7-12-2011

CDA Dairy Queen, Inc. v. State Ins. Fund Appellant's Brief Dckt. 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.

DOCKET NUMBER: 38492

APPELLANTS' BRIEF

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

Honorable Renae Hoff
District Judge, Presiding

Donald W. Lojek
Lojek Law Offices, CHTD.
623 W. Hays Street
Boise, ID 83702

Attorneys for the Appellants

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

Attorneys for the Appellants

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

Attorney for the Respondents

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I. STATEMENT OF THE CASE

A. *NATURE OF THE CASE*

The resolution of this breach of contract action turns upon the constitutionality of the Idaho Legislature's attempted retroactive repeal of I.C. § 72-915 for the express purpose of depriving one of the parties to that contract of its vested rights so that the other party to that contract could be relieved of its contractual obligations. Two Plaintiffs, on behalf of themselves and a putative class (collectively referred to as "CDA Dairy Queen"), brought this action. They are seeking to recover "rate readjustments" (sometimes referred to as dividends) which they were contractually entitled to receive upon the premiums they paid for workers' compensation insurance policies issued by the Defendant, Idaho State Insurance Fund, (hereinafter "SIF").

It is alleged that each of the named Plaintiffs and all of the members of the proposed class are Idaho employers who purchased contracts of workers' compensation insurance with the SIF. *First Amended Complaint* ¶ *8,* R.27. The "Class" includes all subscribers to workers' compensation insurance policies issued by the SIF (hereinafter "policyholders") who:

1. Acquired their policy during the class period;
2. Were billed an annual premium of more than $2,500;
3. Held their policies for at least six months prior to the effective date of SB 1166aa; and,
4. Did not for one or more of the relevant periods (one year blocks of time which the SIF calls "dividend periods") during the "class period," receive at least a *pro rata*

share of the amount being distributed by the SIF as a rate readjustment.

First Amended Complaint ¶ *15,* R.30-31. The "class period" is defined as "Dividend Periods beginning on July 1, 2002 and including all Dividend Periods ending on or before June 30, 2009." *First Amended Complaint* ¶ *12,* R.29.

This action is not a re-litigation of the claims asserted in *Farber, et al. v. Idaho State Insurance Fund,* 147 Idaho 307, 208 P.3d 289(2009) (hereinafter *Farber*). There are many similarities, but there are also two important distinctions which result in this action involving a new class and a new and pivotal issue.

First, *Farber* was initiated, pursued and ultimately resolved solely on behalf of a class composed of policyholders who were billed, for one or more policy years during the class period, $2,500 or less in premiums. This delineation was based on the fact that at the time the action was initiated, the SIF was wrongly treating those policyholders as being ineligible to receive any share of the rate readjustment. The impropriety of the formula being used as to other policyholders was not then known to Plaintiffs and their Counsel.[1] Only policyholders who were billed $2,500 or less for any given policy year during the class period were included in the *Farber* class for that policy year. In contrast, the policyholders who would be included in the CDA Dairy Queen class are those policyholders who were billed, for one or more policy years during the class period, over $2,500 in

[1] In most years at issue in *Farber,* all of the class members received no rate readjustment. There were however, a few years in which policyholders who paid $1,500 or more but less than $2,501 received an amount which was less than a *pro rata* share of the rate readjustment. There were also two years in which most policyholders who paid less than $2,501 were eligible to receive a payment which in all cases was less than a *pro rata* share of the rate readjustment.

premiums and they are class members only for those policy years in which they were billed over $2,500 in premiums. Thus, *Farber* and this action each pertain to two distinctly different classes.

Second, before CDA Dairy Queen filed this action, the Idaho Legislature in direct and immediate response to the *Farber* decision, repealed I.C. § 72-915 and purported to make that repeal *retroactive* to January 1, 2003. CDA Dairy Queen does not question the Legislature's power to repeal I.C. § 72-915 *prospectively* (as to any contract entered into less than six months before the effective date of the repeal).[2] However, the attempt to materially change contracts *retroactively*, so as to relieve the SIF of its fixed and determinable obligations under those contracts, gives rise to a pivotal constitutional challenge which was not before the *Farber* Court. CDA Dairy Queen contends that, with respect to contracts which included rights which vested prior to any legislative action, Art. I § 16 of the Idaho Constitution exists to protect it from legislative action which relieves the SIF of its obligations by depriving CDA Dairy Queen of the opportunity to benefit from those vested rights.

B. *COURSE OF PROCEEDINGS BELOW*

1. A Class Action Complaint was filed on December 24, 2009.

2 An Amended Class Action Complaint was filed on June 10, 2010, R. 6-40, and it was served June, 18, 2010.

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[2] The enactment declared the existence of an emergency. To the extent that this is a supportable declaration, then the repeal would be effective on May 6, 2009, when it was signed by the Governor. However, given that the next rate readjustment would not have been considered until December of 2009, there appears to be no basis in fact or law to support the declaration of an emergency. If that declaration is invalid, then the repeal would not be effective until July 1, 2009. This question was not directly raised for determination by District Court and it was mooted by the District Court's determination that retroactive application back to January 1, 2003, was constitutionally permissible.

3. SIF answered on July 1, 2010, R. 41-53, and subsequently amended that Answer on July 21, 2010. R. 54- 67.

4. Pursuant to I.C. § 10-1211, the Attorney General was served and declined to appear.

5. CDA Dairy Queen filed a Motion for Partial Summary Judgment (including supporting affidavits and memoranda) on September 23, 2010, in which they requested that the District Court determine that the repeal of I.C. § 72-915, if applied retroactively, would violate the protections afforded by Art. I, Section 16, of the Constitution of the State of Idaho.[3] R. 68-70.

6. SIF filed a Cross Motion for Summary Judgment (including supporting affidavits and memorandum) on October 26, 2010, in which it requested that the District Court determine that the emergency repeal of I.C. § 72-915, should be applied retroactively to January 1, 2003, and that this application did not violate protections afforded by either the U.S. or the Idaho Constitutions. R. 207-208.

7. CDA Dairy Queen filed a Motion to Strike all of the Affidavit of James Alcorn and portions of the Affidavit of Counsel which were filed by the SIF in support of its Motion for Summary Judgment. *See, Plaintiffs' Motion to Augment The Record, Item 7.*

8. The matter was heard by the Court on December 15, 2010.

9. The District Court did not rule upon Plaintiffs' Motion to Strike the Affidavits because it indicated it would not be relying upon any portion of the challenged information. Tr. 5:5 to

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[3] The record also reflects that CDA Dairy Queen filed a second Motion for Summary Judgment relative to the Defendants' 14th Affirmative Defense but the documents in the record relative to that Motion (R. 204 - 206) are irrelevant to this appeal.

6:15.

10. The District Court, ruling from the bench, denied Plaintiffs' Motion for Partial Summary Judgment and granted Defendants' Motion for Summary Judgment in a written order filed on 12/28/10. Tr. 105:1 to 119:11.

11. Judgment against Plaintiffs was entered on 1/4/2011. R. 360-362.

12. Appellants' Notice of Appeal timely filed on 1/27/2011. R. 363-366.

C. *STATEMENT OF FACTS*

The SIF was established by the Idaho Legislature in 1917. *See,* Idaho Code, Title 72, Chapter 9. For the first 92 years of the SIF's existence, its sole authority to distribute its surplus as rate readjustments to its policyholders derived from I.C. § 72-915, which read as follows:

> **72-915. Dividends. –** At the end of every year, and as 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 (emphasis added).

This Court has confirmed that this statute is incorporated into and becomes a term of the contracts between the SIF and its policyholders and that it affords the SIF's Manager the discretion to determine whether to declare a rate readjustment and to determine the total amount of the surplus to be distributed among the SIF's policyholders. *Kelso & Irwin, P.A. v. State Insurance Fund; and Drew Forney, Manager of the State Insurance Fund,* 134 Idaho 130, 138; 997 P. 2d 591, 599

(2000). This Court has also held that this statute clearly and unambiguously requires that the Manager must distribute the rate readjustment on a *pro rata* basis among all policyholders who held their policy for at least six months during the period affected by the rate readjustment, giving consideration only to billed premiums for the applicable period. *Farber*, 147 Idaho at 310, 208 P.3d at 292. The decision in *Farber* did not operate to change the law, to interpret an ambiguity in the law, or to change the effect previously given to it by any Idaho Appellate Court.

While in the years since 1917 there have been substantial revisions to many of the statutes pertaining to the SIF, the language of I.C. § 72-915 has been amended only to change the language relative to the person charged with discretion over and responsibility for the distribution of any rate readjustments. *Compare,* 1917 S.L., Ch. 81, §92, p. 252, *with* 1939 S.L., Ch. 251, §15, p. 617 *and* 1941 S.L., Ch. 20, §13, p. 37(see Appendix A). In 1951, the Legislature took away the SIF's ability to make assessments against policyholders but did not in any way change the language of I.C. § 72-915. *See,* 1951 S.L. Ch. 269, §1, p. 570.

Perhaps the most significant revisions of the law pertaining to the SIF occurred when in1998, the Idaho Legislature passed House Bill 774. R. 87-100. The Bill, HB 774, was a by-product of a special legislative task force that spent a year between the 1997 and 1998 sessions drafting the Bill. R.102. That legislation, among other things not remotely relevant to this action, restructured the management of the SIF (creating a Board of Directors with power to oversee the Manager); clarified and delineated the respective powers and responsibilities of the Manager and the Board; repealed I.C. § 72-911, which had previously included language bearing upon the accumulation of reserves and surplus, and provided for the SIF to be deemed, for the purposes of regulation by the Idaho

Department of Insurance, a mutual insurance company. It is apparent that the Legislature did discuss dividends and that the SIF's continued ability to distribute dividends was considered by the Legislature, *e.g.* R.104, but there was never any indication that the provisions of I.C. § 72-915 were considered to be inadequate or in need of change. R. 100-161 (Legislative History).

In the decade following the passage of HB 774 in 1998, the SIF utilized an allocation formula which had been used for several prior years and which impermissibly failed to make a *pro rata* distribution of the rate readjustment funds deemed to be available for allocation. R.172 - 174 & 180-183. The formula correctly utilized "billed premiums" as a starting point but thereafter completely departed from the clear and unambiguous requirements of the contract. Billed premiums were incorrectly *reduced* for underwriting expenses based upon a percentage of the billed premium which percentage was decreased as the amount of billed premium increased. The remaining amount was then, if applicable, further incorrectly *reduced* by a "loss factor" (1.18 times any losses on the policy). The remaining amount, if any, was multiplied by a "rate of return" ("return percentage") which incorrectly increased as the amount of billed premium increased. R. 173 & 175. Initially, this contractually impermissible formula was used to calculate rate readjustments for all policyholders regardless of the amount of premium paid. In 2002, the Board decided to pay no rate readjustment at all to policyholders whose billed premium did not exceed a minimum (initially $2,500 and later changed to $1,500).

The decision to pay no rate readjustment to policyholders whose premium was $2,500 or less was addressed by this Court in an initial opinion issued March 5, 2009 and, following a petition for rehearing, in a replacement opinion issued May 5, 2009. *Farber,* 147 Idaho 309, 208 P. 3d 293-291.

In both decisions, the Supreme Court determined that Idaho Code § 72-915, was a material term of the contract which clearly and unambiguously required that, for any policy period in respect to which the SIF elected to pay a rate readjustment, the funds available for that readjustment had to be divided among all time-qualified policyholders (those who held their policy for at least six months) *pro rata* based solely upon the amount of the premium which each had been billed. *Farber,* 147 Idaho 311-312, 208 P. 3d 293-294.

In the two-month interval between these two Supreme Court decisions, State Senator John Goedde, a member of the SIF's Board of Directors, presented SB 1166 to the Senate Commerce and Human Resources Committee. The minutes reflect that he testified the Bill would "serve to offset an adverse decision of the Idaho Supreme Court regarding the interpretation of Idaho Code, Section 72-915..." but that he was not intending to "circumvent the Supreme Court's decision." R.186-188.

Senate Bill 1166, in its original form, acknowledged the *Farber* decision. It included a statement purporting to reflect the legislative intention underlying the 1998 amendments to the laws regulating the SIF which is facially inconsistent with the recorded legislative history of HB 774. R. 85-161. Relying upon this self-serving revisionist hindsight, the Bill expressed the theory that a conflict existed in the laws regulating the SIF, and, upon that basis, it provided for a repeal of Idaho Code 72-915 retroactive to April, 1998. R. 184. When SB 1166 was presented to the Senate Commerce and Human Resources Committee on April 7, 2010, testimony from representatives of the *Farber* class challenged the Bill on the basis that if applied retroactively it would impair the obligations and rights of contracts. A majority of the committee members voted to hold the Bill in Committee. R. 186-193. On April 14, 2010, the Bill came back before the Committee with

representations that agreements had been reached to amend the Bill. On that basis SB 1166 was sent to the Senate Amending Order, R. 194, were it became SB 1166aa. As amended, the Bill provided for retroactive effect "only" to January 1, 2003, and specifically stated that it was not in any way intended to apply to any claims made in *Farber v. State Insurance Fund.* SB 1166aa, R. 185, passed through both the Senate and the House and was signed by the Governor on May 6th, 2009. (SB1166aa is attached as Appendix B).

On this record, the District Court determined that SB 1166aa was constitutional and in doing so made several determinations each of which CDA Dairy Queen contends are contrary to the law and unsupported by the facts in the record before the District Court. The District Court began by concluding that it could properly look past established Idaho precedent and rely upon the analytical calculus utilized by federal courts in deciding if state action violates the Federal "Contracts Clause" (Art. 1 § 10 of the United States Constitution). Tr. 115:12-16 and Tr. 118:21-25.

Utilizing this "federal approach" the District Court addressed three questions. First, the District Court considered whether any contracts existed that provided for *pro rata* rate readjustments (Tr. 116:5-8) and concluded that even if such contracts existed a retroactive application of the repeal would not substantially impair those contracts because there would only be a "minimal effect on some policyholders" and because the contracts were "primarily set up to provide coverage ... not for the payment of dividends." Tr.117:21-23. Second, the District Court considered whether there was a significant and legitimate public purpose underlying a retroactive application of the repeal of I.C. § 72-915 and concluded that the Legislature's primary concern was the protection of the State's economy and that this was a "grave concern." Tr.117:14-28 and 118:12-16. Third, the District Court

considered whether the means used to protect the economy of the State – i.e. the retroactive repeal of I.C. §72-915 – was a reasonable means and of a character appropriate to that end and concluded that it was. Tr. 117:23-118:2 and 118:12-16.

II. ISSUES PRESENTED UPON APPEAL

A. Is a retroactive change imposed by the Idaho Legislature upon a material term of contracts between, on the one hand, citizens of and businesses in Idaho and, on the other, an entity created by and overseen by the same Legislature a violation of Art. I §16 of the Idaho Constitution, which prohibits state action which impairs the obligations of contracts?

B. Does federal decisional law relative to restrictions imposed on impairment of contracts by state action, as set out in Art. 1 § 10 of the U.S. Constitution provide a relevant basis upon which a retroactive change imposed by the Idaho Legislature upon a material term of the contracts at issue in this matter can be rationally found to be permissible notwithstanding the prohibition against state action which impairs the obligations of contracts set out in Art. I §16 of the Idaho Constitution?

III. ARGUMENT

A. *SCOPE OF REVIEW*

As this appeal involves a constitutional challenge to legislative action, the Supreme Court exercises free review. *Credit Bureau of E. Idaho, Inc. v. Lecheminant*, 149 Idaho 468, 469, 253 P.3d 1188, 1190 (2010). To the extent that this action requires interpretation of a legislative enactment, this action presents a question of law over which this Supreme Court exercises *de novo* review. *V-1 Oil Co. v. Idaho State Tax Commission*, 134 Idaho 716, 718, 9 P.3d 519, 521 (2000).

B. *SUMMARY OF ARGUMENT*

CDA Dairy Queen contends that to the extent that SB 1166aa operates to retroactively remove a material term from contracts which were in existence more than six months prior to the effective date of the Bill, the Bill is an unconstitutional legislative action. CDA Dairy Queen acknowledges that legislative enactments are presumed to be constitutional, that reasonable doubts should be resolved in favor of constitutionality and that the burden of demonstrating that the law should be declared unconstitutional rests upon that party making that claim. *Oneida County Fair Board v. Smylie,* 86 Idaho 341, 346, 386 P.2d 374, 376 (1963). However, this Court has the power to declare enactments unconstitutional in clear cases. *Stuart v. State*, 149 Idaho 35, 40, 232 P.3d 813, 818 (2010). This is a clear case.

When SB 1166aa is considered in view of the prohibition of Art. I §16, Idaho Constitution and the consistent application of that prohibition in decisions of this Court, it is apparent that the

attempt to retroactively repeal I.C. § 72-915 is clearly void because it is unconstitutional. Federal decisional law, which was relied upon by the District Court, is not relevant because it relies upon an interpretation of Art. 1 §10 of the United States Constitution which provides less protection to Idaho citizens than is provided by Art. I §16, Idaho Constitution.[4]

C. THE RETROACTIVE CHANGE IMPOSED BY THE IDAHO LEGISLATURE UPON A MATERIAL TERM OF CONTRACTS AT ISSUE CONSTITUTES A CLEAR VIOLATION OF ART. I §16 OF THE IDAHO CONSTITUTION.

1. *A contract exists between the parties which includes the requirement that any rate readjustments be distributed upon a pro rata basis among time-qualified policyholders considering only the amount of premium paid.*

The District Court professed uncertainty about whether the contracts between CDA Dairy Queen and the SIF included a contractual right to share in any rate readjustments on a *pro rata* basis. Tr.116:5-8. The facts and the law do not support any such uncertainty.

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[4] CDA Dairy Queen sees the District Court's foray into federal decisional law as completely unnecessary because Art. I § 16 as applied by Idaho decisional law clearly prohibits the retroactive application of SB 1166aa. Until the SIF is able to identify Idaho case law which provides justification for this Court to ignore *Steward v. Nelson*, 54 Idaho 56 at 67,28P.2d 824 at 828 (Idaho, 1933) and *Fidelity State Bank v. North Fork Highway District,* 35 Idaho 797, 209 P. 449(1922) and their progeny or articulates any basis upon which those decisions can be overruled, CDA Dairy Queen sees no point in detailing and discussing the other numerous defects in the District Court's decision. CDA Dairy Queen does not intend to waive or to be seen as waiving the right to present these arguments which include in overview: a) the District Court completely misplaced reliance upon *National Railway v. Atchison Topeka,* 470 U.S. 451 (1985); b) the District Court erred in relying upon cases such as *RUI One v. Berkeley,* 371 F.3d 1137 (9th Cir. 2004) without recognizing their lack of relevance to the retroactive changes made by SB 1166aa; c) the District Court made a series of erroneous and unsupported factual determinations; and, d) the District Court relied upon its own erroneous factual determinations and unsupported and illogical claims made by the Idaho Legislature to incorrectly conclude that retroactive application of SB 1166aa was constitutional when evaluated using the analytical approach described in *RUI One*.

The policies of workers' compensation insurance issued by the SIF to the CDA Dairy Queen and thousands of other Idaho employers are acknowledged by the SIF to be contracts for the provision of insurance coverage. *See*, Paragraph A of the policy, R. 74. At all times during the class period, the terms and conditions of the contracts between the SIF and its policyholders included not only the provisions of its written policy but also the Idaho statutes creating and governing the SIF which were in force at the time the contract was entered into. *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 388, 399, 111 P.3d 73, 84 (2005), *Kelso & Irwin, P.A. v. State Insurance Fund; and Drew Forney, Manager of the State Insurance Fund,* 134 Idaho 130, 138; 997 P. 2d 591, 599 (2000), *Straus and Nicholson v. Ketchum*, 54 Idaho 56 at 67; 28 P.2d 824 at 828 (1933).

Given that Idaho Code § 72-915 was in existence until the (arguably) effective date of SB 1166aa there is no rational basis upon which the District Court could question the existence of contracts which included a material term that provided a right to be paid a *pro rata* share of any amount which the SIF's Manager determined could be allocated as a rate readjustment. This right vested as soon as the policyholder held a contract of insurance with the SIF for more than six months. Moreover, any such uncertainty is fully resolved by this Court's decision in *Farber. See,* 147 Idaho at 311, 208 P.3d at 293. In even suggesting that the existence of a right to a *pro rata* share of any amount which the Manager of the SIF determined could be allocated as a rate readjustment was open to question, the District Court was clearly mistaken.

2. *SB 1166aa vitiates a material term of tens of thousands of contracts and the change substantially impairs a material vested right under those contracts.*

The District Court erroneously concluded both that the right to receive a *pro rata* share of any funds distributed as a rate readjustment was not a material term of the contracts for workers' compensation coverage, Tr. 117:6-9 and that the harm that would be done by retroactively removing that right from those contracts did not substantially impair the contracts because the damage done was "minimal." Tr. 117: 10-13 & 21-24. The District Court gave no consideration to the fact that, as to all contracts formed more than six months before the effective date of the statute, the right to receive a *pro rata* share of any funds which the Manager decided to distribute as rate readjustments was a fully vested right.

The relevant facts and binding Idaho precedent preclude the District Court from determining that the right to receive a *pro rata* share of any funds distributed as a rate readjustment is not a material term of the contract. A rate readjustment as described in I.C. §72-915 is the equivalent of a refund of a portion of the premium paid to acquire the policy. The consideration paid for a contractual benefit has long been acknowledged to be one of the material and necessary elements of a contract. *See., e.g. Vance v. Connell,* 96 Idaho 417, 418, 529 P.2d 1289, 1290 (1974). The fact that workers' compensation insurance policies provide coverage does not diminish in any way the materiality of the price term of the contract.[5] The District Court cites no authority which suggests that the price term of a contract or terms which affect the price of a contract can ever be considered

[5] One wonders how the SIF would respond to the argument that the policy was not really about the payment of premiums if it were being made by a person who the SIF had sued to recover the balance of the premium billed for coverage.

to be immaterial terms of the contract.

The relevant facts and law also preclude a determination that the damage caused by vitiating the right to receive a *pro rata* share of any funds distributed as a rate readjustment is either minimal or insubstantial. First it should be noted that, as the District Court appears to acknowledge, Idaho decisions do not turn upon substantiality. Citing from *Fidelity State Bank v. North Fork Highway District*, 35 Idaho 797, 209 P. 449 (1922) the District Court indicated that :

> Any enactment of a legislative character is said to 'impair' the obligation of a contract which attempts to take from a party a right to which he is entitled by its terms or which deprives him of the means of enforcing such right.

Tr. 116:14-18.

Even assuming that substantiality is a proper consideration, the record adequately demonstrates that the amount at issue is substantial. Senator Goedde, a member of SIF's Board of Directors, testified in the Senate hearings that the aggregate amount at issue was in the range of $24 million dollars. R. 188. The record in this case does not permit a demonstration of how the SIF determined this number but it is plainly a substantial amount.

The record in this case does permit calculations which independently demonstrate substantiality. Utilizing the information which is fully available in the record, for those policies issued in a three year period beginning on or after July 1, 2004 and before June 31, 2007, the average percentage of the premium refundable in a *pro rata* allocation of the amount distributed as a rate readjustment is 7.6%. R. 259. In spite of this evidence, the District Court gave no consideration to the determination of the Court of Appeals that a contract price adjustment of 5% could not be considered to be insubstantial. *City of Hayden, v. Washington Water Power Co.,* 108 Idaho 467,

468, 700 P.2d 89, 90 (Ct App. 1985).

Even if the average rate of readjustment were not on its face sufficient to establish substantiality, it is apparent that individual damages are also substantial. Applying the average rate readjustment rate of 7.6% to the known premiums billed to Discovery Care Centre LLC of Salmon (the second named Plaintiff, hereinafter "Discovery Care") for policies for the three years on which the percentage is based (1/1/2005, 1/1/2006 and 1/1/2007 --$238,818.00, R.356) it becomes apparent that if retroactive repeal of I.C. § 72-915 is permitted Discovery Care (which received no rate readjustment in any of these years) will be deprived of about $18,000 which it was entitled to receive under the contracts it had with the SIF. This amount is on its face substantial.

3. *Based upon long-standing Idaho Law, to the extent it is given retroactive application, SB 1166aa violates the protections afforded to Idaho citizens and business by Art. I § 16 of the Idaho Constitution.*

Numerous Idaho decisions have held that the State Legislature may not change material terms of contracts which were in existence prior to the effective date of an enactment seeking to accomplish such a change. There have been no exceptions to this absolutist approach with respect to contracts among citizens and between citizens and governmental or quasi-governmental entities.

In 1922, this Court decided *Fidelity State Bank v. North Fork Highway District*, 35 Idaho 797, 209 P. 449 (1922). In that case, a change in a state statute which the Legislature had intended to be applied retroactively would have caused funds which were deposited into a bank by the North Fork Highway District to have been re-characterized from funds held in trust to funds held as general deposits. If applied retroactively, this statute would have favored the general depositors of the bank

which, in the bank's liquidation, had a right inferior to any funds held in trust. In discussing the applicable law this Court stated:

> A law enacted subsequent to a contract which, if valid, will have the effect of annulling the contract constitutes the most palpable form of legislative impairment, and such an enactment is clearly unconstitutional... Legislation that attempts to make material alterations in the character, terms, or legal effect of existing contracts is clearly void. Of this character are statutes which attempt to add a material condition or provision to a contract, and those which attempt to release material stipulations contained therein. (citations omitted, emphasis added).

Id., 35 Idaho 810, 209 P. 452. Ultimately this Court held:

> It is a well-known fundamental rule of law that a state by the act of its legislature cannot alter the nature or legal effect of an existing contract to the prejudice of either party, nor can the legislature make a law for a particular case between two contracting parties contrary to the existing law and require the courts to enforce it. This rule is founded on two distinct principles of constitutional law, one prohibiting the assumption of judicial power by the legislative department, and the other inhibiting the impairment by a state of the obligation of contracts. The obligation of a contract is impaired by a statute which alters its terms, by imposing new conditions or dispensing with conditions, or which adds new duties or releases or lessens any part of the contract obligation or substantially defeats its ends. It is not only private contracts that are protected from impairment by state law. The protection also extends to contracts made by a state or a municipal corporation. (emphasis added)

Id., 35 Idaho at 813, 209 P. at 453. This holding has remained unquestioned for the last 89 years.

In 1954, this Court decided *Penrose v. Commercial Traveler's Insurance Co.*, 75 Idaho 524, 275 P.2d 969 (1954). In that case, a change in state law which occurred after a contract of insurance had been issued to Penrose by Commercial Traveler's Insurance provided for an award of attorney fees if an insured successfully sued his insurance company for failing to pay an amount justly due on a claim. The resolution of the case required the Court to address two questions. The first question – was there coverage? – was resolved by a majority of the Court in the lead opinion in favor of coverage. The second question – did retroactive imposition of the statute providing for an award

of attorney's fees onto a pre-existing contract amount to an impermissible "impairment of the obligations of contracts?" – was resolved by a three justice majority which held that the statute, as applied to contracts in existence at the time it was passed, impermissibly impaired the contract.[6]

In 1993, this Court decided *Curtis v. Firth*, 123 Idaho 598, 850 P.2d 749 (1993). In that case this Court considered whether a statute which limited the rights of a trust deed beneficiary to initiate judicial action to collect upon the underlying note could be applied to notes and deeds of trust which were executed prior to the effective date of the statute and at a time when the beneficiaries' rights were broader. In reaching its decision, the Court expressly rejected language from an earlier Court of Appeals case which suggested that the applicability of the limitations imposed by the statute would turn not on the date of the contract vis-a-vis the effective date of the statute but rather upon the date the action was filed. In reaching its conclusion, the Court quoted favorably from *Steward v. Nelson*, 54 Idaho 437, 32 P.2d 843 (1934) in which the Court held that the law existing when a mortgage is made enters into and becomes a part of the contract, and any change in the law which operates to deny or to obstruct any rights accruing under the contract as formed (including statutes then in effect) is a violation of Idaho's constitutional provision prohibiting any laws which impair

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[6]The tension between "change of contract" and "change of remedy" which is evident in the conflicting opinions in *Penrose* has continued to be present through a line of cases related to whether statutes imposing attorney fee awards can be applied to contracts in existence at the time that the statute is passed. The rule derived from this line of cases remains consistent with *Penrose* to the extent that if the change brought about by the statute affects the rights of only one party to the contract it is seen as materially and impermissibly changing the contract by changing the balance of power inherent in the contract. Where the rights of both parties are affected equally by the attorney fee statute then the change is not considered to be material and, consistent with "change of remedy" analysis, the only question considered relevant to "retroactive" application is whether the action was filed before the statute became effective. *See, e.g. Myers v Vermas,* 114 Idaho 85, 87-88, 753 P.2d 296, 298-99 (Ct. App 1998), *Ericson v. Blue Cross Health Servs.,* 116 Idaho 693, 695-696, 778 P.2d 815, 817-818 (1989), *Bott v. Idaho State Bldg. Authority,* 122 Idaho 471, 480-481, 835 P.2d 1282, 1291-1292 (1996).

the obligations of contract. *Id.*, 54 Idaho at 441 & 444, 32 P.2d at 845 & 846. Consistent with *Steward v. Nelson,* the Court held that the change in the statute could not be applied to limit the rights in place at the time that contract was executed. *Curtis,* 123 Idaho at 610, 850 P.2d at 761.

Applying this long-standing and consistently utilized analysis, it is apparent that the retroactive application of SB 1166aa, is contrary to the protection afforded to CDA Dairy Queen by Art. I § 16 of the Idaho Constitution. It impermissibly works to change the contract by relieving the SIF of the obligation to pay refunds of premiums paid to it by the policyholders. Because it changes the rights of the plaintiffs and the duties of the SIF, the change materially impairs the contracts between the SIF and its policyholders and is, in the words of this Court in *Fidelity,* "clearly void."

D. *FEDERAL DECISIONAL LAW IS COMPLETELY IRRELEVANT TO THE RESOLUTION OF THIS MATTER.*

1. *Idaho's decisional law has properly imposed a broadly preclusive reading of Art. I § 16 of the Idaho Constitution, which affords greater protection to contracts formed in Idaho than is afforded to the same contracts by Art. I § 10 of the United States Constitution, as interpreted by federal decisional law.*

Initially both state and federal constitutional provisions were seen by this Court to absolutely prohibit any legislative action which impaired a contract by destroying the contract or abolishing any of the obligations of the contract. In 1934, the Idaho Supreme Court observed:

> 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.

Straus and Nicholson v. Ketchum, 54 Idaho 56, 83, 28 P.2d 824, 834 (Idaho, 1933). This reading of the Idaho Constitution is completely consistent with the earlier pronouncement that legislative actions which impair contracts are "clearly void." *Fidelity, supra.*

By 1954, when *Penrose* was decided, it was apparent to this Court that the federal decisional law relative to state action which impaired contracts was evolving in a manner consistent with jurisprudence which allows for a police power right of state and federal governments to, *in the right circumstances*, trump federal constitutional protections. The difference between this federal approach and Idaho decisions treating Art. I § 16 as an absolute prohibition against the impairment of contracts by state action is well demonstrated by the decision in *United States for the Benefit of Midwest Steel and Iron Works v. Henly*, 117 F. Supp. 928 (D.C. Idaho, 1954). In that case, several months prior to the decision in *Penrose*, the U.S. District Court for the District of Idaho, applying federal decisional law, determined that the same attorney fees statute which was found by our Idaho Supreme Court, in *Penrose*, to be a violation of the Idaho Constitution, was not a violation of the Art. 1 § 10 of the United States Constitution. With full knowledge of the decision in *United States for the Benefit of Midwest Steel and Iron Works v. Henly*, this Court nevertheless found in *Penrose* that the statute in question violated the Idaho prohibition against impairment of contracts. Since *Penrose* was decided this Court has never signaled the intention to adopt or to move toward the approach adopted by the federal courts relative to the application of Art. 1 § 10 of the United States Constitution.

The approach taken by this Court in *Penrose* and subsequent decisions is supported by the difference in the language of the two constitutional provisions. With respect to restrictions upon the impairment of contracts, the United States Constitution provides: "Art. 1 § 10. No State shall . . . pass any . . . law impairing the obligation of contracts . . ." In Article I of the Idaho Constitution, "Declaration of Rights [of citizens]," the prohibition against legislation impairing contracts provides:

> Art. I § 16 – **Bill of attainder, etc., prohibited** – No . . . law impairing the obligation of contracts shall ever be passed.[7]

While both provisions have facially preclusive language, it is reasonable based upon both language and context to read Idaho's language as intended to provide the contracts formed by Idaho citizens with absolute protection.

The drafters of the United States Constitution were balancing federal power (including protection of the citizens) against the rights of the states to operate within their own borders. These considerations might be seen as a basis for reading into "any law" the conditioning language "not based upon a valid exercise of the State's legitimate police power." Certainly, this approach has been taken in federal decisions interpreting the breadth of the protections afforded to individual citizens by the federal constitution as balanced against the state police power.

Conversely, the drafters of the Idaho Constitution were themselves citizens seeking to form a government that was not unduly powerful. They set about doing this in Article I which established the rights reserved to the citizens and thereby limits the power of the State government over Idaho

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[7] The word "ever" is in the context used commonly defined as:

2. a : at any time <more than ever before>
   b : in any way <how can I ever thank you>

www.merriam-webster.com/dictionary/ever.

citizens. Moreover, the drafters of the Idaho Constitution had the benefit of the language of the United States Constitution which, in some instances, they freely used verbatim. (e.g. Compare the 4th Amendment, United States Constitution with Art. I § 17, Idaho Constitution). In drafting the prohibition against the legislative impairment of the obligations of contracts, the Idaho drafters eschewed relevant language of the United States Constitution and crafted instead a provision which prevents the legislature from "ever" passing a statute which impairs contracts. Had the drafters considered the federal constitutional protection to be sufficient this change would not have been necessary. Under these circumstances it makes perfect sense that the Idaho Appellate Courts have long read no exceptions into the word "ever."

The decisional law relative to the restriction against the impairment of contracts stated in the United States Constitution has been interpreted by federal courts to provide conditional protection to the contracts of state citizens. Conversely, the decisional law of Idaho relative to Art. I § 16 of the Idaho Constitution has consistently been read as rendering void any state action impairing contractual obligations between Idaho citizens and businesses. The wording of the respective provisions and the context in which they were adopted support these distinctly different approaches. Thus, while the language of the United States Constitution has been interpreted to leave open the possibility of exceptions, the language of the Idaho Constitution has been and should be seen as providing greater protection to Idaho citizens. "Ever," one must think, means never, not "sometimes" or "on occasion" or "when the SIF is out of sorts with a decision of this Court."

2. *Where a provision of the Idaho Constitution affords greater protection to Idaho citizens than is afforded by a like provision in the Federal Constitution, Idaho Courts should not rely upon federal decisional law to determine the rights afforded to Idaho citizens by the Idaho Constitution.*

This Court has observed that because:

> . . . federal and state constitutions derive their power from independent sources . . ., state courts are at liberty to find within the provisions of their own constitutions greater protection than is afforded under the federal constitution as interpreted by the United States Supreme Court. This is true even when the constitutional provisions implicated contain similar phraseology. Long gone are the days when state courts will blindly apply United States Supreme Court interpretation and methodology when in the process of interpreting their own constitutions. (citations omitted.)

State v. Newman, 108 Idaho 5, 10 n.6; 696 P.2d 856, 861 (1985).

This observation was repeated by this Court in *State v. Guzman*, 122 Idaho 981; 842 P.2d 660 (1992) in which this Court declined to adopt the "good faith" exception to the exclusionary rule, which had been formulated by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). This Court perceived that the decision in *Leon* derived from the fact that the federal courts had for some time been developing a narrowing view of the justifications for and benefits of the exclusionary rule. This Court concluded that the by-product of this narrowing process was not consistent with the broader reasons which motivated Idaho to adopt the exclusionary rule in the first instance. *Guzman*, 122 Idaho at 992-993, 842 P.2d at 671-672. Because Idaho had adopted an exclusionary rule which caused the Idaho Constitution to afford its citizens with more protection than was apparently conferred upon them by the United States Constitution, this Court rejected the "good faith exception" which was a by-product of evolving federal decisional law.

There are then, in this case, three primary reasons why it is appropriate to determine that

federal decisional law cannot be relied upon for the purpose of determining if the state action at issue in this case violates the protections afforded by Art. I § 16 of the Idaho Constitution. First, it is clear that, on its face, Art. I § 16 is more restrictive than the different language employed in United States Constitution's "contracts clause." Second, there is every reason to believe that in the circumstances that confronted the drafters of each constitution, the Idaho drafters had greater motivation to limit the State's rights and, thus, to impose an absolute prohibition and opposed any lesser barrier which could accommodate some state interference with existing contracts. Third, the decisional law of Idaho has, in full recognition of the different path being followed by federal courts, consistently treated the restriction against contractual impairment as absolute with respect to contracts among citizens and between citizens and governmental or quasi-governmental entities.

These three factors individually and in conjunction with each other compel the conclusion that federal decisional law is irrelevant to the resolution of the issues presented by this case.

IV. CONCLUSION

For the forgoing reasons it is respectfully requested that the Court determine that the District Court erred in granting summary judgment to the SIF and in denying partial summary judgment to CDA Dairy Queen. For these reasons it is submitted that the Court should remand the matter with to the District Court for entry of Partial Summary Judgment in favor of CDA Dairy Queen on the basis that SB 1166aa is unconstitutional to the extent that it seeks to repeal I.C. § 72-915 retroactively.

RESPECTFULLY SUBMITTED THIS 11TH day of July, 2011.

LOJEK LAW OFFICES, CHTD.

By: Donald W. Lojek,- Of the Firm
Attorneys for Appellants

GORDON LAW OFFICES, CHTD.

By: Philip Gordon- Of the Firm
Attorneys for Appellants

GORDON OFFICES, CHTD.

By: Bruce S. Bistline,- Of the Firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2011, 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
Telephone: 208-395-8500

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

GORDON LAW OFFICES, CHARTERED

Bruce S. Bistline

APPENDIX

ited and paid as are other claims against the State of Idaho, and when all actual and necessary expenses incurred in connection with any application for such loan, or for an extension, renewal or increase of such loans shall have been paid, the balance, if any, of the deposit made by the applicant over and above the sum total of said expenses shall be repaid said applicant from the said "Loan Expense Fund" upon a claim audited and paid as are other claims against the State of Idaho, and such repayment shall be made whether the loan, or extension, renewal or increase of loan be or be not made.

SEC. 4. All moneys paid into the said "Loan Expense Fund" are hereby appropriated and set aside to be expended for the uses and purposes authorized by this Act.

SEC. 5. Any person violating any of the provisions of this Act, shall upon conviction be punished by a fine not exceeding one thousand dollars or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

SEC. 6. All acts or parts of acts in conflict herewith are hereby repealed.

SEC. 7. An emergency existing therefor, this Act shall be in force and effect from and after its passage and approval.

Approved March 20, 1917.

CHAPTER 81.

(S. B. No. 221.)

AN ACT

TO BE CITED AS THE "WORKMEN'S COMPENSATION ACT," PROVIDING FOR COMPENSATION TO EMPLOYEES FOR PERSONAL INJURIES SUSTAINED IN THE COURSE OF PUBLIC AND INDUSTRIAL EMPLOYMENT AND TO THEIR DEPENDENTS IN CASE OF DEATH FROM SUCH INJURIES: PRESCRIBING THE EMPLOYMENTS COVERED BY THIS ACT: MAKING THE PROVISIONS HEREOF APPLICABLE TO EMPLOYEES OF THE STATE, AND ALL COUNTIES, CITIES, CITIES UNDER SPECIAL CHARTER AND COMMISSION FORM OF GOVERNMENT, VILLAGES, SCHOOL DISTRICTS, IRRIGATION DISTRICTS, DRAINAGE DISTRICTS, HIGHWAY DISTRICTS, ROAD DISTRICTS AND OTHER PUBLIC AND MUNICIPAL CORPORATIONS, PROVIDING THE PROCEDURE IN OBTAINING COMPENSATION HEREUNDER: THE AMOUNT OF SUCH COMPENSATION; THE MANNER OF COMPUTING THE SAME;

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THE PERSONS TO WHOM PAYABLE; THE TIME AND MANNER OF THE PAYMENT THEREOF AND THE MANNER OF SECURING THE PAYMENT THEREOF; PROVIDING SPECIFIC ENDEMNITIES FOR CERTAIN INJURIES; DECLARING THE POLICE POWER OF THE STATE IN THE PREMISES: MAKING SPECIAL PROVISIONS REGARDING MEDICAL ATTENDANCE, HOSPITAL CONTRACTS AND SUBSTITUTED SYSTEMS OF COMPENSATION, PAYMENTS TO ALIENS AND PAYMENTS TO THE STATE IN THE EVENT OF THE DEATH OF AN INJURED EMPLOYEE LEAVING NO DEPENDENTS; CREATING AN INDUSTRIAL ACCIDENT BOARD OF THREE MEMBERS; PROVIDING FOR THEIR APPOINTMENT; PRESCRIBING THEIR DUTIES AND POWERS; FIXING AND MAKING PROVISION FOR THE PAYMENT OF THEIR SALARIES AND EXPENSES; PROVIDING THE METHOD OF FIXING COMPENSATION BY AGREEMENT OF THE PARTIES AND BY ARBITRATION; PRESCRIBING THE PROCEDURE BEFORE ARBITRATORS AND BEFORE THE BOARD IN MATTERS ARISING UNDER THIS ACT; PROVIDING FOR THE ENFORCEMENT OF AWARDS AND FOR APPEALS FROM DECISIONS OF THE BOARD ON QUESTIONS OF LAW; PRESCRIBING THE DUTIES, RIGHTS AND OBLIGATIONS OF EMPLOYERS, EMPLOYEES AND SURETIES HEREUNDER; REGULATING THE CONTRACTS SECURING COMPENSATION HEREUNDER; CREATING A STATE INSURANCE FUND TO BE ADMINISTERED BY THE STATE BUT WITHOUT LIABILITY ON THE PART OF THE STATE BEYOND THE AMOUNT OF SUCH FUND, FOR THE PURPOSE OF INSURING EMPLOYERS AGAINST LIABILITY FOR COMPENSATION UNDER THE WORKMEN'S COMPENSATION ACT; PROVIDING FOR THE COLLECTION, ADMINISTRATION, DISBURSEMENT AND INVESTMENT OF SUCH FUND; PROVIDING FOR THE APPOINTMENT OF A STATE INSURANCE MANAGER; PRESCRIBING HIS COMPENSATION, POWERS AND DUTIES; PROVIDING FOR THE EMPLOYMENT BY HIM OF ASSISTANTS; PRESCRIBING THE DUTIES OF THE STATE TREASURER, STATE AUDITOR, AND BOARD OF EXAMINERS WITH RESPECT TO SUCH FUND; PROVIDING FOR THE ISSUANCE OF INSURANCE POLICIES AND THE COLLECTION OF PREMIUMS THEREFOR, AND MAKING GENERAL PROVISIONS FOR THE ADMINISTRATION BY THE STATE INSURANCE MANAGER OF A PUBLIC MUTUAL INSURANCE CARRIER; PRESCRIBING PENALTIES FOR EMPLOYERS IN DEFAULT FOR THE PAYMENT OF PREMIUMS, FOR FALSIFICATION OF PAY-ROLLS AND WILFUL MISREPRESENTATION; ALSO PRESCRIBING A PENALTY FOR THE DISCLOSURE BY THE STATE INSURANCE MANAGER AND HIS ASSISTANTS OF INFORMATION NOT OPEN TO PUBLIC INSPECTION; PROVIDING FOR THE

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, Nineteen 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 hall be divided by the State Insurance Manager, for the purposes of the said fund, into classes. Separate accounts shall e kept of the amounts collected and expended in respect to ach such class for convenience in determining equitable ates; but for the purpose of paying compensation the State nsurance fund shall be deemed one and indivisible. The State nsurance Manager shall have power to rearrange any of the asses by withdrawing any employment embraced in it and ansferring it wholly or in part to any other class, and from ch employments to set up new classes in his direction. The ate Insurance Manager shall determine the hazards of the fferent classes and fix the rates of premiums therefor based on the total payroll and number of employees in each of ch classes of employment at the lowest possible rate consistent with the maintenance of a solvent State Insurance nd and the creation of a reasonable surplus and reserve; l for such purpose may adopt a system of schedule rating such a manner as to take account of the peculiar hazard 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 ses 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-

"c. SIGNAL LAMPS. Whenever a motor vehicle is equipped with a signal lamp to comply with the provisions of Section 48-517, the signal lamp shall be so constructed and located on the vehicle as to give a signal yellow or red in color, which shall be plainly visible in normal sunlight, from a distance of 100 feet to the rear of the vehicle but shall not project a glaring or dazzling light and shall be of a type approved by the commissioner.

"d. SPECIAL RESTRICTIONS ON LAMPS. *1.* Any * *lighted lamp or illuminating device upon a motor vehicle* other than head lamps, spot lamps, or auxiliary driving lamps which projects a beam of light of an intensity greater than * *300* candlepower shall be so directed that no part of the beam will strike the level of the * *roadway* on which the vehicle stands at a distance of more than * *75* feet from the vehicle.

"2. No person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying a red light visible from directly in front thereof. This section shall not apply to authorized emergency vehicles.

"3. Flashing lights are prohibited on motor vehicles, except as a means of indicating a right or left turn.

"e. TRUCKS TO CARRY FLARES OR SIMILAR DEVICES. *1. No person shall operate any motor truck upon a highway outside of a business or residence district at any time from a half hour after sunset to a half hour before sunrise unless there shall be carried in such vehicle a sufficient number of flares, not less than three, or electric lanterns or other signals capable of continuously producing three warning lights each visible from a distance of at least 500 feet for a period of at least 8 hours, except that a motor vehicle transporting inflammables may carry red reflectors in place of the other signals above mentioned.*

"Every such flare, lantern, signal, or reflector shall be of a type approved by the commissioner and he shall publish lists of those devices which he has approved as adequate for purposes of this section.

"2. Whenever any motor truck shall stop upon a highway during the period of time when lighted lamps must be displayed on motor vehicles, where such truck is not or cannot be stopped or parked off the paved, oiled or main travelled portion of the highway, whether disabled or not, the driver or other person in charge of such vehicle shall place or cause to be placed, such flares, lanterns or other lighted signals to be lighted and placed upon the highway, one at a distance of 35 paces or approximately 100 feet in advance of such vehicle, one at a distance of 35 paces or approximately 100 feet to the rear of said vehicle, and the third upon roadway side of the vehicle, except that if the vehicle is transporting inflammables, three red reflectors may be so placed in lieu of such other signals and no open flame or burning flare shall be placed adjacent to any such last mentioned vehicle.

"3. No person shall at any time operate a motor truck transporting explosives as a cargo or part of a cargo upon a highway unless it carries flares or electric lanterns as herein required, but such flares or electric lanterns must be capable of producing a red light and shall be displayed upon the roadway when and as required in this section."

Approved March 11, 1939.

1939

CHAPTER 251

(H. B. No. 178)

AN ACT

AMENDING SECTIONS 43-1701, 43-1702, 43-1703, 43-1704, AND 43-1705, IDAHO CODE ANNOTATED; REPEALING SECTION 43-1706, IDAHO CODE ANNOTATED; AMENDING SECTIONS 43-1707, 43-1708, 43-1709, 43-1710, 43-1711, 43-1712, 43-1713, 43-1714, 43-1715, 43-1716, 43-1717, 43-1718, 43-1719, 43-1720, 43-1721, 43-1722, 43-1723, 43-1725, 43-1726 AND 43-1727, IDAHO CODE ANNOTATED, RELATING TO THE STATE INSURANCE FUND; CREATING THE COMPENSATION INSURANCE COMMISSION, CONSISTING OF FIVE MEMBERS, TO ADMINISTER THE STATE INSURANCE FUND; PROVIDING FOR THE APPOINTMENT AND ORGANIZATION OF SUCH COMMISSION; FIXING THE QUALIFICATIONS AND COMPENSATION OF THE MEMBERS THEREOF AND PRESCRIBING ITS POWERS AND DUTIES; PROVIDING FOR THE METHOD OF MAKING PAYMENTS OF WORKMEN'S COMPENSATION INSURANCE LOSSES AND PREMIUM REFUNDS; PROVIDING FOR INVESTMENT OF SURPLUS OR RESERVE OF THE STATE INSURANCE FUND TO BE MADE BY THE DEPARTMENT OF PUBLIC INVESTMENTS AT THE DIRECTION OF SUCH COMMISSION; PROVIDING FOR CANCELLATION OF ANY POLICY OF WORKMEN'S COMPENSATION INSURANCE UNDER CONDITIONS WHERE THE EMPLOYER IS IN DEFAULT, AND SUBSTITUTING THE WORDS "COMPENSATION INSURANCE COMMISSION," "COMMISSION," "STATE INSURANCE MANAGER" AND "MANAGER" WHERE NECESSARY AND PROPER.

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

SECTION 1. That Section 43-1701, Idaho Code Annotated, be, and the same hereby is, amended to read as follows:

sell any of such securities, the proceeds thereof to be paid over to the state treasurer for said insurance fund."

SECTION 13. That Section 43-1713, Idaho Code Annotated, be, and the same hereby is, amended to read as follows:

"Section 43-1713. CLASSIFICATION OF RISKS AND ADJUSTMENT OF PREMIUMS. Employments insured in the state insurance fund shall be divided by the * * * *commission* for the purpose of 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 * * * *commission* 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 its discretion. The * *commission* shall determine the hazards of the different classes and fix the rates of premiums therefor based upon the total pay roll 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; but for such purpose and in so fixing such rates of premium, such rates shall be fixed with due regard to the physical hazards of each industry, occupation, or employment, and, within each class, so far as practicable, in accordance with the elements of bodily risk or safety or other hazard of the plant or premises or work of each insured and the manner in which the same is conducted, together with a reasonable regard for the accident experience and history of each such insured, and with due regard to the accessibility of medical and hospital facilities. The maximum amount of wages or salary paid to an individual employee on which premium shall be collected by the state insurance fund shall be $2400 per annum."

SECTION 14. That Section 43-1714, Idaho Code Annotated, be, and the same hereby is, amended to read as follows:

"Section 43-1714. ACCOUNTS. The * * * *commission* 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."

SECTION 15. That Section 43-1715, Idaho Code Annotated, be, and the same hereby is, amended to read as follows:

"Section 43-1715. DIVIDENDS. At the end of every year, and at such other times as the * * * *commission* in its 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 * * * *commission* deems may be safely and properly divided, it may in its 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."

SECTION 16. That Section 43-1716, Idaho Code Annotated, be, and the same hereby is, amended to read as follows:

"Section 43-1716. ASSESSMENTS. If the premiums fixed for any class and collected from its members are subsequently found by the * * * *commission* to have been too small for any period, it may determine what additional premiums are required from said class for such period, and may make assessments accordingly, and each of the members of such class shall be liable to the said * *commission* to pay such assessment so made upon him within 30 days after notice thereof."

SECTION 17. That Section 43-1717, Idaho Code Annotated, be, and the same hereby is, amended to read as follows:

"Section 43-1717. 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, 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 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 on 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

CHAPTER 19
(H. B. NO. 32)

AN ACT

MENDING SECTION 65-2006 IDAHO CODE ANNOTATED RELATING TO TRAVEL EXPENSE OF STATE OFFICERS AND EMPLOYEES, PROVIDING AMOUNT FOR TRAVEL EXPENSE, AND REQUIRING PRIOR AUTHORIZATION FOR TRAVEL OUTSIDE THE STATE OF IDAHO, BY PROVIDING THAT ONLY THE JUSTICES OF THE SUPREME COURT AND GOVERNOR SHALL RECEIVE THEIR ACTUAL AND NECESSARY TRAVEL EXPENSE WHEN TRAVELING OUTSIDE THE STATE OF IDAHO.

'e It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 65-2006 be and the same is ereby amended to read as follows:

65-2006. TRAVEL EXPENSES — LIMITATION ON AMOUNT-PRIOR AUTHORIZATION REQUIRED-EXCEPTIONS.—The state board of examiners shall not allow ny claim, or approve any voucher, for the expenses of any fficer or employee of the state, while traveling on the busiess of the state, as provided for in section 65-2005, which hall, exclusive of railroad, stage fare, and supplies, be in xcess of five dollars per day, when travel is between two oints within the state and five dollars per day when the ravel is to and from points outside the state.

No claim for such expense shall be allowed or paid where uch expense is incurred while traveling outside of the State f Idaho, unless prior to the incurring of such expense permission to incur the same has been obtained in writing from he governor of the state and filed with the state auditor, o be made a matter of record with the state board of examiners, except where the same is necessarily incurred, in he business of the state, in direct and continuous travel rom one point in the State of Idaho to another in said state ver the usually traveled route: provided, that the actual nd necessary expenses of the justices of the Supreme Court *nd* the governor, * * * when traveling to and from points utside of the state, shall be allowed and paid.

Approved February 5, 1941.

1941

CHAPTER 20
(H. B. NO. 16)

AN ACT

AMENDING SECTIONS 43-1701, 43-1702, 43-1703, 43-1704, 43-1705 OF THE IDAHO CODE ANNOTATED; ADDING A NEW SECTION TO BE KNOWN AS SECTION 43-1706 OF THE IDAHO CODE ANNOTATED; AMENDING SECTIONS 43-1707, 43-1709, 43-1711, 43-1712, 43-1713, 43-1714, 43-1715, 43-1716, 43-1717, 43-1718, 43-1719, 43-1720, 43-1721, 43-1722, 43-1723, 43-1725, 43-1726 AND 43-1815 OF THE IDAHO CODE ANNOTATED, RELATING TO THE STATE INSURANCE FUND; ABOLISHING THE COMPENSATION INSURANCE COMMISSION AND CREATING THE OFFICE OF STATE INSURANCE MANAGER TO ADMINISTER THE STATE INSURANCE FUND; PROVIDING FOR THE APPOINTMENT OF A STATE INSURANCE MANAGER AND FIXING HIS SALARY AND HIS TERM OF OFFICE AND FOR FIXING THE AMOUNT OF HIS BOND, AND PRESCRIBING HIS DUTIES, LIABILITIES, AND POWERS; PROVIDING FOR THE METHOD OF MAKING PAYMENTS OF WORKMEN'S COMPENSATION LOSSES AND PREMIUM RETURNS; PROVIDING FOR THE INVESTMENT OF SURPLUS OR RESERVE OF THE STATE INSURANCE FUND TO BE MADE BY THE DEPARTMENT OF PUBLIC INVESTMENT AT THE DIRECTION OF THE STATE INSURANCE MANAGER; PROVIDING FOR THE CANCELLATION OF ANY POLICY OF WORKMEN'S COMPENSATION INSURANCE UNDER CONDITIONS WHERE THE EMPLOYER IS IN DEFAULT, AND SUBSTITUTING THE WORDS "STATE INSURANCE MANAGER" AND "MANAGER" FOR THE WORDS "COMPENSATION INSURANCE COMMISSION" OR "COMMISSION" WHERE NECESSARY AND PROPER, AND DECLARING AN EMERGENCY.

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

SECTION 1. That Section 43-1701, Idaho Code Annotated, as amended by Chapter 251, Session Laws of 1939, be, and the same is hereby amended to read as follows:

"Section 43-1701. CREATION OF STATE INSURANCE FUND. There is hereby created a fund, to be known as the state insurance fund, for the purpose of insuring employers against liability for compensation under this workmen's compensation law * * * *and the occupational disease compensation law* and of securing to the persons entitled there-

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 on 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 disablement and death of the employees of such employer, including the reserves so set up."

SEC. 13. That Section 43-1715, Idaho Code Annotated, as amended by Chapter 251, Idaho Session Laws of 1939, be, and the same hereby is, amended to read as follows:

"Section 43-1715. 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 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."

SEC. 14. That Section 43-1716, Idaho Code Annotated, as amended by Chapter 251, Idaho Session Laws of 1939, be, and the same hereby is, amended to read as follows:

"Section 43-1716. ASSESSMENTS. If the premiums fixed for any class and collected from its members are subsequently found by the * * * *Manager* to have been too small for any period, *he* may determine what additional premiums are required from said class for such 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 30 days after notice thereof."

SEC. 15. That Section 43-1717, Idaho Code Annotated, as amended by Chapter 251, Idaho Session Laws of 1939, be, and the same hereby is, amended to read as follows:

"Section 43-1717. 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."

SEC. 16. That Section 43-1718, Idaho Code Annotated, as amended by Chapter 251, Idaho Session Laws of 1939, be, and the same hereby is, amended to read as follows:

"Section 43-1718. POLICIES AND PAYMENT OF PREMIUMS. 1. Every employer insuring in the state insurance fund shall receive from the * * * *Manager* a contract or policy of insurance.

"2. Except as otherwise provided in this chapter, all premiums shall be paid by every employer who elects to insure with the state insurance fund to the * * * *Manager* semi-annually, or at such times as may be prescribed by the * * * *Manager*. Receipts shall be given for such payments and the money shall be paid over to the state treasurer to the credit of the state insurance fund."

SEC. 17. That Section 43-1719, Idaho Code Annotated, as amended by Chapter 251, Idaho Session Laws of 1939, be, and the same hereby is, amended to read as follows:

"Section 43-1719. ACTIONS FOR COLLECTION IN CASE OF DEFAULT. PENALTY. CANCELLATION OF POLICY. If an employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the * * * *Manager*, and it shall

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.