THE ADMISSION OF EXPERT TESTIMONY IN INSURANCE COVERAGE LITIGATION SINCE DAUBERT

ROBERT J. ROMERO
JEFFREY M. COHEN
JASON S. MAZER
KAREN CUSATO

Expert witnesses have and will remain critical components in insurance coverage and bad faith cases. In this article, we address the use of expert witnesses in coverage cases, which we use as the shorthand phrase, understanding that such trials frequently involve two cases in one -- the contract and tort claims. Trial lawyers on both sides seek to freely use expert witnesses to convince the trier of fact that: (1) the loss was within or outside the scope of the insurance contract; (2) the insurer’s particular conduct regarding the claim breached or conformed to the covenant of good faith and fair dealing; (3) and in appropriate cases to support or oppose a possible punitive damage award.

BACKGROUND

Insurance claims and the facts from which they are arise vary significantly. For example, a property damage claim under a third party liability policy may raise issues of “occurrence” that may lend itself to expert testimony about the type of business and the
particular loss in question. Another expert may be offered on insurance practice, to either support or defeat the notion that the insurer’s conduct was tortious.

A business interruption claim could lend itself to competing experts offering opinion testimony about the nature of the particular business in question, or the cause and effect of the business interruption. That expert testimony is intended to give the jury context to decide if a breach of contract occurred. In that same case, the jury may hear from insurance experts to characterize the insurer’s conduct as reasonable under the circumstances. To be sure, the law and jury instructions regarding bad faith vary by jurisdiction. However, the insurer’s conduct is generally assessed under a reasonableness, not infallibility, standard. Experts are routinely offered to demonstrate the presence or absence of good faith claim handling.

Although the use of experts in insurance coverage and bad faith trials is considered routine, there are several steps that should precede the actual use of an expert at trial. A first step is understanding legal challenges that are available to the use of expert witness testimony at trial. That understanding permits the selection of experts who are able to withstand trial court scrutiny under Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1997) and Sargon Enterprises, Inc. v. University of Southern California, 55 Cal.4th 747 (Nov. 26, 2012).

Daubert and the Federal Rules governing the use of expert witnesses are well known. In Daubert, the Supreme Court concluded that the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), test, which required the exclusion of scientific testimony not
derived from generally accepted principles or theories, had been superseded by Rule 702 of the Federal Rules of Evidence. Rule 702 currently states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702, as amended in 2000, provides general standards for district courts in fulfilling their gate-keeping function regarding the admissibility of expert testimony. Daubert itself sets forth a non-exclusive list of factors, which were not codified, but pursuant to Kumho, “might also be applicable to assessing the reliability of non-scientific expert testimony, depending upon ‘the particular circumstances of the particular case at issue.’” FRE 702, advisory committee’s note (2000); Kumho Tire Co., Ltd. v. Carmichael, 529 U.S. 137, 150 (1999). But, the mere fact that the methodology utilized by an expert is not quantitative, testable by scientific method, or subject to peer review and publication is not grounds for excluding expert testimony that is otherwise sufficiently reliable. United States v. Brown, 415 F.3d 1257, 1267 (11th Cir. 2005) (finding admissible expert testimony based upon application of knowledge, skill, and experience to sufficient facts and data).

It is axiomatic that the trial court serves a “gatekeeper” function to ensure that the jury hears only expert testimony that is rooted in something other that speculation and conjecture. While insurance claim handling may defy mathematical certainty, the courts have clearly set forth the notion that an expert’s opinions must be based on experience
and solid factual support. The party offering the testimony bears the burden of establishing expert witness admissibility by a preponderance of the evidence. *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001). The trial court decision to permit or exclude expert witnesses testimony will be reviewed under an abuse of discretion standard. *General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).\(^1\)

The Supreme Court did not explain in *Daubert* how its discussion of scientific expert testimony would impact other types of expert testimony. The Court later addressed that issue in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). There, the Supreme Court noted:

> We conclude that *Daubert*’s general holding—setting forth the trial judge’s general “gatekeeping” obligation—applies not only to testimony based on “technical” and “other specialized” knowledge. *Id.* at 141.

Accordingly, offering experts in insurance coverage and bad faith lawsuits carries with it the need to ensure that proffered opinions will withstand *Daubert/Kumho* scrutiny. The following examples illustrates the *Daubert/Kumho* scrutiny in insurance coverage and bad faith cases

**CASE STUDIES**

Several insurance cases are instructive. In *Groce v. Fidelity General Insurance Company*, 252 Or. 296 (1968), plaintiff obtained an insured’s assignment of rights and sued the defendant insurer for bad faith refusal to settle an underlying bodily injury claim. The Oregon Supreme Court affirmed the assignment of rights. Separately, it

\(^1\) See also *Campbell ex rel. Campbell v. Metropolitan Prop. & Cas. Ins. Co.*, 239 F.3d 179, 185 (2d Cir. 2001).
overruled the insurer’s objection to plaintiff’s use of a lawyer to testify about the carriers’ alleged bad faith. In so doing, the Court writes:

The fact that the jury did not necessarily need the expert testimony did not render the testimony inadmissible. The testimony was a least useful, if not indispensable. It can hardly be said that the average juror was as well equipped as an experienced insurance defense attorney to judge the good or bad faith of an insurer, based upon the facts included within the hypothetical question. *Id.* at 309.2

A New York Court of Appeals decision grappled with similar facts, but reached a different conclusion. In *Kulak v. Nationwide Mutual Insurance Company*, 40 N.Y.2d 140, 735 (N.Y App. 1976), also a wrongful death case stemming from an automobile accident, the plaintiff assignee sued an insurer following a $60,000 verdict in a case where the defendant maintained $10,000 insurance liability limits. In attempting to prove bad faith refusal to settle, plaintiff qualified and offered the testimony of “two experienced trial attorneys . . . in the field of automobile accident injury litigation.” *Id.* at 144. The experts answered a series of hypotheticals, each aimed at establishing that the insurer’s failure to settle before trial was in bad faith. The expert’s testimony further provided that the verdict would exceed the $10,000 policy limit if tried, and that the insurer’s pre-verdict assessment that $7,500 was the reasonable settlement value of the case.

The New York Court of Appeals concluded that the attorney experts testimony was in part inadmissible, and ordered a new trial. In so doing, the court noted:

2 See Fed. R. Evid. 704(a) (“An opinion is not objectionable just because it embraces an ultimate issue.”); see also *American Family Mut. Ins. Co. v. Allen*, 102 P.3d 333, 345 n. 12 (Colo. 2004) (noting some jurisdictions have concluded that expert testimony of industry standards is not required in actions alleging bad faith against the insurer).
The attorney witnesses were invited and permitted to express opinions as to the significance of such considerations in this particular case and that the recovery would exceed policy limits. This was far more than a matter of the form of the question and went to the substance of the testimony. In our view in thus presuming to apply general experience to the particulars of this individual case, the witnesses trespassed on the jury’s domain. *Id.* at 147.3

Significantly, Justice Fuchsberg dissenting in *Kulak* recognized the unique nature of the insurance issues involved in coverage bad faith cases, and would have permitted the lawyer experts to testify freely. Quoting Wigmore on Evidence, Justice Fuchsberg writes:

> But the only true criterion is: On this subject can a jury from this person receive appreciable help? In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject and is not fixed or limited to any class of persons acting professionally. *Id.* at 151 (Fuchsberg, J., dissenting) (citing 7 Wigmore, Evidence [3d] 1923, p. 21).

The dissent in *Kulak* thus concluded that the experts offered by the plaintiff should have been permitted to testify based on their experience handling similar claims:

> Expert testimony on such matters, it appears to me, is not only entirely or in part “peculiarly within the knowledge of men whose experience or study enables them to speak with authority,” but the conclusions to be drawn from it also are “not within the range of ordinary training or intelligence…..” *Id.* at 151 (Fuchsberg, J., dissenting) (citations omitted).

In a first party dispute in the Northern District of Iowa, the court discussed a defendant insurer’s motion to strike a 29 year old and 35 year old defense experts who an insurer offered on workers’ compensation claim handling. *Reedy v. White Consolidated Industries*, 890 F.Supp. 1417 (N.D. Iowa 1995). Despite having relatively little experience in the insurance field, and indeed a background that included employment

---

entirely removed from the insurance industry, the trial court denied plaintiff’s motion to strike the experts. In so doing, the court discussed Rule 702 writing:

“Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony.” An individual can qualify as an expert where he possesses sufficient knowledge gained from practical experience, even though he may lack academic qualifications in the particular field of expertise. *Id.* at 1446 (citations omitted).\(^4\)

Discussing *Daubert*, the *Reedy* court observed that the Supreme Court set forth two essential considerations a court should evaluate when assessing the admissibility of expert testimony: a reliability prong, and a relevancy prong. In short,

- If an expert opinion is so fundamentally unsupported that it can offer no assistance to the jury, then the testimony should not be admitted. *Id.* at 1447.

Moreover, expert testimony may and should be excluded if the trier of fact is equally able to reach the asserted conclusion. In *Reedy*, however, the court held:

> [T]he 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. Furthermore, such testimony does indeed relate to issues in the case. *Id.* at 1447-48 (citations omitted).

The *Reedy* court thus concluded that the experts, while relatively new to the insurance field, had sufficient practical experience in claims adjusting generally and were sufficiently knowledgeable about processing workers’ compensation claims to testify as experts in the case. *Id.* at 1452.

As the above and other cases make clear, the trial court can and should apply the *Daubert/Kumho* test to insurance experts. In *Jaurequi v. Carter Manufacturing Co., Inc.*,\(^4\)

---

\(^4\) See also Advance Brands, LLC v. Alkar-Rapidpak, Inc., No. 08-CV-4057-LRR, 2011 WL 2144481 (N.D. Iowa May 31, 2011) (noting witness is sufficiently qualified to testify as an expert if “his knowledge of the subject matter is such that his opinion will most likely assist the trier of fact in arriving at the truth”).
173 F.3d 1076 (8th Cir. 1999), plaintiff sued John Deer for his bodily injury after being injured by a piece of farming equipment Deer manufactured. Plaintiff offered two engineers to testify that the defendant failed to warn of the danger, and otherwise failed to mark the equipment with proper warnings. The trial court, however, ultimately granted Deer’s motion to exclude the expert testimony.

In so doing, Jaurequi rejected plaintiff’s argument that Daubert applies only in the case of “scientific” testimony, not “technical” testimony. The Eighth Circuit disagreed, reviewing the Daubert holding and recognizing that Kumho put to rest plaintiff’s argument:

The Supreme Court did not explain in Daubert how its discussion of scientific expert testimony would impact on these other types of expert testimony. Most recently, however, the Court has squarely held that Daubert applies to all expert testimony. [Citation] We conclude that Daubert’s general holding—setting forth the trial judge’s general “gatekeeping” obligation—applies not only to testimony based on “technical” and “other specialized” knowledge. Id. at 1082 (quoting Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999)).

Another illustrative case is Gallatin Fuels Inc. v. Westchester Fire Insurance Company, No. Civ.A.02-2116, 2006 WL 1437169 (W.D. Pa. 2006). In that case, the court held that professor Priest’s non-claims adjusting experience qualified him to “serve as an expert on issues such as the fundamental principles of insurance, the operation of the insurance industry, and the reasonableness of Westchester’s claims handling procedures in this action.” Id. at *2. The court found the following experience justified its conclusion:

. . . Priest is a professor of law and economics at Yale Law School, and teaches courses in insurance, insurance regulation, and contracts, among others . . . . Priest has conducted extensive research in the field of law and economics, insurance, the regulation of insurance, and insurance practices. He also has taught and published in the fields of insurance and the
The Ninth Circuit has also addressed the admissibility of experts in the insurance coverage and bad faith context. *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998 (9th Cir. 2004). There, the plaintiff claims handling expert Frank Caliri was permitted to testify over the insurer’s objection:

> Clearly, this lays at least the *minimal foundation* of knowledge, skill and experience required in order to give ‘expert’ testimony on the practices and norms of insurance companies in the context of a bad faith claim. *Id.* at 1016 (citations and quotation omitted).

The Ninth Circuit in *Hangarter* specifically analyzed what *Daubert* factors apply in the context of an insurance coverage case:

> Concerning the reliability of non-scientific testimony such as Caliri’s, “the *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the *knowledge and experience* of the expert, rather than the methodology or theory behind it.”

---

5 See *Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 586-87 (10th Cir. 1998) (holding only that it was not an abuse of discretion to exclude proffered testimony where the expert had no experience with third-party bad faith claims or the law of the applicable jurisdiction and expressly recognizing that appropriate expert testimony may be admissible on remand); *American Home Ins. Co. v. Merck & Co. Inc.*, 462 F.Supp.2d 435, 448-49 (S.D.N.Y. 2006) (holding that expert qualified as an insurance claim handling expert based upon his professional experience and permitting his testimony concerning transit insurance industry claim handling practices but refusing to allow him to testify regarding his interpretation of the applicable policy language); see also *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 378-79 (Ky. 2000) (excluding testimony by an attorney with “no experience working in the insurance industry, no experience adjusting claims from the insurance company’s perspective, and no experience supervising the adjustment of insurance claims”); *Shamalon Bird Farm Ltd. v. United States Fidelity 7 Guaranty Co.*, 809 P.2d 627, 628-29 (N.M. 1991) (finding no abuse of discretion where proffered expert had never handled a business interruption claim and “had not taken the time to familiarize himself with the facts, and thus did not have a sufficient basis to give opinions that would be of help to the jury”); *Trustees of the Univ. of Penn. v. Lexington Ins. Co.*, 815 F.2d 890, 903 (3d Cir. 1987) (finding no abuse of discretion where expert proffered by insurance company had no “experience with claims approaching the magnitude presented by this case.”).


7 The Ninth Circuit expressly rejected Provident’s reliance on *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576 (10th Cir. 1998), the same case cited here by St. Paul, because *Hobbs* merely held that “the district court did not commit clear error in excluding a witness that lacked specialized knowledge” and “in no way held that it would have been an abuse of discretion to admit the testimony of an expert with general knowledge of the field to testify on
The Ninth Circuit further explained that the trial court did not abuse its discretion in admitting expert testimony because the expert’s analysis was dependent upon his knowledge of, and experience within, the insurance industry and not contingent upon a particular methodology or technical framework. *Hangarter*, 373 F.3d at 1017-18.8

However, the court maintains wide latitude to evaluate the expert’s experience and qualifications specific to the matter at issue. In Certain Underwriters at Lloyds, London v. *Inlet Fisheries, Inc.*, 389 F.Supp.2d 1145 (D. Ala. 2005), the court acknowledged the trial court’s service as “gatekeeper” and the wide latitude afforded in admitting or excluding expert testimony. *Id.* at 1152. In *Inlet Fisheries*, the court focused on the insurer expert Wilton’s experience, which started in 1958, as it relates to the specific topic of marine pollution policies at issue. *Id.* at 1153. The court ultimately excluded Mr. Wilton’s opinion regarding stand-alone marine pollution policies:

Despite many years of experience in the insurance business, with respect to underwriting marine pollution policies Wilton’s experience is minimal, sporadic, and concerning stand-alone policies of the type at issue in the case at bar non-existent . . . Wilton has no knowledge of the underwriting policies, practices, or procedures of either Lloyds or WQIS, the dominant issuers of marine pollution policies. In sum, Wilton lacks “particularized experience with vessel pollution policies” an, therefore, although qualified to testify as an expert on some aspects of the standards of the insurance industry, he is not qualified to testify as an expert on underwriting marine pollution insurance policies. *Id.* at 1154.

---

8 See also *Crowley v. Chait*, 322 F.Supp.2d 530, 541-42 (D.N.J. 2004).

specific bad faith claims issues.” *Hangarter*, 373 F.3d at 1022 n. 12.
Where an expert on insurance practices has gained knowledge of the standards applicable in the industry through experience and training, his or her testimony may accordingly be based thereon. See, e.g., Geico Caas. Co. v. Beauford, 2007 WL 2412974 (M.D. Fla. Aug. 21, 2007) (recognizing that an insurance claims adjuster with 30 years of claim handling experience is qualified to testified as an expert on claim handling in a Florida bad faith case). The testimony must, however, be relevant to the facts at issue in the particular case:

The “gate-keeping’ inquiry must be tied to the facts of a particular case.” Moreover, the testimony must be helpful or “fit” with the issues to be resolved in the case; that is, the district judge must also determine whether an expert’s reasoning and methodology can be properly applied to the facts in issue. Allaputtah Services, Inc. v. Exxon Corp., 61 F.Supp.2d 1335, 1339 (S.D. Fla. 1999) (internal citations omitted).

Another Pennsylvania case is illustrative. See Hyde Athletic Indus., Inc. v. Continental Cas. Co. 969 F.Supp. 298 (E.D. Pa. 1997). In that case, the insured sued the carrier for defense and indemnity arising out of a Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)-alleged pollution case. The issue concerned the Sudden and Accidental Pollution Exclusion. The insured shoe manufacturer offered expert testimony that the environmental spill was sudden and accidental. Although the court ultimately considered the expert testimony on summary judgment, the court found for the defendant insurer and awarded summary judgment.

---

The court observed that in addition to inconsistencies in the expert’s testimony, the court was:
Concerned that [the expert’s] opinion would be admissible at trial under Federal Rule of Evidence 702 because it may not meet the standards outlined in Daubert. Nevertheless, the court considered the substance of the affidavits, and concludes that they do not prevent entry of summary judgment on the duty to defend or indemnify. Id. at 309 n. 7.

As mentioned at the outset, expert witness testimony may address both to the breach of contract and tort aspects of any particular coverage case. With respect to the breach of contract claim, experts are often used to establish that the predicates of coverage (either the scope of the insuring agreement or an exclusion) apply to either preclude or afford coverage in any particular fact pattern. See Brown v. Auto-Owners Ins. Co., 121 F.3d 697, WL 547975 (4th Cir. 1997) (unpublished).

In Brown, the insured sought to recover for structural damage to a commercial warehouse that occurred following a windstorm and rain. Brown v. Auto-Owners Ins. Co., 121 F.3d 697 (4th Cir. 1997) (unpublished). Both the insured and the insurer offered expert testimony concerning the cause of the collapse and property damage. The insured’s expert testified that the damages were caused by wind, a condition covered under the insurance contract. The insurers, however, tried to establish through expert testimony from a civil engineer that the loss was caused by water logged soil and lateral pressure, all excluded under the terms of the policy.

The court ultimately granted summary judgment for Auto-Owners, rejecting the insured’s expert as offering nothing more than his “subjective belief on the cause of collapse.” The court wrote:

[The insured expert’s] opinion on the cause of the collapse and the forces involved was not based upon any mathematical calculations or scientific methodology, but his personal observations. He did not know the
magnitude of the wind required to lift the roof or even the velocity of the wind on the night of the collapse. Further, he was unable to quantify the forces placed upon the wall by the embankment or even explained the mechanics of how the collapse and damage to the roof occurred. Given the lack of scientific data or reasoning to support his conclusions, we find that the district court did not abuse its discretion in excluding the expert’s testimony. *Id.*

In one case, a legal malpractice case, the court permitted plaintiff’s expert to testify over the defense objection. *Talmage v. Harris*, 354 F.Supp.2d 860 (W.D. Wis. 2005). In *Talmage*, plaintiff sued his former lawyers in a legal malpractice case, contending that the law firm had failed to properly prosecute an action for insurance bad faith against plaintiff’s carrier after a fire loss. The law firm recommended that plaintiff settle the breach of contract action with the insurer. However, the law firm allegedly wrongfully advised the client that the bad faith case would continue notwithstanding the release of the contract action.

Contending that advice was in error, the plaintiff sued the law firm for legal malpractice. In so doing, the plaintiff attempted to use a lawyer expert to testify about the strength of the insurance claim together with the forensic accountant to testify about damages. Over the defense objection, the court considered the plaintiff’s experts, drawing upon *Daubert* and its progeny:

In Wisconsin, expert testimony is not required to establish what a reasonable insured would have done under the circumstances, but it is permitted if the witness testifying is qualified and the testimony will help the trier of fact to understand the evidence or determine a fact in issue. Generally, expert testimony is required only when the plaintiff’s bad faith claim implicates complex industry practices or procedures outside the common knowledge and ordinary experience of an average juror. *Talmage*, 354 F.Supp.2d at 865.

homeowners sued Allstate contending that the insurer breached the implied covenant of
good faith and fair dealing after denying a property damage claim under an all risk
insurance contract. The trial court granted summary judgment in favor of Allstate,
including summary judgment on the bad faith claim.

The California Court of Appeal reversed. In so doing, it considered the
admissibility of the policyholder’s expert witness offered to testify about Allstate’s claim
handling practices. The expert testified, among other things, that Allstate had violated
various provisions of the Unfair Insurance Practices Act and other regulations that the
expert contends set forth the minimum standards for claims resolution. As to plaintiff’s
expert, the court affirmed the trial court’s decision to permit the policyholder’s expert:

Jordan was not seeking to recover on a claim based on a violation of
Section 790.03 subdivision (h). Rather, her claim was based on a claim of
common law bad faith arising from Allstate’s breach of the implied
covenant of good faith and fair dealing which she is entitled to pursue.
Jordan’s reliance upon the [expert’s] declaration was for the purpose of
providing evidence supporting her contention that Allstate had breached the
implied covenant by its action. This was a proper use of evidence of an
insurer’s violations of the statute and the corresponding regulations. Id. at
323 (emphasis in original) (citations omitted).

Another California case questioned and ultimately held that the use of an insured’s
expert was improper. California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175
Cal.App.3d 1. In California Shoppers, the policyholder sued Royal Globe for breach of
contract and the breach of the implied covenant of good faith and fair dealing after the
insurer refused to defend California Shoppers.

At trial, the jury awarded compensatory, tort and punitive damages. Following the
trial, the court granted judgment notwithstanding the verdict on the punitive damages
award. The Court of Appeal addressed the trial court’s decision to allow the insured’s
expert, a plaintiff’s attorney who had experience suing insurance companies, to testify at trial. The Court of Appeal writes that the expert’s testimony “was essentially that everything Royal Globe did with reference to California Shoppers was wrong.” Id. at 66. Moreover, the expert was permitted to use a demonstrative exhibit, which the Court of Appeal noted contained erroneous and incorrect statements of the law.

The court ultimately concluded that the trial court erred in allowing this expert to testify because he was not qualified, even though he was a lawyer who handled cases against insurance companies. The court wrote:

The crux of the error here was that [the expert] in no sense was qualified as an expert to testify about the subject on which he purported to testify. There is no question both on the record and as a matter of repute at the bar, but that he is a highly qualified trial attorney, and a particularly aggressive advocate of plaintiffs’ cases against insurance companies. However, no foundation whatsoever was laid to demonstrate that Aitkin had any special knowledge, skill, experience, training or education such as would qualify him as an expert on insurance company practices. It is no answer, that certain of his professional efforts are aimed at discovering insurance company derelictions of duty, and then taking them to task. An objection was made to his giving opinions on how California Shoppers’ claim was handled.

Indeed, as Aitkin candidly admitted, he had never been employed nor even retained as counsel by an insurance company. Small wonder. Id. at 66.

The California Supreme Court recently addressed an expert witness issue in the case of Sargon Enterprises, Inc. v. University of Southern California, 55 Cal.4th 747 (Nov. 26, 2012). The California Supreme Court clearly held that trial court judges must discharge their “gatekeeping role” as set forth in Daubert and its progeny. Id. at 772-72.

Prior to Sargon Enterprises, California followed the Kelly/Frye “general acceptance” test dating back to 1923 which excluded new scientific techniques or methodologies until that technique or methodology gained the “general acceptance” in

In *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal.4th 747 (Nov. 26, 2012), however, the California Supreme Court finally adopted *Daubert* and its progeny to establish the trial court’s role as “gatekeeper” to exclude speculative expert testimony. There, plaintiff Sargon, a small dental implant company with net profits of $101,000 in 1998, entered into a contract with USC’s dental school to conduct a five-year clinical study of Sargon’s recent FDA-approved “immediate load” dental implant. Sargon’s implant was groundbreaking since it could be implanted immediately following the extraction of a tooth unlike the then-existing procedure. In 1999, Sargon sued USC, alleging, among other things, breach of contract.

The evidence revealed that Sargon’s implant was successful, but that, contrary to its contractual obligations, USC failed to properly report its findings to Sargon. Thus, at trial, the jury found that USC breached its contract with Sargon and the jury awarded Sargon compensatory damages of $433,000. This amount, however, did not take into account Sargon’s claim for lost profits, the evidence for which the trial court excluded as not foreseeable to USC. The trial judge excluded Sargon’s evidence for lost profits on foreseeability grounds, but later reversed on appeal.
After examination of the expert’s testimony and the methodology used, the Supreme Court affirmed the trial court’s original decision to exclude the expert’s testimony:

Thus, under Evidence Code section 801, the trial court acts as a gatekeeper to exclude speculative or irrelevant expert opinion. As we recently explained, “[T]he expert’s opinion may not be based ‘on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors . . . . [¶]’ Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?” [Sargon Enterprises, Inc. v. Univ. S. Cal., 55 Cal.4th 747, 770 (Nov. 26, 2012) (citing Jennings v. Palomar Pomerado Health Systems, Inc., 114 Cal.App.4th 1108, 1117 (2003)).

Sargon Enterprises also analyzed Evidence Code section 802 in conjunction with Section 801, noting that Section 802:

[E]xpressly permits the court to examine experts concerning the matter on which they base their opinion before admitting their testimony. The reasons for the experts’ opinions are part of the matter on which they are based just as is the type of matter. Evidence Code section 801 governs judicial review of the type of matter; Evidence Code section 802 governs judicial review of the reasons for the opinion. “The stark contrast between the wording of the two statutes strongly suggests that although under section 801(b) the judge may consider only the acceptability of the generic type of information the expert relies on, the judge is not so limited under section 802.” Sargon Enterprises, 55 Cal.4th at 771 (quoting Edward J. Imwinkelried & David L. Faigman, Evidence Code Section 802: The Neglected Key to Rationalizing the California Law of Expert Testimony, 42 LOY. L.A. L. REV. 427, 441 (2009)).

In so finding, the Court stated, however, that courts must be cautious in excluding testimony, since the trial court’s gatekeeping role does not involve choosing between competing expert opinions: “the gatekeeper’s focus ‘must be solely on principles and methodology, not on the conclusions that they generate.’” Sargon Enterprises, 55
Cal.4th at 772 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993)).

**CONCLUSION**

Expert witnesses can and will continue to be used in insurance coverage and bad faith cases. The rules set forth in *Daubert*, its progeny and now *Sargon Enterprises* in California are equally clear that the trial court will act as “gatekeepers” to determine if the expert is qualified to offer the opinions they offer to the trier of fact. It is incumbent upon practitioners on both sides to evaluate the qualifications of the experts and to make appropriate pre-trial challenges. The cases reviewed illustrate that this inquiry will be a case-by-case analysis that evaluates the expert’s expertise, experience in the area, and ultimately ensures that the expert’s opinions are rooted in fact and not based on pure speculation.