Washington Law Review

Volume 62 | Number 1

1-1-1987

Wrongful Termination of Benefits Under the Longshore and Harborworkers' Compensation Act: A Compromise Approach

Gregory L. Russell

WRONGFUL TERMINATION OF BENEFITS UNDER THE LONGSHORE AND HARBORWORKERS' COMPENSATION ACT: A COMPROMISE APPROACH

Workers' compensation statutes were an expression of an entirely new social principle when first enacted in the early 1900's.[1] At the heart of the compensation statutes was a legislative compromise between the rights of employees and employers.[2] In recent years, however, the legislative compromise has come under increasing stress, as many compensation systems have not kept pace with social and legal changes.[3] As tort liability expanded and administrative delays lengthened, injured employees have attempted to circumvent the "exclusive remedy" provisions of the compensation statutes, which limit an employer's liability to statutory benefits, and recover additional compensation. Allegations against an employer and its workers' compensation carrier for wrongfully delaying or terminating benefits has been a common tactic. The two theories most frequently used to establish liability in these cases are intentional infliction of emotional distress and bad faith refusal to pay benefits. As more and more injured employees try to recover both statutory compensation payments and common law tort damages, the courts face a difficult task in deciding when to allow these suits without opening the floodgates of litigation and disintegrating the compensation system.

While many state supreme courts have considered whether to allow actions against a compensation insurer for intentional infliction of emotional distress and bad faith, the issues have not been clearly settled under one federal compensation statute, the Longshore and Harborworkers'

1. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.00 (1985).

2. Theoretically, these statutes compensate injured workers quickly and adequately by imposing liability on an employer without proof of fault, yet limit the liability of employers to less than what might be available in an ordinary tort action. *See* A. MILLUS & W. GENTILE, WORKERS' COMPENSATION LAW AND INSURANCE 47–48 (1st ed. 1976); Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CALIF. L. REV. 857, 874–75 (1985); Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. INDUS. & COM. L. REV. 555, 555–56 (1963).

3. *See generally* Comment, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1644 (1983). Two principal problems have arisen. First, the system has become disadvantageous to injured employees in light of the expansion of tort liability since the early 1900's. *Id.* Second, the agencies administering the compensation plans are overworked and understaffed. These conditions frequently result in long delays in resolving disputed compensation claims. *Id.* Unscrupulous employers and insurers can terminate benefits without just cause and force an employee to wait up to a year without benefits for an administrative hearing. *See, e.g.*, Sample v. Johnson, 771 F.2d 1335, 1338 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1206 (1986) (nine- and ten-month delays under the LHWCA); Texas Employers Ins. Ass'n v. Jackson, 618 F. Supp. 1316 (E.D. Tex. 1985) (one-year delay under the LHWCA).

Compensation Act (LHWCA).[4] Three federal courts have apparently adopted different approaches, modeled after the three approaches taken by state courts. This Comment argues that the "Compromise approach," which allows actions based on intentional infliction of emotional distress but rejects actions based on bad faith, is most consistent with the policies underlying the LHWCA and should be followed by the courts.

I. BACKGROUND

Workers' compensation laws were enacted in response to the coincidence of a sharp increase in industrial accidents attending the rise of the factory system and a decrease in the employees' common law remedies for their injuries.[5] The LHWCA arose for the same reasons, but only became necessary because of several rulings by the United States Supreme Court that prevented state compensation acts from applying to maritime workers.[6] Originally, Congress patterned the LHWCA after the state acts.[7]

A. Policies and Structure of State Compensation Acts and the LHWCA

The structures of the LHWCA and the state acts generally embody three policies, reflecting a legislative compromise between the interests of employees and employers. First, employees are expected to receive swift and certain payment without resort to a lawsuit because the LHWCA requires

4. 33 U.S.C.A. §§ 901–950 (1986).

5. A. LARSON, *supra* note 1, § 4.00. Recovery against an employer under turn-of-the-century common law principles was exceptionally difficult. *Id.* § 4.30, at 27 (the employee at common law was remediless in 83% of all cases). First, employees had the difficult burden of proving employer negligence under the limited common law duties imposed against employers. Second, the three formidable defenses of contributory negligence, assumption of risk, and the fellow servant rule frequently defeated recovery. Third, co-workers were often unwilling to testify against employers. W. KEETON, D. DOBBS, R. KEETON, & G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 568–72 (5th ed. 1984) [hereinafter PROSSER]; Comment, *supra* note 3, at 1644; Note, *Intentional Torts Under Workers' Compensation Statutes: A Blessing or a Burden?*, 12 HOFSTRA L. REV. 181, 182–83 (1983).

6. In Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), the Supreme Court rejected the application of state compensation laws to maritime workers. In Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924) and Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920), the Supreme Court struck down congressional statutes providing for coverage of maritime workers through existing state compensation statutes. The Supreme Court finally upheld the constitutionality of the LHWCA in Crowell v. Benson, 285 U.S. 22 (1932). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, §§ 6-45 to -48, at 404–17 (2d ed. 1975); Clark, *The Expanding Coverage of the Longshoremen's and Harbor Workers' Compensation Act*, 43 LA. L. REV. 849, 851–52 (1983).

7. The LHWCA, as enacted in 1927, was patterned after the New York Compensation Act. 4 A. LARSON, *supra* note 1, § 89.10, at 16-165 (1986); G. GILMORE & C. BLACK, *supra* note 6, § 6-46, at 408.

payment of benefits by an employer without proof of fault.[8] All the employee must prove is that the injury falls within the coverage provisions of the LHWCA.[9] Congress established a federal agency, the Office of Workers' Compensation, to process LHWCA claims and handle any disputes.[10] In addition, the LHWCA imposes various sanctions for late payment, including prejudgment interest,[11] percentage penalties,[12] and attorneys' fees to insure swift and certain payment.[13]

Second, in return for the assumed swift and certain payment, employees must accept a lower level of benefits than they might receive if they sued at common law.[14] The LHWCA limits an employer's liability to that prescribed in the Act with a provision generally known as the "exclusive remedy clause."[15] The exclusive remedy clause is the heart of the legislative compromise between the rights of employers and employees.[16]

---

8. 33 U.S.C.A. §§ 902–903 (1986). Theoretically, this provision avoids the delays and excessive costs associated with tort litigation. "[The LHWCA] eliminates to a large extent the delay, suffering hardship, and expense incident to the long time in which it took to reach a case after it was submitted to the court because of the congestion in the courts, with damage cases crowding the docket." 68 CONG. REC. 5412 (1927) (statement of Rep. Underhill).

9. Most compensation acts cover any accidental personal injury that occurs within the scope of the employee's duties. The LHWCA provides that compensation shall be payable if disability or death results from an injury to a maritime employee upon navigable water. 33 U.S.C.A. § 903(a) (1986). Injury is defined as "accidental injury or death arising out of and in the course of employment." *Id.* § 902(2).

10. *See id.* §§ 919, 921, 927, 939, 940 (dealing with procedure in respect of claims, review of compensation orders, and administration by the Secretary of Labor and the Deputy Commissioner).

11. *See, e.g.*, Grant v. Portland Stevedore Co., 16 Ben. Rev. Bd. Serv. (MB) 267 (1984).

12. Under the LHWCA, if the employer or insurer fails to pay benefits after they become due but prior to a formal award, a 10% penalty is imposed. 33 U.S.C.A. § 914(e) (1986). The employer may controvert a claim and refuse to pay, but once an award is made, if the employer fails to pay benefits, a 20% penalty is assessed. *Id.* § 914(f).

13. Attorneys' fees are assessed whenever the claimant utilizes the services of an attorney and is successful in establishing the claim. *Id.* § 928.

14. LHWCA compensation benefits vary depending upon the type of injury, but are limited to two-thirds of an employee's average weekly wage for injuries classified as temporary total disability. *Id.* § 908(b). The LHWCA also requires payment of all medical bills related to the injury. *Id.* § 907. Thus, an employee usually receives enough money to avoid becoming destitute, but frequently does not receive enough to fully compensate for the injury. A. LARSON, *supra* note 1, § 2.50, at 11–12; Note, *supra* note 5, at 185. *Cf.* Page, *supra* note 2, at 556 (benefits do not achieve an "equitable correlation" with a worker's injury).

The less-than-full remedy was intended to keep down the costs of compensation, prevent fraud and malingering, and create employee incentives for self-protection as an implicit substitute for assumption of risk and contributory negligence. A. LARSON, *supra* note 1, § 2.50, at 11–12; Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law,* 16 GA. L. REV. 775, 800–01 (1982).

15. 33 U.S.C.A. § 905 (1986).

16. The exclusive remedy clause is part of the quid pro quo in which the sacrifices and gains of employees and employers are put in balance. While the employer assumes a new liability without fault, the employer is also relieved of the prospect of large damage verdicts. 2A A. LARSON, *supra* note 1, § 65.11, at 12-1 to -6 (1983); Page, *supra* note 2, at 555–56.

Finally, Congress envisioned the LHWCA as providing a mechanism to spread the costs of industrial accidents from injured workers to consumers.[17] Thus, the LHWCA requires employers to assure payment of compensation under the Act, either by obtaining private compensation insurance or by meeting the requirements of a self-insurer.[18] The insurance premiums can then be added into the costs of production and passed on to the consumer with an increase in price. Since the insurer plays such a central role in the compensation scheme, it "stands in the shoes" of the employer under the LHWCA and may invoke the exclusive remedy clause as a defense to a tort suit by an employee.[19]

The exclusive remedy clause has been under increasing attack in recent years.[20] As the likelihood of substantial tort recoveries rose significantly beyond that available in the early 1900's,[21] as administrative agencies became more overworked,[22] and as legislatures failed to adjust compensation schemes to account for these changes,[23] injured employees have tried to circumvent the exclusivity bar and sue outside the confines of the compensation system.

B. Development of Judicial Exceptions to the Exclusive Remedy Rule

Injured employees have successfully urged courts to develop exceptions to the exclusive remedy rule. Courts initially recognized a few limited exceptions that allowed employees to sue employers directly.[24] Courts also

17. In effect, legislatures saw industrial accidents as costs of production that should be reflected in the price of the product causing the injury. 68 CONG. REC. 5412 (1927) (when introducing the LHWCA bill, S3170, for passage, Rep. Underhill stated: "The original intent of all workmen's compensation laws was to transfer from society and from the courts the expense of taking care of those injured in industry and transfer it to the industry itself."); *see also* 68 CONG. REC. 5410 (1927) (statement of Rep. Graham); A. LARSON, *supra* note 1, § 1.00, at 1–2, § 2.70, at 14; Note, *supra* note 5, at 183.

A corollary of this third policy is that safety in the workplace would be increased since employers would seek to minimize costs of production by increasing safety and reducing workplace accidents. Comment, *supra* note 3, at 1642.

18. 33 U.S.C.A. §§ 904, 932 (1986).

19. 2A A. LARSON, *supra* note 1, § 65.11, at 12-5 n.3 (1983); Hughes v. Chitty, 283 F. Supp. 734 (E.D. La. 1968), *aff'd*, 415 F.2d 1150 (5th Cir. 1969); *see also* 33 U.S.C.A. § 935 (1986) (substitution of the insurance carrier for the employer in order to discharge the obligation and duties of the employer under the compensation act).

20. Epstein, *supra* note 14, at 776.

21. Page, *supra* note 2, at 556–57.

22. *See supra* note 3 and accompanying text.

23. Comment, *supra* note 3, at 1657.

24. These exceptions included the dual capacity doctrine, suits against parent and sibling corporations of employers, and actions based on fraud or an intentional tort committed by the employer. *See, e.g.*, Seide v. Bethlehem Steel Corp., 169 Cal. App. 3d 985, 215 Cal. Rptr. 629, 632 (1985) (recognizing an intentional torts exception to the exclusive remedy provision of the LHWCA); Flamm v. Bethlehem Steel Co., 185 N.Y.S.2d 136 (1959), *aff'd*, 202 N.Y.S.2d 222 (1960) (recognizing fraud in terminating medical benefits as an exception to the LHWCA's exclusive remedy provision); Comment, *supra* note 3, at 1648.

have allowed employees to sue third parties, such as manufacturers, for injuries covered by compensation.[25]

In the early 1970's, courts began to allow employees to aim their suits not at the employer or third parties, but at the insurance carrier who terminated or delayed compensation benefits without cause.[26] Insurers naturally raised the exclusive remedy provision as a defense.

The first theory advanced by employees to pierce the insurer's exclusivity shield focused on the newly developing tort of intentional infliction of emotional distress. In 1976, the Alaska Supreme Court held that a compensation claimant alleging intentional infliction of emotional distress was allowed to sue under this theory despite the exclusive remedy or penalty provisions of the Alaska workers' compensation act.[27] This case unleashed a flood of lawsuits against insurers.[28] Most courts, however, severely restricted this cause of action by requiring proof of deliberate intent, outrageous conduct, and severe emotional distress before the exclusivity principle would be shattered.[29]

As courts fenced in the emotional distress theory with limitations, compensation claimants began looking for alternative theories to support a suit against an insurer. A development in tort law outside the workers' compensation system provided this new theory. In the late 1970's, courts began recognizing a cause of action against insurers based on bad faith claims practices in the settling of an insured's claim.[30] The bad faith theory allowed claims against an insurer even when the insurer's conduct was not outrageous. This theory appealed to injured employees because the standard of proof was not as stringent as that required for intentional infliction of emotional distress.[31]

In 1979, the Wisconsin Supreme Court extended the bad faith doctrine to the workers' compensation context and allowed a compensation claimant to

25. *See* A. MILLUS & W. GENTILE, *supra* note 2, at 48; Larson, *Third Party Action Over Against Workers' Compensation Employer,* 1982 DUKE L.J. 483 (surveying case law).

26. Similar to many state compensation acts, the LHWCA allows an insurer to unilaterally controvert or terminate the payment of benefits. 33 U.S.C.A. § 914(a) (1986). The injured employee must then either request an informal conference or file for a formal hearing before the Office of Administrative Law Judges to resolve the dispute. *Id.* § 919(c), (d); 20 C.F.R. § 702.261–.273 (1986). Resolution of the dispute may last up to a year or more. *See supra* note 3.

27. Stafford v. Westchester Fire Ins. Co., 526 P.2d 37 (Alaska 1974), *overruled on other grounds,* Cooper v. Argonaut Ins. Cos., 556 P.2d 525 (Alaska 1976).

28. 2A A. LARSON, *supra* note 1, § 68.34(c), at 13-72 to -75 (1983).

29. *Id.* at 13-75 to -76.

30. Schuessler, *First Party Bad Faith: Should It Be Extended to Workers' Compensation Cases?,* 34 FED'N INS. COUNS. Q. 199, 199 (1984) (and cases cited therein).

31. Although bad faith is labeled an intentional tort, the test for bad faith employs a negligence standard of reasonableness and focuses on whether an insurer had a reasonable basis upon which to deny benefits. *Id.* at 201.

sue an insurer for bad faith.[32] Just as the decision by the Alaska Supreme Court unleashed a flood of suits alleging intentional infliction of emotional distress, the decision by the Wisconsin Supreme Court unleashed another flood of lawsuits in the early 1980's alleging bad faith delay or nonpayment of compensation benefits.[33]

C. *State Court Approaches to the Problem*

State courts are divided into three main groups on the issues of whether to allow actions against a compensation insurer for intentional infliction of emotional distress or bad faith. The three approaches taken by the state courts can, for simplicity's sake, be called the "Compensation approach," the "Limitation approach," and the "Compromise approach," depending on which workers' compensation policies the particular approach implicitly stresses.

1. *The Compensation Approach*

"Compensation courts"[34] focus on the policy of providing swift and

32. Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W.2d 220 (1979).

33. Between 1980 and 1985, over 30 cases alleging bad faith delay by an insurance company or self-insured employer reached the highest courts in 16 different jurisdictions.

34. State courts that currently allow actions for both intentional infliction of emotional distress and bad faith include *Colorado*, Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1276 (Colo. 1985); *Connecticut*, Carpentino v. Transport Ins. Co., 609 F. Supp. 556, 561–62 (D. Conn. 1985) (interpreting Connecticut law); *Maine*, Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220, 222–23 (Me. 1978); *Maryland*, Gallagher v. Bituminous Fire & Marine Ins. Co., 303 Md. 201, 492 A.2d 1280, 1281 (1985) (holding that the exclusive remedy clause does not bar a bad faith action, but dismissing the complaint since Maryland does not recognize the tort of bad faith) and Young v. Hartford Accident & Indem. Co., 303 Md. 182, 492 A.2d 1270, 1278–79 (1985) (allowing action for intentional infliction of emotional distress); *Mississippi*, McCain v. Northwestern Nat'l Ins. Co., 484 So. 2d 1001, 1002 (Miss. 1986) and Southern Farm Bureau Casualty Ins. Co. v. Holland, 469 So. 2d 55, 58–59 (Miss. 1984); *Montana*, Birkenbuel v. Montana State Compensation Ins. Fund, 687 P.2d 700, 703–04 (Mont. 1984) and Hayes v. Aetna Fire Underwriters, 187 Mont. 148, 609 P.2d 257, 259, 262 (1980); *New York*, DeMarco v. Federal Ins. Co., 99 A.D.2d 114, 472 N.Y.S.2d 464, 466–67 (App. Div. 1984), *cf.* Burlew v. American Mut. Ins. Co., 63 N.Y.2d 412, 472 N.E.2d 682, 685, 482 N.Y.S.2d 720, 722–23 (App. Div. 1984) (barring action since conduct failed to amount to outrageous conduct or bad faith); and *South Dakota*, Hollman v. Liberty Mut. Ins. Co., 712 F.2d 1259, 1261–62 (8th Cir. 1983) (interpreting South Dakota law). Many of these decisions address only the bad faith issue. However, the rationales used by the courts encompass intentional infliction of emotional distress as well.

Several other state court decisions appear to recognize both theories: *Alaska*, Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43–44 (Alaska 1974) (penalties were not intended as the exclusive remedy for intentional wrongdoing), *overruled on other grounds*, Cooper v. Argonaut Ins. Cos., 556 P.2d 525 (Alaska 1976); *Delaware*, Correa v. Pennsylvania Mfrs. Ass'n Ins. Co., 618 F. Supp. 915, 922–25 (D. Del. 1985) (applying Delaware law, but relying on Compensation court decisions to hold that Delaware's exclusive remedy provision does not bar actions for bad faith or intentional infliction of emotional distress where the insurer failed to pay workers' compensation medical benefits); *Michigan*, Broaddus v. Ferndale

certain compensation to an injured employee, while maximizing an employee's recovery by allowing actions for both bad faith and intentional infliction of emotional distress. These courts generally use a two-step analysis to justify focusing on one policy to the exclusion of the other two. First, the courts hold that the exclusive remedy clause does not apply to actions based on intentional or bad faith conduct.[35] Then, the courts focus on legislative intent to support their conclusion that the various statutory penalties and remedies for delay or nonpayment of benefits are not intended to be the exclusive remedy for insurer misconduct.[36]

a. Avoiding the Exclusive Remedy Clause

Compensation courts generally use one of three rationales to avoid the language of the exclusive remedy clause, all of which focus on the coverage provisions of a workers' compensation statute. The basic premise of these courts is that the workers' compensation statute is exclusive only if it covers the injury sustained by the employee.[37]

The first rationale is that many compensation statutes apply only to "personal injuries," language which is generally interpreted to cover physical injuries.[38] Alleged injuries stemming from insurer misconduct, however, are generally nonphysical, consisting primarily of emotional and financial harm.[39] As a result, the courts conclude that the injuries are not covered by the compensation act.[40]

The second rationale is that compensation acts generally apply only to injuries that occur within the scope of an employee's duties.[41] Injuries from

---

Fastener Div., 84 Mich. App. 593, 269 N.W.2d 689, 693 (1978) (relying on the nonphysical rationale to allow an action against a compensation carrier); *Pennsylvania,* Reed v. Hartford Accident & Indem. Co., 367 F. Supp. 134, 135–36 (E.D. Pa. 1973) (Pennsylvania compensation act is not the exclusive remedy for an insurer's intentional tort); and *Texas,* Massey v. Armco Steel Co., 652 S.W.2d 932, 933–34 (Tex. 1983) (reversing dismissal of claims for bad faith and intentional infliction of emotional distress to allow plaintiff to amend the complaint, since Texas allows a common law action for an intentional tort that is independent of the original injury).

35. DeMarco v. Federal Ins. Co., 99 A.D.2d 114, 472 N.Y.S.2d 464, 466 (N.Y. App. Div. 1984).

36. Hayes v. Aetna Fire Underwriters, 187 Mont. 148, 609 P.2d 257, 262 (1980). Courts using the Compensation approach generally treat cases dealing with intentional infliction of emotional distress and bad faith as analogous. S. ASHLEY, BAD FAITH ACTIONS § 7:12, at 21 (1984).

37. *See* 2A A. LARSON, *supra* note 1, § 65.40, at 12-25 to -26 (1983) ("[T]he employer should be spared damage liability only when compensation liability has actually been provided in its place. . . .")

38. Broaddus v. Ferndale Fastener Div., 84 Mich. App. 593, 269 N.W.2d 689, 693 (1978).

39. *Id.* at 692.

40. *Id.* at 693.

41. The LHWCA covers injuries arising out of and in the course of employment. 33 U.S.C.A. § 902(2) (1986). Courts interpret similar language to mean that workers' compensation substitutes for tort recovery only if the employee's injuries have been caused by the ordinary risks of employment. Love, *supra* note 2, at 874. Thus, the premise of the scope of employment rationale is that deliberate, intentional injury by the employer or insurer is not one of these ordinary risks. *Id.*

an insurer's misconduct are "separate and distinct" from the initial work-related injury.[42] The employee seeks damages not as an injured employee, but as a compensation claimant.[43]

The third rationale focuses on the statutory language referring to "accidental injuries."[44] Compensation courts argue that intentional infliction of emotional distress and bad faith involve intentional rather than accidental misconduct by an insurer and therefore do not fall within the coverage of the compensation statutes or the exclusive remedy provisions.[45]

b. Focusing on Legislative Intent to Avoid the Exclusivity of the Statutory Penalties and Remedies

In the second step of their analysis, Compensation courts reject the argument that statutory remedies for delay or nonpayment should be the employee's exclusive remedy.[46] Compensation courts usually look to legislative intent, and then conclude that the legislature could not have intended to preclude a common law tort action for insurer misconduct as a supplement to the statutory remedies.[47]

The courts advance two rationales in support of this assumption regarding legislative intent, or, more precisely, the lack of legislative intent. First, the statutory policy of swift and certain payment of compensation is undercut when an insurer wrongfully delays or terminates payment.[48] Recognition of common law tort actions against an insurer will deter this conduct and further the policy of compensation.[49] Thus, the legislature could not have intended to allow insurers to frustrate this primary policy.[50] Second, Compensation courts focus on the low level of penalties provided in a compensation statute for delay or nonpayment of benefits.[51] The courts

42. Hayes v. Aetna Fire Underwriters, 187 Mont. 148, 609 P.2d 257, 261 (1980); Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W.2d 220, 221 (1979).

43. Martin v. Travelers Ins. Co., 497 F.2d 329, 330–31 (1st Cir. 1974).

44. The LHWCA covers "accidental injury or death." 33 U.S.C.A. § 902(2) (1986).

45. Hollman v. Liberty Mut. Ins. Co., 712 F.2d 1259, 1261 (8th Cir. 1983) (interpreting South Dakota law).

46. Compensation courts must make this second step since traditional compensation principles hold that when a penalty has been built into the compensation act for any kind of employer conduct, the boundaries of the general exclusivity principle are expanded to take in that conduct. 2A A. LARSON, *supra* note 1, § 69.30, at 13-130 (1983).

47. *See* Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220, 223 (Me. 1978) (also noting that the statutory penalty is payable to the state rather than the claimant).

48. Kranzush v. Badger State Mut. Casualty Co., 103 Wis. 2d 56, 307 N.W.2d 256, 261 (1981).

49. Schuessler, *supra* note 30, at 206.

50. *See id.*

51. Most statutes provide only a 10% or 20% penalty. *See, e.g.*, 33 U.S.C.A. § 914(e), (f) (1986).

view these penalties, or any other statutory procedures, as basically inadequate to remedy intentional insurer misconduct.[52]

2. *The Limitation Approach*

"Limitation courts"[53] focus on the policy of limiting an employer's liability and providing an employee with adequate, but less-than-full, compensation. These courts reject both the bad faith and emotional distress theories, relegating the injured employees to any available statutory remedies. The rationale is that:

> [T]he legislature, anticipating that bad faith in delaying payment of benefits would occur on occasion, provided a quick, simple and readily accessible method of resolving disputes over such payments without "the proof and defenses incident [to a common law action], the intolerable delay in resolution of a lawsuit, economic waste to all and expense to the worker" . . . or the spectre of "multiple jurisdictions being engaged in the resolution of the same basic questions with the possibility of conflicting results."[54]

---

52. *See* Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W.2d 220, 224 (1979).

53. State courts that currently reject actions founded on bad faith or intentional infliction of emotional distress include *Georgia,* Bright v. Nimmo, 253 Ga. 378, 320 S.E.2d 365, 368 (1984); *contra* Brazier v. Travelers Ins. Co., 602 F. Supp. 541, 548 (N.D. Ga. 1984) (interpreting Georgia law prior to the *Bright* decision); *Illinois,* Robertson v. Travelers Ins. Co., 95 Ill. 2d 441, 448 N.E.2d 866, 867, 872 (1983) and Hicks v. Board of Educ., 77 Ill. App. 3d 974, 397 N.E.2d 16, 19–20 (1979) (the statutory penalties in Illinois are more substantial than in other states, amounting to 50%); *Kansas,* Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837, 843–44 (1984); *Minnesota,* Denisen v. Milwaukee Mut. Ins. Co., 360 N.W.2d 448, 449 (Minn. Ct. App. 1985); *New Mexico,* Chavez v. Kennecott Copper Corp., 547 F.2d 541, 543 (10th Cir. 1977) and Escobedo v. American Employers Ins. Co., 547 F.2d 544, 544 (10th Cir. 1977) (both interpreting New Mexico law), *see also* Dickson v. Mountain States Mut. Casualty Co., 98 N.M. 479, 650 P.2d 1, 3 (1982), and Gonzales v. United States Fidelity & Guar. Co., 99 N.M. 432, 659 P.2d 318, 320–21 (N.M. Ct. App. 1983); *Tennessee,* Perry v. Transamerica Ins. Group, 703 S.W.2d 151, 151, 154–56 (Tenn. Ct. App. 1985); and *Wisconsin,* Jadofsky v. Iowa Kemper Ins. Co., 120 Wis. 2d 494, 355 N.W.2d 550, 553 (Wis. Ct. App. 1984). Wisconsin initially recognized both torts, but the legislature overruled Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W.2d 220 (1979), increased the statutory penalty from 20% to 200%, and declared this penalty to be the exclusive remedy for wrongful delay or nonpayment of benefits. Jadofsky v. Iowa Kemper Ins. Co., 120 Wis. 2d 494, 355 N.W.2d 550, 553 (Wis. Ct. App. 1984); WIS. STAT. ANN. § 102.18(a)(1) (West Supp. 1984).

Several other state court decisions appear to bar both actions: *Iowa,* Harned v. Farmland Foods, Inc., 331 N.W.2d 98, 101 (Iowa 1983) (rejecting claim alleging intentional, outrageous conduct by an employer in refusing to provide medical benefits); *Missouri,* Young v. United States Fidelity & Guar. Co., 588 S.W.2d 46, 47–48 (Mo. Ct. App. 1979) (refusing to apply doctrine of bad faith to workers' compensation claims); and *South Carolina,* Whitten v. American Mut. Liab. Ins. Co., 468 F. Supp. 470, 474–75 (D.S.C. 1977), *aff'd mem.,* 594 F.2d 860 (4th Cir. 1979) (dismissing complaint alleging intentional infliction of emotional distress since South Carolina does not recognize such a tort without accompanying physical injury and since the penalties provide a full remedy).

54. Robertson v. Travelers Ins. Co., 95 Ill. 2d 441, 448 N.E.2d 866, 869–70 (1983).

Thus, these courts interpret legislative intent to deny an employee any tort suit against an insurer for injuries resulting from delay or nonpayment of compensation.[55]

3. *The Compromise Approach*

"Compromise courts"[56] implicitly focus on all three policies underlying workers' compensation and refuse to disrupt the legislative bargain except in cases of egregious misconduct. The various Compromise courts allow actions for intentional infliction of emotional distress and reject actions for bad faith, but use different rationales in reaching this result.

One Compromise court allows an action for intentional infliction of emotional distress, relying on the arguments used by Compensation courts,[57] but rejects the bad faith theory, relying on the rationale employed by Limitation courts.[58] The court distinguishes intentional infliction of emotional distress from bad faith by focusing on the proof required to state a cause of action.[59] The court concludes that only the tort of intentional infliction of emotional distress meets the standard of egregious cruelty or venality needed to shatter the exclusivity principle.[60]

---

55. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837, 844 (1984).

56. Only two state courts currently allow actions based on outrageous conduct or intentional infliction of emotional distress, while denying actions based on bad faith: *California,* Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972); and *Alabama,* Self v. Bennett, 474 So. 2d 673, 673 (Ala. 1985), Moore v. Liberty Mut. Ins. Co., 468 So. 2d 122, 122 (Ala. 1985), Bearden v. Equifax Servs., 455 So. 2d 836, 836–37 (Ala. 1984), Garvin v. Shewbart, 442 So. 2d 80, 82–83 (Ala. 1983), and Waldon v. Hartford Ins. Group, 435 So. 2d 1271, 1273 (Ala. 1983).

Some other decisions suggest that two additional state courts may also follow the Compromise approach: *Arizona,* Hixon v. State Compensation Fund, 115 Ariz. 392, 565 P.2d 898, 899–900 (1977) (dismissing complaint because bare allegation of intentional infliction of emotional distress fails to state a claim for relief under Arizona law, which requires outrageous and extreme conduct), and Sandoval v. Salt River Project Agric. Improvement & Power Dist., 117 Ariz. 209, 571 P.2d 706, 711 (Ariz. Ct. App. 1977) (rejecting action against an insurer for negligence or intentional deprivation of benefits, but noting that the holding does not preclude an *Unruh*-type action); and *Florida,* Old Republic Ins. Co. v. Whitworth, 442 So. 2d 1078, 1079, 1083 (Fla. Dist. Ct. App. 1983) (rejecting bad faith action, but noting that the conduct alleged was not sufficiently outrageous or deliberate to fall within the intentional tort exception).

57. The Alabama court focuses on the rationale that an intentional, outrageous act is not within an employee's scope of employment, nor is it accidental. Garvin v. Shewbart, 442 So. 2d 80, 83 (Ala. 1983).

58. The Alabama court focuses on the rationale that a bad faith action would circumvent the policy and remedies of the compensation act. Waldon v. Hartford Ins. Group, 435 So. 2d 1271, 1273–74 (Ala. 1983).

59. Garvin v. Shewbart, 442 So. 2d 80, 83 (Ala. 1983). Intentional infliction of emotional distress requires proof of outrageous conduct on the part of the insurer, and resulting severe emotional injury. *Id.* This is a much heavier burden of proof than that under a bad faith theory, where a plaintiff need only show unreasonable conduct. Schuessler, *supra* note 30, at 201.

60. Garvin v. Shewbart, 442 So. 2d 80, 82–83 (Ala. 1983); *see* 2A A. LARSON, *supra* note 1, § 68.34(c), at 13-76 (1983).

Other Compromise courts, rather than focusing on the standard of proof, use the "dual capacity" doctrine to allow a compensation claimant to sue an insurer for intentional infliction of emotional distress.[61] However, these courts reject any attempt to sue an insurer for bad faith delay or nonpayment of compensation benefits.[62] The rationale used to deny bad faith actions is similar to that used by Limitation courts.[63]

D. The LHWCA Cases

Recently, an apparent conflict has developed in the federal courts over whether the penalty provisions of the LHWCA provide the exclusive remedy for insurer misconduct that amounts to intentional infliction of emotional distress or bad faith.

1. Approach Taken by the First Circuit

In 1974, the First Circuit held that the exclusive remedy and penalty provisions of the LHWCA did not bar a state law action against an insurer for intentional infliction of emotional distress in terminating compensation payments.[64] The court advanced several reasons in support of its decision to

61. Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972). In *Unruh*, the California Supreme Court held that when an insurer engages in outrageous conduct, the insurer "steps out of the shoes" of the employer and is no longer protected by the exclusive remedy clause. 498 P.2d at 1073, 102 Cal. Rptr. at 825.

62. California appellate courts have consistently required proof of fraudulent, deceitful, outrageous, or perfidious conduct by the insurer. Mere allegations of bad faith delay in payment do not constitute sufficiently outrageous conduct to shatter the exclusivity bar. Santiago v. Employee Benefits Servs., 168 Cal. App. 3d 898, 214 Cal. Rptr. 679, 681–82 (1985); *see also* Love, *supra* note 2, at 891 n.280 (citing additional cases). Even allegations of intentional infliction of emotional distress, without more, are not sufficient. *See, e.g.*, Cervantes v. Great Am. Ins. Co., 140 Cal. App. 3d 763, 189 Cal. Rptr. 761, 762–63, 768 (1983) (dismissing action even though plaintiff alleged intentional infliction of emotional distress). Rather, the complaint must contain allegations of specific conduct deemed to be outrageous or fraudulent. Everfield v. State Compensation Ins. Fund, 115 Cal. App. 3d 15, 171 Cal. Rptr. 164, 165 (1981). *Cf.* Dill v. Claims Admin. Servs., 178 Cal. App. 3d 1184, 224 Cal. Rptr. 273, 275–76 (1986) (holding that California's exclusive remedy provision does not bar an employee's action against an independent claims administrator of a self-insured employer, when the employee alleges intentional failure to pay benefits but not outrageous conduct). *Contra* Denning v. Esis Corp., 139 Cal. App. 3d 946, 189 Cal. Rptr. 118, 119–20 (1983); Santiago v. Employee Benefits Servs., 168 Cal. App. 3d 898, 214 Cal. Rptr. 679, 683–85 (1985).

63. These courts argue that the legislature has provided a remedy, the remedy avoids the delay associated with litigation, and to allow such suits would result in a partial disintegration of the workers' compensation system. Everfield v. State Compensation Ins. Fund, 115 Cal. App. 3d 15, 171 Cal. Rptr. 164, 166 (1981).

64. Martin v. Travelers Ins. Co., 497 F.2d 329 (1st Cir. 1974). The plaintiff in the case was an injured longshoreman who had received three checks from Travelers Insurance Company totalling $5700 in settlement of his workers' compensation claim. Two weeks after the employee deposited the checks and began making withdrawals on them, the insurer stopped payment on the checks and filed an appeal of the

allow a state law action outside the LHWCA, many of which parallel the rationales used by Compensation courts.[65] The First Circuit's reasoning has been cited and relied on extensively by Compensation courts in creating a bad faith exception to the exclusive remedy provision of the particular workers' compensation act.[66]

2. *Approach Taken by the District Court for the Eastern District of Texas*

In 1985, a federal district court in the Fifth Circuit held that the LHWCA preempts state law whenever a cause of action is based on the mishandling or termination of LHWCA compensation payments.[67] The Eastern District of Texas used rationales similar to those used by Limitation courts and held that the LHWCA is the exclusive remedy for work-related injuries, including injuries resulting from bad faith or intentional infliction of emotional distress.[68] The district court also explicitly refused to follow the First Circuit's decision.[69]

---

administrative agency's decision. This conduct allegedly violated section 914(f) of the LHWCA, making the insurer liable for a 20% penalty under the LHWCA.

The complaint alleged that the insurer's actions violated the terms of the LHWCA and had subjected the employee to financial embarrassment since he had written checks that had become worthless. The complaint also alleged that the insurer should have known that the employee had a "grievous and life-threatening disease" which could be aggravated by the insurer's actions into another "disabling attack" and severe physical impairment. *Id.* at 330. The First Circuit ultimately remanded the case to the district court to determine whether the insurer's actions constituted a tort under state law. *Id.* at 331.

65. For instance, the First Circuit reasoned that the intentional acts of the insurer were not within the scope of the longshoreman's employment. *Id.* at 330–31.

66. Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W.2d 220, 223–24 (1979); Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220, 222–23 (Me. 1978).

67. Texas Employers Ins. Ass'n v. Jackson, 618 F. Supp. 1316 (E.D. Tex. 1985). The injured employee had received temporary total disability benefits from the compensation insurer. In September of 1983, the insurer terminated payments in accordance with the provisions of the LHWCA after the employee was examined by a physician of his own choice. The employee appealed and, on September 14, 1984, nearly one year later, won an award of compensation, attorneys' fees, and interest on any unpaid compensation. *Id.* at 1318.

The employee then filed an action in state court alleging several causes of action, including bad faith claims practices under Texas law and intentional infliction of emotional distress. In response, the insurer filed a declaratory judgment action in federal court seeking to enjoin the employee from pursuing his state court action. The district court granted the injunction. *Id.* at 1318–19, 1324.

68. *Id.* at 1319–20.

69. *Id.* at 1321–22. The district court initially focused on three preemption doctrines. The court reasoned that the LHWCA preempted state law for three reasons. First, Congress expressly preempted state law by providing, in 33 U.S.C.A. § 905 (1986), that the LHWCA is the employees' exclusive remedy. *Texas Employers*, 618 F. Supp. at 1319. Second, Congress' intent to supersede state law may be inferred because the LHWCA is so pervasive as to make reasonable the inference that Congress left no room for states to supplement it. *Id.* Third, allowing state law actions would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, including the desire for uniformity and for avoiding litigation. *Id.* at 1319–20.

3. *Approach Taken by the Ninth Circuit*

In 1985, the Ninth Circuit held that the LHWCA bars an action for bad faith termination of benefits.[70] The Ninth Circuit rationale is somewhat obscure and it is not clear whether the court would adopt the Limitation approach or the Compromise approach.[71] However, the court distinguished the First Circuit decision as a case involving "conspicuously contemptible" facts.[72] This distinction leaves open the possibility that the

---

The court also relied on two recent Supreme Court decisions. In Allis-Chalmers v. Lueck, 471 U.S. 202 (1985), the Supreme Court held that a state law requirement of good faith in payments of compensation may not be used to expand the applicable labor relations law governing contracts and that the state law was preempted by federal law. Second, the district court relied on Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), where the Supreme Court held that New York's Human Rights law was preempted to the extent that it prohibited practices that were lawful under federal law. *Texas Employers*, 618 F. Supp. at 1320.

In addition, the district court relied on a "but for" rationale to conclude that the LHWCA should be an employee's exclusive remedy. The court stated:

> In the present case, the violations alleged are rooted in federal compensation law. But for the federal compensation law, there could be no mishandling of the claim since there could be no claim. . . . There can be no escaping the conclusion that except for the federally created rights and duties there could be no mishandling of compensation. Since the right to compensation comes from the LHWCA, the right to damages for mishandling the compensation also arises from the Act.

Id. at 1320–21.

70. Sample v. Johnson, 771 F.2d 1335, 1347 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1206 (1986). Unlike the plaintiffs in the First Circuit and Eastern District of Texas cases, who were pursuing actions based on state law, the longshoremen in this case sought to bring an action for bad faith under federal maritime law. *Id.* at 1343–44.

The longshoremen also brought an action against the Office of Workers' Compensation seeking a prospective injunction to, in effect, speed up the handling of disputed claims and reduce the administrative hearing delay from over nine months to twenty days. The Ninth Circuit mooted this claim and failed to reach it. *Id.* at 1343.

71. The opinion is unclear for several reasons. First, the Ninth Circuit's discussion of the LHWCA's exclusive remedy and penalty provisions merely provided support for the court's decision to reject a federal bad faith action. *Id.* at 1346. The court did not decide the issue of whether the LHWCA would also bar an action for bad faith or intentional infliction of emotional distress based on state law.

Second, assuming the Ninth Circuit would extend its rationale to actions based on state law, the opinion's rationale is ambiguous. On the one hand, it could be read to bar both bad faith and emotional distress actions. Although noting that federal courts have recognized an "intentional tort" exception to the LHWCA, *id.* at 1346–47, the court continued: "Even if the exclusivity provision of the LHWCA is not read to bar the putative cause of action for wrongful refusal to pay, the penalty provision should serve the same purpose." *Id.* at 1347.

This statement is similar to those made by Limitation courts in denying both bad faith and emotional distress actions. *See* Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837, 843–44 (1984) (holding that the penalty provision in the Kansas compensation act bars an action for intentional nonpayment of benefits, even though the exclusive remedy clause itself does not). Thus, the *Sample* opinion could mean the Ninth Circuit adopts the Limitation approach.

On the other hand, the Ninth Circuit opinion suggests that the court may have adopted the Compromise approach. *See infra* note 72 and accompanying text.

72. *Sample*, 771 F.2d at 1347. The court noted that the plaintiffs had failed to allege sufficient facts to

Ninth Circuit could still adopt the Compromise approach, rejecting bad faith actions while allowing actions based on outrageous conduct.

II. ANALYSIS

It appears the First Circuit has adopted the Compensation approach, the Eastern District of Texas has adopted the Limitation approach, and the Ninth Circuit may adopt either the Limitation approach or the Compromise approach.

In order to assist federal court decisionmaking, the following analysis will make three points. First, the Compensation and Limitation approaches do not adequately address the policies underlying the LHWCA. Second, the federal courts should adopt the Compromise approach since it best furthers the LHWCA policies. In addition, a proper reading of the three federal opinions demonstrates that the courts, rather than taking inconsistent approaches, have implicitly adopted the Compromise approach. Third, the LHWCA is not sufficiently out-of-date to require a court to update the statute by creating a bad faith exception to the Act.

A. The Compensation and Limitation Approaches Are Inadequate

1. The Compensation Approach

The two-step analysis[73] used by Compensation courts and the First Circuit to justify focusing exclusively on the policy of compensating injured employees is inadequate. The rationales[74] used in the first step to avoid the exclusive remedy clause fail to provide a principled basis for allowing actions for bad faith or intentional infliction of emotional distress under the LHWCA. In the second step, while the legislative intent rationale used by Compensation courts to avoid the exclusivity defense may provide a sound basis for allowing an action based on outrageous conduct, the justification does not provide a principled basis for allowing an action for bad faith. The proper approach should consider all of the policies underlying the LHWCA.

---

state a cause of action for intentional infliction of emotional distress, impliedly characterizing the facts in *Sample* as involving "ordinary refusal to pay." *Id.*

73. *See supra* notes 35–36 and accompanying text.

74. The three rationales used in the first step of the analysis to avoid the coverage provisions of the compensation act and the exclusive remedy provision are (1) the nonphysical rationale, (2) the scope of employment rationale, and (3) the accidental injury rationale. *See supra* text accompanying notes 37–45.

a. The Nonphysical Rationale

The nonphysical rationale is based on the premise that nonphysical injuries like emotional distress are not compensable under a workers' compensation statute; thus, the exclusive remedy provision does not apply.[75] However, the rationale fails to provide satisfactory reasons for allowing either an emotional distress or bad faith action outside the LHWCA. First, the rationale has no textual basis in the LHWCA's coverage provision.[76] Second, the rationale's premise fails under the LHWCA, a statute which does in fact provide a remedy for mental or nonphysical injuries.[77] Third, as a practical matter, the nonphysical test is too imprecise to be used successfully by the courts.[78]

b. The Scope of Employment Rationale

The scope of employment rationale, while it may provide a sound basis for allowing actions based on outrageous conduct, fails to provide a principled basis for also allowing a bad faith action. Compensation courts support this rationale by arguing that intentional acts of an insurer in delaying or terminating benefits are "separate and distinct" from the original work-related injury.[79] However, this merely assumes a conclusion. Negligence following an initial injury is frequently considered part of the original injury.[80] Even though bad faith is technically considered an "intentional tort," the test for bad faith focuses on the reasonableness of an

75. Love, *supra* note 2, at 870–71.

76. The LHWCA covers disability or death resulting from "an injury." 33 U.S.C.A. § 903(a) (1986). Injury is defined as "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury . . . ." *Id.* § 902(2). Thus, the LHWCA does not use the word "personal" or "physical" to define the word "injury" for coverage purposes.

The result would be the same in most states since many state compensation statutes have been amended in recent years to cover "accidental injury" rather than "personal injury." This change in language, which was intended to expand compensation coverage to include occupational diseases, effectively destroys the textual basis for the nonphysical rationale in state acts as well. *See* Love, *supra* note 2, at 870–71.

77. *See, e.g.*, Sample v. Johnson, 771 F.2d 1335, 1347 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1206 (1986) (one longshoreman received compensation for "mental health sequelae").

78. Professor Larson acknowledges that distinguishing between physical and nonphysical injuries is exceptionally difficult, especially when an employee sustains both physical and nonphysical injuries. 2A A. LARSON, *supra* note 1, § 68.30, at 13-40 (1983). He suggests a test that would focus on the essence of the tort in deciding whether to allow the employee to sue outside the compensation system. *Id.* § 68.34(a), at 13-62 to -63 (1983). However, this test has been criticized as leading to unjust results. Love, *supra* note 2, at 888–89.

79. *See supra* notes 41–43 and accompanying text.

80. For instance, a plaintiff can recover from a negligent automobile driver for injuries sustained after the accident from medical malpractice. PROSSER, *supra* note 5, § 44, at 309–10.

insurer's conduct.[81] Reasonableness is primarily a negligence inquiry.[82] Thus, it is not self-evident that unreasonable, bad faith conduct is separate and distinct from the original workplace injury. Moreover, even intentional acts are not always separate and distinct from the original injury.[83] The issue is one of foreseeability.[84] Compensation courts have failed to supply any reasons why a subsequent intentional act by an insurer is or is not a foreseeable consequence of the original injury. The proper focus of a court's analysis should not be on the intentional nature of the tort since some intentional injuries are foreseeable. Rather, courts should concentrate on the outrageous nature of the insurer's conduct. The more outrageous an insurer's conduct, and the more harm that results, the more likely that the subsequent injury will be separate and distinct from the original injury.[85]

c. *The Accidental Injury Rationale*

Probably the most persuasive rationale for avoiding the exclusive remedy clause in both emotional distress and bad faith cases is the "accidental injury" rationale.[86] The premise of the accidental injury rationale is that an insurer cannot commit an intentional act and later claim that the act was accidental and thus limit an employee to compensation benefits.[87]

---

81. Schuessler, *supra* note 30, at 201.

82. *Id.* Negligence is defined as conduct which "involves an unreasonably great risk of causing damage" or which "falls below the standard established by law for the protection of others against an unreasonable risk of harm." PROSSER, *supra* note 5, § 31, at 169.

83. For instance, when a landlord's negligence in failing to provide adequate security measures for an apartment building results in intentional, criminal attacks upon a tenant, courts have held the landlord responsible if the attacks were reasonably foreseeable. *See, e.g.*, Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (holding a landlord liable for foreseeable criminal acts); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972) (holding a landlord liable for an assault upon a tenant where the assailant lurked in the poorly lighted and unlocked vestibule of the landlord's apartment house).

84. The LHWCA uses the phrase "naturally or unavoidably." 33 U.S.C.A. § 902(2) (1986). The inquiry is essentially the same. Rather than focusing on foreseeability, a court interpreting the LHWCA would focus on whether the intentional bad faith conduct was a natural or unavoidable result of the original injury.

Many state compensation acts reject the foreseeability notion and adopt a "positional-risk" test, under which an injury is compensable if it would not have happened but for the claimant's employment. A. LARSON, *supra* note 1, § 6.00; Page, *supra* note 2, at 561 (arguing that even if the risks are unforeseeable, an intentional tort may still be compensable if the employment in fact exposed the employee to those risks). This test makes it even more difficult to argue that subsequent bad faith conduct is a separate and distinct injury.

85. *Cf.* Martin v. Travelers Ins. Co., 497 F.2d 329, 331 (1st Cir. 1974) (an insurer's callous stopping of payment is a separate tort).

86 Professor Larson endorses this rationale as the most satisfactory. 2A A. LARSON, *supra* note 1, § 68.11, at 13-4 (1983) (labeling this rationale the "nonaccidental theory").

87. *Id.* § 68.00; Note, *supra* note 5, at 191 (it is anomalous to allow an employer to categorize as an accident an injury that the employer intentionally inflicted on an employee).

Again, however, while the rationale may cover outrageous conduct, it should not, without more, extend to cover bad faith acts. If the accidental injury rationale were read broadly, it would encompass all technical intentional torts and lead to illogical results and disintegration of the compensation system.[88]

In any event, since the penalty provisions of the LHWCA apply whether or not the delay or nonpayment is accidental,[89] Compensation courts must go beyond the accidental injury rationale to allow an employee to sue for either bad faith or emotional distress outside the LHWCA.

The two rationales[90] used by Compensation courts in the second step of their analysis are unpersuasive. The first rationale is contradictory. While the rationale furthers the policy of compensating the injured employee by providing for recovery of additional tort benefits, it actually undercuts the policy of swift and certain payment. The essence of the latter policy is the avoidance of the delays and costs associated with tort litigation.[91] Allowing

88. For instance, intentional torts include not only intentional infliction of emotional distress and bad faith, but also battery and assault. Battery is a "harmful or offensive contact with a person, resulting from an act *intended* to cause . . . such contact." PROSSER, *supra* note 5, § 9, at 39 (emphasis added). Assault is an act *intended* to arouse apprehension of imminent physical injury or battery. *Id.* § 10, at 46. Allowing suits for slight injuries that are only technically considered intentional would result in the disintegration of the compensation system. *See* Epstein, *supra* note 14, at 814 (noting that indirect erosion of the compensation system occurs when the intent requirement is attenuated).

To prevent this disintegration, most federal and state courts require a plaintiff to show "deliberate intent" in order to state a claim for intentional infliction of emotional distress. Sample v. Johnson, 771 F.2d 1335, 1346 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1206 (1986); *see* Houston v. Bechtel Ass'n Professional Corp., 522 F. Supp. 1094, 1096 (D.D.C. 1981) ("nothing short of specific intent to injure the employee falls outside the scope of § 905(a)"); *see also* Comment, *supra* note 3, at 1658–59.

However, only one state court has applied the same deliberate intent requirement to a bad faith action. Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1275–76 (Colo. 1985) (defining deliberate intent to require proof of knowledge by the insurer that its conduct is unreasonable, or reckless disregard by the insurer of the fact that the conduct is unreasonable). In Colorado, the accidental injury rationale does provide a principled basis for avoiding the exclusive remedy provision in both emotional distress and bad faith cases. If the federal courts require an LHWCA plaintiff to prove deliberate intent in a bad faith action, use of the accidental injury rationale would probably not result in attenuation of the intent requirement.

89. Texas Employers Ins. Ass'n v. Jackson, 618 F. Supp. 1316, 1320 (E.D. Tex. 1985) (good faith does not play a part in the LHWCA penalty provisions). The LHWCA penalty provisions assess a 10% or 20% penalty whenever compensation is not paid within the prescribed time limits. 33 U.S.C.A. § 914(e) (1986) (in the case of compensation due without an award, the time limit is 14 days after compensation becomes due); *id.* § 914(f) (in the case of compensation due with an award, the time limit is 10 days after compensation becomes due). *See supra* note 12. There is no requirement that the failure to pay be accidental. *See also* Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43 (Alaska 1974) (interpreting the penalty provisions of a statute similar to LHWCA to cover both intentional and negligent delay in payment), *overruled on other grounds*, Cooper v. Argonaut Ins. Cos., 556 P.2d 525 (Alaska 1976).

90. The first rationale infers legislative intent from the policy of swift and certain payment and the policy of compensation underlying the LHWCA. The second rationale infers legislative intent by focusing on the low level of the penalty awards. *See supra* notes 46–52 and accompanying text.

91. After administrative costs and claimants' attorneys' fees have been accounted for, half of the workers' compensation premium dollar goes to workers. In contrast, only 30% to 40% of the premium

bad faith actions undercuts this goal by injecting a tort action into the LHWCA scheme. In any event, it seems rather presumptuous to argue that replacing a one year administrative delay with a two, three, or four year court case will result in quicker or speedier payment of compensation.

The second rationale is unpersuasive because it fails to consider all the policies underlying the LHWCA. While the rationale may be persuasive when focusing solely on the legislative policies of prompt payment and compensating an injured employee, the rationale ignores the policy of limiting an employer's liability and providing an employee with less-than-full compensation. Although a ten or twenty percent penalty may not always fully compensate an employee for the injury, this alone does not justify avoiding the legislative scheme, especially when the scheme expressly fails to provide full compensation in other areas. The most satisfactory approach should consider all the policies underlying the LHWCA.

2. *The Limitation Approach*

The District Court for the Eastern District of Texas, and Limitation courts generally, defer to Congress or the state legislature if the compensation statute covers the particular injury alleged.[92] Limitation courts focus exclusively on the policy of limiting an employer's liability to that provided in the statute and adopt a "but for" analysis.[93] This analysis is inadequate primarily because it is too broad. Taken to its logical conclusion, it would allow insurers to engage in any tortious conduct, no matter how extreme or outrageous, yet be subject, at worst, to limited statutory remedies.[94] In light of the policy of compensation underlying the LHWCA, this result is not justified. Limitation courts focus on the policy of limiting an employer's liability, but ignore the other policies of compensating an injured employee and providing prompt payment.[95]

---

dollar goes to workers under tort law. Comment, *supra* note 3, at 1652 n.73 (arguing that this difference is outweighed by enhancing workplace safety).

92. *Id.* at 1654.

93. *See, e.g.*, Texas Employers Ins. Ass'n v. Jackson, 618 F. Supp. 1316, 1320–21 (E.D. Tex 1985) (reasoning that "but for" the LHWCA, there would be no compensation payments and no delay in those payments).

94. For instance, an insurer could pay an injured employee compensation, then later beat up the employee, steal the check, and, in effect, wrongfully terminate payment of compensation. Under this "but for" analysis, the insurer would only be liable for the statutory remedies of attorneys' fees, interest, and a 20% penalty. Congress could not have intended such preposterous results. *See* 2A A. LARSON, *supra* note 1, § 68.34(b), at 13-69 to -70 (1983) ("Plainly the existence of a compensation claim does not give insurers or employers a blanket exemption from the entire law of tort.").

95. A possible argument could be made that a dividing line should be drawn between criminal and noncriminal conduct, rather than between unreasonable, bad faith conduct and outrageous conduct as this Comment suggests. But this division is unpersuasive for several reasons. First, the right of prosecution in a criminal case lies with the state and not with the injured employee. It is unfair to relegate an employee to

B. The Compromise Approach Should Be Followed by Courts Interpreting the LHWCA

1. The Compromise Approach Best Furthers the Policies Underlying the LHWCA

The Compensation, Limitation, and Compromise approaches all ultimately rely on an interpretation of legislative intent to support their contradictory positions. The statutory provisions involved are frequently very similar, yet the courts following the three different approaches essentially interpret similar legislative intent in three different ways.[96] Courts faced with the decision in the context of the LHWCA must therefore decide which of the three interpretations of "legislative intent" is correct.

The Compromise approach provides a middle ground between the Compensation and Limitation approaches, and yields the best interpretation of "legislative intent" by focusing on and balancing all the policies underlying the LHWCA. The Compromise approach best furthers all the policies underlying the LHWCA. First, the Compromise approach furthers the policy of compensating an injured employee by allowing actions against an insurer for intentional infliction of emotional distress. When an employee suffers serious injury[97] from an unscrupulous insurer, the employee has a remedy outside the compensation act, which supplements the remedies and penalties already provided under the LHWCA.

Second, the Compromise approach furthers the policies of limiting an employer's liability and avoiding litigation by rejecting actions based on bad faith. A bad faith claim is easier to allege and easier to prove than an action for intentional infliction of emotional distress.[98] By rejecting bad

---

the vagaries of the criminal justice system, where a case may not be pursued for any one of a number of reasons unrelated to the employee, such as lack of state resources, insufficient evidence, or inadequate state counsel. In addition, the standard of proof in a criminal case is higher than in a civil case, making it more difficult to reach egregious insurer misconduct like that in Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (insurance adjuster feigned romantic involvement with the claimant causing emotional distress).

96. For instance, the Georgia workers' compensation statute was recently challenged by two different claimants, one in state court and one in federal court under diversity jurisdiction. Both claimants' actions sought damages for bad faith conduct by a compensation insurer. Interpreting the same statute with reference to practically the same factual allegations, the courts reached opposite results. The federal court adopted the Compensation approach and allowed the action to proceed. Brazier v. Travelers Ins. Co., 602 F. Supp. 541 (N.D. Ga. 1984). The Georgia Supreme Court adopted the Limitation approach and dismissed the action. Bright v. Nimmo, 253 Ga. 378, 320 S.E.2d 365 (1984).

97. Under this analysis, the employee must prove the state law elements of an intentional infliction of emotional distress claim. For instance, in Alabama a plaintiff must prove extreme and outrageous conduct that intentionally or recklessly caused severe emotional distress to the plaintiff. The conduct must be so outrageous in character and so extreme in degree as to be regarded as atrocious and utterly intolerable in a civilized society. Garvin v. Shewbart, 442 So. 2d 80, 83 (Ala. 1983).

98. Schuessler, *supra* note 30, at 201. *Contra* J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 8878.55, at 451 (1981).

faith actions, a court reduces potential litigation and also reduces an employer's potential liability.

Finally, the LHWCA is a system intended to fairly allocate the risks of industrial life between consumers and injured employees.[99] Conduct that is essentially negligent, and thus clearly within the foreseeable risks of industrial life, should fall within the confines of the LHWCA scheme, while conduct that goes far beyond negligence, and is clearly not a foreseeable risk, should fall outside the LHWCA. Actions for intentional infliction of emotional distress require proof of outrageous and intentional conduct and should not be covered by the LHWCA exclusivity principle. Bad faith conduct, on the other hand, is judged on a standard of reasonableness or negligence and should be handled within the LHWCA system. An approach that balances the interests of both parties, allows some recovery, and focuses on the basic thrust of compensation law furthers the policies of the LHWCA better than an approach which focuses exclusively on one interest.[100]

The Compromise approach is also best from a practical perspective. The Compensation approach is unfair to the employer and its insurer because it puts the insurance adjuster in a difficult bargaining position. Threats of bad faith lawsuits would force an insurer to settle an employee's meritless claim in order to avoid the legal costs of a bad faith lawsuit.[101]

On the other hand, the Limitation approach, which allows no suits at all, puts the employee in an unfair bargaining position. The long gaps between termination of a disputed claim and administrative resolution of the dispute give the insurer a tremendous financial and emotional weapon with which to force the employee to settle a claim for less than that to which the employee would be entitled under the compensation laws.[102] An employee needs some recourse against the truly unscrupulous insurer.

---

99. *See supra* note 17 and accompanying text.

100. 130 CONG. REC. S11,622 (daily ed. Sept. 20, 1984) (statement of Sen. Hatch that interpretations of the LHWCA by courts and the Department of Labor should reach results in keeping with the congressional intent and purpose and that do not disrupt the consensus reached between employer and employee interest groups).

101. Because of the reasonableness standard of proof in a bad faith action, almost any delay in payment could provide grounds initially to state a claim for bad faith. Schuessler, *supra* note 30, at 210. Moreover, an employee often has a good faith belief that he or she should get more compensation. Add to this an attorney's duty to vigorously represent his or her client, and the impetus for a bad faith suit arises, even if the recovery is only a payment by the insurer to get rid of the "nuisance" claim. This is not how the compensation system was intended to function. *Cf.* Hayes v. Aetna Fire Underwriters, 187 Mont. 148, 609 P.2d 257, 262–63 (1980) (Harrison, J., specially concurring).

102. The financial disadvantage is mitigated to some extent if the employee has outside sources of income, such as union, welfare, social security or unemployment benefits, or personal insurance. But to the extent an employee is still emotionally upset by the insurer's actions, the weapon remains. Also, the goal of workers' compensation was to provide an employee with sufficient benefits so he or she would not have to rely on the government for support. A. LARSON, *supra* note 1, § 2.50, at 11–12; Note, *supra* note 5, at 185.

The Compromise approach is more equitable. While the threat of suit is still present, the elements of an intentional infliction of emotional distress claim are much more difficult to prove[103] and would be more easily dismissed on a motion for summary judgment, hence reducing the nuisance value of the suit. In addition, the Compromise approach provides the employee with some recourse against an unscrupulous insurer by allowing actions for intentional infliction of emotional distress. This approach balances the interests of the employee and employer, and provides a conceptual framework most consistent with the compromise between these competing interests that underlies the LHWCA.

2. *A Narrow Reading of the Decisions Interpreting the LHWCA Suggests That the Federal Courts Have Adopted the Compromise Approach*

The apparent conflict in the federal courts[104] over whether the penalty provisions and other statutory remedies available under the LHWCA for wrongful delay or termination of compensation should be the employee's exclusive remedy can be reconciled by a narrow reading of the opinions. Taken as a whole, the opinions should be read as adopting the Compromise approach.

The First Circuit[105] relied on rationales used by Compensation courts to avoid the exclusive remedy provisions of the LHWCA. This decision, although it uses broad language similar to that employed by Compensation courts, should be read only to allow a state law action for intentional infliction of emotional distress. The court did not reach the issue of bad faith.

---

103. This Comment envisions that a plaintiff would have to allege specific acts of outrageous conduct and deliberate intent to injure the employee in order to state a claim for intentional infliction of emotional distress. Mere allegations of intentional infliction of emotional distress, outrageous conduct, or fraud without supporting facts would not avoid the exclusivity bar.

California courts require a plaintiff to plead specific outrageous acts, and consistently reject claims relying on conclusory language. Palmer v. R.L. Kautz & Co., 141 Cal. App. 3d 155, 190 Cal. Rptr. 139, 145 (1983), *appeal dismissed per stipulation of the parties; see also* Everfield v. State Compensation Ins. Fund, 115 Cal. App. 3d 15, 20, 171 Cal. Rptr. 164, 166 (1981) ("a complaint which does not contain factual allegations identifying the particular acts or circumstances which distinguish the tort of outrageous conduct from an ordinary nonperformance of a statutory duty owed by respondent to appellant is insufficient").

The Federal Rules of Civil Procedure, however, only require notice pleading, and do not require that a plaintiff allege specific facts in the complaint. FED. R. CIV. PROC. 8. Thus, a motion for summary judgment is needed in the federal system to dismiss a complaint for failure to allege facts specific enough to support a claim for outrageous conduct. *See* FED. R. CIV. PROC. 56; *see also* FED. R. CIV. PROC. 12(b) (allowing a motion to dismiss to be converted into a motion for summary judgment if matters outside the pleadings are presented to the court).

104. *See supra* notes 64–72 and accompanying text.

105. Martin v. Travelers Ins. Co., 497 F.2d 329 (1st Cir. 1974).

While the opinion began with the usual Compensation rationales,[106] these justifications fail to address the issue of whether the LHWCA provisions for penalties, attorney's fees, and prejudgment interest should be the longshoreman's exclusive remedy when there has been a wrongful delay or termination in payment of compensation. In addressing this issue, the court clarified the true basis for its decision. The court focused on the outrageous conduct of the insurer:

> But seemingly the crux of the complaint here is the insurer's callous stopping of payment without warning when it should have realized that acute harm might follow . . . . [W]e are satisfied that plaintiffs are not precluded by the terms of the [LHWCA] from pursuing whatever independent remedy may be recognized for such conduct.[107]

The use of the words "callous," "such conduct," "without warning," and "acute harm" indicate that the court was primarily disturbed by the insurer's outrageous conduct and the resulting severe injury. The opinion did not turn on whether the conduct was intentional, or whether the longshoreman's employment had terminated. Rather, the First Circuit concluded that the penalty provisions were not the exclusive remedy for actions based on outrageous conduct by an insurer.[108]

The focus of the decision, then, is not the accidental injury or scope of employment rationales used by Compensation courts, but the outrageous, callous conduct of the insurer and the acute harm that resulted from this misconduct. Because of this perspective, the First Circuit decision does not provide sound precedent for allowing a bad faith cause of action, which focuses on reasonableness and does not require outrageous conduct. Thus, the case stands for the proposition that insurers who engage in outrageous conduct that causes severe injury are not protected by the exclusive remedy provisions of the LHWCA.

While the First Circuit decision applies to claims based on outrageous, callous insurer conduct, the decision by the Eastern District of Texas applies to claims for bad faith conduct.[109] Although the complaint in the district court case alleged both bad faith and intentional infliction of

106. The First Circuit used the typical scope of employment rationale. *Id.* at 330–31. In addition, the court used a statutory rationale relying on the relation between the LHWCA sections, *id.* at 330, but this rationale has little merit and disregards the usual method of reading penalty provisions to expand the coverage provisions of the compensation act involved. *See* 2A A. LARSON, *supra* note 1, § 69.30, at 13-130 (1983).

107. *Martin*, 497 F.2d at 331.

108. In a footnote the court mentioned that the plaintiff had relied on the state law tort of intentional infliction of emotional suffering. *Id.* at 331 n.1.

109. Texas Employers Ins. Assn v. Jackson, 618 F. Supp. 1316 (E.D. Tex. 1985).

emotional distress as theories of recovery, the court's opinion focused exclusively on the bad faith theory.[110]

Moreover, several of the preemption rationales[111] used by the district court lose considerable force if extended to include outrageous conduct by the insurer as well as bad faith conduct. One of the court's principal preemption arguments was that recognition of the bad faith action would be an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[112] One of the objectives stated was the protection of the employer and carrier from tort suits. The court suggested that this protection would be lost if longshoremen could sue the insurer for mishandling of claims. This rationale, if read broadly to encompass outrageous conduct as well, yields absurd "but for" results.[113]

In addition, the district court's opinion relied heavily on a Supreme Court case[114] which held that state law requiring good faith payment of compensation may not be used to expand the applicable labor relations law governing contracts since the federal law preempted state law.[115] While this precedent may support the conclusion that bad faith actions should not be allowed, it does not mandate the same result for actions founded on outrageous conduct.[116]

---

110. The true focus for the decision becomes apparent from the court's statement: "This court adopts the position that the LHWCA has pre-empted state law regarding actions for *bad faith* handling of LHWCA claims." *Id.* at 1319 (emphasis added). The district court nowhere in its opinion discusses the different standards of conduct required for intentional infliction of emotional distress and bad faith. After initially noting in its statement of facts that the longshoreman alleged intentional infliction of emotional distress, the district court never mentioned the tort again.

111. *See supra* note 69 and accompanying text.

112. *Texas Employers*, 618 F. Supp. at 1319.

113. *Id.* at 1320. *See supra* note 94 and accompanying text.

114. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

115. *See Texas Employers*, 618 F. Supp. at 1320.

116. Other United States Supreme Court opinions, which deal with the issue of whether a federal statute creates a private right of action, do not apply to the issue addressed in this Comment. The issue presented in those cases was whether to create a federal action based on a federal statute which did not provide for such a federal remedy. *See, e.g.*, Mobile Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) (refusing to allow a plaintiff to supplement her remedies under the Death on the High Seas Act with additional remedies available under the general maritime law). The issue presented here is whether a federal statute prevents a claimant from pursuing existing state law actions for intentional infliction of emotional distress and bad faith. *Cf.* Sample v. Johnson, 771 F.2d 1335 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1206 (1986) (plaintiffs asked the court to create a federal bad faith action under the general maritime law, but arising from the LHWCA, a federal statute).

This Comment also focuses on a policy analysis in deciding whether to allow any state law actions. An important issue not directly addressed in this Comment is the effect of federal preemption doctrines on state law remedies. *Cf.* Texas Employers Ins. Assn v. Jackson, 618 F. Supp. 1316 (E.D. Tex. 1985). Moreover, in light of recent Supreme Court decisions, a strong legal argument can be made that the LHWCA preempts any state law remedies. *See* Offshore Logistics, Inc. v. Tallentire, 106 S. Ct. 2485 (1986) (dismissing plaintiffs' wrongful death claims after concluding that the Death on the High Seas Act

For these reasons, the opinion should be read narrowly, leading to the conclusion that the district court held only that the LHWCA is the exclusive remedy for injuries sustained due to bad faith claims practices.

The Ninth Circuit opinion is somewhat unclear as to which approach the court has taken,[117] but should be read to bar only bad faith actions, and is thus consistent with the Compromise approach. First, the case involved allegations of bad faith conduct and not intentional infliction of emotional distress.[118] Second, the Ninth Circuit relied on authority that bars an action outside the compensation system when "ordinary refusal to pay" is involved.[119] Also, the court distinguished the First Circuit decision as involving conduct that was "conspicuously contemptible" and beyond ordinary refusal to pay.[120] This implies that the court did not reach the issue of whether the LHWCA would also bar a state law action based on outrageous conduct. Finally, the Ninth Circuit ultimately relied on the statutory penalty provisions to conclude that the LHWCA barred a federal bad faith action.[121] Although the court provided no explicit rationale for this conclusion, it must have implicitly relied on legislative intent. The Ninth Circuit opinion should be read to adopt the Compromise approach since this approach is most consistent with hypothesized Congressional intent.

The preceding analysis of the three opinions makes clear that, in combination, the federal courts have implicitly adopted the Compromise approach. The First Circuit decision allows actions based on outrageous conduct and severe injury, while the Eastern District of Texas and Ninth Circuit decisions reject actions based on unreasonable or bad faith conduct. This approach best furthers the policies underlying the LHWCA.

---

preempts state wrongful death statutes when an accident occurs on the high seas). Detailed analysis of this issue is beyond the scope of this Comment.

117. *See supra* notes 71–72 and accompanying text.

118. The opinion noted that the complaint failed to allege that the plaintiffs "suffered severe emotional distress or that it was inflicted intentionally, let alone with actual malice." Sample v. Johnson, 771 F.2d 1335, 1347 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1206 (1986). Also, the plaintiffs' brief asked the Ninth Circuit to recognize a federal action for "bad faith" termination of compensation benefits. Appellants' Opening Brief at 50, Sample v. Johnson, 771 F.2d 1335 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1206 (1986). On the facts, then, the case provides precedent for denial of only a bad faith action.

119. *Sample*, 771 F.2d at 1347.

120. *Id.*

121. *Id.*

C. *The LHWCA Does Not Need to Be Updated by Creation of a Bad Faith Exception to the Exclusive Remedy Provision*

One commentator has suggested that the unprecedented growth of statutory law in recent years, coupled with the inability of many legislatures to keep these statutes up to date, demands that courts take a more activist stance in reviewing and interpreting statutes.[122] That commentator argues that a court should no longer defer to legislatures to update a statute rendered obsolete or inadequate by changes in legal doctrine since enactment of the legislation.[123] A student commentator has suggested that creation of exceptions to the exclusive remedy rule in workers' compensation cases may be desirable to readjust an outdated statute.[124] Under this analysis, even though the Compromise approach best furthers the general policies of the LHWCA, a court should still attempt to readjust the "outdated" or "obsolete" LHWCA and recognize an action for bad faith.

Even accepting the theory that courts should modify obsolete statutes and that creation of exceptions to the exclusive remedy rule is an appropriate use of this kind of judicial power, courts should not create a bad faith exception to the LHWCA.

The student commentator relies on five factors to conclude that courts should create exceptions to the exclusive remedy rule. First, expansion of tort liability has changed the legal landscape in such a way as to render the original legislative compromise inequitable and obsolete.[125] Second, creation of exceptions furthers the workers' compensation goals of compensating injured workers and improving workplace safety.[126] Third, reliance on original legislative intent is not helpful because the legal landscape is markedly changed since the compensation statutes were originally enacted.[127] Fourth, the exception should have workable boundaries.[128] Finally, while

122. *See generally* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

123. Professor Calabresi argues that courts should decide when a statute has become so out of phase with the whole legal framework that, whatever the age of the statute, it can only stand if the legislature reaffirms it. *Id.* at 164. This result is accomplished by placing the burden of overcoming legislative inertia on the parties whose desires do not conform with the fabric of the law, and hence whose wishes can only be recognized if current legislative support exists for them. *Id.* Professor Calabresi also argues that courts may place the burden of reforming an obsolete or inadequate statute on the group benefiting from the statute's obsolescence. *Id.* He does not, however, discuss whether his doctrine should apply to the LHWCA.

124. Comment, *supra* note 3, at 1654–55.

125. *Id.* at 1655.

126. *Id.* at 1643–48, 1661.

127. *Id.* at 1655–57.

128. *Id.* at 1658.

complete revision of compensation laws is beyond the institutional competence of the courts, creation of exceptions would break the logjam of legislative inertia and result in reform of the compensation laws.[129]

Applying these five concepts to the LHWCA, however, shows that federal courts should not create a bad faith exception to the LHWCA. First, although changes in the legal landscape have occurred since 1927, and even since major revisions of the LHWCA in 1972,[130] the LHWCA as a whole is not so outdated as to be obsolete or inadequate. The 1972 amendments substantially increased employee benefits in accord with nearly every recommendation of the National Commission on State Workmen's Compensation.[131] In addition, although Congress was aware of the emergence of bad faith liability for employers and insurers, substantial 1984 amendments to the LHWCA failed to change the penalty provisions in any way.[132] Thus, it is not at all clear that the LHWCA is obsolete or a proper candidate for judicial creation of a bad faith exception to the exclusive remedy provision.

Second, the argument that insurers and employers are better able to bear the costs of injuries resulting from bad faith conduct is alone insufficient justification for imposing liability.[133] This is particularly true under the LHWCA, which effectively places the risk of wrongful delay on longshoremen, not employers or insurers.[134] Under the LHWCA, Congress

129. For example, judicial creation of a bad faith exception in Wisconsin spurred the legislature to amend the penalty provisions of the state workers' compensation law. *See supra* note 53; *see also* Comment, *supra* note 3, at 1659 (arguing that judicial creation of exceptions could spur legislatures to address workers' compensation issues and alleviate many of the deficiencies identified a decade ago by the National Commission on State Workmens' Compensation Laws).

130. For instance, only in the last few years have courts begun to recognize an action against insurers for bad faith. This action did not exist in 1927 and was not widely recognized in 1972. Also, the LHWCA is an "expansionist" statute in that it expands the rights of the statutory beneficiaries beyond those available at common law. Workers' compensation statutes are generally considered to be expansionist in nature. G. CALABRESI, *supra* note 122, at 139. It could be argued that further expansions in tort liability, such as the creation of a bad faith action, should be incorporated into the statute so that it maintains its expansionist character. Finally, longer administrative delays in resolving disputed claims allow insurers to force premature settlements by injured employees. *See supra* note 3 and accompanying text.

131. A. LARSON, *supra* note 1, § 5.30, at 17 n.52 (Supp. 1984).

132. The 1984 amendments included the addition of provisions for bad faith conduct by employers in reporting injuries. Texas Employers Ins. Ass'n v. Jackson, 618 F. Supp. 1316, 1320 n.9 (E.D. Tex. 1985). Also, in the early 1980's there has been a significant increase in the number of bad faith suits brought against insurers in the workers' compensation context. *See supra* note 33 and accompanying text.

133. *See* Epstein, *supra* note 14, at 811 (the policies of accident protection and loss distribution are "antithetical to the workers' compensation system"). *Cf.* Comment, *supra* note 3, at 1646–48 (using an economic analysis to argue that employers are the appropriate party to bear accident costs).

134. The LHWCA provides that an employer may controvert payment and then suspend payment of benefits until an administrative law judge resolves the dispute. *See supra* note 26. Other compensation statutes, in contrast, provide that an employer may controvert compensation, but must continue to pay benefits in the interim between termination of benefits and a decision by the administrative agency resolving the dispute. *See, e.g.*, Carpentino v. Transport Ins. Co., 609 F. Supp. 556, 559 (D. Conn. 1985)

gave employers and insurers a unilateral right to suspend payment of compensation, effectively placing the risk of wrongful termination of benefits on the employee. Congress mitigated the burden on the employee by providing provisions for the award of penalties, attorneys' fees, and interest on the amounts unpaid during the interim period.[135] Even though the employer or insurer could better afford the costs, Congress placed the additional costs on employees.

Third, while original legislative intent in the drafting of the LHWCA in 1927 or 1972 is unhelpful because of the relatively recent development of bad faith actions, analysis of all the policies underlying the LHWCA yields the conclusion that courts should not recognize a bad faith action.[136]

Fourth, the tort of bad faith does not have workable boundaries to prevent disintegration of the compensation system. The tort focuses on the reasonableness of an insurer's conduct, an inquiry akin to negligence. This type of tort should be covered by the LHWCA.[137] Also, the intent requirement could become attenuated, allowing too many frivolous actions.[138]

Finally, it is unlikely that creation of a bad faith exception alone would spur Congress to act. If a court recognizes a bad faith exception, the burden of overturning legislative inertia is placed on insurers and employers. Their only remedy to what they feel is an inequitable situation is to seek amendment of the LHWCA to bar bad faith actions or to include bad faith actions under the coverage of the statute. Although they may have a strong Congressional lobby, it is highly unlikely that employers and insurers alone could bring about amendment to the LHWCA.[139]

However, if a court fails to create a bad faith exception, an employee is not left entirely without redress for injuries sustained as the result of wrongful delay or termination of compensation benefits. First, an employee may recover penalties, attorneys' fees, and prejudgment interest. Second,

---

(discussing the Connecticut compensation act and its failure to allow for unilateral discontinuance of benefits).

135. *See supra* notes 11–13 and accompanying text.

136. *See supra* notes 96–103 and accompanying text.

137. *See supra* notes 99–100 and accompanying text.

138. *See supra* note 88.

139. The 1984 amendments to the LHWCA resulted from years of pressure by interest groups representing employers, insurers, and employees. All of these groups had to cooperate to spur legislative action. 130 CONG. REC. S11,622 (daily ed. Sept. 20, 1984) (statement of Sen. Hatch: "The Longshore Act does not lend itself to amendment easily or often . . . . [The 1984 amendments reflect] a fragile consensus, carefully crafted over the last several years."). The 1972 amendments to the LHWCA also resulted from over 30 years of pressure by employers, insurers, and employees. If courts create a bad faith action, employees would have no incentive to cooperate in amending the LHWCA. In fact, they would have an incentive to fight reform of the LHWCA, ensuring legislative deadlock. *See also* R. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 28 (1985) (noting that passing legislation is much more difficult than blocking legislation and that judicially created policies which would never have been enacted legislatively may prove impossible for the legislature to overturn).

if the insurer's conduct is sufficiently outrageous, an employee can sue for damages under the theory of intentional infliction of emotional distress.[140] Third, if an employee is suffering because of the long delays associated with the administrative process, the employee may be able to bring an action against the administrative agency to recover damages and seek an injunction to require quicker resolution of disputes in the future.[141] The underlying basis for bad faith suits is probably, at heart, an employee's dissatisfaction with the long delays before an administrative law judge resolves the dispute.[142] A more honest approach to the problem would be to permit a class action suit, rather than to create a bad faith exception.

III. CONCLUSION

Federal courts facing the issue of whether to allow an action against an insurer for intentional infliction of emotional distress or bad faith in handling LHWCA claims should follow the Compromise approach. Federal courts should reject claims alleging bad faith since these claims rest on the unreasonableness of an insurer's conduct and are properly encompassed within the exclusive remedy and penalty provisions of the LHWCA. On the other hand, federal courts should allow actions for intentional infliction of emotional distress if the plaintiff can meet the high standard of proof by showing deliberate intent by the insurer to injure the plaintiff, outrageous conduct by the insurer, and severe emotional distress suffered by the plaintiff. The Compromise approach strikes the best balance between the competing interests of the employer, insurer, and employee by furthering the LHWCA policies of compensating injured employees, limiting employer and insurer liability, and allocating the risks of industrial accidents.

Gregory L. Russell

140. Martin v. Travelers Ins. Co., 497 F.2d 329 (1st Cir. 1974).

141. In fact, the plaintiffs in *Sample* alleged such a cause of action, but the Ninth Circuit dismissed the action on mootness grounds. Sample v. Johnson, 771 F.2d 1335, 1343 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1206 (1986). However, the court's opinion indicated that the same claims might not be moot if brought as a class action. *Id.* at 1339. The plaintiffs in *Sample* were suing in their individual capacities. *Id.* at 1338.

142. *See, e.g.*, Garrett v. Washington Air Compressor Co., 466 A.2d 462, 463 (D.C. 1983) (plaintiff filed suit against his employer and compensation carrier after "[h]e apparently became frustrated with the slow pace of the administrative process . . . .").