

1 THE STATE OF WASHINGTON  
2 OFFICE OF THE INSURANCE COMMISSIONER

FILED

3 In the Matter of

Docket Nos. 11-0088 and 11-0089  
2011 SEP 14 12:29

4 ABILITY INSURANCE COMPANY,

REPLY IN SUPPORT OF MOTION

TO STRIKE AND EXCLUDE, DIC

5 An Authorized Insurer and Respondent

TESTIMONY OF CRAIG BENNION  
Chief Hearing Officer

6 The OIC offers the following in brief reply to the Ability Insurance Company  
7 (“Ability” or the “Company”) opposition to the motion to strike and exclude.

8 **A. Mr. Bennion offers only legal conclusions and ultimate issues opinions.**

9 According to the briefs, both parties appear to agree in their characterizations of Mr.  
10 Bennion’s testimony. At page 2 lines 8-12, OIC’s motion points out that Mr. Bennion did not  
11 offer any observations as a percipient witness (what he said “did not concern any factual  
12 matters”) and did not offer any opinions or informed statements concerning “industry  
13 standard of care.” Instead, Mr. Bennion “solely provided his own personal legal conclusions  
14 about what he thought certain Washington Administrative Code rules said and meant, how he  
15 felt they should be interpreted, and whether he thought the Company had complied with these  
16 rules and laws.”

17 Ability’s opposition brief does not refute or deny this. It asserts, “Ability hired Craig  
18 Bennion for two purposes: (1) to explain how a professional whose job has been to interpret  
19 policies goes about the process of interpreting a policy such as the policy at issue here and (2)  
20 to provide testimony that Ability’s interpretation is not only reasonable but correct.” *See*  
21 Ability Opp. at p. 2 lines 4-7. The Company’s opposition materials did also include a  
22 declaration from Mr. Bennion, but it adds nothing to his qualifications, adds nothing to his  
23 opinions, and provides no basis for his opinions.

**B. Mr. Bennion’s opinions are inadmissible and Ability cites no case to the contrary.**

As OIC’s motion correctly points out, Mr. Bennion’s opinions on ultimate issues and  
legal conclusions are inadmissible. *See, e.g.,* OIC motion at pages 3-5. OIC’s motion is rich

1 with numerous examples of binding Washington precedent explaining why such proffered  
2 testimony is inadmissible, while the Company's opposition materials do not refute,  
3 distinguish, or even address these. Instead, Ability relies solely on *Hangarter v. Provident*  
4 *Life & Acc. Ins. Co.*, 373 F.3d 998 (9th Cir. Cal. 2004),<sup>1</sup> which is inapposite for several  
5 reasons.

6 First, *Hangarter's* underlying facts and issues were far different. The case dealt with  
7 factually intensive claims handling practices related to a bad faith tort claim. Here, on the  
8 other hand, this Court is only concerned with determining the meaning of language in a  
9 Washington Administrative Code provision (among other laws) and applying it to a discrete  
10 set of facts. As OIC's motion pointed out (and without any opposition from the Company),  
11 not only is this task exclusively the Court's, this task does not require an expert like Mr.  
12 Caliri.

13 Second, while the Company argues that *Hangarter* teaches us that since an expert was  
14 allowed to testify there, so should Mr. Bennion be allowed to testify here,<sup>2</sup> a closer review  
15 reveals no such lesson. Actually, the facts about the expert there show quite the opposite. In  
16 *Hangarter*, the plaintiffs presented expert testimony from a person named Frank Caliri, whose  
17 qualifications included:

18 twenty-five years' experience working for insurance companies and as an independent  
19 consultant. His experience has included evaluating insurance claims, assisting insureds  
20 in dealing with insurance companies to obtain payment of their claims, marketing  
21 insurance products, and evaluating insurance policies. Caliri worked for both Unum  
22 and Provident as a representative at the time many of the own occupation disability  
23 policies like *Hangarter's* were sold and has received training on how insurance

---

20 <sup>1</sup> While *Hangarter* was a California United States District Court trial court decision, a decision from one trial  
21 court in one state is not binding authority for a trial court in another state. See, e.g., *Panag v. Farmers Ins. Co. of*  
22 *Wash.*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009) ("Federal court decisions are guiding, but not binding,  
23 authority." [cite omitted]); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 33-31, 178 P.3d 995 (2008)  
(while courts may consider "well-reasoned precedents from federal courts and sister jurisdictions" for what  
"persuasive" effect they may have, such cases are "not binding [cites omitted].")

<sup>2</sup> See Ability Opp. At 4 line 19 ("Mr. Bennion's testimony was not improper legal conclusion," citing  
*Hangarter*.)

1 companies in general, and Defendants in particular, adjust claims. He has also been  
2 found qualified to testify on insurance practices and standards within the industry  
3 twelve times before (once in an insurance bad faith case), and has never been found to  
4 be unqualified. Moreover, Caliri's expertise has been employed by defense firms  
(including one involved in this litigation) 35-40% of the time he has served as an  
expert.

5 *Hangarter* at 1016. But the evidence and absence thereof here, by contrast, only shows:

- 6 • Mr. Bennion has no experience in evaluating claims in the kind of claim-handling  
7 capacity Mr. Caliri did,
- 8 • Mr. Bennion has no experience assisting insureds in dealing with insurance companies  
9 to obtain payment of claims (in fact, as OIC's motion pointed out without rebuttal  
10 from the Company, he's never helped such a person before, and he has chosen to only  
11 help protect insurance companies),
- 12 • Mr. Bennion has no experience or knowledge of marketing insurance products – let  
13 alone the kind of long term care policy here,
- 14 • Mr. Bennion has had no experience working for an insurer or anyone else (until now)  
15 regarding the kind of long-term case policy sold to the insured in this matter,
- 16 • Mr. Bennion has no training on how any company, let alone companies in general,  
17 adjust any claims,
- 18 • Mr. Bennion has never testified on insurance practices and standards such as the long-  
19 term care matter here, and
- 20 • while Mr. Caliri was found qualified a dozen times for both insureds/consumers and  
21 insurers, and was never found unqualified, Mr. Bennion has never been an expert  
22 anywhere before and has never been found or qualified to be an expert on any matter.

23 Third, contrary to the Company's suggestion, *Hangarter* does not somehow transform Mr.  
Bennion's inadmissible conclusions of law and opinions on ultimate issues into admissible  
testimony. The Company's opposition brief argues, at page 4 line 19, that "Mr. Bennion's  
testimony was not improper legal conclusion," and then cites "*Hangarter*, 373 F.3d at 1017."  
Of course, page 1017 in *Hangarter* indicates nothing about what Mr. Bennion said; but  
actually, that page and the one before it in the *Hangarter* decision help us understand why Mr.  
Caliri's words did not cross this bright line of inadmissibility while Mr. Bennion's do. As the

1 *Hangarter* opinion recounts, Mr. Caliri did happen to reference certain California statutes  
2 when he spoke. And, consistent with the precedent cited in OIC's motion, the *Hangarter*  
3 court *did* recognize that doing such could be prohibited, inadmissible testimony if what he  
4 said had concerned an ultimate issue or amounted to the giving of an opinion as to his own  
5 legal conclusion that improperly usurped the court's role. *See Hangarter* at 1016 (cites  
6 omitted.) But the court then went on to make clear that the statutes Mr. Caliri talked about  
7 were "[not] directly at issue in the case – [and] were [merely] ancillary to the ultimate issue,"  
8 which issue was bad faith. *Hangarter*, 373 F.3d at 1017. Here, by contrast, Mr. Bennion  
9 spoke about a rule which *is* "directly at issue in the case" and which *is not* merely "ancillary"  
10 to "the ultimate issue." Mr. Bennion actually tried to tell this Court why his – and the  
11 Company's – interpretation is the "correct" one that this Court not only should, but must,  
12 adopt.

13 Other courts have also distinguished *Hangarter* for the same reasons it is inapposite  
14 here. This happened, for example, in *Imperial Trading Co. v. Travelers Prop. Cas. Co. of*  
15 *Am.*, 654 F. Supp. 2d 518, 521 (E.D. La 2009). There, a sister federal court recognized that  
16 the *Hangarter* judge, in the context of *bad faith cases* – which this matter is not –  
17 properly allowed Mr. Caliri's testimony because (a) the witness was "amply qualified," (b)  
18 the testimony would assist the trier of fact, and, of most significance here, and (c) the witness  
19 "would not render an opinion on the ultimate issues of the case." *Imperial Trading* at 521,  
20 *citing Hangarter*. But then the *Imperial Trading* court went on to exclude the proffered  
21 witness's testimony for some of the same reasons OIC's motion offers here: because Mr.  
22 Bennion's opinions are "rife with legal conclusions, which are inadmissible" and "proposes  
23 only to 'tell the trier of fact what to decide.'" (Cites omitted.) *Id.* at 522 and 523.

**C. Nothing else in the Company's opposition undercuts OIC's motion.**

The Company also briefly attempted to misrepresent what Mr. Bennion said, first by  
trying to re-cast it as him having supposedly provided "expertise" into "how such matters are

1 interpreted in the industry” (*see* Ability opp. Brief at p. 4 line 8), and then as him having  
2 supposedly “offered his opinions on practices and norms in the context of interpretation of  
3 policy and regulation.” *See* Ability opp. Brief at p. 4 lines 15-16. OIC staff respectfully  
4 submits that a fair review of the hearing recording shows that he said no such things. As  
5 already mentioned, the evidence fails to show that Mr. Bennion is qualified to speak to what  
6 the “norm” or industry standard of care is, or is familiar with the industry standard of practice  
7 the Company now seems to claim he talked about. His sole proffered qualification is years of  
8 writing opinion letters for insurance companies – which is irrelevant to any issue in this  
9 matter. Mr. Bennion only offered personal views of how to interpret and apply the words of  
10 WAC 284-54-253, which improperly usurps this Court’s responsibility to make that  
11 determination. The law as cited in OIC’s motion makes it plain that such cannot be  
12 considered as “evidence,” and cannot be cloaked in a false veneer of supposed ‘expertise.’ As  
13 OIC’s motion and the caselaw cited therein made clear, such proposed testimony is  
14 inadmissible.

15 And as OIC’s motion also pointed out, ER 702 requires that for an “expert” to be  
16 allowed to testify, this “expert” must have “specialized knowledge,” which knowledge “will  
17 assist the trier of fact” – not merely be generally “helpful” in the vague way suggested by  
18 Ability. Rather, the proffered expert must assist in “understand[ing] the evidence” or in  
19 determining “a fact in issue.” ER 702. Again, as OIC’s motion pointed out at page 6 lines 1-  
20 2, “nothing he said assists in understanding any *other* witness’s testimony or the  
21 determination of any *fact* in issue.” (Emphasis in original.) Nothing in the Company’s  
22 opposition materials provide to the contrary.

23 The Company’s claim that it provided a brief disclosure sentence in compliance with  
the Court’s order to briefly summarize the general areas of Mr. Bennion’s anticipated  
testimony is irrelevant to whether, as OIC’s motion indicated, the Company “violated the  
rules of *discovery* and *chose to ignore its obligations rather than abide by them.*” (Emphasis

1 added.) See OIC motion at p. 7, lines 12-13. As indicated, Mr. Bennion's declaration  
2 contradicts what he said at the hearing, and even if, *arguendo*, the Company did not actually  
3 learn what OIC asked in discovery until some other point just before the hearing, the  
4 Company was under no lesser obligation to immediately supplement its discovery responses.  
5 Here, the facts clearly show the Company simply ignored OIC's discovery, and never  
6 disclosed what OIC asked for before Mr. Bennion was allowed to speak. Because OIC staff  
7 did not know what Mr. Bennion was going to say until he said it, OIC staff was prevented  
8 from analyzing his opinions, researching the law, reviewing it with the agency, and filing any  
9 motion to exclude any sooner than happened here.

10 The Company also makes a results-oriented, meritless argument that we should now  
11 misconstrue the sequence of events and turn these informal proceedings into more formal  
12 proceeding only to argue that OIC staff has somehow waived the right to contest the  
13 admissibility of what Mr. Bennion said. Here, because of Ability's violation of discovery,  
14 OIC staff had not been given what it asked for, did not know his actual "opinions" and "the  
15 grounds" for his opinions, until he actually spoke. This prevented any intelligent review of  
16 the law regarding the admissibility of his testimony in advance, or the discussion thereof, until  
17 after he had already spoken and until after OIC staff could review the same with other OIC  
18 staff. To now argue that this sequence shows a sort of tacit acknowledgment that what Mr.  
19 Bennion had to say was properly admissible "evidence" is absurd.

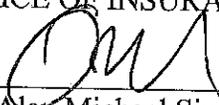
### 20 CONCLUSION

21 Had Ability not violated the rules of discovery and not ignored its discovery  
22 obligations, OIC would have knowS Mr. Bennion's opinions and the grounds for his opinions  
23 before he spoke. But now that his views are known, they are all plainly improper and for the  
reasons above, should be excluded. Ability's response and opposition to OIC's motion to  
exclude provides nothing to refute this. While Mr. Bennion's views – like those of any  
party's lawyer or other representative – are entitled to no weight and can always be

1 considered purely for their persuasive effect, Mr. Bennion should not be cloaked under the  
2 guise of an expert simply to bolster the Company's own position. Nothing Mr. Bennion  
3 offered is proper to include as "evidence" or "testimony," and it is important that such  
4 improper information not be elevated to that status here. Accordingly, Mr. Bennion's  
5 statements should be excluded and not considered as "evidence" or "testimony" in this matter.

6 DATED this 14th day of September, 2011.

7 OFFICE OF INSURANCE COMMISSIONER

8 By: 

9 Alan Michael Singer

10 Staff Attorney

11 Legal Affairs Division

**JOAN HANGARTER, Plaintiff-Appellee, v. PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Defendant, and THE PAUL REVERE LIFE INSURANCE COMPANY; UNUMPROVIDENT CORP., Defendants-Appellants.**

No. 02-17423

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

*373 F.3d 998; 2004 U.S. App. LEXIS 12841*

February 10, 2004, Argued and Submitted, San Francisco, California

June 25, 2004, Filed

**PRIOR HISTORY:** [\*\*1] Appeal from the United States District Court for the Northern District of California. D.C. No. CV-99-05286-JL. James Larson, Magistrate Judge, Presiding.

*Hangarter v. Paul Revere Life Ins. Co., 236 F. Supp. 2d 1069, 2002 U.S. Dist. LEXIS 21870 (N.D. Cal., 2002)*

**DISPOSITION:** Affirmed.

**COUNSEL:** Horace W. Green, San Francisco, California; Evan M. Tager, Washington, DC (argued); Christopher C. Wang, Washington, DC, for the defendants-appellants.

Ray Bourhis, San Francisco, California; Alice Wolfson, San Francisco, California; Daniel U. Smith, Kentfield, California (argued), for the plaintiff-appellee.

**JUDGES:** Before: Alfred T. Goodwin, A. Wallace Tashima, and Richard R. Clifton, Circuit Judges. Opinion by Judge Clifton.

**OPINION BY:** Richard R. Clifton

**OPINION**

[\*1003] CLIFTON, Circuit Judge:

Joan Hangarter, a chiropractor who operated her own business, obtained an "own occupation" [\*1004] disability insurance policy in 1989 from Paul Revere Life Insurance Company. She filed a claim for total disability in July 1997 based on shoulder, elbow, and wrist pain. Paul Revere paid Hangarter benefits for an eleven-month period and then terminated her benefits based upon the opinion of its medical examiners and claim investigators that Hangarter was not "totally disabled" and continued to work and earn income, making her ineligible for benefits under [\*\*2] the policy. Hangarter brought a diversity action alleging violation of *Cal. Bus. & Prof. Code § 17200* (the Unfair Competition Act, or UCA), breach of contract, breach of the covenant of

good faith and fair dealing, and intentional misrepresentation against Paul Revere and its parent company, UnumProvident Corp. The jury returned a \$ 7,670,849 verdict in Hangarter's favor, \$ 5 million of which was for punitive damages. Raising a multitude of issues, Defendants appeal the district court's post-verdict denial of judgment as a matter of law (JMOL), the jury's award of damages, and a permanent injunction issued by the district court under the UCA.

We affirm the district court's denial of a JMOL and the jury's award of damages. We reverse the district court's permanent injunction under the UCA.

**I. BACKGROUND**

Joan Hangarter owned her own chiropractic practice in Berkeley, California. On a typical day, she would treat between 30 and 50 patients. In 1989, Hangarter purchased an individual "own occupation" disability insurance policy from Paul Revere. In 1993, Hangarter began to experience severe recurrent shoulder pain. She sought treatment from a [\*\*3] chiropractor in her office, Dr. England, who adjusted her daily. In 1995 and 1996, Hangarter also saw an orthopedist, Dr. Isono. As a result of ongoing, severe pain in her shoulder, arm, and neck, Hangarter in 1997 started to see Dr. Linda Berry, a chiropractor, and to attend physical therapy sessions. Although Hangarter continued this treatment for approximately eight weeks, her pain was not alleviated. She filed a claim for benefits under her disability insurance policy in May 1997 and began receiving payments in October 1997. She was also in an auto accident in October 1997, which aggravated her pain.

Though she continued to be treated by Drs. Berry and Isono, Hangarter's condition did not improve. Between 1996 and 2000 Hangarter had 3 Magnetic Resonance Imaging studies (MRIs), which Dr. Isono interpreted as having abnormal findings. The third MRI in May 2000 showed her condition to be growing worse, despite treatment by Drs. Berry and Isono. Dr. Berry diagnosed Hangarter's symptoms as epicondylitis, cervical intervertebral disk syndrome, and tendinitis. Dr.

Isono offered only surgery to correct the problem, which Hangarter rejected based on her past negative experience with post-surgery [\*\*4] pain medication. Hangarter eventually discontinued seeing Dr. Isono and was treated solely by Dr. Berry, whose chiropractic manipulations gave her some pain relief.

In 1999, Paul Revere employed an "independent medical examiner" (IME), Dr. Aubrey Swartz, to examine Hangarter and her medical records. In contrast to the findings of Drs. Isono and Berry, Dr. Swartz concluded that Hangarter's condition was "normal" and that she would be able to see two chiropractic patients an hour. Dr. Edward Katz, an orthopedic surgeon, at the request of Hangarter's counsel, reviewed her medical records<sup>1</sup> and examined her in July 2001, two years after Dr. Swartz. Dr. Katz disagreed with Dr. Swartz's conclusions. He found 75% range of motion in her neck, spasm and tenderness in the right trapezius muscle, and reduced grip strength in her arm. Dr. Katz also found evidence of cervical disk disease, a depressed biceps reflex on Hangarter's right side along with numbness and tingling of the middle finger of her right hand, an indicator of nerve root compression affecting the sensory portion of the nerve going down the arm. Dr. Katz reviewed the reports of the MRI scans of Hangarter's cervical spine taken [\*\*5] in May 1997, finding mild to minimal central canal stenosis, a narrowing of the spinal canal which causes some compression on the spinal canal or the nerve roots. He concluded that Hangarter suffered from lateral epicondylitis, more commonly called tennis elbow, cervical disk disease, and rotator cuff tendinitis, and that her condition was worsening. Drs. Katz, Berry, and Isono testified that Hangarter could not maintain a normal, continuous chiropractic occupation.

1 These records included the files of Dr. Isono, the MRI reports of Hangarter's right shoulder and cervical spine taken in 1997, the records and deposition of Dr. Linda Berry, the electromyogram ("EMG") studies of March 6 and March 30, 1998, the report of Dr. Swartz and another doctor retained by Paul Revere, and the MRI report of May 12, 2000.

While Hangarter was receiving benefits from her policy, she hired Dr. Parissa Peymani to adjust patients while she assisted with office management. Dr. Peymani testified that after she started working, [\*\*6] Hangarter stopped seeing all but five to seven of her patients, which Dr. Berry [1005] had encouraged her to do to see if her condition was at all improving. Dr. Peymani testified that during the year-and-a-half she worked for her, Hangarter performed adjustments for only 5 out of over 9,000 patient visits. Hangarter ceased employing

Dr. Peymani in May 1999, because she could no longer afford to pay her. She then sold her practice.

On May 21, 1999, Paul Revere terminated Hangarter's "total disability" benefits. The letter claimed that Hangarter was ineligible for benefits under the policy as she was not "totally disabled" and was working and earning income. After Paul Revere terminated Hangarter's benefits, it attached her bank account for the insurance premiums, until the account was drained, at which point the company cancelled her policy. Hangarter subsequently brought a diversity action against Defendants alleging violation of § 17200 of the *Unfair Competition Act*, breach of contract, breach of the covenant of good faith and fair dealing, and intentional misrepresentation. After eleven days of trial, a jury of six returned a unanimous verdict for Hangarter. The total award was \$ 7,670,849, [\*\*7] including \$ 5,000,000 for punitive damages, \$ 1,520,849 for past and future unpaid benefits, \$ 400,000 for emotional distress, and \$ 750,000 for attorneys' fees. The district court also issued a permanent injunction under the UCA. Defendants filed a motion for a JMOL or for a new trial, which the district court denied. See *Hangarter v. Paul Revere Life Ins. Co.*, 236 F. Supp. 2d 1069 (N.D. Cal. 2002). This appeal followed.

## II. DISCUSSION

We review the denial of a motion for a JMOL de novo. See *Monroe v. City of Phoenix*, 248 F.3d 851, 861 (9th Cir. 2001). JMOL is appropriate "when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000) (quoting *Fed. R. Civ. P. 50(a)*). When reviewing the record as a whole, "the court must draw all reasonable inferences in favor of the nonmoving party," keeping in mind that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences [\*\*8] from the facts are jury functions, not those of a judge." *Id.* at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)).

JMOL should be granted only if the verdict is "against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result." *EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997) (citations and quotation marks omitted); see also *Mockler v. Multnomah County*, 140 F.3d 808, 815 n.8 (9th Cir. 1998) (noting that reversal is warranted only if the verdict is not supported by "such relevant evidence as reasonable minds might accept as adequate to support a conclusion" (internal quotation marks omitted)). A new trial is proper only if "the verdict is contrary to the clear weight of the evidence, or is based upon evidence which

is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001) (citations and quotation marks omitted). We review a district court's denial of a motion for a new [\*\*9] trial for clear abuse of discretion. *Saman v. Robbins*, 173 F.3d 1150, 1154 n.4 (9th Cir. 1999).

#### A. Total Disability

##### 1. Jury Instruction

We review de novo jury instructions that are challenged as a misstatement [\*1006] of law. *See Mockler*, 140 F.3d at 812. Jury instruction errors are subject to harmless error review. *See Shaw v. City of Sacramento*, 250 F.3d 1289, 1293 (9th Cir. 2001).

Defendants argue that the district court's jury instruction on the meaning of "total disability" was a misstatement of California law. The district court's instruction to the jury stated:

#### TOTAL DISABILITY

Plaintiff's policy defines "total disability" as follows:

"Total Disability" means that because of Injury or Sickness:

- a. you are unable to perform the important duties of your Occupation; and
- b. you are not engaged in any other gainful occupation; and
- c. you are under the regular and personal care of a physician.

This means, according to the law in California, that plaintiff is eligible for benefits if she is unable to perform the substantial and material duties of her own occupation in the usual and customary way with reasonable continuity. [\*\*10]

The district court's jury instruction was based upon the California Supreme Court's holding in *Erreca v. Western States Life Ins. Co.*, 19 Cal. 2d 388, 121 P.2d 689 (Cal. 1942), that "the term 'total disability' does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way." *Id.* at 695.

Defendants argue that because the "total disability" provision of Paul Revere policy was unambiguous, the

district court's imposition of *Erreca's* definition of "total disability" was unwarranted under California law. Contrary to Defendants' position, California law requires courts to deviate from the explicit policy definition of "total disability" in the occupational policy context<sup>2</sup> where it is necessary to "offer protection to the insured when he is no longer able to carry out the substantial and material functions of his occupation." *Austero v. Nat'l Cas. Co.*, 84 Cal. App. 3d 1, 148 Cal.Rptr. 653, 667 (Cal. Ct. App. 1978) (emphasis added), *overruled on other grounds* [\*\*11] by *Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 809, 169 Cal.Rptr. 691, 699 n.7, 620 P.2d 141 (Cal. 1979). Indeed, "California courts oppose strict adherence to a highly limited definition of 'total disability' in both non-occupational and general occupational disability policies." *Id.*; *see also Moore v. American United Life Ins. Co.*, 150 Cal. App. 3d 610, 197 Cal.Rptr. 878, 882-83 (Cal. Ct. App. 1984) (stating that the unambiguous "policy language misstated California law as it has existed since [*Erreca*]. When coverage provisions in general disability policies require total inability to perform 'any occupation,' the courts have assigned a common sense interpretation to the term 'total disability'" (emphasis added)).

2 The California Supreme Court in *Erreca* defined total disability in the context of a general, nonoccupational disability policy. Hangarter's policy was an *occupational* policy, as opposed to a nonoccupational policy which "does not insure the plaintiff in respect to any particular occupation. The general or total disability which it insures against is akin to . . . provisions defining total disability as that which prevents the insured 'from engaging in any occupation, or performing any work whatsoever for remuneration or profit.'" *Joyce v. United Ins. Co. of America*, 202 Cal. App. 2d 654, 21 Cal.Rptr. 361, 367 (Cal. Ct. App. 1962) (emphasis added). California courts have specifically applied *Erreca* in the context of occupational policies. *See, e.g., Austero*, 148 Cal.Rptr. at 666 ("We see no reason for distinguishing between non-occupational and occupational disability policies in terms of the definition of 'total disability' . . .").

[\*\*12] [\*1007] The policy in this case defined "total disability" as being "unable to perform the important duties" of one's occupation and to not be "engaged in any other gainful occupation." As Defendants concede, Hangarter's policy was an occupational policy that insured Hangarter against the loss of her ability to perform her occupation as a chiropractor, not any other occupation. Given the occupational nature of the policy, the district court appropriately formulated a jury instruction that only referred to Hangarter's ability to perform the

important duties of her own occupation. California courts have specifically upheld jury instructions in the occupational policy context that defined "total disability" as the inability to perform the substantial and material duties of one's own occupation. See *Austero*, 148 Cal.Rptr. at 665 (upholding the instruction if the "plaintiff was 'rendered unable to perform the substantial and material duties of his occupation in the usual and customary way,' that he was totally disabled" (emphasis added)). Additionally, for all practical purposes there is no difference between *Erreca's* use of the phrase "substantial and material [\*\*13] duties" and the policy's use of the phrase "important duties."<sup>3</sup>

3 Although the instruction eliminated the policy's requirement that Hangarter not be engaged in "any other gainful occupation" in order to receive "total disability" benefits, that appears proper under California law, even if the policy language seems unambiguous. See *Moore*, 197 Cal.Rptr. at 882-83, 892-93. Given that this case involved an occupational disability policy, the district court did not err in formulating a jury instruction that focused solely on Hangarter's ability to perform the substantial and material duties of her occupation, not any other occupation. Moreover, as discussed in the following section, occasional though futile attempts to engage in one's occupation -- possibly in violation of the precise terms of the policy -- are insufficient to reverse the jury's determination of total disability under *Erreca's* definition of "total disability." See *Joyce v. United Ins. Co. of America*, 202 Cal. App. 2d 654, 21 Cal.Rptr. 361, 368 (Cal. Ct. App. 1962). Additionally, the fact that Hangarter possibly earned income while performing tasks incidental to her primary occupation is also immaterial under *Erreca's* definition. See *Erreca*, 121 P.2d at 695-96. In any event, even if the district court erred in eliminating this portion of the policy in its jury instruction, the error was harmless because Defendants conceded that, at the time benefits were terminated, Hangarter was not working.

[\*\*14] Defendants also contend that the imposition of *Erreca's* definition of total disability in this case obviated the policy's partial or residual disability provision.<sup>4</sup> This argument also disregards California law. In *Wright v. Prudential Ins. Co. of America*, 27 Cal. App. 2d 195, 80 P.2d 752 (Cal. Dist. Ct. App. 1938), cited approvingly by the California Supreme Court in *Erreca*, the California District Court of Appeal specifically rejected the defendant's contention that the California judicial "rule [regarding 'total disability'] does not apply

where the policy provides for 'various degrees of disability':

No logical reason appears, however, why the same rule should not be applied where the policy provides for both total and partial disability in order to make the total disability clause 'operative and to prevent a forfeiture' of the indemnity provided by that clause. In either case a literal interpretation of the total disability clause would defeat the very purpose of insurance against total disability, [\*1008] because it rarely happens that an insured is so completely disabled that he can transact no business duty whatever. *The rule quoted has been [\*\*15] applied in many cases where the policy in suit provided for both total and partial disability. . . .* The fact that the insured may do some work or transact some business duties during the time for which he claims indemnity for total disability or even the fact that he may be physically able to do so is not conclusive evidence that his disability is not total, if reasonable care and prudence require that he desist.

*Id.* at 761-62 (citations omitted) (emphasis added). The fact that the policy in this case contained a residual or partial disability clause does not make the district court's jury instruction inconsistent with California law.<sup>5</sup>

4 The policy provides residual disability benefits if the insured is unable to perform one or more of the important duties of her occupation; is unable to perform the important duties of her occupation for more than 80 of the time normally required to perform them; or her loss of earnings is equal to at least 20 of her former earnings while engaged in her occupation or another occupation; and she is under the regular and personal care of a physician.

[\*\*16]

5 Defendants rely on *Dietlin v. Gen. Am. Life Ins. Co.*, 4 Cal. 2d 336, 49 P.2d 590 (Cal. 1935) for the proposition that a "literal construction" of the policy controls where a partial disability provision exists. *Dietlin* pre-dated *Erreca*, and though the court in *Dietlin* declined to apply the judicial construction of total disability, it did not justify its approach based on the fact that there was a partial disability provision in the policy. The court simply decided to "adhere to the con-

struction placed upon the language of the policy" without further explanation. *Id.* Tellingly, the California Supreme Court in *Erreca* subsequently interpreted *Dietlin* by stating that the court denied benefits in that case because "the climbing of scaffolds did not constitute a substantial portion of [Dietlin's] duties," a view consistent with *Erreca's* definition of "total disability." *Erreca*, 19 Cal.2d at 398. The court in *Erreca* made no mention at all of the existence of partial benefits language in the *Dietlin* policy.

The district [\*17] court therefore did not erroneously misstate California law in its jury instruction.

## 2. Jury's Total Disability Finding

The question of what amounts to total disability is one of fact . . . ." *Erreca*, 121 P.2d at 696. "We review the factual findings made by the jury under the substantial evidence test . . . ." *Sarkisian v. Winn-Proof Corp.*, 688 F.2d 647, 651 (9th Cir. 1982).

The jury's special verdict made the specific finding that at the date her benefits were terminated by Defendant, "Plaintiff was unable to perform the substantial and material duties of her own occupation in the usual and customary way with reasonable continuity." Defendants argue that "undisputed evidence" demonstrates that Hangarter "continued to manage her business profitably" and engaged in a "gainful occupation" in violation of the precise terms of the policy. Given that the district court correctly applied California law in formulating its jury instruction for "total disability," our relevant inquiry is only whether the jury's factual finding of total disability, pursuant to the jury instruction, was supported by substantial evidence. The fact that some evidence might demonstrate [\*18] that Hangarter violated the precise terms of the policy is immaterial.

There was sufficient evidence for the jury to find that Hangarter was totally disabled. Though there is conflicting evidence in the record regarding Hangarter's medical condition, the jury's determination that before the date of termination Hangarter was physically unable to perform "the substantial and material duties of her own occupation in the usual and customary way with reasonable continuity" is supported by substantial evidence. Three doctors testified that Hangarter could not maintain a continuous, normal chiropractic occupation. While Defendants note that Hangarter made a handful of attempts to perform chiropractic adjustments, futile attempts to return to one's previous occupation [\*1009] are insufficient to reverse the jury's determination of total disability under California law. See *Joyce*, 21 Cal.Rptr. at 368 ("[A] finding that the plaintiff was 'wholly and continuously disabled' is not precluded by the fact that he made two futile attempts to return to his job. Such find-

ing must be upheld since the evidence shows that on each occasion of his return to work, he was unable to perform the [\*19] duties of his occupation . . .").

Though Hangarter hired another chiropractor from 1997-1999 to treat her patients while she performed clerical tasks incidental to her primary occupation, this is insufficient to disqualify her from being "totally disabled" under California law. Hangarter had an *occupational* policy with Paul Revere, and was insured against losses stemming from her inability to perform her occupation as a chiropractor. Her occasional stints as an office manager do not constitute the occupational practice of chiropractic medicine. Under California law, the performance of tasks *incidental* to one's profession does not demonstrate that an individual is not "totally disabled." See *Culley v. New York Life Ins. Co.*, 27 Cal. 2d 187, 163 P.2d 698, 701 (Cal. 1945) ("Recovery is not precluded under a total disability provision because the insured is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of business" (citations and quotation marks omitted)).

Similarly, the fact that Hangarter's enterprise possibly made a profit during this time period is also immaterial. As the California Supreme [\*20] Court noted in *Erreca*:

The insurer also stresses the magnitude of the respondent's enterprise and his income therefrom. Such matters have *no proper place* in the determination of whether respondent is totally disabled from performing remunerative work. Disability insurance is designed to provide a substitute for earnings when, because of bodily injury or disease, the insured is deprived of the capacity to earn his living . . . . *It does not insure against loss of income.* The respondent receives his income from his ranches as an owner or lessor; his labor contributes nothing toward it. The contention of the insurer would lead to the strange conclusion that a bedridden merchant is not totally disabled from performing gainful work because he receives a substantial income from a business, the management of which he has been forced to abandon to others.

*Erreca*, 121 P.2d at 695-96 (emphasis added).<sup>6</sup>

<sup>6</sup> Hangarter testified that "most of the money [earned during this time] went all to overhead."

Though the record is unclear on this issue, Hangarter and Dr. Peymani testified that Hangarter saw, at most, five to seven patients during a year. Hangarter then hired Dr. Peymani to "take over" her practice. She later replaced Dr. Peymani, and shortly afterward sold her practice altogether. When her benefits were terminated, she was not engaged in any occupation.

[\*\*21] Substantial evidence supports the jury's finding that Hangarter was unable to perform the substantial and material duties of her occupation as a chiropractor in a normal and continuous way. The district court therefore did not err in declining to disturb the jury's finding that Hangarter was totally disabled.

#### B. Jury's Bad Faith Determination

A cause of action for breach of the implied covenant of good faith and fair dealing in the insurance context is characterized as insurance bad faith, for which a plaintiff may recover tort damages. "The key to a bad faith claim [under California [\*1010] law] is whether or not the insurer's denial of coverage was reasonable . . . . The reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact." *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1161 (9th Cir. 2002) (citations and quotation marks omitted). Where there is a genuine issue of an insurer's liability under a policy, a court can conclude that an insurer's actions in denying the claim were not unreasonable as a matter of law. *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.*, 90 Cal. App. 4th 335, 108 Cal.Rptr.2d 776, 784 (Cal. Ct. App. 2001). [\*\*22] "The genuine issue rule in the context of bad faith claims allows" a court to grant JMOL when "it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable . . . . An insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably." *Amadeo*, 290 F.3d at 1161-62 (citations omitted).

Though the existence of a "genuine dispute" will generally immunize an insurer from liability, a jury's finding that an insurer's investigation of a claim was biased may preclude a finding that the insurer was engaged in a genuine dispute, even if the insurer advances expert opinions concerning its conduct. See *Chateau Chamberay*, 108 Cal.Rptr.2d at 785 ("an [insurer] expert's testimony [demonstrating a genuine dispute as to liability] will not automatically insulate an insurer from a bad faith claim based on a biased investigation"); see also *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 996 (9th Cir. 2001) ("Our decision does not eliminate bad faith claims based on an insurer's allegedly biased [\*\*23] investigation. Expert testimony does not automatically insulate

insurers from bad faith claims based on biased investigations."). An insurer's bias may be shown through the following factors:

1. The insurer may have misrepresented the nature of the investigatory proceedings;
2. The insurer's employees lied in depositions or to the insured;
3. The insurer dishonestly selected its experts;
4. The insurer's experts were unreasonable; or
5. The insurer failed to conduct a thorough investigation;

*Chateau Chamberay*, 108 Cal.Rptr.2d at 785; cf. *Sprague v. Equifax, Inc.*, 166 Cal. App. 3d 1012, 213 Cal.Rptr. 69, 79 (Cal. Ct. App. 1985) (fraudulent termination exists if insurer arranges "an inadequate medical examination, producing a false conclusion, which would form an apparently plausible basis for wrongfully terminating payments").

Substantial evidence was presented at trial that the jury could have relied upon in determining that Defendants engaged in a biased investigation. Frank Caliri testified that Paul Revere's letter terminating Hangarter's benefits was misleading, deceptive, and fell below industry standards as it incorrectly advised [\*\*24] Hangarter about her rights under the policy.<sup>7</sup> The letter claimed that Hangarter was "working," and therefore was in violation of the policy. This statement, as Paul Revere acknowledged in the same letter, was false because Hangarter had already sold her chiropractic business. Indeed, the letter went on to deny Hangarter any [\*1011] residual benefits, claiming that because she had "sold" her business and "was not working," she was ineligible for them. Moreover, the letter made no mention of recovery or rehabilitation benefits, and when Hangarter specifically asked about such benefits before the letter was issued, she was erroneously told that she was ineligible for them. Finally, the termination letter incorrectly stated that the policy was governed by ERISA. If true, this would have meant that Hangarter had no available remedies under state law, including punitive damages.<sup>8</sup>

<sup>7</sup> Defendants respond to Caliri's testimony by stating that under California law the insurer has no obligation to inform the insured about benefits set forth clearly in the policy. This, however, does not rebut Caliri's observation that Defendants' failure to inform Hangarter fully about her

rights under the policy generally fell below industry customs and norms.

[\*\*25]

8 If an insurance policy is part of an employee welfare benefit plan governed by ERISA, then a plaintiff's state law claims relating to that policy are preempted and federal law applies to determine recovery. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56-57, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987); *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d 489, 493-94 (9th Cir. 1988) (per curiam) (holding that plaintiffs' "state statutory claims for compensatory and punitive damages" were preempted under *Pilot Life* even if the statute fell within ERISA's saving clause).

Evidence was also presented that Defendants exhibited bias in selecting and retaining Dr. Swartz as the IME. Paul Revere used Dr. Swartz nineteen times from 1995 to 2000. Caliri testified that when an insurer "uses the same [IME] on a continual basis," the medical examiner becomes "biased" because they "lose their independence." Similarly, evidence showed that in thirteen out of thirteen cases involving claims for total disability, Dr. Swartz rejected the insured's claim that he or she was totally disabled. Moreover, [\*\*26] Defendants' letter retaining Dr. Swartz, written by an in-house medical consultant who had never examined Hangarter, claimed that there were no objective findings for a disabling injury. Caliri testified that this letter "biased" and "predisposed the doctor" against finding disabling injuries by "telling him [Defendants'] opinion."

Additionally, Hangarter offered evidence that Defendants had developed and applied to her case file a comprehensive system for targeting and terminating expensive claims, such as those stemming from "own occupation" policies where the insured was a disabled professional who had been receiving benefits for months or years. Dr. William Feist testified that Defendants in the mid-to-late 1990s had instituted "unethical" policies such as "round table claim reviews" that were made with the goal of achieving a "net termination ratio" (the ratio of the value of terminated claims compared with new claims).<sup>9</sup> Caliri similarly testified that the round table process violated the insurance industry principle of looking at each policy claim objectively and on a case-by-case basis.

9 Caliri also testified, based on internal Provident documents, that Defendants set goals for terminating whole blocks of claims without reference to the merits of individual claims for benefits; e.g., a directive that each adjuster will maintain a list of ten claimants "where intensive effort will lead to successful resolution of the

claim. As one drops off another name will be added." He referred to testimony by Ralph Mohny and Sandra Fryc that "resolution" of claims meant their "termination." Caliri testified that Hangarter's case file was taken to a round table on September 9, 1997.

[\*\*27] Viewing the evidence in Hangarter's favor, we conclude that the district court did not err in determining that the jury had substantial evidence before it to find that the Defendants engaged in a biased, and thus "bad faith," investigation.

### C. Future Damages Jury Instruction

The district court instructed the jury that if it found that Defendants "breached [their] duty of good faith and [\*1012] fair dealing," it could award Hangarter "an amount of future contract benefits that you reasonably conclude after examination of the policy and other evidence that plaintiff would receive had the contract been honored by the insured." Defendants argue that the district court misstated California law in its jury instruction. Though Defendants failed to object to the jury instruction, they did not waive this argument.<sup>10</sup>

10 *Fed. R. Civ. P. 51* provides that "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." *Fed. R. Civ. P. 51* (2002). Though Defendants did not object to the jury instruction, they did object to the admission of evidence of future policy benefits in their motion in limine no. 3. While "deficient in terms of the plain language of *Rule 51*," this objection "falls within the limited exception we have recognized for a pointless formality." *Voo-hries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 714 (9th Cir. 2001). "Where the district court is aware of the party's concerns with an instruction, and further objection would be unavailing, we will not require a futile formal objection." *Gulliford v. Pierce County*, 136 F.3d 1345, 1348 (9th Cir. 1998) (citations and quotation marks omitted).

[\*\*28] Nonetheless, Defendants' argument is unavailing on the merits. In *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 620 P.2d 141, 169 Cal. Rptr. 691 (Cal. 1979), the California Supreme Court stated that:

We have never held, however, that future policy benefits may not be recovered in a valid tort cause of action for breach of the implied covenant of good faith and

fair dealing . . . . Thus, in applying to these facts the *general rule for fixing tort damages* . . . , the jury may include in the compensatory damage award future policy benefits that they reasonably conclude, after examination of the policy's provisions and other evidence, the policy holder would have been entitled to receive had the contract been honored by the insurer.

*Id.* at 149 n.7 (emphasis added). The California Court of Appeal in *Pistorius v. Prudential Ins. Co.*, 123 Cal. App. 3d 541, 176 Cal.Rptr. 660 (Cal. Ct. App. 1981) interpreted *Egan* as holding, generally, that future damages for bad faith claims based upon tort theories of liability are appropriate. *Id.* at 666 ("Defendant's position that compensatory damages based on a contractual [\*\*29] cause of action for breach of an implied covenant of good faith in a disability insurance policy cannot include a sum for future benefits is correct. However where the damages are based on a tort theory, the situation is different." (citation omitted) (emphasis added)).

It is well established that a state court's interpretation of its statutes is binding on the federal courts unless a state law is inconsistent with the federal Constitution. *Adderley v. Florida*, 385 U.S. 39, 46, 17 L. Ed. 2d 149, 87 S. Ct. 242 (1966). The court in *Pistorius* reasonably interpreted *Egan* to apply to insurance bad faith claims generally. Though Defendants espouse a theory of tort law, nowhere mentioned within *Egan*, that would limit the application of tort damages in this case to present and past harms, the California Supreme Court in *Egan* was quite clear in emphasizing that it had "never held . . . that future policy benefits may not be recovered in a valid tort cause of action for breach of the implied covenant of good faith and fair dealing" and that when applying the "general rule for fixing tort damages . . . the jury may include in the compensatory damage award future policy [\*\*30] benefits." *Egan*, 620 P.2d at 149 n.7 (emphasis added). The California Court of Appeal's announcement of a rule of law "is a datum for ascertaining state law which is not to be disregarded by a federal court unless it [\*\*1013] is convinced by other persuasive data that the highest court of the state would decide otherwise . . . ." *Hicks v. Feiock*, 485 U.S. 624, 630 n.3, 99 L. Ed. 2d 721, 108 S. Ct. 1423 (1988) (quoting *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237-38, 85 L. Ed. 139, 61 S. Ct. 179 (1940)). Defendants have not advanced any persuasive argument to suggest that the California Supreme Court would not have allowed future damages in *Pistorius* or the instant case.

The district court therefore did not misstate California law in instructing the jury that Defendants could be liable for future damages.

#### D. Punitive Damages

##### 1. Availability under California Law

We review de novo the availability of punitive damages. *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992 (9th Cir. 1998). Under California law Hangarter was entitled to punitive damages if she proved "by clear and convincing evidence that [Defendants] have been guilty of oppression, fraud, [\*\*31] or malice." *Cal. Civ. Code* § 3294(a).

"Viewing the facts in a light most favorable to the judgment," we conclude that the jury's award of punitive damages was consistent with California law. *Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 529 P.2d 608, 624, 118 Cal. Rptr. 184 (Cal. 1974). California courts have upheld the awarding of punitive damages based on conduct nearly identical to that alleged of Defendants. In *Moore*, the court held that the fact that an insurance policy disregards applicable California law could serve as "one factor to consider in evaluating an award of punitive damages . . . . The jury could reasonably conclude that certain aspects of defendant's deceptive claims practices were particularly invidious because lay persons would be unlikely to discover the deception." *Moore*, 197 Cal.Rptr. at 895. Indeed, "lay persons would be unlikely to know that they had an established right under California law to have coverage determined using the broader *Erreca* standard rather than the explicit language of defendant's policy." *Id.* at 895-96.

Additionally, California courts have stated that biased medical [\*\*32] examinations and claims targeting practices could serve as a basis for punitive liability under California law. *Id.* at 897. As the court in *Moore* held,

looking at the record, as we must, in a light most favorable to the judgment, it appears the jury could properly have concluded the conduct of defendant in this case was highly reprehensible. The jury could conclude that defendant consciously pursued a practice or policy of cheating insureds out of benefits by obtaining incorrect opinions of total disability from treating physicians.

*Id.* (citations omitted). Moreover, the jury "could conclude that plaintiff's own treating physician was misled by defendant's systematic claims practices and that de-

defendant acted in bad faith by summarily denying plaintiff's claim even though her treating physician had indicated she could not work at her regular occupation." *Id.*

Finally, California courts have held that punitive damages are warranted where the cumulative evidence "supports a finding of intent to injure, since evidence establishing 'conscious disregard of another's rights' is evidence indicating that the defendant was aware of the probable consequences of [\*\*33] his or her acts and willfully and deliberately failed to avoid those consequences." *Notrica v. State Comp. Ins. Fund*, 70 Cal. App. 4th 911, 83 Cal.Rptr.2d 89, 113 (Cal. App. Ct. 1999) (internal quotation marks omitted). The evidence proffered at trial that Defendants disregarded *Erreca's* definition of total disability, engaged in biased [\*1014] medical examinations, misinformed Hangarter regarding her potential benefits, and employed policies to achieve net termination ratios could support a jury's finding that Defendants had a "conscious course of conduct, firmly grounded in established company policy" that disregarded the rights of insureds. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 582 P.2d 980, 987, 148 Cal. Rptr. 389 (Cal. 1978).

The district court therefore did not err in concluding that the jury's award of punitive damages was consistent with California law.

## 2. Constitutional Due Process

Current Supreme Court jurisprudence instructs courts reviewing the constitutionality of punitive damages awards to consider the "reasonableness of a punitive damages award," of which the "most important indicium . . . is the degree of reprehensibility of the [\*\*34] defendant's conduct." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996). The court in *Gore* laid out several important factors that are relevant in determining the reprehensibility of the defendant's conduct, including whether the harm caused was physical as opposed to economic; tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id.* at 576-77.

The jury's awarding of punitive damages in this case satisfies the general framework laid out in *Gore*. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 1525, 155 L. Ed. 2d 585 (2003) ("While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*." (emphasis added)). The evidence, viewed in Hangarter's favor, can support the conclusion that Defendants' conduct was in

reckless [\*\*35] disregard of the rights and the physical well-being of Hangarter; was threatening to an individual who was economically vulnerable; was part of a general corporate policy and not an isolated incident; and caused harm in a deceitful manner.

Defendants argue that the Supreme Court's decision in *State Farm* compels the conclusion that, in order to be constitutional, punitive damages in this case should be limited to no more than \$ 1,000,000. Defendants' argument is essentially that because their conduct in this case is less invidious than the defendant's conduct in *State Farm*, the 1:1 ratio of punitive damages to compensatory damages applied in that case should equally apply here. *State Farm's* 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be. "Indeed, [\*1015] the Court in *Gore* stated that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award . . ." *Gore*, 517 U.S. at 582 (first emphasis added). Likewise, the Court in *State Farm* stated that "We decline again [\*\*36] to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* at 1524 (citations omitted). "Because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those . . . previously upheld [by the Court] may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *Id.* (citations and quotation marks omitted).

11 That said, there are important factual distinctions between *State Farm* and the case at bar. In *State Farm* the "compensatory damages for the injury suffered . . . likely were based on a component [(emotional distress)] which was duplicated in the punitive award." *State Farm*, 123 S. Ct. at 1525. Indeed, the plaintiff in *State Farm* "suffered only minor economic injuries"; her award was primarily for emotional distress, the result of conduct which "it is a major role of punitive damages to condemn." *Id.* In contrast, Hangarter's damages for emotional distress were only one third of her pecuniary damages, suggesting that *State Farm's* concern over a duplicative award is not as strongly present here. Moreover, the defendant's out-of-state conduct in *State Farm*, which was legal in the jurisdiction where it occurred, bore little relation to the plaintiff's harm. *Id.* at 1522-1523. Here, Defendants do not assert that their alleged conduct is legal in any U.S. jurisdiction. Additionally, unlike in *State Farm*, a legally sufficient nexus existed between Defendant's allegedly widespread corporate policies and the termination of Hangarter's benefits.

While the Court in *State Farm* noted that the conduct that harmed the plaintiffs was "scant," evidence presented in this case indicates that Defendants' challenged policies were company-wide. *Id.*

[\*\*37] The ratio in this case is approximately 2.6:1, well within the Supreme Court's suggested range for constitutional punitive damages awards. *See id.* ("Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution . . ."). Given that due process prohibits only a "grossly excessive" award, leaving to the states "considerable flexibility in determining" whether "the damages awarded [were] reasonably necessary to vindicate the State's legitimate interest in punishment and deterrence," the district court did not err in concluding that the jury's award of punitive damages was within constitutional parameters. *Gore*, 517 U.S. at 568 (emphasis added).

#### E. Evidentiary Errors

"To reverse a jury verdict for evidentiary error," Defendants must show that the district court abused its discretion and that the error was prejudicial. *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688 (9th Cir. 2001). "A reviewing court should find prejudice only if it concludes that, more probably than not, the lower court's error tainted the verdict." *Id.*

##### 1. Expert Witness Frank Caliri

###### [\*\*38] a. Qualifications

Rule 702 requires that a testifying expert be "qualified as an expert by knowledge, skill, experience, training, or education." *Fed. R. Evid. 702*. Rule 702 "contemplates a broad conception of expert qualifications." *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994) (emphasis added). Moreover, "the advisory committee notes emphasize that Rule 702 is broadly phrased and intended to embrace more than a narrow definition of qualified expert." *Id.*; *see also Fed. R. Evid. 702* advisory committee's note ("In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.").

Defendants assert that the district court abused its discretion in admitting the testimony of Caliri because he lacked sufficient qualifications to testify about claims adjustment standards in the context of an insurance bad faith claim.<sup>12</sup> Caliri has [\*1016] twenty-five years' experience working for insurance companies and as an independent consultant. His experience has included evaluating insurance claims, assisting insureds in dealing [\*\*\*39] with insurance companies to obtain payment of their claims, marketing insurance products, and evaluat-

ing insurance policies. Caliri worked for both Unum and Provident as a representative at the time many of the own occupation disability policies like Hangarter's were sold and has received training on how insurance companies in general, and Defendants in particular, adjust claims. He has also been found qualified to testify on insurance practices and standards within the industry twelve times before (once in an insurance bad faith case), and has never been found to be unqualified. Moreover, Caliri's expertise has been employed by defense firms (including one involved in this litigation) 35-40% of the time he has served as an expert.

12 Defendants' argument that Caliri lacked specialized knowledge as to insurance bad faith claims relies heavily on *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576 (10th Cir. 1998), in which the Tenth Circuit held that the district court *did not abuse its discretion* in finding that the witness "lacked specialized knowledge on New Mexico bad faith cases and his experience was with first party, not third party insurance disputes." *Id.* at 587. The court acknowledged that the witness possessed expertise as to the "general field," but reasoned that "the expert who lacks specific knowledge *does not necessarily* assist the jury." *Id.* (emphasis added). Defendants' reliance on this case is unavailing. The Tenth Circuit merely held in *Hartford* that the district court did not commit *clear error* in excluding a witness who lacked specialized knowledge. The court in no way held that it would have been an abuse of discretion to admit the testimony of an expert with general knowledge of the field to testify on specific bad faith claim issues.

[\*\*40] "Clearly, this lays at least the *minimal foundation* of knowledge, skill, and experience required in order to give 'expert' testimony" on the practices and norms of insurance companies in the context of a bad faith claim. *Thomas*, 42 F.3d at 1269 (emphasis added). Given Caliri's significant knowledge of and experience within the insurance industry, the district court did not abuse its discretion in concluding that he was qualified to testify as an expert witness.

###### b. Ultimate Issue Testimony

"It is well-established . . . that expert testimony concerning an ultimate issue is not per se improper." *Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1066 n.10 (9th Cir. 2002). Indeed, *Fed. R. Evid. 704(a)* provides that expert testimony that is "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." That said, "an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law."

*Mukhtar*, 299 F.3d at 1066 n.10. Similarly, instructing the jury as to the applicable law "is the distinct [\*\*41] and exclusive province" of the court. *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993) (citations and quotation marks omitted).

Defendants contend that Caliri's testimony that Defendants failed to comport with industry standards inappropriately reached legal conclusions on the issue of bad faith and improperly instructed the jury on the applicable law. This argument is unavailing. Caliri's testimony did not improperly embrace the issue of bad faith under *Fed. R. Evid. 704(a)*. While Caliri's testimony that Defendants deviated from industry standards supported a finding that they acted in bad faith, Caliri never testified that he had reached a legal conclusion that Defendants actually acted in bad faith (i.e., an ultimate issue of law). See *Ford v. Allied Mut. Ins. Co.*, 72 F.3d 836, 841 (10th Cir. 1996) (concluding that "expert witness for [the defendant] was permitted to testify" to "the issue of bad faith" by showing that the defendant relied on both "Iowa law" and "industry practice that before there is payment . . . , one looks at the total coverage available at [\*1017] the time of the accident" (emphasis [\*\*42] added)).<sup>13</sup>

13 Defendants rely heavily on *Thompson v. State Farm Fire & Cas. Co.*, 34 F.3d 932 (10th Cir. 1994), where the Tenth Circuit held that "it is plainly within the trial court's discretion to rule that [bad faith] testimony inadmissible because it would not even marginally 'assist the trier of fact.'" *Id.* at 941. The Tenth Circuit in *Thompson*, however, merely held that a district court did not abuse its discretion in ruling such testimony inadmissible, *not* that the admission of such testimony would be a per se abuse of discretion.

Moreover, Caliri's testimony did not improperly usurp the court's role by instructing the jury as to the applicable law. Although Caliri's testimony that Defendants departed from insurance industry norms relied in part on his understanding of the requirements of state law, specifically California's Unfair Settlement Claims Practice § 2695, "a witness may refer to the law in expressing an opinion without that reference rendering [\*\*43] the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988). Caliri'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.

The district court therefore did not abuse its discretion in concluding that Caliri's testimony did not improperly invade the province of the jury or the court.

### c. Reliability

Rule 702 allows admission of "scientific, technical, or other specialized knowledge" by a qualified expert if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999), "require that the judge apply his gatekeeping role . . . to all forms of expert testimony, not just scientific testimony." *White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th Cir. 2002). [\*\*44]

That said, "far from requiring trial judges to mechanically apply the *Daubert* factors -- or something like them -- to both scientific and non-scientific testimony, *Kumho Tire* heavily emphasizes that judges are entitled to broad discretion when discharging their gatekeeping function."

*United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). Indeed, as we recently noted in *Mukhtar*, a "trial court not only has broad latitude in determining whether an expert's testimony is reliable, but also in deciding *how* to determine the testimony's reliability." *Mukhtar*, 299 F.3d at 1064 (citing *Hankey*, 203 F.3d at 1167) (emphasis added). Concerning the reliability of non-scientific testimony such as Caliri's, the "*Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the *knowledge and experience* of the expert, rather than the methodology or theory behind it." *Id.* at 1169 (emphasis added); see also *Kumho Tire*, 526 U.S. at 150 ("Engineering testimony rests upon scientific foundations, [\*\*45] the reliability of which will be at issue in some cases. . . . In other cases, the relevant reliability concerns may focus upon *personal knowledge or experience*." (emphasis added)).<sup>14</sup>

14 Caliri testified as to whether Defendants' practices were consistent with insurance industry standards. This sort of analysis is dependent upon the witness's knowledge of, and experience within, the insurance industry. Although Defendants during voir dire argued that Caliri's selection of documents to review went to the reliability of his "methodology" as an expert, the district court correctly surmised that questions regarding the nature of Caliri's evidence went more to the "weight" of his testimony -- an issue properly explored during direct and cross-examination. See *Children's Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004) ("The factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for

the opinion in cross-examination." (citation and quotation marks omitted)).

[\*\*46] [\*1018] While the district court erred in stating that *Daubert* did not apply to Caliri's non-scientific testimony, that error was harmless. We "require a district court to make *some* kind of reliability determination to fulfill its gatekeeping function." *Mukhtar*, 299 F.3d at 1066 (emphasis in original). The district court satisfied this obligation by probing the extent of Caliri's knowledge and experience before trial in considering a motion in limine, in a detailed ruling during voir dire, and in an order denying Defendants' motion to strike.<sup>15</sup> The court ultimately concluded that Caliri's "experience, training, and education" provided a sufficient foundation of reliability for his testimony. Even though the district court did not hold a formal *Daubert* hearing, the court's probing of Caliri's knowledge and experience was sufficient to satisfy its gatekeeping role under *Daubert*. See *Mukhtar*, 299 F.3d at 1064 (noting that a "a separate, pretrial hearing on reliability is not required"); *Hankey*, 203 F.3d at 1169 ("The district court probed the extent of this knowledge . . . and experience during the motion in limine-FRE 104 [\*\*47] hearing, and therefore did not abuse its discretion in determining how best to conduct an assessment of the expert testimony."); see also *United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000) ("Nowhere in *Daubert*, *Joiner*, or *Kumho Tire* does the Supreme Court mandate the form that the inquiry into relevance and reliability must take . . .").

15 We grant Defendants' February 10, 2004 motion to augment the Excerpts of Record with Defendants' Motion to Strike Caliri's testimony.

Given that, unlike scientific or technical testimony, the reliability of Caliri's testimony was not contingent upon a particular methodology or technical framework, the district court did not abuse its discretion in finding Caliri's testimony reliable based on his knowledge and experience. We thus conclude that the district court's inquiry was sufficient to comply with its gatekeeping role, as we have interpreted it in *Mukhtar*, 299 F.3d at 1066.

## 2. William Feist's Deposition

### a. Qualifications

[\*\*48] As discussed, *Fed. R. Evid. 702* "contemplates a broad conception of expert qualifications." *Thomas*, 42 F.3d at 1269 (emphasis added). Though it is somewhat unclear whether Feist testified as an expert witness or a percipient witness, the district court nonetheless held an extensive hearing on the Feist deposition, and gave detailed reasons for finding Feist sufficiently qualified as either an expert or percipient witness. Feist,

a board-certified specialist in insurance medicine and Provident's vice-president and director of its medical department through 1996, has been educated on insurance policy law and disability policy language. At Provident he was active in the practice of claims adjudication where he participated in round tables in which Provident employees discussed terminating disability policies. [\*1019] He is also familiar with insurance policy ethics from educational and practical experience.

The district court therefore did not abuse its discretion in finding Feist qualified to discuss Provident's handling of disability claims.

### b. Unavailability

Defendants argue that the district court erred in finding Feist "unavailable." [\*\*49] "Feist's residence in Alabama placed him outside of the court's subpoena power under *Fed. R. Civ. P. 45*, and he was thus unavailable pursuant to *Fed. R. Civ. P. 32(a)(3)*, which permits deposition testimony where "the witness is at a greater distance than 100 miles from the place of trial or hearing." The admitted deposition was from the Alameda County Superior Court case *United Policyholders v. Provident Life and Accident Ins. Co., UnumProvident Corp., and Bay Brook Med. Group*. In the *United Policyholders* case, a partner of Defendants' counsel, representing Provident Life & Accident Insurance Co. and UnumProvident, cross-examined Feist. Defendants therefore had ample opportunity to cross-examine Feist and satisfied *Fed. R. Evid. 804(b)(1)*. See *Fed. R. Evid. 804(b)(1)* ("Testimony given . . . in a deposition . . . [is admissible where] the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, [\*\*50] cross, or redirect examination.").

### c. *Fed. R. Evid. 402 and 403*

To be admissible, evidence must be relevant under *Fed. R. Evid. 402* and its probative value must not be substantially outweighed by the danger of unfair prejudice under *Fed. R. Evid. 403*. Defendants argue that Feist's testimony regarding the claims-handling procedures at Provident should have been excluded because it bore no direct relationship to Paul Revere's handling of Hangarter's claim and was therefore irrelevant and prejudicial.

The jury could have reasonably inferred that the claims handling procedures at Provident were carried over to Paul Revere as a subsidiary of UnumProvident after Unum and Provident merged. This inference was not unwarranted given that Ralph Mohny controlled claims-handling at both Provident and Paul Revere and Paul Revere's handling of Hangarter's claim employed

practices similar to those used at Provident. See *Murray v. Toyota Motor Distribs., Inc.*, 664 F.2d 1377, 1379-80 (9th Cir. 1982) (ruling admissible deposition testimony [\*\*51] of an unavailable former employee of a company against an affiliated company with a similar motive where both affiliates were controlled by the same parent company).<sup>16</sup> Moreover, the deposition was corroborated by a number of internal Provident and Paul Revere documents, and by the testimony of Chris Ryan, Ralph Mohnney, Joseph Sullivan, Sandra Fryc, and Frank Caliri. Any possible prejudice caused by the deposition was thus marginal.

16 Ralph Mohnney, the former vice president of claims for Provident, assumed responsibility for group disability claims with Provident's acquisition of Paul Revere in 1997 and maintained this role after the merger with Unum in 1999 for UnumProvident. Mohnney was Senior Vice President, Customer Care, for UnumProvident at the time Hangarter's claim was investigated and her policy terminated.

The district court therefore did not abuse its discretion in concluding that Feist's deposition was relevant to Hangarter's claims.

### 3. Provident Documents

Defendants argue that some of the documents [\*\*52] produced by Provident in [\*1020] another lawsuit were erroneously admitted because they were not properly authenticated and lacked a sufficient nexus to this case. Regarding authentication, witness Robert Parks certified that all the documents were produced by Provident and its affiliated companies which eventually became UnumProvident in response to a document production request. "Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself." *United States v. Blackman*, 72 F.3d 1418, 1426 (9th Cir. 1995) (quoting *Braswell v. United States*, 487 U.S. 99, 114-15, 101 L. Ed. 2d 98, 108 S. Ct. 2284 (1988), which is quoting *Curcio v. United States*, 354 U.S. 118, 125, 1 L. Ed. 2d 1225, 77 S. Ct. 1145 (1957)); see also *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1114 (9th Cir. 1982). Additionally, Defendants at trial conceded that the overwhelming majority of the documents relied upon at trial were business records of Provident, and Caliri testified to their genuineness. The documents were thus properly authenticated as business records exempt from the hearsay rule. [\*\*53] See *Fed. R. Evid.* 803(6); 801(b).

The documents also had a sufficient nexus to Hangarter's claim. The documents confirmed that Provident's claims handling practices were adopted by Paul Revere

after Provident merged with Unum in 1999 to form UnumProvident. See Exhibits 153/155 (stating that it was necessary to "Bring Wooster [(Paul Revere headquarters)] reporting into conformance with Chattanooga [(Provident)] standards."). Additionally, Caliri testified that depositions of Provident employees demonstrated that the companies worked together to transition Provident's claims handling practices to Paul Revere. Finally, Caliri testified that Hangarter's claim went to a round table review on September 9, 1997 and that the adjuster handling her claim stated that the purpose of the review was to "explore[] termination options," consistent with the alleged corporate policies of UnumProvident.

The court therefore did not abuse its discretion in allowing Hangarter to introduce documents produced by Provident in another lawsuit.

### 4. Stephen Rutledge Testimony

Defendants argue that the district court improperly excluded the testimony of Stephen [\*\*54] Rutledge, who was to testify that both the percentage of monthly individual disability claims that Paul Revere paid and Paul Revere's total payouts for the individual disability line of insurance increased during the relevant time period.

Defendants' contention is unpersuasive. The district court rejected Rutledge's testimony because it related to *all individual* disability claims, and not to only own occupation disability claims. Hangarter's entire case was premised upon the theory that Defendants purposefully terminated her claim because it was a high cost, own occupation disability claim. An increase in disability payouts does little to disprove Hangarter's theory that Defendants intended to terminate claims such as Hangarter's. The district court therefore was within its discretion in excluding this evidence as irrelevant and prejudicial under *Rules 402 and 403*, particularly given its potential to confuse the jury. See *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1034 (9th Cir. 2003) (citing *Longenecker v. Gen. Motors Corp.*, 594 F.2d 1283, 1286 (9th Cir. 1979) ("Trial judges are better able to sense the dynamics of a trial than we can ever be, [\*\*55] and broad discretion must be accorded them in balancing probative value against prejudice.")).

### [\*1021] F. Bifurcation

"Rule 42(b) of the Federal Rules of Civil Procedure confers broad discretion upon the district court to bifurcate a trial, thereby deferring costly and possibly unnecessary proceedings . . ." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). A district court's refusal to bifurcate a trial is accordingly reviewed for an abuse of discretion. *Hilao v. Estate of Marcos*, 103 F.3d 767, 782 (9th Cir. 1996).

Defendants argue that the district court abused its discretion in trying the issues of liability for contract damages and liability for punitive damages for tortious breach of that contract together before the same jury. Defendants cite *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), and *Connecticut v. Doebr*, 501 U.S. 1, 115 L. Ed. 2d 1, 111 S. Ct. 2105 (1991), for support of the quite novel proposition that due process *required* that the issues of liability for contract damages be bifurcated from liability for punitive damages for tortious breach. [\*\*56] Neither *Mathews* nor *Doebr* mention bifurcation at all; such cases concern what due process must be afforded by a state statute enabling the government on its own initiative or an individual enlisting the aid of the state to deprive another of his or her property by means of a prejudgment attachment or similar procedure. *Rule 42(b)* merely *allows*, but does not require, a trial court to bifurcate cases "in furtherance of convenience or to avoid prejudice." *Fed. R. Civ. Proc. 42(b)*.

The district court's decision to decline to bifurcate the trial comported with normal trial procedure. "Since the evidence usually overlaps substantially, the normal procedure is to try compensatory and punitive damage claims together with appropriate instructions to make clear to the jury the difference in the clear and convincing evidence required for the award of punitive damages." *McLaughlin v. State Farm Mut. Auto. Ins. Co.*, 30 F.3d 861, 871 (7th Cir. 1994). Defendants concede that the district court issued correct jury instructions regarding the different burdens of proof. Additionally, Defendants' profits, financial condition, and financial [\*\*57] statements helped establish Defendants' alleged business strategies, incentives, and practices, all of which were relevant to Hangarter's claim for breach of contract. *Cf. EEOC v. HBE Corp.*, 135 F.3d 543, 551 (8th Cir. 1998) ("The evidence of racially discriminatory conduct was relevant on issues of liability . . . and punitive damages. . . . The district court did not abuse its discretion in declining to bifurcate the issues.").

The district court therefore did not abuse its discretion in trying the issues of liability for contract damages and liability for punitive damages for tortious breach of that contract together before the same jury.

#### G. Standing and the UCA

The district court held that Defendants violated the UCA and in turn ordered them to "obey the law" and

refrain from "future violations, including, but not limited to, targeting categories of claims or claimants, employing biased medical examiners, destroying medical reports, and withholding from claimants information about their benefits."

The district court erred in concluding that Hangarter had Article III standing to pursue injunctive relief under the UCA. "Article III standing requires an injury [\*\*58] that is actual or imminent, not conjectural or hypothetical. In the context of injunctive relief, the plaintiff must demonstrate a *real or immediate threat* of an irreparable injury." *Clark v. City of Lakewood*, 259 F.3d 996, 1007 (9th Cir. 2001) (emphasis [\*1022] added) (citations and quotation marks omitted). Hangarter currently has no contractual relationship with Defendants and therefore is not personally threatened by their conduct. Even if *Cal. Bus. & Prof. Code § 17204* permits a plaintiff to pursue injunctive relief in California state courts as a private attorney general even though he or she currently suffers no individualized injury as a result of a defendant's conduct,<sup>17</sup> "a plaintiff whose cause of action [under § 17204] is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury" to establish Article III standing. *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001); see also *Cal. Bus. & Prof. Code § 17204* (authorizing civil action to enforce [\*\*59] § 17200 by "any person acting for the interests of . . . the general public").

17 We reach no conclusion as to whether Hangarter's UCA claim is viable on the merits under California law.

Because Hangarter lacked standing to prosecute an UCA claim for injunctive relief, on remand, the district court shall vacate the injunction.

### III. CONCLUSION

We affirm the district court's denial of a JMOL and the jury's award of damages and reverse the district court's permanent injunction under the UCA.

**AFFIRMED IN PART, REVERSED IN PART, and REMANDED.** Defendants to bear costs.<sup>18</sup>

18 As noted in footnote 15 above, we grant Defendants' February 10, 2004 motion to augment the Excerpts of Record with Defendants' Motion to Strike Caliri's testimony.

654 F. Supp. 2d 518, \*; 2009 U.S. Dist. LEXIS 105927, \*\*;  
80 Fed. R. Evid. Serv. (Callaghan) 219

**IMPERIAL TRADING CO., INC., ET AL. v. TRAVELERS PROPERTY CASUALTY CO. OF AMERICA**

**CIVIL ACTION NO: 06-4262 SECTION: R**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA**

*654 F. Supp. 2d 518; 2009 U.S. Dist. LEXIS 105927; 80 Fed. R. Evid. Serv. (Callaghan) 219*

**July 31, 2009, Decided**

**July 31, 2009, Filed**

**SUBSEQUENT HISTORY:** Motion denied by *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, 2009 U.S. Dist. LEXIS 88126 (E.D. La., Sept. 10, 2009)

**PRIOR HISTORY:** *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, 2009 U.S. Dist. LEXIS 70139 (E.D. La., July 27, 2009)

**COUNSEL:** [\*\*1] For Imperial Trading Company, Inc., Imperial Trading Company LLC, AMA Distributors Inc, Imperial Ventures Inc, Delta Video Services Inc, Lucky Coin Machine Company, Rainbow Services Inc, Rapd Fire Inc, Don Juan Cigar Company LLC, ZLN Holdings LLC, Southeast Ventures Inc, Plaintiffs: James M. Garner, LEAD ATTORNEY, Charles E. Tabor, Darnell Bludworth, Martha Y. Curtis, Raymond C. Lewis, Ryan O'Neil Luminais, Sher, Garner, Cahill, Richter, Klein & Hilbert, LLC, New Orleans, LA; Constantine D. Georges, Constantine D. Georges, Attorney at Law, New Orleans, LA.

For Travelers Property Casualty Company of America, Defendant: Ralph Shelton Hubbard, III, LEAD ATTORNEY, Brad Elliot Harrigan, Joseph Pierre Guichet, Simeon B. Reimonenq, Jr., Lugenbuhl, Wheaton, Peck, Rankin & Hubbard (New Orleans), New Orleans, LA; Adam T. Boston, Stephen E. Goldman, Robinson & Cole, LLP (Hartford), Hartford, CT; Christopher R. Perry, Daniel F. Sullivan, John Malloy, Wytan M. Ackerman, PRO HAC VICE, Robinson & Cole, LLP (Hartford), Hartford, CT.

For GAB Robins North America, Inc., Movant: Judy Lynn Burnthorn, LEAD ATTORNEY, Karen Patricia Holland, Deutsch, Kerrigan & Stiles, LLP (New Orleans), New Orleans, LA.

For [\*\*2] Infinity Property and Casualty Corporation, Movant: James R. Nieset, Jr., LEAD ATTORNEY, Mi-

chael J. Madere, Ralph J. Aucoin, Jr., Porteous, Hainkel & Johnson (New Orleans), New Orleans, LA.

**JUDGES:** SARAH S. VANCE, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** SARAH S. VANCE

**OPINION**

[\*519] **ORDER AND REASONS**

Before the Court is defendant's Motion *In Limine* to Exclude the Testimony of Peter Knowe (R. Doc. 148). For the following reasons, the Court GRANTS the motion.

**I. Background**

The plaintiffs in this case are the owners and lessees of commercial properties that were damaged during Hurricane Katrina. At the time of the hurricane, the properties in question were insured by defendant Travelers Property Casualty Company of America. Plaintiffs submitted a claim to Travelers shortly after the hurricane, and Travelers advanced plaintiffs \$ 1 million for the covered losses to one property on September 25, 2005. Plaintiffs claim that Travelers failed to participate in the adjustment process in good faith after that point, reimbursing plaintiffs' for portions of the covered loss in small increments over the following year. At issue in this Order is the expert testimony of Peter Knowe, whom plaintiffs seek to present as an expert witness [\*3] to testify about industry standards and practices, especially with regard to bad faith. Mr. Knowe's report contains opinions and conclusions that generally support plaintiffs' legal and factual assertions (R. Doc. 148, Ex. A ("Knowe Report")), and defendant has moved to exclude this evidence from trial.

**II. Legal Standard**

*Federal Rule of Evidence 702* provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is [\*520] based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

*FED. R. EVID. 702.* A district court has considerable discretion to admit or exclude expert testimony under Rule 702. See *General Electric Co. v. Joiner*, 522 U.S. 136, 138-39, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997); *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 371 (5th Cir. 2000). Although parties typically seek to exclude expert testimony [\*\*4] on the basis that it is unreliable, see *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the Court must also determine whether the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." *FED. R. EVID. 702*; see also *Daubert*, 509 U.S. at 591. In addition, evidence may always be excluded based on "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *FED. R. EVID. 403.*

### III. Discussion

Defendants first argue that Mr. Knowe is unqualified to provide expert testimony in this case because his previous experience in claims adjusting did not involve property claims, and he has never handled claims of the same magnitude as those in the present litigation. This argument is unpersuasive. Mr. Knowe has considerable educational and professional background in the insurance industry, much of which was spent adjusting claims and evaluating complex litigation, including bad-faith litigation. Furthermore, he has already been qualified as an expert in numerous state and federal courts. The Court finds that Mr. Knowe's qualifications do not [\*\*5] prohibit him from providing expert testimony in this matter.

Sufficient qualifications to testify as an expert, however, do not automatically allow testimony to be presented at trial. Many of the subjects upon which Mr. Knowe opines, such as the scope of coverage for rental

value and extra expenses, and the relevance of private investigator Terrell Miceli, have already been ruled upon by the Court. The Court recently excluded evidence of complaints against defendant's adjuster W. Van Meredith, which is at the heart of Mr. Knowe's opinions as to defendant's improper supervision of its contract adjusters. Furthermore, plaintiffs have retracted their claim that failure to reform the policy with respect to rental value coverage is indicative of bad faith, and they have settled their claims arising from the Edwards Avenue property. All of Mr. Knowe's opinions on these subjects have accordingly become irrelevant since he assembled his expert report, and they will be excluded. *FED. R. EVID. 402.*

Additionally, defendant challenges Mr. Knowe's testimony on the grounds that plaintiffs seek to introduce him as a "bad faith expert," which a number courts have excluded. This Court, in *Marketfare Annunciation, LLC v. United Fire & Cas. Co.*, No. 06-7232, 2008 U.S. Dist. LEXIS 34872, 2008 WL 1924242 (E.D. La. Apr. 23, 2008), [\*\*6] excluded testimony from a bad faith expert because the claims in the case were not "overly complicated," and the issues in the case could be understood by the jury without the assistance of expert testimony. 2008 U.S. Dist. LEXIS 34872, [WL] at \*2-3. Several other courts have reached the same conclusion. See *Crow v. United Benefit Life Ins. Co.*, No. 03:00CV1375G, 2001 U.S. Dist. LEXIS 2993, 2001 WL 285231, at \*2-3 (N.D. Tex. Mar. 16, 2001) (excluding expert testimony regarding defendant's breaches of the duty of good faith and fair dealing because such [\*521] opinion "invades both the province of the court and the jury"); *Thompson v. State Farm Fire & Cas. Co.*, 34 F.3d 932, 941 (10th Cir. 1994) (excluding bad faith expert on grounds that it is "expert testimony . . . offered on an issue that the jury is capable of assessing for itself" and that "it would not even marginally 'assist the trier of fact'"). The courts, however, are not unanimous on the issue. In *Hangarter v. Paul Revere Life Ins. Co.*, 236 F. Supp. 2d 1069, 1089-91 (N.D. Cal. 2002) (Magistrate order), *overruled on other grounds sub nom. Hangarter v. Provident Life & Acc. Co.*, 373 F.3d 998 (9th Cir. 2004), the district court allowed testimony from a bad faith expert because he was amply [\*\*7] qualified, would assist the trier of fact, and would not render an opinion on the ultimate issues of the case.

Although courts have ruled different ways on this issue, this Court will exclude Mr. Knowe's expert testimony regarding whether defendant's actions were unreasonable, arbitrary and capricious, in bad faith, or without probable cause. The issue of whether defendant's actions are unreasonable or in bad faith under *La. Rev. Stat. Ann. §§ 22:1892 and 1973* is not unusually complicated and is well within the comprehension of the average juror. The

jurors must determine whether plaintiffs provided defendant with satisfactory proof of loss, which, in order to be considered "satisfactory," must inform the insurer of the facts underlying the claims and provide enough information to allow the insurer to act. They will then determine whether defendant failed to tender payment within the thirty- or sixty-day period after receiving the proof. The jury will then address whether failure to do so was arbitrary, capricious, or without probable cause. In so doing, it will assess whether defendant, under the facts known at the time of its action, denied the claim without a reasonable basis. Mr. [\*\*8] Knowe's testimony on these issues will thus not assist the jury in determining the facts in issue. *FED. R. EVID.* 702; *Daubert*, 509 U.S. at 592. See also *Peters v. Five Star Marine*, 898 F.2d 448, 449-450 (5th Cir. 1990) (holding that trial court's exclusion of expert testimony because "the jury could adeptly assess th[e] situation using only their common experience and knowledge," and thus "[e]xpert testimony was unnecessary"). This testimony will be excluded.<sup>1</sup>

1 The parties' arguments about the introduction of Mr. Knowe's testimony in other trials is unavailing. Unlike here, the report he submitted in *St. Paul Fire & Marine Ins. Co. v. Jablonski*, No. 2:07-CV-386-FTM-29SPC, 2009 U.S. Dist. LEXIS 3118 (M.D. Fla. 2009), for example, indicates the factual basis for several of its conclusions. Suffice it to say that this Court will not accept or exclude Mr. Knowe's testimony based on the opinions he offers in a *different* case.

This case presents a few technical issues that would benefit from expert testimony, such as causation. The Knowe Report, however, will not assist the jury in assessing these issues. This Court's review of the report indicates that most of the proffered opinions are nothing more than a series [\*\*9] of conclusory statements supporting plaintiffs' view of the factual and legal issues in this case. These conclusions do not reflect the application of technical expertise. The report reads more like a closing statement delivered by a trial attorney than a technical analysis provided by an expert witness. Most of Mr. Knowe's conclusions are unmoored to any analysis or method, and his report sheds woefully little light on *why* the jury should accept his conclusions. It also offers numerous commonplace observations, such as that the insurer must inform the insured why it is denying a claim, or that it must adjust all claims presented. These observations are well within the comprehension [\*\*522] of the average juror and will not provide any assistance in understanding the facts at issue.

*Rule 702 of the Federal Rules of Evidence* requires, before expert testimony can be admitted, that the testimony be based on sufficient facts, that it be the product

of reliable principles and methods, and that the principles and methods be reliably applied to the facts of the case. Mr. Knowe's report does not meet this standard. For example, with respect to the damage to contents at the Airline Drive -- a significant [\*\*10] issue in this litigation -- Mr. Knowe's report indicates that water entered the structure and caused damage to stock before the building was flooded by the levees. Specifically, he notes that the breaking of a water pipe caused damage to plaintiffs' property at Airline Drive. Knowe Report at 7-8, 17-18. Whether the water from the pipe damaged the stock at Airline Drive, however, is a highly contested issue in this litigation, and the Knowe Report provides no indication as to how Mr. Knowe's methods or analysis led to the factual conclusions he provides. As such, his opinion is little more than an *ipse dixit* directive to the jury to believe the plaintiffs' evidence.

This analysis is representative of the report as a whole. The report contains virtually no citations. It provides no basis for many observations and conclusions. The report provides numerous opinions as to the scope of the policy's coverage, but at no point does Mr. Knowe explain his analysis of the policy. In fact, the policy language is not cited in the report at all. Mr. Knowe's report does not explain how numerous, repeated conclusions about defendant's conduct -- that it was "dishonest," "deliberate," "arbitrary [\*\*11] and capricious," "unreasonable," "unfair," "in bad faith" -- were reached. In short, it is difficult to discern any method at work in much of the analysis, and the Court cannot determine how the conclusions stated are the result of Mr. Knowe's expertise. While it is clear that Mr. Knowe has considerable experience in the insurance industry, his process for coming to conclusions is opaque.

The report is also rife with legal conclusions, which are inadmissible in this court. See *Estate of Sowell v. United States*, 198 F.3d 169, 171-72 (5th Cir. 1999); *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997). In addition to numerous declarations of the parties' legal duties, it states that "Travelers has failed and refused to fulfill its obligations to provide full coverage for Imperial's claim clearly as required by the policy . . ." Knowe Report at 8. It opines that "Travelers' refusal to reopen [the] adjustment is arbitrary and capricious conduct." *Id.* at 11. In fact, the majority of the substantive pages in the report contain a statement declaring that defendant's conduct was in bad faith, arbitrary, or capricious. See *id.* at 5, 11, 12, 13, 14, 15, 16, 17, 18, 21, 23, 24, 25. None of these [\*\*12] legal conclusions is admissible.

Lastly, several of Mr. Knowe's opinions are legally incorrect. He states that "[i]nsurance coverage must be viewed by the interpretation of policy language under the reality of the circumstances." This is a misstatement of Louisiana law. See *LA. CIV. CODE. art. 2046* ("When

the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." The report cites to *Veade v. La. Citizens Property Corp.*, 985 So. 2d 1275 (La. Ct. App. 2008), for the proposition that "Louisiana case law supports the period of restoration must be extended by the carrier until the actual damages are paid by the carrier . . ." Knowe Report at 16 (as in original). *Veade* does not stand for this proposition, nor does it address [\*523] periods of restoration in any way.<sup>2</sup> Finally, Mr. Knowe's view of the rental value provisions in the policy -- that it provided coverage that could never be recovered by the policyholder, Knowe Report at 6 -- conflicts with the analysis in this Court's ruling,<sup>3</sup> as well as the position put forth by plaintiffs.

2 The Knowe Report only provides the citation of this case and [\*\*13] not the name. But this citation includes *Veade's* correct docket number, so the possibility of a typographical error is remote.

3 This Court held that the provision was susceptible to two different interpretations, and was thus ambiguous as a matter of law. (R. Doc. 281.) Neither interpretation, however, is consistent with the interpretation that Mr. Knowe provides.

In sum, despite the qualifications of its author, the Knowe Report will not assist the jury in making any factual determination in this matter. To the extent that it contains stray passages that are not tainted with the flaws discussed here, these passages are imbedded in and inextricably intertwined with the legal conclusions, irrelevant statements, commonplace observations, and legally incorrect assertions that characterize the remainder of the report. Based on this report, Mr. Knowe proposes only to "tell the trier of fact what to decide." *Askanase*, 130 F.3d at 673. This Court will exclude all of Mr. Knowe's testimony.

#### IV. Conclusion

For the foregoing reasons, defendant's motion *in limine* to exclude the testimony Peter Knowe is GRANTED.

New Orleans, Louisiana, this 31st day of July, 2009

/s/ Sarah S. Vance

SARAH S. VANCE

UNITED [\*\*14] STATES DISTRICT JUDGE