THE USE OF EXPERTS IN INSURANCE BAD FAITH LITIGATION

By: Madeleine Fischer[1]

Using an expert in an insurance bad faith case presents unique challenges due to the sometimes legal or quasi-legal subject matter involved. Courts debate whether expert testimony in these cases should be admitted at all. And if admitted, what qualifies a person as an expert, and what are the limits of such testimony? If you oppose expert testimony, what strategies increase your chances of mounting a successful *Daubert* challenge? If you are offering expert testimony, what are your potential responses to a *Daubert* attack?

This article will examine case law on these issues and offer practical tips for proponents and opponents of insurance bad faith experts.

Context: Key bad faith issues

An insurer has a duty to deal with its insured in good faith. An insurer who denies coverage or delays payment without a reasonable basis may be liable for the tort of bad faith. An honest mistake or a denial of coverage based upon a genuine dispute is not bad faith. While states vary in their formulation of the standard for proving bad faith, the crux of bad faith is the unreasonableness of the insurer's conduct.

The circumstances giving rise to claims of bad faith are myriad, and the incidence of bad faith lawsuits has increased in recent years. Two common scenarios are:

> An insurer fails to settle a third-party lawsuit against its insured within policy limits. After trial, judgment is entered against the insured in excess of policy limits. The insured alleges that the insurer had the opportunity to settle and that liability was reasonably clear;
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> An insurer denies a first-party claim for policy benefits, or underpays or terminates payment prematurely. The insured alleges that the

[1] Madeleine Fischer is a partner at Jones, Walker, Waechter, Poitevent, Carrère & Denègre's New Orleans office. In her insurance coverage practice she primarily represents policyholders and has a special interest in bad faith issues. She writes regularly on insurance coverage for the CGL Reporter and is a vice chair of the Insurance Coverage Litigation Committee. In addition to her insurance coverage work, Ms. Fischer frequently handles and writes on products liability cases and class actions.

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claim is fully covered and that the insurer failed to conduct a reasonable investigation or conducted a biased investigation.

In either of these situations, proof that the insurer merely made a decision that was incorrect is not proof of bad faith. The insured may attempt to prove bad faith by offering expert testimony. In turn, the insurer may seek to strike the insured's expert, or may combat the insured's expert with an expert of its own.

Expert testimony: Admissible? Required?

Rule 702 of the Federal Rules of Evidence provides the standard for relevance of expert testimony in federal court. A qualified expert may testify to "scientific, technical, or other specialized knowledge" if that testimony "will assist the Trier of fact to understand the evidence or to determine a fact in issue." State courts follow similar evidentiary rules or principles. Thus, a key to admissibility is whether the testimony is helpful. Some courts have held that testimony about how insurance claims are managed and evaluated, as well as the statutes and regulations that govern insurance companies, can be helpful in determining whether a claim was handled in bad faith.[2] Other courts frame the issue as whether the testimony is beyond the ken of a lay jury. If so, the testimony is appropriate; but if the subject matter is within the knowledge and experience of the jury, then the testimony is not helpful and may be excluded on that ground.[3]

A second key is reliability, which in turn requires that the proffered expert be competent.[4] Rulings on the admissibility of expert testimony are reviewed for abuse of discretion.[5]

In *Campbell v. State Farm Mutual Automobile Insurance Co.*,[6] a case involving alleged bad faith for failure to settle an automobile accident case within

2 *Kraeger v. Nationwide Mut. Ins. Co.*, No. 95-7550, 1997 WL 109582 (E.D. Pa. Mar. 7, 1997).
3 *Reedy v. White Consolidated Indus., Inc.*, 890 F. Supp. 1417, 1446 (N.D. Iowa 1995).
4 *Id.*
5 *Royal Maccabees Life Ins. Co. v. James*, 146 S.W.3d 340, 353 (Tex. Ct. App. 2004); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1144 (Utah 2001).
6 65 P.3d 1134 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

policy limits, a trial court in Utah admitted testimony from two experts called by the plaintiff to testify about State Farm's policy for handling claims, its excess liability handbook, its failure to maintain statistics on excess verdicts, and the profits it derived from its claims handling practices. The Utah Supreme Court found that the issues presented by the case, although not arcane, were quite difficult for the average person to understand, and therefore upheld the admission of the expert testimony as helpful to the jury.

The *Campbell* case illustrates the powerful effect of persuasive expert testimony in a bad faith suit. The insured, Curtis Campbell, incurred an excess judgment in the underlying case of three times his policy limit of $50,000 because his automobile liability insurer, State Farm, failed to pay policy limits in settlement. Campbell sued State Farm for bad faith, and, no doubt swayed by the testimony of Campbell's insurance experts, the jury awarded him $2.6 million in compensatory damages and $145 million in punitive damages. Although the trial court remitted both awards, the Utah Supreme Court reinstated the jury's award of $145 million in punitive damages and affirmed in all other respects.

The United States Supreme Court granted certiorari and reversed the punitive damages award.[7] No doubt the Supreme Court was thinking of the expert testimony when it criticized the punitive damage award as going far beyond that necessary to punish State Farm for its handling of Campbell's claim: "This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."[8] The Supreme Court's decision may be asserted by insurers to limit the scope of expert testimony in a bad faith case to acts pertaining directly to the handling of the insured's claim or at least similar acts occurring in the same state, as opposed to otherwise legal nationwide practices.

Although courts commonly find expert testimony admissible in bad faith cases under the "helpfulness" standard,[9] a few courts refuse to do so. For example, in *Marketfare Annunciation, LLC v. United Fire & Casualty Co.*,[10] Judge Carl Barbier of the Eastern District of Louisiana rejected expert testimony in a case in which a grocery store chain alleged damages to its business caused by the winds of Hurricane Katrina. The plaintiff, Marketfare, contended that its insurer, United, substantially underpaid Marketfare's claim in bad faith. Here, it was the defendant, United, that sought to introduce expert testimony. After noting that Louisiana courts had been figuratively flooded with insurance bad faith cases after the disastrous 2005 hurricane season, Judge Barbier concluded that the bad faith claim presented by Marketfare was not overly complicated. "At its most basic, the claim is there was no reasonable basis to deny payment of certain claims."[11] Judge Barbier found that the obligations of an insurer in adjusting claims and related responsibilities were issues "present in almost every Hurricane Katrina case tried by this Court and it is not clear why expert testimony is necessary for the jury to understand the reasonableness standard."[12] Accordingly, he excluded the bad faith expert testimony.

In contrast to the *Campbell* case, no expert testimony was adduced in *Marketfare*. The plaintiff, nonetheless, did very well before the jury, winning a total award of over $29,000,000, of which almost $6,000,000 consisted of statutory penalties. The case is currently on appeal to the Fifth Circuit.[13]

Expert testimony was also excluded in another State Farm case, this time when the testimony was proffered by the plaintiff about State Farm's "good neighbor" slogan. In *Hatch v. State Farm Fire & Casualty Co.*,[14] the Wyoming Supreme Court held that the trial court properly refused to allow the plaintiff's bad faith expert to testify as to whether State Farm complied with the standard of "a good neighbor". The court found that being a good neighbor was not the legal standard for good faith and fair dealing in the investigation and handling of insurance claims, and further, whether the insurer acted as a good neighbor did not require any specialized knowledge. Accordingly, expert testimony on that subject would not help a jury. The court affirmed the trial court's judgment in favor of State Farm.

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7 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

8 *Id.* at 420.

9 *See e.g.*, *Ford v. Allied Mut. Ins. Co.*, 72 F.3d 836 (10th Cir. 1996); *Moses v. Halstead*, 477 F. Supp. 2d 1119 (D. Kan. 2007); *Shepherd v. Unumprovident Corp.*, 381 F. Supp. 2d 608 (E.D. Ky. 2005); *Furr v. State Farm Mut. Auto. Ins. Co.*, 716 N.E.2d 250 (Ohio 1998); *Hall v. Globe Life & Acc. Ins. Co.*, 968 P.2d 1263 (Okla. Civ. App. 1998); *Neal v. Farmers Ins. Exch.*, 582 P.2d 980 (Cal. 1978).

10 No. 06-7232, 2008 WL 1924242 (E.D. La. Apr. 23, 2008).

11 *Id.* at *2.

12 *Id.*

13 *Marketfare Annunciation, LLC v. United Fire & Cas. Ins. Co.*, No. 08-30795 (5th Cir. docketed Aug. 13, 2008).

14 930 P.2d 382 (Wyo. 1997).

A question related to admissibility of expert opinion in a bad faith case is whether expert testimony is *required* to prove the plaintiff's case. In *Bergman v. United Services Automobile Ass'n*,[15] the insured, Bergman, sued his insurer, United, for bad faith failure to pay underinsured motorist benefits. The trial court, in a bench trial, refused to allow Bergman's insurance expert to testify. Bergman appealed arguing that this was reversible error because, without expert testimony, the trial could have no yardstick against which to measure the insurer's conduct. He maintained that bad faith cases require the testimony of an insurance expert and that he was therefore entitled to a new trial.

On this point, the Superior Court of Pennsylvania determined as a matter of first impression that expert testimony was not *per se* required to prove bad faith. The court held that generally it is within the capability of the Trier of fact to assess whether an insurer acted in bad faith or breached its duty of care. Because Bergman's case "did not involve highly sophisticated insurance concepts or practices,"[16] the trial court's decision to exclude the testimony was supported by the record and was within its sound discretion.

Most courts that have considered the issue agree that there is no requirement for expert testimony to prove bad faith.[17] In *American Family Mutual Insurance Co. v. Allen*,[18] the Colorado Supreme Court took a more nuanced pen to this issue. The court noted that expert testimony is not required where the defendant's standard of care does not require specialized or technical knowledge; nor is it required when a statute or administrative rule establishes a standard of care. But circumstances do exist in which the standard of care in the insurance industry is not within the knowledge and experience of ordinary people. In those circumstances the court acknowledged that expert testimony may be required.

What qualifies an insurance bad faith expert?

Under Rule 702 of the Federal Rules of Evidence, a witness is qualified if he has the requisite "knowledge, skill, experience, training or education." Not surprisingly, experience working in the insurance industry is commonly offered as the premiere qualification for an insurance bad faith expert who plans to testify on the typical custom and practice of insurers in handling claims. A study of case law demonstrates that within the insurance industry, a wide variety of specific experiences may or may not suffice, depending upon the subject matter on which the expert is offered.

In *Rinehart v. Shelter General Insurance Co.*,[19] the plaintiff, Michael Rinehart, offered the testimony of his expert, Allan Windt, that Rinehart's automobile insurer, Shelter, demonstrated bad faith in the handling of his case file and the refusal to settle claims against him resulting from an accident that Rinehart caused when driving while intoxicated. Windt had thirty years of experience in handling claims for more than 70 insurance companies and a wide variety of corporations as insureds. He had also authored a treatise, "Insurance Claims and Disputes," originally published in 1982, and which, at the time of trial, was in its fourth edition. Shelter did not challenge Windt's qualifications directly, but argued that the testimony should have been excluded because, among other things, Windt admitted he did not know the legal standard for bad faith. The Missouri Court of Appeals found that Windt's testimony was properly admitted, because regardless of whether Windt understood the legal standard to be applied by the court, he testified to facts and circumstances that satisfied the key element of Rinehart's claim: a finding that the insurer intentionally disregarded Rinehart's financial interest in hope of escaping full responsibility on his policy.

While referring to Windt's treatise, the court wisely did not attempt to support Windt's qualifications on the basis of the fact that he was a lawyer, nor did it even mention this fact.[20] In its opinion, Windt did not need to know the legal standard because he was not offered as an expert in the law that the court should apply, but rather as an expert in insurance custom and practice. Windt's background as a lawyer was irrelevant to his qualifications.

In *Employers Reinsurance Corp. v. Mid-Continent Casualty Co.*,[21] the district court judge favored experience over formal education, allowing Robert Hall to testify in a bad faith dispute between an insurance

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15 742 A.2d 1101 (Pa. Super. Ct. 1999).

16 *Id.* at 1108.

17 *See, e.g., DeChant v. Monarch Life Ins. Co.*, 547 N.W.2d 592, 599-600 (Wis. 1996).

18 102 P.3d 333, 343-44 (Colo. 2004).

19 261 S.W.3d 583 (Mo. Ct. App. 2008).

20 Windt graduated first in his class from Duke Law School in 1976. *See* Allan Windt: Insurance Expert Witness, http://www.insuranceexpertwitnesswindt.com/ (last visited June 13, 2009).

21 202 F. Supp. 2d 1212 (D. Kan. 2002).

company and its reinsurer. Hall had worked for 40 years in the insurance industry (including 13 years for a reinsurer) in a variety of positions, but did not have a college degree or any professional insurance designations. The court found that Hall's background and experience constituted "specialized knowledge."

Courts debate the degree of consonance required between the expert's particular experience and the subject of his testimony. In *City of Hobbs v. Hartford Fire Ins. Co.*,[22] the Tenth Circuit affirmed exclusion of the testimony of a claims handling expert who did not have specific experience in handling third-party claims. "Though a proffered expert possesses knowledge as to a general field, the expert who lacks specific knowledge does not necessarily assist the jury."[23] Similarly, in *Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc.*,[24] an insurance underwriter with 45 years of experience in the insurance industry in general was found to have insufficient experience to testify on evaluating risks in underwriting marine pollution policies.

Conversely, in *McKeeman v. General American Life Insurance Co.*, the Nevada Supreme Court, in a *per curiam* opinion, held that the district court abused its discretion in excluding the testimony of Clinton Miller concerning life insurance practices. The trial court sustained the insurer's objection to this testimony because Miller's experience was mainly with casualty and property claims, although he had some experience with life insurance. Miller would have offered testimony regarding handling of life insurance claims, specifically practices as to change of beneficiaries on allegedly void policies, the acceptance and return of late premium payments, and reinstatement of lapsed coverage. The Nevada Supreme Court held that the testimony should have been admitted and remanded the case for a new trial.

Insurers sometimes offer their own employees or former employees to give expert testimony, with mixed results. This strategy did not pay off for the defendant in *Seikel v. American Medical Security Life Insurance Co.*[25] In *Seikel*, the plaintiff sued AMS for bad faith refusal to pay certain medical expenses incurred by his daughter, Jessica Seikel. AMS planned to offer the testimony of Janet Mashl, its Vice President of Client Services, to testify as an expert regarding AMS's decision to terminate insurance for Jessica Seikel on the ground that she was not a dependent of her father. Seikel moved to strike Mashl arguing that she was not qualified because she was not a licensed claims adjuster and did not handle or supervise claims processing during the relevant time period. Judge Ralph Thompson of Oklahoma's Western District agreed and granted the motion. He noted that Mashl's qualifications to offer an opinion were "questionable at best"; however, he stated that he would permit her to testify as a fact witness based on her personal knowledge of AMS's practices and procedures and the actions taken with respect to Jessica Seikel's claims.

One the other hand, a plaintiff who can find a former employee of the defendant insurer to testify against the insurer may fare better. This was illustrated in *Shepherd v. Unumprovident Corp.*,[26] a case involving the alleged bad faith handling and adjustment of a disability claim. There, the plaintiff identified Unumprovident's former employee, Mary Fuller, as its expert in handling and management of disability claims. Unumprovident attacked the qualifications of Fuller, arguing that she had never worked in their Tennessee office, never handled a disability claim file from start to finish, and had no formal education in insurance. The district court overruled these objections and found Fuller qualified by background and experience despite a lack of formal education in the field of insurance. The court found that the defendant's challenges to Fuller's testimony did not preclude her testimony but could serve as fodder for cross-examination by counsel. Ironically, during her employment with Unumprovident, she had several times been identified as its witness on claims practices and procedures, a fact that detracted from the credibility of Unumprovident's challenge to her expertise here.

It is questionable whether a lawyer who has not worked for an insurance company in a non-legal capacity should be allowed to testify as an expert in insurance custom and practice. However, courts often permit them to do so. As one court commented: "Attorneys may testify as experts with respect to insurance industry standards. Present or former employees of the insurance industry are not the only persons qualified to render expert opinions about its operations."[27]

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[22] 162 F.3d 576 (10th Cir. 1998).

[23] *Id.* at 587.

[24] 389 F. Supp. 2d 1145 (D. Alaska 2005), *aff'd*, 518 F.3d 645 (9th Cir. 2008).

[25] No. 05-1403, 2007 WL 4859272 (W.D. Okla. Feb. 26, 2007).

[26] 381 F. Supp. 2d 608 (E.D. Ky. 2005).

[27] *Klein v. State Farm Mut. Auto. Ins. Co.*, 948 P.2d 43, 50 (Colo. Ct. App. 1997).

Thus, in *Furr v. State Farm Mutual Automobile Insurance Co.*,[28] the court permitted an attorney who practiced in the area of insurance to give extensive testimony explaining casualty insurance, uninsured motorist insurance, reserves, bad faith claims, the Ohio Administrative Code, how claims are processed and investigated and an insurance company's duty to its insured. He also testified to his opinion that, based on the factual scenario of the case, the insurer did not meet the appropriate standards of care and there was no reasonable justification for the delay and failure to make payment on the claim.[29]

And, in *Clearwater v. State Farm Mutual Automobile Insurance Co.*,[30] the court allowed an attorney who had many years of insurance defense experience, but no hands-on work as an insurance company employee, to testify that the defendant, State Farm, acted in bad faith by failing to settle the claim of its insured. The court disagreed with State Farm's assertion that the attorney was incompetent to testify about State Farm's procedures and practices, stating that the attorney's testimony was based upon the same information relied upon by State Farm's expert.

Distinguishing law and fact as subject matters of bad faith expert testimony

Whether qualified by direct experience or otherwise, how far should an expert be allowed to go before he treads upon the province of the court, *i.e.*, the law? Even though Rule 704 of the Federal Rules of Evidence permits opinions that "embrace [] an ultimate issue", this rule does not allow an expert to render conclusions of law.[31] When a court accepts a witness as an expert, the witness is imbued with a certain mystique and his testimony may take on a (perhaps undeserved) aura of trustworthiness and reliability. If experts were permitted to testify to legal conclusions, there is a substantial danger that the jury would simply accept the expert's conclusions instead of making its own decision.[32] Additionally, if legal testimony were allowed, predictably both sides would engage such experts to battle over legal principles, confusing the jury with differing expert opinions and the court's jury instructions.[33]

However, drawing bright lines between factual questions, legal questions, and mixed questions in the heat of trial is not easy, and jurisprudence concerning these distinctions is inconsistent. The difficulty is illustrated by *Employers Reinsurance Corp. v. Mid-Continent Casualty Co.*,[34] in which Judge Vratil of the District of Kansas attempted to differentiate fact from law in a dispute between a reinsurer and it's reinsured over underlying declaratory judgment action expenses incurred by the reinsured.

In *Employers*, both sides hired experts and each side moved to strike the other side's expert. Judge Vratil made several important rulings. First, she allowed each expert to testify about industry custom and practice concerning reinsurance agreements. Second, she determined that if the reinsurance policy was unambiguous, its interpretation constituted a matter of law for the court alone. However, if the policy was found to be ambiguous, each expert would be permitted to testify to his own view of its meaning in light of insurance industry custom and practice.[35] Third, no expert was permitted to testify to the legal meaning of terms such as "waiver" and "estoppel", nor would either expert be allowed to recite his understanding of the duty of good faith, or in the context of reinsurance, "utmost good faith". Last, neither expert was allowed to testify to the conclusion that the opponent had breached its duty of good faith. Judge Vratil concluded that that testimony constituted "an impermissible attempt to apply the law to the facts of the case to form a legal conclusion."[36]

Some courts, however, do permit experts to testify that an insurer violated a statute or regulation. Thus, in *Peiffer v. State Farm Mutual Automobile Insurance Co.*,[37] where the insured sued her automobile insurer for refusal to pay further no-fault benefits for medical treatments, the Colorado Court of Appeals found no error in the admission of the plaintiff's expert's testimony that State Farm had violated several provisions of Colorado's Unfair Claims Settlement Practices Act. The court stated:

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[28] 716 N.E.2d 250 (Ohio Ct. App. 1998).

[29] *See also Moses v. Halstead*, 477 F. Supp. 2d 1119 (D. Kan. 2007) (allowing testimony by an attorney regarding the standard of care in handling an insurance claim).

[30] 780 P.2d 423 (Ariz. Ct. App. 1989), *vacated in part on other grounds*, 792 P.2d 719 (Ariz. 1990).

[31] *Snap-Drape, Inc. v. C.I.R.*, 98 F. 3d 194, 198 (5th Cir. 1996), *cert. denied*, 522 U.S. 821 (1997), and cases cited therein. Opening the door to ultimate issues does not "open the door to all opinions." *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). Thus, opinions that tell the Trier of fact what result to reach are not permitted. *Id.*

[32] *Specht v. Jensen*, 853 F.2d 805, 809. (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989).

[33] *Id.*

[34] 202 F. Supp. 2d 1212 (D. Kan. 2002).

[35] *See also Royal Maccabees Life Ins. Co.*, 146 S.W.3d at 354 (permitting expert to testify to his interpretation of a policy that the court had deemed ambiguous).

[36] *Employers*, 202 F. Supp. 2d at 1219.

> [W]hile we agree with State Farm that an expert witness should not dictate the law that the jury should apply, an expert witness is permitted, in the trial court's discretion, to refer to facts of the case in legal terms. Here, because the expert's testimony discussed the facts, his mention of legal standards and terms was admissible.[38]

Several cases allow testimony concerning violation of statutory provisions or regulations when they are not directly at issue, but are merely ancillary to the ultimate issue of bad faith. Thus, in *Hangarter v. Provident Life and Accident Insurance Co*.,[39] the Ninth Circuit found no abuse of discretion in permitting expert testimony that the defendant departed from insurance industry norms based in part on the expert's understanding of the requirements of a provision of California's Unfair Settlement Claims Practice Act.[40] And in *Gallatin Fuels, Inc. v. Westchester Fire Insurance Co*.,[41] the district court allowed plaintiff's expert to testify concerning whether the defendant violated various insurance statutes and regulations. The court found that none of the statutory provisions or regulations were directly at issue and whether the defendant complied with them could be relevant as to whether the defendant acted reasonably or deviated from industry standards.[42]

This issue took another turn in a case from the Idaho Supreme Court, *Walston v. Monumental Life Insurance Co*.[43] In *Walston*, the insured under a cancer insurance policy, James Walston, sued for bad faith after the insurer, Monumental, refused to provide coverage for $3,800 in expenses for medical services to his wife before her death from lung cancer. Walston purchased the policy based upon a solicitation from Monumental that came under the auspices of a Masonic organization and included a letter signed by the Sovereign Grand Commander of the Supreme Council of the Scottish Rite Brotherhood. The brochure contained a headline reading "lifetime benefits of up to $250,000," which caught Walston's eye. Monumental denied coverage and rescinded the policy after its investigation revealed that Walston's wife had visited a doctor for a follow-up from breast cancer on one occasion within the five-year period before Walston submitted his insurance application. Although the breast cancer was unrelated to the lung cancer from which she died, Monumental considered the post-operative visit for breast cancer to constitute "treatment" and thus, in its view, was a misrepresentation by Walston on his application.

Walston called James Wadhams, a former Nevada insurance official, to testify as an expert in his bad faith case. Wadhams testified that Monumental's solicitation violated Idaho insurance department advertising regulations and was designed to deceive. Apparently Wadhams testimony was effective. The jury rendered a verdict in favor of Walston awarding $3,800 for breach of contract, $120,000 in compensatory damages caused by an intentional breach of the duty of good faith, and $10,000,000 in punitive damages.

On appeal Monumental argued that Wadhams' testimony that Monumental's solicitation violated Idaho insurance department advertising regulations should not have been admitted because Idaho's Unfair Claim Settlement Practices Act does not allow for a private cause of action for violation of the Act. The Idaho Supreme Court rejected this argument noting that the testimony of Wadhams did not relate to Walston bringing a claim under the Act. Rather the testimony was presented to show insurance industry standards and was properly admitted for that purpose. Further, Monumental's extreme deviation from customary practices was relevant to the state of mind necessary to establish fraud.[44]

Not all courts make such fine distinctions. Many simply hold that it is improper for an insurance expert to give testimony that the insurer violated a particular statute or that the insurer acted in "bad faith".[45]

Making and meeting Daubert challenges

Rule 702 now requires that expert testimony be "based upon sufficient facts or data" and be "the product of reliable principles and methods." Further, the witness must have "applied the principles and methods reliably to the facts of the case." Jurisprudentially developed in the landmark case of

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[37] 940 P.2d 967 (Colo. Ct. App. 1997), *aff'd* 955 P.2d 1008 (Colo. 1998).
[38] *Id*. at 971.
[39] 373 F.3d 998 (9th Cir. 2004).
[40] *Id*. at 1017.
[41] 410 F. Supp. 2d 417 (W.D. Pa. 2006).
[42] *Id*. at 421-22.
[43] 923 P.2d 456 (Idaho 1996).
[44] *Id*. at 461.
[45] *See, e.g.*, *Kraeger*, 1997 WL 109582.

Daubert v. Merrell Dow Pharmaceuticals, Inc.,[46] the reliability requirement ensures that expert testimony is "more than subjective belief or unsupported speculation."[47] In fulfilling its gatekeeping role, the court must make an objective independent validation of the principles and methods the expert used. The court must review the reasonableness of the expert's approach together with his particular method of analyzing data to reach a conclusion as to the reliability of the testimony to the specific matter at hand. Under *Daubert*, the following non-exclusive factors were used to determine whether scientific testimony was reliable: (1) whether the expert's technique can be or has been tested; (2) whether the method has been subjected to peer review and publication; (3) the known or potential rate of error of a technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community.[48]

In *Kumho Tire Co., Ltd. v. Carmichael*,[49] the Supreme Court explained that the requirement of reliability applies to *all* expert testimony, not just scientific testimony. "The factors identified in *Daubert* 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."[50]

In a non-scientific context, the reliability of an expert's methodology is determined by "common sense, logic, and practices common to or accepted in the area of expertise in question."[51] Due to the nature of the subject matter of bad faith testimony, it may be difficult to challenge an expert's "methodology" in an objective sense. However, a bad faith expert's testimony may be measured against several criteria analogous to those set forth in *Daubert*. For example, the expert's track record in other courts bears some similarity to the "rate of error" and "acceptance in the community" yardsticks. As for publication and peer review, an insurance expert's theories may be contrasted against published materials in the field, including his own previous publications where they exist. The existence of standards and controls is analogous to custom and practice in the insurance industry and insurance statutes and regulations.

If the expert's testimony and reports appear to constitute mere subjective belief and speculation, then the expert is not reliable. As the Supreme Court stated in *General Electric Co. v. Joiner*, the data examined by the expert and his conclusions must be linked by more than the *ipse dixit* of the expert.[52]

With these principles as a guide, the plaintiff in *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*,[53] offered an experienced claims adjuster to testify that the defendant insurer was "in bad faith." The court refused to allow such testimony on the ground that it constituted a legal conclusion. Additionally, the adjuster was prohibited from testifying as to what the insurer's employees "thought", "believed" or "felt".[54] Testimony regarding bad faith often tends to stray into the area of subjective intent, since intent is a critical element of the tort of bad faith is some jurisdictions. An expert is in no better position than a jury to assess what someone else was thinking.[55]

In short, when considering points on which to challenge the opposing expert or points on which to defend your own, consider the following:

Is the expert qualified? Particularly, does the expert have substantial hands-on experience in the insurance industry?

Is the expert's opinion consistent with generally-accepted written authorities on insurance and claims handling? Is the expert's opinion consistent with his own prior writings?

Has the expert ever been prohibited from testifying in a court? (In addition to published opinions, be sure to check court records in cases in which the expert has testified. Many trial court filings are now available through the internet.)

Has the expert thoroughly reviewed all pertinent documents and depositions from the case, so that

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46 509 U.S. 579 (1993).
47 *Id.* at 590.
48 *Id.* at 593-94.
49 526 U.S. 137 (1999).
50 *Id.* at 150.
51 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure: Evidence § 6266 (1st ed. 1997).
52 522 U.S. 136, 146 (1997).
53 410 F. Supp. 2d 417 (W.D. Pa. 2006).
54 *Id.* at 422.
55 *Old Line Life Ins. Co. v. Brooks*, No. 05-722, 2007 WL 892448 (S.D. Miss. Mar. 21, 2007); *Steadfast Ins. Co. v. Auto Mktg. Network, Inc.*, No. 97-5696, 2004 WL 783356 (N.D. Ill. Jan. 28, 2004).

his opinion is supported by or "linked" to adequate data? Does he cite supporting facts from the case when giving his opinions?

Has the expert stated his opinion in terms of a legal conclusion?

Does the expert's opinion purport to describe the opponent's state of mind?

Is the expert testifying to matters that require specialized knowledge, or does the testimony cover subjects that an average juror can understand without expert guidance?

Conclusion

While expert testimony is not required to prove bad faith, it is often quite helpful. Cases such as *Campbell* and *Walston* illustrate the impact of a convincing plaintiff's expert on jury awards. Interestingly, in both of these cases the experts testified to matters that broadly affected its insureds, not just the particular plaintiff involved, and in both cases the jury awarded punitive damages. In view of the Supreme Court's reversal of the punitive damage award in *Campbell*, courts may be more restrictive in allowing expert testimony of this broad scope.

Nothing prevents a defendant insurer from retaining its own expert and insurers commonly do so as the most effective strategy for combating bad faith allegations. Whether offered to support the plaintiff or the defendant, the most effective experts are those who are qualified by true experience in the insurance industry; who carefully support their opinions with case facts; and who avoid couching their opinions in legal terms.