OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NORTHBROOK NATIONAL INSURANCE COMPANY, Petitioner v. LARRY W. BREWER, ET AL.

CASE NO: 88-995

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IN THE SUPREME COURT OF THE UNITED STATES

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER, ET AL.

No. 88-995

Washington, D.C.

Wednesday, October 4, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:57 p.m.

PETER MICHAEL JUNG, ESQ., Dallas, Texas; on behalf of the Petitioner.

TIMOTHY M. FULTS, ESQ., Dallas, Texas; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE RENQUIST: We'll hear argument next in Number 88-995, Northbrook National Insurance Company versus Larry Brewer.

Mr. Tucker -- Mr. Jung, you may proceed whenever you're ready.

ORAL ARGUMENT OF PETER MICHAEL JUNG

ON BEHALF OF THE PETITIONER

MR. JUNG: Mr. Chief Justice, and may it please the Court:

In this case the Court is called on to revisit an issue which it last addressed in 1961, the right of workers' compensation insurers to avail themselves of diversity jurisdiction.

The case involves questions of statutory interpretation relating to the direct action proviso of 28 U.S.C. Section 1332(c) which deems an insurance company to share the citizenship of its insured in a direct action against the insurer of a policy or contract of liability insurance.

The facts of the case are extraordinarily simple. In April of 1986 Larry Brewer, who was a Texas citizen, allegedly suffered a disabling on-the-job injury while working for Whitmire Line Clearance, Incorporated, which is a Texas corporation.

Brewer filed a claim for benefits with the Texas Industrial Accident Board, and in May of 1987 that board made an award in Brewer's factor.

Pursuant to Texas law, that award was not against Whitmire but, rather, against Whitmire's compensation insurance carrier, Northbrook National Insurance Company. Northbrook is an Illinois corporation.

Northbrook chose to exercise its right under Texas law to bring a suit to set aside the board award, and it brought that suit in federal district court on the basis of diversity of citizenship between itself and Brewer.

It did so with full awareness of two adverse Fifth Circuit predecents which had applied the direct action proviso to Texas workers' compensation suits where the employee and the employee shared common citizenship.

Both the District Court and the Fifth Circuit panel felt obliged to follow those precedents, but each court questioned their soundness, particularly in light of a Sixth Circuit precedent holding that workers' compensation suits by insurers do not fall within the direct action proviso.

In my argument today I will first briefly address the context and legislative history of the direct action proviso and then turn to the two issues in this appeal, first, whether this is, indeed, a direction action on a policy or contract of liability insurance and, second, whether an action

by an insurer rather than against an insurer falls within the direct action proviso.

As this Court is aware, in certain states -- notably Louisiana and Wisconsin -- an injured party is permitted to bring a direct action against the tortfeasor -- excuse me, against the tortfeasor's liability insurance carrier without joining the tortfeasor and without first obtaining a judgment against the tortfeasor.

In 1954 this Court not only sustained the constitutionality of such statutes, but also held in Lumberman's Mutual Casualty Company versus Elbert that such suits could be filed in federal court on the basis of diversity of citizenship between the injured worker plaintiff -- injured emp -- plaintiff --and the insurance company defendant.

At about that same time attorneys for injured parties in the state of Louisiana began to disfavor their own state court system due to the unusual Louisiana appellate rule which permits free and open reexamination of jury findings and verdicts, and the results of these two phenomena was a massive increase in the dockets of the federal courts in Louisiana.

The direct action proviso was the congressional response to this situation.

By deeming the out-of-state insurer to share the citizenship of his in-state insured, the statute effectively

eliminated most direct actions from the federal courts and Congress --

QUESTION: Do --do -- do you get a jury trial in Louisiana on a negligence claim if you're a plaintiff?

MR. JUNG: I regret to say I do not know that, Your Honor. I only know what --

QUESTION: Well, that -- you're from Texas.

MR. JUNG: That's correct, Your Honor, but the legislative history suggests that you do because Congress was concerned about plaintiffs choosing the federal courts so as to avoid the reexamination problem that prevailed in Louisiana state courts.

And Congress in enacting the direct action proviso expressed concern, not only about the dockets in Louisiana, but about the fact that direct actions filed by injured parties in the federal courts did not fall within what Congress perceived as the spirit and intent of diversity jurisdiction.

Now, the congressional focus throughout the legislative history is on suits by injured parties against insurance companies and on the fact that such plaintiffs, if they come from in state and file their suit in federal court, have no need of the federal courts to avoid possible local bias.

There is no indication in the legislative history

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that Congress had any concern about the filing of suits by insurance carriers.

Likewise, nothing indicates that Congress specifically had workers' compensation actions in mind when it enacted the direct action proviso.

It stated that there were, at the time, two states, Louisiana and Wisconsin, which had direct action statutes.

Obviously if workers' compensation suits -- statutes had been regarded as direct action statutes, that statement could not have been made.

Only three years earlier this Court in the Horton versus Liberty Mutual Insurance Company case had held that notwithstanding the withdrawal of removal jurisdiction over such suits, original diversity jurisdiction over workers' compensation suits persisted, and yet nothing in the legislative history of the direct action proviso suggests any intent to tamper with or alter this Court's decision in Horton or to otherwise affect workers' compensation suits.

The Congressional purpose in enacting the direct action proviso is mirrored in the language which Congress chose, particularly the term direct action.

The lower courts have had considerable experience in distinguishing between direct actions that fall within the proviso and other actions against insurance companies that do not.

They correctly reasoned that direct action was used by Congress as a term of art to refer to a suit against an insurance company on a derivative liability, by which is meant that the cause of action asserted against the insurance company is one which could instead have been asserted against the -- the insured.

QUESTION: May I stop you there. Why is it limited to that?

You said it's a derivative liability.

It arises because the insurance company has issued a policy to somebody who would otherwise be liable. Why doesn't that apply equally in workmen's compensation or fire insurance or automobile insurance? Why limit it to negligence cases?

MR. JUNG: It is not necessarily limited to negligence cases, Justice Stevens.

QUESTION: You -- you would apply it to a fire insurance policy?

MR. JUNG: No, Your Honor, because that is not a derivative liability. Fire insurance is two-party insurance between the injured person --

QUESTION: I see.

MR. JUNG: -- and the insurer.

QUESTION: So, it's insurance that insures the insured against liability to an approximate point --

MR. JUNG: To another person, a third party.

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QUESTION: -- which is exactly what workmen's compensation is.

MR. JUNG: Which is exactly what it is, Your Honor, in most states, but not in Texas and some other states.

QUESTION: Well, would you agree that in most states if the -- if the employee had the option between suing the employer or the insurance company, it would be a direct action?

MR. JUNG: I would stop just short of agreeing with that, Your Honor, and would say this. Congress clearly in the legislative history of the direct action proviso had in mind tort statutes.

QUESTION: Well, I understand that.

MR. JUNG: It still takes the Court a little bit afield from that. But analytically in states where an employer is liable, analytically that is indistinguishable from a direct action.

QUESTION: Well, then, why does it stop being a direction action because it's the legislature of Texas rather than the plaintiff who makes the decision that you shall always sue the insurance company?

MR. JUNG: Well, the legislature not only decided that you shall sue the insurance company directly, it decided that you have no cause of action against the insured employer.

QUESTION: Is that true if -- if the insurance

policy had lapsed or if, in fact, there was no insurance or sometimes the insurer -- is the employer scot-free then?

MR. JUNG: He is scot-free of liability for workers' compensation benefits. He may well be liable on standard common law theories, but there is not anywhere near a complete congruence.

QUESTION: But he has no liability under the Texas workmens' compensation statute if he fails to insure?

MR. JUNG: That is correct. An employer in Texas can never be liable for workers' compensation benefits with the exception of some very specific self-insurance provisions which require posting of bonds and so forth.

Apart from that, he may be liable at common law for his own negligence, just as any negligent party.

QUESTION: But supposing he's not negligent? Because workmens' compensation applies even in the absence of negligence. Then it would be wise.

Of course, he -- he -- I suppose the employer would risk criminal responsibilities or something like that. But to just falsely represent that they have insurance coverage --

MR. JUNG: Well, for falsely representing, he would risk criminal liability, but in fact, workers' compensation insurance is voluntary in Texas, and an employer who wishes to run the gauntlet of having common law liability is not obligated to purchase workers' compensation insurance.

QUESTION: I see.

MR. JUNG: And that's a fairly unusual feature of the Texas scheme.

It's a feature that we believe is dispositive of this case in that in Texas workers' compensation liability on the insurance carrier is a primary liability, not a derivative liability, and the cause of action asserted against the insurer for workers' compensation benefits is not a cause of action which could be asserted against the employer.

QUESTION: And for that reason it's not a direct action?

MR. JUNG: For that reason it is not a direct action, Your Honor.

QUESTION: What kind of an action is it?

MR. JUNG: It's an action. There's no question about that.

QUESTION: It's not an indirect action, is it?

MR. JUNG: It is not an indirect action, and yet the courts have said that any action which is filed against an insurance carrier does not merely because it is filed directly against that insurance carrier qualify for the term of art direct action.

If that had a more specific meaning than that as is reflected in the legislative history and the context of the statute.

QUESTION: You don't know what kind of an action it is. It is not indirect, and it's not direct. It's something else.

MR. JUNG: That's correct, and there are many cases in the lower courts where there are suits on two-party insurance, say, against a fire insurer for failing to pay a claim, and the courts have said that is not a direct action. It is something else, and they haven't given another label to it.

The statute applies by its terms not to direct actions generally, but to direct actions against insurance companies, and the Fifth and Sixth Circuits have split on the interpretation of that provision and the application of it to workers' compensation suits filed by insurers rather than against insurers.

The Fifth Circuit has reasoned that the entire workers' compensation process must be treated as a claim by an insured worker against an insurance carrier to recovery money, and has held in Campbell versus Insurance Company of North America that a workers' compensation suit by an insurance company is, in fact, the same thing as a workers' compensation suit against an insurance company. And the Court also reasoned that it would be unfair to deny a federal forum to an injured worker, but to afford that forum to an insurance company.

The Sixth Circuit, on the other hand, in Aetna Life and Casualty Company versus Greene reasoned first, that there is nothing in the direct -- in the legislative history of the direct action proviso to suggest its application to suits by insurers; second, that indeed, such suits do fall, unlike suits by injured workers, within the spirit and purpose of diversity jurisdiction; and, finally, that it would do unwarranted violence to the language used by Congress to say that a suit brought by an insurance company is, in fact, against the insurance company.

And Congress had good reason to choose the phrase "against the insurance company" when drafting the direct action proviso. Where an injured worker files a suit, generally speaking, he is -- files suit in the state in which he lives.

And if he chooses a federal court in preference to his own home state court, he does so for gratuitous reasons of litigation strategy unrelated to the purposes that the framers in the original Congress had in mind in enacting diversity jurisdiction.

Direct actions brought by out-of-state insurers, on the other hand, partake of all the classical incidents of diversity jurisdiction. They represent an attempt to avoid actual or perceived local bias in the state courts. Thus, the Fifth Circuit's focus in Campbell on the big picture was, we

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submit, a blurred focus. The focus should not be on who filed the administrative claim or on who's seeking money from whom or on who bears the burden of proof, but it should be on who made the decision to bring this dispute in a federal court and on whether the likely reasons underlying that decision are in accord or in discord with the purposes of diversity jurisdiction.

QUESTION: May I ask, Mr. Jung, in the area of negligence insurance coverage and the like, are there cases resolving this by or against question whether an insurance company might have brought suit against the prospective plaintiff and the insured to determine whether there was coverage or something like that?

MR. JUNG: There are indeed, Your Honor, and ironically they're in the Fifth Circuit. And in both of the cases, Dairyland Insurance Company versus Makover and Evanston Insurance Company versus Jimco, the Fifth Circuit has limited Campbell to its facts and to the context of workers' compensation insurance.

And in those cases an insurer did what Your Honor described, brought a reverse direct action in Louisiana against the injured party/would-be plaintiff and against its own would-be insured to determine the coverage question, and the courts entertained the suit reasoning that that is not a direct action.

Indeed, in the Evanston case, the Court went so far as to say, "The direct action proviso has no applicability to suits by insurers."

QUESTION: Did they say it was not a direct action or it wasn't by the insurance company?

MR. JUNG: They went off on by the insurance company --

QUESTION: Yeah, I understand.

MR. JUNG: -- and they distinguished -- they limited Campbell to its facts is basically what the Fifth Circuit in this case said that they had done.

QUESTION: Are there any cases in which an -- insurance companies that originally bring an action realigned?

MR. JUNG: I'm not aware of any cases in the diversity context where the party who physically brings the suit and files the complaint has been realigned as the defendant.

We have that in Skelly Oil in the declaratory judgment cases in federal question jurisdiction, but that rests on some different issues involving -- arising under as used by Congress in 1331. I'm not aware of any case in the insurance context or otherwise where the party who files the suit in a diversity case has been realigned as a defendant.

QUESTION: In diversity when there is a realignment, then there has to be a reassessment of the residence of the

parties. I assume the same would happen here and that a suit originally brought by could be against if there'd been realignment, although that's not presented here.

MR. JUNG: Well, I suppose that's theoretically possible, Justice Kennedy, but there has been, as I've said -- there've been a lot of sorting out of who's adverse to whom. The City of Indianapolis case is a good example of that, but there've been, to my knowledge, no case where you -- except -- went so far with that as to make the person who filed the suit anything other than a plaintiff.

You may have made some other co-parties plaintiff or defendant according to their true interests, but never has the party who under rule 3 commenced the case by filing the complaint with the court been construed to be the party against whom the case was brought.

QUESTION: Is there an overtone of a race to the courthouse in these circumstances?

MR. JUNG: Your Honor, unfortunately at some times in Texas workers' compensation litigation, there is a race to the courthouse because even in state court, there can be two different forums that are available.

There was no race to the courthouse in this case. Mr. Brewer did not file a state court suit. Unfortunately, the direct action proviso makes a suit against an insurance carrier in state court not removable to federal court. And so

in that sense, if either party has the option to bring suit and if the out-of-state insurer desires to be in federal court, it's to his advantage to file the suit first, whereas the injured worker may have an advantage in filing in state court first. But that's a fairly unusual situation and it's not the situation in this case.

We believe that the Fifth Circuit's search for symmetry in Campbell was a search for false symmetry. The distinction between suits by insurers and suits against insurers is rooted in the materially different situations faced by the parties.

The Fifth Circuit's search for fairness in Campbell has ironically produced unfairness by affording an unquestionably neutral forum to the injured worker while denying an unquestionably neutral forum to the insurance carrier.

And finally and perhaps most importantly --

QUESTION: Well, of course, Congress decided that wasn't all that important in negligence cases.

MR. JUNG: Well, in negligence cases, Your Honor, you still have removal. In federal -- excuse me, in workers' compensation cases you do have the anti-removal statute, 1445(c), which prohibits removal of workers' compensation cases. But an ordinary negligence suit filed against an out-of-state party in state court can be removed --

QUESTION: No, I'm saying -- I'm talking about the -

-

MR. JUNG: The direct action?

QUESTION: -- where the direct action statute clearly applies. They decided that the prejudice to the fact that the insurance company was out of state wasn't sufficient to justify federal jurisdiction.

MR. JUNG: Looking only at the statute, one could come to that conclusion. If you review the legislative history, what I think is more apparent is that Congress simply didn't focus on the removal problem.

Throughout the legislative history there is a preoccupation with the state of Louisiana and with the phenomenon --

QUESTION: And they thought this was not the kind of litigation that belongs -- that belongs in federal court.

MR. JUNG: Well, they were faced with the circumstance where plaintiffs, injured parties were filing suit, and there's nothing in there to suggest that they even thought about the situation where the injured party had filed suit in state court and the insurance company wanted to remove. That is not what was causing the crowded dockets in Louisiana.

It is a basic anomaly of the statute in that it does, as Justice Blackmun indicated, create a race to the

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courthouse in some situations.

QUESTION: Of course, in these cases, I suppose, the prejudice against the insurance company is not to much because it's out of state. It's because it is an insurance company.

MR. JUNG: Well, there can be that. If we had filed this case, though, in the state court in Lamar County, Texas, we would have been in front of an elected judge who depends on people like Mr. Brewer to elect him every four years and who depends for campaign contributions on the local bar, and we would have been the insurance company from Chicago.

And so as trite as it may sound, we filed the suit in federal court for all the traditional diversity jurisdiction reasons, to try and get a more neutral forum, one in which an out-of-state company could stand on an even footing.

Finally, the Court in Campbell overlooked the plain language that Congress used. In the Horton case this Court was faced with a clear and unambiguous statute that withdrew removal jurisdiction of workers' comp cases, but just as plainly and unambiguously left unaffected, the provisions allowing original jurisdiction. And this Court said in Horton that it must take Congress as its word.

Here we have a statute that withdraws federal diversity jurisdiction of direct actions against insurers but says nothing about direct actions by insurers.

Again, we submit, this Court should take Congress at its word.

I'd like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Jung.

Mr. Fultz, we'll hear now from you.

ORAL ARGUMENT OF TIMOTHY M. FULTS

ON BEHALF OF THE RESPONDENT

MR. FULTS: Mr. Chief Justice, and may it please the Court:

The issue for determination before the Court today is one of construction and one of interpretation -- construction and interpretation, of course, of the direction action proviso to section 1332.

It is the Respondents' contention that Fifth Circuit's construction of that proviso in the Campbell case is right and that the Sixth Circuit's construction of that proviso in the Greene case is wrong.

The Campbell decision does two things or is two things. It is consistent with the underlying Congressional intent regarding workers' compensation matters in general.

The second thing that the Campbell decision does is move or put in a local forum an essentially local dispute.

The decision in Greene, on the other hand, constitutes an unwarranted extension of federal jurisdiction

into what is essentially a local matter, and it creates the very type of problems that congressional intent and court decisions have tried to eliminate in the workers' compensation context.

QUESTION: Well, Mr. Fults, when you described something as a local matter, do you mean that it turns on issues of local law?

MR. FULTS: I mean that it turns on issues of local law, Your Honor, and also that the liability issue is one that is -- that is between the individual and his employer. It is a Texas resident in this case working for a Texas employer, hurt on a Texas job. The fact that the Texas --

QUESTION: But the --

MR. FULTS: -- employer was insured doesn't affect that basic liability issue.

QUESTION: But isn't that true of lots of diversity cases, that it's -- all you need is one out-of-state party, and you do get a federal forum for what is essentially strictly local law?.

MR. FULTS: Those are the -- there are certain types, Your Honor, and I believe what we have in the workers' compensation context is a history of legislative intent designed to take these types of cases.

QUESTION: And what -- legislative intent found in

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the prohibition against removal?

MR. FULTS: Exactly, Your Honor. Senate Reports 1830 to the 1958 amendment --

QUESTION: But there was no effort to remove here, was there?

MR. FULTS: There was no effort to remove in this case.

QUESTION: So, what -- what else do you derive your conclusion that they -- they -- Congress didn't want workmen's compensation cases in federal court?

MR. FULTS: From the legislative history, Your Honor, in almost those exact words, in Senate Report 1830 that no federal question is involved. Also, from this --

QUESTION: But in -- in Horton, this Court recognized, did it not, that where the insurance company brought the action in federal court and did not attempt to remove it, contrary to the statute, that that was consistent with Congressional policy.

MR. FULTS: It -- that is exactly what the holding in Horton was, Your Honor, because at the time Horton was decided in 1961 we did not have this proviso. We did have the amendment to section 1445 that eliminated removal of workers' compensation. Then we have the Horton case where the Court holds that because section 1445 was amended as it was, these cases can't be removed, but we can't infer from that they

can't be originally filed in federal court.

I would note that in the Horton case in the dissent a very clear statement was made that although section 1332 doesn't specifically prohibit original filings in federal court, a clearer expression of Congressional dislike for saddling federal courts with such cases could hardly be imagined. That's the underlying thought.

QUESTION: Then something came after Horton, you see.

MR. FULTS: And then after Horton we have the amendment to or the direct action proviso, the amendment to section 1332(c).

QUESTION: How much money's involved in this case?

QUESTION: When was that?

MR. FULTS: The board award, Your Honor, was $36,000, the board award being the award to Mr. Buer -- Mr. Brewer by the Texas Agency, the Industrial Accident Board. It was enough at the time. It would not be enough now for federal jurisdiction.

QUESTION: That was the one case.

MR. FULTS: Yes, sir.

It's instructive --

QUESTION: Do you know when the proviso was enacted, Mr. Fults?

MR. FULTS: '64, Your Honor.

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QUESTION: '64, thank you.

MR. FULTS: It's important, I believe, in analyzing congressional intent in the workers' compensation context to look a little bit at the history. Workers' compensation statutes exist in all 50 states. They exist in the substantive body of federal law. They are universally regarded as designed to benefit the worker.

There's a legislative tradeoff. Common law rights are taken away. Statutory rights are given.

Because of that legislative tradeoff, those given statutory rights must be construed in favor of the worker.

This court has held that in United States versus Demco in 1966 the purpose of the workers' compensation statutes is to provide a quicker and more certain remedy for the worker.

QUESTION: But that doesn't mean jurisdictional statutes should be construed in favor of one party or the other.

MR. FULTS: Your Honor, it does not directly mean --

QUESTION: Well, I --I -- I would suggest to you it doesn't mean it at all, directly or indirectly.

MR. FULTS: Your Honor, I agree with that, but I do think that it is important because of the express congressional intent that a federal forum is not an

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appropriate forum for a workers' compensation case for a delay.

QUESTION: Well, that's -- that's quite a different argument, to say that your argument carries out congressional intent.

But to say that because workmen's compensation is involved and because state workmen's compensation statutes are construed in favor of the workers, therefore, we should construe a jurisdictional statute in favor of the worker is quite a different argument.

MR. FULTS: It's a different argument, Your Honor, but I think it takes us to the same place because what we see, Respondent contends, starting in 1954 with the Elbert case, going through the 1958 amendment to section 1445, through Horton and through the 1964 amendment that we're concerned with today is a history of recognition that a workers' compensation case is essentially local in character and should be decided in a local forum.

Otherwise, what we have is --

QUESTION: If it's a local forum, why are you here?

MR. FULTS: We don't believe --

QUESTION: Are you going to call us a local forum?

MR. FULTS: No, Your Honor, and we do not believe that this case should be here for these reasons.

Mr. Brewer was injured in 1986. A board award was

given in 1987.

Mr. Brewer is still wondering why he has not received his award. That is not because of any detriment or any derogation of a federal forum.

It is because most states, such as Texas, have specific statutes, such as our section 23-101, that give workers' compensation cases priority.

This is in line with the overall federal purpose in a workers' compensation case of a quick and efficient remedy for the worker. We don't have that in the federal forum.

QUESTION: You say that's a federal purpose. Did you mean to say that?

MR. FULTS: I meant to say an intent, a federal intent. We see that -- a congressional intent throughout the legislative history.

QUESTION: In the '64 statute?

MR. FULTS: The 1964 legislative history does not mention workers' compensation directly.

QUESTION: So, you're relying on the earlier 1958?

MR. FULTS: Yes, your honor.

QUESTION: Which this court said in Horton still permitted the insurance company to become a plaintiff?

MR. FULTS: Yes, it does.

And we then go further to have the direct action proviso that provides in a direct action against an insurer,

which we believe we do have here --

QUESTION: And where Congress said nothing about workmen's compensation?

MR. FULTS: Yes, sir. And that is -- that is the holding in the Hernandez case, that is the holding in Campbell, that is recognized even in Greene, that we have a direct action and Congress by -- by not expressly mentioning a workers' compensation case did not exclude it.

The language in Hernandez is obviously when they said "all direct actions," we meant all direct actions. And, therefore, workers' comp falls directly within that orbit.

QUESTION: May I ask? You said earlier about the rights of the employee. As I understand from your opponent, the employer -- it's really entirely up to the employer whether there shall be coverage for the employee because the employer is totally free to just not buy any insurance and just, in effect, opt out of the program completely.

MR. FULTS: Texas does have a voluntary workers' compensation system. Their opting out is not without penalty.

QUESTION: So, the employee really has no right to be covered by the statute?

MR. FULTS: That's right, and some are and some aren't.

QUESTION: Yeah.

MR. FULTS: And it -- exactly.

QUESTION: Yeah.

QUESTION: Mr. Fults, I don't understand what your point is.

Is your point that this statute covers only workmen's compensation cases and all workmen's compensation cases? Is that your point?

MR. FULTS: No, Your Honor. My point is that it covers all directions and that workers' compensation cases are such direct actions and, therefore, this proviso does cover this workers' compensation case, no matter who brings the suit.

QUESTION: Why does it contain the language against the insurer of a policy or contract of liability then?

MR. FULTS: I don't know why, Your Honor, and the Court has obviously put its finger on the weakest point of our case.

The language says in a direct action against an insurer -- and if I understand the Court's question, it's how can you stand there and say against an insurer means by an insurer.

QUESTION: Right. Right. I didn't want to put it that harshly, Mr. Fults, but that's basically what's troubling me.

MR. FULTS: In answer to that -- and that is at first blush, Your Honor, it does seem difficult or impossible

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to reconcile "by" with "against." This is why I have tried to stress the legislative intent behind the statute.

My speculation is that the contingency was probably not thought of at the time. That I don't think is appropriate to take that approach in a formal determination. That's my speculation of why it is.

QUESTION: I might be willing to make that leap of faith if -- if it -- if it made no sense the way it's written. But you can't say it doesn't make any sense the way it's written.

I mean, it does serve the classic purpose of diversity jurisdiction the way it's written. It protects the out-of-state insurance company against being stuck in an in-state suit, but -- but does not give the in-state plaintiff the opportunity to do the same.

MR. FULTS: In theory, Your Honor, I believe that that's true, and the theory I'm talking about is the theory of diversity jurisdiction that there really would be local prejudice.

I think that Congress has manifested and definitely manifested an intent that out-of-state incorporations -- out-of-state corporations are not entitled to that benefit because in 1954, section 1445 was amended saying corporation, you cannot remove this workers' compensation case to federal court.

There is the congressional intent, that it is not a diversity theory situation, and that's the distinction that I would make.

QUESTION: Your argument, certainly, is similar to that in the last case, isn't it?

MR. FULTS: I'm sorry, Your Honor, I didn't hear you.

QUESTION: I say, your argument, certainly, is similar to that made in the preceding case today.

MR. FULTS: Yes, sir.

QUESTION: You just haven't cited Holy Trinity yet.

(Laughter.)

QUESTION: There's been no discussion of whether or not this is a policy or contract of liability insurance. Is a health insurance policy the kind of -- that people have to cover their family against health, is that a liability insurance policy?

MR. FULTS: I think it would be a first policy -- a first party liability case. I think the interpretation that would be appropriate, Your Honor, is is that taken really by both Greene in the Sixth Circuit and Campbell in the Fifth Circuit?

There is no dispute among the circuits that workers' compensation is liability insurance. The definition --

QUESTION: Well, does liability insurance -- excuse

me -- does liability insurance have a well-understood meaning in the insurance industry?

MR. FULTS: The meaning cited by the Court is one that indemnifies against becoming liable, almost a -- a self-definition.

QUESTION: Well, that isn't this kind of policy in Texas, though, is it?

MR. FULTS: It does indemnify the employer against liability for this action by his employee.

QUESTION: Does the policy do that or does the state law do that? The state law does that, not the policy.

MR. FULTS: No, the policy -- if I follow the Court, the policy does it because it's required under the state law.

QUESTION: But it's not a liability policy. It's not indemnifying the insured. It's merely a promise to pay the insured for certain costs that are incurred, say, in a health policy, and I would think that the workmen's comp policy under the Texas scheme is very much like that.

I don't see that the Texas scheme makes this a liability insurance at all.

MR. FULTS: That argument is raised -- did not raise an oral argument -- has been raised by the Petitioner in his briefs, of course.

In Texas it is a voluntary workers' compensation scheme -- pardon me. The employer has the right but not the

obligation to buy workers' compensation insurance.

If he buys that compensation insurance, he has purchased an indemnity from becoming liable under the definition that's been adopted by both the Fifth and Sixth Circuits as used in the Vines case cited by both.

And that is what we believe would make that a liability action.

QUESTION: Well, if an employer purchases a health insurance policy for the employees as a fringe benefit, you wouldn't call that a liability policy, would you?

MR. FULTS: No, because there would be no liability for those health benefits otherwise. That's a perk.

In our situation the employer very well could have liability and would whether he's insured or not for an on-the-job injury caused by his negligence because of the Texas --

QUESTION: Well, not for workmen's compensation. He'd have it under common law principles of negligence.

MR. FULTS: Exactly, and because of the workers' compensation scheme he can insure with compensation insurance against that.

Again, I would go to the definition that the Vines Court used it as a policy that indemnifies against becoming liable, and it appears to me that is exactly what we have.

I think that it's important to note if the grain rationale is adopted what we would have.

As the Court has already alluded, we would have a race to the courthouse situation.

We would have a situation where an insurance carrier has the right, has the luxury of picking his forum, federal or state, but the unhappy employee, the unhappy worker, as the Campbell Court put it, does not have that luxury.

QUESTION: Well, maybe Congress can remedy the damage.

MR. FULTS: That would be possible with an amendment of section 1332(c).

QUESTION: Well, maybe the employee does have that right because if it's not -- if, taking Justice Kennedy's point, if it's not a contract of liability of insurance, then the proviso doesn't apply, and they could just go on in federal court.

MR. FULTS: If that were -- if that were the case, Your Honor, it could.

The fact of the matter in a practical sense is that both the Fifth and the Sixth Circuits have expressly held that this type of workers' comp situation is a liability insurance situation.

So, as a practical matter --

QUESTION: The Sixth Circuit relied on the by language, by or against point, and the direct action point.

MR. FULTS: Correct.

QUESTION: But not on the -- what the words liability insurance mean.

MR. FULTS: Correct.

The Hernandez case, not the Campbell case. Hernandez also in the Fifth Circuit expressly talks about it being a liability insurance case.

QUESTION: Of course, I suppose if we agree with your opponent on the ultimate outcome, I suppose we could straighten that out, couldn't we, and open the door to both. Say that -- in other words, if we bought his third argument -- he didn't really press it in oral argument, the one Justice Kennedy's referring to -- that would eliminate the disparity in the opportunity to get in federal court.

MR. FULTS: What it would also do, Your Honor, that I think is more --

QUESTION: Federal judges will have more business, too.

MR. FULTS: It would give judges a lot more business. And that has been the underlying concern both -- in both sets of legislative history, if you will, is not to clog the federal dockets with cases that are recognized to be essentially local in character.

We have -- the Industrial Accident Board in Texas publishes an annual report. The annual report gives statistical data on the number of cases involved.

The most recent annual report of the Texas Administrative Agency puts 7,800 -- actually 7,872 cases currently in the state courts. These are cases that would arguably fall over to the federal courts if the Sixth Circuit analysis applied.

QUESTION: But you have to a $50,000 to go into diversity now, don't you?

MR. FULTS: Yes, Your Honor, you do now.

QUESTION: Do most of those awards exceed $50,000, do you think?

MR. FULTS: The data is not compiled in that fashion. I would doubt really and truly that most fall within that category.

But, I think we would run into a very significant problem with the Horton case if we were in this position.

Horton was a $1,400 award by the board.

Total and permanent injury is the highest category of injury that -- in this workers' compensation scheme.

The Court held in Horton that even though the insurance company went to court on a $1,400 claim, it was possible that the counterclaim for benefits would come in being $14,000 over the jurisdictional amount. That was a 5 to 4 decision, and that was a very -- that -- that was the main point of the dissent is that should not be that way.

That's the situation we would find ourself in,

however, under the Court's analogy.

We would have a race to the courthouse. We would have the problem that has already been noted of a substantially crowded federal docket becoming even worse.

We would also have a delay in the resolution of claims which is directly contrary to the universally accepted policy underlying workers' compensation cases.

The effect would be to effectively eliminate the use of the Texas statute that gives workers' compensation priority. It would be -- it could potentially result in a disparity of results, also directly contrary to the underlying purposes because some courts would be in state court -- some cases in state court, some cases in federal court.

For these reasons, in the Respondents' view, an adoption of the Greene analysis would create the very problems that we have a 15-year history of trying to eliminate.

QUESTION: May I ask you a question about the Sixth Circuit case which I frankly haven't read yet. Does the -- what state statute was involved in that case?

MR. FULTS: Tennessee.

QUESTION: Does Tennessee have the same peculiarities as the Texas statute?

MR. FULTS: There are some similarities. I think, for the purpose of the Court's question, they're different.

QUESTION: For example, in Tennessee would the

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employer be liable?

MR. FULTS: The employer -- counsel are nodding, and I'm going to defer.

In Tennessee my understanding is that the employer must be joined as a party, whereas in Texas you cannot.

QUESTION: To the extent there are differences between the two states, you would have thought the Sixth Circuit might have decided the way the Fifth did and vice versa, isn't that right, that the -- the -- under that statute there's a stronger case for the -- for your side of it, your side of the case.

MR. FULTS: That would be true.

Really, the only basis for the Greene decision is the point that Petitioner raises in argument that this is a case where classical diversity theory should apply.

And, for the reasons that I have already talked about -- that being that Congress has abandoned that intent in workers' comp situations -- I believe that basis falls from the Greene case.

What we're really doing, if you will, is combining or stacking legal fiction on legal fiction.

QUESTION: See, it would seem in that case you would pretty clearly have had a direct action, but maybe you don't. Maybe it wasn't by the right party.

Does anyone ever argue that the action really

commences when the employee files the claim, and at that stage it's an action against the insurance company -- it's just a continuation of that action?

MR. FULTS: Yes, indeed, Your Honor, and that is one of the bases of the Campbell holding, that being that this -- the process viewed in its entirety is really --

QUESTION: Is an action against them.

MR. FULTS: -- a claim for the worker to get the benefits that he is entitled to.

That's why the Campbell Court said there's no distinction, really, in who brings the case. That type of analysis has been used by this court before in the Indianapolis versus Chase National Bank case that counsel alluded to in argument.

Justice Frankfurter makes a point of saying that one party's preference for federal forum is no reason to deny the plain facts of the matter.

The plain facts of this matter are that we are talking about a worker injured on the job who by statute has been given what is supposed to be an economical, uniform, expeditious remedy that will be denied to him under the Green analysis.

For these reasons, Your Honor, we think that the decision of the Fifth Circuit should be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fults.

Mr. Jung, you have ten minutes remaining.

REBUTTAL ARGUMENT OF PETER MICHAEL JUNG

ON BEHALF OF THE PETITIONER

MR. JUNG: Mr. Chief Justice, and may it please the Court:

Although the matter is outside the record, I do feel the need to respond to Justice Marshall's question. I have the Industrial Accident Board award before me, and it amounts to $56,723.99. So, this case meets the $50,000 jurisdictional limitation, even though it was filed at a time when the limitation was only $10,000.

With respect to the character of workers' compensation insurance in Texas and its status as liability insurance, I certainly did not mean to hide the ball in my opening argument on that point because I believe it's wrapped up directly with the question of direct action.

In fact if, indeed, liability insurance is an indemnity agreement and if, in fact, in the state of Texas an employer is never liable for workers' compensation benefits, then it follows that a Texas workers' compensation policy is not an indemnity agreement.

It may protect the employer from other forms of liability for common law negligence, but it does not indemnify him for workmen's compensation liability because he has no such liability.

And, for that reason, the key factor of the employer's non-liability goes to both the direct action question and to the question of liability insurance.

QUESTION: Well, can't it be said that he has no liability unless he voluntarily subjects himself to some sort of scheme such as by buying the insurance in which case his liability is substituted by the insurance scheme?

MR. JUNG: He does not have any liability even if he buys the insurance. He may obligate the insurance company, but he does not obligate himself.

And, if a workers' compensation insurer becomes insolvent in Texas, the employer does not become liable for those benefits.

Equally well, an employer could provide any other form of first-party insurance.

For example, accident insurance. If I as an employer provide accident insurance for the benefit of my employees, no one would seriously argue that that was liability insurance.

What workers' compensation insurance is in Texas is a specialized form of accident insurance protecting the employee for on-the-job injuries, even though the employer would not have been liable for those injuries.

QUESTION: Mr. Jung, lots of your -- a major part of your argument really is unique to Texas, isn't it?

MR. JUNG: Texas and Washington State.

QUESTION: So, if we -- we could agree with you without resolving the conflict, couldn't we?

MR. JUNG: I believe you could. Texas and Washington State have this scheme, and my research was inconclusive as to whether it exists elsewhere in the country, but at least those two jurisdictions.

QUESTION: It certainly was no part of the justification for the Sixth Circuit's decision, which we thought -- with which we thought there was a conflict?

MR. JUNG: Absolutely not, although the Sixth Circuit did focus on the fact the employer and the insurance carrier were jointly and severally liable in Tennessee.

Unfortunately the Fifth Circuit did not notice or pay significant attention to that on -- that particular factor of its own state's law in Texas.

In fact, the Respondent argues that Campbell is right and Greene is wrong. There is serious doubt even within the Fifth Circuit concerning the Campbell decision.

In this case the Court said that Campbell stands on weak jurisprudential legs even in the Fifth Circuit, and it should be limited to its facts and has been limited to its facts.

QUESTION: Well, it -- it stuck to it, and that was the basis for its decision in this case.

MR. JUNG: It did so, Your Honor, because of the rule that one Fifth Circuit panel cannot overrule another Fifth Circuit panel.

QUESTION: Well, I agree with that.

MR. JUNG: The Court did not --

QUESTION: But the issue we have before us is whether that decision is right.

MR. JUNG: That is correct, Your Honor.

The Court did not take the case en banc in the Fifth Circuit, even though the panel strongly hinted that it should do so. And, quite frankly, we expected to argue this case in the Fifth Circuit en banc rather than in this court.

QUESTION: So, we have to assume that the entire Fifth Circuit agrees with the rule of law in that circuit.

MR. JUNG: Well, that it does or that the case does not otherwise meet the extraordinary requirements necessary for en banc consideration, which I must admit --QUESTION: Not important enough for the Fifth Circuit, but important enough for us?

MR. JUNG: Exactly. Well, I was greatly pleased when the Court agreed to hear this case, but -- and disappointed when the Fifth Circuit declined to take it en banc.

QUESTION: The difference between the Court of Appeals and this court on such matters is that this court can

avoid cases, but cannot avoid en banc. They can't avoid cases, but they can avoid en banc, and which of the two is more difficult --

MR. JUNG: But, Mr. Justice Stevens is correct. It may well be that the Fifth Circuit chose to merely adhere to its prior precedent unless and until overruled by this court.

There is, indeed, a potential race to the courthouse, and it would be disingenuous to deny that such a thing could exist. But that is an artifact, we submit, of Section 1445(c) which deprived the courts of removal jurisdiction but left the original jurisdiction unaffected in workers' compensation cases.

And that is true irrespective of what this court does here today with the direct action proviso.

In a suit where the employer, the employee and the insurance carrier are all diverse from one another, that suit may be filed by either party in the federal court system, notwithstanding the direct action proviso, but may not be removed to that court by any party.

And so, 1445(c) creates that race to the courthouse irrespective of the circumstances of the direct action provision.

Finally, on the issue of clogging federal dockets, I regret that we did not have modern statistics for the Court, but in the 1958 legislative history, the Court did have -- the

Congress, excuse me, did have before it the relative frequency of filing of workers' compensation suits in federal courts by insurance carriers in the state of Texas.

And those statistics reveal as of that year when the jurisdictional amount was only $3,000 that less than 2 percent of the workers' compensation cases heard in the Texas federal courts were filed there originally by insurance companies.

So, I think that the fears of overburdened federal dockets are largely ephemeral fears.

In any event, this court held in the Meredith versus City of Winterhaven case that diversity jurisdiction does not exist for the court's convenience. It exists for the protection of the litigants in those cases that fall within the spirit and intent of diversity jurisdiction.

This is one of those cases, and we, therefore, respectfully urge that the Fifth Circuit be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jung.

The case is submitted.

(Whereupon, at 2:48 p.m., the case in the above-entitled matter was submitted.)

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BY alan friedman

(REPORTER)