

THE SCOPE OF EXPERT TESTIMONY IN INSURANCE BAD FAITH CASES: CAN THE EXPERT TESTIFY ON THE MEANING OF THE INSURANCE POLICY?

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ABSTRACT

This article discusses the use of claims handling experts in bad faith insurance claims and the admissibility of their testimony in legal malpractice cases. While a duty of good faith has been established in insurance case law, insurance claims experts are used in court to provide information and analysis on training, policy, and interpretation by various insurance claims handlers and their subsequent decisions in covering or denying situations. Such experts minutely examine the training and preparation regimes of the claims handlers, but their testimony is sometimes limited based on concerns over invading the court's province and whether policies are ambiguous. This article argues that such concerns are invalid and unworkable, and that such expert testimony, analogous to testimony for cases in legal malpractice, is both acceptable and helpful to legal proceedings.

I. INTRODUCTION

The use of claims handling experts in insurance bad faith cases has dramatically increased in the past several years. Claims handling experts are used to provide testimony on whether the insurance company handled the claim properly, in bad faith, or in accordance with insurance industry practices and standards. Claims experts can also provide the trier of fact with an important understanding of how the insurance claims business works—i.e., what an insurance adjuster does and what they are supposed to do.

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Expert testimony in insurance bad faith cases can be extremely important to both sides. Indeed, expert testimony may be the key factor that sways the trier of fact. For example, in the trial of *Campbell v. State Farm* in Utah, the expert testimony of two claims experts was a significant factor in the \$145 million punitive damage award.¹

Although insurance claims experts are being increasingly used by both plaintiff and defense in insurance bad faith cases, the testimony of such experts has, however, been limited to whether the insurer's conduct complied with the practices and standards in the insurance industry for claims handling.² Many courts have precluded insurance claims experts from testifying on whether the insurer properly interpreted and applied an

¹ *Campbell v. State Farm Mut. Auto Ins. Co.*, 65 P.3d 1134 (Utah 2001), *rev'd in part*, 538 U.S. 408 (2003).

To rebut State Farm's "honest mistake" defense, the Campbells called experts Stephen Prater and Gary Fye. These men were intimately acquainted with the intricacies of the insurance industry and with State Farm's practices in particular. Their qualifications as experts were not challenged by State Farm. Their testimony focused upon explaining State Farm's PP & R policy and demonstrating its far-reaching effects. State Farm now argues that much of this testimony was without foundation and was prejudicial. In particular, State Farm challenges the experts' testimony concerning the company's excess liability handbook, its failure to maintain statistics on excess verdicts, the profits it derived from improper claims handling and the effects of its PP & R policy and related practices in the insurance industry in general. State Farm also argues that Mr. Prater impermissibly testified to legal conclusions.

Id. at 1159.

We have reviewed the entire transcript of both Prater's and Fye's trial testimony. With the exception of the argument concerning legal conclusions, we find it unnecessary to address with particularity State Farm's specific challenges. That the experts' testimony was helpful is evident. State Farm conceded the witness' qualifications. Although the rule does not require that the issue to which an expert testifies be arcane, the issues raised in this case were in fact quite difficult for the average person to understand. The experts' familiarity with the insurance industry in general, and State Farm in particular, must have greatly aided the jury's understanding of the issues. Moreover, our review of the record satisfies us that the experts' testimony, given its relevance and its helpfulness, did not raise any concerns under rule 403 sufficient to warrant exclusion. Thus, because the experts' testimony was helpful to the jury, the trial court did not abuse its discretion under rule 702.

Id. at 1160.

² Experts in insurance bad faith cases frequently testify on the standards and practices in the insurance industry for the handling of claims. *See, e.g.*, *Hanson v. Prudential Ins. Co. of America*, 783 F.2d 762, 765 (9th Cir. 1985); *Tricor Cal. Inc. v. State Comp. Ins. Fund*, 35 Cal. Rptr. 2d 550, 551-552 (Cal. Ct. App. 1994); *Rawlings v. Apodaca*, 726 P.2d 565, 569, 574 (Ariz. 1986) (insurance claims expert permitted to testify that insurer's conduct breached insurance industry custom and practice). However, an insurer may not excuse its treatment of the insured by proving that it conformed to industry standards. *Silberg v. Cal. Life Ins. Co.*, 521 P.2d 1103, 1109 (Cal. 1974).

insurance policy provision.³ The courts have usually reasoned that the interpretation of a contract provision is the domain of the court and not expert testimony.

The purpose of this article is to examine whether insurance claims experts should be permitted to testify on the meaning of insurance contract provisions in evaluating whether the insurer acted reasonably in applying a policy provision to a given claim. In the article I will argue that the courts have too narrowly limited the scope of insurance claims experts' testimony in insurance bad faith cases. Insurance claims experts should be able to testify on whether an insurance claims handler has properly interpreted and applied insurance policy provisions. Admissible expert testimony should not only include insurance industry claims handling standards pertaining to the interpretation and application of insurance policy provisions, but also testimony regarding the applicable case law. This is necessary because insurance claims handlers, in applying an insurance policy provision, have been trained to consider and apply both industry standards and case law when making a coverage decision. Accordingly, expert testimony concerning not only insurance industry practices but also the applicable case law is needed in insurance bad faith cases where there is a coverage issue in order to provide the trier of fact with all the relevant facts and testimony concerning the insurer's conduct.

The first section of the article will summarize the development of bad faith law and how it relates to the handling of claims. To find that the insurer has breached its duty of good faith and fair dealing, the trier of fact must, in most jurisdictions, find that the insurer's conduct was not only unreasonable but also in reckless disregard for the interests of the policyholder.⁴ In spite of this broad standard, insurance claims handling experts have often been prevented from testifying as to whether the claim handler investigated and resolved insurance coverage issues in accordance with insurance industry standards, including the applicable case law. This is in spite of the fact that the claims handler almost daily addresses and

³ See, e.g., *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 454-55, 457 (9th Cir. 1999); *Flinkote Co. v. Gen. Accident Assurance Co.*, 410 F.Supp.2d 875, 876, 885 (N.D. Cal. 2006).

⁴ Although this article focuses on expert testimony on insurance contract interpretation with regard to the bad faith cause of action, the same testimony would be helpful, and should be considered, with regard to the breach of contract claim. Any reference herein to bad faith cause of action should also be read to include the breach of contract cause of action.

makes important decisions concerning the application of coverage, which themselves involve consideration of the applicable case law.

The second section of the article will examine what insurance claims personnel do in their day to day handling of claims. Here, it will be noted that insurance claims personnel receive a wide range of training and experience in the interpretation of insurance policy provisions, and are called upon, on a daily basis, to interpret and apply insurance policy provisions to an equally wide variety of insurance claims. Further, there is substantial literature in the insurance industry regarding the interpretation and application of insurance policy provisions. This literature is available to insurance claims personnel to assist them in the interpretation and application of insurance policy provisions. This training and education, along with the available literature, constitutes, at least in part, the insurance industry's standards for insurance claims handling with regard to the interpretation and application of insurance policy provisions. Such information is relevant in both insurance contract and bad faith actions in order for the trier of fact to determine, first, the meaning of the contract provision, and second, in the bad faith cause of action, whether the insurer has complied with those standards.

The third section of the article will address the current status of case law as it applies to the admissibility of expert testimony on the interpretation of insurance policy provisions in insurance bad faith cases. Here, it is noted that the courts have articulated two principle reasons for restricting expert testimony when it comes to insurance contract construction: First, the rules of evidence preclude such testimony absent a finding of ambiguity, and second, such testimony invades the province of the court. Both of these limitations fail to recognize the nature of insurance claims handling, including insurance industry publications and materials on insurance policy interpretation and that claims handling routinely involves consideration of the applicable case law. Further, these limitations have proved to be unworkable either because they are fraught with exceptions or they are artificial and fail to offer sufficient guidance on how to determine what expert testimony is admissible and what is not.

The fourth section will turn to a discussion of expert testimony in legal malpractice cases. A discussion of expert testimony in legal malpractice cases is appropriate because of the similarities between the legal and claims handling professions. A consideration of expert testimony in legal malpractice cases also offers a possible approach to the admissibility of expert testimony on the meaning of insurance contract provisions in insurance bad faith cases. In this regard it will be noted that expert testimony in legal malpractice cases can extend to legal issues, or in other

words, matters that may normally be considered to be in the province of the court. Here, it will be argued that insurance claims handling is a quasi-legal profession with regard to the interpretation and application of insurance contract provisions. Accordingly, insurance claims experts should be given the same latitude of testimony that is granted to experts in legal malpractice cases. Without such latitude the trier of fact will be precluded from hearing relevant evidence concerning the conduct of the insurance claims handler.

The article will conclude that expert testimony on the interpretation of insurance contracts should be permitted on both insurance industry practices and standards and applicable case law. By expanding insurance expert testimony to include the interpretation and application of insurance policy provisions the trier of fact will be permitted to hear relevant evidence concerning the insurer's conduct. Any concern that such testimony will amount to instructing the jury on the law can easily be obviated by appropriate procedural mechanisms.

II. INSURANCE BAD FAITH LAW AND THE ROLE OF THE INSURANCE CLAIMS EXPERT

Most courts have held that every insurance contract contains an implied covenant of good faith and fair dealing "that neither party will do anything which will injure the right of the other to receive the benefits of the agreement."⁵ In the seminal case of *Gruenberg v. Aetna Ins. Co.*, the California Supreme Court held that, "in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself."⁶

Having held that insurance contracts contain a duty of good faith the courts were then required to address how that duty was to be established. Several courts have adopted a two pronged test, under which the insured has the burden (1) "[t]o show...the absence of a reasonable basis for denying the benefits of the policy; and (2) the insurer's "knowledge or

⁵ See, e.g., *Commuale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 200 (Cal. 1958); see also, Dougals G. Houser, *Good Faith As a Matter of Law: The Insurance Company's Right to be Wrong*, 27 TORT & INS. L.J. 665, 666 (1991-1992).

⁶ 510 P.2d 1032,1038 (Cal. 1973).

reckless disregard of the lack of a reasonable basis for denying the claim.”⁷ It appears that two jurisdictions, Hawaii⁸ and Ohio⁹, have adopted only the first prong of this test.

The first part of the two prong test requires a determination of whether the insurer’s conduct is objectively reasonable, whereas the second prong addresses the mental state of the claims handler and asks whether he/she acted “deliberately and consciously rather than negligently.”¹⁰

Insurance claims experts are frequently called upon to provide testimony on both prongs of the bad faith test. The expert may provide testimony of whether the insurer’s conduct was reasonable (the first prong) in light of insurance industry claims handling standards and practices. Similarly the expert may be asked to testify on whether insurance company programs or policies created, in the expert’s opinion, improper incentives such that the claims handler was motivated to handle the claim to the insurer’s benefit and the detriment of the policyholder.¹¹

The insurance claims expert may also be asked to testify on whether the insurer reasonably interpreted and applied a particular policy provision. For example, where the insurer denies coverage on a first party water loss because of a policy exclusion for long term seepage,¹² the claims expert may be asked not only for his/her opinion on the adequacy of the insurer’s investigation but also on whether, based on the facts, the insurer was reasonable in its denial of coverage. Such expert testimony may not only

⁷ *Regal Homes, Inc. v. CNA Ins.*, 171 P.3d 610, 621 (Ariz. Ct. App. 2007); *Picket v. Lloyd’s*, 621 A.2d 445, 453 (N.J. 1993); *Anderson v. Cont’l. Ins. Co.*, 271 N.W.2d 368, 376 (Wis. 1978).

⁸ *Best Place, Inc. v. Penn. America Ins. Co.*, 920 P.2d 334, 347 (Haw. 1996).

⁹ *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 399-400 (Ohio 1994).

¹⁰ *Vandeventer v. All American Life & Cas. Co.*, 101 S.W.3d 703, 721 (Tex. App. 2003) (citing *Colley v. Ind. Farmers Mut. Ins. Group*, 691 N.E.2d 1259, 1261 (Ind. Ct. App. 1998)).

¹¹ Courts have found that certain insurance company programs or policies create such improper claims handling motivations. For example, the Arizona Supreme Court in *Zilisch v. State Farm*, 995 P.2d 276, 280 (Ariz. 2000), called attention to these practices when it wrote: “There was sufficient evidence in this case from which a jury could find that State Farm acted unreasonably and knew it. There was evidence that State Farm set arbitrary goals for the reduction of claims paid. The salaries and bonuses paid to claims representatives were influenced by how much the representatives paid out on claims.”

¹² Homeowners’ insurance policies may commonly contain an exclusion for “loss caused by continuous or repeated seepage or leakage of water or steam from within a plumbing, heating or air conditioning system or from within a domestic appliance which occurs over a period of weeks, months or years.” See *Fidelity Casualty & Surety Bulletins, Personal Lines Volume, Dwellings HIB-3*, Nov. 1994.

involve consideration of the policy language, but also insurance industry publications which provide guidance generally on the interpretation of insurance policies as well as industry publications concerning the meaning of the operative policy provision itself. In addition, the reasonableness of the insurer's conduct in interpreting and applying the policy provision may also depend on whether the insurer properly considered the applicable case law.¹³ Some courts have precluded expert testimony on insurance industry policy interpretation, excluding testimony on the applicable case law on the grounds that such testimony invades the court's domain.¹⁴

The limitations on the scope of an insurance claims expert's testimony appear artificial when considered in context with how insurance claims handlers are trained and what they are asked to do on a daily basis; that is, make coverage decisions. The limitation also fails to recognize the extensive insurance industry literature on the interpretation of insurance policies, which are relied upon frequently by insurance claims handlers to adjust claims. In other words, the limitations on the scope of testimony of experts concerning insurance policy interpretation issues are not tied to the real world. In order to appreciate this disconnect between the rules concerning admissibility of expert testimony and the real work of insurance claims handlers it is necessary to examine that "real world."

III. INTERPRETATION AND APPLICATION OF INSURANCE POLICY PROVISIONS IN THE INSURANCE CLAIMS HANDLING PROCESS

Insurance claims handling not only involves the proper investigation, evaluation and settlement of claims, but also, and frequently on a daily basis, the interpretation and application of insurance policy provisions. In the real world of insurance claims handling, insurance claims handlers are trained in policy interpretation; provided resources on how to interpret and apply policy provisions, and then required to interpret and apply insurance policies to specific fact situations. Any evaluation of whether the insurer's conduct in applying and interpreting a policy provision must, therefore,

¹³ See, e.g., *Redies v. Attorneys Liab. Prot. Soc'y*, 150 P.3d 930, 938 (Mont. 2007); *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 11 P.3d 162, 174 (Okla. 2001); *Transcontinental Ins. v. Wash. Pub. Utilities Districts' Util. Sys.*, 760 P.2d 337, 347 (Wash. 1988).

¹⁴ See, e.g., *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 454-55, 457 (9th Cir. 1999). *McCrink v. Peoples Benefit Life Ins. Co.*, 2005 WL 730688, at *4 (E.D. Pa. March 29, 2005).

consider the resources and training available to insurance claims handlers and whether those resources and training were utilized and followed.¹⁵

Insurance claims handlers are trained on how to interpret and apply insurance policies. This training includes educating the claims person on the insurance industry rules for the interpretation of insurance policies. These include the following: (a) exclusions are to be interpreted narrowly,¹⁶ (b) insuring agreements are to be interpreted broadly,¹⁷ (c) the insurance company must resolve doubts concerning coverage in favor of the policyholder,¹⁸ (d) policy language should be given its plain, ordinary and popular meaning;¹⁹ (e) ambiguous policy provisions should be interpreted against the insurer and in favor of coverage,²⁰ (f), and that the insurance company has the burden of proving the application of an excluded peril.²¹

There are also several texts which have been used to train insurance industry claims handlers on not only proper claims handling but also on the interpretation and application of insurance policy provisions.²² A partial list of such insurance texts would include the following:²³

¹⁵ At least one commentator has contended that there is no such thing as insurance industry standards and that the expert's opinion in insurance cases should "be based upon the same three things that a court's opinion would be based upon: the policy language, judicial precedent and any relevant statutes." ALLAN D. WINDT, *INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSURED* § 9:26A (4th ed. 2001 & Supp. 2006) (hereinafter "WINDT") Such a view ignores the vast amount of material used in the insurance industry, other than case law, to assist in the interpretation and application of insurance policies.

¹⁶ KENNETH S. WOLLNER, *HOW TO DRAFT AND INTERPRET INSURANCE POLICIES* 19 (1999) ("Exclusions and other limitations are strictly construed against the party seeking to impose the limitation.").

¹⁷ ERIC A. WIENING & DONALD S. MALECKI, *AM. INST. OF CPCU, INSURANCE CONTRACT ANALYSIS* 76 ("[I]nsuring agreement provides a broad statement of coverage.").

¹⁸ DONNA J. POWOW, *AM. INST. OF CPCU, PROPERTY LOSS ADJUSTING* § 5.34 (2003).

¹⁹ PRENTISS REED & PAUL THOMAS, *ADJUSTMENT OF PROPERTY LOSSES* 48 (McGraw Hill 1977).

²⁰ *Id.* at 50.

²¹ Insurance claims handlers have testified that these standards are used in the insurance industry to interpret and apply insurance policies. See Deposition of Stephen Hinkle at 166, *Illing v. State Farm Fire and Cas. Co.*, No.: 1:06cv513-LG-RHW (So. Dist. Miss., Feb 9, 2007) (Stephen Hinkle, a State Farm claim consultant, testified at his deposition that it is a basic tenant of insurance claims handling that the insurer must prove the application of the exclusion).

²² In addition to texts, there are a number of insurance industry publications which may provide invaluable information. Possibly the most important such publication is the magazine, "Claims," published by the National Underwriter Company. This magazine, which is published monthly, contains articles on a wide variety of insurance claims

PRENTISS REED & PAUL THOMAS, *ADJUSTMENT OF PROPERTY LOSSES* (McGraw Hill 1977).

JANE S. LIGHTCAP, INT'L CLAIM ASSOC., *MANAGING CLAIM DEPARTMENT OPERATIONS* (1997).

JAMES J. MARKHAM ET AL., INS. INST. OF AM., *THE CLAIMS ENVIRONMENT* (1993).

DONNA J. POPOOW, AM. INST. OF CPCU, *PROPERTY LOSS ADJUSTING* (2003).

JAMES R. JONES, AM. INST. OF CPCU, *LIABILITY CLAIM PRACTICES* (2003).

DONALD J. HIRSCH, *CASUALTY CLAIM PRACTICE* (McGraw Hill 1996).

Some of these texts have been cited by several courts,²⁴ and may be admissible as evidence of insurance industry standards.²⁵ These texts frequently contain advice on how a claims handler should interpret an insurance policy. For example, Thomas and Reed in their book, *Adjustment of Property Losses*, which has been used in the training of insurance claims handlers,²⁶ sets forth 16 standard rules for the construction of insurance policies.²⁷

adjusting issues, including the investigation and adjustment of mold claims, catastrophic injury claims, and workers compensation claims, among others. The magazine provides additional information on insurance industry standards, including the state of the art on insurance industry claims handling practices. See Claims Magazine, available at <http://www.claimsmag.com/cms/claims/website>.

²³ Frequently, the insurer's counsel will argue that such publications should not be admissible because they are parole evidence, which should not be allowed to change the agreed terms to a contract. In the insurance contract context, however, many courts have allowed the introduction of extrinsic evidence as an aid in contract interpretation. See, e.g., *Montrose Chem. Corp. v. Admiral Ins. Co.* 897 P.2d 1, 14 (Cal.1995).

²⁴ For example, REED & THOMAS, *supra* note 19, has been cited by several courts. See, e.g., *Willhite v. Marlow Adjustment Co.*, 623 S.W.2d 254, 261 (Mo. Ct. App. 1981); *Los Angeles Mut. Ins. Co. v. Cawog*, 106 Cal. Rptr. 307, 310 (Cal. Ct. App. 1973); *Creole Explorations, Inc. v. Underwriters at Lloyds, Inc.*, 161 So.2d 768, 775 (La. 1964).

²⁵ The Federal Rule of Evidence permits the admittance of such texts as substantive evidence. "[S]tatements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the [expert] witness or by other expert testimony or by judicial notice." FED. R. EVID. 803(18).

²⁶ In the preface, the authors note that the text "provides guidance and information to enable the claim representative to perform his or her duties in an effective and professional manner," and "[t]his...is a text for both student and instructor; it is a reference for all property claim personnel." REED & THOMAS, *supra* note 19, at iii, iv.

²⁷ *Id.* at 47-50.

Insurers often require that their claims handlers be trained in how to interpret and apply insurance policies. For example, State Farm mandates that its claims personnel attend claim training courses in which they are taught “[h]ow to read a policy, [and] how to determine coverage.”²⁸

In addition to insurance industry texts, insurance claims handlers make use of a wide range of publications that provide guidance on the interpretation of insurance policies.²⁹ For example, the Fidelity, Casualty and Surety Bulletins (FC&S Bulletins”), published by the National Underwriter Co., has been used in the insurance industry for decades to provide guidance on the interpretation and application of insurance policies.³⁰ The FC&S Bulletins have also been widely cited in court opinions. As one court noted:

The FC & S bulletin, which is published by the National Underwriters Association, is used by insurance agents and brokers to interpret standard insurance policy provisions. (*Maryland Casualty Co. v. Reeder* (1990) 221 Cal.App.3d 961, 972, 270 Cal.Rptr. 719.) “[R]eliance on [an] FC & S bulletin is appropriate under Civil Code section 1645 which provides: ‘Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.’” (*Maryland Casualty Co. v. Reeder, supra*, at p. 973, fn. 2, 270 Cal.Rptr. 719; *American Star Ins. Co. v. Insurance Co. of the West* (1991) 232 Cal.App.3d 1320, 1331 & fn. 8, 284 Cal. Rptr. 45.) “[I]nsurance industry publications are particularly persuasive as interpretive aids where they support coverage on behalf of the insured. Ultimately, the test is whether coverage is ‘consistent with the insured’s objectively reasonable expectations.’ [Citation.]” (*Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co.* (1994) 22 Cal.App.4th 1508, 1512-1513, 27 Cal.Rptr.2d 841.)³¹

²⁸ Deposition of Mike Porterlance at 88, *Davis v. State Farm*, No.: 1:06cv638-LTS-JMR (quoting Mike Porterlance, a State Farm claims department employee).

²⁹ See *Maryland Cas. v. Reeder*, 270 Cal. Rptr. 719, 722-723, 725 (Cal. Ct. App. 1990). The court also found that the insurance industry’s own interpretation of the broad form endorsement and certain exclusions precluded application of the exclusions in plaintiff’s policy. *Id.* at 725-726.

³⁰ See FC&S Bulletins Homepage, <http://cms.nationalunderwriter.com/cms/fcsbulletins/public+website/> (last visited Oct 13, 2008).

³¹ *Golden Eagle Ins. Co. v. Ins. Co. of the West*, 121 Cal. Rptr. 2d 682 (Cal. Ct. App. 2002).

Similarly, the International Risk Management Institute publishes several volumes, which are used in the insurance industry, among other subjects, on the interpretation and application of personal and commercial lines policy forms and provisions.³²

In addition to being knowledgeable regarding insurance industry policy interpretation standards and rules, insurance claims handlers need to be, and are often familiar with the applicable law in the jurisdictions in which they work. This includes the law of tort and contracts, as it applies to insurance contracts. In the book, *The Claims Environment*, Markham points out that “claims representatives should have expert knowledge of insurance policy coverages, the law, and determination of damages.”³³ Insurance claims personnel are commonly trained in the applicable law of the jurisdictions in which they work. For example, Stephen Hinkle, a State Farm Claim Consultant, has testified that, “over the course of [my] tenure as a claim consultant I’ve become familiar with the law in all four states that I’m involved in.”³⁴ Without such training and knowledge, an insurance adjuster would not be able to handle properly many of the claims assigned to him or her.

Insurers also publish their own written guidance documents on the interpretation and application of the insurance policies that they sell. For example, State Farm publishes a number of Operation Guides, which provide guidance to claims personnel on the handling of first party property claims. These Operation Guides frequently provide information on how particular policy provisions are to be interpreted. For example, State Farm Operation Guide 75-100, entitled “Claim Interpretations-Losses Insured First Party,” is “[t]o provide the Company interpretation of selected Section I-Losses Insured.”³⁵ With regard to Hurricane Katrina, Stephen Hinkle of

³² The International Risk Management Institute (“IRMI”) publishes several volumes on various types of insurance policies, including commercial liability, commercial property, and personal property policies. These volumes are also used widely in the insurance industry to assist claims personnel in the interpretation and application of insurance policies.

³³ JAMES J. MARKHAM ET AL., *INS. INST. OF AM., THE CLAIMS ENVIRONMENT* 12 (1993). (Markham, the director of Curriculum, General Counsel, and Ethics Counsel of the Insurance Institute of America, was previously employed by State Farm.).

³⁴ Deposition of Stephen Hinkle at 121, *Illing v. State Farm Fire and Cas. Co.*, No. 1:06 CV 513-LG-RHW (S.D. Miss. Mar. 16, 2007). Mr. Hinkle, who was responsible for consulting on State Farm claims in several southern States, testified that he actually kept a “folder that says Georgia law, Alabama law, South Carolina law, and Mississippi law.” *Id.* at 123.

³⁵ State Farm Operation Guide 75-100, entitled “Claim Interpretations-Losses Insured First Party” (on file with author).

State Farm drafted the Wind-Water Protocol, which provided guidance to State Farm claims personnel on how to apply State Farm policies to Katrina related claims.³⁶ These training materials are consistent with State Farm's requirement that one of the responsibilities of a claims representative is to "determine if the cause of that loss is covered [under] the contract."³⁷

An insurance claims handlers' obligation to interpret and apply properly insurance policy provisions is required by the National Association of Insurance Commissioners Model Unfair Claims Practices Act ("Act") and Model Unfair Claims Practices Regulations ("Regulations").³⁸ Over 45 states have adopted the Act either in its original form or in a modified form.³⁹ Likewise, many state insurance commissioners have adopted the Regulations.⁴⁰

The Act and the Regulations are two of many important sources of information for insurance industry standards for the proper handling of claims.⁴¹ The requirements set forth in the Regulations address an

³⁶ Memorandum from Stephen Hinkle, State Farm, State Farm Wind-Water Protocol (Sept. 13, 2005).

³⁷ Deposition of Mike Porterlance at 51, *Davis v. State Farm*, No. 1:06cv638-LTS-JMR (S.D. Miss. Date?); *see also* Porterlance Dep. at 116 (adjusters are expected to make a coverage determination on the loss).

³⁸ NAIC UNFAIR CLAIMS SETTLEMENT PRACTICES ACT, vol. 6, § 900-1 (2008); NAIC UNFAIR PROPERTY/CASUALTY CLAIMS SETTLEMENT PRACTICES MODEL REGULATION, vol. 6, § 902-1 (2008). Regulations or statutes which govern insurance claims handling can be used as standards against which the insurer's conduct can be measured. *Wailua Assocs. v. Aetna Cas. & Sur. Co.*, 27 F. Supp. 2d 1211, 1221 (D. Haw. 1998) (the Hawaii Supreme Court, in adopting a common law remedy for bad faith, expressed its concern that the administrative remedies provided in H.R.S. § 431:13-103(a) were inadequate to "provide sufficient incentive to insurers to perform their obligations in good faith" . . . [a]lthough H.R.S. § 431:13-103 does not provide for a private cause of action, the insurance industry should not be encouraged to commit the types of unfair practices contained therein. Therefore, the Court finds that violations of the unfair settlement provision, § 431:13-103(a), may be used as evidence to indicate bad faith." (citation omitted)). *See also* *Spray, Gould & Bowers v. Associated Int'l Ins. Co.*, 84 Cal. Rptr. 2d 552,560 (Cal. Ct. App. 1999) (where the court observed that "[t]he [Insurance] Commissioner's Regulations establish the standard of conduct for insurers in California"); *Peiffer v. State Farm Mut. Auto. Ins. Co.*, 940 P.2d 967, 971 (Colo. Ct. App. 1996) (expert permitted to testify that insurer violated provisions of the Colorado Unfair Claims Settlement Practices Act).

³⁹ NAIC UNFAIR CLAIMS SETTLEMENT PRACTICES ACT, vol. 6, § 900-1 (2008).

⁴⁰ For example, in California the Act is codified at CAL. INS. CODE § 790.03(h) (2005), and the Regulations, which have been adopted by the California State Insurance Commissioner, can be found at CAL. CODE REGS. tit. 10 § 2695.1 (2008).

⁴¹ Markham has pointed out that, "insureds are frequently permitted to introduce evidence of violations of the Model Unfair Claims Settlement Practices Act and Model Unfair Claims Settlement Practices Regulations "because the model act is a nationally

insurer's obligations when it comes to interpreting and applying insurance coverage provisions. For example, the Regulations require:

Every insurer shall disclose to a first party claimant or beneficiary, all benefits, coverage, time limits or other provisions of any insurance policy issued by that insurer that may apply to the claim presented by the claimant.⁴²

It is difficult to imagine an insurer complying with this requirement without knowing how to interpret and apply the applicable policy provisions. Similarly, the Regulations set forth detailed requirements with regard to denial letters, which would also mandate knowledge on how to interpret and apply the insurance policy.

Where an insurer denies or rejects a first party claim, in whole or in part, it shall do so in writing and shall provide to the claimant a statement listing all bases for such rejection or denial and the factual and legal bases for each reason given for such rejection or denial which is then within the insurer's knowledge. Where an insurer's denial of a first party claim, in whole or in part, is based on a specific statute, applicable law or policy provision, condition or exclusion, the written denial shall include reference thereto and provide an explanation of the application of the statute, applicable law or provision, condition or exclusion to the claim.⁴³

Many insurers have inserted the Act and Regulations into their claims manuals.⁴⁴ State Farm, in its 1997 Catastrophe Claims Manual, sets forth the Act.⁴⁵ Similarly, Farmers' Regional Claims Manual States: "In all

recommended standard of care. It was developed [by the National Association of Insurance Commissioners] as a guide for insurance regulators in every state to establish reasonable claim practices. Since the NAIC [National Association of Insurance Commissioners] is made up of insurance "experts," juries should consider their opinion of what constitutes unfair claim practices when evaluating the behavior of an insurer in a bad faith case. Thus, although the model [Unfair Claims Settlement Practices] act may not allow insureds or claimants who have been treated unfairly by an insurer to file a private action, it has been used indirectly for the benefit of many plaintiffs." MARKHAM, *supra* note 33, at 397.

⁴² CAL. CODE REGS. tit. 10 § 2695.4(a) (2008).

⁴³ CAL. CODE REGS. tit. 10 § 2695.7(b)(1) (2008).

⁴⁴ Insurers may be required to have manuals or written claims handling standards. For example, The Act required insurers to "adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies." CAL. INS. CODE § 790.03(h)(3) (2005).

⁴⁵ State Farm Catastrophe Claims Manual, P. 1.1 (on file with author).

cases, the applicable state's Unfair Claims Settlement Practices Act/Regulations take precedence over anything in this manual.⁴⁶ The principles defined are so basic to good claims practice that we adhere to them throughout our operating territory as a matter of company policy. The Unfair Claims Practices Regulations of some states are more restrictive than the Model Regulations. If that is the case, those regulations will take precedence over anything in this manual.⁴⁷

IV. THE SCOPE OF THE INSURANCE CLAIMS EXPERT'S TESTIMONY⁴⁸

Ignoring the real world of insurance claims handling, many courts have held that an insurance claims expert cannot testify on the insurer's interpretation of an insurance policy because such testimony either invades the court's province as the sole interpreter of contract provisions,⁴⁹ or is barred by rules of evidence concerning contract interpretation.⁵⁰ These two barriers to expert testimony on the meaning of insurance policies have

⁴⁶ Farmers' Regional Claims Manual (on file with author).

⁴⁷ Farmers' Regional Claims Manual, p. IV-1 (on file with author). Similarly, Farmers' Claims Representative Field Manual sets forth the same standard as in the Regional Claims Manual, and, in addition, requires that "[e]ach claims representative be thoroughly familiar with the model act and their states' specific regulations." Similar requirements are set forth in Farmers' Branch Claims Office Procedure Manual. Randy Sommers, a Farmers' claims supervisor, who was deposed in the matter of Farmers Ins. Co. of Ariz. v. Stanley Wirick, Ariz., Case No. 2004-0201, pp. 19-20 & 34, testified that the unfair claims practices act sets forth Farmers' minimum standards for claims handling.

⁴⁸ For further discussion of expert testimony in insurance bad faith cases see Joel S. Feldman et al., *Expert Witnesses in Insurance Class Actions and Individual Cases - Defense Perspective*, 2000 A.L.I.-A.B.A. COURSE OF STUDY 249 (2000).

⁴⁹ See *Devin v. United Servs. Auto. Ass'n*, 8 Cal. Rptr. 2d 263, 268 (Cal. Ct. App. 1992); *Elder v. Pac. Tel. and Tel. Co.*, 136 Cal. Rptr. 203, 210 (Cal. Ct. App. 1977) (expert opinion testimony inadmissible where the issue is one of law for the court); *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 993 P.2d 751, 762 (N.M. Ct. App. 1999) (refusing to let insurer's expert witness, an attorney, testify generally concerning insurance law in suit for breach of duty to defend); *Lone Star Steakhouse & Saloon, Inc. v. Liberty Mut. Ins. Group*, 343 F. Supp. 2d 989, 1015 (D. Kan. 2004) (excluding testimony of claims expert on whether allegations in complaint fell within policy definition of "occurrence," that insurer had no basis to apply exclusion for "expected and intended" injury, that insurer was inconsistent in its claims handling, and that insurer is barred by estoppel from denying coverage).

⁵⁰ Nonetheless, even under this limited approach to expert testimony in insurance bad faith cases, the expert may refer to facts in legal terms. *Peiffer v. State Farm Mut. Auto. Ins. Co.*, 940 P.2d 967, 971 (Colo. Ct. App. 1996).

proved either unworkable or are so fraught with exceptions as to be virtually meaningless.

A. LIMITATIONS ON EXPERT TESTIMONY IN INSURANCE CASES BASED ON CONCERN THAT TESTIMONY WILL INVADE THE COURT'S PROVINCE HAVE PROVED UNWORKABLE AND FAIL TO RECOGNIZE THE REALITY OF INSURANCE CLAIMS ADJUSTING.

The admissibility of expert testimony under the Federal Rules of Evidence, as well as the rules of evidence for many states, is governed by whether the testimony will "assist the trier of fact."⁵¹ The Federal Rules permit experts to testify on ultimate issues.⁵² While many courts have held that an expert cannot testify on legal matters, including the interpretation of insurance policies,⁵³ courts will permit experts to testify on mixed questions of law and fact.⁵⁴ Some commentators have noted that the distinction between purely legal testimony and testimony on mixed

⁵¹ FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); see *Soutiere v. Soutiere*, 657 A.2d 206, 208 (Vt. 1995).

⁵² "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704. At least one commentator has noted that, "[e]arly cases rejected expert testimony couched in terms of the ultimate issue—whether there is bad faith. These cases suggested that the testimony was inadmissible because it invades the province of the jury. Because of the latitude afforded trial courts by the Federal Rules of Evidence and similar state rules, however, this objection may be difficult to sustain today." Timothy J. Muldowney & Robert A. Zupkus, *Bad Faith Claims: The Role of the Expert*, 64 DEF. COUNS. J. 226, 231 (1997) [hereinafter Muldowney & Zupkus] (citations omitted).

⁵³ See, e.g., *Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1065 n.10 (9th Cir. 2002) ("an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law.") (emphasis omitted).

⁵⁴ See, e.g., *Nimely v. City of N.Y.*, 414 F.3d 381, 397 (2d Cir. 2005); *U.S. v. Segna*, 555 F.2d 226, 229 (9th Cir. 1977) (allowing expert testimony on defendant's sanity); *Dixon v. Jacobs*, 427 F.2d 589, 595, n.17, 600-01 (D.C. Cir. 1970) (allowing testimony on the dangerousness of a mental patient); *U.S. v. Sisson*, 294 F. Supp. 520, 522-23 (D. Mass. 1968) (noting general permissibility of expert testimony on the mixed question of patent infringement).

questions of law and fact has not been workable.⁵⁵ A lawyer can frame the question as a matter of fact in order to get admitted expert testimony which otherwise would be excluded as testimony on the law.⁵⁶

Despite the inherent problems with distinguishing between fact and legal testimony, many courts have held that expert testimony regarding the meaning of an insurance policy is admissible under the guise that such testimony is limited to insurance industry practices and not the law.⁵⁷ As one District Court noted:

The Court alone determines the legal effect and construction of the USF&G policy. But the Court was not seeking expert testimony to determine the ultimate legal issue of coverage under the policy. Instead, the Court was seeking the testimony solely to determine what general understanding, if any, the insurance industry has as to the meaning of certain provisions in USF&G's policy. While resolution of this factual question affects the legal issues involved, the factual issue of industry custom is distinct from the legal issue of construction.⁵⁸

At the very least, this approach comports, to some degree, with what actually occurs in the insurance industry. That is, the industry has adopted its own interpretation of what policy provisions mean, if not provided its claims handlers with protocols on how to interpret and apply insurance policies.⁵⁹ Despite the statement that factual issues are distinct from legal issues, it is apparent that the distinction cannot always be easily determined.

⁵⁵ Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797, 798 (1983-1984); Wilburn Brewer, *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 761 (1993-1994) [hereinafter Brewer].

⁵⁶ Brewer, *supra* note 56, at 767; *see also*, North River Ins. Co. v. Employers Reinsurance Corp., 197 F. Supp. 2d 972, 982-84 (S.D. Ohio 2002); Prof'l Consultants Ins. Co. v. Employers Reinsurance Co., 2006 WL 751244, at *21-22 (D.Vt. Mar. 8, 2006) (noting that expert opinions regarding policy meaning are admissible where opinion based on documents and depositions in the case, the course of conduct of the parties, and the experts knowledge of industry custom and practice).

⁵⁷ *See, e.g.*, U.S. Fid. & Guar. Co. v. Williams, 676 F. Supp. 123, 126 (E.D. La. 1987).

⁵⁸ *Id.* at 126 (footnote omitted).

⁵⁹ Expert testimony on the meaning of a policy provision may be particularly appropriate where the court determines that the provision is of a "specialized nature," *Playtex FP, Inc. v. Columbia Cas. Co.*, 622 A.2d 1074, 1076-77 (Del. Super. Ct. 1992).

An ample demonstration of the difficulty, if not the artificiality, of determining whether an expert opinion is based on law or fact is found in the District Court's decision in *Professional Consultants Ins. Co. v. Employers Reinsurance Co.*⁶⁰ The case presented the court with an issue of whether a reinsurance agreement limit was "an annual, or per policy, limit or a single limit for the life of the agreement."⁶¹ The insured, Professional Consultants, in its opposition to the insurer's motions for summary judgment, submitted an affidavit from Waterman, an expert on reinsurance matters, in which Waterman provided three opinions, which were challenged by the insurer as inadmissible legal conclusions. Waterman's opinions were:

1. "It is my opinion that the plain language of the 1993 Agreement stipulates emphatically that the reinsurance coverage pertains to each policy issued by PCIC that became effective after the effective date and prior to the termination date of the 1993 Agreement." (Paper 121 ¶13.)

2. "[I]t is my opinion that the 1993 Agreement affords, and in accord with reinsurance industry custom and practice should be understood to provide reinsurance indemnity for all policies issued to each insured during the period the 1993 Treaty Agreement was in effect." (Paper 121 ¶ 13.)

3. "It is also my opinion that ERC's [Employers' Reinsurance Company] argument that the dates of claim assigned to the LACERA and Raytheon claims are improper because they should have been assigned to later policy periods, which it raised for the first time in October 2003---over 5 ½ years after PCIC had first notified ERC of the claims and assigned the dates of claims---is contrary to the reinsurance custom, practice, and standards and does not conform with ERC's obligation of utmost good faith to PCIC." (Paper 121 ¶ 16.)⁶²

These would appear to be impermissible legal opinions, because they offer legal conclusions, such as whether the insurer acted in "utmost good

⁶⁰ See *Prof'l Consultants Ins. Co., No. 1:03-CV-216, 2006 WL 751244 (D.Vt. Mar. 8, 2006)*.

⁶¹ *Id.* at 2.

⁶² *Id.* at 21.

faith,” and provided an interpretation of the policy. Nonetheless, the court found the opinions admissible.

Mr. Waterman’s statements appear not to be based on case law or legal standards but rather on his knowledge of the facts of the case, his experience, and his understanding of industry custom. (Paper 121 ¶ 9) The first bulleted statement [number 1 above] . . . might be read as a legal determination that the contract is unambiguous. See *Luneau*, 750 A.2d at 1033-34 (question of whether a contract term is ambiguous is a matter of law for the court to decide). Mr. Waterman made the statement, however, in the middle of a paragraph in which he opined that if ERC intended more limited coverage, ERC would have been required by industry custom to make such restrictions explicit to PCIC. (Paper 121 ¶ 13). Insofar as the statement is intended as a factual statement concerning prevailing reinsurance practices, the statement is an admissible factual description. To the extent that it may be read as an opinion on the ultimate legal issue, it is not admissible. See *N. River Ins.*, 197 F. Supp. 2d at 982-84.⁶³

In the second and third bulleted statements [numbers two and three above] above, Mr. Waterman explicitly discusses “industry custom” as it applies to the parties here. To the extent that the statements are intended as facts concerning prevailing reinsurance customs, they are admissible as expert opinion testimony. To the extent that they may be read as opinions on the ultimate legal issues before the Court, they are not admissible. In accordance with the findings above, ERC’s motion to strike on this ground is DENIED in part and GRANTED in part.⁶⁴

The Court’s opinion is troublesome because the Court offers no guidance on how the parties are to determine what portions of the expert opinion are based on legal conclusions and what are based on industry

⁶³ In support of its position, the court cited the opinion in *North River Ins. Co. v. Employers Reinsurance Corp.*, 197 F. Supp. 2d 972 (S.D. Ohio 2002), noting that the “*North River* court excluded the testimony where the parties based their opinions on case law and legal standards, but allowed the testimony where the experts based their opinions on facts of the case, experience in the industry, and their own research of reinsurance practices.” *Prof. Consultants Ins. Co. v. Employers Reinsurance Co.*, No. 1:03-CV-216, 2006 WL 751244, at *22 (D. Vt. Mar. 8, 2006).

⁶⁴ *Id.* at 22.

standards. What if the law and industry standards are the same? The Court does not address this issue either. It would appear that to be admissible all that an expert has to do is label otherwise inadmissible legal opinions "insurance industry standards." Thus, form conquers substance.⁶⁵ Finally, nowhere do we see any evidence of industry standards. Indeed, the court concedes that "Waterman does not appear to base his testimony on any reference materials or treatises."⁶⁶

The weaknesses in the court's approach may be addressed by simply admitting that the issues addressed by the expert are both legal conclusions and opinions of insurance industry practice. Where the law and industry practice are consistent the opinion should not be disregarded.⁶⁷ The court could, therefore, make a determination of whether the opinions are consistent with the law, and where they are admit them even though they might also be legal opinions. By taking this approach the court avoids the near impossible task of dividing up the opinions into legal and non-legal opinions and provides clearer guidance to the parties on what is admissible and what is not.⁶⁸

Despite the apparent artificiality between legal conclusions and insurance industry standards, some courts have persisted in their view that the testimony of insurance claims handling experts should be limited to industry standards, even when the expert is testifying on the meaning of a policy provision. Therefore, the court in *Aetna Insurance Co. of Hartford, Conn. v. Loxahatchee Marina, Inc.*⁶⁹ held:

⁶⁵ "The prohibition of expert legal testimony often seems to be an elevation of form over substance." *Expert Legal Testimony*, *supra* note 56, at 800.

⁶⁶ Prof. Consultants Ins. Co., No. 1:03-CV-216, 2006 WL 751244, at *21 (D. Vt. Mar. 8, 2006).

⁶⁷ *North River*, 197 F. Supp. 2d at 982 (noting that where insurance industry standards and the law are the same the expert's opinion should not be disregarded).

⁶⁸ The Court should also require the expert to provide support for his or her opinions on industry practice, with citations to either texts or other materials. See *North Star Mut. Ins. Co. v. Zurich Ins. Co.*, 269 F. Supp. 2d 1140, 1148 (D. Minn. 2003) (noting that it is important that expert's opinion be "tethered to...independent authority"). Absent such supporting evidence the opinions are merely general statements of practice, which may not be admissible. See *Chateau Chamberay Homeowners Assoc. v. Assoc. Int'l. Ins. Co.*, 108 Cal. Rptr. 2d 776 (Cal. Ct. App. 2001) (holding two page conclusionary expert report on insurance company's claims handling practices inadmissible). In other words, the expert's opinion should not be based solely on the law. See *North River*, 197 F. Supp. 2d at 981 (noting that an expert opinion is inadmissible where it is based on "settled principles of indemnity law").

⁶⁹ 236 So. 2d 12 (Fla. Dist. Ct. App. 1970).

On the final question, the expert in the insurance business testified as to the customs and usages in the insurance business, types of policies, premium rates, exclusions and other matters and also answered hypothetical questions. Aetna did not question the qualification of the witness but contends his testimony invaded the province of the trial judge to interpret the insurance contract. This contention is not tenable. Obscure connotations of an insurance policy can be greatly illuminated by knowledge of custom and usage in the industry as well as the expert's knowledge of terms which take on a different hue in the specialized field than in the field of general knowledge."⁷⁰

Permitting an insurance expert to testify on the meaning of the policy based on insurance standards may comfortably avoid the legal testimony issue, but what then is the court to do when the issue is whether the insurer's coverage decision was reasonable in light of all considerations normally considered in making a coverage decision, such as case law?⁷¹ Equally troubling is whether the coverage dispute is reasonably debatable.⁷² Courts may dismiss the insured's bad faith claim if it can be shown that the insurer's position is reasonably debatable. Whether the position is reasonably debatable may depend not only on insurance industry standards, but also on applicable case law.⁷³ Finally, what are the courts to do where

⁷⁰ *Id.* at 14. See also *Travelers Indem. Co. v. Scor Reins. Co.*, 62 F.3d 74, 78 (2d Cir. 1995) (permitting testimony about reinsurance industry practice where testimony was relevant to interpret ambiguous policy provision), and *North River Ins. Co.*, 197 F. Supp. 2d at 983 (permitting an expert to construe a certification of reinsurance to the extent it "constitutes a statement of fact concerning industry custom and practice").

⁷¹ Some courts, in apparent recognition of the need to allow expert testimony of the law, have allowed "[an expert] witness to give an opinion on the ultimate issue of whether the duty of good faith and fair dealing was breached. The witness is allowed to describe industry standards and their historical basis, including a description of reported cases, statute or insurance commissioner regulations that shaped claim handling practices. Such testimony is less truncated and usually more beneficial and easily understood by jurors. It captures for the jury the complete claim universe, how standards were established, what they are and the significance of compliance or non-compliance with them." Timothy J. Muldowney & Robert A. Zupkus, *Bad Faith Claims: The Role of the Expert*, 64 DEF. COUNS. J. 226, 232 (1997).

⁷² "The mistaken [or erroneous] withholding of policy benefits, if reasonable or if based on a legitimate dispute as to the insurer's liability under California law, does not expose the insurer to bad faith liability." *Tomaselli v. Transamerica Ins. Co.*, 31 Cal. Rptr. 2d 433, 440 (Cal. Ct. App. 1994).

⁷³ See *Delgado v. Interinsurance Exch. Of Auto. Club of So. Cal.*, 59 Cal. Rptr. 3d 799, 811-13 (Cal. Ct. App. 2007) (holding that the determination of whether an insurer had

the insurer has invoked the defense of reliance on counsel? The insurer may have a defense to a bad faith claim where it can show that it obtained a coverage opinion from its counsel and reasonably relied on that opinion.⁷⁴ But how is the insurer's reasonable reliance to be determined without consideration for not only insurance industry standards, but also applicable case law.⁷⁵ In other words, the courts' formulation that expert testimony must be limited to insurance industry standards is not only artificial, but it also does not address very real issues that face the courts every day in insurance bad faith cases.

Excluding expert testimony on the law is also contrary to the widely held rule that insurance claims handling experts can testify on whether the insurer complied with or violated applicable statutory standards for claims handling.⁷⁶ If an expert can testify on statutory standards then what can be the justification for precluding the expert from testifying on applicable case law, where consideration of that case law is pivotal to determining whether the insurer acted reasonably? The same should be the case where the expert testifies with regard to the interpretation and application of insurance policies.

reasonable basis to deny a duty to defend may turn on a question of law applicable to the facts).

⁷⁴ *State Farm Mut. Auto. Ins. Co. v. Superior Court ex rel. Johnson Kinsey, Inc.*, 279 Cal. Rptr. 116, 117-18 (Cal. Ct. App. 1991) (holding good faith reliance on advice of counsel is factor in determining whether insurer acted in bad faith).

⁷⁵ *George F. Hillenbrand, Inc. v. Ins. Co. of N. Am.*, 128 Cal. Rptr. 2d 586, 608 (Cal. Ct. App. 2002) (holding reliance on counsel is not a defense if insurer did not have probable cause to file a declaratory relief action).

⁷⁶ *Hangarter v. Paul Revere Life Ins. Co.*, 236 F. Supp. 2d 1069, 1089 (N.D. Cal. 2002) ("It would be reasonable for experts in bad faith insurance practices to look to the relevant statutory and regulatory requirements in examining the reasonableness of an insurer's actions."); *Kraeger v. Nationwide Mut. Ins. Co.*, No. Civ. A. 95-7550, 1997 WL 109582, at *1 (E.D. Pa. 1997) ("[Expert] [t]estimony about how insurance claims are managed and evaluated and the statutory and regulatory standards to which insurance companies must adhere could be helpful to the jury in evaluating whether the claim in the instant case was handled in bad faith."); *Peiffer v. State Farm Mut. Auto. Ins. Co.*, 940 P.2d 967, 971 (Colo. Ct. App. 1996) ("[W]hile we agree with State Farm that an expert witness should not dictate the law that the jury should apply, an expert witness is permitted, in the trial court's discretion, to refer to the facts of the case in legal terms."); *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 134 (Tex. App. 1994) ("An expert . . . may offer his or her opinion as to a mixed question of law and fact . . ."); *accord Century Indem. Co. v. Aero-Motive Co.*, 254 F. Supp. 2d 670, 677 (W.D. Mich. 2003); and see Deposition of Stephen Hinkle, *supra* note 34.

B. PRECLUSION OF EXPERT TESTIMONY ON INSURANCE POLICY INTERPRETATION BECAUSE POLICY IS NOT AMBIGUOUS IS NO LONGER AN EFFECTIVE LIMITATION ON EXPERT TESTIMONY.

Courts are also reluctant to allow expert testimony on the meaning of contract provisions unless the court first finds that the operative contract provision is ambiguous.⁷⁷ This rule, however, is fraught with numerable exceptions. Courts have, held that it is proper to consider facts extrinsic to the contract in determining whether the contract is ambiguous.⁷⁸ Similarly, evidence of industry custom and practice is admissible even where there is no ambiguity where it is shown that the parties to the contract were presumed to have known of the practice.⁷⁹ Courts will also consider expert testimony on the purpose of insurance and the history of a particular policy even though there is no issue of ambiguity.⁸⁰ Drafting history may also be

⁷⁷ See *Twin City Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 386 F. Supp. 2d, 1272, 1277 (S.D. Fla. 2005) (“[I]ntroduction of extrinsic evidence regarding the drafting history or intent behind an insurance policy is “inappropriate and unnecessary” when the policy language is unambiguous.”) (citation omitted), *but see Prof'l Consultants Ins. Co. v. Employers Reins Co.*, No. 1:03-CV-216, 2006 WL 751244, at *20-22 (D. Vt. Mar. 8, 2006); *Tapatio Springs Builders, Inc. v. Md. Cas. Ins. Co.*, 82 F. Supp. 2d 633, 649 (W.D. Tex. 1999) (admitting testimony by insurance claims expert that an insurance policy was ambiguous); *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1217 (Cal. 2003) (holding history and purpose of pollution exclusion “may properly be used by courts as an aid to discern the meaning of disputed policy language”); *and Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.* 42 Cal. Rptr. 2d 645, 670-71 (Cal. Ct. App. 1995) (holding drafting history and similar insurance industry materials “may be of considerable assistance in determining coverage issues.”).

⁷⁸ See, e.g., *Tapatio*, 82 F. Supp. 2d at 641 (“[T]he contract may be read in the light of the surrounding circumstances to determine whether an ambiguity exists.”); *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968) (holding extrinsic evidence is relevant when it is offered to prove the meaning to which the contract language is reasonably susceptible); *Feurzeig v. Ins. Co. of the West*, 69 Cal. Rptr. 2d 629, 632-34 (Cal. Ct. App. 1997) (holding expert testimony is admissible to show that a provision of a policy is or is not ambiguous); *Imbrandtsen v. N. Branch Corp.*, 556 A.2d 81, 84 (Vt. 1988) (noting a number of courts have held “circumstances surrounding the making of the agreement, [including] the “object, nature, and subject matter of the writing,” can be considered when the court is inquiring into whether the contract is ambiguous); *and see Prof'l Consultants Ins. Co.* 2006 WL 751244, at *3 (permitting a look at circumstances surrounding the making of the agreement when inquiring into contract ambiguity).

⁷⁹ *Lambourne v. Manchester Country Props.*, 374 A.2d 122, 123-24 (Vt. 1977).

⁸⁰ *Playtex FP, Inc., v. Columbia Cas. Co.*, 622 A.2d 1074, 1077-78 (Del. Super. Ct. 1992).

considered, even in the absence of any ambiguity in the policy.⁸¹ Indeed, some courts have held that expert testimony is admissible regarding insurance industry understanding or usage to assist the court in interpreting the relevant policy provisions without any determination that the policy is ambiguous.⁸² Sometimes courts may also preclude expert testimony on the grounds that it presents impermissible evidence of a party's subjective intent,⁸³ but even then expert testimony has been admitted on what an insurer intended when it wrote the policy.⁸⁴ Given these many exceptions it would appear that the rules regarding the admissibility of extrinsic evidence are of little practical use in providing guidance on how and when expert testimony on the meaning of an insurance policy should be admitted.

⁸¹ *Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co.*, 864 F.2d 648, 651-52 (9th Cir. 1988) (relying on explanatory information contained in an ISO circular and excerpt from a Fire Casualty & Surety Bulletin about the intended scope of a standard completed operations exclusion); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 105 (D.N.J. 1990) (holding interpretation of policy language and establishment of whether policies are ambiguous, policyholder "must be allowed to explore the creation of the language and whether the intent of the drafter(s) is inconsistent with its application."); *Md. Cas. Co. v. Reeder*, 270 Cal. Rptr. 719, 723 (Cal. Ct. App. 1990) ("[T]he concomitant availability of interpretative literature is of considerable assistance in determining precisely what risks the Maryland policies cover."); *Eaton Corp. v. Aetna Cas. & Sur. Co.* No. 189068, slip op. (Ohio Ct. App. Sept. 9, 1992), reprinted in 8 MEALEYS LIT. REP. (INS.) 44, at F-1 (allowing drafting history because it might reveal admissible evidence concerning "ambiguity, meanings(s) of language, breath of coverage, intent, risks assumed and impeachment"); 1 LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION §1:15 (David L. Leitner et al. eds., 2005) ("drafting history evidence may used to (a) establish ambiguity, by demonstrating that the provision is susceptible to more than one reasonable interpretation; (b) provide extrinsic evidence to interpret the provisions; and/or (c) preclude the insurer from disputing the meaning advanced when approval for the clause was sought from the relevant regulatory authorities, irrespective of the policyholder's reliance on, or even awareness of, that meaning (so-called 'regulatory estoppel')."). *But see* *U.S. Fid. & Guar. Co., v. Treadwell Corp.*, 58 F. Supp. 2d 77, 100-101 (S.D.N.Y. 1999) (excluding drafting history because insurer did not participate in drafting of policy and because drafting history did not unambiguously support insured's position).

⁸² *Gerawan Farming Partners, Inc., v. Westchester Surplus Lines Ins. Co.*, No. CIV F 05-1186 AWI DLB, 2008 WL 80711, at *19-20 (E.D. Cal. Jan. 4, 2008).

⁸³ *Winet v. Price*, 6 Cal. Rptr. 2d 554, 558 (Cal. Ct. App. 1992) (holding uncommunicated subjective intent prior to the execution of the contract is not admissible to interpret the meaning of the contract).

⁸⁴ *U.S. Elevator Corp. v. Associated Int'l Ins. Co.*, 263 Cal. Rptr. 760, 764-65 (Cal. Ct. App. 1989) (holding testimony of insurer's underwriter may be offered to establish that a policy provision is or is not applicable to the issue before the court).

Courts may need to look elsewhere for guidance if they are to recognize the true nature of insurance claims handling and adopt an approach to expert testimony that reflects that handling.

V. EXPERT TESTIMONY IN LEGAL MALPRACTICE CASES: A MODEL FOR EXPERT TESTIMONY IN INSURANCE BAD FAITH CASES.⁸⁵

Expert testimony in legal malpractice cases offers a model for how courts may approach similar expert testimony in insurance bad faith cases. Like the legal profession, the insurance industry considers claims handling a profession.⁸⁶ Insurance claims handlers, like lawyers, are required to have extensive knowledge concerning legal matters.⁸⁷ As with the legal profession,⁸⁸ insurance claims handlers are subject to professional ethical standards.⁸⁹ Given the nature of an insurance claims handler's work, it is

⁸⁵ For further discussion of expert testimony in legal malpractice cases see Ambrosio, Michael P., and McLaughlin, Denis F., "The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases," 61 TEMP. L. REV. 1351.

⁸⁶ MARKHAM, *supra* note 33, at 373 ("As professionals, claim representatives should use their position, knowledge and expertise for the benefit of their customers. Claim representatives must have a professional attitude towards providing customer service...There are ethical obligations that arise out of the professional duties of claims representatives.").

⁸⁷ *Id.* at 389 ("Claim representatives should be expert in matters of insurance coverage, legal liability, damages and methods of repair."). Granted the scope of a claims handler's legal knowledge will be more limited than a lawyers. For example, claims handlers will need to be informed on the law concerning tort liability and damages as well as applicable contract law but not, as with a lawyer, the law of estates or tax law.

⁸⁸ See *Rogers v. Robson, Masters, Ryan, Brumund and Belom*, 392 N.E.2d 1365, 1371 (Ill. App. Ct. 1979), *aff'd*, 407 N.E.2d 47 (Ill. 1980) (Violations of rules of professional responsibility or ethical standards may be admitted as evidence or legal malpractice. The court observed: "It is true that the present action is one for malpractice and not a disciplinary proceeding, but it would be anomalous indeed to hold that professional standards of ethics are not relevant considerations in a tort action, but are in a disciplinary proceeding. Both malpractice actions and disciplinary proceedings involve conduct failing to adhere to certain minimum standards and we reject any suggestion that ethical standards are not relevant considerations."). See also Brewer, *supra* note 56, at 767; see also KATHERINE J. MCKEE, ANNOTATION, *Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Action*, 50 A.L.R.5th 301 (1997).

⁸⁹ MARKHAM, *supra* note 33, at 381-386. For example, the Society of Special Investigation Units, the National Association of Public Adjusters, and the National Association of Independent Adjusters all publish ethical standards for their members. One of the most well-known of these organizations is the American Institute of Chartered Property Casualty Underwriters ("CPCU"), which publishes a Code of Professional Ethics.

not surprising that courts have long recognized that insurance claims handlers often act in the capacity of a lawyer.⁹⁰ Insurance claims adjusters have been found to be acting as a lawyer when they complete settlement and release forms, or advise the claimant regarding the claim process.⁹¹ In such circumstances the insurance claims adjuster may be subject to the standard of care of a practicing lawyer.⁹² Further, at least one court has held that an insurer's standard of care is "analogous to the standard of care

Canon 3 of the CPCU Code contains the following ethical standards: "R3.1 In the conduct of business or professional activities, a CPCU shall not engage in any act or omission of a dishonest, deceitful, or fraudulent nature. R3.2 A CPCU shall not allow the pursuit of financial gain or other personal benefit to interfere with the exercise of sound professional judgment and skills." CODE OF THE PROFESSIONAL ETHICS OF THE AMERICAN INSTITUTE FOR CPCU, Canon 3 (2007).

⁹⁰ See, e.g., *Liberty Mut. Ins. Co. v. Jones*, 130 S.W.2d 945, 949 (Mo. 1939).

⁹¹ *Jones v. Allstate Ins. Co.*, 45 P.3d 1068, 1070 (Wash. 2002); *Blinston v. Hartford Accident and Indem. Co.*, 441 F.2d 1365, 1367 (8th Cir. 1971) (holding that the standard of care for a practicing lawyer may not apply to an insurance claims handler where the claims handler is providing his/her employer with an appraisal of the company's legal position, even though the claims handler is not a member of the bar); *Liberty Mut. Ins. Co.*, 130 S.W.2d at 961 (However, an insurance claims handler may not be engaging in the practice of law when he (1) "investigates...the facts and circumstances relating to a casualty or claim arising under a policy of casualty insurance issued by his employer, and reports to his employer the facts ascertained in such investigation"; (2) "determines for his employer the pecuniary limit which his employer will be willing to offer or pay in settlement of any claim arising under a policy of casualty insurance issued by such employer"; (3) state in his or her report to his or her employer "the opinion...given by the company's counsel on any question of liability upon any given claim"; and (4) during "the negotiation and settlement of a claim arising under a policy of casualty insurance issued by his employer, truthfully states to the claimant or claimant's representative what the company's attorney has advised."); see also Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 88 (2007) ("A majority of courts have held that one who provides legal services, regardless of whether licensed or authorized, should be held to the standard of care applicable to attorneys providing those same services.")

⁹² *Allstate Ins. Co.*, 45 P.3d at 1075 ("[W]e hold that insurance claims adjusters, when preparing and completing documents which affect the legal rights of third party claimants and when advising third parties to sign such documents, must comply with the standard of care of a practicing attorney."). See also JAMES MCLOUGHLIN, ANNOTATION, *Activities of Insurance Adjusters as Unauthorized Practice of Law*, 29 A.L.R.4th 1158 (1984) ("[T]he courts have held that adjusters for insurers who gave legal advice, made legal recommendations, appeared in court, or engaged in other activities requiring a lawyer's training or status were engaged in the unauthorized practice of law.); see also Jeffrey A. Parness, *Civil Claim Settlement Talks Involving Third Parties and Insurance Company Adjusters: When Should Lawyer Conduct Apply?*, 77 ST. JOHN'S L. REV. 603, 604-606 (2003).

owed by other professionals to their clients and [which] is elucidated by expert testimony.”⁹³

As with insurance claims handlers, expert testimony is commonly used in legal malpractice cases to establish the standard of care. Courts will require expert testimony in legal malpractice cases unless the breach of the standard is so obvious that jurors can rely upon their common knowledge to determine if there has been malpractice.⁹⁴ Expert testimony in legal malpractice cases may be limited to only factual issues, in the same way such testimony is limited in insurance bad faith cases. One commentator has noted that, “[e]xpert legal testimony is frequently permitted (and sometimes required) on the issue of the standard of care in legal malpractice actions. Even in jurisdictions which generally exclude expert testimony about the law, the testimony of legal experts about the ordinary knowledge and skill of members of the legal profession is admitted on grounds that it concerns a question of fact, not an issue of law.”⁹⁵ In some cases, however, it is practically impossible to separate a lawyer’s standard of care from the law.⁹⁶ Courts will, in certain circumstances, permit the expert to testify on legal matters.⁹⁷ In other words, to provide an opinion on the standard of care requires a discussion of the applicable law.

⁹³ See *Sullivan v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 536 (Mass. 2003) (citing to cases in which expert testimony required in legal malpractice cases); see also *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 480 (3d Cir. 1979).

⁹⁴ See, e.g., *Ankey v. Franch*, 652 A.2d 1138, 1153 (Md. Ct. Spec. App. 1995) (expert testimony was necessary to establish whether attorney’s decision, in advising client not to appeal was reasonable); *Suritz v. Kelner*, 155 So. 2d 831, 834 (Fla. Dist. Ct. App. 1963) (holding that expert testimony not required where jury alone could determine whether attorney committed malpractice).

⁹⁵ See TRIAL OBJECTIONS HANDBOOK § 8:28 (2d ed. 2001), and the cases cited therein.

⁹⁶ *Smith v. Childs*, 437 S.E.2d 500, 506 (N.C. Ct. App. 1993) (citing *HAJMM Co. v. House of Raeford Farms, Inc.*, 403 S.E.2d 483, 488 (N.C. 1991)) (“When the expert witness is an expert legal witness, the voidance of testimony regarding legal conclusions can be problematical since attorneys deal with legal terms of art on a daily basis.”). *Expert Legal Testimony*, *supra* note 56, at 799 (It is evident that “courts have had great trouble parsing the legal and factual elements in attorney malpractice cases.”).

⁹⁷ In *Mazer v. Sec. Ins. Group*, 368 F. Supp. 418, 422 n.4 (E.D. Pa. 1973) *aff’d.*, 507 F.2d 1338 (3d Cir. 1975), the court said that the general rule “that a witness will not be permitted to give an opinion as to the ultimate fact in issue...is not followed where the matters involved are beyond the knowledge of ordinary laymen” and it made “no difference that this was being tried by a judge without a jury” since, “[o]bviously, not all judges are experts in all tactical matters which may pertain to all lawsuits.” See also MICHAEL A. DISABATINO, ANNOTATION, *Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney*, 14 A.L.R.4th 171

Similarly, expert testimony regarding the reasonableness of an insurance claims handler's conduct will often involve not only purely factual issues, but also mixed questions of law and fact, as well as purely legal matters. The latter situation may arise where the issue is whether the insurance claims handler properly interpreted and applied an insurance policy provision to the facts of a particular case.⁹⁸ In such cases a coverage decision could not be reached without consideration of the insurance industry standards and publications regarding the policy provision at issue, as well as applicable case law. Therefore, the claims handler may be asked not only whether he/she considered insurance industry standards and publications but also whether they considered the applicable case law, or whether they sought the advice of counsel on the coverage issue, and if so, whether they independently reviewed and evaluated that advice.⁹⁹ Such an independent review may involve determining whether all the applicable case law has been considered and properly evaluated. In other words, as with the legal professional, the claims professional's conduct in a given case must consider the applicable case law.

Where the claims professional's conduct is inseparable from the law it would be appropriate to allow expert testimony on whether the claims handler reasonably evaluated the coverage issue, not just in light of applicable insurance industry standards, but also considering the applicable case law. Any concern that the expert's opinions may be contrary to the law can be addressed by the court hearing the expert's testimony before it is heard by the jury.¹⁰⁰ Further, the court can require that the expert's

(1982); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100-101 (1st Cir. 1997) (expert testimony on the law in legal malpractice cases may be admissible in some cases); *Sharp v. Coopers & Lybrand*, 457 F. Supp. 879 (E.D. Pa. 1978), *aff'd in part*, 649 F.2d 175 (3d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982) (law professor permitted to testify about tax consequences of an oil drilling venture and about the meaning of the relevant code provision).

⁹⁸ See *WINDT*, *supra* note 15, § 9:26A ("Case Law can, in many circumstances, constitute evidence that the insurer's policy interpretation or understanding of its rights/obligations was reasonable.").

⁹⁹ See *Klinger v. State Farm Mut. Auto. Ins. Co.*, 895 F. Supp. 709, 712 (M.D. Pa. 1995) (testimony regarding the insurer's reliance of counsel is admissible). Of course, a review of the case law discussing the operative policy provision would be circumscribed by other standards applicable to insurance claims handling, such as the insurer's duty to resolve any coverage doubts in favor of the policyholder. See *POPOW*, *supra* note 18, at § 5.34.

¹⁰⁰ *Expert Legal Testimony*, *supra* note 56, at 813 (Court can prescreen proffered expert testimony to determine if testimony on the law is warranted, and if such testimony will conflict with the court's instructions); see *BREWER*, *supra* note 56, at 761 ("[C]ommentators have suggested that the trial judge should first hear the testimony outside

opinions not be based solely on the law, but also be grounded in insurance industry practices and standards.

VI. CONCLUSION

The traditional rules limiting the admissibility of expert testimony on insurance policy interpretation have proved to be either unworkable or are fraught with so many exceptions so as to make them of doubtful use. No longer do courts rigorously adhere to their prior refusal to hear expert testimony on policy interpretation unless the court first finds that the operative policy terms are ambiguous. Rather, courts have shown an increasing willingness to consider a wide range of evidence on the meaning of policy terms, including insurance industry publications and drafting history materials, even where there is no determination that the policy is ambiguous. Similarly, many courts have virtually abandoned the age-old requirement that expert testimony should not be admitted on the law because it invades the province of the court. Courts have achieved this result by agreeing to hear expert testimony on policy interpretation as long as it couched in terms of insurance industry practices and standards, even though that same testimony may, for all practical purposes, be nothing more than the otherwise prohibited testimony on the law.¹⁰¹

The historic limitations on expert testimony concerning insurance policy interpretation also fail to recognize the reality of insurance claims handling. Insurance claims handlers are commonly trained in the interpretation of insurance policy provisions. Those same claim handlers have access to a wide range of insurance industry publications and materials that provide further guidance on insurance policy interpretation. The claims handlers' training includes training on the applicable insurance law. Indeed, claims handlers are expected to know the case law that may be applicable to the interpretation of policies.

In revisiting the traditional limitations on expert testimony in insurance bad faith cases the courts may gain guidance from decisions in legal

the presence of the jury to determine whether the expert's legal premises are compatible with the anticipated jury instructions and then admit only that part of the testimony that the court finds to be in harmony with its view of the law.").

¹⁰¹ This is not to suggest that there are no insurance industry standards on the interpretation of policy terms generally and with regard to specific policy terms. That is obviously not the case. (See discussion, *supra*, pp. 6-13) Such evidence of insurance industry standards concerning policy interpretation has an equal place in the evaluation of an insurer's conduct as does the case law.

malpractice cases. Courts have recognized that expert testimony on the standard of care in legal malpractice cases must, in certain cases, include reference to the law. Indeed, without consideration of the applicable law it may not be possible to determine the standard of care for a lawyer in a particular specialty or case.

It is appropriate to apply the standards for expert testimony in legal malpractice cases to expert testimony on the interpretation of insurance policies. There are many similarities between the legal and claims handling professions. One important similarity is that, within their respective realms, the members of each profession are called upon to consider applicable case law when they make important decisions. Accordingly, in determining whether an insurer has properly applied its insurance policy to a given set of facts the trier of fact should take into account whether the insurer properly considered that relevant case law in its coverage decision. In addition, at the least, the courts should also permit testimony on insurance industry standards concerning the interpretation of policy provisions. Such testimony will assist the court and the trier of fact in not only better understanding, and therefore interpreting, the operative policy provision, but also in determining whether the insurer acted in bad faith when it applied the policy provision to the facts of the claim.

Concerns that expert testimony on insurance industry standards and case law concerning the interpretation of policy provisions will invade the province of the court can be addressed by the court hearing, outside the jury, and the proffered expert testimony in order to determine whether the testimony will be in accord with the court's instructions to the jury.

Permitting expert testimony on the interpretation of insurance policy provisions in both breach of contract and bad faith actions will permit the trier of fact to hear a broader range of relevant evidence and, thereby, be better informed on the meaning and application of the operative policy provision. Such expert testimony will provide for a more informed judiciary when it comes to the interpretation and application of insurance policy provisions.

