

BB REVIEW

Product Liability and Casualty Litigation Update

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ENGINEERING EXPERTS MUST BE LICENSED IN ALABAMA BEFORE TESTIFYING

Recent Change in Alabama Law -- Engineers Must Now Be Licensed In Alabama Before Testifying

A combination of actions by the Alabama Legislature and the Alabama Supreme Court have changed, as it relates to engineering expert testimony, the long-held practice that licensure in Alabama is not a “condition precedent” to an expert’s ability to testify. Previously, trial courts determined whether a proposed expert’s education, training, experience and profession gave them knowledge in an area superior to a layman. *See, e.g.*, Ala. R. of Evid. 702. If such superior knowledge was proven, the “expert” was allowed to testify without regard to whether they were licensed in Alabama, or in many cases whether they were even an engineer. This remains the law with regard to most experts, but not experts testifying to areas of “engineering.”

In *Board of Water and Sewer Commissioners v. Hunter*, No. 1050067, 2006 WL 2089914 (Ala. July 28, 2006) (application for rehearing overruled October 20, 2006), the Alabama Supreme Court upheld an amendment to Ala. Code. § 34-11-1(7) providing, in part, that an engineer must be licensed in Alabama before testifying in this state. The engineering licensing statute was amended in 1997 to, for the first time, include “testimony” in the definition of the practice of engineering. Section 34-11-1(7) provides that persons violating that statute or assisting in the violation (*i.e.* corporations and attorneys hiring non-licensed experts) may be guilty of a separate Class A misdemeanor for each day the violation occurs.

While the statute was amended nine years ago, it was not enforced until the *Hunter* case when the defendant sought to exclude the plaintiffs’ unlicensed engineering expert. While the trial court agreed with the plaintiff, ruling that the unlicensed engineer could testify, the Supreme Court reversed. The Supreme Court noted that the amended statute changed expert procedures, and conflicts with Alabama Rule of Evidence 702, but the Court deferred to the legislature’s will and held the statute is constitutional. As such, experts testifying in areas deemed to be engineering must now be engineers who are licensed by the Alabama Engineering Board.

In an effort to provide guidance as to which areas of testimony are truly “engineering,” several attorneys asked Alabama’s Engineering Licensing Board for an Advisory Opinion interpreting Ala. Code. § 34-11-1(7) and the *Hunter* decision. In its Advisory Opinion, the Board identified six areas which the Board believes are engineering, thus requiring that only a licensed engineer testify. The listed areas are: 1) automotive design, 2) accident reconstruction, 3) occupant protection, 4) machine design, 5) chemical processes and equipment, and 6) product, systems or process design. Of course, the Advisory Opinion included several caveats which leave

substantial areas of gray related to what testimony is truly covered by these categories. For instance, the Advisory Opinion used as an example the fact that a non-engineer accident reconstruction expert can still testify without violating the statute if he is otherwise qualified (*e.g.* a former police officer or a physicist) and does not hold himself out as an engineer in his testimony.

The Board also listed nine areas which they do not deem to be engineering: ballistics, crime scene analysis, blood spatter analysis, vehicular accident investigation, human factors, biomedical/biomechanics, fire investigation, fire analysis and analysis of chemical structures and composition. The Board further noted that the statute exempts several areas of engineering, including engineering work performed for the government or a public utility.

The change in the law, coupled with the Advisory Opinion and its caveats, has delayed (or stopped) cases throughout the Alabama as judges and attorneys attempt to figure out what areas of expert testimony are truly engineering. The gray areas left by the Advisory Opinion leave trial judges to interpret the statute and determine whether or not proposed testimony fits into an engineering area, so disputes are raging on a daily basis in many courts. In other courts, cases are not moving at all as trial judges wait to see if the Supreme Court or legislature will return the state to the prior procedures. In situations where judges are not willing to wait, well respected experts have been jettisoned because they are either not engineers, or they are not licensed in Alabama. Parties have been forced to scramble to locate expert witnesses who are licensed in this state, or those that can be licensed on short notice. Of course, in the fallout parties have been forced to part with many experienced expert witnesses, and rely instead upon new experts who may not have the level of expertise or gravitas of the experts they replace.

What Should You Do Right Now?

If you do business in Alabama and/or have the possibility of being sued in this state, you should take steps now to ensure that experts who might be called upon to testify on your behalf in areas identified as engineering are either licensed engineers in this state or fit into an exception to the engineering licensing statute. This includes both engineers you employ who may be called as a witness, as well as outside experts that you (or others in your industry) regularly utilize. Even if you do not currently have active litigation in Alabama, you should not wait to get engineers licensed and identify experts who can meet the new requirements. Judges today are forgiving because of the sudden change in practice; but that forgiveness will likely end soon.

Get Engineers Licensed in Alabama

Engineers who may testify in litigation that are not licensed in any state (*e.g.* many college professors and corporate engineers) should start the application process now to become licensed in Alabama. They will be required to, among other things, take both the Fundamentals of Engineering Exam (“FE exam”) and Professional Engineers Exam (“PE exam”), as well as provide evidence of 1) an engineering degree, 2) a minimum of four years of experience, and 3) at least five verifiable references. This testing and application process can take upwards of one year.

Engineers who may be witnesses in litigation who are already licensed in another state can most likely obtain a license in Alabama through comity. The process of becoming licensed in Alabama through comity is also fairly detailed. Before a comity application will be considered, the engineer must: 1) provide evidence that he has passed both the FE and PE exams, 2) obtain references from three prior supervisors, and 3) obtain college transcripts. These requirements are a problem for some older engineers because the PE exam was not offered until the late 1960’s (therefore many older, but still qualified, engineers never took it), some of their prior supervisors are no longer living and some college transcripts from the 1950’s and 1960’s are hard to locate. Under the best of circumstances, a comity application may take as long as three-four months to be approved.

Balch & Bingham attorneys have assisted many engineers, both in-house and outside experts, in navigating the licensure process, including resolving some of the difficulties mentioned above.

Identify Qualified Experts -- Even if They Are Not Engineers

The Advisory Opinion makes clear that non-engineer experts in areas such as accident reconstruction may still be qualified as experts in Alabama if they possess the prerequisite education and experience, and do not hold themselves out as an engineer. If you have previously relied upon non-engineers, such as former police officers or scientists, to testify in any of the areas identified as engineering, you should start now to determine if those experts will still be qualified. Because of the caveats in the Advisory Opinion, these cases are being evaluated on a case-by-case basis by trial courts. Alternatively, experts may seek a further advisory opinion from the Engineering Licensing Board regarding whether certain areas of proposed testimony may be deemed engineering. Either way, the outcome is uncertain given the lack of clear guidance. Balch & Bingham attorneys are currently involved in several cases involving non-engineer experts who, despite the change in law, may still be allowed to testify in areas such as accident reconstruction or chemical processes.

Current Attempts to Change the Law

Various groups are seeking to amend the engineering licensing statute once again to return Alabama law back to the point where licensure is not required for an engineer to testify, and where non-engineers can continue to be offer testimony and be evaluated by the trial court without fear of violating the engineering licensing statute. In addition to parties unsuccessfully seeking rehearing of the *Hunter* decision (denied last Friday by the Alabama Supreme Court), organizations including the Alabama Trial Lawyers Association have begun to lobby the Alabama Legislature to amend the engineering licensing statute again to remove from the definition of engineering the reference to "testimony" added in 1997. While the plaintiff's bar is one group advocating for the statute to be amended, the largest defense counsel organization (the Alabama Defense Lawyer's Association) has not taken a formal position. Many defense attorneys feel that, while the new statute creates problems in the short term, it will eventually help weed out some of the junk science experts plaintiffs have proffered. As such, there could be an intense debate over whether to amend the statute again. The next legislative session does not begin until March 6, 2007, so any amendment to the law is, at best, several months away.

Conclusion

The amended engineering licensing statute and the *Hunter* decision have significantly altered the pool of experts available to testify in product liability and casualty lawsuits in Alabama. Balch & Bingham's product liability and casualty attorneys are well versed in this change in law and experienced in navigating clients, and their experts, through the new procedures.

Balch & Bingham LLP – Product Liability and Casualty Litigation Practice Group

The attorneys in Balch & Bingham's Product Liability and Casualty Litigation Practice Group possess a long history of handling complex personal injury, property damage and wrongful death litigation. Current cases include a wide variety of products such as asbestos, automotive parts, chemicals, child restraint systems, electrical devices, exercise equipment, hand tools, manufacturing equipment, mold, office furniture, lead paint, medical devices, motorcycle helmets, pharmaceuticals, saw mill equipment and tractor equipment. In the past year Balch & Bingham attorneys have successfully litigated several cases involving these and other products, obtaining victories through motions to dismiss, summary judgment, at trial and through appeals.

Balch & Bingham litigators represent clients in nationwide and statewide class actions, mass actions, litigation arising out of product recalls and multidistrict litigation, often serving as national coordinating counsel in high-profile litigation matters. Balch & Bingham attorneys enjoy membership in a number of professional associations, including the highly-selective American College of Trial Lawyers, the International Association of Defense Counsel (IADC), the Federation of Defense and Corporate Counsel (FDCC), the Defense Research Institute (DRI), and the Alabama Defense Lawyers Association (ADLA), including one partner currently serving as President-Elect and two partners serving on its Board of Directors.

