

## Experts, Gatekeepers, and Insurance Issues in Federal Cases.

by Dennis J. Wall

Expert witnesses have testified on insurance issues for a long time. For example, in *Farmers Insurance Exchange v. Schropp*, 222 Kan. 612, 621, 567 P.2d 1359, 1367 (1977), the Supreme Court of Kansas held that the record supported a jury verdict, and that the liability insurer acted negligently or in bad faith in settlement. The Kansas Supreme Court noted "that, in addition to the evidence outlined above, expert testimony was offered on behalf of Schropp and received by the court; this, too, was supportive of the finding." More recently, in a case involving issues of the reasonableness of a settlement made by the policyholder and the injured claimant, a Florida intermediate appellate court noted that "proof of reasonableness is ordinarily established through use of expert witnesses . . ." *Chomat v. Northern Insurance Co. of New York*, 919 So.2d 535, 538 (Fla. Dist. Ct. App. 2006).

Decisions are reported daily involving issues concerning the testimony of expert witnesses in bad faith and other insurance-related cases. See generally Dennis J. Wall, *Recent Expert Witness Opinions in Property Insurance Cases: A Symphony of Different Instruments Playing From the Same Page*, A.B.A. Property Insurance Law Committee Newsletter 12 (Torts and Insurance Practice Section, Fall 2004).

In federal courts in particular, Fed. R. Evid. 702 and 703, as applied in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), are the announced tools for federal judges to use in exercising their "gate-keeping" role concerning the admissibility of opinion testimony from expert witnesses. In *Daubert*, the United States Supreme Court announced various limitations to be applied by these "gatekeepers" whenever federal trial judges are called upon to address the admissibility of expert witness opinion testimony, particularly on scientific and technical subjects. *Id.* at 592-94. The Court focused these factors on all, or nearly all, potential opinion testimony of expert witnesses in federal courts in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-50, 119 S. Ct. 1167, 1174-75, 143 L. Ed. 2d 238 (1999). Note that, in particular, Fed. R. Evid. 702 was later amended, effective as of December 1, 2000.

"Under *Daubert*, courts measure reliability by considering four nonexclusive factors: whether the testimony (1) is capable of being tested, (2) has been subjected to peer review and publication, (3) has a known rate of error, and (4) has been generally accepted in the relevant community." *Professional Consultants Insurance Co. v. Employers Reinsurance Co.*, 2006 WL 751244 \*20 (D. Vt. March 8, 2006).

In *Employers Re*, a federal district judge focused these overall *Daubert* factors on opinions expressed by two proffered experts. One of the two experts, both men, apparently did *not* base his opinions "on any reference materials or treatises." The other expert did base his opinions on so-called "learned tests and treatises," but based his opinions *only* on "his own publications and ... scholarly literature generally." *Id.* at \*21.

Of greater significance to the district judge-gatekeeper, however, was that both of the proffered experts affirmatively based "their opinions on experience working and researching in the field, and on the facts of the case." *Id.* at \*20. Their shared disregard of identified and recognized treatises and texts was not fatal to the admissibility of their opinions in the *Employers Re* case. *Id.* at \*21-\*22.

In the *Employers Re* case, the federal district judge held that the two experts' various opinions were reliable enough to pass *Daubert* muster as a "factual description" or "as facts concerning prevailing reinsurance customs," but would *not* be admissible in evidence "[t]o the extent that" the opinions in question represented inadmissible legal conclusions. *Id.*

On the application of limitations on admissibility of expert witness opinion testimony in an insurance case in jurisdictions which do *not* follow *Daubert*, please see, e.g., *Red Carpet Corp. of Panama City Beach v. Calvert Fire Ins. Co.*, 393 So. 2d 1160, 1160-61 (Fla. Dist. Ct. App.) (Expert could properly testify in that first-party insurance case, on remand, as to "trade custom in

the insurance industry” and as to “the usual methods of handling claims under such policies.”), *review denied*, 402 So. 2d 608 (Fla. 1981); *Aetna Ins. Co. of Hartford, Conn. v. Loxahatchee Marina, Inc.*, 236 So. 2d 12, 14 (Fla. Dist. Ct. App. 1970) (Expert was properly allowed to testify in that declaratory judgment action which involved a third-party or liability insurance policy, “as to the customs and usages in the insurance business.”); *Bailey v. Cameron Mutual Insurance Co.*, 122 S.W.3d 599, 603-04 (Mo. Ct. App. 2003).

To summarize the requirements broadly imposed by the decisions in *Daubert* and its progeny, the federal trial courts must monitor the gate of admissibility by asking three questions, so to speak, where admissibility of expert opinions is at issue: (1) “whether the expert is properly qualified”; (2) “whether the expert’s testimony is reliable”; and (3) “fit”, meaning *connection between the result of the particular expert’s study or examination and discrete, disputed issues of fact in the particular case*. *Ortiz v. Yale Materials Handling Corp.*, 2005 WL 2044923 \*3-\*5 (D. N.J. Aug. 24, 2005). “Thus, in 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.” *Century Indemnity Co. v. Aero-Motive Co.*, 254 F. Supp. 2d 670, 678 (W.D. Mich. 2003). The qualification requirement of an expert witness under Fed. R. Evid. 702 in an insurance case is thus “met where the witness’ qualifications provide a foundation for the witness to answer a specific question.” *Id.* at 676.

In the *Century Indemnity* case, an expert witness was qualified on the basis of *experience* to testify to opinions on the reconstruction of lost insurance policies. “The Court concludes that the *Daubert* factors are not helpful in assessing reliability 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.” *Id.* at 679. *Experience* is often the basis for a finding of the reliability requirement for experts seeking to testify in federal court. *See, e.g., Oxford Gene Technology Ltd. v. Mergen Ltd.*, 345 F. Supp. 2d 431, 443 (D. Del. 2004) (allowing expert opinion testimony from attorney who had been practicing for 18 years, on the issue of reasonable corporate behavior in a patent infringement case); *Tapatio Springs Bldrs., Inc. v. Maryland Casualty Co.*, 82 F. Supp. 2d 633, 648-49 (W.D. Tex. 1999) (denying insurance company’s motion to exclude opinions of policyholder’s proffered expert, who based such opinions on “twenty years of experience in the insurance industry,” and on the insurance company’s “own documents and his interpretations of them,” in what the published opinion shows was a close call in some respects for the district judge in this case); *cf. In Cedar Hill Hardware & Constr. Supply, Inc. v. Insurance Corp. of Hannover*, 2006 WL 508315 \*3 (E.D. Mo. March 1, 2006), a case involving breach of contract claims, vexatious refusal claims, and an insurance company’s counterclaim and defenses, and various, sometimes unspecific, expert witnesses, the court explained that: “Upon careful consideration of the parties’ various other *Daubert* motions seeking the exclusion of one another’s expert witnesses, including witnesses offering opinions on the cause or origin of the fire, the Court is not persuaded to grant any of the motions for exclusion.”

Further, it is still a continuing requirement that the opinions of expert witnesses must ordinarily be supported by facts in the record, and the expert’s opinion is not by itself proof that record facts exist to support that opinion. Thus, in *Lopez v. Allstate Ins. Co.*, 282 F. Supp. 2d 1095 (D. Ariz. 2003), the federal court rejected “the opinion” of an expert witness that the insurance company failed to comply with standard industry practices for insurance claims. There was no “foundation,” said the court, because there was no information about the person’s qualifications; 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”; *Lopez v. Allstate Ins. Co.*, 282 F. Supp. 2d 1095, 1104-05 (D. Ariz. 2003).

The reports of expert witnesses that are required by the Federal Rules of Civil Procedure are helpful in focusing the *Daubert* factors on the proffered testimony of expert witnesses. First, expert witness reports are not generally admissible unless they represent the expert’s testimony. *E.g., Kelsey v. Allstate Ins. Co.*, 2005 WL 1773302 \*3 (N.D. Cal. July 26, 2005); *see Ortiz v. Yale Materials Handling Corp.*, 2005 WL 2044923 \*3 (D. N.J. Aug. 24, 2005). On the other hand,

reports of experts in federal court have generally been viewed as affirmatively furnishing the basis for in limine rulings in response to challenges to the expert's qualifications or to the admissibility of her or his expressed opinions. *Abrams v. Van Kampen Funds, Inc.*, 2005 WL 88973 \*5 n.5, \*13-\*15 (N.D. Ill Jan. 13, 2005).

Depositions or excerpts of depositions chosen by a party's attorney for the expert to review, which the court termed "spoonfed depositions" in *Crowley v. Chait*, 322 F. Supp. 2d 530, 547 (D. N.J. 2004), were held, in that case, to constitute "information that is simply too unreliable to be trusted," so that the federal court in that case excluded the opinion testimony of two experts to the extent their opinions were based on such sources. *Id.* at 541-42, 545-47.

Many of these *Daubert*-inspired concerns, and a number of Rule 702 carry-forward requirements still in effect, are illustrated by the evidentiary rulings in *Talmage v. Harris*, 354 F. Supp. 2d 860 (W.D. Wis. 2005). That case involved an attorney malpractice action. The plaintiff alleged that his former attorneys "negligently failed to pursue" an intentional tort claim for first party bad faith against the plaintiff's fire insurer. *Id.* at 861. The defendants' attorneys filed a motion to exclude or limit expert testimony in the attorney malpractice case. One expert, a lawyer, was held by the court in that case to be qualified to testify to his opinions regarding first party good faith or bad faith claim handling. The basis of the expert's qualification was his experience in those areas, said the court. The particular expert was shown to have "substantial experience in insurance law. Although he does not specialize in fire loss claims, he has special knowledge of the insurance claims adjustment process in general as a result of his 20 years' experience as a lawyer defending insurance companies against claims by policy holders." *Id.* at 866.

In addition, that same lawyer-expert "has spoken on the topic of bad faith at legal seminars and has prepared materials in connection with those seminars," and the court held that "it is reasonable to infer that a lawyer who is requested repeatedly to be a speaker at a 'bad faith' legal seminar" has "significantly more knowledge about that topic than the average person or even the average lawyer." *Id.*

Moreover, the same attorney-witness was *thereby also held qualified* to offer expert opinion testimony as to certain issues involved in the malpractice claim itself. That same person was held to be "qualified to offer opinions concerning defendants' knowledge that plaintiff's bad faith claim had a two-year statute of limitations, their improper advice that he should sign the Mutual Release and their failure to inform him that they were terminating his representation before the applicable statute of limitations expired." *Id.* at 866-67.

On the other hand, an "opinion" about "what degree of coverage" an insurance endorsement would allow will generally be excluded, particularly where the court already declared the subject policy "to be clear and unambiguous." *Twin City Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 386 F. Supp. 2d 1272, 1277 (S.D. Fla. 2005). Conclusory statements, even though they may not be legal conclusions, have similarly been barred from admissibility in federal court. See *Brainard v. American Skandia Life Assurance Corp.*, 432 F.3d 655, 663-64 (6<sup>th</sup> Cir. 2005). In federal court, "an expert opinion must 'set forth facts' and in doing so, outline a line of reasoning arising from a logical foundation." *Id.* at 664. In the *Brainard* case, an expert's affidavit was thus held to be properly "disregarded", where the affidavit "employs broad and dramatic language without substance or analysis." *Id.*

## Conclusion

The fault-lines of division among the Justices of the United States Supreme Court have not prevented the Court from establishing a universal focus on the question of expert witness testimony in the federal trial courts. The Court's *Daubert* decision has been implemented and expanded in fields of expert endeavor far from *Daubert's* original spotlight on scientific and technical testimony proffered by and from expert witnesses. The federal courts have functioned as "gatekeepers" as to the reception of expert witness opinions and other testimony in insurance cases, for example. This article has highlighted the fact of a shared focus on the part of the many federal courts that have applied the requirements declared in *Daubert*, including in insurance cases.

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