Is there an Expert in the House? Expert Evidence in Insurance Coverage Cases

By Thomas R. Newman

Mr. Newman gratefully acknowledges the research assistance of his colleague Christine Megan van Gelder of Duane Morris, LLP.

While the admission of expert evidence is a matter that rests within the discretion of the trial judge, generally, a qualified expert will be permitted to offer his or her opinion on an issue which involves “specialized knowledge” (i.e., “professional or scientific knowledge or skill not within the range of ordinary training or intelligence”).\(^1\) The test is one of need: Does the trier of the facts (judge, jury, or arbitrators) require the benefit of the expert’s specialized knowledge?\(^2\)

In federal courts, the admissibility of expert evidence is governed by Rule 702 of the Federal Rules of Evidence, which provides:

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.\(^3\)

Experts in insurance cases, as any other expert, must be prepared to withstand a \(^4\) Daubert challenge, as well as vigorous cross-examination.

The expert’s opinion must be based on one of the following:

A. Personal knowledge of the facts upon which the opinion rests;
B. Facts and material in evidence;
C. Material not in evidence that is derived from a witness who was subject to cross-examination; and

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\(^1\) Dufel v. Green, 84 N.Y.2d 795, 797-798 (N.Y. 1995). (The cases cited herein are for general illustrative purposes only. The law may differ somewhat from one jurisdiction to another and should always be researched.).

\(^2\) Id.

\(^3\) FED. R. OF EVID. 702.

D. Material not in evidence provided it is accompanied by evidence establishing its reliability. Once reliability is established, the expert may testify about it, even though it would otherwise be considered inadmissible hearsay.5

Appropriate Subjects for Expert Evidence in Insurance/Reinsurance Disputes

The following issues include some, but by no means all, of the issues arising in insurance/reinsurance litigation on which expert evidence may be appropriate:

A. The insurance industry has generally accepted long-standing, custom, and usage to explain ambiguous terms of an insurance policy.6 Insurance industry custom and usage may be used to explain ambiguous terms of an insurance policy (as any other contract), but it may not be used to add to, contradict, or vary unambiguous contractual terms.7 Whether the policy is ambiguous is a question of law for the court to decide.8 Ambiguity will be found if the terms “are susceptible to at least two reasonable interpretations.”9 To constitute a custom and usage sufficient to affect the rights of parties to a contract, the custom and usage must be certain, definite, general, and uniform. Casual, occasional, or individual practices will not bind a party. Custom and usage must develop over time and be known and accepted by a great number of persons.10

B. Under a policy with a duty to defend, what is the standard of care owed by an insurer in supervising outside counsel appointed to defend a third-party claim against its insured?11

C. The standard of care in handling first-party claims.12

D. What constitutes an appropriate investigation of a claim?13

E. Insurance archeology and terms likely to have been included in a lost policy. For example, would a

7 Pink v. American Sur. Co., 283 N.Y. 290, 296 (N.Y. 1940); Colligan v. First Nat’l Ins. Co., 40 N.Y.S.2d 955, 955 (2d Dept. 1943) (terms of the “policy being plain and unambiguous, proof of a custom or usage which contradicts or varies the terms is inadmissible.”).
10 B.M. Heede, Inc. v. Roberts, 303 N.Y. 385. 389 (N.Y. 1952) (custom and usage must be “uniform, continuous and well-settled”); Belasco Theatre Corp. v. Jelin Prods., 270 A.D. 202, (1st Dept 1945) (custom and usage, “if it is to be read into a contract to ascertain the intention of the parties,” must be “general, uniform and unvarying”); Victor v. National City Bank, 200 A.D. 557, (1st Dept 1922) (“Custom and usage do not spring up over night. They require time to receive that universal acceptance which is one of the requirements of their existence”). “[T]he existence of custom and usage is a question of fact and may not be proven by opinion. . .” DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 103 (Mass. 1983).
11 Eberhard v. AISLIC, A.A.A. Arbitration in Denver, CO., Apr. 19, 2007 (author testified at hearing).
liability policy issued in the 1940’s or 1950’s have included products liability coverage and, if so, would it have been subject to aggregate limits?

F. In a misrepresentation or non-disclosure case, what disclosure would a reasonable underwriter have expected to be made? In jurisdictions where the standard is not a “reasonable underwriter,” but what the actual underwriter would have done, such evidence may come in to rebut the underwriter’s testimony.

G. What evidence or other considerations in the case would have led a reasonable insurer to accept (or reject) an offer to settle a third-party claim within its policy limits?

H. What evidence or other considerations would have led a reasonable insurer to conclude that a claim was likely (or not) to involve an excess policy, and, therefore, require (or not) notice to the excess insurer? Or require notice by a cedent to its reinsurer?

I. Where an insurer is charged with bad faith, what constitutes appropriate claims handling under the circumstances of the particular case?

J. Is a cedent entitled to indemnity for declaratory judgment expenses under a reinsurance contract that does not specifically address that issue?

K. Explaining policy terms, the significance, if any, of industry drafting history, and the nature and limitations of the coverage bought.

L. The necessity for and reasonableness of an insured’s costly defense of “bet-your-company” nationwide products liability litigation. A large insured whose policy gives it the right to control its defense may incur very substantial defense costs while paying little or nothing to settle claims or judgments.

M. Where the insurer has denied coverage for nonfortuity, i.e., that the insured “expected or intended”

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injury arising from its action or products, there will be expert evidence on non-insurance matters, such as the defective nature of the product or the insured’s waste disposal practices, and what the insured knew or should have known when the injury-causing acts occurred.

N. Whether certain conduct increased the risk of loss from an underwriting standpoint.

O. The availability of certain types of insurance at particular points in time (e.g., coverage for environmental contamination or asbestos after the early 1980s).

P. How to allocate settlements and judgments over successive policy periods.

Q. What constitutes “bodily injury” sufficient to trigger coverage?

R. The relationship between primary and excess insurers and what duties do they owe each other.

Selecting the Expert

Once you have decided that expert evidence would be helpful to your case and framed the questions on which you want the expert to opine, you must find the right expert for your particular case and the specific issues involved. A number of factors must be considered. For example, will he or she be addressing (and trying to persuade) a jury, judge, or panel of arbitrators? Do you want a lawyer experienced in insurance matters or an industry person, such as a retired claims executive, actuary, or underwriter?

If you select a lawyer, be sure your expert emphasizes his or her experience with claims handling (or whatever the subject is) and industry custom and practice. Otherwise the court may view your witness as simply another hired counsel in the case and exclude his or her evidence.

Depending on the jurisdiction, consider whether you need a local expert whose evidence may be better received than an out of state person? Do you want someone with academic credentials who teaches insurance law, or a claims person or adjuster, perhaps with a CPCU designation, who has had a wealth of hands-on experience but no college degree? In some cases, you might want a retired insurance regulator.

Before contacting your potential expert, gather as much information about him or her as possible. Useful sources are web sites found through Google or other search engines, testimony in cases in which he or she was involved found through LEXIS, published books and articles and (perhaps, best of all) candid evaluations from colleagues or lawyers who have previously used or opposed the expert.

Once you have done your homework, call or email the expert and ask the following questions:

21 Liability insurance is not meant to cover the statistically known business risk of injury arising from the use of products such as pharmaceuticals or automobiles.


23 National Union Fire Ins. Co. of Pittsburgh, Pa. v. Carib Aviation Corp., 759 F.2d 873, 879 n.6 (11th Cir. 1985).


25 Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 690,727 (1st Dist. 1996); Owen-Illinois, Inc. v. United Ins. Co., 650 A.2d 974,994 (N.J. 1994)(“the court shall appoint a special master, one skilled in the economics of insurance, to create a model for allocating the claims;” implicit in this is the need for expert evidence to assist the special master or challenge the model).


28 It is difficult to get active insurance officials to give expert evidence because they are concerned that their testimony may be used against their company in another matter presenting the same or similar issues.
A. Would he or she be interested in acting as an expert for you?
B. Does he or she have any conflict with or know any of the parties?
C. Has he or she previously worked with or know opposing counsel?
D. Does he or she have real expertise in the area of insurance involved?
E. Has he or she previously prepared reports, testified, or expressed any views bearing on the issues you are interested in or related topics? If so, ask for copies or citations.
F. Is the expert sympathetic or hostile toward your position as you describe it in general terms and subject to what appears from the documents and other evidence you will provide?
G. Most importantly, does the expert have time, within whatever deadlines you have, to review the material you will send (which may be massive), produce a comprehensive expert report and be available for deposition, and to attend the trial or hearing?

**Working with the Expert**

There is an old maxim. It is better to be safe than sorry. Assume, therefore, that whatever documents you provide to, and communications you have with, your expert will be discoverable by your adversary. This includes attorney work product and otherwise privileged material; “because any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver to the same extent as with any other disclosure.”

Furthermore, because of the importance of cross-examination of experts, “where material sufficiently relevant to the issues is shown to an expert who will testify, it may be discoverable even if otherwise subject to a privilege such as that accorded to work product under Federal Rules of Civil Procedure 26(b)(3).” Without pre-trial access to attorney-expert communications, opposing counsel may not be able to uncover and reveal effectively the influence that counsel has achieved over the expert’s testimony.

Assume further that whatever notes and drafts your expert makes will also be discoverable. Tell this to your expert at the outset of your working relationship. Most communications thereafter will be by telephone or in-person. However, even the substance of these may be discoverable, so always bear this in mind and act accordingly.

That does not mean you are to withhold from your expert any factual material that may be necessary for the expert to gain a fair and balanced view of the issue. Never withhold information or documents on which the expert is likely to be cross-examined, because you think they are harmful to your case. It is a huge mistake to do so. You do not want your expert to be

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29 In re Pioneer Hi-Bred Int’l, Inc., 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (“fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony. Indeed, we are quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party.”); B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of N.Y., 171 F.R.D. 57, 66 (S.D.N.Y. 1997); Elm Grove Coal Co. v. Director, Office of W.C. Programs, U.S. Dept of Labor, 2007 U.S. App. LEXIS 5271 (4th Cir. 2007).
blind-sided at deposition or trial and have his or her credibility and usefulness destroyed on cross-examination. Moreover, it has been held that information known to the party calling the expert which “might affect the expert’s judgment, should be disclosed even if not already shown to the expert.”

Send the expert everything you think he or she will need to fairly assess the issue and prepare a report outlining and justifying the opinions expressed therein. Include whatever you think necessary to prepare the expert for cross-examination. Advise the expert that if he or she requires any additional information, not to hesitate asking for it.

The form of the expert report, generally, will be as outlined in Federal Rule of Civil Procedure 26(a)(2)(B) and “shall contain a complete statement of all opinions expressed and the basis and reasons therefore; the data or information considered by the witness in forming the opinions; any exhibits used as a summary of or support for the opinions; the qualification of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.” It is helpful, before stating the opinions to be offered, to include a brief statement of the “Scope of this report,” setting forth what it is that the expert was asked to do and on which he was asked to comment or opine.

When the expert has reached his or her conclusions, but before he or she has prepared and sent you a draft report, you should arrange a telephone conference to discuss the expert’s conclusions. However, be aware that the substance of the conversation may be discoverable. Resist the temptation of telling the expert exactly what to say. It is far better for the expert’s report to be written in his or her own words and style. It will make the report much easier to defend at deposition or trial. While the report will support your position, it should be a fair and balanced presentation of a neutral person trying to assist the tribunal to reach the correct result. Tell your expert not to send you drafts of the report or emails or memoranda containing other musings about the case that you have not specifically requested.

Finally, when the draft report has been prepared, the expert can read it to you over the phone or at a face-to-face meeting. If the report contains no surprises and clearly and cogently presents the position you were looking for, ask the expert to finalize it and send it to you (by email and hard copy).

Ideally, any changes you or your client may wish to make will be minimal, acceptable to the expert. Hopefully any changes will be simply stylistic or editorial in nature, rather than a substantive alteration of the expert’s views which will provide fodder for cross-examination.

34 Gall v. Jamison, 44 P.3d 233, 241 (Colo. 2002) (“In fact, documents considered but rejected by the expert trial witness could be even more important for cross-examination than those actually relied upon by him.” We hold that an expert considers documents or materials for the purposes of Rule 26(a)(2)(B) where she reads or reviews them before or in connection with forming her opinion, even if she does not rely upon or ultimately rejects the documents or materials.”).
35 The compensation is being paid for the witness’s time, not for the testimony. It is imperative that this point is one of the first things that you tell the expert when preparing for deposition or trial.