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Who's the Expert?

The Implications of *Allen* and *Fisher* for Insurers and Defense Practitioners

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How much do experts matter? Two Colorado decisions, *American Family Mutual Insurance Company v. Allen*, 102 P. 3d 333 (Colo. 2004), and the recent holding in *Fisher v. State Farm Mutual Automobile Insurance Company*, --- P.3d --- (Colo. Ct. App. 2015), address this issue in the insurance bad faith context. *Allen* and *Fisher* provide important guidance for insurance companies and insurance defense practitioners regarding the limitations on admissibility of standard-of-care expert testimony—and expert reports—at trial.

Allen involved the fallout from the purported sale of a vehicle. The owner of a pickup truck sold the truck to a friend (Allen). It was a conditional sale; the seller retained title to the truck while payments were made by Allen, and the seller's insurance covered the truck while it was conditionally owned by Allen. One weekend, Allen was driving the truck with some passengers when Allen (who had been driving) got tired and asked a friend to drive. That friend fell asleep at the wheel. The vehicle went off the road and flipped. Allen and one other passenger were injured in the resulting accident. Allen sought coverage for damage to the truck and injuries sustained in the accident under the seller's insurance policy. The insurance company denied the claim. Allen initiated this action, claiming, inter alia, a first-party insurance bad faith claim. Allen did not provide expert testimony on the standard of care in the insurance industry for investigating and denying an insurance claim.

The *Allen* court held that, in a first-party insurance bad faith case, an expert is not required to establish the insurer's standard of care when (1) a statute provides valid, but not conclusive, evidence of the standard of care and (2) the standard of care is within the common knowledge and experience of the average juror.

While the *Allen* court observed that expert witnesses can provide additional relevant evidence of the standard of care if the standard is not within the knowledge of the ordinary juror, expert testimony is not required where the defendant's standard of care does not require specialized or technical knowledge. *Allen*, 102 P. 3d at 343. Further, the court held, if a legislative enactment or administrative rule establishes the standard of care, an expert is not required. Relying on its previous reasoning in *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 932 (Colo. 1997), the *Allen* court held that where the legislative or administrative rule is not conclusive of the standard of care, the statute or rule may be used as evidence of the standard of care from which the jury may evaluate the defendant's conduct.

The *Allen* court observed that, like the rules in *Gerrity*, the Unfair Claims Practices Act ("UCPA"), C.R.S. § 10-3-1104 *et seq.*, regulates the conduct of the insurance industry but does

not create a private right of action. The *Allen* court held that the UCPA may be used as valid, but not conclusive, evidence of industry standards.

In conclusion, the *Allen* court noted, "The reasonableness of an insurer's investigation into the underlying events of an automobile insurance claim is not a technical question and does not require additional professional training beyond the knowledge of the average juror. Nor does a determination of what constitutes a reasonable explanation for denying a claim require special knowledge or training." *Allen*, 102 P.3d at 345. The *Allen* court concluded that the evidence presented at trial, with the guidance of the UCPA (incorporated into the jury instructions), was sufficient for a reasonable jury to evaluate the insurance company's conduct (here, whether or not the denial of Allen's claim was unreasonable), without the need for an expert opinion.

How Does *Allen* Impact Insurers? Whether the insurer acted unreasonably will be determined by the jury through application of industry standards, including the experience of the jurors themselves with insurers. The jury now has significantly less expert guidance in making a determination of the reasonableness of an insurance company's actions.

The recent Colorado Court of Appeals decision in *Fisher* expanded upon the *Allen* ruling. In *Fisher*, the insured (Fisher) was involved in an auto accident with a motorist who had $25,000 in liability coverage. The parties stipulated that the other motorist was 100% at fault. Fisher's State Farm policies had a combined UIM coverage limit of $400,000. Fisher's claimed medical expenses were $1.35 million. Fisher submitted a UIM claim to State Farm, which countered with a $59,000 settlement offer. Fisher rejected that offer to settle all claims, no subsequent payment of undisputed medicals was made. Fisher filed suit against State Farm.

State Farm filed, and was granted, a pretrial motion to exclude Fisher's designated insurance expert. The Court of Appeals held that the trial court "correctly concluded that the expert's proffered opinion—that State Farm unreasonably denied or delayed payment to Fisher when it failed to advance the amount of its initial settlement offer—was contrary to Colorado law."[1] *Fisher*, 2015 COA 57, at ¶ 47.

In response, Fisher filed a pretrial motion to exclude testimony from State Farm's designated insurance expert, which Fisher characterized as a "rebuttal expert" whose report only served to rebut the opinions set forth by Fisher's expert. Fisher argued that since his expert had been excluded, there was no need for State Farm's expert opinion. The trial court granted Fisher's motion.

On appeal, State Farm argued, *inter alia*, that exclusion of its expert's testimony was prejudicial because determination of whether State Farm's conduct was reasonable required evidence of insurance industry standards, which are not a matter of common knowledge. The *Fisher* court concluded that, while the reasonableness of an insurer's conduct is determined objectively based on proof of industry standards, expert testimony is not necessarily required to

[1] As the Court of Appeals observed, "C.R.E. 408 expressly prohibits the admission into evidence of the amount of a settlement offer to prove the 'amount of a claim that was disputed.' Colorado law thus prohibits the conclusion that State Farm's initial settlement offer represents an admission that the amount of the offer was the amount of benefits owed to Fisher for his medical expenses." *Fisher*, 2015 COA 57, at ¶ 15.

establish the standard of care under which to evaluate an insurer's conduct when a statute establishes that standard. *Fisher*, 2015 COA 57, at ¶ 53 (citing *Allen*, supra at 343). The *Fisher* court noted that C.R.S. § 10-3-1115(2) defines "unreasonableness" for the purpose of a claim under §§ 10-3-1115 or -1116.

Assuming without deciding that State Farm's expert's proffered testimony was admissible under C.R.E. 702 and C.R.E. 403, the *Fisher* court held that any error in excluding the opinion by State Farm's expert on industry standards did not prejudice State Farm.[2] Taking *Allen* one step further, the *Fisher* court examined State Farm's proffered expert report and concluded: (1) the report offered duplicative testimony (the insurer offered lay testimony that argued the same theories contained in the expert report); the expert simply made bare assertions of opinion regarding compliance with insurance industry standards, without any description of said industry standards or how the insurer comported with those standards; (3) the report contained arguments inconsistent with Colorado law; and (4) the report did not contain the opinions expressed in State Farm's offer of proof.

Accordingly, the *Fisher* court held that exclusion of State Farm's expert testimony was not reversible error, because:

(1) A legislative enactment (C.R.S. § 10-3-1115) established the standard of care under which to evaluate State Farm's conduct (and this statute was used as guidance in the relevant jury instruction);
(2) The reasonable investigation and denial of an insured's claim was within the common knowledge and experience of the jury; and
(3) Based on an analysis of the proffered expert report, exclusion of the report would not substantially influence the outcome of the case or impair the basic fairness of the trial.

How Does *Fisher* Impact Insurers? *Fisher* refined and expanded upon the basic holding in *Allen* that experts are not required to establish the insurer's standard of care. The major impact of the *Fisher* decision is the addition of a third prong of the rule, which requires a fact-specific analysis of the expert report prior to exclusion or inclusion.

Some important takeaways from *Allen* and *Fisher*:

- Neither case conclusively established that an insurance industry expert is never admissible in first-party insurance bad-faith cases.
- The *Allen* and *Fisher* decisions apply equally to both plaintiff and defendant.
- The third prong of the *Fisher* court's decision—whether exclusion of the proffered expert's report would substantially influence the outcome of the case or impair the basic fairness of the trial—is fact-specific; thus, it leaves open the possibility that an insurance industry expert report may still be admissible.
- Based on *Fisher*, factors that may bolster the chances of admissibility of an insurance expert's testimony and report include:
    - Avoid duplicative testimony (e.g., nobody else can testify regarding the information and knowledge and opinions advanced by the expert).

[2] The *Fisher* court made several other holdings in its decision; however, only the holding regarding expert testimony in first-party bad-faith cases is examined in this article.

    - Expert opinions regarding compliance with applicable insurance industry standards must lay out descriptions of said standards and must describe how the insurer comported with those standards. (Without these guide-posts, the expert is offering only conclusions—i.e., taking over the job of the jury.)
    - The expert report's arguments must be consistent with Colorado law.
    - The expert report must contain the specific opinion expressed in the offer of proof (designation of experts), which must "contain a complete statement of all opinions to be expressed and the basis and reasons therefor." C.R.C.P. 26(1)(2)(B).
- *Allen* and *Fisher* are therefore reminders of the importance of a thorough and educational expert report, and the related duty of the insurer's counsel. Counsel must take the time to work with the expert before a report is drafted to make sure that information that is "common sense" to the expert, but new to a jury, is in place to create the foundation for critical defenses.