The Hon. James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff, v. KAREN ULBRICHT, et al., Defendants.	No. 2:20-cv-0369-JLR **SECOND AMENDED COMPLAINT FOR INSURANCE BAD FAITH DAMAGES** **JURY TRIAL DEMANDED**
KAREN ULBRICHT, individually and as the personal representative of THE ESTATE OF ROBERT ULBRICHT, and HEIDE L. ULBRICHT; and ROBERT S. ULBRICHT, collectively as assignees of the right of P.M. Northwest, Inc.; and P.M. NORTHWEST, INC., a Washington corporation, Plaintiffs, v. UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant.	No. 2:20-CV-00617-JLR
UNITED STATES FIDELITY AND GUARANTY COMPANY, Third Party Plaintiff, v. PM NORTHWEST, INC., et al. Third Party Defendants.	

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Plaintiffs Karen Ulbricht, individually and as the personal representative of the Estate of Robert Ulbricht and Heide L. Ulbricht and Robert S. Ulbricht, as assignees of the right of P.M. Northwest, Inc. ("PM Northwest"), and PM Northwest individually submit the following Complaint and allege as follows:

I. PARTIES

1.1. Karen Ulbricht, Heide L. Ulbricht and Robert S. Ulbricht, collectively ("Ulbrichts") are residents of and domiciled in Snohomish County, and citizens of the State of Washington.

1.2. P.M. Northwest is a Washington corporation, with is principal place of business in Ferndale, Washington.

1.3. United States Fidelity and Guaranty Company ("Travelers") is a Connecticut corporation with its principal place of business in Hartford, Connecticut.

II. VENUE AND JURISDICTION

2.1. This Court has subject matter jurisdiction under 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs.

2.2. Venue is proper in this Court under 28 U.S.C. § 1391 because a substantial number of the events or omissions giving rise to the claims occurred in the Western District of Washington.

III. FACTS

The Policies

3.1. Travelers issued five Commercial General Liability ("CGL") insurance policies to Named Insured PM Northwest with combined policy periods spanning from March 31, 1977 to March 31, 1982.

Policy No.	Policy Period	Liability Limits
1 CC A56045	March 31, 1977 to March 31, 1978	$500,000.00
1 CC B12875	March 31, 1978 to March 31, 1979	$500,000.00
1 CCC 70507	March 31, 1979 to March 31, 1980	$500,000.00

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1 CCD 17906	March 31, 1980 to March 31, 1981	$500,000.00
MP 50769	March 31, 1981 to March 31, 1982	$500,000.00

3.2. Under each of the above listed CGL insurance policies, Travelers owed a duty to defend PM Northwest from any claims for bodily injury occurring within each policy period.

The Underlying Action

3.3. Robert Ulbricht was diagnosed with mesothelioma—a terminal cancer of the lining of the lungs caused by asbestos exposure—in November 2017.

3.4 On January 24, 2018, the Ulbricht family filed a personal injury and loss of consortium claim, captioned *Ulbricht et al., v. CBS Corp. et al.*, No. 18-2-02146-4 SEA in the Superior Court for King County, Washington, against 18 defendants, including PM Northwest ("Underlying Action").

3.5. The Underlying Action alleged that Mr. Ulbricht's mesothelioma was caused by exposure to asbestos while working at the Texaco oil refinery in Anacortes, Washington, beginning in 1973 through the 1980s.

3.6. On February 27, 2018, the Underlying Action was set for an expedited trial for August 6, 2018 based on Mr. Ulbricht's terminal diagnosis.

3.7. During Mr. Ulbricht's deposition, he testified that from the early 1970s through the 1980s, he frequently worked near PM Northwest contractors removing and installing asbestos laden insulation.

3.8. On March 27, 2018, PM Northwest notified Travelers of the Underlying Action and requested a defense and indemnity. Travelers responded on April 5, 2018 stating that it had no records and requested more information, which PM Northwest provided the same day.

3.9. On July 9, 2018, PM Northwest located five Certificates of Insurance on file with the Department of Labor and Industries, Contractors Registration Section, identifying Travelers' predecessors as having five annual CGL policies of insurance in effect from March 31, 1977 to March 31, 1982 which included liability coverage in effect during the years of Mr. Ulbricht's claimed asbestos exposure.

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3.10. On July 9, 2018, PM Northwest tendered these certificates of insurance to Travelers via email:

> Our lawyer just found our old policies. We actually did have one from 3/31/77-3/31/78 with [Travelers]. The policy number is 1 CCA56045. We need to get a claim opened ASAP. Trial date is set for 8/6/18 and mediation of 7/18/18. We are being represented by David Shaw at William Kastner his office phone is 206-628-6621 and cell phone is [REDACTED].
>
> Please tell me what else I need to send to get this going and if need to contact someone else.

3.11. On July 10, 2018, Travelers responded requesting that the certificates be scanned in for "any documents, claimant, insured, full contact information for all parties involved, etc."

3.12. That same day, PM Northwest replied, this time attaching all five certificates of insurance:

> I attached all 5 insurance policies I have for [Travelers] from 1977-1982 and the original complaint we were served and the amended. I have a couple of other documents for it but I think this should be what you need to open it. Our attorney has all the documents so if more are needed he might be the one to contact . . . .

3.13. On July 11, 2018, Travelers alleges that it began searching for the insurance policies corresponding to the five certificates provided.

3.14. On July 16, 2018, Travelers responded to a voicemail previously left by PM Northwest:

> Thank you for the voicemail message about the demand for the mediation. You can forward it to me at this email address.
>
> As previously indicated, we are currently trying to locate copies of the policies you have provided some information to. To date, we have not received anything back. Pending the outcome of our coverage and policy investigation, PM Northwest should continue to protect its own interests with regards to any court imposed deadlines or resolution of the referenced matter.
>
> Pending further review of this matter, Travelers fully reserves its rights . . . .

3.15. On July 18, 2018, Travelers' search request responded, "Search Opus Filenet and APT Nothing found Searching policy number and insured name to: "nothing found."

3.16. On July 18, 2018, a mediation was held for the Underlying Action.

3.17. During the mediation, counsel for PM Northwest contacted Travelers and again

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was told that it had not located any insurance policies and that it was PM Northwest's responsibility to prove that coverage existed.

3.18. On July 30, 2018, PM Northwest followed-up again asking Travelers "[a]nything on our Policies yet??".

3.19. On August 1, 2018, still without a determination from Travelers, counsel for PM Northwest met with the Ulbrichts' counsel to discuss the possibility of resolving the Underlying Action without trial.

3.20. During that meeting, the Ulbrichts' counsel proposed the idea of a consent judgment of $4,500,000.

3.21. The next day, August 2, 2018, PM Northwest again contacted Travelers to inquire if a decision had been made on insurance coverage but did not receive any response.

3.22. Since trial was set to begin on Monday, August 6, 2018, and because Travelers was still refusing to provide a defense or indemnity to PM Northwest, counsel for PM Northwest presented the consent judgment to his client.

3.23. On August 2, 2018, the Ulbrichts and PM Northwest executed an agreement to settle the Underlying Action.

3.24. On August 3, 2018, the stipulated judgment for $4,500,000 was entered and filed.

3.25. On August 9, 2018, Travelers notified PM Northwest that it is "still trying to locate any potentially applicable policies," and asked if trial had started. Travelers again reminded PM Northwest to "continue to protect its own interests."

3.26. In September of 2018, the Ulbrichts filed their motion to determine reasonableness of the $4,500,000 judgment and Travelers subsequently intervened to contest the reasonableness of the amount.

3.27. On November 9, 2018, Travelers notified the Ulbrichts that it had "located information that policy number 1 CCC 70507 (1979-80) was issued" and "also located secondary evidence regarding policies numbered 1 CC B12875 (1978-79) and 1CCD 17906 (1980-81)."

3.28. However, it also noted that it had "not located any documents or information for policy 1 CC A56045 (1977-78) or MP 50769 (1981-82)."

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3.29. On November 29, 2018, Plaintiffs sent written notice to Travelers and the Washington Insurance Commissioner of the bases for this claim (IFCA Notice), and Travelers has still failed to resolve those bases.

3.30. On December 26, 2018, King County Superior Court Judge Veronica Alicea-Galvan found that the "Covenant Judgment entered by the Plaintiffs and PM Northwest in the amount of $4,500,000 on August 3, 2018 was reasonable."

3.31. On January 22, 2019, Travelers filed a Notice of Appeal appealing the trial court's determination of reasonableness.

3.32. While Travelers was continuing its appeal from the Superior Court's December 26, 2018 Order, on May 1, 2019, Travelers sent a letter to the Ulbrichts' counsel enclosing a check of $2,500,000 stating:

> Travelers maintains its position that the settlement reached between PM Northwest Inc. and Mr. Ulbricht was not reasonable and is moving forward with its appeal of the court's decision regarding reasonableness. Travelers also maintains its position that it is PM Northwest's burden to establish the existence, terms and conditions of any policies allegedly issued by [Travelers]. PM Northwest has not done so.
>
> Notwithstanding the foregoing, Travelers is tendering the total potential limits available for all of the policies (listed on Exhibit A hereto) that are alleged to have been issued to PM Northwest by [Travelers].
>
> Travelers payment is without waiver of its right to contest the issuance, terms and conditions of all of the policies issued or allegedly issued to PM Northwest by [Travelers], or the reasonableness of the settlement between PM Northwest and your clients.

3.33. On February 10, 2020, the Washington Court of Appeals affirmed the trial court's determination of reasonableness.

3.34. On February 12, 2020, Plaintiffs sent written notice to Travelers and the Washington Insurance Commissioner of the bases for this claim (IFCA Notice), and Travelers has still failed to resolve those bases.

3.35. On February 28, 2020, Travelers filed a Motion for Reconsideration of the Court of Appeals' Order which was denied on March 20, 2020.

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3.36. On April 17, 2020 Travelers filed a Petition for Review to the Supreme Court of the State of Washington.

IV. BREACH OF CONTRACTUAL DUTY TO DEFEND AND INDEMNIFY

4.1. Under the Policies referenced above in paragraphs 3.1 and 3.2, Travelers owed PM Northwest a contractual duty to defend and indemnify it against the Underlying Action.

4.2. Travelers' denial of coverage and refusal to defend and/or indemnify PM Northwest was a breach of the Policies, which has caused PM Northwest to be damaged in an amount to be proven at trial, but in any event in excess of $75,000, exclusive of interest and costs for damages. PM Northwest's damages include (1) the unpaid amount of the Judgment against PM Northwest up to its policy limits, (2) all post judgment interest that accrues until Travelers pays all of its policy limits, (3) reasonable attorney's fees and litigation costs it has incurred to obtain coverage under the Policies ("*Olympic Steamship* damages"), and (4) such other damages as are proven.

V. BAD FAITH DENIAL OF COVERAGE WITHOUT A REASONABLE INVESTIGATION

5.1. Under Washington Law, and insurer must conduct a reasonable, and full and fair investigation of a claim before denying coverage. WAC 284-30-330(4); *Coventry v. American States Ins. Co.*, 136 Wn. 2d 269, 281 (1998).

5.2 Travelers failed to fully and fairly investigate whether it had issued the five CGL insurance policies reflected in the Certificates of Insurance received by Travelers on July 10, 2018.

5.3. Travelers failed to investigate whether the Certificates: (1) were signed by a "Producing Agent" for Travelers; (2) were filed with the Washington State Department of Labor and Industry, Contractors Registration Section as a representation of insurance policies in place for PM Northwest; and (3) conceivably constituted secondary evidence of five CGL insurance policies issued by Travelers to Named Insured PM Northwest between March 31, 1977 and March 31, 1982.

5.4. By refusing to defend PM Northwest, Travelers violated WAC 284-30-330(4) and

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its common law duty to act in good faith which caused damages in an amount to be proven at trial, including, at a minimum, the amount of the Consent Judgment, plus post-judgment interest that has accrued on the Judgment.

5.5. Travelers' denial of coverage without first conducting a reasonable investigation constitutes bad faith conduct which results in a rebuttable presumption of harm to support the remedy of coverage by estoppel under *Safeco Ins. Co. of Am. v. Butler,* 118 Wn. 2d 383 (1992).

V. VIOLATION OF INSURER'S ENHANCED OBLIGATION OF FAIRNESS TOWARDS ITS INSURED

6.1. On July 9 and 10, 2018, PM Northwest sent Travelers copies of Certificates of CGL insurance policies in force March 31, 1977-1982.

6.2. These Certificates of Insurance constitute factual evidence conceivably establishing that PM Northwest was the named insured under the CGL policies corresponding to the Travelers' policies listed in the Certificates.

6.3. These Certificates of Insurance constituted evidence that Travelers conceivably owed PM Northwest policy benefits, including a duty to defend in the Underlying Action.

6.4. Thus, as late as July 10, 2018, Travelers had received evidence of its putative agent's representations that PM Northwest had at least five CGL policies in force between March 31, 1977 and March 31, 1982.

6.5. Despite having received the Certificates indicating the existence of the five CGL insurance policies, Travelers refused to give the interests of PM Northwest equal consideration to its own interest in deciding whether to provide PM Northwest with a defense under a reservation of rights until the existence and terms of the referenced policies could be determined.

6.6. Travelers ignored the evidence in its possession and erroneously and self-servingly concluded without any consideration of the interests of PM Northwest, its putative insured, that under the law of Washington it owed no duty to a putative Named Insured such as PM Northwest unless and until that putative insured was able to prove, to Travelers' subjective satisfaction, that it was an insured under alleged Travelers' policies.

6.7. Travelers ignored the reasonable interpretation of the facts and law that would

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have established that it had a duty to defend PM Northwest and instead chose to embrace the self-serving position that the five certificates were not even conceivably evidence that would establish the fact that it had issued one or more policies that owed PM Northwest a duty to defend.

6.8. By doing this, Travelers has breached its enhanced duty of fairness towards PM Northwest by failing to give equal consideration to the insured's interests as its own by resolving unresolved factual and legal issues in its own favor. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010); *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 400 P.3d 1234 (2017).

6.9 Travelers further breached its enhanced duty of good faith towards PM Northwest on May 1, 2019, by misrepresenting its "total potential limits available for all of the policies" and in its later assertion of a condition on the Ulbricht's acceptance of the $2.5 Million check that "Should the Court of Appeals reverse the trial court and find the $4.5 million stipulated settlement unreasonable and it the amount ultimately found reasonable is less than $2.5 million, USF&G will seek to recover any over payment."

6.10. Plaintiffs have been harmed by Travelers breaches of duties of good faith alleged above, in an amount to be proven at trial, and further Plaintiffs have been prejudiced, which results in a rebuttable presumption of harm to support the remedy of coverage by estoppel under *Safeco Ins. Co. of Am. v. Butler,* 118 Wn. 2d 383 (1992).

VII. VIOLATION OF INSURANCE FAIR CONDUCT ACT

7.1. Travelers unreasonably denied PM Northwest a defense, one of the important insurance policy benefits, without first conducting a full and fair investigation. This caused PM Northwest to sustain as actual damages the $4,500,000 Judgment. Further, Travelers unreasonably failed to pay all post judgment interest accruing on the Judgment, which is another important insurance policy benefit, and was actual damages resulting by Travelers' unreasonable breach of its insurance contract. On May 1, 2019 Travelers also misrepresented "the total potential limits available for all of the policies (listed on Exhibit A hereto)" and further failed to clearly disclose in writing that it may require reimbursement if the appeal reversed the ruling that the settlement

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was reasonable.

7.2. Travelers, in its handling of the PM Northwest claim, violated WAC 284-30-330(1) and (4) and WAC 284-30-350 (1) and (7).

7.3. Plaintiffs are entitled by these breaches under RCW 48.30.015 to recover the actual damages PM Northwest sustained (including the full amount of the Judgment), together with the costs of the action, including reasonable attorneys' fees and litigation costs, and to have the total damages increased up to three times the actual damages.

7.4. Plaintiffs have provided written notice to Travelers and the insurance commissioner on November 29, 2018 and on February 12, 2020 of these bases for this claim, and Travelers has failed to resolve those bases within 20 days of receipt of either notice.

VIII. VIOLATION OF WASHINGTON CONSUMER PROTECTION ACT

8.1. Travelers violated the Washington Consumer Protection Act (RCW 19.86) by violating WAC 284-30-330(4) by denying PM Northwest's claim without first conducting a full and fair investigation. Further, Travelers violated the Washington Consumer Protection Act (RCW 19.86) by violating WAC 284-30-330(1) and WAC 284-30-350 (1) and (7) by misrepresenting the terms of its insurance policies when it stated on May 1, 2019 that "the total potential limits available for all of the policies (listed on Exhibit A hereto)" and further by failing to clearly disclose in writing that it may require reimbursement if the appeal reversed the ruling that the settlement was reasonable.

8.2 Travelers' conduct constituted an unfair or deceptive act or practice that occurred in the conduct of Travelers' trade or commerce and that affects the public interest. PM Northwest was injured in its business or property by this conduct, and Travelers' conduct was a proximate cause of that injury. Plaintiffs are entitled to recover the actual damages PM Northwest sustained, together with the costs of the suit, including a reasonable attorney's fee, and that award may be increased up to an amount not to exceed three times the actual damages sustained, provided that such increased damage award may not exceed $25,000.

IX. JURY DEMAND

9.1 Pursuant to Rules 38 and 39 of the Federal Rules of Civil Procedure, Plaintiffs

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demand that a jury determine all issues triable by jury, including the amount of enhanced damages under the Washington Insurance Fair Conduct Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays for judgment against Travelers as follows:

10.1 An award of Judgment to Plaintiffs for the amount of their damages proven at trial for Travelers' breach of its contract;

10.2 An award of Judgment to Plaintiffs for the amount of their damages proven at trial for Travelers' bad faith conduct;

10.3. An award against Travelers under RCW 48.30.015 of all of the damages PM Northwest sustained, together with the costs of the action, including reasonable attorneys' fees, and litigation costs, and an increase of the total damages award up to three times the actual damages;

10.4. An award against Travelers under RCW 19.86.090 of all of the actual damages PM Northwest has sustained, together with the costs of the suit, including a reasonable attorney's fee, and an increase of that award to an amount not to exceed three times the actual damages sustained, providing that such increased damage award may not exceed $25,000.

10.5. An award of Plaintiffs' reasonable attorney's fees and litigation costs under the *Olympic Steamship* doctrine; and

10.6. Such other relief as the Court deems just and proper.

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DATED this 3rd day of November, 2020.

By: *s/Richard Dykstra*
Richard Dykstra, WSBA# 5114

By: *s/ Alexander E. Ackel*
Alexander E Ackel, WSBA# 52073

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Attorneys for Ulbrichts and PM Northwest Inc.

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this 3rd day of November 2020, I caused a copy of the foregoing to be served on the counsel for the parties via the court's e-filing system.

s/Nori Skretta
Nori Skretta, Paralegal

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2021 WL 8269498 (W.D.Wash.) (Expert Report and Affidavit)
United States District Court, W.D. Washington.

UNITED STAES FIDELITY and GUARANTY COMPANY, Plaintiff,

v.

Karen ULBRICHT, et al, Defendants;

Karent Ulbricht, et al., Plaintiffs,

v.

United States Fidelity and Guaranty Company, Defendants;

United States Fideilty and Guaranty Company, Third-Party Plaintiff,

v.

Allianz Insurance Company, et al., Third-Party Defendants.

No. 20CV00369.
August 27, 2021.

Expert Report of Charles M. Miller

Name of Expert: Charles M. Miller, Esq.
Area of Expertise: Legal & Insurance >> Insurance Practices & Standards
Area of Expertise: Legal & Insurance >> Legal Experts
Representing: Defendant
Jurisdiction: W.D.Wash.

TABLE OF CONTENTS

I. INTRODUCTION

1. I have been retained by Karen Ulbricht, individually and as the personal representative of The Estate of Robert Ulbricht; and Heidi Ulbricht and Robert S. Ulbricht, collectively as assignees of the right of P.M. Northwest, Inc., a Washington corporation; and P.M. Northwest to provide my expert opinion on whether United States Fidelity and Guaranty Company (hereinafter, "USF&G") [1] complied with the practices and standards in the insurance industry for claims handling in its handling of P.M. Northwest's claim, which is the subject of this action. I have also been asked to provide my opinion on the insurance industry standards for the application and interpretation of insurance policy provisions, such as those involved in this matter, and on the application of those standards to this case. The opinions herein are offered to a reasonable degree of professional certainty.

[1] Because Travelers merged with St. Paul and USF&G before the P.M. Northwest claim was submitted and handled, and because that Travelers claims office handled the P.M. Northwest claim, Travelers and USF&G are used interchangeably herein.

2. A copy of my CV is attached hereto as Exhibit A. My hourly rate is $525, except for deposition and trial, where it is $575 an hour.

II. SUMMARY OF OPINIONS

3. USF&G violated insurance industry claims handling standards by failing to conduct a timely and thorough investigation of P.M. Northwest's older policies, which would provide P.M. Northwest with coverage for defense and indemnity in the action brought by Robert Ulbricht against P.M. Northwest. For example, Travelers failed to contact witnesses, including its own insured, to obtain information and documents regarding the history of the coverage. Travelers also failed to both timely evaluate the evidence of the old policies it did receive and timely advise P.M. Northwest of its coverage position regarding defense and indemnification. As a result of Travelers' failure to conduct a timely investigation and evaluation of the Ulbricht claim, P.M. Northwest was compelled to enter into stipulated judgment or face the risk of bankruptcy. Further, Travelers failed to advise P.M. Northwest of the potential for a verdict in excess of the USF&G policy limits, as well as respond to Ulbricht's settlement demand, as it was required to do under insurance industry standards. Indeed, Travelers never sought to protect P.M. Northwest by providing, at the minimum, a defense, as it should have done. Rather, Travelers abandoned P.M. Northwest, and then only belatedly paid P.M. Northwest the total amount of the USF&G policy limits, which should have been paid much earlier. Overall, it is evident that Travelers, in its handling of P.M. Northwest's claim under the USF&G policies, sought to protect its own interests to detriment of its insured, P.M. Northwest.

III. BASIS FOR OPINIONS

A. Background and Experience

4. I have been retained as an expert on insurance industry practices and standards in more than 200 cases, in both federal and state courts, including those in Washington, Nevada, Arizona, California, Idaho, New Mexico, South Carolina, Colorado, Wyoming, Pennsylvania, Florida, the U.S. Virgin Islands, Hawaii, Oregon, Utah, Arkansas, Texas, Missouri, Massachusetts, Mississippi, Louisiana, West Virginia, and Toronto, Ontario, Canada. I have been qualified as an expert on insurance industry claims handling standards and practices in Washington, Nevada, Arizona, Arkansas, Colorado, Ohio, West Virginia, New Mexico, Hawaii, Florida, Louisiana, Kansas, South Carolina, Idaho, and California. Attached here as Exhibit B is a list of the cases in which I have been deposed or given trial testimony in the last four years.

5. My opinions are based on my experience and training as an insurance claims adjuster and manager at Fireman's Fund Insurance Company from 1972 to 61990, my experience and training as a lawyer practicing insurance law, and my experience in reviewing and analyzing the claims handling of other insurance companies. My opinions are also based upon, among other sources, my review and knowledge of insurance industry texts and articles concerning the handling of insurance claims, and of the statutory and regulatory standards for the handling of insurance claims, such as the such as National Association of Insurance Commissioners' Model Unfair Claim Settlement Practices Act, which has been adopted in Washington at WAC 284-30-330 (hereinafter, the “Act”), and the National Association of Insurance Commissioners' Model Unfair Claims Settlement Practices Regulations, which has also been adopted in Washington at WAC 284-30-340-380 (hereinafter, the “Regulations”). [2]

[2] In addition, other applicable Washington State statutes and regulations are cited herein.

6. The Act is one of many important sources of information for insurance industry standards for the proper handling of claims. Indeed, the Act is often an articulation of general insurance industry standards for claims handling. [3] As one well-known author on insurance claims handling has pointed out, “insureds are frequently permitted to introduce evidence of violations of the Model Unfair Claims Settlement Practices Act because the model act is a nationally 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” (Markham, James J. [Ed.], et al., The Claims Environment [Insurance Institute of America, 1st ed., 1993], p. 297; hereinafter, “Markham”). Because the Act and Regulations constitute accepted insurance industry minimum standards for claims handling, where appropriate, sections of the Act and Regulations are referred to herein.

[3] The Act and the Regulations are based upon the National Association of Insurance Commissioners' Model Unfair Claims Settlement Practices Act and Regulations. More than 45 states have adopted the Model Unfair Claims Settlement Practices Act, either in its original form or in a modified form, including Washington. The Model Unfair Claims Settlement Practices Act and Regulations are used by insurance commissioners nationwide to perform market conduct examinations of insurance claims operations. Such examinations involve the review of hundreds of claims files to determine if the insurer is complying with the standards set forth in the Model Unfair Claims Settlement Practices Act and Regulations. Further, many insurers have inserted the Model Unfair Claims Settlement Practices Act and Regulations into their claims manuals and require their claims personnel to comply with them.

7. During my employment at Fireman's Fund, I was responsible for the handling of thousands of claims, either as an adjuster or supervisor, including claims such as the one involved in this case. In many other similar claims, it was necessary, upon notice of an accident or occurrence, for me to thoroughly investigate the claim, determine the scope and extent of damages, and then determine what coverages applied to the loss. During my employment in the insurance industry, I not only had the opportunity to learn about proper claims handling standards from my own employer, but I was also able to observe the claims handling procedures and standards of many other insurers. In addition, I attended numerous classes, workshops, seminars, and similar programs regarding the handling of insurance claims. I have received the Associate in 2Claims certification from the Insurance Institute of America.

8. My experience with insurance industry claims handling standards continued with my legal practice, which began in 1990. My legal practice, particularly since 1992, has been substantially devoted to insurance matters. As a result, I have been able to review claims files and manuals of many insurers, as well as to observe their claims handling procedures and methods. I have also testified as an expert in insurance claims handling and related matters since 1997. As a result, I again have had the opportunity to review numerous claims files, claims manuals, and other documents regarding the claims handling procedures of many insurance companies.

9. My continuing work in insurance industry-related programs includes presentations on ethics and claims handling at the Property Loss Research Bureau's regional conventions. In addition, I am currently the author of the personal lines claims handling section for the International Risk Management Institute.

B. Documents Reviewed

10. I have been provided and reviewed the documents listed on Exhibit C, attached hereto. These documents are the type of documents that are reasonably and customarily relied upon by experts in formulating opinions regarding insurance claim handling standards and practices and an insurer's handling of a claim.

C. Insurance Industry Standards and Practices

11. Insurance company claims representatives are routinely trained in the standards of insurance claims handling. Claims personnel are expected to know these standards and apply them in their work on a daily basis. This requirement is underscored in a text on insurance claims, which has been used nationwide to train insurance claims personnel. In the book, The Claims Environment by Markham et al., the authors, all of whom are or were employed in the insurance industry, point out that “claims representatives should have expert knowledge of insurance policy coverages, the law, and determination of damages” (Markham, p. 12).

12. A claims professional in Washington, or one who handles claims in Washington, should be trained and knowledgeable in the standards of insurance claims handling.

1. The Purpose of Insurance Industry Claims Handling Standards Is to Provide Insureds With the Peace of Mind That Full Policy Benefits Will Be Timely Paid in the Event of a Covered Loss.

13. One of the principal purposes of insurance is to provide policyholders with peace of mind. As Markham has pointed out:

Society suffers any time an individual or a business is unable to continue to be a contributing member due to the financial impact of a property loss or a lawsuit. By indemnifying an individual and restoring him or her to the same financial position as before the loss, insurance enables the individual to continue as a worker, a consumer, and a taxpayer. Otherwise, the financial impact might be so great that the individual would become dependent on family, relatives or public assistance.

...

The insurance transaction inherently involves an exchange of unequal amounts. Those who do not suffer a loss during a policy period will not receive any payments from the transaction. Those who do suffer a loss will likely receive amounts that significantly exceed the amount of premium paid. Yet, individuals and business are willing to participate in this pooling and sharing of risks because it gives every participant **peace of mind** to know that funds will be available to pay for the unfortunate few and because financial uncertainty is removed for all.

(Markham, pp. 2, 5; emphasis added)

14. In order to fulfill the insurer's obligation to the insured to provide peace of mind, the insurer must conduct thorough, fair, unbiased, and timely investigations of the claims presented to it, and then properly evaluate and timely pay those claims. If these insurance industry claims handling standards are not complied with, it is likely that the insured will not receive the benefits owed under the insurance policy. In that event, it is recognized in the insurance industry that the financial loss will fall solely on the insured's shoulders, often resulting in the insured suffering more than just the loss that would have been covered under the insurance policy. In this event, the insured may suffer additional losses, such as damage to credit (including even bankruptcy), loss of business, emotional distress, and other damages-all because the insurer has failed to fulfill its obligations under the insurance policy. Because insurers recognize that, between the insured and insurer, the insured is the weaker party who is likely to suffer substantial losses if the policy benefits are not timely paid, it is critical that the insurer act with "utmost good faith and fair dealing" (Markham, p. 18).

2. Insurance Industry Claims Personnel Are Trained in the Duty of Good Faith to Assure That the Purposes of Insurance Are Fulfilled.

15. Insurance claims personnel are guided in their claims handling by the insurance industry standards for claims handling, including their training on the duty of good faith and fair dealing. Indeed, insurance claims professionals are commonly taught about the importance of avoiding bad faith conduct. As Markham has pointed out, "[c]laim representatives must know what the law of bad faith is, how it evolved, and 2how it affects everyone in the claims business. More important, they must know how to investigate, evaluate, and settle claims in a way that protects the interests of both the insured and the insurer and avoids the problems that lead to bad faith claims" (Markham, p. 234). Conduct which, in the insurance industry, is understood may lead to bad faith includes failing to conduct diligent investigations (Rokes, Willis Park, Aggressive Good Faith and Successful Claims Handling [IIA, 1st ed., 1987], pp. 31-37; hereinafter, "Rokes").

16. Insurance is defined as the "pooling of fortuitous losses by transfer of such risk to insurers, who agree to indemnify insureds for such losses, to provide other pecuniary benefits on their occurrence, or to render services connected with the risk" (Rejda, George E., Principles of Risk Management and Insurance [Addison Wesley, 8th ed., 2003], p. 18, quoting from the Commission on Insurance Terminology of the American Risk and Insurance Association). As the definition reflects, a key, if not critical component of insurance is the transfer of risk from the insured to the insurer.[4] If this transfer is interfered with so that the

insured does not receive the full benefits owed under the insurance policy, then the purpose of insurance is defeated. In order to avoid this outcome, the insurance industry has adopted various standards and practices for the handling of insurance claims. The aim of these standards and practices is to assure that the purpose of insurance and the insurance contract are fulfilled when the insured submits a claim. [5] Among the standards for claims handling are the following:

4 Insurance contracts are unlike other contracts, because they are written solely by the insurance company. The insured generally cannot negotiate the terms of the contract, but must accept the terms as written, and the insurance company accepts a premium in return for its agreement to pay the insured's covered losses. Because of these differences, insurance contracts are deemed to be contracts of good faith; that is, the insurance company agrees to act in good faith in fulfilling its obligations under the contract (See Markham, pp. 12, 66).

5 Insurance industry claims handling standards are derived from a number of sources. One important group of these sources is the insurance industry texts which have been or are used to train insurance claims handlers on how to handle insurance claims. These include the following texts: Markham, James J. (Ed.), et al., The Claims Environment (IIA, 1st ed., 1993); Rokes, Willis Park, Aggressive Good Faith and Successful Claims Handling (IIA, 1st ed., 1987); Vaughn, Emmet J., &Vaughn, Therese, Fundamentals of Risk and Insurance (John Wiley & Sons, Inc., 9th ed., 2003); Jones, James R., Liability Claim Practices (IIA, 1st ed., 2001); Petitta, Joseph P., Insurance Practice for the Millennium (2000); Mehr, Ann E., & Markham, James J., Insurance Operations, Regulation and Statutory Accounting (IIS, 2nd ed., 2004); White, George A. (Ed.), et al., Organizational Behavior in Insurance, Vol. 1 (IIA, 1st ed., 1992); Popow, Donna J., Property Loss Adiusting (Am. Inst. of CPCU, 3rd ed., 2004); Thomas, Paul & Reed, Prentiss, Adiustment of Property Losses, (McGraw Hill, 4th ed., 1977); Soule, Charles E., Disability Income Insurance: The Unique Risk (The Am. College, 4th ed., 1994); Lightcap, Jane S., Managing Claim Department Operations (Int'l. Claim Assoc., 1997); Hirsch, Donald J., Casualty Claim Practice (Irwin/McGraw Hill, 6th ed., 1996); Mehr, Robert I., & Cammack, Emerson, Principles of Insurance (R. D. Irwin Inc., 5th ed., 1972); and Murdock, Michael T., Claims Operations: A Practical Guide (IRMI, 1st ed., 2010). Other important sources of insurance industry claims handling standards include Claims magazine, the Fire Casualty & Surety ("FC&S") Bulletins, and the International Risk Management Institute ("IRMI") publications. In addition, the claims handling manuals and standards of the insurers themselves, many of which I have reviewed, set forth how insurance claims should be handled. Finally, claims handling standards are derived from the deposition testimony of insurance claims handlers from many insurance companies, many of which I have also reviewed.

a. The insurance company must treat its policyholder's interests with equal regard to its own;

b. The insurance company should assist the policyholder with the presentation of the claim;

c. The insurance company should not mischaracterize the evidence to the benefit of the insurer;

d. The insurance company should not select or use biased consultants or experts;

e. The insurance company should be open and honest in all of its dealings with its insured;

f. The insurance company must disclose to its insured all benefits, coverages, and time limits that may apply to the claim;

g. The insurance company should not consider factors in its evaluation of a claim for which there is no evidence;

h. The insurance company must conduct a full, fair, and prompt investigation of the claim at its own expense;

i. The insurance company should objectively evaluate all claims based on all available evidence, and not just evidence which the insurance company believes supports its position;

j. The insurance company should examine and question reports from its consultants to assure that they contain all opinions necessary to properly evaluate the claim and are based on all relevant and available evidence;

k. The insurance company must fully, fairly, and promptly evaluate and adjust the claim;

l. The insurance company must pay timely all amounts not in dispute;

m. If there is a full or partial claim denial, the insurance company must give a written explanation, pointing to the facts and policy provisions supporting the denial;

n. The insurance company must not misrepresent facts or policy provisions;

o. The insurance company must timely advise its insured of all policy limitations or exclusions which may apply to a claim;

p. The insurance company must not assert coverage positions which it knows are without merit; and

q. The insurance company must look for coverage and not just ways to deny a claim.

17. Insurance claims professionals are also routinely trained in the interpretation and application of insurance policies sold by their respective companies. These same insurance claims professionals are called upon daily to interpret and apply those policies in the course of handling insurance claims. In interpreting and applying insurance policy provisions, insurance claims professionals will apply the accepted insurance industry standards and practices for insurance policy interpretation. Pursuant to these standards and practices, an insurance company must interpret its policies reasonably, pursuant to the well-recognized insurance industry rules for insurance policy construction, which include the following:

• exclusions are to be interpreted narrowly; [6]

6 Wollner, Kenneth S., How to Draft and Interpret Insurance Policies (Cas. Risk Pub., LLC, 1999), p. 19, "Exclusions and other limitations are strictly construed against the party seeking to impose the limitation." All the insurance texts referenced in this report are either used in training insurance claims professionals or as reference materials for claims professionals.

• insuring agreements are to be interpreted broadly; [7]

7 Wiening, Eric A., & Malecki, Donald S., Insurance Contract Analysis (Am. Inst. of CPCU, 1st ed., 1992), p. 76, "[I]nsurance agreement provides a broad statement of coverage."

• the insurance company must resolve doubts concerning coverage in favor of the policyholder; [8]

8 Popow, Donna J., Property Loss Adiustin. (Am. Inst. of CPCU, 3rd ed., 2004), § 5.34.

• policy language should be given its plain, ordinary, and popular meaning; [9]

9 Thomas, Paul & Reed, Prentiss, Adjustment of Property Losses (McGraw Hill, 4th ed., 1977), p. 48.

• ambiguous policy provisions should be interpreted against the insurer and in favor of coverage; [10] and

10 Id., p. 50.

• the insurance company has the burden of proving the application of an excluded peril. The Fire Casualty & Surety (FC&S) Bulletin notes two important principles: "[T]he burden is on the insurer to establish the fact that the exclusions apply. The insurer simply stating that coverage is excluded is not enough to settle the issue; the insurer must prove its case," and "if there is any reasonable doubt as to the applicability of an exclusion, the insured is entitled to the benefit of the doubt. Exclusions are to be construed strictly against the insurer" ("That Particular Part," FC&S, June 2004). [11]

11 The FC&S Bulletins have been published by the National Underwriter for more than years to assist insurance companies in the interpretation and application of a wide variety of insurance policy provisions. The FC&S Bulletins are used frequently by insurance industry claims professionals to interpret and apply insurance policy provisions. As one Court has 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 [citation omitted].... [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 [citations omitted].' ... [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 omitted]" (*Golden Eagle Insurance Co. v. Ins. Co. of the West,* 99 Cal.App.4th 837, 838 [Cal. App. 2002]).

18. In arriving at my opinions in this case, I have applied the standards for insurance claims handling.

IV. OPINIONS

A. USF&G Failed to Handle the P.M. Northwest Claim in Accordance With Insurance Industry Claims Handling Standards.

1. USF&G Failed to Conduct a Timely and Thorough Investigation of P.M. Northwest's Claim.

a. Insurance Industry Claims Handling Standards Require a Thorough and Timely Investigation.

19. "An investigation must often be undertaken to develop fully the facts needed to determine coverage. Good faith claim practices require that this investigation be objective, thorough, and timely" (Markham, p. 29; see also Jones, James R., Liability Claim Practices [IIA, 1st ed., 2001; hereinafter, "Jones"], § 1.14, that insurers have a good faith duty to perform investigations promptly and thoroughly; and Rokes, p. 114, that insurers have a duty to conduct prompt investigations). Similarly, Barry Zalma, in his recently published text on insurance claims handling, writes, "There is no excuse, regardless of the size of the loss, for failing to complete a thorough investigation" (Insurance Claims: A Comprehensive Guide [Nat'l. Underwriter, 2015], p. 420). Another insurance industry text points out: "The adjuster must conduct a thorough investigation and do it promptly. Since property insurance policies are first party in nature, the law will require the insurer to deal fairly with its insureds once a loss occurs. Unjustified delays are not tolerated" (Loss Adjustment and Subrogation [AEI, 6th ed., 2006], p. 52).

20. Travelers, in its January 2007 Property Best Practices, provides that the claim handler is responsible for "[i]nvestigating the facts and circumstances giving rise to the loss or damage" ("2007 Property Best Practices," p. 8). [12] Likewise, Travelers' June 2004 Liability Best Practices, which was produced in this case, provides that, "[Text redacted in copy]" (Bates No. TRAV 2857). Travelers also advises its claims handlers that,

[12] This document is not subject to a protective order.

[Text redacted in copy]

(Knowledge Guide, Bates No. TRAV 2775)

21. Similarly, the Regulations provide that "[e]very insurer, must complete its investigation of a claim within thirty days after notification of claim, unless the investigation cannot reasonably be completed within that time" (WAC § 284-30-370). Investigation is defined as "all activities of the insurer directly or indirectly related to the determination of liabilities under coverages afforded by an insurance policy or insurance contract" (WAC § 284-30-320(11)).

b. USF&G's Notice of Ulbricht's Claim and Failure to Commence a Timely and Thorough Investigation in Accordance With Insurance Industry Standards. [13]

[13] Not all of Travelers' failures to conduct a thorough and timely investigation are discussed in this section of the Report. For context purposes, some of those failures are discussed elsewhere in the Report.

22. On March 27, 2018, Kesha Huntley, Office Manager for P.M. Northwest, sent to Travelers Claims the following email:

I'm looking for information on an old policy that PM Northwest, Inc. had in the 70's or early 80's. I don't have a number for all I can find is it looks we had a GL policy with U.S.F. & G. I called Travelers main office and they directed me to this email to try and find out more info. We got served with some papers so I'm trying to see if the lawyer we have been talking to is covered under our old policy or if we need to find a new one. It might be under PM Northwest, Inc. or P.M. Northwest, Inc. everyone kind of had their own way of writing it. If you need more info you can call me at [Text redacted in copy] or just use this email. (Bates No. TRAV 1014)

23. Huntley's message was apparently sent to Gwen Neal, Travelers' Operations Analyst/BI Claims Operations in Hartford, Connecticut (Bates No. TRAV 1044). Even though the email was sent to Travelers' claims department, a claim file was not set up until months later (See Infra). On March 28, 2018, Neal, in an email to Karen L. Berneche, asked if Berneche "would ... be able to help with the E-mail below or pass it to the correct person" (Id.).

24. Not receiving a response, on April 4, 2018, Huntley's again sent her email to Travelers' claims. (Bates No. TRAV 1028). The email was then apparently forwarded to Anne Marie Kilbert, Travelers Claim Professional/BI Claim Operations in Hartford, Connecticut (Bates No. 1014). On April 5, 2018, Kilbert also forwarded Huntley's email to Karen Berneche with the note that "I'm forwarding this email to you as she is looking for policies before Discover-Re existed" (Id.). [14] Although the email was sent through Travelers' claims department on two different occasions Travelers again failed to set up a claim file. This was particularly egregious since Huntley had written that, "[w]e got served with some papers so I'm trying to see if the lawyer we have been talking to is covered under our old policy or if we need to find a new one." Clearly, Travelers was on notice that its insured had been sued and was trying to determine if their attorney would be covered under P.M. Northwest policies. Travelers failure to set up a claim file at this time was clearly contrary to both insurance industry and Travelers claims handling standards. (See Infra).. Despite having been sent an email on March 28, 2018, by Neal, it was not until April 5, 2018, that Berneche, Travelers Senior Consultant/Claim Regulatory Compliance, [15] responded by writing to Huntley and requesting additional information. This and other delays by Travelers were particularly critical, given that Ulbricht's action, which was filed on January 24, 2018, had already been set for trial on August 6, 2018. Accordingly, Travelers, in order to conduct a proper investigation, "get to the truth," and protect its insured's interests, had to conduct an expedited, thorough, and timely search for the policies, which it did not do. This was contrary to Travelers' own claim handling standards, which require that "[Text redacted in copy] [Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2793). [16]

14 No information is provided on what Discover-Re is, nor does a reference to Discover-Re appear on the Travelers document entitled "Request for CL Policy/Definitions Page," which does contain references to apparently several data bases that can be used to locate policies (Bates No. TRAV 1986).

15 According to a document produced by Travelers entitled "Claim Regulatory Compliance," that department "provides national support to Claim Services in connection with a wide range of regulatory, compliance and business resiliency matters" (Bates No. TRAV 1993). This includes "Records Retention - Policies and Procedures" (Id.). It would appear that Berneche is not in the claims department, but rather in a department that provides support services to the claims department.

16 According to the Knowledge Guide, Travelers also has a "[Text redacted in copy]" document and a "[Text redacted in copy]" (Bates Nos. TRAV 2793 & 2794). It does not appear that either of these documents have been produced in this case.

26. Also on April 5, 2018, Huntley responded to Berneche's email (Bates No. TRAV 1083). Huntley wrote:

The policy should be under PM Northwest, Inc. but some places spell it different sometimes a space between P.M. sometimes it's PM. I have been on a hunt for a few weeks now and everyone keeps sending me in circles so I'm just going on whatever the last person gave me. We are located in Washington, at the time our office was in Mount Vernon, WA and from what I can tell it looks like pre 1981 our insurance was thru U.S.F. & G, but for how long I am not sure. As of right now there is no claim but we are named in a lawsuit by a man named Robert Ulbricht. He worked for the oil refinery in Anacortes, Washington that our company used to work in and he now has Mesothelioma .... He just got diagnosed so there shouldn't be anything previous. We most likely will get dismissed out of it after a deposition probably but our lawyer fees need to go thru it. [17]

17 Huntley's statement that there "is no claim," should not have been relied upon by Travelers to ignore the claim and not assign it to the claim department. Clearly, there was a claim as Huntley reported that P.M. Northwest was named in a lawsuit in which Ulbricht alleged he had mesothelioma, a serious cancer condition. Indeed, an insurer must look for coverage and not just ways to deny coverage (See Markham, p. 13, "[T]he claims representative's chief task is to seek and find coverage, not to seek and find coverage controversies or to deny or dispute claims"; and p. 9, "[C]laim representatives must investigate the facts of each claim because policyholders do not know exactly what is covered, under exactly what circumstances it is covered, or exactly what amount should be paid"). In order to fulfill this obligation, Travelers had to conduct an investigation into the older policies, which it failed to timely do.

27. Following receipt of this information, Travelers' limited effort to locate the lost policies commenced (See Infra).

c. USF&G Failed to Conduct a Policy Search in Accordance With Insurance Industry Standards.

i. Insurance Industry Standards Regarding Locating Old or Lost Policies.

28. It is critically important that an insurer commence a timely and thorough investigation of any environmental claim where there is a lost policy (or policies). This is because such claims frequently span many years (referred to as long-tail claims) and can expose an insured to substantial damages. This is certainly the case with asbestos claims. Until the mid-1980's, there was no asbestos exclusion on the standard Insurance Services Office ("ISO") Comprehensive General Liability ("CGL") policy (See Deposition of David Shaw, p. 30). Accordingly, pre-mid-1980's primary CGL policies are more likely to provide coverage for asbestos claims for an insured.

29. Reconstruction of older policies thus becomes an important if not critical objective where an insured faces claims arising from asbestos exposure over several years. Often, this reconstruction is done through the use of secondary evidence. Indeed, one insurance industry source offers that "greater weight might be accorded to secondary documents in the following order:

(1) Insurer documents

(2) broker document, or other third-party documents, and

(3) policyholder documents.

(Talley, Douglas, "Proving the Existence of Past Policies with Secondary Evidence," IRMI, January 2011, p. 3) [18]

[18] The International Risk Management Institute ("IRMI") publishes several volumes on various types of insurance policies, such as professional liability, commercial liability, commercial property, and personal property policies, including this volume on insurance claims handling. These volumes are also used widely in the insurance industry to assist claims personnel in the interpretation and application of insurance policies. According to the IRMI "Personal Risk Management & Insurance" publication, the publication "was designed, researched, and written by the staff of IRMI, with the assistance of technical advisers.... It is designed to be used by those with a working knowledge of insurance-insurance ... adjusters-to give them detailed and practical information about specific topics on which they questions ... The research for the [publication] involved a thorough review of insurance literature, legal research, and interviews with many underwriters, agents, attorneys, and adjusters. Virtually all of the text was written by IRMI staff and has been extensively reviewed by insurance professionals not affiliated with the firm. In addition, each section written by us was carefully reviewed internally and revised as necessary" (1st reprint, September 2004, Preface).

30. The foregoing order of importance is understandable, given that an insurance company commonly has the greater resources to keep and maintain policy records of many kinds for many years.

31. In terms of specific types of documents, the same author notes that certificates of insurance "will certainly be of **great probative value,** since such certificates by industry custom and practice are designed to evidence the existence and certain material terms of a policyholder's insurance coverage" (Id., p. 4; emphasis added).

32. Other types of recognized secondary evidence that an insurer can seek include:

Records produced by insurance brokers, including ledgers or schedules of insurance.

Premium invoices.

Loss prevention surveys conducted by insurers. [19]

[19] In this regard, underwriting files also become an important source of secondary evidence.

Specimen or sample policies used by the insurer during the policy period in question.

Loss history cards

Broker "placing slips."

Broker and underwriter correspondence.

Testimony of an insured's employee.

Testimony of an insurer's employee.

(Id., pp. 4-5) [20]

[20] Elsewhere, Talley points out that the "the majority rule appears to be that the burden of proof required to establish the issuance and terms of a lost policy is a 'preponderance of the evidence"' (Talley, Douglas, "Judicial Reconstruction of Missing Insurance Policies," IRMI, September 2010, p. 5; and see "Coverage for Pollution Claims Under Lost Policies," IRMI, p. 3, "Most courts hold that policyholders are required to prove the existence and terms of lost insurance policies only to a preponderance of the evidence"). Any claims handler responsible for searching for lost policies must keep this standard in mind at all times in order to be able to objectively determine when he/she has sufficient evidence that likely will meet the standard.

33. Another insurance industry source also provided the following potential sources of information that the insurer could access by "interviewing and obtaining documents from:

1. The risk manager or person responsible for the insurance program.

2. The broker

3. The insurer

4. Records retention personnel

5. Additional insureds

6. Outside counsel

7. Former employees.

("Insurance Archaeology," Practical Risk Management/Risk Management Activities - Topic A-24, IRMI, p. 4)

34. For the purposes of this matter, it is particularly important to note that "[o]btaining information from the state's insurance regulatory body can be helpful as well. These government agencies require insurers admitted to conduct business in the state to file policy forms as a prerequisite to obtaining approval.... [S]tate regulatory bodies may be a valuable source of information" (Id.).

35. An insurer can also investigate various business records which can be a source of secondary evidence. The "[p]rimary method to prove the existence of a lost insurance policy is to use ordinary business records that mention or pertain to the insurance provided there under," such as,

• Accounting ledger sheets

• Canceled premium checks

• States of premium accounts

• Credit invoices

• Loss runs

• Settlement agreement

• Certificates of insurance

• Binders

• Correspondence

• Proofs of loss

• Premium audit records

• Premium refunds/dividends

• Minutes of board of directors meetings.

(Id., pp. 3-4)

36. In addition, the insured's accountant may have records on the premiums paid to insurers for a particular period of time, if not also documents supporting the issuance of the lost policies.

37. "Another common means of proving the existence of a lost primary policy is to show that it was referenced on the schedule of underlying insurance in a contemporaneous umbrella or excess policy. Since the existence of primary coverage is so important to the operation of excess coverage, courts feel safe in presuming that, if the umbrella or excess insurer acknowledged them, the primary policies must have existed" (Id., p. 4). [21]

[21] Although Travelers became aware of P.M. Northwest's excess carriers, Travelers never contacted them.

38. "Another way to prove that lost insurance policies exist is to introduce the testimony of an eyewitness who was involved in the purchase of the insurance" (Id., p. 5).

39. As for the terms of a policy, it has been recognized that "the terms of a lost policy [can be determined] by introducing specimen copies of standard insurance forms commonly used in the industry and by showing that the insurer used such forms" (Id., p. 6).

ii. Washington State Insurance Department Regulations Regarding an Insurer's Obligations to Investigate Claims of Lost Policies.

40. Pursuant to Washington State Insurance Regulations, it is

An unfair act or practice or an unfair method of competition for an insurer to fail to **investigate thoroughly and promptly all claims of lost policies.** [22] It is also an unfair practice or an unfair method of competition for an insurer to fail to provide all facts known or discovered during an investigation concerning the issuance and terms of a policy, including copies of documents establishing such facts, to an insured claiming coverage under a lost policy ... The following procedures are minimum standards

for the facilitations of reconstructing a lost policy and determining its terms. These procedures do not create a presumption of coverage for the loss once the contract is reconstructed.

22 Lost policy is defined as including "general liability insurance policies that are alleged by an insured to be lost" (WAC § 284-30-910(4)).

(1) Within fifteen working days after receipt by the insurer of notice of a lost policy, an insurer shall commence an investigation into its records, including its computer records, to determine whether it issued the lost policy. If the insurer determines that it issued the policy in question, it shall promptly commence an investigation into the terms and conditions relevant to the environmental claim. [23]

23 Environmental claim is defined as "a claim for defense or indemnity submitted under general liability insurance policy by an insured facing or allegedly facing, potential liability for bodily injury or property damage to others arising from a discharge of pollutants into land, air, or water" (WAC § 284-30-910(1)). It would appear that asbestos would qualify as a pollutant given that it is considered under Federal Environmental Protection Agency regulations as a Hazardous Substance (CFR § 302.4).

(a) For purposes of this section, "notice of a lost policy" means written notice of the lost policy in sufficient detail to identify the person or entity seeking coverage, including information concerning the name of the alleged policyholder, if known, together with material facts known to the insured concerning the lost policy.

(b) Insureds and insures shall fully cooperate with each other in the investigation of lost policy issues.

(i) Each shall provide to the other facts known or discovered during an investigation, including the identity of any witnesses with knowledge of facts related to the issuance or existence of a lost policy.

(ii) Each shall provide the other with copies of documents establishing facts related to the lost policy ...

(2) If the insurer discovers information **tending to show** the issuance of a policy applicable to the claim, the following procedures shall apply:

(a) If the insurer is able to determine the terms of the policy, upon request the insurer shall provide to an insured an accurate copy or reconstruction of the policy or portions of the policy located.

(b) If after diligent investigation the insurer is not able to locate all or part of the policy or to determine the terms, conditions, or exclusions of the policy, the insurer shall provide copies of all insurance policy forms **potentially applicable** to the environmental claim issued by the insurer during the applicable policy period. The insurer shall state which of the potentially applicable forms, if any, is most likely to have been issued and why, or alternatively, shall state why it is unable to identify the forms after a good faith search. Providing copies of forms and meeting the standards of this section, is neither an admission by an insurer that a policy was issued or effective, nor, if a policy were issued, that it was necessary in the form produced, unless the insurer so states.

(c) If it is concluded that a general liability insurance policy **more likely than not** was issued to the insured by the insurer, and neither the insured nor the insurer can produce any evidence which **may tend to show** the policy limits applicable to the policy, it shall be assumed, in the absence of other evidence, that the minimum limits of coverage offered by the insurer during the period in question were purchased by the insured.

(WAC § 284-30-920; emphasis added) [24]

[24] According to WAC § 284-30-900(4), "This regulation is adopted to provide minimum standards for the conduct of insureds and insurers for presenting and resolving environmental claims with the goal of facilitating the fair, principled, and efficient resolution of environmental claims without resort to unnecessary, time-consuming, and expensive litigation."

41. The foregoing act also provides for non-binding mediation "concerning the existence, terms, or conditions of a lost policy, or regarding coverage for an environmental claim" (WAC § 284-30-940).

d. Travelers' Failure to Timely Search for P.M. Northwest's USF&G Policies Pursuant to Insurance Industry and Washington State Standards and Requirements.

i. Travelers' Initial and Insufficient Policy Search.

42. Following receipt of additional information from Huntley, on April 9, 2018, Berneche, in an email to "ADM-OPUS,"[25] wrote:

[25] There is no information in the documents produced identifying "ADM-OPUS" or specifying its location, purpose, or function.

Are we not utilizing forms any longer for these requests?

We are looking for a GL policy or maybe WC policy for P.M. Northwest,[26] Inc. that was written on USF&G paper. I am not certain if we would still have policies from the 1970's and through and to 1982. This is the period the employee worked for PM Northwest and at the time was located in Mount Vernon, WA.... The worker at the time of injury was working at an oil refinery located in Anacortes, WA and owned by PM Northwest.

[26] It is noteworthy that Berneche did not point out that P.M. Northwest could have been spelled in different ways, as she was advised by Huntley (See Supra).

(Bates No. TRAV 1006)

43. It is evident that Berneche was transmitting incorrect information regarding 2the claim. Huntley had advised Berneche that Ulbricht "worked for the oil refinery in Anacortes," and not for P.M. Northwest (See Supra). Further, Huntley never told Berneche that P.M. Northwest owned the oil refinery. These mistakes certainly would have not been made or would have been timely cleared up if a timely claims department investigation had been commenced, including a review of the complaint and any related documents.

44. On April 10, 2018, Cori Rau, who is with Travelers Document Management - Litigation Support Department, wrote to Berneche that "Per the email you had sent to ADM-Opus. You will need to fill out the BI Document Mgmt form.[27] I've attached it. Then you can email to BIDOCMGT(o)travelers.com" (Bates No. TRAV 1006).

[27] There is nothing in the documents produced that provides any instructions on when and how to complete the BI Document Mgmt form, as would be expected. Indeed, there is nothing in the Travelers Knowledge Guide produced herein that provides any direction on searching for and locating lost or missing policies, as also would be expected.

45. On the same date, Berneche asked Rau if she would "utilize the same form for a claim file as well" (Bates No. TRAV 1010). Rau responded by writing that "[y]ou can use the BI form for anything St. Paul related" (Id.). Rau did not specifically respond to this question, nor is there any indication that Berneche followed up and asked the question a second time. This is important because, on April 11, 2018, Rau advised Berneche that the entry "AER" on the top of the BI Document Mgmt form is for "a name search" (Bates No. TRAV 1018). [28] According to the Travelers document entitled "Request for CL Policy/ Definitions Page," "AER" stands for "Account Experience Record," which "will provide the requester with complete policy information for a particular name of insured. This can be done with name only or policy number. When this is checked off we will conduct a complete search of all available databases. The requester will receive screen prints or hard copies from fiche of our findings" (Bates No. TRAV 1986). In other words, the AER search would not include claim files. A claim file search would be done through "AER w/Claims History," which "will provide the requester with an AER including claim history which reflects any losses incurred" (Id.). This search was not recommended by Rau nor requested by Berneche, even though she inquired about claim files. As a result, Travelers failed to search timely in an important database for prior claim files. [29]

28 Travelers BI Document Management form is numbered CP-6073 06-14. (See Bates No. TRAV 1031). This is the form Travelers used throughout its search of the USF&G **20** policies. The Knowledge Guide. however, provides that "[Text redacted in copy] [Text redacted in copy]" (Bates No. TRAV 2761). There is no record of this form being used to look for P.M. Northwest's USF&G policies.

29 A third search, entitled "AER w/All GL & Package Policies," was also included in the request. This search would have provided "the requestor with an AER and all GL and package policies from various areas of retrieval." (Bates No. TRAV 1986). Further, there is no indication that Travelers' searches at this time included underwriting files, which would be another important source of information.(See Supra).

46. On April 11, 2018, Berneche, in an email to "BI Document Management," to which she apparently attached the completed request form, wrote: "The agent said the policy was written on USF&G paper. At this time I don't need the actual policy (if found) but WC or GL policy numbers would be helpful" (Bates No. TRAV 1036). This communication further underscores Berneche's limited and incomplete investigation. Clearly she should ask for the actual policies if they were available, because that would settle the issue-then there would not be any lost policies. Further, there is nothing in the documents produced to date indicating that Berneche, or anyone else, talked with the agent, so this again may be Berneche sending incorrect information.

47. The "Request For BI Policy" form, dated April 11, 2018, sent by Berneche to "BI Document Management, 2CR, Home Office," was for a "St. Paul Request," which, according to the from "includes USF&G" (Bates No. TRAV 1031). Only three search requests are made: (1) "Policy(ies) listed only," (2) "AER (Please include SAI and/or any policy number for the account," and (3) "AER w/All GL & Package Policies" (Id.). Although "AER w/Claims History," could have been requested on the form, it was not. [30] Rather, Berneche only asked for the following: "The agent is looking for a GL or WC policy for this insured. The insured at the time was located in Mount Vernon, WA and the employee worked during the policy period above. Just want to see if we have a policy for this company" (Id.).

30 It appears that Berneche could also have requested "Underwriting files," but did not do so (Id.).

48. On April 12, 2018, Berneche reported to Huntley that they were still searching "through quite a few years for the policy or policies ... but it should be soon" (Bates No. TRAV 1038).

49. On April 20, 2018, now three weeks following the notice of the claim, Phyllis Thompson of Travelers responded to Berneche's request attaching "a copy of the original BI Policy request form." (Bates Nos. TRAV 1008 & 1030). [31] On the form Thompson reported: "searched API Northbrook USFG Opus Ame CCR nothing found for this named insured" (Bates No. TRAV 1031). On the same date, Berneche wrote Huntley the following:

[31] Presently, the meaning of the terms used in this response is not known.

I had requested that they search for any GL and WC policy that included the dates that the claimant had worked for P.M. Northwest, Inc. Unfortunately no policies were found for that time period.

(Bates No. TRAV 1008).

50. This was, in effect, a denial of coverage based on an incomplete and inadequate investigation that did not include, in accordance with insurance industry standards, at the least the following:

• Interviewing the insured

• Interviewing any witnesses to the history of the coverage [32]

[32] Likewise, Travelers advises its claims handlers that "[Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2797).

• Interviewing any accountants who may have had knowledge of the policies

• Obtaining any documents from the insured

• Conducting a search for older claim files

• Conducting a search for underwriting files

ii. USF&G Certificates of Insurance Are Discovered and Provided to Travelers.

51. In May 2018, Colin Mieling, an associate in Bergman's firm, had submitted a public records request to the Washington State Department of Labor & Industries for P.M. Northwest's "insurance and surety bond information" (See Bates No. BDO 0001-0002). [33] Travelers had not conducted such a search, nor had it directed P.M. Northwest to do so, even though it is known that various state regulatory agencies often have insurance policy documents (See Supra).

[33] David Shaw also made a similar request (See David Shaw's deposition, p. 35). This further underscores the recognition that such records are available; however, despite this, Travelers' did not seek such records.

52. On July 2, 2018, Jacob O'Connor of the Washington Department of Labor & Industries responded to Mieling with the results of the search (See Bates No. BDO 0004). This search resulted in locating Certificates of Insurance issued by USF&G on behalf of P.M. Northwest for the 1977-1978, 1978-1979, 1979-1980, 1980-1981 and 1981-1982 policy periods (Bates Nos. TRAV 1634-1638). Each certificate confirmed the respective policy number, named insured (P.M. Northwest), the insurer (USF&G), and that the policies included CGL coverages, which would provide coverage for defense and indemnity for the Ulbricht claims, based on the then-filed Complaint and First Amended Complaint. The certificates also contained the following language: "This is to certify that policies of insurance listed below have been issued to the insured named above and are in force at this time" (See, e.g., Bates No. TRAV 1634).

53. On July 9, 2018, Bergman, Ulbricht's counsel, in an email to David Shaw, Travelers' counsel, wrote: "Attached is a link to the records we were able to obtain from the state relating to PM Northwest's insurance coverage (with policy numbers/information) going back to the early 1970s. From a cursory review, it appears that they may have a substantial amount of coverage relevant

to the periods at issue in this case" (Bates No. BDO 0006). On the same date, Bergman confirmed to Shaw that 2the records were obtained as a result of "a FOIA request with DLI" (Bates No. BDO 0005). There is no apparent reason why Travelers did not conduct the same search.

e. USF&G's Failure to Timely Assign the P.M. Northwest Claim to the Travelers' Claim Department and the Claims Department's Continued Failure to Conduct a Timely and Thorough Investigation.

i. The P.M. Northwest Claim Should Have Been Assigned to the Travelers Claim Department When Travelers First Received Notice of the Ulbricht Claim.

54. Echoing the Act and insurance industry claims handling standards are the Washington "Specific Unfair environmental claims settlement or trade practices" (WAC § 284-30-930), which provide that it is an unfair practice for an insurer to fail "to commence investigation of an environmental claim within fifteen working days after receipt of a notice of an environmental claim" (WAC § 284-30-930(2)). Further, insureds and insurers "shall provide to the other facts known or discovered during an investigation, including the identify of any witnesses with knowledge of facts related to any environmental claims," and "[e]ach shall provide the other with copies of documents establishing facts related to an environmental claim" (WAC § 284-30-930(2)(a)(i) & (ii)). Clearly, this provision contemplates that the investigation will be handled by a claims department.

55. Likewise, Travelers' 2005 Best Practices provides that "[Text redacted in copy]" (Bates No. TRAV 2856). Travelers received notice of the claim in March 2018, but did not assign the claim to the claim department until July 2018, thereby significantly delaying Travelers' handling of the claim, even by its own standards. Travelers also recognizes that "[Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2749; emphasis added). Despite this recognition, P.M. Northwest's claim was not sent timely to the claims department, and there was no timely "verification" of the coverage.

56. Further, Travelers' Knowledge Guide, part of which was produced as Bates Nos. TRAV 2738-2854 (hereinafter, the "Knowledge Guide"), which apparently contains the Travelers claims handling standards applicable to the P.M. Northwest claim, provides that as of April 1, 2007, "[Text redacted in copy]" (Bates No. TRAV 2738; emphasis in original). There is no record of the P.M. Northwest claim being submitted to Kelley. In addition, the Knowledge Guide requires that "[Text redacted in copy]" (Bates No. TRAV 2739; emphasis in original). Again, there is no indication that van Vooren was involved in the evaluation of the extrinsic evidence supporting the issuance of the USF&G policies. Further, the Knowledge Guide lists "[Text redacted in copy]" (Bates No. TRAV 2741; emphasis in original). There is also no record of Gresham being involved in the handling of the P.M. Northwest claim.

57. Travelers failed to timely assign the claim against P.M. Northwest to its claims department. This was despite the fact that Huntley's initial email was directed to Travelers' claims department, and that Kilbert, who is titled a "Claim Professional" received Huntley's email (See Supra). Further, on April 5, 2018, Berneche wrote to Huntley that "[t]he call center should have directed to someone that handles claims for Travelers as the old claims are usually ours" (Bates No. TRAV 1083). Indeed, Berneche referred to the Ulbricht matter as a "claim" (Id.). Nonetheless, Berneche proceeded with the policy search, noting that "[w]e don't believe there is a claim set up, so we are looking for the policy" (Bates No. TRAV 1018). This may suggest that, if a claim file was set up in the claim department, it would have been the claim department and not "Claim Regulatory Compliance" which would have directed the policy search.

58. Timely assignment to Travelers' claims department should have resulted in a request for the "papers" served on P.M. Northwest, so that Travelers could timely begin its investigation and evaluation of the claim, as well as having the claims department timely engage in searching for the old P.M. Northwest policies. This would have included contacting Huntley; taking her statement (see Infra); [34] and determining how she learned that the policies were issued by USF&G, who else she talked to over the "few weeks" she was apparently searching for old policies and what she was told, and what documents regarding the policies she has, among other matters consistent with the requirements for a timely and thorough investigation of missing or lost policies (See Supra). This investigation is consistent with Travelers' requirements in the Knowledge Guide, which requires

"[Text redacted in copy]" and that "[Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2767).[35] None of this investigation was timely performed or performed at all. Such investigation was particularly important since Huntley reported that P.M. Northwest had been "named in a lawsuit," which would require a response within a limited time.

34 Indeed, Travelers teels its claims handles that "[Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2794). Travelers' claims handlers here did not comply with this direction.

35 Travelers also cautions its claims handler that, "[Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2769). No such continuing investigation in accordance with industry standards occurred with regard to P.M. Northwest's claim.

59. Further, Huntley reported that Ulbricht had been recently diagnosed with mesothelioma, which is caused by exposure to asbestos. This could have been confirmed by Travelers timely obtaining the complaint[36] and any other documents Huntley may have regarding the claim. Regardless, the notice that asbestos was likely involved would invoke Travelers' April 2, 2007, "Large Exposure Claim Program (LEC)," pursuant to which the Travelers' SLG clams unit handles large exposure cases, which includes "cancer [and] other serious diseases" (Bates No. TRAV 1987). It is noteworthy that the Ulbricht claim was ultimately, but apparently not timely, assigned to the SLG claims unit (See Infra). There is no apparent reason why this could not have occurred shortly after Travelers first received notice of the P.M. Northwest claim.

36 Ulbricht's complaint was filed on January 24, 2018, and the Amended Complaint was filed on March 23, 2018 (See Bates Nos. TRAV 1639, 1644). Accordingly, the Complaint would have been available to Travelers when it first received notice from P.M. Northwest, and the Amended Complaint would have been available shortly thereafter.

60. Further, according to the Travelers June 5, 2014, document entitled "Special Instructions for Certain Issues and Claim Types," the individuals listed thereon "[Text redacted in copy]," which includes "[Text redacted in copy]" (Bates No. TRAV 1990; emphasis in original). There is no record that these individuals, who are in Travelers' home office claims department, were timely contacted upon receipt of the notice of the claim to determine how to assign the Ulbricht claim to the claim department. In other words, Travelers claims handlers were provided resources on how to handle asbestos claims, but did not use those resources here.

ii. Travelers Opens a Claim File but Continues to Fail to Conduct a Timely and Thorough Investigation.

61. On July 9, 2018, Huntley, in an email to Berneche, wrote: "Our lawyer just found our old policies.[37] We actually did have one from 3/31/77-3/31/78 with USF&G. The policy number is 1CCA56045.[38] We need to get a claim opened ASAP. Trial date is set for 8/6/18 and mediation on 7/18/18. We are being represented by David Shaw" (Bates No. TRAV 1023).

37 It would appear that the reference to policies is incorrect, and it should have been certificates. Further, the certificates were actually obtained by Bergman, Ulbricht's counsel, as a result of a search that Travelers also could have easily conducted.

38 It is unclear why Huntley only refers to one of the five policies documented by the certificates of insurance.

62. On July 10, 2018, Huntley provided the following additional information:

I attached all 5 insurance policies[39] I have for USF&G from 1977-1982 and the original complaint we were served and the amended. I have a couple of documents for it but I think this should be what you need to open it. Our attorney has all the documents so if more are needed he might be the one to contact because I don't have them all.

[39] It would appear that the reference to policies is incorrect, and it should have been certificates.

(Bates No. TRAV 1058)

63. On or about July 10, 2018, Travelers received the certificates of insurance that had been obtained from the Washington Department of Labor & Industries. On that date, the following entry was made in the claim file:

Email Report-Our lawyer just found our old policies.[40] We actually did have one from 3/31/77-3/31/78 with USF&G. The policy number is 1CCA56045.[41] We need to get a claim opened ASAP. Trial date is set for 8/6/18 and mediation on 7/18/18. We are represented by David Shaw at William Kastner.

[40] This is incorrect, as the certificates were actually discovered by Ulbricht's counsel.

[41] It is unclear why only one of the five policies is referred to in this note.

(Bates No. TRAV 1602)

64. Significantly, there is no record of Travelers' claims handlers asking Huntley what additional documents she had or contacting P.M. Northwest's counsel to obtain what additional documents he had. Indeed, no Travelers claims handler contacted or visited Huntley (or others at P.M. Northwest) to obtain necessary information and documents, despite the fact that Travelers' claims department has available "[Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2748).[42] Again, Travelers failed to conduct the necessary and required investigation.

[42] Travelers apparently makes available to its claims handlers an "Outside Task Referral" guide, which has not been produced in this case (Id.).

65. On July 10, 2018, Berneche advised Huntley that she will forward the information "to our Customer Care Center to set up the claim" (Bates No. TRAV 1023). Berneche then sent notice of the claim to "Claim Reporting," writing:

The attached claim will need to be set up and assigned to one of our offices. This claim should be handled by Travelers as NAU (the old Discover Re) did not exist during the time period listed below for this claim. The confirmation should be sent to the attorney for P.M. Northwest. His contact information is below. He also has additional documents that the adjuster may need. (Bates No. TRAV 1058)

66. On July 10, 2018, "losscommunication" at Travelers acknowledged receipt of Berneche's claim notice (Bates No. TRAV 1052). On the same date, Berneche forwarded the acknowledgement to Huntley (Id., and see Travelers "Environmental Claim Setup Form," Bates No. TRAV 1907).[43]

[43] The Set Up Form references the following Travelers policy: "Policy Effective Date*:03/31/1981Travelers Policy Sym/ Form:*Z9N Policy Number:*58W41617 Risk ID:* 48887 ... Insured Name: PM Northwest" (Bates No. TRAV 1907). This is not one of the policy numbers discovered by either P.M. Northwest or Travelers. It is unknown where this policy number comes from.

67. Again, despite the second notice that P.M. Northwest's attorney had additional documents, there was no attempt by Travelers to obtain them.

68. It was, therefore, not until July 10, 2018, or over three months after Huntley reported the claim, that Travelers' claims handlers recorded in a claim file for 5the first time that Travelers had received notice of the Ulbricht claim (See Bates No. TRAV 1602).

iii. Travelers Assigns the P.M. Northwest Claim to the SLG Claim Unit, Which Continues Travelers' Failure to Conduct a Timely and Thorough Investigation.

69. Also on July 10, 2018, the claim file was transferred to the SLG claims unit and assigned on July 11, 2018, to James P. Quimby, Travelers Account Executive in the Travelers Special Liability Group. (Bates No. TRAV 1601). [44] According to the LEC document, this referral is to include "[Text redacted in copy]" (Bates No. TRAV 1987). On July 18, 2018, Quimby, in a memorandum to Carol Pinkston at SLG, sent a "copy of our files for the above-captioned insured for submission to the IEC program" (Bates No. TRAV 1631). This submission included the certificates of insurance, along with Ulbricht's Complaint and Amended Complaint. Quimby also hand wrote on the memorandum: "New notice with date in early August-large demand" (Id.). On July 9, 2018, Matthew Bergman, Ulbricht's counsel, in a letter to David Shaw, USF&G's attorney, presented the plaintiff's demand to P.M. Northwest in the amount of $3.5 million (Bates Nos. TRAV 1633 & BDO 0006). [45] Apparently, this demand was then forwarded to Quimby, who included it in the package sent to Pinkston without further comment. Indeed, at no time does Travelers make any effort to evaluate the demand, let alone the potential verdict value of Ulbricht's claim, despite having received documentation of P.M. Northwest's policies.

44 It does not appear that Quimby was provided the results of Phyllis Thompsons and Karen Berneche's searches when the claim file was transferred as would have been expected.

45 Despite this demand, Travelers never advised its insured of the potential excess exposure as required by insurance industry standards (See Infra). Further, in the demand letter, Bergman noted that the court had just denied P.M. Northwest's "summary judgment on Statute of Repose and granting of Plaintiff's motion to strike Defendant's superseding cause/employer negligence defenses" (Bates No. TRAV 1605). The loss of these defenses would likely have an adverse impact on P.M. Northwest's defense in the Ulbricht case, thereby increasing its potential verdict value.

70. The referral to SLG underscores USF&G's recognition that Ulbricht's claim presented a substantial damages exposure. According to the LEC program document, by definition, this unit handles "Large Exposure Claims" (Bates No. TRAV 1987). Indeed, "Severe Bodily Injury" is defined as "claims where the exposure exceeds $250,000" (Id.). [46] Further, on July 19, 2018, Quimby wrote to Pinkston that "[t]his is being set up due to the large demand and the insured is providing their own defense while Resolute and Travelers conduct policy investigations" (Bates No. TRAV 1630). Travelers clearly recognized the substantial exposure to P.M. Northwest early in its handling of the claim.

46 Despite apparent recognition of the value of Ulbricht's claim, Travelers never advised P.M. Northwest of this apparent evaluation in accordance with insurance industry standards.

71. Oddly, Quimby did not include in the package the earlier documents regarding Berneche's policy search (See Supra). It is unclear whether Quimby had those documents, and if so, whether he recognized that an inadequate search had previously been undertaken. This is further suggested in his July 10, 2018, letter to Huntley, in which he wrote:

Please allow this letter to acknowledge our receipt of the captioned lawsuit ("Lawsuit") in our office on July 10, 2018.

We have begun our investigation by ordering the applicable policies from our off-site storage facility. Once we have received the policies we shall continue our investigation by reviewing the information which you forward to us in light of the coverage provided by the policies.

Pending the outcome of our coverage and policy investigation, PM Northwest should continue to protect its own interests with any court imposed deadlines and/or answer dates.

(Bates No. TRAV 1632)

72. This letter may suggest that Quimby was not aware of the prior policy search, and that P.M. Northwest had notified USF&G in March 2018 of Ulbricht's claim. Quimby refers to conducting a policy search in the "off-site storage facility," which is apparently a resource for locating policies, but which is not identified in the search request form used by Berneche (See Supra). [47] Significantly, Quimby continues USF&G's failure to conduct a full and complete search for claim files.

47 It is not presently known if the "off-site storage facility" is a different source for locating policies than what was utilized by Berneche, or if the facility is in some way identical to the sources searched by Berneche.

73. On July 12, 2018, Quimby, in an email to BI Document Management, attached a "request for USF&G Policies" (Bates No. TRAV 1589). Since a search had already been requested from BI Document Management (see Supra), this again suggests that Quimby was not aware of the prior search as he should have been. Further, this search, as with prior searches, was not done on a rush basis, even though by this date Travelers was aware of the upcoming mediation and trial dates (See July 10, 2018, email from Scott Homersham to Quimby, Bates No. TRAV 1590, "Please note the trial and mediation dates below").

74. Other than requesting a policy search that appears to have already been done, Quimby failed to conduct any of the investigation of the P.M. Northwest policies in accordance with insurance industry standards. This is evidenced by the fact that the claim file contains no record of any such investigation (See Infra for discussion of claim file documentation).

75. As a result of the SLG referral, it would appear that Quimby would have had access to legal advice if necessary, although none is documented in the claim file. Further, apparently only one claim file was opened under claim number DOF6335 (Bates No. TRAV 1601). [48] This is somewhat unusual, as it has been the practice in the **14** insurance industry to open a separate claim file for each policy year in which there may be an indemnity exposure. There is no record of any other claim files in the documents produced. [49]

48 Indeed, Travelers provides a process for claims handlers to obtain necessa legal advice. The Knowledge Guide notes that "[Text redacted in copy]" (Bates No. TRAV 2770). There is no evidence this process was used during Travelers' handling of P.M. Northwest's claim.

49 Further, there is no record of any reserve posted on the claim file, despite the importance of reserves in the insurance industry. In the insurance industry, reserves are "an estimation of the money that will eventually be paid for the costs associated with a claim," and the "reserves should represent what the insurer estimates the final settlement will be" (Markham, pp. 54, 255).

Reserving losses for claims is a **crucial adjusting task. The reserve represents the amount of money that the insurer anticipates will be needed to pay a particular claim.** The reserve includes both the amounts owed to the policyholder or claimant(s) and, with some insurers, the funds required to cover the insurer's expenses. Estimating ultimate losses is a key adjusting skill acquired with experience and training. Failure to reserve properly, by either underestimating or overestimating the final cost of claims, can distort the insurer's financial statements.

The amount insurers pay for claims is a key element in calculating future rates. Actuaries base future rates not only on the amount of money paid on both open and closed claims, but also on the amount reserved on open claims and reserved for incurred but not reported losses and reopened claims. Accuracy in reserving eventually translates into rates that accurately reflect loss potential. (Myhr, Ann E., & Markham, James J., Insurance Operations, Regulations, and Statutory Accounting [CPCU/IIA, 2nd

ed., 2004; hereinafter, "Myhr & Markham"], § 8.28, emphasis added; and see Travelers' Knowledge Guide, Bates No. TRAV 2806 "[Text redacted in copy]

76. On July 16, 2018, Quimby, in an email to Huntley, acknowledged Huntley's voice message regarding the "demand for the mediation," and responded:

As previously indicated, we are currently trying to locate copies of the policies you have provided some information to. To date, we have not received anything back. Pending the outcome of our coverage and policy investigation, **PM Northwest should continue to protect its own interests with regards to any court imposed deadlines or resolution of the referenced matter.**

(Bates No. TRAV 1427; emphasis added)

77. By this date, Quimby should have been in a position to provide Huntley with Travelers' initial evaluation of the coverage based on the secondary evidence produced, as well as sample policy forms as required (See Supra). This response, under these circumstances, again amounts to a denial of coverage contrary to insurance industry standards (See Infra).

78. On July 18, 2018, Phyllis Thompson of Travelers wrote Quimby that "[t]he results of your Policy requests and a copy of the new original BI Policy request form at attached.". (Bates No. TRAV 1667). In the attached BI Document Management form, Thompson reported: "Searched OPUS Filenet and API Nothing found searching policy number and insured name. (Bates No. TRAV 1668). It was not, however, until July 31, 2018, that Quimby responded to Thompson in an email and asked if this request is complete. (Bates No. TRAV 1090). Shortly therafter, on July 31, 2018, Thompson responded to Quimby's search request, writing that it was complete, and that "[w]hen search name and number nothing was found" (Bates No. TRAV 1090). [50]

50 This may have been the first time that Quimby was made aware of the earlier policy search. Regardless, when Quimby was provided the form, he should have noted that claim files were not searched. There is no indication that this occurred.

79. Based on Thompson's email, on August 2, 2018, Quimby, in an email to Huntley, wrote the following:

I am going to finalize our search and review for policies in the next few days and will respond further, once we have additional information.

Pending the outcome of our investigation, PM Northwest should continue to protect their interests with regards to the further handling of this matter. Once we have finalized our investigation into alleged and/or potentially applicable policies, I will respond further.

Pending further review of this matter, Travelers fully reserves its rights.

(Bates No. 1426)

80. There is no evidence that Quimby finalized his search within a few weeks, nor that he provided Huntley with any further information regarding the status of his search, as he should have done (See Supra). This is also contrary to Travelers' own standards, which require that the claim handler " [Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2767). This email also amounts to a further denial of coverage, which does not accord with insurance industry standards (See Infra). Indeed, Traveler's general reservation of rights also does not accord with insurance industry standards (See Infra; and see Quimby's July 16, 2018, email to Huntley, Bates No. TRAV 1427). [51]

51 Insurance claims handlers are taught to advise the insured of specific coverage defenses the insurer may assert in order to avoid any risk of waiver or estoppell. As Markham has pointed out: "The insurance company's failure to advise the

insured of the coverage problem at the beginning of the claim adjustment process will most likely prevent the company from later denying coverage to the insured" (Markham, p. 31). In order to effectively advise the insured of such policy defenses, the insurer, at the outset of the claim, should send the insured a reservation of rights letter which, among other things, contains a reference "to each policy provision that might preclude coverage, with an explanation of why such a provision may result in a coverage denial" (Jones, § 4.8).

81. It is unclear what additional investigation Quimby contemplated, because no investigation plan appears in the claim file. [52] The only claim file entry possibly related to additional investigation is Quimby's August 6, 2018, claim file entry that he "[d]iscussed claim with Bob Hyland. Awaiting completion of policy search from paralegals" (Bates No. TRAV 1601). It is unclear what this refers to, as there is no indication in the claim file that any paralegals had been requested to search for policy information. Further, there is nothing in the claim file documenting the type of investigation that would be required by insurance industry standards (See Supra). [53]

52 This is contrary to Travelers' standards, which note that "[Text redacted in copy]" (Knowledge Guide, Bates No. RRAV 2831).

53 On August 30, 2018, Quimby made the following entry in the claim file: "Discussed claim with Tim Mills and Lisa Oesterman to give stats and review of documents received and next steps towards policy investigation" (Bates No. TRAV 1601). There is no indication here what the next steps would be.

iv. Travelers Failed to Evaluate the Evidence Supporting Issuance of the USF&G Policies, Including Its Duty to Defend and Indemnify P.M. Northwest.

82. At this point in his claim handling, Quimby should have evaluated the policy evidence that he did have and whether that evidence supported coverage for defense and/or indemnity for P.M. Northwest. Indeed, Travelers requires such timely coverage analyses. The Travelers Knowledge Guide provides that "[Text redacted in copy]" (Bates No. TRAV 2760).

83. This was particularly important, given that Travelers had received the certificates of insurance. In the insurance industry, certificates of insurance are important secondary sources that can be used to document the issuance of insurance policies. As one insurance industry resource has pointed out: "Certificates of insurance provide a number of important benefits. The most important benefit is that **they provide evidence that insurance is in place at the time they are issued.** They also provide a record of applicable coverages, including the names of the issuing insurers, policy numbers, effective and expiration dates, and some basic details regarding the scope of coverage" ("Certificates of Insurance," Practice Risk Management/Liability Risks and Insurance - Topic G-25, IRMI, p. 1; emphasis added). Likewise, it has been noted that "[t]he certificate of insurance is the primary vehicle **for verification that insurance requirements** have been met" (Murdock, Michael T., Claims Operations: A Practice Guide, "Chapter 20: Certificates of Insurance" [IRMI, 2010], p. 1; emphasis addedd. Indeed, "[c]ertificates of insurance were introduced **to verify** that certain general types of coverages and limits were being provided by the insurers designated thereon for the period stipulated" (Id., p. 49; emphasis added).

84. Pursuant to insurance industry standards and Washington insurance regulations, and even absent the additional required investigation, Quimby had to determine if the certificates of insurance were sufficient evidence to support coverage for at least the duty to defend. In doing so, he had to determine if the certificates of insurance **"tend[ed] to show** the issuance of a policy applicable to the claim." Clearly that was the case. Indeed, Travelers had not disputed that the certificates tended to show that a policy had been issued.

85. Next Quimby had to "provide copies of all insurance policy forms **potentially applicable** to the environmental claim issued by the insurer during the applicable policy period." Further, Travelers was required to "state which of the potentially applicable forms, if any, is most likely to have been issued and why, or alternatively, shall state why it is unable to identify the forms after a good faith search" WAC § 284-30-920(2)c). This, Quimby did not do. Quimby therefore failed to provide P.M. Northwest

necessary and required information so that P.M. Northwest could evaluate its coverage position. Further, Quimby himself needed to review the likely Comprehensive General Liability forms issued by Travelers in the late 1970s and early 1980s in order to determine what the likely coverage was. This would involve interviewing knowledgeable underwriters, investigating USF&G's files on the history of policy forms, and such similar investigation. This, Quimby also did not do. [54]

54 It is important to note that, much later, Travelers would produce sample policy forms to P.M. Northwest (See Infra).

86. Finally, and in accordance with insurance industry claims handling standards, Quimby would have to determine if the existence of the policies had been proven by a preponderance of the evidence (See Supra). Preponderance of the evidence is a well known and recognized standard in the insurance industry. IRMI notes that it is the "amount of evidence in support of a cause that, on the whole, is more convincing than the evidence offered in opposition to it" (IRMI, "Preponderance of Evidence," Definition). [55] At this point in Quimby's "investigation," there was no evidence contradicting the issuance of the policies; there was only important evidence verifying their issuance. Under these circumstances, pursuant to insurance industry standards, Travelers had to acknowledge that there was sufficient evidence to require Travelers to provide P.M. Northwest with, at the least, a defense. Travelers' failure to do so was contrary to the industry standard that the insurer give equal consideration to both the insured's and insurer's interests. Here, Travelers failed to give any consideration to the facts which supported coverage for P.M. Northwest and placed Travelers' interests above those of P.M. Northwest.

55 Travelers' own manual echoes this understandin when claims handlers are advised that "[Text redacted in copy]" (Knowledge Guide, Bates Nos. TRAV 2828-2829).

87. In providing a defense, Travelers could issue a reservation of rights in accordance with insurance industry standards, thereby protecting its rights should coverage not be confirmed. Indeed, Travelers' claims handlers are advised that "[Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2770). Travelers also recognizes that a reservation of rights letter can provide additional protections:

[Text redacted in copy]

(Knowledge Guide, Bates No. TRAV 2773)

88. Despite Travelers' ability to protect itself while providing a defense to its insured, Travelers did not do so.

89. Further, Travelers could also commence a declaratory relief action, while providing for the defense, in order to ask a court whether coverage would be afforded based on the available evidence. There is no evidence that Travelers gave any consideration to either option, which would have allowed Travelers to protect its insured and itself. Rather, Travelers abandoned its insured.

90. Further, to the extent that there was any doubt that coverage was provided to P.M. Northwest, Travelers had to consider resolving that doubt in favor of coverage (See "That Particular Part," FC&S, June 2004). There is again no indication that Travelers considered giving, let alone gave, P.M. Northwest the benefit of the doubt. [56]

56 Quimby did make the following entry in the claim file on August 9, 2018: "Interim Coverage Committee" (Bates No. TRAV 1601). No further information about this meeting is provided in the claim file. Accordingly, there is no evidence that any of the required evaluation of Travelers' coverage position took place at this meeting.

v. Travelers' Continuing Search Locates Additional Evidence of the Issuance of the USF&G Policies, Which Travelers Again Fails to Evaluate and Act Upon.

91. Travelers' policy search continued in August 2018. On August 17, 2018, Cara Corson,[57] a legal specialist in the Special Liability Group, in an email to BI Document Management, attached a "search request for USF&G retro microfilm records" (Bates No. TRAV 1377). Corson also wrote that "[t]his is a rush request" (Id.).[58] It does not appear that this records resource had been previously searched, as would have been expected. Further, despite the fact that Travelers knew that P.M. Northwest had been served with papers, and that there was an upcoming mediation and trial date, at 2no time prior to August 17, 2018, did Travelers ask that any of its searches be rush searches. This is significant, because Travelers did not commence a more thorough policy search until after it became aware of P.M. Northwest's assignment on August 15, 2018. (See Bates No. 1588).

57 Corson may be the paralegal that Quimby referred to in his August 6, 2018, claim file entry (See Supra). Nonetheless, the use of SLG resources to look for the policies was not made available at Travelers until the claim was created and sent to SLG, on June 11, 2018, which was over two months after the loss was first reported.

58 It appears that Corson may have been assigned to look for P.M. Northwest policies given the numerous communications between her and others regarding the search. There is, however, no document evidencing that assignment.

92. Likewise on August 17, 2018, Corson, in an email to Pinkston, reported that she attached "a St. Paul overnight request form," and requested to "[p]lease rush" (Bates No. TRAV 1386). This policy source also had not been previously searched, as would have been expected.

93. Also on August 17, 2018, Corson, in an email to Pinkston, advised that "I found more policies. Please rush" (Bates No. TRAV 1193). Corson's actual search request, also dated August 17, 2018, was attached to the August 17, 2018, email. (See Bates Nos. TRAV 1194-1197). It appears Corson, also on August 17, 2018, submitted a Request for BI Policy form, in which she asked: "Please check USF & G microfilm [sic] records only" (Bates No. TRAV 1370).[59] It is unknown why this limitation was put on the search. As with prior searches, there is no request to search for claim files. Further, it does not appear that there was a prior request for a search of USF&G microfilm records. If that is the case, there is no apparent reasonable explanation for this search not being made much earlier. Finally, it is noteworthy that Corson requested a search of four different P.M. Northwest spellings (Id.). This is the first time such a search was requested, even though Huntley had advised Travelers in her first notice of the loss that the spellings could be different (See Supra).[60]

59 The following handwritten note appears on another copy of this form: "USF&G Retro Microfilm" (Bates No. TRAV 1126).

60 It also appears that, in August 2018, Travelers' Surplus Lines database was checked for the first time without any results (See August 17, 2018, email from Lisa Denn to Corson, Bates No. TRAV 1128).

94. On August 20, 2018, Nancy Fang of Travelers advised Corson and Pinkston in an email that "[d]ata found in USU and attached is that spreadsheet. No data found in impact" (Bates No. TRAV 1175).[61] There is no apparent record of these two data sources being previously searched. The spreadsheet, headed "USF&G Summary Policy Transations [Sic]-Premium 260," identified several P.M. Northwest policies.[62] These included two of the policies that were previously disclosed in the certificates of insurance: Policy C70507, for March 15, 1979, to March 15, 1980; and Policy D17906, for March 15, 1980, to March 15, 1981. In addition, three new policy numbers were disclosed: Policy 007442, for March 15, 1979, to March 15, 1980; Policy 169892, for March 15, 1980, to March 15, 1981; and Policy L72573, for September 15, 1978, to September 15, 1980.

61 Presently, it is not known what "USU" and "Impact" are, and what kind of data they may contain.

62 According to the testimony of Thomas Hornbeck, Travelers' Regional Director, in the matter of *Herman J. Trotsky v. The Travelers Indemnity Company, et al.,* USDC, W. Dist. WA, at Seattle Case No. C11-02144-JCC (hereinafter, *"Trotsky"),*

the Premium 260 database (Id., p. 28). Likewise Lisa Lauf Travelers Senior Parale al testified in the *Trotskv* case that "[Text redacted in copy]," for the "[Text redacted in copy]" (Lauf deposition, pp. 82 & 129). Despite this, there is no evidence that this database was searched prior to August 2018.

95. The foregoing results are important for several reasons. First, they appear 2to confirm that USF&G had issued three of the previously identified CGL policies. That would again require Travelers' claims handler to review this additional information to determine whether sufficient secondary evidence of these policies had been produced to support, at the minimum, Travelers' duty to defend P.M. Northwest. There is no contemporary notation in the claim file electronic entries clearly indicating this was done; accordingly, it must be concluded it was not done (See Infra). [63] Further, there is no indication that Travelers commenced a search of the policies identified in the spreadsheet, which had not been previously identified, which would have been expected. Finally, there is no apparent reason why this information, which was obtained five months after the first report of the claim, could not have been obtained soon after the first report of the claim in March 2018 (See Supra).

63 The only possible entry which may be related to this finding is Quimby's August 30, 2018, entry, in which he states he reviewed the documents received (See Supra). Again, there is no indication that this new information was included in the August 30, 2018, review.

96. On August 20, 2018, Corson completed a policy search form entitled "St. Paul & Acquired Companies Policy Search" (Bates No. TRAV 1115). Apparently attached to this search form was a form entitled "St. Paul & Acquired Companies Policy Search/ Claim File search for policies that back NR from Doc Mgmt" (Bates No. TRAV 1117). The two-page claim form completed by Corson indicates that she may have located a workers' compensation policy issued to P.M. Northwest, policy number 536227 (See Bates No. TRAV 1125). Indeed, she wrote on the form that more policies were found. This search is also significant because Corson requested the search on August 17, 2018, and received a response on August 20, 2018, only one business day later. This demonstrates how quickly Travelers' searches could be done. If these searches had been timely done, which Travelers did not do, it is evident that Travelers would have had results soon after the loss was first reported. It is noteworthy, that it was not unitl August 24, 2018, that there was a first request to search for claims data. Indeed, it was not until August 24, 2018, that Travelers, for the first time, search the LSS and RHS data bases which contained USF&G losses paid and reserves respectively. (Bates No. TRAV 1225). There is no apparent reason why this search could not have been completed soon after the loss was reported. Attached to Corson's completed two-page form are printouts of a number of policies. These printouts indicate that information was located from "PREMIUM 260," for the following CGL policies: Policy B12875, for the period of March 15, 1978, to March 15, 1979; Policy C70507, for the period of March 15, 1979, to March 15, 1980; and Policy D17906, for the period of March 15, 1980, to March 15, 1981. All three of these policies were identified in the five certificates of insurance originally produced by P.M. Northwest (See Supra).

97. On August 21, 2018, Corson, in an email to Robert Hyland, [64] wrote:

64 Significantly, this email report was not copied to Quimby even though he was responsible for the coverage investigation.

I have completed a St. Paul/USF&G policy search on "P.M. Northwest," "PM Northwest," "P.M. of Oregon" and "PM of Oregon." The only GL policy numbers I came up with are C70507, B12875 and D17906. The first two policy numbers are listed on the certificates of insurance you gave me (they are the ending portions of the numbers). The last number is showing premium in 1980 and 1981. I don't see any evidence of other policy numbers on the certificates of insurance. So the next step would be for me to request all the policy numbers on the certificates of insurance from Document Management as well as the one policy number that I identified. Please let me know if you would like to do that after you get more information search Sharon Dorval [65] completed.

65 It is unknown what Sharon Durval's search consisted of or what she was instructed to search for.

(Bates No. TRAV 1089). [66]

66 Corson may have commenced another policy search on August 23, 2018, for various name formats for P.M. Northwest, as well as other names and policy numbers. This search included three of the policies that Fang found, and which were not on the five certificates of insurance, which are Policies BAP 7442, BAP 169892, and MP 50769.

98. This search appears to be the results obtained from Corson's August 17, 2018, search request (See Supra). It is important to note how quickly she received the results, further indicting that a timely policy search following the notice of the claim would likely have resulted in establishing sufficient secondary evidence of the policies to support coverage.

99. Although it is not yet entirely clear, it would appear that the late discovery of additional evidence of the policies identified in the certificates of insurance may have been due to the manner in which Travelers was entering the earlier searches and/or searching in a previously unsearched database. If so, then again there would be no reason why this should not have been done much earlier, as Huntley had previously advised Travelers that the names for P.M. Northwest may be spelled differently.

100. On August 23, 2018, Corson, in an email to Regina Ryan and Robert Hyland, [67] wrote that she was "sending you the St. Paul/USF & G policy search I recently completed" (Bates Nos. TRAV 1112, 1152). There is no record of Travelers sending the results of this search to P.M. Northwest as it was required to do (See Supra).

67 Likewise, this email was also not copied to Quimby as would be expected. It is evident that Quimby was not being included in the coverage investigation as he should have been.

vi. Travelers Locates Substantial Evidence of the Issuance of USF&G Policy but Fails to Acknowledge That the Evidence Triggers Travelers' Duty to Defend and Indemnify P.M. Northwest.

101. On August 23, 2018, Sherry Bowers, Senior Paralegal/SLG, [68] in an email to Fang, advised that she was "taking over the research and Cara sent me print outs of the results but the ability to filter is needed, [69] not to mention not sending in the same request in again" [70] (Bates No. TRAV 1207). On August 24, 2018, Bowers, in an email to Pinkston, wrote: "This is a rush request for legal-not the same as already been requested by Cara Corson" (Bates No. TRAV 1206). [71] Again, Travelers is conducting searches which it apparently had not conducted previously. There is no apparent reason why these searches could not have been conducted earlier. Further, all but one of the August 2018 searches were "rush" searches, which Travelers had not previously done. Shortly thereafter, Bowers corrected her earlier email, writing: "My apologies, appears as though I need some claim data too. Please disregard the last email and attachment and forward this one" (Id.). [72] This appears to be the first time that "claim data" was searched for. [73]

68 It is important to keep in mind that Quimby and SLG were assigned handling of the claim on July 11, 2018, or over two months prior to Bowers' search, even though Bowers was also in SLG.

69 It is not known what "ability to filter" refers to.

70 Significantly, Bowers had "worked with the old systems for close to 15-20 years." (Bates No. TRAV 2285).This indicates that it was not until August 23, 2018, that Travelers, for the first time, assigned the search to a more experienced person.

71 Bowers may have also requested another search on August 27, 2018 (See Bates No. TRAV 1164). The purpose and scope of this search is not entirely clear; therefore, any opinions regarding this search will have to await the results of additional discovery in this matter.

72 It is not known what the attachment was and what search was requested in the first email.

73 In the meantime, Fang, on August 27, 2018, reported on her searches of "SPC, USU, LSS, RHS and Impact" (Bates No. TRAV 1205). Fang reported on "[n]o data found in Northbrook" (Id.). Fang's search was apparently limited to three policies: 12875, 17906, and 50769, all of which were identified in the original certificates of insurance. It is unknown why the other two policies originally identified in the certificates of insurance were also not searched for. Nonetheless, it does not appear that Fang's search was performed prior to August 27, 2018.

102. The August 23, 2018, paralegal search report included the first report of a claim apparently involving P.M. Northwest (Bates Nos. TRAV 2862-2868). This was claim number USF00007600 40013894, which was apparently set up under policy 1ccc70507, which was one of the policies identified in the certificates of insurance (See Bates No. TRAV 2868). The claim number appears to have been in the "ClaimPlatform Unconverted Claims" database. There is no prior record of this database being searched. [74] Even though Travelers had previously recognized the need to search for claim files and had the ability to do so, it was not until four months after the claim was first reported that Travelers, for the first time, obtained claim file information. This failure to conduct a timely and thorough search for all documents related to P.M. Northwest's

74 It is not entirely clear how long this search took, but it is noted that Bowers placed her first search request on August 23, 2018 and the search report is also dated August 23, 2018. Even if the search took more than one day it is evident that a claims file search would take a very short period of time. Accordingly, if this search had been conducted shortly after notice of the claim Travelers would certainly have been in a position to timely defend and indemnify the insured. policies would have a significant impact on Travelers' untimely decision not to defend 2and indemnify P.M. Northwest (See Infra). Further, there is no record of Travelers timely disclosing the results of this search to P.M. Northwest, as it was required to do (See Supra).

103. On August 27, 2018, Bowers submitted a new search which had "not been previously requested," and then on August 29, 2018, she followed up with another email to Pinkston that she "was given a few more names to check and therefore needed to add a few more numbers to the request sent on Monday" (Bates No. TRAV 1146). Bowers attached a revised spreadsheet (Bates Nos. TRAV 1148-1150). [75] Again, it would appear that Travelers continued to conduct name and policy number searches and searches of databases that were not previously performed.

75 The information on Bowers' revised spreadsheet is difficult to discern, so any opinions regarding this will have to await the completion of additional discovery.

104. On August 29, 2018, Bowers, in an email to Regina Ryan, who is with Travelers, advised that "I have located and attached copies of the policy for the 1 CCC policy [76] that is within a couple claim files that I have. I am expecting two additional claim files that are on KOVIS film, [77] but I do not have hard files in my possession and think you may want to review them as quite a bit was paid per the indemnity. [78] I have not located any additional policy documents at this time, but I am still working on it" (Bates No. TRAV 1135; and see Bates Nos. TRAV 1094-1104). Significantly, Bowers' search for the policy numbers in the certificates of insurance in the LSS and RHS data bases was requested on August 24, 2018. [79] As a result the claim numbers were located on August 27, 2018, one business day later, and then two days thereafter Travelers obtained the claim file, which included the policy documents.(See Bates Nos. TRAV 1233-1238). This demonstrates again how quickly Travelers could obtain results of its searches, which could have been completed shortly after Travelers first received notice of the claim..

76 This is policy 1 CCC170507, which was in effect from March 31, 1979, to March 31, 1980, and was identified on one of the certificates of insurance.

77 It is presently not known what the KOVIS film database covers. Nonetheless, again there is no prior record of this database being searched.

78 It is not clear what two additional files Bowers was referring to.

79 See Bates No. TRAV 1225.

105. The documents located are very significant. First, there is the declarations page for policy 1CCC70507, which is entitled "Comprehensive General-Automobile Liability Insurance-Automobile Liability Insurance Declarations," and which confirms the policy period, and the named insured (P.M. Northwest, etc.) is also confirmed (Bates No. TRAV 1095). The policy limits of $500,000 each per occurrence and $500,000 **15** aggregate for Bodily Injury Liability are likewise confirmed. Further, the endorsements to the policy are listed, which includes form COS 20, which is a CGL policy. It is also noteworthy that the declarations page confirms that policy 1CCC70507 is a renewal policy of policy 1CC B12875, which was also identified in the certificates of insurance (See Supra). Further, handwritten notations on the declarations page indicate that the policy was renewed for the March 31, 1980, to March 31, 1981, policy period with an increased premium. [80]

80 This was likely policy 1 CCC17906, which was in effect for the period of March 31, 1980, to March 31, 1981, and which was identified in the originally produced certificates of insurance.

106. Also included was a certificate of insurance issued to U.S. Oil, which further confirmed the coverage provided by policy 1 CCC705070 (Bates Nos. TRAV 1096-1097). [81] Significantly, a "Comprehensive General Liability Insurance" policy, form number Casualty 20 (1-79) [82] was included (Bates No. TRAV 1101). This form set forth CGL coverage provided by the policy. The form is substantially identical to the ISO [83] standard CGL policies in use from 1973 to 1986, and would have provided coverage for both defense and indemnity to P.M. Northwest in the Ulbricht action. [84] There is nothing in the claim file indicating that Travelers' claims handlers ever attempted to reconstruct the USF&G policies and determine the likely forms that would have made up the policies, as they were required to do. Finally, the documents included a USF&G "Statement of Earned Premium" which set forth how USF&G calculated the premium for policy 70507 (Bates No. TRAV 1104).

81 In addition, the documents included an "Amendment of Cancellation Condition," form G537 (Ed. 6-76) (Bates No. TRAV 1098); a "Deductible Property Damage Liability Insurance" endorsement, form No GLC03 00 01 73 (Bates No. TRAV 1099); a "Comprehensive General Liability Supplement" endorsement, form number GLC 04 06 04 76 (Bates No. TRAV 1100); and an "Employers Liability Insurance" endorsement (Bates No. TRAV 1103).

82 This may also be identified as form COS 70 (1-71) (See Bates No. TRAV 1102). All of these forms further confirmed the issue of this policy by USF&G to P.M. Northwest.

83 According to one insurance industry source,

A very important part of ISO's service to its customers is the development of standardized coverage forms and endorsements. These forms and endorsements are copyrighted by ISO and are licensed for use by its insurer customers. ISO's standardized forms and endorsements serve as benchmarks. Without them, it would be very difficult for consumers and government to make meaningful price and coverage comparisons among insurers. Standardized forms provide a base from which insures can depart, tailoring endorsements to insure unique risks or target markets.

ISO's staff drafts language to express the intent of the new or revised coverage concept in a way that addresses such matters as new laws, court interpretations of forms, or changed market conditions. Once the new forms are developed it is reviewed by the appropriate working committee. Once approved by the committee, ISO files the proposed forms, where necessary, with state insurance regulatory for their approval. (Talley, Douglas, "Stock and Mutual Insurer Contract Wordings," IRMI, June 2011, p. 4)

[84] Indeed, the USF&G CGL form is identical to the ISO 1973 CGL policy (See "The 1973 CGL Policy," IRMI).

107. Despite the significance of the foregoing documents, there is nothing in the claim file documents produced to date showing any evaluation by Travelers of these documents except, possibly, for the August 9, 2018, claim file entry, which, as previously discussed, contains no detail on what was discussed in the referenced meeting, and a August 30, 2018, claim file entry for an "Interim Coverage Committee," which again contains no detail on who attended that meeting and what was discussed (See Bates No. TRAV 1601). The next entry in the claim file after August 30, 2018, is dated June 12, 2019, or nine months later, and it reports that the claim has been resolved and paid, and that the file will be closed (Id.). In other words, between August 2018 and June 2019, there is nothing in the claim file notes indicating any activity on Ulbricht's claim by the claim department. Indeed, the claim department simply ignored the evidence supporting issuance of the policies and takes no further action to protect 2its insured's interests.

108. The foregoing conduct was clearly contrary to not only insurance industry standards, but also Travelers' standards. Pursuant to Travelers' 2004 Best Practices, under the heading "Coverage," claims handlers are to "[Text redacted in copy]" (Bates No. TRAV 2856). This was not done. Further, claims handlers are to "[Text redacted in copy]" (Bates No. TRAV 2858). Not only did Travelers fail to conduct an initial evaluation, but it also failed to continue evaluating as new information was received.

109. On September 7, 2018, Bowers, in an email to Regina Ryan, wrote:

Please know that the research that you requested [85] for P.M. Northwest is now compete, and after a thorough search of all systems and available resources the results of the St. Paul Legacy policy research are attached. [86]

[85] It is unclear why Bowers refers to the search as one P.M. Northwest requested, as Berneche, in response to P.M. Northwest's original notice of the claim, simply wrote that, as a result of the limited search, "no policies were found for that time period" (Bates No. TRAV1008). Travelers' subsequent policy searches, which were of many databases not previously searched, were at Travelers' instigation.

[86] These documents, Bates Nos. TRAV 1106-1111, are not entirely clear, and are also difficult to read. Therefore, any opinions regarding their content and significance will have to await the results of further discovery. Further, it is not entirely clear if the September 5, 2018, Request for BI Policy, which may have been included in Bowers' documents sent to P.M. Northwest, is included in the search Bowers refers to or is a different search (See Bates No. TRAV 1106). The special instructions for this search were to "attempt to locate UW materials/ Policy documents and if not please look for claim files" (Id.).

As to the policy document located in the claim file, please keep in mind that we do not know their origin and they do not necessarily represent the complete policies as issued.

With regards to the policy/policies identified but not located, please know that Records Management/CL Documents Management Groups have already been consulted and available related claims files have been reviewed. In lieu of such, I have provided Claim Finance Prem Stats transactions line codes when available. Please keep in mind that any data retrieved in Claim Finance Prem Stats Transactions line codes must be used with caution because [it] was not created for the purpose of confirming coverage and it has been exposed to any number of possible input/storage/retrieval errors, but it may help. [87]

[87] No opinions can be offered regarding Bowers' statements concerning the reliability of the "Claim Finance Prem Stats" until further discovery is conducted.

The Records Management request and results for policy documents not located is also attached for your file.

(Bates No. TRAV 1105). [88]

[88] Again, there is no evidence that Quimby was copied on this email, or any of the results of the Corson/Bowers searches, as would be expected.

110. It is surprising that Bowers, a paralegal, would set forth Travelers' position regarding the significance of the discovered documents, and not the claim department, as would be required. Further, Bowers' virtual disavowal of the significance of the policy documents discovered in a claim file is inexplicable, since the source of the documents is most clearly USF&G, as they are labeled as such and found in a USF&G claim file.

111. Most significantly, after the documents confirming, at the least, the issuance of one CGL policy to P.M. Northwest, there is again no evidence that Travelers conducted any evaluation of the documents to determine its continuing duty to defend and indemnify P.M. Northwest. Most troubling is the fact that there is no apparent reason why the foregoing search could not have been completed within a short period of time following notice of the claim, thereby permitting Travelers to timely fulfill its obligation to defend and indemnify P.M. Northwest, which it did not do.

112. Finally, it is evident that the search was not thorough and did not include 2all "available resources." Among the many failures by Travelers to conduct a thorough and timely investigation was the failure to contact and interview the insured about the policy history. The insured's counsel was not contacted to determine what information he had regarding the policy history, and third parties who may have had knowledge regarding the policy history were also not contacted.

113. On November 9, 2018, Nancy Brownstein, Travelers' counsel, wrote to Shaw, P.M. Northwest's counsel (Bates No. ULBRICHT 31). In the letter, Brownstein asserted that once Travelers' received the certificates of insurance on July 9, 2018,

USF&G immediately commenced an investigation into its records to determine whether it had issued the policies listed on the certificates. Despite diligent investigation, USF&G is unable to establish the issuance, terms, conditions, exclusions, scope and applicable policy period of all of the alleged USF&G policies. USF&G has located information that policy number 1 CCC 70507 (1979-80) was issued. USF&G has also located secondary evidence regarding policies number 1 CC B12875 (1978-79) and ICCD 17906 (1980-81). No actual policy or partial policy has been located for these two. We have not located any documents or information for policy 1 CC A56045 (1977-78) or MP 50769 (1981-82).

(Id.)

114. Contrary to Brownstein's letter, Travelers had not conducted a diligent investigation (See Supra). Indeed, Brownstein does not seem to have been aware that the loss was actually reported in March 2018, and then followed only by a cursory investigation (See Supra). Further, she is clearly incorrect that no documents have been found regarding policies A56045 and MP 50769, as certificates of insurance evidencing USF&G's issuance of those policies had previously been provided to Travelers.

115. Brownstein then wrote that Travelers is "producing with this letter relevant documents that we have located as well as confidential and proprietary bates stamped USF&G general liability forms that may have been in use during the alleged policy period of 1977 to 1982, and may be in response to PM Northwest's claim for coverage" (Bates No. Ulbricht 32). [89] At no point does Brownstein set forth Travelers' position regarding the evidence supporting the issuance of the policies and Travelers' obligation to defend and indemnify Ulbricht, as would be expected. Rather, Brownstein writes:

89 It does not appear that these documents and forms were attached to Brownstein's letter as it was produced in this case.

USF&G's production of these documents and forms is not an admission that the alleged policies were issued or that any of the forms were actually used for the alleged policies. USF&G cannot say which, if any, of these forms were actually used or what other forms, endorsements or other materials may have comprised the policies to the extent a policy was issued to PM Northwest that may be potentially applicable to this claim.

(Id.)

116. In writing the foregoing, Brownstein simply ignores the evidence supporting the issuance of, at the least, policy 70507, which includes the policy limits and the CGL form issued as part of that policy. This is clearly substantial evidence of the issuance of this policy by USF&G, which apparently Travelers chose to ignore along with its obligations to its insured. Indeed, Brownstein failed to comply with Washington regulations (See Supra). This again is a failure by Travelers to give equal consideration to its and P.M. Northwest's interests.

117. On December 19, 2018, Brownstein wrote the Washington State Office of the Insurance Commissioner in response to P.M. Northwest's Notice Letter (Bates No. Ulbricht 0006). Brownstein contended that USF&G had "never denied coverage to PM Northwest." This is incorrect. In Travelers' Motion to Intervene, Travelers wrote that "[b]ecause USF&G was unable to locate evidence of any policies issued to PM Northwest and PM Northwest provided none, **USF&G declined to defend.** (Bates No. TRAV 1923; emphasis added). Further, this position is contrary to insurance industry standards as Travelers' continued refusal to defend and indemnify Ulbricht amounted to a constructive denial, particularly since P.M. Northwest first put Travelers on notice in March 2018. By December 2018, Travelers clearly had sufficient time to provide P.M. Northwest with its coverage position, which it never did. Travelers' failure to do so amounted to a constructive denial.

118. Brownstein continued to assert that Travelers had conducted a search for the policies and had located evidence of three of the policies. As with her prior letter, this was incorrect and clearly a misrepresentation of Travelers' conduct (See Act, § 284-30-330(1), that it is an unfair claims settlement practice to "[m]isrepresent[ ] pertinent facts or insurance policy provisions").

2. Travelers Failed to Take Statements From Its Insured and Witnesses.

a. Insurance Industry and Travelers' Standards Regarding the Taking of Statements as Part of a Thorough and Timely Investigation.

119. "Statements are written or recorded accounts of the facts and circumstances involved in a claim; they are the principal investigative tool of the claim representative. The basic purpose of a statement is to gather information in a logical and orderly fashion so that claim representatives can make decisions necessary for the disposition of the claims" (Markham, p. 46). Similarly, Popow points out: "In larger or more complicated losses, especially those involving a coverage question or suspected insurance fraud, the insured's statement is an essential part of the investigation. The statement's purposes are to establish the property's ownership, the cause of loss and facts that surround the loss, the extent of loss, and also determine for subrogation purposes if any third party is responsible for the loss" (Popow, Donna A. [Ed.], Property Claim Practices [The Institutes, 1 st ed., 2011], §§ 3.16-3.17).

120. A statement in this matter was particularly called for, so as to obtain an accurate and complete picture of the coverage. For example, Travelers should have interviewed Huntley to learn how she determined that USF&G had issued policies, what documents she had or what records were available at P.M. Northwest regarding its insurance history, and who else may have knowledge regarding that history. In addition, other possible witnesses, including former employees, accountants, or even former and current attorneys, could have been contacted regarding their knowledge of the insurance history. None of this investigation was done.

121. Travelers' failure to conduct such interviews would appear to be contrary to the company's own "2007 Property Best Practices," which require that "[t]he claim files notes should include documentation to support that a discussion was held with the Insured/Claimant regarding the nature and scope of the damage" ("2007 Property Best Practices," p. 12).

122. There is no documentation in the claim file that any of this investigation was conducted. The lack of documentation is important, given the insurance industry standard that claim files must contain documentation of all activities on the handling of the claim (See Regulations, § WAC 284-30-340, that claim "files must contain all notes and work papers pertaining to the claim in enough detail that pertinent events and dates of the events can be reconstructed"). Travelers' own "2004 Best Practices" require that "[Text redacted in copy]" (Bates No. TRAV 2856). [90] Further, Travelers, in its Knowledge Guide, advises its claims handlers that "[Text redacted in copy]" (Bates No. TRAV 2788). Likewise, Travelers' claims handlers are instructed that,

90 Pursuant to Travelers' "2007 Property Best Practices," p. 2, "[c]laim file documentation should include the facts underlying the claim and plans to resolve and communicate questionable coverage issues with the Insured/Claimant."

[Text redacted in copy]

(Bates No. TRAV 2788)

123. Travelers' standards correspond with the insurance industry standard for documentation of claim files:

The standard for [claim file] documentation is that the file should speak for itself. The basis for all decisions should be clear, all communications to and from the claim representative should be recorded, and it should be possible at any stage in the file's life to transfer it from one claim representative to another. Upon transfer of a file, what has been done and what remains to be done should be clear.

(Markham, p. 340)

Good claim handling alone is not enough to avoid bad faith claims. Supporting evidence must be in the file to establish that the good work was indeed done. **If the documentation is not in the file, then it can only be assumed that nothing happened.** The absence of good log notes, correspondence, and investigative and evaluative material is another indicator that the claim representatives were not doing their job properly.

(Markham, p. 249; emphasis added)

b. Travelers' Claim File Lacks Evidence of an Investigation in Accordance With Insurance Industry Standards, and as Such, It Must Be Concluded That Such an Investigation Did Not Take Place.

124. Complete documentation of the claim file is critical for several reasons. First, if there is a change in the handling adjusters, the new adjuster must be able to determine what has occurred in the handling of the claim, what decisions were made, and the basis for those decisions. [91] Without that information, the new adjuster will be unable to effectively proceed with handling the claim, thereby causing unnecessary delays or even mistakes in the claim handling. Further, supervisors periodically review the claim files to evaluate the claim handling, and they must also be able to determine how the claim is being handled and whether it is being handled in accordance with accepted claims handling standards. Without complete documentation of the claim file, the supervisor will be unable to fulfill this important role. Finally, claim files are often audited, either in the office where they are handled and/or by a home office audit team. When the files are audited by an audit team, the team will use a prepared audit form, which sets forth the standards that are to be used to evaluate the claim handling. If the claim file is not properly documented, the audit team will be unable to evaluate the claim file in accordance with the company's audit standards.

91 Likewise Travelers advises its claims handlers that "[Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2788).

125. At no time should adjusters be able to supplement their file documentation by verbally representing to supervisors, managers, or auditors that an activity that is not documented in the claim file actually took place. Verbal representations of activities often come well after the activity should have been performed, and, therefore, are subject to inaccurate memories as to what actually occurred. Further, verbal representations may be viewed as unreliable where the adjuster attempts to explain their failure to perform a certain activity. Accordingly, only contemporaneous entries in the claim file should be relied upon to determine what was done in the handling of the claim file. Finally, at no time should it be assumed that an activity took place where it is not documented in the claim file. Assumptions as to claim handling conduct would only undermine the purpose of file documentation-that the claim file is accurately documented as to all events that occurred in the handling of the claim. Assumptions also would mean that claim file evaluation would be based on mere conjecture or speculation, which would be clearly improper.

126. Given the lack of documentation in what has been represented as the claim file, it must be concluded that Travelers did not conduct any investigation that accorded with insurance industry standards. This would have included, among other investigatory steps, interviewing and taking statements from the parties and witnesses, and obtaining any and all relevant documents. There is no record of any such activity. Based on the documents produced, Travelers ignored this important and essential step in its handling of P.M. Northwest's claim.B. **Travelers Failed to Timely Advise P.M. Northwest of the Risk of an Excess Verdict and Respond to Settlement Demands in Order to Protect Its Insured From an Excess Judgment.**

1. Insurance Industry Standards Regarding an Insurer's Obligation to Timely Advise Its Insured of Any Potential for an Excess Verdict and Respond Timely to Settlement Demands Within Policy Limits in Order to Protect the Insured From an Excess Judgment.

127. The Act, as well as insurance industry claims handling standards, mandates that an insurer must attempt "in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear" (Act, § 284-30-330(6)). Insurance industry claims handling standards further require that demand letters be responded to in a timely fashion, and establish that it is an improper claims practice to fail "to acknowledge with reasonably promptly upon communications with respect to claims arising under insurance policies" (See Act, § 284-30-330(2).

128. As Markham has noted, "The claim representative should respond promptly to the attorney. The importance of a timely reply is magnified when the amount of money demanded by the attorney is at or near the policy limits" (Markham, p. 256). And as Markham has further pointed out, "[i]f the plaintiff attorney is willing to release the insured from any personal liability, provided the insurer will pay the policy limits, the limits should be offered as soon as possible," and "[a]n insurer that fails to properly investigate, evaluate, negotiate, and settle third-party claims exposes its insureds to excess verdicts and exposes itself to bad faith claims" (Id., pp. 263, 270; and see (Liability Claim Concepts and Practices, Prahl, Robert J. & Urata, Stephen M. (IIA, 1st ed., 1985) , p. 166 ("Prahl & Urata"), "On occasion, a plaintiff's attorney will send adjusters a demand letter and place a time limit on the demand. When this occurs, the adjusters must respond to the attorney within the time designated"). It is also critical that the claims handler respond in writing to time limit demands. As Prahl and Urata have noted, "[i]n order to avoid bad faith, an adjuster should respond in writing to such demands by attorneys" (Id., p. 166).

129. It is imperative that the insured be advised of policy limits demands. (See Markham, p. 256, "The insured must be advised of the demand and the possible implications of not accepting the demand," and p. 267, that status letters to the insured should contain "[o]ffers, demands, reasons for delay, information uncovered in the discovery process, and any other information that has a bearing on the case"). In another text used in the insurance industry to train claims representatives, it was noted that, "[t]he insurer's fiduciary responsibility to protect the insured in a liability matter mandates that it keep the insured informed of all developments that could affect the interests of its insured during the life a claim or a suit. Particularly important is the

progress of any negotiations that might conclude the case" (Rokes, p. 30). Similarly, "[a]ll developments that might affect the interest of an insured concerning the handling of the claim or the conduct of a lawsuit should be communicated immediately to promptly advise the insured where there is a possibility of an excess judgment" (Id., p. 35). Jones also points out: "The insured's interest should be protected by keeping the insured advised and by seeking the insured's point of view" (Jones, § 10.6). Constant communications with the insured during settlement negotiations is essential if the insurer is going to not only keep the insured informed regarding settlement discussions, but also protect the insured's interests.

130. Pursuant to insurance industry standards, an insurer must timely advise its insured of the potential for an excess verdict. As Markham has noted: "The insured should also be notified when a claim may exceed the policy limits for liability coverages .... The insurance company should notify the insured of potential excess exposure through an *excess letter'* (Markham, p. 281). As Prahl and Urata further point out: "An excess letter should include the following information: ... The letter should explain that the company will defend the insured and pay the cost of defense but that in the event of a verdict in excess of the policy limit(s), the policy will not cover the excess amount" (Prahl & Urata, p. 90).

2. Travelers Failed to Comply With Insurance Industry Standards Regarding an Insurer's Obligation to Timely Advise the Insured of the Potential for an Excess Verdict and Timely Respond to a Settlement Demand.

131. In addition to the foregoing standards, Travelers instructs its claims handlers that, "[Text redacted in copy]" (Knowledge Guide, Bates No. TRAV 2770; and see Bates No. TRAV 2807, "[Text redacted in copy] [Text redacted in copy]"). Despite the fact that P.M. Northwest's excess insurer was identified on the certificates of insurance, Travelers did not put the excess carriers on notice, contrary to its own claims handling standards. Further, Travelers never sent P.M. Northwest a letter advising it of the potential of an excess verdict.

132. In this case, it would have been in March 2018, when Travelers was first put on notice of Ulbricht's claims, that such notice was clearly warranted, given the verdict range assessments (See Supra). Indeed, Travelers' own "2004 Best Practices" provides that the claims handler is to "[Text redacted in copy]" (Bates No. TRAV 2856; and see Bates No. TRAV 2859, [Text redacted in copy]").

133. As previously noted, on July 9, 2018, Matthew Bergman, Ulbricht's counsel, in a letter to David Shaw, USF&G's attorney, presented the plaintiff's demand to P.M. Northwest in the amount of $3.5 million (Bates Nos. TRAV 1633 & BDO 0006). [92] Despite having received the demand, Travelers made no response to it, as it was required to do, nor did Travelers advise P.M. Northwest of Travelers' position regarding the demand, as it was required to do. [93]

92 Despite this demand, Travelers never advised its insured of the potential excess exposure as required by insurance industry standards (See Infra, and see Supra, p. 41, fn. 44).

93 On July 12, 2018, Shaw also sent Quimby the settlement demand (See Shaw's August 11, 2018, email to Vanessa Oslund; and see August 14, 2018, Declaration of David A. Shaw [hereinafter, "Shaw's Declaration"], Bates No. TRAV 1597, "on July 16, 2018 ... Ms. Huntley forwarded him [Quimby] the Plaintiff's demand letter").

134. On July 18, 2018, a mediation was held to determine if the Ulbricht matter could be resolved. Shaw, in an August 11, 2018, email, wrote the following about his contacts with Travelers during the mediation:

My only contact with insurers occurred during the mediation. I spoke with both James Quimby and Inna Goncharova by telephone at the mediation. I was informed by both that neither had located policies and that it was the insured's obligation to prove the terms of the policies.... At the time of my conversations with the adjusters during the mediation, I informed them both that 1. I was at the court mandated mediation, and 2. That the case was scheduled to go to trial on August 6.

Dick Huntley will sign a declaration to the effect that had a judgment been rendered at trial within the range I advised him was typical for mesotheloma plaintiff verdicts in Washington, the company would have filed for bankruptcy. The range of verdicts we spoke about was 1-6 million dollars. [94]

94 See also Shaw's Declaration, Bates No. TRAV 1579; and Findings of Fact and Conclusions of Law Re: Reasonableness of Covenant Judgment, pp. 5-6, discussing verdict estimates of "$1 million to $6 million," and "$6 million to $8 million," and p. 9, "Recent jury verdicts in mesothelioma cases in the Pacific Northwest have ranged from $950,000 to $81 million").

135. In his deposition, Shaw further testified that, during his conversation with the insurers, he was advised "that they hadn't found any policies, that it was my client's obligation to prove their policies and prove the existence and that the claim falls within the terms of the policies and that was the end of that" (Shaw deposition, p. 94). [95]

95 This position is surprising given that USF&G in its March 6, 2020, Complaint for Declaratory Relief ("Complaint") "concluded that the evidence reflects that it issued" the five CGL policies to P.M. Northwest between the collective period of March 31, 1977 to March 31, 1982," and that "USF&G believes that each of the five (5) USF&G Policies has limits of liability of Five Hundred Thousand Dollars ($500,000)." (Complaint, ¶¶ 28 & 29). There is no evidence that Travelers obtained any additional evidence regarding the existence of the policies after August 2018. Further, all the information that Travelers obtained was from its own files. Accordingly, there is no apparent reason why Travelers could not have taken the foregoing position in August 2018. Further, Travelers failed to conduct a timely policy investigation, which should have been completed no later than 60 days after it received notice of the claim in March 2018. Accordingly, Travelers should have been in a position to admit that the five policies were issued at the limits cited above as early as May 2018, and thereby provided Travelers the ability to timely and fully participate in the P.M. Northwest's defense and settlement. Clearly, this position was contrary to the Washington Regulations, which require the insurer to conduct a thorough investigation for policies (See Supra). Indeed, Travelers had undertaken an investigation. And even though that investigation was late and incomplete, the fact of its undertaking demonstrates that Travelers was, through its stated position, improperly seeking to impose the obligation to locate the policies upon its insured.

136. Travelers failed to participate in the mediation to protect its insured's interests. This was despite the fact that Travelers had more than enough time prior to the mediation to conduct a timely and thorough search for the policies, but which it did not do. Further, prior to the mediation, and even based on its insufficient investigation, Travelers did have secondary evidence supporting the issuance of the five USF&G policies to P.M. Northwest. Travelers should have acted to protect its insured at the mediation based on this evidence while protecting its own interests with a reservation of rights and/or declaratory relief action, neither of which Travelers did. As a direct result, P.M. Northwest was compelled to enter the stipulated judgment. This was certainly foreseeable, particularly since Quimby had repeatedly told P.M. Northwest to protect itself. On December 26, 2018, the court determined that the stipulated judgment was reasonable. [96]

96 On February 10, 2020, this decision as affirmed on appeal in an unpublished opinion.

137. Shaw's statement noting the potential value of Ulbricht's claim further underscores Travelers' failure to timely advise its insured, and the excess carrier, of the potential of an excess verdict.

138. On August 3, 2018, P.M. Northwest entered into a stipulated judgment with Ulbricht in the amount of $4.5 million (Bates No. TRAV 1576). On August 15, 2018, Bergman sent Quimby notice of the stipulated judgment and settlement agreement (Bates No. TRAV 1588). This was certainly required, as Travelers had refused to defend P.M. Northwest (See also Findings of Fact and Conclusions of Law Re: Reasonableness of Covenant Judgment, p. 6, "On August 6, 2018, PM Northwest again

contacted USF&G to inquire if a decision had been made on insurance coverage; the insurer responded that no defense or indemnity coverage would be furnished in this case").

139. On May 1, 2019, or well over a year after P.M. Northwest first put Travelers on notice of Ulbricht's claim, Brownstein, in a letter to Berman, enclosed Travelers' check for $2,500,000 (Bates No. Ulbricht 008). [97] Bernstein wrote that "Travelers has tendered the total potential limits available for the policies ... that are alleged to have been issued to PM Northwest by USF&G" (Id.). There is no indication in the claim file documents produced on how Travelers arrived at its decision to make this payment. The only claim file entry related to the payment is dated June 12, 2019, and reads: "Claim resolved and paid from file DOF6335 ... I will proceed to close our file" (Bates No. TRAV 1601). Further, there is no indication that Travelers had obtained any additional information by May 1, 2019, that it did not have by, at the latest, August 29, 2018 (See Supra). Assuming such to be the case, there is no justification for Travelers' late indemnity payment. Travelers' failure to timely and thoroughly investigate the missing policies further delayed its payment. If Travelers had conducted such an investigation, there is no reason to believe that Travelers would not have obtained secondary evidence of the policies within 60 days of the notice of the claim in March 2018. Indeed, Travelers received the certificates of insurance in July 2018, and by August 29, 2018, Travelers had also obtained substantial additional secondary evidence of the policies. This result was without the completion of the thorough investigation required by insurance industry standards (See Supra).

97 There are a series of Travelers claim documents dated in April 2019 that may be related to this payment; however, at this time, that cannot be determined, and as such, any opinions regarding these documents will have to await the completion of further discovery in this case (See Bates Nos. TRAV 1906, 1911, 1915-1918).

140. Brownstein also wrote that "Travelers also maintains its position that it is PM Northwest's burden to establish the existence, terms and conditions of any policies allegedly issued by USF&G. PM Northwest has not done so" (Id.). Despite the foregoing, Travelers undertook to investigate and search for the policies, as it is required to do. Indeed, Travelers told P.M. Northwest that it was conducting the investigation. That investigation, however, was untimely and incomplete. Further, to the extent that Travelers contends that the evidence of the policies that has been produced is insufficient, Travelers failed to advise P.M. Northwest why that is the case. 25 Indeed, Travelers at no time advised P.M. Northwest of its position on the specific documents that supported coverage, as it was required to do.

141. Likewise, and as pointed out by Richard Dykstra, P.M. Northwest's counsel, in his May 2, 2019, letter to Brownstein, Travelers had failed to pay any interest on the judgment, as would have been required under the standard ISO CGL policies issued in the 1970s, such as USF&G's policy issued to P.M. Northwest (See Supra). There is no record of Travelers making this payment.

C. USF&G Failed to Defend P.M. Northwest in Accordance With Insurance Industry Claims Handling Standards.

1. Insurance Industry Standards Regarding an Insurer's Defense Obligation to Its Insured.

142. The ISO CGL policy form, such as the USF&G policies here, provides coverage for defense and indemnity for claims of bodily injury and property damage arising from an occurrence within these four exposure categories. The insurer's defense obligation is one of the most important, if not the most important, coverage provided by a CGL policy. This is because the defense obligation occurs at the outset of the claim and requires the immediate expenditure of funds to protect the insured's interest. The insured, therefore, relies heavily upon the insurer's fulfillment of its defense obligation in order to protect the insured's financial interests. Without such protection, and given the costs of defense, an insured may not be able to defend itself. Accordingly, "[a]n insurer's decision regarding its duty to defend is one of the most important decisions an insurer must make" (Jones, § 4.12). [98]

98 As Jones notes, "[t]he financial consequences of the duty to defend can be quite significant because, without it, insureds could incur defense costs of thousands, and even hundreds of thousands, of dollars" (Id., § 4.12).

143. Insurance adjusters are taught that the defense obligation is broader than the indemnity obligation, and that it extends even to claims that are unmeritorious. Indeed, the "trend is to require the insurer to examine the allegations of the suit and defend the insured not only against claims alleged in the lawsuit but also against claims that could reasonably be asserted based on the allegations of the lawsuit" (Id., § 4.14).

144. Because of the broad nature of an insurer's defense obligation, an insurer "can only deny the duty to defend when any possible claims are clearly outside the scope of coverage" (Id.). Accordingly, it is incumbent upon the insurer to conduct a complete and thorough investigation if the insurer is to establish that it has no duty to defend. Indeed, a failure to conduct such an investigation can and does amount to bad faith (Id., § 4.1, "Claim representatives can make poor coverage decisions if they fail to gather all the facts before making their decisions").

2. USF&G Improperly Refused to Defend P.M. Northwest, Contrary to Insurance Industry Claims Handling Standards.

145. P.M. Northwest's March 2018 notices to Travelers clearly sought a defense (See Second Amended Complaint for Insurance Bad Faith Damages, ¶3.8, "On March 27, 2018, PM Northwest notified Travelers of the Underlying Action and requested a defense and indemnity"). In Huntley's March 27, 2018, email to Travelers, she wrote: "We got served with some papers so I'm trying to see if the lawyer we have been talking to is covered under our old policy" (Bates No. TRAV 1044). In her April 5, 2018, email to Berneche, Huntley wrote that "we are named in a lawsuit by a man named Robert Ulbricht" (Bates No. TRAV 1083). P.M. Northwest had complied with the likely notice provisions in the USF&G policies, thereby requiring Travelers to provide a defense or timely explain why no defense would be provided. Travelers did not timely respond to the notice in accordance with insurance industry standards.

146. It should have been evident to Travelers, upon receipt of Huntley's emails, that P.M. Northwest had been named in a lawsuit. In such situations, Travelers

[Text redacted in copy]"(Knowledge Guide, TRAV 2771; emphasis added). Consistent with insurance industry standards, Travelers requires its claims handlers to immediately determine the "potential for coverage," and not to wait for a tender of defense or until all coverage issues are resolved.[99] Despite these standards, Travelers did nothing.

99 Likewise Travelers also requires of its claims handlers that "[Text redacted in copy] (Knowledge Guide, Bates No. TRAV 2772; emphasis added). Again, Travelers claims handlers must respond where the "insured is served," which was the case with P.M. Northwest, and yet Travelers did nothing.

147. Significantly, Travelers did not timely request a copy of the complaint so that it could determine the scope of its defense obligation to P.M. Northwest. Clearly, the complaint invoked Travelers' defense obligation pursuant to the CGL policies issued by USF&G, as demonstrated in the USF&G policy documents discovered in August 2018.

V. CONCLUSION

148. I understand that there is additional discovery yet to be completed in this case. In particular, I understand that some depositions have only recently been taken, but I have not yet had time to review them. Once they are reviewed, along with the results of any additional discovery, I may supplement this report. The opinions expressed herein are subject to change or modification, depending on the results of any future investigation and discovery in this case.

End of Document

2021 WL 8441125 (W.D.Wash.) (Trial Motion, Memorandum and Affidavit)
United States District Court, W.D. Washington.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff,

v.

Karen ULBRICHT, et al., Defendants,

Karen ULBRICHT, et al., Plaintiffs,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant,

UNITED STATES FIDELITY AND GUARANTY COMPANY, Third-Party Plaintiff,

v.

ALLIANZ INSURANCE COMPANY, et al., Third-Party Defendants.

Nos. 2:20-CV-00369-JLR, 2:20-CV-00617-JLR.
November 16, 2021.

NOTE ON MOTION CALENDAR:
DECEMBER 3, 2021

United States Fidelity and Guaranty Company's Motion to Exclude Testimony of Charles M. Miller

Everett W. Jack, Jr, WSBA No. 47076, Steven P. Caplow, WSBA No. 19843, Nancy A. Brownstein, WSBA No. 50150, Davis Wright Tremaine LLP, 920 Fifth Avenue, Suite 3300, Seattle, WA 98104-1610, Telephone: 206.622.3150, Facsimile: 206.757.7700, Email: jacke@dwt.com, Email: nancybrownstein@dwt.com, Email: stevencaplow@dwt.com, for plaintiffs United States Fidelity and Guaranty Company.

Honorable James L. Robart.

United States Fidelity and Guaranty Company (USF&G) respectfully requests the Court exclude the testimony of Charles M. Miller, a litigation expert designated by PM Northwest/Ulbrichts ("PM Northwest") to testify on claims handling.

First, Miller's boilerplate testimony—which discusses more than a dozen claimed standards of care related to claims handling—does *not* address the only standard of care alleged for investigating a claim actually referenced in PM Northwest's Second Amended Complaint (SAC). Accordingly, Miller's proposed testimony is not only not relevant to this case, is prejudicial, and will confuse (rather than assist) the jury.

Second, Miller—who is a practicing lawyer—is acting as an advocate rather than an expert. For example, ignoring his own legal authority, which expressly requires "mutual cooperation," Miller's one-sided report references USF&G's actions, without any consideration of PM Northwest's own delays and failures to provide information.

Third, Miller's work consists of commonplace observations about the primary facts— such as what was said in an email or the number of days between events—that the jury is easily capable of comprehending and drawing correct conclusions – without Miller's one-sided commentary.

Fourth, Miller's 84-pages of running commentary on the chronology of events reflects an improper use of expert testimony to present his clients' case and his interpretation of the facts.

I. BACKGROUND [1]

[1] Citations are to the Declaration of Nancy Brownstein in Support of USF&G's Motion for Summary Judgment. Dkt No. 71.

A. The Underlying Action

In January 2018, the Ulbrichts filed the underlying action in King County Superior Court. Ex. 1. The case was set on an expedited trial calendar. Ex. 2. Months later, PM Northwest contacted USF&G seeking help locating an "old policy" from the 1970's or early 1980's for which it could not find a policy number. Ex. 3. PM Northwest did not notify USF&G: (i) it was a defendant in a lawsuit filed in January; or (ii) that the lawsuit had a trial date four (4) months away; and (iii) did not request that USF&G either defend or indemnify it in the lawsuit. After conducting a search, USF&G advised PM Northwest it could not locate a policy or evidence of a policy issued to PM Northwest and offered to assist further. Ex. 6.

USF&G heard nothing further for nearly three (3) months, until July 9 and July 10, 2018, when PM Northwest: (i) provided USF&G copies of five certificates of insurance, the earlier filed Complaint and Amended Complaint in the Underlying Action; (ii) advised USF&G that the case was scheduled for mediation in 9 days; (iii) advised USF&G of the trial date in 27 days; and (iv) for the first time asked that a claim file be opened. Ex. 7 at 1-2. USF&G then initiated a second search for policies that may have been issued to PM Northwest based on this new information. Ex. 12. Then on July 16, 2018, PM Northwest sent USF&G a copy of the $3.5 million mediation demand it had received a week earlier. Ex. 13 at 3. The demand was $1.4 million higher than the combined policy limits stated on the certificates of insurance.

At mediation, the Ulbrichts never reduced their pre-mediation demand or made an offer at or below the combined policy limits stated on the certificates of insurance. PM Northwest's counsel testified the demand was "ridiculous" and not a "real demand" because it was too high. Ex. 8 at 82:2-15. Following the mediation, counsel for PM Northwest and the Ulbrichts met at a bar and without any negotiation agreed to a stipulated judgment for $4.5 million. Ex. 19.

Although its second search for policies that may have been issued to PM Northwest also was unsuccessful, USF&G continued to search for secondary evidence of policies through numerous legacy database systems. Ex. 20. Through this search for secondary evidence, USF&G located references to policy numbers contained on only three of the five certificate of insurance and found incomplete portions of a single policy for the 1979-80 year. Ex. 21. For the remaining two of the five certificates of insurance, no secondary evidence was found referencing either of the policy numbers. *Id.* For its part, PM Northwest itself never located any policy information and other than information located by USF&G, has no information concerning the terms, conditions, exclusions, or endorsements that comprised the alleged policies.

B. Expert Charles M. Miller

PM Northwest, and its assignee, the Ulbrichts, retained Charles Miller as a claims handling expert for this coverage litigation. Miller is a practicing attorney with decades of experience. Declaration of Nancy A. Brownstein in Support of USF&G's Motion to Exclude Expert Testimony ("Brownstein Decl.") Ex. B. More than twenty years ago, prior to becoming a lawyer, Miller worked at Fireman's Fund as a claims adjuster. *Id.*

To perform his work on this case, Miller read the parties' correspondence, depositions, and court pleadings. *Id.* Ex. C. Miller then generated an 84-page report. *Id.* Ex. A.

The introductory section of Miller's report, (*id.* ¶¶ 5-6, 11-17), addresses the standard of care for investigating a claim. According to Miller, the primary source of the standard of care is based on WAC 284-30-340- 284-30-380. *Id.* ¶¶ 5-6. Yet Miller's massive report contains only two references to these provisions (*id.* ¶¶ 21, 122) and only a handful of references to other WAC provisions.

Instead, Miller assembled a long list of purported claim standards based on what appears to be an outdated literature review that is not particularized to the State of Washington or the particulars of this case. *Id.* ¶ 16. If the standards are mentioned at all in the report, the references are difficult to locate. In addition to being of doubtful relevance to this case, the standards (e.g., "insurance companies" "should not use biased consultants") do not appear to require expert explication. Nor does Miller offer any. Instead, he confines himself to general observations along the lines of claims professionals "should be trained and knowledgeable" (*id.* ¶ 12), insurance provides "peace of mind" (*id.* ¶ 13 (emphasis omitted)), "claims professionals are commonly taught about the importance of avoiding bad faith" (*id.* ¶ 15), the insurance industry adopts standards and practices, so insureds get the benefit of their policies (*id.* ¶ 16), and claims professionals are trained on how to interpret policies (*id.* ¶ 17.)

The remainder of the report is essentially a chronology of events punctuated by Miller's "expert" assessment of the evidence and legal conclusions: an email transmitted by USF&G contains factual mistakes (*id.* ¶ 43), there is "no apparent reason" why USF&G did not conduct "the same search" for certificates of insurance as already performed by the Ulbrichts (*id.* ¶ 53), "no apparent reason" why assignment of the claim to the SLG unit "could not have occurred" after USF&G received notice of the claim (*id.* ¶ 59), letter text suggests SLG "was not aware of the prior policy search" (*id.* ¶ 72), SLG "would have had access to legal advice if necessary" (*id.* ¶ 75), from the claim file, it is "unclear what additional investigation [SLG] contemplated" (*id.* ¶ 81), "[USF&G] had not disputed that the certificates tended to show that a policy had been issued" (*id.* ¶ 84), USF&G did not give the benefit of the doubt to PM Northwest (*id.* ¶ 90), "it does not appear there was a prior request for a search of USF&G microfilm records" (*id.* ¶ 93), the performance of a search in one day "demonstrates how quickly [USF&G's] searches could have been done" (*id.* ¶ 96), using a different spelling of PM Northwest may have facilitated later searches (*id.* ¶ 99), the claim file entry does not describe who attended a meeting or what was discussed (*id.* ¶ 107), "only contemporaneous entries in the claim file should be relied upon" (*id.* ¶ 125), "communications with the insured during settlement negotiations is essential" (*id.* ¶ 129), "[c]learly" the insurers' view that the insured has the burden of proof on coverage is "contrary to the Washington Regulations" (*id.* ¶ 135), "there was no justification for [USF&G's] late indemnity payment" (*id.* ¶ 139), there is no record that USF&G paid post-judgment interest (*id.* ¶ 141), "'[c]laim representatives can make poor coverage decisions if they fail to gather all the facts"' (*id.* ¶ 144). Miller subsequently issued a Supplemental Report along the same lines. Brownstein Decl., Ex. D.

Unsurprisingly, courts routinely reject Miller's work product. *See Kisner v. State Farm Fire & Cas. Co.*, 2020 WL 6947902, at *2 (N.D. W.Va. Oct. 28, 2020) (excluding Miller testimony on questions of law); *Marshall v. State Farm Fire & Cas. Co.*, 2017 WL 5307936, at *1 (Ariz. Super. Aug. 30, 2017) (granting limine motion to legal opinions and industry standards testimony on policy interpretation from plaintiffs' claim handling expert Charles Miller); *Smith v. Nationwide Affinity Ins. Co.*, 2017 WL 3720201, at *11 n.5 (N.D. Ind. Aug. 28, 2017) (rejecting opinions offered by Charles Miller); *Harvey Prop. Mgmt. Co., Inc. v. Travelers Indem. Co.*, 2016 WL 8200625, at *6 (D. Ariz. May 12, 2016) (ruling Miller's bad faith testimony did not raise triable issues of fact to defeat summary judgment); *Saracana Condo. Ass'n v. State Farm Fire & Cas. Co.*, 2014 WL 12639341, at *10 (D. Ariz. Aug. 18, 2014) (granting State Farm summary judgment on plaintiff's bad faith claim because Miller's testimony on bad faith investigation did not create genuine issues for trial); *Hoa v. State Farm Fire & Cas. Co.*, 2014 WL 1152967, at *7 (D. Ariz. Mar. 14, 2014) ("Mr. Miller did not connect his opinions with the facts of this case in order to support that State Farm's claims handling conduct was motivated by bad faith."); *Food Pro Int'l, Inc. v. Farmers Ins. Exch.*, 169 Cal. App. 4th 976, 995 (2008) (dismissing punitive damages claim notwithstanding Miller's declaration that "Farmers' conduct was unreasonable and did not comply with the standards and practices in the insurance industry for claims handling").

II. ARGUMENT

"Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *U.S. v. Verduzco*, 373 F.3d 1022, 1033 (9th Cir. 2004) (citations omitted). "Before admitting expert testimony into evidence, the district court must perform a 'gatekeeping role' of ensuring that the testimony is both 'relevant' and 'reliable' under [Federal Rule of Evidence] 702." *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188 (9th Cir. 2019) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)). "It is now well settled that this gatekeeping function extends beyond scientific testimony to

testimony based on 'technical' and 'other specialized' knowledge.'" *1150 BP LLC v. Qwest Chem. Corp.*, 2006 WL 1997380, at *2 (E.D. Pa. July 12, 2006) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999)).

A. Miller's Standard of Care Testimony Will Not Assist the Jury

Miller's standard of care testimony is more likely to confuse than assist the jury. The Second Amended Complaint (i.e., Miller's clients' third version) state that WAC 284-30-330(4) and *Coventry v. American* establish the standard of care for investigation of a claim. Dkt. 27 ¶ 5.1. Yet, Miller's reports fails to address either. Accordingly, Miller's expert work serves no function. Further, the expert report addresses at least 17 standards (Brownstein Decl., Ex. A ¶ 16) without disclosing or discussing the relevance of these standards to this case. Even on the limited issue of claim investigation, it is doubtful the jury requires Miller's special knowledge to understand that an investigation should be "objective" or "timely." *PacTool Int'l Ltd. v. Kett Tool Co., Inc.*, 2012 WL 13686, at *2 (W.D. Wash. Jan. 4. 2012) ("[I]t has not been shown that specialized knowledge" of a patent attorney "will assist a jury as to any evidence in this particular case"); *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360-61 (Tex. 2000) (expert's opinion will not assist a jury on a matter that is within the jury's "common knowledge")

B. Miller Fails to Consider Countervailing Evidence

Although not referenced in the SAC, Miller relies on WAC 284-30-930, which addresses environmental pollution claims. Brownstein Decl., Ex. A ¶ 54 (Since its enactment more than 30 years ago, no case has ever applied this WAC to an asbestos bodily injury claim.) However, even if applicable to this case, correctly applied the WAC imposes duties on both the insured and the insurer:

(a) Insureds and insurers shall ***fully cooperate with each other in the investigation of environmental claims***.

(i) ***Each*** shall provide to the other ***facts known or discovered during an investigation***, including the identity of any witnesses with knowledge of facts related to an environmental claim.

(ii) ***Each*** shall provide the other with ***copies of documents*** establishing facts related to an environmental claim.

WAC 284-30-930(2)(a)(i) & (ii) (emphasis added). Yet, Miller's one-sided report references only USF&G's actions, without any consideration of PM Northwest's repeated delays and failures to provide information including pleadings, the accelerated trial date, and the mediation demand. Even without the WAC, Miller's failure to consider countervailing evidence renders his report unreliable. *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 596 (9th Cir. 1996) (expert may not "pick and choose" and "present the Court with what he believes the final picture looks like"); *Dibella v. Hopkins*, 2002 WL 31427362, at * 3 (S.D.N.Y. Oct. 30, 2002) (excluding testimony based on expert's report, which was "largely a factual one that seeks to advocate for Hopkins' version of the facts").

C. Miller's Opinions Will Not Assist the Jury

Miller's testimony is contrary to the "general rule" that expert testimony not only is unnecessary "but indeed may properly be excluded" if the jury is capable of comprehending the primary facts and of drawing correct conclusions. *Santiago Salas v. PPG Architectural Finishes, Inc.*, 2019 WL 399029, at *1 (W.D. Wash. Jan. 31, 2019) ("Expert testimony is inadmissible if it concerns factual issues within the knowledge and experience of ordinary lay people because it would not assist the trier of fact in analyzing the evidence."); *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962). *See also Cohen v. W. Hotels, Inc.*, 276 F.2d 26, 27 (9th Cir. 1960) (affirming exclusion of expert with 30 years of experience because jurors "could determine for themselves, without expert assistance, whether the installation used caused the wrinkled condition of the edge of the rug"); *Dhillon v.*

Crown Controls Corp., 269 F.3d 865, 871 (7th Cir. 2001) (affirming exclusion of biomechanical engineer's testimony that putting a door over an opening would have prevented injury to forklift operator's leg). The jury does not need Miller's assistance to read email, learn that "there is no apparent reason" why certain actions could have been done earlier, understand the performance of a search in one business day demonstrates the speed in which such searches can be performed, explain that a claim file entry does not record who attended a meeting, or comprehend Miller's dozens of other commonplace observations.

D. Miller's Assessment of the Evidence Cannot Be Substituted for the Jury

Miller's proposed testimony, as befits a thirty-year lawyer, simply argues his client's case from the witness stand. The report provides a running commentary on the chronology of events. Courts do not allow the use of expert testimony that "consist[s] of their appreciation of the facts" and law:

> The testimony of an 'expert' is tendered, who is an individual who happens to have some title, normally describing himself as a 'consultant.' A review of their 'expert' reports normally reveals that the reports consist of their appreciation of the facts (some of which are usually in dispute), their conclusion as to what the law is or ought to be, as far as fixing responsibility for the accident, and for sure, a reservation at the end of the report to change their opinion if they learn more information.

Thomas v. Global Explorer, LLC, 2003 WL 943645, at *2 (E.D. La. Mar. 3, 2003) (citation omitted) (excluding causation expert's testimony based on review of deposition testimony and vessel reports). *See also PacTool*, 2012 WL 13686, at *2 (disallowing as a legal conclusion lawyer-expert's testimony that persons violated the duty of disclosure); *Morales v. Fry*, 2014 WL 12042563, at *3 (W.D. Wash. Mar. 25, 2014) (precluding expert from offering any opinions – including legal reasoning or conclusions – beyond explaining industry standards as relevant to the case); *Santiago Salas,* 2019 WL 399029, at *1 ("Expert testimony that merely tells the jury what result to reach is inadmissible."); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 565 (11th Cir. 1998) (expert's "characterizations of documentary evidence" do not assist the jury); *Pledger v. Reliance Trust Co.*, 2020 WL 6101409, at *11 (N.D. Ga. Jan. 24, 2020) (expert testimony as to party's motives excluded as unhelpful); *Highway Materials Inc. v. Whitemarsh Township*, 2004 WL 2220974, at *19 (E.D. Pa. Oct. 4, 2004) (expert who "sets forth twenty-four circumstances/actions by the Defendants" improperly applying the law to the facts). The jury, not Miller, should assess the evidence.

III. CONCLUSION

For the foregoing reasons, Miller's testimony should be excluded.

DATED this 16th day of November, 2021.

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2021 WL 8441136 (W.D.Wash.) (Trial Motion, Memorandum and Affidavit)
United States District Court, W.D. Washington,
At Seattle.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff,

v.

Karen ULBRICHT, et al., Defendants,

Karen ULBRICHT, et al., Plaintiff,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant,

UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff,

v.

ALLIANZ INSURANCE COMPANY, et al., Third-Party Defendants.

No. 2:20-cv-0369-JLR.
November 29, 2021.

NOTED FOR HEARING:
DECEMBER 3, 2021

Defendants' Response in Opposition to United States Fidelity and Guaranty Company's Motion to Exclude Testimony of Charles M. Miller

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Hon. James L. Robart.

Defendants hereby submit this response in opposition to United States Fidelity and Guaranty, Co.'s (“Travelers”) Motion to Exclude Testimony of Charles M. Miller.

I. INTRODUCTION

The parties have both filed dueling motions to exclude their opponent's claims-handling experts. *See* Dkt. # 68; Dkt. # 72. Defendants' expert, Charles Miller, authored a detailed 84-page report in which he cites numerous insurance industry customs and practices concerning the claims handling involved in the underlying claim, *Ulbrichts v. CBS Corp. et al.*, No 18-2-02146-4-SEA. By contrast, Travelers' expert, Allan Windt, authored a report almost entirely composed of legal opinions and conclusions on the ultimate issue of bad faith. [1] Unlike Windt, Miller does not try to provide legal opinions. Nor does he infringe on this Court's role in informing the jury about issues of law. Rather, his disclosed opinions set out the applicable industry standards

and explain in detail how Travelers repeatedly violated them. In its Motion, Travelers relies on one-sided descriptions and misleading excerpts of Miller's testimony, and ignores the actual depth and breadth of his opinions.

[1] *See* Dkt. # 68 for a discussion of the inadmissibility of Travelers' expert's opinions.

Travelers' misleading arguments should be summarily dismissed by this Court.

II. FACTUAL BACKGROUND

Defendants' expert, Charles Miller is an attorney specializing in the field of insurance law with decades of experience in the insurance industry. From 1972 to 1990, Miller worked as an insurance claims adjuster and manager at Fireman's Fund Insurance Company. Dkt. # 73-1 (Expert Report of Charles M. Miller (dated Aug. 27, 2021)) at 8. [2] During his employment at Fireman's Fund, Miller was responsible for the handling of thousands of claims, either as an adjuster or supervisor, including claims such as the one involved in this case. *Id.* at 9. Miller was also responsible for investigating "claim[s], determine[ing] the scope and extent of damages, and then determin[ing] what coverages applied to the loss." *Id.*

[2] Unless otherwise stated, all page citations reference the ECF page designation.

After nearly two decades working in the insurance industry, Miller became an attorney and since 1992 has almost exclusively focused his legal career on insurance matters. *Id.* at 10. Because of Miller's unique breadth of experience, he has "had the opportunity to review numerous claims files, claims manuals, and other documents regarding the claims handling procedures of many insurance companies." *Id.* Miller has continued his work in insurance industry-related programs, including presenting on ethics and claims handling at the Property Loss Research Bureau's regional conventions. *Id.* In addition, Miller is currently the author of the personal lines claims handling section for the International Risk Management Institute. [3] *Id.*

[3] For more on Miller's extensive experience and expertise, see his CV at Dkt. # 73-2.

III. EVIDENCE RELIED UPON

This Motion is based upon the records and files herein, including the Declaration of Alexander E. Ackel, with the exhibit thereto.

IV. ARGUMENT AND AUTHORITY

A. Miller's testimony is relevant.

Travelers argues that Miller's opinions do "*not* address the only standard of care alleged for investigating a claim actually referenced in PM Northwest's Second Amended Complaint," and is therefore "not relevant to this case." Dkt. # 72 at 2 (emphasis in the original). This argument is the first of many misrepresentations contained within Travelers' Motion.

Setting aside the fact that the assertion oversimplifies Defendants' claims, [4] it is simply false. Miller directly addresses the claim that Travelers denied coverage "without first conducting a reasonable investigation:" [5]

[4] Subsumed in Defendants' claim that Travelers failed to conduct a reasonable, and full and fair investigation is also their bad faith claims that Travelers failed to: (1) "fully and fairly investigate whether it had issued the five CGL insurance policies reflected in the Certificates of Insurance;"

(2) "to investigate whether the Certificates [] were signed by a "Producing Agent" for Travelers;"

(3) whether the Certificates were filed with the Washington State Department of Labor and Industry, Contractors Registration Section as a representation of insurance policies in place for PM Northwest; and (4) whether the Certificates conceivably constituted secondary evidence of five CGL insurance policies." Dkt. # 27 at 7. Defendants also have insurance bad faith claims that Travelers violated its enhanced obligation of fairness towards the insured, the Washington Insurance Fair Conduct Act, and the Washington Consumer Protection Act. *See generally id.*

[5] *See* Dkt. # 27 at 8 (Second Amended Complaint).

On the same date, Berneche wrote Huntley the following … "Unfortunately no policies were found for that time period."

This was, in effect, *a denial of coverage based on an incomplete and inadequate investigation* that did not include, in accordance with insurance industry standards, at the least the following:

• Interview the insured

• Interviewing any witnesses to the history of the coverage

• Interviewing any accountants who may have had knowledge of the policies

• Obtaining any documents from the insured

• Conducting a search for older claim files

• Conducting a search for underwriting files

Dkt. # 73-1 at 33 (emphasis added). The fact that Miller did not cite to legal authority, as Travelers suggest he needed to do, [6] and instead cites to an industry standard, does not affect the admissibility or relevance of his opinions. In fact, as discussed below, opinions based on industry standards, as opposed to legal opinions, are favored by courts.

[6] Travelers notes in its Motion that "Miller's reports fails to address either [WAC 284-30-330(4) or *Coventry v. American*]. These two citations were cited in Defendants' Second Amended Complaint for the assertion that an "insurer must conduct a reasonable, and full and fair investigation of a claim before denying coverage."

Miller's report also discusses Travelers' post-denial conduct and its failure to look for and consider secondary evidence of the insurance policies. These opinions all relate to Defendants' claims that Travelers failed to investigate whether the certificates of insurance "constituted secondary evidence" of the policies, Dkt. # 27 at 7, and that Travelers' failure to investigate those certificates constituted a breach of "its enhanced duty of fairness towards PM Northwest," Dkt. # 27 at 8-9.

Clearly, Miller's opinions are relevant to the claims at issue.

B. Miller's testimony is helpful to the jury.

Travelers claims that Miller's testimony is not helpful to the jury because the jury does not require "Miller's special knowledge to understand that an investigation should be 'objective' or 'timely.'" However, this is a gross oversimplification of Miller's opinions, and an attempt by Travelers to belie the comprehensive and detailed nature of Miller's 84-page report. *See* Dkt. 73-1. Rather, Miller's opinions, which are heavily rooted in an analysis of the applicable industry standards, [7] are precisely the type of "standard of care" testimony that is routinely allowed by the federal courts. *See, e.g.*, *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016-17 (9th Cir. 2004) (expert testimony that insurer deviated from industry standards was admissible; testimony that insurer actually acted in bad faith inadmissible); *San Diego Unified Port District v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 3:15-cv-01401-BEN-MDD, 2018 WL 5281909, at *6 (S.D. Cal. Oct. 23, 2018) ("The Port has identified sufficient factual foundation for his opinion of whether an insurer "deviated from industry standards .... Furthermore, Mr. Bishop's testimony and expert report will be helpful to the trier of fact because it will provide a framework for understanding complex claims handling practices involving insurance cases...."); *Kagan v. State Farm Mutual Automobile Ins. Co.*, No. 08-CV-04903 GAF, 2009 WL 10675116, at *3 (C.D. Cal. Nov. 11, 2009) ("Mr. Peterson may testify regarding industry standards and practices, may testify regarding statutory and regulatory provisions relevant to claims handling."); *O'Sullivan v. Geico Cas. Co.*, 233 F. Supp. 3d 917, 929 (D. Colo. 2017) ("Mr. Torres may testify as to insurance industry standards, which may include his testimony and opinions explaining how he believes Geico's conduct differed from the conduct of other insurers or fell short of industry standards.").

7 Indeed, Travelers concedes "discusses more than a dozen claimed standards of care related to claims handling." Dkt. # 72 at 2.

In *Hangarter*, the Ninth Circuit held that it was permissible to allow a claims-handling expert to opine that the insurer deviated from industry standards since that testimony fell short of "a legal conclusion that Defendants actually acted in bad faith (*i.e.*, an ultimate issue of law)." 373 F.3d at 1016-17. *Hangarter* drew a clear distinction between testimony regarding insurance industry standards and testimony regarding the reasonableness of the insurer's conduct—the former being admissible expert testimony while the latter being impermissible legal opinion.

In his report, Miller sets out numerous applicable industry standards and explains how Travelers failed to comply with them. For example, Miller starts by opining that Travelers failed to comply with the industry standard that "[e]very insurer, must complete its investigation of a claim within thirty days after notification of claim, unless the investigation cannot reasonably be completed within that time." Dkt. # 73-1 at 19-22. Miller continues to explain what the industry standards prescribe when performing a lost policy search and how Travelers failed to comply.

He opines that the industry standard required Travelers to: search for secondary evidence, such as premium invoices; obtain information from the state's insurance regulatory body; and perform investigation of "various business records." *Id.* at 22-27. Miller also notes that a "[r]econstruction of older policies [is] an important if not critical objective where an insured faces claims arising from asbestos exposure over several years." *Id.* at 23. And that "the terms of a lost policy [can be determined] by introducing specimen copies of standard insurance forms commonly used in the industry." *Id.* at 26.

Obviously, Miller's opinions go far beyond merely testifying that "an investigation should be 'objective' or 'timely.'" The fact that Travelers attempts to cast Miller's testimony in this simplified light, while ignoring the extent and breadth of Miller's disclosed opinions, seriously undercuts Travelers' assertion that Miller's testimony will not aid the trier of fact.

The jury will not likely know, for example, what the industry standard is for a timely investigation, or what activities should be included in a search for lost policies. Similarly, the jury will not likely know the various means by which insurers are expected to reconstruct policies, and the importance of policy reconstruction in general. *See* *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 924, 148 Cal. Rptr. 389, 396-397 (Cal. 1978) ("We can conceive of many ways in which a lay jury, in assessing the conduct and motives of an insurance company in denying coverage under its policy, could benefit from the opinion of

one who, by profession, and experience was peculiarly equipped to evaluate such matters in the context of similar disputes.”); Croskey, Heeseman, Ehrlich and Klee, California Practice Guide, Insurance Litigation at 15:1005 (Rutter Group 2017) (“Expert testimony may be required to establish … custom and practice in the industry.”).

For these reasons, Miller's testimony will be helpful to the trier of fact.

C. Miller addressed *and rebutted* Travelers' purported “Countervailing Evidence.”

Travelers argues that Miller's testimony should be excluded because he fails to consider or address PM Northwest's alleged failure to cooperate.[8] Again, this argument is simply false; it is both factually and legally incorrect. In fact, Miller directly addressed Travelers' claim that PM Northwest failed to cooperate:

[8] Miller, of course, had no obligation to address any particular argument of the defense. If he had decided not to, that fact would have been relevant to the weight of his testimony, not its admissibility.

Travelers appears to take the position that P.M. Northwest did not cooperate with Travelers' investigation because P.M. Northwest did not report the Ulbricht claim timely and because P.M. Northwest did not timely provide Travelers with the pleadings in the Ulbricht action. Here, Travelers ignores the fact that Ms. Huntley of P.M. Northwest, in her response to Berneche's request for additional information, wrote that “I have been on a hunt for a few weeks now and everyone keeps sending me in circles so I'm just going on whatever the last person gave me.” It is apparent that P.M. Northwest had been diligently seeking to locate insurance information before it notified Travelers, which was only 60 days after P.M. Northwest had received notice of the Ulbricht action. Under these circumstances the brief delay is clearly understandable particularly when it is compared to the several months that Travelers took to locate policy documents that it possessed. Further, Huntley wrote Berneche that “if there is anything else you have questions on I can try and search around for you.” Berneche, however, never requested additional documents or information on the status of the Ulbricht case even though she would have known from Huntley's emails that Ulbricht had commenced an action against P.M. Northwest.

Dkt. # 73-4 at 12-13 (emphasis added).

Similarly, Travelers' assertion that Miller's original report “only [references] USF&G's actions” is plainly wrong. There, he repeatedly discusses PM Northwest's conduct:

• In its initial contact with Travelers, PM Northwest “had written that, ‘[w]e got served with some papers so I'm trying to see if the lawyer we have been talking to is covered ....’” Dkt. # 73-1 at 19, 20.

• “Huntley reported that P.M. Northwest was named in a lawsuit in which Ulbricht alleged he had mesothelioma ....” *Id.* at 22 n. 17.

• “Huntley had advised Berneche that Ulbricht ‘worked for the oil refinery in Anacortes’” *Id.* at 30.

• “Huntley reported that P.M. Northwest had been “named in a lawsuit,” which would require a response within a limited time.” *Id.* at 38.

• “Huntley provided the following additional information: ‘I attached all 5 insurance policies[39] I have for USF&G from 1977-1982 and the original complaint we were served and the amended.’” *Id.* at 40.

Not only are Travelers' arguments factually false, but they are also legally incorrect. Travelers' assertion that Miller failed to accord proper weight to certain facts is not an appropriate ground for exclusion of expert testimony on a *Daubert* motion. *See*

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence"). The Committee Notes to Rule 702 state:

> When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

Fed. R. Evid. 702 Committee Notes on Rules-2000 Amendment; *see also* *United States v. Barnette,* 800 F.2d 1558, 1568-69 (11th Cir. 1986) ("Agent Knee may have been selective in relying on certain evidence while rejecting other evidence, but that was within his domain as an expert witness"), cert denied, 480 U.S. 935 (1987); *Bergen v. F/V St. Patrick,* 816 F.2d 1345, 1352 n. 5 (9th Cir. 1987) ("[T]he weakness in the underpinnings of [expert] opinions may be developed upon cross-examination," because "such weakness goes to the weight and credibility of the testimony" as opposed to its admissibility (internal quotations and citation omitted)).

Obviously, the fact that Miller does not agree with Travelers' assertion that PM Northwest's conduct amounts to a failure to cooperate does not render his opinions inadmissible. *IceMOS Technology Corp. v. Omron Corp.,* No. 17-CV-02575-PHX-JAT, 2019 WL 4750129, at *9 (D. Ariz. Sept. 30, 2019) ("Plaintiffs position appears to be that the Court should accept Plaintiffs version of the facts and exclude the testimony of Defendant's experts because, in Plaintiff's view, they did not accord the proper weight to certain facts … , that is not the correct analysis.").

D. Unlike Travelers' claims-handling expert, Allan Windt, Miller does not usurp the role of the trier of fact.

Finally, Travelers argues that Miller should be precluded from testifying because his "assessment of the evidence cannot be substituted for the jury." Dkt. # 7. This is somewhat remarkable considering Travelers' claims-handling expert, Allan Windt, has offered a report that almost exclusively opines on the reasonableness of Travelers' conduct. *See* Dkt. # 68 at 6-11 (discussing inadmissibility of Travelers' expert's opinions that "at every stage, the conduct of [] USF&G's employees was reasonable."). Miller's opinions, unlike Windt's, do not improperly comment on the ultimate issue. As Miller testified, "I usually don't … testify on bad faith. So I testify on insurance industry standards and claims handling standards ...." Declaration of Alexander E. Ackel filed in Support of this Motion (Ackel Decl.), Ex. A (Deposition of Charles M. Miller (Miller Dep.)) at 23:24-24:03.

Miller went on to add, "I don't know about standard of care and how it fits into that legally, but what I am describing is what the standards are that apply to a particular—to the handling of a particular type of claim and how that claim should be handled pursuant to insurance industry standards." Miller Dep. at 25:8-13. Later in his deposition, when pressed further, Miller reiterated the same:

Q. For purposes of your report, if somebody's conduct doesn't comply with one of those acts that you described, is your conclusion therefore that their conduct was unreasonable?

A. No. My conclusion at that specific point is that they didn't comply with the industry standards; and then putting together the picture of their entire claims handling in which I can draw conclusions as to what, in my view, that means.

…

And at times the word "reasonable" and "unreasonable" may come into play. I don't usually use it, but at times it comes into play.

…

Q. But for purposes of your report, are you concluding, in each of the opinions you offer, that if you found the conduct did not comply with one of those acts that it was per se unreasonable?

A. It's unreason- — no. I concluded that it was contrary to the act, and that's the way that I have expressed it in my report. It's contrary to the specific standard, and that's a stepping stone in the evaluation of the claim handling.

Miller Dep. at 123:9-124:13.

One of the cases cited by Travelers, *Morales v. Fry*, held that this type of testimony—the type that explains "the industry standards relevant to the case and whether the [defendants'] conduct in this case comports with those standards"—is admissible. *Morales v. Fry*, No. C12-2235-JCC, 2014 WL 12042563, at *3 (W.D. Wash. Mar 25, 2014). Notably, Travelers concedes Miller's report sets out more than a dozen industry standards which he opines Travelers violated. Dkt. # 72 at p. 2, ln 4-5. As explained above, these standards will provide the jury with a framework for judging Travelers conduct in this case. The fact that Miller's report comments on the relevant facts to these standards does not make his opinions inadmissible, quite the opposite in fact. Fed.R.Evid 702 (expert testimony must be "based on *sufficient facts* or data" (emphasis added)). In short, Miller's opinions do not "simply argue[] his client's case from the witness stand."

E. Travelers' assertion that "courts routinely reject Miller's work product" is again misleading.

Travelers cites various cases for its assertion that Miller is "routinely" rejected by courts. However, *none* of the cases cited by Travelers struck the entirety of Miller's opinions under *Daubert*. Some of the orders merely placed boilerplate limitations on his testimony that would apply to any expert. For example, *in Kisner v. State Farm Fire and Cas. Co.*, 2020 WL 6947902, at *2 (N.D. W.Va. Oct. 28, 2020), the sum total of the court's discussion on the topic of Miller's opinions was: "Miller may not testify as to questions of law such as the interpretation of a statute, or case law, or the meaning of terms in a statute. Furthermore, he may not present any opinions which were not disclosed in his report or in his deposition." *See also Marshall v. State Farm Fire & Cas. Co*., 2017 WL 5307936, at *1 (D. Ariz. Aug. 30, 2017) (ordering similar general limitations regarding legal opinions and policy interpretation). Others merely found that his opinions failed to raise genuine issues for trial. *See, e.g.*, *Saracana Condo. Ass'n v. State Farm Fire & Cas. Co.*, 2014 WL 12639341, at *10 (D. Ariz. Aug. 18, 2014); *Harvey Prop. Mgmt. Co., Inc. v. Travelers Indem. Co.*, 2016 WL 8200625, at *6 (D. Ariz. May 12, 2016).

Travelers also fails to acknowledge the numerous courts that have rejected objections to Miller's testimony and opinions. *See, e.g.*, *Wood v. Provident Life and Accident Ins. Co.*, No. CV-17-02330-PHX-DGC, 2021 WL 567902, *4 (D. Ariz. Feb. 16, 2021) ("The Court will not preclude Miller from opining that Defendant's conduct in this case fell below the standard of care."); *Harleysville Lake States Ins. Co. v. Lancor Equities, Ltd.*, No. 1- C-6391, 2014 WL 5507572, at *3 (N.D. Ill. Oct. 31, 2014) (denying motion to strike Miller's Declaration); *MI Windows & Doors, LLC v. Liberty Mutual Fire Ins. Co.*, No. 8:14-cv-3139-T-23SPF, 2019 WL 1430115, at *1 (M.D. Fla. Mar. 29, 2019) (denying motion to exclude Miller).

Irrespective of the few courts that have limited Miller's testimony, courts in this district "routinely" allow testimony similar to the opinions offered by Miller:
Regardless, American Family moves to strike Mr. Dietz's report in its entirety because it includes improper conclusions of law. While American Family is correct that an expert may not provide legal opinions, an expert may opine on the subject of whether an insurance company's actions fell below industry standards even if those standards are state regulations. *See* *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) ("[the expert's] references to California statutory provisions

—none of which were directly at issue in the case—were ancillary to the ultimate issue of bad faith."). Therefore, the Court denies American Family's motion to strike Mr. Dietz's report.

Potter v. American Family Ins., No. C16-5406 BHS, 2017 WL 2464137 (W.D. Wash. June 7, 2017) (cleaned up). Moreover, Travelers has done nothing to try to relate the facts of this case to the facts of any of the cases it cited specifically regarding Miller's prior opinions.

V. CONCLUSION

This Court should DENY Travelers' Motion to Exclude Charles Miller's Testimony because his opinions are relevant to the issues in this case; are based on sufficient facts and data; and do not improperly invade the role of the trier of fact.

DATED this 29th day of November, 2021.

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2021 WL 8693193 (W.D.Wash.) (Trial Motion, Memorandum and Affidavit)
United States District Court, W.D. Washington.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff,

v.

Karen ULBRICHT, et al., Defendants.

Karen Ulbricht, et al., Plaintiffs,

v.

United States Fidelity and Guaranty Company, Defendant.

United States Fidelity and Guaranty Company, Third-Party Plaintiff,

v.

Allianz Insurance Company, et al., Third-Party Defendants.

Nos. 2:20-CV-00369-JLR, 2:20-CV-00617-JLR.
December 3, 2021.

Note On Motion Calendar:
December 3, 2021

United States Fidelity and Guaranty Company's Reply in Support of Its Motion to Exclude Testimony of Charles M. Miller

Davis Wright Tremaine LLP, Everett W. Jack, Jr, WSBA No. 47076, Steven P. Caplow, WSBA No. 19843, Nancy A. Brownstein, WSBA No. 50150, Davis Wright Tremaine LLP, 920 Fifth Avenue, Suite 3300, Seattle, WA 98104-1610, Telephone: 206.622.3150, Facsimile: 206.757.7700, Email: jacke@dwt.com, Email: nancybrownstein@dwt.com, Email: stevencaplow@dwt.com, for plaintiffs United States Fidelity and Guaranty Company.

Honorable James L. Robart.

Defendants' Opposition confirms that the testimony of their expert, Charles Miller, should be excluded.

First, Miller is not qualified. He testified at his recent deposition that he has no professional background or experience with the subject of his testimony--claims handling involving lost or missing policies.

Second, Miller's opinions are not relevant or reliable. He is unfamiliar with Washington claim handling standards, does not address the claim handling standards identified in the Second Amended Complaint ("SAC") and admits that his "industry standards" testimony is not establishing the "standard of care" for any aspect of claim handling.

Third, Miller is nothing more than an advocate in the witness box. He disregards any information that does not square with his belief that USF&G failed to properly investigate the claim.

Fourth, Miller's testimony will not help the jury. Although Miller claims the efforts to look for a missing 40-year-old policy are subject to a purported "industry standard," he has no such experience (as either an insurance professional or as an expert), identifies no specific industry standard of care for such a search, and in the end merely offers conclusory observations that the insurer must talk to people and look around.

Fifth, Miller's 84-page running commentary is an improper use of expert testimony to present a narrative version of Defendants' case and interpretation of the facts.

I. ARGUMENT

A. Miller Is Not Qualified or Independent

On November 19, 2021, after USF&G filed its Motion to Exclude Miller's testimony, USF&G was able to depose him. At his deposition, Miller conceded that not a single time in his 18 years of experience as an insurance professional had he ever handled a claim where all or portions of the policy were missing and could not be found. Declaration of Nancy A. Brownstein in Support of USF&G Reply on Motion to Exclude Miller Ex. A ("Miller Dep") 65:21-66:9. As a result, he has no first-hand experience as to the process. *See, e.g., id*. 172:23-173:1 (although he worked at Fireman's Fund, has "no idea" of process timeline to locate missing policies). Similarly, Miller's expert disclosure of cases he has worked on in the last five years does not include any cases involving lost policies. *Id*. 173:24-174:4. He remembers that the issue may have come up "once or twice" in earlier cases, but when pressed he has no memory of these matters and therefore they do not aid his testimony. *Id*. 174:5-20.

Further, although Miller offers opinions on claim handling of claims involving lost policies in the State of Washington, he does not know whether the Washington Insurance Commissioner has adopted any of the "industry standards" he says apply to this case. *Id*. 198:8-199:9. Although he opines insurance policies must be construed pursuant to industry rules for policy construction, he is not familiar how Washington construes insurance policies. *Id*. 199:10-21. Along the same lines, he is not familiar with the requirements in Washington to prove lost or missing policy terms. *Id*. 199:22-25.

Miller also lacks independence. As an expert, Miller publishes and gives CLEs for lawyers on how to bring policyholder claims against insurance companies, *id*. 214:9-215:8 and has only represented parties who are suing their insurance company. *Id*. 20:16-22.

Finally, although Miller opines that USF&G should have provided a defense even without a policy based solely on a certificate of insurance, not once in his 18-year insurance career was he ever asked to make a coverage determination on a claim without having the relevant policy. *Id*. 65:21-66:9. In fact, Miller testified that you could not do a coverage analysis without a policy. *Id*. 152:17-22 ("[H]ow would you do a coverage analysis without the policy?").

B. Miller's Testimony Is Not Relevant or Reliable

First, according to Defendants, Miller's opinions are "heavily rooted in an analysis of the applicable industry standards." Dkt. 79 at p. 4-5. These are fine words, but they ignore the fact that virtually none of Miller's discussion of industry standards is relevant to the issues in this case, and what's more, he admits that the purported industry standards do not establish the "standard of care" required for handling a claim. Miller Dep. 25:5-20. As USF&G's motion points out, Miller's report discusses at least 17 standards without addressing their relevance to this case. Dkt. 72 at p. 4 (citing Dkt. 73-1, ¶ 16). Defendants offer no response, and the lack of a proper foundation for his testimony requires that it be excluded.

Second, USF&G's motion points out that even on the subject of searching for the policies (which Miller calls "investigation"), Miller does not refer to the standards identified in the SAC. Defendants insist this assertion is "simply false." Dkt. 79 at p. 3. But in fact, the 84-page report does not refer to the standards set forth in the SAC, connect any of his work to standards alleged in the SAC or show that his purported "industry standard" has ever been used by himself, or has been adopted by any insurer in the United States (no less in the State of Washington). *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1062-1066 (9th Cir. 2002) (reversing jury verdict because trial court failed to evaluate reliability of expert's "eight criteria for 'decoding' white behavior"), *amending opinion*, 319 F.3d 1073 (2003), *overruled on other grounds by United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020). As a person lacking any background and experience in matters involving lost policies, it is not sufficient for Miller simply to announce that he has come up with what he believes are the criteria for an industry standard. *See Mako v. Burlington N. & Santa Fe R.R.*, 2009 WL 364979, at *9 (W.D. Wash. Feb. 12, 2009) (nothing in expert's "prior education, training, and work history

to suggest that he is qualified to offer expert opinion regarding liability and causation . . . .") Miller is required to show his purported industry standard reliably applies to this particular case.

C. Miller Fails to Consider Countervailing Evidence

A problem that runs throughout Miller's report is that he serves as an advocate rather than an objective source of information. Indeed, Miller cites a regulation that he claims requires the policyholder and the insurance company to "fully cooperate," and share facts and documents. *See* Dkt. 73-1 at p. 35, ¶ 54 citing WAC 284-30-930(2)(a)(i) & (ii). Yet, as USF&G's motion points out, Miller ignores or papers over PM Northwest's repeated failures and delays to provide information. Dkt. 72 at p. 7. *Mako*, 2009 WL 364979, at *9 (expert "formulate[d] his opinions without reviewing all the physical and testimonial evidence present in this case"). Defendants' opposition illustrates the problem. Although Miller mentions PM Northwest's months' long delay in providing USF&G with case pleadings and scheduling information, he then contends PM Northwest nonetheless "had been diligent[]" because Huntley said in an email that "she had been on a hunt for a few weeks now." Dkt. 79 at p. 7. But even if a hunt for a "few weeks" justified several months of delay, Miller's response is a red herring. Huntley was not "on a hunt" for information about the Underlying Action; she already had this in her possession but did not send it to USF&G. *United States ex rel. Mossey v. Pal-Tech, Inc.*, 231 F. Supp. 2d 94, 98 (D.D.C. 2002) (striking expert opinion that contains unsubstantiated assessments of the evidence). Miller's efforts to downplay PM Northwest's serious delay in notifying USF&G that the case had been put on an expedited schedule and mischaracterizing the evidence is not the work of an independent expert. [1]

[1] Defendants expend considerable ink to prove Miller's report references "PM Northwest's conduct." Dkt. 79 at p. 7. However, none of this is responsive to USF&G's actual motion, which refers to Miller's failure to address PM Northwest's lapses in providing complete and timely information.

D. Miller's Opinions Will Not Assist the Jury

First, unable to draw on any of his own background and experience, Miller offers his conclusory assessment of what an insurer must do to look for a lost policy - the insurer must talk to people and look around. Dkt 79 at p. 4 (citing Dkt. 73-1 at p. 33). To make this sound like expert testimony, Miller's observations are elevated to "industry standards" such as "in accordance with insurance industry standards" USF&G was required to "[i]nterview the insured." *Id*. Miller does not show that he or anyone else has ever applied this "industry standard." Even if it applies, he pointedly makes no claim that the failure to follow his industry standard would violate a standard of care. Miller Dep. 25:5-20. Nor does he explain why insurers must conduct interviews if under Washington law the policyholder has a duty to provide this information. Nor does he state, even with the benefit of Huntley's deposition, what additional information would have been gleaned during such an interview - because Huntley had no such information. It serves no purpose to iterate a list of tasks without showing that they actually apply to searching for a policy in accordance with Washington standards, or how the alleged failure to perform one of the tasks resulted in the failure to discover information. In any event, even if Huntley had some gem of information regarding the alleged lost policies (which she admits she did not) there is no showing that the jury would require Miller's expert assistance to appreciate the virtue of asking her to provide it.

Second, Defendants contend that Miller is providing "precisely the type of 'standard of care' testimony that is routinely allowed." Dkt. 79 at p. 5. But as Miller himself acknowledged, he is addressing "industry standards," and he intentionally *does not* offer standard of care testimony. Miller Dep. 25:14-20 ("I don't go to that."). Miller does not and cannot show that his purported industry standard establishes the applicable standard of care for an insurer handling a claim involving a lost or missing policy in Washington. Accordingly, his testimony is of no value. Either Miller's general observations on how to look for a lost policy are so evident that "a lay person would have no difficulty recognizing it," in which case no expert testimony is required, or they are "outside the common understanding of jurors" in which case "expert testimony on the standard of care" is "needed." *Macy's Inc. v. H&M Constr. Co.*, 843 F. App'x. 841, 842-43 (9th Cir. 2021) (internal citation omitted).

Third, even if there were in fact an "industry standard" for looking for a 40-year-old insurance policy, Miller's version tells the jury what it can easily comprehend without the help of an expert who himself has no applicable background or experience. Boiled down, Miller's purported "industry standard" is that in looking for the policies the insurer should talk to people who might have information and look in the places they might be found.

E. Miller's Assessment of the Evidence Cannot be Substituted for the Jury

Miller's 84-page report is a running commentary on the evidence in the case, which periodically offers his conclusory opinion that some aspect is inconsistent with an industry standard, which he admits is not a standard of care. Defendants are seeking to improperly use Miller to present their case and interpretation of the facts. Miller's disclosure follows an unvarying pattern.
• First, he tells the jury what happened. *See, e.g.*, Dkt. 73-1 at p. 42-43, ¶ 71 (quote from USF&G's July 10 letter acknowledging receipt of the complaint and advising USF&G was ordering policies from off-site storage).

• Next, he offers his "expert" gloss on this evidence. *Id*. at p. 43, ¶ 72 ("This letter may suggest that Quimby was not aware of the prior policy search[.]"). *U.S. v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991) (expert testimony excluded because it was "nothing more than drawing inferences from the evidence that he was no more qualified than the jury to draw"), *recalling and amending mandate on other grounds*, 957 F.2d 301 (7th Cir. 1992).

• And then he tells the jury that the evidence is further evidence of bad faith. *Id*. ("Significantly, Quimby continues USF&G's failure to conduct a full and complete search for claim files.").

But it is the task of counsel, not their litigation expert, to admit evidence into the record. Nor does Miller have any special skill or background reading Quimby's letter or telling the jury what Quimby did or did not know. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 565 (11th Cir. 1998) (expert's "characterizations of documentary evidence" do not assist the jury). Nor does Miller's formulaic "expert opinion" that the letter "continues USF&G's failure to conduct a full and complete search" assist the jury to understand the evidence. *Santiago Salas v. PPG Architectural Finishes, Inc.*, 2019 WL 399029, at *1 (W.D. Wash. Jan. 31, 2019) ("Expert testimony that merely tells the jury what result to reach is inadmissible.").

II. CONCLUSION

For the foregoing reasons, Miller's testimony should be excluded.

DATED this 3rd day of December, 2021.

Davis Wright Tremaine LLP

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576 F.Supp.3d 850
United States District Court, W.D. Washington, at Seattle.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff,
v.
Karen ULBRICHT, et al., Defendants.

CASE NO. C20-0369JLR
|
Signed 12/21/2021

Synopsis

Background: Following affirmance as reasonable of $4.5 million settlement of worker's underlying personal injury action, alleging that worker had contracted mesothelioma as a result of exposure to asbestos while working at an oil refinery, and insurer's payment of $2.5 million to worker, insurer brought action seeking declaratory judgment that the total available limits of liability under commercial general liability policies was $2.5 million, that it had exhausted that amount and had no liability in excess of that amount, and that it neither acted in bad faith nor violated Washington Insurance Fair Conduct Act (IFCA) through its handling of insurance claim, and worker and related parties brought action against insurer, alleging that insurer breached various duties, as well as IFCA and the Washington Consumer Protection Act (WCPA). Cases were consolidated and parties moved to exclude their opposing party's claims-handling expert witness.

Holdings: The District Court, James L. Robart, J., held that:

[1] plaintiff's expert was qualified;

[2] proffered testimony of plaintiff's expert was relevant;

[3] proffered testimony of plaintiff's expert was reliable;

[4] opinions of plaintiff's expert on ultimate issue of insurer's reasonableness or on the applicable law were impermissible legal conclusions;

[5] defendants' expert was qualified;

[6] testimony of defendants' expert was relevant; and

[7] failure of defendants' expert to consider countervailing evidence did not render his report unreliable.

Plaintiff's motion denied, and defendants' motion granted in part and denied in part.

Procedural Posture(s): Motion to Exclude Expert Report or Testimony.

West Headnotes (19)

[1] Evidence Necessity of both reliability and relevance

Before admitting expert testimony into evidence, the district court must perform a gatekeeping role of ensuring that the testimony is both relevant and reliable under *Daubert* and rule governing admission of expert testimony. Fed. R. Evid. 702.

[2] Evidence Relevance and materiality

Under *Daubert* and rule governing admission of expert testimony, "relevancy" of expert testimony simply requires that the evidence logically advance a material aspect of the party's case. Fed. R. Evid. 702.

[3] Evidence Daubert and Frye tests as to reliability in general

Under *Daubert* and rule governing admission of expert testimony, "reliability" requires that the expert's testimony have a reliable basis in the knowledge and experience of the relevant discipline. Fed. R. Evid. 702.

[4] Evidence Daubert and Frye tests as to reliability in general

Where expert testimony concerns non-scientific issues, reliability inquiry under *Daubert* and rule governing admission of expert testimony depends heavily on knowledge and experience of

expert, rather than upon scientific foundations. Fed. R. Evid. 702.

[5] **Evidence** Customs and usages; industry practice

Claims-handling expert for insurer had substantial experience adjusting claims in a variety of jurisdictions, and drafting insurance policies for insurance companies, and thus expert was qualified under *Daubert* and rule governing admission of expert testimony, based on his knowledge and experience, to give relevant and reliable expert testimony in insurer's declaratory judgment action concerning claims of bad faith and breach of contract relating to insurer's payment of settlement for insured's underlying personal injury action pursuant to commercial general liability policies. Fed. R. Evid. 702.

[6] **Evidence** Insurance

Opinion of insurer's claims-handling expert on issues of insurance coverage and duties to settle, defend, and indemnify were squarely at issue in insurer's declaratory judgment action concerning claims of bad faith and breach of contract relating to settlement of insured's underlying personal injury action pursuant to commercial general liability policies, and thus expert's opinions on those subjects would logically advance a material aspect of insurer's case, such that expert's proffered testimony was relevant under *Daubert* and rule governing admission of expert testimony. Fed. R. Evid. 702.

[7] **Evidence** Customs and usages; industry practice

Testimony of insurer's claims-handling expert, identifying applicable industry standards on issue of bad faith, would be reliable and thus admissible under *Daubert* and rule governing admission of expert testimony based on expert's knowledge and experience in insurer's declaratory judgment action concerning claims of bad faith and breach of contract with respect to payment of settlement for insured's underlying personal injury action pursuant to missing commercial general liability policies; expert contrasted this case with the typical case where policy document can be located and explained that an insurer would consider who had burden of proving a policy existed and what terms and conditions of policy would have been, and that it was sometimes possible to use secondary evidence to figure out what policy stated without finding policy itself. Fed. R. Evid. 702.

[8] **Evidence** Questions of law or fact

Opinions of insurer's claims-handling expert on ultimate issue of insurer's reasonableness of payment for settlement of insured's underlying personal injury case pursuant to commercial general liability policies, or on the applicable law, were impermissible legal conclusions, and thus expert's opinions were inadmissible in insurer's declaratory judgment action concerning claims of bad faith and breach of contract. Fed. R. Evid. 704(a).

[9] **Evidence** Customs and usages; industry practice

Evidence Questions of law or fact

While an expert witness may testify that an insurer deviated from industry standards on the issue of bad faith, he may not reach an actual legal conclusion that the insurer did so. Fed. R. Evid. 704(a).

1 Cases that cite this headnote

[10] **Evidence** Ultimate issues in general

Expert witnesses are prohibited from opining on the reasonableness of an insurer's actions in denying coverage where the extra-contractual claim at issue rests on the question of whether defendant acted reasonably. Fed. R. Evid. 704(a).

[11] **Evidence** Customs and usages; industry practice

Practicing attorney, who had decades of legal experience and approximately 20 years of experience in insurance industry, including as an adjuster, who had been retained in over 200 cases and qualified as an expert on insurance industry claims handling standards and practices on numerous occasions, whose opinions had been favorably cited by at least one federal court in same circuit, and who had taught and published on subject of bad faith claims and other topics relevant to insured's breach of contract action relating to insurer's payment of settlement for underlying personal injury action pursuant to missing commercial general liability policies, was qualified to testify in action, notwithstanding his apparent lack of experience with missing policy cases. Fed. R. Evid. 702.

[12] **Evidence** Customs and usages; industry practice

Expert witnesses are qualified to give expert testimony on the practices and norms of insurance companies in the context of a bad faith claim where they possess at least the minimal foundation of knowledge, skill, and experience required. Fed. R. Evid. 702.

[13] **Evidence** Insurance

Testimony of insured's claims-handling expert as to industry standard for, among other things, conducting a claim investigation in good faith, locating old or lost policies, taking statements in the course of a claim investigation, an insurer's obligation to discuss implications of an excess verdict with insured, an insurer's obligation to defend insured in litigation, and whether insurer's conduct was consistent with industry standards he identified, was directly related to insured's complaint alleging that insurer's denial of coverage under commercial general liability policies for payment of settlement in underlying personal injury action without first conducting a reasonable investigation was bad faith conduct, and thus testimony logically advanced a material aspect of case and was relevant and admissible under *Daubert* and rule governing admission of expert testimony. Fed. R. Evid. 702.

[14] **Evidence** Negligence in general

Failure of insured's claims-handling expert to consider countervailing evidence did not render his report as to industry standards in bad faith claims unreliable and thus inadmissible in insured's action alleging that insurer's denial of coverage under commercial general liability policies for payment of settlement in underlying personal injury action without first conducting a reasonable investigation was bad faith conduct; court had determined that expert was qualified to offer relevant and reliable expert testimony, and insurer could argue on cross-examination that expert's testimony should have less weight and credibility. Fed. R. Evid. 702.

[15] **Evidence** Factors, Tests, and Standards in General

Where the court has determined that expert is qualified to offer relevant and reliable expert testimony, a factual dispute regarding weakness in the underpinnings of the expert's opinions is not a proper basis for excluding his testimony altogether. Fed. R. Evid. 702.

[16] **Evidence** Insurance

Evidence Due Care and Proper Conduct in General

Testimony of claims-handling expert for insured, that good faith claim practices require that an investigation be objective, thorough, and timely, was capable of educating jury, and thus expert's testimony was relevant and reliable, and thus admissible under *Daubert* and rule governing admission of expert testimony in insured's action alleging that insurer's denial of coverage under commercial general liability policies for payment of settlement in underlying personal injury action without first conducting a reasonable investigation was bad faith conduct;

while jury may have understood the meaning of "objective" or "timely" in common usage, court would not presume jury would understand those terms as used by insurance industry. Fed. R. Evid. 702.

[17] **Evidence** Average or ordinary juror

Expert testimony is inadmissible if it concerns factual issues within the knowledge and experience of ordinary lay people because it would not assist the trier of fact in analyzing the evidence. Fed. R. Evid. 701.

[18] **Evidence** Helpfulness; assisting trier of fact

Expert testimony need only provide appreciable help to the jury to be admissible. Fed. R. Evid. 702.

[19] **Evidence** Negligence in general

Fact that testimony of claims-handling expert, who was qualified to offer relevant and reliable expert testimony, contained a running commentary on the chronology of events was not an attempt to usurp the fact-finding role of the jury, and thus did not render expert's testimony unreliable and thus inadmissible in insured's action alleging that insurer's denial of coverage under commercial general liability policies for payment of settlement in underlying personal injury action without first conducting a reasonable investigation was bad faith conduct. Fed. R. Evid. 702.

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Jonathan Toren, Cameron Davis Young, Jodi Ann McDougall, Cozen O'Connor, Seattle, WA, for Defendant National Surety Corporation.

ORDER

JAMES L. ROBART, United States District Judge

I. INTRODUCTION

This matter comes before the court on the parties' dueling motions to exclude their opposing party's expert witness. Defendants PM Northwest, Inc. ("PM Northwest"), Heide Ulbricht, Karen Ulbricht, and Robert S. Ulbricht (the "Ulbrichts") (collectively, "Defendants") move to strike the expert opinion of Plaintiff United States Fidelity and Guaranty Company's ("USF&G") [1] expert, Allan D. Windt. (Windt Mot. (Dkt. # 68); Windt Reply (Dkt. # 89).) USF&G opposes the motion. (Windt Resp. (Dkt. # 78).) USF&G, likewise, moves to exclude the testimony of Defendants' expert witness Charles M. Miller. (Miller Mot. (Dkt. # 72); Miller Reply (Dkt. # 84).) Defendants oppose this motion. (Miller Resp. (Dkt. # 79).) Having considered the submissions of the parties and the relevant law, the court GRANTS in part and DENIES in part Defendants' motion to strike Mr. Windt's testimony (Dkt. # 68), and STRIKES portions of Mr. Windt's report, as described below. The court further DENIES USF&G's motion to exclude the testimony of Mr. Miller (Dkt. # 72). [2]

1 In their motions and briefs, the parties describe Plaintiff as either USF&G (*see generally* Windt Mot.; Windt Resp.) or "Travelers" (*see, e.g.*, Miller Resp. at 9). For consistency and convenience, the court refers to Plaintiff as "USF&G" throughout this order.

2 Neither party has requested oral argument (*see* Windt Mot. at 1; Windt Resp. at 1; Miller Mot. at 1; Miller Resp. at 1) and the court finds that oral argument would not be helpful to its disposition of the motion. *See* Local Rules W.D. Wash. LCR 7(b)(4); *see also Tubar v. Clift*, No. C05-1154JCC, 2009 WL 1325952, at *2 (W.D. Wash. May 12,

2009) ("The trial court's gatekeeping role under *Daubert* is satisfied, even without a formal hearing, by the court's probing of the expert's knowledge and experience" (citing *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004))).

II. BACKGROUND

This dispute arises out of a personal injury action the Ulbrichts filed in January ***855** 2018 in King County Superior Court against 18 defendants, including PM Northwest ("the underlying action"). (Compl. (Dkt. # 1) ¶ 9; SAC (Dkt. # 27) ¶ 3.4.) The underlying action alleged that Robert Ulbricht had contracted mesothelioma as a result of exposure to asbestos while working at an oil refinery in Anacortes, Washington. (SAC ¶ 3.5.) Several months later, PM Northwest contacted The Travelers Indemnity Company, an affiliate of USF&G, to inquire about the existence of five (5) commercial general liability policies. (Compl. ¶ 10.) The policies could not be readily found and a search for the policies—or other evidence of their existence—commenced thereafter, although USF&G contends that PM Northwest initially failed to put it on notice of the urgency of the matter. (*See id.* ¶ 13-14.)

PM Northwest and the Ulbrichts ultimately resolved the underlying action in a settlement and covenant judgment in the amount of $4.5 million, which was to be paid from insurance policies held by PM Northwest. (*Id.* ¶ 16; SAC ¶ 3.30.) The Ulbrichts and PM Northwest sought a reasonableness determination in the underlying action, which USF&G opposed. (Compl. ¶¶ 19-21; SAC ¶ 3.26.) The King County Superior Court ruled that the judgment was reasonable on December 26, 2018, which was subsequently affirmed on appeal on February 10, 2020. (Compl. ¶¶ 22-23, 25; SAC ¶¶ 3.30, 3.33.) On May 1, 2019, USF&G paid the Ulbrichts $2.5 million, which it contends represents the full limits of the five alleged insurance policies. (Compl. ¶ 24; SAC ¶ 3.32.) On February 12, 2020, two days after the appeals court affirmed that the settlement was reasonable, the Ulbrichts sent a notice letter to USF&G under the Washington Insurance Fair Conduct Act ("IFCA"). (Compl. ¶ 26; SAC ¶ 3.34.)

USF&G initiated this action on March 6, 2020, seeking a declaratory judgment that the total available limits of liability under any policies PM Northwest held with USF&G are $2.5 million; that it had exhausted that amount by its May 1, 2019 payment to the Ulbrichts and had no liability in excess of that amount; and that it neither acted in bad faith nor violated IFCA through its handling of PM Northwest's insurance claim. (Compl. ¶¶ 31-49.) Defendants subsequently brought suit in federal court, which was consolidated with USF&G's declaratory judgment action. (9/21/20 Order (Dkt. # 16).) Defendants' suit alleges that USF&G breached various duties, as well as IFCA and the Washington Consumer Protection Act ("WCPA"), by failing to reasonably investigate PM Northwest's claim before denying it coverage. (SAC ¶¶ 4.1-8.2.)

In advance of trial, which is set to begin on February 14, 2022 (Sched. Order (Dkt. # 17)), the parties have disclosed their claims-handling expert witnesses and the reports authored by each expert. (*See* Ackel Decl. (Dkt. # 69) ¶ 3, Ex. B ("Windt Report"); (Brownstein Decl. (Dkt. # 73) ¶ 2, Ex. A ("Miller Report").) Each party now seeks to exclude or strike the report and testimony of its opposing party's expert witness. (*See* Windt Mot.; Miller Mot.)

III. ANALYSIS

[1] [2] [3] [4] Pursuant to Federal Rule of Evidence 702, "[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," provided:

> (a) the expert's scientific, 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;
>
> ***856** (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.

Fed. R. Evid. 702. "Before admitting expert testimony into evidence, the district court must perform a 'gatekeeping role' of ensuring that the testimony is both 'relevant' and 'reliable' under Federal Rule of Evidence 702." *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188 (9th Cir. 2019) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). "Relevancy simply requires that 'the evidence logically

advance a material aspect of the party's case.' " *Id.* (quoting *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (citation and internal alterations omitted)). Reliability "requires that the expert's testimony have 'a reliable basis in the knowledge and experience of the relevant discipline.' " *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). Where the testimony concerns "non-scientific" issues, the reliability inquiry " 'depends heavily on the *knowledge and experience* of the expert, rather than upon scientific foundations.' " *Hangarter*, 373 F.3d at 1017 (quoting *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000) (emphasis added in *Hangarter*)).

The parties have each moved the court to exclude the testimony of their opponent's claims-handling expert witness. The court begins by considering Defendants' motion before turning to its analysis of USF&G's motion.

A. Defendants' Motion to Strike USF&G's Expert Witness Allan D. Windt

Defendants urge the court to "strike [Mr.] Windt as an expert and preclude his testimony at trial because" his report (1) "fails to set out any applicable industry standards and thus ... lacks a reliable basis"; and (2) is comprised of analysis "directed at his legal conclusions on the ultimate issue, *i.e.*, whether or not USF&G acted reasonably." (Windt Mot. at 12.) The court first addresses Mr. Windt's qualifications to serve as an expert witness before turning to consider the relevance and reliability of his proffered testimony and whether he impermissibly opines on the ultimate issues in the case.

1. Mr. Windt's Qualifications

[5] In contesting the reliability of Mr. Windt's testimony, Defendants do not directly argue that he lacks the requisite qualifications to serve as an expert witness. (*See generally* Windt. Mot.) They do, however, characterize him as "an attorney with limited experience advising insurance clients on the handling [of] insurance coverage claims" and having "no professional insurance experience as an adjustor, appraiser" or working in "any other direct industry" capacity. (*Id.* at 2.) The record, however, contains evidence of Mr. Windt's substantial experience adjusting claims in a variety of jurisdictions, and drafting insurance policies for insurance companies. (*See* Ackel Decl. ¶ 2, Ex. A ("Windt CV") at 2.) He is also "a prominent insurance law commentator," *Hartford Fire Ins. Co. v. Leahy*, 774 F. Supp. 2d 1104, 1111 (W.D. Wash. 2011), who has lectured and published extensively on the subject of insurance claim adjudication. (*See* Windt CV at 1); *see also* Allan D. Windt, Insurance Claims & Disputes, Representation of Insurers and Insureds (6th ed. 2013 & Supp. 2021).

Accordingly, the court finds that Mr. Windt is qualified, based on his knowledge and experience, to give relevant and reliable expert testimony. *Hangarter*, 373 F.3d at 1018 (affirming that a district court's "probing" of an expert's "knowledge ***857** and experience was sufficient to satisfy its gatekeeping role under *Daubert*"). However, even if Mr. Windt has the "knowledge and experience" to offer relevant and reliable expert testimony, *Hangarter*, 373 F.3d at 1017 (quotation marks and emphasis omitted), the court must further evaluate whether he is able to do so in this case.

2. The Relevance of Mr. Windt's Proffered Testimony

[6] Defendants do not address or dispute the relevance of Mr. Windt's proffered testimony (*see generally* Windt. Mot.) but the court must, nevertheless, consider the issue as part of its "gatekeeping role." *Ruvalcaba-Garcia*, 923 F.3d at 1188 (citing *Daubert*, 509 U.S. at 597, 113 S.Ct. 2786). USF&G intends to have Mr. Windt opine at trial, as he has in prior cases, "on issues of coverage and duties to settle, defend and indemnify." (*See* Windt Report at 2; Windt Resp. at 3.) Those topics are squarely at issue in this case. Thus, because Mr. Windt's testimony on those subjects "logically advance[s] a material aspect" of USF&G's case, the court finds that Mr. Windt's proffered testimony is relevant. *Ruvalcaba-Garcia*, 923 F.3d at 1188.

3. The Reliability of Mr. Windt's Testimony

[7] The focus of Defendants' argument is that Mr. Windt has not provided a basis for finding that he will offer reliable testimony because he "fails to set out any applicable industry standards" in his report and, instead, offers only "legal conclusions on the ultimate issue, *i.e.*, whether or not USF&G acted reasonably." (Windt Mot. at 12.) The court disagrees that Mr. Windt has totally failed to identify applicable industry standards in his report. For instance, he explains, that, "in a typical case"—where the policy document can be located—an insurer will determine "whether it has the legal right to

deny coverage ... by considering the policy language, rules of construction, analogous case law interpreting the same or similar policy language, and any relevant statutes." (Windt Report ¶ 5.) He then contrasts this with an atypical case, like this one, where the policy document cannot be found. (*Id.* ¶ 6.) In such a case, Mr. Windt testifies, an insurer would "first consider[ ] who had the burden of proving that a policy existed and what the terms and conditions of the policy would have been." (*Id.*) Later, he testifies that "it is sometimes possible to use secondary evidence to figure out what the policy stated without finding the policy itself." (*Id.* ¶ 10.)

Testimony on the applicable industry standards is permitted by the Federal Rules of Evidence and, if offered by Mr. Windt at trial, the court finds that such testimony would be relevant and reliable based on his knowledge and experience. *See Ledcor Indus. (USA) Inc. v. Virginia Sur. Co.*, No. C09-1807RSM, 2012 WL 254251, at *2 (W.D. Wash. Jan. 26, 2012) (permitting testimony "as to whether Defendant complied with industry standards on the issue of bad faith").

4. Ultimate Issue Testimony

[8] **[9]** **[10]** The court agrees with Defendants, however, that Mr. Windt opines elsewhere in his report on the ultimate issue of USF&G's reasonableness, or that he otherwise testifies on the applicable law. (Windt Mot. at 12.) Although Federal Rule of Evidence 704 permits opinion testimony that "embraces an ultimate issue," Fed. R. Evid. 704(a), the Ninth Circuit has "repeatedly affirmed" that an expert cannot offer " 'an opinion on an ultimate issue of law,' " *United States v. Diaz*, 876 F.3d 1194, 1197 (9th Cir. 2017) (quoting *Hangarter*, 373 F.3d at 1016). Thus, "[w]hile an expert witness may testify that an insurer ***858** deviated from industry standards on the issue of bad faith, he may not reach an actual legal conclusion that the insurer did so." *Ledcor Indus.*, 2012 WL 254251, at *2. Accordingly, expert witnesses have been permitted to "discuss the industry standards and whether [the insurer's] actions conformed with those standards," but are prohibited from opining "on the reasonableness" of the insurer's actions in denying coverage where the extra-contractual claim at issue "rests on the question of whether [d]efendant acted reasonably." *Liu v. State Farm Mut. Auto. Ins. Co.*, No. C18-1862BJR, 2021 WL 717540, at *3-4 (W.D. Wash. Feb. 24, 2021).

At various points, Mr. Windt offers this sort of prohibited opinion testimony. For instance, he organizes his opinions under headers asserting that (1) "it was reasonable for USF&G to not provide PM Northwest a defense in April 2018" (Windt. Report at 3); (2) "it was reasonable for USF&G to provide PM Northwest a defense after USF&G received the certificates of insurance on July 10, 2018" (*id.* at 4); and (3) "USF&G's attempt to locate the policies was reasonable" (*id.* at 6). And his discussion of each broad opinion contains further assertions about the reasonableness of USF&G's conduct:

- "It is my opinion that it was reasonable for USF&G to conclude that the burden of proof was on the insured." (*Id.* ¶ 6.)
- "Necessarily, therefore it was reasonable for USF&G not to afford coverage prior to July 9." (*Id.*¶ 7.)
- "In connection with writing my book and updating the book, I have read every reported insurance case in the country back to the 1940s, and I do not believe that any court in the country has ever held, when addressing the 'potential' rule, that it is enough that there is a potential that policy provisions might exist that fit the facts." (*Id.* ¶ 12.)
- "I am, however, aware of cases holding, consistent with USF&G's conduct in this case, that an insurer cannot have a duty to defend unless the insured has, first, proven the terms of the missing policy." (*Id.* ¶ 12 n.2.)
- "The fact that it apparently also did not occur to the USF&G employees was understandable and reasonable, whether or not it proves to have been a mistake." (*Id.* ¶ 16.)
- The fact that USF&G was unsuccessful does not mean that USF&G's investigation was not reasonable. In my opinion, it was reasonable. Moreover, even if one were to believe that USF&G's investigation had been negligent, that would not mean that USF&G's investigation constituted bad faith. (*Id.* ¶ 17.)
- "Summarizing, for the combination of three reasons, USF&G's policy search was reasonable." (*Id.* ¶ 20.)
- "I am unaware of any reason to conclude that Ms. Bemeche could not, at that time, reasonably have so believed." (*Id.*)
- "I am unaware of any reason to conclude that those actions were unreasonable." (*Id.* ¶ 21.)

- "The investigation by and through Ms. Corson and Ms. Bowers, beginning in August and ending on September 7, was reasonable." (*Id.*¶ 22.)

- "In short, at every stage, the conduct of the USF&G's employees was reasonable." (*Id.* ¶ 25.)

- "It is always true, however, when a mistake is made by an employee, that a better employee would not have made the same mistake. That ***859** does not mean that the employer is always guilty of bad faith." (*Id.*)

- "If PM Northwest is contending that USF&G acted unreasonably because it had had a duty to settle for the lower amount that the plaintiff had been willing to accept, I disagree. To begin with, since as discussed above, it is reasonable to conclude that USF&G did not have a duty to defend, it is reasonable to conclude that USF&G did not have a duty to settle (which duty is governed by a more demanding test). Moreover, based upon the facts that USF&G knew or should have known on 8/2/18, it would have been reasonable for USF&G to believe that it did not have a duty to fund a settlement." (*Id.* ¶ 27.)

- "Finally, with regard to the fact that USF&G reserved the right to seek reimbursement if the Court of Appeals found that the stipulated judgment was unreasonable, that was certainly a reasonable position to take at the time. Note, too, that as discussed earlier in this report, even if it had been undisputed that the amount of the settlement was reasonable, USF&G appears to have overpaid. As for the issue of USF&G paying post-judgment interest in an amount in excess of the policy limit, since the policy documents that were found do not contain a provision obligating USF&G to make a payment in excess of the policy limit, such a payment was not undisputedly owed. Note, too, that as discussed in this report, it is reasonable to conclude that coverage did not exist for the judgment; as a result, for that additional reason, it is reasonable to conclude that coverage did not exist for the interest on the judgment." (*Id.* ¶ 28.)

These statements either seek to "instruct the jury as to the applicable law," or to offer "an opinion on an ultimate issue of law." *Hangarter*, 373 F.3d at 1016; *Liu*, 2021 WL 717540, at *3-4. Neither form of testimony is permitted and so the court STRIKES the portions of Mr. Windt's report that are identified above.

In sum, the court finds that Mr. Windt is qualified to offer relevant and reliable expert testimony on applicable insurance industry standards at trial. Accordingly, the court GRANTS in part and DENIES in part Defendants' motion to strike Mr. Windt's testimony, and STRIKES the offending portions of Mr. Windt's report, as set forth above.

B. USF&G's Motion to Exclude Testimony of Charles M. Miller

USF&G asks the court to exclude the testimony of Defendants' expert Charles M. Miller because: (1) his testimony on industry standards will not assist the jury because he fails to address the standard of care at issue in this matter (Miller Mot. at 6-7); (2) his "failure to consider countervailing evidence renders his report unreliable" (*id.* at 7); (3) he draws conclusions on "primary facts" that "the jury is capable of comprehending" without expert testimony (*id.* at 8); and (4) his "report provides a running commentary on the chronology of events," which attempts to usurp the fact-finding role of the jury (*id.* at 8-9).

The court first considers whether Mr. Miller is qualified to provide expert testimony and then, finding that he is qualified, turns to consider USF&G's arguments that his testimony should nevertheless be excluded.

1. Mr. Miller's Qualifications

[11] As USF&G acknowledges, Mr. Miller "is a practicing attorney with decades of experience." (Miller Mot. at 4 (citing ***860** Brownstein Decl. ¶ 3, Ex. B ("Miller CV")).) In addition to his legal experience, he also has approximately twenty years of experience in the insurance industry—including as an adjuster (*see id.* at 2-3)—and has taught and published on the subject of bad faith claims and other topics relevant to this matter (*id.* at 4-9). Moreover, Mr. Miller "has been retained in over 200 cases" and "qualified as an expert on insurance industry claims handling standards and practices" on numerous occasions. (*See id.* at 1-2.) His opinions have also been favorably cited by at least one federal court in this circuit. *See, e.g.*, *Gerawan Farming Partners, Inc. v. Westchester Surplus Lines Ins. Co.*, No. CIVF 05-1186 AWI DLB, 2008 WL 80711, at *14 (E.D. Cal. Jan. 4, 2008).

[12] Although USF&G did not dispute Mr. Miller's qualification as an expert witness in its motion (*see* Miller Mot. at 2), it argues on reply that Mr. Miller is unqualified based on his apparent lack of experience with cases specifically involving a lost policy (Miller Reply at 1-2). USF&G cites no cases in support of its proposal to define Mr. Miller's prior experience in the insurance industry, including on issues of bad faith, so narrowly. (*See id.*) And doing so would seemingly conflict with the Ninth Circuit's guidance that expert witnesses are qualified "to give 'expert' testimony on the practices and norms of insurance companies in the context of a bad faith claim" where they possess "at least the *minimal foundation* of knowledge, skill, and experience required." *See* *Hangarter*, 373 F.3d at 1016 (emphasis in original) (quoting *Thomas v. Newton Intern. Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994)); *see also* *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 551 (C.D. Cal. 2014) ("Prior experience need not consist of prior expert witness testimony on the same issue."). Notwithstanding his apparent lack of experience with missing policy cases, Mr. Miller has otherwise demonstrated that he has "at least the *minimal foundation*" necessary to offer relevant and reliable expert testimony on the issues presented in this matter. *Hangarter*, 373 F.3d at 1016 (emphasis in original).

2. Mr. Miller's Testimony on Industry Standards

[13] USF&G next argues that Mr. Miller's testimony on industry standards is "not relevant to this case, is prejudicial, and will confuse (rather than assist) the jury" because he fails to "address the only standard of care" at issue in this case. (Miller Mot. at 2.) However, in his report, Mr. Miller testifies as to the industry standard for, among other things, conducting a claim investigation in good faith (Miller Report at 16); locating old or lost policies (*id.* at 21-28); taking statements in the course of a claim investigation (*id.* at 66); the insurer's obligation to discuss the implications of an excess verdict with the insured (*id.* at 71); and an insurer's obligation to defend the insured in litigation (*id.* at 79). Mr. Miller also opines throughout his report on whether USF&G's conduct was consistent with the industry standards he identifies. (*See generally id.*)

This testimony is directly related to Defendants' second amended complaint, which alleges that USF&G's "denial of coverage without first conducting a reasonable investigation constitutes bad faith conduct." (SAC ¶ 5.5.) It thus "logically advance[s] a material aspect" of Defendants' case and is relevant and admissible. *Ruvalcaba-Garcia*, 923 F.3d at 1188.

3. Mr. Miller's Alleged Failure to Consider "Countervailing Evidence"

[14] USF&G next argues that Mr. Miller's "failure to consider countervailing evidence renders his report unreliable." (Miller Mot. at 7.) For instance, USF&G faults Mr. Miller for noting "only USF&G's actions, ***861** without any consideration of PM Northwest's repeated delays and failures to provide information." (*Id.*) As Defendants point out, however, Mr. Miller does discuss PM Northwest's interactions with USF&G at various points in his report (*see* Miller Resp. at 7-8 (collecting examples)), and also directly responds in his supplemental report to USF&G's argument "that P.M. Northwest did not cooperate with [USF&G's] investigation because P.M. Northwest did not timely provide [USF&G] with the pleadings in the Ulbricht action" (*see* Brownstein Decl. ¶ 5, Ex. D ("Suppl. Miller Report") at 12-13).

[15] USF&G argues that this amounts to "paper[ing] over PM Northwest's repeated failures and delays to provide information" to USF&G. (Miller Reply at 3.) But if USF&G perceives "weakness in the underpinnings of [Mr. Miller's] opinions," it should plan to expose any such weaknesses through cross-examination and to argue that, as a result, Mr. Miller's testimony should have less weight and credibility. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1352 (9th Cir. 1987) (quoting *Polk v. Ford Motor Co.*, 529 F.2d 259, 271 (8th Cir. 1976)), *opinion modified on reh'g*, 866 F.2d 318 (9th Cir. 1989). Where, as here, the court has determined that Mr. Miller is qualified to offer relevant and reliable expert testimony, a factual dispute of this sort is not a proper basis for excluding his testimony altogether. *See* *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786 ("[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

4. Mr. Miller's Testimony on "Primary Facts" Within the Jury's Common Knowledge

[16] USF&G further argues that Mr. Miller draws conclusions on "primary facts" that "the jury is capable of comprehending" without expert testimony. (Miller Mot. at 8.) Specifically, USF&G takes issue with Mr. Miller's testimony that "[g]ood faith claim practices require that

[an] investigation be objective, thorough, and timely." (*See* Miller Report at 16 (quoting James J. Markham, et al., The Claims Environment 29 (1993)); Miller Mot. at 7.) USF&G asserts that it is "doubtful" that "the jury requires [Mr.] Miller's special knowledge to understand that an investigation should be 'objective' or 'timely,' " as these concepts are, according to USF&G, matters within the jury's "common knowledge." (Miller Mot. at 7.)

[17] **[18]** Although "[e]xpert testimony is inadmissible if it concerns factual issues within the knowledge and experience of ordinary lay people because it would not assist the trier of fact in analyzing the evidence," *Santiago Salas v. PPG Architectural Finishes, Inc.*, No. C17-1787RSM, 2019 WL 399029, at *1 (W.D. Wash. Jan. 31, 2019), the Ninth Circuit has cautioned that courts should not "overstate the scope of the average juror's common understanding and knowledge," *United States v. Finley*, 301 F.3d 1000, 1013 (9th Cir. 2002). Moreover, expert testimony need only provide "appreciable help" to the jury to be admissible. *See* *United States v. Gwaltney*, 790 F.2d 1378, 1381 (9th Cir. 1986). Mr. Miller's testimony on insurance industry standards of care is certainly capable of providing such help to the jury in this case and, indeed, courts routinely permit expert witnesses to provide testimony of the sort contained in Mr. Miller's report. *See* *Hangarter*, 373 F.3d at 1016; *see also* *Ledcor Indus.*, 2012 WL 254251, at *2. Accordingly, while the jury may understand the meaning of "objective" or "timely" in common usage, the court will not presume they understand those terms as they are used by the insurance industry. Because ***862** Mr. Miller's testimony is aimed at educating the jury in that manner, the court finds his testimony to be relevant and reliable. *Ruvalcaba-Garcia*, 923 F.3d at 1188; *Finley*, 301 F.3d at 1013.

5. Mr. Miller's "Running Commentary on the Chronology of Events"

[19] Finally, USF&G asks the court to exclude Mr. Miller's testimony because it contains "a running commentary on the chronology of events," which attempts to usurp the fact-finding role of the jury. (Miller Mot. at 8-9.) It is plain that both expert reports offer a fair amount of factual recitation. (*See, e.g.*, Miller Report at 18-21, 28-32; Windt Report ¶ 19 ("Turning to the facts of this case ....").) However, the court has found that both experts are qualified to offer relevant and reliable expert testimony and does not find the presence of some surplus testimony to be a basis for excluding their expert testimony altogether. [3]

3 Indeed, the court recognizes that both Mr. Miller and Mr. Windt may need to discuss the facts of this case in order to provide relevant context for their expert opinion testimony. It cautions both experts, however, against doing so excessively or drawing legal conclusions from those facts, *Hangarter*, 373 F.3d at 1016.

Because the court finds that Mr. Miller is qualified to offer relevant and reliable expert testimony on applicable insurance industry standards, USF&G's motion to exclude his testimony is DENIED.

IV. CONCLUSION

For the reasons given above, the court GRANTS in part and DENIES in part Defendants' motion to strike the testimony of Mr. Windt (Dkt. # 68), and STRIKES those portions of Mr. Windt's report identified in this order. The court further DENIES USF&G's motion to exclude the testimony of Mr. Miller (Dkt. # 72).

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Footnotes