8-27-2008

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/Appellees.

Docket No. 35144

(Canyon County
Case No. CV06-7877)

APPELLEES' IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, MANAGER OF THE STATE INSURANCE FUND, AND THE BOARD OF DIRECTORS OF THE STATE INSURANCE FUND'S RESPONSE BRIEF

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APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON, HONORABLE THOMAS J. RYAN, DISTRICT JUDGE, PRESIDING

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves the statutory construction of Idaho Code Section 72-915, wherein the Idaho legislature granted the Manager of the Idaho State Insurance Fund ("SIF") with the discretion to determine whether to issue a dividend for its worker's compensation policies, and which SIF policyholders will receive such a dividend. The statute at issue, I.C. § 72-915, states:

> 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.

Particularly at issue is whether Idaho Code Section 72-915 unambiguously prohibits the Fund Manager from determining how to distribute a dividend to policyholders each year. As discussed below, and as the District Court ruled in granting SIF's partial motion for summary judgment, Idaho Code Section 72-915 is ambiguous and, read in context with other statutes and laws, allows the Manager to use his discretion to determine how dividends will be distributed.

B. Course of the Proceedings

In addition to the course of proceedings outlined by Farber, SIF identifies the following:

- On December 26, 2007, the District Court issued its Memorandum Decision Upon Motions for Summary Judgment (Record ("R.") at 79-91).
- On February 15, 2008, the District Court issued its Amendment to the Court's Memorandum Decision Upon Motions for Summary Judgment (R. at 96-98).

C. Concise Statement of the Facts

As Farber's statement of facts does not fully and adequately state the facts relevant to this matter, SIF presents this supplemental statement of facts.

1. The Purpose of the SIF is to Provide Worker's Compensation Insurance to Idaho Employers and to Ensure the Existence of a Solvent Source From Which Workers Entitled to Compensation May Collect

In 1917, the Idaho legislature enacted a comprehensive statutory scheme, now codified as Idaho Code §§ 72-901 et seq., creating the SIF "for the purpose of insuring employers against liability for compensation under this worker's compensation law ... and of securing to the persons entitled thereto the compensation provided by said laws." Idaho Code § 72-901(1). Since its enactment, the SIF has fulfilled its public purpose by providing worker's compensation coverage to thousands of Idaho employers who have relied on such service being available.[1]

While Idaho employers are not required to procure insurance with the SIF, if an employer is declined coverage by two private carriers and the SIF, then coverage may be obtained through the assigned risk pool.[2] In an effort to fulfill one of its principal purposes—providing worker's compensation insurance to Idaho employers—the SIF maintains an underwriting policy that seeks to insure all Idaho employers, regardless of size, so the majority of Idaho employers who could not otherwise obtain coverage through a private carrier could obtain coverage with the SIF, and therefore avoid the extra costs associated with acquiring an insurance contract through the assigned risk pool, which is the carrier of last resort.[3]

In structuring the SIF, the Legislature determined it should be "created as an independent body corporate politic" and derive its financial well-being from "premiums and penalties received," "property and securities acquired," and "of interest earned" thereon. Idaho

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[1] See Affidavit of Jim Alcorn, at ¶ 13, as submitted as Exhibit 5 to Farber's Motion to Augment Record, as approved by this Court's Order Granting Motion to Augment Record, dated July 2, 2008 ("Alcorn Aff.").

[2] See Alcorn Aff., ¶ 12. The assigned risk pool insures Idaho employers who cannot otherwise secure worker's compensation coverage, but they are generally required to pay a thirty percent (30%) higher premium than if they were insured through the SIF or a private carrier. See Alcorn Aff., ¶ 11.

[3] See Alcorn Aff., ¶ 13.

Code § 72-901(1). The money generated is deposited with the state treasurer, who acts as custodian for the SIF; however, "[t]he money in the fund does not belong to the state . . . [the money is held by the treasurer] . . . for the contributing employers and the beneficiaries of the compensation law, and for the payment of the costs of the operation of the fund." State ex rel. Williams v. Musgrave, 84 Idaho 77, 84, 370 P.2d 778, 782 (1962).

Moreover, the SIF is to "be administered without liability on the part of the state." Idaho Code § 72-901(1). Yet, per I.C. §72-901(4), the SIF is subject to the provisions of the Idaho insurance code, but is not allowed to be a member of the Idaho Insurance Guaranty Association ("IIGA"). The IIGA offers security for those insurers who are unable to make payments on a claim, and guarantees the payment of insurance benefits if an insurance carrier becomes insolvent.[4] Likewise, the IIGA offers security for those individuals insured by insurers unable to pay; however, by statute, this protection does not extend to the SIF.[5]

Unlike other insurance carriers which rely on the IIGA to pay benefits in the event of insolvency, the SIF must be managed such that is maintains sufficient surplus and reserve totals to provide a stable and ongoing source of worker's compensation insurance to protect Idaho workers.[6] As a result, it remains even more critical that the SIF's financial integrity remain intact, for if it is compromised, the availability of worker's compensation insurance in Idaho would be critically jeopardized; this is especially true in light of the fact that the SIF insures 70% of the market, including policyholders unable to obtain coverage from other private insurers.[7]

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[4] See Alcorn Aff., ¶ 16.
[5] Idaho Code § 72-901(4); see also Alcorn Aff., ¶ 15.
[6] See Alcorn Aff., ¶ 18.
[7] See Alcorn Aff., ¶ 19.

2. The Idaho Legislature Charged the Manager with the Primary Responsibility of Conducting the Business and Administration of the SIF

The duty to ensure the SIF maintains its financial integrity is left to the Board of Directors and the Manager. Idaho Code §§ 72-901(3), 72-902. In many ways they share a symbiotic relationship in that their collective decisions determine whether the SIF is able to fulfill its public purpose.[8] For the majority of its existence, the SIF has been directed by a Manager, charged with the duty of conducting the business and administration of the SIF.[9] To accomplish these demanding tasks, the Manager, by statute, has been granted full power and/or discretion over a number of critical business and administrative decisions involving the operation of the SIF, including, but not limited to, directing the investment of surplus funds generated from premiums and interest, the power to sue and to enter into insurance contracts, setting appropriate reserve totals to meet unexpected losses, and declaring a dividend should the proper conditions be present. See generally Idaho Code § 72-901 et seq.

Despite the extent of power and discretion invested in the Manager, the Board of Directors plays an integral role through its duty to "direct the policies and operations of the state insurance fund to assure that [it] is run as an efficient insurance company, remains actuarially sound and maintains the public purposes for which [it] was created." Idaho Code § 72-901(3). Although this duty is enacted through the decisions and guidance of the Manager, the two entities work in conjunction to satisfy the SIF's purpose as mandated by statute.[10]

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[8] See Alcorn Aff., ¶ 19.
[9] See Alcorn Aff., ¶ 20.
[10] See Alcorn Aff., ¶ 19.

3. As Part of His Duties, the Manager Has Been Charged With the Discretion of Determining Whether a Dividend Will Be Paid Each Year

The SIF surplus fund is considered an asset of the fund and dividends, if any, are paid from what the Manager determines to be surplus available for a dividend distribution after evaluating a myriad of factors, including, but not limited to, present and future SIF operating expenses, the required reserves, investment income, market forces, and industry trends.[11] The declaration of a dividend is a multi-step process that ultimately boils down to determining how much surplus is available to declare as a dividend, followed by determining how it is to be divided, taking into account such factors as the costs associated with writing the insurance contract, and any losses that may have been incurred on the insurance contract.[12]

Another important consideration which deserves attention is the marketing effect that a dividend will have on retaining good profitable accounts, because it is the large profitable accounts that allow the SIF to fulfill its public policy objectives of providing a source of insurance for the smaller, less profitable accounts.[13]

4. Policyholders Are Not Entitled to the Payment of a Dividend Each Year

Idaho employers who purchase their worker's compensation insurance from the SIF receive a contract of insurance which sets forth the parameters of their coverage.[14] The contract of insurance does not provide for the payment of a dividend to the policyholders.[15] The governing statutes for the SIF do not guaranty payments of dividends to policyholders, nor do they set forth that the policyholders have a property interest in the surplus or assets of the SIF.

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[11] See Alcorn Aff., ¶ 21.
[12] See Alcorn Aff., ¶ 24.
[13] See Alcorn Aff., ¶ 25.
[14] See Alcorn Aff., ¶ 26.
[15] See Affidavit of Donald W. Lojek filed on January 6, 2007, Ex. 1 (State Insurance Fund Workers Compensation and Employers Liability Insurance Policy).

See generally Idaho Code §72-901 et seq. In fact, this Court previously concluded the SIF's statutory framework does not create any property rights in the SIF's policyholders. Kelso & Irwin, P.A. v. State Insurance Fund, 134 Idaho 130, 135, 997 P.2d 591, 597 (2000). An SIF policyholder has no vested right in the surplus and assets of the SIF; rather, the assets and surplus belong to the SIF in order to meet its statutory purpose provided in I.C. § 72-901(1). Id.

5. The Manager Determines Every Year Whether to Pay a Dividend and the Amount, if Any, of the Dividend a Policyholder May Receive

The SIF, through four different Managers, has issued dividends continuously since at least 1982, using essentially the same dividend formula that is currently being implemented, in that the dividends returned as a percentage of paid premium have always differentiated by the size of the premium; consequently, the SIF has always returned back a larger percentage of paid premium to the large premium policyholders, as opposed to the smaller premium policyholders.[16] One of the reasons for using the premium amount as a basis for determining the rate of return is because a dividend is a return of unused premium and a larger policy will have more unused premium than a smaller premium policy.[17] Similarly, the SIF looks at the losses incurred on a policy and factors that in when determining whether a dividend will be paid; if a policyholder had more losses that exceed a certain percentage of paid premium in the dividend year, then a dividend would not be issued to that policyholder.[18]

Another consideration for issuing larger dividends as a percentage of premium size has to do with the fact that worker's compensation rates are regulated, and thus are the same for all carriers. As such, the SIF has made a business decision to give the larger premium policies a

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[16] See Alcorn Aff., ¶ 27.
[17] See Alcorn Aff., ¶ 28.
[18] See Alcorn Aff., ¶ 29.

larger dividend as percentage of premium in order to help retain the business of the larger policyholders because the SIF has a public purpose to provide a source of insurance for the small employer, because private carriers seek to insure only the large policyholders, and because the SIF needs the large policyholders to help support the ability to continue to insure the small businesses in the state.[19] Accordingly, providing larger policyholders with a larger dividend as a percentage of premium is a good business decision and is consistent with insurance industry practices, as well as the statutory mandate of I.C. § 72-901(3) to run the SIF as an efficient insurance company that remains actuarially sound.[20]

6. Based on a Number of Factors, the Manager Determined in 2003 through 2006 that a Dividend Would Not Be Paid to Policyholders With Premiums Equal to or Less Than $2,500

At a November 21, 2002, SIF board meeting, the Manager, Mr. James Alcorn, expressed to the SIF Board his decision that dividends payable in January 2003 on contracts of insurance with inception dates between July 1, 2001 and June 30, 2002, would only be paid to those policyholders paying over $2,500 per year in premiums.[21] This determination was made in the interest of retaining a strong surplus and reserve.[22] At the December 10, 2003, October 20, 2004, and December 21, 2005 board meetings, the Board of Directors did not object to Mr. Alcorn's decision that the same dividend formula would be followed as the previous year and, therefore, dividends would be paid to policyholders paying over $2,500 per year in premiums.[23]

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[19] See Alcorn Aff., ¶ 29.
[20] See Alcorn Aff., ¶ 32.
[21] See Alcorn Aff., Ex. A (Board of Directors of the State Insurance Fund Minutes of November 21, 2002 special meeting), CL0028 and 0029.
[22] See Alcorn Aff., ¶ 14.
[23] See Alcorn Aff., Ex. B (Board of Directors of the State Insurance Fund Minutes of December 10, 2003), CL 0025; Ex. C (Board of Directors of the State Insurance Fund Minutes of October 20, 2004), CL 0014; and Ex. D (Board of Directors of the State Insurance Fund Minutes of December 21, 2005), CL 0007

Each of the named plaintiffs-appellants purchased worker's compensation coverage from the SIF fund with inception dates between July 1, 2001 and June 30, 2004.[24] None of the plaintiffs-appellants have paid premiums over $2,500 on their contracts for insurance for the contract years of July 1, 2001 to June 30, 2002; July 1, 2002 to June 30, 2003; or July 1, 2003, to June 30, 2004, except Critter Clinic which paid premiums in excess of $2,500 for the policy year with an inception date July 1, 2003, to June 30, 2004.[25] Plaintiffs-appellants that did not pay premiums over $2,500 per year were not offered a dividend for the dividend years in question.[26] The plaintiffs-appellants were each sent a letter stating they would not be receiving a dividend based on the amount of premium they paid.[27]

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

SIF identifies the following additional issues on appeal:

- The District Court's ruling which confirmed the SIF's discretionary authority under the statute should be affirmed. Although not entirely clear, Farber appears to suggest that the only issue addressed by the District Court's decision is the construction of Idaho Code §72-915 inasmuch as the statute addresses whether dividends are mandatory, but avoiding the District Court's decision that Idaho Code §72-915 affords SIF the discretion to determine dividends. See R. at 97. To avoid the potential for multiple reviews of the same Order, this Court should also affirm that portion of the District Court's ruling.

- As an alternative basis to affirm, this Court should find that the Simplot factors for deference to an agency's construction of a statute are met in this action. Although not addressed by the District Court, SIF's interpretation of the statute at issue should be afforded considerable weight and deferred to, as the Simplot factors are met in this case.

III. ATTORNEY FEES ON APPEAL

SIF does not seek fees on appeal in this matter, but does seek costs, pursuant to I.A.R. 40.

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[24] See Alcorn Aff., ¶ 37.
[25] See Alcorn Aff., ¶ 38.
[26] See Alcorn Aff., ¶ 39.
[27] See Alcorn Aff., ¶ 40.

IV. SUMMARY OF ARGUMENT

The District Court's decision that Idaho Code Section 72-915 is ambiguous should be affirmed. The State Insurance Fund also respectfully requests that this court affirm the District Court's ruling that Idaho Code Section 72-915, in context with other statutes and laws, allows the Manager to use his discretion to determine how dividends will be distributed each year to policyholders consistent with the purpose and directives set forth in Title 72, Chapter 9.[28]

In finding that the statute at issue, Idaho Code §72-915, was ambiguous, the District Court correctly applied rules of statutory construction to determine the correct interpretation of the statute. Critically, the District Court relied on the analysis of the whole of Idaho Code §72-915, the entire framework of Title 72, Chapter 9 of the Idaho Code, the dividend practices of Idaho's sister states, and the affidavit testimony of the SIF Manager, Mr. Alcorn, and SIF's expert, Mr. Camilleri. In conjunction with this, the District Court correctly found that the statute afforded SIF the discretion to establish dividend practices to ensure that the SIF is run as an efficient insurance company that remains actuarially sound. This is borne out in construing Idaho Code Section 72-915 as a whole and in light of the wording used in the statute, which makes clear the Idaho Legislature's grant to the Manager the discretionary authority to issue dividends as he deems may be "safely and properly divided."

Alternatively, although not decided by the District Court, a review and application of the Simplot factors used in the determination of whether or not to defer to an agency's interpretation of a statute results in a finding that deference to the SIF in interpreting Idaho Code §72-915

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[28] When these decisions are affirmed and the case remanded to the District Court, the issue that remains for the District Court is a determination of whether the Manager appropriately exercised his discretion in the years he elected not to provide a dividend to policyholders who paid $2,500 or less in premiums.

should be had. Specifically, the SIF is entrusted to administer the statute, its interpretation of the statute is reasonable, the statute does not expressly address the precise question at issue, and there are adequate rationales to support deference to the SIF's interpretation.

V. STANDARD OF REVIEW

"In an appeal from an order of summary judgment this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." Estate of Becker v. Callahan, 140 Idaho 522, 525, 96 P.3d 623, 626 (2004). "This Court reviews the record before the district court, including pleadings, depositions, admissions and affidavits, if any, to determine de novo whether, after construing the facts in the light most favorable to the nonmoving party, there exists any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law." Karr v. Bermeosolo, 142 Idaho 444, 447, 129 P.3d 88, 91 (2005). "If the evidence shows no disputed issue of material fact, what remains is a question of law over which the appellate court exercises free review." Id. Additionally, "[t]he standard of review of the lower court's determination on issues of statutory interpretation is one of free review." Big City Paramedics, LLC v. Sagle Fire Dist., 140 Idaho 435, 436, 95 P.3d 53, 54 (2004). "This Court exercises free review over whether an agency's interpretation of a statute should be afforded Simplot deference." Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho 388, 398, 111 P.3d 73, 83 (2005).

VI. STATUTORY CONSTRUCTION UNDER IDAHO LAW

In determining the meaning of a statute, courts must determine and give effect to legislative intent. Idaho Cardiology Associates, P.A. v. Idaho Physicians Network, Inc., 141 Idaho 223, 227, 108 P.3d 370, 374 (2005). When construing a statute, this Court "will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and

intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions." Ada County Assessor v. Roman Catholic Diocese of Boise, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993). Statutory analysis begins with the literal words of the statute, giving the language its plain, usual and ordinary meaning. State v. Parker, 141 Idaho 775, 777, 118 P.3d 107, 109 (2005). Effect must be given to all the words of a statute, if possible, so that none will be void, superfluous, or redundant. State v. Yzaguirre, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). Where the language of a statute is clear and unambiguous, a court need only determine the application of the words to the facts of the case at hand. Porter v. Board of Trustees, Preston School District No. 201, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). Where, however, a statute is ambiguous, a court should determine legislative intent by examining "not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history." Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho at 398-99, 111 P.3d at 83-84 (quoting State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)). A statute is ambiguous where its language is capable of more than one reasonable construction. Hayden Lake, 141 Idaho at 398, 111 P.3d at 83. It is incumbent upon a court to give a statute an interpretation which will not render it a nullity. State v. Beard, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). Similarly, it is a well-settled principle of statutory construction that statutes should not be construed to render other provisions meaningless. Corporation of Presiding Bishop v. Ada County, 123 Idaho 410, 424, 849 P.3d 83, 97 (1993). Statutes should not be construed so as to yield an absurd result. See, e.g., State v. Doe, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); State v. Yager, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004); State v. Burtlow, 144 Idaho 455, 163 P.3d 244, 245-46 (Ct. App. 2007).

Statutory provisions cannot be read in isolation, but must be interpreted in the context of the entire document. Westerberg v. Andrus, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988).

In summary, in resolving a statute's ambiguity, the Court may look to the following:

- The text of the statute itself, or its four-corners;
- A dictionary;
- Legislative history;
- Public policy;
- Reasonableness of proposed construction;
- Other statutes within the Act, as well as other relevant statutes contained outside the Act;
- Decisions of sister courts which have resolved the same or similar issues; and
- Other relevant extrinsic evidence lending interpretive assistance submitted through affidavits, testimony, etc.

VII. ARGUMENT

A. The District Court correctly ruled that Idaho Code Section 72-915 is ambiguous, as Farber's proposed construction of that statute cannot overcome the reasonable construction put forth by the SIF.

In ruling on the parties' motions for partial summary judgment with respect to the construction of Idaho Code Section 72-915, the District Court held that Idaho Code Section 72-915 is ambiguous. R. at 89. In doing so, the District Court found an ambiguity in I.C. § 72-915:

> The use of the term "class of employment" in 72-915 by its phrasing "any class of employment **or** industry" is ambiguous. By the use of "or", this Court is not convinced that plaintiffs' proposed interpretation that it refers to grouping classes based solely on type of industry is the only reasonable interpretation. That phrase could reasonably be interpreted to mean that the classes could be determined by industry, by size of employer, by premium amounts paid by employer, etc. As the term is ambiguous, this Court is free to examine not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and the legislative history.

R. at 89-90. The District Court later added, in amending its concluding paragraph (R. at 97):

> [I]t is this Court's conclusion that, as a matter of law, the language of I.C. §72-915, in context with the directives of other statutes set forth in the Act, the laws of our sister states, and the decisions of our Supreme Court, allows the fund manager, with the 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 establishes the State Insurance Fund. Specifically, to assure that the State Insurance Fund is run as an efficient insurance company, remains actuarially sound, and maintains the public purposes for which the Fund was created.

As discussed below, Farber's arguments fail, and SIF's construction of §72-915 is reasonable.

1. Farber's arguments are not supported by appropriate statutory construction.

In arguing that Idaho Code Section 72-915 unambiguously requires the Manager to distribute a declared dividend equally among all policyholders, Farber ignores all but the last few sentences of I.C. §72-915, problematic in that this fails to analyze the preceding lines:

> 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** . . .

(emphases added). The principles of statutory construction begin with the literal words of the statute, giving the language its plain, usual and ordinary meaning. State v. Parker, 141 Idaho 775, 777, 118 P.3d 107, 109 (2005). This mandate requires this Court begin with the first sentence of the statute and proceed in an orderly fashion from beginning to end. It does not allow Farber to direct this Court to jump to the last few lines of the statute without first giving meaning to everything that comes before. In fact, the second sentence of Idaho Code Section 72-915 must be read in the context of its first sentence and in light of the entire statutory scheme of Title 72, Chapter 9, not to mention Title 41, Chapter 16.

While SIF understands the directions of this Court to first determine the literal meaning of Idaho Code Section 72-915, the impact of other statutes, whether direct or indirect, cannot be ignored as Farber seeks to do. The effect of Idaho Code Section 41-1618—as it pertains to Idaho Code Section 72-915 and Idaho Code Section 72-913—added the SIF into Idaho's rate setting structure for private employers. As such, after the enactment of Title 41, Chapter 16 in 1961, the

Department of Insurance determined the standardized rates all insurance companies, including the SIF, would charge private employers based upon the rate filings of an authorized rating organization (National Council on Compensation Insurance, or "NCCI").[29] Thus, the enactment of Title 41, Chapter 16 mooted the first full sentence of Idaho Code Section 72-915 and, to the extent 72-913 concerns private employers, mooted that code provision as well.

Further, contrary to Farber's suggestions, the term "properly entitled to" is not defined by prior paid premiums. Such a definition does not comport with the term's plain and common meaning. Aside from a policyholder having to satisfy the six-month longevity requirement—being "a subscriber to the state insurance fund for a period of six (6) months or more, prior to the time of such readjustment"—the policyholder must be "properly entitled to" the dividend, "having regard to his prior paid premiums since the last readjustment of the rates." The impact of "properly entitled to" means that to receive a legal right or to qualify for the dividend (i.e. "entitled"), it must be suitable or appropriate ("properly"). This term encompasses the Manager's discretionary authority to determine if a policyholder is "properly entitled to" receiving a dividend. Consequently, it is incorrect to suggest the term is defined by prior paid premiums. This approach does not comport with basic principles of statutory construction and eliminates the Manager's discretionary authority.

Farber also contends that once the Manager declares a dividend is to be distributed, the statute calls for a pro-rata distribution to each individual member of such class, assuming the policyholder has met the longevity requirement. Appellants' Brief at 17-18. A rational and logical consequence flowing from Farber's flawed interpretation requires each policyholder

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[29] See I.C. § 41-1601 et seq.; see also Alcorn Aff., ¶ 8. This remains the same today.

belonging to the class satisfying the longevity requirement is entitled to the dividend, including those policyholders whose losses exceed their premium amounts. This logical (and absurd) result of Farber's interpretation cannot be ignored. In fact, Farber's failure to address this consequence has been deafening since the inception of the litigation. Moreover, the language of the statute does not describe a "distribution on a pro rata basis," for if it did, it would render the term "discretion" moot, not to mention the term "properly entitled to" obsolete as well. Had the Legislature intended for the distribution to be based on a pro rata basis, it could have clearly and easily articulated that intent in the statute. However, it did not provide such language, and one can only assume it did not because such a system would run contrary to the discretionary authority it provided to the Manager. The Legislature defers to the Manager to ensure the solvency of the SIF, particularly those decisions affecting its financial well-being. The Legislature did not want to impose upon the Manager a strict and inflexible "pro rata" calculus that would undermine the Manager's discretionary authority to make decisions to benefit the SIF.

Accordingly, Farber's proposed construction of the statute conflicts with the wording of the whole statute, and when read in conjunction with the entire statutory scheme of Title 72, Chapter 9. As such, the decision of the District Court should be affirmed.

2. The SIF's interpretation of the statute is a reasonable construction.

In interpreting I.C. §72-915, SIF has looked to the language of the entire statute, and its construction thereof is a reasonable one.[30] In construing I.C. §72-915 as a whole, then, it is clear

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[30] In its motion for summary judgment, SIF argued that I.C. §72-915 is unambiguous, and a reading thereby grants SIF the authority to act as it has with respect to the issuance of dividends. R. at 82. Even if this Court found the statute unambiguous – contrary to the District Court's ruling – the appropriate construction, as discussed herein, validates SIF's position. However, even as framed in the context of an argument as to ambiguity, SIF's construction as explained herein is reasonable, and the District Court was thereby correct in its analysis of the rules of statutory construction as relates to an ambiguous statute.

the Idaho Legislature granted the Manager the discretionary authority to issue dividends as he deems may be "safely and properly divided":

> 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.

Idaho Code § 72-915 (emphases added). Based on this discretionary authority provided by I.C. § 72-915, it was well within the Manager's discretion to determine that a dividend would not be paid to policyholders with premiums equal to or less than $2,500 in 2003 through 2006. In fact, as previously stated, the Idaho Supreme Court has previously embraced the discretion of the Manager as it pertains to dividends: "since 1919 the Manager has had the authority to set surplus and reserves without outside approval and **to declare dividends in his discretion.**" Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho at 392, 111 P.3d at 77 (emphasis added).[31]

In construing I.C. §72-915, the Court must examine the literal words of the statute, beginning with the first sentence:

> 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.

As noted earlier in the brief, in 1961, the Legislature adopted I.C. § 41-1618, which curtailed the Manager's discretionary authority as it pertained to readjusting the rates of the several classes of

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[31] Although the Legislature amended the SIF statutes most recently in 1998 to, among other things, create a board of directors to appoint a manager of the SIF, in general, the Legislature left the Manager's power and discretion intact, *including the authority to set reserve and surplus levels and to declare dividends.* Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 388, 392, 111 P.3d 73, 77 (2005).

employments or industries. Idaho Code § 41-1618 provides that the powers granted to the Manager, under I.C. §§ 72-903 and 72-913, are subject to the provisions set forth in Title 41, Chapter 16. The effect of I.C. § 41-1618—as it pertains to I.C. § 72-915—essentially stripped away the Manager's discretionary authority to readjust the rates for the several classes of employments or industries, and determined that the SIF's rates would be regulated by the Department of Insurance. In turn, the Department of Insurance approves worker's compensation rates based upon the rate filings of an authorized rating organization (National Council on Compensation Insurance, or "NCCI").[32] As seen through the enactment of I.C. § 41-1618, when the Legislature wants to limit the power and discretion of the SIF, it will do so statutorily. Note that the Legislature has not acted to curtail the Manager's power or discretion in the areas of dividend and surplus practices even though it could have easily done so.

The second sentence of I.C. § 72-915 gives rise to the instant dispute and, again, states:

> 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.

(emphasis added) In examining this portion of I.C. § 72-915, it is evident there are several terms that must be given their common, everyday meanings, as the Legislature did not define them in the statute, or provide a separate provision providing that the definitions would apply throughout

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[32] See I.C. § 41-1601 et seq.; see also Alcorn Aff., ¶ 8. Idaho is an administered pricing state which means that the rating organization files the entire rate.

the statutory framework of Title 72, Chapter 9.[33] See Ada County Assessor, 123 Idaho at 428, 849 P.2d at 101. The critical terms of Idaho Code Section 72-915 are defined as follows:

- "aggregate" is defined as "formed by combining into a single whole or total" Black's Law Dictionary 72 (8th ed. 2004).
- "balance" is defined as "to compute the difference between the debits and credits of (an account)" Black's Law Dictionary 152 (8th ed. 2004).
- "deems" is defined as "to consider, think, or judge" Black's Law Dictionary 446 (8th ed. 2004).
- "safely" is defined as "not exposed to danger; not causing danger" or "unlikely to be proved wrong" Black's Law Dictionary 1362 (8th ed. 2004).
- "properly" is defined as "suitable; appropriate" The American Heritage Dictionary 993 (2d ed. 1985).
- "divided" is defined as "separated into parts or pieces" or "pulled by conflicting interests" The American Heritage Dictionary 412 (2d ed. 1985).
- "may" is defined as "to be permitted to" Black's Law Dictionary 1000 (8th ed. 2004).
- "discretion" is defined as "wise conduct and management; cautious discernment; prudence" or "individual judgment; the power of free decision-making" Black's Law Dictionary 499 (8th ed. 2004).
- "entitled" is defined as "to grant a legal right to or qualify for" Black's Law Dictionary 499 (8th ed. 2004).

In analyzing the common, everyday meanings associated with the critical terms defined above, it is obvious the Legislature was concerned with the financial well-being of the SIF. The Legislature placed an emphasis on maintaining the solvency of the SIF, and charged the Manager with the gate-keeping authority and responsibility to safeguard its financial health. Consequently, it is SIF's interpretation of I.C. § 72-915 that whether there is an "aggregate balance remaining to the credit of any class of employment or industry" that "may be safely and properly divided" in the Manager's "discretion," requires an in-depth analysis of a multitude of factors. These factors include present and future SIF operating expenses, required reserves,

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[33] Statute as used in this context refers to a specific provision contained within an "Act," or statutory framework. See, e.g., Ada County Assessor v. Roman Catholic Diocese of Boise, 123 Idaho 425, 429, 849 P.2d 98, 102 (1993). For instance, Idaho Code § 72-915 is a specific provision contained within the statutory framework of Title 72, Chapter 9 of the Idaho Code, or "Act" creating the State Insurance Fund.

investment income, market forces, industry trends, policyholder losses and other additional factors which are relevant in order to accomplish the duty of maintaining a viable, solvent SIF. Although not expressly contained in the statute, the foregoing factors can be implied from a plain reading of the statute, for without considering such factors, the Manager could not determine if the aggregate balance could be safely and properly divided.

Stated otherwise, the Manager must consider, think or judge (i.e. "deem") that the "aggregate balance"[34] "may be safely and properly divided." It is significant that it must be both safely and properly divided; both elements must be present, which requires any division (being separated into parts or pieces or pulled by conflicting interests, i.e., "divided") of the aggregate balance, should it occur, to (1) not be exposed to danger (i.e. "safely"); and (2) be suitable or appropriate (i.e. "properly"). Therefore, the use of the term "and" indicates that even if the division of the aggregate balance was not exposed to danger (i.e. "safe"), the Manager may consider, think or judge (i.e. "deem") the division among policyholders to not be suitable or appropriate (i.e. "proper"), or vice-versa.

As indicated, for the Manager to make this determination he must consider the multitude of factors listed in the previous paragraph. These factors are implied by the statute. It also involves the Manager making the determination of (1) the amount of surplus available for a dividend distribution, (2) how to distribute the dividend after it is declared, (3) how the dividend is calculated, and (4) which policyholders are entitled to receive the dividend and which ones are not. Collectively, these factors can be referred to as the aggregate balance remaining to the credit of any class of employment or industry which the manager deems may be safely and

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[34] SIF defines "aggregate balance" as surplus available for a dividend distribution.

properly divided. Importantly, Farber also appears to agree with this interpretation, indicating that "[a]mong 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." Appellants' Brief at 10.

However, the analysis does not end there, for the statute still requires the Manager to exercise his or her discretionary authority provided by I.C. § 72-915. Discretion indicates "wise conduct and management; cautious discernment; prudence" or "individual judgment; the power of free decision-making." Black's Law Dictionary 499 (8th ed. 2004). "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 . . . ." The language of Idaho Code Section 72-915 indicates the Manager, to the extent he or she believes it to be wise or prudent, may issue a dividend to each individual policyholder should he deem the aggregate balance may be safely and properly divided. The term "may" is defined as "to be permitted to"; the statute is not couched in mandatory terms. The Manager is not directed or required to issue a dividend to each individual member of such class if there is an aggregate balance remaining (that may be safely and properly divided). This might be the outcome had the Legislature used the term "shall" instead of "may." But the statute is clear—the Manager may, in his discretion, credit to each individual member.

Consequently, the plain meaning of I.C. § 72-915 as written provides the Manager with the discretionary authority to determine if a policyholder is entitled to receive a dividend, as well as the amount of such dividend. Idaho Code § 72-915 must be read as affording the Manager

discretion to determine which policyholders are allowed to share in the dividend distribution and this interpretation can be reconciled with the meaning of the term "properly entitled to" contained near the end of the statute. Aside from a policyholder having to satisfy the six-month longevity requirement—being "a subscriber to the state insurance fund for a period of six (6) months or more, prior to the time of such readjustment"—the policyholder must be "properly entitled to" the dividend, "having regard to his prior paid premiums since the last readjustment of the rates." The impact of "properly entitled to" means that in order to receive a legal right or to qualify for the dividend (i.e. "entitled"), it must be suitable or appropriate ("properly"). This term provides the Manager the discretionary authority to determine if a policyholder is "properly entitled to" receiving a dividend.

It is significant that the term "discretion" comes before the term "properly entitled to". This term is modified by and subject to the Manager's discretion. The same can be said for the portion of the statute that reads "having regard to his prior paid premiums since the last readjustment of the rates . . . ." In issuing dividends, the Manager, as part of his or her discretionary authority, takes into account the size of a policyholder's premium and gives it proper consideration and weight along with the myriad of other factors previously discussed herein.

For instance, this term allows the Manager to take into account a policyholder's losses in making the determination as to whether in his discretion, it is appropriate or suitable to allow a policyholder with losses to receive a legal right or to qualify for the dividend (i.e. "properly entitled to"). This determination is well within the Manager's "discretion," or wise conduct and management or prudence. Allowing a policyholder with losses to receive a dividend would run contrary to wise conduct and management or prudence.

In sum, I.C. § 72-915 does not require the Manager to follow a step-by-step process that is outlined in an operations manual or procedural guide to determine if the aggregate balance may be safely and properly divided. Rather, per the language of I.C. §72-915, the Manager exercised the authority given to him by the Legislature in determining that during the years 2003 through 2006, dividends would not be issued to SIF policyholders who paid premiums of $2,500 or less during the respective dividend year. Accordingly, Farber's arguments to the contrary fail.

B. Application of the rules of statutory construction to an ambiguous statute demonstrates that the SIF's dividend issuance practices are appropriate.

Per the above, SIF's interpretation of I.C. §72-915 is reasonable, and the District Court recognized that Farber's proposed interpretation was not the sole interpretation that could be reached from the reading of the statute given the multiple reasonable interpretations of the phrase "any class of employment **or** industry." R. at 89-90. In so doing, the District Court held:

> [I]t is this Court's conclusion that, as a matter of law, the language of I.C. §72-915, in context with the directives of other statutes set forth in the Act, the laws of our sister states, and the decisions of our Supreme Court, allows the fund manager, with the 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 establishes the State Insurance Fund. Specifically, to assure that the State Insurance Fund is run as an efficient insurance company, remains actuarially sound, and maintains the public purposes for which the Fund was created.

R. at 97. Thus, as discussed below, this holding by the District Court with respect to I.C. §72-915 is borne out by its appropriate application of statutory construction methods.

1. Idaho Code § 72-915, in conjunction with Title 72, Chapter 9, grants the Manager of the SIF discretionary authority to ensure the solvency of the SIF and, in doing so, to determine how much dividend to distribute and who receives such dividend.

Support for the District Court's construction of I.C. § 72-915 is found in an examination of Title 72, Chapter 9 in its entirety, making certain to read each statutory provision in context.

See Gillihan v. Gump, 140 Idaho 264, 267, 92 P.3d 514, 517 (2004). Indeed, this Court has previously indicated that one statute should not be read in a vacuum by holding that "statutory ... provisions cannot be read in isolation, but must be interpreted in the context of the entire document." Moss v. Bjornson, 115 Idaho 165, 166, 765 P.2d 676, 677 (1988) (citing Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1988)); see also Wright v. Willer, 111 Idaho 474, 476, 725 P.2d 179, 181 (1986) (holding that "[s]tatutes must be read to give effect to every word, clause and sentence.").

The SIF, like any creature of statute, has only the powers and attributes given to it by statute and no others: "An administrative agency is a creature of statute, limited to the power and authority granted it by the Legislature and may not exercise its sub-legislative powers to modify, alter, or enlarge the legislative act which it administers." Roberts v. Transportation Dep't, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991), aff'd, 121 Idaho 723, 827 P.2d 1174 (1992). Roberts elaborated:

> [W]here, as here, the legislature enacts a statute requiring that an administrative agency carry out specific functions, . . . that agency cannot validly subvert the legislation by promulgating contradictory rules. An administrative agency is limited to the power and authority granted it by the legislature. Such delegated authority is primary and exclusive in the absence of a clearly manifested expression to the contrary. An agency must exercise any authority granted by statute within the framework of that statutory grant. It may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered.

Id. (emphasis added).

A complete reading of Title 72, Chapter 9 highlights that the legislature has not limited the Manager's discretion with respect to the distribution of dividends; rather, Title 72, Chapter 9 highlights the authority and discretion provided by the Idaho Legislature to the SIF, the Manager, and the Board of Directors in order for the SIF to be run as an efficient insurance company that is

actuarially sound. See generally I.C. § 72-901(3). In reading Title 72, Chapter 9 of the Idaho in its entirety, the Manager has the discretion to handle the day-to-day operations of the SIF. In the instant matter, of particular significance is Idaho Code Section 72-901(3), which states:

> It shall be the duty of the board of directors to direct the policies and operation of the state insurance fund to assure that the state insurance fund is run as an efficient insurance company, remains actuarially sound and maintains the public purposes for which the state insurance fund was created.

Idaho Code § 72-901(3).[35] Although Idaho Code Section 72-901(3) focuses on the duty of the Board of Directors, several other statutes direct how the Board will effectuate the policy quoted above, along with the Manager's power and discretion in the related areas of surplus, reserves, premiums, or dividends. As the Court noted in Rivera v. Johnston, 71 Idaho 70, 75, 225 P.2d 858, 862 (1951), "Sections 72-901, 902, 903, 904, and 909 give the State Insurance Fund Manager complete power over the Fund and settlements thereby."[36] As such, a number of other provisions in Title 72, Chapter 9 of the Idaho Code provide that SIF acted in a manner consistent with the discretion granted to the Manager and Board of Directors regarding payment of dividends:

- I.C. § 72-902, which was amended in 1998, required that the SIF Board of Directors appoint a manager of the fund "to conduct the business of the state insurance fund and do any and all things which are necessary and convenient in the administration thereof, or in connection with the insurance business to be carried on . . . ." I.C. § 72-902.

- I.C. § 72-903 gives the Manager "full power to determine the rates to be charged for insurance in said fund, and to conduct all business in relation thereto . . . ."

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[35] See Affidavit of Michael Camilleri, as submitted as Exhibit 4 to Farber's Motion to Augment Record, as approved by this Court's Order Granting Motion to Augment Record, dated July 2, 2008 ("Camilleri Aff."), at ¶ 11.

[36] While these statutes have been amended since that time, in general, the Manager's authority with respect to setting surplus and reserve levels and declaring dividends has not been affected. Hayden Lake, 141 Idaho 392, 111 P.3d at 77.

- I.C. § 72-913 gives the Manager "power to rearrange any of the classes by withdrawing any employment embraced in it and transferring it wholly or in part to any other class, and from such employments to set up new classes in his discretion . . . ."[37]

- I.C. § 72-914 directs the Manager to account for "the setting up of reserves adequate to meet anticipated and unexpected losses and to carry the claims to maturity."

- Idaho Code Section 72-915 gives the Manager discretion to declare a dividend if he deems it may be safely and properly divided. Accord Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 388, 392, 111 P.3d 73, 77 (2005) ("since 1919 the Manager has had the authority to set surplus and reserves without outside approval and **to declare dividends in his discretion**.")(emphasis added).

Support for this approach is found in a previous lawsuit involving the SIF where policyholders sued to challenging its practices relating to the management of its surplus and dividends, and certain real estate investments made with the State. Hayden Lake, 141 Idaho 388, 391, 111 P.3d 73, 76 (2005). The statute at issue was Idaho Code Section 72-911, entitled "Surplus and reserve," which provided a framework for the SIF's retention of a percentage of premiums to be set aside for the SIF's surplus.38 Id. The statute provided that:

> Ten per centum (10%) of the premiums collected from employers insured in the fund shall be set aside by the manager for the creation of a surplus until such surplus shall amount to the sum of $100,000, and thereafter 5 per centum (5%) of such premiums until such time as in the judgment of the manager such surplus shall be sufficiently large to cover the catastrophe hazard and all other unanticipated losses.

Idaho Code § 72-911. After examining the language of Idaho Code Section 72-911, the district court determined it was ambiguous, because the "5% language . . . could be reasonably interpreted to require the SIF manager to set aside at least 5% of the collected premiums, no

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[37] As indicated above, the Idaho legislature adopted Idaho Code Section 41-1618 in 1961, which states the powers granted to the Manager under 72-903 and 72-913 are subject to the provisions set forth in Title 41, Chapter 16.

[38] In 1998, the Legislature amended the SIF's governing statutes. Based on those amendments, Idaho Code Section 72-911 was repealed in 1998 to the extent it related to the amount of premiums to be set aside for surplus, although the Manager's authority with respect to setting surplus and reserve levels and declaring dividends was not affected. Hayden Lake, 141 Idaho at 392, 111 P.3d at 77.

more than 5% of such premiums, or exactly 5% of such premiums." Hayden Lake at 398, 111 P.3d at 83. Consequently, the district court engaged in statutory construction.

In addition, the district court judge, Judge Judd, judiciously declined to substitute his decision-making for the Manager and board of directors, commenting that even though the SIF was conservatively managed, that style of management was well within the outer boundaries of the manager's discretion and reasonable business judgment of the directors, and also complied with the statutorily mandated duties of the manager. 141 Idaho at 401, 111 P.3d 86. With respect to the SIF's dividend and surplus practice Judge Judd wrote:

> This is particularly true in light of the financial difficulties, including outright insolvency, of some private workers' compensation insurers and state workers' compensation funds. This conclusion is not changed by evidence that the processes by which these decisions were reached may have been somewhat deficient.

Id. The Idaho Supreme Court agreed with the district court's conclusion that the statute was ambiguous, and indicated the statute "must be construed to mean what the legislature intended it to mean. To determine that intent, we examine not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history." Id. at 398-99, 111 P.3d 83-84. The Court then began an analysis of several statutes contained within the SIF's statutory framework to determine the Legislature's intent. For instance, it relied on Idaho Code § 72-913, which requires the Manager to "fix the rates of premiums . . . consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve." Id. at 399, 111 P.3d 84. The Court then turned to Idaho Code § 72-914, which directs the Manager to account for "the setting up of reserves adequate to meet anticipated and unexpected losses and to carry the claims to maturity." Id. The Court also

invoked the statute as issue in the present litigation, Idaho Code § 72-915. Id. In addition, the district court also determined the Legislature intended Idaho Code § 72-911 to be a start-up provision and was designed to help the SIF build up its funds. Id. This determination was also supported by the language of the statute itself. Id.

By analyzing other statutes within the SIF's statutory framework, and examining legislative intent, the Idaho Supreme Court concluded that "the language of the statutes governing the SIF, as well as the legislative intent behind former I.C. § 72-911, support the conclusion that it did not place a limit on the amount of premiums the SIF could set aside for surplus" and limiting the Manager's discretion would be inconsistent with the legislative intent to ensure the SIF's solvency. Id.

As is illustrated in Hayden Lake, the SIF, through its Manager, must ensure the maintenance of a solvent fund. Of course the SIF's financial well-being is not static, but rather is subject to many economic forces that threaten its solvency; accordingly, the Legislature granted the Manager the discretionary authority and power "to conduct the business of the state insurance fund and do any and all things which are necessary and convenient in the administration thereof, or in connection with the insurance business to be carried on...." I.C. § 72-902.

Notably, per Roberts, the SIF had (and has) the authority to act in the manner that SIF did with respect to its dividend practices especially in light of the fact that Idaho Code Section 72-901 was amended in 1998 to clearly delegate that the authority of the Board of Directors be "primary and exclusive in the absence of a clearly manifested expression to the contrary." Id. If the Legislature wanted to curtail the Manager's power or discretion in the areas of dividend and surplus practices it could have easily accomplished the task given that in 1961 it limited the

Manager's power to determine the rates to be charged for insurance contracts by mandating the SIF's rates be regulated by the Department of Insurance, which approves worker's compensation rates based upon the rate filings of an authorized rating organization.

By not limiting the Manager's discretion, and in a number of instances directing the Manager to exercise his discretion regarding the level of surplus and reserves and whether a dividend would be declared, the Legislature impliedly granted the Manager, through the Board of Directors, the authority and responsibility for making the following determinations in order to carry out the SIF's purpose: (1) the amount of surplus available for a dividend distribution, (2) how to distribute the dividend after it is declared, (3) how the dividend is calculated, and (4) which policyholders are entitled to receive the dividend and which ones are not. I.C. §§ 72-901, 72-902, 72-903, 72-904, 72-909, 72-913, 72-914, and 72-915. By doing so, the Legislature left the day-to-day administrative operations to the Manager appointed by the board of directors.

Thus, as discussed above, the discretion granted to the Manager by the entirety of Idaho Code Section 72-915 - in conjunction with the remainder of Title 72, Chapter 9 - grants the Manager the authority to issue dividends as he deems may be safely and properly divided, including the discretion to determine the amount of and recipients of such dividends.

2. The decision to preclude policyholders of $2,500 or less from receiving a dividend in 2003, 2004, 2005, and 2006 was well within the Manager's discretionary authority[39]

The decision to preclude policyholders who paid annual premiums of $2,500 or less from receiving a dividend was well within the statutorily mandated discretion of the Manager. Dividends, if any, are paid from what the Manager determines to be surplus available for a

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[39] See Camilleri Aff., ¶¶ 1-14.

dividend distribution after taking into consideration a multitude of factors, including present and future SIF operating expenses, the required reserves, investment income, market forces, industry trends and other additional factors which are relevant.[40] The determination as to whether a dividend may be safely and properly declared, the amount of such dividend, and which policyholders will receive a dividend is not an exact science, but rather is a decision-making process that is based upon experience and knowledge of the insurance business, industry trends, and market forces.[41] The declaration of a dividend is a multi-step process that ultimately boils down to determining how much surplus is safely available to be declared as a dividend, followed by determining how it is to be divided, taking into account such factors as the costs associated with writing the policy, and any losses that may have been incurred on the policy.[42]

Another important consideration is the marketing effect that a dividend will have on retaining larger, more profitable accounts, because these accounts allow the SIF to fulfill its public policy objectives of providing a source of insurance for the smaller, less profitable accounts.[43] Using the premium amount as a basis for determining the rate of return is appropriate because a dividend is a return of unused premium, and a larger policy will have more unused premium than a smaller premium policy because certain costs associated with writing a policy are the same whether the premium amount is $2,000 or $200,000.[44]

Moreover, worker's compensation rates are regulated and thus are the same for all carriers. See Idaho Code § 41-1618. As a result, the SIF must implement certain policies to help

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[40] See Alcorn Aff., ¶ 21; see also Camilleri Aff., ¶ 13.
[41] See Alcorn Aff., ¶ 23; see also Camilleri Aff., ¶ 13.
[42] See Alcorn Aff., ¶ 24; see also Camilleri Aff., ¶ 13.
[43] See Alcorn Aff., ¶ 25.
[44] See Alcorn Aff., ¶¶ 27, 28.

retain the business of the larger policyholders, including the decision to provide the larger premium policies a larger dividend as a percentage of the premium.[45] Providing larger policyholders with a larger dividend as a percentage of premium is a good business decision and is consistent with insurance industry practices, as well as the statutory mandate of I.C. § 72-901(3) to run the SIF as an efficient insurance company that remains actuarially sound.[46]

This argument is further supported by the following example. Assume policy holder A has a $2,000 annual premium, but has $100,000 in losses on its worker's compensation coverage during the period in which the Manager deems the aggregate balance remaining may be safely and properly divided. Under Farber's confined interpretation of Idaho Code Section 72-915 and Title 72, Chapter 9, policy holder A would be entitled to share in the dividend pool along with the remaining policy holders. Surely the Legislature did not intend for this to occur as it would run contrary to the purpose of the SIF. It is clear that policyholder A should not be able to share equally in the dividend pool when he or she is being subsidized by the remaining policyholders. Such a policy would threaten the solvency of the SIF.

In addition, it is significant that the Idaho Supreme Court determined that SIF is not a mutual insurance carrier in the Kelso case. 134 Idaho 130, 134–35, 997 P.2d 591, 595–96 (2000). Whereas a mutual insurance carrier may assess a policyholder whose premiums do not cover its losses, the SIF is not a mutual insurance carrier and, therefore, does not assess its policyholders for the losses the previous year. See id. Moreover, worker's compensation coverage is a unique form of insurance in that it provides unlimited coverage to its policyholder

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[45] See Alcorn Aff., ¶ 29.
[46] See Alcorn Aff., ¶ 32.

regardless of the premium size.[47] The SIF provides a $2,500 policyholder, and any policyholder under or above that amount with the same amount of upper coverage as a $500,000 policyholder.[48] Yet, either policy can have extensive losses well above their premium amounts.

The Legislature afforded the Manager discretion to counteract these precise illustrations. The Manager must be given discretion to exclude a policyholder whose losses exceed its premium amount. And although I.C. § 72-915 does not explicitly provide this authority, it can be indirectly inferred as being one of sound policy. As previously stated, the board of directors, through the Manager, is under a duty to run the fund like an efficient insurance company that remains actuarially sound and maintains the public purpose. Allowing a policyholder to receive a dividend under the circumstances outlined above would be a violation of that duty. And this same rationale applies across the board, whether the policy holder has a $2,000 premium, or a $500,000 premium. Consequently, the decision to give dividends pursuant to a formula that excluded smaller policyholders during the policy years in question was made after considering and weighing all of the factors set forth above, and was consistent with the law and industry practice, and was done with the knowledge of the board of directors.

Although the Manager, in his discretion, ultimately determined the best course of action for the SIF is to exclude policy holders with annual premiums of $2,500 or less from receiving a dividend, this policy was not implemented in isolation; rather, there was no objection by the board of directors. The duty of the board of directors is clear. It must assure that the SIF is run as an efficient insurance company, remains actuarially sound, and maintains the public purposes for which it was created. Id. Yet, these duties can sometimes be at odds with one another.

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[47] See Alcorn Aff., ¶ 34.
[48] See Alcorn Aff., ¶ 34.

Being an efficient insurance company that is actuarially sound does not always comport with the public purpose of the fund. Thus, the SIF is forced to make difficult decisions within the power and discretion provided by the Legislature in order to strike a balance between these duties.

Recall that the SIF is not a monopolistic state fund, but rather must compete for business against private worker's compensation insurance carriers.[49] As a competitor in the private marketplace, the SIF is under constant barrage from more agile, less restricted competitors seeking to lure away its best clients.[50] These private companies have the luxury of tailoring their business practices in such a way to attract the best clients in the market, whereas the SIF is less flexible in that it exists to maintain the public purpose of providing affordable worker's compensation insurance coverage to Idaho employers. The private competitors of the SIF are not bound by the same public purpose, and as a result, are able to "cherry-pick" the prime candidates from the SIF's roster of policyholders.

The SIF serves a "public purpose" but not a "governmental purpose." State ex rel. Williams v. Musgrave, 84 Idaho 77, 85, 370 P.2d 778, 782 (1962). Mr. Alcorn referenced this fact when noting that while private companies are picking only the best accounts, the SIF continued to write as many employers as it can.[51] Chairman Bill Deal reiterated this theme by commenting to the board of directors that if the SIF is taking accounts no other insurance company will take, the losses will increase due to those smaller companies being added to the SIF's base.[52] Moreover, a policyholder with a premium of $2,500 could have equal or greater

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[49] See Alcorn Aff., ¶ 10.
[50] See Alcorn Aff., ¶ 29.
[51] See Alcorn Aff., Ex. E (Board of Directors of the State Insurance Fund Minutes of January 22, 2004), CL 0021.
[52] See Alcorn Aff., Ex. A, CL 0029.

losses than a policyholder with a premium of $100,000.[53] There is nothing to insulate the SIF should this occur; consequently, the SIF needs the larger policyholders to absorb the losses generated by lower premium contributors.[54]

Mr. Alcorn's discretionary authority to exclude policyholders whose annual premiums are $2,500 or less is also supported by the Idaho Attorney General's office. In 2003, David High, Chief of the Civil Litigation Division, wrote a letter to an SIF policyholder who was upset after learning of the SIF's newly fashioned policy to exclude policyholders whose annual premium charges were below $2,500 from receiving a dividend.[55] Mr. High's letter discusses the SIF's prior dividend practices, and specifically its decision to reduce a large surplus that had accumulated over the course of the 1990's.[56] In Mr. High's view, due to the surplus being reduced, the SIF established new criteria for the receipt of a dividend, including the decision to exclude policyholders whose premiums were below $2,500.[57] In discussing the validity of this decision, Mr. High wrote: "It appears the actions taken by the State Insurance Fund with respect to its issuance of dividends are within the Manager's discretion."[58] This letter supports SIF's position that decisions related to the issuance of dividends is within the Manager's discretionary authority. Indeed, the decision resulted from an analysis of many factors that the Manager analyzed in considering what was in the SIF's best interests, such as:

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[53] See Alcorn Aff., ¶ 33.
[54] See Alcorn Aff., ¶ 33.
[55] See Alcorn Aff., Ex. F (letter from David G. High, Chief, Civil Litigation Division, to Robert Equsquiza, January 23, 2003).
[56] Id.
[57] Id.
[58] Id. (emphasis added).

- The marketing effect that a dividend will have on retaining larger, more profitable accounts, because these accounts allow the SIF to fulfill its public policy objectives of providing a source of insurance for the smaller, less profitable accounts.[59]

- The fact worker's compensation rates are regulated and thus are the same for all carriers. See Idaho Code § 41-1618. As a result, the SIF must implement certain policies to help retain the business of the larger policyholders, and one of these business related decisions was to provide the larger premium policies a larger dividend as a percentage of the premium.[60]

- The SIF is not a mutual insurance carrier, which may assess a policyholder whose premiums do not cover its losses. The SIF steers clear of this approach by covering the losses of such policyholders.

- The SIF provides a $2,500 policyholder with the same amount of upper coverage as a $500,000 policyholder.[61] But either policy can have extensive losses well above their premium amounts.

- The fact the SIF is not a monopolistic state fund, but rather must compete for business against private worker's compensation insurance carriers.[62] As a competitor in the private marketplace, the SIF is under constant barrage from more agile, less restricted competitors seeking to lure away its best clients.[63] These private companies have the luxury of tailoring their business practices in such a way to attract the best clients in the market, whereas the SIF is less flexible in that it exists to maintain the public purpose of providing affordable worker's compensation insurance coverage to Idaho employers.

- The SIF serves a "public purpose" but not a "governmental purpose." State ex rel. Williams v. Musgrave, 84 Idaho 77, 85, 370 P.2d 778, 782 (1962). While private companies are picking only the best accounts, the SIF continues to write as many employers as it can.[64]

- The Idaho Attorney General's Office has previously supported Mr. Alcorn's decision to exclude policyholders whose annual premiums are $2,500 or less from the dividend pool: "It appears the actions taken by the State Insurance Fund with respect to its issuance of dividends are within the Manager's discretion."[65] The letter from the Idaho Attorney General's Office also discusses the SIF's prior dividend practices, and specifically its

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[59] See Alcorn Aff., ¶ 25.
[60] See Alcorn Aff., ¶ 29.
[61] See Alcorn Aff., ¶ 34.
[62] See Alcorn Aff., ¶ 10.
[63] See Alcorn Aff., ¶ 29.
[64] See Alcorn Aff., Ex. E (Board of Directors of the State Insurance Fund Minutes of January 22, 2004), CL 0021.
[65] Id. (emphasis added).

> decision to reduce a large surplus that had accumulated over the course of the 1990's. Due to the surplus being reduced, the SIF established new criteria for the receipt of a dividend, including the decision, if there was a reduced amount of money available for a dividend, to exclude policyholders whose premiums were below $2,500.

In operating in such a manner, the SIF is able to maintain the public purpose for which it was created. However, it also runs the risk of losing larger, more attractive policyholders whose larger premium totals have a greater impact in maintaining the financial integrity of the SIF. The decision to return larger dividends to those policyholders who pay larger premium totals is one of the tools available to the SIF to maintain its purpose.[66] It is a discretionary decision well within the statutory framework provided by the Legislature when it enacted the SIF. Referring back to the comments articulated by Judge Judd, it is also a discretionary decision that helps to achieve the financial solvency of the fund, a result which should be commended in a time when other funds (private and state) are not faring as well as the SIF.

Farber attempts to characterize this discretionary authority as "an act of unfettered discretion," ignoring the statutory parameters placed on the Manager. If there are concerns whether the Manager is abusing this Legislative grant of discretionary authority, a remedy available to an aggrieved party is to request a Court examine the validity of the decision under the abuse of discretion standard of review, as illuminated by this Court's decision in Hayden Lake, 141 Idaho at 400 ("This Court also has free review over the district court's determination that the SIF's Manager did not abuse his discretion."). Thus, Farber's concerns that the Manager has "unfettered" discretion is unfounded, as any decision related to the Manager's discretionary authority can be challenged under the abuse of discretion standard of review. SIF believes this to be the ultimate issue to be decided in this case—the issue of whether it was an abuse of

[66] See Alcorn Aff., ¶ 29.

discretion to implement a policy excluding those policyholders paying premium amounts of $2500 or below from receiving a dividend during the dividend years in question, rather than the issue of whether the Manager had the right to implement that policy to begin with.

3. Other state legislatures have granted their state insurance funds the power to set a minimum policy premium amount below which a policyholder is not entitled to receive a dividend

The decision of SIF to preclude policyholders who have paid annual premiums of $2,500 or less from receiving a dividend relative to the distribution of any surplus is not a novel concept. At least two other states, Montana and North Dakota, follow a parallel practice. Similar to Idaho, both states have enacted a state insurance fund via statute, and although SIF realizes Montana's and North Dakota's state insurance funds are not structured identically to Idaho's state insurance fund, an examination of their dividend practices remains instructive.

Montana overhauled its workers' compensation statutes in 1990 in response to its state insurance fund going insolvent. See Mont. Code Ann. § 39-71-2301 et seq. Although the Montana State Insurance Fund has been in existence since the early part of the century, the revision created a new fund. Id. In Montana, unlike Idaho, the management and control of the state insurance fund is vested solely in the board of directors. Mont. Code Ann. § 39-71-2315 (2005). As far as dividend practices are concerned:

> [I]f at the end of any fiscal year there exists . . . an excess of assets over liabilities, including necessary reserves and an appropriate surplus as determined by the board . . ., and if the excess may be refunded safely, then the board, after consultation with the independent actuary engaged . . ., may declare a dividend. The rules of the state fund must prescribe the manner of payment to those employers who have paid premiums into the state fund in excess of liabilities.

Mont. Code Ann. § 39-71-2323 (2005). The statute makes reference to "rules of the state fund" which in turn provide a structure for the dividend calculation attributable to each qualifying

policy holder. One of these rules is entitled "Individual Loss Sensitive Dividend Distribution Plan" and provides several dividend factors the board of directors should consider when calculating a policy holder's rightful dividend calculation—should the board of directors determine a dividend declaration is appropriate. See MONT. ADMIN. R. 2.55.502 (2006). The factors are based on the actuarial determination of a policy holder's proportionate contribution to the operating results of the state fund during the dividend year and are provided in the rule. See id. However, the rule also provides that "[t]he board may set a premium amount below which a dividend shall not be payable to an individual policyholder." Id.

In North Dakota, the legislature has directed the board of directors of its state insurance fund to exclude minimum premium policy holders from participating in the dividend pool. North Dakota's relevant dividend statute is as follows:

> Upon approval of its board of directors, the organization may create and implement actuarially sound employer premium calculation programs, including dividends, group insurance, premium deductibles, and reimbursement for medical expense assessments.

N.D. Cent. Code § 65-04-19.3 (2005). Once a dividend is declared by the board of directors, the administrative rules delineate a policy holder's eligibility and the distribution thereof. N.D. Admin Code § 92-01-02-55 (2005). Of particular significance is the fact that the rule states "minimum premium . . . accounts are not eligible for dividend payments." Id.

The Montana and North Dakota legislatures have taken steps to clarify the board of directors' ability to exclude policy holders at and below a certain premium amount from receiving a dividend should one be declared. Although the Idaho Legislature has not followed suit by adopting a similar express provision, SIF argues that the Legislature has not had the need, especially in light of the 1998 amendments and specifically the impact of I.C. § 72-901(3). This

conclusion is supported, rather than diminished, by the Legislature's overall grant of power, authority, and discretion to the Manager and board of directors throughout the Act. There is no need because the ability for SIF to implement the type of policy Farber complains of can be inferred from the power, authority, and discretion provided throughout the statutory construct of the Act. Had the Legislature wanted to curb the power, authority, and discretion of the Manager and board of directors, it could have taken the steps to do precisely that. However, the 1998 amendments indicate the Legislature's preference to remain "hands-off" and let the Manager and board of directors work together to ensure the purpose of the SIF continues to be fulfilled.

It is hard to argue with that logic in light of the recent success the SIF has enjoyed. While other state insurance funds have endured financial crisis, the SIF continues to enjoy financial success and stability, which is largely attributed to the skill and expertise of Mr. Alcorn and SIF's Board. Collectively, they understand the delicate intricacies of the SIF's business, and have been able to successfully navigate around many pitfalls affecting the industry as a whole.

4. Consideration of Mr. Alcorn's affidavit by the District Court was appropriate.

With regard to the affidavits submitted in this matter, the District Court stated:

> The plaintiffs argue that there is no basis to conclude that any of the information discussed by the manager is his affidavit was known to or within the contemplation of the legislature at the time that it acted in 1917. The facts presented to the court in support of plaintiffs' argument are contained in the affidavit of George Bambauer. Therein, he declares that when he was employed with the SIF, the amount of dividend distribution was based upon a formula which took into account the amount of premiums paid by a policyholder but did not include a minimum premium cut off. Nothing in his affidavit addresses the claims of the manager that the decision conforms to industry practice and is based upon running the SIF as an efficient insurance business. The defendants' position is not only supported by the affidavit of the SIF manager but also the affidavit of their insurance expert, Michael Camilleri.

R. at 88-89. In providing the affidavit of Mr. Alcorn (as well as Mr. Camilleri), SIF is setting forth its reasonable interpretation of an ambiguous statute; such extrinsic evidence is appropriately considered given the determination that the statute is ambiguous. See, e.g., Carrier v. Lake Pend Oreille School Dist., 142 Idaho 804, 808, 134 P.3d 655 (2006)("'When a statute is ambiguous, it must be construed to mean what the legislature intended it to mean. To determine that intent, we examine not only the literal words of the statute, but also **the reasonableness of proposed constructions**, the public policy behind the statute, and its legislative history.'")(emphasis added). Per Roberts, SIF had (and has) the authority to act in the manner the SIF did with respect to its dividend practices, especially in light of the fact that Idaho Code Section 72-901 was amended in 1998 to provide a clear mandate to the Board of Directors. See Roberts v. Transportation Dep't, 121 Idaho at 732, 827 P.2d at 1183. The Legislature clearly delegated authority to the Board of Directors, which authority is "primary and exclusive in the absence of a clearly manifested expression to the contrary." Id. As discussed above, the Legislature has already provided the Manager, through the Board, the power and authority to implement those policies that allow it to be run as an efficient insurance company that remains actuarially sound. The Legislature, in its wisdom, was wise enough to realize it did not have the knowledge base to direct the policies of the SIF, and therefore sought to yield this power, authority and oversight to those more properly suited. In fact, the Board[67] is mandated by statute to appoint a Manager with skill and expertise in the insurance industry. See I.C. § 72-902. Thus, the affidavit of Mr. Alcorn, the Manager of the SIF, was appropriate for the Court to consider..

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[67] The Governor is required to appoint to the Board (1) a licensed insurance agent; (2) a member of the State Senate; and (3) a member of the State House of Representatives. See I.C. § 72-901(2). As a result, there is Legislative oversight and input, contrary to assertions otherwise.

Further, in conjunction with the Alcorn affidavit, the Court's Memorandum Decision makes clear that the Bambauer affidavit submitted by Farber was also considered by the Court. The Court correctly held that the Bambauer affidavit did not, however, overcome the testimony by Mr. Alcorn. The affidavit of George Bambauer, an individual previously employed by the SIF, was submitted in an attempt to establish that Mr. Alcorn's position with respect to dividend distribution would be "different from how his predecessors interpreted the statute."[68] However, Mr. Bambauer was no longer a full-time employee with the SIF when the Legislature amended the SIF's statutory framework in 1998.[69] Further, he never held the position of Manager, but rather worked as a compensation representative, as well as in underwriting and auditing.[70] Additionally, he never made the ultimate decision to issue a dividend or not; he was not charged with that duty.[71] Therefore, any information coming from Mr. Bambauer as to how previous Managers interpreted the statute is, at best, secondhand testimony.[72]

Despite this, Farber contends that "[t]he affidavit of Mr. Alcorn of February 13, 2007 on which the SIF depends is not relevant to the process of determining the meaning of a statute passed in 1917." Appellants' Brief at 19. Idaho Rule of Civil Procedure 56(e) provides, in relevant part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." This Court reviews challenges to a trial court's evidentiary rulings under the abuse of discretion standard. Perry v. Magic Valley

[68] See Affidavit of George Bambauer, as submitted as Exhibit 11 to Farber's Motion to Augment Record, as approved by this Court's Order Granting Motion to Augment Record, dated July 2, 2008 ("Bambauer Aff.")
[69] See Bambauer Aff., ¶ 2.
[70] See Bambauer Aff., ¶ 2.
[71] See generally Bambauer Aff.
[72] Additionally, Mr. Bambauer's affidavit would in fact appear to contradict Farber's position that a Manager should not be interpreting the statute to begin with.

Regional Medical Center, 134 Idaho 46, 50, 995 P.2d 816, 820 (2000). Error is disregarded unless the ruling is a manifest abuse of the trial court's discretion and affects a substantial right of the party. Id. at 50. To determine whether a trial court has abused its discretion, this Court considers whether it correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason. Id. In any event, the District Court's Memorandum Decision correctly explores a number of avenues in construing the statute at issue, and did not rely exclusively on Mr. Alcorn's affidavit. In light of that, as well as the District Court's consideration of Farber's submitted Bambauer affidavit, and the fact that the District Court also considered the affidavit of SIF's expert (Mr. Camilleri) which has not been cited as a point of error by Farber in the brief-in-chief, Farber cannot argue that there was any manifest abuse of the District Court's discretion which affected a substantial right of Farber's. Mr. Alcorn's affidavit was appropriately submitted and considered by the District Court.

C. As an alternative basis for affirming the District Court's ruling, the *Simplot* criteria for deference to the SIF's interpretation of the statute have been met.

Although the SIF does not assert (or believe) that the district Court ruled in its favor on erroneous grounds, Idaho law provides that "[w]here final judgment of the district court is entered upon an erroneous or different theory, it will be upheld on the correct theory." Johnson v. Gorton, 94 Idaho 595, 598, 495 P.2d 1, 4 (1972). Although not addressed by the District Court in its decision, the District Court's ruling may be affirmed by applying the rule that an agency is afforded deference in interpreting a statute, provided certain criteria are met. See Canty v. Idaho State Tax Commission, 138 Idaho 178, 59 P.3d 983 (2002). "The level of deference that should be granted the agency interpretation is determined under the J.R. Simplot

test." Id. at 183 (citing J.R. Simplot Co. v. Idaho State Tax Comm'n, 120 Idaho 849, 862-63, 820 P.2d 1206, 1219-20 (1991)). The Simplot test is four-pronged.

"The first prong asks if the agency is entrusted to administer the statute at issue, so it is 'impliedly clothed with power to construe' this law." Id. at 183. As discussed above, the statute at issue plainly provides only the skeleton for the SIF Manager's discretionary determinations:

> 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.

Idaho Code §72-915 (emphases added). Thus, this prong is met.

"The second prong says that the agency interpretation must be reasonable." Canty, 138 Idaho at 183. "An agency's interpretation is reasonable if it is not 'so obscure or doubtful that it is entitled to no weight or consideration.'" Id. In the present case, the affidavit testimony of Mr. Alcorn established that SIF's practice conformed to industry practice and was based upon running the SIF as an efficient insurance business, a point recognized by the District Court.[73] R. at 89. Farber provided no rebuttal testimony to demonstrate that Mr. Alcorn's testimony advanced an interpretation that was "so obscure or doubtful" such that it would be entitled to no weight or consideration. Importantly, as was the case in Canty, SIF's position is similar to that of Idaho's sister states, as discussed above. Canty, 138 at 183. Thus, this prong is met.

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[73] It is for this reason, as well, that Mr. Alcorn's affidavit was appropriately considered by the District Court, in that it represented critical testimony as to the explanation for SIF's dividend practice.

"The third prong of the Simplot test requires the Court to determine that the statutory language does not expressly treat the precise question at issue." Id. "If it does, no deference need be given to the agency." Id. As discussed above, Idaho Code §72-915 does not specifically address issues such as surplus levels, dividend amounts, or the specific "class[es] of employment or industry" entitled to any dividend. Rather, all of these items are expressly left to SIF for determination thereof. Thus, this prong is met.

"The fourth prong requires the court to look for the rationales underlying deference." Id. at 184. "The rationales to be considered include: (1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation." Id. "'If one or more of the rationales underlying the rule are present, and no 'cogent reason' exists for denying the agency some deference, the court should afford 'considerable weight to the agency's statutory interpretation.'" Id.

- The first rationale, practicality, "apparently refers to the fact that statutory language is often of necessity general and therefore cannot address all of the details necessary for its effective implementation." Id. Here, SIF's interpretation is practical, given that it must be ensured that SIF is run as an efficient insurance company, remains actuarially sound, and maintains the public purposes for which it was created, all whilst competing with private competitors who might cherry-pick prime candidates. Thus, SIF's interpretation is practical in that it allows year-to-year flexibility to adapt to an ever-changing marketplace.

- The second rationale, legislative acquiescence, provides that "[b]y not altering the statutory text the legislature is presumed to have sanctioned the agency interpretation." Id. As discussed above, the SIF, through four different Managers, has issued dividends continuously since at least 1982, using essentially the same dividend formula that is currently being implemented, in that the dividends returned as a percentage of paid premium have always differentiated by the size of the premium; consequently, the SIF has always returned back a larger percentage of paid premium to the large premium

policyholders, as opposed to the smaller premium policyholders.[74] However, the legislative history of Idaho Code §72-915 reflects that the statute has not been amended since 1941, a point previously noted by this Court. See Hayden Lake Fire Protection Dist., 141 Idaho at 392 ("In general the Manager's authority with respect to setting surplus and reserve levels and declaring dividends was not affected by the [1998] amendments."). It is also notable that, by statute, two members of the Idaho legislature serve on the SIF Board: a member of the State Senate; and a member of the State House of Representatives. See I.C. § 72-901(2). Thus, this rationale is met, as well.

- The third rationale "asks whether the agency has expertise." Canty, 138 Idaho at 184. SIF, as an entity providing worker's compensation insurance, has expertise in the insurance field. Moreover, the Board is mandated by statute to appoint a Manager with skill and expertise in the insurance industry, see I.C. § 72-902, and Mr. Alcorn's affidavit testimony more than amply demonstrates his expertise.[75] Further, the Governor is required to appoint to the Board (1) a licensed insurance agent; (2) a member of the State Senate; and (3) a member of the State House of Representatives. See I.C. § 72-901(2). Thus, this rationale is met.

- The fourth rationale, repose, addresses whether or not the position of the agency has been such that it has come to be relied on. Canty, 138 Idaho at 184. Again, the SIF, through four different Managers, has issued dividends continuously since at least 1982, using essentially the same dividend formula that is currently being implemented, in that the dividends returned as a percentage of paid premium have always differentiated by the size of the premium; consequently, the SIF has always returned back a larger percentage of paid premium to the large premium policyholders, as opposed to the smaller premium policyholders.[76] Thus, this rationale has been met.

- The fifth rationale "requires that the agency interpretation be contemporaneous with the passage of the legislation." Canty, 138 Idaho at 184. Here, Idaho Code §72-915, in its original form, was passed in 1917, and last amended in 1941. While the evidence in the record does not reflect that SIF adopted its interpretation of the statute in 1941 (and, thereby, not satisfying this rationale), the evidence does reflect that SIF has consistently held this interpretation since 1982.

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[74] See Alcorn Aff., ¶ 27.

[75] Specifically, Mr. Alcorn has been the SIF Manager since 1998. Alcorn Aff., ¶1. Prior to that, Mr. Alcorn served as the Director of the Idaho Department of Insurance from May 1994 to January 1995, and again from December 1995 until April 1998. Id. at ¶3. Mr. Alcorn also served as the Deputy Director of the Idaho Department of Insurance from January 1995 to December 1995. Id. Further, Mr. Alcorn has extensive experience in the insurance industry since 1970 as a licensed insurance agent and owner of independent property and casualty insurance agencies, and currently holds the professional designation of Certified Insurance Counselor. Id. at ¶2.

[76] See Alcorn Aff., ¶ 27.

Thus, having met 4 of the 5 criteria, the fourth prong is satisfied. In turn, as all four prongs of the Simplot test have been met, SIF's interpretation of I.C. §72-915 should be afforded "considerable weight," and the District Court's decision should be affirmed.

VIII. CONCLUSION

Accordingly, for the reasons stated above, the decision of the District Court granting partial summary judgment to SIF, and, in turn, denying Farber's motion for partial summary judgment, should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of August, 2008.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of August, 2008, I caused to be served two (2) true and correct copies of the foregoing document were **hand-delivered** to each of the following:

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