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IN THE SUPREME COURT OF IOWA
No. 22-1213

IOWA INDIVIDUAL HEALTH BENEFIT REINSURANCE ASSOCIATION,

Appellee/Cross-Appellant,

vs.

STATE UNIVERSITY OF IOWA, IOWA STATE UNIVERSITY OF SCIENCE AND TECHNOLOGY, and UNIVERSITY OF NORTHERN IOWA,

Appellants/Cross-Appellees,

Appeal from the Iowa District Court for Polk County
Celene Gogerty, District Judge

APPELLEE/CROSS-APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

IIHBRA agrees with Defendants that the Supreme Court should retain this case.

STATEMENT OF THE CASE

The Iowa Legislature created the Iowa Individual Health Benefit Reinsurance Association (IIHBRA) as a non-profit entity for the purpose of administering a health insurance plan for Iowans who for whatever reason could not obtain affordable coverage on the private market. The legislation required any entity that provides individual health benefit plans in Iowa to provide its basic and standard coverage at a discounted rate to qualifying persons. The legislation provided a vehicle for spreading the losses experienced by those entities in selling those policies and then paying benefits across all "members" of IIHBRA. The legislation defines "member" to include "self-insured employers that offer health benefit plans subject

to state insurance regulation." The central issue of this appeal is whether the three state universities – each of whom is a self-insured employer offering health benefit plans to its employees – are "members" of IIHBRA.

In ruling on cross-motions for summary judgment, the District Court ruled that each of the state universities was a "member" of IIHBRA and was obligated to comply with the audit and payment obligations imposed by IIHBRA. In a separate ruling on agreed-upon facts, the District Court awarded IIHBRA a judgment against each university for its unpaid assessments. The District Court declined to require the universities to pay late fees imposed by IIHBRA or to pay for the expense (in the form of attorney fees and the expense of litigation) of pursuing the unpaid assessments.

The universities appealed, and IIHBRA cross-appealed.

STATEMENT OF THE FACTS

In 1986, the Iowa Legislature enacted Iowa Code chapter 514E, which created the Iowa Comprehensive Health Insurance Association (ICHIA). *See* 1986 Iowa Acts ch. 1156, § 2 (codified at Iowa Code § 514E.2 (1987)). The ICHIA issues its own individual and group health insurance policies to eligible Iowans. See Iowa Code § 514E.2 (2013). The goal of chapter 514E was to provide health insurance to Iowans unable to obtain affordable coverage on the private market. See id. The insurance commissioner determined the ICHIA program was underutilized and, in

1994, issued a bulletin reminding private health insurers of their obligation under section 514E.11 to notify applicants of the option to purchase ICHIA policies whenever the insurer rejected the applicant or offered coverage at a higher rate. Therese M. Vaughan, Iowa Ins. Div., Bulletin No. 94–6 Utilization of Iowa Comprehensive Health Association's Policy Services (1994), rescinded by Nick Gerhart, Iowa Ins. Div., Bulletin No. 13–4—Rescission of Insurance Division Bulletins 4 (2013).

Ten years later, the Legislature enacted Iowa Code chapter 513C, the Individual Health Insurance Market Reform Act. 1995 Iowa Acts ch. 5, §§ 3–13 (codified at Iowa Code ch. 513C (1997)). The legislature expressed the goal of this Act as follows:

> The purpose and intent of this chapter is to promote the availability of health insurance coverage to individuals regardless of their health status or claims experience, to prevent abusive rating practices, to require disclosure of rating practices to purchasers, to establish rules regarding the renewal of coverage, to establish limitations on the use of preexisting condition exclusions, to assure fair access to health plans, and to improve the overall fairness and efficiency of the individual health insurance market.

Iowa Code § 513C.2 (1997).

Section 10 of the Reform Act created the IIHBRA, a nonprofit corporation organized under Iowa Code chapter 504A. § 513C.10(1). Membership in the IIHBRA is mandatory for health insurance companies selling coverage in Iowa, as

well as health maintenance organizations, fraternal societies, and self-insured employers that offer health benefit plans subject to state insurance regulation. *Id.* Each "member" of IIHBRA is required to "report the amount of earned premiums and the associated paid losses for all basic and standard plans." § 513C.10(7). IIHBRA uses these reports to determine and collect a yearly assessment from all members to spread among all members the losses suffered by the health insurance companies that are required to provide health insurance to Iowans who cannot afford to pay market rates for high-risk policies. § 513C.10(10).

IIHBRA's assessment process commenced with calendar year 1997. For the next 12 years, Iowa State University of Science and Technology (ISU) and University of Northern Iowa (UNI) complied with the reporting and payment obligations imposed upon each "member" of IIHBRA by § 513C.10(1). As the Universities point out in their counterclaim, ISU paid a total of $2,421,036.60 into IIHBRA for the calendar years 1997 through 2009. UNI paid $856,546.58 into IIHBRA for the same calendar years. ISU and UNI participated in the reporting and payment process each year without objection, and obviously without arguing that they were not "members" of IIHBRA.

The application of the reporting and assessment payment obligations to public entities received some attention after the passage of § 513C.10(1).

On March 8, 1996, Therese M. Vaughan, then the Commissioner of Insurance for the State of Iowa, issued Iowa Bulletin 96-3 to all public self-insured employers. The subject of Bulletin 96-3 is the assessment process mandated by the Legislature in what was codified at section 513C.10. Bulletin 96-3 states, among other things, that the statutory definition of "member" included "self-insured plans for government employees authorized under Iowa Code Chapter 509A." (App. at 61-62)

On February 7, 1996, then Assistant Attorney General Scott M. Galenbeck issued an opinion to then Iowa Insurance Commissioner Susan E. Voss on the subject of IIHBRA and specifically whether providers of self-insured group plans for government employees pursuant to chapter 509A are members of IIHBRA and are required to pay the annual assessments issued by IIHBRA. Mr. Galenbeck expressed the opinion that such providers are members because chapter 509 provides for state insurance regulation of group plans issued pursuant to chapter 509A.

The University of Iowa (U of I) did not participate in IIHBRA in the years 1997 to 2009 because, like a great number of entities and employers in Iowa, U of I contracted with a health insurance company to provide health insurance benefits to its employees. The statute does not include such purchasers of group health insurance benefits in the definition of "member." The health insurance companies

with whom U of I and similar entities and employers contracted to provide health insurance benefits are members.

For calendar year 2010, IIHBRA became aware that the U of I had begun to provide self-funded group health benefit plans to its employees. IIHBRA sent its standard reporting request to the U of I for calendar year 2010. U of I responded with the requested information: amount of health plan paid losses for the 2010 calendar year. IIHBRA did the same with ISU and UNI, and both responded as they had done the previous twelve years. When IIHBRA issued assessment notices to the three universities for the 2010 calendar year, however, none of the three universities paid their assessment. (App. at 138)

On October 19, 2012, then Commissioner Voss sent a memo to Dave Roederer, then the Director of the Department of Management of the State of Iowa. The subject of the memo was "the issue of whether the Iowa Board of Regents institutions … are members of [IIHBRA] pursuant to [section 513C.10] and thus required to make yearly assessment payments for any losses incurred by the Association." Commissioner Voss concluded that the three institutions are, in fact, "members of [IIHBRA] and are required to pay assessments as set forth in the formula established by [IIHBRA]." (App. at 63-65)

IIHBRA commenced an action against U of I, ISU, and UNI in an effort to collect the assessments for calendar years 2010 and beyond. The universities filed

a motion to dismiss. The District Court granted that motion and entered an order dismissing IIHBRA's action. IIHBRA appealed. The Court of Appeals affirmed. IIHBRA sought further review. The Supreme Court accepted further review and reversed the dismissal. Back in district court, the parties filed cross-motions for summary judgment; IIHBRA's motion was for partial summary judgment, since damages had not yet been determined. After hearing, the District Court overruled the Universities' motion and granted IIHBRA's motion for partial summary judgment. The Universities later moved a second time for summary judgment, and the District Court overruled it.

IIHBRA and the Universities stipulated on the amounts of the assessments for each of the Universities for years 2010 through 2017:

Iowa State University $1,013,236

University of Iowa $3,020,988

University of Northern Iowa $ 366,427

(App. 138) IIHBRA also submitted a calculation of late charges:

Iowa State University $403,371

University of Iowa $1,173,053

University of Northern Iowa $ 146,371

(App. 138) IIHBRA also submitted in support of its claim for the expense of recovering the assessments its litigation legal fees and expenses in the amount of

$89,180.50. The Universities have not taken issue with any of the calculations of assessments, late fees, or expenses. In other words, the facts relevant to calculation of damages, late charges, and expense are not at all in dispute.

The District Court entered judgment in favor of IIHBRA in the stipulated amounts of the assessments but declined to enter judgment on any of the items for late charges or for the expense of recovering the assessments. The Universities appealed, and IIHBRA cross-appealed.

ARGUMENT ON THE UNIVERSITIES' APPEAL

The Universities are members of IIHBRA for years 2010 through 2017 because they provided self-funded group health benefit plans.

IIHBRA agrees that the Universities preserved error via their motions for summary judgment. IIHBRA agrees that review is for correction of errors of law. *Homan v. Branstad*, 887 N.W.2d 153, 164 (Iowa 2016).

It is not just posturing to observe that this dispute arises and should be adjudicated in the circumstance of the passage of a law designed to help at-risk Iowans insure against health expenses. For a quarter of a century, IIHBRA has functioned within the regulation of health insurance in Iowa by spreading the loss of selling health insurance below-market across as many employers and entities as possible. The purpose of the legislation is advanced by reading the legislation to include as "members" all governmental entities, including the three universities,

each of whom employ many Iowans, some of whom have need for the insurance program sponsored by the legislation.

The Iowa Supreme Court described the statutory goal, purpose, and methodology in its decision on an early appeal from this litigation. *IIHBRA v. Iowa State University*, 876 N.W.2d 800, 802-03 (Iowa 2016). The next several paragraphs come largely from that opinion.

In 1986, the legislature enacted what became Iowa Code chapter 514E, which created the Iowa Comprehensive Health Insurance Association (ICHIA). *See* 1986 Iowa Acts ch. 1156, § 2 (codified at Iowa Code § 514E.2 (1987)). The ICHIA issues its own individual and group health insurance policies to eligible Iowans. *See* Iowa Code § 514E.2 (2013). The goal of chapter 514E was to provide health insurance to Iowans unable to obtain affordable coverage on the private market. Id. The insurance commissioner determined the ICHIA program was underutilized and, in 1994, issued a bulletin reminding private health insurers of their obligation under section 514E.11 to notify applicants of the option to purchase ICHIA policies whenever the insurer rejected the applicant or offered coverage at a higher rate. Therese M. Vaughan, Iowa Ins. Div., Bulletin No. 94–6 Utilization of Iowa Comprehensive Health Association's Policy Services (1994), rescinded by Nick Gerhart, Iowa Ins. Div., Bulletin No. 13–4—Rescission of Insurance Division Bulletins 4 (2013).

In 1995, the legislature enacted what became Iowa Code chapter 513C, the Individual Health Insurance Market Reform Act. 1995 Iowa Acts ch. 5, §§ 3–13 (codified at Iowa Code ch. 513C (1997)). The legislature expressed the goal of this Act:

> The purpose and intent of this chapter is to promote the availability of health insurance coverage to individuals regardless of their health status or claims experience, to prevent abusive rating practices, to require disclosure of rating practices to purchasers, to establish rules regarding the renewal of coverage, to establish limitations on the use of preexisting condition exclusions, to assure fair access to health plans, and to improve the overall fairness and efficiency of the individual health insurance market.

Iowa Code § 513C.2 (1997).

Section 10 is the codified portion of the legislation that created IIHBRA, expressly a nonprofit corporation organized under Iowa Code chapter 504A. § 513C.10(1). Membership in the IIHBRA is mandatory for health insurance companies selling coverage in Iowa, as well as health maintenance organizations, fraternal societies, and self-insured employers that offer health benefit plans subject to state insurance regulation. *Id.* The members are required to "report the amount of earned premiums and the associated paid losses for all basic and standard plans." § 513C.10(7). The IIHBRA uses these reports to determine and collect a yearly assessment from all healthcare providers to spread the cost of providing health insurance to eligible Iowans at below market rates. § 513C.10(10).

In 2001, the legislature amended chapters 513C and 514E to merge the boards of directors of the IIHBRA and the ICHIA. § 513C.10(5); 2001 Iowa Acts ch. 125, § 5. The amendment left intact the IIHBRA's duty to ascertain and collect assessments from its members. See Iowa Code § 513C.10(3) (2003). Another amendment in 2003 clarified the members' obligation to report data and pay assessments to the IIHBRA. 2003 Iowa Acts ch. 91, § 26 (codified at Iowa Code § 513C.10(6) (2005)).

Any fair reading of the statutory definition of "member" in section 513C.10(1)(a) supports the conclusion that the Legislature intended to include the Universities.

Section 513C.10(1)(a) lists in descriptive form a number of entities that "shall be members." The first one descriptor is as broad as could be imagined: "All persons that provide health benefit plans in this state." That language alone should be sufficient to answer the question presented by the Universities appeal. The Universities concede, as they must, that in years 2010 through 2017, each of the Universities provided self-funded group health benefit plans to its employees.

The Universities insist that they are not members because section 513C.10(1)(a) also lists as members "other entities providing health insurance or health benefits subject to state insurance regulation." They argue that they and their

health benefit plans are not subject to state insurance regulation.[1] The Universities argue that (1) their group health insurance plans are governed by chapter 509A, (2) regulation by the insurance commissioner is mentioned in 509A only with respect to political subdivisions, and (3) the three state universities are not political subdivisions. So, the Universities reason, their plans cannot be subject to state insurance regulation, and so, they reason further, they cannot be members of IIHBRA. This argument fails for any one of several reasons.

First, the Universities take too much from the impact of chapter 509A. The purpose of chapter 509A is to provide for group insurance – including health insurance – for public employees. Universities must concede that the employees of the state universities are public employees and that the Universities have in fact provided group health insurance for their employees. The Universities' reliance on 509A ignores the obvious and inescapable observation: By enacting the law codified in 509A, the Legislature has subjected the employers of public employees to state insurance regulation.

Second, any reasonable reading of chapter 509A requires a conclusion that it applies to state entities as well as political subdivisions. The fact that two sections

[1] IIHBRA notes parenthetically that the three state universities have chosen to provide health benefits to their employees. They could have simply contracted with an insurer to provide the insurance and/or benefits. The University of Iowa did so for many years, and that is why it was not a member of IIHBRA until it changed its business model for the 2010 calendar and thereafter provided health insurance and/or benefits in conformity with Iowa State University and University of Northern Iowa. The latter two entities have been members of IIHBRA since the inception of the IIHBRA program and have paid their assessments each and every year – without objection - until the University of Iowa refused to pay.

of 509A (subsections 14 and 15) make specific reference to regulation by the insurance commissioner of the plans offered by "political subdivisions or school corporations" does not lead to the conclusion that all of chapter 509A applies only to "political subdivisions or school corporations" and not to state entities like the three state universities. Indeed, the Universities expressly claim that their plans are governed by chapter 509A. So the fact that the only references to the commissioner are in two subsections does not mean that there is no state insurance regulation of the issuance of group health benefit plans by state entities like the Universities. And the language in section 513C.10 is "state insurance regulation." The sentence relied upon by the Universities does not refer specifically to the commissioner.

Third, with regard to "state insurance regulation," chapter 509 is the foundational authorization for the sale, delivery, and regulation of group insurance in Iowa, including health insurance. Chapter 509 grants to the insurance commissioner extensive powers of regulation over group health insurance. There is no language in chapter 509 or in 509A that excludes from the regulation authorized by chapter 509 the issuance of group health benefit plans under chapter 509A. Similarly, there is no language in chapter 509 or 509A that even suggests that the commissioner of insurance has no regulatory power over the group health insurance plans benefitting the employees of the three state universities just because the policies are provided by state entities.

Fourth, the Legislature sought at the outset of its enactment of the enabling legislation for IIHBRA to include as members "all persons that provide health benefit plans in this state." The Legislature did not say "insurers" instead of "persons." Indeed, the Legislature made clear that "insurers" are just one category within "persons."

Fifth, the position advocated here by IIHBRA has been the position pronounced twenty-five years ago by the Attorney General on behalf of the Insurance Division of the State of Iowa. See Insurance Division Bulletin 96-3, Opinion by Assistant Attorney General Scott M. Galenbeck, March 8, 1996. See also the Iowa Bulletin 96-3, issued by then Iowa Commissioner of Insurance Therese Vaughn.

The Universities' "we are not political subdivisions argument" is interesting, but it does not lead to the conclusion they express. That there are two subsections in chapter 509A that deal with political subdivisions does not mean that the Universities' issuance of group health benefits to their employees is immune from state insurance regulation. Clearly, Universities are "other entities providing health insurance or health benefits subject to state insurance regulation." The Legislature used broad definitional language to include in the definition of "members" not only insurers but also employers who provide health insurance or benefits subject to state insurance regulation." Universities point to no express language or even any

inference from equivocal language that would somehow exclude from the operation of section 513C.10 state employers who provide health benefit plans to their employees. If the Legislature wanted to immunize any subset of public employers from the statutory definition of "members," it would have been easy to do so. Instead the Legislature sought to include, not exclude. There is not a single clause or phrase that seeks expressly to exclude any person, entity, employer, or insurer from the definition of "members." The entire definition is one of inclusion.

Finally, logic dictates that the state universities, like everyone else who provides group health benefits pursuant to chapter 509A, are members of IIHBRA. The State of Iowa itself has been a member until just recently and has paid its assessments. Two of the three state universities acted as members, with full knowledge of the financial consequence, for fifteen years, and dutifully paid their assessments. The three state universities have maintained that they are literally the ***only*** entities – public or private - who can provide health insurance or benefits to their employees without being "members" of IIHBRA. How easy would it have been for the Legislature to say so. That it did not is determinative.

ARGUMENT ON IIHBRA'S CROSS-APPEAL

I. IIHBRA is authorized to collect late fees and the expense of recovering an assessment from a Member who does not pay its assessment.

IIHBRA preserved error on its claims for late fees and for the expense IIHBRA incurred in recovering the assessments that are owed by the three Universities but not paid. IIHBRA submitted evidence and represented to the District Court that the facts relevant to calculating the fees and expenses were not disputed by the three Universities. IIHBRA submitted legal arguments in support of both claims, and the District Court declined to award late fees or the expense of recovering the unpaid assessments.

Because the facts relevant to these two claims are not in dispute, the District Court's decision should have been based on the law. Review on these two claims, therefore, is on errors of law. *Homan v. Branstad*, 887 N.W.2d 153, 164 (Iowa 2016).

The Iowa Legislature created IIHBRA as a nonprofit corporation to be incorporated under chapter 504 and to operate under a plan of operation approved under that same chapter. Specifically:

> The association shall be incorporated under chapter 504, shall operate under a plan of operation established and approved pursuant to chapter 504, and shall exercise its powers through the board of directors established under chapter 514E.

§ 513C.10(1)(b). IIHBRA's plan of operation provides the following for imposition of late charges:

> Assessments shall be due and payable when billed. If the assessment is not received within 60 days of the billing date, the member shall pay interest on the assessment from the billing date at the rate of 1.5% per month. In the event that a Member fails to pay any applicable late

> payment fee with an assessment, the amount of such unpaid late payment fee will be included in the amount of the Member's assessment for the next calendar year.

(App. 139-150)

IIHBRA has no independent source of revenue. It serves as a collector of assessed payments and distributor of reimbursements to the carriers who are required to sell basic and standard policy at less than market to eligible Iowans. When a member like one of the Defendants does not pay its assessment in a timely manner, IIHBRA lacks the financial wherewithal to fully fund the reimbursements that must be paid to those carriers who are members and who have suffered a loss due to their obligation to sell the basic and standard plan of health insurance at a premium below market. Charging a late fee assists IIHBRA in ensuring a timely and efficient process of collecting assessments and distributing reimbursements. There is no viable legal argument that the imposition of a late fee pursuant to its plan of operation somehow exceeds the authority granted IIHBRA by the Legislature.

IIHBRA also seeks recovery of its significant and unusual expense in obtaining the Defendants' compliance with their obligations as members under section 513C.10 to respond to the audit and then to pay the assessment. IIHBRA filed this lawsuit only after efforts to persuade the Defendants that they were, in fact, members of IIHBRA were unsuccessful. This was frustrating, given the

indisputable fact that the Iowa State University and the University of Northern Iowa had participated as members without objection each and every year since the inception of IIHBRA and had voluntarily and timely paid their respective assessments each and every year. Regardless of the reason for the Universities' refusal to pay the 2010 assessments and the assessments for succeeding years, the fact – again indisputable – is that IIHBRA has had to expend money in order to obtain compliance with the mandates of the Legislature in section 513C.10. For IIHBRA, litigation expense is an unusual item but an expense item, nevertheless.

IIHBRA's plan of operation recognizes that IIHBRA will incur expense simply by virtue of its operation. The plan of operation provides that IIHBRA may include those expenses in the appropriate assessments. IIHBRA respectfully submits that spreading the expense of this litigation across all members is unfair and illogical. Only three members of IIHBRA caused IIHBRA to incur the expense of this litigation: the three Universities. The District Court should have entered judgment against all three Universities, jointly and severally, for the expense of the litigation.

CONCLUSION

The Court should affirm the judgment of the District Court with respect to payment of the assessments by the Universities. The Court should reverse the

District Court and remand with direction to award IIHBRA the late fees and the expense of recovering the assessment, all as requested by IIHBRA.

REQUEST FOR ORAL SUBMISSION

IIHBRA requests the opportunity to be heard in oral argument.

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/s/ *Gregory M. Lederer* — *February 7, 2023*
Gregory M. Lederer — Date

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/s/ Gregory M. Lederer
Gregory M. Lederer

CERTIFICATE OF SERVICE

I certify that on February 7, 2023, this document was electronically filed with the Clerk of Court and served on all counsel of record below to this appeal using EDMS.

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