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TEXAS WORKER'S COMP FUND V. DEL

LIBERATO: The issue in this case is whether the Staff Leasing Services Act allows a company to split its workforce into employees that are covered by worker's comp. insurance and leased workers who are not covered.

Here, DEL has its office workers covered by compensation insurance and the workers who perform the hazardous duty of cleaning out refining storage tanks, they do not have worker's comp. coverage.

In fact, pared down to its most simple element what's happening is that the workers here who need coverage most aren't covered, and the workers who need it the least are covered. And what is happening in a broader sense, is that some companies, to be sure not all, some are very reputable, but some staff leasing service companies are using their position to avoid their legal obligations and to avoid paying for coverage for employees. Essentially, they are running a scam through the staff leasing services act.

ENOCH: Assuming that's correct, it seems to me your argument is undercut by provision (e) under §91.042, which contemplates that the client company might have during the period of the assignment of the assigned workers some workers, permanent staff, who are on worker's comp. and to which they add these assigned workers at some point after they've already been working at the store, approximately 2 years. So the statute clearly contemplates you will have a client company that has some workers that it covers by worker's comp. and some workers that it does not cover by worker's comp.

LIBERATO: That's correct. But what that is referring to in (e) is how to calculate the premium. It says here, the premium for the worker's comp. policy is based on, and then it sets out certain criteria. So it is certainly possible for both the leasing company and the client company to both have comp. But that's not the situation here.

ENOCH: You're missing his point though. What (e) contemplates is the fact that the legislature permits a split workforce. Because clearly it contemplates if the company adds the company's former assigned workers to an existing policy. So you have a situation where the client company has an existing policy of worker's comp. and then later if it so desires can add to its own employees the people who were provided by the leasing agency. So why is that not clear that the legislature contemplated and permitted a split workforce?

LIBERATO: I don't think it says that that's a split workforce. I think what it says is that for a certain period, it may be that they both have coverage, or one doesn't and the other one does, and then whenever the leasing company gets coverage, then this is how it's applied.

OWEN: Under your theory if the leasing company does not obtain its own insurance automatically its employees are the employees of the client company and they are covered by worker's comp?

LIBERATO: If the client company has worker's comp, insurance, that's correct.

OWEN: Under (e) it talks about the client company having an existing policy and adding former assigned workers to the existing policy. So what does that mean?

LIBERATO: It just means that that's going to be the method of calculating the...

OWEN: Well they wouldn't have to be added if they were already added.

LIBERATO: But they would also have to have calculated it using the employees that were already there, they were employees that were already covered, and then adding the employee...

OWEN: So you are saying that the leased employees are already part of the existing policy, they are just not counted for premium purposes?

LIBERATO: Yes, they should be counted. And that's the issue in our case.

OWEN: If they should be counted, what's the point of that "or, adds the company's former assigned workers to the existing policy" in (e)?

LIBERATO: I think that would be a situation where the employees had been employed by the leasing company, and then became employees for the client company themselves. And then you could contemplate a situation like that where the employees were employed by the leasing company, worked for the leasing company, were hired by them, but then transferred and became employees of the client company. So I think that that would be one way of reconciling that.

HECHT: You say this is a scam, but how would it be any different if the cleaning employees were independent contractors or were employees of an independent contractor?

LIBERATOR: Well independent contractors, then the right of control test would apply and so whoever has the right of control would be the one that would have the responsibility to provide the worker's comp. insurance. In here, what we have is a specific statute, that being the Staff Leasing Services Act, which says that the client company and the staff leasing company are co-employers. And so it supersedes that right of control test. And so the issue then here of course is just what is the application of the co-employer provision within the Staff Leasing Services Act. So I think the distinction is that there's a whole different body of law that relates to subcontractors. And here it is a use of this particular statute and how this particular statute is going to apply.

ABBOTT: But if this is a scam is it not a very dangerous scam on the part of the leasing agency, because if the client company is covered by worker's comp. insurance, and in providing these leased workers if the leasing agency chooses not to obtain worker's comp. coverage for those employees, and in fact they are performing the more dangerous functions on the job, what that will mean or course is that both the client company and the leasing agency are going to be subject to lawsuit for negligence claims without their common law defenses. And if they are performing dangerous functions and somebody gets seriously injured it could put out of business both the leasing agency and the client company. I don't call that a scam. I call that dangerous.

LIBERATO: It's dangerous, but look at what exactly happened in this case. This case shows as a practical matter what really happens. Here, the client company is in Ch. 11 bankruptcy. The leasing company no longer has a license.

ABBOTT: The same thing can apply to any nonsubscriber for one, but for another doesn't the legal notion of piercing the corporate veil deal with that? If you have a company that hires people who perform dangerous functions and they don't provide adequate insurance or have adequate capitalization to provide for recovery, you can pierce the corporate veil can you not?

LIBERATO: Well you can, and I think that the second aspect of that is that it is very dangerous particularly for the client company. I don't think it's as dangerous for the staff leasing company because they go in and out of business, and quite frankly they are set up as shells to participate in the shell game, the ones that are doing it. But taking the focus away from the staff leasing companies and putting it with the client companies, for the client companies that is a real danger. But the way that the CA wrote the opinion is that the CA said, that the client company is not the one that elects to provide coverage. That's not the one that makes the determination of whether there is coverage. That instead, is at the sole election of the staff leasing company...

HANKINSON: But isn't that what the statute says, that the license holder is who makes the election?

LIBERATO: Yes, that is true. It says it makes the election.

HANKINSON: Putting that then in the context of an earlier question talking about control, since we are required to look at ch. 91 in its entirety, to put all of this in context in interpreting it looking at the issue of control, sec. 91.032 requires that the contract between the leasing company and the client company put all the responsibility for the employee, control and all the things associated with an employment relationship with the license holder. Correct?

LIBERATO: That's true.

HANKINSON: So doesn't it look like we have a situation here where the legislature has set up a scheme here that does put all of the control, including the right to elect insurance in the license

holder?

LIBERATO: I think you are correct that they put control in the licensing company. But when it comes to the control that matters - I mean sure they have control over the administrative aspects of payroll and that sort of thing, but when it comes to the control that matters and that is control of the workplace, that control which seems to me to be the important control of exercise, that's being done by the client company.

HANKINSON: In reality that may be being done, but the statute requires though that the license holder have those responsibilities. There is 5 different items listed in 91.032 which appear to give and require that the contract give the license holder the right to control all of these things, including the right of direction and control are the adoption of employment and safety policies.

LIBERATO: That is true. But then you have to read that in context too with the co-employer language. What else does co-employer mean in 91.042. It says, the licensing company and the staff leasing company are co-employers.

OWEN: Well what about D? Isn't that the situation that we have, the license holder does not elect to obtain worker's comp insurance. And you say that under that circumstance then its employees automatically are covered by the client's insurance.

LIBERATO: That's correct.

OWEN: Well then how do you square that with - the statute says under (d) under those circumstances that 406.004 and .033 apply. And .033 specifically says under those circumstances that the plaintiff has to prove negligence in the scope of employment, which is inconsistent with worker's comp. coverage.

LIBERATO: True, except that the issue that you raise is what is it meant by election? Our position is that election doesn't necessarily mean what the CA said. According to the CA election means you have your own policy, that the staff leasing company has its own policy. But there's more than one way to elect and that that language can be consistent with our theory, which would be that a leasing company elects coverage by contracting with an employer that has coverage. And so if it wants to, or chooses to not elect to have coverage, then it would only do work for a client company that doesn't have comp. coverage.

HECHT: If the client does not have comp coverage, the leasing company still could have in your view?

LIBERATO: That's correct.

HECHT: And that wouldn't effect either the client's employees or the leasing company's

employees?

LIBERATO: It means that the leasing company's employees would have coverage.

HECHT: So this is the only situation that you think is problematic is when the client has coverage and the leasing company doesn't?

LIBERATO: That's correct. I think everything else...

HECHT: If neither one of them has it that's not a problem, both have it that's not a problem, and if the client doesn't and the leasing company does, that's not a problem?

LIBERATO: That's not a problem. And that's covered in the second part of 91.042 . After the co-employer language says, if the license holder elects to obtain worker's comp. insurance, etc., that specifically addresses the situation where the staff leasing company has insurance but...

OWEN: Why would you need that if under your theory if they don't obtain it they've "elected" to rely on the worker's comp of the client? Why would you need (d) if that were true?

LIBERATO: Because they could get it in their own right and there are plenty of companies that do. In fact, the fund insures staff leasing companies and provides comp insurance for them. So they can either get it in their own right and if they do then I have to say there's not a problem, and I think that that eventuality is covered.

OWEN: But you're saying if they don't get private insurance, they don't get comp coverage they've still elected to fall under the client's policy when could they ever elect not to have worker's comp?

LIBERATO: By contracting only with employers who...

OWEN: Where do we find that in the statute?

LIBERATO: By the co-employer language and through the policy of the courts and the legislature to not split workforces.

ABBOTT: Isn't this policy by the legislature to allow splitting workforces?

LIBERATO: I don't think so. In fact, there's nothing that I can see that does allow that.

ABBOTT: Would you agree that if this statute is interpreted as allowing a split workforce, then your argument with regard to the application of the statute pretty much crumbles?

LIBERATO: I think that it's very supportive of our argument. And I think that the split workforce approach and the prohibition against it is the broad policy reason that supports everything that we're arguing and why. If you view this statute in that context it makes it even more clearer that co-employer means co-employer for the purposes that we mean co-employer. But I think that even if it weren't for the split workforce, I don't think that this statute relies exclusively on that. I think we turn to the language in the statute and what does co-employer mean.

ENOCH: But with a split workforce though if the license holder as you say by its contract elects to have the client company carry worker's comp, and the client company breaches the contract and carries no comp on any employee, would you have a claim against a client company for premiums for a nonsubscriber? But for the split workforce where you have an arguable - we already have comp for this client company, we're already the insurance company, we have the right to assess premiums based on their experience. Well if they are not an employer who has worker's compensation, they elect not to have it, it seems to me you could not have this lawsuit against the client company for unpaid premiums.

LIBERATO: Right, there's no coverage. There would be no premiums.

ENOCH: But it seems part of your argument though about your right to assess their premiums is because the license holder has a contract with a client company that they will carry comp. So it seems to me your entire case is premised on a split workforce. You can't get to the client company but for the fact it does have comp coverage on some of its employees.

LIBERATO: From that standpoint that's true. Because you are going to have two separate entities and you're going to have in a sense at least initially two workforces that are combined into one and they are either split or they are not split and that's going to be determined by what the court ultimately holds, or what our position would be is that if the client company has coverage or if they both have coverage or if the staff leasing company has coverage, then the workers are covered. Under any of those three eventualities, then the workers that initially worked for the staff leasing company but are part of the workforce of the client company, then those are going to be covered in all three of those instances.

ENOCH: But in all three of those instances, you would have a direct action for the premiums based on the rating because if the license holder carries it, the rating is based on the experience of the client company. If the client company has it, the ratings obviously is based on the client company. But if the client company doesn't carry comp on the assigned employees, then you have to have some mechanism to go against the client company to assess the premiums for those employees.

LIBERATO: But if they don't have coverage then you wouldn't pay premiums

ENOCH: I'm trying to assess where the Texas worker's comp fund obtains the right to

assess premiums anyway.

LIBERATO: We don't obtain the right to assess premiums. But what we do know is that the Texas worker's comp commission is requiring us to cover those employees and it is logical and right and a part of doing business that if you are required to cover, to pay benefits, then you should at the same time be able to collect premiums. I think that the one other aspect that relates to the contracting between the two that's really important here is that there's something more involved in this particular case than the overall principle and the application of this rule. And that's specifically is what it means to elect. Here, it's not just the statute that we're looking at, but there's also a contract between the leasing company and the client company. And in that contract the leasing company has the client company, DEL, agree to provide worker's comp. insurance. And there's a checkoff where it checks off that it agrees to provide insurance.

O'NEILL: That's not entirely clear is it from the contract whether they agreed to it or not?

LIBERATO: It says employees. And so if there's any ambiguity it would be what is meant by the term employees, that it will provide coverage for the employees. But if you think about it, there can't really be any reason to have it in there. Why on earth would there be in the contract a provision requiring the provision of workers' comp coverage to the employees of the client company? Why on earth would the leasing company care? They wouldn't. The only possible way that it would be in there, the only reasonable way would be if it means that they have elected coverage based on the requirement that the client company, DEL, pay and maintain worker's comp. insurance.

ABBOTT: That's an issue that was not addressed by the CA?

LIBERATO: That's correct.

ABBOTT: Was it an issue that you raised to the CA?

LIBERATO: I think we did, but I'm not sure.

ABBOTT: If it was not a point of error, if it was not an issue raised in the CA, is it an issue that we can address?

LIBERATO: I think it is in the sense that - the overall issue is what is meant by an election. Actually we've only really presented one primary issue, and that is the split workforce. And I think it's a sub-issue within there that is supportive of the view that there's more than one way to elect coverage. And so, yes, I think it can be considered by this court because you are determining it seems to me what is meant by election of coverage.

BAKER: Do I understand your last argument that you've been discussing with Justice

Abbott has to do with the theory that here by virtue of this agreement that DEL agreed to furnish coverage and breached that contract because they didn't; therefore, you can charge them premiums? So that would mean you would have to be a third-party beneficiary of that agreement. You have to be part of that agreement to make that argument.

LIBERATO: That's true.

BAKER: And how can you argue that you're a third-party beneficiary if you're not acknowledged to be such?

LIBERATO: But I'm not using it for that purpose. What I'm using it for the purpose of is to say that it's an easier way to be consistent with what the CA said and to reconcile with 91.402, which talks about whether the license holder, the staff leasing company, elects coverage. And all I'm saying is that yes they have elected coverage and the evidence of the election of that coverage is through the contract.

BAKER: Then if that's the answer that the leasing companies elected coverage, then they are the ones responsible for the premiums and not DEL?

LIBERATO: But once they elect it, then by electing it that then necessarily under our reading of the co-employer, you have to read it with the co-employer language, that's how they become co-employers, and that is how they elect coverage and by being co-employers it passes on through.

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RESPONDENT

DE LEON: This matter comes to the court on a sworn account. The fund sued DEL Industrial alleging that additional premiums were due under a worker's comp. policy of insurance that had been written by the fund covering the employees of DEL Industrial.

The argument of the fund before the TC was that as respects those employees that were leased by DEL Industrial by Administrative Resources Ltd., the fund was entitled to additional premium.

Initially the fund said, we're entitled to about $82,000 in additional premium. And there were competing motions for summary judgment presented to the TC. Judge McCown heard those competing motions for summary judgment. Judge McCown agreed with the fund that the sentence in paragraph C of 91.042 for worker's comp. purposes "a license holder and the license holder's client company shall be co-employers", that that sentence as a matter of law obligated DEL Industrial to pay additional premium as respects the employees which it leased from Administrative Resources as a matter of law. That was the issue before the TC. The final judgment incorporated that

summary judgment and determined that there was premium owed of $29,000. A far cry from $82,000.

That was the issue that went up to the 3rd Court. An issue of statutory construction: What do those words mean? And it was that issue which was considered by the 3rd Court. And in considering that issue, the 3rd Court had to look at the statutory scheme that was presented. The statutory scheme is presented in 91.042. It doesn't appear in isolation, the sentence that was interpreted. The sentence appears as part of a comprehensive statutory scheme. The legislature laid out a scheme. First of all, the legislature in passing the Staff Services Leasing Act said, that we the legislature recognize leasing companies, and the ability of those leasing companies to provide leased employees to client companies. And this is the regulatory scheme under which they may do that.

HECHT: If the leased employee or an independent contractor and the client had the right to control his work, then he would be an employee for purposes of the compensation?

DELEON: That may be. I don't think that that's the issue that was before the court.

HECHT: So then the legislature meant to change that?

DELEON: I think the legislature definitely meant to change that and I think the legislature set up a very specific scheme for addressing that point. And the legislature was aware of these arguments about leasing companies and fraud and all the rest of it that you've heard this morning. And the legislature addressed those concerns in adopting the Staff Leasing Services Act and setting up a very comprehensive regulatory scheme as respects that issue. And in adopting that they said, first of all at 91.042, in paragraph A is, that the license holder has the right to elect whether or not to purchase workers comp. policy. Who is the license holder? It isn't DEL. The license holder is Administrative Resources Ltd, the company that provided leased employees to DEL. That's what they said at paragraph 1.

At paragraph B, they went on to say that if the license holder maintains worker's comp. insurance, then that license holder is going to pay worker's comp. premiums on the employees that it leases to a client company based upon the client company's experience for the previous two years.

Why did the legislature say that? To address one of the concerns that the fund had. This fraud concern. This modifier cleansing issue. What the legislature was saying is client company DEL, you can't escape your experience rating for worker's comp purposes simply by leasing employees from a staff leasing company. That's what they said.

Then they went on at C to say, now if for worker's comp. purposes if the license holder and the client companies are working together they are going to be working together

as co-employers. But the legislature didn't stop there. The legislature went on to explain what the phrase "co-employer" means. And the legislature said, if the license holder elects (Administrative Resources not DEL) to obtain worker's comp. insurance, the client company and the license holder is subject to §406.034.

ABBOTT: With regard to the election if they elect to have coverage for the leased employees, they don't file that election anyway, they just go out and make sure they have worker's comp. insurance for their employees, correct?

DELEON: Correct.

ABBOTT: And one way that they can ensure that they have worker's comp insurance coverage for the employees is to put the burden on the client company to go out and buy the insurance. That certainly is within the realm of contemplation under the statute.

DELEON: I think if Administrative Resources intends for the employees of DEL to have worker's comp, then that issue is addressed in the contract and it talks about the client company's employees, which was an issue which was discussed previously. If the Administrative Resources Ltd, the Staff Leasing company intends to make an election not to have worker's comp. for its employees that it assigns to DEL, it makes that election like any other employer in Texas makes that election by either purchasing worker's comp or not purchasing worker's comp. That's how the election is made.

ABBOTT: But what Administrative Resources Ltd. could do is to say, with regard to these leased employees we are going to go out and get comp insurance. And if they do so what they likely would do would be to pass on that cost to the client.

DELEON: Yes.

ABBOTT: Or what they could do to just make the whole process a little bit simpler instead of themselves going out and getting the insurance, paying the premiums and passing that cost along to the client, what they could do instead is just enter into a contract with the client where the client would pick up the cost of providing for worker's comp. insurance for the leased employees.

DELEON: I think either way if Administrative Resources provided workers that are covered under a worker's comp policy, they would either pass through the costs or they would contract with them, either way.

ABBOTT: And if they contracted with the client, in this instance DEL, they could have some language in the contract between DEL and ARL.

DELEON: Correct.

ABBOTT: And one argument here is that that language that DEL will provide worker's comp. insurance for its employees, there's an argument that that means that you contracted at least with ARL to provide worker's comp. insurance for the leased employees?

DELEON: I think what the contract means where it says - and I think you need to be very careful reading the contract language. The contract language at 11.0 to the contract that was entered into says, client provides Texas worker's comp coverage for client's employees. It doesn't just say employees. It says client's employees. Who's the client? DEL. DEL is providing worker's comp. coverage for its employees. Then it goes on to say at 11.2, company. Whose company? Administrative Resources. That they may furnish and keep in full force and effect at all times during the term of the agreement certain insurance coverages covering all company employees furnished to client pursuant to the agreement. In other words, you have two different contractual provisions. One deals with what DEL is going to do for its employees, and one that deals with what Administrative Resources is going to do with respect to the employees that it assigns to DEL.

GONZALEZ: Do you agree that under the statute that the leasing company here could contract with DEL to have DEL procure worker's comp insurance for the employees at a leasing company?

DELEON: I think what the statute allows -

GONZALEZ: Which I think is what Justice Abbott is asking.

DELEON: I think what the statute allows is for the employee leasing company to make the election. I think how DEL deals with that election is by either doing business with an employee leasing company that has purchased worker's comp. or not doing business with companies that have purchased worker's comp. That's how they deal with it.

GONZALEZ: But that's not the answer to my question.

DELEON: Well I understand. I appreciate that. But I think that they could contract to do that, but I think that what you're suggesting is in effect another split workforce issue. What you're suggesting is that ARL could go to DEL and say, DEL we're contracting with you and we're going to provide worker's comp employees for you, so we are going to buy a policy covering those employees for you. Then we're going to go contract with DeLeon and Boggins and DeLeon and Boggins doesn't want employees that are covered by workers' comp policy. So ARL is going to say, by contract we're not going to provide you employees covered by a policy I think that gets you more into the split workforce situation is where you are going with that question in my opinion. But I think what the statute contemplates is, that the employee leasing company will make an election.

HANKINSON: Can that election be to contract with the client company so that the client company provides comp coverage for the leased employees? Does the statute allow that? I guess

a question that we are all interested in.

DELEON: I think is yes under certain circumstances.

HANKINSON: Under what circumstances?

DELEON: I don't believe that the employee leasing company, the Staff Leasing company has the right to in effect split its workforce per se.

ENOCH: Your point is that that provision isn't talking about a specific assigned employee. It's talking about if you're in the business of assigning employees to various companies, you could as a license holder elect to have compensation for all of your employees, all of these folks that you assign out?

DELEON: That's right.

ENOCH: This is not a election by contract to an individual employee...

DELEON: That's exactly my point.

ENOCH: So a contract with DEL couldn't be considered an election under subpart (a) because you're not electing for your assigned employees. It's just there's a group going over here to this employer that they say they are going to have comp on.

HANKINSON: But if the leasing company under your theory has to do all or nothing, it either has to provide coverage for all its employees regardless of how many client companies, various groups of employees are assigned to or it has to be a nonsubscriber. Is that right. The leasing company has to be one or the other as to all of its employees, is that what you're saying?

DELEON: I'm saying an employer has the right to make an election and if that election applies to its employees, and that means that the leasing company has the right to make that election it's going to apply to its employees.

HANKINSON: But doesn't the statute treat the various employees of the leasing company differently in that the leasing company would pay rates for comp coverage based on information that comes from the particular client that a group of assigned employees works for? The statute does not treat all the employees of the leasing companies or the leasing company as one thing. The rates are all tied to the various client companies.

DELEON: For the first two years they are. If the leasing company carries worker's comp insurance, the client company can't escape its bad experience by having assigned to it those employees from a leasing company.

HANKINSON: And of course that also affects the leasing company because it affects what they pay for the coverage that they buy. So one group of the leasing company's employees may be costing the leasing company more for comp coverage than another group depending on the history during those first two years of the respective client coverage?

DELEON: Correct. And those are costs that certainly are going to be passed on by contract.

HECHT: Do you agree that if the leasing company does not cover its employees, then the client is subject to sue under the common law?

DELEON: Sure. That's exactly what you go down to (c). Look at the 2nd sentence of (c). Look at paragraph (d) and what does it tell you? It tells you what the effect of the election is. It gives the employee leasing company the right to make the election. Then it says, And DEL Ind., client company, whoever you are, if you do business with the staff leasing company that doesn't carry comp, here is what happens. Here is the effect of it.

HECHT: So you couldn't avail yourself of the common law doctrine that if you control the employee, they would be an employer for coverage purposes?

DELEON: That's right. And what it says is, you're either the victim or the beneficiary of the election. You can't have it both ways. I think what the legislature did is it said, one entity has the right to make the election and both entities live or die by that election. It sure didn't say, that the fund has got the right to come along and say, By the way DEL because you happen to carry a policy covering your employees, we've got the right to assess you premium for the Administrative Resources Ltd. employees. It sure didn't say that.

OWEN: So they are treated as a nonsubscriber as to the leased employees?

DELEON: As respects those leased employees, that's exactly right.

OWEN: And it increases the co-employer nonsubscriber?

DELEON: They are just a co-employer, nonsubscriber as it respects those particular employees. And I think the argument of the fund that you've heard about split workforce as respects DEL simply chooses to ignore the statutory scheme. What you are being asked by the fund is to ignore that the legislature set up the Staff Leasing Services Act mechanism.

HANKINSON: The Staff Leasing Services Act has certain requirements that must be in the contract between the client company and the license holder. But there certainly are other terms that are subject to negotiation. And what you're saying then is that whether a license holder, or leasing company in their negotiations with the client company really can't negotiate anything about the comp coverage because they are bound by an election made for all their assigned workers?

DELEON: Precisely.

HANKINSON: And so client companies have to decide: Do I want to deal with a leasing company that is a subscriber or is not, and that's the end of that discussion?

DELEON: That's exactly right. That's the A to Z of it.

ABBOTT: Assume a couple of things, then answer a question. Assume that the leasing agency makes an independent determination with regard to whether or not it obtains workers' comp. insurance made independently with regard to each client that it deals with. So it splits its workforce the way you say that the statute should not. Assume that the way that the leasing agency made the election about whether or not to obtain worker's comp. insurance was done by way of contract between the leasing agency and the client company, such that the leasing agency required the client company to go ahead and obtain the worker's comp. insurance. With regard to this case, assuming those two predicates, can the fund still pursue the client company, you in this case, for payment of premiums because you contracted with the leasing agency to provide workers' comp. insurance or are they going to have to pursue the leasing agency for those premiums or is there just a breach of contract issue between you and the leasing agency? How does the whole contract issue play out between the client company and the leasing agency?

DELEON: You're asking me to presume that on an individual basis, they can negotiate this _____. Let's presume that that's the case. And the client company contracts with the leasing company and says, You've got to have comp. And in effect, they contracted with the leasing company and forced the leasing company to make the election to have comp. Does the fund then have the right to pursue DEL for contracting with Administrative Resources to maintain comp? No.

ABBOTT: Why?

DELEON: Because the contract as respects worker's comp. insurance, the purchase of the comp, no matter whether they contracted for it or not, if Administrative Resources purchased the comp policy from the fund, then they are the ones who are obligated to the premium.

BAKER: What if it's the only way around though?

DELEON: I think that's exactly what's here before the court. And if it's the other way around, you get to the same place.

GONZALEZ: Is the fund obligated to provide coverage?

DELEON: The fund is obligated to provide coverage to the employees for which it collected premium. Period.

GONZALEZ: So there's no obligation till the premium is collected?

DELEON: That's right. I heard at the 3rd court level an interesting concept, the notion that premium follows liability. I've been doing this for about 25 years, and I've never heard an insurance company argue that premium followed liability. Liability follows premium. It's called consideration. If you don't have consideration, you don't have a contract. You don't have a reason to be liable.

HANKINSON: Was issue joined in the TC on the interpretation of the contract between DEL and the leasing company in terms of what the language on the election was meant? Was that issue joined in the TC? Has it been litigated there?

DELEON: I don't recall. We would ask you to affirm the judgment of the 3rd Court.

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REBUTTAL

O'NEILL: Do you know whether the issue was joined on the contract language?

LIBERATO: It wasn't. But I think that the problem that the court is having is in understanding that there are two contracts involved here. We're not trying to enforce the contract between DEL and Limited. What happened was that DEL came to us to get insurance coverage. We contracted with each other then that we would provide them insurance coverage for their employees. Then under the language of the Staff Leasing Services Act, they are co-employers of the leased workers; therefore, we believe that under our contract that they are liable to pay the premiums for those leased workers. And so that's where our rights come from. It's not an attempt to enforce this other contract.

HECHT: And you're just saying that shows that that's what the parties to that transaction thought was going to happen, too?

LIBERATO: Exactly right. And the other contract just kind of shores up our argument - our argument shores up our position that in fact the leasing company elected to have coverage. Because that's what the evidence shows as between the two of them.

ABBOTT: With regard to these leased employees, you say that DEL did not pay the premiums for those leased employees?

LIBERATO: That's correct.

ABBOTT: It turned out that none of those leased employees were injured. Had one of those leased employees been injured and sought recovery, would you have paid in light of the fact they had not paid their premium?

LIBERATO: Well that determination would have been made - if there was a dispute it would have been made by the Texas. Worker's Compensation Commission, and they are saying, Yes, we would have had to pay it. So the answer is, yes.

ABBOTT: Would your position have been that you were not obligated to pay?

LIBERATO: I don't know the answer to that. It seems to me that if even if that were our position, we've got an uphill battle based on the fact that the commission who makes most of the determinations in our cases it was determined that we would be liable.