

Defeating and Utilizing Experts in Bad Faith Actions

Muliha Khan- Zupkus & Angell, P.C.
(Denver, CO)



Brian Kuhlmann- Shelter Insurance
(Columbia, MO)



Blane Smith-The Law office of Blane A. Smith (Sacramento, CA)



Tom Winner- Winner & Sherrod
(Las Vegas, NV)



Marvin Gaye says...Listen up!

First Party Claims: The Experts

Coverage

Damage

Underwriting

"Bad Faith"

A background image showing a business handshake and a document being signed. The handshake is at the top, and the document signing is below it. The image is overlaid with a semi-transparent dark grey filter.

Bad Faith Expert

AKA:

Industry Standards Expert

Claims Handling Expert

CLE Code: 0521

The Bad Faith Expert

Model Regulation Service—January 1997

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

Table of Contents

Section 1.	Purpose
Section 2.	Definitions
Section 3.	Unfair Claims Settlement Practices Prohibited
Section 4.	Unfair Claims Practices Defined
Section 5.	Statement of Charges
Section 6.	Cease and Desist and Penalty Orders
Section 7.	Penalty for Violation of Cease and Desist Orders
Section 8.	Regulations
Section 9.	Severability

Prefatory Note: By adopting this model act in June 1990, the NAIC separated issues regarding unfair claims settlement practices into a free-standing act apart from the NAIC Model Unfair Trade Practices Act. This change focuses more attention on unfair claims as a function of market conduct surveillance separate and apart from general unfair trade practices. By doing so, the NAIC is not recommending that states repeal their existing acts, but states may modify them for the purpose of capturing the substantive changes. However, for those states wishing to completely rewrite their comprehensive approach to unfair claims practices, this separation of unfair claims from unfair trade practices is recommended.

Section 1. Purpose

The purpose of this Act is to set forth standards for the investigation and disposition of claims arising under policies or certificates of insurance issued to residents of [insert state]. It is not intended to cover claims involving workers' compensation, fidelity, suretyship or boiler and machinery insurance. Nothing herein shall be construed to create or imply a private cause of action for violation of this Act.

Drafting Note: A jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This Act is inherently inconsistent with a private cause of action. This is merely a clarification of original intent and not indicative of any change of position. The NAIC has promulgated the Unfair Property/Casualty Claims Settlement Practices and the Unfair Life, Accident and Health Claims Settlement Practices Model Regulations pursuant to this Act.

Retention

Timing

Assistance

Scope

Unfair Claims Settlement Practices Act

The Ideal Bad Faith Expert

Lawyer v. Non-Lawyer

State-specific experience

Underwriting

RESUME

Career Objectives

Seeking for challenging job in any engineering, information, transportation or management field, currently applying my knowledge in Manufacturing and Process.

Professional Experience

- Typical maintenance positions
 - Preventive maintenance
 - Inspect, repair and replace components, perform check list
 - Preventive

Acceptance of Expert Opinions in Bad Faith Actions

Coverage bad faith opinion?...

Or an impermissible legal opinion pursuant to F.R.E 704?

Rule 704. Opinion on an Ultimate Issue

(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

NOTES

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1937; Pub. L. 98-473, title II, §406, Oct. 12, 1984, 98 Stat. 2067; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called “ultimate issue” rule is specifically abolished by the instant rule.



Acceptance of Expert Opinions in Bad Faith Actions

Timing of expert reports:

Colorado's take

Federal v. State Court

CLE Code: 1007

Strike Limit and/or Challenging Expert Opinion



Motion to Strike

Daubert/Kumho Tire issues

Filing a 702 motion

Strike Limit and/or Challenging Expert Opinion



Voir Dire of the Expert



Strike Limit and/or Challenging Expert Opinion

Finding the Weakness

- Factual basis
- Incomplete file or file review
- Qualifications
- Bias

Motions in Limine

WHAT'S THE LINE BETWEEN EXPERTISE AND ADVOCACY?

CLE Code: 1104

IN ONE
ONGOING
MATTER RELATED
TO DISPUTED UIM
BENEFITS:



THE SUPPOSED 'EXPERTISE'

- Opinion: Industry wide, insurance companies are trying to save money.
- Insurance companies give bonuses to those claims handlers who are profitable
- The role of insurance: a special business with a special public trust
- Insurance companies make money by negotiating settlements down.
- I'm aware of how this company operates.
- I'm aware because I sat through a trial in a different jurisdiction many years ago.
- The case didn't settle so that's proof they were negotiating unfairly.

THE SUPPOSED 'EXPERTISE'

- The company's investigation was unfair.
 - They hired experts they knew would support their claims decisions.
 - They unfairly dismissed what the plaintiff doctor said.
 - They didn't ask enough questions, and
 - They asked too many questions (which the policyholder found threatening)
- The company is hiding something
- The company objected to discovery requests
- The adjusters aren't telling the truth
- Their motivations are suspect and I don't believe them.

With respect to Fye's opinions regarding the general principles of insurance, which are contained within his preliminary disclosure, the court finds that an expert is not needed to testify as to the purpose of insurance. First, the jurors, based upon their life experiences and common sense, can form their own opinions as to the purpose of insurance and do not need the assistance of an expert. Second, defendants' advertising material that plaintiff plans to introduce in evidence reveals the purpose of the credit disability insurance policy purchased by Powell. Accordingly, Fye will not be allowed to testify as to his general opinions regarding the purpose of insurance or more specifically, the purpose of credit disability insurance purchased by Powell in this case.

ORDER ON MOTION IN LIMINE:

- EXPERT ALLOWED TO DISCUSS INFLUENCE OF GOAL-SETTING IN CLAIMS HANDLING.
- EXPERT NOT ALLOWED TO TELL JURORS THE PURPOSE OF INSURANCE. “Jurors can form their own opinions about the purpose of insurance and do not need the assistance of an expert.”
- EXPERT NOT ALLOWED TO DISCUSS ADVERTISING MATERIALS
- EXPERT NOT ALLOWED TO THAT WITHHOLDING BENEFITS CAUSED FINANCIAL STRESS
- EXPERT NOT ALLOWED TO GIVE OPINIONS ABOUT DISCOVERY OBJECTIONS MADE BY INSURER DURING LITIGATION
- EXPERT NOT ALLOWED TO DISCUSS INSURER’S WORTH, WEALTH, OR PROFITS
- EXPERT CANNOT OFFER MEDICAL, PSYCHOLOGICAL, OR VOCATIONAL OPINIONS
- EXPERT MAY NOT SAY THIS IS THE ‘TIP OF THE ICEBERG’ OR THAT THE INSURER SHOULD BE INVESTIGATED BY AUTHORITIES
- EXPERT MAY NOT OPINE ON THE LAW
- EXPERT MAY NOT OPINE ON CONTRACT TERMS as this is the function of the court.
- EXPERT MAY NOT SAY THE POLICY IS AMBIGUOUS, as this is the function of the court

12. Any testimony on discovery issues between the parties and/or alleged bad faith of the company in response to discovery because it is not relevant.

Plaintiff argues that testimony on discovery issues between the parties is relevant. The court agrees that the discovery issues between the parties are relevant. In fact, the court has ruled that answers to discovery requests and amended answers are admissible.¹ But the court finds that Fye may not testify about this issue. If a party's discovery responses are inconsistent or indicate an attempt to conceal documents, the jurors will be able to determine this based on their common sense and do not need assistance from an expert. Further, it has not been submitted to the court that Fye is an expert in determining whether an insurance company properly complied with a legal discovery request. Rather, Fye has been presented as an expert relating to claim handling in the insurance industry. Moreover, evidence of failure to comply with a discovery request goes to the credibility of a party and it is the sole province of the jury to determine credibility.

ORDER ON MOTION IN LIMINE:

- EXPERT MAY NOT CLAIM THAT INSURER IS SELLING PEACE OF MIND as this is an invasion of the mental process of the company
- EXPERT NOT ALLOWED TO DISCUSS INSURER'S NET WORTH because it is solely to create bias.
- EXPERT NOT ALLOWED TO TESTIFY ABOUT DISCOVERY ISSUES BETWEEN THE PARTIES or alleged bad faith by the company in conducting or objecting to discovery. It is not relevant.
- EXPERT NOT ALLOWED TO COMMENT ON WITNESSES' OR CONSULTANTS' CREDIBILITY as this invades the province of the jury.
- EXPERT NOT ALLOWED TO GIVE OPINIONS ABOUT CLAIMS HANDLING POST-SUIT.
- EXPERT NOT ALLOWED TO DISCUSS INSURANCE LAWS IN OTHER STATES
- EXPERT NOT ALLOWED TO DISCUSS THIS INSURER'S HANDLING OF CLAIMS IN OTHER STATES as this is not relevant or probative, and would be prejudicial.
- EXPERT MAY NOT DISCUSS THE INTENT, MOTIVATION, OR MENTAL PROCESSES OF OTHER WITNESSES.
- EXPERT MAY NOT GIVE MEDICAL TESTIMONY OR OPINIONS ABOUT DISABILITY
- EXPERT MAY NOT OPINE PLAINTIFF'S INCOME OR EARNING HISTORY
- EXPERT MAY NOT SAY THE POLICY IS AMBIGUOUS, as this is the function of the court

CLE Code: 0316



A background image showing two people in business suits shaking hands. The image is dark and semi-transparent, with text overlaid. The text is in orange and white colors. The overall theme is professional agreement or success.

Defeating the Experts....

Not just limited to “bad faith” experts.

Challenge is critical!

Economist or physician in a bad faith UM/UIM case

Engineer or public adjustor in a 1st party property damage case

Thank you for attending!



Primerus

Member, International Society of Primerus Law Firms

Muliha Khan- Zupkus & Angell, P.C. (Denver, CO)

Brian Kuhlmann- Shelter Insurance (Columbia, MO)

Blane Smith-The Law office of Blane A. Smith (Sacramento, CA)

Tom Winner- Winner & Sherrod (Las Vegas, NV)