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

Before the Honorable JAMESON LEE, JONI Y. CHANG, and MICHAEL R. ZECHER, *Administrative Patent Judges*.

PETITIONER LIBERTY MUTUAL INSURANCE CO.'S REPLY TO PATENT OWNER'S OPPOSITION TO LIBERTY'S MOTION TO EXCLUDE

Petitioner[1] hereby replies in support of its Motion to Exclude ("Mot.", Paper 48) and in response to Progressive's Opposition ("Opp.", Paper 56). Ironically, Progressive's strongest response here, as in other proceedings (*e.g.*, CBM2012-00010), is an *imagined* one: Progressive imagines Petitioner really made no motion at all, but argued, instead, that Progressive's evidence should be admitted. (*Cf.* Opp. 2). Far from it. While Petitioner acknowledges that the Board has broad discretion to admit and consider evidence (Mot. 1-3), should the Board decide to apply the rules of evidence strictly in the proceedings between these parties—*as Progressive itself urges* (*e.g.*, Paper 51 (Progressive's Motion to Exclude); CBM2012-00010, Paper 45 (same))—Progressive's unqualified "expert" testimony clearly fails under those rules, and should be excluded.

Progressive *does not dispute* Dr. Ehsani is unqualified to opine on *insurance matters* (Mot. 5-6), but tries to explain away his sweeping substantive insurance testimony with equally sweeping misstatements. While Progressive now tries to justify Dr. Ehsani's pronouncements about, *e.g.*, "a *fundamental change in operation for an actuarial class approach*" and a "totally different *philosophical approach*" from an "actuarial approach" by saying they are simply "[b]ased on [1] his own expertise and [2] *the assumption that an 'actuarial approach' involves 'assignment to only one actuarial class for a particular risk category'*" (Opp. 4), this is false: (1) it is conceded that *Ehsani has no insurance expertise*, and (2) ***he does not present the language now quoted by Progressive as an assumption—***

[1] All emphases are added and abbreviations are as in Petitioner's Motion (Paper 48).

instead, he states it to the Board as his opinion. *See* EX2016 ¶ 34 (affirmatively reciting this as one of his "reasons" for concluding "a POSITA *in the field of fuzzy logic*[2] would not consider the teachings of Kosaka when using a crisp group, such as an actuarial class"). The only "assumption" Ehsani states in his entire report is that "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." EX2016 ¶ 33. And, contrary to the suggestion in Progressive's papers that Dr. Ehsani was affirmatively "rel[ying] on an opinion offered by Progressive's other expert, Mr. Miller, as to characteristics of an actuarial class" (Opp. 3), Dr. Ehsani *never refers to, cites or mentions Mr. Miller* anywhere in his declaration; nor did he identify the declaration of Mr. Miller (Exhibit 2010) in his list of materials considered, or anywhere else. *Contrast* EX2016 *with* Opp. 5 ("Mr. Miller opined about insurance aspects, and Dr. Ehsani properly relied on that pursuant to Rule 703"). Quite to the contrary, other than the one narrow assumption quoted above, Dr. Ehsani tells the Board that "***all*** of [his] statements and opinions…are based on [his] training and education…" EX2016 ¶ 2. No fair reading of Dr. Ehsani's broad opinions about the nature, philosophy, and fundamentals of an "actuarial approach" to insurance[3] suggests they

[2] Dr. Ehsani opines from the perspective of a different POSITA ("fuzzy logic")—not a POSITA in either the vehicle telematics or insurance aspects pertinent to the '970.

[3] *See also, e.g.*, EX2016 ¶ 29 (arguing, with no reference to Mr. Miller, that a POSITA

could be derived from or supported by this single assumption that "an actuarial class, or risk class, is a grouping of risks (i.e., insureds) with similar risk characteristics": there is simply no basis for Dr. Ehsani to offer the opinions that he does on insurance issues. *Contrast, e.g.,* EX2016 *with* RX1019 ¶ 8 (Petitioner's expert opining on vehicle telematics aspects *declined to opine* on insurance underwriting aspects); RX1022 ¶¶ 24-37 (Petitioner's expert opining on insurance aspects limited opinion to rebutting Progressive's purported *insurance* expert, Mr. Miller); Opp. 5. Progressive's mischaracterization of Dr. Ehsani's testimony in an attempt to defend it is simply breathtaking.

The suggestion Petitioner was obliged to depose Dr. Ehsani to give him a second chance to explain himself (Opp. 5-6) is nonsense[4]: if Progressive had evidence to show Ehsani was sufficiently qualified to opine on insurance matters, it could have offered it in response to Petitioner's clear objections (MX1035 § V; MX1036 §§ II, III). 37 C.F.R. § 42.64(b)(2). It did not even try.

And the cases Progressive cites as supposed justification for Dr. Ehsani's insurance opinions (Opp. 3) actually confirm that *his testimony should be excluded.* In *Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, 286 F.R.D. 266, 271 (W.D. Pa. 2012), the court

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"would not know how to…apply [fuzzy logic] to the *insurance industry*").

[4] Instead, the Rules anticipate a "party challenging an expert's qualifications *may* question the expert's qualifications during cross-examination *and can raise the challenges in its oppositions and, where appropriate, in a motion to exclude evidence.*" 77 Fed. Reg. 48,643.

excluded an expert's testimony precisely because the expert was "not qualified" to testify on certain technical aspects. The court reasoned that even though "one expert may rely upon another expert's opinion in formulating his own," the expert's testimony "***must be limited to his own area of expertise***." *Id.* Likewise, in an unreported opinion in *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), the court *precluded* an expert's testimony where there was "substantial overlap" with another expert's because "an expert may not merely recite another expert's opinion as his own." *Id.* Thus, even if Dr. Ehsani's opinions had (unlike his *actual* testimony) been made in "rel[iance]" upon Mr. Miller's "opin[ing] about insurance aspects" of Kosaka (Opp. 5), *Dr. Ehsani* would still not be qualified to opine on insurance matters, and Dr. Ehsani's testimony resting on his own supposed insurance opinions (*see, e.g.*, EX2016 ¶¶ 28-34) should be excluded.

Finally, as explained in Petitioner's Motion, "[w]hile an expert need not consider *every possible factor* to render a reliable opinion," there are limits: "the expert still must consider *enough factors to make his or her opinion sufficiently reliable* in the eyes of the court." Mot. 6 (quoting *Microstrategy Inc. v. Business Objects, S.A.,* 429 F.3d 1344, 1355 (Fed. Cir. 2005)). Dr. Ehsani, however, did not do so. Instead, he opined in broad contradiction of prior art on the very topics of his testimony—art that would have been known to any POSITA, *e.g.*, *Standard Oil Co. v. American Cyanamid Co.,* 774 F.2d 448, 454 (Fed. Cir. 1985), such as a raft of earlier publications contradicting Progressive's arguments

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