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

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Plaintiffs/Appellants,

vs.

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

Defendants/Respondents.

Docket No. 35144

APPELLANTS' REPLY BRIEF

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

Honorable Thomas Ryan
District Judge, Presiding

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TABLE OF CONTENTS

Table of Contents i

Table of Cases and Authorities iii

I. INTRODUCTION 1

II. ARGUMENT 2

A. Summary of Argument 2

B. No Case Already Decided By This Court Warrants a Determination the Manager Has Discretion Over the Proportioning of any Aggregate Balance Which He Has Chosen to Distribute 3

C. I.C. § 72-915 Not Only Affords the Manager No Discretion Over the Proportioning of Dividends, It Clearly Sets Out a Precise Dividend Proportioning Formula That Allows No Exercise of Discretion on the Part of the Manager 5

D. Neither the SIF Nor the District Court Have Successfully Identified a Single Reasonable Alternative Reading Which Would Render the Statute Ambiguous .9

1. Applicable Legal Standards 10

2. Viewed in the Light of the Appropriate Legal Standard, None of the Proffered Alternative Readings of the Statute Support The Finding of Ambiguity 12

a. The word "properly" as it is used in I.C. § 72-915 generates a need for a determination to be based upon a standard but it does not authorize the exercise of discretion in making of that determination 15

b. The words "may in his discretion" as it is used in I.C. § 72-915 do not authorize the exercise the discretion over "how to" distribute a dividend. 18

3. The Phrase,"Classes of Employment or Industries as used in I.C. § 72-915 is Not Ambiguous 19

E. There is No Demonstrated Justification For Any Consideration of Information Which is Not Shown to be Contemporaneous With the Enactment of I.C. § 72-915 21

F. The SIF Does Not Qualify for the *Simplot* Deference 24

III. CONCLUSION 26

CERTIFICATE OF SERVICE 28

TABLE OF AUTHORITIES

CASES

Ada County Assessor v. Roman Catholic Diocese of Boise,
123 Idaho 425, 428, 849 P.2d 98, 101 (1993) 10

Boise Redevelopment Agency v. Yick Kong Corp.,
94 Idaho 876, 885, 499 P. 2d 575,584 (1972) 7, 14

Boyd v. Potlatch Corp.,
117 Idaho 960, 961, 793 P.2d 192, 193 (Idaho 1990) 11

Carrier v. Lake Pend Orelille School Dist.,
142 Idaho 804,808, 134 P.3d 665 (2006) 22

Hayden Lake Fire Protection District v. Alcorn,
141 Idaho 388, 399,400, 111 P.3d 73, 84, 85 (2005) 4, 5, 24, 25

Idaho Cardiology Associates., P.A. v. Idaho Physicians Network, Inc.,
141 Idaho 223, 225, 108 Idaho P.3d 370, 372 (2005) 22

In re Application for Permit No. 36-7200,
121 Idaho 819, 823, 828 P.2d 848, 852 (1992) 11

In re Tax Appeal of Roman Catholic Diocese,
123 Idaho 425, 429, 849 P.2d 98, 104 (1993) 22

J.R. Simplot Co. v. Idaho State Tax Comm'n,
120 Idaho 849, 862, 820 P.2d 1206, 1219 (Idaho 1991) . . . . . 24 ,25, 26

John Hancock Mut. Life Ins. Co. v. Haworth,
68 Idaho 185, 192, 191 P.2d 359, 362 (1948) 11

Kelso v. State Insurance Fund,
134 Idaho 130, 138, 997 P.2d 591, 599 (2000) 14

Moses v. Idaho State Tax Comm'n,
118 Idaho 676, 678, 799 P.2d 964, 966 (1990) 12

Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County,
132 Idaho 551, 557, 976 P.2d 477, 483 (1999) 10

Pearl v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med.,
137 Idaho 107, 113 (Idaho 2002) 25

Preston v. Idaho State Tax Comm'n,
131 Idaho 502, 505, 960 Idaho185, 189 (Idaho 1998) 25

Rim View Trout Co. v. Higginson,
121 Idaho 819, 823, 828 P.2d 848, 852 (1992) 10

Roberts v. Transportation Department,
121 727, 827 P.2d 1178 (Ct. App.1991) 4, 5

Robison v. Bateman-Hall, Inc.,
139 Idaho 207, 211-212, 76 P.3d 951,956 (2003) 12

State v. Barnes,
133 Idaho 378, 382, 987 P.2d 290, 294 (1999) 11

State v. Martinez,
43 Idaho 180,187, 250 P. 239, 240 (Idaho 1926) 23

Westway Constr., Inc. v. Idaho Transp. Dep't,
139 Idaho 107, 73 P.3d 721 (2003) 7, 9

Winter v. State,
117 Idaho 103,105, 785 P.2d 667, 669 (1989) 9

STATUTES

I.C. § 41-1618 ..... 3, 6

I.C. § 72-322 1

I.C. § 72-901(3) 16

I.C. § 72-902 16

I..C. § 72-903(d) 25

I.C. § 72-911 16

I.C. § 72-913 20

I.C. § 72-914 21

I.C. § 72-915 ..... 1, 2, 3, 4, 5, 6, 8, 9, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

SESSION LAWS

Section 75 and 77, Chapter 81, 1917 Idaho Session Laws 24

Section 87, Chapter 81, 1917 Idaho Session Laws 16

Section 90, Chapter 81, 1917 Idaho Session Laws 20

Section 91, Chapter 81, 1917 Idaho Session Laws 20

Section 93, Chapter 81, 1917 Idaho Session Laws 8

I. INTRODUCTION

The body of law which has become the Idaho Worker's Compensation Law was first enacted by the Idaho Legislature in 1917. Prior to that time, no insurer offered the worker's compensation coverage which Idaho employers were required to secure. To address this situation, the Legislature created the State Insurance Fund (hereinafter the "SIF").

Much has changed since then but some things have remained unchanged. Among the things that have changed: in 1971, the Legislature relieved the SIF from the financially burdensome role of insurer of last resort through the creation of the "assigned risk pool." *See,* I.C. § 72-322.[1]

Among the things that have not changed are the substantive provisions of the statute at issue in this case, which pertains to the distribution of dividends, I.C. § 72-915.[2] From its adoption in 1917, I.C. § 72-915 has afforded the Manager, upon finding that excess premiums have been collected (on an aggregate balance) which he concludes can be "safely and properly divided" with the discretion to decide **whether to** distribute an aggregate balance. Plaintiffs' submit that if a dividend is to be paid the statute sets out a precise proration formula dictating **how to** distribute the balance among all of the time-qualified policyholders.

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[1] Inexplicably, despite this clear expression of legislative intent to relieve the SIF of the burdensome role of "insurer of last resort," the SIF has proceeded with an underwriting policy that includes coverage for many high risk employers. See, Appellees' Brief p. 2. Having thus needlessly exposed itself to high risk policies, the SIF asserts that maintenance of this underwriting policy is a part of the justification for the Court to rewrite the statute at issue in this case so that the SIF can manipulate the dividend allocation system in a manner which will allow it to compete for higher premium lower risk policies. Appellees' Brief at p.29

[2] The statute has changed over the years only to accommodate the changes in the proscribed management structure of the fund – e.g. manager to commission and back to manager.

The Manager and the Board have considered it convenient and appropriate to ignore this language. Consequently, the SIF, for at least the several years at issue here, has chosen to distribute the available funds only among approximately 25% of the SIF's time qualified policyholders.

II. ARGUMENT

A. SUMMARY OF ARGUMENT

The resolution of this appeal turns upon the following question:

> Did the 1917 Legislature intended to confer discretion only over the question of **whether to** declare a dividend and then to direct **how to** distribute that dividend or, alternatively, did the Legislature intended to also confer discretion over the "how to?"

Plaintiffs' claim may be simply put. They contend that the language of I.C. § 72-915 clearly expresses the intent for the Manager to have discretion over the decision of whether to issue a dividend but equally clearly provides that once he makes this discretionary determination, his discretion is at an end. Once the Manager chose to distribute an aggregate balance as a dividend, he has been directed by the Legislature to distribute it to specifically identified policyholders (**each** individual time-qualified policyholder) in **proportion** to his prior paid premiums. If Plaintiffs are correct, the matter should be remanded for further proceedings in the District Court to determine the amount of damages due to the class.

The SIF's positions cannot be so easily summarized. Most of these positions and the underlying "facts" are irrelevant to the question to be resolved in this appeal. Those that are relevant are neither plausible nor supported by cited authority. At its core, the syllogism upon which the SIF builds its entire position is as follows:

Major Premise:	The Manager has been given and in fact needs to have a lot of discretion in order to fulfill his statutory responsibility to manage the Fund.
Minor Premise:	Reading the balance allocation provisions of I.C. § 72-915 as directing that the balance be divided as any other dividend - to each policyholder proportional to the amount of premiums paid - would be a limit on the Managers discretion.
Ergo:	I.C. § 72-915 cannot be read to direct that each policyholder receive a dividend proportional to the amount of premiums paid but rather should be read as granting the Manager discretion over "how to" distribute the available funds.

If the SIF is correct, which Plaintiffs do not concede, then at least a remand for further proceedings in the District Court to determine if an abuse of discretion has occurred and, if so, to determine damages.

The defect in the SIF's logic lies in its major premise. The Manager has not been given and could not be given total control of every decision and matter affecting the Fund. The Legislature has always had the final say. It could dictate a particular procedure as it has done from the outset in I.C. § 72-915 and it can take away powers as it did when it removed rate-making from the powers of the Manager with the passage of I.C. § 41-1618. In the end, it really does not matter how much the Manager wants a power or how having it might allow him to manage the fund differently. What matters - and all that matters - is whether the Legislature, in this case the 1917 Legislature, intended to give or withhold the power at issue.

B. NO CASE DECIDED BY THIS COURT SUPPORTS A DETERMINATION THAT THE MANAGER HAS DISCRETION OVER THE PROPORTIONING OF ANY AGGREGATE BALANCE WHICH HE HAS CHOSEN TO DISTRIBUTE

The language of the statute clearly states that once the Manager has determined that there is an aggregate balance which may be safely and properly distributed, he has the discretion to

decide whether to declare a dividend. This Court has held that this discretion over whether to declare a dividend is broad. *Hayden Lake Fire Protection District v. Alcorn,* 141 Idaho 388, 399, 111 P.3d 73, 84 (2005). The Court in *Hayden Lake* did not hold, and it has never held, that this responsibility is without limits.

At no point in this matter has either party challenged this reading of the statute. *Hayden Lake* would not warrant comment but for the fact that the SIF extensively discussed it, apparently in support of the claim that I.C. § 72-915 should be read in connection with the other provisions of Title 72, Chapter 9, as intending to afford the Manager discretion over how to distribute an aggregate balance. Appellees' Brief, pp. 22-28. This reliance upon a case which had nothing to do with the construction of I.C. § 72-915 and which never discussed the presence or absence of discretion over "how to" proportion a balance, appears to be based upon a myopic reading of *Roberts .v Transportation Department,* 121 Idaho 727, 827 P.2d 1178 (Ct. App.1991), aff'd 121 Idaho 723, 827 P.2d 1174.

The SIF correctly cites language from *Roberts* in which the Court holds both that an administrative agency is limited to the power and authority granted to it by the Legislature and that what power is delegated to the agency is primary and exclusive in the absence of a clear expression of a contrary intent. The SIF then proceeds as though only the second of these two holdings applies to it. Relying on this fallacious premise, it asserts the Manager must have discretion over "how to" allocate an aggregate balance because he has broad discretion over many matters that relate to the solvency of the fund.

There are two principal difficulties with this approach. First, it begs the question by presuming that the Legislature gave the Manager discretion over how to proportion the aggregate

balance. If, as demonstrated below, this power was never given, then the first prong of the holding in *Roberts* (power is limited to what is granted), controls. Second, it depends upon the use of present day circumstances to support an argument that the 1917 Legislature was not, with respect to the proportioning of a balance, clearly expressing its intent to limit the Manager's powers. The problem with this assertion is that there has been no showing that the 1917 Legislature knew of or had any reason to know of or even contemplate the present day circumstances. When the Fund was created it was the only entity offering Worker's Compensation Coverage and consequently the professed need to compete for business by manipulating premiums to large policyholders was not on the minds of the drafters. Absent such a showing, there is no reason to conclude that the 1917 Legislature could have anticipated a need to be even more clear if its goal was to direct that any balance be distributed like any other dividend (proportional based on premiums paid by time-qualified policyholders).

For these reasons, further discussion of *Hayden Lake* is a pointless exercise as nothing in that case helps to resolve the question of whether the power to exercise discretion over how to allocated an aggregate balance was ever given to the Manager.

C. I.C. § 72-915 NOT ONLY AFFORDS THE MANAGER NO DISCRETION OVER THE PROPORTIONING OF DIVIDENDS, IT CLEARLY SETS OUT A DIVIDEND PROPORTIONING FORMULA THAT ALLOWS NO EXERCISE OF DISCRETION ON THE PART OF THE MANAGER.

The SIF asserts that Plaintiffs ignore all of I.C. § 72-915 except for the last few lines and that this reading is deficient. To make this argument, the SIF is compelled to place undue emphasis upon the first half of the sentence at issue and to do everything in its power to ignore

and to distort the critical portion of the sentence. [3] In its direct challenge to Plaintiffs' interpretation of the statute, the SIF points to two specific "flaws." Appellees' Brief, pp.14-15.

First, the SIF contends that the term "properly entitled to" (as used in the phrase "..., such proportion of such balance as he is properly entitled to...") cannot be seen as defined by the immediately following words "having regard to his prior paid premiums." It appears that the SIF perceives that "proper entitlement" necessarily implicates a discretionary determination because "to receive a legal right or to qualify for a dividend (i.e. "entitled"), it must be suitable or appropriate ("properly")." Appellees' Brief, p. 14.

Plaintiffs agree that a determination must be made to arrive at the proportion of the dividend to which each otherwise qualified policyholder is entitled to receive. However, when the lines at issue are read as a whole, it appears that Legislature has provided for a mathematical proportioning based upon readily determinable information (number of qualified policyholders, amount to be divided, time-qualified premiums paid by each) for the amount each policyholder is properly entitled to receive. The proportional formula utilizing these factors reads:

$$\frac{\text{Share of aggregate balance}}{\text{Total aggregate balance}} = \frac{\text{Premiums paid by each policyholders}}{\text{Total premiums paid by policyholders}}$$

Thus, while a determination must be made, there is no apparent need to read in a need for discretion for the purpose of determining any of the factors or the outcome.

It should be noted that not only did the Legislature not articulate any determinative factors or criteria which would necessitate a discretionary determination, but also that it failed to

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[3] In addition, the SIF discusses this first sentence of I.C. § 72-915 and the effect of the enactment of I.C. § 41-1618 but it never explains how this sentence or its status are relevant to the resolution of this matter. For this reason, Plaintiffs will not comment upon the SIF's claims that the sentence has been mooted.

identify any particular fact-finding that would trigger a discretionary determination. This latter omission is sufficient to render an attempt to read in "discretion" as an impermissible delegation pursuant to Article 3, Section 1 of the Idaho Constitution. *See, e.g. Boise Redevelopment Agency v. Yick Kong Corp,* 94 Idaho 876, 885, 499 P.2d 575, 584 (1972). (The Legislature has the responsibility to fix the conditions or events which trigger operation of a statute but it may delegate to an agency the "fact-finding function" and the power to exercise discretion in deciding to act once the given facts are found to be present). In the case of this statute, the Legislature could have permissibly identified a formula with factors that required a fact-finding process to be performed by the Manager or it could have identified other criteria, which if found to be present, would trigger a discretionary determination. As the Legislature did neither of these things, it is not possible to read into this statute a constitutional delegation of discretion.

Second, the SIF has challenged Plaintiffs' reading of the statute for the reason that it creates an "absurd" result. Specifically, the SIF contends that the SIF will be compelled to pay policyholders who suffered losses a share of the dividends (effectively a retroactive premium reduction). The SIF never explains anything to support the reasoning that "fairness" compels that policyholders who suffered losses be excluded from sharing in dividends and, as a consequence, have to pay a greater premium than everyone else. Appellees' Brief, p.15.

In making this assertion, the SIF ignores an alternative reasonable conceptualization, the existence of which causes the SIF's view to be irrelevant to the construction and application of the statute. *Westway Constr., Inc., v. Idaho Transp. Dep't*, 139 Idaho 107, 73 P.3d 721 (2003). (If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial). Beyond this, the SIF's own view is in direct conflict with other provisions of the law

both as it was enacted in 1917 and as it currently exists.

Insurance is a system in which, for a fee, the insurance company assumes the responsibility to pay all losses. In such a system, there is no expectation that the premium collected from any one insured will, over time, pay the losses suffered by that insured. Instead, the system works because careful underwriting by the company allows it to know that, over time, the premiums collected from all insureds will cover the losses suffered by individual insureds, together with operating expenses and all proper surpluses and profits. Viewed in this context, if the SIF has collected too much premium for the risks for which it has assumed responsibility, say 5% too much, then it has overcharged every single policyholder by that very same 5% for its agreement to pay the losses. The fact that some may have suffered losses does not change the fact that all were overcharged for the benefit of being relieved of the risk of loss. Even if it is reasonable to argue that where everyone has overpaid for insurance, those on whose behalf claims were paid should be treated differently, the decision to reduce everyone's premium proportionally is not patently absurd.

Moreover, the SIF's concept that those who suffer losses should pay more than those who do not suffer losses, flies in the face of Section 93, Assessments, Chapter 81 of the 1917 Idaho Session Laws.[4] That provision clearly provides that if total losses for a class exceed the premiums collected for that class, then all members of the class are to be assessed. This approach to assessments is logically consistent with the concept that the premium to be paid by each policyholder is based upon the risk represented by the entire class and not upon the losses

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[4] See Affidavit of Donald W. Lojek In Support of Plaintiffs' Memorandum In Response To The Memorandum of State Insurance Fund In Support of Its Motion for Summary Judgment, 11/7/07 for complete copy of Chapter 81, Idaho Session Laws (herein after Aff. Lojek 11/07/07).

suffered by any individual class member.

The role of assessments in the 1917 Act (allowed) and in the current law (no longer allowed) renders irrational the argument that I.C. § 72-915 should be read to allow the disproportionate allocation of dividends utilized by the Manager. A disproportionate allocation of dividends based upon losses is, in reality, a form of assessment. Some policyholders are paying more premium than others though they are all part of the same risk pool and the SIF's justification for such an unauthorized or illegal assessment is that they suffered losses.

Given that there is a logic and consistency to the Legislature's failure to allow for the consideration of individual losses, the fact that there may be arguments to support such consideration in the allocation of an aggregate balance is insufficient to support a challenge to the statutory scheme which is consistent in giving no consideration to individual losses. *Westway Constr., Inc. v. Idaho Transp. Dep't, supra., Winter v. State,* 117 Idaho 103,105, 785 P.2d 667, 669 (1989) (absent absurdity, ambiguity, or conflict with other statutes, there is no occasion for judicial construction of a statute).

D. NEITHER THE SIF NOR THE DISTRICT COURT HAVE SUCCESSFULLY IDENTIFIED A SINGLE REASONABLE ALTERNATIVE READING WHICH WOULD RENDER THE STATUTE AMBIGUOUS.

In addition to challenging the Plaintiffs' reading of the statute based upon the claims discussed above, the SIF argues that the statute is ambiguous. In this regard, the SIF asserts both that the District Court properly found an ambiguity in the I.C. § 72-915 and that the statute can reasonably be read as providing the Manager with discretionary authority over both the "whether to" and "how to" questions associated with paying a dividend pursuant to the statute. Appellees' Brief, p. 20.

While the SIF asks this Court to uphold the findings of the District Court, it appears to make no attempt in the Appellees' Brief to justify one of the District Court's three interpretations of the statute. Therefore, it is unclear whether the SIF acknowledges that one of the three readings posed by District Court is, in fact, unreasonable or whether the SIF agrees with the District Court and did not, in the interest of adhering to page limitations, discuss the matter. Given this lack of clarity, the Plaintiffs will proceed to address the District Court's specific findings and with respect to the reading on which the District Court and the SIF clearly agree, respond directly to the claims set out in Appellees' Brief.

1. Applicable Legal Standards

Before undertaking this examination, it is useful to have in mind certain principles which guide the process of reading a statute to discern its meaning. The process begins with an analysis of the literal meaning of the language. Where the statute clearly expresses but one permissible intent, "the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." *Ada County Assessor v. Roman Catholic Diocese of Boise*, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993). When, based on analysis of the "literal language of the enactment," reasonable minds attempting to "derive the intent of the legislative body that adopted the act" can conclude that the language appears to express two or more legislative intentions. *Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). However, a statute is not rendered ambiguous "merely because an astute mind can devise more than one interpretation of it." *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

Any evaluation of the intent expressed by the literal language of a statute, to be reasonable, must be guided by certain basic principles. These principles do not, under any authority that Plaintiffs can identify, include looking to any circumstances as they exist nearly 100 years after the enactment of the statute. Instead, in the process of evaluating the meaning of the language the Court must:

1. Look for an interpretation which gives meaning to every word, clause and sentence of the statute should be given effect. *In re Application for Permit No. 36-7200*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

2 Prefer meanings which are "plain, obvious, and rational" over "any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover. *John Hancock Mut. Life Ins. Co. v. Haworth*, 68 Idaho 185, 192, 191 P.2d 359, 362 (1948) (citation omitted).

3. Defer to the Legislature's intended meaning of a term in those instances where it is apparent from the entire enactment that the Legislature intended a term to have a particular meaning that is different from the literal meaning. *Boyd v. Potlatch Corp.*, 117 Idaho 960, 961, 793 P.2d 192, 193 (Idaho 1990).

4. Evaluate a statute which is part of a larger Act, not in isolation but rather in the context of that Act and the related statutory and decisional law **as it existed at the time of that enactment**. *See, e.g. State v. Barnes*, 133 Idaho 378, 382, 987 P.2d 290, 294 (1999).

5. Consider the entire enactment (including definitions provided therein) and the law

existing at the time of enactment, in the process of determining the meaning of the statute.[5] *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 211-212, 76 P.3d 951,956 (2003).

6. Assume, unless it is palpably absurd to do so, that the Legislature meant what it said. *Moses v. Idaho State Tax Comm'n,* 118 Idaho 676, 678, 799 P.2d 964, 966 (1990).

2. Viewed in the light of the appropriate legal standard, none of the proffered alternative readings of the Statute support the finding of ambiguity.

The District Court stated that:

"... the language of IC. § 72-915 states that if the SIF manager deems that a dividend may be safely made, "he may in his discretion, credit to each individual member ... such portion of such balance as he may be properly entitled to, having regard to his prior paid premiums."

could reasonably be read in the following ways:

1. " ... that if a dividend is declared by the fund Manager, **every** subscriber must receive a share of the total amount of dividend in direct proportion to the amount of premium that the subscriber paid as a percentage of the total premium paid by all subscribers;"

2 "...that the Manager could distribute the dividend as he has done in this case because he has decided that giving regard to prior premiums paid, it is the larger premium paying subscribers who are properly entitled to receive the dividend."; and;

3. "...that **every** subscriber must receive a portion of the dividend but it does not have to be in direct proportion to the amount of premium the subscriber paid

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[5] It is worth noting that unless statutory law is to take on an wholly organic nature which would render the e intent of the legislature which enacted a statute irrelevant with the passage of time, the construction of a statute *in pari materia* which looks to relevant statutes and case law must look to material which was or could have been known to the legislature at the time it enacted the statute under consideration.

> relative to the whole. Giving regard to the amount of premiums paid allows the manager to give subscribers who paid a smaller premium less of a percentage than the larger subscribers."

R. p. 87.

When the three competing readings of I.C. § 72-915 are examined in the light of principles applicable to the process of discerning the meaning of a statute, it becomes apparent that readings # 2 and # 3 cannot be seen as reasonable. To begin with, there is a significant lack of consistency between the readings. In readings # 1 and # 3 the words "each individual member" are taken to mean "**every**" subscriber and, as a consequence, the Manager is afforded no discretion over which policyholders are entitled to receive a share of the dividend. Then, in reading # 2, the one favored by the SIF, the District Court, articulates a reading which affords the Manager the discretion to read these words to mean "some" subscribers. Neither the District Court nor the SIF ever explains how it is possible to reach the conclusion that words, which in two out of three readings mean "every subscriber," can rationally be seen as meaning "some subscribers" in the third reading.

Aside from this inexplicable inconsistency over the whether each subscriber means "every subscriber" or just "some subscribers" who are deemed worthy by the Manager, readings # 2 and # 3 share common and overriding flaws. Both fail to give any recognition of to the long-established meaning of "dividend" which in common parlance signifies the well established and uniformly-employed allocation calculus (to each pro rata based upon their respective interest)[6].

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[6] If A owns 100 shares of GE and B owns 1000 shares, B will receive ten times the dividend paid to A. Even a neophyte investor understands that this pro rata sharing of pay out is the means by which "dividends" are allocated.

Beyond these obvious problems, both entirely fail to account for the fact that the 1917 Legislature, acting in apparent recognition of this established calculus for allocating a divided, saw fit to identify one and only one factor (amount of premium paid by each) to be given regard in determining "such proportion" of the available fund as to which each subscriber may be properly entitled. The absence of any other articulated factors (e.g. policy marketing challenges, costs of writing policies, etc.) to be incorporated in determining the amount due to each qualified policyholder generates two hurdles to an attempt to justify either reading # 2 or reading # 3 as "reasonable."

First, aside from the fact that the language directs a *pro rata* proportioning, an attempt to read or infer into the statute discretion over the "how to" of dividend proportioning would be contrary to the established law of this State. Such inferred discretion would lack either articulated boundaries or articulated triggering events or fact-findings. Even if it would be reasonable to infer into this inferred discretion the duty to act consistent with the lawfully imposed duties of the fund Manager, there is no means by which it is possible to identify the circumstances which would trigger the exercise of discretion. The lack of clearly-identified triggering events or triggering fact-finding would itself be an impermissible delegation of legislative power. *See, e.g. Boise Redevelopment Agency v. Yick Kong Corp, supra.* Moreover, as readings # 2 and # 3 involve discretionary power which has no identified boundaries and no identified triggering events or fact-findings, a court would be unable to fulfil the judicial responsibility to insure that the SIF was not acting impermissibly to "expand its own powers and effectively amend statutes without legislative action." *Kelso v. State Insurance Fund,* 134 Idaho 130, 138, 997 P.2d 591, 599 (2000). Given the lack of proper constraints upon the discretion

inferred into the statute by readings # 2 and # 3 neither can be seen as legal and, therefore, neither can be seen as reasonable.

Second, while the Legislature used clear language to identify all of the factors which are associated with a typical dividend distribution (a fund, a qualified group and one factor upon which to apportion the fund among the group) it did not use any language which identifies any factors which would be part of any other calculus The District Court did not point to any language in the "how to" portion of the statute which supported the inference of other factors or of a calculus other than *pro rata.* As will be discussed below under separate headings, the SIF attempts to fill this void by devising strained and unreasonable readings of the words "properly," "properly entitled," and "may in his discretion" as they are used in I.C. § 72-915.

a. *The word "properly" as it is used in I.C. § 72-915 generates a need for a determination to be based upon a standard but it does not authorize the exercise of discretion in the making of that determination.*

The parties are in agreement that "properly" is a word which means "suitably" or "appropriately" and that it evokes a need to measure something against a standard so that suitability can be determined. The dispute between them arises with respect to the yardstick to be applied to gauge what is appropriate in each of the two instances in which the term is used in the statute.

In the first instance, the word "properly" appears in the phrase which articulates the set of circumstances which the Manager must find to be present before he can exercise discretion over the question of "whether to" divide an aggregate balance. (There must be a sum in the accounting of premiums less expenses and losses which the Manager finds can be "safely and

properly" divided).[7] Seeking to avoid the obvious conclusion that this usage of "properly" has no bearing upon the "how to" portion of the statute, the SIF baldly asserts that the considerations of "how to" allocate a dividend would be considered as a matter of discretion by the Manager before he completed the process of determining that an aggregate balance existed which could be safely and properly divided. Appellees' Brief, p.18-20.

This curious reading of the statute has two significant problems. First, it ignores a far more simple and rational reading of I.C. § 72-915. When the section was enacted in 1917 and until 1998, it included a provision requiring the Manager to maintain reserves and a surplus. Sec. 87, Ch 81, S.L.1917, later I.C. § 72-911. Currently, the Manager has the duty to effectuate Board policies, I.C. § 72-902, and the Board has the duty to adopt policies which ensure that the SIF remains actuarially sound. I.C. § 72-901(3). The presence of these legally-imposed duties easily explains the differentiation between "safe" (within the lawful authority of the Manager but he does not deem it a good idea) and "proper" (not within lawful authority). As they are used in I.C. § 72-911, these terms identify, consistent with established standards for lawful delegations of discretion, the conditions which must be found to be present before the Manager can use his discretion to elect whether or not to proceed to distribute an aggregate balance.

Second, the SIF's reading of the "whether to" part of the sentence would impermissibly render all or at least a substantial portion of the "how to" part of the sentence superfluous.[8] If

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[7] Throughout the proceedings below, the parties did not appear to dispute the fact that the term"safely," as used in this context, could properly be read to mean "without exposing the SIF to fiscal danger."

[8] The SIF has never taken a position upon whether the portion of the "how to" language which establishes a longevity requirement for membership the group of policyholders who are part of "each individual member of such class" is binding upon the Manager or subject to his discretion. It would be

the intent of the 1917 Legislature had been to allow him to decide "how to" distribute the aggregate balance before he decided whether to distribute it and to then to elect whether or not to proceed with that decision, there would have been no need for the Legislature to direct the "who" (to each individual"), the formula (proportionally) or a single factor to use in the formula (prior paid premiums). The fact that the Legislature did say these things stands as a compelling contradiction to the SIF attempt to rewrite the statute.

In the second instance, the word "properly" appears in the lengthy phrase which directs the process once the Manager has exercised his discretion to proceed. At this point, the statute directs that he "credit to each time-qualified individual:

> such proportion of such balance as he may be properly entitled to, having regard to his prior paid premiums since the last readjustment of rates.

I.C. § 72-915 (emphasis added). In this instance, the term "properly" relates to the entitlement of the entity which is antecedent of the pronoun "he." As the use of the term "he" follows most closely upon the phrase "each individual member of such class [who satisfies a longevity requirement]," it is apparent that the entity to which the use of the word "properly" relates is each policyholder. Thus, the statute clearly states that the yardstick for measuring propriety ("properly entitled to, having regard to") is each policyholders' prior paid premiums. Thus, the only thing that needs to be known to "properly" determine the entitlement ("such proportion of such balance") due to each policyholder, is his proportionate share based upon prior paid premiums. There is nothing in this usage of "properly" which supports a claim that the

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curious if the SIF conceded that this language limits Manager as it does not perceive that any of the rest of the language of the "how to" portion of the statute does limit him. However, whether this language is binding or not, it does not appear to be necessary to include it in each paraphrasing of the statute or phrasing of its meaning.

Legislature intended that the allocation of an aggregate balance which the Manager had, in his discretion elected to distribute, would turn upon consideration of any factors other than prior paid premiums to be considered or involve any exercise of discretion.

b. *The words "may in his discretion" as it is used in I.C. § 72-915 do not authorize the exercise of discretion over "how to" distribute a dividend.*

Perhaps appreciating the clarity of language dictating "how to" allocate an aggregate balance, the SIF argues in favor of an extraordinary stretching of the application of the phrase "may in his discretion" so that it becomes broad enough to cover not only the "whether to" election but also all of " how to" language. By this means, the SIF seeks to morph the words "credit to each individual member of such class" into "credit to some or all members of such class," the singular qualifying factor (six month membership) into but one of many qualifying factors and the words "properly entitled based upon prior paid premiums" into "properly entitled based upon factors deemed appropriate by the Manager."

The argument appears to be premised upon the claim that "may in his discretion" is redundant unless one reads the language such that "may" applies to the "whether to" decision and "in his discretion" applies to everything that follows after the "whether to" decision is made. There are a number of problems with this argument. First, it generates an impermissible grant of discretion to ignore directive language without so much a stated limit or a triggering fact-finding. Second, it ignores that the phrase is commonly used in statutes, regulations and court rules (over 200 in Idaho alone) for the apparent purpose of using the phrase "in [its or his] discretion" to make clear that permission to act articulated by the word "may" is intended to turn upon discretion and not upon some other factor.

Third, it generates needless conflict within the section by conferring discretion over things which, on the face of the language, are being directed and are fully executable without any exercise of discretion. Some of this conflict is obvious ("each" would no longer means each). Equally substantial (but less obvious) is the conflict which arises from the fact that the "how to" language identifies a single factor (less then six months of membership) which limits "each" and a single factor (prior paid premiums) which is to be referred to in determining the proportional share of each. Giving due deference to the principle "*expressio unius est exclusio alterius,*" the identification of only one factor in each instance stands as very a compelling indication that the Legislature did not intend for any other factors to be considered for the purpose of determining the qualifications of or the share of policyholders entitled to a dividend once the Manager decided to distribute an aggregate balance.

Having failed to deal with these problems, the SIF has not shown how it is reasonable to read the phrase "may in his discretion" as affording the Manager discretion which turns on no identified triggering fact-findings and is controlled by no stated limits. As the statute is written, it does not matter whether the Manager thinks that is good or bad public policy. He has not been given and cannot be given the discretion to determine that the word "each" means "some" and that the rest of the clear language of the "how to" portion of the statute may be ignored.

3. The phrase "classes of employment or industries as used in I.C. § 72-915 is not ambiguous.

The District Court (with the SIF's apparent concurrence) found that words "classes of employment or industries" could allow for classification of employments based upon "industry, by, size of employer, by premium amounts paid by employer, etc." R. p. 89. Consequently, the

District Court found the language was ambiguous.

The terms "classes of employment or industries" and "class of employment or industry" are neither ambiguous upon their face nor when considered *in pari materia* with the balance of the Act adopted in 1917. Understanding the meaning of these terms is, however, necessary to knowing the meaning of the phrase "each individual member of such class" as it is used in the sentence articulating the dividend proportioning calculus established by the 1917 Legislature.

On its face, the term "classes of employment" cannot be read as referring to "classes of employers" as in employers who pay less than $2,500 in annual premiums and employers who pay more than $2,500. Even a casual reading of the provisions of I.C. § 72-915 makes it clear that the statute anticipates the existence of a rating system in which rates are established based upon "classes of employment and industries" and an accounting system in which a balance may accrue to any "class of employment or industry." While it makes complete sense that rates and accounting might be based upon the activities/class of the employee (secretary, laborer, etc) or the industry (law practice, mining, etc.) it makes no sense at all that rates and accounting would be based upon the amount of premium paid by any given employer. If this were true, rates for the coverage of secretaries would be based at least in part upon whether there is one secretary in the office or hundreds.

Even if a system which rates risk based upon the amount of premium paid does not seem patently absurd, its irrationality becomes fully manifest when one refers to the provisions of Section 90, Ch. 81, 1917 Idaho Session Laws, currently codified as I.C. § 72-913 (Classification of risks and adjustments of premium) and Section 91, Ch. 81, 1917 Idaho Session Laws,

currently codified as I.C. § 72-914 (Accounts).[9] These sections demonstrate that the roles of "class" and "industry" are to permit employments to be grouped by the hazards associated with the employment, for rates to be set based upon these hazards, for premiums to be set based upon payroll (representing the number of persons at risk in that class of employment) and for accounts to be kept as to premiums collected and claims paid so that if rates are too high or too low they may be readjusted. To the extent that any question at all is left as to the meaning of "classes of employment," it should be noted that the record is devoid of a single scrap of evidence to demonstrate that rates are now or have ever been determined based upon the amount of premium that an employer pays.

In view of the foregoing, it is not reasonable to see the term "classes of employment" as ambiguous but, even if it were, there is no evidence to support the conclusion that it is rational to read this term as including "classes of employers" based upon the amount of premium paid.

E. THERE IS NO DEMONSTRATED JUSTIFICATION FOR ANY CONSIDERATION OF INFORMATION WHICH IS NOT SHOWN TO BE CONTEMPORANEOUS WITH THE ENACTMENT OF I.C. § 72-915.

The SIF persuaded District Court to evaluate the reasonableness of perceived competing meanings of the statute based on statutes passed within the last 40 years, decisions entered by this Court within the past decade, statutes and regulations of sister states adopted within the past decade, a recent attorney general's opinion, and affidavits containing information about current fund operational considerations (hereinafter "the information submitted by the SIF"). The SIF now invites this Court to do likewise and to go even farther than the District Court went and to find that not only does discretion over "how" to proportion exist, it has not been abused.

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[9] See, Aff. Lojek 11/07/07 for complete copy of Ch. 81, 1917 Idaho Session laws.

This is a curious invitation given that in both of the first two cases cited by the SIF in its discussion regarding statutory construction, the Courts made clear that the information to be relied upon to interpret the meaning of a statute must relate to the time at which the statute was enacted. *Idaho Cardiology Assocs., P.A. v. Idaho Physicians Network, Inc.,* 141 Idaho 223, 225 108 Idaho P.3d 370, 372 (2005). (The Legislature's intent is ascertained from the statutory language and the Court may seek edification from the statute's legislative history and historical content at enactment). *In re Tax Appeal of Roman Catholic Diocese*, 123 Idaho 425, 429, 849 P.2d 98, 104 (1993). (In an attempt to discern and implement the intent of the Legislature, the Court seeks edification from the statute's legislative history and the contemporaneous context at enactment).

The SIF never explains how, given these holdings, any of the information submitted by the SIF is relevant to determining the meaning of I.C. § 72-915, a statute adopted in 1917. The SIF appears to perceive support for its position in *Carrier v. Lake Pend Oreille School Dist.* 142 Idaho 804, 808, 134 P.3d 665 (2006). While the Court in that case did, after finding the language ambiguous, look at the "reasonableness of the proposed construction," it did so with reference to events contemporaneous with the adoption of the statute and never suggested that events 90 years later would be or could be relevant to evaluating the reasonableness of a proposed construction.

Given the absence of any supporting case law, it seems that the assertion actually being made is that the untested information submitted by the SIF demonstrates that the Manager has not abused is discretion (not tested because it was not an issue up for determination by Summary Judgment) and that absent an abuse of discretion, this Court should ignore any meaning of I.C. § 72-915 that is inconsistent with his behavior. Putting aside this apparent invitation for the Court

to shirk its responsibilities, the only thing that the SIF discusses as support for relying upon this information seems to be "change in the law." This assertion turns upon the fact that in 1998 the laws enabling the SIF were amended to create a Board to oversee and direct the Manager. While it never does so directly and cites no authority for doing so, the SIF seems to be suggesting that when the law changed in 1998, the meaning of I.C. § 72-915 changed. Plaintiffs have been unable to find any authority to support this contention.

Moreover, even if it could be said that changes in the SIF enabling law which have occurred since 1917 could, on some basis, have a bearing upon the meaning of the language used in I.C. § 72-915, there is no change so significant as to justify such a conclusion. In a somewhat different vein, it has been held that subsequently enacted legislation can, in very limited circumstances, work to repeal previously enacted legislation. *See State v. Martinez*, 43 Idaho 180, 187 250 P. 239, 240 (Idaho 1926). (Repeal by implication is disfavored and will not be indulged unless both statutes relate to the same subject and have the same object or purpose and cannot be reconciled in any reasonable manner. Where there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed.)

There is nothing that has changed in the law regulating the SIF since 1917 which has any bearing upon the resolution of this case. No statute enacted after 1917 which expressly deals with dividends paid by the SIF to policyholders has been identified by any party or the District Court. No statute, enacted after 1917 which expressly refers to I.C. § 72-915 or its predecessors and which is irreconcilably inconsistent with the provision of that section pertaining to how a dividend is to be proportioned has been identified by any party or the District Court. The SIF has not shown that it is not possible for the Manager to fulfill any duty imposed upon him by the

Legislature since 1917 and still honor the clear "how to" provisions of I.C. § 72-915. Indeed, it does not appear that any materially different duty has been imposed upon the Manager or the Board since 1917 (for example, the law has always required that the SIF be operated without liability to the State, that the Manager conduct the business of the fund, that the Manager have full authority over the fund and be entitled to do any and all of the things necessary and convenient in the administration[10] thereof or in connection with the insurance business to be carried on by him, Sections 75 and 77, Ch 81, 1917 Idaho Session Laws).

In sum, there appears to be no justification for any Court to look to any of the information which the SIF has interjected into this record for the purpose determining the meaning of I.C. § 72-915.

F. THE SIF DOES NOT QUALIFY FOR *SIMPLOT* DEFERENCE.

The SIF has attempted to shoehorn its conduct into the protection afforded to statutory interpretations made by state agencies charged with the administration of the laws adopted by the Legislature. This assertion is not supported by the applicable case law.

The SIF correctly states that the first prong of the test for *Simplot* deference requires that entity be a state agency which has been entrusted to administer the statute at issue. The SIF falls short on this criteria in two respects. First, to qualify for deference, the entity must be a state agency. In *Hayden Lake Fire Protection District v. Alcorn, supra.*, the Court noted that the District Court had found that the SIF was not a state agency. This Court relied upon this finding as partial justification for its holding that the District Court correctly ruled that the Idaho Administrative Procedures Act did not preclude judicial adjudication the plaintiff's claims.

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[10] Of course, this authority cannot be read as itself justifying a violation of the enabling statute.

Hayden Lake, 138 Idaho at 400, 111 P.3d at 85.

In addition, the agency, to be seen as administering a statute, must be empowered to make rules and regulations. *See, e.g. Pearl v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med.*, 137 Idaho 107, 113 (Idaho 2002). The only rule-making power afforded to the Manager or the Fund appears in I.C. § 72-903(d) which authorized the Manager to make rules about record destruction. The role of the SIF is one of execution, acting as a proprietary entity, and not one of administration acting as a governmental entity. The SIF offers no case or statute to support its claim that the Manager is empowered to administer the statute, as opposed to administer the SIF and has wholly failed to establish that even the first prong of the criteria for *Simplot* deference is satisfied.

The second prong requires that the interpretation put forward by a qualified agency must be reasonable. In applying this requirement, the Court has indicated that an agency interpretation could not be deferred to where it was obscure and doubtful. *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 505, 960 Idaho 185, 189 (Idaho 1998). For reasons discussed above it is the Plaintiffs' position that the SIF's interpretation of the statute is both obscure and doubtful and, therefore, that it not to be afforded deference.

The third prong requires that the interpretation put forward by a qualified agency must not pertain to a matter which is expressly dealt with by statutory language. As discussed above, it is apparent that I.C. § 72-915 clearly and expressly details the steps to be taken and the provisions relating to the "how to" distribute a dividend are fully executable without any interpretation by rule or regulation or exercise of discretion by the Manager.

As the SIF cannot meet one, let alone all three of the primary prongs, of the test, it is not

necessary to engage in an analysis of whether the rationals underlying the rule are present. *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (Idaho 1991).

III. CONCLUSION

For the forgoing reasons, it is respectfully submitted that the SIF has failed to identify a single justification which is logically and reasonably sufficient to prevent this Court from finding as a matter of law that:

1. That I.C. § 72-915 clearly and unambiguously expresses a legislative intent relative to the method to be employed for allocation of any amount which the Manager, in his discretion, determines should be distributed as dividend; and,
2. That the Legislature intended by the language it used in LC § 72-915 to provide that, after excluding policyholders who do not meet the longevity requirement and who are not within the classes of employments sharing in the dividend, any dividend which is declared must be distributed among all remaining policyholders in direct proportion to the amount of premium each paid in the dividend period, i.e., on a *pro rata* basis.

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

RESPECTFULLY SUBMITTED this 26th day of September, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of September, 2008, a true and correct copy of the foregoing instrument was served on the following by the method indicated below, and addressed as follows:

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_____ HAND DELIVER

__X__ U.S. MAIL

_____ OVERNIGHT MAIL

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