

**EXPERTS IN INSURANCE CASES:  
USES, ABUSES, AND DAUBERT**

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South Texas College of Law  
Texas Insurance Law Symposium  
January 26-27, 2006

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## I. INTRODUCTION

This paper surveys the use of expert testimony in insurance cases. It briefly outlines the law governing the admissibility of expert witnesses under both federal and Texas law, and then shows, through examples of commonly offered experts in an insurance context, how parties attempt to bypass the restrictions imposed by *Daubert* and *Robinson*.

## II. EXPERT TESTIMONY STANDARDS UNDER FEDERAL LAW: DAUBERT, JOINER, AND KUMHO TIRE

The pervasive use of expert testimony to validate even the most obviously unsound theories led both federal and Texas courts to address the reliability and admissibility of expert opinion testimony. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the U.S. Supreme Court sought to develop a standard for the judicial screening of expert testimony beyond the long-standing "general acceptance" test created in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Daubert* requires that expert testimony be based upon a reliable foundation and be relevant to the issues involved in the case. 509 U.S. at 597. The *Daubert* Court specifically identified the following factors useful in determining whether evidence was reliable and relevant:

1. Has the scientific theory been subject to empirical testing?
2. Has the scientific theory or technique been subject to peer review and publication?

3. What is the known or potential error rate of the particular scientific technique?
4. Is the technique generally accepted in the relevant scientific community?

*Daubert*, 509 U.S. at 593-94.

The test as originally outlined in *Daubert* has since been clarified and expanded in a series of cases, most notably by *General Electric v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The *Joiner* decision resolved the question of the applicable standard of review under *Daubert*, holding that a trial court's ruling on the admissibility of expert opinion testimony should be reviewed under an abuse of discretion standard. *Joiner*, 522 U.S. at 146-47. *Joiner* also applied the "analytical gap" test to expert testimony, and concluded that a trial court may properly conclude that expert testimony may be excluded if there is "simply too great an analytical gap between the data and the opinion proffered." *Id.* at 146. "[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." *Id.* The expert's opinion cannot be supported solely by the expert's own conclusions and assertions, and must be supported by proper foundational data to be valid. *Id.*

The *Kumho Tire* Court clarified the issue of whether *Daubert* should be applied to all forms of expert testimony by stating that "[w]e conclude that *Daubert's* general principles apply to the expert matters described in [Federal Rule of Evidence]

702...[t]he Rule, *in respect to all such matters*, ‘establishes a standard of evidentiary reliability.’” *Kumho Tire*, 526 U.S. at 149 (emphasis added). Thus, the *Kumho Tire* Court expanded the *Daubert* analysis to include all forms of expert testimony. *Id.* *Kumho Tire* also addressed the question of whether the factors used to evaluate the reliability of expert testimony in *Daubert* were exclusive, and ultimately decided that the factors used to test reliability should be left to the discretion of the trial court. The *Kumho Tire* Court stated, “Thus, whether *Daubert*’s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. *Id.* at 153; *Joiner*, 522 U.S. at 143.

The Court made it clear that the *Daubert* factors were meant to be used as helpful guidelines where applicable and appropriate, and were not necessarily definitive. *Kumho Tire*, 526 U.S. at 151. The Court used the example of the situation where the claim of a scientific witness has never been the subject of peer review as an area where the trial court should use factors beyond *Daubert* to determine reliability, but noted that the *Daubert* factors would still be useful in such situations to determine the reliability of an expert’s methodology or whether the expert’s discipline or field of expertise is relevant to the inquiry being made. *Id.*

### III. *DAUBERT UNDER TEXAS LAW: ROBINSON, HAVNER, AND GAMMILL*

Texas has adopted a slightly modified version of the *Daubert* test for reliability and relevance of scientific evidence. This development was not surprising considering

that Texas Rule of Evidence 702, which governs the admissibility of “scientific, technical, or other specialized knowledge,” is modeled upon and tracks the language of the federal rule governing the same. See TEX. R. EVID. 702; FED. R. EVID. 702. In handing down its opinion in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), the Texas Supreme Court noted the proliferation of “professional expert witnesses...available to render an opinion on almost any theory, regardless of merit,” and, due to this, recognized that the judiciary has a “heightened responsibility to ensure that expert testimony show some indicia of reliability.” *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995).

The *Robinson* Court adopted the *Daubert* requirement that scientific evidence be both relevant and reliable, and developed a set of factors to be used by a trial court in making a threshold determination of admissibility for scientific evidence. These factors are as follows:

1. The extent to which the theory has been or can be tested;
2. The extent to which the technique relies upon the subjective interpretation of the expert;
3. Whether the theory has been subjected to peer review and/or publication;
4. The technique’s potential rate of error;

5. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
6. The non-judicial uses which have been made of the theory or technique.

*Robinson*, 923 S.W.2d. at 557. The Court further noted the importance of an independent foundation for an expert's opinion when it stated "[t]hat an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science." *Robinson*, 923 S.W.2d at 557, fn.2 citing *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1317 (9<sup>th</sup> Cir. 1995) (upon remand).

The *Robinson* Court emphasized that the factors outlined were non-exclusive, and that trial courts may consider other factors that are determined to be helpful in evaluating the reliability of scientific evidence. *Robinson*, 923 S.W.2d at 557. The Court further noted that "[t]he factors a trial court will find helpful in determining whether the underlying theories and techniques of the proffered evidence are scientifically reliable will differ with each particular case." *Id.* The burden of proof in showing that evidence fails to satisfy the above factors, or others determined by the court to be useful, and is therefore unreliable falls upon the party opposing the introduction of the expert evidence. *Id.* However, even if expert testimony is deemed to be reliable and relevant, such testimony may still be excluded if the trial judge determines that the probative value of the evidence is outweighed by its

prejudicial effect, in violation of Texas Rule of Evidence 403. *Robinson*, 923 S.W.2d at 561; see also TEX. R. EVID. 403.

As was the situation with *Daubert*, the Texas Supreme Court clarified and expanded its decision in *Robinson* in two subsequent cases, *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 933 S.W.2d 706 (Tex. 1997) and *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998). In *Havner*, the Texas Supreme Court applied the *Daubert* standards of admissibility to a "no-evidence" review, and distinguished between specific and general proof of causation. *Havner*, 933 S.W.2d at 714. Specific proof of causation occurs when it can be shown that a substance caused a particular injury, whereas general causation is based upon the extent to which a substance is able to cause a particular condition in the general population. *Id.* at 714-15. The *Havner* Court recognized that general causation proof is incapable of establishing the particular cause of a specific injury, and noted that general causation is subject to a minimum threshold of being able to show a percentage of risk sufficient to show "more likely than not" that a substance caused an injury. *Id.* at 716.

The *Havner* Court also stated that an expert must be able to explain with reasonable certainty why other plausible or possible causes for a condition are the basis for a condition. *Havner*, 933 S.W.2d at 720. If the expert is unable to negate the possibility that another plausible cause created or contributed to a condition, then the expert's testimony regarding a specific causation may potentially be inadmissible. *Id.* Furthermore, while the Court did not hold that publication is required to establish scientific reliability, it did caution that "courts must be 'especially skeptical' of

scientific evidence that has not been published or subject to peer review.” *Id.* at 727.

The decision in *Gammill* had the same effect on expert testimony in Texas as the *Kumho Tire* decision did for federal law in that *Gammill* extended the effect of *Robinson* to non-scientific expert testimony that involved technical or other specialized knowledge. *Gammill*, 972 S.W.2d at 727. Noting the similarities between the Texas and federal rule of evidence concerning the reliability of expert testimony, the *Gammill* Court concluded that “the relevance and reliability requirements of the Texas Rule 702 apply to all evidence offered under that rule, and the trial court must determine that these requirements have been met before admitting the evidence.” *Id.*

Thus, the framework for analyzing the admissibility of expert testimony under both federal and Texas law is remarkably similar. Both Texas and federal law require that the trial court conduct an inquiry into the relevance and reliability of the evidence through the use of outlined, objective factors (which are not exclusive but typically can be applied in some fashion to most expert testimony), and both jurisdictions have determined that this analysis is applicable to all forms of expert testimony. Additionally, the “analytical gap” test outlined in *Joiner* has been a useful tool in determining the relevancy and reliability of evidence under Texas law.

#### IV. INSURANCE EXPERTS

The subtleties involved in the law surrounding *Daubert* and *Robinson* challenges to expert testimony are exemplified in the use of many types of experts across various disciplines within the insurance context, and this paper

will discuss the use (and abuse) of the more common experts employed in insurance cases. The most commonly used experts in insurance cases are engineers, particularly in foundation claims, “bad faith” experts, mold experts (remediation scope and health effects). A wide variety of other experts are employed in less common case scenarios, although all are subject to the requirements of *Daubert* and *Robinson*.

##### A. Engineers

There are several *Daubert/Robinson* factors that often are applicable to expert engineers. First, in evaluating whether an engineer is qualified to offer expert testimony in a certain area, the educational and practical expertise of the engineer must be determined. One common practice is to offer a licensed professional engineer as an expert to testify on a certain subject matter despite the fact that the expert’s training is in an entirely different field of engineering. For example, it is improper to offer or allow a chemical engineer as an expert in a foundation claim simply because he is a licensed professional engineer, particularly when the engineer took no course work or post-graduate studies involving structural soil mechanics.

While the educational and experiential credentials of any expert are relevant to the admissibility of their testimony, the *Daubert/Robinson* factors are highly applicable to an engineer’s methodology and conclusions. Because an engineer’s report must have a foundation of data and underlying conclusions upon which it relies, it is possible to either verify or discredit an engineer’s testimony with the *Daubert/Robinson* factors. A discussion of the disqualification of an engineer in an exemplar foundation case shall

serve to illustrate typical problems with such an expert's testimony.

Assume that the dispute focuses around whether plumbing leaks caused damage to a residential foundation built upon expansive clay soil. The insurer investigated the claim by engaging independent plumbing and engineering experts to determine the location of any leaks and whether such leaks had damaged the foundation. The insurer's engineer undertook an extensive analysis of the cause of the damage to the foundation, including:

- a. inspection of the property on several occasions, noting his observations of any interior and exterior damage, site drainage, and the presence of several large trees with canopies overhanging the residence;
- b. measurement of the relative elevations throughout the house, which showed downward settlement toward the back right side of the residence;
- c. review of the climatological data, which reflected severe drought conditions in the two years immediately preceding the discovery of signs of foundation damage;
- d. probing of the perimeter to confirm that previous repairs had been made to part of the perimeter of the foundation; and

- e. retention of geo-technical experts to take soil samples from locations both near and removed from the locations of the leak and conduct moisture and bearing capacity measurements, which reflected that the highest moisture readings were in areas removed from the leaks and that the soil had retained sufficient bearing capacity to continue to support the foundation.

Following the review of the data, the insurer's engineer concluded that the leaks had not caused damage to the foundation, which was settling due to drying and shrinking of the soil around the perimeter of the house primarily because of recent severe drought conditions and vegetation surrounding the house. Additionally, soil samples taken did not reflect soils in a liquid state, and measurements taken of each of the samples reflects sufficient bearing capacity to support the foundation and the residence. Based on these conclusions, the insurer tendered payment for repair of the plumbing leaks and denied coverage for foundation repairs.

Further assume that the plaintiff's initial expert inspected the property and issued a report claiming that plumbing leaks were responsible for 100% of the damage to the foundation. Despite the drought conditions and large trees in the area, the expert opined that climate and vegetation could not have caused the foundation damage. However, clearly aware of the *Havner* holding that if an expert is unable to negate the possibility that another plausible cause created or contributed to a condition, then the expert's testimony

regarding a specific causation may potentially be inadmissible, the plaintiff chose to retain another expert. *Havner*, 933 S.W.2d at 720.

In the face of reliance upon an expert that clearly ignored other possible causes of damage to the foundation such as the well-established impact of climate and vegetation on foundation systems, the plaintiff retained an expert that opined that climate and vegetation caused some damage, but that plumbing leaks caused the majority of the damage. The second expert further believed that the plumbing leaks caused enough damage to require the entire foundation to be leveled. The theory of the expert was that the leaks caused the soil in one area to expand and heave the slab upward, while the leaks in another location so saturated the soil that the foundation sunk downward due to the soil's loss of strength. To the extent the plaintiff's expert's conclusions differ from the results indicated by the soil samples, he contends that he could verify the conclusion by taking his own samples, but declines to do so.

The plaintiff's expert in this case possesses sufficient education and experience to offer opinion testimony. However, TRE 702 requires that an expert not only be qualified, but also that his proposed testimony be reliable. See *Gammill*, 972 S.W.2d at 726. A proposed expert may have an advanced degree in a subject about which he intends to testify, have significant professional experience, and have testified as an expert before, but still not be qualified to testify in a particular case. *Kumho Tire*, 526 U.S. at 137. Such is the case when even though an expert witness may be qualified and highly credible, if his conclusions are based on unreliable methodology or so against accepted scientific principles, his opinions are rendered

unreliable and should not be allowed into evidence. See *Joiner*, 522 U.S. at 146. An expert's opinions should be excluded if the data relied upon or the expert methodology and reasoning are unreliable, or if the "analytical gap" between the opinion proffered and the data is simply too great. *Gammill*, 972 S.W.2d at 726.

The opinion of the plaintiff's expert here relies upon a "heave and sink" hypothesis that itself rests upon two distinct processes occurring beneath the foundation: first, he contends that due to the introduction of water via the plumbing leaks, the soil expanded in volume with sufficient force to cause the foundation to heave upward; and second, that enough water was introduced further down such that the soil became so weak that it lost its ability to sustain the weight of the foundation and thus the house sank downward. The expert's damage analysis relies almost exclusively on the latter settlement theory.

The expert testifies in a manner that suggests that he has applied accepted scientific principles applicable to expansive clay soil, and agrees that the American Society of Civil Engineers has recognized that climatic changes and vegetation can cause damage to a foundation in areas where slab foundations are built over expansive clay soil. The expert understands that it is well accepted that within certain limits the introduction of water to this type of soil will cause the soil to expand. Thus, when soil is moistened under a foundation due to introduction of water from a plumbing leak, the soil will expand, and if there is enough expansion, the soil can cause the foundation to move upward or heave. Conversely, if water is removed from expansive clay soil, it will shrink in volume.

Though downward settlement due to dessication of soil in drought conditions is well-accepted, the expert's opinion requires a drastic departure from accepted soil analysis. The first *Robinson* factor requires that a theory be the subject of empirical testing.

It is highly questionable whether it is possible for soil to become so saturated from a plumbing leak under a slab foundation that it loses its plasticity characteristics, becomes essentially a liquid, and thus loses its bearing capacity to hold up a foundation. If this were possible, during any periods of significant rainfall or flooding, houses built upon such soil, particularly in the Houston area, would sink into the ground. The primary reason this does not happen is because of the very basic difference between settlement due to over-saturation as opposed to shrinking from drought condition - if soil reaches an over-saturated state, it does not lose volume as when soil dries and shrinks. As a result, for a foundation to settle downward due to loss of bearing capacity from over-saturation, the soil that was under that foundation must move elsewhere, as there would be no decrease in volume of soil. A home that settles downward due to this phenomenon would have to essentially sink into the soil, displacing soil into void and around the bottom of the outside of the house. No such displacement of soil was noted. The first of the *Robinson* factors requires that a theory be the subject of empirical testing. Here, the American Society of Civil Engineers has recognized that settlement occurs when water is removed from soils, the opposite of the expert's proposed theory that over-saturated soils will settle.

However, an engineer's theory that runs counter to generally accepted engineering principles is not necessarily inadmissible,

provided that the expert is able to support such a position by establishing that his unusual engineering position is supported by an unusual situation. Thus, if the data collected at the residence supports an unusual conclusion, that theory is not inadmissible on its face. However, if the only thing connecting the data and the conclusion is the *ipse dixit* of the engineer himself, then such a position is likely untenable. *Joiner*, 522 U.S. at 146. If soil tests confirmed that the soil near the leaks was dry and strong, as opposed to over-saturated, then the expert's opinion would clearly be erroneous. *Id.* Yet, if the data confirms an unusual hypothesis, such an opinion by an expert may be acceptable. *Id.*

In this scenario, the expert does not have the adequate education or experience to analyze the soil data in such a way as to either prove or disprove his hypothesis. He notes that the soil samples reflect slightly abnormal moisture contents, but his analysis stops there. Further, he believes it is not possible to calculate bearing capacity based on soil boring samples, which is inaccurate. The expert's conclusions about what the soil data can or cannot show makes it clear that he is doing nothing more than making general conclusions without applying any scientific analysis or linking them to any data to support what happened to the foundation. Since the soil borings that were taken do not support his hypothesis (and actually refute it), the expert concludes that the soil samples were not taken in the right area and declines to take samples in the other areas of the house. Discounting previous testing and not requesting new tests allows the expert to conclude that the soil along the drain lines may be so wet that could have lost bearing strength. As this particular engineer testified, he didn't feel that he needed objective soil data to support his opinion

because he could “see the movement - the effect of the plumbing leaks reflected on the elevation survey.” The analysis, without any link to supporting data, is essentially that the leaks caused the damage because there are leaks and there is damage evident in the elevation patterns. Results-oriented conclusions that are unsupported by data are not acceptable under *Daubert*.

The issue of expert testimony in foundation claims was recently discussed in the case of *State Farm Lloyds v. Blacklock*, 2005 WL 2155635, Cause No. 10-04-00018-CV (Tex. App.—Waco, Sept. 7, 2005). *Blacklock*, in addition to illustrating the typical dangers of reliance upon experts not qualified under *Robinson*, shows the danger of ‘stacking’ the testimony of experts upon one another, when there are multiple engineers and the subsequent engineers rely upon the unreliable findings of prior experts. *Blacklock* discusses in detail the qualifications of three experts.

The *Blacklock* Court noted that the “proponent of the evidence bears the burden of demonstrating that the expert’s opinion is reliable...[and if] the expert’s testimony is not reliable, it is not evidence.” *Id.* The court notes that the trial court should only determine whether an expert’s analysis in reaching conclusions is reliable, and not whether the conclusions of the expert are correct. *Id.*; see also *Gammill*, 972 S.W.2d at 728; *Helena Chem. Co. v. Wilkins*, 47 S.W.2d 486, 499 (Tex. 2001).

The *Blacklock* Court first analyzed the qualifications of the testifying engineer, noting that he held a bachelor’s degree in meteorological engineering and was a licensed professional engineer. *Id.* However, his professional experience consisted of building

underground structures, the storage and transportation of liquid petroleum and natural gas, and the building of low income housing. *Id.* The foundation for the approximately 125 homes built by his company were designed by a different engineer. *Id.* Finally, the engineer worked at an engineering and construction company, where he was employed in a marketing position. *Id.* It was during this time that he was introduced to an attorney who requested that he help him perform forensic investigations of residential foundations. *Blacklock*, 2005 WL 2155635. At the time of the *Blacklock* investigation, the engineer had conducted 250 to 275 forensic foundation investigations.

The *Blacklock* Court employed the *Gammill* analytical gap test, and noted that it had been used in the analysis of other foundation cases. See *Allstate Texas Lloyds v. Mason*, 123 S.W.3d 690 (Tex. App.—Forth Worth 2003, no pet.); *United Services Auto Ass’n v. Gordon*, 103 S.W.3d 436, 439 (Tex. App.—San Antonio 2002, no pet.). The Court also noted that “[t]he fact that an opinion was formed solely for the purposes of litigation does not automatically does not automatically render it unreliable,” although “**it is a factor that weighs against the admissibility of an expert’s testimony.**” *Robinson*, 923 S.W.2d at 559. The engineer had testified with respect to his recommendation of full piercing that, “Basically, what it amounts to is if [the plaintiff’s attorney] request that I recommend full piercing, I recommend it if the foundation and the superstructure are damaged. If they don’t recommend it, then I don’t.” *Blacklock*, 2005 WL 2155635. The *Blacklock* Court concluded that the evidence was clear that the engineer’s testimony and opinions were created for litigation purposes, and that his

opinions were not sufficiently supported by reliable, accepted scientific bases.

The reports of both another engineer and a contractor were subsequently found unreliable. *Blacklock*, 2005 WL2155635 at \*9-10. As to the second engineer, Plaintiff argued that his testimony had previously been deemed reliable in other cases, and, thus, should be accepted here. *Id.* The *Blacklock* Court found that this was not enough to satisfy the burden of showing the engineers report to be reliable and relevant. *Id.* The contractor used as a damage expert in this case, based his opinion entirely upon the now stricken engineer report. In *Havner*, the Texas Supreme Court held that “if the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable.” *Havner*, 953 S.W.2d at 714. Thus, the contractor testimony was unreliable. Two examples of Motions filed in actual cases are attached.

### B. Bad Faith Experts

Allegations of violations of the common law duty of good faith and fair dealing are frequent in insurance lawsuits. While it may seem obvious that witnesses offering essentially a legal opinion that the duty of good faith and fair dealing has been breached would not be admissible, such “bad faith” experts are occasionally offered. Typically, such experts offer opinion on claims handling and when liability should have become reasonably clear to an insurer. Such opinions usually usurp the function of the court by defining legal standards for the jury and interpreting contract law, and will serve to confuse, mislead, and prejudice the jury. Although in state practice

Rule 702 allows experts to testify on ultimate issues, the question remains as to what the specialized expertise is that allows an expert to testify as to what actions were “bad faith,” and there are serious questions as to what extent the opinions are ultimately based on the subject opinion of the expert.

Bad faith experts should be disallowed because questions of law are “exclusively for the court to decide and... not an ultimate issue to be decided by the trier of fact.” *Dickerson v. Debarbieris*, 964 S.W.2d 680, 690 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, no pet.). Furthermore, it is well established that matters of law are not proper subjects for expert opinion. See *Schauer v. Mem'l Care Sys.*, 856 S.W.2d 437, 451 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1993, no writ). Further, Texas courts have specifically held that experts may not testify regarding either (1) the definition of the duty of good faith or (2) the interpretation of a contract. See e.g., *Crow v. United Benefit Life Ins. Co.*, 2001 WL285231, Cause No. CIV-A.3:00CV13756 (N.D. Tex., March 12, 2001); *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 133-34 (Tex. App.—Texarkana 1994); *Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 827 (Tex. App.—Dallas 1992, writ denied). With respect to federal practices the Fifth Circuit Court of Appeals explained how expert testimony regarding the definition of the duty of good faith causes confusion and prejudice as follows:

In essence, [the] proffered opinion (1) defines the duty of good faith and fair dealing, and then (2) applies the facts of the case to the law as [the expert] defines it. [The] proffered opinion invades both

the province of the court and the jury. The... proposed testimony regarding the definition of the duty of good faith and fair dealing as applied to an insurer resembles nothing so much as a jury instruction. "Our legal system reserves to the trial judge the role of deciding the law for the benefit of the jury... [I]f an expert witness were allowed to testify to legal questions, each party would find an expert who would state the law in the light most favorable to its position. Such differing opinions as to what the law is would only confuse the jury."... [The] proposed testimony defining the duty of good faith and fair dealing impermissibly intrudes upon the court's duty to instruct the jury as to the appropriate law.

*Crow v. United Benefit Life Insurance Co.*, 2001 WL 285231 at \*2; *See also Askance v. Fatjo*, 130 F.3d 657, 672-73 (5<sup>th</sup> Cir. 1997).

Similarly, interpretation of the terms and/or the legal effect of a contract "presents a question of law for the court" and, under Texas law, is not an appropriate topic for expert testimony. *Dickerson*, 964 S.W.2d at 690. A witness may not give legal conclusions or interpret the law to the jury. *Puente v. A.S.I. Signs*, 821 S.W.2d 400, 402 (Tex. App.—Corpus Christi 1991, writ denied). However, under Texas Rule 704, the Texas Supreme Court has relaxed this requirement and permits expert witnesses to testify regarding mixed questions of law and

fact when the proper predicate is laid. *See Louder v. DeLeon*, 754 S.W.2d 148, 149 (Tex. 1988); *United Way of San Antonio, Inc. v. Helping Hands Lifeline Foundation, Inc.*, 949 S.W.2d 707, 713 (Tex. App. —San Antonio 1997, writ denied). Pure questions of law are not permissible topics for expert testimony. *See, Dickinson*, 964 S.W.2d at 690.

Furthermore, bad faith experts typically are not lawyers, and therefore do not have a technical understanding of the legal concepts about which they propose to testify. This creates a situation whereby the expert could provide the jury with the wrong legal standards. In one such case, a bad faith expert attempted to testify regarding when an insurer violates the duty of good faith and fair dealing by stating that a carrier breaches the duty of good faith by not invoking the appraisal process within the policy when there is a dispute between the parties. There is no Texas case law holding that a carrier breaches the duty of good faith by not invoking the appraisal process when there is a dispute between the parties. Under the Texas Insurance Code, an insurer violates the duty of good faith if it "fails to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." *See* TEX. INS. CODE Art.21.21 § 4(10)(ii); *see also Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 51-52 (Tex. 1997). Thus, the bad faith expert sought to usurp the Court's function by defining the duty of good faith and by then defining it incorrectly.

Additionally, the bad faith expert's proposed opinions sought to tell the jury what verdict to return. However, "[w]hen the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony

is within the common knowledge of the jury, the trial court should exclude the expert's testimony." *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360-61 (Tex. 2000) (emphasis added). "Questions which would merely allow the witness to tell the jury what result to reach are not permitted." *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5<sup>th</sup> Cir. 1983); see also *Story Serv., Inc. v. Ramirez*, 863 S.W.2d 491, 499 (Tex. App.—El Paso 1993, writ denied) (stating that "[i]t is error to admit opinion evidence on an issue when no specialized or technical knowledge is necessary.") Texas courts have held that, "[e]xcept in highly unusual circumstances, expert testimony concerning "extreme" or "outrageous" conduct would not meet [the standards of TRE 702]" because the concept of extreme or outrageous conduct "involves only general knowledge and experience rather than expertise, it is within the province of the jury to decide." *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 620 (Tex. 1999). One non-Texas court encapsulated the issue of bad faith and expert testimony when it stated the following:

[B]ad faith is a legal concept of general application which does not require that scientific, technical, or specialized knowledge be presented to assist the trier of fact... [and does] not involve highly sophisticated insurance concepts or practices, or call for special knowledge, skill or experience to understand and analyze [the insurer's] conduct.

*Bergman v. United Serv. Auto Ass'n*, 742 A.2d 1101, 1107-8 (Pa.Super.Ct. 1999). Thus,

because the bad faith expert proposes to do nothing more than tell the jury how to interpret facts and what verdict to reach, his "expert" opinions are inadmissible.

Bad faith experts are sometimes offered to testify as to "customary standards" for claims handling and/or the industry standard for claims handling. However, as there is no cause of action in Texas for negligent claims handling, such testimony should be irrelevant. See *Higginbotham v. State Farm Mut. Auto Ins. Co.*, 103 F.3d 456, 460 (5<sup>th</sup> Cir. 1997) (holding that Texas law does not recognize a cause of action for negligent claims handling).

It is important to evaluate the experience of bad faith experts, particularly since many were formerly employed within the insurance industry. While a proposed expert may have a great deal of experience in claims handling or other areas, he is not necessarily qualified to testify. Factors such as whether or not the expert's experience was in claims handling for a particular area, such as mold or foundation claims, and the amount of time the expert has been outside of the industry are highly relevant. For an expert witness' proposed testimony to be admissible pursuant to Rule 702, the expert must have specialized "knowledge, skill, experience, training or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject." *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). An exemplar Motion concerning an insurance bad faith expert is attached.

### C. Mold experts

Experts are often used in mold cases, and these experts usually tend to fall into two categories: 1) remediation experts and 2)

health experts. One common assertion of mold remediation experts is to attempt to expand the scope of remediation plans based upon assumptions from areas beyond their expertise, such as in the case of an expert on the scope of remediation discussing not just the presence of mold but the impacts of mold on human health. For example, the use of health effects or the "dangers" of stachybotrys to date the onset of mold in a home is irrelevant when pertinent question is when water and mold damage was discovered and whether that date falls within a policy that might afford coverage for such damage.

Experts evaluating remediation protocols will occasionally attempt to offer testimony in areas beyond their expertise, most often regarding the human health effects of mold. An engineer in one such case attempted to opine that one of the insured's children was experiencing allergic reactions to stachybotrys detected in a wall cavity adjacent to her room. When confronted with the fact that testing in that particular child's room indicated no abnormal spore counts and no airborne stachybotrys, the expert asserted that mold is "recognized to be hazardous to human and animal health," is "extremely toxic," and can impact indoor health quality even when there are no mold spores detectable in the air. Such testimony was not idle opinion on the part of the expert because those opinions on health effects formed the very basis for his conclusion that (a) mold "could have been discovered" in the house prior to the insureds' claim; and (b) significant additional work was required to include remediation and/or replacement of contents and increased areas of the home. In other words, to allow testimony of the expert's ultimate conclusions on the length of time mold was in the insureds' home and what is required to remediate it, a court

would have to allow him to testify about his underlying conclusions that form the basis of these opinions, namely that (a) stachybotrys is an extremely toxic mold that may endanger homeowners even when no spores are detectable in the indoor air; (b) and the insureds' child suffered from allergic type symptoms linked to this mold prior to the date the insureds' discovered the water and mold damage.

Even if the expert's testimony about the health effects of mold were relevant to the analysis, a remediation expert rarely has the specialized knowledge, skill, experience, training or education required to enable him to draw a connection between the two subjects. In this particular case, the expert admitted under oath that:

1. He was not a medical doctor and had no medical training;
2. His background as a chemical engineer did not include dealing with health issues as a routine part of his profession;
3. He had taken no courses in mycology, the study of mold;
4. He had not reviewed the Texas Medical Association's statement concerning a lack of any connection between mold and adverse human health effects other than allergies and was unaware of any studies that prove a relationship between mold and health effects;

5. He had not reviewed any medical records for the insureds;
6. He did not know whether the insured's child was actually allergic to any types of mold; and
7. Whether the mold in the insureds' house poses a health hazard specifically to the insureds would be outside of his area of expertise.

Finally, recognizing his lack of expertise on whether mold presented a health hazard to the insureds, the expert answered, "I can't make an opinion on that, okay? I do not know their health situation, and I haven't analyzed it, okay?" However, despite such admissions, the expert continued to hold himself out as qualified to testify on the health effects of mold and diagnose the insureds' child with enough certainty to require him to expand the scope of the CIH's remediation protocol, and date the presence of mold within a previous policy period. The expert did this by contending that he could do so based upon experience in gathering "anecdotal" information about homeowner's stated health issues during prior mold assessments. Such a half-hazard basis can not serve as a foundation either for qualifying this witness as an expert on health effects or for rendering any conclusion from these anecdotes. There must be some sort of a scientific approach to such a causation analysis before an expert can testify as to causation. See *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). This particular expert was unable to show either general or specific causation as required by the *Havner* Court.

When an expert purports to link exposure to a substance to a medical condition, the holding in *Havner* requires that the expert be able to show a minimum threshold percentage of risk sufficient to suffice as general causation evidence when no direct experimentation is possible. *Id.* at 716. The medical profession already has found that true epidemiological studies undertaken to date have failed to establish any link between mold and adverse health effects other than allergies. Thus, the expert is able to point to no study assessing the risk he associates with exposure to mold; instead, he bases his opinions on the relationship between mold and health effects solely on anecdotal information he claims to have obtained in his mold assessments. No data was ever compiled from these anecdotal accounts of "symptoms," no analysis was ever performed of which molds were related to any symptoms, and the expert can only estimate the number of times homeowners experienced any symptoms, thereby rendering it impossible to reach any statistical analysis of the information he obtained. Furthermore, the expert never reviewed any medical records of any of the individuals he interviewed, does not know if they were ever diagnosed with allergies to mold, much less some toxic reaction, or that their symptoms were even allergic reactions, as opposed to some other disease or cause, including even the flu or common cold.

Another fatal flaw to the admissibility of this particular expert's testimony was his failure to lay a reliable foundation for the methodology underlying his hypothesis regarding the dating of mold within the home. The expert opined that he could tell that mold was present before it was discovered by the homeowner's because the mere presence of *Stachybotrys*, which he claims takes a minimum of six months to

materialize following a water event. The expert admitted that his hypothesis that mold existed in the homeowners' ceiling and wall cavities for at least six months before they made their claim relies solely on the presence of a one type of mold: stachybotrys. The expert further claimed that he has enough experience to know the growth pattern of Stachybotrys, which he contends will not begin to manifest until at least six months after the first introduction of water. However, the expert was not qualified by specialized knowledge, skill, experience, training or education to offer this opinion on the growth rates of mold, as he admitted that he had no formal course training in mycology, that he does not know the difference between different types of mold (aspergillus and penicillium), or mold and rot, and that he must depend upon lab reports to identify what molds are in a house.

Despite this lack of educational basis, the expert contends that he has enough expertise to opine on the growth rate of stachybotrys because in his other residence inspections, stachybotrys was revealed in 50 wall cavity checks and in those 50 experiences, it is his recollection that the water intrusion at issue was a long-term leak. In his own words, he concluded that in the "limited number of water damaged cases that I've studied, I find it very rare to find Stachybotrys unless there's been lengthy damage." When asked upon what data he rests this opinion, the response was simply "it's on my observations, okay?" Since the only time he observed stachybotrys (50 wall checks) involved walls that were "severely structurally damaged and having been exposed to water over the years," the expert thinks this is a statistically sound data base from which to draw his ultimate conclusion.

However, the expert's conclusion lacks reliability, as his underlying methodology is nothing more than a speculative conclusion based on insufficient observation and experience, which ignores even the key difference between his recollection of the conditions surrounding his other discoveries of stachybotrys and those presented at the home in question. He admitted finding no "severely structurally" damaged sheet rock or wooden support structure as he found in other cases with stachybotrys growth. This may just be one of the "rare" times he personally has encountered stachybotrys in a different setting than those he happened to see in other homes. This is not science, nor is it reflective of any specialized expertise; the expert knew that one cannot precisely date the onset of mold and instead, like with his reference to anecdotal health effects, is relying upon his undocumented personal recollection of supposed statistical data (number of walls with stachybotrys and, of that number, the reflected long-term damage). Such speculation should not be given the cloak of scientific expertise, and should not be able to overcome a *Daubert/Robinson* challenge.

Another common type of expert introduced in claims involving mold is that of an expert to testify on the health effects of mold. In one such exemplar case, a microbiologist was retained to testify about the potential health effects of mold upon humans and was specifically designated to testify on the following:

1. The negative health effects mold can have on people generally and on the Plaintiff specifically;

2. The types of mold that were found in the Plaintiff's residence, and the effects these types of mold can have on the health of people;
3. The implications of exposure to mold and toxins that mold produce.

In this case, the expert admitted that he was not qualified to provide opinions on the health effects of mold on the Plaintiff because he was not a medical doctor, and had no opinion as to the potential health effect of mold on the Plaintiff specifically. Despite this, the expert was still offered to testify as to the general health effects of mold, which would only confuse, mislead, and prejudice the jury. In an effort to circumvent his lack of medical expertise, the microbiologist stated that he was an expert on interpreting what the literature says regarding the health effects of mold on human beings. The expert testified as follows:

- Q: The only thing you are saying is that you are an expert on or your believe yourself to be an expert on what is contained in the literature with respect to the health effects of mold on humans; is that correct?
- A: That's correct.
- Q: But you do not consider yourself an expert on the effects of mold on humans?
- A: I consider myself an expert on interpreting what the literature says regarding the health

effects of mold on human beings.

Q: And your expertise for considering yourself an expert as to what's in the literature, what is the basis...

A: Because I keep myself current on the available literature.

The expert later further stated:

Q: Why do you say that you're an expert or believe yourself to be an expert on what's contained in the literature with respect to the health effects of mold on humans?

A: Because I follow the literature as best I possibly can.

Yet, despite this, the expert admits that he is not abreast of the field of allergies, one of the most important topics concerning mold and its health effects, because allergies is just too large of a field. The expert stated that he only follows literature regarding asthma, sick building syndrome, *Apergillus*, *Stachybotrys*, *Penicillium*, and hypersensitivity pneumonitis, which is clearly not an exhaustive command of literature concerning mold and its health effects.

An admittedly incomplete review of literature regarding the health effects of mold on humans does not make an individual an expert. It is well accepted that "an individual's 'review of literature' in an area outside his field does 'not make him any more qualified to testify as an expert... than a lay person who read the same articles.'" *Newton*

*v. Roche Labs, Inc.*, 243 F.Supp.2d 672, 678 (W.D. Tex. 2002). The expert in this case is a microbiologist, not a medical doctor qualified by specialized knowledge, experience and training to testify about the health effects of mold on humans. Even a medical doctor cannot testify as to the medical effects of a substance upon humans based upon an incomplete review of medical literature. See *Kelley v. American Heyer-Schulte Corp.*, 957 F.Supp. 873, 883 (W.D. Tex. 1997), citing *Carroll v. Morgan*, 17 F.3d 787, 789-90 (5<sup>th</sup> Cir. 1994); see also *Newton*, 243 F.Supp. at 682.

Despite his admitted lack of qualifications, the microbiologist opined that there are three possible adverse health effects some individuals may have from exposure to molds within an indoor environment: (1) allergic rhinitis (runny nose from being allergic to mold), (2) hypersensitivity pneumonitis, and (3) exacerbation of asthma. However, the expert was unable to testify as to whether exposure to the levels of mold found within the home in question, and testified as follows:

Q: I think it's even fair for me to say, sir, that someone could present to you mold sampling taken in any structure and you could never provide an opinion whether that type of mold or that level caused hypersensitivity pneumonitis?

A: Well, I'd have to agree with that...

Q: And, I think it, likewise, would be true with respect to allergies, no matter what testing data I put before you

terms of mold types or levels from any structure, you would not be able to tell me whether that type or that level of mold causes allergies?

A: That's correct.

Q: And that same would be true no matter what testing data I put before you in terms of mold levels and mold types. You would not be able to offer an opinion whether those mold types and levels would produce an asthmatic episode in someone who has asthma?

A: That's correct.

The microbiologist further testified that he believes that mold *Stachybotrys* is dangerous because it has the potential to produce very potent mycotoxins, yet acknowledged that he had no information concerning any supposed mycotoxins within the plaintiff's residence. Without the adequate data concerning mycotoxins in the plaintiff's home, the microbiologist should be precluded under Rule 702 from offering an opinion as to the implications of exposure to mold and toxins. The lack of underlying data and the opinion offered creates too great an analytical gap. See *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002).

In this case, the microbiologist was allowed to testify. A similar situation where testimony was allowed was seen in *Allison v. Fire Insurance Exchange*, 98 S.W.2d 227 (Tex. App.—Austin 2002). The exemplar Motion to Exclude is attached.

#### D. Other experts

The variety of expert opinion testimony offered is as myriad as the number of cases that arise in the arena of insurance law. All of these experts are equally subject to the requirements of *Daubert* and *Robinson*. Some less common experts offered include accident reconstructionists, arson causation and responsibility experts, toxicologists, and medical causation experts. While toxicologists and medical causation experts, by virtue of their subject area of expertise, are grounded in scientific principle and methodology, this is not always the case with experts. In an area of expertise in which formalized, academic training is less available, it is highly important to evaluate the training and experience of the expert, as well as their methodology used. In the recreation of an accident, a former police officer who has seen thousands of accident scenes may not be able to offer the basis in physics necessary to recreate an accident, but may arrive at the same conclusion regardless. Thus, as the progeny of both *Daubert* and *Robinson* noted, it is within the trial court's discretion to determine the factors used in determining the reliability of an expert's testimony.

object when the *Daubert/Robinson* factors are not met by an expert.

#### V. CONCLUSION

The federal and state judiciary recognized the need to control the burgeoning usage of experts whose testimony was not grounded in reliable methodologies as evidenced by *Daubert*, *Robinson*, and their progeny. However, while the courts provide an important gatekeeper function, it is still the responsibility of the individual trial lawyers to both judiciously decide if an expert is required and reliable before designation and to properly