Legislative Update

The PIA Legislative Committee voted to oppose LB 1128 introduced by Sen. Vargas of Omaha. This bill involves the intentional tort of “bad faith” which can be asserted against an insurance company. An insurance contract has been described by the courts as a “contract of adhesion.” This means that the contract has been written and prepared by only one party to the contract, which is the insurance company. Because the insurer has prepared all of the terms of the contract and because of the inherent difference in bargaining power between a policyholder and an insurer, the courts place a higher level of good faith performance of the terms of the contract by the insurer. It is not to the level of a fiduciary, it is one of utmost good faith. It is this higher legal level of performance placed upon the insurer which gives rise to a bad faith cause of action.

A bad faith cause of action is based on the insurance contract and can be asserted by the first-party policyholder. A third-party claimant has no such cause of action against the insurer. However, you will see cases in which a third-party claimant is pursuing a bad faith case against an insurer. This is accomplished by the policyholder assigning his bad faith claim to the third party.

There is one area of the law in which a bad faith claim cannot be filed against an insurer. Based upon the case of IHM v. Crawford & Company and Zurich Insurance Company, 254 Neb. 818, 580 N.W.2d 116 (1998), the court held that an injured worker may not sue the workers’ compensation insurer for bad faith. The Legislature enacted and developed workers’ compensation benefits as the sole remedy for an injured worker. Once the worker decides to accept these benefits and submit to the jurisdiction of the Workers Compensation Court, he cannot then turn to other tort remedies against another party, including an insurance company. The Court also noted that there are administrative penalties that can be asserted against a workers’ compensation insurer for poor processing of benefits.

LB 1128 would overturn the result in IHM, and allow an injured worker to sue an insurer for bad faith handling of a workers’ compensation claim. *The bill also provides that the worker can sue an agent of the insurer for bad faith.* This is why the PIA opposed this bill at the hearing held February 24. The law of bad faith is based upon the insurance contract, and the fact that the insurer drafted all of the terms of the policy. The agent has no formal involvement or final say about the terms of the policy. The agent is not a party to the contract. The agent can’t control the claims handling process of the insurer. An agent should not be subjected to a bad faith claim based upon the actions of a workers’ compensation insurer. All of these points were submitted to the Committee in my testimony at the hearing. The bill remains in committee. There was opposition by the State Chamber and many other business associations. Allowing the tort of bad faith to be asserted by injured workers would ultimately increase the cost of workers’ compensation insurance. Attorneys with an Omaha law firm testified in support of the bill. The Nebraska plaintiffs’ bar organization also supported the bill as did the Omaha AFL/CIO.

This issue has been addressed by many courts across the country. Fifteen states, including Colorado, Iowa and South Dakota, allow an injured worker to sue the workers’ compensation insurer for bad faith. There are about 21 states that do not allow for this cause of action.[1] Many of the courts that allow the bad faith claim also rationalize that because of all of the rules and regulations associated with workers' compensation, the injured worker essentially becomes the equivalent of a first party person to the contract, or, in other words, the worker is a policyholder.

I don't think this bill will be voted out of committee. At a minimum, I would hope that insurance agents would be removed from the bill. The Legislature will reconvene next Tuesday for the thirty third day of the session. There is no consensus yet on property tax relief. LB720, the business tax incentive bill, also remains on Select File, pending an agreement on the property tax issue. There are 21 amendments and motions pending on this bill. It will be a very contentious process for the remainder of the session. Fortunately, I don't anticipate any issues arising related to insurance agents. There have been a large number of bills introduced involving mandated health insurance benefits, but none of these bills will be advance.

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[1] Steven Plitt, *A Jurisprudential Survey of Bad Faith Claims In The Workers' Compensation Context And A Call For A Unified Statutory Remedy*. Conn. Ins. L.J., Vol. 18.2, (2011 – 2012)