Opt-Out & Brass Tacks

“Insurance” versus Rights

- Easy to have policy discussion around “insurance.”
  - Just do cheapest, most efficient thing
  - The discussion simply clusters around efficient business subsidization
- Rights are harder: not necessarily supposed to be able to discard easily; may be expensive

What kinds of rights are at issue?

- What is the ERISA right?
  - The right to hold the employer to the discretionary benefits it unilaterally decided to confer
  - There is no ERISA "right" until the employer decides to confer a benefit it was under no obligation to provide

What is a workers' compensation right?

- It is a <u>substitute</u> for a court right to a remedy for personal injury that is of ancient origin
- It was obtained in the early 20th Century in an historic deal
- It was upheld by courts because it was a "reasonable" exchange for common law injury rights

Key Point

- Workers' compensation was **never** meant to be a "discretionary" employee benefit like, e.g., vacation or pension
- That is why it is explicitly exempted from ERISA: it is a different kind of benefit
- From its inception, it was viewed as a reasonable substitute for a body of tort/negligence law that was not working

Two Central Rights Questions

- Must **any** workplace remedial system be reasonable/adequate?
  - Who has the burden of establishing adequacy/inadequacy?
- May a workplace remedial system BOTH retain the exclusive remedy rule AND authorize suspension of the statutory right

The Slippery Slope Problem

- Without a legal requirement of alternative plan adequacy, nothing prevents employers from establishing increasingly and obviously inadequate plans
- If marker competition were sufficient to maintain adequacy it is difficult to explain the emergence of mandatory regimes in the first place

The Contract Argument

- Employees freely contract to enter into opt-out employment
- The argument proves too much
- Akin to *Lochner*: employees were free to contract to work for more than 60 hours per week, so legislation to the contrary interfered with freedom of contract
- Note: Many courts in the 19th century refused to allow pre-injury waiver of rights on the railroads

Pre-History Suggests Caution

- A lot going on from 1890-1910 to deal with accelerating pace of workplace injury
  - Voluntary workingmen's associations
  - Private insurance
  - Voluntary employer "enterprise" plans (especially in railroads)
- Key point: <u>Nothing Worked</u>