For docket see 10-0374

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Supreme Court of Texas.
Texas Department of Insurance, Honorable Mike Geeslin, Commissioner of Insurance and Honorable Danny Saenz, Senior Associate Commissioner
v.
American National Insurance Company and American Life Insurance Company of Texas.
No. 10-0374.

September 14, 2011.

Appearances:

Arthur C. D'Andrea, from the Office of the Solicitor General, for Petitioners.
Susan G. Conway, of Graves, Dougherty, Hearon & Moody, for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The court is ready to hear argument in 10- 0374, Texas Department of Insurance and others v. American National Insurance Company and American Life Insurance Company of Texas.

MARSHAL: May it please the Court, Mr. D'Andrea will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF ARTHUR C. D'ANDREA ON BEHALF OF THE PETITIONER

ATTORNEY ARTHUR C. D'ANDREA: May it please the Court, what American National is asking this Court to do is not only contrary to longstanding Texas policy, it is contrary to unchallenged state practices nationwide. Many states require stop-loss insurers to file policies and pay assessments into risk pools and American National will not be able to cite-

CHIEF JUSTICE WALLACE B. JEFFERSON: Counsel, will the Marshals close the door in the back of the room. Continue, please.

ATTORNEY ARTHUR C. D'ANDREA: Many states require insurers to file policies and pay assessments into

risk pools and today, American National will not be able to cite a single case rejecting that practice. The Department's view on this point is reasonable, longstanding and entitled to deference. I'll begin where we should, with the Insurance Code. There are three ways that TDI wins under the Insurance Code. First, it's just the definition of reinsurance. The Legislature has left the term, "reinsurance" undefined and the definition of reinsurance is notoriously vague. TDI has adopted the definition that's widely accepted, and so under Texas Citizens, that should end the inquiry. TDI's view should be entitled to deference. Now, the second way: Even if this Court were to decide to construct a definition of reinsurance using terms from the Insurance Code like "insurer" or "business of insurance" -- and this was the lower court's approach -- TDI's view would still prevail. There were many definitions of insurer and business of insurer sprinkled throughout the Insurance Code. The lower court chose the one definition that this Court has said, should not be applied throughout the Insurance Code and that's the definition of "insurer" or "business of insurance" located in the section dealing with the unauthorized practice of insurance and what this Court said, in Great American Insurance is that definition is exceedingly broad and there are many definitions of business of insurance and you shouldn't use that within other places in the code. Now, given the deference that is owed to TDI, it makes no sense to cabin TDI to this one exceedingly broad definition of insurer when there are many other definitions of "insurer" in the code that support TDI's view. I'll give you two examples that are listed in our brief. The first definition comes from this chapter dealing with reinsurance intermediaries, which seems like a sensible place to look for a definition of insurance to define reinsurance. And this is -it's- cited in my brief. It's 451.001 and the definition of "insurer" there is, "insurer means a commercially domiciled insurer," which is not the self-funded plan here, or other person legally organized in this state to engage in the business of insurance as an insurance company, including and it lists a bunch of entities, none of which are stop-loss, self-funded plans, Capital Stock Insurance Company, a Lloyd's plan. Another definition is from the carry licensing statute as we proposed and there, again, insurer means the issuer of an insurance policy that is issued to another in consideration of a premium. Now even American National doesn't claim that self-funded plans issue policies. The most they can say is that they are structured at policies.

CHIEF JUSTICE WALLACE B. JEFFERSON: To the employee, it looks very much like insurance, right? You have a claim. You submit the claim. You give payment under that claim or denial and there's a process like an insurance. It seems very close to the business of insurance whether you take a broad definition of that term or not.

ATTORNEY ARTHUR C. D'ANDREA: Yes, Your Honor, it is something like insurance, but more accurately, it's self-insurance. They are self-insured. So take, for example, HEB. HEB has a self-funded plan.

JUSTICE PHIL JOHNSON: Well, but if you have several employers in the group, one employer may have no losses. One employer may have significant losses. The employer with no losses is not self-insuring because they wouldn't be paying any money if they were self-insuring. It seems like where you're sharing the risk and where you have many employers.

ATTORNEY ARTHUR C. D'ANDREA: Where you have many, you are sharing some risk, but it's--

JUSTICE PHIL JOHNSON: As opposed to self-insurance where you're not sharing the risk. Am I missing something on that?

ATTORNEY ARTHUR C. D'ANDREA: No, Your Honor, I think that's right. If you pooled - if HEB got together with Whole Foods and ran a self-funded plan, then in some sense, they would still as an entity together be self-insured. I mean they would be able to issue, they set aside money, some pool of money to pay the health expenses of their employees. Now they can pay their employees' health expenses, but they can't issue policies. They can't, HEB and Whole Foods together or HEB, which has their own stop-loss plan, they can't sell an insurance policy to a citizen on the street or to another business. They're not an insurance company. They're not in the business of insurance. All they can do is pay for their own employees' health expenses and more importantly, when HEB goes out and buys stop-loss coverage to protect the company from catastrophic loss, it's acting as an insurer. It's not acting as an insured when it engages that transaction.

JUSTICE PHIL JOHNSON: But it's not an insured because I mean, the employees are the one that gets sick, right? Or her. And so aren't they the one that has the payment that's going to be made to the physician or whoever. It's not HEB that has, that's been injured by that. HEB or and the pool of employers are not actually the ones injured, are they?

ATTORNEY ARTHUR C. D'ANDREA: Well, they are the injured party when they cash in on the stop-loss insurance. It's their pool. I mean, you are absolutely right, Your Honor, that the stop-loss coverage does not relate. I mean, we agree this is that Fifth Circuit opinion. The stop-loss coverage does not relate to the employees themselves. It's between an insurance company and a grocery store, in this case. It's a contract between those two and it does insure HEB in the sense that if HEB has catastrophic losses from its plan with its own pool of money, then the stop-loss coverage kicks in and reimburses it. So in that sense, HEB is acting as it is the insured in that transaction. It's not a reinsurance. Reinsurance is when an insured buys coverage to protect itself from catastrophic loss. An insurer buys reinsurance to allow it to get risk of its books and sell and issue more policies within its existing capital reserves. That's not what HEB is doing when it buys stop-loss coverage. It's not doing that so it can go sell more policies under some existing capital reserve requirement that it doesn't even have.

JUSTICE DALE WAINWRIGHT: But it is doing it to remove some risk off its books.

ATTORNEY ARTHUR C. D'ANDREA: It does; and that is the kind of the broader definition of reinsurance when it's loosely used as just to transfer risk and that's right. What it is doing there is just, as anyone self-insures or buys insurance is to transfer some risk off of their person or the entity, but it's --

JUSTICE DALE WAINWRIGHT: What about the argument that since reinsurance generally involves parties who are more sophisticated in the insurance business than insureds coming to buy insurance that there's less need for regulation and that's why from a policy standpoint, it's not or should not be included in the definition of insurance with the full scope of regulation and its fees and all that.

ATTORNEY ARTHUR C. D'ANDREA: That's exactly right, Your Honor, and I can see this is not, that's not reflected anywhere in the code, but I think it goes to the reasonableness of the regulation and that is why there are so many exemptions for reinsurance. It's not that TDI can't regulate the insurance. They certainly could. There's nothing stopping them from it besides the statute, but the reason they're designed this way is the point Your Honor makes, which is the point of the Insurance Code is to protect insureds and reinsurers, insurance companies don't need that. They can move risk back and forth for their books and then they sell it to re of reinsurers and there's no need for TDI to be involved and the dissemination of risks really are out in the world, these kind of products. What they are involved in is that first transaction where an insurance company sells an insurance product to an insured that is looking to protect themselves from catastrophic loss. Now after that first transaction, it gets sold and resold and resold and that's reinsurance and that's where TDI largely plays no regulatory role.

JUSTICE PAUL W. GREEN: Well, what is the practical difference then between treating this stop-loss carrier as reinsurance versus insurance, the actual practical difference?

ATTORNEY ARTHUR C. D'ANDREA: The practical difference is they're mostly throughout the code. I mean, in this case, the practical difference is if they are at least arguably, if they are treated as reinsurance, then arguably they do not have to pay and I think this is still not true for a third reason I'll get to later, but at least according to the lower court, if they're treated as reinsurance, they won't have to pay assessments into the risk pool so the risk pool won't get funded. If they're treated as reinsurance, arguably, they don't have to file those forms, file their insurance contracts with the Department. If they're treated as reinsurance, they don't get taxed. There's a general assessment on all contracts of insurance that are issued in the state. Arguably, they wouldn't get taxed there and that's a source of $14 million of revenue to Texas and it kind of goes throughout. There are arguments made that reinsurance doesn't comply with any number of statutory provisions about various parts of insurance.

JUSTICE PAUL W. GREEN: So essentially it's an additional regulatory burden and it's going to cost more.

ATTORNEY ARTHUR C. D'ANDREA: It is, it costs, well, I mean the tax, you mean to the stop-loss issuer of the stop-loss policy? It is a tax to them and I mean, there's no doubt about it. We assess a tax on all the policies issued. And so and they have to file those forms and it is an additional regulatory burden and it's meant to protect insureds. And that's why the Legislature has drafted the statute to ensure that unless you are the sort of sophisticated insurance company who's just packaging your risk and selling it to insurers and re of reinsurers around the world, you have to, if you were to come and sell an insurance policy, to HEB in this state, you need to file it.

JUSTICE PAUL W. GREEN: Well, it sounds to me like the HEB example that you used, that is a sophisticated consumer of that service.

ATTORNEY ARTHUR C. D'ANDREA: They're certainly sophisticated--

JUSTICE PAUL W. GREEN: And it would not be necessarily the target of an insurance regulation scheme.

ATTORNEY ARTHUR C. D'ANDREA: I mean they're sophisticated in the sense like anyone with money, they can buy good lawyers during this transaction, but it's not what they do. They're not in the business of insurance. They are not an insurance company and the nature of the reinsurance product is different. It is not the standard reinsurance as that term is technically understood, which is moving risk around insurance companies.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, it's interesting in a company like HEB in many respects, it does act like an insurer. Many of these companies have in the non-healthcare context self-insured retentions and they hire their own claims adjusters and adjust and handle claims up to a certain amount and maybe are sophisticated enough not to be subject to this kind of regulatory scheme, but this is, the case that we're talking about, it seems similar. I mean, the provision of insurance or whatever you want to call it is very similar to purchasing a policy and having your employees covered not in respect to a self-insured plan.

ATTORNEY ARTHUR C. D'ANDREA: It looks something like insurance, but under the Insurance Code, 4152.001 it is not. It simply does not qualify as a commercially domiciled insurer or other person legally organized in the state to engage in the business of insurance as an insurance company. There is given the deference that is owed to TDI, there is no reason to pick some definition of insurer or to figure that HEB sort of looks like an insurer when there's a definition in the code, in ---

CHIEF JUSTICE WALLACE B. JEFFERSON: And you pointed to a number of other jurisdictions and secondary sources, but in those other jurisdictions are the statutes written similarly to what we have here or are they clearer with respect to what qualifies as reinsurance and what does not?

ATTORNEY ARTHUR C. D'ANDREA: The only ones that have clear statutory provisions, -that I cited are just a few. Typically, it's all--

CHIEF JUSTICE WALLACE B. JEFFERSON: Colorado, for example, is it clearer than Texas or not?

ATTORNEY ARTHUR C. D'ANDREA: In Texas?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

ATTORNEY ARTHUR C. D'ANDREA: In Texas, it is clear - I mean, only under agency deference, no. I think without agency deference, it's a mess as a lot of the Insurance Code is. Reinsurance is undefined. There are-

CHIEF JUSTICE WALLACE B. JEFFERSON: It's a mess in other states like Colorado. If we look at that statute, we would have to--

ATTORNEY ARTHUR C. D'ANDREA: No, I think Colorado, the statutes I cite and I think Colorado is one. Those are clear. Those have adopted, I think it's three statutes I cited in the brief. Those are clear. They say "this is going to be treated as stop-loss coverage is treated like that." The rest of the states that, do that, no, it looks like ours. It's basically the Agency's position for a long time has been that these sorts of products are not reinsurance.

CHIEF JUSTICE WALLACE B. JEFFERSON: So whichever way we go in this case, the Legislature can come back and declare what their current policy is with respect to these sorts of litigants, correct?

ATTORNEY ARTHUR C. D'ANDREA: Yes, Your Honor, there is certainly - I think they could always do that, but certainly here, it's a matter of we're asking for agency deference.

JUSTICE PHIL JOHNSON: Did you say one of the ramifications of being insurer as opposed to a reinsurer is they are required to make contributions to the pool or the-

ATTORNEY ARTHUR C. D'ANDREA: Your Honor, that is one, that opens up an argument to them, but and this leads to the third reason that I think the TDI is correct under the Code and even if these stop-loss products are reinsurance, under the Code, they still have to file them and they would still have to pay their assessments and that is just a plain text argument. And 3.42, which requires filing policies, says that, all contracts of health insurance must be filed. Now, there are a lot of exemptions for reinsurance all throughout the Code, but there is not one in 3.42. There is nothing that says, except reinsurance.

JUSTICE EVA M. GUZMAN: So this concern about companies coming back and seeking refunds is not well-founded then. There was some concern expressed about if we found them to be reinsurance that this would open up the door--

ATTORNEY ARTHUR C. D'ANDREA: I think they might-I mean, they might seek refunds. I think we would defend with Heinrich, certainly these companies would-- if you found for them would get a refund of during that period. So I think they certainly will try to see refunds and we will have to defend those suits. But-- so 3.42 applies to all contracts of health insurance and it has no exemption for reinsurance even though exemptions are elsewhere and I have not heard American National make a strong argument that these aren't contracts for health insurance and likewise, under 3.77 and the pool's amicus brief does a fantastic job of pointing this out. 3.77 defines health insurance, defines health insurance -to include stop-loss coverage. Stop-loss coverage appears in that statute. And--

JUSTICE DALE WAINWRIGHT: Now is that your central statutory text that supports you, 3.7?

ATTORNEY ARTHUR C. D'ANDREA: The -- 3.77 and 3.42 are the two sources of their obligation. 3.42 is the source of their obligation to file forms and 3.77 is the source of their obligation to pay assessments into the risk pool and both of those, even without considering whether this is insurance and reinsurance would require the filings of those policies and the payment of assessments.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The court is ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Ms. Conway will present argument for the Respondents.

ORAL ARGUMENT OF SUSAN G. CONWAY ON BEHALF OF THE RESPONDENT

ATTORNEY SUSAN G. CONWAY: May it please the Court, as much as the Texas Department of Insurance would like for it to not be true, this case turns entirely on Chapter 101 of the Texas Insurance Code. Section 101.053 in that chapter provides that the lawful transaction of reinsurance by insurers is not business of insurance that the Texas Department of Insurance may regulate. Section 101.002 defines insurer as an entity engaged as a principal in the business of insurance.

JUSTICE DEBRA H. LEHRMANN: Let me ask you. I mean even if this is not insurance, given that this is not an insurance company, it's not a company that is sophisticated in the sense that this is what they typically do, then why shouldn't it be regulated?

ATTORNEY SUSAN G. CONWAY: Because the Texas Insurance Code does not distinguish between sophisticated insurance company and insurer. "Business of insurance" is defined in Chapter 101 in terms of conduct. It says, "the following acts in this state shall constitute the business of insurance" and then it lists acts. And among those acts are, "issuing or delivering an insurance contract," and specifically to this case, "contracting to provide indemnification or expense reimbursement for a medical expense by direct payment, reimbursement or otherwise." The definition of "insurer" is not limited to sophisticated insurance companies, and any entity that engages in the business of insurance, as defined, is an insurer.

JUSTICE DEBRA H. LEHRMANN: But don't you agree that the policy that does not support the reinsurance policies from having to be regulated deal with that issue of sophistication, right?

ATTORNEY SUSAN G. CONWAY: It may or it may not. That's a good explanation for why the Legislature may have decided to leave reinsurance generally unregulated. I don't know of any legislative intent that I can tell you on that, but as far as -you know, it doesn't have anything to do with sophisticated. It appears to be a policy judgment by the Legislature that it is not something that needs to be regulated for whatever reason and.

JUSTICE PAUL W. GREEN: I was going to ask you that -- TDI says that in spite of all that, there's still an obligation to file and pay into the risk pool. Do you agree or disagree with that?

ATTORNEY SUSAN G. CONWAY: I disagree with that.

JUSTICE PAUL W. GREEN: So American National is not doing that in other words.

ATTORNEY SUSAN G. CONWAY: American National is not doing that. TDI's basis for saying that American National is obliged to file its policy forms is because the Texas Insurance Code says, health insurance forms have to be filed for prior approval, review and approval of the Department of Insurance and the Department can disapprove any policy form that doesn't meet all of the statutory requirements that apply to health insurance. If this is health insurance, then it must comply with all of the coverage mandates of the Insurance Code, for example. It must comply, those include the ones that you have heard about if you've read the briefs in this case are requirements that health insurance cover newborns with congenital defects, but there is a wide variety of coverage mandates that are included and that apply. If this is health insurance, if this stop-loss coverage for catastrophic losses that health insurance plans buy is health insurance, then that stop-loss coverage has to provide the benefits that health insurance has to provide under Texas law and those include coverage for dependent grandchildren, coverage for chemical dependency, coverage for osteoporosis and prostate cancer--

JUSTICE DALE WAINWRIGHT: And your client's position is that's a problem.

ATTORNEY SUSAN G. CONWAY: That's a problem because it's preempted by federal law because it amounts to a regulation on the plans themselves; and to the extent that these are risk plans, that these are plans that are protected by the federal act that Congress passed in 1974, they state law that regulates those plans is clearly preempted by ERISA.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me -- just to be clear, under the stop-loss policy, there's a catastrophic loss, you don't -- your company doesn't cover that loss. The claims aren't made to you. The claims are made to the employer and then the employer says, this is covered under our policy. It's catastrophic and you need to reimburse us for this. Is that how it works?

ATTORNEY SUSAN G. CONWAY: That's exactly how it works.

CHIEF JUSTICE WALLACE B. JEFFERSON: And you're saying that is not - you're not -- that's not health insurance. You're not providing maternal care, and -- etc., you are simply complying with this contractual policy.

ATTORNEY SUSAN G. CONWAY: The stop-loss coverage does not pay medical expense claims of plan participants. The plan does. And counsel is incorrect to say that we do not believe that this is an insurance contract. The plan does provide insurance. It provides plan documents that are insurance contracts. Plan participants can sue on them and that's how they get their claims reimbursed if the plan does not pay them. They are from the point of view of certainly the covered employee, they function exactly like health insurance functions. The plans are self-insured, which means they run the plans. They accept the insurance risk and they accept the liability for paying the coverage that they offer. If they buy stop-loss coverage, what they are doing is they don't get rid of any of their liabilities. They are still liable as the insurer on their plan contract. They still have to pay the claims. What they can do is cap their economic exposure, cap their financial risk by buying reinsurance and just to back up one step, in a reinsurance transaction, there is an insured, but the insured is an insurer. Reinsurance is insurance for insurers.

JUSTICE DEBRA H. LEHRMANN: Why wouldn't defer to TDI on this? I mean, you know, we do unless it's unreasonable or against the plain meaning of the statute, but you admit that there's a lot of different definitions here and so why wouldn't we defer to them?

ATTORNEY SUSAN G. CONWAY: Because in this case, it is neither reasonable nor consistent with the plain language of the statutes.

JUSTICE DEBRA H. LEHRMANN: How can that be when there's so many different definitions?

ATTORNEY SUSAN G. CONWAY: It takes you back to Chapter 101 of the Insurance Code. That's the only place in the insurance code where there is a comprehensive "business of insurance" definition. That's the chapter that is the starting point for defining TDI's regulatory authority, the scope of TDI's regulatory authority. That chapter denies them in a general way the ability to regulate reinsurance. It says, "the lawful transaction of reinsurance by insurers is not business of insurance that the Department can regulate."

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me ask this. Article 3.77 defines insurer as "any entity that provides health insurance in this state, including stop loss or excess loss insurance." Does that provision suggest that stop-loss insurance is health insurance or a type of health insurance?

ATTORNEY SUSAN G. CONWAY: The definition of insurer suggests that there may be stop-loss insurance that is health insurance and that section of the code gives an illustration of that. It refers later on to stop-loss coverage for physicians, hospitals and other healthcare providers, I believe. That would not be reinsurance and that section of the Code contemplates that there could be an issuer of stop-loss coverage that issues health insurance.

JUSTICE DALE WAINWRIGHT: So you're saying there's excess loss insurance for insureds? It sounded like you just said, for certain healthcare providers, they can get directly excess loss or stop-loss insurance for certain catastrophic risks.

ATTORNEY SUSAN G. CONWAY: The Insurance Code uses stop loss in that context in that way. Stop loss

for physicians, in the healthcare context, this would be a physician who offers basically a service contract to his patients. He agrees to provide physician care, services that he himself provides for a fixed price. You know, he caps the amount he will charge the patient for treating them at so much a year or so much a month or whatever it is.

JUSTICE DON R. WILLETT: Ms. Conway, tell me a little bit about-

JUSTICE DALE WAINWRIGHT: I'm sorry, let me follow up if I may.

JUSTICE DON R. WILLETT: Go ahead. Sure.

JUSTICE DALE WAINWRIGHT: I'm not sure I understood the answer yet.

ATTORNEY SUSAN G. CONWAY: Let me just say -- in that instance, the physician is not acting as an insurer of his patient. He's providing services to his patient at a price, an agreed-upon price and the stop-loss coverage in that case is if he has set a price too low, he can ensure the risk that he can't provide the services for the cost -- for his cost of doing so. He's not an insurer.

JUSTICE DALE WAINWRIGHT: So then you say that the general jurisdictional grant of authority, with exclusions to TDI under Chapter 101 excludes the transaction of reinsurance by insurers. TDI says, but Article 3.77 is more specific, and addresses health insurance, stop-loss health insurance like at issue here and the more specific governs. Sounds like you're arguing that the stop-loss insurance, at least some of it that's provided for under Article 3.77 is different from the excess loss insurance at issue in this case. Am I missing you or is that part of your argument?

ATTORNEY SUSAN G. CONWAY: The -- whatTDI argues is that under Article 3.77 because the definition of insurer refers to stop-loss insurance, that means the definition of health insurance there's also one of those in Article 3.77 includes stop-loss insurance. At the period at issue in this case, 1998 through 2002, the definition of health insurance did not include stop-loss insurance and the pool was only authorized to impose assessments on health insurance and at the period in this case, that statute did not say that stop-loss insurance was health insurance. If it had, it would have arguably run afoul of ERISA, but it didn't. That statute was later amended and the definition - well, that whole regulatory scheme has been amended radically and assessments of the pool are not done at all like they were in 1998.

JUSTICE DON R. WILLETT: My question's really one about maybe collateral effects. TDI argues that if self-funded plans are deemed insurance that it may subject a host of institutions like churches and other bodies to regulation and fees and I wonder what your take is on that.

ATTORNEY SUSAN G. CONWAY: It absolutely will not. ERISA protects private employer plans, almost all of them, with its deemer clause, which says, that state insurance laws may not be used to regulate ERISA plans. Texas has deemer statutes that are very, very similar that cover all the self-insured health benefit plans that are not covered by ERISA. That's state agency plans, municipality plans, political subdivisions, school districts, local governments, all governmental plans and church plans which are also not covered by ERISA, have specific Texas statutes that do the same thing ERISA does and they say that they cannot be regulated as insurers for, they can't be treated as insurers for purposes of regulating them so they're carved out and the outcome of this case will not change that. Those deemer statutes are not at issue. They're not in the Insurance Code.

JUSTICE DON R. WILLETT: So TDI's simply mistaken when they assert that these other institutions will be suddenly subject to regulation and fees.

ATTORNEY SUSAN G. CONWAY: They are mistaken. TDI wants to regulate this coverage, believes that it

should so it has looked outside of Chapter 101 for authority to do so. Chapter 101, however, is the general basis for its regulatory authority. There is not, TDI has no inherent power to regulate reinsurance. It has only the power the Legislature has given it and in this case, not only has it not been given it, it has been expressly denied it by the language in Chapter 101. That language makes it clear that reinsurance is a transaction between insurers and it defines insurers to include health benefit plans.

JUSTICE DEBRA H. LEHRMANN: Why shouldn't we follow the lead of the majority of other jurisdictions on this?

ATTORNEY SUSAN G. CONWAY: Because the issue in this case, Counsel said, it has been long established policy of the Department and the practices of other states. What we are talking about is construction of Texas law. TDI has only the power that it's given and that comes from its enabling act. If it is not given the power in its enabling act, it doesn't have it.

JUSTICE DEBRA H. LEHRMANN: I'm not say we would have to, but why wouldn't we?

ATTORNEY SUSAN G. CONWAY: Because the rule that-- the most expansive rule that this Court has ever adopted on judicial deference to agency interpretation is that the Court will only defer if the agency's interpretation is reasonable and consistent with the plain language of the statute. In this case, it's not either one. It is frankly inconsistent with the basic definition of "business of insurance" and of "insurer" and of the carve-out for reinsurance that's in the Texas Insurance Code. There is no statute in Texas that says, stop-loss insurance for self-insured health benefit plans is not reinsurance and TDI cannot point you to a statute that says that. They can only point you to statutes that use the term, insurance and that TDI would like to assign a definition to that term as used in those statutes and it is not free to do that without reference to the Texas Insurance Code and that's what it's asking you to defer to here. They will ignore Chapter 101 entirely, pick out statutes that believe permit the construction that this isn't reinsurance. It's something else and construe those statutes in a way that it looks to the Supreme Court of Missouri construing Missouri law and that is not at all a source of judicial deference that this Court has ever recognized. I haven't said, much about ERISA and you're probably relieved about that, but it does inform your inquiry in this case because it explains in many respects why this Texas Legislature said, what it said, in the statutes that TDI relies on. The Texas Legislature has been acutely aware of the broad, preemptive effect on Texas law of any insurance regulation that attempts to regulate ERISA plans and the Legislature has legislated with that in mind and has accepted in large part with its own deemer statutes, the policy choices underlying ERISA and those are, as the Supreme Court has said, in a number of ERISA cases, to set up a uniform system of conduct and a federal system for enforcing the standards of conduct that ERISA creates and creating a system that is not so complex and so costly that it will discourage employers from offering healthcare coverage to the their employees, which they do not have to do. Texas has enacted the same policy choices in the statutes that say health insurance benefit plans not protected by ERISA, but that do business in Texas, governmental plans, church plans, are not subject to insurance regulation in Texas even though they could be. This is a policy choice that says, we will sacrifice the protections. We will forego our choice of mandating coverage in order to encourage employers to provide coverage that they can afford and compliance rules that aren't too complex that they won't be discouraged from offering this healthcare coverage to their employees.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Conway. Are there any other further questions? Thank you. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF ARTHUR C. D'ANDREA ON BEHALF OF PETITIONER

ATTORNEY ARTHUR C. D'ANDREA: May it please the Court, I would like to make just two important points. First, American National said, Chapter 101 is the only place with a comprehensive definition of the business of insurance. I think it's constructive to compare that with this Court's holding in Great American Insurance Company which cautions, "Nowhere in the purpose clause of Article 1.4-1", which is the former Chapter 101, "did the Legislature instruct the list of acts contained therein, which constitute doing an insurance busi-

ness was to apply throughout the Code. Rather the Legislature does not evidence an intention to promulgate a uniform definition of the acts which constitute business of insurance." That opinion held that definition, the very one that they rely on and say is a comprehensive definition should not apply throughout the Code. The other mistake is the claim that Chapter 101 is somehow the source, the inherent source of TDI's regulatory powers and it's somehow central to the Code. Other than the fact that it's 101 because it starts early in the code is no such thing. All that chapter is is about regulating and service process on unauthorized people constructing unauthorized business of insurance. There are many other -- it's not central or important in any way. There are many sources of TDI's regulation and here are the two sources of TDI's power are 3.77 and 3.42. There's no reason at all to refer to Chapter 101.

JUSTICE DALE WAINWRIGHT: Do you agree that this case is about the jurisdiction of TDI though?

ATTORNEY ARTHUR C. D'ANDREA: No, Your Honor. I can't --

JUSTICE DALE WAINWRIGHT: Does it have the authority to regulate reinsurance? That's the question.

ATTORNEY ARTHUR C. D'ANDREA: Yes, the question is, I think it's a statutory interpretation case and it is simply under 3.42 and 3.77 what does contract for health insurance mean.

JUSTICE DALE WAINWRIGHT: And I heard you say that earlier. Is this case about the jurisdiction of TDI? Does it have authority to regulate reinsurance?

ATTORNEY ARTHUR C. D'ANDREA: It is about whether we have the authority. Well, let me back up. It's whether we have the authority to ask reinsurance - to ask stop-loss providers to file their contracts and to assess them. We're not asking to regulate them.

JUSTICE DALE WAINWRIGHT: Well, they would have to submit their policies and you could reject them.

ATTORNEY ARTHUR C. D'ANDREA: That's right. Well, they would have to file them with us and right. And there is --

JUSTICE DALE WAINWRIGHT: So there's some regulation.

ATTORNEY ARTHUR C. D'ANDREA: There is some regulation, but I only push back because-

JUSTICE DALE WAINWRIGHT: It's not a trick question. This is about the scope of TDI's authority. Right?

ATTORNEY ARTHUR C. D'ANDREA: It is. It is the scope of that, but I guess what I want to push back on is the ERISA point because it's not regulation in the sense of the ERISA cases that were raised. None of those ERISA cases hold that stop-loss coverage is reinsurance or is not reinsurance and none of those ERISA cases say that states cannot ask them to file them or impose an assessment. What those ERISA cases say and it's not relevant here are that a state may not regulate the plan itself by regulating the substance of the stop-loss coverage they provide. So to take an example. Texas requires that all insurance policies issued in the state to individuals cover newborn baby defects. Now, what those cases say is Texas cannot make stop-loss coverage cover newborn baby defects because by default that would make HEB cover newborn baby defects and arguably ERISA does not allow that. So by imposing our substantive regulations on stop-loss coverage, we might indirectly or pretty directly make HEB cover newborn baby defects. Now there's an ERISA split on that and it's true that at least arguably that would be preempted, but that's not what we're asking for here and we've conceded as much in footnote 5 of our reply brief. This is about a generally applicable filing requirement and a generally applicable tax. In ERISA speak, those do not relate to the plan and that is why they have been unable to cite a single case striking down generally applicable filing requirements or generally applicable taxes under ERISA.

JUSTICE DALE WAINWRIGHT: Let me circle back around. If this case is at least in part about the scope of TDI's authority for stop-loss coverage for these types of self-funded plans, then should the courts accord any deference to the agency interpretation? If the issue is the jurisdiction of the agency's authority as delegated by the Legislature, if we accord deference to an agency's interpretation of the scope of its authority, it could broaden it and narrow it and we would defer to it according to a general deference argument. On the other hand, if the agency has that authority and is interpreting how to apply it and how to interpret the words, then maybe there's some deference there because of their -- the agency's expertise in that area. But if we're talking about the scope of the jurisdictional grant of the scope of the authority, why shouldn't that be a de novo consideration because why should we defer to an agency deciding how much authority it has versus how to do its job based on the authority it's been granted. So why deference here?

ATTORNEY ARTHUR C. D'ANDREA: Right. I think it's a tricky question. I mean, this line is drawn in the federal jurisprudence as well and I think it's hard to say what is a jurisdictional question and I think the cleaner answer -I mean, almost any term then you're interpreting you could say, well, this is about the scope of the agency's authority their --

JUSTICE DALE WAINWRIGHT: I'm not sure about that. I agree with your former question. It's hard, but I'm not sure any question then becomes about jurisdiction.

ATTORNEY ARTHUR C. D'ANDREA: It's not anyone. I agree, Your Honor, but I think a lot of them, you could spin something as jurisdictional or not and I think these are just - I mean, this is the core of what TDI does. This isn't even about the meaning of one term. This is there are a bunch of definitions of insurer. Which one should we pick and I think that's classic agency deference. There are a bunch of definitions of one term. Why refer to any certain section of the Code? Well, it's TDI's code to administer and so it makes sense to defer to them at least on which term to pick.

JUSTICE PHIL JOHNSON: Would you comment briefly, I know your time is up, would you comment briefly on opposing counsel's statement that Section 3.77 as you refer to the definition of "insurance" in it, was not applicable to this case? And amended.

ATTORNEY ARTHUR C. D'ANDREA: Our position is that 3.77 was clear before it was amended. 3.77 says, "insurer" means any entity that provides health insurance in this state, including stop-loss or excess-loss insurance.

JUSTICE PHIL JOHNSON: And your position is that was in there at -- it does apply to this case.

ATTORNEY ARTHUR C. D'ANDREA: It does apply to this case. 3.77 is just by the plain text of 3.77, they owe assessment to the pool because of that because they provide health insurance in the state, including stop-loss insurance. The Legislature has amended 3.77 to change the definition of health insurance to make it much broader and in doing so they made it even more clear that stop-loss coverage was covered, but under the plain text of the old definition, they still clearly qualify.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshal will adjourn the court.

MARSHAL: All rise.

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