

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

**APPELLANTS / CROSS-APPELLEES' FINAL REPLY
BRIEF**

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ISSUES PRESENTED

I. Are the Regents Institutions Members of IHBRA?

Iowa Code § 513C.10

Iowa Code § 513C.10(1)(a)

II. Is IHBRA Entitled To Late Fees or Attorney Fees?

Barberton Rescue Mission, Inc. v. Ins. Div. of Iowa Dep't of Com.,
586 N.W.2d 352 (Iowa 1998)

Botsko v. Davenport C.R. Comm'n, 774 N.W.2d 841 (Iowa 2009)

Olson v. Nieman's, Ltd., 579 N.W.2d 299 (Iowa 1998)

Thorn v. Kelley, 134 N.W.2d 545 (1965)

Iowa Code § 509A.1

Iowa Code § 509A.14

Iowa Code § 509A.15

Iowa Code § 513C.10(1)

Iowa Code § 513C.10(1)(b)

ARGUMENT

I. The Regents Institutions Are Not Members of IIHBRA.

The Regents Institutions have taken the position since this litigation began in 2012 that they are not proper members of IIHBRA, pursuant to the definition in Iowa Code section 513C.10(1)(a).

IIHBRA's argument concerning why the Regents Institutions should be members focuses on the fact that until 2010, various individuals in state government apparently believed that the Regents Institutions were members of IIHBRA. These individuals included an assistant attorney general and an insurance commissioner. However, the opinions of state employees in 2010 do not bind the Court's ability to examine the issue today. Under the language of Section 513C.10, the Regents Institutions are not members, regardless of anyone's opinion in 1996 or 2010.

IIHBRA also asserts that Chapter 509 grants the insurance commissioner extensive powers of regulation of group health insurance, including the Regents Institutions plans. However, group health insurance plans governed by Chapter 509 do not include the self-funded benefits provided by the Regents Institutions and the State to their

employees. Because the State is self-insured, it retains the risk of loss, and its policies are not insurance. To be considered insurance, the assumption of risk by the promoter must be the “principal object and purpose of the program.” *Barberton Rescue Mission, Inc. v. Ins. Div. of Iowa Dep't of Com.*, 586 N.W.2d 352, 355 (Iowa 1998).

Finally, IIHBRA also asserts that because Chapter 509A applies to plans offered by the State, that the Regents Institutions are subject to state insurance regulation and members of IIHBRA pursuant to Section 513C.10(1). Of course, the State could not deny that Chapter 509A applies to “any institution supported in whole or in part by public funds.” Iowa Code § 509A.1. Chapter 509A permits the State to create health plans for its employees. But does the existence of Chapter 509A mean that the Regents Institutions are “subject to insurance regulation”? In fact, the Insurance Division exercises no supervision over the Regents Institutions’ health plans. App. 117-21. The Regents Institutions do not submit any reports to the Insurance Division or receive input or correction from the Division. *Id.* Only political subdivisions are subject to the Commissioner’s rulemaking authority and oversight. Iowa Code §§ 509A.14, 509A.15. The State itself is self-insured and self-regulated.

II. IHBRA Is Not Entitled to Late Fees or Attorney Fees.

The Regents Institutions assert that they are not proper members of IHBRA and that this Court should reverse the district court on this issue and remand the case for consideration of the Regents Institutions' counter claim for reimbursement of assessments paid by ISU and UNI prior to 2010. However, if the Court affirms the district court that the Regents Institutions are members of IHBRA, it should also affirm the district court's ruling denying IHBRA's claim for both late fees and attorney fees. App. 151-60.

IHBRA asserts that it would be fair to award it late fees and attorney fees, because it has had to expend resources to pursue its claims against the Regents Institutions. The district court correctly denied both of these requests. The burden of proof for establishing damages is on IHBRA and under the applicable standards, IHBRA did not demonstrate it was entitled to fee awards. *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 310 (Iowa 1998).

First, the parties disagree on the standard of review to apply here. IHBRA asserts that the Court should review the district court's damages decision for errors at law. However, establishing a rule of damages for

the case rests in the sound discretion of the trier of fact, based upon the best evidence available. *Id.* The district court determined that it did not have enough evidence supporting IIHBRA's request for late fees, including how the amount requested was calculated. The Court should affirm the district court's finding as it was reasonable in response to the evidence presented. *Id.* (recovery may not be had if no reasonable basis for inferring or approximating amount of damages).

Regarding late fees, IIHBRA argues that the district court should have awarded its requested fees since Iowa Code section 513C.10(1)(b) allows IIHBRA to operate pursuant to a plan of operation, and the plan of operation allows a late fee charge to members of 1.5% per month. IIHBRA argues that there is no viable legal argument that the imposition of a late fee pursuant to its plan exceeds the authority the legislature granted IIHBRA. That, however, is not the basis of the district court's holding. Rather, the district court correctly held that IIHBRA had not introduced an evidentiary record adequate to support its request for late fees.

The district court was also correct to deny IIHBRA's request for attorney fees because there is no statutory authorization for that award.

IIHBRA's argument here is also based on an idea of fairness, in that it incurred unusual expense in seeking the assessments from the Regents Institutions. However, in Iowa, attorney fees can only be expressly authorized by statute. *Thorn v. Kelley*, 134 N.W.2d 545, 548 (1965); *Botsko v. Davenport C.R. Comm'n*, 774 N.W.2d 841, 845 (Iowa 2009). There may be many instances where litigation is frustrating and lengthy; but frustration or expense do not support an award of attorney fees where Iowa Code does not allow it.

CONCLUSION

For these reasons, the Court should reverse the district court's rulings that the Regents Institutions are members of IIHBRA and liable for \$4,400,651 in assessments. The Court should remand this case to the district court for consideration of the Regents Institutions' counter claims for unjust enrichment and for the return of assessments paid prior to 2010.

Respectfully submitted,

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CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this final reply brief because the brief is only being filed electronically.

/s/ Jordan Esbrook
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This final reply brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 930 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Jordan Esbrook
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

I certify that on February 1, 2023, this final reply brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ Jordan Esbrook
Assistant Attorney General