

Bad Faith: The Admissibility of Expert Testimony and the Challenges that Follow[†]

Thomas F. Segalla
Joseph M. Hanna

I.

INTRODUCTION

The issues involved in most bad-faith cases tend to be fairly complex. This is not completely surprising – especially in circumstances where action is precipitated by strong disagreement between the two sides regarding some insurance issue. Apart from potential concerns that a jury might weigh expert opinions too heavily, there is little denying that expert testimony is likely to serve the cause of both sides to an insurer bad-faith action.

Samuel Gross, a Professor of Law at the University of Michigan Law School, outlined the “essential paradox” of expert testimony by noting that: “We call expert witnesses to testify about matters that are beyond the ordinary understanding of lay people (that is both the major practical justification and a formal legal requirement for expert testimony), and then we ask lay judges and jurors to judge their testimony.”¹ Accordingly, while courts hold that expert testimony in a bad-faith case is not a necessity,² it is widely held that expert testimony on pertinent issues surrounding insurer practices is admissible in the general discretion of the trial court when offered by an appropriately qualified expert.³

[†] Submitted by the authors on behalf of the FDCC Insurance Coverage Section.

¹ Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1182.

² *Douglas v. U.S. Fidelity & Guaranty Co.*, 127 A. 708 (N.H. 1924).

³ See, e.g., *American Cas. Co. v. Howard*, 187 F.2d 322 (4th Cir. 1951) (considering expert opinions as to advisability of going to trial rather than accepting compromise); *Kabatoff v. Safeco Ins. Co. of Am.*, 627 F.2d 207 (9th Cir. 1980); *Hanson v. Prudential Ins. Co. of Am.*, 783 F.2d 762 (9th Cir. 1985); *Worden v. Tri-State Ins. Co.*, 347 F.2d 336 (10th Cir. 1965); *Clark v. Interstate Nat’l Corp.*, 486 F. Supp. 145 (E.D. Pa.), *aff’d*, 636 F.2d 1207 (3d Cir. 1980); *Rawlings v. Apodaca*, 726 P.2d 565 (Ariz. 1986); *Neal v. Farmers Ins. Exchange*, 582 P.2d 980 (Cal. 1978); *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65 (Kan. 1997).



Thomas F. Segalla is a founding member and senior trial partner in the law firm of Goldberg Segalla LLP, where he is the head of its Litigation Defense Practice. He is a member of the DRI Board of Directors, is the Emeritus Chair of the DRI Law Institute, and a Past Chair of its Insurance Law Committee. He is also a member of the Federation of Defense and Corporate Counsel and the International Association of Defense Counsel, where he serves on several of their substantive committees. He has lectured extensively and published articles for these organizations. His litigation practice is largely devoted to the defense of general insurance and coverage matters, labor law, bad faith and fraud, and environmental and toxic tort matters. He also is retained as an expert by litigants in coverage and bad faith litigation. He is the co-author of the renowned Insurance Treatise, COUCH ON INSURANCE 3d, and provides commentaries to the monthly Bad Faith Update published by Mealeys/Lexis-Nexis.

II. THE ISSUE

The admissibility of expert witness testimony and the documentary evidence upon which such testimony is based are currently subject to a myriad of challenges in all types of litigation, both at the state and federal levels. A clear understanding of the application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁴ *General Electric v. Joiner*,⁵ and *Kumho Tire Co. v. Carmichael*,⁶ is critically important to defense practitioners and their ability to exclude expert evidence offered by the plaintiff/policyholder/insured. The wrangling about whether *Daubert* standards apply only to scientific evidence or whether the *Daubert* gatekeeping function applies equally to nonscientific evidence has been laid to rest.⁷ Consequently, as noted below, those practicing in the insurance-related defense and coverage arenas must be prepared to challenge a plaintiff's proof in bad-faith, claims handling, and policy interpretation cases. Similarly, counsel must be prepared to challenge the documentary evidence upon

⁴ 509 U.S. 579 (1993).

⁵ 522 U.S. 136 (1997).

⁶ 526 U.S. 137 (1999).

⁷ See *infra* Part III.



Joseph M. Hanna is an Associate in the Buffalo office of Goldberg Segalla, which has nine offices throughout New York, New Jersey and Pennsylvania. His practice is focused on commercial litigation with an emphasis on construction law and intellectual property litigation. Mr. Hanna serves as DRI's Young Lawyer Vice-Liaison to the Commercial Committee and Chair of the Minority Outreach Committee. In 2007, Mr. Hanna was named DRI's Young Lawyer of the Year for Outstanding Service for his work on the organization's Young Lawyer Committee. He was selected from more than 4,000 members of DRI across the United States and Canada who were eligible for this award. Mr. Hanna was awarded this distinction and honor for his commitment to diversity in organizing various minority bar programs throughout the

country, authoring articles on minority attorney retention, and spearheading the creation of a comprehensive database of over 500 minority law organization which have been established through the United States.

which any expert opinion is based when offered by plaintiff's counsel to justify plaintiff's interpretation of the policy. Of course, counsel for the insurance company should be aware that the insurer/defense expert's testimony undoubtedly will undergo similar challenge.

A proactive approach that challenges expert testimony within the nonscientific, insurance-related fields must begin with an understanding of *Daubert*, *Joiner*, and *Kumho*. However, if the applicable state jurisdiction does not follow *Daubert* and its progeny, the practitioner should consider the test articulated in *Frye v. United States*,⁸ or perhaps a combination of the two. Though it is beyond the scope of this article, the practitioner also should consider whether the expert is qualified in his or her given field of expertise. Given these mandates, this article will consider a historical analysis of these several cases together with their applicable tests. Defense counsel is urged to consider several additional projects covering application of these tests to expert evidence within the context of the traditional insurance case.

⁸ 293 F. 1013 (D.C. Cir. 1923).

III. THE STANDARD

A. *Daubert, et al.*

Any analysis of the standard that courts will apply to “junk science” and “junk expert testimony” must begin with *Daubert*, *Joiner* and *Kumho*, since difficult questions clearly remain about how these opinions apply outside the scientific disciplines. The term “junk science” itself has been defined as “jargon-filled, serious-sounding deception.”⁹

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁰

In *Daubert*, the parents of children suffering birth defects allegedly caused by the drug Bendectin instituted an action against the manufacturer of that drug. Bendectin was an anti-nausea drug administered to women during pregnancy. Procedurally, the defendant moved for summary judgment on the issue of causation, contending that there was no link between the use of Bendectin and the alleged birth defects. To support its motion, defendant offered the affidavit of a scientific expert. Plaintiff countered this proof with affidavits from eight expert witnesses who argued that in fact there was a causal link. The district court granted the defendant’s motion and plaintiffs appealed to the Ninth Circuit Court of Appeals. Affirming the lower court’s holding, the Ninth Circuit cited *Frye v. United States*,¹¹ noting that scientific testimony would only be admitted if it were generally accepted in the relevant scientific community.¹² Plaintiff then petitioned the United States Supreme Court contending that since *Frye*, the United States Congress had enacted the Federal Rules of Evidence (specifically Rules 104 and 702), which arguably liberalized evidentiary standards. These rules provide as follows:

Federal Rule of Evidence 104(a):¹³

Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court.

⁹ PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* (Basic Books 1991); see also Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55 (1998). For an excellent discussion of the *Daubert* progeny, see Neil E. Mathews & Leondra M. Hanson, *Daubert After Kumho Tire: How the Gate-Keeper Evaluates the ‘Non-Scientific Expert*, DRI BUSINESS LITIGATION 131 (Jennifer A. Dowling ed., 1999); Scott R. Jennette, *Attacking the Plaintiff’s Hazardous Substance Expert in the Post-Kumho Era*, 41 FOR THE DEFENSE 33 (May 1999); Jonathan M. Hoffman & Bert Black, *Old Tires and New Limits: The Effect of Kumho Tire on Expert Testimony*, 27 PROD. SAFETY & LIAB. REP. (BNA) 354 (1999).

¹⁰ 509 U.S. 579 (1993).

¹¹ 293 F. 1013 (D.C. Cir. 1923).

¹² *Daubert*, 509 U.S. at 588.

¹³ FED. R. EVID. 104(a).

Federal Rule of Evidence 104(b):¹⁴

When the relevancy of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Federal Rule of Evidence 702:¹⁵

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.

Recognizing that the Federal Rules of Evidence were intended to be more flexible than the historical *Frye* test, the Supreme Court noted that the *Frye* Court's "rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules."¹⁶ With that said, the Court defined the trial court's "gatekeeping" function and its obligation to exclude evidence when based only upon "subjective belief or unsupported speculation."¹⁷ The Court also enumerated several factors for the trial court to consider when analyzing the reliability of evidence:

- Can the theory or technique be tested or has it been tested?
- Has the theory or technique been subject to peer review and publication?
- Is there a known or potential rate of error?
- Do standards and controls exist and are they maintained?
- Has the theory been generally accepted?¹⁸

The Court emphasized, however, that these factors are "general observations" that should not constitute a definitive test.¹⁹ The Court also cautioned that it had only addressed scientific expert evidence; it was not addressing technical or other specialized knowledge.

¹⁴ FED. R. EVID. 104(b).

¹⁵ FED. R. EVID. 702.

¹⁶ *Daubert*, 509 U.S. at 588.

¹⁷ *Id.* at 590.

¹⁸ *Id.* at 593-94.

¹⁹ *Id.* at 592.

Legal analysts immediately questioned whether the *Daubert* “gatekeeping” function extended to other types of expert testimony. In his dissenting opinion, Justice Rehnquist had articulated this same concern: “Does all of this *dicta* apply to an expert seeking to testify on the basis of ‘technical or other specialized knowledge’ — the other types of expert knowledge to which Rule 702 applies — or are the ‘general observations’ limited only to ‘scientific knowledge?’”²⁰ Other commentators speculated as well.²¹ Furthermore, a significant split developed among the various lower courts about how *Daubert* would be interpreted and whether it would apply to nonscientific evidence.²²

It should be noted that the Supreme Court also (at the same time) remanded *Daubert* to the Ninth Circuit Court of Appeals.²³ On remand, the Ninth Circuit found that the evidence was inadmissible. In addition to the *Daubert* factors, it noted that expert testimony is presumptively unreliable if the research was conducted in anticipation of, rather than independent of, the litigation.

2. General Electric v. Joiner²⁴

The *Daubert*²⁵ Court also left unresolved the issue of what standard should be applied by an appellate court when reviewing a trial court ruling on the admissibility of evidence. In *Joiner*,²⁶ the Supreme Court addressed that issue and resolved the conflict among the various districts that had developed after *Daubert*²⁷ was decided.

The *Joiner* dispute involved a plaintiff’s claim that his cancer was caused by exposure to PCB and chemical fumes. The district court had ruled that a causal link did not exist between the exposure and the cancer. On appeal, the Eleventh Circuit reversed the district court’s ruling, applying a de novo standard of review. The United States Supreme Court rejected this standard, however, ruling that the decision of the district court should not be reversed unless that court abused its discretion.²⁸ Of significance, the Court reaffirmed the *Daubert* standard but without the clarification that had been anticipated:

²⁰ *Id.* at 600.

²¹ See generally Bert Black et al., *The Law of Expert Testimony—A Post-Daubert Analysis*, in *EXPERT EVIDENCE: A PRACTITIONER’S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL 9* (Bert Black & Patrick W. Lee eds., 1997).

²² See discussion *infra* Part IV.

²³ *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995).

²⁴ 522 U.S. 136 (1997).

²⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

²⁶ *Joiner*, 522 U.S. 136.

²⁷ For a discussion of which circuits applied the abuse of discretion standard of review or the de novo standard, see *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997).

²⁸ *Joiner*, 522 U.S. at 137.

[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence[] that is connected to existing data only by the *ipse dixit* of the expert. A Court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.²⁹

Subsequent to *Daubert* and *Joiner*, confusion continued among the federal district and state courts regarding which standard to apply.³⁰ Further, the Supreme Court had not answered the question posed by Chief Justice Rehnquist in *Daubert*, i.e., did the Court's ruling apply to nonscientific and other technical evidence? As a result, after *Daubert* and *Joiner*, courts among the various circuits answered this question differently. For example, the Second, Ninth, and Tenth Circuits held that *Daubert* was limited to scientific testimony and not applicable to experience-based testimony.³¹ In contrast, the Fifth, Sixth, Seventh, and Eighth Circuits authorized the use of *Daubert* factors to analyze the admissibility of expert evidence, both scientific and nonscientific in nature.³²

3. *Kumho Tire Co. v. Carmichael*³³

Recognizing the foregoing conflict, the Supreme Court in *Kumho* confronted the issue directly, analyzing whether the "gatekeeping" function of the district court applied to scientific, nonscientific, and other technical evidence. The *Kumho* plaintiffs had been injured as the result of a tire blowout on a minivan. They sued the tire manufacturer, claiming that either a design or manufacturing defect caused the blowout. In support of their theory, plaintiffs offered the testimony of a tire expert. On motion of the defendant, the trial court excluded the tire expert's testimony utilizing *Daubert* factors (e.g., general acceptance, rate of error, peer review and publication). The Eleventh Circuit reversed, holding that *Daubert* was limited to scientific evidence and did not apply to the tire expert's testimony since that testimony was skill- or experience-based. The United States Supreme Court then reversed the Eleventh Circuit, noting that the language of Rule 702 makes no distinction between

²⁹ *Id.* at 146.

³⁰ For a discussion of the standard adopted by the various states, see Mathews & Hanson, *supra* note 9, at 150.

³¹ See *Iacobelli Const. v. County of Monroe*, 32 F.3d 19 (2d Cir. 1994); *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51 (2d Cir. 1993). The First, Fourth and Eleventh Circuits allowed district judges to review nonscientific expert evidence, but held that they could not utilize the *Daubert* factors. See *Bogosian v. Mercedes-Benz of N. Am., Inc.*, 104 F.3d 472 (1st Cir. 1997); *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915 (11th Cir. 1998).

³² See *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997); *Deimer v. Cincinnati Sub-Zero Prod., Inc.*, 58 F.3d 341 (7th Cir. 1995); *Cummins v. Lyle Indus.*, 93 F.3d 362 (7th Cir. 1996); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996). For a discussion of the conflict among the circuits, see Hoffman & Black, *supra* note 9.

³³ 526 U.S. 137 (1999).

“scientific” knowledge and “technical” or “other specialized” knowledge. Furthermore, the high Court determined that the evidentiary rationale underlying the basic *Daubert* “gate-keeping” function was not limited to “scientific” knowledge:

[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.³⁴

Citing *Joiner*, the Supreme Court further noted that the appellate courts must apply an abuse of discretion standard when reviewing a trial court decision to admit or exclude expert testimony.³⁵ The Court then applied the abuse of discretion standard to the relevant facts, concluding that the testimony of plaintiffs’ tire expert was properly excluded by the trial court under that standard.

Several recent cases have considered the application of *Daubert* standards post-*Kumho*. The case of *Jauregui v. Carter Manufacturing Co.*³⁶ involved the testimony of a mechanical engineer and a human factors expert regarding safety barriers and improper safety warnings. The court there noted that when applying the *Daubert* standard to all types of expert testimony, the trial court is left with “great flexibility in adapting its analysis to fit the facts of each case.”³⁷ Furthermore, the trial court did not abuse its discretion when excluding evidence that was tantamount to “unabashed speculation.”

The United States Supreme Court later refused to grant the plaintiff’s petition for certiorari in *Moore v. Ashland Chemical, Inc.*³⁸ This case involved a doctor’s causation testimony based on clinical assessment and diagnosis of the plaintiff’s illness following exposure to chemical toxins. Relying on *Daubert* and Federal Rule of Evidence 702, the district court had excluded the testimony. The Fifth Circuit reversed, however, noting that *Daubert* factors do not apply to clinical medicine which is not hard science. An en banc court subsequently abandoned the panel determination, ruling that no such distinction exists and that Rule 702 and *Daubert* apply to both scientific and nonscientific expert testimony.

³⁴ *Id.* at 152.

³⁵ *Id.*

³⁶ 173 F.3d 1076 (8th Cir. 1999).

³⁷ *Jauregui*, 173 F.2d at 1082.

³⁸ 151 F.3d 269 (5th Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999).

In *Johnson v. District of Columbia*³⁹ the court refined the issue further. That case involved scalding injuries to an infant child amid allegations that a water heater malfunction caused the injuries. Pursuant to the defendant's motion in limine, the trial court excluded the testimony of plaintiff's plumbing expert on grounds that he was only experienced in the installation of water heaters, had no experience in their design or control function, and was unfamiliar with commercial heaters. The court of appeals determined that as long as the trial judge has the facts necessary to assess the expert's qualifications, that judge can admit or exclude expert testimony without a hearing, based only on the facts contained in the record or the attorney's offer of proof.⁴⁰

B. *The Standard of Frye v. United States*⁴¹

Under *Frye*, the sole determinant of the reliability and admissibility of an expert's testimony is whether the expert's testimony is based on scientific principles or procedures, or whether the principles or procedures have sufficiently gained "general acceptance" in the specific field to which the principles or procedures relate. In a matter now decided over seventy-five years ago, the attorneys representing Frye had attempted to admit expert testimony on the reliability of a systolic blood pressure test to disprove that Frye committed a murder. The federal court excluded the offer of proof because the test had not "gained general acceptance in the particular field to which it belongs;" therefore, the test results were inadmissible because the test was "experimental" as opposed to "demonstrable."⁴² The *Frye* standard is often considered less flexible than the *Daubert* standard. Under *Frye*, the party offering the scientific evidence must conclusively show general acceptance. If the proof is accepted only by a minority of scientists in the applicable/relevant field, such expert proof would be excluded. Under *Daubert*, however, proof that is accepted by a minority of scientists would provide only a basis for impeaching the expert witness.⁴³

³⁹ 728 A.2d 70 (D.C. Cir. 1999).

⁴⁰ *Id.* at 75.

⁴¹ 293 F. 1013 (D.C. Cir. 1923).

⁴² *Id.* at 1014.

⁴³ See *Castrichini v. Rivera*, 669 N.Y.S.2d 140 (1997).

IV. APPLICATION TO INSURANCE ISSUES

There is considerable authority holding that expert testimony is generally not required to establish bad faith or other improper handling of claims.⁴⁴ In some instances, courts have held that the admission of expert testimony was prejudicial,⁴⁵ although in other cases the admission of expert testimony on the point has been deemed nonprejudicial.⁴⁶

A. *General Principles*

There is little doubt that *Daubert* and its progeny occupied serious interest within the insurance industry because inconsistencies that developed after *Daubert* could have adversely affected the standards by which claims professionals, underwriters, and the insurance industry as a whole would be judged. For example, concerns of the American Insurance Association and the National Association of Independent Insurers were expressed in their amici curiae briefs. Positions taken there encouraged the Court to extend *Daubert* standards to “applied science,” including insurance issues, within the context of Y2K litigation.⁴⁷ Their ultimate concern was whether the testimony of an insurance expert, which was based on general personal experience, skill, and knowledge, would withstand application of the relevant standards.

Under the standards that now exist, it must be determined initially whether the testimony offered assists the trier of fact in understanding the issues at hand and leaves undisturbed the province of the jury. The case of *Buckner v. Sam’s Club, Inc.*⁴⁸ confirms this analysis when discussing the testimony of a safety management expert.⁴⁹ Within the insurance context, the court of appeals in New York traditionally has held that “the opinions of experts, which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper.”⁵⁰

⁴⁴ *Thompson v. State Farm Fire and Cas. Co.*, 34 F.3d 932 (10th Cir. 1994); *State v. Merchants Ins. Co. of New Hampshire*, 486 N.Y.S.2d 412 (Sup. Ct. App. Div. 1985); *Groce v. Fidelity General Ins. Co.*, 448 P.2d 554 (Or. 1968); *Weiss v. United Fire & Cas. Co.*, 541 N.W.2d 753 (Wis. 1995).

⁴⁵ *Thompson v. State Farm*, 34 F.3d 932.

⁴⁶ In *Groce v. Fidelity General Ins. Co.*, 448 P.2d 554 (Or. 1968), the court determined that the jury’s lack of a necessary need for expert testimony as to whether insurer acted in bad faith in failing to settle claim did not render the expert testimony inadmissible.

⁴⁷ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), brief for Am. Ins. Assoc. & Nat’l Ass’n of Indep. Insurers Amici Curiae Supporting Petitioners (No. 97-1709), 1998 WL 541973.

⁴⁸ 75 F.3d 290 (7th Cir. 1996).

⁴⁹ See also *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999).

⁵⁰ *Kulak v. Nationwide Mut. Ins. Co.*, 351 N.E.2d 735 (N.Y. 1976) (citations omitted).

The court in *Kulak v. Nationwide Mutual Insurance Co.*⁵¹ likewise excluded expert testimony when deciding whether an insurer acted in bad faith in allegedly failing to settle:

While it might be suggested that an experienced trial attorney . . . who has had frequent occasion to observe the results of juries' deliberations in personal injury actions might be expected reliably to predict the outcome in a particular case, we know of no empirical support for such a conclusion. Moreover, any such result would be based on exposure rather than expertise, and would treat of subject matter calling for no special scientific or professional education, training or skill.⁵²

After recognizing the underlying need for special qualifications *and* testimony, the court further noted that: "[a]ny experience advantage enjoyed by such witnesses would not establish the inability or incompetence of jurors, on the basis of their day-to-day experience and observation, to comprehend the issues, to evaluate the evidence, and finally, to estimate the likely outcome of a specific action."⁵³ Citing Federal Rule of Evidence 702, the lone dissenting judge in *Kulak* endorsed an approach that adopts a more realistic view of the need for expert testimony in today's complex society. He also identified areas where expert testimony is necessary in a bad-faith case.

With this overview of how the standards evolved, the practitioner should next assess how the *Daubert* standards become operative. What is certain is that each situation must be assessed on a case-by-case basis because not all *Daubert* factors will apply to all experts and, in fact, none will apply in some cases. As one commentator has observed:

[T]he *Daubert* factors may or may not apply in each case. . . . Rather than employ a mechanistic application of specific factors, courts should focus on *Daubert's* goal, which is to make certain that the expert, whether basing testimony on professional studies or personal experience employs the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.⁵⁴

⁵¹ *Id.*

⁵² *Id.* at 740.

⁵³ *Id.*

⁵⁴ Patricia A. Krebs & Bryan J. De Tray, *Kumho Tire Co. v. Carmichael: A Flexible Approach to Analyzing Expert Testimony under Daubert*, 34 TORT & INS. L.J. 989, 1003-04 (1999) (citation omitted).

As noted in *Tyus v. Urban Search Management*,⁵⁵ “the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise may vary.”⁵⁶ However, the court in *Tyus* also concluded that: “In all cases . . . the district court must ensure that it is dealing with an expert, not just a *hired gun*.”⁵⁷

While there is limited case law governing whether the testimony of an “insurance expert” meets the applicable *Daubert* tests, there are several recent cases within the coverage context that provide some guidance. In each analysis, the practitioner should determine whether the expert’s opinion is based on mere speculation or whether the expert used the “types of information, analyses and methods relied on by experts in his field.”⁵⁸ Also, “the information that he gathers and the methodology he uses must reasonably support his conclusions.”⁵⁹

Of particular interest when applying the foregoing principles are several cases that postdate *Daubert* but predate *Kumho*. These are relevant to whether the *Daubert* standards are applicable to expert testimony concerning claims-handling procedures.

In *Reedy v. White Consolidated Industries, Inc.*,⁶⁰ the insured alleged, among other things, that his employer acted in bad faith in refusing to pay workers’ compensation benefits. The plaintiff had designated two individuals or experts to testify on claims-handling procedures, and the defendant moved to strike the testimony of both these witnesses. In denying the motion to strike, the court articulated several pronouncements that will assist the practitioner in determining when the testimony of “insurance experts” should be allowed:

- (1) an individual can qualify as an expert where that individual possesses significant knowledge gained from practical experience, even though academic qualifications in the particular field of expertise may be lacking;
- (2) the critical issue is whether the expert’s testimony will assist the trier of fact; merely telling the jury what result to reach is not helpful;
- (3) competency goes to weight, not admissibility;
- (4) expert testimony must be reliable and relevant under *Daubert*; and
- (5) the witness should have specialized knowledge as to relevant activities about which most jurors are not familiar.

⁵⁵ 102 F.3d 256 (7th Cir. 1996).

⁵⁶ *Id.* at 263.

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Tassin v. Sears, Roebuck & Co.*, 946 F. Supp. 1241, 1248 (M.D. La. 1996).

⁵⁹ *Id.* For a discussion of the admissibility of computer models on environmental cases, see Allen Kezsbom & Alan V. Goldman, *The Boundaries of Groundwater Modeling under the Law: Standards for Excluding Speculative Expert Testimony*, 27 TORT & INS. L.J. 109 (1991).

⁶⁰ 890 F. Supp. 1417 (N.D. Iowa 1995).

The court in *Reedy* observed that the “claims adjusting procedure is . . . something about which the average juror is unlikely to have sufficient knowledge or experience to form an opinion without expert guidance, thus expert testimony would not be superfluous.”⁶¹ In reaching the determination to permit expert testimony about whether the defendant’s claims procedure was usual and appropriate, the court reviewed the expert’s practical experience with claims adjustment and the types of claims processed. However, although the testimony of the two experts was admissible, the defendant was still “entitled to pursue further challenges to these experts’ skill or knowledge in order to attack the weight to be accorded their expert testimony.”⁶²

In *United States Fidelity & Guaranty Co. v. Sulco, Inc.*,⁶³ the court likewise considered the proffered expert testimony of a claims processing manager and, without discussing the *Daubert* factors, allowed it as sufficient. And in *Kraeger v. Nationwide Mutual Insurance Co.*,⁶⁴ the court again considered the testimony of the insured’s bad-faith expert, ultimately denying the insurer’s motion in limine. In doing so, however, the court offered certain observations that are helpful in assessing the parameters of a bad-faith expert’s testimony:

- (1) “[t]estimony about how insurance claims are managed and evaluated and the statutory or regulatory standards to which insurance companies must adhere could be helpful to the jury in evaluating whether the claim . . . was handled in bad faith;”⁶⁵
- (2) the expert witness cannot provide legal conclusions that the insurer violated a particular statute or that the insurer acted in bad faith; but
- (3) the expert witness can testify that, based upon expertise and experience, the insurer had no reasonable basis for its actions.

When reaching its conclusion, the court specifically determined that the *Daubert* factors did not apply to this type of testimony.⁶⁶

⁶¹ *Id.* at 1447.

⁶² *Id.* at 1448.

⁶³ 171 F.R.D. 305 (D. Kan. 1997).

⁶⁴ No. 95-7550, 1997 WL 109582 (E.D. Pa. Mar. 7, 1997).

⁶⁵ *Id.* at *1.

⁶⁶ *Id.*

B. *Non-Scientific Cases*

There are many post-*Kumho* nonscientific cases that likewise provide some guidance to those practitioners who litigate insurance issues. For example, in the antitrust case of *City of Tuscaloosa v. Harcros Chemicals, Inc.*,⁶⁷ the Eleventh Circuit considered the nonscientific testimony of a certified public accountant and the testimony of a statistician. It concluded: “that the district court abused its discretion in excluding Garner’s [CPA] testimony. . . . We further conclude that the district court’s interpretations of *Daubert* and of Rules 104 and 702 . . . were erroneous as a matter of law.”⁶⁸ With respect to the statistician’s testimony, the court excluded portions of his testimony only because such testimony was outside his competence and the methodology was flawed. It should be noted that the defense bar also has been successful in excluding the insured/policyholder’s expert in the following cases.

1. *Hyde Athletic Industries, Inc. v. Continental Casualty Co.*⁶⁹

The court in this case excluded the plaintiff’s expert testimony when determining whether the environmental containment was “sudden or accidental” or whether it occurred over a long period of time. The exclusion of the evidence initially was based on inconsistencies between the expert’s deposition testimony and the affidavits submitted on the summary judgment motion. In addition, the court noted that it was “concerned that Robertson’s opinion would be inadmissible at trial under Federal Rule of Evidence 702 because it may not meet the standards outlined in *Daubert*”⁷⁰

2. *Brown v. Auto-Owners Insurance Co.*⁷¹

This case involved expert testimony by a civil engineer regarding the structural damage to a warehouse, which was alleged to be speculative. In rejecting the expert testimony proffered by the insured/policyholder, the court noted that “the expert’s testimony must be grounded in the methods and procedures of science and not subjective belief or unsupported speculation.”⁷² Because the testimony was based on nothing more than the witness’s subjective belief and personal observations regarding the cause of the damages, rather than mathematical calculation or scientific methodology, it was excluded.

⁶⁷ 158 F.3d 548 (11th Cir. 1998).

⁶⁸ *Id.* at 563.

⁶⁹ 969 F. Supp. 289 (E.D. Pa. 1997).

⁷⁰ *Id.* at 298 n.7.

⁷¹ 121 F.3d 697 (4th Cir. 1997) (unpublished table decision).

⁷² *Id.* at *1.

3. Talmage v. Harris⁷³

Plaintiff, a former client, filed a legal malpractice suit against his former attorney in connection with the handling of the client's suit against his fire insurer. Plaintiff retained an expert witness on liability who was also an attorney with over twenty years of experience performing defense work for insurance companies. The expert's work as an insurance defense attorney included adjusting claims, although he never represented a claimant who was pursuing a claim against an insurer for fire loss and making a claim under the insurance policy. The expert also had never defended an insurance company against a claim by its own insured for coverage arising out of a fire loss.

The court explained the Seventh Circuit's test for evaluating the admissibility of expert testimony under Federal Rule of Evidence 702 and *Daubert*:

First, the court must decide whether the expert's testimony pertains to scientific knowledge and must rule out subjective belief or unsupported speculation. Second, the court needs to determine whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue. Regarding this second inquiry, an expert's opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate that opinion; the opinion must be an *expert* opinion (that is, an opinion informed by the witness' expertise) rather than simply an opinion broached by a purported expert. Because an expert's qualifications bear upon whether he can offer special knowledge to the jury, the *Daubert* framework permits—indeed, encourages—a district judge to consider the qualifications of a witness.⁷⁴

The court then held that the expert was qualified, as a lawyer with substantial experience in insurance law, to offer an opinion regarding the reasonableness of the insurer's handling of the plaintiff's claim.⁷⁵ The court noted that although he did not specialize in fire loss claims, the expert had special knowledge of the insurance claims adjustment process in general as a result of his twenty years' experience defending insurance companies against claims by policy holders. The court concluded its analysis by noting that it was satisfied that the expert had "enough experience with insurance claims and knowledge of the law of bad faith in Wisconsin to make his opinion regarding the viability of plaintiff's bad faith claim admissible under *Daubert*."⁷⁶

⁷³ 354 F. Supp. 2d 860 (W.D. Wis. 2005).

⁷⁴ *Id.* at 866 (citations omitted).

⁷⁵ Talmage v. Harris, 354 F. Supp. 2d 860 (W.D. Wis. 2005).

⁷⁶ *Id.* at 866.

4. *Jordan v. Allstate Insurance Company*⁷⁷

In this 2007 California Court of Appeal case, the court held that expert testimony on statutory violation was admissible. Over Allstate's objection, the trial court considered the declaration of an expert on insurance industry claims settlement practice. In his declaration, the expert expressed the opinion that various actions undertaken by Allstate violated certain provisions of the Unfair Insurance Practices Act (Ins.Code, § 790.03, subdivision (h)). Allstate objected to the trial court's consideration of the expert's declaration on the ground that section 790.03, subdivision (h), could not provide the basis for a bad-faith action. Allstate did not counter the expert's declaration, but objected on the ground that it was inadmissible for the reason stated above. The court overruled that objection.

The court held that the plaintiff was not seeking to recover on a claim based on a violation of section 790.03, subdivision (h).⁷⁸ "Rather, her claim was based on a claim of common law bad faith arising from Allstate's breach of the implied covenant of good faith and fair dealing which she is entitled to pursue."⁷⁹ "[Plaintiff's] reliance upon the [expert's] declaration was for the purpose of providing *evidence* supporting her contention that Allstate had breached the implied covenant by its actions. This is a *proper* use of evidence of an insurer's violations of the statute and the corresponding regulations."⁸⁰

Reaching a contrary result, there also exist several cases where the insurer has not been successful in excluding the testimony of the insured/policyholder's expert or where the insurer's own expert testimony has been excluded. These cases are referenced below.

5. *Michigan Millers Mutual Insurance Corp. v. Benfield*⁸¹

In this case, the testimony of the insurer's fire and origin expert was excluded because it was not sufficiently reliable for admission under *Daubert*. Specifically, the court rejected the opinion evidence because it was not supported by reliable procedure and scientific methodology.

6. *Douglas v. State Farm Lloyds*⁸²

Though the issue in *Douglas* did not arise in the *Daubert* context, its determination affects the use of experts in insurance cases. In this "failure to investigate and settle" case, the court noted that "an insurer's reliance upon an expert report, standing alone, will not

⁷⁷ 56 Cal.Rptr.3d 312 (Ct. App. 2007).

⁷⁸ *Id.*

⁷⁹ *Id.* at 323.

⁸⁰ See *Rattan v. United Services Automobile Assn.*, 101 Cal. Rptr. 2d 6 (Ct. App. 2000).

⁸¹ 140 F.3d 915 (11th Cir. 1998).

⁸² 37 F. Supp. 2d 532 (S.D. Tex. 1999).

necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable."⁸³

7. Aetna Casualty & Surety Co. v. Dow Chemical Co.⁸⁴

This environmental case involved a claim by an insurance carrier that it was prejudiced because the insured's report regarding the removal of underground storage tanks did not contain information as to when releases or contamination occurred. The court noted that because the insurer did not utilize an expert on hydrogeology to establish the nature and timing of the discharge, the insurer's claim for prejudice was in doubt.

8. Watts v. Organogenesis, Inc.⁸⁵

In a case involving the construction and interpretation of the phrase, "underlying medical condition," within a medical insurance contract, the insured's doctor had testified that dysreflexia was an underlying medical condition. Accepting the insured's expert testimony, the court noted:

If the phrase is a term of art, then a medical expert's un rebutted designation of the dysreflexia as such is sufficient as the last word on this issue. If it is not, then use of the phrase in the plan document is ambiguous, and therefore should be construed in accordance with the singular/plural rule⁸⁶

9. California Shoppers, Inc. v. Royal Globe Ins. Co.⁸⁷

California Shoppers and four of its shareholders brought an action against its insurance carrier, Royal Globe, to recover damages allegedly resulting from the breaches of two duties arising under the policy.

One such breach was the refusal to indemnify the insured for a judgment awarded against it in a third-party action (the *Unedus* action) brought by a competitor. The other was the failure to defend the *Unedus* action. The main action also included a count for willful breach of the implied covenant of good faith and fair dealing allegedly occurring in connection with the failure to defend, as well as a count for fraud allegedly occurring at the time the insurance was purchased.⁸⁸

⁸³ *Id.* at 541.

⁸⁴ 10 F. Supp. 2d 800 (E.D. Mich. 1998).

⁸⁵ 30 F. Supp. 2d 101 (D. Mass. 1998).

⁸⁶ *Id.* at 110.

⁸⁷ 221 Cal. Rptr. 171 (Ct. App. 1985).

⁸⁸ *Id.* at 174.

The appellate court held that the lawyer who represented the policyholders against the shareholders did *not* qualify as a bad-faith expert. The court reasoned that he could not testify as an expert because he had never been employed by an insurance company, or even retained as counsel by an insurance company.

By virtue of the determination in *Kumho*, the rules espoused by these cases also apply to nonscientific evidence.⁸⁹ Within the insurance context, these include bad-faith, policy interpretations and claims-handling cases.⁹⁰

As the various district and state courts begin applying the *Kumho* analysis of *Daubert* to nonscientific evidence, inconsistencies between rigid application of the standards and a flexible approach should dissolve. For example, in *Moore v. Ashland Chemical, Inc.*,⁹¹ the Fifth Circuit, sitting en banc, likely applied *Daubert* too rigidly when it held that the district court had discretion to exclude the causation testimony of the plaintiff's clinical physician because there existed an "analytical gap" between the causation opinion and the scientific knowledge and data that were cited in support.⁹² "Courts that have applied *Daubert* broadly have demonstrated that, as a general framework, *Daubert* plays an important role in requiring experts to do more than 'come to court with their credentials and a subjective opinion.'"⁹³ Since inconsistency is still a possibility, it is absolutely necessary that the practitioner grasp the standards applied in both state and federal courts within the applicable jurisdictions. An example of such analysis is included below. It considers the status of New York law subsequent to *Daubert*, *Joiner*, and *Kumho*. Such an analysis should be undertaken within the practitioner's relevant jurisdiction.

V. NEW YORK APPROACH

A. State Court

1. Scientific Testimony

New York state courts have not yet adopted the *Daubert* standard as enhanced by *Joiner* or *Kumho*. Specifically, the New York Court of Appeals has not embraced the *Daubert* standard of scientific reliability; instead, it has retained the *Frye* "general acceptance" test. In *People*

⁸⁹ See *Kumho Tire*, 526 U.S. 137.

⁹⁰ See *supra* Part IV.

⁹¹ 151 F.3d 269 (5th Cir. 1998).

⁹² See Krebs & De Tray, *supra* note 54, at 1007 and the dissenting opinion in *Moore*, 151 F.3d at 269, which calls for a grant of wide latitude to the district court when exercising its gatekeeping function.

⁹³ Krebs & De Tray, *supra* note 54, at 1007 (citing *Tassin v. Sears Roebuck & Co.*, 946 F. Supp. at 1248).

v. *Wesley*,⁹⁴ the court noted in a footnote that *Daubert* was not applicable. It remarked that, under *Frye*, the particular procedure need not be unanimously “endorsed” by the scientific community if it is “generally accepted as reliable.”⁹⁵ The *Frye* standard became the basis for New York’s two-part test on the admissibility of scientific expert testimony.⁹⁶ Under the first prong of the test, the proffered expert’s testimony must be based upon scientific knowledge and skill that is not within the jury’s scope of ordinary training or intelligence. The expert need only have gained knowledge or expertise (formal or otherwise) that would assist the jury in interpreting the issues before it. If the proffered proof is based solely on common knowledge or intelligence, the testimony should be excluded because jurors can form these same reasonable opinions.

The second prong requires that the expert’s testimony be based on scientific principles or procedures under the “general acceptance” test.⁹⁷ It is within the province of the trial court to determine whether the expert’s testimony is both necessary to assist in the jury’s interpretation and whether the expert’s theory has gained general acceptance. Once that determination is made, the weight accorded to the expert’s testimony is left to the jury. Although the court may conduct a *Frye* hearing during which each party presents its position to support or challenge admissibility, one court has noted that such a hearing is not necessary, deciding the admissibility issue without a formal hearing.⁹⁸

2. Nonscientific Testimony

Consistently, the courts in New York have held that the *Frye* “general acceptance” test is not applicable to nonscientific or non-novel evidence.⁹⁹ When considering the testimony of an engineer regarding the design defects of an ATV, the court in *Wahl v. American Honda Motor Co.*,¹⁰⁰ ruled as follows: “inasmuch as the testimony . . . is that of an engineer, and . . . is based upon . . . recognized technical or other specialized knowledge, the Court finds that the stricter general acceptance standard of *Frye* is not applicable. The Court will apply the reliability standard as derive[d] from *Daubert* and *Kumho Tire*.”¹⁰¹

⁹⁴ 633 N.E.2d 451 (N.Y. 1994).

⁹⁵ *Id.* at 455. *See also* *People v. Wernick*, 674 N.E.2d 322 (N.Y. 1996); *People v. Green*, 683 N.Y.S.2d 597 (Sup. Ct. App. Div. 1998); *People v. Roraback*, 662 N.Y.S.2d 327 (Sup. Ct. App. Div. 1997).

⁹⁶ *See* *People v. Hughes*, 453 N.E.2d 484 (N.Y. 1983); *People v. Philips*, 692 N.Y.S.2d 915 (Sup. Ct., 1999).

⁹⁷ *People v. Wernick*, 674 N.E.2d 322 (N.Y. 1996).

⁹⁸ *Wesley*, 633 N.E.2d 451.

⁹⁹ *People v. Persaud*, 665 N.Y.S.2d 671 (Sup. Ct. App. Div. 1997); *People v. DiNonno*, 659 N.Y.S.2d 390 (Sup. Ct. App. Term 1997).

¹⁰⁰ 693 N.Y.S.2d 875 (Sup. Ct. 1999).

¹⁰¹ *Id.* at 877.

Following suit, another court in *Clemente v. Blumenberg*¹⁰² questioned the continued application of *Frye* not only to scientific, but to nonscientific expert testimony as well:

[T]he accelerated pace at which science travels is today far faster than the speed at which it traveled in 1923 when *Frye* was written. Breakthroughs in science which are valid may be relevant to a case before the courts. Waiting for the scientific community to “generally accept” a novel theory which is otherwise valid and reliable as evidence may deny a litigant justice before the court.¹⁰³

Thus, when considering the testimony of a biomedical engineer, the court analyzed the issues under both *Frye* and *Daubert* standards:

[T]his court finds that the proffered biomedical engineer is qualified as an expert in biomedical engineering based upon his professional training and may render an opinion as to the general formula of forces upon objects. . . . However, he may not render an opinion based on his report and testimony at the *Frye* hearing because the source of the data and the methodology employed by him in reaching his conclusion is not generally accepted in the relevant scientific or technical community to which it belongs.¹⁰⁴

The court continued: “applying the *Daubert/Kumho* factors . . . this court finds that the data and the methodology employed by the biomechanical engineer are not scientifically or technically valid.”¹⁰⁵ In addition to these findings, the court observed:

A trial judge’s role as a gatekeeper of evidence is not a role created by *Daubert* and rejected by the Court of Appeals; it is an inherent power of all trial court judges to keep unreliable evidence (“junk science”) away from the trier of fact regardless of the qualifications of the expert. A well-credentialed expert does not make invalid science valid merely by espousing an opinion.¹⁰⁶

By virtue of the *Clemente* decision, at least one New York judge is willing to move away from the rigors of *Frye* to a more liberal approach.

¹⁰² 705 N.Y.S.2d 792 (Sup. Ct. 1999).

¹⁰³ *Id.* at 799.

¹⁰⁴ *Id.* at 800.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 799.

3. Parker v. Mobil Oil Corporation¹⁰⁷

In the recent New York State Court of Appeals case of *Parker v. Mobil Oil Corporation*, a plaintiff diagnosed with acute myelogenous leukemia (AML) sued various oil corporations, claiming that his exposure to gasoline containing benzene caused his condition. When analyzing relevant issues, the lower court identified a three-step process for evaluating whether an expert witness's methodology was appropriate to determine scientific reliability. Specifically, the three-step process included: (1) a determination of the plaintiff's level of exposure to the toxin in question; (2) from a review of the scientific literature, proof that the toxin is capable of producing the illness in question (general causation) and proof regarding the level of exposure to the toxin that will produce that illness; and (3) proof of specific causation by demonstrating the probability that the toxin caused the plaintiff's particular illness.

While the court of appeals affirmed the lower court's decision, holding that the submissions of plaintiff's experts were properly precluded and defendants' motions for summary judgment were properly granted, the court of appeals deviated from the lower court's rationale.¹⁰⁸ Specifically, the appellate court rejected the determination that it was necessary for plaintiff always to quantify exposure levels or a dose-response relationship. Rather, the court held that a variety of methodologies may be acceptable so long as they are generally accepted in the scientific community. Thus, whereas the lower court founded its decision primarily upon the failure of plaintiff's experts to adequately quantify plaintiff's level of exposure to the toxin needed to contract AML, the court of appeals focused on the generally unreliable nature of the submissions by plaintiff's experts, which relied upon studies of direct exposure to benzene rather than studies of exposure to benzene in gasoline.

B. Federal Court

Since the Supreme Court's decision in *Daubert*, a handful of federal court cases in New York have addressed the *Daubert/Kumho* standards.

1. Gray v. Briggs¹⁰⁹

In *Gray v. Briggs*, which involved a dispute between an attorney and former law firm employees who had participated in the firm's pension plan, it was alleged that defendants breached a fiduciary duty in violation of the Employee Retirement Income Security Act (ERISA). Plaintiff had retained an expert who asserted, among other things, that defendants had violated ERISA, made speculative personal investments, and violated industry standards

¹⁰⁷ 857 N.E.2d 1114 (N.Y. 2006).

¹⁰⁸ *Id.*

¹⁰⁹ 45 F. Supp. 2d 316 (S.D.N.Y. 1999).

against churning. The defendants challenged the plaintiff's expert and moved to preclude the testimony. Citing *Kumho*, the court rejected the expert's testimony and concomitant report on various grounds. Among them were findings that: (1) the testimony was outside the expert's expertise; (2) the expert lacked the qualifications to express the opinion for which his testimony was offered; and (3) the expert's opinion was nothing more than strained speculations or bare legal conclusions. In other words, it was without sufficient evidentiary basis to be helpful to the court or reliable.

When applying the *Kumho* standard, the court offered that expert testimony is admitted under Federal Rule of Evidence 702 when it "will assist the trier of fact to understand the evidence or determine a fact in issue."¹¹⁰ Further, an expert must be qualified to testify (i.e., by knowledge, skill, experience, training or education). As noted in *Kumho*, the expert must have "sufficient specialized knowledge to assist . . . in deciding the particular issue in the case."¹¹¹

2. Grdinich v. Bradlees¹¹²

Another district court judge considered *Daubert* and its progeny in *Grdinich v. Bradlees*, which involved a claim by a plaintiff who was injured while shopping at defendant's store when ironing boards fell from a display case. The plaintiff had retained an expert to testify that the defendant ignored or failed to follow the industry guidelines applicable to self-service department stores. However, the admissibility of that expert's testimony was challenged by the defendant.

Citing the "gatekeeping" function articulated by *Daubert* and *Kumho* (application of *Daubert* to technical and other specialized knowledge), the court noted that it must decide "whether this particular expert has sufficient specialized knowledge to assist the jurors in deciding the particular issue in the case."¹¹³ The court precluded the expert testimony because:

- (1) none of the *Daubert* factors was present, including that of "general acceptance" within the relevant expert community; and
- (2) there were no countervailing factors which favored admissibility so as to outweigh those identified in *Daubert*.

As a result, the testimony was precluded because it was neither reliable nor relevant.

¹¹⁰ *Id.* at 323 (citation omitted).

¹¹¹ *Id.* (citations omitted).

¹¹² 187 F.R.D. 77 (S.D.N.Y. 1999).

¹¹³ *Id.* at 81 (citations omitted).

3. *Prohaska v. Sofamor*¹¹⁴

In *Prohaska v. Sofamor, S.N.C.*, a patient brought a products liability action against the manufacturer of pedicle bone screws that allegedly cause spinal problems and other consequences. One of plaintiff's experts was a board-certified neurosurgeon with thirty-five years of experience who claimed he was "well acquainted" with defendant's and others' spinal instrumentation, "'even though I do not personally install it myself surgically.'" ¹¹⁵ Following cancer treatment, he had not performed any neurological surgery since 1997. Furthermore, his specialty was "acoustic tumors of the brain and implantation of continuous infusion pumps into the spinal column for control of intractable pain in cancer patients."¹¹⁶ He was not trained to do lumbar fusions — the type of surgery at issue in the case.

The court detailed the expert's lack of experience with the specific fixation devices and related surgery involved in the case at hand.¹¹⁷ Because the focus under *Daubert* is not simply raw qualifications in the abstract but qualifications to testify reliably, the court found the proffered expert to be unqualified by skill, experience, training, knowledge or education in the specific subject at issue. Instead, he demonstrated a "litigation-driven expertise," asserted "conclusory allegations," failed to personally examine plaintiff or her scans, made a differential diagnosis without "intellectual rigor," and indulged in assumptions rather than relying on medical fact.¹¹⁸ Accordingly, his proffered testimony was judged to be unreliable under a *Daubert* analysis.

4. *Brooks v. Outboard Marine Corp.*¹¹⁹

In *Brooks v. Outboard Marine Corp.*, the parent of a minor whose hand was amputated by a propeller on an outboard boat motor commenced a product liability action on behalf of the minor against the motor manufacturer. After Outboard deposed the plaintiff's expert witness and discovery had closed, the plaintiff requested permission to extend discovery in order to obtain a new expert witness. During this same interval, Outboard filed a motion for summary judgment, arguing that the plaintiff's current expert should be precluded from testifying and that summary judgment was proper on the plaintiff's theories of liability.¹²⁰ The matter was then referred to a magistrate judge. Meanwhile, the plaintiff filed the curriculum vitae and one-page report of a new expert witness. The new expert's report concluded that

¹¹⁴ 138 F.Supp.2d 422 (W.D.N.Y. 2001).

¹¹⁵ *Id.* at 435.

¹¹⁶ *Id.* at 436.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 437.

¹¹⁹ 234 F.3d 89 (2d. Cir. 2000).

¹²⁰ *Id.* at 90.

a certain safety mechanism on the boat could have prevented the accident or lessened its severity. Subsequently,

[t]he magistrate recommended denying OMC's motion for summary judgment, finding that it was "premature" because the defendant had not properly responded to the plaintiff's new design defect theory. In addition, the magistrate found it premature to rule on the admissibility of Mr. Warren's testimony, noting that such rulings are usually made on a more complete record. The district court adopted the magistrate's recommendation.¹²¹

On appeal, plaintiff argued that the Supreme Court's decision in *Kumho* required the party challenging the admissibility of its opponent's expert to first use its own expert to call the challenged expert's testimony "sufficiently into question."¹²² Only then could the district court analyze the admissibility of the expert's testimony. The Second Circuit responded that this argument was without merit. The court explained that in *Daubert*,

the Supreme Court instructed that the Federal Rules of Evidence require the trial court to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The subsequent decision in *Kumho Tire* makes clear that this gate-keeping function applies not just to scientific expert testimony as discussed in *Daubert*, but also to testimony based on technical and other specialized knowledge.¹²³

[The court held that the] plaintiff's argument that this gate-keeping role disappears when a proposed expert witness is not challenged by an opposing expert witness thus runs counter to the thrust of *Daubert* and *Kumho Tire*. Nowhere in either opinion is there language suggesting that testimony could only be "called sufficiently into question" by a rebuttal expert. . . . Having determined that the district court acted within its discretion in excluding Mr. Warren's testimony, the plaintiff [had] no evidence in the record to support his theory that the motor had a design defect which caused the accident or increased its severity. As a result, the Court of Appeals held that summary judgment was properly granted.¹²⁴

¹²¹ *Id.*

¹²² *Id.* at 149.

¹²³ *Kumho Tire*, 526 U.S. at 141 (quoting FED. R. EVID. 702).

¹²⁴ *Brooks v. Outboard Marine Corp.*, 234 F.3d at 92.

5. *American Home Assurance Co. v. Merck & Co.*¹²⁵

In the 2006 case of *American Home Assurance Co. v. Merck & Co.*, the insurer brought an action for declaration that it properly denied Merck's claims for coverage under the transit insurance policy. Among other causes of action, American Home counterclaimed for bad faith. "Courts within the Second Circuit [however] have liberally construed expert qualification requirements when determining whether a witness can be considered an expert."¹²⁶ In fact, the courts of the Second Circuit have instructed that when determining whether a witness is qualified to render an expert opinion, a trial court:

must first ascertain whether the proffered expert has the educational background or training in a relevant field. Then the court should further compare the expert's area of expertise with the particular opinion the expert seeks to offer and permit the expert to testify only if the expert's particular expertise enables the expert to give an opinion that is capable of assisting the trier of fact.¹²⁷

With this directive in mind, the federal trial court addressed the parties' motions to preclude expert testimony:

American Home [sought] to preclude the testimony of Merck's "insurance expert," . . . who[m] Merck plan[ned] to have testify at trial about: custom and practice in the transit insurance industry; whether American Home acted in accordance with those industry customs and practices under the Transit Policy; whether American Home acted in bad faith as that term is understood in the industry; and the construction and meaning, as understood in the industry, of the Transit Policy and its provisions.

American Home assert[ed] several challenges to [Merck's] expert's testimony. Specifically, American Home object[ed] (1) generally to his credentials to testify as a transit insurance expert, (2) to the foundation for his opinions to the extent Jervis relie[d] on the report of the prior insurance expert retained by Merck, and . . . (3) to his opining on the meaning of the Transit Policy clauses at issue in this action.

¹²⁵ 462 F. Supp. 2d 435 (S.D.N.Y. 2006).

¹²⁶ *Id.* at 447; *see also* McCulloch v. H.B. Fuller Co., 61 F.3d 1038, 1042 (2d Cir. 1995) ("The decision to admit expert testimony is left to the broad discretion of the trial judge and will be overturned only when manifestly erroneous."); *United States v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985) (qualification requirements of Rule 702 "must be read in light of the liberalizing purpose of the Rule"); *Canino v. HRP, Inc.*, 105 F. Supp. 2d 21, 27 (N.D.N.Y. 2000) ("liberality and flexibility in evaluating qualifications should be the rule") (citation omitted).

¹²⁷ *TC Systems, Inc. v. Town of Colonie*, 213 F. Supp. 2d 171, 174 (N.D.N.Y. 2002).

Regarding [the expert's] credentials, . . . it appear[ed] that the expert [had] substantial experience dealing with transit insurance policies covering policyholders in the United States. The documents Merck [had] submitted in support of its expert indicat[ed] that Jervis [had] over twenty-five years of experience in the transit insurance business across the globe and [had] handled and adjusted over 12,500 transit claims during his career.¹²⁸

The court held that, to the extent it relied on the report of Merck's prior insurance expert, American Home's objection to the expert's testimony was overstated.¹²⁹ In this case, the expert had reviewed all the underlying materials that informed the previous expert and reached similar conclusions. Under such circumstances, there was nothing improper about an expert who incorporated the previous expert's findings in his report.

Finally, the court addressed American Home's concerns about the expert's report and the areas about which he would testify at trial. The expert's report:

Proffer[ed] his readings of the CDG Clause, Sue and Labor clause, and the Valuation clause. In discussing these clauses, [the expert's] report clearly imping[ed] upon the province of the Court, in so far as he essentially proffer[ed] his own version of contractual interpretation. . . . Expert testimony that usurps either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying the law to the facts before it by definition does not aid the jury in making a decision; rather it undertakes to tell the jury what result to reach, and thus attempts to substitute the expert's judgment for the jury's. Thus, the Court [precluded Merck's expert] from testifying as to his interpretation of the clauses at issue in the Transit Policy.

Testifying as a transit insurance expert, [the expert's] testimony should be limited to what he understands to be the standard practices and customs of his business and what he regards as the standard expectations of insurer and insured. While [the expert] may be an expert on customs and practices generally under transit insurance policies, he is not an expert on this Transit Policy, having had nothing to do with the negotiating, drafting or performance of it. Thus, absent sufficient basis for addressing this matter, [the expert] cannot testify as to his understanding of the specific provisions of this policy or the import of specific words or phrases of various clauses therein.¹³⁰

¹²⁸ *Am. Home Assurance Co.*, 462 F. Supp. 2d 447.

¹²⁹ *Id.*

¹³⁰ *Id.* at 448.

VI. RELIABLE DATA

It is obvious that an expert cannot testify in a vacuum. The court in *Joiner*¹³¹ focused on the concept of an “analytical gap,” excluding expert testimony that exposure to certain chemicals caused lung cancer because the expert’s opinion was based on animal epidemiological studies with no explanation as to how such studies applied to humans. In *Moore v. Ashland Chemical, Inc.*,¹³² the Fifth Circuit conducted a similar analysis, excluding the expert testimony of a physician who did not rely on established studies to support his opinion. These cases illustrate the significance of an expert’s research studies and data to the admissibility and relevance of his or her testimony. The recent decision of the Tenth Circuit in *Roberts v. Farmers Insurance Co.*¹³³ provides a case in point. At issue on appeal was whether the district court had properly granted the insurer’s motion for summary judgment since the insurance policy contained a “resident exclusion,” which precluded the insured from recovering for personal injuries sustained at her home. The insured argued that even though the policy excluded such coverage, she should be entitled to recover under the doctrine of “reasonable expectations” because the exclusion was either ambiguous or hidden in the policy (i.e., printed in small font and buried on page seven amid a laundry list of exclusions). Attempting to prove that the resident exclusion was ambiguous, the insured offered the expert testimony of a psychology professor and an accompanying survey of 126 college students. The survey was conducted by the professor and purportedly concluded that, after reading the exclusion, sixty-nine percent of the students believed that the policy provided coverage. The district court excluded the survey, however, noting that:

The Plaintiff’s only support of a claim of ambiguity is the survey of Dr. Donovan, intended to show that the contract must be ambiguous if a group of college students find it to be so. This Court disagrees. The Oklahoma Supreme Court has admonished courts not to indulge in forced or strained construction to create and then construe ambiguities where they do not otherwise exist. Because this Court must determine if the policy is ambiguous as a matter of law, the survey of Dr. Donovan is inappropriate and irrelevant to establish the existence of an ambiguity.¹³⁴

¹³¹ Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

¹³² 151 F.3d 269 (5th Cir. 1998).

¹³³ 201 F.3d 448 (10th Cir. 1999) (unpublished table decision).

¹³⁴ Roberts v. Farmers Ins. Co., 23 F. Supp. 2d 1298, 1303 (N.D. Okla. 1998) (citation omitted).

Affirming the district court's refusal to consider the survey evidence, the Tenth Circuit noted that under Oklahoma contract law, whether an insurance policy is ambiguous is decided as a matter of law. Extrinsic evidence can be considered only after a finding of ambiguity.¹³⁵ In the instant case, however, the court determined that the residence exclusion was not ambiguous; therefore, the survey was irrelevant.

What would have happened had the court determined the existence of an ambiguity? Would the survey of college students have been admissible? The circuit court observed that "well conducted public opinion surveys may play an important role in the courtroom"¹³⁶ and referenced two cases cited by the insured in that regard. In the trademark case of *Brunswick Corp. v. Spinit Reel Co.*,¹³⁷ the confusion between two products surfaced as a legal issue. When determining the likelihood of confusion about the source of a product with a similar trademark or trade dress, the trial court admitted a survey, in addition to other evidence. The survey involved individuals located in shopping areas within five cities who were shown a Sprint SR210 reel and asked to name the manufacturer. The Tenth Circuit held that the district court did not abuse its discretion in admitting the survey, noting that: "[s]urvey evidence may be admitted as an exception to the hearsay rule if the survey is material, more probative on the issue than other evidence, and if it guarantees trustworthiness."¹³⁸

When determining materiality in cases involving confusion over product source, a survey may be the only available method of demonstrating the public state of mind. A survey is considered *trustworthy* when it is conducted according to accepted principles. In *Brunswick*, the survey apparently was conducted using reasonably acceptable market research techniques. The court therefore admitted the survey on the issue of confusion and further indicated that any technical or methodological deficiencies would affect its weight; not its admissibility.

The second case referenced by the Tenth Circuit was *Harold's Stores, Inc. v. Dillard Department Stores, Inc.*,¹³⁹ which involved alleged injury to the plaintiff's public reputation and goodwill. Plaintiff there utilized the services of a marketing professor as an expert. Based on the results of a survey of college-aged women who had visited the plaintiff's store or examined its catalog and visited the defendant's store, the expert calculated damages due the plaintiff nationwide because of defendant's alleged copyright infringement and antitrust actions. Again, the appellate court determined that the district court did not abuse its discre-

¹³⁵ *Roberts*, 201 F.3d 448.

¹³⁶ *Id.* at *2, n.2.

¹³⁷ 832 F.2d 513 (10th Cir. 1987).

¹³⁸ *Id.* at 522 (citations omitted).

¹³⁹ 82 F.3d 1533 (10th Cir. 1996).

tion in admitting the survey as an exception to the hearsay rule. The survey was determined to be “material, probative to the issue of copyright infringement damages, and conducted according to generally accepted survey principles.”¹⁴⁰ The court further noted:

The survey should sample an adequate or proper universe of respondents. That is, the persons interviewed must adequately represent the opinions which are relevant to the litigation. The district court should exclude the survey when the sample is clearly not representative of the universe it is intended to reflect.¹⁴¹

With respect to the insured’s survey offer in *Roberts*, the court determined that the survey would not be allowed, even if the policy was ambiguous: “In the case before us, there is no link between the legal question and the survey evidence; what the public expects from an insurance policy is simply not relevant to the legal question of whether the contract is ambiguous.”¹⁴² The court did not decide application of the reasonable expectation doctrine because that doctrine only applied where the court found the policy ambiguous or the exclusion hidden. Here, the insured had failed to make a prima facie case.

It would appear from these authorities that courts will not admit survey-type evidence or other data, studies, or methodological evidence where there is no “link” between the proffered evidence and the legal issue before the court. This is true whether the case involves bad faith, a claims-handling procedure, or a policy interpretation. It would seem that this “link” is the same “analytical gap” that the court referred to in *Joiner* when it stated: “A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”¹⁴³

VII. PROCEDURAL ATTACK

In his concurring opinion in *Joiner*, Justice Steven Breyer entered an interesting observation:

[J]udges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific, or otherwise technical, evidence. Among these tech-

¹⁴⁰ *Id.* at 1544.

¹⁴¹ *Id.* (citations omitted).

¹⁴² *Roberts*, 201 F.3d 448, at *2, n.2 (unpublished table decision).

¹⁴³ *Gen. Elec. Co. v. Joiner*, 522 U.S. at 146.

niques are an increased use of Rule 16's pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks.¹⁴⁴

The procedural mechanisms referenced by Justice Breyer generally are initiated at the discretion of the court and often occur well into the litigation process. For example, the circuit court of appeals in *Harold Stores* stated: "we cannot conclude the district court abused its discretion in admitting the survey. The district court conducted an extensive voir dire of Dr. Howard and satisfied itself that the survey [met the appropriate standard]."¹⁴⁵ In light of this observation, defense counsel should ask whether any procedural mechanisms are available that can be implemented early in the litigation process to facilitate the economies of handling these types of cases.

The parties and the court must develop a procedural mechanism that challenges the testimony of plaintiffs' insurance industry experts sooner rather than later. Such a procedural device has been developed within recent years in toxic tort and environmental cases and should be tested within the context of other cases as well. *Lore v. Lone Pine Corp.*¹⁴⁶ is instructive. This case involved a toxic tort claim against a landfill operator and the generators and haulers of toxic materials to that landfill. The plaintiffs alleged that their property values depreciated because the landfill existed. They also claimed personal injuries from exposure to various toxic substances. The defendants in *Lore* served an order to show cause seeking a case management order requiring the plaintiff to furnish "basic facts" on the causation issues to support their claims of personal injury and property damage (now known as a "*Lone Pine* order"). Since the plaintiffs failed to provide the expert evidence required by the case management order, the court dismissed the plaintiffs' complaint with prejudice, consistent with the procedural rules of the State of New Jersey. It then noted: "[t]his Court is not willing to continue the instant action with the hope that the defendants eventually will capitulate and give a sum of money to satisfy plaintiffs and their attorneys without having been put to the test of proving their cause of action."¹⁴⁷

¹⁴⁴ *Id.* at 149 (Breyer, J., concurring) (citations omitted).

¹⁴⁵ *Harold Stores*, 82 F.3d at 1545.

¹⁴⁶ No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

¹⁴⁷ *Id.* at *4. See also *In re Love Canal Actions*, 547 N.Y.S.2d 174 (Sup. Ct. 1989), *aff'd as modified*, 555 N.Y.S.2d 519 (Sup. Ct. App. Div. 1990); *Grant v. E.I. DuPont de Nemours & Co.*, No. 91-55-CIV-4H, 1993 WL 146634 (E.D.N.C. Feb. 17, 1993) *aff'd*, 1993 WL 146638 (E.D.N.C. Mar. 26, 1993); *Kinnick v. Schierl, Inc.*, 541 N.W.2d 803 (Wis. Ct. App. 1995). See generally Don G. Rushing & Mary A. Lehman, *Toxic Tort Litigation; Using Case Management Orders*, FOR THE DEFENSE, June 1999.

Other courts have refined and modified the *Lone Pine* order to require plaintiffs to delineate the amount of substance or chemical to which they were exposed or to provide expert medical opinions eliminating other causes.¹⁴⁸ Several recent cases also have considered the problem of a plaintiff's failure to provide any proof of causation at a relatively early stage in the litigation process. These have reinforced the concept that a plaintiff should not even file a lawsuit until there is adequate reason to believe that the plaintiff is injured and that the defendant caused that injury.¹⁴⁹ The same arguments can be made within the insurance context. Relevant areas of inquiry include the following:

- (1) How does plaintiff's expert know the practice and procedure is not readily acceptable in the insurance industry?
- (2) Does the plaintiff's expert analysis conform to peer review?
- (3) Is the testimony of the plaintiff's expert on issues of reconstruction consistent with industry standards and reconstruction principles?
- (4) Is there a gap between the expert opinion offered and the data or study relied upon?

The use of *Lone Pine* orders has been recognized as useful in achieving judicial efficiencies and economies, regulating complicated evidentiary issues, and avoiding duplication of efforts.¹⁵⁰ Therefore, when faced with evidentiary and expert issues in this type of litigation, defense counsel should seek a case management order early in the litigation process. That order also should seek a prima facie showing that any expert evidence satisfies the appropriate standard as articulated in *Daubert*, *Joiner* and *Kumho* or *Frye*.

¹⁴⁸ In *Grant v. E.I. Du Pont De Nemours & Co.*, No. 91-55-CIV-4H, 1993 WL 146634 (E.D.N.C. Feb. 17, 1993), the court required plaintiff to state when exposure to toxic substances occurred. *See also* *Zwillinger v. Garfield Slope Hous. Corp.*, No. CV 94-4009, 1998 WL 623589 (E.D.N.Y. Aug. 17, 1998); *Cottle v. Superior Court*, 5 Cal. Rptr. 2d 882 (Ct. App. 1992); *Atwood v. Warner Elec. Brake & Clutch Co.*, 605 N.E.2d 1032 (Ill. App. Ct. 1992); *Eggar v. Burlington N. R.R.*, No. 89-159-BLG-JFB, 1991 WL 315487 (D. Mont. 1991), *aff'd sub nom. Claar v. Burlington N. R.R.*, 29 F.3d 499 (9th Cir. 1994); *Gallagher v. Fibreboard Corp.*, 641 So. 2d 953 (Fla. Dist. Ct. App. 1994).

¹⁴⁹ *See* *In re Mohawk Rubber Co.*, 982 S.W.2d 494 (Tex. App. 1998); *In re Colonial Pipeline Co.*, 968 S.W.2d 938 (Tex. 1998).

¹⁵⁰ *See* D. Alan Rudlin, *Strategies in Litigating Multiple Plaintiff Toxic Tort Suits*, in ENVIRONMENTAL LITIGATION 122, 137-42 (Janet S. Kole & Larry D. Espel eds., 1991).

VII. CONCLUSION

“Junk science” and the “junk expert” must be challenged early in the litigation process to thwart frivolous and speculative litigation and to preclude the testimony of expert witnesses bearing specious credentials. The plaintiffs’ bar should be tested and required to provide the defense with evidence concerning the qualifications, reliability and relevance of expert opinions well in advance of trial. Such an approach certainly will control the litigation and settlement costs, and it is critical to a proactive approach that challenges the “hired gun.”

APPENDIX A

Insurance Bad Faith: A State by State Review

State	On What Issues Is Expert Evidence Required to Establish Bad Faith?	On What Issues Is Expert Evidence Precluded?
Alabama	<p>None. Alabama courts have no requirement that plaintiffs must present expert testimony in order to proceed on a bad-faith claim. However, it is not uncommon for a plaintiff to utilize an expert in order to meet the heavy burden of proof. <i>See Acceptance Ins. Co. v. Brown</i>, 832 So.2d 1 (Ala. 2001).</p> <p>In civil cases, Alabama utilizes the “general acceptance” test articulated in <i>Frye v. U.S.</i>, 293 F. 1013 (D.C. Cir. 1923), to evaluate the admissibility of expert testimony. Alabama has not adopted the expert testimony standards of <i>Daubert v. Merrell Dow Pharm., Inc.</i>, 509 U.S. 579 (1993). In <i>Bagley v. Mazda Motor Corp.</i>, 864 So.2d 301 (Ala. 2003), the court held that questions of whether a witness is qualified as an expert and whether, if so qualified, a witness may provide expert opinion or testimony on the subject in question remains largely within the discretion of the trial judge.</p>	<p>Rule 704 of the Alabama Rules of Evidence precludes an expert from testifying on the “ultimate issue” to be decided by the trier of fact. Therefore, an expert would be precluded from offering an opinion that the insurer denied a claim in bad faith. Alabama courts are lenient in allowing expert testimony, utilizing the <i>Frye</i> general acceptance test for civil cases. <i>Frye v. U.S.</i>, 293 F.1013 (D.C. Cir. 1923). The court does not implement the more stringent standard employed by the United States Supreme Court in <i>Daubert v. Merrell Dow Pharm., Inc.</i>, 509 U.S. 579 (1993).</p>
Alaska	<p>In Alaska, the courts have held that expert evidence is not required to establish bad faith. “An expert witness may be called when ‘scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.’” <i>Nelson v. Progressive Corp.</i>, 976 P.2d 859, 866 (Alaska 1999) (citing Alaska R. Evid. 702(a)). Yet various courts have admitted expert testimony on a variety of subjects dealing with insurance bad faith. <i>Id.</i> (defense expert testified that the insured had “set-up” the insurer for a bad-faith lawsuit); <i>see also State Farm Fire & Cas. Co. v. Nicholson</i>, 777 P.2d 1152 (Alaska 1989) (the trial court received expert testimony from an independent claims adjuster that the insurer’s delay was unreasonable and outrageous); <i>State Farm Mut. Auto. Ins. Co., v. Weiford</i>, 831 P.2d 1264 (Alaska 1992); <i>Jackson v. American Equity Ins. Co.</i>, 90 P.3d 136 (Alaska 2004) (while the court ultimately held that the expert opinion was</p>	<p>In <i>Nelson v. Progressive Corp.</i>, 976 P.2d 859 (Alaska 1999), the court held that there are no issues where expert evidence is per se precluded.</p>

	sufficiently disclosed before trial, sufficient disclosure could have been a potential problem especially if there was an objection at trial).	
Arizona	Arizona does not require expert evidence in order to establish any elements of a bad-faith claim. However, it is not uncommon for both plaintiffs and insurers to use experts to address the reasonableness of the insurer's conduct. <i>See, e.g., Rawlings v. Apodaca</i> , 726 P.2d 565 (Ariz. 1986); <i>Zilisch v. State Farm Mut. Auto. Ins. Co.</i> , 995 P.2d 276 (Ariz. 2000); <i>Clearwater v. State Farm Mutual Auto. Ins. Co.</i> , 780 P.2d 423 (Ariz. Ct. App. 1989), <i>rev'd on other grounds</i> , 792 P.2d 719 (Ariz. 1990); and <i>City of Glendale v. Farmers Ins. Exch.</i> , 613 P.2d 278 (Ariz. 1980).	The Arizona Supreme Court has held that the admission of expert testimony regarding the credibility or subjective motivation of the person involved in the claim is "dubious." <i>Gurule v. Ill. Mut. Life & Cas. Co.</i> , 152 Ariz. 600, 604 (Ariz. 1987). In addition, legal conclusions "are not an appropriate topic for expert opinion." <i>Knoell v. Metro. Life Ins. Co.</i> , 163 F.Supp. 2d 1072, 1078 n.8 (D. Ariz. 2001); <i>see also Lopez v. Allstate Ins. Co.</i> , 282 F. Supp. 2d 1095 (D. Ariz. 2003).
Arkansas	There is no published Arkansas case law on this issue.	Expert testimony on whether an insurer acted in bad faith is inadmissible. <i>Aetna Cas. & Sur. Co. v. Broadway Arms Corp.</i> , 664 S.W.2d 463 (Ark. 1984).
California	In California, expert testimony is required on whether the insurer conducted a thorough investigation of the facts, handled the claim promptly, acted reasonably based on the information available to it, and made a reasonable evaluation of and response to settlement opportunities. In <i>Neal v. Farmers Ins. Exch.</i> , 582 P.2d 980 (Cal. 1978), the court held that expert testimony is not required where the insurer's wrongful conduct involves commonly understood bad acts, such as lying.	Expert testimony is inadmissible where the issue is one of law for the court to decide (i.e., whether the insured's claim is covered under the insurance policy at issue). <i>Cooper Co. v. Transcon. Ins. Co.</i> , 37 Cal. Rptr. 2d 508 (Ct. App. 1995) (contract interpretation); <i>Devin v. United Servs. Auto. Ass'n</i> , 8 Cal.Rptr.2d 263 (Ct. App. 1992) (contract interpretation); <i>Summers v. A.L. Gilbert Co.</i> , 82 Cal. Rptr. 2d 162 (Ct. App. 1999) (existence of duty).
Colorado	Colorado courts have held that in every bad-faith case, the insured must prove that the insurer's conduct was unreasonable. The court in <i>Travelers Ins. Co. v. Savio</i> , 706 P.2d 1258 (Colo. 1985), held that to establish this element, there must be proof of the insurance industry's standard conduct. The <i>Savio</i> court noted that this element must be determined "on an objective basis..." <i>See also South Park Aggregates, Inc. v. Northwestern Nat'l Ins. Co.</i> , 847 P.2d 218 (Colo. Ct. App. 1992); <i>Burgess v. Mid-Century Ins. Co.</i> , 841 P.2d 325 (Colo. Ct. App. 1992). In <i>Southerland v. Argonaut Ins. Co.</i> , 794 P.2d 1102 (Colo. Ct. App. 1990), the court	In <i>Hines v. Denver & Rio Grande W.R.R. Co.</i> , 829 P.2d 419, 422-23 (Colo. App. 1991), the court held that "the rules on expert opinion are not intended to permit experts to 'tell the jury what result to reach.'"

BAD FAITH: THE ADMISIBILITY OF EXPERT TESTIMONY

	<p>held that anyone with sufficient familiarity with insurance industry standards, including an attorney who has regularly dealt with the insurance industry, may be qualified to present an expert opinion.</p> <p><i>In Novell v. Am. Guar. Liab. Ins. Co.</i>, 15 P.3d 775 (Colo. Ct. App. 1999), the court upheld a trial court's ruling permitting expert testimony in a bad-faith action where "the testimony was helpful in explaining both the applicable statutes governing defendant's claim processing and the issues relative to claims management practice."</p>	
Connecticut	There is no published Connecticut case law on this issue.	There is no published Connecticut case law on this issue.
Delaware	<p>There is no published Delaware case law on this issue. Courts have held that expert testimony is generally admissible on any issue where the expert's testimony will be helpful to the fact finder, particularly in complex insurance cases. <i>N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.</i>, No. 88C-JA-155, 1995 WL 628447 (Del. Super Ct. Apr. 22, 1995).</p>	<p>Expert testimony is generally admissible on any issue where the expert's testimony will be helpful to the fact finder, particularly in complex insurance cases. <i>N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.</i>, No. 88C-JA-155, 1995 WL 628447 (Del. Super Ct. Apr. 22, 1995); <i>Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.</i>, 1994 WL 721642 (Del. Super. Ct. Apr. 13, 1994).</p>
District of Columbia	There is no published District of Columbia case law on this issue.	There is no published District of Columbia case law on this issue.
Florida	There is no published Florida case law on this issue.	There is no published Florida case law on this issue.
Georgia	There is no published Georgia case law on this issue.	There is no published Georgia case law on this issue.
Hawaii	There is no published Hawaii case law on this issue.	There is no published Hawaii case law on this issue.
Idaho	<p>Expert testimony is not required to prove a claim of bad faith. However, expert testimony regarding insurance regulation and industry standards is admissible. <i>See, e.g., Inland Group of Cos. v. Providence Wash. Ins. Co.</i>, 985 P.2d 674 (Idaho 1999) (noting expert testimony on industry standards and practices). Relevant expert testimony concerning damages is also admissible. <i>See, e.g., id.</i> (noting expert testimony on damages).</p>	There is no published Idaho case law on this issue.

Illinois	There is no requirement of expert testimony to prevail or defeat a claim for bad-faith failure to settle within policy limits. <i>Cal. Union Ins. Co. v. Liberty Mut. Ins. Co.</i> , 920 F. Supp. 908 (N.D. Ill. 1996).	Expert evidence cannot be called upon to decide a controverted fact. <i>Norman v. Am. Nat'l Fire Ins. Co.</i> , 555 N.E.2d 1087 (Ill. App. Ct. 1990).
Indiana	There is no published Indiana case law on this issue.	In <i>Bartlett v. State Farm Mut. Auto. Ins.</i> , the court held that an expert witness may not offer opinions about legal issues that will determine the outcome of a case. <i>Bartlett v. State Farm Mut. Auto. Ins.</i> , No. 01-0510-C-H/K, 2002 WL 31741473 (S.D. Ind. Nov. 27, 2002) (precluding testimony of an expert who stated in his affidavit that insurer: (1) violated the Indiana Unfair Claims and Settlement Practices Act; (2) misrepresented pertinent facts and policy provisions; (3) refused to pay benefits in light of the medical examinations; (4) refused to pay the limits and compelled the litigation; and (5) breached its duty of good faith and fair dealing).
Iowa	Iowa courts have held that expert testimony is properly used when it will assist the trier of fact. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." <i>M-Z Enters., Inc. v. Hawkeye-Security Ins. Co.</i> , 318 N.W.2d 408, 414 (Iowa 1982) (citation omitted). In <i>Nassen v. National States Ins. Co.</i> , the court followed Iowa Rule of Evidence 702, which "allows the admission of expert opinions if such opinions will assist the trier of fact in understanding the evidence or in determining certain factual issues." 494 N.W.2d 231, 235 (Iowa 1992). In <i>Johnson v. American Family Mut. Ins. Co.</i> , the court allowed the testimony of three personal injury attorneys as expert witnesses for the defense in a bad-faith action. 674 N.W.2d 88 (Iowa 2004).	In <i>Higgins v. Blue Cross</i> , 319 N.W.2d 232, 238 (Iowa 1982), the court held that an "opinion on a mixed question of law and fact" is inadmissible at trial and not a proper subject of opinion evidence; see also <i>Kooyman v. Farm Bureau Mut. Ins. Co.</i> , 315 N.W.2d 30 (Iowa 1982) (expert opinions that a liability insurer's attorneys acted in bad faith and that the insurer failed to conduct a sufficient investigation of a claim against the insured were inadmissible).

BAD FAITH: THE ADMISIBILITY OF EXPERT TESTIMONY

Kansas	Kansas does not recognize the tort of insurance bad faith. However, there are cases in which courts have allowed expert testimony where it is necessary to determine whether an insurer's conduct is consistent with its contractual duties. In <i>Associated Wholesale Grocers, Inc. v. Americold Corp.</i> , the court held that expert testimony was admissible to show the strengths and weaknesses of the parties' positions on reasonableness of settlement. However, in those instances in which it is necessary to determine whether an insurer's conduct is consistent with its contractual duties, expert testimony is admissible. 934 P.2d 65 (Kan. 1997).	There is no published Kansas case law on this issue.
Kentucky	There is no published Kentucky case law on this issue.	KRE 702, which governs the admission of expert testimony, 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, training, or education, may testify thereto in the form of an opinion or otherwise." Application of KRE 702 is addressed to the sound discretion of the trial court. See <i>Ford v. Commonwealth</i> , 665 S.W.2d 304 (Ky. 1983). An abuse of discretion occurs when a "trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles." <i>Goodyear Tire and Rubber Co. v. Thompson</i> , 11 S.W.3d 575, 581 (Ky. 2000). A trial court's ruling on the qualifications of an expert should not be overturned unless the ruling is clearly erroneous. <i>Commonwealth v. Rose</i> , 725 S.W.2d 588 (Ky. 1987), <i>overruled on other grounds by Commonwealth v. Craig</i> , 783 S.W.2d 387 (Ky. 1990). In <i>Farmland Mut. Ins. Co. v. Johnson</i> , an expert's testimony was precluded when the proffered expert had no experience of adjusting claims in the insurance industry. 36 S.W.3d 368 (Ky. 2000).
Louisiana	None, although expert evidence may be relevant on some issues in bad-faith litigation, such as whether the insurer's failure to pay a claim was arbitrary and capricious or whether the insurer's failure to settle constituted bad faith.	With Louisiana bad-faith claims, expert evidence is not necessary.

Maine	There is no published Maine case law on this issue.	There is no published Maine case law on this issue.
Maryland	<i>In Kremen v. Maryland Automobile Insurance Fund</i> , the trial testimony of an expert witness was used by the plaintiff to prove bad faith. 770 A.2d 170 (Md. 2001). The use of an expert witness is allowed in Maryland even on the ultimate issue if the court determines that it will assist the trier of fact to understand the evidence or to determine a fact in issue. MD. CODE ANN. §§ 5-702, 5-704 (2007). The court must determine whether the witness is qualified by knowledge, skill, experience, training or education, the appropriateness of the testimony on the subject, and whether there is a sufficient factual basis for the admission of the testimony. Md. Rule 5-702. <i>See Johnson & Higgins of Pa., Inc. v. Hale Shipping Corp.</i> , 710 A.2d 318 (Md. Ct. App. 1998); <i>Cigna Prop. & Cas. Co. v. Zeitler</i> , 730 A.2d 248 (Md. Ct. App. 1999).	There is no published Maryland case law on this issue.
Massachusetts	<i>In Herbert A. Sullivan Inc. v. Utica Mut. Ins. Co.</i> , the court held that expert testimony is required on the standard of care owed by an insurance company to its insured in investigating and evaluating a claim, and in overseeing the defense of a third-party claim, unless the insurer's "negligence is so gross or obvious that jurors can rely on their common knowledge." 788 N.E.2d 522, 537-38 (Mass. 2003). <i>In Palmi v. Metro Prop. & Cas. Ins. Co.</i> , a third-party action, the court held that expert testimony must be presented to show that no reasonable insurer would have failed to settle the underlying claim within the policy limits except in "rare cases where the insurer behaved with such indifference or neglect that it would be obvious to a lay person that no reasonable insurer would have acted likewise." 802 N.E.2d 1069, *2 (Mass. Ct. App. 2004) (unpublished decision).	There is no published Massachusetts case law on this issue.
Michigan	There is no published Michigan case law on this issue.	There is no published Michigan case law on this issue.
Minnesota	In Minnesota, there is no requirement which says that expert testimony is required regarding failure to settle within limits.	The question of coverage is a legal issue for the court as to which no expert testimony will be allowed.

BAD FAITH: THE ADMISIBILITY OF EXPERT TESTIMONY

Mississippi	There is no published Mississippi case law on this issue.	There is no published Mississippi case law on this issue.
Missouri	There is no published Missouri case law on this issue.	<p>An expert probably cannot testify as to whether the insurer's actions constituted bad faith. Though an expert may testify to an "ultimate issue" under V.A.M.S. 490.065, an expert opinion on the law is not admissible because it encroaches on the judge's function of instructing the jury. <i>George Weis Co. v. Dwyer</i>, 956 S.W.2d 335 (Mo. Ct. App. 1997).</p> <p>Where the subject of the expert's testimony is within a lay person's experience, expert testimony may not be admitted. <i>Van Meter v. Dahlsten Truck Line</i>, 943 S.W.2d 680 (Mo. Ct. App. 1997). Because the bad faith standard relates to an insurer's preference for its own financial interests above its insureds', financial self-interest is arguably within the juror's understanding and not a proper subject of expert testimony.</p>
Montana	Courts have held that expert evidence is not required to prove or disprove bad faith. In accordance with Rules 702 and 703 of the Montana and Federal Rules of Evidence, courts have discretion to allow expert evidence on issues of liability and damages in a bad-faith case. <i>See, e.g., Federated Mut. Ins. Co. v. Anderson</i> , 991 P.2d 915 (Mont. 1999) (court excluded liability experts on the grounds that opinions were irrelevant and would cause confusion); <i>Dees v. American Nat'l Fire Ins. Co.</i> , 861 P.2d 141 (Mont. 1993) (insurer may use expert testimony to show that investigation of claim was reasonable) (Gray, J., concurring).	There is no published Montana case law on this issue.
Nebraska	There is no published Nebraska case law on this issue. Section 27-702 of the Nebraska Annotated Code states that "[i]f 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." Neb. Rev. Stat. § 27-702 (2007).	The Supreme Court of Nebraska has noted that "it is within the trial court's discretion to admit or exclude the testimony of an expert witness, and '[a] trial court's ruling in receiving or excluding an expert's opinion will be reversed only when there has been an abuse of discretion.'" <i>Zarp v. Duff</i> , 470 N.W.2d 577 (Neb. 1991) (citations omitted).

Nevada	In <i>Powers v. United Servs. Auto Ass'n</i> , the court held that the expert's opinion was proper where investigation management testified that the insurer's investigation was improper, incomplete, poorly done, in violation of the insurer's own procedures, and rendered the opinion that the insurer's conduct amounted to bad faith. 962 P.2d 596 (Nev. 1998).	There is no published Nevada case law on this issue.
New Hampshire	There is no published New Hampshire case law on this issue.	There is no published New Hampshire case law on this issue.
New Jersey	There is no published New Jersey case law on this issue.	There is no published New Jersey case law on this issue.
New Mexico	In <i>Shamalon Bird Farm, Ltd. v. U.S. Fid. & Guar. Co.</i> , a first-party case, the court excluded proffered expert testimony on the grounds that it was not based on any specialized knowledge. 809 P.2d 627 (N.M. 1991). The court held that because the expert lacked experience and training in the area of "business interruption insurance," his opinion would not be "anything outside the experience of a lay person." <i>Id.</i> at 629. In <i>City of Hobbs v. Hartford Fire Ins. Co.</i> , a third-party matter, the Tenth Circuit upheld a trial court decision to exclude proffered expert testimony because "(1) the jury was capable of determining the bad faith issue on its own; and (2) [the proffered expert] lacked specialized knowledge on New Mexico bad faith cases and his experience was with first-party, not third-party insurance disputes." 162 F.3d 576, 587 (10th Cir. 1998).	See <i>Shamalon</i> and <i>City of Hobbs</i> discussion.
New York	In New York, courts will not preclude an expert's testimony in a bad-faith case unless the issues before the jury were within the ambit of the common knowledge and experience of laymen; it was thus unnecessary for an expert to give his opinion on a matter upon which the jury was qualified to draw its own conclusion. See <i>State v. Merchs. Ins. Co.</i> , 486 N.Y.S.2d 412 (App. Div. 1985). Courts have held that the testimony of an expert witness as to accepted standards for settlement practices and procedures of a liability insurer in the insurance industry may not be necessary. See <i>id.</i> However, in <i>Kulak v. Nationwide Mut. Ins. Co.</i> , the court of appeals held that an expert witness	See <i>Merchs. Ins. Co.</i> and <i>Kulak</i> discussion.

BAD FAITH: THE ADMISIBILITY OF EXPERT TESTIMONY

	<p>should be permitted to identify considerations relevant to the assessment of personal injury claims by insurers in general, and then to describe the materiality and weight customarily ascribed to each. Also, expert witness testimony may be introduced which could describe practices followed by insurers generally in settling claims, as well as the practices of their attorneys. 351 N.E.2d 735 (N.Y. 1976).</p>	
North Carolina	<p>There is no published North Carolina case law on this issue.</p>	<p>There is no published North Carolina case law on this issue. However, North Carolina courts have admitted expert testimony to establish whether an insurer has failed to follow acceptable claims-handling practices. <i>See Country Club of Johnston County, Inc. v. U.S. Fid & Guar. Co.</i>, 563 S.E.2d 269 (N.C. Ct. App. 2002).</p>
North Dakota	<p>In <i>Cont'l Cas. Co. v. Kinsey</i>, the court held that an insured may assert a claim for bad-faith failure to defend where the insurer provided an inadequate defense. The court noted that expert testimony was required to establish that the defense was improperly handled. 513 N.W.2d 66 (N.D. 1994). Where an insurer challenges the reasonableness of a <i>Miller-Shugart</i> agreement that forms the basis of the assignment of the insured's bad-faith claim to a third party, the assignee may be required to establish the reasonableness of the settlement through expert testimony by legal experts regarding the likely evidence and likely outcome if the matter had been tried. <i>See D.E.M. v. Allickson</i>, 555 N.W.2d 596 (N.D. 1996).</p>	<p>Courts have held that an insurance expert may not testify that the insurer properly denied benefits under a policy because the insured was "malingering" if the expert cannot testify to a reasonable medical certainty that there was malingering. <i>Smith v. American Family Mut. Ins. Co.</i>, 294 N.W.2d 751 (N.D. 1980).</p>
Ohio	<p>There is no published Ohio case law on this issue. The standard is that expert evidence may be used where the issue is technical and the expert evidence is helpful to the jury. <i>Hoskins v. Aetna Life Ins. Co.</i>, 452 N.E.2d 1315 (Ohio 1983). "Expert testimony is admissible if it will assist the trier of fact to understand the evidence or to determine an issue of fact." <i>LeForge v. Nationwide Mut. Fire Ins. Co.</i>, 612 N.E.2d 1318, 1324 (Ohio 1992) (citations omitted).</p>	<p>There is no published Ohio case law on this issue. In <i>Fowler v. Young</i>, the court held that the trial court has broad discretion in the matter of excluding or admitting expert evidence, and its decision should not be overruled absent a manifest abuse of discretion. 65 N.E.2d 399 (Ohio Ct. App. 1945).</p>

Oklahoma	Oklahoma courts have held that expert testimony is not required, but it is permissible within the discretion of the court on the ultimate issue of whether or not the insurer breached the duty of good faith. <i>Vining v. Enter. Fin. Group, Inc.</i> , 148 F.3d 1206 (10th Cir. 1998); <i>Hall v. Globe Life & Accident Ins. Co.</i> , 968 P.2d 1263 (Okla. Civ. App. 1998).	In <i>Thompson v. State Farm Fire & Cas. Co.</i> , the Tenth Circuit held that the admissibility of expert evidence is within the sound discretion of the trial court. 34 F.3d 932 (10th Cir. 1994). The court affirmed the trial judge's exclusion of expert testimony regarding whether the insurer had breached its duty of good faith.
Oregon	There is no published Oregon case law on this issue. However, because bad-faith failure to settle is based on a negligence standard, evidence is commonly presented to the court as to what a "reasonable insurer" would or would not do.	Oregon courts generally do not allow expert testimony on issues of "reasonableness" that do not require specialized knowledge or training.
Pennsylvania	None. In <i>Bergman v. United Servs. Auto. Ass'n</i> , the court held that the presentation of expert testimony is not required in a bad-faith action. 742 A.2d 1101 (Pa. Super. Ct. 1999).	None. "[T]he admission or exclusion of expert testimony in bad faith cases remains a matter within the sound discretion of the trial court." <i>Bergman v. United Servs. Auto. Ass'n</i> , 742 A.2d 1101 (Pa. Super. Ct. 1999).
Rhode Island	In <i>R.I. Insurer's Insolvency Fund v. Leviton Mfg. Co.</i> , the court held that expert testimony may be required to establish the reasonableness of how a claim was processed by the insurer. 763 A.2d 590 (R.I. 2000).	There is no published Rhode Island case law on this issue.
South Carolina	There is no published South Carolina case law on this issue.	There is no published South Carolina case law on this issue. However, in deciding whether expert evidence is admissible under S.C.R.E. 702, the trial judge must find that: (1) the scientific, technical or other specialized evidence will assist the trier of fact; (2) the expert witness is qualified; and (3) the underlying science is reliable. Additionally, if a science is involved, the court should determine the reliability of the science by assessing: (1) the published peer review of the technique; (2) prior application of the method to the type of evidence in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Finally, if the evidence is admissible under Rule 702, the trial judge must determine whether its probative value is outweighed by its prejudicial effect under S.C.R.E. 403. <i>State v. McHoney</i> , 544 S.E. 2d 30 (S.C. 2001).

BAD FAITH: THE ADMISIBILITY OF EXPERT TESTIMONY

South Dakota	There is no published South Dakota case law on this issue.	There is no published South Dakota case law on this issue.
Tennessee	There is no published Tennessee case law on this issue.	There is no published Tennessee case law on this issue.
Texas	Expert evidence is not required to establish bad-faith claims. However, evidence of what a reasonable insurer would do is important.	Texas courts have not precluded expert testimony on any issue presented in a bad-faith claim against an insurer, unless it violates Rule 702 of the Texas Rules of Evidence.
Utah	Courts in Utah have held that expert reports may provide a solid basis for an insured's claim of bad faith, or a defense to a bad-faith claim by an insured. <i>See Callioux v. Progressive Ins. Co.</i> , 745 P.2d 838 (Utah Ct. App. 1987). In <i>American Concept Ins. Co. v. Lochhead</i> , the court held that expert reports and/or affidavits also may be sufficient in and of themselves to create a factual issue for a jury. 751 P.2d 271, 273 (Utah Ct. App. 1988). <i>But see Butterfield v. Okubo</i> , 831 P.2d 97 (Utah 1992).	Expert opinion concerning conduct by the insurer outside the state of Utah and/or involving different types of claims and policies from those at issue might potentially be precluded for purposes of awarding punitive damages. <i>State Farm Mut. Auto Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003).
Vermont	There is no published Vermont case law on this issue.	There is no published Vermont case law on this issue.
Virginia	There is no published Virginia case law on this issue.	There is no published Virginia case law on this issue.
Washington	There is no published Washington case law regarding any requirement that expert rather than lay evidence be used to establish the bad-faith standard. In <i>Weber v. Biddle</i> , the court held that it is not an abuse of discretion to admit expert testimony regarding conflict of interest, an area that is within the common experience of laymen. 483 P.2d 155 (Wash. Ct. App. 1971).	There is no published Washington case law on this issue.
West Virginia	There is no published West Virginia case law on this issue.	There is no published West Virginia case law on this issue.

Wisconsin	The Wisconsin Supreme Court held that expert testimony is only required for cases presenting particularly complex facts and circumstances outside the common knowledge and experience of an average juror. <i>Weiss v. United Fire & Cas. Co.</i> , 541 N.W.2d 753 (Wis. 1995). In <i>DeChant v. Monarch Life Ins. Co.</i> , 547 N.W.2d 592 (Wis. 1996), the court held that if the claim does not involve such circumstances, no expert testimony is required.	There is no published Wisconsin case law on this issue.
Wyoming	There is no published Wyoming case law on this issue.	There is no published Wyoming case law on this issue.