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Separation of Powers Conflicts in the "Reform" of Arkansas Workers' Compensation Law

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I. Introduction

The Arkansas General Assembly enacted a comprehensive statutory revision of the state's workers' compensation system in 1993, in response to pressure for reform. The resulting legislation not

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2 Some pressures for "reform" have included the wholesale revision of tort recovery systems, particularly in the areas of workers' compensation and medical malpractice. Other "reform" models have focused upon specific aspects of litigation, such as the capping of damage awards, limitation of punitive damages awards or tightening of statutes of limitation to avoid application of the discovery rule in malpractice actions. Philip Pesek et al., The New Workers' Compensation Law: What Happens Now?, ARK. LAW., Summer 1993, at 20 (journal of the Arkansas Bar Association). Tort reform began as early as 1985 in some jurisdictions. See The Tort Movement's Progress Across the Nation, NAT'L L.J., Nov. 9, 1992, at 35 (national survey of tort "reform" efforts among the various jurisdictions). Several jurisdictions have experimented with extensive restructuring of their tort systems, apparently supported by national interest groups. Evidence of pressure for "reform" is also indicated by the formation of such groups as the Civil Justice Reform Group. Reform War Chest, NAT'L L.J., Mar. 21, 1994, at B3. The organization is comprised of 17 Fortune 500 companies, and its purpose is to aid tort reform on the state level. Id. The group expects minimum contributions of $100,000 from each member corporation. Id. The concept of tort reform is not limited to Arkansas. For example, New Jersey legislators are currently discussing tort reform options. Tom Hester, Package Targets Lawsuits, STAR-LEDGER (Newark), Mar. 8, 1994, at 1; Russ Bleemer, Bills to Watch, 136 N.J.L.J. 670, 698 (Feb. 14, 1994) (Senator Gerald Cardinale, Chairman of the New Jersey Senate Commerce Committee, intends to introduce legislation that he describes as "tort reform."). This concept, however, has met with opposition from the members of the New Jersey bar. Herb Jaffe, Lawyers React Quickly to Counter Tort Reform, STAR-LEDGER (Newark), Feb. 13, 1994, at 31; Bleemer, supra at 698 (The New Jersey Chapter of the Association of Trial Lawyers of America, through its President, Lee Goldsmith, refers to this proposed legislation not as "tort-reform" as Senator Cardinale characterizes it, but rather as "tort abolition."). For scholarly comment on tort reform in other jurisdictions, see Leonard J. Nelson, Tort Reform in Alabama: Are Damages Restrictions Unconstitutional?, 40 ALA. L. REV. 533 (1989) (discussing Alabama's tort reform); Marie D. Mendelson, Note, Tort Reform: Ensuring The Most Equitable Results For Plaintiffs And Defendants?, 31 ARIZ. L. REV. 171
only reflects a more conservative approach toward recognition of work-related injury, but also evidences an extreme agitation toward the Arkansas courts with respect to the interpretation of the prior Act that led to expansive construction of benefit eligibility and employee rights. Apart from the substance of the changes that were implemented, the legislation is particularly interesting because of the direct attack on the judicial branch incorporated in the amending language itself. The General Assembly’s forthright declaration of its primacy with regard to the creation and direction of the compensation system may, in fact, represent a limited concern that judicial and administrative decision-making is responsible for increases in claims, which ultimately increase the cost of compensation insurance for Arkansas employers. However, the struggle between the legislative and judicial branches evident in the compensation reform legislation may reflect a deeper or broader sep-


At least one informed observer attributes the General Assembly’s adopting the Act to frustration over judicial and administrative expansion of the concept of eligibility for compensation benefits which the General Assembly had sought to control in its 1986 revision of the workers’ compensation law. See Joseph H. Purvis, From the Respondent: Workers’ Compensation Reform: An Attempt to Save the Goose that Laid the Golden Egg, Ark. L., Summer 1993, at 25-26. Purvis states that:

After the special session of 1986, employers felt most of the problems had been solved and that the playing field would be once again leveled. This was not to be, however, as the Arkansas appellate courts continued to broaden the scope and coverage of workers’ compensation and, in some instances, seemed to opine that the language of the statute did not mean what it seemed to clearly state.

Id. Consequently, the reforms of the Act are seen as directly responding to judicial activism in liberally construing the terms of 1986 revision of the Act. The General Assembly addressed the perceived problem of judicially and administratively expanding the compensation remedy by providing that “[a]ny and all case law inconsistent with the purposes set forth herein is specifically annulled.” 1993 Ark. Acts 796, § 1 (not codified) (This provision appeared in the Act signed by the Governor of Arkansas but does not appear in the Michie Supplement. In fact, the Michie Supplement in its historical note following Ark. Code Ann. § 11-9-101 (Michie Supp. 1993) the editors point out “[a]s originally enacted . . . this section provided, in part: [containing the above quote] . . .” but provides no explanation for the omission.)

ration of powers problem within the state. The tenor of the General Assembly's language, more than the actual substance of the revisions enacted, does permit the broader inference that legislators remain skeptical of the doctrine of judicial review. In recent years, the Arkansas General Assembly, like other state legislative bodies, has been pressed to "reform" state tort law. Some pressures for "reform" have included wholesale revision of tort recovery systems, particularly in the areas of workers' compensation and medical malpractice. Other "reform" models have focused on specific aspects of litigation, such as the capping of damage awards, limitation of punitive damages awards or tightening of

5 See supra note 2.


A number of state courts have rejected limitations or caps placed upon damage awards as violative of state constitutional guarantees. See, e.g., Smith v. Department of Ins., 507 So. 2d 1080, 1087-89 (Fla. 1987) ($450,000 limit on non-economic damages violates "open courts" provision of the Florida Constitution); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976) ($500,000 limit on recovery constituted "special law" in violation of Illinois Constitution); Carson v. Maurer, 424 A.2d 825, 836-38 (N.H. 1980) ($250,000 limit on non-economic damages violates equal protection guarantee of New Hampshire Constitution); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978) (striking $300,000 ceiling on recovery as violative of equal protection clause of North Dakota Constitution); Duren v. Suburban Community Hosp., 482 N.E.2d 1358, 1361-63 (Ohio C.P. 1985) ($200,000 cap violated state and federal constitutions); Lucas v. United States, 757 S.W.2d 687, 688-89 (Tex. 1988) (state supreme court responded to a certified question propounded by the United States Circuit Court by rejecting a $500,000 cap on medical malpractice damages as violative of the Texas Constitution). But see Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 598-601 (Ind. 1980) (upholding $500,000 damages cap); Sibley v. Board of Supervisors of La. State Univ., 462 So. 2d 149, 154-58 (La. 1985) ($500,000 cap upheld).

Interestingly, challenges to punitive damages awards have been asserted as violative of federal constitutional protections in two recent decisions of the United States Supreme Court. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (upholding punitive damages award as consistent with due process in achieving state interest in punishing offending defendant and deterring future wrongdoing likely to jeopardize public); TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2718 (1993) (observing that Fourteenth Amendment imposes substantive limits beyond which punitive damages may not extend). See also Keene Corp. v. Kirk, 870 S.W.2d 573, 581-82
statutes of limitation to avoid application of "discovery" rules in malpractice actions.\(^9\)

A significant goal of the national tort reform movement is the restructuring of state workers' compensation systems. A number of jurisdictions have engaged in major changes to compensation laws,\(^{10}\) while reform efforts are in progress in others.\(^{11}\) In 1992, a movement toward restructuring the Arkansas workers' compensation system prompted the creation of a reform committee. The General Assembly charged this committee with considering problems posed by then existing law under the direction of the

\(^{9}\) For example, the Texas Legislature enacted the Professional Liability Insurance for Physicians, Podiatrists and Hospitals Act in 1975, at least in part to stabilize malpractice premiums. Tex. Ins. Code Ann. art. 5.15-1 (West 1981). In a separate but related act, the Texas Legislature imposed a two year statute of limitations upon claims brought on behalf of minors over the age of six, requiring all actions commenced by minors to be brought within two years of the alleged malpractice or by age eight. Tex. Ins. Code Ann. art. 5.82, § 4 (West Supp. 1976), repealed by 1977 Tex. Gen. Laws 817 (and replaced by Tex. Rev. Civ. Stat. Ann. art. 4590i, § 10.01 (West Supp. 1977) (providing that a minor under the age of 12 has until age 14 to file a health care liability claim)). The Texas Supreme Court struck the minor statute of limitations as violative of the "Open Courts Doctrine." Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983) (citing Tex. Const. art. I, § 13 ("All courts shall be open, and every person for injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.")).


Arkansas Insurance Commissioner.\textsuperscript{12} The resulting bill adopted by the General Assembly reflects a pro-employer bias.\textsuperscript{13} This bias is likely a result of the composition of the committee that reviewed it.\textsuperscript{14}

\textbf{II. The General Assembly's Rationale for Change}

In its effort to reform Arkansas workers' compensation law and practice, the General Assembly sought to revitalize a system that it perceived had become threatened by fiscal instability.\textsuperscript{15} The

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\textsuperscript{12} See Pesek et al., \textit{supra} note 2, at 20 (for a thorough discussion of the history of the reform commission's orientation and work). Insurance Commissioner Lee Douglass formed the ad hoc committee that included representatives from labor, management, and insurance, as well as the legal community. \textit{Id.} In the Summer 1993 issue of the \textit{Arkansas Lawyer}, a series of articles trace the history of the workers' compensation reform movement from neutral, management and labor perspectives, respectively. See \textit{id.}; Joseph H. Purvis, \textit{From the Respondent: Workers' Compensation Reform: An Attempt to Save the Goose that Laid the Golden Egg, Ark. Law., Summer 1993}, at 25 (focussing on the impact of the Act on employers); Zan Davis, \textit{From the Claimant: Workers' Compensation Reform: Cutting Costs by Eliminating Employees from Coverage, Ark. Law., Summer 1993}, at 27 (focussing on the impact of the Act on employers).

\textsuperscript{13} 1993 Ark. Acts 796 (enacting H. 1615, 79th Ark. Legis., Reg. Sess. (1993) and codified at ARK. CODE ANN. §§ 11-9-101 to -1001 (Michie Supp. 1993)). The Chamber of Commerce drafted H. 1615 to replace the bill unanimously agreed to by the committee chaired by Arkansas Insurance Commissioner, Lee Douglass. Pesek et al., \textit{supra} note 2, at 20. The Chamber's bill was viewed as considerably more anti-labor than that produced by the ad hoc committee chaired by Commissioner Douglass. See Davis, \textit{supra} note 12, at 27. For a comprehensive treatment of the Act, see John D. Copeland, \textit{The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?}, 47 ARYx L. REV. 1 (1994). Copeland concludes that this enactment has achieved the goal of redressing employer concerns that liberal decisions of the Workers' Compensation Commission and Arkansas appellate courts have extended benefits to workers whose injuries were never intended to be compensated under the compensation system, yet in doing so may have exposed employers to substantially greater liability for claims arising in tort not subject to compensation under the more restrictive definitions of the Act. \textit{Id.} at 89-90.

\textsuperscript{14} See Pesek et al., \textit{supra} note 2, at 20 (observing that the committee formed by Commissioner Douglass was dominated by management and industry representatives who "carried the majority of votes [on contested provisions] and the result of their work was a management oriented recommendation."). The committee actually reviewed a bill drafted by the Arkansas State Chamber of Commerce. \textit{Id.} Chambers of commerce are usually made up of businesses in the locale and are ardent supporters of management, because their members are predominately employers and not employees.

\textsuperscript{15} Purvis, \textit{supra} note 12, at 25. The author notes "[a]s a result of all this [expansion of benefit eligibility through commission and court interpretation of compensation Act,] the crisis in workers' compensation continued to mushroom and it became readily apparent that many businesses that were supplying jobs to Arkansas workers were
Assembly's action struck at existing judicial doctrine in three distinct ways, each reflecting dissatisfaction with the postures that the state's appellate courts and administrative law system adopted in administering the pre-existing workers' compensation system. This legislative disapproval of the judiciary's interpretation of the Workers' Compensation Act strikes at the very heart of the separation of powers doctrine.

A. Assigning Blame to Judicial and Administrative Systems and Restructuring the System

First, the General Assembly assigned blame for the avowed crisis in workers' compensation insurance to judicial and administrative decision-making. These decisions expanded benefits and access to the system by adopting rules essentially favoring claimants over carriers in the claims resolution process. The Act expressly blamed the expansion of remedies with the fiscal problems beset

in danger of either going under, dropping workers' compensation insurance or moving to other states." *Id.* at 26.

16 *Id.* at 25.
17 For a discussion of the separation of powers issue, see *infra* part III.
18 The General Assembly set forth its rationale for restructuring the Arkansas workers' compensation system in by providing, in pertinent part:

(b) The primary purposes of the workers compensation laws are to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom and then to return the worker to the workforce, and to improve workplace safety through safety programs; improve health care delivery through use of managed care concepts; encourage the return to work of injured workers; deter and punish frauds of agents, brokers, solicitors, employers and employees relating to procurement of workers' compensation coverage or the provision or denial of benefits; curtail the rise in medical costs associated with the provision of workers compensation benefits; and emphasize that the workers compensation system in this state must be returned to a state of economic viability. 1993 Ark. Acts 796, § 1 (codified at Ark. Code Ann. § 11-9-101(b) (Michie Supp. 1993)).

19 Purvis, *supra* note 12, at 25. In reviewing the General Assembly's action in restructuring the state's compensation Act, a defender of the "reforms" argued that the crisis in the compensation system compelling the legislative action could be traced to three long-term developments: (1) appellate court's traditional "liberal construction" of compensation statutes in favor of claimants, expanding the definition of "compensable" claims; (2) increased medical costs associated with physician's fees that tend to be unchallenged by administrative and judicial systems; and (3) increased fraud perpetrated by compensation claimants. *Id.*
WORKERS' COMPENSATION REFORM

The Act sets forth the General Assembly's explanation in the following terms:

The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised and amended from time to time. Unfortunately, many of the changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state. The Seventy-Ninth General Assembly intends to restate that the major and controlling purpose of workers' compensation is to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force. When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. It is the specific intent of the Seventy-Ninth General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision in this act. In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, it shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.\textsuperscript{21}

The General Assembly contracted benefits in several ways. First, it adopted an explicit policy of strict construction of the Workers' Compensation Act.\textsuperscript{22} Second, it limited the statutory definition of "compensable injury" in a dramatic fashion, effectively contracting benefit eligibility.\textsuperscript{23} The limited concept of "compensable injury" re-


\textsuperscript{21} Id.

\textsuperscript{22} Id.; see infra part II.B.

\textsuperscript{23} A comparison of the pre-existing definition of "injury" and the previous definition of "compensable injury" demonstrates the General Assembly's approach. The
prior version of Ark. Code Ann. § 11-9-102 (Michie 1987) defined the term “injury” in the following language: “Injury’ means only accidental injury arising out of and in the course of employment, including occupational diseases as set out in § 11-9-601(e), and occupational infections arising out of and in the course of employment[.]” Id.

The Act re-defined “compensable injury” and provided a far more restrictive view of those injuries subject to compensation under the Act:

(5) (A) “Compensable Injury” means:

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence;

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition;
(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence;
(c) Hearing loss which is not caused by a specific incident or which is not identifiable by time and place of occurrence;
(iii) Mental illness as set out in § 11-9-113;
(iv) Heart, cardiovascular injury, accident, or disease as set out in § 11-9-114;
(v) A hernia as set out in § 11-9-523.

(B) “Compensable injury” does not include:

(i) Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-related hostility or animus of one, both, or all of the combatants, and which said assault or combat amounts to a deviation from customary duties; further, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries;

(ii) Injury incurred while engaging in or performing, or as the result of engaging in or performing, any recreational or social activities for the employee’s personal pleasure;

(iii) Injury which was inflicted upon the employee at a time when employment services were not being performed, or before the employee was hired or after the employment relationship was terminated;

(iv) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs or prescription drugs used in contravention of physician’s orders. The presence of alcohol, illegal drugs or prescription drugs used in contravention of a physician’s orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician’s orders. Every employee is deemed by his performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement per-
stricts recovery in a number of significant ways. The primary limitation requires a showing of a direct nexus between the claimant's work-related activities and the injury. The existence of a pre-existing injury or condition, whether as a result of a later injury or the natural aging process, thus, will defeat a claim for compensation; unless the com-

sonnel for the presence of any of the aforementioned substances in the employees body. An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs or prescription drugs utilized in contravention of the physicians orders did not substantially occasion the injury or accident.

(C) The definition of "compensable injury" as set forth hereinabove shall not be deemed to limit or abrogate the right to recover for mental injuries as set forth in § 11-9-113 or occupational diseases as hereinafter set forth in § 11-9-601 et seq.

(D) A compensable injury must be established by medical evidence, supported by "objective findings" as defined in § 11-9-102(16).

(E) Burden of proof. The burden of proof of a compensable injury shall be on the employee and shall be as follows:

(i) For injuries falling within the definition of compensable injury under subdivision 5(A)(i) of this section, the burden of proof shall be a preponderance of the evidence;

(ii) For injuries falling within the definition of compensable injury under subdivision 5(A)(ii) of this section, the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

(F) Benefits.

(i) When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided this chapter.

(ii) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. If any compensable injury combines with a pre-existing disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

(iii) Under subdivision (5)(F) of this section, benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A nonwork-related independent intervening cause does not require negligence or recklessness on the part of a claimant.

(iv) Nothing in this section shall limit the payment of rehabilitation benefits or benefits for disfigurement as set forth in this chapter[.]
plainant can demonstrate that the work-related injury was the major cause of the impairment. Moreover, unless the worker can point to a specific cause, injuries sustained as a result of work-related activities are not compensable unless they fit within statutory exceptions. The statutory exceptions include: carpal tunnel syndrome and related injuries, back injuries, hearing loss, limited mental illness suffered concurrently with physical injury, certain incidents of heart attack or cardiovascular disease and hernias.

The General Assembly also struck at the perceived crisis in work-
ers' compensation by increasing enforcement of anti-fraud provisions in the law. These provisions included increasing penalties for employees' and employers' fraudulent conduct and creating a fraud investigation unit.\textsuperscript{29}

In addition, the General Assembly sought to address the problem of rising premiums attributable to increasing medical expenses\textsuperscript{30} in two specific ways. First, it created the Workers' Health and Safety Division. This Division is responsible for assessing causes of injuries and occupational disease, and instituting educational programs to educate

\begin{footnotesize}
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Recovery for coronary disease or incident is limited, as provided in the Act, as amended:

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

(b)(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

(2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his burden of proof.

\textsuperscript{30} In 1990, Arkansas ranked nationally as the fifth worst state in compensation costs as carriers paid $1.42 in benefits for every $1.00 in premiums collected. John D. Copeland, The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?, 47 Ark. L. Rev. 1, 3 (1994). Copeland notes that as the average medical cost per compensation claim increased from $1137 to $1582 over a three year period from 1988 to 1991, the percentage of claims paid under the existing compensation scheme attributable to medical costs also increased from 47.35% to 52.3%. Id. at 3, n.3 (citing Carol Griffee, A Workmen's Compensation Compromise, Ark. Bus., May 25, 1992, at 16).\end{itemize}
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employers in worker safety. 31 Second, the General Assembly took a drastic step in mandating a "managed health care" system that requires treatment by physicians and care facilities associated with a managed health care entity. 32 The key provision is the setting of rea-


32 Id. § 19 (codified at Ark. Code Ann. § 11-9-508 (Michie Supp. 1993)). New subsection (c) specifically provides for creation of the managed care system, with subsection (d) delineating the parameters of the system and rights of the injured employee:

(c) In order to help control the cost of medical benefits, the commission . . . is authorized and directed to establish appropriate rules and regulations to establish and implement a system of managed health care for the State of Arkansas.

(d) For the purpose of establishing and implementing a system of managed health care, the commission is authorized to:

(1) Develop rules and regulations for the certification of managed care entities to provide managed care to injured workers;

(2) Develop regulations for peer review, service utilization, and resolution of medical disputes;

(3) Prohibit "balanced billing" from the employee, employer, or carrier;

(4) Establish fees for medical services as provided for in Rule 30 and its amendments. The commission shall make no distinction in approving fees from different classes of medical service providers or health care providers for provision of the same or essentially similar medical services or health care services as defined herein; and

(5) (A) Give the employer the right to choose the initial treating physician, with the injured employee having the right to petition the commission for a one-time only change of physician to one who is associated with a managed care entity certified by the commission, or is the regular treating physician of the employee who maintains the employee's medical records and with whom the employee has a bona fide doctor-patient relationship demonstrated by a history of regular treatment prior to the onset of the compensable injury, but only if the primary care physician agrees to refer the employee to a certified managed care entity for any specialized treatment, including physical therapy, and only if such primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by the managed care entity initially chosen by the employer.

(B) A petition for change shall be expedited by the commission.

(e) Any section or subsection of this act notwithstanding, the injured employee shall have direct access to any optometric or ophthalmologic medical service provider who agrees to provide services under the rules, terms, and conditions regarding services performed by the managed care entity initially chosen by the employer for the treatment and management of eye injuries or conditions. Such optometric or ophthalmologic medical service provider shall be considered a certified provider by the commission.
sonable fees for the treatment of work-related injuries.\textsuperscript{33} Finally, the General Assembly expanded the group of employees eligible for protection under the Act to include those employees of general contractors against whom recovery for work-related injuries is now limited by the Act's exclusivity doctrine.\textsuperscript{34}

One of the General Assembly's primary objectives in restructuring the system was to ensure inflexibility, rather than flexibility, when evaluating the rights of injured employees. In achieving this objective the General Assembly was "successful in swinging the workers' compensation legal pendulum from a liberally construed act which was sympathetic to workers' claims and sometimes produced absurd results to a strict, unbending act which is management oriented."\textsuperscript{35}

B. The Demand for Strict Construction of the Revised Law

The General Assembly sought to deal with the perceived problem of expansive interpretation of the compensation statute by limiting the discretion of the state's courts and the administrative system. This legislative foray into the judicial administration of the Act creates a separation of powers problem to be discussed infra. The Assembly directed the Workers' Compensation Commission, in its administration of the workers' compensation scheme, to confine interpretation to a strict reading of the language of the Act, as amended.\textsuperscript{36} Apparently, this strict construction approach was


\textsuperscript{34} The Act sets forth the exclusivity doctrine and provides, in pertinent part:

(a) The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer, or any principal, officer, director, stockholder, or partner acting in his capacity as an employer, or prime contractor of the employer, on account of the injury or death, and the negligent acts of a coemployee shall not be imputed to the employer. . . .

\textsuperscript{35} Pesek et al., \textit{supra} note 2, at 21.

\textsuperscript{36} For example, the General Assembly expressly stated its policy was to annul prior
designed to reverse and supplant the traditional liberal construction of workers' compensation laws afforded to claimants.\textsuperscript{37} The traditional approach almost necessarily results in expansion of eligibility and benefits because close questions are resolved in favor of coverage and compensation.\textsuperscript{38}

C. Annulment of the Civil Remedy for Wrongful Discharge

The General Assembly sought to annul decisions of the Arkansas Supreme Court\textsuperscript{39} that afforded an employee a civil remedy for an employer's discrimination or retaliatory discharge of that employee prompted by the employee's assertion of rights under the Workers' Compensation Act.\textsuperscript{40} The recognition of this remedy

\footnotesize{judicial decisions. 1993 Ark. Acts 796, § 1 (not codified). Another subsection provides "[t]he purpose of this section is to provide for a timely hearing on claims for benefits" and "the annulment of any and all case law inconsistent herewith." Id. § 27 (codified at Ark. Code Ann. § 11-9-702 (h) (Michie Supp. 1993)).

\textsuperscript{37} See, e.g., Holiday Inn-West v. Coleman, 792 S.W.2d 345, 347 (Ark. Ct. App. 1990) (holding that both the Workers' Compensation Commission and the state courts are required to construe the Act liberally to give effect to its remedial purpose). Other jurisdictions have traditionally applied the rule of affording compensation claimants the benefit of a liberal construction of the compensation act. See, e.g., B & B Nursing Home v. Blair, 496 P.2d 795, 798 (Okla. 1972); Walters v. American States Ins. Co., 654 S.W.2d 423, 430 (Tex. 1983) (McGee, J., concurring) (citing Huffman v. Southern Underwriters, 128 S.W.2d 4 (Tex. 1939)).

\textsuperscript{38} For instance, in redefining the critical term "compensable injury," the General Assembly specifically sought to annul prior commission and judicial decisions on point by providing that "[a]ny and all prior decisions by the Commission and the Courts inconsistent with the definition of compensable injury as herein set forth are hereby specifically annulled, repealed, and held for naught." 1993 Ark. Acts 796, § 2 (not codified) (This provision also appeared in the Act signed by the Governor of Arkansas but does not appear in the Michie Supplement. See infra note 3.).


followed legislative and judicial recognition of similar remedies in other jurisdictions for retaliation directed toward workers' compensation claimants.

Although the Act long had included a criminal penalty provision for offending employers, the absence of any annotations to this provision in the official statutes does not necessarily indicate that such discrimination did not exist in Arkansas. Presuming no employer discrimination occurred does not account for the legislative expansion of the criminal penalty to include prosecution as a felony and adding an administrative remedy. More likely, it suggests that employers effectively were insulated from prosecution for such discrimination. The Act increased the range of punishment

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43 For a comprehensive national survey of the development of the wrongful discharge remedy in tort, see Love, supra note 40. In contrast to the trend in other jurisdictions to base such claims upon tort principles, the Arkansas Supreme Court in Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380 (Ark. 1988), predicated its wrongful discharge action on breach of implied contract.

44 Ark. CODE ANN. § 11-9-107 (Michie 1987) provided:

Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of his claiming benefits under this chapter or who in any manner obstructs or impedes the filing of claims for benefits under this chapter shall be guilty of a misdemeanor and on conviction shall be punished by a fine of not to exceed one hundred ($100) dollars, or by imprisonment of not to exceed six (6) months, or by both fine and imprisonment.

Id.

45 Id.

46 In addition, the amended Act provides for increased penalties for employers or claimants who falsify claims or defenses in an effort to qualify for or defeat a claim for compensation, or to increase or decrease benefit levels. Under the prior statute, only an employee was subject to prosecution for falsification, but the penalty range included only incarceration for up to one year and fine of up to $300. Ark. CODE ANN. § 11-9-106 (Michie 1987). The amended section increases potential liability for any party engaging in misrepresentation to the Class D felony level. 1993 Ark. Acts 796, § 5 (codified at Ark. CODE ANN. § 11-9-106(a)(1) (Michie Supp. 1993)). Interest-
from misdemeanor to felony grade and included the potential administrative sanction of a fine of up to $10,000 for employer discrimination or discharge based on retaliation.\textsuperscript{47}

More significantly, the Act expressly provided for exclusivity of these remedies.\textsuperscript{48} This exclusivity furthers the goal of preserving the at-will employment doctrine by annulling the public policy wrongful discharge remedy that had been evolving in decisions of the Arkansas Supreme Court.\textsuperscript{49} In \textit{Sterling Drug, Inc. v. Oxford},\textsuperscript{50} the court initially recognized a civil remedy for whistle-blowers dis-
charged as a result of disclosing their employer’s illegal acts.\textsuperscript{51} While not directly applying the remedy to compensation claimants, the court impliedly accepted this form of discrimination as falling within the public policy concerns of the remedy.\textsuperscript{52} Citing the landmark Indiana decision of Frampton \textit{v. Central Indiana Gas Co.},\textsuperscript{53} the \textit{Sterling Drug} court supported the development of wrongful discharge exceptions to the at-will employment doctrine.\textsuperscript{54}

The court in \textit{Wal-Mart Stores, Inc. v. Baysinger}\textsuperscript{55} and \textit{Mapco, Inc. v. Payne}\textsuperscript{56} extended \textit{Sterling Drug} to afford protection to discharged compensation claimants. The \textit{Sterling Drug} remedy failed to adequately provide a basis for recovery because it was grounded in a theory of implied contract,\textsuperscript{57} rather than tort. Thus, it limited the discharged claimant’s recovery potential to contractual damages for lost wages and benefits.\textsuperscript{58} However, the latter two decisions nev-
Nevertheless represented an important breakthrough in the protection of compensation claimants from employer retaliation.

In response, the General Assembly expressly "annulled" the decisions in *Wal-Mart Stores, Inc. v. Baysinger* and *Mapco, Inc. v. Payne*. It did so to enhance the criminal punishment available. The General Assembly hoped to discourage employer retaliation by creating the new administrative remedy of providing fines for offending employers. Neither remedy provided direct recovery by the discharged claimant, however, nor for reinstatement. Moreover, the provision included no incentives for claimants' counsel to pursue these remedies on behalf of their clients, such as those generally available in civil actions in contingent fee arrangements or recovery of reasonable attorney's fees by statute.

**III. A Tradition of Separation of Powers Conflicts**

On a purely local level, the General Assembly's action may evidence on-going jealousy within the Arkansas tri-partite system of government between the proper roles accorded the legislative and judicial branches in administering the justice system. On the large scale, however, concerns are focused on the breadth of this fight, involving the future roles of the traditionally "independent" judicial branch and the traditionally "influenced" legislative opinion in his dissent from the *per curiam* order denying rehearing. Sterling Drug, Inc. v. Oxford, 747 S.W.2d 579, 579-80 (Ark. 1988) (Purtle, J. dissenting).

60 812 S.W.2d 463 (Ark. 1991).
61 812 S.W.2d 483 (Ark. 1991).
63 *Id.*
65 One Arkansas commentator, reflecting on the legislative goals in adopting Act 796, observed:

Although Section 35 [, the provision directing the state's courts not to "liberalize" application of the act, as amended,] has no teeth due to a doctrine called "Separation of Powers," it is clear that the drafters were sending the message to all that they will not tolerate anyone trying to accomplish workers' compensation "reform" without their involvement. In other words, if the ALJs, Commission or courts expand the provisions of the new Act, you can count on the General Assembly to correct the expansion at the next legislative session.

Pesek et al., *supra* note 2, at 24.
branch in forming important aspects of public policy bearing upon
dividual rights.

Observers of recent policy developments in Arkansas are not
shocked at the criticism leveled at the state's judicial system by the
General Assembly in its reform of the workers' compensation
scheme. The most obvious example of this tension involves the
competing efforts of the General Assembly and the judiciary to cre-
ate a comprehensive law of evidence for use in Arkansas courts.66

In 1976, the General Assembly enacted legislation adopting a
set of rules of evidence for use in the state's court system.67 The
statutory provisions setting forth the rules essentially mirrored the
federal rules of evidence68 in all significant respects,69 although

were adopted by the General Assembly in 1975 Ark. Acts 1143, § 1 (Extended Sess.
1976)).
68 The "Uniform Rules" follow the same division of evidentiary concepts by articles
and utilize the same numerical framework for designation of particular rules em-
69 This is not to suggest that the General Assembly's "Uniform Rules" did not di-
verge from the Federal Rules in any respect. For example, Ark. R. Evid. 803(8), de-
fining public documents admissible as exceptions to the general hearsay prohibition,
differs markedly from the federal rule in terms of language.

Substantive differences, though few, also exist between the Arkansas and federal
rules. An important distinction is found in Fed. R. Evid. 704(b), which precludes an
expert from rendering an opinion on the mental state of a criminal defendant at the
time of commission of an offense. No such prohibition limiting an expert's opinion
on this question of ultimate fact is included in the Arkansas version. Ark. R. Evid.
of expert opinion on mental state in a criminal trial when relevant to a defensive issue
as to criminal intent. Robinson v. State, 598 S.W.2d 421 (Ark. 1980) (holding the
statute applies to allow expert opinion on the ultimate issue of fact concerning the
defendant's mental state at the time of the crime).

Moreover, Fed. R. Evid. 804(b)(3) permits the admission of an accomplice's
jointly inculpatory statement against the accused in a criminal trial, provided certain
guarantees of trustworthiness and reliability are met. See State v. Earnest, 703 P.2d
872 (N.M. 1985), vacated, 477 U.S. 648 (1986) (holding no constitutional prohibition
on admission of non-testifying accomplice's jointly inculpatory confession under com-
parable New Mexico rule governing admission of declarations against penal interest
provided statement contained sufficient indicia of trustworthiness and reliability).
The comparable Arkansas provision addressing the penal interest exception expressly
precludes such statements: "A statement or confession offered against the accused in
a criminal case, made by a codefendant or other person implicating both himself and
the accused, is not within this exception." Ark. R. Evid. 804(b)(3) (Ark. Code Ann.
§ 16-41-101 (Michie 1994)). The admissibility of the codefendant's confession in a
other provisions not included in this enactment also addressed evidentiary matters.70 The state supreme court declared the evidence code invalid based upon a procedural defect in the legislative process.71

Subsequently, the Arkansas Supreme Court adopted its own Rules of Evidence for use in state court proceedings.72 These rules also mirrored the Federal Rules of Evidence.73 These court-made federal prosecution is again being addressed by the United States Supreme Court this term in Williamson v. United States, 981 F.2d 1262 (11th Cir. 1992), cert. granted, 114 S. Ct. 681 (U.S. Jan. 10, 1994) (No. 93-5256).

70 For example, the General Assembly also recognized the need to dispense with pro forma testimony relating to the predicate for admission of medical records. This action was to ease the burden placed upon medical offices and hospitals to make their staff charged with record keeping available for live testimony at trials. Under Arkansas law, deposition testimony may not generally be substituted for live testimony at trial unless circumstances preclude the witness from appearing. Ark. R. Civ. P. 32 (providing for exceptions to the live witness rule where the witness has died or is beyond the reach of the court’s subpoena power, but not expressly providing for admission of deposition testimony upon agreement of the parties). The General Assembly addressed the problem by recognizing a procedural exception to the general rule for admission of medical records evidence and creating a standardized affidavit for use in admission of these records. Hospital Records Act, Ark. Code Ann. §§ 16-46-301 to -308 (Michie 1994).

Similarly, the General Assembly enacted a “rape shield law” designed to protect complainants in criminal prosecution from disclosure of prior sexual history unless this evidence has been found to be relevant to an issue in the instant prosecution after notice and hearing before the trial court, conducted in camera, prior to trial. Ark. Code Ann. § 16-42-101 (Michie 1994). The Arkansas Supreme Court in Flurry v. State, 720 S.W.2d 699 (Ark. 1986) upheld this limitation on use of evidence for impeachment purposes in criminal prosecutions.

71 In Ricarte v. State, 717 S.W.2d 488, 489 (Ark. 1986), the Arkansas Supreme Court held that the “Uniform Rules of Evidence” were invalid, having been adopted during an unlawful session of the General Assembly.

72 The supreme court’s per curiam order accompanying its opinion in Ricarte provided:

As explained in today’s opinion in Ricarte v. State, 290 Ark. 100, 717 S.W.2d 488 (Oct. 13, 1986), the court under its statutory and rule-making authority adopts the Uniform Rules of Evidence as they are set forth in Act 1143 of 1975 (Extended Session, 1976). The Rules will be applicable as stated in Rule 1101. Rule 1102 is changed to read: “These rules shall be known as the Arkansas Rules of Evidence and may be cited as A.R.E. Rule —.”

In re Adoption of the Uniform Rules of Evidence, 717 S.W.2d 491 (Ark. 1986). For purposes of this article, the court-made rules of evidence will be cited as A.R.E. Rule —, and the legislative rules of evidence will be cited Ark. R. Evid. —.

73 The Federal Rules of Evidence were adopted by the United States Supreme Court by an order dated November 20, 1972. See Reporter’s Note, 409 U.S. 1132 (1973). Subsequently, Congress acted to limit the application of the Court’s order until such time as it had acted to approve the rules. Id. Justice Douglas dissented
rules are generally deemed authoritative by the court in litigation.\textsuperscript{74}

In apparent response to the supreme court's action, the General Assembly re-enacted its evidence code, this time in compliance with procedural requirements for the introduction of legislation.\textsuperscript{75} Consequently, Arkansas law now includes both a judicially-adopted set of evidentiary rules,\textsuperscript{76} and a legislatively-enacted evidence "code."\textsuperscript{77} The latter is destined to be ignored in the official decisions of the state's appellate courts despite the "code['s]" provision that the Uniform Rules govern admission of evidence in the state's courts.\textsuperscript{78}

The existence of two sets of "official" rules does not indicate a mere technical oversight on the part of the judicial and legislative branches in terms of duplication of effort. Rather, it indicates a

\textsuperscript{74} A.R.E. Rule 1101 provides:
\begin{itemize}
  \item[(a)] Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the [courts of this state].
  \item[(b)] Rules Inapplicable. The rules other than those with respect to privileges do not apply in the following situations:
    \begin{itemize}
      \item [(1)] Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104 (a).
      \item [(2)] Grand jury. Proceedings before grand juries.
      \item [(3)] Miscellaneous proceedings. Proceedings for extradition or rendition; [preliminary examination] detention hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.
      \item [(4)] Contempt proceedings in which the court may act summarily.
    \end{itemize}
\end{itemize}

\textsuperscript{75} Uniform Rules of Evidence, Ark. R. Evid. 101 to 1102 (Ark. Code Ann. § 16-41-101 (Michie 1994)). Other jurisdictions operate under an "evidence code" approach in which the state legislature adopts the rules of evidence. See, e.g., Cal. R. Evid. 1 to 1605; La. R. Evid. 101 to 1103; N.Y. Civ. Prac. L. & R. 4501-46 (Consol. 1994); N.J. R. Evid. 1 to 72, in Richard J. Biunno, Current N.J. Rules of Evidence at iv (1992) ("The Rules of Evidence represent the product of the cooperative effort of the Legislature and the Supreme Court.") (New Jersey's prior evidence code which is no longer in effect); N.J. R. Evid. 101 to 1103 (New Jersey's current evidence code which is currently in effect).

\textsuperscript{76} Ark. R. Evid. 1101 (Ark. Code Ann. § 16-41-101 (Michie 1994)). Rule 1101 provides: "Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this state." Id.
true conflict in philosophy respecting the propriety of judicial control over the litigation process. This conflict has appeared in at least two different circumstances in recent years when conflicts over specific control of the process developed.

In State v. Sypult, the state supreme court considered enforcing a legislative provision that excluded communications relating to child abuse from any privilege recognized in the "Uniform Rules of Evidence" other than the attorney/client or minister/confessor privilege. The accused made statements to physicians and a counselor at the Veterans Administration Hospital that the state sought to use at trial. Prior to trial, defense counsel moved to suppress the statements on the ground that they were protected by

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79 For a discussion of the propriety of judicial rulemaking in the context of matters of evidence, see Ammerman v. Hubbard Broadcasting, Inc., 551 P.2d 1354 (N.M. 1976). New Jersey faces a similar separation of powers problem. New Jersey's constitution authorizes the court to make rules "governing the administration of all courts in the state and, subject to law, the practice and procedure in all such courts." N.J. Const. art. VI, § II, para. 3. The New Jersey Constitution divides rulemaking authority between the Legislature, for substantive issues, and the Supreme Court, for procedural issues pertaining to the court. However, in Winberry v. Salisbury, 74 A.2d 406 (N.J. 1950), cert. denied, 340 U.S. 877 (1950), the New Jersey Supreme Court declared its self-authority to promulgate court rules beyond legislative review. Although the state bar made several attempts to challenge this authority, the New Jersey Supreme Court has yet to curtail its self-proscribed authority. See, e.g., American Trial Lawyers Ass'n v. New Jersey Supreme Court, 330 A.2d 350 (N.J. 1974) (holding that the Supreme Court had constitutional authority to adopt a contingent fee agreement); In re LiVolsi, 428 A.2d 1268 (N.J. 1981) (rejecting the New Jersey Bar Association's argument that mandatory fee arbitration, upon client's request, was unconstitutional).

80 800 S.W.2d 402 (Ark. 1990).

81 Id. at 403-04 (citing Ark. Code Ann. § 12-12-511 (Michie 1987 & Supp. 1989)). The statute in effect at the time of trial in Sypult provided:

Any provision of the Arkansas Uniform Rules of Evidence notwithstanding, and except as provided in subsection (b) of this section, any privilege between husband and wife or between any professional person, except the privilege between a lawyer and client, and the privilege between a minister, including a Christian Science practitioner, and any person confessing to or being counseled by the minister, including, but not limited to, physicians, counselors, hospitals, clinics, day-care centers, and schools and their clients shall not constitute grounds for excluding evidence at any proceeding regarding child abuse, sexual abuse, or neglect of a child or the cause thereof.

Id. at 403-04 (citing Ark. Code Ann. § 12-12-511 (Michie 1987 & Supp. 1989)) (emphasis added by the court). This same provision was reenacted following the court's decision in Sypult. See 1991 Ark. Acts 1208, § 13 (codified at Ark. Code Ann. § 12-12-511 (Michie 1993)).

82 Sypult, 800 S.W.2d at 403.
the physician and psychotherapist/patient privilege. The court noted that the public policy prompting the General Assembly to exclude confidential communications from the scope of the patient/therapist privilege to further the goal of reporting of child abuse was substantial. However, it held that this goal focuses not on punishment of offenders, but on protection of children. The court essentially concluded, contrary to unequivocal legislative intent, that the interest of children was better served by "continued encouragement for child abusers to seek rehabilitative treatment."

Quite apart from the merits of the prosecution/rehabilitation goals of public policy, however, the Sypult Court's opinion demonstrates the continuing tension between the legislative and judicial branches over control of the Arkansas courts. In prior decisions noted in Sypult, the court had observed that it shared its rule-making authority with the General Assembly and was prepared to defer to that body in matters of public policy when legislation conflicted with court rules. However, the majority then refined its position on power sharing to only defer to the General Assembly when such conflicts arise "to the extent that the conflicting court rule's primary purpose and effectiveness are not compromised; otherwise, our rules remain supreme." The Sypult Court concluded by holding that the communication between the accused and his doctors was confidential and subject to the claimed privilege, although the fact that he sought and received treatment

83 Id. (citing Ark. R. Evid. 503 (Ark. Code Ann. § 16-41-101 (Michie 1987))). The court's opinion in Sypult refers to the "Uniform Rules of Evidence," the designation applied by the General Assembly in re-enacting its version of the evidence rules in 1987. The opinion makes no reference to the judicially-adopted Rules of Evidence or the precise provision subject to review in the decision. Id. at 404 (citing Ricarte v. State, 717 S.W.2d 488 (Ark. 1986) ("To avoid this conflict, the trial court designed its ruling to enforce provisions of our child abuse and sexual abuse statutes while preserving the sanctity of private communications between patients and their doctors and therapists under the Arkansas Uniform Rules of Evidence.")).

84 Id. at 404-05 (citing State v. Andring, 342 N.W.2d 128 (Minn. 1984) (refusing to enforce a legislative directive that excluded from an applicable privilege confidential disclosures made concerning child abuse)).

85 Id. at 405.

86 Id. at 404 (citing Curtis v. State, 783 S.W.2d 47 (Ark. 1990); St. Clair v. State, 783 S.W.2d 835 (Ark. 1990)).

87 Id.

88 Id.
would not be privileged.\(^8\)

The tension between the legislative and judicial branches to control the litigation process continued after the judicial declaration of supremacy in Sypult. In Vann v. State,\(^9\) the court considered admission of hearsay statements made by a child victim of sexual abuse pursuant to the Uniform Rules of Evidence.\(^9\) The court reversed, based upon its reading of the Supreme Court’s decision in Idaho v. Wright,\(^9\) because the evidence rule did not comport with the minimum standard for reliability required by the Confrontation Clause.\(^9\) The court concluded that the Arkansas Child Hearsay Statute,\(^9\) which had produced the hearsay exception as an addition to the Uniform Rules of Evidence, ran afoul of Wright’s requirement that hearsay admitted without opportunity for cross-examination demonstrate a degree of truthfulness and that cross-examination would be of “marginal utility.”\(^9\)

Apart from the significance of the court’s holding in Vann, the posture in which the decision itself distinguished legislative from judicial rule-making in the evidence area was significant.\(^9\) The

\(^{8}\) Id. Admissibility of the fact that Sypult had sought and obtained treatment, as opposed to the confidential communications themselves, was based on the court’s prior decision in Baker v. State, 637 S.W.2d 522 (Ark. 1982).

\(^{9}\) 381 S.W.2d 126 (Ark. 1992).

\(^{91}\) Vann, 831 S.W.2d at 126. The rule provided for admitting statements made by children under the age of 10 years who were sexual abuse victims, either child abuse or incest, upon the trial court’s finding that the statements “possess[e] a reasonable likelihood of trustworthiness” based upon factors relating to the maturity of the child, the context in which the statement was made, the relationship of the child to the alleged perpetrator and other factors deemed relevant and appropriate to determining trustworthiness. Id. The rule was initially upheld as constitutional in St. Clair v. State, 783 S.W.2d 835, 836 (Ark. 1990). The lower court found this exception to the hearsay rule permitted the introduction of statements made to third persons, which included in Vann the child’s mother, a nurse and the investigating officer. Vann, 831 S.W.2d at 127.


\(^{93}\) U.S. CONST. amend. VI.

\(^{94}\) Ark. code ann. § 16-41-101 (Michie 1994). The rule provided for admitting statements made by children under the age of 10 years who were sexual abuse victims, either child abuse or incest, upon the trial court’s finding that the statements “possess[e] a reasonable likelihood of trustworthiness” based upon factors relating to the maturity of the child, the context in which the statement was made, the relationship of the child to the alleged perpetrator and other factors deemed relevant and appropriate to determining trustworthiness. Id. The rule was initially upheld as constitutional in St. Clair v. State, 783 S.W.2d 835, 836 (Ark. 1990). The lower court found this exception to the hearsay rule permitted the introduction of statements made to third persons, which included in Vann the child’s mother, a nurse and the investigating officer. Vann, 831 S.W.2d at 127.


\(^{96}\) U.S. CONST. amend. VI.


\(^{95}\) Vann, 831 S.W.2d at 126 (quoting Idaho v. Wright, 497 U.S. 805, 820 (1990)).

\(^{96}\) For a thorough treatment of the problems posed by Vann, see Gregory C. Sandefur, Note, Constitutional Law—Child Hearsay Exception in Sexual Abuse Cases—New Arkansas Supreme Court Rule Conflicts with New General Assembly Rule: Which Controls? Vann v. State, 309 Ark. 303, 831 S.W.2d 126 (1992), 15 U. Ark. Little Rock L.J. 143 (1992). The author observes: “The decision in Vann also raises the question, once again, of whether the legislative branch or the judicial branch of the government in Arkansas has the authority to promulgate evidentiary rules for the courts in this state.” Id. at 170.
Vann majority struck down the legislatively adopted rule providing for admission of child victim hearsay statements, yet proceeded to adopt new rules at the same time. In doing so, the court recognized exceptions that would comport with the Supreme Court's concerns in Idaho v. Wright.97

There is no necessary relationship between the apparent long-standing tension between the Arkansas's General Assembly and Supreme Court with respect to control of litigation through promulgation of rules of evidence for use in state courts and the General Assembly's recent posture toward judicial activism reflected in the language used in the Act to restructure the state's workers' compensation system. Nevertheless, the existence of the tension does perhaps reflect an on-going legislative sensitivity to expansive court decisions that it regards as unprincipled activism.

IV. Policy Consequences of Legislative and Judicial Activism

The General Assembly's re-structuring of Arkansas workers' compensation law raises questions about the proper allocation of responsibility for legal reform between the legislative and judicial branches. Worker's compensation reform has not been the only arena in which legislative-judicial sparring has marked the development of Arkansas law, but the recent legislation may indicate the severity of tensions in the two branches. For instance, in 1968 when the Arkansas Supreme Court abolished the doctrine of sovereign immunity,98 the General Assembly responded by simply adding statutory immunity to municipal employees at its next regular session.99 The tenor of language in the amended compensation Act indicates far more concern for judicial activism in the construction of rights accorded the state's workers.

While creating a workers' compensation system has been a


98 Parish v. Pitts, 429 S.W.2d 45 (Ark. 1968) (holding grant of immunity to municipal employees "patently unjust"). The court had earlier taken the position that the doctrine of municipal immunity arising under common law was unfair and urged the General Assembly to abrogate this rule in Kirksey v. City of Fort Smith, 300 S.W.2d 257 (Ark. 1957).

product of legislative action, the General Assembly's "reform" of Arkansas compensation law reflects an open hostility toward judicial intervention. This demonstrates both the virtues and consequences of an institutionalized checks and balances approach to development of legal doctrine.\textsuperscript{100} The Arkansas Supreme Court, however, has demonstrated a willingness to defer at times to the General Assembly over creating new causes of action.\textsuperscript{101}

Certainly, the General Assembly was properly charged with the obligation to create and maintain a viable workers' compensation system.\textsuperscript{102} If, in fact, a fiscal crisis did threaten the integrity of the state's scheme for addressing the industrial injury problem, then legislative action would be appropriate for investigating the nature of the crisis, including verifying its actual existence, and considering alternatives for a solution.\textsuperscript{103}

\textsuperscript{100} This is not to suggest that it is inappropriate for the judiciary to consider legislative concern over judicial activism in interpretation of legislative enactments. In fact, courts should give deference to clear expressions of intent to maintain the integrity of the legislative process. For example, in \textit{Gallegos v. School Dist. of W. Las Vegas, New Mexico}, Judge Hartz, in concurring, observed that the state legislature had expressly repudiated a state supreme court decision applying an expansive reading of the term "maintenance" in the context of deficient maintenance of the state highway in an action brought under the state's Tort Claims Act. 858 P.2d 867, 870 (N.M. Ct. App. 1993). An amendment to the Act expressly excepted from the definition of "maintenance" activities that had been inferred from use of the term by the court in Miller v. New Mexico Dep't of Transp., 741 P.2d 1374 (N.M. 1987). In \textit{Gallegos}, the plaintiff asserted negligent placement of a bus stop on the highway. 858 P.2d at 868. Judge Hartz concurred in application of a pre-amendment reading of the term because the accident giving rise to the cause of action had pre-dated the 1991 amendment of the Act. \textit{Id}. at 871. Nevertheless, he observed: "When the legislature demonstrates discontent with judicial construction of its enactments, however, it is time for the courts to reconsider their precedents." \textit{Id}. at 870.

\textsuperscript{101} \textit{See}, e.g., Lewis v. Rowland, 701 S.W.2d 122, 123-24 (Ark. 1985) (holding a child's claim for loss of consortium, due to the loss of a parent, need be legislatively created).

\textsuperscript{102} ARK. CONST. art. 5, § 32. In a dissenting opinion in Texas Workers' Compensation Comm'n v. Garcia, 862 S.W.2d 61 (Tex. Ct. App. 1993), Justice Peeples argued that the majority's action in striking down the act restructuring the state's workers' compensation system was unprincipled as an abuse of judicial discretion because the Texas Legislature has traditionally been constitutionally empowered to create and regulate the compensation law. \textit{Id}. at 114-15 (Peeples, J., dissenting). The dissent concluded: "We must uphold economic legislation unless it clearly violates individual rights or is outside the bounds of legislative authority set by the constitution." \textit{Id}. at 130 (Peeples, J., dissenting).

\textsuperscript{103} Even an admitted pro-labor observer conceded the existence of a fiscal crisis resulting from skyrocketing workers' compensation insurance premiums. Davis, \textit{supra} note 12, at 27. The observer noted that "[a]s we entered the 90's, premiums paid by employers for workers' compensation insurance had risen to strangling levels, primar-
The legislative process is far more appropriate for broad fact-finding than judicial consideration of competing information in individual cases. However, recent judicial history indicates that courts often serve as effective fact-finders in instances in which broad policy concerns are involved. Moreover, legislative fact-finding is necessarily the product of information input that often favors interest groups capable of amassing data and influencing the legislator’s opinion, rather than broad-based considerations of policy changes. One need look no further than the Congressional debate over the Clinton stimulus and initial budget packages to observe that special interests are able to exert pressure on legislators that may fail to serve more general national interests.

Additionally, the proper judicial function includes preserving individual rights against majority preference. The General Assembly’s directive for strictly construing the Act threatens the traditional role of the judiciary by reserving for the legislative branch the authority to make necessary changes in the compensation scheme to protect individual rights. Yet, if the rights involve a single claimant, or class of claimants, the likelihood that the legislative branch will actually address the grievance is too remote to war-

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104 See infra note 98; Lewis v. Rowland, 701 S.W.2d 122, 123-24 (Ark. 1985).
106 Concurring in Texas Workers’ Compensation Comm’n v. Garcia, 862 S.W.2d 61, 108 (Tex. Ct. App. 1993), Justice Biery argued that the majority’s approach to invalidating the reform measure was predicated on the court’s obligation to “review[ ] the statute in question as it impacts several provisions written by the sovereign people in the Texas Bill of Rights, including equal protection, due course of law, right to jury trial, and open courts.” Responding to the argument that the legislature has traditionally been accorded deference in defining the scope and operation of the workers’ compensation system, Justice Biery continued: “If historical common law rights are to be abrogated by legislative action, it seems axiomatic that such regulatory schemes should provide a level playing field for all those affected by the statute, and fulfill the covenant in our social contract that all will be treated fairly.” Id. (Biery, J. concurring).
rant serious consideration. Traditionally, the courts engage in this type of correction to preclude unfair legislative applications that deny individual rights.

Beyond concern for enforcing individual rights under the law, the General Assembly’s attempt to restrict future judicial intervention in the enforcement of rights guaranteed by the state’s workers’ compensation law itself suggests an attempt to insulate legislative action from judicial review. Clearly, at least with regard to section 6 of the Act,¹⁰⁸ the General Assembly expressly sought to annul Arkansas decisions recognizing a civil remedy for retaliatory discharge of workers’ compensation claimants. The legislative action apparently runs afool of the state’s constitution.¹⁰⁹

The state constitution grants the General Assembly the ability to regulate recovery of work-related injuries and create the state’s workers’ compensation system.¹¹⁰ The constitutional authority for this regulation reads:

The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted.¹¹¹

The provision clearly authorizes the creation of a workers’ compensation system and for regulation of recoveries, including the setting of benefit levels.¹¹² Nowhere does the provision authorize the General Assembly to regulate the employment relationship generally. How-

¹⁰⁹ Ark. Const. art. 5, § 32.
¹¹⁰ Id.
¹¹¹ Id.
¹¹² See, e.g., Odom v. Arkansas Pipe & Scrap Material Co., 187 S.W.2d 320 (Ark. 1945) (upholding constitutional delegation of authority to the General Assembly to create workers’ compensation system limiting recovery for work-related injuries); Baldwin Co. v. Manner, 273 S.W.2d 28 (Ark. 1954) (holding authority to regulate recovery for industrial accidents limited to situations in which employer/employee relationship established).
ever, the General Assembly attempted to do this in the Act by “annul-
ling” judicially recognized civil actions for employer discrimination
aimed at employees filing compensation claims.\textsuperscript{115} Despite the Gen-
eral Assembly’s apparent goal of reinforcing the employment at-will
doctrine,\textsuperscript{114} its effort to do so violates the strict reading of its own
constitutional authority that it imposes on the Arkansas judiciary in
enforcing the amended Act.

The apparent hostility with which the General Assembly has pub-
licly rebuked the executive and judicial branches in their administra-
tion of prior workers’ compensation law virtually invites judicial
retaliation. This retaliation might be manifested through strict con-
struction of the legality of various aspects of the Act and its attempt to
limit compensation system expansion.\textsuperscript{115} Such an exercise of judicial
power would effectively continue the jurisdictional struggle that has
marked Arkansas politics over the past decade.

V. Conclusion

The General Assembly’s enactment of a workers’ compensa-
tion reform program reflects a local response to a problem of na-
tional origin. Increasingly, legislative bodies are confronted
by industrial and management demands for limiting recoveries for
personal injuries. While reform-minded legislators are concerned
about advancing business and insurance interests, the manner in
which the Act openly vilifies judicial enforcement of prior workers’
compensation law hardly promotes the orderly development of
legal theory. The tenor of the General Assembly’s action opens a
wound characterized by a legislative/judicial struggle for
supremacy in developing Arkansas law.

In contrast to the typical, evolutionary progression of judicial


1993)).

\textsuperscript{114} In “annulling” the state supreme court’s decisions recognizing civil remedies for
wrongful discharge, the General Assembly sought to supplant the civil action with
increased criminal penalties and a new administrative remedy to address the problem
of employer discrimination. By enacting these alternative remedies, the General As-
sembly expressly stated that it did not intend these alternative remedies to constitute
exceptions to the at-will employment doctrine. 1993 Ark. Acts 796, § 6 (codified at
Ark. Code Ann. § 11-9-107(d) (Michie Supp. 1993)) (“This section shall not be con-
strued as establishing an exception to the employment at will doctrine.”).


1993)).
doctrine, legislative action often involves major, abrupt changes that reflect changing public policy interests. In this sense, the creation or modification of any compensation system may appropriately lie within the province of the legislative branch. However, enforcement of legislative enactments ultimately is vested in the judiciary. Open castigation and hostility toward judicial exercise of power threatens the stability of the compensation system as counsel, administrative law judges and administrators struggle to anticipate the next round of confrontation leading to changes in philosophy or approach.

In addition, instability ultimately threatens the very business and insurance interests that have pressed for the current reforms precisely because of the uncertainty that these reforms will remain intact, even in the legislative arena. The popularity of reform may itself lead to reaction imposing a far less favorable regime on those interests that sought to limit economic exposure in passing the Act. The consequences are not certain, of course, but a significant round of litigation almost surely is, and the judicial branch will retain the option of eventually reacting to legislative abrasiveness by striking down sections of the Act. Whether it will do so rests in the discretion of a majority of the Arkansas Supreme Court.

The great irony implicit in the General Assembly's action may be that in restricting the definition of compensable injury, the "reformed" act may expand the role of traditional negligent injuries in industrial accident and disease claims. Plaintiffs' may rou-

116 Prior to passage of the Act, state labor leaders threatened to revive the issue of reform through referendum on the general election ballot if the measure was adopted and signed into law. Nevertheless, the Democratic Governor signed the bill into law. Pesek et al., supra note 2, at 20-21.

117 For example, the Arkansas courts might ultimately follow the lead of the Texas appellate court in Texas Workers' Compensation Comm'n v. Garcia, 862 S.W.2d 61 (Tex. Ct. App. 1993), and declare the entire Act unconstitutional as violating state constitutional provisions protecting individual rights or improperly expanding upon the authority delegated to the General Assembly in the constitution. See also Gary Taylor, Battle Raging in Texas: 'Comp' Overhaul Struck Down, Nat'l. L.J., Aug. 30, 1993, at 3 (observing that Texas will be watched nationally because business claims cost of compensation insurance has been reduced following passage of reform measure).

118 This consequence is suggested by other observers. See, e.g., Richard E. Holiman, A Different Viewpoint: Civil Litigation Reforms of the New Workers' Compensation Act, Ark. Law., Summer 1993 at 23. ("The new act specifically removes stress and mental claims not involving physical injury and certain 'gradual injuries' from coverage under workers' compensation. Arguably, this would give the green light to claimants to sue the employer and not be faced with the 'exclusive remedy' defense."); John D.
tinely elect to bring civil actions assessing employer negligence in failing to maintain a safe workplace; failing to warn employees of appreciable risks of injury and disease; failing to properly train employees; failing to protect employees against the hazards of unsafe work habits of co-workers; and statutory negligence actions based upon failure to comply with federal and state workplace safety regulations.

The "exclusive remedy" doctrine, which traditionally has protected employers from the more comprehensive remedies for personal injuries in general tort actions, would ultimately subject employers to the uncertainties of damage exposure not limited by the rather low, and certainly controlled, benefit awards of the workers' compensation law. Thus, despite the General Assembly's expressed intent to preserve the "exclusive remedy" doctrine in enacting the new compensation law, the legislative limitations on recovery exposes employers to liability for injuries previously compensated within the compensation system.

Eventually, of course, the compensation carriers' action in denying liability for injuries arguably excluded under the "reformed" act will create an interesting conflict of interest, as employers confront expanded liability not protected by their compensation coverage. In a sense, the conflict will shift from one pitting claimants against employers and their carriers to one of employers facing car-

Copeland, The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far, 47 Ark. L. Rev. 1, 90 (1994) ("In the long-run, however, employers may find that the new Act only shifts some causes of action from the workers' compensation to tort. Employers may be increasingly exposed to stress and other non-physical claims that may result in large awards against them, with corresponding increase in general liability insurance premiums.").

For example, in White v. Apollo-Lakewood, Inc., 720 S.W.2d 702 (Ark. 1986), the plaintiff sued for intentional infliction of emotional distress based upon the employer's assignment of the employee to tasks that were necessarily likely to produce injury from exposure to highly toxic chemicals used in the production of agricultural products. Id. A unanimous Supreme Court rejected the contention that the employer's intentional assignment of dangerous tasks to the employee despite the known risks constituted actionable conduct. Id. at 703.

Rather, the court held that the employee's exclusive remedy under Arkansas law was to apply for appropriate benefits under the Workers' Compensation Act for any injury ultimately suffered.

riers whose interests lie in denying coverage for compensation. This will require plaintiff's counsel to seek the more desirable recovery options available upon proof of negligence. Rather then the unified front presented by employers and compensation carriers who supported the passage of Act 796, the Arkansas compensation system may eventually by compromised by the self-interests of these allies who seek, respectively, both to assert the benefits of compensation coverage and to deny liability under the compensation system. Ultimately, carriers and claimants may benefit from the reform package at the expense of employers now forced to defend general liability claims without the certain benefit of the umbrella of protection traditionally afforded by a liberally-construed workers' compensation system.