1-26-2011

Farber v. Idaho State Ins. Fund Clerk's Record v. 1 Dckt. 38140

VOLUME I

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, MARGUARITE MCLAUGHLIN, GERALD GEDDES, MILFORD TERRELL, JUDI DANIELSON, JOHN GOEDDE, ELAINE MARTIN and MARK SNODGRASS in their capacity as members of the Board of Directors of the State Insurance Fund,

Defendants-Respondents.

Appealed from the District of the Third Judicial District for the State of Idaho, in and for Canyon County

Honorable THOMAS J. RYAN, District Judge

Donald W. Lojek
LOJEK LAW OFFICES, CHTD

Philip Gordon and Bruce S. Bistline
GORDON LAW OFFICES

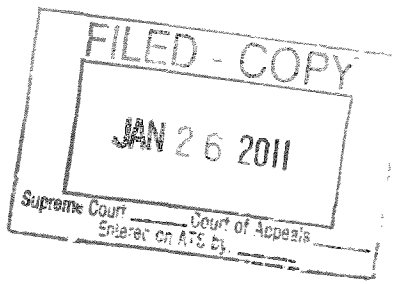
Attorneys for Appellants

Richard E. Hall and Keely E Duke
HALL FARLEY OBERRECHT & BLANTON PA
P. O. Box 1271
Boise, Idaho 83701

Attorneys for Respondents

IN THE SUPREME COURT OF THE

STATE OF IDAHO



RANDOLPH E. FARBER, SCOTT ALAN BECKER and CRITTER CLINIC, an Idaho Professional Association,	)	
Plaintiffs-Appellants,	)	Supreme Court No. 38140
-vs-	)	
THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, its Manager and WILLIAM DEAL, WAYNE MEYER, MARGUARITE MCLAUGHLIN, GERALD GEDDES, MILFORD TERRELL, JUDI DANIELSON, JOHN GOEDDE, ELAINE MARTIN and MARK SNODGRASS in their capacity as members of the Board of Directors of the State Insurance Fund,	)	
Defendants-Respondents.	)	

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE THOMAS J. RYAN, Presiding

Donald W. Lojek, LOJEK LAW OFFICES, CHTD, P.O. Box 1712, Boise, Idaho 83701

Philip Gordon and Bruce S. Bistline, GORDON LAW OFFICES, 623 w. Hays St., Boise, Idaho 83702

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Richard E. Hall and Keely E. Duke, HALL FARLEY OBERRECHT & BLANTON, PA, P.O. Box 1271, Boise, Idaho 83701

Attorneys for Respondents

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ROA Report

Case: CV-2006-0007877-C Current Judge: Thomas J Ryan

Randolph E Farber, etal. vs. Idaho State Insurance Fund, etal.

Other Claims

Date		Judge
7/21/2006	New Case Filed-Other Claims	James C. Morfitt
	Summons Issued (11)	James C. Morfitt
	Filing: A1 - Civil Complaint, More Than $1000 No Prior Appearance Paid by: Lojek, Donald W (attorney for Farber, Randolph E) Receipt number: 0194411 Dated: 7/21/2006 Amount: $88.00 (Check)	James C. Morfitt
7/26/2006	Acceptance of Service for James Alcorn, Manager Idaho State Insurance Fund	James C. Morfitt
	Acceptance of Service for The Idaho State Insurance Fund	James C. Morfitt
8/14/2006	Filing: I1A - Civil Answer Or Appear. More Than $1000 No Prior Appearance Paid by: Hall, Richard E (attorney for Alcorn, James M) Receipt number: 0198805 Dated: 8/14/2006 Amount: $58.00 (Check)	James C. Morfitt
	Notice Of Appearance for all Def	James C. Morfitt
8/18/2006	Stipulated Motion for extension of time to respond to Plt comp & Propounded Discovery	James C. Morfitt
8/22/2006	Order for Stipulated mo for extension of time to respond to Plt comp and propounded Discovery	James C. Morfitt
9/15/2006	Notice Of Service of Plt 3rd set of Discovery (fax	James C. Morfitt
10/2/2006	Filing: I1A - Civil Answer Or Appear. More Than $1000 No Prior Appearance Paid by: Hall, Richard E (attorney for Idaho State Insurance Fund) Receipt number: 0207355 Dated: 10/2/2006 Amount: $58.00 (Check)	James C. Morfitt
	Answer	James C. Morfitt
10/26/2006	Notice of Service Re: Discovery (7)	James C. Morfitt
1/8/2007	Plt Motion for Partial Summary Judgment	James C. Morfitt
	Affidavit of Donald W Lojek Relative to Plt mo for PArtial Sum Judgment	James C. Morfitt
	Affidavit of Philip Gordon Relative to Plt mo for Partial Sum Judg	James C. Morfitt
	Affidavit of Bruce S Bistline Relative to Plt mo for Partial Summary Judgment	James C. Morfitt
	Memorandum in support of Plt mo for Partial Sum Judg	James C. Morfitt
	Notice Of Hearing 2-15-07 9:00	James C. Morfitt
	Hearing Scheduled (Motion Hearing 02/15/2007 09:00 AM)	James C. Morfitt
1/26/2007	Motion to vacate hearing on Plt mo for partial sum judgment (fax	James C. Morfitt
	Affidavit of Keely E Duke in support of def mo vacate hearing (fax	James C. Morfitt
	Memorandum in support of mo vacate hrg (fax	James C. Morfitt
	Motion to shorten time for hrg def mo to vacate hrg (fax	James C. Morfitt
1/30/2007	Hearing result for Motion Hearing held on 02/15/2007 09:00 AM: Hearing Held	James C. Morfitt
	Hearing result for Motion Hearing held on 02/15/2007 09:00 AM: Motion Granted - defendant's motion to vacate plaintiff's motion for partial summary judgment	James C. Morfitt
	Hearing Scheduled (Motion Hearing 04/06/2007 01:30 PM) plaintiff mot for part summary jdmt	James C. Morfitt
	Notice of hearing on motion to vacate	James C. Morfitt

Other Claims

Date		Judge
1/30/2007	Order granting motion to shorten time	James C. Morfitt
2/6/2007	Order Resheduling Hearing & Scheduling Deadlines	James C. Morfitt
2/13/2007	Motion for leave to file plaintiffs' first amended class action complaint and demand for jury trial	James C. Morfitt
	Affidavit of Bruce Bistline in support of motion for leave to file plaintiffs' first amended class action complaint and demand for jury trial	James C. Morfitt
	Notice Of Hearing Re: motion for leave to file plaintiffs' first amended class action complaint and demand for jury trial 4-6-07	James C. Morfitt
	Defendants' Motion for summary judgment	James C. Morfitt
	Memorandum in support of defendants' motion for summary judgment	James C. Morfitt
	Affidavit of Michael Camiller	James C. Morfitt
	Affidavit of James Alcorn	James C. Morfitt
	Notice Of Hearing on defendants' motion for summary judgment 4-6-07	James C. Morfitt
3/2/2007	Plaintiffs motion for certification of class	James C. Morfitt
	Affidavit in support of motion for class cert	James C. Morfitt
	Affidavit of Bruce S Bistline in support of pl motion for class cert	James C. Morfitt
	Memorandum in support of pl motn for class cert	James C. Morfitt
3/12/2007	Memorandum in support of motion to continue summary judgment proceedings (fax)	James C. Morfitt
	Motion to strike affidavit of Michael Camilleri	James C. Morfitt
	Memorandum in support of motion to strike affidavit of Michael Camilleri	James C. Morfitt
	Memorandum in opposition to defendants motion for summary judgment	James C. Morfitt
	Motion to Continue defendants summary judgment proceedings	James C. Morfitt
	Affidavit of Bruce S Bistline in support of memo in support of motion to cont defs summ judgment proceedings	James C. Morfitt
	Notice Of Hearing on Plaintiffs motion to continue summary judgment proceedings to permit discovery	James C. Morfitt
	Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment	James C. Morfitt
	Affidavit of Keely E Duke in Support of Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment	James C. Morfitt
3/13/2007	Notice Of Hearing on Plt mo to strike Affidavit of Michael Camilleri 4-6-07 1:30(fax	James C. Morfitt
	Transcript Filed motion to continue partial summary judgment held January 30, 2007	James C. Morfitt
3/15/2007	Suppl Affidavit of Bruce S Bistline in support of memo in support of mo to continue def summary judg proceedings pursuant to rule 56 f (fax	James C. Morfitt
3/16/2007	Amended Memorandum in support of mo to continue sum judg proceedings pursuant to Rule 56(f)	James C. Morfitt
3/28/2007	Response to Def memo in oppose to Plt mo for Partial sum judg (fax	James C. Morfitt
	Defendants Reply to Plaintiffs opposition to Defendants Motion for Summary Judgment	James C. Morfitt

Other Claims

Date		Judge
3/30/2007	Affidavit/Keely E Duke in supp of defs memo in opposition to plaintiffs motion to cont summ judgment proceedings pursuant to rule 56(f)	James C. Morfitt
	Memorandum/opposition to plaintiffs motion to cont summ judgment	James C. Morfitt
	Defs Memorandum in opposition to plaintiffs motio to strike the affd of Michael Camilleri	James C. Morfitt
	Affidavit of George M Parham	James C. Morfitt
	Affidavit of Keely E Duke in supp of defs memo in opposition to plaintiffs motion to certify class	James C. Morfitt
	Def's Idaho State Ins Fund and James M Alcorns opposition to Motion to Certify Class	James C. Morfitt
4/4/2007	Plt Reply Memorandum RE: Plt mo to cont summary Judgment Proceedings pursuant to rule 56 (f) Fax	James C. Morfitt
	Plt Reply Memorandum RE: Plt mo to strike the affidavit of Michael Camilleri (fax	James C. Morfitt
	Suppl Affidavit of Bruce Bistline in support of mo to cont Def sum judgment Proceedings pursuant to rule 56 (f) Fax	James C. Morfitt
4/5/2007	Notice Of Hearing on Plt mo for class certiifcation 4-19-07 9:00 (fax	James C. Morfitt
	Hearing Scheduled (Motion Hearing 04/19/2007 09:00 AM) mo for class certification	James C. Morfitt
4/6/2007	Hearing result for Motion Hearing held on 04/06/2007 01:30 PM: Hearing Held plaintiff mot for part summ jdmt - mo to cont summ judgment & Plt mo to strike Affd of Michael Camilleri	James C. Morfitt
4/17/2007	Hearing result for Motion Hearing held on 04/19/2007 09:00 AM: Hearing Vacated mo for class certification	James C. Morfitt
	Notice of vacating hearing (fax)	James C. Morfitt
	Notice Of Taking Deposition randolph farber	James C. Morfitt
	Notice Of Taking Deposition scott becker	James C. Morfitt
4/30/2007	Order vacating hearing on plaintiffs' motion to strike the affidavit of Michael Camilleri	James C. Morfitt
	Order granting plaintiffs' motion for leave to file plaintiffs' first amended class action complaint and demand for jury trial	James C. Morfitt
	Notice Of Taking Deposition debbie hiatt	James C. Morfitt
	Order granting pltf's rule 56(f) motion and order vacating hearing on pltf's motion for partial summary judgment	James C. Morfitt
	Order denying def's motion for summary judgment on the issues of standing and waiver	James C. Morfitt
	Order granting def's motion for summary judgment on the isue of statute of limitation	James C. Morfitt
5/2/2007	Transcript Filed - for motion hearing held on April 6, 2007	James C. Morfitt
5/10/2007	Seconded Amended Notice Of Taking Deposition Randolph Farber	James C. Morfitt
	Second Amended Notice Of Taking Deposition Scott Becker	James C. Morfitt
5/24/2007	Notice Of Service of Plaintiffs' Fourth Set of Discovery Requests: Interrogatories No: 19-22; Requests for production of Documents No: 14-22 (fax)	James C. Morfitt

Other Claims

Date		Judge
6/4/2007	Notice Of Taking Deposition james alcorn	James C. Morfitt
	Notice Of Taking Deposition debbie hiatt	James C. Morfitt
6/11/2007	Notice of Service Re: Discovery ___	James C. Morfitt
6/28/2007	Notice of Service Re: Discovery ___	James C. Morfitt
7/2/2007	Change Assigned Judge (batch process)	
7/10/2007	First Amended class action complaint and demand for jury trial	Thomas J Ryan
7/11/2007	Objection to notice of deposition of debbie hiatt (fax)	Thomas J Ryan
7/17/2007	Notice Of Service (fax)	Thomas J Ryan
7/20/2007	Answer to plt first amended class action complaint and demand for jury trial	Thomas J Ryan
7/23/2007	Notice Of Service (fax)	Thomas J Ryan
7/26/2007	Notice Of Service of Plt Randolph Farbers responses to def State Insurance 1st set interr	Thomas J Ryan
7/27/2007	Notice of Service Re: Discovery (fax	Thomas J Ryan
	Plt second Motion for PArtial Summary Judgment (fax	Thomas J Ryan
	Notice Of Hearing 8-31-07 11:00 (fax	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 08/31/2007 11:00 AM) sum judgment	Thomas J Ryan
7/30/2007	Memorandum in support of Plt second mo for PArtial sum judgment	Thomas J Ryan
7/31/2007	Hearing result for Motion Hearing held on 08/31/2007 11:00 AM: Hearing Vacated sum judgment per phone call from attorneys office	Thomas J Ryan
	Amended Notice Of Hearing Re: Plaintiffs' Second Motion for Partial Summary Judgment (fax) 9-20-07	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 09/20/2007 09:00 AM) summ judg	Thomas J Ryan
8/8/2007	Notice of hearing RE: Plt mo for certification of class 9-10-07 1:30 (fax	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 09/10/2007 01:30 PM) mo certification of class	Thomas J Ryan
8/23/2007	Defendants Second Motion for Summary Judgment	Thomas J Ryan
	Affidavit of Keely E Duke in support of Defendants Motion for Summary Judgment	Thomas J Ryan
	Memorandum in support of Defendants Second Motion for Summary Judgment	Thomas J Ryan
	Notice Of Hearing on Defendants Second Motion for Summary Judgment 09-20-07	Thomas J Ryan
8/31/2007	Reply Memorandum in support of plaintiffs' motion for class certification	Thomas J Ryan
9/4/2007	Plt Motion to shorten time RE: Plt renewed mo to cont def summary judg proceedings pursuant to rule 56 (f) or alternatively to reset such mo to a later date 9-10-07 1:30	Thomas J Ryan
	Affidavit of Bruce Bistline in support of Plt mo shorten time RE: Renewed mo to cont def sum judgment pursuant to rule 56 (f) or alternatively to reset such motion to a later date	Thomas J Ryan
	Plt Renewed Motion to cont def sum judgment proceedings pursuant to rule 56 f	Thomas J Ryan
	Affidavit of Bruce S Bistline in support of Plt renewed mo to cont def sum judgment	Thomas J Ryan

Other Claims

Date		Judge
9/4/2007	Memorandum in support of Plt renewed mo to cont def sum judgment	Thomas J Ryan
	Notice Of Hearing 09/10/2007 (fax)	Thomas J Ryan
	defendant's supplemental Memorandum opposing motion to certify class (fax)	Thomas J Ryan
9/7/2007	Affidavit of Keely Duke in support of defendants' memorandum in opposition to plaintiffs' second motion for partial summary judgment	Thomas J Ryan
	Memorandum in opposition to plaintiffs' second motion for partial summary judgment	Thomas J Ryan
9/10/2007	Plt Memorandum in Response to Def memo in support of def 2nd mo for sum judgment	Thomas J Ryan
	Hearing result for Motion Hearing held on 09/10/2007 01:30 PM: Hearing Held mo certification of class & Plt mo sum judgment	Thomas J Ryan
	Hearing result for Motion Hearing held on 09/10/2007 01:30 PM: Motion Granted mo certification of class	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 11/05/2007 01:30 PM)	Thomas J Ryan
	Estimated costs on appeal	Thomas J Ryan
	Hearing result for Motion Hearing held on 09/20/2007 09:00 AM: Hearing Vacated summ judg	Thomas J Ryan
9/24/2007	Order on Plt mo for class certification	Thomas J Ryan
	Order vacating & Resetting hearing & setting out Briefing schedule	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 10/09/2007 02:30 PM)	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 11/27/2007 01:30 PM) sum judg	Thomas J Ryan
9/27/2007	Memorandum regarding process for statutory construction (fax)	Thomas J Ryan
	Bench brief regarding the proper method of statutory construction	Thomas J Ryan
9/28/2007	reporter's transcript of proceedings	Thomas J Ryan
10/4/2007	Plt opposition Memorandum to def Bench Brief regarding the proper method of statutory construction	Thomas J Ryan
	def idaho state insurance fund reply to pltf's memorandum re: statutory construction process (fax)	Thomas J Ryan
	Idaho State Insurance Fund Defendants' Reply to Plaintiffs' Memorandum Re: Statutory Construction (fax)	Thomas J Ryan
10/5/2007	Notice of Errata to Idaho State Insurance Fund def Bench Brief regarding the proper method of construction	Thomas J Ryan
	Amended Bench Brief Regarding the proper method of statutory construction	Thomas J Ryan
10/9/2007	Hearing result for Motion Hearing held on 10/09/2007 02:30 PM: Hearing Held	Thomas J Ryan
10/23/2007	Plt revised second motion for partial sum judg	Thomas J Ryan
	Memorandum in support of plaintiffs' revised second motion for partial sum judg	Thomas J Ryan
	Def motion for sum judg on the meaning of Idaho code section 72-915	Thomas J Ryan
	Memorandum in support of def motn for sum judg on the meaning of Idaho code section 72-915	Thomas J Ryan

Other Claims

Date		Judge
11/5/2007	Hearing Vacated	Thomas J Ryan
11/6/2007	Affidavit of George Bambauer (fax	Thomas J Ryan
11/7/2007	Plt objection to Def mo for summary judgment	Thomas J Ryan
	Affidavit of Donald W Lojek in support of Plt memo in reponse to memo of state Insurance Fund in support of mo for sum judg	Thomas J Ryan
	Plt Memorandum in response to the memo of the state Insurance fund in support of its mo for summary Judgment	Thomas J Ryan
	Memorandum in opposition to Plt revised second motn for partial sum judg	Thomas J Ryan
	Affidavit of keely E. Duke in support of Def memo in opposition to Plt revised second motn for partial sum judg	Thomas J Ryan
11/20/2007	Affidavit of Donald W Lojek RE: Plt revised second motion for PArtial sum Judgment	Thomas J Ryan
	Response to Def memo in oppose to Plt revised second mo for PArtial Sum Judgment	Thomas J Ryan
	Def Reply to Plt memo response to def motn for sum judg on the meaning of Idaho Code section 72-915	Thomas J Ryan
11/27/2007	Hearing result for Motion Hearing held on 11/27/2007 01:30 PM: Hearing Held sum judg	Thomas J Ryan
12/26/2007	Memorandum decision upon motions for summary judgment-(summary judgment neither granted nor denied this decision is on the ruling of Idaho Code 72-915)	Thomas J Ryan
1/4/2008	Motion for Rule 54(b) Certificate (fax)	Thomas J Ryan
	Memorandum in Support of Plaintiff's Motion for Rule 54(b) Certificate (fax)	Thomas J Ryan
	Notice Of Hearing on Plaintiffs' Motion for Rule 54(b) Certificate (fax) 2-14-08	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 02/14/2008 09:00 AM) motn for rule 54 cert	Thomas J Ryan
1/9/2008	Def' s Memorandum of Costs and Fees (fax)	Thomas J Ryan
1/10/2008	Affidavit of Keely E. Duke in Support of Defendants' Memorandum of Costs (fax)	Thomas J Ryan
	Defendant's Brief in Support of Defendants' Memorandum of Costs (fax)	Thomas J Ryan
	Objection to proposed order regarding motions for summary judgment and notice of hearing 02/14/2008 (fax)	Thomas J Ryan
	Memorandum in support of objection (fax)	Thomas J Ryan
1/18/2008	pltf's objection to costs claimed by defendant (fax)	Thomas J Ryan
	Memorandum in support of pltf's objection (fax)	Thomas J Ryan
1/23/2008	Notice Of Hearing 02/14/2008 (def's memo costs)	Thomas J Ryan
2/7/2008	Memorandum in opposition to Plt's motn for Rule 54(b) certificate and Plt's objection to proposed order regarding motn for sum judg	Thomas J Ryan
2/12/2008	def's reply to objections to memorandum of costs (fax)	Thomas J Ryan
2/14/2008	Hearing result for Motion Hearing held on 02/14/2008 09:00 AM: Hearing Held motn for rule 54 cert/def memo costs	Thomas J Ryan
2/15/2008	Order RE: Motions for summary Judgment	Thomas J Ryan

Other Claims

Date		Judge
2/15/2008	Amendment to the courts memorandum Decision Upon motions for sumamry Judgment	Thomas J Ryan
	Rule 54b certification of Final Judgment	Thomas J Ryan
	Civil Disposition entered for: Alcorn, James M, Defendant; Danielson, Judi, Defendant; Deal, William W, Defendant; Geddes, Gerald, Defendant; Goedde, John, Defendant; Idaho State Insurance Fund, Defendant; Martin, Elaine, Defendant; Mclaughlin, Marguarite, Defendant; Meyer, Wayne, Defendant; Snodgrass, Mark, Defendant; Terrell, Milford, Defendant; Becker, Scott Alan, Plaintiff; Critter Clinic,, Plaintiff; Farber, Randolph E, Plaintiff. order date: 2/15/2008	Thomas J Ryan
	Case Status Changed: Closed	Thomas J Ryan
2/28/2008	Motion for Appeal By Permission	Thomas J Ryan
	Memorandum in support of mo for Appeal	Thomas J Ryan
	Notice Of Hearing on Plt mo 3-20-08 9:00	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 03/20/2008 09:00 AM) mo for Appeal by Permission	Thomas J Ryan
	Case Status Changed: Closed pending clerk action	Thomas J Ryan
3/13/2008	SIF Defendants' Memorandum in Opposition to Plaintiffs' Motion for Appeal by Permission (fax)	Thomas J Ryan
3/20/2008	Hearing result for Motion Hearing held on 03/20/2008 09:00 AM: Hearing Held mo for Appeal by Permission	Thomas J Ryan
	Hearing result for Motion Hearing held on 03/20/2008 09:00 AM: Plan Denied mo for Appeal by Permission	Thomas J Ryan
	District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated: less than 100	Thomas J Ryan
3/25/2008	Order Regarding Plt Motion for Appeal by permission and Def Request for Atty fees & costs (Denied	Thomas J Ryan
3/27/2008	Filing: T - Civil Appeals To The Supreme Court ($86.00 Directly to Supreme Court Plus this amount to the District Court) Paid by: Lojek, Donald W (attorney for Farber, Randolph E) Receipt number: 0302797 Dated: 3/27/2008 Amount: $15.00 (Check) For: Farber, Randolph E (plaintiff)	Thomas J Ryan
	Bond Posted - Cash (Receipt 302799 Dated 3/27/2008 for 100.00) clerks record	Thomas J Ryan
	Appealed To The Supreme Court	Thomas J Ryan
	Notice of Appeal from Plt	Thomas J Ryan
4/18/2008	Bond Posted - Cash (Receipt 307483 Dated 4/18/2008 for 60.00)	Thomas J Ryan
7/17/2008	Bond Converted (Transaction number 37951 dated 7/17/2008 amount 100.00)	Thomas J Ryan
	Bond Converted (Transaction number 37952 dated 7/17/2008 amount 60.00)	Thomas J Ryan
3/6/2009	SC-Opinion (Summary Judgment is Reversed and Remanded)	Thomas J Ryan
3/13/2009	Request for Status Conference (fax)	Thomas J Ryan
3/20/2009	Hearing Scheduled (Conference - Status 04/16/2009 01:30 PM)	Thomas J Ryan

Other Claims

Date		Judge
3/20/2009	Order Setting Case for Status Conference	Thomas J Ryan
4/7/2009	Hearing result for Conference - Status held on 04/16/2009 01:30 PM: Hearing Vacated	Thomas J Ryan
	Order Vacating Status Conference	Thomas J Ryan
5/6/2009	Substitute Opinion (S C - Judgment Reversed and Remanded)	Thomas J Ryan
5/26/2009	Hearing Scheduled (Conference - Status 06/18/2009 10:30 AM)	Thomas J Ryan
	Order Setting case for Status Conference	Thomas J Ryan
6/4/2009	Remittitur (Atty Fees of $651.00 allowed for Appellant)	Thomas J Ryan
6/11/2009	Notice Of Service	Thomas J Ryan
6/15/2009	Notice Of Service	Thomas J Ryan
6/18/2009	Hearing result for Conference - Status held on 06/18/2009 10:30 AM: District Court Hearing Held Court Reporter:Kim Saunders Number of Transcript Pages for this hearing estimated: less than 100 pages	Thomas J Ryan
	Hearing result for Conference - Status held on 06/18/2009 10:30 AM: Interim Hearing Held	Thomas J Ryan
6/19/2009	Order Setting Case for Trial and Pretrial Conference	Thomas J Ryan
	Hearing Scheduled (Jury Trial 10/04/2010 09:00 AM) 9 days	Thomas J Ryan
	Hearing Scheduled (Pre Trial 08/19/2010 11:00 AM)	Thomas J Ryan
7/16/2009	Notice Of Service (fax)	Thomas J Ryan
7/17/2009	Notice Of Service (fax)	Thomas J Ryan
	Plaintiffs' Motion to Renew Plaintiffs' Revised Second Motion for Partial Summary Judgment	Thomas J Ryan
	Plaintiffs' Memorandum in Support of Plaintiffs' Motion to Renew Plaintiffs' Revised Second Motion for Partial Summary Judgment	Thomas J Ryan
	Notice Of Hearing Re: Plaintiffs' Motion to Renew Plaintiffs' Revised Second Moton for Partial Summary Judgment 8-20-09	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 08/20/2009 09:00 AM) to renew plts revised 2nd motn for partial summ judg	Thomas J Ryan
7/31/2009	Notice of Service Re: Discovery (fax)	Thomas J Ryan
	Amended Notice of Service Re: Discovery (fax)	Thomas J Ryan
8/4/2009	Notice of Service Re: Discovery (fax)	Thomas J Ryan
8/6/2009	Memorandum in opposition to Plts Motion to renew Plts revised secone Motion for Partial Summary Judgment	Thomas J Ryan
	Affidavit of Counsel in support of Memo in opposition to Plts Motion to Renew Plts revised second Motion for Partial Summary Judgment	Thomas J Ryan
8/13/2009	Plnt's Reply to Defn's Memo Opposing Plnt's Motn to Renew Plnt's Revised Second Motn for Summary Jdmt	Thomas J Ryan
	Affidavit of Donald W Lojek in Suppt of Plnt's Motn to Renew Plnt's Revised Second Motn for Partial Summary Jdmt	Thomas J Ryan
8/20/2009	Hearing result for Motion Hearing held on 08/20/2009 09:00 AM: Hearing Held to renew plts revised 2nd motn for partial summ judg	Thomas J Ryan

Other Claims

Date		Judge
8/20/2009	Hearing result for Motion Hearing held on 08/20/2009 09:00 AM: Motion Granted for mot for Rule 56f relief	Thomas J Ryan
	Hearing result for Motion Hearing held on 08/20/2009 09:00 AM: District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated: less than 100	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 10/15/2009 09:00 AM) sum jdmt	Thomas J Ryan
8/31/2009	Transcript Filed - motion for partial summary judgment dated August 20, 2009	Thomas J Ryan
9/8/2009	Notice Of Service of Plaintiffs (Randolph E Farber, Scott Alan Becker and Critter Clinic) Answer to Defendant State Insurance Funds Second Set of Interrogatories	Thomas J Ryan
9/21/2009	Supplemental Memorandum in Opposition Plnt's Motn for Partial Summary Jdmt, or in the Alternative, Defn's Motn for Summary Jdmt	Thomas J Ryan
	Affidavit of Counsell in Suppt of supplemental Memorandum in Opposition to Plnt's Motn for Partial Summary Jdmt, or in the Alternative, Defn's Motn for Summary Jdmt	Thomas J Ryan
10/1/2009	Supplemental Memorandum in support of pltf's motion to renew pltf's revised second motion for partial summary judgment	Thomas J Ryan
10/5/2009	Motion for Order Shortening Time	Thomas J Ryan
	Notice Of Hearing 10-15-09	Thomas J Ryan
	pltf's Objection to def's motion for order shortening time (fax)	Thomas J Ryan
	Affidavit of bruce bistline (fax)	Thomas J Ryan
10/8/2009	Notice vacating hearing on def's motion summary judgment (fax0	Thomas J Ryan
10/9/2009	Reply in support of supplemental memorandum in opposition to pltf's motion to renew pltf's revised second motion for partial sumamry judgment (fax)	Thomas J Ryan
10/15/2009	Hearing result for Motion Hearing held on 10/15/2009 09:00 AM: Hearing Held - under advisement	Thomas J Ryan
	Hearing result for Motion Hearing held on 10/15/2009 09:00 AM: District Court Hearing Held Court Reporter: Laura Whiting Number of Transcript Pages for this hearing estimated: less than 100	Thomas J Ryan
	Hearing Scheduled (Conference - Status 11/19/2009 09:00 AM)	Thomas J Ryan
11/2/2009	Order Setting case for Status Conference	Thomas J Ryan
11/4/2009	Memorandum Decision Upon Plt Revised Second Motion for PArtial Summary Judgment	Thomas J Ryan
11/9/2009	Notice Of Service (fax)	Thomas J Ryan
11/12/2009	Plaintiff's third Motion for partial summary judgment	Thomas J Ryan
	Affidavit of bvruce bistline in support of motion	Thomas J Ryan
	Memorandum in support of motion	Thomas J Ryan
	Notice Of Hearing 12/17/2009	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 12/17/2009 09:00 AM) pltf's motn partial sum judg	Thomas J Ryan
11/19/2009	Hearing Held	Thomas J Ryan

Other Claims

Date		Judge
11/19/2009	District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated: less than 100	Thomas J Ryan
	Hearing result for Motion Hearing held on 12/17/2009 09:00 AM: Hearing Vacated pltf's motn partial sum judg	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 02/04/2010 01:30 PM) 1/2 day	Thomas J Ryan
12/4/2009	Motion for Reconsideration or, Alternatively, for Bifurcation of Class	Thomas J Ryan
	Memorandum in Suppt of Motion for Reconsideration and Alternative Motn to Bifurcate	Thomas J Ryan
	Affidavit of Donald W Lojek	Thomas J Ryan
	Motion for Leave to File Plnt's Second Amended Class Action Complaint and Demand for Jury Trial	Thomas J Ryan
	Affidavit of Bruce S Bistline in Suppt of Motn for Leave to File Plnt's Second Amended Class Action Conplaint and Demand for Jury Trial	Thomas J Ryan
	Motion to Amend Memorandum Decision Upon Plnt's Revised Second Motn for Partial Summary Jdmt	Thomas J Ryan
	Affidavit of Bruce S Bistline in Suppt of Pln's Motn to Amend Memorandum Decision Upon Plnt's Revised Second Motn for Partial Summary Jdmt	Thomas J Ryan
	Plnt's Motion to Amend Class Definition	Thomas J Ryan
	Affidavit of Bruce S Bistline in Suppt of Plnt's Motn to Amend Class Definition	Thomas J Ryan
	Notice of Depositon of Persons Identified in INterrogatory #34 Date: 12-22-09 9:00am	Thomas J Ryan
	Notice of Deposition 30(B)(6) Idaho State Insurance Fund Date: 12-22-09 9:00am	Thomas J Ryan
	Memorandum in Suppt of Defn's Motn for Summary Jdmt Re: Dividend Amounts and Prejudgment Interest	Thomas J Ryan
	Affidavit of John Marshall	Thomas J Ryan
	Defendant's Motion for Summary Jdmt Re: Dividend Amounts and Prejudgment Interest	Thomas J Ryan
	Affidavit of Counsel in Suppt of Defendant's Motion for Summary Jdmt Re: Dividend Amounts and Prejudgment Interest	Thomas J Ryan
12/8/2009	Notice Of Hearing on Defendant's Motion for Summary Judgment Re: Dividend Amounts and Prejudgment Interest 2-4-10 (fax)	Thomas J Ryan
	Notice Of Hearing 02/04/2010	Thomas J Ryan
12/10/2009	Notice Of Service (fax)	Thomas J Ryan
12/15/2009	Amended Notice of Hearing 2-4-10 (fax)	Thomas J Ryan
12/21/2009	Amended Notice Of Taking Deposition of Person(s) Identified in Interrogatory No. 34 (John Marshall) (fax)	Thomas J Ryan
	Amended Notice Of Taking Deposition of Person(s) Identified in Interrogatory No. 34 (Lahcen Airir) (fax)	Thomas J Ryan
	Amended Notice Of Taking Deposition of Person(s) Identified in Interrogatory No. 34 (James Alcorn) (fax)	Thomas J Ryan
	Amended Notice Of Taking Deposition Idaho State Insurance Fund (fax)	Thomas J Ryan

Other Claims

Date		Judge
12/22/2009	ISIF's Objection to Amended Notice of Deposition of Person(s) Identified in Interrogatory No. 34 John Marshall (fax)	Thomas J Ryan
	ISIF's Objection to Amended Notice of Deposition of Person(s) Identified in Interrogatory No. 34 Lahcen Airir (fax)	Thomas J Ryan
	ISIF's Objection to Amended Notice of Deposition of Person(s) Identified in Interrogatory No. 34 James Alcorn (fax)	Thomas J Ryan
	ISIF's Objections to Amended Notice of Deposition 30(b)(6) Idaho State Insurance Fund (fax)	Thomas J Ryan
	Notice vacating amended deposition	Thomas J Ryan
12/23/2009	Stipulation for Protective Order RE; Database Information	Thomas J Ryan
12/28/2009	Protective Order	Thomas J Ryan
1/4/2010	Defn's Opposition to Pltn's Motn to Amend Memo Decision upon Plnt's Revised Second Motion for Partial Summary Jdmt	Thomas J Ryan
	Defn's Opposition to Pltn's Motn for Leave to File Plnt's Second Amended Class Action Comp and Demand for Jury Trial	Thomas J Ryan
	Defn's Opposition to Pltn's Motn to Amend Class Definition	Thomas J Ryan
	Defn's Opposition to Pltn's Motn for Reconsideration, for Bifurcation of Class	Thomas J Ryan
	Defn's Memorandum in Opposition to Plnt's Third Motn for Partial Summary Jdmt	Thomas J Ryan
1/5/2010	Defendants' Amended Opposition to Plaintiffs Motion to Amend Memorandum Decision Upon Plaintiffs' Revised Second Motion for Partial Summary Judgment (fax)	Thomas J Ryan
1/6/2010	Plaintiff's Motion rule 56(f) to continue summary judgment re: dividend amounts	Thomas J Ryan
	Memorandum in support of motion	Thomas J Ryan
	Pltf's Memorandum opposing def's motion for sumamry judgment	Thomas J Ryan
	Affidavit of bruce bistline	Thomas J Ryan
1/12/2010	Affidavit of Bruce S. Bistline in Opposition to Defendants' Motion for Summary Judgment Re: Dividend Amounts and Prejudgment Interest	Thomas J Ryan
1/14/2010	Reply in Support of Defendant's Motion for Summary Judgment RE: Dividend Amounts and Prejudgment Interest	Thomas J Ryan
	Defendant's Opposition to Plaintiff's Motion, Pursuant to Rule 56(f), to Continue Summary Judgment Proceedings Re: Dividend Amounts	Thomas J Ryan
	Affidavit of Counsel in Support of Defendant's Opposition to Plaintiff's Motion, Pursuant to Rule, 56(f), to Continue Summary Judgment Proceedings Re: Dividend Amounts	Thomas J Ryan
1/19/2010	Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Third Motion for Partial Summary Judgment	Thomas J Ryan
	Reply to Defendant's Opposition to Plaintiff's Motion to Amend Class Definition	Thomas J Ryan
	Reply to Defendant's Opposition to Plaintiff's Motion to Amend Memorandum Decision Upon Plaintiff's Revised Second Motion for Partial Summary Judgment	Thomas J Ryan

Other Claims

Date		Judge
1/19/2010	Reply to Defendant's Opposition to Plaintiff's Motion for Leave to File Plaintiff's Second Amended Class Action Complaint and Demand for Jury Trial	Thomas J Ryan
	Affidavit of Bruce S. Bistline Re: Opposition to Plaintiff's Motion for Leave to File Plaintiff's Second Amended Class Action Complaint	Thomas J Ryan
	Memorandum in Response to Defendant's Opposition to Plaintiff's Motion for Reconsideration or, Alternatively, for Bifurcation of Class	Thomas J Ryan
1/20/2010	Notice Of Hearing re: pltf motion continue sumamry judgment 02/04/2010 (fax)	Thomas J Ryan
	Notice Of Hearing 02/04/2010 (fax)	Thomas J Ryan
1/21/2010	Hearing Scheduled (Motion Hearing 03/18/2010 02:00 PM) 1/2 day - various motns/defs motn summ judg/pltf motn continue and reset	Thomas J Ryan
	Notice vacating hearing and resetting hearing 03/18/2010 (fax)	Thomas J Ryan
1/22/2010	Hearing Scheduled (Motion Hearing 02/04/2010 01:30 PM) def's various motns	Thomas J Ryan
1/28/2010	Stipulation for entry of partial summary judgment re: pltf's share of declared dividends (fax)	Thomas J Ryan
2/2/2010	Notice Of Hearing 2-26-10	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 02/26/2010 03:30 PM) Mo for Reconsideration	James C. Morfitt
2/3/2010	Hearing result for Motion Hearing held on 02/26/2010 03:30 PM: Hearing Vacated Mo for Reconsideration-counsel have partially settled this matter	James C. Morfitt
2/4/2010	Hearing result for Motion Hearing held on 02/04/2010 01:30 PM: Hearing Vacated def's various motns	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 02/26/2010 03:30 PM) mo to reconsider	James C. Morfitt
2/26/2010	Hearing result for Motion Hearing held on 02/26/2010 03:30 PM: Motion Held mo to reconsider (Under Advisement)	James C. Morfitt
	District Court Hearing Held Court Reporter: Yvonne Hyde Gier Number of Transcript Pages for this hearing estimated: less than 100 pages	James C. Morfitt
	Case Taken Under Advisement	Thomas J Ryan
3/15/2010	Notice vacating motions on 3/18/2010 and rest for 4/23/2010 (fax)	Thomas J Ryan
	Hearing result for Motion Hearing held on 03/18/2010 02:00 PM: Hearing Vacated 1/2 day - various motns/defs motn summ judg/pltf motn continue and reset	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 04/23/2010 01:30 PM) pltf motn amend class def/ amend memo/amend comp	Thomas J Ryan
	Notice Of Hearing 04/23/2010 (fax)	Thomas J Ryan
3/25/2010	Decision Or Opinion	James C. Morfitt
	Memorandum decision and order upon plaintiff's motion for reconsideration -DENIED	James C. Morfitt
4/23/2010	Hearing result for Motion Hearing held on 04/23/2010 01:30 PM: Hearing Held pltf motn amend class def/ amend memo/amend comp	Thomas J Ryan

Other Claims

Date		Judge
4/23/2010	District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated: less than 100	Thomas J Ryan
5/10/2010	Motion for Preliminary Approval of Settlement	Thomas J Ryan
	Statement of Notice Alternatives	Thomas J Ryan
	Declaration of Daniel Burke Regarding Claims Administation and Qualifications and Procedures	Thomas J Ryan
	Stipulation Regarding Excluded Members (Filed Under Seal) Document sealed	Thomas J Ryan
	Stipulation for Settlement	Thomas J Ryan
5/24/2010	Order Preliminarily Approving Settlement and Providing for Notc	Thomas J Ryan
6/10/2010	Stipulation regarding the Modification of Exhibit E to Stipulation for Settlement	Thomas J Ryan
6/11/2010	Order Re: Stipulation Regarding the Modification of Exhibit E to Stipulation for Settlement	Thomas J Ryan
7/6/2010	Class counsel's 1st report to the court (fax)	Thomas J Ryan
8/9/2010	Class counsel's 2nd report to the court	Thomas J Ryan
8/16/2010	application of class counsel for an order fixing the amount of the common fund (fax)	Thomas J Ryan
	Notice Of Hearing 9/16/2010 (fax)	Thomas J Ryan
	Hearing Scheduled (Motion Hearing 09/16/2010 01:30 PM) pltf motn fix amount common funds	Thomas J Ryan
8/18/2010	Hearing result for Pre Trial held on 08/19/2010 11:00 AM: Hearing Vacated per Judge	Thomas J Ryan
	Hearing result for Jury Trial held on 10/04/2010 09:00 AM: Hearing Vacated 9 days per Judge	Thomas J Ryan
8/23/2010	Declaration of Tricia M Solorzano Re Mailing of Notice	Thomas J Ryan
	Joint Declaration of Class Counsel in Support of Final Approval of Class Action Settlement, Plan of Allocation of Settlement Proceeds, and Award of Attorneys Fees and Expenses	Thomas J Ryan
	Affidavit of Bruce S Bistline in Support of Application for Attorneys Fees and Expenses	Thomas J Ryan
	Affidavit of Donald W Lojek Relating to Attorneys Fees	Thomas J Ryan
	Affidavit of Philip Gordon in Support of Application for Attorneys' Fees and Expenses	Thomas J Ryan
	Memorandum in Support of Application of Class Counsel	Thomas J Ryan
	Supplemental Notice of Service of Documents Related to Application for Attorney's Fees and Expenses	Thomas J Ryan
8/27/2010	Notice Of Service of Filing of Amended Notice of Objection (fax)	Thomas J Ryan
	Amended Notice of Objection to Proposed Settlement and Application for Award of Attorneys' Fees and Costs Out of Settlement Proceeds (fax)	Thomas J Ryan
9/7/2010	Class counsel's 3rd report to the court (fax)	Thomas J Ryan

Other Claims

Date		Judge
9/9/2010	Reply to amended notice of objection to proposed settlement and application for attorney fees to class counsel, and for the award of attorneys' fee and costs out of settlement proceeds	Thomas J Ryan
	Second Affidavit of Philip Gordon in support of application for attorneys' fees and expenses	Thomas J Ryan
	Supplemental Affidavit of Donald W Lojek in support of application foe attorneys' fees	Thomas J Ryan
	Affidavit of R Brent Walton in support of application for attorneys' fees and expenses	Thomas J Ryan
	Second Affidavit of Bruce S Bistline in support of application for attorneys' fees and expenses	Thomas J Ryan
	Affidavit of Benjamin A Schwartzman	Thomas J Ryan
9/16/2010	Supplemental Affidavit of bruce bistline (fax)	Thomas J Ryan
	Hearing result for Motion Hearing held on 09/16/2010 01:30 PM: Hearing Held pltf motn fix amount common funds - under advisement	Thomas J Ryan
	Hearing result for Motion Hearing held on 09/16/2010 01:30 PM: District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated: less than 100	Thomas J Ryan
9/17/2010	Final judgment and Order of dismissal with prejudice	Thomas J Ryan
	Civil Disposition entered for: Alcorn, James M, Defendant; Danielson, Judi, Defendant; Deal, William W, Defendant; Geddes, Gerald, Defendant; Goedde, John, Defendant; Idaho State Insurance Fund, Defendant; Martin, Elaine, Defendant; Mclaughlin, Marguarite, Defendant; Meyer, Wayne, Defendant; Snodgrass, Mark, Defendant; Terrell, Milford, Defendant; Becker, Scott Alan, Plaintiff; Critter Clinic,, Plaintiff; Farber, Randolph E, Plaintiff. Filing date: 9/17/2010	Thomas J Ryan
	Case Status Changed: Closed	Thomas J Ryan
9/22/2010	Order fixing the amount of the common fund which may be applied to the payment of fees and awarding sums certain for the reimbursement of litigation expenses, the payment of class plaintiff incentive compensation and the payment of the final settlement fund administration expenses	Thomas J Ryan
10/7/2010	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Farber, Randolph E (plaintiff) Receipt number: 0063195 Dated: 10/7/2010 Amount: $101.00 (Check) For: Becker, Scott Alan (plaintiff), Critter Clinic, (plaintiff) and Farber, Randolph E (plaintiff)	Thomas J Ryan
	Appellant's Notice of appeal	Thomas J Ryan
	Appealed To The Supreme Court	Thomas J Ryan
	Case Status Changed: Reopened	Thomas J Ryan
	Bond Posted - Cash (Receipt 63198 Dated 10/7/2010 for 100.00) For Clerk's record	Thomas J Ryan
10/18/2010	S C - Order Augmenting Appeal	Thomas J Ryan
	class counsels 4th report to the court	Thomas J Ryan
10/20/2010	Defendants reqeust for additions to reporters transcript and clerks record (fax)	Thomas J Ryan

Other Claims

Date		Judge
11/9/2010	Application of class counsel for order directing the settlement disribute portion of the attys fees awarded to the court	Thomas J Ryan
	Order Directing the settlement administrator to distribute portion of the attys fees awarded by the court	Thomas J Ryan
11/19/2010	Application of Class Counsel for an Order Directing the settlement Administrator to Pay or assure Payment of Immediate & Periodic Future PAyment of Atty Fees to Class Counsel	Thomas J Ryan
11/22/2010	Order Directing the Settlement Administrator to Pay or Secure Payment of Immediate and Periodic Future Payments of Attorney's Fees to Class Counsel	Thomas J Ryan
12/9/2010	Motion for Order Regarding Erroneous Payments	Thomas J Ryan
	Memorandum in Support of Motion for Order Regarding Erroneous Payments	Thomas J Ryan

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Attorneys for Defendants Idaho State Insurance Fund and James M. Alcorn, Manager of the State Insurance Fund

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RANDOLPH E. FARBER, SCOTT ALAN BECKER and CRITTER CLINIC, an Idaho Professional Association, Plaintiffs, 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.	Case No. CV06-7877 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

COME NOW defendants, Idaho State Insurance Fund and James M. Alcorn, Manager of the State Insurance Fund ("SIF"), by and through their counsel of record, Hall, Farley, Oberrecht

& Blanton, P.A., and hereby move this Court for summary judgment on the grounds that plaintiffs lack standing to bring this action and that their claims are time barred.

This motion is supported by the memorandum and affidavits filed contemporaneously herewith.

DATED this 13th day of February, 2007.

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

By _____
Richard E. Hall-Of the Firm
Keely E. Duke-Of the Firm
Attorneys for Defendant, Idaho State Insurance Fund

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2007, I caused to be served a true copy of the foregoing DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, by the method indicated below, and addressed to each of the following:

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Lojek Law Offices, CHTD
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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

Plaintiffs,

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.

Case No. CV06-7877

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW defendants, Idaho State Insurance Fund, James M. Alcorn, Manager of the State Insurance Fund, and the Board of Directors of the State Insurance Fund ("SIF"), by and

through their counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., and hereby submit this Memorandum in Support of Defendants' Motion for Summary Judgment.

INTRODUCTION

Plaintiffs filed their "Class Action Complaint and Demand for Jury Trial" ("Complaint") claiming that the State Insurance Fund ("SIF") had no authority to deny them dividend payments, based on annual premiums paid, over the course of the last five years.[1] Plaintiffs seek to enjoin the State Insurance Fund defendants ("SIF defendants") from continuing to calculate dividends in the present manner and are seeking damages for each year they were a subscriber during the class period, which they allege covers a period including 2003 through 2006.[2]

The SIF defendants are entitled to summary judgment based on the following three independent theories: (1) plaintiffs do not have standing to bring this lawsuit because they do not have a property interest in the SIF funds; (2) the SIF defendants exercised the authority given to them by the Idaho 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; and (3) plaintiffs have waived their claims in this lawsuit by continuing to insure themselves with the SIF despite their knowledge that during the years 2003 through 2006, they were not issued a dividend given that they paid premiums of $2,500 or less during each respective dividend year. In the event the Court does not grant the SIF defendants summary judgment as to all of plaintiffs' claims, the SIF defendants seek a partial summary judgment with respect to plaintiffs' claims for dividends in 2003 because such claims are time barred pursuant to Idaho law.

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[1] Class Action Complaint and Demand for Jury Trial, pg. 3. Of note, plaintiffs have not yet certified a class. As such, and at the time of the filing of this memorandum, no class exists pursuant to Idaho law.
[2] *Id.*

STATEMENT OF UNDISPUTED FACTS

A. The Purpose of the SIF Is to Provide Workers' 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 I.C. §§ 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 insurance coverage to thousands of Idaho employers who have relied on such service being available.[3]

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 must be obtained through the assigned risk pool.[4] In an effort to fulfill one of its principal purposes – providing worker's compensation insurance to Idaho employers – the SIF maintains a liberal 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.[5]

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 Code §

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[3] *See* Affidavit of Jim Alcorn ("Alcorn Aff."), ¶ 13.
[4] *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.
[5] *See* Alcorn Aff., ¶ 13.

72-901(1). The money generated is deposited with the state treasurer, whom 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 guaranties the payment of insurance benefits in the event that an insurance carrier becomes insolvent.[6] However, as directed by statute, this protection does not extend to the SIF.[7]

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 Idaho workers.[8] 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 many policyholders who could not obtain coverage from other private insurers whose underwriting policies are not as liberal as the SIF.[9]

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

B. The Idaho Legislature Charged the SIF 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.[10] 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.[11] 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.[12]

C. 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 excess surplus after evaluating a myriad of factors,

[10] *See* Alcorn Aff., ¶ 19.
[11] *See* Alcorn Aff., ¶ 20.
[12] *See* Alcorn Aff., ¶ 19.

including, but not limited to, present and future SIF operating expenses, the required reserves, investment income, market forces, and industry trends.[13] The declaration of a dividend is a multi-step process that ultimately boils down to determining how much excess 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.[14]

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.[15]

D. 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.[16] The contract of insurance does not provide for the payment of a dividend to the policyholders.[17] 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. *See generally* Idaho Code § 72-901 et seq. In fact, the Idaho Supreme Court has previously concluded that 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,

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

the assets and surplus belong to the SIF in order to meet its statutory purpose provided in I.C. § 72-901(1). *Id.*

E. The SIF 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.[18] 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 because the cost associated with writing a policy is the same whether the premium amount is, for example, $2,000 or $200,000.[19] Similarly, the SIF looks at the losses incurred on a policy and factors that in determining whether a dividend will be paid; if a policyholder had more losses than paid premiums in the dividend year, then a dividend would not be issued to that policyholder.[20] Other considerations 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; because the SIF has a public purpose to provide a source of insurance for the small employer, and 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, the SIF has made a business decision to give the larger premium policies a larger dividend as percentage of premium in order to help

[18] *See* Alcorn Aff., ¶ 27.
[19] *See* Alcorn Aff., ¶ 28.
[20] *See* Alcorn Aff., ¶ 29.

retain the business of the larger policyholders.[21] 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.[22]

F. 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 at the time, Mr. Jim 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.[23] This determination was made in the interest of retaining a strong surplus and reserve.[24] At the December 10, 2003 board meeting, 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 dividends, payable in January of 2004 on contracts of insurance with inception dates between July 1, 2002 and June 30, 2003, would be paid to policyholders paying over $2,500 per year in premiums.[25] At the October 20, 2004, board meeting, it was decided that the same dividend formula would be followed as the previous year and dividends, payable in January of 2005 on contracts of insurance with inception dates between July 1, 2002 and June 30, 2003, would be paid to policyholders paying over $2,500 per year in premiums.[26] At the December 21, 2005, board meeting, it was decided that the dividend formula would be followed as the previous year and dividends, payable in January of 2006 on

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

contracts of insurance with inception dates between July 1, 2003 and June 30, 2004, would be paid to policyholders paying over $2,500 per year in premiums.[27]

Each of the named plaintiffs purchased worker's compensation coverage from the SIF fund with inception dates between July 1, 2001 and June 30, 2004.[28] None of the plaintiffs 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.[29] Since plaintiffs did not pay premiums over $2,500 per year they were not offered a dividend.[30] The plaintiffs were each sent a letter stating they would not be receiving a dividend based on the amount of premium they paid.[31] Plaintiffs have renewed their existing contracts for insurance and paid their respective premiums even though they had not been offered a dividend the prior year.[32]

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Marchand v. JEM Sportswear, Inc.*, 143 Idaho 458, 147 P.3d 90 (2006). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Id.* The non-moving party must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial. *Id.* If the evidence reveals no disputed issues of material fact,

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[27] *See* Alcorn Aff., Ex. D (Board of Directors of the State Insurance Fund Minutes of December 21, 2005), CL 0007.
[28] *See* Alcorn Aff., ¶ 37.
[29] *See* Alcorn Aff., ¶ 38.
[30] *See* Alcorn Aff., ¶ 39.
[31] *See* Alcorn Aff., ¶ 40.
[32] *Id.*

then summary judgment should be granted. *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718-19, 918 P.2d 583, 587-88 (1996). Summary judgment is properly granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Id.*

In situations where both parties have filed for summary judgment, the standard of review is not affected. *Treasure Valley v. Woods*, 135 Idaho 485, 489, 20 P.3d 21, 15 (Ct. App. 2001). Rather, each motion must be separately considered on its own merits, with the court drawing reasonable inferences against the party whose motion is under consideration. *Id.*

ARGUMENT AND ANALYSIS

A. The Idaho Supreme Court has ruled that SIF policyholders do not have a property interest in the SIF's surplus and assets; therefore, plaintiffs' complaint must be dismissed for lack of standing since they do not have a property interest in the dividends they seek.

Standing is a preliminary question to be determined by this Court before reaching the merits of the case. *Troutner v. Kempthorne*, 142 Idaho 389, ___, 128 P.3d 926, 928 (2006). To establish standing to bring suit, the complaining party must allege injury to a property right or a civil right. *Fleenor v. Darby School Dist.*, 128 P.3d 1048, 1050 (Mont. 2006); *Adam v. City of Hastings*, 676 N.W.2d 710, 714 (Neb. 2004) (holding that "[s]tanding is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.").

1. According to *Kelso*, Policyholders Do Not Have a Property Right in the SIF's Assets.

The Idaho Supreme Court in *Kelso v. State Ins. Fund* conducted a painstaking analysis to determine whether a policyholder had a vested right in the surplus and assets of the SIF. 134 Idaho 130, 997 P.2d 591 (2000). Kelso, a policyholder of the SIF, brought an action against the SIF to "return all monies to the policy holders held by SIF under the designation of 'surplus as

regards policyholder' in excess of the six million dollars of reserves and surpluses' . . . and an accounting and recovery of assets squandered by the SIF through invalid and illegal use of the monies in the surplus." *Id.* at 133, 997 P.2d at 594. Kelso's main arguments in support of having a property interest were that 1) the SIF was a mutual insurance company, and 2) the statutory framework provided policyholders with a property interest in the SIF's assets. *Id.* The court's detailed analysis included a discussion on why the SIF was not a mutual insurance company and interpreted the statutory provisions governing the SIF to find no property right of the policyholders in the SIF's assets.[33] The court's ultimate holding was that Kelso had no property right in the surplus or assets of the SIF sufficient to support a claim for relief. *Id.*

a. The SIF is not a mutual insurance company; therefore policyholders do not have a property right in the SIF's assets.

Preliminarily, the fund of the SIF consists of all premiums and penalties received and paid into the fund and the property and securities acquired by and through the use of the monies in the fund and are considered its assets. *Id.* at 135 n. 3, 997 P.2d at 596, n. 3, 597.

In its discussion of the differences between a mutual insurance company and the SIF, the *Kelso* court identified some of the similarities, but found that even with some similarities the differences were "far more significant." *Id.* at 134, 997 P.2d at 595. The SIF board of directors is appointed by the Governor, the board of directors of a mutual insurance company is elected by the policyholders. *Id.* The SIF is not required to hold annual meetings as is a mutual insurance company, but "the most compelling argument against a finding the SIF is a mutual insurance carrier is that the Idaho legislature chose not to give policyholders of the SIF the same rights as policyholders of mutual insurers." *Id.* The SIF's statutes

[33] Since any dividend offered to policyholders is paid from the surplus, it is reasonable and logical that a dividend is part of the SIF's assets until the policyholder receives it.

do not allow SIF's policyholders to vote for the board of directors or on any other issue, and nowhere does it provide the SIF is "owned by and shall be operate in the interest of its member." Therefore, while the legislature obviously intended the SIF to operate like a mutual insurance company, it must not have intended the SIF to be "owned" by its policyholders in the same way a private mutual insurance company is owned by its policyholders. Consequently, Kelso does not have vested property interest in the assets of the SIF simply because the SIF operates much like a private mutual insurance company.

Id. (Emphasis added.)

While plaintiffs are not suggesting they are due a dividend by virtue of the SIF being a mutual insurance company, the court's analysis in *Kelso* is instructive because it addresses the expectations of the policyholder. By the language in their complaint, plaintiffs infer that they are entitled to a dividend any time the SIF determines that dividends will be issued, as if they were "owners" of the SIF. Policyholders are not "owners" in the SIF and are not entitled to the surplus or assets, as the *Kelso* court enunciated.

b. The statutory structure of the SIF does not create a property interest; therefore there is no right to the SIF's assets.

Any property rights a policyholder might possess must be found either in the insurance contract itself or in the statutory framework of the SIF. *Id.* at 135, 997 P.2d at 596. The *Kelso* court found that the SIF's statutory framework does not grant policyholders a property right in the SIF's assets or surplus. *Id.* at 136, 139, 997 P.2d at 597, 600. Kelso did not allege any property rights had arisen from the insurance policy. *Id.* at 135, 997 P.2d at 596. Likewise, plaintiffs in the present case have not alleged that a property right exists in their respective insurance policies. The reason no such allegations are made is because the insurance policies in question do not grant policyholders a property right in the SIF's assets or surplus, nor does the policy make any mention of dividends to policyholders.

Kelso's claims and the claims of the plaintiffs herein are quite similar and, as such, emphasizes the holding in *Kelso*. Kelso was asking that the SIF return to the policyholders all monies over a $6 million surplus. Here, plaintiffs are asking that the SIF return them a dividend from the surplus. The plaintiffs in both cases are asking for money from the surplus. However, plaintiffs have not demonstrated, nor can they demonstrate, because of the holding in *Kelso* and the absence of a statutory or contractual right, that they have a property interest in any dividend offered by the SIF. Without a property interest in that which a party claims to have been denied, there is no standing and plaintiffs' claims must be dismissed against the SIF.

2. Plaintiffs Cannot Bring a Statutory Violation Claim Without Standing to Bring the Action.

The failure to have a right or interest in an alleged claim was also the basis of the Idaho Supreme Court's decision in *Troutner v. Kempthorne* when it determined that plaintiffs lacked standing to bring a statutory violation claim against the Judicial Council. *Troutner*, at ___, 128 P.3d at 929. Plaintiffs, who were Democrats, claimed they and other Democrats were denied the chance to serve on the Judicial Council because the Governor appointed a Republican, which, according to plaintiffs, violated the council's governing statute. *Id.* However, as the court pointed out, "nobody has a right to be considered for such position" and even if the appointee were removed, there was no requirement that the Governor consider plaintiffs or any other Democrat for the position. *Id.* The reasoning used to support the court's holding that plaintiffs' lacked standing was the fact that the governing statute does not require that membership on the council include persons from any particular political party, and, thus, plaintiffs did not have any right to have a member of their political party appointed. *Id.*

The facts of the present case are quite analogous to the facts in *Troutner*. Plaintiffs here are claiming that the SIF manager violated Idaho Code § 72-915 when he did not offer plaintiffs

a dividend from the SIF's surplus. The plaintiffs in *Troutner*, in essence, claimed that the Governor abused his discretion when he appointed a Republican to the Judicial Council, denying them an opportunity to serve on the council. Part of the rationale behind the court's finding was that the Governor, in his discretion, could appoint someone from any political party, or he could appoint someone who had no party affiliation at all, which did not guaranty plaintiffs, or any Democrat, an appointment to the Judicial Council.. *Id.* at ___, 128 P.3d at 929.

Here, plaintiffs are claiming that the SIF manager abused his discretion when he determined that only policyholders paying more than $2,500 in premiums would receive a dividend and policyholders paying less than $2,500, such as plaintiffs, were denied an opportunity to receive a dividend. The statute in the present case is also analogous to the statute in *Troutner*. Although the subject matter of the two statutes is different, the overall gist of the two statutes is the same – the statute does not confer a right upon plaintiffs. The *Troutner* plaintiffs had no right to be members on the Judicial Council and plaintiffs in this case do not have a right to be offered a dividend from the SIF.

Since plaintiffs have no property right in the surplus of the fund, they cannot prove that they have a right or a guaranty to a dividend if the SIF used different criteria when determining the dividend. As set forth above, the formulation for the dividend is determined every year by the Manager and is based on what was in the best interest of the fund and what would keep the fund's surplus and reserves strong. This in turn benefits all policyholders. Many factors go into determining what is in the best interest of the fund and how to keep the fund and the policyholders protected. Changing any part of the calculus could yield a variety of results in determining which policyholders receive a dividend and, therefore, no guaranty can be given to plaintiffs that they will receive a dividend.

The *Troutner* court found that the relief requested by plaintiffs, if granted, would not necessarily get them a seat on the council. In this case, plaintiffs cannot show that a grant of the relief they have requested will get them a dividend.

Recall that in determining whether a party has standing the focus is on the party seeking relief, not on the merits of the case. *Id.* at ___, 128 P.3d at 928. The focus for standing in the instant case is not whether the manager had discretion to formulate the dividend as he did, but whether the plaintiffs have standing to bring their claim in the first place. Plaintiffs do not have a property right in the SIF's surplus and without such a right they have no injury to be remedied by this Court. Plaintiffs' claim is nothing more than a hope for a dividend and is no different than a person who cries foul because he/she did not receive a gift when others did. There is no right in receiving a gift, only a hope that a gift will be given. However, unlike the person who fails to receive a gift, plaintiffs are not without a remedy. Their remedy is through the political process wherein the governing statutes could be amended to provide policyholders a property right in the surplus funds. Plaintiffs must have more than a hope of receiving a dividend to confer standing; they must have a property right, which the *Kelso* court determined non-existent. And, without a property right, there can be no standing to bring a claim for relief.

Without a property interest in the SIF's assets or surplus, plaintiffs do not have standing to bring their claims. As both the Montana and Nebraska Supreme Court's pointed out, standing is based on having a legal right or interest in the subject matter of the action. Here, because of the unequivocal holding from *Kelso* and the supportive holding in *Troutner*, the SIF defendants' Motion for Summary Judgment should be granted in its entirety and plaintiffs' claims dismissed.

B. In the event the Court rules that plaintiffs have standing to bring this lawsuit, the SIF defendants are nevertheless entitled to an award of summary judgment as to all of plaintiffs' claims because the SIF Manager exercised his statutory authority in issuing dividends and deciding who would receive those dividends.

1. Title 72, Chapter 9 of the Idaho Code grants the Manager of the State Insurance Fund discretionary authority to issue dividends as he deems may be "safely and properly divided."

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 (emphasis added). When referencing the power of the Manager, the statute makes repeated reference to the term "discretion," which the Idaho Supreme Court has embraced: "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 388, 392, 111 P.3d 73, 77 (2005) (emphasis added).[34]

Plaintiffs assert that Idaho Code Section 72-915 should be read in a vacuum with no regard to the other statutes contained within Title 72, Chapter 9 and, therefore, request that this Court enjoin the SIF, its Manager, and its Board of Directors from exercising the very discretion

[34] 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. *Id.* *See also* Affidavit of Michael Camilleri ("Camilleri Aff."), ¶ 11.

provided to it by the Legislature in Title 72, Chapter 9 of the Idaho Code. As discussed below, plaintiffs' argument fails. It is a well-settled principle of statutory construction that statutes should not be construed to render other provisions meaningless. *Moss v. Bjornson*, 115 Idaho 165, 166, 765 P.2d 676, 677 (1988). In addition, the Idaho Supreme Court has previously rejected plaintiffs' argument that one statute should 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. *Id.* at 166, 765 P.2d at 677 (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) ("Statutes must be read to give effect to every word, clause and sentence.").

Second, if adopted, plaintiffs' argument would undermine the authority and discretion the Idaho Legislature granted 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 SIF Manager has the discretion to handle the day-to-day operations of the SIF. In the instant matter, of particular significance is I.C. § 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 I.C. § 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 SIF's 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

[35] Camilleri Aff., ¶ 11.

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]

Beginning with I.C. § 72-902, the Idaho Legislature required that the SIF Board of Directors appoint a manager of the fund. The statute goes on to provide that it is the SIF Manager's duty "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.[37] Idaho Code Section 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, ..." while I.C. § 72-913 gives the Manager the "*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.*" (emphasis added).[38] 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." Finally, I.C. § 72-915 gives the Manager discretion to declare a dividend if he deems it may be safely and properly divided.

The many references to power and discretion provided by the Legislature throughout the statutory framework of the SIF cannot be ignored, as plaintiffs are attempting to do. 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

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[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.

[37] Camilleri Aff., ¶ 11.

[38] In 1961, the Idaho Legislature adopted I.C. § 41-1618, which states that the powers granted to the state insurance manager, under I.C. §§ 72-903 and 72-913 are subject to the provisions set forth in Title 41, Chapter 16. This essentially determined that 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. Alcorn Aff., ¶ 8.

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).

Per *Roberts*, the SIF defendants had (and have) the authority to act in the manner the SIF did with respect to its dividend practices especially in light of the fact that I.C. § 72-901 was amended in 1998 to provide a clear mandate to the board of directors. The Legislature clearly delegated authority to the board of directors, which is "primary and exclusive in the absence of a clearly manifested expression to the contrary." *Id.* And 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. As indicated in footnote 38 above, the Legislature 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.[39] The foregoing provides a clear indication of the fact that when the Legislature wants to limit the power and discretion of the SIF, it will do so statutorily.

By not limiting the Manager's discretion, and in a number of instances directing the SIF Manager to exercise his discretion regarding the level of surplus and reserves and whether a

[39] Idaho Code § 41-1618; *see also* Alcorn Aff., ¶ 8.

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 excess surplus to be distributed, (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 SIF Manager who is appointed by the board of directors.

Despite the day-to-day administrative operations being within the discretion of the SIF Manager, in the past, like here, courts have been asked to supersede the SIF Manager's authority and the lower court and Idaho Supreme Court have refused to do so. *See Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 111 P.3d 73 (2005). In *Hayden Lake*, 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. As is illustrated in *Hayden Lake*, the SIF, through its Manager, must ensure the maintenance of a solvent fund.

As discussed above, in addition to the discretion granted to the SIF Manager by I.C. § 72-915, the remainder of Title 72, Chapter 9 grants the SIF 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. As public officials, the Manager and Board of Directors are entitled to the presumption of regularity and the plaintiffs are unable to meet their burden in showing the decision to exclude certain policyholders from receiving dividends is grossly unfair.

In *Hayden Lake*, the Idaho Supreme Court affirmed the district court's ruling that the presumption of regularity applied to the actions taken by the SIF. 141 Idaho 388, 403, 111 P.3d 73, 88 (2005). Although the presumption of regularity in *Hayden Lake* applied in the context of real estate transactions, there is no reason to indicate that it would not apply to the actions of the Manager and/or board of directors taken in connection with the SIF's surplus and dividend practices.

"There is in Idaho, as in most states, a presumption of regularity in the performance of official duties by public officers." *Id.* (*citing Roper v. Elkhorn at Sun Valley*, 100 Idaho 790, 793, 605 P.2d 968, 971 (1980)); *see also Horner v. Ponderosa Pine Logging*, 107 Idaho 1111, 1114, 695 P.2d 1250, 1253 (1985) (a presumption that the Industrial Commission did its duty and informed itself of the facts in reaching its decision); *Meservey v. Gulliford*, 14 Idaho 133, 137, 93 P. 780, 784 (1908) (a presumption that public officers act within their authority until the contrary is shown concerning the appointment by the Board of County Commissioners where the court states "it is, moreover, a rule of procedure that the burden of proving unlawful or irregular conduct rests upon him who asserts it, since there is no presumption of official irregularity . . . In the absence of an affirmative showing, it will be presumed that the officers were in the rightful performance of duty and that the conditions existed which authorized them to act as they did").

Due to the presumption of regularity, the burden is on the plaintiffs to show that the decision to exclude policyholders of $2,500 or less from receiving a dividend was grossly unfair. It is not SIF defendants' burden to prove to this Court that the decision was at all prejudicial. This is especially true in light of the fact that the decision was made for the benefit of the SIF as a whole. The Manager (a state employee) and the board of directors have no personal stake in the excess surplus; they are deriving no personal benefit from maintaining a financially sound and secure SIF. Rather, they are simply fulfilling their obligations as mandated by the statutory framework of the SIF.

Moreover, the SIF, through four different managers, has issued dividends continuously since at least 1982 using essentially the same dividend formula as is used presently, in that the dividends returned as a percentage of paid premium have always differentiated by the size of the premium, such that the SIF has always returned back a larger percentage of paid premium to the large policy holders as opposed to the smaller sized policyholder.[40] And since 1982, this policy has not been challenged. Mr. Alcorn has simply changed the threshold for receiving a dividend based on the amount of dollars available for a dividend, which has been supported by the board of directors as being in the best interests of the SIF. Accordingly, it is the plaintiffs' burden to show that this new policy is grossly unfair keeping in mind the overall purpose of the SIF.

3. Discretionary decisions made by the Manager under this authority are subject to the abuse of discretion standard of review.

When reviewing the actions of the Manager pertaining to the SIF's surplus and dividend practices, the abuse of discretion standard has been determined to be the appropriate standard of review. In fact, recent Idaho case law involving the State Insurance Fund supports this finding. In *Hayden Lake*, prior to analyzing the district court's decision, the Idaho Supreme Court

[40] *See* Alcorn Aff., ¶ 27.

outlined its authority to review the matter: "[t]his Court has free review over the construction of a statute . . . which includes whether a statute provides for judicial review, and the standard or review to be applied if judicial review is available. 141 Idaho 388, 400, 111 P.3d 78, 85 (2005) (citing *Waters Garbage v. Shoshone County*, 138 Idaho 648, 650 67 P.3d 1260, 1262 (2003)). "This Court also has free review over the district court's determination that the SIF's Manager did not abuse his discretion." *Id.* (citing *Hoskinson v. Hoskinson*, 139 Idaho 448, 454, 80 P.3d 1049, 1056 (2003)). The foregoing is important because it stands for the proposition that where judicial review is appropriate, the court has the ability to determine the appropriate standard of review to be applied.

In *Hayden Lake*, the Court determined that the district court's decision to implement the abuse of discretion standard when reviewing the SIF's dividend related policies was appropriate "considering the fact that the challenged decisions of the Manager and Directors were discretionary." *Id.* at 400, 111 P.3d at 85. The Court agreed with the district court's assessment that although Idaho's Administrative Procedures Act (IAPA) did not apply to the SIF, the Act's "judicial review provisions 'enunciate a sound standard' to review the SIF's Managers' and Directors' actions." *Id.* In particular, the Court referenced Idaho Code § 67-5279, which states that agency action should be confirmed "unless the court finds that the action was: . . . (d) arbitrary, capricious, or an abuse of discretion." *Id.* Despite having the opportunity to analyze the Manager's actions regarding the management and issuance of dividends under either an arbitrary or capricious standard, the opinion is noticeably silent as to both standards. And the Court followed suit by confirming the district court's application of the abuse of discretion standard as being the appropriate standard of review, while dismissing HLFPD's argument that the business judgment rule should be applied to evaluate the decisions made by the Manager or

the Board of Directors. *Id.* at 400–01, 111 P.3d at 85–86. The Court noted that the SIF is not a private corporation, and thus "its Managers and Directors are entitled to the higher level of deference afforded by the abuse of discretion standard." *Id.* at 401, 111 P.3d at 86.

The SIF understands the validity of any discretionary decision exercised by the Manager is subject to judicial review. However, once the validity of a decision based on the Manager's discretion is called into question, the SIF argues—per *Hayden Lake*—the appropriate standard of review is the abuse of discretion standard.

4. Based on the presumption of regularity and the abuse of discretion standard, the Manager did not abuse his discretion in deciding to not provide policyholders of $2,500 or less from receiving a dividend in 2003, 2004, 2005, and 2006.[41]

The Manager did not abuse his discretion because the decision of precluding policyholders of $2,500 or less from receiving a dividend is entitled to the presumption of regularity and was not an abuse of discretion.

In determining whether an act or decision constitutes an abuse of discretion, this Court must ask (1) whether the issue is correctly perceived the issue as one of discretion; (2) whether the decision was within the outer boundaries of the discretion provided and consistent with applicable legal standards; and (3) whether the decision was reached by an exercise of reason. *See Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991); *Sheridan v. St. Luke's Reg'l Med. Ctr.*, 135 Idaho 775, 25 P.3d 88 (2001); *Selkirk Seed Co. v. Forney*, 134 Idaho 98, 996 P.2d 798 (2000). "Discretion" denotes wise conduct and management, as well as the power of free decision-making. *Black's Law Dictionary* 499 (8th ed. 2004).

As discussed throughout this memorandum, the decision to preclude policyholders who have paid annual premiums of $2,500 or less from receiving a dividend was well within the

[41] *see also* Camilleri Aff., ¶¶ 1-14.

statutorily mandated discretion of the SIF Manager. Dividends, if any, are paid from what the SIF Manager determines to be excess surplus 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.[42] 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.[43] 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.[44]

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.[45] 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 the cost associated with writing a policy is the same whether the premium amount is $2,000 or $200,000.[46]

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

[42] *See* Alcorn Aff., ¶ 21; *see also* Camilleri Aff., ¶ 13.
[43] *See* Alcorn Aff., ¶ 23; *see also* Camilleri Aff., ¶ 13.
[44] *See* Alcorn Aff., ¶ 24; *see also* Camilleri Aff., ¶ 13.
[45] *See* Alcorn Aff., ¶ 25.
[46] *See* Alcorn Aff., ¶ 27.

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.[47] 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.[48]

This argument is further supported by the following example. Assume policy holder A has a $2,500 premium insurance rate, but has $100,000 in losses on its worker's compensation coverage during the period in which the SIF Manager deems the aggregate balance remaining may be safely and properly divided. Under plaintiffs' confined interpretation of I.C. § 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 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 steers clear of this approach by covering the losses of such policyholders. *See id.* Moreover, worker's compensation coverage is a unique form of insurance in that it provides unlimited coverage to its policyholder regardless of the premium size.[49] The

[47] See Alcorn Aff., ¶ 29.
[48] *See* Alcorn Aff., ¶ 32.
[49] *See* Alcorn Aff., ¶ 34.

SIF provides a $2,500 policyholder with the same amount of upper coverage as a $500,000 policyholder.[50] But either policy can have extensive losses well above their premium amounts.

The Legislature afforded the SIF Manager *discretion* to counteract these precise illustrations. The SIF 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 SIF 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 froth above, and was consistent with the law and industry practice, and was done with the knowledge of the board of directors.

Although the SIF 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. Being an efficient insurance company that is actuarially sound does not always comport with the public purpose of the fund. As a result, the SIF is forced to make difficult decisions

[50] *See* Alcorn Aff., ¶ 34.

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.[51] 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.[52] 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 87, 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.[53] 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.[54] Moreover, a policyholder with a premium of $2,500 could have equal or greater losses than a policyholder with a premium of $100,000.[55] There is nothing to insulate the SIF

[51] *See* Alcorn Aff., ¶ 10.
[52] *See* Alcorn Aff., ¶ 29.
[53] *See* Alcorn Aff., Ex. E (Board of Directors of the State Insurance Fund Minutes of January 22, 2004), CL 0021.
[54] *See* Alcorn Aff., Ex. A, CL 0029.
[55] *See* Alcorn Aff., ¶ 33.

should this occur; consequently, the SIF needs the larger policyholders to absorb the losses generated by lower premium contributors.[56]

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.[57] 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.[58] 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.[59] 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*."[60] This letter supports SIF defendants' position that decisions related to the issuance of dividends is within the SIF Manager's discretionary authority.

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 policy holders whose larger premium totals have a greater impact in maintaining the financial integrity of the SIF. The decision to return larger dividends to those policy holders who pay larger premium totals is one of the tools available to the SIF to maintain its purpose.[61] It is a discretionary decision well

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[56] *See* Alcorn Aff., ¶ 33.
[57] *See* Alcorn Aff., Ex. F (letter from David G. High, Chief, Civil Litigation Division, to Robert Equsquiza, January 23, 2003).
[58] *Id.*
[59] *Id.*
[60] *Id.* (emphasis added).
[61] *See* Alcorn Aff., ¶ 29.

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.

5. 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 the SIF defendants 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 defendants realize Montana 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 defendants argue 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 the SIF defendants to implement the type of policy plaintiffs complain 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, collectively, work together to ensure the purpose of the SIF continues to be fulfilled.

And it is hard to argue with that logic in light of the recent success the fund 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 the board of directors. Collectively, they understand the delicate intricacies of the SIF's business, and have been able to successfully navigate around many of the pitfalls affecting the industry as a whole.

C. In the event the Court does not grant the SIF defendants' summary judgment in its entirety, plaintiffs' claims are subject to a three-year statute of limitation.

The state insurance fund's governing statutes are incorporated into the policyholder's insurance contract and where the gravamen of a party's claim is a statutory violation, a three-year statute of limitation is applicable. *Kelso*, 134 Idaho at 138, 997 P.2d at 599; *Hayden Lake*, 141 Idaho at 403–04, 111 P.3d at 88–89. Plaintiffs allege that defendants acted in contravention to their statutory authority, which places plaintiffs' claim within the three-year statute of

limitation for claims involving statutory violations. Therefore, any claims for alleged damages that occurred prior to July 21, 2003 are time-barred.

In plaintiffs' complaint they are seeking an award of damages going back five years preceding the filing of their complaint. However, application of a three-year statute of limitation for claims of statutory violations as set forth in *Hayden Lake* determines that plaintiffs were required to bring their cause of action within three years of being passed over for a dividend from SIF. Upon determination of the dividend for a particular year, the SIF sent all policyholders who would not be receiving a dividend a letter indicating such. For dividends issued in January 2003, plaintiffs were sent a letter informing them they would not be receiving a dividend in 2003, which is the date plaintiffs would have been on notice of their alleged harm and is the date the three-year statute of limitations began to run on that particular dividend claim.

Because the statute of limitation for allegations of statutory violation is three years, plaintiffs' claims for dividends offered prior to July 21, 2003, are time-barred. Therefore, plaintiffs' claim for damages as to the January 2003 dividend must be dismissed.

D. Plaintiffs waived any right to a claim for dividends by continuing to pay their premiums despite their notice that they were receiving a dividend in prior years.

Generally, waiver is an issue in contractual situations where the contract contains certain conditions which need to be met before one of the parties is expected to perform. 17A Am.Jur.2d *Contracts* §638. A party waives that condition and any accompanying claims for failure of the condition when he goes ahead and performs anyway without the condition being satisfied. *Id.* The situation presented here is somewhat different but application of the waiver doctrine is still useful and applicable. Plaintiffs' insurance policy is in fact a contract between the policyholder and the SIF. *Intermountain Gas Co. v. Industrial Indemnity Co. of Idaho*, 125 Idaho 182, 868 P.2d 510 (Ct. App. 1994). There is no dividend provision in the contract and,

therefore, there is no condition precedent to be considered. However, the waiver doctrine is appropriate because, even though plaintiffs were passed over for a dividend based on the amount of premium paid, they still paid their insurance premiums for the next policy year knowing they had not received a dividend. This scenario has been repeated each and every year since the inception of the dividend pay-out based on the $2,500 premium level in 2003.

Plaintiffs knew they had not been paid a dividend for the years in question, along with the reasoning for such decision, but chose to keep paying their premiums, renewing their insurance, and subjecting themselves to their perceived injury. However, they could have mitigated their damages by changing insurance carriers, if they truly believed they were being harmed. Plaintiffs are free to obtain their worker's compensation coverage from other insurance companies who will insure them if they believed they could get a better deal on worker's compensation insurance elsewhere. The fact that plaintiffs kept their SIF policy demonstrates two things: 1) they knew they had no right to a dividend and 2) there was no real harm or injury in not receiving a dividend.

Plaintiffs waived their right to claim injury when they continued to pay their premiums and renewed their insurance policies with the SIF, without receiving a dividend. Therefore, plaintiffs' claims should be dismissed.

CONCLUSION

The SIF defendants are entitled to summary judgment based on the following three independent theories: (1) plaintiffs do not have standing to bring this lawsuit because they do not have a property interest in the SIF funds; (2) the SIF defendants exercised the authority given to them by the Idaho 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; and (3) plaintiffs have waived their claims in this lawsuit by continuing to insure themselves with the SIF despite their knowledge that during the years 2003 through 2006, they were not issued a dividend given that they paid premiums of $2,500 or less during each respective dividend year. In the event the Court does not grant the SIF defendants summary judgment as to all of plaintiffs' claims, the SIF defendants seek a partial summary judgment with respect to plaintiffs' claims for dividends in 2003 because such claims are time barred pursuant to Idaho law.

RESPECTFULLY SUBMITTED this 13th day of February, 2007.

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

By _____
Richard E. Hall-Of the Firm
Keely E. Duke-Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2007, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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Richard E. Hall
Keely E. Duke

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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

Plaintiffs,

vs.

CV06-7877

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.

/

AFFIDAVIT OF MICHAEL CAMILLERI

1. My name is Michael Camilleri and I am an attorney licensed to practice in the jurisdictions of New York & Washington, D.C.

2. I currently serve as a principal in the insurance consulting firm of Preferred Insurance Capital Consultants, LLC and as a principal, director and General Counsel of First Commercial Insurance Company, a Florida domestic property and casualty insurer.

3. From 1978 – 1990, I was with the National Council on Compensation Insurance, a national insurance rating organization during which time I served as Senior Vice President and General Counsel, managing the countrywide legal and regulatory offices for that organization, including the State of Idaho. During that time, I represented the insurance industry on numerous occasions before state and federal

legislatures and insurance departments, including the State of Idaho. I also served on various advisory committees to the National Association of Insurance Commissioners.

4. From 1981 – 1988, I was an adjunct Professor of Law at the College of Insurance.

5. From 1991 – 1998, I was a senior partner at the law firm of Adorno & Zeder (now Adorno & Yoss) heading up the firm's countrywide insurance regulatory department.

6. From 1999 – 2001, I was President of Insurance Data Resources, a national workers compensation rating organization.

7. Throughout the 29 years I have been in the insurance industry, I have frequently been retained to draft and interpret insurance regulations and statutes by state legislators, state insurance departments, insurance carriers and employers. These assignments have included statutory and regulatory construction for the State of Idaho.

8. I have also served as an expert and qualified by numerous state courts on issues of statutory and regulatory construction.

9. I have been retained as a consulting expert by the State of Idaho State Insurance Fund in the matter of Randolph E. Farber, Scott Alan Becker and Critter Clinic, an Idaho Professional Association v. 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.

10. During the course of my assignment, I was asked to review the issues contained in Plaintiff's Motion for Partial Summary Judgment and more specifically the following:

> "1. Other than I.C. §72-915, there are no contract provisions, regulations, or statutes which bear upon the determination of which policy holders are entitled to share in a dividend pool which the Manager of the SIF determines should be distributed;
>
> 2. I.C. §72-915 does not confer any discretion upon the Manager of the SIF relative to the selection of criteria for determining which policy holders are entitled to share in a dividend pool which the Manager of the SIF determines should be distributed.
>
> 3. I.C. §72-915 does not permit the SIF to utilize the amount of premium paid by a policy holder for the purpose determining whether such policy holder is eligible to receive any share of the dividend fund but instead requires the SIF to utilize the amount of premium paid by a policy holder for the purpose of computing the pro rata portion of the dividend pool which is payable to every policy holder." [Plaintiff's Motion for Partial Summary Judgment, p. 2)

11. I.C. §72-915 provides as follows:

> "Dividends. – At the end of every year, and at such other times as the manager in his discretion may determine, a readjustment of the rate shall be made for each of the several classes of employments or industries. If at any time there is an aggregate balance remaining to the credit of any class of employment or industry which the manager deems may be safely and properly divided, he may in his discretion, credit to each individual member of such class who shall have been a subscriber to the state insurance fund for a period of six (6) months or more, prior to the time of such readjustment, such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates."[I.C. §72-915, p 582]

The sole statutory requirement in I.C. §72-915 is that the manager, in his discretion, may provide for a dividend to subscribers who have been with the State

Fund for a period of six months or more. That discretion can be exercised to declare or not declare a dividend to all or some of the policyholders.

However, it should be noted that additional statutory authority on this issue is relevant. For example, I.C. 72-901(3) provides that "it is the duty of the board of directors to direct the policies and operations 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 purpose for which the state insurance fund was created". Consistent with the general mandate I.C. 72-901(3) provides to oversee and manage the fund, I.C. 72-902 provides that:

> "The board of directors of the state insurance fund shall appoint a manager of the state insurance fund, whose duties, subject to the direction and supervision of the board, shall be to conduct the business of the state insurance fund, and do any and all things which are necessary and convenient in the administration thereof . . . ."

These provisions, along with I.C. 72-915, impose upon the manager both the responsibility and the discretion to administer the fund so as to make all decisions necessary to assure the financial integrity of the fund.

12. I.C. §72-915 is very general in its treatment of dividends. This is fairly typical. See South Dakota Code Section 20:06:23:03; Utah Code Section 31A-33-116; Nevada RS 693A.160; Nebraska Code 44-325. In those states, as well as almost all other jurisdictions, industry custom and practice typically follows a pattern as follows:

a. Management reviews the financial performance of the company over the course of the last fiscal year.

b. Management reviews the anticipated financial needs of the company for the future.

c. Management determines whether excess funds are available beyond those required to meet statutory, regulatory and organizational obligations.

d. If an excess exists, management can declare a dividend to certain policyholders within the context of an approved (management and board of directors) plan of dividend distributions. Such determinations can be made on the basis of risk performance, longevity, size or other relevant criteria.

e. The plan is discussed with the board of directors and such plan is either accepted, rejected or modified.

f. Those eligible for dividends receive distributions.

13. During the course of my analysis, I reviewed the methodology used by the Idaho State Insurance Fund in determining its dividend program. That review indicates that the Fund considered the following factors in making its determination: risk size, experience and loss history, expense factors, and risk retention considerations. This methodology and the aforementioned factors are consistent with both industry practice and usage and reasonable and prudent insurance company management.

The Idaho State Insurance Fund's determination with respect to dividends is very much consistent with this analysis and with other State Fund and private carrier methodology. The Idaho Fund manager reviewed the expense and performance history of risks delineated by premium size and concluded that the profitability of risks below $2,500 in premium did not warrant a dividend. Accordingly, fiscal prudence dictated that a dividend should not be issued to policyholders under $2,500 in premium for the years in question.

The practice of issuing dividends to policyholders has its basis in the concepts of recognizing performance and as a marketing tool to retain the more profitable risks. Some companies take these concepts to a very fine degree, actually limiting dividends on a risk by risk basis to those insureds achieving a certain performance.

Other companies may expand the program to all risks within a certain class. In this case, the Fund manager performed an expense and performance analysis by size of risk and determined that smaller risks had produced a lower profitability return. In addition, because of certain fixed costs applicable to all insureds, the expense ratio for smaller risks is generally higher than that of larger risks. Based on these factors, the manager determined that those small insureds did not merit a dividend.

It should be noted that this exercise of discretion was reviewed by the Chief of the Civil Litigation Division for the Office of the Attorney General, State of Idaho and found that the Fund's decision was a proper exercise of that discretion (See Letter of David G. High to Mr. Robert Equaquiza dated January 22, 2003).

14. Based on the above, it is my conclusion that:

a. Neither I.C. §72-915 nor any other Idaho Code provision, prescribes how dividends are to be distributed, only under what financial circumstances they may be distributed. However, other statutory provisions, specifically I.C. § 72-901, provide the Manager and board of directors with the implied authority and power to implement such dividend policies "to assure that the state insurance fund is run as an

efficient insurance company, remains actuarially sound and maintains the public purposes for which state insurance fund was created."

b. Consistent with I.C. §72-915, I.C. § 72-901(3), I.C. § 72-902, I.C. 72-914 and industry practice and usage, the Idaho State Fund Manager has the discretion, subject to Board approval, to determine which policyholders, if any, are entitled to a dividend.

c. The Idaho State Fund properly exercised its discretion in establishing a dividend plan which excluded insureds paying premiums under $2,500.

FURTHER AFFIANT SAYETH NAUGHT.

Michael Camilleri

BEFORE ME, THE UNDERSIGNED AUTHORITY, personally appeared Michael Camilleri, who is personally known by me and who states that the matters set forth in the foregoing Affidavit are true and correct; that he executed the Affidavit in his own hand, and that he did take an oath.

Elizabeth Fisher
My Commission DD285791
Expires March 02, 2008

Notary Public
State of Florida

My commission expires: 03/02/08

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2007, I caused to be served a true copy of the foregoing AFFIDAVIT OF MICHAEL CAMILLERI, by the method indicated below, and addressed to each of the following:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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

Plaintiffs,

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.

Case No. CV06-7877

AFFIDAVIT OF JAMES M. ALCORN

STATE OF IDAHO)
) ss.
County of Ada)

I, James M. Alcorn, being first duly sworn, depose and state:

1. I am the Manager of the SIF and have been since April 1998.

2. I have had extensive experience with the insurance industry since 1970 as a licensed insurance agent and owner of independent property and casualty insurance agencies and currently hold the professional designation of Certified Insurance Counselor.

3. I served as the Director of the Idaho Department of Insurance from May 1994 to January 1995, and as its Deputy Director from January 1995 to December 1995, and then again served as Director of the Department from December 1995 until April of 1998.

4. My past experience as a licensed insurance agent and as Director of the Idaho Department of Insurance has caused me to be familiar with the laws regulating the insurance industry and insurance industry practices.

5. As the Manager of the State Insurance Fund (SIF), I am familiar with its history and its day to day operations and am required by law to conduct the business of the SIF and do all things convenient and necessary to manage the SIF so that it is run as an efficient insurance company, remains actuarially sound and maintains the public purposes for which it was created.

6. The SIF was created by the Idaho Legislature in 1917 for the purpose of providing a stable source of worker's compensation insurance for Idaho employers and their employees.

7. Idaho Law provides that all Idaho employers must maintain worker's compensation insurance coverage for their employees.

8. Since the enactment of 41-1601 et seq. in 1961, Idaho's worker's compensation insurance rates have been regulated by the Department of Insurance which approves worker's compensation rates based upon the rate filings of an authorized rating organization (National Council on Compensation Insurance aka NCCI). Idaho is an administered pricing state which means that the rating organization files the entire rate. Companies may file with the Department of Insurance for approval to deviate from the filed rate by individual rate or for all rates. Companies may also use schedule credits on specific policies. Companies may not use both a deviation and scheduled credits.

9. SIF has chosen to deviate 7% from all filed rates. Therefore, the premiums for all SIF policyholders are calculated beginning with a rate 7% below the rates approved by the Department of Insurance. This deviation is applied across the board for all policyholders regardless of premium size or losses occurring on an insurance policy.

10. Idaho is a competitive state which means that the SIF is not a monopoly and must compete for business against the private worker's compensation insurance carriers.

11. Idaho also has a worker's compensation assigned risk pool which insures employers who cannot otherwise secure workers compensation coverage, but employers insuring through the assigned risk pool are subject to rates 30% above the standard rate.

12. Idaho employers are not required to insure through the SIF, they may insure with a private carrier or if they are declined coverage by two private carriers and the SIF then coverage can be obtained through the assigned risk pool which is the carrier of last resort.

13. The SIF has a public purpose to provide worker's compensation insurance to Idaho employers and while it is not the insurer of last resort, the SIF maintains a liberal underwriting policy that seeks to insure all employers regardless of size so that most Idaho employers who could not otherwise obtain coverage through a private carrier could obtain coverage with the SIF and avoid the extra costs associated with acquiring an insurance policy through the assigned risk pool.

14. As SIF Manager, I am required to maintain the solvency of the SIF and make decisions regarding the level of surplus and reserves needed by the Fund to remain actuarially sound so there continues to be a stable and available source of worker's compensation insurance coverage.

15. The maintenance of adequate surplus and reserves is an important aspect of managing the SIF because unlike all other worker's compensation carriers operating in Idaho the Fund is precluded by statute (I.C. §72-901(4)) from being a member of the Idaho Insurance Guaranty Association.

16. The Idaho Insurance Guaranty Association guaranties payment of insurance benefits in the event that an insurance carrier cannot pay its insurance claims or becomes insolvent.

17. All insurers in the state belong to the Idaho Insurance Guaranty Association except the SIF which is barred by law.

18. Since the SIF cannot like other carriers rely on Idaho Insurance Guaranty Association to pay benefits in the event of insolvency, the SIF must be managed such that it maintains sufficient surplus and reserves to provide a stable ongoing source of worker's compensation insurance to protect Idaho workers.

19. The duty of the Manager and the Board of Directors to maintain the financial integrity of the SIF is paramount because if the SIF were to become insolvent, the availability of worker's compensation insurance in Idaho would be critically jeopardized, since the SIF insures over 39,000 employers which comprise approximately 70% of the market. Many of these employers, especially the smaller employers, could not obtain coverage from other insurers whose underwriting policies are not as liberal as the SIF.

20. Since its inception the duty to operate and manage the SIF and to decide the appropriate level of surplus, reserves and dividends has been the duty of its Manager and subject to his or her discretionary authority.

21. The SIF surplus is an asset of the SIF and dividends, if any, are paid from what the Manager determines to be surplus that is safely available after taking into consideration various factors including, but not limited to, present and future SIF operating expenses, the required reserves, projected investment income, market forces, and industry trends.

22. Dividends paid by the SIF are not the same as dividends paid by to stockholders of a company. SIF dividends are not related to ownership or the sharing of profits. SIF dividends are the return of unused premium.

23. The determination as to whether to declare a dividend, how much, and who will receive one is not a science, but is a decision-making process that is based upon experience and knowledge of the insurance business, industry trends, and market forces.

24. The declaration of a dividend is a multi-step process that starts with deciding how much surplus is safely available to be declared as a dividend, then there is a determination as to how it is to be divided up taking into account the cost of writing an insurance policy and considering the losses that may have been incurred on the policy.

25. One other consideration is the marketing effect that a dividend will have on retaining good profitable accounts, because it is those large profitable accounts that allow the SIF to fulfill its public policy objectives of providing a source of insurance for Idaho employers which includes many of the smaller less profitable accounts.

26. Policyholders of the Fund are provided with a contract of insurance that sets forth the parameters of their coverage and neither it nor the governing statutes of the SIF provide that policyholders are entitled to, or guarantied that they will receive a dividend.

27. The SIF, through three previous managers and the current Manager, has issued dividends continuously since at least 1982 using essentially the same dividend formula as is used presently, in that the dividends returned as a percentage of paid premium have always differentiated by the size of the premium taking into account the losses incurred on the insurance policy such that the SIF

has always returned back a larger percentage of paid premium to the large policy holders, as opposed to the smaller sized policyholders. This is consistent with workers compensation insurance industry practices.

28. One of the reasons for using policy size as a basis for determining the rate of return is because dividend is a return of unused premium and a larger policy will have proportionately more unused premium than a smaller premium policy because certain costs associated with writing a policy are essentially the same whether it be for $2,000 or $200,000 policy.

29. Other considerations for issuing larger dividends as a percentage of premium size has to do with the fact that workers compensation rates are regulated and as such are the same for all carriers, and because the SIF has a public purpose to provide a source of insurance for the Idaho employers including the small employers, and because private carriers seek to insure only the large profitable policyholders, and because the SIF needs the large policyholders to help support the ability to continue to insure the small businesses in the state. The SIF has made a business decision to give the larger premium policies a larger dividend percentage in order to help retain the business of the larger profitable policyholders. Moreover, 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 has losses that exceed a certain percentage of premium in a policy year then a dividend would be reduced or not paid depending on the level of losses.

30. It is the retention of the large profitable insurance policies that helps the SIF maintain its public purpose of providing insurance to Idaho employers. It is the large profitable accounts that are subject to being lured away by the private insurance carriers with whom the SIF is in competition.

31. Since workers compensation rates are regulated by the state, the primary method used to cause large profitable policyholders to switch workers compensation insurance companies is to offer them high scheduled credits.

32. Since the SIF has chosen to deviate from the regulated rates it cannot use scheduled credits so it relies on the return of dividend to retain large profitable accounts. (*See* Paragraph 8 above) This is a good business decision that helps the SIF retain the large profitable policyholder and is consistent with workers compensation insurance industry practices and the statutory mandates of Idaho Code Section 72-901 to run the SIF as an efficient insurance company.

33. Additionally, a policyholder with a premium of $2,500 could have equal or greater losses than a policyholder with a premium of $100,000, and therefore the larger policyholders more readily absorb the losses generated by lower premium contributors.

34. Worker's compensation coverage is a unique form of insurance in that it provides unlimited coverage to its policyholder regardless of the premium size. The SIF provides a $300 policyholder with the same amount of upper coverage as a $500,000 policyholder, but either policy can have extensive losses well above their premium amount. Losses in excess of a million dollars on a claim are not unheard of and have been paid by the SIF.

35. The decision to give dividends pursuant to a formula that excluded smaller policyholders during the policy years in question was made by considering and weighing all 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.

36. The decision to give dividends pursuant to a formula that excluded smaller policyholders was also informally reviewed by the Chief of the Civil Litigation Unit of the Idaho Attorney General's Office in a letter dated January 22, 2003, to Robert Egusquiza, wherein Deputy Attorney General David High stated that the dividend distribution practice was within the discretionary authority of the SIF Manager.

37. Each of the named plaintiffs purchased worker's compensation coverage from the SIF with inception dates between July 1, 2001 and June 30, 2004.

38. None of the plaintiffs 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 the Critter Clinic which paid premiums in excess of $2,500 for the policy year with an inception date between July 1, 2003, to June 30, 2004.

39. Plaintiffs were not offered a dividend for years they did not pay premiums over $2,500.

40. Dividends are declared by the SIF in December and the plaintiffs were each sent a letter the January following the declaration of the dividend stating they would not be receiving a dividend based on the amount of premium they paid for the particular policy year. Plaintiffs have renewed their existing contracts for

insurance and paid their respective premiums even though they may not have been offered a dividend the prior year.

41. If the Court were to accept the Plaintiff's interpretation that Idaho Code Section 72-915 does not give the SIF Manager the discretion to declare a dividend that can be safely and properly divided with regard to prior paid premiums then it severely impacts the ability of the Manager to run the SIF as an efficient insurance company, remain actuarially sound, and maintain the public purposes for which the insurance Fund was created.

42. Attached to this affidavit as Exhibit "A" is a true and correct copy of Board of Directors of the State Insurance Fund Minutes from November 21, 2002's Special Meeting.

43. Attached to this affidavit as Exhibit "B" is a true and correct copy of Board of Directors of the State Insurance Fund Minutes from December 10, 2003.

44. Attached to this affidavit as Exhibit "C" is a true and correct copy of Board of Directors of the State Insurance Fund Minutes from October 20, 2004.

45. Attached to this affidavit as Exhibit "D" is a true and correct copy of Board of Directors of the State Insurance Fund Minutes from December 21, 2005.

46. Attached to this affidavit as Exhibit "E" is a true and correct copy of the letter sent by David G. High, Chief, Civil Litigation Division of the Idaho Attorney General's Office, to Robert Egusquiza on January 22, 2003.

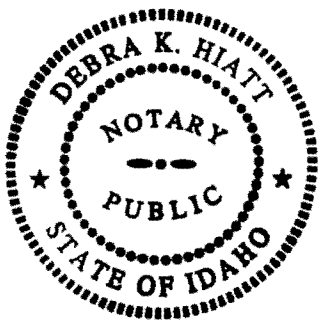
47. Attached to this affidavit as Exhibit "F" is a true and correct copy of Board of Directors of the State Insurance Fund Minutes from January 22, 2004.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

James M. Alcorn

SUBSCRIBED AND SWORN to before me this 13th day of February, 2007.

(SEAL)



Debra K. Hiatt
Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires 11-8-07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2007, I caused to be served a true copy of the foregoing AFFIDAVIT OF JAMES M. ALCORN, by the method indicated below, and addressed to each of the following:

Donald W. Lojek
Lojek Law Offices, CHTD
1199 W. Main Street
P.O. Box 1712
Boise, ID 83701-1712
Fax No.: (208) 343-5200
Attorneys for Plaintiff

✓ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy

Philip Gordon
Bruce S. Bistline
Gordon Law Offices
623 West Hays Street
Boise, ID 83702
Fax No.: (208) 345-0050
Attorneys for Plaintiff

___ ✓ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy

Richard E. Hall
Keely E. Duke

EXHIBIT A

Board of Directors of the State Insurance Fund
Minutes of November 21, 2002 Special Meeting

Board Members Present:

Bill Deal, Chairman, Agents Representative
Representative Wayne Meyer, Vice Chairman, Legislative Representative
Senator John Goedde, Legislative Representative
Gerald Geddes, Employees Representative
Milford Terrell, Employer Representative

In addition to the Board members, the following individuals attended all, or a portion of, the meeting:

James M. Alcorn – Manager, State Insurance Fund
George Parham – Chief Legal Counsel, State Insurance Fund
Debbie Hiatt – Secretary, State Insurance Fund
Peter Marshall – Attorney, Marshall, Batt and Fisher
Doug Dorn – Investment Consultant
Becky Gratsinger – R.V. Kuhns & Associates, Inc.
Josh Kevan – R.V. Kuhns & Associates, Inc.

Pursuant to the posted notice of the meeting and agenda, Chairman Deal called the Special Meeting of the Board of Directors of the State Insurance Fund to order at 9:00 a.m. The absence of Milford Terrell was noted.

Mr. Alcorn welcomed Doug Dorn and introduced Becky Gratsinger and Josh Kevan from R.V. Kuhn & Associates, Inc. (RVK). Mr. Alcorn explained the new business relationship with RVK as investment consultants to provide consulting opinions and recommendations on investments made by the Endowment Board.

Mr. Terrell joined the meeting at 9:05 a.m.

Ms. Gratsinger provided a brief resume of her qualifications, and the history RVK. Mr. Kevan introduced himself and reviewed his qualifications. There being no specific questions by the Board, Chairman Deal thanked the representatives of RVK. Ms. Gratsinger, Mr. Kevan and Mr. Dorn left the meeting at 9:13 a.m.

Chairman Deal explained the purpose of the special meeting was to discuss the 2003 dividend.

Mr. Alcorn provided the following information on the Fund for the Board to consider when discussing a proposed dividend:

- There is currently $132-133 million worth of premium.
- The Fund has approximately 30,000 policies.
- There is approximately $74 million in surplus.
- Investment income is down $9.9 million from the start of the year, but it changes on a daily basis.

- The State Insurance Fund is extremely solvent.
- Reinsurance coverage was changed from catastrophic and individual coverage, to catastrophic coverage only, which provides a greater liability than in the past. The largest concentration of state employees is in the "towers" where the Health and Welfare employees are housed.
- The Fund is not a member of the Guarantee Association so the Fund needs to be more conservative.
- The Fund gave large dividends over the past years based on money accumulated during the 90's.
- He would like to keep the fund at a 2-1 premium to surplus ratio.
- The Fund is showing a $4.7 million profit to date.

Mr. Alcorn stated that he could be very conservative and not issue a dividend. He realizes policyholders have come to expect a dividend, but a strong case could be made for no dividend.

Mr. Terrell reviewed the $74 million surplus and $5 million in investments, and asked the Manger to review the down side of 2000 and 2001. Mr. Alcorn responded that before dividends, there was $18 million worth of profit in 2001, and $6.8 million in year 2000.

Mr. Terrell asked the amount of dividends paid the last two years. Mr. Alcorn responded the Fund paid out $24.7 million in 2001 and $32.4 in 2000.

Mr. Alcorn feels the Board should look at whether a dividend should be given to the smaller policies, and stated now may be the time to consider changing the procedures. The down side to not offering a dividend to the smaller policies ($2000 and below) is that 20,000 of the 30,000 policyholders have $2000 or less in premium. The under $2000 policyholders account for $12 million worth of the premium. The other $120 million premium is received from the 10,000 policies that are over $2000.

Senator Goedde indicated he has been a proponent of a policy fee for a long time and suggested that perhaps a policy fee could be taken off any dividend paid, which would eliminate the smaller policies from actually getting a dividend. Mr. Terrell agreed with Senator Goedde and asked what the cost of paperwork is to set up for a new policy. He agrees with an up-front fee, but no dividend. He indicated that is the cost of business and that no money is made on smaller accounts, but on the larger accounts. Mr. Alcorn concurred, but said we need to discuss both the pros and cons.

Mr. Alcorn stated that policyholders are used to getting dividends so he knows he'll "take heat", for having a lower dividend or no dividend at all. He also said that some policyholders feel, in error, that they are getting tax money back.

Mr. Alcorn noted that the Fund writes business that other companies will not write, and tries to accommodate those accounts rather than having them assigned to the Assigned Risk Pool. Policyholders in the Risk Pool lose the 15% deviation and have 30% additional premium, so the

Fund is saving those policyholders 45%. Mr. Terrell said other companies are also cutting back and feels the Fund has gone the extra mile to provide service to those policyholders.

Mr. Terrell encouraged the Board to talk about eliminating dividends to the smaller policies, but pay dividends only to the larger policies. He also wanted to note, for the record, that his company is not insured with the State Insurance Fund, so his recommendation is not self-served.

Mr. Geddes inquired about the investment income; Mr. Alcorn responded $4.7 million. The combined loss ratio is 103-104%, which means for every $1 in premium, the costs and operating expenses are $1.03. Mr. Alcorn said he wants to stay at a 100% combined loss ratio and make up the difference on investments.

Mr. Geddes questioned the change in deviation. Mr. Alcorn reminded the Board that at the last meeting, it was decided to deviate 7% next year.

Mr. Geddes asked if Mr. Alcorn anticipates investment income to be the same as this year; Mr. Alcorn said he hopes it will be better, but it is hard to forecast as it changes on a day-to-day basis. Mr. Alcorn explained the Fund invests conservatively and has a lot invested in bonds.

Representative Meyer asked if the Fund could legally charge a fee as Senator Goedde suggested earlier. Mr. Alcorn responded that the Fund could not and that any fees would have to be set by the Department of Insurance and NCCI.

Chairman Deal stated the Board needs to realize the marketplace is different this year. He feels that after visiting with some other larger agencies, the approach to draw a line at a level where no dividends are paid is acceptable. He said if the Fund is taking accounts no other insurance company will take, the losses will increase due to those smaller companies being added to the Fund's base. He further stated the medical inflation of 17-19% needs to also be considered.

Chairman Deal said his recommendation would be no dividend on smaller policies ($2,000 or $2,500) and work with a formula where loss ratio is taken into consideration so only companies who earn a dividend should receive one. Mr. Alcorn agreed.

Mr. Terrell recommended that the Board instruct Mr. Alcorn to consider no dividend for policies of $2,500 or less, and to look at a total dividend around $4 million and keep $1 million in retained earnings. Senator Goedde said the Board also needs to consider a reduced deviation next year so more money can go to surplus.

Representative Meyer agrees with Mr. Terrell's recommendation.

Mr. Geddes also feels it is all right, and would like $4-5 million paid out to only policies making a profit for the Fund.

Senator Goedde concurred with the other Board members.

Chairman Deal reiterated the consensus of the Board that policies of $2,500 or less in premium would receive no dividend, and the Fund would issue a total dividend around $4 million.

Chairman Deal thanked the Board for their input and discussions. There being no other business before the Board, the meeting was adjourned at 10:05 a.m.

EXHIBIT B

Board of Directors of the State Insurance Fund
Minutes of Special Meeting held December 10, 2003

Board Members Present (by telephone):

Bill Deal, Chairman, Agents Representative
Representative Wayne Meyer, Vice Chairman, Legislative Representative
Senator John Goedde, Legislative Representative
Gerald Geddes, Employees Representative

In addition to the Board members, the following individuals attended all, or a portion of, the meeting:

James M. Alcorn – Manager, State Insurance Fund
George Parham – Chief Legal Counsel, State Insurance Fund
Debbie Hiatt – Secretary, State Insurance Fund
Peter Marshall – Attorney, Marshall, Batt and Fisher

Pursuant to the posted notice of the meeting and agenda, Chairman Deal called the Meeting of the Board of Directors of the State Insurance Fund to order at 10:00 a.m. Chairman Deal noted the vacant Board member position has not yet been filled by the Governor.

Chairman Deal stated that the purpose of the special meeting is to discuss dividends.

Mr. Alcorn reviewed the information involved in determining the amount of dividend to be paid in January 2004. He stated that at the present time he estimates 2003 will end with surplus of approximately $85 million and premiums of approximately $160 million. As of the end of November the Fund has a profit of approximately $8.34 million. Currently, the premium income stands at $141.6 million, with losses and loss adjustment expense of $115.46 million, netting just over $26 million. From the $26 million, operating expenses of $17.6 million are subtracted leaving an underwriting profit before other expenses of about $8.5 million. The other expenses, made up primarily of agents' commissions and premium taxes, are approximately $13.6 million. The Fund has investment income currently of approximately $13.1 million. Mr. Alcorn stated that last year the Board discussed keeping the combined ratio of approximately 100 and informed the Board it is currently running 101.

He said if the same dividend formula is used as last year, issuing dividends to qualifying policyholders with premiums over $2,500, the total dividend would be approximately $5.1 million. Last year the total dividend was $4 million. Mr. Alcorn explained if minimum premium policies were included in the dividend, the average amount paid on those small policies would be approximately 1 ½%. The overall difference of the total dividend would be around $136,000.

Mr. Geddes asked Mr. Alcorn for clarification on the minimum amount of the dividend checks. Mr. Alcorn explained that the maximum check written on accounts between $2501-$5000, if the policyholder qualified, would be 3.75%, or $187 on a $5,000 policy. If a dividend was issued on policies between $300 and $2,500, the maximum premium for a qualifying policyholder would

be 1 ½%, or $4.50 dividend on a $300 policy. Mr. Alcorn said the difference of the dividend would be around $136,000.

Mr. Alcorn pointed out that the Treasurer's Office cost to issue a check is approximately $1.25, and with the staff's time in processing, could bring the cost to about $5-$10 per check issued. A discussion followed regarding the cost effectiveness of issuing dividend checks on accounts when the amount of the check would be less than the processing costs.

The Board unanimously agreed on the manager issuing a dividend of approximately $5.1 million, using the same dividend formula as last year, and issuing dividends on accounts over $2,500.

Mr. Alcorn stated that the Fund will likely receive complaints from the smaller policyholders again this year for not receiving a dividend, and the calls and letters will be directed to his attention for response.

The next regular meeting of the Board was scheduled for Thursday, January 22, at 1:30 p.m.

There being no other business before the Board, the meeting was adjourned at 10:25 a.m.

EXHIBIT C

Board of Directors of the State Insurance Fund
Minutes of Meeting held October 20, 2004

Board Members Present:

Bill Deal, Chairman, Agents Representative
Representative Wayne Meyer, Vice Chairman, Legislative Representative
Senator John Goedde, Legislative Representative
Gerald Geddes, Employees Representative
Elaine Martin, Employers Representative

In addition to the Board members, the following individuals attended all, or a portion of, the meeting:

James M. Alcorn – Manager, State Insurance Fund
George Parham – Chief Legal Counsel, State Insurance Fund
Debbie Hiatt – Secretary, State Insurance Fund
Richard Hall – Attorney/Hall, Farley, Oberrecht & Blanton, P.A.

Pursuant to the posted notice of the meeting and agenda, Chairman Deal announced all members were present and called the Meeting of the Board of Directors of the State Insurance Fund to order at 9:05 a.m.

Senator Goedde moved that the minutes of the meeting held July 14, 2004, be approved, seconded by Representative Meyer. The motion to approve the minutes passed.

Mr. Alcorn distributed copies of the *Idaho State Insurance Fund Quarterly Statement as of June 30, 2004*, which has been filed with the Department of Insurance. He reviewed the reserves, surplus, premiums to date, losses, underwriting expense, and investment income. He said the Fund is showing a profit of $3 million for the first six months.

Chairman Deal asked where the new premiums were coming from. Mr. Alcorn said that some business is from other companies, such as Liberty who does not write the smaller policies, the Utah Fund, and also from contractors and new business.

Mr. Alcorn reviewed the direct premium earned, direct losses incurred and the loss ratio for the year, and explained the differences in losses at the request of Senator Goedde.

Mr. Alcorn reviewed the financial statements for September 30, 2004, the adjustment to surplus, losses and operating expenses, and reviewed the differences between 2004 and 2003. He explained premium taxes were approximately $1.5 million higher because the taxes to the Industrial Commission, Second Injury Fund and Department of Insurance, are based on premiums, which have increased. He also said the agents commissions have increased.

Representative Meyer asked about the Industrial Commission premium tax. Mr. Alcorn explained that the percentage of the premiums paid to the Industrial Commission is set per Idaho Code.

Mr. Alcorn reviewed the cash budget as of September 30, 2004. He explained each unit has their own budget, and as of the end of September they were at 73.5% of budget - $19.9 million of the $27.2 projected total.

Mr. Alcorn reported that the Fund is kept well informed on investments and that Matt Haertzen was doing a very good job at the Endowment Board. Mr. Alcorn briefly explained the investment policy and said the Endowment Board follows the policy closely.

Senator Goedde inquired about the Bank Custodial Fee. Mr. Alcorn explained the funds are deposited as required by statute and the fee includes bank charges and investment trades.

Representative Meyer asked about the Bad Debt Write-Off. Mr. Alcorn explained the Code section states bad debts such as audits/premiums not paid, can only be written off after four years.

Ms. Martin asked Mr. Alcorn to explain the telephone expenses. Mr. Alcorn said the telephones at the outside offices are being changed over to a system similar to the Boise office. He explained their phones will now have four digit/direct dial extension numbers, calls can be transferred between offices, charges for long distance are reduced, lines are cheaper, etc. Mr. Alcorn said he plans to review the major changes that have occurred at the Fund during the last five years at the next Board meeting.

As a new member of the Board, Ms. Martin asked what the Board's responsibility was for the budget. Chairman Deal explained that the Board of Directors has the responsibility for hiring the Fund Manager, adopting personnel and compensation policies, and making sure the Fund is run as an efficient insurance company. He further explained it is the Manager's responsibility to set dividends and manage the employees. Chairman Deal further explained that prior to 1998, the Fund was run more like a government agency vs. an insurance company. In 1998, the law was amended and a Board of Directors was appointed. The Board hired a Manager and directed him to operate the Fund like other insurance companies.

Mr. Alcorn explained that the computer program shows all individual line items on the budget, and what invoices make up each category should any Board member want to see it. He said the budget starts with a zero base each year, and that he should have a draft of next year's budget to present to the Board at the next meeting.

Mr. Alcorn said the 2005 rates have been published by NCCI, and the overall average rate increase is 5.3%. For the benefit of the new Board member, Mr. Alcorn gave a history of how the rating structure in Idaho is set up and explained that all companies writing workers comp insurance must be a member of a rating organization, which in Idaho is the National Council of Compensation Insurance (NCCI). He further explained how NCCI determines the rates, how the Fund reports to NCCI, and how NCCI files 600+ classes and rates with the Department of Insurance. He said companies can then file with the Department of Insurance for a deviation

from the published rate or give schedule credits. Mr. Alcorn said he filed with the Department of Insurance for a 7% rate deviation, which had been approved.

Mr. Alcorn advised that although the Manager has been given the responsibility of setting dividends for the Fund, he would like the Board's input. He said last year the Fund issued a dividend of approximately $5 million for policies over $2,500, and he is looking at doing the same for 2005. Mr. Alcorn explained the more premiums the Fund writes, the more is needed in surplus which lessens the amount that can be given in dividends. Chairman Deal explained the Fund's policy is to keep a 2:1 ratio (premiums/surplus). Mr. Alcorn said that 2:1 is a good general industry standard; 3:1 is too light and could be subject to regulatory review. Chairman Deal said the Fund must also keep a conservative level because they do not belong to the Guaranty Association. He also advised the Board carries reinsurance.

Mr. Alcorn said that the first year that the lower premium policies did not receive a dividend (2003), he had around 200 telephone calls. The second year he received around 100 calls. He said some policyholders still feel that dividends are tax refunds due them through the state. Ms. Martin commented that if the Manager only received 300 calls in two years, that not issuing dividends to policyholders under $2,500 appeared to be a good business decision. Representative Meyer agreed and feels the policyholders are used to it now and the process shouldn't be changed. He also said that the dividend on a $2,500 premium would probably only be $15-$20; Mr. Alcorn agreed.

The Board agreed with the Manager's thoughts to issue a dividend of approximately $5 million for policies over $2,500.

Mr. Alcorn stated that the Fund being or not being a member of the Guaranty Association was discussed with him again by some individuals in the industry. Mr. Alcorn discussed why the Fund is not a member of the Guaranty Association. Mr. Alcorn advised the Board that the law states the State Insurance Fund shall not be a member of the Guaranty Association. He explained in the past, companies didn't want state funds to be members because state funds historically had lost money and the Guaranty Association would be required to pick up the cost. He said now they are looking at it more individually.

Mr. Alcorn explained the payments to the Second Injury Fund, the Industrial Commission, and the NCCI Assigned Risk Pool.

Mr. Deal reminded the Board that the State Insurance Fund was listed in the July 2004 issue of Best's Review magazine in the list of top 200 property and casualty companies in the United States.

Mr. Alcorn distributed copies of Idaho Code section 72-906, which states that the Board shall adopt personnel policies and compensation schedules comparable to other insurance companies doing business in the state and region, and handed out copies of the salary survey completed by the Hay Group. Mr. Alcorn said the Fund is pretty close on their salary structure. He also explained the longevity percentage the Fund gives their employees. He further explained the

Fund is not on the state system, but uses a broad-banded system where management looks at market for the position, the worth of the position to the Fund, and the performance of the employee. Representative Meyer asked about pay increases. Mr. Alcorn said presently 4% is the average pay raise increase, although some employees may receive less and others may receive more. Mr. Alcorn said he feels the current pay scale is working and he tries to pay yearly increases, based on what other insurance companies are giving.

Mr. Geddes expressed concern that those employees paid under $10/hr. should be increased. Mr. Alcorn said they will be after longevity at the Fund. Mr. Alcorn stated that the Fund tries to keep all employees above the "living wage" category.

Representative Meyer also mentioned they receive a good benefit package. Mr. Alcorn agreed, but also brought up that other companies also give bonuses, which the Fund does not.

After discussions which included comparison of the salary survey to wages paid at the Fund, pay increases, longevity, and benefits, the Board of Directors agreed the current compensation schedule meets statutory standards.

Representative Meyer moved, and Senator Goedde seconded, that the Board go into Executive Session as outlined in Idaho Code section 67-2345 to discuss legal and personnel issues. Roll call of members present:

Board Member	Vote
Chairman Bill Deal	Aye
Representative Wayne Meyer	Aye
Senator Goedde	Aye
Gerald Geddes	Aye
Elaine Martin	Aye

The motion passed and the Board went into Executive Session. Upon completion of Executive Session, the Board went back into Open Session.

Chairman Deal discussed the state seal currently on the letterhead used by the State Insurance Fund. Mr. Alcorn said it could portray the concept that the Fund was something it is not, i.e. a taxing organization, and asked the Board if they felt the seal should be taken off the letterhead. After discussion, the Board did not feel there would be any political repercussions either way, and concurred that it was a good idea but up to the Manager.

Senator Goedde advised the Board that after discussions the IMA would not object to some type of fee schedule, based on the Medicare and the Blues, to help control the medical fees Idaho pays compared to the surrounding states. He will continue working on this and keep the Board members informed.

Chairman Deal announced that Representative Meyer's term of office would be expiring in November. He thanked Representative Meyer for all his insight and help on the Board, and said

he will be missed on the Board as well as over at the Legislature. Mr. Alcorn presented Representative Meyer with a plaque of appreciation on behalf of the Board of Directors and asked to go on record showing his appreciation for all the hard work, good ideas, and common sense that Representative Meyer brought to the Board through the years. Representative Meyer thanked the Board and wished them the best of luck.

The next meeting of the Board was scheduled for Thursday, January 20, 2005, at 9:00 a.m.

There being no other business before the Board, the meeting was adjourned at 11:35 a.m.

EXHIBIT D

000089

Approved by Board 1/18/06

Board of Directors of the State Insurance Fund
Minutes of Special Meeting held December 21, 2005

Board Members Present:

Bill Deal, Chairman, Agents Representative (by conference call)
Senator John Goedde, Legislative Representative (by conference call)
Representative Mark Snodgrass, Legislative Representative (by conference call)
Gerald Geddes, Employees Representative
Elaine Martin, Employers Representative (by conference call)

In addition to the Board members, the following individuals attended all, or a portion of, the meeting:

James M. Alcorn – Manager, State Insurance Fund
George Parham – Chief Legal Counsel, State Insurance Fund
Debbie Hiatt – Secretary, State Insurance Fund

Pursuant to the posted notice of the meeting and agenda, Chairman Deal called the Meeting of the Board of Directors of the State Insurance Fund to order at 2:00 p.m.

Chairman Deal welcomed the Board and said the special meeting had been called for the purpose of discussing dividends, and turned the meeting over to Mr. Alcorn.

Mr. Alcorn said as of the end of November, the Fund had over $30 million of profit for the year and $131 million in surplus. Based on that information, he suggested the dividend formula be the same as last year, which would amount to slightly over $8 million. He said last year's dividend came to approximately $6 million, but there was more premium to base the dividend on for the latest period.

Mr. Alcorn recommended that they use the existing formula and not include policies under $2500 or less. He said if policies with premiums between $300 and $2500 were included, it would increase the total dividend paid by $420,000.

Chairman Deal asked the Board members for their comments. Senator Goedde said he is happy with the $8 million - it makes sense to him and he agrees with the $2500 floor. Representative Snodgrass feels it is sufficient and indicated he has confidence in the Manager's recommendation. Mr. Geddes agreed to stay with the same formula, and Ms. Martin also concurred with the Manager's suggestion.

Chairman Deal recapped that the Board unanimously agrees with the Manager's recommendation that a dividend of $8 million be paid, with the floor at $2500 to pay those dividends.

Chairman Deal reminded the Board that the next meeting was set for January 18, 2006 at 2:00 p.m., and asked Mr. Alcorn to review who would be guests at the meeting.

Mr. Alcorn said he invited the Fund's reinsurance brokers who will be reviewing how the Fund reinsures, how reinsurance works and the reinsurance markets, as a whole.

Mr. Alcorn said they would also be discussing year-end financials and the 2006 budget and any other items the Board members would like to talk about.

Ms. Martin asked if the meeting dates for the remainder of 2006 could be set at the January meeting. Chairman Deal asked Mr. Alcorn to look at the calendar and set some proposed dates for future meetings, based on the dates the Board met during 2005. Mr. Alcorn said he will send out an e-mail prior to the Board meeting, and provide some meeting date options at the January meeting.

There being no further business before the Board, the Chairman adjourned the meeting at 2:10 p.m. and wished everyone a Merry Christmas....ho! ho! ho! ☺

EXHIBIT E

Board of Directors of the State Insurance Fund
Minutes of Meeting held January 22, 2004

Board Members Present:

Bill Deal, Chairman, Agents Representative
Representative Wayne Meyer, Vice Chairman, Legislative Representative
Gerald Geddes, Employees Representative

In addition to the Board members, the following individuals attended all, or a portion of, the meeting:

James M. Alcorn – Manager, State Insurance Fund
George Parham – Chief Legal Counsel, State Insurance Fund
Debbie Hiatt – Secretary, State Insurance Fund
Peter Marshall – Attorney, Marshall, Batt and Fisher

Pursuant to the posted notice of the meeting and agenda, Chairman Deal called the Meeting of the Board of Directors of the State Insurance Fund to order at 9:35 a.m.

Representative Meyer moved that the minutes of the meeting held October 2, 2003, be approved, seconded by Mr. Geddes. The motion to approve the minutes passed.

Representative Meyer moved that the minutes of the special meeting held December 10, 2003, be approved, seconded by Mr. Geddes. The motion to approve the minutes passed.

Mr. Alcorn reviewed the *Quarterly Statement of the State Insurance Fund for the Period Ending September 30, 2003*. He mentioned that the year-end financial statement is not required to be filed with the Department of Insurance until March. Assets, surplus, premiums, losses, reserves and investment income were reviewed and discussed. Chairman Deal inquired how the Fund's loss ratio compared to the industry as a whole. Mr. Alcorn responded until the other companies file their annual statements with the Department of Insurance in March, he does not have information available to compare.

Mr. Alcorn reviewed the Balance Sheet and Income Statement ending December 31, 2003.

Mr. Alcorn reported the Fund had a 102.9 combined ratio before investment income compared to 109.8 last year, and the loss ratio for year ending 2002 was 83.9 compared to 76.5 in 2003. Premiums were $134.3 million in 2002 and $162.2 million in 2003, for an increase of almost $30 million.

Chairman Deal commented that this is a good loss ratio. Mr. Alcorn agreed and pointed out that over the last year, the Fund continued to write as many employers as it can, whereas other companies are picking only the best accounts. He further stated that other companies are continually trying to take the Fund's good accounts. Chairman Deal agreed.

Mr. Alcorn clarified for Representative Meyer that the new workers comp rates are effective in January of each year. NCCI filed an average rate increase of 7.2% for 2004. It was approved by the Department of Insurance.

Mr. Alcorn reviewed the year-end claim figures:

- Medical paid was $58 million in 2003, compared to $54 million in 2002;
- Time loss benefits paid were $44 million in 2003, compared to $41.8 million in 2002;
- There were 20,348 new claims in 2003, compared to 20,374 in 2002.

Mr. Alcorn said although medical was up $4 million and comp up $3-4 million, premium received increased $30 million. It said it is hard to determine if claims costs are increasing, or if the increase in claims paid was just the result of an increase in policy count. He said the figures are still being reviewed.

Mr. Deal said it had been a goal of the Fund to stay close to a 2:1 ratio on surplus and said the Fund accomplished that goal. Mr. Deal further stated that the manager had met the goals of keeping the surplus ratio where it should be and to keep the combined low.

Mr. Geddes asked about Unearned Revenue; Mr. Alcorn explained it is unearned premium. He further explained the accounting process and why unearned revenue is a liability on the books.

Mr. Alcorn distributed and discussed the 2004 budget and which provided a comparison against the 2003 budget.

He explained some of the main areas where the budget increased or decreased:

- Personnel Expense – increase due to a 4% average pay raise for the employees, an extra pay period in 2004 and expected increase in insurance costs. Chairman Deal said the Department of Administration is putting the benefit package out to bid this year, but that an estimate of 16-19% increase could be expected.
- Administrative Expense – increase due to telephone switches being updated and making it so the district offices can transfer calls directly to the Boise Office, and updating photocopiers.
- Communication Expense – increase due primarily to more outgoing correspondence postage.
- Facilities Expense – the Fund is contracting directly for some of these services now rather that using the Department of Administration contracts and that is providing some savings.
- Data Processing Expense – budget shows a decrease in DP Software-Developed. The Fund is contracting with some of the individuals on a direct basis now or has hired them as direct employees which has resulted in a net decrease in the expenses for this work.
- Total Budget for Operating & Personnel Expenses - $27.1 in 2004 compared to $26.3 in 2003; a 3.1% increase over the 2003 budget.

Representative Meyer asked how the pay increases are done and when they go into effect. Mr. Alcorn stated they are paid after evaluations. Many of the evaluations are done from February

through May. He further clarified that it is not an across the board 4% raise, but based on performance. He also mentioned that the Fund pays a longevity increase. Chairman Deal asked about employee turnover; Mr. Alcorn responded there is now very little turnover.

Mr. Alcorn advised that he is setting up a meeting with the Hay Group to discuss performing a salary survey to compare Fund salaries to that of the other insurance companies doing business in the state and the region. He said the last survey was done five years ago. Mr. Marshall reminded the Board members they have a statutory responsible for making sure that the salaries are tied to the industry standards. Representative Meyer mentioned that economic problems of surrounding states should be taken into consideration when comparing salaries. Mr. Alcorn said he felt the salaries levels were probably not affected because companies tend to lay off employees rather than reducing salaries. Mr. Alcorn also informed the Board that salaries at the Fund were based on performance, market value of the job and what the job is worth to the Fund. Mr. Geddes asked what the increase amount was based on. Mr. Alcorn replied that it appears that private industry pay increases were between 3 ½% and 4 ½%. Chairman Deal stated he feels the analysis of pay was a good idea in light of the Board's statutory requirement.

Mr. Alcorn discussed the dividend recently paid. He said the dividend was paid as discussed and agreed upon in the December 10th meeting. He said the total dividend was approximately $5 million and was based on the same formula as last year, with policyholders of $2500 or less premium not receiving a dividend.

Mr. Alcorn discussed the cost of the policy. Mr. Alcorn said some have complained about overall costs going up because of the lower dividends. Surprisingly, many were the minimum premium policyholders not receiving a dividend. Mr. Alcorn said he has not received nearly the calls he received last year and compared to the overall number of policies, he feels the dividend procedure went relatively smooth.

Mr. Geddes asked Chairman Deal and Representative Meyer if they had noticed new growth in the state. Representative Meyer said northern Idaho is rapidly growing.

Representative Meyer inquired if they had any idea when the vacant Board position might be filled. Mr. Alcorn and Chairman Deal both said they have not heard anything from the Governor on the appointment of a new Board member.

Representative Meyer moved, and Mr. Geddes seconded, that the Board go into Executive Session as outlined in Idaho Code section 67-2345 to discuss legal and personnel issues. Roll call:

Board Member	Vote
Chairman Bill Deal	Aye
Representative Wayne Meyer	Aye
Gerald Geddes	Aye

The motion passed and the Board went into Executive Session. Upon completion of Executive Session, the Board went back into Open Session.

Mr. Geddes moved to renew Mr. Alcorn's contract for an additional two-year period with a salary increase to $145,000; seconded by Representative Meyer; motion passed. On behalf of the Board, Mr. Deal expressed his gratitude to Mr. Alcorn for his continued good work and for meeting the goals set for the Fund. Mr. Alcorn thanked the Board for their comments, and accepted the two year contract. The Board authorized Chairman Deal to execute a new contract.

Mr. Alcorn informed the Board that he has been questioned on numerous occasions as to why the Fund does not advertise their services to encourage new business as well as to counteract any negative comments. Some question why the Fund does not blow its own horn more. He asked for the Board's input.

Chairman Deal said that in the past, there was animosity between the Fund and the private carriers and Mr. Alcorn has overcome that. He has been able to show that the Fund can successfully operate without actively attempting to take business away from the private sector. Chairman Deal said he feels that word of mouth is sufficient advertisement. Mr. Geddes feels the Fund shows they are a dedicated agency with dedicated servants, and the Fund gets their recognition based on performance and the confidence of their policyholders. It was the Board's consensus that the Fund not actively advertise their services.

On behalf of the Board, Chairman Deal thanked Peter Marshall for his excellent legal representation to the Board of Directors, and wished him the best on his retirement. Mr. Alcorn added that Mr. Marshall's expertise has been invaluable over the years. He said that he was always amazed at how well Mr. Marshall was prepared and on top of a subject. Mr. Marshall thanked the Board and said he has enjoyed working with them.

The next regular meeting of the Board was scheduled for Wednesday, April 14, at 9:00 a.m.

There being no other business before the Board, the meeting was adjourned at 3:45 p.m.

EXHIBIT F

000097

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

January 22, 2003

Robert Egusquiza
General Car & Exhaust
1524 First Street So.
Nampa, ID 83651

Re: State Insurance Fund – Dividend Policy

Dear Mr. Egusquiza:

On January 8, 2003, you phoned our office seeking assistance regarding your workers' compensation policy purchased through the Idaho State Insurance Fund. After learning you had called, I requested that Bridget Vaughan in my division, return your call, which she did. During that conversation, you voiced your dissatisfaction with the State Insurance Fund's decision not to issue you a dividend this policy year. The Fund issued a letter to its insureds advising it has elected not to issue dividends to policyholders whose annual premium charges were less than $2,500.00. It is my understanding that you spoke with State Insurance Fund Manager Jim Alcorn and you related your objections to this policy. Since you were not entirely satisfied with Mr. Alcorn's response, you contacted the Office of the Attorney General.

This office has contacted Mr. Alcorn and reviewed the statute that authorizes the Fund Manager to issue dividends. Idaho Code Section 72-915 gives the Manager *discretionary* authority to issue dividends as he deems may be safely and properly divided. In recent years, the State Insurance Fund has issued substantial premium refunds (dividends) to its insureds. I understand from the State Insurance Fund that this was possible at least in part because of the strong economy and the positive effects on the State Insurance Fund's investments. The Fund also elected to reduce a large surplus that had accumulated over the course of the 1990's. That surplus has now been reduced, and this year new criteria were established for receipt of a dividend, including a decision not to award dividends to policyholders whose premium charges did not exceed $2,500.00. The premium refund was proportionally smaller than in previous years. Twenty-five million dollars was in the dividend pool last year. This year, that figure was reduced to $4,000,000.00.

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 334-2530
Located at 700 W. Jefferson Street, Suite 210

It appears the actions taken by the State Insurance Fund with respect to its issuance of dividends are within the Manager's discretion. I am sorry I could not be of more help to you. Unfortunately, many State Fund policyholders who are accustomed to receiving dividends were not issued a premium refund this year. If you wish to pursue this matter further, you should communicate with the State Insurance Fund again.

Sincerely,

DAVID G. HIGH
Chief, Civil Litigation Division

DGH/BV/rg

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Attorneys for Plaintiffs and the Class

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RANDOLPH E. FARBER, SCOTT ALAN BECKER and CRITTER CLINIC, an Idaho Professional Association. Plaintiffs, vs. THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, its Manager, and WILLIAM DEAL, WAYNE MEYER, MARGUARITE 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.	Case No. CV06-7877 MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

A. Overview: What the current Summary Judgment proceeding should and should not be about.

Upon completing a review of the memoranda filed by the parties in support of their respective motions for summary judgment, the Court will no doubt have noticed that the parties see the seminal issue of this case very differently. Plaintiffs have contended that the SIF does not have discretion with respect to the calculus to be used in making an allocation, among policy holders, of any dividends which are declared and distributed by the SIF. The premise of this contention lies in the fact that the Legislature, it its wisdom, has clearly and unambiguously mandated that after the State Insurance Fund (hereinafter referred to as SIF) has exercised its discretion and decided to distribute an amount equal to that which is deemed to be excess surplus as a dividend, the dividend must then be allocated on a *pro rata* based calculus. Apparently being unable to make a cogent argument for the proposition that it has discretion with respect to the allocation calculus, the SIF has sought, under the guise of claiming that the Court must find that it has not abused its discretion, to divert the inquiry away from "Does the SIF have discretion?" to "Should the SIF have discretion?"

There are essentially three problems with this approach. First, by appearing to be urging that the Court must find that it has not abused its discretion, the SIF is raising a claim which is both untimely (as will be addressed in Plaintiffs' *Motion to Continue Summary Judgment Proceedings Pursuant to Rule 56(f)*) but also outside of the issues that counsel for the SIF advised the Court and

the Plaintiffs, would be raised at this time.[1] Second, by appearing to be urging that the Court must find that it has not abused its discretion, the SIF is inviting the Plaintiffs and the Court to waste valuable resources upon a complicated fact and business theory dependent "abuse of discretion" analysis before it has even been ruled that the SIF has any relevant discretion. Third, to the extent that the SIF is asking the Court to consider whether or not the SIF "should" have the relevant discretion, it is improperly inviting the Court to engage in an evaluation which belongs exclusively within the authority of the Legislature.

Perhaps the historical events, asserted facts, self professed rational thought process, claims about the demands of the marketplace and other extraneous information set out in the *Memorandum In Support of Defendants' Motion For Summary Judgment* and the supporting affidavits might be enough to carry the day in legislative proceedings in which all the competing interests can participate and each can bring to bear their specialized knowledge of the issues. However, to the extent that these matters are put forth here as supporting the conclusion that the SIF must have discretion because it makes sense for them to have discretion, they have no place in this proceeding.

These matters are within the province of the Legislature and not of this Court.[2] Moreover, until this Court determines that the provisions of the I.C. §72-915 relative to the dividend allocation

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[1] A transcript has been ordered but the undersigned distinctly recall that Counsel for Defendants advised the Court and Plaintiffs' Counsel that they were requesting the summary judgment hearing requested by Plaintiffs be delayed so that they could raise Statute of Limitations, Waiver and Standing arguments. If "lack of abuse of discretion" had been identified as an issue, the undersigned would have then raised the concerns identified in the *Motion to Continue Summary Judgment Proceedings Pursuant to Rule 56(f)*. Indeed, Ms. Duke's affidavit of 1/26/07 in support of a continuance seems to dwell on the necessity of 1/26/07 having Mr. Alcorn handy to "finalize defendants' opposition to Plaintiffs' Motion for Partial Summary Judgment."

[2] As it acknowledges, the rates to be charged by the SIF are regulated and while it can and regularly does seek to deviate downward (a rational step because it has no need to make a profit). What it does not acknowledge is that a dividend is little more than an after the fact rate deviation. It is very reasonable to think that the legislature never intended to give the SIF the power to discriminate against lower premium policy holders in an after the fact rate adjustment. If some have overpaid for the risk protection, then all have overpaid and allowing the SIF to give some of the small premium policyholders' overpayments back to large premium policyholder could easily be seen as given the SIF unfair advantage over companies which could not give special rate breaks to secure the large premium policies.

calculus either explicitly confers discretion upon the SIF or are either unclear or ambiguous, all of the information which purportedly supports the rationality of the allocation calculus being used by the SIF amounts to nothing more than a plea for judicial activism instead of the application non-ambiguous statutory language.

B. **Overview: Clarifying the terminology**

To fully appreciate the nuances of the debate set out at length in the respective supporting memoranda, it is important to understand that there are five independent steps in the dividend declaration and distribution process.

The first step toward declaration is to determine whether there is a aggregate balance in the surplus funds attributable to any classes of employment or industries – this is a fact finding step. The second step in the declaration process is to determine whether, in the judgment of the Manager, this balance may be "safely and properly divided" – this is a mixed fact finding and discretionary step.

The first step in the distribution process is for the Manager to decide whether to exercise his discretionary power to proceed to distribute that dividend - this is an entirely discretionary step. The second step in the distribution process is the mathematical process of allocating or crediting to each qualified member (policy held for more than six months during the applicable period) of the classes of employment or industries as to which there is adequate surplus funds "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"– this is a purely ministerial step which allows for no discretion in the selection of an allocation calculus. I.C. § 72-915. Of course, the final step in the distribution process is the purely ministerial act of getting the money to the policyholders by way of outright payment or by crediting their accounts.

C. **Overview: Matters about which there needs to be no further debate.**

Defendants have gone to great length, in their *Memorandum In Support of Defendants' Motion for Summary Judgment,* to make clear that the Manager has discretion over the declaration process and the first step of the distribution process (deciding to distribute) and that he has not, based upon the record of this case, abused that discretion. What seems to be lost upon Defendants is that Plaintiffs have not and do not challenge the fact that the Manager has discretion over these first three steps in the declaration and distribution process. Specifically, Plaintiffs do not challenge that upon finding that there is a surplus balance, the Manager does have the discretion to decide whether some portion of those funds can be safely and properly divided. Upon making an affirmative determination on that point, the Manager has the discretion to decide whether some portion of those available surplus funds should be distributed among policy holders. Plaintiffs recognize that the foundational criteria for the exercise of discretion and the actual conference of discretion are both clear in the language of I.C. § 72-915 and unequivocally supported by the holding in *Kelso.*

D. **Overview: Matters which are "in play"**

Plaintiffs' claims in this matter do focus entirely upon the SIF's execution of the second step in the dividend distribution process. Specifically, Plaintiffs challenge here the determination made with respect to the calculus used in allocating the surplus funds the Manager chooses to distribute as a dividend. In this regard, the Plaintiffs initial claim is that the Manager lacks the discretion to first ignore the allocation calculus provided by the Idaho Legislature (*pro rata* among policy holders qualified only by duration of policy) and then to choose to utilize some other calculus not provided by statute. *Complaint* and *Proposed First Amended Complaint* ¶ 8. Secondarily, Plaintiffs claim that even if the Manager has some lawfully afforded discretion to determine the calculus to be used in allocating a declared dividend among policy holders, that discretion has been abused with respect to the distribution of dividends declared since 2002 by being exercised in an arbitrary manner. *Complaint* and *Proposed First Amended Complaint* ¶ 14. It is the first claim which Plaintiffs

believe must, for the sake of judicial economy, be resolved before extensive discovery and debate should proceed on the second claim.

E. **Overview: What issues will and will not be addressed in the Memorandum**

For all the reasons discussed above Plaintiffs submit that there are only four issues properly before the Court for summary judgment resolution at this time. Those matters are: (1) does the SIF have discretion over the allocation calculus used in the distribution process; (2) do the Plaintiffs have standing; (3) what is the correct statute of limitations; and, (4) have the Plaintiffs waived their objections to the allocation calculus that has been used since the SIF stopped paying dividends to policyholders who were paying premiums of $2,500 or less.

The first of these issues – does discretion exist- is the subject of the Plaintiffs' Motion. The other three relevant and timely issues – standing, statute of limitations and waiver, are the legitimate part of the Defendants' motion and will be addressed below.

Beyond this, the Plaintiffs decline to participate in sidetracking the Court's focus from these issues onto debates that, in their view, the Court is never going to need to hear. For this reason and consistent with the *Motion to Continue Summary Judgment Proceedings Pursuant to Rule 56(f)* which Plaintiffs have filed (or will in short order file), Plaintiffs, without intending to waive the right to do so, are not going to challenge in this Memorandum any of the Defendants' assertions about "undisputed facts" which bear upon whether the SIF has acted appropriately in the selection of a allocation calculus other than the *pro rata* calculus called for by law.

In addition, again without intending a waiver, Plaintiffs are not going to respond to most of the discussion or arguments in the *Memorandum In Support of Defendants' Motion for Summary*

Judgment heading B at pages 16-32.[3] This section of the SIF's Memorandum professes to address the right to summary judgment on the basis that the "SIF Manager exercised his statutory authority in issuing dividends and deciding who would receive those dividend." And goes far beyond what the defense counsel advised the court and the undersigned what would be presented at this time.

II. ARGUMENT AND ANALYSIS

A. STANDING

The SIF asserts that Plaintiffs do not have standing to sue the SIF to challenge the dividend allocation calculus that it has been using since the dividend distributed in early 2003 in a manner which favors only some policy holders. This assertion appears to be hinged upon the erroneous belief that *Kelso & Irwin, P.A. v. State Insurance Fund*, 134 Idaho 130, 997 P.2d 591 (2000) stands for the proposition that no policy holder has any claim to or interest in funds within the control of the State Insurance Fund. Relying upon this overly broad reading of *Kelso*, the SIF assert Plaintiffs have no legal or equitable right, title or interest in the subject matter of the controversy. Relying upon this conclusion and its understanding of the holdings regarding standing in *Troutner v. Kempthorne,* 142 Idaho 389, 128 P.3d 926 (2006), the SIF concludes that Plaintiffs cannot assert a claim for a violation of a statute which is by law incorporated into their contracts with the State Insurance Fund. Aside from being based upon a misreading of *Kelso*, the conclusion that Plaintiffs lack standing is contrary to the subsequent conclusion of the Court in *Hayden Lake Fire Protection District v. Alcorn* , 141 Idaho 388, 399-402 11 P.3d 73, 84-87 (2005) .

To fully appreciate the defect in the SIF's argument regarding standing, it is necessary to

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[3] So far as Plaintiffs can discern not a single word on these 16 pages demonstrates how the last 6 lines of I.C. § 72-915 can be seen as unclear as to the intent of the legislature, or ambiguous in establishing the precise allocation calculus to be utilized by the manager or anything other than an explicit and controlling limitation on the discretion of the SIF as to the allocation phase of the dividend distribution process. Until it is shown that the statute cannot be applied as written,any discussion about why it is necessary to construe that statute as affording discretion is premature. *See, e.g. Barbee v. WMA Secs., Inc.*, ___ Idaho ____, 146 P.3d 657, 660 (Idaho 2006)

have the relevant legal principles and the root claim of the Plaintiffs in this matter in mind. It is oft repeated that the evaluation of standing turns not upon the claim being asserted but rather upon the interests of the person asserting the claim. *See, e.g., Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (Idaho 1989). Underlying this inquiry is the view that a person pursuing a claim must have a personal stake which is greater than the stake of the public at large in order to assure that this party has suffered a "distinct palpable injury" that is "fairly traceable" to challenged conduct, *Id.* citing *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 (1978). To satisfy this standing requirement, "litigants must allege an injury in fact and a substantial likelihood that judicial relief will redress the alleged injury. *Miles v. Idaho Power, supra*, 116 Idaho at 641, 778 P.2d at 763. Under this standard, the allegation of injury and of judicial relief which will redress the injury is sufficient for satisfaction of the standing requirement which "does not require that the party prove their case before the commencement of trial." *Pro Indiviso v. Mid-Mile Holding Trust*, 131 Idaho 741, 746 (Idaho 1998).

In this regard, Plaintiffs contend that they have been improperly denied a *pro rata* share of dividends which were actually declared and actually distributed for the reason that the Manager improperly employed an allocation calculus different from the *pro rata* based calculus provided for by the explicit provisions of I.C. § 72-915. That is an alleged injury in fact. They have requested that the Court give them judgment allowing them to force the SIF to pay them the amounts that have been denied. Thus, injury and a relief that will redress that injury have been plead and standing has been established under Idaho law.

1. The SIF misapprehends the import of the holding in *Kelso*.

While the SIF spends several pages essentially regurgitating the analysis that lead the Court to the conclusions that it reached under the heading ***"A. Kelso Has No Vested Property Right in the Surplus and Assets of the State Insurance Fund Sufficient to Support a Claim for Relief."*** *Kelso*,

134 Idaho 133-136, 997 P.2d 595- 597 (2000), there are two very critical aspects of the holding in *Kelso* which Defendants have apparently overlooked. First, while the Court concludes that the plaintiff in *Kelso* had no vested property right in the surplus and assets of the SIF sufficient to support the claims being made in the case, it nonetheless concluded that the plaintiff had breach of contract claims which had to be remanded for determination. Second, at the core of the claim asserted by the plaintiff in *Kelso* was a contention that the SIF had accumulated an excessive surplus. The claim primarily turned upon a construction of I.C. § 72-911. The section at issue in this case, I.C. 72-915, was only mentioned by the Court because the SIF asserted that it conferred discretion upon the Manager of the SIF to accumulate surplus until there was a balance which he determined could be safely and properly divided. Notwithstanding this claim, the Court ruled that the plaintiffs in *Kelso* had stated a breach of contract claim which was remanded for consideration by the District Court.[4] When these aspects of *Kelso* are taken into account, it becomes apparent that the Court has never concluded either:

a. That nothing in the language of I.C. § 72-915 gives rise to a vested property interest in funds held by the SIF; or,

b. That, in the absence of a vested property interest in the funds held by the SIF, a policyholder could not maintain an action against the SIF for a failure to perform one of the duties to its policyholders which are imposed upon it by the laws which govern its conduct.

When these limitations of the breadth of the holding in *Kelso* are taken into account, it is apparent that the case provides no basis for concluding that Plaintiffs in this case have no standing

[4] This breach of contract claim ultimately failed because the Court concluded that I.C. § 72-911 did not create a limit upon how much surplus could be accumulated and other sections of the law including I.C. § 72-915 make clear that the legislature intended to give the Manager discretion over how much surplus was accumulated. From this determination the Court went on to conclude that there was no evidence that the Manager has abused this discretion. *Hayden Lake Fire Protection District v. Alcorn,* 141 Idaho 388, 399-402, 11 P.3d 73, 84-87 (2005).

to maintain a claim premised upon the assertion that once the Manager has found that some portion of the surplus held by the SIF may be safely and properly divided and elected to begin to distribute that portion of the surplus, he cannot thereafter deny policyholders the right to receive a *pro rata* share of the dividend.

It is apparent that without regard to whether the plaintiffs in Kelso had a vested property right, they had the right to and did pursue their claim that they were damaged by the failure of the Manager to perform one of the duties he owed the policyholders based upon the statutes enacted to govern the SIF. Indeed, after remand of these claims, a standing challenge was raised by the SIF as to the request for declaratory relief and this challenge was rejected by the District Court. *Hayden Lake Fire Protection District v. Alcorn,* 141 Idaho at 395, 11 P.3d at 80 (2005). On appeal, while noting that the challenge had been raised the Supreme Court, apparently did not consider it worth evaluating further as it went on to hold that the District Court had properly concluded that with respect to the particular claims asserted by the plaintiffs as violations of the Manager's statutory duties, the Manager had discretion and had not abused that discretion. *(Hayden Lake Fire Protection District,* 141 Idaho at 399-402, 11 P.3d at 84-87 (2005).) *Id.* at 399-402, 11 P.3d at 84-87.

2. The holding in *Troutner v. Kempthorne* has no bearing upon an evaluation of whether the Plaintiffs in this action have standing.

Defendants' reliance upon the holding in *Troutner v. Kempthorne* as a guide to the evaluation of whether Plaintiffs have standing to challenge the Manager's failure to use the *pro rata* based calculus called for by the provisions of I.C. § 72-915 is misplaced. The holding in *Troutner v. Kempthorne* adds nothing to the analysis. The Court merely reiterates the requirement that the plaintiff must suffer some injury which is distinct from any injury suffered equally by all and which is palpable. After examining the claims of the plaintiff in *Troutner*, the Court concludes that to the extent it is an injury at all, it is an injury suffered by everyone in the State in equal measure. *Troutner*, 142 Idaho at 391-393, 128 P.3d at 928-930.

Troutner really adds nothing to Idaho jurisprudence. " . . . a citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction." *Noh v. Cenarrusa*, 137 Idaho 798, 800 (2002) citing *Miles, supra*, at 641. "[Plaintiffs] must 'establish a peculiar or personal injury that is different than that suffered by any other member of the public.'" *Id.* citing *Selkirk-Priest Basin Ass'n v. State,* 128 Idaho 831, 834 (1996). Since the SIF's policy holders -- Plaintiffs here -- do not fall in the category of all tax payers or all members of the public *Troutner* is misapplied by Defendants.

Based upon the claims made in this case, the Court should conclude that Plaintiffs have, at minimum, asserted a heretofore unresolved claim to a vested property right to receive a *pro rata* share of a dividend once the Manager of the SIF exercises his discretion and determines that it is appropriate to distribute a dividend. The Plaintiffs have a right previously recognized in *Kelso* to bring an action to assert that the Manager has violated a statutorily-imposed duty to them relative to dividends. Under these circumstances, it is appropriate to conclude that the Plaintiffs have alleged a distinct and palpable injury which can be addressed by judicial relief and that they have, therefore, standing to pursue their claim.

B. STATUTE OF LIMITATIONS

As Defendants properly acknowledge, the parties to this action are also parties to an insurance contract. The terms and conditions which establish the relative powers, duties, and obligations of the parties to this insurance contract are not only those set out within the contract but also those provisions of Idaho Code which direct and control the conduct of the SIF and which are incorporated into the policyholder's contract with the SIF. This "incorporation" is such that any conduct by SIF which violates the terms of the statutes which are incorporated into the contract, are a breach of that contract. *Kelso, supra,* 134 Idaho at 138, 997 P.2d at 599 ("Consequently, any act

taken by the SIF beyond its statutory authority would also be a breach of the SIF's contract with Kelso.").

While this would seem to compel the conclusion that the statute of limitations which applies to the breach of a written contract document (5 years) would also apply to a breach of the terms "incorporated" into contract by law, Defendants have pointed to what they believe is contrary authority. In *Hayden Lake Fire Protection District v. Alcorn,* 141 Idaho 388, 11 P.3d 73 (2005) the Court concluded that the statute of limitations applicable to actions upon a "liability created by statute" (3 years, I.C. §5-218) applied to prevent the Plaintiff in that case from pursuing a claims that the SIF had violated I.C. 41-722 by entering into certain purchase and lease agreements which were all entered into by SIF more than three years prior to the filing of the Complaint. *See, Hayden Lake Fire Protection District, supra*, 141 Idaho at 394-395 and 404, 111 P.3d at 79-80 and 88. The decision provides very little insight into the Court's analysis of the issue other than to confirm that the "conclusion" of the District Court was correct. The "conclusion" which appears to have been affirmed is that the holding in *Dietrich v. Copeland Lumber Co.*, 28 Idaho 312, 154 P. 626 (1916), probably is *not* controlling because of the decision in *Kelso, supra. Hayden* does provide "'useful support of the proposition that the true *gravamen* of the plaintiffs' claims should control the question of what statute of limitations is applicable rather than the way the claims are actually plead'". *Hayden Lake Fire Protection District, supra,* 141 Idaho at 404, 111 P.3d 89 (citing from and providing emphasis to the District Court Memorandum Decision and Order of 11/14/01). On close analysis it becomes apparent that the Defendants' are actually asking this Court to extend the application of I.C. 5-218 beyond the logical extreme and to the point of rendering the holding in *Kelso* (the statutes are incorporated into the SIF contract) meaningless.

The *gravemen* of the Plaintiffs' case is their contractual right to a *pro rata* share of those monies distributed by the SIF to its policy holders as a dividend. As we have seen, *Kelso, supra*,

compels this identification of the *gravemen*, i.e., a case sounding in contract and a written contract at that. This allows a five-year statute to be applied. "The defense of statute of limitations is never favored by the Courts, and if there is doubt as to which of two limitation periods should apply, courts generally apply the longer. *Gust, et al. v. Prudential Ins. Co. of America,* 898 P.2d 964, 968 (Mont. 1995). "Because statutes of limitation are in derogation of a presumptively valid claim, a longer period of limitations should prevail if two statutes are arguably applicable." *Aneco Ins. Co. v. Rockwell,* 940 P.2d 1096, 1097 (Colo. Ct. App. 1997). This principle seems to be widely held. See, e.g., *Traveler's Indemnity Co. v. Anderson,* 983 P.2d 999, 1002 (Ariz. 1999); *Global Financial Services, Inc. v. Duttenhefuer,* 575 N.W. 2d 667, 671 (N.D. 1998); *Zoss v. Schafers,* 598 N.W. 2d 550, 553 (S.D. 1999).

Idaho does not have a case directly on point, but holdings in this state are clear that "The substance, not the form, of the action controls and determines the applicable Statute of Limitations." *Barnett v. Aetna Life Insurance Co.*, 99 Idaho 246 (1978). Stated somewhat differently, the "'appropriate statute of limitations is determined by the substance, not the form, of the action.'" *Nerco Minerals Co. v. Morrison Knudsen*, 140 Idaho 144, 148 (2004).

Kelso itself is awfully clear:

> It is undisputed that Kelso has a contract for worker's compensation insurance with the SIF. Any violation of the provisions of that contract would constitute a breach of contract by the SIF. Additionally the contract necessarily incorporates the statutory framework which both created the SIF and governs the actions that can be taken by the SIF with regard to the SIF's funds . . . Consequently, any act taken by the SIF beyond its statutory authority would also be a breach of the SIF's contract with Kelso. At 138.

Thus, whether we analyze this as a contest between two statutes which are arguably applicable or we focus on the substance of this action, we are looking squarely at I.C. § 5-216 and a five-year statute governing a breach of contract claim where the smaller policy holders have been

the victims of multiple breaches of contract.

The Court needs no reminder that in *Kelso* the Plaintiffs made numerous claims regarding the conduct of the SIF. All claims were dismissed by the District Court. Most of the District Court's decisions were upheld on appeal but two breach of contract claims were remanded for further proceedings. The Court was not called upon to consider and did not consider whether one or both of these claims might be precluded by the statute of limitations. One of the claims which was remanded arose from the assertion that the SIF had failed to perform duties imposed upon it, a section within the chapter of the Idaho Code which created the SIF and which directly governs its conduct, specifically *I.C. § 72-911*. *Kelso*, 134 Idaho at 139, 997 P.2d at 599. The other claim sought an accounting for squandered assets and acted beyond its statutory authority when it purchased certain real property. *Kelso*, 134 Idaho at 140, 997 P.2d at 600 (portion of the SIF had acted beyond its statutory authority and which provides for the statutes applicable to the SIF to be incorporated into its contracts). While it is not made clear in the decision in *Kelso* what provision of Idaho law created the foundation for this claim, the case was remanded and consolidated into the District Court proceedings chronicled in *Hayden* and from the decision in *Hayden*, it appears that the claims relative to improper real estate transactions were premised upon the assertion what were professed to be leases or mortgage loans and if they were loans they violated the provisions of I.C. §41-722. *Hayden* at 141 Idaho 393-394, 111 P.3d 78-79.

The final step in the process of recognizing the irrelevance of the holding in *Hayden* relative to the applicable statute of limitations involves a close analysis of the holding in *Hayden.* At the outset, it is important to note that by the time both the District Court and the Supreme Court got to the point of determining which statute of limitations applied to the Plaintiffs' claims, both had already concluded that the Plaintiffs could not recover upon their claims premised upon *I.C. §72-*

911. Hayden at 141 Idaho 394-396, 398-399, 111 P.3d 79-81, 83-84. With respect to the claims premised upon I.C. § 41-722 the Court in *Hayden* held that the 3 year statute of limitations applicable to a "liability created by statute" was properly relied upon to dismiss the Plaintiffs' (SIF policy holders) claims against the SIF . The statute involved in *Hayden*, is found in the chapter of the Idaho Insurance Code which regulated the investments which may be made by insurance companies doing business in Idaho. Unlike in *Dietrich* where the statute provided for the defendants, as directors of an *ultra vires* corporation, to be personally liable to persons dealing with the Corporation, nothing in the language of I.C. § 41-722 provides that the insurance company will be liable to its policy holders for a violation of I.C. § 41-722.[5]

Having completed the analytical steps discussed above, it is apparent not only that the *Hayden* Court did not conclude and would not have concluded that the 3 year statute of limitations is applicable to actions premised upon a violation of the provisions of *I.C., §72-901 et. seq.*, which create and expressly govern the conduct of the SIF and which are incorporated into the contract between the SIF and its policyholders. While the Court in *Hayden* does not detail its reasoning, it is clear that at the time of considering what statute of limitations was applicable, the only claim under consideration was the claim that certain real estate transactions violated the Idaho Insurance Code which is generally applicable to all insurance companies doing business in Idaho. It is also apparent from the decision in *Hayden,* that the Court perceives some elasticity in the language of I.C. § 5-218 ("an action upon a liability created by statute") so that it might apply to at least some "statutory violations." However, the reiteration of the District Court's conclusion that *Dietrich* probably does not control in light of *Kelso* and the emphasis the Court places upon the word

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[5] Indeed, the Department of Insurance is charged with the responsibility of enforcing the Idaho Insurance Code and it is not at all clear that an insured even has a private cause of action for investments which violate the provisions of the Idaho Insurance Code.

"*gravaman*" which is used by the District Court indicates that the Court recognizes that there is a difference between claims premised upon the contract (which, per *Kelso*, incorporates provisions of I.C. § 72-901 *et. seq.* which explicitly governs the conduct of the SIF) and claims premised upon a violation of the provisions of the Idaho Insurance Code.

When the claim made in this case is considered in light the facts, statutes and case law underlying the holding in *Hayden* it is apparent that *gravaman* of Plaintiffs' claim is their contract with the SIF.[6] The claim is not premised upon a violation of the general insurance law of Idaho which regulates the conduct of all insurance companies doing business in Idaho. The claim is premised upon a violation of a duty that only the SIF owes to a policyholder, that the SIF owes only to its policyholders and that only its policyholders can force the SIF to honor. Without a contract between Plaintiffs and the SIF, there would be no claim that Plaintiffs can make. The *gravamen* of this action is the contract and the correct statute of limitations is the 5 year statute applicable to written contracts (I.C. § 5-216). If this is not the correct conclusion then *Kelso's* requirement that the statutes governing the SIF be treated as being incorporated into the contract between the parties is meaningless.

C. WAIVER

Defendants have asserted that for each policy year that has an inception date after the dividend distribution which occurred in 2003, the Plaintiffs have waived their objection to the dividend allocation calculus being used by the SIF. Exactly how this assertion is justified by the

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[6] It is worth noting that the District Court in *Hayden* at stated that the pleadings were not the controlling consideration and that the Court should look instead to the gravaman. *Hayden*, 141 Idaho 395, 111 P.3d 80. The Defendants have noted that the Complaint in this matter does not allege "breach of contract." To the extent that this is considered a critical fact relevant to the determination then the correct remedy is to afford the Plaintiffs an opportunity to amend the complaint. A dismissal at this point for this reason will only lead to an immediate refiling of the complaint and, if Plaintiffs are correct about the applicability of the 5 year contract statute of limitations then a complaint filed in April of 2007 will reach back to April of 2002 and sweep in all claims relating to dividends at issue in this matter.

facts of this case is difficult to discern. In some respects, it appears that the claim is really a "failure to mitigate claim." In other respects, it appears that the claim is that the purchase of a new policy is a waiver of any objection about the previous policy year distribution allocation. In still other respects, it appears that the claim is that the purchase of a new policy is a waiver of any objection about the distribution allocation for the policy just purchased.

These various claims will be taken up in turn but at the outset it is worth noting that the SIF has cited not a single case in support of this waiver/failure to mitigate argument. The only authority cited, 17 AM. JUR. 2D *Contracts* § 638, clearly pertains only to the fact that under appropriate circumstances, that party A can be held to have waived a contractual requirement that the party B perform some act before party A is expected to perform. This case does not involve such a circumstance and the SIF has not provided any authority for the proposition that when Mary, who has previously contracted with Bob enters into a subsequent contract with Bob, Mary can be seen has having waived her objection Bob's performance on the earlier contract. Nor has the SIF provided any authority for the proposition that, given the same history, where Bob is free to decide to behave differently with respect to the second contract and has provided no indication that he will not reform his ways, Mary's decision to enter into the second contract can possibly be seen as a waiver of the right to hold Bob accountable if he also breaches the second contract. Finally, the SIF has provided no authority for the proposition that, absent a clear showing that Mary's damages arising from Bob's deficient conduct exceed the damages she would sustain by being forced to enter into a contract with Bill solely to preserve her right to force Bob to pay for the damage he has caused, Bob can expect the Court to conclude, on summary judgment or otherwise, that Mary has failed to mitigate her damages. Plaintiffs, being themselves unable to find authority that would support such claims, is left to conclude that the SIF has cited no supporting authority because there is no supporting authority.

What can be said in general terms is that waiver and failure to mitigate have been asserted by the SIF as affirmative defenses. *See, Answer to Plaintiff's Class Action Complaint and Demand for Jury Trial*, Third Defense and Fifth Defense. As the party seeking summary judgment based upon a affirmative defenses, the SIF has the burden of showing the absence of a genuine issue of fact material with respect to those defenses. *Mason v. Tucker & Assocs.*, 125 Idaho 429, 437, 871 P.2d 846, 854(Idaho Ct. App. 1994). The SIF has not and on the record cannot meet this burden.

Assuming for the sake of discussion that "waiver" is even an applicable defense in this matter – something the SIF has yet to demonstrate – the record will not support a fact finding that that the Plaintiffs, by purchasing policies after they had been passed over for dividends in previous years, have waived either their claim for previous damage for any policy purchased after they had previously been passed over. Initially, there is the fact that the Board of the SIF acts each year to decide if they will use the same dividend calculus as they used the previous year. Given this fact, there is no way for the Court, the Plaintiffs or even the Defendants to know at the beginning of a policy year what allocation calculus they intend to use if they decide to declare and distribute a dividend. Beyond this, the fact that the defense of waiver requires a good deal of specific evidence which is not inferable from the record, even if Court assumes that on any given policy inception date, each of the Plaintiffs knew that the SIF would use the same dividend allocation calculus when, 12 to 18 months after the end of that policy year, they set about to distribute a dividend. It is well established that "waiver is a voluntary, intentional relinquishment of a known right or advantage." *Tiffany v. City of Payette*, 121 Idaho 396, 403, 825 P.2d 493, 500 (1992), quoting *Brand S Corp. v. King*, 102 Idaho 731, 734, 639 P.2d 429, 432 (1981). While the Court could certainly conclude that each of the Plaintiffs voluntarily entered into new policies with the SIF after the dividend allocation which occurred in early 2003, there is simply no evidence that would support a finding or an

inference that they did so knowing that the conduct of the SIF was a breach of contract and with the intention of waiving the right to seek recovery of the dividends that they were wrongfully denied.

Assuming for the sake of discussion that "failure to mitigate" is even an applicable defense in this matter – something the SIF has yet to demonstrate – the record will not support a fact finding that the Plaintiffs, by purchasing policies after they had been passed over for dividends in previous years, have failed to mitigate the theoretical damage that they might suffer if the SIF continued to use the same dividend allocation calculus. As Mr. Alcorn goes to lengths to point out, the SIF makes affordable coverage available to businesses that might end up in the far more expensive "assigned risk" coverage group. There is also the fact that while workers compensation insurance rates appear to be regulated, the SIF regularly elects to depart from those rates to lower rates. *See, e.g. Document # CL0014,* attached part of Exhibit A, *Affidavit of James M. Alcorn.* Assuming these things to be true, then the entry of summary judgment on the theoretically applicable affirmative defense of failure to mitigate is, based upon the record, precluded by an absence of evidence demonstrating that the Plaintiffs had reasonable alternatives.

The SIF has failed to identify any law or facts which will support the entry of summary judgment in its favor on either the affirmative defenses of waiver or failure to mitigate.

III. CONCLUSION

It is firmly established in this jurisdiction that in a summary judgment proceeding the Supreme Court, exercising its free review on matters of law, "construes all disputed facts liberally in favor of the non-moving party." *Nerco, supra*, at 148 citing *Eagle Water Co., Inc. v. Roundy Pole Fence Co.*, 134 Idaho 626, 628 (2000). The same rule applies to the District Court. *Doe v. Durtschi*, 110 Idaho 466, 469 (1986).

Defendants have not established either good law or undisputed facts which would allow them to prevail on the issues of waiver, standing and statutes of limitation. It is respectfully requested that Defendants' motion on these issues be denied in all respects.

Defendants broader motion for summary judgment may be taken up at a later time if necessary after the Court's ruling on Plaintiffs' Motion for Partial Summary Judgment. For the reasons set forth in the *Memorandum in Support of Motion to Continue Summary Judgment Proceedings to Permit Discovery*, and discussed above, Plaintiffs do not consider it reasonable or appropriate to expend any of their time or the Court's responding to the voluminous discussion in the *Memorandum In Support of Defendant's Motion for Summary Judgment*, pp. 16-32, in support of the claim that the Manager has not abused discretion which neither *I.C. §72-915* nor any Court decision has conferred upon him. If the Court disagrees, then leave of Court will be requested to brief the "surprise" issues contained in Defendants' Motion for Summary Judgment.

DATED: this 12th day of March, 2007.

LOJEK LAW OFFICES, CHTD.

Donald W. Lojek
Attorneys for Plaintiffs and the Class

GORDON LAW OFFICES, CHTD.

Bruce S. Bistline

CERTIFICATE OF SERVICE

I hereby certify that on the day of March, 2007, I caused the foregoing document to be delivered by the method indicated below and addressed to the following:

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RANDOLPH E. FARBER, SCOTT ALAN BECKER and CRITTER CLINIC, an Idaho Professional Association, Plaintiffs, 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.	Case No. CV06-7877 DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW defendants, Idaho State Insurance Fund and James M. Alcorn, Manager of the State Insurance Fund ("SIF") (collectively "SIF Defendants"), by and through their counsel

of record, Hall, Farley, Oberrecht & Blanton, P.A., and hereby respectfully submit this memorandum in reply to plaintiffs' "Memorandum in Opposition to Defendants' Motion for Summary Judgment." For the reasons stated below, SIF Defendants' Motion for Summary Judgment should be granted.

INTRODUCTION

In an attempt to escape the SIF Defendants' compelling arguments made in their summary judgment memorandum, plaintiffs focus on unwarranted personal attacks against defense counsel and inappropriately attempt to shift plaintiffs' burden of prosecuting this case to the SIF Defendants. Such attacks are nothing more than a diversion from one of the main dispositive issues in this case – whether the SIF Manager has the discretion to determine how a dividend will be allocated.[1]

As addressed in the SIF Defendants' Memorandum in Support of Motion for Summary Judgment, the Idaho Legislature clearly and unambiguously provided the SIF and the Manager the discretion to declare a dividend and to determine how a dividend would be distributed. Notwithstanding that legislative mandate, plaintiffs want this Court to strip the SIF Defendants of that discretion by ignoring the language of Idaho Code Section 72-915, and by attempting to read that statute in a vacuum. As addressed in the SIF Defendants' Memorandum in Support of Motion for Summary Judgment, plaintiffs' argument fails and this Court should rule as a matter of law that the SIF Manager has the discretion to determine how a dividend is distributed and to dismiss plaintiffs' claims as a matter of law.

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[1] Plaintiffs baldly assert that the SIF defendants failed to argue in their moving papers that the SIF Manager has the discretion to determine how a dividend will be distributed. As is evidenced by the SIF Defendants Memorandum in Support of Summary Judgment, the SIF Defendants argued that the SIF Manager has been charged with determining whether a dividend will issue and, if so, who will be offered a dividend, on what basis the dividend will be offered, and when the dividend will be offered. *See* Memorandum in Support of Defendants' Motion for Summary Judgment, pgs. 16-22.

In addition, the SIF Defendants have provided substantial affidavit evidence supporting their position that Mr. Jim Alcorn, the SIF Manager, appropriately exercised his discretion in determining that policyholders of $2,500 or less would not receive a dividend from 2003 to 2006. Significantly, plaintiffs elected not to refute the substantial evidence presented by the SIF Defendants. Rather, they took a gamble and are hoping that this Court will excuse their failure to prosecute this case and permit them additional time to respond. As addressed in the SIF Defendants' Memorandum in Opposition to Plaintiffs' Motion to Continue Summary Judgment Proceedings Pursuant to Rule 56(f), SIF Defendants respectfully request that the Court deny plaintiffs' request and proceed with a hearing on this issue. Plaintiffs' failure to respond must be viewed as a concession of that particular issue and summary judgment should be granted in defendants' favor on the ground that there is no genuine issue of fact as to whether defendants abused their discretion in distributing the dividend.

Lastly, as discussed in SIF Defendants' Motion for Summary Judgment and as addressed below, plaintiffs fail to adequately challenge the SIF Defendants' arguments on standing, statute of limitations, and waiver; accordingly, as there is no genuine issue of fact on the issues of standing, statute of limitations, and waiver, summary judgment should be granted in defendants' favor on these three issues as well.

ARGUMENT

A. PLAINTIFFS MISCONSTRUE SIF DEFENDANTS' ARGUMENT IN A DESPERATE ATTEMPT TO POSTPONE THE HEARING BY FIRST ASKING THE COURT TO DETERMINE WHETHER THEY EVEN HAVE A LEGITIMATE LEG TO STAND ON.

It is clear that plaintiffs either do not fully comprehend the entirety of SIF Defendants' position, or they are attempting to avoid confronting the compelling arguments advanced by SIF Defendants in their Motion for Summary Judgment. Plaintiffs' misguided assertions that the SIF

Defendants are unable to make a cogent argument for the proposition that the SIF has discretion with respect to how declared dividends can be distributed, and instead seek to "divert the inquiry away from 'Does the SIF have discretion?' to 'Should the SIF have discretion?'" is not only wrought with error, but all flair and no substance.[2]

In support of their decision to cower from SIF Defendants' compelling arguments, plaintiffs raise three hollow excuses in seeking this Court's protection. The first two excuses are addressed in SIF Defendants' Memorandum in Opposition to Plaintiffs' Motion to Continue Summary Judgment Proceedings Pursuant to Rule 56(f), thus need not be repeated here.[3] The third excuse is based on the erroneous premise that the SIF Defendants are improperly inviting the Court to engage in an evaluation which belongs exclusively within the authority of the Legislature.[4] By making this statement, it is clear that plaintiffs misunderstand the Court's role in statutory construction, as well as the central argument advanced by SIF Defendants in this matter.

1. Plaintiffs' attempt to read I.C. Section 72-915 in a vacuum violates the rules of statutory construction as set forth by the Idaho Supreme Court that, among other things, statutory provisions cannot be read in isolation, but must be interpreted in the context of the entire document.

One of the central arguments raised by SIF Defendants in their Motion for Summary Judgment is that plaintiffs inappropriately attempt to read I.C. Section 72-915 in a vacuum by ignoring the remainder of Title 72, Chapter 9, which, significantly, includes the purposes of the

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[2] *See* plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment ("plaintiffs' Memorandum"), pg. 2.

[3] The first excuse raised by plaintiffs is that defense counsel for the SIF limited the arguments in their Motion for Summary Judgment to solely arguments based on the statute of limitations, standing, and waiver; the second excuse is based on the groundless argument that the SIF is inviting the plaintiffs and the Court to waste valuable resources in deciding the "abuse of discretion" issue before the Court determines that the SIF even has any relevant discretion. *See* SIF Defendants' Memorandum in Opposition to Plaintiffs' Motion to Continue Summary Judgment Proceedings Pursuant to Rule 56(f); *see also* plaintiffs' Memorandum, pgs. 2-3.

[4] *See* plaintiffs' Memorandum, pg. 3.

SIF and the Board of Directors' and Manager's role in effectuating those purposes. In particular, I.C. Section 72-915 must be reconciled with I.C. Section 72-901(3), which requires the SIF Board to assure that the SIF is run as an efficient insurance company that remains actuarially sound. Of course this position directly counters plaintiffs' argument, which is premised on the mistaken belief that I.C. Section 72-915 is the sole statute bearing upon the determination of which SIF policyholders are entitled to share in any dividend pool. This argument is based solely on statutory construction, and directly relates to what plaintiffs' self-pronounced "first claim" is all about.[5] Yet, inexplicably, plaintiffs refuse to address it, and instead concoct several arguments based on smoke and mirrors they hope will divert the Court's attention. The plaintiffs cannot run from this statutory argument forever.[6]

From the inception, SIF Defendants have argued that by giving meaning to the entire statutory framework of the SIF, versus reading I.C. Section 72-915 in isolation as plaintiffs suggest, the Legislature clearly and unambiguously provided the SIF and the Manager the discretion with respect to how dividends can be distributed.[7] Plaintiffs' failure to reconcile I.C. Section 72-915 with the remaining statutory framework of the SIF proves fatal to their position. As more thoroughly discussed on pages 16 to 21 of SIF Defendants' Memorandum in Support of Motion for Summary Judgment, plaintiffs' myopic reading of I.C. Section 72-915 violates the

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[5] *See* plaintiffs' Memorandum, pgs. 5-6.

[6] I.C. § 72-915 was enacted in 1917 and has not been substantively changed since that time. However, there have been amendments to several other statutes within the SIF's statutory framework which need to be reconciled with I.C. § 72-915, which plaintiff's narrow and strict reading of the statute fails to accomplish. For instance, when the SIF was originally enacted ninety years ago, it was designed to be the primary worker's compensation insurance provider in the state. At one time it was the sole rate setting mechanism, and was authorized to adjust the rates at the Manager's discretion. However, the setting of rates is now done by the NCCI, which prevents the SIF from adjusting its own rates to compensate for excess losses or excess gains. Therefore, the SIF needs to be given the flexibility to adapt to how business operates in the current market, versus being constricted by an out-of-date statute. The SIF must be given discretion to enact those policies that will help it operate as an efficient insurance company that remains actuarially sound.

[7] *See* Memorandum in Support of Defendants' Motion for Summary Judgment ("SIF Defendants' Memorandum"), pg. 16–21.

rules of statutory construction set forth by the Idaho Supreme Court that, among other things, statutory provisions cannot be read in isolation, but must be interpreted in the context of the entire document. *Westerberg v. Andrus*, 114 Idaho 401, 757 P.2d 664 (1988); *see also Moss v. Bjornson*, 115 Idaho 165, 166, 765 P.2d 676, 677 (1988) (statutes should not be construed to render other provisions meaningless). As a result, plaintiffs are clearly mistaken when they claim the SIF is "improperly inviting the Court to engage in evaluation which belongs exclusively within the authority of the Legislature."[8]

With these statutory rules of construction in mind, it is imperative that I.C. Section 72-915 be examined in the context of the entire statutory framework of the SIF, rather than in isolation as plaintiffs suggest. Specifically, the interplay between I.C. Sections 72-901(3) and 72-915 must be flushed out. The crux of I.C. Section 72-901(3) is that the SIF Board is required to implement policies to assure that the SIF is run as an efficient insurance company that remains actuarially sound and maintains the public purpose for which is was created.[9] Therefore, any policy that runs contrary to these enumerated duties is in violation of the Legislature's specific mandate. Although I.C. Section 72-901(3) focuses on the duty of the SIF Board, several other statutes direct how the SIF Board will effectuate the policy mentioned above, particularly I.C. Section 72-902, which requires the SIF Board to appoint a skilled and experienced Manager whose duties, subject to the direction and supervision of the SIF Board, is to "conduct the business of the [SIF] and do any and all things which are necessary and convenient in the administration thereof . . . ." Therefore, the SIF Board and Manager work in conjunction to effectuate the purposes of the SIF as mandated by the Legislature.

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[8] *See* plaintiffs' Memorandum, pg. 3.

[9] The SIF was created "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." I.C. Section 72-910(1).

The Legislature impliedly granted the Manager, through the SIF Board, the authority and responsibility for making the following determinations in order to carry out the SIF's purpose: (1) the amount of excess surplus to be distributed, (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. Consequently, the SIF Defendants argue that the decision to issue dividends only to those policyholders paying over $2,500 per year in premiums is well within the Manager's authority and discretion, since such a dividend allocation policy comports with the overall duties as outlined in I.C. Section 72-901(3). But what remains lost on plaintiffs is the fact that what they consider to be "historical events, asserted facts, self-professed rational thought process, claims about the demands of the marketplace and other extraneous information"[10] that has no place in this proceeding, actually serves a dual-purpose; what plaintiffs are quick to dismiss as a "waste of valuable resources" is not only pertinent to the issue of whether the Manager abused his discretion,[11] but more importantly, addresses the crux of SIF Defendants' *statutory argument* by focusing on the interplay between I.C. Section 72-915 and other relevant statutory provisions within the SIF's framework (namely I.C. Section 72-901(3)), and specifically the collection of factors motivating the Manager's decision to issue dividends only to those policyholders paying over $2,500 per year in premiums.

The Manager's decision to issue dividends only those policyholders paying over $2,500 per year in premiums "assure[s] that the [SIF] is run as an efficient insurance company, remains actuarially sound and maintains the public purposes for which [it] was created" as outlined in

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[10] *See* plaintiffs' Memorandum, pg. 3.

[11] Whether the Manager abused his discretion is the "secondary claim" per plaintiffs' lingo, and one that they insist is "out-of-play" until the Court rules on their Motion for Partial Summary Judgment.

I.C. Section 72-901(3). In their Motion for Summary Judgment, SIF Defendants discuss several examples in support of this policy which directly cut against plaintiffs' assertions that by engaging in such a complicated fact and business theory the SIF Defendants invite the plaintiffs and the Court to waste valuable resources.[12] However, engaging in such a complicated fact and business theory is precisely what is required in order for SIF Defendants to explain why the decision to issue dividends only to those policyholders paying over $2,500 per year in premiums promotes the statutory purpose of the SIF. Moreover, it reconciles I.C. Section 72-915 with the remaining statutory framework of the SIF, which plaintiffs refuse to acknowledge.

As explained in SIF Defendants' Motion for Summary Judgment, 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.[13] However, under plaintiffs' narrow interpretation of I.C. Section 72-915, losses incurred by a policyholder are insignificant. But clearly such a position contradicts the Legislature's express mandate that the SIF be run as an efficient insurance company which remains actuarially sound. According to plaintiffs' restricted argument, a policyholder with a $2,500 premium insurance rate, but $100,000 in losses on its policy during the period in which the SIF Manager deems the aggregate balance remaining may be safely and properly divided, would qualify to receive a dividend as long as it has held a policy for more than six months during the applicable period.[14] Plaintiffs ignore the fact that it would take the SIF forty years to recoup these losses.

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[12] *See* plaintiffs' Memorandum, pg. 3.
[13] *See* Affidavit of James M. Alcorn ("Alcorn Aff."), ¶ 24.
[14] *See* plaintiffs' Memorandum, pgs. 4-5.

By forcing all of the action into I.C. Section 72-915, while remaining oblivious to other pertinent statutory provisions, plaintiffs' argument fails to address such objectionable outcomes. However, the Legislature, in its wisdom, did not; it gave the SIF and the Manager the authority and discretion to counteract such unwelcome results. The short-sidedness of plaintiffs' argument focuses on the trees instead of the forest, and in so doing renders other statutory provisions meaningless.

This process becomes even more complicated due to the fact that the SIF is directed by statute to be self-sufficient, but is not allowed to be a member of the Idaho Insurance Guaranty Association ("IIGA"). I.C. § 72-901(1), (4). Unlike other insurance carriers which rely on the IIGA to pay benefits in the event of insolvency, the SIF must implement policies that maintain sufficient surplus and reserve totals to provide a stable and ongoing source of worker's compensation insurance to Idaho workers.[15] And the importance of this duty is magnified by the fact the Idaho Supreme Court determined that the SIF is not a mutual insurance carrier; unlike a mutual insurance carrier, the SIF does not assess a policyholder whose premiums do not cover its losses. *Kelso & Irwin, P.A. v. State Insurance Fund*, 134 Idaho 130, 134–35, 997 P.2d 591, 595–96 (2000). The SIF covers the losses of such policyholders, which in turn fulfills one of its principal purposes—providing worker's compensation insurance to Idaho employers by maintaining a liberal underwriting policy that seeks to insure all Idaho employers, regardless of size, so the majority of Idaho employers who might not otherwise obtain coverage through a private carrier could obtain coverage with the SIF.[16] Again, plaintiffs' narrow interpretation of I.C. Section 72-915 fails to take this statutory provision into account; in fact, plaintiffs'

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[15] *See* Alcorn Aff., ¶ 18.
[16] *See* Alcorn Aff., ¶ 13.

Memorandum in Support of Partial Summary Judgment fails to discuss the ramifications of the IIGA altogether.

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.[17] While SIF Defendants have gone to great lengths in their Motion for Summary Judgment to explain the necessity in keeping the larger premium policyholders on board, highlighting a few of the essential points remains instructive.

Much of the need to create incentives to maintain the larger, more profitable policyholders arises from the fact that worker's compensation rates are regulated and thus are the same for all carriers. *See* Idaho Code § 41-1618. Recall that the SIF is not a monopolistic state fund, but rather must compete for business against private worker's compensation insurance carriers.[18] 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.[19] But the SIF's private competitors are not bound by a "public purpose"; whereas the private insurers choose only the best accounts, the SIF writes as many employers as it can.[20] And without the larger premium policyholders, the SIF is less able to absorb the losses generated by the smaller premium policyholders.[21] Consequently, the SIF determined that one of the methods available to

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[17] *See* Alcorn Aff., ¶ 25.
[18] *See* Alcorn Aff., ¶ 10.
[19] *See* Alcorn Aff., ¶ 29.
[20] *See* Alcorn Aff., Ex. E (Board of Directors of the State Insurance Fund Minutes of January 22, 2004), CL 0021. Chairman Bill Deal reiterated this theme by commenting to the SIF Board 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. *Id.*
[21] *See* Alcorn Aff., ¶ 33.

retain the business of the larger policyholders was to provide the larger premium policies a larger dividend as a percentage of the premium.[22]

Ultimately, plaintiffs are correct when they claim that "the parties see the seminal issue in this case very differently." [23] However, from SIF Defendants' perspective, the issue is not as clear and unambiguous as plaintiffs claim it to be. Whereas plaintiffs' myopic argument focuses on one statute within the SIF's entire statutory framework, the SIF Defendants' argument incorporates a more holistic approach, thereby satisfying the rules of statutory construction as set forth by the Idaho Supreme Court. It is through this holistic approach that the statutory framework of the SIF is best analyzed and interpreted, versus in isolation as plaintiffs suggest.

2. Plaintiffs continue to ignore critical language in I.C. § 72-915, particularly the effect of "safely and properly divided" and "properly entitled to" in their interpretation.

Not only do plaintiffs attempt to read I.C. Section 72-915 in a vacuum by failing to reconcile it with the remaining statutory provisions comprising the SIF, but they also fail to define critical language in the statute, specifically what effect "safely and properly divided" and "properly entitled to" have on the dividend pool. Plaintiffs' approach violates another rule of statutory construction enunciated by the Idaho Supreme Court which requires that "all parts of a statute should be given meaning." *Robbins v. County of Blaine*, 134 Idaho 113, 120, 996 P.2d 813, 820 (2000); *see also Wright v. Willer*, 111 Idaho 474, 476, 725 P.2d 179, 181 (1986) ("Statutes must be read to give effect to every word, clause and sentence.").

Plaintiffs' oversimplified interpretation of I.C. Section 72-915 blows past several critical elements of the statute, and in the process fails to give meaning to every word, clause and sentence as mandated by the Idaho Supreme Court. Plaintiffs' shoddy statutory interpretation

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[22] See Alcorn Aff., ¶ 29.
[23] *See* plaintiffs' Memorandum, pg. 2.

begins with what they consider to be the second step of the "declaration process," which in their mind consists of whether, in the judgment of the Manager, the aggregate balance may be "safely and properly divided."[24] Although plaintiffs state that this is a "mixed fact finding and discretionary step" that is as far as their analysis takes them. This step is simply void of any meaningful or thorough analysis, and ultimately fails to discuss what fact finding elements pertain to this step, or what discretion and in what capacity may be exercised by the Manager.

SIF Defendants argue that "safely and properly divided" goes much further than simply determining if there is an aggregate balance remaining attributable to a class of employments or industries. For instance, it involves such critical decisions, including, but not limited to, the Manager taking into account losses on a policyholder's worker's compensation coverage during the applicable period, or the global effect of issuing dividends only to those policyholders paying over $2,500 per year in premiums. In plaintiffs' rush to focus the attention on what they consider to be the "fourth step"[25] in the dividend declaration and distribution process, they gloss over statutory language that must be given meaning. And this point is made perfectly clear in pointing out plaintiffs' own admission: "Plaintiffs have not and do not challenge the fact that the Manager has discretion over these first three steps in the dividend declaration and distribution process."[26] By failing to give meaning to the terms "safely and properly divided," the plaintiffs have inadvertently accepted and supported SIF Defendants' position.

But plaintiffs also fail to give meaning to the phrase "properly entitled to" contained in the latter portion of I.C. Section 72-915. Plaintiffs have made it abundantly clear up to this point

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[24] *See* plaintiffs' Memorandum, page 4.
[25] Plaintiffs' self-pronounced fourth step of the dividend declaration and distribution process is the mathematical process of allocating the dividend to each qualified member (policy held for more than six months during the applicable period) of the classes of employment or industries as to which there is adequate surplus funds "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." *See* plaintiffs' Memorandum, pg. 4.
[26] *See* plaintiffs' Memorandum, pg. 4.

in the litigation that, in their view, the only requirement a policyholder must meet in order to be eligible to receive a dividend—once the Manager declares the aggregate balance may be safely and properly divided—is that it must have held the policy for more than six months during the applicable period.[27] Plaintiffs argue: "this is a purely ministerial step which allows for no discretion in the selection of an allocation calculus."[28] Although plaintiffs' argument has superficial appeal, it is inherently flawed in that it fails to fully define and analyze the effect of "properly entitled to" in the context of the statute. For instance, plaintiffs argument fails to take into account the fact that a policyholder that incurs losses on policy during the applicable period may not be "properly entitled to" receiving a dividend. SIF Defendants argue that "properly entitled to" means much more than simply being a policyholder for more than six months during the applicable period as plaintiffs suggest. Rather, the Legislature granted the Manager discretion to counteract such unwelcome results. Consequently, SIF Defendants argue I.C. Section 72-915 is not as clear and unambiguous as plaintiffs claim it to be.

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. When 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." *Id.* at 398–99, 111 P.3d at 83–84 (quoting *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)). As such, this Court must look to the Legislature's intent and purpose in creating the SIF—to insure employers against liability under Idaho's worker's compensation laws, and to ensure workers entitled to compensation have a source from which they may collect. I.C. § 72-901(1). Ancillary to that purpose is the requirement that the SIF be

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[27] *See* plaintiffs' Memorandum, pgs. 4-5.
[28] *See* plaintiffs' Memorandum, pg. 4.

administered without liability on the part of the state (i.e. solvency), that it be operated as an efficient insurance company, and that adequate reserves are maintained to meet anticipated and unexpected losses. Keeping the Legislature's intent and purpose in mind, SIF Defendants argue their interpretation of I.C. Section 72-915 is much more conducive to meeting these objectives, versus the plaintiffs' narrow and confined interpretation.

B. PLAINTIFFS DO NOT HAVE STANDING TO BRING THIS ACTION BECAUSE THEY DO NOT HAVE A PROPERTY INTEREST IN THE SURPLUS OR ASSETS OF THE FUND.

Plaintiffs cannot refute that they do not have a property interest under which to raise their claims against defendants. The court in *Kelso* clearly set forth that a policyholder with the SIF has no property right in the surplus or assets of the fund. *Kelso & Irwin, P.A v. State Ins. Fund*, 134 Idaho 130, 997 P.2d 591 (2000). Therefore, plaintiffs' claims that they are entitled to dividends from the surplus or assets of the fund are without merit because they do not have a right to a dividend. Plaintiffs cannot claim they have been injured because there is no basis for their belief that they were entitled to something. If one is not entitled to a certain item, there is no injury when you did not receive that to which there was never an entitlement in the first place. There is no right to a dividend and without a right to a dividend plaintiffs cannot claim injury. Any dividend offered should be enjoyed as an unexpected benefit as the result of the successful management of the fund. That certain policyholders received a benefit in the form of a dividend does not mean they were entitled to the dividend. To be sure, plaintiffs were not offered a dividend; to be sure, plaintiffs are angry that others received a dividend, while they did not; however, being angry that you did not receive something that someone else did for which there was never an entitlement is not the same thing as an injury in fact. Plaintiffs have not been injured, they have been angered and the two are not synonymous.

Plaintiffs claim that granting the relief they seek will redress their injury. Before the Court can redress an injury, however, it must find injury. Plaintiffs do not meet the standing requirements because they do not have a property interest which converts their anger into an injury.

While plaintiffs do not appreciate SIF Defendants' arguments stemming from the *Kelso* case, they cannot escape the law that says they do not have a property right in the surplus or assets of the fund. Plaintiffs attempt to align themselves with the *Kelso* plaintiffs and suggest that since the *Kelso* plaintiffs were allowed to proceed, plaintiffs here should be allowed to proceed as if they had standing, as well. Noticeably absent from plaintiffs analysis is the *Kelso* court's determination that where plaintiffs failed to properly allege a breach of contract those claims were dismissed. Plaintiffs have wholly failed to formulate their claims in terms of breach of contract and, even if plaintiffs' allegations are viewed in a light most favorable to them, breach of contract claims will not be illuminated giving rise to standing.

Plaintiffs also infer that since the Idaho Supreme Court did not discuss standing in either *Kelso* or *Hayden Lake Fire Prot. Dist.*, 141 Idaho 388, 111 P.3d 73 (2004), then plaintiffs should automatically have standing. Such an argument fails to recognize that standing was not an issue on appeal in either of those cases, therefore, the court was not asked to provide an analysis and render a decision.

Plaintiffs' disagreement with the relevance of *Troutner v. Kempthorne,* 142 Idaho 389, 128 P.3d 926 (2006), and their claim that "*Troutner* really adds nothing to Idaho jurisprudence" amounts to a disrespectful attack on the Idaho Supreme Court. Plaintiffs disagree with *Troutner* for the obvious reason that the case is very analogous to the case at hand and if this Court follows *Troutner*, under the doctrine of *stare decisis,* SIF Defendants win their standing argument. As argued in SIF Defendant's Memorandum in Support of Summary Judgment,

plaintiffs, here, just as the plaintiffs in *Troutner*, do not have standing to bring their claims because plaintiffs cannot demonstrate a right under which to claim injury. Without a right or a personal injury that is different than any other citizen, there can be no standing. Plaintiffs do not have a right to have a dividend distributed to them once it has been declared by the SIF defendants. This is no different than a citizen who would come to the SIF and claim distribution of a dividend just because the SIF has declared a dividend since the citizen has no statutory or contractual right to the distribution of a dividend. As addressed in the SIF Defendants' briefing, plaintiffs do not having standing to bring their action against the SIF Defendants; therefore, SIF Defendants' Motion for Summary Judgment must be granted.

C. PLAINTIFFS CHARACTERIZE THIS ACTION AS A "STATUTORY CONSTRUCTION" CASE AND CLAIM THAT DEFENDANTS HAVE VIOLATED I.C. § 72-915, WHICH NECESSARILY REQUIRES THE PROPER STATUTE OF LIMITATIONS TO BE THREE YEARS.

Plaintiffs have and continue to characterize the conduct of the SIF defendants as being in violation of Idaho Code Section 72-915. Claims, the gravamen of which are based on statutory violations, are subject to a three year statute of limitation. *Hayden Lake Fire Prot. Dist v. Alcorn*, 141 Idaho 388, 403-04, 111 P.3d 73, 88-89 (2004). Plaintiffs allege that a five-year statute of limitation based on contract law is controlling in this instance by virtue of governing laws being incorporated into an insurance contract. Plaintiffs argue that the holding in *Hayden Lake* is not applicable in this case because it referenced different statutes. This is merely a distinction without a difference. In upholding the trial court's decision to apply a three-year statute of limitation, the Idaho Supreme Court in *Hayden Lake* relied upon the holding in *Dietrich v. Copeland Lumber Co.* that statutory liability is one that depends for its existence on the enactment of the statute, and not on the contract of the parties. *Id.* at 404, 111 P.3d at 89.

Here, plaintiffs have argued throughout this proceeding that the SIF Defendants violated Idaho Code Section 72-915 when they determined that plaintiffs would not receive a dividend based on the amount paid on annual premiums. For example, in plaintiffs' "Memorandum in Support of Motion to Continue Summary Judgment Proceedings Pursuant to Rule 56(f)," page 3, plaintiffs state that the Alcorn affidavit was "useless to the question of statutory construction which had been raised by the Plaintiffs' motion." In plaintiffs' "Motion for Partial Summary Judgment, " page 2, ¶ 1, and their supporting memorandum, plaintiffs state that "[o]ther than I.C. §72-915, there are no contract provisions" that bear upon the determination of which policyholders are entitled to a share in the dividend pool. Plaintiffs should be judicially estopped from now arguing against a statutory violation because it works against them. Plaintiffs cannot have it both ways for the purposes of determining which statute of limitation applies.

Plaintiffs assert that I.C. Section 72-915 did not endow the SIF Defendants with discretion to determine how the dividends were to be distributed once dividends were declared. For liability to flow to the SIF Defendants, plaintiffs will need to prove that the SIF Defendants violated I.C. Section 72-915. This liability ultimately depends on the existence of a statute, not on the insurance contract between the parties, which is supported by the holding in *Hayden Lake*. The resolution of liability does not depend on the insurance contract between the parties. Without I.C. Section 72-915 there would be nothing to incorporate into the insurance contract.

The law from *Hayden Lake* is very clear that statutory violation claims are governed by a three year statute of limitations, regardless of the machinations the plaintiffs went through to distinguish the *Hayden Lake* holding. Defendants do not disagree that the gravamen of a plaintiffs' case is the controlling factor. Defendants do disagree, however, with plaintiffs' assertion that the gravamen of their claims is a contractual right to a share of the dividends. Their own motion for summary judgment sets forth their understanding that there are no contract

provisions that apply to the dividends at issue here. Because the facts in both *Kelso & Irwin, P.A v. State Ins. Fund*, 134 Idaho 130, 997 P.2d 591 (2000) and *Hayden Lake* are similar to the facts in the present case and because the SIF is the defendant in all three actions, there is no question that the three-year statute of limitations as applied in *Hayden Lake* is also applicable here.

Throughout plaintiffs' documents on file herein, plaintiffs assert that the SIF Defendants violated Idaho Code Section 72-915; therefore, plaintiffs cannot be heard to argue that the gravamen of their claims rests solely on contractual claims. It is the alleged statutory violation that is at the heart of the matter and that type of allegation is governed by a three-year statute of limitation. Therefore, any claims for a dividend issued three years prior to the filing of this action on July 21, 2006 must be dismissed.

D. PLAINTIFFS' REPEATED PAYMENT OF PREMIUMS FOR WORKER'S COMPENSATION INSURANCE THROUGH THE SIF, DESPITE NOT RECEVIEING A DIVIDEND, OPERATES MUCH LIKE A WAIVER IN THAT PLAINTIFFS GAVE UP ANY RIGHT TO CLAIM A DIVIDEND FOR PRIOR YEARS.

The SIF Defendants' use of the waiver argument was simply to illustrate plaintiffs' choice to continue purchasing their workers' compensation insurance from the SIF, which was also a choice to accept the SIF's decision not to distribute a dividend to plaintiffs. Nothing can diminish the fact that plaintiffs continue to subject themselves to the discretion of the SIF Defendants when they pay their annual premiums each year knowing that they may or may not receive a dividend.

The SIF Defendants acknowledge and are fully aware that this is not your typical breach of contract case under which the pure doctrine of waiver would apply. The SIF Defendants further argue that this is not a breach of contract case at all – it is a statutory violation case. That does not, however, prevent defendants from arguing by analogy and using doctrines that have parallel application. Plaintiffs could have decided to take their insurance business elsewhere,

which would have avoided a waiver situation and mitigated their damages. We now know that plaintiffs did not exercise that option, instead they kept returning to the SIF for their worker's compensation needs and kept incurring alleged damages along the way.

The SIF Defendants insured plaintiffs as they were expected to do under the policy of insurance. Plaintiffs expressed their satisfaction with the service the SIF was providing them by paying premiums the following years. Plaintiffs should not be allowed to now cry foul.

CONCLUSION

Plaintiffs wholly failed to respond to the SIF Defendants' abuse of discretion argument and their failure is a full concession on that point, which is a central argument in the SIF Defendants' Motion for Summary Judgment. On that basis alone, SIF Defendants' Motion for Summary Judgment must be granted.

Furthermore, plaintiffs have failed to adequately challenge the SIF Defendants' arguments on standing, statute of limitations, and waiver. Therefore, the SIF Defendants' Motion for Summary Judgment must be granted.

DATED this 28th day of March, 2007.

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

By _____
Richard E. Hall-Of the Firm
Keely E. Duke-Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of March, 2007, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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Richard E. Hall
Keely E. Duke

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 35144

RANDOLPH E. FARBER, SCOTT ALAN BECKER and CRITTER CLINIC, an Idaho professional association,

Plaintiffs-Appellants,

v.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, its manager, and WILLIAM DEAL, WAYNE MEYER, MARGUERITE MC LAUGHLIN, GERALD GEDDES, MILFORD TERRELL, JUDI DANIELSON, JOHN GOEDDE, ELAINE MARTIN, and MARK SNODGRASS in their capacity as members of the Board of Directors of the STATE INSURANCE FUND,

Defendants-Respondents.

Boise, February 2009 Term

2009 Opinion No. 31

Filed: March 5, 2009

Stephen W. Kenyon, Clerk

Appeal from the District Court of the Third Judicial District of the State of Idaho, Canyon County. The Honorable Thomas J. Ryan, District Judge.

The summary judgment is reversed and the case is remanded.

Lojek Law Offices, Chtd., and Gordon Law Offices, Boise, for appellants. Donald J. Lojek and Bruce S. Bistline argued.

Hall, Farley, Oberrecht & Blanton, P.A., Boise, for respondents. Richard E. Hall and Keely E. Duke argued.

J. JONES, Justice

This class action lawsuit arises out of a decision by the Idaho State Insurance Fund (the Fund) to distribute dividends pursuant to I.C. § 72-915 only to those policyholders who paid more than $2,500.00 in premiums. The Plaintiffs – those policyholders whose annual premiums

were $2,500.00 or less – sued the Fund, its Manager, and its Board of Directors[1] for damages and injunctive relief. Both parties moved for partial summary judgment regarding the interpretation of I.C. § 72-915. The district court denied the Plaintiffs' motion and granted the Fund's motion. We reverse and remand.

I.

The Fund was created in 1917 to provide worker's compensation insurance to Idaho employers, particularly those employers who could not otherwise obtain insurance from private carriers. *See* I.C. § 72-901. The Board of Directors sets the Fund's policies while the Manager conducts the Fund's day-to-day operations. I.C. §§ 72-901 & 902. Since the Fund's inception, the Manager has, on occasion, distributed a dividend to policyholders pursuant to I.C. § 72-915. This dividend is different from the dividend issued to stockholders of a corporation and is instead more aptly described as a refund of unused premium. *See id.* From at least 1982 until 2003, whenever the Manager decided to distribute a dividend it was distributed to all policyholders who had paid premiums for at least six months prior to the distribution.[2] The amount of dividend each policyholder received was determined based on the premium amount the policyholder paid. Beginning in 2003, however, the Manager decided to calculate the dividend by splitting the entire surplus between those few policyholders who paid more than $2,500.00 in annual premiums to the Fund.[3] This practice continued during the following years' distributions as well.

The Plaintiffs of this class action lawsuit are those Idaho employers who paid annual premiums of $2,500.00 or less to the Fund for worker's compensation insurance from the policy year beginning in 2001 onward. These class members comprise the majority of the Fund's policyholders.[4] Both parties moved for partial summary judgment regarding the proper interpretation of I.C. § 72-915. The Fund argued that the statute does not require the Manager to distribute dividends according to a set formula, but rather allows the Manager to exercise his discretion in determining how to distribute dividends amongst policyholders. The Plaintiffs conceded that the statute grants the Manager discretion in making the decision as to *whether* to

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[1] This opinion will refer to the defendants collectively as "the Fund."

[2] The Manager stated in an affidavit that large policyholders were paid a larger percentage dividend than small policyholders, based in part on the fact that "certain costs associated with writing a policy are essentially the same whether it be for $2,000 or $200,000 policy."

[3] The dividend distributed in 2003 was for the policy year beginning in 2001.

[4] The parties estimate that the class may be as large as 30,000 members and comprises at least seventy-five percent of all the Fund's policyholders.

distribute dividends, but argued that the statute prescribes *how* to distribute dividends once the Manager decides to make a distribution. The district court denied the Plaintiffs' motion for summary judgment, and instead granted the Fund's motion for partial summary judgment. It then certified the judgment for appeal pursuant to Idaho Rule of Civil Procedure 54(b).

The Plaintiffs appealed to this Court, reiterating their argument that the statute grants the Manager no discretion regarding how to distribute dividends amongst policyholders.

II.

A. Standard of Review

When reviewing an order for summary judgment, the standard of review for this Court is the same standard used by the district court in ruling on the motion. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). The Court exercises free review over the entire record that was before the district judge to determine whether either side was entitled to summary judgment. *Id.* Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho R. Civ. P. 56(c).

In order to resolve this appeal we must engage in statutory interpretation, which is an issue of law over which this Court exercises free review. *In re Daniel W.*, 145 Idaho 677, 679, 183 P.3d 765, 767 (2008). The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). Statutory interpretation begins with the literal language of the statute. *Paolini v. Albertson's, Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006). Provisions should not be read in isolation, but must be interpreted in the context of the entire document. *Westerburg v. Andrus*, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988). The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. *Id.* It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. *AmeriTel Inns, Inc. v. Pocatello-Chubbuck Auditorium Dist.*, 146 Idaho 202, 204, 192 P.3d 1026, 1028 (2008). When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction. *Payette River*, 132 Idaho at 557, 976 P.2d at 483. Therefore, the plain meaning of

a statute will prevail unless it leads to absurd results. *Driver v. SI Corp.*, 139 Idaho 423, 427, 80 P.3d 1024, 1028 (2003).

A statute is ambiguous when the language is capable of more than one reasonable interpretation. *Porter v. Bd. of Trustees*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). However, a statute may not be deemed ambiguous merely because parties present differing interpretations to the court. *Id.*

B. The Statute Unambiguously Requires the Manager to Distribute the Dividend According to the Formula Provided Therein

The Fund argues that I.C. § 72-915 is ambiguous and, when read together with other statutes and laws, the affidavit of the Manager, and holdings from sister states, it grants the Manager the discretion to distribute dividends however he sees fit. The Plaintiffs, on the other hand, argue that the statute unambiguously requires the Manager to distribute the dividend monies proportionately according to the amount of premium paid by each policyholder who meets the six-month longevity requirement and who falls within the classes of employment sharing in the dividends.

The statute in question reads:

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

I.C. § 72-915.

1. The District Court Erred in Finding the Statute Ambiguous

The district court found that the statute was ambiguous because, in the court's view, the statute could reasonably be interpreted three ways. In addition to the interpretation advanced by the Plaintiffs, the district court posited two alternate interpretations. First, the district court stated that the statute could be interpreted to mean that the Manager could distribute dividends only to the larger policyholders because they are the only ones "properly entitled" to receive a dividend. However, a careful reading of the statute does not support this rationale. The statute

reads "[the Manager] may in his discretion, credit to *each individual member* [a dividend]." I.C. § 72-915 (emphasis added). This language indicates that all members who meet the longevity requirement are entitled to receive a dividend. The district court's emphasis on the language "properly entitled" is misplaced, as that language relates to the requirement that the dividend be distributed pro rata "having regard to [the policyholder's] prior paid premiums." *See id.*

Second, the district court asserted that the statute could be interpreted to mean that each policyholder is entitled to a dividend, but that the dividend need not "be in direct proportion to the amount of premium the [policyholder] paid relative to the whole." Again, this interpretation is not supported by the plain language of the statute. Should a dividend be declared, the statute provides that each policyholder who has been a subscriber for at least six months prior shall be credited "such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums." I.C. § 72-915. The inclusion of the words "proportion" of the balance, and "having regard to" the policyholder's "prior paid premiums" can only mean that the distribution of dividends must be done on a pro rata basis. *Id.* The language is not ambiguous as to this requirement, and the district court erred in finding it ambiguous on these grounds.

Instead, the plain language of I.C. § 72-915 demonstrates that the statute grants the Manager discretion to distribute a dividend when "there is an aggregate balance remaining to the credit of any class of employment or industry" and the Manager deems that the aggregate balance "may be safely and properly divided." The Manager's discretion is therefore limited to the decision of whether or not to distribute a dividend in the first place. The remainder of the sentence sets forth the method by which dividends are to be distributed, requiring the Manager to "credit to each individual member of such class" who has been a policyholder for at least six months "such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates." *Id.* The phrase "any class of employment or industry," when read with other statutes related to worker's compensation insurance, refers to the class to which each policyholder belongs for purposes of determining the rate paid for worker's compensation coverage.[5] The statute contemplates dividing the aggregate balance

[5] The district court erroneously held that the word "or" rendered the phrase ambiguous. Originally the Manager divided different employments into classes and, after taking into consideration the hazards of the different classes, fixed the premium rates for each class. *See* I.C. § 72-913. However, in 1961, the Legislature set up a system in which every insurer that writes worker's compensation insurance in Idaho, including the Fund, must be a member of a ratings organization. I.C. § 41-1615. The ratings organization then establishes classes of employment or industry

proportionately according to the policyholder's *prior paid premiums* relative to all paid premiums. To argue that this language could be construed to somehow grant discretion regarding how to calculate the distribution makes no sense, and would require this Court to stretch the plain language beyond its obvious meaning. Finally, in 2002 the Idaho Legislature passed House Bill No. 511, an appropriations bill, which casts further doubt on the Fund's proposed interpretation of I.C. § 72-915. H.R. 511, 56th Leg., 2d Reg. Sess. (Idaho 2002). The bill provided that the Fund would distribute a specified amount to state agencies as policyholders, and that "[t]he balance of the dividends shall be credited to each individual agency proportionally in accordance with Section 72-915, Idaho Code." *Id.* This language demonstrates that in 2002, the Legislature viewed section 72-915 as requiring a pro rata distribution of dividends.

2. The Fund's Argument for Interpreting the Statute is Unpersuasive

In addition to relying on the district court's reasoning, as discussed above, the Fund argues that reading I.C. § 72-915 together with I.C. § 72-902 makes clear that the Manager has the discretion to determine how to distribute the dividend. Section 72-902 reads:

> The board of directors . . . shall appoint a manager of [the Fund], whose duties, subject to the direction and supervision of the board, shall be to conduct the business of [the 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 under the provisions of this chapter.

I.C. § 72-902. The Fund argues that the Manager's power to "do any and all things which are necessary and convenient" includes the discretion to determine how to distribute a dividend. The Fund also argues that I.C. § 72-901(3) provides that the Board has a duty "to direct the policies and operation of the [Fund] to assure that the [Fund is] run as an efficient insurance company, remains actuarially sound and maintains the public purposes for which the [Fund] was created." However, sections 72-901(3) and 902 are general statutes, while section 72-915 is a specific

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and fixes rates. I.C. § 41-1620. The effect of the later-enacted statute is that "[t]he powers granted to the [Manager of the Fund] under sections 72-903 and 72-913 . . . shall be subject to the provisions of this chapter." I.C. § 41-1618(1). Therefore, the Manager no longer has unfettered power to determine rates. *See; Id.* The ratings organization establishes different classes to which each policyholder is assigned to determine the rate for purchasing worker's compensation insurance. To illustrate the class system used by the current ratings organization, the following are examples of classes: "landscape gardening and drivers," "fruit packing," "printing," "bookbinding," "hotel: restaurant employees," and other classes that define specific classes of employment or industry. *See* Idaho State Insurance Fund, Rates, http://www.idahosif.org/Rates/rates.aspx (last visited March 3, 2009). Because there is no other possible meaning of the phrase "class of employment or industry" it is unambiguous.

statute. Therefore, the more specific statute controls. *See Shay v. Cesler*, 132 Idaho 585, 588, 977 P.2d 199, 202 (1999). As discussed above, section 72-915 sets forth a specific method for determining how the manager is to distribute dividends.

Because the statute is unambiguous, there is no need to consider the plethora of evidence and testimony provided by the Fund to support its argument that the Manager acted reasonably in choosing to distribute a dividend only to those policyholders who paid more than $2,500.00 in annual premiums. The arguments, evidence, and testimony provided to this Court would be better targeted at the Legislature, which is empowered to change existing law. No matter the number and persuasiveness of the Fund's arguments, this Court's role is to interpret the law, which in this case was unambiguously established in 1917. *See In re Permit No. 36-7200*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992) (stating that "[t]he wisdom, justice, policy, or expediency of a statute are questions for the Legislature alone") (citing *Berry v. Koehler*, 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962)). If, in the intervening time, it has become prudent to alter the statutory language related to the requirements for distribution of dividends, the proper remedy is to approach the Legislature to change the law.

C. The Fund's Interpretation of the Statute is not Entitled to Deference

The Fund argues, in the alternative, that even if the district court's reasons for granting it summary judgment are determined to be incorrect, this Court should affirm the judgment based on the principle of agency deference. An agency's interpretation of its enabling statutes is entitled to deference if a four-pronged test is satisfied. *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002); *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 857-59, 820 P.2d 1206, 1214-16 (1991). First, the agency must have been entrusted with the responsibility to administer the statute at issue. *Id.* Second, the agency's statutory construction must be reasonable. *Id.* Third, the court must determine that the statutory language at issue does not treat the precise issue. *Id.* Fourth, the court must ask whether any of the rationales underlying the rule of deference are present.[6] *Id.* If the test is met,

[6] The rationales include: (1) public groups' reliance on the agency's interpretation over a period of time; (2) the agency's interpretation represents a "practical" interpretation of the statute; (3) the Legislature is charged with knowledge of how its statutes are interpreted, and thus when it does not alter the statute, it presumably sanctions the agency's interpretation; (4) the agency's interpretation is entitled to additional weight when it is formulated contemporaneously with the passage of the statute at issue; and (5) courts should recognize and defer to the agency's expertise. *J.R. Simplot Co.*, 120 Idaho at 857-59, 820 P.2d at 1214-16.

the court must give "considerable weight" to the agency's interpretation. *Id.* Without considering the first and fourth prongs, we hold that the second and third prongs are not met, and therefore no agency deference is warranted.

The Fund argues that the second prong is met because its Manager testified that the Fund's practice conformed to industry practice and was consistent with the goal of running the Fund as an efficient insurance business. The Fund further asserts its position is similar to those held by sister states, which is evidence of its reasonableness. *See Cantry v. Idaho State Tax Comm'n*, 138 Idaho 178, 59 P.3d 983 (2002). However, the sister states that the Fund emphasizes do not have statutes that are comparable to Idaho's statute. Montana specifically allows the board of its state insurance fund to "set a minimum [premium] amount below which a dividend shall not be payable to an individual policyholder." MONT. ADMIN. R. 2.55.502 (2006). Similarly, North Dakota has a rule that specifies that small accounts are ineligible for dividend payments. *See* N.D. ADMIN. CODE § 92-01-02-55 (2005). Therefore, no reason exists to compare Idaho's statute authorizing dividends to the markedly different statutes of Montana and North Dakota.

As to the third prong, the Fund asserts that because the statute is ambiguous, the issue of how to distribute dividends is not precisely treated. Based on the above discussion, noting that the statute unambiguously requires the Manager to distribute a dividend pro rata to all policyholders should he decide in his discretion to distribute any dividend, the issue at hand has been precisely treated.

Since the second and third prongs are not met, the Fund has not shown that its interpretation of I.C. § 72-915 is entitled to deference.

III.

The district court's order granting summary judgment to the Fund is reversed and the case is remanded for further proceedings. Costs are awarded to Appellants.

Justices BURDICK, W. JONES, and HORTON, and Justice Pro Tem KIDWELL CONCUR.

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Opinion entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 3/5/09

STEPHEN W. KENYON
Clerk

By: Deputy

CV06-07877

IN THE SUPREME COURT OF THE STATE OF IDAHO

FILED A.M. 1:20 P.M.

MAY 06 2009

CANYON COUNTY CLERK
T RANDALL, DEPUTY

Docket No. 35144

RANDOLPH E. FARBER, SCOTT ALAN BECKER and CRITTER CLINIC, an Idaho professional association,

Plaintiffs-Appellants,

v.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, its manager, and WILLIAM DEAL, WAYNE MEYER, MARGUERITE MC LAUGHLIN, GERALD GEDDES, MILFORD TERRELL, JUDI DANIELSON, JOHN GOEDDE, ELAINE MARTIN, and MARK SNODGRASS in their capacity as members of the Board of Directors of the STATE INSURANCE FUND,

Defendants-Respondents.

Boise, February 2009 Term

2009 Opinion No. 66

Filed: May 5, 2009

Stephen W. Kenyon, Clerk

SUBSTITUTE OPINION. THE COURT'S PRIOR OPINION DATED MARCH 5, 2009, IS HEREBY WITHDRAWN

Appeal from the District Court of the Third Judicial District of the State of Idaho, Canyon County. The Honorable Thomas J. Ryan, District Judge.

The summary judgment is reversed and the case is remanded.

Lojek Law Offices, Chtd., and Gordon Law Offices, Boise, for appellants. Donald J. Lojek and Bruce S. Bistline argued.

Hall, Farley, Oberrecht & Blanton, P.A., Boise, for respondents. Richard E. Hall and Keely E. Duke argued.

J. JONES, Justice

This class action lawsuit arises out of a decision by the Idaho State Insurance Fund (the Fund) to distribute dividends pursuant to I.C. § 72-915 only to those policyholders who paid more than $2,500.00 in premiums. The Plaintiffs – those policyholders whose annual premiums

were $2,500.00 or less – sued the Fund, its Manager, and its Board of Directors[1] for damages and injunctive relief. Both parties moved for partial summary judgment regarding the interpretation of I.C. § 72-915. The district court denied the Plaintiffs' motion and granted the Fund's motion. We reverse and remand.

I.

The Fund was created in 1917 to provide worker's compensation insurance to Idaho employers, particularly those employers who could not otherwise obtain insurance from private carriers. *See* I.C. § 72-901. The Board of Directors sets the Fund's policies while the Manager conducts the Fund's day-to-day operations. I.C. §§ 72-901 & 902. Since the Fund's inception, the Manager has, on occasion, distributed a dividend to policyholders pursuant to I.C. § 72-915. This dividend is different from the dividend issued to stockholders of a corporation and is instead a refund based upon a rate readjustment. From at least 1982 until 2003, whenever the Manager decided to distribute a dividend it was distributed to all policyholders who had paid premiums for at least six months prior to the distribution.[2] The amount of dividend each policyholder received was determined based on the premium amount the policyholder paid. Beginning in 2003, however, the Manager decided to calculate the dividend by splitting the entire surplus between those few policyholders who paid more than $2,500.00 in annual premiums to the Fund.[3] This practice continued during the following years' distributions as well.

The Plaintiffs of this class action lawsuit are those Idaho employers who paid annual premiums of $2,500.00 or less to the Fund for worker's compensation insurance from the policy year beginning in 2001 onward. These class members comprise the majority of the Fund's policyholders.[4] Both parties moved for partial summary judgment regarding the proper interpretation of I.C. § 72-915. The Fund argued that the statute does not require the Manager to distribute dividends according to a set formula, but rather allows the Manager to exercise his discretion in determining how to distribute dividends amongst policyholders. The Plaintiffs conceded that the statute grants the Manager discretion in making the decision as to *whether* to

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[1] This opinion will refer to the defendants collectively as "the Fund."

[2] The Manager stated in an affidavit that large policyholders were paid a larger percentage dividend than small policyholders, based in part on the fact that "certain costs associated with writing a policy are essentially the same whether it be for $2,000 or $200,000 policy."

[3] The dividend distributed in 2003 was for the policy year beginning in 2001.

[4] The parties estimate that the class may be as large as 30,000 members and comprises at least seventy-five percent of all the Fund's policyholders.

distribute dividends, but argued that the statute prescribes *how* to distribute dividends once the Manager decides to make a distribution. The district court denied the Plaintiffs' motion for summary judgment, and instead granted the Fund's motion for partial summary judgment. It then certified the judgment for appeal pursuant to Idaho Rule of Civil Procedure 54(b).

The Plaintiffs appealed to this Court, reiterating their argument that the statute grants the Manager no discretion regarding how to distribute dividends amongst policyholders.

II.

A. Standard of Review

When reviewing an order for summary judgment, the standard of review for this Court is the same standard used by the district court in ruling on the motion. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). The Court exercises free review over the entire record that was before the district judge to determine whether either side was entitled to summary judgment. *Id.* Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho R. Civ. P. 56(c).

In order to resolve this appeal we must engage in statutory interpretation, which is an issue of law over which this Court exercises free review. *In re Daniel W.*, 145 Idaho 677, 679, 183 P.3d 765, 767 (2008). The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). Statutory interpretation begins with the literal language of the statute. *Paolini v. Albertson's, Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006). Provisions should not be read in isolation, but must be interpreted in the context of the entire document. *Westerburg v. Andrus*, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988). The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. *Id.* It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. *AmeriTel Inns, Inc. v. Pocatello-Chubbuck Auditorium Dist.*, 146 Idaho 202, 204, 192 P.3d 1026, 1028 (2008). When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction. *Payette River*, 132 Idaho at 557, 976 P.2d at 483. Therefore, the plain meaning of

a statute will prevail unless it leads to absurd results. *Driver v. SI Corp.*, 139 Idaho 423, 427, 80 P.3d 1024, 1028 (2003).

A statute is ambiguous when the language is capable of more than one reasonable interpretation. *Porter v. Bd. of Trustees*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). However, a statute may not be deemed ambiguous merely because parties present differing interpretations to the court. *Id.*

B. The Statute Unambiguously Requires the Manager to Distribute the Dividend According to the Formula Provided Therein

The Fund argues that I.C. § 72-915 is ambiguous and, when read together with other statutes and laws, the affidavit of the Manager, and holdings from sister states, it grants the Manager the discretion to distribute dividends however he sees fit. The Plaintiffs, on the other hand, argue that the statute unambiguously requires the Manager to distribute the dividend monies proportionately according to the amount of premium paid by each policyholder who meets the six-month longevity requirement and who falls within the classes of employment sharing in the dividends.

The statute in question reads:

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

I.C. § 72-915.

1. The District Court Erred in Finding the Statute Ambiguous

The district court found that the statute was ambiguous because, in the court's view, the statute could reasonably be interpreted three ways. In addition to the interpretation advanced by the Plaintiffs, the district court posited two alternate interpretations. First, the district court stated that the statute could be interpreted to mean that the Manager could distribute dividends only to the larger policyholders because they are the only ones "properly entitled" to receive a dividend. However, a careful reading of the statute does not support this conclusion. The statute

reads "[the Manager] may in his discretion, credit to *each individual member* [a dividend]." I.C. § 72-915 (emphasis added). This language indicates that all members who meet the longevity requirement are entitled to receive a dividend. The district court's emphasis on the language "properly entitled" is misplaced, as that language relates to the requirement that the dividend be distributed pro rata "having regard to [the policyholder's] prior paid premiums." *See id.*

Second, the district court asserted that the statute could be interpreted to mean that each policyholder is entitled to a dividend, but that the dividend need not "be in direct proportion to the amount of premium the [policyholder] paid relative to the whole." Again, this interpretation is not supported by the plain language of the statute. Should a dividend be declared, the statute provides that each policyholder who has been a subscriber for at least six months prior shall be credited "such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums." I.C. § 72-915. The inclusion of the words "proportion" of the balance, and "having regard to" the policyholder's "prior paid premiums" can only mean that the distribution of dividends must be done on a pro rata basis. *Id.* The language is not ambiguous as to this requirement, and the district court erred in finding it ambiguous on these grounds.

Instead, the plain language of I.C. § 72-915 demonstrates that the statute grants the Manager discretion to distribute a dividend when "there is an aggregate balance remaining to the credit of any class of employment or industry" and the Manager deems that the aggregate balance "may be safely and properly divided." The Manager's discretion is therefore limited to the decision of whether or not to distribute a dividend in the first place. The remainder of the sentence sets forth the method by which dividends are to be distributed, requiring the Manager to "credit to each individual member of such class" who has been a policyholder for at least six months "such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates." *Id.* The phrase "any class of employment or industry," when read with other statutes related to worker's compensation insurance, refers to the class to which each policyholder belongs for purposes of determining the rate paid for worker's compensation coverage.[5] The statute contemplates dividing the aggregate balance

[5] The district court erroneously held that the word "or" rendered the phrase ambiguous. Originally the Manager divided different employments into classes and, after taking into consideration the hazards of the different classes, fixed the premium rates for each class. *See* I.C. § 72-913. However, in 1961, the Legislature set up a system in which every insurer that writes worker's compensation insurance in Idaho, including the Fund, must be a member of a ratings organization. I.C. § 41-1615. The ratings organization then establishes classes of employment or industry

proportionately according to the policyholder's *prior paid premiums* relative to all paid premiums. To argue that this language could be construed to somehow grant discretion regarding how to calculate the distribution makes no sense, and would require this Court to stretch the plain language beyond its obvious meaning. Finally, in 2002 the Idaho Legislature passed House Bill No. 511, an appropriations bill, which casts further doubt on the Fund's proposed interpretation of I.C. § 72-915. H.R. 511, 56th Leg., 2d Reg. Sess. (Idaho 2002). The bill provided that the Fund would distribute a specified amount to state agencies as policyholders, and that "[t]he balance of the dividends shall be credited to each individual agency proportionally in accordance with Section 72-915, Idaho Code." *Id.* This language demonstrates that in 2002, the Legislature viewed section 72-915 as requiring a pro rata distribution of dividends.

2. The Fund's Argument for Interpreting the Statute is Unpersuasive

In addition to relying on the district court's reasoning, as discussed above, the Fund argues that reading I.C. § 72-915 together with I.C. § 72-902 makes clear that the Manager has the discretion to determine how to distribute the dividend. Section 72-902 reads:

> The board of directors . . . shall appoint a manager of [the Fund], whose duties, subject to the direction and supervision of the board, shall be to conduct the business of [the 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 under the provisions of this chapter.

I.C. § 72-902. The Fund argues that the Manager's power to "do any and all things which are necessary and convenient" includes the discretion to determine how to distribute a dividend. The Fund also argues that I.C. § 72-901(3) provides that the Board has a duty "to direct the policies and operation of the [Fund] to assure that the [Fund is] run as an efficient insurance company, remains actuarially sound and maintains the public purposes for which the [Fund] was created." However, sections 72-901(3) and 902 are general statutes, while section 72-915 is a specific

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statute. Therefore, the more specific statute controls. *See Shay v. Cesler*, 132 Idaho 585, 588, 977 P.2d 199, 202 (1999). As discussed above, section 72-915 sets forth a specific method for determining how the manager is to distribute dividends.

Because the statute is unambiguous, there is no need to consider the plethora of evidence and testimony provided by the Fund to support its argument that the Manager acted reasonably in choosing to distribute a dividend only to those policyholders who paid more than $2,500.00 in annual premiums. The arguments, evidence, and testimony provided to this Court would be better targeted at the Legislature, which is empowered to change existing law. No matter the number and persuasiveness of the Fund's arguments, this Court's role is to interpret the law, which in this case was unambiguously established in 1917. *See In re Permit No. 36-7200*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992) (stating that "[t]he wisdom, justice, policy, or expediency of a statute are questions for the Legislature alone") (citing *Berry v. Koehler*, 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962)). If, in the intervening time, it has become prudent to alter the statutory language related to the requirements for distribution of dividends, the proper remedy is to approach the Legislature to change the law.

C. The Fund's Interpretation of the Statute is not Entitled to Deference

The Fund argues, in the alternative, that even if the district court's reasons for granting it summary judgment are determined to be incorrect, this Court should affirm the judgment based on the principle of agency deference. An agency's interpretation of its enabling statutes is entitled to deference if a four-pronged test is satisfied. *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002); *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 857-59, 820 P.2d 1206, 1214-16 (1991). First, the agency must have been entrusted with the responsibility to administer the statute at issue. *Id.* Second, the agency's statutory construction must be reasonable. *Id.* Third, the court must determine that the statutory language at issue does not treat the precise issue. *Id.* Fourth, the court must ask whether any of the rationales underlying the rule of deference are present.[6] *Id.* If the test is met,

[6] The rationales include: (1) public groups' reliance on the agency's interpretation over a period of time; (2) the agency's interpretation represents a "practical" interpretation of the statute; (3) the Legislature is charged with knowledge of how its statutes are interpreted, and thus when it does not alter the statute, it presumably sanctions the agency's interpretation; (4) the agency's interpretation is entitled to additional weight when it is formulated contemporaneously with the passage of the statute at issue; and (5) courts should recognize and defer to the agency's expertise. *J.R. Simplot Co.*, 120 Idaho at 857-59, 820 P.2d at 1214-16.

the court must give "considerable weight" to the agency's interpretation. *Id.* Without considering the first and fourth prongs, we hold that the second and third prongs are not met, and therefore no agency deference is warranted.

The Fund argues that the second prong is met because its Manager testified that the Fund's practice conformed to industry practice and was consistent with the goal of running the Fund as an efficient insurance business. The Fund further asserts its position is similar to those held by sister states, which is evidence of its reasonableness. *See Cantry v. Idaho State Tax Comm'n*, 138 Idaho 178, 59 P.3d 983 (2002). However, the sister states that the Fund emphasizes do not have statutes that are comparable to Idaho's statute. Montana specifically allows the board of its state insurance fund to "set a minimum [premium] amount below which a dividend shall not be payable to an individual policyholder." MONT. ADMIN. R. 2.55.502 (2006). Similarly, North Dakota has a rule that specifies that small accounts are ineligible for dividend payments. *See* N.D. ADMIN. CODE § 92-01-02-55 (2005). Therefore, no reason exists to compare Idaho's statute authorizing dividends to the markedly different statutes of Montana and North Dakota.

As to the third prong, the Fund asserts that because I.C. § 72-915 is ambiguous, the issue of how to distribute dividends is not precisely treated. However, we have determined otherwise. The language of the statute unambiguously provides the manner in which any declared dividend is to be distributed. Furthermore, no language in I.C. § 72-915 permits the imposition of an arbitrary $2,500 premium-payment threshold for entitlement to a dividend.

Since the second and third prongs are not met, the Fund has not shown that its interpretation of I.C. § 72-915 is entitled to deference.[7]

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[7] It might be observed that, as a general proposition, an agency has a more difficult task arguing for deference to its interpretation of a statute when the agency's interpretation of the statute has changed without a change in the statute. I.C. § 72-915 has not been amended since 1941. The $2,500 premium-payment threshold was not imposed by the Fund until 2003. No such threshold existed between 1917, when I.C. § 72-915 was enacted, and 2003, when the $2,500 threshold was adopted. While the Fund argues strenuously for its current interpretation, the Plaintiffs could argue just as strenuously for the Fund's pre-2003 interpretation of I.C. § 72-915 – an interpretation of much longer standing.

III.

The district court's order granting summary judgment to the Fund is reversed and the case is remanded for further proceedings. Costs are awarded to Appellants.

Justices BURDICK and HORTON, and Justice Pro Tem KIDWELL CONCUR.

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Opinion entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 5/15/09

STEPHEN W. KENYON Clerk

By: Sue Thomas Deputy

CV06-07877

In the Supreme Court of the State of Idaho

FILED
A.M. 1:30 P.M.

JUN 04 2009

CANYON COUNTY CLERK
T RANDALL, DEPUTY

RANDOLPH E. FARBER, SCOTT ALAN BECKER and CRITTER CLINIC, an Idaho professional association,

Plaintiffs-Appellants,

v.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, its manager, and WILLIAM DEAL, WAYNE MEYER, MARGUERITE MC LAUGHLIN, GERALD GEDDES, MILFORD TERRELL, JUDI DANIELSON, JOHN GOEDDE, ELAINE MARTIN, and MARK SNODGRASS in their capacity as members of the Board of Directors of the STATE INSURANCE FUND,

Defendants-Respondents.

REMITTITUR

Supreme Court Docket No. 35144-2008
Canyon County District Court #06-7877

TO: THIRD JUDICIAL DISTRICT, COUNTY OF CANYON.

The Court having announced its Opinion in this cause March 5, 2009, which was withdrawn May 5, 2009, and having announced its Substitute Opinion May 5, 2009, and having denied Respondent's Petition for Rehearing on May 12, 2009; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Substitute Opinion, if any action is required; and,

IT FURTHER IS HEREBY ORDERED that Appellants' memorandum of costs on appeal filed March 16, 2009 in the amount of $651.00 be and hereby is allowed.

DATED this 27th day of May, 2009.

Stephen Kenyon
Clerk of the Supreme Court
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RANDOLPH E. FARBER, SCOTT ALAN BECKER and CRITTER CLINIC, an Idaho Professional Association, Plaintiffs, -vs- THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, its Manager, and WILLIAM DEAL, WAYNE MEYER, MARGUARITE 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.	Case No. CV 2006-7877*C MEMORANDUM DECISION UPON PLAINTIFFS' REVISED SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

On July 16, 2009, the plaintiffs filed a renewed request to the Court asking that partial summary judgment be entered upon their revised second motion. Specifically, they seek a holding as a matter of law that:

1. I.C. §72-915 clearly and unambiguously expresses a legislative intent relative to the calculus to be employed for allocation of any amount which the manager, in his discretion, determines should be distributed as dividend;
2. That the legislature intended by the language that it used in I.C. §72-915 to provide that, after excluding policyholders who do not meet the longevity requirement and who are not within the classes of employment sharing in the dividend, any dividend which was declared must be distributed among all remaining policyholders in direct proportion to the amount of premium each paid in the dividend period.

In its opinion filed May 5, 2009, the Idaho Supreme Court did specifically find that "section 72-915 sets forth a specific method for determining how the manager is to distribute dividends." *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 208 P.3d 289, 295 (2009).

Further, the opinion set forth that "the Legislature viewed section 72-915 as requiring a pro rata distribution of dividends." *Farber*, 208 P.3d at 294. That is "[T]he statute contemplates dividing the aggregate balance *proportionately* according to the policyholder's *prior paid premiums* relative to all paid premiums." *Id.* Finally, the Idaho Supreme Court stated, "[T]he inclusion of the words 'proportion' of the balance, and 'having regard to' the policyholder's 'prior paid premiums' can only mean that the distribution of dividends must be done on a pro rata basis." *Farber*, 208 P.3d at 293.

The plaintiffs argue that the Idaho Supreme Court established that once the manager declared a dividend, the distribution of the dividend to policyholders shall be in direct proportion to the amount of premium each paid in the dividend period.

The defendants argue that once each policyholder's account is given credit for it's pro rata share of the declared dividend, then the SIF should be able to evaluate each account to determine what amount each policyholder is properly entitled to by taking into account the losses and expenses.

This Court disagrees with SIF's interpretation that it has the ability to go beyond a simple pro rata distribution of the dividend based upon premiums paid. In so finding, this Court refers to the language of the Idaho Supreme Court which stated that "[T]he Manager's discretion is therefore limited to the decision of whether or not to distribute a dividend in the first place." *Farber*, 208 P.3d at 294. Also, the language that the "statute contemplates dividing the aggregate balance *proportionately* according to the policyholder's *prior paid premiums* relative to all paid premiums." *Id.*

Thus, the proper method of calculation is as set forth in subsection "B" entitled "The Applicable Formula Governing the Pro Rata Dividend" contained in pages 4 through 9 of the Supplemental Memorandum in Opposition to Plaintiffs' Motion to Renew Plaintiffs' Revised Second Motion for Partial Summary Judgment, or In the Alternative, Defendants' Motion for Summary Judgment.

DATED this 4th day of November, 2009.

Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Decision Upon Plaintiffs' Revised Second Motion for Partial Summary Judgment was forwarded to the following persons via U.S. Mail, postage prepaid, on this 14 day of November, 2009.

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Attorneys for Plaintiffs and the Class

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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

Plaintiffs,

vs.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, its Manager, and WILLIAM DEAL, WAYNE MEYER, MARGUARITE 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.

CASE NO. CV06-7877

MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, FOR BIFURCATION OF CLASS

COME NOW the Plaintiffs and the Class they represent, by and through their

undersigned counsel of record, and respectfully move the Court for a reconsideration of the Order entered by Judge James Morfitt dated April 30, 2007.

The Plaintiffs and the class they represent maintain that a five-year rather than a three-year statute of limitation should apply in this case from the date of the filing of the Complaint.

This motion is brought pursuant to Rules 11(a)(2) and 54(b), Idaho Rules of Civil Procedure and is supported by a Memorandum of even date and the Affidavit of Donald W. Lojek, both filed contemporaneously herewith.

Alternatively, the Plaintiffs and the Class they represent move for a bifurcation of the certified Class into two sub-classes. The first class would be composed of those employers who purchased a policy of insurance with the State Insurance Fund on or after July 1, 1999 and before July 1, 2001, who paid annual premium for such insurance to the SIF which was not more than $2,500 for one or more policy years beginning on or after July 1, 1999 and before July 1, 2001, and who did not receive a dividend from the SIF relating to those two years (Sub-Class #1).

The second class would be composed of those employers who purchased a policy for worker's compensation insurance from the SIF on or after July 1, 2001, paid an annual premium for such insurance to the SIF which was not more than $2,500 for one or more policy years beginning on or after July 1, 2001, and did not receive a dividend since July 22, 2003, from the SIF during any respective subsequent year that dividends were paid to other policyholders (Sub-Class #2).

RESPECTFULLY SUBMITTED this 4th day of ~~November~~ December, 2009.

LOJEK LAW OFFICES, CHTD.

By _____
Donald W. Lojek

GORDON LAW OFFICES

By _____
Bruce S. Bistline

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of ~~November~~ December, 2009, a true and correct copy of the foregoing instrument was served on the following by the method indicated below, and addressed as follows:

[X] Hand Delivery
[ ] U.S. Mail, postage paid
[ ] Overnight Express Mail
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Attorney for State Insurance Fund

_____
Donald W. Lojek