UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIBERTY MUTUAL INSURANCE CO.
Petitioner

v.

PROGRESSIVE CASUALTY INSURANCE CO.
Patent Owner

Case CBM2012-00002
Patent 6,064,970

PATENT OWNER'S OPPOSITION TO LIBERTY'S MOTION TO EXCLUDE EVIDENCE

Patent Owner Progressive Casualty Ins. Co. ("Progressive") hereby opposes the motion to exclude filed by Liberty Mutual Insurance Co. ("Liberty"). (Paper No. 48.)

I. SUMMARY OF ARGUMENT

Liberty has failed to demonstrate good cause to exclude evidence introduced by Progressive. Liberty bases its motion on a misunderstanding of the facts and a misapprehension of the law. The attacks lodged by Liberty in its motion go to the sufficiency of the Progressive evidence in question, *not* to its admissibility, and Liberty's motion to exclude should therefore be denied.

II. LEGAL STANDARD

A. Not Proper To Argue Weight Of Evidence In Motion To Exclude

"A motion to exclude must explain why the evidence is not admissible (*e.g.*, relevance or hearsay)[.]" 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012). However, the Office Patent Trial Practice Guide makes clear that such a motion to exclude "may ***not*** be used to challenge the sufficiency of the evidence to prove a particular fact." *Id*. (emphasis added). Indeed, as set forth in the caselaw cited by Liberty, the "sufficiency of evidence relates *not* to admissibility but to the *weight* of the evidence and is a matter for the trier of fact to resolve." *SEC v. Guenthner*, 395 F. Supp. 2d 835, 842 n.3 (D. Neb. 2005) (emphasis added).

B. Liberty Argues That Progressive's Evidence Should Be *Admitted*

Notwithstanding that Liberty is moving to exclude evidence, it spends several pages of its seven-page motion setting forth caselaw for the proposition that the Board should *not* exclude evidence. (Motion at 1-3.) Indeed, Liberty claims that there is *no* "need for formal exclusion," and it is "better for the Board" to admit evidence "than to exclude particular pieces." (Motion at 1, 2.) Progressive does not concede or agree that Liberty's characterization of the law applies in all instances, such as where new evidence is improperly submitted with a reply brief or cross-examination of a witness indicates that his or her prior testimony was unreliable. Nevertheless, since Liberty has not argued that, in evaluating Progressive's evidence, there is any reason to depart from the general principles favoring the admission of evidence, its motion should be denied under the very caselaw it cites.

III. ARGUMENT

A. Liberty Claims Erroneously That Dr. Ehsani Improperly Opines As To Insurance Issues

Liberty has failed to satisfy its burden of showing good cause that portions of Progressive's expert Dr. Mark Ehsani's declaration (Exhibit 2016) should be excluded. As demonstrated below, Liberty's argument is based on its erroneous characterization as to Dr. Ehsani's opinions, and Dr. Ehsani properly provided expert testimony as to the deficient disclosure in Kosaka.

Liberty claims erroneously that Dr. Ehsani provides expert testimony as to "*insurance* issues." (Motion at 5, emphasis in original.) To the contrary, Dr. Ehsani relied on an opinion offered by Progressive's other expert, Mr. Miller, as to characteristics of an actuarial class. Dr. Ehsani plainly stated this assumption in his declaration:

> I have been asked to assume that an "actuarial class" has the following characteristics: an actuarial class, or risk class, is a grouping of risks (i.e., insureds) with similar risk characteristics.

(Ex. 2016, at ¶ 33.) The underlying opinion was offered by Mr. Miller in his declaration. (*See* Ex. 2010, at ¶ 16, "An actuarial class, or risk class, is a grouping of risks (i.e., insureds) with similar risk characteristics[.]")

In forming his opinions, Dr. Ehsani properly relied on Mr. Miller's description of an actuarial class. Indeed, Federal Rule of Evidence 703 expressly states that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of[,]" as Dr. Ehsani has done. The caselaw is clear that "under Rule 703" "an expert may rely upon another expert to form an opinion[.]" *See*, *e.g.*, *Member Servs., Inc. v. Sec. Mut. Life Ins. Co.*, No. 3:06-cv-1164 (TJM/DEP), 2010 WL 3907489, at *27 (N.D.N.Y. Sept. 30, 2010); *see also Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, 286 F.R.D. 266, 271 (W.D. Pa.

2012) ("it is well-settled that one expert may rely upon another expert's opinion in formulating his own").

Using Mr. Miller's description of actuarial classes, Dr. Ehsani applied his own expertise as to fuzzy logic and crisp logic. (*See* Ex. 2016, at ¶¶ 33-34.) He explained that assigning an insured to an actuarial class involves crisp logic, not fuzzy logic because "a single assignment" of an insured to an actuarial class "generates only a single crisp value[.]" (*Id*. at ¶ 34.) By contrast, fuzzy logic "uses multiple, partial values to show degrees of membership a variable of interest might have for its membership functions" and "represent[s] [a] diametrically opposite approach[]" from crisp logic." (*Id*.)

Based on his own expertise and the assumption that an "actuarial approach" involves "assignment to only one actuarial class for a particular risk category," Dr. Ehsani concluded that actuarial classes are a foreign concept to Kosaka. That is, "an actuarial approach does not have a mechanism to generate multiple fuzzy values such as the multiple fuzzy risk evaluation values of Kosaka[.]" (*Id*.) Dr. Ehsani further concluded that "[i]t would constitute a fundamental change in operation for an actuarial class approach to use the multiple, partial membership assignment fuzzy risk evaluation values of Kosaka" and that the notion of such a "selection of a fuzzy logic approach over a crisp actuarial class approach [would]

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