IN THE SUPREME COURT OF TEXAS

NO. 09-0048

MCI SALES AND SERVICE, INC., F/K/A HAUSMAN BUS SALES, INC. AND MOTOR COACH INDUSTRIES MEXICO, S.A. DE C.V., F/K/A DINA AUTOBUSES, S.A. DE C.V., PETITIONERS,

v.

JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DOLORES HINTON, DECEASED, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

Argued March 24, 2010

CHIEF JUSTICE JEFFERSON, dissenting in part.

At the time this case was submitted to the jury, James Hinton[1] had neither received nor been promised any payments to settle his claims. Because the Court nevertheless concludes that Central Texas' payments to the bankruptcy court's registry rendered it a "settling person," I respectfully dissent in part.

1. The statute requires courts to evaluate settling persons "at the time of submission."

Former section 33.011—the statutory provision applicable here—defined "settling person" as:

[1] James Hinton is one of a number of plaintiffs whose claims are now before us. For ease of reference, I refer to them as "Hinton."

> a person who *at the time of submission* has paid or promised to pay money or anything of monetary value to a claimant at any time in consideration of potential liability . . . with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.

Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41 (amended in 1995 and 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 33.011) (emphasis added). Because the statute stipulated that a settling person was one who, "at the time of submission" of the jury question, had paid or promised to pay, reviewing courts cannot consider a post-submission monetary exchange when determining whether a party was a settling person. *See Knowlton v. U.S. Brass Corp*., 864 S.W.2d 585, 598 (Tex. App.–Houston [1st Dist.] 1993) ("[A] party who settles after objections are made to the charge, after the charge is read to the jury, and after closing arguments, although before the jury begins deliberating, is not a settling person because the settlement had not been effected *at the time of submission*."), *aff'd in part and rev'd in part on other grounds, sub nom. Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644 (Tex. 1996); *Gilcrease v. Garlock, Inc*., 211 S.W.3d 448, 454-55 (Tex. App.–El Paso 2006, no pet.) (holding that settlement agreements cannot be contingent on any other outcome, at the time of submission, in order to satisfy chapter 33).

At the time the proportionate responsibility question was submitted to the jury, and throughout the course of the trial, Hinton had not settled any claims with Central Texas, and the funds that Central Texas placed in an interest-bearing account were never promised to any particular claimant. The bankruptcy court rejected the notion that the funds had a guaranteed trajectory, pointing to various contingencies, including the possibility that "some [of the claims] could be adjusted to zero." As a historical fact, of course, "each participant in the Litigation Plan received

within two percent of the amount determined by the mediator, with one exception," ___S.W.3d at___, and "the Plaintiffs negotiated for and were the ultimate recipients of some of these proceeds," *id*. at___. But those facts chronicle Hinton's status *after* submission, which is irrelevant under the statute. The trial court appropriately viewed Hinton's status at the time of submission, as no one could have known at that point whether Hinton would recover any of the remaining funds.

2. Under Central Texas' bankruptcy reorganization, claimants had two choices: guaranteed payment under the Apportionment Plan or contingent recovery under the Litigation Plan.

The Apportionment and Litigation Plans do, in some ways, bear the marks of a settlement. Central Texas tendered money to the bankruptcy court to satisfy claims against it, and it was released from liability. At the time of submission, however, money had not been paid or promised "to a claimant," as required under the statute, TEX. CIV. PRAC. & REM CODE § 33.011, but rather deposited into a court registry—the ultimate distribution of which remained uncertain.

Central Texas' insurers deposited the $5 million policy limits into the bankruptcy court's registry to set aside costs for the multiple bus crash claimants. Central Texas pledged to pay an additional $7,000 per year for five years, making the total amount available to such claimants around $5,035,000. Claimants were given two options regarding disbursement: (1) they could join the "Apportionment Plan," in which a mediator would delegate a percentage of liability to each defendant, after which participating claimants could either immediately collect funds, or receive an apportionment in future litigation; or (2) claimants could join the "Litigation Plan," in which participants chose a special judge, decided on the form of a proceeding, and ultimately reasserted their claims. As the bankruptcy judge noted, recovery under the Litigation Plan was contingent on

proof that the defendants' negligence "was a proximate cause of [the claimants'] injuries and/or damages. And then they had to prove, if they met that burden, the extent of the damages." Based on the evidence presented, the special judge would make new liability determinations, assign amounts owed, and, if enough funds remained, allot those funds accordingly. Hinton chose the Litigation Plan.

The bankruptcy judge summarized the plans as follows:

> One, it allowed the people that wanted their money now to take it. Those people who disagreed with their claim agreed that other people could take money, which diminished the pool. That's a huge agreement. And number two, it provided that, among themselves, they could re-challenge their numbers, and when it was all done, re-look at their percentage, and they'd only get a percentage of what was left. . . .
>
> They did agree among themselves that, no matter—that they would start with the number they originally had been given in the apportionment plan. . . . And they agreed that, no matter what the new evidence showed, they wouldn't increase their claim by more than ten percent. . . .
>
> . . . So, among themselves, they could go up or down some, but it wouldn't be more than ten percent up; *there was no limit on down*.

(Emphasis added.)

To further complicate matters, the bankruptcy judge recognized that other potential parties later appeared to be "entitled to recover some of the [remaining] two and half million," and that it may "turn[] out, for a number of reasons, that the litigation plan claimants are not entitled to it." As to this potential outcome, the judge noted that Litigation Plan claimants could be left in the cold:

> [T]he initial apportionment agreement, and the information available to whoever would look at that, has grown greatly. And, so, it's certainly possible that the information provided to the special judge could result in one or more or all of the parties here, the litigation fund claimants, having their claims adjusted. It's possible some could be adjusted to zero, just factually, just based on that information.

Consequently, Hinton, as a "litigation fund claimant," could not count on recovering any of the money set aside by Central Texas.

The Court's observation that "Plaintiffs had the option of requesting disbursement of their proportionate shares of the Fund," ___S.W.3d at___, mistakenly lumps members of the Apportionment Plan with members of the Litigation Plan. Hinton, a member of the latter group, elected to try his claims in lieu of immediate receipt of his share of the insurance funds. It is true that the order approving the Apportionment Plan stipulated that

> [t]he parties may agree at any time to approve full or partial distribution of the Litigation Funds to any or all participants. Any agreement to distribute funds, however, must be agreed to in writing by all participants remaining in the Litigation Plan at the time the agreement is entered.

At the time the jury question was submitted, however, no party had attempted to enter into any such agreement, and even if any of them had, there was no guarantee that every other participant in the Litigation Plan would have agreed to such a distribution in writing. The parties rejected this option by refusing to enter into the Apportionment Plan in the first instance.

In fact, the above provision more likely referred to those parties who had not yet decided whether to join the Litigation Plan, and therefore had an option to join the Apportionment Plan before re-litigating their claims under the Litigation Plan. The preceding provision in the order approving the Apportionment Plan supports this interpretation, since it mandates that

> [e]ach participant in the Litigation Plan agrees that *any recovery from the Litigation Fund will necessitate that the claimant prove by a preponderance of the evidence* . . . that the negligence of [the defendants] was a proximate cause of the participant's injuries and/or damages; and . . . the amount of damages suffered by the claimant as a result of that negligence.

(Emphasis added.) The Apportionment Plan gave parties an opportunity to collect full or partial distribution of the funds. By rejecting this option, Hinton and others explicitly chose to re-litigate their claims. As the Court concedes, "the Litigation Plan did not set a floor on each claimant's possible individual recovery." ___S.W.3d at___.

3. Central Texas was not a "settling person" under the plain language of the statute.

While the Court correctly notes that "[t]he statute does not require certainty in the actual *amount* of the money or thing of monetary value," ___S.W.3d at___ (emphasis added), the statute does require certainty as to the *eventual receipt* of money or thing of monetary value. *See* TEX. CIV. PRAC. & REM. CODE § 33.003; *Hall v. White, Getgey, Meyer & Co., LPA*, 347 F.3d 576, 582-83 (5th Cir. 2003) (applying Texas law), *rev'd in part on other grounds*, 465 F.3d 587 (5th Cir. 2006); *Gilcrease*, 211 S.W.3d at 454-55.

The Court cites *Gilcrease v. Garlock* for the proposition that unconditional promises to pay are valid settlements for purposes of chapter 33. *See Gilcrease*, 211 S.W.3d at 455. *Gilcrease* holds that unconditional promises to pay are valid settlements, however, only so long as the promises are not contingent on any outside factors, such as related litigation proceedings. In *Gilcrease*, settling defendants had yet to pay the full amount they had promised claimants, but they *had* made unconditional promises to pay. *Id.* Payment was not contingent on bankruptcy proceedings, or on any other future arrangements between the parties. *Id*. The *Gilcrease* court distinguished the case before it from two other cases that themselves more closely bore a resemblance to the facts before us now, *McNair v. Owens-Corning Fiberglas Corp*., 890 F.2d 753 (5th Cir. 1989), and *Cimino v.*

Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd, in part, on other grounds*, 151 F.3d 297 (5th Cir. 1998).

In *McNair*, the Fifth Circuit held that notes promising payment did not constitute a settlement if their ultimate payment depended on the outcome of insurance litigation. *McNair*, 890 F.2d at 755-56. In that case, asbestos plaintiffs received notes from two defendants who were in the process of litigating claims with their insurers. *Id*. Despite the fact that the notes constituted promises to pay, the court held that because payment was contingent on some future litigation—no matter how likely it was to end in their favor—the promise of payment could not be considered a settlement within the terms of the statute. *Id*.

The *Gilcrease* court next looked to a federal district court case, *Cimino v. Raymark Industries, Inc.*, 751 F. Supp. at 656. In that case, plaintiffs reached a non-cash settlement agreement with an insolvent defendant who promised to pay a specified sum of money over a period of years. *Id*. The court held that, due to the defendant's insolvency, the settlement agreement was more like a promissory note, since "[p]ayment [was] contingent on the outcome of the unstable . . . bankruptcy proceedings and on the continued financial viability of the [defendant]." *Id*.

Like the defendant in *Cimino*, Central Texas (and its insurer) agreed to deposit money in the bankruptcy court. Hinton's receipt of these funds, however, remained contingent on the outcome of the Litigation Plan proceedings, and on the existence of additional claims from outside parties. Despite Central Texas' deposit of insurance funds, and its promise to pay a specified amount over a period of years, Hinton remained at risk of not recovering, and therefore, the agreement was at best akin to the "promissory note" in *Cimino*.

Bankruptcy courts often provide a "settle or litigate" option like the one used here. *See* Georgene Vairo, *Mass Torts Bankruptcies: The Who, The Why and The How*, 78 AM. BANKR. L.J. 93, 102 (2004) ("If a settlement was not reached, the claimant could elect mediation, binding arbitration, or traditional tort litigation."). Courts can distinguish between parties who choose to settle (like those under the Apportionment Plan), and those who choose to litigate (like those under the Litigation Plan). This ready distinction is evidenced by the terms of the bankruptcy court's order approving and describing the two plans:

> All Bus Crash Claimants participating in the Litigation Plan agree to be bound by the terms and conditions of the Litigation Plan. A failure to elect payment . . . constitutes an agreement to be bound by the terms of the Litigation Plan. *The participation of any Bus Crash Claimant in the Litigation Plan . . . shall not constitute a settlement* or compromise of the claimant's claims against the debtors.

(Emphasis added.)

I would hold that the court of appeals erred in reversing the trial court's refusal to submit Central Texas as a "settling person." Because the Court's holding regarding Chapter 33 neither complies with the statute ("at the time of submission"), nor properly construes the circumstances under which Hinton pursued his claims within the bankruptcy proceedings, I respectfully dissent from that part of the Court's judgment.

_____
Wallace Jefferson
Chief Justice

Opinion Delivered: December 17, 2010