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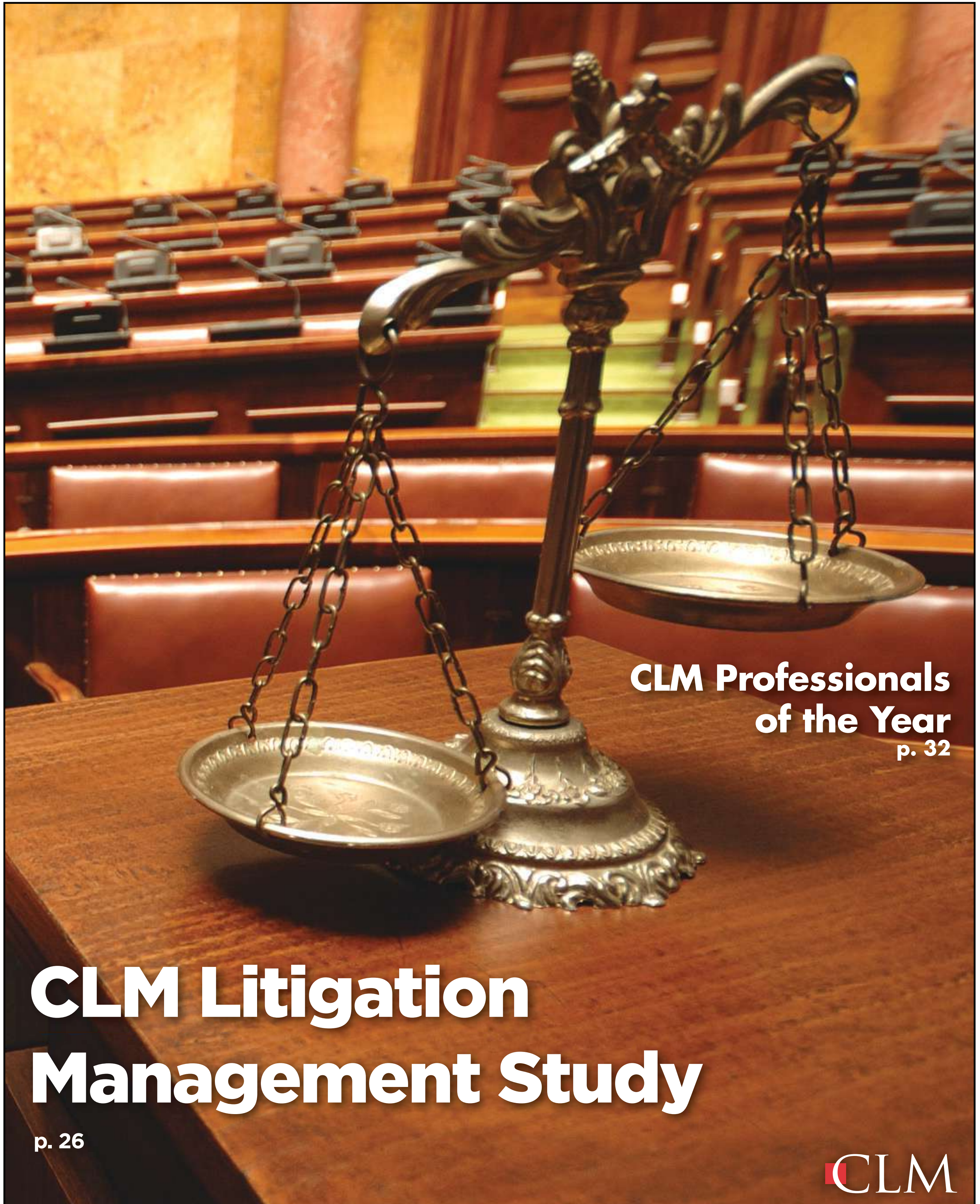

"Judge, We're Not Offering Testimony on the Law!"

Use of Experts in Extra-Contractual Litigation

By Jose "JJ" Trevino, Jr. and R. Wade Vandiver

Across your desk comes a new lawsuit alleging bad faith in the handling of a property damage insurance claim allegedly arising out of a recent catastrophic wind/hail storm. Even though the insured made no objection for a year after the settlement of the property damage claim, you now have received a notice and demand letter from plaintiff's counsel who states that the insured has suffered property damages significantly higher than the settlement.

Plaintiff's counsel alleges that the insurer not only has breached the contract of insurance, but committed acts of bad faith including breaches of common law and insurance-related statutes. How is your expert going to articulate that the insurer's conduct in handling the claim did not violate the law without running afoul of the long-standing prohibition from telling the jury what result to reach or, even worse, from objection on the basis that your expert was offering legal conclusions?

Using Experts

Effectively using an expert in a lawsuit involving allegations of bad faith can be challenging. There is a fine line between the expert's testimony being excluded by the court as an impermissible legal conclusion or admitted on the basis that the expert's opinion is a proper analysis of the law to the facts of the case that was adequately supported by the expert's reliance upon industry standard.

In the course of analysis, the following issues are important when considering the type of expert witness potentially needed in addressing insurance coverage, claims handling, and extra-contractual issues:

- Does the complaint state a breach of contract cause of action? If so, what are the precise allegations in which the insurer allegedly breached the contract?
- Does it state breaches of common law duties, i.e. bad faith allegations pertaining to how the underlying claim was handled?
- Does it state breaches of statute regulating the settlement or payment of the claim?

Defending an extra-contractual claim will, more often than not, require the use of a liability expert to testify regarding the insurer's conduct in handling of the underlying claim. So, let us examine the general rules, emanating from the Federal Rules of Evidence, concerning the ability of an expert witness to offer testimony in issues relating to contractual and extra-contractual breaches. Federal Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

a. the expert's…technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

b. the testimony is based on sufficient facts or data;

c. the testimony is the product of reliable principles and methods; and

d. the expert has reliably applied the principles and methods to the facts of the case.

Also, remember Federal Rule 704, which allows opinions that embrace "an ultimate issue in the case." While courts uniformly disallow expert testimony on what the law is, how a particular law should be construed, or the legal effect of the terms contained in an insurance policy, courts usually allow a qualified expert to offer opinions concerning insurance industry practices as they apply to issues of contractual and extra-contractual liability. The challenge involves the preparation of the expert to walk this tightrope.

Walking the Tightrope

All first-party claims begin with an analysis of the contractual issues involved. Beyond inquiring into the basics (was the policy in force, is the claimant an insured under the policy, etc.), in a first-party claim, like a wind/hail storm claim, an important issue involves whether the damages alleged are covered damages under the policy, i.e., is there contractual coverage for the damages claimed? One may believe that such an analysis involves only an analysis of the law, and hence, an expert who also evaluates such an issue will be offering testimony on the law.

But what about expert testimony regarding the extra-contractual allegations? If the expert is not properly prepared, the result could be a motion to strike on the basis that your expert is impermissibly offering a legal conclusion. Walking the tightrope is explaining that such testimony is not purely on the law. Rather, the expert's testimony must refer generally to the applicable law and provide the factual basis that supports the expert's conclusions regarding an ultimate issue to be decided by the jury.

The expert should rely upon ordinary industry practices and customs, and evaluate those practices against the standards of ordinary practice in the insurance industry by testifying about standard industry practice and whether the insured's conduct involved met that standard of practice. The expert, however, may not tell the jury what result to reach, or go beyond a point where an expression of opinion would require the expert to pass upon the weight or credibility of the evidence.

Making it across the tightrope is not always easy to navigate. In the case of *Employers Reinsurance Corp. v. Mid-Continent*, a Kansas Federal District Court explained that an expert's conclusions as to whether a reinsurer's conduct amounted to a breach of the duty of good faith constituted an impermissible attempt to apply the law to the facts of the case to form a legal conclusion. In attempting to testify that the reinsurer breached the duty of good faith and fair dealing, the reinsured's expert's testimony was excluded, as follows:

"This is a frivolous and unfounded refusal by [the reinsurer] to honor the reinsured's claims. [The reinsurer's] pattern of utter disregard for its reinsured…is antithetical to all basic precepts of utmost good faith fundamental to the reinsurance industry. The conduct of [the reinsurer] has been unreasonable and unfair and constitutes bad faith owing to its violation of the duty of utmost good faith and fair dealing in its performance in dealing with [the reinsured's] reinsurance claim."

Yet, the court overruled other objections to the expert's testimony stating that if the reinsurance agreement was found to be ambiguous (an issue that the Court did not address in the Motion to Strike the expert's testimony), evidence of facts and circumstances that demonstrate the parties' intent is admissible and a mixed question of law and fact for the jury to determine under proper instructions. In its ruling, the Court found that the expert's opinions may be relevant to the meaning of the contract "in light of insurance industry custom and practice."

Expert Opinion

The issue was also explained in a case that involved alleged bad faith in the handling of a claim for uninsured motorist benefits. In Furr v. State Farm Mutual Auto Insurance Co., the Plaintiff's bad faith expert was attempting to offer an opinion regarding the handling of the underlying claim, but the insurer objected to the expert on the basis that the expert was not qualified to give an expert opinion with regard to whether the insurer acted "reasonably." The court, in finding that the testimony related to either matters beyond the knowledge or experience possessed by laypersons or dispelled a misconception common among laypersons, explained:

In his testimony, [plaintiff's "bad faith" expert] explained casualty insurance, uninsured motorist insurance, reserves, "bad faith" claims, the Ohio Administrative Code, how claims are processed and investigated, and an insurance company's duty to its insured. After being given a factual scenario of the case, [he] testified that the claim was handled in a manner well below the appropriate standards of care and that there was no reasonable justification for the delay.

As the old saying goes, "one must be preparado, not desperado." Early evaluation and analysis of the claim, while working closely with experts regarding what the testimony can and cannot be makes the difference between walking the tightrope or falling off. The key is keeping the expert focused on the facts and generating an opinion regarding whether facts reflect compliance with industry standards.

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