BEFORE THE MISSOURI SUPREME COURT

AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS, Appellant,	)	
v.	)	Case No. SC89064
DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE, **STATE OF MISSOURI,** Respondents.	)	

Respondents' Brief

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JURISDICTIONAL STATEMENT

This action involves the construction of the revenue laws of the state of Missouri, namely section 148.340, RSMo 2000. Therefore, jurisdiction of this appeal lies with the Missouri Supreme Court pursuant to Article V Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

American National Life Insurance Company of Texas ("American National") is a Texas-domiciled insurance company licensed and transacting insurance business in the state of Missouri since 1972. Appellant's Brief Appendix, A-2, paragraph 1. The Director of Revenue ("Revenue") is the state official charged with, among other things, the collection of revenue from premium tax assessments. Section 148.350, RSMo 2000. The Director of Insurance, Financial Institutions and Professional Registration ("Insurance") is the state official charged with, among other things, the certification to Revenue of sums to be assessed upon insurance companies, such as American National, for premium tax. Section 148.350, RSMo 2000.

> Many employers provide health care insurance benefits to their employees. Some employers retain the financial risk of providing the health care benefits to their employees by maintaining a self-funded health plan. Such employers reimburse their employees for the cost of the health care the employee incurs or will pay the health care provider directly. The employer, in order to limit its financial risk for the health care benefits it has agreed to provide will purchase insurance to reimburse the employer for large medical expense losses incurred by the employees protected by the plan. This insurance is called stop-loss coverage and comes in two general types: aggregate stop-loss coverage and specific stop-loss coverage. In both cases the benefit is paid to the employer (or to the trustees of a self-funded plan). Aggregate stop-loss coverage reimburses the employer for any coverage above the expected amount of the

aggregate claims. Specific stop-loss coverage pays a benefit after a cap on any individual is exceeded.

Appellant's Brief Appendix, A-2, paragraph 2.

"In the years 2001, 2002 and 2003, American National was issuing stop-loss coverage to self-insured employer health benefit plans." Appellant's Brief Appendix, A-4, paragraph 4. "At the time, American National did not report the premiums attributable to stop-loss contracts as direct premiums on its Missouri premium tax returns, nor did it pay Missouri premium taxes on those premiums." Appellant's Brief Appendix, A-4, paragraph 5. In 2004, Insurance issued a letter to American National re-certifying the premium taxes for 2001, 2002 and 2003 by including the amounts attributable to the stop-loss contracts. Appellant's Brief Appendix, A-4, paragraph 6.

On October 21, 2004, American National paid under protest to Revenue the revised assessments for years 2001, 2002, and 2003 and made claim for refund of the payments. Appellant's Brief Appendix, A-5, paragraph 7. On July 14, 2005, Revenue denied American National's claim for refund. Appellant's Brief Appendix, A-5, paragraph 8.

American National appealed Revenue's denial to the Administrative Hearing Commission (AHC) on August 11, 2005. Appellant's Brief Appendix, A-1. The AHC joined Insurance as a party with Revenue. Appellant's Brief Appendix, A-1. The AHC affirmed Revenue's denial on December 27, 2007. Appellant's Brief Appendix, A-1 and A-21.

ARGUMENT

I. (Responding to Appellant's Point I. A and B) The Administrative Hearing Commission did not err in holding that American National Life Insurance Company's premiums received on account of stop-loss insurance issued to employers in this state are direct premiums, because such holding is authorized by law.

The parties stipulated the facts. The issue, then, is whether the AHC's decision to uphold Revenue's denial of American National's claim for refund based on those stipulated facts is authorized by law, section 148.340, RSMo 2000. To decide this issue, the Supreme Court must conduct "*de novo* review of the [Administrative Hearing Commission's] AHC's interpretation of revenue laws and will uphold the AHC's decision if it is 'authorized by law and supported by competent and substantial evidence upon the whole record'." President Casino, Inc. v. Director of Revenue, 219 S.W. 3d 235, 239 (Mo. 2007), quoting Six Flags Theme Parks, Inc. v. Director of Revenue, 179 S.W.3d 266, 268 (Mo. banc 2005).

On pages 13 and 14 of its brief, American National contends that the AHC's finding that the stop-loss coverage of American National is reinsurance is dispositive of the present case. American National fails to recognize, however, that the present case involves two issues, not one, and that both are issues of law, not fact.

The first issue is whether American National's stop-loss insurance premium is direct premium under section 148.340, RSMo, regardless of whether it is reinsurance. Because this issue is one of construing a statute and applying it to stipulated facts, the issue is one of law.

The second issue is whether American National's stop-loss premium is reinsurance. By reason of American National's own complaint admitting that the issue was one of law

(AHC Record, page 2), the parties' stipulation of facts and the lack of any other evidence in the record, the decision on whether American National's premiums are reinsurance is a question of law to be decided *de novo*.

Where the issue is one of law, the Supreme Court may sustain the administrative agency's decision even though the rationale differs from that of the agency. KV Pharmaceutical Co. v. Missouri State Bd. of Pharmacy, 43 S.W.3d 306, 310 (Mo. 2001). Here, this Court may sustain the AHC's decision on roughly the same rationale as AHC's, namely that regardless of whether premiums received on account of stop-loss insurance may be classified as reinsurance, such premiums are nonetheless direct premiums subject to tax. (*See* Argument under Point I.A.1. and 2., below). Or this Court may sustain the AHC's decision on a different rationale, namely that American National's stop-loss premiums are direct premium subject to tax because such premiums are not reinsurance. (*See* Argument under Point I.B., below).

A. The General Assembly intends for the word "direct" in section 148.340, RSMo 2000, to include premiums received by American National from stop-loss insurance.

"Every insurance company… not organized under the laws of this state, shall… pay tax upon the direct premiums received… on account of business done in this state… for insurance of life, property or interest in this state at the rate of two percent per annum… ." Section 148.340, RSMo 2000. The issue here is one of statutory construction: whether the premiums American National receives for stop loss coverage issued to employers in this state

are "direct premiums received" within the meaning of section 148.340, RSMo 2000. More specifically, the issue concerns the meaning of the word "direct," because the parties do not dispute that American National has received premiums on account of business done in this state. In construing a statute, the key is to ascertain the legislative intent from the words used by the general assembly. "The primary rule of statutory construction is to determine the legislature's intent by considering the plain and ordinary meaning of the words – such as "direct" - used in the statute and by giving each word, clause, sentence, and section of the statute meaning." Neske v. City of St. Louis, 218 S.W.3d 417, 424 (Mo. 2007).

In its Point I.A., American National contends that the statute at issue is section 148.350, RSMo 2000. But this statute merely requires that each insurance company file a proper premium tax return and contains other filing and review procedures. The statute really at issue is the one that defines which premiums are subject to tax: section 148.340, RSMo 2000.

1. "Direct" as used generally in insurance includes American National's stop-loss premiums.

In the context of insurance, the word "direct" describes a relationship between an insurance company and its policyholder, uninterrupted by the current presence of another insurance company. For example, in Mississippi Insurance Guar. Ass'n v. MS Cas. Ins. Co., 947 So.2d 865 (Miss. 2006), the issue was whether agreements substituting one insurance company for another insurance company for policy obligations first originating with the other insurance company constituted direct insurance for purposes of the statutory obligations of the

insurance guaranty association. The court held that such an agreement was direct insurance, despite the label of the agreements as "assumption reinsurance," because the substituting insurance company was directly liable to the policyholder for the insurance obligations under the original insurance policy. 947 So.2d at 873.

The stop-loss insurance issued American National, and the premiums it received in consideration for such insurance, is even more clearly direct. American National is directly liable to its policyholder – the self-insured employer - under a stop-loss insurance policy it originated. No insurance company other than American National has or has had direct liability to the policyholder, unlike the assumption reinsurance at issue in Mississippi Insurance Guar. Ass'n v. MS Cas. Ins. Company, where another insurance company was at least for some period of time directly liable to the policyholder.

An even closer example of a policy held to be direct insurance for the purposes of a regulatory statute is In re Mission Ins. Co., 112 N.M. 443, 816 P.2d 502 (1991). There, the New Mexico Supreme Court held that a self-insured employer under excess workers' compensation policies had direct insurance for statutory purposes because the court found that the employer's relationship with the insurance company "was insured to insurer and uninterrupted by the presence of another insurer. We find the policies to be 'direct insurance'." 816 P.2d at 505. The court's description of the excess workers' compensation policies likewise describes American National's stop-loss policies:

> Under the policies at issue, Mission [the insurance company] was to pay claims that exceeded either the specific retention on an individual claim (*e.g.*, in claim year 1984-85 Mission would pay amounts in excess of $100,000 on any

> individual worker's claim), or all amounts that exceeded Levi Strauss' aggregate retention for a given year (*e.g.*, in claim year 1984-85 Levi Strauss' aggregate retention amount was $2,500,000). The retentions in essence are large deductibles. If and when either the specific retention level was met for a single claim, or when all claims in that year exceeded Levi Strauss' overall retention, Mission's obligation to pay attached.

816 P.2d at 504. Like the policies at issue in In re Mission Ins. Co., American National's stop-loss policies require it to pay claims that exceed either a specific retention on an individual claim or all amounts that exceed the policyholder's aggregate retention. More important, the employer's relationship to American National is insured to insurer uninterrupted by the presence of another insurer.

The court's description of retentions as "in essence… large deductibles" applies equally to American National's stop-loss policies. This description is also important when considering the application of section 148.340, RSMo 2000. The General Assembly has provided no distinction between premium received from a policyholder with a large deductible and premium received from policyholders without a large deductible. Indeed, the General Assembly has provided no guidance for any distinction involving policies with a deductible. But American National's argument would push the Missouri Supreme Court down a slippery slope of exempting from taxation premiums received from any insurance policy with any deductible.

That the General Assembly intended all insurance premiums be taxed when, as here, the insurance premiums pass directly from an insured to an insurer is also shown by the

General Assembly's use of express exemptions where it intends otherwise. For example, in section 148.390.1, RSMo 2000, the General Assembly has excluded premiums received in consideration of annuity contracts from premium tax.

American National attempts to misdirect the Court into, first, an examination of whether stop-loss insurance premium is reinsurance (which it is not) and, second, an erroneous assumption that – even if its stop-loss premium bore some similarity to reinsurance premium - all reinsurance must be deemed not direct insurance.

American National's premiums for stop-loss insurance must have been received by one insurer directly from the insured without intervention by another insurer at some point, but American National apparently believes that stop-loss premiums are always indirect. American National is, however, the first insurance company issuing coverage to a policyholder and can name no other intervening insurer. Thus, American National's stop-loss premiums are direct premiums, even if the insurance might be a form of "reinsurance," because unlike other reinsurance premiums, American National's stop-loss premiums are received from a policyholder, not from another insurance company.

American National in effect seeks to subvert the General Assembly's intent by creating a Court-ordered exemption from premium tax rather than a mere avoidance of multiple taxation. Tax exemptions are strictly construed with doubt resolved in favor of applying the tax. President Casino, Inc. v. Director of Revenue, 219 S.W. 3d 235, 239 (Mo. 2007). Exemptions from taxation will not be implied where the statute may be reasonably be construed otherwise. *See* Salvation Army v. Hoehn, 354 Mo. 107, 114, 188 S.W.2d 826, 829 (1945).

American National implies a dichotomy that is not warranted by section 148.340, RSMo 2000: direct premiums or reinsurance premium. To the contrary, even if one classifies stop-loss premium as a type of reinsurance, nothing in the statute requires that stop-loss "reinsurance" premium be deemed not direct insurance, given the fact that this so-called "reinsurance" differs significantly from other reinsurance. Unlike all other reinsurance, American National's so-called "reinsurance" is not issued to any other insurance company, but rather to businesses not engaged in the business of insurance. Taxation of all other reinsurance would involve the possible multiple taxation of premiums, but taxation of American National's so-called "reinsurance" would not.

2. In section 376.1010, RSMo 2000, the General Assembly defines stop loss insurance issued to employee benefit plans as direct insurance.

Statutes relating to the same subject matter must be construed and applied with reference to each other to determine legislative intent, even if those statutes are in different chapters of the Revised Statutes. Allright Properties, Inc. v. Tax Increment Financing Commission of Kansas City, 240 S.W.3d 777, 779 (Mo. App. W. D. 2007). Section 376.1010 and section 148.340, RSMo 2000, are in different chapters of the Revised Statutes, but both are statutes relating to the business of insurance, and in both by the General Assembly has assigned Insurance responsibility for enforcement.

In section 376.1010, RSMo, the General Assembly requires multiple employer plans maintain stop-loss coverage: "A multiple employer self-insured health plan shall maintain aggregate excess stop-loss coverage and individual excess stop-loss coverage provided by an

insurer licensed by the state to write accident and health insurance **on a direct basis**." Section 376.1010, RSMo 2000 (emphasis added).

This statutory provision provides both an express and an implied indication of the legislature's intent that "direct insurance" include stop-loss coverage. The indication is expressed through the word "direct" in describing the type of accident and health insurance that a stop-loss insurer, such as American National, must be licensed to sell. If the insurer must be licensed to sell the insurance on a direct basis, the insurance is likewise considered direct.

The indication is also implied by the statute's requirement that the insurer issuing the stop-loss coverage be "licensed by the state to write accident and health insurance." If the legislature had believed that the insurer issuing stop-loss coverage to a self-insured health plan was acting solely as a traditional reinsurer (as American National argues), no requirement for licensure of the insurer would have been needed, because the transaction of reinsurance is exempted from the requirement for a certificate of authority to transact the business of insurance. See section 375.786.1(2), RSMo 2000. That the legislature requires stop-loss coverage for multiple employer self-insured health plans be issued only by insurers licensed by the state implies, therefore, that stop-loss coverage is considered by the General Assembly as a form of direct insurance.

American National can take no comfort from the apparent fact that its stop-loss coverage is issued to single employer plans while section 376.1010 is concerned with stop-loss coverage for certain multiple employer plans. In fact, a multiple employer plan is even more like an insurance company than is a single employer plan. By definition, a multiple

employer plan will, like an insurance company issuing health insurance, spread risk over more than one employer and may spread risk over different types of industries or businesses. The single employer plans insured by American National, on the other hand, necessarily involve the employees of only one employer. If the General Assembly considers stop-loss coverage of multiple employer plans to be direct insurance, then it would certainly consider American National's stop-loss coverage of single employer plans is even more clearly direct insurance.

B. The stop-loss coverage issued by American National is not reinsurance.

"Reinsurance is insurance for insurance companies." 14 Holmes' Appleman on Insurance 2d, section 102.1 (2000); *see also* 1A Couch on Insurance 3d, section 9:1, *and* 46A C.J.S. section 1501 (1993). "Properly used, reinsurance means only one thing – 'the ceding by one insurance company to another of all or a portion of its risks for a stipulated portion of the premium.'" 14 Holmes' Appleman on Insurance 2d, section 102.1 (2000), quoting from Skandia America Reinsurance Corp. v. Schenck, 441 F. Supp. 715, 724 (S.D.N.Y. 1977).

American National issues insurance, called stop-loss, to an employer or the employer's employee benefit plan. Neither the employer nor its employee benefit plan is considered an insurance company. *See* State ex rel. Farmer v. Monsanto Co., 517 S.W.2d 129 (Mo. 1974). And American National's stop-loss policies cannot fit the description of a "ceding" by one insurance company to another of all or a portion of its risks. Instead, American National's stop-loss insurance represents the transfer of some risks by an employer's health benefit plan to an insurance company.

Stop-loss insurance is not reinsurance under ERISA

The federal Employee Retirement and Income Security Act (ERISA) expressly states that the employer health benefit plans to which American National issues its stop-loss policies are not in the business of insurance for purposes of any state law. *See* 29 USC §1144(b)(2)(B).

Because such plans are not in the business of insurance, any insurer of such plans acts "…as the plans' insurer… and not as a 'reinsurer' of insurance companies providing primary coverage to the plans." Connelly Management Employee Welfare Benefit Plan v. North American Indemnity, N.V., 2008 U.S. Dist. LEXIS 30272, 2008 WL 1336085 (S.D. Ind. April 8, 2008), Appendix A4. Thus, American National acts as the plans' insurer and not as a "reinsurer" of insurance companies providing primary coverage to the plans.

Stop-loss insurance is not reinsurance in Missouri

In Associated Industries v. Angoff, 937 S.W.2d 277 (Mo. App. W.D. 1996), the court held that Insurance lacked statutory authority to adopt a rule that regulated stop-loss coverage as group health insurance. In describing stop-loss coverage, the court used language indicating that it considered stop-loss as a form of direct insurance, namely health insurance, but that it was distinguishable from another type of direct insurance, namely group health insurance:

> The parties agree that there are two general types of stop-loss **insurance**: aggregate stop-loss coverage and specific stop-loss coverage. In both cases the benefit is paid to the employer (or to the trustees of a self-funded plan).

> Aggregate stop-loss coverage reimburses the employer for any overage above the expected amount of the aggregate claims. Specific stop-loss coverage pays a benefit after a cap on any individual is exceeded. The cap is, in effect, a deductible. The lower the deductible, the more the risk is shifted to the **insurer**.

937 S.W.2d at 279 (emphases added). Noticeably absent from the court's opinion is any indication that the court or the parties (which included a Missouri domestic life insurance company headquartered in St. Louis) considered stop loss coverage as reinsurance, although the Court did include *dictum* from another case outside this state where stop-loss insurance was reckoned "akin to reinsurance". 937 S.W.2d at 283.

American National's discussion of Associated Industries v. Angoff, pages 14 and 15 of its brief, misses the mark. Associated Industries did not construe section 148.340, RSMo 2000, or any other revenue law for that matter. Its holding rejecting Insurance's regulation had nothing to do with whether stop-loss insurance is reinsurance, and did not discuss whether all reinsurance is exclusive of direct insurance.

That the courts and the insurance industry in this state have considered stop-loss coverage to be a form of direct insurance is further supported by the Missouri Supreme Court's description of stop loss insurance: "By definition, stop-loss coverage is a form of health insurance." Fidelity Security Life Ins. Co. v. Director of Revenue, 32 S.W.3d 527, 530 (Mo. 2000). Neither the court nor the parties in Fidelity Security Life Ins. Co. made any reference or argument that stop loss coverage should be considered reinsurance.

Fidelity Security Life does, however, make an even stronger case that the insurance industry in this state itself considers stop-loss premiums be direct premiums for tax purposes.

In that case, the taxpayer, a Missouri domestic life insurance company with its headquarters in Kansas City, prevailed upon the Missouri Supreme Court to allow it a credit against premium tax for benefits paid under its stop-loss policies. If Fidelity Security Life Insurance Company had even remotely considered stop loss premiums to be reinsurance premiums, it would have advocated for a complete exemption from taxation, as does the Texas-based taxpayer here, rather than merely for a credit. To suggest that Fidelity Security Life's lack of argument for a complete exemption is not probative on the issue of whether such an exemption exists assumes that the insurance company is ignorant of its own financial interest or of the insurance laws of the state in which it is organized and headquartered.

American National's arguments rebutted

On pages 12 and 13 of its brief, American National cites section 375.041.1, RSMo, and 20 CSR 200-1.030(1) and then bootstraps its own reporting thereunder as evidence that its stop-loss insurance premiums are reinsurance.[1] This portion of the argument, assuming that it is permitted despite reference to matters outside the record, amounts to nothing more than stating that stop-loss premium is reinsurance premium because American National says so.

American National argued at the AHC that stop-loss coverage is reinsurance by employing a false dichotomy, equating the term "indemnity coverage" (used to describe stop-loss coverage) solely with reinsurance and by implication not with direct insurance. This argument has already been made and rejected in this state. *See* Gage & Tucker v. Director of

[1] American National's annual reporting is not part of the record.

Revenue, 769 S.W.2d 117, 122-123 (Mo. banc 1989). Here, as in Gage & Tucker, the presence of indemnity provisions does not remove stop-loss coverage from consideration as direct insurance.

American National has also argued before the AHC that direct insurance contemplates a direct relationship between the insurer and the employee. This argument is wholly without merit. That American National has a direct relationship with the employer as a policyholder does not make its stop-loss coverage any less direct than if it had a direct relationship with the employees of the employer.

In fact, under a traditional group health insurance policy, the relationship between the insurance company and the employee is even less direct than the relationship between American National and its policyholder-employer under American National's stop loss policy. The relationship under a traditional group health insurance policy is less direct because the employee does not negotiate any of the terms and conditions, but rather takes those terms and conditions as negotiated between the insurance company and the employer.

With the sole exception of BCBSM, Inc. v. Commissioner of Revenue, 663 N.W.2d 531 (Minn. 2003), none of the cases cited by American National on pages 15 through 18 of its brief have anything to do with whether stop-loss insurance is reinsurance. For three reasons, American National's reliance on BCBSM, Inc. v. Commissioner of Revenue is misplaced. First, the Minnesota court did not have before it in-state precedents in which stop-loss insurance was treated as direct insurance. In Missouri, however, stop-loss insurance is considered by the insurance industry and the courts as direct insurance. Second, Minnesota apparently has no counterpart to section 376.1010, RSMo 2000, in which this state's General

Assembly has expressly, as well as by implication, declared that stop-loss insurance is direct insurance. Third, the Minnesota court did not consider whether, regardless of any label as "reinsurance", the premiums received from stop-loss insurance are nonetheless "direct premiums received" because of the significant difference between stop-loss insurance and reinsurance.

II. (Responding to Appellant's Point I.C) Taxation of American National's stop-loss insurance premium does not violate the Equal Protection Clauses of Article 1 Section 2 of the Missouri Constitution and Amendment XIV, section 1 of the United States Constitution, because the state of Missouri does not treat American National's stop-loss premium differently from any other stop-loss premium.

Under the equal protection clauses of the federal and state constitutions, the state's taxation scheme is only required to show a reasonable basis for the differentiation between classes of taxpayers and to treat all similarly situated persons alike. See McKinley Iron, Inc., v. Director of Revenue, 888 S.W.2d 705, 708-709 (Mo. 1994).

The state has a reasonable basis for treating premiums received from stop-loss insurance differently from premiums received from reinsurance. Taxation of reinsurance premium would involve possible multiple taxation of the premium, first when the premium is received by the ceding insurance company and then again when the premium is received by the assuming reinsurance company. But taxation of stop-loss premium received by American National from employee welfare benefit plans would involve taxing the premium only once – when received by American National.

The state has also treated all similarly situated persons alike. American National has not and cannot make any showing that Insurance and Revenue have treated American National differently from any other insurance company issuing stop-loss policies to employers for their health benefit plans.

CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission denying American National's claim for refund should be affirmed.

Respectfully submitted,

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Certificate Of Compliance

The undersigned counsel for Respondents certifies the following:

1. Respondents' Brief filed herein complies with the page limits of Rule 84.06(b) and contains 4,846 words of proportional type.

2. Microsoft Word was used to prepare Respondents' Brief.

3. The disk provided with this notification has been scanned for viruses and is virus-free.

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Certificate of Service

The undersigned certifies that a true and accurate copy of the foregoing was mailed by United States first class mail to each of the following on the _____ day of May, 2007:

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