

Use and Abuse of Expert Witnesses in Insurance Cases

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This is a brief outline for CLE sessions about expert witnesses and witnessing. Here is the Table of Contents, using non-matching, informative, and

¹ Further information about all this can be found on Quinn's website: michaelseanquinn.com. The informative resume is to be found in the lower right hand corner. Take the longer one.

informal language using roman numerals in an outline format:²

I. Insurance Bad Faith—Broad Characterization of Coverages

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I. Insurance Bad Faith—Broad Characterization of Coverages

Insurance related expert witnesses are usually called only to testify on insurer bad faith matters, and not directly on

² As a whole the presentation here strives to achieve informality and non-technical, as well as non-esoteric, presentation. For those attending who want something with a different flavor, see the Exhibit, which is a rather different sort of essay.

coverage or legal issues.³ Thus, this outline will appear to be simpler than these types of discussions generally are. Then again, it will not be as boring as these “papers” and presentations often are. So, let’s begin with the underlying substance: Typical areas of bad faith.

A. First Party Coverage (“First Party Coverage” (FPC)), involves insurance policies where the insurance proceeds or benefits are to be payable to the insured(s) or beneficiaries directly and usually involve disputes between one or more insureds and one or more insurers, e.g., property insurance, health insurance, or workers compensation insurance.

B. Third Party Coverage (“TPC” occurring most frequently with liability insurance “LC”), involves insurance policies (or that part of them), typically liability insurance,

³ As a general rule, when testifying before a jury, experts on insurance—insurer conduct, for example—are not asked or allowed to testify as to the precise content of cases or statutes, per se. (Sometimes, when an expert is testifying before a judge only, the opposite may be true when the expert is acting as an explanatory witness about how insurance policies work; this is also frequently the case in depositions.) It often helps for the expert to have the short relevant sections of the pertinent statutes or law photocopied and on hand, as well as a summary of the most recent pronouncement of—the elements of common law bad faith (either off to the side or in “the” stack to be used anyway, or in one’s pocket). The same is true for lists of all of those who are part of the cast of character in the pending case, as well as the lawyers examining the expert witness.

where the insurance proceeds are to be paid, not directly to the insured, but to third parties on behalf of the insured, i.e., the coverage is designed so that the insurer pays in the insured's stead the damages owed by the insured to others for certain liabilities. Those covered liabilities of an insured must arise under specific circumstances, e.g., when the injurious event was "fortuitous" or (what pretty much amounts to the same thing, "was an accident," or certainly unintended, at least, usually). Whether damages arose from an accident, whether fortuity characterizes an event, and whether its cousins apply are jury issues. Still, insurer decisions regarding these issues may be bad faith.

As a general rule, the law of insurance bad faith has a much more diverse and complex relationship with FPC than it does with LC. (More presently.)

C. Types of Bad Faith. We start with the claims adjustment process and insurer decision making conduct.

1. Common Law: performance of significant matters in the adjustment of a claim or claims, and whether it was done or decided with or without a reasonable basis. In proving or defending against allegations of common law bad faith, reference need only be to the general principles and the acts or omissions of the carrier and applied to the situation(s) in which those decisions, acts, or omission took place. Statutory bad faith is the opposite.

2. Statutory Bad Faith—Specific Statutes⁴: A number of acts or omissions are explicitly required of insurers in connection with an insurance claim. E.g.:

a. Specific Acts.

i. Certain acts must be performed “promptly” and reasonably understood in context.

ii. Certain acts must be performed within statutorily specified time limits.

⁴ See §§ 541.060 and 542 of the Texas Insurance Code.

iii. Insurers must provide insureds with the reasons or justification for certain of its decisions, e.g., denial or delay of a claim, the reasons it does or does not do something in adjusting a claim, or reserves its right(s) to do something(s) later.

b. Bad faith allegations and/or the defense against them must refer specifically to the terms at issue in the relevant statute.

The term “explicit” does not require that the specification be perfect—or even really--precise.

II. Bad Faith Itself

A. A great many cases of insurer bad faith involve situations in which an insurer has significantly misconstrued, misunderstood, or misrepresented the meaning of its own insurance policy.

Alternatively, it could be that the insurer understood its policy, but its adjustment behavior was/is a “long distance,”

conceptually conceived, from what is required by the meaning of at least one relevant term in its policy. Often policies are standard form policies, so there may be well-established case law on the language or topic.

The expert witness should be ready to testify about the “distance” between the meaning of the terms of the insurance contract and the conduct of the insurer in performing the investigation, its decision-making, the language of its—say—denial letter, or its reservation of rights letter, and so forth.

B. The general principle of common law bad faith—simply put—is that an insurer may not make unreasonable adjustment or claims decisions. These actions or decisions could include many varied things, such as:

- i. denial of coverage;**
- ii. issuance of amounts of recovery under the policy;**
- iii. issuance of a reservation or rights;**

iv. language of the reservations communiqué
(letter);

v. and so forth.

If these acts or decisions are manifestly unreasonable,⁵ irrational, and fall below the standard accepted care generally accepted in the “industry,” bad faith liability may exist. It must be remembered that adjusting a claim is not as simple as driving a motor scooter. The more complex the case, and hence the adjustment process, the less resemblance there is between the analogy used here—or anything like it and the “real thing” of the adjustment process. This is true in general and across the board.

C. Many of the principles of sound adjustment are principles of epistemology, i.e., how we can know truths.

1. Common Law Bad Faith vs. Negligence

a. Common law bad faith is NOT like negligence, inadvertence is not enough. One can light a match

⁵ This one might be described in the following slang, “Wow,” Unreasonable,” “By God! Unreasonable,” “Intolerable unreasonable,” and so on.

negligently, or call somebody by the wrong name, or misspell a word. Such errors are not bad faith.

b. Common law bad faith requires deliberate purposeful conduct by the insurer. In contract, negligence must be almost completely an unintentional performance or one motivated by its evil, or close to evil, distant cousin: reckless performance. (Here “performance” also includes omissions.⁶)

c. Of course, even excessive lack of intentionality can itself be a symptom of bad faith.

d. Still, there is a connection to negligence. An act (or omission) constitutes bad faith only if it is at least negligent or worse. It is necessary, but it is not sufficient. Thus, negligence, recklessness, or problematic and disturbing intentionality are necessary conditions of, under normal conditions, insurer bad faith.

⁶ Reckless is still classifiable as unintentional, even though it is close to intentional. Reckless conduct is something like negligent conduct performed in the context of a flagrant disregard of other's rights, “I don't give a damn,” or even worse, “F-them, I do as I see fit without paying any one's interests, except under my own narcissistic conceptions.”

e. Probably, an expert will (or should be) permitted to testify about these matters.

2. Different Standard of Care Than Negligence

a. In the negligence context, actors owe each other only the duty of *ordinary care*. Insurers, because of their special relationship to their insureds, owe their insureds the *duty of good faith and fair dealing*. Generally, this means that an insurer must treat the insured's interests on a par with its own, or at least equal to its own. Quite frequently, findings of insurer bad faith involve an insurer not following this important principle. Adherence is often an matter of perspective, which is easily lost in the heat of the moment.

b. Significantly, expert witness should be allowed to testify as to whether an insurer objectively acted in good faith. This is not simply a matter of law.

3. With two exceptions, this principle does not apply to liability insurance.

1. First Exception: Unreasonably wrongful failure or deliberate failure to provide a defense to the insured, if called for in the policy.⁷

2. Second Exception: Unreasonably wrongful failure or wrongfully deliberate failure or refusal to settle a covered case against an insured, after a reasonable demand has been made to settle within policy limits.⁸ (Often this is called a “*Stowers Demand*.”) Experts on liability insurance claims practice and related decision-making are usually permitted to testify about whether an insurer made a reasonable “*Stower’s decision*” and is therefore not “guilty” of insurer bad faith.

4. FPI, e.g., property insurance mostly focuses on “property damages,” and/or what used to be called

⁷ And it is called for in most liability insurance policies. Sometimes liabilities are also called “indemnity” policies. Ignore this difference, except in some rare situations. Be sure you know what you are talking about here. Probably the expert cannot testify as to the semantic difference. But s/he can testify to an insurer’s mistake in confusing the two terms, if it has influenced its behavior or indicates that the insurers’ rationale is unreasonably defective as to generally applicable knowledge. (From now on we will refer to all adjusters as “he.” It is not sexist in the slightest. It is simple that the word “he” is shorter and easier to type.) In any case, this observation applies across the board. Thus, explaining how an insurer misused the phrase “surety bond”—which is or is close to a type of insurance--indicates that the insurer is ill informed, and this may indicate something indicative of bad faith or something dangerously close to it.

⁸ Texas jurisprudence (and therefore its courts) rejects the idea that insurers have a duty to make the settlement offer themselves. An expert should not this mistake. This is true though that some believe that this rule is a mistake—a legal mistake and a relatively “ancient,” useless anomaly, which is nothing but insurer protective.

“Business Interruption Insurance,” and which is now “officially” called “Loss of Business Income Insurance”⁹ is entirely different.

III. Typical Issues and Conduct of Insurers & Adjusters in Bad Faith Cases~~~~~The Expert Witness

A. In virtually all bad faith cases, an expert (as well as the adjusters) will have to know the meanings of the operative words in insurance contracts, their accepted usage in the insurance “industry,” and how they might be ambiguous,¹⁰ whether they are thought to be or are argued to be.¹¹

B. In virtually every case, the expert witness will have to be able to relate that which alleges a loss and the descriptive

⁹ Experts better know the accepted vocabulary difference and the unreasonableness of an adjuster misusing these phrases.

¹⁰ It is advisable for an insurance expert to keep in mind the simple fact that a term is vague or difficult to understand does not make it ambiguous. Vagueness and complexity are separate issues. (Consider this: the more complex the policy and/or that which is insured by it, the more likely that some of the terms will be difficult to understand. Sometimes engineers or physicians, or physicists, not to mention chemists, have to be brought in to explain the terms and both its meaning and its common usage. Obviously, adjusters cannot usually do this.) QUESTION: Is accounting the same sort of thing?

¹¹ Notice again a good deal of this has to do with knowing whether an insurer is interpreting its contract in an acceptable “insurance industry” way. As a general rule, insurers and insureds need to be quite literalistic in interpreting insurance contracts. This was centrally involved in the application of the Ambiguity Rule in insurance contracts, although it applies to all contracts.

language in a policy. Here, are a few examples of which there are many, many more:

1. What is “wind damage”? (Notice how quickly, meaning links to other matters—How does it relate to other damages? How does one look at its order and timing?)

2. What is “subsidence”? (Would any slippage whatsoever of the ground under the parking lot being built constitute subsidence? What if it were 1/10th of an inch? What if it were the contents of a sand box? Brought yesterday?) All these are problems of meaning and interpretation.

3. What is ACV? What is the real meaning of the term spelled out name? What counts as evidence? Do current estimates of a building which has been entirely destroyed qualify?)

4. Can a building which has been completely destroyed be “restored,” as that term is used in a property policy?

5. If only the equivalent of accidents, i.e., “occurrences,” are what makes something not an accident. Suppose a homeowner had large quantities of a highly flammable, explosive substance in his garage, where he smokes! What if the material is highly explosive and the homeowner not only smokes in the garage, but also fixes his motorcycles, two or three at a time, and keeps *Widespread Panic* at a high volume? (Oh yes, this explosive compound responds to loud sounds. But when and how much?)

6. What if a business which calls its self a “fun house” burst (or starts a bigger fire) and is situated over a “strip joint,” which burns. Is the insurer obligated to pay property damage? What if it is situated over a casino? What if both are used by the insurer’s in-house

adjusters? Or its executives? (How is this about “meaning” of policy language, if at all?)

C. Of course there are lots of other things expert witnesses need to know, and other terms they have to be attentive to. And now we come to some really BIG stuff including core principles and tests. Obviously, common law and/or statutory insurer bad faith can turn on these kinds of problems and issues. These principles and considerations need to be conceived of as setting forth and then measuring against an industry standard:¹²

1. The more *thorough* the insurer’s investigation, the more carefully it is reviewed, discussed, debated within the company (or the office of the high prestige independent adjuster);

2. The more logical the adjuster’s reasoning in the context of investigation, reporting, and decision

¹² In this regard, proving bad faith and defending against it, resemble proof of and refutations of allegations of negligence.

making the more thoughtful and reasoned the insurer's final decision(s), the less likely the insurer will be found to be in bad faith. The expert should be able to articulate and highlight the logic/reasonableness, or lack thereof, of the claims handling actor and decision makers.

3. It is also crucial that the insurer have the right attitude. The expert witness (as with claims handlers in general must articulate the principle “*Look for coverage!*”¹³ and how the insurer did or did not fulfilled this standard.

4. Never deviate from it.

5. The expert witness must, in most cases, be able to calculate—or at least know how to do it.¹⁴

¹³ There is universal agreement (or close to it) about this principle in the insurance industry. Of course, like any foundational principle, based upon values, which is not in the self-interest of the person or entity, there is not always universal “follow-ance” of this principle: sometime by accident, sometimes by inexperience, sometimes by sloppiness, sometimes by “idiocy,” sometimes by negligence, and sometimes by design. The worse it gets on this “spectrum,” the more it is or indicative of insurer bad faith. All adjusters should be fit and ready to testify to this evaluation and stating it, or it’s opposite(s).

¹⁴ Some cases are unusual, vastly unfamiliar, or hugely complex. In this sort of case, and adjuster cannot be expected actually to do the calculation.

6. The same points apply to cause and origin.

7. All the same points are true for the entire adjustment team—or at least—that part of the team involved in a given case, up to and including the senior decision makers.

SO MUCH FOR AN INTRODUCTION TO EXPERTISE
IN THE AREA OF INSURANCE BAD FAITH.

IV. Other Uses for Insurance Expert Witnesses

A. Insurance expert witness can also be used in an insurance case for the following:

1. Explain the policy, if that is permitted;

2. Explain processes leading up to policy

issuance

a. marketing;

b. retained agents, wholesale agents, MGAs;

c. the surplus lines carrier and its relation to

state agencies; and

d. underwriting.

3. Explain a variety of other assorted matters,

such as:

a. issuance of Certificates of Insurance

(i) purpose;

(ii) text;

(iii) who—may issue—does issue; and

(iv) problems

b. ACORD form—who is and who should not

be involved and what should involvement look like.

4. Explain the structure of the insurance industry,

e.g., sales, intermediary group structure regulation, relations with other types of institutions and people (e.g., governmental commissions, banks, &c.)

5. Explain facts about differences in adjustment

processes, e.g., CG versus commercial property insurance, business interruptions versus non-payment of loan insurance, maritime v. commercial airplane insurance

- a. most significantly: how are different types of adjustment done, e.g., at what pace**
- b. how do different types of adjusters behave**
- c. how do different adjustment departments—those working on different types of cases--conduct communications with policyholders and others:**
 - (i) oral**
 - (ii) written: such as denial letters, reservation of rights letters, “You can count on us letters/”**

Of course, experts will not just be describing how all these things work. They will also often be describing whether various functions have been correctly or reasonably performed. This need not be in a bad faith case, of course. It is often necessary in complex contract cases, and occasionally in super-twisted-in-all-directions securities cases, and the like.

V. Qualifying and Preparing Proposed Experts & Other Recommendations

A. Challenged for Qualifications: Often is argued that a proposed expert is not really qualified to testify. Experts are challenged by way of a “Motion to Disqualify.” They are numerous, but with some witnesses they get less routine, as time goes along.

1. The usual ground urged for disqualifying a proposed expert is that s/he doesn’t know enough. Often opponents of the witness argue that the proposed witness does not have enough experience of the relevant sort. (E.g., the witness primarily has done worker’s comp claims so s/he should not be permitted to testify in an adjustment case involving Financial Institution Bonds.)

2. Sometimes the claim is not just that the proposed witness doesn’t know enough, but that s/he does not have sufficiently scientific training or knowledge. There is a U.S. Supreme Court case, which

some lawyers use as the foundation for this. It's the wrong case for challenging insurance experts. Nobody adjusting claims is a "scientist" and there is no science or technology involved. It's like complaining that a historian is not a scientist.

3. In any case, sometimes experts are qualified—in fact usually, if they are any good at all; but sometimes they are not. Difficulties arising in conjunction with disqualification get more pronounced as the complexity and/or value of the case go(es) up.

4. The fact that a proposed expert witness of some experience has been disqualified completely once—or a few times—is not a certainty as to what will happen in a particular case. Judges decide these issues and have wide discretion in their rulings.

B. Other Recommendations. Expert witnesses must be prepared for testifying, whether in depositions or for trial.

1. They must prepare themselves. This happens by study, by writing a report (if required), and by rehearsal-speech. Experts should think about the questions they will be asked and construct the right sorts of answers and the right sorts of arguments. They should avoid humor and witty sarcasm most of the time and incivility all the time, even when pointing out the outrageous incivility of examining counsel. (This must be done even though it makes the testimony less interesting and more boring. Well, maybe a little bit here and there. It better be less than too much, and it better be good. Don't be Harry Reid trying to tell a joke.)

2. Advocating lawyers in the case at hand should prepare expert witnesses. Except in monetary smallish cases, this should be done carefully. It takes time. Sample questions should be used. The expert's degree of knowledge and preparedness should be quizzed.

Videotaping is particularly helpful.¹⁵ Previous deposition and reports should be reviewed. These can be found on WestLaw, and—more significantly—on association, society, or common-interest—organizations, amongst lawyers, for example.

3. All expert testimony should be presented with restraint. An expert witness is not an advocate. S/he is an objective authority. Expert witnesses are supposed to be characterized by objectivity, a sense of seriousness, perhaps a semi-academic like quality, affability, and so forth.

4. Arguably, expert testimony should have that which might be called a “Christian” quality. Of course this has nothing to do with religious or internal belief. Probably, under most circumstances, an expert witness should not wear a cross on his lapel or around her neck.

The point here is that there should be a degree of

¹⁵ Of course there are document discovery problems right here. Expert witnesses should not get or retain videotapes of training or practice sessions. Lawyers should not save them either, if at all possible.

friendliness, love of neighbor (including strident and even insulting lawyers), and sometimes even a tenor of forgiveness. (Some might believe that this is nothing but secular cynicism in disguise.)

VI. Lawyers as Expert Witness: Insurance Cases

A. Sometimes lawyers are perfect witnesses. What if the problem arises out of the insurer's General Counsel Office, or the adjustment division? What if the real problem arises out of the insurer failing to supervise defense counsel in an appropriate and reasonable way? Surely, an insurance lawyer may be very helpful in testifying about an insurer's internal guidelines, behavior rules, and so forth.

B. Insurance lawyers with enough of the right sort of experience and/or training are probably as well qualified as many or most actual adjusters. This is true, if for no other reason, than because lawyers have a good sense of what counts

as a convincing argument, even when empirical facts are central to the decision.

C. There is usually an attempt to disqualify experienced insurance lawyers on the grounds that they have not been employees of insurance companies, usually in adjustment departments. This is an illogical argument, even if it sometimes works. If a very experienced insurance lawyer is presented as an expert and that lawyer has worked for insurance companies over and over again on many sorts of problem, the chances are that such a lawyer will be at least as qualified to testify to the issues at hand as employees of insurance companies, e.g., adjusters.

D. Earlier the matter of “distance” was discussed. In bad faith cases, the conclusion may depend upon the “distance” between how a policy is or should be understood and how the insurer actually understood it. Lawyers are often very good at this, so long as they do not come off as advocates.

E One last thing, lawyers as expert witness have little danger of exposure to malpractice liability—of that founded upon fiduciary-ness—either. First, such an expert I not functioning as a lawyer. Second, the duties and danger of lawyers do not apply here. Third most states have refused to recognized such cause of action. Alas, that established may be subject to a new trend. It is still a minority, however. Nevertheless, have expert witnessing explicitly included in your malpractice insurance.

VII. Conclusion

One of the most important things to remember about expert witnessing is this: The testimonial function of an expert witness is teaching. When testifying an expert witness should regard her/himself as a teacher. In preparing to be an expert witness, that person should keep in mind past teachers who were the most instructive, the most likable, the most authoritative, and the least irritating. Then, try to generalize their attributes; in this regard, think about not just you, but

your spouse, your kids, your Xs, your Ys, and your Zs. Call up you “brothers” and “sisters” from college. Now, try to put it all together. You will be amazed how often the stories and evaluations match up. The expert witness should be like that. However, s/he should avoid advanced physics teachers, actual chemistry teachers, usually accounting teachers, and certainly those who taught differential equations. These people are too hard to understand; they go too fast; and they are usually boring. Above all, though for different reasons, AVOID LAW SCHOOL PROFESSORS types! (Actual law professors are OK, so long as they don’t act or talk like it. Alas, this means you have to avoid the entire faculty at Yale—and its “family--and a good number of their mentally-high-powered graduates. Elitism is a good thing in some context, but this is not one of them.)

The people around me are not great proof readers, and I am awful. Any reader who has criticism of that sort, write or call me. The same goes for discussions regarding substance.