USE OF EXPERTS IN COVERAGE

AND BAD FAITH LITIGATION

Nisha Byers
Fred Shuchart
Shareholders
Cooper & Scully, P.C.
900 Jackson Street
Suite 100
Dallas, Texas 75202
(214) 712-9500
(214) 712-9540 *fax*
nisha.byers@cooperscully.com
fred.shuchart@cooperscully.com

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I. INTRODUCTION

Expert witnesses can play a significant role in coverage and bad faith litigation because such cases usually involve complex disputes. Both plaintiffs and defendants generally rely heavily on the expert witness in bad faith litigation to analyze the basis upon which the carriers deny or delay payment of a claim. Experts in the insurance industry allow the jury or court to benefit from their knowledge, skill, experience, training and education that a common juror may not possess. This is especially true with respect to the historical nature of the insurance industry.

This article provides a general overview of the evidentiary rules governing the admissibility of an expert's opinion testimony. The primary focus will be on the use of expert testimony in coverage and bad faith litigation, as well as the obstacles that a party may face in presenting expert testimony. While the rules of evidenced have been litigated in a variety of context, this article will present only the benefit of judicial interpretation in the context of insurance matters.

II. WHEN ARE EXPERTS APPROPRIATE UNDER RULES OF CIVIL EVIDENCE

The Rules of Evidence govern the admissibility of testimony by experts. Texas Rule of Evidence 702 determines the appropriateness of expert testimony and reads as follows:

> **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.**

Tex. R. Evid. 702; see also Fed. R. Evid. 702. Thus, there are two preliminary thresholds to warrant the admissibility of expert testimony:

First, the expert's testimony must be such that it will assist the trier of fact in understanding the evidence or determining a fact in issue and

Second, the witness must qualify as an expert in order to opine as one. The witness must be qualified by knowledge, skill, experience, training, or education.

III. QUALIFICATIONS

The types of experts to be used in insurance litigation are limited only by the skill and qualifications of the testifying expert. The success of a case could depend highly on the expert's ability to explain the relevant facts as they relate to the party's theory of causation, especially in a case where the facts support each party's arguments. A well qualified, presentable expert witness can be a potent weapon and provides a basis for retaining expert assistance early in the litigation.

Texas Rule of Evidence 702 provides that the witness may qualify as an expert by "knowledge, skill, experience, training or education." Under the Federal Rule of Evidence 702, an expert witness must be qualified by the same factors. An early draft of Texas Rule of Evidence 702 required "special" knowledge, but the word "special" was deleted as too restrictive. In order to qualify as an expert, the witness must present specialized knowledge and understanding that will assist the trier of fact. This knowledge, skill or expertise is of a type not possessed by people generally. *Hardware Mut. Cas. Co. v. Wesbrooks*, 511 S.W.2d 406 (Tex. App.--Amarillo 1974, no writ). The rules of evidence do not limit or define minimum standards to qualify as a witness. Instead, the rules acknowledge the sources of expertise.

In order for an expert's testimony to be competent, it must be shown that the expert is trained in the science of which he testifies or has knowledge of the subject matter of the issues in question. *Missouri-Pac. Ry. Co. v. Buenrostro*, 853 S.W.2d 66, 77 (Tex. App.--San Antonio 1993, writ denied). Many professions require formal education and training. However, there are no definitive guidelines for determining the knowledge, skill, education or experience required of a particular witness when testifying as an expert. Instead, the determination of whether a particular witness is qualified to testify as an expert is a matter of judicial discretion. The party offering expert testimony must at least show that the expert possesses "a higher degree of knowledge than an ordinary person or a trier of fact." The party offering an expert witness has the burden of establishing his qualifications; however, a failure to object to an expert's qualifications waives any complaint on that basis.

Courts possess judicial discretion in excluding testimony of persons not qualified as experts. One example involving insurance policy language is *Royal Indem. Co. v. Senterfitt*, 474 S.W.2d 941, 945 (Tex.

Civ. App.--Austin 1971, no writ), where the court refused to allow testimony from a service advisor and a business manager for Bob Miller Volkswagen on the meaning of the clause "full coverage collision protection" as contained in a vehicle rental contract which was a collateral issue to the issue of liability insurance coverage. Nor would the court allow testimony from the business manager on the difference between a rented and a leased vehicle that was intended to explain the insurance company's use of the term "leased cars" versus the term "rented cars." The business manager testified that he was not familiar with the insurance policies and the endorsements and the court therefore held that he was not qualified to render an opinion as to the definition of terms found in the policies.

An expert may have the knowledge, skill and experience required to qualify as such, but may not have experience necessary to testify before a jury. For example, academic professionals often make good experts because they are articulate and accustomed to a teaching method of speaking. Such method can be useful to simplify the facts in assisting the jury to better understand the case. On the other hand, witnesses with advanced knowledge and experience that have had little opportunities to share their skills may not appear as authoritative.

Remember, the jury is free to judge the credibility of each witness, including expert witnesses. The mere qualification of a witness as an expert does not preclude the fact finder from exercising judgment in reliance on opinion testimony. *Novosad v. Mid-Century Ins. Co.*, 881 S.W.2d 546, 560 (Tex. App.--San Antonio 1994, no writ); *American Motorist Ins. Co. v. Volentine*, 867 S.W.2d 170, 174 (Tex. App.--Beaumont 1993, no writ); *Service Lloyds Ins. Co. v. Martin*, 855 S.W.2d 816, 822 (Tex. App.--Dallas 1993, no writ). The jury may take into account the witness' skill and experience, along with his manner and attitude in testifying. *State Reserve Life Ins. Co. v. Ives*, 535 S.W.2d 400, 405 (Tex. Civ. App.--Fort Worth 1976, no writ).

No matter the ability to testify, the subject of an expert's testimony may be enough to obtain success. In the unlikely event that expert testimony is uncontroverted, such testimony may be regarded as conclusive if the nature of the subject matter requires the jury to be guided solely by expert opinions and the evidence is otherwise credible and free from contradictions and inconsistency.

Professional experts, those who are hired frequently to testify, may hinder the effectiveness of the expert's testimony. Opposing counsel may examine these experts' prior depositions for contradictory positions. Often, attorneys use cross-examination as a means to impeach the expert's background, not just the expert's testimony, and attempt to show the jury that the expert is biased and thus lacks credibility.

A. Insurance Professionals as Experts

Generally, a witness who is to give an expert opinion about the standard of care within a profession which requires licensing must be licensed in that same profession. Certainly, if the field of the expert overlaps with the standard of care in question, an unlicensed witness may be allowed to act as expert if there is enough similarity in the two fields. See *Ponder v. Texarkana Mem. Hosp.*, 840 S.W.2d 476 (Tex. App.--Houston [14th Dist.] 1991, writ denied)(neuroscience expert was qualified to testify in medical malpractice action as to cause of infant's brain damage); There may be limitations as to the type of testimony a non-licensed expert can present. For example, courts have held that non-licensed experts or experts not immediately practicing in the field in question should not be allowed to testify concerning the standard of care applicable to that particular profession.

Insurance experts are usually persons in the insurance industry, such as underwriters, claims handlers, brokers, regulators and attorneys, who have extensive knowledge with regard to the historical and current customs of the insurance industry. The allegations of bad faith are generally based on alleged inappropriate and unreasonable behavior on the part of a claims-handler, either in the investigation of the claim or in making the final coverage decision. In such a case, both sides may offer experts to testify as to the reasonableness of the claims-handler's conduct. Licensed claims adjusters are perfect for the role of expert in bad faith litigation because the expert can opine as to the reasonableness of another claims adjuster's conduct according to the ordinarily accepted standards in the industry.

Licensed insurance adjusters usually qualify as experts in bad faith litigation. Adjusters have specialized knowledge, education, experience and skill in the practice of adjusting claims that an ordinary person would not possess and can opine on the appropriate standard of care applicable to the insurance industry. To avoid the attack on the credibility of an adjuster, the insurance company should pay special

attention to those adjusters hired to act as experts. The credibility of an expert can be attacked on the basis of the relationship the expert has with the insurance company. For example, if the insurance company has used one particular adjuster on numerous occasions as an expert in bad faith litigation and the insurance company is aware of the expert's predisposition to favor insurance companies, though contrary evidence demonstrates a violation of the standard of care, the claimant can easily attack the insurer's reasonable basis defense in reliance upon the predisposed expert.

Further problems arise with the use of claims adjusters as experts, unless they have a broad range of experience handling claims for more than one company within the industry. Otherwise, it is difficult to show that the witness has sufficient knowledge, skill and experience to render opinions on the whole insurance industry's standard of practice as opposed to one insurance company's practices.

Insurance adjusters should be careful not to offer testimony about matters outside their realm of experience and knowledge. In *Peavy Co. v. M/V ANPA*, 971 F.2d 1168 (5th Cir. 1992) the Fifth Circuit held that Zurich's claims manager was not qualified to testify on whether Zurich was prejudiced by the absence of a electrical engineering expert due to the insured's late notice of the occurrence and the potential claims. The court held that the claims manager's skill, knowledge and experience in adjusting claims does not include skills necessary to opine as an expert regarding electrical matters.

Underwriters also serve well in the role of expert in coverage litigation. Such experts can assist the trier of fact by presenting the historical nature of underwriting specific risks, as well as historical insight into the interpretation and intent of specific policy provisions. For instance, the insurance expert would testify as to the historical understanding of the term "occurrence," emphasizing that insurance is only intended to cover fortuitous acts. Furthermore, the testimony of insurance experts may be used to ensure that the interpretation of specific policy provisions is consistent with the expectations of the industry, which may conflict with court interpretations, either limiting or expanding the language of an insurance contract beyond that which the original drafters intended.

B. Attorneys as Experts

A lawyer can testify as an expert in a lawsuit involving insurance matters where the lawyer has specialized knowledge, familiarity and practical experience with the insurance industry and standards. It is especially helpful if the attorney has very specific knowledge with regard to historical customs of the industry. Attorneys usually have the perfect qualifications to act as experts when it comes to convincing a jury given the attorney's advocacy skills and experience. Furthermore, attorneys are often skilled in eloquent articulation of matters involving complex facts and circumstances.

Attorneys serve well as experts in bad faith litigation involving mixed questions of law and fact. As attorneys, these types of experts are required to know the standard of care in the insurance profession. Attorneys particularly serve well in taking a given set of facts and applying those facts to the appropriate standard of care to form the basis of an expert opinion.

Despite an attorney's skill, his role as an expert may present certain problems. For example, an attorney, acting as expert, is most comfortable in the role of advocate and may act somewhat overzealous in presenting his testimony, which could damage his own credibility.

Attorneys acting as experts in insurance litigation can assist the trier of fact in understanding the evolution of particular case law with respect to judicial construction of particular policy provisions. However, problems may arise when the attorneys attempt to offer opinions which contain legal conclusions. Again, the attorney is more likely to err on the side of promoting legal conclusions due to the attorney's training and experience of an adversary nature.

IV. CONTENT OF TESTIMONY

A. Ultimate Fact Issues

Texas Rule of Evidence 704 provides that opinion testimony is not objectionable simply because it addresses an ultimate fact issue. Rule 704 provides:

> **Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.**

Expert testimony should be admitted only when it will aid the jury in making inferences regarding the fact issues more effectively. Tex. R. Evid. 702. When the jury is equally competent to form an opinion regarding

ultimate fact issues, the expert's testimony as to those issues may be excluded.

The ultimate fact issue always prevalent in a bad faith lawsuit is whether the insurance company had a reasonable basis to delay payment or deny a claim. Whether there is a reasonable basis for denial must be judged by the facts before the insurance company at the time it handled the claim. *Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990); *Ramirez v. Transcontinental Ins. Co.*, 881 S.W.2d 818, 822 (Tex. App.--Houston [14th Dist.] 1994, writ denied); *State Farm Lloyds Ins. v. Polasek*, 847 S.W.2d 279, 287 (Tex. App.--San Antonio 1992, writ denied). Thus, an expert opining on the reasonableness of the insurer's denial or delay must review only the facts known to the insurer at the time of denial or delay.

An insurance carrier has a right to present expert testimony that the carrier relied upon as its basis for denying or delaying payment. In *State Farm Lloyds v. Mower*, 876 S.W.2d 914, 921 (Tex. App.--Houston [1st Dist.] 1993, no writ), the Houston Court of Appeals held that the trial court committed reversible error that probably resulted in the rendition of an improper judgment when it refused to allow evidence offered by State Farm regarding the basis for State Farm's denying or delaying a payment. State Farm obtained bids from two experts that showed that the home, which is the subject of the claim, could be rebuilt for less than the policy limits and that both the slab and the garage were useable remnants and would be used for rebuilding. The Court of Appeals held that State Farm had a right to present the evidence of its reliance upon the two bids from two experts because the existence of the useable remnants was the basis of the dispute on whether or not the home was a total loss.

1. Experts on Coverage

The broadest and most varied area in which experts are used in insurance litigation is on the facts which determine whether the policy covered the loss. Insurance carriers can prevail in a bad faith cause of action when the carrier relies upon an uncontroverted expert's opinion. In such a case, the carrier could easily prevail on a motion for summary judgment. *Cortez v. Liberty Mut. Fire Ins. Co.*, 885 S.W.2d 466 (Tex. App.--El Paso 1994, writ denied)(Liberty Mutual relied upon physician's medical opinion regarding the worker's compensation claimant's ability to return to work when such opinion was uncontroverted).

A variety of types of experts are used in coverage litigation to assist the parties in analyzing the facts and presenting the circumstances before the court to assist the court in determining a duty to defend and/or indemnify. Claimants and carriers as well retain experts on the particular subject giving rise to a coverage dispute, i.e., fire marshall or arson specialist to determine arson, medical doctors to determine date of and duration of injury, accident reconstructionist to determine cause of accident, etc. While the expert cannot opine on the carrier's duties under its contract based upon the facts and circumstances, the expert is most useful in articulating the facts and inferential evidence that supports a legal conclusion on the carrier's duties.

It is certainly not uncommon for insurance experts to opine not only on the facts, but also the legal conclusions. Note that this method is subject to objection, which will be discussed later in this article. At least one case has held that Tex. R. Evid. 704.1 permits an expert to testify to ultimate issues which are mixed questions of law and fact, such as whether particular conduct constitutes negligence. *Puente v. A.S.I. Signs*, 821 S.W.2d 400, 402 (Tex. App.--Corpus Christi 1991, writ denied) , relying on *Birchfield*, 747 S.W.2d at 365.

2. Conflicting Expert Opinions

Multiple courts have held that a disagreement among experts about whether the cause of loss is covered by the policy will not support a judgment for bad faith. To the contrary, the claimant must prove that the insurance company had no reasonable basis for denying or delaying payment of the claim and that it knew or should have known that no reasonable basis existed. *National Union Fire Ins. Co. v. Dominquez*, 873 S.W.2d 373 (Tex. 1994); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994); *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597 (Tex. 1993).

In *Lyons*, the Court held that there was no evidence to support the jury's finding that the insurance company breached the duty of good faith and fair dealing. *Lyons* involved a dispute about whether damage to the claimant's house was caused by a windstorm, which was a covered peril, or as the carrier claimed, by settling of the foundation, which was an excluded peril. The carrier denied the claim based on two inspection reports, one by a reconstruction expert and the other by a registered professional engineer. The court held at trial that the evidence offered by the claimant in support of the bad faith finding consisted of an expert's opinion that the windstorm caused the damage based on testimony by the claimant and her neighbors that the brick veneer and outside back stair

case were visibly damaged after the storm. The court then noted that this evidence supported the jury's finding of coverage under the policy.

However, the court explained that the issue of bad faith focuses not on whether the claim was valid but on the reasonableness of the insurer's conduct in rejecting the claim. The court explained that evidence of coverage in some circumstances might support a finding of bad faith where the insurer ignored the evidence of coverage. In *Lyons*, the claimant failed to offer any evidence that the reports of the carrier's experts were not objectively prepared, or that the carrier's reliance on them was unreasonable, or any other evidence from which a fact finder could infer that the carrier acted without a reasonable basis and that it knew or should have known that it lacked a reasonable basis for its actions. .

Likewise, in *Dominquez*, 873 S.W.2d 373, the court rejected the jury's finding that the insurance carrier breached the duty of good faith and fair dealing in a dispute involving whether the claimant's back injury was work-related for purposes of establishing the claimant's entitlement to worker's compensation benefits. The doctor who had initially seen the claimant diagnosed his back pain as stemming from a degenerative hip condition. However, a second doctor had given his opinion that the claimant's condition was work-related. The court then noted that the only evidence offered by the claimant to establish bad faith was a letter by a doctor to the claimant's attorney stating his opinion that the injury was work-related. While the letter was some evidence of coverage, the court held it was not evidence of an absence of a reasonable basis for denying the claim. The court then observed that the claimant presented no evidence that cast doubt on the carrier's reliance on the medical professionals who diagnosed the condition as a degenerative disease and the claimant's own statements on disability insurance forms that his condition was not work-related.

Lyons and *Dominquez* involved a legal sufficiency review of the evidence supporting a jury's finding of bad faith based on expert testimony. Yet, even in a review of the validity of a summary judgment in bad faith litigation, courts have employed the same analysis. In *Ramirez v. Transcontinental Ins. Co.*, 881 S.W.2d 818 (Tex. App.--Houston [14th Dist.] 1994, writ denied), Transcontinental Insurance Company ("TIC") filed a Motion for Summary Judgment, granted by the trial court, on the basis that TIC acted reasonably denying worker's compensation benefits to Ramirez. Ramirez claimed that he experienced an accident as a landscape laborer which aggravated an existing condition known as Temporomandibular Joint Syndrome ("TMJ"). Ramirez argued that TIC's reliance on one doctor's opinion (Dr. Rejaie) was unreasonable. According to Dr. Rejaie, there was no evidence of recent trauma to the right side of Ramirez' face in the form of a wound or swelling of the soft tissue and if Ramirez suffered any recent trauma, it did not cause acute injury or change the chronic, long standing nature of his condition. Thus, Dr. Rejaie concluded that Ramirez' condition was not compensable under TIC's policy. TIC also possessed medical reports from another dentist who suggested that Ramirez' TMJ syndrome was aggravated by an alleged accident and therefore was compensable.

Ramirez' argument was based on conflicting expert opinions, relying upon *Guajardo v. Liberty Mut. Ins. Co.*, 831 S.W.2d 358 (Tex. App.--Corpus Christi 1992, writ denied). In *Guajardo*, the carrier denied benefits based on one doctor's opinion that the claimant could resume his usual employment, even though the carrier was aware of several contrary medical opinions. The court recognized in *Guajardo* that "situations may arise in which contrary medical opinion casts sufficient doubt on the reliability of the carrier's expert opinion, that the carrier no longer has a reasonable basis to deny coverage." The *Guajardo* Court explained:

> Other courts may challenge the credentials or the reliability of the carrier's expert or his professional reputation for sound and impartial opinions. Further, the circumstances under which an expert's opinion is brought to the carrier's attention are also important in determining whether the carrier reasonably relied upon its expert opinion. For instance, a party may cast doubt on the expert's opinion if it shows that the same expert has consistently rendered opinions favorable to the carrier or other interested parties in the past and that those opinions were later shown to be false or questionable.

Guajardo, 831 S.W.2d at 365. The *Guajardo* Court, as well as the *Ramirez* Court, held that the carrier's reasonable basis is a question of fact where, in addition to the conflicting expert opinion, the party alleging bad faith brings direct and circumstantial evidence showing the carrier's expert opinion was questionable and that the carrier knew or should have known the opinion was questionable. *Ramirez*, 881 S.W.2d at 825; *Guajardo*, 831 S.W.2d at 365; see also *Packer v. Travelers Indem. Co. of R.I.*, 881 S.W.2d 172 (Tex. App.--Houston [1st

Dist.] 1994, no writ)(case involving very similar facts and holding as *Ramirez*).

Still, the *Ramirez* Court held that *Guajardo* does not hold that conflicting expert opinions automatically create a fact issue as to bad faith. Rather, *Guajardo* holds that a fact issue may be present only in certain circumstances where the reasonableness of the carrier's reliance on an expert is seriously called into question by an opposing expert or other evidence. Furthermore, the court ruled that *Guajardo* is consistent with *Lyons, Dominquez* and *Moriel* in its presentation of the standard for bad faith; "that is, the evidence must demonstrate that the insurance carrier's reliance on certain information in denying a claim is unreasonable and therefore, does not constitute a reasonable basis for denial." See *Dominquez,* 873 S.W.2d at 377; *Lyons*, 866 S.W.2d at 601.

The evidence in the *Ramirez* case proved that TIC's reliance on Dr. Rejaie's medical ability constituted a reasonable basis as a matter of law. While Dr. Rejaie admitted he was not an expert in the treatment of TMJ, he testified that he regularly diagnosed TMJ. Furthermore, Ramirez, not TIC, chose Dr. Rejaie. Dr. Rejaie's conclusion that Ramirez' condition was not work-related was based on multiple examinations. Finally, Ramirez' own expert, Dr. Phillips, did not question the results of those examinations or studies, nor did Phillips dispute or criticize Rejaie's conclusions or attack his credentials or impartiality. Thus, the Ramirez court held that TIC established, as a matter of law, that its reliance on Dr. Rejaie's opinion was a reasonable basis for denying Ramirez' claim.

3. Conflict Among Experts Constitutes Reasonable Basis

In one case, the court recognized the dispute among expert reports as a reasonable basis for delay in payment. In *Estrada v. State Farm Mut. Auto. Ins. Co*., 897 F. Supp. 321 (W.D. Tex. 1995), Estrada sought the policy limits for uninsured motorist benefits through State Farm Mutual Automobile Insurance Company. State Farm rejected the offer, but instead offered to settle for various lesser amounts. Estrada then sued State Farm for bad faith based on State Farm's delay in paying Estrada his uninsured motorist benefits. State Farm eventually paid these benefits after an arbitration.

The district court granted State Farm's motion for summary judgment on the basis that there was disagreement among the doctors' reports regarding the extent of the plaintiff's injuries and the existence of pre-existing conditions. One doctor suspected a herniated disk requiring surgery, but two other doctors have concluded that Estrada suffered only from a "bulge or mild hour glass defect." The court observed the conflicting opinions on the severity of Estrada's injury, its effects on his lifestyle, whether treatment with epidural steroids would be effective, and whether surgery was necessary. The court concluded that State Farm's explanation that it delayed payment because of a bona fide dispute over the appropriate medical management of Estrada's condition provided State Farm a reasonable basis for delay in payment.

Testimony on fact issues that determine coverage could be the most productive area for experts in bad faith litigation, especially given the current Supreme Court case of *Republic Ins. Co. v. Stoker,* 903 S.W.2d 338 (Tex. 1995). In Stoker, the Supreme Court held that if the insurance company had a reasonable basis to deny a claim at the time of the denial, though such basis was not the reason for denial, there can be no bad faith. Both plaintiffs and defendants can present expert testimony to attack and/or defend the basis upon which the carrier denied the claim. However, since Stoker, the plaintiff may have a more difficult burden disputing all bases upon which the carrier could have denied the claim though the plaintiff may not be aware of such basis at the time of denial.

4. Attack on Reliance Upon Expert

There are multiple bases upon which an opponent can attack an insurance carrier's conduct in relying upon an expert opinion as the basis for denying a claim. The attacking party can focus on the expert's lack of investigation, the expert's predisposition and the weight of contrary expert testimony.

In *Nicolau v. State Farm Lloyds*, 951 S.W.2d 444 (Tex 1997), the insured provided sufficient evidence to show that the insurers had no reasonable basis for denying a claim by attacking the insurer's expert's predisposition and investigation. Nicolau brought a claim under his homeowners' policy issued by State Farm Lloyds for cracking and other damages to their home. The State Farm policy excluded losses caused by construction or foundation defects and by settling or foundation movement with the exception of losses caused by accidental discharge or leakage from a plumbing system.

The Nicolaus relied upon various foundation and engineering inspections and reports. State Farm sought the assistance of the American Leak Detection who determined that a plumbing leak existed beneath

the master bedroom. At one point, the State Farm Lloyds adjuster wrote the Nicolaus stating that he was going to get a second opinion from Haag Engineering and testified that at the time he wrote the letter, he "knew [Haag Engineers] were of the general opinion that a localized leak beneath the house would not cause foundation movement as a general rule." Haag failed to isolate the leak, determine its severity or take soil samples from beneath the Nicolau home, but concluded that any isolated plumbing leak beneath the home did not cause the foundation movement. See also *Aetna Cas. & Sur. Co. v. Garza*, 906 S.W.2d 543, 551 (Tex. App.--San Antonio 1995, n.w.h.)(failure to investigate thoroughly is bad faith); but see *Polasek*, 847 S.W.2d at 288 ("[e]ven the most thorough investigation must stop somewhere; there is always something else the investigator could have done."); *State Farm Fire & Cas. Co. v. Simmons*, 857 S.W.2d 126, 138 (Tex. App.--Beaumont 1993, writ denied)(lack of complete investigation); *Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 139 (Tex. App.--Dallas 1992) judgment set aside, 843 S.W.2d 486 (Tex. 1993)(improper and incomplete investigation of cause of fire). Eventually, State Farm concluded that the settling or heaving of the foundation was not associated with the plumbing leak.

The court reasoned that State Farm's awareness of Haag's tendency in and of itself renders this to be "blind reliance" that should have put State Farm on notice that Haag's opinion was questionable. Because State Farm's adjuster knew of Haag's predisposition and because Haag failed to conduct adequate tests to determine whether the plumbing leak caused the foundation damage, the court held that the weight of contrary expert testimony to destroy State Farm's reasonable basis was a question of fact for the jury. Thus, the court upheld the jury verdict that State Farm had no reasonable basis for denying the claim or delaying a payment of the claim.

The *Nicolau* case gives us several relevant points regarding an insurance company's reliance on an expert when denying a claim. First, it appears that an insurer must demand and insure that its expert performed a complete and thorough investigation before relying upon the expert's advice. Of fundamental importance to determining bad faith, the carrier should read and understand the expert's report before relying thereon. See *St. Paul Ins. Co. v. Rakkar*, 838 S.W.2d 622, 627 (Tex. App.--Dallas 1992, writ denied). If the adjuster has any doubts about the report, or contents therein, the adjuster should contact the expert for further exploration before making his final decision on coverage. The adjuster at this point may seek a second expert opinion.

Furthermore, adjusters and attorneys should be wary of retaining experts commonly retained throughout the insurance industry such that a predisposition is apparent. Even if a predisposition is not apparent, the attorney and adjuster should consider at least the potential appearance the expert may have before the jury. Accordingly, attacking the credibility of an expert's investigation and opinion, as well as the relationship the expert has with the insurance company, can easily weaken the insurer's reasonable basis argument in reliance upon an expert.

B. Questions of Law

Texas continues to follow the fundamental principal that expert witnesses are not to provide statements of law. This is obviously based upon the idea that the trial judge is better equipped to determine questions of law and instruct the jury because of his special training and experience. The trial judge is presumed to have special competency in matters of law and can therefore determine matters of law without testimony. *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 134 (Tex. App.--Texarkana 1994, no writ). Thus, the existence of a duty is not an area subject to expert testimony. See *Puente v. A.S.I. Signs*, 821 S.W.2d 400, 402 (Tex. App.--Corpus Christi 1991, writ denied)(expert cannot testify as to existence of a "duty").

1. Duties Under Insurance Policy

There are multiple duties under an insurance policy. Most often litigated are the duty to defend and the duty to indemnify. These duties, like all other duties, are not subject to expert testimony. Multiple courts have held that effect.

In *St. Paul Ins. Co. v. Rahn*, 641 S.W.2d 276 (Tex. App.--Corpus Christi 1982, no writ), Novigrod left his pickup truck with the Bazaar Corporation for mechanical repairs. He was given access to a motorcycle while waiting for his truck. While driving the motorcycle with a passenger, Janis Rahn, Novigrod was involved in an accident wherein Rahn sustained serious injuries. Rahn then sued Gomez, the person causing the accident, Novigrod and the Bazaar Corporation.

Upon notification of the claim pending against Novigrod, St. Paul refused to provide him a defense. Thereafter, Novigrod entered into a consent judgment

and covenant not to execute with Rahn. Rahn thereafter filed a lawsuit against St. Paul for breach of the duty to defend and indemnify Novigrod and Bazaar Corporation. St. Paul's primary basis for denying the defense was the argument that the motorcycle was not considered an "owned vehicle" or a "temporary substitute automobile," both of which were covered under the St. Paul policy.

At trial and again raised on appeal, St. Paul objected to the testimony of Rahn's expert witness, Mr. Joe Westheimer. Westheimer presented opinion testimony to the effect that the motorcycle was a substitute vehicle under the terms of the policy and that St. Paul had a duty to investigate the accident and inform Novigrod of the existence of any other insurance that came to the attention of St. Paul which might have provided him coverage. The Corpus Christi Court of Appeals held that the trial court ruled correctly in excluding this expert's testimony. The Court held that coverage afforded by an insurance policy is not an area subject to interpretation by expert witnesses. Additionally, the Court held that whether or not a legal duty exists under a given set of facts and circumstances is a question of law for the court. Thus, the Court held the expert's opinion sought to determine whether a duty exists under an insurance policy is inappropriate.

In *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App.--Dallas 1992, writ denied), Medical Protective brought a declaratory judgment action to determine its legal obligations to defend and indemnify Dr. Capino under a professional liability policy for Capino's sexual relations with Rose Cluett. Capino acted as pediatrician for Rose and Walter Cluett's children. Walter Cluett sued Capino for alienation of affection arising out of Capino's sexual relations with his wife. Thereafter, Capino demanded that Medical Protective defend her and pay any damages assessed against her up to her professional liability policy limits.

At trial, Cluett presented the affidavit of expert Ted Cackowski wherein he opined that the conduct complained of by Cluett was within the scope of coverage and was in fact covered by the policy. The trial court disregarded Cackowski's affidavit and the Court of Appeals upheld the trial court's discretion in concluding that coverage afforded by an insurance policy is not an area subject to the interpretation by expert witnesses. *Keane v. Hawkeye-Sec. Ins. Co.*, 786 S.W.2d 802, 805 (Tex. App.--Fort Worth 1990, no writ); *St. Paul Ins. Co. v. Rahn*, 641 S.W.2d 276, 284 (Tex. App.--Corpus Christi 1982, no writ).

2. Ambiguity

While it is often helpful for an expert to opine about historical interpretations of policy language, the expert must be careful when assisting the court in determining whether a provision is ambiguous. The issue of whether policy language is plain or ambiguous falls within the experience of the judge and does not require expert testimony, unless, the words are technical and have specific meaning in specific situations. See *National Union Fire Ins. Co. v. Hudson Energy Co.*, 780 S.W.2d 417, 424 (Tex. App.--Texarkana 1989), *aff'd*, 811 S.W.2d 552 (Tex. 1991)(testimony of insurer's underwriting expert concerning interpretation of insurance contract is inadmissible, even to rebut testimony of insured's witness concerning custom as to interpretation as to that type of contract; court determined policy unambiguous). Expert testimony is not necessary to determine whether a policy provision is ambiguous. If the policy language is truly unambiguous, then why is an expert necessary to opine on its meaning?

Also, once a provision is determined ambiguous, that is, if a contract of insurance is susceptible of more than one reasonable interpretation, the court must resolve the uncertainty by adopting the construction that most favors the insured. *Hudson Energy Co.*, 811 S.W.2d at 555. For this reason, expert testimony is ordinarily unnecessary in situations involving ambiguous policy language.

C. Mixed Questions of Law and Fact

There seems to be no doubt that expert testimony concerning mixed questions of law and fact is admissible. One argument is that such testimony is admissible under Rule 704 because it deals with ultimate fact issues. On the other hand, it is the province of the court to determine questions of law and to ensure that the correct law is presented before the jury.

1. What is a Mixed Question of Law and Fact

Only one Texas case even attempts to define the term "mixed question of law and fact." In *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 134 (Tex. App.--Texarkana 1994, no writ), the court recognized Black's Law Dictionary definition of "mixed question of law and fact" as:

> [A] question depending for solution on questions of both law and fact, but is really a

> question of either law or fact to be decided by either judge or jury.

The court held that Black's definition provides no guidance. The Texarkana Court then offers the following:

> A better definition is that an opinion or issue involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard.

citing Charles W. Ehrhardt, The Conflict Concerning Expert Witnesses and Legal Conclusions, 92 W. Va. L. Rev. 645 (1990). The Crum & Forster Court supported the admission of expert testimony on mixed questions of law and fact because often the trial judge does not instruct the jury as to the law until all the evidence is presented. It can be difficult for the jury to understand the ramifications of the evidence in complex factual and legal issues without some guidance as to the law. On the other hand, the Crum & Forster Court recognized that any legal explanation by the judge during the presentation of evidence might be construed as an impermissible comment on the weight of the evidence. Thus, the Crum & Forster court allowed an expert witness to explain the term "subrogation," albeit a legal term, in efforts to explain its meaning as used in an insurance situation. The court held that allowing admission of this testimony was helpful to the jury, which is the whole basis under Rule 702 for admission of expert testimony.

2. Relevant Issues and Proper Legal Concepts

It has been held that Rule 704 avails the parties of an opportunity to present expert testimony on mixed questions of law and fact.

Birchfield v. Texarkana Mem. Hosp., 747 S.W.2d 361 (Tex. 1987) is most often cited for the proposition that an expert can testify on a mixed question of law and fact. The Supreme Court held in Birchfield that "fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts." Yet, the Birchfield qualification that the opinion be confined to the relevant issues and based on proper legal concepts has not contributed much to the clarification of Rule 704.

In *DeLeon v. Louder*, 743 S.W.2d 357, 367 (Tex. App.--Amarillo 1987, writ denied per curiam), 754 S.W.2d 148 (Tex. 1988), the court found that an experienced law enforcement trooper could not testify as an expert on the factual cause of an accident because the opinions of law and fact invade the province of the jury. Even though the Supreme Court denied the writ of error, it expressly disapproved of the lower court's holding and stated that there is "little danger in an expert's answer to an all-embracing question on a mixed question of law and fact." 754 S.W.2d at 149. The court noted that other rules of evidence concerning expert testimony on mixed questions of law and fact could come into play such as Rule 702 (assist trier of fact qualifications) and Rule 403 (objection based on probative value). Still, the court reiterated that expert testimony on proximate cause is admissible "as long as it is based on proper legal concepts."

While there is still no judicial definition of this phrase "based on proper legal concepts," the party presenting such expert opinion should show that the expert has been given an appropriate legal definition of the term about which he is asked to give an opinion.

V. POTENTIAL OBJECTIONS

A. Rule 403--Probative Value

Rule 403 mandates that 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, or needless presentation of cumulative evidence. Opponents may oppose the use of expert testimony when such testimony exceeds even the court's understanding. Remember expert testimony is only admissible if it will assist the trier of fact.

Expert testimony on mixed questions of law and fact are often subject to a Rule 403 unfair prejudice, confusion of issues and misleading objection. *Louder v. DeLeo*n, 754 S.W.2d 148, 149 (Tex. 1988). This objection is logical, especially where the expert's opinion is based upon an improper legal concept. Note that even though the expert's testimony may be relevant, the expert may be appropriately qualified to testify, and specialized knowledge could assist the trier of fact, Rule 403 prohibits its admissibility after comparing the probative value of the testimony to the potential danger of unfair prejudice, confusion and possible misconceptions by the jury.

B. Rule 703/705--Bases of Expert's Opinion

The admissibility of underlying facts or data reviewed by an expert is left to the discretion of the court. Often, the expert forms his opinion after review of documents that would be inadmissible into evidence based on one or more objections. Thus, we have Tex. R. Evid. 703 and 705.

Tex. R. Evid. 703 provides that:

> **The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or reviewed by 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.**

Rule 705 provides that:

> **The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.**

Generally, under Texas law once a testifying expert is designated, all communications and materials upon which he or she relies in formulating their opinion are discoverable. Tex. R. Civ. P. 166b(e). It is often preferable in complex and difficult cases to have separate consultants and trial experts. This allows the attorney to obtain expert consultation throughout the case and then also prepare for trial without the risk of having to disclose all communications and work product. At the same time, the attorney can reserve trial experts by not exposing them to information that could appear biased in the eyes of the jury. For example, the consulting expert should be responsible for determining facts that will support a specific theory and the attorney can then discard any information that the consulting expert learned that is not helpful to the case. By doing so, the attorney can present to the trial expert only that information which is relevant and necessary to theories proposed at trial.

1. Hearsay

Under Tex. R. Evid. 703, expert opinions may be based solely on inadmissible hearsay. Yet, this does not mean that all hearsay testimony upon which the expert relies is admissible. Texas Rule of Evidence 104(a) is the court's source of judicial discretion and allows the judge to determine whether the facts and data relied on by the expert are the type reasonably relied upon by experts in the same field. Thus, the expert should testify to the fact that such data is normally and reasonably relied upon by other experts in that particular field. Not all materials relied upon by the trial expert are admissible as a proper basis for the expert's opinion.

In *Decker v. Hatfield*, 798 S.W.2d 637 (Tex. App.--Eastland 1990, writ dismissed w.o.j.), the court recognized that ordinarily an expert witness should not be permitted to recount a hearsay conversation with a third party even if that conversation forms part of the basis of his opinion relying on Tex. R. Evid. 801, 802. Yet, considering Rules 703 and 705 the court concluded that an expert psychologist could disclose information gathered by conversations with a child in determining legal guardianship for that child.

First Southwest Lloyds Ins. v. MacDowell, 769 S.W.2d 954 (Tex. App.--Texarkana 1989, writ denied), is a case involving the use of experts in determining arson where the court allowed the witness to give his opinion but prohibited the expert from testifying to all the facts that explain how he reached his conclusions. First Southwest relied upon multiple experts to opine on the origin of a fire which destroyed the Armstrong-McCall Beauty Supply Company located in a building leased to the MacDowells.

The trial court excluded testimony by Rick Evans, the Paris Fire Marshall, concerning a report by an eye-witness of the fire, even though such report served as a partial basis for his conclusion that the fire was incendiary in nature. The trial court allowed Evans to state that an eye-witness account of the fire by Tommy Hudspeth contributed to his conclusion that the fire was incendiary. Yet, the trial court refused to allow Evans to recount before the jury what Hudspeth had told him.

First Southwest contended that all testimony by Evans regarding Hudspeth's eye-witness account is admissible under Tex. R. Evid. 703 and 705 because it partially formed the basis for Evans' expert opinion. First Southwest argued that these rules allow disclosure of Hudspeth's eye-witness account by Evans on direct examination because Evans' testimony establishes that arson investigators routinely and reasonably rely upon eye witness accounts in forming their opinions. The court recounted Rules 703 and 705 and held that the use of the permissive word “may” does not indicate an

absolute right on the part of the expert to disclose all of the facts and underlying data under all circumstances. The appellate court concluded as follows: "[T]he better judicial position is to not allow the affirmative admission of otherwise inadmissible matters merely because such matters happen to be underlying data upon which an expert relies."

The court provided an example of when an expert in an arson case could properly state that he based his opinion that a fire was incendiary in nature upon many years of fire investigation training and experience, the physical findings of the fire scene and reports made to the expert during the course of his investigation. The court reasoned that if the expert were allowed to detail every statement made to him that contributed to his conclusion, then the expert could be effectively used to present an infinite amount of evidentiary matters to the jury. The court then suggested the following interpretation of Rule 703/705:

> The rules do not necessarily allow the expert to recount the entire basis of any opinion which may be admissible. Although some courts have allowed the direct admission of all data upon which an expert relies to form an opinion, a much better argument could be made against the admission on direct examination of unauthenticated underlying data. See, e.g., Carlson, Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data, 36 U. Fla. L. Rev. 234, 242 (1984).

The court held that it is the trial court's authority to exercise its discretion in excluding these types of evidence. In so holding, the court relied upon Tex. R. Evid. 403 "Exclusion of Relevant Evidence on Special Grounds" which clearly gives the trial court discretion to exclude admissible evidence, albeit relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Also under Rule 403, the trial court could consider undue delay, or needless presentation of cumulative evidence. Thus, the Court of Appeals did not upset the exercise of the trial court's discretion in disallowing the presentation of hearsay evidence which formed the basis of an expert's opinion.

Obviously, the admission of the underlying facts or data reviewed by the expert in forming his opinions or inferences is left to the discretion of the court. As with most matters involving the admissibility of expert testimony, the rules of evidence and case law do not provide definitive guidelines for determining the admissibility of expert testimony. The safest approach for all parties is to try and try again. One thing is certain, if the testimony proffered is to explain the basis for delay and/or denial of a payment of a claim, and such basis is reliance upon an expert, the expert's opinion is probably admissible, though the underlying data may not be. The expert may be allowed to testify as to the documents reviewed without testifying as to their contents, as similarly done in the MacDowell case.

C. Rule 702 -- Assist Trier of Fact/Qualifications

An objection can be raised under Rule 702 on the grounds that the expert's opinion does not assist the trier of fact to understand the evidence or to determine a fact in issue. Remember, this is the threshold requirement under Rule 702 for the admission of expert testimony. This objection was suggested in the per curiam opinion denying the writ of error in the *DeLeon* case. *DeLeon*, 754 S.W.2d 148, 149 (Tex. 1988). The Rule 702 objection should probably be accompanied by a Rule 403 objection. If the expert testimony will not assist the trier of fact, it probably falls within one of the Rule 403 dangers.

Objections to the qualifications of an expert can be based upon multiple factors, both personal, as well as professional. For example, the expert witness must have sufficient experience and knowledge to evaluate the facts which are the subject of his opinion. Otherwise, the expert's testimony would not be of assistance to the jury. Furthermore, while the expert may have a specialized knowledge about an infinite matter of subjects, as most experts do, the expert must have specialized knowledge that is pertinent to the facts in issue.

As with most matters left to judicial discretion, there are no terminative factors to qualify an expert. The party should present enough information as possible concerning the expert's experience and the subject matter of the litigation. Most important of all, in preparing for potential qualification objections, the attorneys should interview potential experts in explicit detail, to find all hidden skeletons that may surface at trial.

D. Legal Conclusions

Objections to the expert testimony involving legal conclusions are often prevalent in the use of affidavits in summary judgment evidence. Statements

in an affidavit which are mere conclusions or which represent the affiant's mere conclusory opinion unsupported by fact are insufficient as summary judgment evidence. An affidavit in support or in opposition to a motion for summary judgment must set forth facts, but not legal conclusions. Such affidavits must be made on personal knowledge. Tex. R. Civ. P. 166a(e). Though a party may object to legal conclusions contained in an affidavit as evidence to a motion for summary judgment, such legal conclusions will not raise fact issues.

Even at trial, experts should not present pure legal conclusions, though such testimony is admissible without proper objection. The objecting party should be careful not to waive any of its objections to an expert's presentation of legal opinions. The party objecting can waive its objections by cross-examining such expert in a manner that results in the same legal conclusions and opinions which were the subject of the prior objections. *Allied Gen. Agency, Inc. v. Moody*, 788 S.W.2d 601, 607 (Tex. App.--Dallas 1990, writ denied); *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595 (Tex. App.--Tyler 1984, writ ref'd n.r.e.); *New Hampshire Fire Ins. Co. v. Plainsman Elevator, Inc.*, 371 S.W.2d 68, 72 (Tex. Civ. App.--Amarillo 1963, writ ref'd n.r.e.)(objections to certain evidence are unavailable when similar evidence to same effect is offered and received without objection). The objecting party can also waive its objections by failing to object each and every time a legal conclusion is rendered by an expert witness.

E. Mixed Questions of Law and Fact

Often, expert testimony is required in insurance cases to establish whether a standard of care has been met. An expert's testimony on the standard of care is most helpful when the allegations of the plaintiffs do not fall within common understanding of laypersons. This often happens in malpractice, Stowers and bad faith cases. Yet, this rule does not apply when the acts of the defendant fail to meet a standard normally understood by a layperson. *Ranger County Mut. Ins. Co. v. Guin*, 704 S.W.2d 813, 817 (Tex. App.--Texarkana 1985), aff'd, 723 S.W.2d 656 (Tex. 1987).

In *Connecticut Gen. Life Ins. Co. v. Tommi*, 619 S.W.2d 199, 204 (Tex. Civ. App.--Texarkana 1981, writ ref'd n.r.e.), the insurance company objected to a physician's opinions regarding the cause of death on the basis that such opinions concerned mixed questions of law and fact. The court held that opinions as to the cause of death were properly admitted because there is no question that expert testimony is admissible to establish the cause of death or injury. The question of fact presented was whether or not the death was considered accidental or due to intentional self-inflicted injuries, which established the question of law as to whether or not the death was covered under an accidental death policy. The court held that "any witness familiar with the cause, purpose and experiential history of the type of conduct engaged in by the insured [use of rope around neck to restrict oxygen supply as a means of heightening sexual pleasure] . . . would be competent to testify as to whether death in such circumstances would be considered accidental or intentional, even though such testimony could result in a legal conclusion as to coverage."

Remember, to avoid objection on an expert's testimony on mixed questions of law and fact, the expert opinion must be confined to the relevant issues and it must be based on the proper legal concepts. The party presenting such expert opinion should be prepared to demonstrate that the expert has been given an appropriate legal definition and proper legal concept.

VI. CONCLUSION

Proper, skilled and articulate expert testimony can be the basis for success in complex insurance litigation. More often that not, coverage and bad faith litigation involve issues that the average public does not understand. Along with professional malpractice, the use of expert testimony is almost necessary in insurance litigation.

With proper qualifications, an insurance expert may be allowed to testify as to an infinite amount of issues relevant in coverage and bad faith litigation. Though there is little case law on many of the rules of evidence pertaining to the admissibility of expert testimony, common sense usually prevails. No matter what parties encounter in presenting expert testimony in insurance litigation, the parties and their counsel should step into the shoes of the fact finder in determining the assistance of expert testimony, the qualifications and credibility of the expert.