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FEDERAL RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

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Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937; Oct. 1, 1987; Dec. 1, 2000.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:
Notes of Advisory Committee on Rules. Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, *15 Vand. L. Rev. 473, 489 (1962).* Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and

of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, supra, at 531; McCormick § 15. A similar provision is *California Evidence Code § 801(b).*

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in *Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F.Supp. 670 (S.D.N.Y. 1963)* See also Blum et al, The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service, *24 U.Chi.L.Rev. 1 (1956);* Bonynge, Trademark Surveys and Techniques and Their Use in Litigation, *48 A.B.A.J. 329 (1962);* Zeisel, The Uniqueness of Survey Evidence, *45 Cornell L.Q. 322 (1960);* Annot., *76 A.L.R.2d 919.*

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied. See Comment, Cal.Law Rev.Comm'n, Recommendation Proposing an Evidence Code 148-150 (1965).

Notes of Advisory Committee on 1987 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 2000 amendments. Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. *Compare United States v. Rollins, 862 F.2d 1282 (7th Cir. 1988)* (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), with *United States v. 0.59 Acres of Land, 109 F.3d 1493* (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. *See, e.g.*, Ronald Carlson, *Policing the Bases of Modern Expert Testimony, 39 Vand.L.Rev. 577 (1986)* (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony. A Response to Professor Carlson, 40 Vand.L.Rev. 583 (1987)* (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. *See* Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's

anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

COMMENTARY

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The basic rule

Rule 703 departs from the common law in permitting an expert to form an opinion based on facts or data that are not admissible in evidence. The Advisory Committee's Note states that the Rule is intended to "broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court." In other words, an expert should be allowed to use the same information in Court that she would use in real life. *See, e.g., South Cent. Petr., Inc. v. Long Bros. Oil Co., 974 F.2d 1015 (8th Cir. 1992)* (finding no abuse of discretion when an expert in a mineral rights case was permitted to make revenue projections based on multiple hearsay about the oil well in question, as the underlying information was reasonably relied on by experts in the field and only the expert's opinion, not the underlying information, was admitted into evidence).

The Rule provides that if the facts or data are of a type reasonably relied upon by experts in the particular field of expertise, then the expert is permitted to use this information as a basis for her opinion. An example offered by the Advisory Committee is that of a physician who forms a diagnosis based on (1) information from numerous sources, including statements by patients and relatives, and (2) reports and opinions from nurses, technicians, and other doctors. *See also United States v. Posey, 647 F.2d 1048 (10th Cir. 1981)* (in a drug prosecution, it was permissible for one chemist to rely upon tests run by another in testifying that the tested substance was cocaine: "It is quite reasonable for a chemist to review another chemist's analysis when forming an opinion as to the veracity of the latter's test results.").

Judicial function

Under Rule 703, the Trial Judge must determine the "reasonable reliance" question: whether the expert relies on information which, though inadmissible, is the information that other experts in the field reasonably rely on. If the expert takes into account inadmissible information that other experts in the field would not rely upon, the opinion is subject to exclusion under the Rule. *See, e.g., Redman v. John D. Brush & Co., 111 F.3d 1174 (4th Cir. 1997)* (a metallurgic engineer's testimony that a safe was not burglar deterrent was properly excluded; the expert relied solely on hearsay information from store personnel to identify a standard of burglar protection capacity; experts would not rely on this hearsay as an indication of industry safety standards).

How does the Judge determine whether otherwise inadmissible facts or data are of a type reasonably relied upon by experts in a particular field? Just as a witness' own testimony may establish personal knowledge of an event about which the witness is testifying, it appears that an expert witness should be able to lay a foundation that establishes the reasonableness of relying on the inadmissible evidence. In other words, if a psychiatrist is called to testify as to a person's mental condition, and if the psychiatrist indicates that her opinion is based in part on reports by school officials, the psychiatrist should be able also to testify that such reports are ordinarily used and relied upon by other psychiatrists in making psychiatric diagnoses in nonlitigation contexts. Of course, it should be permissible for opposing counsel to introduce evidence to the contrary.

Suppose the expert testifies that the information he is using is relied upon by other experts, and the adversary does not contest this assertion. Should, or must, the Trial Judge simply take the expert's word for it? Or does the Trial Judge have an independent duty to assess whether the expert's opinion is based on reliable information?

The Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* provides strong support for the principle that the Trial Judge has an independent role to play in determining whether the expert has reasonably relied on inadmissible information. The Court in *Daubert* emphasized the Trial Court's essential role as a "gatekeeper" whose duty it is to assure that expert testimony is reliable. Since the basis of the expert's testimony is an essential component of its reliability, it follows that the Trial Judge cannot simply assess reasonable reliance on inadmissible information under Rule 703 by deferring to experts. *Daubert* gives the Trial Judge an independent role that cannot be delegated. Consequently, the Third Circuit has, after *Daubert*, overruled prior case law which had held that "the principal arbiters of the reasonableness of reliance upon inadmissible evidence are the experts and not the trial judge." The Court explained as follows:

Daubert makes clear for the first time at the Supreme Court level that courts have to play a gatekeeping role with regard to experts. In stating that Rule 702 is the primary locus of the gatekeeping role, the Court implies that there are at least some secondary loci in other Rules. By requiring the judge to look to the views of other experts rather than allowing the judge to exercise independent judgment, current Third Circuit case law eviscerates the judge's gatekeeping role with respect to an expert's data and instead gives that role to other experts. . . . We now make clear that it is the judge who makes the determination of reasonable reliance, and that for the judge to make the factual determination under Rule 104(a) that an expert is basing his or her opinion on a type of data reasonably relied upon by experts, the judge must conduct an independent evaluation into reasonableness. The judge can of course take into account the particular expert's opinion that experts reasonably rely on that type of data, as well as the opinions of other experts as to its reliability, but the judge can also take into account other factors he or she deems relevant.

In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994).

Use of Rule 703 as a "backdoor" hearsay exception

Rule 703 is not a hearsay exception. However, there is a danger that Rule 703 can be used as a "back door" hearsay exception -- a crafty litigant could give hearsay to its expert for the purpose of having the expert refer to it as a basis for the expert's opinion. Any limiting instruction may well be disregarded by the jury.

There are some cases that, while not explicit on the point, appear to bear out the premise that Rule 703 can be (ab)used as a hearsay exception. That is, cases can be found that appear to admit an expert's underlying information as full substantive evidence, though not explicitly stating that Rule 703 can operate as a hearsay exception. *See, e.g., United States v. Rollins, 862 F.2d 1282 (7th Cir. 1988)* (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant). Other cases can be found that admit only the expert's opinion itself as substantive evidence, but admit the underlying facts for the limited purpose of explaining or supporting the expert's opinion. *See, e.g., Marsee v. United States Tobacco, 866 F.2d 319 (10th Cir. 1989)* (noting that inadmissible basis could be considered by the jury, but only for the purpose of evaluating the expert's testimony). Finally, there are reported appellate cases indicating that Trial Courts have sometimes permitted experts to bring inadmissible information before the jury without limitation. *See, e.g., Hutchinson v. Groskin, 927 F.2d 722 (2d Cir. 1991)* (a medical expert was allowed to refer to letters from three prominent physicians, and to testify that his conclusion was consistent with those doctors; this was reversible error, since the tactic revealed hearsay to the jury and impermissibly bolstered the expert's testimony).

The Advisory Committee on Evidence Rules has proposed an amendment to Rule 703 that would regulate the disclosure to the jury of inadmissible information reasonably relied upon by an expert. The proposal will be issued for public comment in 1998, and if approved by the Judicial Conference and the Supreme Court, and not rejected by Congress, the proposal would become law on December 1, 2000. The proposed amendment reads as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admissible. If otherwise inadmissible, the facts or data shall not be disclosed to the jury unless their probative value substantially outweighs their prejudicial effect. Nothing in this rule restricts the presentation

of underlying expert facts or data when offered by an adverse party.

Note that the question is not whether an expert can give an opinion based on inadmissible information. Rather, the question is whether the jury can be told about the information. In any event, if the otherwise inadmissible information is to be brought before the jury, a limiting instruction must be given on request. *See, e.g., United States v. 0.59 Acres of Land, 109 F.3d 1493* (9th Cir. 1997) (judgment reversed, in part because a limiting instruction was not given: "When inadmissible evidence used by an expert is admitted to illustrate and explain the expert's opinion . . . it is necessary for the court to instruct the jury that the otherwise inadmissible evidence is to be considered solely as a basis for the expert opinion and not as substantive evidence.")

Relationship to Rule 702

The "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry -- much narrower, for example, than is the inquiry into whether the expert's opinion is helpful and reliable under Rule 702. Rule 703 regulates the expert's use of inadmissible information, while Rule 702 regulates the methodology, reliability, adequacy of basis, and helpfulness of the opinion, as well as the qualification of the expert witness.

The proper delineation between the two Rules was set forth by the Third Circuit in *DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990). DeLuca* was a Bendectin case, in which the plaintiff proffered expert testimony that Bendectin caused limb reduction in fetuses. The Trial Judge in *DeLuca* rejected the proffered testimony of the plaintiff's expert on the ground that the expert's recalculation of epidemiological studies was not accepted as reliable by experts in the field. The Court relied on Rule 703. But the Third Circuit reversed and remanded, noting that "Rule 703 has a narrow function; it seeks to delimit the bases for expert testimony." The defendant's objection that the expert's reanalysis of those studies was unreliable could not be considered under Rule 703:

Rule 703 is satisfied once there is a showing that an expert's testimony is based on the type of data a reasonable expert in the field would use . . . . It does not address the reliability or general acceptance of an expert's methodology. When a statistician refers to a study as not statistically significant, he is not making a statement about the reliability of the data used, rather he is making a statement about the propriety of drawing a particular inference from that data.

This did not necessarily mean that the plaintiff's expert's reanalysis of epidemiological data was admissible. The *DeLuca* Court noted that if an expert's methodology is itself unreliable, it can be excluded under Rule 702, even if the basis of the expert's opinion satisfied the reasonable reliance standard of Rule 703. The Court explained that the helpfulness standard of Rule 702 prevents an expert from using accepted data in an unreliable manner: "Rule 702's helpfulness requirement implicitly contains the proposition that expert testimony that is based on unreliable methodology is unhelpful and therefore excludable."

Of course, if an expert's testimony is unreliable, it might often be excluded under either Rule 702 or 703. However, this is not always the case, as the Third Circuit recognized in *In re Paoli R.R. Yard Litig., 35 F.3d 717 (3d Cir. 1994):*

There will be times when an expert's methodology is generally reliable but some of the underlying data is not of a type reasonably relied on by experts. In those cases, the expert can testify so long as he or she does not significantly rely on the unreliable data, and so long as his or her testimony survives Rule 702 without any reliance on the excluded data. Moreover, if the judge thinks that the expert would reach a different conclusion if he was not able to rely on this data, a conclusion that would no longer help the plaintiff (or defendant) to prove his or her case, the district court can exclude his opinion as irrelevant.

NOTES:

Research Guide:

Federal Procedure:

9 Moore's Federal Practice (Matthew Bender 3d ed.), ch 53, Masters § 53.02.
11 Moore's Federal Practice (Matthew Bender 3d ed.), ch 56, Summary Judgment § 56.14.
26 Moore's Federal Practice (Matthew Bender 3d ed.), ch 633, New Trial § 633.02.
1 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 103, Rulings on Evidence §§ 103.13, 103.20.
1 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 104, Preliminary Questions § 104.12.
2 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 405, Methods of Proving Character § 405.04.
3 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 602, Lack of Personal Knowledge § 602.02.
4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 615, Exclusion of Witnesses §§ 615.04, 615.07.
4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 701, Opinion Testimony by Lay Witnesses § 701.03.
4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 702, Testimony by Experts § 702.02.
4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 703, Bases of Opinion Testimony by Experts §§ 703.02 et seq.
4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 705, Disclosure of Facts or Data Underlying Expert Opinion §§ 705.03, 705.05.
5 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 802, Hearsay Rule § 802.07.
5 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 803, Hearsay Exceptions; Availability of Declarant Immaterial §§ 803.05, 803.06, 803.19.
5 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 901, Requirement of Authentication or Identification § 901.12.
1 *Federal Rules of Evidence Manual (Matthew Bender) §§ 102.02, 402.02, 403.02.*
2 *Federal Rules of Evidence Manual (Matthew Bender) § 405.02.*
3 *Federal Rules of Evidence Manual (Matthew Bender) §§ 602.02, 602.04, 702.02, 703.02, 703.03, 705.02.*
4 *Federal Rules of Evidence Manual (Matthew Bender) § 803.02.*
5 *Federal Rules of Evidence Manual (Matthew Bender) § 1006.02.*
2 Fed Proc L Ed, Administrative Procedure § 2:197.
7 Fed Proc L Ed, Condemnation of Property §§ 14:95, 100-102.
7A Fed Proc L Ed, Court of Federal Claims § 19:206.
9A Fed Proc L Ed, Criminal Procedure §§ 22:1212, 1263.
10 Fed Proc L Ed, Discovery and Depositions §§ 26:47, 199.
10A Fed Proc L Ed, Discovery and Depositions § 26:894.
12 Fed Proc L Ed, Evidence § 33:118.
12A Fed Proc L Ed, Evidence §§ 33:462, 505, 511, 595.
14 Fed Proc L Ed, Foreign Trade and Commerce § 37:1570.
26 Fed Proc L Ed, Patents § 60:510.
27A Fed Proc L Ed, Pleadings and Motions § 62:659.
33A Fed Proc L Ed, Witnesses §§ 80:8, 189, 213, 228, 230, 250-252, 255, 256, 258-260, 262, 263.

Am Jur:

23 Am Jur 2d, Depositions and Discovery §§ 50, 248.
63B Am Jur 2d, Products Liability §§ 1811, 1867-1873.
29A Am Jur 2d, Evidence § 1064.

Am Jur Trials:

40 Am Jur Trials, Using the Human Factors Expert in Civil Litigation, p. 629.
46 Am Jur Trials, The Use of Biomechanical Experts in Product Liability Litigation, p. 631.
48 Am Jur Trials, Audio Recordings: Evidence, Experts and Technology, p. 1.

78 Am Jur Trials, Pharmacist Malpractice: Trial and Litigation Strategy, p. 407.
82 Am Jur Trials, Defending Against Claim of Ineffective Assistance of Counsel, p. 1.
83 Am Jur Trials, Compensation on Dissolution of Marriage for Spousal Contributions to Education, p. 197.
94 Am Jur Trials, Pollution of Underground Water Sources--Common Law Liability and Private Rights of Action, p. 1.

Am Jur Proof of Facts:
7 Am Jur Proof of Facts 3d, Defective Design of Golf Cart, p. 225.
8 Am Jur Proof of Facts 3d, Carpal Tunnel Syndrome, p. 1.
9 Am Jur Proof of Facts 3d, Premises Liability--Failure to Protect Parking Facility Patron from Criminal Attack, p. 597.
31 Am Jur Proof of Facts 3d, Proof of Negligence by Hospital Emergency Room Nurse, p. 203.
31 Am Jur Proof of Facts 3d, Proof of Entitlement to, or Disqualification from, Status as Decendent's Personal Representative, p. 433.
60 Am Jur Proof of Facts 3d, Proof of Matters by Judicial Notice, p. 175.
61 Am Jur Proof of Facts 3d, Proof of Identity of Fiber, Fabric, or Textile, p. 501.
62 Am Jur Proof of Facts 3d, Proof of Incompetency, p. 197.
65 Am Jur Proof of Facts 3d, Proof of Seatbelt Defense, p. 1.
65 Am Jur Proof of Facts 3d, Hand Tool Injuries, p. 407.
75 Am Jur Proof of Facts 3d, Proof of Identification of Bite Marks, p. 317.
78 Am Jur Proof of Facts 3d, Proof of Claims Arising from Exposure to Latex Products, p. 233.
12 Am Jur Proof of Facts 2d, Value Of Coin Collection, p. 355.

Forms:
19 Bender's Federal Practice Forms, Form FRE(VII):1, Federal Rules of Evidence.

Intellectual Property:
5A Chisum on Patents (Matthew Bender), ch 18, Interpretation and Application of Claims--Doctrine of Equivalents--Prosecution History Estoppel § 18.03.
3 Gilson on Trademarks (Matthew Bender), ch 8, Trademark Infringement Litigation §§ 8.11, 8.13.

Criminal Law and Practice:
3 Criminal Constitutional Law (Matthew Bender), ch 14A, Conduct of the Trial § 14A.03.
3A Criminal Defense Techniques (Matthew Bender), ch 67A, Using Forensic Evidence in Court Today § 67A.02.
1 Business Crime (Matthew Bender), ch 4B, Motions Directed at Discovery § 4B.04.

Corporate and Business Law:
3 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 23, Pretrial of Antitrust Cases § 23.03.
4 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 36, Economic Evidence and Economic Experts in Antitrust Litigation § 36.03.
4 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 37, The Use of Experts in Antitrust Litigation §§ 37.04, 37.05.

7 Securities Law Techniques (Matthew Bender), ch 107, The Uses and Functions of Experts in Securities Litigation § 107.02.

Annotations:

What information is of type "reasonably relied upon by experts" within *Rule 703, Federal Rules of Evidence*, permitting expert opinion based on information not admissible in evidence. *49 ALR Fed 363.*

When will expert testimony "assist trier of fact" so as to be admissible at federal trial under *Rule 702 of Federal Rules of Evidence. 75 ALR Fed 461.*

Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique-modern cases. *105 ALR Fed 299.*

Admissibility of Expert or Opinion Evidence--Supreme Court Cases. *177 ALR Fed 77.*

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired. *11 ALR5th 497.*

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense. *58 ALR5th 749.*

Products Liability: Ladders. *81 ALR5th 245.*

Admissibility of Expert and Opinion Evidence as to Cause or Origin of Fire in Criminal Prosecution for Arson or Related Offense--Modern Cases. *85 ALR5th 187.*

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney. *14 ALR4th 170.*

Admissibility of expert or opinion testimony concerning identification of skeletal remains. *18 ALR4th 1294.*

Admissibility and weight, in criminal case, of expert or scientific evidence respecting characteristics and identification of human hair. *23 ALR4th 1199.*

Admissibility of expert testimony as to modus operandi of crime. *31 ALR4th 798.*

Propriety of cross-examining expert witness regarding his status as "professional witness". *39 ALR4th 742.*

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. *42 ALR4th 879.*

Admissibility at criminal prosecution of expert testimony on battering parent syndrome. *43 ALR4th 1203.*

Admissibility, at criminal prosecution, of expert testimony on reliability of eyewitness testimony. *46 ALR4th 1047.*

Admissibility of expert testimony as to appropriate punishment for convicted defendant. *47 ALR4th 1069.*

Admissibility of voice stress evaluation test results or of statements made during test. *47 ALR4th 1202.*

Admissibility of expert testimony that item of clothing or footgear belonged to, or was worn by, particular individual. *71 ALR4th 1148.*

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids. *75 ALR4th 897.*

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute--state cases. *83 ALR4th 629.*

Admissibility of DNA identification evidence. *84 ALR4th 313.*

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay-state cases. *89 ALR4th 456.*

Air pollution: evidence as to Ringelmann Chart observations. *51 ALR3d 1026.*

Admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital reports. *55 ALR3d 551.*

Admissibility of X-ray report made by physician taking or interpreting X-ray pictures. *6 ALR2d 406.*

Admissibility of testimony of expert witness as to land value, over claim of hearsay based on his lack of personal knowledge, relating to sales of comparable property. *95 ALR2d 1217.*

Texts:

2 Benedict on Admiralty, Digest of Cases § 214.

5 Environmental Law Practice Guide (Matthew Bender), ch 33, Toxic Torts § 33.04.

3 Frumer & Friedman, Products Liability (Matthew Bender), ch 18A, Expert Evidence and Products Liability § 18A.03.

3 Frumer & Friedman, Products Liability (Matthew Bender), ch 22, Automotive Products Liability Law §§ 22.02, 22.04, 22.11, 22.14.

5 Frumer & Friedman, Products Liability (Matthew Bender), ch 55, Toxic Torts § 55.03.

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Imwinkelried. A final comment -- the importance of the procedural framework [Discussion of How good is good enough? Expert evidence under Daubert *[Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993)]* and Kumho *[Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999)]*. D. L. Faigman, D. H. Kaye, M. J. Saks, J. Sanders. 50 Case W. L. Rev. 645-*67 Spr 2000]*. *50 Case W Res L Rev 669*, Spring 2000.

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Faigman; Kaye; Saks; Sanders. How good is good enough? Expert evidence under Daubert *[Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993)]* and Kumho *[Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999)]* [Discussion of Should the courts incorporate a best evidence rule into the standard determining the admissibility of scientific testimony?: Enough is enough when it is not the best. E. J. Imwinkelried. 50 Case W. L. Rev. 19-51 Fall 1999]. *50 Case W Res L Rev 645*, Spring 2000.

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Interpretive Notes and Decisions:

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I.IN GENERAL 1. Generally

There is no requirement that facts necessary to foundation of expert's opinion be perceived by him at trial; expert may testify to relevant matters based on facts in evidence or those made known to him prior to trial; expert may testify without giving opinion, leaving inferences to be drawn by trier of fact. *United States v Hill (1981, CA3 Pa) 655 F2d 512, 8 Fed Rules Evid Serv 1021.*

Although Rule 703 permits expert to base opinion upon materials that would otherwise be inadmissible, materials independently excluded by court by reason of another rule of evidence will not automatically be admitted under Rule 703 and expert testimony is subject to Rule 403's general bar on admission of unduly prejudicial evidence. *Nachtsheim v Beech Aircraft Corp. (1988, CA7 Wis) 847 F2d 1261, 25 Fed Rules Evid Serv 1153.*

Experts are allowed to testify to their bare conclusions. *Bezanson v Fleet Bank-NH (1994, CA1 NH) 29 F3d 16, 24 UCCRS2d 399,* appeal after remand, request den (1995, CA1 NH) *45 F3d 423,* reported in full (1995, CA1 NH) *1995 US App LEXIS 341.*

Court is to assess whether witness has presented sufficient facts upon which to base expert opinion or inference, and pursuant to Rule 104(a), court may permit or disallow testimony accordingly. *Logsdon v Baker (1975, App DC) 170 US App DC 360, 517 F2d 174; International Election Systems Corp. v Shoup (1978, ED Pa) 452 F Supp 684, 200*

USPQ 79, affd without op (1979, CA3 Pa) *595 F2d 1212.*

Basis of opinion should rest not only on facts of record, but also without omission of material facts necessary to form an intelligent opinion. *Holmgren v Rocco Farms Foods, Inc. (1976, ED Pa) 410 F Supp 57.*

It is clear from *Fed. R. Evid. 703*, *705* that expert's opinion is evidence, whether or not underlying facts or data are ever disclosed to trier of fact, and whether they are independently admissible. *Bice v United States (2006) 72 Fed Cl 432.*

2. Relationship to other rules and laws

Although plaintiffs contend that under Rule 703 their expert witness should have been allowed to testify that National Transportation Safety Board report was one of sources he relied on in reaching his opinion, Congress has determined that these reports shall not be used as evidence at trial; although plaintiffs also contend that defendant's counsel opened door to admission of report by referring to it in opening argument, such reference, even if wrongfully made, does not override statutory mandate against use of report's conclusions. *Curry v Chevron, USA (1985, CA5 La) 779 F2d 272, 19 Fed Rules Evid Serv 1594.*

Although Rule 703 permits expert to base opinion upon materials that would otherwise be inadmissible, materials independently excluded by court by reason of another rule of evidence will not automatically be admitted under Rule 703 and expert testimony is subject to Rule 403's general bar on admission of unduly prejudicial evidence. *Nachtsheim v Beech Aircraft Corp. (1988, CA7 Wis) 847 F2d 1261, 25 Fed Rules Evid Serv 1153.*

Without necessarily discounting relevance of *Fed. R. Evid. 1006* and *611(a)*, which were not mutually exclusive with *Fed. R. Evid. 703*, *Fed. R. Evid. 703* was dispositive in validating admission of summary chart prepared by IRS agent itemizing defendant's receipt of payments and net profits relative to sale of certain paintings was properly admitted into evidence to support agent's expert testimony. *United States v DeSimone (2007, CA1 RI) 488 F3d 561, 99 AFTR 2d 3236.*

Court is to assess whether witness has presented sufficient facts upon which to base expert opinion or inference, and pursuant to Rule 104(a), court may permit or disallow testimony accordingly. *Logsdon v Baker (1975, App DC) 170 US App DC 360, 517 F2d 174; International Election Systems Corp. v Shoup (1978, ED Pa) 452 F Supp 684, 200 USPQ 79,* affd without op (1979, CA3 Pa) *595 F2d 1212.*

Read together, Rules 703 and 705 reveal that data underlying expert's opinion which is elicited on cross-examination does not come in as substantive evidence, but is admitted for limited and independent purpose of enabling jury to scrutinize expert's reasoning. *United States v Wright (1986, App DC) 251 US App DC 276, 783 F2d 1091, 19 Fed Rules Evid Serv 1473.*

Provision of state medical malpractice act which provides for pre-litigation hearing by medical review panel (composed of attorney and three health care providers) and which makes report of that panel admissible in any subsequent litigation, but provides that it should not be conclusive, amounts, at most, to another legislatively imposed exception to hearsay rule, and Rules 701-705 clearly contemplates such expert testimony. *Hines v Elkhart General Hospital (1979, ND Ind) 465 F Supp 421,* affd (1979, CA7 Ind) *603 F2d 646.*

Defendant's motion pursuant to *Fed. R. Crim. P. 16(a)(1)(G)* for disclosure of any expected expert testimony under *Fed. R. Evid. 702*, *703*, or *705* was dismissed as moot because government represented that it had not yet determined whether it would call expert witness but, if it did, it would provide information required. *United States v Ojeikere (2004, SD NY) 299 F Supp 2d 254.*

Unpublished Opinions

Unpublished: Since *Fed. R. Evid. 602* is governed by *Fed. R. Evid. 703* and Rule 703 states that facts or data in particular case upon which expert bases opinion or inference may be those perceived by or made known to expert at or before hearing, it is perfectly acceptable for expert witness to testify to facts or data ascertained by persons other than witness. *United States v Adams (2006, CA3 NJ) 189 Fed Appx 120,* cert den (2007, US) *127 S Ct 989, 166 L Ed 2d 747.*

3.--Sixth Amendment

Defendant must have access to hearsay information relied upon by expert witnesses in order to assure that there is no violation of his constitutional right to confront adverse witnesses in effective manner. *United States v Lawson (1981, CA7 Ill) 653 F2d 299, 8 Fed Rules Evid Serv 1261,* cert den *(1982) 454 US 1150, 71 L Ed 2d 305, 102 S Ct 1017.*

Even though district court erred by allowing case agent to stray from his proper expert function while testifying in defendants' drug case, as he repeated hearsay evidence without applying any expertise whatsoever, thereby violating hearsay rule and Confrontation Clause, *U.S. Const. amend. VI,* error was harmless given overwhelming evidence against defendants; three cooperating witnesses testified extensively that both defendants were significant participants in drug conspiracy, taped conversations were incriminating for both defendants, and search of one defendant's residence turned up drugs and drug paraphernalia. *United States v Dukagjini (2002, CA2 NY) 326 F3d 45, 60 Fed Rules Evid Serv 141,* post-conviction relief den, post-conviction relief dismd (2005, WD NY) *388 F Supp 2d 176.*

Court allowed expert witness, who was employee of IRS called to testify as expert in corporate and individual taxation, to form opinions in reliance on statements witness had heard from certain employees to extent permitted by *Fed. R. Evid. 703* because such reliance was not prohibited by *Confrontation Clause of Sixth Amendment. United States v Stone (2004, ED Tenn) 222 FRD 334, 94 AFTR 2d 5203.*

Unpublished Opinions

Unpublished: In racketeering case alleging violations of *18 USCS § 1959(a)(5)* and *18 USCS § 924(c),* district court did not abuse its discretion by allowed detective to testify as expert on gang activities and to offer opinions based on hearsay, as allowed by *Fed. R. Evid. 703*; because detective testified and was available for cross-examination, her reliance on hearsay to form her opinions did not violate *Confrontation Clause. United States v Wells (2006, CA9 Cal) 162 Fed Appx 754.*

Unpublished: Defendant's contention that district court violated his Sixth Amendment Confrontation Clause rights in light of Crawford, by allowing expert opinion based, in part, on hearsay (specifically, testimonial evidence of company historian), or, in alternative, violated pre-Crawford *Fed. R. Evid. 703,* did not stand up under plain error review because, even excluding company historian's evidence, expert's opinion was based on books, CDs, and personal knowledge that did not appear to be testimonial evidence subject to Crawford rule; moreover, neither U.S. Supreme Court nor any circuit court had issued published opinion regarding what otherwise inadmissible sources, testimonial or non-testimonial, expert could rely upon when forming opinion in light of Crawford; thus, any error district court may have committed by permitting expert testimony was not plain. *United States v Springer (2006, CA11 Fla) 165 Fed Appx 709,* reh, en banc, den (2006, CA11) *179 Fed Appx 689.*

4. Qualified experts

Fact that expert's opinion is based upon self-evidence untrustworthy underpinnings may properly be taken into account in determining whether expert is truly qualified for circumstances of particular case. *Shatkin v McDonnell Douglas Corp. (1983, SD NY) 565 F Supp 93, 13 Fed Rules Evid Serv 1928.*

When either expert's qualifications or his testimony lie at periphery of what scientific community considers acceptable, special care should be exercised in evaluating reliability and probative worth of proffered testimony under Rules 703 and 403. In re "Agent Orange" *Prod. Liab. Litig. (1985, ED NY) 611 F Supp 1223, 18 Fed Rules Evid Serv 144,* affd (1987, CA2 NY) *818 F2d 187,* cert den *(1988) 487 US 1234, 101 L Ed 2d 932, 108 S Ct 2898.*

In action filed by consumer and his wife under Fair Credit Reporting Act, *15 USCS §§ 1681* et seq., against credit information provider and two credit reporting agencies, deposition testimony of plaintiffs' witness, who gave deposition testimony regarding denial of credit to plaintiffs, was inadmissible under *Fed. R. Evid. 703* because she had not met prerequisite of being qualified as expert witness under *Fed. R. Evid. 702*. *Zotta v Nationscredit Fin. Servs. Corp. (2003, ED Mo) 297 F Supp 2d 1196* (criticized in *Gohman v Equifax Info. Servs. (2005, DC Minn) 395 F Supp 2d 822)* and (criticized in *Morris v Equifax Info. Servs., LLC (2006, CA5 Tex) 457 F3d 460).*

Psychologist, who did not file expert report required by *Fed. R. Civ. P. 26(a)(2)(B),* was not precluded from testifying as to plaintiff's post-traumatic stress syndrome in action filed by plaintiff and his wife after they were injured by electrical line being installed by electrical company and tree service, as expert report was not necessary pursuant to *Fed. R. Civ. P. 26,* testimony would be relevant to issues presented, and psychologist was qualified to testify. *Rogers v Detroit Edison Co. (2004, ED Mich) 328 F Supp 2d 687, 64 Fed Rules Evid Serv 1138.*

Where plaintiff workers, in their suits against defendant manufacturers and facilities alleging silica-related injuries, were diagnosed with silicosis in mass screenings by doctors who relied on inadequate and unreliable histories, and doctors were affiliated with lawyers and mobile x-ray screening companies, not workers as patients, doctors' diagnoses and accompanying testimonies were inadmissible under *Fed. R. Evid. Rule 104, 702, 703. In re Silica Prods. Liab. Litig. (2005, SD Tex) 398 F Supp 2d 563.*

5. Hypotheticals

Only qualified expert may answer hypothetical questions, but projection of lost profits based on evidence of record regarding decreased sales of certain product is not hypothetical and may be addressed by lay witness. *Teen-Ed, Inc. v Kimball International, Inc. (1980, CA3 NJ) 620 F2d 399, 6 Fed Rules Evid Serv 135.*

Expert witnesses may be competent to give opinions based upon hypothetical facts even though foundation that expert has personal knowledge of those facts has not been laid. *Estate of Carey v Hy-Temp Mfg., Inc. (1991, CA7 Ill) 929 F2d 1229, CCH Prod Liab Rep P 12779,* reh den (1991, CA7) *1991 US App LEXIS 10846.*

Summary judgment was granted to tire manufacturer because tires at issue had been destroyed and testimony provided by plaintiff's proposed expert, which was based entirely upon hypothetical situations and speculation, was not sufficient to prove case of causation as required under *New York law. Oines v Island Ford, Inc. (2003, SD Ind) 287 F Supp 2d 936, CCH Prod Liab Rep P 16769,* affd (2004, CA7 Ind) *93 Fed Appx 80.*

6. Cross-examination

In cross-examining expert witness, party should often be afforded latitude to confront witness with his or her notes. *Estate of Carey v Hy-Temp Mfg., Inc. (1991, CA7 Ill) 929 F2d 1229, CCH Prod Liab Rep P 12779,* reh den (1991, CA7) *1991 US App LEXIS 10846.*

District court did not err in permitting cross-examination of plaintiff's expert as to state trooper's report of accident, where trooper did not testify, and expert had read report prior to preparing his report; therefore, counsel was free to cross-examine expert as to all documents he reviewed in establishing his opinion. *Ratliff v Schiber Truck Co. (1998, CA8 Mo) 150 F3d 949, 49 Fed Rules Evid Serv 1450.*

In action in which defendant appealed from judgment of district court convicting him of possessing firearm as felon in violation of *18 USCS § 922(g)(1),* and sentencing him to 120 months' imprisonment, judgment was affirmed where district court did not abuse its discretion by limiting cross-examination of government's fingerprint expert. *United States v Lee (2007, CA7 Ill) 502 F3d 691,* reh den (2007, CA7 Ill) *2007 US App LEXIS 24423.*

Read together, Rules 703 and 705 reveal that data underlying expert's opinion which is elicited on cross-examination does not come in as substantive evidence, but is admitted for limited and independent purpose of

enabling jury to scrutinize expert's reasoning. *United States v Wright (1986, App DC) 251 US App DC 276, 783 F2d 1091, 19 Fed Rules Evid Serv 1473.*

Unpublished Opinions

Unpublished: Defendant did not establish that testimony from police officer in defendant's trial for extortion stemming from his involvement with criminal street gang incorporated testimonial hearsay from witnesses whom defendant was not able to cross examine; officer explained that basis for his expert testimony, which provided summary overview of organized Asian criminal structure in general, came from informants, other law enforcement sources and cooperating witnesses, and particularly from his experience as member of intelligence unit targeting Asian organized crime; district court qualified officer as expert; and district court ensured that officer's statement did not involve testimonial statements offered to prove facts related to defendant in particular or his alleged crime. *United States v Chong (2005, CA9 Cal) 178 Fed Appx 626.*

7. Reasonable reliance

Trial court should not be used as testing ground for theories supported neither by prior control experiments nor calculations with indicia of reliability; fate of defendant in criminal prosecution should not hang on his ability to successfully rebut scientific evidence which bears aura of special reliability and trustworthiness, although, in reality witness is testifying on basis of unproved hypothesis in isolated experiment which has yet to gain acceptance in its field. *United States v Tranowski (1981, CA7 Ill) 659 F2d 750, 8 Fed Rules Evid Serv 1297.*

Trial court must make factual inquiry and finding as to what data is found reliable by experts in field. *In re Japanese Elec. Prods. Antitrust Litig. (1983, CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases P 65757, 14 Fed Rules Evid Serv 401,* revd on other grounds, remanded *(1986) 475 US 574, 106 S Ct 1348, 89 L Ed 2d 538, 1986-1 CCH Trade Cases P 67004, 4 FR Serv 3d 368,* on remand sub nom *In re Japanese Elec. Prods. Antitrust Litig. (1986, CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases P 67374,* cert den *(1987) 481 US 1029, 107 S Ct 1955, 95 L Ed 2d 527.*

Fed. R. Evid. 703 specifically allows experts, in reaching their opinions, to rely on facts outside record and not personally observed, but of kind that experts in his or her field reasonably rely on in forming opinions. *Asad v Cont'l Airlines, Inc. (2004, ND Ohio) 314 F Supp 2d 726.*

Fed. R. Evid. 703 does not abdicate judicial responsibility to expert for it leaves room for rejection of testimony if reliance on facts and data is unreasonable. *Pugliano v United States (2004, DC Conn) 315 F Supp 2d 197.*

Evidence considered by expert, if not first hand, must be of sort properly relied on by expert in field; statement that expert heard something from unidentified source does not qualify as data of sort on which expert would normally rely; this is particularly true where statement relied on constitutes part of actual opinion being offered. *Fernandez v Spar Tek Indus. (2008, DC SC) 76 Fed Rules Evid Serv 784.*

Plaintiff failed to meet his burden of establishing that expert's methodology provided adequate basis for expert's opinion under Daubert and Kumho Tire standards; even if expert's methodology was found adequate under Daubert and Kumho Tire to support its general propositions, it remained inadequate to support more specific opinions expert offered; this was, in part, because general standards contained in expert's methodology were what they purported to be--general standards--they provided no specific standard on which expert might decide that particular guard or other safety device was or was not required (or adequate) on particular machine in particular era. *Fernandez v Spar Tek Indus. (2008, DC SC) 76 Fed Rules Evid Serv 784.*

Unpublished Opinions

Unpublished: Defendant claimed that district court erred under *Fed. R. Evid. 702* and *703* when it admitted testimony of Alcohol Tobacco and Firearm (ATF) agent to prove interstate commerce requirement of *18 U.S.C.S §*

922(g)(1); this claim failed because ATF agent's expert testimony regarding origin of weapon was sufficient to establish interstate commerce element of § 922(g), and after four witnesses testified that firearm was Tec, it was appropriate for agent to rely on that testimony as basis for his expert opinion that firearm at issue traveled in interstate commerce. *United States v Staples (2008, CA3 Pa) 2008 US App LEXIS 3791.*

8.--Other experts

It is permissible for chemist testifying as expert witness to review another chemist's analysis when forming opinion as to veracity of latter's test results. *United States v Posey (1981, CA10 Okla) 647 F2d 1048, 8 Fed Rules Evid Serv 228.*

Where expert's testimony was based on analyses performed by unrelated company, which was not admitted as evidence, district court did not abuse its discretion in determining that it was reasonable for expert to rely on company's analyses as basis for his testimony. *CBS Broad., Inc. v EchoStar Communs. Corp. (2006, CA11 Fla) 450 F3d 505, 19 FLW C 596, 78 USPQ2d 1865,* reh, en banc, den (2006, CA11 Fla) *186 Fed Appx 983* and on remand, injunction gr (2006, SD Fla) *472 F Supp 2d 1367* and cert den (2007, US) *127 S Ct 945, 166 L Ed 2d 705.*

In class action suit in which neighbors of plutonium production facility sought damages for radiation-related sicknesses, district court abused its discretion in allowing defendant independent contractors to use one expert's probable causation analysis to cross-examine another expert to impeach her credibility because impeached expert had not relied on other expert's data; however, no prejudice resulted because contractors had already undermined impeached expert's credibility by highlighting her lack of due diligence in uncovering plaintiff's medical history. *Phillips v E.I. Dupont De Nemours & Co. (In re Hanford Nuclear Reservation Litig.) (2007, CA9 Wash) 497 F3d 1005, CCH Prod Liab Rep P 17808, 37 ELR 20211.*

Alleged patent infringer challenged expert's reliance on seed report tests that were produced by patent holder's scientific team, but not by expert personally; challenge failed, however, because Federal Rules of Evidence established that expert need not have obtained basis for his opinion from personal perception; furthermore, expert's testimony was admissible, regardless of admissibility of seed report, as *Fed. R. Evid. 703* expressly authorized admission of expert opinion that was based on facts or data that themselves were inadmissible, as long as evidence relied upon was of type reasonably relied upon by experts in particular field in forming opinions. *Monsanto Co. v David (2008, CA FC) 516 F3d 1009.*

It is reasonable to expect that experts will rely on opinions of expert in other fields as background material for arriving at opinion; thus, testimony of real estate appraiser, hydrologist and forester is admissible in land condemnation action, despite contention that their opinions are improperly based upon opinions of other experts. *United States v 1014.16 Acres of Land (1983, WD Mo) 558 F Supp 1238, 13 Fed Rules Evid Serv 225,* affd (1984, CA8 Mo) *739 F2d 1371, 16 Fed Rules Evid Serv 418.*

Reliance by expert upon excerpts from opinion by another expert generated for purposes of other litigation was improper, and pertinent part of plaintiffs' accountant's report, referring to and relying upon opinion of expert in another lawsuit as to valuation of company's residuals, was inadmissible, because (1) *Fed. R. Evid. 702* and *703* do not permit experts to rely upon excerpts from opinions developed by another expert for purposes of litigation, (2) case law supported conclusion that accountant's reliance upon excerpts from expert's opinion was improper, (3) it was unprecedented for auditor to rely upon excerpts from opinion given in adversarial litigation as basis for reaching audit opinion concerning company's financial statements, and (4) excerpts from such opinion were not of type reasonably relied upon by accountants in forming audit opinions. *In re Imperial Credit Indus. Sec. Litig. (2003, CD Cal) 252 F Supp 2d 1005, 55 FR Serv 3d 1121.*

Under Rule 703, expert's testimony may be formulated by use of facts, data and conclusions of other experts. *Asad v Cont'l Airlines, Inc. (2004, ND Ohio) 314 F Supp 2d 726.*

Court denied defendant's motion to strike testimony and exhibits of plaintiff's experts to extent that they relied on data of defendant's expert because (1) report of defendant's expert and summary of his anticipated testimony were furnished to court and plaintiff as part of defendant's pre-trial submission of proposed expert testimony, and thus, plaintiff and its experts were entitled to assume that defendant's expert would probably testify and that defendant would stand behind its expert's report and data; (2) no work product problem was presented because opinion and data of defendant's expert were voluntarily furnished to plaintiff by defendant; (3) plaintiff's experts could rely on data of defendant's expert under *Fed. R. Evid. 702, 703*, and thus, report would be admitted for limited purpose of clarifying factual record as to meaning of that portion of data of defendant's expert that was referred to in plaintiff's experts' opinion testimony; (4) plaintiff's experts indicated that, although data and report of defendant's expert were somewhat flawed, portions that they relied upon were of kind and quality that would reasonably be relied upon by experts in their fields in forming their opinions; (5) court would give little or no weight to data and report of defendant's expert because neither had been adequately tested, and thus, it added little or no weight to opinion of plaintiff's experts; (6) while probative effect of report and data of defendant's expert was almost nil, its potentially prejudicial effect had even less weight in bench trial. *Verizon Directories Corp. v Yellow Book United States, Inc. (2004, ED NY) 331 F Supp 2d 134.*

Unpublished Opinions

Unpublished: In stating medical opinion, physician must express opinion with reasonable degree of medical certainty. *Shoemaker v John Hancock Mut. Life Ins. Co. (2005, CA3 Pa) 147 Fed Appx 245.*

9.--Reports

Reports from field agents are sources on which expert witness may reasonably rely for basis of his opinions. *United States v Golden (1976, CA9 Cal) 532 F2d 1244,* cert den *(1976) 429 US 842, 50 L Ed 2d 111, 97 S Ct 118; United States v Genser (1978, CA3 NJ) 582 F2d 292, 78-2 USTC P 9682, 2 Fed Rules Evid Serv 1027, 42 AFTR 2d 5747, 49 ALR Fed 335.*

Bankruptcy court did not err in permitting real estate appraiser to rely on report of private environmental assessment of property as well as letters from both federal and state environmental protection agencies in evaluating value of property in question, where it questioned appraiser whether other experts in field traditionally relied on such information and witness indicated they did. *City of Perth Amboy v Custom Distrib. Servs. (In re Custom Distrib. Servs.) (2000, CA3 NJ) 224 F3d 235, 44 CBC2d 1290, CCH Bankr L Rptr P 78246.*

Government adequately proved defendant was mentally ill and dangerous after he committed unprovoked attack on repairman and was diagnosed as dangerous by doctor whose expert opinion sufficiently established future dangerousness based on agent's report that included hearsay. *United States v LeClair (2003, CA8 Minn) 338 F3d 882,* cert den *(2003) 540 US 1025, 157 L Ed 2d 445, 124 S Ct 587.*

Chemist employed by DEA did not violate Confrontation Clause of Sixth Amendment when testifying that substance seized from defendants was cocaine because (1) he was testifying as expert, so facts and data did not need to be admissible for his opinion to be admitted under *Fed. R. Evid. 703*; (2) even if Confrontation Clause precluded admitting report of former chemist who had actually done lab work, that did not spoil chemist's testimony as Sixth Amendment did not demand that chemist or other testifying expert have done lab work himself; and (3) while former chemist's own conclusions based on data should have been kept out of evidence, and would have been if right objection had been made by defendants, given chemist's live testimony and availability for cross-examination, former chemist's inferences and conclusions were not harmful to defendants. *United States v Moon (2008, CA7 Ind) 512 F3d 359.*

In products liability case regarding drug, reliance by plaintiffs' expert on unpublished report by biostatistician for Food and Drug Administration did not comport with Fed. R. 703, as report was not final report; there was concern as to why expert relied on unpublished report while eschewing his own published, peer-reviewed view that ratio was in far lower range for Rezulin-induced liver failure, which omission suggested that expert's reliance on unpublished report

was not based on scientific method but on expediencies of particular litigation. *In re Rezulin Prods. Liab. Litig. (2004, SD NY) 309 F Supp 2d 531, CCH Prod Liab Rep P 16930.*

In suit arising from sale of tractor truck that had previously been in accident, purchaser's expert, in opining as to cost of repair, was permitted under *Fed. R. Evid. 703* to rely on report prepared by another appraiser and was not required to make independent appraisal. *Storie v Duckett Truck Ctr., Inc. (2007, ED Mo) 75 Fed Rules Evid Serv 346.*

Expert witness's report was held admissible, where report met tests for reliability and helpfulness for trier of fact under *Fed. R. Evid. 702* and *703*, and disclosures by expert were sufficient under U.S. Ct. Fed. Cl. R. 26; there was no unfair surprise or bad faith, and sanctions under U.S. Ct. Fed. Cl. R. 37 were denied. *John H. Banks v United States (2007) 75 Fed Cl 294.*

Unpublished Opinions

Unpublished: Prisoner was not entitled to relief under *42 USCS § 1983*, because he failed to create any genuine issue of material fact to show present asbestos-related injury so as to create Eighth Amendment violation by prison officials in that prisoner's medical records, medical expert, and uncontradicted asbestos inspections showed no prolonged asbestos exposure; further, expert's report that prisoner was unlikely to suffer from asbestos-related injury in future did not violate *Fed. R. Evid. 703* because her opinion was based on her finding that there was no evidence in prisoner's medical records to suggest that he was exposed to moderate or severe levels of asbestos for prolonged period of time. *Harris v Donald (2008, CA11 Ga) 2008 US App LEXIS 1600.*

Unpublished: *Fed. R. Evid. 703* allows experts to testify about matters discussed in their own reports, not new matters from excluded expert report. *Garza v Allstate Tex. Lloyd's Co. (2008, CA5 Tex) 2008 US App LEXIS 2626.*

10.--Other particular cases

Expert opinions as founded upon facts or data upon which experts may reasonably rely, such as governmentally approved tables or codes, are acceptable bases for expert opinions. *Frazier v Continental Oil Co. (1978, CA5 Miss) 568 F2d 378, 2 Fed Rules Evid Serv 1032.*

That research protocol or method was conducted in anticipation of litigation does not mean it cannot be type of study expert would rely upon in expressing opinion, although district court may decide that financial and other incentives of litigation pose unacceptable risk to objectivity and neutrality of person gathering data such that data would not normally be considered reliable in relevant field. *United States v Marine Shale Processors (1996, CA5 La) 81 F3d 1361, 42 Envt Rep Cas 1507, 44 Fed Rules Evid Serv 340, 26 ELR 21000.*

Although Rule 703 permits experts to rely upon hearsay, litigants' self-serving general affidavits and checklists prepared in gross for complex litigation are not material that medical experts would reasonably rely upon and so must be excluded under Rule 703 in mass toxic tort litigation; furthermore, physician's failure to consider and discuss studies that address actual population and amount of exposure involved in instant lawsuit confirms conclusion that his opinion is legally incompetent. In re "Agent Orange" *Prod. Liab. Litig. (1985, ED NY) 611 F Supp 1223, 18 Fed Rules Evid Serv 144,* affd (1987, CA2 NY) *818 F2d 187,* cert den *(1988) 487 US 1234, 101 L Ed 2d 932, 108 S Ct 2898.*

Where plaintiff's expert reasonably and necessarily had to rely on data produced by defendant, expert's failure to independently verify defendant's data raised no barrier to admissibility of his analyses. *McReynolds v Sodexho Marriott Servs. (2004, DC Dist Col) 349 F Supp 2d 30, 95 BNA FEP Cas 176, 66 Fed Rules Evid Serv 42.*

Freedom of Information Act (FOIA) requester's declaration in support of his summary judgment motion challenging adequacy CIA's search for records was struck, in part, because much of its content was hearsay, was not based on personal knowledge, and was not supported by record or attached documentation, as required by *Fed. R. Civ. P. 56(e)*; requester's statements were not admissible as expert testimony under *Fed. R. Evid. 703* on issue of whether

CIA had conducted adequate FOIA search because exhibits requester relied upon in making his declaration were not necessarily admissible into evidence merely on basis of his reliance. *Hall v CIA (2008, DC Dist Col) 538 F Supp 2d 64, 75 Fed Rules Evid Serv 1163.*

11. Speculation

Slip-and-fall plaintiff's expert's opinion must be excluded under Rule 703, where he concluded bus should have parked next to walkway ramp instead of under covered driveway in order to safely discharge passengers at hotel during snowstorm, because nothing in record supports his speculation that walkway ramp was free of ice and not blocked by snow. *Blake v Bell's Trucking, Inc. (2001, DC Md) 168 F Supp 2d 529,* affd (2002, CA4 Md) *31 Fed Appx 90.*

Expert's opinions were not reliable because they were not grounded in sustainable methods and procedures, expert was unable to substantiate his testimony with any research or testing of any product at issue; rather, expert's testimony was mere subjective belief and unsupported speculation and, as such, was excluded pursuant to *FRE 703. Byrne v Liquid Asphalt Sys. (2002, ED NY) 238 F Supp 2d 491,* reconsideration den, request gr (2003, ED NY) *250 F Supp 2d 84.*

Where hotel owner sought to strike certain statements contained in company's experts' affidavit regarding effect of September 11, 2001, on tourism industry in Hawaii on basis that statements lacked foundation, and were conclusory and speculative, court held that experts' statements were admissible under *Fed. R. Evid. 702* and *703,* as statements were based on numerous news reports, various Hawaii visitor, hotel occupancy, and convention data. *OWBR LLC v Clear Channel Communs., Inc. (2003, DC Hawaii) 266 F Supp 2d 1214.*

Summary judgment was granted to tire manufacturer because tires at issue had been destroyed and testimony provided by plaintiff's proposed expert, which was based entirely upon hypothetical situations and speculation, was not sufficient to prove case of causation as required under *New York law. Oines v Island Ford, Inc. (2003, SD Ind) 287 F Supp 2d 936, CCH Prod Liab Rep P 16769,* affd (2004, CA7 Ind) *93 Fed Appx 80.*

Resort's experts' testimony regarding bodysurfing and body whomping activities of injured party was excluded inasmuch as it was not based on sufficiently reliable facts or data; report was not only based on two unreliable hearsay statements but on speculative and conjectural conclusions as to what both men at beach and lifeguard had intended "catching waves" to mean. *Fiorentino v Rio Mar Assocs., LP (2005, DC Puerto Rico) 381 F Supp 2d 43, 67 Fed Rules Evid Serv 1196,* motions ruled upon, claim dismissed (2007, DC Puerto Rico) *2007 US Dist LEXIS 24844.*

12. Admissibility or inadmissibility of facts or data relied upon

Disclosure during expert witness' testimony of facts or data upon which he has relied in forming opinion or inference permits expert witness to take into account matters which are not admissible, but it does not entitle witness to reiterate inadmissible evidence not pertinent to formation of expert's opinion. *United States v Brown (1977, CA5 Fla) 548 F2d 1194, 77-1 USTC P 9278, 1 Fed Rules Evid Serv 847, 39 AFTR 2d 1138.*

Under *Fed. R. Evid. 703,* U.S. district court enjoys discretion to permit expert witness to disclose to jury facts or data that are otherwise inadmissible if court determines that their probative value in assisting jury to evaluate expert's opinion substantially outweighs their prejudicial effect; Rule 703 applies only when expert witness testifies about matters within scope of his expertise; however, Eleventh Circuit agreed with proposition that hearsay evidence admitted under Rule 703 must be type of evidence reasonably relied upon by experts in particular field in forming opinions or inferences on subject. *United States v Garcia (2006, CA11 Ga) 447 F3d 1327, 70 Fed Rules Evid Serv 103, 19 FLW Fed C 527.*

Read together, Rules 703 and 705 reveal that data underlying expert's opinion which is elicited on cross-examination does not come in as substantive evidence, but is admitted for limited and independent purpose of enabling jury to scrutinize expert's reasoning. *United States v Wright (1986, App DC) 251 US App DC 276, 783 F2d*

1091, 19 Fed Rules Evid Serv 1473.

While expert can rely on data that is not admissible to form his opinion, such reliance does not elevate evidence to be admissible for truth of matter asserted. Miller & Sons Drywall, Inc. v Comm'r (2005) *TC Memo 2005-114, 89 CCH TCM 1279.*

Bankruptcy court did not err in admitting testimony of expert, where documents on which he based his opinions were not admissible, because expert testified that documents that he examined were of kind relied on by other experts in field. *Alexander v Hardeman (2007, BAP10) 363 BR 917.*

13. Hearsay, generally

Defendant must have access to hearsay information relied upon by expert witnesses in order to assure that there is no violation of his constitutional right to confront adverse witnesses in effective manner. *United States v Lawson (1981, CA7 Ill) 653 F2d 299, 8 Fed Rules Evid Serv 1261,* cert den *(1982) 454 US 1150, 71 L Ed 2d 305, 102 S Ct 1017.*

Expert may base his testimony upon type of hearsay he would normally rely upon in course of his work. *United States v Arias (1982, CA4 NC) 678 F2d 1202, 10 Fed Rules Evid Serv 788,* cert den *(1982) 459 US 910, 74 L Ed 2d 173, 103 S Ct 218.*

Hearsay testimony by expert must be based upon type of evidence reasonably relied upon by experts in particular field in forming opinions or inferences upon subject. *United States v Cox (1983, CA11 Ga) 696 F2d 1294, 12 Fed Rules Evid Serv 539,* cert den *(1983) 464 US 827, 78 L Ed 2d 104, 104 S Ct 99.*

Under *Fed. R. Evid. 703*, U.S. district court enjoys discretion to permit expert witness to disclose to jury facts or data that are otherwise inadmissible if court determines that their probative value in assisting jury to evaluate expert's opinion substantially outweighs their prejudicial effect; Rule 703 applies only when expert witness testifies about matters within scope of his expertise; however, Eleventh Circuit agreed with proposition that hearsay evidence admitted under Rule 703 must be type of evidence reasonably relied upon by experts in particular field in forming opinions or inferences on subject. *United States v Garcia (2006, CA11 Ga) 447 F3d 1327, 70 Fed Rules Evid Serv 103, 19 FLW Fed C 527.*

To extent district court was concerned that defendant's expert's testimony would rely on hearsay, it was not valid concern because social science experts commonly based their opinions on interviews. *United States v Joseph (2008, CA2 NY) 542 F3d 13.*

Defendants were improperly convicted of violating *18 USCS §§ 1959(a)(3)*, (6), and 924(c)(1) because admission of testimony of Government's expert witness, investigator with New York State Police, violated *Fed. R. Evid. 702* and *703*; witness's testimony about operations and structure of gang at issue involved purely factual matters and summarization of results of task force investigation that fell far beyond proper bounds of expert testimony, and testimony strongly suggested that witness was acting as case agent rather than expert because he did not explain how he pieced together hearsay information to reach studied conclusion. *United States v Mejia (2008, CA2 NY) 545 F3d 179, 77 Fed Rules Evid Serv 1028.*

Unpublished Opinions

Unpublished: Although district court erred under by allowing physician to testify regarding substance of report, which was inadmissible hearsay absent determination that probative value substantially outweighed any prejudicial effect under Rule 703, defendant did not establish plain error as reference to report was brief and focus of physician's testimony was his on his own observations. *United States v Copeland (2008, CA9 Cal) 2008 US App LEXIS 18182.*

14. Summary judgment availability

Rule 703 does not prevent court from granting summary judgment against party who relies solely on expert's opinion that has no more basis in or out of record than theoretical speculations. *Pa. Dental Ass'n v Med. Serv. Ass'n (1984, CA3 Pa) 745 F2d 248, 1984-2 CCH Trade Cases P 66214, 16 Fed Rules Evid Serv 1263*, cert den *(1985) 471 US 1016, 105 S Ct 2021, 85 L Ed 2d 303.*

Although intent of Rule 703 is to broaden acceptable bases of expert opinion, it is not intended to make summary judgment impossible whenever party has produced expert to support its position; Rule 703 requires that grounds relied on by expert be of type reasonably relied on by experts in particular field, and not mere unsupported assumptions. *Merit Motors, Inc. v Chrysler Corp. (1977, App DC) 187 US App DC 11, 569 F2d 666, 1977-2 CCH Trade Cases P 61772, 2 Fed Rules Evid Serv 1212.*

If government wished to argue that experts in field of banking and finance would not reasonably rely on plaintiff thrift's report in opining as to what plaintiff would have done, they had to do so by filing proper motions; motion sub judice under U.S. Ct. Fed. Cl. R. 56 was not proper means by which to achieve this end. *Anchor Sav. Bank, F.S.B. v United States (2003) 59 Fed Cl 126*, corrected (2003, Ct Fed Cl) *2003 US Claims LEXIS 268* and (criticized in *Commercial Fed. Bank, F.S.B. v United States (2004) 59 Fed Cl 338).*

15. Appeal and review

Failure of plaintiff's counsel to make contemporaneous objections to District Court's possible reliance upon substance of expert testimony solicited by plaintiff's counsel precludes plaintiff from making objections on appeal from judgment in favor of employer in personal injury action. *Fox v Taylor Diving & Salvage Co. (1983, CA5 La) 694 F2d 1349, 1984 AMC 1290, 12 Fed Rules Evid Serv 503.*

Trial court must make factual inquiry and finding as to what data is found reliable by experts in field; insofar as trial court substitutes its own views of reasonable reliance for those of experts, its determinations are subject to review for legal error. *In re Japanese Elec. Prods. Antitrust Litig. (1983, CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases P 65757, 14 Fed Rules Evid Serv 401*, revd on other grounds, remanded *(1986) 475 US 574, 106 S Ct 1348, 89 L Ed 2d 538, 1986-1 CCH Trade Cases P 67004, 4 FR Serv 3d 368*, on remand sub nom *In re Japanese Elec. Prods. Antitrust Litig. (1986, CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases P 67374*, cert den *(1987) 481 US 1029, 107 S Ct 1955, 95 L Ed 2d 527.*

Defendants' claim that district court erred in admitting expert testimony that was partially based on hearsay could not be reviewed on appeal following defendants' resentencing upon remand because defendants did not raise issue in their direct appeal, and defendants failed to show any exceptional circumstance to exempt them from such waiver, as intervening case law holding that Confrontation Clause barred testimonial hearsay statements did not involve *Fed. R. Evid. 703*. *United States v Henry (2007, App DC) 472 F3d 910.*

Unpublished Opinions

Unpublished: Appellate court rejected both arguments raised by correctional officer who had been convicted of depriving prisoner of his civil rights; much of testimony provided at trial was consistent with or corroborated testimony of other government witnesses, and it was not error for district court to have admitted certain expert testimony. *United States v Steptoe (2005, CA3 Pa) 126 Fed Appx 47.*

16. Miscellaneous

Judge is permitted under pre-Rule authority to require statement of particulars before permitting more general description by witness in form of an opinion. *United States v Milne (1973, CA5 Fla) 487 F2d 1232.*

Inspection of accident scene may be used as basis of expert testimony. *Elgi Holding, Inc. v Insurance Co. of North America (1975, CA2) 511 F2d 957; Esler v Safeway Stores, Inc. (1978, CA8 Mo) 585 F2d 903, 3 Fed Rules Evid Serv*

681.

Expert's opinion need not be generally accepted in scientific community before it can be sufficiently reliable and probative to support jury finding so long as expert arrived at causation opinion by relying upon methods that other experts in field would reasonably rely upon in forming their own opinions. *Osburn v Anchor Laboratories, Inc. (1987, CA5 Tex) 825 F2d 908, CCH Prod Liab Rep P 11552, 23 Fed Rules Evid Serv 1061,* reh den, motion gr (1987, CA5 Tex) *834 F2d 425* and cert den *(1988) 485 US 1009, 108 S Ct 1476, 99 L Ed 2d 705.*

Fact that expert does not have personal knowledge of every bit of information contained in affidavit does not render testimony incompetent under Rule 703. Rosales v Honda Motor Co. (1980, SD Tex) 6 Fed Rules Evid Serv Rep 720.

When either expert's qualifications or his testimony lie at periphery of what scientific community considers acceptable, special care should be exercised in evaluating reliability and probative worth of proffered testimony under Rules 703 and 403. In re "Agent Orange" *Prod. Liab. Litig. (1985, ED NY) 611 F Supp 1223, 18 Fed Rules Evid Serv 144,* affd (1987, CA2 NY) *818 F2d 187,* cert den *(1988) 487 US 1234, 101 L Ed 2d 932, 108 S Ct 2898.*

Pursuant to *Fed. R. Evid. 703*, expert witness' testimony was not inadmissable due to his failure to participate personally in testing of seller's allegedly defective product; court did not find expert's testimony that experts in his field typically relied on results of tests performed by others unreliable. *Lohmann & Rauscher, Inc. v Ykk (U.S.A.) Inc. (2007, DC Kan) 477 F Supp 2d 1147.*

II.PARTICULAR CASES

A.In General 17. Accountants and accountings

Gasoline retailer's accounting expert's opinion that retailer would have survived had oil company not breached special allowance agreement was admissible under Rule 703 where expert testified that his opinion was based on profit margin comparisons between retailer and 2 service stations in neighboring towns and oil company offered no evidence that comparisons are not type relied upon by accounting professionals. *Au Rustproofing Center, Inc. v Gulf Oil Corp. (1985, CA6 Ohio) 755 F2d 1231, 40 UCCRS 802.*

In trial of defendant charged with securities fraud, inter alia, District Court properly admitted testimony of government's expert accountant concerning what he had been told by defendant's employees whom he had interviewed, where expert's task of obtaining overall financial picture from records alone was difficult due to improper recordkeeping and purposeful destruction, interviews were used to corroborate or supplement opinions already formed, and, when expert recited this hearsay, it was used only to explain how he had formed some of his opinions and conclusions and court repeatedly instructed jury relative to this limited purpose. *United States v Affleck (1985, CA10 Utah) 776 F2d 1451, 22 Fed Rules Evid Serv 234.*

In prosecution for income tax evasion, District Court properly cautioned jury to essentially exclude accountant's expert testimony relative to defendant's net worth, which relied on statement of casual business acquaintance of defendant that had been stricken as hearsay, since although experts are sometimes allowed to refer to hearsay evidence as basis for testimony, such hearsay must be type of evidence reasonably relied upon by experts in particular field in forming opinions or inferences on subject. *United States v Scrima (1987, CA11 Fla) 819 F2d 996, 87-2 USTC P 9383, 23 Fed Rules Evid Serv 428, 60 AFTR 2d 5200.*

District court did not err in admitting expert testimony on amount owed on defaulted loans on basis of loan agreements and promissory notes, since it is common sense that certified public accountants reasonably rely on loan agreements to calculate interest due on loans. *De Saracho v Custom Food Mach., Inc. (2000, CA9 Cal) 206 F3d 874, 2000 CDOS 1726, 2000 Daily Journal DAR 2375, 55 Fed Rules Evid Serv 62, 45 FR Serv 3d 1164,* cert den *(2000) 531 US 876, 148 L Ed 2d 126, 121 S Ct 183.*

In action arising from termination of golf cart distributorship, district court did not abuse its discretion in striking expert testimony of distributor's accountant on lost profits; testimony was inadmissible under *Fed. R. Evid. 703* because accountant used flawed methodology in failing to factor in expenses. *Club Car, Inc. v Club Car (Quebec) Imp., Inc. (2004, CA11 Ga) 362 F3d 775, 63 Fed Rules Evid Serv 1299, 58 FR Serv 3d 64, 17 FLW Fed C 308,* reh, en banc, den (2004, CA11 Ga) *111 Fed Appx 1003* and cert den *(2004) 543 US 1002, 125 S Ct 618, 160 L Ed 2d 461* and (criticized in *Pioneer Commer. Funding Corp. v Norick (2006, ED Pa) 2006 US Dist LEXIS 84728).*

Pursuant to *Fed. R. Evid. 702* and *703* and Daubert, as well as relevant standards governing public accounting profession, Certified Public Accountant's work as expert witness in litigation is not to be judged by wholesale application of standards that would have governed his work (both methods and substantive principles) had he performed audits himself. *In re Williams Sec. Litig. (2007, ND Okla) 496 F Supp 2d 1195.*

Pursuant to *Fed. R. Evid. 702* and *703,* accountant may testify with respect to Generally Accepted Accounting Standards or Generally Accepted Accounting Principles violations on basis of work done in compliance with American Institute of Certified Public Accountants' standards for consulting work. *In re Williams Sec. Litig. (2007, ND Okla) 496 F Supp 2d 1195.*

18. Aircraft and aviation, generally

In suit for damages arising out of airplane crash, Rule 703 permits plaintiff's expert to testify, from training records not independently admissible in evidence, to his opinion of pilot's competence such testimony is relevant. In re Aircrash in *Bali (1982, CA9 Cal) 684 F2d 1301, 11 Fed Rules Evid Serv 875.*

District Court did not err in excluding under Rule 403 expert testimony regarding subsequent airplane crash, which did not meet threshold requirement of being substantially similar to airplane crash giving rise to products liability action sub judice. *Nachtsheim v Beech Aircraft Corp. (1988, CA7 Wis) 847 F2d 1261, 25 Fed Rules Evid Serv 1153.*

In pilot's products liability action against aircraft manufacturer for injuries sustained in emergency landing, reports of defendants' experts who investigated cause of incident were not admissible under either Rule 702 or 703; Rule 702 permits expert opinion testimony, not opinions contained in documents prepared out of court, and Rule 703 allows expert to rely on materials, including inadmissible hearsay, in forming basis of opinion, but does not permit admission of materials relied on for truth of matters they contain if materials are otherwise inadmissible. *Engebretsen v Fairchild Aircraft Corp. (1994, CA6 Ky) 21 F3d 721, CCH Prod Liab Rep P 13847, 39 Fed Rules Evid Serv 9, 1994 FED App 121P,* reh den (1994, CA6 Ky) *1994 US App LEXIS 14320* and (criticized in *United States v Collicott (1996, CA9) 92 F3d 973, 96 CDOS 6157, 96 Daily Journal DAR 10106, 45 Fed Rules Evid Serv 449)* and (criticized in *Ridgway v Ford Dealer Computer Servs. (1997, CA6 Mich) 114 F3d 94, 137 CCH LC P 58527, 47 Fed Rules Evid Serv 159, 1997 FED App 166P).*

19. Antitrust

Neither Rule 703, which excludes opinions based on unreliable assumptions, nor Rule 702, which excludes opinion testimony not helpful to trier of fact, precludes admission in antitrust suit of report, relying on economic information not seriously challenged as unreliable, which posits that Japanese firms in general and Japanese electrical equipment manufacturers in particular have higher fixed costs than do similar American firms, that these higher fixed costs are result of differences in labor market and differences in financing practices, and that these higher fixed costs create climate in which vigorous price competition is unlikely and collusion to avoid it is desirable. *In re Japanese Elec. Prods. Antitrust Litig. (1983, CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases P 65757, 14 Fed Rules Evid Serv 401,* revd on other grounds, remanded *(1986) 475 US 574, 106 S Ct 1348, 89 L Ed 2d 538, 1986-1 CCH Trade Cases P 67004, 4 FR Serv 3d 368,* on remand sub nom *In re Japanese Elec. Prods. Antitrust Litig. (1986, CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases P 67374,* cert den *(1987) 481 US 1029, 107 S Ct 1955, 95 L Ed 2d 527.*

In antitrust action in which defendants moved to exclude proposed testimony of plaintiff's expert witness pursuant

to *Fed. R. Evid. 702* and *703* on grounds that his methods and resulting testimony were unreliable, court concluded that defendants' motion to preclude expert's testimony on issues relating to causation and liability was granted insofar as that testimony was based on original data sample but that expert could offer expert testimony to extent that it was not dependent on biased data. *U.S. Info. Sys. v IBEW Local Union No. 3 (2004, SD NY) 313 F Supp 2d 213, 175 BNA LRRM 2938, 2004-1 CCH Trade Cases P 74330.*

Statistician testifying for plaintiffs in antitrust litigation was entitled to reasonably rely on sulfuric acid pricing data under *Fed. R. Evid. 703* without submitting those facts into evidence, particularly after defendants gave positive evaluation of reliability of those compilations as party admission under *Fed. R. Evid. 801(d)(2). In re Sulfuric Acid Antitrust Litig. (2006, ND Ill) 235 FRD 646.*

Reconsideration movants had every opportunity to present their arguments well before court's previous opinion that barred opinions of expert witnesses in form of price data under *Fed. R. Evid. 703* and *803(17)*; instead, movants delayed, inexcusably, to see how things would go and their motion for reconsideration was denied. *In re Sulfuric Acid Antitrust Litig. (2006, ND Ill) 446 F Supp 2d 910.*

20.--Damages and lost profits

In private antitrust action, testimony of financial analyst concerning damages plaintiff suffered due to lost prospective profits from oil drilling operations is admissible under *FRE 703* since materials upon which expert based his testimony are of type commonly relied upon by financial analysts in course of their normal activities. *Venture Technology, Inc. v National Fuel Gas Co. (1981, WD NY) 7 Fed Rules Evid Serv 1343.*

Defendant union's motion to exclude plaintiff contractors' expert's revised report in antitrust case was denied where revised report's selection of projects for analysis because plaintiffs intended to base damage claim on them did not bias sample in any meaningful way and union could challenge particular flaws in sample that was used by expert through cross-examination. *U.S. Info. Sys. v IBEW Local Union No. 3 (2004, SD NY) 175 BNA LRRM 2985,* motion to strike gr, in part, motion to strike den, in part (2006, SD NY) *2006-2 CCH Trade Cases P 75510,* motion to strike gr, in part, motion to strike den, in part (2006, SD NY) *2006 US Dist LEXIS 52938.*

21.--Surveys

Expert in field of health care and economics may testify, in action against parish hospital service district for alleged violations of federal and state antitrust laws, on general business practices of managed care plans, basing his opinion partly on interviews with representatives of managed care plans, despite plaintiff hospital's argument that these informal conversations do not adequately meet requirements of formal survey where hospital has not shown that interviews held by expert are not information-gathering device reasonably relied on by experts, and interviews upon which expert bases his opinion go more toward weight than admissibility of his opinion. *Doctor's Hosp. v Southeast Medical Alliance (1995, ED La) 878 F Supp 884, 1995-1 CCH Trade Cases P 71014, 42 Fed Rules Evid Serv 60,* motion to strike gr, in part, motion to strike den, in part (1995, ED La) *1995-1 CCH Trade Cases P 71015.*

In antitrust action, where one party's expert failed to observe numerous fundamental protocols necessary to protect objectivity and reliability of survey, which rendered survey inadmissible under *FRE 702*, other expert's opinion testimony was restricted to opinions not based on unreliable survey. *Menasha Corp. v News Am. Mktg. In-Store, Inc. (2003, ND Ill) 238 F Supp 2d 1024, 2003-1 CCH Trade Cases P 73929,* affd (2004, CA7 Ill) *354 F3d 661, 2004-1 CCH Trade Cases P 74254.*

Expert's survey was precluded in antitrust case because: (1) screening questionnaire failed to identify relevant respondents; (2) questionnaire instructions were complex and confusing; (3) pre-test was not conducted; (4) response rate was low; (5) non-response bias was not addressed; (6) respondents were unwilling or unable to devote time to take survey seriously; (7) results could not be replicated; (8) standard error measurement was not calculated; and (9) key parameter estimate was arbitrarily changed. *United States v Dentsply Int'l, Inc. (2003, DC Del) 277 F Supp 2d 387,*

2003-2 CCH Trade Cases P 74120, revd and remanded on other grounds (2005, CA3 Del) *399 F3d 181, 2005-1 CCH Trade Cases P 74706,* cert den *(2006) 546 US 1089, 126 S Ct 1023, 163 L Ed 2d 853* and judgment entered (2006, DC Del) *2006-2 CCH Trade Cases P 75383.*

22. Audits and auditors

Summaries of results of audit prepared by accounting firm are not admissible under Rule 703 in action for failure to make contributions to employer-employee trust funds in violation of collective bargaining contracts, where such summaries do not reflect independent opinion of witness based upon his evaluation of facts and data, but rather represent opinions and conclusions of his staff, which he adopted as his own without knowing, in most cases, what sources his staff relied upon in forming their opinions and conclusions. *Paddack v Dave Christensen, Inc. (1982, DC Or) 11 Fed Rules Evid Serv 672,* affd in part and revd in part on other grounds (1984, CA9 Or) *745 F2d 1254, 5 EBC 2542, 117 BNA LRRM 2963, 102 CCH LC P 11228, 16 Fed Rules Evid Serv 1280.*

Reliance by expert upon excerpts from opinion by another expert generated for purposes of other litigation was improper, and pertinent part of plaintiffs' accountant's report, referring to and relying upon opinion of expert in another lawsuit as to valuation of company's residuals, was inadmissible, because (1) *Fed. R. Evid. 702* and *703* do not permit experts to rely upon excerpts from opinions developed by another expert for purposes of litigation, (2) case law supported conclusion that accountant's reliance upon excerpts from expert's opinion was improper, (3) it was unprecedented for auditor to rely upon excerpts from opinion given in adversarial litigation as basis for reaching audit opinion concerning company's financial statements, and (4) excerpts from such opinion were not of type reasonably relied upon by accountants in forming audit opinions. *In re Imperial Credit Indus. Sec. Litig. (2003, CD Cal) 252 F Supp 2d 1005, 55 FR Serv 3d 1121.*

23. Breach of contract

Gasoline retailer's accounting expert's opinion that retailer would have survived had oil company not breached special allowance agreement was admissible under Rule 703 where expert testified that his opinion was based on profit margin comparisons between retailer and 2 service stations in neighboring towns and oil company offered no evidence that comparisons are not type relied upon by accounting professionals. *Au Rustproofing Center, Inc. v Gulf Oil Corp. (1985, CA6 Ohio) 755 F2d 1231, 40 UCCRS 802.*

In breach of contract action District Court erred in excluding statements by supplier's expert witness and board of directors regarding quality of copier which was subject of suit, on ground that statements were hearsay because they were based on what they had been told by customers and engineers, since assessments were sort of inference that businessmen customarily draw and thus constituted personal knowledge. *Agfa-Gevaert, A.G. v A.B. Dick Co. (1989, CA7 Ill) 879 F2d 1518, 28 Fed Rules Evid Serv 400.*

In breach of contract suit against distributor by manufacturer, District Court erred in excluding statements by supplier's expert witness regarding quality of copier since statements were not hearsay because they were based on what customers and engineers had told expert and assessments were sort of inference that businessmen customarily draw. *Agfa-Gevaert, A.G. v A.B. Dick Co. (1989, CA7 Ill) 879 F2d 1518, 28 Fed Rules Evid Serv 400.*

In investors' suit for breach of purchase agreement for oil wells, court properly admitted expert testimony to determine offset amount; production figures relied on by experts were type reasonably relied upon by experts in field. *South Cent. Petroleum, Inc. v Long Bros. Oil Co. (1992, CA8 Ark) 974 F2d 1015, 36 Fed Rules Evid Serv 1096.*

Expert's reliance on purchased gas adjustment filings in giving opinion about damages in breach of contract case went to weight rather than admissibility of evidence, hence allegation that other experts did not rely on same methodology was irrelevant. *Concise Oil & Gas Pshp. v Louisiana Intrastate Gas Corp. (1993, CA5 La) 986 F2d 1463, 38 Fed Rules Evid Serv 531, 126 OGR 10,* reh, en banc, den (1993, CA5 La) *990 F2d 1254.*

In plaintiff company's action alleging that defendant individuals agreed to sell it promissory notes but then reneged on agreement after they received inside information that caused them to believe notes would increase in value, company's proposed expert's testimony was inadmissible to extent he was simply rehashing otherwise admissible evidence about which he had no personal knowledge; because "Facts" section of expert's report addressed lay matters jury was capable of understanding and deciding without expert's help, it was inadmissible. *Highland Capital Mgmt., L.P. v Schneider (2005, SD NY) 379 F Supp 2d 461.*

In action alleging claims of RICO violations, conspiracy, breach of contract, and others, plaintiff's motion to exclude proposed testimony of witness retained by defendants was granted in part where (1) objectionable portion of witness's report was not his calculation of damages; rather, it was his extensive, subjective analysis of evidence in record and his factual "findings" and legal conclusions based on those subjective interpretations of that evidence; and (2) expert's extensive interpretation of relevant legal documents and suggested credibility determinations as presently included in his written report were not admissible because they usurped fact-finding role of jury and distracted more than they aided. *Brill v Marandola (2008, ED Pa) 75 Fed Rules Evid Serv 535.*

In breach of contract case brought by sales representatives against seller, expert testimony regarding representatives' alleged damages that was proffered by seller was insufficiently reliable to satisfy *Fed. R. Evid. 703*; expert's conclusions were based on information received solely from seller's counsel, and seller never talked to any of seller's employees to verify accuracy of information. *Lyman v St. Jude Med. S.C., Inc. (2008, ED Wis) 580 F Supp 2d 719.*

24. Breach of warranty

There was no abuse of discretion in excluding expert testimony where data underlying expert's opinion, document prepared by voting machine seller's national sales director, who was not present during elections in question, made "reverse" "guestimate" about amount of time that machines were down, was so unreliable that no reasonable expert could base opinion on it and document and expert's testimony were properly excluded from trial on breach of warranty claim brought against voting machine seller. *Montgomery County v Microvote Corp. (2003, CA3 Pa) 320 F3d 440, 60 Fed Rules Evid Serv 873,* costs/fees proceeding, objection granted, in part (2004, ED Pa) *2004 US Dist LEXIS 8611.*

In breach of implied warranty, negligence, and strict liability action, expert's affidavit stating that bottle manufacturer's defects caused leaks in bottles and that seal could have been used was factual assertion and not legal conclusion that could have been determined by inspection of photographs of bottles and by information provided by manufacturer so as to comply with *Fed. R. Evid. 703. Helen of Troy, L.P. v Zotos Corp. (2006, WD Tex) 235 FRD 634.*

25. Cause of accident

Summary judgment was granted to tire manufacturer because tires at issue had been destroyed and testimony provided by plaintiff's proposed expert, which was based entirely upon hypothetical situations and speculation, was not sufficient to prove case of causation as required under *New York law. Oines v Island Ford, Inc. (2003, SD Ind) 287 F Supp 2d 936, CCH Prod Liab Rep P 16769,* affd (2004, CA7 Ind) *93 Fed Appx 80.*

Resort's experts' testimony regarding bodysurfing and body whomping activities of injured party was excluded inasmuch as it was not based on sufficiently reliable facts or data; report was not only based on two unreliable hearsay statements but on speculative and conjectural conclusions as to what both men at beach and lifeguard had intended "catching waves" to mean. *Fiorentino v Rio Mar Assocs., LP (2005, DC Puerto Rico) 381 F Supp 2d 43, 67 Fed Rules Evid Serv 1196,* motions ruled upon, claim dismissed (2007, DC Puerto Rico) *2007 US Dist LEXIS 24844.*

26.--Aircraft and aviation

Court erred in not admitting plaintiffs' expert's affidavit in opposition to summary judgment motion since expert's conclusions as to cause of Army helicopter crash were based on depositions, government documents, official Army

reports, and historical data of helicopter, and was thus more than bare, conclusory allegation of cause, and expert's qualifications as expert were not in dispute. *Monks v General Electric Co. (1990, CA6 Tenn) 919 F2d 1189, 31 Fed Rules Evid Serv 932, 19 FR Serv 3d 1519.*

In pilot's products liability action against aircraft manufacturer for injuries sustained in emergency landing, reports of defendants' experts who investigated cause of incident were not admissible under either Rule 702 or 703; Rule 702 permits expert opinion testimony, not opinions contained in documents prepared out of court, and Rule 703 allows expert to rely on materials, including inadmissible hearsay, in forming basis of opinion, but does not permit admission of materials relied on for truth of matters they contain if materials are otherwise inadmissible. *Engebretsen v Fairchild Aircraft Corp. (1994, CA6 Ky) 21 F3d 721, CCH Prod Liab Rep P 13847, 39 Fed Rules Evid Serv 9, 1994 FED App 121P*, reh den (1994, CA6 Ky) *1994 US App LEXIS 14320* and (criticized in *United States v Collicott (1996, CA9) 92 F3d 973, 96 CDOS 6157, 96 Daily Journal DAR 10106, 45 Fed Rules Evid Serv 449)* and (criticized in *Ridgway v Ford Dealer Computer Servs. (1997, CA6 Mich) 114 F3d 94, 137 CCH LC P 58527, 47 Fed Rules Evid Serv 159, 1997 FED App 166P).*

Plaintiff administratrix who sought strict liability action against airplane manufacturer for damage resulting in pilot's death may not obtain new trial on claims of prejudicial error where: (1) expert's opinion that decedent's alcohol consumption led to pilot error causing the accident was not prejudicial because of the accompanying limiting instruction, (2) expert's reference to interviews with decedent's associates, while normally excludable hearsay, was admissible as statements routinely relied upon by such experts. *Stevens v Cessna Aircraft Co. (1986, ED Pa) 634 F Supp 137, 20 Fed Rules Evid Serv 972*, affd without op (1986, CA3 Pa) *806 F2d 252* and affd without op (1986, CA3 Pa) *806 F2d 254* and affd without op (1986, CA3 Pa) *806 F2d 254.*

27.--Explosions

In suit by automobile repairer who suffered injuries as result of explosion of tire being mounted using bead seater, District Court erred in limiting testimony of expert witness on cause of accident since although opinion was not based on evidence in case, testimony was based both on first hand observation and upon having been informed of circumstances of accident and of results. *Ponder v Warren Tool Corp. (1987, CA10 Kan) 834 F2d 1553, CCH Prod Liab Rep P 11644, 24 Fed Rules Evid Serv 601.*

Expert testimony in case involving explosion of propane tank and subsequent fire was properly admitted although it was based in part upon report by deceased expert, since district court was satisfied that deceased expert's report was of type reasonably relied upon by experts in field and was reasonably relied upon by testifying expert in forming his own opinion, and testifying expert also relied upon his own thorough understand of manifold system, his extensive experience in behavior of propane, and his extensive investigation of physical evidence. *Arkwright Mut. Ins. Co. v Gwinner Oil (1997, CA8 ND) 125 F3d 1176, 47 Fed Rules Evid Serv 1301* (criticized in *Smith v Rasmussen (1999, ND Iowa) 57 F Supp 2d 736, 63* Soc Sec Rep Serv 550).

28. Civil rights

In civil rights action brought against police officers alleging inter alia excessive force during arrest, District Court did not err in allowing police expert to testify as to proper level of force to be used by police in various situations where expert testified as to his credentials and informed court that he frequently instructed police officers in proper use of force, and court carefully mitigated any possible prejudice by appropriately instructing jury that testimony relative to disarming suspect was intended to show range of possible situations that police might encounter and that there was no suggestion that defendant had used weapon. *Kladis v Brezek (1987, CA7 Ill) 823 F2d 1014, 23 Fed Rules Evid Serv 741, 8 FR Serv 3d 417.*

In civil rights action filed by arrestee against police officers alleging false arrest and use of excessive force, District Court erred in admitting testimony of state trial judge's assessment of witness' credibility since judge was not testifying

about existence of some objective factors to which he had personal knowledge of underlying facts but rather gave his own opinion as to credibility. *Schultz v Thomas (1987, CA7 Wis) 832 F2d 108, 23 Fed Rules Evid Serv 1332.*

In *42 USCS § 1983* case alleging use of excessive force by sheriff's deputies against detainee, who later died, certain defense expert reports were stricken to extent that they were based on medical evidence or opinion, including experts' opinions about detainee's cause of death; experts were not physicians and were asked to opine about use of force in law enforcement situations, so there was no showing that medical reports were kind of evidence upon which experts in relevant field relied. *Richman v Sheahan (2006, ND Ill) 415 F Supp 2d 929,* summary judgment gr, in part, summary judgment den, in part,, objection overruled, motion to strike den (2007, ND Ill) *2007 US Dist LEXIS 9478.*

Federal district court that was deciding summary judgment motions in *42 USCS § 1983* suit filed by arrestee who alleged excessive use of force by police disregarded defense affidavit as incompetent evidence because affiant's expert qualifications to give opinion as to city's alleged failure to train its police officers were not adequately established under *Fed. R. Evid. 703. Terrell v City of El Paso (2007, WD Tex) 481 F Supp 2d 757.*

29. Credibility

In civil rights action filed by arrestee against police officers alleging false arrest and use of excessive force, District Court erred in admitting testimony of state trial judge's assessment of witness' credibility since judge was not testifying about existence of some objective factors to which he had personal knowledge of underlying facts but rather gave his own opinion as to credibility. *Schultz v Thomas (1987, CA7 Wis) 832 F2d 108, 23 Fed Rules Evid Serv 1332.*

Prosecution's expert witness was improperly allowed to vouch for credibility of defendant's patients when he was asked whether patients were telling truth about defendant recording false symptoms; with only defendant's records and patients' statements to FBI as evidence, expert was in no better position than lay person to say whether patients testified truthfully. *United States v Vest (1997, CA7 Ill) 116 F3d 1179, 47 Fed Rules Evid Serv 283,* cert den *(1998) 522 US 1119, 140 L Ed 2d 120, 118 S Ct 1058.*

30. Damages

In wrongful death action testimony of expert witness as to economic loss and allowable damages was admissible under *Fed Rules of Evid 703* where such expert based his calculations for actual expenses on tables from United States Department of Labor, Bureau of Labor Statistics. *Higgins v Kinnebrew Motors, Inc. (1977, CA5 Fla) 547 F2d 1223, 2 Fed Rules Evid Serv 291.*

In suit for damages arising out of airplane crash, Rule 703 permits plaintiff's expert to testify, from training records not independently admissible in evidence, to his opinion of pilot's competence such testimony is relevant. In re Aircrash in *Bali (1982, CA9 Cal) 684 F2d 1301, 11 Fed Rules Evid Serv 875.*

Trial court properly admitted testimony of economist and mathematician on issue of plaintiff's damages, where expert used rental-value chart prepared by real estate appraiser who also testified on behalf of plaintiff to calculate losses plaintiff incurred due to defendant's alleged failure to negotiate increasing rents during period in issue, where chart was admitted into evidence without objection and witness had no independent opinion about rental value of plaintiff's property, but merely reached conclusion as to likely value based upon facts in evidence, and where trial court properly noted that appraisers' compilations of rental figures for comparable buildings are reasonably relied upon by experts in computing real estate values and rental returns. *Ramsey v Culpepper (1984, CA10 NM) 738 F2d 1092, 15 Fed Rules Evid Serv 1996.*

Expert's reliance on purchased gas adjustment filings in giving opinion about damages in breach of contract case went to weight rather than admissibility of evidence, hence allegation that other experts did not rely on same methodology was irrelevant. *Concise Oil & Gas Pshp. v Louisiana Intrastate Gas Corp. (1993, CA5 La) 986 F2d 1463, 38 Fed Rules Evid Serv 531, 126 OGR 10,* reh, en banc, den (1993, CA5 La) *990 F2d 1254.*

Testimony by construction company's expert witness about increased costs caused by time delays associated with lack of sand was unsupported by evidence, hence district court abused its discretion in admitting it. *Tyger Constr. Co. v Pensacola Constr. Co. (1994, CA4 Va) 29 F3d 137, 40 Fed Rules Evid Serv 1376,* cert den *(1995) 513 US 1080, 130 L Ed 2d 633, 115 S Ct 729.*

Where lessors of property upon which lessees operated gasoline station sought damages for loss of use of property after termination of lease during lengthy environmental investigation concerning possible contamination of property by fuel residue, testimony of lessors' expert environmental consultant was improperly excluded on ground that expert could only speculate concerning condition of property at termination of lease since soil tests were only conducted well before and well after termination; purpose of expert's testimony was not to show actual condition of property at termination but to establish uncertainty that existed during investigation due to potential contamination and lack of reliable data, and such testimony was relevant to show that such uncertainty prevented lessors from obtaining market value for property. *Jaasma v Shell Oil Co. (2005, CA3 NJ) 412 F3d 501, 67 Fed Rules Evid Serv 729, 35 ELR 20137.*

Federal Rule of Evidence 703 provides basis for constructing and applying reliable statistical model that will allow individualized and definite proof of damages sustained by members of class actions; even if not otherwise available and admissible, survey or polling techniques of type reasonably relied upon by experts in particular field can be constructed to determine point of fact relative to certain class members. *In re Sugar Industry Antitrust Litigation (1976, ED Pa) 73 FRD 322, 1976-2 CCH Trade Cases P 61215, 1 Fed Rules Evid Serv 1219, 22 FR Serv 2d 634.*

Because plaintiffs' expert was experienced in treating burn patients and, through his experience, had sufficient facts and data to estimate medical expenses for burn victims, court allowed expert to testify about injured plaintiff's future medical expenses; expert was medical doctor, and his opinions were based on his expertise and evaluation of injured plaintiff, and fact that expert was not expert in life care planning and relied on actuarial tables in forming his opinion did not make his opinion inadmissible. *Morales v E.D. Etnyre & Co. (2005, DC NM) 382 F Supp 2d 1273.*

In suit involving sales contract, employer's damages expert could not testify to opinion based on theory furnished to expert by employer's employees, because employees did not assist expert in any way, employees were not designated as experts, even though information on which expert relied required technical or other specialized knowledge, and employer made no attempt to demonstrate that information was of type normally relied on by experts in expert's field. *Loeffel Steel Prods. v Delta Brands, Inc. (2005, ND Ill) 387 F Supp 2d 794.*

In patent infringement action, plaintiff's motion to exclude testimony of defendants' experts on damages and royalty calculations based on remote terminal deployment figures, was denied because defendants' experts followed professional standards to obtain information relied upon in their opinions, which demonstrated that type of information and manner in which it was acquired was reasonably relied upon by experts within their field, and probative value of information plaintiff sought to exclude substantially outweighed its prejudicial effect. *Inline Connection Corp. v AOL Time Warner, Inc. (2007, DC Del) 470 F Supp 2d 435.*

Unpublished Opinions

Unpublished: Although required procedure when objection is made to propriety of expert witness is to make determination of reliability on record for any witness offered under *Fed. R. Evid. 702* or *703*, even assuming that district court did not make required determination, any error was harmless and plaintiff's challenge failed; jury did not accept expert testimony regarding claimed actual damages and awarded zero damages. *Chieco v Willis & Geiger (2004, CA9 Cal) 116 Fed Appx 860,* cert den *(2005) 545 US 1123, 125 S Ct 2920, 162 L Ed 2d 311.*

31.--Lost earnings

Objections to expert's testimony regarding plaintiff's past and prospective earnings loss should have been sustained, where (1) expert based future earnings loss calculation on plaintiff's remaining life expectancy rather than remaining

work-life expectancy, without offering evidence that plaintiff could be expected to work beyond age 65, (2) expert's projection took loss of fringe benefits into consideration, but was not accompanied by evidence that plaintiff ever received fringe benefits, and (3) expert doubled plaintiff's proven annual income to estimate future earnings loss, but no evidence was presented to demonstrate that plaintiff was likely to experience such dramatic increase in income. *Gumbs v International Harvester, Inc. (1983, CA3 VI) 718 F2d 88, CCH Prod Liab Rep P 9836, 14 Fed Rules Evid Serv 272, 36 UCCRS 1579.*

District court abused its discretion in permitting vocational expert to testify on personal injury plaintiff's future lost earnings, since testimony was based on unrealistic and speculative assumption that plaintiff would have been employed on permanent, full-time basis, year in and year out, had he not been injured. *Boucher v United States Suzuki Motor Corp. (1996, CA2 NY) 73 F3d 18, 43 Fed Rules Evid Serv 521.*

32.--Lost profits

Only qualified expert may answer hypothetical questions, but projection of lost profits based on evidence of record regarding decreased sales of certain product is not hypothetical and may be addressed by lay witness. *Teen-Ed, Inc. v Kimball International, Inc. (1980, CA3 NJ) 620 F2d 399, 6 Fed Rules Evid Serv 135.*

Expert testimony on future lost profits based on prior projections is suspect when actual market performance data are available. *Advent Sys. v Unisys Corp. (1991, CA3 Pa) 925 F2d 670, 13 UCCRS2d 669.*

In action arising from termination of golf cart distributorship, district court did not abuse its discretion in striking expert testimony of distributor's accountant on lost profits; testimony was inadmissible under *Fed. R. Evid. 703* because accountant used flawed methodology in failing to factor in expenses. *Club Car, Inc. v Club Car (Quebec) Imp., Inc. (2004, CA11 Ga) 362 F3d 775, 63 Fed Rules Evid Serv 1299, 58 FR Serv 3d 64, 17 FLW Fed C 308,* reh, en banc, den (2004, CA11 Ga) *111 Fed Appx 1003* and cert den *(2004) 543 US 1002, 125 S Ct 618, 160 L Ed 2d 461* and (criticized in *Pioneer Commer. Funding Corp. v Norick (2006, ED Pa) 2006 US Dist LEXIS 84728).*

In suit brought by buyers alleging seller's breach of requirements contract, buyers' expert testimony on lost profits was admissible under *Fed. R. Evid. 703* and adequately supported damages award; expert relied on information provided by buyers' management and by seller; sources were not so slight as to be fundamentally unsupported, and weight to be given to expert's opinion was properly left to jury. *Structural Polymer Group, Ltd. v Zoltek Corp. (2008, CA8 Mo) 543 F3d 987.*

Because methodology and data employed in expert witness's report was unreliable, even though witness was found to be qualified, and because second expert witness's report was predicated on first expert's findings, their expert testimony on potential sales and lost profits was excluded pursuant to *Fed. R. Evid. 702* and *703. Ellipsis, Inc. v Color Works, Inc. (2006, WD Tenn) 428 F Supp 2d 752.*

In action arising over dispute regarding plan by property owners to operate composting facility on their property, township was entitled to preclude under Daubert and *Fed. R. Evid. 702* and *702* testimony of property owners' expert on economic loss; expert's loss report was not based on sufficient facts, and it failed to apply "yardstick" methodology reliably to facts. *Rondigo, L.L.C. v Casco Twp. (2008, ED Mich) 537 F Supp 2d 891.*

33. Depositions

In wrongful death case against railroad in which worker suffocated in load of pinto beans inside hopper rail car, court must reject argument that co-workers' testimony and circumstances of accident were established through testimony of plaintiff's expert witness, even though Rule 703 permits expert to rely upon certain types of hearsay evidence in forming opinion, because Rule merely allows expert to formulate and explain basis of his opinion; it does not authorize party to prove truth of hearsay declarations by having expert echo deposition testimony of individuals who witnessed underlying events. *Garay v Missouri Pac. R.R. (1999, DC Kan) 65 F Supp 2d 1202,* affd without op (2000,

CA10 Kan) *242 F3d 388,* reported in full (2000, CA10 Kan) *2001 Colo J C A R 62.*

In action filed by consumer and his wife under Fair Credit Reporting Act, *15 USCS §§ 1681* et seq., against credit information provider and two credit reporting agencies, deposition testimony of plaintiffs' witness, who gave deposition testimony regarding denial of credit to plaintiffs, was inadmissible under *Fed. R. Evid. 703* because she had not met prerequisite of being qualified as expert witness under *Fed. R. Evid. 702. Zotta v Nationscredit Fin. Servs. Corp. (2003, ED Mo) 297 F Supp 2d 1196* (criticized in *Gohman v Equifax Info. Servs. (2005, DC Minn) 395 F Supp 2d 822)* and (criticized in *Morris v Equifax Info. Servs., LLC (2006, CA5 Tex) 457 F3d 460).*

34. Discrimination in employment

Employees' motion to strike portion of declaration of employer's statistical expert referring to store manager survey was granted because record demonstrated that survey was designed and administered by counsel for employer in midst of litigation, interviewees knew survey was related to sex discrimination litigation, and survey instrument exhibited bias on its face. *Dukes v Wal-Mart, Inc. (2004, ND Cal) 222 FRD 189, 85 CCH EPD P 41689.*

On motion for summary judgment in race discrimination case, defendants, former employer and others, argued that expert witness's opinion was not based on facts and data but on hearsay and hearsay within hearsay in violation of *Fed R. Evid. 703*; however, defendants were incorrect because expert's opinion was based on facts and data collected from personnel files she reviewed, which were business records maintained by defendants; as such, those records were exception to hearsay rule under *Fed. R. Evid. 803(6). Jones v Rabanco (2006, WD Wash) 439 F Supp 2d 1149.*

35.--Age discrimination

Testimony of age discrimination plaintiff's economic expert was properly admitted where employer's objections were to facts or data on which expert based opinion. *Tyler v Bethlehem Steel Corp. (1992, CA2 NY) 958 F2d 1176, 59 BNA FEP Cas 875, 58 CCH EPD P 41361,* cert den *(1992) 506 US 826, 113 S Ct 82, 121 L Ed 2d 46, 59 BNA FEP Cas 1535, 59 CCH EPD P 41781.*

Expert statistician's testimony did not support inference of age discrimination in university professor's age discrimination suit, since expert offered conclusory opinion on ultimate issue of discrimination, stating that there had been systematic effort over years artificially to depress professor's salary in comparison to those of younger faculty hired more recently; statement was expressly based upon incomplete information and did not contain any statistical analysis that would be competent summary judgment testimony from expert. *Ross v University of Texas (1998, CA5 Tex) 139 F3d 521, 79 BNA FEP Cas 788, 73 CCH EPD P 45351, 49 Fed Rules Evid Serv 545,* reh den (1998, CA5 Tex) *1998 US App LEXIS 12694.*

36. Drugs and narcotics

Forensic chemist may testify that seized Quaaludes were made by same machine as tablet obtained in Columbia by Drug Enforcement Administration agent and could not have been made in any legitimate laboratory in United States where sample pill was sent by agent in heat-sealed container by diplomatic pouch with agent's identification thereupon; DEA forensic scientists rely upon agents in field to submit such samples and to establish their authenticity and thus scientist's reliance on agent's report that sample pill was obtained in Columbia does not make his testimony inadmissible but rather it is factor to be considered by jury in assessing weight of his testimony. *United States v Arias (1982, CA4 NC) 678 F2d 1202, 10 Fed Rules Evid Serv 788,* cert den *(1982) 459 US 910, 74 L Ed 2d 173, 103 S Ct 218.*

In prosecution of physician for prescribing controlled substances outside usual course of medical practice and for other than legitimate medical purposes, reference to nontestifying expert's report which had not been introduced into evidence as consistent with expert's opinion was improperly permitted since it was not type reasonably relied upon by experts in field and was improper bolstering of testifying expert's opinions. *United States v Tran Trong Cuong (1994, CA4 Va) 18 F3d 1132, 40 Fed Rules Evid Serv 574.*

Even though district court erred by allowing case agent to stray from his proper expert function while testifying in defendants' drug case, as he repeated hearsay evidence without applying any expertise whatsoever, thereby violating hearsay rule and Confrontation Clause, *U.S. Const. amend. VI*, error was harmless given overwhelming evidence against defendants; three cooperating witnesses testified extensively that both defendants were significant participants in drug conspiracy, taped conversations were incriminating for both defendants, and search of one defendant's residence turned up drugs and drug paraphernalia. *United States v Dukagjini (2002, CA2 NY) 326 F3d 45, 60 Fed Rules Evid Serv 141,* post-conviction relief den, post-conviction relief dismd (2005, WD NY) *388 F Supp 2d 176.*

Defendant's argument that lead agent, although qualified to give lay opinion testimony about general operation of drug points under *Fed. R. Evid. 701*, should not have been permitted to reveal to jury underlying data on which he based his opinions, as was permitted, under certain conditions, for expert testifying pursuant to *Fed. R. Evid. 702* was without merit because defendant failed to identify underlying data under *Fed. R. Evid. 703* that agent purportedly disclosed to jury in discussing leader's role in drug conspiracy, and there was no indication that agent quoted from, or cited to, police reports, accounts of non-testifying informants, or other inadmissible material regarding leader's relationship to defendant or his violent take-over of drug point. *United States v Rodriguez (2008, CA1 Puerto Rico) 525 F3d 85.*

Defendants' argument that detective formed his opinion about typical operations of narcotics dealers over course of thousands of interviews, and that thus his testimony was in reality testimony of thousands of out-of-court "witnesses" who were not subject to cross-examination, was rejected because while Confrontation Clause of Sixth Amendment barred introduction of "testimonial" out-of-court statements by witnesses who were not subject to cross-examination, that rule did not prevent expert witness from relying on (without repeating to jury) otherwise inadmissible evidence in formulating his opinion under *Fed. R. Evid. 703. United States v Law (2008, App DC) 528 F3d 888.*

Unpublished Opinions

Unpublished: Where defendant was charged with attempting to manufacture methamphetamine based on testimony and items found at scene of fire, clean-up company's report officer relied upon in rendering opinion that methamphetamine was being manufactured in trailer was admissible evidence under business records exception to hearsay rule. *United States v Ward (2006, CA10 Okla) 182 Fed Appx 779,* cert den (2006, US) *127 S Ct 422, 166 L Ed 2d 298.*

37.--Distribution

Opinion testimony from investigative agents that heroin found in defendant's residence ranged in purity from 14 to 18 percent, that heroin upon distribution to users is ordinarily one to 3 percent pure, and that type of triple beam balance scale found in house was "tool of the trade" of heroin distribution was admissible in prosecution for possession of heroin and marijuana with intent to distribute, unlawful use of mails, in violation of Travel Act, since agents testified that they were relying respectively on 12 and 18 years of experience in investigating heroin distribution, which included distinguishing among grades of heroin and investigating ways heroin is diluted prior to distribution. *United States v Monu (1986, CA4 NC) 782 F2d 1209, 20 Fed Rules Evid Serv 1023.*

District Court did not err in admitting testimony of police officer, which had been offered as expert testimony on criminal narcotics distribution organizations and how they operate, since facts or data relied upon do not need to be admissible in evidence, nor is it therefore required that there be scientific link between witnesses' observations and data relied on by experts in field. *United States v Patterson (1987, CA9 Cal) 819 F2d 1495, 23 Fed Rules Evid Serv 479.*

Where Drug Enforcement Administration agent testified that quantity of cocaine seized from defendant's car was too large to have been exclusively for personal use, agent was competent to testify to relative raw-weight distinctions in drug quantities typically possessed by users as distinguished from dealers, and any error in admitting this testimony was harmless because government's evidence connected defendant to kilogram of cocaine seized elsewhere. *United States v Reynoso (2003, CA1 RI) 336 F3d 46, 61 Fed Rules Evid Serv 1503,* cert den *(2003) 540 US 1062, 124 S Ct 841, 157 L*

Ed 2d 720 and post-conviction relief den (2006, DC RI) *2006 US Dist LEXIS 55936.*

Unpublished Opinions

Unpublished: Expert witness testimony which led to conclusion that drug quantity was consistent with intent to distribute did not violate Sixth Amendment because *Fed. R. Evid. 703* allowed expert to base his conclusion on evidence that would have otherwise been admissible at trial. *United States v Zavala (2005, CA3 Pa) 141 Fed Appx 69.*

38.--Identification of drugs or narcotics

Trial court, in prosecution for possession of marijuana, did not abuse its discretion in refusing to strike testimony of government's expert witness regarding results of chemical testing of substance seized from defendant on ground that government failed to comply with best evidence rule because test results themselves (thin layer chromatographic plates) had not been offered as evidence, where (1) defendant did not move to strike testimony in question until government had completed its direct examination of witness and cross-examination was well under way, (2) test slides were highly perishable, and (3) defense expert did not dispute readings but rather reliability of such test. *United States v Gavic (1975, CA8 Minn) 520 F2d 1346, 1 Fed Rules Evid Serv 16.*

Expert who was not himself personally familiar with conditions under which known sample of heroin was determined by drug enforcement agency to be such, but who stated that sample had been through all tests at his laboratory performed on heroin samples and that he personally tested known sample against prior standards in state laboratory and found them to be similar; witness was able to testify to his conclusion that unknown substance found on defendant was in fact heroin based on facts that were of a type reasonably relied upon by experts in his particular field. *United States v Hollman (1976, CA8 Ark) 541 F2d 196, 1 Fed Rules Evid Serv 324.*

DEA chemist's testimony that substance was heroin was admissible despite defendant's claim that he was unable to cross-examine chemists who developed standards on which witness based his conclusion; it is extremely rare for expert's proffered opinion not to rely upon information gathered out of court, and defendant sought application of rule that would make it nearly impossible to rely on any scientific standard, ignoring very reason for Rule 703's existence. *United States v Abbas (1996, CA4 Md) 74 F3d 506, 43 Fed Rules Evid Serv 1077,* cert den *(1996) 517 US 1229, 134 L Ed 2d 965, 116 S Ct 1868.*

Testimony of supervisor of chemist who had analyzed crack concerning chemist's report was properly admitted expert testimony since report and supporting documentation were kind of evidence on which forensic chemist reasonably relies in forming opinion on composition of particular substance. *United States v Smith (1992, App DC) 296 US App DC 100, 964 F2d 1221, 35 Fed Rules Evid Serv 920.*

39.--Value

Testimony by narcotics agent as to value of heroin though based partly on information gathered from other undercover narcotics agents familiar with markets involved would be admissible under Rule 703 since such information was of type reasonably relied upon by experts determining prevailing prices in clandestine markets. *United States v Golden (1976, CA9 Cal) 532 F2d 1244,* cert den *(1976) 429 US 842, 50 L Ed 2d 111, 97 S Ct 118.*

Testimony of prosecution's drug valuation expert was properly admitted under *Fed. R. Evid. 703* by district court because, although data relied upon by expert was hearsay, it was of type reasonably relied upon by drug valuation experts in forming their opinions, and testimony was subject to cross-examination by defendant. *United States v Brown (2002, CA11 Fla) 299 F3d 1252, 59 Fed Rules Evid Serv 410, 15 FLW Fed C 856,* vacated and remanded on other grounds, motion gr *(2003) 538 US 1010, 123 S Ct 1928, 155 L Ed 2d 847, 2003* Daily Journal DAR 4880 and reinstated on other grounds, on remand (2003, CA11 Fla) *342 F3d 1245, 16 FLW Fed C 1023,* cert den *(2004) 543 US 823, 125 S Ct 37, 160 L Ed 2d 34* and reh, en banc, den (2004, CA11 Fla) *99 Fed Appx 888.*

40. Economics and economists

Trial court properly admitted testimony of economist and mathematician on issue of plaintiff's damages, where expert used rental-value chart prepared by real estate appraiser who also testified on behalf of plaintiff to calculate losses plaintiff incurred due to defendant's alleged failure to negotiate increasing rents during period in issue, where chart was admitted into evidence without objection and witness had no independent opinion about rental value of plaintiff's property, but merely reached conclusion as to likely value based upon facts in evidence, and where trial court properly noted that appraisers' compilations of rental figures for comparable buildings are reasonably relied upon by experts in computing real estate values and rental returns. *Ramsey v Culpepper (1984, CA10 NM) 738 F2d 1092, 15 Fed Rules Evid Serv 1996.*

Testimony of age discrimination plaintiff's economic expert was properly admitted where employer's objections were to facts or data on which expert based opinion. *Tyler v Bethlehem Steel Corp. (1992, CA2 NY) 958 F2d 1176, 59 BNA FEP Cas 875, 58 CCH EPD P 41361,* cert den *(1992) 506 US 826, 113 S Ct 82, 121 L Ed 2d 46, 59 BNA FEP Cas 1535, 59 CCH EPD P 41781.*

Defendant's expert witness was improperly excluded pursuant to *Fed. R. Evid. 403, 602,* and *702* because his economic analysis would have been helpful to jury in determining whether insider trading took place; economic expert was permitted not only to tell jury that economic concept was issue, but also to analyze concept and offer informed opinions; moreover, district court was wrong to conclude that it was "perfectly obvious" that expert did not have personal knowledge of facts that formed basis for his opinions where he disclosed that he and his staff had reviewed pertinent stock prices and analysts' reports; in addition, *Fed. R. Evid. 703* permitted expert to base on opinion on any facts or data, admissible or not, which were of type reasonably relied on by experts in field, and using stock prices and information issued by various companies was reasonable way for economist to analyze impact of that information on stock prices. *United States v Nacchio (2008, CA10 Colo) 519 F3d 1140, CCH Fed Secur L Rep P 94603.*

Expert in field of health care and economics may testify, in action against parish hospital service district for alleged violations of federal and state antitrust laws, on general business practices of managed care plans, basing his opinion partly on interviews with representatives of managed care plans, despite plaintiff hospital's argument that these informal conversations do not adequately meet requirements of formal survey where hospital has not shown that interviews held by expert are not information-gathering device reasonably relied on by experts, and interviews upon which expert bases his opinion go more toward weight than admissibility of his opinion. *Doctor's Hosp. v Southeast Medical Alliance (1995, ED La) 878 F Supp 884, 1995-1 CCH Trade Cases P 71014, 42 Fed Rules Evid Serv 60,* motion to strike gr, in part, motion to strike den, in part (1995, ED La) *1995-1 CCH Trade Cases P 71015.*

41.--Wages

District court did not abuse its discretion when it admitted expert economist's testimony pursuant to *Fed. R. Evid. 703* when expert relied on pay stubs and statements of employee's wife, who district court believed to be reliable regarding her husband's salary and benefits, and employer could have easily countered any inaccurate testimony concerning pay and benefits. *Taylor v Invacare Corp. (2003, CA6 Ohio) 64 Fed Appx 516, 8 BNA WH Cas 2d 1472.*

Opinion of plaintiff's economic expert need not be excluded for lack of factual foundation, where court presumes plaintiff's counsel provided expert with reliable data concerning plaintiff's rate of pay at time of her discharge and average number of hours she worked per week, because defendant's dispute with these numbers goes not to admissibility but to weight of expert's opinion, which can be fully explored in cross-examination. *Deghand v Wal-Mart Stores (1997, DC Kan) 980 F Supp 1176.*

42. Environmental matters

In landowners' actions under CERCLA and state law for alleged hazardous waste dumping by defendants, expert testimony as properly precluded; chemical engineer's opinions were not based on tests he performed or even tests of

properties at issue, analytical chemist's conclusions were not based on her own expert area and not on tests of properties at issue, geotechnical engineering professor was not qualified to testify as geochemist or hydrogeologist and used data and methodology not recognized by experts in those fields, and toxicologist and medical doctor relied on those experts' work to form their opinions of medical causation. *Berry v Armstrong Rubber Co. (1993, CA5 Miss) 989 F2d 822, 38 Fed Rules Evid Serv 1157, 23 ELR 21117,* reh den (1993, CA5 Miss) *1993 US App LEXIS 25888* and cert den *(1994) 510 US 1117, 127 L Ed 2d 386, 114 S Ct 1067.*

In suit to recover cleanup costs of site of mobile home park which had previously been site of petroleum production, testimony of mobile home park's expert that regional water quality board had ordered cleanup should have been admitted as prior inconsistent statement to impeach testimony of board's site cleanup unit chief that in first instance remediation would likely not have been required, since it created genuine issue of material of fact about whether mobile home park's response costs were necessary, and was part of basis for expert's opinion that contamination posed threat to public health or environment such that water quality board would require cleanup. *Carson Harbor Vill., Ltd. v Unocal Corp. (2001, CA9 Cal) 270 F3d 863, 2001 CDOS 9080, 2001 Daily Journal DAR 11365, 53 Envt Rep Cas 1321, 32 ELR 20180, 154 OGR 509,* cert den *(2002) 535 US 971, 152 L Ed 2d 381, 122 S Ct 1437, 55 Envt Rep Cas 2120.*

Where lessors of property upon which lessees operated gasoline station sought damages for loss of use of property after termination of lease during lengthy environmental investigation concerning possible contamination of property by fuel residue, testimony of lessors' expert environmental consultant was improperly excluded on ground that expert could only speculate concerning condition of property at termination of lease since soil tests were only conducted well before and well after termination; purpose of expert's testimony was not to show actual condition of property at termination but to establish uncertainty that existed during investigation due to potential contamination and lack of reliable data, and such testimony was relevant to show that such uncertainty prevented lessors from obtaining market value for property. *Jaasma v Shell Oil Co. (2005, CA3 NJ) 412 F3d 501, 67 Fed Rules Evid Serv 729, 35 ELR 20137.*

In action in which automobile manufacturers alleged that state regulations establishing greenhouse gas emission standards for new automobiles were preempted under Energy Policy and Conservation Act, *49 USCS §§ 32901-32919,* expert's testimony regarding climate change and its effect on state's forests and associated industries satisfied *Fed. R. Evid. 702*'s reliability requirement because expert used models which other scientists had determined were reliable and *Fed. R. Evid. 702* and *703* permitted expert to rely on global climate models that were created by other scientists. *Green Mt. Chrysler Plymouth Dodge Jeep v Crombie (2007, DC Vt) 508 F Supp 2d 295.*

43. Firearms and weapons

Expert in firearm origin, identification, and design classification could rely on trade publications and company catalogs in testifying as to origin of firearm because such publications were of type reasonably relied upon by experts in firearms field. *United States v Harper (1986, CA5 Miss) 802 F2d 115, 21 Fed Rules Evid Serv 1175.*

Proof of interstate nexus to firearm may be based upon expert testimony by law enforcement officer, and such opinion may be based on facts or data of type reasonably relied upon by experts in particular field, even if sources are not admissible evidence, such as hearsay. *United States v Gresham (1997, CA5 Tex) 118 F3d 258, 48 Fed Rules Evid Serv 110,* cert den *(1998) 522 US 1052, 118 S Ct 702, 139 L Ed 2d 645* and magistrate's recommendation, habeas corpus proceeding (2006, SD Ga) *2006 US Dist LEXIS 19783.*

Expert's reliance on information stamped on gun to testify that it had traveled in interstate commerce was proper, since, absent evidence to contrary, such information is type reasonably relied upon by firearms experts. *United States v Carter (2001, CA8 Mo) 270 F3d 731,* reh den, reh, en banc, den (2001, CA8) *2001 US App LEXIS 26515.*

Testimony by firearm and tool mark examiner for Bureau of Alcohol, Tobacco, and Firearms was not improperly admitted to establish interstate nexus requirement because it was based partly on hearsay, i.e., information he received

from technical advisor at Association of Firearms and Tool Mark Examiners to verify his conclusion, since it was type of information reasonably relied upon by experts in his field. *United States v Floyd (2002, CA11 Ga) 281 F3d 1346, 15 FLW Fed C 304.*

Defendant's convictions for receiving firearm while under indictment and making false statement to purchase firearm were proper pursuant to *Fed. R. Evid. 703* because, where expert's opinion testimony was inadmissible, hearsay upon which that opinion was based is also inadmissible. *United States v Dixon (2005, CA5 Tex) 413 F3d 520, 67 Fed Rules Evid Serv 630,* reh, en banc, den (2005, CA5) *163 Fed Appx 351* and affd (2006, US) *126 S Ct 2437, 165 L Ed 2d 299, 19 FLW Fed S 320.*

Where defendant was convicted of possession of firearm during drug-trafficking crime under *18 USCS § 924(c)(1)(a)(ii)* and being felon in possession of firearm under *18 USCS §§ 922(g)* and *924(e),* Alcohol Tobacco and Firearms (ATF) agent was properly allowed to testify as to interstate nexus element of federal firearms offense, which concerned specialized knowledge, using public and non-public ATF records. *United States v Cormier (2006, CA1 Me) 468 F3d 63.*

Defendant's proffered expert witness testimony concerning inaccuracies and incompleteness of National Firearms Registration and Transfer Record was not improperly excluded on grounds that witness did not qualify as expert under *Fed. R. Evid. 702* and *703* and that testimony could be excluded under *Fed. R. Evid. 403* because it would mislead jury and cause confusion; findings that testimony was not based upon sufficient facts or data, was not product of reliable principles and methods, and that witness had not applied principles and methods reliably to facts of case were not abuse of discretion; further, trial court found that techniques that witness used-his statistical analysis of Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) annual data and his correspondence with gun owners and ATF personnel-was untested and lacked peer review. *United States v Giambro (2008, CA1 Me) 544 F3d 26.*

44. Fires and arson

Government had reliable basis for admitting testimony of arson expert who testified about cause and origin of fire, which helped jury determine whether fire was caused by arson, since reports, photographs, and third-party observations on which he relied are types usually relied upon by experts in field of fire cause and origin. *United States v Gardner (2000, CA7 Ill) 211 F3d 1049, 54 Fed Rules Evid Serv 788.*

Expert's testimony was excluded where he intended to use lab report indicating that debris sample contained traces of gasoline as substantive evidence in support of his ultimate opinion that range fire was started as result of arson; lab report was hearsay and its prejudicial potential outweighed any probative value it might have. *Turner v Burlington Northern Santa Fe R.R. (2003, CA9 Mont) 338 F3d 1058, 2003 CDOS 7117, 2003 Daily Journal DAR 8964, 61 Fed Rules Evid Serv 1491.*

Unpublished Opinions

Unpublished: Where defendant was charged with attempting to manufacture methamphetamine based on testimony and items found at scene of fire, officer's testimony regarding conversation with on-scene fire investigator concerning acid-type bottle of yellow liquid was erroneously admitted hearsay, but error did not affect defendant's substantial rights, because there was other physical evidence at scene associated with manufacturing of methamphetamine. *United States v Ward (2006, CA10 Okla) 182 Fed Appx 779,* cert den (2006, US) *127 S Ct 422, 166 L Ed 2d 298.*

45. Gambling

Gambling expert's testimony based on results of analysis of betting slips and records seized from gambling operation was not hearsay where expert ascertained validity of computations by sample checks and personally verified there were twenty-three writers in the operation; his testimony did not go beyond reasonable reliance on reports of others permitted an expert who customarily relies on such reports. *United States v Morrison (1976, CA1 Mass) 531 F2d*

1089, 1 Fed Rules Evid Serv 1122, cert den *(1976) 429 US 837, 50 L Ed 2d 103, 97 S Ct 104.*

Expert witness was qualified under Daubert to offer opinion that defendant had gambling addiction to support downward departure for significantly reduced mental capacity under *USSG § 5K2.13. United States v Yi Ching Liu (2003, ED NY) 267 F Supp 2d 371.*

46. Historians

In action for trademark infringement, report from art historian about meanings of Chinese ideograms that were present on both product labels was relevant and admissible under *FRE 703. Friesland Brands, B.V. v Vietnam Nat'l Milk Co. (2002, SD NY) 221 F Supp 2d 457, 59 Fed Rules Evid Serv 1220.*

In denaturalization action, expert historian was permitted to testify about concentration camp systems in Germany and Nazi party organization that ran camp based on his examination of various records prepared by authorities at time, but he was not permitted to offer conclusions or opinions regarding immigrant. *United States v Wittje (2004, ND Ill) 333 F Supp 2d 737,* affd (2005, CA7 Ill) *422 F3d 479,* reh den, reh, en banc, den (2005, CA7 Ill) *2005 US App LEXIS 23665.*

47. Homicide

In murder case, defendant argued that hearsay relied upon by State's expert witness--which included witness's 1966 preliminary hearing testimony, defendant's statement in March 1967 he had shot victim, and testimony by witness who heard shooting--was not kind of evidence generally relied upon by pathologists; however, under *Fed. R. Evid. 703,* expert witnesses are permitted to draw on wide range of sources in forming their opinions, and district court did not err in holding expert did not exceed limits on what he could testify to. *United States v Avants (2004, CA5 Miss) 367 F3d 433,* reh den, reh, en banc, den (2004, CA5 Miss) *107 Fed Appx 448.*

Under Rule 703, medical examiner could testify about results of FBI toxicology report analyzing blood samples from victim of automobile accident in trial for negligent homicide, regardless of whether findings were admissible standing alone and regardless of whether examiner in fact relied on report in making his pathology findings, where information was known to examiner before hearing and was type of data on which he would rely in arriving at opinions in his expert field of pathology. *Government of the V.I. v Petersen (2001, DC VI) 131 F Supp 2d 707, 56 Fed Rules Evid Serv 8,* affd (2001, CA3 VI) *281 F3d 220.*

In murder prosecution where defendant raised insanity defense, there was no error in admitting opinion testimony by state psychiatrist although based in part on medical records not in evidence. *State v Clark (1975) 112 Ariz 493, 543 P2d 1122.*

48. Identification of persons

Restriction on scope of experts' testimony did not adequately protect defense where, inter alia, government failed to satisfy its threshold requirement of demonstrating that ion microprobic analysis experiments conducted by expert witnesses were sufficiently reliable to warrant introduction of their testimony comparing sample of defendant's hair with 3 hairs of unknown origin; fate of accused should not hang on his ability to successfully rebut scientific evidence bearing aura of trustworthiness where, in reality, expert is testifying on basis of unproved hypothesis which has yet to gain general acceptance. *United States v Brown (1977, CA6 Mich) 557 F2d 541, 2 Fed Rules Evid Serv 312.*

Documents containing known signature of party can be used by handwriting expert to provide basis for handwriting identification. *United States v Shields (1978, CA10 Utah) 573 F2d 18.*

Trial court did not err in permitting forensic pathologist to testify during murder trial that dental records were consistent with 2 bodies he examined, notwithstanding defendant's claim that both mouths were still in growth period

when records were made and dental change could be expected, since objection went to weight of evidence as distinguished from its admissibility. *State v Esslinger (1984, SD) 357 NW2d 525* (ovrld in part on other grounds as stated in *State v LaPlante (2002) 2002 SD 95, 650 NW2d 305).*

In *42 USCS § 1983* suit filed against police by man wrongly convicted of rape, under *Fed. R. Evid. 702*, *703*, and *704*, plaintiff's expert was permitted to testify as to whether showup identification procedure used to obtain positive identification from 13-year-old victim was impermissibly suggestive but not as to whether officers had fabricated evidence. *Bibbins v City of Baton Rouge (2007, MD La) 489 F Supp 2d 562.*

49.--Fingerprints

Whether electronic fingerprinting machine generated accurate image was authentication question unaffected by Daubert and fingerprint card could be authenticated under *Fed. R. Evid. 901(b)(4). United States v Lauder (2005, CA10 NM) 409 F3d 1254, 67 Fed Rules Evid Serv 486.*

As ACE-V fingerprint method was generally accepted, subject to peer review, testable (although untested), and, as practiced by FBI, had acceptable error rate, expert testimony was sufficiently reliable under *Daubert. United States v Sullivan (2003, ED Ky) 246 F Supp 2d 700,* subsequent app, judgment entered (2005, CA6 Ky) *431 F3d 976, 2005 FED App 478P*.

50.--Voice identification

District Court did not err in admitting testimony of expert on spectrographic voice identification, notwithstanding that evidence was based on spectrograph created by government's intended witness who was unable to testify, since defendant had access to material used by expert in forming his opinion and expert had based testimony at trial on his own analysis of spectrographs. *United States v Smith (1989, CA7 Ill) 869 F2d 348, 27 Fed Rules Evid Serv 938.*

51. Identification of things, generally

Documents containing known signature of party can be used by handwriting expert to provide basis for handwriting identification. *United States v Shields (1978, CA10 Utah) 573 F2d 18.*

Expert's identification of weapon as Hungarian-made machinegun may be based upon description of weapon testified to by layman. *United States v Mann (1983, CA4 SC) 712 F2d 941, 13 Fed Rules Evid Serv 751.*

Expert testimony that marks on ignitions of stolen cars may have been made by two of screwdrivers found in cars used by defendant in bank robberies was not rendered unreliable by evidence that marks may have been made during later removal of ignitions by mechanics. *United States v Murphy (1993, CA5 Tex) 996 F2d 94, 39 Fed Rules Evid Serv 253,* cert den *(1993) 510 US 971, 126 L Ed 2d 389, 114 S Ct 457.*

Expert's reliance on information stamped on gun to testify that it had traveled in interstate commerce was proper, since, absent evidence to contrary, such information is type reasonably relied upon by firearms experts. *United States v Carter (2001, CA8 Mo) 270 F3d 731,* reh den, reh, en banc, den (2001, CA8) *2001 US App LEXIS 26515.*

Admission of agent's testimony, which properly relied on statements of dynamite manufacturing employees under *Fed. R. Evid. 703* did not affect defendant's' substantial rights because only relevance of that testimony was whether dynamite had traveled in interstate commerce, and fact that dynamite was stolen in Arizona and found in New Mexico conclusively established that it did so; thus, even without agent's testimony jury surely would have concluded that dynamite had crossed state lines. *United States v Sinks (2007, CA10 NM) 473 F3d 1315.*

52. Insurance

Police detective's opinion that loss of jewelry did not constitute mysterious disappearance so as to be excluded from

insurance coverage, but rather was likely theft, was properly admitted since witness qualified as expert on theft in area, had specialized knowledge of jewel thieves and their methods of operation, and his investigation of insured's theft afforded him distinct knowledge of case outside of jury's common experience. *Sphere Drake Ins. PLC v Trisko (2000, CA8 Minn) 226 F3d 951, 55 Fed Rules Evid Serv 1034.*

District court properly denied insurer's motion to alter or amend judgment awarding oil companies attorney's fees on their claim that insurer breached its duty to defend them in underlying negligence action where testimony of attorney who participated in underlying negligence action was properly allowed under *Fed. R. Evid. 703* to offer expert testimony as to reasonableness of attorney's fees, and oil companies' failure to provide required information regarding attorney's expert testimony was harmless error under *Fed. R. Civ. P. 37(c)(1)* because they had notified insurer of their intention to call attorney, revealed nature of his testimony, and provided insurer copies of billing invoices upon which attorney was to rely for his testimony; using those invoices, insurer could have performed same calculations as attorney. *Primrose Operating Co. v Nat'l Am. Ins. Co. (2004, CA5 Tex) 382 F3d 546, 65 Fed Rules Evid Serv 205, 34 ELR 20081.*

In action in which liquidator of insurance estate filed suit against insurance company alleging that insurance company had failed to pay reinsurance due to estate, insurance company's motion to exclude testimony of liquidator's experts was denied in part with respect to one expert where expert's testimony did not reach what law required, but rather, touched upon what person familiar with custom of insurance industry would believe to be impact of law upon business. *Suter v Gen. Accident Ins. Co. of Am. (2006, DC NJ) 424 F Supp 2d 781.*

In dispute over life insurance benefits, it was not clear whether beneficiary's expert, insurance agent, was qualified to render expert opinion in field of insurance underwriting since he had never been underwriter, and it was not clear that he had knowledge, skill, experience, training, or education necessary to render opinion regarding insurance underwriting guidelines; furthermore, beneficiary failed to show that his testimony was based on admissible data or that facts and data he relied upon were of type reasonably relied upon by experts in field of insurance underwriting in forming opinions regarding underwriting practices. *Dracz v Am. Gen. Life Ins. Co. (2006, MD Ga) 426 F Supp 2d 1373,* summary judgment gr, motion to strike den, motion den (2006, MD Ga) *427 F Supp 2d 1165,* affd (2006, CA11 Ga) *201 Fed Appx 681.*

53. Literature and publications

Expert in firearm origin, identification, and design classification could rely on trade publications and company catalogs in testifying as to origin of firearm because such publications were of type reasonably relied upon by experts in firearms field. *United States v Harper (1986, CA5 Miss) 802 F2d 115, 21 Fed Rules Evid Serv 1175.*

There was no abuse of discretion in district court's admission of expert's expert testimony where (1) testimony following expert's reference to studies of doctor was not summary thereof, but rather description, based on expert's own expertise, of current state of medical research on subject of scarring, and (2) while it could have been that expert's opinion was formed, in part, on basis of published works of doctor and other researchers, scholarly literature was information that was reasonably relied upon by medical experts, pursuant to *Fed. R. Evid. 703. Ramirez v Debs-Elias (2005, CA1 Puerto Rico) 407 F3d 444, 67 Fed Rules Evid Serv 271.*

Rule 703 allows medical expert to base his opinion on data in technical publication even if such data is inadmissible in evidence. *Apicella v McNeil Laboratories, Inc. (1975, ED NY) 66 FRD 78, 19 FR Serv 2d 1360.*

On negligence claim that was filed because plaintiffs caught Legionnaire's Disease from spa, defendant's expert's consultation of journals and colleagues did not make his opinion inadmissible under *Fed. R. Evid. 703. Adel v Greensprings of Vt., Inc. (2005, DC Vt) 363 F Supp 2d 683.*

54. Medical malpractice

In medical malpractice action trial court did not err in ruling that expert could not rely upon note written by consulting physician in patient's chart where consulting physician did not have personal knowledge of alleged event and did not know where he obtained information recorded in note, since, although an expert is not confined to admissible evidence in forming an opinion under Rule 703, note contained in chart was not of type reasonably relied upon by experts in particular field in forming opinions or inferences upon subject. *Ricciardi v Children's Hospital Medical Center (1987, CA1 Mass) 811 F2d 18, 22 Fed Rules Evid Serv 752.*

In medical malpractice suit, letter from deceased's physician to doctor at medical department of deceased's employer stating that deceased's perforated peptic ulcer was due to prednisone was not admissible as type of information reasonably relied upon by expert since it was merely conclusory statement made by doctor who was not treating physician at time of illness in question for presumed purpose of obtaining employment disability benefits. *Gong v Hirsch (1990, CA7 Ill) 913 F2d 1269, 31 Fed Rules Evid Serv 762* (criticized in *State v Hinnant (2000) 351 NC 277, 523 SE2d 663).*

District court did not abuse its discretion when it admitted expert's testimony because expert's extensive investigation of records and reports fulfilled sufficient facts or data requirement, expert's reliance on reports prepared by others was plainly justified in light of custom and practice of medical profession and it was unrealistic to expect physician, as condition precedent to offering opinion testimony in personal injury case, to have performed every test, procedure, and examination himself; moreover, expert testified that orthopedists customarily formed opinions based on medical reports rather than seeking to verify independently underlying primary evidence, and given that testimony, district court was fully entitled to conclude that use of x-ray and MRI reports by witness had reliable basis in experience of medical profession; further, *Fed. R. Evid. 703* authorized experts to rely on materials compiled by others as long as those materials were of type reasonably relied upon by experts in particular field. *Crowe v Marchand (2007, CA1 RI) 506 F3d 13.*

Provision of state medical malpractice act which provides for pre-litigation hearing by medical review panel (composed of attorney and three health care providers) and which makes report of that panel admissible in any subsequent litigation, but provides that it should not be conclusive, amounts, at most, to another legislatively imposed exception to hearsay rule, and Rules 701-705 clearly contemplates such expert testimony. *Hines v Elkhart General Hospital (1979, ND Ind) 465 F Supp 421,* affd (1979, CA7 Ind) *603 F2d 646.*

In husband's suit asserting claims of negligence and wrongful death against U.S. in connection with wife's death after surgery in hospital operated by U.S., husband's failure to designate wife's treating physician as expert witness did not did not result in exclusion of physician's testimony under *Fed. R. Civ. P. 26(a)(2)(B), 37(c)(1)* because physician was treating doctor, not witness for purposes of *Fed. R. Evid. 703* who was being called just to offer expert testimony, and husband and his attorney did not appear to have acted in bad faith in failing to disclose physician before close of discovery. *Vaughn v United States (2008, SD Ga) 542 F Supp 2d 1331.*

55. Motor vehicle accidents

Rule 703 does not warrant admitting in evidence opinion of "accidentologist" as to point of impact in automobile collision based on statements of bystanders since requirement that data be of type reasonably relied upon is not satisfied; therefore, opinion of state trooper investigating accident is not admissible if it is not based on physical evidence and is derived primarily from story of biased witnesses; trial process is better served when witnesses are required to testify directly and to be subject to cross-examination. *Dallas & Mavis Forwarding Co. v Stegall (1981, CA6 Ky) 659 F2d 721, 9 Fed Rules Evid Serv 612.*

Plaintiffs could not rely on *Fed. R. Evid. 703* as grounds for admission of evidence of news articles and television programs related to prior accidents involving sport utility vehicle (SUV) involved in plaintiffs' rollover accident; even though Rule 703 allowed plaintiffs' experts to base their opinions on inadmissible evidence, such as news articles and television programs, provided that evidence was of type reasonably relied upon by experts in particular field, rule did

not allow admittance of evidence otherwise inadmissible. *Bado-Santana v Ford Motor Co. (2005, DC Puerto Rico) 364 F Supp 2d 79.*

56.--Toxicology

Under Rule 703, medical examiner could testify about results of FBI toxicology report analyzing blood samples from victim of automobile accident in trial for negligent homicide, regardless of whether findings were admissible standing alone and regardless of whether examiner in fact relied on report in making his pathology findings, where information was known to examiner before hearing and was type of data on which he would rely in arriving at opinions in his expert field of pathology. *Government of the V.I. v Petersen (2001, DC VI) 131 F Supp 2d 707, 56 Fed Rules Evid Serv 8,* affd (2001, CA3 VI) *281 F3d 220.*

Cumulative nature of expert testimony concerning conversion of vitreous humor sample from decedent to blood alcohol concentration and decedent's consumption of alcohol and level of intoxication on evening of his one-car accident did not justify wholesale exclusion of testimony in wrongful death action against automobile manufacturer where all three experts were qualified and had differing opinions as to reliability of converting vitreous humor fluid to alcohol content. *Olson v Ford Motor Co. (2006, DC ND) 411 F Supp 2d 1149,* motions ruled upon (2006, DC ND) *411 F Supp 2d 1137.*

57. Negligence

Under Rule 703, medical examiner could testify about results of FBI toxicology report analyzing blood samples from victim of automobile accident in trial for negligent homicide, regardless of whether findings were admissible standing alone and regardless of whether examiner in fact relied on report in making his pathology findings, where information was known to examiner before hearing and was type of data on which he would rely in arriving at opinions in his expert field of pathology. *Government of the V.I. v Petersen (2001, DC VI) 131 F Supp 2d 707, 56 Fed Rules Evid Serv 8,* affd (2001, CA3 VI) *281 F3d 220.*

On negligence claim that was filed because plaintiffs caught Legionnaire's Disease from spa, defendant's expert's consultation of journals and colleagues did not make his opinion inadmissible under *Fed. R. Evid. 703. Adel v Greensprings of Vt., Inc. (2005, DC Vt) 363 F Supp 2d 683.*

In breach of implied warranty, negligence, and strict liability action, expert's affidavit stating that bottle manufacturer's defects caused leaks in bottles and that seal could have been used was factual assertion and not legal conclusion that could have been determined by inspection of photographs of bottles and by information provided by manufacturer so as to comply with *Fed. R. Evid. 703. Helen of Troy, L.P. v Zotos Corp. (2006, WD Tex) 235 FRD 634.*

In action for negligence, strict liability, and breach of warranty, defendants' motion to exclude chemical analyses of laboratory was granted as to initial laboratory analysis where reliability of initial laboratory analysis was undermined by unexplainable level of imidacloprid found in control sample (153.6 ppb), especially considering that control sample was assumed clean and devoid of any imidacloprid. *Bauer v Bayer A.G. (2008, MD Pa) 564 F Supp 2d 365.*

In action for negligence, strict liability, and breach of warranty, defendants' motion to exclude opinion testimony of plaintiffs' expert was granted where (1) plaintiffs' expert could not simply assume that imidacloprid would accumulate in 25 honeybee wax without some scientific basis or validating methodology; expert generated testable hypothesis, but did not follow through; and (3) expert's failure to account for alternative causes of bee morbidity further supported determination that his methodology was unreliable. *Bauer v Bayer A.G. (2008, MD Pa) 564 F Supp 2d 365.*

58. Patents and infringement thereof

Patent holder's expert's legal conclusions regarding prosecution laches and alleged infringer's burden of proof were stricken, where expert offered no authority for his legal conclusions nor any reason to believe that they were reached by

employing reliable method of legal analysis; however, remainder of expert's declaration was admissible on issue of whether plaintiff's prosecution of patents was reasonable. *Reiffin v Microsoft Corp. (2003, ND Cal) 270 F Supp 2d 1132,* findings of fact/conclusions of law (2003, ND Cal) *281 F Supp 2d 1149, 69 USPQ2d 1413.*

Concerning patent claiming process for making E. coli cells with enhanced capacity to accept foreign deoxyribonucleic acid (DNA) or "improved competence," competitor failed to present evidence opposing patentee's claims of literal infringement and, in fact, contested only "improved competence" question which was adequately addressed, inter alia, by patentee's expert's affidavit, which was based on tests he arranged and controlled and was thus admissible; thus, competitor's product infringed on nine claims of patentee's patent. *Invitrogen Corp. v Biocrest Mfg., L.P. (2004, WD Tex) 2004 US Dist LEXIS 28975,* affd in part and revd in part on other grounds, remanded (2005, CA FC) *424 F3d 1374, 76 USPQ2d 1741.*

In patent holder's suit against competitor for patent infringement and tortious interference with contract and prospective business relations, expert opinion offered by competitor concerning invalidity of patent was not inadmissible under *Fed. R. Evid. 702*, *703*, and *403*, as expert's reliance on another person's recollection went to weight and not admissibility; opinion of competitor's damages expert was excluded to extent that it amounted to improper legal argument on patent and contract law. *Cryovac Inc. v Pechiney Plastic Packaging, Inc. (2006, DC Del) 430 F Supp 2d 346.*

In patent infringement action in which defendants filed motion requesting court to preclude plaintiff's infringement expert from offering certain testimony at trial, defendants' motion to exclude based on *Fed. R. Evid. 702* and *703* was denied where (1) expert's qualifications--his skill, education, experience and training--were uncontested; (2) expert's report contained sufficient data to support his conclusions and inadequate evidence had been presented to refute his methodology; and (3) defendants' arguments primarily focused on weight to be afforded expert's opinions, and not on reliability. *Inline Connection Corp. v AOL Time Warner Inc. (2007, DC Del) 472 F Supp 2d 604.*

Motion in limine was partially denied because, while it was argued that plaintiff's expert testimony was unreliable, unprecedented, and untested, rendering it inadmissible pursuant to *Fed. R. Evid. 104*, *702*, and *703*, expert testified that he knew of precedent in textbooks, professional publications, cases, or reported opinions utilizing his methodology for determining damages for patent infringement based on minimum royalty payments, and plaintiffs did not produce evidence or expert of their own, nor did they otherwise counter expert's methodology. *Edizone, L.C. v Cloud Nine (2008, DC Utah) 76 Fed Rules Evid Serv 779.*

59. Post-traumatic stress

District court abused its discretion in excluding testimony of physician who was expert on subject of electrical trauma, and who headed clinical team that examined and evaluated railroad worker allegedly injured by lightning, that worker suffered post-traumatic stress disorder and had lost function because of electrical injury; it was reasonable for the physician to rely on other qualified experts' examination of worker to reach her conclusions, and was entitled to rely on work of her team members in reaching her conclusion. *Walker v Soo Line R.R. (2000, CA7 Ill) 208 F3d 581, 54 Fed Rules Evid Serv 439,* cert den *(2000) 531 US 930, 148 L Ed 2d 250, 121 S Ct 311.*

In plaintiff's action against seminary alleging sexual abuse, expert may testify regarding post-traumatic stress disorder and repressed memory, where expert testified about several studies which validated theory of repressed memory, because there is sufficient scientific basis for theory; issue of probative value of expert's opinion in light of other experts' opinions on validity of theory will be for jury to decide. *Isely v Capuchin Province (1995, ED Mich) 877 F Supp 1055, 41 Fed Rules Evid Serv 1116.*

Psychologist, who did not file expert report required by *Fed. R. Civ. P. 26(a)(2)(B)*, was not precluded from testifying as to plaintiff's post-traumatic stress syndrome in action filed by plaintiff and his wife after they were injured by electrical line being installed by electrical company and tree service, as expert report was not necessary pursuant to

Fed. R. Civ. P. 26, testimony would be relevant to issues presented, and psychologist was qualified to testify. *Rogers v Detroit Edison Co. (2004, ED Mich) 328 F Supp 2d 687, 64 Fed Rules Evid Serv 1138.*

60. Product features, design or defects and products liability

Trial court does not abuse its discretion in excluding expert witness' opinion that television set is defective where expert's opinion is based on test with television set of same design and manufacture as one in question but appears to have been subjected to unreasonable abuse. *Horton v W. T. Grant Co. (1976, CA4) 537 F2d 1215.*

Expert's opinion, formed as result of examination of product, may be used to establish existence of defective condition. *Barris v Bob's Drag Chutes & Safety Equipment, Inc. (1982, CA3 Pa) 685 F2d 94, CCH Prod Liab Rep P 9385, 10 Fed Rules Evid Serv 1564.*

In products liability suit where plaintiff claimed to have been injured when reflector in light fell and struck her head, District Court abused its discretion in failing to address defendant's objection to expert testimony based on topographical brain mapping since Rule 703 contemplates that court play some role in assessment of expert testimony offered to jury and record did not sufficiently establish trustworthiness of procedure or acceptance in relevant scientific community. *Head v Lithonia Corp. (1989, CA10 Okla) 881 F2d 941, 28 Fed Rules Evid Serv 618, 105 ALR Fed 291.*

Plaintiffs who brought false advertising claims against competing producer of turfgrass seed and sod was properly permitted to introduce testimony by expert in turfgrass breeding and development even though expert's opinions were based on data collected by others, since expert testimony may be admissible on grounds that it is based on scientific method at least as it is practiced by recognized minority of scientists in field. *Southland Sod Farms v Stover Seed Co. (1997, CA9 Cal) 108 F3d 1134, 97 CDOS 1804, 97 Daily Journal DAR 3368, 42 USPQ2d 1097, 1997-1 CCH Trade Cases P 71742, 46 Fed Rules Evid Serv 797* (criticized in *McKendall v Crown Control Corp. (1997, CA9 Cal) 122 F3d 803, 62 Cal Comp Cas 1100, 97 CDOS 6326, 97 Daily Journal DAR 10329, CCH Prod Liab Rep P 15045, 47 Fed Rules Evid Serv 1)* and (criticized in *Desrosiers v Flight Int'l (1998, CA9 Cal) 156 F3d 952, 98 CDOS 7182, 98 Daily Journal DAR 9928, 49 Fed Rules Evid Serv 1585).*

Metallurgic engineer was not qualified to testify about industry standards for fire and burglar resistant safes; he had never before analyzed safe, engaged in manufacture or design of safes, or received any training regarding, nor was he personally familiar with standards and rating systems for fire protection capacity and burglary protection capacity used in safe industry, but acknowledged that his only knowledge of safes was acquired in preparation for trial. *Redman v John D. Brush & Co. (1997, CA4 Va) 111 F3d 1174, CCH Prod Liab Rep P 14925, 46 Fed Rules Evid Serv 1514, 32 UCCRS2d 785.*

District court did not abuse its discretion in striking original expert in product liability action where expert was not expert in design or engineering of stand-up lift trucks and had neither operated nor seen stand-up lift truck before case. *Anderson v Raymond Corp. (2003, CA8 Ark) 340 F3d 520, CCH Prod Liab Rep P 16711, 61 Fed Rules Evid Serv 1523.*

In this products liability action, despite *Fed. R. Evid. 407*'s general exclusion of subsequent remedial measure evidence, *Fed. R. Evid. 703* permitted plaintiff's expert to base his opinion on consideration of Safety Recall Instruction; it was reasonable for engineer to rely upon warning and alternative safety instruction subsequently issued by manufacturer in forming opinion that earlier service manual failed to provide adequate instructions and warnings to automobile technicians. *Pineda v Ford Motor Co. (2008, CA3 Pa) 520 F3d 237.*

Affidavit of products liability plaintiff's proposed engineering expert will not be stricken, even if 2-page affidavit, purporting to express opinion regarding whether grandfather clock was defectively designed or should have been sold with warnings attached, may be of limited probative value, because affidavit states that expert has reviewed discovery materials in case as basis for his opinion, and document need not be stricken simply because it may not be as helpful as plaintiff hoped it would be. *Beaver v Howard Miller Clock Co. (1994, WD Mich) 852 F Supp 631.*

Plaintiff's expert may testify as to purpose of alkoxylating wax, even though that opinion is based in part on hearsay discussions with unnamed employees of chemical suppliers, because it is also based on expert's review of chemical company report, his experience at chemical company, and his education, experience, and training. *Hot Wax, Inc. v Warsaw Chem. Co., Inc. (1999, ND Ill) 45 F Supp 2d 635, 1999-2 CCH Trade Cases P 72568, 51 Fed Rules Evid Serv 1398.*

Expert's opinions were not reliable because they were not grounded in sustainable methods and procedures, expert was unable to substantiate his testimony with any research or testing of any product at issue; rather, expert's testimony was mere subjective belief and unsupported speculation and, as such, was excluded pursuant to *FRE 703*. *Byrne v Liquid Asphalt Sys. (2002, ED NY) 238 F Supp 2d 491*, reconsideration den, request gr (2003, ED NY) *250 F Supp 2d 84.*

In trade dress infringement suit involving cookie design, court rejected manufacturer's argument that cookie company founder's declarations were entitled to little weight because founder did not have formal degrees. *Big Island Candies, Inc. v Cookie Corner (2003, DC Hawaii) 269 F Supp 2d 1236.*

Where one expert failed to conduct destructive testing, his non-destructive examination did not include removing and analyzing compressor section, and his reliance on another expert's suspect investigation, together with his failure to conduct any testing, impugned reliability of his analysis, company was entitled to exclude expert's testimony in products liability action. *Ind. Ins. Co. v GE (2004, ND Ohio) 326 F Supp 2d 844.*

In breach of implied warranty, negligence, and strict liability action, expert's affidavit stating that bottle manufacturer's defects caused leaks in bottles and that seal could have been used was factual assertion and not legal conclusion that could have been determined by inspection of photographs of bottles and by information provided by manufacturer so as to comply with *Fed. R. Evid. 703*. *Helen of Troy, L.P. v Zotos Corp. (2006, WD Tex) 235 FRD 634.*

Expert testimony based on customer complaints against automobile manufacturer was admissible in product liability action for purpose of explaining to jury basis for his opinion and to establish that manufacturer had notice of customer complaints, but expert was prohibited from discussing specific details of any of complaints because specific details would have been waste of time, would have confused jury, and would have bee prejudicial to manufacturer. *Olson v Ford Motor Co. (2006, DC ND) 410 F Supp 2d 855.*

Fact that hydraulic company's expert was not present and did not conduct pressure tests on allegedly defectively manufactured suction hoses himself did not render expert's opinion testimony unreliable or speculative for *Fed. R. Evid. 702* purposes; pursuant to *Fed. R. Evid. 703*, expert could rely upon scientific facts or data made known to him when formulating his expert opinion. *Don's Hydraulics, Inc. v Colony Ins. Co. (2006, DC Del) 417 F Supp 2d 601.*

In parents' action against car manufacturer and national car seller, that alleged that defective design in vehicle caused vehicle to roll in accident, killing parents' son, automotive expert's education and experience sufficiently qualified him under *Fed. R. Evid. 702* as expert regarding vehicle handling and safety, his opinion was reliably based on his knowledge of testing performed during vehicle model's design phase, expert's consideration of another expert's testing, which was itself inadmissible, was permissible under *Fed. R. Evid. 703*, and expert's testimony would be helpful to jury, satisfying requirement of fit in *Fed. R. Evid. 702*; however, because expert's conclusion that alternate design was not supported by testing and provided no specific information regarding whether and how such alternative design would have prevented accident from occurring, conclusory statement was exclude from expert's report and testimony. *Montgomery v Mitsubishi Motors Corp. (2006, ED Pa) 448 F Supp 2d 619.*

In action in which plaintiff filed suit against defendants, designer and installer, alleging that after defendants completed construction of aquarium, there remained certain defects to its design, which as result, caused entire 2,800 gallons of water to leak out and plaintiff to sustain substantial damages, testimony of defendants' expert, licensed structural engineer, was admissible and cross examination and careful instruction on burden of proof were appropriate

measures for attacking engineer's testimony where (1) issue of what caused glass to crack was at center of this case, because any finding of liability rested on answer to that question; and (2) it was obvious that any expert testimony shedding light on that issue would be helpful to trier of fact in deciding ultimate issue of this case. *Sachs v Reef Aquaria Design, Inc. (2007, ND Ill) 74 Fed Rules Evid Serv 1238.*

Pursuant to *Fed. R. Evid. 703*, expert witness' testimony was not inadmissable due to his use of four pound benchmark in evaluating test results of allegedly defective hook and loop straps; this benchmark did not render his expert testimony unreliable. *Lohmann & Rauscher, Inc. v Ykk (U.S.A.) Inc. (2007, DC Kan) 477 F Supp 2d 1147.*

Unpublished Opinions

Unpublished: Defense counsel's contention that expert's reference to firearm's stampings was inadmissible hearsay failed because expert did not testify as to specific markings on firearm but instead explained that markings formed basis for his evaluation, which was customary in expert's field of analysis; thus, these facts and data need not have been admissible in evidence, under *Fed. R. Evid. 703*. *United States v Flowers (2007, CA4 Va) 2007 US App LEXIS 12171.*

61.--Fires

Expert's testimony concerning function of firewall in preventing spread of fire into passenger compartment of automobile involved in collision is admissible where based upon published report by National Advisory Committee for Aeronautics concerning human survival in airplane crash fires since such report is information of type reasonably relied upon by experts in particular field. *Nanda v Ford Motor Co. (1974, CA7 Ill) 509 F2d 213, 19 FR Serv 2d 1521.*

Expert witness for customer in civil liability suit against television manufacturer cannot testify that television's wiring was dangerous and could cause fire where expert had not performed proper tests on television in question or television of like manufacturing history. *Horton v W. T. Grant Co. (1976, CA4) 537 F2d 1215.*

Expert testimony based partly on National Fire Protection Code concerning proper design of vent systems for underground gasoline tanks is admissible in action for injuries sustained in flash fire at service station where expert merely buttressed his own opinion by reference to publication in order to establish standard of care required in constructing gasoline tanks. *Frazier v Continental Oil Co. (1978, CA5 Miss) 568 F2d 378, 2 Fed Rules Evid Serv 1032.*

Statistics on accidents involving fires in trucks manufactured by defendant were properly excluded from product liability case where (1) they were prepared strictly in anticipation of litigation and based on information received from sister company, (2) only memorialization of analysis relied on by expert was extremely informal, (3) expert did not explain method of analysis, and (4) doubt existed as to relevance of expert's statistics and opinion. *Soden v Freightliner Corp. (1983, CA5 Tex) 714 F2d 498, CCH Prod Liab Rep P 9783, 14 Fed Rules Evid Serv 306* (criticized in *State v Rothlisberger (2004, Utah App) 2004 UT App 226, 95 P3d 1193, 203 Utah Adv Rep 19)* and (superseded by statute on other grounds as stated in *Ragland v State (2005) 385 Md 706, 870 A2d 609).*

62. Psychiatrists

Videotaped hypnotic session conducted with defendant by psychiatrist, apparently amounting to recitation of recollection of events of offense by defendant, was properly excluded by trial court, since defendant made no record in trial court as to whether or not expert in fact relied on videotaped session or whether experts in particular field practiced by expert reasonably rely on such facts or data, and expert was permitted to testify extensively as to other extra-judicial statements of defendant as basis for his opinion. *United States v Mest (1986, CA4 NC) 789 F2d 1069, 21 Fed Rules Evid Serv 1026,* cert den *(1986) 479 US 846, 93 L Ed 2d 102, 107 S Ct 163.*

Fact that Title VII plaintiff testified that she began having nightmares long after alleged harassment ended contradicted facts upon which psychiatrist said he relied did not mean that psychiatrist's testimony was not based on reliable data and should not have been admitted; psychiatrist disclosed underlying facts on which he relied and jury was

then free to credit or not to credit psychiatrist's testimony and diagnosis. *Skidmore v Precision Printing & Packaging, Inc. (1999, CA5 Tex) 188 F3d 606, 81 BNA FEP Cas 1252, 16 BNA IER Cas 1081, 77 CCH EPD P 46256, 53 Fed Rules Evid Serv 44.*

Statements by subject of psychiatric examination may be used by expert witness as basis for his opinion. United States ex rel. *United States ex rel. Edney v Smith (1976, ED NY) 425 F Supp 1038,* affd without op (1977, CA2 NY) *556 F2d 556,* cert den *(1977) 431 US 958, 53 L Ed 2d 276, 97 S Ct 2683.*

Expert's testimony about student's molestation by teacher was not inadmissible under *Fed. R. Evid. 703* because teacher provided no evidence that expert's opinions were not based on data or methodology reasonably relied upon by experts in field of psychiatry, and because it was necessary for court to hear what student told expert in order to properly evaluate his diagnosis; expert's testimony was also admissible under *Fed. R. Evid. 803(4)* for because he acted primarily as consulting physician for purposes of diagnosing student. *Sanchez v Brokop (2005, DC NM) 398 F Supp 2d 1177, 68 Fed Rules Evid Serv 691.*

In murder prosecution where defendant raised insanity defense, there was no error in admitting opinion testimony by state psychiatrist although based in part on medical records not in evidence. *State v Clark (1975) 112 Ariz 493, 543 P2d 1122.*

63. Psychologists

Where court concluded that social psychologist's testimony and conclusions were unreliable because they were neither grounded on sufficient data nor product of reliable methodology, it was unnecessary for court to determine whether psychologist's testimony fit facts at issue. *Pugliano v United States (2004, DC Conn) 315 F Supp 2d 197.*

Psychologist, who did not file expert report required by *Fed. R. Civ. P. 26(a)(2)(B),* was not precluded from testifying as to plaintiff's post-traumatic stress syndrome in action filed by plaintiff and his wife after they were injured by electrical line being installed by electrical company and tree service, as expert report was not necessary pursuant to *Fed. R. Civ. P. 26,* testimony would be relevant to issues presented, and psychologist was qualified to testify. *Rogers v Detroit Edison Co. (2004, ED Mich) 328 F Supp 2d 687, 64 Fed Rules Evid Serv 1138.*

Psychologist was permitted to rely on facts not in evidence, including statements made to her by three children, as basis for her opinion under *FRE 703,* but those facts were admissible only for purpose of evaluating reasonableness and correctness of psychologist's conclusions, and not to establish truth of matters asserted by children. *In re CA.S. (2003, Dist Col App) 828 A2d 184.*

Unpublished Opinions

Unpublished: District court did not abuse its discretion by precluding psychologist from testifying about defendant's childhood abuse as probative value of such testimony was minimal and did not substantially outweigh possible prejudice to government under *Fed. R. Evid. 703. United States v Copeland (2008, CA9 Cal) 2008 US App LEXIS 18182.*

64. Sanity, insanity and competency

Physician could predicate his opinion regarding defendant's sanity, in part, on recorded observation of Medical Center for Federal Prisoners staff members pursuant to Rule 703 since observations recorded by trained, though admittedly not expert staff personnel, are type of information which broadened scope of Rule 703 was intended to encompass. *United States v Bramlet (1987, CA7 Ill) 820 F2d 851, 22 Fed Rules Evid Serv 1511,* cert den *(1987) 484 US 861, 98 L Ed 2d 129, 108 S Ct 175.*

District court did not abuse its discretion in finding that probative value of defendant's fellow mental health facility

inmates' claims that defendant attempted to enlist them in his effort to appear insane substantially outweighed any prejudicial effect of statements, especially given that defendant had opportunity to cross-examine mental health expert regarding reasonableness of his reliance on statements and to downgrade credibility of such out-of-court statements in eyes of jury during closing argument. *United States v Leeson (2006, CA4 W Va) 453 F3d 631, 70 Fed Rules Evid Serv 784,* cert den (2007, US) *127 S Ct 1874, 167 L Ed 2d 365.*

Letters that defendant allegedly wrote while in prison and that government attempted to admit into evidence at competency hearing without corroborating their reliability or showing good cause why they were not discovered and disclosed months earlier were not suitable ground upon which to base expert opinion. *United States v Cole (2004, ED La) 339 F Supp 2d 760.*

In murder prosecution where defendant raised insanity defense, there was no error in admitting opinion testimony by state psychiatrist although based in part on medical records not in evidence. *State v Clark (1975) 112 Ariz 493, 543 P2d 1122.*

65. Statistics and statisticians

Statistics on accidents involving fires in trucks manufactured by defendant were properly excluded from product liability case where (1) they were prepared strictly in anticipation of litigation and based on information received from sister company, (2) only memorialization of analysis relied on by expert was extremely informal, (3) expert did not explain method of analysis, and (4) doubt existed as to relevance of expert's statistics and opinion. *Soden v Freightliner Corp. (1983, CA5 Tex) 714 F2d 498, CCH Prod Liab Rep P 9783, 14 Fed Rules Evid Serv 306* (criticized in *State v Rothlisberger (2004, Utah App) 2004 UT App 226, 95 P3d 1193, 203 Utah Adv Rep 19)* and (superseded by statute on other grounds as stated in *Ragland v State (2005) 385 Md 706, 870 A2d 609).*

Expert statistician's testimony did not support inference of age discrimination in university professor's age discrimination suit, since expert offered conclusory opinion on ultimate issue of discrimination, stating that there had been systematic effort over years artificially to depress professor's salary in comparison to those of younger faculty hired more recently; statement was expressly based upon incomplete information and did not contain any statistical analysis that would be competent summary judgment testimony from expert. *Ross v University of Texas (1998, CA5 Tex) 139 F3d 521, 79 BNA FEP Cas 788, 73 CCH EPD P 45351, 49 Fed Rules Evid Serv 545,* reh den (1998, CA5 Tex) *1998 US App LEXIS 12694.*

Federal Rule of Evidence 703 provides basis for constructing and applying reliable statistical model that will allow individualized and definite proof of damages sustained by members of class actions; even if not otherwise available and admissible, survey or polling techniques of type reasonably relied upon by experts in particular field can be constructed to determine point of fact relative to certain class members. *In re Sugar Industry Antitrust Litigation (1976, ED Pa) 73 FRD 322, 1976-2 CCH Trade Cases P 61215, 1 Fed Rules Evid Serv 1219, 22 FR Serv 2d 634.*

Employees' motion to strike portion of declaration of employer's statistical expert referring to store manager survey was granted because record demonstrated that survey was designed and administered by counsel for employer in midst of litigation, interviewees knew survey was related to sex discrimination litigation, and survey instrument exhibited bias on its face. *Dukes v Wal-Mart, Inc. (2004, ND Cal) 222 FRD 189, 85 CCH EPD P 41689.*

Analyses of expert, statistician, were sufficiently reliable, notwithstanding his reliance on his assistants, especially given fact that collaboration, such as occurred, was typical of experts in instant expert's field; further, issue of expert's ability to learn if programming underlying analysis contained serious error was for jury and not issue to be resolved under Daubert; expert did not need to personally write computer code in order for resulting analysis to be admissible. *McReynolds v Sodexho Marriott Servs. (2004, DC Dist Col) 349 F Supp 2d 30, 95 BNA FEP Cas 176, 66 Fed Rules Evid Serv 42.*

Statistician testifying for plaintiffs in antitrust litigation was entitled to reasonably rely on sulfuric acid pricing data

under *Fed. R. Evid. 703* without submitting those facts into evidence, particularly after defendants gave positive evaluation of reliability of those compilations as party admission under *Fed. R. Evid. 801(d)(2). In re Sulfuric Acid Antitrust Litig. (2006, ND Ill) 235 FRD 646.*

Unpublished Opinions

Unpublished: In appellant's suit to recover from motor company damages for decedent's death in vehicular accident, district court did not err in allowing, under *Fed. R. Evid. 703*, company's expert witness to testify on basis of statistical evidence because that expert testified that he both consulted and relied on statistics from federal government. *Maxwell v Ford Motor Co. (2005, CA5 Miss) 160 Fed Appx 420.*

66. Surveys, generally

Survey of consumers may be used as basis for expert testimony. *President & Trustees of Colby College v Colby College--New Hampshire (1975, CA1 NH) 508 F2d 804, 185 USPQ 65; Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v Steinway & Sons (1975, CA2 NY) 523 F2d 1331, 186 USPQ 436.*

Employees' motion to strike portion of declaration of employer's statistical expert referring to store manager survey was granted because record demonstrated that survey was designed and administered by counsel for employer in midst of litigation, interviewees knew survey was related to sex discrimination litigation, and survey instrument exhibited bias on its face. *Dukes v Wal-Mart, Inc. (2004, ND Cal) 222 FRD 189, 85 CCH EPD P 41689.*

Under *Fed. R. Evid. 703*, surveys facts and data need not be independently admissible at trial for expert to testify as to opinion based on them, so long as methodology is "of type reasonably relied upon by experts in particular field in forming opinions or inferences upon subject." *Johnson v Big Lots Stores, Inc. (2008, ED La) 13 BNA WH Cas 2d 992, 76 Fed Rules Evid Serv 372.*

Unpublished Opinions

Unpublished: *Cal. Bus. & Prof. Code § 651(h)(5)(A)*, which regulated advertisement by dentists of membership and specialty in, or credentials received from, national specialty board that was not recognized by American Dental Association, was improperly declared unconstitutional restriction of commercial speech, in violation of First Amendment, via summary judgment; while survey evidence that state dental board submitted to prove potentially misleading nature of dentists' advertisements that were prohibited by § 651(h)(5)(A) was properly admitted given that legislative history showed that significant motivation behind 2002 amendment to statute was concern over misleading advertisements, it was not inadmissible hearsay as it fell within exception in *Fed. R. Evid. 803(1)* for declarant's present sense impressions, and it was admissible under *Fed. R. Evid. 703* as basis of opinions that were offered by board's experts, such evidence was not determinative; evidence created genuine issue of material fact regarding potential of such advertisements to mislead. *Potts v Zettel (2007, CA9 Cal) 2007 US App LEXIS 2450.*

67. Tax matters

In prosecution for income tax evasion, District Court properly cautioned jury to essentially exclude accountant's expert testimony relative to defendant's net worth, which relied on statement of casual business acquaintance of defendant that had been stricken as hearsay, since although experts are sometimes allowed to refer to hearsay evidence as basis for testimony, such hearsay must be type of evidence reasonably relied upon by experts in particular field in forming opinions or inferences on subject. *United States v Scrima (1987, CA11 Fla) 819 F2d 996, 87-2 USTC P 9383, 23 Fed Rules Evid Serv 428, 60 AFTR 2d 5200.*

In defendant's fraud trial, pursuant to *Fed. R. Evid. 611(a)* and *703*, district court appropriately allowed jury to consider government's summary charts, which depicted allegedly fraudulent sales transactions and showed discrepancies in defendant's income tax reporting, during its deliberations, although prior introduction of underlying

documents would not have barred district court from admitting summaries under *Fed. R. Evid. 1006*. *United States v Milkiewicz (2006, CA1 Mass) 470 F3d 390.*

Under *Fed. R. Evid. 703*, summary chart prepared by IRS agent itemizing defendant's receipt of payments and net profits relative to sale of certain paintings was properly admitted into evidence to support agent's expert testimony; listed information was data already admitted into evidence, hence no problem arose under *Fed. R. Evid. 703*'s limitations concerning "otherwise inadmissible" evidence. *United States v DeSimone (2007, CA1 RI) 488 F3d 561, 99 AFTR 2d 3236.*

Court allowed expert witness, who was employee of IRS called to testify as expert in corporate and individual taxation, to form opinions in reliance on statements witness had heard from certain employees to extent permitted by *Fed. R. Evid. 703* because such reliance was not prohibited by *Confrontation Clause of Sixth Amendment. United States v Stone (2004, ED Tenn) 222 FRD 334, 94 AFTR 2d 5203.*

Government's proffered witnesses satisfied *Fed. R. Evid. 702* and *703* because government made sufficient showing of reliability of testimony that two well-experienced IRS agents would provide; agents were well-trained, experienced, educated in their area of expertise and had testified in numerous other cases that involved complex, closely-related tax issues, and agents' expertise would assist trier of fact in understanding and in weighing evidence and issues involved in complex tax fraud case before court. *United States v Vallone (2008, ND Ill) 101 AFTR 2d 1169*, post-conviction relief den, motion for new trial denied (2008, ND Ill) *2008 US Dist LEXIS 62351*.

Tax matters partner (TMP) was not entitled to exclude opinion testimony of Government's expert witness in TMP's action challenging IRS's proposed tax adjustments to TMP's 1999-2003 tax returns to disallow interest and depreciation deductions that TMP claimed regarding sale and leaseback of waste-to-energy facility in Germany; expert opinion of German tax lawyer, which directly supported Government's position that sale-in lease-out transaction could not justifiably be considered transfer of depreciable ownership interest in facility, was sufficiently reliable under *Fed. R. Evid. 702* and *703*. *KSP Invs. v United States (2008, ND Ohio) 101 AFTR 2d 1290.*

Testimony by certified public accountant who was qualified by U.S. Court of Federal Claims as expert in economic damages in regulated public utility industry that relied on work undertaken by claimant's director of taxes for calculating property taxes that were properly included in claim for damages resulting from U.S.'s breach of Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, codified at *10 CFR § 961.11*, was properly allowed under *Fed. R. Evid. 703*, which permits expert witness to rely upon facts or data made known to expert at or before hearing even if facts or data are not be admissible in evidence provided that they are of type reasonably relied upon by experts in that particular field; because data on which witness was relying in fact was of type reasonably relied upon by experts in accounting field, because deposition testimony of director of taxes, who did not testify at trial, was available to U.S. in preparation for its cross-examination of witness, and because defendant's counsel had full and fair opportunity to cross-examine witness about bases for his expert testimony, no error resulted from admission thereof. *Sys. Fuels, Inc. v United States (2007) 79 Fed Cl 37.*

68. Trademarks and infringement thereof

In trademark infringement action, reports of interviewees regarding confusion of trademarks are admissible under state-of-mind exception to hearsay rule, and reports may form basis of expert's opinion on likelihood of confusion of trademarks. *Piper Aircraft Corp. v Wag-Aero, Inc. (1984, CA7 Wis) 741 F2d 925, 223 USPQ 202, 16 Fed Rules Evid Serv 86.*

In action for trademark infringement, report from art historian about meanings of Chinese ideograms that were present on both product labels was relevant and admissible under *FRE 703*. *Friesland Brands, B.V. v Vietnam Nat'l Milk Co. (2002, SD NY) 221 F Supp 2d 457, 59 Fed Rules Evid Serv 1220.*

In trademark infringement suit between financial services companies that had same name, where defendants' name

was translation of its Russian name, plaintiff was entitled to introduce expert opinion of linguist as to proper translation of defendants' name because linguist's citation of certain Internet source did not render his opinion unreliable, particularly as source itself was not unreliable and linguist relied on other sources as well, and linguist properly applied his principles and method to facts of case. *Alfa Corp. v Oao Alfa Bank (2007, SD NY) 475 F Supp 2d 357.*

69.--Surveys

Survey evidence relevant to secondary meaning is admissible in trademark infringement action under Rule 703 where necessary foundation has been provided, and any deficiencies in such evidence go to its weight rather than to its admissibility. *Allstate Ins. Co. v All-State Realty, Inc. (1983, CA9 Cal) 15 Fed Rules Evid Serv 705.*

Survey in trademark infringement case suffered from two substantial flaws that showed it was untrustworthy and inadmissible; first, it suffered from uncontroverted definitional problems in that it was submitted to show mark should be classified as "suggestive" instead of "generic" or "descriptive," but it did not properly define any of classifications, and, second, universe chosen for survey was improper. *J & J Snack Foods Corp. v Earthgrains Co. (2002, DC NJ) 220 F Supp 2d 358, 65 USPQ2d 1897.*

In trademark infringement suit, consumer surveys conducted by retailer's expert witness to determine likelihood of consumer confusion with regard to satirist's use of retailer's slogans and advertising graphics were seriously flawed under *Fed. R. Evid. 703*; inter alia, surveys inadequately replicated market conditions, used overly broad consumer universe, and failed to take into account marketplace conditions and typical consumer behavior. *Smith v Wal-Mart Stores, Inc. (2008, ND Ga) 537 F Supp 2d 1302.*

70. Value of property

Trial judge properly admitted the testimony of expert witness, who estimated value of two properties producing oil and gas, after making personal inspection and consulting past production performance obtained from reports filed by the lease operators with state, core analyses data and well records obtained from records of two companies, data as to price of oil and gas obtained from pipeline run statements in records of the two companies, and data as to the operating costs from billing records from operators of the leases, to which defense objected on the grounds that the records on which opinion was based were not themselves offered in evidence. *United States v Williams (1971, CA5 Tex) 447 F2d 1285,* cert den *(1972) 405 US 954, 31 L Ed 2d 231, 92 S Ct 1168,* reh den (1972, US) *31 L Ed 2d 591, 92 S Ct 1308.*

In legal malpractice case arising out of sale of corporate assets, trial court did not abuse its discretion in admitting exhibit which had been compiled by expert from internal corporate records and on which expert relied in testifying as to value of assets. *Simpson v James (1990, CA5 Tex) 903 F2d 372,* reh den, amd on other grounds (1990, CA5) *1990 US App LEXIS 11486.*

Expert testimony of commodities analyst concerning economic motivation for smuggling gold dust should have been admitted to buttress heroin smuggling defendant's defense that he thought he was smuggling gold dust, not heroin; district court erred in not finding expert qualified since, although he was not gold exporter or trader, he was commodities analyst who specialized in precious metals and his consulting company tracked flow of precious metals around world. *United States v Diallo (1994, CA2 NY) 40 F3d 32, 40 Fed Rules Evid Serv 1044.*

Bankruptcy court did not err in permitting real estate appraiser to rely on report of private environmental assessment of property as well as letters from both federal and state environmental protection agencies in evaluating value of property in question, where it questioned appraiser whether other experts in field traditionally relied on such information and witness indicated they did. *City of Perth Amboy v Custom Distrib. Servs. (In re Custom Distrib. Servs.) (2000, CA3 NJ) 224 F3d 235, 44 CBC2d 1290, CCH Bankr L Rptr P 78246.*

Reliance by expert upon excerpts from opinion by another expert generated for purposes of other litigation was improper, and pertinent part of plaintiffs' accountant's report, referring to and relying upon opinion of expert in another

lawsuit as to valuation of company's residuals, was inadmissible, because (1) *Fed. R. Evid. 702* and *703* do not permit experts to rely upon excerpts from opinions developed by another expert for purposes of litigation, (2) case law supported conclusion that accountant's reliance upon excerpts from expert's opinion was improper, (3) it was unprecedented for auditor to rely upon excerpts from opinion given in adversarial litigation as basis for reaching audit opinion concerning company's financial statements, and (4) excerpts from such opinion were not of type reasonably relied upon by accountants in forming audit opinions. *In re Imperial Credit Indus. Sec. Litig. (2003, CD Cal) 252 F Supp 2d 1005, 55 FR Serv 3d 1121.*

In action in which plaintiff filed this class action against defendant, Treasurer of Commonwealth of Pennsylvania, for failing to pay him interest allegedly earned on his property confiscated pursuant to Disposition of Abandoned and Unclaimed Property Act (DAUPA), *72 Pa. Cons. Stat. §§ 1301.1* et seq., plaintiff's motion in limine to exclude portions of expert report and testimony was denied where (1) it was not necessary for expert to interview every individual involved in handling of plaintiff's property and claim in order to establish that his methodology was reliable; and (2) while there was no ascertainable rate of error associated with expert's methodology, another forensic accountant could repeat expert's interview methodology to ascertain its accuracy. *Smolow v Hafer (2007, ED Pa) 513 F Supp 2d 418,* summary judgment gr, judgment entered (2007, ED Pa) *2007 US Dist LEXIS 63417.*

Expert, who was certified public accountant and fraud examiner, had 25 years of experience, was valuation expert with special expertise in bankruptcy, and was consultant to debtor's committee of unsecured creditors, was qualified by education, training, skill, and to construct cash flow analyses under *11 USCS § 548* and render opinion on solvency of debtors at particular points in time; therefore, her testimony was admissible, pursuant to *Fed. R. Evid. 702* and *703* and Daubert/Kumho, in trustee's fraudulent transfer action because testimony was probative and not irrelevant or unreliable. *Sharp v Chase Manhattan Bank USA, N.A. (In re Commercial Fin. Servs.) (2005, BC ND Okla) 350 BR 520.*

Unpublished Opinions

Unpublished: In action by realty corporation and resort corporation against city, its employees, and its independent contractors, district court properly instructed jury that it could consider expert's opinion regarding value of corporations' roller coaster and information on which it was based, pursuant to *Fed. R. Evid. 703*, but that it was required to disregard any hearsay remarks by expert. *Wantanabe Realty Corp. v City of New York (2005, CA2) 159 Fed Appx 235.*

71.--Condemnation

Opinion of tax assessor that electric transmission line would not change assessed value of landowners' property for tax purposes was incompetent and inadmissible in condemnation proceeding; district court itself said that tax assessments are wrong in 98 percent of cases but nonetheless allowed evidence. *United States v 0.59 Acres of Land (1997, CA9 Ariz) 109 F3d 1493, 97 CDOS 2515, 97 Daily Journal DAR 4443, 46 Fed Rules Evid Serv 1122.*

District court did not abuse its discretion in excluding certain testimony of landowner's expert under *Fed. R. Evid. 702* and *703* in *U.S. Const. amend. V* eminent domain action involving condemnation of easement on land belonging to landowner for construction of power transmission lines; expert's testimony about specific electromagnetic field (EMF) measurements on land was properly excluded under *Fed. R. Evid. 402* and *403* because measurements could plausibly mislead jury into thinking that EMFs posed health risk to humans, and countervailing probative value of such measurements was minimal because landowner presented no evidence linking specific EMF levels with specific public perceptions or market effects. United States v 87.98 Acres (2008, CA9 Cal) 530 F3d 899.

Testimony of valuation witnesses in condemnation proceedings stating dollar amounts of comparable sales they considered in arriving at opinions of value was admissible under Rules 703 and 705. *Department of Transp. v Beeson (1985, 2d Dist) 137 Ill App 3d 908, 92 Ill Dec 700, 485 NE2d 511.*

72. Vocational experts

District court abused its discretion in permitting vocational expert to testify on personal injury plaintiff's future lost earnings, since testimony was based on unrealistic and speculative assumption that plaintiff would have been employed on permanent, full-time basis, year in and year out, had he not been injured. *Boucher v United States Suzuki Motor Corp. (1996, CA2 NY) 73 F3d 18, 43 Fed Rules Evid Serv 521.*

District court did not abuse its discretion in admitting injured worker's physicians' statements through expert testimony of vocational rehabilitation counselor; expert can rely upon matters that are not in evidence in forming opinion, and counsel conducted thorough cross-examination of expert concerning opinions of various doctors as to extent of plaintiff's impairment. *Brennan v Reinhart Institutional Foods (2000, CA8 SD) 211 F3d 449, 54 Fed Rules Evid Serv 535.*

73. Miscellaneous

Where experiment upon which expert bases testimony purports to simulate actual events and to show jury what presumably occurred at scene of accident, party introducing evidence has burden of demonstrating substantial similarity of conditions which may not be identical but should be sufficiently similar to provide fair comparison. *Jackson v Fletcher (1981, CA10 Okla) 647 F2d 1020, 7 Fed Rules Evid Serv 1839.*

District Court did not err in disregarding for purposes of summary judgment conclusion of experts as to acceptability of using seat belt around legs of mentally retarded adult to extent they assumed, without support in record, that resident was thus prevented from leaving his wheelchair. *Shaw by Strain v Strackhouse (1990, CA3 Pa) 920 F2d 1135, 31 Fed Rules Evid Serv 950, 118 ALR Fed 755.*

Nontestifying audiologist's report was not admissible other than to indicate information on which treating physician relied, but admission was harmless where physician testified that report was one source he relied upon and he read report into record without objection. *Boone v Moore (1992, CA8 Mo) 980 F2d 539, 37 Fed Rules Evid Serv 84.*

In voter's challenge to constitutionality of newly-installed touch screen voting system, trial court did not abuse its discretion by ruling voter's expert testimony inadmissible as excluded expert declarations were references to newspaper articles and unidentified studies absent any indication that experts normally relied upon them. *Weber v Shelley (2003, CA9 Cal) 347 F3d 1101, 2003 CDOS 9373, 62 Fed Rules Evid Serv 1194.*

District court properly allowed expert witness to testify as to defendants' check kiting scheme because witness testified that he had reviewed underlying materials that contained information inputted into Check Kiting Analysis Software used by FBI to review defendants' bank records; as result, expert properly formed expert opinion based on this evidence. *United States v Abboud (2006, CA6 Ohio) 438 F3d 554, 97 AFTR 2d 1142, 2006 FED App 66P,* reh den, reh, en banc, den (2006, CA6) *2006 US App LEXIS 14704* and reh den, reh, en banc, den (2006, CA6) *2006 US App LEXIS 14703* and cert den (2006, US) *127 S Ct 446, 166 L Ed 2d 309* and (criticized in *United States v Kaechele (2006, ED Mich) 466 F Supp 2d 868).*

District court did not err during personal injury action that employee filed against company that hired his employer to move textile equipment from mill, when it limited testimony by employee's expert, because there was no evidence that expert visited mill where employee was injured and expert's proffered testimony about safety practices followed by company that owned mill was largely immaterial to issues jury had to resolve. *Pelletier v Main St. Textiles, LP (2006, CA1 Mass) 470 F3d 48, 21 BNA OSHC 1793.*

District court erred in denying model train distributor's *Fed. R. Civ. P. 59(a)* motion for new trial after jury returned verdict in favor of its competitor in competitor's action alleging unjust enrichment and misappropriation of trade secrets related to design drawings; district court erred under *Fed. R. Evid. 703* in allowing competitor's expert to testify as to conclusions drawn by expert who testified in related judicial proceedings in South Korea because testimony as to South Korean expert's report and conclusions was hearsay under *Fed. R. Evid. 801(c). Mike's Train House, Inc. v Lionel, L.L.C. (2006, CA6 Mich) 472 F3d 398, 81 USPQ2d 1161, 2006 FED App 457P.*

Where plaintiffs, parents of boy allegedly killed by persons associated with Islamic terrorist group Hamas, sued defendant foundation, alleged Hamas support group, where expert on terrorism in Arab world, fluent in Arabic, explained that websites of Islamic movements and Islamic terrorist organizations had long been accepted by security experts as valid, important, and indeed indispensable sources of information, it was permissible to admit expert's testimony as to who killers had been even though expert had relied heavily on information set forth on certain websites that he attributed to *Hamas. Boim v Holy Land Found. for Relief & Dev. (2008, CA7 Ill) 549 F3d 685.*

In action against defendant Socialist People's Libyan Arab Jamahiriya (Lybia) for hostage taking under *28 USCS § 1605(a)(7),* (e)(2), part of Foreign Sovereign Immunities Act, expert's report and State Department's Patterns of Global Terrorism report were properly admitted to find evidence of quid pro quo to support allegations that plaintiffs, husband and wife, were taken as human shields; denial of Lybia's motion to dismiss was affirmed. *Simpson ex rel. Estate of Mostafa Fahmy Karim v Socialist People's Libyan Arab Jamahiriya (2006, App DC) 470 F3d 356.*

In investor's proceeding seeking to recover $ 5.6 million in investment losses from corporation and broker, arbitration panel did not deprive investor of fair hearing by declining to hear from his second expert witness, who opined that broker's notes were backdated and that methodology used by corporation's expert witness to find that notes were properly dated was flawed; although second expert's testimony as to methodology was admissible under *Fed. R. Evid. 703,* by time panel decided not to hear from second expert, it was in position to conclude that methodology was no longer material to question of broker's credibility. *Lessin v Merrill Lynch, Pierce, Fenner & Smith, Inc. (2007, App DC) 481 F3d 813.*

Expert testimony of broadcast engineer was sufficient to warrant its consideration by magistrate in preliminary injunction hearing, where he testified that (1) companies he used to create maps were reasonably relied upon by experts in his field, and (2) he reviewed maps and made corrections based upon his 50 years of expertise in broadcast engineering and his personal knowledge of television markets around world, because maps were not inadmissible hearsay, and testimony surrounding maps was admissible under *FRE 703.* CBS, Inc. v PrimeTime 24 J.V. (1998, SD Fla) 9 *F Supp 2d 1333, 47 USPQ2d 1260, 12 FLW Fed D 40,* motion gr, in part, request den (1998, SD Fla) *1998 US Dist LEXIS 21944,* ops combined at (1998, SD Fla) *76 F Supp 2d 1333,* findings of fact/conclusions of law (1998, SD Fla) *48 F Supp 2d 1342,* judgment entered (1998, SD Fla) *1998 US Dist LEXIS 20488.*

In action for removal of structures and obstructions from landowner's property over which government owned flowage easement rights, affidavit by government's expert's in support of government's motion for summary judgment was based on expert's personal knowledge; expert personally examined data that was made known to him and formed expert opinion based on his own assessment of data within his area of expertise. *United States v Foresome Entm't Co. (2002, ND Ohio) 318 F Supp 2d 548.*

Where court excluded ALJ's initial decision in prior Federal Trade Commission proceeding against plaintiff, because initial decision was not admissible as public report and because jury likely would have given undue weight to findings of ALJ, plaintiff's expert witnesses were precluded from referencing initial decision; any value initial decision could have had in assisting jury adequately to evaluate expert witness testimony offered by plaintiff was offset by significant prejudice. *Rambus, Inc. v Infineon Techs. AG (2004, ED Va) 222 FRD 101.*

Relying on interviews of patients, as to whether procedure was performed, was not acceptable basis of opinion testimony under *Fed. R. Evid. 703* where interviews were not of type reasonably relied upon by experts in particular field in forming opinions or inferences upon subject, periodontists did not generally make decisions on whether other dentists performed certain procedures, and periodontists did not quiz their patients on types of information that expert witness elicited from defendants' patients. *United States v Reicherter (2004, ED Pa) 318 F Supp 2d 265.*

Marshal indicated, at least by inference, that information that he relied upon to make his security recommendations was of type that was reasonably relied upon by experts in particular field in forming opinions or inferences upon subject; thus, his opinion or inference that specific restraints on defendant were required during trial was admissible,

even if facts or data upon which his opinion or inference was based were not. *United States v Honken (2004, ND Iowa) 378 F Supp 2d 1010*, request gr, objection overruled (2004, ND Iowa) *378 F Supp 2d 1040.*

Federally certified court interpreter with seventeen years of experience was qualified under *Fed. R. Evid. 702* to render opinion about meaning of slang terms in transcripts that were to be used in defendants' criminal prosecution; additionally, interpreter's research on-line and in books in addition to her work with gang members were reliable methods for interpreters to use in preparing interpretative services and thus allowed her to rely on hearsay to form her opinions under *Fed. R. Evid. 703. United States v Rivera (2005, ED Va) 442 F Supp 2d 274.*

Court denied employer's motion to strike affidavits and declarations in support of employees' motion for conditional certification of collective action under Fair Labor Standards Act (FLSA), *29 USCS §§ 201* et seq., even though they contained inadmissible hearsay because at this preliminary stage and for these preliminary purposes, employees did not need to come forward with evidence in form admissible at trial; moreover, *Fed. R. Evid. 703* permitted expert to base his testimony on hearsay provided that inadmissible hearsay was not disclosed to jury by expert. *White v MPW Indus. Servs. (2006, ED Tenn) 236 FRD 363.*

In action in which plaintiff stock purchasers filed suit against defendant corporation and eight individuals alleging violations of §§ 11, 12(a)(2) and 15 of Securities Act of 1933, §§ 10(b) and 20(a) of Securities Exchange Act of 1934, S.E.C. Rule 10b-5, court's consideration of plaintiffs' expert's affidavit and his opinions contained therein was permissible under Federal Rules of Evidence where (1) defendants did not dispute that expert's proffered opinions were relevant and that he had adequate background and practical experience in field of business valuation and market efficiency; and (2) expert's analysis was based upon relevant and reliable data, which defendants did not appear to dispute. *In re Flag Telecom Holdings, Ltd. Sec. Litig. (2007, SD NY) 245 FRD 147.*

In trademark infringement suit between financial services companies that had same name, plaintiff was entitled to introduce expert opinion of insurance company executive regarding issues that he considered important to plaintiff's continuance as successful and growing financial services company, which included increasing overlap between services provided by insurance companies and those provided by banks, importance of brand identity in financial services industry, and importance of ratings in financial services and insurance industry, because (1) expert was qualified to offer expert opinion on these matters; (2) his opinions were sufficiently supported; (3) he adequately applied his opinions to facts of case, (4) his opinions on reinsurance were relevant to case, and (5) while these objections did affect admissibility of expert's testimony, defendants could still raise these issues to challenge expert's testimony. *Alfa Corp. v Oao Alfa Bank (2007, SD NY) 475 F Supp 2d 357.*

Lessee was not entitled to summary judgment in lessor's action alleging breach of contract with regard to maintenance and repair obligations and breach of contract for failure to obtain consent for assignment; lessor's experts were qualified under *Fed. R. Evid. 703* to give expert opinion that problems with facilities were not attributable to ordinary wear and tear and that lessee's alleged breach diminished facilities' fair market value, and "owner-opinion" rule permitted sole shareholder of lessor corporation to testify under Ohio R. Evid. 701 regarding value of facilities before and after lessee's occupancy; because lease contained language prohibiting assignment of both contractual rights and duties, traditional rule of interpretation governing general anti-assignment provisions was inapplicable in determining whether lessee's assignment of security deposit constituted breach of lease. *Ohio Envtl. Dev. Ltd. P'ship v Envirotest Sys. Corp. (2007, ND Ohio) 478 F Supp 2d 963.*

In action in which defendant was charged with securities fraud, defendant's motion to exclude testimony of government's proposed expert was granted in part and denied in part where (1) government's proposed expert's had sufficient expertise and experience in economics to perform economic analyses of stock price movements; (2) government's expert's would be admissible only to refute argument, if one was made, that market for company's stock was not efficient or that extrinsic market factors account for observed stock price drop; and (3) to extent government sought to raise new arguments, to make new factual proffer, or to advance new legal theory in post-hearing submission, such portions were beyond scope of ordered briefing. *United States v Schiff (2008, DC NJ) 538 F Supp 2d 818.*

In action in which defendant was charged with securities fraud, government's motion to exclude proposed defense expert testimony was denied where (1) one expert's opinions regarding what information was important to investors was at heart of dispute about materiality at issue in this case and were thus relevant; and (2) to extent that second expert's opinion was based on second expert's knowledge of business practices within industry, such testimony was permissible. *United States v Schiff (2008, DC NJ) 538 F Supp 2d 818.*

In fraudulent transfer proceeding, plaintiffs' proposed expert could testify on issue of whether plaintiffs received reasonably equivalent value for payments made by plaintiffs to defendant for purchase of portfolios of fresh charged-off credit card accounts because she had extensive experience in business of purchasing and selling of charged-off debt, her approach to evaluating accounts from perspective of what reasonable debt buyer could expect to collect was reliable and accepted method of determining value of charged-off credit card accounts, and one actually used by reasonable debt buyers in pricing portfolios, and her testimony would assist court in understanding evidence relevant to evaluating whether plaintiffs received reasonably equivalent value. *Sharp v Chase Manhattan Bank USA, N.A. (In re Commercial Fin. Servs.) (2005, BC ND Okla) 350 BR 559.*

It was error for bankruptcy court to rely on testimony provided by supplier to prove "ordinary course of business" defense in proceeding under *11 USCS § 547* because testimony offered by expert did not meet Daubert standard, as required by *Fed. R. Evid. 702* and *703* when expert's testimony about industry standard for payment of invoices to international suppliers was speculative and not grounded in reliable data. *Murray, Inc. v Agripool, SRI (In re Murray, Inc.) (2008, BAP6) 392 BR 288, 50 BCD 69.*

B.Cause of Injury or Death 74. Drugs

Fact that defendant drug manufacturer in action for injuries caused by DES was able to undercut some of research basis for physicians' expert opinions does not affect admissibility of opinions, but affects weight and credibility of testimony. *Payton v Abbott Labs (1985, CA1 Mass) 780 F2d 147, CCH Prod Liab Rep P 10924, 19 Fed Rules Evid Serv 1077.*

In medical malpractice suit, letter from deceased's physician to doctor at medical department of deceased's employer stating that deceased's perforated peptic ulcer was due to prednisone was not admissible as type of information reasonably relied upon by expert since it was merely conclusory statement made by doctor who was not treating physician at time of illness in question for presumed purpose of obtaining employment disability benefits. *Gong v Hirsch (1990, CA7 Ill) 913 F2d 1269, 31 Fed Rules Evid Serv 762* (criticized in *State v Hinnant (2000) 351 NC 277, 523 SE2d 663).*

Expert testimony proffered by victim of renal failure against manufacturer of ibuprofen tablets is inadmissible under *FRE 703* and *704*, where proffered testimony would be attempt to establish link between use of ibuprofen and subsequent renal failure, because such testimony would not be helpful since expert cannot state that injury was caused by ibuprofen as there is no such known reaction and expert's testimony is only hypothetical explanation for injury. *Porter v Whitehall Lab., Inc. (1992, SD Ind) 791 F Supp 1335, CCH Prod Liab Rep P 13325, 36 Fed Rules Evid Serv 464*, affd (1993, CA7 Ind) *9 F3d 607, CCH Prod Liab Rep P 13685, 38 Fed Rules Evid Serv 925* (criticized in *Alder v Bayer Corp. (2002) 2002 UT 115, 61 P3d 1068, 461 Utah Adv Rep 11).*

Summary judgment is inappropriate in federal tort claim arising out of Naval hospital patient's allegedly wrongful death from pulmonary hypertension after receiving excessive amounts of drug Danocrine to treat endometriosis, where plaintiff's experts have been shown to possess requisite scientific expertise and experience to qualify as experts under Connecticut law, their testimony is based on well-founded scientific methodologies, and they have testified that proximate cause exists because there is temporal relationship between overdose and onset of terminal disease, because plaintiffs' experts' testimony satisfies admissibility requirements of *FRE 403, 702*, and *703*. *Zuchowicz v United States (1994, DC Conn) 870 F Supp 15*, judgment entered (1996, DC Conn) *1996 US Dist LEXIS 20179*, affd (1998, CA2 Conn) *140 F3d 381, 49 Fed Rules Evid Serv 495.*

In litigation relating to phenylpropanolamine (PPA), plaintiffs' expert testimony was admissible as to association between PPA and hemorrhagic stroke in women between ages of 18 and 49 where testimony was based on reliable epidemiologic study and where sheer volume of case reports, case series, and spontaneous reports associating PPA with hemorrhagic stroke in women was significant. *In re Phenylpropanolamine Prods. Liab. Litig. (2003, WD Wash) 289 F Supp 2d 1230.*

In products liability actions in which patients alleged that manufacturer that used warning labels approved by FDA provided inadequate warnings about diabetes and weight gain risks posed by antipsychotic drug, opinions of four experts were admissible because practicing endocrinologist's opinion indicated thorough understanding of diabetes, one doctor had expertise in psychopharmacology, background of one doctor qualified him to testify as to how FDA operated, and another doctor had conducted research concerning how antipsychotic drugs influenced glucose and fat metabolism; however, expert was not permitted to testify that some drug studies included work of researchers sanctioned or indicted, because such testimony was likely to inflame jury and was not useful. *Zyprexa Prods. Liab. Litig. v Eli Lilly & Co. (2007, ED NY) 489 F Supp 2d 230, CCH Prod Liab Rep P 17759,* partial summary judgment den, summary judgment den, Certificate of appealability denied (2007, ED NY) *2007 US Dist LEXIS 46710.*

75.--Birth defects

In products liability case arising out of birth defects allegedly resulting from drug mother ingested during pregnancy, defendant's sales charts containing grafts plotting rate of birth defects in general population, number of tablets of drug in question distributed, and number of new therapy starts were admissible since they were of type reasonably relied upon by experts who studied birth defects. *Wilson v Merrell Dow Pharmaceuticals, Inc. (1990, CA10 Okla) 893 F2d 1149, 29 Fed Rules Evid Serv 427.*

Epidemiological studies of link between Benectin and birth defects was type of data reasonable expert in field would use in rendering opinion on issue of causation of birth defects and District Court's disallowance of testimony of expert basing his testimony on it was therefore erroneous; prior judicial opinions on admissibility of such evidence turning on statistically significant link between drug and birth defects go to weight of evidence, not admissibility of expert's testimony based on it. *DeLuca v Merrell Dow Pharmaceuticals, Inc. (1990, CA3 NJ) 911 F2d 941, CCH Prod Liab Rep P 12570, 31 Fed Rules Evid Serv 593.*

It was erroneous to permit expert to testify that Bendectin is human teratogen which causes birth defects since such opinion is without scientific foundation in face of wealth of published epidemiological data to contrary. *Ealy v Richardson-Merrell, Inc. (1990, App DC) 283 US App DC 137, 897 F2d 1159, CCH Prod Liab Rep P 12400, 29 Fed Rules Evid Serv 897,* cert den *(1990) 498 US 950, 111 S Ct 370, 112 L Ed 2d 332.*

Teratologist's testimony that drug caused plaintiff's birth defects was admissible as scientific knowledge since expert testified repeatedly that he employed generally accepted methodology, which was confirmed in peer-reviewed journal presented to district court, there was no overwhelming body of contradictory epidemiological evidence to expert's conclusion, expert examined relevant studies, noted their limitations, and followed methodology accepted by teratologists to reach his conclusion; additional indicia of reliability of expert's testimony included fact that many years earlier he testified, at FDA's invitation, on causation of birth defects, and he was expert with significant stature and expertise in area of birth defects. *Ambrosini v Labarraque (1996, App DC) 322 US App DC 19, 101 F3d 129, CCH Prod Liab Rep P 14801, 45 Fed Rules Evid Serv 889,* cert dismd *(1997) 520 US 1205, 117 S Ct 1572, 137 L Ed 2d 716.*

In products liability action against manufacturer of drug alleged to have caused birth defects, testimony of manufacturer's expert witnesses concerning their clinical experiences falls within Rule 703, in that their experiences formed basis for their opinions. In re Richardson-Merrell, Inc. "Bendectin" *Products Liability Litigation (1985, SD Ohio) 624 F Supp 1212,* affd (1988, CA6 Ohio) *857 F2d 290, 11 FR Serv 3d 1267,* cert den *(1989) 488 US 1006, 102 L Ed 2d 779, 109 S Ct 788,* dismd (1990, DC Dist Col) *1990 US Dist LEXIS 11504.*

Scientific evidence is inadmissible where parents of child with birth defect attempted to introduce criticisms of methodology of earlier studies of drug's teratogenic effect and extrapolations of animal studies involving drug, because such criticisms cannot be relied on to establish causation and animal studies were performed with far higher doses than those given therapeutically and therefore proffered evidence could neither form basis for expert opinion nor create genuine issue for trial. *Lynch v Merrell-National Laboratories Div. of Richardson-Merrell, Inc. (1986, DC Mass) 646 F Supp 856, CCH Prod Liab Rep P 11177,* affd (1987, CA1 Mass) *830 F2d 1190, CCH Prod Liab Rep P 11553, 24 Fed Rules Evid Serv 152.*

Prescription drug manufacturer is entitled to summary judgment against claim that its pregnancy drug caused deformities to extremities of child, where parents' case relies on expert-opinion testimony to establish causal relationship between drug use and birth defects, because experts' opinions (based on animal and chemical studies, and criticisms of epidemiological data) are inadequate and inadmissible under Rule 703 in light of over 30 studies concluding that no statistically significant association exists between drug and birth defects. *Turpin v Merrell Dow Pharmaceuticals, Inc. (1990, ED Ky) 736 F Supp 737, 30 Fed Rules Evid Serv 862,* affd (1992, CA6 Ky) *959 F2d 1349, CCH Prod Liab Rep P 13088, 34 Fed Rules Evid Serv 1206,* cert den *(1992) 506 US 826, 113 S Ct 84, 121 L Ed 2d 47.*

Parents' products liability case against manufacturer of morning sickness drug which allegedly caused child's Poland's syndrome will not be summarily dismissed, even though epidemiological studies overwhelmingly support manufacturer's assertion of no causal connection between its drug and birth defects, because parents' experts will dispute that assertion based on animal studies and chemical analysis, which at this point cannot be deemed inadmissible. *Longmore v Merrell Dow Pharmaceuticals, Inc. (1990, DC Idaho) 737 F Supp 1117, CCH Prod Liab Rep P 12618, 30 Fed Rules Evid Serv 872.*

Parents of child born with birth defects may not present doctors who would testify that mother's use of vaginal spermicide caused child's trisomy--18, where experts would rely on evidence from fields of human genetics and epidemiology to prove causation, because basis of their opinions is not "of type reasonably relied upon by experts in particular field" and opinions should be excluded under Rule 703. *Smith v Ortho Pharmaceutical Corp. (1991, ND Ga) 770 F Supp 1561, 33 Fed Rules Evid Serv 511.*

76.--Vaccines

Expert opinions that administration of yellow fever and smallpox vaccines on same day caused plaintiff's encephalomyelitis were based on type reasonably relied upon by experts in field and admissible to rebut government's summary judgment motion. *Mendes-Silva v United States (1993, App DC) 299 US App DC 39, 980 F2d 1482, 37 Fed Rules Evid Serv 1046.*

In products liability case involving swine flu vaccination, testimony of expert witness concerning incidence of particular disease caused by vaccination is inadmissible where it is based upon data which is not reasonably relied upon by experts in neurology and epidemiology. *In re Swine Flu Immunization Products Liability Litigation (1981, DC Colo) 508 F Supp 897,* affd (1983, CA10 Colo) *708 F2d 502, 13 Fed Rules Evid Serv 160.*

Given that individuals conceded that they could not prove that child's autism was caused by thimerosal in drug companies' vaccines and that co-morbid conditions, such as mental retardation, were regularly associated with autistic patients who had never been exposed to vaccines, inability of individuals' experts to rule in thimerosal as cause of autism rendered inadmissible his opinion that thimerosal, but not whatever caused autism, was specific cause of co-morbidities regularly associated with autism. *Easter v Aventis Pasteur, Inc. (2005, ED Tex) 358 F Supp 2d 574.*

77. Exposure to harmful substances

Medical expert opinion testimony that plaintiff's leukemia was caused by use and administration of veterinary chloramphenicol was properly admitted where scientific studies and case histories reported in generally accepted medical literature suggested association between chloramphenicol and blood disorders. *Osburn v Anchor Laboratories,*

Inc. (1987, CA5 Tex) 825 F2d 908, CCH Prod Liab Rep P 11552, 23 Fed Rules Evid Serv 1061, reh den, motion gr (1987, CA5 Tex) *834 F2d 425* and cert den *(1988) 485 US 1009, 108 S Ct 1476, 99 L Ed 2d 705.*

Administrative law judge's discrediting of medical expert evidence was not harmless given expert's superior credentials and emphatic and reasoned conclusion that miner was not disabled by black lung disease; administrative law judge incorrectly believed that expert may not base opinion on materials that are not part of record. *Peabody Coal Co. v Director, Office of Workers' Compensation Programs, United States DOL (1999, CA7) 165 F3d 1126.*

Where inmate alleged that prison officials did not adequately protect inmate from exposure to second-hand cigarette smoke, it was error to exclude testimony of inmate's expert because expert was qualified to testify regarding deleterious health effects of environmental tobacco smoke (ETS); however, error was harmless because inmate could not meet objective requirement of showing that inmate was exposed to unreasonably high levels of *ETS. Larson v Kempker (2005, CA8 Mo) 405 F3d 645, 67 Fed Rules Evid Serv 162,* amd on other grounds (2005, CA8 Mo) *414 F3d 936* and vacated without op, recalled (2005, CA8 Mo) *2005 US App LEXIS 14788.*

Expert witness's opinion is not admissible under *FRE 703*, where expert planned to testify that decedent's exposure to radiant energy emitted by Video Display Terminals at her work caused her cervical cancer, because expert's opinion is not based on reliable methodology since he cited no published studies, scientific data, or other authority upon which he relied in forming his theory. *Hayes v Raytheon Co. (1992, ND Ill) 808 F Supp 1326, 37 Fed Rules Evid Serv 233,* affd (1994, CA7 Ill) *1994 US App LEXIS 8415.*

In plaintiff employee's product liability action against defendant manufacturers that asserted that exposure to manufacturers' paints during course of employee's employment caused employee to develop skin cancer, and one of employee's experts, employee's treating physician, was concerned with treatment, not cause, had no special training in toxicology, and failed to conduct medically appropriate differential diagnosis, expert had no competent foundational basis to "rule in" powder coatings as cause of employee's skin cancer; summary judgment entered in favor of manufacturers. *Medalen v Tiger Drylac U.S.A., Inc. (2003, DC Minn) 269 F Supp 2d 1118.*

Bases for experts' opinions were sufficient where each explained reasons for his opinion, and they based their opinions on direct observation of patient and on her records; this was type of information reasonably relied upon by experts in medical field. *Bice v United States (2006) 72 Fed Cl 432.*

78.--Asbestos

In suit by surviving spouse of victim of colon cancer against asbestos manufacturers to recover damages arising from death of victim, District Court did not err in excluding affidavit of expert witness, in considering motion for summary judgment, since expert's opinion that asbestos exposure could have caused colon cancer victim's death lacked foundation and was unreliable where expert never actually examined decedent but merely relied on examinations performed by other physicians who reached different conclusions. *Washington v Armstrong World Industries, Inc. (1988, CA5 Miss) 839 F2d 1121, 25 Fed Rules Evid Serv 298, 10 FR Serv 3d 1189.*

District Court acted within its authority in evaluating reliability of experts' sources where sources were reports of diagnostic screens of orders to detect presence of asbestos-related disease in tire workers since sampling of reports revealed that they were replete with so many obvious errors as to be of no value to trier of fact. *Slaughter v Southern Talc Co. (1990, CA5 Tex) 919 F2d 304, 31 Fed Rules Evid Serv 1509, 20 FR Serv 3d 1462.*

Physicians specializing in pathology and occupational lung disease were properly permitted to give expert testimony on whether plaintiff developed mesothelioma from exposure to asbestos-containing products while working aboard defendants' vessels as merchant seaman, given their extensive backgrounds in study of mesothelioma and its causes, their review of literature, and their review of decedent's history. *Holbrook v Lykes Bros. S.S. Co. (1996, CA3 Pa) 80 F3d 777, CCH Prod Liab Rep P 14548, 1996 AMC 1957, 44 Fed Rules Evid Serv 55.*

Letter opinions of 2 doctors were properly excluded from evidence in FELA (*45 USCS §§ 51* et seq.) case alleging that railroad worker's death from lung cancer was due to work-related asbestos exposure, where doctors had never examined worker, were unavailable at trial, and never mentioned worker's smoking history, and where live expert failed to state in his reports that he relied upon letter opinions in rendering his diagnosis, because although Rule 703 expands scope of sources upon which expert may rely, it does not supersede Rule 403 probative/prejudicial analysis and operate as back door for getting speculative hearsay evidence before jury. *Emigh v Consolidated Rail Corp. (1989, WD Pa) 710 F Supp 608, 27 Fed Rules Evid Serv 1404.*

79.--Chemicals, herbicides and defoliants

In action brought by individual exposed to chemical herbicide against chemical company for alleged toxic effects of herbicide District Court properly excluded testimony of expert witness and granted summary judgment for defendant where opinion rested on plaintiff's statements that he experienced certain symptoms and that chemical was only possible cause, no supportive medical tests linked chemical to plaintiff's ailments, and medical study relied upon did not clearly provide source of support for expert's opinion; without more than credentials and subjective opinion, an expert's testimony that "it is so" is not admissible. *Viterbo v Dow Chemical Co. (1987, CA5 Tex) 826 F2d 420, 23 Fed Rules Evid Serv 1222.*

Medical doctor with more than 50 years of experience in making differential diagnoses of patients and pulmonologist with considerable training in treating individuals with occupational exposure was qualified to testify in railroad employee's FELA suit alleging that negligent workplace exposure to PCBs caused his injuries since physician used traditional methods to form his opinion by reviewing variety of background factors that are normally investigated in medical profession. *Hines v Conrail (1991, CA3 Pa) 926 F2d 262, 33 Fed Rules Evid Serv 349, 122 ALR Fed 675* (criticized in *Wills v Amerada Hess Corp. (2004, CA2 NY) 379 F3d 32, 2004 AMC 2082, 64 Fed Rules Evid Serv 1153).*

In mass tort litigation involving Agent Orange, animal and industrial exposure studies proffered by plaintiffs are of so little probative force and are so potentially misleading as to be inadmissible, and they cannot be acceptable predicate for opinion under Rule 703, where there is no evidence that plaintiffs were exposed to high concentrations involved in both animal and industrial exposure studies, some of industrial exposure studies have been recognized as flawed, and laboratory animal studies require making assumption that chemicals behave similarly in different species. In re "Agent Orange" *Prod. Liab. Litig. (1985, ED NY) 611 F Supp 1223, 18 Fed Rules Evid Serv 144*, affd (1987, CA2 NY) *818 F2d 187*, cert den *(1988) 487 US 1234, 101 L Ed 2d 932, 108 S Ct 2898.*

In action brought by wife of deceased Vietnam veteran against manufacturer of Agent Orange, opinion of plaintiff's expert to effect that exposure to Agent Orange was cause of death would be excluded at trial under Rule 703, where there are no facts that rationally support opinion, only information available on decedent is sketchy and unreliable, expert's assumption that decedent was exposed to no toxic substance other than Agent Orange during his lifetime is baseless, expert's information about decedent's family history and personal habits is suspect, and only relevant epidemiologic studies, which were conducted on very group with which decedent apparently served, are entirely negative. In re "Agent Orange" *Prod. Liab. Litig. (1985, ED NY) 611 F Supp 1267,* judgment entered (1985, ED NY) *618 F Supp 623.*

Proffered expert testimony of doctor and scientist are deemed inadmissible in tort action seeking damages for birth defects allegedly caused by pregnant mother's 10-minute exposure to toxic airborne emission that emanated from chemical explosion at defendant's plant 4 miles away, where there is no evidence--no epidemiological, experimental animal or other controlled study--which suggests that malathion, isomalathion, or other proposed chemicals are likely to cause birth defects, because experts' methodology in arriving at conclusion of causation amounts to little more than giant leap of faith from alleged coincidence of chemical exposure and mother's experiencing of certain symptoms, so that exclusion of both experts is compelled by *FRE 703*. *Boyles v American Cyanamid Co. (1992, ED NY) 796 F Supp 704.*

80.--Implants

Expert testimony failed to establish that defendant's silicone breast implants caused products liability plaintiff's scleroderma since overwhelming evidence from epidemiological studies showed no causal connection and treating physician's reliance on case reports, temporal methodology and plaintiff's atypical symptoms were insufficient to show causation and other expert's testimony was likewise problematic since basis for his opinion was studies linking silica with scleroderma, but none showing causation. *Meister v Med. Eng'g Corp. (2001, App DC) 347 US App DC 361, 267 F3d 1123, CCH Prod Liab Rep P 16282, 58 Fed Rules Evid Serv 476.*

Expert's testimony based on epidemiology study should be excluded from products liability case under *FRE 703*, where study has lower-end confidence interval less than one for relative risk linking breast implants to Sjogren's Syndrome, because it is unreasonable as matter of law for expert to rely on study to draw any conclusions regarding *Sjogren's-implant link. Kelley v American Heyer-Schulte Corp. (1997, WD Tex) 957 F Supp 873, 46 Fed Rules Evid Serv 1359,* subsequent app (1998, CA5 Tex) *139 F3d 899.*

81. Toxic torts

Expert testimony for toxic tort plaintiff was properly excluded where expert concluded that main methodologies used to establish causation are human epidemiological studies, live animal testing, and in vitro testing, but conceded that he did not effectively rely on any of them, but merely had scientific hunch. *Christophersen v Allied-Signal Corp. (1991, CA5 Tex) 939 F2d 1106, 33 Fed Rules Evid Serv 1173,* cert den *(1992) 503 US 912, 117 L Ed 2d 506, 112 S Ct 1280, 92 CDOS 1819, 92 Daily Journal DAR 2780, 34 Fed Rules Evid Serv 324.*

District court properly excluded as unsound toxic tort plaintiffs' direct evidence of causation which consisted of single water sample taken from defendant's wastewater pond two years after plaintiffs had gotten their last water from water supply. *Renaud v Martin Marietta Corp. (1992, CA10 Colo) 972 F2d 304, 35 Envt Rep Cas 1900, 36 Fed Rules Evid Serv 349, 25 ELR 20936.*

82. Miscellaneous

Physician's expert opinion that seaman's polymyositis-like condition was caused by trauma and physical stress he experienced while aboard Navy vessel had adequate foundation; while physician recognized that cause or causes of polymyositis in all cases has not been definitely proven with degree of certainty required by medical science, he also recognized that certain possible causes have been identified and studied through medical research, that these theories have been published and subjected to peer review, and some articles offered epidemiological support for physician's opinion that physical stress and trauma can cause or aggravate polymyositis. *Cella v United States (1993, CA7 Ind) 998 F2d 418, 37 Fed Rules Evid Serv 1229,* reh, en banc, den (1993, CA7 Ind) *1993 US App LEXIS 20311.*

Fact that Title VII plaintiff testified that she began having nightmares long after alleged harassment ended contradicted facts upon which psychiatrist said he relied did not mean that psychiatrist's testimony was not based on reliable data and should not have been admitted; psychiatrist disclosed underlying facts on which he relied and jury was then free to credit or not to credit psychiatrist's testimony and diagnosis. *Skidmore v Precision Printing & Packaging, Inc. (1999, CA5 Tex) 188 F3d 606, 81 BNA FEP Cas 1252, 16 BNA IER Cas 1081, 77 CCH EPD P 46256, 53 Fed Rules Evid Serv 44.*

District court abused its discretion in excluding testimony of physician who was expert on subject of electrical trauma, and who headed clinical team that examined and evaluated railroad worker allegedly injured by lightning, that worker suffered post-traumatic stress disorder and had lost function because of electrical injury; it was reasonable for the physician to rely on other qualified experts' examination of worker to reach her conclusions, and was entitled to rely on work of her team members in reaching her conclusion. *Walker v Soo Line R.R. (2000, CA7 Ill) 208 F3d 581, 54 Fed Rules Evid Serv 439,* cert den *(2000) 531 US 930, 148 L Ed 2d 250, 121 S Ct 311.*

District court assumed overly aggressive gatekeeper role in excluding expert physicians' testimony about causation of plaintiff's chronic pain syndrome (CPS) because they all relied on plaintiff's statements about his past medical history in determining whether fall caused his CPS since physician testified that patient history indicating freedom from pain before given event followed by pain of type experienced and observed following incident was sufficient basis for diagnosis and treatment of plaintiff's CPS, and claim that other conditions might have caused plaintiff's CPS went to weight of medical testimony, not its admissibility. *Cooper v Carl A. Nelson & Co. (2000, CA7 Ill) 211 F3d 1008, 53 Fed Rules Evid Serv 684.*

Facts and data upon which plaintiff patient's proffered expert relied to support his causation opinions did not satisfy requirements of *Fed. R. Evid. 703*, as they were not kind of information reasonably relied upon by experts forming medical causation opinions in applicable medical and/or scientific fields of epidemiology, pharmacology, neurology, neuropathology, statistics, or obstetricsgynecology; therefore, *Fed. R. Evid. 703* required that expert's opinions be excluded. *Soldo v Sandoz Pharms. Corp. (2003, WD Pa) 244 F Supp 2d 434.*

Oceanographers could not render opinions that were outside of their field of expertise; beach resort's experts determined that victim's fateful accident may have resulted not from normal ocean conditions but from his aquatic activities such as bodysurfing or body whomping, which were probably executed without appropriate safety measures, but they were not doctors in medicine, cervical spine trauma, or accident reconstruction. *Fiorentino v Rio Mar Assocs., LP (2005, DC Puerto Rico) 381 F Supp 2d 43, 67 Fed Rules Evid Serv 1196,* motions ruled upon, claim dismissed (2007, DC Puerto Rico) *2007 US Dist LEXIS 24844.*

In *42 USCS § 1983* case alleging use of excessive force by sheriff's deputies against detainee, who later died, certain defense expert reports were stricken to extent that they were based on medical evidence or opinion, including experts' opinions about detainee's cause of death; experts were not physicians and were asked to opine about use of force in law enforcement situations, so there was no showing that medical reports were kind of evidence upon which experts in relevant field relied. *Richman v Sheahan (2006, ND Ill) 415 F Supp 2d 929,* summary judgment gr, in part, summary judgment den, in part,, objection overruled, motion to strike den (2007, ND Ill) *2007 US Dist LEXIS 9478.*

Causation testimony offered by injured transit bus rider's treating physician amounted merely to "net opinion" under *Fed. R. Evid. 703* and did not meet *Fed. R. Evid. 702* requirements because physician had relied entirely on rider's own communications in concluding that rider's back and neck pain were related to his accident on bus where, inter alia, physician did not conduct his own investigation of accident or rider's past medical history, and documentary evidence showed that, at time of accident, rider was receiving Social Security disability benefits for back condition, and that he also suffered preexisting neck problems. *Miller v United States (2006, DC Del) 422 F Supp 2d 441.*

Fed. R. Evid. 703 does not require putative medical expert to personally examine patient; expert's evaluation of patient's medical records, like performance of physical examination, is reliable method of concluding that patient is ill even in absence of physical evaluation. *Caldwell v Cont'l Am. Ins. Co. (In re Caldwell) (2006, BC ED Pa) 350 BR 182.*

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