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CDA Dairy Queen, Inc. v. State Ins. Fund Respondent'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 No. 38492 (Canyon County District Court Docket No. CV-09-13607*C)

RESPONDENTS' RESPONSE BRIEF

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

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I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises from the District Court's determination that the Idaho Legislature's retroactive repeal of Idaho Code §72-915 was constitutional. The Appellants (collectively, "Dairy Queen") argue that the retroactive repeal was a violation of the Contract Clause provisions of the United States and Idaho Constitutions. The District Court disagreed and this appeal followed.

B. Course of the Proceedings

The Idaho State Insurance Fund (collectively, with the other Appellees, "SIF") does not identify any additional matters beyond those identified by Dairy Queen.

C. Concise Statement of the Facts

1. The *Farber* litigation.

Prior to this litigation, a group of Idaho State Insurance Fund policyholders sued the SIF contending it was not following I.C. §72-915 because it was not paying them a pro rata share of dividends declared by the SIF. Farber v. Idaho State Ins. Fund, 147 Idaho 307, 208 P.3d 289 (2009). The SIF disagreed, explaining that per the language of I.C. §72-915, the SIF Manager had the authority to determine that dividends would not be issued to SIF policyholders who paid premiums of $2,500 or less during the respective dividend year or who had losses that exceeded premiums in a year.

The statute at issue in the *Farber* litigation, which also forms the basis for this action, I.C. §72-915, stated:

> 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.

The Farber Court held that I.C. §72-915 was unambiguous and "the distribution of dividends must be done on a pro rata basis." Farber, 147 Idaho at 311. Notably, the Court recognized the Legislature's power to change the law and commented that SIF's arguments were better targeted to the Legislature:

> The arguments, evidence, and testimony provided to this Court would be better targeted at the Legislature, which is empowered to change existing law. . . . If, in the intervening time, it has become prudent to alter the statutory language related to the requirements for distribution of dividends, **the proper remedy is to approach the Legislature to change the law**.

Id. at 313 (emphasis added).

2. The repeal of I.C. §72-915.

Over eight months before this action was filed, and while the Farber litigation was pending before this Court, the Idaho Legislature voted to repeal I.C. §72-915.[1] (R. 242-45.) As required by law, the repeal specifically provided that: "An emergency existing therefor, which emergency is hereby declared to exist, Section 1 of this act shall be in full force and effect on

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[1] During the course of drafting the legislation, the bill was taken up at hearing in the Senate Commerce and Human Resources Committee on April 7 and April 14, 2009 (R. 186-97.) Notably, at the April 7, 2009 hearing on the bill, plaintiffs' counsel in this action – Mr. Gordon and Mr. Lojek – specifically provided testimony in opposition to the bill. (R. 188-89.)

and after passage and approval, and Section 2 of this act shall be in full force and effect retroactively to January 1, 2003." (Id. at §3.) The Statement of Purpose accompanying the bill recognized that the repeal was necessitated by the decision in Farber:

> 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.

(R. 245.) The Legislature further explained that the repeal was necessary to clarify the law regarding the payment of dividends by the SIF and that this legislation would allow the SIF to operate as an efficient insurance company and "issue dividends in the same manner as other insurance companies operating within the State of Idaho." (Id.)[2]

The Fiscal Note emphasized the financial uncertainty faced by the SIF and its State and private policyholders 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

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[2] 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 precedn[t] at the time the statute was passed." State, ex rel. Wasden v. Maybee, 148 Idaho 520, 529, 224 P.3d 1109, 1118 (2010)(quoting Druffel v. State, Dep't of Transp., 136 Idaho 853, 41 P.3d 739 (2002)); accord Smith v. Washington County, 150 Idaho 388, 247 P.3d 615, 619 (2010)(stating that "[w]e 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.").

> 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.)

The Governor signed the repeal on May 6, 2009. (Id.) Thereafter, in Farber, this Court denied Respondent's Petition for Rehearing on May 12, 2009, and issued its Remittitur to the District Court on May 27, 2009. (Remittitur, Supreme Court Docket No. 35144-2008.)

3. Summary of this action.

Over seven months later, on December 24, 2009, Dairy Queen filed a Class Action Complaint and Demand for Jury Trial (R. 6-22) that was subsequently amended (R. 23-40). Dairy Queen alleged that in violation of I.C. §72-915, there were policyholders who paid in excess of $2,500 in annual premiums that did not receive a pro rata share of dividends from December 24, 2004 on. (R. 30.)

Recognizing that the repeal of I.C. §72-915 barred the lawsuit, Dairy Queen sought a ruling that "[t]hat the repeal of I.C. §72-915 by the 2009 legislature be deemed to be unconstitutional, void and of no effect as to all policies issued prior to July 1, 2009." (R. 37.) The District Court disagreed and granted summary judgment to the SIF. (R. 357-58.)

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

SIF does not identify any additional issues on appeal.

III. ATTORNEY FEES ON APPEAL

SIF only seeks an award of costs should it prevail, pursuant to I.A.R. 40.

IV. SUMMARY OF ARGUMENT

As an initial matter, Dairy Queen also sought a declaration that the repeal of I.C. §72-915 was unconstitutional under the U.S. Constitution. Dairy Queen has not disputed the District Court's award of summary judgment on that issue and, therefore, it should be affirmed.

With respect to the Idaho Constitution, the repeal of I.C. §72-915 did not implicate the Contract Clause of the Idaho Constitution because dividends are not addressed in the policyholders' contract. Therefore, the District Court's dismissal of Dairy Queen's lawsuit should be affirmed.

If the Contract Clause of the Idaho Constitution is relevant, the repeal of I.C. §72-915 was constitutional based upon an analysis of Idaho and federal law. Dairy Queen asserts that the Idaho Constitution's Contract Clause must be read literally and interpreted without reference to federal decisional law. This position is unsupported both by this Court's prior reference to federal decisional law in considering constitutional questions and by this Court's recognition of a police power/public welfare exception to Idaho's Contract Clause, which echoes the considerations in modern Contract Clause analysis. Accordingly, federal law is appropriately considered in evaluating the constitutionality of the repeal of I.C. §72-915 under the Idaho Constitution.

As an initial matter, the retroactive nature of the repeal of I.C. §72-915 correctly followed Idaho law, expressly stating that such repeal was being made retroactive.

In analyzing constitutionality, the repeal of I.C. §72-915 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). As the challenger to the legislation, Dairy Queen has to overcome this heavy presumption. In addition, the test applied in determining whether the repeal violates the Contract Clause is a demanding one. Under modern Contract Clause analysis, in order to prevail on their claim that the repeal violates the Contract Clause, Dairy Queen must establish that:

- the state law has, in fact, operated as a substantial impairment of a contractual relationship;
- the State does not have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem; and
- the adjustment of the rights and responsibilities of contracting parties is not based upon reasonable conditions and is not of a character appropriate to the public purpose justifying the legislation's adoption.

As a matter of law, Dairy Queen is unable to meet its burden under this test, and summary judgment was correctly granted in the SIF's favor. First, the Idaho Legislature has not operated a substantial impairment of a contractual relationship because there is no contractual right to dividends in the SIF workers' compensation policies, nor any vested or expected right therein. In addition, even assuming a right of contract existed, the repeal cannot be considered to have substantially impaired it because the purpose of the contract is to provide workers' compensation insurance to Idaho's employers and employees. This core function remains unchanged by application of the repeal.

Second, the significant and legitimate public purpose underlying the repeal is evident. The SIF and the workers' compensation coverage it provides are creatures of statute. When the

Legislature created the SIF, it did not prevent itself from using its police powers to shepherd the SIF, a quasi-public entity, and run it efficiently. The repeal merely conforms to the law the way the Legislature intended it and the way the SIF has paid dividends for years. Thus, the Legislature, recognizing the vitality of the SIF is necessary to the vitality of the public welfare, repealed I.C. §72-915 so the Manager would have the authority to make the decisions necessary to the economic health and competitiveness of the SIF in today's market. Third, the repeal is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the action. Thus, SIF was appropriately entitled to summary judgment because there was no factual question that prevented the District Court from determining that, as a matter of law, Dairy Queen failed to meet its heavy burden of showing that the repeal of I.C. §72-915 was unconstitutional.

Additionally, it is inappropriate for Dairy Queen to ask this Court to rule that the Legislature had no basis to enact the repeal as emergency legislation because the Idaho Supreme Court has previously held that the Legislature's decision to declare an emergency is exclusively within the legislature's authority and will not be second-guessed by the judiciary.

As a final matter, Dairy Queen's attempt to reserve additional factual and legal disputes on appeal, without specification of the precise nature of the alleged errors, is insufficient for purposes of appeal, and this Court should deem all such arguments waived.

For these reasons, the District Court's decision should be affirmed.

V. STANDARD OF REVIEW

"Both constitutional questions and questions of statutory interpretation are questions of law over which this Court exercises free review." Stuart v. State, 149 Idaho 35, 40, 232 P.3d 813, 818 (2010); accord, V-1 Oil Co. v. Idaho State Tax Com'n, 134 Idaho 716, 718, 9 P.3d 519, 521 (2000) (holding that "[b]ecause constitutional questions are purely questions of law, they are also reviewed de novo.").

Despite the free review/de novo standard for questions of constitutionality, legislative acts are 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 at 346. The burden of proving that a legislative act rests squarely on the challenger:

> 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. An appellate court is obligated to seek an interpretation of a statute that upholds it [sic] constitutionality.** The judicial power to declare legislative action unconstitutional should be exercised only in **clear cases**.

Stuart v. State, 149 Idaho at 40 (*quoting* Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 154 P.3d 443 (2007)) (emphases added).

VI. ARGUMENT

A. Dairy Queen does not contest the District Court's ruling regarding the U.S. Constitution and, therefore, the dismissal of that claim should be affirmed.

On summary judgment, the District Court held the following: "THE COURT HEREBY FINDS that the Legislature's retroactive repeal of I.C. §72-915 is constitutional under **the**

United States Constitution and the Idaho Constitution." (R. 358) (emphasis added). Dairy Queen did not appeal the District Court's decision as it pertained to the United States Constitution. Therefore, the District Court's finding that the retroactive repeal of I.C. §72-915 is constitutional under the United States Constitution should be affirmed.

B. Idaho's Contract Clause is not implicated because Dairy Queen had no contractual right to dividends.

There is no contractual right to a dividend under an SIF workers' compensation policy. Therefore, the Contract Clause is not implicated and the summary judgment in the SIF's favor should be affirmed.

The contract of insurance SIF policyholders receive sets forth the parameters of the workers' compensation coverage. (R. 74-79.) It does not provide for the payment of a dividend to the policyholders. In fact, nowhere does it even address dividends. Accordingly, Dairy Queen's dividend claim is not a term of the insurance policy and, therefore, no provision in the SIF policies is impacted by the repeal of I.C. §72-915.

In an attempt to avoid the inescapable fact that dividends are not mentioned in any way, shape, or form in each SIF policyholder's contract for insurance, Dairy Queen generally points to Hayden Lake Fire Protection District v. Alcorn, 141 Idaho 388, 111 P.3d 73 (2005), Kelso v. State Insurance Fund, 134 Idaho 130, 997 P.2d 591 (2000), and Straus v. Ketchum, 54 Idaho 56, 28 P.2d 824 (1933) for the premise that "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." (Appellants' Brief at 13.) This argument ignores the nature of the SIF, its governing statutes, and the SIF policies themselves.

The SIF is an "independent body corporate politic," and, thus, a quasi-public entity that is created by, and exists by, a statutory grant of authority. See generally, I.C. §72-901 et seq.; Kelso, 134 Idaho at 136 (holding that the SIF is not a private insurance company). While "SIF's statutory provisions are necessarily part of [the insured's] contract with SIF," Kelso, 134 Idaho at 140, the contract of insurance does not provide for the payment of a dividend to the policyholders – in fact, nowhere does it even address dividends, nor does the Kelso decision make any such finding.

Further, 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 I.C. §72-901 et seq. Notably, this Court previously concluded the SIF's statutory framework does not create any property rights in the SIF's policyholders. Kelso, 134 Idaho at 135 (holding that "Kelso does not have [a] vested property interest in the assets of the SIF simply because the SIF operates much like a private mutual insurance company."). As such, an SIF policyholder has no vested right in the surplus and assets of the SIF and there is no right to a dividend.

Because there is no contractual right to a dividend, the Idaho Contract Clause is inapplicable and the District Court's dismissal of Dairy Queen's case should be affirmed.

C. If Idaho's Contract Clause is implicated, the Court may appropriately consider federal case law in evaluating its requirements.

Dairy Queen contends that "federal decisional law is completely irrelevant to the resolution of this matter." (Appellants' Brief at 19).[3] Dairy Queen's position is unsupportable given that this Court has held 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 981, 988, 842 P.2d 660, 667 (1992).[4]

With respect to the Contract Clause specifically, the Idaho Supreme Court has not been persuaded that federal law is inconsistent with the Idaho Constitution. To the contrary, the Idaho Supreme Court recently addressed a federal and state constitutional argument with a single, dispositive analysis that relied on the application of federal case law. See State v. Korn, 148 Idaho 413, 224 P.3d 480, 482 (2009). In Korn, the defendant argued that a city violated his

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[3] This is not surprising given that Dairy Queen has not challenged the District Court's ruling as to the constitutionality of the repeal of I.C. §72-915 under the U.S. Constitution, the modern Contract Clause analysis for which eviscerates Dairy Queen's claims in this action.

[4] Dairy Queen cites State v. Newman, 108 Idaho 5, 16 n.6, 696 P.2d 856, 867 n.6 (1985) for the proposition that Idaho courts no longer "blindly apply United States Supreme Court interpretation and methodology" in interpreting state constitutions; however, in doing so, Dairy Queen fails to acknowledge this Court's remark that while defendants "did not also argue that the due process clause of Art. I, § 13 of Idaho's Constitution invalidates the Act in question, had they done so, we do not think that the result would have been different, for we are convinced that the rules we set down for facial challenges to the constitutionality of a statute, although derived from federal sources, are also sound and proper under Idaho's Constitution." *Id.*

rights under "the contract clauses found in the Idaho and U.S. constitutions." 148 Idaho at 415. The Korn Court, without making a distinction between the two constitutions, engaged in a single analysis, relying on federal case 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.

Ignoring Korn and instead triumphing the Guzman case as an example of this Court's departure from U.S. Supreme Court interpretations of the federal Constitution (specifically, Fourth Amendment protections), Dairy Queen fails to note that this Court later refused to further expand Guzman, instead opting to adopt the U.S. Supreme Court's Fourth Amendment rationale in evaluating search and seizure protections for garbage. State v. Donato, 135 Idaho 469, 20 P.3d 5 (2001). In doing so, this Court explained that Guzman was the result of "the uniqueness of our state, our Constitution, and our long-standing jurisprudence," as well as "an independent exclusionary rule based on the state constitution that had developed over sixty-five years." Id. at 472.

There is no case law in Idaho establishing any "independent" rule with respect to the Contract Clause and, as noted above, the Korn court looked to federal law in disposing of a Contract Clause argument. 148 Idaho at 415-16 (citing Allied Structural, supra). Similarly, in Lindstrom v. District Bd. of Health Panhandle, 109 Idaho 956, 961, 712 P.2d 657, 662 (Ct. App. 1985), the Court of Appeals, citing to Allied Structural, summarily rejected a Contract Clause challenge without identifying any different analysis between the U.S. and Idaho constitutions.

Accordingly, Dairy Queen's argument that federal decisional law is "completely irrelevant" should be disregarded by this Court.

D. Idaho's Contract Clause does not mandate a literal reading, nor does modern Contract Clause analysis approve of such.

Dairy Queen next asserts that the Idaho Constitution's Contract Clause is to be interpreted differently than the U.S. Constitution, given slightly different language used in both clauses.[5] In doing so, Dairy Queen takes the absolutist position that "'[e]ver', one must think, means never, not 'sometimes' or 'on occasion'[.]" (Appellants' Brief at 22.) The result, Dairy Queen contends, is that Idaho's constitution is "intended to provide the contracts formed by Idaho citizens with absolute protection." (Appellants' Brief at 21.) If that is the case, then a review of Idaho Supreme Court case law will illustrate that the Court has rejected every law that impaired any contractual right. Such is not the case.

Take first the Korn decision. In Korn, the Court quoted the U.S. Supreme Court decision in Allied Structural when it stated that "[t]he . . . contracts clause protects only those contractual obligations already in existence at the time the disputed law is enacted." 148 Idaho at 415-16.[6] Tellingly absent from the Korn decision (and Lindstrom, supra) was any discussion

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[5] Compare Article I, §10, U.S. Constitution ("No state shall ... pass any ... law impairing the obligation of contracts.") with Article 1, §16, Idaho Constitution ("No ... law impairing the obligation of contracts shall ever be passed.").

[6] The Allied Structural Court rejected the literal reading of the Contract Clause that Dairy Queen seeks to employ on appeal: "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.

of how a Contract Clause claim would be treated differently under the Idaho Constitution than under the U.S. Constitution. Also missing was any statement by the Court that Allied Structural's modern contract clause analysis (and appurtenant non-literal reading of the Contract Clause) was inapplicable when interpreting the Idaho Constitution.

Dairy Queen's argument for a literal reading of the Contract Clause also fails given this Court's prior recognition of the police power exception to the Contract Clause. See Agricultural Products Corp. v. Utah Power & Light Co., 98 Idaho 23, 557 P.2d 617 (1976) (holding that the state may exercise its police power to modify contracts related to public utilities if it is in the public interest). Similar to the question posed in Agricultural Products, the Idaho Court of Appeals considered the question of whether ordinances could impose fees upon existing franchises in the later decision of City of Hayden v. Washington Water Power Co., 108 Idaho 467, 700 P.2d 89 (Ct. App. 1985). There, while rejecting the particular fees at issue, the Court took pains to indicate that the State had the authority to act pursuant to its police power, even if it impacted existing contracts. Id. at 469. Thus, the police power exception to the constitutional proscription against impairing contracts could be considered for those acts "promoting the health, comfort, safety and general welfare of society." Id. at 468.

Further, in Curr v. Curr, 124 Idaho 686, 864 P.2d 132 (1993), this Court reviewed the authority of the Idaho Industrial Commission to cap attorneys fees at 25% via a "letter of understanding." The Court's primary basis for rejection was the Commission's failure to abide by the Administrative Procedures Act. Id. at 691. Notably, the Court did not take the absolutist view that because the 'letter of understanding' impaired fee agreements, it was *per se*

unconstitutional; rather, the Court focused on the Commission's lack of procedure in promulgating the 'letter of understanding': "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." Id. (emphasis added). Thus, the Court's criticism was not with the right to modify the agreements, but simply the procedure in which it was done.

Even the 1954 Penrose decision (Dairy Queen's touchstone case in this litigation) was reeled in by later decisions - decisions that are unaddressed by Dairy Queen. (Appellants' Brief at 18, n. 6). These decisions clarified 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 appears to have 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 below in Section F(2) (c), 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 below in Section F(3), were not at issue in Penrose and, applied here, demonstrate that the repeal complies with the Contract Clause.

The absolutist view Dairy Queen advocates has also long been rejected by the U.S. Supreme Court with respect to the U.S. Constitution's Contract Clause. See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 503, 107 S.Ct. 1232, 1251 (1987) (stating that "it is well settled that the prohibition against impairing the obligation of contracts is not to be read literally."). Even Washington State's Contract Clause, which differs from Idaho's by only a single letter and which also utilizes the word "ever," is not construed literally. See, e.g., Optimer Intern., Inc. v. RP Bellevue, LLC, 214 P.3d 954, 958-59 and n.10 (Wash. App. 2009) (explaining that "'the prohibition against any impairment of contracts is not an absolute one and is not be read with literal exactness.' The 'prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people.' . . . These parallel provisions [of the U.S. and Washington State Constitutions] are substantially similar and are interpreted as having the same effect. In light of this similarity, we may rely on cases construing the federal constitutional provision as persuasive authority in construing the Washington constitutional provision.") (internal citations omitted).[7]

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[7] *Compare* Article 1, §16, Idaho Constitution ("No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed.") *with* Article I, §23, Washington State Constitution ("No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.").

Accordingly, Dairy Queen's argument on appeal – that Idaho has made an absolutist interpretation of the Idaho Constitution's Contract Clause and that reference to federal decision law is "irrelevant" – is unsupported. As discussed below, then, application of modern Contract Clause analysis is appropriate, and fully supports the ruling of the District Court in this matter.

E. The retroactive component of the repeal of I.C. §72-915 followed Idaho law.

As an initial matter, Idaho Code §73-101 provides that "No part of these compiled laws is retroactive, unless expressly so declared." The Idaho Supreme Court has confirmed that "a statute will be applied retroactively where there is a clear legislative intent to that effect." Union Warehouse and Supply Co., Inc. v. Illinois R.B. Jones, Inc., 128 Idaho 660, 669, 917 P.2d 1300, 1309 (1996). In repealing I.C. §72-915, the Idaho Legislature was clear on the intent to make the legislation retroactive, stating in Section 3 of the repeal:

> An emergency existing therefore, 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.

Accordingly, the retroactive component of the repeal of I.C. §72-915 followed Idaho law.

F. Based on the Modern Contract clause analysis, the retroactive repeal of I.C. §72-915 was constitutional.

1. The Modern Contract Clause analysis.

Whether there is a violation of the Contract Clause requires a three-step analysis: (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 1137, 1147 (9th Cir. 2004) (internal quotations omitted).

In Los Quatros, Inc. v. State Farm Life Ins. Co., 800 P.2d 184 (1990), the Supreme Court of New Mexico outlined the modern parameters of the test for whether the legislation violates the Contract Clause once it has been established there is indeed a contractual relationship. In Los Quatros, a mortgagor sued for declaratory judgment that a law allowing for early payment applied to its mortgage, despite the contract's language to the contrary. The mortgagee relied on Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 18 L.Ed. 403 (1866), for the proposition that states cannot constitutionally reduce a party's existing rights under a contract; however, the Quatros court pointed out that "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." Quatros, 800 P.2d at 192.

The Quatros court went on to explain that different Contract Clause cases had different factors present but found these cases to be nevertheless applicable:

> Perhaps the case providing the best overview of the appropriate methodology is *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* [459 U.S. 400 (1983)]. There the Court reviewed a Kansas statute regulating the price of natural gas sold intrastate between a producer and a public utility, and held that it was not invalid under the Contract Clause. The Court noted, first, that "[t]he threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" It went on to say that "[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected," or "the height of the hurdle the state legislation must clear."

> In determining the extent of the impairment, it is relevant that the industry which the complaining party has entered has or has not been regulated in the past.
>
> If the answer to the threshold inquiry is that the state regulation does indeed constitute a substantial impairment, the state "must have a significant and legitimate public purpose behind the regulation," so that there is some guarantee that the state "is exercising its police power, rather than providing a benefit to special interests." Finally, once a legitimate public purpose has been identified, the reviewing court must determine "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.'"

Quatros, 800 P.2d at 192 (citations omitted).

The Quatros court allowed the legislation to stand because it did not effect the underlying debt and because the banking industry is highly regulated, thus the impairment was slight. Despite finding the impairment was slight, the court still found it necessary to evaluate the public purpose. The court concluded that promoting the alienability of land was a public purpose, and that the legislation was appropriately tailored to that end. Id.; accord Allied Structural, 438 U.S. at 244-45 (stating that "[i]n 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.").

The following is an application of modern contract clause analysis to the instant case. As discussed below, and again bearing in mind that "[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 at 346, plaintiffs cannot demonstrate that the repeal of I.C. §72-915 was unconstitutional.

2. Threshold Inquiry: The Idaho Legislature has not operated a substantial impairment of a contractual relationship.

In analyzing a claim that the Contract Clause has been violated, "[t]he threshold inquiry is 'whether the state has, in fact, operated a substantial impairment of a contractual relationship." RUI One Corp. v. City of Berkeley, 371 F.3d at 1147; accord, Quatros, 800 P.2d at 192. "The threshold inquiry . . . 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.

a. There is no contractual right to a dividend.

As discussed above in Section VI(B), Dairy Queen cannot prevail on this threshold question because dividends are not covered by the SIF policies. In fact, the SIF contract of insurance does not provide for or even address in any way, shape, or form the payment of a dividend to the policyholders. There is simply no contractual right to a dividend under the SIF workers' compensation policy.

In addition, as addressed above on pages 9-10, 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 I.C. §72-901 et seq. An 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 as provided in I.C. §72-901(1). Kelso, 134 Idaho at 135.[8]

Dairy Queen's argument, then, is necessarily predicated on the presumption that the Legislature is powerless to make policy changes in the law that Dairy Queen contends is the sole source of its "contract" for dividends. This argument has been rejected by the U.S. Supreme Court. In National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co., 470 U.S. 451, 105 S.Ct. 1441 (1985), Congress passed statutes relieving railroads of providing rail service to inter-city passengers; then later amended the statutes to require railroads to pay Amtrak for transporting its employees. In turn, the railroads sued, alleging that the amendment was unconstitutional under the Contract clause; the U.S. intervened on the side of Amtrak. The National R.R. Court explained that a presumption exists that it is the primary function of the legislature to make laws that establish the policy of the state and not to make contracts:

> Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body. Indeed, "'[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.'" Thus, the party asserting the creation of a contract must overcome this well-founded presumption and we proceed

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[8] Even if one assumes for sake of argument that I.C. §72-915 is incorporated into each contract for insurance with the SIF, the SIF policy itself caveats that it is subject to statutory change: "Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to this law." (R. 75.) Thus, if that is the case, an SIF policyholder is on notice from the commencement of coverage that the terms of the policy are governed by statutes, and are subject to amendment at any time by a change in the law. The repeal of I.C. §72-915 then would be automatically incorporated into the policy, and no impairment of contract would exist.

> cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation.

National R.R., 470 U.S. at 465-67.

Here, the Idaho Legislature opted to simply abandon any policy that mandated a particular dividend methodology by repealing the statute that a) provided no guarantee of dividends and b) according to the Farber Court provided the only basis to claim a particular dividend methodology.

In short, the SIF policy and the SIF statutes have promised nothing that Dairy Queen has not received, and Dairy Queen can cite no specific impairment of an express or promised contractual provision; as such, no Contract Clause question is implicated. The District Court's award of summary judgment should be affirmed.

b. There is no vested or expected right to a dividend.

Although Dairy Queen's argument suggests that the dividend methodology under I.C. §72-915 constituted a "material vested right" (Appellants' Brief at 14), at summary judgment, Dairy Queen offered no factual evidence regarding past dividend practices that might give rise to a claim of a "vested" right. It is well established that "an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). As such, Dairy Queen failed to come forward with any evidence of a party making a claim for a "vested" right. In addition, Idaho generally precludes insureds from claiming a "reasonable expectation" of some term not expressly provided for in their

policy of insurance. See generally Ryals v. State Farm Mut. Auto. Ins. Co., 134 Idaho 302, 304, 1 P. 3d 803, 805 (2000). Therefore, Dairy Queen's argument of a "vested right" fails.

Nevertheless, even if this argument is considered, Dairy Queen cannot paint an expected or vested right to a strict pro rata dividend distribution because SIF dividends have not previously been paid that way. See, e.g., Farber, 147 Idaho at 310 (discussing payment methodologies from 1982 to present). Moreover, any change in the interpretation of I.C. §72-915 created by Farber was promptly remedied by the Idaho legislature before remittitur issued. See Southwestern Bell Tel. Co. v. Public Utility Commission of Texas, 615 S.W.2d 947, 956-57 (Texas Civ. App. 1981) (finding that "[i]n determining whether a retroactive statute impairs or destroys vested rights, the most important inquiries are (1) whether the public interest is advanced or retarded, (2) whether the retroactive provision gives effect to or defeats the bona fide intentions or reasonable expectations of affected persons, and (3) whether the statute surprises persons who have long relied on a contrary state of the law.").

In the present case, the SIF, for decades prior to this instant litigation, employed a dividend methodology other than that which this Court mandated in Farber. See Farber, 147 Idaho at 310 (noting testimony that, from 1982 until 2003, "large policyholders were paid a larger percentage dividend than small policyholders," and from 2003 on, the dividend was calculated "by splitting the entire surplus between those few policyholders who paid more than $2,500.00 in annual premiums to the Fund."). The Farber decision then announced an interpretation of I.C. §72-915 that the Legislature itself did not intend for the statute, as borne

out by S.B. 1166a's Statement of Purpose.[9] Indeed, even before the Idaho Supreme Court's Order Denying Petition for Rehearing (May 12, 2009) and subsequent Remittitur (May 27, 2009), the repeal of I.C. §72-915 was put into effect by virtue of the Governor's signature on May 6, 2009.

Thus, even after the initial Farber decision, no expectation in pro rata distribution of declared dividends could reasonably have been contemplated by SIF policyholders given that I.C. §72-915 was repealed even before the Farber appeal was completed before this Court. Thus, here, an SIF policyholder could have only reasonably expected to receive dividends in pro rata fashion after the Farber decision – and even then, the law was immediately changed by the Idaho legislature before remittitur ever issued.

Such analysis is supported by case law addressing similar issues. See Boykin v. Boeing Co., 128 F.3d 1279, 1283 (9th Cir. 1997) (finding that the retroactive application of the Senate Bill did not defeat any reasonable expectation of the plaintiffs in the lawsuit because the employees had not changed their position and the employees could not have a reasonable expectation for a different outcome); In Re Marriage of Giroux, 704 P.2d 160, 162-163 (Wash. App. 1985) (rejecting an argument that the husband in a divorce proceeding had no reasonable expectation that his military pension would not be treated as community property).

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[9] It is also significant to point out that since the major statutory amendments of 1998, the SIF has been squarely under the regulatory authority of the Department of Insurance, and is deemed, for the purposes of regulation, a mutual insurer. See I.C. §72-901. Since 1998, however, the SIF has never been subject to any regulatory action by the Department of Insurance related to its dividend practices.

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

It is well established that "[t]he Contracts Clause provides protection against 'substantial' impairments of the obligation of contract only. A finding of minimal alteration of contractual obligations may end the court's inquiry." 16B Am. Jur. 2d Constitutional Law § 776 (2010).

The overriding purpose of workers' compensation policies issued by the SIF is not to potentially allow a fractional return on paid premiums. Instead, the core, fundamental function and purpose of worker's compensation coverage is to provide unlimited coverage for covered worker injuries (and, under Part 2, additional coverage for covered employer liability in an amount contracted by the policyholder) to its policyholder regardless of the premium size. Thus, the SIF policy provides a policyholder paying $300 a year in premiums the same coverage as a policyholder paying annual premiums of $500,000. The repeal of I.C. §72-915 did not alter, in any way, the coverage for workers' compensation claims. Altering the way the SIF Manager pays out dividends to particular policyholders, then, does not constitute a "substantial" impairment to the parties' contract of insurance.

Moreover, Dairy Queen cannot demonstrate that the repeal effectuated a "substantial impairment" on the insurance polices between the SIF and the policyholders based upon the limitations of their own Amended Complaint. Dairy Queen does not, and cannot, contend that their claims in this action are applicable to all policyholders paying in excess of $2,500 in premiums for the years at issue. In years where SIF elected to not distribute dividends to those policyholders below a certain paid premium level ($2,500, as was the subject of the Farber

action), the dividends declared were, instead, redirected to policyholders of more than $2,500 in premiums. Thus, certain of those larger policyholders received dividends that were larger than what their pro rata share would have been under I.C. §72-915. In fact, Dairy Queen's own complaint seeks to exclude those same certain policyholders from this action. (R. 30-31, ¶15.) Therefore, Dairy Queen's efforts to nullify the repeal of I.C. §72-915 is not predicated on the claim that all policyholders' rights were "impaired" by the repeal, but only that certain policyholders' rights were impaired.

In addition, a review of Idaho authority cited by Dairy Queen discussing impairment of contracts actually highlights the need for a "substantial" impairment, a key element for which Dairy Queen cannot demonstrate in its own case. For example, in Steward v. Nelson, 54 Idaho 437, 32 P.2d 843 (1934), the issue presented to the Court was the impact of two statutes passed by the Idaho legislature that deprived the plaintiff mortgage-holders of the right to foreclose on already agreed-to mortgages after a certain period of time. The Court found that the law effectively obliterated the intent of the mortgage. 32 P.2d at 845 and 847. In the present case, however, as discussed above, there has been no 'substantial' impairment by virtue of the repeal of I.C. §72-915.

Similarly, in Curtis v. Firth, 123 Idaho 598, 850 P.2d 749 (1993), the legislature amended a law, which amendment would effectively eviscerate the right to act on a note secured by a deed of trust. The Court concluded the amendment was not constitutional because the remedies available to note-holders at the time they entered into a note were erased by the amendment. As such, the situations in Steward and Curtis are distinguishable from this case -

the laws in those cases significantly impaired the purpose of existing contracts, where in this case the purpose of the contracts remained untouched.

Apparently recognizing this problem, Dairy Queen instead asserts that the dividend should be considered to be "consideration" for the Policy, and, thus, a substantial impairment. (Appellants' Brief at 14.) There is not a single affidavit from any of the complaining plaintiffs that the Policies were purchased for that reason. In addition, such argument ignores the true "consideration" exchanged by the parties: payment of premium in exchange for unlimited workers' compensation coverage on covered claims.

Dairy Queen goes on to point to the "aggregate amount at issue" as being $24 million, and thus "substantial." First, this argument again ignores the reason for the insurance contracts: workers' compensation coverage. Second, this figure ignores that not all policyholders paying premiums greater than $2,500 are benefited from the arguments Dairy Queen makes in this case because some of them received greater than a pro rata dividend. Third, this figure was offered in testimony in relation to the Farber decision and included issues of potential other similar Farber judgments. Lastly, Dairy Queen did not bring their claim until at least eight months after this legislative hearing and, therefore, this was not a comment solely limited to this case. (R. 188.)

Again ignoring the purpose of the SIF insurance policies and the discretion the SIF Manager has with respect to when to declare a dividend and how much will be declared (Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho at 392, 111 P.3d at 77), Dairy Queen offers a hypothetical impact of the repeal of I.C. §72-915 on Discovery Center. Specifically, Dairy

Queen proposes an unsubstantiated dividend average of 7.6%[10] for the three-year period[11] between July 1, 2004 to June 30, 2007 policy issuances. Using this rate, Dairy Queen yields a three-year total of $18,000.00 for plaintiff Discovery Care's hypothetical dividend upon payment of $238,818.00 in premiums during that period.

Omitted from this calculation, however, is the problem that fundamentally runs to the core as to why the Idaho Legislature repealed I.C. §72-915 – the Discovery Care policy loses money, which requires, in essence, payment by other Idaho policyholders to cover Discovery Care's policy losses. For that period identified by Dairy Queen, Discovery Care paid $238,818.00 in premiums; however, it incurred **$339,802.83** in policy losses. (R. 356.)

The policy rationale behind dividends is not to reward employers that incur more in claims than pay in premiums. In addition, the fundamental crux and purpose of the SIF policy – payment of premium for coverage in amounts potentially in significant excess of that premium

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[10] It is unclear where Dairy Queen derives this figure; it appears, however, that the figures are extracted in the Affidavit of Counsel that Dairy Queen moved to strike during summary judgment (R. 258-59.) The class period Dairy Queen actually claims is defined as "some or all of the Dividend Periods beginning on July 1, 2002 and including all Dividend Periods ending on or before June 30, 2009[.]" (R. 29.) Dairy Queen's average does not include the 3.97% and 4.45% figure for July 1, 2002 to June 30, 2003 and July 1, 2003 to June 30, 2004, respectively (R. 258.) A 3.97% figure for a hypothetical policyholder paying $10,000.00 in the July 1, 2002 to June 30, 2003 period would yield a dividend of $397.00 – hardly an amount that would constitute a "substantial" impairment of a contract.

[11] Dairy Queen's use of a three-year period is also notable for the fact that it appears to deviate from the five-year period other plaintiffs contend is the applicable statute of limitations in actions regarding dividends. Farber et al. v. The Idaho State Insurance Fund, Idaho Supreme Court Docket No. 38140 (pending). While not necessarily at issue on this appeal, SIF certainly contends that, as in the Farber action, a three-year statute of limitation is appropriate for claims under I.C. §72-915, not a five-year. See Hayden Lake, 141 Idaho at 399 & 403-04.

– is not impacted by the repeal. Discovery Care can continue to run significant losses far and above its own paid premium, and, if a policy is in place that covers the claims, it will be provided coverage by the SIF.

Finally, Dairy Queen's citation to City of Hayden, 108 Idaho 467, for the proposition that "a contract price adjustment of 5% could not be considered to be insubstantial" (as compared to Dairy Queen's unsubstantiated 7.6%) fails for a couple of reasons. First, Dairy Queen again ignores the reason for the insurance contracts. Second, Dairy Queen does not accurately reflect the Court's concerns in City of Hayden. What the Court correctly said was that: "We cannot say that the **effect** of a five percent price adjustment would be immaterial." 108 Idaho at 468 (emphasis added). The Court's concern lay not with the 5% itself, but instead the need to petition for rate adjustment, administrative expenses of collecting and remitting the franchise fees, and the potential increase in the price of energy. Id. Dairy Queen suffers no such effect – the repeal changes nothing, and Dairy Queen cannot demonstrate that it received and relied upon a dividend in the manner demanded in past years, such that it would suffer additional ill-effects of a change in the law.

As such, given that the repeal of I.C. §72-915 does not have any impact on the purpose of the SIF's workers' compensation policies, and given that Dairy Queen cannot even contend that all policyholders are impacted by the change in the law (which some policyholders will, in fact, benefit from), Dairy Queen cannot demonstrate the repeal "substantially impaired" their contracts of insurance with the SIF.

3. Post-Threshold Inquiry: The State has a significant and legitimate public purpose behind the repeal of I.C. §72-915.

Even if the threshold showing – a substantial impairment of a contractual relationship – is met, the Court must then inquire "whether 'the State, in justification, [has] a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem,' to guarantee that 'the State is exercising its police power, rather than providing a benefit to special interests.'" RUI, 371 F.3d at 1147. Thus, Diary Queen must demonstrate that there lacked a legitimate public purpose behind the repeal of I.C. §72-915.

The legitimate public purpose behind the repeal of I.C. §72-915 is borne out by the Legislature's Statement of Purpose and Fiscal Note to S.B. 1166a. (R. 245.) There, the Legislature stated the repeal was necessary to offset an adverse decision of the Idaho Supreme Court regarding the interpretation of I.C. §72-915, the need to clarify the law regarding the payment of dividends so that the SIF Manager could operate the SIF as an efficient insurance company, and to permit the SIF to pay dividends as its competitors do. (Id.) In turn, the repeal's Fiscal Note emphasized the financial uncertainly faced by SIF in light of the Court's ruling and the potential risks facing policyholders and the SIF as a result of the Supreme Court's interpretation of I.C. §72-915. (Id.)

Critically, the very requirement of workers' compensation is, itself, an express exercise of the police power of the State:

> DECLARATION OF POLICE POWER. The common law system governing the remedy of workmen against employers for injuries received and occupational diseases contracted in industrial and public work is inconsistent with modern industrial conditions. The welfare of the state depends upon its industries and

> even more upon the welfare of its wageworkers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as is in this law provided.

I.C. §72-201. In turn, the SIF was created "for the purpose of insuring employers against liability for compensation under this worker's compensation law . . . and of securing to the persons entitled thereto the compensation provided by said laws." I.C. §72-901(1). The Board of the SIF is instructed to "direct the policies and operations of the state insurance fund to assure that [it] is run as an efficient insurance company, remains actuarially sound and **maintains the public purposes for which [it] was created**." I.C. §72-901(3) (emphasis added); Board of County Com'rs of Twin Falls County v. Idaho Health Facilities Authority, 96 Idaho 498, 502, 531 P.2d 588, 592 (1974) (stating that "no entity created by the state can engage in activities that do not have primarily a public, rather than a private purpose, nor can it finance or aid any such activity.").

SIF's public purpose is also borne out in statutory operational aspects not imposed on private insurers. For example, public corporations are required to first attempt to insure through the SIF, unless declined as a matter of risk or if they opt to self-insure. I.C. §72-928(a); City of Boise v. Industrial Comm'n, 129 Idaho 906, 935 P.2d 169 (1997). Additionally, the SIF is also statutorily required to administer workers' compensation claims for the Idaho National Guard, but is forbidden from collecting premiums or otherwise charging for such administration – in

effect, serving as the Idaho National Guard's third-party administrator for free. I.C. §72-928(b). Finally, the SIF Board is comprised of individuals appointed by the Governor, two of whom are required to be sitting legislators. I.C. §72-901(2).

Thus, the significant and legitimate public purpose behind the repeal of I.C. §72-915 is clear. The Farber ruling conflicted with years of dividend practices by the SIF and 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." (R. 245 (Statement of Purpose); accord, I.C. §72-901(3) (stating "[i]t shall be the duty of the board of directors to direct the policies and operation of the state insurance fund to assure that the state insurance fund is run as an efficient insurance company, remains actuarially sound and maintains the public purposes for which the state insurance fund was created.").

As a result, applying the new interpretation of I.C. §72-915 from Farber "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." (Id.) This is especially critical in light of the absence of the "safety net" for policyholders afforded by the Idaho Insurance Guaranty Association, which SIF is forbidden from being a member of (I.C. §72-901(4)),[12] as well as the potential risk of direct financial impact to public

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[12] In brief, the Idaho Insurance Guaranty Association (I.C. §41-3601 et seq.) provides for payment of certain claims should a private insurer become insolvent.

coffers as stated in the repeal's Fiscal Note. (R. 245 – "that number could exceed $5,000,000 annually.")

Further, the Farber interpretation of I.C. §72-915 would have required SIF to operate differently (and more inefficiently) than its competition, impairing its ability to compete, a point also emphasized by the Legislature. (R. 245, Statement of Purpose – "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.")

In doing so, the Legislature made clear that its intent was to allow the SIF – the largest workers' compensation carrier in the State of Idaho – to be able to compete with private insurers that were not under the constraints of dividend requirements defined by the Farber court in analyzing I.C. §72-915.[13] Indeed, the policy underlying the grant of discretion to the SIF Manager to decline to issue dividends to policies that require loss payments exceeding billed premiums is appropriate, so as to avoid windfalls to policies that drain premium dollars from other Idaho policyholders.[14][15] See, e.g., S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885,

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[13] Certainly, in 1998, the Idaho Legislature intended to place the SIF on equal footing with private insurers: "Finally, in the 1998 amendments to the SIF's statutes, I.C. §72-901(4) was added to make it clear the SIF is subject to, and must comply with, the provisions of the Idaho insurance code. That provision also states '[f]or purposes of regulation, the state insurance fund shall be deemed to be a mutual insurer.'" Kelso, 134 Idaho at 134.

[14] Incredibly, Dairy Queen's counsel even acknowledged, at committee hearing on the repeal bill, that SIF could decline to pay dividends based on losses: "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." (R. 188-89.)

895 (9th Cir. 2003) (providing that "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.").[16] Public policy clearly favors not rewarding employers that lose more than they pay, and further favors not issuing additional dividend payments for past years, which amounts are patently in excess of the dividends that SIF has previously determined to be "safely and properly divided."

Thus, even if the repeal of I.C. §72-915 constituted a substantial impairment on the SIF policy with its policyholder, the Legislature had a legitimate public purpose behind the repeal,

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[15] There would also obviously be a strong public policy discouraging the payment of dividends to employers that criminally endanger their employees. See, e.g., Dominguez v. Evergreen Resources, Inc., 142 Idaho 7, 10, 121 P.3d 938, 941 (2005)(injured worker's compensation claim benefits paid by State Insurance Fund; employer sentenced to 17 years on "federal charges of improper disposal of hazardous waste knowing that his actions placed others in imminent danger of death or serious bodily injury, as well as making material misstatements relating to a confined space entry permit he falsely claimed was prepared prior to Dominguez entering the steel tank.").

[16] On reply, Dairy Queen may attempt to assert that S. Cal. requires burden-shifting; however, as explained in SIF's summary judgment reply briefing (R. 287-90), this does not occur in this action, as the State is not the contracting party, nor can Dairy Queen demonstrate a substantial impairment of contract. See, e.g., In re Seltzer, 104 F.3d 234, 236 (9th Cir. 1996)(explaining that "[t]he burden is placed on the party asserting the benefit of the statute only when that party is the state.").

as demonstrated by its Statement of Purpose, Fiscal Note, its statutory authority over the SIF, and its exercise of police power in the realm of workers' compensation insurance.[17]

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

Again assuming *arguendo* that the Legislature caused a substantial impairment of a contractual right, not only is Diary Queen unable to show that the Legislature lacked a significant public purpose in repealing I.C. §72-915, they are unable to show that any adjustment of the rights and responsibilities of the contracting parties is not based upon reasonable conditions and is not of a character appropriate to the public purpose. This critically undercuts Dairy Queen's challenge because even were this Court to reach this stage of the analysis, Dairy Queen has 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 (holding that "[u]nless the State itself is a contracting party, ... '[a]s is customary in reviewing economic and social

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[17] It is for these reasons that, even were this Court to diverge from the modern Contract Clause analysis, and instead apply some other unique test fashioned solely from Idaho law, as Dairy Queen demands, Idaho law obviously recognizes a police power/public welfare exception to the Contract Clause, as discussed above. See, e.g., Agricultural Products Corp., 98 Idaho at 29 ("public interest"); City of Hayden, 108 Idaho at 469 ("police power regulations"); Bunker Hill Co. v. Washington Water Power Co., 98 Idaho 249, 253, 561 P.2d 391, 395 (1977) ("police power" and "public interest"); Curr, 124 Idaho at 691 ("interest of public welfare") The very nature of Idaho's workers' compensation law, and the public purposes for which SIF serves, amply demonstrate that the retroactive repeal of I.C. §72-915 falls squarely within just such an exception.

regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.').

The repeal of I.C. §72-915 is a narrow repeal, only impacting a discretionary dividend that is merely incidental to the core function of SIF's policies. In addition, the repeal has no impact on the express terms of the policies, and the right to a dividend has not been abolished altogether. The law has merely been changed to conform with the methodology for calculating dividends that the Manager has used for years.

Finally, any adjustment is of a character appropriate to the public purpose behind the repeal. As noted by the Legislature's Fiscal Note, the cost of reading the repeal as unconstitutional could drain upwards of $5,000,000 from the public coffers. By contrast, the Manager's current method of calculating dividends results in the SIF remaining competitive in the insurance environment and able to offer workers' compensation coverage to Idaho employers at the lowest premium rate. In short, Dairy Queen cannot show that any adjustment to the rights of the parties is not based upon reasonable conditions or that it is inappropriate to the character of the public purpose behind the repeal.

G. The repeal was effective May 6, 2009, and the District Court's summary judgment ruling should be affirmed.

In the District Court's Order of December 28, 2010 ("Order"), the District Court expressly ruled that "IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is GRANTED in all respects[.]" (R. 358.) SIF's summary judgment expressly argued that the emergency repeal was effective as of May 6, 2009, months before Dairy

Queen's action was initiated; as a result, and in conjunction with the retroactive nature of the repeal, Diary Queen's claims were barred. (R. Adden., Item #2, pp. 15-17.)

Dairy Queen expressly admits that the repeal bars claims arising after the repeal: "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)." (Appellants' Brief at 3.) Nevertheless, Dairy Queen then asserts that the effective date of the appeal "was not directly raised for determination by District Court" (contrary to SIF's briefing, cited above), and was "mooted" by the District Court's ruling on the constitutionality of the retroactive effect of the repeal. (Appellants' Brief at 3, n.2.)

To the contrary, it was addressed on summary judgment by SIF, both in briefing (R. Adden., Item #2, pp. 15-17) and at argument (Tr. 39:4-6.) The District Court offered no qualifiers in its ruling, oral or written, that the question of the effective date was "moot" as a result of the ruling on the constitution question. To the contrary, SIF's motion for summary judgment was granted "in all respects," to include the question of the effective date.

Dairy Queen then obliquely argues in a footnote that "there appears to be no basis in fact or law to support the declaration of an emergency" (Appellants' Brief at 3, n.2), but disregards that the Legislature is afforded great discretion in declaring emergency legislation. This point was discussed at length by this Court in evaluating the propriety of the Legislature's emergency repeal of a law created by voter initiative. Gibbons v. Cenarrusa, 140 Idaho 316, 320-21, 92 P.3d 1063, 1067-68 (2002). In Gibbons, the Court stated it would not interfere with the

legislative process and that the Legislature's decision to declare an emergency is exclusively within the legislature's authority and will not be second-guessed by the judiciary. Id.

Thus, this Court should reject Dairy Queen's attempt to divide the District Court's ruling for future piecemeal litigation and follow the precedent established in Gibbons to leave the validity of declaring an act an emergency to the legislature.

H. Dairy Queen is not permitted to "reserve" issues on appeal nor conduct appeal-by-ambush.

Finally, in arguing that "[f]ederal decisional law . . . is not relevant," (Appellants' Brief at 12), Dairy Queen states in a footnote that it does not intend to waive the right to present a number of arguments:

> 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 on *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*.

(Appellants' Brief at 12, n.4.) No further argument or explanation is made on any of these points. However, in its "Issues Presented Upon Appeal," Dairy Queen only identifies the following issues, both related to the question of constitutionality under the Idaho Constitution:

> 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?

(Appellants' Brief at 10.) By rule, Appellants' Brief should fairly set forth all issues on appeal:

> **Issues Presented on Appeal**: A list of the issues presented on appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the issues should be short and concise, and should not be repetitious. The issues shall fairly state the issues presented for review. The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.

(I.A.R. 35(a) (4)). Neither of the cited issues address, nor fairly comprise, any contention that the District Court made erroneous factual determinations or errantly relied upon incorrect case law in analyzing the federal approach to the Contract Clause. Indeed, the remainder of Appellants' Brief is devoid of any identification of what facts were "erroneous and supported," and does not discuss or even mention RUI or National R.R. at any other place within Appellants' Brief, leaving this Court and SIF to only speculate as to what complaints Dairy Queen has on those items identified in the footnote.

Dairy Queen's attempt to reserve argument on unidentified issues apparently until reply briefing or oral argument is not allowed. Rhead v. Hartford Ins. Co., 135 Idaho 446, 452, 19 P.3d 760, 766 (2001)(holding, in review of summary judgment decision including free review

of district court's conclusions of law, that "[t]he Rheads failed to raise the issues of breach of contract and bad faith in their initial brief. The Court will not consider those issues.").

This Court and the SIF should not be required to speculate as to the specific issues Dairy Queen intends to raise on appeal, nor should Dairy Queen be afforded the tactical advantage of an appeal-by-ambush by briefing several issues in reply briefing after making only the vaguest of reservations in its brief-in-chief.

Accordingly, Dairy Queen has waived all issues not otherwise identified and argued in its brief-in-chief, including, in particular, any that may relate to the vague categories identified in Footnote 4 on page 12 of Appellants' Brief.

VII. CONCLUSION

For the reasons stated above, the December 28, 2010 decision of the District Court granting summary judgment to SIF, and, in turn, denying Dairy Queen's motion for partial summary judgment, should be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of September, 2011.

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CERTIFICATE OF SERVICE

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

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