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Supreme Court of Texas.
TEXAS MUNICIPAL LEAGUE INTERGOVERNMENTAL RISK POOL, Petitioner,
v.
TEXAS WORKERS' COMPENSATION COMMISSION and Subsequent Injury Fund,
Respondents.
No. 00-1114.

July 19, 2001.

Appearances:
Attorney for Petitioner: Jim David Bickham Jr., Vinson & Elkins,
L.L.P., Austin, TX, for petitioner.
Attorney for Respondent: Joseph A. Pitner, Office of the Attorney
General of Texas, Austin, TX, for respondent.

Before:

Thomas R. Phillips, Chief Justice, Priscilla R. Owen, Harriet
O'Neill, Wallace B. Jefferson, Xavier Rodriguez, Nathan L. Hecht,
Deborah Hankinson, James A. Baker, Craig Enoch, Justices.

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JUSTICE: Thank you. Be seated.

The Court is ready to hear argument from petitioner in Texas
Municipal League Intergovernmental Risk Pool v. the Workers'
Compensation Fund and the Subsequent Injury Fund.

SPEAKER: May it please the Court. Mr. David Bickham will present
argument for the petitioner. The petitioner has reserved five minutes
for rebuttal.

ORAL ARGUMENT OF JIM DAVID BICKHAM JR. ON BEHALF OF THE PETITIONER

MR. BICKHAM: May it please the Court. As this Court is aware, the
issue in this case is whether my client, the TML Intergovernmental Risk
Pool can constitutionally be required to make payments into the
subsequent injury fund. And there are a variety of different statutes
in the Labor Code as well as the underlying administrative code rules,
the TWCC rules that we have challenged that deal with how these
payments get made into the subsequent injury fund and the challenge is
an as applied challenge.

JUSTICE: [inaudible] employees of your respective cities would
still be having the [inaudible] subsequent injury fund.

MR. BICKHAM: As the statute is currently written, that is correct.

They would have the ability --

JUSTICE: And that is your position; that they should still be able to?

MR. BICKHAM: At least until the legislature changes the law, if it so desires and, you know, obviously, the legislature has the ability to make choices to cover employees, you know, with payments from a particular fund even if it doesn't require payments in -- what happened in this case is the legislature attempted to require or, at least, on its face arguably attempted to require cities and other political subdivisions to make payments into this fund. But because the fund is in the nature of an insurance fund, and that the payments into the fund aren't based on the claims made from the fund, under a long line of authority from this Court, a lot of various attorney general opinions, the system set up is unconstitutional.

And we are attacking the requirement that cities must make payments into the fund to the extent that that's how it's being interpreted by TWCC.

JUSTICE: The cases that you rely upon and the attorney general opinions would require us to really look at this as being an assessable insurance program. That was the basis for the City of Tyler as well as some of the discussions, some of the attorney general opinions, correct?

MR. BICKHAM: Those are -- it's correct to the extent that this is analogous to assessable insurance.

JUSTICE: But the cases you rely upon, those were -- that was assessable insurance.

MR. BICKHAM: Those were assessable insurance cases and those were really the most analogous.

JUSTICE: Okay. You're calling -- are you claiming that this is an assessable insurance program or are you just asking us to analogize to it because an assessable insurance plan really contemplates the payment of premiums and we don't have any premiums being paid here?

MR. BICKHAM: Actually --

JUSTICE: We actually have unclaimed benefits being paid in.

MR. BICKHAM: Well, see, I disagree that it's actually unclaimed benefits. I think what is being paid in and this Court has noted that in the Industrial Accident Board v. Texas Employers Insurance Association case. It's not in the nature of benefits that are being paid in or compensation. Instead, it is an arbitrary amount fixed by the legislature --

JUSTICE: But it's not --

MR. BICKHAM: -- and they fixed that arbitrary amount as the amount that would, otherwise, have been due had there been somebody under the statute entitled to [inaudible].

JUSTICE: It's not a premium, though. It's not an insurance premium that's being paid.

MR. BICKHAM: Well, not in the sense that -- it is a premium in the sense that those final --

JUSTICE: As we -- [inaudible] think of a premium being paid, I'm going to pay a set amount of money and in return, I'm going to get an amount of coverage and if I have a claim then that within the coverage, then, in fact, the claim will be paid. It's not a premium in that sense of the word.

MR. BICKHAM: No, it is not a premium in that sense. And in reality, in an assessable program, what's paid in the form of an assessment is not really a premium either because it's not based upon your claims history from the fund. It's based upon the fund's current

solvency or insolvency and they can just make a call for money to be paid in, you know, upon the occurrence of some event. And, really, although we've used the case as an --

JUSTICE: Let's go back to the original question. Are you claiming that this is an assessable plan?

MR. BICKHAM: I am not claiming that it is an assessable plan. I'm claiming that it operates very much like one and I think the Court can view the prohibitions. And the crux of the prohibition is to prevent cities or to prevent the legislature from requiring cities to take their locally generated revenues and transfer those locally generated revenues in a way where those revenues no longer benefit directly the residents of the particular city or political subdivision and instead, benefit some larger group.

JUSTICE: But those benefits could potentially benefit the citizens of the city.

MR. BICKHAM: They could potentially and one of the issues that has not been briefed because of the new nature of the law is as of May at the earliest and September at the latest, there have amendments to the provision of the subsequent injury found in the Labor Code that talked about how the money can be spent and that money now is not only used to pay benefits and also to reimburse insurance carriers under certain situations.

In section 403.006(b) of the Labor Code, it now can also be used in different situations to reimburse insurance carriers at the discretion of TWCC and the money is also gonna be used to fund feasibility studies and later, the development of certain regional workers compensation healthcare networks that are going to be basically HMO-type operations for Workers' Comp claimants, you know, providing benefits to Workers' Comp claimants. And I think that those provisions show that the system that is set up is really a system that is taking these monies that belong to the city. It is the city's money. When there is no legal beneficiary --

JUSTICE: Under what theory is the city's money?

MR. BICKHAM: It is the city's money in the sense that the Workers' Comp statute -- these are cities that self-insure, under the Workers' Comp statute, the money when someone dies or they have compensable injury has to be paid to a legal beneficiary.

JUSTICE: Right. And I --

MR. BICKHAM: And in these circumstances where no legal beneficiary exists, there's a long line of cases that demonstrate that if you have a failure of the condition in the policy, either the lack of a beneficiary or the failure of some of that necessary to recover, that the carrier itself retains ownership of the money.

But what the legislature has done in creating a subsequent injury fund is to transfer ownership from the carrier to the subsequent injury fund.

JUSTICE: I'm interested in the ownership issue with the carrier. Is that by statute? Is that by contract that the carrier owns the fund?

MR. BICKHAM: It is by common law that in the situations where there is no rightful claimant under the policy that the carrier retains ownership to the funds and this Court addressed it in the industrial accident work cases. We've given several other cases that have addressed that. The way that the Workers' Comp Commission has attempted to get around that is now by creating a presumption in the statute that if nobody files a claim within a certain period of time, it used to be 8 months, now it's 12 months, that they'll presume for purposes of making payments into the subsequent injury fund only that there is no

legal beneficiary.

But they're not presuming it for all purposes so, arguably, you're saying we're not gonna presume it for purposes of ownership but the reality is the city owns the money until the very moment that either one of two things happen. Somebody makes a valid claim and is entitled to recover or until they transfer titles to the subsequent injury fund.

JUSTICE: But it seems to me that's how the city assesses, not much of this is set aside for [inaudible] injury claims. There'll be a certain amount that has to be paid out, a certain amount that don't have to be paid out and so we spread that out [inaudible] the risk that you have that the employees may injure.

How does the assessment in this second injury fund -- does the city have to pay a premium to the second injury fund to get its workers covered by the second injury fund?

MR. BICKHAM: Not as the statute is currently written. That's separately funded by the state.

JUSTICE: Right. And it's very analogous --

JUSTICE: So, the only contribution the city is required to pay under the second injury fund is if there's any unclaimed funds from a compensation claim or a death, I guess. Those death funds, that's the only payment that the city pays and the second injury fund is just whatever's left over from a death claim when there's no heir that received money.

MR. BICKHAM: That is right except for the idea that these funds are somehow unclaimed. And that was really the crux of the Court of Appeals in its decision --

JUSTICE: No, no. I'm assuming they're unclaimed and I'm assuming -- I agree with you that it's the city's money. I'm saying that the only money the city's required to pay the second injury fund is that money.

MR. BICKHAM: That's correct.

JUSTICE: So, there's no premium they pay to get their employees covered by the second injury fund.

MR. BICKHAM: That's right.

JUSTICE: The only requirement they have to pay is this. Now, if the Court determines that they don't have to pay that in, that they don't have to pay that in, then the city pays nothing for the benefit of having access to the second injury fund which benefits its citizens.

MR. BICKHAM: For the very short term, I think that would be correct. I think that the legislature could. The big problem with it is the fact that these payments -- unclaimed as you said death benefits into the fund, aren't related to the amount of money that a particular city's employees draw out of the fund. That's then the problem with assessable insurance and the reason that assessable insurance has been found to be an unconstitutional grant of public money you're lending in private. The legislature could fix it by -- by --

JUSTICE: How could the -- how could the city ever have insurance? How could a city ever buy insurance to cover its employees or its officers if we interpret it the pay-in has to be reasonably [inaudible] gets paid out, as narrow as you require. How could they ever buy insurance for that?

MR. BICKHAM: Because there have been constitutional amendments at the time the City of Tyler case came out, the Court held that cities couldn't provide insurance for their employees. Then, article III in the context of Workers' Compensation Insurance, article III, section 61 was passed that allows cities -- allow the legislature to pass suitable laws to require cities to provide worker's compensation insurance and to allow for the payment of cause charges and premium fund policies and

benefits under policies.

And then -- so, that's how it was handled with the Worker's Comp. With regard to other insurance in article III, section 52(a) itself, an amendment was passed in the mid-'80s that now allows and other political subdivisions to purchase non-assessable insurance on a premium basis but it took a constitutional amendment for cities to be able to do that.

JUSTICE: [inaudible]

JUSTICE: How come the second injury fund is an individual association or a corporation within the prohibition of section 52(a)?

MR. BICKHAM: It -- the subsequent injury fund is a bank account, as Mr. Pitner says, but it is administered --

JUSTICE: [inaudible]

MR. BICKHAM: -- by the Workers' Compensation Commission who is also independent, which is an organization or association.

JUSTICE: [inaudible] it's the state. I mean, what -- what would lead you given the -- given the evil they were trying to prevent. What would you do say that individual association or corporation includes an entity of the state which after all created this municipality and can abolish it?

MR. BICKHAM: Well, if you look at the various attorney-general's opinions that have been cited, several of those -- one of them was trying to create a state-operated statewide insurance assessable network if you will, for Workers' Comp claimants. The money that was being paid in in the form of assessments was gonna be administered by this entity. There've been state guarantee associations that were gonna be under the [inaudible] of the state government but we're interested to be created --

JUSTICE: I understand [inaudible] attorney-general's opinions but --

MR. BICKHAM: And --

JUSTICE: -- what's the reason [inaudible] --

MR. BICKHAM: In reality is, cities and gets to the problems that were discussed in Edgewood and in City of Lubbock v. Dallas which is more -- where instead of a private entity, it's the state taking control of locally generated revenues and then the City of Lubbock was --

JUSTICE: That's another constitutional amendment and another point of error [inaudible], another issue in your brief [inaudible].

MR. BICKHAM: Yes, it is.

JUSTICE: How is the -- why would you argue based on the intent of the framers and then the plain language of this provision that the subsequent injury fund is an individual association or corporation, [inaudible] why should we say that?

MR. BICKHAM: Because --

JUSTICE: [inaudible] being bound by --

MR. BICKHAM: -- association -- the particularly, you know, when you're looking at in the context of constitution where you're not -- you don't have defined terms, you look at it in the broad sense and the subsequent injury fund is a bank account for the association, that association initially being the Industrial Accident Board, now being the TWCC and it does comport with the intent of the framers. You know, for example, if you said --

JUSTICE: Why is it -- excuse me. Why is it for the benefit of the Commission? Why is it that fund a benefit for the people [inaudible] contribute to it in order to pay benefits to the employees or their beneficiaries statewide?

MR. BICKHAM: It is a benefit on a statewide basis but what these article III, section 52 cases talk about is that the benefit has to be for the benefit of the local public [inaudible] --

JUSTICE: What --

MR. BICKHAM: There's no doubt that in the every comp cases --

JUSTICE: Let me go back to the -- excuse me, sir. You said at the very outset [inaudible] commensurate to a justice from New York that it's the city's money that --

MR. BICKHAM: Correct.

JUSTICE: That is your premise. This is the city's money, which is why it can't be paid anything that goes outside confines of that city, but the Pool itself it's a separate independent entity, isn't it?

MR. BICKHAM: The pool is a separate entity that makes cities pay their proportionate shares based upon their --

JUSTICE: No, I understand. And whether --

MR. BICKHAM: claims history --

JUSTICE: -- the pool is based on your claims history and all of that?

MR. BICKHAM: Right.

JUSTICE: Is that right?

MR. BICKHAM: And in fact --

JUSTICE: Now, let me ask you another question, have you made [inaudible] complaint that some of the money that your city if you were from Lubbock, go to the Risk Pool, maybe pay that to a claimant who is in McCallery and so it doesn't -- wouldn't that violate this scheme under your viewpoint?

MR. BICKHAM: It would and in the --

JUSTICE: So, why aren't we complaining about the actual benefits that people get that -- where your money go to some other city?

MR. BICKHAM: Because the --

JUSTICE: It has the same theory.

MR. BICKHAM: Because the original way that the pool was gonna be setup, it was going to be setup where it took the money in from the cities based upon statewide claims --

JUSTICE: And --

MR. BICKHAM: And the attorney-general struck that down and made them rework the way that the organization worked to make sure that it took money in from the cities that was directly based upon that particular city's claims history with the fund.

JUSTICE: But that [inaudible] --

MR. BICKHAM: In proportionality --

JUSTICE: That -- that, if I understand that argument, based on how the amount that a particular city contributed was computed not on the other end on where it goes, but was the --

MR. BICKHAM: [inaudible]

JUSTICE: [inaudible] You just state, where gonna assess you a \$100,000 a year, all 1600 then we got this [inaudible] to pay the benefits so you say, "Well, that's not right because it's not based on what's already been held to meet the criteria our claims [inaudible]. So, they change it based on the claims interest so you are a small city, you pay \$50,000, Lubbock pays a \$100,000 but money goes to the funding, is distributed statewide. Why isn't that unconstitutional?

MR. BICKHAM: It is -- it is not unconstitutional because of the relationship -- because there is a more direct [inaudible] that the city really is paying in. It's paid in based upon its claims history. And so the, the attempt is to make sure that those local dollars really are benefiting the local individuals of the city.

And the legislature, I think, could rewrite the statute in a way that would make the payments into the subsequent injury fund more directly related to a city's particular claims from or city's employees' particular claims from the fund which would probably have the benefit if it's done the right way of making it constitutional. The ways it's written now where it's an arbitrary amount based not at all on claims coming in is a problem. The other problem that is with it is now that it's been amended so that the money's gonna be used for so many different thing --

JUSTICE: Are you forgetting -- and you characterized it as arbitrary amount because the legislature picked 364 weeks of benefits?

MR. BICKHAM: That's correct. It's just the choice that was made --

JUSTICE: [inaudible] What's the difference?

MR. BICKHAM: And actually, the --

JUSTICE: But is it true at every case where there's a -- it's a death benefit that every employer or if there's a designated [inaudible] has to pay 364 weeks?

MR. BICKHAM: That is the fact and in reality is --

JUSTICE: So everybody is --

MR. BICKHAM: The legislature has the power to do that for private companies as a -- as a cost of their choosing to write Workers' Comp in the state of Texas. But the constitutional prohibition says the legislature has no [inaudible] to take the city's money and do the same thing. And that's really where the issue falls out. It's a matter of, does the legislature have authorization no matter how good the cause is, do they have the specific grant of authority that allows them to take this money.

JUSTICE: Let me add one follow up question to Justice O'Neill's earlier question that I'm still puzzled by, you keep saying it's the city's money but at the point in time that the money is paid over from the pool to the subsequent injury fund, at that point in time, there has been a gap and an effort to locate the statutory beneficiary and none has been located and the money is turned over, right?

MR. BICKHAM: Correct.

JUSTICE: I mean that's how -- that's how the payments made. Why is that still the city's money at that point in time when in fact an event has occurred that triggers an obligation for the money to be paid out and no longer kept by the city?

MR. BICKHAM: Because the trigger hasn't happened. There are two parts to the trigger. One is the event occurs, the compensability of the death. The second condition is that somebody, a legal beneficiary, is entitled to take it and under the constitutional authorization that allows cities to provide Workers' Comp insurance, the legislature can only -- the only payments that the legislature is authorized to allow cities to make are payments of benefits and this Court has already recognized correctly that these payments into the subsequent injury fund are not payments of benefits.

JUSTICE: Thank you, sir.

JUSTICE: Could the state designate -- the state designated who the legal beneficiaries are -- did the State designate the second injury fund as a legal beneficiary in the event -- you don't have a spouse, you don't have children, you don't have parents -- if you go through that level then the fourth level of beneficiary would be the second injury fund.

MR. BICKHAM: They did not. Instead, what they say is when there is no --

JUSTICE: But they [inaudible] could they?

MR. BICKHAM: I think that they couldn't based upon the constitutional authorization to pay benefits because when the statutes were put in the late '50s and early '60s, I think that the clear intent of the framers -- when you're thinking of insurance benefits are benefits paid to individuals who have an insurable interest in the life of the individual who died and I don't think that the word benefit should be construed in the context that if the government chooses to save then if no else, then we'll take it and put it in our bank account -- would really -- I think that would violate the specific authorization that allows payment of benefits.

JUSTICE: But, doesn't it go to the State?

MR. BICKHAM: It does not, under the Workers' Comp code. There is a narrow definition of who the beneficiary is in the context of traditional life insurance --

JUSTICE: Right.

MR. BICKHAM: -- it does go the State, I mean, each state and it -- you can actually go down and find heirs, which is why --

JUSTICE: And is that why escheat doesn't fit because here, it never goes as opposed to those lapses somehow.

MR. BICKHAM: That's correct. Here, it lapsed and prior to the creation of the subsequent injury fund and prior to the time that the rules were written [inaudible] the insurance pay the money into the fund, in those cases, the earlier cases that we've cited in our brief, whenever there was no legal beneficiary, the courts tell the insurance, "It's your money. You get to keep the money because there wasn't somebody making the claim."

I mean, so what the statute has the effect of doing is changing the state of the law to the cities from "It's your money," to "Pay it over a year and we're gonna re-distribute it in this likely setup," and that's why it's unconstitutional.

JUSTICE: Any other questions? Thank you, Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Joseph Pitner will present argument for the respondents.

ORAL ARGUMENT OF JOSEPH A. PITNER ON BEHALF OF THE RESPONDENT

MR. PITNER: May it please the Court. To support its argument that the challenge provisions violate the lending the credit, the provision that TML has characterized the subsequent injury fund as an assessable insurance program and this comparison is flawed and there are several reasons why that's true.

MR. PITNER: First, it issues no policy and it has no contractual relationship with the employer or the employees or any other insurance carrier. It has no actuaries to determine risk history or premium rates. It charges no premiums.

JUSTICE: [inaudible] besides the point and even if it's not an assessable life insurance company with insurance, it still not -- it still isn't fit within the exception to [inaudible].

MR. PITNER: It is within the exception --

JUSTICE: Section 52(a) does not specifically allow -- the subsequent injury fund still doesn't fit to the expressed exception of the 52(a).

MR. PITNER: That is correct. That is correct because it's not

corporation association or other entity [inaudible] --

JUSTICE: They didn't -- and the response to that that the fund is just used to funnel money to individuals and that's the constitutional problem that it's not the money debit that goes to the fund. The fund is just used as a mechanism to funnel the city's money to individuals.

MR. PITNER: Yes. This is the TML's indirect ad valorem tax argument.

JUSTICE: Non-tax argument. [inaudible] I thought they were making the argument -- that under 52(a) what the fund is actually doing is taking the money from the city and turning it over to individuals in violation of 52(a) provision about lending credit or granting public money to individuals.

MR. PITNER: In response to that, there is a public purpose exception to the grant of public money. There is adequate public control over the disbursement of this money. It is done by either the commission of the courts and following the statutory standards.

JUSTICE: Of course, the constitutional exception or authority [inaudible] public funds.

MR. PITNER: It is the -- the constitutional exception to the expenditure of public money is that it is expended for public purpose and not for a private purpose.

JUSTICE: And your citing that giving the subsequent injury fund that makes payments to individuals, that's where the public [inaudible] --

MR. PITNER: It is --

JUSTICE: -- not by private --

MR. PITNER: Yes, ma'am.

JUSTICE: Is that in the --

MR. PITNER: Yes, ma'am. It is for public purpose.

JUSTICE: Is that in the constitution or you're just saying that's the case law, the public purpose exception [inaudible] --

MR. PITNER: Yes, sir. That is case law. It is not specifically spelled out in the constitution except for -- there is article III, section 51 which is the framer's grant to the legislature to require cities to carry Workers' Compensation Coverage for their employees.

JUSTICE: The public good argument troubles me. It doesn't seem to be much of a limit to it. Supposed the legislature just imposed a fee on cities to pay State employees or to pay judges, that would be a good fund, [inaudible] fund for judicial retirement, why, and that would certainly reap the public good because the public's gonna have to pay for it anyway, why wouldn't the constitution prohibit that?

MR. PITNER: Well, I believe -- this is somewhere to the argument that was decided by the Third Court of Appeals in Dougray's v. Morales case, the attorney occupation tax, where [inaudible] payment of the attorney occupation tax was for public purpose. The attorney occupation tax being for State employee attorneys.

JUSTICE: Yeah, but there is -- it is not a payment by a city.

MR. PITNER: It is not payment by the city. That's absolutely right.

JUSTICE: So the State could just -- as long it is for the public good, the State could impose any fees on the cities to help pay the expenses.

MR. PITNER: I believe the constitutional provisions for the State imposing fees is broken down to ad valorem taxes which the State cannot do, income taxes which the State cannot do and occupation taxes and I believe the other taxes or fees the State might impose are constitutionally permissible if they're imposed on cities. And the

basis of our argument is, is that this required payment of money, we don't believe it is a tax but if it is a tax, it's not an ad valorem tax.

JUSTICE: You agree that whatever is paid in by a city, there is no relation to what claims there maybe on behalf of its employees?

MR. PITNER: That is absolutely right, I agree with that and it is an amount that the -- is set by the legislature and 364 weeks of benefits. It has -- it's not assessed in an ad valorem way. As a matter of fact, it's impossible to assess it as an ad valorem tax because if you have beneficiaries that might be entitled to the money but have not yet come forward, you don't know the ages of those beneficiaries or how long that money would be paid out to them.

JUSTICE: Do you agree with Mr. Bickham's position that this is the cities' money?

MR. PITNER: Well, the cases that were cited in the TML's brief, they began with two very old cases, two large cases, one in 1896 and the other 1907. In most particular cases, it appears that there was no escheat statute in the State of Texas that escheated life insurance policies to the State and these two cases were decided on what the bylaws of those two associations state.

MR. PITNER: And if these two cases were decided on what the bylaws of those two associations state, in one case, the bylaws stated --

JUSTICE: Let me -- I don't -- I don't mean to interrupt. My understanding was that Mr. Bickham was relying on a statute not cases that the -- the Texas Workers Comp Statute say that the money belongs to the city if the beneficiary can't be found. Do you agree with that?

MR. PITNER: No, ma'am. I don't. I don't agree with that.

JUSTICE: So, there is no such statute. This is not way the system -- the framework is setup?

MR. PITNER: No, ma'am. The way it's setup is, is that if there is a compensable death that triggers payment. And if there are eligible beneficiaries --

JUSTICE: Do you what statute he is relying on? I -- I didn't get a [inaudible] but I -- I wrote down but he said -- under the Workers Comp Statute and money is not due if the beneficiary can't be found and therefore belongs to the city.

MR. PITNER: No, ma'am. I'm not aware there are any such statutory provisions --

JUSTICE: Is it -- is it your position then that once the [inaudible] occurs a death and in fact the money is no longer the city's and is [inaudible] to become payable to the statutory beneficiary [inaudible] there is a statutory beneficiary [inaudible]?

MR. PITNER: That's what triggers is the compensable death. That's right. And --

JUSTICE: As opposed to [inaudible] which is the death plus a claim made by a statutory beneficiary.

MR. PITNER: That's right.

JUSTICE: And you will see [inaudible] a new brief [inaudible] the court of appeal's escheat argument is that -- [inaudible] anything to say about it?

MR. PITNER: Well, I -- I think that the -- escheat argument is a good one. It is a good analogy. It is not a perfect analogy by any means. And the court of appeals used the custodial dispute analogy so that there would not be a passing of title to the state and if there was not passing of title to the state, then the court of appeals reasoned that there were no constitutional implications and this was part of the complaint by the TML that the Court Of Appeals actually

side-stepped these constitutional issues that [inaudible] raised.

I don't think that the custodial-escheat analogy has to be perfect because I think that all -- all the Court has to do is to say it operates more like in a street than it does at tax. So I don't think that you have to go completely through a custodial-escheat analysis in order to avoid the -- the challenge that it's an ad valorem tax or it violates the gift of public money or lending it further.

JUSTICE: Is there any [inaudible] --

JUSTICE: I'm sorry. Most escheat statute require the state to hold the money and then pay it over to some unknown beneficiary and here, doesn't the state take control and domination and then pay it out to -- not the beneficiaries but to someone else that -- it's not -- it's not a close analogy in that respect. Isn't that right?

MR. PITNER: Well, a custodial-escheat as the court of appeals used, the money is held for the occurrence of -- of possible beneficiary but in the mean time, the state can make use of that money.

JUSTICE: For the sake [inaudible] the money all together to [inaudible] who were not beneficiaries, isn't that right here? If there weren't enough [inaudible] --

MR. PITNER: Theoretically, it's possible except for the fact that the new legislation that Counsel mentioned -- this House Bill 2600, provides for a funding mechanism if the second injury fund does go bankrupt [inaudible] --

JUSTICE: [inaudible] has governed this dispute here -- the new legislation you are talking about, do we apply it in this case?

MR. PITNER: I don't think so. I don't think it's really relevant to the issues in this case.

JUSTICE: [inaudible] this is really [inaudible] anyway because under the Workers Comp Statute there's a hierarchy of beneficiaries. And so [inaudible] beneficiaries exist, they -- they never [inaudible] the possession of the money. The money stays with the cities unless until there's a beneficiary as [inaudible] the statutory [inaudible] -- The money is never paid out to beneficiary who [inaudible] --

JUSTICE: Well, but there is a section, isn't there, 43.007(d). Doesn't that say if one does come to existence then -- then the money is paid out?

MR. PITNER: That is correct --

JUSTICE: But assuming that -- [inaudible] assuming there is no beneficiary, the -- the [inaudible] question, is it the city's money or not on [inaudible]? The city is not required to pay any anyone unless there is a beneficiary. It's not as if this goes into the -- the [inaudible] or it's distributed [inaudible] distribution or by will [inaudible] like that. There's a designation within the statute of an order had been administrated once you get to the bottom and there aren't any of those but for the subsequent injury fund the -- the city will keep this money, is that correct?

MR. PITNER: No, ma'am. They wouldn't keep the money. They wouldn't keep the money because they are a governmental entity that's defined by the terms of the statute to be an insurance carrier. And insurance carriers are not allowed to keep the money if the beneficiary does not appear. They have to pay it over into --

JUSTICE: But for the subsequent injury funding, if under the comp statutes, if there were no beneficiaries that quality under then under the -- it goes to the spouse, children, grandparents, siblings, there's a hierarchy there. Assuming there are no beneficiaries, and if you had the requirement that this pool pay the money to the subsequent injury fund, the fund would keep the money?

MR. PITNER: If the statute is rewritten in that fashion, yes, ma'am.

JUSTICE: My point is, there's no requirement to pay anyone -- there's no beneficiary that ever take possession of the money into the statute and once that which are qualified beneficiaries.

MR. PITNER: There is no beneficiary to take possession of the money unless there is qualifying beneficiary.

JUSTICE: [inaudible] requirement that [inaudible] it would still be the pool's money.

MR. PITNER: I disagree.

JUSTICE: You would say that what the pool have to pay to the -- to the state?

MR. PITNER: No, ma'am.

JUSTICE: And then if there was no beneficiary it would escheat that to the -- to the pool?

MR. PITNER: Are we talking about the fund or the intergovernmental risk pool?

JUSTICE: I'm talking about the risk pool. I'm talking about the -- the -- let's say that the -- the death benefits are -- are due, right but there's no beneficiary.

MR. PITNER: Right.

JUSTICE: What happens -- without the statute [inaudible] to the -- to the subsequent injury pool but the risk fund I mean the risk pool, if they have to pay the benefits upon the death, and there were no subsequent injury fund, would they go to an state and then if there was no one to claim them, they would escheat somewhere?

MR. PITNER: The Workers Compensation Act does not -- is not setup to [inaudible] if there are not eligible beneficiaries that then the money escheat to the state of the deceased. So, it would not.

JUSTICE: So, it would be the city's money?

MR. PITNER: It wouldn't be the city's money. The intergovernmental risk pool is -- is an administrating body for the self-insuring cities. It holds their money in order to pay their claims. It has no direct ownership of that money as such.

JUSTICE: What would happen to it? What would happen to it absent the subsequent injury fund? You have a -- a compensable death. Where do these benefits go?

MR. PITNER: It -- it would remain with the carriers including the self-insured cities if there was no such claim [inaudible] --

JUSTICE: Right. So the escheat analogy just does not apply and -- and Mr. Bickham was correct then, he was saying under statutory scheme that the money would belong to the city but or the subsequent injury claim.

MR. PITNER: Well, the -- absolutely right, your Honor. There would no escheat analogy if there was not subsequent injury claim. The death benefits were not considered life insurance so they would not come under the life insurance escheat statute.

JUSTICE: Under the Workers Compensation scheme, does the state determine who the beneficiaries are?

MR. PITNER: Yes, your Honor, they do. They --

JUSTICE: Could this -- is there anything that prohibits the state from declaring itself to be a beneficiary under the Workers' Compensation scheme?

MR. PITNER: I'll see no impediment to that occurring because in the same fashion, I think the same policy reasons that apply to unclaimed life insurance policies where the insurance company is not allowed to keep those proceeds that they escheat to the state. They are

held by the comptroller. They are there until a claim is made. If a claim is made in the future, then that money is paid to that claimant. In a custodial-escheat, the state does not take title to the money. There are provisions in the general escheat statutes where the state takes custody of money or property then it can file a lawsuit in order to transfer the title to the state but that's not the case here. It doesn't incur that the escheat statutes really work.

JUSTICE: When the person who owned the funds no longer exist, and there is nobody to whom to give the funds and so [inaudible] turning of the owner is, this is not the same thing as someone -- this is not like an insurance case where you pay me the premium and I take on the risk of the injury as [inaudible] by a number of people and there is no plan for this particular risk that it comes provision, the insurance company, it makes logical sense, would keep those funds and there's [inaudible] to pay them to assess to introducing the premiums to all the people that are paying the premiums and [inaudible]. The escheat only works -- doesn't it get -- there is no beneficiary to accept the funds.

MR. PITNER: That is absolutely right. If no known beneficiaries are there, then escheat works.

JUSTICE: And that's because there was a beneficiary who now owns the funds because of a risk but they're not there to accept them and so we don't have a number of [inaudible] that go some place else.

MR. PITNER: Yes, your Honor. That's how escheat works. There are certain policy considerations here too. This Court upholds the trial court's ruling that these two constitutional provisions have been violated by the statutory scheme then no self insuring governmental body will have to pay money into the fund, that no county, school districts, the State, state --

JUSTICE: What percentage of the fund did those [inaudible] represent?

MR. PITNER: Ma'am?

JUSTICE: What percentage of the overall fund does the risk pool represent?

MR. PITNER: Payments into the subsequent injury fund, probably an insignificant amount. I would --

JUSTICE: The sky would not fall?

MR. PITNER: No, no, no.

JUSTICE: Well, on the other hand, if they don't pay [inaudible] to it, would they be entitled to make claims on it?

MR. PITNER: Well, that's the thing. They would be entitled to make claims. They had never said in any of their pleadings before the trial court or anywhere else that they should be prevented from making reimbursement claims on the fund. They have never said, as a matter of fact, they have --

JUSTICE: Well, I'm a little confused, the subsequent injury fund, as I understood, exists to make up the difference with the person who already has one injury [inaudible] so the employer only pays for the second injury and the fund makes up the difference, is that correct?

MR. PITNER: That is correct. That difference of lifetime benefits.

JUSTICE: So that by paying into the fund, each city could get a better bid whenever they have that situation because money comes back to them to satisfy that kind of a claim from the subsequent injury fund, is that correct?

MR. PITNER: That is correct, your Honor.

JUSTICE: So if they don't pay into the fund, they don't pay but they can still make demands and get payments from the fund.

MR. PITNER: That is correct, your Honor. They can still take money out even though they pay nothing into the [inaudible].

JUSTICE: Any other questions? Thank you, Counsel.

MR. PITNER: Thank you, your Honors.

REBUTTAL ARGUMENT OF JIM DAVID BICKHAM JR. ON BEHALF OF THE PETITIONER

JUSTICE: [inaudible] asking, is that true?

MR. BICKHAM: It is true, your Honor.

JUSTICE: Is there something unfair about that?

MR. BICKHAM: I don't think so because I think it's something --

JUSTICE: Well, [inaudible] I don't have to pay for that. I can take out.

MR. BICKHAM: I think it's something the legislature can fix very easily. You know, as an initial matter, the legislature is free to treat its political subdivisions and governmental units [inaudible] --

JUSTICE: [inaudible] for me, what do you think the public benefit exception is or isn't?

MR. BICKHAM: The public benefit exception clearly exists with regard to article III, section 52 cases and as Justice Hecht was noting, you got to be careful not to read the public benefit exception to be too broad or they --

JUSTICE: Well, exactly how you read it then?

MR. BICKHAM: How you read it and how it's appropriately read in the cases made clear, we've cited the Byrd v. City of Dallas case, the Key v. Marion County Commissioners Court and how you read it is you look at the particular public to be benefited and if that is geographically the same as the members of the political subdivision that is represented by the entity that's making the payment, then the public benefit going to those individuals can overcome certain [inaudible] --

JUSTICE: Well, what's the geographic area of [inaudible] that we're talking about in the --

MR. BICKHAM: Each particular city in political subdivision and the reason that --

JUSTICE: That make up the study.

MR. BICKHAM: Right. It's the individual --

JUSTICE: Well, I still just can't understand it but if [inaudible] of the cities are paying money into the pool, it's function is to take that money and then pay claims out all over the State by the same rationale and you don't complain about that, that's okay, right? While the same rationale does apply to the subsequent injury fund where they're all paying amounts in there and it goes out the same way all over the State.

MR. BICKHAM: Because the difference is and it's a valid question with a very distinct difference. The difference is these are cities that each is individually self-insured. They cover their own particular risk.

JUSTICE: Well, I understand that but --

MR. BICKHAM: They had pooled their [inaudible] --

JUSTICE: I understand that.

MR. BICKHAM: -- individually but --

JUSTICE: But --

MR. BICKHAM: -- but the payments they make were based upon

proportionately the amount of claims that their citizens make and that's not the case with the subsequent injury fund. The subsequent injury fund there told, "You pay 364 weeks of that benefits and whether or not any individual from your city has ever made a claim.

MR. BICKHAM: Whereas, with regard to TML risk pool, the payments made by the individual cities are based directly on that cities' claims out of Workers' Comp claims that are paid as benefit payments by the risk pool. The risk pool acts sort of an administrator for all of these self-insured --

JUSTICE: What percentage of the cities in Texas [inaudible] in this risk pool under self-insured?

MR. BICKHAM: I am not sure it's a significant percentage that participates in this particular risk pool. There may be others that are participating in different forms. There are similar risk pools out there for counties, [inaudible] and so many other --

JUSTICE: But with respect to cities, how many cities choose the self-insurers as opposed to the -- as compared to the total number of cities in the State of Texas?

MR. BICKHAM: I don't know the number but it's a high number. It's a high number of self-insured because it is more economical and they're invested in the public trust.

JUSTICE: So, is it safe to say that the vast majority of the State is covered with respect to -- in terms of cities participating in the self-insurance plan?

MR. BICKHAM: I think that's right and if I discovered that's wrong, I'll send something to say that because I really don't know factually but my impression is that that's correct.

It is the vast majority of the different public entities and part of it is just how extensive private insurance has gotten and also the other problem is all of the various rulings out there that talk about the types of insurance that they can and cannot buy so self-insuring is just prudent so you don't end up in litigation over.

JUSTICE: Justice Enoch asked could the State in the statute determining the beneficiaries, could the State have designated itself as the default beneficiary [inaudible]?

MR. BICKHAM: I think not for two reasons and I touched on the first one earlier which is the provision that allows cities to provide Comp Insurance which is article III, section 61 of the constitution, only authorizes the legislature to make law for the payment of benefits and I don't think that you should read benefits outside of the context to how it's really used in insurance which is a payment made to someone with an insurable interest, a family member, somebody that has some sort of financial relationship with the person in some circumstances, medical providers, things like that.

But I think even more importantly, if you look at what article III, section 52 has dealt with in the past, it's trying to make sure that the money benefits, the individual city residents and their family members, either by pension plans that have been approved to be all paid, where the money is paid into a pension plan that goes back either to the employer, it's family members, not, you know, being spread out throughout the State. And I think it really does sort of violate the substance of the two amendments.

JUSTICE: The use of the word "benefit," it's not in 52, right? It's somewhere else, right?

MR. BICKHAM: Article III, section 61 is the specific authorization that in the face of article III, section 52 was needed to be passed so that cities could even participate in the Workers' Comp Program.

JUSTICE: Any other questions? Thank you, Counsel. That concludes the various arguments [inaudible].

SPEAKER: All rise. Oyez, oyez, oyez. The Honorable Supreme Court of Texas is now --

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