

INSURANCE AND REINSURANCE

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IN THIS ISSUE

This article will provide a primer on utilizing experts in insurance coverage litigation, including the basics of when expert testimony is allowed, procedural requirements, strategic and evidentiary issues, and practical tips on making expert testimony a successful component of an insurance coverage defense.

Keys to Successfully Using Experts in Insurance Coverage Litigation

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I. Back to Basics – Expert Witness General Rule

Federal Rule of Evidence 702 provides that testimony is admissible as expert testimony 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. While the rule had initially been applied only to scientific testimony, it was extended to apply to all expert testimony by the Supreme Court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The Supreme Court expects trial judges to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert v. Merrell Dow*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). This is known as the district court’s “gatekeeping” function.

As part of the district court’s gatekeeping function, it must determine whether the proffered witness is qualified to give the expert opinion he or she seeks to express, whether that evidence is reliable, and, lastly, whether that evidence is relevant. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

While the first two prongs are necessary to the overall analysis, i.e., whether an expert possess the requisite knowledge, skill and training to express the opinions provided and whether the expert has based his opinion on accepted methodology, data and information and the opinion is not the subject of subjective belief and unsupported speculation (see Section IV below on Evidentiary Issues), it is generally the third prong that drives whether an expert will be permitted to testify in an insurance coverage action. That is

whether the expert’s opinion is relevant to the issue(s) presented in the case and not merely attempts by either the insured or the insurer to reargue its legal positions to the court via an expert’s testimony.

While it is well known under Federal Rule of Evidence 704 that expert testimony is not inadmissible because it embraces an ultimate issue to be decided by the trier of fact, it is generally held that expert testimony providing legal conclusions are inadmissible. (See *Suter v. General Acc. Ins. Co. of Am.*, 424 F. Supp.2d 781, 791 (D.N.J. 2006) [“The district court must limit expert testimony so as to not allow experts to opine on ‘what the law required’ or ‘testify as to the governing law.’”]).

II. Exceptions to the General Rule

Despite the general rule that expert witnesses may not testify as to opinions regarding the ultimate interpretation of terms and provisions in the insurance policy (i.e. legal conclusions), expert testimony may be admissible when the interpretation of a contract provision depends on trade or industry practice, even without a finding that the policy provision at issue was ambiguous. For example, in *Kona Tech Corp. v. S.Pac. Transp. Co.*, 225 F.3d 595, 611 (5th Cir. 2000), the Court of Appeals upheld the district court’s admission of expert testimony to interpret contract provisions having a specialized meaning — in this case the railroad industry — without a finding that the contract terms were ambiguous. Additionally, in *Phillips Oil Co. v. OKC Corporation*, 812 F.2d 265, 279-280 (5th Cir.) cert. denied, 484 U.S. 851, 108 S.Ct.152, 98 L.Ed.2d 107 (1987), the Court of Appeals for the Fifth Circuit upheld the district court’s admission of expert testimony to explain an accounting provision of an unambiguous farm-out

agreement because it had special usage and meaning in the oil and gas industry.

Further, in *First National Bank of NJ v. Reliance Elec. Co.*, 668 F.2d 725, 731 (3d Cir. 1981), the court affirmed the use of expert testimony as to customs in the banking industry without a finding of contract ambiguity. In *Manhattan Re-Ins. Co. v. Safety National Cas. Corp.*, 83 Fed Appx. 861, 863 (9th Cir. 2003), the court permitted expert testimony on insurance industry contract drafting custom and practice so long as the expert did not testify about the legal interpretations of the contract clauses. And in *Simon Wrecking Co., Inc. v. AIU Ins. Co.*, 530 F.Supp.2d 706, 715-716 (E.D. Pa. 2008), the court considered expert testimony regarding custom and trade usage of the policy term “sudden and accidental.”

III. Expert Strategy

Assuming that an expert’s testimony will not be admissible if it purports to provide a legal conclusion, but may be admissible to provide an interpretation of contract terms that depend on trade or industry practice, the initial question that should be asked is: “Does the policy provision at issue in this litigation require an interpretation based on trade or industry practice such that an expert’s opinion may be not only admissible but required?” In conjunction with that question should also be an analysis of whether it is anticipated that the insured’s counsel will be retaining an expert to argue that trade and industry practice requires a court to rule in the insured’s favor on its interpretation of the provision at issue. No one wants to be left scrambling in response to a motion for summary judgment and/or in response to an expert disclosure to locate and identify a qualified expert, and then get that expert to review and formulate opinions that he or she will either have to

swear to in an affidavit or testify to at deposition and trial. Proactively determining whether the insured intends to designate an expert to offer such opinions makes for a more efficient approach.

IV. Evidentiary Issues

The fundamental evidentiary issue for any expert starts with whether the person selected has the requisite knowledge, skill and training to testify to the issues for which he or she has been designated to provide expert testimony. Without the requisite specialized knowledge that is pertinent to the facts of the particular case, the expert can and likely will be challenged — and if the court finds that a purported expert is unqualified, he or she will be disqualified. All potential candidates should be extensively interviewed regarding their knowledge, skill and experience on the issue at hand.

Once an expert has been retained, he or she must be provided with all of the relevant documents, data and information necessary to form an analysis and provide opinions that cannot be construed as subjective belief and unsupported speculation. Thus, it is a good practice to review the expert’s file in advance of any expert witness deposition to ensure that the file contains all pertinent documents relevant to their opinions.

Next, in Federal Court cases where the parties are required to comply with the expert disclosure requirements of Federal Rule of Civil Procedure 26(a)(2)(B), including providing the opposing party with a written report signed by the expert, it is imperative that the written report include, among other things, a complete statement of all of the opinions the witness will express, including the basis and reasons for those opinions. If the expert report omits a key opinion of the

expert witness, it is highly likely that such opinion will not be admissible at trial absent some extraordinary circumstance — a scenario that is sure to rankle any client who has already incurred the cost of retaining the expert witness. Therefore, it is imperative that time and effort is put into ensuring that your expert's reports are complete, timely and compliant with the requirements of the Federal Rules and any district court local rules.

V. Evidentiary Issues in Practice

A. Selecting an Expert

The first step upon being retained to defend a given case should be to determine the right type of expert or experts needed and get them on board as early as possible. Start with identifying the issues at hand and matching the expert accordingly. For example: Will the issue be about an alleged ambiguous policy provision, or will it be about the policy drafting history? Will it be about insurance regulations or compliance with the insurance company's claims-handling guidelines?

Particularly in insurance coverage cases, the question usually comes down to whether to retain a former insurance company executive (underwriter, claims manager) or insurance regulator or to retain an attorney who has expertise in the particular insurance coverage issue at stake. Should other types of insurance industry executives be considered? The answer usually is no because of the high stakes of the litigation and the requirement that the expert have the necessary training, skill and knowledge to testify on the subject matter. The safer route is to select the person most qualified for the assignment, recognizing that there are dangers in retaining attorneys to act as experts in insurance claims-handling cases if the attorney has no

experience in actually handling claims. While the attorney may be qualified to testify, a jury might not find that the attorney's experience matches that of an opposing expert that has experience actually handling claims. Thus, while being mindful of the necessary skill, training and experience necessary to qualify an expert witness under the evidentiary rules, don't forget about the jury and what they may perceive as lack of skill, training and experience. With that in mind, be sure the expert has the skills necessary to testify, including being able to easily present and explain their area of expertise and their opinions to the jury. An expert may be the greatest in the world on paper, but trials are not fought on paper and efficient trial presentation is a fundamental requirement for any expert witness.

B. Attorneys as Experts

Attorneys frequently testify at trial as experts on insurance coverage and insurance bad faith, among other insurance issues. As a general proposition, attorneys who practice insurance law can explain technical issues involving the application of a state insurance regulatory scheme to the conduct in question. An attorney experienced or trained in this area can explain how the facts of a case apply to the law or to clarify difficult points. However, courts are by and large divided over the scope of expert testimony that should be allowed in insurance coverage cases, and nowhere is this more apparent than in the context of a testifying attorney.

For example, two issues frequently come about in the context of the admissibility of an attorney's expert opinion at trial on insurance coverage and insurance bad faith issues. First is whether the attorney is truly qualified to render an opinion concerning the quality and quantity of conduct of an insurer. Second is

whether the attorney may opine as to the application of the law of the jurisdiction, or whether such invades the province of the trier of fact. Both provide fertile grounds for the insurer's counsel to move to disqualify or limit the scope of the insured's proffered expert at trial.

Most courts will permit a party to offer evidence of standard industry practices, provided that the expert witness has sufficient qualifications. However, to the extent an insured proffers an attorney-expert to supply such testimony, keep in mind that it is the attorney's expertise in insurance law, as opposed to the practice of law, which is paramount. F.R.E. Rule 702 requires that a testifying expert be "qualified as an expert by knowledge, skill, experience, training, or education."

In California, as with other jurisdictions, "...an expert's qualifications must be established with respect to the subject matter of his testimony. The fact that the purported expert may be qualified in one field vaguely related to another does not mean that he is qualified in that other field." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1081). As to insurance bad faith, the rule has been narrowed down such that the proffered expert must demonstrate special knowledge, skill, experience, training or education on "insurance company practices." (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 66.). Thus, simply because a proposed expert is an attorney with insurance law experience does not necessarily mean the expert will qualify to offer opinion testimony as to all insurance matters, including coverage and bad faith.

To illustrate the point, in one recent case, the insured designated an attorney expert to opine not only as to coverage under an insurance

policy, but also as to an insurer's duties, issues of claims handling, standards in the insurance industry with respect to claims handling, and whether the insurer's conduct was unreasonable. From the face of the designation, the expert appeared well-qualified. He had a longtime practice as a coverage lawyer, claimed to have "handled claims" on behalf of a number of insurers, and even authored a published treatise on insurance law. The downside of this expert did not appear to the insured's counsel — or to the insurer's counsel, for that matter — until the expert's deposition, which revealed that the attorney expert retained by the insured had previously been retained by one of the insurers in the action on 50-100 cases and had thus been privy to that insurer's "sensitive internal communications." The trial court found this was potentially material to the evaluation of whether that insurer owed a duty to defend and indemnify the insured. Therefore, the trial court ordered the insured's expert disqualified based on his former work as an attorney for one of the insurers in the case.

Policyholder counsel may specifically seek out lawyers who have had experience in working for and/or advising insurance companies about insurance coverage and good faith, compared to lawyers who may be qualified and knowledgeable in insurance matters but whose only experience lies in suing insurance companies. The former may have handled similar claims or dealt with the same carriers in litigation as experts, and thus may be viewed as more qualified to address the issues of prior bad conduct, custom and practice, absence of mistake or inadvertence, intentional conduct, or similarity of facts *vis-a-vis* the insured's case with the insurer's prior conduct. However, not only do such experts not qualify per se, but defense counsel should look for a ground uniquely within the

province of such attorney testifying experts — i.e., disqualification.

If the attorney qualifies to opine as to insurance coverage and bad faith issues and is not conflicted out due to prior representation of a party, what next? Expert opinions from lawyers practicing insurance law are often devoted to legal conclusions regarding various clauses in the operative policy. Such an expert will typically seek to introduce opinion testimony concerning policy language and interpretation and the insurer's various duties. In California, courts have acknowledged that expert opinion by attorneys presents a particular danger where the attorney/expert testifies on questions of law, because it may give the jury the mistaken impression that the attorney/expert knows more about the law than the court, and suggests to the jury that it should follow the attorney/expert's opinion rather than the court's instructions. (*See, e.g., Downer v. Bramet* (1984) 152 Cal.App.3d 837).

Similarly, it is generally agreed that experts should not be permitted to testify to the ultimate issue of bad faith. In *Bartlett v. State Farm Mutual Automobile Ins.*, 2002 U.S. Dist. LEXIS 23541 (S.D. Ind. 2002), for example, the plaintiff insured sought to submit an expert affidavit in opposition to the insurer's motion for summary judgment. The expert, who was an attorney and former employee of the Indiana Department of Insurance, opined that State Farm had, among other things, violated the Indiana Unfair Claim and Settlement Practices Act and had breached the covenant of good faith and fair dealing. The court in *Bartlett* struck expert's affidavit on the ground that it was "essentially a supplemental brief in the guise of testimony," explaining that "he offers no insight into the practices of State Farm in general or the practices that occurred in this

particular situation..." (*Id.* at 10). As the expert had sought to testify as to what constitutes bad faith under Indiana law, the court found that he had "overstepped the permissible bounds." (*Id.* at 12).

Precluding legal conclusions from retained lawyer experts is not unique to the policyholder side, as set forth in the recent case of *Kearney v. Auto-Owners Insurance Co.*, 2009 WL 3712343 (M.D. Fla. November 5, 2009). There, in defending a claim for bad faith handling of an umbrella policy claim, the insurer retained a former justice to offer expert opinion on its behalf. Several proffered opinions were excluded at the trial court level, including: that the carrier did not violate Florida's "bad faith statute"; that the insured's complaint should be dismissed; that the excess insurer acted in good faith when it paid policy limits; and that the insurer's failure to timely pay following the filing of a civil remedy notice was not in bad faith. Again, whether an insurer acted in bad faith is almost always a legal conclusion, and experts are typically limited in their opinion to what an ordinary and reasonable claims-handling practice consists of and whether the insurer complied with those standards.

Frequently the experts will present the most persuasive testimony in bad faith litigation. However, absent an expert qualified to test the insurer's practices with accepted industry standards, or to explain how the insurer's conduct falls below industry standards, the insured will not meet their burden. To the extent the insured relies upon an attorney expert to meet its burden, several avenues become available to the insurer's counsel to limit or outright preclude such an expert depending upon the attorneys' qualifications, whether his or her experience is geared to one side or the other, and the scope of his or her anticipated testimony.

C. Tips for Qualifying — and Challenging — Experts

As mentioned throughout the preceding sections, preparation is key to making sure defense experts do not get disqualified. To recap and summarize: (1) identify and retain the appropriate type of expert right away; (2) have an expert perform a conflict check to avoid disqualification because of previous experience; (3) research an expert as thoroughly as the opposing counsel will; (4) provide the expert with all necessary information and documentation; and (5) keep the expert informed on the status of the case.

As the saying goes, sometimes the best defense is a good offense. Being proactive and thorough is also critical for success in challenging an insured's expert. Work with the insurer to find out everything possible about the opposing expert before his or her deposition, starting with whether that person has ever worked for your client. If so, there may be grounds for disqualification if it can be established that the expert obtained knowledge of your client through attorney-client communications. Be sure to check all available resources, including Westlaw and Lexis, the expert's own website, his or her publications, and the expert's social media activity on blogs, Facebook, Google+, Twitter, etc.

This research is crucial to preparing for the expert witness deposition — the ultimate arena where it will be determined whether this expert will be qualified to testify at trial. Testimony obtained at the deposition lays the groundwork for a motion in limine to disqualify, exclude or otherwise limit the testimony of this expert, or for an evidentiary 402 hearing. In fact, it is good practice to have the motion prepared *before* the expert

deposition in order to know exactly what testimony from the expert is needed to support such a motion. Be sure to have a game plan going into the deposition, along with specific questions focused on disqualifying the expert because of a conflict of interest or lack of experience, to accomplish these goals.

VI. Conclusion

With so much on the line, it is impossible to be over-prepared when utilizing experts in an insurance coverage defense. A proactive approach starts with understanding the parameters of what the expert will be allowed to testify to and identifying the appropriate expert with the knowledge, skill and training necessary to testify on the insurer's behalf. From that point, it is essential to perform plenty of research and to work closely with the expert to ensure not only that their testimony will be admissible, but that all necessary procedural steps have been followed. As experts become an increasingly critical component of high-stakes insurance coverage litigation, it is more important than ever to obtain the right expert for the job — and to ensure he or she will be able to take the stand.

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