IN THE FLORIDA SUPREME COURT

CASE NO. 79,024

STATE OF FLORIDA, et al.,

Appellants/Cross-Appellees,

vs.

LEWIS E. MELAHN, etc.,

Appellee/Cross-Appellant.
_____/

BRIEF OF AMICI CURIAE MOTORS INSURANCE CORPORATION, CIM INSURANCE CORPORATION, MIC PROPERTY AND CASUALTY INSURANCE CORPORATION, MIC INSURANCE CORPORATION, and MIC GENERAL INSURANCE CORPORATION IN SUPPORT OF APPELLEE/CROSS-APPELLANT'S POSITION

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INTRODUCTION

This case involves the appeal of a Final Judgment entered by the Honorable George S. Reynolds, III, in the case of Melahn v. State of Florida, Case No. 90-4435 (Fla. 2d Cir. Nov. 4, 1991) (hereinafter "Melahn"), which held Florida's insurance premium tax, sections 624.509 and 624.512, Florida Statutes, as it existed from 1980 through 1985 to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In reaching its Final Judgment, the Melahn trial court relied upon the ruling made by the Honorable F. E. Steinmeyer, III, in the case of Motors Insurance Corp. et al. v. Gallagher, et al., Case No. 90-2046 (Fla. 2d Cir. Nov. 13, 1991) (hereinafter "Motors Insurance"), which also held Florida's insurance premium tax to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[1] The Final Judgment in Melahn was entered based on Motions for Summary Judgment. Motors Insurance was decided after an evidentiary trial.

The Final Judgment in Melahn was appealed to the First District Court of Appeal, which certified it to this Court as involving issues of great public importance and requiring immediate resolution. On December 11, 1991, this Court accepted jurisdiction in Melahn and set an expedited briefing schedule. On December 17, 1991, this Court accepted jurisdiction in Motors Insurance and also entered an expedited briefing schedule. The Appellees in both Melahn and Motors Insurance filed motions to consolidate the two cases and to extend the briefing schedule to allow the trial record in Motors Insurance to be

[1]Motors Insurance involved the constitutionality of sections 624.509 and 624.512, Florida Statutes, as they existed from 1983 through June 30, 1988. However, there were no statutory differences during these years which relate to the issues in these cases.

transcribed and to provide adequate time to brief the issue. These motions were denied. On December 20, 1991, this Court granted Amici Curiae leave to file a brief in support of Appellees.

The Final Judgment in Melahn is based on a ruling of law that the purposes asserted by the State of Florida are not legitimate state purposes for a discriminatory tax and that the tax is therefore unconstitutional. The trial court was correct in making this finding based on Appellee's Motion for Partial Summary Judgment. However, the trial court erred in making additional factual findings as to the identity of the purposes for the statute and whether the alleged purposes are rationally related to the discriminatory tax. These findings are essentially dicta and are unrelated to the court's ruling.

Furthermore, the factual findings of the trial court are based on "inferences from the evidence," and such findings are erroneous in a summary judgment proceeding. If there are evidentiary issues relevant to the issues to be decided by this Court, they should be resolved in Motors Insurance and based on the trial record in that case which is markedly different from the record in this case. In this brief, Amici Curiae will identify excerpts from the Motors Insurance record for purposes of illustrating this point.

Record citations in this brief are as follows: Melahn record on appeal (R. ___), and the Appendix of Amici Curiae, (Motors A. __).

SUMMARY OF ARGUMENT

In Melahn and in Motors Insurance, the trial courts declared the former provisions of sections 624.509 and 624.512, Florida Statutes, unconstitutional because such statutes violate the Equal Protection Clause of the Fourteenth Amendment of the United States

Constitution by impermissibly discriminating against foreign insurers in favor of domestic insurers.[2] Appellees in both cases are foreign insurance companies which paid a tax equal to two percent of their gross insurance premiums on insurance sold in the State of Florida.[3] Domestic companies, provided they meet certain requirements, were completely exempted from this tax.[4]

The determination of whether the challenged statutes violated the Equal Protection Clause requires a two-step analysis. First, the purposes for the statute must be identified and a determination made as to whether such purposes are legitimate state purposes. Second, it must be determined whether any legitimate purposes were rationally related to the discriminatory statute.

The statutes at issue fail on all points. With regard to identifying the purposes for its discriminatory tax, Florida has set forth its purposes in the statute itself. These purposes include promoting a domestic insurance industry for economic reasons and raising tax revenue from non-Florida residents. The United States Supreme Court has determined that these purposes are not legitimate purposes for a discriminatory tax, and a tax based on such purposes is unconstitutional. Appellants have essentially conceded that the purposes set

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[2]The Equal Protection Clause states:

> 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. XIV, § 1.

[3]Appellee in Melahn is the Director of the Division of Insurance of the State of Missouri, which is the receiver of Transit Casualty Company. The State of Missouri, as well as many other states, recognizes the unconstitutional nature of Florida's tax. See Melahn Affidavit (R. 521-26); Bond Affidavit (R. 529, 533-34).

[4]The tax at issue was repealed as of July 1, 1988. See Chapter 87-99, Laws of Florida.

forth in the statute as the basis for the discriminatory tax are not legitimate state purposes and have not relied upon these purposes in their brief.

In response to this predicament, Appellants have simply conjured additional purposes in order to support their position in this litigation. During the trial of Motors Insurance, counsel for Appellants admitted that the asserted purposes are a legal fiction. Furthermore, the asserted purposes are simply some of the consequences which the Appellees allege would result from promoting a domestic insurance industry. Florida's tax is imposed solely as a result of nonresidency, and Appellants should not be allowed to avoid the determination by the trial court that the tax lacks a legitimate State purpose.

Moreover, it is clear from the record in both cases that the discriminatory taxes were not rationally related to the additional purposes now asserted by the State. Regardless of the investment or other activities taken by a foreign insurer to alleviate the alleged concerns of the State of Florida, the foreign insurer would continue to be taxed at a higher rate than that paid by domestic insurers. Thus, even though the foreign insurer may have invested substantial assets, undertook risky lines of insurance, employed numerous residents, and created no regulatory or administrative burdens to the State of Florida, all supposed policy reasons for the discriminatory tax, the foreign insurer was always paying a higher tax than its domestic counterpart.

To achieve any of the Appellants' asserted purposes would have required a taxpayer to change its state of domicile to Florida. However, the trial court in Motors Insurance found that such statutes do not, in fact, cause companies to change their state of domicile. The testimony in this case is to the same effect. Thus, even under the reasons now asserted by the State of Florida, the former statutes should be found to be unconstitutional because

the statutes did not serve the State's asserted purposes. Furthermore, it is precisely because taxpayers do not change their domicile in response to such taxes that the State of Florida was able to achieve its objective of collecting substantial amounts of tax revenue from nonresidents without imposing a tax on domestic companies.

In their brief, Appellants have asserted that the trial courts below erred in finding Florida's tax unconstitutional. Twice, however, the United States Supreme Court has declared similar discriminatory insurance premium taxes to be unconstitutional. In addition, the trial and appellate courts of seven other states have reviewed virtually identical statutes and found them to be unconstitutional. The legislative history of the tax at issue, as well as the history of its litigation in Florida, shows that both Appellants and the Florida Legislature knew this tax was unconstitutional, and accordingly, the Legislature repealed it as of July 1, 1988. Likewise, the departments of insurance in other states have also acknowledged that such statutes are unconstitutional. Given this background, it is obvious that the State of Florida is fighting a desperate rear-guard action to attempt to keep money collected under an unconstitutional tax. Taxpayers who have paid such funds are clearly entitled to refunds.

ARGUMENT

I. FLORIDA'S INSURANCE PREMIUM TAX DISCRIMINATED AGAINST NON-RESIDENTS AND SUCH DISCRIMINATION IS CLEARLY UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE.

A. Florida's Statutory Scheme (1980-1988).

Florida's insurance premium tax, section 624.509, Florida Statutes, imposes a tax on "insurance premiums, risk premiums for title insurance, or assessments including membership fees and policy fees and gross deposits received from subscribers to reciprocal or interinsurance agreements, and on annuity premiums." Section 624.512 provides a full exemption from the tax for domestic insurers who meet certain criteria.

In 1985, the Florida scheme provided in pertinent part:[5]

> **624.509 Premium tax; rate of computation. -**
>
> (1) In addition to the license taxes provided for in this chapter, each insurer shall also annually, and on or before March 1 in each year, except as to wet marine and transportation insurance taxes under s. 624.510, pay to the Department of Revenue a tax on insurance premiums, risk premiums for title insurance, or assessments, including membership fees and policy fees and gross deposits received from subscribers to reciprocal or interinsurance agreements, and on annuity premiums or considerations, received during the preceding calendar year, the amounts thereof to be determined as set forth in this section, to-wit:
>
> (a) An amount equal to 2% of the gross amount of such receipts on account of life and health insurance policies covering persons resident in this state and on account of all other types of policies and contracts (except annuity policies or contracts taxable under paragraph (b)) covering property,

[5]Florida's insurance premium tax scheme was amended in 1988 to remove this discrimination against foreign insurers. Although changes were made to the statutes during the relevant time period, the 1985 version of the statutes fairly reflects the tax as it existed from 1980 to 1988.

> subjects, or risks located, resident, or to be performed in this state, omitting premiums on reinsurance accepted, and less return premiums or assessments, but without deductions....

§ 624.509(1)(a), Fla. Stat. (1985) (emphasis added).

> **624.512 Domestic insurers: exemption. -**
>
> (1)(a) An insurer which is organized and existing under the laws of this state and which maintains its home office in this state shall not be required to pay the tax on insurance and annuity premiums, assessments, or considerations as imposed under ss. 624.509 and 624.510, except as provided in s. 624.513.

§ 624.512(1)(a), Fla. Stat. (1985) (emphasis added).

Under these statutes, Florida's insurance premium tax scheme imposed, under all circumstances, a greater rate of tax on foreign insurers writing business in Florida than on similarly situated domestic insurance companies. Regardless of its activities in Florida, no foreign insurer could have ever qualified for the exemption granted to domestic companies (Motors A. 131). Thus, there is no dispute that Florida's insurance premium tax was facially discriminatory, and that it was specifically designed to discriminate based solely on residency. The result is that the tax produced substantial revenue exclusively from foreign insurance companies.

B. The History Of Discriminatory Insurance Premium Tax Litigation.

1. The History Of Litigation In The United States Related To Discriminatory Insurance Premium Taxes.

Insurance premium taxes that discriminate against foreign insurers were first held unconstitutional in Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926). In Hanover, the Court held, in an unanimous opinion, that once a state admits a foreign insurance company

to do business in the state, that company is put on a par with all other insurers and tax laws that apply to one must apply equally to the other.

The United States Supreme Court reiterated this principle in Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981), where the Court stated that it:

> [C]onsidered it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose.

Id. at 668.

In 1985, the United States Supreme Court was again confronted with insurance premium taxes that discriminated against foreign insurers in Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), holding certain purposes asserted by the State of Alabama not to be legitimate purposes under the Equal Protection Clause. Alabama asserted two policy justifications for this tax differential: first, the encouragement of capital investment in assets and governmental securities in Alabama; and second, the promotion of a domestic insurance industry. The U.S. Supreme Court held that neither objective constitutes a legitimate state purpose for discriminating against foreign residents. Critical to the Court's decision was the unrelenting discriminatory nature of Alabama's taxing scheme: regardless of the foreign insurers' activities and investments in Alabama, foreign insurers were always taxed at a higher tax rate than domestic insurers. Id. at 878, 882.

Subsequent to Ward, seven different states, besides Florida, have addressed the constitutionality of similar insurance premium tax schemes. In all seven states, the courts have held the taxing schemes unconstitutional under the Equal Protection Clause. See Principal Mut. Life Ins. Co. v. Taylor, Case No. 87-3353 (1st Div. Chanc. Ct. Ark. April 1, 1991); Principal Mut. Life Ins. Co. v. Div. of Ins., 780 P.2d 1023 (Alaska 1989); Penn Mut. Life Ins. Co. v. Dep't of Licensing and Reg., 162 Mich. App. 123, 412 N.W.2d 668 (Ct. App. 1987); Metropolitan Life Ins. Co. v. Com'r of Dep't of Ins., 373 N.W.2d 399 (N.D. 1985); State v. American Bankers Ins. Co., 374 N.W.2d 609 (S.D. 1985); Mutual Life Ins. Co. of N.Y. v. Wyoming, Case No. 90-358 (1st D.Ct. Wyo. 1985); Keystone Provident Life Ins. Co. v. Ramil, Case No. 2380 (Tax App. Ct. Haw. 1986); (Motors A. 08-88).

Hanover Fire Ins. and Ward are directly on point and are dispositive of this case. To rule for Appellants would require this Court to overrule established constitutional principles set forth by the U.S. Supreme Court. Although Appellants have sought to portray the trial court's application of Ward as strained and overly expansive, it clearly is not. Every court, since Ward, that has considered the issue of discriminatory insurance premium taxes has held such taxes unconstitutional.

2. The History Of Litigation In Florida Related To Discriminatory Insurance Premium Taxes.

After Western & Southern, it became clear that discriminatory taxing schemes such as Florida's were unconstitutional and various foreign insurance companies doing business in Florida filed claims for refunds of taxes they had paid. However, because Ward involved a statute virtually identical to Florida's and was on appeal to the United States Supreme Court, Florida refrained from acting on the refund claims pending a declaration from the

Court. After the Court decided Ward, however, Florida still refused to act even though it knew that the tax was unconstitutional. Under Florida law, the exclusive remedy for refund claims is to file a claim for refund and for the State to then act upon it. See § 215.26(2), Fla. Stat. (1989) (Motors A. 518-22). By refusing to act, the State of Florida was able to hold refund claims in abeyance, while it set out on a course of action designed to allow it to retain the unconstitutional taxes.

Knowing that such a discriminatory tax was unconstitutional, the State of Florida repealed the tax during the 1987 legislative session but made its repeal effective as of July 1, 1988 (Motors A. 230). Then, apparently still unsure as to how to deal with the pending refund claims, the Appellants filed two declaratory judgment actions which sought a declaration of the tax's constitutionality. See Gerald Lewis, et al. v. Metropolitan Life Ins. Co., Case No. 87-2561 (Fla. 2d Cir.)(Motors A. 523); Gerald Lewis, et al. v. Continental Ins. Co., Case No. 88-782 (Fla. 2d Cir.).[6] (Motors A. 536.) In these actions, Appellants, who were plaintiffs in the former actions, alleged that they were "in doubt" as to the constitutionality of section 624.509 and were accordingly unsure as to their duties, powers, and rights with respect to parties requesting refunds under the statute. However, before the court could decide the constitutionality of section 624.509, the State of Florida, as part of an agreement with various insurance companies, made additional statutory changes and many insurance companies waived their refund claims (Motors A. 556-73). These statutory provisions were adopted in the 1988 legislative session and made effective July 1, 1988.

[6]This Court may take judicial notice of court proceedings. § 90.202, Fla. Stat. (1991).

At this point, the State of Florida had accomplished its objective of repealing the unconstitutional tax provisions and eliminating many of the refund claims. Accordingly, prior to the above declaratory judgment actions going to trial, Appellants dismissed their complaints (Motors A. 534, 555). This action precluded a declaration by the Florida courts of the statute's constitutionality. Even though the named defendants in the pending litigation had withdrawn their claims, refund claims filed by other foreign insurance companies remained pending, including those of Amici Curiae. Any of the companies with pending claims could have been named as defendants in such litigation, and the issues in this cause could have been brought to closure in 1987 or in 1988.

The State of Florida, however, still delayed a final resolution of these refund claims. The only logical explanation for such an action was the State knew that, under Florida law, there would be no interest paid on pending refund claims and that it intended to take the position that the statute of limitations applied to unfiled refund claims. Thus, the State of Florida believed it would receive substantial economic benefits from this delay. It was not until 1990 that the State finally denied certain pending refund claims of Amici Curiae and Amici Curiae immediately filed suit contesting the denial of these claims.

II. THE APPROPRIATE STANDARD OF REVIEW FOR DETERMINING THE VALIDITY OF A DISCRIMINATORY TAX UNDER THE EQUAL PROTECTION CLAUSE.

The polestar for determining whether a particular classification violates the Equal Protection Clause is whether the "discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 875 (1985); Dep't of Rev. v. Amrep Corp., 358 So.2d 1343 (Fla. 1978). Absent

a legitimate state purpose, or a rational relationship to that purpose, the discriminatory tax treatment that Florida has imposed on foreign insurers is a violation of the Equal Protection Clause of the United States Constitution.

The determination of whether Florida's discriminatory tax violates the Equal Protection Clause because it impermissibly discriminates requires a two-step analysis:

1. First, a court must identify the purposes for such discrimination, and then, as a matter of law, determine whether the identified purposes are legitimate state purposes. Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981)
2. Second, if a court determines that the purposes are legitimate, it must determine whether it was reasonable for the legislature to believe that, by discriminating against foreign insurers, the statutes are rationally related to such purposes. Id.

Thus, the threshold issue is whether the purposes espoused by the State for the imposition of this discriminatory tax are the purposes of the statute and whether they constitute legitimate state purposes within the context of the Equal Protection Clause. If the purposes espoused by the State do not constitute legitimate state purposes, then the Final Judgment must be upheld. If one or more of the articulated purposes is found to constitute a legitimate state purpose, then a determination must be made as to whether that purpose is rationally related to the discriminatory tax. In the instant case, however, the Final Judgment was entered based on a Motion for Partial Summary Judgment and, because the determination of whether a rational relationship exists is, in part, a factual question, and

because disputed issues of fact exist, such a determination cannot be made based on this record and the procedural posture of this case.[7]

III. THE TRIAL COURT CORRECTLY DETERMINED THAT FLORIDA'S DISCRIMINATORY INSURANCE PREMIUM TAX VIOLATES THE EQUAL PROTECTION CLAUSE.

A. The Purposes For Florida's Discriminatory Taxes Asserted By Appellants Are Pretextual And the Trial Court Erred In Finding Them To Be The Purposes For Such Taxes.

There is no dispute that the taxing statutes at issue are facially discriminatory and that the Florida Legislature has clearly and fully articulated its purposes for adopting such a discriminatory tax. In Section 624.512(2), Florida Statutes, the State of Florida has set forth in great detail its purposes for providing a preference to domestic insurers:

> (2) Recognizing that it is in the public interest to create an incentive for environmentally clean industry to locate in this state, a known center for tourist-related activities; to broaden the state's economic base; to encourage investment in this state; and to enhance the economic and financial climate of the state, the Legislature finds that a premium tax exemption for domestic insurers promotes the public interest for the following reasons:
>
> (a) Domestic insurers are required to pay corporate income tax in this state;[8]
>
> (b) Domestic insurers are required to invest their assets in this state;

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[7]Motors Insurance was decided after an evidentiary trial and is also before this Court. If this factual issue is relevant to any rulings to be made by this Court, this Court should not rule until the evidence in Motors Insurance is before this Court.

[8]Foreign insurers, including Amici, are also required to pay a corporate income tax in this State. See, e.g., Motors Ins. Corp. v. Dep't of Rev., et al., Case No. 90-2044 (Fla. 2d Cir. Ct.).

> (c) Domestic insurers are more likely to invest heavily in real estate in this state and thereby increase the local government tax base;
>
> (d) Domestic insurers employ many residents of this state;
>
> (e) Domestic insurers contribute to the economy of the state by utilizing local services and local businesses.

§ 624.512(2), Fla. Stat. (1985).[9]

When a statute that is facially discriminatory sets forth its purpose, it is clear that a court should not attempt to discern any other purpose. In Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959), the United States Supreme Court stated:

> The statutes, on their face admittedly discriminatory against non-residents, themselves declared their purpose.... Having themselves specifically declared their purpose, Ohio statutes left no room to conceive of any other purpose for their existence.

Id. at 529-30. Similarly, in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), the Court held that the legislature had clearly set forth its reasons for the exemption and, "[t]hus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid the [local] industry." Id. at 270-71.

In the present case, the trial court erroneously found three new purposes for the discriminatory statute. These purposes are described in the Final Judgment:

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[9]In construing any statute, the legislative intent is of primary importance. This legislative intent should be determined from the language of the statute at issue. Where the legislature has expressed its intent by the use of words found in the statute, the court is to give effect to that expressed intent. S.R.G. Corp. v. Dep't of Rev., 365 So.2d 687 (Fla. 1978); Englewood Water District v. Tate, 334 So.2d 626 (Fla. 2d DCA 1976). A court in construing the statute cannot attribute to the legislature any intent beyond that which was expressed in the statute. Bill Smith, Inc. v. Cox, 166 So.2d 497 (Fla. 2d DCA 1964).

(1) Seeking to increase and optimize the state's degree of regulatory power and influence over insurers which do business in the State of Florida;

(2) Seeking to encourage a configuration of the insurance industry serving Florida which is responsive to the needs of Florida insurance consumers;

(3) Seeking to encourage a configuration of the insurance industry serving Florida in which Florida is in the best position to protect the interests of Florida insurance consumers in the event of financial impairment or insolvency of a member of the industry.

In making such a finding, the trial court confused the purpose of insurance regulation with the purposes of the discriminatory tax at issue. The State of Florida offered no evidence that these purposes are related to Florida's discriminatory tax.[10] Simply asserting these purposes as objectives of insurance regulations does not demonstrate that they are related to Florida's discriminatory tax in any way.

The circumstances of this case are very different from those where a statute is valid on its face or a legislature has chosen not to set forth its purposes for adopting a particular statute. The cases cited by Appellants regarding this issue deal with statutes which either were facially nondiscriminatory or which did not set forth their purposes. Where a statute does not set forth its purposes, there may be a genuine doubt as to its purpose. As a practical matter, in most instances, the purposes of a statute are not in dispute and references by courts as to how such purposes are determined are merely dicta.

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[10]The trial court in Motors Insurance made a general reference to insurance regulation. The State of Florida, however, produced no evidence which would support these factual findings. See infra.

In Motors Insurance, Amici Curiae asserted that the identifications of the purposes of the tax is a question of fact and substantial evidence exists in the Motors Insurance record regarding this issue. In Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981), the Fifth Circuit Court recognized that the existence of purposes in support of a statute is a matter of proof, and that the existence of such purposes should not find:

> [T]heir way into the record ... through a process of argumentation rather than of proof.... The state interests intended to be furthered by legislation are appropriately a matter subject to proof in the district court, where it is incumbent on the state to offer into evidence the justification for its legislative act. Inferential identification of state interests allegedly advanced by legislation is entirely unsatisfactory and we admonish litigants to assist us by advancing evidence of state interests in the trial court.

Id. at 483, n.2 (citations omitted).[11]

Section 624.512, unequivocally sets forth the purposes for the tax: "to encourage investment in this state," and "to create an incentive for environmentally clean industry [i.e. insurance] to locate in this state." The statute recognizes that "[d]omestic insurers are required to pay corporate income tax in this state,[12] ... are required to invest their assets in this state, ... are more likely to invest heavily in real estate in this state, ... employ many residents of this state, ... [and] contribute to the economy of the state ...." The problem with these purposes is that they all relate to promoting a domestic insurance industry or

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[11]This conclusion is consistent with the well-recognized principle that parties may only argue evidence that is before the court. See, e.g., Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015 (Fla. 4th DCA 1982); Chrysler Corp. v. Miller, 450 So.2d 330 (Fla. 4th DCA 1984); Reynolds v. Burt, 359 So.2d 50 (Fla. 1st DCA 1978).

[12]Foreign insurers, including Plaintiffs, are also required to pay a corporate income tax in this State. See, e.g., Motors Ins. Corp. v. Dep't of Rev., et al., Case No. 90-2044 (Fla. 2d Cir. Ct.).

encouraging investment in Florida. In Ward, these purposes were specifically found not to be legitimate state purposes for a discriminatory tax. Any reasons identified by Appellants beyond the reasons set forth in the statute are pretextual and should be rejected.

Florida's legislative history confirms that the purpose of Florida's insurance premium tax was to promote a domestic insurance industry and to contribute to the economy of the state by raising tax revenues from foreign insurers.[13] During the 1982 legislative session, the Florida Legislature set forth the purposes for Florida's insurance premium tax. Nowhere is there any mention or discussion of purposes other than those set forth in section 624.512(2). Indeed, the legislative reports indicate that the reason for the changes made to that statute were to "express the public policy goal of having insurers employ individuals in this State thereby aiding employment." See (Motors A. 177). By 1987, after Ward, the Legislature knew the tax was unconstitutional but still wished to use it to raise tax revenues. In the May 12, 1987 House Insurance Committee meeting regarding HB 1245 (1987), the Chair stated:

> Now, let me give you a little background about where we are and where we need to be.
>
> The Governor had recommended a 2.5% across-the-board premium tax. You know, there is a court case pending right now that says that we are treating out-of-state companies unfairly because we don't have any tax on domestics and we have 2% on foreigns. So what the Governor's proposal would have done would have been to apply 2.5% across the board for everybody. We didn't find many folks that liked that too much....

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[13]Appellate courts may consider legislative staff summaries in reviewing statutes. Ellsworth v. Ins. Co. of North America, 508 So.2d 395, 398 (Fla. 1st DCA 1987). Additionally, both parties have stipulated to the authenticity of the legislative history referred to in this brief (Motors A. 90).

> So then in discussing the problem with some of the representatives of some of the domestics, a proposal was made to increase, now we will begin to talk about the amount of revenue that is going to be raised from the issue. And so the proposal was that we raise the out-of-state companies to 2.25 and we raise the domestics to 1/2 and do a study for a year, then come back in and address the constitutional problem next year. Well, that is nothing but a tax increase, and doesn't really get at the constitutional problem. But still there is the problem associated with the amount of revenue we needed to generate for this year's budget, and so another suggestion was made and in fact, this is what passed this morning in the Senate, that we do a speedup on the collection which provides nonrecurring revenue of just under $50 million.

(Motors A. 215-16.)

In the May 14, 1987 meeting of the Senate Committee on Finance and Tax regarding HB 1245 (1987), the background of Florida's discriminatory tax was discussed, with the Chair acknowledging that the tax was unconstitutional. The proposed remedial bill would have raised the tax on foreign insurance companies to 2.3% and imposed a tax on domestics of .5%.

> SENATOR DERATANY: Basically, let me tell you what has happened. This has been kicked around and the Governor has proposed because of a constitutional problem with the premium tax that exists today and the court cases that have come up and been resolved in a negative way as it relates to Florida's law and other states, that we have to do something about our premium tax. It discriminates against out-of-state companies, and we are in the process, we have been working on this all session.
>
> The Governor, recognizing that, had recommended $186 million across-the-board, two and a half percent premium tax, and recognizing that that is unpopular and probably unattainable, we have been working with the insurance industry to arrive at an equitable solution where we can have a law that is constitutionally correct and protects us against paying back the 400 and some million dollars in premiums that have been collected by out-of-state companies in the past years, the --

which is the threat that is hanging over the heads of the Attorney General's Office and the Department of Revenue....

So this, this is an interim type bill that for one year corrects with the study and hopefully we'll come back next year and resolve, resolve the issue when we have the data necessary to do a more comprehensive approach; and with that, we have come up with, at the last minute, last night, we finally arrived at a fairly equitable or as close to an equitable solution with the insurance industry as possible, and staff director David Beggs is going to outline very generally the, what is in the bill.

MR. BEGGS: The proposed committee substitute which was passed out for one year only, beginning July 1 of this year, would raise the premium tax on foreign companies to 2.3 percent from the current 2.0 percent.

For regional home office companies, the rate would increase from 1.0 percent to 1.15 percent.

Domestic companies would go from a total exemption right now to paying a tax of .5 percent.

SENATOR DUDLEY: Senator, I understand your point about addressing the lawsuit and trying to correct the law, but why are we increasing the tax rate? Is this just an opportunity to raise taxes? Is this what we are doing?

SENATOR DERATANY: I guess every tax bill has the opportunity within to raise taxes ....

(Motors A. 232-36.) Senator Crawford summarized:

> What we are trying to do here is to not penalize general revenue and shift the tax around a little bit so that we can keep this incentive for people to have their corporate headquarters here, and insurance companies are a great clean business to have in your community. I have one and it is a great asset to us.

(Motors A. 245.)

In the May 19, 1987 Senate Floor debate of that bill, the tax's unconstitutionality was again discussed:

> SENATOR DERATANY: Bringing you up to date on what has happened, the reason there is an insurance premium tax bill is because the courts have ruled in several states that our law, as it relates to the insurance premium tax, discriminates against out-of-state insurance companies and therefore we

> have had to go through and make a correction in order to provide a level playing field for in-states, regionals, and the domestics.

(Motors A. 298.) See also June 1, 1987 House Floor debate (Motors A. 313).

In the May 5, 1988 meeting of the House Insurance Committee regarding HB 464 (1988), which actually repealed the discriminatory tax, the Chair discussed the premium tax:

> This is, by way of review, we changed last year the premium tax in response to a Supreme Court decision, and that change implements a new premium tax law in the state of Florida. That new premium tax law will take effect I guess on July 1 of this year unless we adopt another premium tax bill this year ....
>
> In the interim between last year and this year, an intensive study was done for purposes of gathering data, for purposes of putting together a premium tax bill which would satisfy the revenue needs of our state while at the same time eliminate the constitutional problem of the preexisting system, and also try to treat with a sense of equity some of the distinctions between the different types of companies writing insurance in our state and also to the extent we could, we wanted to try to confer a benefit upon those companies, whether they be international, national, regional or domestic. We wanted to try to confer an economic benefit on any of those companies who come to our state, who establish business in our state and who promote economic activity in our state. We wanted to try to do that in a fashion which was fairest for the most people.

Id. In the House of Representatives' Staff Analysis and Economic Impact Statement, the long-range consequences of the proposed bill is stated as providing "economic incentives to insurers to domicile or establish and maintain required offices in Florida ... consistent with the goals and policies of the State Comprehensive Plan set forth in s. 187.201(22), F.S." That section is specifically designed to "promote an economic climate which provides economic stability, maximizes job opportunities, and increases per capital income for its residents," all of which were declared invalid under Ward when furthered by a discriminatory tax (Motors A. 349).

Nowhere is there any discussion in any of the legislative history surrounding Florida's insurance premium tax as to any other purposes for the tax except those identified by the Florida Legislature in section 624.512(2). In considering the various changes, including the repeal in 1987 and 1988 of the discriminatory provision, the Florida legislature has never expressed the slightest concern regarding regulatory issues. Any additional reasons now asserted by Appellants are pretextual and manufactured for purposes of this litigation.

Moreover, because of the amount of tax collected, it is clear that generating tax revenue from foreign residents is the primary purpose for Florida's insurance premium tax. An exhibit introduced during the trial of Motors Insurance sets forth an estimate of the amount of insurance premium taxes collected from foreign insurers for the period 1981 through 1989 (Motors A. 457).[14] When compared to the annual budget of the Department of Insurance, it is clear the State is collecting substantially more from foreign insurers, than is required to completely fund insurance regulation and that it is, instead, being used for the purpose of funding general revenue (Motors A. 456). Clearly, the purpose of the tax is not related to the costs of regulating foreign insurance companies but rather to raising revenues.

Subsequent to Ward, a number of states have attempted to assert such pretextual purposes in an attempt to circumvent the application of Ward. In Principal Mut. Life Ins. Co. v. Taylor, Case No. 87-3353 (1st Div. Chanc. Ct. April 1, 1991), Arkansas' premium tax

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[14]For purposes of the trial in Motors Insurance, Appellants stipulated that these estimates were reasonable for the purpose of estimating the order of magnitude of the premium tax contributions to the State Treasury. However, these are not the amounts currently at issue in these cases. First, many companies waived their claims. See infra pp. 9-11. Second, in the event of refunds, the State has offset certain other tax adjustments which it claims result from such refunds. Third, if the State is correct in its statute of limitations argument, such statute has run on all unfiled claims.

statute was found to violate the Equal Protection Clause by discriminating in favor of domestic insurance companies. Arkansas, like Florida, had asserted that the discrimination was necessary to compensate it for the differences involved in the regulation of foreign insurance companies. Rejecting this purpose as pretextual, the court held that the legislative history of the statutes, the Arkansas Insurance Code, and case precedent all demonstrated that the statute's purpose was the promotion of domestic business, which purpose was declared not to be a legitimate purpose by Ward, supra. As the court noted:

> It is clear to this court that [the premium tax] was designed to promote domestic business within this state by discriminating against foreign companies that wish to compete by doing business here. This is not a legitimate state purpose under [Metropolitan Life Ins. Co. v. Ward]. Accordingly [Arkansas' statute] violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Principal Mut. Life, at 6-7.

The evidence in the Motors Insurance record confirms that Florida's insurance premium tax also lacks a legitimate state purpose and is in violation of the Equal Protection Clause. See, e.g., New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 279 (1988)("It could not be clearer that health is not the purpose of the provision, but is merely an occasional and accidental effect of achieving what is its purpose, favorable tax treatment for [local residents].")

B. The Trial Court Correctly Found, As A Matter Of Law, That The Purposes Asserted By Appellants Are Not Legitimate Purposes For Florida's Discriminatory Tax.

1. The History Of Discriminatory Taxes And The Equal Protection Clause.

The United States Supreme Court has uniformly held, over a long line of cases, that once a state admits a foreign corporation to do business in that state, that it may not thereafter discriminate against the foreign corporation solely on the basis of its residency. As a result and without exception, the U.S. Supreme Court has held a state may not constitutionally favor its own residents by taxing foreign corporations at a higher rate because of their residence.

In Southern Railway Co. v. Greene, 216 U.S. 400 (1910), the Court invalidated an Alabama tax applied solely to foreign corporations admitted to carry on business. As the Court noted:

> The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other person in a like situation ....
>
> [T]o tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and ... such attempted taxation under a statute of the State, does violence to the Federal Constitution.

Id. at 412, 418.

In Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926), the Court relied upon Southern Railway to declare unconstitutional under the Equal Protection Clause an

insurance premium tax that discriminated against foreign insurers. Illinois, like Florida, had imposed a discriminatory tax on the premiums of foreign insurance companies, exempting domestic insurance companies from the tax. Declaring the tax unconstitutional, the Court reiterated that once a state admits a foreign corporation to do business in that state, that corporation is entitled to equal tax treatment:

> By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and tax laws made to apply to it after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the Fourteenth Amendment.

Id. at 515.

In Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949), the Court applied the same principles to invalidate an Ohio ad valorem tax imposed on certain account receivables of foreign corporations from which domestics were exempt. As the Court noted:

> After a state has chosen to domesticate foreign corporations [by permitting them to qualify to conduct business within the state], the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis.... It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner.

Id. at 571-72 (emphasis added). Significantly, the Court noted that, with regard to taxation, the Equal Protection Clause permits no other conclusion:

> The Ohio statutory scheme assimilates its own corporate creations to natural residents and all others to nonresidents. While this classification is a permissible basis for some different rights and liabilities, we have held, as to taxation ... that the federal right of a nonresident "is the right to equal treatment."

Id. at 572 (citations omitted) (emphasis added).

In WHYY, Inc. v. Glassboro, 393 U.S. 117 (1968), the Court invalidated another domestic preference tax scheme, rejecting the state's claimed legitimate state purpose of avoiding increased administrative burdens. Once again, the Court found that plaintiff had "not been 'accorded equal treatment, and the inequality is not because of the slightest difference in [the state's] relation to the decisive transaction, but solely because of the different residence of the owner.'" Id. at 120.

In Williams v. Vermont, 472 U.S. 14 (1985), the Court invalidated a use tax that exempted residents from its application:

> We perceive no legitimate purpose, however, that is furthered by this discriminatory exemption. As we said in holding that the use tax base cannot be broader than the sales tax base, "equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." A State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation. In the present case, residence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants--at least among those who used their cars elsewhere before coming to Vermont. Having registered a car in Vermont they are similarly situated for all relevant purposes. Each is a Vermont resident, using a car in Vermont, with an equal obligation to pay for the maintenance and improvement of Vermont's roads. The purposes of the statute would be identically served, and with an identical burden, by taxing each. The distinction between them bears no relation to the statutory purpose. As the Court said in Wheeling, appellants have not been "accorded equal treatment, and the inequality is not because of the slightest difference in [Vermont's] relation to the decisive transaction, but solely because of the[ir] different residence."

Id. at 23-24 (citations and footnotes omitted). See also Zobel v. Williams, 457 U.S. 55 (1982).

In Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), the United States Supreme Court again confronted a discriminatory insurance premium tax and found the purposes asserted for such discrimination to be unconstitutional. Alabama, like Florida, had imposed a greater rate of tax on foreign insurers doing business in Alabama than that which it had imposed on domestic insurers. Ward, supra at 871, n.2; § 624.512(1)(a), Fla. Stat. Similarly, both Florida's and Alabama's taxing statutes provided for a reduced rate of tax on foreign insurers if the foreign insurer undertook certain actions within the taxing state. Ward, supra; §§ 624.514(1) and (2), Fla. Stat. Regardless of the activities undertaken, however, a higher rate of tax was always imposed on foreign insurers than on insurers domesticated in Alabama.[15]

Alabama asserted two policy justifications for this tax differential: first, the encouragement of capital investment in assets and governmental securities in Alabama; and second, the promotion of a domestic insurance industry. The U.S. Supreme Court held that neither objective constituted a legitimate state purpose for discriminating against foreign residents when such discrimination is based solely upon foreign residence status. Critical to the Court's decision was the unrelenting, discriminatory nature of Alabama's taxing scheme: regardless of the foreign insurers' activities and investments in Alabama, foreign insurers were always taxed at a higher tax rate than domestic insurers:

> The crucial distinction ... lies in the fact that Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama's purpose ... constitutes

[15]It is undisputed that Alabama's statute is virtually identical to Florida's. Sections 624.509 and 624.512, Fla. Stat. (1985); Ward, 470 U.S. at 871, n.2.

> the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent. As Justice Brennan, joined by Justice Harlan, observed in his concurrence in Allied Stores of Ohio, Inc. v. Bowers, this Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening "the residents of other state members of our federation." Unlike the retaliatory tax involved in Western & Southern, which only burdens residents of a State that imposes its own discriminatory tax on outsiders, the 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.

Ward at 878 (citations omitted) (emphasis added). Because this discrimination will remain unless the foreign insurer changes its state of domicile, the U.S. Supreme Court determined that the purposes articulated by Alabama to support the tax were not legitimate under the Equal Protection Clause of the United States Constitution. Ward is completely consistent with decisions of the United States Supreme Court reaching back as far as 1910 and should be dispositive, along with the other Supreme Court cases, of this case. The analysis utilized by the Court is equally applicable to this case, and to rule for Appellants would require this Court to overrule clearly established principles of law.

Thus, the U.S. Supreme Court has uniformly held that, with respect to general tax burdens on businesses, once a state admits a corporation within its borders to do business, it may not tax a foreign corporation on a different basis than that of domestic corporations where residency is the sole basis for the distinction. Although a rational-basis test is applied to discriminatory classifications based on residency, it is clear that discriminatory taxing classifications are accorded little deference. In Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959), which was heavily relied upon in Ward, Justice Brennan explained why:

> I think that the answer lies in remembering that our Constitution is an instrument of federalism. The Constitution furnishes the structure for the operation of the States with respect to the National Government and with respect to each other. The maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action. Because there are 49 States and much of the nation's commercial activity is carried on by enterprises having contacts with more States than one, a common and continuing problem of constitutional interpretation has been that of adjusting the demands of individual States to regulate and tax these enterprises in light of the multistate nature of our federation. While the most ready examples of the Court's function in this field are furnished by the innumerable cases in which the Court has examined state taxation and regulation under the Commerce and Due Process Clauses, still the Equal Protection Clause, among its other roles, operates to maintain this principle of federalism.
>
> Viewing the Equal Protection Clause as an instrument of federalism, the distinction between Wheeling and this case seems to me to be apparent. My Brethren's opinion today demonstrates that in dealing with as practical and complex a matter as taxation, the utmost latitude, under the Equal Protection Clause, must be afforded a State in defining categories of classification. But in the case of an ad valorem property tax, Wheeling teaches that a distinction which burdens the property of nonresidents but not like property of residents is outside the constitutional pale. But this is not because no rational ground can be conceived for a classification which discriminates against nonresidents solely because they are nonresidents: could not such a ground be found in the State's benign and beneficent desire to favor its own residents, to increase their prosperity at the expense of outlanders, to protect them from, and give them an advantage over, "foreign" competition? ... The proper analysis, it seems to me, is that Wheeling applied the Equal Protection Clause to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents against the residents of other state members of our federation.

Id. at 532-33 (emphasis added). See Ward, 470 U.S. at 878 (adopting Justice Brennan's

opinion).[16] Thus, principles of federalism, similar to that present in the Commerce and Due Process Clauses, are incorporated within the Equal Protection Clause forbidding discriminatory taxation of nonresidents.

The logical reason for this result is obvious. As the Court recently observed:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency .... When the State singles out [a particular class of business], though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes become acute.

Minneapolis Star & Tribune Co. v. Minnesota Com'r of Rev., 460 U.S. 575, 585 (1983). The threat of burdensome taxation is particularly troublesome where the class singled out for disfavored treatment lacks representation in the taxing state's legislature. See also Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 675-76 (1981) (Powell, J., plurality opinion) (less deference due regulation which bears disproportionately on foreign residents as such regulation avoids state's political processes, increasing the risk of unduly burdensome taxes). In such cases, a State can raise revenues without the political burden of taxing its own citizens in an equivalent manner and can provide local businesses with a competitive advantage at the same time. The only limitation on a state in such circumstance would be the state's perception of the amount of taxes such companies can be forced to bear.

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[16]In Western & Southern, the Court noted that Justice Brennan's interpretation had not, as of yet, been adopted by the Court. 451 U.S. at 667, n. 21. Four years later, however, the Court clearly and expressly adopted that interpretation as it relates to the taxation of nonresidents. 470 U.S. at 878.

Indeed, this Court, in Dep't of Rev. v. Amrep Corp., 358 So.2d 1343 (Fla. 1978), adopted Justice Brennan's views of the Equal Protection Clause as an instrument of federalism, and declared unconstitutional a statute which exempted from taxation intercompany accounts receivables of corporate "affiliated groups" if domiciled in Florida, but which did not exempt those groups domiciled outside of Florida. This Court, in an opinion which clearly foreshadowed the Supreme Court's decision in Ward, utilized the same analysis and cases that the Supreme Court utilized in Ward to hold the tax violative of the Equal Protection Clause:

> [W]e conclude that Section 199.023(7), Florida Statutes (1975), does, in fact, violate the Equal Protection Clause of the United States Constitution. Since the embryonic position of Chief Justice Taney that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty," the law has evolved to recognize that while the states enjoy wide latitude in placing conditions upon the entry of a foreign corporation to transact business within a state other than the state in which it is incorporated, once a foreign corporation is admitted and domesticated, it enjoys equal protection of the laws of the admitting state to the same extent as domiciliary corporations.... Applying this analysis to the instant case, we determine that the ad valorem tax at issue must fail because ... the unequal treatment of identical receivables is based solely on the residence of the parent and is not differentiated in any way on the basis of where the receivable arose or its actual contacts with the State of Florida.

Id. at 1352-53.

In DABT v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), reversed on other grounds, 495 U.S. ___, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), this Court again noted "that promotion of domestic business or industry, when accomplished by imposing a discriminatory tax against out-of-state competitors is not a legitimate state purpose under the Equal Protection Clause of the United States Constitution." Id. at 1009, n.2. Because Florida's discriminatory

tax is based on residency, it violates the Equal Protection Clause. Dep't of Rev. v. Amrep Corp. and DABT v. McKesson Corp. are directly on point and the trial courts' finding of unconstitutionality is consistent with the precedent of this Court and the U.S. Supreme Court.

2. Florida's Discriminatory Tax Is Based On Residency And Violates The Equal Protection Clause.

During this and the Motors Insurance litigation, Appellants' lawyers identified eight purposes to support the taxing scheme at issue, five of which are set forth in Section 624.512(2), Florida Statutes. The actual purposes for the tax are set forth in the statute and these purposes are clearly unconstitutional under Ward. Appellants, in fact, do not now argue that such purposes are the basis of the statute.

The three nonstatutory purposes found by the trial court to support Florida's taxing scheme are:[16]

> (1) Seeking to increase and optimize the state's degree of regulatory power and influence over insurers which do business in the State of Florida;
>
> (2) Seeking to encourage a configuration of the insurance industry serving Florida which is responsive to the needs of Florida insurance consumers providing for instance, insurance coverage to Florida customers during times of hard markets in lines of insurance in which the insurance industry in general has restricted its writing of insurance;

[16]At the trial of Motors Insurance, Appellants were unable to establish these purposes. The trial court in Motors Insurance only acknowledged a general interest by the Department of Insurance in acquiring greater regulatory control (Motors A. 2). The reason for the difference in these findings is that the evidence presented at trial either refuted the assertion of Appellants or Appellants were unable to produce any evidence to support these conclusory statements. Appellants failed to present any evidence as to the latter two nonstatutory purposes.

(3) Seeking to encourage a configuration of the insurance industry serving Florida in which Florida is in the best position to protect the interests of Florida insurance consumers in the event of financial impairment or insolvency of a member of the industry.

In asserting these purposes, Appellants have merely restated the same objectives as those originally set forth in the statute, the promotion of a domestic insurance industry. Indeed, the purposes asserted are simply those that the State alleges are the consequences of having a domestic insurance industry. Under no circumstances can such an approach evade a finding that Florida's tax violates the Equal Protection Clause. Florida's taxing scheme, like Alabama's taxing scheme, purely and simply discriminates against nonresidents on the basis of their nonresidency, and this is not a legitimate state purpose.[17] Ward, 470 U.S. at 878, 882.

The fallacy of the State's position is illustrated by examining the second purpose related to the assertion that certain domestic insurance companies sell more insurance in "hard markets." The tax exemption, however, does not relate to whether a company sells such insurance. A domestic company gets the exemption whether or not it sells such insurance. On the other hand, no matter how much of such insurance a foreign insurance company sells, it is denied the exemption. This is the reason that the exemption is based solely on residency. Residency is the only distinguishing feature as to whether a company

[17]The logical implication of Appellants' position is far-reaching. If any of the purposes asserted by Appellants are sufficient to allow discrimination against foreign insurers, then it cannot be doubted that the State will seek to conjure other purposes to support new taxing schemes or schemes previously declared unconstitutional. Indeed, the same justification can easily be extended to other lines of business and to rates of taxation far in excess of that present here. If the State's position is accepted, it is difficult to imagine any limitation upon a state from imposing onerous burdens on foreign competitors.

gets the exemption. The Alaska Supreme Court analyzed this same question and reached the same conclusion. See Principal Mut. Life Ins. Co. v. Div. of Ins., 780 P.2d 1023, 1027-28 (Alaska 1989).

3. All Other States Which Have Addressed This Issue Since Ward Have Declared Discriminatory Insurance Premium Taxes Unconstitutional.

Seven states, subsequent to Ward, have addressed the constitutionality of similar insurance premium tax schemes. In all seven states, the trial and appellate courts have held that similar taxing schemes violated the Equal Protection Clause and declared them unconstitutional. See Principal Mut. Life Ins. Co. v. Taylor, Case No. 87-3353 (1st Div. Chanc. Ct. Ark., April 1, 1991); Principal Mut. Life Ins. Co. v. Div. of Ins., 780 P.2d 1023 (Alaska 1989); Penn Mut. Life Ins. Co. v. Dept. of Licensing and Regulation, 162 Mich. App. 123, 412 N.W.2d 668 (Ct. App. 1987); Metropolitan Life Ins. Co. v. Com'r of Dep't of Ins., 373 N.W.2d 399 (N.D. 1985); State v. American Bankers Ins. Co., 374 N.W.2d 609 (S.D. 1985); Mutual Life Ins. Co. of N.Y. v. Wyoming, Case No. 90-358 (1st D.Ct. Wyo. 1985); Keystone Provident Life Ins. Co. v. Ramil, Case No. 2380 (Tax App. Ct. Haw. 1986).

In Metropolitan Life Ins. Co. v. Com'r of Dep't of Ins., 373 N.W.2d 399 (N.D. 1985), the North Dakota Supreme Court relied upon Ward to declare unconstitutional a similar insurance premium tax, finding that such tax was placed upon foreign insurers because of their residence and that none of the purposes advanced by the state to support such statute were legitimate when accomplished by discrimination. North Dakota asserted twenty-three reasons in support of its statute, but the court held that all were invalid under the analysis of Ward. See also State v. American Bankers Ins. Co., 374 N.W.2d 609 (S.D. 1985) (South

Dakota Supreme Court declared unconstitutional a similar insurance tax on excess line insurers).

In Principal Mut. Life Ins. Co. v. Taylor, Case No. 87-3353 (1st Div. Chanc. Ct. Ark., April 1, 1991), Arkansas' premium tax statute was found to violate the Equal Protection Clause for discriminating in favor of domestic insurance companies. Arkansas, like Florida, had asserted that the discrimination was necessary to compensate it for the differences involved in the regulation of foreign insurance companies. Rejecting this purpose as pretextual, the court held that the legislative history of the statutes, the Arkansas Insurance Code, and case precedent all demonstrated that the statute's purpose was the promotion of domestic business, which purpose was declared not to be a legitimate purpose by Ward, supra. Similarly, in Mutual Life Ins. Co. of N.Y. v. Wyoming Ins. Dep't, et al., Case No. 90-358 (1st Jud. D.Ct. Wyo. 1985), Wyoming's insurance premium taxing scheme was declared unconstitutional. The Wyoming court found that Wyoming's statute was identical to Alabama's, and based upon the United States Supreme Court's decision in Ward, declared the statute unconstitutional.

Although Appellants have sought to characterize Ward as "an isolated eddy," it clearly is not. Even though faced with overwhelming judicial rejection of discriminatory taxes, including by this Court, Florida still argues that it is constitutionally permissible to promote a domestic industry through a discriminatory tax. The State does so by arguing that it has different reasons for promoting the domestic insurance industries than those expressly rejected in Ward. In asserting this defense, Appellants ignore the analysis of the Court's opinion in Ward and other cases. Undoubtedly, there are an endless number of reasons why a state may want a domestic insurance industry. There is no requirement that the U.S.

Supreme Court rule on each specific reason before the clear principles established by the Court over the last century are accepted by the various states.

Appellants also argue that other decisions require a different result. See Appellants' Initial Brief, citing Northeast Bancorp, Inc. v. Bd. of Governors of the Federal Reserve System, 472 U.S. 159 (1985); G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982); Madden v. Kentucky, 309 U.S. 83 (1940); Board of Educ. v. Illinois, 203 U.S. 553 (1906); International Org. of Masters v. Andrews, 626 F. Supp. 1271 (D. Alaska 1986), aff'd in part, vacated by, 831 F.2d 843 (9th Cir. 1987), cert. denied, 485 U.S. 962 (1988). Both trial courts properly rejected these decisions as being clearly inapplicable.

In Northeast Bancorp, the United States Supreme Court analyzed at great lengths whether it was a violation of equal protection for Connecticut to permit corporations within the New England region to engage in banking within Connecticut, but to prohibit all other corporations. That decision is inapplicable because the Equal Protection Clause only applies to foreign corporations admitted within a state's borders; it does not apply, as in Northeast Bancorp, to the state's decision not to allow corporations inside its borders. See Wheeling Steel, 337 U.S. at 571-72; Ward, 470 U.S. at 878; Western & Southern, 451 U.S. at 664-65. Second, Northeast Bancorp does not concern the discriminatory imposition of a tax. As the Supreme Court has found, a discriminatory tax provides great cause for concern because of the threat of singling out a particular class of taxpayers for burdensome taxes without any political constraints.

Further, although the Court found the distinction discriminatory, it held that Congress' determination as to banks' unique role in this society provided a legitimate basis for the distinction. The Court found that Congress had made a clear public policy decision

to encourage the formation of community-based local banks, rather than highly concentrated banks. Congress made this decision based upon the significant role banks play in the development of communities, and the need to preserve a close relationship between those in the community who need credit with those who provide it. Id. at 172-75. Thus, Congress has historically, in furtherance of this policy, outlawed or severely restricted interstate banking. The Court found that when Congress began to ease these restrictions, one of Congress' aim was to encourage, as a middle ground, the development of regional, rather than full, interstate banking. Based on this historical policy, the Court found the discrimination to be supported by a legitimate state purpose.

By contrast, Congress has never expressed a public policy determination to prohibit large interstate insurance companies. Although there has been clear congressional intent to permit states to regulate insurance on a local basis, Congress has never indicated an intent to limit the development of interstate insurers. See, e.g., McCarran-Ferguson Act. Congress' public policy determination to encourage development of community-based banks simply does not apply to insurance.

Clearly, the Supreme Court in Northeast Bancorp had Ward in front of it when it decided Northeast Bancorp and had every opportunity to recede from it, if Appellants were correct. See Northeast Bancorp (O'Connor, J., concurring). By distinguishing Ward based upon the unique role Congress has chosen for banks, the Court maintained that it is improper for a state to discriminate against nonresidents solely to encourage domestication or investment within a state. The purposes articulated by Appellants in section 624.512(2), relate to such purposes found by this Court not be legitimate purposes.

With regard to Madden v. Kentucky, Board of Educ. v. Illinois, and International Org. of Masters v. Andrews, supra, those cases are also clearly distinguishable. Neither Madden nor Board of Educ. concerned the discriminatory treatment of a foreign corporation, but rather the discriminatory treatment of a resident's property being placed outside the state. Furthermore, in International Org., the state was acting as a "market participant," not a "market regulator," a critical distinction as recognized by that court. The U.S. Supreme Court has recognized a similar distinction. New Energy Co. v. Limbach, 486 U.S. 269, 277 (1988).

Finally, Appellants argue that the trial court erred because the court's decision violates Congress' delegation of its power over interstate commerce to the several states with regard to the regulation and taxation of insurance under the McCarren-Ferguson Act, 15 U.S.C. section 1011. This argument is clearly specious as Congress cannot withdraw rights provided by the Equal Protection Clause or authorize its violation. See Western & Southern, 451 U.S. at 652-68. Appellants discussion of the Commerce Clause is irrelevant to this case and simply confuses the issues in this case. The fact that Congress has conferred certain authority on the various states has absolutely nothing to do with a proper application of the Equal Protection Clause.

For the foregoing reasons, the trial court was correct in declaring Florida's insurance premium tax unconstitutional for impermissibly discriminating against foreign corporations in violation of the Equal Protection Clause and this Court should affirm that decision. For the following reasons, Florida's tax also is not rationally related to any legitimate state purpose.

C. Florida's Discriminatory Insurance Premium Tax Is Not Rationally Related To The Purposes Asserted By Appellants And The Trial Court Erred in Holding There Is Such A Relationship.

1. The Residency Requirement In Florida's Tax Scheme Prevents It From Being Rationally Related To A Legitimate Purpose Under The Equal Protection Clause.

Sections 624.509, 624.512, and 624.514, Florida Statutes, are not rationally related to the purposes offered by Appellants in support of those statutes. Florida's taxing scheme, like Alabama's in Ward, provides for a reduced rate of tax on foreign insurers depending upon certain actions undertaken by the insurer in Florida, e.g., establishing a home office in Florida. See Ward at 871; § 624.514, Fla. Stat. However, under both Florida's and Alabama's taxing schemes, regardless of the investment or other activities taken by the foreign insurer, the foreign insurer will continue to be taxed at a higher rate than that enjoyed by domestic insurers. Thus, even though the foreign insurer may invest substantial assets, undertake risky lines of insurance, employ residents, and create no regulatory or administrative burdens in the taxing state even in the event of financial impairment, all supposed policy reasons in support of the tax, the foreign insurer will, regardless, always pay a higher tax than its domestic counterpart.

Under Florida's scheme, no matter how much investment or other activities a foreign insurer undertakes in Florida, its rate of taxation under all circumstances will always be higher than that for Florida's domestic insurers. Therefore, the distinction between domestic insurers and foreign insurers and their tax liability is dependant solely upon their state of incorporation, and not the degree of their activities within the State of Florida. This is exactly the type of taxing discrimination that the Equal Protection Clause prohibits and

has been declared by the courts, without exception, to prevent. See Ward, supra; Allied Stores, supra.

In Ward, this was critical to the Court's findings:

> Moreover, the investment incentive provision of the Alabama statute does not enable foreign insurance companies to eliminate the discriminatory effect of the statute. No matter how much of their assets they invest in Alabama, foreign insurance companies are still required to pay a higher gross premiums tax than domestic companies. The State's investment incentive provision therefore does not cure, but reaffirms, the statute's impermissible classification based solely on residence. We hold that encouraging investment in Alabama assets and securities in this plainly discriminatory manner serves no legitimate state purpose.

470 U.S. at 882-83 (emphasis added).

In Western & Southern Life, the Court declared a retaliatory taxing scheme constitutional because the tax burdened only residents of states that imposed discriminatory taxes on nonresidents; it was thus possible for foreign insurers, depending upon the policies of their domiciliary states or upon their lobbying efforts, to be taxed at the same rate as domestics. The statutory scheme was rationally related to promoting its purpose since foreign insurers who pursued that purpose were rewarded with the same rate charged domestic insurers. In Ward, this distinction was critical:

> Unlike the retaliatory tax involved in Western & Southern, which only burdens residents of a State that imposes its own discriminatory tax on outsiders, the 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.

Ward, 470 U.S. at 878 (citations omitted) (emphasis added). Here, regardless of the activities undertaken, foreign insurers will never be entitled to the exemption from the tax

that domestic insurers receive. Under Western & Southern and Ward, Florida's tax is clearly not rationally related to a legitimate state purpose.

Similarly, in G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982), the Supreme Court upheld against an Equal Protection challenge a statute tolling the limitation period for actions against unrepresented foreign corporations. Critical to this Court's analysis was the fact that foreign corporations could receive the same limitation period provided to residents by the appointment of a registered agent for receipt of service of process. The prohibition, therefore, was rationally related to its purpose. Id. at 410-11.

Other courts have reached the same conclusion. In Principal Mut. Life Ins. Co. v. Div. of Ins., 780 P.2d 1023 (Alaska 1989), the Alaska Supreme Court declared Alaska's premium insurance taxing scheme unconstitutional for violating the Equal Protection Clause. The state had advanced the following reasons, inter alia, to support the legislation: the tax differential in favor of domestic insurers ensured a more stable insurance market in Alaska through domestic insurers; and the tax differential increased the availability of insurance in Alaska since domestic insurers are more familiar with the state and will write coverage for risks which foreign companies will not insure. The court rejected these reasons, finding that the legislation failed to advance any legitimate state interest since foreign insurers, under all circumstances, were taxed at a higher rate. As the court noted, domestic insurers are of course under no compulsion to sell in the state and may leave the state at any time. Indeed, a domestic insurer's greater familiarity with the state may actually cause it to avoid underwriting certain risks. Unlike the retaliatory tax approved in Western & Southern, supra, Alaska's premium tax:

> [O]n the other hand, does not encourage other states to lower the rate premiums they impose on Alaska insurers. For no matter how low the rate imposed by the foreign insurer's home state, [Alaska's taxing scheme] requires a foreign insurer to pay twice the premium rate paid by Alaska insurers. Unlike a retaliatory tax, [Alaska's taxing scheme] does not provide for the reduction of taxes on foreign business upon the reduction by their states of taxes imposed on Alaska businesses.

Id. at 1027-28.

Similarly, in Penn Mut. Life Ins. Co. v. Dep't of Licensing and Regulation, 162 Mich. App. 123, 412 N.W.2d 668 (Ct. App. 1987), the court invalidated Michigan's insurance premium tax after it found that the state's goals were not promoted by the tax as a foreign insurer could never enjoy the same tax preference enjoyed by domestic insurers. 412 N.W.2d at 673.

2. The Court Erred In Finding The Asserted Purposes Are Rationally Related To Florida's Taxing Scheme In Making Certain Related Factual Findings And In Making Such Factual Findings Based On A Motion For Summary Judgment.

This issue of whether an identified purpose is rationally related to a statute is, in part, a question of fact. Based on the evidence in this case and in Motors Insurance, the Florida Legislature did not and could not have reasonably believed that Florida's insurance premium tax scheme was rationally related to the promotion of the purposes now asserted for the tax. All five of the purposes set forth by the Florida Legislature in support of the statute are contained in section 624.512(2) and relate to the promotion of a domestic insurance industry for economic reasons. Furthermore, by not relying on these purposes in their brief, Appellants have essentially admitted that these purposes are not legitimate purposes under the analysis required by Ward. Thus, the Legislature did not even

contemplate that there was a rational relationship between this discriminatory tax and insurance regulation.

It is also clear that the Legislature could not have reasonably believed that the remaining three purposes now advocated by Appellants would be advanced by Florida's insurance premium taxing scheme. Those purposes are:

> (1) Seeking to increase and optimize the state's degree of regulatory power and influence over insurers which do business in the State of Florida;
>
> (2) Seeking to encourage a configuration of the insurance industry serving Florida which is responsive to the needs of Florida insurance consumers;
>
> (3) Seeking to encourage a configuration of the insurance industry serving Florida in which Florida is in the best position to protect the interests of Florida insurance consumers in the event of financial impairment or insolvency of a member of the industry.

(R. 915).

For these purposes to be rationally related to the discriminatory tax, a number of factual relationships must be established. Since these purposes relate to differences between foreign and domestic companies, the first step is a determination of whether the discriminatory tax could cause foreign insurers to re-domesticate to Florida. It is only after this relationship is established, that the differences asserted for foreign and domestic companies must be examined and a determination made regarding their validity.

(a) The Trial Court Erred In Finding That It Is Rational To Conclude That The Discriminatory Tax Would Result In Insurance Companies Changing Their State Of Domicile.

The clear and undisputed evidence produced in both Melahn and Motors Insurance shows that the statutes did not serve to induce companies to change their state of domicile and the trial court in Motors Insurance so found (Motors A. 02). For this reason, the statutes cannot be rationally related to the purposes now identified by Appellants as the basis for the tax, and Appellants cannot prevail on their Motion for Summary Judgment.

In the affidavits filed in support of Appellees' motions for summary judgment, Lewis E. Melahn, Director of the Missouri Department of Insurance, and Thomas Bond, former Commissioner of Insurance for the State of Texas, both averred that insurance premium tax schemes that discriminate against foreign insurers do not induce insurance companies to domesticate and that the purpose for such discriminatory taxes is to raise revenue and to promote the development and growth of business within the state. Melahn Affidavit at ¶ 8 (R. 522); Bond Affidavit at ¶ 8 (R. 529).

In the Motors Insurance case, the trial court considered all of the evidence presented by both sides and in its Final Judgment, concluded, "The Court finds that, based on the evidence, a discriminatory insurance premium tax statute does not, in fact, cause an insurance company to change its state of domicile." Final Judgment, Motors Insurance (Motors A. 02). This finding of fact by the trial court was based on the undisputed testimony of Dr. Alfred E. Hofflander, Professor of Finance at U.C.L.A., who testified that based upon regression analysis studies that he performed, there was actually no correlation between a discriminatory insurance premium tax and inducing insurers to domesticate. In

fact, Dr. Hofflander's unrefuted testimony was that there was no evidence on which a legislator could have relied to reach a reasoned belief that such a relationship existed.

Significantly, Appellants are unable to present any evidence to even dispute this finding. Both of Appellants' expert witnesses admitted that they did not know if Florida's insurance premium tax induced insurance companies to domesticate in Florida. Dr. Lilly testified in his deposition that he had no opinion as to whether Florida's discriminatory tax played any role in encouraging foreign insurers to domesticate in Florida. Mr. Castellanos testified similarly. See Lilly Deposition, Motors Insurance, filed in Melahn on October 21, 1991, at pp. 13-14; Castellanos Deposition, Motors Insurance, p. 10 (R. 845-56).

The only evidence presented on this issue by the State of Florida were the depositions of three insurance company executives who said they considered this tax in deciding to locate in Florida. The trial court in Motors Insurance, however, rejected this testimony when it found that the tax did not, in fact, cause companies to domesticate in a particular state (Motors A. 02).

The trial court in Motors Insurance was correct in finding Florida's discriminatory insurance tax did not cause insurance companies to domesticate in Florida, and the trial court in Melahn erred in finding there is such a relationship. The clear and unrebutted testimony in Motors Insurance established that a discriminatory tax does not induce domestication. This Court should not rule on this issue until the full record in Motors Insurance is before the Court.

(b) The Trial Court Erred In Finding That The State Has A Greater Degree Of Regulatory Power And Influence Over Domestic Insurers Than Foreign Insurers Which Do Business In The State Of Florida

With regard to whether the State has a greater degree of regulatory power over domestic insurers than foreign insurers which do business in the State, the evidence in Melahn shows that this is either not true or the differences are those that Florida has adopted voluntarily. Clearly, the State has an enormous degree of regulatory control over foreign insurers, including the authority to deny or revoke an insurer's Certificate of Authority. See § 624.418, Fla. Stat. Similarly, there is no doubt that the State of Florida is interested in regulating and monitoring the insurance industry in the State of Florida. The Florida Statutes for insurance span over 600 pages, more than any other regulated industry in the State. The issue is not whether the State of Florida has significant control over foreign insurers, but whether Florida has chosen to exercise it in a manner to acquire the control over foreign insurers that it desires.

Clearly, Florida's regulatory treatment of foreign and domestic companies is voluntary. The State is free to regulate the activities of both domestic and foreign insurance companies in whatever manner it chooses. To the extent the State chooses to regulate foreign and domestic insurers differently, or chooses not to exercise the control over foreign insurers that it has, it does so because it is in the State of Florida's best interest to do so. Mr. Castellanos testified in support of such during the Motors Insurance trial. (R. 845-56).

In fact, it is generally recognized that the State of Florida could deny the right of foreign insurance companies to sell insurance in Florida if they wished. They do not do this, however, because the State of Florida wants foreign insurers to sell insurance in Florida.

This is another of the inconsistencies in the State's position. Such inconsistencies are to be expected when one tries to argue positions which are, in fact, untrue. In this case it is absolutely clear that the State of Florida never used this discriminatory tax to accomplish regulatory purposes and that such an assertion is a complete fiction. Trying to construct a rational argument regarding a legal fiction often produces such inconsistencies.

(c) The Trial Court Erred In Finding That Domestic Insurers Are More Responsive To The Needs Of Florida Insurance Consumers; For Instance, Providing Insurance Coverage To Florida Customers During Times Of Hard Markets

With regard to the purpose of encouraging a configuration of the insurance industry serving Florida which is responsive to the needs of Florida insurance consumers, the record either contains no competent substantial evidence to support this finding or demonstrates there is a factual dispute regarding this issue. The affidavits of Mr. Melahn and Mr. Bond both aver that insurance companies that domesticate in the State of Florida are less likely to be responsive to the needs of Florida insurance consumers in times of hard market conditions because of their small capital base, lack of economies of scale, and lack of access to capital markets. Bond Affidavit, ¶ 19 (R. 534-35); Melahn Affidavit, ¶¶ 17 and 18 (R. 524-25).

Similarly, during the trial of Motors Insurance, clear and unrebutted evidence was introduced that demonstrated that domestic insurance companies are not more responsive to the needs of consumers than foreign insurance companies, including during times of "hard markets," (a general restriction of the amount of insurance written by insurance companies). Dr. Hofflander testified during the Motors Insurance trial that both foreign and domestic insurance companies act in a rational manner and pursue those lines of insurance which

provide the greatest possibility of return with the most appropriate degree of risk. This testimony was supported by an exhibit introduced into evidence in Motors Insurance which shows the market share of domestic and foreign insurance companies over the relevant time period (Motors A. 458-59). The charts demonstrate that the market share of foreign and domestic companies has not changed in any significant way over the decade at issue. Additional charts which set forth the changes in market share by various types of insurance were also introduced into evidence in Motors Insurance and they supported this same conclusion (Motors A. 464-513). These charts show the market share for domestic and foreign companies to be random over time and unrelated to "hard markets."

Amici Curiae respectfully request that this Court not resolve this factual issue until the full record in Motors Insurance is before this Court.

(d) The Trial Court Erred In Finding That It Is In The Interests Of Florida Insurance Consumers To Attempt To Force Companies to Domesticate In Florida In Anticipation Of Financial Impairment Or Insolvency.

Finally, with regard to the purpose of seeking to encourage a configuration of the insurance industry in which Florida is in the best position to protect the interests of Florida insurance consumers in the event of financial impairment or insolvency, Appellants cannot prevail on this issue as there are also factual disputes regarding its resolution.

By statute, the State has specific capital and surplus requirements and restrictions on the amount of premiums that can be written by an insurer. The state also dictates the type of deposits required within the State of Florida and requires annual experience reporting. The statutes provide the State with the authority to deny or revoke the Certificate of Authority to do business in the State if, in the opinion of the Department of Insurance, the

insurance company is of unsound financial condition, has engaged in suspect practices, has failed to pay any outstanding judgment entered against it, no longer meets requirements of the original certificate of authority, refuses to be examined by the Department of Insurance, has been suspended in any other state, or is insolvent. See § 624.418, Fla. Stat.

Additionally, the State has the power to conduct examinations of companies which do business in this state. Clearly, the State's authority with regard to regulation of insurance is broad and numerous options are available to it in order to protect insurance consumers. This includes monitoring more closely the insolvency of insurance companies, increasing their examination and reporting requirements, and raising the minimum assets required to be maintained within the State. See Bond Affidavit, ¶ 18 (R. 533-34). Florida's statutory scheme for the regulation of foreign insurers is also largely voluntary (R 845-56).

It is clear, based on this evidence, that the reasons now asserted by the State to support the statutes are pretextual and that the true purposes for the statutes are to raise revenue and to encourage domestication of insurance companies.

CONCLUSION

The position of the Appellants in this case ignores what is undisputedly the true purposes of the statute. The statute contains five purposes clearly related to economic development and promotion of a local industry specifically found to be unconstitutional under Ward. Furthermore the legislative history clearly shows that, when amending the statute, the Legislature has been concerned with the amount of revenue and economic development. The Legislature has never expressed even a hint of the slightest concern of the impact of this tax on the regulatory process.

The reason for this approach by the Legislature is obvious. There is an extensive Insurance Code related to the regulation of insurance companies, and if the State of Florida wishes to regulate foreign insurance companies in a different manner, it has an immediate and direct way to do that, including the prohibition of selling insurance in Florida by companies not domesticated in this state.

The purposes now asserted by State of Florida are not only a complete legal fiction, they are based on premises which are not, in fact, true--such as the assumption that there is a rational relationship between a discriminatory tax and the domestication of insurance companies in Florida. The argument that a person who is not knowledgeable in the insurance industry could believe that there would be such a relationship is of no help to the State. The overwhelming and undisputed evidence in Motors Insurance is that there was no information available upon which a reasonable person could have relied in deciding that this tax would cause companies to domesticate in Florida. Certainly large companies which pay the greatest portion of this tax have no basis for changing their state of domestication because of such a tax.

For the foregoing reasons, this Court should uphold the trial court's decision in this matter regarding the unconstitutionality of Florida's insurance premium tax.

DATED this 24th day of December, 1991.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Lee Rohe, Assistant Attorney General, Tax Section, The Capitol, Tallahassee, Florida 32301; Daniel C. Brown, Esquire, Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, P.A., 215 South Monroe Street, Suite 400, Tallahassee, Florida 32301; Patrick J. Farrell, Jr., Esquire, Fuller, Johnson & Farrell, 111 North Calhoun Street, Tallahassee, FL 32302; and by U.S. Mail to Miriam F. Glueck and Lisa A. Weixelman, 4705 Central, Kansas City, MO 64112 this 24th day of December, 1991.

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