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FLORIDA SUPREME COURT

CASE NO. 79,024

STATE OF FLORIDA, ROBERT A. BUTTERWORTH, DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, and J. THOMAS HERNDON, in his official capacity as Executive Director of the Department of Revenue of the State of Florida.

Appellants/Cross Appellees,

vs.

LEWIS E. MELAHN, successor in office to LEWIS R. CRIST as Director of Insurance and Receiver of TRANSIT CASUALTY COMPANY,

Appellee/Cross Appellant.

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APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This appeal arises from a final judgment entered by the Honorable George S. Reynolds, III, Circuit Judge, Florida Second Judicial Circuit on cross motions for summary judgment. The judgment declared Section 624.509, Florida Statutes, as it read prior to July 1, 1988, (and during the period 1980-1985) to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Judgment was rendered on November 4, 1991. Appellants (Defendants below) timely noticed this appeal.

Plaintiff below, Lewis E. Melahn, sued in his capacity as Director of Insurance of Missouri and in his derivative capacity therefrom as receiver of Transit Casualty Company, a property and casualty insurance company organized under the laws of Missouri (domiciled in Missouri). Transit transacted insurance in Florida and several other states, but is now insolvent and in the process of liquidation under the laws of Missouri and under the supervision of Mr. Melahn. Defendants below were the State of Florida, the Department of Revenue of the State of Florida, and J. Thomas Herndon, in his capacity as Executive Director of the Department of Revenue. The Defendants below (Appellants here) will be referred to collectively throughout this brief as "the State" or as "Florida."

Mr. Melahn sought a declaratory judgment that Section 624.509, Florida Statutes, as it read prior to July 1, 1988, unconstitutionally discriminated under the Fourteenth Amendment against Transit, a foreign insurer, by reason of its combined effect together with

Sections 624.512 and 624.514, Florida Statutes (in their pre-July, 1988 form). He further sought a full refund of all premium taxes paid by Transit for the years 1980-1985.

Section 624.509, Florida Statutes, imposed a premium tax on insurers writing insurance in Florida at the rate of 2% of gross premiums written (excluding certain credits and exemptions not relevant here). Section 624.512, Florida Statutes, exempted insurance companies which (cumulatively) were organized under Florida law, maintained their home offices in Florida, and complied with the requirements of Sections 628.271 and 628.281, Florida Statutes, by maintaining their books and records in Florida and by maintaining physical possession of their assets in Florida. Section 624.514 (1), Florida Statutes, granted a 50% reduction in the tax rate imposed by Section 624.509, Florida Statutes, to insurers organized under the laws of other jurisdictions, but electing to own and maintain a regional home office in Florida and to keep therein certain records pertaining to their activities. Mr. Melahn contended below that the result of this tax structure was discrimination against foreign, or non-domestic, insurers of an invidious and unconstitutional nature (R1-11; A1-11).[1]

The State denied Mr. Melahn's allegations of unconstitutionality. The State asserted, and substantiated by proof, that it has a legitimate interest in maximizing its regulatory control and influence over insurers serving Florida citizens and that Florida, indeed, has more regulatory authority and control over a domestic insurer (as defined for purposes of

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[1]References to "R._" refer to the record; references to "A._" refer to the Appendix to this brief.

the tax exemption) than it has, or can ever reasonably hope to achieve, over a similarly situated foreign insurer. (R278-281; A220-223) (R282-286; A224-228) (R771-784; A668-681) (R812-814; A684-686; R822-825; A694-697; R830-834; A702-706; R836-844; A708-716) The State asserted that the tax structure was rationally related to the regulatory goal of achieving the greatest degree of regulatory control possible with respect to the insurance industry serving Florida citizens. The State asserted that the tax advanced that objective in two ways: first, by encouraging the formation of insurers doing business here as domestic insurers, subject to Florida's plenary control and influence, and, further, by encouraging those foreign, insurers which did not elect to redomesticate or form a Florida domestic subsidiary, to maintain regional home offices here, thereby subjecting themselves to increased, though not plenary, regulatory control by Florida. (R946; A1378) (R282-286; A224-228) (R749-751; A646-648)

The State also asserted, and provided proof, that domestic insurers tend to provide coverage to Florida insurance consumers in those lines from which foreign insurers, and the insurance industry in general, recede in times of hard market conditions. (R946; A1378) (R771-784; A668-681) Finally the State asserted and proved that the tax structure not only could be rationally conceived to have the intended effect of encouraging the formation of domestic insurers, thereby enhancing Florida's aggregate degree of regulatory control over the insurance industry, but that, in fact, the tax structure actually did influence insurers to become domiciled in Florida. (R668; A374; R674-679; A380-387) (R684; A408; R668;

A412) (R650; A390; R653-657; A393-391) (Bond Deposition, pg. 54-55 of transcript; A800-801)

After considering the affidavits and the depositions of expert and non-expert witnesses for both sides, the trial court determined that there was no genuine dispute of material fact and that the case was ripe for disposition on summary judgment. (R915; A1360) The trial court found that seeking to increase the State's degree of regulatory power and influence over the insurance industry serving the State of Florida is a legitimate State interest for purposes of Equal Protection Clause analysis. (R915; A1360) The court found that seeking to encourage a configuration of the insurance industry serving Florida which is responsive to the needs of Florida insurance consumers is a legitimate State interest for purposes of Equal Protection Clause analysis. (R915; A1360) The court found that seeking to encourage a configuration of the insurance industry serving Florida in which Florida is in the best position to protect the interest of Florida insurance consumers in the event of financial impairment or insolvency of a member of the industry is a legitimate State interest for purposes of Fourteenth Amendment analysis, as well. (R915-916; A1360-1361)

The court further found that Florida in fact has a greater degree of regulatory influence and control over domestic insurers than over similarly situated foreign insurers doing business in this State and that such control can be exercised for the benefit of Florida insurance consumers. (R916; A1361) Further, the court found that on the evidence in this record it is at least fairly debatable that insurers domesticated in Florida tend to be

comparatively more responsive to the needs of Florida insurance consumers, providing insurance coverage to Florida consumers during times of hard markets. (R916; A1361) The court also found that it was fair and reasonable to conclude that the tax structure created by Sections 624.509, 624.512, and 624.514, Florida Statutes, would have the effect of encouraging the formation of domestic insurers in this State. The court found that, in fact, it did have that effect to some extent. The court therefore concluded that the legislature could have reasonably believed that the statutes would induce insurers to form as domestic insurers in Florida. (R916-917; A1361-1362) The court concluded that the challenged statutes are rationally related to the encouragement of the formation of insurers serving Florida, which, in turn, furthers Florida's interest in obtaining a greater degree of power and influence over insurers operating in this State. (R917; A1362)

Notwithstanding those findings, the trial court concluded that the decision of the United States Supreme Court in *Metropolitan Life Insurance Company v. Ward*, 470 U.S. 869 (1985) (hereinafter "*Ward*"), holds that not even legitimate regulatory interests of the State may be pursued by means of a distinction in treatment based upon residency, and that employing such a distinction renders otherwise legitimate regulatory objectives illegitimate, for purposes of Equal Protection Clause analysis. The trial court therefore declared Section 624.509, Florida Statutes, to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and invalid. The State appeals that determination by the trial court.

The trial court further declined to address the question of whether its declaration of invalidity should operate only prospectively from the date of the *Ward* decision. (R918; A1363) The State asserts error in that regard, if indeed, the trial court is correct in its conclusion that Section 624.509, Florida Statutes, *in pari materia* with Sections 624.512 and 624.514, Florida Statutes, violated the Equal Protection Clause.

The trial court held that a portion of Mr. Melahn's claim for a refund of Transit's premium tax payments was barred by the provisions of Section 215.26, Florida Statutes. The State does not seek review of the trial court's determination that Section 215.26, Florida Statutes, operates to bar a portion of Mr. Melahn's refund claim. The State does, however, assert error in the trial court's application of Section 215.26, Florida Statutes, to the facts of this case. Mr. Melahn filed a tax refund application on behalf of Transit on February 26, 1988. (R89-93; A66-70) (R94-97; A71-74) (R631-635; A367-371) The amount of tax actually remitted by Transit within three years of February 26, 1988 was $88,828.57 (composed of payments made on March 1, 1985, April 17, 1985, July 22, 1985 and October 15, 1985, less an overpayment refund of $9,027.57 previously made by the Department of Revenue). (R87-88; A64-65; R94-97; A71-74) (R631-635; A367-371) The trial court held, however, that all taxes remitted for the year 1984 by Transit were potentially refundable under Section 215.26, Florida Statutes, even though a substantial portion of 1984 taxes were actually paid more than three years before the filing date of the refund application. The trial court reasoned that, because the final payment for 1984 taxes was due and was made

on March 1, 1985, within the three year window provided by Section 215.26, Florida Statutes, that all 1984 taxes, together with other tax payments actually made within the three-year window provided by the statute ($232,827.66) were potentially refundable. The State asserts error in that determination.

The State does not otherwise assert error in the final judgment below.

QUESTIONS PRESENTED

1. Did the trial court err in broadly reading *Metropolitan Life Insurance Company v. Ward*, 470 U.S. 869 (1985), as holding that a distinction in tax treatment between foreign and domestic insurers based upon residency is always prohibited by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, even where the distinction is rationally related to otherwise legitimate State regulatory objectives, and, upon that basis, declaring invalid the pre-July, 1988 premium tax structure of Sections 624.509, 624.512, and 624.514, Florida Statutes?

2. If not, did the trial court err in declining to make its declaration of invalidity of Florida's premium tax structure prospective from the date of the decision in *Metropolitan Life Insurance Company v. Ward*, 470 U.S. 869 (1985), in view of the fact that the *Ward* decision announced a new, unforeshadowed and different principle of law than had previously prevailed?

3. In any event, did the trial court err in interpreting the three-year non-claim provisions of Section 215.26, Florida Statutes, as allowing for the refund of taxes actually paid into the State treasury more than three years before Appellee filed its application for a tax refund in this case?

SUMMARY OF ARGUMENT

The trial court's finding that the purposes advanced by the State for the tax structure are legitimate regulatory objectives is supported by the testimony of insurance experts offered both by Mr. Melahn and by the State. It is legally correct. The trial court's finding that the tax structure was rationally related to (*i.e.*,could reasonably be viewed as advancing) those objectives is likewise legally correct. Under appropriate Equal Protection Clause review standards, the trial court should have upheld the validity of the premium tax structure.

The trial court erred because of its interpretation of the holding in *Ward*, and therefore erred in concluding that *Ward* compelled a ruling whereby Florida's premium tax structure violated the Equal Protection Clause. Neither *Ward*, nor any case heretofore considering *Ward*, has interpreted it to hold that a distinction drawn between insurers on the basis of residency is invalid, where that distinction is rationally related to the accomplishment of a concededly valid regulatory goal. Yet, the decision below construes *Ward* to hold precisely that.

Contrary to the trial court's view, *Ward* is a narrow and non-dispositive opinion. It must be so regarded. It has been sharply limited to its facts by subsequent decisions of the United States Supreme Court and the subordinate federal courts. It is criticized among constitutional scholars who have addressed it. If the holding in *Ward* is expanded as the trial

court here concluded it should be, it will upset the very allocation of power over the regulation of interstate commerce embodied in the Constitution of the United States itself.

Ward has been construed subsequently by the United States Supreme Court as holding only that "encouraging the formation of new domestic insurance companies within a State...[is] not, standing alone, [a] legitimate state purpose which could permissibly be furthered by discriminating against out-of-state corporations in favor of local corporations." *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 177 (1985) (emphasis supplied). Indeed, as pointed out in *Northeast Bancorp*, the Court in *Ward* itself expressly limited its holding:

> We hold only that such regulation may not be accomplished by imposing discriminatorily higher taxes on nonresident corporations solely because they are nonresidents.

Ward, 470 U.S. at 882, n.10 (emphasis added). Thus, *Ward* does not hold that the Equal Protection Clause precludes the pursuit of a legitimate regulatory objective - such as maximizing a state's power over the insurance industry serving the state - by distinctions in treatment of insurers based on residency, where it is shown that the distinction is rationally related to the state's comparative degree of regulatory power over the two classes of insurers. Instead, it holds only that the mere protection or encouragement of a domestic industry as an end in and of itself, "standing alone," *Northeast Bancorp,* 472 U.S. at 177, at 105 S.Ct. 2555, is impermissible under the Equal Protection Clause.

Throughout the history of this republic, it has been the office of the Commerce Clause, not of the Equal Protection Clause, to protect out-of-state businesses from state-made distinctions based on residency, irrespective of the reasons for the distinction. Jurisprudence under the dormant Commerce Clause early established, and has consistently maintained, that distinctions based on foreign residency are per se violations of that clause, and will be upheld, if at all, only upon a demonstration of the most compelling of reasons and a demonstration that no less intrusive means are available to the state in accomplishing the objective. The Equal Protection Clause, on the other hand, historically has not been held to prohibit, as a class, all distinctions based on residency, but, instead, to prohibit only those which are conclusively shown not to be rationally related to a legitimate state interest.

The Commerce Clause unequivocally reposes in Congress the power to regulate commerce among the states. In deference to that constitutional grant of power, Commerce Clause jurisprudence has consistently recognized that Congress may, in its wisdom, remove the strictures of the Commerce Clause from the states, through the exercise of its legislative power under that clause. *Prudential Ins. v. Benjamin*, 328 U.S. 408 (1946). Among the strictures which the Congress may remove is the prohibition of the dormant Commerce Clause on virtually any discrimination in the treatment of foreign business based on residency. *Id.* at 422-425.

With respect to the business of insurance, Congress has done precisely that, by enacting the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* Through that Act, Congress

made the policy decision that the interests of interstate commerce in relation to insurance are best served by allowing the states to distinguish between foreign and domestic insurers, where the distinction is rationally related to legitimate state regulatory concerns. *Id.* If *Ward* is given the breadth imbued to it by the decision below, however, that policy decision by the Congress will have been nullified by the judicial branch, ostensibly under the aegis of the Equal Protection Clause. In reality,however, the judicial branch will have determined that its wisdom, its view as to what is best for the Union regarding the regulation of commerce, supersedes that of Congress itself, the body expressly empowered by our Constitution to make those judgments and directly elected by the citizens to do so.

Close examination of *Ward* clearly shows that it need not be understood to arrogate that Congressional prerogative to the judiciary under the guise of equal protection analysis. *Ward* should not be expanded beyond its narrow channel. If *Ward* is understood in the narrow sense in which it was intended, the separation of powers, which is at the core of our Constitution, will remain intact, and the tax in question is clearly constitutional under the Equal Protection Clause.

In the alternative, if *Ward* is to stand for the proposition ascribed to it below, then the trial court erred in declining to give its declaration of unconstitutionality effort only from the date of decision in *Ward*. Under established principles, the State's reliance interests in the apparently validity of the tax prior to *Ward*, coupled with the disruptive effect of full

retroactivity of the judgment below on the State, favors making the declaration effective only from and after the date of the *Ward* decision.

Finally, if the statute is unconstitutional, the trial court erred in its interpretation of Section 215.26, Florida Statutes, the non-claim provision as to tax refunds. The court below departed from the court's interpretation of Section 215.26, Florida Statutes, and in doing so, blurred the previous bright-line test for the commencement and expiration of the non-claim period.

ARGUMENT

I. THE PREMIUM TAX IS VALID UNDER THE EQUAL PROTECTION CLAUSE; THE TRIAL COURT ERRED IN ITS READING OF METROPOLITAN LIFE INSURANCE CO. V. WARD AND IN DECLARING FLORIDA'S PREMIUM TAX INVALID ON THE BASIS OF ITS UNDERSTANDING OF THAT DECISION.

The trial court's judgment is based on a broad reading of the *Ward* decision. However, when one scrutinizes the carefully chosen language of the *Ward* opinion and views *Ward* in the context of the historical development of the issues here in controversy, it is apparent that *Ward's* holding is not as broad as the trial court viewed it. Moreover, profound constitutional policy considerations weigh against reading *Ward* any more broadly than necessary. Subsequent treatment of *Ward* in the federal court bears out the view that *Ward* is sharply limited in its reach. Under an appropriately narrow reading of *Ward's* holding, Florida's premium tax structure is consistent with the requirements of the Equal Protection Clause.

A. THE HISTORICAL CONTEXT

Prior to 1944, insurance was not considered "commerce" under the Commerce Clause of the United States Constitution. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868). Thus, in contrast to the restrictions of the dormant Commerce Clause on the power of the states to regulate, burden, and impose barriers to the interstate transaction of other business, the states were free of those restraints in regard to the business of insurance. The states were free to prohibit, burden, and treat foreign insurers differently, since the power to regulate insurance was viewed as outside of the sphere of the national government's power. The states were the only line of defense to protect the interests of their citizens in regard to the business of insurance transacted within their borders. Because of the practical and legal impediments to projecting state power over insurers beyond the states' borders, the states commonly chose to impose premium taxes on foreign insurers operating within their borders, but to wholly or partially exempt companies organized under the laws of the particular state from such premium taxes, as an inducement for insurers to become organized under the laws of the particular state.

That situation prevailed undisturbed until the year 1944, when the United States Supreme Court decided the case of *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). The opinion in *South-Eastern Underwriters* held that insurance was "commerce" under the Commerce Clause and overruled *Paul v. Virginia.* That ruling threatened havoc for the states' long-standing insurance regulatory and taxing structures.

In response to *South-Eastern Underwriters Ass'n*, Congress enacted the McCarran-Ferguson Act, 15 USC §§ 1011 and 1012. Section 1 of the McCarran-Ferguson Act, 15 USC §1011, provides:

> "Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." (emphasis supplied)

Congress thus delegated *its own power* over interstate commerce to the several States, in regard to the regulation and taxation of insurance. The McCarran-Ferguson Act broadly validated the states' pre-*Southeastern Underwriters* powers to impose taxing and regulatory requirements on the business of insurance and restored the *status quo ante* with respect to the states' power over the regulation and taxation of insurance. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *Klamath-Lake Pharmaceutical Assoc. v. Klamath Medical Services Bureau*, 701 F.2d 1276 (9th Cir. 1983), *cert. denied* 464 U.S. 822 (1983). Subsequent to the Act, the states continued to utilize a combination of investment incentives and differential premium taxes as an inducement to the formation of domestic insurers to serve their citizens. By 1985, at least 28 states employed such tax differentials similar to that challenged in this case. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

B. THE *WARD* DECISION

In 1985, a five-to-four majority of the Justices of the United States Supreme Court decided *Ward*. It is upon that decision that the trial court based its judgment declaring that the former provisions of Section 624.509, Florida Statutes, were in violation of the Equal Protection Clause.[2]

The *Ward* decision does not support the judgment below. *Ward* must be read as an isolated eddy in the main current of Equal Protection jurisprudence. Its result is explicable by the odd procedural posture in which the case was presented to the Supreme Court, and by the narrowness of the justification offered by the State of Alabama in defense of its statute. *Ward* is certainly not definitive, either by its own terms or in the light of subsequent treatment of the opinion.

The *Ward* case arrived for review at the United States Supreme Court having been treated by the lower courts only in summary proceedings. The Alabama trial court considered only two purposes advanced by the State of Alabama in support of the Alabama law. Both of those purposes constituted purely economic parochialism: encouraging investment in assets of the State of Alabama, and protecting or promoting Alabama's domestic insurance industry as a goal in and of itself. *See Ward*, 470 U.S. at 876. Indeed the Court in *Ward* analyzed the Alabama statute as "designed only to favor domestic industry

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[2] In the trial court the Appellee also relied upon decisions of the courts of other states subsequent to *Ward* which applied *Ward* to invalidate differential premium taxes. The trial court did not rely upon those cases. As further discussed in text, *infra*, at pp. 24-27, each of those decisions is inapposite to the facts of this case.

within the state". *Id.* at 878 (emphasis supplied). The State of Alabama had offered numerous other state interests justifying the Alabama statute, but those interests were not considered by the Alabama courts, and the majority in *Ward* expressly declined to review and pass upon them. *Id.* at 875, n.5.

The majority opinion in *Ward* relied principally upon four previous Equal Protection Clause cases : *WHHY, Inc. v. Glassboro*, 393 U.S. 117 (1968); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926); and *Southern R. Co. v. Greene*, 216 U.S. 400 (1910). *Id. at* 878. Three of those cases involved property taxes which treated foreign companies differently from domestic companies with no apparent justification other than simply the fact of foreign residence. Since the taxes under review in those cases were property taxes, no distinction in the state's regulatory relation to the foreign companies supported the difference in tax treatment. Since the burdens upon the State from property ownership is equal whether the property owner is foreign or domestic, those cases - *WHHY, Wheeling Steel,* and *Southern Railroad* - found no discernable basis for the difference in treatment, other than the mere fact of foreign residency. None was offered by the states. The fourth case - *Hanover Fire Ins. Co. v. Harding* - similarly involved a statute which the court expressly found to have no regulatory objective or aspect, but to be merely a revenue-raising device.

In contrast to that line of cases, another line of Equal Protection Clause cases preceded *Ward*, which *Ward* did not question, limit, or overrule. This latter line of cases

established the proposition that, where a reasoned difference exists between the state's relation to a foreign corporation and the State's relation to a domestic corporation, a tax, or other distinction, recognizing that difference is accepted by the Equal Protection Clause. For instance, in *G. D. Searle v. Cohn*, 455 U.S. 404 (1982), the court, addressing an equal protection challenge, upheld a longer tolling period under the state's statute of limitations against foreign corporations than against domestic corporations, although remanding for consideration of a Commerce Clause claim (a claim not present in this case by virtue of the McCarran-Ferguson Act). The state justified that difference based on the greater burden on its citizens in locating and serving process upon foreign corporations. In *Madden v. Kentucky*, 309 U.S. 83 (1940) the state's greater difficulties in administering and collecting taxes levied upon deposits in foreign banks justified a differential in tax treatment. In *Board of Education v. Illinois*, 203 U.S. 553 (1906) the Court upheld an estate tax exemption for bequests to domestic, but not foreign, charitable organizations. The court noted that the state had more control over the operations of a domestic charity and therefore could better direct the benefits of its charitable activities to the state's own citizens, than in the case of a foreign charity.

The *Ward* opinion did not recede from that line of cases. Instead, *Ward* found that the justification put forward by Alabama for its tax constituted nothing more than mere economic protectionism for a domestic industry, making Alabama's tax closely akin to the property taxes considered in the cases discussed above. Upon that analysis, the *Ward*

opinion concluded that the Alabama tax contravened equal protection guarantees. The majority opinion telegraphed the narrow nature of its holding explicitly:

> "We hold that *under the circumstances of this case* the *promotion of domestic business* by discriminating against non-resident competitors is not a legitimate state purpose . . . This case does not involve or question . . . the broad authority of a state to promote and regulate its own economy. We hold only that such regulation may not be accomplished by imposing discriminatorily higher taxes on non-resident corporations *solely because* they are non-residents."

Ward, 470 U.S. 882, n. 10 (and associated text) (emphasis supplied). Thus the majority opinion in *Ward* recognized that a tax differential which serves state interests other than merely providing a commercial advantage to domestic insurers was not within its sweep. Indeed, the court remanded the case for consideration of additional purposes which Alabama had put forward, but which had not been considered by the lower courts. If *Ward* were as broad as the trial court assumed, there would have been no occasion for the Supreme Court to remand the case for consideration of other potentially legitimate purposes. If *Ward* had adopted the principle that no state interest, regardless of its legitimacy, may justify distinctions in tax treatment of insurers based on residency, then the remand ordered in *Ward* was a futile act; there would have been no need for further review of the additional justifications offered by Alabama, as none would suffice.

Moreover, to read *Ward* as the trial court did, is to read it as authorizing the judiciary to supplant its judgment as to what is best for the Union in regard to interstate commerce

for that of the Congress. The Commerce Clause unequivocally reposes in Congress the power to regulate commerce among the states. Commerce Clause jurisprudence has consistently recognized that Congress may, in its wisdom, remove the strictures of the Commerce Clause from the states, through the exercise of its legislative power under that clause. *Prudential Ins. Co. v. Benjamin, supra*. Principal among the strictures of that Clause which the Congress may remove is the prohibition of virtually any discrimination in the treatment of foreign business based on residency. E.g. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977) With respect to the business of insurance, Congress has removed that restriction from the states. Through the McCarran-Ferguson Act, Congress made the policy decision that the interests of interstate commerce are best served by allowing the states to distinguish between foreign and domestic insurers, where the distinction is rationally related to legitimate state regulatory concerns. If *Ward* is given the breadth imbued to it by the decision below, however, that policy decision by the Congress, made in the exercise of its power to regulate commerce, will have been nullified by the judicial branch, ostensibly under the aegis of the Equal Protection Clause. In reality, however, the judicial branch will have determined that its wisdom, its view as to what is best for the Union regarding the regulation of commerce, supersedes that of Congress itself, the body expressly empowered by our Constitution to make those judgments and directly elected by the citizens to do so. If *Ward* is read as the trial court asserts that it should be, hereafter no state interest, regardless of its legitimacy, justifies residency-based distinctions

toward insurers, even where the residence-sensitive treatment is rationally related to the state interest. That result would eviscerate the Congress' determination to the contrary in the McCarran-Ferguson Act.

Ward need not be, and, for the good of the Union, should not be, read to reach that result.

C. SUBSEQUENT TREATMENT OF *METROPOLITAN LIFE INSURANCE CO. V. WARD*

1. Federal Cases

The holding in *Ward* has been sharply limited to its facts by subsequent decisions of the United States Supreme Court itself, and by subsequent decisions of the lower federal courts which have considered it. In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985), the court rejected an Equal Protection Clause challenge, predicated on *Ward*, to Massachusetts and Connecticut statutes which permitted out-of-state bank holding companies domiciled in reciprocating New England states to acquire an in-state bank, but denied that privilege to holding companies domiciled in states outside of New England. The court characterized *Ward* as narrowly holding that "encouraging the formation of new domestic insurance companies within a state....[is] not, standing alone, [a] legitimate state purpose which could permissibly be furthered by

discriminating against out-of-state corporations in favor of local corporations." *Id.* at 177 (emphasis supplied). The majority in *Northeast Bancorp* regarded the states' interest in preserving a close relationship between those in the community who need credit and the banks which provide it (*i.e.*, in preserving local institutions responsive to local concerns) as a legitimate state interest. *Id.* The trial court here likewise determined that preserving local insurance institutions responsive to local concerns was legitimate. (R914-920; A1359-1365) The *Northeast Bancorp* opinion noted that the Congress, in the exercise of its power over interstate commerce, had authorized state action in relation to banking such as that taken by Massachusetts and Connecticut. *Id.* at 166-176. The court then concluded:

> We think that the concerns which spurred Massachusetts and Connecticut to enact the statutes here challenged, different as they are from those which motivated the enactment of the Alabama statute in *Metropolitan*, meet the traditional rational basis for judging equal protection claims under the Fourteenth Amendment.

Id. at 178 (emphasis supplied). Justice O'Connor noted in concurrence that there was no meaningful distinction, for Equal Protection Clause purposes, between the Massachusetts and Connecticut statutes at issue in *Northeast Bancorp* and the Alabama statute as issue in *Ward*. She noted that insurance, like banking, is of "profound local concern." Further, she noted that, "[e]specially where Congress has sanctioned the barriers to commerce that

fostering of local industries might engender, this Court has no authority under the Equal Protection Clause to invalidate classifications designed to encourage local businesses because of their special contributions." *Id.* at 179.

The lower federal courts have followed the lead of the United States Supreme Court in their treatment of *Ward*. In *Trojan Technologies, Inc. v. Commonwealth of Pa.*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 2814 (1991) the court rejected an equal protection challenge to Pennsylvania's Steel Act, which requires contractors for public works projects to use American-made steel. The complainant's case rested on *Ward*. The court disposed of it thusly:

> . . . *Metropolitan Life* was sharply limited to its facts in *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 176....(1985). As the present case does not involve the taxing power and "the Equal Protection Clause permits economic regulation that distinguishes between groups that <u>are</u> legitimately different - as local institutions so often are, *id.* at 180....(O'Connor, J. concurring), we find no basis for concluding that the Steel Act contravenes the equal protection clause.

Id. at 915. In *Associated Gen. Contractors of California, Inc. v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), the court also rejected a challenge based on *Ward*. The challenged ordinance gave preference in bidding for public contracts to minority-owned businesses and to local businesses. The court regarded *Ward* as limited to its facts. It distinguished *Ward*, holding that the preference granted by the challenged ordinance, in its

view, was not a burden imposed "discriminatorily....on nonresident corporations solely because they are nonresidents, [but was] an attempt to lighten a [competitive] burden of San Francisco businesses not shared by others." *Id.* at 943 (quoting *Ward at* 470 *U.S.* 882, n.10). The court specifically held that the city's interest in encouraging businesses to locate in and remain in the city was legitimate for equal protection purposes and that the locality preference was rationally related to that purpose. *Id.*

Again, in *International Org. of Masters v. Andrew*, 626 F. Supp. 1271 (D.Alaska 1986), *aff'd. in part, vacated in part on other grounds*, 831 F.2d 843 (9th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988), the court treated *Ward* as sharply limited and rejected a *Ward*-based equal protection challenge to an Alaska statute. The challenged statute mandated a higher pay differential to Alaska residents employed by a public conveyance company than to non-resident employees. The court expressly found that the purposes offered by the state - including the assertion that Alaska employees are more acutely aware of local conditions and needs - were legitimate and that the statute was valid, notwithstanding *Ward*.

In sum, the federal courts which have had occasion to consider *Ward* have recognized the narrowness of its holding, and have recognized that the presence of any legitimate state goal in addition to the desire to promote local business, standing alone, removes the challenged statute from the reach of *Ward* and requires the courts to scrutinize the statute under traditional rational basis tests.

2. Cases From Other States

Several decisions in other states have applied *Ward* to invalidate differential premium taxes. However, none of those cases pass upon the arguments raised here by Florida in support of its tax, and none were decided upon a record which demonstrated both the legitimacy of the state's objectives and the rational connection between the differential tax and those objectives. Therefore, each of those cases is unpersuasive on the issues presented here for decision.

North Dakota defended a *Ward*-based equal protection challenge to its residency-distinct premium tax by asserting that the differential tax served in lieu of a tax on revenues generated by foreign insurers as a result of reinsurance transactions with domestic insurers. *Metropolitan Life Ins. Co. v. Commissioner of Ins.*, 373 N.W.2d 399 (N. D. 1985). However, domestic insurers were not taxed on their reinsurance premiums; thus the court concluded that this asserted state interest was tantamount to asserting that discrimination, as its own objective, is legitimate; a proposition which the court rightfully rejected. North Dakota alternatively asserted that the higher premium tax on out-of-state insurers compensated the state for services rendered to such insurers and equalized the overall tax burdens imposed on foreign and domestic insurers, contentions which the court rejected as unsupported by the evidence. Finally, North Dakota asserted that the tax simplified the administration of North Dakota's tax and insurance laws and encouraged out-of-state insurers to transact

business in the state; assertions which were self-evidently illogical. The court thus declared that statute invalid. Here, in contrast, no such contentions are asserted by Florida. The evidence below clearly supported the trial court's findings, both as to the legitimacy of the regulatory interests asserted by Florida and as to the rational connection between the tax treatment and the advancement of those interests.

Penn Mutual Life Insurance Co. v. Department of Licensing & Regulations, 412 N.W.2d 668 (Mich. Ct. App. 1987) is likewise not on point. There the court held that the purposes advanced by the state (establishing a reliable source of coverage in the state and increasing the availability of coverage where the need was greatest) were legitimate, but held that the means chosen were not rationally related to accomplishment of those objectives. In the alternative, the court held that, if the objective were merely the creation of domestic insurers, as an end in and of itself, such an objective was illegitimate in the court's understanding of *Ward*. Unlike Michigan, Florida asserted, and proved, that the Florida's regulatory influence is at its zenith in relation to domestic insurers, that encouraging the formation of domestic insurers to serve Florida insureds is therefore a logical intermediate step in achieving the goal of maximizing its aggregate regulatory power over the insurance industry in general (as opposed to being merely an end in itself), and that the tax structure is rationally related to that endeavor.

In *State v. American Bankers Ins. Co.*, 374 N.W.2d 609 (S.D. 1985), the court invalidated a law which required unauthorized insurers doing business in the state to pay a premium tax rate 1.5 times that charged to licensed insurers. The court did so because South Dakota law permitted unlicensed insurers to service existing policies without obtaining a license to transact insurance in the state. Therefore, the state's asserted objective for the differential tax - to induce such insurers to become licensed - was at odds with the law of the state and was therefore determined to be pretextual. Again, such is not the case here. The evidence presented below persuaded the trial court that the objectives asserted by Florida were substantial and legitimate.

Finally, the court in *Principal Mutual Life Ins. Co. v. State*, 780 P.2d 1023 (Alaska 1989) invalidated Alaska's differential premium tax, but did so not on the ground that the purpose asserted was illegitimate, but because the proofs did not bear out the basis for its assertion. Once again, that is not the case here.

D. *WARD* DOES NOT CONTROL

Florida does not justify its tax upon the purely economic goal of protecting domestic industry from its foreign competitors. Instead, the trial court here found that Florida's regulatory interests in respect to insurance are indeed ultimately served by encouraging the domestication of insurers serving Floridians. Therefore, *Ward* does not govern the outcome of this case. The statute must instead be judged by the historically-accepted tests developed

under the Equal Protection Clause in cases of this nature: the statute passes muster under the Equal Protection Clause if it is fairly debateable that it advances a legitimate governmental interest. That test has been adhered to steadfastly by the courts of this nation, including the United States Supreme Court itself, in cases arising both before and after the *Ward* decision. *See, e.g., Madden v. Kentucky, supra*; *Flemming v. Nestor*, 363 U.S. 603 (1960); *Lehnenhausen v. Lake Shore Auto Parts, Inc.*, 410 U.S. 356 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981); *United States R.R. Bd. v. Fritz*, 449 U.S. 166 (1980); *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648 (1981); *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985); *Alamo Rent-A-Car v. Sarasota-Manatee Airport Authority*, 825 F.2d 367 (11th Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988).

By adhering to that well-established test, and according *Ward* its appropriately narrow place in the course of constitutional thought, the Court will preserve the constitutional balance between the judiciary and the legislature. By confining *Ward* to its facts, the Court will avoid the prospect of that decision becoming an "unfortunate" one, one remembered for creating the constitutional quagmire resulting from a broad reading. *See Regan, D.H., "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," 84 Mich. L Rev. 1091, 1277-1278.* The admonitions of that unbroken line

of equal protection analysis, and that scholarly admonition, are particularly cogent here. We here consider a challenge to the State's exercise of power to regulate interstate commerce in insurance, a power expressly delegated to the State by Congress in the McCarran-Ferguson Act. Therefore, the State's tax and regulatory structure is entitled to the same deference which this Court would give to a Congressional Act.

E. APPLICATION OF THE APPROPRIATE STANDARD OF REVIEW

1. The Standard

In this Equal Protection Clause challenge the appropriate constitutional standard of review is the rational basis test. *See, e.g., United States R.R. Board v. Fritz*, 449 U.S. 166 (1980). Under this test, it has long been held that distinctions in the treatment of business entities engaged in the same business activity are permissible and that statutory regulation may treat them differently, so long as the distinctions have some rational relationship to their distinguishing features. *Id.* To pass muster under this test, the statute's classification need only be supported by a showing of conceivable legitimate state objectives, and a showing that one may rationally conclude that the statutes would further one or more of those objectives. *Western & Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. 648, 668 (1981).

The first prong of the test is a question of law. *See e.g. Ward.* In addressing this question, the court is free to consider any conceivable purpose for the statute. *E.g.,*

Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456 (1981). This Court recently reaffirmed unequivocally this principle under an Equal Protection Clause analysis, and stated that "legislation will be presumed constitutional....if any state of facts, known or assumed, justifies the law, the court's inquiry ends...." *Glendale Fed. Savings and Loan Ass'n v. State of Florida*, 587 So.2d 534 (Fla. 1st DCA 1991) (citations omitted, emphasis supplied).

The second prong of the test presents a mixed question of law and fact. *See Western & Southern,* 451 U.S. at, 672-673. Under this branch of the test, the court need only consider whether the legislature rationally could have concluded that the statute would advance a legitimate interest. *Western and Southern, 451 U.S. 648; Clover Leaf Creamery Co.*, 449 U.S. at 466. Whether the statute actually achieved the objective is constitutionally irrelevant. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 175. Where there are "plausible reasons" for the statute, the court's inquiry is at an end. *Id.*

In *Dandridge v. Williams*, 397 U.S. 471 (1970), the United States Supreme Court reiterated that standard of review and held that a statutory distinction will not be set aside if any state of facts may be conceived to justify it. *Id.* at 485 (emphasis supplied). The court further explained that if a classification has some reasonable basis, it cannot be held to offend the Constitution merely because the classification is not made with mathematical nicety. *Id. See also Western & Southern,* 451 U.S. at 674; *United States v. Carolene Products Co.*, 323 U.S. 18 (1944). This court has consistently applied these principles. In *Fraternal*

Order of Police, Metro. Dade County v. Department of State, 392 So 2d 1296 (1980), the court held that, in addressing Equal Protection and Due Process challenges, the proper standard of review is whether the means utilized bear a rational relationship to any legitimate objective. The court emphasized that the legislature has wide discretion to determine the public interest and the necessary measures for its achievement. Whether the legislature chose the best possible means to achieve a given result is of no consequence to the courts, provided that the means selected are not wholly unrelated to achievement of a legitimate state objective. *Id.* at 1302.

Moreover, this Court has held that, particularly in the field of taxation, the legislature possesses great freedom in classification, and the burden is on the one attacking the legislation to negate every conceivable basis which may support it. *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d 311, 314 (Fla. 1984). When the legislature exercises its taxing power, every presumption in favor of the enactment's validity must be indulged. *Id.* Hence, a plaintiff challenging the validity of a statute on Equal Protection and substantive Due Process grounds has the heavy burden of proving beyond a reasonable doubt that the statute is unconstitutional. *Metropolitan Dade County v. Bridges*, 402 So.2d 411 (Fla. 1981); *Bonvento v. Board of Pub. Instruction of Palm Beach County*, 194 So.2d 605 (Fla. 1967); *see also, Bunnell, 453 So.2d 808* (Fla. 1984) (all doubts concerning validity of statute resolved in favor of statute's validity). These are the controlling standards of review in this case.

2. Application of the Standard

The trial court decided this matter on cross Motions for Summary Judgment. Under Fla. R. Civ. P. 1.510, summary judgment is proper where there are no genuine issues of material fact.[3] The trial court held that there was no genuine issue of any material fact, and the record supports this holding. (R914; A1359)

The first question for the court was whether the premium tax statutes had a legitimate purpose. *See Western & Southern*, 451 U.S. 648. Appellants advanced three purposes for the premium tax statute: (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

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[3] In their respective Motions for Summary Judgment, the parties maintained that there was no genuine issue of material fact, and that each was entitled to summary judgment as a matter of law. Neither side claimed that summary judgment was inappropriate because there was a genuine issue of material fact. (R258-287; A200-229; R544-577; A307-340). Moreover insurance experts offered by both sides agreed that maximizing the state's regulatory control over the insurance industry serving its citizens was a sound policy objective, and agreed that the state has more regulatory influence and control over a domestically-organized insurer operating here than it can ever practically and legally achieve over a similar foreign insurer. (R282-286; A224-228)(R278-281; A220-223)(pp. 32, 71-72, 76, 77, 79, 86, 99, 114 of Bond deposition transcript; A778, 817-818, 822-823, 825, 832, 845, 860) (pp. 155-159 of Melahn deposition transcript; A913-917) The evidence showed that the tax structure should encourage the formation of either new and independent organizations or subsidiaries of foreign insurers as domestic insurers serving Floridians. (R650; A390; R653-657; A393-397) (R668; A374; R674-679; A380-387); (R684; A408; R688; A412) (pg. 54-55 of Bond's deposition transcript; A800-801) While Appellee's experts held the opinion that the tax structure would not induce foreign insurers to themselves redomesticate to Florida, they conceded that the tax should and did induce the formation of domestic subsidiaries of foreign companies in some cases. Thus, while they quibbled with the wisdom of the structure, or with its utility, they conceded that the effect could rationally be expected; which is all that is constitutionally required in this case.

responsive to the needs of Florida insurance consumers; and (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 that financial impairment or insolvency of a member or members of the industry. (R282-286; A224-228; R771-784; A668-681) (R278-281; A220-223) The trial court held that these purposes were each legitimate state purposes under the Equal Protection Clause. (R914-920; A1359-1365) The record supports this conclusion.

The court found, and the record supports, that Florida's residency-based distinction in premium tax treatment promotes legitimate state regulatory objectives. (R282-286; A224-228) (R278-281; A220-223) Specifically, the court found that Florida has a greater degree of regulatory influence and control over domestic insurers than over similarly situated foreign insurers doing business in Florida. (R915; A1360) The evidence was undisputed that Florida enjoys more regulatory power and influence over domestic insurers than foreign insurers operating within the State. (R282-286; A224-228; R771-784; A668-681) (R812-814; A684-686; R822-825; A694-697; R830-834; A702-706; R836-844; A708-716) Appellee's own experts agreed that the state of domicile (in this case Florida) has greater regulatory control over domestic insurers (pp. 156-159 of Melahn deposition transcript; A914-917) (pp. 32, 77, 79, 86, 114 of Bond deposition transcript; A778, 823, 825, 832, 860), and they did not dispute Appellants' evidence that in the event an insurer becomes insolvent, the state of domicile is in the best position to protect the state's policyholders. (pp. 100-101 of Melahn deposition

transcript; A547-548) (pp. 32, 77, 79, 86, 114 of Bond deposition transcript; A778, 823, 825, 832, 860).

The court also found that the evidence showed it was at least fairly debateable that domestic insurers tend to be comparatively more responsive to the needs of Florida customers, particularly in times of hard markets. (R916; A1361) The record supports this conclusion. The uncontested evidence established that domestic insurers do, in fact, provide coverage to Florida citizens in hard market conditions where non-domestic companies restrict coverage. (R771-784; A668-681) Appellants admitted that they had no factual or other basis to refute this evidence. (pp. 172, 173, 238, 248 of Melahn deposition transcript; A930, 931, 996, 1006) (pp. 126-127 of Bond deposition transcript; A872-873)

Appellees merely contended, without any factual or legal support, that the purposes advanced for the premium tax statute were illusory, and that the actual purposes of the statute were solely to raise revenue and favor domestic industry. (R519-535; A290-306) (pp. 174-179 of Melahn deposition transcript; A932-937). The court rejected this argument, and held that the premium tax statute was not merely a devise to raise revenue, but also was structured to acquire varying degrees on control and influence over insurers doing business within the state by encouraging the formation of insurers operating in Florida which maintain the majority of their assets in Florida, and maintain their principal offices in Florida. (R917; A1362)

Florida law requires that domestic insurers keep their books, records and assets in this State. §§ 628.271, 628.281, Florida. Statutes. Thus the tax inducement was not simply a means to induce incorporation here, but was aimed, as well, at inducing the maintenance of records and company assets in this state, subject to the plenary power and jurisdiction of Florida. Indeed, the overall tax structure was quite rationally designed to reward varying degrees of practical submission by insurers to the regulatory power and jurisdiction of this State. Those insurers which elected to own and occupy a regional office here thereby brought valuable and fixed assets within the jurisdiction of Florida and maintained records of regional activities here, enabling Florida to obtain access to and control over such assets and records directly, without the aid and assistance of any other jurisdiction. Such companies subjected themselves to Florida's influence to a greater degree than foreign insurers which did not locate a regional office here, but did not submit to the full breadth of power which Florida may exert over a domestic company. Such regional companies were rewarded by a 50% credit on premium tax. Companies which elected to domesticate here, maintain the majority of their assets in this state,[4] and subject themselves to the plenary and unimpeded power of this state in respect to their continuing existence as a corporate entity, were offered an exemption from premium tax as an inducement to subject themselves to such plenary power.

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[4]This is to be distinguished from a requirement to invest in securities or debt instruments of Florida. Rather, it refers to maintaining possession of the asset, or of the legal evidence of ownership, in Florida.

Therefore, the premium tax statue encouraged domestication as a means of acquiring regulatory control and influence over insurers doing business in this state to the maximum extent possible, for the protection of Florida insureds.

The second question for the court in applying the rational basis standard was whether it was reasonable for the legislature to conclude that the challenged classification would assist in achieving the objectives identified. *See Western & Southern, supra.* Appellants presented uncontroverted evidence that the residency-based premium tax distinction would induce, and did induce, insurers to form domestic insurance companies in Florida. (R650; A390; R653-657; A393-397) (R668; A374; R674-679; A380-387) (R684; A408; R688; A412) (R282-286; A224-228) Moreover, the record reflects that Appellee's own expert witness admitted that a state's residency-based premium tax distinction would induce insurers to form domestic subsidiary insurance companies in that state. (pp. 54-55 of Bond deposition transcript; A800-801) By inducing insurers to form domestic insurance companies in Florida, the State obtains greater regulatory control and influence over the insurers doing business in the state. Appellees further admitted that they had no evidence to dispute whether the Florida legislature could have reasonably believed that the premium tax statute would induce insurers to form domestic insurance companies in Florida. (pp. 46, 54-55 of Bond deposition transcript; A792, 800-801) (pp. 225, 226, 246 of Melahn deposition transcript; A983, 984, 1004) Hence, there was no genuine dispute of any material fact as to this issue.

On this record, then, as a matter of law the premium tax statute was constitutional under the rational basis standard of review for Equal Protection Clause analysis. Therefore, this Court is compelled, in the course of principled constitutional adjudication, to affirm the validity of Florida's premium tax and to reverse the judgment entered below.

II. ALTERNATIVELY, THE TRIAL COURT ERRED IN DECLINING TO MAKE ITS DECLARATION OF INVALIDITY PROSPECTIVE FROM THE DATE OF THE UNITED STATES SUPREME COURT'S *WARD* OPINION.

If the *Ward* decision is to be read as broadly as the trial court assumed, *Ward* means that no state interest, however legitimate, may justify distinctions in tax treatment of insurers based on residency. Such a rule of law is a departure from established precedent, and changes the law as it relates to residency-based distinctions in the tax treatment of insurers. [5] Under these circumstances, if this court affirms the lower court's reading of *Ward*, the decision should be applied prospectively from the date of the *Ward* opinion. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[6]

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the United States Supreme Court stated the test to determine whether a decision should be applied prospectively only: First,

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[5] Prior to the *Ward* decision, a long line of Equal Protection Clause cases established that where a reasoned difference exists between the State's relation to a foreign corporation and the State's relation to a domestic corporation, a tax, or other distinction, recognizing that difference is constitutional. *See* discussion at pp. 14, 15, *supra*. *See also Prudential Insurance Co. v. Benjamin, supra*. The *Ward* decision, as interpreted and applied by the trial court, departs from this line of cases.

[6] *But see James.B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991). However the *Beam* decision does not dictate a result contrary result in the instant case.

the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, the court must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Third, the court must weigh the inequities imposed by retroactive application to avoid the injustice or hardship of a holding of nonretroactivity. *Id.* at 306.

Prospective treatment of a decision is particularly appropriate where a decision invalidates a state tax statute. In *American Trucking Associations, Inc. v. Smith*, ___ U.S. ___, 110 S. Ct. 2323, 110 L.Ed.2d 148 (1990), the United States Supreme Court considered whether a decision declaring an Arkansas flat use tax unconstitutional under the Commerce Clause should be applied prospectively. Applying the *Chevron Oil* test, the court found that prospective treatment was warranted. Central to the court's determination was the state of Arkansas' justifiable reliance on prior precedent in enacting and implementing its tax, and the undue burden which retroactive application would place on the state's treasury, its current operations, and future plans. *Id.* at 110 L.Ed.2d 162-163 (plurality opinion). The Supreme Court decision which invalidated the Arkansas tax announced a new principle of law. *Id.* at 110 L.Ed.2d 160-161, 163. Arkansas could not have been expected to foresee that the decision would overturn established precedent, and invalidate its tax.

Where the state cannot easily foresee the invalidation of a tax statute, the court should give due consideration to the inequitable results which retroactive relief may produce. *Id.* at 110 L.Ed.2d 161-163; *see also, Chevron Oil, supra*. It would be unfair to impose the burden occasioned by retroactive relief when the state could validly rely on established precedent in enacting and implementing the tax. *Id.* at 110 L.Ed.2d 163.[7]

In *Smith*, the court considered the potential fiscal consequences which would be caused by invalidating a taxing statute, and expressly stated that the burden which retroactive relief would impose on a State's treasury is a relevant and important factor for consideration in fashioning relief in such a case. *Id.* at 110 L.Ed.2d 161-163. A refund of all taxes, if required, would have potentially disruptive consequences for the State and its citizens, and produce substantial inequitable results. *Id* at 110 L.Ed.2d 162. The Court concluded that the fiscal burden which retroactive relief would cause, coupled with the State's reliance on valid existing precedent in enacting the tax, justified prospective application of the Court's decision. *Id.* at 110 L.Ed.2d 163.

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[7] This situation is to be distinguished from the facts in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, __ U.S. __, 110 S.Ct. 2238, 110 L. Ed. 2d 17 (1990), where the State enacted a tax scheme virtually identical to the Hawaii scheme previously invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and thus it was held that the State could "hardly claim surprise at the Florida court's invalidation of the scheme". Here, the State enacted the premium tax statutes in reliance upon principles established by prior Equal Protection Clause cases. The State took no recalcitrant action after *Ward*, and, in fact, repealed the portions of the tax to which Appellee objects in 1988.

This case meets the test for prospective relief announced in *Chevron Oil*, and followed in *Smith*. The factors upon which the court in *Smith* relied in granting prospective relief in that tax case are present here, and carry equal significance and weight.

If *Ward* means what the trial court held it to mean - that no state interest can justify a distinction in a taxing statute based on residency - then *Ward* established a new principle of law by overruling clear past precedent.[8] *See Ward, supra at 875, fn. 5.* The tax clearly passed inspection under pre-*Ward* precedent. These statutes have been in existence for at least several decades. When enacted, and at least until *Ward*, the premium tax statutes were entirely consistent with the Equal Protection Clause as interpreted in an established line of cases. It would be unjust to impose the burden caused by fully retroactive relief when Florida was entitled to rely on valid prior precedent in implementing this tax.

Moreover, prospective application of the trial court's decision would not retard the Equal Protection Clause, as interpreted by the trial court. Prospective relief would protect the litigants constitutional rights, provide for a potential refund of post-*Ward* taxes in appropriate cases, and impose constitutional limitations on the states in enacting taxing statutes applicable to non-residents.

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[8] As discussed above, the State contends that the court limited its ruling in *Ward* to the facts of that case, and remanded the matter to the Alabama trial court for further consideration of other state purposes not before the Supreme court. The trial court's broad reading of *Ward*, however, extends that decision beyond its facts, and indeed establishes a new principle of law. Moreover, the members of the court recognized *Ward* as establishing a new principle of law. *Ward*, 470, U.S. at 883 (O'Connor J., dissenting) *See, also American Trucking Association, Inc. v. Smith, supra.*

Finally, a refund of all taxes, including taxes paid before *Ward*, to Appellants, and all others similarly situated, would have serious and disruptive consequences on this State's already overburdened treasury. Fully retroactive relief a refund of all premium taxes paid would ignore the State's reliance interests in valid prior precedent, and would produce substantial inequitable results. Hence, any refunds of taxes paid pursuant to the premium tax statutes should be limited to those amounts paid after the *Ward* decision.

III. THE TRIAL COURT ERRED IN ITS APPLICATION OF SECTION 215.26, FLORIDA STATUTES, TO THE FACTS OF THIS CASE.

Section 215.26, Florida Statutes, is a non-claim statute, which bars a taxpayer's right to seek a refund of taxes paid into the State treasury unless the taxpayer makes application for refund within three years of the date that the right to refund accrues. This Court has held that a taxpayer's right to a refund of taxes paid under an unconstitutional statute accrues at the time of payment of the tax into the state treasury. *State ex rel. Victor Chemical Works, Inc, v. Gay*, 74 So.2d 560 (Fla. 1954); *State ex rel. Tampa Electric Co. v. Gay*, 40 So.2d 225 (Fla. 1949).

In this case, the taxpayer actually paid $97,856.14 in premium taxes into the state within three years of the date that Mr. Melahn made application for refund. The sum of $9,027.57 was refunded to the taxpayer by reason of overpayment. Thus the net tax paid into the state treasury within the period allowed for claiming a refund was $88,828.57. However, the trial court misconstrued section 215.26, holding that the taxpayer's right to claim a refund

of taxes due for the year 1984 was not barred, even though most of that tax was not actually paid into the State treasury within the allowable time for applying for refund. The trial court reasoned that, since the final payment for 1984 taxes due was not required to be made, and in fact was not made, until March, 1985 (within three years of the filing of the refund application), all of the tax due for 1984 was subject to a claim for refund, though, as noted above, only a portion of the 1984 tax was actually paid within the three-year period.

The decision in *State ex rel. Victor Chemical Works, Inc. v. Gay, supra* holds that the running of the non-claim period commences when the right to refund accrues and holds that the right accrues upon payment of the tax into the treasury, as distinguished from the due date of the tax paid. A bright line test is required for the operation of section 215.26. The date of actual payment provides the required certainty and avoids confusion among taxpayers as to the commencement and expiration of the allowable time for claiming a tax refund. Interpreting section 215.26 to anchor the commencement of the non-claim period to the due date of taxes, rather than the date of actual payment of the taxes, while creating a salutary effect for the taxpayer in this case, will work to the disadvantage of taxpayers in other circumstances. For instance, under section 212.06, Florida Statutes, sales tax is due at the moment of sale. Yet the dealer has until the 20th day of the following month to remit the tax. Further, sales tax returns are routinely audited, with the common result that the taxpayer underpaid the tax. Under such circumstances, the tax is actually paid into the treasury much later than its due date. If the trial court's interpretation of section 215.26 is

adopted, the non-claim period for refund would begin to run before the tax is actually paid. Such a construction, in contrast to the payment-date construction, creates pitfalls for the unwary taxpayer and difficulty for state agencies in administering section 215.26. Under this Court's interpretation of section 215.26, the non-claim period as to late-paid taxes does not commence until actual payment, a construction which is favorable to the taxpayer in such circumstances.

The State therefore urges the Court to reverse the trial court on in respect to the trial court's interpretation of section 215.26, Florida Statutes.

CONCLUSION

For the foregoing reasons, the State asks the Court to reverse the judgment of the trial court insofar as it declares section 624.509, Florida Statues, as it existed prior to July 1, 1988, to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. In the alternative, the State asks the Court to reverse the judgment of the trial court insofar as it declines to make such declaration operative only from and after the date of decision in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), and insofar as it holds that section 215.26, Florida Statutes, does not bar the

Appellee's right to a refund of taxes actually paid into the State Treasury on dates more than three years prior to February 26, 1988.

Respectfully submitted,

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DEFENDANTS/APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand delivery to **PATRICK J. FARRELL, JR.**, Fuller, Johnson & Farrell, Post Office Box 1739, Tallahassee, Florida 32302-1739, and by facsimile and United States Mail to **MIRIAM F.**

GLUECK and **LISA A. WEIXELMAN**, 4705 Central, Kansas City, Missouri 64112, this 12th day of December, 1991.

DANIEL C. BROWN