IN THE SUPREME COURT OF TEXAS

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No. 05-0016
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MID-CENTURY INSURANCE COMPANY OF TEXAS AND TEXAS FARMERS INSURANCE COMPANY, PETITIONERS,

v.

SHEFQET ADEMAJ, RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TWELFTH DISTRICT OF TEXAS
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Argued October 17, 2006

JUSTICE O'NEILL, concurring, joined by JUSTICE MEDINA

I agree with the Court that Mid-Century and Texas Farmers Insurance Companies (collectively, "Mid-Century") lawfully recouped the Automobile Theft Prevention Authority (ATPA) fee from their policyholders. But the Court rests that conclusion on a construction of Insurance Code article 21.35B that could permit rate-regulated insurers to collect the items enumerated therein in addition to their filed rates in a manner that threatens to undermine the Legislature's efforts to create a fair and competitive rate system. Accordingly, I concur in the Court's judgment, but cannot join its opinion.

The Court concludes that section (a) of article 21.35B of the Insurance Code provides independent authorization for insurers to charge policyholders for the enumerated items — policy

fees, taxes, service fees, and other specified charges.[1] A careful reading of the entirety of article 21.35B belies that construction. Section (a) of article 21.35B provides:

> (a) *No payment may be solicited or collected by an insurer* . . . in connection with an application for insurance or the issuance of a policy other than:
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> (1) premiums;
> (2) taxes;
> (3) finance charges;
> (4) policy fees;
> (5) agent fees;
> (6) service fees, including charges for costs described under Article 21.35A of this code;
> (7) inspection fees; or
> (8) membership dues in a sponsoring organization.

TEX. INS. CODE art. 21.35B(a)[2] (current version at TEX. INS. CODE § 550.001(a)) (emphasis added). Section (d) of article 21.35B provides for criminal penalties for a violation of the statute. Read in conjunction with this penalty provision, the language I have emphasized suggests that section (a)'s purpose was not to *authorize* collection of the listed items but to *prohibit* the collection of any other charges. *See Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex. 1994) (stating "[o]nly in the context of the remainder of the statute can the true meaning of a single provision be

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[1] The Court attempts to blunt the effect of its erroneous construction of article 21.35B by noting that its "holding here is limited [to circumstances where] an insurer's charge [is] both authorized by Article 21.35B and approved in advance by a commissioner's rule." ___ S.W.3d at ___ n.8. But that limitation cannot be reconciled with the Court's conclusion that "Article 21.35B [is] an affirmative source of an insurer's authority to solicit and collect payments." The Court cites no law that would authorize the Commissioner or the courts of appeals "to prevent the wrongful imposition of the section 3(o) expenses." ___ S.W.3d at ___ n.10.

[2] Act of May 27, 1991, 72d Leg., R.S., ch. 242, § 11.17, 1991 Tex. Gen. Laws 1063, *amended by* Act of May 30, 1993, 73d Leg., R.S., ch. 685, § 12.49, 1993 Tex. Gen. Laws 2666, *amended by* Act of May 18, 1995, 74th Leg., R.S., ch. 380, § 2, 1995 Tex. Gen. Laws 2928 [hereinafter article 21.35B]. Article 21.35B has since been recodified, but because the parties refer to the law as it stood when the suit was filed, we do the same. Act of May 20, 2003, 78th Leg., R.S., ch. 1274, § 26, 2003 Tex. Gen. Laws 4138 (current version at TEX. INS. CODE § 550.001(a)).

made clear"). I would hold that insurers may charge their policyholders for the items listed only if the charge has been included in their filed rates under article 5.101 or otherwise authorized by the Legislature or by the Commissioner of Insurance exercising his or her delegated authority. *See* TEX. INS. CODE art. 5.101.[3] This reading is consistent with that of the Commissioner in *Service Life & Casualty Insurance Co. v. Montemayor.* Response to Petition for Review at 4, *Service Life & Cas. Ins. Co. v. Montemayor*, No. 04-0897 (Tex. June 21, 2004). ("This section is not, however, blanket *authorization* for *all* insurers to charge policyholders for every item listed.").

Whether "premium" is a component of rate, as the court of appeals held, 202 S.W.3d 176, 182, or rate is a component of "premium," as the Court holds today, no one would argue that insurers may collect premiums that have not been authorized by the Commissioner, even though premiums are a charge enumerated in section (a) of article 21.35B. And other language in article 21.35B strongly indicates that section (a) does not independently authorize imposition of the listed charges. "Membership dues in a sponsoring organization" is an item listed under section (a)(8), yet section (c) provides that "an insurer may require that membership dues in its sponsoring organization be paid as a condition for issuance or renewal of an insurance policy." If, as the Court holds, section (a) authorizes insurers to charge the enumerated items, then section (c) is a nullity. We have often held

[3] Act of May 27, 1991, 72d Leg., R.S., ch. 242, § 2.01, 1991 Tex. Gen. Laws 952, *amended by* Act of May 30, 1993, 73d Leg., R.S., ch. 685, § 6.04, 1993 Tex. Gen. Laws 2603, *amended by* Act of May 25, 1995, 74th Leg., R.S., ch. 984, § 1, 1995 Tex. Gen. Laws 4936, *amended by* Act of May 25, 1997, 75th Leg., R.S. ch. 942, §§ 1, 2, 1997 Tex. Gen. Laws 2950, *amended by* Act of May 27, 1997, 75th Leg., R.S., ch. 1330, § 18, 1997 Tex. Gen. Laws 5030, *amended by* Act of May 22, 2001, 77th Leg., R.S., ch. 1071, § 1, 2001 Tex. Gen. Laws 2359 [hereinafter article 5.101]. We refer to the version of the statute in effect when this lawsuit was filed, as do the parties. However, effective December 1, 2004, the Legislature replaced article 5.101 with article 5.13–2. Act of June 2, 2003, 78th Leg., R.S., ch. 206, § 6, 2003 Tex. Gen. Laws 925. In 2005, the Legislature repealed article 5.13– 2, effective April 1, 2007. Act of May 24, 2005, 79th Leg., R.S., ch. 727, § 18(d), 2005 Tex. Gen. Laws 2187.

that courts should avoid construing statutes in a manner that will render language meaningless. *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 8 (Tex. 2000) (citing *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995); *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987)).

Finally, the Court's construction of article 21.35B is inconsistent with the comprehensive scheme the Legislature has created to regulate automobile insurance rates. In setting the benchmark rate, the Commissioner may consider a number of factors. TEX. INS. CODE art. 5.101, § 3(c). In the version of the statute that the parties agree applies here, those factors include all costs and expenses of operation, like taxes and the ATPA fee, "*excluding only those expenses* that are disallowed under Subsection (o)" of section 3 of article 5.101. TEX. INS. CODE art. 5.101, § 3(c)(4) (emphasis added). Excluded expenses include certain administrative expenses exceeding 110% of the industry median, lobbying expenses, certain advertising expenses, judgments or fines for bad-faith insurance practices, civil or criminal penalties or fines, contributions to social, religious, political, or fraternal organizations, fees paid to advisory groups, and "any unreasonably incurred expenses, as determined by the commissioner." TEX. INS. CODE art. 5.101, § 3(o). The Court's interpretation of article 21.35B would allow insurers to recoup expenses disallowed under subsection (o), because the Court concludes the Commissioner has discretion to include or exclude any expenses in the article 5.101 rate, including the ATPA fee, based on the permissive statutory language "may give consideration to." *See* TEX. INS. CODE art. 5.101, § 3(c). That interpretation, however, is clearly flawed, as it renders the words "excluding only" in section 3(c)(4) meaningless. *Kerrville State Hosp.*, 28 S.W.3d at 8. If the Commissioner can exclude *only* the specified expenses, it suggests that he *must* consider

other appropriate expenses.[4] Moreover, in setting the benchmark rate upon which individual insurers' rates are based, the Commissioner is to "produce rates that are just, reasonable, adequate and not excessive for the risks to which they apply, and not confiscatory." TEX. INS. CODE art. 5.101, § 3(b)(2). By definition, a rate that would not compensate an insurer for reasonable expenses like the ATPA charge imposed upon insurers under article 4413(37) would not be adequate. *Am. Alliance Ins. Co. v. Bd. of Ins. Comm'rs*, 126 S.W.2d 741, 742 (Tex. Civ. App.—Austin 1939, writ ref'd) (holding statute that imposed tax on insurers that could not be included in rate or passed on to policy holders was unconstitutional).

More importantly, the Court's decision today would allow insurers to circumvent the restrictions on rates that article 5.101 imposes by simply characterizing charges as "policy fees." The Court summarily dismisses that notion, reasoning that "[a]ny insurer choosing to charge the fee to policyholders both within and outside of the article 5.101 rate would be charging double that which the commissioner permits and, as is the case for any type of impermissible double charging, would be subject to administrative penalties." ___ S.W.3d at ___. But under the Court's reading of article 21.35B, the Commissioner would have no legal ground to require remedial action absent double charging. If an insurer imposed a "policy fee" to recover expenses barred under article 5.101, § 3(o), the insurer would be acting under the "affirmative source of . . . authority to solicit and collect payments" afforded by article 21.35B. ___ S.W.3d at ___.

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[4] Furthermore, if the statute gives the Commissioner discretion not to consider expenses, then the Commissioner also has discretion not to consider "a reasonable margin for profit," since the "may give due consideration" language applies to that factor as well. TEX. INS. CODE art. 5.101, § 3(c)(3).

II.

While I disagree with the Court's interpretation of article 21.35B, I nevertheless conclude that Mid-Century was entitled to rely on Rule 5.205 and pass on the ATPA fee directly to its policyholders. 28 TEX. ADMIN. CODE § 5.205 (1992). I agree with Mid-Century and the Court that the flat ATPA fee simply does not neatly fit within the flexible rating program. Because the fee is imposed on a per-vehicle basis, spreading it among lines of coverage through the flexible rating program would mean that consumers who purchased all lines would pay a greater portion of the ATPA fee than those who bought only the minimum liability limits, resulting in a discriminatory rate. *See AT&T v. Cent. Office Tel. Inc.*, 524 U.S. 214, 223 (1998) (recognizing that rates are discriminatory when similarly situated customers pay different fees for the same services). By empowering insurers to pass on the ATPA fee to policyholders in Rule 5.205, the Commissioner assured that consumers would not pay discriminatory rates, while protecting insurers' constitutional right to recoup expenses. *See id.*; *Am. Alliance Ins. Co.*, 126 S.W.2d at 742.

The crux of Ademaj's complaint is that Mid-Century violated the filed-rate doctrine by failing to include the ATPA fee in its rate filing with the Commissioner. *See AT&T*, 524 U.S. at 222 (noting that, under the filed-rate doctrine, the rate a regulated carrier has filed is the only lawful charge). But to the extent the doctrine applies in this context, its purposes have been served. The filed-rate doctrine assures, first, that the reasonableness of regulated rates is determined solely by the appropriate regulatory authority. *See Mincron SBC Corp. v. Worldcom, Inc.*, 994 S.W.2d 785, 789 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (citing *Keogh v. Chi. & Nw. Ry. Co.*, 260 U.S. 156, 161-64 (1922)). Second, the doctrine assures that rates imposed on consumers are

nondiscriminatory. *Id.* Both of these purposes have been satisfied in this instance. Here, Rule 5.205 was adopted by the Commissioner in his rate-regulatory capacity under several provisions of the Insurance Code, including article 5.101 and article 5.98.[5] And, as I have said, the rule establishes a mechanism to provide for nondiscriminatory rates while protecting insurers' constitutional rights. While the rule may allow insurers to charge policyholders $1 more than 30% above the benchmark rate, in my view the rule harmonizes the objectives underlying the ATPA and article 5.101, and therefore provided the insurers a valid basis for the pass-through charge. *See R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992). Consequently, I concur in the Court's judgment, but I do not join its opinion.

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Harriet O'Neill
Justice

OPINION DELIVERED: November 30, 2007

[5] Article 5.98 authorizes the Commissioner to adopt reasonable rules appropriate to accomplish the purposes of chapter 5 of the Insurance Code, one of which was to give the Board of Insurance the power to fix just and reasonable automobile insurance rates.