EROSION OF THE EXCLUSIVE REMEDY DOCTRINE AT THE HANDS OF BAD FAITH:THE RIGHT CAUSE BUT THE WRONG EFFECT

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"No perfect rule is possible, so the decisive question is what rule has the fewest flaws. From this it follows that the great secret for success of the workers' compensation system lay not in its vaunted, coercive compulsion, but in the fact that it followed the very pattern of risk distribution that both historical experience and general theory of contract law indicated would best minimize the risks in question."[1]

I. INTRODUCTION

Workers' compensation laws, rules and regulations establish a system of comprehensive medical coverage and income benefits for employees who suffer work- related injuries. Workers' compensation is a statutory scheme that grants the injured employee a sure remedy of scheduled income benefits and medical coverage without regard to fault while, in exchange, the employer and insurer escape the high costs of litigation, and the threat of compensatory and punitive damages.[2] Integral to the delicate balance of this *quid pro quo* is the requirement that employees injured at work have as their exclusive remedy the workers' compensation system, thereby giving rise to the "exclusive remedy doctrine."[3] The integrity of the exclusive remedy doctrine is the key to maintaining a fundamentally sound and equitable workers' compensation system.[4]

The exclusive remedy doctrine has become increasingly vulnerable to judicial determinations that a particular injury does not fall within the workers' compensation system. An injured employee who obtains a ruling that his or her injury is outside the workers'* compensation system is free to seek tort recovery against the employer. Historically, judicially-created inroads into the exclusive remedy doctrine included only those injuries that did not arise from an accidental workplace injury.

There is, however, a new development in the so-called workers' compensation

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1.Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law,* 16 Ga. L. Rev. 775, 805(1982).

[2]Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 407 (1988).

3.ld. at 411-412.

[4]Epstein, *supra* note 1, at 818; King, *supra* note 2, at 411-12.

common law that poses a threat to the integrity of the exclusive remedy doctrine. Many states now make tort litigation available even to employees whose injuries arise from an accidental workplace injury. At least eighteen states allow workers to bring tort suits against their employers/insurers for the alleged bad faith denial or cessation of workers' compensation payments.[5] This new bad faith cause of action enables employees to pursue workers' compensation benefits and tort recovery for a single workplace injury. Employers/insurers are thus exposed to the very risks the *quid pro quo* was designed to prevent: compensatory and punitive damages.

In addition to undermining the *quid pro quo*, bad faith litigation and other tort claims[7] have dramatically increased workers' compensation costs.[8] A large portion of those costs can be eliminated by legislative reinforcement of exclusive remedy provisions with regard to the bad faith handling of claims.

This article explores the emerging bad faith cause of action by giving the historical context in which courts evaluate the exclusive remedy doctrine, as well as the current state of workers' compensation in general. That perspective provides the

[5]*See, e.g.*, Doss v. Food Lion, 267 Ga. 312, 313, 477 S.E.2d 577, 578 (1996). The court denied Claimant's request to sue in tort for the alleged bad faith delay in authorizing rehabilitative treatment, which is typical of decisions disallowing a separate bad faith claim.

6.See infra notes 64-78 and accompanying text. The increasing availability of a bad faith cause of action against insurers is not limited to workers' compensation claims. Insurers' bad faith has gained attention from both the plaintiffs and defense bars. Plaintiffs' counsel have commented, "No one escapes the insurance company. . . . [G]odlike, it demands our tithing — that we pay our premiums promptly no matter how outrageous the price — failing which we will surely be condemned to dark and dreadful places. The insurance company is the God of Money. But the God of Money is not a benevolent god. It does not love us. It only loves its dollars, and it will hire the best lawyers in the land to keep them. The effects of insurance propaganda are already being felt by victims across the land whose just cases are, for the first time, being systematically rejected by their own neighbors. It is too early for meaningful statistics, but insurance adjusters are more arrogant than ever before." GERRY SPENCE, WITH JUSTICE FOR NONE 182 (1990). Defense commentators maintain that plaintiffs' counsel are equally at fault for bad faith litigation. *See* Lee Craig, *Avoiding Bad Faith Liability by Handling Claims Properly*, FOR THE DEFENSE, NOV. 1996, at 17-21. The following advice, for example, appeared in *Trial*, a historically plaintiff-oriented publication: "The success of a case is far more limited if an insurer simply mishandled one claim rather than engaged in misconduct that was part of the insurer's standard practice . . . Establishing that the insurer has an ongoing practice of similar inappropriate claim denials can significantly enhance the potential for punitive damages." William M. Shemoff & Sharon Arkin, *Preparing the First-Party Bad Faith Case*, TRIAL, Sept. 1995, at 53 55.

[7]*See, e.g.*, Irvin Investors, Inc. v. Superior Court, 800 P.2d 979 (Ariz. 1990)(psychological injury caused by sexual molestation of one worker by another held to be in the course and scope of employment for worker's compensation purposes); Tingley v. Town of Wallingford, 1994 Conn. Super. Ct,, Lexis 40 (January 11, 1994)(describing a judicially created exception to the exclusive remedy doctrine for intentional torts); Zola Haynes Moore v. RLCC Techs., Inc., 688 So.2d 1135 (La. 1996) (exception codified in La.R.S. 23: 1032(B)); Regan v. Amerimark Bldg. Prods., 118 N.C. App. 328; 454 S.E.2d 849 (1995) (retaliatory discharge); (Legget v. Central, Inc., 318 Ark. 732, 887 S.W.2d 523 (1994) (strong dissent states that this action has been legislatively foreclosed); Gant v. Sentry Ins., 1 Cal. 4th 1083, 824 P.2d 680 (1992); Walt's Drive-A-Way Serv. v. Powell, 638 N.E.2d 857 (Ind. 1994); Sabella v. Manor Care, Inc., 915 P.2d 901 (N M 1996) (sexual harassment/discrimination).

8.See Donald R. Fraham, *Managing Workers' Compensation Benefits is Key to Managing Cost*v COMPENSATION & BENEFITS MGMT., Spring 1996, at 1-8; William D. Heger, *Continuing the Effort to Revive Workers' Compensation*, BEST'S REV. (PROP/CASUALTY), Nov. 1994, at 68-71

backdrop for an analysis of holdings in various jurisdictions that have allowed this inroad into the exclusive remedy doctrine. After building a foundation in policy, the article asserts that state legislatures should move quickly to serve the mutual goals of punishing bad faith while ensuring that the exclusive remedy doctrine remains intact as the very cornerstone of the workers' compensation system.

II. DEVELOPMENT OF AMERICAN WORKERS' COMPENSATION

Workers in nineteenth century America did not generally bring lawsuits against their employers for injuries sustained on the job.[9] A prevailing fear of unemployment kept most employees from ever testifying against their employers.[10] Also during this time, employers' most reliable legal defenses, assumption of risk, contributory negligence, and negligence of a fellow employee, became strong precedent for insulating employers." By the end of the nineteenth century, employees' decreasing remedies in work-related tort litigation gained the attention of many state legislators.[12] As industrial growth brought corresponding increases in industrial accidents,[11] legislators searched for answers. The German compensation system enacted in 1893,[14] and the British Compensation Act of 1897 provided new employee compensation frameworks.[15] Despite the popularity of these foreign solutions, the first American compensation act, passed by Maryland in 1902, was struck down as unconstitutional.[16] State courts struck down other state compensation laws on the same grounds:[17] imposing liability on employers without fault amounted to a

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taking of property without due process of law under state and federal constitutions. Legislatures feared court findings of unconstitutionality and, as a result, passed less comprehensive and non-compulsory acts.[19] But in a landmark decision in 1917, the United States Supreme Court upheld a New York compulsory workers' compensation statute.[20] An explosion of American workers' compensation law began soon thereafter.

Workers' compensation in the United States became a unique system that cannot

9.Dana M. Leonard, Comment, *Exclusivity Provisions of Workers' Compensation Statutes*, 55 U. ClN. L. REV. 549, 550(1986).

[10]*Id.* at 550.

11.ARTHUR LARSON, WORKERS' COMPENSATION LAW: CASES, MATERIALS AND TEXT § 5.20 (1984).

[12]*Id.*

[13]*ld.* An estimated 70% to 94% of all industrial accidents went uncompensated before workers' compensation legislation reached the U.S. King, *supra* note 2, at 415.

[14]An account of this system was published as a Special Report of the U.S. Commissioner of Labor in 1893. *Id.*

[15]Epstein, *supra* note 1, at 818. The British Compensation Act of 1897 became a model for many state legislatures in the U.S. *Id.*

[16] A narrow cooperative accident fund for miners passed in Maryland in 1902. LARSON, *supra* note 11, at § 5.20.

[17]See, *e.g.*, 1909 MONT. LAWS § 67 (struck down as unconstitutional in 1909).

[18]LARSON, *supra* note 11, at § 5.20.

[19]*Id.*

20.New York Central R.R. v. White, 243 U.S. 188 (1917).

be categorized under tort law or social insurance.[21] The underlying premise of the *quid pro quo* is that the costs of industrial accidents and diseases "should, like other costs of doing business, be borne by the enterprise that engendered them,"[22] and ultimately by the consumer[23] Workers' compensation creates a contractual relationship between employers and employees "in which benefits are shared in a way that maximizes their joint profits and uses price adjustments to match the residual risks assigned to each party." The combination of the employers' strict liability and the employee's limited damages act as a pre-arranged settlement for future claims.[25]

The amount of compensation injured workers receive under the system often leaves employees in a worse financial position than if they had never been injured,[26] but the benefits afforded under workers' compensation go beyond the actual dollar payments. Employees enjoy guaranteed recovery of benefits for injuries that fall within the statute regardless of fault. The goal of the system is to benefit both employees and employers by (1) replacing uncertain remedies with certain ones; (2) avoiding the expenses and risks of tort litigation; and (3) channeling workers' compensation disputes through the presumably cheaper administrative system.[27]

In recent years, however, workers' compensation costs have risen to catastrophic levels. In 1984, the yearly workers' compensation costs paid by employers were an estimated thirty billion dollars and rising.[28] Costs rose twenty-nine percent between 1988 and 1991 to an annual employer payout of about sixty billion dollars.[29] In 1993, employers paid seventy billion dollars,[30] but the frantic efforts of reformers began to pay off. 1994 brought slight decreases in the average rates of cost growth.[31] Nonetheless, growth continues.

Analysts have identified four primary reasons for the enormous growth in workers' compensation costs: (1) the system evolved to pay many benefits that it was not designed to pay, such as long-term health care, stress-related illnesses and occupational rehabilitation;[3] (2) medical costs rose;[33] (3) fraudulent claims increased;[34] and (4)

[21] LARSON, *supra* note 11, at § 1.20.

[22] *See* W. Page Keeton et al. Prosser & Keeton on the Law of Torts § 80 (5th ed. 1984).

[23] LarS0N, *supra* note 11, at § 2.20.

[24] Epstein, *supra* note 1, at 804.

[25] id.

26. LARSON, *supra* note 11, at § 2.50.

[27] Epstein, *supra* note 1, at 818.

[28] Kevin D. Thompson, *Workers' Compensation Premiums Soar,* Black ENTERPRISE Apr 1993 at 33

29. id'

30. Rebecca Shafer Bruce, *Worker' Compensation: Ripe for Cost-Cutting,* THE N Y. TIMES, March 12 1995, at sec. 3, p. 13.

[31] Sue Veitengruber, *Conference Speakers Assess State of Workers' Compensation, Examine Role of Safety in Current Turnaround,* PROF. SAFETY, Feb. 1996, at 14.

32. Meg Fletcher, *Workers' Compensation Expenses Outstrip Rates: Insurers,* BUS. INS., Sept. 18 1989 at 28-31.

33. Patrick A. Gallagher, *HMO Strategies for Managing Workers' Compensation Claims,* HEALTHCARE FIN. MGMT., Mar. 1996, at 40-44; Heger, *supra* note 8, at 68.

[34] Fraham, *supra* note 8 at 2; *Workplace Injuries Massive Price Tag,* USA TODAY: MAG AM SCENE Nov. 1996, at 6.

litigation costs grew.[35] Efforts by reformers to improve workplace safety and to lower the costs of medical care and fraud have successfully lowered the cost of the system in some states.[36] Workers' compensation reformers, however, have paid relatively little attention

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to the high litigation costs.

Attorney involvement in workers' compensation claims increases the costs to all parties, and a recent National Council on Compensation Insurance (NCCI) study revealed that 75.9 percent of all serious workers' compensation claimants had independent legal counsel.[38] In states that allow bad faith actions to pierce their exclusive remedy provisions, the potential for enormous civil judgments looms large over employers and insurers.[39] Unless those states' legislatures reinforce the viability of their exclusive remedy provisions, their workers' compensation reform is incomplete.[40]

A viable exclusive remedy provision channels disputes regarding the rights and remedies afforded employees who are injured on the job[41] A typical provision states that "[t]he rights and remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee ... at common law or otherwise, on account of such injury, loss of service, or death."[42] Employees can only avoid the exclusive remedy doctrine by proving their injury is not within the scope of the Workers' Compensation Act.[43] Indeed, much of workers' compensation litigation concerns determinations of whether or not injuries *arose out of employment, and were suffered in the course of employment*[44] A much more controversial question, however, is whether or not an

[35]Fraham, *supra* note 8, at 2; Heger, *supra* note 8, at 70.

[36]Veitengruber, *supra* note 31, at 14.

[37]Sally Roberts, *Tort Reform Issues Top Risk Managers' Concerns: Survey*, BUS. INS., Apr. 15, 1996, at 1.

[38]Heger, *supra* note 8, at 70.

[39]See, *e.g.*, Meg Fletcher, *Bad Faith Ruling May Cut Workers Comp Dividends*, BUS. INS., Sept. 4, 1995, p. 2, 21 (bad faith claim against a California insurer resulted in a $20.3 million judgment, $20 million of which were for punitive damages); Albert J. Millus, *Rumblings in the System*, BEST'S REV., Sept. 1988, p. 38-42 (bad faith cases contribute to the financial woes of the workers compensation system); Thomas R. Bond, *Workers Comp Court Fights Can Hurt*, BUS. INS., June2, 1980, p. 18,20 (decrying large punitive damages in bad faith suits by injured workers against employers and insurers).

40.Fletcher, *supra* note 39.

[41]*See, e.g.*, GA. CODE ANN. § 34-9-11(1992).

[42]GA. CODE ANN. § 34-9-ll(a)(1992). It is important to note that Georgia law extends the limited liability of an employer to the employer's insurer. *See* Ga. CODE ANN.. § 34-9-1(3)(1992).

[43]See *infra* notes 48-87 and accompanying text. Such injuries include but are not limited to intentional torts, retaliatory discharge, and sexual harassment discrimination. *Compare* Covington v. Berkeley Granite Corp., 182 Ga. 235, 238 (1935) (holding that claims which do not fall within the Act are not contemplated by the exclusivity provision) *with* Nowell v. Stone Mt. Scenic R., 257 S.E.2d 344 (Ga. App. 1979) (holding that even injuries not compensable under the Act can still be within the purview of the Act for purposes of the exclusivity provision).

[44]*See, e.g.*, Bryant v. Wal-Mart Stores, Inc., 417 S.E.2d 688 (Ga. App. 1992) (holding that the exclusive remedy provision applies to intentional acts of the employer as long as the injury arises out of employment); Oliver v. Wal-Mart Stores, Inc., 434 S.E.2d 500 (Ga. App. 1993) (holding that slander suffered at work is not covered by the statute and is not subject to the exclusive remedy provision); Cline v. Aetna Casualty & Surety Co., 223 S.E.2d 14 (Ga. App. 1975) (holding that injuries resulting from fraud do not fall within the Act and are not subject to the exclusive remedy provision); Murphy v. ARA Services, Inc., 298 S.E.2d 528 (Ga. App. 1982); Cox v. Brazo, 303 S.E.2d 71 (Ga. App. 1983) (holding that sexual harassment is not within

employee whose injury is clearly within the statute should be allowed to elude the doctrine of exclusivity and pursue a recovery in tort for bad faith.

Workers' compensation claimants who sue in tort for bad faith have suffered an injury arising out of and in the scope of employment. This injury and the claims management of that injury give rise to a cause of action in tort in those states allowing bad faith claims. Tort recovery for a compensable injury is in direct conflict with the exclusive remedy doctrine.

Accomplishing the primary goal of workers' compensation certainty of benefits depends squarely on the integrity of the exclusive remedy doctrine in workers' compensation statutes.[45] The exclusive remedy doctrine limits the injured workers' recovery to that provided by the workers' compensation statute. The replacement of common law actions with statutory recovery takes the guesswork out of remedies and "prevents] litigation from becoming a grotesque imitation of global war."[46] If employees could bring their employer or their employer's insurance carrier into court claiming a separate tort action for every injury or subsequent delay in payments, the workers' compensation system would disintegrate.[47]

III. THE EROSION OF THE EXCLUSIVE REMEDY DOCTRINE

A. INTENTIONAL TORTS

The erosion of the exclusive remedy doctrine is primarily the result of judicially-created exceptions to the rule [48] Bad faith has been the most recent inroad, but injured employees have argued for tort exceptions for some time. Their success is largely due to the weakening of employers' tort defenses,[49] and by the increasing attractiveness, financial and otherwise, of tort remedies as compared to compensation benefits.[50] Claims alleging intentional torts appear to be the most common threat to the exclusive remedy doctrine nationwide.[51] Most of the courts that recognize exceptions for intentional torts have done so by finding that the employee's injury did not arise out of an accident, while others

the Act).

45.Workers' compensation is threatened in many jurisdictions by judicial expansion of the definition of compensable injury and expanded awards by legislatures. Epstein, *supra* note 1, at 809. However, the most lethal threat to workers' compensation is the weakening of the exclusive remedy doctrine *Id* at 818

46.Id.

[47]*See* Wendell J. Kiser, *Bad Faith Handling of Workers' Compensation Cases: Can it Give Rise to a Separate Tort Action Against Employers, Carriers, or Self-Insureds?,* 23 TORT & INS L J 147 160 (1987)

[48]W. at 159.

[49]Many states have adopted comparative negligence over contributory negligence. Assumption of risk is often destroyed as a defense if the risk was created by the employer or if the risk was a known or extraordinary one. The fellow servant doctrine has weakened as well. LARSON, *supra* note 11, at S 4 50

[50]Kiser, *supra* note 47, at 159.

51.See. e.g., Irvin Investors, Inc. v. Superior Court, 800 P.2d 979 (Ariz. 1990); Tingley v Town of Wallingford, 1994 Conn. Super. Ct„ Lexis 40 (January 11, 1994); Zola Haynes Moore v RLCC Techs Inc- 688 So.2d 1135 (La. 1996) (exception codified in La.R.S. 23; 1032(B)); Regan v. Amerimark Bide Prods 118 N.C. App. 328; 454 S.E.2d 849 (1995).

simply declare that their workers' compensation statutes do not contemplate intentional acts. "

Alaska's courts, which have allowed intentional torts to pierce the exclusive remedy doctrine, stated broadly their rationale: the social benefits of workers' compensation would not be furthered if intentional torts came within the workers' compensation system.[53] Only a handful of states, however, place enough confidence in this reasoning to create a blanket exception for intentional torts. Among the remaining states, there is no discernible consensus on when and why to excuse a claim of intentional tort.

Maryland created legislative exceptions only for certain intentional torts, namely false arrest, defamation, and the intentional infliction of emotional distress.[54] California barred intentional infliction of emotional distress claims under the exclusive remedy doctrine,[55] but allowed an independent claim for false imprisonment.[56]

Delaware courts carved out an exception for intentional torts only if committed by the employer,[57] while Florida extended intentional tort liability to employers and their alter egos.[58] A summary of claims that have successfully eluded the workers' compensation system in some states includes those for retaliatory discharge,[59] purely economic harm,[60] sex discrimination[61] and negligent inspection.[62] The inability of most state courts to fashion reasonably consistent exceptions in the area of intentional torts signals the vulnerability of the exclusive remedy doctrine in other areas of law, including bad faith.

2. BAD FAITH

Once the workers' compensation board declares a claimant's injury is compensable, there is still potential for tort litigation in many states. Whether or not a claimant is allowed to circumvent the workers' compensation system by bringing a civil

[52]Kiser, *supra* note 47, at 159.

[53] Van Biene v. Era Helicopters, Inc., 779 P.2d 315, 318-19 (Alaska 1989).

[54]Federated Dept. Stores v. Thach, 324 Md. 71, 595 A.2d 1067 (1991) (citing Maryland Workers' Compensation Act).

[55]Hunter v. Up-Right, Inc., 6 Cal. 4th 1174, 864 P.2d 88, 26 Cal. Rptr. 2d 8 (1993).

[56]Fermino v. Fedco, Inc., 7 Cal. 4th 701, 872 P.2d 559, 30 Cal. Rptr. 2d 18 (1994) (stating employer stepped outside of its proper role).

[57]Langhome v. Walters, 1994 Del. Super. Lexis 307 (holding employers have liability for intentional torts if substantially certain to cause injury or death).

[58]Cox v. Simeon, Inc., 668 So.2d 706, 1996 Fla. App., Lexis 1764.

[59]Legget v. Central, Inc., 318 Ark. 732, 887 S.W.2d 523 (1994) (strong dissent states that this action has been legislatively foreclosed); Gant v. Sentry Ins., 1 Cal. 4th 1083, 824 P.2d 680 (1992); Walt's Drive-A- Way Serv. v. Powell, 638 N.E.2d 857 (Ind. 1994); Sabella v. Manor Care, Inc., 915 P.2d 901 (N.M. 1996).

60.Hunter v. Up-Right, Inc., 6 Cal. 4th 1174, 864 P.2d 88 (1993); Zola Haynes Moore V. RLCC Techs., Inc., 688 So.2d 1135 (La 1996).

[61] Sabella v. Manor Care, Inc., 915 P.2d 901 (N.M. 1996).

[62]Van Biene v. Era Helicopters, Inc., 779 P.2d 315 (Alaska 1989) (holding that because employers and insurers are considered separate entities in Alaska, a claim against the insurer for negligent inspection of the employer's premises was allowed).

action for bad faith depends entirely on the integrity of the state's exclusive remedy provision. At present, eighteen state courts hold unequivocally that claimants may sue their employer/insurer in tort for the bad faith handling of their workers' compensation claims.[63] Twenty-three state courts maintain that their workers' compensation acts remain the exclusive remedy of claimants, even those who allege bad faith. The nine remaining states appear not to have ruled decisively on the issue.[65] Because so many jurisdictions have opened their doors to this cause of action, bad faith is an important and growing factor in the erosion of the exclusive remedy doctrine.

The eighteen states that allow independent causes of action for bad faith generally do so in the spirit of opening alternative forums to the injured claimant.[66] A handful of state courts have simply ruled that bad faith claims are independent actions that are not subject to the exclusivity provisions of their respective Workers' Compensation Acts. Mississippi,[67] Montana[68] and New Mexico[69] are typical among states that treat bad faith claims as independent of the workers' compensation system. Hawaii joined them in 1996 when its supreme court stated one popular rationale, that is, that injuries from bad faith conduct by the employer/insurer are separate from the original industrial injury covered by workers' compensation.[70]

Other states allow independent bad faith claims only where the insurer acted with some degree of malicious, outrageous or deceitful conduct. For example, in California an injured worker may bring an action for bad faith against an employer/insurer only if the latter's conduct in handling the original claim is grossly deceitful.[71] In Illinois, the employer/insurer's conduct must be outrageous,[72] while Minnesota courts raised the

[63]0f these eighteen states, the five that are not referred to are Alaska, Michigan, Missouri, Ohio and Wisconsin.

[64.]Of these twenty-three states, the thirteen that are not subsequently discussed are Connecticut, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, New Jersey, New York, Oklahoma, Rhode Island and Utah. Note, however, that courts in Kentucky and New York have stated they might allow bad faith tort suits to leave the system, but have not yet seen facts that would compel them to do so. *See* Zurich Ins. Co. v. Mitchell, 712 S.W.2d 340 (Ky. 1986); and Burlew v. Am. Mut. Ins. Co., 63 N.Y.2d 412, 472 N.E.2d 682 (1984).

65.These nine states include Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Vermont, Virginia, West Virginia and Wyoming. The District of Columbia, Puerto Rico and the Virgin Islands also appear to be undecided. *See* Appendix 1.

66.Vivian Senungetuk, *Workers' Compensation Exclusivity: Is it Here oris it Gone?* 58 DEF. COUNSEL J. 526 (1991). *See* Appendix 2 for a description of recent trends among states' treatment of bad faith suits.

67.See, e.g., Leathers v. Aetna Casualty & Surety Co., 500 So.2d 451 (Miss. 1986)(injured worker's complaint held to contain a viable course of action where employer willfully refused to process a legitimate claim).

68.See, e.g., Birkenbuel v. Montana State Comp. Ins. Fund, 212 Mont. 139, 687 P.2d 700 (1984)(claim for bad faith in settlement negotiations against state compensation fund held to be independent of the Worker's Compensation Act).

[69]*See, e.g.*. Russell v. Protective Ins. Co., 107 N.M. 9, 751 P.2d 693 (1988) (recognizing bad faith as an independent cause of action only for refusal to pay).

[70.]Hough v. Pacific Ins. Co., 83 Haw. 457, 927 P. 2d 858 (Haw. 1996) (allowing a bad faith claim since the injury was separate from the original industrial injury).

[7l]Unruh v. Truck Insurance Exchange, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (Cal.App 1971) (allowing bad faith claim for insurer's gross deceitful behavior in the handling of a claim)

[/2]Ledingham v. Blue Cross Plan for Hosp. Care, 29 111. App. 3d 339, 330 N.E.2d 540 (1975), *rev'd on*

standard to "outrageous and extreme conduct."[73] Maine courts require malicious intent to bring a bad faith suit,[74] and in Washington, the employer/insurer must "[exceed] all reasonable bounds of administrative procedure."[75]

Still other states have declared that workers' compensation insurers have a duty of good faith in handling claims, the breach of which is not controlled by the exclusive remedy doctrine. Courts in Colorado[76] and Texas[77] have decided that their employers/insurers have a duty of good faith regarding the payment of workers' compensation claims. Although Delaware imposes the same duty on employers/insurers, its courts have recognized a duty of good faith only in situations where the claimant has suffered the intentional infliction of emotional distress.[78]

On the other hand, many of the twenty-three states that exclude bad faith claims brought outside of the system expressly intend to preserve the integrity of their Workers' Compensation Acts.[79] A number of states have disallowed independent claims of bad faith against insurers and have placed them squarely within the jurisdiction of the workers' compensation system as the exclusive source of redress. Arizona,[80] Arkansas,[81] Florida,[82] and Kansas[83] are solid representatives of the states that have not allowed bad faith claims to pierce their exclusive remedy doctrines. The state supreme court in Alabama stated its position clearly by saying the court "has no authority to create an exception to the impenetrable exclusive remedy provision."[84] Pennsylvania entered this category of states in 1996 when it reversed its previous position and declared the workers' compensation

other grounds, 64 111. 2d 338, 356 N.E.2d 75 (1976) (allowing a bad faith claim where insurer's conduct was outrageous).

73.Hastings v. Fireman's Fund Ins. Co., 404 N.W.2d 374 (Minn. App. 1987) (allowing a bad faith claim for insurer's outrageous and extreme conduct).

[74]Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220 (Me. 1978) (allowing a bad faith claim for malicious intent for delaying payments).

[75]Deeter v. Safeway Stores, Inc., 50 Wash. App. 67, 747 P.2d 1103 (1987) (allowing bad faith claim where a self-insurer's conduct exceeded all reasonable bounds of reasonable administrative procedure).

[76]Travelers Ins. Co., v. Savio, 706 P.2d 1258 (Colo. 1985) (holding insurer's duty of good faith was breached by a negligent delay in payments).

[77]Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210 (Tex. 1988). The Texas legislature has taken steps to limit the damages the court may award. TEX. INS. CODE ANN. § 56-7-105 (West 1993).

[78]Korrea v. Penn. Manuf. Assoc. Ins. Co., 618 F. Supp. 915 (D.C. Del. 1985) (holding that insurer has duty of good faith where claimant suffers intentional infliction of emotional distress). Delaware deems bad faith actions by employers before the injury are within the exclusive jurisdiction of the act, but bad faith after the injury can give rise to a claim for intentional infliction of emotional distress only. Kofran v. Amoco Chem. Corp., 441 A.2d 226 (Del. Super. 1982).

79.Senungetuk, *supra* note 65, at 526.

[80]*See, e.g.*, Sandoval v. Salt River Proj. Improvement Power Dist., 117 Ariz. 209, 571 P.2d 706 (Ariz. App. 1977) (noting that wrongful deprivation of benefits is the only tort claim barred).

[81]See, *e.g.*, Cain v. Nat. Union Life Ins. Co., 290 Ark. 240, 718 S.W.2d 444 (1986) (neither failure to pay nor late payment of worker's compensation are remediable outside of the worker's compensation system).

[82]*See, e.g.*, Old Republic Ins. Co. v. Whitworth, 442 So.2d 1078 (Fla. App. 1977) (noting that wrongful deprivation of benefits is the only tort claim barred).

83.See, e.g., Horman v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984)(where a remedy exists under the workmen's compensation act. injured workers have no right to bring an action at common law).

[84]Wilkins v. W. Point-Pepperell Inc., 397 So.2d 115, 117-118 (Ala. 1981).

system should be "the exclusive forum for redress of injuries in any way related to the workplace."[85] The Georgia supreme court also closed the door on bad faith claims in 1996 when it refused to differentiate between bad faith delays in payment and bad faith refusal to authorize treatment.[86] Both, the court declared, are the exclusive domain of the workers' compensation system.[87]

IV. Undermining the Exclusive Remedy Doctrine: Policy Implications

When evaluating whether or not to allow an employee's claim to circumvent the workers' compensation system, it is incumbent upon courts to address the underlying policy question of whether the exclusive remedy doctrine should remain intact. Expert commentators maintain that "[t]he exclusiveness of remedy is a rational mechanism for making the compensation system work in accord with the purpose of the Act."[88] Indeed, to undermine the exclusive remedy doctrine is to undermine the workers" compensation system.

The workers' compensation system developed from a bargained-for exchange between industry and employees: employees injured at work receive sure recovery without regard to fault while employers receive immunity from compensatory and punitive damages. If the extent of recovery by an employee is the issue, other means exist to accomplish that end without weakening the exclusivity doctrine.[90]

Allowing direct tort action between employer and employee undermines the express premise of the original legislative bargain. So long as the injury is not *wholly separate* from the employer/employee relationship, the exclusive remedy doctrine must remain intact. Otherwise, one side of the legislative bargain is undone while the other remains in force.[91] The delicately balanced *quid pro quo* imposing no-fault liability in exchange for immunity from tort claims becomes illusory without channeling claimants' exclusive recourse through the workers' compensation system.[92]

Workers' compensation will lose its effectiveness as a cost-spreading mechanism if tort law invades the process. The transaction costs of a workers' compensation claim from initial reporting through the administrative courts are lower than those of a tort claim

[85]Kuney v. PMA Insl Co. 525 Pa. 171, 176, 578 A.2d 1285, 1287 (1990) (holding that the workers' compensation system should be the exclusive forum for redress of injuries in any way related to the workplace).

[86]Doss v. Food Lion, 267 Ga. 312,477 S.E.2d 577 (1996).

[87]*Id.* at 313.

[88]See Epstein *supra* note 1, at 818; King, *supra* note 2, at 516.

[89]For a complete discussion of the evolution of workers' compensation, *see supra* notes 9-46 and accompanying text.

[90]The legislature is in the best position to expand injured employees' recovery. *See supra* text accompanying notes 63 and 102.

[91]Epstein, *supra* note 1, at 812-813. Professor Epstein argues that allowing a tort action and a workers' compensation claim is beyond rational defense. *Id.*

[92]King, *supra* note 2, at 411-2.

in litigation.[93] Unlike the tort system, workers' compensation is unfettered by expensive determinations of fault or pain and suffering,[94] and tort is regarded as a notoriously inefficient cost-spreading vehicle.[95] Most importantly, workers' compensation has less actual adjudication, thus allowing more insurance premium funds to reach injured workers.

Much of the stability of the workers' compensation system is grounded in predictability. Adding bad faith claims to the formula not only adds the unpredictability inherent in tort, but also makes the avenue of recovery unclear.[97]

Some commentators argue tortious conduct can be deterred only through tort exceptions to the exclusive remedy doctrine.[98] The fundamental flaw in such reasoning is the assumption that the exclusive remedy doctrine is synonymous with immunity. The workers' compensation system is a shield only to the extent that it confines recovery to that provided by the legislature under the Workers' Compensation Act. So long as the workers' compensation system requires the employer or insurer to pay some penalty to employees who suffer injuries due to bad faith, the injury is redressed. The entire claim remains within the workers' compensation system, the bad faith is punished, and the system itself remains viable.[99]

IV. Punishment for Bad Faith is Best Addressed by the Legislature

The most effective way to protect the integrity of the exclusive remedy doctrine is to reinforce the workers' compensation act with a provision that specifically addresses the bad faith handling of claims. Judicially-created solutions dilute the exclusive remedy doctrine. A state legislature, on the other hand, can swiftly restore predictability to the benefit of insureds and insurers alike by setting out a test for bad faith and providing an appropriate penalty within the workers' compensation system.

The Texas state legislature, although it allows bad faith suits to elude the system, has put statutory limits on the amount recoverable.[1110] To rid their workers' compensation systems of litigation completely, states like Florida[101] and Oregon[10'] have crafted

[93] *Id*

[94] *See generally* Cornelius J. Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. Rev. 1355 (1974) (discussing problems of tort law in the identification of causal factors and thus in the proper allocation of

[95] King, *supra* note 2, at 412; *See also* Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184 (1987).

[96] King, *supra* note 2, at 412.

[97] *Id.* at 413.

98.See Arthur J. Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 686-87 (1983).

99Epstein, *supra* note 1, at 814.

100.TEX. INS. CODE ANN. § 56-7-105 (West 1993).

[101] FLA. STAT. ANN. § 440.34 (West 1995).

legislation that not only caps recoveries, but that clearly maintains the system's jurisdiction over bad faith claims.

Bad faith on the part of employers and insurers is as costly, financially and ethically, as fraud on the part of claimants. While many workers' compensation acts provide a penalty for unreasonable claims management by assessing an add-on percentage to the claimant's benefits, bad faith goes beyond unreasonable behavior.[103] Effective legislation can control bad faith without the diluting effect of judically-created solutions.

Uniformity in all bad faith provisions would be helpful, but because each state's workers' compensation system is unique, the value of uniform model legislation is limited. A bad faith provision, however, should be separate and distinct from those punishing unreasonable conduct both in form and severity. Suggestions include: a specific dollar amount imposed as a single fine;

- an increased percentage of benefits imposed as a continuing assessment for the duration of benefits payments;
- a multiple of the benefits (e.g., treble benefits imposed either as a onetime fine or as a continuing penalty for the duration of benefits payments); and/or
- criminal fines and, in the extreme, incarceration.

Legislatures must clearly distinguish unreasonable, non-malicious claims management problems from the malice and intent necessary to constitute bad faith.[104] By incorporating such legislation into workers' compensation acts, the workers' compensation system can punish bad faith and likely reduce workers' compensation and litigation costs while preserving the integrity of the exclusive remedy doctrine.

[102]OR. REV. STAT. § 656.262(10)(a)(1995). The text of the Oregon statute is instructive. It reads in part: "If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due. Notwithstanding any other provision of this chapter, the director shall have exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount described in this subsection. The entire additional amount shall be paid to the worker if the worker is not represented by an attorney. If the worker is represented by an attorney, the worker shall be paid one-half the additional amount and the worker's attorney shall receive one- half the additional amount in lieu of an attorney fee."

[103]Unruh v. Truck Insurance Exchange, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal.Rptr. 815 (Cal.App. 1971) (allowing bad faith claim for insurer's gross deceitful behavior in the handling of a claim); Ledingham v. Blue Cross Plan for Hosp. Care, 29 Ill. App. 3d 339, 330 N.E.2d 540 (1975), *rev'cl on other grounds*, 64 Ill.2d 338, 356 N.E.2d 75 (1976) (allowing a bad faith claim where insurer's conduct was outrageous); Hastings v. Fireman's Fund Ins. Co., 404 N.W.2d 374 (Minn. App. 1987) (allowing a bad faith claim for insurer's outrageous and extreme conduct); Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220 (Me. 1978) (allowing a bad faith claim for malicious intent for delaying payments).

104Legislatures can incorporate the successful techniques already in use in many workers' compensation acts that distinguish claimants' unreasonable behavior from fraud. *Compare* GA. CODE ANN. §34-9-19 (1995) (fraud provision) *with* Ga. CODE ANN. §34-9-108 (1995) (unreasonableness provision.)

V. CONCLUSION

The bad faith cause of action is the latest addition to the grab-bag of judicially- created exceptions to the exclusive remedy doctrine. It has become a formidable weapon in the hands of injured employees who desire to escape the workers' compensation system. Bad faith exists and cannot be ignored. The solution, however, lies not in the erosion of the exclusive remedy doctrine.

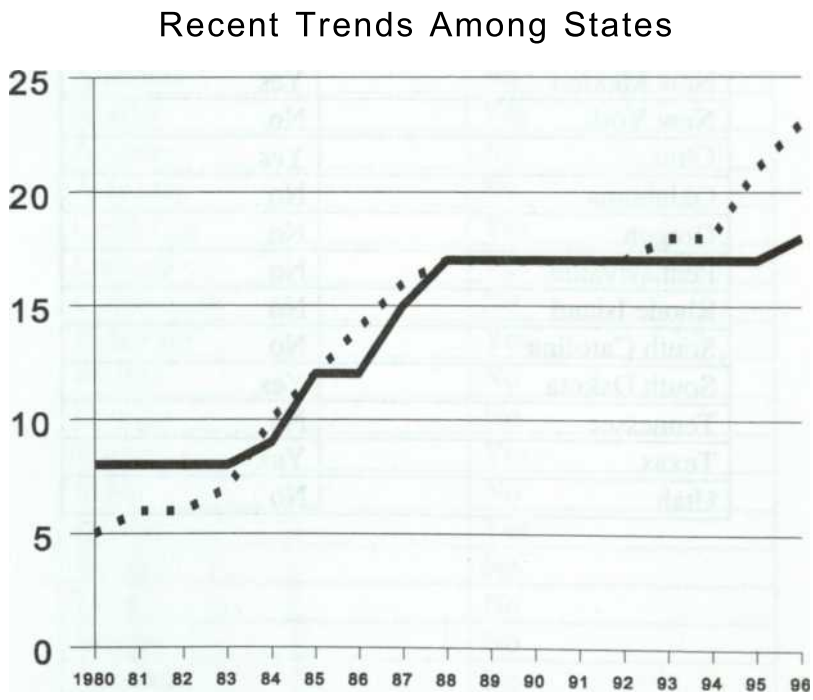
The history of workers' compensation legislation points to the exclusive remedy doctrine as the foundation of the workers' compensation system. Instead of undermining that system, state legislators should address and punish bad faith within their respective workers' compensation acts. Because workers' compensation has proven its benefit to American workers, employers and industry in general, state legislators must move to preserve the exclusive remedy doctrine before it is dismantled completely.

Appendix 1 State Judiciaries That Have Addressed Bad Faith

Name of State	Allows Independent Bad Faith Action?
Alabama	**No**
Alaska	**Yes**
Arizona	**No**
Arkansas	**No**
California	**Yes**
Colorado	**Yes**
Connecticut	**No**
Delaware	**Yes**
Florida	**No**
Georgia	**No**
Hawaii	**Yes**
Idaho	**No**
Illinois	**Yes**
Indiana	**No**
Iowa	**No**
Kansas	**No**
Kentucky	**No**
Louisiana	**No**
Maine	**Yes**
Maryland	**No**
Massachusetts	**No**
Michigan	**Yes**
Minnesota	**Yes**

Mississippi	**Yes**
Missouri	**Yes**
Montana	**Yes**
New Jersey	**No**
New Mexico	**Yes**
New York	**No**
Ohio	**Yes**
Oklahoma	**No**
Oregon	**No**
Pennsylvania	**No**
Rhode Island	**No**
South Carolina	**No**
South Dakota	**Yes**
Tennessee	**No**
Texas	**Yes**
Utah	**No**

Appendix 2


Recent Trends Among States
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