


Insurance Expert Witnesses: When is Their Opinion Testimony Admissible and When is it Desirable?

by Dennis J. Wall

 For twenty-six years, Dennis Wall has practiced in civil litigation and appeals, representing individuals and businesses in Insurance Coverage disputes of all types. He has served in many cases in many states as an expert witness on insurance coverage and bad faith issues. Dennis Wall is the author of the leading book on Bad Faith, *Litigation and Prevention of Insurer Bad Faith* (Second Edition Shepard's/McGraw-Hill; 2004 Supplement West), which analyzes over 3,000 cases, statutes, regulations, texts and periodicals. Mr. Wall is a Florida Supreme Court certified Mediator.

Opinion testimony is sought from Expert Witnesses on a host of issues concerning insurance coverage, insurance bad faith, and related insurance matters. This article will explore the current state of the case law concerning the admissibility of opinion testimony from Expert Witnesses on insurance issues generally. In general terms, the courts often allow opinion testimony of Expert Witnesses on issues related to insurance coverage and insurance bad faith, in particular, so long as the Expert does not offer an opinion on what the particular court in a given case perceives as a "conclusion of law." These judicial decisions will affect practitioners' decisions concerning the desirability of eliciting the opinion testimony of Expert Witnesses on issues related to insurance matters.

To begin with, it has recently been held that an Expert Witness in a lawsuit involving a wrongful refusal to defend by a liability insurance company does *not* need to couch her or his testimony in terms of a "reasonable degree of professional insurance probability."¹ Since the Expert testimony in such a case "did not contain predictions of future events, nor did it involve his opinion on the causal relationship between certain events," the Ohio Court of Appeals held that "[t]he 'probability' standard simply was not applicable to or required for his testimony."²

Two judicial tests regulate the admissibility of Expert Witness testimony generally. Those two tests have likewise been applied by the courts to the question of admissibility of Expert Witness opinion testimony on issues related to insurance. The first of these two tests regulates the admissibility of

Expert Witness opinion testimony in all Federal Court actions since the United States Supreme Court decided the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³ nearly a dozen years ago.

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In the *Daubert* case, the United States Supreme Court enumerated a host of factors to be considered by Federal Trial Judges confronted with questions concerning the admissibility of Expert Witness opinion testimony. Federal Trial Judges are tasked with a gatekeeper function concerning the admission of Expert Witness opinion testimony. The Supreme Court in *Daubert* constructed an array of boundaries that would determine the admissibility of scientific and technical testimony, in general terms. Thus, the *Daubert* Court fashioned a series of requirements related to such things as peer review, the capacity of the opinion testimony at issue to be replicated or duplicated, and the like.⁴

The *Daubert* requirements have been held to apply to *all* opinion testimony of Expert Witnesses in the Federal Courts. After *Daubert* was decided, the United States Supreme Court later held that the approach it endorsed in *Daubert* was not limited to Expert Witness testimony concerning purely scientific principles. Federal Trial Judges were instructed by the Court to adopt a flexible, case-by-case analysis, focusing on the potential Expert Witness' experience and area of expertise, in a wide range of subjects.⁵

In a new case addressing the issue of Expert Witness testimony on insurance issues in Federal Court, it has been held that an Expert Witness can offer opinion testimony on at least certain insurance issues without reference to the technical requirements imposed by the *Daubert* Court. "[I]n certain cases, all of the *Daubert* factors may be helpful to the court's inquiry, while in other cases where

reliability derives solely from the personal knowledge or experience of the witness, the factors may not be helpful at all.”⁶ In that recent case, *Century Indemnity Co. v. Aero-Motive Co.*, a party elicited the opinion testimony of an Expert Witness named Talley. Mr. Talley was qualified on the basis of experience, and the *Daubert* factors were held by the court to simply be inapplicable. “The Court concludes that the *Daubert* factors are not helpful in assessing the liability in this case because Talley’s opinions, which are based upon his experience in reconstructing lost insurance policies, are not the type of opinions that can be tested or verified or subjected to peer review.”⁷

Moreover, qualification of the Expert Witness in the *Century Indemnity* case was held to be appropriate under the present edition of Rule 702 of the Federal Rules of Evidence.⁸ Rule 702 draws a broad boundary for the qualification of an Expert Witness in any case. “This requirement is met where the witness’ qualifications provide a foundation for the witness to answer a specific question.”⁹ In that case, the United States District Judge held that there had been a sufficient demonstration to the court that the Expert in question “has significant experience in commercial underwriting practices and has an historical knowledge of forms used and coverages offered in the commercial insurance industry.”¹⁰ This was not the most important or telling foundation for the witness’ qualifications, however, said the Federal Trial Judge: “More importantly, Talley has *performed insurance reconstruction services for clients in cases involving lost insurance policies.*”¹¹

The dangers of opinion testimony usurping the District Judge’s exclusive function of determining questions of law, however, will prevent any Expert Witness from rendering opinions that cross that impermissible boundary. This is as true of Expert Witnesses on insurance issues as in any other area, exemplified by the decision in the case of *Employers Reinsurance Corp. v. Mid-Continent Casualty Co.*¹² In that case, arising under Oklahoma substantive law, the opinion testimony of an Expert Witness was held admissible regarding an insurance agreement’s “meaning in light of insurance industry custom and practice.”¹³ However, the same Expert was not allowed to offer opinion testimony in that case on the legal meaning of terms such as “waiver” or “estoppel”, or on the question of whether legal duties existed: “The Court will determine whether a [good faith] duty exists and so instruct the jury.”¹⁴

Recently, in a wrongful refusal to defend case involving allegations of extra-contractual liability on the part of the insurance carrier, the Ohio state courts were faced with issues concerning Expert opinion testimony. The trial court in that case ruled that a

particular witness was qualified as an Expert because he had handled insurance claims for thirty-seven years, and was thus “an expert in standard procedures that were used in the industry for investigation, review and analysis in evaluating coverage” in cases where insureds tendered their defense to their insurers.¹⁵ The trial court further ruled in that case, however, that the opinion testimony of that Expert Witness should be stricken. This second ruling was reversed on appeal. In part, the Ohio Court of Appeals rejected the liability insurance company’s argument that had convinced the trial judge to strike the testimony in question, that the testimony amounted to a legal conclusion:

Westfield argues also that OKL attempted to use Clines’s testimony to establish the legal obligations owed by an insurance company to its insured pursuant to the terms and conditions of a policy, and thereby usurped the trial court’s obligation to instruct the jury on the law. We disagree. Clines’s expert testimony informed the jury of the proper internal procedures for handling a claim. The jury should have been able to weigh this evidence against testimony from Westfield’s witnesses indicating that the claim was properly handled.¹⁶

“Beyond admissibility in such a case, it has even been held that Expert testimony might be required on the standard of care owed by an insurance company.”

Beyond admissibility in such a case, it has even been held that Expert testimony might be *required* “on the standard of care owed by an insurance company to its insured in overseeing the defense of a third-party claim.”¹⁷

In order to be considered in opposition to or in support of a pending motion for summary judgment, the opinion testimony of an Expert Witness must not only stop short of expressing legal conclusions as opposed to applying legal standards to the facts, but the facts necessary to support the application of those opinions must ordinarily be in the record, under the decided cases. In the case of *Lopez v. Allstate Ins. Co.*,¹⁸ the posture presented by the case involved the insurance company’s motion for summary judgment. The opinion of an Expert Witness on the issue of bad faith and alleged failure to comply with standard industry practices for insurance claims, was entirely rejected for multiple reasons by the United States District Court in that case. In part, according to the court, the substance of the opinion consisted “primarily of legal conclusions as to the reasonableness of Allstate’s actions, which are not proper matters for an expert opinion and are to be disregarded”, and the opinion “is not supported by the record.”¹⁹

Thus, in order to preclude the entry of a summary judgment in favor of a disability insurance company, the Ninth Circuit Court of Appeals recently held in a case arising under Arizona substantive law, that a policyholder Expert's opinion testimony not only had to (1) display the grounds upon which the opinion was based, but also (2) be consistent with and based on some evidence that was in the record.²⁰

In a very recent case involving reconstruction of lost insurance policies, an Expert Witness in the area of insurance was allowed to testify to the opinion that the provisions of lost policies of excess liability insurance, had likely followed the terms of certain primary policies of insurance. It was significant that all but one of the primary policies of insurance were themselves available *and were in the record*. The plaintiff policyholder submitted sufficient evidence in that case, the Indiana Court of Appeals held, to raise a genuine issue of material fact and thus defeat the insurers' motions for summary judgment. However, at trial said the Indiana Court of Appeals, the policyholder-plaintiff "must prove, by a preponderance of the evidence, the substance of the relevant policy provisions."²¹

In addition to the *Daubert* test, or series of tests, more accurately, recently enunciated by the Supreme Court of the United States, the admissibility of Expert Witness opinion testimony has been regulated by the "*Frye*" test. This test originated with a case called *Frye v. United States*.²² The standard of admissibility of Expert Witness testimony developed from that case is directed to scientific reliability. It requires the proponent of the evidence to bear the burden of proof both that the underlying scientific principle is generally accepted, and that the testing procedures used to apply that principle to the specific facts of the particular case are also generally accepted. The necessary acceptance will come, if at all, from relevant members of the particular field. Whether persons might differ over the conclusions to be drawn from the application of the scientific principles and the testing procedures in question, is not important to the *Frye* test.²³ Florida, for example, follows *Frye*.²⁴ In Florida, the *Frye* admissibility standard for opinion testimony of Expert Witnesses is confined to "the arena of determining the admissibility of novel expert opinion testimony".²⁵

Without reference to the *Frye* test, however, Florida courts have long held that insurance policy provisions can be examined by the application of opinion testimony based upon custom and usage in the insurance industry and the Expert's particularized knowledge: "Obscure connotations of an insurance policy can be greatly illuminated by knowledge of custom and usage in the industry as well as the expert's knowledge of terms which take on a different hue in the specialized field than in the field of

general knowledge."²⁶ In the *Loxahatchee Marina* case which has just been quoted, the Expert Witness in question was an expert "in the insurance business [who] testified as to the customs and usages in the insurance business, types of policies, premium rates, exclusions and other matters and also answered hypothetical questions."²⁷

Similarly, in a later Florida state court decision, a Florida appellate court held that opinion testimony offered by an Expert Witness should have been admitted "regarding insurance adjusting, policy provisions, and trade custom in the insurance industry."²⁸

"Lawyers increasingly fill the role of the Expert Witness whose testimony is held admissible in current cases concerning Insurance."

Lawyers increasingly fill the role of the Expert Witness whose testimony is held admissible in current cases concerning Insurance. Thus, in the very recent decision in *Johnson v. American Family Mutual Insurance Co.*,²⁹ several different lawyers were allowed to express their opinion testimony as Expert Witnesses on several different Insurance issues. An injured claimant as the assignee of an insured, a person named Jennings, filed that case. Jennings was previously found liable for damages in excess of his automobile liability insurance policy limits.

The plaintiff in the Third-Party Bad Faith case contended that the automobile liability insurance company had acted unreasonably when it rejected his earlier offer to settle for the automobile liability policy limits. "To rebut this contention, American Family called as a witness an experienced personal-injury litigator who had been made familiar with the facts available to American Family and its lawyers."³⁰ This was relevant evidence to the defense of the injured claimant's claim for Bad Faith against the automobile liability insurance company, the Iowa Supreme Court held in that case.

Two other lawyers were also called as Expert Witnesses in that case, on a different insurance issue. The plaintiff-assignee, in that case, the injured claimant holding an excess judgment against a policyholder, had "expressly challenged" the sufficiency or quality of the insurance company's communications with the policyholder "concerning the status of settlement negotiations and the potential for a verdict in excess of policy limits."³¹ These two attorneys were allowed to testify in response to those contentions of the plaintiff in that bad faith case: "Consequently, this was a matter as to which American Family was entitled to present evidence contradicting plaintiff's claims."³²

The Iowa Supreme Court observed in remarks applicable to all of the Expert Witness opinion testimony before it that, under the circumstances presented in the *Johnson* case, there was no abuse of discretion when the lower court admitted the opinion testimony of Expert Witnesses into evidence "concerning the issues that we have discussed."³³

Conclusion

"Expert witnesses are helpful in applying standards of conduct to given facts and their opinions may well determine the outcome of the case, ordinarily as long as those facts are in the record of the given case."

The current state of the case law, in general terms, is that most courts ordinarily allow the opinion

testimony into evidence from Expert Witnesses concerning issues related to insurance coverage, insurance bad faith, reconstruction of lost insurance policies, and many other, similar insurance issues. There is one exception followed by all courts, however, and that is when an Expert Witness offers opinion testimony on what the particular court in a given case views as a legal conclusion; such an opinion is reserved strictly to the court in that case, and an Expert Witness is not allowed to testify to a legal conclusion. Expert Witnesses are helpful, however, in applying standards of conduct to given facts and their opinions may well determine the outcome of the case, ordinarily as long as those facts are in the record of the given case. In such cases, when the groundwork can be laid, practitioners will desire to seek to admit opinion testimony of Expert Witnesses in insurance cases.

¹ *Westfield Cos. v. O.K.L. Can Line, Inc.*, 155 Ohio App. 3d 747, 804 N.E.2d 45 (Ohio Ct. App., 1st Dist. 2003), app. denied (app. not allowed), 102 Ohio St. 3d 1459, 809 N.E.2d 33, 2004-Ohio-2569 (2004).

² *Westfield Cos. v. O.K.L. Can Line, Inc.*, 155 Ohio App. 3d at 764 ¶ 49, 804 N.E.2d at 58 ¶ 49.

³ 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

⁴ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 592-94, 113 S. Ct. at 2796-97.

⁵ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-50, 119 S. Ct. 1167, 1174-75, 143 L. Ed. 2d 238 (1999). Federal Rule of Evidence 702, discussed further in the text, was amended after *Daubert* and *Kumho*. Amended Rule 702 became effective on December 1, 2000.

⁶ *Century Indem. Co. v. Aero-Motive Co.*, 245 F. Supp. 2d 670, 678 (W.D. Mich. 2003).

⁷ *Century Indem. Co. v. Aero-Motive Co.*, 245 F. Supp. 2d at 679.

⁸ F.R.E. 702 currently provides in full as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

⁹ *Century Indem. Co. v. Aero-Motive Co.*, 245 F. Supp. 2d at 676.

¹⁰ *Century Indem. Co. v. Aero-Motive Co.*, 245 F. Supp. 2d at 677.

¹¹ *Century Indem. Co. v. Aero-Motive Co.*, 245 F. Supp. 2d at 677. [Emphasis added.]

¹² 202 F. Supp. 2d 1212 (D. Kan. 2002).

¹³ *Employers Reinsurance Corp. v. Mid-Continent Casualty Co.*, 202 F. Supp. 2d at 1217.

¹⁴ *Employers Reinsurance Corp. v. Mid-Continent Casualty Co.*, 202 F. Supp. 2d at 1218.

¹⁵ *Westfield Cos. v. O.K.L. Can Line, Inc.*, 155 Ohio App. 3d 747, 764 ¶ 48, 804 N.E.2d 45, 58 ¶ 48 (Ohio Ct. App., 1st Dist. 2003).

¹⁶ *Westfield Cos. v. O.K.L. Can Line, Inc.*, 155 Ohio App. 3d at 764-765 ¶¶ 49-50, 804 N.E.2d at 58 ¶¶ 49-50.

¹⁷ *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 403, 788 N.E.2d 522, 536-37 (2003).

¹⁸ 282 F. Supp. 2d 1095 (D. Ariz. 2003).

¹⁹ *Lopez v. Allstate Insurance Co.*, 282 F. Supp. 2d at 1104-05.

²⁰ See *Prieto v. Paul Revere Life Insurance Co.*, 354 F.3d 1005, 1011 (9th Cir. 2004).

²¹ *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 720-22 (Ind. Ct. App. 2004).

²² 293 F. 1013 (D.C. Cir. 1923).

²³ See *Frye v. United States*, 293 F. at 1014.

²⁴ *Dirling v. Sarasota County Gov't.*, 871 So. 2d 303, 305 (Fla. 1st DCA 2004).

²⁵ *United States Sugar Corp. v. Henson*, 823 So. 2d 104, 106 (Fla. 2002). Accord, *Dirling v. Sarasota County Gov't.*, 871 So. 2d 303, 305 (Fla. 1st DCA 2004) (Worker's Compensation proceeding). In any case, the Frye test of admissibility of Expert Witness opinion testimony is not applied in Florida state courts to established procedures or techniques, nor to opinion testimony based entirely on the personal experience and training of the particular Expert Witness. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 29 Fla. L. Weekly D1133, D1134 (Fla. 2d DCA May 12, 2004).

²⁶ *Aetna Insurance Co. v. Loxahatchee Marina, Inc.*, 236 So. 2d 12, 14 (Fla. 4th DCA 1970).

²⁷ *Aetna Insurance Co. v. Loxahatchee Marina, Inc.*, 236 So. 2d at 14.

²⁸ *Red Carpet Corp. v. Calvert Fire Insurance Co.*, 393 So. 2d 1160, 1160 (Fla. 1st DCA 1981), review denied, 402 So. 2d 608 (Fla. 1981). "The witness was highly qualified as an expert in the field of insurance." *Red Carpet Corp. v. Calvert Fire Insurance Co.*, 393 So. 2d at 1160.

²⁹ 674 N.W.2d 88 (Iowa 2004).

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- 30** Johnson v. American Family Mutual Insurance Co., 674 N.W.2d at 91.
31 Johnson v. American Family Mutual Insurance Co., 674 N.W.2d at 91.
32 Johnson v. American Family Mutual Insurance Co., 674 N.W.2d at 91.
33 Johnson v. American Family Mutual Insurance Co., 674 N.W.2d at 91.