IN THE SUPREME COURT OF TEXAS

NO. 05-0541

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, PETITIONERS

v.

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued April 11, 2007

JUSTICE HECHT, joined by JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE MEDINA, dissenting.

Texas, like most other states,[1] taxes gross premiums for insurance of risks and property in the state,[2] and like every other state but Hawaii,[3] Texas imposes an additional retaliatory tax on out-of-state insurers doing business in Texas whose home states tax more heavily than Texas does, all other things being equal.[4] Such retaliatory taxes have been "a common feature of insurance taxation

[1] CCH STATE TAX GUIDE, ALL STATES ¶ 88, at 9705 (2006) (stating that gross premiums taxes are "the most common form of insurance company tax" and are "imposed in every state upon some kind of insurance company").

[2] TEX. INS. CODE §§ 221.001-228.007.

[3] *Prudential Ins. Co. of Am. v. Comm'r of Rev.*, 709 N.E.2d 1096, 1098, 1099 n.7 (Mass. 1999).

[4] TEX. INS. CODE §§ 281.001-.052, *formerly* TEX. INS. CODE art. 21.46. The retaliatory provision compares not just premium taxes but "the sum of the taxes or other charges, prohibitions, and restrictions imposed" on an insurer. *Id.* §§ 281.004(a)(2) ("The comptroller shall impose and collect a tax or other charge or a prohibition or restriction on a foreign insurer authorized to engage in business in this state if . . . the sum of the taxes or other charges, prohibitions, and restrictions imposed by that other state is more than the sum of the taxes or other charges, prohibitions, and restrictions that this state directly imposes on the foreign insurer."), 281.052 (providing for "a penalty or other obligation", under certain circumstances, to match the penalty or obligation imposed on a domestic insurer by the foreign insurer's state of organization). This case involves only taxes.

for over a century",[5] and though they obviously impinge on interstate commerce, they do not implicate the "implied limitation on the power of the States to interfere with or impose burdens on interstate commerce" contained in the Commerce Clause of the United States Constitution because "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act."[6] But the Fourteenth Amendment Equal Protection guaranty does not permit states to impose "more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose."[7] "[T]he principal purpose of retaliatory tax laws is to promote the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes."[8] The United States Supreme Court has held that this purpose is legitimate and that a retaliatory tax rationally related to it does not violate Equal Protection.[9]

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[5] *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981).

[6] *Id*. at 652-653; *id*. at 654 ("The Court has squarely rejected the argument that discriminatory state insurance taxes may be challenged under the Commerce Clause despite the McCarran-Ferguson Act." (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 414 (1946), and *Prudential Ins. Co. v. Hobbs*, 328 U.S. 822 (1946) (per curiam)).

[7] *Id*. at 668 (internal punctuation omitted).

[8] *Id*.

[9] *Id*. at 671-672.

Texas' retaliatory tax, first enacted in 1935[10] and consistently applied until this case, falls squarely within the Supreme Court's holding. But in this case, the Comptroller has reinterpreted the statute as it applies to title insurers, multiplying the tax due and transforming it into a penalty on nonresident insurers doing business in Texas. This sudden departure from the settled application of the retaliatory tax was not prompted by any legislative revision of the statute or any change in retaliatory taxation in other states. The only apparent purpose for the Comptroller's new position is to generate revenue from nonresident title insurers simply because they are nonresident. In my view, the Comptroller has misconstrued the tax statute so that it now violates Equal Protection. Because the Court disagrees, I respectfully dissent.

When insurance is sold through an agent, the insurer and the agent share the premium revenue. For title insurance in Texas, the revenue division is set by the Commissioner of Insurance.[11] During the times material to this case, that division has been 15% to the insurer and 85% to the agent.[12] For decades, the retaliatory tax in Texas and other states has been determined by comparing

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[10] Act of May 2, 1935, 44th Leg., R.S., ch. 307, § 1, 1935 Tex. Gen. Laws 713, 713-714 ("Whenever, by any law in force without this State, an insurance corporation . . . of this State or agent thereof is required to make any deposit of securities . . . or to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, license fees, or otherwise, or any special burden is imposed, greater than is required by the laws of this State for similar foreign corporations or their agents, the insurance companies . . . of such States or governments shall be and they are hereby required as a condition precedent to their transacting business in this State, to make a like deposit for like purposes . . . and to pay . . . for taxes, fines, penalties, certificates of authority, valuation of policies, license fees and otherwise a rate equal to such charges and payments imposed by the laws of such other State upon similar corporations of this State and the agents thereof.") (amending former TEX. REV. CIV. STAT. art. 4758 (1925)), *repealed by* Act of May 28, 1945, 49th Leg., R. S., ch. 279, § 4, 1945 Tex. Gen. Laws 442, 445, *and by* Act of May 23, 1951, 52d Leg., R.S., ch. 491, § 4, 1951 Tex. Gen. Laws 868, 1093. The first retaliatory provision appears to have been enacted in 1909, but it referred only to different security deposit requirements in different states, not different taxes. Act approved Mar. 22, 1909, 31st Leg., R.S., ch. 108, § 29, 1909 Tex. Gen. Laws 192, 203, *formerly* TEX. REV. CIV. STAT. art. 4768 (1911), *then* TEX. REV. CIV. STAT. art. 4758 (1925).

[11] TEX. INS. CODE § 2502.054(b)(1)(B) ("This subchapter does not . . . prohibit a title insurance company from . . . arranging for a division of premiums with the agent as set by the commissioner . . . ."), *formerly* TEX. INS. CODE art. 9.30, § B(1) ("This Article may not be construed as prohibiting . . . a foreign or domestic title insurance company doing business in this state . . . from . . . making the arrangement for division of premiums with the agent as shall be set by the commissioner . . . .").

[12] *See* Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas § IV, P-23(f) ("During 2000, and thereafter until changed by the Commissioner, on all title insurance written by title insurance agents, the division of premiums between title insurance companies and title insurance agents shall be as follows: (1) title insurance companies shall receive 15% of each title insurance premium, and (2) title insurance agents shall receive 85% of each title insurance premium . . . ."), *adopted* 28 TEX. ADMIN. CODE § 9.1, *available at* http://www.tdi.state.tx.us/title/

the taxes on total premiums, not just the insurer's share. A few years ago, it is not clear exactly when, the Comptroller decided for the first time to compare other states' taxes on total premiums with Texas' tax on only the insurer's 15% share. Simply put, the Comptroller now takes the position that "total" means 100% in every other state and 15% in Texas.

Ordinarily, everything is bigger in Texas, and though "total" is now smaller here, taxes have increased. The Comptroller's "new math", as the Court refers to it, multiplies the retaliatory tax and discriminates against out-of-state insurers doing business in Texas. For example, suppose an insurer from a state with a 2% premium tax rate does business in Texas, where the rate is 1.35%. On a $1,000 premium, the total tax would be $20 in the other state and $13.50 in Texas. Requiring the out-of-state insurer to pay a $6.50 retaliatory tax on its Texas business equalizes the tax burden on the two insurers' business in each other's state. Each insurer and its respective agents would, together, pay $20 in taxes and collect $980 in revenue. But in the Comptroller's view, the retaliatory tax is determined by the difference between the other state's $20 premium tax and the insurer's 15% share of Texas' $13.50 premium tax – $2.03 – a difference of $17.97. Hence, the out-of-state insurer together with its respective agents pays $31.47 in taxes and collects $969.73 in revenue. The Comptroller's new math increases the out-of-state title insurer's tax burden merely because the insurer is out-of-state.

By artificially reducing the size of Texas' premium tax, the Comptroller's new position dictates that Texas impose retaliatory taxes even when insurers hail from states imposing lower premium taxes than Texas. Suppose an insurer from a state with a 1% premium tax does business in Texas. On a $1,000 premium, the Comptroller would compare the $2.03 insurer's share of the Texas tax to the $10 premium tax in the other state and assess a $7.97 surcharge. In essence, for purposes of applying the retaliatory tax, the Comptroller has reduced Texas' gross premiums tax rate

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by 85%, from 1.35% to 0.2025%. Virtually every other state taxes gross premiums, but none has so low a rate. The tax now applies to all out-of-state insurers doing business in Texas merely because they are not domestic companies. The retaliatory tax, thus construed, no longer operates to discourage excessive taxation in other states; it now operates to discourage foreign insurers from doing business in Texas.

The Comptroller's change in position transforms the retaliatory tax, long a means of equalizing tax burdens on domestic and foreign insurers doing business in Texas, into a penalty against out-of-state insurers. The Comptroller's new position is not based on any change in the law. The relevant statutory provisions have been materially the same for decades. The retaliatory tax statute imposes "a tax . . . on a foreign insurer if . . . the foreign insurer's state of organization . . . imposes a tax . . . on a similar domestic insurer that is . . . more than the [tax] this state directly imposes on the foreign insurer."[13] The retaliatory tax must be "impose[d] and collect[ed] . . . in the same manner and for the same purpose" as the tax on the insurer in the other state.[14] These provisions, recodified in 2003,[15] were enacted in 1957[16] and derived from the first retaliatory tax

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[13] TEX. INS. CODE § 281.004(a) ("The comptroller shall impose and collect a tax or other charge or a prohibition or restriction on a foreign insurer authorized to engage in business in this state if: (1) the foreign insurer's state of organization by law imposes a tax or other charge or a prohibition or restriction on a similar domestic insurer that is or may be authorized to engage in business in that other state; and (2) the sum of the taxes or other charges, prohibitions, and restrictions imposed by that other state is more than the sum of the taxes or other charges, prohibitions, and restrictions that this state directly imposes on the foreign insurer.").

[14] *Id.* § 281.004(b) ("The comptroller shall impose and collect the tax or other charge, prohibition, or restriction under Subsection (a) in the same manner and for the same purpose as the foreign insurer's state of organization.").

[15] Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 1, 2003 Tex. Gen. Laws 3611, 3638-3641, 4138.

[16] Act of May 22, 1957, 55th Leg., R.S., ch. 396, § 1, 1957 Tex. Gen. Laws 1184, 1185 ("Whenever by the laws of any other state or territory of the United States any taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions are imposed upon any insurance company organized in this State and licensed and actually doing business in such other state or territory which, in the aggregate are in excess of the aggregate of taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon a similar insurance company of such other state or territory doing business in this State, the Board of Insurance Commissioners of this State shall impose upon any similar company of such state or territory in the same manner and for the same purpose, the same taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions . . . ."), *formerly* TEX. INS. CODE art. 21.46.

statute enacted in 1935.[17] The premium tax statute imposes a "tax . . . on all premiums from the business of title insurance",[18] "regardless of whether paid to a title insurance company or retained by a title insurance agent",[19] to be paid by the insurer.[20] These provisions, also recodified in 2003,[21] and amended in 2007,[22] were enacted in 1987[23] and derived from prior premium tax statutes, the first one dating to 1893.[24]

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[17] *Supra* note 10.

[18] TEX. INS. CODE § 223.003(a) ("An annual tax is imposed on all premiums from the business of title insurance. The rate of the tax is 1.35 percent of title insurance taxable premiums for a calendar year, including any premiums retained by a title insurance agent".).

[19] *Id*. § 223.005 (a) ("Premiums received from the business of title insurance are subject to the tax under this chapter regardless of whether paid to a title insurance company or retained by a title insurance agent, with the tax being in lieu of the tax on the premiums retained by a title insurance agent.").

[20] *Id*. § 223.005(b) ("The state facilitates the collection of the premium tax on the premiums retained by a title insurance agent by establishing the division of the premiums between the title insurance company and title insurance agent so that the company receives the premium tax due on the agent's portion of the premiums and remits it to the state.").

[21] Act of May 22, 2003, 78th Leg., ch. 1274, §§ 1, 26(b)(4), 2003 Tex. Gen. Laws 3611, 3622-3624, 4139.

[22] Act of May 27, 2007, 80th Leg., R.S., ch. 932, § 3, 2007 Tex. Gen. Laws 3194, 3195 (amending Section 223.003(a), which previously read: "An annual tax is imposed on each title insurance company that receives premiums from the business of title insurance. The rate of the tax is 1.35 percent of the title insurance company's taxable premiums for a calendar year, including any premiums retained by a title insurance agent".).

[23] Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 22, 1987 Tex. Gen. Laws 3610, 3638-3640, *formerly* TEX. INS. CODE art. 9.59 §§ 1 ("Each title insurance company receiving premiums from the business of title insurance shall pay . . . an annual tax on those premiums . . . ."), 8(b) ("The premium tax is levied on all amounts defined to be premium . . . , whether paid to the title insurance company or retained by the title insurance agent . . . . The State of Texas facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State.").

[24] Act approved May 11, 1893, 23d Leg., R.S., ch. 102, § 1, 1893 Tex. Gen. Laws 156. The premium tax statutes have been frequently amended, and codified over the years as TEX. REV. CIV. STAT. art. 5243e (1895) (taxing "gross premium receipts" of "every life, fire, marine, accident, or other insurance company"), TEX. REV. CIV. STAT. art. 7376 (1911), and TEX. REV. CIV. STAT. art. 7064 (1925). Article 7064 was amended by Act of May 29, 1981, 67th Leg., R.S., ch. 844, § 1, 1981 Tex. Gen. Laws 3212, 3212-3215 and later recodified as articles 4.10 (applicable to title insurance companies) and 4.11 of the Insurance Code. Act of May 31, 1981, 67th Leg., R.S., ch. 389, § 36, 1981 Tex. Gen. Laws 1490, 1780-1784. Article 4.10 was, in turn, amended by Act of May 30,1983, 68th Leg., R.S., ch. 283, 1983 Tex. Gen. Laws 1367 and Act of May 24, 1985, 69th Leg., R.S., ch. 161, §§ 3-4, 1985 Tex. Gen. Laws 715, 716. Eventually, in 1987, separate provisions for title insurance were enacted and codified at art. 9.59. Act of June 1, 1987, 70th Leg., R.S., ch. 1073, §§ 22, 23, 1987 Tex. Gen. Laws 3610, 3638-3641. Currently, provisions for gross premium taxes on various kinds of insurance are found in Chapters 221 through 226 of the Insurance Code. Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 1, 2003 Tex. Gen. Laws 3611.

The Comptroller argues that the premium tax on the agent's 85% share of premiums is not "directly impose[d]" on the insurer within the meaning of the retaliatory tax statute, even though the insurer must remit the tax. In furtherance of its view, the Comptroller in 2001 adopted a rule limiting an insurer's liability for the premium tax to the amount due on its share.[25] The Comptroller acknowledges that no one took this position in the forty years after the phrase "directly imposes" was adopted in the 1957 statute, or in the ten years after the premium tax imposition and collection provisions were detailed in 1987. The Comptroller's position not only discards a settled, decades-old application of statutory provisions frequently revisited and left substantively unchanged by the Legislature, it contradicts the purpose of a tax in place since at least 1935. This tax was based on the burden imposed by other states on the insurance industry and not on an artificial allocation of the tax burden between insurers and their agents.

The Court concludes that the Comptroller's reinterpretation of the statute is due deference under *Tarrant Appraisal District v. Moore*.[26] While an agency's initial interpretation of a statute "is not carved in stone",[27] an agency's decision to depart from a longstanding interpretation is entitled to "considerably less deference" unless the agency provides some reasonable explanation for the

[25] 34 TEX. ADMIN. CODE § 3.831(4)(c) ("Title insurers and title agents are both subject to the premium and maintenance tax on their proportional share of the premiums and are separately liable for the tax if the insurer fails to remit the tax due on the agent's portion.").

[26] 845 S.W.2d 820, 823 (Tex. 1993) ("[C]onstruction of a statute by an administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute.").

[27] *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (quoting *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 863 (1984)); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000) (an agency has ample latitude to adapt its rulings or policies to changing circumstances).

change.[28] This is particularly so where the agency's earlier interpretation is accompanied by legislative acquiescence.[29]

But even if the Comptroller's interpretation of "directly imposed" were entitled to more serious consideration, the plain language of the rest of the statute makes clear that the new interpretation is unreasonable.[30] The statute clearly requires the Comptroller to make apples-to-apples comparisons. Section 281.004 instructs the Comptroller to impose and collect the retaliatory tax "in the same manner and for the same purpose" as the foreign insurer's state tax. The Court insists that the retaliatory tax focuses on the insurance company to the exclusion of agents, but it is myopic to view a tax on gross revenue as affecting only some of the participants in the business who must share that revenue. One cannot assume that insurers and agents in other states do not share premium revenues merely because Texas has a statute specifying how they must do so. Indeed, one must assume that insurers and agents expect to be paid and to share in premium revenue. If only the insurer's share of the Texas premium tax is to be considered, then that share must be compared to the insurer's share of the premium tax in the other state. But by comparing only the insurer's share of the Texas premium tax to another state's undivided premium tax, the Comptroller imposes and collects the retaliatory tax in a different manner and for a different purpose than the other state in imposing and collecting its tax.

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[28] *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *see Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (though an agency decision to reinterpret a statute is entitled to *Chevron* deference, such an interpretation is "less persuasive"); *Rust*, 500 U.S. at 187 (the agency provided "reasoned analysis" to support its changed interpretation); *Flores v. Employees Ret. Sys.*, 74 S.W.3d 532, 544-545 (Tex. App.–Austin 2002, pet. denied) (an agency must explain a decision to depart from a longstanding policy); *City of El Paso v. El Paso Elec. Co.*, 851 S.W.2d 896, 900 (Tex. App.–Austin 1993, writ denied).

[29] *See Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944) (contemporaneous construction of an act by those charged with its enforcement is "'worthy of serious consideration as an aid to interpretation, particularly where the construction has been sanctioned by long acquiescence. Although a contemporaneous or practical construction is not absolutely controlling, it has much persuasive force and is entitled to great weight in determining the meaning of an ambiguous or doubtful provision.'") (citations omitted).

[30] *Continental Cas. Co. v. Downs*, 81 S.W.3d 803, 807 (Tex. 2002) ("Construction of a statute by the agency charged with its enforcement is entitled to serious consideration only if that construction is reasonable and does not contradict the statute's plain language.") (citations omitted).

There is another equally important reason to reject the Comptroller's new interpretation: it makes no sense. In *Western & Southern*, the Supreme Court acknowledged that a state has a legitimate interest in promoting interstate commerce by "deterring other States from enacting discriminatory or excessive taxes."[31] But there is no rational basis for comparing 100% of another state's premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive. Texas' legitimate interests in deterring excessive taxation by other states are not served by retaliating whenever another state's industry-wide tax would exceed Texas' tax on some of the participants, or whenever another state employs a different accounting method for calculating and assessing premium taxes. Nor is it served by retaliating against states whose total premium taxes are lower than Texas'. Under the Comptroller's new construction, the retaliatory tax provisions have been transformed into a means for blatant and unapologetic discrimination against out-of-state insurers and parochial protectionism.

The Court asserts that "the Comptroller's interpretation is consistent with the statutory scheme developed by the Legislature",[32] but the fact is that the Comptroller and others who administered the retaliatory tax for decades thought a contrary interpretation was required by the statute. The Court adds that "[t]he Comptroller did not develop this scheme independently as a revenue-raising plan",[33] but no other basis for the "scheme" has been advanced, and none is apparent. The Comptroller's sudden multiplication of the retaliatory tax cannot serve the legitimate state purpose of discouraging excessive taxation in other states because even when a state's tax rate is a fraction of the rate in Texas, insurers from that state must, in the Comptroller's view, pay a retaliatory tax.

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[31] 451 U.S. at 668.

[32] *Ante* at ___.

[33] *Ante* at ___.

I agree with the Court that whether other states may react in a way that is ultimately unfavorable to Texas insurers, or whether the Comptroller's position may have other "unforeseen or unintended results", is none of our business. But it is certainly our business to ensure that persons similarly situated are afforded the equal protection of the law guaranteed by the Fourteenth Amendment. The Court concludes that the retaliatory tax remains "an equalizer between similarly situated title insurers."[34] The Comptroller's treatment of Texas title insurers doing business in other states and out-of-state title insurers doing business in Texas is as equal as 15 is to 100.

I would hold that the Comptroller's position is not permitted by the text of the retaliatory tax statute or by the Fourteenth Amendment. Accordingly, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: May 16, 2008

[34] *Ante* at ___.