5-9-2011

CDA Dairy Queen, Inc. v. State Ins. Fund Clerk's Record v. 2 Dckt. 38492

Vol 2 of 3

(VOLUME II)

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

LAW CLERK

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON,

Plaintiffs-Appellants,

-vs-

SEE AUGMENTATION RECORD

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN and MAX BLACK and STEVE LANDON 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 RENAE J. HOFF, District Judge

Donald W. Lojek
Lojek Law Offices

Philip Gordon and Bruce S. Bistline
GORDON LAW OFFICES

Attorneys for Appellants

Richard E. Hall and Keely E. Duke
HALL FARLEY OBERRECHT & BLANTON PA

Attorneys for Respondents

38492

IN THE SUPREME COURT OF THE

STATE OF IDAHO

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON, Plaintiffs-Appellants, -vs- THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN and MAX BLACK and STEVE LANDON in their capacity as members of the Board of Directors of the State Insurance Fund, Defendants-Respondents.	)	Supreme Court No. 38492

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

HONORABLE RENAE J. HOFF, Presiding

Donald W. Lojek, Lojek Law Offices

Philip Gordon and Bruce S. Bistline, GORDON LAW OFFICES

Attorneys for Appellants

Richard E. Hall and Keely E. Duke, HALL FARLEY OBERRECHT & BLANTON PA

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS, Continued

INDEX

INDEX, Continued

STATE INSURANCE FUND
1215 W. STATE STREET • P.O. BOX 83720 • BOISE, IDAHO 83720-0044
PHONE (208) 332-2100 • (800) 334-2370

MEMORANDUM

Date: December 9, 2002

From: James M. Alcorn, Manager

Subject: Dividend Formula for Policies with Inception Dates of July 1, 2000 to June 30, 2001

Loss Adjustment Expense 18% for all policies

Premium Size	Underwriting Expense	Return Percentage
<2,500	100%	0%
2,501 to 5,000	75%	15%
5,001to 10,000	70%	25%
10,001 to 20,000	65%	28%
20,001 to 50,000	65%	32%
50,001 to 100,000	60%	35%
100,001 to 200,000	55%	40%
>200,0001	55%	45%

STATE INSURANCE FUND

1215 W. STATE STREET • P.O. BOX 83720 • BOISE, IDAHO 83720-0044
PHONE (208) 332-2100 • (800) 334-2370

MEMORANDUM

Date: December 11, 2003

From: James M. Alcorn, Manager

Subject: Dividend Formula for Policies with Inception Dates of July 1, 2001 to June 30, 2002

Loss Adjustment Expense 18% for all policies

Premium Size	Underwriting Expense	Return Percentage
<2,500	100%	0%
2,501 to 5,000	75%	15%
5,001to 10,000	70%	25%
10,001 to 20,000	65%	28%
20,001 to 50,000	65%	32%
50,001 to 100,000	60%	35%
100,001 to 200,000	55%	40%
>200,0001	55%	45%

000097

CL.0066

STATE INSURANCE FUND

1215 W. STATE STREET • P.O. BOX 83720 • BOISE, IDAHO 83720-0044
PHONE (208) 332-2100 • (800) 334-2370

MEMORANDUM

Date: December 17, 2004

From: James M. Alcorn, Manager

Subject: Dividend Formula for Policies with Inception Dates of July 1, 2002 to June 30, 2003

Loss Adjustment Expense 18% for all policies

Premium Size	Retention	Return Percentage
<2,500	100%	0%
2,501 to 5,000	75%	15%
5,001to 10,000	72%	25%
10,001 to 20,000	67%	28%
20,001 to 50,000	67%	32%
50,001 to 100,000	62%	35%
100,001 to 200,000	57%	40%
>200,0001	57%	45%

COPY

STATE INSURANCE FUND

1215 W. STATE STREET • P.O. BOX 83720 • BOISE, IDAHO 83720-0044
PHONE (208) 332-2100 • (800) 334-2370
WWW.IDAHOSIF.ORG

MEMORANDUM

Date: December 21, 2005

From: James M. Alcorn, Manager

Subject: Dividend Formula for Policies with Inception Dates of July 1, 2003 to June 30, 2004

Loss Adjustment Expense 18% for all policies

Premium Size	Retention	Return Percentage
<2,500	100%	0%
2,501 to 5,000	75%	15%
5,001to 10,000	72%	25%
10,001 to 20,000	67%	28%
20,001 to 50,000	67%	32%
50,001 to 100,000	62%	35%
100,001 to 200,000	57%	40%
>200,0001	57%	45%

LEGISLATURE OF THE STATE OF IDAHO

Sixtieth Legislature First Regular Session - 2009

IN THE SENATE

SENATE BILL NO. 1166

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO THE STATE INSURANCE FUND; TO PROVIDE LEGISLATIVE INTENT; REPEALING SECTION 72-915, IDAHO CODE, RELATING TO DIVIDENDS; DECLARING AN EMERGENCY AND PROVIDING A RETROACTIVE EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. LEGISLATIVE INTENT. (1) Historically, the State Insurance Fund has exercised its discretion, pursuant to Section 72-915, Idaho Code, to determine the annual amount of dividend, if any, a policyholder would receive.

(2) On March 5, 2009, the Idaho Supreme Court filed its opinion in *Farber v. Idaho State Insurance Fund*, S. Ct. 35144, in which it interpreted Section 72-915, Idaho Code, and ruled that the State Insurance Fund cannot exercise its discretion in determining how much of a dividend to pay to each policyholder because the statute requires a pro rata distribution of dividends to all policyholders. The result of the decision is to require that the State Insurance Fund pay dividends on policies that are not financially profitable, thereby restricting the fund's ability to reduce premiums and pay dividends to profitable policyholders.

(3) In its decision, the Supreme Court stated that, if it has become prudent to alter the statutory language related to the requirements for distribution of dividends, the Legislature is the appropriate venue for such change.

(4) It was the intent of the Legislature in passing House Bill No. 774, As Amended of the Second Regular Session of the Fifty-fourth Idaho Legislature, effective on April 3, 1998, that the State Insurance Fund should operate like an efficient insurance company, subject to regulation under Title 41, Idaho Code, including the dividend provisions set forth in Chapter 28, Title 41, Idaho Code. The retroactive repeal of Section 72-915, Idaho Code, to April 3, 1998, will conform with that intent. Section 73-101, Idaho Code, permits such retroactive repeal as long as it is "expressly so declared" in legislation.

(5) The retroactive repeal of Section 72-915, Idaho Code, will reconcile conflicts in the existing laws governing the State Insurance Fund and will allow the fund, like other insurance companies, to issue dividends pursuant to Chapter 28, Title 41, Idaho Code.

SECTION 2. That Section 72-915, Idaho Code, be, and the same is hereby repealed.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, Section 1 of this act shall be in full force and effect on and after passage and approval, and Section 2 of this act shall be in full force and effect retroactively to April 3, 1998.

Ank Sheet

LEGISLATURE OF THE STATE OF IDAHO

Sixtieth Legislature First Regular Session - 2009

Moved by Davis

Seconded by Cameron

IN THE SENATE
SENATE AMENDMENT TO S.B. NO. 1166

AMENDMENT TO SECTION 1

On page 1 of the printed bill, in line 24, delete "April 3" and insert: "January 1"; in line 25, delete "1998" and insert: "2003" ; and following line 29, insert:

"(6) It is the intent of the Legislature that the provisions of this act shall not apply to any action filed in a state or federal court of law in the state of Idaho on or before December 31, 2008, and the provisions of this act shall not apply to the aforementioned case of *Farber v. Idaho State Insurance Fund* as currently pending with respect to those policy holders paying annual premiums of not more than two thousand five hundred dollars ($2,500).".

AMENDMENT TO SECTION 3

On page 1, in line 33, delete "April 3, 1998" and insert: "January 1, 2003".

MINUTES

SENATE COMMERCE AND HUMAN RESOURCES COMMITTEE

DATE:	April 7, 2009
TIME:	1:30 p.m.
PLACE:	Room 117
MEMBERS PRESENT:	Chairman Andreason, Vice Chairman Coiner, Senators Stegner, Cameron, Goedde, Lodge, Smyser, Sagness (Malepeai), and LeFavour
MEMBERS ABSENT/ EXCUSED:	
GUESTS:	See attached sign-in sheet.
NOTE:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.
CONVENED:	**Chairman Andreason** called the meeting to order at 1:48 P.M.
MINUTES:	

H218 — **Relating to Building Codes**

Lee Gagner, spoke in support of **H218**. Since the passage of 2004 Building Code passage there have been many changes. Through the passage of Building Codes in conjunction with the Fire Industry they have created standards of ingress and egress requirements out of windows in basements, upper levels which have reduced safety issues. Another major fire safety improvement was the smoke detectors systems being required to be hardwired in new housing. Any code amendments should be decided in the Legislature, rather than by the local jurisdictions. Two reasons he is supporting the bill: 1) He can not identify the need for the bill; and 2) Single-family and duplex dwellings should be exempted.

Senator Goedde stated there has been a proposal to send this bill to the amending order and opt out the single-family and duplex dwellings. **Mr. Gagner** responded that he would be in support of the amendment.

MOTION: **Senator Goedde** moved that **H218** be referred to the 14th order for amendment. The motion was seconded by **Vice Chairman Coiner**. The motion carried by **Voice Vote.**

S1166 — **Relating to the State Insurance Fund**

Senator Goedde, presented **S1166**, relating to the State Insurance Fund (SIF). The purpose of this legislation is to repeal *Idaho Code*, Section 72-915, and will serve to offset an adverse decision of the Idaho Supreme Court regarding the interpretation of *Idaho Code,* Section 72-915 which

could subject the SIF to pay dividends on policies that are not financially profitable, thereby restricting the SIF's ability to reduce premiums and pay dividends to profitable policyholders. The proposed repeal of *Idaho Code*, Section 72-915 will clarify the law regarding the payment of dividends by the SIF by making it clear that in passing H774aa in 1998, it was the intent of the Legislature to have the SIF operate like an efficient insurance company subject to regulation under Title 41, *Idaho Code*, including the dividend provision set forth in Title 41, Chapter 28, *Idaho Code*. Repeal of the law effective April 3, 1998 is necessary because on that date laws were enacted which subjected the SIF to regulation under the Insurance Code, Title 41, *Idaho Code*. This legislation will allow the SIF to issue dividends in the same manner as other insurance companies operating within the State of Idaho (Attachment A).

Senator Goedde stated that historically the SIF has exercised its discretion, pursuant to *Idaho Code*, Section 72-915, to determine the annual amount of dividend, if any, a policyholder would receive. Dividends have never been distributed on a pro rata basis. It was the intent of the 1998 Legislature in passing H774aa, effective April 3, 1998, that the SIF should operate like an efficient insurance company, subject to regulation under Title 41, *Idaho Code*, including the dividend provision set forth in Chapter 28, Title 41, *Idaho Code*. The SIF does not have stockholders so dividends are returned to the policyholders.

On March 5, 2009, the Idaho Supreme Court filed its opinion in *Farber v. Idaho State Insurance Fund* in which it interpreted Section 72-915, *Idaho Code*, and ruled that the SIF cannot exercise its discretion in determining how much of a dividend to pay to each policyholder, because the statute requires a pro rata distribution of dividends to all policyholders. The result of the decision is to require that the SIF pay dividends on policies that are not financially profitable, thereby restricting the SIF's ability to reduce premiums and pay dividends to profitable policyholders. **Senator Goedde** stated that in making this decision, the Court ignored *Idaho Code,* Section 72-901, which requires the SIF to operate as an efficient insurance company, and *Idaho Code*, Section 41-2844, which allows for distribution of dividends. The Court interpreted 72-915 in a manner inconsistent with other laws governing the SIF and past practices that go back to the1980s.

Senator Goedde advised that *Idaho Code, Section* 73-101 specifically allows for retroactive enactment of legislation. Repealing Section 72-915, *Idaho Code*, retroactive to April 3, 1998 when H774aa was enacted, will reconcile conflicts in the existing laws governing the SIF and will allow the SIF, like other insurance companies, to issue dividends pursuant to Chapter 28, Title 41, *Idaho Code.* He stated that it is not his intention in bringing this bill to circumvent the Supreme Court's decision, and in fact the Supreme Court stated in the *Farber* case that if it has become prudent to alter the statutory language related to the requirements for distribution of dividends, the Legislature is the appropriate venue for such change.

Currently the judgment against the SIF is estimated at $5 million and

there is potential for another $24 million in additional judgments if this legislation is not passed. Large businesses right now support the small businesses that are written by the SIF. He stated the SIF generally takes a loss on policies issued under $1,500. If the SIF does not have the discretion to offer dividends and premium deviations to large businesses, they will go to the private sector for those benefits, and it will further erode the base of the SIF. This could also substantially impact the state agencies and public entities insured by the SIF.

In response to questions of the Committee, **Senator Goedde** disclosed that as a member of the Board of Directors of the State Insurance SIF he was named in the *Farber* lawsuit. However, he was never served nor deposed in the case. He called upon **Rich Hall**, attorney for the SIF to respond to a legal question. **Mr. Hall** stated that the Supreme Court did rule in the 2000 case of *Kelso & Irwin, P.A. v. State Insurance Fund,* that the Worker's Compensation statutes became a part of the contract of insurance between the State Insurance Fund and the policyholder.

TESTIMONY:

Phillip Gordon, attorney, representing plaintiffs, a class of 30,000 Idaho employers, in the *Farber* case spoke in opposition to **S1166**. He advised that the action was brought because his clients believe that the SIF had misinterpreted *Idaho Code*, Section 72-915 and had departed from its traditional historic interpretation of that statute. He stated that up until and including the policy year 2000, the SIF had always paid dividends pro rata as commanded by the statute. The SIF took the position after the 2000 policy year that it was the intent of the Legislature that the SIF comply with the provisions of the Idaho Insurance Code, Title 41, *Idaho Code.* However, the Supreme Court held in the 2000 case of *Kelso & Irwin, P.A. v. State Insurance Fund*, that the SIF is not a public mutual insurance company.

The *Farber* case was filed in 2006 and the Supreme Court decided unanimously on March 5, 2009, that *Idaho Code*, Section 72-915, means that if you pay dividends to one, basically you pay them to all pro rata. He stated that if this legislation is passed and *Idaho Code*, Section 72-915 is repealed there would be no guidance and no statute whatsoever that would allow the SIF to pay dividends. He stated that when you purchase a contract of worker's compensation insurance with the SIF you get three things: 1) insurance in the event one of your employee's is hurt; 2) a defense if a lawsuit is brought by an injured employee; and 3) a right to share pro rata in dividends. The State and Federal Constitutions have provisions forbidding the passage of laws which impair the obligations of contracts. **Mr. Gordon** stated that this legislation impairs the obligations of contracts inasmuch as the 2000 Supreme Court decision clearly held that *Idaho Code*, Section 72-915, is part of the contract of insurance between the SIF and all of its policyholders. To effect that retroactively impairs the obligations of contracts.

Senator Goedde inquired of **Mr. Gordon** whether he thought a policy holder that spends $150 on a premium and incurs $10,000 in costs in that year because of an injured employee should receive a dividend. **Mr. Gordon** responded that it was his understanding that the SIF may

consider losses and is not obligated to pay a dividend in that instance. However, he could not cite case law to substantiate his position.

TESTIMONY:

Don Lojek, attorney, also representing plaintiffs, spoke in opposition to **S1166**. He stated that *Idaho Code*, Section 72-915, was enacted in 1917. Under that statute the manager of the SIF has the ability to declare a divided if he or she thinks there is a sufficient amount of money to support dividends to policyholders. Once the manager declares the dividend, then the statute requires that the manager of the SIF distribute those dividends on a pro rata basis. He stated that in recent years that was changed unilaterally by the SIF without seeking legislative approval. The SIF drew a line at $2,500 and said that the employers whose premiums were less than $2,500 would receive no dividend whatsoever. Dissatisfaction with that policy resulted in the class action lawsuit being filed in 2006, and the Supreme Court issued its decision in favor of the plaintiff's on March 5, 2009. This case is still in litigation as the SIF has filed a motion for a rehearing. He stated that this legislation is premature and if passed will leave the SIF without authority to pay dividends.

In response to questions of the Committee, **Mr. Lojek** advised that if this bill were to pass, the Supreme Court would then have to decide whether or not it has any jurisdiction because the statute would be repealed. This would likely lead to more litigation. He stated he is unaware of dividend policies by other domestic stock and mutual insurance companies, but is aware that there are shareholders and stockholders that are entitled to dividends under Title 41, Chapter 28, *Idaho Code*, but stated that the SIF is a different kind of entity governed by the State of Idaho and code.

Senator Cameron stated that his concern with this legislation would be to keep the SIF as a viable and responsible entity. He stated he does not see this bill as necessarily reversing the decision of the Supreme Court, but merely affects the amount of money the SIF would have to pay out. He inquired whether **Mr. Lojek** would financially gain should this bill not pass, and should the Supreme Court's decision be upheld. **Mr. Lojek** responded that according to its financial disclosure at the end of 2008, the SIF had a $198 million surplus. If the policy holders that he and others represent prevail, the judgments could be between $10 million and $15 million. That amount will be governed by the Court below when it considers plaintiff's attorney's fees incurred over the last two and one half years. **Mr. Lojek** was asked if his opposition to this legislation was mainly the retroactive nature of this bill. He responded that it was.

Senator Goedde asked **Mr. Lojek** to clarify how the SIF is going to pay dividends from this day forward if the legislation is adopted without a retroactive date. He stated that it was his feeling that the SIF manager could use his discretion prospectively to decide whether or not to declare a dividend, but that it would open up a constitutional question to go back and change contracts.

Senator Coiner stated that Title 72, Chapter 9, Idaho Code states that the SIF shall be deemed a mutual insurer, subject to Idaho Insurance Code, Title 41, Idaho Code. **Mr. Lojek** advised that the 2000 case of

Kelso v. State Insurance Fund said that although it kind of looks like the SIF is a mutual insurance company, it really is not and therefore it does not fit in Title 41, Chapter 28.

TESTIMONY:

Richard E. Hall, attorney for the SIF, spoke in support of **S1166**. **Mr. Hall** advised that the previous statement by **Mr. Gordon** that prior to the year 2000, dividends were distributed pro rata was incorrect, and that has never really been the case. In the past, losses were taken into account in the payment of dividends. The ability of the SIF to offset dividends with losses is unclear in the 2009 Supreme Court decision. This could result in a dividend distribution to a policyholder who pays a $1,500 premium but has a $3 million loss. This does not make sense, but is one of the potential problems that has been created by the Supreme Court decision.

Mr. Hall stated that managing an insurance company right now is a tremendous task, and what this decision of the Supreme Court does is that it takes away the discretion that would give the SIF the opportunity to be able to compete in a viable way with the insurance companies that are not regulated in this way. He stated that we need to pass this legislation in order to financially protect the SIF. **Senator Stegner** commented that it should not be the role of the Legislature to pass legislation to save someone who has gotten themselves into a financial mess. He asked **Mr. Hall** why this should be different. **Mr. Hall** responded that in this particular case the Supreme Court specifically said that if the parties think their decision is inappropriate they should go to the State Legislature, which was really in effect an invitation to say that this is a type of issue that the Legislature ought to deal with. He pointed out that in this situation we are dealing with a State agency which is governed by legislation. The decision is based upon a statute that was written in 1917. The insurance code has been changed numerous times since then but this one statute has been left on the books. He believes it is of such a significant financial impact that it is a reasonable way to handle this particular situation.

Senator Sagness asked **Mr. Hall** to expand on the effect not passing this legislation will have on the SIF. **Mr. Hall** responded that the Supreme Court's decision makes it very clear that they feel there should be a pro rata distribution based upon premiums paid. They do not mention anything with regard to whether or not a loss would be calculated into that dividend. He stated that because of all the factors related to how the SIF is managed, how dividends are calculated, how premiums are calculated, how rates are calculated, and how classifications are made, he is unable to give the specifics of what the financial implications will be. He advised he does believe they will be significant, and by that he means important and very difficult for the SIF to absorb. He confirmed that the cost of current judgments and future potential litigation would be between $18 million and $24 million.

MOTION:

Senator Cameron made a motion, seconded by **Senator Goedde**, that **S1166** be sent to the floor with a do pass recommendation.

In discussing his motion, **Senator Cameron** stated that he participated in the 1998 group convened by Governor Batt to update the State Insurance

Fund Code. The intent at that time was to try and move the SIF away from being a state run program so that it could actively compete and work in the market place along side all the other companies that were offering worker's compensation insurance. He stated that they did a pretty good job, but obviously missed Section 72-915. The question before us today is first, what is the role that you want the SIF to play. If you want the SIF to still be a viable entity who will compete for business with every other carrier you must vote for this bill. The second issue is the retroactive nature of the bill. The minimal impact of not passing this legislation is $24 million. The long range impact is what you do to the SIF. If you make the SIF non competitive with other worker's compensation products then you have just spelled the doom or the end of which will cause harm to all of our constituents who are currently purchasing that product because of its competitive pricing. That is the major catastrophe – not the $24 million.

SUBSTITUTE MOTION:

Senator Stegner made a substitute motion, seconded by **Senator LeFavour**, that **S1166** be held in Committee.

In discussing his substitute motion, **Senator Stegner** stated that in his opinion the Legislature has every right to look at this issue, but we do not do it by proposing legislation in the last hours of the session. He stated a statewide debate would be more appropriate, not a half hour hearing.

Senator Goedde stated that this does affect every little policyholder in this state. The SIF is their only avenue and if we jeopardize the viability of the SIF those $150 policy holders will be required to pay $500 to $750 premiums for the same coverage. He further stated that the interpretation of Section 72-915 is in direct conflict with the dividend statute in Title 41 and that causes a severe problem for the SIF. He urged passage of this bill to fix the omission of the 1998 bill.

VOTE ON SUBSTITUTE MOTION:

The voice vote on the substitute motion to hold the bill in Committee was in doubt, and **Chairman Andreason** requested the secretary take a roll call vote. **Chairman Andreason, Senators LeFavour, Sagness, Smyser** and **Stegner** voted **Aye; total of five. Senators Lodge, Goedde, Cameron, and Coiner** voted **Nay; total of four.** The substitute motion passed five to four.

H202

Relating to the State Fire Marshall

Jeanne Medley, Land Developer, testified stating she was in support of **H202**. The International Fire Code (IFC) has given rural fire chiefs absolute control and has taken away democracy and power of the people in Idaho County. The local government has no say on how the IFC is interpreted and enforced in their county.

Dean Ellis, President of the Idaho Fire Chiefs Association, stated in the interest of time he deferred to **Ron Anderson, representing the Idaho Fire Chiefs Organization. Mr. Anderson** stated the fix that is being proposed in **H202** does not solve the problem, in fact, it creates more problems. Under **H202** if the International Fire Code (IFC) is adopted, it will take the adoption out of the hands of the State Fire Marshall and gives each city and county fire district the ability to adopt the

code. Currently, out of 35 cities only 13 of these cities have adopted the code. If this legislation were to pass, there would be a great number of cities throughout the State where there would be no code in effect. The bill takes the authority away from the State Fire Marshall and his assistants to inspect anything other than State owned or leased buildings or governmental agencies. As a Fire Chief in the City of Meridian along with the Chiefs of Boise, Idaho Falls, Wood River and a few other chiefs in this room today, it would take away our ability to inspect other than State buildings. Section §41-256 in the State Statute states that every fire chief in the State is considered an assistant to the Fire Marshall, and will not have the authority to inspect any business. This would mean day cares, schools, bars, restaurants, etc. would not be inspected for fire safety. The proposed bill creates a number of issues for fire chiefs statewide.

The Fire Chiefs propose that an impartial appeals board be created that is not affiliated in any way with the fire department which would act with impartiality to fire code enforcement cases. The fire chiefs also propose that an interim committee would be created, chaired by the Association of Idaho Cities, to bring back legislation next year that will address some of these issues. Finally, training be put in place for smaller rural fire departments to standardize the application and enforcement of the IFC (Attachment B).

Tim Vargas, Fire Commissioner from Jerome County, State's President Fire Commissioners, stated there are a number of reasons the Idaho State Fire Commissioner Association (ISFCA) stands opposed to **H202**. The Association feels it takes away local control. Fire Commissioners are elected by the taxpayers in their districts and as duly elected officials, they are charged with overseeing a budget that will guarantee that the equipment and the manpower is in place for fire suppression. In addition, we are charged with the duty of enforcing the provisions of the International Fire Code as well as fire prevention activities within our districts. This bill eliminates the commissioners from performing their duties. It would prevent them from plan review on new construction for commercial and private properties. The commissioners would only be accountable for State owned structures or their political subdivisions. They would only have jurisdiction over their own fire stations in their district. ISFCA proposes that the Legislature consider a State Fire Code Board that would function in much the same manner as the State Building Code Board and it may even be possible to have this Board service the Fire Code. This Board would adopt the code and write the necessary amendments to tailor the code to the needs of Idaho. One of the main complaints they hear is how inflexible the code appears to be in the enforcement process. The Board would also serve as the appeals board for fire code enforcement cases. ISFCA stands prepared to work with the interim task force this summer, fire chiefs, Idaho Association of Cities, and insurance companies to develop the legislation. They hope to bring back a solid bill that will meet the needs of all Idaho citizens pertaining to the enforcement of the IFC, fire protection and prevention issues that are encountered on a daily basis.

issues that are encountered on a daily basis.

ADJOURN: There being no further business, the meeting adjourned at 3:40 p.m.

Senator John Andreason
Chairman

Carol Deis
Secretary

Lois Bencken
Assistant Secretary

MINUTES

SENATE COMMERCE AND HUMAN RESOURCES COMMITTEE

DATE:	April 14, 2009
TIME:	1:30 p.m.
PLACE:	Room 117
MEMBERS PRESENT:	Chairman Andreason, Vice Chairman Coiner, Senators Stegner, Cameron, Goedde, Lodge, Smyser, Sagness (Malepeai), and LeFavour
MEMBERS ABSENT/ EXCUSED:	
GUESTS:	See attached sign-in sheet.
NOTE:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.
CONVENED:	**Chairman Andreason** called the meeting to order at 8:15 a.m.
MINUTES:	

S1166

Relating to the State Insurance Fund

Senator Davis stated the fiscal impact of this legislation is a substantial concern to the State budget. Absent advancement of this legislation will require the State to find some economics which the State does not have built into the budget. The principle concern of the Committee was the impact of current and pending litigation. **Senator Davis** asked if the Committee would consider sending the bill to the floor for possible amendment with the commitment to the Committee that together with the sponsors of the bill a set of amendments would be written that would not adversely impact the current and pending litigation.

Senator LeFavour inquired about the settlements that had been awarded and wanted to make sure the bill would not impact the fund settlements. **Senator Davis** clarified that if there is a lawful claim currently pending they would be entitled to pursue whatever remedy. If there has already been a settlement, it is not our intent to write any amendments that would require any expunging.

MOTION:

Senator Cameron moved that **S1166** be referred to the 14th order for amendment. The motion was seconded by **Senator Lodge**. The motion carried by **Voice Vote.**

Senator Stegner advised he was aware of the efforts to negotiate this bill and to find some remedy that would be agreeable to him, and he finds no objection to this action.

H231

Relating to the Public Employee Retirement System

Senator Cameron stated that **H231** is designed to fix the problem that has occurred with one of the city council members in the City of Jerome. A council member who was a former State employee ran for city council and he is fine until his number of months serving on the council exceeds the number of months he was a State employee. The result would be a significant cut in PERSI benefits to that council member. The council member would have to resign from his seat on the city council prior to that month that would lower his benefits. This legislation could potentially impact 100 to 150 active individuals who are elected officials but had some previous State service or some other entity that is a PERSI participant.

Senator Cameron walked the Committee through his presentation to clarify how the benefit would fluctuate with this public service (Attachment A). There are three methods of calculating this split benefit and **Senator Cameron** explained two. Example 1: Shows an individual who has 120 months of general service and 119 months of elected service, they stayed 1 month below the PERSI split benefit. Their monthly retirement benefit would be $1195. Example 2: Shows an individual who has 119 months of general service and 120 months of elected service the retirement benefit drops to $605. The proposed change in the bill allows city elected officials and others the same split benefit protection as legislators so the elected service would not count against their PERSI benefits. We do not want to prohibit those that have served either as an employee of the State of Idaho, county, city or hospital from being able to serve as an elected official.

MOTION:

Vice Chairman Coiner moved that **H231** be sent to the floor with a do pass recommendation. The motion was seconded by **Senator LeFavour**. The motion carried by **Voice Vote. Senator Cameron** will be the sponsor of the bill.

H248

Relating to the Employment Security Law

Bob Fick, Legislative Affairs, Department of Labor, stated that **H248** before the Committee today takes advantage of a provision in the stimulus package that benefits both unemployed workers and businesses. Under this proposal the State will adopt three expansions of unemployment insurance benefits. Upon certifying to the federal government that the State has adopted these expansions the State will receive $32.3 million from the Reed Act into the unemployment insurance trust fund. The expansions are relatively minor in the grand scheme of things: 1) Allows the most recent quarter of wages prior to lay-off to be used in calculating benefits if the traditional benefit calculation method, which is the first four of the last five quarters, fails to qualify the individual. This will cover approximately 8% of claimants. A large number of the claimants actually qualify later by waiting an extra quarter; 2) Benefits for claimants that work part-time and were laid-off from a part-time job and only want to continue to seek a part-time position. Under the current formula the system does not care whether you work part-time or full time per week. It is set-up to look at how much time you made in the quarter. To continue receiving benefits the claimant must be seeking part-time or

full time work; and 3) Extended benefits for workers who have exhausted all their other benefits and are in a State approved training program. As long as they continue with successful progress in the program they can receive additional benefits. A number of unemployed workers who are covered by the Trade Adjustment Systems Act already are eligible for these benefits. This picks up those in State approved training and that is the control the State has when it approves this training. It allows the workers to receive this extended benefit, and this is less than 1% of claimants. The total cost for all three expansion benefits is $3 million. Upon certifying that we have expanded these benefits the State will receive $32.3 million into the Reed Act Account. That infusion of cash immediately into the trust fund will reduce the amount of money the fund will have to borrow later this year when it is depleted. Eventually, once the rates adjust themselves, it will mean that rate increases to employers will be 10 to 15% less than they would be had the infusion not occurred. This legislation has been endorsed from ICAC, AFLO-CIO, small business and the Restaurant and Retailers Association.

H248 — **Senator Stegner** moved that **H248** be sent to the floor with a do pass recommendation. The motion was seconded by **Senator Cameron**. The motion carried by **Voice Vote. Senator Stegner** will be the sponsor of the bill.

S1214 — **Relating to Unemployment Benefits**

Bob Fick, Legislative Affairs, Department of Labor, stated that **S1214** allows the State to adopt a formula for triggering federal state extended benefits for a longer period than the current formula allows. This is provided for in the stimulus bill. The federal state extended benefits have been around since World War II. They are up to thirteen weeks of additional benefits for unemployed workers who have exhausted all their other benefits. Up until now they have been paid 50% from the State Trust Fund and 50% from the federal government. Under the stimulus bill the federal government has agreed to pay 100% of those benefits through the end of this year and have agreed to allow states to adopt triggers on these benefits. Currently the benefits are triggered by the insured unemployment rate rising above 5%. The rate rose above 5% the beginning of February. It is expected to trigger down below 5% about the middle of June. The new formula allowed in the American Recovery and Reinvestment Act of 2009 (Stimulus Act) lets the states use the seasonally adjusted total unemployment rate. When that rate exceeds 6.5% on a three month rolling average the extended benefit period triggers on and stays on until the rolling average falls below 6.5%. Under the current situation the 6.5% three month rolling average was hit the last week of April 1, 2009. It will stay above 6.5% for the rest of this year. In cases where the federal government is paying 100% of federal state extended benefits the state can use this total unemployment rate calculation. As soon as the federal government stops paying 100% they will convert back to the more conservative 5% seasonally insured unemployment rate. The effect of this is an additional $14 to $20 million into the Idaho economy during the second half of 2009.

MOTION: — **Senator LeFavour** moved that **S1214** be sent to the floor with a do pass

recommendation. The motion was seconded by **Vice Chairman Coiner**. The motion carried by **Voice Vote. Senator LeFavour** will be the sponsor of the bill.

MOTION: **Senator Sagness** moved to approve the minutes of March 24, 2009. The motion was seconded by **Vice Chairman Coiner**. The motion carried by **Voice Vote.**

MOTION: **Senator Smyser** moved to approve the minutes of March 26, 2009. The motion was seconded by **Senator Lodge**. The motion carried by **Voice Vote.**

MOTION: **Senator LeFavour** moved to approve the minutes of April 2, 2009. The motion was seconded by **Vice Chairman Coiner**. The motion carried by **Voice Vote.**

ADJOURNED: There being no further business, the meeting adjourned at 8:34 a.m.

Senator John Andreason
Chairman

Carol Deis
Secretary

ANNUAL STATEMENT

of the

Idaho State Insurance Fund

of

Boise

in the state of

Idaho

to the

Department of Insurance

of the

State of Idaho

For the Year Ended

December 31, 2009

HAND DELIVERED

2009 ALPHABETICAL INDEX – PROPERTY & CASUALTY ANNUAL STATEMENT BLANK

* 3 6 1 2 9 2 0 0 9 2 0 1 0 0 1 0 0 *

ANNUAL STATEMENT

For the Year Ended December 31, 2009
of the Condition and Affairs of the

Idaho State Insurance Fund

NAIC Group Code.....NONE, NONE (Current Period) (Prior Period) NAIC Company Code..... 36129 Employer's ID Number..... 82-0412279

Organized under the Laws of Idaho State of Domicile or Port of Entry Idaho Country of Domicile US

Incorporated/Organized..... December 31, 1917 Commenced Business..... January 1, 1918

Statutory Home Office	1215 West State Street..... Boise ..... ID ..... 83702 *(Street and Number) (City or Town, State and Zip Code)*	
Main Administrative Office	1215 West State Street..... Boise ..... ID ..... 83702 *(Street and Number) (City or Town, State and Zip Code)*	208-332-2100 *(Area Code) (Telephone Number)*
Mail Address	PO Box 83720..... Boise ..... ID ..... 83720-0044 *(Street and Number or P. O. Box) (City or Town, State and Zip Code)*	
Primary Location of Books and Records	1215 West State Street..... Boise ..... ID ..... 83702 *(Street and Number) (City or Town, State and Zip Code)*	208-332-2100 *(Area Code) (Telephone Number)*
Internet Web Site Address	www.idahosif.org	
Statutory Statement Contact	Thomas R Haddock *(Name)*	208-332-2510 *(Area Code) (Telephone Number) (Extension)*
	tom.haddock@idahosif.org *(E-Mail Address)*	208-332-2559 *(Fax Number)*

OFFICERS

Name	Title
James M Alcorn	Manager

DIRECTORS OR TRUSTEES

John W Goedde, Rodney A Higgins, Steven C Landon, Terry F Gestrin, Max Black

State of..... Idaho
County of..... Ada

The officers of this reporting entity being duly sworn, each depose and say that they are the described officers of said reporting entity, and that on the reporting period stated above, all of the herein described assets were the absolute property of the said reporting entity, free and clear from any liens or claims thereon, except as herein stated, and that this statement, together with related exhibits, schedules and explanations therein contained, annexed or referred to, is a full and true statement of all the assets and liabilities and of the condition and affairs of the said reporting entity as of the reporting period stated above, and of its income and deductions therefrom for the period ended, and have been completed in accordance with the NAIC *Annual Statement Instructions* and *Accounting Practices and Procedures* manual except to the extent that: (1) state law may differ; or, (2) that state rules or regulations require differences in reporting not related to accounting practices and procedures, according to the best of their information, knowledge and belief, respectively. Furthermore, the scope of this attestation by the described officers also includes the related corresponding electronic filing with the NAIC, when required, that is an exact copy (except for formatting differences due to electronic filing) of the enclosed statement. The electronic filing may be requested by various regulators in lieu of or in addition to the enclosed statement.

(Signature)
James M Alcorn
(Printed Name)
Manager
(Title)

Subscribed and sworn to before me Dana Sorenson
This 22nd day of February, 2010

Commission Expires: August 2, 2011

a. Is this an original filing? Yes [X] No [ ]
b. if no 1. State the amendment number
2. Date filed
3. Number of pages attached

DANA SORENSON NOTARY PUBLIC STATE OF IDAHO

000116

000200

ASSETS

	Current Year			Prior Year
	1 Assets	2 Nonadmitted Assets	3 Net Admitted Assets (Cols. 1 - 2)	4 Net Admitted Assets
1. Bonds (Schedule D)	479,295,791		479,295,791	503,123,999
2. Stocks (Schedule D):				
2.1 Preferred stocks			0	
2.2 Common stocks	71,487,691		71,487,691	53,854,771
3. Mortgage loans on real estate (Schedule B):				
3.1 First liens			0	
3.2 Other than first liens			0	
4. Real estate (Schedule A):				
4.1 Properties occupied by the company (less $.....0 encumbrances)	2,173,127		2,173,127	2,380,879
4.2 Properties held for the production of income (less $.....0 encumbrances)			0	
4.3 Properties held for sale (less $.....0 encumbrances)			0	
5. Cash ($.....34,788,521, Sch. E-Part 1), cash equivalents ($.....0, Sch. E-Part 2) and short-term investments ($.....9,202,396, Sch. DA)	43,990,918		43,990,918	29,254,796
6. Contract loans (including $.....0 premium notes)			0	
7. Other invested assets (Schedule BA)	933,350		933,350	1,079,889
8. Receivables for securities	3,674,258		3,674,258	7,872,984
9. Aggregate write-ins for invested assets	0	0	0	0
10. Subtotals, cash and invested assets (Lines 1 to 9)	601,555,135	0	601,555,135	597,567,318
11. Title plants less $.....0 charged off (for Title insurers only)			0	
12. Investment income due and accrued	4,835,303		4,835,303	5,482,948
13. Premiums and considerations:				
13.1 Uncollected premiums and agents' balances in course of collection	5,158,315	1,841,274	3,317,040	4,107,108
13.2 Deferred premiums, agents' balances and installments booked but deferred and not yet due (including $.....0 earned but unbilled premiums)	9,764		9,764	14,336
13.3 Accrued retrospective premiums			0	
14. Reinsurance:				
14.1 Amounts recoverable from reinsurers	84,327		84,327	28,920
14.2 Funds held by or deposited with reinsured companies	396,357		396,357	464,549
14.3 Other amounts receivable under reinsurance contracts			0	
15. Amounts receivable relating to uninsured plans			0	
6.1 Current federal and foreign income tax recoverable and interest thereon			0	
16.2 Net deferred tax asset			0	
17. Guaranty funds receivable or on deposit			0	
18. Electronic data processing equipment and software	14,889,199	14,396,519	492,681	372,208
19. Furniture and equipment, including health care delivery assets ($.....0)	89,065	89,065	0	0
20. Net adjustment in assets and liabilities due to foreign exchange rates			0	
21. Receivables from parent, subsidiaries and affiliates			0	
22. Health care ($.....0) and other amounts receivable			0	
23. Aggregate write-ins for other than invested assets	4,614,505	488,142	4,126,363	4,140,120
24. Total assets excluding Separate Accounts, Segregated Accounts and Protected Cell Accounts (Lines 10 to 23)	631,631,969	16,815,000	614,816,970	612,177,507
25. From Separate Accounts, Segregated Accounts and Protected Cell Accounts				
26. TOTALS (Lines 24 and 25)	631,631,969	16,815,000	614,816,970	612,177,507
DETAILS OF WRITE-INS				
0901.			0	
0902.			0	
0903.			0	
0998. Summary of remaining write-ins for Line 9 from overflow page	0	0	0	0
0999. Totals (Lines 0901 thru 0903 plus 0998) (Line 9 above)	0	0	0	0
2301. Ceded Reinsurance Deposit	1,706,000		1,706,000	1,342,030
2302. National Guard Receivable	2,487		2,487	2,443
2303. Premium Tax Refund Rec - IDOI	2,417,876		2,417,876	2,795,647
2398. Summary of remaining write-ins for Line 23 from overflow page	488,142	488,142	0	0
2399. Totals (Lines 2301 thru 2303 plus 2398) (Line 23 above)	4,614,505	488,142	4,126,363	4,140,120

LIABILITIES, SURPLUS AND OTHER FUNDS

		1 Current Year	2 Prior Year
1.	Losses (Part 2A, Line 35, Column 8)	317,254,569	323,013,370
2.	Reinsurance payable on paid losses and loss adjustment expenses (Schedule F, Part 1, Column 6)		
3.	Loss adjustment expenses (Part 2A, Line 35, Column 9)	36,813,380	36,787,992
4.	Commissions payable, contingent commissions and other similar charges		
5.	Other expenses (excluding taxes, licenses and fees)	7,843,442	2,407,825
6.	Taxes, licenses and fees (excluding federal and foreign income taxes)	1,921,692	2,302,246
7.1	Current federal and foreign income taxes (including $.....0 on realized capital gains (losses))		
7.2	Net deferred tax liability		
8.	Borrowed money $.....0 and interest thereon $.....0		
9.	Unearned premiums (Part 1A, Line 38, Column 5) (after deducting unearned premiums for ceded reinsurance of $.....0 and including warranty reserves of $.....0)	18,815,096	25,049,609
10.	Advance premium	2,661,630	2,529,230
11.	Dividends declared and unpaid:		
	11.1 Stockholders		
	11.2 Policyholders	14,045,136	13,586,262
12.	Ceded reinsurance premiums payable (net of ceding commissions)	1,494,707	1,179,234
13.	Funds held by company under reinsurance treaties (Schedule F, Part 3, Column 19)		
14.	Amounts withheld or retained by company for account of others	524,968	312,159
15.	Remittances and items not allocated	165,187	31,027
16.	Provision for reinsurance (Schedule F, Part 7)		
17.	Net adjustments in assets and liabilities due to foreign exchange rates		
18.	Drafts outstanding		
19.	Payable to parent, subsidiaries and affiliates		
20.	Payable for securities	11,286,821	10,585,139
21.	Liability for amounts held under uninsured plans		
22.	Capital notes $.....0 and interest thereon $.....0		
23.	Aggregate write-ins for liabilities	4,049,955	3,518,024
24.	Total liabilities excluding protected cell liabilities (Lines 1 through 23)	416,876,585	421,282,117
25.	Protected cell liabilities		
26.	Total liabilities (Lines 24 and 25)	416,876,585	421,282,117
27.	Aggregate write-ins for special surplus funds	0	0
28.	Common capital stock		
29.	Preferred capital stock		
30.	Aggregate write-ins for other than special surplus funds	0	0
31.	Surplus notes		
32.	Gross paid in and contributed surplus		
33.	Unassigned funds (surplus)	197,940,384	190,895,389
34.	Less treasury stock, at cost:		
	34.1 .....0.000 shares common (value included in Line 28 $.....0)		
	34.2 .....0.000 shares preferred (value included in Line 29 $.....0)		
35.	Surplus as regards policyholders (Lines 27 to 33, less 34) (Page 4, Line 39)	197,940,384	190,895,389
36.	TOTALS (Page 2, Line 26, Col. 3)	614,816,970	612,177,507

DETAILS OF WRITE-INS

2301.	Credits Due Policyholders	4,049,955	3,518,024
2302.			
2303.			
2398.	Summary of remaining write-ins for Line 23 from overflow page	0	0
2399.	Totals (Lines 2301 thru 2303 plus 2398) (Line 23 above)	4,049,955	3,518,024
2701.			
2702.			
2703.			
2798.	Summary of remaining write-ins for Line 27 from overflow page	0	0
2799.	Totals (Lines 2701 thru 2703 plus 2798) (Line 27 above)	0	0
3001.			
3002.			
3003.			
3098.	Summary of remaining write-ins for Line 30 from overflow page	0	0
3099.	Totals (Lines 3001 thru 3003 plus 3098) (Line 30 above)	0	0

LEGISLATURE OF THE STATE OF IDAHO

Sixtieth Legislature First Regular Session - 2009

IN THE SENATE

SENATE BILL NO. 1166, As Amended

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO THE STATE INSURANCE FUND; TO PROVIDE LEGISLATIVE INTENT; REPEALING SECTION 72-915, IDAHO CODE, RELATING TO DIVIDENDS; DECLARING AN EMERGENCY AND PROVIDING A RETROACTIVE EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. LEGISLATIVE INTENT. (1) Historically, the State Insurance Fund has exercised its discretion, pursuant to Section 72-915, Idaho Code, to determine the annual amount of dividend, if any, a policyholder would receive.

(2) On March 5, 2009, the Idaho Supreme Court filed its opinion in *Farber v. Idaho State Insurance Fund*, S. Ct. 35144, in which it interpreted Section 72-915, Idaho Code, and ruled that the State Insurance Fund cannot exercise its discretion in determining how much of a dividend to pay to each policyholder because the statute requires a pro rata distribution of dividends to all policyholders. The result of the decision is to require that the State Insurance Fund pay dividends on policies that are not financially profitable, thereby restricting the fund's ability to reduce premiums and pay dividends to profitable policyholders.

(3) In its decision, the Supreme Court stated that, if it has become prudent to alter the statutory language related to the requirements for distribution of dividends, the Legislature is the appropriate venue for such change.

(4) It was the intent of the Legislature in passing House Bill No. 774, As Amended of the Second Regular Session of the Fifty-fourth Idaho Legislature, effective on April 3, 1998, that the State Insurance Fund should operate like an efficient insurance company, subject to regulation under Title 41, Idaho Code, including the dividend provisions set forth in Chapter 28, Title 41, Idaho Code. The retroactive repeal of Section 72-915, Idaho Code, to January 1, 2003, will conform with that intent. Section 73-101, Idaho Code, permits such retroactive repeal as long as it is "expressly so declared" in legislation.

(5) The retroactive repeal of Section 72-915, Idaho Code, will reconcile conflicts in the existing laws governing the State Insurance Fund and will allow the fund, like other insurance companies, to issue dividends pursuant to Chapter 28, Title 41, Idaho Code.

(6) It is the intent of the Legislature that the provisions of this act shall not apply to any action filed in a state or federal court of law in the state of Idaho on or before December 31, 2008, and the provisions of this act shall not apply to the aforementioned case of *Farber v. Idaho State Insurance Fund* as currently pending with respect to those policy holders paying annual premiums of not more than two thousand five hundred dollars ($2,500).

SECTION 2. That Section 72-915, Idaho Code, be, and the same is hereby repealed.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, Section 1 of this act shall be in full force and effect on and after passage and approval, and Section 2 of this act shall be in full force and effect retroactively to January 1, 2003.

Donald W. Lojek ISBN 1395
LOJEK LAW OFFICES, CHTD
623 West Hays Street
PO Box 1712
Boise, ID 83701
Telephone: 208-343-7733
Facsimile: 208-345-0050

Philip Gordon ISBN 1996
Bruce S. Bistline ISBN 1988
GORDON LAW OFFICES
623 West Hays Street
Boise, ID 83702
Telephone: 208/345-7100
Facsimile: 208/345-0050

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

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON,

Plaintiffs,

vs.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN AND MAX BLACK AND STEVE LANDON in their capacity as members of the Board of Directors of the State Insurance Fund,

Defendants.

CASE NO. CV 09-13607-C

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' 14TH AFFIRMATIVE DEFENSE

COME NOW, the Plaintiffs, by and through their undersigned counsel of record, and pursuant to Rule 56(a), I.R.C.P., move for summary judgment on the Defendants' Fourteenth Affirmative Defense.

This Motion is supported by the Acknowledgment of Service from the Office of the Idaho Attorney General and a Memorandum in Support of this Motion, both of which are being filed contemporaneously herewith.

DATED this 14th day of October, 2010.

GORDON LAW OFFICES

By _____
Philip Gordon
Attorneys for Plaintiffs

LOJEK LAW OFFICES, CHTD.

By _____
Donald W. Lojek
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of October, 2010, a true and correct copy of the foregoing instrument was served on the following by the method indicated below, and addressed as follows:

[ ] Hand Delivery
[ ] U.S. Mail, postage paid
[ ] Overnight Express Mail
[ ] Facsimile Copy:

Richard E. Hall
Keely Duke
Hall Farley Oberrecht & Blanton PA
702 West Idaho Street, Ste. 700
Boise, ID 83702
Attorney for State Insurance Fund

Donald W. Lojek

Richard E. Hall
ISB #1253; reh@hallfarley.com
Keely E. Duke
ISB #6044; ked@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
W:\3\3-461.9\PLEADINGS\MSJ-Mtn.doc
Attorneys for Defendants

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

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON,

Plaintiffs,

vs.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN and MAX BLACK and STEVE LANDON, in their capacity as members of the Board of Directors of the State Insurance Fund,

Defendants.

Case No. CV 09-13607-C

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW defendants, The Idaho State Insurance Fund, James M. Alcorn in his official capacity as its Manager, and William Deal, Wayne Meyer, Gerald Geddes, John Goedde, Elaine Martin, Mark Snodgrass, Rodney A. Higgins, Terry Gestrin, Max Black, and Steve

Landon in their capacity as members of the Board of Directors of the State Insurance Fund (collectively, "SIF"), by and through their counsel of record Hall, Farley, Oberrecht & Blanton, P.A., and pursuant to Idaho Rule of Civil Procedure 56, hereby move this Court for an order dismissing plaintiffs' First Amended Class Action Complaint and Demand for Jury Trial with prejudice, on the grounds that there are no genuine issues of material fact, and that SIF is entitled to summary judgment as a matter of law on all of plaintiffs' claims.

Specifically, SIF is entitled to summary judgment because the repeal of I.C. § 72-915 bars Plaintiffs' action as the emergency repeal of I.C. § 72-915 was signed May 6, 2009, and was made retroactive to January 1, 2003, thereby barring Plaintiffs' action. Furthermore, contrary to Plaintiffs' position, the repeal of I.C. § 72-915 is constitutional, both under the U.S. and Idaho constitutions.

This motion is based upon the Memorandum in Support of Defendants' Motion for Summary Judgment, the Affidavit of James M. Alcorn in Support of Defendants' Motion for Summary Judgment, and the Affidavit of Counsel in Support of Defendants' Motion for Summary Judgment, which are filed herewith, as well as all pleadings and papers on file in this action.

SIF requests oral argument.

DATED this 26th day of October, 2010.

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

By #6432
Richard E. Hall - Of the Firm
Keely E. Duke - Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of October, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Donald W. Lojek Lojek Law Offices, Chtd. 623 West Hays Street Boise, ID 83702 Fax No.: (208) 345-0050 *Attorneys for Plaintiffs*	___ X ___ ___ ___	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Telecopy Email
Philip Gordon Bruce S. Bistline Gordon Law Offices 623 West Hays Street Boise, ID 83702 Fax No.: (208) 345-0050 *Attorneys for Plaintiffs*	___ X ___ ___ ___	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Telecopy Email

Richard E. Hall
Keely E. Duke

11-23 AM 1080

Richard E. Hall
ISB #1253; reh@hallfarley.com
Keely E. Duke
ISB #6044; ked@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
W:\3\3-461.9\PLEADINGS\MSJ-Aff-Alcorn.doc
Attorneys for Defendants

FILED
A.M. 4:38 P.M.
OCT 26 2010
CANYON COUNTY CLERK
S. DYE, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON, Plaintiffs, vs. THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN and MAX BLACK and STEVE LANDON, in their capacity as members of the Board of Directors of the State Insurance Fund, Defendants.	Case No. CV 09-13607-C **AFFIDAVIT OF JAMES M. ALCORN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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 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 generally provides that all Idaho employers must maintain worker's compensation insurance coverage for their employees, other than those specifically exempted by I.C. §72-212.

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 is currently deviating by 9% from all filed rates. Therefore, the premiums for all SIF policyholders are calculated beginning with a rate 9% 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 50% 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 an 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 approximately 36,000 employers, which is approximately 70% of the market. Many of whom, especially the smaller employers, cannot get 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. 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.

26. 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.

27. The decision to distribute dividends in a certain fashion 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.

28. If the Court were to find that Idaho Code Section 72-915 has not, or cannot, be repealed as intended by the Idaho Legislature, the SIF Manager would lack the discretion to declare a dividend that can be safely and properly divided with regard to prior paid premiums.

29. Attached hereto as Exhibit A is a true and correct copy of the SIF's internal Underwriting Policy which I executed on October 5, 1998, and which is still in effect.

//

//

//

//

//

//

//

FURTHER YOUR AFFIANT SAYETH NAUGHT.

James M. Alcorn

SUBSCRIBED AND SWORN to before me this 26th day of October, 2010.

(SEAL)

PAMELA WATSON NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires 7-2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of October, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Donald W. Lojek Lojek Law Offices, Chtd. 623 West Hays Street Boise, ID 83702 Fax No.: (208) 345-0050 *Attorneys for Plaintiffs*	___ X ___ ___ ___	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Telecopy Email
Philip Gordon Bruce S. Bistline Gordon Law Offices 623 West Hays Street Boise, ID 83702 Fax No.: (208) 345-0050 *Attorneys for Plaintiffs*	___ X ___ ___ ___	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Telecopy Email

Richard E. Hall
Keely E. Duke

STATE INSURANCE FUND

1215 W. STATE STREET • P.O. BOX 83720 • BOISE, IDAHO 83720-0044
PHONE (208) 334-2370 • (800) 334-2370

UNDERWRITING POLICY

It is the policy of the Idaho State Insurance Fund (ISIF) to offer insurance coverage to all Idaho employers who are required, by Idaho Code, to obtain workers compensation insurance on their Idaho employees and who are willing to comply with reasonable business terms and conditions. Cancellation, non-renewal, or refusal to quote will only occur given one or more of the following conditions:

1. Employers subject to Federal workers or workers compensations laws.
2. Employers with multi-state exposures (ISIF is not authorized to write coverage outside Idaho).
3. Failure to comply with policy contract provisions, including but not limited to:
   - Failure of an applicant or policyholder to pay, when due, a required premium or deposit.
   - Failure of a policyholder to cooperate in reporting, investigation, settlement, or defense of claims.
   - Failure of a policyholder to provide records required for payroll and premium verification.
   - Failure of an applicant or policyholder to agree to and act on loss prevention recommendations by ISIF safety professionals or to maintain a reasonable safety environment for its employees.
4. Failure of an applicant to provide information sufficient to properly evaluate the exposure.
5. The policyholder has acted fraudulently or makes material misrepresentations with respect to the filing of claims or payments of premiums.
6. The policyholder or applicant, if warranted by claims experience, should be written in the assigned risk plan.

JAMES M. ALCORN
Manager

October 5, 1998
Date

EXHIBIT
Identification
A

Richard E. Hall
ISB #1253; reh@hallfarley.com
Keely E. Duke
ISB #6044; ked@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
W:\3\3-461.9\PLEADINGS\MSJ-Aff.doc
Attorneys for Defendants

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

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON,

Plaintiffs,

vs.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN and MAX BLACK and STEVE LANDON, in their capacity as members of the Board of Directors of the State Insurance Fund,

Defendants.

Case No. CV 09-13607-C

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss
COUNTY OF ADA)

I, Bryan A. Nickels, being first duly sworn, depose and state:

1. I am an attorney licensed to practice in the State of Idaho, and am an attorney with the law firm of Hall, Farley, Oberrecht & Blanton, P.A., attorneys for defendants in this action, and make this Affidavit on my personal knowledge and belief.

2. Attached hereto as Exhibit A is a true and correct copy of the "Memorandum Decision Upon Motions for Summary Judgment," filed December 26, 2007 in the matter entitled *Randolph E. Farber, et al. v. The Idaho State Insurance Fund*, in the District Court for the Third District of Idaho, Canyon County, Case No. CV06-7877 (Judge Morfitt and Judge Ryan, presiding)("*Farber*").

3. Attached hereto as Exhibit B is a true and correct copy of the "Amendment to the Court's Memorandum Decision upon Motions for Summary Judgment," filed February 15, 2008, in the *Farber* litigation.

4. Attached hereto as Exhibit C are true and correct copies of the legislative history, engrossed text, and Statement of Purpose/Fiscal Note regarding the 2009 repeal of I.C. §72-915 (SB1166, as amended), as maintained on the Idaho State Legislature website at http://legislature.idaho.gov/legislation/2009/S1166.htm.

5. Attached hereto as Exhibit D is a true and correct copy of the "Memorandum Decision Upon Plaintiffs' Revised Second Motion for Partial Summary Judgment," filed November 4, 2009, in the *Farber* litigation.

6. Attached hereto as Exhibit E is a true and correct copy 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," filed September 21, 2009, in the *Farber* litigation, as was referenced in the "Memorandum Decision Upon Plaintiffs' Revised Second Motion for Partial Summary Judgment," which is attached hereto as Exhibit D.

7. Attached hereto as Exhibit F is a true and correct copy of the "Remittitur" issued by the Idaho Supreme Court on May 27, 2009, in the *Farber* litigation.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Bryan A. Nickels

SUBSCRIBED AND SWORN to before me this 26th day of October, 2010.

Notary Public
Residing at Boise, Idaho
My Commission Expires: 10-04-16

KARA L. CLIPPARD NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of October, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Donald W. Lojek Lojek Law Offices, Chtd. 623 West Hays Street Boise, ID 83702 Fax No.: (208) 345-0050 *Attorneys for Plaintiffs*	___ X ___ ___ ___	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Telecopy Email
Philip Gordon Bruce S. Bistline Gordon Law Offices 623 West Hays Street Boise, ID 83702 Fax No.: (208) 345-0050 *Attorneys for Plaintiffs*	___ X ___ ___ ___	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Telecopy Email

Richard E. Hall
Keely E. Duke

EXHIBIT A

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.	CASE NO. CV 2006-07877*C
Plaintiffs,	MEMORANDUM DECISION UPON MOTIONS FOR SUMMARY JUDGMENT
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.	

This matter came on for hearing upon plaintiffs' second motion for summary judgment and upon defendants' motion for summary judgment. Presenting oral argument for the plaintiffs was

Bruce Bistline, attorney at law. Presenting oral argument for the defendants was Richard Hall, attorney at law.

The court has reviewed the written briefs submitted on behalf of the parties, the affidavits submitted and considered the oral arguments presented and finds as follows:

PROCEDURAL HISTORY

This is a class action law suit. The class is defined as all Idaho employers who pay annual premiums of $2,500 or less to the Idaho State Insurance Fund, hereinafter "SIF", for workers compensation coverage. The complaint declares that I.C. §72-915 authorizes the SIF manager to readjust the rates of a particular class of employment or industry, in other words, to pay dividends. Since 2003, the fund has paid dividends to only those subscribers who pay more than $2,500 of annual premiums into the fund.

Plaintiffs allege that those in their class comprise 80 to 95 % of the subscribers to the SIF. The number of policies issued by the SIF is claimed to be 29,789 in 2002 and 32,320 in 2003. So the class is very large.

Count I of the complaint calls for the court to use its power to declare the rights, status, and other legal relations of parties pursuant to I.C. §10-1201, in other words, to make SIF pay dividends to the members of the class by Declaratory Judgment.

Count II of the complaint asks the court to enjoin the defendants from ever again paying out dividends to some but not all of the SIF subscribers.

Count III asks the court to award damages to the class in the amount that would have been paid to them in dividends in previous years.

The defendants in the case are SIF itself, its manager, James Alcorn and the board of directors (nine in number).

Both sides have filed Motions for Summary Judgment.

The plaintiffs filed theirs on January 5, 2007 asking the court to rule that I.C. §72-915 is the only authority that exists re: dividends paid by SIF and that it provides no discretion to the SIF manager to select particular classes of subscriber to receive dividends. Alternatively, if the manager

has the discretion to select classes of subscriber, it does not allow the class to be determined by the amount of premium paid. The court has not yet ruled on this motion.

The defendants filed theirs on February 13, 2007 asking the court to rule that, as a matter of law, I.C. §72-915 does allow the SIF manager the discretion to allocate dividends as he deems appropriate. Further, that the court needed to resolve issues of standing and the applicable statute of limitations to this case. On the latter issues, the court has ruled that the plaintiffs do have standing and that the applicable statute of limitations is three years in this case where the gravaman of the plaintiffs' claim is a statutory violation.

Plaintiffs' second motion for summary judgment asks the court for its judicial determination that the words set out in the last several lines of 72-915 clearly and unambiguously express a legislative intention that any dividend which the manager decides to distribute must be distributed in direct proportion to the amount of premium paid in the dividend period by each policy holder.

The plaintiffs argue that the Court must use the literal meaning of the words of the statute unless it would be contrary to other clearly expressed legislative intent or would lead to an absurd result. Plaintiffs initially argue that the words set out in the last lines of 72-915 unambiguously express a legislative intent relative to the calculus to be used in allocating a dividend and that the calculus requires any dividend which the Manager may decide to distribute, must be distributed in direct proportion to the amount of premium paid in the dividend period by each policyholder who meets the longevity requirement and falls within the classes of employment sharing in the dividend. Plaintiffs argue that the following framework is established by 72-915:

The second sentence of the statute provides for a readjustment process which involves crediting back to qualified subscribers excess funds which involves two phases:

a) the phase leading to the declaring of a dividend

Step 1: Manager must determine if there are available funds

Step 2: Manager must determine if those funds may be safely and properly divided

b) the phase in which distribution of the dividend is accomplished.

Step 1: Manager must determine if he will proceed with a dividend. Statute provides that having found funds available for division, the Manager may in

his discretion proceed with the *distribution.*

Step 2: Manager must determine which policyholders are qualified to share in the distribution

- To be a qualified policyholder, a subscriber must be a member of "such class" which refers to any class of employment or industry as to which there were excess funds
- Further, the policyholder must satisfy the longevity requirement which requires subscription for 6 months or more prior to the time of readjustment

Step 3: Manager shall "credit to <u>each</u>" qualified policyholder their share. The use of the following phrase "as he is properly entitled to, having regard to his prior paid premiums" demonstrates an intention for the respective share of "each" to be calculated solely with reference to the amount of premiums paid.

Plaintiffs further argue that the term "class of employment" cannot, considering the section as a whole, rationally be read to allow differentiation between employers based upon the amount of the annual premium paid. If "classes of employment" is instead ambiguous, the legislature intended the term to refer to employment groupings for rating and accounting purposes and was not intended to refer to the amount of premium paid by the employer.

The defendants counter with their own summary judgment motion arguing that if the court considers the entire statutory framework of the SIF, it will see that the legislature clearly and unambiguously provided the SIF and its manager the discretion to determine how declared dividends should be distributed. By its motion for summary judgment, the defendants want the court to declare this to be true as a matter of law.

Defendants argue that the SIF was set up in 1917 to provide workers compensation insurance to Idaho employers who could not otherwise get it from private carriers. In order to provide the security necessary to insure that payments are made on all deserving claims, the SIF must be managed such that it maintains sufficient surplus and reserve totals to provide a stable and ongoing source of workers' compensation insurance to Idaho workers. The duty of insuring the

financial integrity of the SIF is left to the board of directors and the fund manager.

They further argue that the decision to pay a dividend to only those subscribers who pay premiums in excess of $2,500 is based upon a marketing strategy. That is, the larger accounts are generally more profitable and the dividends to them keeps them in the SIF instead of going to private insurers and this allows the SIF to fulfill its public policy objective of providing a source of insurance for the smaller, less profitable accounts. The defendants declare that providing larger policy holders with a larger dividend is a good business practice and is consistent with insurance industry standards as well as the statutory mandate of 72-901(3) to run the SIF as an efficient insurance company.

In the end, the court has before it motions for summary judgment filed by both parties each asking the court to interpret the meaning of Idaho Code §72-915.

FINDINGS OF LAW

"Statutory construction is a question of law. *State v. Reyes,* 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct.App.2003). Where the language of a statute is plain and unambiguous, the Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode,* 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight,* 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar,* 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct.App.2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight,* 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar,* 134 Idaho at 389, 3 P.3d at 67.

When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode,* 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is incumbent upon a court to give a statute an interpretation which will not render it a nullity. *State v. Beard,* 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct.App.2001). Construction of a statute that leads

to an absurd result is disfavored. *State v. Doe,* 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); *State v. Yager,* 139 Idaho 680, 690, 85 P.3d 656, 666 (2004); ***State v. Burtlow***, 144 Idaho 455, 163 P.3d 244, 245 -246 (Ct.App., 2007).

"The objective of statutory interpretation is to give effect to legislative intent. *Robison v. Bateman-Hall,* 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). Because "the best guide to legislative intent is the words of the statute itself," the interpretation of a statute must begin with the literal words of the statute. *In re Permit No. 36-7200,* 121 Idaho 819, 824, 828 P.2d 848, 853 (1992); *accord McLean v. Maverick Country Stores, Inc.,* 142 Idaho 810, 813, 135 P.3d 756, 759 (2006). Where the statutory language is unambiguous, the Court does not construe it but simply follows the law as written. *McLean,* 142 Idaho at 813, 135 P.3d at 759. The plain meaning of a statute therefore will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *Gillihan v. Gump,* 140 Idaho 264, 266, 92 P.3d 514, 516 (2004). In determining its ordinary meaning "effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." *State v. Mercer,* 143 Idaho 108, 109, 138 P.3d 308, 309 (2006) (quoting *In re Winton Lumber Company,* 57 Idaho 131, 136, 63 P.2d 664, 666 (1936)).

If the language of the statute is capable of more than one reasonable construction it is ambiguous. *Carrier v. Lake Pend Oreille Sch. Dist. No. 84,* 142 Idaho 804, 807, 134 P.3d 655, 658 (2006). An ambiguous statute must be construed to mean what the legislature intended it to mean. *Id.* To ascertain legislative intent, the Court examines not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and its legislative history. *Id.*" ***State v. Yzaguirre***, 144 Idaho 471, 163 P.3d 1183, 1187 (20

It is a well-settled principle of statutory construction that statutes should not be construed to render other provisions meaningless.

As stated in *Westerberg v. Andrus,* 114 Idaho 401, 757 P.2d 664 (1988):

> [O]ur prior cases have held that statutory or constitutional provisions cannot be read in isolation, but must be interpreted in the context of the entire document. *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.'); *Hartley v. Miller-Stephan,* 107 Idaho 688, 690, 692 P.2d 332, 334 (1984), *reh'g denied* December 31, 1984 ('We will not construe a statute in a way which makes mere

> surplusage of the provisions included therein.); ... *Bastian v. City of Twin Falls,* 104 Idaho 307, 310, 658 P.2d 978, 981 (Ct.App.1983), *petition for review denied* 1983 ('The particular words of a statute should be read in context; and the statute as a whole should be construed, if possible, to give meaning to all its parts in light of the legislative intent.'). 114 Idaho at 403-04, 757 P.2d at 666-67. Emphasis added.

The Court's primary duty in interpreting a statute is to give effect to the legislative intent and purpose of the statute. *Adamson v. Blanchard,* 133 Idaho 602, 605, 990 P.2d 1213, 1216 (1999); *Bannock County v. City of Pocatello,* 110 Idaho 292, 294, 715 P.2d 962, 964 (1986). The legislature's intent is ascertained from the statutory language and the Court may seek edification from the statute's legislative history and historical content at enactment. *Adamson,* 133 Idaho at 605, 990 P.2d at 1216." ***Idaho Cardiology Associates, P.A. v. Idaho Physicians Network, Inc.***, 141 Idaho 223, 225, 108 P.3d 370, 372 (Idaho, 2005).

A statute is ambiguous where the language is capable of more than one reasonable construction. *Jen-Rath Co., Inc. v. Kit Mfg. Co.,* 137 Idaho 330, 335, 48 P.3d 659, 664 (2002). " Ambiguity is not established merely because differing interpretations are presented to a court; otherwise, all statutes subject to litigation would be considered ambiguous." *Hamilton,* 135 Idaho at 571, 21 P.3d at 893. "The interpretation should begin with an examination of the literal words of the statute, and this language should be given its plain, obvious, and rational meaning." *Williamson v. City of McCall,* 135 Idaho 452, 455, 19 P.3d 766, 769 (2001)." ***Porter v. Board of Trustees, Preston School Dist. No. 201***, 141 Idaho 11, 14, 105 P.3d 671, 674 (Idaho,2004).

ANALYSIS

In filing their 2nd motion for summary judgment, the plaintiffs are seeking a ruling from the court on four narrow issues:

1. that the words of 72-915 clearly and unambiguously express a legislative intent as to the "calculus to be used in allocating a dividend."
2. that the calculus referred to above requires distribution of dividends in proportion to premiums paid by the various policyholders;

3. that the term "class of employment" as used in 72-915 cannot be used to form a class based upon amount of premiums paid;

4. that if the term "classes of employment" is ambiguous, then the legislature intended the term to refer to employment groupings for rating and accounting purposes and that classes were differentiated by the "hazards" associated with each employment grouping so that "rates of premiums" could be fixed and not by the amount of premium paid by the employer.

I.C. § 72-915 provides:

> **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.

In filing their motion for summary judgment, defendants are seeking a ruling from the court that their interpretation of the meaning of I.C. §72-915 is the correct interpretation. Specifically:

1. I.C. §72-915 unambiguously grants the SIF manager the discretionary authority to issue dividends as he deems may be "safely and properly divided", or alternatively,

2. I.C. §72-915 is ambiguous and therefore the court must look to other sources to determine legislative intent, such as the other statutes within the act which declare that the paramount goal of managing the SIF is achieving and maintaining a solvent insurer for the various policy holders.

The court determines that plaintiffs' first two issues are intertwined with the whole of defendants' motion for summary judgment and will therefore discuss them together.

Plaintiffs emphasize the language "credit to each individual member of the class" supports their argument that the manager, if he declares a dividend, must pay everyone in the class something. Further, that from 1917 until 2003, this was interpreted to mean a pro rata distribution

to all policyholders.

Defendants emphasize that whether the statute is determined to be clear or ambiguous, the manager has the discretionary authority to exclude the low premium policyholders from the dividend distribution.

The court has considered the analysis of both parties arguing that I.C. §72-915 is clear and unambiguous. However, the court cannot make that finding. There are too many different interpretations of that statute which can be reasonably made which renders it ambiguous.

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

This could be interpreted to mean what the plaintiffs claim that it means. That is, that if a dividend is declared by the fund manager, **every** subscriber must receive a share of the total amount of dividend in direct proportion to the amount of premium that subscriber paid as a percentage of the total premiums paid by all subscribers.

It can also be interpreted to mean that the manager could distribute the dividend as he has done in this case because he has decided that giving regard to prior premiums paid, it is the larger premium paying subscribers who are properly entitled to receive the dividend.

A third interpretation could be that **every** subscriber must receive a portion of the dividend, but it does not have to be in direct proportion to the amount of premium the subscriber paid relative to the whole. Giving regard to the amount of premiums paid allows for the manager to give the subscribers who paid a smaller premium less of a percentage than the larger subscribers.

All of these interpretations seem reasonable to the court. If the language of the statute is capable of more than one reasonable construction it is ambiguous. *Carrier v. Lake Pend Oreille Sch. Dist. No. 84, 142 Idaho 804, 807, 134 P.3d 655, 658 (2006).* It is the opinion of this court that the statute is ambiguous.

Therefore, we turn to the interpretation of I.C. §72-915 which may include analysis of:

a) the text of the statute itself, or its four corners; and,
b) the dictionary;
c) legislative history;
d) public policy;
e) reasonableness of proposed construction;

f) other statutes within the Act, as well as other relevant statutes contained outside the Act;
g) decisions of sister courts which have resolved the same or similar issues;
h) other relevant extrinsic evidence leading interpretative assistance submitted through affidavits, testimony, etc.

An ambiguous statute must be construed to mean what the legislature intended it to mean. To ascertain legislative intent, the Court examines not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and the legislative history. *Carrier, supra; State v. Yzaguirre*, 144 Idaho 471, 163 P.3d 1183 (2007).

The overriding theme of the Act which creates the State Insurance Fund is the maintenance of the Fund's solvency so as to avoid liability on the part of the state and the creation of "an independent body corporate politic . . . for the purpose of insuring employers against liability for compensation under this worker's compensation law . . . I.C. §72-901.

The powers and duties of the state insurance manager are based upon conducting the business of the state insurance fund "and do any and all things which are necessary and convenient in the administration thereof: I.C. §72-902. Said manager is appointed by the members of the board of directors who have the duty "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**." I.C. §72-901(3), emphasis added.

The manager, James Alcorn, in his affidavit, explains his rationale for declaring and issuing dividends only to subscribers who have paid an annual premium in excess of $2,500. Essentially, he claims that a primary need of the Fund in maintaining solvency is to be able to compete with other insurance carriers to retain large employers/subscribers. Accordingly, he, with the approval of the members of the board of directors, decided to issue dividends to those larger subscribers only to provide them greater incentive to stay with the SIF.

The plaintiffs argue that there is no basis to conclude that any of the information discussed by the manager is his affidavit was known to or within the contemplation of the legislature at the time that it acted in 1917. The facts presented to the court in support of plaintiffs' argument are contained in the affidavit of George Bambauer. Therein, he declares that when he was employed

with the SIF, the amount of dividend distribution was based upon a formula which took into account the amount of premiums paid by a policyholder but did not include a minimum premium cut off. Nothing in his affidavit addresses the claims of the manager that the decision conforms to industry practice and is based upon running the SIF as an efficient insurance business. The defendants' position is not only supported by the affidavit of the SIF manager but also the affidavit of their insurance expert, Michael Camilleri.

It seems to this court that the plaintiffs' argument is based upon the principle that as subscribers, they have an interest in the dividend distribution and are entitled to a pro rata share of the distribution. Our supreme court has stated that the SIF cannot be analogized to a trust creating property rights in policyholders. Rather, the SIF has no fiduciary duties to its policyholders. *Hayden Lake Fire Protection Dist. V. Alcorn, et al*, 141 Idaho 388, 401-402, 111 P.3d 73 (2005).

Other states have adopted dividend distribution practices similar to the method that plaintiffs complain about in this case. See Mont. Code Ann. §39-71-2323 (2005) in conjunction with Mont. Admin. Rule 2.55.502 (2006) and N.D. Cent. Code § 65-04-19.3 (2005) in conjunction with N.D. Admin. Code §92-01-02-55 (2005). That is, the states of Montana and North Dakota specifically provide for the exclusion of policyholders who pay smaller premiums from receiving dividend distributions.

Plaintiffs seek a further determination that the term "class of employment" as used in 72-915 cannot be used to form a class based upon amount of premiums paid and that if "classes of employment" is ambiguous, then the legislature intended the term to refer to employment groupings for rating and accounting purposes and that classes were differentiated by the "hazards" associated with each employment so that "rates of premiums" could be fixed and not by the amount of premium paid by the employer.

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

the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and the legislative history.

Therefore, it is this court's conclusion that, as a matter of law, the language of I.C. §72-915, in context with the directives of other statutes set forth in the Act, the laws of our sister states and the decisions of our supreme court, allows the fund manager, with approval of the board of directors, to distribute the dividends in the manner they have adopted since 2003.

The defendants' counsel is directed to prepare an order of summary judgment consistent with this Memorandum Decision.

Dated this 26th day of December, 2007.

Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

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

Donald W. Lojek
Lojek Law Offices, CHTD
1199 W. Main Street
P.O. Box 1712
Boise, ID 83701-1712

Richard E. Hall
Keely E. Duke
Hall, Farley, Oberrecht & Blanton, P.A.
702 West Idaho, suite 700
P.O. Box 1271
Boise, ID 83701

DEC 26 2007 — P. SALAS

Date — Deputy Clerk

EXHIBIT B

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. CV 2006-07877*C AMENDMENT TO THE COURT'S MEMORANDUM DECISION UPON MOTIONS FOR SUMMARY JUDGMENT

The Court, upon reviewing the proposed order for summary judgment submitted by the defendants and the arguments of the parties relating to that proposed order and the plaintiffs'

request for a Rule 54(b) certificate, has reconsidered the language set forth in that decision and finds that the final two paragraphs need to be amended in order to more clearly conform to the Court's opinion. The language of those paragraphs in the Memorandum Decision of December 26, 2007 is as follows:

> Therefore, it is this court's conclusion that, as a matter of law, the language of I.C. §72-915, in context with the directives of other statutes set forth in the Act, the laws of our sister states and the decisions of our supreme court, allows the fund manager, with approval of the board of directors, to distribute the dividends in the manner they have adopted since 2003.
>
> The defendants' counsel is directed to prepare an order of summary judgment consistent with this Memorandum Decision.

That language is amended to read that it is this Court's conclusion that, as a matter of law, the language of I.C. §72-915, in context with the directives of other statutes set forth in the Act, the laws of our sister states, and the decisions of our Supreme Court, allows the fund manager, with the approval of the board of directors, to use his discretion to distribute dividends to policyholders in a manner that is consistent with the legislative purpose and directives set forth in Article 72, Chapter 9, Idaho Code, which establishes the State Insurance Fund. Specifically, to assure that the State Insurance Fund is run as an efficient insurance company, remains actuarially sound, and maintains the public purposes for which the Fund was created.

The Court will prepare an Order upon motions for summary judgment which conforms to the Memorandum Decision and this amendment.

Dated this 15th day of February, 2008.

Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

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

Donald W. Lojek
Lojek Law Offices, CHTD
1199 W. Main Street
P.O. Box 1712
Boise, ID 83701-1712

Richard E. Hall
Keely E. Duke
Hall, Farley, Oberrecht & Blanton, P.A.
702 West Idaho, suite 700
P.O. Box 1271
Boise, ID 83701

2-15-08
Date

Deputy Clerk

EXHIBIT C

SENATE BILL 1166

Printer Friendly Version

Full Bill Information

Individual Links:

Bill Text
Amendment
Engrossment 1 - amendment(s) incorporated
Statement of Purpose / Fiscal Note

S1166aa.....by STATE AFFAIRS COMMITTEE

STATE INSURANCE FUND - Adds to and repeals existing law relating to the State Insurance Fund.

03/27Senate intro - 1st rdg - to printing
03/30Rpt prt - to Com/HuRes
04/14Rpt out - to 14th Ord
04/15Rpt out amen - to engros
04/16Rpt engros - 1st rdg - to 2nd rdg as amen
Rls susp - **PASSED - 27-7-1**
AYES--Andreason, Bair, Brackett, Broadsword, Cameron, Coiner, Corder, Darrington, Davis, Fulcher, Geddes, Goedde, Hammond, Heinrich, Hill, Jorgenson, Keough, Lodge, McGee, McKague, McKenzie, Mortimer, Schroeder, Siddoway, Smyser, Stegner, Winder
NAYS--Bilyeu, Bock, Kelly, LeFavour, Sagness(Malepeai), Thorson(Stennett), Werk
Absent and excused--Pearce
Floor Sponsor - Goedde
Title apvd - to House
04/17House intro - 1st rdg - to Bus

04/22Rpt out - rec d/p - to 2nd rdg

04/232nd rdg - to 3rd rdg

04/293rd rdg - **PASSED - 50-16-4**

AYES -- Anderson, Andrus, Barrett, Bayer, Bedke, Bell, Bilbao, Black, Block, Bolz, Boyle, Chadderdon, Clark, Collins, Crane, Eskridge, Gibbs, Hagedorn, Hartgen, Harwood, Henderson, Jarvis, Kren, Labrador, Lake, Loertscher, Luker, Marriott, Mathews, Moyle, Nielsen, Nonini, Palmer, Pence, Raybould, Roberts, Schaefer, Shepherd(02), Shepherd(08), Shirley, Simpson, Smith(30), Stevenson, Takasugi, Thayn, Thompson, Wills, Wood(27), Wood (35), Mr. Speaker

NAYS -- Boe, Burgoyne, Chavez, Chew, Cronin, Durst, Higgins, Jaquet, Killen, King, Pasley-Stuart, Ringo, Ruchti, Rusche, Sayler, Smith(24)

Absent and excused -- Hart, McGeachin, Patrick, Trail

Floor Sponsor - Black

Title apvd - to Senate

04/30To enrol

05/01Rpt enrol - Pres signed

Sp signed

To Governor

05/06Governor signed

Session Law Chapter 294
Effective: 05/06/09 Section 1;
01/01/03 Section 2

LEGISLATURE OF THE STATE OF IDAHO

Sixtieth Legislature First Regular Session - 2009

IN THE SENATE

SENATE BILL NO. 1166, As Amended

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO THE STATE INSURANCE FUND; TO PROVIDE LEGISLATIVE INTENT; REPEALING SECTION 72-915, IDAHO CODE, RELATING TO DIVIDENDS; DECLARING AN EMERGENCY AND PROVIDING A RETROACTIVE EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. LEGISLATIVE INTENT. (1) Historically, the State Insurance Fund has exercised its discretion, pursuant to Section 72-915, Idaho Code, to determine the annual amount of dividend, if any, a policyholder would receive.

(2) On March 5, 2009, the Idaho Supreme Court filed its opinion in *Farber v. Idaho State Insurance Fund*, S. Ct. 35144, in which it interpreted Section 72-915, Idaho Code, and ruled that the State Insurance Fund cannot exercise its discretion in determining how much of a dividend to pay to each policyholder because the statute requires a pro rata distribution of dividends to all policyholders. The result of the decision is to require that the State Insurance Fund pay dividends on policies that are not financially profitable, thereby restricting the fund's ability to reduce premiums and pay dividends to profitable policyholders.

(3) In its decision, the Supreme Court stated that, if it has become prudent to alter the statutory language related to the requirements for distribution of dividends, the Legislature is the appropriate venue for such change.

(4) It was the intent of the Legislature in passing House Bill No. 774, As Amended of the Second Regular Session of the Fifty-fourth Idaho Legislature, effective on April 3, 1998, that the State Insurance Fund should operate like an efficient insurance company, subject to regulation under Title 41, Idaho Code, including the dividend provisions set forth in Chapter 28, Title 41, Idaho Code. The retroactive repeal of Section 72-915, Idaho Code, to January 1, 2003, will conform with that intent. Section 73-101, Idaho Code, permits such retroactive repeal as long as it is "expressly so declared" in legislation.

(5) The retroactive repeal of Section 72-915, Idaho Code, will reconcile conflicts in the existing laws governing the State Insurance Fund and will allow the fund, like other insurance companies, to issue dividends pursuant to Chapter 28, Title 41, Idaho Code.

(6) It is the intent of the Legislature that the provisions of this act shall not apply to any action filed in a state or federal court of law in the state of Idaho on or before December 31, 2008, and the provisions of this act shall not apply to the aforementioned case of *Farber v. Idaho State Insurance Fund* as currently pending with respect to those policy holders paying annual premiums of not more than two thousand five hundred dollars ($2,500).

SECTION 2. That Section 72-915, Idaho Code, be, and the same is hereby repealed.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, Section 1 of this act shall be in full force and effect on and after passage and approval, and Section 2 of this act shall be in full force and effect retroactively to January 1, 2003.

REVISED REVISED REVISED REVISED REVISED REVISED

STATEMENT OF PURPOSE

RS18877C1

Repeal of Idaho Code Section 72-915 will serve to offset an adverse decision of the Idaho Supreme Court regarding the interpretation of Idaho Code Section 72-915 which could subject the State Insurance Fund to pay dividends on policies that are not financially profitable, thereby restricting the Fund's ability to reduce premiums and pay dividends to profitable policyholders. The proposed repeal of Idaho Code 72-915 will clarify the law regarding the payment of dividends by the State Insurance Fund by making it clear that in passing House Bill 774aa in 1998, it was the intent of the legislature to have the State Insurance Fund operate like an efficient insurance company subject to regulation under Title 41, Idaho Code, including the dividend provision set forth in Title 41, Chapter 28, Idaho Code. Repeal of the law effective April 3, 1998 is necessary because on that date laws were enacted which subjected the State Insurance Fund to regulation under the Insurance Code, Title 41 of the Idaho Code. This legislation will allow the State Insurance Fund to issue dividends in the same manner as other insurance companies operating within the State of Idaho.

FISCAL NOTE

The State of Idaho and public entities, which are insured by the State Insurance Fund, face losing all or part of their future dividends and deviations as a result of uncertainties as to the effect of a recent Supreme Court decision. Based on dividends and rate reduction deviations provided by the State Insurance Fund over the past two years, that number could exceed $5,000,000 annually. Private businesses may also, due to the same uncertainties, experience the loss of future dividends and deviations since, according to the Court's decision, the Fund has no option when distributing dividends, other than to use a pro rata formula.

Contact:
Name: Senator John W. Goedde
Office:
Phone: (208) 332-1322

REVISED REVISED REVISED REVISED REVISED REVISED

EXHIBIT D

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.

Donald W. Lojek
Lojek Law Offices
P.O. Box 1712
Boise, ID 83701

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

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

William H. Hurst
CLERK OF THE DISTRICT COURT

Deputy Clerk

EXHIBIT E

Richard E. Hall
ISB #1253; reh@hallfarley.com
Keely E. Duke
ISB #6044; ked@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
W:\3\3-461.2\MSJ - OPP THIRD\MSJ - Opp Third Supp v4.doc
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 **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**

COME NOW the 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, as per the Court's request as stated at oral argument on August 20, 2009, respectfully submit the following.

SUMMARY OF ARGUMENT

Following the Idaho Supreme Court's ruling in this matter, the Plaintiffs filed a request to renew their Second Motion for Partial Summary Judgment, specifically seeking a ruling that "pursuant to the terms of I.C. §72-915, after excluding policyholders who do not meet the longevity requirements 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." The SIF opposed such motion, contending that Plaintiffs' Motion was not a proper summary judgment motion, sought an advisory ruling of the Court, and otherwise failed to provide a precise equation to calculate such dividends.

A hearing was held on August 20, 2009, and, at the hearing, the Court requested additional briefing on the subject of the appropriate measure of damages, in light of the Idaho Supreme Court's decision on appeal. The following is the additional briefing requested by the Court.

As discussed herein, and at the August 20, 2009 hearing, SIF asserts that the Supreme Court's decision in the appeal did not rule out taking into consideration the losses on a policy or expense factor when distributing a dividend. However, if this Court does not agree with SIF's position that losses and expenses should be considered when distributing a dividend, then the Court must use the Idaho Supreme Court's interpretation of Idaho Code §72-915 to determine the formula that is to be used in the determination of the Plaintiffs' share of the previously declared dividends. The formula can be simply stated as follows:

(Total Annual Declared Dividend / All Paid Premiums for the Year) X Individual Policyholder Premium

ARGUMENT AND ANALYSIS

A. The Idaho Supreme Court Did Not Rule Out the Consideration of Losses and the Expense Factor When Distributing Dividends.

As has previously been explained by defendants, SIF dividends, if any, are distributed based upon what the Manager determines to be available surplus that can be safely and properly distributed to policyholders that are "properly entitled to," after the Manager evaluates a myriad of factors, including, but not limited to, present and future SIF operating expenses, the required reserves, investment income, market forces, and industry trends.[1] 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, followed by the determination as to how it is to be properly 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.[2] The SIF asserts such is the case given the language of Idaho Code Section 72-915 which provides that once the Manager has declared the annual dividend, he must then "credit to each individual member . . . such proportion of such balance as he is properly entitled to, have regard to his prior paid premiums . . . ." As such, based on the Idaho Supreme Court's decision in this case, the SIF is to credit to each policyholders' account their pro rata share of the declared dividend. Once that occurs, and it is the SIF's position that is as far as the Supreme Court's decision goes, each account is evaluated to determine what amount each policyholder is properly entitled to by taking into account the losses and expenses.

---

[1] *See* Affidavit of James M. Alcorn ("Alcorn Aff."), originally filed with this Court on February 13, 2007, ¶ 21.
[2] *See* Alcorn Aff., ¶ 24.

Although SIF maintains that consideration of the losses and expense factor bears on the determination of which policyholders are entitled to a dividend, this Court has indicated it feels the Idaho Supreme Court does not permit losses and expenses to be considered. As such, assuming *arguendo* that losses and expenses are not to be considered in the distribution of a dividend after the dividend amount has been declared, then the Court must use the Idaho Supreme Court's interpretation of Idaho Code §72-915 to determine the formula that is to be used in the determination of the Plaintiffs' share of the declared dividend. The following is how Idaho Code §72-915 and the Idaho Supreme Court provide the Plaintiffs' share of the declared dividends should be determined:

(Total Annual Declared Dividend / All Paid Premiums for the Year) X Individual Policyholder Premium

B. <u>The Applicable Formula Governing the Pro Rata Dividend.</u>

1. <u>The Idaho Supreme Court has acknowledged on many occasions that the manager has the discretion to determine how much of a dividend will be declared each year.</u>

As outlined in Idaho Code Section 72-915, the SIF Manager is afforded discretion in the determination of the dividend when there is an "aggregate balance" which may be safely and properly divided:

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

Idaho Code §72-915 (emphases added). Dividends, if any, are paid from what the Manager determined could be safely and properly divided 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.[3] Indeed, the Idaho Supreme Court has embraced the discretion of the Manager as it pertains to dividends, as explained in its recent decision: "the plain language of I.C. §72-915 demonstrates that the statute grants the Manager discretion to distribute a dividend where '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.'" *Farber v. The Idaho State Insurance Fund*, 147 Idaho 307, 208 P.3d 289, 294 (2009); *accord, Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 392, 111 P.3d 73, 77 (2005) ("since 1919 the Manager has had the authority to set surplus and reserves without outside approval and to declare dividends *in his discretion.*")(emphasis added).[4]

2. Once the dividend is declared by the Manager, the Idaho Supreme Court ruled in this case that it must be divided pro rata to every policyholder.[5]

On the appeal of this matter, the Idaho Supreme Court indicated that "[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. In further elaborating on this, the Court went on to state that: "[t]he statute contemplates dividing the aggregate balance *proportionately* according to the policyholder's *prior paid premiums* relative to all paid premiums." *Id.* at 294 (underlined

---

[3] *See* Alcorn Aff., ¶ 21; *see also* Affidavit of Michael Camilleri ("Camilleri Aff."), ¶ 13, originally filed with this Court on February 13, 2007.

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

[5] Again, the SIF still strongly believes losses and expenses should be considered but assuming *arguendo* that this court determines they are not, then the following is a discussion of the formula that must be used.

emphasis added). In describing the dividend contemplated under Idaho Code §72-915, the Court acknowledged that "[t]his dividend is different from the dividend issued to stockholders of a corporation and is instead a refund based upon a rate readjustment." *Id.* at 291.

As such, a policyholder ("PH") dividend is computed as follows:

(Total Annual Declared Dividend / All Paid Premiums for the Year) X Individual Policyholder Premium

Accordingly, given such formula, the individual policyholder's dividend is comprised of two components – first, determination of the universally-applicable Readjustment Rate (Total Annual Declared Dividend/All Paid Premiums for the Year), which applies to all eligible policyholders (*i.e.*, those that have held policies for more than 6 months); and second, determination of dividend amounts unique to the individual policyholder (i.e., application of the Readjustment Rate to paid premiums) that may be declared by SIF.

Based on this formula, the Court can determine, as a matter of law, the Plaintiffs' share of the declared dividends for the dividend periods at issue in this matter. The following is the correct application of the above formula to make such determination.

a. The total annual dividend declared by SIF (the Readjustment Rate numerator)

As established in SIF's responses to discovery requests, SIF declared dividends for each of the identified dividend periods as follows:

Dividend Period	**Total Annual Dividend Declared**
7/1/01-6/30/02	$5,037,216
7/1/02-6/30/03	$5,993,228
7/1/03-6/30/04	$8,097,755

7/1/04-6/30/05	$15,459,013
7/1/05-6/30/06	$21,101,317
7/1/06-6/30/07	$14,375,339

Affidavit of Counsel in Support of Memorandum in Opposition to Plaintiffs' Motion to Renew Plaintiffs' Revised Second Motion for Partial Summary Judgment ("Counsel Aff."), Exh. A, pp. 5-11, originally filed on August 6, 2009.

b. All paid premiums to SIF for the year (the Readjustment Rate denominator)

As established in SIF's responses to discovery requests, SIF received the following total premium dollars for each of the identified dividend periods as follows:

Dividend Period	**All Paid Premiums for the Year**
7/1/01-6/30/02	$128,529,174
7/1/02-6/30/03	$151,142,366
7/1/03-6/30/04	$181,836,374
7/1/04-6/30/05	$211,615,539
7/1/05-6/30/06	$233,670,170
7/1/06-6/30/07	$221,981,656

Counsel Aff., Exh. A, pp. 5-11.

c. The Readjustment Rate, per year (Total Declared Annual Dividend/All Paid Premiums for the Year).

Accordingly, based on the above figures, the Readjustment Rate for each of the identified dividend periods is as follows:

Dividend Period	**Formula**		**Readjustment Rate**
7/1/01-6/30/02	$5,037,216 / $128,529,174	=	3.9191%

7/1/02-6/30/03	$5,993,228 / $151,142,366	=	3.9653%
7/1/03-6/30/04	$8,097,755 / $181,836,374	=	4.4533%
7/1/04-6/30/05	$15,459,013 / $211,615,539	=	7.3052%
7/1/05-6/30/06	$21,101,317 / $233,670,170	=	9.0304%
7/1/06-6/30/07	$14,375,339 / $221,981,656	=	6.4759%

Thus, by way of example, utilizing this Readjustment Rate for the 7/1/01-6/30/02 dividend period for a hypothetical policyholder paying $1,000 in premiums, the dividend would be $39.19.

d. Based on the formula established by the Idaho Supreme Court, Plaintiffs' share of the declared dividends for the applicable dividend periods is $5,392,539.

Based on information provided to Plaintiffs by way of discovery regarding the premium totals paid by policyholders with policies of less than $2,500,[6] Plaintiffs' share of the declared dividends total for the dividend periods at issue is as follows:

Dividend Period	**<$2,500 Premiums**		**Readj. Rate**		**Total Class Dividend**
7/1/01-6/30/02	$14,991,392	X	3.9191%	=	$587,528
7/1/02-6/30/03	$15,906,348	X	3.9653%	=	$630,734
7/1/03-6/30/04	$17,296,019	X	4.4533%	=	$770,244
7/1/04-6/30/05	$17,371,735	X	7.3052%	=	$1,269,040
7/1/05-6/30/06	$17,926,383	X	9.0304%	=	$1,146,952[7]

[6] The figures identified in this section are derived from totals identified in the spreadsheets provided to Plaintiffs and identified in SIF's recent discovery responses. Counsel Aff., Exh. A (filed 8/6/09). In total, these spreadsheets are 3,060 pages long; at the Court's request, SIF will provide a copy of such spreadsheets, either in hard copy or as .pdfs, as the Court may prefer. In addition, attached hereto as Exhibit A to Counsel's Affidavit in Support of 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 is a spreadsheet summarizing the calculations contained herein.

7/1/06-6/30/07	$18,481,641	X	6.4759%	=	$988,041[8]
Total:					**$5,392,539**

Accordingly, assuming this Court does not permit the application of losses and expenses to the distribution of dividends, Plaintiffs' share of the declared dividends is $5,392,539.

C. Plaintiffs Are Not Entitled To Prejudgment Interest.

It is anticipated that Plaintiffs will make a request for prejudgment interest. However, any such argument necessarily fails, as Plaintiffs are not entitled to make a claim for prejudgment interest on dividend amounts, as such dividends are not within a category for which prejudgment interest is allowed under Idaho law:

> When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of twelve cents (12¢) on the hundred by the year on:
>
> 1. Money due by express contract.
>
> 2. Money after the same becomes due.
>
> 3. Money lent.
>
> 4. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied.
>
> 5. Money due on the settlement of mutual accounts from the date the balance is ascertained.
>
> 6. Money due upon open accounts after three (3) months from the date of the last item.

Idaho Code §28-22-104(1). In the present case, the amounts at issue – a readjustment of rates in the form of dividends – do not fall into any of these categories. As stated previously, the

---

[7] Dividends were also paid in this year for policies between $1,500 and $2,500. The dividends paid to those policies totaled $471,872, which amount has been deducted from the Total Dividend figure.
[8] Dividends were also paid in this year for policies between $1,500 and $2,500. The dividends paid to those policies totaled $208,812, which amount has been deducted from the Total Dividend figure.

contract of insurance does not provide for the payment of a dividend to the policyholders.[9] The governing statutes for the SIF do not guarantee 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). A SIF policyholder has no vested right in the surplus and assets of the SIF; rather, the assets and surplus belong to the SIF in order to meet its statutory purpose provided in Idaho Code §72-901(1). *Id.* Thus, in light of the discretionary nature of the dividend, the dividend does not fall into any of the enumerated categories under Idaho Code §28-22-104, and, as such, no prejudgment interest can be awarded. *See, e.g.,* Taylor v. Maile, 146 Idaho 705, 712, 201 P.3d 1282, 1289 (2009)(rejecting claim for prejudgment interest on monies placed in revocable trust, as the amounts did not "'constitute money due by express contract, or money after the same becomes due, or money lent, or money due on the settlement of mutual accounts from the date the balance is ascertained, or money due upon open accounts after three months from the date of the last item...Nor did the [Taylors] retain the money without the express or implied consent of the [Mailes].'")

Moreover, prejudgment interest is not automatic, and "[i]n the area of prejudgment interest, equitable principles are emphasized." Chenery v. Agri-Lines Corp., 115 Idaho 281, 289, 766 P.2d 751, 759 (1988). Most notably, the decision to award prejudgment interest is a discretionary determination by the district court. In light of the Idaho Supreme Court's need to

---

[9] *See* Affidavit of Donald W. Lojek filed on January 6, 2007, Ex. 1 (State Insurance Fund Workers Compensation and Employers Liability Insurance Policy). *See also Farber, supra* and *Hayden Lake, supra.*

resolve a question of first impression, and the pending declaration of additional dividends over and above what the Manager had already determined may be "safely and properly" divided, prejudgment interest in addition to those additional declared dividends would potentially adversely impact the Fund. The SIF should not be additionally penalized with prejudgment interest for distributing dividends inconsistent with the Supreme Court's recent interpretation of Idaho Code §72-915. This is especially true given that in response to the Supreme Court's ruling on Idaho Code §72-915, the Idaho Legislature immediately went forward and repealed that section of law. As such, an award of prejudgment interest is not appropriate and the SIF requests a ruling from this Court that prejudgment interest will not be applied in this case.

In any event, "prejudgment interest is allowed only where the damages are liquidated or readily ascertainable by mathematical process." Ross v. Ross, 145 Idaho 274, 276, 178 P.3d 639, 641 (Ct. App. 2007). "This limitation is based upon 'equitable considerations,' which presumably include the notion that a person who could not determine the amount owed should not be charged interest on the sum that is ultimately found to be due." *Id.* (internal citation omitted). As explained by the Idaho Court of Appeals:

> A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion **or discretion**. Examples are claims upon promises to pay a fixed sum, claims for money had and received, claims for money paid out, and claims for goods or services to be paid for at an agreed rate.

Id. at 277 (quoting Seubert Excavators, Inc. v. Eucon Corp., 125 Idaho 744, 874 P.2d 561 (Ct. App. 1993))(emphasis added). In the present matter, the amount of dividends that might be declared in favor of the policyholder class at issue was not a liquidated sum capable of being determined prior to the Supreme Court's opinion, given both that the determination of the dividend is discretionary in nature, and that the formula applicable to the policyholder class at

issue was not established until the Idaho Supreme Court's ruling in Farber – a point further borne out by the fact that the parties continue to provide argument to this Court regarding the precise formula to use in determining what dividends might be due to the policyholders in the class at issue. As such, Plaintiffs cannot characterize any declared dividend for policyholders with policies of less than $2,500 in premiums as "liquidated" sums, as the applicable dividend amounts have not been "readily ascertainable by mathematical process."

For these reasons, this Court should deny any request by Plaintiffs for prejudgment interest.

CONCLUSION

For the above reasons, and for the reasons stated in SIF's previously filed Memorandum in Opposition to Plaintiffs' Motion to Renew Plaintiffs' Revised Second Motion for Partial Summary Judgment and oral argument thereon, Plaintiffs' Motion should be denied. Plaintiffs' requested formula for the declaration of dividends in favor of the Plaintiffs fails to properly consider the actual process by which the Manager determines the appropriate dividend, which includes consideration of losses and expenses.

However, even if this Court is not inclined to permit consideration of losses and expenses in SIF's determination of the dividends at issue in this matter, then the formula defined by the Idaho Supreme Court when it applied Idaho Code Section 72-915 must be used:

(Total Annual Declared Dividend / All Paid Premiums for the Year) X Individual Policyholder Premium

Based upon that formula, Plaintiff s' share of the declared dividends for the dividend periods at issue is **$5,392,539**. In conjunction therewith, the Court should reject any request by Plaintiffs for prejudgment interest.

Oral argument is requested.

RESPECTUFLLY SUBMITTED this 21 day of September, 2009.

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of September, 2009, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Donald W. Lojek
Lojek Law Offices, CHTD
623 West Hays Street
Boise, ID 83702
Fax No.: (208) 345-0050
Attorneys for Plaintiff

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

Richard E. Hall
Keely E. Duke

EXHIBIT F

In the Supreme Court of the State of Idaho

RANDOLPH E. FARBER, SCOTT ALAN BECKER and CRITTER CLINIC, an Idaho professional association,	)	REMITTITUR
Plaintiffs-Appellants,	)	Supreme Court Docket No. 35144-2008
v.	)	Canyon County District Court #06-7877
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.	)	

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

Donald W. Lojek ISBN 1395
LOJEK LAW OFFICES, CHTD
623 West Hays Street
PO Box 1712
Boise, ID 83701
Telephone: 208-343-7733
Facsimile: 208-345-0050

Philip Gordon ISBN 1996
Bruce S. Bistline ISBN 1988
GORDON LAW OFFICES
623 West Hays Street
Boise, ID 83702
Telephone: 208/345-7100
Facsimile: 208/345-0050

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

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE LLC OF SALMON,

Plaintiffs,

vs.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN AND MAX BLACK AND STEVE LANDON in their capacity as member's of the Board of Directors of the State Insurance Fund,

Defendants.

CASE NO. CV 09-13607-C

AFFIDAVIT OF PHILIP GORDON RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
:ss.
County of ADA)

PHILIP GORDON, being first duly sworn on his oath, deposes and states as follows:

1. I am one of the attorneys for the Plaintiffs in this matter and I make this Affidavit on my own personal and direct knowledge, except where otherwise stated. The other counsel for the Plaintiffs are Donald W. Lojek and Bruce S. Bistline, a member of my firm. We are the same three attorneys who represented the Plaintiffs and the members of the class in the case of *Farber v. State Insurance Fund* (which was assigned Case Number 2006-CV-7877 in the above Court), and I am accordingly familiar with what occurred in that litigation.

2. I am making this Affidavit in Regards to Defendants' Motion for Summary Judgment.

3. Please see hereto attached *Affidavit of James Alcorn* in Case Number 2006-CV-7899, Bates Stamped Number 000120-000131.

Dated this 22nd day of November, 2010.

Philip Gordon

SUBSCRIBED AND SWORN TO BEFORE ME this 22nd day of November , 2010.

TRACY MURP... NOTARY PUBLIC STATE OF IDAHO

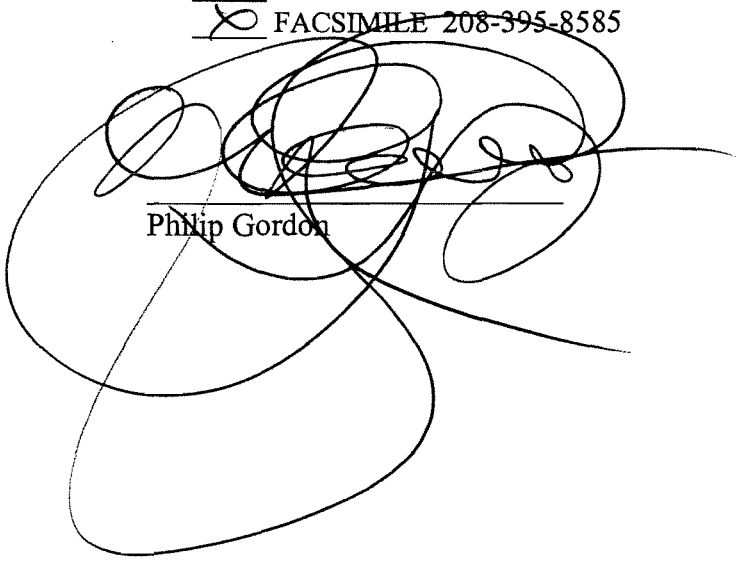
Notary Public for Idaho
Residing at Boise, Idaho
Commission expires: 3/28/2013

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 2010, I caused the foregoing document to be delivered by the method indicated below and addressed to the following:

Richard E. Hall
Keely Duke
Hall Farley Oberrecht & Blanton
702 W. State St. Ste. 700
Boise, Idaho 83701
Telephone: 208-395-8500

_____ HAND DELIVERY
_____ U.S. MAIL
_____ OVERNIGHT MAIL
__X__ FACSIMILE 208-395-8585



Philip Gordon

Richard E. Hall
ISB #1253; reh@hallfarley.com
Keely E. Duke
ISB #6044; ked@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
W:\3\3-461.2\Alcorn Aff..doc

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

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

000131

Richard E. Hall
ISB #1253; reh@hallfarley.com
Keely E. Duke
ISB #6044; ked@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
W:\3\3-461.9\PLEADINGS\MSJ-Reply.doc
Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON,

Plaintiffs,

vs.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN and MAX BLACK and STEVE LANDON, in their capacity as members of the Board of Directors of the State Insurance Fund,

Defendants.

Case No. CV 09-13607-C

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ORIGINAL

COME NOW the defendants, The Idaho State Insurance Fund, James M. Alcorn in his official capacity as its Manager, and William Deal, Wayne Meyer, Gerald Geddes, John Goedde, Elaine Martin, Mark Snodgrass, Rodney A. Higgins, Terry Gestrin, Max Black, and Steve

Landon in their capacity as members of the Board of Directors of the State Insurance Fund (collectively, "SIF"), by and through their counsel of record Hall, Farley, Oberrecht & Blanton, P.A., and hereby submit their reply to plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Plaintiffs' Opposition") and in support of Defendants' Motion for Summary Judgment, filed October 26, 2010 ("SIF Motion"). For the reasons stated herein, the SIF Motion should be granted.

SUMMARY OF ARGUMENT

Plaintiffs' Opposition fails to demonstrate that the repeal of I.C. § 72-915 is unconstitutional.

As an initial matter, plaintiffs' attempts to burden-shift two steps in the Contract Clause analysis - whether the State has a significant and legitimate public purpose behind the regulation such as the remedying of a broad and general social or economic problem, and whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption – should be rejected by the Court, as burden-shifting only occurs where the State is attempting to impair its own contractual obligations. As the SIF is not the State of Idaho, no such burden-shifting is appropriate.

Further, plaintiffs fail to demonstrate how – or even if – the Idaho Constitution's Contract Clause is evaluated under any test different from the modern Contract Clause analysis that courts now employ. Absent such a showing, and in light of the Idaho Supreme Court's holding that "we seriously consider federal law in determining the parameters of our own constitutional provisions, and we may adopt federal precedent under the state constitution but only to the extent that we believe the federal law is not inconsistent with the protections afforded by our state

constitution" this Court may appropriately apply modern Contract Clause analysis in the determination of this matter. State v. Guzman, 122 Idaho 981, 988, 842 P.2d 660, 667 (1992).

Additionally, plaintiffs have failed to establish that the Idaho Legislature has operated a substantial impairment of a contractual relationship, given there is neither a contractual right to a dividend under the SIF policies of insurance, nor a history of distribution of dividends in pro rata fashion that would give rise to an expectation of receiving such dividends. Further, the repeal did not impair the policies, which expressly incorporate Idaho law. Moreover, even were an impairment to have occurred, it was not a "substantial" impairment simply because it may have impacted a claimed financial term, given the size of the dividends at issue and the heavily-regulated nature of the workers' compensation field.

Even were plaintiffs to establish a substantial impairment, however, plaintiffs still fail to demonstrate that the repeal lacks a significant and legitimate public purpose. Plaintiffs also cannot disregard the public purpose of the fund, and cannot ignore the broad purpose of the repeal: to avoid the harm effectuated on current and future public and private policyholders by way of loss of dividends and deviations if I.C. § 72-915 were not repealed. Plaintiffs also fail to recognize that the Legislature is empowered to change laws to avoid windfalls to private parties.

Finally, plaintiffs cannot show that the repeal is anything other than based upon reasonable conditions and is a character appropriate to the public purpose justifying the repeal. The repeal of I.C. § 72-915 was intended to address the uncertainty arising from the Farber decision, and to avoid harm to current and future policyholders as a result thereof.

Accordingly, for the reasons stated below, the SIF Motion should be granted.

UNDISPUTED MATERIAL FACTS

As the Court is aware, plaintiffs currently have their own Motion for Partial Summary Judgment pending, which will be heard at that same time as the SIF Motion. In the SIF's Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed November 22, 2010, at pp. 4-7 ("SIF MSJ Opposition"), the SIF identified the limited number of undisputed material facts this Court must consider in light of the question posed (to wit, the constitutionality of the repeal of I.C. § 72-915), which were not – and cannot – be disputed by plaintiffs. Plaintiffs' Opposition provides no additional challenges to these undisputed material facts as outlined by the SIF. As such, in an effort to reduce duplication, the SIF references and incorporates the "Undisputed Material Facts" section of the SIF MSJ Opposition (pp. 4-7) as if fully set forth herein, and instead only identifies those facts in cursory fashion:

1) Plaintiffs' claim is predicated on Idaho Code § 72-915.

2) Idaho Code § 72-915 was repealed on May 6, 2009.

3) Idaho Code § 72-915 was repealed to a retroactive date of January 1, 2003.

4) Plaintiffs' claims all relate to dividend distributions after January 1, 2003.

5) Plaintiffs' action was not filed until December 24, 2010.

6) Plaintiffs' claim is foreclosed if the repeal is upheld.

7) The purpose of the SIF is to provide Worker's Compensation coverage to Idaho employees.

Additionally, plaintiffs have not – and cannot – dispute the following facts established in the SIF Motion:

1) The repeal of I.C. § 72-915 was made effective prior to the Idaho Supreme Court issuing remittitur in the Farber case.

2) The repeal of I.C. § 72-915 was expressly made retroactive as expressed in the language of the repeal.

3) Dividends prior to the Farber decision were paid on a non-pro rata basis.

4) Dividends after the Farber decision and the repeal of I.C. § 72-915 were also paid on a non-pro rata basis.

ARGUMENT

1. The SIF does not bear the burden of proving that the repeal was constitutional, and such repeal is generally presumed to be constitutional.

Plaintiffs concede, as they should, that "they shoulder the initial burden of convincing this Court that the challenged enactment is unconstitutional." Plaintiffs' Opposition at p.8; Stuart v. State, 149 Idaho 35, ___, 232 P.3d 813, 818 (2010)("There is a presumption in favor of the constitutionality of the challenged statute or regulation, and **the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers**.")(quoting Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 154 P.3d 443 (2007))(emphasis added).

However, plaintiffs then assert that the burden shifts to the defending party "to demonstrate the existence of a legitimate and significant public purpose and an impairment which is a reasonable means for and of a character appropriate to the furtherance of that public interest." Plaintiffs' Opposition at p. 9. Plaintiffs contend this burden shifts simply where "State action retroactively terminates the contract rights of a citizen who is a party to a contract with a public entity." *Id.* Plaintiffs cite to S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003) for this proposition. This argument, however, ignores two critical distinctions.

First, and most importantly, this burden only applies where the State is a party to the contract that is impaired. *See* University of Hawai'i Professional Assembly v. Cayetano, 183 F.3d 1096, 1106 (9th Cir. 1999)("Defendants bear the burden of proving that the impairment was reasonable and necessary because '[t]he burden is placed on the party asserting the benefit of the

statute **only when that party is the state.**'")(emphasis added). As the Ninth Circuit previously explained:

> When a state statute substantially impairs a private contract, we must next determine whether the impairment is both reasonable and necessary to fulfill an important public purpose. *See Energy Reserves*, 459 U.S. at 411-12, 103 S.Ct. at 704-05. The parties dispute who bears the burden on this issue. **We conclude that the bankruptcy and district courts properly required the trustee, as the objecting party, to carry the burden.** *See Northwestern Nat'l Life Ins. Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir.1980) ("the challenger must demonstrate that legitimate governmental interests do not justify the impairment"). **The burden is placed on the party asserting the benefit of the statute only when that party is the state.** *See Keating*, 903 F.2d at 1228 (requiring state to prove that legislation impairing public contract is necessary to achieve a valid public purpose); *National Collegiate Athletic Ass'n v. Miller*, 795 F.Supp. 1476, 1487 (D.Nev.1992) (same), *aff'd on other grounds*, 10 F.3d 633 (9th Cir.1993), *cert. denied*, 511 U.S. 1033, 114 S.Ct. 1543, 128 L.Ed.2d 195 (1994).

In re Seltzer, 104 F.3d 234, 236 (9th Cir. 1996)(emphases added). That is, the burden only shifts where the State itself bears the contractual obligations impacted by the change in the law. *See, e.g.,* State of Nev. Employees Ass'n v. Keating, 903 F.2d 1223 (9th Cir. 1990)(challenge to Nevada's change to Nevada's state employees' pension plan which change precluded employees from withdrawing pension funds without penalty prior to vesting).

In the present case, the SIF is not "the State," nor did the State have any contractual obligations with the plaintiffs-policyholders. By statutory definition, the SIF is "created as an independent body corporate politic" and derives its financial well-being from "premiums and penalties received," "property and securities acquired," and "of interest earned" thereon. I.C. § 72-901(1). The SIF is to "be administered without liability on the part of the state." *Id.* The money generated by the SIF is deposited with the state treasurer, who acts as custodian for the SIF; however, "[t]he money in the fund does not belong to the state . . . [the money is held by the treasurer] . . . for the contributing employers and the beneficiaries of the compensation law,

and for the payment of the costs of the operation of the fund." State ex rel. Williams v. Musgrave, 84 Idaho 77, 84, 370 P.2d 778, 782 (1962). Notably, the State itself is a policyholder, and not the insurer. *See* Affidavit of Counsel in Support of Defendants' Motion for Summary Judgment, filed October 26, 2010 ("Counsel Aff."), at Exh. C, Fiscal Note ("The State of Idaho and public entities, **which are insured by the State Insurance Fund**, ...")(emphasis added). As the State has no contractual relationship with the plaintiffs-policyholders, this burden-shifting is inapplicable to this matter.

Second, the question of burden-shifting is not even reached until plaintiffs have first demonstrated a **substantial** impairment of a **contract** – not simply that the state "retroactively terminates the contract rights of a citizen". *See* Cayetano, 183 F.3d at 1106 ("Defendants bear the burden of **proving that the impairment** was reasonable and necessary because '[t]he burden is placed on the party asserting the benefit of the statute only when that party is the state.'")(emphasis added); *accord* S. Cal., 336 F.3d at 894 ("Because Santa Ana has **substantially impaired its own contract**, it has the burden of establishing that the trench cut ordinance is both reasonable and necessary to an important public purpose.")(emphasis added)(citing Cayetano). As discussed in the SIF's Motion, plaintiffs cannot demonstrate that any contract right has been impaired by the repeal of I.C. § 72-915, nor can plaintiffs demonstrate that the impairment is substantial. Even then, however, the precise burden the State faces depends upon the degree of the impairment: "[I]f a State undertakes to alter substantially the terms of a contract, it must justify the alteration, and the burden that is on the State **varies directly with the substantiality of the alteration**." Equipment Mfrs. Institute v. Janklow, 300 F.3d 842, 860 (8th Cir. 2002)(quoting White Motor Corp. v. Malone, 599 F.2d 283, 287 (8th Cir. 1979))(emphasis added).

In any event, plaintiffs do not dispute that the repeal of I.C. § 72-915 – like all legislative acts – is presumed to be constitutional: "[a] legislative act is presumed to be constitutional and all reasonable doubt as to its constitutionality must be resolved in favor of its validity." Oneida County Fair Bd. v. Smylie, 86 Idaho 341, 346, 386 P.2d 374, 376 (1963).

Thus, plaintiffs cannot demonstrate that the SIF bears any burden in proving the constitutionality of the repeal of I.C. § 72-915 – to the contrary, the repeal is presumed to be constitutional, and plaintiffs themselves bear the burden of establishing that the repeal is unconstitutional.

2. Federal law is applicable in interpreting Idaho's Constitution both generally and in this case.

Plaintiffs next assert that federal law regarding the U.S. Constitution's Contract Clause is inapplicable to the evaluation of the Idaho Constitution's Contract Clause. Plaintiffs' attempts to downplay the State v. Korn, 148 Idaho 413, 224 P.3d 480 (2009) decision, and to rely upon Idaho caselaw without specifying how the Idaho Supreme Court has rejected federal analysis in favor of an analysis unique to the Idaho Contract Clause, should be rejected by this Court.

a. *State v. Korn* demonstrates that Idaho does not employ a separate analysis.

As explained by the SIF in its brief-in-chief, the Idaho Supreme Court addressed a federal and state constitutional argument in Korn with a single, dispositive analysis. In Korn, the defendant argued that a city violated his rights under "the contract clauses found in the Idaho and U.S. constitutions." The Korn Court, without making a distinction between the two constitutions, engaged in a single analysis, relying on federal law (Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978)) to hold that the city's ordinance did not violate his rights under either constitution. *Id.* at 483.

Plaintiffs attempt to downplay Korn by asserting that "[n]owhere in its opinion does our Supreme court engage in any substantive analysis of whether or not the ordinance Korn challenged violated either the State or Federal Contracts Clause." Plaintiffs' Opposition at p. 11. While the Court resolved the issue short of the full test as outlined in, e.g., RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1147 (9th Cir. 2004), telling is the absence of any discussion of how a Contract Clause claim would be treated differently under the Idaho Constitution than under the U.S. Constitution. This is consistent with the rule that "we seriously consider federal law in determining the parameters of our own constitutional provisions, and we may adopt federal precedent under the state constitution but only to the extent that we believe the federal law is not inconsistent with the protections afforded by our state constitution." State v. Guzman, 122 Idaho at 988.

Further, the Korn Court quoted the U.S. Supreme Court decision of Allied Structural Steel Co. v. Spannaus, *supra*, in stating that "[t]he ... contracts clause protects only those contractual obligations already in existence at the time the disputed law is enacted." Thus, the Idaho Supreme Court expressly relied upon a U.S. Supreme Court case, which evaluated a Contract Clause claim under the U.S. Constitution. A review of Allied Structural reflects the modern test of the Contract Clause. For example, the Allied Structural Court rejects the literal reading of the Contract Clause that plaintiffs seek to employ in this case: "The Clause is not, however, the Draconian provision that its words might seem to imply. As the Court has recognized, 'literalism in the construction of the contract clause ... would make it destructive of the public interest by depriving the State of its prerogative of self-protection." 438 U.S. at 240. Further, the Allied Structural Court also, for example, discussed the requirement of

substantiality, and evaluation of the nature and purpose of the legislation where a severe impairment occurs:

> In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

438 U.S. at 244-45. Thus, the implicit argument by plaintiffs – that Idaho has rejected the modern Contract Clause analysis with respect to the Idaho Constitution's own Contract Clause, or somehow employs some other test – is unavailing.

b. Idaho Contract Clause decisions reflect application of the modern Contract Clause analysis.

Plaintiffs cite two Idaho decisions for their contention that Idaho does not utilize modern federal Contract Clause analysis: the 1954 decision of Penrose v. Commercial Travelers Insurance Company, 75 Idaho 524, 275 P.2d 969 (1954), and the 1933 decision in Straus v. Ketchen, 54 Idaho 56, 28 P.2d 824 (1933).

With respect to Penrose, plaintiffs acknowledge that the lead opinion authored by Justice Thomas "demonstrated a strong inclination to apply what is current Federal methodology," but that the dissenting opinions of three concurring Justices demonstrates that the Idaho Supreme Court has refused to use the modern federal Contract Clause analysis. Plaintiffs' Opposition at 15. However, the Penrose decision has been reeled in by later decisions, clarifying that retroactive legislation, even as applied to existing contracts, is not *per se* unconstitutional. In Eriksen v. Blue Cross of Idaho Health Services, Inc., the Idaho Court of Appeals clarified that "[b]ecause the statute shifted the balance of power between contracting parties, by identifying a favored party in the event of litigation, the Supreme Court barred its application to pre-existing

contracts." 116 Idaho 693, 696, 778 P.2d 815, 818 (Ct. App. 1989). Thus, the Eriksen Court narrowed Penrose to scenarios where a statutory change would have "affected bargaining relationships by designating favored parties," characterizing the Penrose decision as resting upon a "policy rationale." *Id.* This explanation by the Idaho Court of Appeals was later confirmed by the Idaho Supreme Court in Bott v. Idaho State Bldg. Authority, 122 Idaho 471, 835 P.2d 1282 (1992).

As discussed above, however, the repeal of I.C. § 72-915 did not impact the "bargaining relationships" between the parties, but rather maintained the status quo of dividend practices in accord with the Idaho Legislature's intent. Further, the policy needs of the repeal of I.C. § 72-915, outlined in the SIF's brief-in-chief, were not at issue in Penrose, and, applied here, demonstrate that the repeal complies with the Contract Clause. Tellingly, this later discussion of Penrose by the Idaho appellate courts is not cited by plaintiffs.

Nor is the 1933 Straus v. Ketchen decision guiding authority on application of the modern Contract Clause analysis in Idaho. Not surprisingly, omitted from plaintiffs' discussion of Straus is that the Idaho Supreme Court was simultaneously ruling on both the U.S. and Idaho Contract Clause provisions:

> **Under the federal and state constitutional provisions above quoted, no law can ever be passed impairing the obligations of a contract, and no exception is made, consequently the contracts of a drainage district stand upon the same footing as those of individuals or any other agency.** The Legislature cannot, under such constitutional prohibitions, authorize, under the police power of the state, the creation of a contracting agency and permit the contracting of obligations, and by the same power destroy its contracts and abolish its obligations. To permit the Legislature to do so would destroy the very essence of the constitutional prohibitions. Clearly such was never the intention of the framers of the Constitution. Were it otherwise, no person would ever be safe to enter into a contract with public or quasi public corporations, creatures of the law.
>
> ...
>
> For the reasons herein announced, we hold that chapter 183, Session Laws 1933, impairs the obligations of the contract, as to the bonds in question, **in violation of**

article 1, § 10, Constitution of the United States, and article 1, § 16, Constitution of Idaho.

28 P.2d at 834 & 835-36. (emphases added). As an initial point, Straus actually supports the SIF's position that the Idaho Supreme Court has not enunciated a test different than the federal analysis, in that Straus treated the U.S. Constitution and Idaho Constitution Contract Clause provisions in the same breath. Further, Straus's contention that under the U.S. Contract Clause "no law can ever be passed impairing the obligations of a contract" is, now almost 80 years later, no longer even remotely an accurate statement regarding federal Contract Clause law. *See, e.g.,* Allied Structural, *supra* (cited in State v. Korn, *supra*); RUI, *supra.*

In addition, the Straus decision includes reference to Von Hoffman v. Quincy, 71 U.S. (4 Wall.) 535, 18 L.Ed. 403 (1866). In evaluating a Contract Clause under the New Mexico state constitution, the New Mexico Supreme Court explained: "much water has flowed over the dam since *Von Hoffman,* and so we prefer to apply more modern Contract Clause analysis in deciding whether or not to invalidate this statute in this case." Los Quatros, Inc. v. State Farm Life Ins. Co., 800 P.2d 184, 192 (N.M. 1990). Further, Straus' language as to "public or quasi public corporations" is also untenable under more recent Idaho law, given that Idaho appellate courts have made clear that laws impacting existing public and quasi-public contracts are not *per se* unconstitutional. *See, e.g.,* Agricultural Products Corp. v. Utah Power & Light Co., 98 Idaho 23, 29, 557 P.2d 617, 622-23 (1976)(public utilities - "On the other hand, the state has a well established right to regulate public utilities. ... Pursuant to that power, it has been settled that the state may fix rates for a public utility service which will supersede rates previously fixed by private contract. ... Private contracts with utilities are regarded as entered into subject to reserved authority of the state to modify the contract in the public interest."); City of Hayden v. Washington Water Power Co., 108 Idaho 467, 469, 700 P.2d 89, 91 (Ct. App.

1985)(municipalities - "We do not suggest, of course, that a municipality never may impose new burdens upon an existing franchise grantee. A city has the inherent right to enact valid police power regulations, even if contracts are thereby affected."). In short, plaintiffs fail to cite any Idaho authority that demonstrates that Idaho employs anything but the modern Contract Clause analysis employed by federal courts.

Accordingly, this Court can correctly utilize the modern Contract Clause test – such as that employed in the RUI and Quatros decisions – in evaluating the constitutionality of the repeal of I.C. §72-915.

3. The repeal of I.C. § 72-915 is constitutional, per modern Contract Clause analysis.

Its prior arguments notwithstanding, plaintiffs next argue that application of the modern Contract Clause analysis (as reflected in the RUI decision) demonstrates that the repeal of I.C. §72-915 is unconstitutional. Plaintiffs' arguments as to each of the elements outlined in RUI[1] are in error, and plaintiffs' arguments fail.

a. The Idaho Legislature has not operated a substantial impairment of a contractual relationship.

i. There is no contractual right to dividends in the SIF workers' compensation policies.

Plaintiffs baldly contend that the decisions in Kelso & Irwin v. State Insurance Fund, 134 Idaho 130, 997 P.2d 591 (2000) and Hayden Lake Fire Protection District v. Alcorn, 141 Idaho 388, 111 P.3d 73 (2005) demonstrate there is a "contractual agreement between the Fund and its

[1] As previously explained in the SIF's brief-in-chief, the RUI Court summarized the modern Contract Clause three-step analysis as follows: (1) "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship[;]" (2) "whether the State . . . [has] a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem[;]" and (3) "whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." RUI One Corp. v. City of Berkeley, 371 F.3d at 1147 (internal quotations omitted). Additionally, the first step "itself has three components: 'whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.'" *Id.*

policyholders regarding the specific term before this Court." Plaintiffs' Opposition at 18-19. In doing so, however, plaintiffs fail to address two points on this issue raised in the SIF's brief-in-chief, and, as such, do not appear to contest them.

First, plaintiffs do not dispute that the SIF policy of insurance is silent as to dividends. *See* Affidavit of Donald W. Lojek in Support of Plaintiffs' Motion for Partial Summary Judgment ("Lojek Aff."), filed September 22, 2010, at Exh. A.

Second, plaintiffs also do not dispute the SIF's governing statutes do not guarantee 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* I.C. § 72-901 *et seq*. The Idaho Supreme Court previously concluded the SIF's statutory framework does not create any property rights in the SIF's policyholders. Kelso, 134 Idaho at 135. Plaintiffs acknowledge this, but argue that the policyholders' claimed contract right is simply "a right to share in [a] dividend" once declared. Plaintiffs' Opposition at n.4. In doing so, however, plaintiffs also fail to address the SIF's argument that plaintiffs cannot characterize a strict pro rata dividend distribution as some variety of expected or vested contractual right that has been disrupted by retroactive application, because SIF dividends have not previously been paid that way, and, indeed, any change in the law created by *Farber* was promptly remedied by the Idaho legislature (via repeal) even before remittitur issued by the Idaho Supreme Court in the *Farber* matter. *See, e.g.,* Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 Idaho 400, 411, 103 S.Ct. 697, 704 (1983)("[S]tate regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment."); Boykin v. Boeing Co., 128 F.3d 1279, 1283 (9th Cir. 1997)("The proper inquiry in determining the constitutionality of retroactive legislation is 'whether a party has changed position in reliance upon the previous law

or whether the retroactive law defeats the reasonable expectations of the parties.'"); *accord*, In Re Marriage of Giroux, 704 P.2d 160 (Wash. App. 1985).

Accordingly, there is no contractual right to dividends, and a legislative change to the statute governing the methodology for distribution of dividends does not implicate a term of the SIF insurance policy.

ii. The repeal of I.C. § 72-915 was not a change in law that impaired the contractual relationship between the SIF and its policyholders.

Plaintiffs next contend, in conclusory fashion, that the workers' compensation policies must be impaired, simply by the fact of the existence of the SIF's summary judgment motion, and because plaintiffs' rights "will be rendered nugatory by their inability to enforce them." Plaintiffs' Opposition at p. 19.

The SIF's summary judgment motion is not, and cannot, be construed as some variety of admission that the repeal of I.C. § 72-915 constituted an impairment of the SIF-issued workers' compensation policies. To the contrary, it was plaintiffs that brought this action, alleging that such repeal was unconstitutional under the Contract Clause of the U.S. and Idaho constitutions. The SIF's summary judgment motion merely seeks to resolve those claims. The fact that plaintiffs cannot sue for a claimed pro rata share of declared dividends because of the repeal of I.C. § 72-915 does not mean there has been an impairment.

To the contrary, as explained in the SIF's brief-in-chief (and unaddressed in plaintiffs' Opposition), the policy expressly provides:

> Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to this law.

(Lojek Aff., Exh. A, at p. 2.) Thus, even to the extent a dividend methodology may be a term of the contract by virtue of statute (here, the now-repealed I.C. § 72-915), that term is subject to

change at any time by the Legislature, which is expressly outlined in the policy. Changes in the law are automatically incorporated into the policy, and no "impairment" would exist because the terms of the policy are changed when the law is changed, a fact that all policyholders are apprised of in the express language of their policy.

iii. The SIF policies were not "substantially impaired."

Plaintiffs' Opposition then asserts that the workers' compensation policies were, in fact, substantially impaired, given that a financial term was altered. Plaintiffs' Opposition at p. 20 (citing S. Cal, *supra*, and its underlying District Court decision at 202 F. Supp. 1129 (2002)). Plaintiffs' argument on this point fails for two key reasons.

First, plaintiffs are dismissive of the value of the dividends at issue, effectively contending that any financial term that is altered constitutes a substantial impairment. In doing so, however, they disregard S. Cal.'s explanation that "[w]hen assessing substantial impairment, we need not resolve the 'question of valuation' in terms of dollars if an **important** financial provision is impaired." 336 F.3d at 891 (emphasis added). In discussing this, the S. Cal. court cited two decisions, United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505 (1977) and Cayetano, *supra*. The S.Cal. court pointed out that in U.S. Trust, the change in the law effected "an 'outright repeal' of 'an important security provision'" – to wit, diversion of "revenues and reserves earmarked as security for privately held bonds." 336 F.3d at 889. The S. Cal. court also noted that in Cayetano, the statute at issue allowed the state "to delay employees' pay by one to three days on no more than six occasions over one year." *Id.* Plaintiffs fail to explain how the pro rata share of a discretionary declared dividend is an "important financial provision" comparable to a bond security or a paycheck.

Perhaps even more incredibly, plaintiffs appear to suggest a right to a dividend declaration itself: "[i]t bears directly upon the cost of that contract or the consideration for the issuance of the policy." Plaintiffs' Opposition at p. 20. However, as explained above, and uncontested by plaintiffs,[2] the SIF's policyholders have no contractual right to a dividend or even a property interest in the assets of the SIF, per the terms of the policy, the SIF's governing statutes, and the Kelso decision. Thus, the SIF Manager is entitled, in his discretion, to forgo the declaration of dividends for particular dividend periods or even declare a nominal amount, and, absent an abuse of such discretion, the SIF's policyholders cannot challenge such determinations; thus, the SIF's policyholders have no inherent right to rely upon dividends as "consideration" for a workers' compensation policy or that a particular amount be declared as dividends. Thus, plaintiffs cannot demonstrate that the potential for a dividend – the existence and amount thereof purely in the discretion of the SIF Manager – constitutes an "important financial provision" of a workers' compensation policy.

Second, plaintiffs then argue that "[t]his is a class action and the damages are an aggregate of the individual damages, which in this case are expected to be in excess of one million dollars." Plaintiffs' Opposition at p. 21.[3] Plaintiffs cite no authority for this proposition, nor otherwise highlight any differential analysis employed by courts depending on whether the challenged legislative action impacts one contract (e.g., the municipal franchise agreement in City of Hayden, *supra*) or potentially hundreds of contracts (e.g., attorney fee agreements in Curr

[2] "Plaintiffs are not claiming in the case at bar, just as they never claimed in *Farber*, that they have an absolute 'contractual right to a dividend.'" Plaintiffs' Opposition at n.4.

[3] It is worth noting, of course, that this action is not yet actually certified as a class action. As noted in the SIF's brief-in-chief, as well, not all policyholders with more than $2,500 in paid premiums for the years at issue would be class members as some policyholders benefit from the SIF's dividend practices, a point that plaintiffs do not dispute.

v. Curr, 124 Idaho 686, 691, 864 P.2d 132, 137 (1993))[4] or even potentially thousands of contracts (e.g., utility customers' private contracts in Agricultural Products Corp.).[5]

Finally, plaintiffs do not challenge the SIF's argument that the workers' compensation policies exist in a "heavily regulated industry," such that "expectations of further regulation that industry may lessen the severity of a subsequent impairment of that party's contractual rights and obligations." State v. All Property and Cas. Ins. Carriers Authorized and Licensed To Do Business In State, 937 So.2d 313, 324 (La. 2006). Indeed, in the context of insurance agreements, "public interest is so affected by the insurance business carried on in the state that private right of contract must be subjected to the police power." U.S. for Use and Benefit of Midwest Steel & Iron Words Co. v. Henly, 117 F. Supp. 928, 930-31 (D. Idaho 1954)(quoting Intermountain Lloyds v. Diefendorf, 51 Idaho 304, 5 P.2d 730 (1931)). Given that Idaho's workers' compensation law exists as an express exercise of the police power (I.C. §72-201), and also given that the Idaho Supreme Court has expressly recognized that an exercise of the police power is an exception to the application of the Contract Clause prohibition,[6] there should be no doubt that the Legislature's repeal of a statute relating to an insurer in a heavily-regulated industry created as a result of an exercise of the Legislature's police power would not constitute a 'substantial' impairment of contracts (that is, workers' compensation insurance policies).

---

[4] Although addressing only four fee agreements in particular, the Idaho Supreme Court spoke generally as to the right of the Idaho Industrial Commission to modify attorney fee agreements: "In order to **justifiably modify attorney fee agreements in the interest of public welfare**, the Commission must afford due process to the contracting parties, i.e., notice and an opportunity to be heard at a meaningful time." 124 Idaho at 696 (emphasis added).

[5] Although addressing only one customer's rate increase, the Idaho Supreme Court spoke generally as to the right of the Public Utility Commission's right to allow rate changes: "On the other hand, the state has a well established right to regulate public utilities. ... Pursuant to that power, it has been settled that the state may fix rates for a public utility service which will supersede rates previously fixed by private contract. ... Private contracts with utilities are regarded as entered into subject to reserved authority of the state to modify the contract in the public interest." 98 Idaho at 29.

[6] City of Hayden, 108 Idaho at 469 (stating that "[a] city has the inherent right to enact valid police power regulations, even if contracts are thereby affected," but holding, as to specific facts in case, "the police power exception to the constitutional proscription against impairing contracts does not apply.").

b. The State has a significant and legitimate public purpose behind the repeal of I.C. § 72-915.

Plaintiffs next address the requirement that, in demonstrating a violation of the Contract Clause, the regulation lacked a significant and legitimate public purpose. In doing so, however, they attempt to equate the SIF with the State of Idaho, and further fail to demonstrate that the repeal lacked a legitimate and significant public purpose.

i. The SIF does not have the burden of proof, as it is not "the state."

Plaintiffs first reiterate their argument that the SIF, as a "public entity," carries the burden of proof in demonstrating whether there is a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. Plaintiffs' Opposition at 22. As addressed earlier on pages 5-8 above, this is incorrect, as the SIF is not "the state."

Plaintiffs' error lies in the application of caselaw which looks to whether a State or state entity interferes "with their own obligations." S. Cal., 336 F.3d at 894 ("Because Santa Ana has substantially impaired **its own contract**, ...")(emphasis added); *accord* Allied Structural, 438 U.S. at 244, n.15 ("The Court indicated that impairments of **a State's own contracts** would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties.")(emphasis added); Cayetano, 183 F.3d at 1106 (9th Cir. 1999)("Defendants bear the burden of proving that the impairment was reasonable and necessary because '[t]he burden is placed on the party asserting the benefit of the statute **only when that party is the state**.'")(emphasis added). Plaintiffs' flaw lies in the inherent conclusion that the SIF is the State.

The SIF does not dispute that, by law, it is "created as an independent body corporate politic." I.C. § 72-901(1). However, it is not "state managed," as plaintiffs contend. Plaintiffs'

Opposition at p. 22. Rather, the SIF is managed by the SIF Manager. I.C. § 72-902.[7] The SIF is, by express statute, to "be administered without liability on the part of the state." I.C. § 72-901(1). The money generated by the SIF is deposited with the state treasurer, who acts as custodian for the SIF; however, "[t]he money in the fund does not belong to the state . . . [the money is held by the treasurer] . . . for the contributing employers and the beneficiaries of the compensation law, and for the payment of the costs of the operation of the fund." State ex rel. Williams v. Musgrave, 84 Idaho 77, 84, 370 P.2d 778, 782 (1962). Thus, when the SIF issues a workers' compensation policy to a policyholder, no relationship between the State and the policyholder is created,[8] and the State bears no liability whatsoever for that policy of insurance. Thus, a legislative act by the Idaho State Legislature applicable to the SIF – such as the repeal of I.C. § 72-915 – does not constitute an impairment of the State's own contractual obligations.

Accordingly, the burden remains on plaintiffs to demonstrate that there is no significant and legitimate public purpose behind the repeal of I.C. § 72-915.

ii. The applicable standard is not "strict scrutiny."

Even were the Court to find that the SIF was equivalent to the State, which it should not, the Court should reject plaintiffs' demanded "strict scrutiny" standard. Plaintiffs' Opposition at pp. 22 & 24.

---

[7] "72-902 .STATE INSURANCE MANAGER -- POWERS AND DUTIES OF STATE INSURANCE MANAGER. 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, or in connection with the insurance business to be carried on under the provisions of this chapter. The manager shall have skill and expertise in managing and administering within the insurance industry, shall be of good moral character and shall be bonded in the time, form and manner as prescribed by chapter 8, title 59, Idaho Code."

[8] Again, the State itself is a policyholder. *See* Counsel Aff., Exh. C, Fiscal Note ("The State of Idaho and public entities, **which are insured by the State Insurance Fund**, ...")(emphasis added).

"Strict scrutiny" is, of course, a different constitutional standard employed in other constitutional law matters. For example, in the context of alleged First Amendment violations, "any restriction based on the content of speech [in traditionally public forums] must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." Christian Legal Soc. v. Martinez, 130 S. Ct. 2971, 2984, n.11 (U.S. 2010). This is inapplicable in the Contract Clause analysis.

The requirement is simply that there be "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." RUI, 371 F.3d at 1147. Caselaw discussing the scenario of a State's impairment of its own contractual obligations does not impose a new "strict scrutiny" standard, but rather simply directs courts to more closely scrutinize legislative assessments of reasonableness and necessity where the State is attempting to alter its own contractual obligations. Energy Reserves Group v. Kansas Power and Light Co., 459 U.S. at n.14. Even in that scenario, however, the burden is not a static test, but depends on the degree of impairment: "[I]f a State undertakes to alter substantially the terms of a contract, it must justify the alteration, and the burden that is on the State **varies directly with the substantiality of the alteration.**" Equipment Mfrs. Institute v. Janklow, 300 F.3d at 860 (quoting White Motor Corp. v. Malone, 599 F.2d 283, 287 (8th Cir. 1979))(emphasis added).

Accordingly, the Court should reject any contention by plaintiffs that a "strict scrutiny" standard applies to this action.

iii. Plaintiffs fail to demonstrate that the repeal of I.C. § 72-915 lacks a significant and legitimate public purpose.

Plaintiffs contend that the repeal of I.C. § 72-915 is "nothing more than an amnesty provision for the illegal conduct of the fund." Plaintiffs' Opposition at 27. Plaintiffs further

contend that the repeal is "very narrow and specific and only designed to benefit a single entity." *Id.* at 24. Thereby, plaintiffs argue, there lacks a significant and legitimate public purpose behind the repeal of I.C. § 72-915.

Plaintiffs' first error in arguing such a position is that plaintiffs attempt to argue what they contend is the motivation ("reward the Fund for having ignored the clear and unambiguous language of a law" and "amnesty ... for the illegal conduct") behind the repeal, rather than looking to the text of the repeal. Plaintiffs' Opposition at 25 & 27. This is, of course, inappropriate. As the RUI court explained, in rejecting a dissenting opinion's efforts to characterize the motives for an amendment:

> Although the dissent cites additional facts that it states "reveal why the Marina Amendment is an improper exercise of municipal authority," post, at 1158, these facts are introduced solely to establish a supposed nefarious motive on behalf of the City Council. Such facts are wholly irrelevant, however, as our analysis of the constitutionality of an ordinance must proceed from the text of the ordinance, not the alleged motives behind it. See Golden State Transit Corp. v. City of Los Angeles, 686 F.2d 758, 761 (9th Cir.1982) (**"It is well settled that a reviewing court 'will not strike down an otherwise constitutional statute on the basis of an allegedly illicit legislative motive.'** " (quoting United States v. O'Brien, 391 U.S. 367, 383, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968))).

371 F.3d at 1146, n.7 (emphasis added).[9]

Plaintiffs' next error lies in characterizing the Legislature's act as one of "very narrow focus ... aimed at specific" parties. Plaintiffs' Opposition at 24. Plaintiffs' citation to Allied Structural is of little benefit to this Court, given its lack of factual similarity to this matter. In

[9] Plaintiffs also err in attempting to attribute some deficiency in the constitutionality of the repeal by noting that it was passed in response to the Idaho Supreme Court's decision in *Farber*. Not only did the Idaho Supreme Court expressly contemplate that the law would be changed, but even the U.S. Congress' efforts to pass legislation in direct response to a U.S. Supreme Court holding has been upheld. *See* Farber v. Idaho State Insurance Fund, 147 Idaho 307, 313, 208 P.3d 289, 295 (2009)("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."); In Re Marriage of Giroux, 704 P.2d 160 (Wash. App. 1984)(approving retroactivity of military pay-related community property statute passed in response to U.S. Supreme Court decision in McCarty v. McCarty, 453 U.S. 210 (1981)).

that matter, the U.S. Supreme Court rejected the effort of the Minnesota Legislature to "grossly distort[] the company's existing contractual relationships with its employees" by imposing new, onerous requirements for pension funding in the event an employer attempted to close up shop in Minnesota or terminate a pension:

> Moreover, the retroactive state-imposed vesting requirement was applied only to those employers who terminated their pension plans or who, like the company, closed their Minnesota offices. The company was thus forced to make all the retroactive changes in its contractual obligations at one time. By simply proceeding to close its office in Minnesota, a move that had been planned before the passage of the Act, the company was assessed an immediate pension funding charge of approximately $185,000.
>
> Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. There is not even any provision for gradual applicability or grace periods. Cf. the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1061(b)(2), 1086(b), and 1144 (1976 ed.). See n. 23, infra. Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem. The presumption favoring "legislative judgment as to the necessity and reasonableness of a particular measure," *United States Trust Co.*, 431 U.S., at 23, 97 S.Ct., at 1518, simply cannot stand in this case.
>
> The only indication of legislative intent in the record before us is to be found in a statement in the District Court's opinion:
>
> "It seems clear that the problem of plant closure and pension plan termination was brought to the attention of the Minnesota legislature when the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota plants and attempted to terminate its pension plan." 449 F.Supp., at 651.
>
> But whether or not the legislation was aimed largely at a single employer, it clearly has an extremely narrow focus. It applies only to private employers who have at least 100 employees, at least one of whom works in Minnesota, and who have established voluntary private pension plans, qualified under § 401 of the Internal Revenue Code. And it applies only when such an employer closes his Minnesota office or terminates his pension plan. Thus, this law can hardly be characterized, like the law at issue in the *Blaisdell* case, as one enacted to protect a broad societal interest rather than a narrow class.

438 U.S. at 247-49. The repeal of I.C. §72-915 was not an effort by the Idaho Legislature to disrupt the business decision of a company by suddenly imposing new, onerous financial conditions and "grossly distorting" extant contracts. Moreover, as the Ninth Circuit has explained, the reach of Allied Structural has been pulled back: "The Court retreated from its holding in *Spannaus* [in later cases]. In these cases, the Court indicated a renewed willingness to defer to the decisions of state legislatures regarding the impairment of private contracts." Keating, 903 F.2d at 1226.

In the present case, the Legislature appropriately explained the 'significant and legitimate public purpose' of the repeal by the Legislature's Statement of Purpose and Fiscal Note to S.B. 1166, as amended. Counsel Aff., Exh. C. There, the Legislature stated:

> Repeal of Idaho Code Section 72-915 will serve to offset an adverse decision of the Idaho Supreme Court regarding the interpretation of Idaho Code Section 72-915 which could subject the State Insurance Fund to pay dividends on policies that are not financially profitable, thereby restricting the Fund's ability to reduce premiums and pay dividends to profitable policyholders. The proposed repeal of Idaho Code 72-915 will clarify the law regarding the payment of dividends by the State Insurance Fund by making it clear that in passing House Bill 774aa in 1998, it was the intent of the legislature to have the State Insurance Fund operate like an efficient insurance company subject to regulation under Title 41, Idaho Code, including the dividend provision set forth in Title 41, Chapter 28, Idaho Code. Repeal of the law effective April 3, 1998 is necessary because on that date laws were enacted which subjected the State Insurance Fund to regulation under the Insurance Code, Title 41 of the Idaho Code. This legislation will allow the State Insurance Fund to issue dividends in the same manner as other insurance companies operating within the State of Idaho.

Id.[10] In turn, the repeal's Fiscal Note emphasized the financial uncertainly faced by the SIF in light of the Court's ruling:

> The State of Idaho and public entities, which are insured by the State Insurance Fund, face losing all or part of their future dividends and deviations as a result of uncertainties as to the effect of a recent Supreme Court decision. Based on dividends and rate reduction deviations provided by the State Insurance Fund over the past two years, that number could exceed $5,000,000 annually. Private businesses may also, due to the same uncertainties, experience the loss of future dividends and deviations since, according to the Court's decision, the Fund has no option when distributing dividends, other than to use a pro rata formula.

Id. Plaintiff's attempt to assert that the stated intent is only prospective in nature, but the repeal itself squarely addresses the Legislature's concern that the Farber decision "require[s] the State Insurance Fund pay dividend on policies that are not financially profitable, thereby restricting the fund's ability to reduce premiums and pay dividend to profitable policyholders." Counsel Aff., Exh. C. The Legislature, in so doing and with the rule that "the Legislature was aware of the prevailing judicial interpretation of that statute and specifically chose to change that interpretation," clearly recognized that the Farber court's interpretation of I.C. § 72-915 would apply not only to future policies, but also to existing policies and policies no longer in force – Farber itself was addressing a class of "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." 147 Idaho at 310. Thus, the Legislature was acutely cognizant that additional claims might be brought pursuant to I.C. § 72-915 if not retroactively appealed, which would have precisely the harmful impact the Legislature sought to avoid: the loss of future dividends and

[10] Of course, even in the absence of such a legislative statement as to a particular decision by the Idaho Supreme Court: "[s]tatutes are construed under the assumption that the legislature was aware of all other statutes and legal preceden[t] at the time the statute was passed." State, ex rel. Wasden v. Maybee, 148 Idaho 520, ____, 224 P.3d 1109, 1118 (Idaho 2010)(quoting Druffel v. State, Dep't of Transp., 136 Idaho 853, 41 P.3d 739 (2002)); *accord* Smith v. Washington County, ___ Idaho ___, ___ P.3d ____, 2010 WL 3895341 (Idaho, October 6, 2010) ("We presume that when it amended § 12-117(1), the Legislature was aware of the prevailing judicial interpretation of that statute and specifically chose to change that interpretation.").

deviations. Given the SIF's public purpose[11] and the potential impact upon thousands of policyholders (present and future) of such a result, the 'significant and legitimate public purpose' is amply demonstrated.

Finally, plaintiffs fail to recognize, again, the history of dividend payments by the SIF. Plaintiffs have not, and cannot, demonstrate that SIF dividends were previously paid pro rata, either before[12] or after the Farber decision. Indeed, any change in the law created by Farber was promptly remedied by the Idaho legislature even before any remittitur in Farber issued. The end result of the Farber decision, then, was to suddenly mandate a particular dividend distribution methodology which had not previously been employed, and could not have been expected or relied upon by policyholders, resulting in a windfall to policyholders still within the applicable statute of limitations. However, as the Ninth Circuit has explained, avoidance of windfall is a perfectly appropriate basis for a Legislature to act: "if a statute causes unforeseen and unintended consequences such that private parties would obtain windfalls they never expected, later amendment to realign a statute with the parties' expected bargain may be reasonable." S. Cal., 336 F.3d at 895. Here, the Idaho Legislature has made clear its belief that the Farber court wrongly interpreted its intent (Counsel Aff., Exh. C, Section 1(4)), and the plaintiffs cannot demonstrate any existing "expected bargain" given that dividends were never paid in a strict pro rata fashion.

Thus, as the U.S. Supreme Court has explained, "unless the State is itself a contracting party, courts should '**properly defer to legislative judgment as to the necessity and**

---

[11] Plaintiffs do not appear to contend that the SIF itself lacks a public purpose, as was previously outlined by the SIF in its brief-in-chief. *See generally* Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 33-36.

[12] Affidavit of Jim Alcorn in Support of Defendants' Motion for Summary Judgment, filed October 26, 2010 at , ¶ 25.

reasonableness of a particular measure." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 505, 107 S.Ct. 1232, 1252 (1982)(emphasis added). In the present case, the Idaho State Legislature appropriately stated the reasons for the repeal of I.C. § 72-915 and the retroactive nature therefor, and plaintiffs are thus unable to demonstrate that the repeal lacked a significant and legitimate public purpose.

c. The adjustment of the rights and responsibilities of the SIF and its policyholders, if any, is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the repeal of I.C. § 72-915.

Finally, plaintiffs assert, with little specific explanation, that the retroactive repeal of I.C. §72-915 is not of an appropriate character to the public purpose justifying the repeal.

Plaintiffs first misstate the test, asserting that "the Court is to to [sic] examine the availability of alternative measures which the legislature could have taken which would have addressed its legitimate concerns without producing a concomitant impairment of the Fund's contractual obligations to the Plaintiffs and the members of the class." Plaintiffs' Opposition at p. 28. More correctly, the burden falls upon plaintiffs to disprove that "the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." RUI One Corp. v. City of Berkeley, 371 F.3d at 1147 (9th Cir. 2004).). This is the final step of the RUI analysis, where a court has already identified a contractual impairment of some kind, but also found that the legislation addressing that impairment serves a significant and legitimate public purpose: "[o]nce a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of the contracting party [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Energy Reserves Group, Inc., 459 U.S. at 413. Thus, the Court need not find that

legislation should avoid "concomitant impairment," as at this stage in the analysis, impairment will have already been found but also justified by a public purpose.

Even were the Court to reach this stage of the analysis, plaintiffs have failed to expressly indicate what is inappropriate as to the character of the repeal of I.C. § 72-915, or to otherwise overcome the deference afforded the Legislature in making such repeal. *See, e.g.,* Energy Reserves, 459 U.S. at 412-13 ("Unless the State itself is a contracting party, ... '[a]s is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'"). The Legislature has identified the potential harm caused by the Farber ruling: the loss of future dividends and deviations both to public and private entities insured by the SIF. The Legislature, in seeking to avoid such harm, repealed I.C. § 72-915 (the only source from which the SIF could be required to distribute under a particular methodology) and made it retroactive. The retroactive nature of the statute both ensured that no such harm could be brought on present and future policyholders by claims related to past dividend periods, and prevented policyholders from gaining a windfall that was neither reflective of any past dividend practice of the SIF nor which policyholders could have claimed an expectation in. S. Cal., 336 F.3d at 895 ("if a statute causes unforeseen and unintended consequences such that private parties would obtain windfalls they never expected, later amendment to realign a statute with the parties' expected bargain may be reasonable.").

In doing so, the Legislature cut off the risk of unknown claims adversely harming present and future policyholders. Counsel Aff., Exh. C, Fiscal Note ("The State of Idaho and public entities, which are insured by the State Insurance fund, face losing all or part of their future dividends and deviations **as a result of uncertainties** as to the effect of a recent Supreme Court Decision. ... Private businesses may also, **due to the same uncertainties**, experience the loss of

future dividends and deviations[.]". However, the Legislature, in its judgment, also saw fit to actually preserve claims by policyholders who had already initiated litigation as of December 31, 2008, including the *Farber* plaintiffs. Thus, the retroactive repeal of the newly-interpreted I.C. § 72-915 to eliminate the risk of unknown additional claims impacting present and future policyholders, while preserving existing litigated claims, was legislation of a wholly appropriate character to address the Legislature's concerns at hand.

Finally, plaintiffs again raise the SIF's purported 'surplus,' but fail to explain the relevance to this particular question. While certainly a consideration in explaining how dividends are determined, the Legislative repeal is not predicated on the assertion that a lack of repeal will result in the insolvency of the Fund – rather, the Legislature expressly states that "[t]he result of the [Farber] decision is to require that the State Insurance Fund pay premiums on policies that are not financially profitable, thereby restricting the fund's ability to reduce premiums and pay dividends to profitable policyholders." Counsel Aff., Exh. C, Section 1(2). Further, even were the repeal based, in whole or in part, on concerns about the solvency of the SIF, this would still not render the repeal unconstitutional for being of an inappropriate character, especially given the public purpose of the SIF, its lack of State monetary support, and its lack of a safety net in the form of the Idaho Insurance Guaranty Association.

Accordingly, plaintiffs fail to demonstrate that the repeal of I.C. § 72-915 is not based upon reasonable conditions and is of not a character appropriate to its public purpose.

CONCLUSION

Accordingly, for the reasons stated above, the repeal of Idaho Code § 72-915 is constitutional and forecloses Plaintiffs' claims, and the Court should grant summary judgment in favor of the SIF on all of plaintiffs' claims in this case.

DATED this 10 day of December, 2010.

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 10th day of December, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Donald W. Lojek
Lojek Law Offices, Chtd.
623 West Hays Street
Boise, ID 83702
Fax No.: (208) 345-0050
Attorneys for Plaintiffs

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

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

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

_____
Richard E. Hall
Keely E. Duke

Donald W. Lojek ISBN 1395
LOJEK LAW OFFICES, CHTD
623 West Hays Street
Boise, ID 83701
Telephone: 208-343-7733
Facsimile: 208-345-0050

Philip Gordon ISBN 1996
Bruce S. Bistline ISBN 1988
GORDON LAW OFFICES
623 West Hays Street
Boise, ID 83702
Telephone: 208/345-7100
Facsimile: 208/345-0050

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

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE LLC OF SALMON,

Plaintiffs,

vs.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN AND MAX BLACK AND STEVE LANDON in their capacity as member's of the Board of Directors of the State Insurance Fund,

Defendants.

CASE NO. CV 09-13607-C

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [I.R.C.P. 56 (a), (c) and (d)]

COME NOW THE PLAINTIFFS, and the members of the class, by and through undersigned counsel, and hereby provide the Court with the following Reply Memorandum in Support of their Motion for Partial Summary Judgment.

I. CURRENT PROCEDURAL POSTURE

Currently pending before this Court are four Motions,

A. Plaintiffs' Motion for Partial Summary Judgment.

Filed September 23, 2010. This Motion asks the Court to find and declare that making the 2009 repeal of Idaho Code §72-915 retroactive to January 1st, 2003, is clearly unconstitutional, in that it violates Article I, Section 16 of the Constitution of Idaho. In Support of this Motion, the Plaintiffs filed the Affidavit of Philip Gordon to which was attached a number of documents, which were either culled from the public record (including the complete legislative history of 2009 Session Law, Ch. 294 (hereinafter "SB 1166aa") which is at issue in this matter) or supplied by the Defendants (hereinafter collectively referred to as the "Fund") in *Randolph Farber, et.al. v. The Idaho State Insurance Fund*, CV06-7877, Canyon County (herein after "*Farber v. Fund*" to differentiate from citations to the Supreme Court decision in the matter), and the Affidavit of Donald Lojek to which was attached a copy of the policy form used by the State Insurance Fund. Plaintiffs filed a Memorandum in Support of that Motion on the same day (hereinafter "Plf Memo."), and the Fund filed its Opposition on November 22nd, 2010 (hereafter "Def. Opp").

B. Defendants' Motion for Summary Judgment.

Filed October 26th, 2010. This Motion asks the Court to find and declare that the retroactivity aspect of the repeal of Idaho Code §72-915 offends neither Article 1, Section 16 of

the Idaho Constitution, nor Article 1, Section 10, Clause 1 of the United States Constitution. (Each of these provisions is generally known as the "Contracts Clause" of its respective Constitution.) In Support of this Motion, the Fund filed the Affidavit of James Alcorn, the Fund's Manager, which consists largely of self-serving conclusory claims regarding "facts" and seeks to introduce a purported internal document of the Fund. The Fund also filed the Affidavit of Bryan A. Nickels, to which is attached several pleadings and decisions from *Farber v. Fund*, and a portion of the legislative history of SB 1166aa. The Fund filed a Memorandum in Support of that Motion on the same day (hereinafter "Def Memo"), and Plaintiffs filed their Opposition on November 22nd, 2010 (hereinafter Plf's Opp.).

C. Plaintiffs' Motion pursuant to Rule 56 (f).

Filed on November 22, 2010, this Motion asks the Court to proceed on the Plaintiffs' independently determinable Motion for Partial Summary Judgment, if granted, which would moot the Defendants' Motion for Summary Judgment and, to the extent that the Court finds it necessary to consider and rely upon any of the claims made in the Affidavit of James Alcorn or many of the documents attached to the Affidavit of Bryan Nickels, asks the Court to stay proceedings on the Fund's Motion for Summary Judgment until relevant discovery can be conducted by Plaintiffs. In support of this Motion, the Plaintiffs filed the Affidavit of Philip Gordon which, among other things, identifies some of the discovery which would need to be conducted if the Court considers the Alcorn Affidavit relevant and admissible. The Plaintiffs filed a Memorandum in support of that Motion on the same day, and Fund filed their Opposition on or about December 3, 2010.

D. Plaintiffs' Motion to Strike.

Filed on November 22, 2010, this Motion asks the Court to Strike many of the documents attached to the Affidavit of Bryan Nickels and to Strike the entire Affidavit of James Alcorn on the basis that they are wholly irrelevant to these proceedings and therefor not properly filed affidavits. Plaintiffs filed a Memorandum in support of that Motion on the same day, and the Fund filed its Opposition on or about December 3, 2010.

II. INTRODUCTION

The Fund's 36 page memorandum in opposition to Plaintiffs' Motion for Partial Summary Judgment consists almost entirely of arguments and analyses which were set forth verbatim (or virtually verbatim) in their memorandum in support of their own Motion for Summary Judgment. Plaintiffs have already replied to most of these arguments in their *Memorandum in Opposition to Defendants' Motion for Summary Judgment* and do not wish to burden the Court with reading those arguments again. For this reason, Plaintiffs are intending to generally use summaries of arguments and provide references as appropriate to earlier memoranda.

III. UNDISPUTED MATERIAL FACTS

The indisputable and material facts are that Plaintiffs and the putative class members all entered into contracts with the Fund, an entity created and regulated by the State of Idaho. All of those contracts included a clear and unambiguous provision mandated by the Idaho Legislature which required any dividends to be allocated *pro rata* among all time-qualified policyholders. This term had been part of every policy issued by the Fund since 1917. The Manager of the Fund considered that dividend allocation requirement to be inconvenient to his vison of how the Fund

should be operated. Rather than going to the Legislature to secure a change in the legislatively mandated contract provision, I.C. § 72-915, he simply breached the contracts between the Fund and its policyholders by ignoring that contract provision. In every year relevant to this action, he exercised his discretion to declare a dividend (ranging between 5 million and 24 million dollars) and then proceeded to arbitrarily allocate the dividend without the benefit of any rule, regulation, or statute to support his conduct. The approach he took caused Plaintiffs and the other putative class members to receive either no dividend or less than they should have received.[1] After the Manager was shown the error of his ways by the Supreme Court in *Farber, et al. v. Idaho State Insurance Fund,et al.,* 147 Idaho 307, 208 P.3d 289 (2009) rather than taking action to remedy the multiple breaches and to appropriately compensate all of the policyholders who had been denied the full benefit of their contract with the Fund, representatives of the Fund went to the Idaho Legislature and advocated for the passage of a bill which removed I.C. § 72-915 from the contracts between the Fund and its policyholders, retroactive to a date prior to the earliest claim that Plaintiffs can assert, consistent with existing statutes of limitation.

The Fund attempts to obscure these facts with several erroneous, inapposite or distorted claims about these undisputed facts. First, it asserts that Plaintiffs' claims are predicated on Idaho Code § 72-915 and not upon the contract. *Def Opp.*, pp 4-5. This assertion is premised upon the fact that the language of I.C. § 72-915 is not part of the printed specimen policy which

---

[1] It should be noted that this conduct, as carried out, is contrary to the law in another respect. The formula implemented by the Manager works to reduce(in many cases to $0.00) the dividend allocable to policyholders who have suffered insured losses. This action works as an assessment against them which causes them to pay more premiums on their policy then were paid by insureds who did not sufferer covered losses. Prior to1951, the Manager had the power to assess policyholders within a particular industry on an equal basis. I.C. §72-916. In 1951,the Legislature repealed I.C. §72-916 . Since that date the Manager has had no power to assess any policyholders. In either event, causing the net cost of insurance to be higher for policyholders who suffered losses than for those who do not suffer losses is illegal conduct and itself a breach of the contract. See *Affidavit of Donald W. Lojek* dated December December 6, 2010.

is issued by the Fund. This claim ignores undisputed facts. First, without a contract between the Plaintiffs and the Fund there would be no right to seek the required dividend allocation. I.C.§72-915, by itself, confers no generalized rights on any person or entity– only those in contract with the Fund. Second, the Idaho Supreme Court has already expressly ruled that I.C. § 72-915 is a provision of the contract between the Fund and its policyholders. *Hayden Lake Fire Protection Dist v. Alcorn*, 141 Idaho 388, 399 (2005).

Second, the Fund claims that it is undisputed and material that I.C. §72-915 was repealed on May 6, 2009. *Def. Opp.* pp. 5-6. The Fund is apparently not reading SB 1166aa very carefully. SB 1166aa provides that there was an emergency such that Section 1 of the act (the statement of purpose section) was effective immediately upon the Governor's signature or May 6, 2009. SB 1166aa provides that Section 2 (the language repealing I.C. §72-915) is retroactively effective as of January 1, 2003. Based solely upon the language of SB 1166aa it is not possible to conclude that the actual repeal of I.C. § 72-915 was itself an emergency enactment and, therefore, if it is not effective retroactively (because it is constitutionally defective) then it is not effective until other general laws become effective, i.e., on July 1, 2009.

Third, the Fund claims that it is an undisputed fact that Idaho Code § 72-915 was repealed retroactive to January 1, 2003 (Opp. pp.6). The Plaintiffs do not dispute that SB 1166aa states that the repeal of I.C. § 72-915 is retroactive to January 1, 2003. However, by claiming that the statute is retroactively repealed the Fund is jumping the gun. Until it is determined if this action is constitutional it is not correct to say that it is an undisputed fact that

I.C. § 72-915 was repealed retroactive to January 1, 2003.[2]

Fourth, the Fund claims that Plaintiff's claim is foreclosed if the repeal is upheld. *Def. Opp.* p.6 This assertion confounds the effect of a retroactive repeal and a prospective repeal. Plaintiffs' claim is foreclosed if the retroactive repeal is deemed to be constitutional. If the retroactive repeal is unconstitutional then the repeal of I.C. § 72-915 will only apply prospectively as of the actual effective date of the bill and will not foreclose Plaintiffs' claims.

Fifth, the Fund engages in a lengthy discussion of the purposes for which it was created. Whether this discussion is accurate or not, it is wholly immaterial to the decision to be made by the Court. It appears to be offered to give the Fund some justification for filing the Affidavit of James Alcorn. The same can be said for the Fund's continued efforts, under the guise of providing "Background" to continue to try to induce the Court to concern itself with a plethora of irrelevant information which does little other than to attempt to justify the Manager's repeated breaches of the contract. This case does not turn upon whether there is a justifiable breach of contract, and consequently the Fund's recitation of the "facts" underlying the Manager's conduct are no more relevant here, and should be no more persuasive to this Court than they were to the Idaho Supreme Court.

---

[2] At this point the numbering of the points set out in the memorandum will diverge from the numbering set out in the Fund's opposition memorandum. This is because Plaintiff agrees that their claims all relate to dividend distributions which occurred after 1, 2003 (Fund's point #4) and that this action was not filed until 24, 2009 (Fund's point 5), assuming there is a typographical error in the caption of that point.

IV. **ARGUMENT**

A. Summary of Argument

Plaintiffs maintain that a retroactive application of the repeal of I.C. §72-915 is a violation of the Idaho Contract Clause and as such SB 1166aa cannot work as a bar to Plaintiffs' breach of contract claims. In 1917, the legislature imposed a term into the Funds' contracts.[3] The Plaintiffs and every member of the putative class accepted those contracts and proceeded to pay premiums pursuant to those contracts. Idaho decisional law makes clear that the Idaho Contracts clause works to prohibit the Legislature from retroactively favoring an entity which it created by removing terms from contracts which it mandated in the first place. *Straus v. Ketchen,* 54 Idaho 56 (1933).

The Fund's response to this argument seeks to dodge controlling Idaho case law and proceeds instead on the demonstrably false premise that "Federal law is applicable in interpreting Idaho's Constitution both generally and in this case." *Def. Opp.* p.10. Launching from this unsupported notion, the Fund's argument proceeds by placing excessive reliance upon a single Ninth Circuit case, which discusses but does not employ (because the matter is resolved on a threshold issue) a number of factors employed in Federal decisional law analysis relative to the Federal Contracts Clause. To support its claim that Federal Contracts Clause analysis applies, the Fund also exalts a smattering of cases from other states. Apparently the Fund is suggesting that this Court should rely on these decisions in order to overrule the long line of decisions of the

---

[3] It should be noted that this term remained in place for 92 years and that during that time there was at least one overhaul of the law controlling the operations of the Fund. In 1998 the Legislature considered and enacted a substantial reorganization of the Fund. During that process, despite the benefit of testimony by the Fund manager and several other knowledgeable persons, there is no record that the Fund manager or his supporters made any attempt to have the Legislature consider or change I.C. § 72-915 specifically or the dividend allocation process generally.

Idaho Supreme Court. However, the Fund fails to cite to a single authority which would support this Court in proceeding to disregard the long-standing and controlling Idaho precedent on the basis that it is not "modern" or "refined". *Def. Opp.* pp. 3-4.

B. Reliance upon Federal Contracts Clause analysis for the purpose of determining Plaintiffs' Motion for Partial Summary Judgment is unwarranted.

Plaintiffs contend that this matter can be resolved by looking only to the Idaho Contracts Clause. If SB 1166aa impairs the Plaintiffs' contracts then it is unconstitutional under Idaho law and it does not matter if the Fund can demonstrate (which it cannot) that SB 1166aa is not unconstitutional under the Federal Contracts Clause. The Federal Contracts Clause imposes a floor below which state conduct cannot dip, but, as a provision of the Federal Constitution which infringes upon the power of the States who joined the Union, it is understandable that the Courts have read into that infringement a limited willingness to defer to an exercise of police power by a state legislature. The Federal Contracts Clause does not however impose a ceiling upon the rights that the citizens of a state may impose upon their state government in the Constitution they adopt. This means of course that the Idaho Supreme Court could, as it has done in other instances, properly determine that the Idaho Contracts Clause is intolerant of State action which impairs contracts, especially when the contract right at issue was mandated by the legislature in the first instance. Indeed, considering Idaho Decisional Law, this is exactly what has happened with respect to the Courts' application of the Idaho Contracts Clause. The Fund seeks to avoid the clear result of applying Idaho Contracts Clause analysis in this case in several ways which will be addressed below.

1. The contents of the pleadings do not control the issues which must be proven in order for the Plaintiff to prevail.

The Fund suggests, without any supporting authority, that because the Plaintiffs have alleged in their Amended Complaint that SB 1166aa violates both the Federal and the State contracts clause, they cannot prevail in this action unless the they prove that the Bill violates both provisions. *Def. Opp.* p 10. This assertion places undue weight upon the pleadings in this action which are intended only to give notice of the claims being made but which have never been held under modern procedural rules to set the standard of what must be proven to prevail upon those claims. In making this assertion Defendants fail to address the fact that all Idaho precedent supports a conclusion that if SB 1166aa violates the protection afforded by the Idaho Contracts Clause, it cannot eliminate the contractual rights at issue in this matter. There is no reason why Plaintiffs cannot proceed and prevail solely upon the Idaho Contracts Clause claim. Plaintiffs have the absolute right to determine the basis for their motion.

2. Federal law is not applicable in interpreting Idaho's Constitution both generally and in the context of the Contracts Clause.

Placing unfounded reliance upon *State v. Korn*, 148 Idaho 413, 224 P. 3d 480 (2009), the Fund asserts that "Federal law is applicable in interpreting Idaho's Constitution both generally and in this case." *Def. Opp.* pp. 10. While it may be argued that the *Korn* Court employed a "single, dispositive analysis," it is specious to conclude or assert that the Court conducted any analysis whatsoever as to whether the challenged ordinance "impaired the obligations" of any contract or even got close to deciding that the constitutional analysis would be the same regardless of whether the Federal Contract Clause claim or the Idaho Contracts Clause claim was being evaluated. The Court's ruling that no Contract Clause violation occurred resulted entirely from its threshold evidentiary determination that "...Korn simply failed to meet his burden of

establishing the existence of a contract or contracts that were affected by adoption of the ordinance." 224 P. 3d 480, 483. Having determined that no contract existed, the *Korn* Court never even reached the question of whether or not an impairment had occurred, and it certainly did not reach the question of whether Federal decisional law relative to the Federal Contracts Clause had any bearing at all upon how the Idaho Contracts Clause should be applied.

In a similar vein, while it may be asserted that our Supreme Court "has not indicated it has (or will) differentiate its analysis of Idaho's Contract Clause versus that of the federal constitution" *Def. Opp.* p 11, such an assertion is meaningless in view of the fact that Idaho Courts have repeatedly employed an analysis which, unlike the analysis applied by Federal Courts to the Federal Contracts Clause, shows no tolerance for Legislative action which impairs contracts involving State-created entities or which arise from attempts to retroactively remove terms mandated by the Legislature in the first instance. This groundless assertion is being employed because the Fund is unable to cite a single case in which the Idaho Supreme Court has held that Idaho Contract Clause claims will be analyzed by recourse to Federal Contract Clause jurisprudence. Indeed, the Fund's assertion ignores the conclusion compelled by juxtaposing the decision of District Judge Chase Clark's (United States District Court for the District of Idaho) decision in *United States for Use and Benefit of Midwest Stell & Iron Works Co. v. Henly et al.* 117 F. Supp. 928 (D.Idaho,1954) which found an Idaho statute constitutional applying Federal Contracts Clause analysis against the Idaho Supreme Court decision in *Penrose v Commercial Travelers Insurance Company,* 75 Idaho 85, 753 P.3d 969 (1954) which a few months later and with full awareness of Judge Clark's ruling, found the same statute unconstitutional applying Idaho Contracts Clause analysis. When these cases are considered together it is certain that the

Idaho Supreme Court has manifested a clear intention to " differentiate its analysis of Idaho's Contract Clause versus that of the federal constitution."

Despite being aware that Judge Clark's determination that the Idaho statute was a reasonable exercise of the State's police power and therefor not a violation of the Federal Contracts Clause, the *Penrose* Court refused to reach the same conclusion with reference to the Idaho Contracts Clause. The juxtaposition of these two cases, so close in time and involving the exact same Idaho statute, provides a compelling demonstration that our Supreme Court consciously considers the Idaho Contracts Clause as imposing a greater limit upon the Legislature than is imposed by the Federal Contracts Clause, and that it will therefore employ a different analysis when dealing with Idaho Contracts Clause claims than is applied by Federal Courts construing challenges based on the Federal Contracts Clause.

3. The Fund erroneously claims that in the context of the facts of this case, both the Idaho and United States' Contract Clauses are not to be read literally and that this Court should utilize the three-step analysis employed by some Federal Courts to determine whether state action is unconstitutional under the Idaho provision.

The Fund argues that the Idaho Contracts clause should be interpreted using the three step analysis set out in *RUI One Corp. v. City of Berkeley,* 371 F. 3d 1137 (9th Cir. 2004). *Def. Opp. p 11.-14.*[4] This assertion is belied by every Idaho Supreme Court decision interpreting our State Contracts Clause. In every case which the Plaintiffs have cited, the Idaho Supreme Court has used a consistent pattern of analysis which is based upon a long line of Idaho precedent and which does not utilize the three step approach described in the majority and dissenting opinions in RUI.

[4] This argument is raised previously raised by the Fund, *See Def. Memo,* pp. 18-19 and rebutted by the Plaintiffs. See *Plf. Opp.*, pp.9-16.

Lacking any supportive Idaho cases the Fund is left to rely upon Federal decisions and a single decision from New Mexico. *Def. Opp. 11-12.* The Fund does not provide this Court with any authority upon which this Court could rely to jettison long standing Idaho precedent. Instead the Fund seems inclined to justify ignoring the entire body of Idaho Contracts Clause jurisprudence on the basis that "the modern law" pertaining to the Federal Contracts Clause is somehow a better way to apply the State Contracts Clause. *Def. Opp.* p 14. The Fund does not explain how or why the analysis employed in Idaho Supreme Court decisions involving the Idaho Contracts Clause should be treated as outmoded when it has been consistently applied in cases decided as recently as 1993. *Curtis v. Firth,* 123 Idaho 598, 850 P.2d 749 (1993) and *Curr v. Curr,* 124 Idaho 686. (1993). In addition, almost all of the Idaho case which are relied upon by Plaintiffs post date the earliest U.S. Supreme Court cases which holds that the Federal Contract Clause will, in limited circumstances, give way to reasonable exercises of police power. *See, Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934). Despite the fact that Federal decisional law has, since as early as 1934, interpreted the Federal Contracts Clause as allowing, in limited circumstances, for contracts to be impaired by exercises of the state's police power, the Idaho Supreme Court has consistently not adopted this approach. Indeed, it did not do so even when the choice was clearly before it in *Penrose.* This Court should clearly reject the suggestion that it should defer not only to the Federal Courts, but to the highest Court of a sister state. This is especially true when Idaho precedent is so clear and consistent.

4. The Idaho Cases cited and discussed by the Fund lend no support to its argument that Federal Law analysis or something akin to it should be applied in this case.

Defendants' dismissive characterization of the whole line of Idaho appellate cases

interpreting Article 1, Section 16 of the Idaho Constitution as well as their attempts to distinguish the individual cases can only be understood in the context of their prefatory remarks:

> Plaintiffs ultimately fail to make discussion of how these cases interact with the correct test under the Contract Clause, or that Idaho courts employ a Contract Clause analysis different from that employed by the federal courts regarding the U.S. Constitution's Contract Clause. *See, e.g.,* State v. Korn, 148 Idaho at 413...

There are numerous problems with this formulation which carry over into and plague Defendants' discussion of the individual Idaho cases.

Primary among those problems is the Fund's failure to appreciate the high level of intolerance the Idaho Supreme Court has shown for legislative attempts to retroactively remove terms which it mandated be included in contracts between Idaho citizens and entities created by legislative action. In *Straus v. Ketchen*, 54 Idaho 56, 83 (1933), the Court established the foundational understanding on which its Contract Clause cases have rested -and wisely so- for the intervening 77 years. It is against this background of wisdom and restraint, rather than against Defendant's assertion that our Court has yet to discover the "correct test" that this Court should review each cited Idaho case.

The relevant facts of *Straus* can be readily summarized. Drainage Districts had been formed by legislative action and they were allowed to issue bonds for development purposes. A particular process for repaying these bonds was established by the laws in place at the time that the bonds were issued and sold by the Drainage District. Later the legislature changed the law and allowed for a different manner of repayment, which, under the circumstances, could have lead to some of the real property securing the extant bonds to be released from the liens before those bonds were fully paid off. The Defendants contended that this would unduly compromise the security of the bond holders. *Id.* 54 Idaho at 59-63.

The Court refused to allow the change in the statute to be applied retroactively to bonds purchased before the passage of the statute at issue. Specifically the Court stated:

> It is conceded by the parties that the bonds in question are *contracts* existing as between the land owners and the bondholders. Under the federal and state constitutional provisions above quoted, *no law can ever be passed impairing the obligations of a contract*, and no exception is made, consequently the contracts of a drainage district stand upon the same footing as those of individuals or any other agency. The legislature cannot, under such constitutional prohibitions, authorize under the police power of the state the creation of a contracting agency and permit the contracting of obligations, and by the same power destroy its contracts and abolish its obligations. To permit the legislature to do so would destroy the very essence of the constitutional prohibitions. Clearly such was never the intention of the framers of the Constitution. Were it otherwise no person would ever be safe to enter into a contract with public or quasi-public corporations, creatures of the law.

Id 83 (emphasis added). The Idaho Supreme Court has consistently employed such strong language when, on the authority of a provision which is included in the Article of the State Constitution titled "Declaration of Rights", it strikes down legislation which impairs existing contracts, especially on a retroactive basis.

Plaintiffs decline Defendants' tacit suggestion that they should defend each of the Idaho cases whose reasoning Defendants attack and whose holdings they seek to narrow or distinguish. These cases each speak for themselves, and each represents an important milestone in the history of how Idaho's Contracts Clause has been interpreted by Idaho Courts. Instead, Plaintiffs will discuss each of the Idaho cases cited by Defendants which are making their first appearance in any briefing in this case, along with other Idaho decisions mentioned in Defendants' cases:

a. *Eriksen v. Blue Cross*, 116 Idaho 693 (Ct. App. 1989). *Eriksen* involved an attorney fee award in a case involving an insurance policy filed after the Legislature amended I.C. § 12-120(3) allowing fees to a prevailing party in a contracts case. The policy had been issued before the effective date of the amendment but the commencement of the litigation was after the effective

date. The actual language of *Eriksen* is instructive:

> .... *Penrose* is inapposite here. It involved an insurance statute which authorized attorney fee awards only to policyholders. Because the statute shifted the balance of power between contracting parties, by identifying a favored party in the event of litigation, the Supreme Court barred its application to pre-existing contracts. *Penrose, 75 Idaho at 540, 275 P.2d at 979* (Keeton, J., concurring). *Idaho Code § 12-120(3)* is different. That statute is party-neutral. It mandates fee awards to prevailing parties but does not affect bargaining relationships by designating favored parties. Therefore, the policy rationale of *Penrose* does not apply to this case.
>
> We also believe the reasoning of *Myers* is inapplicable here. In *Myers*, we drew a line against application of *I.C. § 12-120(3)* to suits filed prior to the 1986 amendment because the parties in such cases had no opportunity to weigh the risk of exposure to mandatory fee awards before deciding to litigate. That is not so here. Although the insurance policy was issued prior to the 1986 amendment, the application of the attorney fee provision was triggered only by the commencement of litigation *after* the amendment had become effective. Thus, unlike the parties in *Myers*, the parties in this case were aware of the attorney fee risk when they chose to litigate. 116 Idaho 693, 695. (Emphasis in original)

This court of appeals case neither mentions the Contracts Clause nor characterizes *Penrose* as "resting" upon a policy rationale. Although the analysis in *Penrose* is very brief, it is unmistakable that the decision rests upon the conclusion that the Idaho Contracts Clause is clear that it means what its says and that there is no mere "policy rationale" as argued by the Defendants. *Def. Opp.* p. 32.

What can be drawn from *Eriksen* is that there are compelling differences between the circumstances presented in *Eriksen* and Idaho precedent. First, in *Eriksen* the change imposed on the contract was "party neutral" in that it applied to and impacted both parties to the contract equally. The same cannot be said about the circumstances presented in this case. SB 1166aa works to impose a burden upon the Plaintiffs by taking away their contractual right to receive back a part of the consideration which they gave for their insurance policies, while simultaneously

conferring a benefit on the Fund by releasing it from paying damages caused to Plaintiffs by the Fund's breach of contract. The Fund is not penalized or burdened one whit. SB 1166aa not only shifts the balance of power, it removes the Plaintiffs' power to enforce their contractual right retroactively and completely. This is exactly the type of governmental vice which the Contracts Clause was intended to prevent.

Second, as they are applied, the attorney fees statutes are not "strictly" retroactive. While they are sometimes interpreted as applying to contracts which existed before the passage of the statute they are only triggered when a lawsuit is filed by one of the parties after the passage of the statute. While it is true that the parties to the contract were having an attorney's fee provision imposed upon their contracts after the contract was formed, they each had the power to decide whether to trigger the impact of that statute by failing to resolve their differences before a lawsuit was filed. As the Court noted in *Eriksen*, the decision to litigate is a volitional one, one which the parties make knowing of the state of the law at the time they do so.

The Statute at issue in the case at bar bears no relationship to an attorneys fees statute which, at most, may shift the balance of power between the parties. This enactment eliminates all remedies available to one of the parties, which impairs the very core of the contract - consideration. Thus, the statute herein challenged, by contrast to the statute at issue in *Eriksen*, features virtually every vice which has historically caused our Supreme Court to find a law unconstitutional under our Idaho Contracts Clause.

Almost identical considerations animated the Supreme Court decision in *Bott v. Idaho State Building Authority,* 122 Idaho 471, 835 P. 2d 1282 (1992). In deciding the case the Court stated:

> We are not persuaded that *Penrose v. Commercial Travelers Ins. Co., 75 Idaho 524, 275 P.2d 969 (1954)*, cited by the Authority, controls our decision. *Penrose* involved an insurance statute which authorized attorney fee awards to policyholders only. This Court barred its application to pre-existing contracts because, in the words of a concurring justice, it "would create a new liability and impose a burden not covered by the terms of the insurance policy." *Id. at 540, 275 P.2d at 979* (Keeton, J., concurring in part and dissenting in part).
>
> Our Court of Appeals has aptly distinguished that statute in *Penrose* from *I.C. § 12-120(3)*: "*Idaho Code § 12-120(3)* is different. That statute is party-neutral. It mandates fee awards to prevailing parties but does not affect bargaining relationships by designating favored parties. Therefore, the policy rationale of *Penrose* does not apply to this case." *Eriksen v. Blue Cross of Idaho, 116 Idaho 693, 695, 778 P.2d 815, 817 (Ct.App.1989)*. As in this case, *Eriksen* involved a contract entered into before the applicable amendment, but where the lawsuit was filed after the amendment. Accordingly, an award of attorney fees under *I.C. § 12-120(3)* to the prevailing party below is appropriate regardless of the fact that the Agreement was formed prior to the amendments.

Id. 480-81. Given that there is nothing "party neutral" about SB 1166aa, *Bott* lends no support to a claim that *Penrose* should not be controlling in this case. SB1166aa simultaneously imposes on the Plaintiffs, without any recourse, an assessment because they are smaller policyholders or because they suffered covered losses and also the burden of subsidizing favored policyholders who benefit from the Manager's arbitrary decision to breach the contract. SB1166aa does not limit itself to changing future contracts but attempts instead to take away vested contractual rights which bear directly upon the cost of the insurance - the consideration for the policy.

Agricultural Products Corp. v. Utah Power and Light Co., 98 Idaho 23, 557 P. 2d 617 (1976), also fails to lend support to the Fund's position. Rather, after recognizing the vitality of the State Contract Clause, the Court acknowledges, through reference to its own decisions rather than Federal authority, that the contracts of public utilities command a special place within the law, due in large measure to the extensive regulation of their rates by the Public Utilities

Commission. Of significance, here, is that the rate adjustments in question were all prospective, and no retroactive tinkering was involved, unlike the case at bar. Hence the only lesson to be derived from this case is the importance the Court gives to role of the Contracts Clause in preventing Idaho contracts from being retroactively impaired by governmental action.

City of Hayden v. Washington Water Power Co., 108 Idaho 467; 700 P. 2d 89 (1985), holds that notwithstanding decisions such as *Agricultural Products Corp. supra.*, legislative enactments can be found to impair the contracts of even those entities regulated by the Public Utilities Commission. The Court did observe that, in the context of public utility law, governmental entities do have an "inherent right to enact valid police power regulations, even if contracts are thereby affected." 108 Idaho 467, 469, but at the same time imposed a critical limit to that right by stating "...the police power is limited to governmental acts promoting the health, comfort, safety and general welfare of society.....It does not embrace revenue measures." *Id.*(emphasis added) Here, as Plaintiffs have demonstrated in prior briefing, the retroactive repeal of the dividend statute not only fails to promote the health, comfort, safety and general welfare of society at large, but serves solely to provide *post hoc* validation for the Manager's disregard for the contractual obligations of the Fund which have resulted in financial loss to tens of thousands of Idaho businesses. SB 1166aa is nothing if it is not a measure intended to protect the Fund from paying damages – it is all about revenue.

Steward v. Nelson, 54 Idaho 437, 32 P.2d 843(1934); *Tanner v. Shearmire,* 115 Idaho 1060, 772 P.2d 267 (1987), and *Curtis v. Firth,* 123 Idaho 598, 850 P.2d 749(1993). Defendants depict this trio of cases as being "easy" Contracts Clause cases given that in each instance the unconstitutional legislative action operated to retroactively deprive a party of a legislatively

created remedy (*Steward*- limiting right to foreclose, *Tanner* - terminating the right to foreclose after a period shorter than provided for in the mortgage and *Curtis*- eliminating the right to sue on a note secured by property) which was available to them under their respective contracts prior to the passage of the challenged law. In commenting on the latter two cases, Defendants observe that:

> "The effect of the amendment, however was to effectively strip the right to act on the note, requiring note-holders to seek foreclosure as a primary recovery mechanism instead. Such a change would obviously be a 'substantial' impairment of the notes, as the note-holders would largely be left with a right without a remedy..."

Def. Opp. p.34. Ironically Defendants accurately describe the net effect on Plaintiffs and the members of the class herein of allowing the repeal of I.C. § 72-915 to be applied retroactively. Unless this Court finds and rules that the retroactivity aspect of SB 1166aa is unconstitutional, the "net effect of the amendment" would be to totally leave the Plaintiffs with a right without any remedy other than to seek the protection of the Contracts Clause.[5] . If *Steward, Tanner,* and *Curtis* are "easy" cases, the case at bar may be the easiest of all cases to be brought before the Courts of this State, for it not only seeks to retroactively excuse the Fund's years-long egregious breaches of its contractual obligtions, but also would operate to deprive Plaintiffs of the ability to utilize the Courts of this State to redress those wrongs. The vices inherent in making the repeal of I.C. § 72-915 retroactive are readily apparent. Any constitutionally acceptable virtue is non-existent.

---

[5] It should be noted in all three cases the legislative action did not leave the protesting contract party with no remedy at all but rather worked to deprive that party of

C. Even if it were appropriate to apply Federal decisional law analysis in determining a SB 1166aa, the Fund wrongfully concludes that SB 1166aa is constitutional under either the Idaho or the U.S. Constitutions.

The Fund at no point explains how 1166aa can be held to be constitutional utilizing the analysis articulated and used in Idaho decisions. Instead, the Fund wants to divert the consideration of the issue onto a side track which the Fund considers to be more favorable to its position. The siding selected by the Fund is an analysis set out in *RUI One Corp. v. City of Berkely,* 317 F.3d at 1147. The majority and dissenting opinions set out a multiple part analysis unlike anything ever employed by an Idaho Court. The Fund's arguments with respect to how the case at bar should be resolved in its favor applying the analysis described in *RUI One* as they appear in the Fund's Memorandum opposing Plaintiffs' Motion for Summary Judgment are virtually identical to the arguments set out in the Fund's Memorandum in Support of Motion for Summary Judgment. *Compare, Def. Memo.* pp 21-37 with *Def. Opp.* pp 14-30. Plaintiffs have already responded to most of these arguments, *Plf. Opp.* 16-30, and will not cut and paste those responses into this memorandum. Instead the Plaintiffs will summarize those responses and go beyond summary only where they deem it appropriate to expand upon or add to arguments previously stated.

1. The Idaho Legislature has caused a substantial impairment of a contractual relationship.

The Court in *RUI One* would begin its analysis of this issue with an inquiry into whether there was in the contract at issue an agreement as to the matter subject to the legislation. To satisfy this requirement it should be sufficient for the Plaintiffs to show that SB1166aa, in attempting to repeal I.C. § 72-915 retroactive to January 1, 2003, undertakes to remove a term

from their contracts with the Fund. Given the Supreme Court's holdings in *Kelso, supra*, and *Hayden Lake, supra*, it is apparent that the Supreme Court of Idaho considers I. C.§ 72-915 to be an express term of the agreement between Fund and its policyholders. *See also Farber v. State Insurance Fund, supra,* and *Plf. Opp.* pp. 18-19.

One of the Fund's arguments is that *Farber* changed the law and, as a consequence, the enactment of SB 1166aa was merely an act to restore the law to its pre-*Farber* state. *Def. Opp.* p. 16. That is absolutely untrue. The Fund appears to be laboring under the misapprehension that the Manager's conduct and not the Legislative enactment determines the law of the state and, in this case, the terms of the contract. *Farber* did no more than to *recognize* that the long-standing existing law, incorporated as a contract provision, was clear and unambiguous. It changed no part of that law, and rendered no "new" interpretation of the law. The "remedy" then adopted by the Idaho Legislature was not a remedy in response to a *change* in the law or a shift in judicial interpretation; it was a renege, pure and simple. To give it any more weight than that would be to suggest that the Legislature has the power to overrule the Supreme Court. In legal terms, that renege was an unconstitutional impairment of the obligation of the Fund to pay and the right of the Fund policyholder to receive a *pro rata* share of the dividend corpus for each of the years within the class period.

In its effort to avoid the clear import of the applicable Supreme Court holdings (one of which, *Hayden Lake,* the Fund does not even acknowledge) the Fund makes a curious effort to use the doctrine of "reasonable expectations" as both a sword and a shield.

Using it as a shield the Fund argues that the doctrine has been discredited and rejected in Idaho. The Fund appears to perceive that this helps it because, in its view, the Plaintiffs' claims

are premised not upon an actual right to receive a dividend but rather upon an expectation that they will get a dividend. *Def. Opp.* p.15-16. This perception is based upon the Fund's half-accurate claim that there is no absolute, contractual right to a dividend under the contract of worker's compensation insurance with the Fund. This claim is true up to a point but it is irrelevant in the circumstances presented in this case where a dividend has been declared and illegally distributed every year relevant to this action. Until the Manager decides to declare and to distribute a dividend, no policyholder has any right to receive any dividend. However, as has been established in *Farber, supra*, once the Manager of the Fund decides in his discretion that there is ample surplus to safely declare a dividend (generally between five and twenty million dollars), that contract, *per Farber*, clearly and unambiguously requires that the dividend corpus *must* then be divided among all of the Funds time-qualified (held policy for more than 6 months) policyholders on a *pro rata* basis. That is a contractual right, and the Fund's duty to pay those dividends to all policyholders in the manner mandated by *Farber* is a contractual obligation. The concept of "reasonable expectations" has nothing at all to do with Plaintiffs' claim that they have, as long as they do so within the statue of limitations, a right to sue the Fund for breach of contract as a result of the illegal dividend allocation policy utilized by the Manager which constitutes a breach of contract.

Next the Fund attempts to use the discredited doctrine of reasonable expectations as a shield. In this regard, the Fund asserts that because the Manager consistently broke the law and breached the contract the Plaintiffs "cannot paint a right to a strict pro rata dividend distribution as some variety of expected or vested contractual right that has been disrupted by retroactive application." *Def. Opp.* pp. 16 -19. This assertion is premised upon several cases from other

jurisdictions which must apparently give more credit to the doctrine of reasonable expectations than is afforded to that doctrine by the Idaho Court. Throughout the whole discussion what the Fund never attempts to deal with is the fact that as to breach of contract claims made within the period of a statute of limitations (asserted defense here), and absent a (waiver -not a basis for the current motion) a contracting party always has the right to sue the other party to the contract for breaches of that contract (single or repetitive) and thus always has a very reasonable expectation of a right to recover in the event of a breach.

The Fund begins by suggesting reliance upon *Southwestern Bell Tel. Co. v. Public Utility Commission of Texas*, 615 S.W.2d 947, 956-57 (Texas Civ. App. 1981) but this case is not helpful to the Fund's position. At issue there was a retroactive adjustment of utility rates. The decision in that case turned upon the court's conclusion that ". . . no person can have a vested right in any rate other than the last legal or official rate promulgated by the Commission." In the context of this case, the last legal right given to the Fund's policyholders was that right conferred in 1917 and unchanged until the tinkering 2009 Idaho Legislature attempted the unconstitutional repeal.

The Fund cites three tests which were identified in *Southwestern Bell* as appropriate tests in determining of a legislative *change* generates an impermissible impairment. *Def. Opp.* p. 17. It must be noted that until I.C. § 72-915 was repealed it was never changed. It was broken repeatedly by the Manager but when the Supreme Court was asked by the Fund, in *Farber*, to declare the law ambiguous and give it an interpretation which would validate the Manager it refused to do so and found instead that the law has clearly and unambiguously provided from the day of its enactment for a *pro rata* allocation of each declared dividend. Under these

circumstances the analysis in *Southwestern Bell* is inapposite.

Even if this were not true, the tests articulated have no bearing upon this case. The third test, "whether the statute surprises persons who have long relied on a contrary state of the law" is surely not applicable here. Here again, the Fund confuses the illegal conduct of the Manager of the Fund in *ignoring* I.C. § 72-915 with the existence or creation of "a contrary state of the law." Here, though, the *law* did not change. I.C. § 72-915 was since its enactment constant, clear and unambiguous. *Farber* did nothing to change this. The second test: "whether the retroactive provision gives effect to or defeats bona fide intentions or reasonable expectations of affected persons" similarly provides the Fund with no help. Policyholders had, until the passage of 1166aa (the retroactive provision) a contractual right to a *pro rata* share of allocated dividend and a bona fide right to sue to enforce their contract and to collect damages. Perforce they had a reasonable expectation that, if they chose to act to recover on the contract, the Fund would be compelled to honor that right. If the retroactive repeal of I.C. § 72-915 were permitted to be effective, this contractual right and the right to seek recovery would be taken away completely. It follows that *Southwestern Bell,* as it deals with a change in the law, does not provide a helpful evaluation.

Similarly, the cases cited by SIF, *Boykin v. Boeing Co.,* 128 F.3d 1279 (9th Cir. 1997) and *In re Marriage of Giroux*, 704 P.2d 160 (Wash. App. 1984) give no succor to the Fund as they are wholly inapposite. In both instances there was an actual "change of law" situation as opposed to a situation, as presented in this case, where the law had always been clear and all that changed was one contracting party's attempts to ignore the law and, when caught violating it, a furtherattempt to justify that conduct by claiming that the law was not clear.

In the *Giroux* situation, the law in Washington was that a military pension was community property. The U.S. Supreme Court, in a case styled *McCarty v. McCarty*, 101 S. Ct. 2728 (1981), held that federal law prohibits state courts from dividing military retirement pay pursuant to state community property laws. That decision completely changed Washington law relative to the division of property in a divorce proceeding.

Congress did not like the *McCarty* decision, however, and enacted a statute effectively reversing the *McCarty* holding and providing for the retroactive change to the date of the *McCarty* decision. The Senate Report explained the intent as: "The purpose of this provision is to place the Courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. . . ." In the context of the case, the serviceman thought that he had squeaked through a narrow window of time between the *McCarty* decision and the remedial legislation passed by Congress which was retroactive to the date of *McCarty*. He wanted to keep all of the retirement monies for himself. The Court of Appeals of Washington did not allow this.

It is important to note that there is no analysis in this decision of any contractual language or contract between Giroux and his spouse. Nor is there any analysis under the Contracts Clause. The case is clearly decided based on due process grounds and under the separation of powers clause in the Constitution. It is hardly applicable here. "Settled expectations" or "reasonable expectations" might have some applicability in Washington in situation involving a change of law in a non-contractual situation. However, where there is a contract, as here, then *Idaho* law is very clear – Idaho courts must look to "traditional rules of contract construction" and reasonable

expectations have no part in that process. *Ryals v. State Farm Mut. Ins. Co.,* 134 Idaho 302, 1 P.3d 803 (2000).

Similarly, in the *Boykin* case the matter revolved around a wage dispute. This was a class action brought by salaried engineers, management, professional and administrative employees who were allegedly not receiving legally appropriate overtime compensation for hours worked in excess of a 40 hour work week. This Ninth Circuit case is decided on the separation of powers clause in the Washington Constitution; there is neither any analysis of the Contract Clause nor even a citation to the Contracts Clause of either the Washington State or Federal Constitutions.

The salaried employees had a collective bargaining agreement with Boeing which allowed them some overtime payment but not at the 1.5 multiplier required for non-exempt employees. Both the Federal Fair Labor Standards Act and the Washington Minimum Wage Act exempted the class of employees bringing the lawsuit from the 1.5 multiplier for overtime work. However, in 1995, the Washington Court of Appeals had determined in a case styled *Tift v. Professional Nursing Services, 886 P.2d 1158(1995)* that under State law a payment of any overtime on an hourly basis (as provided in the collective bargaining agreement) defeats an the "salary" exemption which would otherwise prohibit the employee from receiving overtime with a multiplier of 1.5. This *changed* the applicable law. In direct response, the Washington legislature amended the Washington Minimum Wage Act by stating "the payment of compensation or provision of compensatory time off in addition to a salary shall not be a factor in determining whether a person is exempted under RCW 49.46.010(5)(c)." Wash. Rev. Code Section

49.46.130(2)(a). The law was intended to apply retroactively and negated the *Tift* decision.

This sequence of events brought the employees back to their contract with Boeing and erased the change in the law created by *Tift*. They then argued that the *Tift* decision gave them "rights" which could not be taken away by the subsequent Washington legislature's retroactive enactment which effectively cancelled *Tift*. They argued that they had a "reasonable expectation" that *Tift* would continue to act in their favor and that it could not be erased by a subsequent retroactive legislative act by the Washington legislature.

The Fund has taken this *Boykin* case out of context and wants to equate *Tift* with *Farber*. The difference between the two is immediately apparent, however, and the comparison is an apples and oranges approach. *Farber* did not *change* the law. *Farber* stated what the clear and plain meaning of the law was and essentially construed the contract between the Fund and its policyholders to reach the conclusion that the contractual obligation of the Fund was unambiguous and required a *pro rata* distribution of the dividend corpus, once such corpus was created by the Manager. *Tift*, on the other hand, did not interpret a contract or a contractual term but, rather, interpreted an ambiguous Washington statute which was not a part of the contract either between the Plaintiff/employees in that case or the Plaintiffs/employees at Boeing. Thus, there was no interference with any contractual obligation which, of course, explains why there is no Contract Clause analysis in the case. *Boykin,* accordingly, is not helpful to the Court's analysis here, and it is of no avail to the Fund.

All conditions precedent applicable to the policyholders, Plaintiffs here, have been fulfilled. The policyholders paid their premiums. The Fund accepted those premiums. The Fund also accepted its duties to comply with the terms and conditions of its contract of insurance with its policyholders which include the existing Idaho statutes creating and governing the Fund. *See Kelso and Hayden Lake, supra.* The rights of the policyholders to receive the amount of dividend justly due them on a *pro rata* basis depends solely on the clear and unambiguous language of the Funds contract with them. This is not a matter of any "reasonable expectation" but an express contractual right. The Fund's argument ignores contract law, mounts an offense based on a discredited and, in the context of this case, wholly inapplicable legal principle and its mistaken view that the Manager has the power to establish the law of the State and unilateral alter the terms of existing policyholder contracts. But the Fund cannot avoid, ostrich-like, the clear, contractual right of the Fund's policyholders to receive a *pro rata* portion of the dividend corpus. The legislative abrogation of that right on a retroactive basis clearly is offensive to constitutional principles.

2. The retroactive repeal of I.C. § 72-915 is a change in law that impairs the contractual relationship between SIF and its policyholders.

In framing its argument that there is no impairment of the contractual relationship between the Fund and its policyholders, the Fund appears to seek to ignore the fact that what Plaintiffs claim to be unconstitutional is not the fact that the Legislature elected to repeal I.C. § 72-915, but that it made the repeal retroactive, thereby completely eliminating

the already fully accrued rights to receive a *pro rata* share of the dividends that were declared and distributed. *Def. Opp.* p. 21. The Fund aggravates this oversight by contending that what must be impaired is the "contractual relationship", when, in fact, the wording of the Idaho Contracts Clause addresses and prohibits laws which impair "the obligations of contracts." While this difference may seem insignificant at first blush, it plainly is not, given that what Plaintiffs are asking this Court to do, in essence, is to go back during each of the years of the class period, and order the Fund to pay to the Plaintiffs the difference between what they did pay to them as dividends, and the amount that they were ***obligated*** to pay to them out of each dividend that was distributed. This case does not implicate the larger "contractual relationship" between the parties, but is directed only at this one obligation of the Fund.

Nor does it avail Defendants to point out that the policy of insurance provides that: "Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to this law." *Def. Opp.* p. 21. This provision is irrelevant to the circumstances presented by this case. The term "workers compensation law" has no application to any provision contained in Title 72, Chapter 9 of the Idaho Code, as that term only applies to Chapters 1 through and including 8 of that Title. *See I. C. § 72-101 (1), and Statutory Notes to I.C. 72-101.*[6] Chapter 9, which included I.C. § 72-915 is not part of the "workers compensation law" of Idaho. It is titled "State Insurance Fund" and

---

[6] In 1971 the Legislature engaged in a "comprehensive recodification of the workmen's compensation law and occupational disease law of the state of Idaho." As part of that process it repealed Chapters 1, 2,3,4,5,6,7,8,10,11 and 12 of Title72. Clearly, while the creation of the State Insurance Fund was part of the process of adopting a Worker's Compensation system, the statutes establishing and regulating the Fund are not themselves part of the Workers's Compensation law.

consists of a specialized set of provisions creating and governing the Fund. None of its provisions has any bearing upon the substantive law pertaining to worker's compensation. Therefore, considering the plain language of the policy, the cited policy provision to changes in the law regulating the conduct of the State Insurance Fund are inapposite

If it could be said that the phrase "worker's compensation law" intends to include the statutes regulating the State Insurance Fund, the provision only has application if the retroactive repeal is constitutional but it cannot work to render the retroactive repeal constitutional. If the term of the contract at issue is "allocate any dividends distributed on a *pro rata* basis, it is not in conflict with I.C. §72-915 because it is I.C. §72-915. Thus, there is nothing to change to create conformity with the law. If an attempt is made to remove I.C. §72-915 in an unconstitutional retroactive manner, then that attempt will fail and the terms of the contract will need no change to be in conformity with the law. It is preposterous to suggest that some how an apparently unconstitutional retroactive repeal of I.C. §72-915 could be rendered magically constitutional because at the instant of its passage the contract was changed so that the *pro rata* allocation term disappeared leaving no right to impair.

The truest test, however, of whether or not making the repeal of I.C. § 72-915 retroactive impairs the obligations that the Fund owes to its policyholders for all of the years in question lies in what the Fund is asking the Court to do. It is important to note that all of the dividends which were paid by the Fund in the class period stated in this action pertain to policies which were issued and held for at least 6 months prior to January 1, 2009, or several months prior to the issuance of the decision in *Farber* and the

introduction of SB 1166aa.[7] This being true, when the Fund asks the this Court to grant it Summary Judgment based on the passage of 1166aa, its goal is to cause the claims of the Plaintiffs

and the members of the class validated by *Farber* to be rendered unenforceable.

3. Retroactive repeal of I.C. 72 § 915"substantially impairs" the contractual rights of the Plaintiffs and the putative class members.

The Fund claims that the retroactive removal of a term of the contract which bears directly upon the cost of the coverage conferred by the contract is not substantial for several reasons. First, the Fund claims that the core purpose of the policy is to provide coverage for workers compensation claims and to not create circumstances in which a policyholder might get a "fractional return on paid premiums." *Def. Opp.* p. 23. This argument ignores the fact that what insurance costs is critically important to people. What is paid is the policyholders' portion of the consideration and consideration is at the very heart of every contract. The Fund asserts that everyone gets the same coverage regardless of how much they pay but what this ignores is that everyone pays the same premium amount per dollar of payroll per class of employee. Which means that everyone gets the same coverage per dollar of payroll per class of employee. What changes when the Fund manipulates the dividend allocation is that some people end up paying more for per dollar of payroll per class of employee despite the fact that they are getting no more coverage.

---

[7]Given that the Fund pays dividends approximately 18 months after the end of a dividend period, the dividend of over $14 million which was paid in 2010 actually applied to the policy year 7/1/7 to 6/30/8. Hence the rights of Plaintiffs' to the receipt of a *pro rata* share of the dividend paid in 2010 would have vested approximately 9 months prior to the Supreme Court's initial *Farber* opinion, and almost 11 months prior to the repeal of the statute.

This is in effect an illegal assessment being imposed on some policyholders.[8] No matter how this is twisted and turned the contract term at issue is a financial term and alterations of financial terms are inherently substantial. *Plf. Memo. p. 20.*

Next the Fund argues that the retroactive repeal of I.C. §72-915 is not substantial because Plaintiffs cannot prove that all policyholders received less than their *pro rata* share of any dividend being allocated and corollary to this Plaintiffs' action, if permitted, might lead to some disadvantage to those policyholders who got substantially more then their "pro rata" share of any dividend being allocated. The Fund cites no authority for the proposition that a certain percentage of the contracts of a State agency must be impaired by a legislative enactment for that State action to be an unconstitutional impairment of contract. In essence the Fund is asking the Court to allow the legislature to deprive some of the Funds' policyholders of their contract rights because the Fund did not breach all of its contracts. It is not at all clear how this is a rational justification for ignoring the Idaho Contracts Clause nor how it renders the damage to the Plaintiffs and the other members of the class any less substantial. Nor does the Fund cite any authority that suggests the Court should concern itself with the possibility (absent a retroactive repeal of I.C. § 72-915) that the Fund might have a right to collect overpayments from some of its policyholders or by depriving them of the opportunity to receive more then a *pro rata* share of the dividend. While it is not at all clear that the Fund could ever recover voluntary overpayments or even if they could, why that should be this Court's concer? While some policyholders were

---

[8] I.C.§72-916 which permitted class wide assessments was repealed in 1951. See Doc Nos. 000132 and 000133, Second Affidavit of Donald W. Lojek in Support of Motion for Partial Summary Judgment hereinafter 2nd Aff. Lojek.

overpaid and while they may like being overpaid, this does nothing to lessen the substantiality of the impairment of the rights of the Plaintiffs.

What the Fund cannot escape is that it is a legislatively created entity that had contracts with its insureds and that those contracts by legislative mandate included a provision which bears inexorably upon the cost of the insurance. The Fund, as to many of its policyholders, ignored that provision and as a consequence the total cost of coverage provided to many of its insureds exceeded by as much as 10% what was paid for the same coverage by other insureds. The Idaho Court of Appeals has held that it could not say a contract price adjustment of 5% was insubstantial. *City of Hayden v. Washington Water Power Co.*, 108 Idaho 467, 468; 700 P. 2d (Ct. App. 1985). There can be little doubt that for those who have been deprived of their share of the adjustment to their policy costs, the loss is substantial.[9] The loss becomes even more substantial when it is understood that Mr. Alcorn has acknowledge that the amount at issue could be millions of dollars.[10]

4. SB 1166aa is not based upon a significant and legitimate public purpose which would support a retroactive repeal of I.C. § 72-915.

As some length the Fund argues that there is a legitimate and significant public purpose which is served by releasing the Fund, with its nearly $200 million in surplus and its total financial separation from the State of Idaho, from the liability that its Manager and Board have created for it by choosing to ignore the clear unambigous language of I.C.

---

[9] One of the Plaintiffs here has received nothing at all from the declared dividend surplus. See Doc Nos. 000134, 2nd Aff. Lojek.

[10] Lest the Court be shocked by the numbers involved it should be noted that the amount at issue is not likely to be more than 10% of the Fund's existing surplus nor substantially more than the dividends it has been distributing for the past several years.

§ 72-915. The arguments made in this regard are substantially identical to what is argued in the Funds Memorandum in Support of Summary Judgment. *Compare, Def. Memo.* p.32 to 36 with *Def. Opp.* p.25 to 29.

These arguments seek to distract the Court's attention from the fact that there is no basis upon which to conclude that the Legislature either did or could conclude that relieving the Fund from its obligations to its policyholders benefitted the public health, comfort, safety or general welfare. More significantly, they do not deal with the fact it is presumptively unconstitutional under established Idaho precedent for the Legislature to act to retroactively change or remove contract provisions which it mandated be included in contracts with legislatively created entities. *Straus v.Ketchen, supra.* Beyond these brief responses, Plaintiffs will rely upon and incorporate their responses to these arguments in prior briefing. *See Plf. Opp.* p. 21-28.

This Fund has also argued that the 2009 Idaho Legislature may state what the intent of the 1998 Legislature was in passing House Bill 774aa in 1998. *Def. Opp.* p. 25. It seems to be hornbook law that "...the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90, 117 S.Ct.452, 458 (1996) citing *U.S. v. Price*, 361 U.S.304, 80 S.Ct. 326 (1960) and *Higgins v. Smith*, 308 U.S. 473, 60 S.Ct. 355 (1940).

In *Schrader*, *Schrader v. Idaho Dept. Of Health and Welfare*, 768 F.2d 1107, 1114 (9th Cir. 1985), the Ninth Circuit stated: "It is well settled that the views of a later Congress regarding the legislative intent of a previous Congress do not deserve much weight." Similarly, the 9th Circuit earlier held: "Subsequent legislation, while not always

without significance, usually is not entitled to much weight in construing earlier statutes." *State of Idaho v. Andrus*, 720 F.2d 1491,1468 (9th Cir. 1983). The same may be said here. The Legislature's Statement of Public Purpose as it concerns a legislative intent 11 years past, should not be recognized by this Court.

5. SB 1166aa is not an action which is based upon reasonable conditions and of a character appropriate to any significant or legitimate public purpose.

Finally, the Fund argues that retroactive repeal of I.C.§ 72-915 is an action which is reasonable and appropriate to a significant and legitimate public purpose. The arguments made in this regard are identical to what is argued in the Fund's Memorandum in Support of Summary Judgment. *Compare, Def. Memo.* p. 36 to 37 with *Def. Opp.* p.30. While the Fund may well be able to establish that a prospective repeal of I.C. §72-915 makes sense, what the Fund has not done and cannot do is to demonstrate how a retroactive repeal of a law which has been clear and unambiguous since its passage in 1917 in order to save the Fund from the financial consequences of its failure to follow that law is a reasonable response to a Supreme Court decision which makes clear that the Fund has no excuse for its conduct. Beyond this the Plaintiffs have already responded to the Fund's arguments and rather than repeat those arguments here will incorporate them herein. *See Plf. Opp.* pp. 28-31.

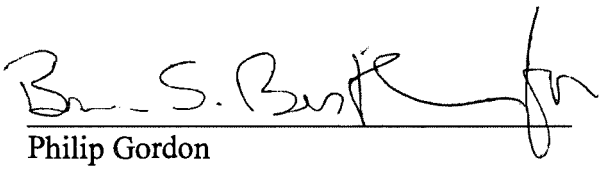
V. **CONCLUSION**

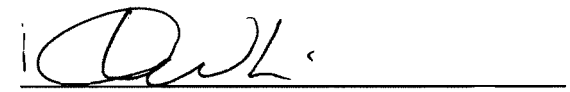
This Court is obliged to apply Idaho decisional law to resolve Plaintiffs' Idaho Contracts Clause challenge to making the repeal of I.C. § 72-915 retroactive, as our

Supreme Court has consistently done since at least the 1922 case of *In re Fidelity State Bank*. Application of the body of Idaho decisional law to the case at bar clearly results in a finding that the retroactivity provision of SB 1166aa unconstitutionally impairs a legislatively mandated obligation of the contracts of insurance between the Plaintiffs and the members of the class on the one hand, and the Idaho State Insurance Fund on the other. For these reasons, the Court should declare SB 1166aa unconstitutional, as being in violation of Article 1, Section 16 of the Idaho Constitution.

Respectfully submitted this 6th day of December, 2010.

GORDON LAW OFFICES, CHTD.

By: 
Philip Gordon

By: 
Donald W. Lojek

CERTIFICATE OF SERVICE

HEREBY CERTIFY that on the 6th day of December, 2010, 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
[ ] Facsimile Copy:
395-8585

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

Donald W. Lojek

12-15 H

Donald W. Lojek ISBN 1395
LOJEK LAW OFFICES, CHTD
623 West Hays Street
Boise, ID 83701
Telephone: 208-343-7733
Facsimile: 208-345-0050

Philip Gordon ISBN 1996
Bruce S. Bistline ISBN 1988
GORDON LAW OFFICES
623 West Hays Street
Boise, ID 83702
Telephone: 208/345-7100
Facsimile: 208/345-0050

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

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE LLC OF SALMON,

Plaintiffs,

vs.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN AND MAX BLACK AND STEVE LANDON in their capacity as member's of the Board of Directors of the State Insurance Fund,

Defendants.

CASE NO. CV 09-13607-C

SECOND AFFIDAVIT OF DONALD W. LOJEK IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF IDAHO)
: ss.
County of Ada)

DONALD W. LOJEK, being first duly sworn, upon oath, deposes and says:

1. I am one of the attorneys for the Plaintiffs in the above-entitled matter, and I make this Affidavit based upon my personal and direct knowledge, unless otherwise stated herein.

2. Attached hereto as Doc. # 000132 is a true and correct of 1917 Session Laws, Chapter 81, Section 93 and as Doc # 000133 is true and correct copy of the "Statutory Notes" from the current Annotated Idaho Code which reflect that Section 93, after several recodifications and no amendments became Idaho Code §72-916 and then was repealed in 1951.

3. Attached hereto as Doc #000134 is a true and correct copy of a Loss Experience Analysis Report which was supplied by the Idaho State Insurance Fund to Plaintiff Discovery Care Centre LLC of Salmon.

DATED: December 6th, 2010.

LOJEK LAW OFFICES, CHTD.

Donald W. Lojek

SUBSCRIBED AND SWORN to before me this 6th day of December,2010.

TRACY MURPHY NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 3/28/2013

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2010, I caused the foregoing document to be delivered by the method indicated below and addressed to the following:

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

✓ HAND DELIVERY
____ U.S. MAIL
____ OVERNIGHT MAIL
____ FACSIMILE **208-395-8585**

Donald W. Lojek

JUDICIAL DECISIONS

Cited in: Brady v. Place, 41 Idaho 747, 242 P. 314 (1925); Brady v. Place, 41 Idaho 753, 243 P. 654 (1926); Flynn v. Carson, 42 Idaho 141, 243 P. 818 (1926).

72-915. Dividends. — At the end of every year, and at such other times as the manager in his discretion may determine, a readjustment of the rate shall be made for each of the several classes of employments or industries. If at any time there is an aggregate balance remaining to the credit of any class of employment or industry which the manager deems may be safely and properly divided, he may in his discretion, credit to each individual member of such class who shall have been a subscriber to the state insurance fund for a period of six (6) months or more, prior to the time of such readjustment, such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates. [1917, ch. 81, § 92, p. 252; reen. C.L. 256:92; C.S., § 6303; I.C.A., § 43-1715; am. 1939, ch. 251, § 15, p. 617; am. 1941, ch. 20, § 13, p. 37.]

JUDICIAL DECISIONS

Cited in: Kelso & Irwin, P.A. v. State Ins. Fund, 134 Idaho 130, 997 P.2d 591 (2000).

72-916. Assessments. [Repealed.]

STATUTORY NOTES

Compiler's Notes. — This section, which comprised S.L. 1917, ch. 81, § 93, p. 252; C.L. 256:93; C.S., § 6304; I.C.A., § 43-1716; 1939, ch. 251, § 16, p. 617; 1941, ch. 20, § 14, p. 37, was repealed by S.L. 1951, ch. 269, § 1, p. 570.

72-917. Readjustment of payrolls. — If the amount of premium collected from any employer at the beginning of any period is ascertained by using the estimated expenditure of wages for the period of time covered by such premium payment as a basis, and adjustment of the amount of such premium shall be made at the end of such period and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for such period; and if such wage expenditure for such period is less than the amount of which such estimated premium was collected, such employer shall be entitled to receive a refund from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or to have the amount of such difference credited on succeeding premium payments at his option; and if such actual premium, when so ascertained, exceeds in amount a premium so paid by such employer at the beginning of such period, such employer shall immediately upon being advised of the true amount of such premium due forthwith pay to the manager an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of such period, for deposit in the state insurance fund. [1917, ch. 81, § 94, p. 252; reen. C.L. 256:94; C.S., § 6305; I.C.A., § 43-1717; am. 1939, ch. 251, § 17, p. 617; am. 1941, ch. 20, § 15, p. 37.]

State Insurance Manager, with the consent of the State Auditor, may sell any of such securities, the proceeds thereof to be paid over to the State Treasurer for said State Insurance Fund.

Administration Expenses.

SEC. 89. The entire expense of administering the State Insurance Fund shall be paid in the first instance by the State, out of moneys appropriated therefor. In the month of July, Nineen Hundred Eighteen, and semi-annually thereafter in such month, the State Insurance Manager shall ascertain the just amount of expense incurred by him during the preceding calendar year, in the administration of the State Insurance Fund, including expense incurred for the examination, determination, and payment of losses and claims, and shall refund such amount to the State Treasury.

Classification of Risks and Adjustment of Premiums.

SEC. 90. Employments insured in the State Insurance Fund shall be divided by the State Insurance Manager, for the purposes of the said fund, into classes. Separate accounts shall be kept of the amounts collected and expended in respect to each such class for convenience in determining equitable rates; but for the purpose of paying compensation the State Insurance fund shall be deemed one and indivisible. The State Insurance Manager shall have 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 direction. The State Insurance Manager shall determine the hazards of the different classes and fix the rates of premiums therefor based upon the total payroll and number of employees in each of such classes of employment at the lowest possible rate consistent with the maintenance of a solvent State Insurance Fund and the creation of a reasonable surplus and reserve; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk.

Accounts.

SEC. 91. The State Insurance Manager shall keep an account of the money paid in premiums by each of the several classes of employments, and the expense of administering the

State Insurance fund and the disbursements on account of injuries and deaths of employees in each of said classes, including the setting up of reserves adequate to meet anticipated and unexpected losses and to carry the claims to maturity; and also an account of the money received from each individual employer; and of the amount disbursed from the State Insurance Fund for expenses, and on account of injuries and death of the employees of such employer, including the reserves so set up.

Dividends.

SEC. 92. At the end of every year, and at such other times as the State Insurance 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 State Insurance 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 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.

Assessments.

SEC. 93. If the premiums fixed for any class and collected from its members are subsequently found by the State Insurance Manager to have been too small for any period, he may determine what additional premiums are required from said class for said period, and may make assessments accordingly, and each of the members of such class shall be liable to the said Manager to pay such assessment so made upon him within thirty days after notice thereof.

Readjustment of Payrolls.

SEC. 94. If the amount of premium collected from any employer at the beginning of any period is ascertained by using the estimated expenditure of wages for the period of time covered by such premium payment as a basis, an adjustment of the amount of such premium shall be made at the end of such period and the actual amount of such premium shall be deter-

STATE INSURANCE FUND

1215 W. STATE STREET P.O. BOX 83720 BOISE, IDAHO 83720
PHONE (208)332-2100 (800)334-2370
WWW.IDAHOSIF.ORG

LOSS EXPERIENCE ANALYSIS REPORT

DISCOVERY CARE CENTRE LLC OF SALMON
1475 N COLE RD
BOISE, ID 83704

Policy Number: 575180
Report Date: 12/29/2009

AGENCY: POST INSURANCE SERVICES INC

Effective Date(s)	Exp Mod	Billed Premium	Losses	Loss Ratio	Dividend	Dividend Ratio	Open Claims	Total Claims
01/01/2004	1.10	$70,629.00	$144,448.20	204.52	$0.00	0.00	0	7
01/01/2005	0.86	$59,078.00	$208,081.26	352.21	$0.00	0.00	0	10
01/01/2006	1.03	$78,476.00	$64,460.06	82.14	$0.00	0.00	0	9
01/01/2007	1.27	$101,264.00	$67,261.51	66.42	$0.00	0.00	0	31
01/01/2008	1.39	$107,507.00	$18,434.44	17.15			0	22
Totals:		$416,954.00	$502,685.47	120.56	$0.00		0	79

Current Year		Estimated	YTD					
01/01/2009	1.23	$111,280.00	$39,964.35	35.91			1	9

Renewal Year		Estimated	YTD					
01/01/2010	1.09	$105,309.00	$0.00	0.00			0	0

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

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON, Plaintiffs, vs. THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN and MAX BLACK and STEVE LANDON, in their capacity as members of the Board of Directors of the State Insurance Fund, Defendants.	Case No. CV 09-13607-C **ORDER**

BASED UPON written motions and oral argument thereon, and for the reasons as stated on the record at the time of the hearing held on December 15, 2010,

THE COURT HEREBY FINDS that the Legislature's retroactive repeal of Idaho Code §72-915 is constitutional under the United States Constitution and the Idaho Constitution. Accordingly,

IT IS HEREBY ORDERED that plaintiffs' Motion for Partial Summary Judgment is DENIED;

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is GRANTED in all respects;

IT IS FURTHER ORDERED that plaintiffs' Motion, Pursuant to Rule 56(f), to Vacate Defendants' Motion for Summary Judgment and to Continue that Motion Pending Discovery by Plaintiffs is DENIED;

IT IS FURTHER ORDERED that plaintiffs' Motion to Strike the Affidavit of James M. Alcorn and Selected Exhibits Attached to the Affidavit of Counsel Both of Which were Filed in Support of Defendants' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

DATED this ____ day of December, 2010. DEC 27 2010

By _____
The Hon. Renae Hoff
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of December, 2010, I caused to be served a true copy of the foregoing **ORDER**, by the method indicated below, and addressed to each of the following:

Richard E. Hall
Keely E. Duke
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
P. O. Box 1271
Boise, ID 83701
Fax: (208) 395-8585
Attorneys for Plaintiffs

- [x] U.S. Mail, Postage Prepaid
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Telecopy

Donald W. Lojek
Lojek Law Offices, Chtd.
623 West Hays Street
Boise, ID 83702
Fax No.: (208) 345-0050
Attorneys for Plaintiffs

- [x] 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 Plaintiffs

- [x] U.S. Mail, Postage Prepaid
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Telecopy

CLERK OF THE COURT

By _____

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

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON, Plaintiffs, vs. THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN and MAX BLACK and STEVE LANDON, in their capacity as members of the Board of Directors of the State Insurance Fund, Defendants.	Case No. CV 09-13607-C **JUDGMENT**

THE ABOVE-ENTITLED MATTER came before the Court for hearing on December 15, 2010. Based upon the Order filed December 28, 2010, the Court now enters the following Judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON take nothing on their claims against defendants THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN, MAX BLACK and STEVE LANDON, that those claims are dismissed with prejudice, and that judgment be entered in favor of defendants.

DATED this _____ day of December, 2010. JAN - 3 2011

By _____
The Hon. Renae Hoff
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the JAN 04 2011 day of ~~December~~, 2010, I caused to be served a true copy of the foregoing **JUDGMENT**, by the method indicated below, and addressed to each of the following:

Richard E. Hall
Keely E. Duke
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
P. O. Box 1271
Boise, ID 83701
Fax: (208) 395-8585
Attorneys for Plaintiffs

- [x] U.S. Mail, Postage Prepaid
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Telecopy

Donald W. Lojek
Lojek Law Offices, Chtd.
623 West Hays Street
Boise, ID 83702
Fax No.: (208) 345-0050
Attorneys for Plaintiffs

- [x] 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 Plaintiffs

- [x] U.S. Mail, Postage Prepaid
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Telecopy

CLERK OF THE COURT

By _____

Donald W. Lojek ISBN 1395
LOJEK LAW OFFICES, CHTD
623 West Hays Street
PO Box 1712
Boise, ID 83701
Telephone: 208-343-7733
Facsimile: 208-345-0050

Philip Gordon ISBN 1996
Bruce S. Bistline ISBN 1988
GORDON LAW OFFICES
623 West Hays Street
Boise, ID 83702
Telephone: 208/345-7100
Facsimile: 208/345-0050

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

CDA DAIRY QUEEN, INC., and DISCOVERY CARE CENTRE, LLC OF SALMON,

Plaintiffs,

vs.

THE IDAHO STATE INSURANCE FUND, JAMES M. ALCORN, in his official capacity as its Manager, and WILLIAM DEAL, WAYNE MEYER, GERALD GEDDES, JOHN GOEDDE, ELAINE MARTIN, MARK SNODGRASS, RODNEY A. HIGGINS, TERRY GESTRIN AND MAX BLACK AND STEVE LANDON in their capacity as members of the Board of Directors of the State Insurance Fund,

Defendants.

CASE NO. CV 09-13607-C

APPELLANTS' NOTICE OF APPEAL

Filing Fee: $86.00 Idaho Supreme Court
$15.00 Canyon County

ORIGINAL

TO: THE IDAHO STATE INSURANCE FUND, *et al.*, AND THEIR ATTORNEYS OF RECORD, HALL, FARLEY, OBERRECHT AND BLANTON. NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, CDA Dairy Queen and Discovery Care Centre, LLC of Salmon, acting on behalf of themselves and the putative Class, appeal to the Idaho Supreme Court from the Order denying Plaintiffs' Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment which was entered by the Honorable Renae Hoff and filed on December 28, 2010 and from the Judgment of January 4, 2011 following that Order.

The claims arising from the Plaintiffs' Complaint pertain to a series of dividend distributions made or approved by the Defendants near the first of every year beginning in January 2005 and continuing through January of 2010 (and potentially January 2011). The trial court dismissed all of the claims of the Plaintiffs and the putative Class and there is a final Order and a final Judgment in this regard. The Idaho Supreme Court will be asked to review, *de novo*, the constitutionality of the Idaho Legislature's retroactive appeal of I.C. § 72-915.

2. Appellants have the right to appeal to the Idaho Supreme Court pursuant to I.A.R. 11(a)(1).

3. Appellants intend to assert on appeal that the aforesaid Order and Judgment constitute errors of law and should be reversed on appeal and remanded with instructions to the District Court to allow the case to proceed which would include, *inter alia*, certification of a Class and the determination of damages for each Class member.

4. A reporter's hard copy transcript of the arguments of counsel and the spoken decision of Judge Hoff rendered on December 15, 2010 at the conclusion of the hearing on cross-motions for summary judgment on December 15, 2010 has been requested. This will constitute the reporter's standard transcript as defined in Rule 25(c)(5), I.A.R.

5. Documents to be included in the record in addition to those documents

automatically included pursuant to I.A.R. 28 are:

a. All Motions for Summary Judgment.

b. All Affidavits supporting all Motions for Summary Judgment.

c. All memoranda in support of or opposing the cross-motions for summary judgment.

6. The undersigned certifies:

a. That the clerk of the court has been paid the estimated fee for the preparation of the clerk's record pursuant to I.A.R. 27(c), *i.e.*, in the amount of $100.00;

b. That the reporter's estimated fee for preparation of the transcript has been paid to the Reporter in the amount of $399.75;

c. That a copy of this Notice of Appeal has been served on the reporter at the address set out below:

Carole Bull
1115 Albany Street
Caldwell, ID

d. That all appellate filing fees have been paid; and

e. That service has been made on all parties required to be served pursuant to I.A.R. 20 and the Idaho Attorney General without, however, admitting that the Idaho Attorney General must be served under I.C. § 10-1211 or any other statute.

RESPECTFULLY SUBMITTED this 25th day of January, 2011.

GORDON LAW OFFICES

By _____
Philip Gordon, Of the Firm
Attorneys for Plaintiffs/Appellants

By _____
Bruce S. Bistline, Of the Firm
Attorneys for Plaintiffs/Appellants

LOJEK LAW OFFICES, CHTD.

By _____
Donald W. Lojek, Of the Firm
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of January, 2011, a true and correct copy of the foregoing instrument was served on the following by the method indicated below, and addressed as follows:

[ ] Hand Delivery
[✓] U.S. Mail, postage paid
[ ] Overnight Express Mail
[ ] Facsimile Copy:

Richard E. Hall
Keely Duke
Hall Farley Oberrecht & Blanton PA
702 West Idaho Street, Ste. 700
Boise, ID 83702
Attorney for State Insurance Fund

[ ] Hand Delivery
[✓] U.S. Mail, postage paid
[ ] Overnight Express Mail
[ ] Facsimile Copy:

Lawrence Wasden
Idaho Attorney General
Attorney General's Office
P.O. Box 83720
Boise, ID 83720-0010

_____
Donald W. Lojek

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

CDA DAIRY QUEEN, INC., etc.,	)	
	)	
Plaintiffs-Appellants,	)	Case No. CV-09-13607*C
	)	
-vs-	)	CERTIFICATE OF EXHIBIT
	)	
THE IDAHO STATE INSURANCE FUND, etc.,	)	
	)	
Defendants-Respondents.	)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the following is being sent as an exhibit:

NONE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 6 day of ~~March~~ April, 2011.

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Randall Deputy

CERTIFICATE OF EXHIBIT

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

CDA DAIRY QUEEEN, INC., etc.,	)	
	)	
Plaintiffs-Appellants,	)	Case No. CV-09-13607*C
	)	
-vs-	)	CERTIFICATE OF CLERK
	)	
THE IDAHO STATE INSURANCE FUND, etc.,	)	
	)	
Defendants-Respondents.	)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules, including documents requested.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 6 day of ~~March~~ April, 2011.

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Randall Deputy

CERTIFICATE OF CLERK

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

CDA DAIRY QUEEN, INC., etc.,	)	
	)	
Plaintiffs-Appellants,	)	Supreme Court No. 38492
	)	
-vs-	)	CERTIFICATE OF SERVICE
	)	
THE IDAHO STATE INSURANCE FUND, etc.,	)	
	)	
Defendants-Respondents.	)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Record and one copy of the Reporter's Transcript to the attorney of record to each party as follows:

Donald W. Lojek, Lojek Law Offices, P O Box 1712, Boise ID 83701

Richard E. Hall and Keely E. Duke, P O Box 1271, Boise, ID 83701

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 6 day of ~~March~~ April, 2011.

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Rudell Deputy

CERTIFICATE OF SERVICE