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The Limited Scope Of Bad-Faith Expert Testimony

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These days, no one is surprised to see a bad faith expert listed on expert designations in insurance coverage litigation involving allegations of bad faith. While lawyers on both sides of the dispute routinely engage bad faith experts, there is still uncertainty regarding the proper scope of a bad faith expert's testimony.

The United States Supreme Court first examined the admissibility of "expert" testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993). *Daubert* established that the trial judge must act as a "gatekeeper" by ensuring that an expert's testimony is based on a reliable foundation and is relevant to the question before the trier of fact.

Six years later, in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court extended its holding in *Daubert* and required judges to apply the gatekeeping function to *all* expert testimony. The Court held that the *Daubert* analysis serves as a reminder to courts to ensure that expert testimony is relevant to the issues, meets the required standards, and is at least potentially helpful to the trier of fact.

In the years following *Daubert* and *Kumho Tire*, federal courts have wrestled with questions involving how to perform their gatekeeping function in the case of "other experts," including the now common-place "bad faith expert." In addition to considering an expert's qualifications (a topic outside the scope of this article), the following general guidelines should be considered when engaging a bad faith expert for litigation in federal court.

1. Expert testimony on bad faith is not required.

Although most courts have been clear that expert testimony on bad faith is not required to either prove or disprove that an insurer acted in bad faith, lawyers representing both policyholders and insurers continue to try and make the argument that such expert testimony is necessary. When a "bad faith" expert is offered, it is generally argued that the bad faith issues involved in the case are complex and that such expert testimony would assist the fact finder in making its determination. However, courts are reluctant to find that a bad faith issue is so complex that it is outside the common knowledge and ordinary experience of an average juror and, thus, requires expert testimony. Accordingly, arguments that a party's failure to designate an expert on bad faith is fatal to its case have generally been unsuccessful. *See, e.g., Shiva Worldwide v. Great Lakes Reinsurance*, 10-cv-3867, 2011 WL 5325788, at *3 (S.D. Tex.); *Talmage v. Harris*, 354 F.Supp.2d 860, 865 (W.D. Wis. 2005); *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.,* 410 F. Supp. 2d 417, 421 (W.D. Pa. 2006).

2. Experts are not permitted to offer their opinion on the ultimate legal conclusion that an insurer acted in bad faith in violation of applicable law.

Courts have drawn a fine line between what is permissible and what is impermissible testimony when it comes to experts rendering legal conclusions regarding bad faith. While an expert witness may not give an opinion as to the ultimate legal conclusion, he may give an opinion regarding the legal question at issue. From a practical standpoint, this means that an expert cannot testify that "the insurer in this case acted in bad faith in violation of applicable law." However, some jurisdictions may allow an expert to testify as to the relevant industry standards AND that the insurer deviated from those standards in the particular case. *See, e.g., Hangarter v. Provident Life and Accident*, 373 F.3d 998, 1016 (9th Cir. 2004); *Gallatin Fuels,* 410 F. Supp. 2d at 422.

3. Experts *may* be permitted to testify as to whether an insurer violated applicable insurance statutes.

As with many areas of the law, whether an expert may be permitted to testify regarding an insurer's alleged violation of applicable insurance statutes or regulations has not yet been resolved. A few courts have allowed the testimony, holding that it could be relevant in determining whether the insurer acted reasonably and/or deviated from industry standards and, thus, had acted in bad faith.

However, in these cases, the courts pointed out that because there was no claim based upon a violation of an insurance statute, the statutory provisions/regulations were not directly at issue in the litigation. Rather, the potential violation of the provisions/regulations was merely offered as *evidence* supporting the insured's common law bad faith claim. *See, e.g., Gallatin Fuels*, 410 F. Supp. 2d at 421-22; *Hangarter*, 373 F.3d at 1017.

4. Experts are not permitted to offer their opinion on the application of the insurance policy to a particular loss.

In some cases, parties have attempted to introduce expert testimony regarding how the policy applies to the particular loss at issue – specifically whether the claim was covered and payable under the policy or whether the insurer improperly denied benefits under the policy. Because an expert's opinions on the issue of contract interpretation would not assist the trier of fact in understanding coverage, these types of expert opinions are generally considered to be impermissible legal conclusions.

Moreover, when a policy term is unambiguous, an expert opinion on "the usual and customary meaning" of the term is not admissible. The purpose of allowing expert testimony is to assist the trier of fact in understanding the evidence at issue. When a policy term is unambiguous, an expert's opinion regarding the "usual and customary meaning" of that term in the field is irrelevant. However, if a policy term is ambiguous or it is a term determined to have a highly specialized meaning, then expert testimony regarding the usual and customary meaning may assist the trier of fact and, therefore, may be admissible. *See, e.g., Rosamond v. Great Am. Ins. Co.*, 3:10CV263TSL-MTP,

2011 WL 4433582, at *5 (S.D. Miss. Aug. 4, 2011); *Gallatin Fuels,* 410 F. Supp. 2d at 421.

5. Experts are not permitted to testify regarding the subjective intent of the claim handler responsible for the handling of the insured's claim.

Expert testimony is sometimes offered regarding the subjective intent of a claim handler or insurer with regard to a particular claim. Such testimony might include a statement that the insurer, through its claims handler, "intended from day one" to deny coverage for the claim. Such testimony is impermissible, as an expert may not testify as to what he believes another individual thought, believed, or felt. Courts that have addressed this issue have determined that an expert is not in any better position than the jury to assess another's subjective intent. *See, e.g., Gallatin Fuels,* 410 F. Supp. 2d at 423.

For the foreseeable future, it is clear that the "bad faith expert" is here to stay. The guidelines above are based on several federal court cases that have addressed the admissibility of bad faith expert testimony. However, as courts continue to wrestle with their gatekeeping role in cases involving bad faith experts, the expert opinions that are ultimately admissible in a case may vary from jurisdiction to jurisdiction.

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