STRATEGIES FOR EXCLUDING OR LIMITING PLAINTIFFS' BAD FAITH EXPERTS

Plaintiff's counsel will frequently attempt to use a "bad faith expert" to bolster a claim that an insurer acted in bad faith in an attempt to survive a Motion for Summary Judgment and to present their case to the jury. Often, such an expert simply acts as another advocate for the plaintiff to the judge and ultimately to the jury. This paper and the presentation will address strategies and arguments for excluding these experts who often lack sufficient expertise, are not helpful to the jury, present irrelevant and prejudicial information, lack a sufficient basis for their assertions, and/or improperly tell the jurors what result they should reach. Please note that this will not be a balanced presentation of arguments and authorities on both sides of the issue, but rather is intended to present legal arguments and strategies for excluding or limiting the testimony of plaintiff's bad faith expert. This paper is also not intended to be a survey of the law on this issue as courts' acceptance of bad faith experts and the elements of bad faith vary by state and in the various federal courts across the country. For that reason, the paper will primarily rely on federal authorities and the Federal Rules of Evidence.

I. Applicable Standard for Admissibility of Expert Testimony.

Expert testimony is only admissible under the Federal Rules of Evidence if the expert's opinions are reliable, relevant, and helpful to the trier of fact. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Under *Federal Rule of Evidence* 702, relevant expert testimony is admissible only if the trial court finds that: (1) the expert is qualified to testify about the matters he intends to address; (2) the methodology employed by the expert to reach his conclusions is sufficiently reliable; and (3) the expert's testimony will assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or determine a fact in issue. *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002). The proponent of the expert witness bears the burden of establishing that the expert's testimony satisfies the qualification, reliability, and helpfulness requirements. *See United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

II. The Witness Must Be Qualified.

The first step in addressing plaintiff's attempt to present expert testimony on bad faith is to address the qualifications of the witness. In keeping with the above admissibility standard, "opinion testimony proffered by an expert witness must be excluded unless the *party proffering the witness* proves, by a *preponderance* of the evidence, that the witness is qualified, and that his testimony is both reliable and helpful." *Beam v. McNeilus Truck & Manufacturing, Inc.*, 697 F. Supp. 2d 1267 (N.D. Ala. 2010) (emphasis in original).

Defense counsel should fully explore the qualifications of the proposed expert to provide testimony on the specific issues on which he or she is expected to testify. For example, plaintiff's counsel will sometimes attempt to use a local lawyer who specializes in insurance cases as a bad faith expert. While local lawyers may have extensive experience litigating insurance claims, they often lack claims handling experience or other experience relevant to the specific issues in the case. Since, as noted below, expert testimony is not allowed on legal issues or on policy

construction, defense counsel can establish through deposition testimony and/or other evidentiary means that the witness lacks qualifications to testify as to the matter at issue in the case. Furthermore, deposition questioning can be used to specifically delineate the expert's experience to demonstrate that the expert does not have specific experience with the matter at issue, for example, when the lawyer has substantial experience in the property and casualty arena, but attempts to testify as a bad faith expert on a disability insurance claim.

In addressing an expert's qualifications based on experience, courts have been careful to note that general experience or experience in a related area is not sufficient to qualify the expert to testify in another specialized area. *See, e.g., United States v. Brown*, 415 F. 3d 1257 (11th Cir. 2005) (upholding district court's refusal to qualify an expert with a Ph.D. in plant pathology who had only worked with the chemical substance at issue in the case on "isolated projects"); *Broadcort Capital Corp. v. Summa Medical Corp.*, 972 F. 2d 1183 (10th Cir. 1992) (while the witness had some education and training in the field, he had no experience with the specific type of entity at issue in that case); *City of Hobbs v. Hartford Fire Ins*., Co., 162 F. 3d 576, 587 (10th Cir. 1998) ("Though a proffered expert possesses knowledge as to a general field, the expert who lacks specific knowledge does not necessarily assist the jury.") *Beam*, 697 F. Supp. 2d at 1277 (expert's experience with guard devices and warning labels are not sufficient to qualify him as expert because his prior experience did not involve the specific product at issue in the case).

Even if the expert has testified in other similar cases, that testimony itself does not qualify her to testify as an expert in the present case, without her being otherwise qualified. *Beam*, 697 F. Supp. 2d 1277; *Kline, Inc. v. Lorillard, Inc.*, 878 F. 2d 791 (4th Cir. 1989) ("[I]t would be absurd to conclude that one can become an expert simply by accumulating experience in testifying").

III. Bad Faith Experts Can Be Excluded on the Basis that Their Testimony Would Not Assist the Trier of Fact.

As noted above, an essential requirement for admissibility of expert testimony is that it be helpful to the trier of fact. Expert testimony is helpful to the trier of fact "if it concerns matters that are beyond the understanding of the average lay person." *Frazier*, 387 F. 3d at 1262. An expert may not testify to "inference[s] that the jury could draw on its own" from evidence that it is equally competent to assess. *United States v. Weiner*, 3 F. 3d 17, 21-22 (1st Cir. 1993). Furthermore, "[E]xpert testimony generally will not help the trier of fact when it offers nothing more than what lawyers can argue in closing arguments." *Frazier*, 387 F. 3d at 1362.

There are a number of Tenth Circuit cases and district court cases within the Fifth Circuit holding that expert testimony opining that an insurance company's actions violated industry standards should be excluded because it would not assist the trier of fact. As explained in *North American Specialty Ins. Co. v. Britt Paulk Ins. Agency, Inc*., 579 F.3d 1106, 1112 (10th Cir. 2009), those cases hold that the jury is fully capable of deciding whether the insured is guilty of bad faith. *See also Thompson v. State Farm Fire & Casualty Co*., 34 F.3d 932, 941 (10th Cir. 1994) (whereas here expert testimony is offered on an issue that a jury is capable of assessing itself, it is plainly within the trial court's discretion to rule that testimony is inadmissible because it would not even marginally "assist the trier of fact"); *Marketfare Annunciation, LLC. v. United Fire & Casualty Co.*, 2008 WL 1924242 (E.D. La. 2008) (holding that the jury was capable of understanding the standard for bad faith conduct as applied to the facts of the case, and it was not clear why expert testimony would be necessary); *Denison Custom Homes, Inc. v. Zurich American Ins. Co.*, 2005

WL 5994166 (S.D. Tex. 2005) (holding that expert testimony will not assist the trier of fact in determining the issue of bad faith because the jury is capable of assessing bad faith itself and "it is not for plaintiff's expert to tell the trier of fact what to decide); *Crow v. United Benefit Life Ins. Co.*, 2001 WL 285231 (N.D. Tex. 2001) (rejecting testimony from plaintiff's expert as to the type of insurance company conduct that constitutes a breach of the duty of good faith and fair dealing and identifying actions taken by the insurer which breached the duty of good faith and fair dealing on the basis that the testimony invades the province of the court and the jury.)

IV. An Expert Cannot Testify As to the Intent of the Parties.

While there are not a lot of cases on the point, it seems clear that an expert cannot testify as to motive or intent. *DePaepe v. General Motors Corp*., 141 F.3d 715 (7th Cir. 1998), contains a very good statement of this authority, holding as follows:

> The district court overruled GM's objection to [the expert's] testimony about motive or purpose, remarking that "as an expert, he can speculate." With all respect to the district court, the whole point of *Daubert* is that experts can't "speculate." They need analytically sound bases for their opinions. District courts must be careful to keep experts within their proper scope, lest apparently scientific testimony carry more weight with the jury than it deserves. [The expert] lacked any scientific basis for an opinion about the motives of GM's designers.

DePaepe, 141 F.3d at 720.

V. Bad Faith Expert Testimony Should Be Excluded to the Extent that it Asserts Legal Conclusions or Other Testimony on the Law.

It is clear that the courts will not allow expert testimony on legal issues. In *Brooks v. J.C. Penney Life Ins. Co.*, 231 F. Supp. 2d 1136 (N.D. Ala. 2002), the court rejected as inadmissible the affidavit of plaintiff's bad faith expert who opined that the insurance company failed to define significant terms in the policy, relied on vague and ambiguous provisions in the policy, and did not adequately investigate the claim. *Brooks*, 231 F.2d at 1141, note 5. The court held that the affidavit appears to consist primarily of legal conclusions, which are the province of the court to make, along with a few factual observations that the court is capable of making without the assistance of an expert. *Id.* Accordingly, the court held that the opinions were inadmissible because they did not help the court in analyzing the issues before it, and contained inadmissible legal conclusions. *Id.*

The Eleventh Circuit provides a particularly strong statement on the issue of expert testimony on a legal conclusion in *Montgomery v. Aetna Casualty & Surety Co.*, 898 F. 2d 1537 (11th Cir. 1990). In that case, the court held as follows:

> An expert may testify as to his opinion on an ultimate issue of fact. Fed.R.Evid. 704. An expert may not, however, merely tell the jury what result to reach. *Id.* at committee notes (merely telling the jury what result to reach is not helpful to the jury and therefore is not admissible testimony). A witness also may not testify to the legal implications of conduct; the court must be the jury's only source of the law. Donaldson [the expert] testified that in his opinion Aetna had a duty to hire tax counsel in this case. *See supra*, note 4. This was a legal conclusion, and therefore should not have been admitted. The district court abused its discretion by allowing Donaldson to testify about the scope of Aetna's duty under the policy.

Montgomery, 898 F.2d at 1541. (citations omitted in part)

The Eleventh Circuit has clearly stated that an expert may not testify as to the scope of the insurer's duty under the policy or interpretation of a policy based on the rule that the interpretation of an insurance contract presents a question of law. *Montgomery,* 898 F.2d. *See also Craggs Construction Co. v. Federal Ins. Co.,* 2007 WL 1452927 (M.D. Fla. 2007) (excluding plaintiff's expert's analysis as a series of legal conclusions regarding whether a performance bond surety can be liable for property damages caused by the negligence of its principal). While *Montgomery* applies Florida law, other courts also hold that the interpretation of an insurance contract presents a question of law. *See, e.g., Axis Surplus Ins. Co. v. Innisfree Hotels, Inc.,* 2006 WL 2882373 (S.D. Ala. 2006). Thus, to the extent the expert attempts to interpret the policy or testify as to the duties under the policy, that testimony should be excluded.

VI. Expert Testimony on Industry Standards or Reasonable Claim Handling Practices.

One scenario in which the courts seem to be more willing to consider expert testimony in bad faith cases is when a plaintiff seeks to utilize the expert to testify concerning alleged claim handling industry practices and standards. *See Armstead v. Allstate Property and Casualty Insurance Co.,* 2016 WL 4123838 (N.D. Ga. 2016). In addition, courts have allowed testimony as to the reasonableness of claims handling conduct based on the expert's experience in the industry and whether the insurance company complied with those alleged claim handling standards. *Whiteside v. Infinity Casualty Ins. Co.,* 2008 WL 3456508 (M.D. Ga. 2008). *See also Kearney v. Auto-Owners Ins. Co.,* 2009 WL 3712343 *9-11 (M.D. Fla. 2009). The courts in the Ninth Circuit have been particularly willing to allow testimony concerning industry standards and the violation thereof. *See, e.g., Handgarter v. Provident Life and Accident Ins. Co.,* 373 F.3d 998, 1015-1018 (9th Cir. 2004). (Finding that the trial court did not abuse its discretion in allowing plaintiff's experts to testify concerning claim handling standards in the context of an insurance bad faith claim.)

While this case law often seems to allow impermissible testimony concerning legal issues, such as whether the insured's conduct constitutes bad faith, testimony on those points seems to be the most likely area in which the courts have allowed plaintiffs to present expert testimony. Those courts that allow this testimony generally justify their rulings on the basis that this testimony would be helpful to lay jurors because they are generally not familiar with the

intricacies of claims handling. *Whiteside*, 2008 WL 3456508 at *8-9 and *Kearney*, 2009 WL 3712343 at *10-11.

Despite the willingness of some courts to consider this type of "industry standard" testimony, there are a number of valid arguments for the exclusion of this testimony. First, it is common for experts to attempt to present testimony concerning the "reasonableness" of claims handling or the industry standard of practices that violates the above-referenced limitations on testimony concerning policy interpretation and other legal conclusions. In addition, any attempt to present such testimony must still satisfy the requirement for reliability, the requirement that the testimony be relevant and helpful to the trier of fact, and the requirement that the testimony be within the proposed expert's actual expertise.

A. The Witnesses Testimony Must Satisfy the Reliability Requirement Under Rule 702.

Under Rule 702, the reliability requirement remains a discreet, important requirement of admissibility. *See United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). In *Frazier* the court points out that the committee notes to Rule 702 state that:

> [i]f the witness is relying solely or primarily on experience, then the witness must explain *how* that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it."

Id. at 1261-1262 (quoting *Fed. R. Evid.* 702 advisory committee's note 2000 amendment). That Court noted that, if the admissibility of expert testimony could be established by the *ipse dixit* of an admittedly qualified expert, the reliability prong would be for all practical purposes subsumed by the qualification prong. *Id.* at 1261

In the bad faith context, it is common for experts to attempt to testify that defendants' actions are not in accordance with industry standards, customs, and practices for claims handling, without identifying any specific "industry standard" that supports their opinions or citing any rule or other authority that supports their testimony regarding supposed "industry standards." This common scenario is the precise situation where the expert is attempting to have the court "take her word for it." To find such testimony reliable, the court would have to do just that and would have to "take a leap of faith" and rely on the expert's "*ipse dixit* and assurance that [her] testimony is based on the nationally accepted standard." *Butler v. First Acceptance Ins. Co.*, 652 F. Supp. 2d 1264, 1273 (N.D. Ga. 2009). *See also Frazier*, 387 F. 3d at 1261 ("If admissibility could be established merely by the *ipse dixit* even of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong"). Thus, when encountering such testimony, it is important to press the witness and confirm that he or she cannot point to a reliable source or authority supporting the expert's assertions. In that instance, the court should exclude that testimony as lacking sufficient reliability.

On a related issue, bad faith experts will often cite the applicable state version of the Unfair Claims Settlement Practices Act or state department of insurance regulations in an attempt to grasp for a written standard to bolster their opinions on behalf of the plaintiff. The treatment of the various states' adoption of the Unfair Claims Settlement Practices Act and state insurance department regulations can vary among jurisdictions. However, some states, either through case law authority or language in the statutes and regulations themselves, state that violations of these provisions cannot be construed to create or imply a private cause of action, that the provisions are not a proper standard for judging a bad faith claim, or even that the provisions and, further, the violation of those provisions, shall not be utilized for any purpose or admissible as evidence in any civil or criminal court proceeding. *See, e.g., Armstead v. Allstate Property and Casualty Insurance Company*, 2016 WL 4123838 at *6-7 (N.D. Ga 2016) (noting that the Georgia Unfair Claims Settlement Practices Act does not create or imply a private cause of action and that allowing the expert to reference alleged violations of that Act would be more prejudicial than probative); Alabama Insurance Regulation 482-1-124-.02 (evidence of the violation of this chapter and the provisions contained herein . . . shall not be utilized for any other purpose or admissible as evidence for any purpose in any civil or criminal court proceeding).

When confronting a bad faith expert who attempts to rely on state statutes or regulations as a basis for testimony concerning industry standards or the violation of those standards, defense counsel should explore whether those provisions and/or the case law in the state preclude or limit the use of the provisions in civil proceedings.

B. Plaintiffs Must Show that the Proposed Bad Faith Expert's Testimony Is Relevant in the Context of the Applicable Law on Bad Faith.

While the elements of bad faith liability vary from state to state, many jurisdictions apply a requirement that the plaintiff demonstrate that the insurer did not have a lawful or arguable reason for its claim determination. For example, under Alabama law, "'regardless of imperfections' of [the insurer's] investigation, the existence of a debatable reason for denying the claim at the time the claim was denied defeats a bad faith failure to pay the claim." *State Farm Fire and Cas. Co. v. Brechbill*, 144 So. 3d 248, 258 (Ala. 2013). Alabama law is clear that bad judgment or negligence is not sufficient to support a bad faith claim. *Singleton v. State Farm Fire and Cas. Co.*, 928 So. 2d 280, 286-287 (Ala. 2005) (noting that not strictly complying with the claims manual under the circumstances was possibly indicative of bad judgment or negligence, but more than that is required in a bad faith action).

In most states applying the debatable reason standard, the relevant question is not whether the insured complied with industry standards or whether claims handling was reasonable, but rather whether the insured had a debatable reason for its claim determination. Therefore, testimony as to industry standards for claims handling and even testimony concerning the failure to comply with such standards should not be admissible because it is not relevant under the *Federal Rules of Evidence* 401, 402, and 403. *Smith v. Allstate Insurance Co.*, 912 F. Supp. 2d 242, 251-252 (W.D. Pa. 2012) (quoting prior caselaw for the proposition that a bad faith case is not a malpractice case in which the insured's conduct would be judged by standards of the insurance industry).

In fact, a number of cases relying on expert testimony in a "bad faith" context are actually cases involving a claim of bad faith failure to settle, which in many jurisdictions actually applies a negligent standard. *Moore v. GEICO General Insurance. Co.,* 633 F. Appx 924, 927-928 (11th Cir. 2016); *Camacho v. Nationwide Mutual Insurance Co.*, 13 F. Supp. 3d 1364 (N.D. Ga. 2014). Plaintiff's counsel will often respond to attempts to exclude bad faith experts by citing these bad faith failure to settle cases, and defense counsel needs to be careful to make the distinction between the different standards that apply.

Moreover, the courts recognize that expert testimony "may be assigned talismanic significance in the eyes of the lay jurors." *United States v. Frazier*, 387 F.3d 1214 (11th Cir. 2004). As such, any probative value that such evidence may have is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Accordingly, such evidence should be excluded under *Federal Rule of Evidence* 403.

Furthermore, this argument ties into the requirement that such testimony must assist the trier of fact. Since the issue in a debatable reason bad faith state is not whether the insurance company complied with industry standards or even its own standards or whether the claims handling was reasonable, such testimony would not assist the trier of fact. *Smith,* 912 F. Supp. 2d at 242.

C. Defense Counsel Should Continue to Seek to Exclude Testimony that Falls Outside Expert's Qualifications.

When experts purport to provide testimony concerning insurance industry practices and whether insurer's conduct complied with those practices and constitutes reasonable claims handling, a closer examination of the purposed expert testimony often reveals that the specific opinions are actually outside the scope of the expert's expertise. In advocating for the plaintiff's claim under the guise of asserting that the claims handling failed to comply with industry standards or practices, experts will often present opinions that are actually medical opinions or opinions otherwise requiring expertise beyond that of a "insurance industry expert." For example, a witness may assert that the medical records were not interpreted appropriately or the insurance company improperly relied on medical information in an independent medical examination report or a physician opinion. The same argument applies when a purported insurance industry expert comments on engineering matters, accident investigation matters, or other technical matters encountered in the context of the evaluation and determination of a claim.

It is important in deposing these experts to drill down and identify the specific facts and issues upon which these experts base their opinions in order to determine when the expert's opinion strays from the expert's expertise. Defense counsel can then use that testimony, along with details and limitations of the expert's actual expertise, and the specifics in the file, to establish that the expert's allegations of improper claim handling practices are actually statements concerning medical, engineering, or other technical issues outside the expert's knowledge and expertise.

VII. CONCLUSION.

While it seems some courts are more willing to allow testimony from bad faith experts on the specific issue of claim handling standards and practices, the above strategies can be used to seek to exclude or at least limit the scope of the testimony allowed. A close examination of the

testimony proposed usually reveals that much of the testimony is outside the scope appropriate for expert testimony and will not assist the trier fact. It is critical that defense counsel oppose these attempts at all stages of the litigation.

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