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## **Client Alert**

### **PSRB Successfully Excludes Purported Expert Testimony**

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Just because opposing counsel hires an expert with a multipage C.V. and decades of experience does not mean that purported expert can offer opinions in court. Recently, PSRB successfully excluded testimony from two purported experts in *Pulse Engineering v. The Travelers Indemnity Co.*, Cause No. 1:06-cv-1237-LJM-JMS (S.D. Ind. Sept. 22, 2009).

In this environmental-insurance-coverage action, the defendant insurers asserted a “late notice” defense (claiming that they were prejudiced by the timing of the policyholder’s notice) and a “pollution exclusion” defense (claiming that the insurance policies’ pollution exclusion barred coverage because there was a violation of an environmental law). The insurers engaged a prominent Indiana environmental attorney and a vice president for a national environmental engineering company with more than two decades of experience as a hydrogeologist (Douglas Swanson), to opine on these issues (among others). Despite these credentials, the federal district Court excluded their testimony related to the insurers’ “late notice” and “pollution exclusion” defenses.

The Court first addressed the insurers’ purported environmental-law expert, who opined that the policyholder had violated historical environmental laws. As a result of this opinion, Travelers argued there was no coverage because the policies at issue stated that they did not apply to injury or damage from pollution that resulted in a violation of law. The court agreed with PSRB’s position stating: “If allowed, [the] opinion—which is more legally than factually focused—would effectively dictate the outcome in this case. The [c]ourt concludes that [the] opinion that [the] pollution violated the law is on an ultimate legal issue. Therefore, [the] opinion on this matter is improper . . . and is excluded.”

Next, the Court found that insurers’ experts impermissibly opined that the insurers had been prejudiced by the timing of the policyholder’s notice of the claim. Both proposed experts attempted to testify that the policyholder failed to address the contamination promptly and that this delay increased the environmental-cleanup costs because: (1) the contamination migrated further offsite, (2) there were changes in governmental regulations, and (3) contractor fees had increased.

PSRB argued that this testimony did not meet the reliability standard set forth in Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) because the experts had not based their testimony on sufficient facts or data. The Court agreed:

The [c]ourt concludes that [the attorney's] opinion that the timing of [the policyholder]'s notice prejudiced Travelers does not satisfy Rule 702 and Daubert. Travelers does not dispute that [she] has no "actual cost data" to back up her opinion. Additionally, the information [she] considered to support her proffered conclusions regarding potential prejudice to Travelers is not too technical or complicated for a trier of fact to consider without [her] opinion. Therefore, [her] opinion will not assist the trier of fact in understanding the evidence or in determining these facts that are in issue.

The Court also excluded Mr. Swanson's testimony on this point: "The Court determines that, like [the attorney's] opinion, Swanson's opinion that a delay in cleanup has resulted in overall higher costs will not assist the trier of fact in understanding the evidence or in determining a fact in issue."

This is an important decision in the environmental-insurance-coverage context. Whether an insurer was actually prejudiced by late notice is a reoccurring issue. This case begins to lay the foundation for future pro-policyholder decisions. Insurance companies continue to look for ways to avoid coverage, and the late notice defense is now *en vogue*. Without counsel capable of critically analyzing an opposing expert, insurers can get away with relying experts with impressive résumés as opposed to admissible evidence. However, as we argued successfully to the Court here, the insurers failed to present admissible evidence of actual prejudice, which may ultimately be detrimental to their entire case.

This principle applies beyond the insurance context. Excluding an opposing party's expert is often fatal to that party in any complex case. Having savvy counsel with a technical background provides a real advantage in achieving this goal. By possessing science and engineering acumen (in addition to legal expertise), technical-based attorneys are able to comprehend, analyze, and critique opposing experts much more effectively and efficiently than "typical" attorneys. PSRB has several technical-based attorneys with degrees in geology, biology, and differing areas of engineering. This base knowledge provides clients real value in complex, technical cases.

In sum, if you or your clients face a purported expert, do not take their testimony at face value. Just because they appear to know what they are talking about and have years of experience to support it does not mean it is proper testimony for court. PSRB deals with experts in a wide variety of fields (not just related to the environment) on a daily basis and has had success excluding the other side's experts and defending our own. If you need additional information or assistance related to expert testimony, Daubert challenges, etc., please do not hesitate to contact [Greg Gotwald](#) or [Brett Nelson](#) of PSRB.