7-30-2008

Farber v. Idaho State Ins. Fund Appellant's Brief Dckt. 35144

IN THE SUPREME COURT OF THE STATE OF IDAHO

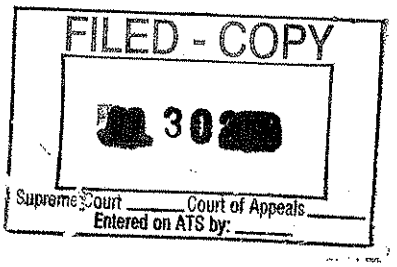
RANDOLPH E. FARBER, SCOTT ALAN BECKER and CRITTER CLINIC, an Idaho Professional Association,

Plaintiffs/Appellants,

vs.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, its Manager, and WILLIAM DEAL, WAYNE MEYER, MARGUERITE McLAUGHLIN, GERALD GEDDES, MILFORD TERRELL, JUDI DANIELSON, JOHN GOEDDE, ELAINE MARTIN, and MARK SNODGRASS in their capacity as member of the Board of Directors of the State Insurance Fund,

Defendants/Respondents.



Docket No. 35144

APPELLANTS' BRIEF

Appeal from the District Court of the
Third Judicial District of Canyon County

Honorable Thomas Ryan
District Judge, Presiding

Donald W. Lojek
Lojek Law Offices, Chtd.
1199 W. Main St.
PO Box 1712
Boise, ID 83701

Attorneys for the Appellants

Philip Gordon
Bruce S. Bistline
Gordon Law Offices
623 West Hays Street
Boise, ID 83702

Attorneys for the Appellants

Richard E. Hall
Keely Duke
Hall Farley Oberrecht & Blanton
702 W. Idaho St. Ste. 700
PO Box 1271
Boise, Idaho 83701

Attorneys for the Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I.
ISSUES ON APPEAL

The single issue on appeal is as follows:

A. Does I.C. § 72-915 compel the Manager of the State Insurance Fund to distribute available dividend monies to its policyholders on a *pro rata* basis?

II.
STATEMENT OF THE CASE

A. Nature of the Case

This case involves the meaning of I.C. § 72-915. The State Insurance Fund ("SIF") and its Board of Directors each year routinely decide whether to distribute dividends from the excess surplus of the SIF. However, once the SIF Manager and Board of Directors have decided that there is a sufficient surplus so as to allow dividends to be paid to policyholders they have ignored the clear requirements of the law and consistently decided to exclude approximately 75% of the policyholders from any dividend in favor of the other 25% who collectively receive the entire dividend distribution which is divided among this favored minority.

Plaintiffs and the some 30,000 members of the class they represent have protested this conduct in light of I.C. § 72-915. Plaintiffs believe that this statute is controlling and prohibits the exercise of any discretion on the part of the State Insurance Fund's Manager and Board of Directors with respect to the distribution of dividend monies once it has been

decided that there are sufficient monies to distribute to policyholders in the form of dividends.

This appears to be a case of first impression.

B. The Course of Proceedings

1. The Class Action Complaint was filed on July 21, 2006.
2. An Acceptance of Service for The Idaho State Insurance Fund was filed on July 26, 2006.
3. An Acceptance of Service for James Alcorn, Manager Idaho State Insurance Fund was also filed on July 26, 2006.
4. A Notice of Appearance was filed on or about August 11, 2006.
5. An Answer was filed on or about October 2, 2006.
6. Plaintiffs filed a Motion for Partial Summary Judgment on January 3, 2007.
7. Defendants filed a Motion for Summary Judgment on or about February 13, 2007.
8. *Motion for Class Certification with Supporting Memorandum filed on March* 2, 2007.
9. Argument was held on the parties' cross motions for summary judgment on April 6, 2007.
10. The Order of the Court granting defendants' Motion for Summary Judgment on a statute of limitations issue but denying the defendants' Motion for Summary Judgment based on standing and waiver was entered on April 30, 2007.

11. An Order granting Plaintiffs' Rule 56(f) Motion and Order Vacating Hearing on Plaintiffs' Motion for Partial Summary Judgment was filed on April 30, 2007.

12. An Amended Complaint was filed on July 10, 2007 to include a dividend distribution which occurred after the initial complaint was filed in the "class period" and to refine the definition of the class.

13. Plaintiffs' Second Motion for Partial Summary Judgment was filed on July 27, 2007.

14. Defendants' Second Motion for Summary Judgment was filed on or about August 23, 2007.

15. Order Re: Plaintiffs' Motion for Class Certification filed on or about September 24, 2007.

16. Defendants' Motion for Summary Judgment on the Meaning of I.C. § 72-915 filed on or about October 23, 2007.

17. Order Re: Motions for Summary Judgment filed on February 15, 2008 granting defendants' Motion for Summary Judgment regarding the meaning of I.C. § 72-915.

18. Rule 54(b) Certification of Final Judgment filed February 15, 2008.

C. Statement of Facts

The Idaho State Insurance Fund is "an independent corporate body politic" created by statute for the purpose of providing worker's compensation insurance to Idaho

employers. Amended Complaint, R 49, ¶ 4; Answer to Amended Complaint, R 67, ¶ 7. Article 72, Chapter 9, Idaho Code. The SIF is governed by a Board of Directors which directs the policies and operation of the Fund. Amended Complaint, R 49, ¶5; Answer to Amended Complaint, R 67, ¶ 8. The day-to-day business of the SIF is conducted by a Manager, Defendant James M. Alcorn, who is appointed by the Board of Directors. Amended Complaint, R 50, ¶6; Answer to Amended Complaint, R 67, ¶ 9.

While the SIF exists to carry out a proprietary function and has no governmental function, it is considered to be an agency of the State of Idaho. *State ex rel. Williams v. Musgrave,* 84 Idaho 77, 85, 370 P.2d 778, 782-783, (1962). It has the status of a private insurance company which is regulated by the Department of Insurance as a mutual insurer, Idaho Code §72-901 (4); yet it is not a mutual insurer. *Kelso & Irwin, P.A. v. State Insurance Fund,* 134 Idaho 130, 133-135 ; 997 P.2d 591, 594-596 (2000). It is not a corporation but it has many of the characteristics of a corporation. *State ex rel. Williams v. Musgrave,* 84 Idaho at 88, 370 P.2d at 774. It has the power to enter into contracts to provide insurance and services related to that insurance, Idaho Code §72-905. The premium dollars that the SIF collects as a result of those contracts, while not a part of the State Treasury, are nevertheless placed into the custody of the State Treasurer. Idaho Code § 72-910. The monetary assets of the SIF are to be managed by an "endowment fund investment board" -- presumably a reference to the Board established in Idaho Code §57-718.

Given that the SIF is permitted to enter into contracts of insurance, information about the powers and procedures of the SIF relative to the distribution of a dividend pool might conceivably be found in a printed policy or contract which was issued to its

policyholders. But the policy issued by the SIF documenting coverage for workers' compensation does not include any provision which identifies the factors or the formula that may or will be used by the SIF in determining how the funds in a dividend pool will be distributed between and among the policyholders (hereinafter "distribution criteria").[1] The SIF policy form also does not include any provision which confers discretion upon the SIF with respect to the selection of any distribution criteria. *See Affidavit of Donald W. Lojek,* January 5, 2007, Exhibit 1..

There are no rules or regulations issued by the Department of Insurance or by the SIF which set out dividend distribution criteria or which confer discretion upon the SIF with respect to the selection of distribution criteria. *See Affidavit of Philip Gordon*, January 5, 2007, ¶¶ 3-7.

Despite being afforded the opportunity to identify any other statute, regulation, attorney general opinion, or other authority which directly supports the distribution criteria selected by it, the SIF has indicated only that the process utilized was "performed pursuant to the discretionary power granted to the Manager under Idaho law as set forth in Title 72 of the Idaho Code." *See Answer to Interrogatory No. 2,* attached as Exhibit 2 to the Affidavit of Bruce S. Bistline, January 5, 2007 (hereinafter Aff Bistline").[2]

---

[1] The SIF was asked to admit that no provision in its policies of insurance provided that the Fund could or would take into account the amount of premium paid in deciding which of its policyholders would share in a dividend distribution. The SIF denied these requests on the basis that the policies speak for themselves. *See Response to Request for Admissions Nos. 161 and 162,* Exhibit 3, Aff Bistline, January 5, 2007.

[2] The Affidavit of the SIF Manager, James M. Alcorn, p.8, ¶ 32, dated February 13, 2007 offers that the decision to exclude the 30,000 or so small employers in favor of the approximately 10,000 larger employers somehow promotes the efficient operation and management of the Fund which is dictated by I.C. § 72-901.

Given that the SIF is an entity created by the legislature, and in the absence of contractual rights, rules regulations or regulatory powers, information about the powers and procedures of the SIF relative to the distribution of a dividend pool must be found in the enabling statutes. The sole statute which sets forth distribution criteria and, consequently, controls the allocation of a dividend distribution is Idaho Code §72-915. That statute states as follows:

> 72-915. DIVIDENDS. At the end of every year, and at such other times as the manager in his discretion may determine, a readjustment of the rate shall be made for each of the several classes of employments or industries. If at any time there is an aggregate balance remaining to the credit of any class of employment or industry which the manager deems may be safely and properly divided, he may in his discretion, credit to each individual member of such class who shall have been a subscriber to the state insurance fund for a period of six (6) months or more, prior to the time of such readjustment, such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates.

The Idaho Attorney General's office also appears to have concluded that the provisions of I.C. §72-915 represents the sole source of the SIF's power with respect to the issuance of dividends in general and specifically with respect to the SIF's selection of distribution criteria. *See letter from David G. High, Chief Civil Litigation Division, to Robert Egusguiza,* January 22, 2003, Exhibit 3, Aff. Bistline.

In every year from 2000 through 2005, the SIF has determined that it had retained a surplus which could be safely distributed among its policyholders and thereby created an annual dividend pool. *See Response to Request for Admissions Nos. 31, 37, 43, 49, 55, 61,* Exhibit 4, Aff. Bistline. It appears that the throughout this period the SIF's

determination was based upon an assessment of premiums collected, reserves available and retained surplus with a stated goal of maintaining a 2:1 ratio between all premiums collected during the year and the entire surplus held at the end of the year. *See Documents CL0003, CL0007, CL0014, CL00025,* Exhibit 5, Aff. Bistline.

Beginning with the dividend monies for the 2001 policy year which were distributed in early 2003, the SIF has, with respect to each declared dividend, elected not to distribute a share of the dividend pool to all policyholders. This concept was first discussed by the Board of Directors in November 2002 and was implemented by the Manager in 2003. *See Documents CL0025, CL0028 - CL0029,* Exhibit 5, Aff. Bistline. At the outset, the Board and Manager considered the idea of excluding policyholders who paid $2000 to $2,500 or less and of implementing a formula to take into account a loss ratio so that "only companies who earn a dividend should receive one." *See Documents CL 0028-0029,* Exhibit 5, Aff. Bistline. Ultimately, a bright line was drawn so that no policyholder who paid $2,500 or less in premiums received any share of the annual dividend pools distributed in each year between 2003 and February of 2007. *See Response to Request for Admission Nos. 52, 58, 64,* Exhibit 4, Aff. Bistline.

Each of the Plaintiffs and the approximately 30,000 members of the class they represent were policyholders who purchased worker's compensation insurance from the SIF. Plaintiff Farber was a policyholder for each year between 2000 and 2005, and he did not receive a share of any dividend pool distributed in those years. *See Response to Request for Admission Nos. 74-79 and 92-97,* Exhibit 5, Aff. Bistline. For each relevant dividend period Plaintiff Farber paid less than $2,500 in premiums. *See Response to Request for Admission 134-139,* Exhibit 5, Aff. Bistline."

Plaintiff Becker was a policyholder for each year between 2000 and 2005 and he did not receive a share of any dividend pool distributed in those years. *See Response to Request for Admission Nos. 80-85 and 98-103,* Exhibit 5, Aff. Bistline. For each relevant dividend period, Plaintiff Becker paid less than $2,500 in premiums. *See Response to Request for Admission Nos. 140-145,* Exhibit *5,* Aff Bistline.

Plaintiff Critter Clinic was a policyholder for each year between 2000 and 2005 and it did not receive a share of any dividend pool distributed in 2002 through 2004. *See Response to Request for Admission Nos. 86-91 and 106-108* , Exhibit *5,* Aff, Bistline. For each relevant dividend period (2000 through 2003) Plaintiff Critter Clinic paid less than $2,500 in premiums. *See Response to Request for Admission Nos. 146-149,* Exhibit 5, Aff. Bistline.

The trial court in its Order dated February 15, 2008 granted the SIF motion for a summary judgment dated October 23, 2007 which asked for agreement with their interpretation of I.C. § 72-915, i.e., that the statute is ambiguous and as such must be read to incorporate the discretion afforded the Manager with respect to other aspects of the SIF's operation. The Defendants' argument then concluded that the Manager of the SIF could exercise discretion in drawing bright lines demarcating which policyholders would receive a dividend and which would not. The Order appears at R. 92-95 and states in material part at R 93-94 that:

> Idaho Code § 72-915, in context with the directives of other statutes set forth in the Act, the laws of Idaho's sister states, and the decisions of the Idaho Supreme Court, allows the Manager of the State Insurance Fund, with approval of the Board of Directors, to use his discretion to distribute dividends to policyholders in a manner that is consistent with the legislative purpose and directives set forth in Article 72,

Chapter 9, Idaho Code, which established the State Insurance Fund.

From that Order and subsequent Rule 54(b) Certification the Plaintiffs have timely appealed.

III.
ARGUMENT

A. Scope of Review

This Court exercises free review over issues decided by the trial court on a motion for summary judgment. "This Court's review of a trial court's ruling on a motion for summary judgment is the same standard used by the trial court in originally ruling on the motion." *Robison v. Bateman-Hall*, 139 Idaho 207, 209, 76 P.3d 951,953 (2003). The record is to be liberally construed in favor of the party opposing the motion for summary judgment and any reasonable conclusions and inferences are drawn in that party's favor. *Id.* Additionally, the interpretation of a statute is a question of law over which this Court exercises *de novo* review. *V-1 Oil Co. v. Idaho State Tax Commission,* 134 Idaho 716, 718, 9 P.3d 519, 521 (2000).

B. A Summary of the Argument

With respect to any entity it creates the legislature has the power to confer discrete powers and discrete responsibilities along with limited discretion to discharge those powers

and responsibilities. However, the legislature always has the power to limit or to remove that discretion as it sees fit.

The legislature in its enactment of I.C. § 72-915 made a policy determination whereby certain powers and limited discretion were given to the State Insurance Fund. Among the powers specifically conferred upon the SIF Manager was the power to make factual determinations and, under appropriate circumstances, to exercise some discretion in order to determine that some portion of the accumulated surplus of the fund could safely be distributed among its policyholders. Thus, the legislature has given the Manager the discretion to determine first, whether a dividend pool is available for distribution to policyholders and, second, the discretion to decide whether to distribute that dividend pool to policyholders.

One of the responsibilities ofthe Manager of the SIF is the obligation set forth in the statute to distribute the dividend pool by means of a "credit to *each* individual" who had been a policyholder for at least six months or more prior to the declaration of the dividend. (Emphasis added). At that point the discretion of the Manager of the SIF has ended. In the determination of the appropriate credit the Manager has no discretion. That is to say, once the Manager has decided that there is enough money to be distributed to the policyholders in the form of dividends, the Manager's discretion there ends and the distribution should then be made on a *pro rata* basis.

An election by the Manager, whether wholly arbitrary or based upon some perceived justification, to draw a bright line at $2,500 and to declare that those policyholders who have not paid in excess of that amount in annual premium are disqualified from sharing in an identified dividend pool is beyond the power of the Manager. The effect of drawing this

$2,500 line is to exclude approximately 75% of the SIF policyholders in a bold refusal to follow I.C. § 72-915. Affidavit of Donald W. Lojek, November 6, 2007, Exhibit B; Deposition of James Alcorn, p.126, ll 14-25.

Since the fund insures about 40,000 policyholders there are approximately 30,000 employers in this state who now receive absolutely no dividend even though millions of dollars are annually distributed to the remaining 25% of policyholders

C. Argument

The Court is asked to keep in mind that plaintiffs ask only for a decision on the *meaning* of I.C. § 72-915 (i.e., the literal meaning of the words) -- not the *application* of the statute (how the statute must be applied given constitutional constraints or any irreconcilable conflicts with other provisions of the law). Any "application" issues can be addressed by the court below on remand.

Plaintiffs' argument in support of their interpretation addresses two fundamental points:

1. I.C. § 72-915 clearly expresses the legislative intent regarding the method to be used in allocating or distributing the money available for dividends.
2. The procedure established by I.C. § 72-915 requires that dividend monies must be distributed in direct proportion to the amount of premium paid by each policyholder who (a) meets the expressed longevity requirement and (b) who falls within the classes of employment sharing in the dividends.

Since plaintiffs are seeking only to have this Court determine the literal meaning of the statute it is not necessary for this court to consider whether the legislative intent expressed in I.C. § 72-915 conflicts with any legislative intent expressed elsewhere. Plaintiffs seek only this Court's opinion on *meaning* and request a remand consistent with the Court's opinion so that the case can proceed and be allowed to develop.

Plaintiffs also do not seek a determination as to whether the SIF Manager has or has not violated any discretion that may be conferred upon him by I.C. § 72-915 or any other section of the Idaho Code. Plaintiffs do not believe that affidavits and arguments which point to circumstances related to the operation of the Fund or which discuss statutes passed decades after the adoption of I.C. § 72-915 in 1917 are necessary or helpful to determining the meaning of the statute.

Again, for purposes of clarity, the statute in question states as follows:

> 72-915. DIVIDENDS. At the end of every year, and at such other times as the manager in his discretion may determine, a readjustment of the rate shall be made for each of the several classes of employments or industries. If at any time there is an aggregate balance remaining to the credit of any class of employment or industry which the manager deems may be safely and properly divided, he may in his discretion, credit to each individual member of such class who shall have been a subscriber to the state insurance fund for a period of six (6) months or more, prior to the time of such readjustment, such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates.

The State Insurance Fund has itself acknowledged that I.C. § 72-915 expressly authorizes "dividends." *Kelso & Irwin, P.A. v. State Insurance Fund,* 134 Idaho 130, 138, 997 P.2d 591, 599 (2000). This statute has been consistently interpreted to provide the

basis for the declaration of a dividend to policyholders. See, *Hayden Lake Fire Prot. Dist. v. Alcorn,* 141 Idaho 388, 399, 111 P.3 73, 84 (2005).[3]

The role of the Supreme Court in interpreting a statute is to give effect to the legislative intent and purpose of the statute. *Adamson v. Blanchard,* 133 Idaho 602, 605, 990 P.2d 1213, 1216 (1999). "The interpretation of a statutory provision must begin with the literal words of the statute, giving the language its plain, obvious and rational meaning." *Crawford v. Department of Correction,* 133 Idaho 633, 635, 991 P.2d 358, 360 (1999).

There are numerous cases decided by this Court which hold that the starting point for any statutory interpretation is the literal wording of the statute and that this Court will give a statute its plain, obvious and rational meaning unless that leads to absurd results. See, e.g., *Eastern Idaho Agricultural Credit Ass'n v. Neibauer,* 133 Idaho 402, 409, 987 P.2d 314, 321(1999). When interpreting a statute, courts are to look first at the literal words of a statute and then give those words their plain, usual and ordinary meaning. *State v. Diaz*, 144 Idaho 300, 303, 160 P.3d 739 742 (2007).

With these rules in mind, we see that the first sentence of the statute pertains solely to the timing of setting (readjusting) of "rates" which should occur at least annually and the second sentence of the statute pertains to the process of dealing with funds accumulated because the previously established rates have proven to be higher than was necessary given the losses incurred. Both process involve readjusting rates.

---

[3]However, these rulings tell us nothing about what is supposed to happen once the decision has been made to distribute a dividend to policyholders.

In the first sentence, the legislature directs that:

A. On an annual basis a "readjustment of the rate" shall be made for each of the "several classes of employments or industries."

B. A "readjustment of rates" can also occur at such other times as the Manager, in his discretion determines to be appropriate.

The terms "rates" and "classes of employments" and "industries" are not specifically defined in the section but it is apparent they are being used in a statute regulating an insurance provider. "Rate" both connotatively and denotatively refers to a factor having to do with a factor used in determining the charge that is assessed by the SIF for workers' compensation insurance coverage. "Classes of employment" clearly refers to groupings based upon type of occupation (e.g. underground miner or surface miner) and "industries" refers to groupings based upon specific types of enterprises (e.g. mining). While the exact working of this classification system are not made clear in I.C. § 72-915,[4] what is clear for the purpose of statutory interpretation is that differing occupations and enterprises are assessed different rates and those rates are to be adjusted at least annually.

The second sentence of I.C. § 72-915 provides for a readjustment process which involves "crediting" back to qualified "subscribers" (policyholders) excess funds. This is a process which involves phases. First, there is the phase leading to the *declaring* of a dividend. Second, there is the phase in which *distribution* of the dividend is directed.

---

[4]The function of the classification system and procedures relevant to that function are apparent from other provisions of the law. See, e.g., I.C. § 72-913(a) and § 72-914

The process for *declaring* a dividend is not at issue in this matter. *Declaring a* dividend is a process that involves two distinct steps. First, the Manager must determine if there are available funds. Second, the Manager must determine if those finds "may be safely and properly divided."

With respect to the determination if funds are available for division, I.C. §72-915 provides that surplus can be identified when "there is an aggregate balance to the credit of any class of employment or industry." This phrase is evidence that the Legislature expects that there will be some form of accounting system that will compare the income and expenses for each of the industries and "classes of employments" used for the rate setting process. See, I.C. § 72-914. While the nature and methodology of this accounting system cannot be discerned based upon the language of I.C. § 72-915, this information is not a necessary part of a code provision focused on adjusting rates and dividing the SIF's excess surplus. What can be discerned beyond any debate is that the Manager can *declare* or carve out a dividend from the "aggregate balance" or, in common parlance, the surplus or profit remaining after completing the appropriate accounting process.

Once a surplus has been found to exist, the statute then compels the Manager to assess if the surplus can be "safely and properly divided." The terms "safely and properly divided" are not defined within the provisions of I.C. § 72-915. Typically, "safely" means without causing or risking danger or harm. "Properly" means appropriately or correctly. These terms are clearly intended to provide the criteria for guiding the discretionary decision relative to the availability of funds to be divided.

Once the Manager decides that he can *declare* a dividend then the *distribution* process is triggered. The first step in the *distribution* process is for the Manager to determine if he will proceed with a dividend distribution. In this regard, I.C. §72-915 provides that having found funds available for division, the Manager "may in his discretion" proceed with the *distribution.* Clearly, the legislature intended that the Manager would have the discretionary power to forgo *distribution* of a dividend even if he found remaining balances which he would concede could be safely and properly divided. This interpretation has already been adopted by the Idaho Supreme Court. *Hayden Lake Fire Protection v. Alcorn,* 141 Idaho 388, 399, 111 P.3d 73, 84 (2005).

The second step of the *distribution* process then involves determining which policyholders are qualified to share in the dividend *distribution.* To be included as a "qualified policyholder," an individual subscriber must be a member of "such class." While "class" is not defined, the use of the word "such" clearly signals that the meaning of "class" is made evident by something which precedes the use of the term "such class." Looking back to earlier language, it becomes apparent that the "class" referred to by the phrase "such class" is any class of employment or industry as to which there were excess funds. Thus, where the Manager chooses to distribute dividends to subscribers insured in one or more types of occupations or enterprises, then all subscribers insured within those types of occupations or enterprises would be members of "such class" for the purpose of being a "qualified policyholder."

Among those subscribers who are included as "qualified policyholders" only those who satisfy the "longevity requirement" are entitled to actually share in the dividend. This

requirement is akin to the "of record" requirement for corporate stock dividends. To satisfy the "longevity requirement," an employer must have "been a subscriber to the State Insurance Fund for a period of six (6) months or more, prior to the time of such readjustment." The legislative intent is crystal clear upon the face of the statute: to qualify to share in a division of excess funds, a form of readjustment, the subscriber (policyholder) must have been a subscriber for more than six months prior to the divisions of the excess funds.

The final step in the *distribution* process provides that once the Manager has chosen to exercise his discretion to declare and distribute a dividend, that dividend should be allocated by :

> "... credit[ing] to each individual member [who is a "qualified policyholder" and satisfies the "longevity requirement"], such portion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates."

This language clearly and explicitly articulates which otherwise qualified subscribers are entitled to receive a share and the precise formula for determining their respective shares of a dividend distribution. The use of the term "credit to *each*" when given its common meaning, reflects the intention that all policyholders who qualified by satisfying the "qualified policyholders" and the "longevity" requirements would be entitled to share in the distribution. This language cannot be read as intending to afford any discretion to "credit to some" which is the SIF process being challenged in this action.

The use of the phrase "as he is properly entitled to, having regard to his prior paid premiums" demonstrates an intention for the respective share of "each" to be calculated

solely by reference to, or "with regard to," the amount of premiums paid. This language affords no justification for reading in a legislative intention to authorize consideration of' any other factors, such as the cost of writing the policy or the perceived need to favor some policyholders over others. This language clearly reflects the legislative intention to have a dividend governed by the amount of premiums paid, not by an act of unfettered discretion by an unspecified person.

In common usage, where there is an amount to be divided between a number of individuals who have each contributed something to the whole, the phrase "properly entitled to, having regard to his prior paid premiums" can only be rationally read as describing a distribution method which allocates the dividend directly and solely in proportion to the premium paid by each. This is customarily called distribution on a "*pro-rata*" basis. It is not a unique concept. Such an allocation is not only consistent with the language of the statute but completely consistent with the concept of a "dividend" which is, in everyday experience, determined on a *pro-rata* basis and not by some form of arbitrary scale which completely excludes 75% of policyholders or shareholders.

Finally, the "formula" includes a starting point for the determination of each policyholders' "prior paid premiums." The statute provides that this determination shall be made based upon premiums paid "since the last readjustment of rates." This phrase could, at least theoretically, refer to the last readjustment of the rates for premium determination purposes (the first sentence of I.C. §72-915) or the readjustment that comes from crediting to policyholders share of excess funds being divided.

Given that this phrase appears in the sentence of the portion of the statute dealing with the division of excess funds, a process the Legislature has already referred to as a "readjustment," logic and reason compel the finding that this phrase pertains to premiums paid since the last dividend. Such a reading would be consistent with the obvious *pro rata* intent since each subscriber would get a share based upon all premiums paid over an extended period between dividends without regard to whether they were subscribers for the whole period between dividends. In any event, since the rates are set annually by the SIF and the dividends have been distributed annually, the interpretation applied is not going to materially effect the outcome. Moreover, neither interpretation of this language provides any support for discriminating among policyholders based upon the fact that they paid $2,500 or less in premiums during the period to which the dividend applies.

Plaintiffs believe that the trial court went astray in looking outside the statute in order to justify a finding that it was ambiguous. But a statute may not be deemed ambiguous merely because parties present differing interpretations to the court. *Payette River Property Owners Association v. Board of Commissioners of Valley County,* 132 Idaho 551, 557, 976 P.2d 477 483 (1999) or because "an astute mind can devise more than one interpretation of it." *Matter of Permit No. 36-7200,* 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). Plaintiffs do not see any ambiguity and ask for this Court's agreement.

The affidavit of Mr. Alcorn of February 13, 2007on which the SIF depends is not relevant to the process of determining the meaning of a statute passed in 1917. It is self-serving and certainly conclusory. He states essentially that in order to run the SIF as an efficient insurance company (which he says is dictated by I.C. § 72-901, ¶ 32, Alcorn

Affidavit) he has to ignore the smaller employers when it comes to distributing dividend money. While this position might give Mr. Alcorn some personal comfort it does not excuse a violation of a legislatively-mandated dividend distribution system. In his deposition Mr. Alcorn admitted that the SIF is not losing money on the smaller policies. Affidavit of Donald W. Lojek, November 6, 2007, Exhibit B, p. 159, ll 13-14. When asked why the bright line was drawn at $2,500.00, Mr .Alcorn's answer is vague and off-point. *Id.*, pp. 158, l. 20 to pp. 159, l. 6.

If the SIF believes that its efficiency is hampered by I.C. § 72-915 it may address its concern to the Idaho Legislature. This it has never done. Instead, the statute governing the distribution of dividend monies has been ignored to the annual detriment of some 30,000 smaller employers in this state.

CONCLUSION

For the foregoing reasons, it is submitted that it is both necessary and appropriate for a court, as the first step in the process of determining applicability of I.C. § 72-915 to the claims made in this action, to begin by interpreting the language of the section pertaining to dividend distribution. When this step is taken in accordance with established principles of statutory interpretation, this Court should as a matter of law find:

1. That I.C. § 72-915 clearly and unambiguously expresses a legislative intent relative to the method to be employed for allocation of any amount which the Manager, in his discretion, determines should be distributed as dividend;

and,

2. That the Legislature intended by the language it used in LC. § 72-915 to provide that, after excluding policyholders who do not meet the longevity requirement and who are not within the classes of employments sharing in the dividend, any dividend which is declared must be distributed among all remaining policyholders in direct proportion to the amount of premium each paid in the dividend period, i.e., on a *pro rata* basis.

Accordingly, the relief sought by Appellants is for a remand to the district court with the above findings clearly stated for the district court's guidance so the *application* of I.C. § 72-915 can then be addressed.

RESPECTFULLY SUBMITTED this 30th day of July, 2008.

LOJEK LAW OFFICES, CHTD.

By: Donald W. Lojek - Of the Firm
Attorneys for Appellants

GORDON LAW OFFICES, CHTD.

By: Bruce S. Bistline - Of the firm
Attorneys for the Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of July, 2008, a true and correct copy of the foregoing instrument was served on the following by the method indicated below, and addressed as follows:

[ ]	Hand Delivery	Richard E. Hall
[✓]	U.S. Mail, postage paid	Keely E. Duke
[ ]	Overnight Express Mail	Hall Farley Oberrecht & Blanton
[ ]	Facsimile Copy:	702 W. Idaho St. Ste. 700
	395-8585	PO Box 1271
		Boise, Idaho 83701

Donald W. Lojek