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WORKERS' COMPENSATION LAW—Bad Faith Refusal of an Insurer To Pay Workers' Compensation Benefits: *Russell v. Protective Insurance Company*

I. INTRODUCTION

In *Russell v. Protective Insurance Company*,¹ the New Mexico Supreme Court held that New Mexico Insurance Code's Trade Practices and Frauds Article² displaces the exclusivity provision³ of the Workers' Compensation Act.⁴ In displacing the Workers' Compensation Act,⁵ the Trade Practices and Frauds Article implicitly created a private right of action for intentional, willful refusal to pay workers' compensation benefits.⁶ The court also held an injured worker is an intended, third-party beneficiary of his or her employer's workers' compensation insurance contract.⁷ An injured worker is now able to assert standing as a beneficiary of his or her employer's insurance contract⁸ and bring an action under the Trade Practices and Frauds Article for an insurer's intentional, willful refusal to pay worker's compensation benefits.⁹

By the time *Russell* was decided, the New Mexico Legislature had created the workers' compensation division to hear and decide an injured worker's compensation claim.¹⁰ In creating this administrative agency, the legislature only granted the agency the jurisdiction to hear a claim alleging an employer's, but not an insurer's, bad faith settlement of a compensation claim.¹¹ Under *Russell*, an injured worker may still bring a bad faith claim for the insurer's intentional, willful refusal to pay compensation benefits. More importantly, the supreme court stated in dicta that Protective, the defendant, had an obligation to Russell in tort as well as in contract.¹² Therefore, the exclusive remedy provision may not preclude an injured employee from bringing a cause of action for an insurer's

1. 107 N.M. 9, 751 P.2d 693 (1988).

2. N.M. STAT. ANN. §§ 59A-16-1 to 30 (Repl. Pamp. 1987).

3. See N.M. STAT. ANN. § 52-1-6(D) (Repl. Pamp. 1987) (the exclusive remedy provision prohibits an injured worker from bringing a claim in law or equity against a fellow employee, the employer, or the employer's workers' compensation insurer); see *infra* note 87.

4. *Russell*, 107 N.M. at 11, 751 P.2d at 695.

5. Unless named differently by a legislature, the author will use the term "Workers' Compensation" instead of "Workmen's Compensation" in discussing statutes.

6. *Russell*, 107 N.M. at 11-12, 751 P.2d at 695-96.

7. *Id.* at 14, 751 P.2d at 698.

8. *Id.* at 13, 751 P.2d at 697.

9. *Id.* at 11-12, 751 P.2d at 695-96.

10. See N.M. STAT. ANN. § 52-5-1 (Repl. Pamp. 1987).

11. See N.M. STAT. ANN. § 52-1-54(G) (Repl. Pamp. 1987).

12. *Russell*, 107 N.M. at 13, 751 P.2d at 697.

tort which is independent and separate from the Workers' Compensation Act.¹³

II. STATEMENT OF THE CASE

On October 14, 1986, Richard Russell filed an action in Bernalillo County District Court to obtain workers' compensation benefits.¹⁴ In Count II of his complaint, Russell sought damages against Protective Insurance Company (Protective) for its refusal "to attempt in good faith to effectuate a prompt, fair and equitable settlement of [his worker compensation] claim."¹⁵ During the pre-trial hearing on November 4, 1986, Protective filed a motion to dismiss, asserting that the exclusivity provision of the Workers' Compensation Act precluded Russell from bringing Count II.¹⁶ The district court entered an order denying Protective's motion to dismiss with leave to file an interlocutory appeal.¹⁷

The New Mexico Court of Appeals assigned the case to the summary calendar with summary reversal proposed.¹⁸ Russell opposed summary reversal, contending that the Trade Practices and Frauds Article created a private right of action which displaced the Workers' Compensation Act's exclusive remedy provision.¹⁹ The court of appeals held that the exclusivity provisions of the workers' compensation statute precluded an injured worker from bringing suit for an insurer's bad faith refusal to settle a workers' compensation claim.²⁰

The New Mexico Supreme Court granted Russell's petition for certiorari. The court's first opinion reversed the decision of the court of appeals.²¹ Subsequently, Protective and its insured, Fastline Motor Co., filed a motion for rehearing, requesting that the supreme court reconsider its opinion.²² After reconsideration, the supreme court withdrew its original opinion and drafted a second opinion.²³ The New Mexico Supreme Court

13. *Id.* at 12, 751 P.2d at 696.

14. *Russell v. Protective Ins. Co.*, No. 9705, slip op. at 1 (N.M. Ct. App. Feb. 24, 1987); Petitioner's Petition for Writ of Certiorari to the Court of Appeals of the State of New Mexico at 2.

15. *Russell*, 107 N.M. at 10, 751 P.2d at 694. Russell alleged that Protective twice attempted to settle his claim for a grossly unfair amount. *Russell v. Protective Ins. Co.*, No. 9705, slip op. at 1 (N.M. Ct. App. Feb. 24, 1987). Russell claimed that Protective reduced his benefits to \$28.92 per week when, although 50% disabled at all times, he was entitled to compensation benefits of no less than \$144.60 per week. Petitioner's Petition for Writ of Certiorari to the Court of Appeals of the State of New Mexico at 3.

16. *Russell*, 107 N.M. at 10, 751 P.2d at 694. Protective contended Count II of Russell's complaint failed to state a claim because it was barred by *Dickson v. Mountain States Casualty Co.*, 98 N.M. 479, 650 P.2d 1 (1982), and *Gonzales v. United States Fidelity & Guaranty Co.*, 99 N.M. 432, 659 P.2d 318 (Ct. App. 1983). Both cases held that a worker is limited by the exclusivity provisions of the Workers' Compensation Act from bringing suit against the workers' compensation insurer. Petitioner's Brief on Rehearing at 1.

17. *Russell*, 107 N.M. at 10, 751 P.2d at 694.

18. *Russell*, No. 9705, slip op. at 1 (N.M. Ct. App. Feb. 24, 1987).

19. *Id.*

20. *Id.* at 1, 3.

21. *Russell v. Protective Ins. Co.*, No. 16,966, slip op. at 1 (N.M. S. Ct. Feb. 24, 1987).

22. *Russell*, 107 N.M. at 10, 751 P.2d at 694.

23. *Id.*

held that the Trade Practices and Frauds Article displaced the Workers' Compensation Act's exclusive remedy provision.²⁴ The court also held that an injured worker is an intended, third-party beneficiary of his employer's workers' compensation insurance contract.²⁵

III. HISTORICAL BACKGROUND

To understand the implications of *Russell*, a brief discussion of the underlying policies and rules of construction for New Mexico's workers' compensation statutes is necessary. An examination of the four leading New Mexico cases applying the policies and rules of construction to the exclusive remedy provision of New Mexico's Workers' Compensation Act further shows how *Russell* changed the interpretation of New Mexico's workers' compensation laws.

Workers' compensation statutes are the product of legislative balancing.²⁶ After weighing the competing interests, the legislature concluded that the employer should assume total financial responsibility for work-related injuries or death of its employees, regardless of who is at fault.²⁷ In return for accepting no-fault liability for its employees' injuries and deaths, an employer's liability is statutorily limited.²⁸ The exclusive remedy provision is a mechanism by which the workers' compensation statute seeks to maintain a part of the balance.²⁹ Basically, the exclusive remedy provision prohibits an injured worker from bringing a claim against a fellow employee, the employer, or the employer's workers' compensation insurer.³⁰ On the other side of this balance, New Mexico's workers' compensation statutes seek to prevent the uncertainty of litigation and to assure the injured worker prompt compensation payment.³¹ Additionally, the statutes seek to provide humanitarian and cost-effective assistance to an injured worker³² and keep injured workers and their families financially secure, if only minimally.³³

New Mexico courts have developed rules of statutory construction for this state's workers' compensation statutes. First, workers' compensation statutes are liberally interpreted to favor the worker.³⁴ However, the

24. *Id.* at 11, 751 P.2d at 695.

25. *Id.* at 13-14, 751 P.2d at 697-98.

26. *Dickson*, 98 N.M. at 480, 650 P.2d at 2 (citing *City of Artesia v. Carter*, 94 N.M. 311, 313-14, 610 P.2d 198, 200-01 (Ct. App. 1980)).

27. *Id.*

28. *Id.*

29. *Dickson*, 98 N.M. at 480, 650 P.2d at 2; N.M. STAT. ANN. § 52-1-6(D) (Repl. Pamp. 1987).

30. *See* N.M. STAT. ANN. § 52-1-6(D) (Repl. Pamp. 1987).

31. *Mirabal v. International Mineral & Chem. Corp.*, 77 N.M. 576, 578, 425 P.2d 740, 742 (1967).

32. *Anaya v. New Mexico Steel Erectors, Inc.*, 94 N.M. 370, 372, 610 P.2d 1199, 1201 (1980); *Casillas v. S.W.I.G.*, 96 N.M. 84, 86, 628 P.2d 329, 331 (Ct. App. 1981).

33. *Casillas*, 96 N.M. at 86, 628 P.2d at 331; *Aranda v. Mississippi Chem. Corp.*, 93 N.M. 412, 416, 600 P.2d 1202, 1206 (Ct. App. 1979), *cert. denied*, 93 N.M. 683, 604 P.2d 821 (1979).

34. *Anaya*, 94 N.M. at 372, 610 P.2d at 1201; *Mirabal*, 77 N.M. at 578, 425 P.2d at 742; *but see* N.M. STAT. ANN. § 52-5-1 (Repl. Pamp. 1987) (rule of liberal construction for workers' compensation cases shall not apply to workers' compensation division cases).

statutory interpretation should not be strained or unreasonable³⁵ but should lead to a result which accomplishes the purpose for which the statute was enacted.³⁶ Second, workers' compensation statutes should not be construed in such a way as to nullify their provisions³⁷ because the courts should not use their power to repeal a statutory provision.³⁸

Using these policy concerns and rules of statutory construction, the courts have interpreted New Mexico's workers' compensation statute's exclusive remedy provision in four important cases: *Chavez v. Kennecott Copper Corp.*,³⁹ *Escobedo v. American Employers Insurance*,⁴⁰ *Dickson v. Mountain States Mutual Casualty Co.*,⁴¹ and *Gonzales v. United States Fidelity & Guaranty Co.*⁴² The material facts in *Chavez* and *Escobedo* were essentially the same.⁴³ In both cases, the claimants filed federal claims for bad faith refusal to pay workers' compensation benefits. The federal actions were filed after the workers' compensation claims had been settled in state district court and the claimants had waived all claims against either the employer or the insurer.

In *Chavez* and *Escobedo*, the Tenth Circuit Court of Appeals held that New Mexico's Workmen's Compensation Act's exclusive remedy provision foreclosed a claim for bad faith refusal to pay a claimant's benefits.⁴⁴ Basing its decisions on New Mexico law,⁴⁵ the court in both cases reasoned that because the Act created a remedy for bad faith refusal to settle a workers' compensation claim,⁴⁶ the remedy found in the Act was exclusive. Moreover, the court stated that the Workmen's Compen-

35. *Anaya*, 94 N.M. at 372, 610 P.2d at 1201.

36. *Mirabal*, 77 N.M. at 578, 475 P.2d at 742.

37. *Varos v. Union Oil Co. of California*, 101 N.M. 713, 715, 688 P.2d 31, 33 (Ct. App. 1984).

38. *Sanchez v. Bernalillo County*, 57 N.M. 217, 226, 257 P.2d 909, 915 (1953).

39. 547 F.2d 541 (10th Cir. 1977).

40. 547 F.2d 544 (10th Cir. 1977).

41. 98 N.M. 479, 650 P.2d 1 (1982).

42. 99 N.M. 432, 659 P.2d 318 (Ct. App. 1983).

43. In *Chavez*, the claimant sought workers' compensation benefits from the defendant and gave notice of the claim in state district court as required under the Workman's Compensation Act. 547 F.2d at 542. However, the defendant refused to pay the claimant. *Id.* The claimant then filed in state district court where a judgment for the claimant and against the defendant was entered for the sum of \$17,000 and \$3,000 in attorney's fees. *Id.* The claimant and his attorney executed a "receipt and satisfaction of judgment" which released the defendant from "any and all" claims arising under the claimant's employment and the workmen's compensation statute and "any claims against defendant except such right as he is now entitled to by way of fringe benefits . . ." *Id.* Later, *Chavez* brought suit in New Mexico federal district court alleging the defendant denied the claimant's compensation claim in bad faith. *Id.*

In *Escobedo*, the claimant was injured on the job, and the defendant commenced payment of workers' compensation benefits. 547 F.2d at 544. After seven months, the defendant terminated the installment payments. *Id.* The claimant's suit in New Mexico district court eventually led to a negotiated settlement and then a stipulation and joint motion by the parties. *Id.* at 545. The court entered judgment for *Escobedo*, and he agreed to the stipulation of judgment which released the defendant from "any and all other liability whatsoever kind and nature . . ." arising from the proceeding. *Id.* Shortly thereafter, *Escobedo* filed suit in New Mexico federal district court alleging that the defendant terminated the claimant's workmen's compensation benefits in bad faith. *Id.*

44. *Chavez*, 547 F.2d at 543; *Escobedo*, 547 F.2d at 545; see also N.M. STAT. ANN. §§ 59-10-1 to 138 (1953).

45. *Chavez*, 547 F.2d at 543; *Escobedo*, 547 F.2d at 545.

46. N.M. STAT. ANN. § 59-10-6 (1953).

sation Act provided a remedy regardless of whether the denial was made in good or bad faith.⁴⁷ Although the Workmen's Compensation Act gave the worker the right to file a claim, the state district court could only adjudicate the merits of the statutorily limited claim for compensation benefits.⁴⁸ Thus, the Tenth Circuit held that, according to the Act, the federal district court did not have jurisdiction to adjudicate a worker's bad faith claim.⁴⁹

Until *Dickson v. Mountain States Mutual Casualty Co.*,⁵⁰ the New Mexico courts had not addressed the propriety of tort actions for refusal to pay workers' compensation benefits.⁵¹ In *Dickson*, the claimant was injured on the job and became totally disabled.⁵² The insurer paid the claimant's bi-weekly compensation benefits but refused to pay some of her medical expenses.⁵³ The claimant filed suit in state district court, alleging that the defendant refused in bad faith to pay hospitalization and medical expenses covered by her employer's workers' compensation insurance policy.⁵⁴

The New Mexico Supreme Court held that the Workmen's Compensation Act⁵⁵ provided the exclusive remedy for an injured employee who believed the insurer has wrongfully withheld payment of medical bills.⁵⁶ The court based its holding on the idea that workers' compensation statutes are the product of legislative balancing.⁵⁷ In striking the statutory balance, the legislature was justified in depriving the employee of his common law rights against the employer/insurer because, in return, the employee received no-fault coverage for all his work-related injuries.⁵⁸ Citing with approval the holdings and underlying rationales of *Chavez* and *Escobedo*,⁵⁹ the court concluded by stating that if the Workmen's Compensation Act provides a remedy, the Act is the claimant's exclusive remedy.⁶⁰ The Act provided a remedy for the bad faith refusal to pay hospitalization and medical expenses.⁶¹ Therefore, a claimant must follow the procedures set forth in the Act to redress her bad faith claim.⁶²

In *Gonzales v. United States Fidelity & Guaranty Co.*,⁶³ the claimant was injured at work and became permanently disabled.⁶⁴ After the de-

47. *Chavez*, 547 F.2d at 543; *Escobedo*, 547 F.2d at 545 (quoting *Chavez*, 547 F.2d at 543).

48. *Id.*

49. *Id.*

50. 98 N.M. 479, 650 P.2d 1 (1982).

51. *Id.* at 480, 650 P.2d at 2.

52. *Id.* at 479, 650 P.2d at 1.

53. *Id.*

54. *Id.*

55. N.M. STAT. ANN. §§ 52-1-1 to 69 (Cum. Supp. 1981).

56. *Dickson*, 98 N.M. at 479, 650 P.2d at 1.

57. *Id.* at 480, 650 P.2d at 2; see *supra* notes 26-33 and accompanying text.

58. *Id.*

59. *Id.* at 480-81, 650 P.2d at 2-3.

60. *Id.* at 481, 650 P.2d at 3.

61. *Id.*

62. *Id.*

63. 99 N.M. 432, 659 P.2d 318 (Ct. App. 1983).

64. *Id.* at 432, 659 P.2d at 318.

fendant interrupted payment of the claimant's workers' compensation benefits on two separate occasions,⁶⁵ the claimant brought suit in state district court.⁶⁶ The claimant alleged⁶⁷ that a private right of action for unfair insurance settlement practices could be implied from New Mexico's Unfair Insurance Practices Act for failure to pay workers' compensation benefits.⁶⁸ The state district court dismissed for failure to state a claim,⁶⁹ and the claimant appealed to the court of appeals.

The court of appeals held that the Workmen's Compensation Act⁷⁰ was the exclusive remedy for a compensation claim, regardless of whether the Unfair Insurance Practices Act⁷¹ provided a private right of action for the wrongful termination of the claimant's benefits.⁷² The court never reached the issue of whether the Unfair Insurance Practices Act created a private right of action under the facts as alleged,⁷³ even though the claimant argued that the defendant knowingly violated the Unfair Insurance Practices Act.⁷⁴ Citing *Dickson*, the court stated that, because

65. *Id.* at 433, 659 P.2d at 319. The claimant alleged that the defendant was paying him full compensation benefits when a person claiming to be an attorney representing the claimant approached one of the defendant's claim officers in an attempt to settle the claimant's compensation claim. *Id.* at 432, 659 P.2d at 318. Upon learning this, the claimant sought to prevent the first attorney from settling his claim by hiring another attorney to inform the defendant to continue the claimant's regular compensation payments. *Id.* at 433, 659 P.2d at 319.

66. *Id.*

67. The claimant in *Gonzales* stated four causes of action. First, the claimant pled an implied, private right of action under the Unfair Insurance Practices Act. N.M. STAT. ANN. §§ 59-11-9 to 22 (1978)(repealed in 1984). *Gonzales*, 99 N.M. at 433, 659 P.2d at 319. The court's treatment of this count is addressed in the body of the Note. See *supra* notes 63-76 and accompanying text. Second, the claimant alleged he had a common law cause of action for intentional infliction of mental and emotional distress. *Id.* at 434, 659 P.2d at 320. The court held that the Workmen's Compensation Act, N.M. STAT. ANN. §§ 52-1-1 to -69 (Cum. Supp. 1982), provided a remedy for the claimant's damages. *Gonzales*, 99 N.M. at 434, 659 P.2d at 320.

Third, the claimant alleged that the defendants failed to honor contractual and statutory obligations to deal fairly with the injured employee. *Id.* at 435, 659 P.2d at 321. The court held that the Workmen's Compensation Act, N.M. STAT. ANN. §§ 52-1-1 to 69 (Cum. Supp. 1982), provided a remedy under the facts alleged by the claimant. *Gonzales*, 99 N.M. at 435, 659 P.2d at 321. Fourth, the claimant alleged he had a property right which vested upon entry of judgment in his workers' compensation proceeding. *Id.* The court assumed, but did not decide, that the plaintiff had a property right and held that any deprivation of a property right is determined according to the Workmen's Compensation Act, N.M. STAT. ANN. §§ 52-1-1 to 69 (Cum. Supp. 1982). *Gonzales*, 99 N.M. at 435, 659 P.2d at 321.

68. *Gonzales*, 99 N.M. at 433, 659 P.2d at 319. Unfair Insurance Practices Act, N.M. STAT. ANN. §§ 59-11-9 to 22 (1978).

69. *Gonzales*, 99 N.M. at 432, 659 P.2d at 318.

70. N.M. STAT. ANN. §§ 52-1-1 to 69 (Cum. Supp. 1982).

71. N.M. STAT. ANN. §§ 59-11-1 to 22 (1978).

72. *Gonzales*, 99 N.M. at 435, 659 P.2d at 321.

73. *Id.*

74. *Id.* at 434, 659 P.2d at 320. The claimant specifically alleged that §§ 59-11-13(1), (3), (5), (6) and (7) of the Unfair Insurance Practices Act were violated. *Id.* These §§ state:

3. failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies;
5. not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear;
6. compelling insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured when such insureds have made claims for amounts reasonably

the Workmen's Compensation Act provided a remedy under the facts alleged in this case,⁷⁵ the Act's remedy is the exclusive remedy.⁷⁶

Before *Russell*, the scope of the workers' compensation statute's exclusivity provision was clear. The provision foreclosed an injured worker from bringing an action for which the workers' compensation statute provided a remedy.⁷⁷ However, the possibility for change did exist. The *Gonzales* court stated in dicta that if it were not for the exclusivity provision of the Workmen's Compensation Act, the claimant's alternative causes of action might have provided a means of seeking recourse against a defendant's wrongful termination of workers' compensation benefits.⁷⁸ By enacting the Trade Practices and Frauds Article in 1984, the New Mexico Legislature set the stage for *Russell*.

IV. DISCUSSION OF THE COURT'S RATIONALE

In *Russell*, the New Mexico Supreme Court used a two step analysis of the Trade Practices and Frauds Article to allow an injured worker to bring suit against a workers' compensation insurer for its bad faith refusal to pay workers' compensation benefits. First, the *Russell* court construed the Trade Practices and Frauds Article of the New Mexico Insurance Code to be so broad in its terms and clear and explicit in its words that the Article displaces the exclusivity provision of the Workers' Compensation Act.⁷⁹ Therefore, the court found that an insured could bring suit against a workers' compensation insurer for a violation of the Article.⁸⁰ Second, the court determined that an injured worker was an intended, third-party beneficiary of his employer's workers' compensation insurance contract, and, therefore, had standing as the insured to file suit against the insurer.⁸¹

The court began its analysis of the Trade Practices and Frauds Article by stating that the Article explicitly granted an insured a private right of action against an insurer.⁸² After stating this premise, the court applied

similar to amounts ultimately recovered;

7. attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

Unlike the Trade Practices and Frauds Article, N.M. STAT. ANN. §§ 59A-16-1 to 30 (Repl. Pamph. 1987), the Unfair Insurance Practices Article provided an administrative remedy for the violation of the Act. N.M. STAT. ANN. §§ 59-11-14 to 22 (1978). The Trade Practices and Frauds Article, however, specifically provides for a private right of action for violation of the Article. N.M. STAT. ANN. § 59A-16-30 (Repl. Pamph. 1987).

75. *Gonzales*, 99 N.M. at 434, 659 P.2d at 320.

76. *Id.*

77. *See, e.g., Dickson*, 98 N.M. 479, 650 P.2d 1.

78. *Gonzales*, 99 N.M. at 435, 659 P.2d at 321.

79. *Russell*, 107 N.M. at 11, 751 P.2d at 695.

80. *Id.* at 11-12, 751 P.2d at 695-96.

81. *Id.* at 11-14, 751 P.2d at 695-98.

82. *Russell*, 107 N.M. at 11, 751 P.2d at 695. The court cited § 59A-16-30 which states:

Any person covered by this article (Article 16) who has suffered damages as a result of a violation of Article 16 of the Insurance Code by an insurer or agent is granted a right to bring an action in district court to recover actual damages. . . . The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.

the rule of statutory construction stated in *Galvan v. City of Albuquerque*⁸³ to the Trade Practices and Frauds Article.⁸⁴ *Galvan* stands for the proposition that a statute which is "so broad in its terms and so clear and explicit in its words as to show it was intended to cover the whole subject . . ." displaces an earlier, special statute.⁸⁵ The *Russell* court stated that when the legislature enacted the Trade Practices and Frauds Article, the legislature intended to broaden the Workers' Compensation Act.⁸⁶ The court found that the right of private action against an insurer under the Trade Practices and Frauds Article was so broad, clear, and explicit that it must have been intended to displace the exclusive remedy provision of the Workers' Compensation Act.⁸⁷ The Trade Practices and Frauds Article thus implicitly amended the Workers' Compensation Act by allowing an insured to bring suit against a workers' compensation insurer who in bad faith refused to pay workers' compensation benefits.⁸⁸

However, the court was careful to limit the private right of action under the Article to "intentional, willful refusal to pay [workers'] compensation benefits . . ."⁸⁹ The court stated that an insurer's "negligent or dilatory failure to pay benefits" is explicitly covered by the Workers' Compensation Act and, therefore, not actionable under the Article.⁹⁰ Therefore, the Trade Practice and Frauds Article offers an insured a private right of action against a workers' compensation insurer for the intentional, willful refusal to pay compensation benefits because such an

83. 87 N.M. 235, 531 P.2d 1208 (1975).

84. *Russell*, 107 N.M. at 11, 751 P.2d at 695.

85. *Id.* (emphasis in the original deleted) (quoting *Galvan*, 87 N.M. at 237, 531 P.2d at 1210). *Galvan* specifically held that sections 5-6-18 to 22, which allow for suits against the state government but limits judgments to the insurance policy limits, is so broad in its terms and so clear and explicit in its words as to show it was intended to cover the whole subject and therefore displace the prior statute, sections 64-25-8 and 9 (1953), which did not allow for a plaintiff to bring an automobile negligence action against the state government. *Galvin*, 87 N.M. at 237, 531 P.2d at 1210.

86. *Russell*, 107 N.M. at 11, 751 P.2d at 695.

87. *Id.* The court in *Russell* made this determination even though section 52-1-6(D) states:

Such compliance with the provisions of the Workmen's Compensation Act, including the provisions for insurance, shall be, and construed to be, a surrender by the employer and the employee of their rights to any other method, form or amount of compensation or determination thereof or to any cause of action at law, suit in equity or statutory or common-law right to remedy or proceeding whatever for or on account of such personal injuries or death of such employee than as provided in the Workmen's Compensation Act and shall be an acceptance of all of the provisions of the Workmen's Compensation Act and shall bind the employee himself and, for compensation for his death, shall bind his personal representative, his surviving spouse and next of kin, as well as the employer and those conducting his business during bankruptcy or insolvency. Nothing in the Workmen's Compensation Act, however, shall affect or be construed to affect, in any way, the existence of or the mode of trial of any claim or cause of action which the workman has against any person other than his employer or another employee of his employer, including a management or supervisory employee, or the insurer, guarantor or surety of his employer.

88. *Russell*, 107 N.M. at 12, 751 P.2d at 696.

89. *Id.*

90. *Id.*

action is independent and separate from any cause of action contemplated by the Workers' Compensation Act.⁹¹

91. *Id.* The *Russell* court concluded that the legislature intended the Trade Practices and Frauds Article to extend third-party beneficiary standing to an injured worker. *Russell*, 107 N.M. at 13, 751 P.2d at 697. However, other interpretations of the Article are possible. The Trade Practices and Frauds Article's private right of action states the elements necessary to invoke the Article. To invoke the private right of action, the claimant must be covered by the Article, N.M. STAT. ANN. § 59A-16-30 (Repl. Pamp. 1987) ("any person covered by this article (Article 16) . . ."), and must bring the claim against an insurer, N.M. STAT. ANN. § 59A-16-20(E) (Repl. Pamp. 1987). Also, the damages suffered by the claimant must be the result of an insurer's violation of the Article. N.M. STAT. ANN. § 59A-16-30 (Repl. Pamp. 1987).

In Count II of his complaint, *Russell* sought damages against Protective for its alleged refusal "to attempt in good faith to effectuate a prompt, fair and equitable settlement of his [workmen's compensation] claim." *Russell*, 107 N.M. at 10, 751 P.2d at 694. The language in Count II mirrors the language found in the Trade Practices and Frauds Article. N.M. STAT. ANN. § 59A-16-20(E) (Repl. Pamp. 1987) ("not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claim in which liability has become reasonably clear. . . .") However, section 59A-16-20(E) of the Article created a cause of action which only insureds, but not third-party claimants, could use to invoke the Article's private right of action. *Id.* Arguably, if the legislature had sought to grant third-party beneficiaries a private right of action under section 59A-16-20(E) of the Article, then the Article would have made such an affirmative statement.

Specifically, the *Russell* court states that the legislature intended the Article to extend third-party beneficiary standing to an injured worker because of the specific language found in the Trade Practices and Frauds Article's definition of unfair claims. *Russell*, 107 N.M. at 13, 751 P.2d at 697 (citing N.M. STAT. ANN. § 59A-16-20(J) (Repl. Pamp. 1987)). The Article's § 59A-16-20(J) speaks of "making known to insureds or claimants . . ." However, subsection J may have spoken to claimants because the legislature believed that in this particular instance of insurer fraud, the claimant must be afforded a cause of action. Certainly subsection J's use of the word "claimant" cannot reasonably be interpreted to mean that the legislature also intended the section to grant a cause of action to a claimant when subsection E specifically limits the use of its cause of action to the insured. Additionally, because the Workers' Compensation Act is applicable to *Russell*, a strong argument may be made that the exclusive remedy provision embodies the legislature's specific and explicit intent that *Russell* has necessarily surrendered all of his statutory rights to a remedy. N.M. STAT. ANN. § 52-1-20(C), (D) (Repl. Pamp. 1987). Therefore, the plain meaning of the Article leads to the conclusion that the legislature limited the Trade Practices and Frauds Article's private right of action to the named insured when a bad faith claim is made against an insurer.

A case which sheds light on this problem is *Patterson v. Globe American Casualty Co.*, 101 N.M. 541, 685 P.2d 396 (Ct. App. 1984). In *Patterson*, the New Mexico Court of Appeals held that the Unfair Insurance Practices Act, N.M. STAT. ANN. §§ 59-11-9 to -22 (1978), did not create a private right of action for a third-party's suit against an insurer for bad faith. *Id.* at 544, 685 P.2d at 399. The court sought to interpret the Unfair Insurance Practices Act in a manner consistent with its legislative intent. *Id.* at 543, 685 P.2d at 398. The court approached its task by measuring the Act against the goal sought to be accomplished and the wrong sought to be remedied. *Id.* The purpose of the Act was to regulate the insurance industry, according to the congressional mandate in The McCarran-Ferguson Act, 15 U.S.C. §§ 1011 - 1015 (1976). Because Congress did not address the private right of action issue directly, the court examined the Unfair Insurance Practices Act to determine if the New Mexico state legislature intended to create a private right of action. *Patterson*, 101 N.M. at 544, 685 P.2d at 394. The language of the Act did not provide a private right of action, therefore, the court could only infer that the legislature did not intend to create a private remedy. *Id.*

Similarly, the Trade Practices and Frauds Article applied in *Russell* also sought to regulate the insurance industry, pursuant to 15 U.S.C. §§ 1011 - 1015 (1976). Unlike the Unfair Insurance Practices Act, the Trade Practices and Frauds Article provided a private right of action. N.M. STAT. ANN. § 59A-16-30 (Repl. Pamp. 1987). Simply because a private right of action existed does not mean the legislature intended the Article's private right of action to apply to an injured employee who was covered by the Workers' Compensation Act. The Act gave no indication any party other than the insured could use the private right of action. Because the Act did not provide a private right of action for parties other than the named insured, it is reasonable to conclude that the legislature did not intend to create a remedy for people other than the named insured.

After concluding that the Trade Practices and Frauds Article provided an insured a private right of action against the compensation insurer, the court addressed the issue of whether an injured worker was a third-party beneficiary of his employer's workers' compensation insurance contract.⁹² The court began its analysis by rejecting the notion that the named insured in a workers' compensation insurance contract means solely the employer and does not include the employee.⁹³ The court reached this conclusion in three steps. First, the court noted that a specific section of the Trade Practices and Frauds Article "equate[s]" insureds with claimants.⁹⁴ Based on this premise alone, the court stated that the legislature intended to expand the traditional notion of "insured" to include others than those who were named insureds of the insurance contract.⁹⁵ If the definition of insured includes third-party beneficiaries, then the insured's private right of action under the Article extends to third-party beneficiaries as well.⁹⁶ Because Russell is a claimant, he may bring an action under the Article even though the specific section of the Article upon which Russell relies to bring his bad faith action specifically limits the right of action to the insured.⁹⁷

Second, the court analyzed the problem under contract law.⁹⁸ The court stated that contract law has moved away from the strict limitations of privity of contract.⁹⁹ Contract law has reached the point where a third party, who has no formal contractual obligation with either the promisor or promisee, can assert standing as a beneficiary to a contract.¹⁰⁰ Citing the *Restatement (Second) of Contracts*, the court stated that a third party has standing to bring an action which a party to the contract could bring if the third party's rights are "consistent with the terms of the contract and with the policy of law authorizing the contract and proscribing remedies for its breach."¹⁰¹ Having already determined that the Trade Practices and Frauds Article granted third-party beneficiaries of the insurance contract a private right of action, the court then concluded that the policy of law which authorizes the private right of action under the

92. *Russell*, 107 N.M. at 13, 751 P.2d at 697.

93. *Id.*

94. *Id.* Section 59A-16-20(E) (Repl. Pamp. 1987) states "not attempting in good faith to effectuate prompt, fair and equitable settlement of an insured's claims in which liability has become reasonably clear . . ." represents an unfair claims practice and as such is prohibited (emphasis added). However, § 59A-16-20(J) (Repl. Pamp. 1987) states "making known to insured or claimants . . ." Section 59A-16-30 (Repl. Pamp. 1987) is more to the point: "Any person covered by this article [Article 16] who has suffered damages as a result of a violation of Article 16 of the Insurance Code by an insurer or agent is granted a right to bring an action in district court to recover actual damages." Neither the Insurance Code nor the Trade Practices and Frauds Article define the term "insured."

95. *Russell*, 107 N.M. at 13, 751 P.2d at 697.

96. *See id.*

97. *See id.*

98. *Id.*

99. *Id.*

100. *Russell*, 107 N.M. at 13, 751 P.2d at 697 (citing RESTATEMENT (SECOND) OF CONTRACTS § 313(2)(b) (1981)).

101. *Id.* (emphasis in original deleted).

Article justifies an injured worker's third-party beneficiary standing.¹⁰² This is so, the court stated, because the legislature intended to grant third-party beneficiary standing to an injured worker.¹⁰³ Because an injured worker's right to recover was consistent with public policy and with the terms of the contract, the worker is a third-party beneficiary of his employer's workers' compensation insurance contract.¹⁰⁴

Like many insurance contracts, the contract between Protective and Russell's employer precluded actions by third parties against the insurer.¹⁰⁵ In the third step of its analysis, the court stated that the contract's prohibitive language may not be valid because it might be against public policy.¹⁰⁶ Moreover, a showing of third-party beneficiary status is most forcefully demonstrated by the contracting parties' intent to benefit the third-party.¹⁰⁷ Proof of the contracting parties' intent may be found in either the contract itself or from "some evidence that the person claiming to be a third-party beneficiary is an intended beneficiary."¹⁰⁸ Given the court's determination that the legislature intended the Trade Practices and Frauds Article to extend third-party beneficiary standing to an injured worker, the court would thwart legislative intent if the court allowed Protective's insurance policy to preclude a third-party action by Russell.¹⁰⁹ Even though the insurance contract in this case precluded action by third parties, the court concluded there was sufficient evidence from the legislative enactment of the Article to find Russell was an intended beneficiary of the contract.¹¹⁰ Therefore, Russell could bring an action under the Trade Practices and Frauds Article against Protective for its intentional, willful refusal to pay workers' compensation benefits.¹¹¹

V. ANALYSIS AND IMPLICATIONS

Underlying the holding in *Russell* was the court's assessment that the New Mexico legislature intended the Trade Practices and Frauds Article to allow an injured worker to bring a private right of action against a

102. *Id.*

103. *Russell*, at 13, 751 P.2d at 697.

104. *Id.*

105. *Id.*

106. *Id.* (citing *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969)). The *Shingleton* court held a third-party beneficiary to a motor vehicle liability insurance policy has a cause of action against the insurer. *Shingleton*, 223 So. 2d at 715. The *Shingleton* court reasoned that the purpose of buying car insurance is to discharge oneself of the financial responsibility for one's negligent acts which result in harm to others. *Id.* at 716. Automobile insurance is not an exclusive private contract because it serves to protect society from the hazards of everyday life. *Id.* (citing *Simon v. Iowa Mutual Cas. Co.*, 3 Ill. 2d 318, 322, 121 N.E.2d 509, 511 (1954)). As such, express contractual provisions may be limited when they are out of line with public policy. *Shingleton*, 223 So. 2d at 717. In this case, a contract which prevents the public from receiving the protection the insurance was purchased to provide is against public policy. *Id.*

107. *Russell*, 107 N.M. at 13, 751 P.2d at 697.

108. *Id.* (emphasis in original deleted) (citing *Valdez v. Cillessen & Sons, Inc.*, 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987)).

109. *Russell*, 107 N.M. at 13, 751 P.2d at 697.

110. *Id.*

111. *Id.*

workers' compensation insurer. However, while *Russell* was in the courts, the legislature had re-written New Mexico's workers' compensation laws. This change in New Mexico's Workers' Compensation Act has limited the future applicability of *Russell*.¹¹² Nonetheless, the new Act does not seem to preclude an employee's cause of action for an insurer's bad faith failure to pay compensation benefits, rather than the employer's. *Russell's* real importance, then, lies in the court's implication that an exception to the exclusivity provision may also exist in tort law.

By the time *Russell* was decided, the legislature, in 1986 and 1987, had dramatically re-written the Workers' Compensation Act. In the present Workers' Compensation Act, the legislature has created an administrative agency which handles workers' compensation claims.¹¹³ The Workers' Compensation Division of the New Mexico Department of Labor monitors workers' compensation claims using informal and formal hearings¹¹⁴ before hearing officers.¹¹⁵ In addition to deciding workers' compensation claims, the hearing officer has the authority to award damages for an employer's bad faith refusal to pay a worker's compensation claim.¹¹⁶

The Act does not explicitly grant the hearing officer jurisdiction over claims arising from an insurer's bad faith dealings.¹¹⁷ In *Russell*, an insurer's alleged bad faith dealings, not an employer's, are the focus of the court's decision.¹¹⁸ Because the administrative agency only has jurisdiction over an employer's bad faith dealings,¹¹⁹ the Act does not preclude an injured worker from bringing a bad faith claim in court against an insurer. Therefore, an injured worker may still bring a private action,

112. In *Russell*, an insurer's alleged bad faith dealings, not an employer's, are the focus of the court's decision. 107 N.M. at 10, 751 P.2d at 694. However, because the administrative agency only has jurisdiction over an employer's bad faith dealings, N.M. STAT. ANN. § 52-1-54(G) (Repl. Pamph. 1987), the Act does not preclude an injured worker from bringing a bad faith claim in court against an insurer.

113. N.M. STAT. ANN. §§ 52-5-1 - 18 (Repl. Pamph. 1987); see also *Wylie Corp. v. Mowrer*, 104 N.M. 751, 753, 726 P.2d 1381, 1383 (1986) (creation of the workmen's compensation administration and the grant of power to the Administration to hear and decide workers' compensation claims is a valid exercise of legislative power). In *Russell*, the court distinguished cases upholding exclusive remedy provisions from states having administrative rather than judicial worker's compensation remedies. See *Russell*, 107 N.M. at 12, 751 P.2d at 696 (distinguishing *Young v. United States Fidelity & Guar. Co.*, 588 S.W.2d 46 (Mo. App. 1979) and *Hixon v. State Compensation Fund*, 115 Ariz. 392, 565 P.2d 898 (Ct. App. 1977)). Therefore, it is tempting for insurance companies to speculate that the *Russell* holding will fall in the face of New Mexico's creation of the administrative remedy. However, § 52-1-54(G) does not preclude an employee's action against an insurer who in bad faith fails to pay compensation benefits. See *infra* notes 112-13 and accompanying text; *supra* notes 114-18 and accompanying text.

114. N.M. STAT. ANN. §§ 52-5-5, 7 (Repl. Pamph. 1987).

115. N.M. STAT. ANN. §§ 52-5-2, 6 (Repl. Pamph. 1987).

116. N.M. STAT. ANN. § 52-1-54(G) (Repl. Pamph. 1987). This section states that "[t]he hearing officer may exceed the maximum amount stated in this subsection in awarding a reasonable attorney's fee if he finds that an employer acted in bad faith with regard to handling the injured worker's claim and the injured worker has suffered economic loss as a result thereof." (emphasis added). Bad faith is defined in this subsection as "conduct by the employer in the handling of a claim which amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker." *Id.*

117. *Id.*

118. *Russell*, 107 N.M. at 10, 751 P.2d at 694.

119. See *supra* note 115.

because of *Russell*, in state district court under the Trade Practices and Frauds Article, for an insurer's intentional, willful refusal to pay compensation benefits.

The significance of *Russell* may not lie in the creation of a statutory exception to the Workers' Compensation Act's exclusive remedy provision, but in the existence of a cause of action in tort which is not precluded by the exclusive remedy provision. The *Russell* court stated in dicta that Protective had an obligation to Russell in tort as well as in contract.¹²⁰ By contracting with Russell's employer, Protective may have a legal obligation to Russell to act in a way that will not injure Russell.¹²¹ Because the Act should not be construed to affect any claim a worker has against his compensation insurer,¹²² the court stated that when an insurer's tortious action results in damages which are "unrelated to the workers' physical or psychological job-related disability, then such a cause of action is independent of, and separate from, the cause of action contemplated by the Workers' Compensation Act. . . ."¹²³ Therefore, an injured employee is not precluded from bringing a cause of action in tort which is independent and separate from the Workers' Compensation Act.¹²⁴

120. *Russell*, 107 N.M. at 13, 751 P.2d at 697. Though the court did not need to address Protective's obligation to Russell in tort, the court states "[f]inally, we are not unmindful of the insurer's obligation to Russell in tort as well as in contract." *Id.*

121. *Id.* at 14, 751 P.2d at 698 (citing W. PROSSER AND W. KEETON, *THE LAW OF TORTS* § 93, at 668 (5th Ed. 1984)), which states:

[B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.

122. *Russell*, 107 N.M. at 13, 751 P.2d at 696 (citing N.M. STAT. ANN. § 52-1-6(D)); see *supra* note 87.

123. *Russell*, 107 N.M. at 12, 751 P.2d at 696.

124. *Id.* To support its decision which found Protective liable in tort as well as in contract, the *Russell* court listed other jurisdictions which have allowed recovery for the tortious acts of a workers' compensation insurer. Three cases cited by the court allow claimants to bring suit against their employers or compensation carriers as long as the action is for an injury which occurred outside the scope of employment. In *Martin v. Travelers Ins. Co.*, 497 F.2d 329, 330 (1st Cir. 1974), the claimant's injury arose outside the course and scope of his employment. The First Circuit Court of Appeals held that the Longshoremen's and Harbor Workers' Compensation Act's exclusive remedy provision, 33 U.S.C. § 905(a), did not extend to the insurer's act because the worker was seeking compensation benefits for an injury that occurred after his employment ended. *Id.* The court stated that because the Longshoremen's and Harbor Workers' Compensation Act's exclusive remedy provision did not address the issue of the timing or withdrawal of a compensation payment, the Act did not preclude a claimant's tort cause of action for an insurer's withdrawal of compensation payments without warning. *Id.* at 330-31.

In *Coleman v. American Universal Ins. Co.*, 86 Wis. 2d 615, 616, 273 N.W.2d 220, 221 (1979), the claimant alleged a separate injury arising out of the insurer's bad faith refusal to pay workers' compensation benefits. The Supreme Court of Wisconsin held that when a compensation insurer acts in bad faith in the settlement or payment of compensation benefits, the insurer commits a tort independent from those acts covered by Wisconsin's Workers' Compensation Act. *Id.* The court began with the premise that if the worker's injury falls within the coverage of the Act, the compensation remedy is exclusive. *Id.* Moreover, an injury covered by the Act bars an action for the damages resulting from the injury, even though those damages are not statutorily compensable.

VI. CONCLUSION

Under the Trade Practices and Frauds Article, an injured worker is an intended, third-party beneficiary of his employer's workers' compensation insurance contract. An injured worker now has the same standing as an insured under the Trade Practices and Frauds Article to file an action against an insurer for the intentional, willful refusal to pay workers' compensation benefits. By the time *Russell* was decided, the New Mexico legislature had created the Workers' Compensation Administration to hear and decide an injured worker's compensation claim. However, the agency's jurisdiction only extends to claims alleging an employer's, but not an insurer's, bad faith settlement of a compensation claim. An injured worker may still bring a bad faith claim against an insurer. More importantly, in *Russell* the New Mexico Supreme Court stated in dicta that Protective had an obligation in tort not to injure Russell as well as in contract. The significance of *Russell* may not lie in the creation of a statutory exception to the exclusive remedy provision, but in denying an insurer the exclusive remedy shield when the insurer is guilty of an intentional, willful tort against an out-of-work and injured worker.

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Id. at 617, 273 N.W.2d at 222. If the injury, however, was distinct in time and place from the original on-the-job injury and occurred while the injured was not employed but was the result of the intentional acts of the insurer, they allowed the claimant to bring such an action. *Id.* at 617-18, 273 N.W.2d at 222-23.

Similarly, in *Gibson v. Ben Franklin Ins. Co.*, 387 A.2d 220 (Me. 1978), the claimant alleged that the workers' compensation insurer's refusal to pay benefits caused a separate and distinct injury from the work-related injury claimed under the act. The Supreme Judicial Court of Maine held that Maine's Workmen's Compensation Act's exclusive remedy provision does not foreclose an action for employees' injuries which do not arise out of and in the course of their employment. *Id.* at 222. The court determined that an insurer's willful deprivation of benefits to the employee which had an established right occurred outside the course of employment. *Id.*

The *Russell* court noted three cases which focused on the insurer's intentional torts. In *Broaddus v. Ferndale Fastener Div.*, 84 Mich. App. 593, 269 N.W.2d 689 (1978), the claimant alleged that the insurer wrongfully and intentionally terminated her workers' compensation benefits. The Court of Appeals of Michigan held that Michigan's Worker's Disability Compensation Act's exclusive remedy provision did not bar a tort suit for non-physical damages—damages which do not incidentally result from an industrial injury. *Id.* at 597, 269 N.W.2d at 693. Otherwise, the court stated, insurers could withhold benefits from undeniably compensable injuries with impunity. *Id.* Therefore, the claimant could bring an action for emotional distress caused by the insurer's intentional and wrongful denial of compensation benefits. *Id.* at 596, 269 N.W.2d at 692.

In *Reed v. Hartford Accident and Indemnity Co.*, 367 F. Supp. 134 (E.D. Pa. 1973), the claimant alleged intentional economic duress, conversion, abuse and misuse of process, and breach of a compensation agreement by a workers' compensation insurer. The federal district court in *Reed* held that when the tortious acts of an insurer lie outside the Workmen's Compensation Act, the exclusive remedy provision does not deprive the claimant of his common law causes of action. *Id.* at 135.

The court in *Hollman v. Liberty Mutual Ins. Co.*, 712 F.2d 1259, 1261 (8th Cir. 1983), reached the same conclusion as did the court in *Reed*. Construing South Dakota's Workers' Compensation Act, the court concluded that the "legislature did not intend to bar an action for intentional torts independent of the party's claim for worker's compensation." *Id.*