The title of this article may be the most obtuse question of some time, but please allow us to explain. As part of The Federalist Papers James Madison penned the statements “…if men were angels, no government would be necessary. If angels were to govern men, no external or internal controls on government would be necessary.” As many readers know, this quote, and many other pearls of genuine wisdom, led to our United States Constitution. So what does this quote and angels have to do with employee injury benefit claims? Maybe everything.

As some background, this article follows up on a prior 2013 submission entitled “What in the Wild, Wild West is Texas Doing With Employee Injury Claims.” If you missed that article, it included a discussion of Texas’ “nonsubscription” system, wherein an employer may elect to withdraw from the state-sponsored workers’ compensation system and manage its own employee injury benefit program. Although Texas has allowed such election since 1913, it was not until the 1980s that nonsubscription became more widely used by Texas employers. Today it is estimated approximately 30 percent of employers in Texas are nonsubscribers, and they arguably save millions of dollars, by way of injury benefit claim-related cost savings. However, with such election comes the reality an employee may file a direct claim against the employer, in Texas state court, for negligence or recovery of benefits. If such occurs, the employer also waives several common law defenses. In other words, for a Texas nonsubscriber, the typical “exclusive remedy,” or an employee’s sole recovery for a workplace injury through the workers’ compensation system, is forfeited. The company has direct exposure for the loss. Nevertheless, in recent years, and primarily due to the astronomical employer cost savings, Texas’ system has caught the eye of legislators across the country. This all leads us to the ultimate question concluding this year’s previously submitted article, that is, should nonsubscription be part of the discussion in your State’s legislature or should your business be lobbying for this kind of alternative to traditional workers’ compensation? Apparently, the legislature for the state of Oklahoma was way ahead of us.

In early May 2013, Oklahoma Senate bill 1062 was signed into law. Like Texas, it allows an employer to opt out of traditional workers’ compensation. Affectionately known as the “Oklahoma Option,” proponents of the bill claim it to be a free-market savior to economic pressures driving up business costs associated with Oklahoma’s workers’ compensation system, a system that was actually over-hauled less than five years ago. Opponents to bill 1062 believe the allowances provided to employers drastically change the benefits and potential outcomes for employees, and cost savings will be primarily recouped to the detriment of injured employees, through unfair claim management practices. Irrespective of which side you may come down on bill 1062, the fact remains it is the law and may potentially be the beginning of a nationwide trend towards alternative systems to workers’ compensation. Some have called this a shift from “…adversarial

HOW IN THE WILD, WILD WEST DID ANGELS START HANDLING EMPLOYEE INJURY BENEFIT CLAIMS?

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systems to administrative systems.” 7 This article will provide a look at portions of the text of bill 1062 and attempt to spur thoughtful discussion regarding how the law may affect employers and employees, as well as whether it is a model for other states to consider.

A few years ago there began rumblings that Oklahoma might consider a Texas-like alternative system to workers’ compensation. In 2012, a prior version of bill 1062 came to a vote and failed to pass. Not so in 2013, it is now law. Known as the Oklahoma Employee Injury Benefit Act, it is simply an alternative system to managing employee injury benefits, but only for employers that qualify. 8 The law specifically allows an employer, wishing to elect the option, to follow these general steps: make formal notice of election to the insurance commissioner; pay a $1,500 fee; create a written benefit plan; obtain self-insured or licensed carrier insurance coverage; seek final approval from the State authority; and provide the “…same forms of benefits…” as those provided under the Workers’ Compensation Act. 9

How different could this new option be, as compared to workers’ compensation, especially if it requires the “same forms of benefits”? To answer that question, let’s look at more textual provisions of the bill. The new law states “…neither the Workers’ Compensation Commission, the courts of this state, or any state administrative agencies shall promulgate rules or any procedures related to the design, documentation, implementation, administration or funding of the qualified employer’s benefit plan.” 10 It also clarifies that “…no other provision of the Administrative Workers’ Compensation Act defining covered injuries, medical management, dispute resolution or other process…shall apply….” 11 The benefit plan may also allow for “…lump sum payments…and settlements.” 12 The underlying Compensation Act “…shall not define, restrict, expand or otherwise apply to the benefit plan.” 13 The law’s text further provides an “…employer’s liability under the benefit plan…shall be exclusive and in place of all other liability of the qualified employer and any of its employees at common law or otherwise, for a covered employee’s occupational injury or loss of services…[and] preclude a covered employee’s claim against a qualified employer, its employees, and insurer for negligence of other causes of action.” 14

The net-net of all these provisions on the new Oklahoma option are that Oklahoma employers appear to have carte blanche ability to design the benefit plan, determine compensable benefits and independently resolve disputes in a protected manner. In essence, employers can set the benefits, adjudicate the outcomes and enjoy exclusive remedy protection. This option, in theory, may be excellent news for businesses to obtain cost savings and maybe even help employees achieve more expedient and appropriate care.

This all brings us back to the title of this article, and begs the obtuse question, are employers angels? Is there a practical need for more external and internal controls on corporate employer driven programs, such as alternatives to workers’ compensation? Texas seems to think so, as tort exposure in state court likely precludes some bad-acting employers from taking unfair advantage of employees, through strict administration of injury claims and unscrupulous design of benefit plans. Texas’ system allows employers to determine benefits, but checks and balances such freedom with tort exposure. The Texas system has been working at a fast clip for approximately 20 years. Some employers float in and out of nonsubscription, but by and large, the system seems to work.

Oklahoma took a different approach, requiring employers to provide the “same forms of benefits,” but in doing so shielding the employer with exclusive remedy language. Will this work? Who knows? There are certainly some skeptics. Some folks evaluating the new law believe there may not be a genuine shield for employers. It is believed there may be exposure to an employer’s benefit plan administrator or even third party claims handler. Others point out that the text of the law does not provide exclusive remedy protection to vertically related parties, for instance, in a general contractor/subcontractor scenario. Many persons, who have analyzed the new law, believe the text itself provides numerous instances of unconstitutional issues, including violations of state and federal constitutional provisions and rights. And, as may be no surprise, some in the plaintiff’s bar believe it will be like “shooting fish in a barrel” attacking the law and employers who try to benefit from the election to opt out.

Whatever the outcome, those persons interested in being a part of this new system, as employers or facilitators, appear to universally believe there is a buck to be made. This fact alone may cause some to pause, when considering the source of certain advice, regarding the likely outcomes for employers who choose to take the option.

Maybe employers will get it right and the Oklahoma option will be the new model for alternatives to workers’ compensation. Maybe employers will get it totally wrong and be back on the steps of Congress in five years. Possibly employers will realize “that comp system was not so bad after all.” We do know employers are only human and certainly not angels. Might the Oklahoma option be a good start or will it be fraught with issues such as Supreme Court reversal, creative claims from the plaintiff’s bar, unintended employee consequences or employer exposure due to vague/absent language? Time will tell, but the best indicator may be that angels are not handling employee injury benefit claims. As James Madison also said, “…experience has taught mankind the necessity of auxiliary precautions.” Does the new Oklahoma Law have enough auxiliary precautions to protect employers, protect employees and allow our businesses to still make a profit?

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1 http://www.txsans.org/history.htm
3 Id.
4 http://newsok.com/oklahoma-workers-compensation-measure-signed-into-law/article/3807094
5 Id. at 2.
6 http://legiscan.com/OK/research/SB1062/2013
7 Id at Section 110, part B.
8 Id at Section 109, part D.
9 Id. at Section 110, part B.
10 Id. at Section 110, part C.
11 Id.
12 Id. at Section 116, part A.