

Recent Court Decision Rocks WC System



BY MICHAEL SEAN QUINN

By a 6-2 vote, the Texas Supreme Court said that employees could waive participating in the workers' comp system and give up their common law claims against their employers in exchange for a private work-related accident-illness insurance scheme substituting for workers' compensation

On March 29, 2001, the Supreme Court of Texas decided a consolidated case of enormous importance to insurance intermediaries. In *Lawrence v. CDB Services Inc.*, the high court said by a vote of 6-2, that employees could waive participating in the workers' comp system and give up their common law claims against their employers in exchange for a private work-related accident-illness insurance scheme substituting for workers' compensation. This idea creates the possibility of enormous innovation and possible improvement. At the same time, it is an idea that creates the possibility for deplorable dishonesty and irresponsible experimentation.

This problem could arise only in Texas. Every state has a workers' compensation system. The one in Texas is unique. It is (at least in theory) voluntary. Employers do not have to subscribe to it, and employees can opt out of it. The Texas system was made necessary by the "hands-off," individualistic economic philosophy prevalent in the later part of the 19th century. It was also thought to be required by the "Open Courts" provisions of the Texas constitution. It said—and says today—that people can always go to court to enforce their rights.

Origins of the opt out system

The heart of the Texas optional system is to be found in §406.033 of the Labor Code. As stated there, employers may opt out of the workers' comp system. If they do, they lose certain common law defenses. Non-subscribing employers may not set up an employee's contributory negligence as a defense. According to recent court decisions interpreting this statute, neither may employers set up the comparative negligence of an employee as a defense. According to the statute, employers may not utilize assumption of the risk as a defense.

For more commentary on this court decision, read our news story on page 12.

At the same time, the non-subscribing employer expressly keeps the right to defend a lawsuit brought by an injured employee upon the grounds that the employee intended his own injury or that the employee was drunk. Not stoned, mind you: just drunk. (How much sense does that make?)

In contrast, if the employee opts out of the comp system, the employer gets to keep all of its common law defenses. Under either opt-out system,

the employee must prove that the employer was negligent. Usually, this is not too difficult. However, it is also often easy for the employer to show that the employee was negligent to some degree.

The statutory scheme does not indicate whether an employee can opt out of the comp system, in exchange for some sort of private insurance scheme system. It is absolutely clear that the Labor Code does not purport to be an absolutely exclusive list of all issues which might come up in a controversy between an employee and a non-subscribing employer. For example, the statutory scheme requires that the employee prove that he is injured. As a practical matter, an employer will try to prove that the employee was not injured.

In *Lawrence*, the Supreme Court held (at the very least) that when an employee opts into a private-on-the-job accident-illness insurance scheme, which includes the employee waiving all common law rights he has against the employer, and the employee does so voluntarily (i.e., does so both without duress and without the exercise of that option being a condition of employment), the waiver will be enforced, if it also complies with the so-called express negligence rule and is conspicuous in whatever document the employee signs. Perhaps the court's holding is broader than set forth here, but the holding is at least this.

Since the language of the statute, literally construed, does not forbid contracts pursuant to which employees waive the right to sue under the common law, one must ask whether the contracts violate public policy. The legislature clearly intended the workers' comp system to be comprehensive. Further, in the past, the Texas Supreme Court has said that all common law defenses were abolished as against non-subscribing employers. Surely waiver is a common law defense. Moreover, the waiver of a right to sue is equivalent to shifting the risk of injury from the employer to the employee. Arguably that shift is the tantamount of the common law defense of assuming-the-risk, which has expressly been forbidden by the workers' comp statute.

The Supreme Court rejected these gambits. The majority said that the comp statute was not comprehensive, precisely because of the opt out provisions. Moreover, financial risk has not been shifted from the employer to the employee. Under the *Lawrence* case, waiver is authorized only if there is private, substitute insurance exchanged for the waiver. (One wonders what would happen if a pri-

vate insurer were insolvent. Hopefully, a court would have to say that that was a different issue. It might say that the insolvency of the insurer extinguished the waiver.)

Weighing public policy

Most people see the workers' comp system as comprehensive. It certainly plays a central role in the industrial life of Texas. Given that fact, and given the generality of the comp statute, in *Lawrence* the plaintiffs-workers argued that the waiver-in-exchange-for-private-insurance option was contrary to public policy. The Supreme Court rejected this view for a variety of reasons. They may be reconstructed in a series of separate considerations.

First, if an employer provides coverage as good or better than the comp system at a cheaper price to itself and the insurer, why should it be prevented from doing so? After all, economic creativity and growth demand flexibility and freedom.

Second, courts should not be in the business of comparing individual plans against the existing comprehensive paradigm. It is too difficult to tell whether quite different plans, which may involve divergent approaches, are really comparable. It is not suitable work for courts. It is appropriate work for legislatures (or administrative agencies with legislative mandates and guidelines).

Third, since the worker-waivers in question appear to be voluntary, it cannot be plausibly claimed that the waivers are stimulated by duress. Besides, overall participation in the



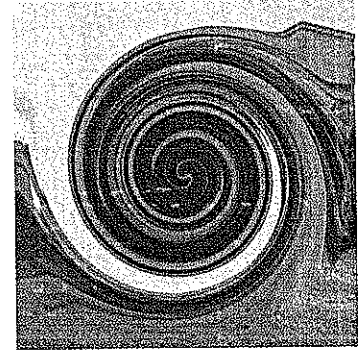
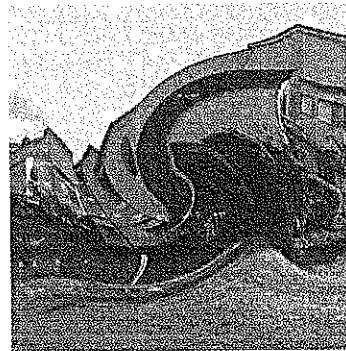
comp system is voluntary. Substituting one voluntary accident-related insurance for another cannot, therefore, be contrary to public policy.

Fourth, it is not at all clear, as some claim, that private work-related accident insurance schemes are necessarily procured by duress. Facts simply were not developed in the courts below to prove that proposition. It is not at all the kind of obvious thing of which appellate courts can take judicial notice (i.e., posit to be true without evidence).

Fifth, it is not known how many non-subscribers have insurance plans like the ones in *Lawrence*. Since that is not known, if the courts invalidate private plans, it might deprive many participants of benefits which they are already receiving or which they will shortly need.

Finally, part of the public policy of Texas is to encourage freedom of contract. This theme has been integral to Texas law as long as anyone's grandfather could remember. Freedom of contract is part of the essence of the Texas public policy. That deep and heavy-duty idea militates strongly in favor of approving waivers for non-subscribers that provide alternative insurance.

The insurance system *Lawrence* reviews prevents workers from suing employers for the employers' negligence. In the context of indemnity agreements, Texas jurisprudence requires that if anyone is to be released from liability for his own future negligence, the release "must be expressed in unambiguous terms within the four-corners of the release."



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Additionally, "the releasing language must be conspicuous."

The majority held, and the dissent did not dispute, that the waivers involved in *Lawrence* survived both of these tests. It is not clear that this rule—the so-called express negligence rule should apply to the kinds of waivers at issue in *Lawrence*. The natural habitat of the express negligence rule is the indemnity agreement. That is quite a different topic, however.

Dissenting opinion

Two judges dissented. Justice Baker wrote the opinion, and Chief Justice Thomas Phillips joined in. The thrust of the dissent was that the public policy of the state of Texas invalidated worker waivers of liability in exchange for private work-related accident-illness insurance.

The structure of the workers' compensation statute, Justice Baker wrote, was to create a comprehensive system specifying two methods for handling workplace injuries. One method was through the statutory comp system; the other method was through the common law, as modified by the mandatory limits prescribed in the statute. Private insurance schemes are outside this comprehensive system and therefore inconsistent with the public policy of the state. The majority decision in *Lawrence* thus "allows employers an end-run

around the [Workers' Comp] Act's carefully-crafted system and improperly creates a third compensation method." The cardinal sources of public policy in Texas are statutes passed by the legislature. According to the dissenters, the majority ignores this fact and reads comp act too narrowly.

Historically, Texas courts have always construed this statute broadly and liberally in favor of injured workers. This the majority does not do. The policies underlying the workers' comp system are there to "encourage workers' compensation insurance subscription while assuring non-subscribing employers' injured employees a means to seek suitable compensation. The waiver system approved in *Lawrence* is inconsistent with this socio-political goal.

The road ahead

Of course, the majority would concede the workers' comp statute must be construed liberally in favor of injured workers. The majority would say that it need not construe the exclusivity provisions of the comp statute broadly in favor of requiring adherence to the statute, when there are private substitutes available. The argument between the majority and the dissenters is a real conundrum. The law on interpreting statutes is not rich enough to adjudicate the dispute clearly.

There is a real danger in the *Lawrence*

decision. First, the number of fly-by-night entrepreneurs—some of whom will be crooked—will establish private substitute programs. These programs will pay injured workers for a while, and then they will fail. Some injured workers will go uncompensated. They will sue the non-subscribing employers. One suspects that the courts will not be generous in exonerating non-subscribers that have purchased work-related accident-illness insurance from irresponsible entities.

Litigation will not stop there. Insurance agents, brokers and intermediaries of all sorts who have sold these programs will be sued on a variety of theories. Agents will lose a fair number of these cases. E&O insurance will pay some of the losses. Private assets will pay for some of them. A fair fraction will go uncompensated.

As a result of this new system, some agents will make money and serve the public interest. Some will do neither. Some will have to leave the biz. Some will go bankrupt. Some will go to jail. *Lawrence* presents a very dangerous opportunity. ■

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