IN THE SUPREME COURT OF TEXAS

NO. 07-0410

EMPLOYEES RETIREMENT SYSTEM OF TEXAS, PETITIONER,

v.

XAVIER DUENEZ AND IRENE DUENEZ, RESPONDENTS

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

JUSTICE BRISTER delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE WILLETT joined.

JUSTICE HECHT delivered a dissenting opinion.

JUSTICE WAINWRIGHT delivered a dissenting opinion, in which JUSTICE JOHNSON joined.

The curious question in this case is whether a state agency can demand dismissal of its own claim in court because it failed to exhaust administrative remedies in front of itself. The Employees Retirement System of Texas ("ERS") asserts a subrogation claim against former member Xavier Duenez and his family, seeking reimbursement of funds it paid their health-care providers. After the claim was filed in court, ERS sought to dismiss it because it had exclusive jurisdiction of its own claim.

The Legislature granted ERS exclusive jurisdiction of questions relating to "payment of a claim," but ERS's subrogation suit seeks *collection* of a claim. When it pays claims, ERS holds the

money and can require claimants to come and get it through the agency's administrative processes. But when ERS collects claims, someone else holds the money and has no reason to join ERS's administrative processes. That is why the first thing ERS's agent had to do was file suit in court.

Exhaustion of administrative remedies cannot be a prerequisite to filing suit when filing suit is itself a prerequisite to exhausting those administrative remedies. Because ERS does not have exclusive jurisdiction of this claim, the court of appeals' opinion does not conflict with any of our own, so we dismiss the petition for want of jurisdiction.

I. Background

These parties are not new to this Court. When the Duenezes were injured in a collision caused by a drunk driver, ERS paid benefits of more than $400,000 through its agent and administrator, Blue Cross Blue Shield of Texas.[1] But Blue Cross refused to pay for in-home nursing care for Ashley Duenez (deeming it custodial rather than medical), so the Duenezes filed sued in court without exhausting ERS's administrative remedies. We held in *Duenez I* that ERS had exclusive jurisdiction of claims for benefits, and thus dismissed the suit until the Duenezes complied with those administrative procedures.[2]

In the meantime, the Duenezes sued and obtained a judgment for $44 million against the convenience store that sold beer to the drunk driver. On appeal, three of the Duenezes settled their claims with the convenience store for $35 million. In *Duenez II*, we reversed the judgment as to the

[1] *See* TEX. INS. CODE § 1551.056; *Blue Cross Blue Shield of Tex. v. Duenez* (Duenez I), 201 S.W.3d 674, 676 (Tex. 2006).

[2] *Duenez I*, 201 S.W.3d at 676–77.

remaining two and remanded for a new trial to include apportionment of liability.[3] Neither Blue Cross nor ERS were parties in that case, but they hope to be reimbursed from the proceeds of the settlement.

Before we decided either *Duenez I* or *Duenez II*, ERS filed this suit for subrogation against the Duenezes. By then, the Duenezes were no longer participants in ERS: Xavier Duenez had left his employment with the state, obtained coverage from a new insurer, and dropped all claims for benefits from ERS.[4]

Blue Cross filed this suit on ERS's behalf, specifically alleging that the funds it sought were for ERS's benefit. Oddly, Blue Cross nevertheless named ERS as a defendant. And paradoxically, the suit sought both a court judgment and a declaration that no court had jurisdiction because ERS had exclusive jurisdiction.

ERS filed a plea to the jurisdiction demanding dismissal for the Duenezes to pursue their claims administratively even though they had no affirmative claims to pursue. The trial court denied ERS's plea to the jurisdiction, and the court of appeals affirmed.[5] ERS petitioned for review, asserting that the denial of its plea to the jurisdiction here conflicts with our opinion granting its plea to the jurisdiction in *Duenez I*.[6]

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[3] *See F.F.P. Operating Partners, L.P. v. Duenez* (Duenez II), 237 S.W.3d 680, 694 (Tex. 2007).

[4] *See Duenez I*, 201 S.W.3d at 675.

[5] 221 S.W.3d 809.

[6] *See* TEX. GOV'T CODE § 22.225(b), (c). We disagree with JUSTICE HECHT that the issues here are nonjusticiable. ERS wants $400,000 from the Duenezes, and they do not want to pay; ERS wants this case decided administratively, and the Duenezes want their day in court. These are all live controversies that this case and this appeal can decide. *See U.S. v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949) (holding that "courts must look behind

II. Does ERS Have Exclusive Jurisdiction of Subrogation?

The Legislature created ERS to attract and retain state employees by providing health, insurance, and retirement benefits.[7] The powers granted ERS appear in the Texas Employees Group Benefits Act.[8] The Act authorizes ERS to adopt a plan "reasonably necessary to implement this chapter and its purposes."[9] ERS adopted a 70-page "Employee Benefit Plan" that included a subrogation provision on its penultimate page:

> **Subrogation/Right of Recovery**
> To the extent of such services provided, the Plan is subrogated to all rights of recovery the Participant has and the Plan may assert such rights independent of the Participant. Also, if the Participant has obtained or obtains a court judgment, settlement, arbitration, award, or other monetary recovery from another party, because of the injury or sickness, the Plan is entitled to reimbursement from the proceeds of recovery to the extent of benefits provided. If a recovery is made, the Plan shall have first priority over the Participant or any other party to receive from said recovery reimbursement of the benefits the Plan has provided . . . .
>
> In the event that the Participant fails to cooperate with the Plan or prejudices its subrogation rights, the Plan may deduct from any pending or subsequent claim made under the Plan any amounts the Participant owes the Plan until such time as cooperation is provided or the prejudice ceases.

The Duenezes argue ERS had no authority to adopt this provision because the Act says nothing about subrogation. But the Act also says nothing about what services are covered or excluded, when preapproval is required, what range of charges are allowed, or how fast benefits must

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names that symbolize the parties to determine whether a justiciable case or controversy is presented").

[7] TEX. INS. CODE § 1551.002.

[8] *Id*. §§ 1551.001–.407.

[9] *Id*. § 1551.052(b).

be paid — all important parts of a health benefits plan. Instead, the Act authorized ERS to specify these details in a plan that would "implement this chapter and its purposes."[10] The Act also expressly authorized ERS to "contain costs,"[11] and to provide benefits "at least equal to those commonly provided in private industry."[12] As subrogation reduces costs,[13] and private plans commonly include subrogation,[14] we disagree that ERS was not authorized to include subrogation in the plan it adopted.

But allowing subrogation is not the same thing as granting exclusive jurisdiction of it. When an agency has exclusive jurisdiction of a dispute, the courts have no jurisdiction until administrative procedures are exhausted.[15] In deciding whether an agency has exclusive jurisdiction, we look to its

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[10] *Id*. § 1551.052(b).

[11] *Id*. § 1551.055(13).

[12] *Id*. § 1551.002(2).

[13] *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 35 (Tex. 2008); *see* David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 882 n.99 (2002) ("The widespread use of insurance subrogation strongly indicates that individuals benefit from avoiding not only the moral hazard costs, but also the lost utility from paying for duplicative coverage.").

[14] *See, e.g.*, *FMC Corp. v. Holliday*, 498 U.S. 52, 54 (1990); *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 644 (Tex. 2007); *see also* Katherine E. King, *The Interplay Between R.C. § 2315.20 and* Robinson v. Bates, 3 OHIO TORT L.J. 59 (2007)("[N]early every (if not every) health insurance plan and policy, as well as Medicare and Medicaid, includes a subrogation provision . . . ."); Gerard Sinzdak, Sereboff v. Mid-Atlantic Medical Services, Inc.: *The Supreme Court's Current View on the Enforceability of Third-Party Reimbursement Clauses Under ERISA*, 27 BERKELEY J. EMP. & LAB. L. 523, 523 (2006) ("Employer health insurance plans commonly include third-party reimbursement clauses—sometimes referred to as subrogation clauses . . . ."); Paul R. Thomson, III, *Insurance Subrogation—A Subrogation Clause in a Health Insurance Policy is Enforceable Even Though the Insured Has Not Been Made Whole*, 16 U. ARK. LITTLE ROCK L. REV. 475, 476 (1994) ("Clauses permitting subrogation commonly appear in insurance and construction contracts . . . .").

[15] *State v. Fid. & Deposit Co. of Md.*, 223 S.W.3d 309, 311 (Tex. 2007); *Duenez I*, 201 S.W.3d at 675.

authorizing legislation for an express grant of exclusive jurisdiction,[16] or for "a pervasive regulatory scheme" indicating that was the Legislature's intention.[17] Exclusive jurisdiction is a question of law we review de novo.[18]

The Act here expressly grants ERS exclusive jurisdiction of disputes relating to payment of a claim:

> The executive director has exclusive authority to determine all questions relating to enrollment in or *payment of a claim* arising from group coverages or benefits provided under this chapter other than questions relating to payment of a claim by a health maintenance organization.[19]

While the Act does not define "claim," it uses the term only in connection with demands for benefits.[20] Thus, we held in *Duenez I* that this provision granted ERS exclusive jurisdiction of claims "for payment of ERS-derived benefits."[21] But there is no claim for benefits in this suit. The Duenezes past medical bills have already been paid, and their future bills are the responsibility of

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[16] *See, e.g.*, *Houston Mun. Employees Pension Sys. v. Ferrell*, 248 S.W.3d 151, 157 (Tex. 2007); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 223 (Tex. 2002).

[17] *E.g.*, *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 625 (Tex. 2007); *In re Entergy Corp.*, 142 S.W.3d 316, 323 (Tex. 2004); *see also Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006).

[18] *Thomas*, 207 S.W.3d at 340; *David McDavid Nissan*, 84 S.W.3d at 222.

[19] TEX. INS. CODE § 1551.352 (emphasis added).

[20] *See, e.g.*, *id.* §§ 1551.059, .062, .211, .215, .216, .259, .351, .354, .401.

[21] *Duenez I*, 201 S.W.3d at 676.

a new insurer. The question here is not a member's claim for payment of benefits (as it was in *Duenez I*), but ERS's claim for *reimbursement* of benefits it has already paid.[22]

Nor does the Act provide a detailed regulatory scheme suggesting ERS must have exclusive jurisdiction of its own subrogation claims. The Act provides many details about eligibility,[23] dependents,[24] coverage plans,[25] and contributions,[26] but there are no details suggesting a regulatory scheme for pursuing subrogation against third parties. To the contrary, the Act states that its administrative remedies "are the exclusive remedies available to an employee, participant, annuitant, or dependent,"[27] but does not include ERS as a potential administrative claimant in that list. The Act also authorizes ERS to file suit (*not* an administrative claim) to resolve questions that might expose it to double liability.[28] Viewing the Act as a whole, it appears the Legislature intended ERS's administrative procedures to handle claims for benefits by employees, not claims against third parties by ERS.

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[22] *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207-08 (Tex. 2002) (holding exclusive jurisdiction of agency to regulate relations between car manufacturers and dealership owners did not include tortious interference claim by prospective buyer).

[23] *See* TEX. INS. CODE §§ 1551.101–.114.

[24] *Id.* §§ 1551.151–.159.

[25] *Id.* §§ 1551.201–.206, .251–.259.

[26] *Id.* §§ 1551.301–.324.

[27] *Id.* § 1551.014.

[28] *Id.* § 1551.354.

Support for this conclusion also arises from ERS's own plan.[29] Of course, exclusive jurisdiction must be granted by the Legislature; an agency cannot grant exclusive jurisdiction to itself.[30] But when ERS adopted a plan providing for subrogation, it specified no administrative remedies except that "the Plan may deduct from any pending or subsequent claim made under the Plan any amounts the Participant owes the Plan." Deducting subrogation from a benefits payment falls within ERS's exclusive jurisdiction; pursuing money damages to reimburse benefits already paid is a different matter.

Moreover, ERS's plan allowed it to assert subrogation against third parties "independent of the Participant." So rather than suing the Duenezes after their settlement, ERS could have sued the convenience store independently or intervened in *Duenez II*.[31] If ERS has exclusive jurisdiction of subrogation, then it could have demanded that the Dram Shop claim in *Duenez II* be dismissed for exhaustion of administrative remedies. We do not think the Legislature intended ERS to handle administratively every tort suit involving injured state employees.

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[29] *See Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001) (noting that we consider an agency's interpretation of its own powers "if that interpretation is reasonable and not inconsistent with the statute").

[30] *See id.* ("An agency may not, however, exercise what is effectively a new power, or a power contradictory to the statute, on the theory that such a power is expedient for administrative purposes.").

[31] *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007) ("Contractual (or conventional) subrogation is created by an agreement or contract that grants the right to pursue reimbursement from a third party in exchange for payment of a loss . . . ."); *see, e.g.*, *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 34 (Tex. 2008); *Estrada v. Dillon*, 44 S.W.3d 558, 560 (Tex. 2001); *Guillot v. Hix*, 838 S.W.2d 230, 232 (Tex. 1992).

Finally, we must avoid constitutionally suspect constructions of the Act if we can.[32] Relegating common-law claims to administrative remedies implicates the Texas Constitution's open-courts provision.[33] We have rejected open-courts complaints when a grant of exclusive jurisdiction involved claims that did not exist at common law.[34] But subrogation existed at common law long before ERS was created.[35] We decline to construe the Act to relegate subrogation defendants to administrative procedures before ERS, *especially when the claimant is ERS itself*, and then have judicial access limited to substantial-evidence review.[36]

It is true that the Act provides for exclusive jurisdiction of questions "relating" to payment of claims, which arguably extends far beyond paying claims alone. But immediate problems arise if we construe the Act that broadly. Large insurance or retirement payments may attract the attention of creditors, former spouses, competing heirs, or tax collectors. The commercial, marital, probate, and tax questions in such cases could all arguably "relate" to the underlying payment of a claim, but nothing in the Act suggests the Legislature intended ERS to exercise expertise in all these areas. ERS's expertise is in deciding payment of benefits, and we should not read "relating to" more broadly than that.

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[32] *City of Houston v. Clark*, 197 S.W.3d 314, 320 (Tex. 2006); *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002).

[33] *See* TEX. CONST. art I, § 13.

[34] *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 227 (Tex. 2002).

[35] *See, e.g.*, *Faires v. Cockrill*, 31 S.W. 190, 194 (Tex. 1895) ("Perhaps the courts of no state have gone further in applying the doctrine of subrogation than has the court of this state.").

[36] *See* TEX. INS. CODE § 1551.359.

While we reject ERS's claim of exclusive jurisdiction over its own subrogation claims, that does not mean its administrative procedures could never play a role. One of several declarations the Duenezes sought by counterclaim was a declaration that ERS "incorrectly determined that the amount owed" by the Duenezes was $113,174.76 for nursing services the trial court ordered ERS to pay. Had this declaration challenged the amounts ERS paid to health-care providers (a matter within its expertise), the doctrine of primary jurisdiction would require such a claim to be abated and referred to ERS for an initial determination.[37] But the Duenezes' pleadings and briefs do not challenge the *amount* of these charges, but whether they *owe* them.[38] As the question is not whether ERS should have paid these benefits but whether the Duenezes should reimburse them, that is a subrogation question outside ERS's exclusive jurisdiction.

Nor, of course, do we reject ERS's claim for subrogation on the merits. ERS has apparently never pursued a subrogation claim either administratively or in court, perhaps because all members other than the Duenezes have complied with the Plan's subrogation provisions. As we have noted with respect to workers' compensation cases, "[a] carrier's subrogation claim should hardly ever be

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[37] *See In re Sw. Bell Tel. Co.*, 226 S.W.3d 400, 403 (Tex. 2007); *David McDavid Nissan*, 84 S.W.3d at 221 (holding courts should defer to administrative agencies under doctrine of primary jurisdiction when "(1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations").

[38] We disagree with JUSTICE WAINWRIGHT'S interpretation that the Duenezes are "directly attack[ing] ERS's decision to pay, or to decide not to pay" these benefits. ___ S.W.3d at ___. To the contrary, the Duenezes *insisted* that ERS pay these charges, and got the trial court to order ERS to do so.

contested" as "claimants should already know how much they have received in benefits."[39] The only defenses the Duenezes have raised to subrogation appear to be equitable defenses barred by the Plan under which they accepted benefits.[40] But none of that provides exclusive jurisdiction for ERS to decide its own subrogation claims.

The dissenting opinions agree there is something odd about the procedural posture of this case, but fail to recognize that ERS and its agent Blue Cross had no other choice. Had no benefits been paid, ERS could have effectively invoked its administrative procedures by simply withholding payment and requiring the Duenezes or their providers to file administrative claims for them. But once the benefits were paid, ERS had no choice but to seek reimbursement in court.

Construing the Act as a whole,[41] we conclude that the court of appeals' opinion rejecting ERS's claim of exclusive jurisdiction here does not conflict with this Court's opinion in *Duenez I* affirming ERS's exclusive jurisdiction of questions relating to payment of benefits. Accordingly, without argument,[42] we dismiss the petition for want of jurisdiction.

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Scott Brister
Justice

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[39] *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 37 (Tex. 2008).

[40] The ERS plan provided for subrogation "even though the third–party payment does not compensate the Participant for his or her whole loss," and that it "shall not be defeated by any so-called 'Fund Doctrine,' or 'Common Fund Doctrine.'" *See Fortis Benefits v. Cantu*, 234 S.W.3d 642, 650 (Tex. 2007) ("We agree with those courts holding that contract-based subrogation rights should be governed by the parties' express agreement and not invalidated by equitable considerations that might control by default in the absence of an agreement.").

[41] TEX. GOV'T CODE § 311.021(2).

[42] *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: July 3, 2009