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Opting Out of the Grand Bargain: A Pathway to Poverty?

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— Comment —
Opting Out of the Grand Bargain: A Pathway to Poverty?

Contents

Introduction 1375
I. A Brief History of the Grand Bargain 1378
II. Workers' Compensation in Oklahoma 1381
III. Opting Out in Texas 1387
IV. The Feasibility of Emulating Opt-Out Acts in States with Constitutional Provisions 1391
Conclusion 1394

Introduction

An early form of workers' compensation was depicted in Alexander O. Exquemelin's 1678 account of Caribbean buccaneers.[1] According to Exquemelin, the buccaneers drew up "an agreement or *chasse partie*" as to how to divide the loot up amongst officers, crew members, and crew members wounded during the voyage.[2] This early form of workers' compensation awarded either six hundred pieces of eight or six slaves for the loss of a right arm.[3] If a man were to lose the use of his arm he would be awarded the same amount as if the arm had been severed.[4] And for "a severe internal injury which meant the victim had to have a pipe inserted in his body [he] would earn 500 pieces of eight or five slaves in recompense."[5] The injured buccaneer's share was first withdrawn from the total amount to ensure that the injured man was cared for before the remaining loot was divided up amongst the remaining crew members.[6]

The buccaneers' early form of workers' compensation predates the American system by over three centuries. Workers' compensation programs did not arise in the United States until the Twentieth

1. Alexander O. Exquemelin, The Buccaneers of America (Alexis Brown trans., Dover Publ'ns 2000) (1678).
2. *Id.* at 71.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

Century.[7] Workers' compensation developed support as a type of grand bargain between the employee and the employer. Under this system, an injured employee agreed to surrender their common-law right to sue for damages that fell within the scope of workers' compensation in exchange for specific guaranteed benefits.[8] Beginning in the 1980s there was an increase in legislation that was intended to curb the increasing costs of workers' compensation programs.[9] By 1997, over two-thirds of states passed legislation that tended to curb the rising costs by decreasing both the right to compensation and the amount of benefits an injured worker is entitled to receive.[10]

The call for legislative reform to traditional state-run workers' compensation programs continues today. Support has increased within the last few years for alternative "opt-out" programs in response to the perceived failings of the state-run programs regarding both rising costs and decreased benefits.[11] Oklahoma, South Carolina, Tennessee, and Florida proposed legislation that would create alternative opt-out programs to the traditional state-run programs.[12] In 2013, Oklahoma became the second state in the country to pass legislation creating an alternative to the traditional state-run workers' compensation programs.[13] Supporters like John D. Doak, the Oklahoma Insurance Commissioner, assert that alternative plans cut costs while increasing the

7. LEX K. LARSON & ARTHUR LARSON, WORKERS' COMPENSATION LAW 21 (5th ed. 2013) (observing that the legislatures of New York, Massachusetts, Minnesota, New Jersey, Connecticut, Ohio, Illinois, Wisconsin, Montana, and Washington had created commissions to investigate workers' compensation legislation by 1910).

8. *Id.* at 4.

9. *Id.* at 25 (noting that rising costs were associated with a combination of factors including medical care; an increase in number, length, and litigiousness of proceedings; attorney involvement; and the perception of widespread fraud amongst workers).

10. *Id.*

11. Michael Grabell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Comp*, PROPUBLICA (Oct. 14, 2015), https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp [https://perma.cc/ZV4E-WVZ5]; Michael Moline, *House Freshman's Workers' Comp Bill Would Render System Voluntary*, FLA. POL. (Dec. 7, 2016), http://floridapolitics.com/archives/228432-workers-comp-4 [https://perma.cc/RPG3-E9LV].

12. *See, e.g.*, S.B. 1062, 54th Leg., 1st Sess. (Okla. 2013); H.B. 4197, 121st Sess. (S.C. 2015); H.B. 997, 109th Gen. Assemb. (Tenn. 2015). The Florida bill referenced in the previous footnote has yet to be filed officially.

13. Zeke Campfield, *Oklahoma State Senate Approves Workers' Comp Overhaul*, NEWSOK (Feb. 27, 2013), http://newsok.com/article/3759633 [https://perma.cc/Q2AM-LSVQ].

competitiveness of the workers' compensation insurance market.[14] Proponents allege that private alternative plans decrease costs for companies.[15] In 2016, Oklahoma reported a decrease for the fourth year in a row according to the state insurance program.[16] In 2016, the National Council on Compensation Insurance in Oklahoma filed an overall loss cost decrease of 10.2% for workers' compensation.[17] Supporters credit the decrease in Oklahoma's workers' compensation costs to declines in market experience, market trend, and recent reforms to traditional workers' compensation programs.[18] A recent study by Alison Morantz, a Stanford law professor, supports the proponents' claims and found that companies saved around forty-four percent when they replaced traditional workers' compensation programs with private plans.[19]

In September 2016, the Oklahoma Supreme Court dealt a striking blow to supporters of opt-out programs when it held that the Oklahoma Employee Injury Benefit Act[20] (OEIBA) was

14. Specifically, Doak claimed that the 2013 workers' compensation reforms enacted in 2013 were accomplished by replacing "an outdated adversarial court system with the Workers' Compensation Commission, increas[ing] the competitiveness of our workers' compensation insurance markets, and develop[ing] an innovative solution to workplace injuries," resulting in annually decreasing costs. Stephanie K. Jones, *Oklahoma Supreme Court Rules Workers' Comp Opt-Out Unconstitutional*, INS. J. (Sept. 14, 2016), http://www.insurancejournal.com/news/southcentral/2016/09/14/426439.htm [https://perma.cc/8FGP-ZAVC].

15. *See* Joanne Sammer, *Opting Out: Are Alternative Workers' Comp Programs Viable?*, SOC'Y FOR HUMAN RESOURCE MGMT. (Sept. 1, 2016), https://www.shrm.org/hr-today/news/hr-magazine/0916/pages/opting-out-are-alternative-workers'-comp-programs-viable.aspx [https://perma.cc/8JPU-QLSX] ("From an employer's standpoint, opt-out plans could reduce their expenses substantially.").

16. *Oklahoma Workers' Comp Loss Costs Fall 10.2%*, INS. J. (Sept. 9, 2016), http://www.insurancejournal.com/news/southcentral/2016/09/09/425933.htm [https://perma.cc/EWJ5-6K5V].

17. *Id.*

18. *Id.*

19. Alison Morantz analyzed injury and illness claims filed by employees of fifteen Texas companies from 1998 to 2010. She found that the decrease in costs was due to a decrease in the frequency of serious claims regarding replacement of lost wages and a decline in the overall costs associated with each claim. Alison D. Morantz, *Rejecting the Grand Bargain: What Happens When Large Companies Opt Out of Workers' Compensation?* 47–48 (Stanford Law Sch., John M. Olin Program in Law & Econ., Working Paper No. 488, 2016), https://ssrn.com/abstract=2750134 [https://perma.cc/TGH8-98TX].

20. 2013 Okla. Sess. Law Serv. Ch. 208, § 107 (West) (codified at OKLA. STAT. ANN. tit. 85a, § 200 (West 2017)).

unconstitutional.[21] The Oklahoma Supreme Court's decision does not end the debate surrounding opt-out legislation.[22] Going forward, Texas provides a model for states looking to enact alternative programs, while Oklahoma provides a cautionary tale. Part I of this Comment focuses on a brief history of workers' compensation in the United States. Part II focuses on Oklahoma's system of workers' compensation and their implementation of an alternative opt-out program. Part III focuses on the opt-out program in Texas and how it survived constitutional challenges, while Part IV analyzes whether the opt-out programs can be emulated in states where the existing system was created by a constitutional provision.

I. A BRIEF HISTORY OF THE GRAND BARGAIN

Workers' compensation in the United States arose as a result of increasing industrialization in the Nineteenth Century and the influence of systems created in Germany and England.[23] Beginning in the early 1900s, various state commissions began investigations into workers' compensation.[24] Under the "industrial," or "grand," bargain, employees gave up the common law right to bring a negligence action against their employer in return for a predetermined amount of benefits.[25] In 1910, the Uniform Workmen's Compensation Law was drafted during a Chicago conference[26] and New York adopted a type of compulsory workers' compensation system.[27]

In 1911, however, the Court of Appeals in *Ives v. South Buffalo Railway Co.*,[28] held the New York system to be an unconstitutional taking by imposing liability upon employers regardless of fault.[29] In response to the *Ives* Court's holding, the New York legislature passed a constitutional amendment, effective January 1, 1914, which

21. Vasquez v. Dillard's, Inc., 2016 OK 89, 381 P.3d 768.

22. *See supra* note 11 and accompanying text (noting the increased support for alternative opt-out programs).

23. LARSON & LARSON, *supra* note 7, at 20–21.

24. *Id.* at 21.

25. Parret v. UNICCO Serv. Co., 2005 OK 54, ¶ 20, 127 P.3d 572, 578, *superseded by* OKLA. STAT. ANN. tit. 85a, § 5 (West 2017).

26. LARSON & LARSON, *supra* note 7, at 21.

27. *Id. See* Act of June 25, 1910, ch. 674, 1910 N.Y. Laws 1945.

28. 94 N.E. 431 (1911).

29. *See id.* at 448 (holding that "[a]ll that it is necessary to affirm in the case before us is that in our view of the Constitution of our state the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statue is therefore void").

permitted a mandatory workers' compensation system.[30] The new workers' compensation law, passed after the amendment, took effect on July 1, 1914, and provided for an exclusive remedy for injured workers who, in lieu of a jury trial, would receive a set, predetermined amount.[31] Compensation for injured workers was to be provided regardless of fault unless the injured worker intended to injure or cause the death of himself or another worker or if the injury was solely due to the injured employee being intoxicated.[32]

The new law establishing an exclusive remedy for injured workers was challenged in *N.Y. Central Railroad Co. v. White*[33] as a violation of the Plaintiff's Fourteenth Amendment rights and limiting the freedom to contract.[34] In a 9–0 decision, the United States Supreme Court held that New York's law did not violate equal protection or due process of law under the Fourteenth Amendment, nor did it limit freedom of contract.[35] This ruling paved the way for the expansion of workers' compensation in other states, and forty states adopted some form of compensation acts by 1920.[36] Mississippi became the last of the then existing forty-eight states to enact a workers' compensation system in 1949.[37] In the subsequent years, workers' compensation coverage was extended by adding jurisdictions and broadening the

30. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 195–96 (1917) ("Nothing contained in this constitution shall be construed to limit the power of the legislature . . . to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount for such compensation for death shall not exceed a fixed or determinable sum . . . .").

31. *See* Act of December 16, 1913, ch. 816, 1913 N.Y. Laws 2277 (enacting the legislation); Act of January 8, 1914, ch. 41, 1914 N.Y. Laws 216 (reenacting the legislation); *N.Y. Cent. R.R. Co.*, 243 U.S. at 208–09 (holding that the New York law was constitutional); *see also* THE N.Y. STATE WORKERS' COMP. BD., THE NEW YORK STATE WORKERS' COMPENSATION BOARD CENTENNIAL 6–7 (2014), www.wcb.ny.gov/WCB_Centenial_Booklet .pdf [https://perma.cc/FB87-DP6M] (discussing the adoption of New York's workers' compensation law).

32. *N.Y. Cent. R.R. Co.*, 243 U.S. at 202.

33. 243 U.S. 188 (1917).

34. *Id.* at 191, 206.

35. *Id.* at 206–08 (holding that "the authority to prohibit contracts made in derogation of a lawfully established policy of the state respecting compensation for accidental death or disabling personal injury is . . . clear" and that "the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment").

36. LARSON & LARSON, *supra* note 7, at 23.

37. *Id.*

boundaries of individual acts including people, employment, and the kinds of injury, including occupational disease.[38]

In 1970, Congress enacted the Occupational Safety and Health Act.[39] This law created the National Commission on State Workmen's Compensation Laws.[40] The Commission was composed of fifteen members appointed by the President tasked with evaluating current programs and making recommendations for improvement.[41] The Commission submitted their final report detailing the inadequacies of existing programs in 1972.[42] The Commission made a large number of recommendations for improvement in their report, including:

> [C]ompulsory coverage in all acts; elimination of all numerical and occupational exemptions to coverage, including domestic and farm labor; full coverage of work-related diseases; full medical and physical rehabilitation services without arbitrary limits; a broad extra-territoriality provision; elimination of arbitrary limits on duration or total sum of benefits; and a weekly benefit maximum that rises from an immediate 66 2/3 percent to an ultimate 200 percent of average weekly wage in the state.[43]

The Commission recommended a three year time frame for states to comply with the recommendations before federal intervention to ensure compliance would begin.[44] In the ten years following the Commission's report, state legislation on workers' compensation greatly expanded benefits, including unlimited medical benefits and occupational disease coverage, while an increasing number of employees were covered.[45] The number of covered workers expanded by at least five percentage points in almost half of states between 1968 and 1976.[46]

38. *Id.* at 23–24. In spite of the expansion of the workers' compensation system, not all workers were covered under it. For example, domestic and agricultural workers, small firms, and casual workers were still excluded from the system. *Id.* at 24.

39. Occupational Safety and Health Act of 1970, Pub. L. No. 91–596, 84 Stat. 1590 (1970).

40. LARSON & LARSON, *supra* note 7, at 24.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Daniel N. Price, *Workers' Compensation Program in the 1970's*, 42 SOC. SEC. BULL. 3, 7 (1979) (pointing out that in 1976, the proportion of covered workers had risen by at least five percentage points from the 1968 numbers

Perhaps the marked increase in expanded state coverage throughout the 1970s can be attributed to the looming possibility of federal intervention in the event that the Commission's minimum recommended standards were not met. Throughout the 1970s, federal legislators introduced various bills that were designed to make states meet the Commission's minimum standard.[47] None of these bills passed through Congress, but the possibility of federal intervention lingered over states if they failed to comply.[48] By the 1980s, state focus shifted from achieving the Commission's established standards and turned toward specific problems like asbestos-related diseases.[49] In the mid to late 1980s, state focus once again shifted—this time to curtailing employers' rising costs related to workers' compensation.[50] By 1997, over two-thirds of states had enacted legislation aimed at decreasing workers' compensation costs through a variety of measures while making it more difficult for injured workers to recover for preexisting conditions, repetitive motion injuries, or stress-related cases.[51] The focus on cost reduction continues today with a rise in proposed legislation to allow employers to opt out of state-run workers' compensation programs and instead create alternative private plans.[52]

II. WORKERS' COMPENSATION IN OKLAHOMA

Workers' compensation was designed to provide injured workers and their families with "a living and prevent them from becoming public charges."[53] The Oklahoma legislature created the Oklahoma Workers' Compensation Commission, which applies the Administrative Workers' Compensation Act[54] (AWCA) to employers

in thirteen states, while a similar increase was seen in eleven other states between 1972 and 1976).

47. LARSON & LARSON, *supra* note 7, at 24–25.

48. *Id.* at 24.

49. *Id.* at 24–25.

50. *Id.* at 25.

51. *See id.* ("[C]hanges commonly found in this legislation include (1) restrictions on the right of the claimant to choose his or her medical provider, (2) utilization of managed care, (3) anti-fraud provisions, (4) measures designed to reduce attorney involvement at the administrative level, (5) measures designed to encourage early resolution of claims, and (6) measures designed to reduce duplicate recovery among different reimbursement systems.").

52. *See* Grabell & Berkes, *supra* note 11.

53. Corbin v. Wilkinson, 52 P.2d 45, 48 (Okla. 1935).

54. OKLA. STAT. ANN. tit. 85A, § 1 (West 2017).

and employees.[55] Currently, the AWCA applies to both employers and employees in Oklahoma.[56] Nearly all employees in Oklahoma are covered under the AWCA, with the exception of a few select groups.[57] For example, employees whose employment is casual, or required due to conviction of a criminal offense or incarceration, are not covered.[58] Additionally, employees covered by another workers' compensation system are not covered under the AWCA, nor are certain agricultural and horticultural workers, some licensed real estate sales associates and brokers, volunteers, and some domestic workers.[59]

Under Oklahoma law, the rights and remedies guaranteed to employees under the AWCA are exclusive of all other rights and remedies, so a covered employee does not have a right to tort damages.[60] The exclusive remedy guaranteeing injured workers compensation does not apply if, however, an intentional tort committed by the employer caused the injury[61] or if the employer fails to pay the employee compensation as required by law.[62] If the employer fails to pay the injured employee compensation due under the AWCA, the employee can either make a claim for compensation under the AWCA or file a claim for civil damages in an Oklahoma district court.[63] Additionally, if an employer commits an intentional tort, an employee has a right to file for civil damages in a district court.[64] Under the AWCA, an employee cannot agree to waive his or her right to compensation through any contract, regulation, or device.[65] Oklahoma law further prevents employers from discriminating or retaliating against an employee who engages in protected activity under the AWCA.[66]

55. OKLA. ADMIN. CODE § 810:1-1-3 (2017).

56. OKLA. STAT. ANN. tit. 85A, § 3(A) (West 2017).

57. *Id.* § 2(18).

58. *Id.* § 2(18)(a).

59. *Id.* § 2(18).

60. *Id.* § 5(A).

61. *Id.* § 5(B)(2).

62. *Id.* § 5(B)(1).

63. *Id.* § 5(D).

64. *Id.* § 5(I). Under Oklahoma law, an intentional tort exists only if the injury occurs because of "willful, deliberate, specific intent" on behalf of the employer against the employee. *Id.* § 5(B)(2).

65. *Id.* § 8(A).

66. *Id.* § 7(A).

Before 2013, Oklahoma workers were covered under the Workers' Compensation Code.[67] But, in 2013, this was repealed in favor of the Administrative Workers' Compensation Act,[68] which adopted the Oklahoma Employee Injury Benefit Act.[69] The constitutional challenges began soon thereafter. On November 25, 2013, the Oklahoma Supreme Court heard a constitutional challenge in *Coates v. Fallin*.[70] There, the Court held that absent a clear constitutional defect it would uphold the OEIBA because it is not the duty of the Court to rewrite statutes "merely because the legislation does not comport with our concept of prudent public policy."[71]

The OEIBA was modeled upon its Texas counterpart's program to allow employers to opt out of the state-run system of workers' compensation. Under the OEIBA, employers could draft their own worker compensation laws and decide which injuries the policies would cover.[72] The OEIBA also permitted employers to limit injured employees to certain physicians and how workers obtained compensation from the employer as well as how disputes would be handled.[73] Although the general premise of the Oklahoma and Texas opt-out plans are the same, there are several key differences which permitted the opt-out plan to survive in Texas despite a similar act being overturned in Oklahoma. First, Oklahoma had an existing state mandated workers' compensation program[74] whereas Texas never had a mandatory program.[75] Secondly, as the Oklahoma Supreme Court would ultimately hold, the OEIBA did not guarantee all Oklahoma workers' the same rights when a work-related injury occurred.[76] Instead, the OEIBA allowed for employers to single out injured

67. Workers' Compensation Code, ch. 318, 2011 Okla. Sess. Laws 2553, (repealed 2013).

68. OKLA. STAT. ANN. tit. 85A, § 1 (West 2014).

69. *Id.* § 3.

70. 2013 OK 108, 316 P.3d 924.

71. *Id.* ¶ 2, 316 P.3d at 924.

72. OKLA. STAT. ANN. tit. 85A, § 2(9)(a)–(g) (West 2013).

73. *Id.*

74. *Title 85A. Workers' Compensation*, OKLA. ST. COURTS NETWORK, http://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKSTB1&level=1 [https://perma.cc/6BZ3-FQFZ] (last visited Mar. 22, 2017).

75. Morantz, *supra* note 19, at 47–48.

76. Vasquez v. Dillard's, Inc., 2016 OK 89, ¶ 19, 381 P.3d 768, 773 ("The Opt Out Act does not guarantee members of the subject class, all employees, the same rights when a work related injury occurs. Rather, it provides employers the authority to single out their injured employees for inequitable treatment.").

employees for "inequitable treatment."[77] The OEIBA expressly stated that employers are not bound by the Oklahoma Workers' Compensation Act unless expressly incorporated within the OEIBA.[78] The OEIBA also failed to eliminate the exclusive remedy provision that is found within the AWCA.[79]

There were several constitutional challenges to the OEIBA. In December 2013, the Oklahoma Supreme Court held the OEIBA to be constitutional despite being challenged in *Coates v. Fallin*.[80] On September 13, 2016, however, the Oklahoma Supreme Court struck down the OEIBA as unconstitutional in *Vasquez v. Dillard's*.[81] The *Vasquez* Court held that the legislation created two disparate classes of workers and resulted in an "unconstitutional special law" under the Oklahoma Constitution.[82] In *Vasquez*, the Court analyzed the issue of whether the statute was a special law with a three-part test. The Court's analysis turned on: (1) whether the law was special or general, (2) if it was a special law, then if a general law applied, and (3) if there was no applicable general law, then was the special law constitutionally permissible.[83] Under the Oklahoma Constitution,

77. *Id.*

78. OKLA. STAT. ANN. tit. 85A, § 203(B) (West 2015) ("The benefit plan shall provide for payment of the same forms of benefits included in the Administrative Workers' Compensation Act for temporary total disability . . . disfigurement, amputation or permanent total loss of use of a scheduled member, death and medical benefits as a result of an occupational injury, on a no-fault basis, and with dollar, percentage and duration limits . . . contained in Sections 45, 46 and 47 of this title. For this purpose, the standards for determination of average weekly wage, death beneficiaries, and disability under the Administrative Workers' Compensation Act shall apply under the Oklahoma Employee Injury Benefit Act; but no other provision of the Administrative Workers' Compensation Act defining covered injuries, medical management, dispute resolution or other process, funding, notices or penalties shall apply or otherwise be controlling under the Oklahoma Employee Injury Benefit Act, unless expressly incorporated.").

79. *Id.* § 5(A) (West 2014) ("The rights and remedies granted to an employee subject to the provisions of the Administrative Workers' Compensation Act shall be exclusive of all other rights and remedies of the employee . . . .").

80. Coates v. Fallin, 2013 OK 108, ¶ 3, 316 P.3d 924, 925 (holding that "Senate Bill 1062, 2013 Okla. Sess. Laws, Ch. 208 is not unconstitutional as a multiple-subject bill and that the Legislature has exercised proper authority in a matter over which it has the power to act by adopting a code for the future execution of workers' compensation law in Oklahoma which comports with the Okla. Const. art. 5, 57").

81. 2016 OK 89, 381 P.3d 768.

82. *Id.* (holding that "[t]he core provision of the Opt Out Act . . . creates impermissible, unequal, disparate treatment of a select group of injured workers").

83. *Id.* ¶ 11, 381 P.3d at 772.

"[l]aws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted."[84] The *Vasquez* Court held that a special law is one that has different treatment for "less than an entire class of similarly affected person or things" whereas a general law applies to all members of a class.[85] Dillard's argued that the statutory class created by the OEIBA was all Oklahoma employers rather than injured employees.[86] Dillard's relied on *Grimes v. City of Oklahoma City*[87] in support of their proposition.[88] The *Vasquez* Court, however, distinguished *Grimes* from the issue at bar because *Grimes* looked to the title of the legislative act in determining the protected class and did not deal with workers' compensation.[89] In *Vasquez*, unlike *Grimes*, the title of the OEIBA was aimed at employees and did not address employers.[90] The *Vasquez* court further held that the legislative intent behind the OEIBA was that the intended class were injured employees rather than employers.[91]

In *Vasquez*, Dillard's argued that the OEIBA was constitutionally valid even if it was found to be a special law since it was "substantially and reasonably related to a legitimate government objective."[92] Dillard's argued that the OEIBA allowed for a "more effective system of identifying and treating workplace injuries; improving access to medical treatment; improving worker health and safety; and encouraging job creation."[93] Dillard's further contended that to accomplish the aforementioned goals, the Oklahoma Legislature gave employers the ability to implement the benefits to their employees.[94] The Court, however, was not persuaded by Dillard's argument. The Court was unwilling to "accept the invitation of employers to find a discriminatory state statue constitutional by

84. OKLA. CONST. art. 5, § 59.

85. *Vasquez*, ¶ 12, 381 P.3d at 772.

86. *Id.* ¶ 15, 381 P.3d at 772.

87. 2002 OK 47, 49 P.3d 719 (upholding a municipality's right to choose how to financially support schools within the city limits against a special law attack).

88. *Vasquez*, ¶ 16, 381 P.3d at 772.

89. *Id.* ¶¶ 17–18, 381 P.3d at 772–73. The legislative act at issue in *Grimes* was titled "Municipal Support of Public School Systems" while the legislative act at issue in *Vasquez* was titled "Employee Injury Benefit Act." *Id.*

90. *Id.* ¶ 18, 381 P.3d at 772.

91. *Id.* ¶ 18, 381 P.3d at 773.

92. *Id.* ¶ 28, 381 P.3d at 774.

93. *Id.*

94. *Id.*

relying on the interests of employers in reducing compensation costs."[95] The Court then analyzed whether or not a general law is impossible due to certain circumstances or if the goals of the legislation could be accomplished by a general law.[96] Finally, once the *Vasquez* Court determined that the OEIBA was a special law, it looked to see if the law was "substantially and reasonably related to a legitimate government objective" so it could survive a constitutional challenge.[97]

The *Vasquez* Court further held that the OEIBA allows for employers to treat their employees inequitably when compared with employees who fall under the AWCA.[98] Under the OEIBA, employers are not bound by the provisions of the AWCA for the "purpose of: defining covered injuries; medical management; dispute resolution or other process; funding; notices; or penalties" unless there is incorporation of the AWCA's standard into the OEIBA.[99] The OEIBA clearly stated that "no other provision of the Administrative Workers' Compensation Act defining covered injuries, medical management, dispute resolution or other process, funding, notices or penalties shall apply or otherwise be controlling under the Oklahoma Employee Injury Benefit Act, unless expressly incorporated."[100] The OEIBA ensured that injured employees under the OEIBA would not receive the same protection of procedures as employees covered by the AWCA.[101]

The OEIBA failed in Oklahoma due to the already existing mandatory state-run workers' compensation program. In Texas, however, there was never a mandatory system of workers' compensation. The challenges faced in Oklahoma in implementing a new system creating a different class of workers are likely to be experienced in other states considering opt-out programs. Unlike in Texas, Oklahoma never incorporated a provision to allow for equalization of bargaining by permitting the employee to opt out of the alternative program and instead sue in court for damages. Given the continued national onslaught on compensation benefits through benefit cuts and opt-out legislation, perhaps the great equalizer would be to give the injured

95. *Id.* ¶ 29, 381 P.3d at 774 (citing Torres v. Seaboard Foods, LLC., 2016 OK 20, ¶ 47, 373 P.3d 1057, 1079 (2016)).

96. *Id.* ¶¶ 31–32, 381 P.3d at 774–75.

97. *Id.* ¶ 28, 381 P.3d at 774.

98. *Id.* ¶ 19, 381 P.3d at 773.

99. *Id.* ¶ 22, 381 P.3d at 773.

100. OKLA. STAT. ANN. tit. 85A, § 203(b) (West 2015).

101. *Vasquez*, ¶ 28, 381 P.3d at 774.

worker back the right to sue for damages and recover more than the paltry sum often guaranteed for injured workers.

III. OPTING OUT IN TEXAS

Unlike the rest of the United States, Texas never had a mandatory system of state-run workers' compensation. Under Texas law, an employer has the option to join the traditional workers' compensation system with oversight by the Texas Department of Insurance[102] or they can opt out of the statutory system and create a "non-subscription" program, but would lose the exclusive remedy provision and could become liable "for work related injuries under common law principles of negligence,"[103] although they would gain certain freedoms and advantages from state oversight.[104] Non-subscribers could thus become liable to injured workers and be forced to pay high awards if found negligent since they lose immunity from lawsuits.[105] If a Texas employer choses to subscribe to the workers' compensation system, then it can either buy an insurance policy through a company licensed by the Texas Department of Insurance, obtain certification from the DWC to self-insure any compensation claims, join an approved self-insurance group, or be a self-insured government entity.[106] Most of the non-subscriber plans are governed under the Federal Employee Retirement Income Security Act (ERISA), which allows for more freedom for employers than traditional state-run plans.[107] These opt-out plans greatly affect the statutorily defined benefits for injured workers, state measures that are designed to ensure that injured workers receive benefits, the use of state administrative or civil courts in disputes, and the exclusive remedy which was part of the original grand bargain.[108]

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102. *See* TEX. LAB. CODE ANN. § 406.002(a) (West 2016).

103. Brookshire Bros., Inc. v. Lewis, 997 S.W.2d 908, 912 (Tex. App. 1999) (holding that Brookshire is a "nonsubscriber under the Texas workers' compensation law. . . . [and] is responsible for work-related injuries under common law principles of negligence"); *see also* Werner v. Colwell, 909 S.W.2d 866, 868 (Tex. 1995).

104. *Information for Workers' Compensation Non-subscribers*, TEX. DEP'T OF INS., https://www.tdi.texas.gov/wc/employer/cb007.html [https://perma.cc/W3JA-4NRR] (last updated Feb. 24, 2017).

105. *Id.*

106. *Id.*

107. NEW ST. GRP., WORKERS' COMPENSATION OPT-OUT: CAN PRIVATIZATION WORK? 8 (2012), https://www.sedgwick.com/NewsRelease/WCOpt-OutStudy.pdf [https://perma.cc/CM62-YRV8].

108. *Id.* at 6.

These alternative policies are touted as a less costly option for the employer typically because they have a specific policy and benefit limits for employees.[109] Costs were often kept lower than through workers' compensation due to not covering partial, total, or permanent total disabilities; medical benefits limited to two years rather than lifetime coverage; capped death benefits; and per-person or per-event capped limits on benefits.[110] As of 2012, about one-third of Texas employers were non-subscribers.[111] This number is almost the lowest it has been according to a study spanning nearly two decades,[112] but this had not diminished other states' interest in the non-subscription option.[113] Interestingly, the greatest number of non-subscribers employed fewer than five employees.[114] A 2012 study revealed that fifteen percent of non-subscribers were primarily concerned with the high costs of insurance premiums.[115] The same primary financial concerns were echoed by large non-subscribing companies in 2012.[116] Another 2012 study, however, revealed that more often than not, subscribing employers did not experience a change in their premium.[117]

109. *Id.*

110. *Id.* at 15 (citing Alison Morantz, *Opting Out of Workers' Compensation in Texas: A Survey of Large, Multistate Nonsubscribers*, *in* REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 197 (Daniel Kessler ed., 2010).

111. WORKERS' COMP. RESEARCH & EVALUATION GRP., TEX. DEP'T OF INS., EMPLOYER PARTICIPATION IN THE TEXAS WORKERS' COMPENSATION SYSTEM: 2012 ESTIMATES 6 (2012), https://www.tdi.texas.gov/reports/wcreg/documents/2012_Nonsub.pdf [https://perma.cc/HXU5-CXWA].

112. *See id.* The first study of the percentage of Texas non-subscribers was in 1993. The 1993 study showed that forty-four percent of employers were non-subscribers. In 2010, this number dipped down to an all-time low of thirty-two percent. This number increased in 2012 to thirty-three percent of employers. *Id.*

113. *See supra* note 11 and accompanying text (noting the increased support for alternative opt-out programs).

114. WORKERS' COMP. RESEARCH & EVALUATION GRP., TEX. DEP'T OF INS., *supra* note 111, at 8.

115. *Id.* at 13. Other primary reasons given were too few employees, workers' compensation was not mandatory, high medical costs, and few on-the-job injuries. *Id.*

116. *Id.* at 14. Non-subscribing employers with 500 or more employees were primarily concerned with high insurance premiums (twenty-three percent) and high medical costs within the workers' compensation system (twenty-four percent). *Id.*

117. *Id.* at 16.

Texas, however, retained the right for an employee to sue for common law tort damages if their employer elected to opt out of the workers' compensation system, even if the employer opted to purchase alternative coverage.[118] Employers that opted out of the typical system can be sued under tort law and lose their right to common law defenses, which includes key defenses that were used prior to the introduction of workers' compensation laws in the early 1900s.[119] For example, under Texas law, an employer loses the defense of contributory negligence, assumption of the risk, or that the injury or death was caused by a negligent co-worker.[120] In order to avoid liability, the employer must show that the employee was solely responsible for their injury.[121]

If an employee does sue the employer for civil damages, their ability to recover from the employer is often limited by the opt-out plans which typically do not cover attorney's fees, judgments for pain and suffering, or punitive damages.[122] If the employer decides to provide the employee with an alternative benefit plan after they opted out of the state system, then the employer can require that the employee waive their right to sue in tort and instead submit to arbitration.[123] Traditionally, Texas law prohibited an employee from preemptively waiving their right to sue an employer.[124] Prior to 2001, Texas employers that opted out often required employees to waive their rights to sue for future injuries as a condition to employment, thereby limiting an employers' future risk related to an employee's ability to recover in tort.[125] Concerns arose that employees were being

118. TEX. DEP'T OF INS., *supra* note 104.

119. *See* TEX. LAB. CODE ANN. § 406.033(a)(1-3) (West 2016) ("In an action against an employer . . . who is not covered by workers' compensation insurance obtained in the manner authorized by Section 406.003 . . . it is not a defense that: the employee was guilty of contributory negligence; the employee assumed the risk of injury or death; or the injury or death was caused by the negligence of a fellow employee.").

120. *Id.*

121. *See* NEW ST. GRP., *supra* note 107, at 14 ("Texas courts have interpreted the removal of the contributory negligence defense to mean that employers must prove that employees are solely responsible for their injury to escape liability.").

122. *See* TEX. DEP'T OF INS., *supra* note 104 (explaining that non-subscribers do not enjoy the limited liability subscribers enjoy and may be liable for damages for pain and suffering, as well as legal expenses).

123. *See* TEX. LAB. CODE ANN. § 406.033(e)–(f) (West 2016).

124. *See* NEW ST. GRP., *supra* note 107, at 14.

125. Jason Ohana, Note, *Texas Elective Workers' Compensation: A Model of Innovation?*, 2 WM. & MARY BUS. L. REV. 323, 342 (2011). Ohana asserts that by waiving negligence claims before employment began, the employer

taken advantage of since they were not injured at the time they signed the contract and so were unlikely to consult with attorneys who could evaluate the arbitration agreement.[126] In 2001, the Texas legislature attempted to limit the potential for abuse by an employer who required employees to waive their rights to litigate for future claims.[127]

Following 2001's legislative reform, a preemptive waiver to litigate future injuries became theoretically unenforceable in Texas courts. In spite of the legislative reform, employers found a way around this legal hurdle by requiring employees to sign arbitration agreements usually before an injury occurred.[128] By 2012, fourteen percent of non-subscribing employers required employees to agree to resolve disputes by arbitration.[129] Ninety percent of non-subscribers required employees to sign the arbitration agreement prior to employment before any possible work-related injury could occur.[130] Injured employees brought suit alleging that arbitration agreements violated Texas law. However, Texas courts consistently held that the Federal Arbitration Act preempts the Texas statutory prohibition.[131]

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could calculate possible negligence and benefits claims with a great degree of accuracy. The employer would know what remedy employees could utilize, thus lowering employers' costs. An employer would provide employees with an "often inferior benefits package" because the employer required prospective employees to waive the rights that would have been waived under a state-run workers' compensation system. *Id.*

126. *Id.*

127. *Id.* at 342–43 (citing TEX. LAB. CODE ANN. § 406.033(e) (West 2009)).

128. *Id.* at 343–44.

129. WORKERS' COMP. RESEARCH & EVALUATION GRP., TEX. DEP'T OF INS., *supra* note 111, at 32. The number of employers requiring arbitration increased from nine percent in 2010. *Id.*

130. *Id.* This number was at ninety percent as of 2012 and was ninety-eight percent in 2010. *Id.*

131. *In re* Bison Bldg. Materials, Ltd., Nos. 01-07-00003-CV, 01-07-00029-CV, 2008 WL 2548568, at *10 (Tx. Ct. App. June 26, 2008) ("We . . . now hold that the FAA preempts any potential application of the Texas non-waiver provision stated in Labor Code section 406.033€ to prevent enforcement of the arbitration clause stated in the [p]lan."); *In re* Border Steel, Inc., 229 S.W.3d 825, 832 (Tx. Ct. App. 2007) ("The Texas Labor Code provides that any agreement by an employee to waive a cause of action or any right described in section 406.033(a), which is executed before the employee's injury or death, is void and unenforceable. We have already determined that the provisions of the FAA are applicable to this case, based on Border Steel's interstate activities. Therefore, the FAA preempts the application of the Texas non-waiver provision to prevent the enforcement of the Arbitration Agreement at issue here."); *In re* R & R Pers. Specialists of Tyler, Inc., 146 S.W.3d 699, 703–04 (Tx. Ct. App. 2004) ("Consequently, the FAA preempts state statutes to the extent they are inconsistent with that Act . . .

Therefore, the Texas statue preventing employees from waiving rights over future injuries was rendered ineffective through arbitration agreements prior to employment. The rights of injured employees to compensation benefits continues to be eroded through arbitration agreements signed prior to injuries. Employees are unlikely to understand the significance of what they are signing and are in an inherently unequal bargaining position since they would likely need the employment more than their employer needs them.

IV. THE FEASIBILITY OF EMULATING OPT-OUT ACTS IN STATES WITH CONSTITUTIONAL PROVISIONS

It is easy to lose focus on who workers' compensation was originally designed to protect when viewing workers' compensation plans solely through a financial lens. States created constitutional provisions to enact workers' compensation provisions; unfortunately, workers' compensation benefits have not kept up with inflation or the rising costs of living.[132] The debate surrounding workers' compensation cuts intensified nationally, affecting more states than just Oklahoma and Texas. In August 2014, a Florida Circuit Judge held Florida's system of workers' compensation to be unconstitutional in *Cortes v. Velda Farms*.[133] The *Cortes* Court held the exclusive remedy provision of the Florida workers' compensation act to be invalid and unconstitutional because it failed to provide for a "reasonable alternative remedy to the tort remedy it supplanted."[134] The Court in *Cortes* supported its holding by analyzing how the Legislature repealed numerous benefits since 1968, "including permanent partial disability without replacing any of them with equivalent benefits."[135] The *Cortes* Court concluded that to pass constitutional muster the exclusive replacement remedy must provide for significant benefits to the injured worker.[136] However, "without full medical care or indemnity for permanent partial loss of wage earning capacity," the Florida workers' compensation act failed to provide a reasonable alternative than originally existed in tort law.[137]

We conclude that the FAA preempts the application of the nonwaiver provision to prevent or restrict enforcement of the arbitration provisions at issue here.").

132. JACK B. HOOD ET AL., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS IN A NUTSHELL 89 (6th ed. 2016).

133. No. 11-13661, 2014 WL 6685226 (Fla. Cir. Ct. Aug. 13, 2014).

134. *Id.* at *10.

135. *Id.*

136. *Id.* at *9.

137. *Id.* at *10.

Cortes and *Vasquez* are just two examples of many of the states' recent attempts at limiting workers' compensation benefits at the expense of the injured worker without providing for some form of alternative remedy in exchange for the rights injured workers surrendered years ago in the "grand bargain." Compensation benefits are not uniform across the United States, so workers in some states experience greater benefits and protections while others struggle to survive on benefits that keep them well below the poverty line.[138] Benefits vary greatly between neighboring states so that an amputated arm in one state is worth $45,000, but in a neighboring state it is worth nearly three-quarters of a million dollars.[139] The disparity for injuries is so great that in Illinois a lost testicle is worth nearly $100,000, but in Minnesota a testicle is worth less than $5,000.[140] The constant chipping away of benefits by state legislatures allows for two men who were injured on the job in neighboring states to have vastly different outcomes.

Jeremy Lewis's and Josh Potter's stories are remarkably similar, yet have strikingly different consequences. Both men were in their 20s when they were injured on the job at southern industrial plants and each lost part of their left arms.[141] Lewis was awarded $45,000 in workers' compensation, while Potter's total benefits will exceed $740,000 during his lifetime.[142] The difference in total amounts of benefits received for a comparable injury is due to Potter losing his arm in Georgia while Lewis was injured in Alabama, only fifty miles from the Georgia line.[143] Due to Alabama's minimal workers' compensation benefits, Jeremy Lewis's life took a downward spiral

138. Michael Grabell, *U.S. Labor Department: States Are Failing Injured Workers*, PROPUBLICA (Oct. 5, 2016, 6:01 AM), https://www.propublica.org/article/us-labor-department-states-are-failing-injured-workers [https://perma.cc/C6W6-EWXN].

139. *Id.*

140. Lena Groeger, Michael Grabell, ProPublica, & Cynthia Cotts, *Workers Comp Benefits: How Much is a Limb Worth?*, PROPUBLICA (Mar. 5, 2015), https://projects.propublica.org/graphics/workers-compensation-benefits-by-limb [https://perma.cc/33XJ-V2EW] (select "Testicle" from drop-down menu listing body parts) (explaining that as of 2015, the maximum compensation for one testicle in Illinois is $73,537 but in Minnesota one testicle is worth $3,750 in workers' compensation benefits).

141. Michael Grabell & Howard Berkes, *How Much Is Your Arm Worth? Depends on Where You Work*, PROPUBLICA (Mar. 5, 2015), https://www.propublica.org/article/how-much-is-your-arm-worth-depends-where-you-work [https://perma.cc/M476-UARE].

142. *Id.*

143. *Id. See also* Groeger, Grabell, ProPublica & Cotts, *supra* note 140 (depicting the cost of a limb state-by-state).

after he lost his arm. Lewis claims that after his injury he "lost everything" that he owned from his three-bedroom home in a new development to his three new cars.[144] Lewis then had no other option but to move his family into a "rundown singlewide trailer on the outskirts of town."[145] Lewis's tragic story is but one of many injured workers for whom the workers' compensation failed them. Workers' compensation benefits are now at the lowest in decades since the 1970s and are not providing for injured workers in the way that the program was originally designed.[146]

Opt-out proponents argue that opt-out provisions will keep costs low without cutting benefits for injured workers. Supporters cite Texas as a model for other states. A 2016 study showed that Texas has one of the most affordable workers' compensation coverage whereas Alabama's compensation rates, despite its limited compensation benefits plan, are higher than Texas's.[147] Despite its flaws, the Texas system can provide a model for other states to follow when constructing opt-out systems. The *Cortes* Court summarized the challenge to workers' compensation seen nationally—multiple classes of benefits that were eliminated and cut back without replacing them with anything.[148] Injured workers are no longer receiving what they originally contracted for and the "grand bargain" has become distinctly one sided. Under the Texas system, workers can opt out of alternative coverage and instead retain the right to sue in tort.[149] The biggest challenge for other states seeking to implement some form of alternative benefit plan is the same issue faced by Oklahoma, which led to a constitutional challenge over the creation of two classes of workers singled out for disparate treatment.

Opt-out plans have significant setbacks to the rights of injured workers that should be carefully evaluated when states decide whether or not to implement a form of opt-out plans like in Texas. For example, opt-out plans usually have a shortened time frame for

144. Grabell & Berkes, *supra* note 141.

145. *Id.*

146. *Id.*

147. Don Jergler, *Report Shows California and New Jersey Have Highest Workers' Comp Rates*, INS. J. (Oct. 18, 2016), http://www.insurancejournal.com/news/national/2016/10/18/429683.htm [https://perma.cc/FC63-3DRS].

148. Cortes v. Velda Farms, No. 11-13661, 2014 WL 6685226, *8–9 (Fla. Cir. Ct. Aug. 13, 2014).

149. Stephanie K. Jones, *Opting Out of Texas Workers' Comp Doesn't Have to Mean Going Bare*, INS. J. (June 5, 2014), http://www.insurancejournal.com/news/southcentral/2014/06/05/330945.htm [https://perma.cc/ZPJ3-UKHB].

reporting injuries.[150] In Texas, injured workers covered under opt-out plans are required to report workplace injuries in twenty-four hours versus the typical thirty days required by most state-run programs.[151] Additionally, medical coverage is often limited in terms of length.[152] Non-subscribing employers can also have less state oversight than employers enrolled in traditional plans and employers can terminate benefits under opt-out plans if the employees do not follow the guidelines.[153] In 2015, NPR and ProPublica looked into 120 companies who set up their own injury benefit plans under the OEIBA and compared them with traditional state-run programs. In this study, they found that employers were able to pay workers far less under OEIBA than they would under traditional workers' compensation plans.[154]

CONCLUSION

Texas's opt-out plan can provide a model for other states, particularly in light of the way multiple state legislatures chipped away at benefits for injured workers over the years. While the Texas model is a far from perfect solution to the rising costs and limited benefits, portions of the system could work in other states even if they have existing constitutional provisions for state-run workers' compensation systems. The great fault in the OEIBA was due to the creation of two disparate groups of employees. However, like the *Cortes* Court held, the existing system has left the workers' compensation system to be a mere shadow of itself and nothing more than a "pathway to poverty for the injured worker."[155] Perhaps a viable solution would be to

150. Suzzanne W. Decker & Nicole K. Whitecar, *Opt-Out Workers' Compensation Plans Could be a Beneficial Option*, MILES & STOCKBRIDGE (Oct. 28, 2015), http://www.milesstockbridge.com/labor-employment-benefits-immigration-blog/posts/opt-out-workers-compensation-plans-could-be-beneficial-option/ [https://perma.cc/L7B4-ZJAQ].

151. *Id.*

152. *Id.*

153. *Id.*

154. Grabell & Berkes, *supra* note 11 (explaining that Costco, a non-subscriber, paid $15,000 for an amputated finger, but Wal-Mart paid $25,000 for the same amputated finger).

155. Howard Berkes, *Labor Secretary Calls Workers' Comp Opt-Out Plans a 'Pathway to Poverty,'* NPR (Mar. 25, 2016, 1:29 PM), http://www.npr.org/sections/thetwo-way/2016/03/25/471849458/labor-secretary-calls-workers-comp-opt-out-plans-a-pathway-to-poverty [https://perma.cc/6RCY-MHZW] (explaining that former Labor Secretary Thomas Perez confirmed an investigation into opt-out programs that saved millions of dollars but created a "pathway to poverty" for injured workers).

incorporate a provision to allow for injured workers' to opt out of either the traditional workers' compensation system or the opt-out programs and instead sue for civil monetary damages. Although suing in tort is riskier than accepting a predetermined, albeit limited, set of monetary awards, few injured workers are able to support themselves with a decent quality of life under existing workers' compensation systems throughout the United States.

The Texas legislature already eliminated common law defenses for negligence including assumption of the risk, negligence of a co-worker, and contributory negligence. This, too, is an equalizer for injured employees. If this were expanded into other states, then perhaps more employers would be concerned about liability due to the elimination of commonly used defenses and expand benefits under opt-out plans to avoid tort liability. The system that has arisen today has left significant room for improvement and expansion with regards to treatment for injured workers. On the other hand, if employers were to adopt alternative benefit plans that have shown a reduction in costs to employers than employers may be more inclined to implement opt-out programs. Finally, the Texas system permits arbitration agreements prior to employment, which include a waiver for any future injuries since this is governed under federal law, thus, preempting existing Texas statutes. For future states, this could present a significant problem to alternative opt-out plans since it would hinder states' ability to limit potential abuse to employees through statutory law. The Texas system has significant flaws; however, in light of expanding restrictions on workers' compensation benefits, perhaps the Texas model can provide legislatures with a feasible template in constructing opt-out legislation in the future.

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