Bad Faith: The Admissibility of Expert Testimony and the Challenges That Follow

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A. Introduction

The issues involved in most bad-faith cases tend to be fairly complex. This is not completely surprising in a circumstance where there must be a strong disagreement between the two sides as to some insurance issue before there will be any action. Apart from potential concerns that a jury may weigh expert opinions too heavily, there is little denying that expert testimony may serve the cause of both sides to a bad-faith action.

Professor Samuel Gross from the University of Michigan outlined the ‘essential paradox’ of expert testimony by noting that: “We call expert witnesses to testify about matters that are beyond the ordinary understanding of lay people (that is both the major practical justification and a formal legal requirement for expert testimony), and then we ask lay judges and jurors to judge their testimony.”

Accordingly, while courts hold that expert testimony in a bad-faith case is not a necessity, it is widely held that expert testimony on pertinent issues and insurer practices is admissible in the general discretion of the trial court when offered by an appropriately qualified expert.

B. The Issue

The admissibility of expert witness testimony and the documentary evidence upon which such testimony is based are currently subject to a myriad of challenges in all types of litigation, both at the state and federal levels. A clear understanding of the application of Daubert v. Merrell Dow Pharmaceuticals, Inc., General Electric v. Joiner, and Kumho Tire Co. v. Carmichael, is critically important to defense practitioners and their ability to exclude expert evidence offered by the plaintiff/policyholder/insured. The wrangling about whether Daubert standards apply only to scientific evidence or whether the Daubert gatekeeping function applies equally to nonscientific evidence has been laid to rest. Consequently, as noted below, those practicing in the insurance-related defense and coverage arenas must be prepared to challenge a plaintiff’s proof in bad faith, claims handling, and policy interpretation cases. Similarly, counsel must be prepared to challenge the documentary evidence upon which any expert opinion is based that is offered by plaintiff’s counsel to justify plaintiff’s interpretation of the policy. Of course, counsel for the insurance company should be aware that the insurer/defense expert’s testimony undoubtedly will undergo similar challenge.
A proactive approach that challenges expert testimony within the nonscientific, insurance-related fields must begin with an understanding of *Daubert*, *Joiner*, and *Kumho*. However, if the applicable state jurisdiction does not follow *Daubert* and its progeny, the practitioner should consider the test articulated in *Frye v. United States*, or perhaps a combination of the two. Though it is beyond the scope of this article, the practitioner should also consider whether the expert is qualified in its field of expertise. This article will next consider a historical analysis of these cases together with their applicable tests. Defense counsel will be urged to consider several projects covering application of these tests to expert evidence within the context of the traditional insurance case.

C. The Standard

1. *Daubert*, et al.

Any analysis of the standard that courts will apply to “junk science” and “junk expert testimony” must begin with *Daubert*, *Joiner* and *Kumho* since difficult questions clearly remain regarding how these opinions apply outside scientific disciplines. Junk science has been defined as “jargon-filled, serious-sounding deception.”


   In *Daubert*, the parents of children suffering birth defects allegedly caused by the drug Bendictin instituted an action against the manufacturer of that drug. Bendictin was an anti-nausea drug used by mothers during pregnancy. Procedurally, the defendant moved for summary judgment on the issue of causation contending there was no link between the use of Bendictin and the alleged birth defects. To support its motion, defendant offered the affidavit of a scientific expert. Plaintiff countered this proof with affidavits from eight expert witnesses who argued that there was a causal link. The district court granted the defendant’s motion and plaintiffs appealed to the Ninth Circuit Court of Appeals. Affirming the lower court’s holding, the Ninth Circuit cited *Frye v. United States*, noting that scientific testimony would only be admitted if it were “generally accepted in the relevant scientific community.” Plaintiff petitioned the United States Supreme Court contending that since *Frye*, the United States Congress had enacted the Federal Rules of Evidence (specifically Rules 104(a) and (b) and Rule 702), which arguably liberalized evidentiary standards. These rules provide as follows:

   **Federal Rule of Evidence 104(a):**
   Preliminary questions concerning the qualifications of a person to be a witness . . . or the admissibility of evidence shall be determined by the Court.
Federal Rule of Evidence 104(b):
When the relevancy of evidence depends on the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Federal Rule of Evidence 702:
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.

Recognizing that the Federal Rules of Evidence were intended to be more liberal than the historical Frye test, the Supreme Court noted that the Frye Court’s “rigid general acceptance requirement would be at odds with the liberal thrust of the Federal Rules.” With that said, the Court defined the trial court’s “gatekeeping” function and its obligation to exclude evidence based only on “subjective belief or unsupported speculation.” The Court also enumerated several factors for the trial court to consider when analyzing the reliability of evidence:

1) Can the theory or technique be tested or has it been tested?
2) Has the theory or technique been subject to peer review and publication?
3) Is there a known or potential rate of error?
4) Do standards and controls exist and are they maintained?
5) Has the theory been generally accepted?

The Court emphasized, however, that these factors are “general observations” that should not be considered a definitive test. The Court also cautioned that it had only addressed scientific expert evidence; it was not addressing technical or other specialized knowledge. Legal analysts immediately questioned whether the Daubert “gatekeeping” function extended to other types of expert testimony.

In his dissenting opinion, Justice Rehnquist initiated this same concern: “[D]oes all of the dicta apply to an expert seeking to testify on the basis of ‘technical or other specialized knowledge’ the other types of expert knowledge to which Rule 702 applies, or are the ‘general observations’ limited only to scientific knowledge?” Other commentators speculated as well. Further, there developed a significant split among the various lower courts about how Daubert would be interpreted and whether it would apply to nonscientific evidence.
It should be noted that the Supreme Court remanded *Daubert* to the Ninth Circuit Court of Appeals. On remand, the Ninth Circuit found that the evidence was inadmissible. In addition to the *Daubert* factors, it noted that expert testimony is presumptively unreliable if the research was conducted in anticipation of, rather than independent of, the litigation.\(^{19}\)

b. *General Electric v. Joiner*\(^{20}\)

The *Daubert* Court also left unresolved the issue of what standard should be applied by an appellate court when reviewing a trial court ruling on the admissibility of evidence. In *Joiner*, the Supreme Court addressed this issue and resolved the conflict among the various districts that had developed after *Daubert*.\(^{21}\)

The *Joiner* dispute involved a plaintiff’s claim that his cancer was caused by exposure to PCB and chemical fumes. The district court had ruled that a causal link did not exist between the exposure and the cancer. On appeal, the Eleventh Circuit reversed the district court’s ruling, applying a de novo standard of review. The United States Supreme Court rejected this standard, however, ruling that the decision of the district court should not be revised unless that court abused its discretion.\(^{22}\) Of significance, the Court reaffirmed the *Daubert* standard but without the clarification that had been anticipated:

> [N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence, which is connected to existing data, only on the *ipse dixit* of the expert. A Court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.\(^{23}\)

Subsequent to *Daubert* and *Joiner*, confusion still existed among the federal district and state courts regarding which standard to apply.\(^{24}\) Further, the Court did not answer the question posed by Chief Justice Rehnquist in *Daubert*: Did the Court’s ruling apply to nonscientific and other technical evidence? As a result, after *Daubert* and *Joiner*, courts in the various circuits answered this question differently. For example, the Second, Ninth, and Tenth Circuits held that *Daubert* was limited to scientific testimony and not applicable to experience-based testimony.\(^{25}\) In contrast, the Fifth, Sixth, Seventh, and Eighth Circuits authorized the use of *Daubert* factors to analyze admissibility of expert evidence, both scientific and nonscientific in nature.\(^{26}\)

c. *Kumho Tire Co. v. Carmichael*\(^{27}\)

Recognizing the foregoing conflict, the Supreme Court in *Kumho* confronted the issue directly, analyzing whether the “gatekeeping” function of the
district court applied to scientific, nonscientific and other technical evidence. The *Kumho* plaintiffs had been injured as the result of a tire blowout on a minivan. They sued the tire manufacturer, claiming that either a design or manufacturing defect caused the blowout. In support of their theory, plaintiffs offered the testimony of a tire expert. On motion of the defendant, the trial court excluded the tire expert’s testimony utilizing *Daubert* factors (general acceptance, rate error, peer review and publication). The Eleventh Circuit reversed, holding that *Daubert* was limited to scientific evidence and did not apply to the tire expert’s testimony since that testimony was skill- or experience-based. The United States Supreme Court reversed the Eleventh Circuit, noting that the language of Rule 702 makes no distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. Further, the high Court determined that the evidentiary rationale underlying the basic *Daubert* “gatekeeping” function was not limited to “scientific” knowledge:

> [W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.”

Citing *Joiner*, the Supreme Court further noted that the appellate courts must apply an abuse of discretion standard when reviewing a trial court decision to admit or exclude expert testimony. The Court then applied the abuse of discretion standard to the relevant facts, concluding that the testimony of plaintiffs’ tire expert was properly excluded by the trial court under that standard.

Several recent cases have considered the application of *Daubert* standards post-*Kumho*. The case of *Jaurequi v. Carter Manufacturing Co.* involved the testimony of a mechanical engineer and human factors expert regarding safety barriers and improper safety warnings. The court there noted that when applying the *Daubert* standard to all types of expert testimony, the trial court is left with “great flexibility in adapting its analysis to fit the facts of each case.” Further, the trial court did not abuse its discretion when excluding evidence that was nothing more than “unabashed speculation.”

The United States Supreme Court later refused to grant the plaintiff’s petition for *certiorari* in *Moore v. Ashland Chemical, Inc.* This case involved a doctor’s causation testimony based on clinical assessment and diagnosis of the plaintiff’s illness following exposure to chemical toxins. Relying on *Daubert* and Federal Rule of Evidence 702, the district court excluded the testimony. The Fifth Circuit reversed, however, noting that *Daubert* factors do not apply to clinical medicine which is not hard science. An en banc court subsequently
abandoned the panel determination, holding that no such distinction exists and that Rule 702 and Daubert apply to both scientific and nonscientific expert testimony.

The court in Johnson v. District of Columbia refined the issue further. That case involved scalding injuries to an infant child amid allegations that a water heater malfunction caused the injuries. Pursuant to the defendant’s motion in limine, the trial court excluded the testimony of plaintiff’s plumbing expert on grounds that he was only experienced in the installation of water heaters, did not have any experience in the design or control function, and was unfamiliar with commercial heaters. The court of appeals determined that as long as the trial judge has the facts necessary to assess the expert’s qualifications, the judge can admit or exclude expert testimony without a hearing, based on those facts contained in the record or the attorney’s offer of proof.

d. Frye v. United States

Under Frye, the sole determinant of the reliability and admissibility of an expert’s testimony is whether the expert’s testimony is based on scientific principles or procedures, or whether the principles or procedures have sufficiently gained “general acceptance” in the specific field to which the principles or procedures relate. Decided over seventy-five years ago, the attorneys representing Frye attempted to admit expert testimony on the reliability of a systolic blood pressure test to disprove that Frye committed a murder. The federal court excluded the offer of proof because the test had not “gained general acceptance in the particular field to which it belongs;” therefore, it was inadmissible because it was “experimental” as opposed to “demonstrable.” The Frye standard is often considered less flexible than the Daubert standard. Under Frye, the party offering the scientific evidence must conclusively show general acceptance. If the proof is accepted only by a minority of scientists in the applicable/relevant field, such expert proof would be excluded. Under Daubert, however, proof that is accepted by a minority of scientists would provide only a basis to impeach the expert witness.

D. Application to Insurance Issues

There is considerable authority holding that expert testimony is generally not required to establish bad faith or other improper handling of claims. In some instances, courts have held that the admission of expert testimony was prejudicial, although the admission of expert testimony on the point has been deemed nonprejudicial in other cases.

1. General Principles
There is little doubt that the insurance industry held serious interest in Daubert and its progeny because inconsistencies that developed after Daubert could have adversely affected the standards by which claims professionals, underwriters, and the insurance industry as a whole would be judged. For example, concerns of the American Insurance Association and the National Association of Independent Insurers were expressed in their amici curiae briefs, where they encouraged the Court to extend Daubert standards to “applied science,” including insurance issues within the context of Y2K litigation. The ultimate concern was whether the testimony of an insurance expert, which is based on general personal experience, skill, and knowledge, would withstand application of the relevant standards.

Under existing standards, it must be determined initially whether the testimony offered assists the trier of fact in understanding the issues at hand and leaves undisturbed the province of the jury. The case of Buckner v. Sam’s Club, Inc. confirms this analysis when discussing the testimony of a safety management expert. Within the insurance context, the court of appeals in New York has traditionally held that “the opinions of experts, which intrude on the province of the jury to draw inferences and conclusions are both unnecessary and improper.”

The court in Kulak v. Nationwide Mutual Insurance Co. similarly excluded expert testimony when deciding whether an insurer acted in bad faith in allegedly failing to settle:

While it might be suggested that an experienced trial attorney . . . who has had frequent occasion to observe the results of juries’ deliberations in personal injury actions might be expected reliably to predict the outcome in a particular case, we know of no empirical support for such a conclusion. Moreover, any such result would be based on exposure rather than expertise; and would treat of subject matter calling for no special scientific or professional education, training or skill.

After recognizing the underlying need for special qualifications and testimony, the court further noted: “[a]ny experience advantage enjoyed by such witnesses would not establish the inability or incompetence of jurors, on the basis of their day-to-day experience and observation, to comprehend the issues, to evaluate the evidence, and finally to estimate the likely outcome of a specific action.” Citing Federal Rule of Evidence 702, the one dissenting judge in Kulak endorsed an approach that takes a more realistic view of the need for expert testimony in today’s complex society. He also identified areas where expert testimony is necessary in a bad faith case.
With this overview, the practitioner should next assess how the \textit{Daubert} standards become operative. What is certain is that each situation must be assessed on a case-by-case basis because not all \textit{Daubert} factors will apply to all experts and, in fact, none will apply in some cases. As one commentator has observed:

\begin{quote}
[T]he \textit{Daubert} factors may or may not apply in each case. Rather than employ a mechanistic application of specific factors, courts should focus on \textit{Daubert}'s goal, which is to make certain that the expert, whether basing testimony on professional studies or personal experiences, employs the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.\footnote{51}
\end{quote}

As noted in \textit{Tyus v. Urban Search Management},\footnote{52} “the measure of intellectual rigor will vary by the field of expertise, and the way of demonstrating expertise may vary.”\footnote{53} However, the court in \textit{Tyus} also concluded that: “In all cases . . . the district court must ensure that it is dealing with an expert, not just a \textit{hired gun}.”\footnote{54}

While there is limited case law to govern whether a particular “insurance expert” meets the applicable \textit{Daubert} tests, there are several recent cases within the coverage context that provide some guidance. In each case under scrutiny, the practitioner should determine whether the expert’s opinion is based on mere speculation or whether the expert used the “types of information, analyses, and methods relied on by experts in his field.” Also, “the information that he gathers and the methodology he uses must reasonably support his conclusions.”\footnote{55}

When applying the foregoing principles, several interesting cases that postdate \textit{Daubert} but predate \textit{Kumho} should be considered. These address whether the \textit{Daubert} standards are applicable to expert testimony concerning claims-handling procedures. In \textit{Reedy v. White Consolidated Industries, Inc.},\footnote{56} the insured alleged, among other things, that his employer acted in bad faith in refusing to pay workers’ compensation benefits. The plaintiff had designated two individuals or experts to testify on claims-handling procedures, and the defendant moved to strike the testimony of these witnesses. In denying the defendant’s motion, the court made several statements that will assist the practitioner in determining when the testimony of “insurance experts” should be allowed:

\begin{enumerate}
\item An individual can qualify as an expert where that individual possesses significant knowledge gained from practical experience, even though academic qualifications in the particular field of expertise may be lacking.
\item The central issue is whether the expert’s testimony will assist the trier of fact; merely telling the jury what result to reach is not helpful.
\end{enumerate}
3) Competency goes to weight, not admissibility.
4) Expert testimony must be reliable and relevant under *Daubert*.
5) The witness should have specialized knowledge about relevant activities in the case with which most jurors are not familiar.

The court held that the “claims adjusting procedure is . . . something about which the average juror is unlikely to have sufficient knowledge or experience to form an opinion without expert guidance, thus expert testimony would not be superfluous.”* In reaching its decision to permit expert testimony about whether the defendant’s claims procedure was usual and appropriate, the court reviewed the expert’s practical experience with claims adjustment and the types of claims processed. However, while the testimony of the two experts was admissible, the defendant was still “entitled to pursue further challenges to these expert’s skill or knowledge in order to attack the weight to be accorded their expert testimony.”*58

In *United States Fidelity & Guaranty Co. v. Sulco, Inc.*,59 the court likewise considered the proffered expert testimony of a claims processing manager and, without discussing the *Daubert* factors, allowed it as sufficient. Again, in *Kraeger v. Nationwide Mutual Insurance Co.*,60 the court considered the testimony of the insured’s bad faith expert and denied the insurer’s motion *in limine*. In doing so, the court made certain observations that are helpful in assessing the parameters of a bad faith expert’s testimony:

1) Testimony about how insurance claims are managed and evaluated and the statutory or regulatory standards to which insurance companies must adhere could be helpful to the jury in evaluating whether the claim was handled in bad faith.
2) The expert witness cannot provide legal conclusions that the insurer violated a particular statute or that the insurer acted in bad faith.
3) The expert witness can testify that, based upon expertise and experience, the insurer had no reasonable basis for its actions.

In reaching its conclusion, the court specifically determined that the *Daubert* factors did not apply to this type of testimony.

There are many post-*Kumho* nonscientific cases that likewise provide some guidance to those practitioners who litigate insurance issues. For example, in the antitrust case of *City of Tuscaloosa v. Harcros Chemicals, Inc.*,61 the Eleventh Circuit considered the nonscientific testimony of a certified public accountant and the testimony of a statistician and held: “[w]e conclude that the district court abused its discretion in excluding Garner’s [CPA] testimony . . . . We further conclude that the district court’s interpretations of *Daubert* and of Rules 104 and 702 . . . were erroneous as a matter of law.”62 With respect to the statistician’s
testimony, the court excluded portions of his testimony only because such testimony was outside his competence and the methodology was flawed.63

It should be noted that the defense bar also has been successful in excluding the insured/policyholder’s expert in the following cases:

- **Hyde Athletic Industries, Inc. v. Continental Casualty Co.**64 The court in this case excluded the plaintiff’s expert testimony when determining whether the environmental containment was “sudden or accidental” or whether it occurred over a long period of time. The exclusion of the evidence initially was based on inconsistencies between the expert’s deposition testimony and the affidavits submitted on the summary judgment motion. In addition, the court noted that it was “concerned that Robertson’s opinion would be inadmissible at trial under Federal Rule of Evidence 702 because it may not meet the standards outlined in *Daubert* . . .”65

- **Brown v. Auto-Owners Insurance Co.**66 This case involved expert testimony by a civil engineer regarding the structural damage to a warehouse, which was alleged to be speculative. In rejecting the expert testimony proffered by the insured/policyholder, the court noted that “the expert’s testimony must be grounded in the methods and procedures of science and not subjective belief or unsupported speculation.”67 Because the testimony was based on nothing more than the witness’s subjective belief and personal observations regarding the cause of the damages, rather than mathematical calculation or scientific methodology, it was excluded.

- **Talmage v. Harris**68 Plaintiff, a former client, filed a legal malpractice suit against his former attorney in connection with his handling of the client’s suit against his fire insurer. Plaintiff retained an expert witness on liability. The expert was an attorney, with over 20 years of experience performing defense work for insurance companies. The expert’s work as an insurance defense attorney included adjusting claims. He never represented a claimant who was pursuing a claim against an insurer for fire loss and making a claim under the insurance policy. The expert had never defended an insurance company against a claim by its own insured for coverage arising out of a fire loss.

The court explained the Seventh Circuit’s test for evaluating the admissibility of expert testimony under F.R.E. 702 and *Daubert*:

First, the court must decide “whether the expert’s testimony pertains to scientific knowledge” and “must rule out subjective belief or unsupported speculation.”69
Second, the court needs to determine “whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue.” Regarding this second inquiry, “[a]n expert's opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate that opinion; the opinion must be an expert opinion (that is, an opinion informed by the witness' expertise) rather than simply an opinion broached by a purported expert.”

“Because an expert's qualifications bear upon whether he can offer special knowledge to the jury, the Daubert framework permits—indeed, encourages—a district judge to consider the qualifications of a witness.”

The court held that the expert was qualified to offer an opinion regarding the reasonableness of the insurer’s handling of the plaintiff’s claim. The expert was a lawyer with substantial experience in insurance law. The court noted that although he did not specialize in fire loss claims, the expert had special knowledge of the insurance claims adjustment process in general as a result of his 20 years’ experience as a lawyer defending insurance companies against claims by policy holders. The court concluded by stating that it was satisfied that the expert had “enough experience with insurance claims and knowledge of the law of bad faith in Wisconsin to make his opinion regarding the viability of plaintiff’s bad faith claim admissible under Daubert.”

Jordan v. Allstate Insurance Company In this 2007 California Court of Appeals case, the court held that expert testimony on statutory violation was admissible. Over Allstate's objection, the trial court considered the declaration of an expert on insurance industry claims settlement practice. In his declaration, the expert expressed the opinion that various actions undertaken by Allstate violated certain provisions of the Unfair Insurance Practices Act (Ins.Code, § 790.03, subdivision (h)). Allstate objected to the trial court’s consideration of the expert’s declaration on the ground that section 790.03, subdivision (h) cannot provide the basis for a bad faith action. Allstate did not counter the expert’s declaration, but objected on the ground that it was inadmissible for the reason stated above. The court overruled that objection.

The court held that the plaintiff was not seeking to recover on a claim based on a violation of section 790.03, subdivision (h). Rather, her claim was based on a claim of common law bad faith arising from Allstate’s breach of the implied covenant of good faith and fair dealing which she is
entitled to pursue.\textsuperscript{79} Plaintiff’s reliance upon the expert’s declaration was for the purpose of providing evidence supporting her contention that Allstate had breached the implied covenant by its actions. This is a proper use of evidence of an insurer’s violations of the statute and the corresponding regulations.\textsuperscript{80} (See \textit{Rattan v. United Services Automobile Assn.} 84 Cal.App.4\textsuperscript{th} 715, 724, 101 Cal.Rptr.2d 6, 4th Dist. 2000).

To the contrary, there exist several other cases where the insurer has not been successful in excluding the testimony of the insured/policyholder’s expert or where the insurer’s own expert testimony has been excluded:

- \textit{Michigan Millers Mutual Insurance Co. v. Benfield}.\textsuperscript{81} In this case, the testimony of the insurer’s fire and origin expert was excluded because it was not sufficiently reliable for admission under \textit{Daubert}. Specifically, the court rejected the opinion evidence because it was not supported by reliable procedure and scientific methodology.

- \textit{Douglas v. State Farm Lloyds}.\textsuperscript{82} Though the issue here did not arise in the \textit{Daubert} context, its determination affects the use of experts in insurance cases. In this “failure to investigate and settle” case, the court noted that “an insurer’s reliance upon an expert report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer’s reliance on the report was unreasonable.”\textsuperscript{83}

- \textit{Aetna Casualty & Surety Co. v. Dow Chemical Co.}.\textsuperscript{84} This environmental case involved a claim by an insurance carrier that it was prejudiced because the insured’s report regarding the removal of underground storage tanks did not contain information as to when releases or contamination occurred. The court noted that because the insurer did not utilize an expert on hydrogeology to establish the nature and timing of the discharge, the insurer’s claim for prejudice was in doubt.

- \textit{Watts v. Organogenesis, Inc.}\textsuperscript{85} In a case involving the construction and interpretation of the phrase, “underlying medical condition,” within a medical insurance contract, the insured’s doctor had testified that dysreflexia was an underlying medical condition. Accepting the insured’s expert testimony, the court noted: “If the phrase is a term of art, then a medical expert’s unrebuted designation of the dysreflexia as such is sufficient as the last word on this issue. If it is not, then use of the phrase in the plan document is ambiguous, and therefore should be construed in accordance with the singular/plural rule . . . .”\textsuperscript{86}
California Shoppers, Inc. v. Royal Globe Ins. Co. California Shoppers and four of its shareholders brought an action against its insurance carrier, Royal Globe to recover damages allegedly resulting from the breaches of two duties arising under the policy. One such breach was the refusal to indemnify the insured for a judgment awarded against it in a third-party action (the *Uneedus* action) brought by a competitor. The other was the failure to defend the *Uneedus* action. The main action also included a count for willful breach of the implied covenant of good faith and fair dealing allegedly occurring in connection with the failure to defend, as well as a count for fraud allegedly occurring at the time the insurance was purchased. The appellate court held that the lawyer who represented the policyholders against the shareholders did not qualify as a bad faith expert. The court reasoned that he could not testify as an expert because he had never been employed by an insurance company, or even retained as counsel by an insurance company.

By virtue of the determination in *Kumho*, the rules espoused by these cases also apply to nonscientific evidence. Within the insurance context, these include bad faith, policy interpretations and claims-handling cases.

As the various district and state courts begin applying the *Kumho* analysis of *Daubert* to nonscientific evidence, inconsistencies between rigid application of the standards and a flexible approach should dissolve. For example, in *Moore v. Ashland Chemical, Inc.*, the Fifth Circuit sitting en banc likely applied *Daubert* too rigidly when it held that the district court had discretion to exclude the causation testimony of the plaintiff’s clinical physician because there existed an “analytical gap between the causation opinion and the scientific knowledge and data that were cited in support.” Since inconsistency is still a possibility, it is absolutely necessary that the practitioner grasp the standards applied in both state and federal courts within the applicable jurisdictions. An example of such analysis is included below. It considers the status of New York law subsequent to *Daubert*, *Joiner*, and *Kumho*. Such an analysis should be undertaken within the practitioner’s relevant jurisdiction.

E. New York Approach

1. State Court

a. Scientific Testimony

New York state courts have not yet adopted the *Daubert* standard as enhanced by *Joiner*, or *Kumho*. Specifically, the New York Court of Appeals has
not embraced the Daubert standard of scientific reliability; instead, it has retained the Frye “general acceptance” test. In People v. Wesley,\textsuperscript{92} the court noted in a footnote that Daubert was not applicable, remarking that, under Frye, the particular procedure need not be unanimously “endorsed” by the scientific community if it is “generally accepted as reliable.”\textsuperscript{93} The Frye standard became the basis for New York’s two-part test on the admissibility of scientific expert testimony.\textsuperscript{94} Under the first prong of the test, the proffered expert’s testimony must be based upon scientific knowledge and skill that is not within the scope of the jury’s ordinary training or intelligence. The expert need only have gained knowledge or expertise (formal or otherwise) that would assist the jury in interpreting the issues before it. If the proffered proof is based solely on common knowledge or intelligence, the testimony should be excluded because jurors can form these same reasonable opinions. The second prong requires that the expert’s testimony be based on scientific principles or procedures under the “general acceptance” test.\textsuperscript{95} It is within the province of the trial court to determine whether the expert’s testimony is both necessary to assist in the jury’s interpretation and whether the expert’s theory has gained general acceptance. Once that determination is made, the weight accorded to the expert’s testimony is left to the jury. The court traditionally has conducted a “Frye hearing” during which each party presents its position to support or challenge admissibility. One court has noted that such a hearing is not necessary, deciding the admissibility issue without a formal hearing.\textsuperscript{96}

b. Nonscientific Testimony

Consistently, the courts in New York have held that the Frye “general acceptance” test is not applicable to nonscientific or non-novel evidence.\textsuperscript{97} In Wahl v. American Honda Motor Co.,\textsuperscript{98} when considering the testimony of an engineer regarding the design defects of an ATV, the court ruled as follows: “inasmuch as the testimony is that of an engineer, and . . . is based upon . . . recognized technical or other specialized knowledge, the Court finds that the stricter general acceptance standard of Frye is not applicable. The Court will apply the reliability standard as derived from Daubert and Kumho Tire.”\textsuperscript{99}

Following suit, another court in Clemente v. Blumenberg\textsuperscript{100} questioned the continued application of Frye not only to scientific, but to nonscientific expert testimony as well:

[T]he accelerated pace at which science travels is today far faster than the speed at which it traveled in 1923 when Frye was written. Breakthroughs in science which are valid may be relevant to a case before the courts. Waiting for the scientific community to “generally accept” a novel theory which is otherwise valid and reliable as evidence may deny a litigant justice before the court.\textsuperscript{101}
Thus, when considering the testimony of a biomedical engineer, the court analyzed the issues under both *Frye* and *Daubert* standards:

[T]his court finds that the proffered biomedical engineer is qualified as an expert in biomedical engineering based upon his professional training and may render an opinion as to the general formula of forces upon objects. . . . However, he may not render an opinion based on his report and testimony at the *Frye* hearing because the source of the data and the methodology employed by him in reaching his conclusion is not generally accepted in the relevant scientific or technical community to which it belongs.102

The court continued: “applying the *Daubert/Kumho* factors . . . this court finds that the data and the methodology employed by the biomechanical engineer are not scientifically or technically valid.”103 In addition to these findings, the court observed:

A trial judge’s role as a gatekeeper of evidence is not a role created by *Daubert* and rejected by the Court of Appeals; it is an inherent power of all trial court judges to keep unreliable evidence (“junk science”) away from the trier of fact regardless of the qualifications of the expert. A well-credentialed expert does not make invalid science valid merely by espousing an opinion.104

By virtue of the *Clemente* decision, at least one New York judge is willing to move away from the rigors of *Frye* to a more liberal approach.

c. *Parker v. Mobil Oil Corporation*

In a recent New York State Court of Appeals case, *Parker v. Mobil Oil Corporation*, a plaintiff, who had been diagnosed with acute myelogenous leukemia (AML), sued various oil corporations, claiming that his exposure to gasoline containing benzene caused his AML.105 The Third Department established a three-step process for evaluating whether an expert witnesses’ methodology was appropriate to determine scientific reliability. Specifically, the three-step process included: (1) A determination of the Plaintiff’s level of exposure to the toxin in question, (2) from a review of the scientific literature, proof that the toxin is capable of producing the illness in question (general causation) and the level of exposure to the toxin which will produce that illness, and (3) establishing specific causation by demonstrating the probability that the toxin caused the plaintiff’s particular illness.

While the Court of Appeals affirmed the Third Department’s Decision and held that plaintiff’s experts’ submissions were properly precluded and defendants’
motions for summary judgment were properly granted, the Court of Appeals deviated from the Third Department’s rationale. Specifically, the court rejected the Third Department’s holding that it was necessary for plaintiff to always quantify exposure levels or a dose-response relationship. Rather, the court held, a variety of methodologies may be acceptable so long as they are generally accepted in the scientific community. Thus, whereas the Third Department primarily founded its decision upon that plaintiff’s experts’ submissions failed to adequately quantify plaintiff’s level of exposure to the toxin needed to contract AML, the Court of Appeals focused on the generally unreliable nature of plaintiff’s experts’ submissions which relied upon studies of direct exposure to benzene rather than studies of exposure to benzene in gasoline.

2. Federal Court

Since the Supreme Court’s decision in *Daubert*, there have been a handful of federal court cases in New York that have addressed the *Daubert/Kumho* standards.

- *Gray v. Briggs*¹⁰⁶

  In *Gray v. Briggs*, which involved a dispute between an attorney and former law firm employees who had participated in the firm’s pension plan, it was alleged that defendants breached a fiduciary duty in violation of the Employee Retirement Income Security Act (ERISA). Plaintiff had retained an expert who asserted, among other things, that defendants had violated ERISA, made speculative personal investments, and violated industry standards against churning. The defendants challenged the plaintiff’s expert and moved to preclude the testimony. Citing *Kumho*, the court rejected the expert’s testimony and concomitant report on various grounds:

1) The testimony was outside the expert’s expertise;
2) The expert lacked the qualifications to express the opinion for which his testimony was offered;
3) The expert’s opinion was nothing more than strained speculations or bare legal conclusions; it was without sufficient evidentiary basis to be helpful to the court or reliable.

When applying the *Kumho* standard, the court offered that expert testimony is admitted under Federal Rule of Evidence 702 where it will assist the trier of fact to understand the evidence or determine a fact in issue. Further, an expert must be qualified to testify (i.e., by knowledge, skill, experience, training or education). As noted in *Kumho*, the expert must have “sufficient specialized knowledge to assist in deciding the particular issue in the case.”¹⁰⁷
Another district court judge considered *Daubert* and its progeny in *Grdinich v. Bradlees*, which involved a claim by a plaintiff who was injured while shopping at defendant’s store when ironing boards fell from a display case. The plaintiff had retained an expert to testify that defendant ignored or failed to follow the industry guidelines applicable to self-service department stores. The defendant challenged the admissibility of the expert’s testimony. Citing the “gatekeeping” function articulated by *Daubert* and *Kumho* (application of *Daubert* to technical and other specialized knowledge), the court noted that it must decide “whether this particular expert [has] sufficient specialized knowledge to assist the jurors in deciding the particular issue in the case.” The court precluded the expert testimony because:

1) none of the *Daubert* factors were present, including that of “general acceptance” within the relevant expert community; and
2) there were no countervailing factors which favored admissibility which so as to outweigh those identified in *Daubert*.

As a result, the testimony was precluded because it was neither reliable nor relevant.

In *Prohaska v. Sofamor, S.N.C.*, a patient brought a products liability action against the manufacturer of pedicle bone screws that allegedly cause spinal problems and other consequences. One of plaintiff’s experts was a board-certified neurosurgeon with 35 years of experience who claimed he was "well acquainted" with defendant’s and others’ spinal instrumentation, "'even though I do not personally install it myself surgically.'" He had not performed any neurological surgery since 1997 following cancer treatment. His specialty was acoustic tumors of the brain and implantation of continuous infusion pumps into the spinal column for control of intractable pain in cancer patients. He was not trained to do lumbar fusions - the type of surgery at issue in the case.

The court detailed the expert’s lack of experience with the specific fixation devices and related surgery involved in the case at hand. Because the focus under *Daubert* is not simply raw qualifications in the abstract but, rather, qualifications to testify reliably, the court found the proffered expert was unqualified by skill, experience, training, knowledge or education in the specific subject at issue. Instead, he demonstrated a "litigation driven expertise", asserted "conclusory allegations," failed to personally examine plaintiff or her scans, made a differential diagnosis absent "intellectual rigor" and indulged in assumptions
rather than relying on medical fact. Accordingly, his proffered testimony was found unreliable under a Daubert analysis.

- Brooks v. Outboard Marine Corp. 114

In Brooks v. Outboard Marine Corp., the parent of a minor whose hand was amputated by a propeller on an outboard boat motor brought a product liability action on behalf of the minor against the manufacturer of the motor. Outboard deposed the plaintiff’s expert witness. After the close of discovery, the plaintiff requested permission to extend discovery in order to obtain a new expert witness. During this time, Outboard filed a motion for summary judgment, arguing that the plaintiff’s current expert should be precluded from testifying and that summary judgment was proper on the plaintiff’s theories of liability. 115 This was referred to a magistrate judge. Meanwhile, the plaintiff filed a curriculum vitae and one-page report of a new expert witness. The new expert’s report concluded that a certain safety mechanism on the boat could have prevented the accident or lessened its severity. The magistrate recommended denying OMC’s motion for summary judgment, finding that it was “premature” because the defendant had not properly responded to the plaintiff’s new design defect theory. 116 In addition, the magistrate found it premature to rule on the admissibility of Mr. Warren’s testimony, noting that such rulings are usually made on a more complete record. 117 The district court adopted the magistrate’s recommendation.

On appeal, plaintiff argued that the Supreme Court’s decision in Kumho, 118 required the party challenging the admissibility of its opponent’s expert witness to first use its own expert to call the challenged expert’s testimony “sufficiently into question.” 119 Only then, contended the plaintiff, can the district court analyze the admissibility of the testimony of the expert witness. The Second Circuit held that this argument was without merit. The court explained that in Daubert, 120 the Supreme Court instructed that the Federal Rules of Evidence require the trial court to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” 121 The subsequent decision in Kumho Tire makes clear that this gate-keeping function applies not just to scientific expert testimony as discussed in Daubert, but also to testimony based on “‘technical’ and ‘other specialized’ knowledge.” 122

The court held that “plaintiff’s argument that this gate-keeping role disappears when a proposed expert witness is not challenged by an opposing expert witness thus runs counter to the thrust of Daubert and Kumho Tire. Nowhere in either opinion is there language suggesting that testimony could only be “called sufficiently into question” by a rebuttal expert.” 123 Having determined that the district court acted within its discretion in excluding Mr. Warren's testimony, the plaintiff had no evidence in the record to support his theory that the motor had a design defect which caused the accident or increased
its severity. As a result, the Court of Appeals held that summary judgment was properly granted.

- *American Home Assurance v. Merck & Co., Inc.* \(^{124}\)

In the 2006 case, *American Home Assurance Company v. Merck & Co., Inc.* the insurer brought an action for declaration that it properly denied Merck’s claims for coverage under the transit insurance policy. American Home asserted a counterclaim for bad faith, amongst other causes of action. Courts within the Second Circuit “have liberally construed expert qualification requirements” when determining whether a witness can be considered an expert. \(^{125}\)

The Second Circuit has instructed that a trial court, in determining whether a witness is qualified to render an expert opinion, “must first ascertain whether the proffered expert has the educational background or training in a relevant field.” \(^{126}\) Then the court “‘should further compare the expert’s area of expertise with the particular opinion the expert seeks to offer [and permit the expert … to testify only if the expert’s particular expertise … enables the expert to give an opinion that is capable of assisting the trier of fact.’” \(^{127}\) With this guidance in mind, the court addressed the parties’ Motions to preclude expert testimony.

American Home sought to preclude the testimony of Merck’s insurance expert, who Merck planned to have testify at trial about: custom and practice in the transit insurance industry; whether American Home acted in accordance with those industry customs and practices under the Transit Policy; whether American Home acted in bad faith as that term is understood in the industry; and the construction and meaning, as understood in the industry, of the Transit Policy and its provisions. \(^{128}\)

American Home asserted several challenges to Merck’s expert’s testimony. Specifically, American Home objected to (1) to his credentials to testify as a transit insurance expert, (2) to the foundation for his opinions to the extent Jervis relied on the report of the prior insurance expert retained by Merck, and (3) to his opining on the meaning of the Transit Policy clauses at issue in this action. \(^{129}\)

Regarding the expert’s credentials, the court held that it appeared that the expert had substantial experience dealing with transit insurance policies covering policyholders in the United States. The documents Merck had submitted in support of its expert indicated that Jervis has over twenty-five years of experience in the transit insurance business across the globe and has handled and adjusted over 12,500 transit claims during his career. \(^{130}\) The court held that American Home’s objection to the expert’s testimony to the extent it relied on the report of Merck’s prior insurance expert was overstated. \(^{131}\) In the instant case, the
expert reviewed all the underlying materials that informed the previous expert and reached similar conclusions. Under such circumstances, the court reasoned that there was nothing improper about the expert incorporating the previous expert’s findings in his report.\textsuperscript{132}

Finally, the court addressed American Home’s concerns about the expert’s report and the areas he was likely to opine on at trial. The expert’s report proffered his readings of the CDG Clause, Sue and Labor clause, and the Valuation clause. In discussing these clauses, the expert’s report clearly impinged upon the province of the court, in so far as he essentially proffered his own version of contractual interpretation.\textsuperscript{133} “Expert testimony that usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of jury in applying the law to the facts before it by definition does not aid the jury in making a decision; rather it undertakes to tell the jury what result to reach, and thus attempts to substitute the expert’s judgment for the jury’s.”\textsuperscript{134} Thus, the court precluded Merck’s expert from testifying as to his interpretation of the clauses at issue in the Transit Policy.

The court explained that:

“Testifying as a transit insurance expert, Jervis’s testimony should be limited to what he understands to be the standard practices and customs of his business and what he regards as the standard expectations of insurer and insured. While the expert may be an expert on customs and practices generally under transit insurance policies, he is not an expert on this Transit Policy, having had nothing to do with the negotiating, drafting or performance of it. Thus, absent sufficient basis for addressing this matter, the expert cannot testify as to his understanding of the specific provisions of this policy or the import of specific words or phrases of various clauses therein.”

F. Reliable Data

It is obvious that an expert cannot testify in a vacuum. The court in \textit{Joiner}\textsuperscript{135} focused on the “analytical gap” concept, excluding expert testimony that exposure to certain chemicals caused lung cancer because the expert’s opinion was based on animal epidemiological studies with no explanation as to how such studies applied to humans. In \textit{Moore v. Ashland Chemical},\textsuperscript{136} the Fifth Circuit conducted a similar analysis, excluding the expert testimony of a physician who did not rely on established studies to support his opinion. These cases illustrate the significance to admissibility and relevancy of research studies and data upon which the expert relies.
The recent decision of the Tenth Circuit in *Roberts v. Farmers Insurance Co.* provides a case in point. At issue on appeal was whether the district court had properly granted the insurer’s motion for summary judgment on grounds that the policy contained a “resident exclusion,” which precluded the insured from recovering for personal injuries sustained at her home. The insured contended that even though the policy excluded such coverage, she should be entitled to recover under the doctrine of reasonable expectations because the exclusion was either ambiguous or hidden in the policy (i.e. printed in small font and buried on page seven amid a laundry list of exclusions). Attempting to prove that the resident exclusion was ambiguous, the insured offered the expert testimony of a psychology professor and an accompanying survey of 126 college students. The survey was conducted by the professor and purportedly concluded that, after reading the exclusion, sixty-nine percent of the students believed that the policy provided coverage. The district court excluded the survey noting:

The plaintiff’s only support of a claim of ambiguity is the survey of Dr. Donovan, intended to show that the contract must be ambiguous if a group of college students find it to be so. This Court disagrees. The Oklahoma Supreme Court has admonished courts not to indulge in forced or strained construction to create and thus construe ambiguities where they do not otherwise exist. Because this Court must determine if the policy is ambiguous as a matter of law, the survey of Dr. Donovan is inappropriate and irrelevant to establish the existence of an ambiguity.

Affirming the district court’s refusal to consider the survey evidence, the Tenth Circuit noted that under Oklahoma contract law, whether an insurance policy is ambiguous is decided as a matter of law. Extrinsic evidence can be considered only after a finding of ambiguity. In the instant case, however, the court determined that the residence exclusion was not ambiguous; therefore, the survey was irrelevant.

What would have happened had the court determined the existence of an ambiguity? Would the survey of college students have been admissible? The circuit court noted that “well-conducted public opinion surveys may play an important role in the courtroom.” The court also referenced two cases cited by the insured pertaining to such surveys. In *Brunswick Corp. v. Spinit Reel*, a trademark case, the confusion between two products surfaced as a legal issue. The trial court admitted a survey, in addition to other evidence, when determining the likelihood of confusion about the source of a product with a similar trademark or trade dress. The survey involved individuals in shopping areas within five cities who were shown a Sprint SR210 reel and asked to name the manufacturer. The Tenth Circuit held that the district court did not abuse its discretion in admitting the survey. It noted: “[s]urvey evidence may be admitted as an
exception to the hearsay rule if the survey is material, more probative on the issue than other evidence, and if it guarantees trustworthiness.”

When determining materiality in cases involving confusion over product source, a survey may be the only available method of demonstrating the public state of mind. A survey is considered trustworthy when it is conducted according to accepted principles. In Brunswick, the survey was apparently conducted using reasonably acceptable market research techniques. The court therefore admitted the survey on the issue of confusion and further indicated that any technical or methodological deficiencies would affect its weight; not its admissibility.

The second case referenced by the Tenth Circuit was Harold’s Stores, Inc. v. Dillard Department Stores, Inc., which involved alleged injury to the plaintiff’s public reputation and goodwill. Plaintiff there utilized the services of a marketing professor as an expert. Based on the results of a survey of college-aged women who had visited the plaintiff’s store or examined its catalog and visited the defendant’s store, that expert calculated damages due the plaintiff nationwide because of defendant’s alleged copyright infringement and antitrust actions. Again, the appellate court determined that the district court did not abuse its discretion in admitting the survey as an exception to the hearsay rule. The survey was determined to be material, probative to the issue of copyright infringement damages, and conducted according to generally accepted survey principles. The court further noted:

The survey should sample an adequate or proper universe of respondents. “That is, the persons interviewed must adequately represent the opinions which are relevant to the litigation.” The district court should exclude the survey “when the sample is clearly not representative of the universe it is intended to reflect.”

With respect to the insured’s survey offer in Roberts, the court determined that the survey would not be allowed even if it was determined that the policy was ambiguous: “In the case before us, there is no link between the legal question and the survey evidence; what the public expects from an insurance policy is simply not relevant to the legal question of whether the contract is ambiguous.” The court did not decide the application of the reasonable expectation doctrine because that doctrine only applied where the court found the policy ambiguous or the exclusion hidden. Here, the insured failed to make a prima facie case.

It would appear from these authorities that courts will not admit survey-type evidence or other data, studies, or methodological evidence where there is no “link” between the offered evidence and the legal issue before the court. This is true whether that be a bad faith standard, claims-handling procedure, or policy interpretation. It would that this “link” is the same “analytical gap” that the court
referred to in *Joiner* when it stated: “A court may conclude that there is simply too great an analytical gap between the data and the opinion offered.”

**G. Procedural Attack**

Justice Breyer, in his concurred opinion in *Joiner*, entered an interesting observation:

[J]udges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific or otherwise technical evidence. Among these techniques are an increased use of Rule 16’s pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks.

The procedural mechanisms referenced by Justice Breyer are generally initiated at the discretion of the court and often occur well into the litigation process. For example, the circuit court of appeals in *Harold Stores* stated: “we cannot conclude the district court abused its discretion in admitting the survey. The district court conducted an extensive voir dire of Dr. Howard and satisfied itself that the survey met the appropriate standard.” In light of this observation, defense counsel should ask whether any procedural mechanisms are available that can be implemented early in the litigation process to facilitate the economies of handling these types of cases.

The parties and the court must develop a procedural mechanism that challenges the testimony of plaintiffs’ insurance industry experts sooner rather than later. Such a procedural device has been developed within recent years in toxic tort and environmental cases and should be tested within the context of other cases as well. *Lore v. Lone Pine Corp.* is instructive. This case involved a toxic tort claim against a landfill operator and the generators and haulers of toxic materials to that landfill. The plaintiffs alleged that their property values depreciated because the landfill existed. They also claimed personal injuries from exposure to various toxic substances. The defendants in *Lore* served an order to show cause seeking a case management order requiring the plaintiff to furnish “basic facts” on the causation issues to support their claims of personal injury and property damage. The order sought by the defendants has come to be known as a “Lone Pine order.” Since the plaintiffs failed to provide the expert evidence required by the case management order, the court dismissed the plaintiff’s complaint with prejudice consistent with the procedural rules of the State of New Jersey. It then noted: “[t]he Court is not willing to continue the instant action with the hope that the defendants eventually will capitulate and give a sum of
money to satisfy plaintiffs and their attorneys without having been put to the test of proving their cause of action.”

Other courts have refined and modified the *Lone Pine* order to require plaintiffs to delineate the amount of substance or chemical to which they were exposed or to provide expert medical opinions eliminating other causes. Several recent cases also have considered the problem of a plaintiff’s failure to provide any proof of causation at a relatively early stage in the litigation process. These have reinforced the concept that a plaintiff should not even file a lawsuit until there is adequate reason to believe that the plaintiff is injured and that the defendant caused that injury. The same arguments can be made within the insurance context. Relevant areas of inquiry include the following:

1) How does plaintiff’s expert know the practice and procedure is not readily acceptable in the insurance industry?
2) Does the plaintiff’s expert conform to peer review?
3) Is the testimony of the plaintiff’s expert on issues of reconstruction consistent with industry standards and reconstruction principles?
4) Is there a gap between the expert opinion offered and the data or study relied upon?

The use of *Lone Pine* orders has been recognized as useful in achieving judicial efficiencies and economies, regulating complicated evidentiary issues, and avoiding duplication of efforts. Therefore, when faced with evidentiary and expert issues in this type of litigation, defense counsel should seek a case management order early on in the litigation process. That order also should seek a prima facie showing that any expert evidence satisfies the appropriate standard as articulated in *Daubert, Joiner* and *Kumho v. Frye*.

**H. Conclusion**

“Junk science” and the “junk expert” must be challenged early in the litigation process to thwart frivolous and speculative litigation and to preclude testimony of expert witnesses bearing specious credentials. The plaintiffs’ bar should be tested and required to provide the defense with evidence concerning the qualifications, reliability and relevance of expert opinions well in advance of trial. Such an approach certainly will control the litigation and settlement costs and is critical to a proactive approach that challenges the “hired gun.”
### Appendix “A”

<table>
<thead>
<tr>
<th>STATES:</th>
<th>WHAT ISSUE(S) REQUIRES EXPERT TESTIMONY TO ESTABLISH BAD FAITH?</th>
<th>ON WHAT ISSUE(S) IS EXPERT TESTIMONY PRECLUDED?</th>
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<tbody>
<tr>
<td><strong>ALABAMA</strong></td>
<td>None. There is no requirement for a plaintiff to present expert testimony in a bad faith claim. It is not uncommon for a plaintiff to utilize expert testimony to meet a heavy burden of proof <em>Acceptance Ins. Co. v. Brown</em>, 832 So. 2d 1 (Ala. 2001) In civil disputes, the admissibility of expert testimony is evaluated by the state under the <em>Frye</em> “general acceptance” test. Alabama has yet to adopt the rigid standards est. in <em>Daubert</em>. Whether a witness is qualified as an expert and whether their qualification allows them to give their expert opinion or testimony are questions left largely to the trial judge’s discretion. <em>Bagley v. Mazda Motor Corp.</em>, 864 So.2d 301 (Ala. 2003)</td>
<td>Rule 704 of the Alabama Rules of Evidence precludes an expert from testifying on the “ultimate issue” being decided by the trier of fact. An expert would be precluded from offering their opinion that a denial of a claim was made by an insurer in bad faith.</td>
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<td><strong>ARIZONA</strong></td>
<td>None. Although, commonly both plaintiffs and insurers use experts to evaluate the reasonableness of an insurer’s behavior. <em>Rawlings v. Apodaca</em>, 151 Ariz. 149, 157-58 (1986)</td>
<td>None. Nevertheless, the Arizona Supreme Court has noted: “the admission of expert testimony regarding the credibility or subjective motivation of the persons involved in the claim is “dubious.” <em>Gurule v. Illinois Mut. Life &amp; Cas. Co.</em>, 152 Ariz. 600, 604 (1987)</td>
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<td>CALIFORNIA</td>
<td>In California, expert testimony is required on whether the insurer conducted a thorough investigation of the facts, handled the claim promptly, acted reasonably based on the information available to it, and made a reasonable evaluation of and response to settlement opportunities. It is not required where the insurer’s misconduct involves commonly understood bad acts, such as lying. <em>Neal v. Farmers Ins. Exch.</em>, 21 Cal. 3d 910, 924 (1978)</td>
<td>Issues of law. <em>Summers v. A.L. Gilbert Co.</em>, 69 Cal. App. 4th 1155, 1179-80 (1999)</td>
</tr>
<tr>
<td>CONNECTICUT</td>
<td>No court in Connecticut has decided what role an expert should play in a bad faith trial; ergo there is no case law to determine when an expert is required to show bad faith.</td>
<td>There are no cases precluding expert testimony with regard to bad faith claims.</td>
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<td>DISTRICT OF COLUMBIA</td>
<td>District of Columbia Courts have not addressed this issue.</td>
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<td>FLORIDA</td>
<td>None.</td>
<td>None.</td>
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<td>GEORGIA</td>
<td>None.</td>
<td>None.</td>
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<td>HAWAII</td>
<td>No reported cases.</td>
<td>No reported cases.</td>
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<td>KANSAS</td>
<td>None. In considering whether an insurer’s conduct is consistent with its contractual duties, expert testimony is admissible.</td>
<td>Only when it’s not admissible under the rules of evidence.</td>
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<tr>
<td>KENTUCKY</td>
<td>It is not required in all bad faith cases.</td>
<td>When the proffered expert had no experience working in the insurance industry or adjusting claims.</td>
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<td>LOUISIANA</td>
<td>None. May be relevant on some issues in a bad faith claim.</td>
<td>It is not necessary in Louisiana.</td>
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<td>MAINE</td>
<td>Has not been addressed.</td>
<td>Has not been addressed.</td>
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<td>MARYLAND</td>
<td>There are no appellate cases reported that require expert testimony to establish bad faith. Expert testimony is admissible, if it will assist the trier of fact.</td>
<td>Generally, experts are not allowed to testify as to their interpretation of policy. <em>Truck Insurance Exchange v. Marks Rentals, Inc.</em>, 288 Md. 428, 434, 418 A.2d 1187 (1980). Expert testimony may be introduced to assist in interpreting particularly specialized policies. <em>Johnson &amp; Higgins of Pa., Inc. v. Hale Shipping Corp.</em>, 121 Md. App. 426, 710 A.2d 318 (1998).</td>
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<td>MASSACHUSETTS</td>
<td>Expert testimony is required on the standard of care an insurance company owes the insured in investigating and evaluating a claim; and in overseeing the defense of a third party claim, unless the insurer’s negligence is so gross or obvious that jurors can rely on their common knowledge. Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 788 N.E.2d 522, 537-38 (Mass. 2003).</td>
<td>Courts have not identified any general subject on which expert testimony is precluded in a bad faith claim.</td>
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<tr>
<td>MICHIGAN</td>
<td>Not addressed in DRI Compendium</td>
<td>Not addressed in DRI Compendium</td>
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<td>MINNESOTA</td>
<td>There are no reported cases interpreting Minnesota law that has mandated the use of expert testimony to establish bad faith. It is implied that expert testimony may be necessary, Ortega-Maldonado v. Allstate Ins. Co., 519 F. Supp. 2d 981 (D. Minn. 2007).</td>
<td>The question of coverage is a legal issue for the court as to which no expert testimony will be allowed.</td>
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<tr>
<td>MISSISSIPPI</td>
<td>Mississippi courts have not specifically addressed this issue.</td>
<td>Generally, Mississippi courts have excluded expert testimony on legal issues that invade the province of the court. Additionally, an expert may not testify that an insurer failed to comply with an insurance contract or that an insured fulfilled the conditions of an insurance contract since testimony embraces the ultimate fact which is reserved for the jury’s consideration.</td>
</tr>
<tr>
<td>MISSOURI</td>
<td>Has not been specifically addressed in Missouri.</td>
<td>In Missouri, an expert probably may not testify as to whether insurer’s conduct constituted bad faith. Where the subject of the expert’s testimony is within a lay person’s experience, the testimony may not be admitted. Van Meter v. Dahlsten Truck Line, 943 S.W.2d 680, 682 (Mo.Ct.App.1997).</td>
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<td>MONTANA</td>
<td>Expert testimony is not required to prove or disprove bad faith. Allowing expert testimony is left to the court’s discretion on issues of liability and bad faith in accordance with Rules 702 and 703 of the Montana and Federal Rules of Evidence. <em>Federated Mut. Ins. Co. v. Anderson</em>, 1999 MT 28i, 297 Mont. 33, 991 P.2d 915 (1999).</td>
<td>There has been no specific rule established regarding what expert testimony is either admissible or inadmissible.</td>
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<td>NEBRASKA</td>
<td>Not specifically addressed.</td>
<td>Not specifically addressed.</td>
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<td>NEVADA</td>
<td>It is proper where investigations management testified that the insurer’s investigation was improper, incomplete, poorly done, in violation of the insurer’s own procedures, and rendered the opinion that insurer’s conduct amounted to bad faith. <em>Powers v. United Svcs. Auto. Ass’n</em>, 114 Nev. 690, 703, 962 P.2d 596 (1998).</td>
<td>None.</td>
</tr>
<tr>
<td>NEW HAMPSHIRE</td>
<td>There is no New Hampshire law that addresses the same.</td>
<td>There is no New Hampshire law that addresses the issue.</td>
</tr>
<tr>
<td>NEW JERSEY</td>
<td>This issue is not addressed in New Jersey.</td>
<td>This issue is not addressed in New Jersey.</td>
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<tr>
<td>NEW MEXICO</td>
<td>Not included in DRI Compendium.</td>
<td>Not included in DRI Compendium.</td>
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<tr>
<td>NEW YORK</td>
<td>The Courts in New York have held that if the issue presented to the jury is within the scope of the common knowledge and experience of laymen, then expert testimony is not necessary on matters the jury is qualified to draw its own conclusions on.</td>
<td>New York courts do not seem to preclude expert testimony in a bad faith case unless it infringes on the jury province. Primarily, if the evidence is within the common knowledge and experience of a layperson where the jury is allowed to draw its own conclusion such testimony may be excluded.**</td>
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<td>NORTH CAROLINA</td>
<td>No case has been reported that has required expert testimony to establish bad faith.</td>
<td>Expert testimony is precluded on two grounds (a) that no case law was offered for the proposition that insurance adjusters could testify as experts, and (b) the expert would have offered legal conclusions that would have been substituting his judgment of the jury and trial court. <em>Burrell v. Sparkkles</em>, 189 N.C. App. 104, 657 S.E.2d 712 (2008).</td>
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<td>STATES:</td>
<td>WHAT ISSUE(S) REQUIRES EXPERT TESTIMONY TO ESTABLISH BAD FAITH?</td>
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| NORTH DAKOTA | Insured may assert a claim for bad faith failure to defend where an insurer provided inadequate defense. Expert testimony is required to establish that an insurer provided inadequate defense. *Continental Cas. Co. v. Kinsey*, 513 N.W.2d 66, 69-70 (N.D. 1994). If an insurer challenges the reasonableness of the Miller-Shugart agreement that forms the basis of the assignment of the insured’s bad faith claim to a third party, the assignee may be required to establish the reasonableness of the settlement through expert testimony regarding the likely evidence and likely outcome if the matter has been tried. *D.E.M. v. Allickson*, 555 N.W.2d 596, 603 (N.D. 1996). | “An insurance expert may not testify that the insurer properly denied benefits under a policy because the insured was “malingering” if the expert cannot testify to a reasonable medical certainty that there was malingering.” *Smith v. American Family Mut. Ins. Co.*, 294 N.W. 2d 751, 764 (N.D. 1980). “An expert will not be permitted to express an opinion if the facts and circumstances disclosed by the evidence are such that it may be assumed that the jury is capable of understanding them and arriving at its own conclusions.” *Praus ex rel. Praus v. Mack*, 2001 N.D. 80 ¶34, 626 N.W.2d 239, 250 (2001). |}
<p>| OHIO | There is no opinion given that requires expert testimony to establish bad faith. The standard is, expert testimony may be used if the issue is technical and the testimony is beneficial to the jury. <em>Hoskins v. Aetna Life Ins. Co.</em>, 6 Ohio St. 3d 272, 279, 452 N.E.2d 1315 (Ohio 1983). “Expert testimony is admissible if it will assist the trier of fact to understand the evidence or to determine an issue of fact.” <em>LeForge v. Nationwide Mut. Fire Ins. Co.</em>, 82 Ohio App. 3d 692, 612 N.E.2d 1318 (Ohio App. 1992). | There is no court opinion that has ruled that expert testimony is categorically precluded on any particular issues necessary to establish bad faith. From a general perspective, the trial may use its broad discretion in determining the admissibility of expert testimony, and a higher court may reverse if the trial court abuses its discretion. <em>Donegal Mut. Ins. v. White Consol. Industries, Inc.</em>, 852 N.E.2d 215 (Ohio App. 2006)(Citing <em>Kumho</em>). The trial court must perform a “gatekeeping” role to insure that expert testimony is sufficiently (a) relevant and (b) reliable to justify its submission to the jury. Id. (citing <em>Daubert</em>). |</p>
<table>
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<tr>
<td>OKLAHOMA</td>
<td>Expert testimony is not a requirement to establish bad faith. However, expert testimony is permissible within the court’s discretion on the ultimate issue of whether or not the insurer breached the duty of good faith and fair dealing. <em>Vining v. Enter. Fin. Group, Inc.</em>, 148 F.3d 1206 (10th Cir. 1998).</td>
<td>Admissibility of expert testimony is left to the discretion of the court. <em>Thompson v. State Farm Fire &amp; Cas. Co.</em>, 34 F.3d 932 (10th Cir. 1994).</td>
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<tr>
<td>OREGON</td>
<td>No reported cases exist. In practice, because bad faith failure to settle is based upon a negligence standard, both parties usually present evidence as to what a “reasonable insurer” would or would not do.</td>
<td>Issues of “reasonableness” which do not require specialized training to knowledge.</td>
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<tr>
<td>RHODE ISLAND</td>
<td>Expert testimony is required on the issue of reasonableness of an insurer’s claims processing. <em>R.I. Insurer’s Insolvency Fund v. Leviton Mfg. Co.</em>, 763 A.2d 590, 595 (R.I.2000).</td>
<td>This issue has not been specially addressed by the state.</td>
</tr>
<tr>
<td>SOUTH CAROLINA</td>
<td>Courts in South Carolina have not specifically addressed which issues require expert testimony. In practice, insured and insurers have utilized expert testimony in the field of claims adjustment on the issue of reasonableness in adjustment practices.</td>
<td>Courts in South Carolina have not specifically addressed this issue within the context of bad faith.**</td>
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<tr>
<td>SOUTH DAKOTA</td>
<td>No reported cases exist.</td>
<td>No reported cases exist.</td>
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<tr>
<td>TENNESSEE</td>
<td>None.</td>
<td>None.</td>
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<td>TEXAS</td>
<td>Expert testimony is not required to establish bad faith.</td>
<td>Courts have not precluded expert testimony on any issue that is presented in a bad faith claim, unless it violates Rule 702 of the Texas Rules of Evidence.</td>
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<td>UTAH</td>
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<td>VERMONT</td>
<td>There are not cases in Vermont that address this issue.</td>
<td>There are no cases in Vermont that address this issue.</td>
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<tr>
<td>VIRGINIA</td>
<td>This issue has not been specifically addressed by Virginia courts.</td>
<td>This issue has not been specifically addressed by Virginia courts.</td>
</tr>
<tr>
<td>WASHINGTON</td>
<td>There are no reported cases.</td>
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<td>WISCONSIN</td>
<td>In <em>Weiss v. United Fire &amp; Cas. Co.</em>, the Wisconsin Supreme Court held that expert testimony “is only required for cases presenting particularly complex facts and circumstances outside the common knowledge and experience of an average juror.” <em>Weiss v. United Fire &amp; Cas. Co.</em>, 197 Wis. 2d 365, 541 N.W.2d 753 (1995). In contrast, if the claim does not involve circumstances of this nature, then no expert testimony is needed. <em>DeChant v. Monarch Life Ins. Co.</em>, 200 Wis.2d 559, 547 N.W.2d 592 (1996).</td>
<td>There are no published Wisconsin decisions that preclude expert testimony.</td>
</tr>
<tr>
<td>WYOMING</td>
<td>No reported cases exist. It may be presented to establish good faith and fair dealing standards in the investigation and handling of claims. <em>Hatch v. State Farm Fire &amp; Cas. Co.</em>, 930 P.2d 382 (Wyo. 1997).</td>
<td>Not addressed.</td>
</tr>
</tbody>
</table>

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7  293 F. 1013 (D.C. Cir. 1923).

293 F. 1013 (D.C. Cir. 1923).
Daubert, 509 U.S. at 588.
Id. at 588.
Id. at 590.
Id. at 593-94.
Id. at 592.
Id. at 600.
See discussion in section B.1.b., infra.
Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311 (9th Cir. 1995).
For a discussion of which circuits applied the abuse of discretion standard of review or the de novo standard, see United States v. Jones, 107 F.3d 1147 (6th Cir.), cert. denied, 521 U.S.1127 (1997).
Joiner, 522 U.S. at 137.
Id. at 146.
For a discussion of the standard adopted by the various states, see Mathews & Hanson, supra note 8, at 150.
See Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997); Deimer v. Cincinnati Sub-Zero Prod., 58 F.3d 341 (7th Cir. 1995); Cummins v. Lyle Indus., 93 F.3d 362 (7th Cir. 1996); Peitzmeier v. Hennessy Indus., 97 F.3d 293 (8th Cir. 1996), cert. denied, 520 U.S. 1196 (1997). For a discussion of the conflict among the circuits, see Hoffman & Black, supra note 8, at 356-59.
Kumho, 526 U.S. at 152.
Id.
173 F.3d 1076 (8th Cir. 1999).
Jaurequi, 173 F.2d at 1084; see also Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293 (8th Cir. 1996), cert. denied, 520 U.S. 1196 (1997).
151 F.3d 269 (5th Cir. 1998), cert. denied, 526 U.S. 1064 (1999).
728 A.2d 70 (D.C. 1999).
Id. at 75.
293 F. 1013 (D.C. Cir. 1923).
Id. at 1014.


Thompson v. State Farm Fire and Cas. Co., 34 F.3d 932 (10th Cir. 1994).

In Groce v. Fidelity General Ins. Co., 252 Or. 296, 448 P.2d 554 (1968), the court held that the fact that jury did not necessarily need expert testimony as to whether insurer acted in bad faith in failing to settle claim did not render his testimony inadmissible.


75 F.3d 290, 293 (7th Cir. 1996).

See also United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).


Id.

Id. at 148.

Id.

Id. at 151.


102 F.3d 256 (7th Cir. 1996).

Id. at 263.

Id. (emphasis added).


Id. at 1447.

Id. at 1448.


158 F.3d 548 (11th Cir. 1998).

Id. at 563.

Id.


Id. at 299 n.7.

121 F.3d 697 (4th Cir. 1997).

Id. at 697.


Porter v. Whitehall Lab., 9 F.3d 607, 614 (7th Cir.1993).

Ancho v. Pentek, 157 F.3d 512, 515 (7th Cir. 1998).

Id. at 518 (quoting United States v. Benson, 941 F.2d 598, 604 (7th Cir.1991)).

United States v. Vitek Supply Corp., 144 F.3d 476, 486 (7th Cir.1998).


56 Cal.Rptr.3d 312 (Cal.App.2d Dist. 2007).

Id.

Jordan v. Allstate, 56 Cal.Rptr.3d 312 (Cal. App. 2nd Dist. 2007).


140 F.3d 915 (11th Cir. 1998).


Id. at 541.


Id. at 110.


Id.

151 F.3d 269 (5th Cir. 1998), cert. denied, 526 U.S. 1064 (1999).

Id. at 279 (citing Joiner).

See Krebs & De Tray, supra note 51, at 1007 and the dissenting opinion in Moore, 151 F.3d at 284, which calls for a grant of wide latitude to the district court when exercising its gatekeeping function.


Wesley, 83 N.Y.2d 417.


181 Misc.2d 396, 693 N.Y.S.2d 875 (Sup. Ct., Suffolk Co. 1999).

Id. at 399.

183 Misc.2d 923, 705 N.Y.S.2d 792 (Sup. Ct., Richmond Co. 1999).

Id. at 932.

Id. at 934.

Id.

Id. at 932.


Kumho, 526 U.S. at 156.


Id. at 435.

Id. at 436.

Id. at 437.

234 F.3d 89 (2d. Cir. 2000).

Id. at 90.


Id.
Id. at 149.
Id. at 589.
Kumho Tire, 526 U.S. at 141 (quoting Fed.R.Evid. 702).
Brooks v. Outboard Marine Corp., 234 F.3d at 92.
TC Sys. Inc. v. Town of Colonie, New York, 213 F.Supp.2d 171, 174 (N.D.N.Y.2002); see also McCulloch v. H.B. Fuller Co., 61 F.3d 1038, 1042 (2d Cir.1995) (“The decision to admit expert testimony is left to the broad discretion of the trial judge and will be overturned only when manifestly erroneous.”); United States v. Brown, 776 F.2d 397, 400 (2d Cir.1985) (qualification requirements of Rule 702 “must be read in light of the liberalizing purpose of the rule”); Canino v. HRP, Inc., 105 F.Supp.2d 21, 27 (N.D.N.Y.2000) (“liberality and flexibility in evaluating qualifications should be the rule”).
Id.
Id.
Id.
Id.
Nimely v. City of New York, 414 F.3d 381, 397 (2d Cir.2005).
151 F.3d 269 (5th Cir. 1998).
201 F.3d 448 (10th Cir. 1999).
1999 WL 1063826 at 2, n.2 (10th Cir. 1999).
832 F.2d 513 (10th Cir. 1987).
Id. at 522 (citations omitted).
82 F.3d 1533 (10th Cir. 1996).
Id. at 1544 (citations omitted).
Roberts v. Farmers Ins. Co., 201 F.3d 448 (10th Cir. 1999).
Id. at 149 (citations omitted).
Harold Stores, 82 F.3d at 1545.

153 In re Mohawk Rubber Co., 982 S.W.2d 494, 499 (Tex. App. 1998); In re Colonial Pipeline Co., 968 S.W.2d 938, 943 (Tex. 1998).


155 See Appendix “A” which is a state by state Compendium on the issues addressed in this paper. A special thanks to Emery Lewis a student at the SUNY at Buffalo Law School for his work on this Appendix.