Memorandum

TO: Alan Maclin

CC: Bob Pratte, R. Scott Davies, Steve Wilson, Pat McDavitt, Mardi Savage, Mark Schroeder, Brent Lindahl, Christian Walker, Neal Buethe

FROM: Matthew Kading

DATE: June 6, 2001

RE: **Admissibility of Expert Opinions**
[REDACTED ATTORNY-CLIENT AND WORK PRODUCT]

ISSUE

You have asked for legal authority to support the admissibility of testimony from [REDACTED] expert witnesses. Several of the experts have submitted preliminary reports that contain general background narratives on the mortgage banking industry. Some of the experts overlap in subject matter. We are concerned that plaintiffs will seek to exclude some experts entirely (or portions of their testimony/reports) as:

1. duplicative

2. irrelevant

3. not true "expert opinion," but mere factual background with occasional arguments about the positive aspects of mortgage banking, yield spread premiums and mortgage brokers.

4. further, if expert [REDACTED] opines that all (or virtually all) of the loans complied with RESPA, or Susan Woodward opines that based on her regression analysis yield spread premiums are used to compensate brokers for "services," plaintiffs may argue this is improper testimony on the ultimate fact issues.

SUMMARY OF CONCLUSIONS

The overriding standard for the admissibility of expert testimony is whether it will assist the trier of fact to understand the evidence or determine a fact in issue. Fed. R. Evid. 702. Expert testimony is not barred merely because it embraces an ultimate fact issue to be decided by the jury. The case law on admission of expert testimony on "legal"

issues is very fact-specific. Although the trial judge has considerable discretion, courts generally allow expert testimony concerning the application of complex statues and regulations. There is Eighth Circuit precedent to the effect that expert testimony regarding the significance of complex financial regulations is admissible. Expert testimony on mixed questions of law and fact is generally admissible if (1) the testimony is not presented in the form of a bald legal conclusion, and (2) the testimony is phrased to avoid usurping the trial judge's role in instructing the jury as to the law.

DISCUSSION

I. General Principles Governing Admissibility of Expert Testimony

The Federal Rules of Evidence provide the following general standard for the admission of expert testimony:

> 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 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.

Fed. R. Civ. P. 702 (as amended April 17, 2000).

Rule 702 incorporates the Supreme Court's holding in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and subsequent cases, including Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). In Daubert, the Court held that trial judges must perform a "gatekeeper" function to exclude unreliable or irrelevant expert testimony. See also J.B. Hunt Transport, Inc. v. General Motors Corp., 243 F.3d 441 (8th Cir. 2001)(trial court properly excluded expert testimony that was relevant but based on unreliable partial reconstruction of accident). In Kumho Tire, the Court clarified that this gatekeeper function applies to all expert testimony, not just testimony which can be classified as "scientific" in nature.

Expert testimony must be both relevant and reliable to be admissible. See Thurman v. Missouri Gas Energy, 107 F. Supp.2d 1046, 1049 (W.D. Mo. 2000) (citing Kumho Tire, 526 U.S. at 139; Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1083 (8th Cir. 1999)). To be considered relevant, "there must be a valid connection to the pertinent inquiry in the case." Thurman, 107 F. Supp. at 1049 (citing Daubert, 509 U.S. 579). To be reliable, the evidence must be based upon proper "methods and procedures" and must "represent more than a subjective belief or an unsupported speculation." Id. (citing Daubert, 509 U.S. at 579). In sum, the evidence must have "a reliable basis in the

knowledge and experience of the relevant discipline." Id. (citing Kumho Tire, 526 U.S. at 143).

II. What Constitutes "Expert" Testimony

Rule 702 states that expert testimony may consist of any "specialized knowledge." Moreover, a witness may qualify as an expert because of her "knowledge, skill, experience, training, or education." Thus, experience alone may be sufficient foundation for expert testimony. See Kumho Tire, 526 U.S. at 155 ("no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience"); Den Norse Bank v. First Nat'l Bank, 75 F.3d 49, 57-58 (1st Cir. 1996)(forty years of experience in banking industry qualified banker as expert); Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 217 F.3d 33, 38-39 (1st Cir. 2000)(individual who worked in industry qualified as expert to testify about industry practice); Zimmer v. Miller Trucking Co., 743 F.2d 601, 604 (8th Cir. 1984)(policeman not allowed to give expert testimony because subject of testimony within knowledge of jury). Accordingly, testimony concerning the workings of the mortgage banking industry, which is based on specialized knowledge and experience, should be admitted if it will assist the jury in understanding the evidence or determining a fact in issue. Cf. Bauman v. Centex Corp., 611 F.2d 1115, 1120 (5th Cir. 1980)(testimony of management consultant and CPA on complex corporate management issues was admissible as expert testimony).

Expert testimony is not synonymous with "opinion" testimony. Rather, expert testimony includes any explanation of technical or other specialized principles that are relevant to the case. See Advisory Committee Notes to Rule 702. Generally speaking, expert testimony rises to the level of opinion when the expert suggests inferences the jury should draw in applying the expert's specialized knowledge to the facts of the case. Id. Unlike lay witness opinions, expert opinions are not required to be based on personal knowledge of a factual matter at issue in the case. See Moore's Federal Practice Section 26.23[2][a] (3d Ed. 1997)(citing In Re Air Crash at Charlotte N.C., 982 F. Supp. 1086, 1091 (D. S.C. 1997).

III. Expert Testimony on "Ultimate Issue"

As the Eighth Circuit has stated: "An expert is allowed to express an opinion even if it embraces the ultimate issue to be decided by the fact finder." United States v. Battle, 859 F.2d 56, 57 (8th Cir. 1988)(citing Fed. R. Evid. 704(a) and United States v. Kelly, 679 F.2d 135, 136 (8th Cir. 1982)). Federal Rule of Evidence 704(a) provides:

> [T]estimony in the form of an opinion or inference otherwise inadmissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

However, Rule 704 must be read in conjunction with the other Rules of Evidence governing expert witness testimony, particularly Rule 701 and 702.

> The abolition of the ultimate issue rule does not lower the bar so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus, the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

Advisory Committee Notes to Rule 704 (1972)(citations omitted).

Experts must be careful, however, not to invade the court's province and testify about what the law is. See Donnelly Corp. v. Gentex Corp., 918 F. Supp. 1126, 1137 (W.D. Mich. 1996). Thus, experts must be careful when testifying to state their opinions "on the ultimate issues of fact, while explaining their own understandings of the law, but without purporting to give expert opinions as to what the law is." Id.

IV. Exclusion of Expert Testimony as Duplicative

Plaintiffs might argue that some of Standard Federal's experts should be precluded from testifying because the testimony is duplicative. Striking duplicative expert testimony and reports is within the discretion of the district court under Rule 403 of the Federal Rules of Evidence. See Fed. R. Evid. 403; Van Dyke v. Coburn Enterprises, Inc., 873 F.2d 1094, 1100-01 (8th Cir. 1989); Upsher-Smith Laboratories, Inc. v. Mylar Laboratories, Inc., 944 F. Supp. 1411, 1440 (D. Minn. 1996). The proffered evidence to be stricken, however, is "needlessly duplicative" testimony. See United States v. Skillman, 922 F.2d 1370, 1374 (9th Cir. 1991). As the Eastern District of Pennsylvania has so vividly described:

> There is no rule against multiple expert opinions on the same point of contention. It is only unduly repetitious evidence which should be precluded. When the repetitious add to the weight of the opinions, rather than merely "beating a dead horse," duplicitous [sic] testimony is admissible.

Alegria Enterprises v. Immel's Marine, Civ. A. No. 90-8127, 1992 WL 57929, at *2(E.D. Pa. March 16, 1992).

In the present case, particular concern has been raised about Standard Federal's three industry experts, each of which will testify concerning the evolution and status of the mortgage banking industry. While each expert will discuss the industry, each will give testimony about a different aspect of the industry, that, presumably, does not overlap with the other experts' testimony areas. This testimony should be admissible. To the extent any areas of testimony (or any statements in the expert reports) do overlap, it might be prudent to designate only one of the experts to testify (or report) concerning that area.

V. Admissibility of Opinions on "Legal" Questions

Courts are hostile to expert legal opinions concerning legal questions on which the judge will instruct the jury. However, admission of expert opinions concerning the application of a complex regulatory or legal standard is more commonly allowed. 29 Wright & Miller § 6264 n. 36.

In United States v. Van Dyke, 14 F.3d 415 (1994), the Eighth Circuit addressed the admissibility of expert testimony concerning compliance with federal banking regulations. Defendant Van Dyke was accused of criminal violations of federal banking laws, including bank fraud, false loan documentation and making false statements to a financial institution. The case involved "Regulation O," a detailed provision which governs, among other things, transactions between a bank and its officers.

The trial court refused to admit expert testimony from a practicing attorney explaining the significance of key parts of the Regulation. The expert's testimony was limited almost exclusively to word-for-word recitation of the Regulation's provisions. The Eighth Circuit held this was reversible error despite the broad discretion afforded accorded to a trial court's exclusion of expert testimony:

> Here, we are convinced that elaboration by [the defense expert] would clearly have assisted the jury in understanding the regulation and defendant's reasons for asserting that he had not violated its provisions. This would have especially been appropriate given [a prosecution witness's] prior unequivocal assertion that defendant had violated Regulation O and other laws.

14 F.3d at 422.

Similarly, in Fiataruolo v. United States, 8 F.3d 930 (2d Cir. 1993), the court of appeals held that it was not error for the trial judge in a tax refund case to admit expert testimony that a taxpayer was not a "responsible person" for purposes of Section 6672 of the Internal Revenue Code. The testimony was offered as part of a longer exposition of established accounting principles, including a factual explanation the procedures followed by the construction business at issue in the case. Thus, the expert's opinion "was not a simple bald assertion of the law and was not designed to invade the province of the trial court. 8 F.3d at 942 (citations admitted).

CONCLUSION

Of the issues presented, expert testimony on [REDACTED] compliance with RESPA is the most difficult. VanDyke appears to give us a strong argument that expert testimony on RESPA should be allowed. Alternatively, the experts should be allowed to represent the same type of testimony if it is not phrased as an analysis of the law, but rather, an analysis of the facts as applied to applicable legal standards. In that case, the experts should be careful not to phrase the legal standards in conclusory terms which in effect compete with the trial judge's jury instructions.