

Fiduciary Duties and Expert Testimony



BY MICHAEL SEAN QUINN

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Insurance intermediaries, whether they are brokers or agents, have fiduciary duties. Often these duties run to policyholders or prospective policyholders. Often they run to insurers. Sometimes, they can run to both at the same time.

I. Duties to Policyholder

On Dec. 28, 2000, a California Court of Appeals decided *Westrec Marina Management v. Jardine Insurance Brokers*. Westrec, as its full name implies, manages marinas. Indeed, it is the largest marina manager in the country. It hired a group of insurance brokers to do two things: first, to obtain property and casualty insurance for the marinas; second, to obtain authority for Westrec to retail insurance to boat owners who rented slips. Problems developed with both of these placements.

For two years, the Jardine brokers had placed the marina property and casualty insurance with Generali for approximately \$850,000 a year. After two years, the brokers told Westrec that its premium would double to \$1.7 million per year. In placing the insurance, the brokers relied on an intermediary who was an employee of yet another broker. The truth of the matter was that the intermediary had found an alternative placement for her other accounts at an increase in premium of 20-30 percent. Nonetheless, she then placed the insurance with yet another insurer for a premium of \$1.7 million, a 100 percent increase. Thereafter, the marina found a different policy for \$1.374 million per year.

The problem with the insurance program for boat owners renting slips was a little more complicated. The published opinion of the appellate court is not too clear about what happened. Westrec obtained authority from the American Yacht Society to retail insurance to boat owners renting slips. There was some sort of falling out between Westrec and AYS, so that Westrec had to find a new source of insurance. It went to Jardine. Thereafter, Jardine formed an agreement with AYS which prevented it from servicing the Westrec wholesale-to-retail account. Westrec alleged that the conduct of the brokers breached their contractual agreement, thereby causing Westrec lost profits.

The case was tried to a jury. The very expensive property and casualty program was conceptualized as a violation of fiduciary duties. Under California law, an insurance intermediary has a fiduciary duty to its customers to obtain the best available price. The problem involving the boat owners renting slips was conceptualized only as a breach of contract. Why it was not also thought of as a breach of fiduciary duties is a mystery.

The jury awarded the marina approximately

\$350,000 in damages for the marina program. This is approximately the difference between the price the defendant broker obtained and 130 percent out of the previous premium. In other words, the jury believed that the insurance intermediaries had failed to find the best available price. The published opinion says nothing about damages in connection with the wholesale-to-retail program for boat owners renting slips.

The jury found in favor of the marina on its fiduciary duty and contract claims. It found against the marina on its theory of fraud. The breach of contract theory is independent and straightforward. There is an important difference between breach of fiduciary duty and fraud. A owes B a fiduciary duty when A has the highest possible duty of loyalty and good faith. A as a fiduciary of B, must place the interests of B ahead of its own. A breaches its fiduciary duties to B whenever he fails to act in B's best interest and whenever he places his own interests ahead of B. Fraud is lying. Someone can breach fiduciary duties negligently. No one can ever commit fraud except deliberately.

Given the way the appellate court summarized the facts of this case, it is difficult to see how the intermediary could have been guilty of anything but fraud. The intermediary placed all of her other marina accounts with Anglo-American Insurance, after Generali stopped selling it. There is an increase in premium of 20-30 percent. The intermediary did not ask Anglo-American to quote the Westrec account. Instead, she told Westrec that their premiums with Anglo-American would be approximately \$2 million. She then placed the insurance for \$1.7 million.

Of course, it is possible, that for some quirky reason the broker believed that Anglo-American would not sell to Westrec for an increase of 30 percent only. The reported opinion, however, says nothing about whether she had such a belief or what its foundation in fact might have been.

II. Expert Witnesses: Boat Program

Westrec wanted more money. The brokers appealed to try to defeat the \$350,000 judgment. The marina appealed because the trial court had excluded the testimony of its expert witness as to the boat program, although not as to the marina program. The marina's expert estimated that 2,000 boats would have been insured under the boat program during this six-months it was not available then estimated the profits Westrec would have made.

The expert based his opinion on insurance programs other than boat programs through marinas. For example, he used a program at a boat stor-

age facility in Alaska and a program for physicians insured by a hospital as a group.

The trial court excluded this testimony because it was not of the sort permitted in lost profits cases. Lost profits must be proved by evidence which is reasonably reliable, which provides reliable statistical information and which constitutes an analysis of the relevant market. There was no way this expert testimony could possibly constitute the analysis of any relevant market.

III. Experts General Principles:

In recent years, the courts have raised the standards for admitting expert witness testi-

mony. Formerly, anyone who had substantially above-average knowledge about a topic constituted an expert, and such people were fairly and formally permitted to express their opinions on a variety of matters. As often happens, things got out of hand.

The United States Supreme Court followed by the Texas Supreme Court dramatically raised the standards for expert witnesses. They focused on scientific experts. They held that if a party proposed to provide expert testimony, the witness must genuinely be an expert; the testimony must be actually relevant to the precise issues in the case; and the evidence must be reliable. This standard is

applied rigorously.

It is unclear how this rule applies to testimony which cannot be made scientific. This includes testimony about how the insurance business works, how brokerage works, how adjustment is performed, how underwriting is done in a reasonable manner, and so forth.

However, on March 16, Judge Joe Fish, a Dallas-based federal judge, in the United States District Court for the Northern District of Texas, suggested that expert testimony in the area of insurance practices would have to be based upon expert observations as to sound practice in the insurance industry. It would also have to address particular issues in the case.

In *Crow v. United Benefit Life Insurance Company*, the plaintiff designated one Ouida Peterson as an expert. Judge Fish characterized Peterson's opinion as consisting of two parts: a definition of the Texas rule governing good faith and fair dealing and an inference that United Benefit Life had breached that rule. Her opinion apparently did not contain a detailed review of how the insurer had engaged in unacceptable conduct.

Just as generalities which are not tied down to a particular case are not admissible, neither are bottom-line conclusions such as, this insurer acted in bad faith, the insurance intermediary breached fiduciary duties, or this insurance broker committed fraud. The province of the expert is to look at actual behavior in a particular case and discuss whether that behavior constitutes factible, sound, or good practice in the relevant factors of the insurance industry. Accordingly, the Court held that Peterson's testimony was inadmissible.

IV. Conclusion

The use of experts in insurance cases is not yet well-regulated. Sometimes, agents testify as to bad faith matters. Other times, adjusters testify as to underwriting matters, and so forth. There is a cottage industry among retired adjusters testifying on bad faith matters. Sometimes they know what they are talking about, sometimes not. Occasionally, lawyers try to testify about insurance matters. Often, they do not have the right credentials or the right set of experiences.

The agent, broker or intermediary who runs into trouble needs to be sure that if an expert is hired to vindicate him (or, at least, to mitigate the negative cause of his conduct) that the right expert is hired and that the report is formulated in the right sort of way. Extra-vagant, broadly-gauged conclusions will not suffice. ■

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