STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION 12-01

The Honorable Brent Hill
President Pro Tempore
Idaho State Senate
Statehouse
Boise, Idaho 83720

Dear Pro Tem Hill:

You requested an Attorney General Opinion regarding article III, section 14 of the Idaho Constitution (Origination Clause). The section requires that "bills for raising revenue shall originate in the house of representatives." This responds to your request. This opinion relies significantly on an earlier opinion (1999-2) authored by Ted Spangler.

QUESTION PRESENTED

Is the initiation of fee legislation by the Idaho Senate defensible under article III, section 14 of the Idaho Constitution?

CONCLUSION

Article III, section 14 of the Idaho Constitution requires all revenue raising bills to originate in the Idaho House of Representatives. Application of this provision has generally been to legislation involving an increase or decrease involving a tax or taxing measure. It has not been traditionally applied to legislation involving fees. A challenge to a fee measure would be a case of first impression for Idaho Courts. Based upon case law from other jurisdictions, a reasonable legal defense can be advanced to support the origination of fee legislation in either chamber of the legislature. As reflected in greater detail below, this defense is likely to become factually specific and require a determination as to whether the fee is truly a fee, or a tax disguised as a fee. If there is doubt as to whether the legislation creates a fee or a tax, it is recommended that such legislation originate in the House.

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ANALYSIS

A. Reasons for Caution in the Analysis

The cautious approach to the initiation of fee legislation noted above is based on a number of considerations. The first cause for a conservative approach is reflected in Justice Harlan's statement concerning the Origination Clause of the federal constitution. "What bills belong to that class [of bills raising revenue] is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject." Twin City Nat'l Bank v. Nebecker, 167 U.S. 196, 202, 17 S. Ct. 766, 769, 42 L. Ed. 134 (1897).

The next consideration counseling a conservative approach to the question is that if the Idaho Supreme Court rejects the interpretation that "revenue bills" are only those that levy taxes, the cost to the state could be high. Any controversy heard in a court will involve the payment of money to the state. To justify litigation, the amounts in question are likely to be high. If the law was initiated in the senate, and this is found unlawful, then the law is void. This means that those who paid money under that law will be due refunds. If the case is a class action, the resulting refunds could be large. *See, e.g.,* Ware v. Idaho State Tax Commission, 98 Idaho 477, 483, 567 P.2d 423, 429 (1977) (Grocery credit case upholding a refund of only $90.00 established that a class of an additional 27,980 plaintiffs might also be entitled to relief).

Third, the leading case on Idaho's Origination Clause is Dumas v. Bryan, 35 Idaho 557, 207 P. 720 (1922). This case is 90 years old and subject to conflicting interpretations.

A fourth consideration suggesting caution where fee legislation is initiated is whether the fee enacted is a fee or a tax. Simply labeling a tax a fee will not protect it on judicial review. *See, e.g.,* V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund, 128 Idaho 890, 920 P.2d 909 (1996) (One cent per gallon petroleum transfer fee used to fund the clean water trust fund held a tax, not a fee). If it is really a tax, not a fee, then the common rule is that initiation in the senate is fatal and the statute is void. The exception to this rule is if the revenue-raising portion of the enactment is merely incidental to the main purpose of the statute. If it is, then origination of the bill in the senate is permitted. Dumas, however, may indicate that Idaho does not recognize this general exception. This is discussed below.

The fifth point counseling caution in where fee bills originate is simply that all these uncertainties are avoided if fee bills originate in the house. This removes any possibility of violating the Origination Clause.

B. The General Rule

The general rule is that origination clauses apply only to bills to levy taxes in the strict sense of the word.

At the federal level, this rule was laid down in United States v. Mayo, 1 Gall. 396, 26 F. Cas. 1230 (1813). Holding that laws creating fines and forfeitures are not "revenue laws" under the Origination Clause, Circuit Justice Story wrote:

> The true meaning of 'revenue laws' in this clause is, such laws as are made for the direct and avowed purpose for creating and securing revenue or public funds for the service of the government. No laws, whose collateral and indirect operation might possibly conduce to the public or fiscal wealth, are within the scope of the provision.

Mayo, 26 F. Cas. at 1231.

Judge Story later authored a treatise on the Constitution in which he expounded on this statement.

> [T]he history of the origin of the power already suggested abundantly proves that it has been confined to 'bills to levy taxes' in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue.

Joseph Story, *Commentaries on the Constitution of the United States*, § 880, 5th Ed. (1891). Quoted in Morgan v. Murray, 328 P.2d 644, 648 (Mont. 1958).

In United States v. Norton, 91 U.S. 566, 1 Otto 566, 23 L. Ed. 454 (1875), the United States Supreme Court held that an act to create a postal money order system and to provide criminal penalties for embezzlement was not a "revenue bill" within the meaning of the Origination Clause. The Court adopted Judge Story's view of the matter, specifically referring to Mayo and the *Commentaries*. It quoted the *Commentaries* language noted above in its holding.

Another federal case from 1875 sheds more light on the proper interpretation of the federal Origination Clause. In United States ex. rel. Michels v. James, 13 Blatchf. 207, 26 F. Cas. 577 (1875), Circuit Judge Johnson held that a postage fee increase was not a "revenue bill." He wrote:

> Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return.

James, 26 F. Cas. at 578.

The general rule, that origination clauses apply only to bills to levy taxes in the strict sense of the word, is widely adopted in several states. In Ennis v. State Highway Commission, 108 N.E.2d 687 (Ind. 1952), the Indiana Supreme Court looked into the constitutionality of an act establishing a toll road and toll road commission. One of the challenges to the act was that it had originated in the senate and that it was therefore invalid because it was a revenue-raising measure that was required to originate in the house. The Court did not agree.

> This court has held that the term 'raising revenue' is confined to acts that levy taxes, in the strict sense of the word, and does not apply to other purposes which may incidentally create revenue.

Ennis, 108 N.E.2d at 692.

The Supreme Court of Montana was faced with deciding whether a statute prohibiting sale of liquor by private individuals and providing for sale through a system of state liquor stores was void as a revenue-raising bill that originated in the senate. The Court held it was not. In deciding the point, it discussed approvingly Judge Story's *Mayo* opinion and his treatise on the federal constitution discussed above. The Court held that, despite its revenue-raising features, the purpose of the act was to regulate and limit the manufacture and sale of intoxicating liquor. State v. Driscoll, 54 P.2d 571 (Mont. 1936).

In Northern Counties Investment Trust v. Sears, 41 P. 931 (Or. 1895), the Oregon Supreme Court set forth the general origination clause test. It paraphrased the sentiments expressed in the federal *James* case noted above:

> A law which requires a fee to be paid to an officer, and finally covered into the treasury, of a county, for which the party paying the fee receives some equivalent in return, other than the benefit of good government which is enjoyed by the whole community, and which the party may pay and obtain the benefits under the law, or let it alone, as he chooses, does not come within the category of an act for raising revenue . . . .

Northern Counties, 41 P. at 936.

In Yourison v. State, 140 A. 691 (Del. Super. 1928), two individuals were found guilty of having operated a fishing boat carrying passengers for hire without the required license. The defendants appealed seeking to overturn the statute on the grounds that it was a bill for raising revenue that improperly originated in the state senate. After reviewing the statute at issue, the Delaware court concluded that the statute was not a revenue bill as it was not designed to raise revenue for the general expenses of the government.

A Texas case held that an act that originated in the senate conferring the vote on women who met certain qualifications, and imposing on them a poll tax, was not a revenue act and hence not violative of the Texas constitution's origination clause even though the tax was imposed on women whether they intended to vote or not. The Texas court found that the object of the bill was to confer the franchise on qualified women, not to raise revenue. As such, it did not violate the Texas constitution's origination clause. Stuard v. Thompson, 251 S.W. 277 (Tex. Civ. App. 1923).

The Kentucky Court of Appeals, quoting the federal Mayo and James opinions noted previously, held that a bill imposing license taxes on blended spirits and providing penalties for nonpayment violated the state constitution's origination clause. The Commonwealth of Kentucky argued that the bill only incidentally raised revenue. The main purpose of the statute was to regulate the industry. The court disagreed. It found that the statute required nothing of the manufacturer but payment of the tax. As such, it was clearly a revenue act that the Kentucky constitution required originate in the house. The statute was declared void. H.A. Thierman Co. v. Commonwealth, 97 S.W. 366 (Ky. App. 1906).

In Opinion of the Justices, 150 A.2d 813 (N.H. 1959), the New Hampshire Supreme Court held that a bill making nominal increases in licensing fees and permits for pharmacies and pharmacists was not a "money bill" and did not violate the origination clause. In Opinion of the Justices, 152 N.E. 2d 90 (Mass. 1958), the Supreme Court of Massachusetts held that a bill was not a "money bill" when it expended state money on an option to purchase a rail line and contained provisions for repayment to the state by imposition of a tax on people served by that line. The court found that the chief purpose of the bill, which originated in the senate, was to avoid economic harm through the preservation of existing rail service. Repayment of the money used was incidental to the chief purpose of the bill. As such, it did not violate the origination clause.

These cases show the rule to be that origination clauses generally pertain strictly to taxes used for general government purposes, and for which the people who pay the tax receive no equivalent return other than the provision of good government. If the exaction is merely incidental to the main purpose of the bill, the origination clause is generally not violated. The question is whether Idaho subscribes to the general rule.

C. Idaho Cases

There are four reported Idaho cases on the state's origination clause. None directly address whether bills implementing fees must originate in the house.

In Worthen v. State, 96 Idaho 175, 525 P.2d 957 (1974), a bill amending the Idaho Income Tax Act originated in the house. The senate, however, added two significant amendments. The issue was whether the senate had the power to amend a revenue bill initiated in the house. The question arose because of differences between

the origination clauses in the federal and Idaho constitutions. Article 1, Section 7 of the federal Constitution provides:

> All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

In contrast, article III, section 14 of the Idaho Constitution provides:

> Bills may originate in either house, but may be amended or rejected in the other, except that bills for raising revenue shall originate in the house of representatives.

Notwithstanding the absence in the Idaho Constitution of language expressly authorizing the senate to amend revenue bills, the Idaho Supreme Court held that the senate could do so. The court stated that to prohibit the senate from amending house-originated revenue bills would be an obstruction of the legislative process. Article III, section 14 must be read to mean that revenue bills must originate in the house, but the senate is permitted to amend such bills.

The Worthen holding was upheld in Gallagher v. State, 141 Idaho 665, 115 P.3d 756 (2005). A bill to temporarily increase the sales tax from 5% to 5.5% was introduced in the house. The senate amended the bill significantly, raising the increase to 6% and lengthening the period of time the temporary increase would be in effect. The house concurred in the amendments. The bill was passed and signed into law. Gallagher argued that the senate amendments raised significantly more money than the house version. The amendments, therefore, constituted a revenue bill unconstitutionally initiated in the senate. The Idaho Supreme Court, relying on Worthen, rejected Gallagher's arguments and upheld the statute.

State ex. rel. Parsons v. Workmen's Compensation Exchange, 59 Idaho 256, 81 P.2d 1101 (1938), involved worker's compensation benefits payable as a result of the work-related death of an employee. A bill initiated in the senate and subsequently enacted provided that in the event the deceased worker left no dependents, the death benefit was payable to the state treasury. The surety liable to pay the death benefit sued, contending that this was a revenue law that should have originated in the house. The Supreme Court upheld the statute, in part reasoning that the provision objected to is analogous to a person dying intestate and without heirs. In such a case, the decedent's property escheats to the state.

Idaho's most important origination clause case is Dumas v. Bryan, 35 Idaho 557, 207 P. 720 (1922). Unfortunately, as well as being 90 years old, it is the most confusing of the cases. It also concerned a tax, not a fee, and so is not directly on point. It does, however, provide some insights into the issue at hand.

In 1921, the Legislature enacted a bill that originated in the senate. It provided for the transfer of the Albion Normal School from Albion to Burley. The first four

sections of the bill authorized the move and directed how it was to be accomplished. The fifth section levied a statewide property tax to fund the move. Opponents of the move challenged the entire statute on Origination Clause grounds. The Idaho Supreme Court agreed the Origination Clause was violated.

The Idaho Supreme Court reviewed case law from other states with similar origination clauses. The Court's attention was directed to:

> [M]any cases holding that where the revenue part of an act is merely an incident and not the principal purpose for which it was enacted, the fact that it contains a provision for raising revenue as an incident to such purpose does not make it a revenue law within the meaning of this constitutional provision.

35 Idaho at 564, 207 P. at 722.

In particular, in Dumas the court noted Chicago, B. & Q. R. Co. v. School District No. 1, 165 P. 260 (Colo. 1917), and Evers v. Hudson, 92 P. 462 (Mont. 1907). In School District No. 1, an act amended a statute establishing a system of public schools. Incident to the amendment was a provision for raising revenue to meet the requirements of the statute as amended. This was held not to violate the Colorado Constitution's origination clause. In Evers, an act providing for the establishment of county free high schools also provided for a property tax to provide funds for the current expenses of those schools. It also provided authority for bond issues. This was held not to violate the origination clause of the Montana Constitution.

Despite these and other state and federal cases with similar holdings, the Idaho Supreme Court held that the Albion statute violated the origination clause of the Idaho Constitution. In doing so, it enforced a stricter view of the origination clause than was current in other jurisdictions. Whether the court adopted this stricter view because it rejected the majority rule that revenue measures which are merely incidental to the main purpose of a statute do not run afoul of the origination clause, or because it took a harder line on what qualified as "incidental" is not clear. Whatever the analysis, the court adopted a more conservative approach to the origination clause than was current. The Dumas court's conservative approach counsels caution on the issue of whether fees are "revenue" under Idaho's origination clause.

On the other hand, the Dumas court noted with approval a definition from Bouvier's Law Dictionary that defined "revenue" as "the income of the government arising from taxation." It also cited Millard v. Roberts, 202 U.S. 429, 26 S. Ct. 674, 50 L. Ed. 1090 (1906) which held that bills for other than tax purposes, but which may incidentally create revenue, are not revenue bills under the federal origination clause. The court noted that this decision approves Story on constitutional law when he lays down the rule that revenue bills are those that levy taxes in the strict sense of the word. These comments indicate that the court may view fees as outside the requirements of

Idaho's origination clause. This is only *dicta,* however, as the fee issue was not before the court.

Dumas can be read either as a rejection of the general rule discussed above, or as merely a stricter interpretation of what revenue-raising measures qualify as "incidental."

The Idaho cases establish a number of points. Dumas teaches that originating a revenue bill in the senate is a fatal flaw that can result in the enacted statute being declared void. Worthen and Gallagher teach that the senate can amend a revenue bill. *Parsons* stands for the proposition that not every bill that results in money flowing to the state treasury is a revenue bill. None of these cases addresses whether a bill imposing a fee is "a bill for raising revenue."

Historically, many fee bills originated in the senate. The period 2006 through 2010 provides several examples of fee bills enacted into law after originating in the senate. These include: 2006 Idaho Sess. Laws 881 (S.B. 1350aa) (providing for fees charged by county recorder for electronic duplication of records); 2006 Idaho Sess. Laws 828 (S.B. 1409aa) (increase in court filing fees); 2006 Idaho Sess. Laws 873 (S.B. 1343) (setting licensing fees for dental health professions); 2007 Idaho Sess. Laws 196 (S.B. 1086) (providing for wolf tag hunting fee); 2007 Idaho Sess. Laws 361 (S.B. 1118) (increasing snowmobile registration fees); 2008 Idaho Sess. Laws 424 (S.B. 1257) (application fees for certification of real estate education providers); 2008 Idaho Sess. Laws 433 (S.B. 1352) (revising fees for filing notice of water claims); 2008 Idaho Sess. Laws 924 (S.B. 1460) (increasing temporary motor vehicle permit fees); and, 2010 Idaho Sess. Laws 70 (S.B. 1267) (increasing licensing fees for attorneys). All of these bills originated in the senate, were passed by the house and became law.

If faced with the question whether bills creating fees fall under the limitation of the origination clause of the Idaho Constitution, the Idaho Supreme Court will likely find that fees are not so constrained. There are several reasons for this. First, Dumas is ambiguous and does not specifically address fees. Second, there are a number of post-Dumas cases from other jurisdictions adhering to the rule that only bills for taxes, strictly construed, are subject to the origination clauses in their jurisdictions. Third, the practice of introducing in the Idaho Senate bills establishing fees is one of long standing with which the Idaho House has traditionally concurred.

AUTHORITIES CONSIDERED

1. **United States Constitution:**

   Art. I, § 7.

2. **Idaho Constitution:**

Art. III, § 14.

3. **Idaho Session Laws:**

2006 Idaho Sess. Laws 828 (S.B. 1409aa).

2006 Idaho Sess. Laws 873 (S.B. 1343).

2006 Idaho Sess. Laws 881 (S.B. 1350aa).

2007 Idaho Sess. Laws 196 (S.B. 1086).

2007 Idaho Sess. Laws 361 (S.B. 1118).

2008 Idaho Sess. Laws 424 (S.B. 1257).

2008 Idaho Sess. Laws 433 (S.B. 1352).

2008 Idaho Sess. Laws 924 (S.B. 1460).

2010 Idaho Sess. Laws 70 (S.B. 1267).

4. **United States Supreme Court Cases:**

Millard v. Roberts, 202 U.S. 429, 26 S. Ct. 674, 50 L. Ed. 1090 (1906).

Twin City Nat'l Bank v. Nebecker, 167 U.S. 196, 17 S. Ct. 766, 42 L. Ed.134 (1897).

United States ex. rel. Michels v. James, 13 Blatchf. 207, 26 F. Cas. 577 (1875).

United States v. Mayo, 1 Gall. 396, 26 F. Cas. 1230 (1813).

United States v. Norton, 91 U.S. 566, 1 Otto 566, 23 L. Ed. 454 (1875).

5. **Idaho Cases:**

Dumas v. Bryan, 35 Idaho 557, 207 P. 720 (1922).

Gallagher v. State, 141 Idaho 665, 115 P.3d 756 (2005).

State ex. rel. Parsons v. Workmen's Compensation Exchange, 59 Idaho 256, 81 P.2d 1101 (1938).

V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund, 128 Idaho 890, 920 P.2d 909 (1996).

Ware v. Idaho State Tax Commission, 98 Idaho 477, 567 P.2d 423 (1977).

Worthen v. State, 96 Idaho 175, 525 P.2d 957 (1974).

6. Other Cases:

Chicago, B. & Q. R. Co. v. School District No. 1, 165 P. 260 (Colo. 1917).

Ennis v. State Highway Commission, 108 N.E.2d 687 (Ind. 1952).

Evers v. Hudson, 92 P. 462 (Mont. 1907).

H.A. Thierman Co. v. Commonwealth, 97 S.W. 366 (Ky. App. 1906).

Morgan v. Murray, 328 P.2d 644 (Mont. 1958).

Northern Counties Investment Trust v. Sears, 41 P. 931 (Or. 1895).

Opinion of the Justices, 150 A.2d 813 (N.H. 1959).

Opinion of the Justices, 152 N.E. 2d 90 (Mass. 1958)

State v. Driscoll, 54 P.2d 571 (Mont. 1936).

Stuard v. Thompson, 251 S.W. 277 (Tex. Civ. App. 1923).

Yourison v. State, 140 A. 691 (Del. Super. 1928).

7. Other Authorities:

Joseph Story, *Commentaries on the Constitution of the United States*, § 880, 5th Ed. (1891).

Dated this 24th day of May 2012.

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