DAUBERT ISSUES IN COVERAGE & BAD FAITH CASES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

MISCELLANEOUS

I. INTRODUCTION AND OVERVIEW

Defendants in insurance coverage and bad faith cases often benefit from the expertise and testimony of retained experts. Many coverage and bad faith claims, at some point, focus on the discovery and testimony of expert witnesses. Regardless of what particular theory a plaintiff may be using to prosecute his or her lawsuit, the inquiry often turns to expert witnesses.

This paper begins with a discussion of expert discovery and then focuses on procedural challenges to experts. Specifically, this paper explores the primary uses of and challenges to expert witnesses in the context of insurance coverage and bad faith claims, with an emphasis on the typical Rule 702 and *Daubert/Robinson* challenges to the use of experts, and the procedural considerations regarding those challenges. The paper also covers some specific challenges to experts under Texas law.

II. DISCOVERY OF EXPERTS

A. Written Discovery

No matter what area of litigation or expertise of the witness, expert discovery is first controlled by the exchange of written discovery. Written discovery allows for the formal exchange of information about experts, their opinions, impressions, the materials reviewed, and their qualifications.

1. Texas Rules of Civil Procedure

a. Discovery Control Plans

At the outset of the case, some decisions will have to be made on the issue of expert discovery. Pursuant to Rule 192, discovery control plans may dictate the order, format and deadlines for expert discovery. The majority of state law construction claims will fall under Level 2 or Level 3 discovery control plans.

(i) Level 2

Level 2 is the "default" level in lawsuits where the plaintiffs fail to make an election under Rule 190. Level 2 usually restricts depositions to a total of 50 hours per side. However, if one side designates more than two experts, the opposing side may add an additional six hours of total deposition time for each additional expert. *See* Rule 190.3(b)(2). In addition, Level 2 imposes a 25 interrogatory limit. This interrogatory limit may affect the ability of a party to conduct discovery regarding consulting experts whose opinions have been reviewed by a testifying expert.

(ii) Level 3

Level 3 requires the court to enter a pretrial scheduling order, and allows the court and parties to tailor discovery to that particular suit. The extent and scope of discovery must be defined in the court order in order to avoid application of the default Level 2 provisions. *See* Rule 190.4. Level 3 scheduling orders are designed for more complex litigation.

b. Rule 195 - Expert Discovery Procedures

Rule 195 controls the scope of expert discovery. Rule 195 sets limits on the types of discoverable information on experts, and also limits the permissible types of discovery. Furthermore, designation, reporting and depositions are all regulated by Rule 195, including the cost of experts in relation to preparing for and giving depositions.

(i) Permissible Discovery Tools

In Texas, a party may request another party to disclose information concerning testifying expert witnesses only through Requests for Disclosure (Rule 194) and through depositions and reports. *See* Rule 195.1. Thus a party may not seek discovery or information concerning testifying experts in interrogatories or requests for production. Further, under Level 2 a party is not obligated to disclose information regarding testifying expert witnesses unless prompted to do so through a Request for Disclosure, regardless of the expert designation deadline. However, nothing in this rule prevents discovery of consulting experts whose opinions have been reviewed by a testifying experts by serving traditional written discovery.

(ii) Scope of Permissible Expert Discovery

Texas also limits the permissible scope of expert discovery in several ways. First, Rule 192.3(e) defines the permissible scope of discovery of testifying and consulting experts:

> The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a

consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

1. the expert's name, address, and telephone number;

2. the subject matter on which a testifying expert will testify;

3. the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;

4. the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;

5. any bias of the witness;

6. all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony; and

7. the expert's current resume and bibliography.

See Rule 192.3(e).

(iii) Scheduling Order for Designating Experts

Experts must be designated in accordance with the pretrial scheduling order in Texas. If no pretrial scheduling order controls the designation of experts, the default guidelines contained in Rule 195.2 require the following designation dates:

(a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period; and

(b) with regard to all other experts, 60 days before the end of the discovery period.

Designation requires the parties to furnish all of the materials and information required in Rule 194.2(f) regarding Request for Disclosure. Specifically, the following information and materials are required to be disclosed in response to a properly served Request for Disclosure:

(1) The expert's name, address, and telephone number;

(2) The subject matter on which the expert will testify;

(3) The general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to your control, documents reflecting such information; and

(4) If the expert is retained by, employed by, or otherwise subject to your control:

(A) All documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) The expert's current resume and bibliography.

(iv) Deposition or Report?

Texas Rule of Civil Procedure 195.3 governs the scheduling of expert depositions. Rule 195.3 states:

(a) *Experts for Party Seeking Affirmative Relief.* A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:

(1) **If no report furnished**. If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot - due to the actions of the tendering party - reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject.

(2) **If report furnished**. If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for

deposition until reasonably promptly after all other experts have been designated.

(b) ***Other Experts***. A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.

TEX. R. CIV. P. 195.3.

There is absolutely no requirement under Rule 195.3 for the party not seeking affirmative relief to produce an expert report. In fact, Rule 195.3 provides that if the plaintiff does not provide an expert report, he must make the expert available for deposition "reasonably promptly" after the expert is designated. Rule 195.3. If the plaintiff does provide an expert report, he is not required to make the expert available for deposition until after all other experts have been designated. *See* Rule 195.3. In other words, only if the party seeking affirmative relief fails to provide a report do the deposition requirements become effective. Whether or not experts are designated with or without reports, all parties must make experts available for deposition reasonably promptly following the designation of all experts.

Regardless of whether plaintiff provides an expert report, Rule 195.3 provides no circumstances under which a defendant is required to provide one. Nevertheless, in many cases defense counsel readily agree to provide expert reports without seizing the strategic advantage provided by the Texas Rules of Civil Procedure and a plaintiff's counsel's over-reliance on the need for expert reports.

The best way to take advantage of a plaintiff's attorney's focus on expert reports is to negotiate a Scheduling Order that does not require either party to provide an expert report for any retained expert witnesses. Often, both sides will agree to a Level 3 Scheduling Order that governs the major deadlines in a case such as expert designation deadlines, when discovery ends, when pre-trial documents are due and the trial date, among others. When the parties are unable to come to an agreement regarding a scheduling order, this is typically due to a disagreement over on various deadlines. Items simply omitted from a proposed Level 3 Scheduling Order rarely catch an attorney's attention. Therefore, it is vital that defense counsel initiate the negotiation over the Level 3 Scheduling Order by submitting a proposed draft to plaintiff's counsel to review. By omitting requirements for either party to provide an expert report, expert report requirements are taken off of the negotiating table. An opposing attorney may agree to a Level 3 Scheduling Order without even realizing that providing expert reports is not required.

By removing the expert report requirement from the case, defendant is placed in an advantageous position in many ways. First, plaintiff's counsel will often simply not realize that expert reports are not needed and will readily supply them with plaintiff's designation of expert witnesses. Thus defense counsel is provided a road-map for use during plaintiff's expert's deposition. Second, by not having defendant's expert reports, plaintiffs' counsel will be without a road-map of his own when deposing the defendant's experts. Many plaintiff's counsels have become accustomed to having expert reports to rely upon when deposing defendant's experts. By taking away plaintiff's counsel's roadmap, defense counsel place themselves on the path to a successful defense.

Following designation of an expert by a party seeking affirmative relief, the designating party must either provide a report or make the expert available for deposition reasonably promptly to allow completion of the deposition at least 15 days prior to the deadline for designation of the opposing party's experts. *See* Rule 195.3. Only if the party seeking affirmative relief fails to provide a report do the deposition requirements become effective. Whether or not experts are designated with or without reports, all parties must make experts available for deposition reasonably promptly following the designation of all experts.

(v) Supplementation

The Texas Rules of Civil Procedure require supplementation of expert discovery, including written and deposition discovery. Rule 195.6 requires supplementation only for experts who are retained by, controlled by, employed by, or otherwise under the control of a party. For these experts, supplementation is only required for changes or additions to the expert's mental impressions or opinions and the basis for them.

(vi) Cost of Experts

Texas requires the party retaining the expert witness to pay all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition. *See* Rule 195.7.

2. Expert Discovery in Federal Court

The Federal Rules of Civil Procedure provide specific guidelines for expert discovery:

a. Testifying experts

A party is entitled to discover information about the other party's experts who will testify at trial. FRCP 26(b)(4)(A). A party is entitled to the following information about the other party's testifying expert:

(1) Identity of experts. The identity of all expert witnesses who may present testimony at trial. FRCP 26(a)(2)(A).

(2) Written report. A written, signed report from each expert retained or specially employed to provide expert testimony or whose duties as an employee regularly involve giving expert testimony. FRCP 26(a)(2)(B). Not all testifying experts must produce a report, only those experts retained or specially employed by a party. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under FRE 702. The expert's report must include the following:

(a) A complete statement of opinions to be expressed and the basis for them.

(b) The data or other information considered by the witness in forming the opinion.

(c) Any exhibits used as summary of or support for the exhibits.

(d) The expert's qualifications, including a list of all publications for the past 10 years.

(e) The compensation to be paid to the expert.

(f) A list of other cases in which the expert has testified at trial or in deposition in the preceding four years. FRCP 26(a)(2)(B). The party need not produce copies of reports and transcripts of previous testimony of the expert as part of the disclosure. *All W. Pet Sup. Co. v. Hill's Pet Prds. Div.*, 152 F.R.D. 634, 640 (D. Kan.1993).

(3) Other discovery. A party is entitled to other discovery about the testifying experts, including depositions. FRCP 26(b)(4). A testifying expert who is required under FRCP 4(a)(B) to produce a report may not be deposed until after the report is provided. FRCP 26(b)(4)(A).

(4) Cost of expert. Ordinarily, the party seeking discovery will pay the expert's fee for the time spent on discovery. Under FRCP 26(b)(4)(C), the court may require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery and to pay the party whose expert is made subject to discovery a fair portion of the fees and expenses that party incurred in obtaining information from the expert. *See Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 154 F.R.D. 212, 213 (E.D. Wis. 1994). The rule does not specify when a party must demand payment of fees to its expert, but courts have used it to award expert fees even after trial. Compare *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1011-12 (10th Cir.1996) (motion for fees was untimely because it was filed 4-1/2 months after the court had entered a final judgment & ordered each party to bear its own costs) with *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 336 (5th Cir.1995) (application for costs filed 9 months after original application for taxation of costs was timely). The party seeking discovery is not required to pay the expert's time spent preparing for a deposition. *Healy*, 154 F.R.D. at 214 (certain exceptions exist, including complexity of case and time elapsed between expert's work and deposition date).

b. Consulting experts

Generally, a party cannot discover the facts known by a consulting expert. *See* FRCP 26(b)(4)(B). A consulting expert is an expert retained in anticipation of litigation who is not expected to testify. A party may discover the facts known and opinions held by a consulting expert only if it is impracticable to obtain facts or opinions on the same subject or by other means, or for medical examinations as provided under FRCP 35(b). FRCP 26(b)(4)(B); *Braun v. Lorillard Inc.*, 84 F.3d 230, 236 (7th Cir. 1996) (negative test results for presence of asbestos fibers in decedent's lungs were discoverable when tests destroyed tissue and results could not be obtained from any other source).

It is unclear whether a party may discover the identity and location of a consulting expert by interrogatory under FRCP 26(b)(1). FRCP 26 generally does not permit discovery of the identity of non-testifying, retained experts without the required showing

of exceptional circumstances. *USM Corp. v. American Aerosols, Inc.*, 631 F.2d 420, 424 (6th Cir. 19890); *Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses*, 622 F.2d 496, 501 (10th Cir. 1980) (expressing no view on exceptional circumstances exception).

3. Local Rules For Expert Discovery

(a) Northern District of Texas

No local rule affects FRCP 26 and a party's obligation to file initial disclosures.

(b) Southern District of Texas

No local rule affects FRCP 26 and a party's obligation to file initial disclosures.

(c) Western District of Texas

No local rule affects the scope of discovery permitted under FRCP 26 and a party's obligation to file initial disclosures.

(d) Eastern District of Texas

Local Rule 26 further elaborates on the parties' initial disclosure obligations. In addition to very specific expert disclosure and discovery requirements, that rule provides the following:

"LOCAL RULE CV-26 Provisions Governing Discovery; Duty of Disclosure

(b) **Disclosure of Expert Testimony.**

(1) When listing the cases in which the witness has testified as an expert, the disclosure shall include the styles of the cases, the courts in which the cases were pending, the cause numbers, and whether the testimony was in trial or deposition.

(2) By order in the case, the judge may alter the type or form of disclosures to be made with regard to particular experts or categories of experts, such as treating physicians.

B. Depositions

One of the most important events in the course of litigation is the expert deposition. The outcome of the plaintiff's claims may hinge on how the testifying expert does in deposition. Naturally, careful preparation and evaluation of the issues involved in the case improves the likelihood of a successful deposition of the plaintiff's expert.

1. Preparation

The value of preparation cannot be overestimated. Knowledge of all relevant literature is critical to raising and sustaining any *Daubert* challenges against that particular expert. It is also helpful to consult with your client and your own consulting experts in preparation for taking the opposing expert's deposition.

2. Discover *All* of the Opinions of the Adverse Expert

Trial is the most important cross-examination, and it is better to know all the answers at trial than to be surprised at trial when you get the answer to the question that you were afraid to ask in deposition.

3. The Expert's Qualifications

Weaknesses of the plaintiff's expert's qualifications should be exploited. If your experts have better credentials, be sure to point out to the differences to the jury through the *opposing* expert witness, so as to refrain from making your experts appear pompous.

4. Bias Shown By History of Testimony

Of course, it generally pays to know the testimonial history of the expert you are opposing. Does the witness testify only for plaintiffs? Does the witness testify for plaintiffs the vast majority of the time? Has the expert made sworn statements in other cases that are inconsistent with the expert's positions in the case at hand? Within the context of coverage and bad faith claims, exposing an opposing expert's bias may result in significant harm to such expert's credibility as well as the opposing party's overall case.

5. Obtain Testimony Favorable To Your Case

During cross-examinations, it is possible to obtain testimony from an opposing expert that supports -- at least in a small way -- your theory of the case. There are some commonly acknowledged principles that can serve as small admissions of the validity of your case. An adverse expert may be willing to agree with several of your premises while disagreeing with your conclusion.

In the same fashion, it may be possible to have the adverse witness accredit your expert witness by having the adverse witness acknowledge the reliability of

your witness' data and assumptions, and the legitimacy of his credentials. In some cases, you may even be able to get the adverse expert to admit that your expert is better qualified in a specific area.

III. SCIENTIFIC RELIABILITY PROBLEMS WITH EXPERTS

A. Introduction

An understanding of the applicability of *Daubert* to coverage and bad faith claims is crucial to an effective challenge to the theories of an expert. The United States Supreme Court changed the landscape of pretrial and trial challenges to expert witnesses when it handed down its decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993). The *Daubert* decision reined in trial courts' unwarranted tolerance of what the high Court called "junk science." Masquerading as "scientific theories," many novel, unproven and unreliable techniques and theories had invaded federal courts. Trial courts had taken too passive an approach to gatekeeping and too often had permitted unreliable testimony to reach the jury, cloaked in the aura of the special expertise brought by the expert witness.

The *Daubert* Court reminded trial courts that "The Rules–especially Rule 702–place appropriate limits on the admissibility of purportedly scientific evidence by assigning the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* The Court enunciated a list of six factors for trial courts to consider when ruling on the admissibility of expert testimony. *Id.* The end result was that Rule 702 now has specific parameters for use in evaluating whether a proffered expert's testimony should be permitted to be heard by the jury. *Id.* Before turning to the six *Daubert* factors however, we will examine Rules 702 and 703 to understand the existing framework at the time that *Daubert* was handed down.

B. The Rules of Evidence

1. Rule 702

Many states have enacted rules of evidence that mirror the federal rules. Texas Rule of Evidence 702, like its federal counterpart, permits opinion testimony by a witness qualified as an expert by knowledge, skill, experience, training, or education.

Rule 702 provides:

> 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.

2. Rule 703

In addition to challenging the qualification of experts to render expert testimony under Rule 702, the foundation of the expert's opinions may also be challenged pursuant to Rule 703:

Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Together, these rules of evidence provide powerful ammunition to the defense for challenging the qualifications of the expert to render opinion testimony, and for challenging the opinion itself as unreliable. As outlined above, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), was the first United States Supreme Court case to dispense with the "general acceptance test" and set forth the requirements for qualification of expert testimony under Federal Rule of Evidence 702.

Later in Texas, *E.I. duPont Defendant Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) incorporated the holding of *Daubert* and applied it to consideration of expert opinions pursuant to the substantially similar Texas Rule of Evidence 702.

C. The Simple Three-Step Approach

The basic three-step approach for expert testimony under *Daubert* and *Robinson* is as follows:

1. The expert must be qualified;

2. The testimony must be relevant; and

3. The opinion must be reliable.

As a practical matter, the expert must be qualified according to education, training and experience. The testimony must also be relevant. Should the court determine that the expert testimony meets the relevance test, the plaintiffs must still demonstrate that the expert's opinions are reliable.

D. The Burden of Proof

Once an objection to the expert has been made, the *Daubert and Robinson* cases shift the burden of demonstrating the admissibility of expert opinion to the proponent of the expert's opinion. These cases require that an objection be made to the expert's qualification or reliability of the specific opinion, and the proponent must then bear the burden of proving the qualifications of the witness to testify or the reliability of the specific opinion.

To meet his burden, the proponent of the testimony must prove both the qualifications of the witness and the reliability of the testimony on the premise that expert evidence that is not grounded "in methods and procedures of science" is no more than "subjective belief or unsupported speculation." *Robinson*, 923 S.W.2d at 557.

E. The *Daubert/Robinson* Factors

The factors to be evaluated by the trial court when considering the admissibility of expert opinion include, but are not limited to, the following factors:

1. the extent to which the theory has been or can be tested;

2. the extent to which the technique relies upon the subjective interpretation of the expert;

3. whether the theory has been subjected to peer review and/or publication;

4. the technique's potential rate of error;

5. whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

6. the non-judicial uses which have been made of the theory or technique.

Robinson, 923 S.W.2d at 557.

F. Key Texas Cases After *Robinson*

A number of Texas cases have been decided after Robinson that expand on the factors adopted and enunciated by the Robinson court as well as shed light on the application of Daubert/Robinson to coverage and bad faith issues.

1. *Merrell Dow Pharmaceuticals, Inc. v. Havner*

In *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), the Texas Supreme Court analyzed the reliability of epidemiological studies relating to proximate causation. The opinion set forth several requirements for the admissibility of expert opinions based upon epidemiological studies. In addition to satisfying the *Daubert/Robinson* factors, the plaintiff must show that the epidemiological studies themselves are reliable. The Texas Supreme Court set forth guidelines relating to the statistical reliability of such epidemiological studies to support an opinion on proximate causation.

The language contained in the *Havner* opinion may offer support in efforts to exclude experts or strike opinions as unreliable. Some of the more interesting comments include the following:

1. "An expert's bare opinion will not suffice." (Plaintiff. 711).

2. ". . . it is not so simply because 'an expert says it is so.'" (Plaintiff. 712).

3. ". . . even an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the earth is the center of the solar system." (Plaintiff. 712).

4. An expert's bald assurance of validity is not enough. (Plaintiff. 712).

5. "A flaw in the expert's reasoning from the data or in the data itself may render a reliance on a study unreasonable and render the inferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence." (Plaintiff. 714).

6. ". . . courts must be 'especially skeptical' of scientific evidence that has not been published or subjected to peer review." (Plaintiff. 727).

2. ***Gammill v. Jack Williams Chevrolet, Inc.***, 972 S.W.2d 717 (Tex. 1998)

The *Daubert/Robinson* factors are not limited to novel or unconventional science, but rather extended to all scientific evidence proffered under Rule 702. There are some experts who "are more than willing to proffer opinions of dubious value for the proper fee." All expert testimony should be shown to be reliable before it is admitted. Experience alone may provide a sufficient basis for an expert's testimony in some cases, but it cannot do so in every case. A more experienced expert may offer unreliable opinions, and a lesser experienced expert's opinions may have solid footing.

3. ***Weiss v. Mechanical Associated Services, Inc.***, 989 S.W.2d 120 (Tex. App.–San Antonio 1999, pet. denied)

The appellate court held that expert testimony that a claimant's health problems were caused by exposure to x-ray chemicals from a neighboring office was inadmissible and constituted insufficient evidence of causation. The claimant worked as a nurse and office administrator in a building immediately below a physician's office that routinely processed x-ray films and other radiography.

After a number of years of working in this office, the claimant developed asthma and other reactive airway diseases ultimately requiring hospitalization. After filing suit, the claimant retained two toxicologists to testify that "the claimant's symptoms ... were typical of patients suffering from chemical sensitivity and chronic immune dysfunction syndrome."

The appellate court found that neither of the claimant's experts relied on any particular theories that had been or could be tested. The court further found that the experts' opinions were highly subjective in that they assumed that the emission and exposure to the chemicals were the causative agents of the claimant's illness.

The court also found the absence of reliance of epidemiological studies or other scientific data as important factors in its determination that the expert testimony was inadmissible and in any case insufficient to establish causation.

4. ***State Farm Lloyds v. Mireles*****,** 63 S.W.3d 491 (Tex. App. – San Antonio 2001)

Insureds brought action against their homeowners' insurer to recover foundation damages allegedly caused by a plumbing leak covered under the policy. The insurer appealed a jury verdict finding for the insureds, arguing that the plumbing leak occurred a substantial distance away from the location of the foundation damage.

At trial, the insureds' expert opined that water from the plumbing leak travelled through plumbing channels below the foundation to the area of the foundation damage. The Court of Appeals reversed and rendered verdict for the insurer, finding that the "analytical gap" in the insureds' expert's opinion was so great as to render the opinion unreliable and irrelevant. The expert failed to rule out the possibility that the foundation damage was the result of other causes. Also, the expert had assumed without evidentiary support that the plumbing channels were located in the area of the foundation damage.

5. ***Reliance Insurance Company v. Denton Central Appraisal District***, 999 S.W.2d, 626 (Tex. App.– Fort Worth 1999, no pet.)

The court of appeals, citing and following *Ellis*, held that a party is required to object either before trial or when the evidence is offered to preserve any complaint that expert evidence or testimony is unreliable. The court stated that "while Reliance thoroughly and artfully cross-examined each of Denton's experts, it never objected to or moved to strike their testimony on the theory it now raises on appeal." Slip op. At 3. Accordingly, the Court held that the Defendants waived any objection to the reliability of the evidence.

6. ***State Farm Fire & Cas. Co. v. Gandy*****,** 880 S.W.2d 129 (Tex. App. – Texarkana 1994) *rev'd on other grounds*, 925 S.W.2d 696 (Tex. 1996).

Insured's judgment creditor, as assignee of insured's rights, brought a negligence action against homeowners' insurer, alleging the insurer failed to use reasonable care in discharging its assumed duty to represent insured. The court of appeals ruled that the trial court did not abuse its discretion in allowing the testimony of plaintiff's expert witness. The court found that the expert, an attorney, met the qualification requirements under Rule 702 by his education, training and experience. The expert had worked as an outside counsel for insurance firms as well as a personal injury lawyer.

7. ***Sears, Roebuck & Company v. Kunze***, 996 S.W.2d 416 (Tex. App. – Beaumont 1999, pet. denied)

In *Kunze*, a product liability action, the court applied *Robinson* to exclude an out of court test offered by the defendants. The trial court excluded the test because the expert's theory and technique had not been tested in the past, because it relied on a subjective determination, because it had not been subjected to peer review, because it had no established rate of error, because the underlying theory or technique had not been tested in the past, and because there were no non-judicial uses of the technique. 996 S.W.2d at 424. Applying an abuse of discretion standard of review, the court of appeals affirmed, holding that the trial court "appear[ed] to have properly applied the factors set out in *Robinson*." *Id*.

8. ***The Kroger Company v. Betancourt***, 996 S.W.2d 353 (Tex. App. – Houston [14th Dist.] 1999, pet. denied)

The court held that an objection to expert's testimony as "speculative" and "unreliable" failed to preserve complaint that the expert was unqualified, since the court believed the argument related "more to the expert's qualifications than to the reliability of his conclusions."

G. Key Federal Cases After *Daubert*

1. ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137; 119 SCT 1167; 143 L.ED. 238; (1999).

In one of the more important decisions since *Daubert*, the United States Supreme Court held that the reliability factors may apply to the testimony of all experts, not just "scientific" experts. It further held that the gatekeeping function applies to all expert testimony and is not limited to novel science or scientific testimony.

2. ***Moore v. Ashland Chemical Inc.***, 151 F.3d 269 (5th Cir.1999)

The 5th Circuit held in a toxic tort case that the underlying analytical data relied upon by the plaintiffs' expert had gaps that were too wide to support his causation opinion. Thus the 5th Circuit held that the trial court properly excluded his causation testimony on the grounds that the foundation was unreliable as a matter of law.

3. ***Tanner v. Westbrook***, 174 F.3d 542 (5th Cir. 1999)

The trial court abused its discretion in admitting a physician's medical causation testimony in an alleged perinatal injury case where the expert did not have the training or background in cerebral palsy and the studies relied upon did not address the alleged cause in question.

4. ***Mays v. State Farm Lloyds***, 98 F. Supp.2d 785 (N.D. Tex. 2000)

Insureds sued their homeowners' insurer, alleging that the insurer wrongfully denied their claim for structural damage to their home resulting from foundation movement. In support of their position, the insureds offered expert testimony that the damage was caused by a sewer leak rather than tree roots. On insurer's motion for summary judgment, the court held that insureds' expert's testimony was unreliable and inadmissible. The court found that insureds' expert formed his opinion after a single visual inspection of the property, and he failed to provide a basis for his conclusion. Thus the expert's testimony amounted to nothing more than speculation.

H. The Trial Court Must Determine Whether the Expert is Qualified

Naturally, the decision on an expert witness's qualification rests with the trial court. *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. *Robinson*, 923 S.W.2d at 558. The proponent of the testimony must prove that the witness is qualified under Texas Rule of Evidence 702, which permits testimony by a witness "qualified as an expert by knowledge, skill, experience, training, or education." In addition, the testimony must "assist the trier of fact."

The *Broders* Court ruled that the trial court properly excluded the testimony of an emergency room physician that proper treatment by the defendants, also emergency room physicians, would have prevented the death of a patient suffering from a head injury. *Broders*, 924, S.W.2d 152. Rejecting the plaintiff's argument that the expert was qualified simply because he was a medical doctor, the Court noted that "given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question." *Id.*

The *Broders* court also rejected the argument that the expert's testimony was admissible because he possessed knowledge and skill not possessed by people

generally. *Id.* Rather, the Court declared that the focus should be on the fit between the subject matter at issue and the expert's familiarity with it. *Id. at 153, quoting with approval Nunley v. Kloehn*, 888 F. Supp. 1483, 1488 (E.D.Wis.1995). The Court reasoned that the expert's undoubtedly greater knowledge did not establish that his expertise on the issue of cause in fact met the requisites of Rule 702. *Id.* For example, while the expert knew that neurosurgeons should be called to treat head injuries and what treatments they could provide, he never testified that he knew, from either experience or study, the effectiveness of those treatments in general or in this case. *Id.* The court concluded that the witness had not been shown to be qualified to testify about the cause in fact of death from an injury to the brain. Therefore, the Court held that the trial court did not abuse its discretion in excluding the expert's testimony. *Id.*

The supreme court also upheld the trial court's exclusion of unqualified expert testimony in *United Blood Services v. Longoria*, 938 S.W.2d 29 (Tex. 1997)(blood collection expert in tainted transfusion case held unqualified) and *Leitch v. Hornsby*, 935 S.W.2d 114 (Tex. 1996)(testimony of co-worker that use of lifting equipment would have prevented plaintiff's injury held incompetent because witness was not qualified to testify about what type of lifting devices might have prevented plaintiff's injury). The Fourteenth Court of Appeals recently followed *Broders* in *Houghton v. Port Terminal Railroad Association*, 999 S.W.2d, 39 (Tex. App. – Houston [14th Dist,] 1999)(general experience of railroad engineer does not qualify him as an expert on the causal relationship between flat spots on the brakes and the rough coupling of railroad cars, where proponent failed to show a valid connection between the expert's experience and training and the pertinent issues in the case).

I. The Appellate Standard of No Evidence With Respect to Expert Testimony

Of course, the *Daubert* issues are not limited to trial. The issues of relevance and reliability also impact the appellate review of sufficiency of the evidence supporting a finding by the trier of fact. Expert opinion which is not reliable is the legal equivalent of no evidence. *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 711-713 (Tex. 1997). In addition, the *Havner* court held that opinion testimony on a question of mixed law and fact given without reference to proper legal concepts is the equivalent of no evidence. *Id.* Therefore, because incompetent opinion testimony is not evidence, a finding supported only by such testimony cannot survive a no evidence challenge. *Id.*

Rule 702 offers substantive guidelines for determining if the expert testimony is some evidence of probative value. *Id. at 712.* In explaining the application of reliability standards to the no evidence standard of review, the Court in *Havner* wrote:

> It could be argued that looking beyond the testimony to determine the reliability of scientific evidence is incompatible with our no evidence standard of review. If a reviewing court is to consider the evidence in the light most favorable to the verdict, the argument runs, a court should not look beyond the expert's testimony to determine if it is reliable. But such an argument is too simplistic. It reduces the no evidence standard of review to a meaningless exercise of looking to see only what words appear in the transcript of the testimony, not whether there is in fact some evidence. We have rejected such an approach ... [t]he threshold determination of reliability does not run afoul of our no evidence standard of review. *Id.*
>
> * * *

Moreover, while the admissibility rather than sufficiency of the evidence was the focus of the Supreme Court's decision in *Daubert*, that Court nevertheless explained that when "wholesale exclusion" is inappropriate and the evidence is admitted, a review of its sufficiency is not foreclosed:

> [I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment ... and likewise to grant summary judgment.

Havner, 953 S.W.2d 711-713; *see also Schaefer,* 612 S.W.2d at 205 (noting that to accept the expert's opinion as some evidence "simply because he used the magic words" would effectively remove the jurisdiction of the appellate courts to determine the legal sufficiency of the evidence in any case requiring expert testimony).

J. Objections to Arguably Unreliable Expert Testimony

1. Texas State Law

In *Maritime Overseas Corporation v. Ellis*, 971 S.W.2d 402 (Tex. 1998), a majority of the court held that

a party must object to preserve a complaint that expert evidence is legally insufficient. In a well-known dissent, however, Justices Hecht and Phillips argued that in other cases, the Texas Supreme Court had previously held that evidence admitted without objection lacked probative value. *Id*. at 415 (Hecht, J., dissenting).

The majority in *Ellis* observed that, under *Havner*, a party may complain on appeal that scientific evidence is unreliable and thus, no evidence to support a judgment. *Id. at 409. Havner* recognizes that a no evidence complaint may be sustained when the record shows one of the following: (a) a complete absence of a vital fact; (b) the reviewing court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Id*.

The guiding principle that came out of *Ellis* was this: to preserve a complaint that scientific evidence is unreliable and thus, no evidence a party must object to the evidence before trial or when the evidence is offered. *Id.* at 409. The *Ellis* court reasoned that a timely objection to the reliability of scientific evidence is required to afford the offering party the opportunity to cure any defect that may exist and to avoid trial and appeal by ambush. *Id*.

The Texas Supreme Court again addressed this issue in a unanimous opinion in *General Motors Corporation v. Sanchez*, 997 S.W.2d 584 (Tex. 1999). *Sanchez*, a product liability case, involved allegations that a truck transmission placed in neutral slipped into reverse after the driver exited, pinning the driver against a gate. The driver suffered a deep laceration trying to free himself from between the truck and the gate and he bled to death. *Id.*

The court, referring to its opinion in *Ellis*, held that allowing a *Robinson* challenge when G.M. did not object at all in the trial court to the reliability of the expert evidence would "deny [the plaintiffs'] expert the opportunity to pass muster in the first instance and usurp the trial court's discretion as gatekeeper." *Id*.

2. Federal Courts

In federal court, a failure to object likely waives any error. In *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168 (5th Cir. 1997), the Fifth Circuit found that the error was waived, finding that the objections went to the admissibility of the testimony, and that the failure to object precluded the court from ignoring the evidence in determining whether a sufficient basis existed for the jury's decision. "Had the defendants objected to the admissibility of the evidence, their case would be strong." *Id*. at 177. Nevertheless, the court determined that a jury verdict could not be based on erroneous evidence and remanded the case for further proceedings. *Id.*

K. *Daubert* Extended Beyond Scientific Testimony

The United States Supreme Court's decision in *Daubert* was handed down as an indictment of junk science. Since *Daubert*, many practitioners and commentators have wondered whether the *Daubert* standards of relevance and reliability applied only to cases involving scientific evidence, or whether they applied to all types of expert evidence under Rule 702.

The United States Supreme Court answered this question for the federal courts in *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 1175 (1999), a product liability suit involving allegations of defective design or manufacturer of an automobile tire. After the district court granted summary judgment for the manufacturer after excluding the testimony of the plaintiff's expert, the Eleventh Circuit Court of Appeals reversed, holding that the district court had erred as a matter of law in applying *Daubert* to the expert's testimony. *Id.*

In reversing the Court of Appeals, the Supreme Court held that *Daubert* was not limited to scientific evidence and applied it to all Rule 702 testimony. *Id.* Writing for the majority, Justice Breyer said:

> This case requires us to decided how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert's* general holding–setting forth the trial judge's general gatekeeping obligation–applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. *Id. at 1171*.

He added that the court "may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine the testimony's reliability." *Id*.

In imposing the requirement that all expert opinion testimony pass the threshold of relevance and reliability, the Court said:

> We conclude that *Daubert's* general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, "establishes a standard of evidentiary reliability" . . . [I]t "requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility." And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of the relevant discipline [citations omitted]."

The high Court reiterated the principle that the *Daubert* analysis is intended to be a flexible inquiry, with no single factor considered dispositive:

> But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.

Id., *citing General Electric Company v. Joiner*, 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

IV. PROCEDURAL ISSUES TO CONSIDER REGARDING *DAUBERT* CHALLENGES

In addition to the substantive challenges created by *Daubert* and its progeny, there are a number of developing procedural issues, some of which are addressed below. Unfortunately, because neither the United States Supreme Court or the Texas Supreme Court has set forth a procedure for challenging the expert, there are some unanswered questions that require trial counsel to exercise good judgment.

A. Timing of *Daubert/Robinson* Challenge

One of the key procedural issues regarding *Daubert* and *Robinson* challenges is the timing of those challenges, yet there is little agreement nationwide on this topic. In Texas, a *Daubert/Robinson* challenge is timely if raised before trial or during trial. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402 (Tex. 1988)(to preserve a complaint that scientific evidence is unreliable, and thus constitutes no evidence, party must object to evidence before trial or when evidence is offered).

Nevertheless, trial courts are using a number of different procedures for the timing of *Daubert* challenges. Through the use of scheduling orders, some courts are requiring the challenges to be made long before trial. Some even explicitly state that a late filing is deemed a waiver of a *Robinson* objection. The advantage of requiring early challenges to experts is that it permits the party whose expert may be stricken an opportunity to cure the objection or hire an new expert.

Regardless of the timing, the Texas Supreme Court has labeled such a challenge a "*Daubert/Robinson*– type hearing." *Maritime Overseas*, 971 S.W.2d at 411. Justice Hecht observed that the Court has not explained what this hearing "...is, how it is invoked, when it is to be commenced relative to the commencement of trial, and whether it is required." *Id*. at 423. The motion is typically called a "motion to strike" or "motion to exclude" if it is raised in advance of trial and a motion in limine if raised at the commencement of trial.

A problem with all of these approaches is determining whether it is necessary to regarding-tender the evidence during trial. If the court does not actually "strike" the expert but instead "limits" the expert by way of a motion in limine, the traditional rule would require the evidence to be regarding-tendered during trial, and a failure to offer such evidence during the trial would constitute a waiver of any error.

1. Different Procedures Used By Trial Courts

Some courts require the challenge to be made long before the trial. The advantage (some would say disadvantage) to this procedure is that it allows a party whose expert is struck the opportunity to cure by hiring a new expert.

Many of the courts that use this procedure require the motion to be filed no later than a certain number of days before trial and may even explicitly state that a late filing will be deemed a waiver of *Robinson* objection. *See Maritime Overseas*, 971 S.W.2d 402 (Tex. 1998) (Gonzalez, J. concurring). Usually these courts permit parties to file the motion earlier if desired.

Some courts enter scheduling orders requiring that the motion be "filed and heard" no later than a certain number of days before trial. Because hearing dates are determined by the Court based on its availability and not by trial counsel, such a requirement

necessitates that trial counsel file any such motions long before the Court's deadline.

If a party has hired an expert who they believe may be the subject of a *Robinson* challenge, the issue may be presented by challenging the other side's expert, which will normally result in a counter-motion to strike.

Some courts prefer to hear the *Daubert/Robinson* motion during a motion in limine. As mentioned above, one potential problem here is that a jury has sometimes already been ordered before the hearing on the motion in limine begins so a court lacks the time to review properly and fully the motion before the start of trial. On the other hand, the case is at its most ripe and the court may have a better understanding of the case at that time.

Other courts require the motion to be heard no later than shortly before trial. The advantage to this procedure is that all the discovery will have been conducted so the court will have all the necessary information to make a ruling. Additionally, the court avoids an "advisory ruling" which allows a party a second opportunity to locate a new expert. Deferring the matter until shortly before trial may avoid a prolonged Rule 104(a) hearing since most cases settle before such a motion would be heard. Requiring the motion before trial avoids making jurors wait out in the hallway or making a quick decision without adequate reflection and/or research.

Finally, some courts prefer to hear the motion during trial. This ensures that the court will have the best understanding of the case, and therefore the best comprehension of the significance of the testimony. This approach also avoids the unnecessary hearings because of settlements. It also adds the additional element of risk that may increase the likelihood of settlement in some cases. Lastly, it helps minimize the expense of bringing experts to the court twice– once for the hearing and once for trial.

This type of approach carries some disadvantages. In addition to the disadvantages of making jurors wait (which some judges minimize by late night hearings or reviewing the evidence such as depositions, affidavits and articles during the trial), challenges in the middle of trial inflict a twofold prejudice to a party whose expert is stuck - not only does the party lose the expert, the attorney also potentially loses credibility with the jury because the expert has been promised or referred to during voir dire or opening statement.

This procedure also creates problems when a deposition from an expert is used at trial. If the attorney did not anticipate a *Daubert* objection or issues of concern to the trial judge, it will be difficult to address these issues without the witness testifying live at trial. Conceivably the objection could be cured by an affidavit or by testimony from the expert over the telephone, but time makes these remedies impractical.

In conclusion, because approaches to this issue in Texas are so varied, trial lawyers are wise to know well the court's scheduling order to determine whether there is a deadline for raising *Daubert* challenges.

B. Evidentiary Hearings: Required or Not?

The question of whether a court must hold an evidentiary hearing is also unclear. *Daubert* seems to indicate "yes." See *Daubert* 609 U.S. at 566; *compare Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1124 (9th Cir. 1994)(court not required to hold evidentiary hearing.). If a request for a hearing is denied, the requesting party should submit the evidence in affidavits or other forms of evidence. *See United States v. Call*, 129 F.3d 1402 (10th Cir. 1997). In *Call*, the court held that *Daubert* does not require an evidentiary hearing on admissibility of evidence but the appellate court must have a "sufficiently developed record" in order to allow a determination of whether the district court applied the correct law.

The analysis outlined in *Daubert* is extensive, requiring the district court to carefully and meticulously review the proffered scientific evidence." *Id.* at 1405, *quoting Robinson v. Missouri Pacific*, 16 F.3d 1083, 1089 (10th Cir. 1994). The court further indicated that the district court should liberally allow parties to present materials during a Rule 104a hearing and should make specific fact findings.

C. Affidavits

Short of an evidentiary hearing, the question then arises as to whether affidavits are admissible during a hearing on an expert challenge. Moreover, can a party submit articles and journals without laying a foundation that the "evidence" was relied upon by the expert? A party should be able to submit affidavits, articles or any other support for an expert opinion since Rule 104(a) states that a court is not bound by the rules of evidence in determining the admissibility of the evidence.

It is important for practitioners to distinguish between support for the reliability of the expert's

methodology from support for the reliability of the basis of the opinion. Any evidence offered to support the reliability of the basis of the opinion should be relied upon by the expert as a basis for the opinion. If an article or affidavit is offered not to support the basis for the expert's opinion but the methodology used by the expert, it is necessary for the expert to have relied on the article.

D. Tenders of Evidence

Next, consider whether an attorney must tender evidence of the expert's testimony during the trial if the court has struck the expert before trial. If the court merely grants a motion in limine, the expert evidence must be regarding-tendered during trial. A court might change a ruling after hearing all the evidence in the case, some of which might buttress a claim of reliability. Additionally, new evidence could be presented at that time.

E. Court-Appointed Experts

Yet another procedural question is whether a court can appoint an expert to advise the court on the scientific or technical matters

1. Federal Court

The answer appears to be "Yes." Fed. R. Evid. 706. *See also Daubert*, 509 U.S. at 595; *Joiner*, 522 U.S. at 136, 118 S.Ct. at 521 (Breyer, J., concurring); *In re Joint Eastern & Southern Dists. Asbestos Litig.*, 151 F.R.D. 540 (E.&S.D. N.Y. 1993). "The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned." R. 706 advisory committee's note. *Cf. Hall v. Baxter Healthcare Corp.* 947 F.Supp. 1387, 1392 (D. Or. 1996) (court "invoked [the] inherent authority as a federal district judge to appoint independent advisors to the court"); Strong, McCormick on Evidence §17 at 70-71 (the judge's power to appoint an expert is "well recognized").

2. State Court

The answer is unclear. Texas does not have a counterpart to the federal rule, but such an appointment is probably part of a court's inherent authority. Justice Gonzalez, without citing any specific authority under the state rules, has suggested that trial courts may "appoint a panel of specially trained scientists or a special master to hear evidence and report on complicated scientific and statistical matters," with the expert fees assessed as court costs. *Maritime Overseas*, 41 Tex. S.Ct.J. at 693.

F. The Appellate Standard of Review For *Daubert/Robinson* Decisions

1. Federal courts

In *General Electric v. Joiner*, 522 U.S.136, 118 S.Ct. 512 (1997), the Supreme Court held that the trial court's exclusion may not be second-guessed by an appellate court unless it rises to an abuse of discretion.

2. Texas

In Texas, the standard of review is also abuse of discretion. *North Dallas Diagnostic Center v. Dewberry*, 900 S.W.2d 90, 93 (Tex. App. -- Dallas 1995, writ denied). The test for determining whether the trial court abused its discretion is whether the trial acted without reference to any guiding rules and principles. *Id.; Robinson*, 923 S.W.2d at 558; *Longoria*, 938 S.W.2d at 31. An appellate court cannot conclude that an abuse of discretion occurred merely because it would have ruled differently. *Robinson*, 923 S.W.2d at 558; *Purina*, 948 S.W.2d at 932.

V. SPECIAL CONSIDERATIONS IN COVERAGE AND BAD FAITH CASES

A. Overview

Within the context of coverage and bad faith claims, expert testimony can often assist the insurer in defending against insureds' cause of action. Expert testimony provides valuable assistance in the following areas:

- providing analysis prior to and during coverage determination;
- analysis and interpretation of policy provisions pertaining to the investigation and denial of claims; and
- providing analysis of issues regarding reasonableness of denial of claims.

B. How Early Should an Expert Be Retained?

1. Early Retention

In *Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566 (Tex. 1990) the Texas Supreme Court held that whether an insurer has a reasonable basis for the denial of a claim must be judged by the facts before the insurer at the time the claim was denied. *See Viles*, 788 S.W.2d

at 567. Therefore, it is important for the insurer's retained expert to have access to and an understanding of all facts known at the time a determination to deny the claim is made. To facilitate this understanding, it is important that the expert be retained as early as possible, perhaps even before the lawsuit is actually filed. Provided that the retained expert's analysis complies with the requirements of *Daubert/Robinson*, the retained expert's opinions regarding a coverage dispute that are made prior to a decision to deny coverage may prove critical to the insurer's defense of subsequent bad faith litigation.

2. Discovery Considerations

One potential disadvantage to this approach arises in the context of discovery. The retained testifying expert's knowledge and opinions are discoverable to the extent they are learned through involvement in the case. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 555 (Tex. 1990).

One obvious exception to this general rule is the attorney-client privilege. Individuals who analyze coverage issues are often licensed attorneys. However, it is still important that the licensed attorney be well-qualified on the particular issue under review. Trial counsel seeking to use the attorney-client privilege to shield a testifying expert's opinions from discovery by retaining a licensed attorney will not be able to escape the qualification requirements of Rule 702 and *Daubert/Robinson*. *See Prellwitz v. Cromwell, Truemper, Levy, Parker and Woodsmale, Inc.*, 802 S.W.2d 316 (Tex. App. – Dallas 1990).

C. Analysis of Policy Construction

1. Overview

Texas courts have long held that interpretation of language in contracts and insurance policies is a province of the court. *See Texas Lloyds v. Laird*, 209 S.W.2d 937, 940 (Ct. Civ. App. – Galveston 1948). Courts have held that "coverage afforded by an insurance policy is not an area subject to interpretation by expert witnesses." *Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 829 (Tex. App. – Dallas 1992).

2. Expert Testimony May Be Applicable

Nevertheless, some Texas courts have held that expert testimony may be used to interpret policy provisions in a dispute over the denial of a claim. In *Mescalero Energy, Inc. v. Underwriters Indemnity General Agency, Inc.*, 56 S.W.3d 313 (Tex. App. – Houston [1st] 2001), the court held that expert testimony may be used to establish the reasonable definition of an industry term. *See id.* at 323. Reasoning that courts have in the past used expert definitions to determine the meaning of specialized terms in a policy, the court found that the affidavit of an expert would be admissible as evidence of the commonly understood meaning of a term. *See id.* at 324.

Reconciling the Dallas court's decision in *Cleutt* with the Houston court's decision in *Mescalero*, it is clear expert testimony may not be used to determine the ultimate question of coverage under a particular policy. However, expert testimony may be used to assist the court in determining the commonly understood meaning of policy terms underlying the coverage dispute. Thus retaining an expert witness to construe policy terms is beneficial both in interpreting the commonly understood meaning of terms as well as establishing a consistent application of such terms throughout different policies.

D. Reasonableness of Denial of Claims

In *Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997) an insured brought an action against a health insurer for bad faith denial of a claim for heart surgery. In upholding the jury verdict for the insured, the Texas Supreme Court reaffirmed that an insurer breaches its duty of good faith and fair dealing when the insurer has no reasonable basis for denying or delaying payment of a claim, and the insurer knew or should have known that fact. *See id.* at 50.

Because this standard relies heavily on a "reasonable basis" for denial of a claim, it is important for the insureds that their retained expert reach a conclusion on the appropriateness of insurer's denial of coverage based on an objective analysis of the parties' competing positions. An expert report that ignores the insurer's basis for denial of the claim is susceptible to challenge. The insurer's expert should be thoroughly familiar with the insurer's basis for denial of coverage as well as the insured's position that the claim should be covered. When applicable, the insurer's expert should be prepared to demonstrate that the opposing expert's opinions are inherently unreliable because they fail to address (much less refute) the reasonable basis that existed for denial of coverage.

VI. *DAUBERT/ROBINSON* CHECKLIST

A. Pre-Trial

1. Proceed in preparing your case as if *Daubert/Robinson* will apply to all forms of expert testimony.

2. Review all the *Daubert/Robinson* factors and any suggested other factors given by the courts and commentators with respect to each expert, both those retained by you and those retained by your opposition.

a. Sometimes all the factors are not applicable, but that very point has helped some courts determine that the testimony is not admissible.

b. If a particular factor is not applicable and you are offering the testimony, your expert should explain the reasons it is inapplicable.

3. Review all factors that courts have adopted for determining reliability of expert testimony.

a. One factor is qualifications. Identify the fields that an expert has testified in. The more fields, the more the expert can appear to be a hired gun.

b. One factor is the timing of the opinion. Make sure that your expert does not form an opinion and then try to prove it. Instead, the expert must in fact and in appearance form his or her opinions only after completing the necessary research.

c. Ask your expert to identify the methods used by others in the field to form opinions.

d. Scrutinize causation opinions that are "...based on a temporal relationship between [the defendant's conduct] and an adverse effect, without ruling out the possibility of coincidence." Baker, 27 ST. MARY'S L.J. 237, 290 (1996). *See also Albritton v. Union Pump Co.*, 898 S.W.2d 773, 775-76 (Tex. 1995) (circumstances were too remotely connected as to constitute legal cause).

4. Review literature in the field on the proper methodology.

5. "[C]ourts are inclined to view expert testimony as unreliable if the expert ... cannot recount a careful investigative process." Baker, 27 ST. MARY'S L.J. at 269.

6. "[C]ourts are unwilling to accept an expert's assurance that the expert's methodology is appropriate without independent supporting documentation." *Id.* at 270.

7. For experts in areas of specialized knowledge who are qualified based on experience, the expert should be able to provide specific factual support of their experiences rather than general, vague conclusions.

8. Review the expert's qualifications on an opinion by opinion basis.

9. Research how courts have ruled on your particular expert and/or the expert's field of study.

10. Review the expert's assumptions for consistency with the actual facts.

11. Qualify your expert in his deposition, and establish the admissibility of any supporting exhibits at the deposition.

12. If you are deposing the opposing expert, consider asking no or very limited questions on qualifications.

13. If the court has not set a *Daubert/Robinson* objection cut-off date, ask your own expert *Daubert/Robinson* questions on reliability at the expert's deposition or at a minimum prepare an affidavit in advance of trial to use if an objection is raised.

14. Review applicable ethical codes and guidelines published by professional organizations. It has recently been suggested that "when an ethical violation is one that would raise questions as to the objectivity, impartiality, or reliability of the proffered testimony, then that violation should result in a presumption in favor of exclusion of that testimony." Daniel W. Shuman & Stuart A. Greenberg, *The Role of Ethical Norms in the Admissibility of Expert Testimony*, 37 JUDGES J. 4, 6 (1998).

15. Ask your expert, better yet, a consulting expert, to test your opposing expert's theories. If the tests disprove the theory, the test can be used in a *Daubert* hearing. *See Williamson v. General Motors Corp.*, 23 Prod. Safety 53; *Stanczyk v.*

Black & Decker, Inc., 836 F.Supp. 566, 567 (N.D. III 1993).

B. Pre-Trial Conferences and Rulings

1. Request a Rule 166 pretrial conference and request that the court impose deadlines for raising objections to experts and exhibits. List your expert's report as an exhibit (even though it is hearsay) to flesh out whether a *Daubert/Robinson* objection will be raised.

2. If a *Daubert/Robinson* objection is raised, ask the court to rule on the issue before trial to save the jurors' time and to give the court adequate time for reflection on the complicated issues. The hearing should be very early if you can schedule it (so you can replace the expert or fix any problem) or very late (so the court will not feel as if it is rendering an advisory ruling).

3. If you believe strongly in your expert's methodology, consider asking the court to appoint its own expert. Even if the court declines, the request itself is a strong indicator to the court of the strength of your position.

C. *Daubert/Robinson* hearings:

1. Support your expert by providing the court with supportive evidence.

a. Provide affidavits from non-testifying experts to support the methodology and conclusions of the expert.

b. Provide the court with research in the field, even if it is not used by the expert, that corroborates the expert's testimony and methodology.

c. If the expert relies on articles or studies, provide them to the court instead of just having the expert refer to them.

2. Bring your expert to the hearing. If it's too expensive, ask the court for leave for the expert to appear by telephone, if for no other purpose than to answer any questions from the judge. It's often too late to do this at the hearing itself, so raise this issue at a pretrial conference.

3. Consider bringing a separate expert for the limited purpose of supporting your expert.

4. Consider bringing an expert for the limited purpose of criticizing the other side's expert.

5. Keep the time that it takes to present your evidence short and be creative and interesting. Remember you are not bound by the rules of evidence; use charts, summaries, articles, affidavits, etc.

D. Trial

1. Object that this is not a proper subject for expert testimony - does not aid the jury.

2. Object to the expert under Rule 702 and *Daubert/Robinson*.

3. Object under Rule 403.

4. Object to the expert's opinions; consider requesting a running objection. If denied, make sparse but critical objections for new areas of testimony.

5. If you present an opposing expert who may have some of the same difficulties in passing *Daubert/Robinson*, make it clear on the record that you are doing so despite your objection to the opposing expert. See *Russell v. Ramirez*, 949 S.W.2d 480, 488 (Tex. App. -- Houston [14th Dist] 1997, no writ) ("A party on appeal should not be heard to complain of the admission of improper evidence offered by the other side, when he, himself, introduced the same evidence or evidence of a similar character."), *quoting McInnes v. Yamaha Motors Corp.*, 673 S.W.2d 185, 188 (Tex. 1984).

6. If you want to provide support for the expert's opinion or methodology for appeal, but do not want to bore the jury with unnecessary detail, ask the court for leave to submit information to the court only for a Rule 104(a) determination.

7. Make "no evidence" objections at the close of Plaintiff's case and specifically argue *Daubert/Robinson*.

8. Make "no evidence" objections during the charge conference.

9. Ask questions tied to issue of whether the expert's testimony will aid the jury.

E. Formulate Specific Questions

Some examples of topic areas for questions to challenge an expert under *Daubert/Robinson* include:

- What theory / technique / methodology did you use?
- Is this the same theory / technique / methodology that you use outside the courtroom?
- Is this theory / technique / methodology used in other areas?
- How long have you used this theory / technique / methodology (before hired in case)?
- Did you test your theory / technique / methodology? How often?
- Did you keep records of your tests?
- Describe tests.
- Did you use the same method for testing each time tested?
- Is there a way to check your tests? If so, was it done?
- Does your theory-technique-methodology require subjective interpretation of data?
- Have you published theory-technique-methodology?
- Has anyone else?
- Peer reviewed journal?
- Has your theory-technique-methodology been criticized in the community?
- Does your theory-technique- methodology have a rate of error?
- How was it determined?
- Is your theory-technique-methodology generally accepted by the scientific community?
- By majority? By consensus?
- What groups and organizations?
- By any particular individuals recognized as authoritative in field?
- For how long accepted?

Because *Daubert* and *Robinson* will continue to generate battles between the experts that will now take place on two, and even three, different arenas (before the trial judge in determining admissibility, before the jury in determining the jury verdict, and before the appellate courts in reviewing the trial court's decisions), practitioners should keep these potential audiences in mind when they hire experts and present them at trial.

Originally many thought these battles would be waged almost exclusively by defense attorneys challenging the plaintiff's experts. Experience has shown, however, that cross-motions by plaintiffs frequently are filed in response to motions by defendants and that many plaintiff's lawyers are raising the issue even without a defense objection. The increase in the number of motions shows that attorneys will need to keep abreast of *Daubert/Robinson* developments, including developments outside Texas, concerning particular types of experts.