ATTORNEY GENERAL OPINION NO. 00-1

To: The Honorable Bruce Newcomb
Speaker, Idaho House of Representatives
P.O. Box 757
Burley, ID 83318

Per Request for Attorney General's Opinion

QUESTION PRESENTED

You have requested an opinion as to whether Idaho's tiered premium tax statutes violate: (a) the Commerce Clause of the United States Constitution; (b) the Equal Protection Clauses of the United States and Idaho Constitutions; or (c) the rights to substantive due process under the United States Constitution and the Uniformity Clause of the Idaho Constitution.

SHORT ANSWER

None of the premium tax statutes implicated, Idaho Code §§ 41-340, 41-402 and 41-403, violates Art. I, § 8 of the United States Constitution, the Commerce Clause, as that provision does not apply to the regulation and taxation of insurance.

Idaho's general base rate statute, Idaho Code § 41-402, does not violate the Equal Protection Clauses (U.S. Constitution amend. 14, § 1, and Idaho Constitution art. 1, § 2); the Due Process Clause, amend. 14, § 1 of the United States Constitution; or the Uniformity Clause, art. 7, § 5 of the Idaho Constitution. Similarly, Idaho's retaliatory premium tax statute, Idaho Code § 41-340, would likely withstand a constitutional challenge under the equal protection clauses, substantive due process, or the uniformity clause.

It is unclear whether Idaho's reduced rate for Idaho investments statute (hereinafter reduced rate or reduced tax statute), Idaho Code § 41-403, standing alone, or its cumulative effect with the retaliatory tax statute, Idaho Code § 41-340, violates the equal protection provisions of the United States and Idaho Constitutions, notwithstanding sound arguments to the contrary. A similar conclusion applies regarding any potential challenge based on the uniformity clause or substantive due process. Although no cases are directly on point, authority from various courts can be used to support arguments on either side. Ultimately, only the courts can establish certainty regarding these determinations.

ANALYSIS

Your questions arise out of the recent litigation brought by the American Trucking Associations, Inc. in the Fourth Judicial District (American Trucking Associations, Inc. v. Idaho Transportation Department, CV OC 9700724D), which resulted in a settlement where the state agreed to pay a significant sum of money. The limited commodity use fee at issue in the trucking case, Idaho Code § 49-434(9), was struck down on Commerce Clause grounds. You've asked us to review the premium tax statutes in light of the recent successful challenge in the trucking case.

1. Description of Premium Tax Statutes

The general base rate of premium tax is set forth in Idaho Code § 41-402(2). This section provides that the current base premium tax rate is 2.75% (except for title insurance companies, whose rate is 1.5%). This statute applies equally to all insurers within the respective lines of business.

Insurers can qualify for a reduced tax rate of 1.4%, rather than the applicable higher rate under Idaho Code § 41-402(2), upon showing that they have 25% of their total assets (or 25% of total required reserves for life insurers) invested in specified Idaho investments. Idaho Code § 41-403. As originally enacted in 1961, the reduced rate for Idaho investments was available only to domestic insurers. In 1983, however, Idaho Code § 41-403 was amended by H.B. 198 to change the applicability of the section from "any domestic insurer" to "any insurer." According to the committee minutes and the statement of purpose for that bill, the change was intended to encourage foreign insurers to invest in Idaho. Idaho Code § 41-403 currently reads as follows:

> Provided that it shall comply with rules and standards duly promulgated by the director of insurance for the purposes of assuring the establishment and maintenance in this state of services and facilities consistent with the nature and extent of its operations, any insurer, other than a life insurance company, having at all times throughout the year with respect to which the tax is payable twenty-five percent (25%) or more of its assets invested in the investments set forth below, shall, with respect to premiums on which taxes are to be computed under section 41-402, Idaho Code, compute and pay such tax at the rate of one and four-tenths percent (1.4%) instead of at any higher rate provided for under section 41-402, Idaho Code; and provided further, any life insurance company, in order to qualify for a tax rate of one and four-tenths percent (1.4%) instead of any higher rate provided for under section 41-402, Idaho Code, shall maintain throughout the year with respect to which tax is payable at least twenty-five percent (25%) of the reserve required under section 41-706(4), Idaho Code, invested in the designated investments set forth below:

> (1) Bonds or warrants of this state, or of any county, city or incorporated town or district within this state authorized by law to be issued; or
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> (2) Taxable real estate within this state; or
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> (3) First mortgages upon improved, unencumbered real estate situated within this state; or
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> (4) Stocks or bonds of corporations organized under the laws of, or maintaining their home office and principal administrative records in this state if such stocks or bonds are lawful investments of the insurer under chapter 7 (investments) of this code; or
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> (5) Bonds authorized by law to be issued against the revenues derived from the operation in this state of domestic water and sewage systems or off-street parking facilities; or
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> (6) Time deposits, or other deposits for interest income purposes, in any Idaho branch of any bank, or trust company, or savings and loan association, or any other legally organized and approved financial institution with one (1) or more branches in this state and insured by any instrumentality of the United States government.

Between 1985 and 1987, Idaho Code § 41-403 allowed non-life companies to qualify for the reduced rate through one of two alternatives. During this time, in addition to the current 25% of admitted assets basis, non-life companies that had 75% of their total premiums written in Idaho invested in Idaho assets could also qualify for the reduced rate. Life companies could qualify for the reduced rate during that time by investing in Idaho assets 75% of the required reserves for Idaho-only business, as opposed to the current measure, which is 25% of all required reserves.

Idaho Code § 41-340 imposes a “retaliatory tax” (as well as other retaliatory provisions) on foreign insurers. This section essentially provides that if an Idaho insurer would have to pay a higher rate of tax under the laws of a foreign company’s state of domicile than under Idaho’s law, then the foreign company will be taxed at that higher rate. In other words, the Idaho Department of Insurance compares Idaho’s rate with the rate Idaho companies would have to pay in the foreign company’s home state, and then the department taxes the foreign company at the higher of these two rates. Idaho Code § 41-340 provides in relevant part:

> (1) The purpose of this section is to aid in the protection of insurers formed under the laws of Idaho and transacting insurance in other states or countries against discriminatory or onerous requirements under the laws of such states or countries or the administration thereof.
>
> (2) When by or pursuant to the laws of any other state or foreign country or province any taxes in the aggregate, are or would be imposed upon Idaho insurers, or upon the agents or representatives of such insurers, which are in excess of such taxes in the aggregate, directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this state, so long as such laws of such other state or country continue in force or are so applied, the same taxes in the aggregate, shall be imposed by the director upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in Idaho. Any tax imposed by any city, county, or other political subdivision or agency of such other state or country on Idaho insurers or their agents or representatives shall be deemed to be imposed by such state or country within the meaning of this section.

In 1985, the reduced rate statute was amended to exempt foreign insurers with qualifying Idaho investments from the effects of the retaliatory tax. In 1987, the legislature removed this exemption. Currently, a foreign insurer qualifying for the reduced tax based on Idaho investments is still subject to the retaliatory tax. In other words, if the reduced tax rate is lower than the rate that a similarly situated Idaho insurer would pay in the foreign insurer's state of domicile, then the foreign insurer is nevertheless taxed in Idaho at the higher rate imposed by its home state, even if it satisfies the requirements of the reduced rate statute.

The reduced tax and retaliatory tax statutes serve different purposes. The reduced rate provision appears to be aimed at encouraging investment in Idaho (although there are many other reasons that may support the statute, *e.g.*, increased regulatory control and better protection of consumers), while the retaliatory tax is intended to deter foreign states from imposing high rates of tax on Idaho companies. Excluding title insurance and in general terms, four states currently impose rates lower than Idaho's reduced rate, approximately 35 states impose rates lower than Idaho's regular rate. The reduced rate provision might benefit insurers from these states.

Idaho's base premium tax rate statute is constitutional. Similarly, the retaliatory tax statute, standing alone, is likely constitutional. The primary constitutionality questions are: (a) whether the reduced rate statute is unfairly discriminatory, denies foreign insurers substantive due process, or violates the Idaho uniformity clause because it requires that foreign insurers invest an unreasonable amount of their assets in specified

Idaho investments, and (b) whether the reduced rate and retaliatory rate sections, when taken together, result in unfair discrimination against foreign insurers, constitute a denial of substantive due process, or violate the uniformity provision of the Idaho Constitution.

2. Constitutional Standards

A. U.S. Const. Art. I, § 8—Commerce Clause

In Western & Southern Life Insurance Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981), the Supreme Court held that the Commerce Clause does not apply to the authority of states to regulate and tax the business of insurance based on the McCarran-Ferguson Act (codified at 15 U.S.C. §§ 1011 – 1015), which gives the states exclusive authority over the regulation of insurance.[1] Because the Commerce Clause is inapplicable to the business of insurance, and the Privileges and Immunities Clause does not apply to corporations, "[o]nly the Equal Protection Clause remains as a possible ground for invalidation" of Idaho's premium tax statutes under the United States Constitution. *See* Western & Southern Life Insurance Co. v. State Bd. of Equalization of Cal., 451 U.S. at 656, 101 S. Ct. at 2077.

B. U.S. Const. Amend. 14, § 1; Idaho Const. Art. 1, § 2—Equal Protection

Regarding the standard to be applied in any challenge to Idaho's premium tax, Idaho courts have held: "While a legislative act is presumed constitutional [citation omitted], whether it is reasonable and not arbitrary is a question of law for determination by the courts." Sterling H. Nelson & Sons, Inc. v. Bender, 95 Idaho 813, 815, 520 P.2d 860 (1974). "It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." Olsen v. J.A. Freeman Co., 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). Therefore, the burden to overcome the presumptive constitutionality of any statute rests with any challenger.

The Equal Protection Clause provides: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. 14, § 1. When analyzing claims based on equal protection, courts must: (1) identify the challenged classification and (2) determine the applicable standard. The Idaho Supreme Court recently summarized the applicable standards for an equal protection challenge:

> For equal protection challenges to statutes based on the Fourteenth Amendment, three levels of scrutiny are used. These are strict scrutiny, intermediate scrutiny and the rational basis tests. The analysis of equal protection claims under the Idaho Constitution is very similar. "Three

> standards of equal protection analysis have been recognized in Idaho: strict scrutiny, means-focus, and rational basis."

Meisner v. Potlatch Corp., 131 Idaho 258, 261, 954 P.2d 676, 679 (1998) (citations omitted). The strict scrutiny test is applied to classifications involving a fundamental right or suspect class. *Id.* The intermediate scrutiny test has been applied by the United States Supreme Court only to classifications based on gender or illegitimacy. *Id.* The Meisner court further stated:

> The means-focus test, while similar to the intermediate scrutiny test, has not been limited by Idaho courts to cases involving gender and illegitimacy; rather it has been applied to cases "where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute . . . ." This Court, however, "has limited review under [the means-focus] standard to statutes of a blatantly discriminatory nature." Economic and social welfare [laws], such as the workers compensation statutes, are not subject to the means-focus test unless they create a suspect or invidiously discriminatory classification or involve a fundamental right.

Meisner v. Potlatch Corp., 131 Idaho at 261-62, 954 P.2d at 679-80 (citations omitted); *see also* Packard v. Joint School Dist. No. 171, 104 Idaho 604, 608, 661 P.2d 770, 774 (Ct.App. 1983) (asserting that "rational basis" test incorporates a "means-focus" analysis, and thus the two tests are not conceptually different). None of the tests by strict scrutiny test, intermediate scrutiny or means-focus would apply in review of Idaho's premium tax statutes; therefore the proper standard is the rational basis test.

The Idaho Supreme Court has stated, "a classification for tax purposes is reviewed on the rational basis test." Bon Appetit Gourmet Foods, Inc. v. State Dept. of Employment, 117 Idaho 1002, 1004, 793 P.2d 675, 677 (1989), *addendum on rehearing* (1990); *accord* V-1 Oil Company v. Idaho State Tax Comm'n, Opinion No. 75 (Aug. 1, 2000). Similarly, the United States Supreme Court has stated that under the Equal Protection Clause, a state may not impose "more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between the foreign and domestic corporations bears a rational relation to a legitimate state purpose." Western & Southern Life Insurance Co. v. State Bd. of Equalization of Cal., 451 U.S. at 668, 101 S. Ct. at 2083. The Court stated that two questions must be answered in determining whether any challenged classification is rationally related to achievement of a legitimate state purpose: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Id.* "In the equal protection context, however, if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish." Metropolitan Life Insurance Company v. Ward, 470 U.S. 869, 881, 105 S. Ct. 1676, 1683, 84 L. Ed. 2d 751 (1985). As discussed below, any substantive due process argument is likely subsumed in an equal protection analysis.

The statute involved in Bon Appetit Gourmet Foods, Inc. excluded certain types of persons from the independent contractor exemption to the unemployment tax. In a 3-2 decision, the court in that case held that the statute was unconstitutional. The court rested its decision on the lack of any evidence in the record supporting a rational reason for the classification. The issue of constitutionality was not addressed below, as this was an appeal from the industrial commission. The majority indicated that no rational reason was presented by the state, and the court was unable to proffer any rational reason. The dissenting opinions criticized the majority of the court for what was, in their view, effectively ignoring the presumption of constitutionality and requiring an affirmative showing of constitutionality, rather than requiring the challenger to demonstrate unconstitutionality. The court held that the statute violated the Equal Protection Clauses of the United States and Idaho constitutions on its face, and as applied to Bon Appetit Gourmet Foods, Inc., because no rationale or reasons supported the law. Bon Appetit Gourmet Foods, Inc. v. State Dept. of Employment, 117 Idaho at 1004, 793 P.2d at 677. The court did not articulate any separate standard or analysis for a determination of unconstitutionality "as applied" as opposed to a determination of unconstitutionality apparent within the statute.

When applying the rational basis test, the mere presence of some inequality will not render a statute unconstitutional, i.e., "'[a] statutory discrimination will not be set aside if any statement of facts may be reasonably conceived to justify it.'" Olsen v. J.A. Freeman Co., 117 Idaho at 711, 791 P.2d at 1290 (*quoting* Jones v. State Bd. Of Medicine, 97 Idaho 859, 866, 555 P.2d 399, 406 (1976), *quoting* McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 (1961)); *accord* Meisner v. Potlatch Corp., 131 Idaho at 262, 954 P.2d at 680.

C. U.S. Const. Amend. 14, § 1—Due Process
Idaho Const. Art. 7, § 5—Uniformity Clause

It appears that any challenge based on substantive due process would parallel the required analysis based on an equal protection challenge and not result in a different outcome. The Idaho Court of Appeals characterized substantive due process as "the right to be free from arbitrary deprivations of life, liberty or property." State v. Reed, 107 Idaho 162, 167, 686 P.2d 842, 847 (Ct. App. 1984). In first determining that the challenged law was in the social and economic domain, and thus the deferential standard of review applied in a substantive due process analysis, the court held that the challenged statute requiring motorists to carry liability insurance served a reasonably conceivable and legitimate objective. The court of appeals noted that the principle of equal treatment for similarly situated persons "obviously shares a common nexus with substantive due process." *Id*. The court also stated that the rational basis test for equal protection analysis "is analogous to the deferential test of substantive due process applied to social and economic legislation." State v. Reed, 107 Idaho at 168, 686 P.2d 848. This encompasses the essence of the standard set forth earlier by the Idaho Supreme Court when it held "that the sole standard applicable to the due process provisions of the federal and state constitutions is whether the challenged law bears 'a rational relationship to the preservation and promotion of the public welfare.'" Jones v. State Bd. of Medicine, 97 Idaho at 866, 555 P.2d at 406.

While it is also conceivable that a challenger could also raise the Uniformity Clause, art. 7, § 5 of the Idaho Constitution, as a basis to attack the constitutionality of Idaho's premium tax statutes, the analysis would similarly mirror that of rational basis under an equal protection challenge. The Idaho Supreme Court has stated that although "various standards have been articulated under" the Uniformity Clause and the Equal Protection Clause, "there is little practical distinction between the two." Justus v. Board of Equalization, 101 Idaho 743, 746, 620 P.2d 777, 780 (1980). "A taxing plan offensive to one also violates the other." *Id.*

3. Retaliatory Tax Statute (Idaho Code § 41-340)

Idaho's retaliatory tax, standing alone, likely would withstand a constitutional challenge. Retaliatory premium taxes have a long history and are used in most states. In Western & Southern Life Insurance Co. v. State Bd. of Equalization of Cal., the United States Supreme Court upheld the constitutionality of California's retaliatory premium tax. Like Idaho, California imposed the tax when a foreign company's state of domicile imposed a tax rate higher on California companies than that imposed by California on the foreign company. After dismissing the taxpayer's challenge based on the Commerce Clause pursuant to the McCarran-Ferguson Act, the Court also found that California's retaliatory tax did not violate the Equal Protection Clause of the Fourteenth Amendment. The Court pointed out that the purpose of California's retaliatory tax statute "is not to generate revenue at the expense of out-of-state insurers, but to apply pressure on other States to maintain low taxes on California insurers." Western & Southern Life Insurance Co., 451 U.S. at 669-70, 101 S. Ct. at 2084. The court held that this purpose of promoting domestic industry by deterring barriers to interstate business, was a legitimate state purpose, and California's legislature could rationally have believed the retaliatory tax would promote this purpose.

Other retaliatory tax statutes have withstood constitutional challenge as well. *See* Prudential Ins. Co. of America v. Commissioner of Revenue, 709 N.E.2d 1096 (Mass. 1999) (applying pressure on other states to maintain low taxes on Massachusetts insurers, and thus promote Massachusetts insurers, was a legitimate purpose, and it was "at least debatable" that the operation of the taxing system had a rational relationship to that purpose); Executive Life Insurance Company v. Commonwealth, 606 A.2d 1282 (Pa. 1992) (retaliatory tax statute does not violate Equal Protection Clause of the United States Constitution, nor the Uniformity Clause of the Pennsylvania Constitution); Gallagher v. Motors Insurance Corp., 605 So. 2d 62 (Fla. 1992), *cert. dismissed* 506 U.S. 1074, 113 S. Ct. 1036, 122 L. Ed. 2d 179 (1993) (discussed below); *see also* American Southern v. State Dept. of Revenue, 674 So. 2d 810 (Fla. Dist. Ct. App. 1996) (upholding Florida's construction and application of the term "similar insurer" within its retaliatory tax statute).

Similar to California's retaliatory tax law at issue in Western & Southern Life Insurance Co., Idaho's retaliatory law is expressly for the purpose of protecting Idaho domiciled insurers "against discriminatory or onerous requirements under the laws of" foreign states or countries or the administration of those laws. Any direct constitutional challenge to the retaliatory tax statute would likely fail. As alluded to earlier, a constitutional challenge to Idaho's premium tax structure would likely focus on the reduced rate statute standing alone or its interplay with, *i.e.*, deference to, the retaliatory tax.

4. Potential Challenges To Reduced Rate Statute (Idaho Code § 41-403)

A. Case Authority

Two years after Idaho's law was changed to make the reduced rate available to all insurers, the Supreme Court decided Metropolitan Life Insurance Company v. Ward, 470 U.S. 869, 105 S. Ct. 1676, 84 L. Ed. 2d 751. At issue in Ward was Alabama's premium tax, which taxed foreign insurance companies at either 3 or 4% (depending on the type of insurance sold) but taxed all domestic companies at 1%. A domestic insurer was defined as a company incorporated and having its principal office in Alabama. Foreign companies could reduce their tax rate by investing prescribed percentages of their worldwide assets in specified Alabama assets and securities, but could never bring their rate down to the level applied to domestic insurers. Domestic insurers were entitled to the 1% rate even if they had no investments in Alabama.

Alabama successfully argued in state court that the disparate premium tax classification was constitutional because it bore a rational relationship to at least two legitimate purposes other than raising revenue: "'(1) encouraging the formation of new insurance companies in Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute.'" Metropolitan Life Insurance Company v. Ward, 470 U.S. at 873, 105 S. Ct. at 1679. On appeal, the insurers stipulated that the statute was reasonably related to the two purposes, so the only issue before the Supreme Court was whether the purposes were legitimate. In a 5-4 decision, the U.S. Supreme Court reversed the state appellate court and remanded the case for further action. Applying the rational basis test, the Supreme Court concluded that neither of the two purposes was legitimate "when furthered by discrimination" and, as a result, the classification violated the Equal Protection Clause.

In light of conclusions by other courts that encouraging formation of new domestic insurers, promoting domestic investment, and similar goals are legitimate state purposes, one cannot help but wonder whether the Ward Court might have concluded that the stated purposes were legitimate, but further that the Alabama statute was not reasonably related thereto, had the parties not stipulated to the existence of a reasonable relationship. *See e.g.* Gallagher v. Motors Ins. Corp., 605 So. 2d 62 (encouraging the formation of new insurance companies was a legitimate state purpose). The Supreme Court's reasoning and conclusion in Ward rested largely on the obvious discriminatory nature of Alabama's tax framework. The Supreme Court distinguished California's retaliatory tax at issue in Western & Southern Life Insurance Co. by noting that Alabama's "domestic preference tax gives the 'home team' an advantage by burdening all foreign corporations seeking to do business within the state, no matter what they or their states do." Metropolitan Life Insurance Company v. Ward, 470 U.S. at 878, 105 S. Ct. at 1682. It seems that, but for the stipulation, the Supreme Court could have reached the same conclusion by alternatively reasoning that the obvious discriminatory means by which Alabama sought to achieve its purposes, which purposes were legitimate, was not "reasonably related" to the state purposes.

In State v. Alabama Municipal Insurance Corporation, 730 So. 2d 107 (Alabama 1998), *rehearing denied* (1999), the Alabama Supreme Court upheld an amended premium taxation system that resulted from the United States Supreme Court's invalidation of the previous statutory framework in Metropolitan Life Insurance Company v. Ward. As discussed above, the United States Supreme Court in Ward held that the prior statutory scheme was an unconstitutional domestic preference because it precluded foreign insurers from achieving parity with domestic insurers and was not dependent on the manner in which Alabama insurers were treated in respective foreign states, as with a retaliatory tax. After Ward, the foreign insurance companies entered into a settlement with the state, whereby the plaintiffs dismissed their action in exchange for the legislature's redesigning the insurance premium tax system. State v. Alabama Municipal Insurance Corporation, 730 So. 2d at 108. The Alabama legislature enacted the Insurance Premium Tax Reform Act of 1993, the constitutionality of which was challenged in this case.

In calculating the appropriate premium tax amount, Alabama's 1993 act provided for an "office credit," which included incremental reductions in an insurer's tax rate for each office it operated within the state, and a "property credit," consisting of incremental reductions in an insurer's tax rate based on the amount of investment in real property the insurer had made within Alabama. The Alabama Supreme Court reversed the trial court and upheld the taxing system, concluding that the "credits" were not unconstitutionally discriminatory.

In concluding that the challenged "credits" did not violate the Equal Protection Clause, the court found that: "The tax credits employed reasonable classifications designed to reach the legitimate legislatively determined goal of encouraging investment in the state and encouraging insurers to employ Alabama citizens and to open offices in rural areas." State v. Alabama Municipal Insurance Corporation, 730 So. 2d at 112. The court found that, in the words of the Western & Southern Life court, whether the challenged tax "credits" are rationally related to these goals is "at least debatable," and that it is reasonable that the legislature would believe that these goals would be promoted by the adoption of the credits. In reaching its decision to uphold the taxing framework, the court made the following findings:

> The statute in question imposes a flat premium tax rate on all insurers, foreign and domestic, without exception. The credits challenged are based on objective, clearly ascertainable criteria. Although we recognize that some companies are economically unable at this time to qualify for the credits, we must also recognize that their inability to qualify is a result of their own business decisions and their own economic performance. . . . [T]he statute does not discriminate [by creating] classes of insurers to be treated differently from other classes. . . . "[A]ny difference of effect that may have arisen from the [statute] [brackets in original] is the result, not of discriminatory treatment, but of the unique financial situation of individual insurance company taxpayers."

State v. Alabama Municipal Insurance Corporation, 730 So. 2d at 111 (quoting John Hancock Mutual Life Ins. Co. v. Commissioner of Revenue, 497 N.W.2d 250, 254 (Minn. 1993) ("Elimination of tax offset option was rationally related to the legitimate state goal of tax simplification [and] any difference of effect that may have arisen from the . . . amendment . . . is the result, not of discriminatory treatment, but of the unique financial situation of individual insurance company taxpayers."). The court applied the rational basis test in reaching its conclusion that the commissioner's application of the statute did not violate the Equal Protection Clause of the Fourteenth Amendment nor the Uniformity Clause of the Minnesota Constitution.[2]

Following the Ward decision, successful challenges of premium tax laws were brought in North Dakota, Michigan, and Alaska. However, unlike Idaho's statute, in each of these cases the law at issue expressly treated foreign and domestic companies differently. For example, in Metropolitan Life v. Commissioner of Department of Insurance, 373 N.W.2d, 399 (N.D. 1985), the North Dakota Supreme Court ruled unconstitutional a law imposing a 2-1/2% premium tax on only foreign insurance companies. The state argued that the law was justified because domestic companies were subject to the state income tax. Evidence was produced, however, showing that the different treatment resulted in foreign companies paying a much higher tax rate than domestic companies. Similar to the conclusion of the Supreme Court in Ward, the court found that none of the purposes advanced by the state in support of the statute, including promotion of the domestic insurance industry and encouragement of capital investment in the state, were legitimate purposes when advanced by discrimination.

In Penn Mutual Life Ins. Co. v. Dept. of Licensing & Regulation, 412 N.W.2d 668 (Mich. Ct. App. 1987), Michigan's premium tax on foreign insurers was ruled to be unconstitutional. Like North Dakota, Michigan imposed a 2 or 3% premium tax on foreign insurers, but not on domestic insurers. Domestic insurers were required to pay a "single business tax." The effect of this tax system was to impose a greater tax burden on foreign insurers. The court found the purpose asserted by the state to be legitimate (increasing the availability of certain types of insurance), but concluded the different treatment afforded foreign companies was not rationally related to achieving the purpose.

Alaska's premium tax statute imposing tax on foreign insurers at double the rate applied to domestic companies was ruled unconstitutional in Principal Mutual Life Insurance Co. v. Division of Insurance, 780 P.2d 1023 (Alaska 1989). The Alaska Supreme Court found that the purposes asserted by the state in support of the higher rate for foreign insurers were either not legitimate, or there was no evidence to support that they were advanced by the state's classification system.

A notable departure from this line of cases is Gallagher v. Motors Ins. Corp. In Gallagher, the Florida Supreme Court upheld a premium tax law that exempted insurance companies that were organized under Florida law, maintained their home offices in Florida, and maintained their records and assets in Florida. The law also granted a 50% reduction in tax to foreign insurers that elected to own and maintain a regional home office in Florida and to keep therein certain records of their activities within the state. The state argued that the purpose of the law was to acquire a greater degree of regulatory control over insurance companies. The trial court found that this was a legitimate state purpose, and further found that "the legislature could have believed" that the different tax treatment would have the effect of causing a company to change its state of domicile and therefore increase the state's ability to regulate such companies. The Florida Supreme Court found the trial court's findings to be supported by competent substantial evidence, and upheld the trial court's ruling that the tax was constitutional.

The Gallagher court noted that although the regulatory goal was not set forth in the statute, the statute incorporated regulatory requirements set forth elsewhere and, "an intent to gain regulatory control was discernible from the statutory scheme itself." The record supported the conclusion that Florida had more control and regulatory influence over a domestic insurer than over a foreign insurer and that Florida would be in a better position to protect the interests of Florida policyholders in the event of an insurer's financial instability if the insurer were domiciled in Florida. The court did not believe that taxing foreign insurers at a higher rate than domestics in order to gain greater regulatory control was the type of discrimination that the Equal Protection Clause was intended to prevent. It went on to say, "[a] rational relationship exists where, as here, it is found that the legislature rationally could have believed that the challenged statutory scheme in fact would promote the asserted legislative objective. Whether the statutory scheme in fact would promote the legislative objective is not dispositive."

B. Analysis of Idaho's Reduced Rate Statute

As discussed above in section 2.B., the reduced rate statute would most likely be reviewed under the rational basis test. Recognizing that a statute is presumed to be constitutional, if the reduced rate is challenged, a court might require the state to show that the tax is rationally related to a legitimate state purpose. The state might point to the following as a legitimate state purpose advanced by the statute: encouraging foreign companies to redomesticate to Idaho, heightening regulatory control over companies by having more assets in Idaho and therefore more security in the case of financial problems, encouraging in-state investment for the general welfare of the state, and encouraging greater service and commitment to Idaho insureds by their insurers by virtue of greater investments and contact with this state.

In making the showing of a rational relationship to a legitimate state purpose, the state should not be limited to the facts considered by a legislative committee or any express purpose. The Supreme Judicial Court of Massachusetts in Prudential Ins. Co. of America v. Commissioner of Revenue, stated that it is irrelevant for constitutional analysis whether a reason for legislation advanced on appeal is the same reason that motivated the legislature. Similarly, the United States Supreme Court has stated that when there is a "plausible" reason for a statute, it is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." United States R.R. Retirement Board v. Fritz, 449 U.S. 166, 178-79, 101 S. Ct. 453, 461, 66 L. Ed. 2d 368 (1980) (*quoting* Fleming v. Nestor, 363 U.S. 603, 612, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435 (1960)). In School Dist. No. 25 v. State Tax Comm'n, 101 Idaho 283, 290, 612 P.2d 126 (1980), where the Idaho Supreme Court reversed the district court and determined that a tax statute was not unconstitutional, the court used different language to express the same conclusion: "Every reasonable presumption must be indulged in favor of the constitutionality of an enactment." The Idaho Supreme Court recently confirmed that: "'A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" V-1 Oil Company v. Idaho State Tax Comm'n, Opinion No. 75 (Aug. 1, 2000) (*quoting* F.C.C. v. Beach Communications, Inc. 508 U.S. 307, 315 (1993)).

Idaho Code § 41-403 affords a reduced tax rate to insurers who invest 25% of their total assets in enumerated Idaho investments. (*See* Idaho Code § 41-403 quoted above).

Accordingly, the classification made by the statute is not based on foreign versus domestic insurers, but rather those insurers that invest the requisite portion of assets in the permissible Idaho investments.

Although a state may enact laws with the purpose and effect of encouraging domestic industry, "a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business." Metropolitan Life Insurance Company v. Ward, 470 U.S. 887, 105 S. Ct. 1681, n.6. Despite this rule, it appears that the majority of courts have concluded that promotion of local economic development and investment, described in a variety of manners, is a legitimate state purpose. The conclusion in Ward to the contrary appears limited to the circumstance where the discriminatory effect is pervasive and blatant. Regarding the determination that there was no legitimate purpose behind the statute, the Ward decision should also be read in light of the fact that the court was hamstrung by the parties' stipulation that the statute was reasonably related to the state's purposes.

A prior version of Idaho's reduced rate tax, though not challenged using the same theories as might be relied upon today, was upheld by the Idaho Supreme Court in Idaho Compensation Co. v. Hubbard, 70 Idaho 59, 211 P.2d 413 (1949). In Idaho Compensation Co., the insurer, an Idaho domestic company, had been paying premium tax at the rate of 1%, which amount of tax had been accepted by the commissioner for several years. For tax years 1945 and 1946, the Idaho Commissioner[3] of Insurance required, and Idaho Compensation Co. paid tax at the rate of 3%. The company brought an action for declaratory judgment construing the applicable statute, Idaho Code section 41-808 then in effect, and for a refund of the taxes paid in excess of 1%. The commissioner took the position that the complaint, even if true, failed to state a claim for relief. The trial court found in favor of the company, and the commissioner appealed. On appeal, the Idaho Supreme Court reversed the trial court and ruled in favor of the commissioner, confirming his imposition of the higher tax rate.

In so ruling, the court quoted from the applicable code section, 41-808:

> Any insurance company transacting business in this state having more than fifty per cent of its assets invested in bonds or warrants of this state... or in taxable property within this state, or in first mortgages upon improved, unencumbered real estate within this state, shall pay a tax of one per cent upon the premiums collected in this state on risks located in this state, in lieu of the tax provided in the preceding sections.

Idaho Compensation Co., 70 Idaho at 61. This quoted section is a precursor to the current reduced rate statute, Idaho Code § 41-403.

The court in Idaho Compensation Co. concluded that the company did not have more than 50% of its assets invested in qualifying investments. The bulk of the company's investments was in U.S. bonds that, in the commissioner's opinion, did not qualify as a permissible investment for purposes of obtaining the reduced 1% tax rate. One of the company's contentions was that the statute unfairly discriminated against, not the insurer, but, rather, U.S. bonds. The company asserted that the statute's failure to recognize U.S. bonds as a permissible investment for the reduced tax rate amounted to an effective indirect tax against the bonds. The Idaho Supreme Court held that, "the classifications made [by not including U.S. bonds within the scope of recognized investments for purposes of satisfying the applicable version of the reduced rate tax] were clearly a reasonable exercise of legislative judgment and discretion . . . ." Idaho Compensation Co., 70 Idaho at 64, 211 P.2d at 416.

This holding in Idaho Compensation Co. may not be enough to defeat a constitutional challenge. First and foremost, the issue that might be presented in the future, a potential challenge based on unconstitutional discrimination against foreign insurers in favor of domestics, was not presented to the court. The Idaho Supreme Court has long held the view that it will not address issues not raised by the parties or argued. Taylor v. Browning, 129 Idaho 483, 927 P.2d 873 (1996). Second, the statutory language and the realities of the market are different today, fifty years later. Third, the courts have continued to refine the standards and analyses based on intervening case law. Therefore, it would be unwise to conclude that the reduced rate statute will withstand constitutional challenge simply based on Idaho Compensation Co., despite the fact that the case can only help support a position defending the constitutionality of the statute.

Because Idaho's reduced rate statute does not expressly differentiate between foreign and domestic insurers, it probably would not be found unconstitutional pursuant to Metropolitan Life Ins. Co. v. Ward. However, at the present time, only domestic insurers are taking advantage of the reduced rate, although at least one foreign insurer has qualified since 1988. As a result, it is possible a court might conclude that, although neutral on its face, the effect of the law is to provide an improper advantage to domestic insurers.

Though the language of the statute may pass constitutional muster, there is still a risk that a court might determine that the effect of the statute is not rationally related to achieving the stated goal. Insurers may argue that the proportion of assets/reserves required to be invested in Idaho to obtain the reduced rate, 25% of the total, is unreasonable, and this fact indicates an improper discriminatory motive or negates any rational relation between the reduced tax statute and the state purpose(s). Foreign insurers could argue that this level of investment is impractical or essentially impossible, especially given the relative size of Idaho compared to the economies of large states such as California, Florida, New York and Texas. While no recent reported premium tax cases have been located which specifically address the issue of a constitutional challenge to a reduced rate tax statute based on investments as applied, there is some authority to support a claim of unconstitutionality.

The United States Supreme Court held in Bethlehem Motors Corp. v. Flynt, 256 U.S. 421, 41 S. Ct. 571, 65 L. Ed. 1029 (1921), that a licensing tax statute that imposed only 20% of the regular tax amount upon companies that had submitted a sworn statement to the effect that three-fourths of the manufacturer's entire assets were invested in bonds or property of North Carolina was unconstitutional. The local sheriffs levied on vehicles owned by non-resident vehicle manufacturers in order to satisfy their full-rate tax obligations. The vehicle manufacturers sought a preliminary injunction to bar the sale, which injunction was initially granted, and then dissolved. The North Carolina Supreme Court affirmed the order dissolving the restraining order "thereby sustaining the license tax and the levy upon the automobiles made to enforce it." The Supreme Court noted that the act did not facially delineate between foreign and domestic manufacturers; however, the challenging manufacturers asserted that the provision was so onerous as to constitute illegal discrimination because only domestic manufacturers could qualify. The state argued that a foreign manufacturer could satisfy the condition just as easily as a domestic company. In reply, the Supreme Court stated:

> To this we cannot assent. The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the state; it cannot be satisfied by a nonresident manufacturer, his factory necessarily being in another state, some of its products only at a given time being within the state. Therefore, there is a real discrimination, and an offense against the Fourteenth Amendment, if we assume that the corporations are within the state.

Bethlehem Motors Corp. v. Flynt, 256 U.S. at 426, 41 S. Ct. at 573.

Insurers may claim that the effect of the reduced rate law is not rationally related to achieving goals or purposes of the statute. Insurers challenging the reduced rate statute might assert that the purpose is revenue shifting from qualifying domestic companies to foreign companies.

Large insurers might argue that the reduced rate tax unfairly discriminates against them because it may be more difficult to invest 25% of their large amount of assets in Idaho, as compared to smaller insurers. The inverse of this argument was made in State v. Alabama Municipal Insurance Corporation. In that case, the trial court found that the tax credits unfairly discriminated against smaller insurers because the tax credits increased incrementally based on the number of offices and employees located in Alabama. The Alabama Supreme Court rejected this argument, however, noting that an insurer's inability to take advantage of the credit "is a result of [its] own business decisions and [its] own economic performance." 730 So. 2d at 111 (*see* full quote above). As noted in footnote 2 above and discussed previously, however, there is other authority to support a potential argument by insurers that the effect of the statute is discriminatory.

For these reasons, foreign insurers might argue that the statute, though not facially discriminatory, is impermissibly discriminatory in its effect. It is impossible to give any meaningful prediction as to how a given court will decide the issue of whether the statute is unconstitutional in its effect.

C. Potential Challenge To Combined Effect of Reduced Rate Statute & Retaliatory Tax Statute

Foreign insurers may assert that the fact that the retaliatory tax statute will still be applied, even if a foreign insurer meets the criteria of the reduced rate statute, further establishes either the illegitimacy of the purpose of the reduced rate statute, or the lack of any rational relationship between the classification or distinction made by the statute and the purpose(s). The argument might be that given the retaliatory tax, foreign companies' motivation to invest in Idaho would be stymied by the effective superiority of the retaliatory tax. If a given foreign insurer's domiciliary state imposes higher taxes than the reduced rate, that foreign insurer will not receive the benefit of the reduced rate statute, even if the insurer satisfies the prerequisites thereof. This fact, a challenger might argue, shows that the reduced rate tax is not rationally related to achieving any legitimate purpose(s), or, alternatively, the purpose(s) is not legitimate because it constitutes in reality the improper shifting of a revenue raising burden to foreign companies. It might also be argued that the statute is not a rational means of encouraging Idaho investment because it only encourages investment by foreign insurers whose home states impose tax rates significantly lower than Idaho's regular rate.

One straightforward response to such an argument is that, presuming both statutes are valid, one of them must control. In effect, the Idaho Legislature has determined that of the two possible adjustments to the base rate, the retaliatory tax is of paramount importance. The fact that the legislature placed a greater weight on the retaliatory tax than on the reduced rate simply evidences the greater importance the legislature placed on promoting fair and equal treatment of Idaho insurers by other states.

In Board of Insurance Comm'rs v. Prudential Fire Insurance Co., 167 S.W.2d 578 (Ct. Civ. App. Tex. 1942), *rehearing denied* (1943), the court affirmed a judgment in favor of the insurer against the insurance regulator for taxes paid under protest. In this case the regulator unsuccessfully argued that the retaliatory tax law effectively trumped the reduced rate law. At that time, Texas imposed a base premium tax rate of 4.05% but imposed a reduced rate of 1.5% upon any insurer investing one-fourth of its entire assets in Texas. Oklahoma did not have a reduced rate; it simply had a flat 4.0% rate. The Oklahoma insurer qualified for the reduced rate in Texas and paid the reduced rate tax computed at 1.5%. However, the Texas regulator determined that Oklahoma charged a higher rate because it would not recognize a reduced rate even if a Texas insurer invested one-fourth of its assets in Oklahoma. Therefore, Texas concluded that application of the retaliatory law required that the Oklahoma insurer pay an additional 2.5% of tax (difference between the 1.5% reduced rate already paid and the 4.0% Oklahoma rate). The Oklahoma insurer paid this under protest, sued for this amount and prevailed in the trial court and on appeal.

While the issue of the constitutionality of the applicable Texas premium tax statutes was never addressed in Board of Insurance Comm'rs v. Prudential Fire Insurance Co., the case is of some use to the analysis. The nature of the court's review was to merely construe how the retaliatory tax statute should be applied. In reaching its conclusion, the court addressed its view of what the purpose of the reduced tax statute was. The court stated:

> This optional provision for investment of assets rather than pay the higher tax is necessarily a finding by the Legislature that it regarded the payment of the 1 ½% on gross receipts plus the investment of 25% of assets in Texas property as being equivalent to the higher rate of 4.05% on gross receipts required of all corporations, domestic or foreign, which do not desire to make the investment in Texas property. To hold otherwise would convict the Legislature of requiring a larger occupation tax of corporations, both foreign and domestic, not making the investment in Texas property than it required of those making the investment. No specific reason is stated in the statute for the right to pay the lower tax, but . . . no doubt the Legislature thought that a compliance with the option to invest assets in Texas property would make this valuable property subject to taxation and that in view of such additional taxation it was but just to reduce their occupation tax. In addition the Legislature no doubt thought that the investment of the assets of insurance companies, both foreign and domestic . . . would help to furnish a large and needed market for such securities . . . .

Board of Insurance Comm'rs v. Prudential Fire Insurance Co., 167 S.W.2d at 579. The court held that because the premium tax law "provides that the payment of the 1 ½% rate on gross receipts plus the investment in Texas property requirement is equivalent to the payment of the higher 4.05% flat rate; and since such flat rate is higher than the 4% flat rate levied by the Oklahoma statute, the provisions of [the] retaliatory tax statute, do not apply." *Id.* at 579-80.

It is clear that the Texas court in Board of Insurance Comm'rs v. Prudential Fire Insurance Co. concluded that the primary reason for the reduced rate was the legislature's view that the lower rate combined with other tax presumably paid on the invested property would constitute an equivalent amount of tax. Despite the fact that the Texas court did not address the constitutionality of the applicable statutes, it should not go unnoticed that the court modified the application of the retaliatory law as calculated in conjunction with the reduced rate tax by concluding that, under the facts presented, the foreign insurer, who had paid out of pocket only the reduced rate taxes, had effectively paid the higher base rate so as to preclude collection of the difference between the reduced rate and the insurer's domestic rate.

In this office's opinion, the most obvious reason for permitting a reduced rate, such as Idaho Code § 41-403, is not to serve as an alternative mechanism to pay the same amount of tax. Achieving such parity would be speculative and likely inexact given the various types of qualifying investments and the fact that the 25% limit is a minimum or floor proportion. Rather, the primary goals seem to be economic stimulation and greater potential regulatory control, or variations thereof.

The lack of an unequivocal conclusion regarding the constitutionality of the effect of Idaho Code § 41-403, as applied in concert with Idaho Code § 41-340, is based on the potential that a court could find practical discrimination, despite the facial neutrality of the reduced rate statute. Since 1983, the language of Idaho Code § 41-403 has applied equally to foreign and domestic companies, yet foreign companies might be able to convince a court that the statute is unfairly discriminatory against foreign companies and not reasonably related to a legitimate state purpose. Based on the circumstances and relatively recent court decisions, any definite opinion regarding the constitutionality of the reduced rate statute, as applied in relation to the retaliatory tax statute, would be imprudent.

CONCLUSION

Any Commerce Clause challenge to Idaho's premium tax statutes will fail because the Commerce Clause does not apply to the states' regulation and taxation of insurance.

Courts will likely use the equal protection rational basis test in analyzing any potential constitutional challenge to the premium tax statutes grounded on the equal protection clauses of the United States and Idaho constitutions, substantive due process, or the uniformity clause of the Idaho Constitution. Under this test, a statute, which is presumed to be constitutional, will be struck down only if it is determined that the classification made by the law is not supported by a legitimate state purpose or if the classification is not reasonably related to achieving the otherwise legitimate state goal. Idaho's statutes addressing premium tax rates are not facially unconstitutional under an equal protection analysis by virtue of effecting express discrimination against foreign insurers.

The retaliatory tax statute seems to be well within the scope of permissible legislative regulation. Regarding Idaho's reduced rate statute, standing alone, or its combined effect with the retaliatory tax, several state goals or purposes can be proffered in an effort to defeat any potential prospective constitutional challenge. Uncertainty lies in whether any given court will find that the potential reasons for the reduced rate statute constitute legitimate state purposes and, assuming legitimacy, whether the statute is reasonably related to achieving those purposes. As is apparent from the case law, the judges and courts that have wrestled with these issues have not been of one mind. Many cases have been reversed on appeal, and many appellate decisions have flowed from closely split courts. In light of the premium tax and equal protection jurisprudence, any effort to predict how a potential Idaho or federal court would rule would be presumptuous and risk misleading the reader. Therefore, this office expresses no opinion on the constitutionality of the reduced rate statute, standing alone or as applied with the retaliatory tax.

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. 1, § 8.
Amend. 14, § 1.

2. Idaho Constitution:

Art. 1, sec. 2.
Art. 7, sec. 5.

3. Idaho Code:

§ 41-340.
§ 41-402.
§ 41-403.

4. Idaho Cases:

Bon Appetit Gourmet Foods, Inc. v. State Dept. of Employment, 117 Idaho 1002, 793 P.2d 675 (1989), *addendum on rehearing* (1990).

Idaho Compensation Co. v. Hubbard, 70 Idaho 59, 211 P.2d 413 (1949).

Jones v. State Bd. Of Medicine, 97 Idaho 859, 555 P.2d 399 (1976).

Justus v. Board of Equalization, 101 Idaho 743, 620 P.2d 777 (1980).

Meisner v. Potlatch Corp., 131 Idaho 258, 954 P.2d 676 (1998).

Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

Packard v. Joint School Dist. No. 171, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

School Dist. No. 25 v. State Tax Comm'n, 101 Idaho 283, 290, 612 P.2d 126 (1980).

State v. Reed, 107 Idaho 162, 686 P.2d 842 (Ct. App. 1984).

Sterling H. Nelson & Sons, Inc. v. Bender, 95 Idaho 813, 520 P.2d 860 (1974).

Taylor v. Browning, 129 Idaho 483, 927 P.2d 873 (1996).

V-1 Oil Company v. Idaho State Tax Comm'n, Opinion No. 75 (Aug. 1, 2000).

5. Federal Cases:

Bethlehem Motors Corp. v. Flynt, 256 U.S. 421, 41 S. Ct. 571, 65 L. Ed. 1029 (1921).

Metropolitan Life Insurance Company v. Ward, 470 U.S. 869, 881, 105 S. Ct. 1676, 1683, 84 L. Ed. 2d 751 (1985).

Western & Southern Life Insurance Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

United States R.R. Retirement Board v. Fritz, 449 U.S. 166, 178-79, 101 S. Ct. 453, 461, 66 L. Ed. 2d 368 (1980).

6. Other Cases:

American Southern v. State Dept. of Revenue, 674 So. 2d 810 (Fla. Dist. Ct. App. 1996).

Board of Insurance Comm'rs v. Prudential Fire Insurance Co., 167 S.W.2d 578 (Ct. Civ. App. Tex. 1942), *rehearing denied* (1943).

Executive Life Insurance Company v. Commonwealth, 606 A.2d 1282 (Pa. 1992).

Gallagher v. Motors Insurance Corp., 605 So. 2d 62 (Fla. 1992), *cert. dismissed* 506 U.S. 1074, 113 S. Ct. 1036, 122 L. Ed. 2d 179 (1993).

John Hancock Mutual Life Ins. Co. v. Commissioner of Revenue, 497 N.W.2d 250 (Minn. 1993).

Metropolitan Life v. Commissioner of Department of Insurance, 373 N.W.2d, 399 (N.D. 1985).

Penn Mutual Life Ins. Co. v. Dept. of Licensing & Regulation, 412 N.W.2d 668 (Mich. Ct. App. 1987).

Principal Mutual Life Insurance Co. v. Division of Insurance, 780 P.2d 1023 (Alaska 1989).

Prudential Ins. Co. of America v. Commissioner of Revenue, 709 N.E.2d 1096 (Mass. 1999).

Republic Insurance Company v. Commissioner of Taxation, 138 N.W.2d 776 (Minn. 1965).

State v. Alabama Municipal Insurance Corporation, 730 So. 2d 107 (Alabama 1998), *rehearing denied* (1999).

DATED this 21st day of September, 2000

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[1] The Commerce Clause was the basis of the Fourth Judicial District Court's February 22, 2000 decision that the limited commodities use fee at Idaho Code § 49-434(9) was unconstitutional in American Trucking Associations, Inc. v. Idaho Transportation Department, CV OC 9700724D.

[2] Other courts have cast doubt on the justification that an insurer is truly free to make its own investment decisions: ". . . it is not an answer to say that the Texas law is nondiscriminatory [for purposes of determining whether to apply the retaliatory tax – not used in the constitutional equal protection context] because an out-of-state company may adjust its investment portfolio so as to avail itself of equal treatment under the Texas law. This observation ignores the realities of the insurance business. It should require no statistics to demonstrate that the

Texas statute operates to the advantage of domiciliary insurance companies. When a company organizes and begins business, its home state obviously becomes its major market. Its volume, surplus, and physical plant are developed in the local market and it can be expected that it will invest largely in local securities and property." Republic Insurance Company v. Commissioner of Taxation, 138 N.W.2d 776 (Minn. 1965). There was no constitutional question posed in Republic Insurance Company. The only issue before the court was whether the graduated reduced rate schedule in Texas law would forgo imposition of the higher Texas rate of 3.85% versus the Minnesota rate of 2% pursuant to the Minnesota retaliatory law. The board of tax appeals concluded that because the Texas insurers qualified for the lower rate in Texas of 1.1% based on investment in Texas securities, and other Minnesota companies had so qualified in Texas, it should not apply the higher Texas rate based on the retaliatory law. In reversing the board, the Republic Insurance Company court used the Texas decision in Board of Insurance Comm'rs v. Prudential Fire Insurance Co., 167 S.W.2d 578 (Ct. Civ. App. Tex. 1942) *rehearing denied* (1943), which had determined that the Texas graduated rate was in effect the full 3.85% rate (due to the fact that the other Texas investments would be subject to some tax), and therefore applied that rate to the Texas insurers. *See also* Bethlehem Motors Corp. v. Flynt, 256 U.S. 421, 41 S. Ct. 571, 65 L. Ed. 1029 (1921), discussed below.

[3] Per amendments to the code in 1974, the "commissioner" became the "director." *See* Idaho Code §§ 41-202, 41-203.