ETHICAL ISSUES CONCERNING EXPERTS

By: Lesley Reynolds and Kara Petteway

I. Introduction

An expert witness’s failure to satisfy the requirements of Federal Rule of Evidence 702 and Daubert may lead to disqualification, which is a damaging result for the client. But, additional consequences, including sanctions under Federal Rule of Evidence 11, 28 U.S.C. § 1927, and the court’s inherent authority may await the attorney.

This article surveys several ethical pitfalls related to the use of expert witnesses. These scenarios are grouped into two categories: (1) problems with the reliability or credibility of the expert witness, and (2) problems with the integrity of the expert’s report. The article reviews situations that may trigger unfavorable results for the attorney, the client, or both.

II. Problems with Reliability or Credibility of Expert Witness

A. Attorney Sanctions Where the Attorney Relies on an Unreliable Expert

Attorneys have an ongoing responsibility to ensure the reliability and credibility of an expert witness.

When retaining an expert, an attorney must conduct a “reasonable inquiry” into an expert’s background." Sanchez v. Esso Standard Oil de P.R., Inc. 4 provides an extreme example of a lawyer’s failure to fulfill this responsibility. In Sanchez, the plaintiffs retained an

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1 Lesley Reynolds practices in the Washington, DC office of Norton Rose Fullbright, where she focuses on matters involving health care and health care litigation. Through her practice, Lesley has worked extensively on False Claims Act litigation and class action issues. Lesley has significant experience working with experts in both a consulting and litigation context. Lesley can be reached at (202) 662-0247 or lesley.reynolds@nortonrosefulbright.com.

Kara Petteway practices in the Washington, DC office of Norton Rose Fullbright, where she focuses her practice on complex civil litigation and government investigations. Her civil litigation experience has involved contractual matters, employment discrimination, the Endangered Species Act, and the Racketeer Influenced and Corrupt Organizations Act. Her government investigation experience has involved environmental regulation, securities enforcement and pay-to-play allegations. Kara can be reached at (202) 662-4714 or by email at kara.petteway@nortonrosefulbright.com.

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3 Id. at *52.
4 Id.
Vice-Chairs (cont.)

George R Parker
Bradley Arant Boult Cummings LLP
445 Dexter Ave
Montgomery, AL 36104-3775
(334) 956-7607
Fax: (334) 956-7701
gparker@babc.com

James D Myrick
Womble Carlyle
5 Exchange St
Charleston, SC 29401-2530
(843) 722-3400
Fax: (843) 723-7398
jmyrick@wcsr.com

James Terrell
McCallum Methvin & Terrell PC
2201 Arlington Ave S
Birmingham, AL 35205-4003
(205) 939-0199
Fax: (205) 939-0399
jterrell@mmlaw.net

Jeffrey Adam Brauer
Hahn Loeser & Parks LLP
200 Public Sq, Ste 2800
Cleveland, OH 44114-2303
(216) 274-2371
Fax: (216) 241-2824
jabrauer@hahnlaw.com

Joel Wiley Mohrman
McGlinchey Stafford PLLC
1001 McKinney St, Ste 1500
Houston, TX 77002-6420
(504) 586-1200
Fax: (713) 520-1025
jmohrman@mcglinchey.com

Kathleen Foster
US Small Business Administration
2705 Carriage Ln
Carrollton, TX 75006-4731
(214) 499-2018
kannfoster880@gmail.com

Lisa Pittman
Martin Disiere Jefferson & Wisdom LLP
800 Travis St, Fl 20
Houston, TX 77002-5714
(713) 632-1700
pittman@mdjiwlaw.com

Loren D Podwill
Bullivant Houser Bailey PC
888 SW 5th Ave, Ste 300
Portland, OR 97204-2089
(503) 499-4620
Fax: (503) 295-0915
loren.podwill@bullivant.com

Richard Vanderslice
Richard L Vanderslice PC
1445 Snyder Ave
Philadelphia, PA 19145-2317
(215) 667-8070
Fax: (215) 279-9229
rv@vanderslicelaw.com

Robert J Caldwell
Kolesar & Leatham
400 S Rampart Blvd, Ste 400
Las Vegas, NV 89145-5725
(702) 362-7800
Fax: (702) 362-9472
rcaldwell@klnevada.com

Ronald L Richman
Bullivant Houser Bailey PC
601 California St, Ste 1800
San Francisco, CA 94104-2823
(415) 352-2700
Fax: (415) 352-2701
ron.richman@bullivant.com

Scott R Wolf
Blanchard Walker O’Quin & Roberts
400 Texas St, Ste 1400
Shreveport, LA 71101-5490
(318) 934-0228
Fax: (318) 227-2967
swolf@bwor.com

Vartan Javier Saravia
Darling & Risbrough LLP
19200 Von Karman Ave, Ste 750
Irvine, CA 92612-8519
(714) 384-4250
Fax: (714) 384-4251
vjs@darlingrisbrough.com

Amber C Coisman
Tressler LLP
233 S Wacker Dr, Fl 22
Chicago, IL 60606-6399
(312) 627-4000
Fax: (312) 627-1717
acoisman@tresslerllp.com

Stacey Wang
Holland & Knight LLP
400 S Hope St, 8th Floor
Los Angeles, CA 90071-2809
(213) 896-2400
Fax: (213) 896-2450
stacey.wang@hkllaw.com

Alyssa K Ehrlich
2026 Mendocino Blvd
San Diego, CA 92107-2306
(619) 616-6155
alyssakayehrlich@gmail.com

Alexander S Valdes
Winstead PC
401 Congress Ave., Suite 2100
Austin, TX 78701
(512) 370-2842
avaldes@winstead.com
To our Members and Readers,

This is my last edition of the BLC Newsletter as Chair of the Committee. It has been a terrific year, and I thank all of you, especially the Newsletter Committee, for your hard work for BLC.

The first article is “Ethics & Experts – What You May Not Know That Can Destroy Your Case,” which is based on the excellent papers and discussion from our CLE presentation at the Spring meeting. The second article provides helpful insight into a potential change in the economic loss rule. The final article describes recent trends in foreclosure litigation.

This summer, the Annual Meeting was held in San Francisco on August 8-12, and I passed the torch to Tom Wert, who will lead our group for the next year. We had an incredible turnout for our business meeting—it was standing room only with a lot of wonderful folks in attendance. Afterward, we shared a fabulous social dinner at Le Colonial. The highlight of the Annual Meeting was when BLC won the Leadership Involvement Award from TIPS. It is a real credit to our leaders who have worked so hard this year, and Tom and I were proud to accept it on your behalf. And we are in good hands for the next year—Tom is very excited and has great plans for our BLC members. If you have not already met Tom, please reach out to him and let him know that you’d like to be involved.

Our next TIPS meeting is the fall meeting in Minneapolis. Please check out the TIPS website for more information regarding the meeting logistics, available at, http://www.americanbar.org/groups/tort_trial_insurance_practice.html. Be sure to let us know if you will be attending so you can join us for our “social” dinner with good food and fellowship in a more casual setting. We always have a great turnout and a lot of fun. Thank you again for an amazing year, and I’m looking forward to more great things to come. ☺

Marcy Hogan Greer
Former Chair, Business Litigation Committee
mgreer@fulbright.com

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August 7-12, 2014
Sheraton Hotel
Boston, MA
FLORIDA SUPREME COURT LIMITS THE ECONOMIC LOSS RULE

By: Thomas P. Wert and Robert Malani

The Florida Supreme Court recently retracted from decades of precedent, concluding that “the application of the economic loss rule is limited to products liability cases.” *Tiara Condo. Ass’n, Inc. v. Marsh & McLennan Cos.,* 110 So. 3d 399, 400 (Fla. 2013). The holding in *Tiara* seems clear; however, questions remain concerning whether the net effect of *Tiara* will be far reaching or whether *Tiara* merely shifted the focus on the interplay between contract claims and tort claims in the non-products liability context. *Tiara* may lead to an expansion of alleged tort claims in non-product breach of contract cases, but if the alleged tort claims are not based upon a breach of a duty independent from contractual duties, plaintiffs will undoubtedly be hard-pressed to maintain such claims.

The economic loss rule is a judicially created doctrine setting forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004). The prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent contracting parties from circumventing the allocation of losses, set forth in the contract, by bringing an action for economic loss in tort. When parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages which the parties have, or could have, addressed in the contract. Accordingly, courts have held that a tort action is barred where a defendant has not committed a breach of a duty apart from the obligations established by the contract.

Although the origin of the economic loss rule is somewhat unclear, the rule initially appeared in products liability cases. *Moransais v. Heathman*, 744 So. 2d 973, 979 (Fla. 1999). The products liability economic loss rule was developed to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided by warranty law. *Am. Aviation*, 891 So. 2d at 537–38. As the theory of strict liability replaced the theory of implied warranties in actions based upon defective products, Florida courts grappled with the issue of whether to permit a cause of action in tort by one who suffered purely economic loss due to a defective product. For those who were in contractual privity, actions based on breach of warranty continued as the viable method if the only damages were economic in nature. However, for those not in contractual privity, the proper theory of recovery became perplexing. As a result, Florida adopted the products liability economic loss rule, precluding recovery of economic damages in tort where there is no other property damage or personal injury. *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987). Reasoning that warranty law was more appropriate than tort law for resolving economic losses in this context, Florida’s Supreme Court concluded that a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself. *Fla. Power, 510 So. 2d at 901*. The essence of these early holdings is a party may not sue in tort for purely economic losses to a product because contract principles are more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage. *Moransais*, 744 So. 2d at 980.

Over the years, the economic loss rule has been applied to numerous other circumstances, expanding the doctrine beyond its original defective product application. *Tiara Condo. Ass’n, Inc. v. Marsh & McLennan Cos.*, 110 So. 3d 399, 402 (Fla. 2013). Additionally, Florida courts created exceptions, allowing recovery for torts committed independently of the contract breach, such as fraud in the inducement. *Am. Aviation, 891 So. 2d at 536*. Where a contract existed, a tort action would lie for either intentional or negligent acts considered to be independent from the acts that breached the contract. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996). In order to prove an independent tort, proof of facts separate and distinct from the breach of contract is required. Florida courts

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1. Thomas P. Wert is the Partner In Charge of the Orlando, Florida office of Roetzel & Andress, LPA, a Florida Bar Board Certified Construction Law Attorney and a Certified Circuit Court Mediator. He focuses his practice on complex business litigation and construction law. Robert Malani is an associate at Roetzel & Andress, Orlando, who focuses his practice on business, creditors’ rights and bankruptcy litigation.
The number of residential mortgage foreclosure litigation cases is staggering. During the wake of the financial crisis, the number of contested foreclosure and accompanying litigation increased exponentially utilizing a myriad of theories. What once started with allegations involving the impropriety of book entry systems such as Mortgage Electronic Registration Systems (“MERS”) has evolved into increasingly novel and complex claims pertaining to the securitization of a residential mortgage into a mortgage backed security.

Although there are several common claims and themes typically seen in residential mortgage litigation cases, the law is continually evolving. This article provides an overview of some of the more common claims as well as those which are evolving. Prior to examining these claims, it is helpful for the practitioner to be aware of the amount of residential mortgage lending cases in general.

A. Trends in Litigation Volume

The U.S. Office of the Comptroller of the Currency (“OCC”) Mortgage Metric Report for the fourth quarter of 2012 revealed there are fewer delinquencies and foreclosures that are occurring.\(^1\) Notably:

- 89.4% of mortgages were current and performing at the end of the fourth quarter 2012, compared with 88.6% the third quarter of 2012 and 88.0% for 2011;
- The percentage of mortgages 30 to 59 days past due was 2.9%, representing a decline of 8.2% from the third quarter of 2012, and 6.1% from 2011;
- Seriously delinquent mortgages—60 or more days past due or held by bankrupt borrowers whose payments are 30 days or more past due—remained at 4.4% for the third consecutive quarter, down 11.6% from 2011;
- The number of loans in the process of foreclosure at the end of 2012 fell below one million for the first time since the end of June 2009;
- In the fourth quarter of 2012, servicers initiated 156,773 new foreclosures—the lowest number of new foreclosures since the OCC began reporting mortgage performance in the first quarter of 2008; and
- The number of completed foreclosures fell to 105,875, a 7.7% decrease from the third quarter of 2012, and an 8.9% decrease from 2011.

The OCC reported several factors contribute to the year-over-year improvement, including:

- Strengthening economic conditions;
- The ongoing effects of both home retention efforts and home forfeiture actions; and
- Servicing transfers to institutions outside the federal banking system.

Of note, the OCC reported mortgage servicers continue to emphasize alternatives to foreclosure during the fourth quarter of 2012, implementing 367,169 home retention actions compared with 169,064 home forfeiture actions.

Mortgage Daily’s Litigation Trend Report for the fourth quarter of 2012 shows that 2012 had the highest number—15% more than 2011—of reported mortgage litigation cases.\(^2\) The current trend in mortgage litigation involves claims pertaining to loan modifications (an increase of approximately 33% from the second to third quarter of 2012), and in “servicing” litigation (an increase of approximately 33% from 2011 to 2012). Additionally, claims pertaining to the process under which a residential mortgage loan is placed into a mortgage backed security are increasing. Finally, with the advent of the Consumer Financial Protection Bureau (“CFPB”)’s servicing rules going into effect on January 10, 2014, this area of the law will likely evolve into claims under such rules.

**COMMON CLAIMS IN RESIDENTIAL MORTGAGE LITIGATION CASES**

B. Role of MERS

Borrowers typically challenge the role of loan registry systems such MERS in wrongful foreclosure

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claims. MERS was formed by a consortium of residential mortgage lenders and investors desiring to streamline the process of transferring ownership of mortgage loans in order to facilitate securitization. 3

The Fifth Circuit has recently held where a borrower’s deed of trust names MERS as the beneficiary and nominee of the original lender, there is no basis under Texas law for a borrower to assert that the designation of MERS as beneficiary somehow renders the loan transaction void and/or unsecured, or that despite this designation, MERS is somehow not the beneficiary of the deed of trust. 4 The Sixth Circuit has held the same; 5 as well as numerous federal district courts. 6

Stated another way MERS, as the nominee for the originating lender, and its successors and assigns, has the authority to foreclose on the deed of trust and the authority to transfer its rights and interests to another entity, which would then be able to foreclose if a borrower is in default in default on the note. 7

C. Owner/Holder and Bifurcation/Split Note Theory

Borrowers typically argue that only a “holder” of the promissory note has the capacity to foreclose. 8 Borrowers also frequently allege that any assignment of the underlying security instrument “splits” it from the related promissory note and renders an unsecured interest in the collateral property. 9 These theories are alive and well and their validity is a “question very much in dispute.”

D. Securitization of Promissory Note into Mortgage Backed Security

Borrowers also challenge the process by which a promissory note is pooled and bundled into a mortgage backed security, which is colloquially referred to as securitization. The securitization process is governed by one or more pooling and servicing agreements (“PSA”) which typically involves a master servicer and the underlying investor of the mortgage backed security. The claim arising most frequently is that the PSA specifies a “closing date” by which any mortgage must be assigned to it in order to become a part of the mortgage backed security. 10 As with the owner/holder and bifurcation claims, the scope to which a borrower may challenge compliance with the PSA is hotly disputed.

THE NATIONAL MORTGAGE SETTLEMENT

In April 2012, forty-nine of the state attorneys general and other federal agencies entered into a settlement agreement with what are colloquially known as the “big five.” 11 The National Mortgage Settlement involved a settlement of over 17 billion dollars and was designed to provide homeowner relief, impose servicing standards throughout the industry, and compensation to homeowners who lost home to foreclosure during January 1, 2008 to December 31, 2011. Of particular import is the National Mortgage Settlement imposes a set of servicing standards specifically aimed to facilitate loan modifications and prohibit the use of “dual tracking—a situation where a loan is under review for a modification.

Borrowers are increasingly premising claims upon a mortgage servicer’s non-compliance with the National Mortgage Settlement. Similar to the treatment of a borrower’s claims pertaining to the securitization under a PSA, courts have held where a borrower is not a party

10 The “big five” are Bank of America, Wells Fargo, JPMorgan Chase, Citibank, and Ally Financial (formerly GMAC).
11 The Fifth Circuit has held where a borrower’s deed of trust names MERS as the beneficiary and nominee of the original lender, there is no basis under Texas law for a borrower to assert that the designation of MERS as beneficiary somehow renders the loan transaction void and/or unsecured, or that despite this designation, MERS is somehow not the beneficiary of the deed of trust. The Sixth Circuit has held the same; as well as numerous federal district courts. As stated another way MERS, as the nominee for the originating lender, and its successors and assigns, has the authority to foreclose on the deed of trust and the authority to transfer its rights and interests to another entity, which would then be able to foreclose if a borrower is in default in default on the note. Borrowers typically argue that only a “holder” of the promissory note has the capacity to foreclose. Borrowers also frequently allege that any assignment of the underlying security instrument “splits” it from the related promissory note and renders an unsecured interest in the collateral property. These theories are alive and well and their validity is a “question very much in dispute.” Borrowers also challenge the process by which a promissory note is pooled and bundled into a mortgage backed security, which is colloquially referred to as securitization. The securitization process is governed by one or more pooling and servicing agreements (“PSA”) which typically involves a master servicer and the underlying investor of the mortgage backed security. The claim arising most frequently is that the PSA specifies a “closing date” by which any mortgage must be assigned to it in order to become a part of the mortgage backed security. As with the owner/holder and bifurcation claims, the scope to which a borrower may challenge compliance with the PSA is hotly disputed.

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to a consent judgment, a borrower lacks standing to seek compliance with same.\textsuperscript{12} The role of the National Mortgage Settlement in residential mortgage litigation cases is continually evolving and remains unclear. Because of this uncertainty, it is likely we will see an increase of claims involving non-compliance under the National Mortgage Settlement.

\textbf{CONCLUSION}

In short, it does not appear that we will see a reduction in the number of residential mortgage litigation cases as a result of a drop in default rates. Along with the standard claims asserted in mortgage litigation cases, it appears borrower will have new grounds to assert claims upon under the CFPB regulations. Although the National Mortgage Settlement does not provide a private right of action, borrowers have, and will likely continue to do so, asserted violations of the terms of the settlement in support of their claims against mortgage lenders and servicers.\textsuperscript{12} See, e.g., Habib v. Bank of Am., N.A., No. 13-cv-10853, 2013 U.S. Dist. LEXIS 98168, at *8-11 (E.D. Mich. July 15, 2013); Jurewitz v. Bank of Am., No. 12-cv-2940, 2013 WL 1457739, at *3 (S.D. Cal. Apr. 10, 2013); Rehbein v. CitiMortgage, Inc., 2:13-cv-65, 2013 WL 1395644, at *5 (E.D. Va. Apr. 4, 2013) (holding that a borrower had “no right to bring third-party suits to enforce the Consent Judgment” because the “language of the Consent Judgment indicates that the parties to the agreement did not intend the individual borrowers to be able to sue to protect the benefits the consent judgment confers”).
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expert to testify regarding the environmental impact of a gasoline-dispensing service station against Esso, even though the expert’s conduct previously had been “condemned” by other courts. Specifically, the expert, who at one time consulted for Esso and was dismissed by Esso for incompetence, had threatened Esso’s employees and was simultaneously involved in five other lawsuits against Esso.

In addition to “overwhelming evidence” of the expert’s “bias,” the expert’s opinions were shown to be unreliable as the litigation progressed. The expert offered conflicting and unsupported testimony, “obscured” and made “wholly-erroneous” representations of the facts, and interfered with and influenced the work of court-ordered environmental consultants.

The district court found that the expert was not qualified to testify as an expert witness under Daubert and Rule 702, and that even if he had been deemed qualified, his bias rendered his testimony unreliable. The court also sanctioned the plaintiffs’ counsel and awarded Esso the attorneys’ fees it incurred in defending itself. The court found that the attorney’s initial failure to conduct a reasonable inquiry into the expert’s background and his continued reliance on the expert’s opinion after learning the true facts merited sanctions under Rule 11, 28 U.S.C. § 1927, and the court’s inherent authority.

As Sanchez demonstrates, an attorney must conduct a thorough background of an expert before retaining the expert, but that is not the end of counsel’s obligation: the attorney cannot turn a blind eye to indicators of unreliability that arise after the expert is retained. In Rollins v. St. Jude Medical, Inc., Rollins’s counsel continued to rely on the “expertise” of a witness regarding a particular medical device—and challenged St. Jude Medical’s motion to disqualify the witness as an expert—after the witness disavowed any familiarity with the medical device during a deposition. Only at the Daubert hearing did Rollins’s attorneys communicate to the court their intention not to call the witness as an expert. Even though the district court acknowledged that the attorneys’ initial reliance on the expertise of the witness was permissible, the court found counsels’ continued assertion of the witness’s expertise to be in violation of Rule 11 because it resulted in unnecessary delay and needless litigation costs.

Points to Consider

- Conduct a thorough background check on all expert witnesses.
- An attorney’s duty to ensure that an expert witness is credible and reliable is ongoing.

B. Expert Disqualification Where The Expert “Switches Sides”

Another circumstance in which an expert may be disqualified is where the expert has “switched sides” in litigation. Disqualification for “switching sides” generally requires that moving counsel “hold an objectively reasonable belief in the existence of a confidential relationship with the challenged expert or consultant … and that during the relationship there was a disclosure of confidential or privileged information to the expert that is relevant to the current litigation.”

5 Id. at *5.
6 Id. at *52 (“[A] simple legal database search could have revealed to [plaintiff’s counsel] that other courts already condemned [the expert’s] behavior and attitude in similar litigation”).
7 Id. at *9.
8 Id. at *9-10.
9 Id. at *10.
10 Id. at *13-14.
11 Id. at *49-55. See also id. at *51 (“While an attorney should hire an expert witness for technically-complex litigation with the objective of vigorous advocacy on behalf of the client, the attorney and expert must also ensure they do not cross the line from persuasion into deception in pursuit of that objective”).
13 Id. at *5-6, *11.
14 Id. at *11-12.
15 Id. at *11-13. See also id. at *13-14 (“This sanction targets plaintiff’s attorneys’ most unreasonable conduct – their failure to withdraw [the expert] as an expert witness until the day of the Daubert hearing even though they were fully aware that the hearing was unnecessary because, as they noted themselves [the expert] ‘recanted on the majority of his affidavit testimony’ at his deposition”). The court did not find that the attorney’s conduct rose to the level of “bad faith” necessary to trigger sanctions under 28 U.S.C. § 1927. See also Fin. R. Civ. P. 11 (requiring an attorney to certify that any submission before the court is “not being presented…to…cause unnecessary delay, or needlessly increase the cost of litigation”). Cf. Pinello v. Stihl AG & Co. KG, No. 8:08-CV-00452 (LEK/RFT), 2011 U.S. Dist. LEXIS 34460, at *23-24, *45–47, (N.D.N.Y. Mar. 31, 2011) (disqualifying an expert failing to satisfy any of the Daubert factors, but denying a motion for Rule 11 sanctions despite counsel’s continued reliance on the expert after discrediting testimony during deposition) Also available at 2011 WL 1302223.
**Hinterberger v. Catholic Health Sys.** presents an unusual test case for a “switching sides” analysis. There, Catholic Health Systems engaged a litigation support firm to provide scanning and coding services. The same litigation support firm was subsequently engaged by the plaintiffs, a group of Catholic Health Systems’ hourly employees, to provide consulting services, though the parties dealt with different representatives from the litigation support firm. Catholic Health Systems moved to disqualify the firm from serving as an expert for the plaintiffs. The court denied the motion to disqualify. First, the court held that the litigation support firm was not an “expert” as would fall under the authorities permitting disqualification. Further, if it could be considered an “expert,” the record did not support a finding that a confidential relationship had been formed between the plaintiffs and the litigation support firm or that any confidential information had actually been transmitted to the firm.

As **Hinterberger** illustrates, establishing a transfer of confidential information can present challenges. Courts have judged whether a disclosure of confidential information has taken place based on the existence and depth of exposure to confidential information. For example, in **Eastman Kodak Co. v. Kyocera Corp.**, Kodak moved to disqualify Kyocera’s expert, who had been retained as an expert by Kodak in prior litigation. The court concluded that there had not been a “disclosure” of confidential information because the expert had not conducted an analysis of the confidential information that was viewed; rather, he had simply reviewed and taken brief notes on the material to determine its relevance to the prior case.

Some courts have required that confidential information disclosed to the expert be relevant to the current litigation. In **Bone Care Int’l L.L.C. v. Pentech Pharm., Inc.**, the court concluded that expert disqualification was only appropriate where there is a “substantial relationship” between the confidential information acquired in a prior lawsuit and the matters on which the expert will testify. In this patent case, the court concluded that disqualification was not warranted because there was no “technical overlap” between the subject of the patents in the two lawsuits.

**Points to Consider**

- Prior or current involvement with an opposing party is not necessarily sufficient for disqualification of an expert witness.
- Consider whether prior litigation is sufficiently similar to current litigation to constitute the “same case.”

### III. Problems with Reliability or Credibility of Expert Witness’s Report

**A. Attorney Sanctions Where the Attorney Fails to Convey Information to Expert**

Ethical concerns can arise for attorneys utilizing expert witnesses, even when the expert is fully qualified and credible. Specifically, a lawyer can be found to be in violation of Rule 11 if the lawyer fails to supply an expert with the information necessary to prepare a report matching the facts of the case.

For example, in **Ellis v. Beemiller, Inc.**, the plaintiff’s counsel failed to adequately communicate information to an expert that was damaging to his client’s credibility. The attorney failed to communicate his client’s precise theory of liability or the fact that his client’s later testimony in deposition contradicted this theory. According to the court, the attorney’s omissions constituted a “failure to meaningfully convey

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17 Id. at *23.
18 Id. at *9.
19 Id. at *13-14.
20 Id. at *25.
21 Id. at *133-34.
22 Id. at *57-62.
24 Id. at *16–17. The existence of a confidential relationship between the expert and the moving party was unquestioned. Id. at *24.
27 Id.
30 Id. at *19–20, *22.
31 Id.
the salient facts to his expert … in order to ensure that [the expert’s] opinion had a proper ‘fit’ to the facts of the case.” The court imposed Rule 11 sanctions. Having failed to provide meaningful disclosure to the expert witness, the attorney “prevented the inapplicability of [his client’s theory of liability] from being discovered at a much earlier time.”

**Points to Consider**

- Ensure the expert witness is fully informed of all relevant facts.
- Non-disclosure of material information can result in Rule 11 sanctions.

**B. Expert Disqualification Where the Attorney Ghost-Writes Expert’s Report**

An expert’s report may be found unreliable and inadmissible if an attorney exerts too much influence over the content of an expert’s report. While Rule 26 does not entirely preclude an attorney from assisting an expert in the preparation of the expert’s report, it is necessary that the content of the report accurately reflects the substance of the expert’s testimony, rather than “merely express[ing] the opinions of the lawyers who hired [the expert].”

The fact that an expert’s report was prepared by counsel does not necessarily compel disqualification. Instead, courts examine whether the expert provided significant input prior to the lawyers’ preparation, and whether the expert reviewed and approved the finished product after the lawyers’ contributions were added. For example, in *Tindall v. H & S Homes, L.L.C.*, a district court permitted an expert to testify even though Tindall’s counsel prepared a preliminary draft of the expert’s report. The court emphasized that the expert had provided “substantial input” before counsel prepared a draft and had reviewed and edited the draft before its signing.

Courts have permitted discovery to determine the extent of an attorney’s involvement in preparation of an expert report. Importantly, courts have not permitted the recently-added protection in Rule 26(b)(4)(B) against disclosure of “drafts of any report” to shield the extent of an attorney’s involvement in the preparation of an expert’s report. Further, even where an attorney’s contribution comports with Rule 26, the extent of the contribution still may be used to impeach the credibility or reliability of the expert.

**Points to Consider**

- Attorney preparation of an expert report is not per se invalid.
- The court may order discovery to ascertain the extent of the lawyer’s contribution.
- Attorney involvement in preparation of an expert report may be used to impeach the expert at trial.
also created an exception to the economic loss rule for professional malpractice claims, reasoning that liability in that context should not be limited to the terms of the contract for public policy reasons. Moransais, 744 So. 2d at 983. As the Florida Supreme Court issued such rulings, a desire arose to return the economic loss rule to its origins.

With this apparent aspiration in mind, the Florida Supreme Court addressed Tiara. In Tiara, Tiara Condominium Association retained Marsh & McLennan as its insurance broker. One of Marsh’s responsibilities was to secure condominium insurance coverage. Tiara Condo. Ass’n, Inc. v. Marsh & McLennan Cos., 110 So. 3d 399 (Fla. 2013). Marsh secured windstorm coverage through Citizens Property Insurance Corporation, which issued a policy containing a loss limit in an amount close to $50 million. In September 2004, Tiara’s condominium sustained significant damage caused by hurricanes Frances and Jeanne. After being assured by Marsh that the loss limits coverage was per occurrence (meaning that Tiara would be entitled to almost $100 million in coverage), Tiara proceeded with more expensive remediation efforts. When Tiara sought payment from Citizens, Citizens claimed that the loss limit was $50 million in the aggregate, not per occurrence. Ultimately, Tiara and Citizens settled for approximately $89 million, but Tiara had spent over $100 million refurbishing the condominium.

Subsequently, Tiara filed suit against Marsh, alleging negligence and breach of fiduciary duty claims, among others. Tiara alleged that Marsh failed to advise Tiara of Tiara’s complete insurance needs and of Marsh’s belief that Tiara was underinsured. The trial court granted summary judgment in favor of Marsh. On appeal, the Eleventh Circuit certified a question to the Florida Supreme Court to determine whether the economic loss rule prohibited recovery, or whether an insurance broker falls within the professional services exception which would allow Tiara to proceed with its claims. Tiara, 110 So. 3d at 401.

The Florida Supreme Court restated the Eleventh Circuit’s question as follows:

DOES THE ECONOMIC LOSS RULE BAR AN INSURED’S SUIT AGAINST AN INSURANCE BROKER WHERE THE PARTIES ARE IN CONTRACTUAL PRIVITY WITH ONE ANOTHER AND THE DAMAGES SOUGHT ARE SOLELY FOR ECONOMIC LOSSES?

The Florida Supreme Court answered the restated question in the negative, but went further. The Tiara Court explained that after reviewing the original purpose of the economic loss rule, and the unprincipled extension of the rule, it would take a step back and hold that the economic loss rule applies only in the products liability context. The Tiara Court acknowledged that it was departing from its own precedent to vindicate other principles of law and/or remedy continued injustice because the established rule has proven unacceptable or unworkable in practice.

In a concurring opinion, Justice Pariente agreed with the majority’s conclusion, but opined that the Tiara is fully consistent with the development of the Court’s precedent on the economic loss rule. As a result, Justice Pariente concluded that the majority’s decision is neither a monumental upsetting of Florida law nor an expansion of tort law at the expense of contract principles. Rather, in Justice Pariente’s opinion, Tiara merely clarifies that the economic loss rule was always intended to apply only to products liability cases because where no product is involved, a party must still prove an alleged tort is independent of any breach of contract claim.

Chief Justice Polston also dissented, focusing on the Court’s decision to restate the question certified by the Eleventh Circuit rather than answer the question as presented. Justice Polston opined that the Court should have simply answered the Eleventh Circuit’s question in the negative based on the Court’s controlling precedent. Instead, according to Justice Polston, Tiara obliterates the economic loss rule and greatly expands the use of tort law at a cost to Florida’s contract law.

In a separate dissent, Justice Canady concluded that Tiara repudiates Florida case law and sets a new course for the expansion of tort law at the expense of contract law. Justice Canady explained that the Court has repeatedly recognized that the economic loss rule prevents contract law from drowning in a sea of tort and this rationale should not be limited to the products liability context. He recognized that the majority provides no explanation as to why the economic loss rule is appropriately applied in the products liability context but is unworkable or unwise in broader circumstances. Justice Canady concluded that as a result of the majority’s holding, Florida courts now
face the prospect of every breach of contract claim being accompanied by a tort claim.

Regardless of the ultimate effect, the Florida Supreme Court’s decision in *Tiara* will bring greater awareness to the inherent problems involved in actions which contain both contract and tort claims. *Tiara* will undoubtedly encourage practitioners to include tort claims in actions which, in the past, were solely based in contract. However, a party seeking such tort relief would be well advised to specifically plead and prove that any breaches of tort duties are independent of the defendant’s contractual obligations. See *Freeman v. Sharpe Res. Corp.*, 6:12-CV-1584-ORL-22T, 2013 WL 2151723, *8* (M.D. Fla. May 16, 2013) (explaining that the *Tiara* decision limited the economic loss rule to product liability cases; however, dismissing plaintiff’s fraud in the inducement claims with leave to amend to permit plaintiff to plead, with specificity, the alleged representations that were not covered by or expressly contradicted by the parties’ written agreement). Otherwise, the claims will be vulnerable for failing to allege or prove a tort independent of the breach of contract. In conclusion, it seems the battle cry has now become “no independent tort,” rather than “the economic loss rule bars recovery!” 672
### 2013-2014 TIPS CALENDAR

#### October 2013

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<td>16-18</td>
<td>40th Annual Midwinter Symposium on Insurance Employee Benefits</td>
<td>The Driskoll Austin, TX</td>
<td>Ninah F. Moore – 312/988-5498</td>
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| 21-25 | Fidelity & Surety Committee Midwinter Meeting | Waldorf-Astoria Hotel New York, NY | Felisha A. Stewart – 312/988-5672,  
Speaker Contact: Donald Quarles – 312/988-5708 |

#### February 2014

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| 5-11  | ABA Midyear Meeting                        | Swissotel Chicago Chicago, IL  | Felisha A. Stewart – 312/988-5672,  
Speaker Contact: Donald Quarles – 312/988-5708 |
| 20-22 | Insurance Coverage Litigation Committee Midyear Meeting | Arizona Biltmore Resort & Spa Phoenix, AZ | Ninah F. Moore – 312/988-5498    |

#### March 2014

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