Bad Faith Claims Practices in Texas: Do They Exist: Extending a Bad Faith Cause of Action of Texas Workers' Compensation Insurance Claimants.

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I. Introduction

On January 15, Joseph Smith, an employee of Acme Manufacturing Com-

pany, injured his lower back while attempting to lift a crate onto a delivery truck. Following thorough examinations, three physicians separately concluded that he would be unable to work for an indefinite period of time, thus entitling him to workers' compensation benefits. Over several months, Smith regularly received his weekly payments from ABC Insurance, Acme's compensation carrier. A fourth physician, asked by the carrier to evaluate Smith, believed he was able to return to work. Without warning to Smith, ABC ordered the discontinuance of the payments based on these findings. The cessation of payments left Smith economically strained and emotionally distraught. Unable to work and without other funds, he wondered if he would be able to adequately support a wife and three children, as well as keep up the mortgage payments on his six-year-old home. After a lengthy delay and under considerable stress, Smith settled his case with ABC for an amount far below what he believed he was entitled to rather than face the possibility of economic ruin.[1]

The above scenario, although not uncommon,[2] is the exception and not the rule, in that most workers' compensation claims are handled quickly and in good faith by the insurance carrier. Nevertheless, under current Texas law, if a carrier unreasonably or intentionally refuses or delays paying benefits which results in either financial or emotional distress, a Texas workers' compensation claimant is without the recourse of either an adequate statutory remedy[3] or a common-law bad faith action.[4] Although the claimant

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1. The above mentioned scenario is purely hypothetical and no reference is intended toward any parties existing at this time or at any time in the past.

2. *See, e.g.,* Robertson v. Travelers Ins. Co., 427 N.E.2d 302, 306 (Ill. App. Ct. 1981) (action for intentional infliction of emotional distress resulting from insurer deliberately stalling compensation claim causing statute of limitations to run); Massey v. Armco Steel Co., 635 S.W.2d 596, 597 (Tex. Civ. App.—Houston [14th Dist.] 1982) (action for breach of duty of good faith and fair dealing owed under insurance contract and for intentional infliction of emotional distress resulting from bad faith settlement practices), *rev'd on other grounds,* 652 S.W.2d 932 (Tex. 1983); Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 221 (Wis. 1979) (damages for intentional infliction of emotional distress occasioned from insurance adjustor's termination of payments resulting in claimant's eviction from home). For cases from other jurisdictions that have been brought by workers' compensation claimants for either intentional infliction of emotional distress or for intentional harassment resulting from delay or termination of benefits (i.e., bad faith actions), see, e.g., Escobedo v. American Employers Ins. Co., 547 F.2d 544, 544 (10th Cir. 1977); Wilkens v. West Point-Pepperell, Inc., 397 So. 2d 115, 117 (Ala. 1981); Sullivan v. Liberty Mut. Ins. Co., 367 So. 2d 658, 659 (Fla. Dist. Ct. App. 1979). For a list and analysis of more cases in this area, see 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.34(c), at n.49.19-.20 (1982 & Supp. 1983).

3. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 18a(a), (b) (Vernon Supp. 1985). The penalty provision, "not to exceed 15 percent of the weekly indemnity compensation then past due," is intended to remedy the claimant if the carrier or employer fails to pay, or exercises unreasonable delay in paying, the claimant's benefits. *See id.* § 18a(b). These penalty provisions are usually applicable to misconduct of an insurer which is not necessarily intentional in nature, such as delay, mismanagement, or deficient administrative procedures. *See* Massey v.

has some remedies under the Texas statutes,[5] they are most likely inadequate when the claimant has suffered financial and personal hardships as a result of the termination of his benefits.[6] It is, therefore, imperative that a remedy be judicially molded or legislatively enacted to adequately compensate a claimant when a carrier unjustifiably denies an employee's claim.[7]

This comment will focus generally on the development of the tort of bad faith in relation to insurance law and workers' compensation cases. It will also explore the viability of extending this bad faith cause of action to workers' compensation claimants in Texas.

Armco Steel Co., 635 S.W.2d 596, 604 (Tex. App.—Houston [14th Dist.] 1982) (James, J., dissenting) (discussing inadequacy of penalty provisions of art. 8306, § 18), *rev'd on other grounds,* 652 S.W.2d 932 (Tex. 1983).

4. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983). In *Massey,* the claimant alleged that the carrier breached the "duty of good faith and fair dealing owed under a contract of insurance and sought damages for intentional infliction of emotional distress." *See id.* at 933. Summary judgment was granted by the trial court against the claimant and was affirmed by the court of appeals under the premise that the workers' compensation statute provides an employee's exclusive remedy. *See* Massey v. Armco Steel Co., 635 S.W.2d 596, 598 (Tex. App.—Houston [14th Dist.] 1982), *rev'd on other grounds,* 652 S.W.2d 932 (Tex. 1983). The supreme court, however, reversed the decision of the appellate court and remanded the case to resolve a technical point, leaving the issue in *Massey* unresolved. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983); *see also* Brousseau, *Workers' Compensation, Annual Survey of Texas Law,* 38 SW. L.J. 345, 357 (1984) (discussion of exclusivity of remedy provision in relation to *Massey* decision).

5. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon Supp. 1985); *see also* Grove Mfg. Co. v. Cardinal Constr. Co., 534 S.W.2d 153, 155 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (employee waives cause of action for intentional tort if he proceeds under workers' compensation act). *See generally* 2A A. LARSON, WORKMEN'S COMPENSATION LAW §§ 65.00-67.50 (1982 & Supp. 1983) (comprehensive review of exclusiveness of workers' compensation remedy).

6. *See* Comment, *Bad Faith Refusal of Insurance Companies to Pay First Party Benefits—Time for the Illinois Supreme Court to Recognize the Tort and Resulting Punitive Damages,* 1984 S. ILL. L.J. 121, 140-41 (discussing policy considerations behind acceptance of bad faith tort).

7. *See* Hayes v. Aetna Fire Underwriters, 609 P.2d 257, 262 (Mont. 1980). Finding that the statutory remedies were inadequate to redress a compensation claimant for harm suffered as a result of the insurer's bad faith, Justice Daly, of the Montana Supreme Court, stated:

> The compensation Act should not be a "shield" which will insulate those who would engage in intentional wrongdoing in the settlement and investigation of workers' claims. No one should be allowed intentionally or tortiously to cut-off a claimant unilaterally for whatever purpose they choose and then hide behind workers' compensation exclusively in assurance that the only retribution will come in the form of a compensation penalty paid for by society.

See id. at 262.

II. EVOLUTION OF THE TORT OF BAD FAITH

A. *Its California Roots*

The tort of "bad faith"[8] in the performance and settlement of an insurance contract was pioneered by the California courts.[9] Initially, these courts allowed a third party claimant to recover in excess of the policy limits for an insurer's bad faith refusal to settle.[10] The early decisions were not based wholly on tort principles, but instead were founded on the insurer's violation of an implied covenant of good faith and fair dealing in an insurance contract.[11]

The bad faith rationale applied in third party situations was later extended to a first party claim.[12] This decision, however, was based on completely

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8. *See* J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 1612, at 368 (1981). Bad faith conduct of an insurer in settling a claim has been construed as being any unreasonable refusal to pay when the insurer lacks probable cause for withholding the payments. *See id.* at 368.

9. *See id.* § 8877, at 283-91 (California pioneered tort of bad faith and its doctrines have swept field of jurisprudence).

10. *See* Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 200 (Cal. 1958); Crisci v. Security Ins. Co., 426 P.2d 173, 178-79, 58 Cal. Rptr. 13, 16 (1967); *see also* Harman, *An Insurer's Liability for the Tort of Bad Faith,* 42 MONT. L. REV. 67, 70-72 (1981) (analysis of early California decisions in development of tort of bad faith); Comment, *Tort Liability for an Insurer's Bad Faith Refusal to Settle: A Developing Trend Appropriate for Adoption in Missouri,* 45 MO. L. REV. 103, 106-10 (1980) (comprehensively traces development of "third-party excess judgment cases" in development of bad faith tort actions); Note, *Tort of Bad Faith Adopted to Address Insurer's Unreasonable Conduct in Settling Valid Claims—Bibeault v. Hanover Ins. Co.,* 15 SUFFOLK U.L. REV. 651, 654 (1981) (discussion of California rulings giving rise to tort of bad faith).

11. *See* Crisci v. Security Ins. Co., 426 P.2d 173, 178-79, 58 Cal. Rptr. 13, 16-17 (1967) (first case to recognize action based in both tort and contract for insurer's breach of implied duty of good faith and fair dealing); Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 200-02 (Cal. 1958) (insurer's refusal to defend insured and accept reasonable settlement offer constituted breach of implied duty to act in good faith); Brown v. Guarantee Ins. Co., 319 P.2d 69, 75 (Cal. Ct. App. 1957) (insurer's bad faith in settlement process arose from contractual duties, rather than negligence). Additionally, the *Comunale* court found the insurer's duty to act in good faith stems from its duty to consider the interests of its insured as it would its own. *See* Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 201 (Cal. 1958).

12. *See* Fletcher v. Western Nat'l Life Ins. Co., 89 Cal. Rptr. 78, 93 (Ct. App. 1970) (first party claimant recovers as result of company's bad faith); *see also* Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037, 108 Cal. Rptr. 480, 485 (1973). The *Gruenberg* court discussed the distinction between first and third party actions. *See id.* at 1037, 108 Cal. Rptr. at 485. Third party bad faith cases usually involve the insurer's "duty to accept reasonable settlements" when handling a claim against its insured brought by a third party under a liability policy. Alternatively, first party bad faith cases generally revolve around the insurer's bad faith refusal to pay valid claims of its own insured under an insurance contract. *See id.* at 1037, 108 Cal. Rptr. at 485. Stated differently, first party insurance pays the policyholder for her own losses, whereas, third party insurance shields the insured from liability claims brought by others. *See*

independent grounds from that of a breach of contract action.[13] The court allowed an insured to recover against a disability insurer under the tort of intentional infliction of emotional distress for the insurer's malicious withholding of benefits.[14] However, the apparent difficulty in establishing evidentiary proof that an insurer "intentionally" inflicted emotional distress on the insured[15] led to the landmark decision of *Gruenberg v. Aetna Insurance Co.*[16] The California Supreme Court, in *Gruenberg,* relaxed the strict evidentiary standards previously required[17] and for the first time recognized a separate first party tort claim when an insurer "unreasonably and in bad faith" refused to pay an insured's valid claim.[18]

B. *The Gruenberg Doctrine of Bad Faith*

The *Gruenberg* case found that implicit in every insurance contract is an insurer's duty to act reasonably and in good faith when processing a claim of its own insured.[19] This responsibility was found to apply not only to the

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Comment, *Tort of Insurer's Bad Faith Refusal to Pay First Party Claims,* 82 W. VA. L. REV. 579, 579 & n.1 (1980).

13. *See* Fletcher v. Western Nat'l Life Ins. Co., 89 Cal. Rptr. 78, 93 (Ct. App. 1970).

14. *See id.* at 93. In *Fletcher,* the insurer cut off the plaintiff's disability payments due him under a contract of insurance, notwithstanding innumerable medical reports confirming the plaintiff's disability. *See id.* at 84. Due to the intentional termination of his benefits, the plaintiff almost lost his home and other property. *See id.* at 87. In addition, his family was lacking for food, and he was eventually forced to "gather" money from neighbors to have his electricity restored. *See id.* at 87. Considering the egregious conduct of the insurer in *Fletcher,* the court had little difficulty extending a cause of action for intentional infliction of emotional distress to first party claimants. *See id.* at 93-94; *see also* Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention,* 13 PAC. L.J. 833, 837 (1982) (noting facts of *Fletcher* were conducive to extension of third party law to first party situation).

15. *See* Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1, 4 (7th Cir. 1972) (plaintiff must prove four elements of emotional distress as well as clearly outrageous conduct); *see also* RESTATEMENT (SECOND) OF TORTS § 46 (1965) (plaintiff's burden of proof to show defendant's conduct was intentional, outrageous, and proximate cause of emotional distress); W. PROSSER & W.P. KEETON, HANDBOOK OF THE LAW OF TORTS § 12, at 54 (5th ed. 1984) (noting one main drawback of grounding action in tort for intentional infliction of emotional distress is "difficulty of proof").

16. 510 P.2d 1032, 1037-38, 108 Cal. Rptr. 480, 485-86 (1973) (relying on *Comunale, Crisci,* and *Fletcher* in recognition of tort of bad faith).

17. *See id.* at 1038, 108 Cal. Rptr. at 486; *see also* Parks & Heil, *The Tort of "Bad Faith"—The Impact of Gruenberg v. Aetna Insurance Company,* 24 FED'N INS. COUNS. Q., Spring 1974, at 3, 14 (*Gruenberg* may establish standard of proof of something less than intent to recover for tort of bad faith); Schuessler, *First Party Bad Faith: Should It Be Extended To Workers' Compensation Cases?,* 34 FED'N INS. COUNS. Q., Winter 1984, at 199, 201 (noting that *Gruenberg* decision relaxes standard of proof from intentional to reasonableness standard).

18. *See* Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1038, 108 Cal. Rptr. 480, 486 (1973).

19. *See id.* at 1037, 108 Cal. Rptr. at 485. The plaintiff owned a cocktail lounge and

policy requirements to settle, defend, and pay, but also to the insurer's duty to carry out those contractual obligations in good faith.[20] Accordingly, a violation of this duty was deemed a tort when an insurer "maliciously and without probable cause" or "unreasonably and in bad faith" withheld payments in an attempt to injure or deprive an insured of his benefits under the policy.[21]

The *Gruenberg* case is particularly significant because the court found that the plaintiff was entitled to recover for emotional distress damages even in the absence of "extreme" or "outrageous" conduct on the part of the insurer.[22] The court's reasoning, therefore, gives credence to the proposition that the evidentiary basis for the tort of bad faith is less stringent than that of intentional infliction of emotional distress.[23] Nevertheless, after *Gruenberg,*

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restaurant which was destroyed by fire. The structure was insured by three insurance companies which subsequently hired a private adjustor to investigate the claim. While investigating the claim, the adjustor mentioned to an arson investigator that the plaintiff carried excess insurance coverage on the building. Three days later the plaintiff was charged with arson and defrauding an insurer in connection with the fire. *See id.* at 1034, 108 Cal. Rptr. at 482. Both charges, however, were later dismissed due to lack of probable cause. *See id.* at 1035, 108 Cal. Rptr. at 483. In processing the claim, the insurer's counsel demanded that the plaintiff submit to an examination concerning the fire and to produce certain documents as required under the policy. *See id.* at 1034, 108 Cal. Rptr. at 482. Meanwhile, plaintiff's counsel advised him not to make statements concerning the fire while criminal charges were still pending and asked for a waiver of the examination until the criminal charges were concluded. *See id.* at 1034, 108 Cal. Rptr. at 482. The counsel for the insurer proceeded to deny liability due to the plaintiff's failure to submit to the examination. After the criminal charges were dropped, the plaintiff notified the insurer he was prepared to submit himself for examination, and his offer was rejected. *See id.* at 1035, 108 Cal. Rptr. at 483. The plaintiff alleged in his petition a cause of action sounding in tort, and the supreme court held that the claim stated sufficient facts to support a bad faith cause of action in tort. *See id.* at 1042, 108 Cal. Rptr. at 490.

20. *See id.* at 1037, 108 Cal. Rptr. at 485.

21. *See id.* at 1038, 108 Cal. Rptr. at 486. *See generally* Note, *An Insurer's Bad Faith Refusal to Pay a Valid First Party Claim: A Tort Whose Time Has Come in Iowa,* 32 DRAKE L. REV. 987, 988-91 (1983) (comprehensive discussion and analysis of *Gruenberg* decision in relation to development of tort of bad faith). In the wake of the *Gruenberg* decision, two commentators summarized the state of the law in California as to what damages may be recovered by an insured where an insurer wrongfully breaches his duty of good faith and fair dealing:

> 1. all sums due, directly or indirectly, under the contract, which includes not only the sums promised but conceivably the excess of a judgment, such as in a liability suit by a third person (and in fire insurance, conceivably extra damages caused by an insurer's delay or refusal to pay a loss); 2. compensatory damages, including those resulting from mental and emotional causes following the insurer's improper conduct; 3. punitive or exemplary damages.

J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 8877, at 383 (1981).

22. *See* Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1042, 108 Cal. Rptr. 480, 489-90 (1973).

23. *See* Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978). Following the lead of *Gruenberg,* the Wisconsin Supreme Court established the test to be applied for an

in order to recover under the bad faith theory, the insured must at least show the insurer's absence of a "reasonable basis" in denying benefits.[24]

III. EXPANSION OF THE TORT OF BAD FAITH TO WORKERS' COMPENSATION CLAIMANTS

A. *Policy Considerations*

The exclusive remedy provisions of workers' compensation acts are designed to balance the gains and sacrifices of employers and employees.[25] The employer assumes liability for "accidental" injuries to employees regardless of fault, but is relieved of the possibility of large damage verdicts which may jeopardize the future of the employer's business.[26] Under the exclusivity clauses, an employee is not barred from bringing an action for intentional torts against his employer, but if the employee elects to pursue a claim under the compensation act, he waives his cause of action for the intentional tort.[27] The "election of remedies" theory alleviates the problem of

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insured to recover under the tort of bad faith: "the absence of a *reasonable basis* for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *See id.* at 376 (emphasis added). *See generally* Schuessler, *First Party Bad Faith: Should It Be Extended to Workers' Compensation Cases?*, 34 FED'N INS. COUNS. Q., Winter 1984, at 199, 201 (reasonableness standard of *Gruenberg* less stringent than intentional infliction of emotional distress theory).

24. *See* Parks & Heil, *The Tort of "Bad Faith"—The Impact of Gruenberg v. Aetna Insurance Company*, 24 FED'N INS. COUNS. Q., Spring 1974, at 3, 11-12 (asserting proposition that tort of bad faith judged by "reasonable basis" standard in light of *Gruenberg* decision). The impact of the *Gruenberg* decision is evidenced by the fact that at least 22 other jurisdictions have judicially recognized a bad faith tort action for an insurer's bad faith settlement practices. *See, e.g.*, Grand Sheet Metal Prods. v. Protection Mut. Ins., 375 A.2d 428, 430 (Conn. 1977); Christian v. American Home Assurance, 577 P.2d 899, 902 (Okla. 1978); Anderson v. Continental Ins. Co., 271 N.W.2d 368, 374 (Wis. 1978). *But see, e.g.*, Spencer v. Aetna Life & Casualty Ins. Co., 611 P.2d 149, 152-53 (Kan. 1980) (bad faith tort action statutorily precluded); Lawton v. Great Southwest Fire Ins. Co., 392 A.2d 576, 581 (N.H. 1978) (statutory remedy precludes bad faith tort action); Farris v. United States Fidelity & Guar. Co., 587 P.2d 1015, 1023 (Or. 1978) (statute provides exclusive remedy).

25. *See* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 65.00, at 12-1 (1982) (discussion on nature and scope of exclusive remedy provision and corresponding policy considerations).

26. *See id.* at 12-1; *see also* Gunter v. Mersereau, 491 P.2d 1205, 1207 (Or. Ct. App. 1971) (motivating philosophy behind workmen's compensation act is loss arising from accidents in industry should be distributed between employer and consumer as cost of production); Woolsey v. Panhandle Ref. Co., 131 Tex. 449, 453, 116 S.W.2d 675, 676 (1938) (workers' compensation objective is to do away with issues of negligence, unavoidable accident, and contributory negligence, and to fix amount recoverable free from uncertainty).

27. *See* Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980) (intentional tort action waived by proceeding under act from injuries derived in course of employment); *see also* H. L. Hutton & Co. v. District Court, 398 P.2d 530, 534 (Okla. 1965) (election of remedy waives other claim).

an employee's double recovery for his injuries. Both employers and insurers, however, have used this theory to escape liability for tortious wrongs committed *not* in the course of employment, but in the processing and settlement of an employee's claim.[28] As a result, by allowing an insurer to escape liability for its tortious wrongs through the protection offered by the exclusivity provisions, one of the basic principles of justice, "that no one should profit by his own wrong," is circumvented.[29]

In light of the preexisting protection the exclusivity clause affords a compensation carrier, the adoption of a bad faith tort action would tend to equalize the bargaining power between the worker and insurer by prompting the insurer to act reasonably and in good faith in processing the claim.[30] Recognition of a bad faith tort remedy would also compensate a claimant for any detriment suffered as a result of an insurer's bad faith settlement practices[31] and would alleviate the inadequacy of statutory remedies.[32] While the statutory remedies provide a good method by which to resolve common

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28. *See, e.g.,* Unruh v. Truck Ins. Exch., 498 P.2d 1063, 1073, 102 Cal. Rptr. 815, 825 (1972) (wrongful and tortious conduct of insurer beyond protection aspect of exclusivity provision originally intended by act); Hayes v. Aetna Fire Underwriters, 609 P.2d 257, 261-62 (Mont. 1980) (insurers frequently insulate themselves from liability for wrongful conduct by asserting protection of workers' compensation exclusivity provision); Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 224 (Wis. 1979) (insurer should not be limited to 10% penalty provision when intentional wrong does not fall within act).

29. *See* Kaufman, *The Scientific Method in Legal Thought: Legal Realism and the Fourteen Principles of Justice,* 12 ST. MARY'S L.J. 77, 89-90 (1980) (rejecting idea that wrong is what legislature says it is).

30. *See* Kranzush v. Badger State Mut. Casualty Co., 307 N.W.2d 256, 261 (Wis. 1981) (bad faith action good policy since promotes assurance worker's "exclusive remedy will not be denied through the intentional wrongdoings of the insurer"); *accord* Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1, 5 (7th Cir. 1972) (insureds forced to take insurance contracts "as is," leaving little or no alternative remedy); Christian v. American Home Assurance Co., 577 P.2d 899, 902 (Okla. 1977) (insured has essentially no bargaining power in insurance contract; relegated to terms of contract as basis of decision to extend insured's bad faith tort action). *But see* Hayes v. Aetna Fire Underwriters, 609 P.2d 257, 262-63 (Mont. 1980) (Harrison, J., specially concurring) (recognition of independent action may place insurers at disadvantage in settling claims). *See generally* Note, *An Insurer's Bad Faith Refusal to Pay a Valid First Party Claim: A Tort Whose Time Has Come in Iowa,* 32 DRAKE L. REV. 987, 990 (1983) (discussion on policy considerations of applying tort of bad faith to insurance contracts).

31. *See, e.g.,* Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43 (Alaska 1974) (compensation law only exclusive where it provides adequate remedy); Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220, 223 (Me. 1978) (penalty provision of Workmen's Compensation Act not sufficient to redress claimant since fines assessed to insurer paid to state rather than claimant); Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 224 (Wis. 1979) (10% remedy provision does not adequately compensate worker for detriment occasioned by intentional tort).

32. *See, e.g.,* DEL. CODE ANN. tit. 19, § 2362 (Supp. 1982) (no other penalty for delays in compensation payments besides amount past due from compensation carrier); MO. ANN. STAT. § 287.120(4) (Vernon Supp. 1985) (entitles claimant to 15% increased recovery on past

cases of payment delay or refusal, these provisions do not contemplate the harm which may arise from an insurer's intentional bad faith conduct.[33] Consequently, jurisdictions that have granted a claimant an independent tort action have done so where the circumstances clearly dictate and not merely for minor or insignificant violations.

B. *Other Jurisdictions*

1. Case Law

a. Bad Faith Tort Action Extended to Compensation Claimants—The *Coleman* Case

The Wisconsin Supreme Court, in *Coleman v. American Universal Insurance Co.*, was the first to uphold a bad faith tort action against a compensation carrier for injuries arising out of the settlement and processing of a workers' compensation claim.[34] The plaintiff in *Coleman* was a workers' compensation claimant who had received payments for injuries sustained in the course of employment.[35] Subsequently, when these payments were cut off, he brought a bad faith action against the insurer, not for his discontinued payments, but for a separate injury of emotional distress attributed to the bad faith conduct of the defendant in rejecting his claim.[36] The plaintiff alleged that his payments had been arbitrarily stopped on three separate occasions, notwithstanding the insurer's possession of uncontradicted medical reports demonstrating the plaintiff's entitlement to continuing payments.[37] It was also alleged the defendant's bad faith conduct was intentionally calculated to harm the plaintiff in an attempt to save the company money.[38] Furthermore, the plaintiff claimed that the defendant's termination of payments

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due benefits); TEX. REV. CIV. STAT. ANN. art. 8306, § 18a(a), (b) (Vernon Supp. 1985) (recovery not to exceed 15% of past due benefits).

33. *See* Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 224 (Wis. 1979) (penalty of 10% does not contemplate harm resulting from insurer's bad faith actions); *see also* Schuessler, *First Party Bad Faith: Should It Be Extended to Workers' Compensation Cases?*, 34 FED'N INS. COUNS. Q., Winter 1984, at 199, 217 (statutory penalties should be adequate to cover most common cases of insurer delay or refusal to render benefits).

34. *See* Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 221 (Wis. 1979). Prior to the *Coleman* decision, the Wisconsin Supreme Court recognized that a bad faith cause of action was available in first party insurance claims and, employing the same rationale, found no reason why this bad faith action should not be extended to third party compensation claimants. *See id.* at 221 (citing Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978)). The evidentiary standard of proof used by the Wisconsin courts in a traditional bad faith action can be found in Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978).

35. *See* Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 221 (Wis. 1979).

36. *See id.* at 221.

37. *See id.* at 221.

38. *See id.* at 221. Plaintiff's petition specifically alleged:

resulted in his being evicted from his home, causing him severe emotional distress.[39] In affirming the denial of the defendant's motion for summary judgment, the Wisconsin Supreme Court declared that a worker may assert a separate cause of action for damages occasioned by the alleged bad faith settlement practices of a workers' compensation insurer.[40] The court found that such action is "independent" of a claim for injuries covered by the Wisconsin Workers' Compensation Act.[41] Rejecting the defendant's contention that the Act provides the claimant's sole remedy, the court reasoned that the available compensation remedy is exclusive, "only if the *injury* falls within the coverage of the act."[42] In this respect, the court found that the injury complained of was "distinct in time and place" from the original industrial injury, and, as such, it did not fall within the purview of the Act.[43] Therefore, the exclusivity provision was no bar to a claim grounded on tort principles.[44]

> These acts were intentional, malicious, and outrageous, and were meant to take advantage of John Coleman's present physical and mental condition. That these tactics of harassment and delay were meant to cause the plaintiff to give up on his claims, to minimize the amount of the defendant's liability or to cause the [plaintiff] to starve. That such acts are in bad faith and with the intent and effect of causing emotional distress.

Id. at 221.

39. *See id.* at 221. The plaintiff also stated that he had cooperated with the defendant at all times by submitting the appropriate reports and permitting examinations by physicians. *See id.* at 221.

40. *See id.* at 221.

41. *See id.* at 221.

42. *See id.* at 222 (emphasis added). *But see* 2A A. LARSON, WORKMEN'S COMPENSATION LAW, § 65.00, at 12-1 (1982) (injury not covered under compensation act; action for compensable damages foreclosed, even if particular element of damages not compensated for).

43. *See* Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 223 (Wis. 1979).

44. *See id.* at 223; *see also* Reed v. Hartford Accident & Indem. Co., 367 F. Supp. 134, 135-36 (E.D. Pa. 1973) (applying Pennsylvania law, exclusivity of Act irrelevant to actions not covered by it). In finding the injury to be separate and distinct from the original injury suffered in the course of employment and not merely an aggravation or extension of the original injury, the *Coleman* court quoted Professor Larson to illustrate its finding:

> It is true that but for the original injury the investigation would never have been undertaken and the second injury would not have occurred. But must we go on to say that the carrier acquires complete tort immunity ever after for anything its agents do to carry out their investigation? Suppose the agent had decided to burglarize the claimant's house to get needed evidence. Suppose claimant died of fright on seeing the burglar. Is the compensation act the exclusive remedy, merely because the activity involved, which was the collecting of evidence, was in the mainstream of the agent's duties?
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> Again, suppose a claimant has a compensable broken toe, and is being tailed by a photographer. Claimant sees him in the bushes, a scuffle ensues, and claimant receives a skull fracture as a result of a blow from the camera. Is this skull fracture nothing but an aggravation of the broken toe?

See Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 223-24 (Wis. 1979) (quoting 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 65.00, at 13-36 to -37 (1978)).

Finding that the compensation act's penalty provision does not foreclose an action for the tort of bad faith, the *Coleman* court emphatically maintained that the penalty provision was designed to avoid litigation by promoting the automatic payment of benefits where there is no justification for delay.[45] Therefore, in instances where the insurer's inexcusable delay was due to its own mismanagement or deficient administration, the penalty provision was applicable.[46] The court based its decision on the public policy consideration of providing a remedy in instances where the penalty provision may be wholly inadequate.[47] Where the insured has been harmed to the extent that the remedies available in the provision are inadequate, the insured could bring an action for the tort of bad faith.[48]

In 1981, the *Coleman* decision was preempted by the Wisconsin Legislature and was replaced by a new penalty provision giving an exclusive remedy for an insurer's bad faith conduct.[49] The rationale of the *Coleman* decision nevertheless remains viable in that it can serve as a guideline for extending the tort of bad faith in workers' compensation claims in other jurisdictions.[50] Although the *Coleman* case has been the only decision to extend a bad faith cause of action to workers' compensation claimants, other jurisdictions have circumvented the exclusivity provisions of workers' compensation statutes in factual situations similar to that in *Coleman.* This is accomplished by allowing an independent action against an insurer for intentional infliction of

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45. *See* Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 224 (Wis. 1979) (interpreting WIS. STAT. § 102-22(l) (1977), allowing for increase of compensation award of 10% as penalty for inexcusable delay of payments).

46. *See id.* at 224.

47. *See id.* at 224. In regard to the inadequacy of the penalty provision, the court concluded: "The inexcusable-delay provision . . . does not contemplate that the intentional tort of bad faith can be expiated merely by payments augmented in the amount of 10 percent." *See id.* at 224.

48. *See id.* at 224. The court relied on the holdings of other jurisdictions in reaching its conclusion. *See id.* at 224 (citing Martin v. Travelers Ins. Co., 497 F.2d 329, 331 (1st Cir. 1974) (Federal Longshoremen's and Harbor Workers' Compensation Act does not prohibit separate tort action for insurer's bad faith conduct outside bounds of Act); Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43 (Alaska 1974) (penalty provision of Alaska Workers' Compensation Act no bar to recovery of intentional bad faith torts of insurer committed in processing worker's claim)).

49. *See* WIS. STAT. ANN. § 102.18(bp) (West Supp. 1984) (provides exclusive remedy for employer's or insurer's bad faith conduct through imposition of lesser of 200% of compensation due or $15,000); *see also* Schuessler, *First Party Bad Faith: Should It Be Extended to Workers' Compensation Cases?,* 34 FED'N INS. COUNS. Q., Winter 1984, at 199, 201-05 (comprehensive discussion and analysis of *Coleman* decision and its implications).

50. *See* Hayes v. Aetna Fire Underwriters, 609 P.2d 257, 261-62 (Mont. 1980) (relying on *Coleman* rationale in extending bad faith action to Montana compensation claimants); *see also* Massey v. Armco Steel Co., 635 S.W.2d 596, 605 (Tex. App.—Houston [14th Dist.] 1982) (James, J., dissenting) (asserting proposition that *Coleman* bad faith action be extended to Texas compensation claimants), *rev'd on other grounds,* 652 S.W.2d 932 (Tex. 1983).

emotional distress.[51]

b. The Tort of Intentional Infliction of Emotional Distress

Although the tort of bad faith has received limited recognition in the workers' compensation area, several jurisdictions have allowed a claimant to recover under an emotional distress theory.[52] The first case to pierce the exclusiveness defense afforded an insurer under a workers' compensation statute was *Unruh v. Truck Insurance Exchange.*[53] In *Unruh,* the plaintiff was a workers' compensation claimant who, over a period of time, was befriended by an investigator employed by plaintiff's compensation carrier.[54] During this period, the plaintiff became "emotionally involved" with the agent, who used the relationship to obtain evidence refuting the plaintiff's claim.[55] When the evidence was presented at the plaintiff's compensation hearing and the deception was made known to her, the plaintiff suffered a complete emotional breakdown requiring hospitalization.[56]

The plaintiff was allowed to recover for the intentional torts[57] committed

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51. *See* Martin v. Travelers Ins. Co., 497 F.2d 329, 331 (1st Cir. 1974) (intentional infliction of mental and emotional suffering under Maine law); Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 39, 42 (Alaska 1974) (conscious infliction of mental distress); Unruh v. Truck Ins. Exch., 498 P.2d 1063, 1073, 102 Cal. Rptr. 815, 825 (1972) (intentional infliction of emotional distress); *see also* Robertson v. Travelers Ins. Co., 427 N.E.2d 302, 307 (Ill. App. Ct. 1981) (intentional infliction of emotional distress); Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220, 222 (Me. 1978) (intentional infliction of physical and emotional distress); Hayes v. Aetna Fire Underwriters, 609 P.2d 257, 261, 262 (Mont. 1980) (intentional infliction of emotional distress); Flamm v. Bethlehem Steel Co., 185 N.Y.S.2d 136, 138-39 (App. Div. 1959) (action allowed for fraud and conspiracy against employer and physican independent of exclusivity provision).

52. *See* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.34(b), (c) (1982 & Supp. 1983) (comprehensive list of cases discussing exclusive remedy provisions in relation to tort actions brought for insurer's intentional refusal or delay of compensation payments resulting in emotional distress).

53. *See* 498 P.2d 1063, 1066, 102 Cal. Rptr. 815, 818 (1972).

54. *See id.* at 1066, 102 Cal. Rptr. at 818. The plaintiff in *Unruh,* as a result of her on-the-job injuries, underwent four major back surgeries, and at all times the defendant had knowledge of the plaintiff's condition. *See id.* at 1066, 102 Cal. Rptr. at 818.

55. *See id.* at 1066-67, 102 Cal. Rptr. at 818-19. In *Unruh,* the carrier's agent had enticed the plaintiff to accompany him on a trip to Disneyland. *See id.* at 1066, 102 Cal. Rptr. at 818. While at Disneyland, the agent inveigled her into crossing a rope and barrel bridge, and as she crossed, the agent violently shook the bridge while another undercover investigator filmed the event. *See id.* at 1066, 102 Cal. Rptr. at 818.

56. *See id.* at 1066-67, 102 Cal. Rptr. at 818-19. As a result of the injuries sustained, the plaintiff sought $500,000 in general damages and $2,000,000 in punitive damages. *See id.* at 1067, 102 Cal. Rptr. at 819.

57. *See id.* at 1076-77, 102 Cal. Rptr. at 828-29. The *Unruh* court allowed the plaintiff to maintain an action for the intentional torts of assault and battery and intentional infliction of emotional distress, but found that the other counts grounded upon the theory of negligence

by the insurer under the dual capacity doctrine.[58] The court found that the carrier had stepped out of its proper role of "insurer" by embarking upon a detestable course of conduct and, therefore, as one acting under a different capacity, should not be afforded protection under the workers' compensation exclusivity provision.[59] In subsequent California cases brought under the *Unruh* rationale, the courts have been reluctant to allow tort claims outside the exclusive remedy provisions, except where the insurer's conduct is clearly of the outrageous and shocking nature found in *Unruh*.[60]

In other jurisdictions, however, cases subsequent to *Unruh* appeared to relax the factual circumstances required for a separate tort action. In one case, the claimant was injured attempting to turn off a shredder and subsequently brought an action against the machine's manufacturer for his injuries.[61] While the plaintiff's suit was pending, he brought an action for conscious infliction of mental injury against the insurance carrier.[62] The action was based on the allegation that the carrier willfully, maliciously, and deliberately withheld his compensation benefits in an attempt to discourage him from filing for his workers' compensation benefits.[63] The court held for the claimant, stating that, in most instances, the compensation statute will shield the insurer from liability in tort; however, "[i]n circumstances where there is tortious conduct that goes beyond the bounds of untimely payments, the immunity from suit provided by the Workmen's Compensation Act is lost."[64]

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were protected by the exclusivity provision of the compensation act. *See id.* at 1076-77, 102 Cal. Rptr. at 828-29.

58. *See id.* at 1076-77, 102 Cal. Rptr. at 828-29. The dual-capacity doctrine was first recognized by the California Supreme Court in 1952. *See* Duprey v. Shane, 249 P.2d 8, 13-14 (Cal. 1952). The dual capacity doctrine allows an injured employee to bring a separate tort action against his employer who has dual legal personalitites; one as an employer and another in a secondary non-employer capacity. *See id.* at 15. This case involved a chiropractor who was also the claimant's employer. *See id.* at 10. The doctor undertook to treat the claimant's injury and negligently aggravated it in the process. *See id.* at 10. The court found that he was acting in a doctor-patient capacity at the time and, therefore, was not immune from a tort action for malpractice by virtue of his employer status. *See id.* at 13-14.

59. *See* Unruh v. Truck Ins. Exch., 498 P.2d 1063, 1077, 102 Cal. Rptr. 815, 829 (1972).

60. *See, e.g.,* Cervantes v. Great Am. Ins. Co., 189 Cal. Rptr. 761, 764 (Ct. App. 1983) (*Unruh* exception for extreme and outrageous behavior falling outside reasonable behavior expected of insurers); Ricard v. Pacific Indem. Co., 183 Cal. Rptr. 502, 506 (Ct. App. 1982) (outrageous and deceitful conduct found in *Unruh* is required to state cause of action outside exclusive remedy provision); Everfield v. State Compensation Ins. Fund, 171 Cal. Rptr. 164, 165 (Ct. App. 1981) (insurer's conduct must be of outrageous nature); *see also* Schuessler, *First Party Bad Faith: Should It Be Extended To Worker's Compensation Cases?,* 34 FED'N INS. COUNS. Q., Winter 1984, at 199, 212 (discussing limited impact of *Unruh* decision).

61. *See* Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 38 (Alaska 1974).

62. *See id.* at 39.

63. *See id.* at 39.

64. *See id.* at 43. The *Stafford* court followed the reasoning in *Unruh* by finding that the

In order to curb the subsequent wave of tort actions based on intentional delays and terminations of payments,[65] some courts began to demand that the insurer's conduct be "conspicuously contemptible" for claimants to bring tort actions.[66] For example, in an Illinois case, the insurer was held liable for the tort of "outrage" where it intentionally withheld compensation benefits until the statute of limitations had run on the claim and then proceeded to defend itself on that basis.[67] Such case law, therefore, indicates that an insurer's mere delay in making compensation payments will not be a sufficient basis on which to ground an action in tort.[68] The claimant must instead prove the insurer's conduct went beyond the bounds of reasonableness, to the point of outrageousness, if the claimant expects to maintain a cause of action for the tort of intentional infliction of emotional distress against a workers' compensation exclusivity defense.[69]

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insurer's immunity was lost when it exceeded its proper role under the compensation act by committing an intentional tort. *See id.* at 43. The court also found that the exclusive remedy provision of the Alaska Workers' Compensation Act did not bar an intentional tort claim arising from the wrongful conduct of the insurer since the Act did not provide a remedy for such a wrong. *See id.* at 43. Furthermore, the court noted that the penalty provision of the Act would be insufficient to redress the detriment suffered by the claimant. *See id.* at 43.

65. *See* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.34(c), at 13-72 (1982 & Supp. 1983) (Professor Larson asserts proposition that *Stafford* set off wave of bad faith tort actions).

66. *See* Martin v. Travelers Ins. Co., 497 F.2d 329, 330 (1st Cir. 1974) (insurer stopped payment on valid compensation payments only after claimant had deposited and made withdrawals against them, resulting in severe embarrassment and emotional distress); Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 221 (Wis. 1979) (action for tort of bad faith and intentional infliction of emotional distress after insurer stopped payments three times, causing plaintiff to be evicted); *see also* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.34(c), at 13-75 (1982 & Supp. 1983) (in cases subsequent to *Stafford,* claimant typically successful in factual situations wherein insurer's conduct "conspicuously contemptible").

67. *See* Robertson v. Travelers Ins. Co., 427 N.E.2d 302, 307 (Ill. App. Ct. 1981). The egregiousness of the insurer's conduct is evidenced by the fact that the jury returned a $2,000,000 punitive damages verdict in favor of the claimant. *See id.* at 304. Because Illinois does not allow punitive damage recovery in such cases, the case was remanded on the issue of damages. *See id.* at 310.

68. *See* Martin v. Travelers Ins. Co., 497 F.2d 329, 331 (1st Cir. 1974) (mere late payment not sufficient basis for tort action); Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43 (Alaska 1974) (tortious conduct must go beyond untimely payments to pierce exclusivity defense); Unruh v. Truck Ins. Exch., 498 P.2d 1063, 1071-72, 102 Cal. Rptr. 815, 822 (1972) (mere negligence of compensation carrier will not give rise to tort liability); Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 224 (Wis. 1979) (mere delays adequately compensated by 10% penalty award).

69. *See* Ricard v. Pacific Indem. Co., 183 Cal. Rptr. 502, 506 (Ct. App. 1982) (outrageous and deceitful conduct needed to maintain tort action outside exclusive remedy provision); Robertson v. Travelers Ins. Co., 427 N.E.2d 302, 307 (Ill. App. Ct. 1981) (outrageous conduct required to state action in tort).

2. Statutory Penalties for Refusal or Delay in Compensation Benefits

When a workers' compensation claimant brings a tort action against an insurer for wrongfully terminating or delaying compensation benefits, most jurisdictions have held that such an action will not lie because the claimant's recovery is limited to the exclusive remedies provided under the applicable compensation statute.[70] In an attempt to afford a claimant some type of remedy for an insurer's inexcusable or unreasonable withholding of benefits, virtually all states have enacted statutory penalty provisions to deal with this problem.[71] The penalties are usually statutorily dictated percentages that are added to the amount of unpaid compensation[72] and range from 10%[73] to 200%.[74] In some states, attorney's fees may also be awarded.[75]

Although the jurisdictions vary greatly in the requisites of proof required to recover under the respective penalty provisions,[76] in most jurisdictions the penalties are fixed at a specific percentage irrespective of the insurer's con-

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70. *See, e.g.*, Hixon v. State Compensation Fund, 565 P.2d 898, 899 (Ariz. Ct. App. 1977) (action brought for intentional infliction of emotional distress occasioned by improper termination of compensation benefits barred by workers' compensation exclusivity provision); Young v. United States Fidelity & Guar. Co., 588 S.W.2d 46, 48 (Mo. Ct. App. 1979) (bad faith action for insurer's refusal to pay benefits foreclosed by exclusive remedies provided under workers' compensation statute); Dickson v. Mountain States Mut. Casualty Co., 650 P.2d 1, 2 (N.M. 1982) (compensation act provides exclusive remedy; bars claimant's action for emotional distress and mental anguish resulting from insurer's failure to pay compensation).

71. *See, e.g.*, GA. CODE ANN. § 114-705(e) (1983) (providing 15% penalty for insurer's inexcusable delay of compensation benefits); ME. REV. STAT. ANN. tit. 39, § 104-A(2) (Supp. 1984) (forfeiture of $25 per day for insurer's failure to pay compensation); TEX. REV. CIV. STAT. ANN. art. 8306, § 18a(a) (Vernon Supp. 1985) (providing for 15% penalty of all past due compensation).

72. *See, e.g.*, LA. REV. STAT. ANN. § 22:658 (West 1978) (12% of difference between amount tendered or paid and amount found due); ILL. STAT. ANN. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985) (percentage award of compensation "additional to that otherwise payable"); WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (percentage of "total compensation due"). *But see* CAL. LAB. CODE § 5814 (Deering 1976) (10% penalty added to "full amount" of claimant's award); MINN. STAT. ANN. § 176.225(1)(b) (West Supp. 1985) (additional award of 25% added to "final" compensation award for an insurer's unreasonable or vexatious delay).

73. *See* CAL. LAB. CODE § 5814 (Deering 1976) (10% penalty for delay); FLA. STAT. ANN. § 440.20(7) (West Supp. 1984) (punitive penalty of 10% of unpaid installment).

74. *See* WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (up to 200% or $15,000 penalty may be assessed against insurer for malicious or bad faith failure to pay compensation benefits).

75. *See* ILL. ANN. STAT. ch. 48, § 138.16 (Smith-Hurd Supp. 1985) (reasonable attorney's fees recoverable where insurer's delay unreasonable); LA. REV. STAT. ANN. § 22:658 (West 1978) (punitive penalty of 12% and "all reasonable attorney's fees for the prosecution and collection of such amount").

76. *Compare* MINN. STAT. ANN. § 176.225(1)(b) (West Supp. 1985) (providing up to 25% additional compensation where insurer "unreasonably or vexatiously delayed payments") *with* WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (200% or $15,000 penalty assessed

duct.[77] Some states, however, have adopted penalty provisions which take into account instances where an insurer acts intentionally or unreasonably in denying benefits by increasing the percentage awarded to the claimant.[78] In Illinois, for example, where an insurer is merely "negligent" in failing to pay a claim, the claimant may be entitled to an additional ten dollars per day for every day the benefits remain unpaid.[79] The Illinois statute increases the penalty to 50% of the benefits due where the insurer has unreasonably or vexatiously delayed payments, intentionally underpaid compensation, or instituted frivolous proceedings for the purpose of delay where no real controversy ever existed as to the insurer's liability for paying the compensation.[80]

A penalty statute similar to Illinois' is also in effect in Wisconsin.[81] Under the Wisconsin penalty provision, a claimant may have his unpaid compensation benefits increased by 25% where the insurer has not acted in "good faith" in processing a claim.[82] The statute also provides for those instances when a carrier acts with "malice or bad faith" by awarding a claimant "the lesser of 200% of total compensation due or $15,000."[83] The Wisconsin statute specifically designates these provisions as the claimant's "exclusive

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where carrier suspends, terminates, or fails to make payments resulting from "malice or bad faith").

77. *See, e.g.*, CAL. LAB. CODE § 5814 (Deering 1976) (penalty fixed at 10% of compensation award); GA. CODE ANN. § 114-705(e) (1983) (penalty designated at set rate of 15% after 14 days); TEX. REV. CIV. STAT. ANN. art. 8306, § 18a(a) (Vernon Supp. 1985) (penalty not to exceed 15% of unpaid compensation).

78. *See* ILL. ANN. STAT. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985) (penalty imposed against insurer whose actions are "unreasonable," "vexatious," or "intentional"); LA. REV. STAT. ANN. § 22.658 (West 1978) (percentage penalty plus attorney's fees where insurer's conduct "arbitrary, capricious, or without probable cause"); MINN. STAT. ANN. § 176.225(1)(b) (West Supp. 1985) (penalty assessed against insurer who acts "unreasonably or vexatiously"); WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (penalty imposed where insurer's conduct malicious or in bad faith).

79. *See* ILL. ANN. STAT. ch. 48, § 138.19(l) (Smith-Hurd Supp. 1985) (penalty imposed where carrier shall "without good and just cause fail, neglect, refuse, or unreasonably delay" payments). Although the penalty will be assessed at $10 per day, it shall not exceed a total of $2500. *See id.*

80. *See id.* § 138.19(k).

81. *See* WIS. STAT. ANN. § 102.18(1)(b)-(bp) (West Supp. 1985). *Compare* ILL. ANN. STAT. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985) (compensation claimant entitled to recovery for insurer's unreasonable or vexatious delay) *with* WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (insured allowed recovery for insurer's malicious or bad faith settlement practices).

82. *See* WIS. STAT. ANN. § 102.18(1)(b) (West Supp. 1985).

83. *See id.* 102.18(1)(bp). Under the statute, the Department of Labor defines what conduct demonstrates malice or bad faith in assessing a penalty. *See id.* § 102.18(1)(bp). Under Wisconsin common law, however, in order to show an insurer's "bad faith" the plaintiff must show "[t]he absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *See* Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978).

remedy," which legislatively preempts *Coleman* and forecloses a claimant's common-law action for the intentional tort of bad faith.[84]

Thus, in looking at the Illinois and Wisconsin penalty statutes, it appears that the needs of both the insurer and the claimant are adequately addressed.[85] First, the statutes hold the insurer accountable for his actions by imposing fair and adequate penalties where the circumstances dictate.[86] Secondly, the penalty statutes provide the claimant with an adequate remedy for any detriment he may have suffered and create an incentive for the insurer to act reasonably in settling an employee's claim.[87] Finally, by barring common-law recoveries, the statutes foreclose the possibility of high damage verdicts being assessed against the carrier, possibly resulting in the disintegration of the workers' compensation scheme.[88]

In determining whether the exclusive remedy provision of the Texas Workers' Compensation Act[89] precludes a common-law tort action for an insurer's bad faith settlement practices, it is important to consider the current state of Texas law concerning an insurer's duty of good faith and fair dealing in insurance contracts.[90]

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84. *See* WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (statute provides claimant's exclusive remedy for insurer's bad faith conduct).

85. *See* ILL. ANN. STAT. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985) (statute serves employee's needs by awarding additional compensation in form of 50% for insurer's bad faith actions, while limiting insurer's liability by providing claimant's exclusive remedy under Act); WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (claimant allowed up to 200% additional compensation for insurer's bad faith conduct; insurer's liability limited to $15,000).

86. *See* ILL. ANN. STAT. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985) (50% penalty award for unreasonable or vexatious delay, $10 per day for negligent delay); WIS. STAT. ANN. § 102.18(1)(b)-(bp) (West. Supp. 1985) (200% penalty award for malicious or bad faith conduct, 25% penalty in other instances of delay).

87. *See* ILL. ANN. STAT. ch. 48, 138.19(k) (Smith-Hurd Supp. 1985) (redresses claimant by imposition of 50% penalty for insurer's unreasonable or vexatious settlement practices); WIS. STAT. ANN. § 102.18(1)(bp) (West. Supp. 1985) (providing claimant additional 200% increase in compensation award for detriment suffered from insurer's bad faith actions).

88. *See* ILL. ANN. STAT. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985) (claimant's exclusive remedy against insurer provided by statute); WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (provision furnishes claimant's "exclusive remedy"); *see also* Robertson v. Travelers Ins. Co., 427 N.E.2d 302, 304 (Ill. Ct. App. 1981) (threat of unlimited tort damages evidenced by jury verdict against workers' compensation carrier for $150,000 general damages and $2,000,000 punitive damages).

89. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (Vernon 1967).

90. *See* Massey v. Armco Steel Co., 635 S.W.2d 596, 599-600 (Tex. App.—Houston [14th Dist.] 1982) (James, J., dissenting) (discussion of evolution of insurer's implied duty of good faith and fair dealing recognized in insurance contracts as applicable to workers' compensation insurance contracts), *rev'd on other grounds,* 652 S.W.2d 932 (Tex. 1983).

IV. VIABILITY OF EXTENDING A BAD FAITH CAUSE OF ACTION TO TEXAS WORKERS' COMPENSATION CLAIMANTS

A. *Recognition of Insurer's Duty of Good Faith and Fair Dealing in Texas*

It is well established in Texas that "[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a *tort,* as well as a breach of contract."[91] The same duty of care and faithfulness which arises in common-law contractual relationships has also been found to be applicable to insurance contracts;[92] Texas law acknowledges that an implied duty of good faith and fair dealing exists in insurance contracts.[93] Therefore, since an intentional breach of this duty may be actionable in tort,[94] it is necessary to examine if the exclusive remedy provision of the compensation statute bars a separate tort action for the intentional wrongdoing of a compensation carrier in connection with the processing of an employee's claim.

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91. Montgomery Ward & Co. v. Scharrenbeck, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947) (emphasis added). The *Scharrenbeck* case involved a service contract to repair and maintain plaintiff's gas heater. *See id.* at 155, 204 S.W.2d at 509. Defendant's negligent repair caused plaintiff's house to burn, resulting in the court's finding that the defendant breached an implied duty to use care. *See id.* at 157, 204 S.W.2d at 510. In finding the defendant liable in tort and independent of an action for breach of contract, the court stated: "[i]n such a case, the contract is mere inducement creating the state of things which furnishes the occasion of the tort." *See id.* at 157, 204 S.W.2d at 510; *see also* Diamond v. Duncan, 107 Tex. 256, 260, 172 S.W. 1100, 1100 (1915) (duty to use care grows out of contractual relationship).

92. *See* Burroughs v. Bunch, 210 S.W.2d 211, 214-15 (Tex. Civ. App.—El Paso 1948, writ ref'd) (failure of insurance broker to obtain policy constitutes breach of implied duty to use care in insurance contract); *see also* American Standard Life Ins. Co. v. Redford, 337 S.W.2d 230, 231 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.) (general rules of contract law also applicable to insurance contracts). A breach of an implied contractual duty of good faith and fair dealing may also sound in tort. *See* Jack Criswell Lincoln Mercury, Inc. v. Tsichlis, 549 S.W.2d 255, 259 (Tex. Civ. App.—Beaumont 1977, no writ) (defendant car dealer liable in tort for intentionally deceiving immigrant car buyer and not procuring insurance as provided under sales contract). Where the breach of the implied duty of good faith is intentional, one may also recover punitive damages. *See* City Prods. Corp. v. Berman, 610 S.W.2d 446, 450 (Tex. 1980) ("When a distinct, willful tort is alleged and proved in connection with a suit upon a contract, one may recover punitive damages, but even in that instance the complainant must prove that he suffered some actual damages.").

93. *See* Montgomery Ward & Co. v. Scharrenbeck, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947) (Texas common law recognizes implied duty of good faith and fair dealing accompanies every contract); *see also* American Standard Life Ins. Co. v. Redford, 337 S.W.2d 230, 231 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.) (general rules of contract law equally applicable to insurance contracts).

94. *See* Jack Criswell Lincoln Mercury, Inc. v. Tsichlis, 549 S.W.2d 255, 259 (Tex. Civ. App.—Beaumont 1977, no writ) (breach of implied contractual duty of good faith and fair dealing may sound in tort).

B. *The Downfall of the Texas Exclusive Remedy Provision and the Potential Recognition of a Common-Law Bad Faith Action—Massey v. Armco Steel Co.*

Prior case law interpreting the exclusive remedy provision of the Texas Workers' Compensation Act has held that the Act does not exempt employers or their compensation carriers from common-law liability for intentional torts committed against an employee.[95] Where an employee elects to file a claim under the Act for benefits, however, he is precluded from maintaining a common-law action for an intentional tort.[96] Although the decisions interpreting the exclusive remedy provision clearly prohibit a separate action for an intentional tort causing the original industrial injury,[97] the Act may no longer bar a separate action for an intentional tort predicated on an act occurring after the original injury and during the settlement process.[98] The Texas Supreme Court has recently declared that an employee may not be relegated solely to a workers' compensation claim, but "may have one claim against his employer under the Workers' Compensation Act and a claim at

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95. *See* Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980) (employee's cause of action for intentional torts of employers and carriers guaranteed by Texas Constitution and may not be eliminated by legislature); *see also* Fidelity & Casualty Co. v. Shubert, 646 S.W.2d 270, 278 (Tex. App.—Tyler 1983, writ ref'd n.r.e.) (Act does not exempt carrier or employer from common-law liabilities based on intentional injuries or torts).

96. *See* Paradissis v. Royal Indem. Co., 507 S.W.2d 526, 529 (Tex. 1974) (compensation act provides employee with substitute cause of action for injuries occasioned at hands of carrier or employer); Grove Mfg. Co. v. Cardinal Const. Co., 534 S.W.2d 153, 155 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (employee waives action for intentional torts by seeking benefits under act); Jones v. Jeffrey, 244 S.W.2d 924, 926 (Tex. Civ. App.—Dallas 1951, writ ref'd) (election to proceed under Act waives common-law remedies).

97. *See* Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980) (Act does not destroy claimant's right to sue for intentional injuries occasioned by employer); Paradissis v. Royal Indemnity Co., 507 S.W.2d 526, 529 (Tex. 1974) (employer and insurer exempt from liability for intentional injuries arising out of "course of employment"). Article 8306, § 20 of the Texas Workers' Compensation Act states:

> The terms "Injury" or "Personal Injury" shall also be construed to mean and include "Occupational Diseases," . . . the term "Occupational Disease" . . . shall be construed to mean any disease arising out of and in the course of employment which causes damage or harm to the physical structure of the body and other such diseases or infections as naturally result therefrom.

See TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1985). Thus, it is doubtful, from examining the statutory language, that an insurer's bad faith conduct could be construed as an "occupational disease" which arises in the "course of employment," and thereby bar an intentional tort claim based on such conduct. *See* Massey v. Armco Steel Co., 635 S.W.2d 596, 604 (Tex. App.—Houston [14th Dist.] 1982) (James, J., dissenting), *rev'd on other grounds,* 652 S.W.2d 932 (Tex. 1983).

98. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983) (impliedly holding claimant may maintain action for insurer's intentional torts where tort claim mutually exclusive of compensation claim).

common law for an intentional tort" arising in the settlement process.[99]

In *Massey v. Armco Steel Co.,*[100] the Industrial Accident Board (IAB) awarded the plaintiff total and permanent compensation for injuries received in the course of his employment.[101] The insurer appealed the IAB's award to the district court.[102] In his counterclaim, apart from his claim for recovery of benefits due under the policy, the plaintiff alleged that the defendants had conspired against him to hinder settlement of his compensation claim.[103] He also alleged that the defendants breached their duty of good faith and fair dealing owed under an insurance contract and sought recovery for intentional infliction of emotional distress.[104] On appeal, the Texas Supreme Court reasoned that an employee would have a cause of action for an intentional tort if the alleged tort was *mutually exclusive* of his right to recover compensation benefits under the Act.[105] Finding that the plaintiff did not allege sufficient facts to sustain a cause of action for civil conspiracy, the court remanded the case, allowing the plaintiff to amend his pleadings and to state some other intentional act(s) separate from the compensation

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99. *See id.* at 933.

100. *See id* at 932.

101. *See id.* at 933. In *Massey,* the plaintiff suffered an on-the-job injury ultimately resulting in amputation of a finger. *See* Massey v. Armco Steel Co., 635 S.W.2d 596, 597 (Tex. App.—Houston [14th Dist.] 1982), *rev'd on other grounds,* 652 S.W.2d 932 (Tex. 1983). In conjunction with the hand injury, the plaintiff alleged associated injuries to his arm, shoulder, and neck, resulting in "emotional trauma in the form of near-psychotic reactive depression." *See id.* at 597. The plaintiff also contended throughout the proceedings that the medical evidence was uncontradicted. *See id.* at 597.

102. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983). Under the Workers' Compensation Act, all questions arising under the Act not settled by agreement between the interested parties shall be determined by the IAB. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1985). The IAB conducts a hearing and renders a decision as to what, if any, compensation should be paid. *See id.* If either party to a claim does not wish to abide by the ruling of the IAB, they may appeal the award to the district court for a trial on the "rights and liability of the parties thereto." *See id.*

103. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983). The plaintiff brought an action in tort rather than for breach of the compensation insurance contract. *See* Massey v. Armco Steel Co., 635 S.W.2d 596, 597 (Tex. App.—Houston [14th Dist.] 1982), *rev'd on other grounds,* 652 S.W.2d 932 (Tex. 1983). Furthermore, it was alleged that the defendants were aware of the plaintiff's uncontradicted medical evidence in regard to his poor physical and mental condition and made a "conscious decision that he was not capable of withstanding extended settlement negotiations or a lengthy litigation period." *See id.* at 597. Thus, the plaintiff contended that his injuries were not limited to the loss of his finger and that he should be entitled to recover in tort for the bad faith actions of the defendants in processing his claim. *See id.* at 597.

104. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983).

105. *See id.* at 933. For a general discussion of the *Massey* decision in relation to the Texas workers' compensation exclusivity provision, see generally Brousseau, *Workers' Compensation, Annual Survey of Texas Law,* 38 SW. L.J. 345, 355-58 (1984).

claim.[106] Consequently, despite the fact that the court employed the ambiguous term "mutually exclusive," its remand of the case, coupled with its use of the expressions "separable" and "independent"[107] terms, which other courts have specifically relied upon in recognizing an independent cause of action for a carrier's bad faith settlement practices, lends support to the conclusion that the Texas Supreme Court intended to do the same.[108] A comparison of the *Massey* decision with decisions from other jurisdictions may clarify the ambiguity in the terms used by the *Massey* court.

The Wisconsin Supreme Court, although not using the "mutually exclusive" language in *Coleman,* employed similar language to that used in *Massey.*[109] Since the action in *Coleman* was found to be based on a "separate injury" not covered by the Act,[110] it may be concluded that the plaintiff's action in *Coleman* was "mutually exclusive" of his compensation claim, as

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106. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983). The court found that the plaintiff's allegations that the defendants "agreed to resist his claim," rejected his proposed settlements, and ultimately appealed the award of the IAB, were not sufficient to state a cause of action for civil conspiracy. *See id.* at 934. The essential elements of a civil conspiracy action are: "(1) two or more persons . . . ; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result thereof." *See id.* at 934 (citing 15A C.J.S. *Conspiracy* § 1(2) (1967)). In rejecting the plaintiff's cause of action, the court found that the alleged overt acts of the defendants in refusing to settle and appealing the IAB's award were not unlawful per se. *See id.* at 934.

107. *See id.* at 933 (because compensation claim and tort claim are "mutually exclusive, employer's intentional act must be separable from compensation claim and must produce independent injury"); *see also* Brousseau, *Workers' Compensation, Annual Survey of Texas Law,* 38 Sw. L.J. 345, 355 (1984) (noting that *Massey* decision not "definitive opinion in the difficult area of exclusivity of remedy" and leaves "several questions subject to continuing doubt").

108. *See* Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 223 (Wis. 1979) (claimant's action not based on original industrial injury, but on "separate" injury resulting from "intentional" acts of insurer while investigating claim); *see also* Hayes v. Aetna Fire Underwriters, 609 P.2d 257, 262 (Mont. 1980) (employing language similar to *Massey* and *Coleman* in upholding workers' compensation claimants bad faith cause of action).

109. *Compare* Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 223 (Wis. 1979) (insurer's intentional bad faith acts must produce "separate" injury from original industrial injury) *with* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983) (intentional act of insurer must be "separable" from compensation claim and must produce independent injury).

110. *See* Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 223 (Wis. 1979). The *Coleman* court also stated that the claimant's injury was occasioned by the bad faith acts of the insurer and, thus, was not barred by the exclusive remedy provision because the injury was "distinct in time and place" from the original job-related injury subject to the compensation laws. *See id.* at 223. In reaching its conclusion, the *Coleman* court followed the lead of other jurisdictions also finding that a claimant's action for intentional torts of an insurer is separate from the compensation claim. *See id.* at 223 (citing Reed v. Hartford Accident & Indem. Co., 367 F. Supp. 134, 135 (E.D. Pa. 1973)); Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 42 (Alaska 1974).

that term would be generally understood. Similarly, three courts in other jurisdictions, while not using language as specific as that used in *Massey* and *Coleman,* have ostensibly reached the same results.[111] In finding that the exclusive remedy provisions did not bar a claimant's action for the intentional torts of an insurer, one court stated that the plaintiff's cause of action was based on the insurer's "alleged independent intentional torts and breach of their agreement, unrelated to [the plaintiff's] employment."[112] A second court found that the insurer's bad faith conduct gave rise to an "independent action" separate from the original job-related injury.[113] A third court noted that the "compensation law is exclusive only where in fact it provides a remedy."[114] From the context of the above courts' use of such language as "unrelated," "independent action," and "exclusive only where in fact it provides a remedy," it may be inferred that they intended to grant a separate tort action where it is "mutually exclusive" of the claim for compensation.[115] Though a comparison of *Massey*'s "mutually exclusive" language with similar language of other jurisdictions may help indicate what the Texas Supreme Court intended, the ultimate interpretation of the term "mutually exclusive" remains a task for future courts faced with this issue.[116]

The *Massey* court never reached the plaintiff's last claim that the insurer breached its implied duty of good faith under the insurance contract.[117]

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111. *See* Reed v. Hartford Accident & Indem. Co., 367 F. Supp. 134, 135-36 (E.D. Pa. 1973); Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43 (Alaska 1974); Hayes v. Aetna Fire Underwriters, 609 P.2d 257, 262 (Mont. 1980).

112. *See* Reed v. Hartford Accident & Indem. Co., 367 F. Supp. 134, 135 (E.D. Pa. 1973). The court further stated the tortious acts of the insurer resulted in a "completely independent cause of action, arising out of the relationship between insured and insurer" and not from the original industrial injury on which the compensation claim was based. *See id.* at 135.

113. *See* Hayes v. Aetna Fire Underwriters, 609 P.2d 257, 262 (Mont. 1980). Significantly, the *Hayes* court, in structuring the language and reasoning behind its decision, relied very heavily upon the rationale of the *Coleman* decision. *See id.* at 262-63.

114. *See* Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43 (Alaska 1974). In finding the "compensation law exclusive only where" it provides a remedy, the Alaska Supreme Court premised is decision on the rationale that intentional wrongs committed in conjunction with the payment and investigation of claims should be protected by the exclusivity provision. *See id.* at 44.

115. *See* Massey v. Armco Steel Co., 635 S.W.2d 596, 599 (Tex. App.—Houston [14th Dist.] 1982) (James, J., dissenting), *rev'd on other grounds,* 652 S.W.2d 952 (Tex. 1983). Following the rationale of *Coleman* and *Stafford,* Justice James, advocating the imposition of a bad faith tort action for an insurer's breach of good faith and fair dealing, noted that the tort action was "separate and distinct" from an action arising under an insurance contract. *See id.* at 599.

116. *See* Brousseau, *Workers' Compensation, Annual Survey of Texas Law,* 38 SW. L.J. 345, 355 (1984) (*Massey* language not definitive; leaves exclusive remedy issue open for interpretation).

117. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 933-34 (Tex. 1983) (addressed issue of good faith and fair dealing, but failed to resolve before reversing and remanding case).

Therefore, the question also remains unresolved as to whether a Texas workers' compensation claimant may maintain a separate tort action for a compensation carrier's breach of good faith and fair dealing owed under an insurance contract. It is significant that by remanding the case to give the plaintiff an opportunity to amend, the court may have impliedly recognized a separate bad faith action where there is a sufficient factual basis to support the claim.[118]

V. A PROPOSED EXTENSION OF A BAD FAITH CAUSE OF ACTION IN TEXAS

A. *Proposed Standard of Review for the Tort of Bad Faith in Texas*

As previously discussed, Texas does not recognize a common-law action for the bad faith settlement practices of workers' compensation insurance carriers.[119] Therefore, in advocating the adoption of a bad faith cause of action, it is necessary to examine the standards of review employed by other jurisdictions in evaluating a bad faith claim. Although each jurisdiction has its own criteria as to what must be asserted to state a cause of action for the tort of bad faith, four common elements transcend these geopolitical differences.[120] For a workers' compensation claimant to recover under a bad faith theory, he first has to establish the carrier's duty of good faith and fair dealing implied in the insurance contract.[121] Second, he must prove the carrier breached that duty by showing the lack of a reasonable basis for denying

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118. *See id.* at 934. The court stated that the plaintiff should be entitled to amend his pleadings to state a sufficient cause of action, and that the trial court erred in handling the matter by summary judgment. *See id.* at 934 (construing Texas Dep't of Corrections v. Herring, 513 S.W.2d 6, 10 (Tex. 1974) (party must be given opportunity to amend for failure to state cause of action before issue may be resolved through summary judgment)).

119. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983) (impliedly recognizing bad faith action by declaring that employee may have cause of action for intentional tort and separate action for compensation where these actions are "mutually exclusive"). *But see* Paradissis v. Royal Indem. Co., 507 S.W.2d 526, 529 (Tex. 1974) (employee barred from bringing action for intentional tort where he seeks recovery under Workers' Compensation Act).

120. *See* Massey v. Armco Steel Co., 635 S.W.2d 596, 602 (Tex. App.—Houston [14th Dist.] 1982) (James, J., dissenting) (advocating adoption of bad faith tort in Texas using common elements gleaned from other jurisdictions), *rev'd on other grounds,* 652 S.W.2d 932 (Tex. 1983); *see also* Comment, *Tort of Insurer's Bad Faith Refusal to Pay First Party Claims,* 82 W. VA. L. REV. 579, 596 (1980) (listing common elements of prima facie case of bad faith).

121. *See* Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1038, 108 Cal. Rptr. 480, 486 (1973) (first case recognizing duty of good faith and fair dealing implied in insurance contract; breach of such duty gives rise to bad faith tort action); *see also* Montgomery Ward & Co. v. Scharrenbeck, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947) (first Texas case to recognize implied duty of good faith and fair dealing in every contract).

benefits and the carrier's knowledge or reckless disregard of the absence of a reasonable basis.[122] Third, the claimant must demonstrate that the carrier's bad faith conduct proximately caused the injury complained of and was "separate" and "independent" from the original job-related injury.[123] Fourth, the claimant must establish that he sustained substantial damages as a result of the carrier's actions.[124]

In adopting the above standard of review for the tort of bad faith, it is imperative that the alleged facts giving rise to the claim be judged on an objective basis, that is, would the "reasonable insurer" under similar circumstances have delayed or denied the claimant's benefits.[125] By employing an objective basis of review, an insurer may freely deny questionable or extortionate claims.[126] If an insurer exercises ordinary care or has a "reasonable basis" in denying a claim it has nothing to fear but a judge or jury's interpretive analysis.[127] Consequently, recognition of the tort of bad faith in Texas would tend to equalize the bargaining power between the parties, in that the carrier would no longer be permitted to hide behind the protection afforded

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122. *See* Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978) (establishing applicable standard of care for tort of bad faith in insurance context). *See generally* Schuessler, *First Party Bad Faith: Should It Be Extended to Workers' Compensation Cases,* 34 FED'N INS. COUNS. Q., Winter 1984, at 199, 207 (acknowledging *Anderson* as setting applicable standard of care for tort of bad faith); Comment, *An Insurer's Bad Faith Refusal to Pay a Valid First Party Claim: A Tort Whose Time Has Come in Iowa,* 32 DRAKE L. REV. 987, 991 (1983) (recognizing *Anderson* as establishing applicable standard of care in first party bad faith action); Comment, *Tort of Insurer's Bad Faith Refusal to Pay First-Party Claims,* 82 W. VA. L. REV. 579, 596 (1980) (listing *Anderson* standard as common element of tort of bad faith).

123. *See* Hayes v. Aetna Fire Underwriters, 609 P.2d 257, 262 (Mont. 1980) (injury suffered as result of insurer's bad faith must be "independent" from original industrial injury); Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 223 (Wis. 1979) (original job-related injury must be "separate" from injury upon which bad faith action based).

124. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1965) (measure of tort damages based on purpose for which action maintained); *accord* TEX. REV. CIV. STAT. ANN. art. 8306, § 18a(a) (Vernon Supp. 1985) (15% penalty for delayed compensation sufficient to redress claimant absent substantial harm).

125. *See* Anderson v. Continental Ins. Co., 271 N.W.2d 368, 377 (Wis. 1978) (advocating use of objective "reasonable man" standard in adjudicating bad faith cases); *see also* Massey v. Armco Steel Co., 635 S.W.2d 596, 602 (Tex. App.—Houston [14th Dist.] 1982) (James, J., dissenting) (advocating objective standard of knowledge for adoption of bad faith tort in Texas), *rev'd on other grounds,* 652 S.W.2d 932 (Tex. 1983); Parks & Heil, *The Tort of "Bad Faith"—The Impact of Gruenberg v. Aetna Insurance Company,* 24 FED'N INS. COUNS. Q., Spring 1974, at 3, 12-13 (bad faith tort should be judged by objective "reasonable man" standard rather than subjective standard of what insurer thought was reasonable due in part to potential harm that may arise from subjective standard).

126. *See* Anderson v. Continental Ins. Co., 271 N.W.2d 368, 377 (Wis. 1978) (insurer need not fear being found liable for bad faith tort where it acts reasonably and in good faith in denying debatable claims).

127. *See id.* at 377.

by the exclusivity provision.[128]

B. *The Need for a Statutory Bad Faith Remedy—A Legislative Proposal*

Since the Texas courts have not yet provided an adequate common-law remedy for injuries occasioned from an insurer's bad faith settlement practices,[129] the responsibility of correcting this inequity lies with the Texas Legislature.[130] Judicial intervention would indeed cure many of the inequities which result under the existing law; however, legislative action would likely provide clearer guidelines and help abolish the present inequities.[131] Through the promulgation of statutory penalites and guidelines, the legislature can fashion a "bad faith" remedy which will compensate an employee for the detriment he may have suffered and protect the insurer by limiting the amount which may be recovered.[132] Currently, the Texas Workers' Compensation Act provides for a 15% penalty for delays in the payment of compensation.[133] This current provision, however, does not contemplate that injuries resulting from the intentional bad faith acts of an insurer can be expiated by the mere addition of 15% to the past-due compensation.[134]

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128. *See* Hayes v. Aetna Fire Underwriters, 609 P.2d 256, 262 (Mont. 1980) (carrier forced to deal with insured in good faith by recognizing bad faith tort).

129. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983). In *Massey,* the court impliedly adopted a common-law remedy where a claimant can state sufficient facts to sustain an action for intentional torts against an insurer; however, the tort action must be mutually exclusive of the claim for compensation and produce an independent injury. *See id.* at 934.

130. *See* Paradissis v. Royal Indem. Co., 507 S.W.2d 526, 529 (Tex. 1974) (absent legislative mandate, court must construe statute as written since compensation act intended to be employees' exclusive system of redress); Woolsey v. Panhandle Ref. Co., 131 Tex. 449, 456, 116 S.W.2d 675, 678 (1938) (regrettable claimant left without adequate remedy, but "it is the duty of courts to construe laws as enacted, and to carry out the intention of the Legislature as expressed in such laws").

131. *See* ILL. ANN. STAT. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985) (provides remedy for insurer's intentional wrongs and establishes discernible guidelines for insurer to follow in processing and settling claims); MINN. STAT. ANN. § 176.225(1)(a)-(d) (West Supp. 1985) (statute establishes guidelines for insurer to follow in handling employee claims); WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (balances equities by granting claimant adequate redress for malicious or bad faith conduct of insurer and limiting insurer's potential liability with exclusive remedy provision).

132. *See* WIS. STAT. ANN. § 120.18(1)(bp) (West Supp. 1985) (providing claimant remedy for detriment resulting from wrongful acts of insurer; puts ceiling on amount recoverable to protect insurer).

133. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 18a(a) (Vernon Supp. 1985) (15% penalty award on amount of past due compensation attributable to insurer's delay in payments).

134. *See* Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 42 (Alaska 1974) (nominal penalty award to claimant for insurer's malicious or intentional bad faith acts insufficient to redress claimant for potential harm resulting therefrom); Hayes v. Aetna Fire Underwriters,

The legislative proposal, which appears below, is modeled after statutes which have recently been enacted in Illinois, Minnesota, and Wisconsin.[135] These statutes have been enacted to address instances where an insurer acts unreasonably or in bad faith in processing or settling an employee's claim.[136] The proposal, which includes statutorily regulated penalties for an insurer's bad faith conduct, is aimed at balancing the bargaining powers between the parties by creating an incentive for the insurer to deal fairly and in good faith when processing a claim. The proposed amendment to the Texas Workers' Compensation Act is as follows:

Additional Award as Penalty for Bad Faith Conduct of Insurance Carriers or Employers in the Processing or Settlement of Employee Claims

(a) After notice and a hearing or upon the opportunity to be heard,[137] the Industrial Accident Board, or upon appeal, a court of competent jurisdiction, may in its discretion award additional compensation which it considers just,[138] up to, but not exceeding, the lesser of 200% of the compensation then past due or $70,000[139] in any case where an insurance carrier or employer has:

(1) instituted proceedings and/or interposed a defense where no real

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609 P.2d 257, 262 (Mont. 1980) (10% penalty award does not adequately compensate employee for detriment resulting from insurer's bad faith conduct; employee entitled to another remedy); Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 224 (Wis. 1978) (penalty provision providing for imposition of 10% additional award for delayed payments does not contemplate insurer's intentionally calculated harm).

135. *See* ILL. ANN. STAT. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985); MINN. STAT. ANN. § 176.225(1) (West Supp. 1985); WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985).

136. *See* ILL. ANN. STAT. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985) (addresses insurer's unreasonable, vexatious, intentional, and frivolous conduct); MINN. STAT. ANN. § 176.225(1)(a)-(d) (West Supp. 1985) (statute contemplates insurer's negligent, intentional, unreasonable, and vexatious conduct); WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (imposes 200% or $15,000 penalty for insurer's malicious and bad faith conduct in handling claims).

137. *See* MINN. STAT. ANN. § 176.225(1) (West Supp. 1985) (providing party against whom proceeding brought opportunity to be heard so as to refute charges against him and provide due process under law).

138. *See* WIS. STAT. ANN. § 102.18(1)(a) (West Supp. 1985) (intended to give party in best position to hear facts and circumstances of case discretion in awarding just amount of penalty); *see also* MINN. STAT. ANN. § 176.225(1) (West Supp. 1985) (tribunal given discretion in awarding additional amount).

139. *See* WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (department may award just compensation "not to exceed the lesser of 200% of total compensation due or $15,000"). This proposal is reasonably modest in light of the amount of damages recoverable under a similar provision of the Texas Insurance Code. *See* TEX. INS. CODE ANN. art. 21.21, § 16(b)(1) (Vernon 1981) (where insurer acts unfairly or deceptively, insured may recover "three times the amount of actual damages plus court costs and attorney's fees").

or present controversy exists as to the carrier's liability to pay the compensation, but which are only frivolous or are for delay;[140] or

(2) unreasonably, vexatiously, or in bad faith delayed or refused compensation payments;[141] or

(3) intentionally underpaid compensation.[142]

(b) The penalty award as provided in this section is to be the employee's exclusive remedy against an insurance carrier or employer for engaging in conduct described in subsection (a)(1), (a)(2), or (a)(3).[143]

(c) Actions or conduct rising to the level described in subsections (a)(1), (a)(2), or (a)(3) are to be defined by rule of the Industrial Accident Board.[144]

The employment of this penalty provision is intended to be discretionary with the IAB or the courts.[145] The imposition of a penalty under this proposed statute should be tailored to the individual facts and circumstances surrounding each case, and its sanctions should be imposed only where warranted.[146] Perhaps one pitfall of the proposed legislation is that it may result

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140. *See* ILL. ANN. STAT. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985) (penalty available where "proceedings have been instituted or carried by one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay"); MINN. STAT. ANN. § 176.225(1)(a) (West Supp. 1985) ("instituted a proceeding or interposed a defense which does not present a real controversy but which is frivolous or for the purpose of delay").

141. *See* ILL. ANN. STAT. ch. 48, § 138.19(k) (Smith-Hurd Supp. 1985) (penalty imposed where insurer's conduct unreasonable or vexatious in delaying payments); WIS. STAT. ANN. § 102.189(1)(bp) (West Supp. 1985) (statute sets applicable standard of recovery for bad faith action). Because the statutes have only recently been enacted, there is a scarcity of case law construing them; therefore, the *Anderson* common-law test for bad faith could be employed here. *See* Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978) (establishing applicable standard of proof for tort of bad faith: "the absence of a reasonable basis for denying benefits of the policy and the [insurer's] knowledge or reckless disregard of the lack of a reasonable basis for denying the claim").

142. *See* MINN. STAT. ANN. § 176.225(1)(d) (West Supp. 1984) (penalty may be imposed where employer or insurer has "intentionally underpaid compensation").

143. *See* WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1984) (provision designed to be claimants' exclusive remedy, thereby foreclosing claimant from bringing tort action for wrongs covered by provision).

144. *See id.* ("department may, by rule, define actions which demonstrate malice or bad faith"). This provision is intended to give the tribunal control over what levels of conduct exceed those described in the provision, as they are in the best position to define such levels of conduct. *See id.*

145. *See id.* § 102.18(1)(b) (imposition of penalty left to discretion of department of labor); *see also* MINN. STAT. ANN. § 176.225(1) (West Supp. 1985) (assessment of penalty award discretionary with compensation judge or court).

146. *See* MINN. STAT. ANN. § 176.225(1) (West Supp. 1985) (upon notice and hearing, compensation judge or court may impose sanctions if warranted); WIS. STAT. ANN.

in a barrage of bad faith claims.[147] Once the standards are established as to what constitutes "bad faith," however, the proposed statute should reduce the actions brought to those which are of a truly meritorious nature.

Besides providing a claimant with a bad faith remedy, the proposed statute has other benefits. The exclusive remedy proviso of the legislative enactment has the distinct advantage of guaranteeing greater protection for the employee and, at the same time, the proposal adequately insulates the insurer from liability in tort and its resultant high damages.[148] The insulation of the insurer from excessive liability in tort will also ultimately protect the consumer by indirectly maintaining the price of goods.[149] In a workers' compensation situation, the employer pays the premium to the insurer with the employee being named as a third-party beneficiary.[150] When the insurer is burdened with a tort verdict, the penalty passed on to the employer in the form of increased premiums are thereafter transferred to the consumer through an increase in the cost of the employer's goods and services.[151] This "passing the buck" situation would be almost nonexistent under the proposed legislation due to the reduced likelihood of insurer tort liability.[152] Therefore, the enactment of the proposed statute by the Texas Legislature would act to adequately serve and protect the interests of all concerned parties.

VI. CONCLUSION

Traditionally, courts have precluded a compensation claimant from bringing a bad faith action against an insurer, reasoning that the injured claim-

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§ 102.18(1)(bp) (West Supp. 1985) (based upon ultimate facts of case, department of labor may assess penalty where insurer acts in bad faith).

147. *See* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.34(c), at 13-72 (1982) (noting that *Stafford* decision set off wave of tort claims against insurers).

148. *Cf.* Sparks v. Republic Nat. Life Ins. Co., 647 P.2d 1127, 1132 (Ariz. 1982) (en banc) (upheld $4.5 million damage verdict against insurer for terminating claimant's policy in bad faith); *see also* Robertson v. Travelers Ins. Co., 427 N.E.2d 302, 304 (Ill. App. Ct. 1981) ($2 million punitive damage award against workers' compensation insurance carrier who intentionally acted in bad faith in processing employee claim).

149. *See* Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention,* 13 PAC. L.J. 833, 857 (1982) (consumer protected as result of legislative limits imposed on amount insured may recover in bad faith action).

150. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 12g (Vernon 1967) (provision providing for payment of premiums for compensation insurance by employers in all instances with employee as beneficiary).

151. *See* Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention,* 13 PAC. L.J. 833, 857 (1982) (society as consumer ultimately bears risk of loss in form of higher premium and cost of goods sold occasioned by virtually unlimited tort verdicts rendered against insurers).

152. *See* WIS. STAT. ANN. § 102.18(1)(bp) (West Supp. 1985) (foreclosing tort action and resulting tort liability by providing claimant's exclusive remedy under compensation act).

ant's "exclusive remedy" for the intentional torts of his employer and compensation carrier are provided under the applicable workers' compensation statute. This line of reasoning, however, has faltered in recent years as courts have begun to uphold a claimant's right to bring a bad faith action against an insurer for torts committed in processing a worker's claim. This right of action has been upheld on two principal grounds. First, the claimant's action is not based on the original industrial injury, but on a "second and separate injury" resulting from the bad faith acts of the insurer in processing the claim.[153] Therefore, since the compensation act does not cover the injury, the exclusivity provision cannot bar an action to recover for it. The second method of recovery is based on public policy considerations, in that the nominal penalty awards available to the claimant are not adequate to redress the injury inflicted, and the claimant should be entitled to another remedy.

Although the Texas courts have not as yet expressly granted a compensation claimant a bad faith cause of action against an insurer, they may have impliedly done so in the *Massey* case. The *Massey* decision granted a claimant the right to have one claim for compensation and another for the intentional torts of an insurer if such claims are "mutually exclusive."[154] Exactly what the "mutually exclusive" language means is left for future courts to decide. It may be reasonably inferred, however, that the court intended to grant a compensation claimant a bad faith action where sufficient facts are plead to sustain the action.

Alternatively, in the absence of, or in addition to, judicial intervention, it can be strongly argued that the most appropriate solution to the present workers' compensation problem is legislative action. With the enactment of this author's proposed statute, the Texas Legislature could afford protection to the insured and insurer alike and at the same time eradicate the harsh and often unfair result of the present system. As the law in Texas now stands, it actually encourages a compensation insurer to act unreasonably in processing the claims of a worker, as the insurer is able to shield itself from liability by hiding behind the protection afforded by the exclusive remedy provision.

153. *See* Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 223 (Wis. 1979).
154. *See* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983).