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Supreme Court of Texas.
Mid-Century Insurance Company of Texas and Texas Farmers Insurance
Company,
Petitioners,
v.
Shefget Ademaj, Respondent.
No. 05-0016.

October 17, 2006.

Appearances:
Thomas T. Rogers, Jackson Walker, L.L.P., Austin, TX, for
petitioner.
D.J. Powers, Law Offices of D.J. Powers, Austin, TX, for
respondent.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet
O'Neill, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht,
Scott A. Brister, and David M. Medina, Justices.

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CHIEF JUSTICE: In Texas Farmers Insurance Company versus Shefget
Ademaj, Ademaj, Ademaj. Give me the correct name pronunciation.

COURT ATTENDANT: May it please the Court. Mr. Rogers will present
arguments for the petitioner. Petitioner has reserved five minutes for
rebuttal.

ORAL ARGUMENT OF THOMAS T. ROGERS ON BEHALF OF THE PETITIONER

MR. ROGERS: May it please the Court. With me today until they come
from, from well, this case involves the construction that Texas
Insurance Code Article 21-35(b) as well as the construction of Texas
Insurance Code Article 5.101 which is the flexible rating program that
had dismissed to have for making rates through out the billing of
insurance. The Court below quoting the Third Court's opinion in Liberty
Mutual Insurance Company versus Greise express the fear that appellants
or the petitioners who are construction of Article 21-35(b) that it
permits insurer to collect premiums and permits some insurer to collect
payments in addition to premiums that are enumerated policy fees,
taxes, finance charges. The Third Court raising express the theory that
interpretation would yield what you call unregulated add-ons to the

price of regulated insurance period. At the same time, the respondent claims that the insurer's construction about the 21-35(b) is going to resolved in deregulation of Automobile Insurance in Texas. Neither is proved with respect to the Auto Theft Prevention Authority which is the dispute before this Court. The regulator, the Commissioner of insurance doing his job as the regulator with the roaming process with regard to the ATPA fee. He promulgated two rules dealing with that fee. One found at 28 Texas Administrative Code Section 5.205 and another which is found in the Texas Automobile Rules and Rating Manual at Rule 15. The regulator, armed with the knowledge that this tax was imposed upon insurers. Armed with the knowledge that you regulated, bringing in for motor vehicle insurance decide that this fear tax under the Auto Theft Prevention Act would be levied by the insurer or recoop by the insurer directing from the insured. In addition to premium IE, he determined it's not premium. He directed the insurers to recoop it directly from the insured and require that the insurer give a notice, a written notice to the insurer that the one dollar fee was been dealt in addition to premium. It works out for 50 cent fee because all the policies in Texas are written for six month periods. So this hardly in my opinion, qualifies as either unregulated add-on or the deregulation of Automobile Insurance.

JUSTICE: Well, but it, it could leave to that based on your construction -

MR. ROGERS: I know.

JUSTICE: And I-- and well as you say that is now what happened in this case but if all these fees under 21-35(B) two, three, four, five, six, seven, eight don't come within the rate in 5.101. Then it could lead to that result.

MR. ROGERS: The fee-- You're absolutely right. The fees that don't come in to the rate under 5.101 if an insurance is not rate regulated for example. Take Neutralight Insurance Company; they're not rate-regulated, they had membership fees, they can charge a membership fee. The two petitioners are domestic stock companies. They don't have membership fees because they're not that type of organization so it wouldn't charge membership fees, in the first place.

JUSTICE: But, but one thing they, they could charged these things without any regulation and theoretically, there could be double charges.

MR. ROGERS: Theoretically, there could be double charges, theoretically but you don't need 21-35(B) to do that nor this 21-35(B) authorized double charging. A rate regulator insurer; for example, the two petitioners who are rate-regulated in the sale of the insurance. With respect to the policy fees; for example, in 21-35(B) include the policy fees and the rate-making process. So a rate regulated insurer or like the two petitioners, it certainly charged policy fees in addition to a regulated rate. But they'll be violating rate regulation by doing so. If we go back prior to the adoption of Article 21-35(B) in 1991. Automobile Insurance in Texas had been regulated recollection the service correctly since 1927 by the Commissioner then by the State Board of Insurance and by the Board of Insurance Commissioners and by the State Board Insurance and now by the commission of Texas Department of Insurance Company. The insurers with a rate regulating with double bill with or without 21-35(B) in 1991 simply by including cost in their rate base that where normally clear in the rate base. And is certain then in rate regulation attempting to let it goes cost again. But that circumvents the wholes concept of rate regulation, violates the rate regulatory process and violates the rate regulatory laws.

JUSTICE: But here's something that I don't understand about that. You-- Your client, I presume has put taxes in its rates before under 5.101, right?

MR. ROGERS: Yes, premium taxes.

JUSTICE: And is that-- are you saying it's just within the company's discretion where to put them? Because if they have put in there before he, he makes that decision as whether they go there or whether they go outside the 5.101 rate.

MR. ROGERS: Ultimately, the Commissioner makes that decision as the regulator. As a practical matter, we'll making rates. He start with by saying the brief appear in the premium and that's the first component in rate making. And the pure premium consist of the losses paid on claims and the expenses associated with adjusting thoses losses; that's pure premium, that's all goes into it. But that pure premium wouldn't compensate an insurer for all the expenses he incurs in the line of the business of insurance. Let alone give it a profit on a regulated rate. So added to a pure premium is a fact they call "expense loading" and you load the expenses into the Bureau of Premium and you get the gross rate. The expense loading is where you get things like policy fees, premium taxes, agent's commissions. And these are loaded as a percentage in to the gross rate. Theoretically, the ATPA fee could be load in the rates, the Commissioner didn't do it. And I would suggest the Commissioner didn't do it because it doesn't fit into the rate-making. Premium taxes is a tax at the percentage of premium so the rate then insured his charge if you are a better driver than I am, you pay less premium and the insurer pay less premium taxes. If I pay a higher rate for a higher premium, the insurer paid more premium taxes. So the premium taxes fluctuate in proportion to the premium built into the rate based on the risk classification. Our one dollar ATPA fee doesn't do that, it's not like agent commissions, if there's an increase with the premium, it's not like premium taxes that increase in the premium, it just this one dollar per-vehicle fee sitting out there all by itself. So ...

JUSTICE: So there's nothing to prevent it from coming under 5.101?

MR. ROGERS: Well, the question is, Judge, where do you put it when we make rates?

JUSTICE: But I, I thought you acknowledged that it would be proper to assess that under 5.101?

MR. ROGERS: No, I said it's theoretically possible. And here's the problem with it. When making annual bill rates they're made by line, you recall the 5.101 defines rate as the price per line per year of exposure. The per line refers to the lines of Automobile Insurance coverage in the prior tense your annual bill policy. In those lines are first liability. There are two set of fines in liability; liability by an injury, liability property damage. The enacting liability you have tip, mid-day, you have much as two lines proper damage by the injury and made comprehensive and coalition. The premium taxes, when we talk about taxes could nicely into each line. Because we're talking about the premium taxes that go into the proper factor in expense loading for property damage by the injury if mid-day. So there's a place to put them, there is no place to put the ATPA fee if you spread over all the coverages then the insurer is not collecting that fee dollar for dollar from the insurer. Because part of this in liability, part of this in tip, part of this in mandate. And if the insurer doesn't buy all those coverages then the insurer isn't reputing the fee. So when we talk about the benchmark rate process, the Commissioner made the benchmark rates that he is instructed by legislature to do so. Come up with a

range of rates which is 30 percent below and 30 percent above the benchmark rate. So he plugged in benchmark rate for each line and puts ten cents in this line, ten cents in this line. And I buy less than the lines, all the lines then the insurer not refuted. And then when the insurer make his flex filings which it makes individually, it can't put the ATPA fee in the flex filings because its flex filing is the maximum 30 percent above the benchmark rate. Then it's collecting a dollar 30, it's making a profit of that. If it's flex filing is 400 the benchmark rate then it's not collecting the entire fee. And if we accept the proposition that was articulating American lines by the Third Court back in 1931 that an insurer cannot be prohibited from collecting a tax. Then the due process clause and the equal protection clause and the insurer is entitled to collect that fee at 50 percent-- 50 cents per six month policy period as 50 cents and not for the eight cents and 30 cents by having spread the, the rate. So likely, the both processes of the Commissioner where-- well, this fee really doesn't debt generates. It can't be spread and collected in a benchmark rate, it can't be spread in the individual flex filings and even if it were, if you were filing higher than the benchmark in collecting more than the fee and if you're collecting lower than the benchmark, you're collecting less than you're entitled to. Well, the Commissioner regulating the medicine insurance, instructed the insurers to collect this fee in addition to premium directly from the insured. Now, we go back and look at the American lines case ...

JUSTICE: What, what statute give the Commissioner in that authority?

MR. ROGERS: Is authority can regulate rates? It starts with Article 5.01 and that is his legislative grant of authority. And it grants in the exclusive authority to promulgate prescribe just legal rates to premium is on, they're also uses the word determine, determine. Then you go to Article 5.101 for promulgating of benchmark rate and it talks about the various items that go into making up the rate. So when the Commissioner is promulgating the rate in determining the rate, he has the discretion other than those expenses that are threshold is allowed to decide within the rate-making scheme and actual principles. How and when something is going to figure in to the rates or not. That is the discretion vested in the Commissioner under his power to determine, promulgate and prescribed rates. The Court, in American Alliance, observed and has been going back to a 2 percent tax that will be levied by the legislature to file the requirements and retirement relief fund. The legislature provided him all that the tax could neither be collected from the insurer nor could it be included in the rates for the insurer and the poor ones struck as unconstitution but maybe integration is pertinent here that it didn't matter whether it was included in the expense; the Court therefore has expensive account, but I mean expense loading. It didn't matter whether the expense loading or was add on to the rate at the end.

JUSTICE: Well, so that's really wasn't a whole-- I mean, doesn't addressed the question of Court's today. And the Court there just said, "it's confiscatory whatever claim put it in."

MR. ROGERS: That's correct. But the point be the Commissioner has the authority to determine that we're going to make the benchmark rates, we're going to have the flex filings made and we got this 50 percent per policy period hanging out here under the ATPA fee. And I'm going to instruct the insurer to collect the direct-- I'm run out of my time.

CHIEF JUSTICE: Time has expired and the Court is ready to hear

argument from the respondents.

COURT ATTENDANT: May it please the Court. Mr. Powells-- excuse me--
- Mr. Powers will present argument for the respondents.

ORAL ARGUMENT OF D.J. POWERS ON BEHALF OF THE RESPONDENT

MR. POWERS: May it please the Court. My name is D. J. Powers and I represent the respondent Ademaj.

JUSTICE: Mr. Powers, let me-- it seems like I understand the procedural facts of this case. It was filed as a class suit, correct?

MR. POWERS: Yes.

JUSTICE: Dispositive motions for summary judgment were filed before the class ratification determination?

MR. POWERS: Yes ...

JUSTICE: Has there been a class determination on whether it can be certified or not?

MR. POWERS: No, there is not. What happened was the ...

JUSTICE: Mr. Ademaj, his claims were savored and his summary judgment was granted so that it take final to summary judgment as to Mr. Ademaj.

MR. POWERS: I guess it's individual claim.

JUSTICE: So we're up here on a final appeal of award?

MR. POWERS: Yes.

JUSTICE: Correct? It's not an interlocutory appeal?

MR. POWERS: That's right, your Honor.

JUSTICE: Okay.

MR. POWERS: The accused in this case whether the Article 5.101 rate is only the premium charges, this farmer's contends or whether this is the sum of all charges including the premium, all associate tax charges, all these charges according to 21-35(B) as the Court of Appeals below.

JUSTICE: Then makes you-- are you claiming that the company has collected this fee under its rate making or do you acknowledge they have not?

MR. POWERS: The evidence is not clear, one were or the other. Our position is that it's irrelevant. This is a ...

JUSTICE: I know that's your position.

MR. POWERS: Okay.

JUSTICE: I just wondered if, if you're claiming their double debt in here. I understand, he said there's the potential to double debt but do you acknowledge or, or is there anything on the record as to whether there was double debt in here?

MR. POWERS: The only thing with the record is that they did not include it in their premium. But of course, our position is the 5.101 rate is not just the premium charge. It's all the charges ...

JUSTICE: But if it's breaking down as a percentage by line, then couldn't you put easily tell whether it's included in there?

MR. POWERS: I've been doing rate-regulation for about eighteen years. And I can tell you that it's a very difficult to graph what's in this instead of number on your, your debt cases. Hundred fifty dollars for baollow injury and there's no way to tell what's in there you have to go back through the rate violence. And what the rate violence are based on our reports that they filed with the department of insurance about how many taxes licenses of fees they pay. If you look at exhibit

with it's index seven to our agreement, that's where they reports their numbers who backup the rates. And there's a line in there, it says, taxes, licenses and fees incurred. That's where they report the taxes, license and fees incurred in the net put in under the rate. There'S no exception and therefore, the ATPA fee or the OPEC has said the ups up against insurance company ...

JUSTICE: How, how do you address their argument-- I mean, you're the Commissioner, where do you, where do you put it? How do you, how do you divide it between these different lines?

MR. POWERS: The same way we do all others sorts of expenses that are exactly like this. They put it in the rate facts of action where it is there. Let me hive you Mr. Haple examples. The simplest one is the debt page itself. It cost when it produce the declarations page and it cost the same whether I had one coverage or I have five coverages on that debt page. It's still a piece of paper that I got to run through the printer and that' one cost, actuaries tends spread that cost to make sure they recruit their cost in the rates. That's what insurance is all about, spreading those cost amount to insurers.

JUSTICE: And they build that cost as what in there?

MR. POWERS: It's in the rates. They build it-- they don't, they build it at it's ...

JUSTICE: Is that on particular line or just a-- just on top of the line cost to include in total premium charge?

MR. POWERS: Actuaries have discretion in how they do that. They could do it one way, they could say this is a flat fee. Everybody has to get bubbly injury coverage. That first coverage so it maybe that they put it in that charge. It maybe that they spread it out on months to different coverages. Because a crossover insurers they will recruit all those expenses. Actuaries have the discretion in how they set the rates like that.

JUSTICE: But it seems to me this is different though than a declaration to page of cost. It, it statutes says that you have one dollar for a car a year and you don't know what the consumer is which is why the consumer is going to buy, it is a due. Are you saying that at the time the policy is issued that's when they spread it? Perhaps that they included within the rate?

MR. POWERS: No, this is, this is basic rate making. And rate making we have ...

JUSTICE: But somebody buys all the lines and it's rate all of them and you return with your dollar. Did you, did you spread it between the all the lines nearly by half of the lines. You have to return your dollar. But you still have to charged.

MR. POWERS: With all due respect, that's not true your Honor. Two things: one, they could put it in the both of the injury liability, the one coverage collect the entire dollar there. And what rates just that, that coverage and that's when it's required by law or bunch of other car races don't collect in your dollar. But more importantly this goes to a basic rate regulation issue which is we spread cost out, that's what insurance is all about. So we don't go back and say that we get this one dollar for this particular insurance on this particular coverage, what we do is reset rates so that insurers collector cost there expenses of doing business. I may call my agent 50 times and that's going to cost him a lot of more then you perhaps you perhaps owe the cost of rates at one time. That's not build, that's, that's all in the rate. What we do with rates is we set up so they collect their expenses and that's exactly--I believe I give you another example I'm going to explain. There is a-- the cost of put in the policy on the

box. That's a flat charge and it's cost them money to do that. It doesn't matter what our one coverage or five coverages, that's a flat charge for that. There are another example, there's an office to public insurance counsel assessment, again the tax are fee that they have to pay and if I recall the I'm not sure what I've believe it's a flat charged. Where do they put that in? How do they recruit that? Just like they do to every other flat charge in their business.

JUSTICE: And why would the Commissioner be able to say, "Okay, well, maybe all that's-- so do we think this is a more issue of why can't ..."

MR. POWERS: To-- at first while they grant the Commissioner did not say that. The Commissioner have absolutely no evidence that the Commissioner said-- with pharmacist alleging the Commissioner said "Oh it's better to put it-- you know, over here." But what the problem i, is that number one: the Commissioner is bound by the statute to set rates that are just reasonable inadequate. And just reason adequate rates at this Court rule with each telling details. Do you see a residential scheme, means all taxes must be included. So number one, the Commissioner is bound by the statute to include all expenses of operation including all taxes and this is one of-- number two, the Commissioner has authority to say what goes into the rate but beyond that he or she has absolutely no authority over 21-35(B) charges. That these are none rate charges as farmer's alleges then where is the authority? It can't come to 5.101. He has or she has no authority to that. And that's the fundamental problem.

JUSTICE: I, I-- and I understand your argument. Tell me what you do with the "This just impair argument?" That they, they did what the Commissioner told them to do. Ten years they did what they thought the Commissioner told them to do. And then you're going to say that's not what they ...

MR. POWERS: I was not with that ...

JUSTICE: But, but they're going to say, "we did what we thought we were supposed to do and now ten years later, we are subject to this huge amount of money." And that's just not right.

MR. POWERS: Well, first of all, your Honor. It was risky already that our insurance company why aren't suggested to technicality the S60 rule of law against that we shouldn't have to follow them. 'Cause that's, that's what the argument is. This is no different in very filed great doctor pays that this Court or any Court in United States does ever have. And those cases just for one there are deception and ...

JUSTICE: Where they typically they got the one in the beginning. And that bubble at ten years later.

MR. POWERS: Well, many times that they do -

JUSTICE: Do they?

MR. POWERS: - they do above the law. That there many cases you'll see where in utility 4 and 6 purposely gave a lower rate to a company. And then later on the MTRC comes in because they took over tell her not yet the USC but the basic loans. That's where some sort of trusty or whatever will come in later on and then say, "you don't have to pay us more money because we took our grants, we look up as far as ten years ago." And the problem is that we don't care to be where told or wrong rate. The rule of law is you follow the law, follow the rate that's on far. And there's no different here and attain the first one side of the cases to the Court that that that they merely had not been doubled it of course is-- you know, we don't know at this point. But it doesn't matter how longer rules get on the fact. If it's a void law, a rule of laws saying, "You can not charge this thing."

JUSTICE: Mr. Powers, I'm, I'm having some difficulty following that argument that's in your brief. You just stated-- stated that all cost and expenses of operation including all taxes of this must be included in the rate. You tie that to the provision and Article 5.101 Section 3(b)2 that product with the rate must be adequate. When we cite 3(c)4 32 and 3(a)b(2) for the proposition, I don't see anything on those subsequent cites that says, that is mandatory as to all the expenses in taxes, (c)4, (c)6, 3(c). The Commissioner may give due consideration too. There's no mandatory language in that (c)4 says, "One of the things the Commissioner can give due consideration to its expenses of operation of all insurers excluding only those expenses at 0," but in section 0 it says, "These allow the expenses to include again not comprehensive and not mandatory." I'm not sure I follow your argument or agree that adequate rate means, as you cite in your brief on page one, all cost and expenses of operation must be included on that, including all taxes and fees. I don't see any mandatory language in the provision you cited for the proposition.

MR. POWERS: Well, it is a fundamental rule of regulatory law that's said it, "This Court lay down back in 1988 that for just reasonable and adequate rates as a manner of law that requires an improvement of all reasonable expenses included all taxes," that's what this Court said in that case. Number one ...

JUSTICE: What case?

MR. POWERS: It's the QC versus H and 01V case, that we cited in our brief.

JUSTICE: Involving a different administrator scheme.

MR. POWERS: Well, ...

JUSTICE: I'd like to recreate making ...

MR. POWERS: It raises by as the Court American Alliance said those saying principles apply to insurance and ...

JUSTICE: So you think those principle would apply even interrogation of language to the contrary and a statute to different statute?

MR. POWERS: I am-- well, ...

JUSTICE: To your cited rate must include all expenses and fees in cite the statute for that. I agree that's the source of that proposition it it's true that the provision you've looking at don't say that all taxes and expenses must be included in the rate. Of course, if that's correct that all expenses and taxes must be included in the rate then that's can be a compelling argument that the ATPA fee must also be subject to a rate filing. But I don't see language in the statutes that says all taxes and expenses must be included in the, in the rate. Because that's required for to be adequate.

MR. POWERS: Well, of course ...

JUSTICE: But in the, in the PUC statute is a different statute for interpreting insurance statute to you.

MR. POWERS: Sure. But let, let's not dineart in line of this cases because that's they address this exact issue. They said and they said-- I don't remember exactly the page but in that opinion which say, "this particular principle of rate-making applies just like to those and you tell in this-- to insurance companies that they need to be able to collect." As a matter of constitution law in just reasonable and adequate rates all their expenses including all their taxes. That's what the department of insurance was said to in the rate following exhibit. They said report all taxes, licenses and fees. There's no exception in that rate filing form for the ATPA fee or any other fee. So that's what the Department of Insurance has said when they file the

rates. That's what this Court has said, that's what the American Alliance Court says, it is again in approximate rate regulatory law for 18 years. That's the one of the most fundamental rules of rate regulatory law. That a utility insurer or whatever the regulating company is for just reasonable and adequate rates. They had to collect all the reasonable expenses including every tax and fee to pay.

JUSTICE: I'm not sure I disagree with that last statement. I guess the question we have here is whether the collection of all taxes and expenses, must and fees-- must be through the rate and rate process. What, what are you ring the bell that could be opening the door to a new unregulated premium setting environment if, if we follow petitioner's argument? What are somebody expenses other than the Automobile Theft be better that the at least petitioners claims are unregulated?

MR. POWERS: All (70) 21-35(b), other agreement selecting the perfect example of policy fee interesting in all in argument they said 21-35(B), I believe, the language was some insurers in-charged to this other. There's absolutely no language in 21-35(B), it says what you choose it says insurers. It doesn't say the rate-regulated insurance, it doesn't say none rate in insurance, it says insurance made charge this eight charges. They say that the premium charges regulated by rule 2135-- I'm sorry-- 5.101 and that-- that's all the 5.101 regulation, just free rate charged. And that's the only authority under 5.101 Commissioner has. So the other seven charges then are not regulated charges. What could they do when the Commissioner comes in says, "your rate are too high, reduce it by say \$10," as an example. They come back and unregulated policy fee is to add up to policy fee by \$10 and that reduce the entire rate regulatory scheme 5.101, super fully submitted ...

JUSTICE: As simply that you could say this is true, that's not the risk in these cases there the legislature said the only bill that pay is dollar. We can't charged two dollars, wouldn't you agree?

MR. POWERS: I would not agree to that ...

JUSTICE: Is one dollar per-vehicle?

MR. POWERS: That's how much the insurance company ask to pay to the controller. The legislature did not say how much there limited-- that there's no where that there limited of one dollar if it's an unregulated charged under 21-35(b).

JUSTICE: So he think, so he think the insurers by their argument would open the door to charged in \$10 for the Automobile Theft fee potentially but only in paying the Commissioner a dollar?

MR. POWERS: It didn't the controller actually ...

JUSTICE: Controller?

MR. POWERS: Yeah. They could, they could call it a tax and you know, they call it also as a famous policy piece ...

JUSTICE: But what if they call it Automobile Theft, could they charged a \$10 then only pay the Commissioner dollar -

MR. POWERS: There you know ...

JUSTICE: - in a statute?

MR. POWERS: There'll be no probation under Article 21-35(B), do you or if I where wearing the statute it goes for them to do that.

JUSTICE: As the only way to rate that in this including all of them the rate filing.

MR. POWERS: I wouldn't say that in a what the statute with the legislature did is that all charges are in the 5.101 rate.

JUSTICE: I'm looking at, I'm looking at appendix H to Mid-Centuries for he found the merits and, and it has the taxable

authenticity, is that what we're talking about?

MR. POWERS: No.

JUSTICE: No.

MR. POWERS: No, we're not talking. The taxable ...

JUSTICE: What directory they're saying makes them put it under 21-35(B)?

MR. POWERS: On this where I call it base on the side of it did they -

JUSTICE: Well, by understanding ...

MR. POWERS: -there's record, there's record their claim it is the rule-- well, I, I'm not sure with your finding, your Honor 'cause I'm not, ' cause I'm not following with the argument.

JUSTICE: Well, what, what is it they're claiming makes them deal one dollar recruitment or that has been to do it under 21-35(B)? I, I was reading text bulletin about recruitment from policy holders as the Commissioner's statement that, that's what they should do?

MR. POWERS: Okay. That, that's absolutely does not say that. And, and, and what ...

JUSTICE: No, I understand but is that, is that-- am I looking at the wrong document of their argument? And this is what dictates if they did that?

MR. POWERS: I, I think they're probably say the Rule 5.101-- I'm sorry.

JUSTICE: Is it the rule 15?

MR. POWERS: Yes, it's the Rule 15 is what we're argued that, that it's-- that they, number one: physically active, number one that's exempted from premium, what we've been argued.

JUSTICE: So this tax bulletin just relates to -

MR. POWERS: - whether it's premium or not.

JUSTICE: Okay. All right.

MR. POWERS: And, and that's the brief of the fundamental issue -

JUSTICE: Okay.

MR. POWERS: - here is should there's no dispute that ATPA fee is not premium it un-- under of one of this under charges in 21-35(B). And that's all what's the bulletin says is that it's not premium. Does not interested matter, the question is supposed to be 5.101 rate, is that the sum of all charges or is it just one of many other charges? So that all these other things in 21-35(B) could be charged.

JUSTICE: And so how do they assess the premium tax argument? Well, in to the rates, how are we going to figure out premium taxes as part of this factual premium?

MR. POWERS: Well, first of all that as I understood their argument there are some of this noble, noble tax that issue that-- first of all to determine the premiums either whatever it is that this charge on the 5.101 rate that is what the premium tax statutes applied to. That's a separate tax matter what is like be fold to is a separate tax matter. The problem with the argument of this double collecting taxes is that they collect all sorts of taxes in the rate. They mention premium rate but they didn't mention the return on taxes, their sales tax, the real state, all of these taxes are included in the 5.101 rate. And see you have the same taxes on taxes argument for all of these things that are included and of course that completely contradicts their place that the 5.101 rate is only the premium rate asking the support to violate the meritious all to motive the pleading that says, when the legislature use a term like premium with several other statutes but it's excluded it in one at 5.101. A Court should not imply that term in the statute with the legislature left about. It's like I'm out of time. Thank you

very much.

JUSTICE: Thank you counsel.

REBUTTAL ARGUMENT OF THOMAS T. ROGERS ON BEHALF OF PETITIONER

MR. ROGERS: First, with regards to discussions about double debt in. Counsel may not know because he was not involve in, in the Trial Court in the instances. His co-counsel was what they stipulated, which is at page 200 in the record that the Auto Theft Prevention payment not charged to automatized by MCT or TFIC as part of the premium for private band and double debt for.

JUSTICE: That's part of the premium?

MR. ROGERS: Yes.

JUSTICE: But they was say-- we don't know this charge is part of the rate?

MR. ROGERS: Your Honor, this is a-- it should that they have argued in the Courts below and the Courts below agree with, he made the reference to meritor saying, "Well, 5.1- 5.101 doesn't mention the word 'premium' so the legislature intend for the Commissioner to regulate premiums even if the Commissioner that legislature mention it to me to mention regulate rates." And that rate is such a different in bringing and the briefing Court which the Court below followed concluded over, he agree. The Commissioner doesn't regulate premiums the-- or the Commissioner doesn't regulate premiums, it regulates rate. And when they talked about premium in 21-35(b) they mean premium as a component to argue in the brief and at least states in his brief that the rate is the premium plus taxes plus fees. That's-- Judge, that's nonsense.

JUSTICE: For what was really 5.101(e)? I'm sure it may use any rate a classification within the flexibility down without prior approval of that Commissioner. The rate may not include expenses, disallowed under subsection (o).

CHIEF JUSTICE : That's correct.

MR. ROGERS: And then, and then statutes says that several times. And then there's a list of expenses that are disallowed.

JUSTICE: And so it doesn't-- that mean then that separates disallowed, so everything else has to be included in 5.101?

MR. ROGERS: No, no, not everything else was included. That is a none -

JUSTICE: And then why, why -

MR. ROGERS: - exclusive list ...

JUSTICE: Why didn't make merits may not include expenses references in 21-35(B)?

MR. ROGERS: Well, because 21-35(B) just has nothing to do with rate regulation. Claimant 35(b) enacting March 26, 1991 about a month and a half was for Article 5.101 rate. The only relationship between 21-35B and rate regulations is 21-35(B) is reference to premiums. Premiums are the result of making the rates under 5.101 regardless of whether the legislature start the word premium on 5.101 or not. If you go back to the source of authority for the Commissioner 5.01 is given the exclusive jurisdiction and this Court has voted that on several occasions. Mid-Century Insurance versus Kidd and then Worcester Insurance versus somebody else, that the Commissioner has the exclusive authority to promulgate rates of premium. Rates of premium, when you promulgate rates then the result of any other rates out did you charged

the insurance his premium. Then when you get invoice from an insurance company, it's invoice for premium. The definition, each year's definition, insurance dictionary definition of premium is the rate in an insurer charges reflecting his or her expectation of risk for loss. Premium is the consideration plea insurance though the result in the rate regulatory process in 5.101 is premium. Regulated rates in premium and the list of expenses that are disallowed doesn't mean everything else that you can think of goes into the rate. As counsel deceive it, it's a promise isn't agreement it's the promise of actuaries. And the actuaries decide that those employed by the department, knows employed by an insurers. What ramp it goes into making up rates?

JUSTICE: But is it, is it true that your policies are all sorts of fees and taxes that are included in the 5.101 rate?

MR. ROGERS: There are operating expenses that go in the expense flow. Those include to rate regulating insurers they may had policy fees. This all rate regulating insurer doesn't have authority in 21-35(B) it charged policy fee because that is an operating expense that goes in the expense rate.

JUSTICE: Let me ask you put side of that question. Are there any charges outside the 5.101 rate other than the ATPA fees in this case?

MR. ROGERS: In, in-- involve in this case, no. The only fee involved in this case is the ...

JUSTICE: No. I understand that but, but, but does, does Mid-Century charge any other fees outside the 5.101 rate other than the ATP fee?

MR. ROGERS: No. Now, as not the say insured from incur a fee outside of 5.101 rate that is collectible under 21-35(B). A good example are finance charges. And bear in mind when you read 21-35(B) it applies to both the insurance but-- and the application for a policy-- you don't charge premium for an application. But there might be a service charge involve in that application in the prominent statutes.

CHIEF JUSTICE: Counsel, I notice your time has expired. Are there any further questions? That had been the case is submitted and the Court will take a brief recess. Thank you.

COURT ATTENDANT: All rise.

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