ADMISSIBILITY OF INSURANCE COVERAGE EXPERTS

BY

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INTRODUCTION

Insurance coverage is an area of law not for the faint of heart. While it is a sub-set of contract law with many of the same basic principles, the language of the contracts (the policies) is frequently arcane and the factual scenarios to which the policy language must be applied to determine the availability of coverage are almost infinite. Most coverage cases have issues which will not be easily understood by judges, much less juries. Parties, therefore, frequently seek to use experts to help judges and juries understand the case and the parties’ respective positions as to coverage.

Admissibility of expert testimony is governed by the rules of evidence. Federal courts make that determination under F. R. E. 702. Many state courts apply their own version of that Rule. As discussed below, courts generally do not allow experts to offer opinions about the meaning of a policy or how it applies to particular facts. That is generally considered unhelpful to the factfinder, a usurpation of the court’s role in determining the law or invading the province of the jury.

The cases below lay out the federal standard for admissibility of expert testimony and discuss cases from the various federal Courts of Appeal on admissibility of insurance expert testimony to provide a framework for discussion and analysis.

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I. **The Daubert and Kumho Tire Framework**

Prior to the seminal 1993 Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), scientific evidence was admissible only if it was “sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye’s “general acceptance” standard, which predated the Federal Rules of Evidence by decades, governed the admission of expert testimony until *Daubert*. In *Daubert*, the Supreme Court articulated the current standard for admitting expert testimony in federal court. If a scientific expert’s testimony rests on a reliable foundation and is relevant to the facts at issue in the case, there is no prerequisite that the expert’s methods be generally accepted by the scientific community.

In *Daubert*, two children alleged their birth defects were caused by their mothers’ ingestion of a prescription anti-nausea drug, Bendectin. Merrell Dow’s expert reviewed all published studies on Bendectin and birth defects, all of which found no tie between Bendectin and human birth defects. The expert testified that use of Bendectin during pregnancy was not a risk factor for birth defects. Plaintiffs’ experts based their conclusion that Bendectin caused birth defects on test tube and live animal studies. The District Court granted defendant’s motion for summary judgment on the grounds that plaintiffs’ expert evidence was not admissible under the existing standard that “scientific evidence is admissible only if the principle upon which it is based is ‘sufficiently established to have general acceptance in the field to which it belongs.’” *Id.* at 583.

The *Daubert* Court interpreted Federal Rule of Evidence 702, which states:

> 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.

The Court held that a trial court’s inquiry into the admissibility of an expert’s testimony should be “flexible” and that its “overarching subject is the scientific validity … of the principles that underlie a proposed submission”, focusing “solely on the principles and methodology, not on the conclusions that they generate.” Id. at 594-5. The trial court should consider whether a theory can and has been tested, whether it has been subjected to peer review and published, the known or potential error rate of a particular scientific technique, and the “general acceptance” of a technique. Id. at 594. No one factor is determinative.

Six years later, in *Kumho Tire Co. v. Carmichael*, the Supreme Court applied *Daubert* to the testimony of engineers and non-scientific experts. The Court extended *Daubert’s* holding that the trial judge’s duty to determine the reliability and relevance of expert scientific testimony “applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ or ‘other specialized’ knowledge.” 526 U.S. 137, 141 (1999).

In *Kumho Tire*, plaintiffs sued Kumho Tire after a tire blew out on their minivan, causing a fatal accident. Plaintiffs’ expert testified at his deposition that a defect in the tire’s design or manufacture caused the blow-out; he concluded that a design or manufacturing defect was present because a tire’s carcass is supposed to remain bound to the inner tread of the tire even after the tread depth has worn down, the tire’s tread had separated from its inner carcass before the accident, and that separation is what caused the tire blow-out. He based his conclusion on the following propositions: tire separations are not caused by over-deflection, a tire separation caused by over-deflection would show physical signs, and if fewer than two of those physical signs are present he can conclude a manufacturing or design defect caused the separation. Defendants disputed these propositions.
Kumho Tire moved to exclude the expert’s testimony because it failed the reliability requirement of Federal Rule of Evidence 702. The trial court reviewed the expert’s methodology through the lens of the Daubert factors (testing, peer review, error rates, and acceptability in the relevant scientific community) and granted Kumho Tire’s motion to exclude. On a motion to reconsider whether it was too inflexible in applying Daubert, the trial court affirmed its earlier order because there were insufficient indications that the expert’s methodology for analyzing data obtained in visual inspection of the tire was reliable. The Eleventh Circuit reversed, stating that Daubert is limited to assessing experts in “scientific context” and the “application of scientific principles.”

The Supreme Court considered whether a trial judge may consider the Daubert factors in determining whether an engineering expert’s testimony is admissible and concluded that it may. The Court stated: “Daubert makes clear that the factors it mentions do not constitute a ‘definitive checklist or test’.” Id. at 150. The Court held that the trial court had the discretionary authority to determine the reliability of plaintiff’s expert, “in light of the particular facts and circumstances of the particular case” and it did not abuse that discretion. Id. at 158.

II. Opinions by Circuit

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**Second Circuit**

In *SR Int’l Bus. Ins. C. v. World Trade Cir. Props, LLC*, the Second Circuit held that the district court acted within its discretion in allowing plaintiffs’ expert witness to testify “as an expert witness on custom and practice regarding ‘per occurrence property insurance’ coverage. 467 F.3d 107 (2d Cir. 2006). *SR Int’l* adjudicated the dispute between parties with property interests in the World Trade Center (the Silverstein Parties) and their insurance companies about
whether the September 11, 2001 terrorist attack of two airplanes destroying the twin towers of the World Trade Center was one or two “occurrences” under the terms of the relevant insurance contracts.

Jeffrey McKinley, who had been an insurance broker for 23 years and an underwriter for a property insurance company for 4 years, testified on behalf of the Silverstein Parties about custom and practice in the insurance industry with “per occurrence” property insurance. The insurer parties, on appeal, argued that the district court should not have permitted his testimony because of a lack of practical experience, his lack of “genuine methodology”, and lack of “a consistent, reliable methodology by which he applied his opinions to the facts of this case.” *Id.* at 132.

The court held that McKinley had sufficient experience to testify as an insurance expert because he explained that his 30 years in the insurance industry taught him how to identify different practices of insurers. The fact that he had not applied his understanding of custom and practice specifically to a terrorism case was not disqualifying given the unprecedented nature of the terrorist attack at issue in the case. *Id.* at 132-33.

The Second Circuit distinguished the application of *Daubert* to insurance experts from its application to scientific or engineering experts. The court reiterated its ruling from *Iacobelli Construction, Inc. v. County of Monroe*, where it held that *Daubert’s* purpose is to clarify the standard for evaluation “scientific knowledge” with respect to Federal Rule of Evidence 702; experts testifying about the interpretation of a contract “do not present the kind of ‘junk science’ problem that *Daubert* meant to address.” *Id.* at 133 (citing *Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19, 25 (1994)). The Second Circuit concluded that McKinley was properly permitted to testify as an expert on property insurance industry custom and practice. *Id.* at 133-
In *Luizzi v. Pro Transp., Inc.*, a case that arose out of a September 22, 2001, traffic accident coincidentally just after the September 11, 2001 terrorist attacks underlying *SR. Int’l Bus.*, the court warned against allowing an expert to “usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it.” 2011 U.S. Dist. LEXIS 46862, *18 (2011). Luizzi sued Pro Transport, which owned the tractor trailer with which his car collided, and the driver. The driver served a third-party complaint against State National Insurance; State National subsequently filed a second third party complaint against its insurance wholesaler, Green Mountain Agency. State National alleged that Green Mountain breached its contract and was negligent in failing to properly cancel the driver’s policy.

State National challenged Green Mountain’s proposed expert testimony that it was not reasonably foreseeable that State National would incur economic loss if the policy was not cancelled. The court determined that the expert’s opinion on what was foreseeable was irrelevant. However, the court also determined that even though fronting practices were not directly at issue in the case, an expert’s testimony explaining the concept would assist the jurors in reaching their own conclusions. Therefore, Green Mountain’s expert was permitted to explain “what fronting agreements involve and the customs and practices in the insurance industry in using fronting agreements.” *Id.* at *17. The expert was not permitted, however, to testify about whether he believes Green Mountain comported with custom and practice. The court stated that the expert’s “opinion as to how these customs and practices apply to the particular facts of the case is the type of testimony that attempts to interpret the facts and takes the decision out of the hands of the jury.” *Id.*
Third Circuit

In Nationwide Life Insurance Co. v. Commonwealth Land Title Ins. Co., 2011 U.S. Dist. LEXIS 5933, *16-17 (E.D. Pa. 2011), a defendant in a dispute over a title insurance policy sought to introduce expert testimony about the trade usage of language in a policy. The parties disagreed on the meaning of the phrase “covenants, conditions or restrictions on the land” in an endorsement to the policy, and the expert’s report addressed the custom and practice surrounding that phrasing. Id. at *19. Plaintiff objected, arguing the language was unambiguous and was, therefore, not subject to interpretation by an expert witness. The court held that defendant’s expert could testify about industry custom and practice because, under Pennsylvania law, “trade usage must always be considered in interpreting a contract, regardless of whether a phrase is ambiguous.” Id. at *17.

Fifth Circuit

In Weiser-Brown Operating Co. v. St. Paul Surplus Lines Ins. Co., the Fifth Circuit held that the trial court properly excluded expert testimony at trial about insurance industry custom and practice when the expert proffering that opinion made conclusory statements that were unlikely to aid the fact-finder evaluate the defendant’s behavior. 801 F.3 512 (2015). In Weiser-Brown, the plaintiff was a small oil company in a coverage dispute with its insurer about coverage for “loss of control” of an oil well it operated. When Weiser-Brown reported the loss to its insurer, St. Paul, the insurer appointed a loss adjuster to investigate; the adjuster concluded that there was no “loss of control”. Weiser-Brown then sued for breach of contract and bad faith. Id. at 517.

The trial court excluded testimony from Weiser-Brown’s expert, who, in support of Weiser-Brown’s bad faith claim, “would have testified that [the defendant] St. Paul violated
‘accepted practice’ in the insurance industry when it failed to send Weiser-Brown a reservation-of-rights letter.” In his report, based on his view of industry custom and practice, the expert concluded that the insurer “should have informed Weiser-Brown of the potential coverage problem before obtaining an expert to investigate the issue.” The Fifth Circuit wrote that *Daubert* gives trial courts “broad latitude” in deciding whether expert testimony is reliable and admissible, and in deciding how to determine the reliability of expert testimony. *Id.* at 529.

The Fifth Circuit noted that it shared the district court’s concern that the “untestable, conclusory statement” in the expert’s report “would not assist the jury in evaluating St. Paul’s claim-handling behavior.” *Id.* The Fifth Circuit also noted that the expert lacked recent experience adjusting insurance claims. The Fifth Circuit held that, given the conclusory nature of the expert’s report and the expert’s inexperience, the district court did not abuse its discretion in excluding his testimony. *Id.* at 529-30.

**Sixth Circuit**

The Sixth Circuit has not closely analyzed the application of *Daubert* to insurance coverage experts. However, in *B-T Dissolution, Inc. v. Provident Life & Accident Ins.*, the Sixth Circuit accepted that the *Daubert* standard applies to insurance experts. 123 Fed. Appx. 159 (2004). In *B-T Dissolution*, policy provided that, should the employee become disabled, the insurer would provide a payout to B-T to cover its purchase of the disabled employee’s shares. When the B-T employee became disabled seven months after the policy went into effect, Provident denied coverage based on the employee’s false answers in his insurance application. B-T sued for breach of contract and bad faith. The district court granted summary judgment to B-T on its coverage claim and denied the bad faith claim.
On appeal, Provident claimed that the district court abused its discretion “in hearing the testimony of a professor with expertise in the insurance business, concerning certain practices of the insurance industry,” arguing that it should have been excluded under Daubert. Id. at 164. The district court reviewed the professor’s testimony but did not rely on it in rendering judgment. Therefore, the Sixth Circuit held that the district court did not abuse its discretion. Id. at 164.

**Seventh Circuit**

In *Cushman & Wakefield, Inc. v. Ill. Nat’l Ins. Co.*, the Northern District of Illinois allowed a law professor to testify as plaintiff’s insurance industry custom and practice expert over defendants’ objections that, because of his legal background, his opinions were legal opinions disguised with custom and practice language. 2018 U.S. Dist. LEXIS 67523 (2018). In *Cushman*, Cushman sought declaratory judgment against several insurers with respect to several underlying matters. In support of its claims, Cushman named Tom Baker, a University of Pennsylvania law professor, as its expert in insurance industry custom and practice. One defendant challenged Professor Baker’s opinion regarding claims handling because Professor Baker had never worked as a claims handler and had been in academia for the previous 25 years. The court stated that, while “Professor Baker’s lack of practical experience as a claims handler may be relevant to the weight of his testimony, it does not establish that Baker is unqualified to opine on claims handling” and other customs and practices. See Order dated September 27, 2017, Case No. 14 CV 08725, N.D. Ill. (Document 351).

The court precluded Professor Baker from testifying that an underlying complaint filed in 2010 put a defendant insurance company on notice “of allegations related to all the potential defenses that it raised for the first time in August 2012.” This opinion was an inadmissible legal
conclusion because Professor Baker reached it by comparing the allegations in the 2010 complaint with the exclusions relied upon by insurer. The court allowed Professor Baker to testify about the purpose of the prior knowledge exclusion in one of the policies, and the purpose of the investment advisor exclusion in another, because it would help the jury understand how an insurance concept works in practice. *Id.* The court also allowed Professor Baker to offer an opinion that the fortuity doctrine employed by one of the insurer defendants was too expansive and inapplicable. The court stated that interpretation of the fortuity doctrine “is a legally-based concept, thus the interpretation of it falls within the province of the court”, but Professor Baker’s explanation of the insurance industry’s expectations of when the doctrine would apply was not an interpretation of law and was therefore permissible.

**Eighth Circuit**

In *Cedar Hill Hardware & Constr. Supply v. Ins. Corp. of Hannover*, the Eighth Circuit addressed a *Daubert* challenge to expert testimony by an insurance expert. 563 F.3d 329 (2009). Cedar Hill’s hardware store was damaged in a fire. A state fire marshal indicated he believed it was intentional. Hannover sought a declaratory judgment that it had no duty to provide coverage. *Id.* at 332. The district court ruled that Hannover’s insurance industry expert could testify about the propriety of Hannover’s claim handling and investigation during the second phase of the case, and that he could not testify during the first phase about the finding of arson.

After trial, Cedar Hill’s appealed to challenge, among other things, the admissibility of Hannover’s insurance industry expert under *Daubert*. The Eighth Circuit dismissed all arguments challenging the expert’s testimony, which was general “as to underwriting standards, the materiality of mortgage information on underwriting decisions, and proper claims handling.” *Id.* at 343. The court noted that the expert “had exhaustive experience in the
insurance industry” and his testimony “was relevant to provide industry-standard context.” *Id.* The court stated that “[i]ndustry-wide practices are relevant to the question of whether an insurer acts within acceptable boundaries based on information it has received in a given case.” *Id.* at 344.

**Ninth Circuit**

The Ninth Circuit has held that *Daubert* standards are to be applied to scientific and non-scientific expert testimony alike, but when evaluating the admissibility of non-scientific expert testimony, the *Daubert* factors assessing an expert’s methodology are not necessarily applicable, and an expert’s experience and knowledge carries more weight. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (2004).

In *Hangarter*, the plaintiff purchased an “own occupation” disability insurance policy from an insurance company owned by defendant Provident. When shoulder, elbow, and wrist pain interfered with her work as a chiropractor, she filed a disability claim and received benefits from her insurer for 11 months before claims investigators determined she was not “totally disabled.” Plaintiff sued Provident for breach of contract, breach of the covenant of good faith and fair dealing, and intentional misrepresentation. She won a $7.6 million verdict, $5 million of which was punitive damages. *Id.* at 1004.

On appeal, Provident challenged, among other issues, the admissibility of testimony from plaintiff’s expert based on his lack of qualification, his ultimate issue testimony, and the lack of reliability of his testimony. The court held that an expert may opine on an ultimate issue to be decided by the factfinder, but the expert may not give an opinion as to his or her legal conclusion. *Id.* at 1016. The expert testified that Provident failed to comply with industry standards. The court distinguished his opinion as factual rather than legal: “[w]hile Caliri’s
testimony that Defendants deviated from industry standards supported a finding that they acted in bad faith, Caliri never testified that he had reached a legal conclusion that Defendants actually acted in bad faith (i.e. an ultimate issue of law).” *Id.* at 1016. The court further explained that the expert’s testimony did not veer into inadmissible legal opinion even though his testimony on insurance industry norms “relied in part on his understanding of the requirements of state law, specifically California’s Unfair Settlement Claims Practice.” *Id.* at 1017. An expert opinion using legal terms and referring to the law is not automatically inadmissible.

Provident also challenged the expert’s testimony under *Daubert* because the district court had stated that *Daubert* did not apply to his non-scientific testimony. *Id.* at 1018. The Ninth Circuit held that the district court erred in its statement that *Daubert* did not apply, but the error was harmless. *Id.* *Daubert* applies to non-scientific testimony, but “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.” *Id.* at 1017. The court held that the district court did not abuse its discretion in admitting the expert’s testimony. *Id.* at 1018.

**Eleventh Circuit**

While the Eleventh Circuit has not directly addressed *Daubert’s* application to insurance coverage experts, courts within the Eleventh Circuit have. In *Am. K-9 Detection Servs. v. Rutherford Int’l, Inc.*, 2016 U.S. Dist. LEXIS 62279* (M.D. Fl. 2016), the court allowed an expert in an insurance coverage dispute to offer an opinion about the standard of care that a reasonable insurance broker would have exercised. In *Am. K-9*, a canine detection services company brought an action against its Defense Base Act insurance broker, Rutherford, for negligent failure to procure insurance, breach of fiduciary duty, breach of contract, and negligent
misrepresentation. *Id.* at *11. In support of its claim, AMK9’s expert, William Hager, supplied an expert report opining that Rutherford had an obligation to use reasonable care, that they breached their obligations to AMK9, and that they had a special relationship with AMK9 resulting in heightened obligations to AMK9, which they breached. *Id.* at *15-16.

Rutherford challenged Hager’s qualifications under *Daubert* because he had never been a broker or agent, he did not consult with any brokers or agents concerning the issues in the AMK9 case, and he had been disqualified by other federal judges. *Id.* at *16. In a 2014 matter in the Southern District of Florida, Hager had been disqualified from testifying in an order that “implied that the Qualification Requirement would be met only by brokers and those with broker’s experience.” *Id.* at *18. The court in this case disagreed and found “that provided that an expert is otherwise qualified, he or she is not required to be a broker, or have experience as a broker, to speak to the standard of care of a broker.” *Id.*

Rutherford also challenged Hager’s opinion under the reliability requirement of *Daubert*. *Id.* at *20. The court determined that cross-examination was the appropriate avenue for challenging the reliability of Hager’s opinion, rather than preclusion. *Id.* at *21. Rutherford’s final challenge to Hager’s opinion was based on the helpfulness requirement in *Daubert*. Rutherford argued that Hager’s opinion “that Rutherford had heightened obligations due to a special relationship with AMK9 is an impermissible legal opinion” and “improperly invades the province of the Court ‘to instruct the jury on the law’” because he would testify that Rutherford breached its duties to AMK9. *Id.* at *21. The court denied the motion to exclude his testimony based on the helpfulness requirement, simply repeating Federal Rule of Evidence 704(a), which states that “[a]n opinion is not objectionable just because it embraces an ultimate issue.” *Id.* at *21.
III. Conclusion

Insurance coverage experts have a role to play in coverage litigation, but the role is quite limited. Courts are very unlikely to allow even a qualified expert to testify about what a policy means and how it applies to the facts of a given case. However, where such testimony would be helpful to the factfinder, courts may allow a qualified expert to testify to custom and practice and trade usage. Consequently, how the opinion is framed can determine if the testimony will be allowed or precluded.