ACCEC
American College of Coverage and Extracontractual Counsel

USE OF EXPERTS IN COVERAGE AND BAD FAITH CASES

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I. Experts: Federal Court Case Law

United States Supreme Court (Federal Evidentiary Standards)

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

- **Issue:** Whether an expert witness's scientific knowledge be generally accepted in the relevant field to be admissible?

- **Holding:** The Court held that federal judges must enforce their "gatekeeping role" by considering two central factors: reliability and relevance of the proposed expert testimony. Those two factors comport with *Fed. R. Evid.* 702 that expert testimony involve scientific knowledge to assist the trier of fact to understand evidence or determine a fact in issue. Further, the central issue is whether the expert's reasoning and methodology properly can be applied to the facts in issue.

- **Reasoning:** The Court reasoned that the inquiry under Rule 702 was a flexible one and no sole factor determines admissibility. The Court outlined four exclusive factors: (1) whether the theory or scientific technique has been tested; (2) whether it has been subject to peer review and publication; (3) the known or potential rate or error; and (4) whether the principle was generally accepted in the relevant scientific community.

United States Circuit Court of Appeal, Eleventh Circuit

United States v. Frazier, 287 F.3d 1244 (11th Cir. 2004)

- **Issue:** Whether the District Court, by excluding expert testimony of a forensic investigator regarding what he would have expected while recovering inculpatory hair and seminal fluid in a rape case, yet allowing the government to present expert evidence on the same issue, abused its discretion?

- **Holding:** The decision to prevent a qualified forensic investigator from testifying in support of defendant's testimony that he did not have sexual intercourse with victim, and that recovery of inculpatory hair or seminal fluid would have been "expected" if sexual intercourse had occurred, was not abuse of discretion. Further, by introducing that investigators had failed to recover any inculpatory hairs or seminal fluids from victim in support of her claims that defendant had forced her to have sexual intercourse with him, and by arguing the significance of that failure, the defendant opened the door for government to offer reliable expert testimony in rebuttal.

- **Reasoning:** The Court reasoned that the meaning of the expert's opinion of what "would be expected" regarding the recovery of inculpatory hair or seminal fluid in a rape case was uncertain because the specific meaning of what the expert "expected" was impossible to discern. The court could not define what the term "expect" meant in conjunction with the experts testimony because that term could imply a likelihood anywhere between 50–100%. Further, the rebuttal testimony introduced by the government to counteract the viewpoint that the absence of finding hair or seminal fluid meant no sexual assault had occurred falls within the purpose of rebuttal evidence.

Tardiff v. Geico Indem. Co., 481 F. App'x 584, 587 (11th Cir. 2012)
(Bad Faith – Claims Handling)

- **Issue:** Whether the District Court abused its discretion in excluding the expert testimony of an insurance consultant regarding standards for handling insurance claims and whether their testimony was based on their own experience and personal knowledge?

- **Holding:** The Court held that the District Court did not abuse its discretion in excluding the expert testimony of plaintiff's insurance consultant concerning industry standards for handling insurance claims or allowing

testimony of claims adjust and insurer's lawyer.

- **Reasoning:** The Court reasoned that plaintiffs did not show the district court abused its discretion in concluding that the consultant's testimony would not have been helpful to the jury in deciding whether Geico breached its fiduciary duty of good faith because, as the plaintiff's conceded, no Florida court has held that plaintiffs must present expert testimony to prove an insurer acted in bad faith. Additionally, the plaintiff's did not show that the expert testimony concerned matters that are beyond the understanding of an average lay person and that without the testimony, the jury would be unable to decide whether GEICO acted in bad faith.

United States Court of Appeals, Tenth Circuit

City of Hobbs v. Hartford Fire Ins. Co., 162 F.3d 576 (10th Cir. 1998)

- **Issue:** Whether the district court erred in excluding testimony of an insurance expert who lacked knowledge specific to third party bad faith claims?

- **Holding:** The Court held that the district judge did not abuse his discretion by refusing to admit insurance claims expert's proffered testimony.

- **Reasoning:** The Court reasoned that the jury was capable of determining the bad faith issue on its own and that expert did not demonstrate knowledge specific to New Mexico and handling of third party claims. The Court went on to note that while a proffered expert possess knowledge as to a general field, the expert who lacks specific knowledge does not necessarily assist the jury.

N. Am. Specialty Ins. Co. v. Britt Paulk Ins. Agency, Inc., 579 F.3d 1106 (10th Cir. 2009)

- **Issue:** Whether the jury should have been able to heard expert testimony regarding standard insurance practice to establish that an insurance company mishandled a claim?

- **Holding:** The Court held that the exclusion of expert testimony regarding standard insurance industry practice was not abuse of discretion.

- **Reasoning:** The Court reasoned the excluded expert would have compared the insurance company's actions to the industry standard. Further, this testimony would not assist the trier of fact and the jury is perfectly capable of resolving the issues without expert testimony.

  United States District Court, Middle District of Florida

  Travelers Indemnity Co. of Illinois v. Royal Oak Enterprises, Inc., 2004 WL3770571 (M.D. Fla. 2004). (Bad Faith; Industry Standards)

- **Issue:** Whether the legal opinion of an expert in a report can be struck or limited by a motion to strike on the grounds that the testimony exceeds the scope of the case and strays away from the purpose of expert witness testimony?

- **Holding:** The Court held that where a substance of the expert's testimony concerns ordinary practices and trade customs which are helpful to the fact-finders evaluation of the parties conduct against the standards of ordinary practice in the insurance industry, his passing reference to a legal principle or assumption in an effort to place his opinions in some sort of context will not justify the outright exclusion of the expert's report in its entirety.

- **Reasoning:** The Court reasoned that the experts report does not offer legal opinions or conclusions of law. Rather, it discloses a series of opinions as to the customs and practices of the insurance industry concerning the issues in dispute. The Court recognized that the customs and practices throughout the expert's twenty-five years in the field have undoubtedly been shaped by insurance law and it is understandable that some of the statements made in his report reflect that reality. Additionally, expert opinions on the alleged bad faith and breach of duty on behalf of the insured were not struck because a breach of contract counterclaim still existed before the Court. Because bad faith cannot be completely divorced from a breach of contract claim under Florida law, the expert opinion is still relevant.

  United States District Court, Alaska

Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc., 389 F.Supp. 2d (D. Alaska 2005)

- **Issue:** Whether an expert in the insurance industry is qualified to testify as an expert on underwriting marine pollutions policies when the expert has minimal experience with respect to underwriting marine pollution policies?

- **Holding:** The Court held that the insured's witness was not qualified to testify as an expert on underwriting marine pollution insurance policies despite having over 45 years of experience in the insurance industry.

- **Reasoning:** The Court reasoned that the expert lacks "particularized experience with vessel pollution policies." Additionally, his opinion as to current industry standards is based on experience in underwriting at a time when pollution insurance did not stand-alone but were part of protection and indemnity policies, and even that experience is not of recent vintage. Finally, Wilton has no knowledge of the underwriting policies, practices, or procedures of either Lloyds or Water Quality Insurance Syndicate, the dominant issuers of marine pollution policies. Therefore, although qualified to testify as an expert on some aspects of the standards of the insurance industry, he is not qualified to testify as an expert on underwriting marine pollution insurance policies.

United States District Court, Southern District of Florida

Maharaj v. GEICO Casualty Company, 2015 WL 11279830 (S.D. Fla. 2015) (Bad Faith; Industry Standards)

- **Issue:** Whether a bad faith expert witness should be precluded from testifying when her testimony offers opinion about Florida law and she is not an attorney?

- **Holding:** The Court held that there was no reason why the expert should be precluded from testifying on issues of standards of the industry, but the expert may not opine as to whether the defendant acted in bad faith.

- **Reasoning:** The Court reasoned that the opinion testimony from a qualified

witness as to the claims handling standards within the insurance industry, and whether or not Defendant's actions met those standards, will help the jury understand the evidence and determine a fact in issue. The jury, however, does not need any assistance in applying the law to the testimony and making a factual determination as to whether or not GEICO acted in "bad faith". Further the court took into consideration the experts experience in the industry as a result their conclusion. (page 6).

United States District Court, Southern District of Georgia

Cooper v. Pacific Life Ins. Co., 2007 WL 430730 (S.D. Ga. 2007)
(Industry Practices)

- **Issue:** Whether an expert's opinion should be excluded when it is intended to reflect actual industry custom and practice despite that the industry custom and practice is shaped by legal requirements?

- **Holding:** The Court held that an expert may testify as to the practices normally followed by insurance companies regulated by securities laws, but cannot purport to instruct the jury on the legal requirements of the statutes and regulations. Additionally, an expert may give his opinion on industry practice and is entitled to state reasonable assumptions regarding the requirements of applicable legal requirements.

- **Reasoning:** The Court reasoned that an expert may opine as to industry custom and standard without presenting bare conclusions of law. Additionally, the Defendants will have the opportunity to cross-examine the expert to prevent the jury from placing too much weight on the expert's legal conclusions. Further, cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are traditional and appropriate means of attacking shaky but admissible evidence.

United States District Court, Kansas

Employers Reinsurance Corp. v. Mid-Continent Cas. Co., 202 F.Supp.2d 1212 (D. Kan. 2002)

- **Issue:** Whether an expert who has worked in the insurance industry for more

than forty years may give testimony on whether an insurer acted in bad faith?

- **Holding:** The Court held that the reinsured's expert was qualified to testify about industry custom regarding reinsurance agreement coverage of underlying declaratory judgment litigation expenses but the experts' testimony as to whether reinsurer breached its duty of good faith and fair dealing were legal conclusions which were not admissible.

- **Reasoning:** The Court reasoned that while the expert his background and experience qualify him to testify under *Daubert*, the portion of his opinion that the insurer breached its duty of utmost good faith and fair dealing constitutes an impermissible attempt to apply the law to the facts of the case to form a legal conclusion.

Moses v. Halstead, 477 F.Supp. 2d 1119 (2007) (Industry Standards)

- **Issue**: Whether expert testimony regarding insurance industry standards and practices should be excluded?

- **Holding:** The Court held that the attorney's expert witness regarding insurance industry standards and practices were admissible.

- **Reasoning:** The Court reasoned that while the facts are not so complicated as to require testimony of an expert witness, the expert's expertise in the process of handling an insurance defense case and the standard of care regarding that process would be helpful to the Court. *See Lone Star Steakhouse & Saloon, Inc. v. Liberty Mutual Ins. Group*, 343 F.Supp. 2d 989 (D. Kansas 2004) (court allowed testimony regarding insurance industry standards and practice and whether insurance company's actions conformed to those standards).

<u>United States District Court, New Jersey</u>

Crowley v. Chait, 322 F. Supp. 2d 530 (D. New Jersey 2004)

- **Issue:** Whether two expert witnesses were qualified to testify on an issue of underwriting in the surplus lines in the insurance market and whether they

used sound methodology in that testimony?

- **Holding:** The Court held that the plaintiff's insurance industry experts were qualified to testify whether or not there was enough information in files of surplus lines insurer for it to perform underwriting.

- **Reasoning:** The Court reasoned both experts have extensive experience in underwriting and the surplus lines insurance industry. The Court stated it "is not even necessary to construe the Daubert qualifications requirement liberally to admit their testimony." Further, their vast experience in the insurance industry and with the issues that form the core of this litigation readily qualifies them to opine on the underwriting practices at issue. As to the issue of methodology, the Court reasoned that the use of inconsistent approaches as between the experts may raise questions about the reliability of the findings of one or both of them, but it does not in and of itself show that the methodology they employed was so inherently flawed as to render their respective testimonies inadmissible.

United States District Court, Southern District of New York

Mahoney v. JJ Wesier and Co., Inc., 2007 WL 3143710

- **Issue:** Whether an expert in the insurance industry for 50 years may give testimony on the relationship between the claim-loss ratio for a health insurance policy and on the claim-loss ratio routinely seen in the industry?

- **Holding:** The Court held that the expert could give expert testimony on the relationship between the claim-loss ratio for a health insurance policy and on the claim-loss ratio routinely seen in the industry.

- **Reasoning:** The Court reasoned that given the expert's fifty years of experience in the insurance industry, he is qualified to give testimony as an expert. Despite the contention that the expert did not have experience with the precise type of insurance policy in question, the Court stated that was an issue of reliability and not admissibility. As to the issue of the claims-loss ratio in the industry, the Court reasoned that although these opinions lack the existence of corroborating empirical evidence, the expert testified that he has seen premiums refunded on hundreds of occasions even without a

contractual provision requiring such refunds and was familiar with the duties of third-party administrators.

United States District Court, Northern District of Illinois

Federal Ins. Co v. Arthur Andersen, LLP, 2006 WL 6555232 (N.D. Ill. 2006) (Custom and Practices)

- **Issue:** Whether the Court should preclude two experts from testifying on the custom and practice of concluding if an insurer's conduct constituted a breach of the duty to defend?

- **Holding:** The Court held that the experts may testify regarding whether the insurer's conduct meets industry custom and practice but may not testify as to the ultimate issue of whether the insurer breached its duty to defend.

- **Reasoning:** The Court reasoned that the first expert had the knowledge, skill, experience, training or education on the issue of whether the insurer's claims adjuster used proper claims adjusting procedures because he had worked in the insurance industry in various capacities for almost 40 years. Further the Court reasoned that the second expert could testify regarding whether the insurer's conduct meets insurance industry custom and practice because evidence relating to the insurance industry's custom and practice of claims handling is squarely relevant to whether Federal breached its duty to defend, and expert testimony on this topic will help the jury in determining whether Federal breached that duty.

United States District Court, Southern Division of South Dakota

Hanson v. Mutual of Omaha Ins. Co., 2003 WL 26093254

- **Issue:** Whether an expert witness with over forty years of experience practicing insurance law can give an opinion on the issue of bad faith?

- **Holding:** The Court held that the expert met the prongs of the *Daubert* test and could opine on the issue of bad faith.

- **Reasoning:** The Court reasoned that because of the expert's experience with numerous insurance companies, he has the expertise to testify about whether he believes Mutual of Omaha sufficiently monitors denied claims and its claims analysts in comparison to other insurance companies. Additionally, this proposed testimony is relevant because it tends to make the existence of bad faith more or less probable than without his testimony. Furthermore, during his forty-year career in insurance law, he learned about the common practices of insurance companies and has specific information from which he forms his opinions. Any testimony based on facts learned from his personal experience with insurance companies or from the documents in this case does not amount to speculation or guesswork. The Court did, however, prevent the expert from testifying on what he thinks are good practices rather than on an industry standard. The Court stated that what he thinks are good practices amount to speculation and guesswork.

  United States District Court, Eastern District of Oklahoma

  American Commerce Ins. Co. v. Harris, 2009 WL 130225

- **Issue:** Whether an expert's opinion regarding bad faith by an insurer in handling a fire loss claim should be excluded?

- **Holding:** The Court held that the expert may not testify on the issue of bad faith by the insurer but may testify as to the assistance the expert provided to the claimant in submitting his fire loss claim.

- **Reasoning:** The Court reasoned that it is fairly clear that any expertise the adjustor may have in relating in this regard is of a general nature and that any opinion testimony by the adjustor as to bad faith should be excluded because it would not assist the trier of fact to understand the evidence or to determine a fact in issue.

II. **Must Attorneys Be Licensed as Adjusters, or Worked as One, to Provide Expert Testimony on Claims Practices?**
(Refer to state statute.)

Alabama

i. Ala. Code 1975 § 27-9A-3(b)

- An independent adjuster does not include any of the following: [a]ttorney-at-law admitted to practice in this state when acting in their professional capacity as an attorney.

Arkansas

i. A.C.A. § 23-64-102(4)(B)
   - A licensed attorney at law who is qualified to practice law in this state is not deemed to be an "adjuster" for purposes of this chapter.

ii. A.C.A. § 23-64-102(5)(B)
   - The term "insurance consultant" shall not be deemed to include licensed attorneys, actuaries, certified public documents, medical bill analysts, or any other person who gives or offers to give incidental advice to the public in the normal course of business or professional activity other than insurance consulting.

California

i. West's Ann. Cal. Ins. Code. § 15008(a)
   - This chapter does not apply to any of the following: [a]n attorney at law admitted to practice in this state, when performing his or her duties as an attorney at law.

Colorado

i. C.R.S.A. § 10-2-105(2.5)(a)
   - With respect to public adjusters, a license as a public adjuster is not required for: [a]n attorney-at-law admitted to practice in this state, when acting in his or her professional capacity as an attorney.

Florida

i. Fla. Stat. § 626.860
   - Attorneys at law; exemption– Attorneys at law duly licensed to practice law in the courts of this state, and in good standing with The Florida Bar, shall not be required to be licensed under the provisions of this code to authorize them to adjust or participate in the adjustment of any claim, loss, or damage

arising under policies or contracts of insurance.

Idaho

i. I.C. § 41-5804(1)
   - Notwithstanding section 41-5803, Idaho Code, a license as a public adjuster shall not be required of the following: [a]n attorney admitted to practice in this state, when acting in his or her professional capacity as an attorney.

Illinois

i. 215 ILCS 5/1515(d)(1)
   - Notwithstanding subsections (a) through (c) of this Section, a license as a public adjuster shall not be required of the following: an attorney admitted to practice in this State, when acting in his or her professional capacity as an attorney.

Kansas

i. K.S.A. 40-5503(c)(1)
   - Notwithstanding the provisions of this section, a license as a public adjuster shall not be required of the following: [a]n attorney at law admitted to practice in this state, when acting in such person's professional capacity as an attorney.

Louisiana

i. LSA-R.S. 22:1693(E)
   - Notwithstanding Subsections A through D of this Section, a license as a public adjuster shall not be required of any of the following: [a]n attorney at law admitted to practice and in good standing in this state and [a] person employed only for the purpose of obtaining facts surrounding a loss or furnishing technical assistance to a licensed public adjuster, or licensed attorney, including photographers, estimators, private investigators, engineers, and handwriting experts.

Maine

i. 24-A.M.R.S.A. § 1411(3)(A)
   - A person may not for a fee or commission engage in the business of offering advice, counsel, opinion or similar service

with respect to the benefits, advantages or disadvantages under any policy of insurance that is issued in this State unless that person is: [e]ngaged or employed as an attorney licensed in this State to practice law.

Massachusetts

i. M.G.L.A. 175 § 162
   - Whoever, for compensation, not being an attorney at law acting in the usual course of his profession, directly or indirectly solicits from an insured or the representative of an insured, or performs services pursuant to an agreement, engagement or undertaking to represent the insured in connection with the assessment of damages, negotiation, settlement, appraisal or reference of a loss under a fire insurance policy, homeowners insurance policy, commercial multi-peril insurance policy, business interruption insurance policy, fidelity bond or crime insurance policy, inland or ocean marine insurance policy, other property damage insurance coverage of any short, shall be a public insurance adjuster.

Minnesota

i. M.S.A. § 72B.03(b)(1)
   - The definition of adjuster does not include, and a license as an adjuster is not required of, the following: attorneys-at-law admitted to practice in this state, when acting in the attorney's professional capacity as an attorney.

Mississippi

i. Miss. Code Ann. § 83-17-401(a)(i)
   - Adjuster shall not include: [a]n attorney-at-law who adjusts insurance losses from time to time and incidental to the practice of law, and who does not advertise or represent that he is an adjuster.

Montana

i. MCA 33-17-102
   - The term [adjuster] does not include a: licensed attorney who is qualified to practice in this state.

New Hampshire

i. N.H. Rev. Stat. § 402-B:5
   - The commissioner shall waive the requirement of such examination in the following cases: [a]ttorneys-at-law.

ii. N.H. Rev. Stat. § 402-B:2(III)(a).
   - The provisions of this chapter shall not apply to the following: [a]ttorneys duly admitted to practice in this state pursuant to the provisions of RSA 311 when acting in their professional capacity as an attorney.

New Jersey

i. N.J.S.A. 17:22B-4(b)(1)
   - Nothing contained in this act shall apply to: any licensed attorney of this State who acts or aids in adjusting insurance claims as an incident to the practice of his profession and who does not advertise himself as a public adjuster.

New York

i. McKinney's Insurance Law § 2101(g)(2)(B)
   - Public adjuster means any person, firm, association or corporation . . . except that term shall not include: any licensed attorney at law of this state who acts or aids in adjusting insurance claims as an incident to the practice of his profession and who does not advertise himself as a public adjuster.

North Carolina

i. N.C.G.S.A. § 58-33A-10(d)(1)
   - Notwithstanding subsections (a) through (c) of this section, a license as a public adjuster shall not be required by any of the following: [a]n attorney-at-law admitted to practice in this State, when acting in his or her professional capacity as an attorney.

Ohio

i. R.C. § 3951.01(E)(1)
   - Nothing contained in Chapter 3951 of the Revised Code shall apply to the following: [a]n attorney at law admitted to practice

in this state who adjusts insurance losses in the course of the practice of the attorney's profession and who does not hold the attorney out by sign, advertisement, or otherwise as offering such services to the general public.

Oklahoma

i. 36 Okl. St. Ann. § 6203(5)
   - The definition of an insurance adjuster shall not be deemed to include, and a license as an adjuster shall not be required of, the following: [a] licensed attorney in the State of Oklahoma who adjusts insurance losses from time to time, incidental to the practice of law, and who does not advertise or represent that he is an adjuster.

Rhode Island

i. Gen. Laws 1956, § 27-2.4-5(b)(9)
   - A license as an insurance provider shall not be required of the following: [a] person engaged or employed as an attorney licensed to practice law in Rhode Island and provided that those persons do not sell, solicit or negotiate insurance.

South Carolina

i. Code 1976 § 38-48-10(1)
   - "Public insurance adjuster" means any individual who, for salary, fee, commission, or other compensation, engages in public adjusting and who is licensed under § 38-48-20. A public insurance adjuster is not an attorney licensed to practice by the South Carolina Supreme Court who adjusts insurance losses in the course of the practice of law. A public insurance adjuster is not an adjuster representing an insurer and is not licensed in accordance with the provisions of Chapter 47.

Texas

i. V.T.C.A., Insurance Code § 4102.051(b)(1)
   - An attorney licensed to practice law in this state who has complied with Section 4102.053(a)(6).

Virginia

i. VA Code Ann. § 38.2-1845.3
   - This article shall not apply to . . . any licensed attorney in the Commonwealth . . . .

Washington D.C.

i. DC ST § 31-1631.12(3)(A)–(B)
   - This chapter shall not apply to: [a]n attorney at law who does not regularly act as a public insurance adjuster or represent to the public by sign, advertisement, or other written or oral communication indicating that the attorney at law acts as a public insurance adjuster.