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Farber v. Idaho State Ins. Fund Respondent's Brief Dckt. 38140

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

Docket No. 38140

(Canyon County Case No. CV06-7877)

APPELLEES' RESPONSE BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho, In and for the County of Canyon, Honorable Thomas J. Ryan, District Judge, Presiding

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal is the second appeal in the above-entitled District Court action. Whereas the prior appeal in this matter involved the statutory construction of Idaho Code § 72-915 and its effect on how appellees (collectively "SIF") determined how it was to distribute a dividend to policyholders each year, this current appeal instead addresses the applicable statute of limitations for claims made by policyholders for dividend payments under Idaho Code § 72-915. The District Court in the underlying action ruled that a 3-year statute of limitation under Idaho Code § 5-218[1] was applicable, applying this Court's decision in Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho 388, 111 P.3d 73 (2005) ("Hayden Lake"), because the gravamen of appellants' (collectively "Farber") claims are based on a statute, not a written contract. In doing so, the District Court rejected Farber's argument that a longer, 5-year written contract statute of limitation under Idaho Code § 5-216[2] applied. By doing so, the District Court ruled that Farber's claims for damages related to dividends paid out in regard to the July 1, 1999 to June 30, 2000 and July 1, 2000 to June 30, 2001 policy periods were time-barred.

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[1] In particular, Idaho Code § 5-218 requires that "[a]n action upon a liability created by statute, other than a penalty or forfeiture" be brought "[w]ithin three (3) years."

[2] In particular, Idaho Code § 5-216 requires that "[a]n action upon any contract, obligation or liability founded upon an instrument in writing" be brought "[w]ithin five (5) years."

Farber now seeks appeal from the original April 30, 2007, decision of the District Court granting summary judgment to SIF in ruling that Farber's claims were limited by a 3-year statute of limitation, and the subsequent March 25, 2010 decision denying Farber's motion for reconsideration on the same question.

B. Course of the Proceedings

SIF does not identify any additional proceedings beyond those identified by Farber.

C. Concise Statement of the Facts

This matter has previously been appealed to this Court, *see* Farber, et al. v. Idaho State Insurance Fund, 147 Idaho 307, 208 P.3d 289 (2009) ("Farber I"), and as such a lengthy recitation of the facts underlying the parties' disagreement as to the interpretation of Idaho Code § 72-915 is unnecessary, as such is summarized in Farber I. *See* 147 Idaho at 309-10. Instead, facts relevant to the statute of limitation question in this action are identified as follows.

Farber's original Class Action Complaint and Demand for Jury Trial was filed on July 21, 2006. ("Complaint") (R.-35144, 8-26.)[3] The Complaint asserted three causes of action: Declaratory Relief – Payment of Dividends, Declaratory Relief – Injunction, and Damages, all of which were predicated on a statutory claim that Idaho Code § 72-915 "does not provide the Manager any authority whatsoever to distinguish among subscribers or to pay dividends based

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[3] As previously ordered by this Court in its Order Augmented Appeal filed October 14, 2010, "the Appeal Record in this case shall be AUGMENTED to include the Reporter's Transcript and Clerk's Record filed in prior appeal No. 35144." For sake of clarity, citations to the Clerk's Record in the prior appeal are denoted as "R.-35144," whereas citations to documents in the Clerk's Record submitted in this appeal shall simply be denoted by "R."

upon whether a subscriber has paid some threshold amount of annual premium," such that the Manager could not refuse to pay pro rata dividends to policyholders who had paid annual premiums of $2,500 or less. (R.-35144, 12-13.) The Complaint sought recovery of "damages in an amount equal to the dividends which they should have had paid or credited to them during each of the five years preceding the filing of the Complaint for or in respect to which the Fund issued dividends to some but not all subscribers." (R.-35144, 10.) The Complaint specifically defined the "class period" at issue as "the five years immediately proceeding [sic] the filing of this complaint and potentially for some time following the filing of this complaint[.]" (R.-35144, 13.) Accordingly, Farber initially sought dividends for the following years:[4]

Dividend Period	**Dividend Declaration**	**Dividend Paid**
7/1/99-06/30/00	Prior to 7/21/03	Prior to 7/21/03
7/1/00-6/30/01	Prior to 7/21/03	Prior to 7/21/03
7/1/01-6/30/02	Dec. 2003	Jan. 2004
7/1/02-6/30/03	Dec. 2004	Jan. 2005
7/1/03-6/30/04	Dec. 2005	Jan. 2006[5]

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[4] As Farber notes, dividends are declared and distributed approximately 18 months after conclusion of the policy period. (Appellants' Brief at p.4, n.1.)(R. at 250.) Thus, of these original policy periods at issue, while a majority of these policy periods may appear on their face to be barred by the 3-year statute of limitation, in actuality only the July 1, 1999 to June 30, 2000 and July 1, 2000 to June 30, 2001 are at issue in regard to the statute of limitation question. (R. at 289-90.)

[5] By the conclusion of litigation, three additional periods had been added: 7/1/04-6/30/05, 7/1/05-6/30/06, 7/1/06-6/30/07. (R. at 250 & 288.)

SIF subsequently filed a Motion for Summary Judgment on February 13, 2007 on various grounds, including a request for ruling on the applicable statute of limitation, which SIF contended was three years, rather than the five years, because the gravamen of Farber's claims was statutory. (*See generally,* R. 16-99.) Following briefing by Farber, the District Court held a summary judgment hearing on April 6, 2007. (*See generally,* Tr. 4/6/07.) At hearing and following argument, the District Court granted summary judgment to SIF on the statute of limitation question:

> THE COURT: Okay. Thank you. Let's talk first about the statute of limitation issue. The determination of the applicable statute of limitation is a question of law and for determination by the court.
>
> I have read Hayden Lake and Kelso, and it's certainly easy to see why there is perhaps some room for confusion, but I think the Hayden Lake decision makes it clear that if the true gravamen of the plaintiffs' claim is a violation of statute that the statute of limitations for statutory violations is applicable and not the contract violation.
>
> So I determine and find that the statute of limitations that is applicable to this action is the three-year statute of limitation for statutory violations, and I will grant partial summary judgment to the defendants on that particular issue.
>
> And, Ms. Duke, could you prepare that, please.

(Tr. 4/6/07, ll. 34:21-35:14.)

The Court thereafter issued its Order Granting Defendants' Motion for Summary Judgment on the Issue of Statute of Limitation, filed April 30, 2007, stating that: "Plaintiffs' claims and causes of action accruing prior to July 21, 2003, are TIME-BARRED, based upon

the applicable statute of limitation for statutory violations." (R.-35144, 43-45.)[6]

Thereafter, on July 10, 2007, Farber filed his First Amended Class Action Complaint and Demand for Jury Trial, redefining the class and dividend periods at issue, but otherwise leaving unchanged the asserted causes of action and allegations in support thereof. (*See generally* R.-35144, 46-64.) SIF again sought summary judgment as to the construction of the dividend statute at issue, Idaho Code § 72-915, which the District Court granted to SIF on December 26, 2007 in its Memorandum Decision Upon Motions for Summary Judgment. (R.-35144, 79-91, *amended by* Amendment to the Court's Memorandum Decision upon Motions for Summary Judgment, filed February 15, 2008, R.-35144, 96-98.)

The matter was then appealed to this Court, which issued its initial decision reversing the District Court's grant of summary judgment on March 5, 2009, and remanding the matter for further proceedings. *See* Farber, et al. v. Idaho State Insurance Fund, 2009 WL 539960 (Idaho, March 5, 2009) (R. 141-148). During the reconsideration process before this Court, the Idaho Legislature voted for an emergency repeal of Idaho Code § 72-915 on April 29, 2009, as S.L. 2009, ch. 294, § 2, thereafter signed by the Governor on May 6, 2009.[7]

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[6] Farber mistakenly contends that "On April 30th of that year, Judge Morfitt ruled without any detailed explanation that 'Plaintiffs' claims and causes of action arising prior to July 21, 2003 are time-barred based upon the applicable statute of limitation for statutory violations.'" (Appellants' Brief at 5.) In doing so, Farber forgets the April 6, 2007 ruling from the bench issued by Judge Morfitt. Farber's implication that Judge Morfitt failed to explain the basis for his ruling should be rejected by this Court in light of the transcript of the April 6, 2007 hearing.

[7] Information regarding the repeal bill, S.B. 1166a, can be found on the Idaho State Legislature website at http://legislature.idaho.gov/legislation/2009/S1166.htm.

This Court issued the Farber I decision on May 5, 2009, holding that Idaho Code § 72-915 was unambiguous and that "the distribution of dividends must be done on a pro rata basis." Farber I, 147 Idaho at 311. (R. 149-157.) SIF's requested reconsideration was denied by this Court on May 12, 2009, and Remittitur issued on May 27, 2009. (R. 158.)

On remand, Farber sought reconsideration of the District Court's summary judgment ruling via his Motion for Reconsideration or, Alternatively, for Bifurcation of Class, filed December 4, 2009. (R. 163-65.) Following briefing, hearing on the motion was held before Judge Morfitt on February 26, 2010. (*See generally* Tr. 2/26/10.) Thereafter, the District Court issued its Memorandum Decision and Order Upon Plaintiffs' Motion for Reconsideration, filed March 25, 2010, denying Farber's request for reconsideration of the Court's 3-year statute of limitation ruling. (R. 267-275.) In rejecting Farber's arguments, the District Court concluded:

> The Plaintiffs['] argument that a 5-year statute of limitations is appropriate because the contract incorporates the statute and but for the contract, the statute would be inapplicable is not supported by the Supreme Court's holding in *Hayden Lake*. *Kelso* supports Plaintiffs' argument that the statute is incorporated into the contracts. However, *Hayden Lake* sets the applicable statute of limitations for such claims. Plaintiffs have filed a class action lawsuit premised on SIF's failure to distribute dividends in accordance with I.C. § 72-915. Count I of the 1st Amended Complaint seeks declaratory relief – payment of dividends; Count II seeks declaratory relief – injunction, and Count III seeks damages. To the extent that Plaintiffs cast this action as one for breach of cont[r]act, the Plaintiffs' contracts with the SIF incorporate the statute. However, but for the statute, the Plaintiffs would not be entitled to dividends per I.C. § 72-915. Therefore, the gravamen of Plaintiffs' claims is the violation of I.C. § 72-915 and a 3-year statute of limitations applies to Plaintiffs' claims.

(R. 273.) Following resolution of the remainder of the litigation, Farber filed his appeal on this issue on October 7, 2010. (R. 309-314.)

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

SIF does not identify any additional issues on appeal.

III. ATTORNEY FEES ON APPEAL

SIF does not seek fees on appeal in this matter, but requests an award of costs should it prevail, pursuant to I.A.R. 40.

IV. SUMMARY OF ARGUMENT

There should be no confusion that Farber seeks to have this Court overrule its prior decision in Hayden Lake, despite Farber's efforts to bury discussion of the case later in his brief-in-chief. *See* Appellants' Brief at 10. Farber's arguments that this Court must choose a longer statute of limitation, and that the actual gravamen of the dispute is contractual in nature, ring hollow and are unsupported by Farber's Complaint and Idaho law.

The issue posed by this appeal – whether Farber's claims, the gravamen of which assert that SIF violated the dividend payment provisions of the now-repealed Idaho Code § 72-915 – has already been resolved by the Hayden Lake decision, which plainly held that the 3-year statute of limitation governs claims "**when a contract incorporates a statute and the allegations stem from violations of those statutes.**" 141 Idaho at 404 (emphasis added). A review of Farber's claims in this litigation, as further illustrated by this Court's analysis thereof in the Farber I decision, amply illustrate that Farber's claims are wholly predicated upon the existence of Idaho Code § 72-915 – a statute only applicable to SIF workers' compensation policies. As such, the gravamen of the claims lie in allegations of statutory violations by SIF. In fact, in paragraph 8 of the Amended Complaint, Farber states that "[t]his statute provides the

sole and exclusive authority under and pursuant to which the Fund can lawfully pay dividends to its subscribers." (R-35144, 50)(emphasis added). Without Idaho Code § 72-915, Farber has no claim for any dividend, let alone any particular dividend payment methodology, a point conceded by Farber's counsel at hearing. (Tr. 2/26/10, 13:24-14:1.)

Further, Farber's general unhappiness with Idaho Code § 5-218 – and, more generally, the effect of the application of any statute of limitation – is woefully insufficient to warrant reversal of the District Court's decision. In the same vein, Farber's reliance on an almost 60 year-old water rights forfeiture case offers nothing to the resolution of this appeal. (Appellants' Brief at 15)(*citing* Application of Boyer, *infra.*)

Lastly, Farber's contention that this Court must utilize the longer of Idaho Code § 5-216 or § 5-218 misconstrues Idaho law regarding the interpretation of statutes of limitation (and, in particular, the James v. Buck decision, discussed *infra*), as the statute at issue (Idaho Code § 5-218) is not internally ambiguous. Similarly, even were this Court to look to out-of-state authority regarding rules of statutory construction for multiple statutes of limitation, there is no 'substantial question or reasonable dispute' that the 5-year statute of limitation might also apply in this action, given that the Court has already addressed this very question in the Hayden Lake decision and plainly held that the applicable statute of limitation is three years.

Accordingly, for these reasons, as discussed in detail below, the District Court's decision should be affirmed.

V. STANDARD OF REVIEW

Farber is correct in stating that "[t]he determination of the applicable statute of limitation is a question of law over which the Supreme Court has free review." *See* Hayden Lake, 141 Idaho at 403.[8]

VI. ARGUMENT

A. The District Court correctly ruled that the applicable statute of limitation for a claim made for dividends pursuant to Idaho Code § 72-915 is a 3-year statute of limitation pursuant to *Hayden Lake*.

The primary defect in Farber's overarching argument – that this Court must select the longer of two applicable statutes of limitation – is that it incorrectly assumes that the statute of limitation applicable to a claim under an SIF policy is an open or otherwise ambiguous question of law in Idaho. It is not, as this Court has already addressed the issue in Hayden Lake. Farber's efforts to downplay the Hayden Lake decision – the primary precedent upon which the District Court issued its ruling – do nothing more than reflect Farber's unwillingness to recognize that this question of law is settled in Idaho.

1. The earlier *Kelso* decision does not establish a 5-year statute of limitations.

The Hayden Lake case, which addressed the applicable statute of limitation in claims similar to those brought by Farber in this case, followed the earlier decision in Kelso & Irwin, P.A. v. State Ins. Fund, 134 Idaho 130, 997 P.2d 591 (2000), wherein a SIF policyholder sought

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[8] Tellingly avoiding citation to Hayden Lake, Farber's citation to the applicable standard of review is an almost verbatim quote of the standard enunciated in Hayden Lake, which standard does not expressly appear in Oats v. Nissan Motor Corp., 126 Idaho 162, 879 P.2d 1095 (1994)(cited by Farber). Instead, nine pages of Oats are generally cited by the Hayden Lake court in support of its enunciation of the standard.

an injunction against SIF from "selling worker's compensation insurance at the artificially low premiums established by the 1996 amendments to I. C. § 41-1612(2) and (3)" and went on to demand "(1) the return of 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' required by I.C. § 72-911; and (2) an accounting and recovery of assets squandered by SIF through invalid and illegal use of monies in the surplus." *Id.* at 132-33. Although Kelso did not address applicable statute of limitations, the focus of the Kelso court on the statutory gravamen of Kelso's claims and its interaction with Kelso's breach of contract claims refutes Farber's unfounded contention that Kelso establishes a 5-year statute of limitation.

The Kelso court first rejected Kelso's contention that it had any property interest in SIF assets, flatly stating that: "the SIF's statutory structure does not grant Kelso a property interest in the assets of SIF." *Id.* at 136. The Court then turned to the question of breach of contract, and in particular, Kelso's assertion that "the SIF's surplus has been accumulated in violation of the SIF's statutory authority and is in excess of the amount which is statutorily required by the former I.C. § 72-911 and, therefore, must be returned to the policyholders as dividends." *Id.* at 139. The Court prefaced its discussion by noting that:

> 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. When Kelso contracted with the SIF it was entitled to rely on the statutes creating and regulating the SIF, and the limits those statutes place on how the SIF can invest its policyholders' premiums. Consequently, any act taken by the SIF beyond its statutory authority would also be a breach of the SIF's contract with Kelso.

Id. at 138. The Court ultimately held that Kelso's breach of contract claims as to return of surplus and for squandering of assets survived, at least, an Idaho Rule of Civil Procedure 12(b)(6) motion to dismiss.

On the breach of contract claim grounded on the return of surplus demand, Kelso sought to force payment of dividends under Idaho Code § 72-915, the statute at issue in the appeal at bar. *Id.* at 139. In particular, while acknowledging that the SIF Manager had discretion as to when to declare a dividend, Kelso contended that such discretion was not unfettered. *Id.* Kelso contended that, as the surplus had grown larger than that minimally required by I.C. § 72-911, "the policyholders are entitled to a return of the excess surplus." *Id.* The Court concluded that because Kelso was basing his claim on a statutory violation, he alleged sufficient facts to support a breach of contract claim:

> While Kelso's complaint has failed to allege a breach of the duty of good faith and fair dealing with regard to the accumulated surplus, Kelso has alleged the surplus is in excess of what is statutorily required by I.C. § 72-911. Although I.C. § 72-911 was repealed by the Idaho legislature in 1998, this statute was in effect at the time Kelso's complaint was filed. Because we have held the SIF's statutory provisions are necessarily part of Kelso's contract with the SIF, and Kelso has alleged a violation of these statutory provisions, we believe Kelso has alleged sufficient facts to support a cause of action for breach of contract on this issue. Therefore, we hold the district court erred in dismissing this claim.

Id. at 140.

The Court then turned to the 'squandering of assets' claim (relating to allegedly improper leases between the SIF and the State), similarly reversing the dismissal of that breach of contract claim. *Id.* The Court again focused on the significance of Kelso's argument that the

SIF violated Idaho Statutes and held that: "[a]s we have previously stated, Kelso's contract with the SIF necessarily incorporates the SIF's statutory framework. Therefore, viewing all inferences in the light most favorable to Kelso, its allegation the SIF exceeded its statutory authority constitutes a sufficient claim of breach of contract as to withstand a motion to dismiss." *Id.*

Notably, in discussing the incorporation of SIF's governing statutes into the worker's compensation policy and the viability of breach of contract claims premised thereon, the Court was silent as to the applicable statute of limitation for such claims, a question that was to be shortly resolved in the Hayden Lake matter. As discussed below, Farber's unfounded assertion that the Kelso decision "immediately implicates I.C. § 5-216, the five-year statute governing breach of contract claims" (Appellants' Brief at 9) withers in the face of Hayden Lake's subsequent statement that "**[t]his Court did not make any findings [in Kelso] as to the statute of limitation that would apply to the claims.**" Hayden Lake, 141 Idaho at 404 (emphasis added). As such, this Court should reject Farber's mischaracterization of the Kelso decision as establishing any statute of limitation, in light of the Court's express statement in Hayden Lake that it did no such thing.

2. The *Hayden Lake* decision clearly establishes a 3-year statute of limitation for claims based upon SIF's statutes.

Hayden Lake followed the Kelso decision, and, in fact, arose from the District Court's consolidation and class certification of the Hayden Lake and Kelso litigation following the remand of Kelso, given the similarity of claims. *Id.* at 393. Thus, in Hayden Lake, the breach

of contract issues regarding demanded dividend payment due to the claimed excess surplus allegedly in violation of Idaho Code § 72-911, and the claimed improper real estate transactions between SIF and the State, were again revisited, in conjunction with other procedural-based claims. 141 Idaho at 393-94.

The Court affirmed the district court's rejection of Haden Lake's and Kelso's efforts to force an Idaho Code § 72-915 dividend payment based on an alleged excess surplus claim, and went on to affirm the district court's ruling that application of a 3-year bar to the real-estate related claims was proper. *Id.* at 399 & 403-04. In doing so, the Hayden Lake Court emphasized that the Kelso decision made no ruling as to the applicable statute of limitation:

> **There is no Idaho law directly on point as to whether the 3-year statute of limitations for statutory violations or the 5-year statute for breach of contract applies when a contract incorporates a statute and the allegations stem from violations of those statutes.** The district court's application of the three-year statute of limitations stemmed from its finding that the gravamen of HLFPD's claims were grounded in statute.
>
> In Kelso this Court held that Kelso's claims that the SIF "acted beyond its statutory authority" in real estate investments with the State survived a motion to dismiss. Id. at 140, 997 P.2d at 601. This holding was premised on this Court's determination that the SIF's governing statutes were incorporated into its contracts with its policyholders. Id. at 138, 997 P.2d at 599. **This Court did not make any findings as to the statute of limitation that would apply to the claims.**

Hayden Lake, 141 Idaho at 403-04 (emphases added). The Court then went on to add that claims, the gravamen of which were based on statutory violations, are subject to a 3-year statute of limitation and that such was the case with Hayden Lake's claims:

> HLFPD's breach of contract and implied covenant claims are based on alleged statutory violations. The district court looked to Dietrich v. Copeland Lumber

> Co., 28 Idaho 312, 154 P. 626 (1916), which held that the statute of limitation for a statutory liability applied, despite the fact that the case was brought as an action to collect on promissory notes. This Court reasoned that, "[a] '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 318, 154 P. at 628 (quoting 4 Words and Phrases, Second Series, 686). **Though the district court recognized that Dietrich may not be controlling in light of this Court's Kelso decision, it stated that "[Dietrich] is useful in support of the proposition that the true gravamen of the plaintiffs' claims should control the question of which statute of limitations is applicable, rather than the manner in which the claims are actually pled." This conclusion is correct.**

Id. at 404. (emphasis added). Thus, the Hayden Lake decision makes clear that, where the gravamen of a claim sounds in statute, a 3-year statute of limitation applies.

Here, there should be no dispute that the contracts at issue – the SIF worker's compensation policy – "incorporate[] a statute and the allegations stem from violations of those statutes." 141 Idaho at 404. The actual workers' compensation policy, itself, is wholly silent to dividends and any particular dividend distribution methodology. *See* Appellants' Brief, Exh. A.

Notably, the decision in Hayden Lake was further buttressed by another decision by this Court in the Hayden Lake line of cases. *See* Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho 307, 109 P.3d 161 (2005) ("Hayden Lake II"). In that decision, uncited and undiscussed by claimants in this action, this Court rejected an attorney fee request by SIF after receiving summary judgment against the Hayden Lake claimants. *Id.* at 312-13. The Court held that fees could not be recovered by SIF under either Idaho Code § 41-1839(4) or Idaho Code § 12-120(3), again reiterating that the gravamen of the claims was statutory in nature:

> It is undisputed that the SIF's statutory obligations were incorporated into its workers' compensation insurance contract with HLFPD. The plain language of I.C. § 41-1839(4) indicates that it applies to all actions between insureds and

> insurers. However, the statute also limits itself to those actions "arising under policies of insurance." I.C. § 41-1839(4). Black's Law Dictionary defines the word "arise" to mean "to originate; to stem (from)" and includes the example phrase, "a federal claim arising under the U.S. Constitution". Black's Law Dictionary (Garner 6th ed.1999)(emphasis added). Applying this definition, I.C. § 41-1839(4) applies to litigation "originating" from insurance policies. **HLFPD's claims arise, however, both by virtue of its insurance contracts and the statutory obligations governing the SIF's management of its funds.**
>
> ...
>
> Idaho Code § 12-120(3) mandates an award of attorney fees to the prevailing party in a suit involving a commercial transaction, defining a commercial transaction as "all transactions except transactions for personal or household purposes." I.C. § 12-120(3). **However, where the gravamen of a complaint regards a violation of a statute rather than a contract or commercial transaction, I.C. § 12-120(3) does not apply**. Shay v. Cesler, 132 Idaho 585, 588, 977 P.2d 199, 202 (1999). **The gravamen of HLFPD's complaint was whether the SIF violated its statutory obligations imposed by its workers' compensation insurance contracts.** Consequently, the SIF is not entitled to a reasonable award of attorney fees under I.C. § 12-120(3).

Id. at 312-13 (emphases added). Thus, both Hayden Lake and Hayden Lake II clearly establish that claims predicated on SIF's governing statutes are statutory in nature, and thus, subject to the 3-year statute of limitation.

Despite this clear precedent, Farber attempts to argue that Hayden Lake only goes to the question of some nebulous "operation or internal management" test that Hayden Lake makes no discussion of. Farber further argues, despite the fact Hayden Lake was discussing the breach of contract claim relating to SIF's real estate transactions, that this action addresses "the failed execution of a contractual duty owed directly to the Plaintiffs." (Appellants' Brief at 13.) Hayden Lake makes no such distinction, nor otherwise limits its holding; instead, Hayden Lake plainly addressed the broad issue of "whether the 3-year statute of limitations for statutory violations or the 5-year statute for breach of contract applies when a contract incorporates a

statute and the allegations stem from violations of those statutes." 141 Idaho at 403-04; *see also* Appellants' Brief at 16 (stating that "the statute in question and the contracts which incorporate that statute operate in tandem."). Moreover, Hayden Lake II (again, uncited and undiscussed by Farber, despite its relevancy to this appeal) puts the final nail in the coffin on this question, given that SIF was denied attorneys fees where it prevailed against all of the Hayden Lake plaintiffs' claims, including those claims seeking to compel a dividend payment under Idaho Code § 72-915, which is, of course, the nature of Farber's claim (the only distinction being amount versus methodology). Hayden Lake II, 141 Idaho at 313 (holding that "[t]he gravamen of HLFPD's complaint was whether the SIF violated its statutory obligations imposed by its workers' compensation insurance contracts."). Thus, Farber's claims that SIF failed to abide by the payment methodology in Idaho Code § 72-915 as incorporated into the SIF policies fall squarely into Hayden Lake's enunciation of the 3-year statute being applicable to claims where "a contract incorporates a statute and the allegations stem from violations of those statutes." Hayden Lake, 141 Idaho at 404.

3. Farber's own Amended Complaint establishes that the gravamen of Farber's claim is based on statute, not contract.

Farber's Amended Complaint makes clear the statutory nature of the claims being asserted. The Amended Complaint asserts only three causes of action: Declaratory Relief – Payment of Dividends, Declaratory Relief – Injunction, and Damages. None actually assert a separate and distinct claim for breach of contract, and, in fact, plaintiffs' Amended Complaint expressly intertwines a claimed violation of statute with references to contract: *e.g.*, "...such

acts and actions are in derogation of the contractual **and statutory** provisions..." (R.-35144, 58, at ¶ 26); "...acted wrongly, arbitrarily, **in violation of an** [sic] **law of the State of Idaho** and contrary to the contract..." (R.-35144, 58-59, at ¶ 28.a); "...acted in **violation of Idaho law** and the provision of the contract..." (R.-35144, 60, at ¶ 33); "...did not have **any lawful** or contractual authority..." (R.-35144, 62, Prayer for Relief, ¶ 2) (emphases added). In fact, Paragraph 8 expressly alleges that: "**This statute provides the sole and exclusive authority under and pursuant to which the Fund can lawfully pay dividends to its subscribers.**" (R.-35144, 50.)(emphasis added).[9] Farber offers no explanation as to how this action would be viable but for Idaho Code § 72-915 – certainly no express provision of the workers' compensation policy itself addresses dividends. Indeed, even at hearing on Farber's Motion for Reconsideration, Farber's counsel acknowledged that there would be no action without Idaho Code § 72-915:

> THE COURT: Without the statute, you wouldn't have a right to the money either; isn't that correct?
>
> MR. LOJEK: **That's right.** ...

(Tr. 2/26/10, 13:24-14:1.)(emphasis added)[10]

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[9] These allegations and claims are also found in the original Complaint. *See* R.-35144, 8-26.

[10] Counsel went on to only argue that the Court should simply choose the longer breach of contract statute so as to not "cut off peoples' rights prematurely." (Tr. 2/26/10, 14:1-7)("However, I think you have an abundant [sic] of law that we presented to you in the briefing that where there is a choice between a shorter statute and a longer statute, then the idea is that you go with the longer statute for the reasons cited and the cases that are before you. You don't want to cut off peoples' rights prematurely.") Counsel did not, however, argue that there would be any right to dividends in the absence of I.C. § 72-915. (*Id.*, 14:1-15:6.)

As such, Farber acknowledges that his claim for dividends lives or dies based on Idaho Code § 72-915. Moreover, this Court's decision in Farber I makes clear that the gravamen of the parties' dispute lays squarely on the interpretation of Idaho Code § 72-915 rather than any provision of the workers' compensation policy:

> 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. The statute contemplates dividing the aggregate balance *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.

Farber I, 147 Idaho at 312 (emphases in original). There is nothing in the Farber I decision that indicates that the Idaho Supreme Court has reversed its holding in Hayden Lake, or otherwise

held that the gravamen of Farber's suit lay in contract, rather than statute.[11] Further, there is nothing in Farber I that suggested viability of a I.C. § 72-915 claim absent the statute, as this Court even recognized that the Legislature was empowered to change the statute:

> 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. . . . 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**.

Id. at 313 (emphasis added). Indeed, following this Court's initial decision in Farber I on March 5, 2009, the Idaho Legislature promptly passed an emergency repeal of Idaho Code § 72-915, signed by the Governor on May 6, 2009 (S.L. 2009, ch. 294, § 2), and, as such, current

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[11] It is also worth noting that, in Farber's brief-in-chief in Farber I argues that "[t]his case involves the meaning of I.C. § 72-915," and that "[p]laintiffs and the some 30,000 members of the class they represent have protested this conduct in light of I.C. §72-915." *See* Appellants' Brief, Docket No. 31544, filed July 30, 2008, at p. 1. Farber's contention that, e.g., "[p]laintiffs' claims arise out of their contracts with the SIF" (Appellants' Brief at p. 10) should be challenged given the different objectives in each of the appeals – in Farber I, the goal was to establish SIF's liability through questions of statutory interpretation; Farber's current goal is to expand the size of class participants by attempting to recast the question as a contractual one. Given that Farber prevailed in Farber I, this Court should give fair consideration to employing the doctrine of judicial estoppel to preclude Farber from now disavowing his position in the prior appeal. *See, e.g.*, McKay v. Owens, 130 Idaho 148, 153, 937 P.2d 1222, 1227 (1997)(holding that "[i]t may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of litigation, must act consistently with it; one cannot play fast and loose.")(quoting Winmark v. Miles & Stockbridge, 109 Md. App. 149, 674 A.2d 73 (1996)).

policyholders have no basis in contract to demand payment of dividends in the particular fashion directed by the now-repealed Idaho Code § 72-915.[12]

Accordingly, Hayden Lake (and Hayden Lake II, as well) clearly establish that claims, the gravamen of which are based on statutory violations, are subject to a 3-year statute of limitation. Farber's action, as demonstrated by his Amended Complaint and the Farber I, amply demonstrates that this suit is squarely predicated on SIF's alleged non-compliance with the dividend distribution methodology set forth in the now-repealed Idaho Code § 72-915, and that, without such statute, policyholders would have no basis to sue SIF. For that reason, the gravamen of this action is a claimed statutory violation, and as such, is subject to a 3-year statute of limitation.

4. Farber's forfeiture argument is ultimately an unavailing nonsequitur.

Further, Farber's claim of "forfeiture of existing vested property interests" rings hollow as, by definition, all statutes of limitation serve to cut off existing claims, including those that may otherwise be meritorious. (Appellants' Brief at 16.) As this Court has explained:

> "The policy behind statutes of limitation is protection of defendants against stale claims, and protection of the courts against needless expenditure of resources." Johnson v. Pischke, 108 Idaho 397, 402, 700 P.2d 19, 25 (1985). Statutes of limitation are designed to promote stability and avoid uncertainty with regards to future litigation.

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[12] The repeal was made retroactive to January 1, 2003; an appeal on the question of the validity of that retroactive component of the repeal is currently before this Court in *CDA Dairy Queen, Inc., et al v. The Idaho State Insurance Fund, et al.*, Supreme Court Docket No. 38492-2011 (Canyon County Case No. 2009-13607).

Wadsworth v. Department of Transp., 128 Idaho 439, 442, 915 P.2d 1, 4 (1996). The Legislature has simply determined that the statute of limitation for statutory liabilities is to be three years, irrespective of whether memories are still fresh or faded, witnesses are alive or dead, data is available or is no longer available, etc. I.C. § 5-218; *see also* Appellants' Brief at 7-8. Farber has not identified any authority that the application of Idaho Code § 5-218 to cut off expired claims (as every statute of limitation does) is somehow improper or violative of public policy, nor was any such argument raised before the District Court. (R. at 110-115, 167-75, 254-263; Tr. (April 6, 2007) at ll. 29:23-33:3; Tr. (Feb. 26, 2010), *generally*). *See* Hoover v. Hunter, ___ Idaho ___, ____ P.3d ____, 2011 WL 924040 (Idaho, March 18, 2011)(affirming "[t]his Court does not review an alleged error on appeal unless the record discloses an adverse ruling forming the basis for the assignment of error.")(quoting Ada Cnty. Highway Dist. v. Total Success Invs., LLC, 145 Idaho 360, 179 P.3d 323 (2008)); *accord* Parsons v. Mutual of Enumclaw Ins. Co., 143 Idaho 743, 746, 152 P.3d 614, 617 (2007)("The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal.")(quoting Murray v. Spalding, 141 Idaho 99, 106 P.3d 425 (2005)). While Farber may have a general disagreement on the philosophy and purpose of statutes of limitation, that fails to provide a basis to void a Court's application of an applicable statute of limitation.

Moreover, Farber's citation to Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952), for the proposition that "[f]orfeitures are abhorrent and all intendments are to be indulged against a forfeiture," is ultimately nonsensical. Boyer dealt with an individual attempting to change a diversion point for water his water rights, which was protested by the irrigation district

on the grounds that the rights-holder had abandoned and forfeited his water rights based upon non-use pursuant to Idaho's forfeiture statute governing water rights (I.C. § 42-222). *Id.* at 155. No statute of limitation – and, in particular, I.C. § 5-218 – is discussed, nor does the case at bar involve either water rights or a forfeiture statute.

For these reasons, this Court should reject any argument that application of Idaho Code § 5-218 serves as an improper "forfeiture of existing vested property interests."

B. There is no basis to assert that a longer statute of limitation should be applied, as there is no 'reasonable dispute' such that a different, longer statute should apply.

Farber tacitly concedes that Idaho Code §5-218 is applicable, opting to primarily rest his appeal on the claim that if there are two applicable statutes of limitation, the longer should apply.[13] Farber's primary cited authority on this point is James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986); however, Farber mischaracterizes this decision.

In James v. Buck, the Court analyzed the length of time permitting for tolling under Idaho Code § 6-1005 (relating to prelitigation screening panels in medical malpractice claims) as impacting the 2-year statute of limitation under Idaho Code § 5-219. 111 Idaho at 709. Notably, the Court was not selecting between two statutes of limitations, but rather, was interpreting a single statute regarding tolling of the statute of limitation provided in Idaho Code § 6-1011. In James, the district court had held that Idaho Code § 6-1011 tolled the period for 90

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[13] Note that, while before the District Court, Farber cryptically suggested a "multiple gravamen" theory. (R. 173, & 260-61.) This argument appears to have been appropriately abandoned on appeal, as Hayden Lake made no discussion of a "multiple gravamen" theory and such an argument would have to patently disregard the definition of "gravamen." *See* Black's 7th: "The substantial point or essence of a claim, grievance, or complaint."

days, the time period stated in the statute. *Id.* at 710. This Court rejected that conclusion, noting that the remainder of the statute had not been considered:

> The defendants' argument centers in the second sentence of I.C. § 6-1011, which, for convenience sake, we requote: "In no case shall a panel retain jurisdiction of any such claim in excess of ninety (90) days from date of commencement of proceedings." Taken in a vacuum, this sentence would seem to support the defendants. But there is more. Directly following the above sentence, § 6-6011 next says this:
>
> > *If* at the end of such ninety (90) day period the panel *is unable to decide the issues* before it, it *shall summarily conclude the proceedings* and the members may informally, by written communication, express to the parties their joint and several impressions and conclusions, if any, albeit the same may be tentative or based upon admittedly incomplete consideration.... (Emphasis added.)
>
> This portion of the statute establishes *conditions which must be satisfied* before the panel's jurisdiction is terminated:
>
> > (1) the panel must find itself unable to decide the issues before it; and, that being done, then
> >
> > (2) the panel must summarily conclude the proceedings.
>
> *None* of these conditions were satisfied here; there is no evidence that the panel was unable to decide the issues before it. In fact, on August 10, 1983, the panel did in fact file a set of findings and conclusions. The decision was filed 48 days after the hearings before the panel were completed. Likewise, there is no evidence in the record that the panel ever summarily concluded the proceedings- the panel's filing of its findings and recommendations refutes any argument that James' claim was ever summarily concluded.

Id. (emphases in original). The Court held, then, that the statute needed to be considered as a whole:

> The district court erred in focusing solely on the second sentence of I.C. § 6-1011 and in ignoring the next two sentences. This squarely contradicts general rules of statutory interpretation, which include the rule that a court must give

> effect to "all provisions of a statute," and "no one part should be rendered mere surplusage by" the application of one part of the statute to the exclusion of other parts.

Id. (citations omitted). In dicta, the Court then stated, despite there being no Idaho case law on this point, the following:

> In addition, where two constructions of a statute of limitations or a rule which impacts directly upon such a statute are possible, courts generally prefer the construction which gives the longer period in which to prosecute the action. Safeco Insurance Co. of America v. Honeywell, 639 P.2d 996, 1001 (Alaska 1981); Salavea v. City and County of Honolulu, 55 Hawaii 216, 517 P.2d 51, 54 (1973); Drug, Cosmetic & Beauty Trades Service, Inc. v. McFate, 14 Ariz.App. 7, 480 P.2d 30, 32 (1971); Juab County Dept. of Public Welfare v. Summers, 19 Utah 2d 491, 426 P.2d 1, 3 (1967). Our interpretation of I.C. § 6-1011 today is consistent with that rule.

Id. Thus, James v. Buck did not even involve the Court selecting between two applicable statutes of limitation, but, rather, interpreting a single statute regarding tolling. Farber cites to no other decision by this Court in support of his argument and there are no such decisions in Idaho.[14]

As such, Farber detours through other states' caselaw and the Am. Jur., pointing to authority that does little more than hold that, as a matter of statutory construction, where it is unclear which limitation to apply (either as a matter of competing statutes, or an internal

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[14] The Court of Appeals, evaluating whether a plaintiff's claim for benefits from a former employer was subject to the 2-year wage claim statute or the 5-year contract claim statute, cited to James v. Buck, *supra*, in holding that the 5-year statute applied. *See* Latham v. Haney Seed Co., 119 Idaho 427, 807 P.2d 645 (Ct. App. 1990). However, the Court of Appeal's decision was reversed on review by this Court, which held that the more specific 2-year wage claim statute actually applied. *See* Latham v. Haney Seed Co., 119 Idaho 412, 807 P.2d 630 (1991). In doing so, this Court made no discussion or application of James v. Buck. *Id.*

inconsistency in a single statute), the court will err on the side of caution in applying the longer of the two possibilities. A closer review of the authority more aptly demonstrates the kinds of ambiguities courts struggle with before applying such a statutory construction rule, none of which are before this Court:

- 51 Am. Jur. 2d, Limitation of Actions, §92 – As the plain language of the section indicates, there has to be a "substantial question or reasonable dispute" at issue first before resolving the question in favor of a longer period. Tellingly, Farber omits from his citation the remaining portion of this section: "Observation: To invoke the rule of applying the longer of two possible periods of limitations, both of the statutory constructions must be **reasonable**." (emphasis added). However, in the present matter, no such "reasonable" construction exists, as this Court has already squarely addressed the statute of limitation question salient to this litigation in Hayden Lake and Hayden Lake II.
- Amco Ins. Co. v. Rockwell, 940 P.2d 1096, 1097 (Colo. App. 1997) – In Amco, the court analyzed whether Colorado's general two-year statute for torts or its 3-year statute for actions under the state's No-Fault Act applied to a claim for property damage arising from a collision involving an uninsured driver. While the negligence claim would ordinarily fall under the two-year statute, the court made clear that the facts demonstrated that the action was, in fact, a No-Fault Act suit: "[h]ere, it is not disputed that plaintiff was obligated to pay and did pay benefits required **under the No-Fault Act**. And, plaintiff's action is **specifically authorized** under § 10-4-

715(1)(b), C.R.S. (1994 Repl.Vol. 4A) of the No-Fault Act, see Cingoranelli v. St. Paul Fire & Marine Insurance Co., 658 P.2d 863 (Colo.1983) (noting that § 10-4-715 "preserves" tort actions against third party tortfeasors who do not have complying insurance), and was brought because the vehicle driven by defendant was not insured as required under the No-Fault Act. See § 10-4-705, C.R.S. (1994 Repl.Vol. 4A). Under these circumstances, we conclude that plaintiff's claim was intertwined with the No-Fault Act **and was brought 'under' it.**" *Id.* at 1097 (emphases added).[15] In the present case, Farber attempts to re-style his action as a general breach of contract even though none of his causes of action are labeled to be breaches of contract, and where the Complaint specifically avers – correctly – that I.C. § 72-915 "provides the sole and exclusive authority under and pursuant to which the Fund can lawfully pay dividends to its subscribers." (R.-35144, 50, ¶8.) This is wholly distinguishable from the facts in Amco because that plaintiff plainly filed suit under a statute authorizing such suit, thereby entitling him to the statute of limitation afforded by that statute rather than by virtue of a last-resort rule of statutory construction for irreconcilable statutes. This Court has already addressed the application of Idaho

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[15] Note, too, that the Colorado Supreme Court has outlined how this is a statutory construction rule of last resort: "When a court is faced with irreconcilable statutes, it first considers whether those statutes address the same class of cases, and if they do, then the specific provision prevails over the general one, unless the legislature evidences a manifest intent that the more recently enacted general provision should prevail. If specificity fails to resolve the conflict, then the more recent statute may prevail. If neither of these canons resolves the conflict, then public policy and common law doctrine dictate that the statute with the longer limitations period governs." Jenkins v. Panama Canal Ry. Co., 208 P.3d 238, 244 (Colo. 2009).

Code § 5-216 or § 5-218 in statutory gravamen claims, and explicitly held the 3-year statute of limitation to apply. Hayden Lake, 141 Idaho at 403-04.

- In the Matter of Estate of Renwanz, 561 N.W.2d 43 (Iowa 1997) – This matter only involved the interpretation of a single statute (Iowa Code § 633.410) regarding notice to be given to probate estate creditors. In particular, the court examined whether actual knowledge was sufficient to trigger a time for filing a claim with the estate, or whether mailed notice (which had not been made upon the creditor) was required. *Id.* at 44. The court strictly construed the statute, holding that mailing of notice was required, such that the creditor's actual knowledge did not adversely impact the commencement of the time to file a claim with the estate. *Id.* at 45. In the present case, there is no internal ambiguity to the statute of limitation at issue, nor has Farber made any such allegation. The purpose of Farber's citation to this case is unclear, as it is inapplicable to this action.
- Traveler's Indemnity Co. v. Andersen, 983 P.2d 999 (Mont. 1999) – In Travelers, the Montana Supreme Court considered which statute of limitation might apply to a suit by Travelers upon a fraudulent insurance claim, where Montana had a two-year statute applicable to fraud claims, but an eight-year statute applicable to contract claims. The court held that the eight-year statute applied, given Montana's rule that "[t]he general rule applied to situations falling within the twilight zone of contract and tort law is that doubt must be resolved in favor of an action based upon contract." *Id.* at 1002. The court also noted that "[w]here **doubt exists as to the**

theory of the action – and, therefore, which statute of limitations should apply – the general rule is that the doubt is resolved in favor of the longer statute of limitations." *Id.* at 1002 (emphasis added). The court goes on, however, to explain that the question ultimately hinges on the nature of the claim, a summary not quoted by Farber: "'The choice of which statute of limitation should apply **ultimately rests on a characterization of the essence of the claim**.' Consequently, we look to the substance of the complaint to determine the nature of the action and which statute of limitation applies." *Id.* (citations omitted)(emphasis added).[16] The "essence of the claim" in Farber's action is, as Farber himself has stated, that Idaho Code § 72-915 "provides the sole and exclusive authority under and pursuant to which the Fund can lawfully pay dividends to its subscribers." (R.-35144, 50, ¶8.) Thus, the gravamen of the claim is patently statutory in nature, as the claims were in Hayden Lake and Hayden Lake II, and no doubt exists as to the theory of Farber's claim. Thus, the analysis performed in Traveler's is precisely the analysis this Court has already performed in Hayden Lake and Hayden Lake II in finding a 3-year statute applies,

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[16] Note that the Montana Supreme Court chided a claimant for failing to recognize the *gravamen* test Montana employs (as does Idaho, as outlined in Hayden Lake), noting that plaintiff's "conclusory citation to Travelers notwithstanding, the plaintiff simply may not choose which theory to pursue in any situation." Tin Cup County Water and/or Sewer Dist. v. Garden City Plumbing and Heating, Inc., 200 P.3d 60, 66-67. (Mont. 2008). The Montana Supreme Court emphasized that: "A plaintiff cannot change the gravamen of the action to secure a longer period of limitations simply by virtue of mislabeling a claim for relief. The gravamen of a claim, not the label attached, controls the limitations period applied to that claim." *Id.* at 66.

and as such, the rationale in Traveler's actually supports the affirming of the District Court in this decision.

- Global Financial Services, Inc. v. Duttenhefner, 575 N.W.2d 667 (N.D. 1998) – This matter involved the determination of the applicable statute of limitation for suit upon an installment contract that had been assigned to another party. At issue was whether a federal statute of limitation applied, as the action would have been untimely under state law but still timely under federal law based upon differences in accrual. *Id.* at 669. Key in dispute was whether the federal statute of limitation was personal, and thus incapable of being assigned. *Id.* at 671-72. The court's statement that "we have a general policy of selecting the longer statute of limitations when there is a **reasonable dispute** over which statute applies," then, was made in the context of the court evaluating whether or not a statute of limitation could be assigned, a question of some dispute and novel to North Dakota. *Id.* at 671 (noting that "we have not decided specifically whether the benefit of a statute of limitations is assignable" and then contrasting the WAMCO v. First Piedmont Mort., 856 F. Supp. 1076 (E.D. Va. 1994) decision with decisions in other courts on the question of assignability of federal statutes of limitation)(emphasis added). Again, as discussed above, there is no "reasonable dispute" over which statute should apply, as this Court's Hayden Lake and Hayden Lake II decisions, in conjunction with the fact that this action is plainly predicated on the existence of I.C. § 72-915, clearly establish that the only applicable statute of limitation is the 3-year statute.

- Zoss v. Schaefers, 598 N.W.2d 550 (S.D. 1999) – In Zoss, the South Dakota Supreme Court found ambiguous a single statute that had two different statutes of limitation without explanation as to the distinction: "Any person seeking to recover damages pursuant to § 40-28-18 shall file suit no later than one year after the trespass occurred or six months after he knew or should have known of the injury resulting from the trespass." *Id.* at 551 (quoting S.D.C.L. § 40-28-20). The legislative history suggested that the six-month limitation may have been intended as an additional statute for claims that may not have been discovered in the original one-year post-trespass period. *Id.* at 553. Based on this internal inconsistency and ambiguity as to the statute, the court permitted application of the longer one-year period. *Id.*[17] Again, as with the Renwanz decision, *supra*, this case appears wholly inapplicable to this action, given that the Supreme Court of South Dakota was attempting to address an internal ambiguity in a single statute, a point not at issue in this litigation, rendering referral to this case unhelpful and unnecessary.

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[17] The Zoss court quoted Richards v. Lenz, 539 N.W.2d 80 (S.D. 1995), which emphasized that "such application should always be tested by the **nature of the allegations in the complaint**[.]" *Id.* at 85 (emphasis added). The Richards decision involved suit asserting claims for negligence, fraud, and breach of contract, ordinarily subject to different statutes of limitation (3 years for negligence, 6 years for fraud and breach of contract.) *Id.* The court applied the longer period upon holding that: "[t]he Richards' claims arise out of their agreement with WRMH to provide marriage counseling and WRMH's action in assigning Lenz to provide such counseling service to the Richards. The allegations in the complaints lead to the conclusion that the gravamen of the complaints is as much based in contract as it would be in negligence or fraud." *Id.*

Thus, the out-of-state authority cited by Farber is unavailing. There is no ambiguous statute of limitation at issue in this matter, nor is there a 'doubt' or 'reasonable dispute' as to multiple statutes of limitation applying, as the Court has already resolved the question of the applicable statute in Hayden Lake. As discussed at length above, the Hayden Lake decision makes clear that "when a contract incorporates a statute and the allegations stem from violations of those statutes," the 3-year statute applies. 141 Idaho at 403. This Court's decision in Farber I, the allegations of Farber's complaint, the absence of dividend language in the policies at issue, and Farber's counsel's representations at hearing all make more than clear that this litigation exists only because of the claimed failure of SIF to make dividend payments by the methodology specifically set forth by the Legislature in Idaho Code § 72-915.

Thus, James v. Buck has no application in this matter, and there is no basis otherwise for Farber to contend that there is any 'doubt' or 'reasonable dispute' as to the applicable statute of limitation in this matter, given that Farber's complaint is squarely predicated on a claimed violation of Idaho Code § 72-915. Accordingly, Farber's argument on this point should be rejected, and the rulings of the District Court in this matter should be affirmed.

VII. CONCLUSION

For the reasons stated above, the April 30, 2007 decision of the District Court granting partial summary judgment to SIF, and, in turn, denying Farber's motion for reconsideration judgment on March 25, 2010, should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of April, 2011.

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

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of April, 2011, I caused to be served two (2) true and correct copies of the foregoing document were **hand-delivered** to each of the following:

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