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Supreme Court of Texas.
Allstate Insurance Company, Allstate Indemnity Company, and Allstate
Property
and Casualty Insurance Company, Petitioners,
v.
Cevia Fleming, Individually and on Behalf of all Other Persons
Similarly
Situated, Respondent.
No. 05-0645.

October 17, 2006

Appearances:

Wade C. Crosnoe, Dallas, Texas, for petitioner.
David J. Powers, Austin, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Don R. Willett, Harriet
O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale
Wainwright, Phil Johnson, Scott A. Brister

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JUSTICE #1: Major arguments in 05-0645 Allstate Insurance versus
Fleming.

JUSTICE O'NEILL: May it please the Court. Mr. Crosnoe represent
argument for the petitioner. Petitioner reserve in five minutes for
rebuttal.

ORAL ARGUMENT OF WADE C. CROSNOE ON BEHALF OF THE PETITIONER

MR. CROSNOE: May it please the Court. There is no dispute that
Allstate has the right to pass through this ATPA Fee to it's insurance
and to the plan. The Lower Courts' misconstrue the statutory and the
regulatory scheme and retroactively deprived Allstate of it's
constitutional right to, to collect this fee in the name of curing a
perceived problem that being unauthorized insurance judges which is not
presented by the facts of this case. Unauthorized insurance charges are
not at a issue before the presence of Texas Department of Insurance
rule Rating Manual Rule 15 and that is the Tab F of our brief on the
merit's. The same rule is that-- essentially also it, it-- Tab G of our
brief I believe as well in the form Section 5.205. So that rule
express-- expressly unauthorized its the commissioner express

authorization to insurers to recoup the ATPA Fee from insurance in addition to premium the-- then under the policy. And Justice O'Neill was asking earlier there's also a separate tax bulletin that the commissioner promulgated that said-- that he specifically said that, "This recouped ATPA Fees are not to be treated as premiums because that would make them subject to the premium tax liability." That would make him subject to premium tax. So the point here-- is here that this is not an unauthorized charge because there was a Rating Manual Rule that says, "We get to recoup this fee in addition to premium." The important point here is that this, this rule is presumed to be valid and the plaintiff has the burden of showing otherwise. In other words, in response to the early question about who gets to decide this issue? The Commissioner that there is a presumption that the Commissioner gets to decide the issue. And the only way around that is that the plaintiff can show that the rule was not authorized or the rule is not-- or that the rule is inconsistent and conflicts with Article 5.101 and they can't do whether either's then appear.

JUSTICE #1: May authority to recoup the fee is that may not be contested. The question is, "Where do you-- how do you recoup it?" Is it, is it -

MR. CROSNOE: What?

JUSTICE #1: - through an add on fee or is it through the right man?

MR. CROSNOE: And that's what the commissioner spoken to with this Rule 15. By saying that she recouped the fee in addition to policy premium and -

JUSTICE #2: But in the-- it has-- any dispute in the case is whether great premiums or premiums include rights.

MR. CROSNOE: And as -

JUSTICE #2: And depending on how you resolve that question. He, he the rule means one thing or, or not?

MR. CROSNOE: That's true, that properly construed the statute and the ruling that rate is a component of premium and, and therefore-- the-- there ...

JUSTICE #2: Understand that to say the, the rules of the problem just-- read's the this-- the dispute out case.

MR. CROSNOE: Right. And, and I will-- I will certainly address that, that issue your Honor.

JUSTICE #2: Too brief.

MR. CROSNOE: Excuse me?

JUSTICE #1: Depending on what the rate included premium, premiums included rate the rulings have been that ...

MR. CROSNOE: That-- if that-- that's the, that's the point of dispute.

JUSTICE #2: The, the Court of Appeals seemed to be concerned that your argument would allow insurers to charge anything under 21.35B. What's the response to that?

MR. CROSNOE: That, didn't appear to be the be-- the Court of Appeal's concern. If you look at the article 5.101 itself in Section B10. It authorizes the insurance-- the commissioner to promulgate a Rating Manual which is what the Commissioner has done. When it requires insurers to follow that Rating Manual in-- unless they get permission to use their own manual. The rating manual sets forth the rate and sets forth the factors and how you go about calculating a rate. And then also says in Rule 15, "That this, this ATPA Fee is going to be past through in a addition to premium." And that is the source of the authority here and, and if you look at the court of appeals decision on

the same day in the Service Life case your Honor, that's a perfect example of how the system works. In that case Service Life came forward and tried to tackle a \$15 policy fee in addition to the rate and the commissioner objected to that said, "Where not going to let you do that, there was a regulatory proceeding. The-- at the end of that proceeding the result was that, that they are-- the commissioner ruled that, that-- the insurance company couldn't do this." We're not through the Court system. And at the end of the day the result was that the insurance company could not do that.

JUSTICE #2: So ...

MR. COSNER: The, the difference ...

JUSTICE #2: I may, I may be sure I understand. Your position is that insurance cannot do whatever they want to do under 21.35B. That the Commissioner would still have-- could still disallow premium charge.

MR. CROSNOE: Under, under the Rating Manual promulgated which we are obligated to follow, that we cannot do whether we want to.

JUSTICE #2: - under 21.45B.

MR. CROSNOE: And under 21.35B. But here as a rate regulating company. But here we do have authorization to collect this fee -

JUSTICE #3: Does -

MR. CROSNOE: - did, did that.

JUSTICE #3: - Does 21.35B apply for the rate regulating at all?

MR. CROSNOE: Yes. It is a, it is a statute of general application if you look at it. And it's not limited to specific types of insurance like for instance article 5.101. It is, it is limited to motor vehicle insurance.

JUSTICE #3: Well, I'm, I'm just trying to get rationale for the Court of Appeals opinion because they seem to think this 21.35B work somehow under 5.101 serve you to it. That-- they would fit regulation but US21.35B applies to copy-- is whether regulated or not?

MR. CROSNOE: To whether their regulated or not? Yes, is-- it is of statute -

JUSTICE #3: It's just part of the general check at 21.

MR. CROSNOE: It's a statute of general application and of course when you look at article 5.101 and your construing it to turn rate and it means. You should look first to that statute in the definition in that statute not in-- that's what the Court of Appeals went wrong here. They, they, they-- take a look at the definition of rate which says, "Rate is the charge for a particular line for each unit of exposure." That's the entire definition. But the Court of Appeals simply rewrote this definition it said, "We interpret this definition to mean that rate is the entire charge for insurance period without the concluding phrase for "each unit of exposure"." And then based on that re-writ-- revised definition, the Court of Appeals then went on to conclude that premium must be a component charge of the rate. And that's where the Court of Appeals went wrong because by omitting part of the definition of rate the phrase for each unit of exposure. The Court of Appeals violated the rule-- statutory construction that every part of the statute must be-- should be deemed in effect so that no part is rendered meanings. And when they omitted phrase is put back in the statute, as it was by the legislature. It shows that the, the rate cannot be the entire charge for insurance here and that. That rate times the unit of exposure is going to equal the premium. Now, the Court of Appeals also violated other rules of statutory construction here. One of the principal ones is that you should not construe the statute so as to reach an unconstitutional result if you can avoid it. And if you look

at the American Alliance's opinion which was the Court of Appeal-- which was an Austin Court of Appeals decision which this Court refused to read on, and made that opinion it's own. In that case, the Court held that the State's attempt to prevent insurers from recouping a valid expense of operation which in that case wasn't a tax of variant insurance payment that, that violated the due process clause and the equal protect ...

JUSTICE O'NEILL: But that arguments is not being made here, I mean that acknowledge your entitled to recoupment is a question of where.

MR. CROSNOE: That they prevented us from recouping it. They've said, "We have to repay our insurance for recouping the fee and the only way we can do so under the-- according to the Commissioner. The Commissioner told us don't include this in the premium recoup it outside the premium which means outside the rate." And so the only ...

JUSTICE O'NEILL: But that-- but that's being argued in this-- I mean that's in contention as well. If, if, if rate in 5.101 is just premium then why do insurance companies like other elements under 5.101 like Texas and Cost, why do they choose to do that?

MR. CROSNOE: It's-- it, it-- the rate under 5.101 is not just premium. There are fees and taxes that can, that can go in that rate. We've, we've talk about some-- here already there's the premium tax is a perfect example. But when you have a situation where the commissioner comes in and exercise of it's administrative expertise and says, "We-- you know what we don't want to put it in that way because it's going to create a lot of problem here." Then, that is a different situation ...

JUSTICE O'NEILL: Show me where, show me where he says that?

MR. CROSNOE: Where, where the commissioner says in the exercise of it. The commissioner in Manual Rule 15 if you turn to tab or if you first look it.

JUSTICE O'NEILL: Okay.

MR. CROSNOE: If, if you'll turn the Tab F and you gather the Manual Rule 15 which is on the last page it says, "First of all in subparagraph A that each insurer is authorized to recruit the fee from the policyholder."

JUSTICE O'NEILL: Everybody agrees with that.

MR. CROSNOE: And then, if your going to recoup the fee if you like to do that then you have to include the notice under your policy where-- and the notice says that, "This, this fee \$1 is payable in addition to the premium do under this policy." So if you look at sub-part B of that rule under one and two, both have the same require.

JUSTICE O'NEILL: But this is-- I don't understand where this says that they can collect it outside the rate making you, you collected that this is separate item.

MR. CROSNOE: Because properly construed rate is a component of premium and so when you're, when you're telling someone to recoup it outside of the premium that's necessarily outside of the rate.

JUSTICE O'NEILL: Well, it says, "It's payable in addition to the premium" and you say, "fees and taxes are collectible -

MR. CROSNOE: Some fees, -

JUSTICE O'NEILL: - under 101."

MR. CROSNOE: - some fees and taxes of-- premium taxes is in a, is an example. But here again, we have a rule that says, -

JUSTICE O'NEILL: Well, that -

MR. CROSNOE: - "Don't deal with that?"

JUSTICE O'NEILL: - I feel like we're going on circle because that, that-- it just says, "It's payable in addition to the premium" and you acknowledge the fees and taxes can be payable in addition to premium

under 101.

MR. CROSNOE: Unless the department directs otherwise and, and the department has done that here. Maybe it will help if you look at the-- at, at the tax bulletin at Tab G of our, of our brief. They talk ...

JUSTICE O'NEILL: In all that-- all that says is it-- it's, it's not premium.

MR. CROSNOE: Right.

JUSTICE O'NEILL: It didn't say where you charge it.

MR. CROSNOE: It, it-- by telling you that it's not premium. They are telling me that it is not part of the rate either because rate is a component of premium. As defined in the statute in this recent and then Court of Appeal's misconstrue and about the statute can do it otherwise. So ...

JUSTICE #3: Is it in the record of whether the ATPA Fee was part of the rate making or not?

MR. CROSNOE: Is it, is it in the record? Well, there-- the only thing that's in the record there is no evidence of double dipping and there is a stipulation in the record. In a rule 11 agreement that the ATPA Fee in this case was, was charge in addition to the premiums charge under the rate file. So it was charge outside of the records.

JUSTICE #3: So the answer is not.

MR. CROSNOE: There, there is evidence -

JUSTICE #4: I just want to know is there any evidence that the, that the insurer here Allstate included the dollar in the expense loading in rate?

MR. CROSNOE: There, there is no evidence there -

JUSTICE O'NEILL: But ...

MR. CROSNOE: - there's no evidence of that -

JUSTICE #3: One more of the other.

MR. CROSNOE: Well, that-- I mean by saying that we included it outside the, the rate. Where are saying that we didn't put it in.

JUSTICE #3: Why are saying the charge cause.

MR. CROSNOE: That's true-- that's their speculation but their throwing it out their in the absence of any evidence.

JUSTICE O'NEILL: Well, my understanding their saying, "You can't tell whether someone charges twice and that's the problem."

MR. CROSNOE: Well, he say you, you could tell -

JUSTICE O'NEILL: I don't think his accused-- your charging twice. I just think he say, "You can't tell" and if you allow this girl send the right making process we won't we're be able to -

MR. CROSNOE: What would-- it, it, it clearly would be his burden to bring that forum. He said, "You could tell if you look that the right filling" is, is I recall was he was, saying. But there is no evidence that we did that and in fact, we would have been-- we, we would be subject to reinforcements action and administrative penalties when you try it here. Because the rule says, "We get to the few \$1 and we don't get to recoup it twice who once send you night and once outside of the rate."

JUSTICE #5: The procedure parts of this case. Counsel, this is a class suit also?

MR. CROSNOE: Yes, your Honor.

JUSTICE #5: And the, the Trial Court grant in partial summary judgment's?

MR. CROSNOE: Yes.

JUSTICE #5: So this is an appeal from an interlocutory order?

MR. CROSNOE: I sees an -

JUSTICE #5: - here at chapter 51?

MR. CROSNOE: This is an interlocutory bill under chapter 51.

JUSTICE #5: Okay.

JUSTICE #6: Look, if you look back at Rowe and Miranda but you mixed up at 15 brief. Miranda involved the pleaded jurisdiction appeal under chapter 51. Rowe involved the contracts service. The triggering conduct of the win though amendments so effective and apply to the cases are different. Take a look at that two Miranda and Rowe we're both right at that time.

MR. CROSNOE: If-- yes. There, there is a-- there's been a question where it's lie? By somebody this Court's opinions and then looking back at the brief. The, the one decision that was not sign was the-- it's neither communications case. And, and in that case the Court had a missions and suggested that or had, had said in their opinion what the new contracts definition apply to petitions for review filed-- honor after September 1, 2003. Such full he came back at this-- I guess in, in, in the final published version of that, of that decision and revised that language to refer only to the-- to a separate part of house bill 4 which was the, the interlocutory appeal provision for class certification on others. So in doing that, the Court at least suggested that there-- there is a question that-- and that's mine. Is to whether this new conflict provision will apply here. It, it, it doesn't appear to be by it's terms but I would also say that it is a clarification from the legislature as to what this Court's conflicts jurisdiction is intended to be.

JUSTICE #6: Almost the occasion at-- it's neither?

MR. CROSNOE: It's neither communications and the-- I'm looking for that, that, that's cite for me, your Honor, upper to that [inaudible] but.

JUSTICE O'NEILL: I just have one more progress of this. Does a filed rate doctrine applying to you his policies?

MR. CROSNOE: The filed rate doctrine applies to, to limit the discretion of court's to come in. And second guess the commissioner here on hell to pass through this charges. Mr. Powers is argued that the filed rate doctrine just means that you can't charge anything other than the filed rate. But of course filed rate is a part of a filed tear of doctrine and under the file tear of jurors premiums explain that the regulatory scheme and the regulatory body rules are the part of that file tear. And, and so we have not violated the filed rate doctrine but the Lower Court's did by coming in and second get it guessing. The commissioner and it exercise of it's discretion as to how this rate or how is fee is going to be pass to.

JUSTICE O'NEILL: So your interpretation of the filed rate doctrine is something can be charge or is part of the filed rate if the commissioner directs-- how it will be assessed.

MR. CROSNOE: Yeah. Yes, your Honor. It, it, it-- commissioner directs you to charge it outside of the, the, the rate as was done here then we believe that can be done because that rule is part of the regulatory scheme is part of the trial too.

JUSTICE O'NEILL: I just want to make sure up-- understand ,if, if and maybe I'm having trouble hearing. But if, if Rule 15 doesn't answer that question if, if, if I'm confused by Ruled 15. I can't say that it- it's a state about the commissioner you have to file-- charge it outside the rate-- filed rate. Then, had a simply rate doctrine upon that situation. If I don't read that is a directive mission.

MR. CROSNOE: If, if, if, if it does not apply to prevent this firm from -

JUSTICE O'NEILL: If it doesn't answer the question at 15. It's not

clear directive from the commissioner that it has to be charge outside filed rate. How do you thought filed rate doctrine if Rule 15 didn't answer the question?

JUSTICE : Right.

MR. CROSNOE: And, and again-- and I won't go back up over our position on that but the, but the-- the right-- the ideas of directive from the, the commissioner will proceed -

JUSTICE O'NEILL: So you are processing false on that?

MR. CROSNOE: But-- assume that, that it's not a directive then I think we would be in a different situation under that-- under the filed rate doctrine.

JUSTICE O'NEILL: So if this is not a directive then it would be a violation of the filed rate doctrine?

MR. CROSNOE: I, I haven't thought that through, your Honor-- frankly and that what-- is an issue that, that has not been brief. But the-- and I'm just-- I'm not sure about that.

JUSTICE #1: May further questions? Thank you counsel.

JUSTICE #1: The Court is ready to hear argument from the respondent's.

JUSTICE O'NEILL: May it please the Court. Mr. Powers will present arguments of the respondents.

ORAL ARGUMENT OF DAVID J. POWERS ON BEHALF OF THE RESPONDENT

MR. POWERS: Please the Court. I represent [inaudible]. It's preferred to talk about jurisdiction of the couple issues I want to talk on the merit's speaking with-- counsel just said. And maybe absolute critical admissions under this policy of issue on the merit's in this case. When he said, "The article 5.101 rate is not just the premium." That's what I believe I've heard and say, "In this argument that is not just for premium." And a follow up from that is number one. This relying some of rules fault's. The rule said, "In addition to premium that the article 5.101 rate is not just premium and the rule doesn't answer the question and it's not incorrect there."

JUSTICE #3: Is a -

MR. POWERS: Partly outside of the rate.

JUSTICE #3: Is a-- do you agree was in that-- 21.35B is a statute of general application.

MR. POWERS: It is the statute of general applications.

JUSTICE #3: And it, it would apply whether you are regulated or rule-- right is regulated or not.

MR. POWERS: I, I agree-- I agree with that.

JUSTICE #3: The Court of Appeals seem-- it's a malice seems to been driven by it's concern at if-- and if the pieces of 21.35B we're not subject to regulation than insurance can charge anything is that-- do you read it that's why?

MR. POWERS: That they we're interpreting the statutes such that if the premium charge-- what they say it's article 5.101 charge is only regulated then he asks those other seven charges in 21.35B= would be unregulated.

JUSTICE #3: But that's true very-- that's true and unregulated insurance.

MR. POWERS: Right. But unregulated insurance are not regulated so there, there's not a problem with that.

JUSTICE #3: But it's not-- it's just not clear why would you put 21.35B under 5.101 in some instance-- for some carriers but have a different construct using the same statute for other carriers.

MR. POWERS: For example and that is all insurers hear the, hear the-- the limitations of what charges they can imposed. Their none regulated insurer-- charge all those-- charge whatever you want. If your-- but there are specific statutes that apply that would-- soar over light of the general 21.35B under-- is the example. 21.35B says that a sponsoring organization-- this is a none insurer, non agent may charge all this eight things. Well, clearly that's subsume that within a different statute that says, "You have to have a license to be charge on premium got to be in insurance company to do that." So 21.35B is not that just-- everybody gets to do all this stuff. There are others statutes that remand and suit's fee with 5.101 it says, "Is that for regulated item insurers that charge for insurer of it's exposure is in the rate 'cause that's how we rate." Wait, wait, if it meant -

JUSTICE #3: But it doesn't include financial charges?

MR. POWERS: It includes all the charges that are listed in-- all the cost that they have for the insurance company. That's the important distinction, 5.101 which has for the insurance company. You have a finance-- premium finance company which is regulated separately. None of this applies to that, none of it 5.101 doesn't applied to them, 5.101 doesn't applied to the agent it only files to the insurance company. So if -

JUSTICE #3: But 5.101 just doesn't say all of the charges permitted by 21.35B are subject to regulation by commissioner.

MR. POWERS: Well, it doesn't say that in our Court-- your, your correct, your Honor. But here's the problem if-- but their argument is that article 5.101 only applies to-- let say said out bit till by, "Five minutes ago only the premium charge and if you read further briefs." at exactly what they said. Then all this other charges in 21.35B are not rate, rate claim. Another point to Section 3 pay of article 5.101 as somehow giving authority over this other charges. But Section 3 pay talks about anything a Rating Manual this-- what they say, "A rating that just premium might file that files in the premium charge." And nothing in 21.35B-- as I think everyone agrees-- gives the agency authority over the amount of those other charges. So if article 5.101 is only for premium charges there's absolutely nothing and if-- in any either statute that give the agency authority over the, the other charges. Therefore, whatever rate privilege it happens in 5.101-- if you have a power to unregulated the charge. But at-- in additional policy fee that renders 5.101 minimize. What's the point of regulation if you can have an unregulated add on cost on top of that? It makes no sense and that's what the Court of Appeals was saying.

JUSTICE #3: Well, make some sense because you're still looking at the expenses and the laws ratios and setting a page mark rate and a fee that the legislature says, "Of the policy fee that you collect outside of it might or might not be part of it comings."

MR. POWERS: Well, the problem is the analysis that they have to make. Brings you to 21.35B, it's a high we can, we can charge this additional of charges. Well, this one as a matter of, you know, what they argue and the Court's will disagree that-- that's what the commissioner said this outside of that-- of the article 5.101 rate. But assuming that are right then that same analysis opens up all seven other charges at 21.35B without any regulatory authority. The only regulatory authority under their interpretation is 5.101 just on the premium.

JUSTICE #3: The commissioner sort of quite in this case. So-- going making thing of that?

MR. POWERS: Well, I used to be a general counsel of Department of Insurance. I learned longer of math to make any assumptions about the Commission of Insurance and what here she maybe think it's so obhasm. I wanted to response at, at a-- one of it either point.

JUSTICE #3: I have one other question and that is counsel said that, "There was no evidence either way or that the fee was included in the rate filed." What's your-- did not?

MR. POWERS: Of course, my, my, first point is the that matter. Where this is statutory interpretation case in a click happen. But the evidence is two things: one that they-- we agree educated not included in the premium. But of course that doesn't mean it was in the rate. What is in the evidence is the rate filing form-- believe it's appendix six to our brief that the Department of Insurance required them to file. And with that, rate file of form clearly it then refer what he says as they include taxes, licenses and fees in the rate.

JUSTICE #3: As a percentage?

MR. POWERS: I'm sorry?

JUSTICE #3: As a percentage?

MR. POWERS: That's how all expense are there-- all expense are done in this.

JUSTICE #7: If, if the insurance company has millions of dollars that are charging and you get a percentage of taxes, license and fees out of clue what that's compose of?

MR. POWERS: Well, have you on for a many rape cases-- I, I would suggest you really don't want to find that out it's not a lot of fun?

JUSTICE #3: But you can't find it from that form you've going to go somewhere else.

MR. POWERS: No. But what that form requires is that taxes, licenses and fees be included in their numbers and then recoup through the rate. There's no exception therefore the ATPA none whatsoever. So whatever taxes, licenses infused they have-- they got to put in this. Let me-- also I wanted to just follow enough on the admission of the article 5.101 rate is not just one free but also goes to the bulletin. The bulletin talks about premium. They did meet it. It doesn't give an insurance company any advice of one where of the other an addition before the Court of whether it supposed to be in the rate. I want to comeback to I just want it in one your questions. The previous case about, you know, isn't this, you know, when this be unfair to do this now. Two quite things, one as they just admit it they where not keeping bad instructions. They we're told not put in the premium. Premium does not mean, don't put it to 5.101 rate as they've just admit it. But more importantly the case of him to mind a few out of this Court's just a few weeks ago. Problem can answer concrete files I think versus State form and in that case, I remember the facts correctly.

JUSTICE #3: Would you think about it that to sir?

JUSTICE #3: Never mind of everything.

MR. POWERS: Thank you. The, the thing about that case is that-- is-- as I recall. The Department of Insurance have thought to resemble coverage and other revise there and they thought that for a long time. And it turns out that did matter. One of the majority of the Court and I would submit that if it's fair to save the consumers. Sorry he got some bad advise from TDI, and TDI made the mistake ten years ago, the rule of law applies. Then that same rule should said, "Sorry insurance companies is that you had all the smart lawyers" who allegedly was rate for whatever reason based on what the Department of Insurance said. But

the rule of the law is what we're going to follow.

JUSTICE O'NEILL: Are there some insurance companies that are charging the ATPA Fee through the filed rate?

MR. POWERS: Oh, absolutely, your Honor, yes. And I have to say, It's not in-- that's not in the record but. Next point I wanted to address is that the 21.35B somehow is difference of rate regulated companies. There's nothing in 21.35B that distinguishes which type of companies and if it's -

JUSTICE #3: Rate who? That's one point. If it applies to everybody then why should it be govern by 5.101?

MR. POWERS: Just like every other-- just like the license in statute is cover they got. 21.35B says, "Sponsoring organization may charge premiums." Why should they be able to do that? They don't have an insurance license but 25.35B-- 21.35B. If the Court's going to read on it's own. Without looking at the entire's insurance code statute. Then the conclusion would act to counsel, is that the sponsoring organization without a license can charge premiums? And this is not-- that's just not the case because you have to read the statute as a whole and it's exact same thing in this case. You can't read 21.35B in isolation because there's another statute that talks about rate regulated item insurers, that you have to bring into that analysis. And the only way to make that statute meaningful is the way the Court of Appeals rate.

JUSTICE #6: You, you, you support your argument with the structure and over all purpose of the statute. Is there any specific wording that you can point to that says, "This fee must be included in rate making or all taxes and fees must be included in the rate."

MR. POWERS: There's nothing that said-- yeah. There's nothing that says, "That particular fee in the statute." But the statute says, "It's the rates have-- the rates file have to be just reasonable and adequate." Now, at this Court has said, "In the H channel fee is advertise see facts." It's the organization few case. Is that, that needs all taxes must be recruit. But the Department of Insurance -

JUSTICE #6: In statutory language that says that.

MR. POWERS: I'm sorry?

JUSTICE #6: Any language in the statute that says, "All taxes and fees must be included in the rate."

MR. POWERS: No. No specific words are none in the statute. Another thing I want to point out to the Court is I may have said it at the brief in arguing for jurisdiction that the Court of Appeals in encoding and require Allstate to reimburse previously collected ATPA Fees to insurance with no means of recouping those fees that's on page XI of the brief and I believe the expense at the day the-- the Court of Appeals said that, "We have to repay mine." The Court of Appeals did not order any such thing. The Court below-- The Trial Court enter that-- declares for the judgment and said, "This is the law." They did not order one penny to did paid back by Allstate. You [inaudible]

JUSTICE #3: And my fault this was that-- so nobodies seeking recovery of mine.

MR. POWERS: No. I didn't say, "Nobody is seeking -

JUSTICE : [inaudible]

MR. POWERS: - recovery of mine, I say this Court-- the trial Court did not order them they pay the money back." They're claiming it and if you look at the brief that's exactly what they're saying. They said it again the day that the Court of Appeals constitutionally took some money from them. And, and are calling-- required them to reimburse previously collected ATPA Fees to insurance. Where is that requirement?

It's not in the summary judgment and it certainly not in the Court of Appeals opinion.

JUSTICE #5: Someone horizon.

MR. POWERS: I'm sorry?

JUSTICE #5: After had that -

MR. POWERS: No. I-- I'll tell you where it ends it's none arise that make it through it. They're going to repay back money because they entered a rule 11 agreement. And in order to get the benefit's of limiting. The, the interest they going to have pay-- they entered a rule 11 agreement with us and said, "Will go up-- there's rule that the question of a law and if we loose-- we agree to pay back the money." That was the their agreement. That's not a Court of Appeals ordering them to do what and there's a big difference because the Court of Appeals and their claiming that the Court appeals that-- to try and justify jurisdiction. And I wanted that was what erred-- prepared to talk those jurisdiction. I want-- talk about a couple things along those fines Court with. American Alliance-- the case that hanging on hand on is very clear. Insurers must be allowed recoup taxes and regulatory fees through the rates. That's what the words that, that Court used are. It's going to be collected through the rates. And accrues back to the fundamental rule of regulatory-- the rate regulatory law. Lay down by this Court to use ever that H channel fee and followed all the time a regulatory agencies that I've appeared before. That all taxes are recouped as an expense of operation through the rate. So there's no conflict at all of the American Alliance.

JUSTICE #1: What affects when you think a decision in the previously Archaic case and that century case who have all this case.

MR. POWERS: Well, I think when the Court hopefully rules in our favor on that case. That it, it, it wont-- that it, it's going to be absurd to saying merit's issue but this Court means to address jurisdiction first. So it maybe that you never even reach that issue because in our opinion this Court has not respectfully have jurisdiction that hear the Allstate case.

JUSTICE #1: So-- makes century this won't affect this case at all.

MR. POWERS: Well, it, it, it may. It's been on how you rule on jurisdiction. If you rule on jurisdiction say, "We don't have jurisdiction then your right whatever happens in that, that century case would not matter." If in inside -

JUSTICE #1: And through you I'll just go back and continue litigating and then you can back up?

MR. POWERS: Well, it-- will be an issue in that case any office of that, that I mean what the rule in this of the Court. If you uphold that determination and the error Court's found by determination that the only-- to reflect to that charge. And then we would litigate what amount of money they have to repay.

JUSTICE #1: Or the halfway?

MR. POWERS: Or they don't have in that. And I want to point out that in American Alliance where the Court rule that you collect taxes infused further rate. That's exactly what the Court of Appeals held here. They do not say, "I don't have to collect that" they said "You get to collect that but through the rates." In fact, through the legal method that they use to collect every other tax at fee that they incur. Every other tax that pay late-- hey-- that's collected through the rates, that the way you have do it in rate regulation. You collected through the rate like every other expense. Whether it's a percentage tax, whether it's a flat-fee tax. It's always collected that this Court rule through the rates that's an expense of operation. That's what a

mark trying says, "The summary judgment in this case that the record page 393 said they can collect this rate at this fee" through the rate that. The Court of Appeals again says, "You can collect it and I do believe, believe though through the rate." In, increasing a course, they win it exactly to this point but note seven-- they made this very distinction and talk about American Alliance. They said, "We know there are conclusion is consistent with American Alliance because I read in of articles 5.101 in 21.35B requires the Commission of Insurance to include taxes when sitting in a bench more afraid and when approved in a filed rate." There is no inconsistency between those two cases and while-- near their case Farmers talk about American Alliance. If this-- if American Alliance were in conflict with this case and in opinion of this Court, as Allstate is arguing. Then the Farmers conference would have been briefing that in their briefs to this Court. And they didn't-- to read their brief about their brief on the merit's in the reply brief and talk about American Alliance, because they know there's absolutely no conflict between the American Alliance case and the Courts of Appeals opinions in this case. I want to address probably that's the last. I don't will have time for is what conflicts, standard applies to this case, and of course it's our position of the old conflicts standard applies, Public Code 42-- in (25)(E) was contain in HD4 in 2003 Section. And under HD4, the general rule was that all statutory changes only apply to actions filed after September 1, 2003. This action was filed before September 1, 2003. Therefore, under the general rule that change is of such actually would not apply unless there's nothing else in HB4 to makes it apply. And that's why we're turn to Section 1.02 allege a form. Two changes want to make to 220-- 22.225 subsection (d) which says, "It apply hearings of subsection D." And then in Section 1.05-- here's what the legislature said, "They're changing to subsection (d)-- that's a subsection it doesn't apply here." Apply the cases where the petition for review is filed after September 1, 2003. By saying only subsection (d) has that exception. They clearly meant that the subsection (e) change the one that essentially that in this case was not apply even now the petition for review is filed that to September 1, 2003. In response that the one last point response to the question about other insurance companies, here is the problem that, that-- I, I believe this Court is to look at. If they are correct that the 5.101 premium charge-- if it's just a premium charge and the rule requires-- this is what they arguing. The rules require them to collect it outside with the article 5.101 rate. But assume this Court assumes that's true. Here is the problem, every insurer, they collected rate if within the rate is in violation of that rule and then subject the liability therefore. That's all the time I have in that based on that questions.

JUSTICE #6: Learning that question. Thank you Mr. Powers.

REBUTTAL ARGUMENT OF WADE C. CROSNOE ON BEHALF OF PETITIONER

MR. CROSNOE: I again wanted emphasize here the required deference to the commissioner's expertise imposed in this question, if, if, if the, if the commissioner's rule-- Manual Rule 15, there's not doing what we-- or does not saying what we say it does which is that you've got to charge this in-- fee in addition to premium meaning in addition to the rate by definition. If it doesn't do that then four-- what is

the purpose of the rule because everything else by definition if, if that we're the case she would have to put this fee in the rate just like, just like anything else that wasn't exempted by specific rule. So under their -

JUSTICE O'NEILL: What, what's if the rule-- be to show that it's not premium for text purposes and to look the, the consumer be notified that they're being charge this fee in accordance with the statutory mandate.

MR. CROSNOE: But, but again the-- and, and this is why we come back to under, under the statutory's scheme and under the well accepted definition of rate and premium and, and case law not only in this case that it cause the country. Rate is a component of premium.

JUSTICE O'NEILL: But let me, let me follow at one point on that, that Mr. Power's made. Do you agree that taxes are properly included in the rate under 5.101, other types of taxes?

MR. CROSNOE: In, in-- unless they're exempted by the commissioner is that we're here by rule.

JUSTICE O'NEILL: So rate can include tax?

MR. CROSNOE: It, it can.

JUSTICE O'NEILL: So it's not just premium?

MR. CROSNOE: They would be include, those taxes would by definition be included in the premium. Because there part of the-- if, if you putting in the mean of rate then in your part of the premium. Because rate is a component of premium.

JUSTICE #3: But if, if you take the opposite view the premium is a component rate. Then I guess your argument is that what's the point of Rule 15. They're should not telling the insured's, "Your also paying expenses."

MR. CROSNOE: Not telling them anything.

JUSTICE #3: Might be also taxes-- in addition to premium you're just telling me you're paying this.

MR. CROSNOE: Yes. It's, it's meaningless without-- if you interpreted that way -

JUSTICE O'NEILL: Except that the legislator made it clear had a fear-- of that out of putting the notice to the tax payers first will notice.

JUSTICE #4: That's in the rule.

MR. CROSNOE: The, the-- in the rule, they made it clear that the charge this in addition to premium.

JUSTICE O'NEILL: But I thought the legislator-- legislature direct it that they put that notice -

MR. CROSNOE: The, -

JUSTICE O'NEILL: - on the policy.

MR. CROSNOE: - the legislature did not, that's, that's the commissioner's, that's the commissioner's rule. The legislature impose this fee and then we have this constitutional requirement that we deal out to pass that through in some form of fashion to, to our insurance. The commissioner and it's exercise-- it's a administrative expertise said, "Pass this through outside the rate that lay can only occur, it wont create additional premium tax liability and might be insured have to pay another with the dollar but the 1.6 percent tax-- premium tax that would it-- accrue if you put this in the premium. And there are host of other reasons that Mr. Rogers describe earlier why ..."

JUSTICE #5: Is it true that insurers-- going to be-- some insurer are going to be dissatisfied with our premium which ever way it go because some go through the rate making process and thought some head on me.

MR. CROSNOE: There is absolutely no evidence in the record that insurers will putting this fee in the rates. The evidence is that we did not do that way, we did not in fact deal with that way. And I, and I believe that's the evidence. In, in the Farmers case, there, there is no evidence that we, we that we put it or Farmers put it in the rate. We have said that we collected it outside the rate and made clear we want to have the burden of coming forward the insurance that we or double different but putting it in the rate. So there, there is no -

JUSTICE O'NEILL: Those presenting's-- presenting there are, are insurance company toward putting it in the rate if, if there are. What's, what, what, what we're your position to the them?

MR. CROSNOE: If, if they are-- they we're in violation of the, the Manual Rule 15 which told's us not to put it in the rate to collect it in addition to premium. So there, there just no evidence that other insurers are going to be ineffective in that way. And, and if they are it's because they didn't follow the directive of the commissioner. We did follow the directive of, of the commissioner here and that they are saying, "Why you should have listen to the commissioner, you should have listen to our interpretation of the statute." In the statutory scheme that we didn't know about. You should have listen you should follow what we have to say. And, and what the Court's had-- what the Court's have retroactively said about this rather than what the commissioner said about that.

JUSTICE #7: Let me ask you this-- ever. You know, in matter of time commissioner rule like this but some other past to recharge.

MR. CROSNOE: No. I, I think this is a, this is pretty unique example. Telling you that to collect is outside of the rate and again it comes back to the commissioner's likely concern that it-- that this shouldn't generate additional premium tax. Liability that ultimately is, is going to be born by the insurer. And, and as well the administrative difficulties and trying to stick this dollar into the rate, file and having come out and just be a, a dollar ultimate charge to the insurer. Then you got a flexible ratings in all this factors they're trying to stick in this dollar. May keep coming out of dollar that is hired. I think that was the concern and none of this have given it and so -

JUSTICE #1: [inaudible]. Any further questions?

JUSTICE: One other question with regard that complex jurisdiction. Do you think whether the old of the new amendments that is pre-opposed September 2003 applied turns on when the petition for review was filed in this Court?

MR. CROSNOE: No, no we do not because we, we believe we have met either standard.

JUSTICE #1: Well, that, that wasn't my question. With regard -

MR. CROSNOE: Obviously instead -

JUSTICE #1: - to what's that new or the old complex statute applies? You think depends upon when the petition for review was filed in this Court but you think you need the complex standard under either, either pre opposed 2003.

MR. CROSNOE: We, we think we made it in under either standard the- in terms of, of the effective date that, that the statutory with the enactment provision of house bill, bill forward seems to indicate that applies to actions filed September-- after September 1, 1993. This one was -

JUSTICE: That's in fact consistent.

MR. POWERS: - this, this one was filed before. So under that reading, under that reading near under the old's taker. And as I try to

explain earlier not been have the case cite form. Our concern is with the-- decision of this Court and it's neither communication stage which is 142 [inaudible] 295. And, and that's actually the final version of regain. There was some sort of previous it [inaudible] not just be available-- West Law oral at-- in this Texas great law of general. That created some concern and I'm a-- that, that-- we didn't want to concede that point. And as I also mentioned earlier-- we do believe that this is a clarification could -

JUSTICE #3: I'm, I'm confused-- your brief says on page 15 that based on rule the legislative definition conflict would appeared apply here because Allstate petition for review was filed -

MR. POWERS: It, it -

JUSTICE #3: - after September 1, 2003.

MR. POWERS: If, if you look at rule it, it cites-- it talks about the -

JUSTICE #3: All right. I just want to know do you think the operative action is going to be lawsuit this file, the action was filed, or when the petition for review was filed? The brief says, "Petition for review." About you just now said, "Action was right."

JUSTICE #3: Right. I think my-- if I can clarify my reading at the statute is that it applies to actions followed after September 1 ni-- 2003. My concern in my briefing was-- based on some of the-- this decision in the Court cannot cite.

JUSTICE #3: Any further questions? I did not opposed. I recognize to includes the arguments for today and the marshal will adjourn the Court.

JUSTICE O'NEILL: All rise. Oh yeah, oh yeah, oh yeah, the honorable Supreme Court Texas now stands adjourn.

2006 WL 5918082 (Tex.)