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 CBM2012-00003
Patent 8,140,358

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 55) and in response to Progressive's Opposition ("Opp.", Paper 64). Ironically, Progressive's strongest response here 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 58 (Progressive's Motion to Exclude); CBM2012-00010, Paper 45 (same))—Progressive's unqualified "expert" testimony and belated evidence clearly fail under those rules, and should be excluded.

I. Mr. Zatkovich is Not Qualified

To begin with, Progressive *does not dispute* that Mr. Zatkovich is not qualified to provide opinions regarding a POSITA's understandings on *insurance matters*. Mot. 5-6. At a minimum, those portions of his testimony (*see, e.g.*, EX2007 ¶¶ 8, 99, 104) should be excluded.

Nor does Progressive dispute that Mr. Zatkovich *lacked the qualifications that* ***he conceded*** *were required*: he did not have "***as of January 1996***…at least ***one to two years*** of experience with ***telematics systems for vehicles***…including communications and locations technologies." (EX2007 ¶¶ 8, 4, 5; Mot. 5-6;Opp. 2-6). On this

[1] All emphases are added and abbreviations are as in Petitioner's Motion (Paper 55).

point, Progressive, *which bears the burden* of proving Mr. Zatkovich qualified by a preponderance of the evidence, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n.10 (1993), points only to his statement that he has "more than 4 years experience designing and implementing vehicle telematics systems and ha[s] designed and implemented ecommerce computer systems for the insurance industry, such as for Geico and Hartford." (Opp. 3). But Progressive omits that this Geico/Hartford experience only *began* in 1996: it did not give him *one to two years* of experience *as of 1996* (EX2008 (Zatkovich CV) at 4; Mot. 5-6), when the disclosures in the '650 application Mr. Zatkovich purports to interpret were originally made, as Mr. Zatkovich himself conceded was necessary. (EX 2007 ¶ 8). Nor did Progressive ever offer the Board any evidence or explanation of how (in contradiction of Mr. Zatkovich's own testimony (*id.*), as well as Progressive's own positions in co-pending proceedings between these parties[2]) any *later, post-1996* experience would enable Mr. Zatkovich to provide such testimony—and its current argument (Opp. 3) implicitly concedes he *lacked this experience as of 1996*. The suggestion Petitioner was somehow obligated to give Mr. Zatkovich a second chance to explain himself in deposition (Opp. 4-5) is nonsense,[3]

[2] *E.g.,* CBM2012-00010, Mot. (Paper 45) at 5 (arguing expert's "work experience prior to 1993" is "irrelevant to the pertinent art of the '088 Patent").

[3] To the contrary, the Rules anticipate a "party challenging an expert's qualifications *may* question the expert's qualifications during cross-examination *and can raise the chal-*

and is not the rule: if Progressive had further evidence of Mr. Zatkovich's qualifications, it could have offered it in response to Petitioner's objections (MX1045 § III; MX1046 § I). 37 C.F.R. § 42.64(b)(2). It did not even try. Quite simply, Progressive failed to meet its burden of qualifying Mr. Zatkovich.

II. Progressive's Belated Attempt to Introduce Evidence Improperly Relied Upon by Its Expert Should be Rejected

Finally, while Progressive tees up a multitude of excuses (Opp. 6-8), it never actually explains *why* it *never provided a copy in this trial* of the document referred to and relied upon by Mr. Miller in paragraph 15 of Exhibit 2005—*even in response to Petitioner's specific,* ***repeated*** *objections* under Rule 42.63 and Rule 42.6(c), which Progressive *admits* required it to file this exhibit "with the *first* document in which it is cited." Opp. 7. Remarkably, Progressive now argues that it "***complied***" with Rule 42.6(c) by filing the document ***in a different trial*** involving a ***different patent***—a position that makes a mockery of the Rules and is belied by Progressive's own filing of that same document again in *other* trial proceedings (*e.g.*, CBM2012-00004, EX2012; CBM2012-00002, EX2012)—although never in *this* trial. And now, having ignored its opportunity to do so under Rule 42.64(b)(2) *either time* that Petitioner objected, Progressive violates the Rules again by attempting to file the document as a new Exhibit (Exhibit 2018) ***six business days before the oral hearing*** in this trial. The issue is not

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lenges in its oppositions and, where appropriate, in a motion to exclude evidence." 77 Fed. Reg. 48,643.

whether Petitioner or its experts were capable of locating a document Progressive purported to rely upon, but Progressive's refusal to follow the Board's Rules *even after its error had been pointed out* ***twice***. *See* MX1045 § IV; MX1046 § II. If the Board determines to enforce its rules with the strictness Progressive has urged, this improper evidence should also be excluded.

Respectfully submitted,

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