How To Represent Your Clients When Their Insurance Company Says, "No Coverage" Or "Claim Denied"!

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Introduction

The arena for litigation with insurance companies had expanded in Texas during the last 6 to 10 years. The trend is now moving quickly in the other direction. Beginning with Arnold v. National County Fire Insurance, 725 S. W. 2d, 165 (Tex. 1987), the Texas Supreme Court had demonstrated a willingness to bring Texas in line with the progressive and generally accepted philosophy of holding insurance companies to certain standards in dealing with their own insureds. The cases immediately following Arnold sought to further develop the field of first party insurance litigation i.e. suits involving the insured suing their insurance company, to afford insureds the same protections that have been available to insureds regarding certain third-party claims since the Stowers decision. The development of first party "bad faith" insurance practices litigation which started in Texas in the later 1980's had shown a clear trend for making the courts and the consumer statutes of Texas readily available to protect insureds. Texas refers to the duty of good faith and fair dealing, but this paper and the Courts often refer to the more generic term "bad faith" litigation.

Although cases such as Arnold and its progeny established strong precedent for bad faith insurance litigation, more recent opinions leave no doubt that the expansion in bad faith litigation is over. This is not to say however, that bad faith insurance litigation in Texas is not still a meritorious cause of action against an insurance company but that, recent decisions of the Texas Supreme Court in the past year demonstrate that the pendulum is leveling off in the bad faith insurance litigation. Likewise, ERISA has limited the availability of consumer-oriented legislation in the group insurance context as far as the insured is concerned.

The purpose of this paper is to generally trace the theories available in connection with the handling of first-party claims. and, to a lesser extent, claims arising from third-party actions. The theories include breach of the duty of good faith and fair dealing, insurance code violations, deceptive trade practices, breach of contract and other theories.

In order to understand the Theories of Recovery which section follows this introduction, the reader of this paper must understand the basics of"bad faith" claims brought by an insured against his or her own insurance company. "Bad faith" on the part of an insurer is defined as "any frivolous or unfounded refusal to pay proceeds of policy; it is not necessary that such refusal be fraudulent. For purposes of an action, against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty, (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith," Black's Law Dictionary, 6th Edition (1990), "Bad Faith" p. 139.

The duty of good faith and fair dealing in the context of the insurance industry arise in the common law out of the "special relationship" between the insurer and the insured. In addition to having a contractual relationship. The courts recognize additional factors making the relationship more than mere contract: the necessity of insurance, the relative lack of or unequal bargaining power of the insured, and the power of control retained over claims by the insurer. See Arnold v. National County Mutual Fire Ins. Co., 725 S. W. 2d 165, 167 (Tex. 1987).

The issue of "bad faith" typically focuses not on whether the claim was valid, but on the reasonableness of the insurer's conduct in rejecting the claim. The most common case arises out of an insured's allegation that his or her claim was "wrongfully denied".

Texas Courts have swung back and forth on what standard to use to determine the presence or absence of the duty of good faith and fair dealing in a wrongful denial scenario. At different times the Supreme Court has asked either (1) if a "reasonable basis" existed for denying a claim; or (2) if the insurer knew or should have known that it was "reasonably clear" that the claim was covered. Although the most recent pronouncement by the Texas Supreme Court on this issue will be discussed below in the Theories of Recovery section, the two concepts are inter-related. If a reasonable basis existed to deny the claim, logically coverage for the claim would not be reasonably clear. On the other hand, if no reasonable basis exists for denying a claim, it would seem logical that coverage of the claim would be reasonably clear .

The Courts have repeatedly stated that insurers "maintain the right to deny invalid or questionable claims." Aranda v. Ins. Co. of N. Am., 748 S. W. 2d 210, 213 (Tex. 1988). "{A} bona fide dispute about the insurer's liability on the contract does not rise to the level of bad faith." Transportation Ins. Co. v. Moriel, 879 S. W. 2d 10 (Tex. 1994). Because of the continuing presence of insurance fraud and the need for diligence in protecting against illicit claims, the courts have held that even if a claim ends up being valid, the prior denial of that claim does not necessarily amount to bad faith. Liability under Texas law requires denial when coverage is reasonably clear-that is, denial without a reasonable basis for doing so.

The Genesis of Foundation Claims

A. Suit Against the Insurance Company for Foundation Damage

The case of first impression in Texas was Balandran v. Safeco Insurance Company of America, 972 S. W. 2d 738 (Tex. 1998). Balandran brought a state-court suit against their homeowners' insurer to recover for damage to their home's foundation as well as interior and exterior finishes, as a result of broken sewer lines. The form of the policy was the 1991 Texas Standard Homeowner's Policy-Form B. In September 1993, the Balandrans filed a claims against Safeco for damage to their home caused by an underground plumbing leak. The leak caused the soils to expand, damaging the home's foundation as well as its interior and exterior finishes. When Safeco denied the claim, the Balandrans sued the company in state district court. The insurer (Safeco) removed the case to federal court in San Antonio. At trial, the jury found that the structural damage was caused by the plumbing leak an awarded the Balandrans $66,500. Safeco moved for a judgement as a matter of law, contending that the Balandrans' policy excluded this structural damage regardless of the underlying cause. The trial judge granted Safeco's motion, rendering a take-nothing judgement for Safeco. The Balandran's appealed to the Fifth Circuit Court of Appeals. In an unrelated case on an identical policy issue on appeGl to the Fifth Circuit held that policy did not provide coverage for foundation damaged from a plumbing leak. Subsequently, however, the Texas Commissioner of Insurance issued a bulletin vigorously disagreeing with the identical policy pending in the Fifth Circuit. In light of these developments, the Fifth Circuit panel hearing the Balandrans' appeal certified to the controlling question to the Texas Supreme Court regarding policy coverage. The Texas Supreme Court in an opinion written by Chief Justice Tom Phillips held that exclusion in standard homeowners' insurance policy for loss to dwelling caused by settling, cracking, bulging, shrinkage, or expansion of foundation was inapplicable to structural damage from a plumbing leak. The issue in this case was whether or not the 1991 Texas Standard Homeowner's Policy-Form B covers damage to the insured's dwelling from foundation movement caused by an underground leak. For the sake of brevity, this case is included in the Appendix for your reading. The Supreme Court after much insurance contract interpretation concluded that the Balandrans' interpretation of the exclusion repeal provisions is not unreasonable. Because the Balandrans are the insureds, we adopt their interpretation as the proper construction of the policy.

B. Synopsis of Subsequent Relevant Cases Expanding Insurance Carrier Liability

In Ruch v. State Farm Fire and Casualty Company, 1997 WL 452743 (N.D. Tex.). At issue in this case was another interpretation of a foundation damage exclusion in a homeowner's insurance policy. Ruch sued State Farm to recover under a Texas Dwelling Policy for damage to her house's foundation that she contends was caused by an accidental discharge from or leaking in her home's plumbing system. She also brought extra contractual claims against State Farm for breach of the duty of good faith and fair dealing; violations of Article 21.21 of the Texas Insurance Code, violations of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA). State Farm maintained that it was entitled to summary judgment because the Policy does not cover foundation damage, whatever the cause. State Farm prevailed (but remember, this is pre-Balandran). Regarding the breach of good faith and fair dealing the court stated that such a cause of action is based upon the absence of a "reasonable basis" for denial of a claim, delay in payment, or a failure by the insurer to determine whether there is any "reasonable basis" for the denial. See Arnold, infra. The court held that there was no basis for her cause of action since Ruch asserts only that State Farm lacked a reasonable basis for denying her claim because State Farm unreasonably relied on the report of its expert regarding the cause of the foundation damage at her residence in light of conflicting expert reports. It is unnecessary for the

court to address whether it would be reasonable for State Farm to rely on its expert's report because State Farm has contended, and the court agrees, that State Farm reasonably denied coverage under the Policy, regardless of the cause of the foundation damage. Ruch lost on all counts.

3. The worm begins to turn.

A Texas appeals panel affirmed a $982,962 bad faith judgment against an insurer that denied coverage for foundation damage after conducting a biased and inadequate investigation, State Farm Lloyds v. JoAnn Johns, No. 05-96-0IO39-CV, Texas App.-5th Dist. Additionally, the court found there was coverage under the policy for the foundation damage caused by plumbing leaks. Jo Ann Johns filed a claim under her State Farm Lloyds homeowners policy after large cracks, sloping floors and uneven doors appeared. Repairmen discovered plumbing leads under the house, but State Farm denied the claim because its investigation showed the damage was caused by "normal settlement." Johns sued alleging violations of the Texas Insurance Code and DTPA. The jury found liability and awarded mental anguish and treble damages. The court in addressing the "Unreasonable Denial" aspects concluded that a jury -could have determined that State Farm's conduct was unreasonable. The panel said State Farm should have known the claim was covered; it relied on the report of its engineer without checking his credentials; it did not have a procedure for reconciling conflicting expert reports; and it did not reconcile the lack of damage reported for months earlier when an unrelated claim was investigated. The evidence, the appellate court said, also supported two alternative grounds submitted to the jury--failing to adopt and implement reasonable standards or prompt investigation of claims arising under its policies and refusing to pay claims without conducting a reasonable investigation based upon all available information. Specifically, the court cited State Farm's insistence that its engineer was correct and that it did not seek a third opinion, did not require reinspection after a second leak was found, did not require soil testing and did not interview the engineer Johns had retained The court concluded the evidence was legally and factually sufficient to support the jury's findings. In order to award treble damages under the DTPA, the jury had to find State Farm knowingly engaged in an unfair act. Based on the previously discussed evidence, the appeals panel found the jury could have concluded State Farm had no reasonable basis for denying the claim and that it knew it had no reasonable basis. Turning to mental anguish damages, the appellate court held the damages were warranted based on Johns' testimony that she was embarrassed about the condition of her home, she was upset about not being able to entertain friends and family, she had persistent nightmares, the tension caused reinjury to her neck and she was worried about her future because her retirement savings were tied up in the house. The appeals panel also found there was coverage, relying on Balandran, supra, which concluded the Texas standard homeowners policy covered foundation damage caused by plumbing leaks.

4. The technical courts charge to the jury as the defining standard.

The jury question: Do you find from a preponderance of the evidence that Insurer failed to act fairly and in good faith in the handling of the insurance claim under the policy in question?

You are instructed that an insurer fails to act fairly and in good faith in the handling of an insured's claim when failing to attempt in good faith to effectuate settlement of a claim when the insurer's liability has become reasonably clear. You are further instructed that if a reasonable basis exists for denying a claim, liability is not reasonably clear .

Answer "Yes" or "No"

Theories of Recovery

Duty of Good Faith and Fair Dealing

For many years, Texas court had been unwilling to impose in any contract a duty of good faith and fair dealing. As late as 1983, the Texas Supreme Court specifically held that an insurer owned no duty of good faith and fair dealing toward its insured. English v. Fisher, 660 S. W. 2d 521, 522 (Tex. 1983). Under the Texas case law through that time, an insured seeking relief from a mishandled or negligently handled claim had no remedy for a breach of the duty of good faith and fair dealing. However, Justice Spears, in writing the opinion for the Court was willing to impose a duty of good faith and fair dealing where special relationships exist between the parties or due to an imbalance of bargaining power between parties to a contract.

Arnold and Expansion of Liability

a. Arnold v. National County Mutual Ins. Co.

In 1987, the Supreme Court handed down Arnold v. National County Mutual Ins. Co. ,725 S. W. 2d 165 (Tex. 1987), which for the first time imposed a duty of good faith and fair dealing on the carrier in first party insurance matter, i.e. suits between an insured and their insurance company. In that case, the plaintiff had a liability insurance policy which contained an uninsured motorist provision with a limit of$10,000.00 coverage. The plaintiff was subsequently injured in a collision with an uninsured motorist and sought the policy limits under his policy.

Although an independent adjusting firm investigated the accident and advised National County Mutual to pay the policy, National County Mutual declined this on the advice of the attorney employed by National County Mutual. The recommendation by the attorney was based on allegations which National County Mutual never investigated and turned out to be spurious. In subsequent litigation against the uninsured motorist and National County Mutual, plaintiff obtained judgment for $18,000. After the judgment, National County Mutual attempted to tender the policy limits. The plaintiff declined and in turned filed a suit against National County Mutual alleging a breach of the duty of good faith and fair dealing in handling the claim.

The trial court granted summary judgment for the plaintiff, which was affirmed by the Court of Appeals. However, the Supreme Court reversed and remanded for another trial imposing for the first time the duty of good faith and fair dealing on the insurer.

As alluded to by Justice Spears in the English v. Fisher case, the Supreme Court recognized the unequal bargaining power between an insurance company and its insured which put the insurer in a position of clear advantage in this situation. Arnold, at 167. An insurer has the potential to take advantage of the insured and would have leverage over the insured during the negotiation of a settlement or resolution of a claim.

The Arnold Court stated that the new cause of action was available when there was no reasonable basis for denial of the claim or delay in payment or a failure on the part of the insured to determine whether there was any reasonable basis for the denial or delay in payment. The Supreme Court specifically approved exemplary damages as well as mental anguish damages consistent with the principles of tort law which allow similar recoveries. Recent decisions discussed below threaten or at least limit the availability of extra contractual damages in "bad faith" cases.

Arnold opened the door for insured to make certain that claims were properly handled. If insurance companies chose not to deal properly in investigating claims, handling claims, or paying claims, they would be subject to more than minimal exposure. Whereas, generally insurance companies would only be subject to having to pay benefits already owed under a policy plus interest and possibly attorney's fees, the Arnold decision made it clear that if the evidence was sufficient, insurance companies could be subject to extra-contractual damages, certain tort damages and exemplary damages.

b. Aranda v. Insurance Co. Of North America

The most far reaching decision of the Supreme Court made in the area of good faith and fair dealing was Aranda v. Insurance Co. of North America, 748 S. W. 2d 210 (Tex. 1988). In that case, the Court extended the duty of good faith and fair dealing to the relationship between an employee and a worker's compensation carrier notwithstanding the absence of an express contract between the two.

In Aranda, the plaintiff received injuries resulting from his employment. At the time, he had two separate employers both of whom had worker's compensation carriers who were notified of the injury Although both carriers acknowledged that the injury was compensable, they could not agree who was primarily responsible and subsequently refused to pay the benefits or medical expenses until resolution by the Industrial Accident Board.

The plaintiff filed suit against both carriers asserting a breach of the duty of good faith and fair dealing and a failure to effectuate a proper resolution of this claim. The case went up on appeal and the Supreme Court reversed sending the case back to the trial court holding that notwithstanding the lack of a direct agreement between the plaintiff and the carrier, the overall scheme of the Worker's Compensation Act created a "three-party agreement". While this outcome may not seem significant to the lay- person the Aranda court provided a two-prong test for determining whether the duty was breached. First, the insured must establish the absence of a reasonable basis for the denial or delay in payment. This is an objective test to determine what a reasonable insurer would do in the circumstances. The second prong is a more subjective analysis inquiring into whether the defendant carrier knew or should have known that there

was no reasonable basis of the denial or delay. This second prong balances the right to reject invalid claims with the duty to investigate and pay proper claims.

c. Vail v. Texas Farm Bureau Mutual. Ins. Co.

Although not directly expanding the common law breach of the duty of good faith, the Court again demonstrated a willingness to impose statutory duties and limitations on insurance companies dealing with their insured in first party cases in Vail v. Texas Farm Bureau Mut. Ins. Co., 754. W. 2d 129 (Tex. 1988). In Vail, the plaintiffs had obtained a fire insurance policy from Texas Farm Bureau and suffered a fire loss on July 18, 1979. An agent for the insurance company advised the plaintiffs that the claim would not be paid because of a failure to furnish an accurate list of the home contents. The Company subsequently retained an engineering firm to investigate to determine if the fire had been started as a result of arson. The initial investigation concluded that no fire-setting materials were present. A subsequent investigation by the fire marshall retained by the insurance company, likewise proved inconclusive, yet Texas Farm Bureau determined that the claim would be denied based on arson. At trial, there was no finding of arson and the jury found the company had failed to effectuate a settlement after liability had become reasonable clear which demonstrated a lack of good faith in denying the claim. The Court of Appeals upheld the damages under the contract, but rejected the trebling of damages and any claims made under Tex. Ins. Code Art. 21.21-2.

The Supreme Court reversed the Appeals Court and held that an insured does possess a cause of action against an insurer for unfair settlement practice under either the Texas Insurance Code (Tex. Ins. Code Art. 21.21 and 21.21-2) or Texas Deceptive Trade Practices-Consumer Protection Act. See Vail. (The Texas Insurance Code and the Texas Deceptive Trade Practices Consumer Protection Act will be discussed in more detail later. The decision of the Supreme Court allowed a claim under the statutes notwithstanding a failure to demonstrate a frequency of alleged practice which had been generally required prior to Vail. The decision in Vail demonstrates a tendency to hold the insurance companies accountable under statute as well as the common law duty set forth in Arnold.

Along with the causes of action available under the statutory provisions, come a host of remedies available under those statutes, including in addition to actual damages, in some instances, the trebling of damages, injunctive relief and attorney's fees.

d. Viles v. Security National Ins. Co.

The Texas Supreme Court further explained the basis for the breach of the duty of good faith and fair dealing in the Viles }1. Security National Ins. Co., 788 S. W. 2d 566 (Tex. 1990). In that case, the plaintiffs sought to recover damages under a homeowners policy. The agent was notified, an investigation was undertaken by the insurer and the claim was denied for the most part. Pursuant to the policy, a proof of loss was required to be file within (90) days. The proof was filed (91) days after the discovery of the loss and after denial of the claim.

The Supreme Court noted that the failure to timely file the proof of loss might bar a contract claim, but that such an issue was not controlling in a breach of the duty of good faith and fair dealing. While the judicial reasoning here may be unclear, the Appeals Court was saying that the contract defenses raised by the insurance company may be valid, the Supreme Court focused on the underlying rationale behind the duty of good faith and fair dealing. The court stated; "(F)or this reason, we hold that a breach of the duty of good faith and fair dealing will give rise to a cause of action in tort that it separate from any cause of action for breach of the underlying insurance contract.

The most significant part of this case which proves advantageous in certain bad faith cases was the Court's language stating "(W)hether there is a reasonable basis for denial, however, must be judged by the facts before the insurer at the time the claim was denied". The focus of any inquiry as to the basis for delay or denial should be on what the carrier knew at the time not some information obtained after the denial. Again such later acquired information might provide a proper defense to a contract claim but should not affect a claim based in tort.

Retreat from Arnold.

a. Lyons v. The Miller Insurance Company of Texas

The Supreme Court announced a modified "no evidence" review for bad faith cases in Lyons v. The Miller Casualty Insurance Company of Texas, 866 S. W. 2d 597 (Tex. 1993). In Lyons, the plaintiff sought payment on a claim for damage caused by a windstorm. The carrier denied coverage asserting that the damage was caused entirely by

settling and shifting which was not covered. A jury found for plaintiffs, the Court of Appeals reversed finding no evidence of a breach of duty of good faith and fair dealing nor a violation of DTPA (Deceptive Trade Practices Act). The Supreme Court affirmed the Court of Appeals focusing on the evidence supporting the reasonableness of the conduct of the carrier in relation to a tort claim of delay or denial as opposed to a coverage claim. The focus for the reviewing court is "on the relationship of the evidence arguably supporting the bad faith finding to the element of bad faith." See also, National Union Fire Ins. Co. v. Dominquez, 873 S. W. 2d 373, (Tex. 1994). In National, the Supreme Court went one step further stating that the appellate court had to "determine what potential basis a carrier may have for its conduct. Only then can the reviewing court determine if there is evidence that the insurer lacked a reasonable basis for its delay or denial of benefits. Evidence indicating coverage is insufficient to establish an absence of a reasonable basis for delay or denial of benefits.

b. Transportation Insurance Company v. Moriel (New Guidelines in Bad Faith Cases)

As far reaching as Arnold was, the decision in Transportation Insurance Company v. Moriel, 879 S. W. 2d 10 (Tex. 1994) had a similar though opposite affect on the feasibility of first party claims. Moriel received an award from the Industrial Accident Board which the carrier appealed. The comp case was settled but a bad faith claim was reserved. At trial on the bad faith claim, a jury awarded mental anguish and substantial punitive damages. Judgment was entered and affirmed at the Court of Appeals.

The Supreme Court reversed and remanded establishing new guidelines in bad faith cases. The Court discussed the "exceptional nature" of punitive damages presumably in anticipation of the safeguards, procedures and new law it intended to create. The court reiterated its holding in Lyons and Dominguez which place the burden on the claimant to show more than a coverage dispute or difference in expert opinions to prevail on a bad faith claim. Moreover, a breach of the duty of good faith and fair dealing alone is insufficient to trigger punitive. Only bad faith, which is coupled with malicious, intentional, fraudulent, or grossly negligent conduct will entitle the claimant to punitive damages. The Court then reexamined Burke Royalty Co. v. Walls, 616 S. W. 2d 911 (Tex. 1981) for purposes of defining gross negligence in the context of bad faith cases. The Court determined that the definition must include a subjective element- actual awareness. Moreover, the harm must be serious harm independent from the inconvenience and usual consequences of gad faith delays or denials. Based on this test, Moriel had failed to produce any evidence supporting punitive damages.

The result of Moriel and others is that to prevail on an Arnold, a claimant must prove that the carrier had no reasonable basis for delay or denial of benefits; however, differences between experts on the issue of coverage will not support a bad faith claim under review. Bad faith damages alone are compensatory. Only if there is actual awareness of a serious and unique harm will punitive damages be available.

The Pendulum Stops Swinging

In the last couple of years, several decisions from the Supreme Court indicate that the reversal from Arnold has perhaps slowed down with some decisions upholding a finding of bad faith on the part of the carriers although no case has upheld the award of punitive damages in a bad faith case.

a. The Universal Life Insurance Co. v. Giles

The Supreme Court upheld a finding that an insurer violated the duty of good faith and fair dealing in The Universal Life Insurance Co. v. Giles- S.W. 2d (Tex.). Giles involved a claim under a health insurance policy. The insured had obtained coverage shortly before undergoing heart bypass surgery. The carrier denied coverage based on medical records indicating an undisclosed preexisting history. Subsequently, the health care providers corrected the erroneous records making it clear that there was no preexisting history which could preclude coverage. The carrier continued to deny coverage until it received a letter from the insured's attorney. The carrier finally paid but a bad faith claim was filed. A verdict was returned in favor of the insured for mental anguish and punitive damages. The court of appeals affirmed the judgment except for part of the punitive damages which exceeded the amount allowed by law. The Court in Giles in a 5 to 4 vote announced a new standard by which carriers are to be judged in bad faith cases. The Court determined that a proper standard should be the "reasonably clear standard". A carrier violated the duty of good faith and fair dealing if it denies or delays payment of a claim if the carrier knew or should have known that it was reasonably clear that the claim was covered. This puts a new spin on how to deal with bad faith claims stating the standard in positive terms rather than the negative formula which was showing that the carrier had no reasonable basis for denial or delay. The additional benefit this decision has conferred upon a potential plaintiff is that the inquiry as to whether a breach of the duty of good faith and fair dealing has occurred continues to be a question of fact. The

justices in Giles concluded that there was sufficient evidence that the carrier knew or should have known that it was reasonably clear that the claim should have been paid. The Court also concluded that the standards outlined in Moriel as to punitive damages were not met since there was no evidence demonstrating actual awareness that the actions involved an extreme risk with a high probability of serious harm such as death or financial ruin.

b. State Farm Lloyds v. Nicolau (Foundation case)

In another case that came down the same day as Giles, the Court in State Farm Lloyds v. Nicolau, 951 S. W. 2d 444 (Tex. 1997) found that a carrier had breached its duty of good faith and fair dealing. Before reading further here, you should reexamine the Arnold case wherein the insurance carrier relied upon the advice of its attorney in denying coverage under the terms of the policy involved. The Nicolau case involved a foundation claim under a homeowners policy. In this case, homeowners brought a bad faith suit against their insurer to recover on a claim for foundation movement and extensive foundation damage resulting from the plumbing leak. After discovering a significant leak in the plumbing system of the home, and obtaining the expertise of three different individuals in the industry, the Nicolaus filed a claim with State Farm for the foundation damage caused by the leak. State Farm hired Haag Engineering Company to inspect the home. Haag concluded that the reported leak did not significantly affect the foundation, and State Farm denied the claim. The Nicolaus then obtained a further engineering opinion that the plumbing leak had indeed caused the soil movement resulting in foundation damage. Haag examined the additional report and declared its conclusions "unfounded". State Farm adhered to its denial, and the Nicolaus sued for bad faith. State Farm argued that the Haag Engineering reports conclusively establish that it did not act in bad faith in denying the claim. They relied on the reports in denying the claim. The Supreme Court responded stating:

But we have never held that the mere fact that an insurer relies upon an expert's report to deny a claim automatically foreclosed bad faith recovery as a matter of law. Instead, we have repeatedly acknowledged that an insure's reliance upon an expert's report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable.

The Court then related evidence that Haag's work was not objective and the insurer's reliance was not reasonable. Haag's engineer testified that 80-90% of his work consisted of investigations for insurance companies; he was aware that if a leak caused damage that the insurance company would have to pay; and that Haag had a general view that plumbing leaks are unlikely to cause foundation damage. State Farm also know of Haag Engineering's view prior to hiring them. Out of numerous reports prepared by Haag, only two were found where Haag had attributed foundation damage to a leak and according to the testimony, "the engineers who wrote those reports were never seen from [sic] again". The Court, utilizing the appropriate standard of appellate review under the circumstances, found that in "viewing the evidence in the light most favorable to the Nicolaus, we hold there is some evidence to' support the jury's finding that State Farm denied the Nicolaus' claim in bad faith. " The trial court disregarded the jury finding for bad faith mental anguish damages and punitive damages but allowed the breach of contract damages. The Court of Appeals reversed awarding all damages as per the jury verdict.

The Supreme Court following its analysis set forth in Giles determined that there was evidence that the carrier breached its duty by failing to settle a claim after it knew or should have known that it was reasonably clear that the claim was covered. The Court acknowledged that a bona fide coverage dispute alone does not demonstrate bad faith, but in this case, the jury could have inferred the reports relied upon by the insurer were not objectively prepared and were pretextual. The Court analyzed the objectivity of the report and concluded the jury could have properly determined there was a breach. Again, the determination was for the trier of fact and as long as there was evidence that finding must stand.

The Court found no evidence to support the type of malice or conduct justifying punitive damages; however, the Court found that there was evidence to support the jury finding of"knowing" violation of the DTPA which allows the insured to additional damages, which part of the judgment was remanded to the trial court in order to deal with violations of DTPA and additional statutory damages.

In summary, Nicolau case stands for the proposition that an expert's opinion was insufficient to shield bad faith liability. Of course, the case involved an unobjective expert, and improper reliance; however, this case should stand as a warning of the need for retaining objective experts prior to using their reports to deny coverage of a claim.

c. State Farm Fire & Casualty v. Simmons

This was a first party case i.e. the insured was suing its insurance company. This case involved a denial of a homeowner's claim based on arson. After reviewing the evidence, the Court concluded that the carrier had engaged in an OUTCOME ORIENTED INVESTIGATION placing the insureds at the heart of the arson allegations. The Court found evidence to support a bad faith finding including a failure to OBJECTIVELY INVESTIGATE the fire. As the insurer the duty remains to institute a proper, reasonable and objective investigation before denying the claim.

The Court did not find evidence of the type of conduct necessary to support a punitive damages award. As the Court did in Giles and Nicolau, the Court determined that there was no evidence that the carrier was actually aware that its actions would probably result in serious harm including financial ruin. The Court did find evidence to support a finding of a knowing violation of the DTPA entitling the insured to additional damages under the DTPA.

Statue of Limitations

Initially, the Court in Arnold suggested that the breach of duty of good faith and fair dealing was subject to a two (2) year statute of limitations. Again, this was consistent with the overall basis for the establishment of this duty as one sounding in tort rather that contract. The cause of action accrued while the underlying insurance contract claims was finally resolved.

In Murray v. San Jacinto Agency, Inc., 800 S. W. 2d 826 (Tex. 1990), the Texas Supreme Court effectively overruled part of the Arnold decision regarding limitations specifying a new accrual date for a cause of action under the duty of good faith and fair dealing. In Murray, although the statute of limitations remained at two years from the time the cause of action accrued, the accrual date runs FROM THE DENIAL OF THE CLAIM not some subsequent date when the resolution of a separate suit to determine coverage occurs.

The discovery rule will not apply to all limitations where there has been an outright and express denial. Davis v. Aetna Cas. & Sur. Co., 843 S. W. 2d 777,778 (Tex. App.- Fort Worth 1992). Subsequent acts of bad faith after the denial will not give rise to a separate cause of action. Such acts may be evidence of bad faith but cannot be used to extend the statute of limitations. Everyone should be cognizant of the fact that the statute begins to run on the date that the insured is notified of the denial of his or her claim.

There is a requirement that all actions brought under DTPA § 16 of Art .21.21 within two (2) years of the unfair method or deceptive conduct with the statute specifically including a discovery rule. The statute provides an extension of the statute similar to the DTPA if suit was not filed within two (2) years as a result of conduct by the defendant carrier to induce plaintiff to refrain or delay the commencement of litigation.

The Texas Insurance Code

Although the Arnold case provided a common-law remedy to proceed against insurance companies for the handling and settling of claims, it by no means provided the only substantial theory. Over time the Texas Legislature has compiled a statutory list (codified in Texas Insurance Code) of specified acts that amount to "unfair settlement practices." The insurance code provides remedies which differ from those available under a simple breach of contract theory or under a common law breach of the duty of good faith and fair dealing which affords extra leverage to the insured in situations where claims are mishandled.

1. Tex. Ins. Code Art. 21.21

The most frequently used provision of the Texas Insurance Code is Tex. Ins. Code Art. 21.21. Article 21.21 deals with unfair competition and unfair practices. Article 21.21 § 16 provides a private cause of action to:

any person who has sustained actual damages as a result of another's engaging in any act or practice declared in §4 of this article or in the rules or regulations lawfully adopted by the Board under this article to be unfair methods of competition or unfair or deceptive acts in the business of insurance or in any practice defined by § 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action again~t a person or persons engaging in such acts or practices.

For purposes of this paper, only the relevant portions of Art. 21.21 will be discussed. The relevant portions of Art. 21.21 §4, subsection 10, are those dealing with specified acts that amount to "unfair settlement practices." These prohibited practices are statutory "bad faith" or statutory violations of the duty of"good faith and fair dealing." The

laundry list of violations is included in the Texas Insurance Code, Art. 21.21 §4. The prohibited violations can be summarized as follows:

1. Misrepresenting a material fact or policy provision relating to coverage;
2. Failing to attempt a fair settlement one liability has become reasonably clear;
3. Failing to attempt to settle a claim under one portion of a policy where liability is reasonable clear in order to influence settlement of another claim under another part of the policy;
4. Failing to affirm or deny coverage or to provide a reservation of rights letter within a reasonable time,
5. Failing to promptly provide an explanation of the basis for denial;
6. Unreasonably failing to settle, or delaying an offer to settle, under first-party coverage on the basis that third parties are responsible or that other coverage is available;
7. Attempting to enforce a full and final release when partial payment has been made except in the case of questionable or disputed claims;
8. Refusing to pay a claim without conducting a reasonable investigation;
9. (Auto Policy) delaying or refusing to settle a claim because insurance of a different type is available to satisfy all or part of a claim;
10. Requiring a claimant, as a condition of settling a claim, to produce the claimant's federal income tax returns-except 910 where ordered by a Court; (2) in claims involving fire loss; or (3) in claims that involve lost profits or income.
11. (Subsection 11) Misrepresenting the policy (defined as making a false material statement, omitting a material fact, making a misleading statement, making a material misstatement, or failing to disclose information required by law to be disclosed.

Finally, Article 21.21, §16 incorporates Tex. Bus. & Com. Code§17.46 which is more commonly known as the Texas Deceptive Trade Practice-Consumer Protection Act of the DTPA. By incorporating the laundry list contained in §17.46 of the DTPA, Article 21.21 has made available all the potential violations of the DTPA which may expand the duty of insurers under the Texas Insurance Code. Interestingly enough, the DTPA has specifically incorporated Article 21.21; consequently, most actions available under the Texas Insurance Code will be available under the DTPA as well.

The remedies available to injured parties under Article 21.21 include actual damages, reasonable and necessary attorney's fees, and if the trier of fact determines the conduct of the defendant was knowingly committed, the trier of fact may award not more than three times the actual damages. Unlike, the DTPA, the trebling of damages under the insurance code for knowing violations is mandatory. The court may also award other appropriate relief including injunction relief and recision. The Supreme Court has recently stated that to recover mental anguish damages in an Article 21.21 case, the insured must obtain a finding of "knowing conduct." State Farm Life Insurance Company v. Beaston, 907 S. W. 2d 430,437 (Tex. 1995).

Attorney's fees are available under § 16 of Art. 21.21; however, the court also has the authority to award attorney's fees to the defendant if there is a finding that any action brought under § 16 was groundless and brought in bad faith or for the purpose of harassment. This is language which tracks the DTPA statute.

Article 21.21: requires a sixty (60) day notice as a prerequisite to filing suit unless the claim under § 16 is a counter-claim. The defendant has an opportunity to make a settlement offer within the time limit. If the settlement offer turns out to be the same or substantially similar to the ultimate award, the plaintiff's recovery may be limited to the lesser of the amount tendered in the settlement offer or the actual damages.

2. Article 21.55

In 1991 the legislature has placed new burdens on insurance companies in first- party (i.e. the insurance companies insured, the policy holder) claims in Tex. Ins. Code, Art. 21.55

Art. 21. 55 § 2 sets forth a fifteen (15) day limit for an insurer to acknowledge receipt of the first party claim, commence its investigation and request all appropriate forms and information from its insured. The fifteen (15) days runs from receipt of written notification reasonably appraising the insurer of the facts relating to the claim.

Art. 21.55 §3 gives the insurer fifteen (15) business days to accept or reject a claim running from the date the insurer receives all items, statements and forms required by the insurer. There are a few limited exceptions to this strict deadline, but no more than forty-five (45) days. If a claim is rejected, the insurer is required to state the reasons.

Article 21.55 §6 sets forth the damages available for non-compliance with the provisions of Art. 21.55. In addition to the amount of the claim, the insurer will be liable for a penalty of 18% per annum plus reasonable attorney fees, The remedies of Art. 21.55 are not exclusive and are in additions to other remedies provided by common law or statute.

Texas Deceptive Trade Practices-Consumer Protection Act

Tex. Bus. & Com. Code, §§ et seq. Contain the Texas Deceptive Trade Practices- Consumer Protection Act, more commonly known as the DTPA. The DTPA is intended to provide relief for consumers as defined in Section 17.45(4). There is no privity requirement under the DTPA but in order to prevail, the plaintiff must show that he or she is an individual seeking or acquiring by purchase or lease, goods or services. In some instances this is a narrower definition than is required under the Texas Insurance Code which provides remedies for any person injured as a result of unfair or deceptive insurance practices.

The DTPA affords remedies to “consumers" as defined in the statute. A third-party -claimant is not a consumer for purposes of the DTPA.

Section 17.50 provides the remedies available to consumers. Generally, the DTPA provides a cause of action where there have been the following representative types of claims or breaches of the Act:

1. the use or employment by any person of a false, misleading, or deceptive act or practice as specifically enumerated in a subdivision of Section 17.46 of this subchapter;
2. breach of an express or implied warranty;
3. any unconscionable action or course of action by any person; or
4. the use or employment by any person of an act or practice in violation of Article 21.21 of the Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code as amended.

The first means by which a consumer can prevail against an insurer is if the insurer has engaged in an action contained in the laundry list of§17.46 of the DTPA. The most often utilized of the laundry list items contained in §17.46 are:

(3) Causing confusion or misunderstanding as to the affiliation, connection, or association with, or certification by another;

(5) Representing .that goods or services have sponsorships, approval, characteristics, ingredients, uses, benefits or quantities which they do not have or that a person has sponsorship, approval, status, affiliation or connection which he does not;

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(12) Representing that an agreement confers or involves rights, remedies or obligations which it does not have or involve, or which are prohibited by law; (23) The failure to disclose any information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

An additional cause of action under the DTPA can be brought by any person who has suffered damages as a result of the unconscionable acts or course of action by any person. §17.50(3). Section 17.45 defines "unconscionable acts or course of action" as an act or practice which:

(a) Takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(b) Results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

I have enclosed in the appendix a copy of a representative type of DTPA demand letter which also sets out the type of demand letter language utilized when asserting DTPA claims.

Finally, as previously mentioned above with regard to Article 2 1.21 of the Texas Insurance Code, the DTPA has specifically cross-referenced and incorporated violations of Article 2 1.21 and regulations issued by the State Board of Insurance as deceptive trade practices. As the State Board of Insurance has specifically incorporated Article 21.21 violations of the unfair claims settlement practices of Article 21.21-2 are therefore incorporated and actionable under the DTPA.

A prevailing consumer is also entitled to reasonable and necessary attorneys' fees as well as court costs. As in the insurance code, if there is a finding that the action was groundless and brought in bad faith or for the purpose of harassment, the defendant can be awarded reasonable and necessary attorneys' fees and court costs.

As a prerequisite to a suit, unless the statute is about to run, a party must give a sixty (60) day notice period by a DTPA demand letter, see Appendix for this letter. The insurer has an opportunity

to make a settlement offer as well as to request an inspection of certain materials within the sixty (60) day period. If the settlement offer is extended by the defendant in compliance with the DTPA within the sixty (60) days, this may be a defense to additional damages and attorneys' fees under the DTPA on a finding that the offer was the same or substantially similar to the actual damages found by the trier of fact. Again, defense counsel should seriously consider making an offer in every case in compliance with the DTPA to afford their client an opportunity to limit damages.

Timeliness- Texas Insurance Code Article 21.55

Texas Insurance Code Article 21.55 governs the prompt payment of claims and applies to any "first party" claim by an insured that must be paid directly to the insured or beneficiary .This section of the Insurance Code sets forth various statutory deadlines which must be met in the receipt and handling of a claim.

Section 2 of 21.55 requires:

1. Fifteen (15) days after receiving notice of a claim, the insurer must:
a. Acknowledge the claim;
b. Commence investigation (if any); and
c. Request all items, statements and forms reasonably believed will be required (additional requests may be made later if necessary)

Section 3(a) of Article 21.55 requires:

2. Unless the case involves the suspicion of arson (30) days, or requires additional time (up to 45 days), the insurer shall notify the claimant in writing of acceptance or rejection of the claim not later that the 15th business day after the date on which the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss

Section 3(b) of Article 21.55 requires:

3. If a reasonable basis to suspect arson exists, the insurer has 30 days from the date on which the insurer receives all items, statements, and forms in order to accept or reject the claim.

Section 3(d) and (e) states:

4. If the insurer is unable to accept or reject within the 15 day (or 30 day arson) period, during that time frame, the insurer shall notify the claimant, and provide reasons needed for additional time to make the decision. The insurer must :hen either accept or reject the claim within 45 days of the notice that additional time was needed.

Section 6 of Article 21.55 states:

5. Failure to comply with the notice provisions subjects the insurer to potential liability for an 18% per year penalty on the amount of the claim, plus attorneys fees, plus court costs.

In summation, the insurer has 15 days after receiving a claim to acknowledge the claim, begin investigating and seek items, statements, and forms from the claimant. Once all of the items, statements, and forms are received by the insurer, the insurer has 15 days to accept or reject the claim--with 2 exceptions. First, if arson is suspected, the insurer can give notice and expand the period to accept or reject the claim to 30 days. Second, if the claim decision cannot be made in either the 15 day or 45 day arson period, the insurer may provide the claimant with notice and an explanation and expand the period to make its decision by no more than 45 additional days.

Other Theories of Recovery

Although the theories described above for breach of the common law duties and the statutory duties are the strongest cases against insurers in bad faith litigation, other theories should be considered. Of course, in any case in which a claim for benefits under a policy is denied, a breach of contract theory should be asserted. The breach of contract theory does not provide the number of remedies nor the leverage in settlement as do the other bad faith theories because of the nature of a contract claim as opposed to a tort claim; however, it certainly should not be overruled. If the party can not establish a requisite breach of the duty of good faith or the statutory violations, there may well be a breach of contract cause of action. Another advantage is that a breach of contract does have a four (4) year statute of limitations unless there are shorter limitations within the policy itself that are not violative of the public policy of this state.

A breach of contract theory also will allow the recovery of attorneys fees and often times may be necessary partly from a technical standpoint to establish a bad faith denial of a proper claim under a policy. Under the Viles (infra)decision, counsel should be aware of the fact that even if a breach of contract claim is defeated there still may remain a breach of the duty of good faith and fair dealing because of the Supreme Court's recognition that the breach of the duty of good faith and fair dealing is a tort claim separate and apart from the contract action.

A fraud action is also available against insurance companies with regard to the taking of applications and the procuring of insurance. The elements of fraud are slightly more detained than are necessary under the DTPA; nonetheless, the Texas Supreme Court recently has stated that the statute of limitations in a fraud action is four years. There had been some dispute as to the statute of limitations for fraud actions, but this has been clarified and where remedies under breach of the duty of good faith and fair dealing or under the DTPA are unavailable due to the statute of limitation, one should consider a fraud action, keeping in mind the difficulty in proving some of the elements of fraud; which are:

Actual Fraud

1. A material misrepresentation;
2. False or a half truth when made which has a tendency to deceive others;
3. Made knowingly with the intention that it be relied upon;
4. It was in fact relied upon; and,
5. Damages resulted.

Constructive Fraud

This tort is almost the same as actual fraud with a minor difference:

1. A material misrepresentation is made and even though not intentionally made;
2. The representation is known to be inaccurate but no effort is made to prevent a . reliance upon the misrepresentation;
3. It was relied upon; and
4. Damages resulted.

The Supreme Court has expressly adopted the tort of intentional inflection of emotional distress in Twyman v. Twyman, 855 S. W. 2d 618 (Tex. !993). In Twyman, the Court set out the elements of this tort:

1. The Defendant acted intentionally or recklessly;
2. The conduct was extreme and outrageous;
3. The actions of Defendant caused the plaintiff emotional distress; and
4. The emotional distress suffered by the plaintiff was severe.

There are other theories that may fit a particular case, but the major theories involved in insurance litigation involving the taking of application, the denial of claims, the handling of claims and similar actions by insurance companies will generally fall under the theories and the statutes described herein.

Discovery - Practical Considerations

The following section discusses how the discovery process is employed in insurance litigation. By understanding the tactical considerations utilized by plaintiffs counsel, the reader will arrive at an understanding of what is involved in proving up an insurance bad faith case for their clients. More

importantly revealed in the discovery process, are the early actions taken by the insurance company from the moment it learns of a potential claim until the decision to pay or deny. How that conduct and decision making process; is developed during discovery will determine whether a case is a potential punitive damages case or merely a breach of contract claim or a defense verdict.

Here the lawyers strategies for case development are important to the engineers and their clients, since it is the early stages of investigation and claims process which set up either victory or a marginal recovery... or maybe none at all.

One would think that the day of the "smoking gun" document is over, yet more frequently than one might expect, incrimination memoranda still turn up during discovery. If such obvious documents do not appear a more subtle pattern must be established. Combining less incriminating document with damaging deposition testimony or historical data such as previous similar litigation often establish the requisite evidence and intent to create strong cases against carriers. As we all know, the insurance carriers have prepared their defenses very carefully to limit exposure.

The objective here for the lawyer and engineer is showing a pattern of bad faith, if at all possible. For example, the lawyers discovery should be directed toward prior/pending lawsuits and claims should be used to help demonstrate a planned intentional breach of the duty of good faith and fair dealing or violation of the appropriate statutes. The engineer should be dealing with the technical aspects objectively, from a professionally supportable position.

As everyone knows by now, insurance companies hire their engineering experts to:

(1) clothe themselves with the appearance of objectivity;

(2) to craft Clintonian type reasons for supporting their (the insurance companies) denial of the claim; and,

(3) to avoid the damages of bad faith litigation, DTPA and breach of contract claims.

As a part of the discovery process, I have enclosed in the Appendix, a representative set of Interrogatories and Request for Production of Documents in a pending case against Travelers. As you will note, the lawyer is looking for all claims and underwriting files maintained for each claim made against Travelers and subsequently denied in the past five (5) years. The client's engineer should be seeking to identify glaring misstatements in the captive engineers statement to the homeowner/insurance company in order to demonstrate lack of objectivity, error in findings and error in conclusion.

Spoliation of Evidence: Claim File Documents

Spoliation is another word for wrongful destruction. The Texas Supreme Court decided in the summer of 1998 that Texas does not recognize a cause of action for spoliation, Betco Scaffolds Company v. Houston United Casualty Ins. Co. 1999 WL605527 (Tex. App-Houston [14th District] August 12, 1999) (slip copy), and Trevino v. Ortega, 969 S,. W. 2d 950 (Tex. 1998). However, spoliation is a two edged sword which cuts both ways from an evidentiary standpoint. On the side related to the insurance carrier, the Supreme Court held that where the insurance carrier destroyed its claim file and any other evidence of the claim filed by its insured, the carrier was held by a presumption to have presumably destroyed evidence favorable to its insured. All evidence presented by the insured at trial requiring the insurance carrier to rebut such evidence was indulged in favor of the insured.

Conversely, the clients engineer, plumbing contractor, foundation repair contractor and the like may find themselves faced with a spoliation defense to their clients presentation of evidence favorable to their position for whatever the

claim. If during the repairs of the clients property damage or removal of the effected items, i.e. plumbing, pipes, electrical, soils, foundation lifting, temporary piers wherein the insurance carriers engineers claim they did not have the opportunity to inspect the items which are made the basis of the clients claim on his insurance policy, you may well face a spoliation defense to the presentation of such favorable evidence supporting your insurance claim. I have enclosed a copy of a spoliation letter sent to Travelers in the Appendix to this paper for your future reference.

Experts

With the explosion of insurance litigation has come the increased use of experts. Under the Texas Rules of Evidence, witnesses can now give opinions and testimony as to the ultimate issues in the case. This is a matter which should not be overlooked by either side. I can assure you that the insurance carriers have utilized the role of experts in litigation in such a manner as to virtually insulate themselves from most liability. Having established the policies and procedures of an insurance company and having determined how an individual claim has been handled, it can be most useful to have an expert compare the handling of the case and the policies and procedures to industry standards.

As with any expert in any litigation, time should be taken to examine the credentials and background of the experts. Properly used, an expert may prove invaluable in addressing issues to be considered even before the filing of suit. The credentials of the engineer hired by the insurance carrier should be examined carefully. Likewise the insurance engineers observations, facts, theories and conclusions should be dissected to demonstrate error, bias, flawed calculations, and erroneous conclusions. If his or her conclusions are miraculously correct, then you have saved your client a lot of money from the litigation prospective.

It is the job of the clients engineer to "set up" the insurance carrier if possible on the basis of erroneous conclusions made by the insurance engineer due to erroneous findings, and lack of objectivity or bias. The client's engineer should keep a copy of ALL engineering reports prepared by the insurance company (regardless of the case) for later use by the client's attorney and engineer by demonstrating the "cookie cutter" language found in each denial based upon the insurance carriers so-called, "independent engineering consultants." You'll be amazed by the historical similarities found in the insurance carriers engineering reports. By the same token, don't be a victim of the same tactic if you testify for many homeowners. The engineer should write his report based on personal knowledge which resulted from actual investigation done by him or her personally within the limits of his or her expertise. Rebuttal of the captive engineers report should be made on a point by point basis.

In responding to the insurance company engineers report, be advised that when you prepare your report for the client it will be discoverable, unless it is used as a consulting expert opinion only. The client's engineer should not get caught in the appearance of failing to comply with the terms of the insurance contract or give a negative appearance regarding continued good faith communications pending the resolution of a claim, or lack thereof. For example, most if not all insurance policies compel the insured to allow the insurance company the right to investigate the claim made. In doing so, the carrier will hire its engineering experts and a biased report will be written in most cases, whereupon the insurance carrier will deny the claim. In order to have the insurance carrier subjected to the greatest exposure of damages, the client will be required to disclose all information at the time such information was known for the carrier to utilize in the evaluation of his claim. Nothing is gained by not providing the carrier with all the information the client had obtained from his own engineers. Remember, it is discoverable anyway, unless it is used as a consulting report and then a testifying engineer is hired wherein his or her report is used and by the Texas Rules of Civil Procedure such report is automatically discoverable. Conversely, should you fail to provide the engineering report, you are handing the insurance carrier a defense to bad faith, damages for either of two (2) reasons:

1. You allow them to avoid punitive damages since they will simply say that, "if they had known the existence of this or that fact it would have made a difference in how they handled the claims process, (implying that they might have paid the claim); or,

2. You failed to comply with the terms of the policy by allowing or providing the insurance carrier with the relevant information to either pay or deny the claim.

Conclusion

The expansion of insurance litigation with the Arnold decision had created a great new area of practice for both plaintiffs and defendants. The expansion is over. The recent Supreme Court decisions leave little doubt the pendulum has swung back the other way although it is not swinging too far either way recently. Obtaining punitive damages

remains problematic for the insured. The basic inquiry as to whether the duty of good faith and fair dealing has been breached remains in the hands of the jury .If evidence exists supporting a finding that there was a delay or denial after the insurer's liability on the claim becomes "reasonably clear," it appears bad faith damages awards will stand.

Every insured's case must be analyzed to determine what theories are applicable and how to structure discovery to meet the desired end. From the very beginning, careful preparation of the petition and the tailoring of discovery to fit a particular case is essential to posturing a denial claim into a solid breach of the duty of good faith case for settlement or trial purposes.

Likewise, defense counsel are cognizant of the discovery that can be anticipated in bad faith insurance litigation and be prepared to address these matters. Engineers and their clients should be made aware and reminded of what conduct will subject to the insurance carrier to additional damages, punitive damages and other tort damages. The ultimate goal of the engineers representing their clients should be the placing of their clients in a posture to prevail upon presentation of their claim by the insurance carrier, without the need to result to litigation.

Legal Biography of Charles Gregory, Attorney at Law

Mr. Gregory concentrates his practice in commercial/civil trial litigation in the firm's Houston office. In 1977, he received a B.A. degree in Biology/Chemistry from Trinity University in San Antonio, Texas. In 1980, he received a J.D. degree from South Texas College of Law in Houston, Texas. In 1985, Mr. Gregory was honored as an Outstanding Young Man of America. Admitted to the State Bar of Texas 1982. Admitted to practice Federal Court, Southern and Western District of Texas 1983. Certified by Harris County Criminal District Courts for attorneys trying felony criminal cases. Mr. Gregory has litigation experience in commercial/civil trial litigation. Areas of law involved in this practice are acquisitions and mergers, (stock holder agreements, subscription agreements, buy- sell agreements, asset purchase agreements, general and limited partnership agreements) corporate, employment, commercial, and environmental law. In the area of administrative law, Mr. Gregory has represented corporations for/against the following agencies: Texas Department of Health; Texas Department of Health Bureau of Surveillance and Enforcement; Texas House of Representatives - Environmental Affairs Committee; Texas Attorney General Office - Antitrust Division. Lobbied Texas Environmental Affairs committee members to follow mandated regional land use proposals for landfill siting requirements. Other areas of practice involve trade regulations/franchise law, Deceptive Trade Practices-Consumer law, Lender Liability, Insurance Bad Faith Litigation, Intellectual Property law (non-competition agreements, employment agreements, trade secrets, patents, proprietary information).

Representative clients are Texas Disposal Systems, Inc., Pak-Mor Manufacturing Company, Thyssen Industries, AG., Kassel Germany, Nevada Bob's Discount Golf and Tennis Co., C-Air-S Mechanical Contractors, Inc.,.Commercial Money Center, Inc., Momentum Cash Systems, L.L.C., Diversified High Technologies, Inc., Suntech Building Systems, Inc., Total Roll-Off's. L.L.C., O'Rourke Petroleum Products, Inc., Technology Recovery, L.L.C., Plasticos Leon S.A. de C. v. Monterrey Mexico, SciPoint Data Solutions, L.L.C., Griffith Directional Drilling, Inc., Tri-Collar, Inc., Waste Management, Inc., CBM Engineers and many others.