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## **Challenging Experts in Building Product Cases: Clearing the Smoke and Smashing the Mirrors**

Summary/Description: Construction defect cases are often some of the most expensive and time consuming claims and litigation facing an insurer. Many times, the claims, exposure, value and validity of a construction claim centers around the viability of the opposing expert's forensic investigation and testing methods. This program will give those who attend with the necessary tools to not only be able to look beyond the written reports and opinions, but also provide them with a guide to challenging these experts and their methods in both depositions and through legal challenges through motion practice.

### **I. Experts and Building Product claims**

Experts are a must in almost any situation where a claim is made for alleged construction defects. The complexity of the claim demands a level of expertise beyond the ordinary lay person or legal practitioner. Today's buildings – both large and small – involve complex engineering and design techniques. In addition, the products that are used on these projects are typically designed and manufactured over the course of years of design, testing and engineering. Having experts who can properly evaluate the nuances of these products and building techniques is a virtual necessity.

#### **1. Retaining the expert**

Each case has its own unique set of circumstances. Do not simply rely on the same expert time and again even though the claims may be against the same manufacturer or involve the same product. Evaluate what is needed. Do you need a design expert? Is there an installation issue? Do you need an expert to evaluate a product or products that are working in tandem with your client's product as part of the overall building system? Early analysis of the claim, the true issues involved and discussing these issues with your client will help you in selecting the best expert or experts for the claim or suit.

Once the expert is retained, an early inspection is in order. Typically the initial inspection is visual in nature and only reveals basic information about the issues that are being raised. More than likely, reports or inspection summaries exist that can also give background for the claims. These should be analyzed and scrutinized critically for any crucial information that may shed light on the issues at hand.

At some point over the course of the claim or the litigation, a more thorough analysis will be necessary. Typically, this will involve “destructive” testing or forensic testing of various building components. Having your expert present for this testing is very important, as it often may be the only chance to be able to truly inspect issues with installation or forensic examination of the problems being claimed.

## **2. Using the expert as part of the litigation team**

Any expert retained should be ready to consult during each stage of the claim or litigation process. Ensuring the expert obtains the ever-evolving claim information that is inevitably developed over the course of a construction claim also helps to ensure that your expert or experts remain qualified and ready to render counter opinions when the time comes. To that end, include the expert during the discovery phase or investigation of a claim as much as possible.

The expert or experts can also prove to be a valuable resource as the investigation and discovery move forward. A good expert can provide information that assists with questioning the claims and discovering key facts. Also, even though they may not be “retained” experts, most manufacturers or large construction companies will have one or more internal experts who have a wealth of knowledge on the workings of the building products or materials involved. Utilizing these individuals as resources can be invaluable.

## **II. Evaluating the opposing expert**

Once your expert team is in place, one of the primary issues to address is how best to evaluate and potentially attack the opinions of the opposing experts. As a matter of course in any situation involving an opposing expert, a thorough background evaluation should be completed. Every effort should be made to develop a thorough listing of prior cases and claims where the opposing expert has been involved. This can be done through a variety of methods, including searches of online databases, expert libraries, other counsel, etc.

Of course, the best source of information is previous reports and testimony of the experts. These provide valuable insight on the opinions and methodology employed by the expert or experts. Often, when similar materials or methods are used, the expert will simply rely on tried and true methods in the overall evaluation of a claim. Such reliance can be short sighted, as each building often has unique characteristics, and products that may seem similar on their face, may actually have important distinctions that the expert may not realize when performing his or her evaluation of the problem.

It is a wise practitioner that reviews the opposing expert report multiple times. Often, as discovery progresses, facts can change, so evaluation of the report in light of the testimony or other discovery is crucial. Often, new facts will be revealed that cast doubt on the opposing expert's theory or methods. These discrepancies can also be found in previous reports penned by the expert, as changing conditions and "trial and error" tactics can often lead to the expert changing his or her theory over time, and from project to project. These discrepancies can prove to be valuable bits of information for cross examination and later legal challenge.

Often when particular building components or products are at issue, forensic testing is involved. Using your expert team and the expertise of your client/manufacturer is invaluable in understanding the appropriate testing methods and techniques used by the other side. Often, opposing experts will set up and rely on testing methods that are not meant for installed, post sale, post use conditions. A thorough examination of the testing standards and guidelines set by the entity responsible for publishing the standards can lead to potential challenge-worthy issues.

Finally, before challenging an opposing expert, you should gather as much data on the testing methods utilized by the other side as possible. Use every method of discovery available: interrogatories, requests for production and admission, depositions, etc. No stone should be left unturned and no question unanswered. If the report is not clear, obtain clarification. Ensure the expert commits to the both the methodology and the result of the testing.

### **III. Challenging the opposing experts**

Once the background information is gathered and a thorough understanding is had of the opposing expert's opinions, then the expert should be "locked in" on these issues in deposition. It should be readily apparent that the expert should not be deposed until there is a complete understanding of the issues, and a complete record if obtained from the claimant and expert concerning the expert's opinions.

Frankly, the key to the deposition of any construction expert is the preparation beforehand. Most likely, everything you need and everything the expert is going to say is already written in the report, reflected in the notes, or found in the file. The deposition should be used to confirm the opinions and to lock in the expert on his or her evaluation techniques and testing methods.

#### **1. Motion Practice**

When turning to the actual motion practice that will result from a thorough development of the expert's opinions, often the challenges will turn on three key areas: first, the qualifications of the expert; second, the testing methodology used by the expert, and third, in particular to larger projects, the statistical analysis and extrapolation utilized by the expert that make up his or her opinions.

Often, one of the most basic issues – the qualification of the expert – is overlooked. However, the standard for admissibility followed by most states and federal courts (Daubert), requires a rigorous qualification standard that goes beyond mere experience and education. Often, an expert that has significant engineering expertise is overlooked as qualified, despite the fact that the true issues may involve product design and engineering that, in reality, the expert is unqualified.

In exercising its “gatekeeping” function, a district court must ensure that experts “employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kilpatiick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010) (quoting *Knmho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)). As such, where experts fail to follow established guidelines for testing whether a product meets industry standards, courts readily exclude their opinions as unreliable. See, e.g., *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 282 F.R.D. 655, 666-67 (M.D. Fla. 2012) (excluding testimony of expert whose testing procedures “significantly departed] from th[e] [relevant ASTM] standards”); *McCorvey v. Baxter Healthcare Corp.*, No. 99-1250-CIV, 2001 WL 36393134, at \*5-7 (S.D. Fla. Sept. 30, 2001) (excluding expert who “performed a modified ASTM test” and “[f]rom this ... extrapolated” that the product was defective), *aff’d in relevant part*, 298 F.3d 1253, 1256-57 (11th Cir. 2002); *Graff v. Baja Marine Corp.*, No. 2:06-CV-68-WCO, 2007 WL 6900363, at \*2 n.4 (N.D. Ga. Dec. 21, 2007) (excluding testimony of an expert who “completely disregarded [an ASTM] provision” by testing a type of specimen that the standard expressly stated should not be tested), *aff’d*, 310 F. App’x 298 (11th Cir. 2009).

Other courts have similarly excluded other experts’ testimony purporting to opine on inappropriate use of testing standards. For example, in *Brooks v. GAF Materials Corp.*, the court precluded an expert from testifying about his “testing of shingles” pursuant to ASTM D3462, including the results of that testing, “where such testing was performed substantially after the time of manufacture.” Also, in *In Re Pella Corp. Architect & Designer Series Window Mktg.*, 2016 WL 7188277 at \*4-6, \*8 (D.S.C. Dec. 12, 2016) the Court excluded expert testimony from an engineering firm because they misapplied ASTM and other standards that were “inappropriate for use on windows immediately after installation... [and] certainly inappropriate for use on the plaintiffs’ [windows, which have been installed for years”].

Expert opinions that are based on speculation and conjecture are inadmissible, even if offered by a witness with education or expertise on the topic at issue. *Allison v. McGhanMed. Corp.*, 184 F.3d 1300, 1316-17 (11th Cir. 1999) (“Under the regime of *Daubert*... a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.”) (citation omitted); *United States v. Noel*, 581 F.3d 490, 497 (7th Cir. 2009) (“An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.”) (citation omitted). Instead, expert testimony must be “ground[ed] in the methods and procedures of science,’ ... authenticated by ‘more than subjective belief or unsupported speculation,’ and ... ‘supported by appropriate validation - i.e., “good grounds,” based on what is known.”” *United States v. Frazier*, 387 F.3d 1244, 1295 (11th Cir. 2004) (emphasis added) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993)).

In addition, Courts have previously found use of statistical extrapolation methodology unreliable. *Gonzalez*, 317 F.R.D. at 477; *In re Pella*, 2016 WL 7188277, at \*9-11 (excluding SGH experts' testimony because of "possible selection bias" resulting from the experts' "inspections and testing focus[ing] almost exclusively on [windows owned by the named plaintiffs]"). In each of these types of cases, the expert only used a small sampling of products to attempt to extrapolate a common defect among an entire product line or similarly situated buildings. Care must be taken not to overlook this potential challenge, especially when product design issues are involved, or large projects may be at issue.

Expert challenges can take a number of different paths. However, each begins with a thorough evaluation and preparation plan. Once all the necessary information is gathered, then an appropriate challenge can be raised. In so doing, often the strategy and methods utilized can bring the case to an early, successful and cost effective resolution.