IN THE SUPREME COURT OF MISSOURI

AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS,	)	
Appellant,	)	
vs.	)	**Supreme Court No. SC89064**
DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE,	)	
Respondents.	)	

BRIEF OF APPELLANT
AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS

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JURISDICTIONAL STATEMENT

THIS ACTION INVOLVES THE QUESTION OF WHETHER REINSURANCE COVERAGE PROVIDED BY APPELLANT TO MISSOURI EMPLOYERS IS SUBJECT TO PREMIUM TAXES PURSUANT TO SECTION 148.350 RSMO AND THUS INVOLVES THE CONSTRUCTION OF THE REVENUE LAWS OF THE STATE OF MISSOURI. THEREFORE JURISDICTION OF THIS APPEAL LIES WITH THE MISSOURI SUPREME COURT PURSUANT TO ARTICLE V SECTION 3 OF THE MISSOURI CONSTITUTION.

STATEMENT OF FACTS

Appellant, American National Life Insurance Company of Texas (hereinafter referred to as "American National"), is a Texas domiciled insurance company licensed and transacting insurance business in the State of Missouri. American National has been licensed in Missouri to write accident and health insurance, life insurance, annuities and endowments since 1972.

American National issues stop loss reinsurance coverage to employers who provide health care insurance benefits to their employees. These employers retain the financial risk of providing the health care benefits to their employees by creating and maintaining a self-insured health benefit plan. The employer designs an employee benefit plan which sets out the benefits which will be provided to the employees. Such employers reimburse their employees for the cost of the health care the employee incurs or will pay the health care provider directly as per the terms of the plan. The employer retains and pays, at its own expense, a claim administrator to administer the health benefit plan. The employer is responsible for 100% of the benefits provided by the health benefit plan. These employers, in order to limit their financial risk on unusually high claims associated with the health care benefits they have agreed to provide to their employees, purchase reinsurance to reimburse the employer for large medical expense losses incurred by the employees protected by the health benefit plan.

This type of health care reinsurance is called stop loss coverage and comes in two general types: (1) Aggregate stop loss coverage; and (2) Specific stop loss

coverage. In both cases, the benefit is paid to the employer maintaining the self-insured plan. Aggregate stop loss coverage reimburses the employer only for medical expenses well above the expected amount of the aggregate claims. Specific stop loss coverage pays a reinsurance reimbursement on an atypically expensive claim after a specified cap on any individual claim is exceeded.

The contracts between American National and employers fully set forth the arrangement described above. Attached to the Joint Stipulation of Facts, item 5 of the record on appeal, is a specimen copy of the contract between American National and the employer.

Insurance companies annually report all premiums received on account of policies issued in this state to the Respondent Department of Insurance, Financial Institutions and Professional Registration (the "Department of Insurance"). These insurance companies are to pay premium taxes to the Respondent Department of Revenue ("Department of Revenue") (the Department of Insurance and the Department of Revenue, collectively, "Respondents") only on the direct premiums received.

In the years 2001, 2002 and 2003, American National did not report the premiums attributable to the stop loss reinsurance coverage on its tax returns to the Department of Insurance, because it was not direct premium. American National therefore did not pay premium taxes on these premiums. In 2004, the Department of Insurance issued a letter to American National ordering payment of premium taxes on amounts attributable to the stop loss reinsurance coverage for the years

2001, 2002 and 2003.

American National paid the revised assessments for 2001, 2002, 2003 to the Department of Revenue under protest and made a claim for refund indicating that the taxes assessed were not for direct premiums. The Department of Revenue denied the refund request and American National appealed. The Administrative Hearing Commission (the "Commission") found that Stop Loss coverage sold by American National in Missouri was reinsurance but also found that the reinsurance is subject to premium tax. American National appeals the Commission's finding that reinsurance is subject to premium tax.

POINTS RELIED ON

I. THE ADMINISTRATIVE HEARING COMMISSION IN ITS DECISION OF DECEMBER 27, 2007 ERRED IN FINDING THAT THE REINSURANCE CONTRACT AT ISSUE IS SUBJECT TO PREMIUM TAX BECAUSE:

(a) THE ADMINISTRATIVE HEARING COMMISSION ERRONEOUSLY FAILED TO CONSTRUE SECTION 148.350 RSMO, THE RELEVANT TAX STATUTE, IN FAVOR OF THE TAXPAYER;

(b) STATES WITH PREMIUM TAX LAWS SIMILAR TO MISSOURI DO NOT TAX REINSURANCE PREMIUMS; AND,

(c) THE DISCRIMINTORY TAXING OF AMERICAN NATIONAL LIFE INSURANCE OF TEXAS' REINSURANCE PREMIUMS VIOLATES ARTICLE 1 SECTION 2 OF THE MISSOURI CONSTITUTION AND AMENDEMENT XIV, SECTION 1 OF THE UNITED STATES CONSTITUTION, IN PARTICULAR, PROVISIONS GUARANTEEING EQUAL PROTECTION.

ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION IN ITS DECISION OF DECEMBER 27, 2007 ERRED IN FINDING THAT THE REINSURANCE CONTRACT AT ISSUE IS SUBJECT TO PREMIUM TAX BECAUSE:

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(a) The Hearing Commission Erroneously Failed to Construe Section 148.350 RSMo, the Relevant Statute, in the Taxpayer's Favor

An issue before the Commission in this case was whether or not the stop loss insurance coverage issued by American National in Missouri was reinsurance or direct insurance. Respondents did not argue or assert that reinsurance is subject

to premium tax but, without prompting, the Commission found that to be the case. The finding that stop loss coverage issued by American National to employers in Missouri is reinsurance should have been dispositive of matter, with a ruling in American National's favor. The Commission, however, also held that reinsurance is subject to premium tax, an issue not before it, and American National challenges that finding.

It is well established that the tax laws of Missouri shall be interpreted against the taxing authority and in favor of the taxpayer. Section 136.300.1 RSMo provides in part "With respect to any issue relevant to ascertaining the tax liability of a taxpayer, all laws of the state imposing a tax shall be strictly construed against the taxing authority in favor of the taxpayer." The statute further provides in part "The Director of Revenue shall have the burden of proof with respect to any factual issue relevant to ascertaining the liability of a taxpayer …"

The statutes relating to the collection of premium taxes are contained in Chapter 148 RSMo. Section 148.350.1 RSMo provides "Every such company or association shall, on or before the first day of March in each year, make a return, verified by the affidavit of its president and secretary or other authorized officers, to the Director of the Department of Insurance stating the amount of all premiums received on account of policies issued in this state by such company…" Section 148.340 RSMo relates to foreign insurers like American National and provides "Every insurance company or association not organized under the laws of this

state, shall, as provided in section 148.350 RSMo, quarterly pay tax upon the direct premiums received …"(emphasis added)

Section 375.041.2 RSMo provides in part "each domestic, foreign and alien insurer who is authorized to transact insurance in this state..., shall annually, on or before March first of each year, file with the National Association of Insurance Commissioners a copy of its annual statement convention blank, along with such additional filings as prescribed by the director of the department of insurance for the preceding year. The information filed with the National Association of Insurance Commissioners shall be in the same format and scope as that required by the director of the department of insurance and shall include the signed jurat page and the actuarial certification."

20 CSR 200-1.030(1) provides in part "each health services corporation, health maintenance organization (HMO), stock or mutual life insurance company, assessment or stipulated premium plan life insurance company, fraternal benefit society, stock or mutual insurance company other than life, Chapter 383 assessment company, reciprocal and eligible surplus lines insurer and each accredited or qualified reinsurer shall file a sworn annual statement on or before March 1 of each year, for its business and affairs for the year ended the next previous December 31, in accordance with the National Association of Insurance Commissioners (NAIC) Annual Statement Blank and the instructions for it, or in accordance with any other form as the director expressly permits to the entity. This statement also shall be prepared in accordance with the applicable accounting

standards or principles approved by the NAIC, published in the *Accounting Practices and Procedures Manual*, *Valuation of Securities* or *Examiner's Handbook*, or a combination of these, except where the applicable provisions of Chapters 354 and 374.385, RSMo, or other specific rules expressly provide otherwise."

Pursuant to the NAIC Annual Statement Blank and Accounting Practices and Procedures Manual, insurers are to separately report direct premiums and reinsurance premiums. American National reported direct premiums and reinsurance premiums, paying premium tax on the direct premiums, and not paying premium tax on the reinsurance premiums.

American National contends that premiums received on direct business are direct premiums subject to premium taxes while premiums received for reinsurance are not direct premiums and are not subject to premium taxes. The Commission recognized a distinction between direct insurance and reinsurance, and found that the arrangement entered into between American National and employers is reinsurance. This finding should have been dispositive of the case. The Commission, however, then improperly attempted to distinguish direct business from direct premium claiming "direct business is not the same as direct premium." Decision, item 6 of Record on Appeal.

The Commission in this case concluded, "We see no legislative intent to distinguish between ordinary insurance and reinsurance by the use of the term "direct premiums" in Section 148.340… If the legislature had intended to exclude

reinsurance from the scope of the premium tax, it could have done so expressly." See Decision, item 6 of Record on Appeal, page 18. This untenable position is in direct conflict with both Missouri law and Respondent Department of Insurance practices. American National is unaware of any other circumstance where the Department of Insurance has taken the position that reinsurance is subject to premium tax. Based upon the Commission's ruling, any premium received for any insurance or reinsurance in Missouri would be subject to premium tax

The Department of Insurance previously attempted to implement a regulation which, among other things, would require insurers to pay premium taxes on stop loss coverage. The Department of Insurance promulgated a regulation which attempted to treat stop loss coverage provided to employers with self insured health insurance plans as medical expense insurance and thus assert regulatory authority over stop loss coverage. In the regulation the Department attempted to, among other things:

1. Deem stop loss policies as medical expense insurance subject to the laws regulating health insurance policies.

2. Require stop loss insurance to be included in the issuers computation of premium taxes.

Plaintiffs in *Associated Industries* v. Angoff, 937 S. W. 2d 277 (Mo. App. WD 1996) brought an action against the Director of the Department of Insurance challenging the proposed regulation. The *Associated Industries* court determined that the Department of Insurance exceeded its authority in promulgating the

regulation related to stop loss coverage for self insured health plans and ordered the Director and the Department of Insurance to cease, desist and refrain from the application or enforcement of the regulation. The proposed Regulation -- 20 CSR 400-2.150(3) -- which was stricken in 1996, provided in part that "all stop loss insurance issued in this state is to be included in the insurer's computation of premium tax liability and the insurer's obligation for assessments to fund the Missouri Health Insurance Pool." The Respondents present attempt to tax stop loss coverage contravenes the ruling in the *Associated Industries* case which ordered Department of Insurance to cease, desist and refrain from the enforcement of the regulation.

American National is unaware of *any other* reinsurance that is subject to premium tax. The Commission, accordingly, should have construed the premium and other Missouri tax statutes together and if any ambiguity were found in the statutes, the Commissioner should have found in favor of the taxpayer, American National.

(b) States with Premium Tax Laws Similar to Missouri Do Not Tax Reinsurance Premiums

No Missouri cases address the issues raised in the instant appeal. The most likely reason: the Missouri Department of Insurance has not previously attempted to impose premium tax levies upon reinsurance premiums.

Other States with premium tax laws similar to Missouri do not tax reinsurance premiums and there have been cases decided relative to the issue.

Courts in some jurisdictions expressly state, without reservations or caveats, that reinsurance is not subject to premium tax. *See, e.g., John Alden Life Ins. Co. v. Comm'r of Revenue,* 1995 Minn. Tax LEXIS 66 (Minnesota Tax Ct. Cnty. of Ramsey Oct. 3, 1995); *BCBSM, Inc. v. Comm'r of Revenue,* 2002 Minn. Tax LEXIS 19 (Minn. Tax Ct. Cnty. of Ramsey Aug. 1, 2002); *Neff v. Cherokee Ins. Co.,* 704 S.W.2d 1 (Tenn. 1986); *Commonwealth v. Millers Mut. Fire Ins. Co.,* 1957 Pa. Dist. & Cnty. Dec. LEXIS 422 at *18 (Common Pleas Ct. of Dauphin Co., Penn. Dec. 30, 1957) ("reinsurance … premiums are not taxable under the gross premiums tax.").

The issue in *BCBSM* was the same as that now before this Court: whether premiums received by an insurer on stop loss coverage issued to employers with self insured health care coverage for their employees are subject to a premium tax under Minnesota law. "The question before us is whether premiums paid for stop loss coverage by employers who self fund their employees health care costs are premiums paid on direct business." *BCBSM, Inc.,* 663 N.W.2d at 532. The court concluded that the Minnesota statute was not clear and free from ambiguity.

As in Missouri, Minnesota courts construe ambiguous taxation provisions in favor of the tax payer, and the Court concluded that taxes could not be assessed against stop loss premiums. The court held that direct business "could be reasonably interpreted to mean either everything except policies sold between insurance companies, or simply those policies where there is a direct relationship

between the insurer and the employee. The former interpretation would allow taxation on the premiums for these stop loss policies, or the latter interpretation would preclude taxation." *BCBSM, Inc.* 663 N.W.2d at 533. The court determined that stop loss insurance is not "direct business" in the context of interpreting the Minnesota statutes and as such the premium collected for this stop loss was not premiums paid on direct business. The rationale in the *BCBSM* case is compelling and should be adopted in Missouri. Section 136.300, RSMo specifically provides that tax laws should be strictly construed against the taxing authority and in favor of the taxpayer, thus Missouri's tax laws should be interpreted against the Respondents.

In *Neff v. Cherokee Insurance,* the Tennessee Supreme Court first examined the difference between direct policyholders and those that purchase reinsurance. *Neff,* 704 S.W. 2d at 6. The court then explained that the taxation of direct premiums was part-and-parcel of the overall scheme aimed at protecting the state's policy holders. *Neff,* 704 S.W. 2d at 7. The court noted that this rationale is inapplicable for the taxing of reinsurance premiums. *Id.*

In *Southeastern Fire Insurance Company v. South Carolina Tax Commission,* 171 S.E. 2d 355 (1964), the South Carolina Supreme Court's decision turned on strict construction of the premium tax statute. The court first discussed the difference between "insurance" and "reinsurance." *Southeastern Fire,* 171 S.E.2d at 410. The court noted that "insurance" was defined, but "reinsurance" was not defined, by the relevant statute. *Id.* The court determined

that the statute allowing taxation of premiums, by its own terms, applied only to "insurance" contracts. *Id.* The court held that, because a "tax statute is not to be extended beyond the clear import of its language," reinsurance was not subject to the premium tax. *Id.* (citation omitted). The court also held that reinsurance premiums received by foreign corporations were not subject to premium tax *Southeastern Fire*, 171 SE 2d at 411. New York's Court of Appeals used a similar explanation for not taxing reinsurance premiums. In a 1951 decision, the court stated that reinsurance premiums should not be subject to the state's premium tax. *In Matter of Guardian Life Ins. Co. of Am. v. Chapman*, 302 N.Y. 226, 241-44, 97 N.E.2d 877, 885-87 (N.Y.1951). The authority cited is persuasive and supports the contention that reinsurance premiums are not subject to premium taxes.

(c) The Discriminatory Taxing of American National's Reinsurance Premium Violates Article 1 Section 2 of the Missouri Constitution and Amendement 14 Section 1 of the United States Constitution, in Particular, Provisions Guaranteeing Equal Protections.

On information and belief, the Department of Insurance has never imposed a premium tax on reinsurance contracts – save for the American National reinsurance contracts at issue here. Simply put, domestic companies were not required to pay premium tax on reinsurance contracts, but the Department of Insurance levied a premium tax on Texas-based American National's reinsurance contracts.

The Department of Insurance's discriminatory and inequitable conduct violates the Equal Protection provisions of both the Missouri and United States Constitutions. MISSOURI CONST. art 1, § 2; U.S. CONST. amend. XIV, § 1. The discriminatory levy against an out-of-state company also violates the Privileges and Immunities Clause of the United States Constitution. U.S. CONST. art. IV.

Respondents violated American National's equal protection rights because American National is singled out as the only entity subject to premium taxation of payments on reinsurance contracts. The standard for determining an Equal Protection violation is virtually the same under the Missouri and United States Constitutions. *See, e.g., President Riverboat Casino – Missouri, Inc. v. Missouri Gaming Comm'n,* 13 S.W.3d 635 (Mo. 2000); *Sprint Communications Co., L.P. v. Director of Revenue,* 64 S.W.3d 832 (Mo. 2002); *Mallincrodt, Inc. v. Director of Revenue,* 806 S.W.2d 412 (Mo. 1991). These cases demonstrate that a state's taxing authority may not single out particular individuals, organizations, or foreign entities for taxes that differ from other "similarly situated" individuals, organizations or foreign entities without showing that those subject to the discriminatory tax were not actually "similarly situated" or that the state had a compelling state interest for the differentiation. *See id; see also Fulton Corp. v. Faulkner,* 516 U.S. 325 (1996) (court found plaintiffs had standing where in-state stockholder challenged tax regime imposing higher taxes on stock from issuers with out-of-state operations than on stock from purely in-state issuers). In the instant litigation, Respondents fail to provide any business-related reason or any

compelling state interest – indeed, they provide no reason at all – for discriminating against American National.

The only apparent argument for claiming that the "premium tax" extracted from American National does not violate American National's due process rights would be the untenable contention that the levy imposed was a "fee" rather than a "tax." The facts presented in the instant case show this argument must fail. The Missouri Supreme Court explained: In *Roberts v. McNary*, 636 S.W.2d 332, 335-36 (Mo. *en banc* 1981) this Court examined the distinction between a tax and a fee: "Taxes are 'proportional contributions imposed by the state upon individuals for the support of government and for all public needs.' . . . Taxes are not payments for a special privilege or a special service rendered." On the other hand, fees are "charges prescribed by law to be paid by certain individuals to public officers for services rendered in connection with a specific purpose." [citations omitted] Similarly, in *Atlantic Refining Co. v. Virginia*, 302 U.S. 22, 26 (1937), the United States Supreme Court determined that a payment required of a foreign corporation for the privilege of conducting business within Virginia was a fee. "The entrance fee is not a tax, but compensation for a privilege applied for and granted." *Mallincrodt, Inc*, 806 S.W.2d at 413-14.

Under this standard, the premium tax is truly a "tax;" it is not a "fee." American National has paid all fees necessary for selling insurance in Missouri since 1972. American National has therefore paid "the admission fee, so to speak." *See Mallincrodt, Inc.*, 806 S.W.2d at 413-14 at 415. The levy on

premiums is correctly called a "tax" because it is clearly in the nature of a tax; it is not a fee for a service or a license for the privilege of doing business in the state. As noted by Missouri's high court: This court has consistently held that while a state may impose conditions on the entry of foreign corporations to do business in this state, once it has permitted them to enter, the adopted corporations are entitled to Equal Protection with the states own corporate progeny, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis. *Mallinckrodt,* 806 S.W.2d at 415. Classifications among corporations for purposes of taxation are constitutional under the Equal Protection Clause only if they bear a "reasonable and just relation" to the purpose for which they are imposed. *Western & Southern Life Ins. Co. v. State Board of Equalization of California,* 451 U.S. 648, 665 (1981). Respondents fail to provide *any* reason for imposing a reinsurance tax based upon some different "classification" of American National. Indeed, in all other dealings between American National and Respondents, American National has been classified and treated in the same manner as other insurance companies. American National's circumstances demonstrate that, pursuant to applicable Equal Protection provisions, premium taxes should not have been levied for the payments at issue made to American National for reinsurance contracts. Thus Chapter 148 RSMo., as applied in this instance to American National, violated both the United States and Missouri Constitutions.

The U.S. Constitution's Privileges and Immunities Clause of Article IV provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The U.S. Supreme Court has noted, "While the Privileges and Immunities Clause cites the term 'citizens,' for analytic purposes citizenship and residency are essentially interchangeable." *Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 64 (1988).

Like many other constitutional provisions, the Privileges and Immunities Clause is not an absolute. While it bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States . . . it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer v. Witsell,* 334 U.S. 385, 395 (1948). In the instant case, Respondents do not expressly admit that American National was singled out for the tax levy because American National is a foreign corporation. However, Respondents fail to provide *any* reason for singling out Texas-based American National. The totality of the evidence, at the least, raises an inference that Respondents violated the Privilege and Immunities Clause.

A state statute or regulation that discriminates against out-of-state firms usually violates the Commerce Clause of article I of the U.S. Constitution. The McCarran-Ferguson Act, however, removed Commerce Clause restrictions upon the States' power to tax the insurance business. See 15 U.S.C. sec 1011, *et seq*. Nonetheless, the analysis of Commerce Clause violations closely parallels analysis

of due process violations. Thus, even if the Commerce Clause is not directly applicable, analysis of discriminatory conduct generally prohibited under the Commerce Clause has been considered and supports a finding of an Equal Protection Clause violation. See, e.g., *Western & Southern Life*, 451 U.S. at 650-69. American National, being singled out to pay premium tax on payments for reinsurance, has been subjected to this type of illegal discrimination.

In sum, Respondents unquestionably violated the Equal Protection rights guarantied by the Missouri and United States Constitutions, and Respondents may have violated other constitutionally protected rights by levying a premium tax on American National's reinsurance contracts. In particular, when Equal Protection violations are considered in conjunction with the Missouri statute requiring that tax laws be construed in favor of the taxpayer, American National is entitled to a ruling in its favor and to a refund of the disputed premium taxes at issue. *See* RSMo. §136.300.1.

CONCLUSION AND PRAYER

The Court should reverse the finding of the Administrative Hearing Commission that reinsurance premiums are subject to premium taxes. American National prays that the Court render an order in American National's favor, order Respondents refund the premium taxes at issue which were paid under protest, and order that Respondents are permanently enjoined from trying to collect the particular taxes at issue in this case at some future time.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

COMES NOW counsel for Appellant and for their Certificate of Compliance, states as follows:

1. The undersigned does hereby certify that Brief of Appellant filed herein complies with the page limits of Rule 84.06(b) and contains 4,705 words of proportional type.

2. Microsoft Word was used to prepare Brief of Appellant.

3. The undersigned does hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document by mailing a true copy thereof on this _____ day of _____, 2008 via prepaid U. S. Mail to:

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