

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GREAT NORTHERN STOREHOUSE,)
INC., d/b/a FROG ROCK CAFÉ, and)
MOOSEHEAD LIMITED PARTNERSHIP,)
)
Plaintiffs)
)
v.) Civil No. 00-7-B
)
PEERLESS INSURANCE COMPANY and)
THE NETHERLANDS INSURANCE)
COMPANY,)
)
Defendants)

**ORDER ON DEFENDANTS'
MOTION TO PRECLUDE EXPERTS' TESTIMONY
(DOCKET NO. 34.)**

Defendants move pursuant to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), to preclude the giving of testimony by two of Plaintiffs' designated experts on the ground that they lack a reliable factual foundation for their opinions or have no relevant opinion and, therefore, cannot assist the trier of fact to understand or determine a fact in issue. I now **DENY** those motions under *Daubert*, recognizing that certain portions of the experts' testimony are potentially excludable if properly objected to at trial.

Discussion

The experts at issue are Robert Abbott, a veteran Public Claims Adjuster, and Peter Curran, a Certified Public Accountant. Robert Abbott assisted the Plaintiffs in calculating their fire loss to the restaurant property and their "business interruption claim that continues to accrue" and in preparing the three proofs of loss that Plaintiffs filed with the Defendants in pursuit of

their claims. (Defendants' Motion to Preclude, Docket No. 34, Exhibit A.) Plaintiffs designated Abbott to testify concerning how he arrived at the loss figures reflected in the proofs of loss as well as to provide an opinion that Defendants did not adjust the claims in good faith. (*Id.*) Plaintiffs have designated Peter Curran to testify about the economic condition of both the Greenville Frog Rock Café and the "financial status of the Plaintiff, its assets, and . . . its financial records." (*Id.*) It appears from the designation that Plaintiffs intend to use Curran to not only assist them with establishing a value for their business interruption claim, but also to offer an opinion that would tend to refute Defendants' position that Plaintiffs possessed a financial motive to attempt insurance fraud. (*Id.*)

Fed. R. Evid. 702 sets forth a three-part standard for assessing expert-witness proffers. *See Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 124 F.3d 252, 259 (1st Cir. 1997). First, the trial court "must determine whether the putative expert is 'qualified by knowledge, skill, experience, training, or education.'" *Id.* (quoting *Bogosian v. Mercedes-Benz of N.A., Inc.*, 104 F.3d 472, 476 (1st Cir. 1997)). Second, it must determine "whether the proffered testimony concerns 'scientific, technical, or other specialized knowledge.'" *Id.* (quoting *Bogosian*, 104 F.3d at 476). Third, "it must perform its gatekeeping function, by assessing whether the testimony 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Id.* (quoting *Bogosian*, 104 F.3d at 476). In its gatekeeping role, the Court must decide whether the proposed testimony "rests on a reliable foundation and is relevant to the facts of the case." *Bogosian*, 104 F.3d at 479 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993)). In the performance of this gatekeeping role, the Court focuses on "whether the reasoning or methodology underlying [proffered expert] testimony is . . . valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S.

at 592-93; *see also Cortes-Irizarry v. Corporation Insular De Seguros*, 111 F.3d 184, 188 (1st Cir. 1997). In this case, Defendants base their challenge only on the third part of the standard, the most fact-intensive aspect of the Rule. Although a *Daubert* motion can be a useful pretrial tool, "[a] trial setting normally will provide the best operating environment for the triage which *Daubert* demands. . . . [G]iven the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record." *Cortes-Irizarry*, 111 F.3d at 188.

1. Robert Abbott

According to the Defendants, Abbott's opinion that the business interruption loss was \$239,860 was based on unverified figures fabricated by Leigh Turner, one of the principals of the Plaintiff companies. (Defendants' Motion to Preclude at 6-7.) Plaintiffs respond that Abbott reviewed all of the business records available, including daily sales reports and handwritten sales, sales tax, and balance sheets. (Plaintiffs' Objection, Docket No. 46, at 8.)

It is quite clear from Abbott's deposition testimony that much if not most of the financial figures he used to develop Plaintiffs' proofs of loss came directly from Turner and were not "independently verified." Essentially, Defendants' contention is that an adjuster may not rely on financial figures and records supplied by an insured, but must somehow independently verify that the figures and records are accurate. I consider this contention, "unverified" by any citation to authority, to be questionable, especially in light of the First Circuit's recent ruling in *South Port Marine, LLC v. Gulf Oil Ltd. P'ship*, Nos. 99-2369 and 99-2370, 2000 U.S. App. LEXIS 31178, at *24-*25 (1st Cir. December 7, 2000), which suggests that the expert's mere conversations with the principal operator can inform the expert's opinion. If Defendants' challenge is solely focused on the factual predicates for Abbott's opinion, it is my view that the

proper course for Defendants is to endeavor "through cross-examination to explore and expose any weaknesses in the underpinnings of the expert's opinion." *Int'l Adhesive Coating Co. v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540, 544 (1st Cir. 1988). As in the *Bolton* case, "[t]he bulk of [Defendants'] arguments against admissibility are simply a rehashing of the central factual disputes of the case dressed up as attacks on the expert's testimony through Rule 703." *Id.* at 545. Even though *Bolton* is a pre-*Daubert* case, that aspect of its holding still has relevance to the present case. Defendants are asking this Court to use its *Daubert* "gatekeeping" function to make a factual determination about Plaintiffs' credibility. Although Defendants allege that the figures provided by Turner were fabricated, they do not provide any evidentiary record that might "verify" this allegation. Turner is a key witness in this case and Defendants can challenge his documentation, all of which has been provided through discovery, on cross-examination and through their own experts.

I do note, however, a potential problem with one aspect of Abbott's testimony and that relates to his opinion that Defendants did not act in "good faith" when adjusting this claim and dealing with Plaintiffs. The methodology underlying Abbott's opinion that Defendants did not act in "good faith", *i.e.*, his own anecdotal experience from 35 years in the field, appears highly suspect and susceptible to appropriate challenge. Abbott admits that he made no analysis of the complete investigation conducted by the Defendants to compare it to national professional standards or any other objective norm. He did however talk with Mr. Trombly, who investigated this claim on behalf of Defendants, and to the extent that Trombly made admissions to him, the substance of those statements may be admissible at trial as they would be through any fact witness. The remedy is not the exclusion of Abbott as a witness, but rather a limitation on his opinion testimony to the financial aspects of the case unless Plaintiffs are able to show that

information Abbott garnered during his conversations with Trombly and/or Turner about the claim process is otherwise admissible.

2. *Peter Curran*

Defendants contend that Curran testified he had no opinion on any of the areas in which Plaintiffs designated him to testify. (Defendants' Motion to Preclude at 2, 5-6.) Plaintiffs point out that Curran specified at his deposition that he intended to offer the opinion that the Frog Rock Café in Greenville was a viable economic entity with a positive future based on the history he had representing its principals when they were running the Road Kill Café, which was "so successful under their operation."¹ (Plaintiffs' Objection at 4 and Exhibit 1 at 73-74.) Plaintiffs acknowledge, and Curran's testimony reflects, that Curran did not assess the health of the Frog Rock business in all of its three locations, only the health of the Greenville location that sustained the fire loss. (*Id.*)

I agree with Defendants that Plaintiffs' designation is worded in such a way as to suggest more expansive opinion testimony from Curran than his deposition testimony supported. Although the designation appears to suggest it, in fact, Curran has no opinion on the overall financial health of the Plaintiff companies. However, this is a far cry from Defendants' contention that Curran has "NO" opinion to offer. Curran quite clearly has relevant knowledge to offer on the economic prospects of the Greenville restaurant, which, I note, is one of the central factual issues presented in this suit. Thus Curran's opinion, albeit more limited than Plaintiffs' designation suggests, is relevant to the factual dispute in this case. Furthermore, because Defendants do not challenge the methodology underlying Curran's opinion or any of the

¹ The principals of Great Northern and Moosehead Limited Partnership previously operated the Road Kill Café out of the same premises in which the Frog Rock was operated.

other *Daubert* factors, I do not consider Defendants' motion to amount to a *Daubert* challenge to reliability at all.

Conclusion

For the reasons stated herein, the Defendants' Motion to Preclude Experts' Testimony, Docket No. 34, is **DENIED**.

So Ordered.

Dated this 29th day of December, 2000.

Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-7

GREAT NORTHERN STORE, et al v. PEERLESS INSURANCE, et al Filed: 01/13/00
Assigned to: JUDGE D. BROCK HORNBY Jury demand: Both
Demand: \$0,000 Nature of Suit: 110
Lead Docket: None Jurisdiction: Diversity
Dkt# in other court: None

Cause: 28:1332 Diversity-Insurance Contract

GREAT NORTHERN STOREHOUSE, INC TYLER N. KOLLE, ESQ.
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FROG ROCK CAFE [COR LD NTC]
plaintiff BERMAN & SIMMONS, P.A.
P. O. BOX 961
LEWISTON, ME 04243-0961
784-3576

v.

PEERLESS INSURANCE, CO. DANIEL A. PILEGGI, ESQ.
defendant 942-4644
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GERALD W. MOTEJUNAS, ESQ.

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counter-claimant

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