TOO MANY COOKS SPOIL THE BROTH
The Need, or Lack Thereof, for Insurance Coverage Expert Witnesses
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It is without question that “determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law”, i.e., a legal determination. Tennant v. Smallwood, 211 W.Va. 703, 568 S.E.2d 10, 13 (2002) (citations omitted). Nevertheless, it is not uncommon for a party seeking coverage in a declaratory judgment action to identify an “expert witness” to testify as to the construction and application of insurance policy provisions. Fortunately, West Virginia law provides that such testimony is inadmissible. Indeed, “[e]ach courtroom comes equipped with a ‘legal expert,’ called a judge . . . .” Burkhart v. Washington Metropolitan Area Transit Authority, 112 F.3d 1207, 1213 (D.C. Cir. 1997) (citing Marx & Co. v. Diners’ Club, Inc., 550 F.2d 505, 509-10 (2nd Cir.), cert. denied, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977)).

The standards for the admissibility of expert testimony are found within the West Virginia Rules of Evidence. Rule 702 of the West Virginia Rules of Evidence states:

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.


In this regard, commentators have noted that “[i]n deciding the ‘assists the trier of fact’ criterion . . . governing admissibility of expert testimony, the district court must determine whether the testimony usurps either role of trial judge in instructing jury as to applicable law, or role of jury in applying that law to facts before it.” Federal Trial Handbook Civil § 48:37 (4th ed.).

Simply stated, “[b]ecause the jury does not decide . . . pure questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of Rule 702, which allows expert testimony ‘[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. . . .” Franklin D. Cleckley, 2 Handbook on Evidence for West Virginia Lawyers § 7-4(B) (4th ed. 2000) (citing Burkhart, supra) (footnotes omitted). In Jackson v. State Farm Mut. Auto. Ins. Co., the Supreme Court of Appeals of West Virginia adopted this principle and explained the policy behind it, “[t]estimony concerning the applicable law would not be otherwise admissible under W.Va. R. Evid. 702 which permits expert testimony that ‘will assist the trier of fact to understand the evidence or to determine a fact in issue.’ This is because testimony on the applicable law does not assist the jury in determining a fact in issue nor does it assist the jury in understanding the evidence.” 215 W.Va. 634, 600 S.E.2d 346, 356 (2004) (emphasis in original).1 As the United States Court of Appeals for the Ninth Circuit similarly indicated:

Expert testimony is admissible if ‘scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. . . .’ Fed.R.Evid. 702. Here, the reasonableness and foreseeability of the casual workers’ reliance were matters of law for the court’s determination. Assuch, they were inappropriate subjects for expert testimony. See Marx v. Diners Club, Inc., 550 F.2d 505, 509 (2d Cir. 1977) (expert testimony consisting of legal conclusions regarding existence of contract or meaning of its terms not admissible), cert denied, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). The district court did not abuse its discretion when it determined that this expert testimony would be ‘utterly unhelpful’ and was therefore inadmissible. See Little Oil Co. v. Atlantic Richfield Co., 852 F.2d 441, 446 (9th Cir. 1988) (exclusion of expert testimony reviewed for manifest error).

1 The Jackson decision arose out of a third-party unfair claims settlement practices suit. Jackson, supra at 350. At the summary judgment stage, the trial court entered an order in favor of the Plaintiff finding, as a matter of law, that State Farm violated the Unfair Trade Practices Act. Id. at 351. Trial was had on the issue of whether the violations constituted a general business practice, with the jury finding in favor of the Plaintiff. Id. One of the issues State Farm raised on appeal was the trial court’s permitting the Plaintiff’s insurance expert witness to testify. Id. at 355. The Supreme Court of Appeals of West Virginia concluded that “the circuit court abused its discretion in permitting [the witness] to testify as an expert on the application of the Unfair Claims Settlement Practices Act, what constitutes a general business practice under the Act, and actual malice.” Id.

Aguilar v. Int’l Longshoremen’s Union Local #10, 966 F.2d 443, 447 (9th Cir. 1992). Additionally, while W.Va. R. Evid. 704 indicates that “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact”, this “does not mean, however, that all opinions embracing the ultimate issue must be admitted for both Rules 701 and 702 embody the criterion of helpfulness for lay and expert witnesses alike.” 3 Handbook on Fed. Evid. § 704:1 (6th ed.) (footnotes omitted). Indeed, “Rule 704(a) . . . permits neither a lay nor expert witness to render an opinion as to questions which are matters of law for the court. . . .” Id. (footnote omitted); See also 32 C.J.S. Evidence § 851 (“As a general rule, an expert witness may not give his or her opinion on a question of domestic law or on matters which involve questions of law.”) (footnote omitted). Again, the West Virginia Court explained that “the point to focus on is whether an opinion is ‘otherwise admissible’” and “[t]estimony concerning the applicable law would not be otherwise admissible under W.Va. R. Evid. 702 which permits expert testimony that ‘will assist the trier of fact to understand the evidence or to determine a fact in issue.’” Jackson, supra at 356 (citations omitted).2

The analysis relied upon by the Supreme Court in Jackson in the context of unfair claims settlement practices is equally applicable to proffered testimony regarding an insurance policy. As commentators have noted, “[u]nder the rule that witnesses may not give an opinion on a question of domestic law or on matters that involve questions of law, expert testimony has been excluded because it relates to. . . the interpretation of or the law governing a contractual relationship.” 31A Am.Jur.2d Expert and Opinion Evidence § 121 (footnotes omitted). As the Fourth Circuit Court of Appeals stated in Forrest Creek Associates, Ltd. v. McLean Savings and Loan Ass’n, 831 F.2d 1238, 1242 (4th Cir. 1987), “[w]hether FMC breached the contract by retaining the standby fee and therefore should return the fee, is a closer question. Here again the commitment agreement speaks for itself, and its proper interpretation is a question of law.

2 The West Virginia Court further noted that “expert testimony concerning the applicable law is not otherwise admissible because it is superfluous. ‘It is a general rule of law that it is the duty of the jury to take the law from the court and to apply that law to the facts as it finds them from the evidence. The [jury] instructions are the law of the case.” Jackson, supra at 356 (citations omitted).
Thus, we find that the district court was correct in excluding expert testimony proffered by the plaintiffs for the purpose of interpreting the standby fee clause.” As stated previously, it is without question that “[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” Tennant, supra at 13 (citations omitted).

Accordingly, Courts from across the country have found expert witnesses as to the existence or nonexistence of insurance coverage inappropriate. For example, in Devin v. United Services Auto. Ass’n, 6 Cal. App.4th 1149, 8 Cal.Rptr.2d 263 (1992), a California Court noted:

The evidence at trial included testimony of plaintiff’s expert, who opined USAA should have provided a defense because he ‘believed’ the McNairs’ complaint alleged facts which would constitute an ‘occurrence’ or ‘accident’ within the meaning of the policy, and also would constitute ‘property damage’ and ‘bodily injury’ within the meaning of the policy. USAA objected to this testimony, claiming it was an opinion which interpreted the terms of a written instrument – purely a legal conclusion. We agree. The interpretation of the scope of a policy is a question of law. . . . Experts may not opine on pure questions of law.

Id. at 269, n.5 (citations omitted).

Similarly, the Eleventh Circuit Court of Appeals has indicated that a trial court abused its discretion in allowing an expert witness to testify as to an insurer’s duties under a policy. In Montgomery v. Aetna Cas. & Sur. Co., 898 F.2d 1537, 1541 (11th Cir. 1990), the Court stated “Donaldson testified that in his opinion Aetna had a duty to hire tax counsel in this case. . . . This was a legal conclusion, and therefore should not have been admitted. The district court abused its discretion by allowing Donaldson to testify about the scope of Aetna’s duty under the policy.” [Citation and footnote omitted].

The Montgomery and Devin analysis is routinely applied. The Northern District of Alabama rendered a similar decision in Carrier Express, Inc. v. Home Indemnity Co. In Carrier, suit was filed alleging a bad faith refusal to settle claims against an insured. 860 F.Supp. 1465 (N.D. Ala. 1994). The district court excluded the defense expert, a decision which was subsequently challenged. Id. at 1476. The Carrier Court stated “Professor Hamilton’s expected testimony was a dissertation of the law as it related to this case. All topics addressed therein were pure questions of law. As such, this testimony was properly excluded. Decisions regarding questions of applicable law are the province of the court. The court instructs the jury regarding the applicable law; the witnesses do not.” Id.

Likewise, in Breezy Point Cooperative v. Cigna Prop. And Cas. Co., the Court stated “[t]he expert testimony defendant plans to introduce usurps the function of both the jury and this Court. Mr. Greenspan’s proposed testimony that plaintiff’s alleged failure to provide timely notice violated the terms of the insurance policies requires him to construe provisions of the insurance contract and thus contains inadmissible ‘legal opinions as to the meaning of the contract terms at issue.’” 868 F.Supp. 33, 36 (E.D.N.Y. 1994) (quoting Marx & Co., 550 F.2d at 509)).

The same result was reached by the United States District Court for the Middle District of Pennsylvania. In Coregis Ins. Co. v. City of Harrisburg, 2005 WL 2990694 (M.D.Pa. 2005) (unpublished) it was noted that “[t]he rule prohibiting experts from providing their legal opinions or conclusions is so well established that it is often deemed a basic premise or assumption of evidence law - - a kind of axiomatic principle. In fact, every circuit has explicitly held that experts may not invade the court’s province by testifying on issues of law.” Id. (citations omitted) (emphasis added). The Coregis Court looked at the expert report which was purportedly written to reconstruct CGL policies, analyze those policies with respect to the pending civil rights suit, and offer conclusions about the types of insurance policies. Id. As the Court indicated, however, “[s]ubsequently . . . Talley proceeds to address the fundamental legal question before the Court; whether CNA or St. Paul are obligated to provide Harrisburg with a defense and indemnity for the Crawford action”. Id. The District Court rejected such opinions, stating “[i]n offering this legal analysis, Talley strays from offering expert opinion of factual issues into an impermissible effort to advise this Court about
pure legal questions regarding the application of Pennsylvania law to the policies in issue. Moreover, Talley goes even further when he proceeds to offer his opinion about the proper interpretation of whether a claim for “extreme emotional distress” constitutes ‘bodily injury’ under the policies in question and relevant Pennsylvania insurance law. . . .” Id. The decision indicates that “[t]he Court does not require the assistance of Mr. Talley or any other expert report to resolve the issue presented in this action.” Id.; See also McHugh v. United Service Auto. Ass’n, 164 F.3d 451 (9th Cir. 1999) (“Although experts may disagree in their conclusions, their testimony cannot be used to provide legal meaning or interpret the policies as written.”) (citations omitted).

Thus, the proper application of the West Virginia Rules of Evidence should preclude expert witnesses from opining on the proper construction and application of insurance policy provisions. Stated otherwise, the evidentiary rules should leave only one “cook” to tend the “broth”, the judge.