CLM 2016 New York Conference
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Bad Faith Experts

I. Background and Standard for Expert Witnesses

A. "Bad Faith"

Texas: Pattern Jury charge

QUESTION: Did Insurer Inc. fail to comply with its duty of good faith and fair dealing to Paul Payne?

An insurer fails to comply with its duty of good faith and fair dealing by – • failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear; • refusing to pay a claim without conducting a reasonable investigation of the claim; or • canceling an insurance policy without a reasonable basis. PJC 103.1.

Texas: Defense submission

QUESTION: Did [the insurer] breach the duty of good faith? An insurer fails to comply with its duty of good faith and fair dealing by failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer knew or should have known that its liability had become reasonably clear.

The existence of a coverage dispute between the Plaintiffs and [the insurer] does not mean that liability under the insurance policy had become reasonably clear. Moreover, a determination that the carrier actually owed coverage, by itself, does not amount to a breach of the duty of good faith.

You are instructed that liability was not become reasonably clear if [the insurer] had a reasonable basis for not paying money in addition to that they each already paid. You are

	further instructed that liability is not reasonably clear if, at the time [the insurer] denied the claim, a bona fide controversy about the extent of the damage or whether there was coverage for the damage.
Texas:	*The Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997): Insured must demonstrate that the insurer knew or should have known that it was reasonably clear the claim was covered, and failed in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear.
California:	Conduct which is unreasonable and without proper cause. Withholding benefits under the policy when the reason for withholding are unreasonable or without proper cause. *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 556 (1973).
New Jersey:	Company had no valid reasons to deny or delay processing the claim, and insurance company knew or recklessly disregarded the fact that no valid reason existed for denying or delaying the processing of the claim. *Pickett v. Lloyds*, 621 A.2d 445, 457 (1993).
North Carolina:	Insured must prove that the insurance carrier refused to pay after recognition of a valid claim; that the insurance carrier acted in bad faith; and that there was aggravating or outrageous conduct by the insurance carrier. *Lovell v. Nationwide Mut., Ins. Co.*, 424 S.E.2d 181, 184 (N.C. App. 1993) aff'd, 435 S.E.2d 71 (N.C. 1993.

The Standard

Any consideration of expert testimony in bad faith actions necessarily will involve the issues raised in *Frye, Daubert*, *Joiner* and *Kumho Tire*. A brief examination of these cases and the underlying rules of evidence helps to establish a framework upon which the testimony must rest.

B. *Frye*

In the Frye case, the court was confronted with the question of admissibility of expert testimony. In deciding the "systolic blood pressure deception test" had not yet reached sufficient "standing and scientific recognition" to be admissible, the court stated:

> 'The rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases

> in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.'
>
> Numerous cases are cited in support of this rule. Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. *Frye v. United States,* 293 F. 1013, 1014 (D.C. Cir. 1923).

For many years, the *Frye* test of "general acceptance" held sway over questions of admissibility of expert testimony. Then along came *Daubert*.

C. *Daubert*

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable. And it held that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.*, at 597, 113 S.Ct. 2786. The Court also discussed certain more specific factors, such as testing, peer review, error rates, and "acceptability" in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific "theory or technique." *Id.*, at 593–594, 113 S.Ct. 2786.

In commenting on the *Frye* test, the *Daubert* court observed:

> In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining

> the admissibility of novel scientific evidence at trial. See E. Green & C. Nesson, Problems, Cases, and Materials on Evidence 649 (1983). Although under increasing attack of late, the rule continues to be followed by a majority of courts, including the Ninth Circuit.
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> The *Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine. In what has become a famous (perhaps infamous) passage, the then Court of Appeals for the District of Columbia described the device and its operation and declared:
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> > "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*" 54 App.D.C., at 47, 293 F., at 1014 (emphasis added).
>
> Because the deception test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made," evidence of its results was ruled inadmissible. *Ibid. Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585–86, 113 S. Ct. 2786, 2792–93, 125 L. Ed. 2d 469 (1993).

However, the *Daubert* court recognized the change in the federal rules of evidence superseded the Frye test.

The Court's decision in *Daubert* sets forth a trial court's "gatekeeping" role, and instructs that the trial court must determine the admissibility of expert witness testimony pursuant to FED. R. EVID. 702 by following the procedure set forth in FED. R. EVID. 104(a).

- FED. R. EVID. 702 provides: 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.

- FED. R. EVID. 104(a) provides: Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). *See, Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

D. *Joiner*

Even though *Daubert* created a landmark standard for courts to analyze expert testimony in the context of scientific testimony, the test still needed refinement, especially when it came to the admissibility of evidence.

In *Joiner* the court noted:

> But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. See *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (C.A.6), cert. denied, 506 U.S. 826, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992). *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 519, 139 L. Ed. 2d 508 (1997).

The *Joiner* court did affirm that abuse of discretion was the proper standard for appellate review:

> We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings. . . . The Court of Appeals suggested that *Daubert* somehow altered this general rule in the context of a district court's decision to exclude scientific evidence. But *Daubert* did not address the standard of appellate review for evidentiary rulings at all. It did hold that the " austere" *Frye* standard of "general acceptance" had not been carried over into the Federal Rules of Evidence. But the opinion also said:
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> "That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening

> such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S., at 589, 113 S.Ct., at 2794–2795 (footnote omitted). *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 141–42, 118 S. Ct. 512, 517, 139 L. Ed. 2d 508 (1997)

E. *Kumho Tire*

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141–42, 119 S. Ct. 1167, 1171, 143 L. Ed. 2d 238 (1999), the Supreme Court noted that the objective of the gatekeeping requirement "is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho* at 152. The proponent of expert testimony bears the burden of establishing the admissibility of such testimony by a preponderance of the evidence. *See Oddi v. Ford Motor Co.* 234 F.3d 136, 144 (3rd Cir. 2000), *cert. denied* 532 U.S. 921 (2001).

According to the *Kumho Tire* court:

> This case requires us to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert's* general holding—setting forth the trial judge's general "gatekeeping" obligation—applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. See Fed. Rule Evid. 702. We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert,* the test of reliability is "flexible," and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. 142 *142 Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination. See *General Electric Co. v. Joiner,* 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (courts of appeals are to apply "abuse of discretion" standard when reviewing district court's reliability determination). *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141–42, 119 S. Ct. 1167, 1171, 143 L. Ed. 2d 238 (1999).

II. *Application of the Standard*

As the Fifth Circuit explained in *Askanase:*

> "[I]t must be posited as an *a priori* assumption [that] there is one, but only one, legal answer for every cognizable dispute. There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge." *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988). *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997).

Moreover, experts cannot assert which law governs an issue or what the applicable law means because that is a function of the court. *Id.* at 673; *see also Goodman v. Harris Cnty.*, 571 F.3d 388, 399 (5th Cir. 2009) ("[A]n expert may never render conclusions of law."); *Estate of Sowell v. United States*, 198 F.3d 169, 171–72 (5th Cir. 1999); *Snap–Drape, Inc. v. Comm'r*, 98 F.3d 194, 198 (5th Cir. 1996).

Plainly stated, "[an expert's] opinion on the legal conclusions to be drawn from the evidence both invades the court's province and is irrelevant." *Owen v. Kerr McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983).

Additionally, an expert may not offer opinions that simply reiterate what "the lawyer can offer in argument." *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992); *In re Air Crash at New Orleans*, 795 F.2d 1230, 1233 (5th Cir. 1986) ("[T]he trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument."). "Expert testimony is an improper mechanism for offering legal arguments to the [c]ourt . . . [because it] would be unfair to [one party] for the [c]ourt to award [the opposing party]'s legal arguments the elevated stamp of expert." *Fisher v. Halliburton*, Nos. H–05–1731, H–06–1971, H–06–1168, 2009 WL 5216949, at *2 (S.D. Tex. Dec. 21, 2009) (quoting *Sparton Corp. v. United States*, 77 Fed. Cl. 1 (2007)) (alteration in original).

III. *Bad Faith Expert Case Law*

In the case of *Marketfare Annunciation, LLC v. United Fire & Cas. Co.*, CIV.A. 06-7232, 2008 WL 1924242, at *2 (E.D. La. Apr. 23, 2008), a Louisiana court addressed whether an expert witness could testify in a bad faith claim arising out of a Hurricane Katrina claim. In reaching a conclusion to exclude the witness, the court noted that:

> The claims in this case do not seem to be overly complicated. At its most basic, the claim is there was no reasonable basis to deny payment of certain claims. Defendant, the proponent of the testimony, has offered no evidence or statement which would show why or how the expert testimony would benefit the trier of fact, beyond a conclusory statement that "clearly, expert testimony would assist the trier of fact." Defendant does contend that the

> proffered experts would give testimony relating to "the obligation of an insurer to determine which part of a claimed loss is covered by flood insurance; the adequacy of instructions given by an insurer to be [sic] an adjuster; the rules or codes of acceptable conduct for insurance adjusters; the adequacy of training given to adjusters; and the insurance industry standards for reporting and adjusting insurance claims." However, these issues have been present in almost every Hurricane Katrina case tried by this Court, and it is not clear why expert testimony is necessary for the jury to understand the reasonableness standard set forth by the statute. *Id.* at *2.

The *Marketfare* court noted that there were several cases on both sides of the admissibility issue:

- In *Thompson v. State Farm Fire & Casualty Co.*, 34 F.3d 932, 939 (10th Cir.1994), the Tenth Circuit upheld the district court's decision not to allow a bad faith expert. The court concluded that "jurors may properly be viewed as capable of evaluating good and bad faith (just as they regularly determine what constitutes the conduct of a "reasonable' person) by bringing their own common sense and life experience to bear." *Id.* at 939. The court continued that "where ... expert testimony is offered on an issue that a jury is capable of assessing for itself, it is plainly within the trial court's discretion to rule that testimony inadmissible because it would not even marginally assist the trier of fact." *Id.* at 941.

- In the case of *Denison Custom Homes, Inc. v. Zurich Am. Ins. Co.*, CIV.A. V-03-24, 2005 WL 5994166, at *2 (S.D. Tex. Mar. 15, 2005), the court excluded the testimony of experts from both sides on the issue of bad faith, but allowed testimony from one expert on claims handling. The court noted that based on the experts long history of working in the industry and his background publishing articles on claims handling, the expert had sufficient competence to testify on issues relating to claims handling.

- In *Crow v. United Benefit Life Insurance Co.*, 2001 WL 285231 (N.D.Tex. Mar. 16, 2001), the court considered the same issue. In that case, Judge Fish was concerned that allowing the bad faith expert to testify would invade the province of the jury to delineate when a breach of good faith occurred. The court further determined that because the evidence the expert would provide was within an area that the jury can determine for itself, it would not allow the expert to testify. *Id.*

- In *Hangarter v. Paul Revere Life Ins. Co.*, 236 F.Supp.2d 1069, 1089 (N.D.Cal.2002) *overruled on other grounds*, 373 F.3d 998 (9th Cir.2004), the court considered a bad faith claim where there was alleged a "companywide scheme to terminate expensive disability claims to increase profits." *Id.* at 1084. In that case, Plaintiff's expert testified that a special "round table" set up by the

defendant violated insurance ethical standards in several areas. Therefore the jury was permitted to conclude that the insurance company did not act in good faith.

- In *Furr v. State Farm Mut. Auto. Ins. Co.*, 716 N.E.2d 250, 258 (Ohio Ct.App.1998), an appellate court in Ohio approved of a bad faith expert who testified as to claims procedures and the workings of uninsured motorist insurance. The court found that the trial court did not abuse its discretion in determining that the bad faith expert testified as to matters "beyond the knowledge or experience possessed by laypersons or dispels a misconception common among laypersons."

IV. *Selection of Experts*

Experts can assist with a compelling presentation regarding industry standards on claims investigations, communication, evaluation, decision making, supervision, training and written manuals and procedures.

The key to establishing good faith in many jurisdictions depends on the ability of counsel to communicate the reasonable steps taken by the insurance carrier in considering a claim.

However, in order for an expert to be able to testify, the expert must be qualified, their opinions must be reliable, and the opinions must be helpful to the trier of fact.

Early consideration of whether to retain an expert can be critical. The expense of hiring an expert must be taken into account when analyzing the potential risk and exposure.

V. *Supporting and Attacking Experts*

Courts have allowed testimony from experts regarding claims adjusting procedures.

In *Reedy v. White Consol. Indus., Inc.*, 890 F. Supp. 1417, 1447–48 (N.D. Iowa 1995), the court noted that:

> As an initial matter, the court concludes that claims adjusting procedure is also something about which the average juror is unlikely to have sufficient knowledge or experience to form an opinion without expert guidance, thus expert testimony would not be superfluous. *Watkins,* 52 F.3d at 772; *French,* 12 F.3d at 116; *Bartak,* 629 F.2d at 530; *Pro–Tec, Inc.,* 908 F.2d at 348–49. Furthermore, such testimony does indeed relate to issues in the case. *Shaklee Corp.,* 31 F.3d at 647–48. *Reedy,* 890 F.Supp. at 1447-48.

In the case of *S. Park Aggregates, Inc. v. Nw. Nat. Ins. Co. of Milwaukee, Wis.*, 847 P.2d 218, 225 (Colo. App. 1992), the court stated that:

> In *Savio,* our supreme court established the principle that:
>
> > an insurer acts in bad faith in delaying the processing of or denying a valid claim when the insurer's conduct is unreasonable and the insurer knows that the conduct is unreasonable or recklessly disregards the fact that the conduct is unreasonable.
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> *Travelers Insurance Co. v. Savio, supra,* 706 P.2d at 1275. Whether an insurer has acted unreasonably in denying or delaying approval of a claim must be "determined on an objective basis, requiring proof of the standards of conduct in the industry." *Travelers Insurance Co. v. Savio, supra,* 706 P.2d at 1275.
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> Here, South Park presented expert testimony from a claim consultant with over twenty years of experience in the insurance industry. He testified that certain "industry standards" govern the handling of insurance claims and that the reasonableness of an insurance adjuster's actions must be measured against "the things an adjuster ordinarily does and reasonably does." He further testified that it is unreasonable for an insurer to "operate without facts or to have the facts in the file and to ignore them." *S. Park Aggregates, Inc. v. Nw. Nat. Ins. Co. of Milwaukee, Wis.*, 847 P.2d 218, 225 (Colo. App. 1992).

In general, courts tend to allow testimony where it addresses industry standards and does not allow testimony when it infringes on the duties of the judge or when the testimony covers obvious issues.

As the Eleventh Circuit noted:

> Domestic law is properly considered and determined by the court whose function it is to instruct the jury on the law; domestic law is not to be presented through testimony and argued to the jury as a question of fact. *See* 2A Charles Alan Wright, Federal Practice and Procedure § 432 (3d ed.2000); *cf.* Fed.R.Crim.P. 26.1. *United States v. Oliveros*, 275 F.3d 1299, 1306–07 (11th Cir. 2001).

In addition, courts general will not allow experts to testify as to the meaning of policy terms, because that is a function for the court as well. *See, Green Machine Corp. v. Zurich Am. Ins. Group*, 2001 WL 1003217 (E.D. Pa. Aug. 245, 2011, aff'd 313 F.3d 837

(3rd Cir. 2002); *Monticello Ins. Co. v. City of Miami, Beach*, 2009 WL 667454 (S.D. Fla. 2009).