Use and Abuse of Claims Experts in Bad Faith Litigation

By Michael Huddleston

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Experts in bad faith cases come in a wide variety. This article focuses on the use of "claims" experts in extracontractual cases. These cases of course can involve either (1) first-party claims under personal lines, commercial property, life insurance, and other policies potentially obligating the insurer to pay for loss directly to the insured; or (2) third-party liability claims involving allegations of things such as wrongful refusal to defend and wrongful refusal to settle.

Almost all of the subtopics in these two basic types of cases involve treatment and analysis of both statutory and common law. Simply put, insurer conduct involves the analysis of the law, regulations, and statutes. The adjuster is sometimes a lawyer but most often not. Consequently, the use of experts in these cases presents a fundamental tension in that such testimony can devolve into the expert potentially invading the role of the judge in instructing the jury on the law. The appropriate target would appear to be discussion of the accepted standards and practices in the insurance industry for the treatment and analysis of such issues.

First-Party Cases

In first-party cases, testimony typically focuses on whether the carrier had a reasonable basis for denying coverage or delaying payment of the claim. The basis of denial may be a coverage interpretation. In that instance, the expert can explain how a reasonable carrier would go about dealing with and resolving this type of coverage dispute. For example, the expert can properly explain how a carrier could obtain the legal opinion of objective outside counsel on the particular coverage issue. If the carrier did not seek legal counsel's opinion, then the expert can explain to the jury whether the experience level of the adjuster making the ultimate decision was sufficient and whether the adjuster utilized proper controlling standards, such as standards of contract construction, in reaching a decision. The expert can also identify types of conduct that may reveal a bias or pretext or "post-claim underwriting" in reaching the result.

Institutional bad faith is also an appropriate topic for expert testimony. The expert can assist the jury in determining whether the company had standards, practices, and training in place that reflect an attempt to assist adjusters in reaching sound and fair decisions. Additionally, the expert can identify the appropriate internal and external standards and practices and judge the actual conduct by those standards and practices. For example, an adjuster who uses an expert opinion from one claim to interpret the policy and coverage in another claim is not following either industry or internal standards. Mixing and matching opinions without consideration of the factual differences is a fundamentally flawed approach.

In describing whether a carrier had a reasonable basis for its decision, an expert should be permitted to explain to the jury what a carrier would look to and how it would properly assess applicable case law. As noted, that may involve seeking a coverage opinion from in-house counsel or from outside counsel. Carrier experts will often opine as to whether the case was one of first impression, a very typical safe harbor for carrier decisions. A policyholder expert can point out the flaws in the analysis of the carrier. Often, the claim file material analyzing the coverage is objected to on the basis of privilege, which makes the task more challenging. The expert can explain to the jury how the carrier should have gone about its analysis. Of necessity, these topics require some discussion of how a carrier would treat and apply the law. The point of proper testimony should be to explain how a proper insurance company would evaluate the claim, not what the controlling legal interpretation should actually be. Otherwise, the expert will be in danger of invading the province of the court.

Experts in first-party cases are often asked to explain to the jury how the claims adjustment process works. A jury is not necessarily going to understand the ins and outs of, for example, appraisal. The policyholder expert will consider and discuss what things in the claim file and testimony indicate a pretext or set mindset on the part of the carrier that is indicative of bad faith. The expert can explain how a carrier should appropriately approach a claims decision, including the timing of the process and decision. Juries typically do not know how insurance companies internally operate. An expert can explain the different parts of the company that may be involved with a given claim, such as proper claims supervision, the use of large loss committees, the role of underwriters and/or actuaries, the process of setting reserves, the process of reporting to reinsurance companies, and the involvement and function of in-house legal departments.

Finally, experts can be used in first-party cases to explain to the jury about the proper selection and use of outside experts, such as engineers and roofing experts. Such experts are often used to explain what may or may not evidence a pretextual decision to deny coverage. Expert testimony can also involve analyzing the expert reports used for the claims decision, similar to a *Daubert* challenge, to point out why a reasonable carrier under industry practices would or would not rely upon that report or opinion.

Third-Party Liability Claims

In liability cases, the focus of expert testimony is typically on settlement practices. Again, the expert can be used to critique and/or explain the nature of the conduct revealed by the claim file and related testimony. Additionally, experts often address a number of other areas of testimony that impact extracontractual liability:

1. Assessment of adjuster/supervisor conduct, such as method of investigating, approach to assessing coverage issues, and compliance with internal policies
2. Application of liability standards to the conduct, such as ultimate issue testimony regarding when liability became reasonably clear and/or whether a reasonable carrier would have accepted a given settlement demand

TIP: Although claims experts can assist the trier of fact in understanding insurance industry standards, be sure their testimony is not based on barren legal conclusions.

3. Explanation of whether the demand for settlement from the claimant was one a reasonable carrier would accept, looking to things like whether a proper release was offered, protection from lienholders was provided, etc.
4. Assessment of whether a unilateral settlement by the insured, for example with a covenant not to execute, was subject to any of a variety of attacks, such as whether it was the result of collusion or the result of a fully adversarial trial
5. Discussion of whether coverage positions were timely and properly reserved and explanation of the nature and purpose of reservations
6. Discussion of the rules of contract construction applicable to insurance contracts, as used in insurance adjusting practice
7. Explanation of whether the coverage position was one that was bona fide or reasonably debatable or whether it had a reasonable basis
8. Explanation of the coverage dispute process and how things like declaratory judgments work and how they can be used to resolve coverage disputes

In short, opinions about contract interpretation cannot be a determination of who is right or wrong but instead should be focused on whether the use and application of legal principles were consistent with insurance industry standards and practices.[1]

Lawyers as Claims Experts

The key for the lawyer expert is to have sufficient experience with the insurance industry and the claims process to be able to assess the reasonableness of the insurance company's position on legal principles and the application of facts to those principles. Barren legal conclusions simply will not work.

Ashby. In *State Farm Lloyd's Insurance Co. v. Ashby AAA Automotive Supply Co.*, the court held that "an attorney who has been involved in handling insurance cases may be more qualified to testify as an expert concerning bad-faith claims than a licensed adjuster with limited expertise in the area."[2] The court noted that an opinion on the standard of care regarding a licensed profession must come from one who is in fact licensed in that profession.[3] The court also recognized that adjusting must be done by someone licensed by the state.[4] The court noted that attorneys "are exempted from the license requirement to the extent they perform adjusting activities in the course of their practice of law."[5]

The claimant offered the testimony of two lawyers as adjusting or bad faith experts. One had a mixed practice and had handled coverage cases and evaluated bad faith exposure for carriers on occasion. He had handled some suits involving fires, and he was now offering testimony in an arson case. He had never acted other than as a lawyer and thus had no experience as a claims manager or adjuster and had no experience from the insurer's point of view. The other expert, also a lawyer, offered testimony regarding the interpretation of the insurance policy. The court noted that "[h]e had significant experience in the litigation of fire policies."[6] The court ignored challenges to both experts' testimony invading the province of the jury and improperly involving matters of law.

If the expert is a lawyer, attacks based on whether the testimony invades the province of the court to instruct the jury on the law will more likely be made. The interpretation of a contract and thus the determination of whether a contract is ambiguous are typically questions of law.[7] A so-called insurance expert generally may not testify as to the interpretation or ambiguity of a policy.[8]

Stallion. One decision that appears far off the mark is *Stallion Heavy Haulers, LP v. Lincoln General Insurance Co.*[9] The lawyer expert in that case was the author of this article.

The court framed the respective positions of the parties as follows:

> Lincoln complained that Stallion is not allowed to bring additional counsel into the case under the guise of an expert opinion. Lincoln maintained that designating Huddleston as an expert invades the court's role in determining the law to apply to this case. Lincoln characterized Huddleston's report as addressing questions of law; specifically, the duty to defend and the duty to indemnify.
>
> Stallion conceded that Huddleston's report discusses a great deal of legal authority, but argued that Huddleston's root opinions concern Lincoln's handling of the claim and the reasonableness of Lincoln's actions in accordance with the usual and customary practices of the insurance industry. Stallion characterized Huddleston's opinions as mixed questions of law and fact—opinions that Stallion insisted are permitted under Texas insurance law.[10]

The court summarized what it believed were the applicable rules: "Statements of advocacy and legal conclusions do not assist the factfinder and are inadmissible."[11] "[E]xpert opinion testimony may embrace an ultimate issue to be decided by the trier of fact. . . . Rule 704 [of the Rules of Evidence] does not permit an expert to render conclusions of law."[12]

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The court held that allowing expert testimony on mixed questions of law and fact was a Texas rule that did not apply in the federal case before the court.[13] The court opined that the opinion contained few facts pertinent to the case. As to policy interpretation, the court stated:

> Huddleston also interpreted provisions and terms of the policy. Contract law guides the interpretation of insurance policies. If the contract terms are unambiguous, the court must decide the contract's meaning. "Expert testimony on the proper interpretation of contract terms may be admissible when the meaning depends on trade or industry practice." In this case, neither party suggests the meaning of the terms of the contract depends on trade or industry practice. The policy terms are defined within the policy.[14]

The primary problem with *Stallion* is that it takes a situation where the carrier's conduct in applying legal principles is in bad faith and suggests that testimony challenging the carrier's approach is a legal conclusion. That is simply not the case. The role of the insurance carrier involves nonlawyers reaching legal conclusions, which certainly seems problematic in and of itself. The carriers typically utilize in-house or outside counsel to assist in the analysis, but then they claim the communications are subject to the attorney-client privilege. The use of a lawyer expert to pick apart and show why the carrier decision was biased or pretextual is entirely permissible, as numerous cases cited in this article show. The courts in cases like *Stallion* appear to be taking discussion in the expert report of the guiding principles for the decision, which are of necessity legal in part, and turning it into a pivot point for claiming the opinion involves legal conclusions. If an expert is to testify on mixed questions of law and fact, the expert must establish familiarity with the controlling legal standards. If they ultimately conflict with the trial court's determination of the law, then the opinions are not relevant.

Corinth. Similarly, in *Corinth Investor Holdings, LLC v. Evanston Insurance Co.*, the court held that expert testimony regarding whether statutory notices required in malpractice cases were treated by carriers as a form of notice of claim was inadmissible.[15] The court also held that the expert's discussion and disclosure of the controlling legal concepts any insurer would be required to follow amounted to inappropriate legal conclusions and invaded the province of the court and the jury.

Instead of citing controlling law from either Texas or the U.S. Court of Appeals for the Fifth Circuit, the court followed a New Jersey decision, *Holman Enterprises v. Fidelity & Guaranty Insurance Co.*[16] The court in *Corinth* noted:

> The [*Holman*] court did note that the reasonableness of an insurer's denial of a claim may be an appropriate subject matter for an expert witness, but it would not permit the expert to testify because there was not "any sort of gauge for the basis of his decision, either from his own extensive experience in the industry or some industry standards or guidelines. . . ." The Court agrees that whether an insurer acted reasonably is to be judged by the standards of the insurance industry, not by an attorney offering a legal opinion based on his interpretation of case law.[17]

If the expert is a lawyer, attacks based on whether the testimony invades the province of the court to instruct the jury on the law will more likely be made.

It should be noted that New Jersey follows the "net opinion rule." As one court has explained:

> Under New Jersey law, an expert's opinion must be based on a proper factual foundation. In other words, "[e]xpert testimony should not be received if it appears the witness is not in possession of such facts as will enable him [or her] to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture." *"This prohibition against speculative expert opinion has been labelled by modern courts as the 'net opinion rule.'"* "Under this doctrine, expert testimony is excluded if it is based merely on unfounded speculation and unquantified possibilities."[18]

That was not the situation presented in *Corinth*. A more generous and more precise analysis has been provided by the courts in other jurisdictions.

Heggy. The direct opposite approach was taken regarding lawyer/claims expert testimony in *Gray Insurance Co. v. Heggy*.[19] The insurance company in that case sued its coverage lawyers to recover an excess judgment in a case the carrier did not settle supposedly because of the opinions of its lawyers. The court determined that this lawyer/claims expert was qualified under Federal Rule of Evidence 702:

> To assess [the expert's] qualifications, the Court considers his "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Green has practiced law since 1976. Insurance matters constitute a substantial percentage of his practice. Green's experience includes representing insureds and insurance companies, authoring coverage opinions for insureds and insurance carriers, handling the defense of insurance claims, evaluating claims for

settlement purposes, and providing education to insurance company employees on procedures for handling claims, coverage issues, and compliance with the duty of good faith and fair dealing. After careful review, the Court finds that Green's credentials qualify him as an expert in his field since he has "specialized knowledge" gained through "experience, training, or education."[20]

The expert in question proposed to testify "(1) [that the insurer] 'made the decision not to settle the Thomas case for reasons other than reliance on [Defendants'] opinion' and (2) 'that [Plaintiff] violated accepted industry standards in handling the coverage issue and the [underlying] Thomas claim which caused or contributed to Plaintiff's damages.'"[21] The court rejected arguments that the testimony was not based on a sufficient factual foundation. The court explained:

As insurance industry customs and procedures are beyond the realm of the ordinary juror's ken, expert testimony would be helpful to the trier of fact.

Plaintiff first argues that Green's report fails to comply with Fed. R. Civ. P. 26(a)(2). Under Rule 26(a)(2)(B), an expert witness must provide a written report containing, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming [his or her opinions]." Plaintiff complains that Green's stated "basis and reasons for his opinions . . . are so amorphous as to be essentially unstated" and that Green "[f]ail[ed] to provide a complete list of the *facts or data* he considered in forming his opinions." . . . As support, Plaintiff points to Green's citation of "the claim file" and "customs and practices in the industry" as inadequate facts and bases. The Court is unpersuaded by this argument. The Plaintiff can inquire as to which particular facts from the claim file Green relied on in a deposition. The same goes for Green's reference to industry customs and his experience with particular claims. Particularly at this stage, exclusion is not warranted on the basis of Rule 26(a)(2).[22]

With respect to the challenge that the opinion was unreliable, the court refused to straightjacket claims testimony to scientific validity testing. The court reasoned:

[T]his argument "focuses too closely on scientific testimony to the exclusion of other forms of permissible expert testimony." *Milburn v. Life Investors Ins. Co. of Am.*, No. CIV-04-0459-C, 2005 U.S. Dist. LEXIS 46926, 2005 WL 6763386, at *2 (W.D. Okla. Jan. 19, 2005). There are many different kinds of expert testimony, some of which "may focus upon personal knowledge or experience," rather than "scientific foundations." *Kumho*, 526 U.S. at 150. It is for this reason that the Supreme Court acknowledged in *Kumho* that the *Daubert* factors "do not constitute a 'definitive checklist or test'" but that instead the gatekeeping inquiry must be "'flexible'" and "'tied to the facts' of a particular 'case.'" *Id.* (quoting *Daubert*, 509 U.S. at 591, 593–94) (emphasis original). The Court has previously recognized testimony from an insurance industry expert as reliable and based on an appropriate type of "specialized knowledge and experience." *Milburn*, 2005 U.S. Dist. LEXIS 46926, 2005 WL 6763386, at *2. The Court thus finds that the reasoning and methodology employed by [the expert] is valid.[23]

Finally, the court in *Heggy* rejected arguments by the insurer that the claims expert's opinion was not relevant. The court noted:

[E]xpert testimony under Rules 401 and 702 is relevant if it would "'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Daubert*, 509 U.S. at 591 (quoting Fed. R. Evid. 702). Any doubts as to whether expert testimony would be useful in assisting the trier of fact "'should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions.'" *Robinson v. Mo. Pac. R.R. Co.*, 16 F.3d 1083, 1090 (10th Cir. 1994) (citation omitted). In this case, unfair surprise is not a factor, nor is time. Moreover, as *insurance industry customs and procedures are beyond the realm of the ordinary[] juror's ken*, Green's testimony would be helpful to the trier of fact.[24]

James. An interesting exception case to the question-of-law rule is *Royal Maccabees Life Insurance Co. v. James*.[25] That case involved a nonlawyer, former claims adjuster. The court of appeals used the expert testimony of Joseph Wilkerson regarding the meaning of the term "non-medical" used in the application for the policy, which was incorporated into the policy. Wilkerson stated that the meaning he attributed to the term was the common meaning in the "insurance industry."[26] The court of appeals clearly used the term "non-medical" to create an ambiguity, thus permitting Wilkerson to testify as to his interpretation of the policy.

A somewhat similar use of extrinsic proof was employed regarding the meaning of a term in a trade or industry insured in *Mescalero Energy, Inc. v. Underwriters Indemnity General Agency, Inc.*[27] Similarly, in *Insurance Co. of North America v. Morris*,[28] the

court upheld testimony by an insurance expert regarding the nature of suretyship in insurance law. The court also upheld the admission of testimony regarding the duty of an agent to explain material aspects of coverage in the context of taking applications for coverage.

Recent and Exemplary Cases

Hamilton. In *Hamilton v. Bayer Healthcare Pharmaceuticals Inc.*, the court determined that the expert testimony of insurance law author Allan D. Windt should be excluded.[29] Although the court found that Windt was qualified as an insurance expert because of his knowledge, skill, experience, training, or education, his opinion was deemed unreliable and was, therefore, excluded.

The court began its analysis by addressing the basic gatekeeper tests applicable:

> Pursuant to Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), the Court must conduct a two-part inquiry prior to permitting an expert witness to testify before a jury.
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> "First, the district court must 'determine whether the expert is qualified "by knowledge, skill, experience, training, or education" to render an opinion.' [*United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009) (en banc)] (quoting Fed. R. Evid. 702). Second, if the expert is sufficiently qualified, the district court 'must determine whether the expert's opinion is reliable by assessing the underlying reasoning and methodology.' *Id*."[30]

The court applied the U.S. Court of Appeals for the Tenth Circuit's test for admissibility of expert testimony on legal issues set forth in *Specht v. Jensen*[31]:

> The line we draw here is narrow. *We do not exclude all testimony regarding legal issues.* We recognize that a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, *a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms. . . .*
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> . . . [A]n expert's testimony is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, *when the purpose of testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed. In no instance can a witness be permitted to define the law of the case.*[32]

In finding Windt's testimony unreliable, the court explained:

> Windt's testimony might ordinarily be redacted to fit within those parameters, but it fails to apply the applicable law. As this Court explained in ruling on a *Daubert* challenge to an expert in an earlier bad faith case: "the focal point of her testimony must be on the Oklahoma insurance industry's practices and standards and whether they were or were not met in this case. The Court will not permit Sullivan to give testimony regarding unsupported or inadequately explored conclusions regarding issues of fact or to offer a legal opinion."[33]

As to Windt's testimony, the court observed that Windt relied only on "a book he authored as the legal basis for his opinions."[34] The court observed that although the book references Oklahoma law, it also references other states and "often conflicts with Oklahoma law."[35] According to the court, Windt made "no effort" to specify his opinions as based only on the applicable Oklahoma law.[36] As a result, for this sole reason, his opinions were not admitted.

In another opinion involving the same case, the court reached the opposite result with respect to a different insurance industry expert.[37] As to this expert, the insurance company challenged admissibility because the expert allegedly was "not qualified because she [was] not a lawyer and/or [did] not hold a special license relative to the insurance policy at issue."[38] The court held that the opinion testimony was couched in terms of "acceptable industry standards" and therefore would assist the jury "in understanding appropriate industry standards," which, the court noted, is "precisely the reason for permitting expert testimony on claims handling."[39]

Milburn. Both *Hamilton* opinions rely upon the decision of the court in *Milburn v. Life Investors Insurance Co. of America*.[40] In that case, the insurer challenged the testimony of Sue Sullivan on the bases that it was unreliable, would not assist the trier of fact, and failed the Federal Rule of Evidence 403 balancing test.[41]

First, the court found the expert reliable because she "worked for the Oklahoma Insurance Department from 1965 to 1995, thirteen years of which included the position of Assistant Insurance Commissioner," and her "work experience range[d] from coverage and liability dispute resolution to interpreting insurance-related legislation and statutes."[42]

Second, the court found a sufficient factual basis for the opinions given the expert's review of extensive materials from the matter. The court noted that the expert's testimony "appropriately focuse[d] on the reasonableness of Defendant's handling and investigation of Milburn's coverage under the terms of her insurance policy."[43] "To the extent Defendant believes Sullivan's testimony lacks a factual foundation, it may cross-examine her at trial and present contrary evidence."[44]

Third, as to whether the testimony/opinion could be tested, the court noted that claims handling expert testimony has to be treated differently from scientific testimony. It is admissible as long as the expert has sufficient experience in the field, which Sullivan did based on her work with the Oklahoma Insurance Department. The court noted:

> Using her experience and knowledge, Sullivan reviewed the relevant documents and opined on the reasonableness of Defendant's investigation and subsequent denials of Milburn's claims—this is a generally accepted practice when litigating bad faith suits. *See Kumho*, 526 U.S. at 150 ("[T]he relevant reliability concerns may focus upon personal knowledge or experience. . . . [T]here are many different kinds of experts, and many different kinds of expertise."). The Court finds that the reasoning and methodology employed by Sullivan is valid and that her methodology may be properly applied to the particular facts at issue.[45]

The proper focus of admissibility should be on the experience of the expert and the materials reviewed in order to reach an opinion.

Finally, as to whether the testimony of Sullivan would assist the trier of fact, the court concluded:

> Sullivan's testimony may encompass an ultimate issue and also be couched in legal terms. Her testimony does not merely state a legal conclusion, but identifies the evidence she considered in reaching her opinion. Her testimony also *does not tell the jury what verdict to reach, does not attempt to define the law, [and] does not comment on the weight or credibility of the evidence or "prevail[] upon [the trier of fact] to abdicate its function or responsibility for reaching an independent judgment on the ultimate issues . . . ."* The Court finds that Sullivan's testimony will assist the trier of fact in understanding insurance industry standards for claim evaluation and investigation.[46]

Thus, the court provides a helpful summary of approaches to expert testimony that raise red flags regarding whether it will assist the jury:

1. Does the testimony attempt to tell the jury what verdict to reach?
2. Does the testimony attempt to define and instruct on the law?
3. Does the testimony comment on the weight or credibility of the evidence?
4. Does the testimony encourage the jury to abdicate its independent judgment?[47]

Importantly, the court concluded that assisting the trier of fact in understanding insurance industry standards is a matter that "the trier of fact is not capable of assessing for itself."[48] Thus, the court found that "the probative value of Sullivan's testimony is not substantially outweighed by unfair prejudice or confusion."[49]

OneBeacon. The trial court in *OneBeacon Insurance Co. v. T. Wade Welch & Associates* granted the claimant/policyholder's motion in limine regarding expert testimony as to whether a carrier had a duty to settle if it had a reasonable basis, albeit a losing one, for denying the claim, in connection with a common-law *Stowers* failure-to-settle claim.[50] The court granted the policyholder's motion in limine to exclude testimony from an expert regarding whether OneBeacon could consider its policy defenses in evaluating the reasonableness of the claimant's demand to settle within limits. The court merely stated it was granting this part of the motion and further observed: "No witness may testify regarding legal issues. It is the duty of the court to instruct the jury on the law."[51] At the trial, the judge allowed testimony regarding whether the carrier had a reasonable basis as to statutory unfair claims settlement practices, which are triggered by whether the liability of the insurer is reasonably clear.

On appeal after a policyholder verdict, additional issues regarding expert testimony were raised by the parties and addressed by the Fifth Circuit.[52] The Fifth Circuit was asked to assess whether the evidence was sufficient to support a finding of "knowing" violations of the insurance code. The court looked to expert testimony on the mixed question of law and fact involving "knowing" misconduct.[53] The court noted that "knowingly" means that the carrier must have acted with "actual awareness of the falsity, unfairness, or deceptiveness of the act that made it liable under [Texas Insurance Code] Chapter 541."[54] The Fifth Circuit further noted:

> "Actual awareness" does not mean merely that a person knows what he is doing; rather, it means that a person knows that what he is doing is false, deceptive, or unfair. In other words, a person must think to himself at some point, "Yes, I know this is false, deceptive, or unfair to him, but I'm going to do it anyway."[55]

The court observed that the carrier urged that it could not be engaging in a knowing violation if the policy defense upon which it relied was literally correct but rejected in a case of first impression. To this, the court responded:

> DISH's expert testified that OneBeacon's conduct was not that of a reasonable insurer acting prudently, but was an instance of prohibited "post-claim" underwriting, which he defined as occurring when "the insurance company realizes that they

> have a problem, and they desperately look for a way to avoid paying the claim. And what they'll do is they'll try to search for a morsel of evidence that they can conceivably turn into a material misrepresentation, such as we have here."[56]

The court concluded that "the jury was free to disregard that evidence and credit the testimony of DISH's expert. The evidence does not point so strongly and overwhelmingly in OneBeacon's favor that reasonable jurors could not have reached a different conclusion."[57]

James. Obviously, admissibility is a hotly and frequently contested issue, as reflected by the varying rulings in a sampling of cases.[58] An example of the expansive approach some courts take to expert claims testimony is set forth in the aforementioned *Royal Maccabees Life Insurance Co. v. James*.[59] There, the court held:

> We review rulings on the admissibility of expert testimony for an abuse of discretion. A trial court abuses its discretion if it acts without reference to any guiding rules or principles. Expert testimony is admissible if it will assist the trier of fact to understand the evidence or to determine a fact in issue. A witness may be qualified as an expert "by knowledge, skill, experience, training, or education."
>
> An expert may offer his opinion on an ultimate issue to be decided by the trier of fact. Also, an expert may state an opinion on a mixed question of law and fact if the opinion is confined to relevant issues and is based on proper legal concepts. To be relevant, the expert testimony must be sufficiently tied to the facts of the case so that it will assist the jury in resolving a factual dispute.[60]

The court rejected arguments, followed by the federal courts and numerous other jurisdictions,[61] stating that breach of the duty of good faith is a duty to be determined by the court and involves factual issues for which the jury is amply qualified without needing an expert. The court also rejected arguments that the expert testimony involved mere unsupported conclusions and improper attempts to testify regarding matters of law and contract interpretation. The court reasoned:

> The cases relied upon by Royal Maccabees are distinguishable and inapplicable to the facts of this case. In *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357 (Tex. 2000) (per curiam), the supreme court held that the trial court properly excluded the proposed testimony of a human factors and safety expert because the expert's testimony was within the common knowledge of the jury. In *United Way of San Antonio, Inc. v. Helping Hands Lifeline Foundation, Inc.*, 949 S.W.2d 707, 712–13 (Tex. App.-San Antonio 1997, writ denied), the court of appeals held that the trial court erred in allowing a witness to give a legal conclusion where the trial court had stated that the witness could testify solely as a fact witness. In *Holden v. Weidenfeller*, 929 S.W.2d 124, 134 (Tex. App.-San Antonio 1996, writ denied), the reviewing court affirmed the trial court's ruling excluding expert testimony from an attorney as to the existence of an easement because the witness did not establish greater knowledge and education [than] the trier of fact, the trial judge.[62]

The court justified its action based on the expert's credentials:

> Wilkerson had forty-eight years' experience in the insurance industry. He is a licensed claims adjuster and a licensed risk manager. He has taught insurance courses at the college level. To maintain his licenses, Wilkerson attends many seminars including some continuing legal education courses. Although most of his career involved casualty insurance, he also handled numerous group health and life claims.
>
> In light of this Court's conclusion that the insurance policy is ambiguous as a matter of law, it was not error for the trial court to permit Wilkerson to testify as to his interpretation of the policy. Wilkerson testified that the conduct of Royal Maccabees constituted bad faith, unfair dealing and fraud and also that it violated various provisions of the insurance code and the deceptive trade practices act. These opinions on mixed questions of law and fact were proper.[63]

Trial Court Rulings on Key Coverage Issues: Instructions Impacting Experts

Strangely, motions for summary judgment resolving critical coverage issues do not come until shortly before trial. As a result, experts are left in a situation where the position of the party for whom they are testifying suddenly becomes an erroneous position according to the trial court. Where such rulings are entered, the trial of the bad faith case will almost assuredly include an instruction to the jury regarding the court's ruling. The devastation of such rulings and instructions cannot be overestimated. In such scenarios, a claims expert for the carrier must in effect appear to disagree with the judge, a dangerous thing for any expert to do. Explaining why the judge rejected a position but the position was still reasonable is no small task.

Jury instructions regarding coverage determinations by the court must steer clear of making any comment on the weight of the evidence. The decision in *Redwine v. AAA Life Insurance Co.*[64] has been used by some defense counsel as a basis for barring any comment or statement to the jury regarding coverage determinations by the court. However, that is not what *Redwine* holds.

In that case, the plaintiff sued her insurer for misrepresenting a travel accident insurance policy. She contended that the advertisements led her to believe the policy covered serious injuries, while the actual policy language only covered death, loss of limb, or loss of sight. The insurer denied the plaintiff's claim when her daughter suffered a spinal cord injury and

paralysis of her lower limbs caused by an automobile accident. The plaintiff sued for breach of contract, violations of the Deceptive Trade Practices Act and the Texas Insurance Code, fraud, and breach of the duty of good faith and fair dealing.

The trial court held as a matter of law that the policy did not cover the claim and thus granted the insurer a directed verdict on Redwine's breach of contract and duty of good faith and fair dealing causes of action. The trial court instructed the jury as follows:

> You are hereby instructed that AAA Life Insurance Company did not breach its fiduciary duty of good faith and fair dealing, or otherwise act in bad faith, by denying Deanne Redwine's claim under the 365 Travel Accident Policy.
>
> You are hereby instructed that Deanne Redwine's claim pursuant to the injuries received were not covered by the 365 Travel Accident Policy.[65]

The jury in *Redwine* found against the plaintiff on the remainder of her theories.

The court of appeals held that the trial court committed reversible error by commenting on the weight of the evidence with these instructions. The court held that these instructions were unnecessary and improperly suggested to the jury the trial judge's opinion about the remaining causes of action.[66]

The instruction in *Redwine* clearly goes too far, especially as a jury instruction. The instruction was unnecessary as to the remaining issues to be considered by the jury. From the policyholder perspective, in a case where coverage or a duty to defend that was previously contested is found, it is impossible to fairly try the case without the fact of the determination being shared with the jury. For the defendant insurer, though, such sharing is devastating because all of the insurer's protestations about being right on the law have turned out to be wrong, at least in effect.

Conclusion

Claims experts in bad faith cases are not epidemiologists. They cannot be tested in the same way. The insurance companies have diligently worked to avoid having claims manuals that can be the subject of discovery. Training and internal guidelines are in many cases vapor, mist. The adjustment process is intertwined with legal questions that are, in many cases, handled by nonlawyers. Privilege is typically asserted to bar production of any independent legal opinions or advice regarding the coverage position. Experts are used by carriers to fill the void in many cases. Policyholders best use experts to explain the process and question whether the carrier is in any way keeping the insured's interests in mind as it makes claims decisions.

It is no surprise that the end result is that there are a large number of cases seemingly all over the park in dealing with admissibility of expert claims opinions. The proper focus should be on the experience of the expert and the materials reviewed in order to reach an opinion. There is no reason why a lawyer expert cannot satisfy the expert witness requirements in this field. Adjusting requires both insurance adjustment experience and legal knowledge. Most states recognize that a lawyer is lawfully permitted to adjust claims as though actually licensed to be an adjuster. Most importantly, lawyer experts have experience that can be used on broader issues that may well go beyond adjusting claims. This is especially true in cases involving failure to settle. Lawyer experts can interpret and explain the various roles and arcane subjects, such as the tripartite relationship, and internal operations, such as large loss committees and reinsurance.

The courts and/or the legislature should more precisely define the standards and duties for carriers so that these are not amorphous and evolving seemingly in every case. Moreover, judicial recognition is needed of the concept that insurance companies must make legal decisions and that the quality of those decisions and the degree to which the policy interpretation is strained are fair game for litigation. Allowing experts to explain the process of how those decisions are rendered and when they are inappropriately rendered is testimony that will assist the trier of fact. These are not subjects on which the court will be providing legal guidance or instruction. ◄

Notes

1. Ins. Co. of N. Am. v. Morris, 928 S.W.2d 133 (Tex. App. 1996) (upholding the admission of testimony by an insurance expert regarding the nature of suretyship in insurance law; also approving of the admission of testimony regarding the duty of an agent to explain material aspects of coverage in the context of taking applications for coverage), *aff'd in part & rev'd in part*, 981 S.W.2d 667 (Tex. 1998).

2. No. 05-92-01354-CV, 1995 WL 513363, at *15 (Tex. App. Aug. 28, 1995) (Barber, J.).

3. *Id.* (citing Prellwitz v. Cromwell, Truemper, Levy, Parker & Woodsmale, 802 S.W.2d 316, 317 (Tex. App. 1990)).

4. *Id.* (citing Tex. Ins. Code Ann. art. 21.02, § 2(a) (Vernon Supp. 1995)).

5. *Id.* (citing Tex. Ins. Code Ann. arts. 21.02, 21.07-4, § 1(1)(b)(1) (Vernon Supp. 1995)).

6. *Id.*

7. Tex. Farm Bureau Mut. Ins. Co. v. Sturrock, 146 S.W.3d 123, 126 (Tex. 2004) (citing, among others, Kelley-Coppedge, Inc. v. Highlands Ins. Co., 980 S.W.2d 462, 464 (Tex. 1998)).

8. *See, e.g.*, Cluett v. Med. Protective Co., 829 S.W.2d 822, 827 (Tex. App. 1992) (upholding inadmissibility of expert testimony interpreting the policy based on the "usual and ordinary construction of insurance policies" and "industry custom and practice"); St. Paul Ins. Co. v. Rahn, 641 S.W.2d 276, 284 (Tex. App. 1982) (holding that expert testimony regarding whether a temporary substitute automobile was involved was inadmissible and not within a proper area for expert testimony).

9. No. SA-09-CA-0317-FB, 2011 U.S. Dist. LEXIS 3322 (W.D. Tex. Jan. 13, 2011).

10. *Id.* at *3.

11. *Id.* at *5–6 (citing Am. Home Assur. Co. v. Cat Tech, L.L.C., 717 F. Supp. 2d 672, 681 (S.D. Tex. 2010)).

12. *Id.* at *6 (alterations in original) (quoting United States v. Clark, No. 1:09-CR-114-ALLTH, 2010 WL 2710569, at *2 (E.D. Tex. July 7, 2010)).

13. *Id.* at *7.

14. *Id.* at *8 (footnotes omitted).

15. No. 4:13-CV-00682, 2014 U.S. Dist. LEXIS 172647 (E.D. Tex. Dec. 15, 2014).

16. 563 F. Supp. 2d 467, 472 (D.N.J. 2008).

17. *Corinth*, 2014 U.S. Dist. LEXIS 172647, at *13–14 (quoting *Holman*, 563 F. Supp. 2d at 473).

18. Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 323 (App. Div. 1996) (alterations in original) (emphasis added) (citations omitted).

19. No. CIV-11-733-C, 2012 WL 12863163 (W.D. Okla. 2012).

20. *Id.* at *5 n.3.

21. *Id.* at *3.

22. *Id.* at *3–4.

23. *Id.* at *5–6.

24. *Id.* at *7 (emphasis added).

25. 146 S.W.3d 340 (Tex. App. 2004).

26. *Id.* at 348.

27. 56 S.W.3d 313, 320 (Tex. App. 2001).

28. 928 S.W.2d 133 (Tex. App. 1996), *aff'd in part & rev'd in part*, 981 S.W.2d 667 (Tex. 1998).

29. No. CIV-18-1240-C, 2019 U.S. Dist. LEXIS 180318, at *1–2 (W.D. Okla. Oct. 18, 2019) (granting plaintiffs' *Daubert* objection to expert witness Allan D. Windt).

30. *Id.* at *2–3 (quoting Schulenberg v. BNSF Ry. Co., 911 F.3d 1276, 1282–83 (10th Cir. 2018)).

31. 853 F.2d 805, 809–10 (10th Cir. 1988).

32. *Hamilton*, 2019 U.S. Dist. LEXIS 180318, at *2–3 (emphasis added).

33. *Id.* at *3 (citing Milburn v. Life Inv'rs Ins. Co. of Am., No. CIV-04-0459-C, 2005 U.S. Dist. LEXIS 46926, (W.D. Okla. Jan. 19, 2005)).

34. *Id.*

35. *Id.*

36. *Id.*

37. Hamilton v. Bayer Healthcare Pharm. Inc., No. CIV-18-1240-C, 2019 U.S. Dist. LEXIS 180317 (W.D. Okla. Oct. 18, 2019) (denying motion to exclude the opinions and testimony of Diane L. Luther).

38. *Id.* at *3.

39. *Id.* at *5.

40. No. CIV-04-0459-C, 2005 U.S. Dist. LEXIS 46926 (W.D. Okla. Jan. 19, 2005).

41. *Id.* at *2.

42. *Id.* at *3–4.

43. *Id.*

44. *Id.* at *5 (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993)).

45. *Id.* at *6.

46. *Id.* at *7–8 (emphasis added) (citations omitted) (citing, among others, Fed. R. Evid. 704(a); Specht v. Jensen, 853 F.2d 805, 809–10 (10th Cir. 1988); and Frase v. Henry, 444 F.2d 1228, 1231 (10th Cir. 1971)).

47. *Id.* at *8.

48. *Id.*

49. *Id.*

50. No. H-11-3061, 2014 U.S. Dist. LEXIS 139101 (S.D. Tex. Sept. 30, 2014).

51. *Id.*

52. OneBeacon Ins. Co. v. T. Wade Welch & Assocs., 841 F.3d 669 (5th Cir. 2016) (Texas law).

53. *Id.* at 679–80.

54. *Id.* at 679 (citing St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co., 974 S.W.2d 51, 54 (Tex. 1998)).

55. *Id.* (quoting *Dal-Worth*, 974 S.W.2d at 54–55).

56. *Id.* at 679–80.

57. *Id.* at 680.

58. *See, e.g.*, Thompson v. State Farm Fire & Cas. Co., 34 F.3d 932 (10th Cir. 1994) (a first-party fire loss case seeking to admit expert testimony of an insurance expert who was not included on the witness list and whose testimony was offered on issues "that a jury is capable of assessing for itself"); Bright v. Ohio Nat'l Life Assurance Corp., No. 11-CV-475-GKF-FHM, 2013 WL 121479 (N.D. Okla. Jan. 9, 2013) (excluding offered expert Michael Quinn's report and testimony based on finding that it was "in a subspecialty [disability insurance] outside his normal expertise," "riddled with legal conclusions and improper speculation," and based on unreliable methodology). *But see* Bright v. Ohio Nat'l Life Assurance Corp., No. 11-CV-475-GKF-FHM, 2013 WL 12327512 (N.D. Okla. Jan. 9, 2013) (the same case involving analysis of the insurance company's opposing insurance expert witness, wherein the insurance company expressly acknowledged that "the jury in this case will be fully capable of determining whether Ohio National acted reasonably and in good faith"); Higgins v. State Auto Prop. & Cas. Ins. Co., No. 11-CV-90-JHP-TLW, 2012 WL 2369007 (N.D. Okla. June 21, 2012) (excluding insurance experts on both sides based on a finding that the jury was capable of making the determination of the issues without the expert opinions, and the expert opinions involved would not assist or be "helpful" to the jury); Stroud v. Liberty Ins. Co., No. 15-CV-363-GFK-PJC, 2016 WL 10043498 (N.D. Okla. Oct. 7, 2016) (excluding insurance expert witness because it would not assist the jury, repeatedly answered the "ultimate issue," and provided "ruminations on the State of Oklahoma law" that were "irrelevant").

59. 146 S.W.3d 340 (Tex. App. 2004).

60. *Id.* at 353 (citations omitted) (quoting Tex. R. Evid. 702; Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998) (experience alone may provide a sufficient basis for an expert's opinion in some cases)).

61. *See supra* note 58.

62. *James*, 146 S.W.3d at 353 n.7.

63. *Id.* at 354.

64. 852 S.W.2d 10 (Tex. App. 1993).

65. *Id.* at 13.

66. *Id.* at 16.