

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

WELLS FARGO BANK, N.A., etc.,

Plaintiff,

:

Case No. 3:07-cv-449

-vs-

Magistrate Judge Michael R. Merz

:

LaSALLE BANK NATIONAL
ASSOCIATION,

Defendant.

**DECISION AND ORDER DENYING MOTION OF DEFENDANT TO EXCLUDE
ROY OWEN AS AN EXPERT WITNESS FOR FAILURE TO PRODUCE AN EXPERT
REPORT**

On July 7, 2009, the Court reserved a ruling on whether Plaintiff's proposed witness, Roy Owen, should be prevented from giving expert testimony because he did not provide an expert report. Wells Fargo admitted that Owen had not prepared a report, but argued he was not required to do so because he is a "fact witness who has not been specially retained to serve as an expert witness in this case." (Wells Fargo Memo Opp., Doc. No. 124, at 13, quoted at Decision and Order, Doc. No. 176, at 4-5.)

In reserving this question, the Court wrote

Considering *Fielden [v. CSX Transp., Inc.]*, 482 F.3d 866 (6th Cir. 2007)], the Court believes it lacks sufficient information to determine whether Mr. Owen should have filed an expert report. To decide the question, the Court needs the following information:

1. On what subjects is Mr. Owen expected to offer opinion testimony?
2. To what extent are those opinions based on his personal observation as an employee of Crown NorthCorp?
3. Conversely, to what extent are those opinions based on

observations and analysis he made in anticipation of or in support of this litigation?

4. What knowledge did LaSalle have before it deposed Mr. Owen of his intended opinion testimony?
5. What is the precise date of the end of Mr. Owen's employment by Crown NorthCorp? After that date, could it not properly be said he was "specially retained" for this litigation?

Id. at 5-6. The Court invited the parties "to consider these questions and to file, as promptly as possible, statements of their responses." *Id.* at 6.

Wells Fargo responded on July 13, 2009 (Doc. No. 181) and LaSalle on July 17, 2009 (Doc. No. 184). Wells Fargo states that

Mr. Owen will testify regarding whether Defendant breached representations and warranties regarding the two commercial loans that are at issue in this lawsuit, and whether those breaches had a material and adverse effect. The factual bases for these opinions, as well as the opinions themselves, were elicited during a two-day corporate representative deposition of Mr. Owen that took place November 12 and 13, 2008.

(Doc. No. 181 at 1,) It avers that all of his opinions are based on personal observations he made while he was employed at Crown NorthCorp. and none were based on observations and analysis made in anticipation of or support of this litigation. *Id.* at 2. In response to the third question, Wells Fargo refers to a letter from its counsel to LaSalle's counsel of September 25, 2008, in which he stated Mr. Owen would testify regarding "Any and all ways in which Plaintiff alleges that LaSalle breached representations and warranties in the MLPA relating to the Rooths Loan and Priest Loan" and certain 30(b)(6) topics. *Id.* Wells Fargo concludes that this submission shows Mr. Owen is a "fact witness" and therefore an expert report was not required under Fed. R. Civ. P. 26(a)(2)(B). *Id.* at 3.

Mr. Owen was designated by Wells Fargo in its Disclosure of Primary Expert Witnesses on November 18, 2008, the week after Mr. Owen was deposed. When describing his intended testimony, Wells Fargo stated verbatim the language quoted above from Doc. No. 181.

LaSalle seeks to exclude Mr. Owen because he failed to provide an expert report. A person who is qualified to give an expert opinion who is an employee of a **party** but who is not regularly involved in giving testimony is not required to prepare an expert report under Fed. R. Civ. P. 26(a)(2)(B). Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2031.1. Wells Fargo's response shows that, at the time he formed his opinions and gave the deposition testimony which Wells Fargo intends to present to the jury, Mr. Owen was an employee of Crown NorthCorp. but not regularly involved in giving testimony. Fed. R. Civ. P. 26(a)(2)(B) exempts from the expert report requirement only employees of parties, but Crown NorthCorp. is not a party to this litigation. Instead, Wells Fargo is the only party plaintiff and it brings this lawsuit "by and through" Crown NorthCorp. Neither Wells Fargo nor LaSalle has argued this point and both appear to treat Crown NorthCorp. as a party for purposes of Rule 26(a)(2)(B). The Court will respect that treatment and not exclude Mr. Owen's testimony for failure to prepare an expert report, treating him as an employee of a party for purposes of the Rule.

There remain numerous questions regarding whether Mr. Owens can offer expert testimony. For example, the subjects on which Wells Fargo says he will testify appear to be "ultimate" facts within the province of the jury, to wit, whether LaSalle breached the relevant representations and warranties and whether those breaches had a material and adverse effect. It is also not clear that when Wells Fargo says Mr. Owen's testimony is based on "personal observation," it intends to convey that he would be a competent percipient witness of everything on which he bases his opinions. As LaSalle's Responses (Doc. No. 184) make clear, that cannot possibly be the case and an appropriate foundation for his testimony must be shown under Fed. R. Evid. 703. Certainly, Mr. Owen's deposition testimony in which he merely repeats allegations made in the pleadings is not admissible either as lay or expert testimony, although eliciting that testimony in deposition of a Rule 30(b)(6) witness was completely proper. These and perhaps other issues remain for resolution as

the Court reviews the tendered depositions.

In *Fielden v. CSX Transp., Inc.*, 482 F.3d 866 (6th Cir. 2007), the court endorsed a purposive analysis of Fed. R. Civ. P. 26(a)(2)(B) for deciding when a treating physician would be allowed to testify without providing an expert report. This Court concludes that the exemption of employee-experts from the report requirement allow a party to avoid the entire purpose of expert disclosure, especially where, as here, a witness is designated as an expert after he has been deposed and the disclosure of opinions to be offered is as summary as Wells Fargo made here. However, the plain language of the Rule provides for the exemption and the Court cannot re-write it to carry out its perceived purposes¹.

The sole decision made here is that Mr. Owen will not be excluded as an expert for failure to provide a report since he was an employee of an entity being treated by counsel as a party.

August 7, 2009.

s/ **Michael R. Merz**
United States Magistrate Judge

¹In interpreting a statute [or legislated rule] a court should:

1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either (a) a meaning they will not bear, or (b) a meaning which would violate any established policy of clear statement.

Hart and Sacks, *THE LEGAL PROCESS* (Eskridge & Frickey ed. 1994), p. 1169.