THE TORT OF BAD FAITH IN IOWA WORKERS' COMPENSATION LAW

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TABLE OF CONTENTS

I. INTRODUCTION

The current workers' compensation system in the state of Iowa is the result of nearly one hundred years of jurisprudential, economic, and social change resulting in a complex apparatus designed to compensate the worker for injuries resulting from participation in business or industry. The workers' compensation system has grown in substance and complexity; its changes are inexorably linked to changes in medicine, insurance law and business practice, and the growth of the information-based society and economy.

Claimants, practitioners of workers' compensation law, and those working in the insurance industry only a few decades ago would scarcely recognize the current procedures involved in claim processing. Changes include: surveillance of claimants becoming more commonplace; increased computerized processing and evaluation of files and information relating to the claimant's case; concentration and centralization of operations in the

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insurance industry resulting in the likelihood that a claimant's case will be processed and evaluated by an adjuster working hundreds or thousands of miles away; cottage industries developed among medical professionals who serve as rehabilitation nurses supervising and coordinating the claimant's medical care; or the existence of physicians that have come to be known as "claimant's" or "defense" physicians because of their clientele and the perceived slant of their opinions and impairment ratings.

With these new developments in the processing of workers' compensation claims and cases come new possibilities for negligent handling of the claimant's file, insupportable delays or failures in the payment of benefits, or even outright intentional denial or mishandling of a claim. Today more people are responsible for handling such claims, gathering information, or making decisions bearing on the ultimate issues of compensability and damages. There will be continued attempts by claimants' attorneys to seek ways to compensate the claimant facing unreasonable delays or denial of a claim. Further, the injured blue-collar worker finds it more and more important to be adequately and promptly compensated in the "lean and mean" downsizing-plagued economy of this day and age. Thus, a premium is put on those with information-based skills, and an industrial worker or laborer can more easily be vocationally and economically marginalized when suffering some kind of permanent disability or impairment. Traditionally, Iowa has always strived to apply its workers' compensation laws and system broadly and liberally, for the benefit of the worker and his or her family.[1]

The 1990s produced new developments in the areas of tort remedies outside the Iowa workers' compensation system and penalty benefits within workers' compensation.[2] The bad faith cause of action in the workers' compensation context is still a minority view among the various states. Many states reject such claims as an attack on the basis of workers' compensation, which they view as the exclusive remedy for workplace injury. Iowa currently stands with the jurisdictions that find reasons to give the workers' compensation claimant an additional means of compensation when faced with unreasonable delays or unconscionable treatment during the pendency of his or her workers' compensation claim.

This Article will discuss the tort of bad faith within Iowa workers' compensation law, its history, current development and application before the Supreme Court of Iowa, and its usefulness to the workers' compensation claimant faced with extreme delays or inappropriate action on the part of insurance carriers. Peripheral issues, such as the role of penalty benefits in light of tort and discovery issues, which are useful to the practitioner, will also be developed.

This Article will show that recognition of the tort of bad faith in this context is a necessary part of workers' compensation law, given the unique

1. Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979).

2. For a discussion of relevant cases and the convoluted Iowa Supreme Court law surrounding penalty benefits, see Algona, Iowa, attorney Mark Soldat's 1996 presentations before the Iowa Association of Workers' Compensation Lawyers, Inc. and the Iowa Trial Lawyers Association Workers' Compensation CLE seminar.

relationships among the insured, worker, and insurance company and the increasingly complex methodology of insurance company processing, evaluating, and settling workers' compensation claims. While the exclusive remedy aspect of workers' compensation is a necessary and elemental feature of the system of no-fault compensation for injured workers, the subsequent procedural, business, and legal actions that surround the development of a worker's claim and its eventual evaluation and settlement should, therefore, be seen as standing outside the injury-related compensation system. These actions should be held accountable to the civil-tort system when a tortious wrong adequately can be shown to have occurred.

II. HISTORY OF THE BAD FAITH TORT CLAIM AGAINST WORKERS' COMPENSATION INSURANCE CARRIERS

A. *Third-Party Bad Faith*

The concept of a tort of bad faith against insurance companies for allegedly improper claims handling was first realized in the so-called third-party bad faith tort claim situation, in which an injured party not part of the insurance contract in question sues in tort against the tortfeasor's insurance carrier.[3] This is generally a result of the insurance carrier's failure to adequately investigate a claim, a failure to settle with the injured party within the damage limits of the policy, and an excess judgment rendered against the tortfeasor.[4]

The determination that some sort of duty of good faith exists, from which a breach of bad faith can be made, involves an analysis that is grounded in a finding of duties similar in nature to a quasi-contractual or fiduciary relationship—where one party has a bundle of expectations and interests that the other party has a recognizable duty to meet and uphold.[5] There is said to be a breach of the implied covenant of good faith in such a transaction or

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3. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 7.8, at 876-77 (1988).

4. A seminal Iowa case discussing this type of claim, in the third-party context, is *Kooyman v. Farm Bureau Mutual Insurance Co.*, 315 N.W.2d 30 (Iowa 1982). In *Kooyman*, a girl was injured crossing a street to board a school bus. *Id.* at 32. Her parents settled with the defendant school district and proceeded against the driver of the car that struck her. *Id.* Farm Bureau did not apprise the driver of the consequences of failing to settle, and after the company refused the Kooymans' last offer of $100,000, judgment was entered against the driver for $600,000, exceeding his net worth by $500,000. *Id.* at 36. The facts of the case amply illustrated that the potential liability of the driver far exceeded his $25,000 policy limits, and Farm Bureau's attorneys were found to have minimally investigated the claim, undertaken inadequate preparation, and failed to adequately advise their insured of his settlement options and the consequences of settlement. *Id.* at 34-36. The court held that the issue of whether the insurer approached the matter of settlement in good faith depends on whether the company disregarded policy limits. *Id.* at 34. This issue presents a jury question. *Id.* at 37.

5. *See id.* at 34 (citing Neal v. Farmers Ins. Exch., 582 P.2d 980, 986 n.5 (Cal. 1978)).

relationship.[6] Similarly, conduct which is construed as bad faith violates "'community standards of decency, fairness or reasonableness.'"[7]

B. *First-Party Bad Faith—Two Paths to Follow:* Dolan *or* Long

1. *The* Dolan *Decision*

The concept of bad faith on the part of insurance companies was expanded to include first-party bad faith claims.[8] A first-party bad faith tort would involve an insured seeking recovery of his or her own losses which were allegedly covered by the insurer's policy.[9] First-party bad faith tort claims, previously rejected in various cases by the Iowa Supreme Court,[10] were finally adopted in Iowa in *Dolan v. Aid Insurance Co.*,[11] where "the nature of the contractual relationship between the insurer and the insured" justified the adoption of the first-party bad faith tort.[12]

In *Dolan*, the insured party (Dolan) brought suit against his automotive insurer, Aid Insurance Company, for a bad faith failure to settle within his underinsured motorist policy limits, subsequent to a traffic accident, in which the other driver's liability policy limits were insufficient to adequately compensate Dolan.[13] When Dolan settled with the other driver's insurer for the policy limit of $25,000, he expected to recoup the rest of his damages from the underinsured motorist policy he had maintained.[14] Aid Insurance Group, n/k/a Allied Insurance Group (Allied) chose, however, to refuse additional

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6. *Id.*

7. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981)).

8. Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988).

9. Johnson v. Farm Bureau Mut. Ins. Co., 533 N.W.2d 203, 207 (Iowa 1995). The *Johnson* decision is unique because the court rejected a so-called "reverse bad faith" claim, which would have given a new cause of action to insurers when their insured attempted a frivolous bad faith claim. *Id.* at 207-08.

10. *See, e.g.*, Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 112 (Iowa 1986); Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633, 636 (Iowa 1984); Higgins v. Blue Cross, 319 N.W.2d 232, 236 (Iowa 1982); M-Z Enter., Inc. v. Hawkeye-Security Ins. Co., 318 N.W.2d 408, 415 (Iowa 1982).

11. Dolan v. Aid Ins. Co., 431 N.W.2d 790 (Iowa 1988). *But cf.* Johnson v. Farm Bureau Mut. Ins. Co., 533 N.W.2d 203, 208 (Iowa 1995) (refusing to recognize a reverse bad faith claim stating that "sanctions pursuant to Iowa Rule of Civil Procedure 80(a) provide an adequate remedy . . . when an insured filed a frivolous bad faith claim"); Stahl v. Preston Mut. Ins. Ass'n, 517 N.W.2d 201, 203 (Iowa 1994) (applying the "one-year contractual limitations provision" instead of the general statutes of limitations because the cause of action for bad faith was "fundamentally a claim on the policy"); White v. Northwestern Bell Tel. Co., 514 N.W.2d 70, 77 (Iowa 1994) (refusing to extend a bad faith tort claim to a breach of a settlement agreement because "the concerns . . . regarding unequal bargaining power are not implicated").

12. Dolan v. Aid Ins. Co., 431 N.W.2d at 794.

13. *Id.* at 791.

14. *Id.*

payment to Dolan under the policy.[15] Allied focused on prior injuries that Dolan had suffered in a previous accident.[16] Dolan communicated to Allied that the injuries were not substantial and had healed, creating no residual disability at the time of the accident.[17] Allied continued to investigate the injuries, which delayed settlement.[18]

Finally, Allied offered Dolan a $20,000 settlement, which Dolan did not acknowledge.[19] At trial, "the jury found Dolan's damages exceeded $25,000 by the amount of $79,361," which resulted in Dolan's receipt of the $40,000 policy limit of his underinsured motorist policy with Allied.[20] Dolan then filed suit claiming bad faith on the part of Allied in investigating and failing to settle the claim when it had the opportunity.[21]

In analyzing Dolan's legal theory supporting a first-party bad faith claim, the Iowa Supreme Court partially accepted the Wisconsin Supreme Court's bad faith tort analysis[22] as articulated in *Anderson v. Continental Insurance Co.*[23] The *Anderson* test mandated that "a plaintiff must show the absence of a reasonable basis for denying benefits of the policy, and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim."[24] Where a claim is "fairly debatable," the insurance company may refuse coverage, can contest the claim, and as a practical result generally evade a bad faith claim through a directed verdict or summary judgment.[25]

While the framework of the *Anderson* test was acceptable to the Iowa Supreme Court, *Anderson's* rationale had previously been criticized in *Pirkl v. Northwestern Mutual Insurance Ass'n*[26]. In *Pirkl*, the court stated:

> We are not nearly as persuaded as the Wisconsin court in *Anderson* that the rationale which recognizes an ancillary duty of a liability insurer to exercise good faith in the settlement of third party claims is equally applicable and of equal importance when an insured seeks payment of a claim for a property loss from his own casualty insurer.
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> The relationship between the insurer and its insured in the two situations is markedly different. In the former situation, a clear fiduciary duty

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 794.
19. *Id.* at 791.
20. *Id.*
21. *Id.*
22. *Id.* at 794.
23. Anderson v. Continental Ins. Co., 271 N.W.2d 368 (Wis. 1978).
24. Dolan v. Aid Ins. Co., 431 N.W.2d at 794 (citing Anderson v. Continental Ins. Co., 271 N.W.2d at 376). The second prong of the *Dolan* test was softened in *Reuter v. State Farm Mutual Insurance Co.*, 469 N.W.2d 250, 253 (Iowa 1991).
25. Dolan v. Aid Ins. Co., 431 N.W.2d at 794.
26. Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633 (Iowa 1984).

> arises which places an affirmative duty on the insurer to investigate the claim and take such additional affirmative action as is required in the best interests of its insured. In the casualty insurance situation, the relationship between insurer and insured is for many purposes at arms length. The insurer has no clearly defined duty of investigation and may require the insured to present adequate proof of loss before paying the claim. The two parties are on opposite sides of the issue rather than being partners on the same side as in the liability insurance situation.[27]

While the test in *Anderson* was acceptable to the *Dolan* court, *Anderson*'s underpinnings, which linked insured and insurer in a fiduciary-type relationship, were not acceptable.[28] The Iowa Supreme Court instead grounded the duty in a recognition of "the inherently unequal bargaining power between [the] insurer and the insured,"[29] which remains continuous throughout the entire relationship between the parties and becomes particularly important when loss occurs bringing the issue of coverage into play.[30] Further, the *Dolan* court stated that insurance contracts are generally contracts of adhesion, mandating special consideration of the insured-insurer relationship.[31] Recognition of such a tort was necessary since "traditional damages for breach of contract will not always adequately compensate an insured for an insurer's bad faith conduct."[32]

Despite creating the new cause of action, the court found that Dolan had failed to meet the burden set forth in its opinion because of his inability to show "the absence of a reasonable basis for Allied's action."[33]

2. *The* Long *Decision*

In *Dolan*, the Iowa Supreme Court created a first-party bad faith cause of action, granting insureds the right to proceed in tort against insurers that had violated the special relationship between the two parties. Following *Dolan* the court considered the case of *Long v. McAllister*,[34] which at first blush might seem a closer cognate to the claimant-insurance carrier-employer relationship found in workers' compensation law.

In *Long*, the court refused to entertain a bad faith cause of action, which would have allowed a third party to recover against a tortfeasor's insurer for failing to settle a liability claim.[35] Long and his insurance carrier, co-defendant I.M.T. Insurance, entered a dispute concerning the "adjustment of

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27. *Id.* at 635.
28. Dolan v. Aid Ins. Co., 431 N.W.2d at 793-94.
29. *Id.* at 794.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 794-95.
34. Long v. McAllister, 319 N.W.2d 256 (Iowa 1982).
35. *Id.* at 261-62.

motor vehicle property damage under the liability coverage" of his insurance policy.[36]

Long's automobile was damaged when a wagon accidentally collided with it.[37] The wagon was owned by McAllister and McAllister Seed Company, Inc.[38] Long had expected the insurer to pay the portion of his claim that was not disputed by either party.[39] He further alleged in his bad faith suit that I.M.T. should have adjusted the damage promptly and in a manner reflecting good faith.[40] Summary judgment was awarded, however, in favor of I.M.T., thereby dismissing the bad faith tort claim.[41]

The Iowa Supreme Court declined to recognize this type of bad faith tort, otherwise referred to as a third-party direct bad faith tort claim.[42] In doing so, the court refused to consider the content of the insurance contract as creating some sort of recognition of "the victim as a third-party beneficiary of the insurance contract."[43] The court attached particular significance to the contractual intent of the parties and whether consideration of the potential beneficiary status of a third party actually did enter into the parties' intentions at the time of contracting.[44] Additionally, Long was not classified as an "incidental beneficiary" under the contract, which would allow him to become a beneficiary of the contract simply because the contract's terms would be carried out and inure to his benefit.[45] The court simply refused to extend any notion of third-party beneficiary status to the point where an action sounding in tort would follow from failure of that third party to receive the benefit.[46]

The court also rejected Long's argument that a duty should be found between the insurer and the victim third party; instead, the court found that if any sort of relationship existed between the two parties at all, it was an adversarial relationship.[47] Because the insurance contract existed between the insured and insurer, their interests were clearly aligned, and the fiduciary duty, which would necessarily exist between the contracting parties, would mandate that the victim and insurer be in opposition.[48] The insured simply had no special duty or reason to consider the interests of the injured third party.[49]

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36. *Id.* at 257.
37. *Id.*
38. *Id.*
39. *Id.* at 258.
40. *Id.* at 257-58.
41. *Id.*
42. *Id.* at 261.
43. *Id.* at 262.
44. *Id.* (citing Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 645 (Iowa 1973)).
45. *Id.* (citing Khabbaz v. Swartz, 319 N.W.2d 279, 285 (Iowa 1982)).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

The court, using a long-held maxim of insurance that "the insurer stands in the shoes of the insured in dealing with the victim," maintained that the insurer and insured both possessed a significant right "requir[ing] liability to be proven as a predicate for payment of the loss."[50] As a result, the court found no foundation for the concept of giving the third party greater rights when negotiating with the insurer than would exist when the third-party victim would seek to negotiate directly with the insured.[51] For these reasons, the third-party direct tort action was rejected by the Iowa Supreme Court.[52]

A careful reading of *Long* illustrates a recognition of a duty owed by the workers' compensation carrier to the claimant, whereby the employer contracts with the insurance carrier for coverage intended to benefit the third party worker.[53] The insurance contract at issue in *Long* was never admitted into evidence, and hence not evaluated for indications of implied or express intentions to make the victim a policy beneficiary.[54] In the workers' compensation setting, however, there is *de rigueur* contemplation that some other person (the employee) will be the beneficiary of the contract. Clearly, the employer is mandated by Iowa law to obtain workers' compensation insurance coverage,[55] not for its own benefit, but for the expected and desired benefit of insurance coverage for employees suffering work-related injuries and impairments.[56]

C. *First-Party Bad Faith Meets Workers' Compensation: The* Boylan *Decision*

1. *The Contractual Benefit: Claimant, Carrier, and Employer*

As previously stated, the *Long* court's analysis seemed to be a closer match to the relationship between claimant, insurance carrier, and employer in the typical workers' compensation case. The Iowa Supreme Court, however, failed to find in *Boylan v. American Motorists Insurance Co.*[57] a factual situation that was a sufficient analogue to the third party's position in *Long*.[58]

In *Boylan*, plaintiff Robert Boylan suffered injuries as a result of his employment with Cresline Plastic Pipe.[59] He alleged that the defendant

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50. *Id.*

51. *Id.* at (citing Kranzush v. Badger State Mut. Cas. Co., 307 N.W.2d 256, 265 (Wis. 1981)).

52. *Id.* at 257.

53. *See id.* at 262 (citing Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 645 (Iowa 1973)).

54. *Id.*

55. IOWA CODE §§ 85.3(1), 87.1-.2 (1997); *see also* 82 AM. JUR. 2D *Workers' Compensation* § 141 (1992).

56. IOWA CODE §§ 85.3(1), 85.20.

57. Boylan v. American Motorists Ins. Co., 489 N.W.2d 742 (Iowa 1992).

58. *Id.* at 743 (applying Long v. McAllister, 319 N.W.2d 256, 261 (Iowa 1982)).

59. *Id.* at 742.

"delayed and then terminated [his] workers' compensation weekly benefits and medical benefits, arbitrarily and capriciously, without notice *and in bad faith*."[60] The district court granted the defendant's motion to dismiss for failure to state a claim.[61] As part of this determination, the district court found that the bad faith tort in workers' compensation was not analogous to the first-party insurance claims such as those found in *Dolan*.[62] Instead, the court found a relationship equivalent to that discussed in *Long*, comparing the claimant and insurer link to the tort victim and tortfeasor's liability insurer relationship.[63] Because no bad faith tort liability was found in *Long*, no such cause of action could stand as pleaded by Boylan.[64]

In reversing the district court, the Iowa Supreme Court criticized the trial court's hasty determination that an employer or workers' compensation carrier is not required to pay weekly benefits or pay medical service providers prior to the time that the Industrial Commissioner determines the claimant's entitlement to receive the benefits.[65] For example, the penalty benefits provisions found in Iowa Code section 86.13 contemplate unreasonable delays or termination of benefits being paid to the claimant before a ruling by the Industrial Commissioner.[66] The Act also imposes an affirmative obligation to furnish the injured worker with any necessary medical services, hospital care, or medical supplies authorized for treatment.[67] This bundle of statutory and administrative obligations imposed on the insurance carrier creates a *Dolan*-like relationship between claimant and insurance carrier, which brings it into the circle of first-party relationships.[68] Therefore, the Iowa Supreme Court fashioned a new cause of action by recognizing a tort of bad faith in the workers' compensation setting.[69]

2. *Transcending the Exclusive Remedy Principle*

Whether one views the workers' compensation system as a well-oiled, humming engine of adequate compensation, or a conglomerate of discordant parts meting out rough justice, the exclusivity principle, which mandates workers' compensation as the virtual sole means of compensation for work-related injuries, serves as the system's cornerstone. Hence, the Iowa Workers' Compensation Act is designed to serve as the exclusive remedy for the injured

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60. *Id.* (emphasis added).
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 743.
66. IOWA CODE § 86.13 (1997).
67. *Id.* § 85.27. These obligations have been consigned to the employer's insurance company. Boylan v. American Motorists Ins. Co., 489 N.W.2d at 743 (citing IOWA ADMIN. CODE r. 343-2.3, 4.10 (1991)).
68. Boylan v. American Motorists Ins. Co., 489 N.W.2d at 743.
69. *Id.* at 742.

worker.[70] As articulated in Iowa Code section 85.20, "The rights and remedies provided in this chapter, chapter 85A or chapter 85B for an employee on account of injury . . . for which benefits . . . are recoverable, shall be the exclusive and only rights and remedies of such employee . . . at common law or otherwise . . . ."[71] The major statutory addition to this basic principle is the rule allowing independent legal proceedings against co-workers for acts constituting "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another."[72]

Many commentators view this axiom as inflexible, and that the exclusive remedy principle mandates, which the compensation system holds, sway over all workers' compensation-related causes of action, whether they relate to the injury, or sound in tort or contract law. Consider Arthur Larson's rejection of the bad faith tort:

> It seems clear that a compensation claimant cannot transform a simple delay in payments into an actionable tort by merely invoking the magic words "fraudulent, deceitful and intentional" or "intentional infliction of emotional distress" or "outrageous conduct." [sic] in his complaint. The temptation to shatter the exclusiveness principle by reaching for the tort weapon whenever there is a delay in payments or a termination of treatment is all too obvious, and awareness of this possibility has undoubtedly been one reason for the reluctance of courts to recognize this tort except in cases of egregious cruelty or venality.[73]

Clearly, the exclusivity principle is the great fence that seeks to enclose all work-related tort-like injuries. The overriding fear is that the exclusivity principle will begin to disintegrate,[74] with each new application of judicial gloss forcing the law to "become honeycombed with independent and conflicting rulings of the courts. The objective of the Legislature and the whole pattern of workmen's compensation could thereby be partially nullified."[75] The California courts have led the vanguard of states not recognizing the tort, and a representative opinion states:

> In these days of ever shrinking judicial resources, the plaintiff's bar would be well advised to heed these rules [re exclusive jurisdiction of the WCAB] and to concentrate its energy on securing swift and simple compensation for the injured employee in the forum which has exclusive

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70. IOWA CODE § 85.20.

71. *Id.*

72. *Id.* § 85.20(2). Of course, there is always a common-law right to proceed in tort against a third party tortfeasor who may be partially or totally responsible for the damages incurred.

73. 6 ARTHUR LARSON, WORKERS' COMPENSATION LAW § 68.34(c), at 13-229 to 13-230 (1997) (footnotes omitted).

74. Noe v. Travelers Ins. Co., 342 P.2d 976, 979 (Cal. Dist. Ct. App. 1959).

75. *Id.* at 980.

> jurisdiction over the claims. Its continual efforts to make end-runs around the exclusivity provisions of the workers' compensation system would be more appropriately addressed to the Legislature . . . .[76]

Yet, the exclusivity principle has never been a pervasive concern for the Iowa Supreme Court regarding application of the tort of bad faith. In *Tallman v. Hanssen*,[77] the supreme court's pre-*Boylan* "flirtation" with workers' compensation bad faith, the court refused to state whether or not a valid cause of action had been asserted in an allegation that an insurance carrier had intentionally refused to pay medical bills; however, the court made clear that the exclusivity principle was, for them, a low hurdle to clear.[78] The court stated:

> It is axiomatic that an employee's rights and remedies arising from an injury suffered in the course of employment are exclusively provided under Iowa Code chapter 85. A district court would ordinarily have no subject matter jurisdiction over a claim that an employee is entitled to workers' compensation benefits. But this exclusivity principle is limited to matters surrounding a job-related injury and does not extend to subsequent dealings during which a tort may arise by reason of bad faith on the part of an employer's insurer.[79]

To bolster this statement, a South Dakota case was cited for the principle that intentional torts committed by agents of an insurance carrier were not barred by the exclusive remedy principle, because the intentional tort was not compensable under the relevant workers' compensation act.[80] Furthermore, Iowa case law has long considered insurance carriers to be separate from the requirements of Iowa Code section 85.20, with one specific case holding that insurance carriers are more like third parties, rather than alter egos of employers for purposes of the statute.[81] A reading of the plain language of the statute indicates that only the word "employer" is used.[82] The Iowa Supreme Court has also held that "our compensation law does not abolish common law actions in tort except those between employee and employer."[83]

Another way the exclusivity principle might have been invoked is through the penalty award provisions in the Iowa Workers' Compensation

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76. Caplan v. Fireman's Fund Ins. Co., 220 Cal. Rptr. 549, 550 (Ct. App. 1985) (citing United States Borax & Chem. Corp. v. Superior Court, 213 Cal. Rptr. 155, 158 (Ct. App. 1985)) (alterations in original).

77. Tallman v. Hanssen, 427 N.W.2d 868 (Iowa 1988).

78. *Id.* at 870.

79. *Id.* (citation omitted).

80. *Id.* at 870-71 (citing Champion v. United States Fidelity & Guar. Co., 399 N.W.2d 320, 322-23 (S.D. 1987)).

81. Fabricius v. Montgomery Elevator Co., 121 N.W.2d 361, 366 (Iowa 1963).

82. *See* IOWA CODE § 85.20 (1997).

83. Bradshaw v. Iowa Methodist Hosp., 101 N.W.2d 167, 174 (Iowa 1960).

Act.[84] An argument used by many other courts in rejecting the tort of bad faith in the workers' compensation context is the existence of penalty provisions in the relevant workers' compensation act.[85] The *Boylan* court instead concluded that it was "unlikely that the legislature intended the penalty provision in section 86.13 to be the sole remedy for all types of wrongful conduct by carriers with respect to the administration of workers' compensation benefits."[86]

The recognition that the penalty provisions applied only to delays in commencement or termination of workers' compensation benefits was among the reasons cited for this conclusion.[87] The benefits referenced are necessarily compensation benefits, because there is no provision within the Iowa statute for penalty benefits for failing to provide medical care.[88] Other jurisdictions are in accord with the *Boylan* decision that a bad faith cause of action is still viable in addition to an existing statutory penalty system.[89]

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84. *See* IOWA CODE § 86.13 (stating that if compensation payments are unreasonably stopped or delayed then "the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied").

85. *See, e.g.*, Cain v. National Union Life Ins. Co., 718 S.W.2d 444, 444 (Ark. 1986) (rejecting workers' compensation claim for late payment because statutes provide remedies for late payment); Marsh & McLennan, Inc. v. Orange County Supreme Court, 774 P.2d 762, 762-63 (Cal. 1989) (concluding that California law preempts a claim for refusal or delay of compensation benefits); Hormann v. New Hampshire Ins. Co., 689 P.2d 837, 840 (Kan. 1984) (denying independent claim for tortious behavior because statute providing penalties provided exclusive remedy); Kelly v. Raytheon, Inc., 563 N.E.2d 1372, 1374-75 (Mass. App. Ct. 1990) (dismissing claim for intentional and negligent infliction of emotional distress for failure to compensate because workers' compensation laws provided exclusive remedy of statutory penalties); Wood v. Union Elec. Co., 786 S.W.2d 613, 614 (Mo. Ct. App. 1990) (denying claim for recovery of work-related medical expenses because penalty provision provided exclusive remedy); Dunlevy v. Kemper Ins. Group, 532 A.2d 754, 756 (N.J. Super. Ct. App. Div. 1987) (holding that penalty in statute for failure to pay compensation benefits provided sole remedy); Messner v. Briggs & Stratton Corp., 353 N.W.2d 363, 368 (Wis. Ct. App. 1984) (dismissing claim for bad faith denial of workers' compensation because penalty provision provided exclusive remedy). *See generally* 6 LARSON, *supra* note 73, § 68.34(c) (discussing intentional harassment by delay or termination of payments); *Workers' Compensation—Third Party Suits—Compensation Carrier and Its Adjuster Suitable as Third Parties for Intentional Torts in Processing and Handling of Workers' Compensation Claims Despite Exclusivity Clause in Compensation Act*, 23 A.T.L.A. L. REP. 300 (1980); Michael A. Rosenhouse, Annotation, *Tort Liability of Worker's Compensation Insurer for Wrongful Delay or Refusal to Make Payments Due*, 8 A.L.R. 4th 902 (1981).

86. Boylan v. American Motorists Ins. Co., 489 N.W.2d 742, 744 (Iowa 1992).

87. *Id.*

88. *Id.* (citing Klein v. Furnas Elec. Co., 384 N.W.2d 370, 375 (Iowa 1986); IOWA CODE § 86.13 (1991)).

89. *Id.* For cases that allowed claims despite penalty provisions, see Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220, 223 (Me. 1978); Kalvza v. Home Ins. Co., 403 N.W.2d 230, 235 (Minn. 1987); Southern Farm Bureau Cas. Ins. Co. v. Holland, 469 So. 2d

Finally, the court hinted that it saw the penalty provisions as a sort of administrative prod to dissuade insurance carriers from negligence in claims handling, but did not see in the penalty statutes any special contemplation of the willful, reckless, or otherwise egregious acts that recognition of a tort of bad faith would be presumed to cover.[90]

This rationale was criticized by one commentator as an overly expansive reading of the legislative intent concerning the penalty statutes,[91] but there is nothing that the court surmised about the legislature's intent that extends beyond ordinary maxims of statutory construction. The author's premise is that the bad faith cause of action "stems" from the same source as the original action—a compensable workers' compensation injury.[92] "Stems" is likely too strong a word—certainly the fact that a claimant makes application for workers' compensation benefits under the policy and under the Act is tied to the fact that there was a compensable injury in the first place. The tortious conduct constituting bad faith occurs, however, after the injury, outside the workplace, and away from the employer. It occurs in the context of administration and investigation of the claim under the insurance policy, and all of this must be considered against the backdrop of the previously discussed special relationship that exists between the parties.

In short, the confusion seems to lie in blurring the tort into the underlying workers' compensation case. *Boylan* clearly shows that the conduct or situation which gives rise to the tort of bad faith is independent enough from the workplace injury to be considered as not being truly under the umbrella of the workers' compensation system.[93] Because of this separation, the Iowa Supreme Court correctly sees the exclusive remedy principle as a tangential issue to the recognition of a tort remedy for bad faith in workers' compensation, rather than a sticking point calling into question the entire cause of action. Additionally, the very extreme nature of the conduct further separates the tortious bad faith conduct by the insurer or its agents from the original workplace injury, which was meant to be compensated by the no-fault workers' compensation system. This situation is particularly evident when

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55, 58 (Miss. 1984); Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 215 (Tex. 1988); Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 224 (Wis. 1979).

90. Boylan v. American Motorists Ins. Co., 489 N.W.2d at 744.

91. *See* Michelle M. Lasswell, Casenote, *Workers' Compensation—Employee's Allegations that Workers' Compensation Insurer Terminated His Benefits in Bad Faith Stated Bad Faith Tort Claim Against the Insurer*—Boylan v. American Motorists Ins. Co., 489 N.W.2d 742 (Iowa 1992), 43 DRAKE L. REV. 477 (1994). The note's analysis of the court's attempt to guess the legislative will is thought-provoking, but ends with the questionable conclusion that "[i]f the legislature wished to allow a common law cause of action, it could have statutorily provided for a bad faith cause of action." *Id.* at 486. The note concludes with a recommendation that the penalty provisions of the Workers' Compensation Act be strengthened rather than a continuation of recognition of the tort of bad faith. *Id.* at 488. For a discussion of the current Iowa law concerning penalty benefits see *supra* note 2.

92. Lasswell, *supra* note 91, at 486.

93. Boylan v. American Motorists Ins. Co., 489 N.W.2d at 743-44.

considering the unequal bargaining power and special nature of the relationship between claimant and insured.[94]

The intentional nature of bad faith conduct has been persuasive to some courts. Some courts have seen fit to determine that the appropriate remedy for that type of conduct lies in a tort action rather than through administrative penalty determinations within the workers' compensation statutes because the tortious conduct was intentional and separate from the workplace.[95]

III. *BOYLAN* APPLIED: THE TORT'S SHORT HISTORY IN IOWA

A. *Elements of the Cause of Action*

As previously stated, the court in *Boylan* adopted the *Dolan* two-part test for a bad faith cause of action.[96] "'To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.'"[97] The absence of a reasonable basis for denial is the objective prong of the test, and the knowledge requirement is the subjective prong.[98]

The test was somewhat modified in *Kiner v. Reliance Insurance Co.*[99] Claimant Ronald Kiner suffered a workplace back injury and took pain medications for over eight years.[100] After he stopped using the medication, his discomfort continued, and he obtained more prescription pain remedies.[101] Upon submitting the prescriptions to the workers' compensation insurance carrier, the insurance carrier denied payment on the ground that Kiner was addicted to the medication and further requested that the claimant undergo a chemical dependency evaluation.[102]

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94. Izaguirre v. Texas Employers' Ins. Ass'n, 749 S.W.2d 550, 554 (Tex. App. 1988). *But see* Johnson v. Corporate Special Servs., Inc., 602 So. 2d 385 (Ala. 1992); Bowen v. Aetna Life & Cas. Co., 512 So. 2d 248 (Fla. Dist. Ct. App. 1987).

95. *See, e.g.*, Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 214 (Tex. 1988) (finding that the exclusivity provision of the Workers' Compensation Act did not preclude a tort action for breach of the duty of good faith and fair dealing); Coleman v. American Universal Ins. Co., 273 N.W.2d 220, 221 (Wis. 1979) (stating that when a workers' compensation insurer acts in bad faith in the settlement or payment of compensation benefits, a separate tort is committed). *But see* Shaffer v. Proctor & Gamble, 604 A.2d 289, 294 (Pa. Super. Ct. 1992).

96. Boylan v. American Motorists Ins. Co., 489 N.W.2d at 743.

97. Dolan v. AID Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988) (quoting Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978)).

98. Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250, 253 (Iowa 1991) (citing Anderson v. Continental Ins. Co., 271 N.W.2d at 377).

99. Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 13 (Iowa 1990).

100. *Id.* at 11.

101. *Id.*

102. *Id.*

Kiner filed suit against Reliance, under tort theories of bad faith and slander.[103] In evaluating the appellate arguments, the court was uncomfortable with the language from Wisconsin cases like *Anderson* and *Kranzush* referring to "reckless disregard,"[104] preferring instead the language taken from the district court's jury instructions,[105] which were adopted from the Texas Supreme Court's decision in *Aranda v. Insurance Co. of North America*.[106] Therefore, the test was recast in *Kiner* to require two elements: "'(1) That there is no reasonable basis for denying or delaying payment of benefits; (2) That Defendant knew or *should have known* that there was not a reasonable basis for denying payment . . . .'"[107]

The determination of whether a reasonable basis exists involves an analysis of whether the claim is "fairly debatable."[108] Where the claim is fairly debatable and a reasonable basis is shown to deny the claim, the insurer is entitled to debate the claim.[109]

Fair debatability requires the plaintiff "to establish to the satisfaction of a reasonable fact finder that [the insurance carrier's] decision [denying benefits] was not based on an honest and informed judgment."[110] This "fairly debatable" status can change. When an insurer has an initial belief that a claim is fairly debatable, and later investigation changes that status, the insurer will thereafter be on notice that it no longer has a reasonable basis for denial of the claim.[111] The court in *Wetherbee v. Economy Fire & Casualty Co.*[112]

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103. *Id.*

104. *Id.* at 13 (discussing Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978)).

105. *Id.*

106. Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210 (Tex. 1988).

107. Kiner v. Reliance Ins. Co., 463 N.W.2d at 12 (quoting the jury instruction from the district court case); *accord* Reedy v. White Consol. Indus., Inc., 890 F. Supp. 1417, 1436 (N.D. Iowa 1995); Morgan v. American Family Ins. Co., 534 N.W.2d 92, 96 (Iowa 1995); Stahl v. Preston Mut. Ins. Ass'n, 517 N.W.2d 201, 203 (Iowa 1994); Wetherbee v. Economy Fire & Cas. Co., 508 N.W.2d 657, 661-62 (Iowa 1993); Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250, 253 (Iowa 1991).

108. Morgan v. American Family Ins. Co., 534 N.W.2d at 96-97; *see also* Stahl v. Preston Mut. Ins. Ass'n, 517 N.W.2d at 203 ("Where an insurance claim is 'fairly debatable' the bad faith claim must fail."); Clark-Peterson Co. v. Independent Ins. Assocs., 514 N.W.2d 912, 914 (Iowa 1994) (stating that "where coverage is 'reasonably debatable' the insurer is free to debate it"); Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d at 253 (recognizing that "where a claim is 'fairly debatable' the insurer is entitled to debate it").

109. Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1991).

110. Nassen v. National States Ins. Co., 494 N.W.2d 231, 236 (Iowa 1992). In *Nassen*, the court found that the defendant insurance carrier's investigation and the contents of its claim file were relevant to a determination that a claim was "fairly debatable." *Id.* The court found that important information was ignored in the claim file and information that plaintiff attempted to provide was also ignored, thereby allowing instructions on bad faith to be given to the jury. *Id.*

111. Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d at 862. The court held that Farm Bureau still had a reasonable basis to deny the plaintiff's claim. *Id.*

stated, "Whether a claim is fairly debatable in any given situation is appropriately decided by the court as a matter of law";[113] however, the Eighth Circuit Court of Appeals interpreted the various Iowa decisions differently stating that only when the insured has produced "no evidence from which a reasonable juror could make a necessary finding" would an insured be entitled to judgment as a matter of law.[114] This issue has yet to be resolved fully by the Iowa Supreme Court.

B. *Accrual of the Cause of Action and Statutes of Limitations:* Brown v. Liberty Mutual Insurance Co.[115]

Brown v. Liberty Mutual Insurance Co. posed two interesting questions that were certified to the Iowa Supreme Court by the United States District Court for the Northern District of Iowa.[116] In *Brown*, the defendant insurance carrier sought to use a statute of limitations defense, leading to the presentation of these questions.[117]

The first question involved the rule for determining when the cause of action for a bad faith failure to pay workers' compensation benefits actually accrues for purposes of relevant statutes of limitations.[118] Significant times during the course of such a case when the cause of action might be found to have accrued included the date the claim is actually denied by the insurer, or the date the industrial commissioner first makes a determination that the claim falls under the ambit of the Workers' Compensation Act.[119]

Brown attempted to argue that any action by the district court before administrative adjudication of a claim would create "an inconsistent and anomalous outcome."[120] The court held that nothing prevented an adjudication in district court of the tort matter[121] and found two cases from other jurisdictions in accord.[122] Brown alternatively argued that the tort of bad faith was a continuing tort that would result in an accrual of the cause of action being delayed until the date that the last benefit should have been paid.[123]

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112. Wetherbee v. Economy Fire & Cas. Co., 508 N.W.2d 657 (Iowa 1993).

113. *Id.* at 662.

114. Chadima v. National Fidelity Life Ins. Co., 55 F.3d 345, 349-50 (8th Cir.), *cert. denied*, 116 S. Ct. 186 (1995).

115. Brown v. Liberty Mut. Ins. Co., 513 N.W.2d 762 (Iowa 1994).

116. *Id.* at 762.

117. *Id.* at 763.

118. *Id.* at 762.

119. *Id.*

120. *Id.* at 763.

121. *Id.* at 764. The court, however, did state that "issue preclusion principles make it desirable to have the extent of an insurer's liability determined administratively before the district court entertains a bad-faith action." *Id.*

122. *Id.* (citing ALFA Mut. Ins. Co. v. Smith, 540 So. 2d 691, 693 (Ala. 1988); Davis v. Aetna Cas. & Sur. Co., 843 S.W.2d 777, 778 (Tex. App. 1992)).

123. *Id.*

The court rejected this argument, finding that the injury in question came from one event, the denial of the claim.[124]

The second question sought a determination of which statute of limitations period would apply to a cause of action for bad faith failure to pay workers' compensation benefits. The rule in Iowa has long been that the focus of determining a proper statute of limitations turns "not on the relief requested, but on 'the nature of the right sued upon.'"[125] In *Brown* the injuries to the claimant rested on the breach of the "statutory good-faith obligation to pay benefits in advance of a specific directive by the industrial commissioner."[126] Therefore, the five-year statute of limitations for unwritten contracts, contained in Iowa Code section 614.1(4), would be the applicable statute for the bad-faith tort.[127]

IV. CONTINUING VIABILITY OF THE TORT: NEW PENALTY BENEFIT TESTS

After many years of confusing precedent, the Iowa Supreme Court finally provided a significant sharpening of focus in the law surrounding workers' compensation penalty benefits under Iowa Code section 85.13. In a trio of cases—*Christensen v. Snap-On Tools Corp.*,[128] *Robbennolt v. Snap-On Tools Corp.*,[129] and *Meyers v. Holiday Express Corp.*,[130]—the court provided clearer guidelines concerning when penalty benefit awards are appropriate. In doing so, the court borrowed part of the test from the first party bad faith line of cases.[131]

The bad faith test was utilized in *Covia v. Robinson*,[132] in which the court held that a reasonable excuse for delay existed if the insured had raised a debatable issue.[133] In *Kiesecker v. Webster City Custom Meats, Inc.*,[134] the court allowed a reasonable delay in making benefit payments while the insurer performed an investigation of the claim.[135]

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124. *Id.* (citing Scott v. City of Sioux City, 432 N.W.2d 144, 148 (Iowa 1988)).

125. *Id.* (citing Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 462 (Iowa 1984)).

126. *Id.* at 764-65.

127. *Id.* at 765 (citing IOWA CODE § 614.1(4) (1993) ("*Unwritten contracts—injuries to property—fraud—other actions.* Those founded on unwritten contracts, those brought for injuries to property . . . and all other actions not otherwise provided for in this respect, within five years . . . .")).

128. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996).

129. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996).

130. Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

131. Christensen v. Snap-On Tools Corp., 554 N.W.2d at 259-60.

132. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993).

133. *Id.* at 416. In *Covia*, the Iowa Supreme Court found that contesting personal jurisdiction was a debatable issue. *Id.* ("Covia should have been able to raise these arguments [disputing personal jurisdiction] without being penalized under section 86.13.").

134. Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d 109, 111 (Iowa 1995).

135. *Id.*

The trio of penalty benefits cases clarified the rules governing penalty benefit awards.[136] In particular, the *Christensen* court stated:

> [A]n employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."[137]

While that language is familiar from the bad faith context, the *Christensen* court clearly stated that the second prong of the *Dolan* test was not required to be shown—namely the knowledge requirement.[138] Significantly, a finding of a lack of reasonable excuse under Iowa Code section 85.13 does not require any special conduct by the insurer, whether negligent, reckless, or intentional.[139] "The focus is on whether timely payment of the benefits due was made and if not, whether there was a reasonable excuse for the failure to make timely payment of the amount owed."[140]

The penalty benefits cases are important to the claimant's attorney for purposes of providing alternative routes to recovery when the burden of proving a bad faith tort case is too great, and there has been unreasonable delay or denial of benefits. Defense practitioners should also be familiar with their contents, in advising their insurer clients and assisting with the management and investigation of case files. The penalty benefits provisions should serve as a spur and deterrent, allowing the workers' compensation system to work more smoothly.

V. THE ISSUE OF DISCOVERY

As has been amply shown throughout this Article, a fairly high quantum of proof is required to show that a tort of bad faith in the workers' compensation setting has been committed. In order to present a case demonstrating a lack of reasonable basis for denial of benefits, or, in particular, that the defendant knew or should have known that there was not a reasonable basis for denying compensation, the claimant's attorney will generally pursue discovery aggressively.

The claim file maintained by the insurance company is of great interest to the parties. Claim files contain medical records, commentary by adjusters and investigators, work product of attorneys and others created in contemplation of litigation, and similar material, which can provide insight into the actions taken (or not taken) by the defendant insurer.

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136. *See* Christensen v. Snap-On Tools Corp., 554 N.W.2d at 260.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

In *Squealer Feeds v. Pickering*,[141] claimant Pickering sought to examine the entire claim file of defendant Liberty Mutual Insurance Company.[142] Through discovery Liberty Mutual provided all the documents in the claim file up to and including the date of denial of coverage, but resisted discovery of materials prepared after that, citing the protections of the work-product doctrine and the attorney-client privilege.[143] Upon Pickering's motion to compel discovery, the deputy industrial commissioner issued an order compelling Liberty Mutual to produce the rest of the file.[144]

While *Pickering* was in fact a penalty benefits case, it contains a valuable discussion of discovery issues likely to be presented in a workers' compensation bad faith case. The court was firm in denying the claimant access to the materials from the file generated after the denial of insurance coverage.[145] Pickering sought to argue that there was no substantial equivalent for the claim file in the context of a penalty benefits claim.[146] By analogy, the same argument could be made in the bad faith context. The *Pickering* court, however, failed to find a sufficient degree of "uniqueness" in the post-denial materials likely contained in the file.[147] Material contained in the file after the denial is no different from the material that any other adversary would begin to accumulate, with items such as collected mental impressions, documentation of facts, and analysis of the situation, all being prepared in anticipation of a law suit.[148]

Despite the fact that post-denial material may contain information likely to further the bad faith suit, relevancy is not the legal standard for disclosure of such material.[149] The usual protections for work-product discovery items, articulated in the seminal Iowa case *Ashmead v. Harris*,[150] mandate that a specific showing of substantial need or inability to obtain substantial equivalents of the material without undue hardship is necessary to pierce the shield of the qualified work-product discovery privilege.[151] A mere assertion that the material would be helpful or useful in proving the bad faith tort claim would fail.[152] The court vigorously stated that the insurer should be "'free of con-

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141. Squealer Feeds v. Pickering, 530 N.W.2d 678 (Iowa 1995).

142. *Id.* at 681.

143. *Id.*

144. *Id.*

145. *Id.* at 686-87.

146. *Id.* at 686.

147. *Id.* at 687 (citing Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos., 123 F.R.D. 198, 204 (M.D.N.C. 1988), stating that "predenial materials 'should constitute all of the information sufficient for plaintiff to prove its claim'").

148. *Id.* at 687.

149. *Id.* at 688.

150. Ashmead v. Harris, 336 N.W.2d 197 (Iowa 1983).

151. *Id.* at 199 (citing IOWA R. CIV. P. 122(c)).

152. Squealer Feeds v. Pickering, 530 N.W.2d at 688 (citing State Farm Fire & Cas. Co. v. Von Hohenberg, 595 So. 2d 303, 304 (Fla. Dist. Ct. App. 1992)).

cern that, at some later date, an opposing party may be entitled to secure any relevant work product documents merely on request.'"[153]

Based on the Iowa Supreme Court's limited discovery holding in *Pickering*, claimant's counsel will probably be required to rely on pre-denial materials within the claim file that they receive through discovery. It appears that efforts to persuade the courts to disclose material contained in the claim file, and claimed by the insurer to be cloaked in privilege, will not be successful.

VI. CONCLUSION

Ideally, the recognition of the bad faith workers' compensation tort in Iowa and the related tests for awards of penalty benefits will serve as a deterrent to any agents of insurance carriers from committing egregious or unconscionable actions in their capacities as claims adjusters, investigators, or other professionals working with workers' compensation files.

A prominent member of the workers' compensation defense bar noted the effect of bad faith claims. While Marvin Duckworth's 1989 law review article on this subject (written before the Iowa courts embraced the tort of bad faith in workers' compensation) was ominously titled *The Tort of Bad Faith Arising From Workers' Compensation Matters—A Rumbling Volcano,*[154] it correctly pointed out that the tort should ideally serve to compensate claimants and deter improper action by insurers in the case of arbitrary and insupportable denials. The high threshold of proof required by the current tests appears to have been adequate to quell fears among insurers that a rash of frivolous lawsuits designed to wring more settlement money out of workers' compensation cases would erupt like the previously mentioned volcano. Since *Boylan*, the Supreme Court of Iowa has only dealt sporadically with workers' compensation bad faith cases, and the general feeling "in the trenches" among practitioners in the defense and claimants' bars is that the tort of bad faith is only supportable in the truly unique claim denial situation.

With a retooled and clearer standard for penalty benefits now in place, the negligent or less egregious denials and delays can be taken care of through administrative channels, which leads back to a promotion of workers' compensation as the exclusive remedy for nearly all workplace injuries. Hopefully, in Iowa, continued good relations and communication between claimants' attorneys, insurance defense attorneys, and the insurance industry will result in fewer claims for penalty benefits and a rare need for tort actions alleging a bad faith failure to pay workers' compensation benefits. In that situation, the ultimate beneficiaries will be the workers for whom the system is designed.

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153. Shook v. City of Davenport, 497 N.W.2d 883, 888 (Iowa 1993) (quoting *In re* Murphy, 560 F.2d 326, 334 (8th Cir. 1977)).

154. Marvin E. Duckworth, *The Tort of Bad Faith Arising From Workers' Compensation Matters—A Rumbling Volcano*, 39 DRAKE L. REV. 87, 99 (1989-90).