



*Expert Witnesses – Can't Live With 'Em – Can't Live Without 'Em. Tips On  
The Use and Misuse Of Experts In Bad Faith And Coverage Cases*

## THE USE AND MISUSE OF EXPERT TESTIMONY IN BAD FAITH ACTIONS

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### Introduction

Modern trials are frequently battles of experts hired by the parties to advocate their respective positions. Bad faith actions are no different. The plaintiff<sup>2</sup> and the insurer will both beat the bushes for claims handlers or attorneys who are experienced in the customs and practices relating to the insurance claims at issue in the case and who are willing to serve as persuaders for the party by whom they were retained. Disputes regarding the admissibility of this expert testimony are the rule rather than the exception.

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<sup>2</sup> "Plaintiff" designates the party alleging bad faith. In a first party action, it is typically the policyholder. In a third-party action, the plaintiff may be the policyholder who has suffered a judgment exceeding the policy limits or the claimant who has recovered an excess judgment and who is proceeding in his own right and/or as an assignee of the policyholder.

The infinite variety of bad faith claims and substantive and procedural rules applicable in different venues precludes an all-encompassing view of approaches used by the courts in their role of "gatekeepers" regarding admission of expert testimony. This article, therefore, will discuss the general rules regarding expert testimony; the application of those rules to bad faith actions; and then present a potpourri of various issues regarding experts in bad faith litigation, with an emphasis on providing guidance for the preparation and trial of a bad faith case.

## **I. General Rules Regarding Expert Testimony.**

Courts have developed a number of principles relating to the admissibility of expert testimony. Federal Rule of Evidence 702 codifies some of the basic principles for cases in federal court, including principles of reliability first imposed by the Supreme Court in the seminal cases *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>3</sup> and *Kumho Tire Co. v. Carmichael*.<sup>4</sup> Similar rules will apply in state courts that follow an approach similar to Rule 702.<sup>5</sup>

In *Daubert*, the Supreme Court considered the standards for the admission of scientific, technical or other specialized knowledge to assist the trier of fact. The Court emphasized that the trial court must serve as a "gatekeeper" charged with excluding speculative or unsupported opinion evidence. Factors referenced by the court included whether the expert's theories or technique had been tested, were subject to standards, controls and peer review, were known to have a potential rate of error, and were "generally accepted." These

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<sup>3</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>4</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

<sup>5</sup> A minority of jurisdictions have declined to adopt *Daubert's* approach, in which general acceptance is only one factor in the overall reliability analysis, and instead continue to follow the rule first laid down in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), requiring that new or novel expert scientific testimony be based on methods or principles generally accepted in the scientific discipline in question. While in theory, the *Frye* "general acceptance" test might be viewed as more stringent than a *Daubert* approach, the *Frye* approach may in practice be more liberal to the extent that the general acceptance test is only applied to new or novel scientific evidence, leaving other types of expert evidence, such as experience-based evidence, largely immune from scrutiny on grounds of reliability. This is precisely the approach rejected by *Kumho Tire* and federal Rule 702. In jurisdictions limiting the applicability of the general acceptance test in this way, the *Frye* test may have little application to many types of experts offered in bad faith litigation, who often opine based on something other than true scientific knowledge. In these jurisdictions, the case law will have to be consulted to determine whether principles other than the *Frye* general acceptance test may be used to exclude unreliable non-scientific expert testimony. In addition to requiring that the expert be qualified and the testimony relevant, most courts will exclude testimony that is found to be mere speculation or unsupported opinion.

factors pertained to scientific evidence; however, applicability to the types of opinions typically offered in bad faith litigation was not specifically addressed.

In *Kumho Tire*, the Supreme Court confronted the issue of reliability in cases where experts opine on non-scientific matters that are not subject to rigorous review by scientific methods. The Eleventh Circuit had held that such opinion testimony was not subject to *Daubert's* requirement of reliability. The Supreme Court reversed, holding that Rule 702 makes no distinction between scientific, technical or other specialized knowledge. As gatekeeper, the court must require reliability of both scientific and non-scientific expertise.

Under Rule 702, as amended in 2000 to incorporate *Daubert's* reliability requirement, before admitting expert testimony, the court must determine:

- (1) whether the expert is qualified;
- (2) whether the expert's testimony is based on sufficient facts, the expert's methodology is reliable, and the methodology has been reliably applied to the facts; and
- (3) whether the expert's testimony will help the trier of fact to understand the evidence or determine a fact in issue.

Fed. R. Evid. 702(a)-(d). The burden of laying the foundation for the admission of expert testimony is on the proponent of the testimony. *Allison v. McGhan Med. Corp.*<sup>6</sup>

#### **A. Is the Expert Qualified?**

In determining whether the expert is qualified, courts will consider whether the expert has sufficient expertise with respect to the specific subject matter of the expert's opinions. It is not enough that the expert generally has knowledge or experience in the area or industry; rather, the expert must be qualified to render the specific opinions at issue.<sup>7</sup> For example, in *Travelers Prop. Cas. Co. of Am. v. Nat'l Union Ins. Co. of Pittsburgh, PA*,<sup>8</sup> the court precluded an expert from testifying on subrogation issues, despite his extensive experience in the insurance industry, because that experience was primarily in brokering and underwriting. He had little experience in claims, and he had not personally been involved in a similar subrogation issue. Similarly, in *City of Hobbs v. Hartford*

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<sup>6</sup> *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

<sup>7</sup> See, e.g., *Talking Walls, Inc. v. Hartford Cas. Ins. Co.*, 2005 WL 6011243 (N.D. Fla. July 5, 2005); *Currie v. Chevron U.S.A., Inc.*, 2006 WL 5249707 (N.D. Ga. 2006).

<sup>8</sup> *Travelers Prop. Cas. Co. of Am. v. Nat'l Union Ins. Co. of Pittsburgh, Pa.*, 557 F. Supp. 2d 1040 (W.D. Mo. 2008).

*Fire Ins. Co.*,<sup>9</sup> the Tenth Circuit ruled that the district court did not err in excluding testimony of an insurance industry expert who lacked knowledge specific to third party bad faith claims.

## **B. Is the Expert's Opinion Reliable?**

When the expert's testimony is based on experience as opposed to scientific analysis, given the reliability requirement of *Daubert* and Rule 702, the trial court must determine how that experience enables the expert to reach a reliable conclusion on the facts of the case at hand.<sup>10</sup> If the expert is unable to point to a specific standard, describe its source, or explain how the standard is derived from the expert's specific experience, the testimony may be questioned as simply offering the expert's subjective reaction to a particular set of facts, rather than the application of expertise.<sup>11</sup>

In *Hanson v. Mutual of Omaha Ins. Co.*,<sup>12</sup> for example, the plaintiff sued for bad faith claim denial and offered the testimony of an attorney who had represented numerous insurance companies over a period of 40 years and had knowledge about how companies typically handle claims. The court held that it must ensure that expert testimony is not simply speculation or guesswork and that opinion testimony is not solely based on the *ipse dixit* of the expert. Instead, the opinions must be based on a reliable methodology. Applying this requirement, the court held that the witness's extensive experience in the area of insurance company claims handling practices demonstrated that his opinions were not based on speculation or guesswork. Certain of the witness's opinions, however, were inadmissible because they could not be tied back to the witness's experience or his knowledge of industry standards. "Opinions based

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<sup>9</sup> *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 587 (10th Cir. 1998); see also *Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc.*, 389 F. Supp. 2d 1145, 1151-54 (D. Alaska 2005), *aff'd*, 518 F.3d 645 (9th Cir. 2008) (expert with over 45 years of experience in insurance industry was nevertheless unqualified to opine on the materiality of information in evaluating risks in underwriting marine insurance policies). An expert may be "excluded when his training and experience is lacking in the particular area in which his testimony is offered." *Mahoney v. JJ Weiser & Co.*, 2007 WL 3143710, at \*5 (S.D.N.Y. Oct. 25, 2007) (quoting *Crowley v. Chait*, 322 F. Supp. 2d 530, 538 (S.D.N.Y. 2004)).

<sup>10</sup> See, e.g., *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004); Rule 702, 2000 adv. comm'ee comments.

<sup>11</sup> This principle has been applied to expert opinions in the context of various industries. See *Kaufman v. Pfizer Pharmaceuticals, Inc.*, 2011 WL 7659333, at \*9 (S.D. Fla. Aug. 4, 2011) (expert must identify an objective, established industry standard); *Birge v. Dollar Gen. Store*, 2006 WL 5175758 (W.D. Tenn. Sept. 28, 2006) (standard of care testimony excluded where expert could point to no specific safety measures established by industry standard); *In re Pempro Prods. Liab. Litig.*, 2010 WL 5576305, at \*2 (E.D. Ark. June 29, 2010) (without a specific standard, experts' testimony "could only be a subjective opinion on what they believed Defendants could have done rather than what industry or governmental standards require them to do").

<sup>12</sup> *Hanson v. Mutual of Omaha Ins. Co.*, 2003 WL 26093254 (D.S.D. Apr. 29, 2003).

on what he thinks are good practices rather than on industry standard amount to speculation and guesswork.”<sup>13</sup>

The advisory committee notes to the 2000 amendments to Rule 702 list possible grounds for reliability challenges that are a helpful checklist regarding any expert:

- (1) whether the expert testimony grows naturally out of work done by the expert outside of litigation or is “litigation-driven;”
- (2) whether the expert has unjustifiably extrapolated from a premise to reach the conclusion,
- (3) whether the expert has adequately accounted for alternative explanations,
- (4) whether the expert has acted as carefully as the expert would in his or her regular professional work outside paid litigation consulting, and
- (5) whether the field of expertise is known to reach reliable results for the type of opinion being offered.

### **C. Are The Expert's Opinions Helpful?**

Expert testimony may be excluded if it will not assist the trier of fact. Courts have excluded testimony as not helpful in a number of different situations. As a threshold matter, courts may conclude that the bad faith issues may be decided by the jury based on its own common sense and experience, and expert testimony would therefore not be of assistance.<sup>14</sup> Other cases, in contrast, have held that the factual inquiries involved in determining whether an insurance company acted in bad faith involve issues outside the common

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<sup>13</sup> *Id.* at \*6.

<sup>14</sup> See, e.g., *Tardiff v. GEICO Indem. Co.*, 481 Fed. App'x 584 (11th Cir. 2012); *N. Am. Specialty Ins. Co. v. Britt Paulk Ins. Agency, Inc.*, 579 F.3d 1106 (10th Cir. 2009) (jury in bad faith case was capable of comparing company's conduct to industry standard without assistance from an expert); *Am. Commerce Ins. Co. v. Harris*, 2009 WL 130225 (E.D. Okla. Jan. 16, 2009) (well instructed jury can determine bad faith on its own) (citing *Thompson v. State Farm Fire & Cas. Co.*, 34 F.3d 932 (10th Cir. 1994)); *Employers Reinsurance Corp. v. Mid-Continent Cas. Co.*, 202 F. Supp. 2d 1212 (D. Kan. 2002) (expert testimony that reinsurer had in the past paid reimbursement for expenses of declaratory judgment litigation was inadmissible; jurors could draw their own conclusions from the evidence).

experience and understanding of jurors and have held expert testimony admissible.<sup>15</sup>

Courts have rejected testimony as not helpful to the jury where it appears the witness is not truly applying expertise to the facts in a way that will help the jury, but instead simply reviewing the very same evidence that the jury will receive with a spin favoring the party who has hired the expert. Such testimony might be rejected as unhelpful to the jury because it simply presents the same sort of "closing argument" as might be presented by lawyers for one side or the other.<sup>16</sup>

## **II. Application of General Rules to Bad Faith Actions.**

### **A. Opinions Offering Legal Conclusions Are Generally Not Admissible**

Attempts to introduce expert testimony on pure issues of law rarely succeed. The exclusion of expert testimony on legal issues is a settled principle of jurisprudence. Fed. R. Evid. 701, 702. "It is black-letter law that '[i]t is not for the witnesses to instruct the jury as to applicable principles of law, but for the judge.'<sup>17</sup> "The problem with testimony containing a legal conclusion is in conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury."<sup>18</sup>

As the Eleventh Circuit has explained, "Domestic law is properly considered and determined by the court whose function it is to instruct the jury on the law; domestic law is not to be presented through testimony and argued to the jury as a question of fact."<sup>19</sup> "Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards."<sup>20</sup>

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<sup>15</sup> See, e.g., *Marketfare Annunciation LLC v. United Fire & Cas. Co.*, 2008 WL 1924242 (E.D. La. Apr. 23, 2008) (recognizing cases on both sides of this issue); see also *Hanson*, 2003 WL 26093254, at \*7 (noting that insurance is a "shadowy" and "complicated subject" with a "patina of custom and usage"); *Hangarter v. Paul Revere Life Ins. Co.*, 236 F. Supp. 2d 1069, 1089 (N.D. Cal. 2002), *aff'd in relevant part, rev'd in part on other grounds*, 373 F.3d 998 (9th Cir. 2004).

<sup>16</sup> See, e.g., *Cook v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1107-12 (11th Cir. 2005); *United States v. Masferrer*, 367 F. Supp. 2d 1365, 1373 (S.D. Fla. 2005); *Wiggins v. Belk, Inc.*, 2012 WL 135595 (S.D. Ga. Jan. 17, 2012); *In re Rezulin Prod. Liabl. Litig.*, 309 F. Supp. 2d 531, 546-47 (S.D.N.Y. 2004) (testimony improper where it described matters lay jury was capable of understanding without expert assistance and merely repeated facts or opinions stated by other witnesses or documents and drew simple inferences from documents produced in discovery).

<sup>17</sup> *Nieves-Villaneuva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997).

<sup>18</sup> *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985).

<sup>19</sup> *United States v. Oliveros*, 275 F.3d 1299, 1306 - 07 (11th Cir. 2001).

<sup>20</sup> *Burkart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997).

Under these principles, expert opinions regarding the proper interpretation of an insurance policy or the duties imposed upon an insurer by that policy are inadmissible. In *Montgomery v. Aetna Cas. & Sur. Co.*,<sup>21</sup> the insured was a trustee who was sued for violating the terms of a law firm's pension plan. The insurer provided a defense under a reservation of rights. The trustee believed that tax advice was needed and hired independent counsel to sue the IRS for a declaratory judgment. After the tax litigation ended, the trustee sued the insurer to recover the cost of the IRS litigation and offered expert testimony that the insurer had a duty to hire an expert lawyer to sue the IRS in order to properly defend the insured. The Eleventh Circuit reversed a judgment in favor of the trustee because the insurer's duty to its insured was a question of contractual interpretation for the court. "The construction of an insurance policy is a question of law for the court ... a witness also may not testify to the legal implications of conduct; the court must be the jury's only source of law."<sup>22</sup>

## **B. Expert Testimony on Policy Ambiguity**

Insurance litigation often addresses the meaning of policy terms and it is not uncommon for the plaintiff to advance the argument that the policy is ambiguous and must be construed against the insurer. For example, in *Green Machine Corp. v. Zurich Am. Ins. Group*,<sup>23</sup> the plaintiff offered the expert report of a law professor who opined that the insurance clause at issue was ambiguous. The court declined to consider the report because "whether a contract provision is ambiguous is a question of law for the court. Expert testimony that expresses a legal conclusion is improper. Thus, an expert is prohibited from offering his opinion as to the legal obligations of parties under a contract."<sup>24</sup> Similarly, in *Monticello Ins. Co. v. City of Miami Beach*,<sup>25</sup> the court was required to construe an insurance policy. The court noted that ambiguous policy provisions must be construed against the insurer. In a non-jury trial, the insurer offered expert and other parol testimony regarding the insurance industry's customs and usage pertaining to the policy provision at issue. The court rejected that testimony as "not useful," "persuasive" or "conclusive" because the construction of a policy is a question of law for the court.

However, where a policy uses terms that have acquired a specialized meaning in the insurance industry, some courts admit expert testimony concerning the usage of those terms. See, e.g., *Seneca Ins. Co. v. Wilcock*,<sup>26</sup>

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<sup>21</sup> *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537 (11th Cir. 1990).

<sup>22</sup> *Montgomery*, 898 F.2d at 1540, 1541.

<sup>23</sup> *Green Machine Corp. v. Zurich Am. Ins. Group*, 2001 WL 1003217 (E.D. Pa. Aug. 24, 2001), *aff'd*, 313 F.3d 837 (3d Cir. 2002).

<sup>24</sup> *Id.* at \*6.

<sup>25</sup> *Monticello Ins. Co. v. City of Miami Beach*, 2009 WL 667454 (S.D. Fla. Mar. 11, 2009).

<sup>26</sup> *Seneca Ins. Co. v. Wilcock*, 2007 WL 415141 (S.D.N.Y. Feb. 25, 2007).

where an insurance industry executive proposed to opine regarding the meaning of the words "loss" and "claim" as they are generally understood in the insurance industry. The court permitted that testimony but declined to allow the expert to opine on the application of those terms to the facts at issue in the case. The court held that the expert was not competent to offer opinions on the ultimate legal issues before the court. Some courts couch the grounds for admitting such extrinsic evidence on the existence of an ambiguity, while others appear to hold that either an ambiguity or the existence of technical terms in need of explanation constitutes a reason for admission.<sup>27</sup>

### **C. Expert Testimony on Claims Handling**

Bad faith cases spring from claims handling gone awry. Experts are frequently proffered to speak for and against the insurer's handling of the insurance claim at issue. Claims handling issues include the insurer's investigation of the claim, the insurer's communications with its policyholder, the insurer's approach to settlement, and whether the insurer fulfilled its fiduciary responsibility to protect the policyholder. First party bad faith claims involve allegations that the insurer arbitrarily denied the policyholder's claim without sufficient investigation or failed to promptly settle the claim for a fair amount. Third party claims typically focus on the insurer's failure to consider settlement opportunities, thus exposing the policyholder to an excess judgment; failure to provide an adequate defense resulting in an excess judgment against the policyholder; failure to keep the policy holder informed; and whether the insurer unduly placed its own interests ahead of the policyholder's interests.<sup>28</sup>

Evaluating admissibility of expert testimony on claims handling practices often challenges the court to determine whether the expert is offering testimony on how insurers do their job or is instead voicing a legal opinion. For example, in *Travelers Indemnity Co. of Ill. v. Royal Oak Enterprises, Inc.*,<sup>29</sup> the policyholder proposed to call an experienced claims handler to opine on the insurer's duties

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<sup>27</sup> *Travelers Indem. Co. v. Scor Reinsurance Co.*, 62 F.3d 74, 78 (2d Cir. 1995) (court may admit extrinsic evidence regarding industry practice to interpret ambiguous portions of contract, but may not use extrinsic evidence to "alter the meaning" of the contract).

<sup>28</sup> The nature of the expert testimony in any bad faith case will necessarily depend on the forum's definition of bad faith, which varies widely from state to state. For example, bad faith is considered a tort in many states, a breach of contract in other states, and a statutory violation in others. Some states require proof of "outrageous" or "unconscionable" conduct. Others adopt the "wrongful" conduct standard, which may imply recklessness or negligence. Some states pose the "fairly debatable" standard to evaluate the insurer's conduct; others look to whether the insurer conduct was reasonable. In Florida, the court evaluates the bad faith issue on the "totality of circumstances" and whether the insurer placed its own interests before the policyholder's interests.

<sup>29</sup> *Travelers Indemnity Co. of Ill. v. Royal Oak Enterprises, Inc.*, 2004 WL 3770571 (M.D. Fla. Aug. 20, 2004). This case was an action for declaratory judgment, not bad faith.



to defend and indemnify. The insurer moved in limine to strike or limit the expert's testimony. The court noted that experts cannot offer legal opinions because doing so would invade the province of the court, i.e., the extent of coverage is a question of law left to the court's determination. Nevertheless, the court declined to exclude the testimony because it offered opinions as to the customs and practices of the insurance industry concerning the disputed issues. The court explained:

[W]here, as here, the substance of the expert's testimony concerns ordinary practices and trade customs which are helpful to the fact-finder's evaluation of the parties' conduct against the standards of ordinary practice in the insurance industry, *his passing reference to a legal principle or assumption in an effort to place his opinions in some sort of context will not justify the outright exclusion of the expert's report in its entirety.* (emphasis supplied)<sup>30</sup>

In *Empire Lumber Co. v. Indiana Lumbermens Mut. Ins. Co.*,<sup>31</sup> the plaintiff alleged that the insurer committed bad faith in handling a first party fire loss claim. The insurer moved to exclude the plaintiff's expert testimony because it included legal conclusions as to various statutes and regulations and to the meaning and application of the insurance contract, including the extent of the insurer's bad faith. The court held that expert testimony concerning an ultimate issue is not per se improper and it is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. However, an expert cannot offer an opinion on the ultimate issue of law, which remains the province of the court. The court excluded obvious legal conclusions of the expert (e.g., certain conduct "is a violation of" the relevant statute) but refused to strike all of the testimony because certain legal references were relevant to the insurer's claims handling practices:

[A]s part of its own case and to counter ILM's anticipated position that its conduct was appropriate, Empire Lumber is permitted to offer expert testimony speaking to ILM's duty under the circumstances and whether, in fact, ILM complied with that duty of care. *This inquiry no doubt embraces legal questions concerning the meaning and interpretation of the applicable insurance contract/policy, but is nonetheless relevant as foundation to Mr. Shemchuk's opinion as to whether ILM's coverage decisions were done in bad faith.* To do so, Mr. Shemchuk must set forth ILM's duty (in part, by commenting upon the underlying contract/policy), and his opinion that ILM did or did not comply with that duty, before Mr.

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<sup>30</sup> *Id.* at \*2.

<sup>31</sup> *Empire Lumber Co. v. Indiana Lumbermens Mut. Ins. Co.*, 2012 WL 5831196 (D. Idaho Nov. 16, 2012).

Shemchuk can offer any opinion as to whether or not ILM's conduct was reasonable and/or breached any applicable industry standards. This is a *fine line*, to be sure. (emphasis supplied)<sup>32</sup>

*Employers Reinsurance Corporation v. Mid-Continent Cas. Co.*,<sup>33</sup> demonstrates how a court walked the "fine line" in reconciling an expert's inadmissible legal opinions with the expert's testimony regarding the policy's "meaning in light of insurance industry customs and practices." *Employers Reinsurance* was a declaratory judgment action regarding a reinsurer's obligation to reimburse an insurer for legal expenses related to three declaratory judgment actions filed by the insurer against its own insureds. The insurer alleged that the reinsurer breached its duty of good faith and fair dealing by not paying the reimbursement claims. The insurer proposed to call an experienced claims examiner to testify as an expert regarding numerous issues, including the custom and practice in the industry regarding the general duties of an insurer in investigating and settling claims; the interpretation of the terms "loss," "waiver" and "estoppel" in the reinsurance agreement according to industry practices; his understanding of the duty of good faith and fair dealing; his opinion that the legal fees were within the definition of "claims expense" and his conclusion that the reinsurer denied the claim in bad faith.

The court resolved the dispute by announcing a number of rules for evaluating the admissibility of an expert's testimony:

- (1) Objections to the expert's qualifications were overruled based on the expert's specialized knowledge gained through experience, training, or education as set forth in Rule 702. Arguments questioning his experience and qualifications could be brought out at trial to *attack the weight of his testimony*.
- (2) Under Rule 704(a) an expert may testify to an opinion even if the opinion embraces an ultimate fact issue. *The expert may refer to the law in expressing his opinion; however he may not apply the law to the facts to form a legal opinion.*
- (3) The expert's opinions regarding policy interpretation are admissible if the court determines that the policy is ambiguous. Interpretation of an ambiguous policy is a mixed

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<sup>32</sup> *Id.* at \*3.

<sup>33</sup> *Employers Reinsurance Corp. v Mid-Continent Cas. Co.*, 202 F. Supp. 2d 1212, 1217 (D. Kansas 2002).

question of law and fact for the jury to resolve under proper instruction.<sup>34</sup>

- (4) The court, not the expert, will define the terms, waiver and estoppel. *Expert testimony regarding the meaning of legal terms is not appropriate. Likewise, the court will define the duty of good faith and fair dealing and so instruct the jury. The expert's opinion that the reinsurer breached its duty of good faith and fair dealing would not be admitted – whether a legal duty exists is a question of law for the court. The expert may not attempt to apply the law to the facts and testify to a legal conclusion based on the facts.*<sup>35</sup>

Similarly, in *Lone Star Steakhouse and Saloon, Inc. v. Liberty Mutual Ins. Group*,<sup>36</sup> the court allowed an attorney/claims handler to offer opinions on the standards and practices of the insurance industry as they relate to timely investigation, reservation of rights, coverage determinations and whether the insurer conformed to those standards. The court declined to allow the expert to testify regarding the meaning of policy terms or that the insurer was barred by estoppel from denying coverage. The court said it would define those terms for the jury, which could apply those instructions to the facts.

Thomas F. Segalla, a co-author of *Couch on Insurance 3d* has suggested certain standards for assessing the parameters of a bad faith expert's testimony:

- (1) Testimony about how insurance claims are managed and evaluated and the statutory or regulatory standards to which insurance companies must adhere could be helpful to the jury in evaluating whether the claim was handled in bad faith.
- (2) The expert witness cannot provide legal conclusions that the insurer violated a particular statute or that the insurer acted in bad faith.
- (3) The expert witness can testify that, based upon expertise and experience, the insurer had no reasonable basis for its actions.<sup>37</sup>

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<sup>34</sup> Many courts would construe an ambiguous contract against the insurer and not receive evidence as to what the parties meant. See *Monticello Inc. Co. v. City of Miami Beach*, *supra*, note 25.

<sup>35</sup> *Employers Reinsurance*, 202 F. Supp. 2d at 1216-18.

<sup>36</sup> *Lone Star Steakhouse and Saloon, Inc. v Liberty Mut. Ins. Group*, 343 F. Supp. 2d 989 (D. Kan. 2004).

<sup>37</sup> *Bad Faith As A Continuum: From Claim to Trial*, Thomas F. Segalla, p. 152.

In *Ji v. Bose Corp.*, the court noted that "the line is not always clear between impermissible testimony about what the law is and permissible expert testimony about standard industry practice."<sup>38</sup> Thus, in short, the "challenge for the parties, then, is to structure expert testimony to avoid intruding on the province of the court. Focusing on the expert's analysis on industry know-how reduces the risk that the opinion will be struck as a legal conclusion."<sup>39</sup>

#### **D. Cumulative Expert Testimony Will Be Excluded**

Litigants often follow the inclination that "more is better." However, under Federal Rule of Evidence 403, the court has broad discretion to exclude evidence that it deems needlessly cumulative. "Unnecessarily similar and cumulative expert testimony may create a risk that a jury will resolve differences in expert opinion by "counting heads" instead of by giving fair consideration to the quality and credibility of each expert's opinions."<sup>40</sup>

Expert testimony may be considered cumulative where there is "substantial overlap" between the areas on which two experts will testify. However, testimony on the same topic by different experts is not needlessly cumulative where the experts will testify from different professional perspectives.<sup>41</sup> For example, in *Geico Cas. Co. v. Beauford*,<sup>42</sup> the insurer moved to limit the number of expert witnesses in a bad faith case where its opponent proposed to offer the opinions of two insurance industry experts and an attorney experienced in bad faith claims. The court held that the two claims handling experts would offer similar and cumulative testimony and thus, one would be precluded from testifying. However, the Court did not exclude the attorney's testimony<sup>43</sup> because it came from a different perspective.

Similarly, in *Mendez v. Unitrin Direct Prop. & Cas. Ins. Co.*<sup>44</sup> the court denied the insurer's motion in limine where the plaintiff proposed to call an expert adjuster to opine whether the insurer's claims handling was in

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<sup>38</sup> *Ji v. Bose Corp.*, 538 F. Supp. 2d 354, 359 (D. Mass. 2008).

<sup>39</sup> Anna P. Engh "Standards for Admissibility of Insurance Expert Testimony" 2009, ICLC Seminar, March 2009. Engh's article offers examples of permissible and impermissible expert testimony in bad faith cases.

<sup>40</sup> *Royal Bahamian Association, Inc. v. QBE Ins. Corp.*, 2010 WL 4225947 (S.D. Fla. Oct. 21, 2010).

<sup>41</sup> *Id.*

<sup>42</sup> *Geico Casualty Co. v. Beauford*, 2007 WL 2412974 (M.D. Fla. Aug. 21, 2007).

<sup>43</sup> The court did indicate that the testimony might be excluded at trial if it appeared to be cumulative.

<sup>44</sup> *Mendez v. Unitrin Direct Prop. & Cas. Ins. Co.*, 2007 WL 2696795 (M.D. Fla. Sept. 12, 2007).

accordance with claims adjusting industry standards and an expert attorney to testify regarding legal duties owed to the plaintiff by his attorneys. The court held that the experts' subject matter appeared to be different, although the insurer had the right to again raise the issue of cumulative testimony at trial. And, in *Salerno v. Auto Owners Ins. Co.*<sup>45</sup> the plaintiff in a bad faith case proposed to call an attorney frequently hired by insurers to represent policyholders to testify regarding the duties owed by the insurer to the policyholder and whether the insurer met those duties. The plaintiff also intended to call an experienced claims handler to testify about the duties an insurer owes to its insureds. The court held that because the experts were testifying from "different perspectives," their testimony would not be cumulative.

#### **E. Expert Opinion Regarding Motivation or State of Mind**

As a general rule an expert may not offer an opinion on the "motives" or "state of mind" of the parties or others involved in the litigation.<sup>46</sup> Opinions about the parties' intentions or motivations are outside the scope of expert testimony. These issues are to be determined by the jury based upon the evidence. An expert is not in a better position than the jury to assess another's subjective intent. As one court colorfully put it, testimony as to another's state of mind "seems more suited to the mind-reader's booth on a carnival midway than to the witness box in a courtroom."<sup>47</sup> Moreover, testimony about what one party would have done had the other party acted differently may similarly be excluded as unreliable speculation.<sup>48</sup>

In *Gallatin Fuels Inc. v. Westchester Fire Ins. Co.*,<sup>49</sup> the insured sued to recover policy benefits and also alleged that the insurer acted in bad faith. The plaintiff's expert proposed to testify as to a number of issues. The court held that the expert should not be permitted to testify as to his opinion on the application of the policy to the claim because this was an impermissible legal conclusion. However, the court did allow the expert to testify as to his opinion on the insurer's violation of various insurance statutes as support for the expert's opinion that the insurer acted in bad faith. The expert also opined that it was the claim handler's "intention from day one" to deny coverage. The court excluded this testimony, holding that an expert may not opine as to what another individual thought, believed or felt.

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<sup>45</sup> *Salerno v. Auto Owners Ins. Co.*, 2007 WL 106538 (M.D. Fla. Jan. 9, 2007).

<sup>46</sup> *Astra Zeneca LP v. Tap Pharm. Products, Inc.*, 444 F. Supp. 2d 278, 293 (D. Del. 2006), holding that experts are not permitted to testify regarding intent, motive, state of mind, or evidence by which state of mind may be inferred.

<sup>47</sup> *SEC v. Handgis*, 1995 WL 133769, at \*1 (S.D.N.Y. Mar. 28, 1995).

<sup>48</sup> See, e.g., *NN&R, Inc. v. One Beacon Ins. Group*, 2006 WL 2845703, at \*3 (D.N.J. Sept. 29, 2006).

<sup>49</sup> *Gallatin Fuels Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417 (W.D.Pa. 2006).

Not all courts follow this rule. For example, in *Kemm v. Allstate Property & Casualty Inc. Co.*,<sup>50</sup> the insurer sought to depose the claimant's attorney regarding his reasons for rejecting a settlement offer. The plaintiff argued that the attorney's motives and behavior were irrelevant and sought a protective order prohibiting the insurer from eliciting evidence relating to the mental impressions of the claimant's attorney. The court held that the motives and conduct of the attorney were relevant in addressing whether the insurer had a reasonable opportunity to settle the underlying claim. Bad faith failure to settle requires an evaluation of whether there was a realistic possibility of settlement and conduct by underlying claimant's counsel during settlement negotiations may be relevant and admissible. Moreover, in *Mendez v. Unitrin Direct Property & Casualty Ins. Co.*,<sup>51</sup> the defendant insurer proffered testimony regarding the issue of whether the underlying plaintiff and his attorney were willing to settle. The court held that evidence and argument regarding the motive or conduct of the underlying plaintiff was relevant and should not be prohibited.

In *Kearney v. Auto-Owners Insurance Co.*,<sup>52</sup> the plaintiff moved to exclude opinion testimony from the insurer's experts regarding the motives of the plaintiff's counsel regarding settlement on the ground that the opinion was not the proper subject of expert testimony and would amount to speculation. The insurer argued that the motives were relevant to the issue of whether the case could be settled. The court agreed with the insurer that the evidence would be relevant and not pure speculation, however, the court denied the plaintiff's motion without prejudice to its being raised at trial when the specific objections would be reconsidered.

#### **F. Expert Opinion Regarding Credibility**

As a general rule an expert may not opine on the credibility of another witness. Witness credibility is solely the province of the jury and experts may not testify on such matters. Experts are not permitted to offer reasons why the testimony of certain witnesses should be discounted.<sup>53</sup> Questions, including hypotheticals, that call upon a witness to resolve disputed facts, reconcile conflicting testimony or assess the credibility of other witnesses are not within an expert's province.<sup>54</sup>

#### **G. Expert Testimony in Institutional Bad Faith Cases**

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<sup>50</sup> *Kemm v. Allstate Property & Cas. Ins. Co.*, 2009 WL 1954146 (M.D. Fla. July 7, 2009).

<sup>51</sup> *Mendez v. Unitrin Direct Property & Cas. Ins. Co.*, 2007 WL 2696795 (M.D. Fla. Sept. 12, 2007).

<sup>52</sup> *Kearney v. Auto-Owners Ins. Co.*, 2009 WL 3712343 (M.D. Fla. Nov. 5, 2009).

<sup>53</sup> *United States v. Samara*, 643 F.2d 701 (10th Cir. 1981).

<sup>54</sup> *United States v. Stephens*, 73 F.2d 695 (9th Cir. 1934).

Institutional bad faith claims allege that the insurer's patterns and practices created an organizational environment that fostered the alleged bad faith. The plaintiff's focus is directed at the insuring institution rather than the claims handler. *State Farm Mut. Auto Ins. Co. v. Campbell*<sup>55</sup> is a classic example. The insureds contended that they suffered an excess liability judgment because the insurer implemented a scheme to reduce liability payments and increase profits. See also *Zilisch v. State Farm Mut. Auto Ins. Co.*<sup>56</sup> where the plaintiff contended that the insurer set arbitrary claim payment goals for its claims handlers and rewarded them with promotions and raises for achieving those goals.

Institutional bad faith claims provide fertile ground for expert testimony. "The proper expert will not only explain how the carrier's conduct falls below industry standards but also how the carrier profits financially as a result."<sup>57</sup> Practices and standards of the insurance industry are clearly beyond the ken of the normal juror. An experienced insurance expert may be used to explain claims handling standards and compare those standards to the practices of the insurer accused of bad faith.

For example, in *Hangarter v. Provident Life and Accident Ins. Co.*,<sup>58</sup> the insurer was sued for bad faith for terminating the plaintiff's disability benefits. The plaintiff contended that the insurer had implemented an internal system designed to terminate expensive disability benefits for professionals who could no longer practice their occupation. The court held that expert testimony that is otherwise admissible should not be excluded because it addresses the ultimate jury issue. The expert was permitted to testify that the insurer deviated from industry standards because he did not offer a legal conclusion that the insurer actually acted in bad faith. An expert witness may "refer to the law" in expressing an opinion to aid the jury in understanding the facts in evidence, even though reference to those facts is couched in legal terms.

## CONCLUSION

Expert testimony features prominently in bad faith litigation. Under Federal Rule of Evidence 702, for expert testimony to be admissible, the proponent must demonstrate: 1) that the expert is qualified, 2) that the testimony is reliable, and 3) that the testimony will assist the trier of fact in understanding the facts or determining an issue in the case. The reliability requirements of *Daubert* and *Kumho Tire* apply to non-scientific experts of the

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<sup>55</sup> *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>56</sup> *Zilisch v. State Farm Mut. Auto Ins. Co.*, 995 P.2d 276 (Ariz. 2000).

<sup>57</sup> "Proving Institutional Bad Faith - Putting the Insurer's Practices and Procedures on Trial," Jason Mazer, ABA ICLC CLE Seminar March 3-5, 2011.

<sup>58</sup> *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004).