ORAL ARGUMENT – 9/30/04
03-1151
TX ASSN OF SCHOOL BOARDS V. BENAVIDES ISD

HOVANTANIAN: In my time before the court, I will show that the respondent abused his discretion by denying the relator's motion to transfer venue of this case to Travis County. As the court knows in the IPA, the parties signed a provision or embraced a provision which says venue shall lie in Travis County, Texas unless otherwise mandated by law. And that brings into bear §15.020 of the Civ. Pract. & Rem. Code. On a day when this court has reviewed poorly drafted statutes, we are happy to say here is a clear one. Here is one where the intent of the legislature can clearly be discerned. And indeed the parties don't dispute the facial meaning, the plain meaning of the statute.

Section 15.020 defines major transaction. And it says that's a transaction evidenced by a written agreement, which we obviously have in this case, under which a person pays or receives, or is obligated to pay, or is entitled to receive consideration with an aggregate stated value equal to or greater than $1 million. And that statute tells the tale in this case, because that is precisely what we have here in the IPA that the parties agreed to.

The other side will say and has said in their briefs, Well what we're talking about in this case is executed consideration. And the executed consideration is the premiums, and the premiums during the time of issue is only $33,000 and change. Of course, that's one side of the consideration issue. But this court told us in such cases as Federal Sign v. TSU in 1997 that consideration is a two way street. That in fact there can't be mutuality of obligation. There can't be a contract unless consideration goes both ways.

OWEN: Year by year isn't the consideration for the contract just the promise to pay in a certain event?

HOVANTANIAN: It is. We would characterize that as that's the coverage. That's the consideration that goes the other way.

OWEN: But isn't that the consideration?

HOVANTANIAN: The coverage?

OWEN: No. The promise to pay if as and when, which may never happen, but the actual consideration for the bargain is simply the promise.

HOVANTANIAN: Yes. I think we're saying essentially the same thing. It's the promise to pay that is the consideration running from the carrier to the insured. For instance, let's say in your

hypothetical years go by, year after year after year, and no claim is made. There is nothing to handle. There's nothing to adjust. There's nothing to investigate. At the end of those years or at the end of every policy term if there is no claim, the insured cannot go to the carrier and say, Well you didn't do anything for me, you didn't handle a claim or adjust a claim, you didn't pay a claim. So there is no consideration. I'd like my premium back Under their argument that's what can happen. Under our argument it can't because the promise to pay, even a contingent promise to pay, if catastrophe befalls the school district, we will pay covered losses. That is consideration. And in fact, that's not just our argument. This court has said so in a case with admittedly lower stakes, MidCentury Ins. Co. v. Kidd in 1999 where the issue was is $10,000 in PIP in that kind of coverage is that consideration? This court unhesitatingly said yes. It is.

HECHT: The promise to pay if, would seem to be only worth the premium paid for that, otherwise you would be a fool for making that deal. If does not make the premium match up, then you better charge more.

HOVANTANIAN: Agreed. The slight difference is that during the entire policy term BISD knew as any insured knows, and technically the fund is not an insurance company, but it's so obviously analogous that I'm going to continually refer to that, they know during that policy term if there is a covered loss they are covered. In fact they are covered up to $17 million. And that promise to pay as J. Owen puts it, that promise to pay is the consideration that they receive for their premiums. They have no reason to pay any premiums if they are not getting anything. And we have no reason to take the premiums and not provide anything in response.

HECHT: Does consideration in this statute mean consideration like contracts, or is it more ambiguous word than that? Is it just like when people throw around consideration they don't mean consideration that supports a contract. They just mean something that is involved in the transaction.

HOVANTANIAN: I think the legislature intended it to be in the first more formal sense that you've used it. I think they are talking about consideration for a contract. Almost the very first words of the major transaction portion is a transaction evidenced by written agreement. A first year law student understands that a contract and an agreement are virtually the same thing. So we have a transaction evidenced by a written agreement. We think the intent of the legislature is clear. They are talking about contracts and they are talking about consideration in the bargained for exchange meaning of the term.

OWEN: So if the consideration is the promise, the promise to pay if, what is the aggregated stated value of that promise?

HOVANTANIAN: In this case over $17 million in coverage.

OWEN: But that's not what the insured paid for the promise.

HOVANTANIAN: That is correct. Their consideration without question was the premium - $33,000.

OWEN: What is the aggregated stated value of the promise, not what you might be liable for but the promise?

HOVANTANIAN: The promise is up to what we might be liable for. That's why the $17 million figure fulfills that particular portion of the statute. It takes me back to the Kidd case, where the court said $10,000 in coverage is the consideration. That was the promise to pay a covered loss. The same thing here.

OWEN: It's coverage but it's not $10,000 painted(?) over. It's the promise to pay if as and when up to $10,000.

HOVANTANIAN: That is correct. That's the stated value of the consideration. The promise to pay if a condition precedent occurs, we promise to pay up to X amount of dollars. The stated value of the consideration.

JEFFERSON: In this case, you say there is no promise because there is no coverage at all.

HOVANTANIAN: There is a promise to pay a claim if it's covered. And in this case, there is no promise to pay because the claim is not covered. We promise to pay covered claims. It's just that we determined in this case it's not covered. Hence the litigation.

JEFFERSON: So we would equate the promise and not in terms of the value that the insurance company assigns to the risk to this contingent possibility that there may one day be an obligation...

HOVANTANIAN: You're absolutely right.

JEFFERSON: And why is that?

HOVANTANIAN: Because of the very definition of consideration. Perhaps this is a better answer to J. Owen's last question. In the Crill case from Dallas in 2001, the court examined what consideration can be and what it can't be. And the court said consideration is a broad concept. It can include a benefit to the promisor or a detriment to the promisee. And the court elaborated: It can be a right; it can be a benefit; it can be a responsibility.

BRISTER: So is every lottery ticket a major transaction?

HOVANTANIAN: No. No lottery ticket is a major transaction.

BRISTER: But every lottery ticket there's at least the potential to win over $1 million.

HOVANTANIAN: That's correct. The difference is if you turn the lottery ticket over, you will not see any guarantee of $1 million plus payout to the person who buys the ticket. Whereas in this case, BISD knows if it has a covered claim...

BRISTER: Instead it's a contingency just like insurance. If X happens, if we draw your ticket, you will get $1 million. If you have water damage you will get $17 million. Why isn't every lottery ticket under that theory a major transaction?

HOVANTANIAN: Because it's not part of the bargained for exchange. When you buy a lottery ticket...

BRISTER: That's not what most lottery ticket buyers would say.

HOVANTANIAN: I agree. But nevertheless, realistically when you buy a lottery ticket, the possibility of a gigantic payoff, $1 million or more, is just not part of the bargained for exchange. You are gambling. You are buying a chance, and that's all. Whereas in this case, you are buying a promise. Now it's a contingent promise, but case law has held a contingent promise to pay is still a promise to pay and that's consideration. That fits with the Crill courts decision. Several other cases say that a contingent promise to pay is consideration running from one side to the other.

JEFFERSON: If we disagree that the IPA is a major transaction as the statute defines it, then you would agree that venue was proper and do all _____ under the general and permissive venue statute?

HOVANTANIAN: Not necessarily. We wouldn't necessary agree.

BRISTER: These folks agreed to try the case somewhere else. Right?

HOVANTANIAN: Yes they did.

BRISTER: So it's just a matter of whether we can get to it by mandamus or whether y'all are wasting your time down there in Duval County and after it's all said and done we're going to say Look, you signed a contract. You said you would try it somewhere else. What are you doing in Duval County?

HOVANTANIAN: Agreed. I need to modify one slight thing. There is no question you can do this by mandamus. The very same section of the Civ. Pract. & Rem. Code in 15.064(2) is a new provision that says this is mandamusable.

OWEN: Even if it's a mandatory venue.

HOVANTANIAN: That's correct.

OWEN: What was your answer to CJ Jefferson's question? He said this is not a major transaction. Was venue proper in Duval County? Your answer was no because.

HOVANTANIAN: There are several other venue issues that they need to get by here. I will certainly tell you for the purposes of our argument if the court finds that 15.020 doesn't apply here, then obviously we are in big trouble. There's no question about that. Then the venue fight becomes a totally different issue. But happily, because of this contract, and because of what 15.020 says, we respectfully suggest the court should not do that. Because it is a mandatory venue statute that fits hand in glove with the contract the parties agreed to in this case.

I will illustrate the point one other way regarding consideration. If you look at the cases cited in the other side's brief on this very point, on what consideration is, you will find Brownsville Fabrics, Rosenstock, and Stewart Title v. Mack. In every one of those cases, the courts didn't say premiums are consideration. Case closed. They specified premiums are the consideration that flows from the insured to the insurer. And they dropped it right there. In fact in the Mack case, the statute was a one way statute in a different portion of the Civ. Pract.& Rem. Code, which only looked to the amount paid therefore. And it's a $50,000 limit. In that case it didn't make it because it was $1,600 in premiums.

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RESPONDENT

BRODEUR: I think that the court has focused its attention on what we believe is the pivotal issue in this case. And that is, whether this particular series of events constitutes a major transaction under §15.020? The reason it doesn't is that the idea that this is a major transaction is contradicted by the statutory language, by existing case law, and by a strong public policy.

In 1889, the SC held that venue for trials is a matter for the legislature and not a matter for private contracts. And then most recently in 1972, J. Jack Pope held that the fixing of venue by contract except in such instance as permitted by art. 1995 is invalid and cannot be the subject of private contract.

BRISTER: Of course in the old days Southwest didn't fly between South Texas and Austin. Now the fact of the matter is, for argument today, you could leave your home this morning, argue, and then be back by this afternoon in your office. Right?

BRODEUR: I might be able to but it would be hard for the board of trustees at the BISD to do.

BRISTER: If they buy their tickets 14 days in advance, they can do it just as easily and quickly and cheaply as you do. And isn't it silly these days to apply laws before airplanes and cheap Southwest flights when that's not a problem anymore.

BRODEUR: The Ft. Worth CA in 1997 reaffirmed this ruling and held that...

BRISTER: Sure. It's like all law. We keep saying the same thing until somebody says this is ridiculous.

BRODEUR: And that would be for the legislature to change the law. Currently the law is...

BRISTER: J. Pope wasn't sitting in the legislature when he said that was he?

BRODEUR: No. But with respect to the existing case law, the existing case law has not been modified because there is no basis to do it. In fact the legislature did speak and said we will carve out a narrow exception. It's called the Major Transaction. There are no cases yet decided under that.

BRISTER: Your client signed a contract that said we'll try this dispute. The one we filed in Duval County, we agree to do it in Travis County. Now did they sign that with their fingers crossed behind their backs or how?

BRODEUR: No. They signed that probably without knowledge as to whether was void under existing case law...

BRISTER: They don't have lawyers working for the school district?

BRODEUR: I don't know whether they reviewed that particular provision. And that's the same provision that's in all of the risk management fund contracts.

BRISTER: What's going to happen to the economy if we tell everybody, Sure, sign a contract and whatever it says you can just later say well I wasn't very sophisticated. Even though I'm a school district I wasn't very sophisticated and so pay no attention to that contract.

BRODEUR: Even that provision with respect to venue says that unless venue is mandatory elsewhere. And I think that the only way in which venue is not mandatory is if our argument under §15.011 is not a compelling argument. We believe we have a compelling argument for mandatory venue. So we believe that that would not apply because there is mandatory venue here. And we have cited cases in which this has been upheld previously that the improvements to land are to be considered a part of real property for purposes of that mandatory venue provision.

But going back to your larger point with respect to why not let parties contract to this? Obviously if this in effect changes the law with respect to major transaction and some contingent future springing event may create something that makes something that looks like a minor transaction major, then we're going to have an awful lot of companies who contract for venue all over the state. It wouldn't just be Austin. There are thousands of small business that have more than $1 million worth of property, but their premium like Benavides was $33,000. So I believe that what

it does is it abrogates or at least cuts away at the statutory scheme for venue in this state. And I believe that's why this is an important case.

HECHT: In 15.020, it said major transaction means and it goes on and it says is obligated to pay or entitled to receive consideration. If it said some other word besides consideration would that apply differently in this situation?

BRODEUR: It may.

HECHT: It looks like we're hanging a lot on whether consideration means consideration as to make a contract valid or a consideration in a more general sense.

BRODEUR: I think the key word, and we've put a lot of attention on consideration, I believe one of the key words in this provision is the word is. It says that a person pays or receives, which hasn't happened, they've denied they claim. They said there is no obligation and now they come before you and say well but there is. But in their pleadings and in their letters to Benavides they have said we have no obligation to pay you anything.

HECHT: But surely if you paid a million dollars premium for this policy...

BRODEUR: We would have a major transaction on our hands.

HECHT: Even though they would still take the position it's not covered.

BRODEUR: Right.

HECHT: So it doesn't seem to me to turn on whether it's covered because you could always say yes we would owe you under the right circumstances. We just don't owe you under these circumstances.

BRODEUR: There's a logical point here and I think you're driving at it. And I think earlier it was mentioned that in this case consideration needs to be equal. You can't give $33,000 of premium and the underwriting analysis that's in the record that we've presented to you they calculate the value of that obligation at roughly $33,000. There is an equality. It wouldn't be consideration if we gave $33,000 and they had to give $10 million. The whole concept of consideration wouldn't make any sense if at the time of the bargain it weren't equal.

HECHT: The legislature could write a statute that said a person pays or receives or is obligated to pay or entitled to receive under some set of circumstances more than $1 million. And if it were written that way, it would clearly cover this situation.

BRODEUR: I think so. If this statute had said or may be obligated to pay instead of or is obligated to pay, then there would be some...but again that would be a pandora's box because who

knows if in the future you are going to be obligated to pay that amount. I think the reason that there is some certainty in this statute is that it's looking at the contract, consideration, the amount exchanged. And you can figure that dollar figure out. You can't figure out what this claim is worth. It may be that the judge and jury in Duval County think that it's worth $225,000. It may be that it's worth $2.5 million. Who knows. So I think the only certainty that we can arrive at here is by looking at the actual exchange consideration.

HECHT: I'm trying to go a little further than that. For example. The school district contracts with a contractor to build a building for $5 million. Would that be a major transaction?

BRODEUR: Yes.

HECHT: You're are not paying anything until you get your building. You may never get your building. If you get your building it may not be up to $5 million worth. But still it seems like that's a...

BRODEUR: I think that would be. I think that there are two parties. One party is obligated to pay the $5 million. Another is obligated to build the building. It looks like that hits the provision - major transaction.

HECHT: And yet you don't have to pay if you don't get your building. And you don't have to keep building if you don't get paid. The whole thing could fall apart at the $50,000 level. Go out and start moving dirt and the first check bounces and they say that's it for us. But that would still be a major transaction don't you think?

BRODEUR: I think you could look at the agreement and say it is. The key case is this - although this is a case of first impression as the court has pointed out there is a case that is quite similar to this case, and it's the Stewart Title Guarantee v. Mack case. The Houston CA decided that case in 1997, the 1st district. The writ was dismissed w.o.j. And the same issue came up in that case. And in that case it was title insurance and the individual who had purchased the title insurance brought suit. The title insurance company said we can go to arbitration here under the Texas Arbitration Act. And the issue was whether or not provision 171.001(b) of the Texas act applied. And if you look at the language of that act and you look at the language of 15.020 there's amazing similarities. Essentially what that says is that where the total consideration therefore to be paid, not actually paid but to be paid, or furnished by the individual is $50,000 or less, then there is going to be jurisdiction under the Texas Arbitration Act. And what the court held in that case is "accordingly the consideration for the insurance contract was the cost of the policy not the cost or value of the insured property." So that was recent, that the Houston CA looked at the most similar language we have in existing body of case law and said we've got to make some rime or reason out of this. It's got to be the amount of the premium. It can't be the amount of the limits or the value of the property because otherwise we just don't know what the total amount is going to be.

WAINWRIGHT: What if we take the same building from J. Hecht's example with an agreement

to pay for it in equal payments annually for 10 years. So out of a $5 million building I'm paying $500,000 the first year. Is that a major transaction?

BRODEUR: I believe so.

WAINWRIGHT: What if there is a provision that says if occupancy in the building never exceeds 70% you don't have to pay. The first year this clear occupancy is going to be below 70%. Major transaction?

BRODEUR: I wouldn't think so. If there is some future event that hasn't happened yet, we can't tell whether there's an existing obligation of paying more than $1 million, I don't see how that can be a major transaction.

WAINWRIGHT: So do you think any contingency eviscerates the total dollar amount? Any contingency to eventually having to pay out the total dollar amount eviscerates that total amount.

BRODEUR: I believe certainly a contingency like we have on our hands in Benavides does. And I think that most contingencies would because it would affect this term is obligated to pay in 15.020. Because one party would maintain well we're not yet obligated to pay that.

WAINWRIGHT: Back in the example. Pay $500,000 out the first year, then going into bankruptcy and never have to pay again. Still it's a major transaction.

BRODEUR: I think you have to look at the time that suit is brought. At that time you look at the agreement, and if at that time there's an existing obligation, I would say under this language there would be a major transaction. I think those are fascinating hypotheticals because they do get at the issue of a contingency that has been brought up. I just believe that a claim on an insurance policy especially where one party has denied that there's an obligation to pay is the type of contingency that would prevent 15.020 from applying in this case.

We have cited the court to the cases that we believe apply for a mandatory venue in this case under 15.011. And the two primary cases besides this SC's case in Riazzo(?) v. Phillips in 1954 are the Smith v. Reed case, which is a Dallas CA case in 1983, and the _____ Texas case which is a Waco case in 1975. And in those cases the court looked at 15.011 or its predecessor sought to determine whether damage to a house or a structure implicated that mandatory venue provision. Now the venue provision has changed.

BRISTER: The insurance company didn't damage your buildings.

BRODEUR: No. An insurance claim was made. It wasn't paid. It was denied. There's a lot of damage to these buildings. They continue to be very damaged and everyday that goes by there is more and more problems as a result of those buildings.

BRISTER: If somebody drives a truck into your building that causes damage that case needs to be tried. It's damage to property in Duval county. Does that mean though that the people who drove the truck can have an insurer who pays their judgment. If their insurer refuses top pay they also have to sue on their insurance contract in Duval county. That's different from damaged property.

BRODEUR: Right. But the difference between that hypothetical and our case is we have a contract between the two parties. We have a contract between the risk management fund and the school district, and we also have a negligence count in this case. So we're maintaining you're more like the person driving the truck rather than the insured for the person driving the truck. And you drove a truck into our school district. The fact is that by denying the claim the school district is struggling through many means. We're trying to prepare this damage itself. But in any event there is damage to real property here.

The Allison case I don't believe reached this court on that issue. But I would point out that the Dallas CA and the Waco CA, I believe would agree with our interpretation that especially given the damage to real property language in 15.011, that where you've alleged damage to real property even as a result of negligence that you would have mandatory venue. So we believe that under two strong bases both of which have public policy implications, it's important that this case not involve a transfer to another county. Although, I certainly believe as J. Brister pointed out that the hardest part about this case is the fact that in the contract it states venue shall lie. But there is that exculpatory language unless otherwise mandated by law.

And I think in this case it is mandated by law. Both because we have mandatory venue and because we have a long line of cases saying contracts for venue are void as against public policy in the State of Texas. We only have one very narrow exception and to keep it narrow, rather than make it extremely broad is the reason I think we are here today.

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REBUTTAL

JEFFERSON: Turning to the issue of consideration. There's been some questions from the court regarding the lottery analogy. But there are a couple of problems with that analogy that differentiated from 15.020. The first, is that under 15.020 the prefacto requirement under that statute is that you have to have a written contract. And there is no allegation that a lottery ticket is a written contract. And secondly, there is a difference between a chance and a promise. And the two way street of consideration what the insurer does is a promise and it is not a chance. And a contingent promise to pay has always been held to be consideration to pay. That's why the contractual right of indemnification or the promise to pay specified losses in the future is consideration for the premium paid. That is the two way street. And that's why we don't just look to the amount of money that is paid by the school district. Because if that was the test, then you would never have any consideration for insurance policies for two reasons. First, an insurance company never charges as its premium the same amount as its coverage. If that were the case, you would never need insurance. And secondly,

as is pointed out in our cases, there would always be a failure of consideration if the condition preceded doesn't come up. For example. I'm covered by life insurance. The fact that we're all here is probably good evidence that our beneficiaries have never made a claim on our life insurance policy. Yet, we are not allowed to go to our life insurance companies and say, I'm not dead, there is no consideration, refund all of my premiums. The contingent promise is consideration in this case.

Now there was a discussion by opposing counsel and basically the discussion there was two prong. First of all that the legislature was wrong and that we should concentrate on the word is. But given that the statute requires that there be a written contract, and given the totality of circumstances when you apply rules of statutory construction, I think it will become abundantly clear that the plain and common meaning of consideration is just as we have in an insurance transaction. And the problem with utilizing the is approach, is as the CJ pointed out, there are other venue allegations that we have made in this case, which are not before the court because they are not mandatory venue issue, such as our general venue arguments and our 257 arguments. The point is is that we may be in front of this court again on a post-verdict motion. And if the jury returns a verdict of over $1 million, then under their definition of the word is, we now have a major transaction.

Now that goes to show why it should be given as plain and ordinary meaning and under that scenario, under the two way street of consideration, this is a major transaction.

Now counsel hangs his hat on the Stewart Title case, which he says stands for the proposition that you only look at the premium paid. But a closer examination of the Stewart Title case shows that the facts simply don't apply. Because what that case dealt with was a trigger mechanism as to whether or not an arbitration clause would apply. And in that case, the arbitration provision specifically said that we're only going to look down one way of the two way street, and we will only look to the consideration that was paid by the buyer. We aren't going to look at the promise that was given by the title insurance company. And we will only look to what the buyer paid and that will make or break the determination of whether or not it's more or less than $50,000, which was the trigger of whether or not you had binding arbitration. And so that case certainly doesn't help the district because it was a very narrow interpretation and it had to do with a specific contractual agreement in an arbitration clause. It had nothing to do with general concepts of consideration whatsoever.

Next they turn to the issue of 5.011 and they try to make the argument that this court has soundly rejected since before the civil war that somehow or another that recovery of damage to real property if you make a claim that says I have damage to my real property, that somehow that boot straps you into the umbrella of 15.011. But this court has opinions as far back as 1856 that says that you have to read that in context when you look at the predecessor statutes. Because that statute also talks about suits for recovery of land or for partition, for suits to remove encumbrances from title, trespass to try title, suits to quite title, and we don't have those in this circumstance. We have damages to fixtures on to real property and this court has always said in grassfire cases and pecan tree cases and the Austin court said in the Allison case that fixtures are not

enough. And for these reasons we respectfully ask that this court reverse the courts below and transfer venue of this case to Travis county.