II. Constitutional Challenge

Perhaps recognizing that a challenge to vouchers in federal court could fail after *Zelman*, on July 1, 2011, Indiana State Teachers Association leaders, teachers, and parents filed suit in state court seeking declaratory and injunctive relief from Indiana's private school voucher system, in *Meredith v. Daniels*.[7] The court also granted intervenor status to two parents expecting to use vouchers to pay in part for their children's tuition at private schools in Indiana.

Plaintiffs argued three points under the Indiana Constitution: 1) that Article 8, Section 1 restricts the General Assembly from adopting any educational system other than a "general and uniform system of Common Schools" and that private schools are not part of a "uniform system";[8] 2) that Article 1, Section 4 restricts the General Assembly from allowing vouchers paid with public funds to be used at religious institutions where children will be trained in religious beliefs, thus compelling support from citizens to "attend, erect, or support any place of worship, or to maintain any ministry" against their consent;[9] and 3) that Article 1, Section 6 restricts the General Assembly from allowing money "drawn from the state treasury, to be used for the benefit of any religious or theological institution."[10]

III. Trial and Supreme Court Decisions

On January 13, 2012, Judge Michael Keele of the Marion Superior Court granted defendant-intervenors' motion for summary judgment and denied plaintiff's motion for summary judgment.[11] Appellant's verified joint motion to transfer appeal to the Indiana Supreme Court was granted March 16, 2012. The case then proceeded as if it were originally brought before Indiana's Supreme Court.

The Indiana Supreme Court affirmed Judge Keele's lower court decision.[12] Both the trial court and Supreme Court relied on historical documentation of the 1851 revision of the Indiana Constitution.

A. Article 8, Section 1

In 1851, during the Constitutional Convention, an amendment to prohibit public funding of schools other than district or township schools was defeated; the trial court noted that Indiana's practice of funding private schools, including those offering religious

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Pennsylvania Supreme Court Permits Waivers for Future Negligence by Third Parties

*By Michael I. Krauss & Samantha Rocci**

On April 25, 2013, in *Bowman v. Sunoco*, a divided Pennsylvania Supreme Court held that Pennsylvania public policy does not prohibit waivers of liability for future negligence by a non-contracting party.[1] The implications of this decision are significant.

I. Background

The plaintiff worked as a private security guard with Allied Barton Security Services. As a condition of her employment, she signed a "Workers' Compensation Disclaimer." This "disclaimer" purported to waive plaintiff's right to sue any of Allied's clients for damages related to injuries that were covered under the state's Workers' Compensation Act.[2] Subsequently, while guarding one of Sunoco's refineries, plaintiff slipped on snow or ice and was injured. After collecting workers' compensation benefits, she proceeded to sue Sunoco for negligence, asserting that its negligent failure to clear the ice in an obscure location was the proximate cause of her injury.

During discovery, Sunoco learned of the Workers' Compensation Disclaimer, and invoked it in its motion for summary judgment. Plaintiff responded that the waiver contained in the disclaimer violated Pennsylvania's public policy, particularly as clearly embodied in the first sentence of section §204(a) of the Pennsylvania Workers' Compensation Act, which reads: "No agreement, composition, or release of damages made before the date of any injury shall be valid or shall bar a claim for damages resulting therefrom; and any such agreement is declared to be against the public policy of this Commonwealth."[3]

Finding that the disclaimer did not violate public policy as articulated in §204(a), the trial court granted Sunoco's motion and dismissed plaintiff's suit.[4] On appeal, the Superior Court affirmed, ruling that plaintiff waived only her right to sue third-party customers for damages that were covered under workers' compensation. While she waived those rights, she still retained the right to receive damages through Workers' Compensation, the protection of which *is* a

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matter of public policy. The disclaimer itself therefore did not violate public policy, because it did not attempt to deprive her of the rights granted by the Act.[5] The Superior Court found no precedent to support applying §204(a) to waivers benefiting third parties.

II. The Pennsylvania Supreme Court's Ruling

Plaintiff appealed to the Pennsylvania Supreme Court. She reasserted her claim that the disclaimer violated Pennsylvania public policy since it was clearly contrary to the plain language of §204(a) of the Pennsylvania Workers' Compensation Act.[6] Since the language of §204(a) is unambiguous, she argued, the court must apply the statute as written, without "interpreting" it as had done the Superior Court. Plaintiff also argued that the disclaimer conflicted with the subrogation clause of §319 of the Act, which allows a liable employer to be subrogated to the right of the employee when the latter's injury is caused in whole or in part by the act or omission of a third party.[7] Finally, plaintiff asserted that the disclaimer is incompatible with the common law of contract, as it purports to waive a cause of action not yet accrued.

Sunoco reiterated that, properly understood, §204(a) does not apply to releases benefiting third parties, but only to an employer's attempt to reduce its own liability.[8] It supported its argument by citing a Pennsylvania case holding that §204(a) only prohibited agreements to hold *the employer* harmless for future injury.[9] Since plaintiff did recover Workers' Compensation for her injuries, the disclaimer did not contravene the public policy behind the Act.

The Pennsylvania Supreme Court rejected plaintiff's plain language argument after looking at §204(a) as a whole, noting that the majority of §204(a) addresses the employer's obligation under the act, not third party duties.[10] Therefore the court found the section ambiguous as to the issue of third party liability.[11] The court believed that the legislature likely intended the "agreements" and "release of damages" exclusions in §204(a) to refer to employer obligations, though it conceded that the statute does not make this conclusion inevitable. In light of this ambiguity,

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Louisiana Supreme Court Strikes Down Statewide Voucher Program

*By Leslie Davis Hiner**

On May 7, 2013, the Supreme Court of Louisiana ruled that its state's statewide voucher program, an expansion of the New Orleans/Jefferson Parish voucher adopted in 2008, violated the Minimum Foundation Program (MFP) of the Louisiana Constitution.[1] Article 8, Section 13(B) of the Louisiana Constitution specifies that:

> [MFP] funds appropriated shall be equitably allocated to parish and city school systems according to the formula as adopted by the State Board of Elementary and Secondary Education, or its successor, and approved by the legislature prior to making the appropriation.[2]

The Supreme Court held that once funds are dedicated to the MFP, they cannot be used for any purpose other than to support public school systems. The court also rejected defendant's claim that funds appropriated in excess of necessary public school funding could be used for vouchers. The court determined that using the MFP process for vouchers was also constitutionally impermissible.

The court also rejected the argument that voucher students are public students entitled to state funding under MFP, citing the constitution's specific language requiring the funding of public schools, not school children.

Finally, the Supreme Court clearly stated that this ruling did not address the merits of the voucher program, only the funding mechanism. Subsequent to this decision, the Louisiana Legislature funded the voucher program through a line item appropriation; no child's education has been interrupted as a result of this decision.

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Endnotes

1. Louisiana Federation of Teachers v State, Nos. 2013–CA–0120, 2013–CA–0232, 2013–CA–0350, (La. May 7, 2013).

2. LA. Const. art. 8, § 13(B).

Pennsylvania Supreme Court Permits Waivers for Future Negligence by Third Parties

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the court submitted the Act to a more thorugh statutory analysis.

Looking at the history of the statute, the court determined that the legislature intended §204(a) to apply only to employers.[12] The original statutory setup established a dual scheme of recovery using Articles II and III. Originally, provisions in Article III were elective, and Article II applied if the employer and employees did not accept those provisions. Since the Act originally provided this dual recovery scheme, a public policy violation occurred only when the employer attempted to avoid *both* avenues of recovery.[13] Plaintiff was still covered under the compensation scheme detailed in Article III and thus the disclaimer did not violate the public policy behind the Act.

The court did not find plaintiff's other assertions compelling. Turning to her subrogation argument, the court found that an employer may choose to waive its subrogation right, and that such a waiver was clearly not contrary to public order, as it had no effect on workers. The disputed clause had the practical effect of accomplishing just such a waiver.[14]

Plaintiff relied on two Pennsylvania cases, *Henry Shenk Company v. City of Erie* and *Vaughn v. Didizan*, to support her claim that the disclaimer violated contract law by releasing liability for an action not yet accrued.[15] The court distinguished each of them, finding that waivers of future actions are permissible in Pennsylvania if the parties contemplated the actions at the time of release.[16] In each of the two cases cited, the actions could not have been contemplated by the parties, and could be distinguished from her case since here the purpose of the disclaimer was precisely to encompass future causes of action. Therefore, the parties in *Bowman* obviously contemplated such future actions.[17] Furthermore, the court cites multiple cases where releases for claims not yet accrued have been upheld.

Finally, the court looked to two cases from other jurisdictions that upheld similar waivers, *Horner v. Boston Edison Company*[18] and *Edgin v. Entergy Operations, Inc.*[19] In *Horner*, the Appeals Court of Massachusetts found a similar waiver valid since it only prevented the employee from recovering amounts in addition to those recovered from workers' compensation. The Supreme Court of Arkansas, in *Edgin*, found that such a waiver did not violate public policy since the employer was not attempting to "escape liability entirely, but [was] instead, attempting to shield its clients from separate tort liability" for injuries covered by workers' compensation.

The dissent would have denied defendant's summary judgment motion, and found fault with the majority's finding of ambiguity within the statute. Finding the statutory language prohibiting waivers "clear and unambiguous," the dissent argued that the waiver that plaintiff signed therefore contravened Pennsylvania public policy.[20] Furthermore, the dissent asserted that its interpretation was consistent with other portions of the Worker's Compensation Act that permit an employee to bring action against a third party when that party causes him or her injury.[21] Condemning the majority's "journey into the forbidden land of impermissible statutory interpretation," the dissent accused the majority of activism that disregarded the plain meaning of §204(a) in its decision.

III. Implications

This decision has many interesting implications. Clearly, employers whose employees work at remote client sites may now protect those clients from tort liability, and not merely via an indemnity clause as had previously been practiced. An indemnity clause shifts the risk of client negligence from the client to the employer (and depends crucially on the solvency of the employer), while the waiver in *Bowman* shifts the risk to the employee.

A second and quite interesting consideration is that the reasoning of the Pennsylvania Supreme Court majority could logically extend to products liability claims against tool manufacturers for workplace injuries. Since the court stressed that waivers of future tort recovery by an employee do not violate public policy so long as the employee can still recover through workers' compensation, and since it construed §204(a) to apply to only employer-employee relationships, it is difficult to see why its rationale would not apply to a suit by an employee against the manufacturer of an allegedly defective product that injured that employee, assuming an appropriate waiver had been signed. Such an extension of the rationale in *Bowman* would likely lead to employers receiving better deals on tool and other product purchases from manufacturers, in exchange for including "*Bowman* waivers" in their employment contracts. A very significant component of American products liability law involves "end runs" around workers compensation, wherein an employee of a negligent employer, banned from suing that employer

under the state workers' compensation statute, instead sues a product manufacturer, and recovers moneys (pain and suffering, etc.) not recoverable under workers' comp. *Bowman* may now offer a way to prevent such end runs.

The Pennsylvania Supreme Court may soon be called upon to determine the scope of this decision. In the meantime, it is likely that Pennsylvania employees will encounter more waivers of liability for third parties, as employers seek to test the limits of the court's decision in *Bowman*.

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Endnotes

1 Bowman v. Sunoco, Inc., 2013 WL 1767731 (Pa. Apr. 25, 2013).

2 The disclaimer stated:

> I hereby waive and forever release any and all rights I may have to:
>
> -make a claim, or
>
> -commence a lawsuit, or
>
> -recover damages or losses
>
> from or against any customer (and the employees of any customer) of Allied Security to which I may be assigned, arising from or related to injuries which are covered under the Workers' Compensation statutes.

Id.

3 77 P.S. § 71(a).

4 Bowman v. Sunoco, Inc., 2008 WL 8833338 (Pa. Com. Pl. May 21, 2008).

5 Bowman v. Sunoco, Inc., 986 A.2d 883 (Pa. Super. 2000).

6 2013 WL 1767731 at *2.

7 Section 319 reads: "Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, . . . against such third party to the extent of the compensation payable under this article by the employer." 77 P.S. § 671.

8 Bowman v. Sunoco, 2013 WL 1767731 (Pa. Apr. 25, 2013).

9 Inman v. Nationwide Mutual Ins. Co., 641 A.2d 329, 331 (Pa. Super. 1994).

10 Section 204(a) reads, in its entirety:

> (a) No agreement, composition, or release of damages made before the date of any injury shall be valid or shall bar a claim for damages resulting therefrom, and any such agreement is declared to be against the public policy of this Commonwealth. The receipt of benefits from any associating, society, or fund shall not bar the recovery of damages by action at law, nor the recovery of compensation under article three hereof; and any release executed in consideration of such benefits shall be void: Provided, however, That if the employe receives unemployment compensation benefits, such amount or amounts so received shall be credited against the amount of the award made under the provisions of sections 108 and 306, except for benefits payable under section 306(c) or 307. Fifty per centum of the benefits commonly characterized as "old age" benefits under the Social Security Act (49 Stat. 620, 42 U.S.C. §301 et seq.) shall also be credited against the amount of payments made under sections 108 and 306, except for benefits payable under section 306(c): Provided, however, That the Social Security offset shall not apply if old age Social security benefits were received prior to the compensable injury. The severance benefits paid by the employer directly liable for the payment of compensation and the benefits from a pension plan to the extent funded by the employer directly liable for the payment of compensation which are received by an employe shall also be credited against the amount of the award made under sections 108 and 306, except for benefits payable under section 306(c). The employe shall provide the insurer with proper authorization to secure the amount which the employe is receiving under the Social Security Act.

77 P.S. § 71(a) (internal citations omitted).

11 Bowman v. Sunoco, 2013 WL 1767731 at *4 (Pa. Apr. 25, 2013).

12 *Id.* at *5–6.

13 *Id.*

14 *Id.* at *6.

15 Henry Shenk Company v. City of Erie, 352 Pa. 481, 43 A.2d 99 (1945); Vaughn v. Didizian, 436 Pa.Super. 436, 648 A.2d 38 (1994)

16 Bowman v. Sunoco, 2013 WL 1767731 at *6–7.

17 *Id.* at *7.

18 Horner v. Boston Edison Co., 695 N.E.2d 1093 (Mass. App. Ct. 1998).

19 Edgin v. Entergy Operations, Inc., 961 S.W.2d 724, 727 (Ark. 1998).

20 Bowman v. Sunoco, 2013 WL 1767731 at *8–9 (Baer, J., dissenting).

21 *Id.*

Oklahoma Supreme Court Overturns Comprehensive Tort Reform

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"tort reforms"—have sought invalidation of these laws in state courts. This "judicial nullification" strategy, first described in detail in a 1997 Washington Legal Foundation Monograph,[7] utilizes state constitutional provisions to prevent reform proponents from appealing their losses in federal court.

Tort reform opponents took this approach to challenge