

# INSURANCE LITIGATION STRATEGIES

January 2008

Brian V. Francis, ARM

## **Bad Faith: Katie Bar the Door**

In a well thought out and articulated decision involving a worker's compensation insurance carrier, the Oklahoma Supreme Court recently stated that an insurance company cannot hide behind the shield of Exclusive Remedy for a bad faith refusal to pay a workers' compensation award.

The insurance company argued that its liability was limited under the worker's compensation statute. The court rejected this argument stating that this "exclusive remedy" language applies only in the event of an employee's accidental injury "arising out of and in the course of employment." Further, the court went on to say that nothing in the statute's exclusive remedy provision gives common law immunity to an insurance carrier for its failure to act in good faith in the payment of an award.

As in Oklahoma, courts around the country are beginning to hold that an insurer's good faith duty applies to all insurers and all insurance policies as long as there is a contractual or statutory relationship between the insured and insurer, and this applies to worker's compensation insurance. In order to reach that end, opposing counsel is making the argument that the injured employee is a third-party beneficiary of a worker's compensation insurance policy, and consequently, the right to enforce the insurance agreement and the covenant of good faith and fair dealing attached to it belongs to the injured worker. Such an argument is reasonable, well settled and persuasive. Further arguments conclude that bad faith conduct is not reasonably within the contemplation of workers when they give up the right to bring a common law negligence action against an employer for guaranteed benefits. Such a bargain is imposed upon the employer and employee by statute and an insurance carrier is not a party to that bargain.

The recognition that the exclusive remedy doctrine will not be a defense in shielding an insurance carrier from its bad faith conduct will make bad faith worker's compensation claims more difficult to defend. Traditionally sheltered from reprehensible conduct, worker's compensation underwriters will now have to address the fundamental bad faith issues associated with a lack of training and inadequate supervision. Katie bar the door.

Ω