EXPERT VALUATION TESTIMONY IN EQUINE CASES.

GETTING YOUR HORSE (EXPERT) THROUGH THE GATE.

By: David Faughn, Esq.

MILLER, GRIFFIN & MARKS, P.S.C.
271 West Short Street
Suite 600
Security Trust Building
Lexington, Kentucky 40507
(859) 255-6676

I. INTRODUCTION

Everyone is probably familiar with Daubert v. Merrill Dow, 509 U.S. 579 (1993). If you are not familiar with the details, no doubt you are with the concepts generally taken from that case. Most often, it is cited for the proposition that a trial court is a "gatekeeper" when it comes to admitting expert testimony. It certainly does stand for that proposition. It also set standards for reviewing admissibility of proffered scientific expert testimony.

By and large, experts in equine cases have escaped many of the rigorous "Daubert" challenges faced by experts in other fields involving the "hard sciences" or technical knowledge. That is likely to change. The United States Supreme Court has now decided the case of Kumho Tire Co. v. Carmichael, 143 L.Ed.2d 238 (1999). Kumho Tire answered one of the important questions expressly left open by the Supreme Court in Daubert: Do the same considerations apply to non-scientific expert testimony? In Kumho, the Court held that all experts are to be treated the same. As a result, we can expect "Daubert/Kumho" challenges to increase for all non-scientific experts, including those common in equine cases of all types, the equine valuation expert.

While this discussion assumes general familiarity with the law on admissibility of expert testimony, now seems a good time to review Daubert and its expansion in Kumho. The discussion will then turn to how these cases have been and may be applied to economic experts. Finally, we will conclude by discussing the practicalities of making and defending Daubert/Kumho challenges in equine valuation cases.

II. DAUBERT v. MERRILL DOW

Daubert involved a challenge to scientific expert testimony. In particular, the issue was whether ingestion of a particular substance (Bendectin) by a pregnant woman caused birth defects.

The primary question addressed in Daubert was whether the old rule on admissibility of scientific expert testimony set forth in the case of Frye v. U.S., 293 F. 1013 (1923), survived enactment of the Federal Rules of Evidence and, in particular, FRE 702. The Frye test required "general acceptance" of the scientific methodology underlying the proffered testimony before the expert could testify.

In Daubert, the United States Supreme Court held that the Frye test had been superseded by the Federal Rules of Evidence. One thing lost in many citations to Daubert is the fact that the Supreme Court actually intended to "open the gate a little wider" when it came to admitting scientific expert testimony by doing away with the obstacle imposed by Frye's "general acceptance" test. Instead, what often is taken away from Daubert is the Court's emphasis on the trial courts' "gatekeeping" duty. This Daubert "sound bite" has been cited repeatedly in post-Daubert cases, leading one to the mistaken impression that Daubert closed the gate, rather than opened it.

Daubert and its predecessors established that there are three independent criteria for admissibility of expert testimony. First, the expert must be "qualified" as an expert "by knowledge, skill, experience, training, or education." Second, the expert's testimony must be "reliable." Third, the expert's testimony must be "relevant."

(A) THE DAUBERT REQUIREMENTS: QUALIFICATIONS

The challenge involved in Daubert did not concern the proffered expert's qualifications. Indeed, it appears that the experts were all "well-credentialed." Therefore, the Opinion in Daubert did not involve a discussion of what is required for an expert to get through the "qualification" gate. However, this requirement is evident from the language of the rule as well as pre-Daubert cases.

The requirement that an expert be "qualified," like the "reliability" and "relevance" requirements, is rooted in the text of FRE 702. At the time of Daubert, FRE 702 specifically

provided in pertinent part that a person could give an expert opinion where he or she was "qualified as an expert by knowledge, skill, experience, training, or education" to do so.

The self-evident requirement that the expert be "qualified" has been discussed in numerous cases. One example from the Sixth Circuit is the post-Daubert case of Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994), cert. denied, 115 S.Ct. 902 (1995). In that case, the Court discussed the general need to prove an expert's qualifications and emphasized that "the issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." Id. at 1351. By way of example, the Court stated:

> [I]f one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.
>
> On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

Id at 1349-50. As was made clear in Berry, the focus of the qualifications must be on the specific questions to be answered. In the equine valuation context, this means qualification to express an opinion on value and not general qualification as a good horseman or women. This topic will be returned to in the context of a recent decision of the United States District Court for the Eastern District of Kentucky in Jahn v. Equine Services, PSC, et al.

(B) THE DAUBERT REQUIREMENTS: RELIABILITY

Daubert's primary discussion concerned how a trial court is to determine whether a proffered expert's testimony is "reliable" enough to be admissible. Implicit in the Court's analysis, is a dichotomy between "qualifications" and "reliability." If qualifications *ipso facto* determined reliability, there would have been no need for the Daubert Court to go beyond the finding that the experts were "well-credentialed" before finding their testimony to be admissible; the experts would already have satisfied the gatekeeper. Instead, the Daubert Court analyzed "reliability" after it had recognized the experts' qualifications.

As a practical matter, this makes sense. We all have had the experience of seeing a very qualified expert testify using bad science, methodology or facts to reach bad conclusions. For example, this is the case with so-called "hired guns" who may look good on paper, but whose opinions are "unreliable" -- or are "reliable" only in the sense that they will reliably conform their conclusions to serve the side that pays them. Implicit in the Daubert analysis is a warning that trial courts should not be lulled into admitting an expert's testimony based solely upon the expert's apparent qualifications to testify on the subject (or upon the expert's own assurances that his or her opinion is reliable). Instead, reliability is to be determined independently, so that "junk science" is not employed in the courtroom by otherwise good scientists.

The Court found the "reliability" requirement to be rooted in the language of FRE 702. That rule stated in pertinent part "[i]f scientific . . . knowledge will assist the trier of fact . . ." an expert "may testify thereto." Although this "reliability" requirement does not flow as clearly from the text of the rule as the requirement that an expert be "qualified," the Court concluded that this quoted language did require "evidentiary reliability." This conclusion was based upon the Court's

interpretation that the adjective "scientific" implies a grounding in the methods and procedures of science and that the word "knowledge" "connotes more than subjective belief or unsupported speculation." Id. at 589-90. Therefore, the Court concluded that to qualify as "scientific knowledge," the opinion must be derived by the "scientific method," and must be "supported by appropriate validation – i.e. 'good grounds' based on what is known." This, said the Court, establishes a standard of "evidentiary reliability," determined by "scientific validity," that must be met before proposed scientific testimony is admissible. Id. at 590.

The Court held that the "reliability" requirement imposed on the trial courts a duty to test the methodology used by the expert to determine whether it has a sound scientific basis. The focus is not on the conclusion, but on the methodology through which the expert arrived at that conclusion. Presumably, reliable methodology applied to reliable facts will reach reliable conclusions.

On this point, the Court was forced to decide whether the Frye "general acceptance" test had any continuing viability. It concluded that it was no longer an absolute requirement. However, the Court discussed certain "factors" weighing on reliability that may be addressed by trial courts in determining the reliability of scientific testimony. One of these factors (the fourth one) is "general acceptance in the scientific community" of the methodology used by the expert. Therefore, although the Frye test no longer exists as a bright line rule that must be satisfied before scientific testimony is admissible, it is now one of the flexible factors that may be weighed by trial courts in determining "scientific validity" of proffered testimony.

The Court set forth four factors to be considered by all trial courts in weighing the admissibility of expert testimony. These factors are: (1) whether the methodology employed by the expert has been "tested;" (2) whether the methodology has been subject to "peer review" and

"publication;" (3) whether there are known "error rates" in the methodology; and (4) whether the methodology has "general acceptance" in the scientific community (the Frye rule's last gasp).

These factors are to be applied flexibly and no factor is an absolute requirement. In addition, the Court stressed that these Daubert factors are not exclusive. Instead, trial courts are free to employ other factors, so long as they are aimed at and relevant to determining "evidentiary reliability."

(C) THE DAUBERT REQUIREMENTS: RELEVANCE

While we are all familiar with the test of "relevance" imposed by FRE 401 and its state counterparts, the Court in Daubert discussed "relevance" in the context of scientific expert testimony. It is not enough that the expert is qualified and employs "good science," but the "relevance" requirement for admissibility of expert testimony requires that the methodology employed by the expert "fit" the question to be answered and the facts of the case. Id. at 591.

As an example of this, the Daubert Court stated:

> The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Id. at 591-92.

Just like the "qualifications" and "reliability" requirements, the "relevance" requirement was found to be rooted in the text of FRE 702. In this regard, FRE 702 stated in pertinent part that the expert testimony must "assist the trier of fact." This condition – "assistance" – the Court held, "goes primarily to relevance. 'Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.'" Id. at 591 (quoting 3 Weinstein & Berger ¶ 702[02]).

III. POST-DAUBERT QUESTIONS

One issue left unanswered by Daubert – and one that is inherently difficult to answer — is when "reliability" considerations go to "admissibility" as opposed to merely going to the "weight of the evidence." Although the Daubert Court made it clear that trial courts are to determine "reliability" before admitting expert testimony, in the adversary system, problems with methodology or the factual bases for testimony can be and are tested through vigorous cross-examination and rebuttal experts. If an expert's testimony were required to be "100% reliable" there would no longer be an open question — it would be definitively answered. The courts are obviously not required to find "certainty" as the level of reliability before testimony is admitted, id. at 590, but it is not entirely clear where a trial court is to draw the line between admissibility versus matters going merely to weight.

Another important question left open by Daubert was whether the same analysis applied to non-scientific expert testimony. The Daubert Court specifically reserved this issue for a later date and appropriate circumstances.

After Daubert, lower federal courts and state courts (those adopting Daubert as their own interpretation of state rules of evidence), struggled with whether and how to apply Daubert outside of the context of scientific experts. Many of the post-Daubert applications of the Daubert rules and factors were in the context of "technical" or quasi-scientific testimony, although not necessarily those involving the "hard sciences."

In addressing application of Daubert to non-scientific, and, especially, experienced-based, testimony, it safely can be said that (using Daubert's own language) the Daubert factors are an exceptionally poor "fit" (i.e. are not "relevant") in determining "reliability" of testimony. As an

example to which we, as attorneys, can relate, in the context of a legal malpractice question, we might feel confident in testifying that the failure to file a particular lawsuit within a period of limitations was "malpractice" or that the failure to spot a cause of action might deviate from the standard of care. However, how many of us would be basing our opinions on "testing," "peer review" and "publication," "error rates" or "general acceptance?" What sense do those factors even make in this context? The truth is most of us can spot run-of-the-mill legal malpractice when we see it because we practice law day in and day out. It is not because there is some sort of describable, much less "testable," methodology.

This issue is important for each of us when using equine experts. I think it is safe to say that most of us know of experienced horsemen and women with opinions, including those on the value of a horse, we would "take to the bank." I also think it is safe to say that many, if not most, of these opinions are considered by us to be "reliable" based primarily on the experience of the person involved and not because that person has "scientifically" or formally "tested" the valuation methodology, has published it and submitted it to "peer review," knows what "error rate" there is in the opinion or can quantify all of the factors that go into the conclusion on value. The bottom line is we trust the opinion because we trust the experience of the person giving it.

As stated before, after Daubert was decided, and before Kumho clarified that Daubert was to be applied to all experts, many federal and state courts struggled with whether and how to apply Daubert to experience-based expert testimony. A case within the Sixth Circuit containing a valuable discussion on some of these issues (and one that probably has continuing vitality after Kumho) is U.S. v. Jones, 107 F.3d 1147 (6th Cir. 1997). In Jones, the Sixth Circuit was faced with a "Daubert challenge" to admissibility of the expert testimony of a handwriting analyst. The Court first

addressed the issue of whether handwriting analysis was "scientific" testimony. It concluded that it was not. Therefore, the Court was faced with a decision of how to apply the "reliability" and "relevancy" requirements of Daubert to this form of testimony based almost exclusively on experience, not science.

Prior to Jones, the Sixth Circuit already had decided that Daubert applied generally to all expert testimony. It held that Daubert and its factors were to be applied "flexibly" when analyzing non-scientific experts. In Jones, the Court found that a strict application of Daubert would mean that many types of expert testimony would be excluded, which would turn Daubert on its head (the Court recognized that Daubert was intended to lower the bar on admissibility, not raise it). However, the Court found the general framework to be applicable — the trial courts were to decide "reliability" and "relevancy" of all expert testimony before finding it to be admissible.

The expert in Jones was employed as a forensic document analyst for the U. S. Postal Inspection Service Forensic Laboratory. He had completed a two year residence program, had completed FBI and Secret Service courses in "questioned documents," had received training in the CIA training laboratory, and his primary job responsibilities involved the examination of handwriting for the purpose of identifying or eliminating a particular person or machine as the source of a document. He estimated that he had made "well over a million comparative examinations." In other words, like the experts involved in Daubert, he was well-credentialed.

In Jones, the Court, applying Daubert's framework, began to recognize that "qualifications" and "reliability" "do not always separate into a clear dichotomy." Id. at p. 1160. The Court held that this expert's testimony was "reliable," not because he satisfied a rigorous analysis under the Daubert factors, but because his extensive experience made his testimony "reliable." In part, this

conclusion was based on the expert's detailed explanation of how and why he reached particular conclusions in the case -- his testimony included explanations of how each fact led to his ultimate conclusion. While the expert did not have a formal, testable "methodology," he provided a detailed explanation of what facts went into the conclusions. This testimony, combined with the expert's experience, was enough to get him through the gate. While Daubert implied (at least as it concerned true scientific testimony) that "reliability" was a factor to be determined independently from "qualifications" of the expert, Jones held that this line blurs when testimony is based upon experience and not science.

Although Jones dealt with a handwriting expert — an issue far removed from most equine cases — the discussion has importance in this type of litigation. Many equine experts, like the handwriting analyst, are qualified by experience, rather than formal education. Their opinions are "reliable" because of their experience, not because of formal methodology, peer review, publication, testing or known and demonstrable error rates. Therefore, the Jones' Court's discussion of experience as the primary or sole basis of the "reliability" finding is applicable to many of our cases — provided that the discussion survived Kumho and the recent amendments to the Federal Rules of Evidence, both of which will be discussed, in turn, next.

IV. KUMHO TIRE CO. v. CARMICHAEL

The Supreme Court has now had the opportunity to decide certain of the questions left open by Daubert. In particular, it has now addressed whether Daubert applies outside the context of scientific expert testimony. The Court answered that in Kumho Tire Co. v. Carmichael, 143 L.Ed.2d 238 (1999), with a "yes." The Kumho Court made it clear that FRE 702 makes no distinctions in its text between the different types of expert testimony. Id. at 250. All expert testimony is to be

considered for its "reliability" and "relevance," no matter how it is characterized. Therefore, the trial courts' "gatekeeper" duties are equally applicable to all experts.

The Kumho Court noted that it "would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. There is no clear line that divides the one from the others." Id. at 250. The Court also concluded that there is no "convincing need to make such distinctions" because "[e]xperts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called 'general truths derived from . . . specialized experience.'" Id. at 250 (quoting Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 54 (1901)). Therefore, the Court concluded that "Daubert's general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, 'establishes a standard of evidentiary reliability.' . . . It 'requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility.' . . . And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" Id. at 251.

(A) THE DAUBERT/KUMHO REQUIREMENTS: QUALIFICATIONS

As with Daubert, the Kumho Court was not faced with a challenge to the qualifications of a particular expert. Therefore, this requirement for admissibility was not discussed at any length. However, as the Sixth Circuit did in Jones, the Court began to blur the dichotomy between "qualifications" and "reliability" at least as it pertains to certain experts. This issue shall be discussed in the next section.

(B) THE DAUBERT/KUMHO REQUIREMENTS: RELIABILITY

The requirement of "reliability" was the central focus of Daubert. Likewise, it was the central focus of Kumho. While the Daubert Court developed specific factors to be applied by trial courts in weighing "reliability," the Kumho Court made it clear that these factors do not constitute a definitive list of requirements for admissibility.

When addressing whether the Daubert factors of (1) testing, (2) peer review and publication, (3) error rates and (4) general acceptance, are applicable outside of the context of scientific testimony, the Court answered "maybe." These factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of the testimony." Id. at 251-52. Therefore, the Court could "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for the subset of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue." Id. at 252.

The Court held that the "reliability" and "relevancy" requirements were designed "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Id. at 252. Rather than automatically using Daubert's factors, the trial courts must determine whether the Daubert factors "are reasonable measures of the reliability of expert testimony." If they are, they should be used. If they are not, the trial courts must still determine "evidentiary reliability," but the Supreme Court provides precious little guidance on how to make this determination. While the majority opinion assures the trial courts that they will be given "wide latitude" in making "reliability determinations," id. at 252-53, the concurring opinion

cryptically warns that, in a given case, the "failure to apply one or the other of [the Daubert factors] may be unreasonable, and hence an abuse of discretion." Id. at 256-57.

As the Sixth Circuit discussed in Jones, in Kumho the Supreme Court also noted that in certain cases, "the relevant reliability concerns may focus upon personal knowledge or experience." Id. at 251 (noting the Solicitor General's *Amicus Curiae* Brief pointed out many different types of experts, including land valuation, where the Daubert factors may not apply). For measuring "reliability" of experience-based expert testimony, the Court used an example of a "perfume tester" and mentioned that the pertinent inquiry (using the fourth Daubert factor) might be "whether his preparation is of a kind that others in the field would recognize as acceptable."

In other words, the Kumho Court, like the Jones Court, blurred the line between "qualifications" and "reliability." However, as with Daubert, the expert involved in Kumho was conceded to be "qualified." Nonetheless, this did not ensure "reliability" sufficient to make the testimony admissible. The Court also warned, as it had in General Electric Co. v. Joiner, 522 U.S. 136 (1997), that "'nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" Id. at 256 (quoting Joiner, 522 U.S. at 146).[1] Therefore, it did not give any definitive framework for determining when experience, alone, was sufficient to ensure "reliability."

The lesson to be taken from Kumho is one of uncertainty. While it is clear that the trial courts are required to act as "gatekeepers" by requiring sufficient "reliability" before allowing any expert to testify, there is little to guide them in making this determination or us in arguing for or

[1]For those of you, like me, without a strong background in Latin, "*ipse dixit*" means: "He himself spoke. That is, it was his own statement not made on the authority of any precedent." Ballentine's Law Dictionary, Third Edition (1969).

against admission in a given case. The focus is on making sure the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." That may require application of one or more of the Daubert factors – but it may not require application of any of them. A wrong decision on whether to apply one or more of the Daubert factors, however, may be an "abuse of discretion." Moreover, the trial judge may be able to rely on "experience" and "qualifications" as the test of "reliability," but is not to admit testimony connected to the facts based solely upon the "*ipse dixit* of the expert." Therefore, it can never be assumed that credentials, alone, will get an equine expert through the gate – although they may in a given case. It also cannot be assumed that the Daubert factors do not apply in any given case. No matter what sort of expert may be proffered, some consideration needs to be given to the Daubert factors and arguments need to be articulated as to whether they apply and how the expert does or does not satisfy each factor.

(C) THE DAUBERT/KUMHO REQUIREMENTS: RELEVANCE

The Kumho Court focused on the "reliability" requirement of Daubert. It did not focus on, expand or interpret the "relevance" inquiry. At most, it re-iterated that trial courts are assigned the task of "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Id. at 246.

V. AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

In 2000, the Federal Rules of Evidence were amended to conform to the Court's interpretation of the old FRE 702 in Daubert and Kumho. Given that Daubert and Kumho purportedly based their holdings on the language of the old FRE 702, it would seem that these amendments were unnecessary. Perhaps it was felt that the Daubert and Kumho conclusions did not

flow clearly enough from the text and that the text needed to be changed to protect the decisions from reconsideration by future compositions of the Court. Nonetheless, FRE 702 has been amended to read as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

It is important to note, as do the Advisory Committee notes to the amendments, that the new FRE 702 does not attempt to "codify" the Daubert factors. In notes to the amendments, the Committee states that "not all of the specific Daubert factors can apply to every type of expert testimony. . . . The standards set forth in the amendment are broad enough to require consideration of any or all or the specific Daubert factors where appropriate."

Moreover, the Committee notes include "other factors" that courts have used to determine whether expert testimony is "sufficiently reliable to be considered by the trier of fact." These factors include:

> (1) Whether the experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." . . .;
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. . . .;
> (3) Whether the expert has adequately accounted for obvious alternative explanations. . . .;
> (4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." . . .; [and]
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. . . .

The Committee states that "these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended" and that "other factors may also be relevant."

Importantly for our purposes, the Committee notes that experience, alone, may be sufficient to show "reliability" of the opinions of a given expert (at least so long as the expert can explain how the experience leads to the conclusions reached, as was discussed in Jones):

> Nothing in this amendment is intended to suggest that experience alone--or experience in conjunction with other knowledge, skill, training or education--may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. See, e.g., United States v. Jones, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); Tassin v. Sears Roebuck, 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). See also Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").
>
> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." See Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under Daubert, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). See also Kumho Tire Co. v. Carmichael, 119 S.Ct . 1167, 1176 (1999) ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume

tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").[2]

The Committee also noted that the "expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. See, e.g., American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert, 157 F.R.D. 571, 579 (1994) ('[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.')"

VI. STANDARD OF REVIEW; ONCE THROUGH THE GATE, YOU'RE CLEAR TO THE FINISH

In appeals from trial courts' decisions on admissibility of expert testimony, appellate courts have invariably emphasized the broad deference to be given to those decisions. In General Electric Co. v. Joiner, 522 U.S. 136 (1997), the Supreme Court held that the standard for appellate review of trial courts' decisions on admissibility is the "abuse of discretion" standard. Therefore, if you can get your expert through the gate, or keep your opponent's expert from getting through it, there is a substantial chance that the decision will withstand challenge on appeal.

VII. THE ADMISSIBILITY OF LAY WITNESS TESTIMONY ON VALUE; AVOIDING THE GATE ENTIRELY

Before moving on to the subject of how to get your horse (expert) through the Daubert/Kumho gate, it seems appropriate to veer off course slightly and discuss whether you can

[2]The Committee notes include citation to the Jones case as it concerns experience being a proper measure of reliability in a given case. Therefore, it appears that this pre-Kumho case has continuing vitality.

avoid the gate entirely. One way to avoid the "qualifications," "reliability" and "relevance" requirements for expert witnesses imposed by FRE 702 or similar state rules (whether modeled after the pre-2000-amendment rule or post-amendment rule), is to introduce "lay opinion" pursuant to FRE 701 and state counterparts. That rule provided (pre-amendment) in pertinent part:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

The text of this rule provides no guidance on what matters are properly subject to lay testimony. Certain cases, some pre-dating the enactment of federal and state rules of evidence, however, provided that lay witnesses could testify as to value of various real and personal property. E.g., Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993) (business); Davis v. Rhodes, 206 Ky. 340, 266 S.W. 1091 (1924) (household goods and furniture); Svea Fire & Life Ins. Co. v. Walker, 247 Ky. 273, 56 S.W.2d 967 (1933) (automobile). Cases of this sort provide that mere ownership, or ownership combined with some evidence that the owner is generally familiar with values for similar property or with the business of a company, is sufficient foundation for the supposed "lay witness" to express an opinion on value.

There may be good public policy reasons to allow owners to testify in certain valuation cases. Hiring experts may be time consuming and expensive and the valuation issue in a case may not justify requiring a party to retain a true expert. For example, if a case involved placing a value on common household items, such as used furniture (not antiques), or personal property, such as clothing, the cost of an expert may not be justifiable. Moreover, our lay experiences probably make us as qualified as the next person to opine on the value of our own clothing and personal property.

However, there is no logic to extending this reasoning blindly to all matters of "personal property" or business valuation. In many cases, valuation issues are too complicated to be subject to lay opinion based on mere ownership. For example, the valuation of a privately-owned corporation may involve complicated accounting and financial analysis and methodology (such as discounted cash flow analysis) that is not subject to common understanding. Mere ownership of a share in such a company should not qualify a person to express an opinion on value. Nor does a role in management necessarily mean that the witness has any knowledge of how to calculate "value." True expertise should be required in many cases.

This same logic applies to most cases of equine valuation. It is safe to say that many owners have no idea of how to place an accurate "fair market value" on a horse.[3] In practice, they may have numerous experts, including trainers and bloodstock agents, employed for this purpose. That owner may know what he or she paid, what the expert told him or her the horse was worth, what it is insured for, or what selling price he or she has been advised to accept, but (while these may be relevant to value) that does not mean that his or her mere ownership provides any basis whatsoever to express an opinion on actual "fair market value."

In one of Kentucky's foremost treatises on the Kentucky Rules of Evidence (in relevant part modeled after and interpreted in conformity with on the Federal Rules), Lawson, The Evidence Law Handbook, Professor Lawson concedes that expert testimony may, at times, be required in valuation

[3]At some point in our country's history, the value of an "ordinary" horse may have been a matter of lay knowledge. We have long since moved away from the time where everyone owns a horse. It is not fair to say that this is a topic that should be a matter of lay opinion because it deals with issues of common knowledge.

cases. Unfortunately, he does no more than mention this, without explaining when it may be the case. He states:

> In a wide variety of situations, litigants find it necessary to prove the value of property or services. Such proof may be presented through the testimony of expert witnesses and in some instances **might have to be so presented**. But the case law of Kentucky clearly authorizes the introduction of testimony by lay witnesses about the value of property or services, testimony that inevitably involves the use of opinions and conclusions.

Id. at § 6.10 (emphasis added).

Despite the fact that there may be cases where expert valuation opinions will be required, there is an abundance of law, state and federal, allowing owners to testify to value of "personal property," "real property," and "businesses" based on ownership. These courts have typically characterized such opinions as proper "lay" opinions subject to rule 701 and not 702 (and, thus, not subject to Daubert or Kumho). Therefore, in an equine case, it may be possible to admit testimony on value without the need to satisfy the "gatekeeping" requirements of Daubert and Kumho, by going around the "gate" with a lay witness owner.

An argument can be made that if the owner is familiar with the property and/or is familiar with values of similar property, he or she is not really a "lay witness," but is actually testifying as an expert qualified by "knowledge" or "experience." In fact, I believe that this is the most reasonable construction of the rules and case law, despite references in cases to such witnesses as "lay witnesses." Otherwise, the law blurs the line between "owner, lay witnesses" and "experience-based expert witnesses" in many cases. In addition, an argument can be made that these old cases, like the Frye rule, did not survive enactment of state and Federal Rules of Evidence, but should be reconsidered in light of these rules. Nonetheless, these cases remain on the books (and some were

decided after enactment of state and Federal Rules of Evidence) and have been given new life in the Committee's notes on the 2000 amendments to FRE 701.

In the 2000 amendments to the Federal Rules of Evidence, the text of the new rules prohibit attempts to get around, rather than through, the "gate." The post-amendment text of FRE 701 (emphasis added) provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and **(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.**

Clearly, that rule restricts the ability of a party to "avoid the gate" by eliciting "expert opinions" by disguising them as coming from lay witnesses. It provides that such lay opinions must not be based upon some "specialized knowledge." The Committee notes provide that this is the specific intent of the amendments to FRE 701, stating:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson. See Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony." and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process") See also United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

While this seems to have solved the problem of attempts to avoid Daubert and Kumho by eliciting valuation opinions from supposed "lay witnesses," the Committee re-opens this possibility, stating:

> The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." Asplundh Mfg. Div. v. Benton Harbor Eng' g, 57 F.3d 1190, 1196 (3d Cir. 1995).
>
> For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. See, e.g., Lightning Lube, Inc. v. Witco Corp. 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis.

The reasoning behind the Committee's conclusion that value testimony of the owner or officer of a business is not expert, but is lay, testimony, is subject to debate. It makes little sense to state that valuations are not "expert opinions" because they are "not based on experience, training or specialized knowledge," but, instead, are based on "particularized knowledge" gained by virtue of the person's position in the company. What is an experienced-based expert, except someone who has gained "particularized knowledge" by virtue of his experiences? How are courts to distinguish "particularized knowledge" of a lay witness from "specialized knowledge" of an expert? To use Judgment Learned Hand's analysis, quoted in Kumho, both "particularized knowledge" and "specialized knowledge" seem to qualify as "general truths derived from specialized experience."

Kumho at 250; Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 54 (1901).

As stated above, I believe better reasoning is that an owner familiar with property or a business may be an expert (under appropriate circumstances), qualified by experience, but subject to FRE 702. However, the Committee's notes will have to be dealt with by anyone opposing the introduction of "lay witness" opinions on value of any property, including the value of horses and horse interests.

"Avoiding the gate" does have its consequences. Unlike experts, who may base their opinions on facts "made known to the expert at or before the hearing" and may include facts and data that is not admissible at trial, FRE 703, a lay opinion must be "rationally based on the perception of the witness." FRE 701. This rule precludes a lay witness from giving an opinion based on hearsay. E.g., Wright and Gold, Federal Practice and Procedure, § 6254; TLT-Babcock, Inc. v. Emerson Elec. Co., 33 F.3d 397 (4th Cir. 1994); U.S. v. Garcia, 994 F.2d 1499 (10th Cir. 1993).

Many of the factors that lend credibility to or form the basis of an opinion on the value of a horse are not based upon the "perception" of the witness, but are hearsay, such as comparable sales prices obtained through research, attendance at an auction, discussion with parties to transactions or "barn gossip." It is hard to imagine a lay witness forming an opinion on value that is not based in part on hearsay, unless that witness has personally participated in numerous sales of horses and can testify first hand about the condition of the horse, terms of the transaction and consideration paid for each. In such a case, the lay witness is probably so clearly experienced that he or she would easily "get through the gate" as an expert witness and there is no need to try to avoid it through FRE

701 -- and there is also no need to constrain such a witness from supporting their firsthand knowledge with hearsay sources only available to an expert.

Because the grounds that may form a lay witness' opinion are so limited, an attorney treads on dangerous ground when he or she relies solely upon a lay witness in an equine valuation case. First, the court may determine that this is one of those areas where expert testimony is required. Second, even if the owner avoids the gate, he or she may not be able to support the opinion on value with the same latitude as an expert. Third, if the witness has based the opinion on hearsay, it should be excluded under FRE 701. Nonetheless, this is a possible avenue to take if the "gate" needs to be avoided.

VII. APPLICATION OF DAUBERT AND KUMHO TO ECONOMIC AND VALUATION EXPERTS

The courts have not focused as searchingly on economic and valuation testimony as they have on many other more technical or scientific testimony. There are cases, however, that apply Daubert and Kumho in this area. Given Kumho's holding that all expert testimony must pass through the same gate, it is probably safe to say that these challenges may increase in the coming years. Indeed, attorneys in this room may be at the forefront of raising these challenges in the equine context.

For a valuable discussion of various cases involving Daubert/Kumho challenges to different categories of economic testimony, I recommend the article "Kicking The Tires After Kumho: The Bottom Line On Admitting Financial Expert Testimony," 37 Hou.L.R. 431, by Sofia Adrogue and Alan Ratliff. That article outlines several cases involving different types of financial testimony and the outcomes for each case. I will not reiterate all of the valuable information contained in that article, but will discuss many of the issues common in such cases.

Courts faced with Daubert/Kumho challenges to valuation testimony have approached the subject in different ways. Some have considered each of the Daubert factors in turn. Many of those cases purporting to analyze each factor reach the conclusion that the testimony should be excluded. Perhaps this is not surprising given that the factors do not appear to "fit" the "reliability" inquiry for valuation testimony. Therefore, a valuation expert may be expected to "flunk" certain of the Daubert factors in most cases.

For example, in American Tourmaline Fields v. International Paper Co., 1999 WL 242690 (N.D. Tex. 1999), the Court considered a challenge to admission of expert testimony on the value of certain mining deposits. The challenge was based on the proposed expert's qualifications and the reliability of his valuation methodology. Despite the fact that the testimony was not scientific or technical, the Court considered each of the Daubert factors, noting that Kumho provided that they were to be flexibly applied. The Court excluded the testimony based upon these factors. It found that the valuation methodology had not been tested by other experts in this industry, had not been published or subject to peer review, had no established or known error rates and had not been "generally accepted" in the industry.

A similar approach was utilized by the Court in United Phosphorous, Ltd. v. Midland Fumigant, Inc., 173 F.R.D. 675 (D. Kan. 1997), to exclude expert valuation testimony concerning a trade name. The Court applied the Daubert analysis and found the proposed expert to be unqualified to testify and it found the methodology employed to be "unreliable" under Daubert's factors. As in American Tourmaline Fields, the Court found a lack of peer review and publication and "general acceptance" of the methodology employed.

In most valuation cases, however, the courts do not focus searchingly on the Daubert factors. Those that do apply them, but find the testimony to be admissible, seem to focus on the fourth factor, "general acceptance," by deciding whether the valuation methodology is "generally accepted" as a way to value that property. If this can be shown to be the case, it is highly likely that the expert will get through the gate.

For example, an expert was allowed to testify as to corporate value in Gross v. Commissioner of Internal Revenue, 78 T.C.M. 201 (CCH 1999). The expert employed a "discounted cash flow" method of valuation. Despite an absence of "peer review," the Court found the methodology employed to be "reliable," noting that it was also employed by the movant's expert.

The same result was reached in the real estate valuation cases of Hawthorne Partners v. AT&T Technologies, Inc., 1993 WL 311916 (N.D. Ill. 1993) and Taylor v. U.S., 1994 WL 421485 (M.D. Ala. 1994). In each case, the courts found that the expert's testimony utilized an accepted methodology and was based on an adequate foundation. In Taylor, the Court commented that the "income stream" methodology was the primary method used by experts in the industry.

In Exxon Pipeline Co. v. Zwahr, 35 S.W.3d 705 (Tex. App. 2001), the Court analyzed real estate valuation testimony under the Daubert and Kumho cases. The dissenting opinion commented that this analysis focuses on the fourth factor by deciding whether the valuation methodology is "generally accepted" in the industry. Id. at 719 (disagreeing with the conclusions reached by the majority off the court).

In other cases, courts have focused on the experts' experience in the field as a measure of reliability. E.g., In re Valley-Vulcan Mold Co. v. Ampco-Pittsburgh Corp., 237 B.R. 322 (B.A.P. 6th Cir. 1999); Masayesva v. Hale, 118 F.3d 1371 (9th Cir. 1997). Arguably, this approach conforms

with the Supreme Court's comments concerning the "perfume tester" in Kumho, as well as the post-Daubert comments in Jones and in the Committee's notes to the 2000 amendments to FRE 703. Each of these sources states or implies that adequate experience – qualifications – may be sufficient indicia of reliability to get an experience-based expert through the "gate."

There appears to be little or nothing published on admissibility of equine valuation experts in the post-Kumho or post-Daubert era (in truth, there is little published on this subject prior to Daubert, either). However, the United States District Court for the Eastern District of Kentucky recently struck a Plaintiff's equine valuation expert – the Plaintiff, herself[4] – in an unpublished opinion in Jahn v. Equine Services, PSC, et al., U.S. D.C., E.D.Ky., Frankfort Division, Civil Action No. 98-9 (Feb. 15, 2001), a copy of which is attached hereto.[5] In that case, the Plaintiff sought to testify as her own expert on the value of a Hackney pony. In ruling to exclude this testimony, the Court noted that the Plaintiff was an experienced trainer of Hackney ponies (having trained "World Champions"), had owned two others in the past, read trade publications, was a member of trade associations and had been involved in the "horse industry" for twenty years. The Court accepted as given that the Plaintiff was a qualified horsewoman, generally. The Court held, however, that

---

[4]The trial court did not discuss admission of the Plaintiff as a "lay witness owner." However, the Opinion does discuss the bases for the Plaintiff's opinions on value. These include hearsay sources that cannot form the basis of a lay opinion under FRE 701. Therefore, the Plaintiff would not be entitled to express a "lay opinion." Moreover, the Court may agree that equine cases require "expert" opinions on value.

[5] The Daubert/Kumho challenge to the valuation testimony followed the Sixth Circuit's reversal of the trial court's entry of summary judgment in favor of the Defendants. Jahn v. Equine Services, PSC, 233 F.3d 382 (6th Cir. 2000). In that decision, the trial court struck the Plaintiff's causation witnesses under a Daubert/Kumho analysis — although it was not before the Court on such a challenge. One lesson that might be taken away from the Sixth Circuit's decision is that the appellate courts may be more likely to reverse a decision to exclude evidence than they are to reverse a decision admitting it.

general experience in the "horse industry" does not mean specific experience in valuation, stating that success in "isolating the characteristics that are necessary to obtain the coveted title of world champion" do not "bestow a carte blanche authority upon her with regards to all aspects of the Hackney pony industry." Id. at p. 6. In particular, the Court found that her "success in the show ring in no way automatically qualifies her as an expert in the financial aspects of the show pony industry." Id. In making these comments, the Court (citing and quoting from Berry) was applying the "relevancy" or "fit" analysis discussed in Kumho and Daubert, finding that the expert's qualifications must "fit" the particular question at issue in the case. It is not enough to be knowledgeable about horses, a valuation expert must be knowledgeable about horse values.

The Court discussed the various Daubert factors and found that there was a lack of testing regarding her valuation. The Court then returned to experience (not a Daubert factor, but found to weigh on "reliability" in Jones, Kumho and the Committee notes to the 2000 amendments to FRE 2000) by discussing the Plaintiff's lack of sales experience (her only involvement was in purchasing two horses for her own use). The Court also found her research to be inadequate, stating that "it would be incumbent upon the expert witness to determine the purchase price for other similarly situated ponies" (implicitly adopting "general acceptance" of a "comparable sales" approach to valuation for the equine industry). The Court found that there is "no set formula or pricing guide" for horses, but found any valuation must be based on "reliable research data regarding the sales" of other similar horses or ponies (again, implicitly adopting a "comparable sales" approach to valuation). The Court also faulted the Plaintiff's apparent lack of knowledge about what factors, such as gender, might influence price of a show pony. Finally, the Court faulted the research because the Plaintiff had not shown that she consulted any publication listing sale prices (if any exist

in the industry), and had failed to confirm the prices for other particular sales or what factors might have effected prices for other rumored sales transactions about which she claimed knowledge and which supposedly weighed in on her conclusions. The Court concluded that "[u]nverified sale prices, rumors, and barn gossip do not rise to the level of research and investigation necessary for the presentation of an expert opinion." Id. at 9. As stated above (although not discussed by the Jahn Court), reliance on hearsay, even verified hearsay, also disqualifies a person from testifying as a lay witness under FRE 701.

VIII. GETTING YOUR HORSE (EXPERT) THROUGH THE GATE

The cases discussed above do not provide a definitive checklist of ways to get an equine valuation expert through the Daubert/Kumho "gate." Indeed, Kumho establishes that there are no "definitive checklists." As a result, it seems that courts are still struggling with how to approach challenges to financial or other non-technical, non-scientific testimony. However, these authorities do provide valuable tools to be used in making and defending against such challenges.

The Daubert factors are to be applied flexibly and may or may not have any application to a given case. Therefore, the failure of an expert to pass any of these particular factors may not mean much in the final analysis because, as stated above, these factors are an exceptionally poor "fit" for this sort of testimony. Nonetheless, an attorney must be prepared to evaluate the expert's testimony under each of the Daubert factors and should never assume that they do not apply.

In this respect, the fourth factor has been applied more often than any other. The issue for valuation testimony is often whether the valuation methodology is "generally accepted" in the industry for valuing that sort of property.

Examples of valuation methods passing muster in other cases and contexts include "comparable sales" or "market approach" taking into account those factors that make the property unique, "actual market price"of the product, "multipliers" of cash flow, income or other figures, "discounted cash flow" methodologies, cost, and replacement value. While these methods have more or less applicability in valuing equine interests, depending on the type of interest, there should be case support for each approach in valuing other types of property. In this respect, an attorney can argue that any of these methodologies passes Daubert's "general acceptance" factor. However, certain courts have held that it is not enough that the methodology is "generally accepted" for valuing certain property, but it must be shown to be "generally accepted" as a method for valuing the particular property at issue. M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513 (Del. 1999) ("multiplier method" referred to as "capital market approach" found to be "unreliable" because it was not shown to be generally accepted as method for valuing bank). Therefore, it may be necessary to introduce evidence that others in the equine industry use the method for valuing equine interests.

Obviously, our experts will tell us what "methods" they use to value equine interests. If we are lucky, they will have a describable "methodology" and may be able to confirm that others use the same methods. However, even if our experts have not formally categorized their methods, understanding those commonly used in other contexts may help us label them for the courts' consideration.

The first method mentioned is the "comparable sales" or "market approach" method of valuation. While this may be referred to under different names, it consists of estimating price of the property at issue by looking at the sales prices of comparable property, adjusting for those factors that distinguish unique property. This is probably the primary method used for valuing real

property. There are numerous cases involving application of this methodology in that context, so citation to its "general acceptance" of a means of valuation is a simple matter. Critical for our purposes is Jahn's implicit recognition of this as an "acceptable" method for valuing horses.

An important issue in using this method is the expert's ability to verify other sales prices. In Jahn, the Court faulted the Plaintiff's lack of verification of sales prices as one basis for excluding her testimony on value. Therefore, the extent to which an expert can support the opinion with verified references to other similar sales will be critical to the expert's ability to pass through the "gate." In this respect, the Court in Jahn seemed willing to accept sales information published in industry periodicals.

In the Thoroughbred industry, there is an abundance of data on sales. Indeed, equine auctions are a major way Thoroughbreds are bought and sold and numerous publications are available to research prices.[6] Certain publications may also contain articles on the prices paid for stallions going to stud. As stated in Jahn, this may not be true, however, in other disciplines.

In the absence of such sources on sales prices, it may be necessary for a particular expert to draw on his or her own sales experiences as a source of "comparable sales." To draw on the experiences of others, the expert should research sales prices and verify them where possible. While an expert may rely on hearsay, as was stated in Jahn, the expert must not rely on "rumor and barn gossip."

---

[6]Even in the Thoroughbred industry, where auction results are commonplace, blind reliance on results may be mistaken. It is not unheard of for a horse supposedly "struck down" at auction to never change hands or to change hands for a different consideration than the results facially indicate. The expert must be prepared to analyze this issue and to explain why auction results are or are not the type of information "reasonable relied" on by experts in the field as is required for FRE 703.

In applying this methodology, the expert must be able to adjust the "comparable sales prices" to the qualities of the subject property and explain how and why different characteristic factor into the conclusions. Typical sales results reveal wide discrepancies in prices for horses with similar breeding. The expert must be able to explain where the subject horse falls within the range – or if it falls outside of the range – and why. For example, the expert must be able to account for differences in conformation, progeny performance, the performance of closely-related horses, and the competitive success of the subject horse and those sold. In other words, the expert must make tangible all of those "intangibles" that make up the market's evaluation of the horse or horse interest.

To the extent the interest to be valued is a share price or other somewhat "fungible" interest in a horse, comparable sales results may not have to be adjusted to account for differences. For example, if accurate numbers can be obtained for the sales price of shares in a syndicated stallion, those prices may be considered comparable for all shares -- although the price of one share may not be considered comparable when valuing a block of shares. When "fungible" interest are involved, this method begins to approach the "actual market price" method.

What I refer to as the "actual market price" method is a method of valuing property based on the actual sales price of that good in the market. Most often this is used to value fungible goods sold on a liquid market. For example, stock shares publicly traded on an exchange should be valued at the actual sales prices for those shares at the moment at issue -- the best indication of "fair market value" is the actual price placed on identical goods in the market.

While horse interests are not as liquid as shares of stock in a publicly traded company, that does not mean that there are no analogies in our cases. This method is probably best used for valuing the more "fungible" equine interests such as partnership, syndicate and other joint ownership

interests in a given horse. Because the interests may be identical, recent sales prices for other interests may be the best indication of value. However, the prices must be verified as accurate. If an expert intends to ignore such sales in his or her opinion, the reasons why the sales prices are not probative must be explained. For example, in other contexts, experts deviate from actual market prices to deal with "minority discounts," or "control premiums." If this has application in a given context, the expert needs to be prepared to explain why "fair market value" should differ from the actual prices at which the goods have been selling.

A related valuation methodology is the cost method. This bases the value of the good on its cost of acquisition. For example, if a horse was bought recently for $100,000, that number may be the best reflection of its current value. The expert must be prepared to establish, however, that the transaction was an arm's-length one and that it fairly represents "fair market value" as opposed to just the price that owner is willing to pay (another fault mentioned in Jahn was the Plaintiff's inability to verify what anyone else would pay for comparable horses -- it was not enough just to show what she would pay). Moreover, the expert must be prepared to deal with any intervening change in circumstances. As we all know, a horse's value can change drastically from one minute to the next. One misstep can render a million dollar horse worthless. Moreover, value can rise based on victory in one race or show, success of offspring of the horse or closely-related family. Age, alone, is a change of circumstance that may account for a change in value absent other circumstances. Therefore, past sale prices may not be probative of present value. The expert must be prepared to explain why or why not.

The "multiplier method" or "comparative market analysis" or "comparative acquisition methodology" is a commonly used method for valuing companies. It calculates values by applying

an industry multiplier to some balance sheet figure. For example, the value of a fast food franchise may be some multiple of cash flow or sales. Most often, these "multipliers" are calculated by looking at actual sales of related companies and dividing the price by the balance sheet figure on which the multiplier is based. Some industries publish these "multipliers" of cash flow, net income, sales, etc. Conceptually, this method is little more than another approach to the "comparable sales" method, where differences in income, cash flow and other figures are automatically accounted for because the differences are already figured into the balance sheet figure against which the multiplier is applied.

While the multiplier method may not have much application in many areas of the equine industry, I have seen it used to value certain equine interests. For example, in the Thoroughbred industry, it is common to hear a stallion share "priced" at some multiple of a stallion's advertised stud fee. In such cases, this may be a "generally accepted" method of valuing a syndicated stallion share. If so, the expert must be prepared to testify that this is an accepted method and why. The expert must also be prepared to support the particular multiplier applied and the number to which it is to be applied. For example, while an industry multiplier of stud fee may be acceptable, for an unproven stallion, the "acceptability" of the stud fee to which it is applied may be questionable. Moreover, a stallion may be moving in or out of favor, leading to changes in the stud fee in coming years. It is not enough for the expert to establish that the industry prices shares at some factor times the stud fee, if the stud fee is unsupported.

At times, a type of "multiplier" may be calculated under a "capitalization approach." Conceptually, this method begins to approach the "discounted cash flow method" in that the basis of the value is the projected future earnings of the asset. The capitalization method projects the

income stream of an asset with regular growth rates and discounts that stream by an appropriate investment rate. The end result of such calculations is a "multiplier." However, this multiplier is based upon discounting cash flows – like the approach in the "discounted cash flow" analysis.

One of the most common methods for valuing businesses is the "discounted cash flow method," which calculates value based upon projected net cash flows discounted to present value. In my experience, I have never heard of this approach being used to value any equine interest. That does not mean that it would not have some intellectual validity in appropriate circumstances. For example, when valuing a stallion share, cash flows based upon stud fees, other income and expenses may be estimated over the projected useful breeding life of a stallion, and value calculated by discounting the net cash flows to the present value. The discounted cash flow method may also be useful in valuing equine businesses, such as farms or syndicate manager entities. Such businesses have known historical cash flows that may be used in a traditional discounted cash flow analysis for calculating value as would be the case for other going concern businesses in other industries, ignoring that the source of the cash flows are horses.

Obviously, there are difficulties projecting future income for any horse interest - not to mention that most disciplines are "zero sum games" in that the typical horse does not generate sufficient cash flow to pay its own way. This may account for the fact that I have not seen it referred to as a valuation method. To the extent that an expert is not familiar with this methodology, it will never be employed. To the extent it is employed, the expert and attorney must be prepared to support its "general acceptance." While it may be easy to support "general acceptance" of the method for valuing other going concern businesses, it may be difficult to do so for this unique

industry. Conceptually, this approach may have some validity, but intellectual validity is not one of Daubert's factors. "General acceptance" is the key question.

If "comparable sales" cannot be established and these other methods are inapplicable, the expert may be required to resort to some measure of "replacement value." This is more likely to be the case if you are dealing with an uncommon breed with no large market. For example, if the horse is rare in the United States, an expert may be forced to testify about the cost of locating and importing that rare animal to the United States as a replacement for the one at issue. This may be viewed as analogous to the "comparable sales" approach. However, it does not look at actual past sales prices of comparable horses. It looks at current price quotes for substitute or "replacement" horses.

In sum, methodology has been the primary focus of courts considering Daubert challenges to valuation testimony. While every equine expert may have subtleties to his or her methods of placing a value on a given horse interest, there may be some over-riding similarity to other commonly know valuation methods. If so, we can point the court in the right direction for considering the Daubert factors.

Methodology aside, using the example of a "perfume tester," Kumho states that the fourth Daubert factor can be satisfied by experience and qualifications if the industry would consider such background as "generally acceptable" for answering the question. Therefore, satisfaction of this factor can be obtained if it can be shown that your expert's experiences would be "generally acceptable" by others in the equine industry for valuing horses. Obviously, this is the easiest to prove if others in the industry do, in fact, accept your expert's opinions on value, as is the case with certain trainers and bloodstock agents who advise owners on purchasing decisions on a regular basis.

However, the expert must be prepared to show that he or she is using the same "intellectual rigor" in developing the opinion for litigation as he or she uses when pricing a horse for an owner.

If an attorney is lucky, he or she may be able to find an expert who actually priced the animal outside of the litigation. If so, it cannot be argued that his or her opinion expressed in the litigation did not result from the same level of intellectual rigor as he or she used outside of the courtroom. These opinions also meet two of the "other factors" listed in the Committee's notes to the 2000 amendments to FRE 702: "field opinions" on value "grow naturally . . . out of research . . . conducted independent of the litigation" and the expert "is being as careful as he [or she] would be [and was] in his [or her] regular professional work outside his [or her] paid litigation consulting." For example, if a horse was auctioned, the underbidder's opinion will be difficult to attack under Daubert and Kumho – it demonstrates an actual price someone else was willing to pay for that horse and an opinion that was formed without any consideration of its use in litigation. The same is true if other offers were made for the interest in private transactions. Therefore, where the attorney knows the horse was "in play," other "real" non-litigation opinions on value may be out there for discovery and may be easier to get through the "gate" than the opinion of a hired expert.

To one degree or another, the fact that owners listen to the expert in making day to day purchasing decisions may be argued to be a sort of empirical "testing" of the expert's pricing "methodology." If the owners continue to rely on the expert's opinion – or, better yet, make money listening to him or her – it can be argued that this also demonstrates a low error rate in the expert's conclusions. While such arguments may not be "on all fours" with the Daubert factors and may be more anecdotal than "scientific," they rationally relate to the concepts underlying them and can form the basis for an argument for admission if the court determines to analyze each in turn.

Finally, the "lay witness" cases may have some relevance even when considering admissibility of expert opinions. If the courts allow owners to testify about value of "personal property," it seems inconsistent to hold that more qualified industry experts should not be allowed to do so. In other words, it can be argued that the courts have set a low threshold on admissibility of valuation opinions, generally, and it should not be set too high under FRE 703. I believe that it is very difficult to value equine interests and that allowing "lay opinions" on "fair market value" would be a mistake. Nonetheless, until the courts squarely reject use of lay opinions to value equine interests, these opinions from other contexts are out there, for better or worse.

CONCLUSION

The United States Supreme Court has provided wide latitude for trial courts in determining whether to admit expert testimony. The focus is on making certain that the expert employs as much intellectual rigor in the courtroom as experts do in the field.

The first step in getting an expert through the gate is to make certain that he or she has good credentials. That, alone, may be enough to convince a court that his or her opinions on value are "reliable." That should never be assumed, however.

The expert should be well versed in the facts of the case and prepared to explain how the conclusions were reached. The more sales statistics and prices the expert has reviewed and verified, the more likely it will be that he or she will be allowed to testify. Moreover, the expert must be prepared to explain how certain individual characteristics of the horse impact value – things such as conformation, breeding, sex, age, performance and the like.

Finally and most importantly, to the extent the expert can articulate a methodology that is understandable as one of those commonly referred to in cases, the more likely it is that a Judge will

find the expert satisfies the fourth Daubert factor. While the expert may not have formally categorized his or her valuation methodology, you as the attorney may see enough similarities to those used in other valuation cases to characterize it for the court. In this regard, Jahn's implicit acceptance of the comparable sales approach may get your (horse) expert through the gate.

UNPUBLISHED DISTRICT COURT OPINION

JAHN V. EQUINE SERVICES, PSC