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 BRIEF

BRENNA BIRD
Attorney General of Iowa

JORDAN ESBROOK
Assistant Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-8159
(515) 281-4902 (fax)
jordan.esbrook@ag.iowa.gov

ATTORNEY FOR APPELLANTS / CROSS-APPELLEES

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ROUTING STATEMENT

This case should be retained by the Supreme Court, as it presents fundamental issues of broad public importance requiring ultimate determination by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

The Iowa Individual Health Benefit Reinsurance Association (IIHBRA) is a nonprofit organization created by Iowa Code section 513C.10 which spreads the risk of loss associated with selling individual health insurance plans among insurance carriers. IIHBRA has assessed the Defendants, the three Iowa Regents Institutions, for contributions owed as members of IIHBRA. The Regents Institutions assert that they are not members of IIHBRA, and therefore have not paid these assessments since 2010.[1] The district court ruled on summary judgment that the Regents Institutions are members of IIHBRA because they are political subdivisions of the State, not part of the State of Iowa.

Following the ruling on summary judgment, the District Court held a hearing on damages and awarded IIHBRA $4,400,651 for the unpaid assessments. IIHBRA requested late fees of 5% of the unpaid assessments per year as well as attorney fees. The district court did not award IIHBRA either late fees or attorney fees.

[1] From 1997 to 2009, Iowa State University and the University of Northern Iowa paid their assessments, and the Regents Institutions have counterclaimed for unjust enrichment, seeking the return of these funds. App. 14-15.

Both parties have appealed. The Regents Institutions appeal from the district court's ruling that they are members of IIHBRA and the imposition of damages in the amount of $4,400,651 for the unpaid assessments. IIHBRA appeals from the district court's denial of late fees and attorney fees.

STATEMENT OF THE FACTS

A. Iowa Regents Institutions.

The Iowa Board of Regents governs the University of Iowa, Iowa State University, and the University of Northern Iowa ("the Regents Institutions"), as well as several other state institutions. Iowa Code § 262.7; *Jones v. Iowa State Bd. of Regents*, 385 N.W.2d 240, 240 (Iowa 1986); *Iowa Individual Health Ben. Reinsurance Ass'n v. State Univ. of Iowa*, 876 N.W.2d 800, 810–11 (Iowa 2016). The Board of Regents and the Regents Institutions are part of the executive branch of the State of Iowa. Iowa Code § 7E.5(1)(t); ch. 262, 266, 268. The members of the Board of Regents are appointed by the governor and subject to confirmation by the senate. Iowa Code §§ 262.2, 262.7. The Regents Institutions receive an annual appropriation from the legislature. *See* 2022 Iowa Acts Ch. 1149 (Appropriations- Education).

The Regents Institutions provide health insurance plans to employees and their families. App. 117-121. These plans are self-funded. *Id.* The Regents Institutions are not required to submit any reports to the Iowa Insurance Division regarding their health plans and their plans are not examined or approved by the Division. *Id.*

B. The Iowa Individual Health Benefit Reinsurance Association.

In 1995, the Iowa legislature was concerned that if insurance carriers lost money on individual health insurance policies, they might leave the market and stop selling individual policies. To address this concern and promote the availability of individual policies, 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 Act created the Iowa Individual Health Benefit Reinsurance Association (IIHBRA) to spread the risk of loss associated with providing individual health plans among all insurers, whether or not they sold individual policies. Iowa Code § 513C.10(6). IIHBRA's function is to reinsure loss in the individual market by assessing members and distributing those contributions to members who suffered loss. Iowa Code § 513C.10(4).

IIHBRA's members are defined in statute and include a list of entities that are members. Iowa Code § 513C.10(1)(a). The definition includes entities providing health insurance or health benefits subject to state insurance regulation. *Id.* Public entities providing benefits for employees under Iowa Code Chapter 509A are not listed as members.

Every year, each member must submit to IIHBRA a report containing the amount of earned premiums and associated paid losses for their individual plans. App. 147. "Assessable loss" is defined in the statute as the dollar difference for an insurer between paid claims and ninety percent of earned premium statewide. Iowa Code § 513C.10(5). Losses are then recovered by assessing all members based on their share of the total amount of health insurance premiums. IIHBRA reinsures insurers against loss more than 90% of earned premium; or, to state the same thing another way, guarantees that insurers selling individual policies can generate a profit of at least 10% of earned premium.

IIHBRA shares a board of directors with the Iowa Comprehensive Health Insurance Association (ICHIA). *See* Iowa Code § 513C.10(5); 2001 Iowa Acts ch. 125, § 5. But the two organizations operate separately to achieve different aims. ICHIA is the state high risk pool. It offers health

insurance policies to individuals who are unable to obtain affordable health insurance coverage on the private market because of their preexisting medical conditions. Iowa Code chapter 514E. IIHBRA is a reinsurance program designed to share risk among insurers.

C. IIHBRA Assessments for Regents Institutions.

In 2012, the Regents Institutions received assessments for funds owed as members of IIHBRA for the 2010 calendar year. App. 35. They have not paid them or any IIHBRA assessment for any subsequent year. The Regents Institutions asserted that they are not members of IIHBRA and may not be assessed. App. 19-41.

The total amount IIHBRA assessed the Regents Institutions and the district court awarded for the 2010 through 2017 is $4,400,651. App. 138. That amount includes $1,013,236 for Iowa State University, $3,020,988 for the University of Iowa, and $366,427 for the University of Northern Iowa. *Id.* In addition, IIHBRA wishes to assess $1,722,755.00 in late fees, which the district court denied. App. 151-160

D. Procedural History.

IIHBRA filed this action in 2013. IIHBRA's petition alleges that the Regents Institutions are members required to submit annual reports

and pay assessments due under Iowa Code chapter 513C. App. 5-11. The Regents Institutions filed a pre-answer motion to dismiss which asserted two grounds: (1) that IIHBRA lacks the capacity to sue based on the 2001 amendment to chapter 513C; and (2) that the district court lacks subject matter jurisdiction because IIHBRA is required to arbitrate this case under Iowa Code section 679A.19, which governs disputes between "administrative departments, commissions, and boards of the state government." App. 102.

The district court, without reaching the arbitration issue, granted the universities' motion to dismiss on the first ground. App. 102. IIHBRA appealed, and the court of appeals concluded that the 2001 amendment eliminated the IIHBRA's power to sue, but did not reach the arbitration issue. *Id.* On further review, the Supreme Court held that IIHBRA had the capacity to sue and was not an entity of state government. *Iowa Individual Health Ben. Reinsurance Ass'n v. State Univ. of Iowa,* 876 N.W.2d 800, 803–04, 812 (Iowa 2016). The Supreme Court did not consider the Regents Institutions' argument that assessing the state under Chapter 513C was unconstitutional. *Id.*

The case was remanded to district court. The Regents Institutions answered the petition and asserted counter claims against IIHBRA for unjust enrichment and improper assessment, seeking to recover the $2,421,036.60 that Iowa State University paid in assessments from 1997 to 2010 and the $856,546.58 that the University of Northern Iowa paid in assessments from 1998 to 2010. App. 12-16.

In 2019, the parties filed cross motions for summary judgment on the legal issue of whether the Regents Institutions are members of IIHBRA. App. 17-18; 48-49. The district court granted IIHBRA's motion and denied the Regents Institutions' motion, ruling that the Regents Institutions are members of IIHBRA. App. 88-97. However, the court did not enter a final judgment, because the amount of assessments owed by the Regents Institutions had not yet been determined.

In 2021, the Regents Institutions filed a second motion for summary judgment, requesting that the court reconsider its ruling that they were members of IIHBRA and could be liable for the assessments. App. 98-100. The court declined to reconsider its ruling. App. 115. The case moved on to the issue of damages.

IIHBRA submitted calculations of the assessments for the years 2010 through 2017. App. 138. The Regents Institutions accepted that these calculations represent the assessments for those years. IIHBRA has not assessed the Regents Institutions for any years after 2017. The district court entered judgment in the amount of $1,013,236 for Iowa State University, $3,020,988 for the University of Iowa, and $366,427 for the University of Northern Iowa. App. 151-160.

IIHBRA also claimed that the Regents Institutions owed late fees and attorney fees. App. 134-135. The Regents Institutions denied that IIHBRA was entitled to either. App. 123-131. The district court held that IIHBRA was not entitled to either late fees or attorney fees. Express statutory authority is required for a court to award attorney fees and Chapter 513C does not authorize the award of attorney fees. App. 158. And IIHBRA had not established a factual record showing it was entitled to late fees. *Id.*

The Regents Institutions appeal from the district court's rulings that they are members of IIHBRA. App. 161. The Court should reverse the district court's ruling and remand the case to consider the Regents Institutions' counter claims for assessments paid by Iowa State

University and the University of Northern Iowa for years prior to 2010. IIHBRA appeals from the district court's rulings that they are not entitled to late fees or attorney fees. App. 170-71.

ARGUMENT

I. The Regents Institutions Are Not Members of IIHBRA.

A. Preservation of Error and Standard of Review.

The Regents Institutions have preserved this issue by raising it before the district court on a motion for summary judgment. App. 23-28.

The Court's review of the district court's ruling on a statutory interpretation question in a ruling on a motion for summary judgment is for correction of errors at law. *Homan v. Branstad*, 887 N.W.2d 153, 164 (Iowa 2016).

B. Argument.

The members of IIHBRA are defined in Iowa Code section 513C.10(1)(a). The Regents Institutions, as part of the State of Iowa, cannot be members of IIHBRA. The district court erred when it concluded that they are.

Members of the Association are defined to be:

> All persons that provide health benefit plans in this state including insurers providing accident and sickness insurance

> under chapter 509, 514, or 514A, whether on an individual or group basis; fraternal benefit societies providing hospital, medical, or nursing benefits under chapter 512B; and health maintenance organizations, other entities providing health insurance or health benefits subject to state insurance regulation, and all other insurers as designated by the board of directors of the Iowa comprehensive health insurance association with the approval of the commissioner.

Iowa Code§ 513C.10(1)(a).

The Regents Institutions are not members of IIHBRA. The definition in Section 513C.10(1)(a) does not include state entities that provide health insurance to their employees, like the Regents Institutions, under Iowa Code chapter 509A. Nor do the Regents Institutions fall into the catch-all category at the end of the definition, "other entities providing health insurance or health benefits subject to state insurance regulation." The Regents Institutions are not subject to state insurance regulation by the Insurance Commissioner.

The self-funded group health insurance plans offered by the Regents and by the State of Iowa are governed by Iowa code Chapter 509A, Group Insurance for Public Employers. The provisions of Chapter 509A delegate authority to regulate public employer insurance to the governing bodies of the public entity. Specific authority is found at: § 509A.2 (the source of funds are to come exclusively from contributions of

employees or the governing body); § 509A.5 (funds for each plan are under the control of the governing body and shall be used exclusively for administering and carrying out the plan adopted by the governing body); § 509A.8 (any rules for the operation of the plan are to be established by the governing body); and §509A.10 (decisions of the governing body are final and cannot be appealed or set aside by court, other than in cases of fraud).

The authority of the insurance commissioner with respect to 509A group insurance plans is limited to plans of political subdivisions and school corporations. *See* Iowa Code § 509A.14 (the commissioner "shall adopt rules for self-insurance plans for … health insurance for a political subdivision of the state or a school corporation") and § 509A.15 (requiring a certification, actuarial opinion and financial report to be filed with the insurance commissioner by a political subdivision and school corporation). "Political subdivision" means a city, county, or school corporation. Iowa Code 23A.1(1); *Graham v. Worthington*, 146 N.W.2d 626, 633 (Iowa 1966). The Regents Institutions are not cities, county, or school corporations, but are part of the executive branch of the State. Iowa Code § 7E.5(1)(t).

State regulations addressing Chapter 509A plans also recognize that health self-funded plans for the State of Iowa are exempted from regulation. Iowa Administrative Code rule 191-35.20 states: "This rule shall apply to life and health self-funded plans for political subdivisions of the state, school corporations, and all other public bodies of the state. This rule shall not apply to life and health self-funded plans for the state of Iowa." Iowa Administrative Code rule 191-35.20 requires the self-funded plans of political subdivisions to submit an annual report to the Commissioner, to demonstrate that the plans are able to cover reasonably anticipated expenses, and allow the Commissioner to retain an actuary to examine these plans. 191 Iowa Admin. Code r. 35.20(3). But these regulations do not apply to plans provided by the State.

The district court recognized that plans provided by the State of Iowa to its employees are not subject to state regulation, and that if the Regents Institutions were part of the State of Iowa, they would not be providing health insurance or benefits subject to state regulation. App. 93-94. However, the district court then erroneously and inexplicably concluded that the Regents Institutions were political subdivisions, not part of the State.

The Regents Institutions are unquestionably part of the state of Iowa, and therefore their health plans are self-funded plans for the state of Iowa exempt from state insurance regulation. Iowa Code chapter 7E provides that the Board of Regents and the Regents Institutions is a department of the executive branch of state government. Iowa Code § 7E.5(1)(t). The Regents have primary responsibility for state involvement in higher education. *Id.*

Courts have found that the Regents Institutions are part of the State of Iowa and must be treated as State entities. The Iowa Supreme Court has recognized that the Regents Institutions are state agencies, so that with some exceptions, their actions must be challenged through judicial review under Iowa Code chapter 17A. *Papadakis v. Iowa State Univ. of Sci. & Tech.,* 574 N.W.2d 258 (Iowa 1997); *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 489 (Iowa 2012). In *Brine v. University of Iowa*, the Eighth Circuit held that the Board of Regents and the University of Iowa shared the State's immunity under the Eleventh Amendment to the United States Constitution. *Brine v. University of Iowa*, 90 F.3d 271, 275 (8th Cir. 1996). Iowa State University has also

been found to be a state entity for purposes of the Eleventh Amendment. *Van Pilsum v. Iowa State University*, 863 F. Supp. 935 (S.D. Iowa 1995).

In fact, it is the law of this case that the Regents Institutions are part of the state of Iowa. When the district court's dismissal of IIHBRA's petition was on further review, the Supreme Court held that IIHBRA, unlike the Regents Institutions, is not an arm of state government. *Iowa Individual Health Ben. Reinsurance Ass'n v. State Univ. of Iowa*, 876 N.W.2d 800, 810–11 (Iowa 2016). The Court recognized that the Regents Institutions are part of state government. *Id.* (referencing section 7E.5(1) which provides "a nonexclusive list of the twenty-three principal central departments of the executive branch"). Under the law of the case doctrine, "an appellate decision becomes the law of the case and is controlling on both the trial court and on any further appeals in the same case." *United Fire & Cas. Co. v. Iowa Dist. Ct.*, 612 N.W.2d 101, 103 (Iowa 2000). The doctrine is based on a public policy against reopening matters which have already been decided. *Id.*

In the previous appeal in this case, IIHBRA pointed to several facts that, it argued, showed it was not part of state government. *Iowa Individual Health Ben. Reinsurance Ass'n.,* 876 N.W.2d at 811. These

same considerations show that the Regents Institutions are part of state government. The employees of the IIHBRA are not paid by the State of Iowa. By contrast, Regents Institutions staff are state employees. The IIHBRA is represented by private legal counsel, while the Regents Institutions, like other state departments, are represented by the Iowa Attorney General. The IIHBRA is funded by its assessments collected primarily from private sources. The Regents Institutions, however, receive appropriations from the state treasury.

Since the Regents Institutions are an agency or branch of state government, the health plans they provide to employees and their families are not subject to the state insurance regulation through the rules in the administrative code. 191 Iowa Admin. Code r. 35.20. They do not need to submit an annual report or obtain a fidelity bond or excess loss coverage, as described in the rules. App. 117-122. They also do not need to pay assessments to IIHBRA because they are not "entities providing health benefits subject to state insurance regulation" and are not members of IIHBRA.

The Court should reverse the district court's ruling that the Regents Institutions are members of IIHBRA and remand the case to the district court to consider the Regents Institutions' counter claims.

II. Assessing the Regents Institutions as Members of IIHBRA Would Violate Article VII, Section 1 of the Iowa Constitution.

A. Preservation of Error and Standard of Review.

The Regents Institutions preserved error on this issue by raising it in a motion to dismiss and motion for summary judgment. App. 29-32.

The Court's review of constitutional issues is de novo. *Simmons v. State Pub. Def.,* 791 N.W.2d 69, 73 (Iowa 2010).

B. Argument.

The Iowa Constitution prohibits the State from extending credit to private entities, even if there is a public purpose for doing so. *Star Equip., Ltd. v. State, Iowa Dep't of Transp.,* 843 N.W.2d 446, 460 (Iowa 2014). IIHBRA is a mechanism for spreading the loss incurred by private entities offering individual insurance policies. The legislature believed that this reinsurance program would prevent insurers from leaving the individual market. But for the State to be assessed to cover any part this

loss would mean acting as a surety for the private debt of insurers, in violation of Article VII, section 1 of the Iowa Constitution.

Article VII of the Iowa Constitution pertains to state debts and section 1 of that article is entitled "Credit not to be loaned." It provides:

> The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the state shall never assume, or become responsible for, the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the state.

Iowa Const. art. VII, § 1.

The Iowa Supreme Court has recognized that the state "loans its credit" when it acts as a surety for another. *Grout v. Kendall,* 192 N.W. 529, 531 (Iowa 1923). Therefore Article VII, section 1 does not prohibit "the creation of a primary indebtedness for any purpose whatever." *Id.* at 473, 192 N.W. at 531. Rather, the provision only "forbade the incurring of obligations by the indirect method of secondary liability." *Star Equip., Ltd.,* 843 N.W.2d at 460.

To assess the State for the losses incurred by private businesses selling individual insurance policies would be to impose secondary liability on the State, in violation of the Constitution. Secondary liability is incurred when the surety (here the State) has no personal concern in

the debtor's obligation and gains no benefit from the debtor's obligation. The "main purpose" of the promise must not be the benefit of the surety. *Gallagher, Langlas & Gallagher v. Burco,* 587 N.W.2d 615, 618 (Iowa Ct.App.1998). A principal, as distinguished from a surety, means the person with a direct personal relationship in the debt and who receives a benefit from the debt. *Ft. Dodge Culvert & Steel Co. v. Miller,* 206 N.W. 141, 142 (1925); 72 C.J.S. *Principal and Surety* § 12 (2005); *Star Equip., Ltd.,* 843 N.W.2d at 460–61. This is a long-standing and widely recognized principle. *See, e.g., F & M Bldg. P'ship v. Farmers & Merchs. Bank,* 316 Ark. 60, 871 S.W.2d 338, 341 (1994) (holding lessor who mortgaged leased property to secure loan, on condition that it receive the majority of loan proceeds, was a coprincipal rather than a surety); *Star Equip., Ltd.,* 843 N.W.2d at 460-61.

The State derives no benefit from sharing in IIHBRA's assessments, and therefore would be incurring secondary liability or lending its credit if assessed by IIHBRA. The main purpose of IIHBRA's risk sharing process is to benefit insurance carriers who might otherwise decide their losses were too great and leave the individual market. The State does not offer individual health insurance plans on the market.

Consequently, the Regents Institutions and the state of Iowa will never benefit from the assessment of other Association members. The assessed funds will always flow to insurance companies offering individual policies to cover those private debts.

Although the goals of the legislation are laudable, the Association is requesting the Regents Institutions to bear the losses incurred by an immense private industry. And although this may serve a public purpose of encouraging insurers to offer individual policies, a public purpose is not a permitted exception to the prohibition in Article VII, Section 1. *Star Equip., Ltd.,* 843 N.W.2d at 460. To permit IIHBRA to assess the Regents Institutions would violate the Iowa Constitution and therefore their petition for assessments should be denied.

III. IIHBRA Did Not Demonstrate It Is Entitled To Late Fees.

A. Preservation of Error and Standard of Review.

The Regents Institutions preserved error on this argument by raising it before the district court. App. 129-130.

Establishing a rule of damages for the case rests in the sound discretion of the trier of fact, based upon the best evidence available. *Olson v. Nieman's, Ltd.,* 579 N.W.2d 299, 310 (Iowa 1998). When a party

challenges a district court's ruling claiming substantial evidence does not support the decision, the court must view the evidence in the light most favorable to support the judgment and liberally construe the court's finding to uphold, rather than defeat, the result reached. *Iowa Beta Chapter v. State*, 763 N.W.2d 250, 257 (Iowa 2009). The ultimate question is whether the evidence supports the court's finding, not whether the evidence would support a different finding. *Id.*

B. Argument.

The Regents Institutions assert that they are not proper members of IIHBRA 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 on the Regents Institutions' membership in IIHBRA, it should also affirm the district court's ruling denying IIHBRA's claim for both late fees and attorney fees. App. 130.

At the hearing on damages, IIHBRA claimed that it was entitled to late fees on the unpaid assessments sent to the Regents Institutions since 2010 at a rate of 5% per year. App. 138; 174:18-175:21. IIHBRA sought

the amount of the unpaid assessments, late fees in the amount of 5% per year (totaling $1,722,755.00), and attorney fees. IIHBRA submitted two documents to the district court in support of its request for late fees: IIHBRA's plan of operation, and the stipulated chart of the amounts of assessments to each Regents Institution from 2010 to 2017. App. 138-150.

The district court correctly held that on the sparse record submitted by IIHBRA, there was insufficient evidence to award late fees to IIHBRA. The district court noted that IIHBRA's plan of operation called for late fees in the amount of 1.5% per month, not 5% per year. The district court was unable to determine how IIHBRA had reached the 5% per year amount. In addition, the district court recognized that the Regents Institutions have argued in good faith that they are not members of IIHBRA since this litigation began in 2013, and that IIHBRA bears the responsibility for the fact that this case has lasted nearly a decade. The court ruled that it would be inequitable to require the Regents Institutions to pay late fees for the time this litigation has taken. In the end, since the district court was unable to determine based on the evidence what late fees should be imposed, it did not impose any.

In Iowa, the plaintiff bears the burden of establishing a claim for damages with some reasonable certainty and for demonstrating a rational basis for determining their amount. *Conley v. Warne,* 236 N.W.2d 682, 687 (Iowa 1975). Recovery should be denied if there is insufficient evidence for the court to determine the amount to award. *See Moody v. Van Wechel,* 402 N.W.2d 752, 758 (Iowa 1987) (insufficient evidence to support a claim for damages where there was no showing of the value of the damaged crops); *Schiltz v. Teledirect Int'l, Inc.,* 524 N.W.2d 671, 674–75 (Iowa Ct.App.1994) (landlord's claim of damages against a tenant for unpaid electrical charges was too speculative when the lease required the tenant to compensate the landlord for certain electrical use but "[i]nsufficient evidence was provided from which the trial court could adequately determine the amount of electricity expenses which [the defendant] should pay"); *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996)(counterclaimant did not produce enough evidence to establish the reduction in value of an asset so damages could not be awarded).

Here, the district court had no evidence on which to base a ruling that IIHBRA was entitled to 5% per year as a late fee. There was no

testimony about how IIHBRA calculated this amount. The only evidence before the district court was the plan of operation, which called for 1.5% per month, and the spreadsheet showing the assessments. App. 138. The plan of operation does not define "late fee." It does state that a late fee will be added to the next years' assessment, which is not how IIHBRA calculated the late fees in its damages request. The district court would have had to speculate to award IIHBRA's requested 5% per year late fee. It is IIHBRA's burden to demonstrate that it is entitled to damages and to provide the evidence supporting the amount it requested. *Conley,* 236 N.W.2d at 687. It did not do so, and the Court should affirm the district court's decision.

The district court also correctly noted that the Regents Institutions have asserted that they are not members since IIHBRA filed suit in 2013. The district court also recognized the fact that IIHBRA has caused this case to be unreasonably delayed. It would be inequitable to penalize the Regents Institutions for making good faith legal arguments in the proper forum and for the time it has taken this case to progress through the court system.

In addition, IIHBRA has no statutory support for its request for late fees. Under Iowa Code section 513C, which created and governs IIHBRA, the organization may assess the assessable loss plus any "necessary operating expenses" and "additional expenses as provided by law." Iowa Code § 513C.10(6). Nowhere in the Iowa Code is there any authority to assess late fees. The late fees IIHBRA wishes to impose are evidently not related to the amount IIHBRA requires to operate, but are calculated in proportion to the amount assessed to each institution. In addition, in the statute, the term "additional expenses" comes after and modifies "operating expenses," which indicates that the additional expenses must be related to costs actually incurred by IIHBRA. *See Messerschmidt v. City of Sioux City*, 654 N.W.2d 879, 884 (Iowa 2002) (*ejusdem generis* provides that when general words follow specific words in a statute, the general words are read to embrace only objects similar to those objects of the specific words); *Shatzer v. Globe Am. Cas. Co.*, 639 N.W.2d 1, 5 (Iowa 2001); *accord Maxim Techs., Inc. v. City of Dubuque*, 690 N.W.2d 896, 902 (Iowa 2005). The decision to impose late fees on members is evidently an internal policy decision by IIHBRA, but it is not enforceable because it is not authorized in Code.

Nor can IIHBRA rely on the general statutory provision for interest on judgments. Interest does not accrue until the date of entry of judgment, in this case, on July 5, 2022. Iowa Code § 668.13(4).

IV. IIHBRA Is Not Entitled To Attorney Fees.

A. Preservation of Error and Standard of Review.

The Regents Institutions preserved error on this issue by raising it before the district court. App. 127-129.

There is no statute providing for the award of attorney fees in this case. The standard of review for an award of common-law attorney fees is de novo. *Wolf v. Wolf,* 690 N.W.2d 887, 896 (Iowa 2005) (citing *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.,* 510 N.W.2d 153, 158 (Iowa 1993)).

B. Argument.

The district court was correct to deny IIHBRA's request attorney fees for the expense of prosecuting this action. IIHBRA is not entitled to attorney fees. Iowa follows the American rule: 'the losing litigant does not normally pay the victor's attorney's fees.' *Thornton v. Am. Interstate Ins.,* 897 N.W.2d 445, 474 (Iowa 2017). Generally, attorney fees are recoverable only by statute or under a contract. *Id.* Iowa Code section

513C.10, the enabling statute for IIHBRA, provides that: "the assessable loss plus necessary operating expenses for the association, plus any additional expenses as provided by law, shall be assessed by the association to all members in proportion to their respective shares of total health insurance premiums or payments for subscriber contracts received in Iowa during the second preceding calendar year, or with paid losses in the year, coinciding with or ending during the calendar year, or on any other equitable basis as provided in the plan of operation." Iowa Code § 513C.10(6). This statute does not mention or authorize attorney fees. There is no applicable fee-shifting statute or contract here that would permit the Court to award attorney fees.

IIHBRA alleges that attorney fees are "additional expenses as provided by law" or "operating expenses" which are provided for in Section 513C.10. App. 135-36. However, statutory authorization for attorney fees must be express and "must come clearly within the terms of the 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). Iowa courts' stringent approach to statutory attorneys' fees is reflected in *Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 536–37 (Iowa 1980),

where the Iowa Supreme Court held that a statutory provision authorizing an award of attorneys' fees related to district court proceedings did not imply that attorneys' fees on appeal could also be recovered. Other jurisdictions also reject awarding statutory attorneys' fees by implication and require express language. *See Comm'r of Envtl. Prot. v. Mellon*, 945 A.2d 464, 470 (Conn. 2008); *Vance v. Speakman*, 409 A.2d 1307, 1311 (Me.1979); *Holland v. Wal–Mart Stores, Inc.*, 1 S.W.3d 91, 95 (Tex.1999); *see also* Robert L. Rossi, Attorneys' Fees § 6:7, at 6–22 to 6–23 (3d ed. 2002) (noting where statutory provisions contain no language explicitly mentioning attorneys' fees, such fees are generally not authorized).

In addition, the language in Section 513C refers to assessing operating costs and expenses to the members "in proportion to their respective shares of total health insurance premiums or payments for subscriber contracts received in Iowa during the second preceding calendar year" or "on any other equitable basis as provided in the plan of operation." Iowa Code § 513C.10(6). IIHBRA is asking for attorney fees only from the Regents Institutions. It is not proposing to spread the costs

of this litigation to all of its members, as this statutory provision allows. And the plan of operation is silent on attorney fees.

No exception to the American rule applies here. IIHBRA has not alleged that the Regents Institutions acted in bad faith, vexatiously, or for oppressive reasons. *Matter of Guardianship of Radda*, 955 N.W.2d 203, 214–15 (Iowa 2021)(rare exception to American rule allows for attorney fees in cases of bad faith litigation). And the Regents Institutions have pursued legal arguments in good faith throughout this matter. The Iowa Supreme Court has cautioned that fee-shifting awards can "chill vigorous advocacy." *First Am. Bank v. Fobian Farms, Inc.,* 906 N.W.2d 736, 751 (Iowa 2018); *Radda*, 955 N.W.2d at 215. The Regents Institutions should not be penalized for pursuing good faith arguments in their defense. In addition, as the district court recognized, IIHBRA has unnecessarily prolonged this litigation. Since October 11, 2019, when the Court granted summary judgment to IIHBRA, the only issue remaining has been the amount IIHBRA claims that the Regents Institutions owe. IIHBRA failed to respond to discovery or to communications from the Regents Institutions. IIHBRA should not be awarded attorney fees for the unnecessary continuation of this matter.

There is no basis in statute and no exception to the American rule that would have permitted the district court to award IIHBRA attorney fees, and the district court's decision should be affirmed.

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 for years prior to 2010.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

/s/ Jordan Esbrook
JORDAN ESBROOK
Assistant Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-8159
(515) 281-4902 (fax)
jordan.esbrook@ag.iowa.gov

ATTORNEY FOR
APPELLANTS /CROSS-
APPELLEES

CERTIFICATE OF COST

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

/s/ Jordan Esbrook
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This 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 5,696 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 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