Standards for Admissibility of Insurance Expert Testimony

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STANDARDS FOR ADMISSION OF INSURANCE EXPERT TESTIMONY

Insurance coverage litigation often involves using expert testimony to assist the jury in understanding complex fact patterns and terms of art. An expert's opinion regarding industry custom may shed light upon ambiguous policy terms, or assist in evaluating the good faith behavior of the parties. In either setting, litigants must be careful to frame their experts' statements so as not to contravene Federal Rules of Evidence ("FRE") 702 and 704. According to these Rules, an expert's opinion must be helpful to the finder of fact. While experts are permitted to discuss matters directly in issue, they may not provide wholly legal conclusions. Courts have found that expert testimony, on the topic of what the law is, to be unhelpful to the fact-finder, as instruction on the applicable legal standard is the judge's sole responsibility.

Standards Under The Federal Rules of Evidence

Rules 702 and 704: The "Helpfulness" and "Ultimate Issue" Standards

Under Rule 702, expert testimony is permitted "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue ... ." Fed. R. Evid. 702. The Federal Rules Advisory Committee has provided additional information to guide the Rule's interpretation. First, while the Rule stresses the utility of factual or scientific testimony, an expert is also permitted to offer her opinion. See Fed. R. Evid. 702 advisory committee's note. The Advisory Committee states that, "[i]t will continue to be permissible for the experts to take the further step of suggesting the inference, which should be drawn from applying the specialized knowledge to the facts." Id. In addition, the standard for admissibility is whether or not the testimony will assist the trier of fact. "When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time." Id.

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Rule 702 is broadly construed to promote the admissibility of evidence. According to the Advisory Committee, "the fields of knowledge ... are not limited merely to the 'scientific' and 'technical' but extend to all 'specialized' knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by 'knowledge, skill, experience, training, or education.' " Id. Rule 702 only requires that (1) the testimony is based upon sufficient facts or data; (2) the statements are the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. See Fed. R. Evid. 702.

Federal Rule 704, "Opinion on Ultimate Issue," further relaxes the admissibility standards for expert testimony. See Fed. R. Evid. 704(a). The provision did away with the common law rule prohibiting expert testimony that resolved an "ultimate issue of fact," which was considered to supplant the role of the fact-finder. See id. Under Rule 704(a), "testimony ... otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Id. According to the Advisory Committee, the older prohibition was too restrictive, and served only to deprive the judge or jury of useful information. See Fed. R. Evid. 704 advisory committee's note. Rule 704's standard however, is not a limitless one. The Federal Rules require a proffered opinion to meet Rule 702's helpfulness requirement. See id. Moreover, Rule 403 guards against admitting evidence that will either waste time or confuse the jury. "These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach ... ." Id.

Expert Testimony Under Rules 702 and 704

Experts testifying in an insurance coverage dispute face the same constraints applicable to other litigation contexts. As a general rule, while permitted to discuss an ultimate issue of fact under Rule 704, an expert witness may not offer his or her own legal conclusions. As one article explained,

There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge ... . To allow anyone other than the judge to state the law would violate the basic concept. Reducing the proposition to a more practical level, it would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law, and it would intolerably confound the jury to have it stated differently.


The federal circuits and district courts have applied this rule, confining expert testimony to discussion of ultimate facts and excluding the explanation of legal concepts. See, e.g., Marx & Co. v. Diners' Club, Inc., 550 F.2d 505 (2d Cir. 1977) (holding that expert testimony regarding parties' obligation under the relevant contract impermissibly offered a legal conclusion); Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983) (finding that an expert's discussion of contributory negligence usurped the role of the jury in determining liability). See also Brill v. Marandola, 540 F. Supp. 2d 563

1 According to Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

Courts have held that an expert offering a strictly legal opinion provides little assistance to the jury. This is because the judge instructs on the law prior to deliberation. See Ji v. Bose Corp., 538 F. Supp. 2d 354 (D. Mass. 2008) (stating that an expert's provision of legal conclusions encroaches upon the trial judge's exclusive responsibilities); Highland Capital Management, L.P. v. Schneider, 551 F. Supp. 2d 173 (S.D.N.Y. 2008) (holding that "a court must determine whether expert testimony would usurp ... the role of the trial judge in instructing the jury on the relevant legal principles").

The challenge for the parties, then, is to structure expert testimony to avoid intruding upon the province of the court. Parties may offer testimony as to industry practice, and the ways in which knowledge of the industry informs the law and facts at issue. As the court in Bose Corp. observed, "the line is not always clear between impermissible testimony about what the law is and permissible expert testimony about standard industry practice." Bose Corp., 538 F. Supp. 2d at 359. In that case, however, the court made a fairly simple distinction between the two. For example, the expert's claim that no sunset clause existed in the contract due to lack of a termination clause was dismissed as legal conjecture. See id. In contrast, reporting that photographers "often ask models to sign standard release forms" was considered helpful explanation of common practice. Id. Focusing the expert's analysis on industry know-how reduces the risk that the opinion will be struck as a legal conclusion.2

Insurance Caselaw Regarding The Permissible Uses of Expert Testimony

Like the standards announced by the Federal Rules, caselaw in the insurance context weighs in favor of admitting expert testimony. In a coverage case, parties often will dispute a provision in the insurance policy, prompting debate over the contract's meaning. Also a matter of frequent disagreement is the good faith behavior of the insurer. In both of these scenarios, an expert may be asked to interpret a provision in the policy, or opine on the parties' intent. The court may deem either conclusion improper under Federal Rules 702 and 704(a).

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2 A number of the jurisdictions in which insurance issues are frequently litigated follow the Federal Rules of Evidence on the "ultimate issue" question. Specifically, New Jersey, California, Ohio, Pennsylvania, and Texas have each adopted rules that mirror FRE 704(a). See Ca. Evid. Code § 805; N.J. R. Evid. 704; Ohio R. Evid. 704; Pa. R. Evid. 704; Tex. R. Evid. 704.

New York Evidence Rule 704, a provision identical to the federal standard, has been proposed but not yet adopted. Nevertheless, the caselaw in New York traces the line between ultimate issues of fact and conclusions of law. While the latter is impermissible, courts allow experts to discuss matters related to business practice. See, e.g., Lopez v. Senatore, 65 N.Y.2d 1017, 1019 (1985) (stating that an expert should not express "conclusory assertions tailored to meet statutory standards."); People v. Forcione, 156 A.D.2d 952 (4th Dep't 1989) ("while the physician was competent to testify concerning the nature, extent, treatment, prognosis and permanency of the victim's injuries, the ultimate determination whether those injuries satisfied the statutory definition [serious physical injury] was not beyond the ken of the typical juror. . ."); Roman v. Vargas, 182 A.D.2d 543, 582 (1st Dep't 1992) (holding that no expert is permitted to testify that a party was "negligent").
Expert Testimony Regarding "Good Faith" Conduct and Policy Interpretation

Experts have drawn upon their knowledge of insurance practice to determine whether or not a company denied coverage in good faith. In *Hangarter v. Provident Life & Accident Insurance Corp.*, plaintiff Hangarter sued the insurance company for improperly terminating her disability benefits. Provident claimed that Hangarter was ineligible for benefits under the policy as she was not "totally disabled" and was working and earning income. See *Hangarter v. Provident Life & Acc. Ins. Corp.*, 373 F.3d 998, 1005 (9th Cir. 2004). Plaintiff's expert testified that Provident deviated from industry practice in discontinuing Hangarter's insurance payments, challenging the company's assertion that it had acted in good faith. Provident responded that the expert testimony "inappropriately reached legal conclusions on the issue of bad faith and improperly instructed the jury on the applicable law." *Id.* at 1016. The court disagreed focusing on the expert's analysis of industry custom: "While 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.* The court relied on *Ford v. Allied Mutual Insurance Company* in its analysis. *Ford* held that an expert was permitted to testify "to the issue of bad faith" by showing that the defendant relied on both Iowa law and industry practice in examining "total coverage available at the time of the accident" and computing payment. *Hangarter*, 373 F.3d at 1005 (quoting *Ford v. Allied Mutual Ins. Co.*, 72 F.3d 836, 841 (10th Cir. 1996)). See also *Rucker v. National General Ins. Co.*, 442 N.W.2d 113 (Iowa 1989) (finding expert testimony regarding insurance practice admissible on the issue of bad faith under Iowa law). While the experts in each of these cases relied upon and applied certain legal principles, their testimony was admissible as an explanation of industry custom.

Insurance practice as evidence of bad faith arose in *Campbell v. State Farm Aut. Ins. Co.*, where the defendant insurer was facing a punitive damages claim for taking a case to trial, rather than settling for payment of plaintiff's policy limit. The Campbells alleged that defendant State Farm's decision was the result of a nationwide plan to cap payouts on the company's insurance claims. This alleged scheme was referred to as the "Performance, Planning and Review," or PP & R policy. See *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1159 (Utah 2001), rev'd, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).³ State Farm argued that it was unaware of the likelihood of an excess judgment against Mr. Campbell, and resisted settlement in good faith. The Campbells introduced expert testimony regarding State Farm's business practices to rebut the company's "honest mistake" defense. See *Id.* The testimony focused on explaining State Farm's PP & R policy and demonstrating its far-reaching effects. The expert discussed the company's use of an excess liability handbook, its failure to maintain statistics on excess verdicts, and the profits derived from improper claims. See *Id.* The court concluded that "[m]ost of State Farm's objections address [expert] testimony concerning industry standards. In several instances [the expert] described 'duties' and 'standards' of behavior or of 'care' that should dictate the practice of insurance companies generally." *Id.* at 1160. The court found no danger of the expert usurping the role of the judge, as "[i]n every instance ... it was made very clear ... that the witness was testifying only to prevailing standards of conduct in the industry, and not to

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³ The Supreme Court reversed the Ohio decision on the issue of punitive damages. The admission of expert testimony was not discussed by the Court and remains good law.
legal standards or rules of law." Id. Importantly, the court noted its own ability to provide a limiting instruction on consideration of expert testimony. See id. In arguing for the admissibility of expert testimony, parties may wish to highlight this possibility. The court can emphasize to the jury that it may rely only on the judge for an explanation of the law.

While expert opinion is generally permissible in determining bad faith insurance practice, courts have attempted to define the boundaries on this type of testimony. In Transcontinental Co. v. Lemons, plaintiff's expert witness was asked to summarize the claim handling standards for the Oklahoma insurance industry. See Transcon. Co., 2007 WL 4856868, at *2, n. 1 (W.D. Okla. Apr. 24, 2007). He was to outline the principles applicable to insurers, taking into consideration the relevant Oklahoma law. See id. This testimony was relevant to the question of whether the insurance company denied plaintiff's claims without adequate review of the policy, and acted in bad faith. See id. Acknowledging that this testimony potentially disguised a legal conclusion, the court announced:

> Dawson will not be permitted to define for the jury what is legally required of an insurance company when handling a claim for benefits or adduce other rules of law. Nor may he attempt to apply those rules to the facts of this case to direct the jury that a verdict for Lemons is required. But he may, staying on the safe side of the line between ultimate facts and ultimate questions of law, explain his view of Transcontinental's actions based on his familiarity with insurance industry practices and having rendered coverage opinions himself.

Id. at *3.

Experts will also be called upon to discuss the meaning of contract provisions appearing in an insurance policy. Harbor Insurance v. Continental Bank Corp. addressed the scope of an expert's role in analyzing contract language. See Harbor, 1991 WL 222260, at *1 (N.D. Ill. 1991). The case progressed in two phases, both of which are instructive. At the first trial, the district court found that the insurance company was not liable for litigation costs in a shareholder securities fraud case. See id. at *2. The Seventh Circuit reversed and remanded that decision, ruling certain expert testimony inadmissible. See id. Initially, Harbor introduced an attorney-expert to testify on the meaning of "indemnity" in the insurance contract. The court dismissed the expert's legal opinion on the meaning of a contractual term. In the court's view, permitting the expert's testimony would have usurped the court's role of instructing the jury on the law. See Harbor Ins. Co. v. Cont'l Bank Corp., 922 F.2d 357, 366 (7th Cir. 1990).

On remand, the district court considered the insurance companies' motion to bar the testimony of plaintiff's expert, a Delaware attorney. The expert was called to testify as to whether Continental was permitted or required to indemnify its officers after a litigation settlement. See Harbor, 1991 WL 222260, at *3. Using the Seventh Circuit decision as a template, the trial court clarified the test for admitting the expert testimony:

> A lawyer experienced in indemnification matters could be a proper witness to opine on the charter's probable meaning ... . A legal expert may explain the ordinary practices of other corporations who deal with similar indemnification terms in their charter. However, a legal expert may not give a legal opinion as to the meaning of
the ambiguous contract terms. Nor may a legal expert give a legal opinion as to the legal standards believed to be derived from the charter.

_id._ (citing *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 512 (2d Cir. 1977), cert. denied, 434 U.S. 861 (1977)).

The court noted that the expert planned to testify about the practices of similar Delaware corporations that have indemnity provisions in their charters. _See id._ Moreover, he was to offer input regarding "the 'general attitude' of the Delaware courts and the Delaware corporate code on indemnification issues." _Id._ The court concluded that restricting the expert's testimony to the customs of Delaware corporations and courts would not violate the standards set forth by the Seventh Circuit. If the expert "overstepped his bounds and offered legal conclusions," the insurance companies could object during trial. _Id._ The court's application of the Seventh Circuit's decision illustrates the type of expert testimony deemed helpful by the courts, as well as the limitations often imposed.

**Pushing the Limits of Admissibility: The Insurance Expert With Legal Experience**

The restrictions on expert testimony as to governing law may be relaxed where the expert handled legal issues as part of industry practice. In _Suter v. General Accident Insurance Co. of America_, the court confronted this scenario. The plaintiff in _Suter_ alleged that General Accident failed to pay reinsurance due to Integrity as a result of a product liability litigation. _See Suter_, 424 F. Supp. 2d 781, 791 (D.N.J. 2006). General Accident argued that reinsurance payments were not due to Integrity, as Integrity failed to determine in good faith whether the product liability claims had triggered coverage obligations under the reinsurance policy. To rebut the defendant's contentions, plaintiff Suter introduced expert testimony in support of Integrity's good faith efforts. _See id._ Qualified to testify on insurance and reinsurance matters, the expert discussed how the matter would be analyzed by a "hypothetical" court. _See id._ He opined that anything "arguably" covered by an insurance policy should be covered by the insurance company. He additionally offered his view on how this hypothetical court might construe relevant caselaw. _Id._ at 792. The court rejected the argument that the testimony was an impermissible legal conclusion, focusing on the nature of the expert's background and qualifications. The decision noted the expert's thirty-four years' experience in the insurance business, and his involvement in periodic settlements of legal disputes. His testimony was based upon the type of knowledge someone with his resume would be expected to possess: "Where an expert is opining as to the custom and practice of a particular business, and where someone who is an expert in a particular field would be expected to understand the ways in which the laws affect the business, such testimony should be admitted." _Id._ (citing *U.S. v. Fogg*, 652 F.2d 551, 556-57 (5th Cir. 1981) (admitting testimony by an Internal Revenue Service agent, who declared that certain money would be considered a "constructive dividend to the taxpayer"). In these cases, the expert did not advise on what the law requires, but rather, what someone familiar with the law and practices of the insurance industry "believes to be the impact of the law on the business." _Suter_, 424 F. Supp. 2d at 793.

The _Suter_ decision's broad construction of admissibility may be attributed to procedural circumstances. The court observed that during a bench trial, there is less danger of the expert usurping the role of the judge in advising the jury. "Where, as here, there is no jury to instruct, the ability of the witness to 'stray out of bounds and into the rightful territory of the Court is significantly lessened." _Id._
Caselaw Regarding Impermissible Uses of Expert Testimony

Limitations on Rule 702 and "Industry Practice" Testimony

Courts have excluded expert testimony that instructs the jury on the best way to interpret the law. In one case, for example, the defendants submitted expert testimony of a law professor addressing the economic consequences of interpreting an insurance policy as the plaintiff suggested. The expert-professor testified to the jury on the two conditions that must exist for coverage to be provided: (1) there must be some chance that the loss will occur over a particular period; and (2) the chance of accident may not be within the direct control of the policyholder. See Lone Star Steakhouse & Saloon, Inc. v. Liberty Mut. Ins. Group, 343 F. Supp. 2d 989, 1013 (D. Kan. 2004). The expert concluded that the flooding damages sustained by the plaintiff did not fit the insurance policy's definition of "accident," because Lone Star could have easily prevented or controlled the resulting damage. The expert stated that "[i]t would thwart the public policy goals of creating incentives for parties to prevent losses under their control if Lone Star were successful in shifting its responsibility for that harm to its insurer." Id.

The court decided to exclude the testimony of the expert, on the ground that his testimony would not assist the trier of fact. The court found that an insurance policy is not to be construed according to its potential economic effects, but rather as a "reasonable person in the insured's position would have understood [it] ... [e]xpert testimony that the damages must be 'probabilistic' to be covered would not ... assist the jury in understanding these terms." Id. The court also found that the expert's opinion regarding coverage and control by the policyholder was unhelpful. The condition appeared nowhere in the policy and would only confuse the jury. The court determined that the expert's analysis contradicted precedent, and, by striking his testimony, reaffirmed its responsibility to instruct the jury on applicable law.

The court dismissed the policyholder's expert testimony on similar grounds. The expert stated that, "BCH's damages in the 2000 lawsuit fell within the definition of an 'occurrence.'" Id. at 1014. The court considered this opinion a legal conclusion that would not assist the jury in evaluating the facts. Also excluded was the expert's belief that "Liberty Mutual had no basis to apply the exclusion for 'expected or intended injury,'" and was "barred by estoppel from denying coverage." Id. According to the court, these statements involved interpretation of contract terms that should be explained to the jury by the judge alone. Id.

While Rule 702 favors admissibility, the Lone Star decision should caution parties preparing their experts. Expert testimony that directly guides the jury on what the law is and how to apply the law is typically inadmissible. On the other hand, expert testimony concerning the customers and practices of the insurance business and the effect of insurance policy provisions on the operation of that business is likely to be admissible.

Conclusion

While Federal Rules of Evidence 702 and 704 announce broad standards for the admission of expert testimony, the courts will not permit a witness to offer conclusions of law. Because instruction as to applicable law is the exclusive responsibility of the trial judge, an expert's reiteration at best does little to assist the jury and at worst can be misleading. Courts will, however, permit experts to discuss the
customary practice of a given industry. These rules apply to insurance litigation, where clarifying business patterns supplements the jury's understanding of a disputed policy provision, or the parties' conduct thereunder. Oftentimes, discussion of industry custom and explanation of the law governing that custom will overlap. Litigants should structure their expert's discussion of contract law as a clarification of insurance practice. Framed in this light, the expert is merely providing information to assist the jury in applying the law, rather than dictating the appropriate result to reach.
ABOUT THE PRESENTER(S)

Presenter 1
Anna Engh is a partner in the firm's litigation group. She has a wide range of experience in the insurance coverage area. She has handled coverage litigation and negotiated insurance recoveries on behalf of corporate policyholders for a variety of claims, including asbestos, lead, and other mass tort claims; environmental liabilities; first party property damage; D&O and E&O claims; and political risks. Ms. Engh has significant experience in trial and appellate courts as well as in arbitration forums.