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Duties During Litigation

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Texas bad faith law is replete with examples of the duties owed by an insurer to an insured when handling a claim. Not only do an array of statutes govern claims handling, case law provides myriad examples of exactly what is and is not bad faith. Nevertheless, little guidance exists what duties are owed during litigation between insurer and insured. Whether any such duties end due to the changed relationship between the parties has never been directly addressed by Texas courts, and while several have dealt with the admissibility of litigation evidence, the overarching concept of continuing duties of good faith is absent from Texas case law.

This paper examines the hints that Texas cases and statutory law provide as to whether any duties of good faith extend into litigation. We first examine the changed nature of the relationship between the parties after litigation has been filed. We then consider Texas and nationwide case law dealing with the question of whether an insurer's actions during litigation can be used as evidence during a bad faith case. Finally, we examine the statutory scheme of the Texas Insurance Code to determine if and how the duty of good faith continues to apply in litigation. As will be seen, significant policy concerns underlie the arguments of both insurer and policyholder.

A. **Different Roles, Different Duties: How Litigation Alters the Relationship Between Insurer and Insured**

Over time, the basic definition of good faith and fair dealing has become almost rote to most Texas lawyers. But to fully understand the nature of the duty in the post-litigation context, it is helpful to start at the very beginning of Texas bad faith law, and examine what exactly the Texas Supreme Court stated when it adopted the duty into Texas common law. The adoption of a common law cause of action for bad faith first began with *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 164 (Tex. 1987). In *Arnold*, the Court explained:

In the insurance context a special relationship arises out of the parties' *unequal bargaining power* and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insured's misfortunes in bargaining for settlement or resolution of the claims...

Likewise, "[t]he nature of the relationship between the parties, not merely the existence of the contract alone, is the essential factor in determining whether such a duty exists." *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 71 (Tex. 1997).

These points are important when dealing with post-litigation duties because litigation inherently evens the playing field between insurer and insured. Both parties have counsel, both are protected by the rules of evidence and procedure, and both generally have an equal opportunity to present their case to a jury. This would seem to match the Supreme Court's description of the basis for the duty:

In the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of *claims*. In addition, without such a cause of action insurers can arbitrarily deny coverage and delay payment of a *claim* with no more penalty than interest on the amount owed. An insurance company has exclusive control over the *evaluation, processing and denial of claims*. For these reasons, a duty [of good faith and fair dealing] is imposed....

Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 71 (Tex. 1997) (emphasis in original), *citing Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 212 (Tex. 1988). Thus, it would seem that the foundational premise of the duty of good faith and fair dealing disappears when litigation ensues.

This conclusion is bolstered somewhat by the Texas Supreme Court's ruling in *Mid-Century Ins. Co. v. Boyte*, 80 S.W.3d 546 (Tex. 2002) (per curiam). In *Boyte*, Mid-Century's insured, Randy Boyte, was injured in a car wreck with a third-party tortfeasor. *Id.* at 547. After the tortfeasor's insurer tendered its \$100,000 policy limits, Boyte made an underinsured motorist claim with Mid-Century. *Id.* Mid-Century valued the claim at \$120,000 and promptly tendered the \$20,000 difference to Boyte. *Id.* Boyte, however, contended that his claim was worth more than \$200,000 and brought suit to recover it from Mid-Century. *Id.* After the case proceeded to trial, a jury found in Boyte's favor and awarded the \$100,000 difference between his estimate and Mid-Century's. *Id.*

After the trial court rendered judgment, Boyte informed Mid-Century that he was in need of urgent surgery. *Id.* Mid-Century offered to pay for the surgery and post-surgery therapy, but refused to pay the full amount of the judgment while its appeal was pending. *Id.* Mid-Century's appeal was affirmed by the Fort Worth Court of Appeals and the Supreme Court denied its petition for review. *Id.* Following the appeal, Boyte brought suit against Mid-Century and contended that its refusal to pay the entire judgment in spite of the appeal amounted to bad faith and violations of then-Article 21.21 of the Texas Insurance Code. *Id.* That case resulted in another finding for Boyte and affirmance by the Fort Worth Court of Appeals. *Id.* In reviewing the situation, however, the Texas Supreme Court disagreed that the duty of good faith and fair dealing applied to the second portion of litigation. *Id.* at 548.

The Supreme Court began its analysis by recalling that the basis of the duty of good faith and fair dealing rests on the inherently unequal bargaining power between insurer and insured. *Id.*, *citing Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 71 (Tex. 1997). Once a party becomes a judgment creditor, it holds the protections afforded by the "judgment enforcement mechanisms" of the Texas Rules of Civil Procedure. According to the Court, the ability of a party to supersede a judgment while on appeal does not change the result. *Id.* Judgment creditors are not left vulnerable, but have access to a number of enforcement remedies, including execution. *Id.* Moreover, any temporary suspension of those remedies, is not brought about by a disparity of bargaining power between the parties, but by the procedural rules designed to facilitate appeals. *Id.* Those rules essentially level the playing-field between the parties, or at least are designed to. As such, they could not stand as the basis for a bad faith action.

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