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A Step Backward for Rule 702 at the Fourth Circuit

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A recent ruling from the United States Court of Appeals for the Fourth Circuit represents a step backward in the effort to apply amended Federal Rule of Evidence 702 properly. In *Sommerville v. Union Carbide*, plaintiffs sought medical monitoring for an alleged increased risk of developing cancer allegedly resulting from their "chronic" exposure to ethylene oxide, or EtO–a chemical used to sterilize over 50% of all medical equipment–released from Union Carbide's Charleston, West Virginia, facility. They offered Dr. Ranajit Sahu to model EtO emissions to establish the plaintiffs' exposure. The district court correctly excluded Dr. Sahu's testimony under Rule 702, finding his opinions were "not based upon sufficient facts or data because the inputs he uses in the air model are speculative and are premised on assumptions that do not accurately represent the defendants' operations in South Charleston." The Fourth Circuit reversed in an opinion that contradicts the letter and purpose of the recent amendments to Rule 702, falling back on the outdated refrain that "questions regarding the factual underpinnings of the [expert's] opinions affect the weight and credibility of the witness' assessment, not its admissibility."

Courtesy photos

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The Fourth Circuit's opinion reverted to what the Advisory Committee called the "incorrect application of Rule 702" that prompted the Rule's recent amendments. In December 2023, Rule 702 was amended to clarify that a proponent of expert testimony must demonstrate that it is "more likely than not" that, among other things, "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." As the Advisory Committee Notes make clear, the very purpose of the amendments was to prevent the type of analysis reflected in the Fourth Circuit's opinion.

In explaining the need for these amendments, the Advisory Committee bemoaned that "many

courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility," but "[t]hese rulings are an incorrect application of Rules 702 and 104(a)." Indeed, the plain language of Rule 702(b) confirms a court's duty to evaluate whether an expert's "testimony is based on sufficient facts or data." Yet the Fourth Circuit repeatedly relied on the superseded "weight-not-admissibility" crutch in contradiction to the Advisory Committee's clear guidance.

The amendments emphasize that each expert's opinion "must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." It is the district court's duty to conduct this assessment, as the district court did in *Sommerville*, because "jurors may [] lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support."

Still, the Fourth Circuit misguidedly faulted the district court for fulfilling its duty and disapproved of the court's "veiled credibility determination based on Dr. Sahu's choice of which data to input into his [emissions] model." The Fourth Circuit rejected the district court's view that a model is only as good as its underlying data and that courts must analyze underlying data to assess the expert's conclusions—in other words, to prevent "garbage in, garbage out."

For example, one point of contention for the Fourth Circuit was the district court's criticism of Dr. Sahu for making multiple assumptions when selecting data to apply to his model: He assumed the sterilization facility's emissions were solely from uncontrolled ("fugitive") sources, rather than from discrete point sources, such as stacks or pipes. He also assumed that emission rates were constant during particular periods, rather than variable, and used historical data to estimate emissions rather than relying on available records that reflected the actual emissions at the facility. The district court appropriately found that his assumptions rendered his data unrepresentative of conditions at the facility and that he provided "little to no scientific basis for" such assumptions.

The Fourth Circuit found this analysis unavailing because Dr. Sahu provided "detailed reasons" for his assumptions, but the majority inexplicably failed to evaluate whether these reasons were sound or suitable for a jury's ears, as its gatekeeping role would have required. As the dissenting judge correctly noted, Dr. Sahu's assumptions regarding the data are "not problematic on [their] own"; the problem arises where such assumptions are "connected to existing data" by "nothing but Dr. Sahu's own assertions." Courts are tasked with ensuring that opinions based solely on an expert's "say-so" do not reach a jury. In the absence of any scientific basis for his assumptions in selecting underlying data, the district court found Dr. Sahu's resulting opinions unreliable in a proper exercise of its gatekeeping authority under Rule 702.

Another battleground was the district court's valid criticism of Dr. Sahu's reliance on meteorological data from surrounding geographic locations with varying wind patterns, when he could have used available data from the facility at issue to determine emissions dispersion characteristics. This assessment did not, as the Fourth Circuit stated, "conflate[] admissibility with [] weight." Rather, the district court properly

assessed whether Dr. Sahu's opinions regarding Union Carbide's facility were reliably supported by data regarding other facilities–whether the expert's opinion properly "stay[ed] within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Due to the incongruence between Dr. Sahu's opinion and the underlying data, the district court properly excluded the opinion. The majority of the Fourth Circuit panel disagreed.

The Fourth Circuit's dissenting judge struck at the heart of the majority's erroneous reasoning in stating that "we've faulted district courts for 'abdicat[ing] [their] responsibility' with respect to expert testimony based on the belief that 'the question of whether an expert's opinion had an adequate basis in fact could be handled by opposing counsel through cross examination and in jury argument." As the district court pinpointed, cross examination "does not ensure the *reliability* of the expert's testimony; such testimony must still be assessed *before* it is presented to the jury."

Here, it was the district court, not the Fourth Circuit, that was faithful to the text of the Rule's amendments and the Advisory Committee's directive regarding their application by assessing the sufficiency of the data underlying Dr. Sahu's opinions, and ensuring that the conclusions born from that data reflected a "reliable application" of his methodology to the facts of the case.

Opinions like *Sommerville* that rely on the outdated "weight-not-admissibility" refrain grant experts a "get-out-of-*Daubert*-free" card and highlight the need for practitioners to emphasize the purpose of Rule 702's amendments at every opportunity. Practitioners should focus courts' attention on the Advisory Committee's clear guidance on the amendments and on post-amendment case law that correctly follows this guidance to avoid rulings that fail to hold expert witnesses to their proper admissibility burden. Hopefully, the Fourth Circuit will soon be able to right its ship: its *Sommerville* opinion has been appealed for *en banc* consideration. It is incumbent upon practitioners to focus courts' attention on proper applications of Rule 702 to keep junk science from reaching a jury.

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