A Few Thoughts on the Florida Battle in the Context of Other Laws Placing Restrictions on Attorney's Fees and Access to Justice

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A. The Florida Battle

There is an ongoing battle in Florida over the constitutionality of restrictions on attorney's fees. I will defer to the Florida experts on this topic. But, I will mention briefly a few of the key moments in that battle. In 2008, the Florida Supreme Court bypassed the issue of the constitutionality of restrictions on attorney's fees. It construed an ambiguity in the provisions in question to allow variance from a strict percentage formula for awarding attorneys fees in certain appropriate cases. [1] Thereafter, the Florida legislature passed a bill intended to legislatively repeal that 2008 Florida Supreme Court decision.[2] Hopefully, the Florida Supreme Court will declare this statutory repeal unconstitutional. Undoubtedly, the court's failure to do so would have the impact of severely limiting the number of attorneys being interested in handling workers compensation cases and would also drastically reduce the filing of meritorious claims. As mentioned below, that is what history tells us about such restrictions on attorney's fees.

[1] Murray v. Mariner Health, 994 So. 2nd 1051 (Fla. 2008).

[2] Florida House of Representative Bill No. 903 (2009), Amending Section 440.34, Florida Statutes.

B. The Fee Issue On A National Level

A few general rules of thumb that are worth noting in regards to how this topic is dealt with nationally. One basic principal generally adopted in all states regarding workers compensation cases is that each party pays its own lawyer, win or lose.[3] Another general rule of thumb is that each of the fifty states employs some type of provision by statute or case law that subjects claimant's attorneys fees to the supervision of the state workers compensation tribunals that oversee workers compensation claims.[4] The question of how attorneys are compensated for representing injured workers typically raises the debate between those who contend that injured workers will fare just as well without attorneys and that having attorneys involved merely increases the litigation and cost to the system versus those who contend that workers compensation claims are full of complex controversies and problems of proof that are unsolvable in any fair way without the help of lawyers. [5] The current problem in Florida has raised this very same issue. As this writer understands it, the battles in Florida have a history that date back to at least the time of a 1978 study regarding "add on fees" which supposedly found that with greater the attorney involvement, there was also slower the resolution of claims.[6] However, as it has been wisely pointed out, particularly in so far as "add on fees" that might be imposed upon the

[3] Larson's Workers Compensation Law § 133.01. But, see issue of "add on" fees. Id at 133.02 [2] [a], charged against the employer/carrier.

[4] Id. at 133.03.

[5] Id at 133.05.

[6] Id.

employer/carrier if the claimant did prevail, if such fees were awarded that very outcome would appear to vindicate the wisdom of the injured worker's decision to hire an attorney.[7]

This discussion brings to mind the infamous 1954 case of Burns v. Sheppard in the state of Kentucky.[8] That case dealt with a statute providing that the employer would be required to pay one half of the injured worker's attorney's fees in the event of an award in favor of the injured worker. The Supreme Court of Kentucky found that provision unconstitutional on the grounds that "there could be no more constitutional justification for ordering the employer to pay all or part of the employee's attorney's fees than to require the employer to pay part of the claimant's grocery bill".[9] According to Larson's "this may well be the most preposterous single sentence in the archives of constitutional law which is saying quite a lot".[10] Perhaps the Burns Court failed to appreciate that often injured workers struggle over the question of whether they can afford their groceries and if hiring an attorney can change that fate. In this context, a few other similarly historic battles are helpful to mention in order to put the Florida battle in perspective.

[7] Id. at 133.07.

[8] Burns v Sheppard, 264 S.W. 2d 685 (Ky. 1954)

[9] Id. at 687.

[10] Larson's at 133.07D.

C. Veterans Denied The Right To Hire An Attorney

Until fairly recently, pursuant to a law dating back to the Civil War, United States veterans of war in this country were unable to hire attorneys to represent them in administrative hearings before the Veteran's Administration. Offenders were subject to a criminal penalty. Finally, as of June 20, 2007, the United States Congress amended that law to allow attorneys to be retained and paid to assist veterans at the administrative level.[11] It is hard to believe that in a country where we have the utmost respect for those who risk their lives to protect our freedoms that those same veterans were denied the assistance of a lawyers in administrative proceedings to preserve their veteran's benefits. I will not recount the history of this injustice but merely direct the reader to find others who have chronicled this historic battle over the right to hire and compensate lawyers.[12]

D. Inadequate Representation of Criminal Defendants

Studies have repeatedly shown that criminal defendants who cannot afford their own representation are more likely to have inadequate representation and more likely to be

[11] 38 U.S.C. 5904 (c)(4).

[12] See for instance, D.R. DiMatteo, Walters Revisited: Of Fairness, Due Process, and the Future of Veteran's Fight for the Right to Hire an Attorney, 80 Tul. L.Rev.975 (2005).

convicted.[13] In 1963, in a landmark decision the United States Supreme Court established the federal constitutional right to counsel for any defendants facing felony proceedings.[14] Later decisions extended the right to counsel to other proceedings. Despite this mandate imposed by relevant Supreme Court decisions and guidance provided by national studies, we continue to see that criminal defendants are punished, imprisoned and often executed for crimes they may well have not committed simply because of their inability to afford and obtain adequate legal representation.[15]

E. Representing America's Poor in Civil Cases

Much like injured workers and criminal defendants, America's poor are often at a disadvantage in protecting their civil rights. In response to that problem, The Legal Services Corporation (LSC), a private non-profit corporation, was established by the United States Congress in recognition of the need for assistance in assuring equal access to justice for those who would otherwise be unable to afford it. The LSC was established in 1974 by the Nixon administration. During the Reagan administration there was an attempt to eliminate the LSC by

[13] American Bar Association Report: Eight Guidelines of Public Defense Related to Excessive Workloads (August 2009); Gideon's Broken Promise: America's Continuing Quest for Equal Justice: A Report on the American Bar Association Hearings on the Right to Counsel in Criminal Proceedings (2004).

[14] Gideon v. Wainwright, 372 U.S. 335 (1963).

[15] B. Kemper, Gideon: Right to Cousel/Landmark Decision Falls Short of Promise, Washington Lawyer (September 2009).

various means. Funding rose to a high mark during the Clinton administration. Despite the availability of funding, America's poor continue to suffer from numerous restrictions on various grantee organizations of the LSC who are providing legal assistance to poor Americans.[16]

It has long been recognized that many Americans lack any access to real justice. As was stated quite eloquently by one Author:

> **"Equal justice under law" is one of America's most firmly embedded and widely violated legal principles. It embellishes courthouse entries, ceremonial occasions, and occasionally even constitutional decisions. But it comes nowhere close to describing the justice system in practice. Millions of Americans lack any access to the system, let alone equal access. An estimated four-fifths of the civil legal needs of the poor, the estimated needs of the estimated two-to-three fifths of middle income individuals remain unmet. Government legal aid and criminal defense budgets are capped at ludicrous levels, which make effective assistance of counsel for most low income litigants a statistical impossibility. We tolerate a system in which money often matters more than merit,**

[16] A. W. Houseman and L. E. Pearle, Securing Equal Justice for All: A Brief History of Civil Legal Assitance in the United States, Center for Law and Social Policy (Rev. January 2007).

and equal protection principles are routinely subverted in practice.[17]

F. The Texas Experience

The state of Texas legislature passed the Texas Workers Compensation Reform Act of 1989. That statue permitted private companies to opt out of the state workers compensation system and also strictly limited attorneys fees to 25% of the award to come out of the clients recovery or $150/hour, whichever was less.[18] In so doing, the reform totally restructured the then 76 year old workers compensation system. The net result of that change, according to a former president of the Texas Trial Lawyers Association, "killed off a practice area that for years had been the litigation training ground for many Texas lawyers. Our firm was probably the fifth biggest in the state in workers comp. We didn't do any after the new law and we cut out staff by a third to half".[19]

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[17] D.L. Rhode, Access to Justice, Oxford University Press (2004), Chapter 1, Page 3; See Also M.R. Anderson, Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDC's (paper for discussion at World Development Report Meetings) (August 16-17, 1999).

[18] J. Williford, Reformers Regress: the 1991 Texas Workers Compensation Act, 22 St. Mary's Law Journal, 1111 (1991).

[19] T. Carter, ABA Journal, Law News Now, October 2006 Issue, Tort Reform Texas Style. Texas may have become the only state that does not require employers to carry workers compensation insurance. Focus Report, Texas House of Representatives, House of Organization, Proposal to Change Workers Compensation (January 21, 2005).

G. Conclusion

In this great country, we pride ourselves on both our freedoms and our access to justice which are most probably unparalleled in comparison to any other country in the world. However, many of our citizens are limited in their ability to pursue justice. This is especially true in regards to the rights of the poor, those charged with criminal offenses and the injured or disabled. Perhaps the battle currently being waged in Florida needs to be viewed in this larger context of the many whose rights may not be adequately protected and whose access to justice is routinely denied.

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A graduate of St. Lawrence University and Syracuse University Law School, Mr. Reinhardt has been practicing for over 28 years. He specializes in handling workers' compensation, social security disability and personal injury cases. A member of the D.C., Maryland and Virginia Bars, he is an active member of the Virginia Trial Lawyers Association (VTLA), the Workers Injury Law & Advocacy Group (WILG), the National Organization of Social Security Claimant's Representatives (NOSSCR), the Richmond Bar Association and the American Association for Justice (AAJ). He is a long time VTLA board member, past chairman of Workers Compensation Sections. He is also a long time board member of WILG and currently serves on its Executive Committee. Mr. Reinhardt has regularly written articles and taught seminars on topics relating to his areas of specialty.