THE DUTY OF GOOD FAITH AND FAIR DEALING IN WORKERS’ COMPENSATION CLAIMS

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Texas Insurance Bad Faith Litigation
THE DUTY OF GOOD FAITH AND FAIR DEALING IN WORKERS’ COMPENSATION CLAIMS

I. INTRODUCTION

Texas insurers have a duty to insureds and, in the area of workers’ compensation, to injured workers who stand in the shoes of the insured employer, to deal fairly and in good faith when investigating, adjusting, and settling claims. The duty arises from both common and statutory law. Insurer “bad faith” is, in its most general context, the breach of this duty, and it results in that insurer, and sometimes the claims handler, facing exposure for the insured’s independent causes of action for damages. Whether or not the insurer acted reasonably in investigating, adjusting, and settling claims is the key component of a bad faith cause of action. We offer the following discussion regarding insurer good faith and bad faith generally, and, more specifically, about workers’ compensation insurers extra-contractual exposure under Texas law.

II. THE EVOLUTION OF CAUSES OF ACTION FOR INSURER BAD FAITH

A. The Common Law Duty of Good Faith and Fair Dealing

The common law duty of good faith and fair dealing emerged in part because of the inherently unequal bargaining power between an insurer and its policyholders. The existence of this unequal bargaining power was the foundation for the Texas Supreme Court’s creation of the duty, owed by an insurer to the insured, to deal fairly and in good faith when investigating, adjusting and settling claims. A breach of this duty by an insurer can result in the insured having a cause of action against the carrier for damages. The cause of action for breach of the duty of good faith and fair dealing was extended to insurance companies by the Texas Supreme Court in its decision in Arnold vs. National County Mutual Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987). The Arnold court stated that a duty of good faith and fair dealing may arise out of the “special relationship,” between the insured and the carrier that is the foundation of the insurance contract.

The Supreme Court has struggled to define the duty of good faith and fair dealing within the insurance context. The definition of an insurance good faith and fair dealing claim was given its latest incarnation in Universe Life Ins. Co. v. Giles, 950 S.W.2d 48 (Tex. 1997) and tracks the language of Article 21.21 of the Texas Insurance Code:

Failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim when the insurer’s liability has become reasonably clear. State Bar of Texas, Texas Pattern Jury Charges – Business, Consumer & Employment 101 (2000).

B. The Common Law Duty of Good Faith and Fair Dealing in Workers’ Compensation Claims

In the case of Miguel Aranda vs. Ins. Co. of North America, 748 S.W.2d 210 (Tex. 1988) the Texas Supreme Court extended the duty of good faith and fair dealing extra-contractually to worker’s compensation carriers adjusting claims of insureds’ employees. Subsequently, in an opinion issued on the same day as Giles, the Texas Supreme Court also applied the good faith and fair dealing standard stated therein to workers’ compensation claims. United States Fire Ins. Co., et al v. Bessie D. Williams, 955 S.W.2d 267 (Tex. 1997).

Decided in 1988, Aranda surfaced before the legislative re-structuring of the Texas workers’ compensation system from 1989-1991. In its current structure, the Texas Workers’ Compensation Commission (“TWCC”) administers the handling and payment of workers’ compensation claims in Texas. Under authority granted to it throughout the Texas Labor Code, TWCC has adopted extensive rules that regulate these claims. Much of the frustration and confusion with the system may stem from claimants and health care providers failing to understand or comply with the pertinent provisions of the Texas Labor Code. TEX. LAB. CODE ANN. §§ 401-418 (2003) or TWCC Rules. 28 TEX. ADMIN. CODE Chapters 102-180 (2004).

Attorneys and claims professionals dealing with workers’ compensation claims may look at the Giles standard and question how it can apply to the handling of a worker’s compensation claim because of the language regarding “settlement”, as the settlement of a workers’ compensation claim in its entirety is prohibited by the Texas Labor Code. TEX. LAB. CODE ANN. § 408.005 (1993). The State Bar of Texas Pattern Jury Charge—Volume IV Committee recognized the difficulty in reconciling this fact with the common law duty in its 2000 version of the applicable Texas Pattern Jury Charges. The committee suggests a modification of the Giles-type instruction as follows:

Failing to [pay][initiate] benefits when the insurer’s liability has become reasonably clear. State Bar of Texas, Texas Pattern Jury Charges – Business, Consumer & Employment. 103.f (2000).

In a pre-Giles decision, the Supreme Court left open a second species of good faith and fair dealing claim, the suggested submission for
which in a workers’ compensation bad faith case is:

Refusing to [pay] [initiate] benefits without conducting a reasonable investigation. *Id.* See also *Republic Ins. Co. v. Stoker*, 903 S.W. 2d 338 (Tex. 1995).

The Texas Pattern Jury Charge instruction was favorably endorsed by at least one Texas appellate Court in *Bennett v. Security Insurance of Hartford*, 160 S.W.3rd 213 (Tex. App. – Dallas 2005; petition for review filed (Jun 10, 2005)).

The overlay of the administrative system on the common law duty of good faith and fair dealing has been respected by the Texas Supreme Court. In *U. S. Fire*, the first “new law” workers’ compensation bad faith case, the court found that a carrier cannot be liable for simply misinterpreting or misapplying an administrative rule. *See generally, U. S. Fire Ins. Co. v. Williams*, 955 S.W. 2d 267 (Tex. 1997).

The deference that the court gives the TWCC process was underscored at the end of 2001, when the Supreme Court handed down *American Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801 (Tex. 2001) a landmark decision in which the court held that the question of the injured worker’s entitlement to workers’ compensation benefits is a matter committed exclusively to the TWCC, and therefore, there is no cause of action that can be asserted against a workers’ compensation carrier in the absence of a determination that such benefits are due. *Id.* at 803. *Fodge* and the cases applying its holding illustrate the Supreme Court’s willingness to look to statutes to confine an insurance carrier’s duties. *Id.* See also *Henry v. Dillard Dep’t Stores*, 70 S.W.3d 808 (Tex. 2002).

The Fort Worth Court of Appeals applied *Fodge* to affirm a plea to the jurisdiction by a carrier relating to preauthorization claims that had not been ruled upon by the TWCC, but it denied the plea as to treatment that had eventually been ordered by the Medical Review Division of the TWCC. *Malish v. Pacific Employers Ins. Co.*, No. 2-02-181-CV (Tex. App. – Fort Worth, April 23, 2003). The lesson here is that if the TWCC has spoken, the case may proceed at the courthouse.

Again, the Fort Worth Court of Appeals affirmed a summary judgment in a case where the injured worker and his pain management provider sought to avoid *Fodge* and *Malish* by suing not for the wrongful denial of policy benefits, but for misrepresentation as independent tort and extra-contractual causes of action. The Fort Worth Court, citing *Fodge*, held fast to the requirement of litigating the entitlement of benefits through the TWCC before any tort or extra-contractual causes of action may be asserted. *Bone v. Utica Nat’l Ins. Co. of Texas*, No. 2-02-209-CV (Tex. App. – Fort Worth, August 7, 2003).

Nevertheless, the application of *Fodge* is not without its limits. The Fifth Circuit Court of Appeals held that when a carrier subverts the claimant’s ability to exercise administrative review, then an administrative ruling is not a pre-requisite to bringing an extra- contractual claim. *Gregson v. Zurich*, 322 F.3d 883 (5th Cir. 2002).

Finally, who can be sued for breach of the common law duty of good faith and fair dealing: In a bygone era, it was customary to sue the individual claims handler for such a breach. Since 1994, there is no cause of action against an individual claims handler for breach of the duty of good faith and fair dealing, because the individual claims handler does not meet the criteria to establish the “special relationship” between insurer and policyholder that gives rise to this non-delegable duty. *Natividad v. Alexis*, 875 S.W.2d 695 (Tex. 1994).

Other vendors to the carrier, such as experts retained to render opinions to support claim evaluation, do not owe a duty of good faith and fair dealing to the policyholder in the absence of contractual privity. *Dagley v. Haag Engineering*, 18 S.W. 3d 787 (Tex. App. – Houston [14th Dist.] 2000). Some cases have worked their way through the appellate process dealing with the question of whether a TWCC-designated doctor or a peer review doctor can be sued under a theory of conspiracy. For now, there is at least one decision from an appellate court holding that a designated doctor does not become a state actor for purposes of establishing the defense of governmental immunity. *Charles Keller & Medical Evaluation Specialists, Inc. v. Richard Locke*, 37 S.W.3d, 95 (Tex. App. – Houston [14th Dist.] 2002, pet. den.).

C. Limitations on the Common Law Duty of Good Faith and Fair Dealing

In *Republic Ins. Co. vs. Stoker*, 903 S.W.2d 338 (Tex. 1995) a Supreme Court of significantly different composition than the *Arnold* or *Aranda* courts held that the duty of good faith and fair dealing is not breached by an insurer that denies a claim erroneously if, at the time of the denial, a reasonable basis for the denial existed. *Stoker* is discussed in greater detail below.

One post-*Stoker* Court of Appeals decision holds that if there is no evidence to suggest that the insurer obtained the evidence on which it relies to deny or delay the claim in an unobjective or unfair manner, and the evidence, viewed in isolation, suggests that the claim is invalid or questionable, the carrier’s basis is reasonable as a matter of law. *Columbia Universal Life Ins. v. Miles*, 923 S.W.2d 803, 810 (Tex. App. – El Paso 1996, writ denied).
D. Statutory Provisions

The Texas Legislature has extended protection to insurance policy holders through the following laws, which are without a doubt well-known to you as a claims handler:

**Article 21.21 of the Texas Insurance Code**

Article 21.21 Section 1(a) of the Insurance Code prohibits persons from engaging in unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. Section 16(a) creates a cause of action for a person who has sustained actual damages as a result of an act or practice declared to be an unfair method of competition, or an unfair or deceptive act or practice in the business of insurance or any practice enumerated in a subdivision of section 17.46(b) of the Deceptive Trade Practices Act (“DTPA”), discussed below, as an unlawful deceptive trade practice.

The duties under Article 21.21 are owed by persons “engaged in the business of insurance, including agents, brokers, adjusters and life insurance counselors.” TEX. INS. CODE ANN. art. 21.21 Sec. 2 (a). Unlike a common law “Bad Faith” claim, an Article 21.21 claim may, therefore, be asserted against individual marketing and claims professionals.

The specific prohibited conduct of Article 21.21 can be found in subsections 10 and 11. While most sections have little if any relevance to workers’ compensation claims there are a few that appear particularly relevant. Those provisions create a cause of action for:

- misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;
- failing to attempt, in good faith, to effectuate a prompt, fair, and equitable settlement under one portion of a policy of a claim with respect to which the insurer’s liability has become reasonably clear in order to influence the claimant to settle an additional claim under another portion of the coverage;
- failing to provide promptly to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer’s denial of a claim or for the offer of a compromise settlement of a claim;
- refusing to pay a claim without conducting a reasonable investigation with respect to the claim. TEX. INS. CODE ANN. art. 21.21 §§ 4 (10) & (11) (Vernon Supp. 2004).

**DTPA**

The DTPA is intended to protect consumers against false, misleading and deceptive business practices. TEX. BUS. & COM. CODE ANN. §§ 17.01, et seq. (Vernon 2004). An action under the DTPA must be brought by a “consumer.” The DTPA defines “consumer” in section 17.45(4) as an individual, partnership, or corporation, who seeks or acquires by purchase or lease any goods or services. The term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

The issuance of an insurance policy has been held to be a service. McNeill vs. McDavid Insurance Agency, 594 S.W.2d 198 (Tex. Civ. App.—Fort Worth 1980, no writ). Thus, the DTPA applies to the purchase of an insurance policy, and probably applies to first-party claims handling. One Austin Court of Appeals case held in an insurance claims handling/DTPA case that “the circumstances must justify a conclusion that the contracting parties intended that the stranger (to the contract) have the use and benefit of the goods and services furnished under the contract. Keightley v. Republic Ins. Co., 946 S.W.2d 124, 128 (Tex. App. — Austin 1997). While many plaintiffs argue that a workers’ compensation claimant should have consumer status as an intended beneficiary of a policy, at least one court has rejected consumer status for workers’ compensation claimants. Rodriguez v. TEIA, 598 S.W.2d., 677 (Tex. App. – Fort Worth 1980; writ ref’d n.r.e.)

**III. SPECIFIC EXAMPLES OF THE APPLICATION OF THE COMMON LAW DUTY OF GOOD FAITH AND FAIR DEALING**

**A. Claims Investigation**

In Republic Ins. Co. vs. Stoker, 903 S.W.2d 338 (Tex. 1995) an unidentified vehicle dropped some furniture on the highway causing a chain reaction collision. None of the vehicles involved in the accident made contact with the driver of the unidentified vehicle. The Stokers filed an uninsured motorist (“UM”) claim with Republic, who denied their claim on the basis that Mrs. Stoker was more than fifty percent responsible for the collision, although it should have been clear to Republic that there was no coverage because the “actual physical contact” requirement under the insured motorist provision of the policy had not been met.

The Stokers sued Republic and prevailed on their assertion that Republic breached the duty of good faith and fair dealing in not denying their claim for a valid reason. The Court of Appeals affirmed the judgment favoring the Stokers, essentially relying on the fact that Republic did not cite the coverage issue in denying their claim. Simply put, Republic reached the correct result, denial, for the wrong reason.

However, the Texas Supreme Court disagreed with the court of appeals, holding that the most important element to determine if the carrier made a good faith denial of a claim is the set of facts in existence when the
carrier made its decision. The court stated: “what is dispositive is whether, based upon the facts existing at the time of the denial, a reasonable insurer would have denied the claim.” Id. at 341.

The Supreme Court nevertheless left the door open to a narrow set of circumstances that might support a bad faith cause of action, even when insurance coverage is absent. They are (1) conduct by an insurance company so extreme that it causes injury independent of the insurance claim; and (2) failure to timely investigate an insured’s claim. Id. at 341. Note however, that the Fodge court held that the extra-contractual exposure for the denial of a non-covered claim is not a possibility because of detailed regulatory process. American Motorist v. Fodge, 63 S.W.3d, 301 (Tex. 2001).

B. Reliance on Experts

In Lyons vs. Millers Casualty Ins. Co., 866 S.W. 2d 597 (Tex. 1993) the policyholder filed a property damage claim for damage to a portion of the exterior of her home allegedly due to a windstorm. Millers hired a reconstruction expert who reported that the damage was due to settling of the foundation and rotted wood. Mrs. Lyons did not agree with the conclusion, and Millers then hired a professional engineer who agreed with the first expert. Mrs. Lyons hired an expert who reported that the damage had been caused by the windstorm. She then sued Millers on theories that included breach of the duty of good faith and fair dealing.

At the trial, Mrs. Lyons and two neighbors testified there was no prior damage and that the storm had knocked over a tree away from the house. The jury found that the windstorm had caused 25 percent of the problems and that Millers had breached the duty of good faith and fair dealing.

In reviewing the case, the Supreme Court noted that in some instances, evidence of coverage would support a finding that there was no reasonable basis for denying a claim. Nevertheless, the Supreme Court stated that the existence of bad faith is not determined solely by whether the claim was valid, but on the reasonableness of the insurer’s conduct in rejecting the claim.

Stated another way, the court felt that review of the carrier’s conduct should focus on how it reached its denial decision, and not simply that the carrier was incorrect in its denial. The court went on to note that there was no evidence that Millers’ experts did not act objectively, or that Millers unreasonably relied on their reports. This appears to be the rationale followed by the El Paso Court in the Miles case discussed above.

Regarding claims professionals’ reliance on peer reviewers, in a landmark case, State Farm Lloyds v. Nicolau, 951 S.W.2d 444 (Tex. 1997) the Texas Supreme Court identified the type of evidence that could allow a jury to infer that a peer reviewer’s report was not objectively prepared:

1. the expert’s firm performed a substantial amount of work for insurance carriers;
2. a high percentage of the expert’s individual work is performed for insurance carriers;
3. the expert was aware that the carrier would be required to pay the claim if he made findings in favor of the policyholder; and
4. the expert was selected because the carrier knew the expert’s general view of this type of claim would be favorable to his position. Id. at 448-450.

Although the Supreme Court expressed the view that this type of evidence would not always be evidence of bad faith, it nevertheless concluded that this evidence taken as a whole was legally sufficient to support the jury’s conclusion that it was unreasonable for the carrier to rely on the expert’s opinion. Thus, choosing a peer review doctor because of a conservative tendency or a track record favoring the carrier’s position may be a perilous undertaking.

Expert shopping has also been found to give rise to bad faith exposure. In Liberty Mutual v. Crane, 898 S.W.2d, 944 (Tex. App. – Beaumont 1995, no writ), the Beaumont Court addressed the adjuster’s refusal to pay for surgery related to a carpal tunnel claim. The treating doctor, selected by agreement of the parties, recommended surgery. The carrier rejected the treating doctor’s opinion, its own peer review doctor’s opinion, and then sought a third opinion. The court held that there was ample evidence that the carrier pressed on in a “dogged pursuit of a predetermined course of action to deny the claim” as opposed to a reasonable investigation. Id. at 950.

C. Reliance on Controlling Law

Carriers are generally on stable ground in situations where a claim is denied based upon the application of controlling law. Two case examples illustrate this point.

In North American Shipbuilding, Inc. v. Southern Marine & Aviation Underwriting, 930 S.W. 2d 829 (Tex. App. — Houston [1st Dist.] 1996, no writ) a claim based upon numerous defects in a ship hull that required eight to ten months to repair was denied based, in part, upon the holding of a Fifth Circuit case that the policy language at issue did not cover the cost to repair “faulty initial construction.”

The trial court granted a summary judgment in favor of Southern Marine & Aviation, which was affirmed by the court of appeals on the basis that the case law taking the claim out of coverage provided a reasonable basis upon which to deny the claim. The court further commented that even if the controlling case did not take the claim out of coverage, “its close similarity to this case constitutes a reasonable basis for the Underwriters to have denied coverage.” Id. at 835.
The San Antonio Court of Appeals was faced with a question regarding the effect of controlling case law in *Saunders v. Commonwealth Lloyd’s Insurance Company*, 928 S.W. 2d 322 (Tex. App. — San Antonio 1996, no writ). The Saunders’ home, which was community property, was destroyed by fire. There was evidence that Mr. Saunders deliberately started the fire, which resulted in one criminal conviction that was subsequently overturned and led to a jury finding in the breach of contract claim that Mr. Saunders was responsible for the arson fire.

Commonwealth denied the claim on the basis of Texas decisions holding that as a matter of law, an innocent spouse cannot recover for the destruction of community property by the arson of a culpable spouse. The summary judgment granted against Mr. Saunders was upheld on appeal because the controlling case law provided a reasonable basis upon which to deny the claim. *Id.* at 325.

D. Untimely Payment of Benefits

*Transportation Ins. Co. vs. Moriel*, 879 S.W.2d 10 (Tex. 1994) is another landmark Supreme Court case that includes a holding regarding the duty of good faith and fair dealing.

*Moriel* involved a worker’s compensation claim where the carrier was alleged to have delayed paying for medical bills associated with the claimant’s impotence, which was asserted to be related to the compensable injury. The jury awarded actual and punitive damages after finding that the carrier breached the duty of good faith and fair dealing by delaying the processing and paying of the medical bills in question.

In its discussion of the case, the Supreme Court listed conduct which would not be considered a breach of the duty of good faith and fair dealing. The list included:

1. evidence that merely shows a bona fide dispute as to liability;
2. evidence the carrier was incorrect about the factual basis for its determination about proper construction of the insurance policy; and
3. a simple disagreement among experts about whether the cause of the loss is one covered by the policy. *Id.* at 17-19.

The Supreme Court reiterated the standard it had set forth in *Aranda* requiring an insured to prove “that the insurer had no reasonable basis for denying or delaying payment of the claim, and that it knew or should have known of that fact.”

The *Morial* Court further defined the conduct necessary to impose liability for punitive damages on the carrier:

“In general ... an insurance Carrier’s refusal to pay a claim cannot justify punishment unless the insurer was actually aware that its action would probably result in extraordinary harm not ordinarily associated with breach of contract or bad faith denial of a claim, such as death, grievous physical injury or financial ruin.” *Id.* at 19.

IV. DISCOVERY IN BAD FAITH CASES

There is little case law addressing discovery in workers’ compensation “Bad Faith” litigation. Many plaintiffs argue that the scope of discovery in a lawsuit alleging a breach of the duty of good faith and fair dealing can be summarized in two words: *almost unlimited*. A comment from a plaintiff’s lawyer regarding how to seek discovery from an insurance carrier sums up what you can expect from the plaintiff in a bad faith lawsuit:

“The big insurance companies are bureaucratic engines fueled by masses of paper. It is claimants’ counsel’s responsibility to obtain copies of that paper, determine which documents help or hurt the case, and identify what’s missing. Items absent from an insurer’s claims file may prove to be as revealing as those which are present.”


Mr. Ball, who writes frequently on the use of computers and the internet in law practice, might update the aforementioned passage to “fueled by masses of electronic data entries.”

However, like all litigation, discovery is limited to those matters that are relevant and reasonably calculated to lead to the discovery of admissible evidence. While Plaintiff’s counsel will generally seek to parade every denial, dispute or adjustment of payment before the jury, the Supreme Court tells us that only those matters that have been adjudicated by the Commission and found owing are within the courts jurisdiction to litigate. Fodge, 63 S.W. 3d, 801. As such, it may be wise to seek to limit discovery to the extent it is relevant to the specific denial that forms the basis of the complaint. Discovery requests often also seek information relating to other workers’ compensation claim files. A carrier’s ability to disclose that information is questionable. Generally, a party should not be required to disclose information of non-parties that constitutes an invasion of those non-parties’ personal and constitutional privacy right. *Tex. R. Civ. P. 192.6(b); Hoffman v. Fifth Ct. of App.*, 756 S.W.2d 723, 723 (Tex. 1988). Additionally, the medical records contained in the claim files is generally confidential and not subject to disclosure to third parties. *In Re Charles Xeller, M.D.*, 6 S.W.3d, 618,
626 (Tex. App.- Houston [14TH Dist.] 1999, no pet.). Finally, The Texas Labor Code explicitly states that the TWCC is not to disclose confidential claim information. TEX. LAB. CODE ANN. § 402.086. The Labor Code furthers this confidentiality in § 402.091 where it specifically forbids any person, not just the Commission, from knowingly, intentionally, or recklessly publishing, disclosing, or distributing information that is confidential under the subchapter to persons not authorized to receive the information directly from the TWCC. Construing these two sections together, one must question the ability of a carrier to produce third party claim information in response to discovery requests.

V. DAMAGES IN A “BAD FAITH” LAWSUIT

A. Article 21.21 § 16

Article 21.21 § 16(b) of the Insurance Code provides that a person who prevails in a suit filed under this section may obtain the amount of actual damages plus court costs and reasonable and necessary attorneys’ fees. If the fact finder determines that the defendant knowingly committed the acts complained of, it may also award up to three times the amount of actual damages or enjoin the defendant from committing such acts or failing to act or any other relief which the court deems appropriate.

1. Actual Damages

The term “actual damages” is not defined in the statute. Therefore, courts have construed this term to mean damages that are recoverable at common law. Such damages include:

a. Value of the policy benefits wrongly withheld.

In cases that are not workers’ compensation claims, the value of the policy benefits wrongly withheld; however, in a workers’ compensation bad faith context the claimant can only recover those damages that are separate and produces independent injury from the caused workers’ compensation claim. Aranda v. Insurance Co. of North America, 748 S.W.2d, 210 (Tex. 1988). Therefore, whatever elements of damages are pled, they must be separate and distinct to the injuries arising out of the work-related injury.

b. Mental Anguish

Damages for mental anguish are not recoverable under Article 21.21 unless the fact finder determines that the defendant committed wrongful acts knowingly. The plaintiff is not required to establish a physical manifestation of the mental anguish in order to recover such. However, the plaintiff must establish that such anguish is more than mere worry, anxiety or embarrassment. The courts of appeals are divided on unclear whether a plaintiff must establish entitlement to actual damages before damages for mental anguish only can be awarded.

c. Loss of Earning Capacity

d. Loss of Credit and/or Credit Reputation

The amount of damages awarded for such an injury is within the fact finder’s discretion because it is difficult to quantify the loss of credit reputation. The plaintiff need only establish that the denial of credit was due to delinquencies that otherwise would have been satisfied had the policy benefits been paid.

e. Interest

Whether pre-judgment interest is considered part of “actual damages” is somewhat unclear. If such interest can be included as “actual damages,” it may be trebled. However, if it is not considered part of “actual damages,” it is not subject to trebling by the fact finder. Courts of appeals have split on this issue also;

2. Taxable Court Costs

3. Reasonable and Necessary Attorneys’ Fees

The amount and reasonableness of attorneys’ fees are decided by the fact finder. An award of such fees will not be disturbed unless the defendant can establish that the amount awarded was an abuse of discretion.

Attorneys’ fees are not recoverable when the plaintiff has not sustained actual damages. Further, such fees are not recoverable in an action sought for the breach of the duty of good faith and fair dealing when asserted as a common law cause of action only.

There is also a split of authority on whether attorneys’ fees are deemed “actual damages.” As with pre-judgment interest, if attorneys’ fees are deemed “actual damages,” then they are subject to trebling.

4. Treble Damages

As stated previously, if the fact finder determines that a defendant knowingly committed acts prohibited under Article 21.21, it may award up to three times the amount of the actual damages. “Knowingly” is defined in the statute as the “actual awareness of the falsity, unfairness, or deception of the act or practice made the basis for a claim for damages”. Although not characterized as such, these type of damages are often deemed punitive in nature. Treble damages cannot be awarded unless the plaintiff has sustained actual damages.

Additionally, a plaintiff cannot simultaneously recover treble damages under Article 21.21 and common law punitive damages. The plaintiff must elect a remedy in cases where the plaintiff alleges common law causes of action and statutory causes of action for the same conduct. The Texas Civil Practices and Remedies Code, section 41.004(b) provides that exemplary or punitive damages may not be awarded to a plaintiff who is seeking to multiply damages under another statute.
B. Punitive Damages

Under the Texas Supreme Court decision in *Transportation Ins. Co. v. Moriel*, 879 S.W. 2d 10 (Tex. 1994) punitive damages in a bad faith claim requires a showing, as referenced above, of:

1. Evidence that the carrier had actual awareness of an extreme risk created by in carrier’s conduct; and
2. Risk of an extraordinary harm such as death, grievous personal injury or genuine likelihood of financial catastrophe. *Id.* at 19.

VI. CONCLUSION

There are common law and statutory duties that the insurer and insurance claims professionals must respect when dealing with workers’ compensation claims. The breach of these duties results in insurer exposure to the independent causes of action of insureds and claimants and multiple levels of recoverable damages. The key to assisting insurer clients to prevent extra-contractual exposure is to encourage insurer clients to instill reasonable, consistent, and sound claims handling procedures to fulfill their legal duties.