

Expert Witnesses in Bad Faith and Coverage Litigation

Admitting and Excluding Opinion Testimony: Burden of Proof, Prohibited Subjects, Industry Standards, Scope

WEDNESDAY, OCTOBER 21, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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*Guy O. Kornblum and
Bradley A. Levin*



Using Expert Witnesses in Insurance Bad Faith and Coverage Litigation

Overcoming Obstacles
in Presenting
Expert Opinion
Testimony

WEDNESDAY, October 21, 2020
1-2:30 p.m. EDT

Our Topics

What industry experts are best suited for *bad faith claims* and what are common challenges or objections to their testimony?

Our Topics

What industry experts are best suited for *insurance coverage claims* and what are common challenges or objections to their testimony?

Our Topics

Under what circumstances would
Attorneys play a role in presenting
Expert Witness opinions?

Third Party Failure to Settle

Third Party Failure to Defend

First Party Failure to Pay
or Delay in Paying Claim

Third Party Failure to Settle

Third Party Failure to Defend or Indemnify

First Party Failure to Pay
or Delay in Paying Claim

Third Party Failure to Settle

Third Party Failure to Defend

**First Party Failure to Pay
or Delay in Paying Claim**

California

California Civil Jury Instructions (CACI)

2330. Implied Obligation of Good Faith and Fair Dealing Explained

To breach the implied obligation of good faith and fair dealing, an insurance company must, ***unreasonably or without proper cause***, act or fail to act in a manner that deprives the insured of the benefits of the policy. It is not a mere failure to exercise reasonable care. However, it is not necessary for the insurer to intend to deprive the insured of the benefits of the policy.

Illinois

Vexatious and unreasonable conduct

*Cramer v. Ins. Exch. Agency, 675 N.E. 2d 897, 900-904 (Ill.1996);
Section 155 of Illinois Insurance Code*

Colorado

- In the first party context, bad faith arises from insurer conduct which is unreasonable and which the insurer knows or recklessly disregards is unreasonable
 - *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1275 (Colo. 1985).
- In the third party context, bad faith arises from insurer conduct which is unreasonable under the circumstances
 - *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141 (Colo. 1984).

Other states

See United Policyholders: 50 State Survey of Bad Faith Laws and Remedies (October 23, 2014)

**Through experts, suggest or establish
good faith claims principles**

*(and possibly, how they were
violated or complied with in your case)*

Insurance industry standards may be established through expert opinions

Peden v. State Farm Mut. Auto. Ins. Co., 841 F.3d 887, 890 (10th Cir. 2016).

**In *Reedy v. White Consolidated Industries, Inc.*,
890 F. Supp. 1417 (N.D. Iowa 1995),
the Court noted that the**

“claims adjusting procedure is . . . something about which the average juror is unlikely to have sufficient knowledge or experience to form an opinion without expert guidance, thus expert testimony would not be superfluous.”

Some courts reject this approach

In *Shefinio v. GEICO General Ins. Co.* (WD. Pa. 5/31/2013), the court granted a motion *in limine* as to plaintiff’s expert on claims handling because

“the concept of bad faith is within the ken of the average layperson such that expert testimony is not necessary in this matter. A reasonable juror certainly possesses the requisite knowledge to assess the bad faith allegation, which is equally neither particularly complex nor scientific”

***Hangarter v. Provident Life & Acc. Ins. Co.,*
373 F. 3d 998 (9th Cir. 2004): plaintiff’s expert
was qualified to testify on bad faith:**

...standards set out in Daubert v. Merrell Dow Pharm., Inc. 509 U.S. 579 (1997) did not apply “to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it.”

Experts may be permitted to establish industry custom and practice or “good faith” claims handling principles

Might be permitted to testify that conduct was or was not consistent with industry custom and practice, or met the “good faith” claims handling principles

Using or Challenging the “Genuine Dispute” Doctrine through Experts

**Expert May Lend Support to
Case for Punitive Damages:**

*“Substantial Departure” from “Good Faith”
Claims Practices*

Claims investigation –
Diligent, thorough, fair, objective

Customary claims practices/ Industry Standards

*Fact of compliance does not
mean “good faith”*

*Fact of departure does not
mean “bad faith”*

Customary claims practices/ Industry Standards

*Custom and Practice may or may not violate
“good faith” claim practices*

*Failure to comply may or may not be
evidence of “bad faith”*

Coverage Issues

Can expert testify about policy drafting, that policy language is ambiguous, that exclusions are inconspicuous, or how the policy language should be interpreted and applied to the facts?

The Decision Making Process

Supervision and Review

Claims Training

Claims Manuals and Written Procedures

When might I need an expert on claims handling?

Are they required?

See, e.g., Am. Family Mut. Ins. Co. v. Allen, 102 P.3d 333, 335 (Colo. 2004) (expert testimony is not required to establish the insurer's standard of care when a statute provides valid, but not conclusive, evidence of the standard of care and when the standard of care is within the common knowledge and experience of the average juror);

Bergman v. USAA, 742 A.2d 1101 (Pa. Super. 1999)(court refused to adopt a blanket rule requiring expert testimony in all cases involving bad faith claims)

Wolfson and Bourhis, "Do You Need an Expert to Prove Bad Faith?,"
www.dllawgroup.com/Do-You-Need-An-Expert-To-Prove-Bad-Faith.shtml

Retain Your Expert Early

Early file review; make sure he/she is comfortable with your client's position

No surprises

Retain Your Expert Early

*Early retention enhances credibility and
reflects well on your client*

Retain Your Expert Early

*Assistance in developing case theories;
Anticipating questions for and deposition
preparation of claims personnel (for insurer);
Developing questions for claims personnel
or adverse experts (for insured)*

Retain Your Expert Early

*Preparation for Testimony
begins at Retention*

Where do I find an Expert?

Make sure the expert can qualify

Where do I find an Expert?

...an expert attorney witness...The Court found expert testimony was appropriate because it

“relate[d] to matters beyond the knowledge or experience possessed by laypersons or dispels a misconception common among laypersons.”

Furr v. State Farm Mut. Auto. Ins. Co., 716 N.E.2d 250, 258 (Ohio App. Ct. 1998).

Where do I find an Expert?

The court determined that the insured's bad faith expert, a lawyer who represented policyholders, did not qualify as an expert in bad faith coverage cases.

“no foundation whatsoever was laid to demonstrate that [expert] had any special knowledge, skill, experience, training or education such as would qualify him as an expert on insurance company practices.

*The court applied Kumho to determine the admissibility of the expert's nonscientific evidence.
California Shoppers, Inc. v. Royal Globe Ins. Co., 175 Cal. App. 3d 1, 66, 221 Cal. Rptr. 171 (Ct. App. 1985)*

Where do I find an Expert?

Internet sites

Example: www.jurispro.com/badfaith

Where do I find an Expert?

Reported Cases

Where do I find an Expert?

Industry Organizations

What do I look for in an Expert?

Qualifications and Experience in the specific area of insurance at issue in your case

Dudash v. Southern-Owners Ins. Co., 2017 WL 1969671 (M.D. Fla. May 12, 2017);
Estate of Arroyo v. Infinity Indem. Ins. Co., 2016 WL 4506991 (S.D. Fla. Aug 29, 2016)

What do I look for in an Expert?

Communication Skills

Educate about unfamiliar insurance concepts

Simple, plain language

Courts may bar Legal Conclusions

The policy language in question is ambiguous

The claim is covered by the insurance policy

The insurer acted in bad faith

Policy Interpretation

Sixth Circuit held that District Court did not err in refusing to consider on summary judgment the report of a putative expert in the interpretation of insurance policies, because the opinions were inadmissible legal conclusions

North American Specialty Ins. Co. v. Myers, 111 F.3d 1273, 1284 (6th Cir. 1997).

Policy Interpretation

District of Colorado courts barred opinions of plaintiff's expert on interpretation of homeowner's policy language regarding replacement cost and policy ambiguity...

Slavin v. Garrison Prop. & Cas. Ins. Co., 2017 WL 2928030 (D. Col. July 10, 2017).

...and coverage

Chateau Vill. N. Condo Ass'n. v. Am. Family Mut. Ins. Co., 2016 U.S. Dist., LEXIS 49665 (D. Colo. April 13, 2016).

Legal Conclusions

Northern District of Illinois barred certain opinions which were legal conclusions, but allowed other opinions which were not.

Essex Ins. Co. v. The Structural Shop, Ltd. 2017 WL 2224879 (N.D. Ill. May 22, 2017); see also *Fox v. Admiral Ins. Co.*, 2016 WL 6476461 (N.D. Ill. Nov. 2, 2016).

Courts are generally more amenable to testimony on “good faith” claims principles articulated in cases, statutes and regulations

...the Court excluded the some of the opinions of the insured’s bad faith expert on a motion *in limine*.

Testimony about how insurance claims are managed and evaluated, and the statutory and regulatory standards to which insurance companies must adhere, could be helpful to the jury’s evaluation of whether the claim in the instant case was handled in bad faith

Kraeger v. Nationwide Mut. Ins. Co., 1997 WL 109582 (E.D. Pa. 3/7/1997).

Courts are generally more amenable to testimony on “good faith” claims principles articulated in cases, statutes and regulations

...the Court excluded some of the opinions of the insured’s bad faith expert on a motion *in limine*.

the expert cannot testify that the defendant insurer acted in “bad faith” or violated particular statutes, as those are legal conclusions

Kraeger v. Nationwide Mut. Ins. Co., 1997 WL 109582 (E.D. Pa. Mar. 7, 1997).

Courts are generally more amenable to testimony on “good faith” claims principles articulated in cases, statutes and regulations

...the Court excluded some of the opinions of the insured's bad faith expert on a motion *in limine*.

But expert can opine, based upon expertise and experience, that defendant insurer had no reasonable basis for its actions

Kraeger v. Nationwide Mut. Ins. Co., 1997 WL 109582 (E.D. Pa. Mar. 7, 1997).

Industry custom and practice

The District of Colorado ruled expert testimony can be taken into account to determine

“the standard of care, if the standard is not within the common knowledge of the ordinary juror”

O’Sullivan v. GEICO Cas. Co., 233 F.Supp.3d 917 (D. Colo. 2017).

See South Park Aggregates, Inc. v. Nw. Nat. Ins. Co. of Milwaukee, Wis., 847 P.2d 218, 225 (Colo. App. 1992); *Southerland v. Argonaut Ins. Co.*, 794 P.2d 1002, 1107 (Colo. App.1990)

Internal company standards

Court allowed bad faith expert in failure to settle case to testify about insurance company's own internal claims handling standards

AXIS Specialty Ins. Co. v. New Hampshire Inc. Co., 2017 WL 445746 (W.D. Mo. Feb. 2, 2017).

Evaluating witnesses or motives

Courts will not permit a bad faith expert to opine on insurer's motive for an action or whether someone was being truthful

Arrowood Indem. Co. v. United States Fire Ins. Co., 2016 WL 6610806 (N.D. Ohio Feb. 21, 2016).

**How far will your jurisdiction
allow your expert to go?**

Application of the Ultimate Opinion Rule

Whether there is Coverage?

Claims handler's interpretation of coverage

Application of the Ultimate Opinion Rule

What is “Bad Faith”?

Application of the Ultimate Opinion Rule

State of mind of claims handlers?

Application of the Ultimate Opinion Rule

Lack of reasonable claims handling

Bello v. Merrimack Mut. Fire Ins. Co.,

Application of the Ultimate Opinion Rule

Lack of reasonable claims handling

Jordan v. Allstate Insurance Company

Under Colorado statute, the jury may be instructed that violations of the Unfair Claim Settlement Practices Act may be considered in determining whether the claimed injury, damage, or loss was caused by or contributed to by the prohibited conduct.

C.R.S. § 10-3-1113(4).

Standard or Customary Practice In the Industry

Dinner v. United Services Auto. Assoc. Cas. Ins. Co.,

29 Fed. Appx. 823, 827 (3d Cir. 2002)(unpublished)

Standard or Customary Practice In the Industry

Ford v. Allied Mut. Ins. Co.,
72 F.3d 836, 841 (10th Cir.1996)

Opinions Contrary to Policy Construction

District of Colorado court held that an expert witness could not offer coverage opinions that were contrary to the court's construction of the policy or offer an opinion that the insurer's interpretation of the policy, to the extent adopted by the court, was unreasonable.

Chateau Vill. N. Condo Ass'n v. Am. Family Mut. Ins. Co., 216 U.S. Dist. LEXIS 49665 (D.Colo. April 13, 2016)

Post-Litigation Filing Conduct

District of Colorado court held that expert testimony regarding litigation strategy as evidence of bad faith risks creating ethical dilemmas for attorneys representing insurance companies, or conflicts with the attorney's litigation privilege, and could deter insurers from conducting a vigorous defense, and therefore was inadmissible.

Etherton v. Owners Ins. Co., 2013 U.S. Dist. LEXIS 1993 (D.Colo. Jan. 7, 2013).

Disclosure of Opinions

The Federal Rules of Civil Procedure, and a number of state procedural rules, require that a retained expert's opinions be contained in a signed written report. *See Fed.R.Civ.P. 26(a)(2)(B)*.

The report should include:

- an explanation of applicable industry standards of care;
- the source of those standards;
- the manner in which the insurer did or did not comply with those standards

Failure to include this information in the report (or in the expert's deposition or trial testimony) may result in the opinions being stricken or testimony disallowed.

Policyholder Themes

The claims person made numerous errors;

*while one error might be an innocent mistake,
repeated errors must be intentional/bad faith;*

*insurance company admitting to mistakes
now simply because it was caught red-handed.*

Policyholder Themes

*Adjustors are less than candid, doing
the bidding of the company*

Policyholder Themes

*David v. Goliath;
the only way to send a message to the insurance
company is through a large award.*

Insurance Company Themes

An insurance policy is a contract, with limits to what is covered, but an insurance company always looks to find coverage within what is reasonably permitted by the insurance contract

Insurance Company Themes

Claims handling is really customer service, and without good customer service, the insurance company will not succeed;

The insurance company went to great effort and expense to adjust the claim.

Insurance Company Themes

The insurance policy places duties and obligations on both parties; the Insurance company honored the contract more than the insured

Insurance Company Themes

Insurance companies are not perfect; they are human, can make mistakes or misunderstand without being unreasonable;

Adjuster was trying to do job honestly and properly;

Admit to mistakes/apologize/lessons learned.

Insurance Company Themes

*Large awards against insurance companies
just cause everyone's premiums to go up*

Order of Witnesses:

Where does the Expert fit in?

Leadoff hitter?

Cleanup hitter?

Testimonial Presentation:

Be concise;

*the long-winded expert and/or
the tedious presentation will lose
the jury and possibly anger them*

Graphics, Timelines, Exhibits, PowerPoint and Visual Aids

**This is an opportunity for your expert
to talk directly to opposing counsel
and the opposing party**

Make a strong impression

**Demonstrate you are prepared
to take case to trial**

What do I not say?

Stick with admissible descriptions

Sample Disclosure

What to Consider in Proffering or Opposing Expert Testimony

Experience in the insurance industry

*Experience dealing with the specific types
of insurance and claims at issue in your case*

Education and training

What to Consider in Proffering or Opposing Expert Testimony

More than one expert is helpful, but cumulative expert testimony will normally not be allowed

If more than one expert is used, court may preclude one of them unless they offer different perspectives: for example, claims handling vs. underwriting

Rule 403, Federal Rules of Evidence

What to Consider in Proffering or Opposing Expert Testimony

The expert may refer to “the law,” e.g., statutes or regulations if

- a) they serve as a background for the development of good faith or customary claims practices, or*
- b) are the basis from which these good faith claims practices have evolved*

What to Consider in Proffering or Opposing Expert Testimony

“Substantial Deviation”

Using Expert Witnesses in Insurance Bad Faith and Coverage Litigation



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