

THE USE OF EXPERTS IN INSURANCE BAD FAITH LITIGATION

By: [Madeleine Fischer](#)¹

Using an expert in an insurance bad faith case presents unique challenges due to the sometimes legal or quasi-legal subject matter involved. Courts debate whether expert testimony in these cases should be admitted at all. And if admitted, what qualifies a person as an expert, and what are the limits of such testimony? If you oppose expert testimony, what strategies increase your chances of mounting a successful *Daubert* challenge? If you are offering expert testimony, what are your potential responses to a *Daubert* attack?

This article will examine case law on these issues and offer practical tips for proponents and opponents of insurance bad faith experts.

Context: Key bad faith issues

An insurer has a duty to deal with its insured in good faith. An

insurer who denies coverage or delays payment without a reasonable basis may be liable for the tort of bad faith. An honest mistake or a denial of coverage based upon a genuine dispute is not bad faith. While states vary in their formulation of the standard for proving bad faith, the crux of bad faith is the unreasonableness of the insurer's conduct.

The circumstances giving rise to claims of bad faith are myriad, and the incidence of bad faith lawsuits has increased in recent years. Two common scenarios are:

An insurer fails to settle a third-party lawsuit against its insured within policy limits. After trial, judgment is entered against the insured in excess of policy limits. The insured alleges that the insurer had the opportunity

to settle and that liability was reasonably clear;

An insurer denies a first-party claim for policy benefits, or underpays or terminates payment prematurely. The insured alleges that the

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claim is fully covered and that the insurer failed to conduct a reasonable investigation or conducted a biased investigation.

In either of these situations, proof that the insurer merely made a decision that was incorrect is not proof of bad faith. The insured may attempt to prove bad faith by offering expert testimony. In turn, the insurer may seek to strike the insured's expert, or may combat the insured's expert with an expert of its own.

Expert testimony: Admissible? Required?

Rule 702 of the Federal Rules of Evidence provides the standard for relevance of expert testimony in federal court. A qualified expert may testify to "scientific, technical, or other specialized knowledge" if that testimony "will assist the Trier of fact to understand the evidence or to determine a fact in issue." State courts

follow similar evidentiary rules or principles. Thus, a key to admissibility is whether the testimony is helpful. Some courts have held that testimony about how insurance claims are managed and evaluated, as well as the statutes and regulations that govern insurance companies, can be helpful in determining whether a claim was handled in bad faith.² Other courts frame the issue as whether the testimony is beyond the ken of a lay jury. If so, the testimony is appropriate; but if the subject matter is within the knowledge and experience of the jury, then the testimony is not helpful and may be excluded on that ground.³

A second key is reliability, which in turn requires that the proffered expert be competent.⁴ Rulings on the admissibility of expert testimony are reviewed for abuse of discretion.⁵

In *Campbell v. State Farm Mutual Automobile Insurance Co.*,⁶ a case involving alleged bad faith for failure to settle an automobile accident case within

² *Kraeger v. Nationwide Mut. Ins. Co.*, No. 95-7550, 1997 WL 109582 (E.D. Pa. Mar. 7, 1997).

³ *Reedy v. White Consolidated Indus., Inc.*, 890 F. Supp. 1417, 1446 (N.D. Iowa 1995).

⁴ *Id.*

⁵ *Royal Maccabees Life Ins. Co. v. James*, 146 S.W.3d 340, 353 (Tex. Ct. App. 2004); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1144 (Utah 2001).

⁶ 65 P.3d 1134 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

policy limits, a trial court in Utah admitted testimony from two experts called by the plaintiff to testify about State Farm's policy for handling claims, its excess liability handbook, its failure to maintain statistics on excess verdicts, and the profits it derived from its claims handling practices. The Utah Supreme Court found that the issues presented by the case, although not arcane, were quite difficult for the average person to understand, and therefore upheld the admission of the expert testimony as helpful to the jury.

The *Campbell* case illustrates the powerful effect of persuasive expert testimony in a bad faith suit. The insured, Curtis Campbell, incurred an excess judgment in the underlying case of three times his policy limit of \$50,000 because his automobile liability insurer, State Farm, failed to pay policy limits in settlement. Campbell sued State Farm for bad faith, and, no doubt swayed by the testimony of Campbell's insurance experts, the jury awarded him \$2.6 million in compensatory damages and \$145 million in punitive damages. Although the trial court remitted both awards, the Utah Supreme Court reinstated the jury's award of \$145 million in punitive damages and affirmed in all other respects.

The United States Supreme Court granted certiorari and reversed the punitive damages award.⁷ No doubt the Supreme Court was thinking of the expert testimony when it criticized the punitive damage award as going far beyond that necessary to punish State Farm for its handling of Campbell's claim: "This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."⁸ The Supreme Court's decision may be asserted by insurers to limit the scope of expert testimony in a bad faith case to acts pertaining directly to the handling of the insured's claim or at least similar acts occurring in the same state, as opposed to otherwise legal nationwide practices.

Although courts commonly find expert testimony admissible in bad faith cases under the "helpfulness" standard,⁹ a few courts refuse to do so. For example, in *Marketfare Annunciation, LLC v. United Fire &*

Casualty Co.,¹⁰ Judge Carl Barbier of the Eastern District of Louisiana rejected expert testimony in a case in which a grocery store chain alleged damages to its business caused by the winds of Hurricane Katrina. The plaintiff, Marketfare, contended that its insurer, United, substantially underpaid Marketfare's claim in bad faith. Here, it was the defendant, United, that sought to introduce expert testimony. After noting that Louisiana courts had been figuratively flooded with insurance bad faith cases after the disastrous 2005 hurricane season, Judge Barbier concluded that the bad faith claim presented by Marketfare was not overly complicated. "At its most basic, the claim is there was no reasonable basis to deny payment of certain claims."¹¹ Judge Barbier found that the obligations of an insurer in adjusting claims and related responsibilities were issues "present in almost every Hurricane Katrina case tried by this Court and it is not clear why expert testimony is necessary for the jury to understand the reasonableness standard."¹² Accordingly, he excluded the bad faith expert testimony.

In contrast to the *Campbell* case, no expert testimony was adduced in *Marketfare*. The plaintiff, nonetheless, did very well before the jury, winning a total award of over \$29,000,000, of which almost \$6,000,000 consisted of statutory penalties. The case is currently on appeal to the Fifth Circuit.¹³

Expert testimony was also excluded in another State Farm case, this time when the testimony was proffered by the plaintiff about State Farm's "good neighbor" slogan. In *Hatch v. State Farm Fire & Casualty Co.*,¹⁴ the Wyoming Supreme Court held that the trial court properly refused to allow the plaintiff's bad faith expert to testify as to whether State Farm complied with the standard of "a good neighbor". The court found that being a good neighbor was not the legal standard for good faith and fair dealing in the investigation and handling of insurance claims, and further, whether the insurer acted as a good neighbor did not require any specialized knowledge. Accordingly, expert testimony on that subject would not help a jury. The court affirmed the trial court's judgment in favor of State Farm.

⁷ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

⁸ *Id.* at 420.

⁹ See e.g., *Ford v. Allied Mut. Ins. Co.*, 72 F.3d 836 (10th Cir. 1996); *Moses v. Halstead*, 477 F. Supp. 2d 1119 (D. Kan. 2007); *Shepherd v. Unumprovident Corp.*, 381 F. Supp. 2d 608 (E.D. Ky. 2005); *Furr v. State Farm Mut. Auto. Ins. Co.*, 716 N.E.2d 250 (Ohio 1998); *Hall v. Globe Life & Acc. Ins. Co.*, 968 P.2d 1263 (Okla. Civ. App. 1998); *Neal v. Farmers Ins. Exch.*, 582 P.2d 980 (Cal. 1978).

¹⁰ No. 06-7232, 2008 WL 1924242 (E.D. La. Apr. 23, 2008).

¹¹ *Id.* at *2.

¹² *Id.*

¹³ *Marketfare Annunciation, LLC v. United Fire & Cas. Ins. Co.*, No. 08-30795 (5th Cir. docketed Aug. 13, 2008).

¹⁴ 930 P.2d 382 (Wyo. 1997).

