Are Your Experts Immune from Liability?

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What if they are negligent in forming their opinion and the court excludes their testimony? What if they change their opinion on the eve of trial? What if they blow your whole case? Can you sue? Good question. Think about the claim as well. Is it one for breach of contract? Or negligence?

“You blew my whole case” isn’t likely to satisfy Rule 8’s pleading requirements, but if you say it is a breach of contract, this brings up the very important question of who the expert owes a duty to. Expert immunity also seems to vary depending on the state in which you practice, which is why we pose the question to you: Are your experts immune?

Expert Immunity

A recent opinion out of Canada, which has many litigants, law professors and legal bloggers buzzing, made it clear that, in Ontario at least, their experts are immune. On both sides of the ‘v.’ While the law had been previously clear that a party could not sue the opposing side’s expert, Paul v. Sasso et al., 2016 ONSC 7488 set a new precedent that one could not sue their own expert either alleging negligence in the rendering of their expert opinion. Following entry of a rather unfavorable judgment in the defendant’s favor, in which the judge criticized and questioned the objectivity of plaintiffs’ real estate appraiser expert, the plaintiffs filed suit against their expert claiming negligence by the expert in the formation of his opinion. In response to a motion to dismiss filed by the expert on the basis of expert immunity, the court found immunity a must for testifying witnesses because the “proper administration of justice requires the full and free participation of witnesses unhindered by fear of retaliatory suits.”

Expert witness immunity is designed to ensure experts maintain their oath to the court to provide truthful opinions and deter them from being improperly coaxed into giving their clients more favorable opinions.

In addition to the admirable pursuit of the truth, the court also based its decision on an interesting finding that a revisit of the substance and accuracy of the expert’s opinion would also serve as an improper appeal of the judge’s ruling in the real estate case, which was final and not appealed. A finding in the suit against the expert that the expert was negligent would essentially stand as a finding that the judgment in favor of the defendant in the initial matter was wrong. As the court stated, the judge’s “determinations bind the plaintiffs and cannot be questioned through the back door by means of a subsequent civil suit.”

Thus, in Ontario, experts are immune.

The 10th Circuit Court of Appeals

This is not the case everywhere, though. An indirect finding by the 10th Circuit Court of Appeals that you can state a claim against your own expert for alleged negligence in the formation of his opinion. In Pace v. Swerdlov, 519 F.3d 1067 (10th Cir. March 4, 2008), the expert, testifying in a medical malpractice case, changed his opinion (from pro-plaintiff to pro-defense) after he reviewed new evidence, which the plaintiffs alleged resulted in entry of summary judgment against them. On appeal, the federal court granted the motion to dismiss the case not on the basis of immunity, but rather, on a finding that the expert’s change of heart was not the reason for entry of the summary judgment. On further appeal, the 10th Circuit found there was sufficient evidence alleged by the plaintiffs against their expert to withstand a motion to dismiss, meaning, you can sue your own expert. The court
specifically stated, however, that this finding was not intended as a conclusion on the availability of expert witness immunity as a defense to the claim as that, being a state law issue, was a matter for the state court to decide on remand.

In his dissent, Judge Neil Gorsuch, found leaving the question of immunity open troubling in that it encourages experts to give pre-packaged opinions out of fear of liability following an unfavorable trial result for the client. It can be a difficult call, as courts have come down on both sides, many at times in favor of allowing suits against experts for alleged negligence in the formation of their opinions for trial. You have to wonder (and perhaps ask the expert in deposition) whether fear of litigation would create even a subconscious incentive for the expert to find a way to offer an opinion that supports his client’s claims. This is the concern, but should there also be an avenue for recovery if an expert truly fails?

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