IN THE COURT OF APPEALS OF THE STATE OF OREGON

STEWART TITLE GUARANTY COMPANY, a Texas corporation,

Plaintiff-Respondent,

v.

STATE OF OREGON, acting by and through the DEPARTMENT OF CONSUMER AND BUSINESS SERVICES,

Defendant-Appellant.

Marion County Circuit Court No. 11C16094

CA: A151470

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS *AMICUS CURIAE* BRIEF ON THE MERITS

Appeal from the Judgment
of the Circuit Court for Marion County
dated April 12, 2012
The Honorable Vance D. Day

Scott G. Seidman, OSB No. 833209
1600 Pioneer Tower
888 Fifth Avenue
Portland, OR 97204
Telephone: 503.802.2021
E-mail: scott.seidman@tonkon.com

Attorney for *Amicus Curiae* National Association of Insurance Commissioners

Marilyn J. Harbur, OSB No. 802517
DOJ GC Tax & Finance
1162 Court St. NE
Salem, OR 97301
Telephone: 503-947-4530
E-mail: marilyn.harbur@state.or.us

Attorney for Defendant-Appellant

additional counsel listed on next page

G. Kevin Kiely OSB No. 833950
Cable Huston et al
1001 SW 5th Ave. Ste 2000
Portland, OR 97204
Telephone: 503-224-3092 x240
E-mail: gkkiely@cablehuston.com

Attorney for Plaintiff-Respondent

Jonathan W. Monson OSB No. 102650
Cable Huston et al
1001 SW 5th Ave. Ste 2000
Portland, OR 97204
Telephone: 503-224-3092
E-mail: jmonson@cablehuston.com

Attorney for Plaintiff-Respondent

INDEX

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS *AMICUS CURIAE* BRIEF ON THE MERITS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of Insurance Commissioners ("NAIC")

The NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. The NAIC members, together with the centralized resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

The NAIC's purpose is to provide its members with a national forum enabling them to work cooperatively on regulatory matters that transcend the boundaries of their own jurisdictions. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, white papers and actuarial guidelines that promote and establish uniform regulatory policy. Their overriding objectives are to protect consumers as well as to assist in maintaining the financial stability of the insurance industry.

The NAIC performs numerous crucial services on behalf of state

governments including: developing and publishing model laws, regulations, bulletins, financial and accounting standards, white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*. Another NAIC publication is the *Retaliation Tax Guide*, which tracks provisions relating to premium and retaliatory tax and other assessments and fees for all the states and territories. Hundreds of state and federal laws assign duties to the NAIC and incorporate NAIC standards, models and other publications. In light of these resources, the NAIC is often asked to provide information to an appellate court that may be difficult to procure through any other means.

Interest of the NAIC

The interest of the NAIC in this case arises from the interpretation of Oregon's retaliation tax statute. Each state (with the exception of Hawaii) maintains a retaliation tax statute, and the resulting retaliation tax structure has been an effective tool for the NAIC's membership as a whole to regulate foreign insurers operating in their markets. The NAIC also has an interest in promoting the uniformity of insurance laws and regulations among the states.

Individually and collectively, the NAIC members and the state agencies over which they preside have a wealth of experience in the regulation of insurance. Regulators have unique knowledge and expertise of the insurance industry and their expertise should be given the deference it deserves.

The NAIC members are uniquely qualified and situated to assist this Court by presenting the regulatory and public policy concerns involved in this case.

ADOPTION OF STATE'S OPENING BRIEF

The NAIC as *amicus curiae* agrees with and adopts the statement of the case, the statement of the facts, and the standard of review set forth in the opening brief submitted by the State.

SUMMARY OF THE ARGUMENT

The decision by the circuit court failed to give appropriate deference to the Department of Consumer and Business Services (DCBS). Courts are required to defer to an agency's interpretation of the laws it enforces if that interpretation is plausible and not inconsistent with the law's policy, even if the court would reach a different conclusion as a matter of first impression. The circuit court inappropriately substituted its own judgment for what would be the "best" interpretation, rather than determining whether the DCBS decision was reasonable.

The decision by the circuit court also conflicts with the uniformly negative results Stewart Title has experienced in launching similar challenges in other state courts. Stewart Title has challenged whether agent commissions are included in gross premiums for tax purposes in both Minnesota and Maine and has lost both challenges. Stewart Title's position has failed because it is inconsistent with a fundamental premise of insurance regulation. The price of insurance has two

components: pure premium and expenses, including agent commissions. The prevailing view has accordingly been to include both components in the premium tax base.

The circuit court's decision also fails because it conflicts with the very purpose of the retaliatory tax system, which is to reduce barriers to interstate insurance commerce by leveling tax burdens among the states. This reciprocal effect is lost if Oregon stands alone in failing to include agent commissions as part of the premium tax base of its retaliatory tax when the other states do.

Finally, the circuit court's decision is at odds with the treatment of agent commissions in states that have retaliatory tax statutes with the same references to agents or representatives as Oregon's. No other state with this kind of statute seeks to enforce the law separately against the insurer and its agents. Indeed, no other state imposes retaliatory taxes separately on agents, which would make Oregon an outlier if the decision below is allowed to stand.

ARGUMENT

The Circuit Court's Decision Failed to Give Appropriate Deference to the Commissioner of Insurance

As the State's brief says, the Insurance Division of the DCBS assessed retaliatory tax, interest, and penalty amounts to Stewart Title for tax years 2009 and 2010. This action was authorized under ORS 731.854 and ORS 731.859, which reside in Oregon's Insurance Code. It is well established that courts must

defer to regulatory agencies regarding the interpretation of laws those agencies enforce.

This court has ruled that a review of an agency action should show significant deference to the agency's own interpretation if it "is within the range of its responsibility for effectuating a broadly stated statutory policy". *Johnson v. Employment Dept.*, 187 Or App 441, 447 (2003). The Commissioner's actions pursuant to the retaliation provisions effectuated the statutory policy expressed in ORS 731.236, which provides:

> "The Director of the Department of Consumer and Business Services shall enforce the provisions of the Insurance Code for the public good, and shall execute the duties imposed by the code.
> …
> "The Director has the powers and authority expressly conferred by or reasonably implied from the provisions of the Insurance Code." *See id.*

The Oregon Supreme Court reiterated this type of deference to agencies in *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Com'n*, 346 Or 366 (2009), holding:

> "We first note that, although agencies are bound by their own rules, we afford particular deference to agencies' interpretations of those rules. Federal courts have held that a federal agency's construction of its own regulation is controlling unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Oregon courts are almost as deferential to Oregon agencies' interpretations of their own rules, deferring to an agency's interpretation of its own rule if the interpretation is plausible and not inconsistent with the

> rule, the rule's context, or any other source of law. *Don't Waste Oregon Com. v. Energy Facility Sitting*, 320 Or 132, 142, 881 P2d 119 (1994)."

Although these cases involved agency-promulgated rules rather than statutes enacted by legislation, Oregon's retaliation statute (which is identical to the California retaliation statute that was the subject of the landmark *Western and Southern* case decided by the U.S. Supreme Court) was based on a model statute drafted by the insurance industry. See *Western and Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 669 (1981). The placement of the provision in the Insurance Code rather than in the Oregon Administrative Rules does not indicate that any less deference is owed to DCBS. If anything, greater deference should be shown owing to the technical expertise and specialized knowledge required for application of a retaliatory tax.

The nationwide retaliatory tax structure is discussed in greater detail in Part C below. However, it should be noted as part of this discussion that courts recognize the network of retaliation statutes relies upon the experience and acumen of state insurance regulators:

> "…the practical effect of the statutes has been to stabilize at a fairly reasonable level the exactions to which a foreign corporation is subjected for the privilege of doing out-of-state business. It would appear that in actual practice this result has been achieved by a policy of restraint, reasonableness, and practical judgment on the part of the administrative authorities charged with the obligation for their enforcement. Republic Ins. Co. v. Comm'r of Taxation, 138 N.W.2d 776, 780 (Minn. 1965)."

The circuit court concluded Stewart Title's interpretation of the retaliation tax statute is incorrect. However, the decision contained no analysis as to the statutory public policy authorizing the Commissioner to enforce provisions of the Insurance Code, nor does it acknowledge the technical skills and institutional knowledge of the Commissioner's staff in applying the retaliation tax. The absence of any such discussion indicates the circuit court failed to give the required deference for an agency applying a statute that is clearly within the scope of its authority and discretion.

The Classification of Agent Commissions as Taxable Premium Is Instructive as Background for the Issue of Retaliation and Illustrates the Problems in the Circuit Court's Decision

Before any retaliation statute may operate, there must be an initial determination of premium tax. Courts' views of the role of agent commissions at this stage are relevant in an analysis of agent commissions at the retaliation stage. It is undisputed that Stewart Title has challenged the inclusion of agent commissions in the premium tax base and has been unsuccessful in court.

In *Stewart Title Guar. Co. v. Comm'r of Revenue*, 2008 WL 126590 (Minn. Tax Ct. 2008), the Appellee challenged an order of the Commissioner of Revenue determining that Appellee was liable for premium taxes on an amount that included the portion of the title premium retained by the title insurance agent for abstracting work. The issue in the case was whether "gross premiums" should be

interpreted to include the amount retained by the agent and not passed on to the insurer. The Tax Court held that this amount was in fact "received" by the insurer because the agents charged and received the entire premium under Appellee's express authority and direction. *See id*. at 5. The Court rejected Appellee's argument that funds retained by its agents cannot be considered insurance premiums because an agent cannot cover risk of loss and cannot be an insurer, holding the agents' actions are in accordance with the agency agreements, and their collection of premium is on behalf of Stewart. *See id*. at 4. The decision was subsequently affirmed by the Supreme Court of Minnesota in *Stewart Title Guar. Co. v. Comm'r of Revenue*, 757 N.W.2d 874 (Minn. 2008).

During the same time frame, Stewart Title was challenging a similar regulatory action in Maine. In *Stewart Title Guar. Co. v. State Tax Assessor*, 963 A.2d 169 (Me. 2009), the Appellee contracted with a Maine agent for title services such as searches and examinations. The Appellee paid Maine premium taxes based on total premiums less the amount it characterizes as "charges made by non-direct agents". *Id*. at 172. In this action, the Maine Supreme Judicial Court overturned a lower court's decision that the legislature intended the term "gross direct premium" in the premium tax statute to include only the portion of payments that was specifically attributed to title insurance and that was actually received by Appellee.

The court looked to the legislative history and held that the taxable premium:

> "…includes the total consideration paid by the insured for the title insurance, including the cost of the title search and examination completed by the insurer or its agent; and that because the tax is a tax on premiums and not receipts, the tax applies regardless of whether all or a portion of the premium is paid to an agent for the insurer in the first instance, or directly to the insurer." *Id*. at 182.

These decisions demonstrate that courts do not find it significant whether or not the amounts constituting agent commissions are actually received by title insurers. Commissions are to be considered part of the taxable premium, a view that is consistent with other resources on this topic.

A fundamental principle of insurance regulation is that the price of insurance has two components: pure premium and expenses. Robert W. Klein, *A Regulator's Introduction to the Insurance Industry* 19 (2d ed. 2005). The expenses component of premium comprises all of the costs incurred by insurers in acquiring business, providing coverage and servicing a policy. *Id*. Agent commissions are a primary cost of acquiring business. This concept is illustrated in existing guidance provided to insurance companies in properly accounting for their premium revenue in statutory financial statements filed with insurance regulators and the NAIC:

> "Acquisition costs are those costs that are incurred in the acquisition of new and renewal insurance contracts and include those costs that vary with and are primarily related to the acquisition of insurance contracts (e.g., agent and broker commissions, certain underwriting and policy issue costs, and medical and inspection fees).

> Acquisition costs and commissions shall be expensed as incurred. NAIC, ACCOUNTING PRACTICES AND PROCEDURES MANUAL 71-3 (2013)."

The Statement of Statutory Accounting Principles specific to title insurance directs that "[a]mounts paid to or retained by agents shall be reported as an expense" in recognizing premium revenue. NAIC, ACCOUNTING PRACTICES AND PROCEDURES MANUAL 57-4 (2013). This direction is carried out when insurers are instructed to report amounts paid to or retained by title agents as operating expenses on their annual statutory financial statements. Amounts paid to or retained by title agents are defined as "[a]ll amounts paid directly or indirectly to the title agent. It can include commissions or fees paid directly to the title agents. It can also include any amounts collected from the insureds for title insurance premiums that are retained by the title agent, and not remitted to the company." NAIC, OFFICIAL NAIC ANNUAL STATEMENT INSTRUCTIONS—TITLE 74 (2012). The logical inclusion of agent commissions as part of the insurer's expenses is even illustrated by Stewart Title as the record in this case establishes Stewart Title included agent commissions as part of its rate filing. See ER-47.

Case law and NAIC guidance establish the prevailing view that agent commissions should be included in the premium tax base. The retaliatory tax system is designed to reflect the reality of how states tax premiums and at what

rate. The circuit court's decision to *exclude* agent commissions from the basis for retaliation, when states generally *include* agent commissions for purposes of imposing a premium tax, creates a rift between Oregon and other jurisdictions. It puts the DCBS and the state of Oregon at a distinct disadvantage in terms of potential tax revenue.

The Circuit Court's Interpretation Subverts the Intent of the Retaliatory Tax System, Which Is to Level the Playing Field for States and the Insurance Industry

The NAIC described the intent of retaliatory tax laws "to burden an out-of-state insurance company in exactly the same way and to precisely the same extent that the out of state company's state of domicile burdens the companies of the state imposing the retaliatory tax." 2004 *NAIC Proceedings*, 3rd Qtr, Vol. I, p. 648. The reciprocal nature of the statutes achieves uniformity and protects all insurers from burdensome assessments:

> "Thus, retaliatory statutes not only protect domestic insurers when they do business in another state, but also indirectly protect foreign insurers from any increase in burdens. If the statutes worked completely, the result would be an equal level of burdens imposed in each state on foreign insurers, probably resulting in a uniform rate of taxation, as this is the largest single exaction or burden. Indeed, the statutes may be the reason why the tax on premiums has stayed close to two per cent in most states. George A. Pelletier, *Insurance Retaliatory Laws*, 39 NOTRE DAME L. REV. 243, 247 (1964)."

Retaliatory taxes work as a uniform system to foster the reduction of tax barriers. The purpose of these laws is to improve interstate commerce for all insurers by

inducing the states with higher tax burdens to lower those barriers. This goal of reducing tax barriers serves to promote interstate and international commerce.

The reciprocal effect of these statutes is compromised when one state must abide by a different set of rules than states with similar language. The circuit court's decision constitutes such a departure that Oregon will not be able to treat its foreign insurers as other states treat Oregon's insurers. Minnesota is a good example because it is abundantly clear from *Stewart Title Guar. Co. v. Comm'r of Revenue* (discussed above) that Minnesota imposes premium tax on all title insurance premium, including agent commissions.

The central question from the NAIC's 50-state perspective is this: How is the DCBS to burden a Minnesota insurance company in the same way and to the same extent that Minnesota burdens an Oregon company if Minnesota imposes premium tax for agent commissions on the insurer? Under the circuit court's ruling, this creates a scenario where Oregon must seek recovery from an agent who would never have owed the premium tax under Minnesota law.

This interpretation could have implications far beyond the present case, as the retaliation statute governs every line of business transacted under the Insurance Code. See ORS 731.854 (2013). Even more concerning, the decision could be used to undermine the authority of 28 states with similar statutory language that do

not seek separate retaliation against agents.

The Circuit Court's Interpretation of the Statute Departs from the Approach of 28 States With Similar Statutory Retaliation Language Referring to Agents or Representatives

As the history of this case makes clear, state retaliation statutes do not typically lay out each individual tax or fee for each line of business, separate them by components, and direct departments to collect amounts from particular categories of insurance professionals. The statutes are designed to foster consistency in the treatment of foreign insurers and are necessarily broader.

The NAIC's members recognize the value in collecting premium and retaliatory tax provisions for all the states and territories into one publication, the *Retaliation Tax Guide*, which is updated annually. The publication includes statutory and regulatory provisions, and it is updated by Department of Insurance and Department of Revenue staff members who are also able to summarize department practices. Because the NAIC maintains this list of contacts, we were able to conduct an informal survey (to which 34 states including Oregon responded) to determine whether states with similar statutory language retaliate separately against title insurance agents for amounts attributable to their commissions.

As an initial matter, there are 29 states (including Oregon) with retaliation statutes that reference either an agent or representative of the insurer. *See 2012*

NAIC Retaliation Guide, Vol. I. The circuit court found these references significant in the 2001 ruling:

> "Any remaining balance of the aggregate fees must be imposed by the Director, but only on the "agents or representatives of such insurers" under the applicable provisions of this statute. The text and context of the statute is not particularly ambiguous in this regard. Insurers and their agents and representatives are not treated as if they were somehow a single entity[1]." ER-18.

As the retaliatory tax structure relies to some degree upon consistent application of common statutory language, it was worthwhile to compare the circuit court's interpretation against the practices of the other states. The survey question asked whether the states retaliate separately against title insurance agents for the taxes and fees paid on the amount of title insurance premium attributed to or retained by agents as commissions. There were no states that indicated separate retaliation against title agents, even among the states with retaliation tax statutes referencing agents or representatives.

The circuit court's interpretation, if applied to the other 28 states referencing agents and representatives, would have two consequences. First, it would dismantle the states' established practices of imposing retaliatory tax on the

[1] The single entity question produced some discussion in the Minnesota case cited in Part B, as that court held "the agents were acting under Stewart's express authority and direction to charge and receive the entire Title Premium, which they did. Thus, the entire Title Premium, including the agent retained amount was a charge made by a title insurer or its agent." *See Stewart Title Guar. Co. v. Comm'r of Revenue,* 2008 WL 126590 (Minn. Tax Ct. 2008).

insurer. Second, it would create a divide in the country where 29 jurisdictions must collect retaliatory taxes from title agents while the other 22 states would not have the authority to collect from agents at all because their retaliation statutes only reference insurers. The circuit court's decision is not only in conflict with prevailing case law and NAIC guidance, it also creates a conflict between Oregon and the vast majority of states who view title insurers as the liable parties for the entire taxable premium regardless of commissions.

CONCLUSION

For all the foregoing reasons, the court should reverse the circuit court's construction of ORS 731.854.

DATED this 10th day of June, 2013.

TONKON TORP LLP

By */s/ Scott G. Seidman*

Scott G. Seidman, OSB No. 833209
Direct Dial: 503.802.2021
Direct Fax: 503.972.3721
Email: scott.seidman@tonkon.com

Attorney for *Amicus Curiae* National Association of Insurance Commissioners

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,479 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

TONKON TORP LLP

By */s/ Scott G. Seidman*
Scott G. Seidman, OSB No. 833209
Attorney for *Amicus Curiae* National Association of Insurance Commissioners

PROOF OF E-FILING AND SERVICE

I hereby certify that on June 10, 2013, I directed the original **NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS *AMICUS CURIAE* BRIEF ON THE MERITS** be electronically filed with the Appellate Court Administrator, Appellate Courts Record Section, by using the court's electronic filing system.

I further certify that all of the participants in this case are registered appellate court users and were served by using the CM/ECF electronic filing system.

DATED this 10th day of June, 2013.

TONKON TORP LLP

By */s/ Scott G. Seidman*
Scott G. Seidman, OSB No. 833209
Attorney for *Amicus Curiae* National Association of Insurance Commissioners

097204/00001/4643899v1

Tonkon Torp LLP
888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440