Challenges to state workers compensation statutes are nothing new. In fact, contesting the legality of state workers compensation systems goes back more than a century.

In the early 1900s, states such as Maryland and New York were starting to adopt workers compensation systems, but they were promptly struck down by the courts as unconstitutional. The workers compensation laws, often referred to as the “grand bargain,” finally started to come together in 1911, with Wisconsin leading the way. By 1913, 22 states had adopted workers compensation laws, with Florida joining the ranks in 1935. As more states adopted the “grand bargain,” more challenges to workers compensation laws followed.

Court Challenges in Florida

Many states have experienced opposition to certain aspects of their workers compensation statutes throughout history. Florida, in particular, seems to be the latest hotbed of legal activity.

In 2014, the Morales v. Zenith Insurance Company case was decided by the Florida Supreme Court. Midway through 2015, the Florida Workers’ Advocates v. State of Florida (Padgett) case was decided by the Third District Court of Appeal. And three cases are currently pending in the Florida Supreme Court (Westphal, Castellanos, and Stahl).

- In Florida, workers compensation recently survived an exclusive remedy challenge with decisions by the Florida Supreme Court and US Court of Appeals for the 11th Circuit in Morales v. Zenith Insurance Company. In Morales, the estate of a deceased worker collected workers compensation benefits and entered into a settlement agreement with the employer and its insurer. The estate also brought a breach-of-contract action against the employer’s insurer to collect a $9.5 million default judgment that the estate had obtained in a wrongful death action against the employer; this was ongoing when the parties entered into the workers compensation settlement agreement. The estate sought to enforce the judgment against the insurer, alleging coverage under Part 2 (Employers Liability) of the Workers Compensation and Employers Liability Insurance Policy.

  Though there were questions regarding the estate’s standing and whether the release executed as part of the settlement agreement was for all claims or limited to the workers compensation claims, the primary issue resolved by the Court was whether Florida’s exclusive remedy provision and the employer’s liability policy exclusion for “any obligation imposed by workers compensation law” barred coverage for such a claim. The Court found that the exclusion in Part 2 of the Workers Compensation and Employers Liability Insurance Policy barred coverage for the tort judgment, precluding the estate from collecting against the employer’s insurer.

- Exclusive remedy and the constitutionality of Florida’s Workers’ Compensation Act also recently survived a challenge through a very fact-specific set of circumstances in the Padgett case. The case began when an employee (Julio Cortes) brought a negligence
lawsuit against his employer (Velda Farms) for injuries sustained on the job. The employer sought to have the case dismissed based on the exclusive remedy. In response, the injured employee filed an Action for Declaratory Relief, requesting that the court declare the exclusive remedy unconstitutional and alleging that workers compensation benefits have been reduced to the point where injured employees no longer have an adequate remedy.

The employer dropped its exclusive remedy defense in the negligence lawsuit, which removed the employer as a defendant in the declaratory relief challenge to exclusive remedy. The circuit court then allowed two advocacy groups (Florida Workers’ Advocates and Workers’ Injury Law & Advocacy Group) representing a new plaintiff (Elsa Padgett) with a different employer and an unrelated injury claim, to continue the challenge. Even though there was no longer a defendant and the state of Florida was not made a party to the case, the circuit court judge ruled that the entire Florida Workers’ Compensation Act is unconstitutional, stating that “it no longer provides a reasonable alternative to tort litigation.”

On appeal, the Third District Court of Appeal reversed the circuit court’s decision, but did not review the constitutional analysis of the exclusive remedy challenge. Rather, the Court found that the procedural issues of mootness and lack of standing were dispositive and precluded pursuit of the constitutional claims, concluding:

The trial court lacked a justiciable case or controversy within which to determine, and the intervenor/appellees lacked standing to assert, that the challenged provisions of the Florida Workers’ Compensation Law are unconstitutional. ¹

The ruling by the Third District Court of Appeals was appealed to the Florida Supreme Court. At the end of 2015, the Florida Supreme Court declined to accept jurisdiction, denying the Florida Workers’ Advocates and Workers’ Injury Law & Advocacy Group’s petition for review.


Still Pending in Florida
Although the decisions in Morales and Padgett maintained the exclusive remedy in Florida, there are still three remaining high-profile cases pending in the Florida court system.

• In Westphal v. City of St. Petersburg, the Florida Supreme Court is reviewing a constitutional challenge to the Workers’ Compensation Act in which the claimant alleges that a “statutory gap” in workers compensation benefits left him without a remedy. Bradley Westphal, a firefighter for the city of St. Petersburg, sustained severe injuries to his back while fighting a fire. He received Temporary Total Disability (TTD) benefits for the 104-week maximum, but the Judge of Compensation Claims (JCC) determined he was not eligible for Permanent Total Disability (PTD) benefits because he was not at Maximum Medical Improvement (MMI).

The decision by the JCC was appealed to the First District Court of Appeal, where a three-judge panel declared the 104-week maximum unconstitutional and reinstated the previous maximum of 260 weeks. Upon rehearing, the First District Court of Appeal en banc (full court) withdrew the panel decision, remanded the case back to the JCC to consider a new claim for benefits, and certified a question of law to the Florida Supreme Court as to whether a claimant who reaches the 104-week maximum for TTD is deemed by operation of law to be at MMI and, therefore, eligible to assert a claim for PTD.

• In Castellanos v. Next Door Company, the Florida Supreme Court is reviewing the current workers compensation attorney fee schedule enacted in 2009. In this case, the claimant’s attorney was awarded a $164 attorney fee based on the attorney fee schedule, even though the attorney worked 107 hours to obtain workers compensation benefits for the claimant.

The issue before the Court is whether the attorney fee schedule prevents claimants from contracting with an attorney for a “reasonable” attorney fee, amounting to an unconstitutional limitation on “Access to Courts.” The claimant’s attorney argued

Contesting the legality of state workers compensation systems goes back more than a century.
that if the case is upheld, injured claimants would not be able to obtain legal representation because attorneys would be discouraged from taking cases that may result in an unreasonably small amount of compensation.

- In late 2015, the Florida Supreme Court also accepted review of Stahl v. Hialeah Hospital, another constitutional challenge to the Florida’s Workers’ Compensation Act and its exclusive remedy provision. In Stahl, the Court is reviewing the plaintiff’s contention that the Florida Legislature’s 1994 addition of a $10 medical visit copay after an injured worker reaches maximum medical improvement (MMI) and the removal of Permanent Partial Disability (PPD) benefits in 2003 renders the Act an inadequate replacement remedy to tort actions—and thus unconstitutional as the exclusive remedy. Upon its previous review of the case, the First District Court of Appeal upheld the Act as constitutional, finding that:

  Both amendments withstand rational basis review, in that the copay provision furthers the legitimate stated purpose of ensuring reasonable medical costs after the injured worker has reached a maximum state of medical improvement, and PPD benefits were supplanted by impairment income benefits.

- In a recent development with potentially significant implications for the future of opt-out in Oklahoma, another of the pending constitutional challenges, Vasquez v. Dillard’s, saw the opt-out law declared unconstitutional by the Oklahoma Workers’ Compensation Commission. The Commission, in its ruling, found that the opt-out law creates an impermissible “dual and differing system of compensation” for injured workers that denies equal protection and deprives access to courts by creating barriers to compensation. The questions surrounding the constitutionality and future viability of opt-out in Oklahoma may now be resolved on appeal with the Oklahoma Supreme Court.
The new law is also facing challenges to its exclusive remedy provisions, with multiple cases pending in the Oklahoma courts. One of these cases, *Smith v. Baze Corp. Investments*, was recently decided by the Oklahoma Supreme Court. In *Smith*, the claimant suffered an injury to his knee and was awarded PPD benefits. The claimant’s PPD benefit payments were then “deferred” by the Administrative Law Judge, and the decision to defer was upheld by the Workers’ Compensation Commission because the claimant returned to work in his pre-injury position. The deferral of benefits was done in accordance with the “PPD deferral statute,” which states that the payment of PPD benefit awards shall be deferred and ultimately reduced if the employee reaches MMI and returns to work at the pre-injury job for a number of weeks determined by statutory formula.

On appeal with the Oklahoma Supreme Court, the claimant argued that this statutory deferral and reduction of benefits led to the loss of his PPD benefit, leaving him without a remedy for his injury. The issue before the Court was whether the deferral and reduction of PPD benefit awards amounted to an unconstitutional limitation on benefits, resulting in the Administrative Workers’ Compensation Act being an inadequate exclusive remedy in place of common law tort. In its decision, the Court did not rule on the exclusive remedy arguments brought by claimants, but instead focused on the particular statutory provisions that were the basis of the challenge. The Court concluded that the deferral and ultimate reduction of awarded PPD benefits is an unconstitutional violation of due process, reasoning that an award of workers compensation benefits is a vested property interest of which a person cannot be deprived without meaningful opportunity to appear and be heard.

**Georgia Legislation Strengthens the Exclusive Remedy**

In Georgia, legislation was enacted this past year as a result of a Georgia Court of Appeals’ ruling in 2013 in *Pitts v. City of Atlanta*. In this case, a construction worker, Mack Pitts, was killed when a dump truck backed over him during renovation of the Hartsfield-Jackson Atlanta International Airport. The dump truck driver who killed Pitts worked for a subcontractor, not Pitts’s employer. So the dump truck company was not a party to the contract under which Pitts’s employer provided workers compensation benefits.

Pitts’s estate obtained a wrongful death judgment against the dump truck company and its driver. The wrongful death judgment exceeded the limits of the dump truck company’s automobile liability insurance coverage. Subsequently, Pitts’s estate brought a breach-of-contract action against the city and various construction companies, alleging that all defendants breached a contractual duty to require that the dump truck company carry a minimum of $10 million in automobile liability insurance to work on the project.

The Court of Appeals concluded that Pitts was an intended beneficiary of the contracts and that the family’s claim was not barred by exclusive remedy because the Workers’ Compensation Act provided no remedy for breach of contract. The Georgia Supreme Court vacated the decision and sent it back to the appellate court, which again ruled that the exclusive remedy provisions of the Workers’ Compensation Act did not apply.

The enacted Georgia legislation provides that an employer may only be liable to the employee for rights and remedies beyond those provided in the workers compensation statutes by “expressly agreeing in writing to specific additional rights and remedies.” This legislation strengthens the exclusive remedy because it clarifies that employees cannot seek benefits other than workers compensation benefits unless the employer had agreed in writing to provide additional specific rights and remedies.

**West Virginia Also Strengthens the Exclusive Remedy**

In West Virginia, a state in which workers can sue their employers in tort if an employer acts with “deliberate intent,” legislation was enacted this past year which requires the employee and anyone else seeking damages under a deliberate intent claim to prove “actual knowledge” on behalf of the employer. The legislation also creates new criteria for establishing a “serious compensable injury.”

These stricter requirements could result in fewer deliberate intent claims, thus strengthening exclusive remedy in the state.

**Conclusion**

It is unknown if challenges to exclusive remedy and other provisions of state workers compensation laws on constitutional grounds—including inadequate remedy, access to the courts, and due process—will continue to be an ongoing trend. If these constitutional challenges fail in the courts and state legislatures continue to pass legislation to bolster the exclusive remedy and the workers compensation system as a whole, such challenges may subside.

*Please note: The country’s regulatory, legislative, and legal environments can change quickly. This article provides a snapshot at the time of publication.*

Adam Levell, Esq., is a counsel with NCCI’s Legal Division.

Jeff Selbach, Esq., is a senior counsel with NCCI’s Legal Division.