

## TEXAS SUPREME COURT HOLDS THAT STOP-LOSS INSURANCE IS DIRECT HEALTH INSURANCE AND NOT REINSURANCE

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Earlier today, May 18, 2012, the Texas Supreme Court issued its decision and opinion in *Texas Department of Insurance v. American Nat'l Ins. Co.*, analyzing whether stop-loss insurance for self-funded employee health-benefit plans is "direct health insurance" or "reinsurance." Holding that stop-loss insurance sold to a self-funded employee health-benefit plan is direct insurance subject to Texas Department of Insurance ("TDI") regulation under the Texas Insurance Code, the Texas Supreme Court reversed the Court of Appeals ruling that it was reinsurance, which is not subject to regulation.

The case began after a routine audit by the TDI discovered that American National sold stop-loss policies without paying taxes or complying with TDI regulatory requirements applicable to insurers. The TDI, then, took the position that American National committed various violations of the Insurance Code including improperly recording premiums received from self-insured employers as "assumed reinsurance" and not "direct written premiums," failing to pay Risk Pool assessments on the stop-loss policies and failing to submit the policy forms to the TDI for approval or exemption.

On the one hand, American National contended that employers that self-funded their health-benefit plans for its employees are "insurers" in the "business of insurance" and that they are reinsurers when purchasing stop-loss insurance. This is because stop-loss insurance is a redistribution of risk assumed by the plan, much the same as reinsurance which redistributes risk from one insurance company to another. On the other hand, the TDI argued that while an employee health-benefit plan may act like an insurer, the Insurance Code does not regulate it as one. Accordingly, the TDI contended the stop-loss policies are direct insurance and subject to TDI regulation.

The Texas Supreme Court analyzed various definitions of reinsurance, multiple provisions of the Insurance Code and caselaw to conclude that the Insurance Code is ambiguous on how stop-loss insurance should be treated. Finding that the TDI's construction reasonable, formally promulgated and not expressly contradicted by the Insurance Code, the Texas Supreme Court held that "stop-loss insurance sold to a self-funded employee health-benefit plan is not reinsurance, but rather direct insurance subject to regulation under the Insurance Code."

It remains to be seen whether this opinion will have any implications aside from the narrow application of it in connection with stop-loss insurance for self-funded employee health-benefit plans. As a practical matter, this opinion may be used by policyholders and their claimants to support arguments that certain reinsurance products are actually insurance. We already see this to some extent in attempts by policyholders and their claimants to avoid Insurance Code provisions prohibiting direct actions against reinsurers in coverage and bad faith litigation.