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"Bar-barians at the Gate"

How Trial Lawyers are Damaging the Exclusive Remedy Doctrine

I. The History of the Exclusive Remedy Doctrine: The "Grand Bargain"

Following the growth of labor movements worldwide seeking greater protection for workers, Wisconsin became the first U.S. state to pass a comprehensive workers compensation law in 1911. Nine other states passed similar laws or regulations that year followed by thirty-six others by the end of the decade.

The various state workers compensation statutes were all modeled loosely after the original Prussian system, championed by Otto von Bismarck. The central tenet is that of true "no-fault" insurance. Workers were provided wage replacement and medical benefits for the "inevitable" industrial accidents and injuries in exchange for relinquishing the workers' common law right to pursue a civil remedy through the courts.

Thus, employers participating in the system enjoy the notable benefit of tort exemption for workers covered by the statute. Employees remain free to sue third parties who may be responsible for their employment related injuries, but any proceeds from such litigation may go (in whole or in part) to reimburse their employer (or the insurance carrier).

The system worked well for nearly eight decades, with only minor exceptions to the general rule. Attorneys representing injured workers grew increasingly frustrated with what they viewed as inadequate compensation for representing injured workers. Beginning in the 1980s, the industry saw new legal theories presented to circumvent the exclusive remedy and obtain tort-based damages for their clients and themselves.

II. Dual Coverage under Standard Workers Compensation Policies

From virtually the outset of workers compensation in the U.S., legislatures and the courts began to create exceptions to the exclusive remedy, allowing employees to maintain a cause

of action directly against their employer in certain circumstances (more fully explored in Part III, *infra*). The insurance industry responded to this potential gap in coverage by expanding coverage in the traditional workers compensation policy beyond providing benefits mandated by a particular state's workers compensation law.

Modern policies have two parts: Part One (also referred to as "Coverage A") provides coverage for workers compensation claims. Part Two (sometimes referred to as "Coverage B") provides "employer liability" coverage.

As we all know, Part One covers the benefits that an employer is required to pay under state law. The benefits are generally unlimited in time and amount. Part Two insures the employer for its obligation to pay civil damages due to bodily injury by accident or disease if the condition arises out of and in the course and scope of employment *and if* there is a theory of recovery that is recognized as an exception to the exclusive remedy.

III. Traditional Carve-outs vs. Growing Erosion of Exclusive Remedy Doctrine

a. Third Party Liability

i. Contractual Liability -- Part Two provides coverage for actions filed by an employee against a third party who, in turn, files a third party claim for indemnification due to the existence of a "hold harmless and indemnification" clause in a contract between the employer and third party. These situations often occur in the construction industry whenever a sub-contractor's employee is injured, files a workers compensation contractor and then sues an upstream contractor for failure to maintain a safe place to work. The upstream contractor then tenders the action back to the subcontractor due to the underlying contract between the parties. More recent issues involve growing trend to use independent contractors to perform work not closely related to the company's core enterprise (e.g., security, housekeeping, photocopying/imaging, landscaping, etc. Depending on the precise nature of the relationship and contract, the employer may have some exposure.

ii. Contribution/Indemnity Issues -- Some states expressly provide for "actions over" against the employer in cases where employees sue negligent third parties (often in the construction trade or manufacturing context). For example, employee injured by a punch press sues the manufacturer alleging negligent design. Manufacturer might file a third-party action over against the employer alleging removal of safety devices. In certain cases, the employer may be entitled to an offset for the amount paid under workers compensation.

b. **Dual Capacity** -- In jurisdictions allowing recovery for dual capacity, a manufacturer of a defective product may be liable even if the employee is injured by the product at the workplace. However, as noted below, not every jurisdiction supports a tort recovery in a dual capacity context. .

i. States allowing dual capacity suits: California, Illinois, Kansas, Kentucky, Michigan, Minnesota and Ohio

ii. States not allowing dual capacity suits: Indiana, Iowa, Missouri, Montana, Rhode Island, South Carolina, South Dakota, Tennessee, Washington and Massachusetts

iii. Other situations involve employees of doctors or hospitals who are victims of medical malpractice while treating for a work-related injury. Some states (e.g., California) have closed this opening by statute.

iv. Other situations arise from the role of the employer as the owner of land or property

c. **Intentional Injury** -- Rationale behind this exception lie in the fact that the grand bargain was to shield the employer from ordinary negligence. The fact that an injury was caused intentionally by an employer takes it outside the course and scope of employment. Moreover, public policy considerations do not permit an employer immunity from civil actions where there is an intent to injure or harm an employee. This is not a universally held exception, although the trend appears to be toward expansion not just for clearly intentional acts, but also for injuries arising from willful or deliberate conduct, or conduct "substantially certain to result" in the employee's injury. These expansions tend to focus on the employer conduct (the actions taken or not taken) vs. any deliberate intent to injure a particular employee.

Thus, states may allow exceptions to the exclusive remedy where the employer's actions have fraudulently concealed facts or conditions causing injury, or resulted in workplace violence (respondeat superior), or stemmed from negligent hiring or supervision.

d. Intentional Torts and/or Non-Physical Claims

- Intentional/negligent infliction of emotional distress
- Defamation
- False arrest/false imprisonment
- Deceit
- Malicious prosecution
- Negligent hiring or retention
- Retaliatory discharge
- Violation of civil rights
- Loss of consortium
- Sexual harassment
- Bad faith claims handling

See, e.g., Tian v. Aspen Tech, 53 F. Supp. 3d 345 (D. Mass. 2014), citing Green v. Wyman-Gordon Co., 664 N.E.2d 808 (Mass. 1996) and Foley v. Polaroid Corp.,

413 N.E. 2nd 711 (1980); and *Estate of Moulton v. Puopolo, 5 N.E.3d 908 (Mass. 2013)*.

Employees have alleged an independent action based upon the contention that the resulting injury is not "physical" (bodily injury) but "mental" (in those states that do not recognize purely mental claims) or economic in nature. In general, claims for false imprisonment, deceit, defamation, malicious prosecution and retaliatory discharge are fact-dependent. Results are mixed with regard to claims for intentional and/or negligent infliction of emotional distress. Negligent hiring or retention claims have been less successful in avoiding the exclusive remedy.

e. Statutory-Employer and "Contractor-Under" issues

This issue is completely dependent on state law and judicial decisions. Practitioners and claims personnel must keep abreast of changing views in this area, however, or risk running afoul of changes to the law. The case of Patton v. Worthington, 89 A.3d 643 (2014) is instructive. Both the trial courts and appellate courts had supported significant changes to the established five-part test that arose from McDonald v. Levinson Steel Co., 153 A. 424 (Pa. 1930). The Pennsylvania Supreme Court reversed the appellate court, finding that it had confused independent contractors and general contractors (and the persons employed by both). However, a strong dissent was filed noting that the mandatory nature of workers compensation has rendered the statutory employer doctrine obsolete.

f. Occupational Disease Claims

In general, occupational disease claims are insured by Part One ("bodily injury by accident or disease"). However, exceptions to the exclusive remedy may be allowed in situations where the injury stems from a latent condition that is time-barred by the applicable workers compensation statute of limitations or where the medical condition or occupational disease has been expressly excluded by the workers compensation statutory scheme (e.g., repetitive trauma injuries in Missouri). As a subset of these claims, we also include injuries falling outside the statutory scheme: idiopathic causation; injuries for which the accident was not the "prevailing factor" or "predominant factor"; injuries cause by co-employee negligence (respondeat superior).

Recent decisions from Illinois and Pennsylvania have overturned decades of precedent and ruled in latent asbestos cases that the exclusivity provision of the workers compensation acts are inapplicable in cases after the occupational disease statute of limitations has run. In Folta v. Ferro Engineering, 14 N.E.3d 717 (Ill. App. Ct. 2014), the First Appellate District held that a former employee can file a general casualty claim (common law suit) against the former employer if the disease manifests after the workers compensation act's 25 year statute of limitations would serve to bar any

recovery under the workers compensation act. The reasoning of the court is that if a claim is time barred by the workers compensation statute, it is not subject to the exclusivity provisions contained therein. A similar result was found in Tooey v. AK Steel, 81 A.3d 851 (Pa. 2013) and Amesquita v. Gilster-Mary Lee Corp., 408 S.W.3d 293 (Mo. App. E.D. 2013). And at least one other jurisdiction (Montana) had previously held likewise in an occupational disease setting [Gidley v. W.R. Grace & Co., 717 P.2d 21 (Mont. 1986)].

g. Racketeer Influenced and Corrupt Organizations Act (RICO) Claims

Hitting closer to home for those of us in the claims adjusting role, claimants sometimes argue that, in addition to the industrial physical injury, there is subsequent harm produced by and through the claims process. Using the federal RICO statute, claims are made that employers, carriers and physicians have conspired to deny or limit medical treatment or economic benefits. Defenses invoking the Supremacy Clause have been asserted and those cases have wound their way through the Federal courts. See, e.g., Brown v. Cassens Transport Co., 675 F.3d 946 (6th Cir. 2012); Vacanti v. State Compensation Insurance Fund, 14 P.3d 234 (Cal. 2001). *See also*, Gianzero, et al., v. Wal-Mart Stores, Inc., (2011 WL 1740624, D. Colo. 2011), a class action against Wal-Mart, its carrier and claims management firm resulting in a class settlement. *But see*, Jackson v. Sedgwick Claims Management Services, Inc., No. 10-1453 (6th Cir. 2013 en banc), a case filed just a few months after Brown v. Cassens, *infra,* ruled that plaintiffs did not state a cause of action for which relief may be granted. The Jackson court held that a civil RICO claim, brought in a workers compensation context, does not give rise to an injury to "business or property" required by the RICO statute.

h. Bad Faith Claims Handling

Similar to the allegations contained in the RICO litigation, however, no evidence of conspiracy need be proven. Particularly effective in filing against self-insured employers based upon claims handling in a particular injured workers' claim or alleged as a pattern and practice. In some states, the exclusive remedy protection is extended not only to the employer, but the employer's workers compensation carrier [Wis. Stat. Ann. Section 102.03 (22)].

IV. Recent Appellate Cases Affecting the Exclusive Remedy Doctrine

- Padgett (Florida Workers' Advocates v. State of Florida, Case No. 11-13661 CA 25; Circuit Court of the 11th Judicial District [Miami-Dade County] 2014)
  In Padgett, the circuit court ruled that Florida's workers compensation statues were "unconstitutional" on their face because they no longer provided adequate benefits to injured workers in exchange for them giving up their constitutional rights to pursue civil litigation. In the ruling, the judge stated that

statutory changes in Florida had eroded benefits for injured workers to the point that it was no longer a "grand bargain" for the injured workers.

The Florida Court of Appeals (3d District) determined that when there was no justiciable controversy based on procedural grounds (in the action below, the employer dismissed its affirmative defense of workers compensation immunity: State of Florida v. FWA, WILG & Elsa Padgett, 167 So. 3d 500 (Fla. 3 DCA 2015). At that point, the declaratory judgment action became moot. On December 22, 2015, the Florida Supreme Court declined to review the case.

The Padgett case has concluded, but raises some interesting and troubling issues in view of the fact that over the course of the past two decades, many states have passed workers' compensation reform legislation that was intended to reduce employer costs. Attempts will continue to declare statutes unconstitutional or void as against public policy, and there is already another case in Florida on the identical issue winding its way through the courts: Stahl v. Hialeah Hospital, 126 So. 3d 1283 (Fla. 1DCA 2013). The Florida Supreme Court now has three cases before it challenging various provisions of the Florida Workers Compensation Act, in whole or in part. In addition to Stahl, the Court has agreed to hear Castellanos v. Next Door Company, 124 So. 3d 392 (Fla 1DCA 2013), challenging the limitations on attorneys' fees, and Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1DCA 2013), challenging the 104-week time limit on temporary disability benefits.

- Many of these reforms reduced benefits for injured employees and sharpened definitions related to causality. One example of this is an industrial accident resulting in a death claim where there are no dependents. Under tort law, the parents of the decedent have standing to pursue litigation for negligence leading to the wrongful death, but not under any workers' compensation program. [Contrast this result with Texas Mutual Insurance Company v. Ruttiger, 381 S.W.3d 430, (Tex. 2012) where the Texas Supreme Court effective extinguished virtually all extra-contractual liability in the workers compensation claims context; also, Painter v McWane Cast Iron Pipe, 987 So. 2d 522 (Ala. 2007) and Devero v. North American Bus Industries, 154 So. 3d 131, (Ala. Ct. App. 2013)]
- In Missouri Alliance for Retired Americans v. Department of Labor & Industrial Relations, 277 S.W.3d 670 (Mo. 2009), the Missouri Supreme Court declined to decide various constitutional challenges to the 2005 amendments to the Missouri Workers Compensation Act (RSMo, Chapter 287), but granted the Appellant labor organizations certain declaratory relief regarding the exclusive remedy provisions of the Act (RSMo 287.120)

Other recent appellate cases that demonstrate some of the issues and complexity surrounding the exclusive remedy doctrine are:

i. *Leeper v. Asmus, 440 S.W.3d 478 (Mo. App. W.D. 2014) (fellow employee)*
ii. *Picon v. Gallahger Bassett Services, 548 Fed. Appx. 561, 2013 U.S. App. LEXIS 23250, 2013 WL 6068463 (11th Cir. Fla. 2013).*
iii. *Kimzey v. Department of Labor and Industries, 2015 WL 7723006 (Wash. Ct. App. 2015), citing Rothwell v. Nine Mile Falls School District, 206 P.3d 347 (Wash. Ct. App. 2009)*
iv. *Pratt v. Landings at Barksdale, 2013 WL 5376021 (W.D. La. 2013), citing Watters v. Department of Social Services, 15 So.3d 1128 (La Ct. App. 2009)*
v. *Tate v. Liberty Mutual Insurance Co., 2015 Ala. Civ. App. LEXIS 145 (2015); see also, Jones v. Ruth (No. 2080249 (Ala. Civ. App 2009)*
vi. *McDonald's Corp. v Ogborn (No. 2008-CA-000024-M$ (Ky. Ct. App. 2009)*
vii. *Brown v. Southern Ingenuity, Inc., 4 So.3d 974 (La. Ct. App. 2009)*
viii. *Yau v. Allen, 229 Cal. App. 4th 144 (2014)(intentional infliction of emotional distress barred by exclusive remedy). But see, Horn v. Bradco International, 283 Cal.Rptr. 721 (Cal. App. 1991) (permitted emotional distress during termination process)*

V. Options for Employers (and States) to Traditional Workers Compenation

A. Texas Non-Subscriber Act

In the Lone Star State, an employer may reject workers compensation coverage and become a "non-subscriber". However, there are some requirements the employer must meet:

- ERISA document for each employee detailing the Employee Benefit Welfare Plan
- Package of insurance covering medical expense, AD&D, Disability and money for Legal Defense and Settlement
- Safety Program that is well maintained and documented

Here are the most recent statistics to indicate the percentage of Texas employers who have taken advantage of the non-subscriber statute:

- 44% of all Texas Employers are Non-Subscribers
- 20% of all Employees are no longer covered under Workers' Comp
- 53% of all Texas Manufacturers are Non-Subscribers
- 49% of all Texas Retailers are Non-Subscribers
- 42% of all Texas Real Estate Sales and Management Companies are Non-Subscribers
- 38% of all Texas Transportation Companies are Non-Subscribers
- 37% of all Texas Construction Contractors are Non-Subscribers
- 30% of all Texas Healthcare Employers are Non-Subscribers
- 94% of all large Non-Subscriber Employers (200 Employees and up) offer a responsible alternative to workers' compensation
- 30% of the small Non-Subscribing Employers offer a responsible alternative to Workers' Compensation

- :Less than 3% of all injury claims ever go to the Court House in Texas*

Source: Texas A&M study on Non-Subscribers as commissioned by the Texas DOI 2012

B. Oklahoma Option

Prior to 2013, Oklahoma was experiencing a bit of a crisis in its workers compensation system. Here are the lies, damned lies and statistics about Oklahoma in 2012 and prior:

- Ranked 5th highest in claims cost (NCCI 2011)
- Ranked 6th highest in premiums (2012 Oregon Rate Ranking Summary)
- Ranked 47th worst in 2012 workers compensation claims costs (American Legislative Exchange)
- Received a "D" for the effectiveness of its workers compensation system in 2012 (Work Loss Data Institute
  (Foregoing data taken from Property Casualty 360 article, April 30, 2014)

In response, the Oklahoma legislature passed significant reforms to its workers compensation law, but also passed SB 1062 in 2013, effective February 1, 2014. The new law allows employers to choose between using the reformed WC system and the alternative system for all on-the-job injuries (Oklahoma Employee Injury Benefit Act). The Option uses minimum workers compensation benefit levels, employee accountability and a free market approach to medical management. In addition, the Option benefit plan document may broaden some benefits from the WC minimum benefit standards. One final area where the law duplicates the WC approach is "exclusive remedy". Interestingly, Tennessee legislators considered a plan identical to the Oklahoma option and rejected it, largely on fears that reliance on ERISA plans would prevent state oversight and regulation of benefits for workers.

C. Accepted vs. Denied Workers Compensation Claims
D. Weighing the Exposures under Workers Compensation or Other Liability
E. Insurance Policy and Coverage Implications

These three points will be considered together. When the possibility of denying a claim filed under the state Workers Compensation Act because the injury may not have "arisen out of and in the course and scope of employment", sophisticated counsel and savvy adjusters and employers should analyze whether or not it might nonetheless be wise to accept the injury as a compensable claim vs. exposing the employer to a multi-million dollar civil liability verdict. These issues have serious implications for insurers writing CGL and umbrella coverage for these very same employers.

VI. The Future of Exclusive Remedy

Interestingly, many of the attempts to strip away the exclusive remedy results from jurisdictions where legislatures (cheered on by the business lobbyists) have attempted to control runaway workers compensation costs through meaningful reforms (e.g., Florida, Missouri, etc.). When faced with dwindling revenues from traditional sources (representing injured workers in workers compensation claims), many enterprising lawyers will try to push the envelope. It does call to mind the old joke that "this town isn't big enough for one lawyer, but it's plenty big enough for two." In some cases, the reforms have been "too effective" and squeezed the injured worker (and their attorneys) to the point that they seek relief outside the workers compensation statute by attacking the exclusive remedy.

There will always be challenges and exceptions to the exclusive remedy doctrine, but it behooves all of us in the defense bar and those who write coverage and adjust claims to be aware of the basis of these challenges. In some cases, policy language can be tweaked; in other cases, it may depend on educating our claim adjusting staff; in still others, it may require a concerted effort within state legislatures to either expand or contract coverage for certain types of injuries, diseases and claims.

The bottom line is that a growing number of states have experienced significant growth in the per claim cost for workers compensation in the past few decades. We now have a system that, in many cases, is bloated with "too many mouths at the trough", providing precious little in value-added benefit to the injured worker, or the employer in returning the injured worker to productive employment. In essence, we have a system that does not work for the employer, the employer or the carrier. When something is that badly broken, the response is often to enact broad reforms. Failing that, the response has most recently been to allow employers to opt out of the system entirely, or allow injured workers additional civil redress to restore perceived loss of rights and benefits. There is no simple answer to such a complex problem, but awareness of the trends and what can be done to counteract them is a good first step.