ORAL ARGUMENT – 10-2-00
00-0142
LAWRENCE V. CDB SERVICES
00-0201
LAMBERT V. AFFILIATED FOODS

HEINRICH: We are here today about the enforceability of a waiver signed by employees of nonsubscribers of their right to sue those employers at common law. And in order to address this question it's first necessary to look at the worker's comp. act that's in question here.

GONZALES: Does the statute expressly prohibit this kind of contract?

HEINRICH: We assert that it does because of the way it was set up.

GONZALES: But do the words of the statute reflect that?

HEINRICH: No. Expressly not. But the statute was set up to draw a clear line between subscribers and nonsubscribers, and clearly expressly contemplated a common law cause of action against nonsubscribers. The way we know that is because the act specifically set up, specifically delineated how an action against a nonsubscriber would go by specifically setting forth what common law defenses would be available and which ones would not.

HECHT: Were these waiver agreements in use the last time the compensation act was overhauled?

HEINRICH: I do not know. These specific waivers in these two cases, I do not believe those waivers...

HECHT: No, I mean generally speaking. Were employers using waivers like this when the comp act was overhauled?

HEINRICH: I'm not specifically aware of any, but I would assume that they were being used at that time.

HECHT: In the *Hook* case, the waiver went back to 1989. But do you know if they were an innovation in 1989, or if they had been in use for some time?

HEINRICH: I would assume that they had been used for some time, but I don't know that for sure.

HECHT: And why didn't the legislature address it?

HEINRICH: I would assume that the legislature did not address it because it did not need to be addressed. The Act itself clearly says, If you are a subscriber, the quid pro quo is, I can't be sued for common law negligence and in return my employees get a sum certain amount of benefit without having to prove negligence on anybody's part. If I'm not a subscriber, then I must face common law responsibility as set forth in the Act, as specifically described in the Act with regard to what common law defenses I may assert, which common law defenses I'm not allowed to assert.

O'NEILL: If the nonsubscribers' plan is better, your position would be totally different?

HEINRICH: It would be.

O'NEILL: And why? There's evidence in this record that the employer's plan is better, that if offers benefits that are not offered under the worker's comp. statute.

HEINRICH: There is evidence in this record that some parts of the plan in question may be better than some parts of the worker's comp. plan.

O'NEILL: Why can't we look at it as a whole and determine if it's better why can't an employee choose (they don't have to opt into this plan) that they like these benefits better, that the benefits that are offered under the employer's plan? And let's go that route. Why shouldn't we allow that to happen?

HEINRICH: As long as the plan offered by the nonsubscriber is equal to or better than the worker's comp. act benefits, then it's perfectly appropriate for the employee to enter into that agreement.

O'NEILL: But how do we make that qualitative analysis? How do we determine whether it's equal to or better than? It may not have the same benefits but the argument is being made that the employer's plan is better because it offers things that are not offered under worker's comp. And why can't an employee decide those things are more attractive to me, and that's why I am going to opt in?

HEINRICH: In theory, I think you can look at a plan and compare it to workers' comp. Practically though, I do not think it's possible to do that, because there are additional benefits offered to employees of subscribers under the worker's comp act that are impossible to get as an employee of a nonsubscriber.

O'NEILL: Such as what?

HEINRICH: Such as, protection from insolvency. Under Texas law the insolvency pools guarantees unlimited protection due to insolvency of a worker's comp. insurance carrier. There is

not unlimited protection for the insolvency of a private insurance company under a private plan; furthermore, there is certainly no protection for insolvency if an employer is funding this on its own and happens to go belly-up after this employee agrees to accept that particular plan.

ENOCH: The employer could choose to be a nonsubscriber in which event certain activity occurs. Let's suppose the employer chooses to be a nonsubscriber, but then the employee says, But we have a different deal. We will provide some benefits irrespective of you - you have to prove negligence in the work place because we are nonsubscribers. But we have a deal where if you agree to waive that negligence, which we could put you in the posture of by a nonsubscriber, but we will offer some benefits out there. We will actually give you some compensation in exchange for your waiving a claim against us for our negligence. And we have common law provisions out there that talk about clear and conspicuous and everybody knows what's going on here. And you get consideration for giving up that negligence. Isn't that contemplated by the compensation section? Once they are outside the comp scheme then, can't the parties then enter into some sort of contractual arrangement where I give up a claim against you for your negligence in exchange for consideration for me giving that up and could still take - it could be in the form of benefits?

HEINRICH: That's what has happened in these two instances.

ENOCH: But you're arguing the parties can't do that under the scheme because it's a pervasive scheme they can't do that.

HEINRICH: Two reasons. One, that contract that they enter into we assert violates public policy set forth by the comp act; and more specifically, it violates the statute itself...

OWEN: I'm not sure I understood one of your responses to Justice O'Neill's question. You said it would be okay if you put it under the statute, if the benefits were better. And I don't understand. Either the statute prohibits these kinds of agreements or it doesn't. Where in the statute would it exempt a plan that offers higher benefits?

HEINRICH: The statute is set up so that as an incentive for employers to provide comp for employees, and that's the way it was set up back in 1913 when it was first enacted, a penalty provision was put in the act that said, If you're not a subscriber, then you are going to be subject to a common law cause of action.

GONZALES: Why shouldn't we say then that you can't contract to do this type of thing, you either have to be a subscriber or you're not?

HEINRICH: The act says, You should either be a nonsubscriber...

GONZALES: But you said that it's okay to contract if the benefits are better.

HEINRICH: The quid pro quo, the key to the worker's comp. act as enacted in 1913 was it's okay for an employee to give up his common law right to sue as long as he receives the legislatively determined benefit package that he can get by being an employee of a subscriber.

BAKER: But the reverse isn't true. He can contract, but there's nothing - the question from over there that says, when he does contract with the employer, that the benefits have to be better than workers' comp. Isn't that true?

HEINRICH: If an employee of a nonsubscriber enters into a contract in return for benefits that are equal to or greater than the workers' comp.

BAKER: The worker's comp. act doesn't require that nonsubscriber contract to say, And these benefits are better than workers' comp; otherwise, this agreement is void. It doesn't say that.

HEINRICH: It does not expressly say that.

BAKER: And so where does that theory come from other than a CA decision?

HEINRICH: Again, the act was originally enacted to...

BAKER: Aren't we working at least from 1989 forward instead of 1913 since we are under a new whole scheme as we talked about in *Garcia*?

HEINRICH: Yes. But the critical points of the original act and in the act as it exists today are the same with regard to the questions before this court today. And that is, is it against public policy, is it contrary to statute as it currently exist for an employee of a nonsubscriber to be able to waive his right at common law...

HANKINSON: If you would go back to - you listed two points: the contract violates public policy and it violates the statute itself. But in response to Justice Gonzales' question, you've said there is no express provision of the statute at issue. Would you please tell us how this kind of a contractual arrangement violates the statute itself specifically?

HEINRICH: Specifically, the statute says, If you are a subscriber, then your employee can't sue you. If you're a nonsubscriber, you are subject to a common law cause of action and here's how we are going to do that. Here's how this act is going to work. The statute itself specifically expressly contemplates a common law cause of action that exist against a nonsubscriber.

HANKINSON: What you're saying then is that it violates the statute because by doing this kind of an arrangement, the employee can no longer sue the employer on a common law cause of

action with the various restrictions that the statute imposes. Is that the specific violation you are complaining about?

HEINRICH: Yes.

HANKINSON: Would you be specific and tell us how this type of contract violates public policy?

HEINRICH: The public policy behind the workers' comp. act is to encourage employers to provide coverage for workers in the State of Texas. And in return, or as incentive to get as many employers in Texas as possible to provide that coverage, they placed a penalty in the statute to discourage employers from doing that. And if these waivers are allowed to stand, you have in effect eliminated the penalty that the legislature placed in the act to encourage employers to provide worker's comp.

HANKINSON: Is it your position that San Antonio was correct in its interpretation that these types of contracts and waivers should be allowed under certain circumstances that is when the benefits are at least what someone would get under the comp statute, or is it your position that they are absolutely prohibited?

HEINRICH: If the benefits provided under these plans are as good as the benefits under the act, then they are okay.

HECHT: You don't think that can ever be.

HEINRICH: I do not think that can ever be.

HECHT: That's ridiculous to say it would be okay if something that can never happen would happen.

HEINRICH: In theory you could compare, but I think in practical terms it's impossible to do that comparison.

PHILLIPS: If you could compare and could practically compare, who would make that decision? Is that a law question?

HEINRICH: I think it would probably be a factual question.

GONZALES: But should we adopt - this is an issue. I'm not smart enough to really could tell the difference between whether this benefit is comparable to another benefit. This is an issue that is going to be litigated in every case. So should we adopt a rule that requires us to compare the

benefits to see whether or not the contract is better or not?

HEINRICH: No. I think the rule that should be adopted is that these waives are void.

OWEN: Let's suppose we agree with you. One of the employers in this case has already paid over $200,000. What happens to those benefits paid and you go to a common law trial? Is there some sort of credit, and how does that work?

HEINRICH: For instance, Mr. Lawrence has received $225,000 in benefits and a jury awards him $224,000 in damages, then CDB owes him nothing.

OWEN: Is the jury told that he has a contract and that he has been paid under that contract?

HEINRICH: I would think the jury would not be told of that. Because, again, it's a negligence action and the evidence of benefits - well if the benefits are paid by the employer itself, then the collateral source rule would not exclude the jury knowing about that. If it was paid by another insurance company, then possibly the collateral source rule would prevent them from ever even knowing about that.

PHILLIPS: Once he brings this suit can he still keep collecting benefits under the contract? You would say that still doesn't constitute an election?

HEINRICH: If the agreement made the basis of this waiver is void, then no action on his part can invalidate that.

BAKER: Even continuing to accept the benefits? You have to do something with the benefits. If I understand what the CA says, Mr. Lawrence continues to receive benefits, and Mr. Lambert received $58,000 before he sued, but then he declined to accept anymore. Is that factually correct?

HEINRICH: That is correct.

BAKER: But that neither of your clients have ever tendered or paid back any benefits after they filed the suit. Is that a necessary part of this process that you can't accept the benefits and then sue for something else and keep them?

HEINRICH: No. The waiver itself is what makes the situation - the waiver is what is void. The plan itself is not void. And a nonsubscriber could offer its own plan without the waiver. And the employee could receive these benefits and still retain its right to sue under a contract.

BAKER: So the bad part you don't like is not being able to sue to get more?

HEINRICH: That's the part that we believe violates pubic policy.

BAKER: You have two clients and the CA said that Mr. Lawrence did not raise as an issue in his summary judgment response: 1) that the election waiver he signed violates public policy and it void because the benefits are not equal; and 2) that Mr. Lawrence didn't raise the estoppel defense, but Mr. Lambert raised the issue of don't equal each other, therefore, it's void. Where does that leave Mr. Lawrence if he didn't raise it and how can he benefit by any opinion that would be favorable to your viewpoint if he didn't raise it?

HEINRICH: We believe Mr. Lawrence did raise it at the appellate level and at the TC level to begin with. Because it's clear in the response to the motion for summary judgment that Lawrence's argument was, that this waiver is void as against public policy and cites one case which cites the *Hazelwood* case, which is the first case that really talks about a comparison of benefits. So believe it was raised.

BAKER: Are you saying then that the CA when it looked at the record it just says this is void, they've got to then speculate that because he cited one case that cites another one that says something, that you read all the way down through that and finally conclude: ah, ha, here's my argument and I'm going to apply that doctrine. Aren't there some cases so you don't have to search as the CA, those kind of records, to find out those things that you are supposed to raise the ground otherwise, you waive it. Both were for summary judgments weren't they?

HEINRICH: They were.

BAKER: So if you didn't raise, it lose it, isn't that right?

HEINRICH: You're required to specifically raise any positions contrary to summary judgment. But the SC in two different opinions are clear that there's no such thing as a default summary judgment. And if a movant is making a claim for summary judgment as CDB was in this case based upon a waiver, they are required to establish that there were no questions of material fact that would prevent them from...

BAKER: But this is not a factual problem. This is a legal question we're trying to answer then. I don't get that there is any dispute on the facts except what you are now saying that he did raise it and the CA said no he didn't. But that's a matter of looking at the record. We're just looking at known facts and we're going to try to apply this statute in the way that you suggest.

HEINRICH: And under the law, even if a nonmovant does not file a response of any kind to motion for summary judgment, that does not preclude that nonmovant from attacking the grounds

for summary judgment as a matter of law on appeal. And since public policy...

BAKER: Yeah, but don't you have to say why specifically so that the TC has the opportunity to understand the argument even when you're responding to a summary judgment, which your clients did here?

HEINRICH: For instance, taking estoppel is one of the things you raise. If Lawrence had not, which Lawrence did not, specifically attack estoppel in the response to the motion for summary judgment under the law of this state, if as a matter of law estoppel cannot apply that Lawrence is not prohibited from raising that ground, that legal point on appeal of that summary judgment.

BAKER: What's your case that says you can do that?

HEINRICH: The *McConnell* case and also *The City of Houston v. Clear Creek*.

HANKINSON: Having accepted the benefits of the plan, why aren't your clients estopped from now challenging the validity?

HEINRICH: Because the validity of the waiver itself is the essential question. If that waiver is void, then no action on my client's part invalidate that. And therefore he is not estopped by accepting benefits under that particular plan.

HECHT: To followup on that. If there is a business that is owned by the employees and they all get together and they say: We don't want the expense of worker's comp. insurance; we're just going to agree among ourselves we are going to take this risk; we don't think it's very high that we're going to get hurt on the job and we have a health plan that will cover what it covers; and therefore, we all agree that we don't want this, we would rather have the profits. Your view is they can't do that?

HEINRICH: My view is that if they waive their common law cause of action, then that violates the policy of the worker's comp. act.

O'NEILL: Well they could do it if the benefits were better?

HEINRICH: If the benefits were better.

O'NEILL: Now under Affiliated's plan, there are lifetime medical benefits?

HEINRICH: There is somewhat of a dispute in the Lambert case about whether there are lifetime medical benefits.

O'NEILL: Well I believe that's been conceded on appeal hasn't it?

HEINRICH: On appeal they've conceded.

O'NEILL: If there are lifetime medical benefits and there is a significant benefit that this employer plan offered, it's nonoccupational injuries are covered as well, and that is a significant benefit over and above the Texas worker's comp. statute, why can't an employee decide that is a very important benefit to me? If I'm injured while I'm mowing my lawn, or driving a around on the week, I'm covered for lifetime medical benefit. Why can't we let an employee make that choice, that is a superior benefit to them than under the act?

HEINRICH: The employee can make that choice to accept that, but in order to get those benefits as an employee of a nonsubscriber, he shouldn't also have to give up his right to sue at common law.

PHILLIPS: Let's suppose that a superior plan might not violate public policy and might not call for this waiver. And you say that's a fact question. But is the finder of fact to be charged that they are supposed to look at the plan overall as it applies to all potential employees, or as it applies to this particular injured employee? Because lifetime medical may be great clearly for the yard mowing injured person, that plan is better. For somebody injured on the job with serious injuries the comp plan might be better.

HEINRICH: Again, in theory I think you can compare. Practicality, I don't think you can come up with a plan that equates the worker's comp. system. When you look at pubic policy, the law says you're not to look at the specific impact of a given case. You should look at the overall impact to society in general. And it may very well be that the two plans offered in this case, the Lawrence plan and the Lambert plan are much better than a lot of plans out there. But if these waivers are allowed to stand, then nothing would prevent an employer, such as Affiliated or CDB, from putting a plan together that offers an injured worker $100 a week and says: Hey, look this great, we'll pay you $100 a week if you will just sign this waiver.

ABBOTT: If we conclude that the statute does not expressly prohibit these kind of contracts, then your argument is reduced to one of public policy, correct?

HEINRICH: That's right.

ABBOTT: And as you acknowledged, the legislature has been very active necessarily so in establishing what the public policy is with regard to worker's comp. matters. And this is the kind of matter that commands and demands extreme amount of public input, is it not?

HEINRICH: It affects potentially every work in the state of Texas.

ABBOT: Then why would it not be preferable to give this to the legislature to decide what the public policy should be, as opposed to this court deciding what public policy should be?

HEINRICH: Again, assuming without admitting that the statute does not expressly prohibit this and we are looking at public policy argument, the law gives this court the power and ability to decide this on public policy grounds.

ABBOTT: But why would it not be better on grounds somewhat similar to what we said in the *Ozarka* case for us to defer to the legislature's expertise in deciding public policy matters, such as this?

HEINRICH: This court has the power to do that and can do that more than likely on a quicker basis than the legislature would be able to do that. What we are talking about here are issues that affecting workers every day. And I would assert that this court has the power to declare that this violates public policy and has the ability to do that.

ENOCH: Let's assume the negligence has occurred. The worker has a cause of action. The employer comes in and says: Listen, rather than suing us over this why don't you just agree to release us of all liability for this negligence that occurred out here, and we agree to provide you with lifetime benefits. Would that be okay?

HEINRICH: That would be just fine.

ENOCH: That's okay because the parties already know their status, there's already been an injury, already been negligence and so they can all agree to settle that. And your problem is that in this circumstance since the parties really don't know their status, they should not be able to contract in advance for how they will handle it when there's negligence.

HEINRICH: Contracts in advance to exculpate another party from negligence or okay unless they violate public policy.

ENOCH: And haven't we already broached the public policy issue there by saying if it's an exculpation clause, then the clause has to meet certain criteria otherwise _____ against public policy, and that being that they have to be conspicuous and they have to be set out so that the parties are aware of that. And this satisfies that consideration. Doesn't this agreement satisfy what we're previously said about exculpation clauses?

HEINRICH: It's our position that the waivers in issue do not meet the law with regard to fair notice and the express negligence test and conspicuousness test as they exist in the law today.

BAKER: Where do we get the public policy that you say is violated that we can hold

it a void waiver? Do we decide somewhat on _____ public policy? Which policy, whose policy is it that this is against that you think?

HEINRICH: It's the public policy set forth by the legislature in how they crafted...

BAKER: That gets back to Justice Abbott's question. The legislature has established a public policy about worker's comp. and people who are nonsubscribers. So we have to look there to see what it is to determine whether that's been violated.

HEINRICH: That is correct.

BAKER: We don't have any independent public policy that we can enforce to go your way?

HEINRICH: If this court looks at the statute and determines the pubic policy set forth by the legislature in an enactment of this act is violated by these waivers, then it has the power to invalidate...

BAKER: I agree with that. What if we decided because nothing said in there says that it's okay if it's better or equal to worker's comp, that we think that's okay, so we don't think there's a violation of public policy. What other ground, if any, is there to say that the waiver is void?

HEINRICH: This court, for instance, going back to the *Barnhart* opinion in 1918, that was a nonworker's comp. case said there was a nondelegable duty to provide a safe place to work for employees. And in that case, the employer had the employee agree that the employer wouldn't be responsible for that. And what the SC said in that case is, that the employer has a nondelegable duty to provide a safe place to work, and contracting around that violates the public policy in this state. So I think you can rely upon the public policy expressed in the statute or you can rely upon other pubic policy, such as were referred to in the SC in that case.

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RESPONDENTS

HANKINSON: Mr. Morris, doesn't the legislature contemplate that with respect to safety in the workplace, that all employers in the state will either be subscribers for purposes of the worker's comp. law, or nonsubscribers and subject to provisions of the statute applicable to whichever choice they make?

MORRIS: The statute unquestionably provides for election for subscribers and nonsubscribers. That is the policy of the act and any employer may either be a subscriber or a nonsubscriber.

HANKINSON: And it must be one or the other. It's a comprehensive scheme, correct?

MORRIS: There's only two postures that an employer can have. He either subscribes the act or he does not.

HANKINSON: If the employer chooses not to subscribe and then takes on nonsubscriber status, then that employer is subject to the provisions of the Labor Code applicable to nonsubscribers?

MORRIS: Those provisions which are applicable to nonsubscribers, yes, and those are extremely limited.

HANKINSON: So it is a comprehensive scheme designed to cover all employers in the state?

MORRIS: When you talk about design to cover, the comp act is designed to cover with respect to benefits, etc. Those people who are nonsubscribers are not proscribed in any other way.

HANKINSON: The point I'm trying to get to, is how comprehensive is the legislative scheme. Is it designed to cover all employers in the state, so that those who opt out are subject to certain legal requirements as set forth in the statute?

MORRIS: Only in some extremely limited cases.

HANKINSON: Is there a third category of employer, those who choose not to be a subscriber but are not subject to the nonsubscriber applicable provisions of the statute?

MORRIS: There is no third classification. There's only two: subscribers and nonsubscribers.

HANKINSON: If we recognize then the validity of these waivers, are we not then creating a third category of employers: those who choose to privately contract with their employees based on whatever terms they negotiate if that is the appropriate term with their employees?

MORRIS: They are nonsubscribers and by virtue of being nonsubscribers they have the constitutional right to contract with their employees on a voluntary basis as they see fit so long as they do not violate a provision of the act, or some other declared pubic policy of this state.

OWEN: One of the amices cites a provision of the code that says, If you're an employer, you can't buy employees, employers liability coverage unless you also buy worker's comp. coverage. What is your interpretation of what employer's liability coverage means?

MORRIS: Liability coverage is, I cannot obtain an indemnity. And the statute says, an indemnity and an indemnity agreement is a precise type of agreement. And in particular speaking of insurance, which will indemnify me for injuries to my employees, even though I am not a subscriber; and I can't buy that kind of insurance. The statute says I can't unless the policy also provides workers' comp. insurance.

OWEN: So to fund these private contractual agreements, the employer can't back that up with a policy from a recognized financially secure insurance company?

MORRIS: Absolutely not. The statute says he can't do that. He cannot buy indemnity agreements.

OWEN: So the employee is stuck with looking at the financial viability of just the employer?

MORRIS: That's exactly where any employee of a nonsubscriber is, whether he has a benefits plan or not. He's looking at the financial viability of his employer to pay him if he gets hurt on the job, whether he be covered or not covered.

O'NEILL: Does your case rise or fall on whether the benefits you offer are equal or better than?

MORRIS: That doesn't even touch my case, because that issue wasn't raised in my case. The CA expressly said so. Under Rule 166, the summary judgment rule, if you don't raise the point expressly in writing in the TC it's not available on appeal. It was not raised in the TC- expressly in writing in my case and, therefore, culpability is not before me. I'm going to reserve that particular argument for Mr. Ashley, because it is in his case.

ABBOTT: Do you contend that an employer can get an employee to waive gross negligence?

MORRIS: Well that's beside the point. It's not in this case.

ABBOTT: Because if we decide the case your way, we are going to be saying that it's either not a violation of public policy to have these waiver agreements, or it is a public policy issue that we want the legislature to decide. The bottom line is, with regard to these waiver agreements, these waiver letters that the employees enter into, they are waiving their rights against the company. And what I want to know is, do you believe, do you contend that it would be permissible for these waiver agreements to include a waiver of gross negligence?

MORRIS: We're running into a constitutional question there that's not before me in my

case. It's not before the court in this case. The right to recover for intentional injury or gross negligence in a death case is a constitutional provision. It's not provided by the comp act. The comp act merely preserves that right which is granted by the Texas constitution. And from the beginning, 1886 or so, that was granted by the constitution. So all the contract has done is preserve that. Now whether or not an employer can enter into an agreement which would violate that constitutional provision is not before me, it's not before this court.

HANKINSON: The language of these waivers that is before the court does waive all causes of action against the employer?

MORRIS: No question about it. That's absolutely correct.

HANKINSON: So you're then taking the position and a fact there may be a problem with the waivers to the extent they purport to waive claims for gross negligence, but we just should reserve that for another day?

MORRIS: I'm not taking the position that there may be a problem. I'm saying that is a question that's not before this court in my case, and it's something that should be left to a future case when it's properly raised.

HANKINSON: Mr. Heinrich says, though, that this contract, this waiver violates public policy. And he is looking to the provisions of the statute that would allow an employee to sue a nonsubscriber for common law negligence without the benefit of defenses related to the conduct of the employee. And the comp act also preserved the right to sue for gross negligence. And that that public policy is embodied in the statute and he says that if we allow these waivers, that public policy will be violated. Why isn't he correct on that?

MORRIS: Because the prohibition in the statute of what a nonsubscribing employer cannot do are three: he cannot assert contributory negligence; he cannot assume risk; and he cannot assert _____. Now that's the public policy which the legislature has invoked to try to get employers to subscribe.

OWEN: If the legislature says you can't argue assumed risk, why wouldn't the legislature also mean by policy that you can't argue contractually assumed risk?

MORRIS: The legislature hasn't said so. An assumed risk is a tort doctrine. What we're talking about here is an area of free contract, free right to contract unless there be a statutory prohibition. And there isn't any. And this court has said so many times, over and over and over again, if there's a problem in the statute the place to fix it is the legislature and not this court.

ENOCH: You say that the statute is very specific that if you're a nonsubscriber you

can't buy indemnity insurance. Now indemnity insurance also has a provision on generally the right to defend. The insurance company has the right to take over the defense. Is that not a statement by the legislature that they don't want the employer to have alternate funding for a defense against there employees? So not only do they do away with some of the common law defenses, but they also attempt to provide the employer with the financial resources to defend against an employee that's suing them for negligence.

MORRIS: When you go right on to the next section of the statute, the very next section that prohibits that type of indemnity agreement authorizing the employer to obtain other types of insurance covering its employees as is included in these plans provided it does not purport to be workers' comp.

ENOCH: The indication for a lack of indemnity means that they don't want the employer buying third-party liability insurance that necessarily implicates a vigorous defense against the claim of the employee.

MORRIS: You could perhaps say by implication that is there.

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O'NEILL: Mr. Ashley, let me direct my question to you. Does your case rise or fall on the equality of the benefits provided?

ASHLEY: No, it does not.

O'NEILL: And why not?

ASHLEY: Our position is, that you can affirm on the basis of the benefit that Affiliated provided in this particular case to Mr. Lambert. And overall under the Affiliated plan which includes coverage for nonoccupational as well as occupational injuries, that the overall benefits are better. And so that would satisfy the test they propose.

O'NEILL: I think that makes your answer to my question yes, that your case does rise or fall on us finding that the benefits are equal or better than?

ASHLEY: No, you could affirm for that reason, but in my view, you would be affirming for the wrong reason. You would be reaching the right result, but for the wrong reason.

OWEN: Let's assume you have a normal employment agreement where employee benefits are provided. They aren't labeled as worker's comp. An employee is injured on the job and they collect under their employee benefit plan, plus they collect workers' comp. In the normal case

would they get both? They are a nonsubscriber but they do provide health insurance, the employee sues under a common law cause of action for negligence. But they also get their medical coverage under their employer provided medical plan. Normally they would get both would they not? They would get their insurance benefits plus they would get their common law recovery?

ASHLEY: Possibly. I guess there's an issue as to whether the employer would be entitled to a credit in the common law action for the amounts that were paid under the benefit plan. But it's possible they could end up recovering under both.

OWEN: Now we're saying that if you tag on to this agreement an agreement that the employee waives their common law right of coverage, then the only thing they look to are these private medical benefits that the employer now has to fund, but they can't do it out of insurance, but they are doing it personally. Is that what you're saying?

ASHLEY: The difference it seems to me is the legislature really hadn't said anything about this one way or the other. And the point that Mr. Morris made is that if there were to be a decision as to what types of nonsubscriber benefit plans are acceptable or unacceptable under state law, that the sensible and the appropriate body to make that determination is the legislature.

HANKINSON: The legislature has made a decision that it prefers for employers to opt to be subscribers because it imposes penalties under the statute on nonsubscribers. Isn't that - I mean that's been well recognized by this court for a very long time, the public policy behind the comp statute. Are you in agreement with that?

ASHLEY: No, not totally. Certainly they placed a nonsubscribing employer at a disadvantage in the absence of a benefit plan.

HANKINSON: Exactly. And so having done that, the pubic policy of the legislature is to encourage employers to be subscribers because of the protections provided to employees. So my question is the same as I asked Mr. Morris, then. Aren't we now creating a third category of employer that is outside the legislative scheme that has been in place in Texas for close to 100 years now?

ASHLEY: I agree with Mr. Morris that the legislature with respect to nonsubscribers, they did create disadvantages concerning the tort defenses available. It did not purport to restrict the right to contract under that statute.

HANKINSON: But they tried to put the nonsubscribers at a disadvantage financially and because of the risk to force the nonsubscribers into the comp scheme. And if we recognize a third category, the right to contract outside, then aren't we undercutting the legislature's policy and isn't everyone as I believe the amicus brief said, aren't we going to see employers fleeing the scheme

because now they can do their own independent arrangements entirely outside of the comp scheme?

ASHLEY: In my view, the decisions the legislature made in 1989 when they rejected the recommendation of the joint committee to make comp mandatory, is they allowed comp to compete with a nonsubscriber alternatives. And the nonsubscriber alternatives that included these benefit plans, and these benefit plans are ERISA plans which are specifically established and permitted under federal law. So what the legislature actually did was they allowed the competition to continue between the worker's comp. system and the nonsubscriber alternative, and that is what has been going on.

PHILLIPS: Does ERISA put a floor on how minimal all these plans can be?

ASHLEY: I'm not aware of any ERISA provisions that regulate the content of these plans.

PHILLIPS: So you're saying a plan that offered virtually no benefit, as long as it was something, more than a peppercorn, would not invoke any public policy consideration?

ASHLEY: What I'm saying is, first of all that's not what happened.

PHILLIPS: But we can't decide every case that comes along. This is the one we have. You say public policy is not implicated if the plan is under at least some view provide less benefits than comp. But is there a point at which it can get so low that public policy would be implicated?

ASHLEY: Certainly. There are points at which you could get a plan that isn't defensible. These employees have the opportunity, these are voluntary plans, the employees wouldn't accept the plan...

PHILLIPS: But let's say the did and it ends up being virtually nothing. Is public policy ever implicated by that?

ASHLEY: Texas public policy may well be implicated by that plan. But in order to attempt to regulate that plan, you would be regulating the benefits that are available under ERISA plan. And if the legislature were to pass a statute that regulated the - set a certain minimum level...

PHILLIPS: I'm interested under the current law, and I think it's yes or no. Could the benefits get so low that a worker could knowingly agree to sign up with this and then still sue after an injury on the grounds that the benefits were so low that public policy had been violated?

ASHLEY: Unless the worker could successfully rescind the plan, rescind their participation for some reason, there wouldn't be anything currently. While that may be a potential

problem, it doesn't seem to be a real one because of the way that the competition has actually developed between the nonsubscriber alternatives and the workers comp...

OWEN: What if you have a minimum wage worker who is offered a $10,000 sign-on bonus, and up to $3,000 in benefits if you are injured or killed on the job in exchange for waiver of all liability. Don't you think at some point those types of agreement.
SIDE 1 ends

ASHLEY: ...suggesting that a company should or ought to be permitted to make such an agreement. What I am suggesting is that Texas does not have the authority to pass a statute that would outlaw such a plan. If you look at the waiver, the waiver is part of an ERISA plan. Clearly that is a contract between the employee and the plan, a separate legal entity.

PHILLIPS: You said Texas didn't have the power to outlaw such a plan apart from whether or not there's a conflict even with - 49 states require compensation mandatory.

ASHLEY: They do have the power to do that. They could change the decision that they made in 1989 and make comp mandatory.

PHILLIPS: But you claim that short of doing that they have no power to outlaw certain plans as being...

ASHLEY: They have no power to regulate the benefits under the plan. And the key to this is, it is the waiver that determines the benefits that are available to the participant under the plan. This is illustrated in the *Wolfe* case that the Dallas CA decided on Aug. 6, 2000. It was a two-tier plan. And so the employee in that case got one level of benefits if they agreed to waive. They got a different and higher level of benefits if they didn't waive their right to bring a common law action against the employer under that plan. So it's absolutely clear that it is the waiver that is part of the benefit plan that is determining the level of benefits under the plan.

ABBOTT: How many other states have allowed these waivers and how many have disallowed?

ASHLEY: Again, Texas is the only state that does not have mandatory comp. at this point in time. There were three states in 1989 and I'm not aware of any decisions in those states as to whether the waivers are valid or invalid.

OWEN: You were explaining somehow you think this was preempted by ERISA. Would you finish that answer?

ASHLEY: I think it is preempted by ERISA if the Texas legislature were to attempt to

pass a statute to regulate the provisions of the employee benefit plan. There's no preemption problem if the decision is that the waiver is not against public policy.

HANKINSON: But the provision of the employee benefit plan in accordance with ERISA is a different question as to whether or not the employer requires a waiver of rights under our labor code.

ASHLEY: The employer doesn't require waiver. These are voluntary plans. And Mr. Lambert had the option, it was not a condition of his employment...

GONZALES: What would happen if he didn't sign?

ASHLEY: He would remain at work. He would have his common law rights and he would not receive...

GONZALES: How many employees elected to go that way?

ASHLEY: There's nothing in the record about that. I think the Affiliated plan - virtually everybody participates because it's such a good plan.

ENOCH: In response to one of my questions to Mr. Heinrich, he said that this plan does not meet the fair notice cases, the conspicuousness. I thought there was an assertion that it did. In Texas this court has discussed the exculpation clause, the waiver of the other party's negligence. And we have said that that's got to be conspicuous if that's going to happen. And if it is conspicuous, then that's not against public policy. I posed that question and I was told, Well this doesn't pass the fair notice test. Can you respond to that?

ASHLEY: These individual issues concerning whether there was fair notice or whether it was _____ conspicuously, that is not raised by the petitioner in the *Lambert* case in this court. Those issues were raised below and their position was rejected.

ENOCH: But that's not before us at this point?

ASHLEY: No.

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REBUTTAL

ABBOTT: One of the contentions is that it would be bad public policy to subject workers to these types of waiver agreements, and then have it turn out that when the worker is injured, the company doesn't have any assets to back it up, and doesn't have any insurance to pay for it. Is that

not the same situation that a worker would be in with an employer that is a nonsubscriber?

YOUNG: If the employer doesn't take the insurance or can't get the insurance, I guess it would always be the same.

ABBOTT: If an employer is a nonsubscriber and provides no benefits and the worker has as his only resort suing the company for negligence and it turns out that the company doesn't have any assets to cover the claim, how is that different than your claim that allowing waivers would be horrible because companies wouldn't have any money to pay for workers...

YOUNG: I don't think that in that instance that it turns out differently. I think that what the workers' comp act was saying, We want you to subscribe, because if you do subscribe then you will have this protection. There's a liability policy behind if they are insolvent, then that problem is resolved.

ABBOTT: But of course, they don't have to subscribe

YOUNG: No, they do not have to subscribe but there is this penalty that's placed upon them for doing that. If a company is insolvent and it doesn't take insurance and that's the way that it's treated its employees, then yes they are in the comparable situation.

ABBOTT: And companies could go belly-up and the worker who works for a nonsubscribing employer may get nothing if that worker is injured. Correct?

YOUNG: Correct.

ABBOTT: And so help me understand the meaningfulness of the argument that it would be inappropriate to allow these waiver agreements because these waiver agreements can't be backed up by an employer who has insurance company and therefore the employer may not be able to pay the employee?

YOUNG: I think the point is that if you allow these waivers that they can offer any type of a benefits package whatsoever. They do not have to back it up by insurance. That you will not even have that cause of action against them. They are protected by some scenario other than taking out comp. You want to promote them to take out comp. You want to say that you are a subscriber or nonsubscriber. We want to make it to your advantage to take out comp. And if you don't, then we're not going to give you a separate level of protection that says, All you're going to get out of there is $1 a day because that's what you agreed under this waiver. We're not insolvent, because all we've got to pay you is $1 a day.

ENOCH: If the employer can make the election to be a nonsubscriber leaving the

employee to have to prove the employer's negligence to get a recovery in a work related injury, how does that benefit the employee to prevent the employee from contracting for no fault coverage with the employer? How is the employee benefitted by prohibiting the employee who works for a nonsubscriber from entering into an agreement with the employer for no fault benefits?

YOUNG: I don't think that the worker is specifically benefitted by that. But I think what the intent of the policy of setting that in the statute was to say: We want you to be naked; we want you as an employer that you know that if you got assets out here that it's going to be your assets that are going to be attacked. It's not going to be some insurance company that is going to be on the hook for you. And so they say unless you're dealing with a small company that's insolvent already, it doesn't have any assets, if you're dealing with a company the size of Affiliated then you're telling them that you're the one that's on the hook if you don't go into comp.

ENOCH: That goes to the extent that we will prohibit the employee who works for a nonsubscriber from trying to work out a better deal. They either have to go straight negligence lawsuits and that sort of thing, or they have to just work for the employer that's a subscriber?

YOUNG: There are some definite case law out there that talks about the early on that that's the decision of the employees to do that. But I think that when you come down to it, and you say we've got to make it a policy decision and the legislature made that policy decision that says what can we do. That's exactly where they came down and they said, We're going to make these people be subscribers and if they aren't subscribers, then they are not going to be able to take the other route and be advantaged. We're trying to get those people to be subscribers.

It was not clear from original argument that he made two different arguments. First, the act itself does prohibit it regardless of whatever the benefits are. That's also been our argument. And not only because of the fact that you get to elect one of those two, that you're either a subscriber or your subject to that suit, which statutorily says it's going to be there. But also within 406.033, it talks about assumptions of risk and you cannot put that risk on your employee.

ABBOTT: Let's assume that in this waiver agreement, the employer says: I will guarantee you payment of everything to the penny of what the worker's comp. act allows, plus an additional $250,000 per claim. Would that waiver agreement be unlawful or against public policy?

YOUNG: I think so.

ABBOTT: So they get everything, plus half of $4 million

YOUNG: But it could go both ways. If you read the act specifically and it says that you cannot have them assume the risk, and you view the comp act itself as a division of the risk, well what that statute says is that you cannot put any risk on your employee.

ABBOTT: How would there be any risk on the employee if the employee got more under the waiver agreement than the employee would get under a comp agreement?

YOUNG: There's risk. There's minimal risk. But if he's got all of this covered up and he lost $1 million because he couldn't do something else that the $250,000 didn't cover, well he had some risks. Yes, it's minimal at that point in time. And yes maybe what you can say is that if you get to that level to where you are guaranteed the comp benefits, then you could say no harm, no foul, the benefits, the quid pro quo that the Texas government prescribed under the worker's comp. that you got those benefits. So what's the public policy against it? You could take that approach. But the statute itself says, and I think this is what they intended it from the very beginning was that we're going to make this division of risk if you are a subscriber, but if you're a nonsubscriber you cannot put an iota of risk on your employees. That's what it says and that's what it means when it says assuming risk. This court has been so good in the past at defending that. In *Sears* they said no duty doctrine over here; it's really not assumption of risk, it's whether they are negligent at all. And y'all said, No, that puts risk on the employee. And in the recent *Kroger* case, it wasn't statutory. There is no statutory thing there. But you upheld it because it said contributory risk and you understood where the purpose of that statute was.

OWEN: Do you think maybe the legislature was as silent as it has been because of ERISA?

YOUNG: I do not know. I do not believe in any way that your judgements here are preempted by ERISA whatsoever. You have total power to determine whether this statute is valid or not valid. Perhaps, because ERISA was out there.

OWEN: Do you think they were worried that if they said that you can't include in your employee benefit plan a waiver of common law liability that would run afoul of ERISA. Do you think that's maybe why they didn't say that?

YOUNG: I don't know. But I think it's addressed already in the statute. That's my firm belief is that with the assumption risk and all the cases - if y'all will look at the cases where it says assumed risk, assumed risk throughout the history of y'all decisions, you will see that what I'm talking about is correct. That they say you cannot make them assume the risk. And maybe that's why they didn't address it that way. But it's still in the statute already.