IN THE SUPREME COURT OF FLORIDA

Case No. 79,061

TOM GALLAGHER, as Florida Commissioner of Insurance and Treasurer, et al., Appellants, Cross-Appellees, v. MOTORS INSURANCE CORPORATION, et al., Appellees, Cross-Appellants.	DCA Case No. 91-3704 Lower Case No. 90-2046

ANSWER BRIEF OF APPELLEES AND CROSS-APPEAL BRIEF OF CROSS-APPELLANTS

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STATEMENT OF THE CASE AND FACTS

Appellees/Cross Appellants disagree with the Statement of the Case and Facts of the Appellants/Cross Appellees on the grounds that the Statement omits certain issues raised in the pleadings below, omits important facts, draws incorrect inferences from the evidence and from the trial court's Final Judgment, and is argumentative in its assertion of the facts.

Appellees/Cross Appellants, who were plaintiffs below, are MOTORS INSURANCE CORPORATION, CIM INSURANCE CORPORATION, MIC PROPERTY AND CASUALTY INSURANCE CORPORATION, MIC INSURANCE CORPORATION, and MIC GENERAL INSURANCE CORPORATION (these parties are hereinafter collectively referred to as "Taxpayers"). Appellants/Cross Appellees, who were defendants below, are TOM GALLAGHER, in his official capacity as Florida Commissioner of Insurance and Treasurer and as a member of the Cabinet; GERALD A. LEWIS, in his official capacity as Florida Comptroller and as a member of the Cabinet; J. THOMAS HERNDON, in his official capacity as Executive Director of the Department of Revenue, State of Florida; DEPARTMENT OF INSURANCE, STATE OF FLORIDA; DEPARTMENT OF BANKING, STATE OF FLORIDA; and DEPARTMENT OF REVENUE, STATE OF FLORIDA, (these parties are hereinafter collectively referred to as "the State").

Taxpayers' Complaint requested declaratory and injunctive relief and alleged that sections 624.509, 624.512, and 624.514, Florida Statutes (1983-1988) (hereinafter referred to as "Florida's insurance premium tax"), and section 624.429, Florida Statutes (1983-1988) (hereinafter "Florida's retaliatory tax"), are unconstitutional as written and as applied because such taxes impermissibly discriminate against Taxpayers and other foreign insurers in favor of

domestic insurers and therefore violate the Equal Protection and the Due Process Clauses of the Fourteenth Amendment[1] of the United States Constitution and the Due Process Clause of the Constitution of the State of Florida.[2] (R. 303-25) The Complaint also alleged that Florida's retaliatory tax violates the Privileges and Immunities Clause of the Constitution of the United States and that it constitutes an unlawful delegation of legislative authority under Article II, section 3 of the Constitution of the State of Florida. (R. 303-25)

After Taxpayers filed their initial Complaint, the Department of Revenue, on June 6, 1991, sought to impose additional tax assessments against Taxpayers based on the insurance premium tax and the retaliatory tax for the period 1983-1988 (R. 315-16) and also sought to impose pro forma assessments based on the retaliatory tax for the period 1983-1988. (R. 315-16) The purpose of the pro forma assessments was to assert a claim for an increase in retaliatory taxes in the event Taxpayers were successful in declaring unconstitutional Florida's insurance premium tax. (R. 316) Taxpayers amended their Complaint to challenge these assessments on the same grounds as set forth above and, in addition, to challenge the 1983 and 1984 tax assessments on the grounds that such assessments were barred by Florida's statute of limitations, section 95.091, Florida Statutes.

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[1]The Due Process and Equal Protection Clauses state:

> ... No State shall make any law which shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, § 1.

[2]Florida's Due Process Clause states in pertinent part:

> No person shall be deprived of life, liberty or property without due process of law, ...

Fla. Const. art. I, § 9.

The Complaint requested that the challenged statutes be declared unconstitutional and that the State be enjoined from enforcing any assessments for such taxes and ordered to refund all sums paid pursuant to said sections. (R. 303-25)[3] The Taxpayers also alleged that the challenged statutes violated 42 U.S.C. § 1983. (R. 303-25, 452-55)

The matter was heard before the Honorable F.E. Steinmeyer, III. After an evidentiary trial, the court entered Final Judgment on November 13, 1991 declaring section 624.509, et seq., Florida Statutes, unconstitutional under the Equal Protection and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of the Florida Constitution and ordering refunds of the unconstitutional taxes. (R. 779-85) The Final Judgment denied the remainder of the Taxpayers' claims, including the Taxpayers' challenge to the pro forma retaliatory tax assessments. As a result, the court, in the Final Judgment, offset the amounts due under the State's pro forma assessments against the amounts to be refunded to Taxpayers and ordered net refunds to Taxpayers. (R. 785) The State timely filed its Notice of Appeal, and the Taxpayers timely filed their Notice of Cross-Appeal.

Taxpayers appeal those portions of certain Orders and the Final Judgment which held: (1) Florida's retaliatory tax, section 624.429, Florida Statutes, does not constitute an invalid delegation of legislative authority under the Florida Constitution; (2) Florida's retaliatory tax does not violate the Equal Protection Clause of the United States Constitution; (3) Florida's retaliatory tax does not violate the Due Process Clause of the United States and Florida Constitutions; (4) Section 95.091, Florida Statutes, does not bar the pro forma assessments for retaliatory taxes for 1983 and 1984; (5) Taxpayers are not entitled to relief under section 42 U.S.C. §§

[3]The refunds Taxpayers seek with regard to Florida's insurance premium taxes under sections 624.509, 624.512 and 624.514, Florida Statutes, are for the years 1983 through 1988.

1983 and 1988, and (6) Florida's retaliatory tax does not violate the Privileges and Immunities Clause.

Florida's insurance premium tax, section 624.509, Florida Statutes (1983-1988), imposed 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 provided a complete exemption from the tax to domestic insurers who meet certain criteria.[4] It is undisputed that the tax discriminates against foreign insurers, and the State stipulated that the insurance premium tax imposed a greater rate of tax on foreign insurers doing business in Florida than it did on similarly situated domestic insurance companies. (R. 710)

The Taxpayers alleged and proved that there is no legitimate state purpose for Florida's discriminatory insurance premium tax. (R. 780) The Taxpayers asserted that the purposes for Florida's premium tax are set forth in the statute at issue and that, other than raising revenue from non-Florida residents, the State had no other purposes for its discriminatory insurance premium tax. (R. 1297; Plaintiffs' Exhs. 5-18) The State now asserts that the purpose of its insurance premium tax was to gain more regulatory control over foreign insurers. The evidence at trial, however, clearly demonstrated that this assertion is a legal fiction, manufactured solely for the purpose of this litigation. (R. 1259, 1255-70, 1297, 1341-43; Plaintiffs' Exhs. 5-18)

In 1981, the U.S. Supreme Court held that taxes that discriminate against non-residents are a violation of the Equal Protection Clause unless there is a legitimate state purpose for such discrimination. Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648

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[4]The premium tax at issue was repealed effective July 1, 1988. Ch. 87-99, Laws of Florida; Ch. 88-206, Laws of Fla.

(1981). In 1982, Florida's Insurance Code went through its sunset review and, realizing the consequences of Western & Southern, the State set forth its purposes for adopting such a tax when it readopted its discriminatory insurance premium tax. These purposes were to promote a domestic insurance industry for economic development. § 624.512, Fla. Stat. Subsequently, however, such purposes were found to be unconstitutional in Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).[5]

In 1987, the Florida Legislature, knowing the purposes for which it adopted its discriminatory tax and knowing the holding in Ward, acknowledged that its statute was similar to Alabama's insurance premium tax, the tax at issue in Ward. (R. 1267; Plaintiffs' Exh. 15, p.3) As a result, the Legislature acknowledged the statute's unconstitutionality (Plaintiffs' Exh. 13, 16) and repealed the statute effective July 1988. Ch. 87-99, Laws of Fla.; Ch. 88-206, Laws of Fla.

The actions of the Legislature in designing a new statute in 1988 also confirms that the purpose of the domestic exemption from the insurance premium tax was economic development. In its new insurance premium tax, the State of Florida replaced the exemption for domestic companies with a credit tied to salaries paid in Florida. § 624.509, Fla. Stat. It is obvious from the design of the new insurance premium tax that the Legislature intends to continue promoting economic development and employment in Florida by allowing salary credits to be used to reduce a taxpayer's insurance premium's tax liability. In redesigning the tax, the Legislature

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[5]Based on Taxpayers' Motion for Summary Judgment, these purposes were also found unconstitutional by the trial court in this case. (R. 242-43, 780) By not appealing the trial court's order on this issue, the State has acknowledged the unconstitutionality of the actual purposes for the statute.

made no effort to tie the credits to the premiums tax, to regulatory control, or to any other regulatory objective. See § 624.509, Fla. Stat. (1991).

The Taxpayers produced expert testimony as to the purposes for a discriminatory insurance premium tax. Dr. Hofflander, a Professor of Finance and Insurance at U.C.L.A., provided expert testimony which demonstrated that such discriminatory taxes are designed to raise revenue and that they have no impact on regulatory control. (R. 1295-98, 1341-43) Dr. Hofflander's testimony also demonstrated that if the purposes of the tax were regulatory control, it would be designed differently. (R. 1290-93) This testimony was not contradicted by any of the State's witnesses. During this entire proceeding, the State has not been able to produce a single official from the State of Florida who would testify under oath that the purpose of the tax at issue was to gain regulatory control. (R. 289-91, 299-302) Only the State's lawyers have made such an assertion.

Based on the evidence in this case, there can be no serious dispute that the State of Florida did not, in fact, adopt its discriminatory insurance premium tax for the purpose of gaining regulatory control over foreign insurers. In fact, the State of Florida acknowledged at trial that their position is a legal fiction. (R. 1258-59) Thus, the trial court's statement that the purpose of the statute was to increase regulatory control was not a finding of fact but was the adoption of a legal fiction as requested by the State. (R. 780)

Contrary to the assertion in the State's Statement of Facts, the State failed to assert or prove that the premium tax advanced legitimate state regulatory goals. (State's Initial Brief at 3) In fact, the trial court specifically found that the tax does not cause foreign insurers to change their state of domicile to Florida. (R. 780) The State's reference to Dr. Hofflander's

testimony is taken out of context and mischaracterizes his testimony. (State's Initial Brief at 6.) The record demonstrates that Dr. Hofflander clearly testified such a tax does not cause a taxpayer to change its state of domicile, and that, in 1982, there was no evidence available on which anyone could have relied to believe that it would. (R. 1280-85, 1341-43)

Furthermore, contrary to the State's claims that it proved that its discriminatory tax was related to regulatory control, it did not do so. The State has provided no record cite to support a claim to having presented evidence on the purpose of the discriminatory feature of the insurance premium tax or on its relationship to regulatory control.[6] No claim to such a relationship was made by either of the State's witnesses, Dr. Lilly (R. 1367-1403) or Mr. Castellanos. (R. 1439-66)

The only other testimony submitted by the State was the deposition of three insurance company employees, Mr. Alexander, Mr. Menke and Mr. Butler. (Defendants' Exhs. 2-4) None of these witnesses, however, claimed that a relationship existed between the discriminatory features of the insurance premium tax and increased regulatory control. Furthermore, they each testified there were a number of reasons why the companies with which they are associated are Florida companies. Contrary to the State's assertions, Mr. Alexander, Sr., also testified he formed a new company in Florida in order to be subjected to less regulation, which is exactly the opposite of what the State now asserts is the objective of its tax. (Defendants' Exh. 2 at 12) Mr. Menke testified that while he considered Florida's tax in deciding to locate in Florida, he also testified the predecessor of his firm ran into financial difficulty, gave up licenses in six

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[6]The State has merely put on evidence as to the State's interest in regulation. The State then put on evidence which it claims demonstrates that certain insurance companies considered this tax when locating in Florida. However, these two issues are separate and do not provide a basis for asserting a relationship between the purpose of the tax and regulatory control.

other states, and moved to Florida because they intended to primarily sell insurance in Florida. (Plaintiffs' Exh. 3, at 10-12) Mr. Butler, the general counsel for Florida Farm Bureau Federation, claimed his company considered the tax, he also acknowledged the marketing advantage of being a Florida company selling insurance to Florida farmers. (Plaintiffs' Exh. 4 at 7, 12) Furthermore, any claims by the State that the three companies moved their domicile to Florida were rejected by the court when the court found that the tax does not, in fact, cause companies to change their state of domicile. The State has not appealed this finding of fact which is clearly supported by competent substantial evidence. (R. 780)

The Taxpayers also alleged and proved that there is no legitimate state purpose for the retaliatory tax. In fact, the State has never articulated a purpose for its retaliatory tax. It was only after the close of Plaintiffs' case that the attorney for the State made such an assertion. The State presented no evidence on this issue. The trial court based its finding of unconstitutionality solely on the holding in Western & Southern -- a case which found a different type of retaliatory tax to be constitutional. (R. 781)

The importance of the failure of the State to assert a purpose for its retaliatory tax is demonstrated by examining the purpose it asserts for its premiums tax. The State claims it has a purpose for its insurance premium tax which is different from that which any other state has ever asserted. Although there are numerous federal and state courts which have addressed literally dozens of purposes for discriminatory insurance premium taxes, the State now asserts that Florida's purpose for the insurance premium tax has never been addressed by any court. (State's Initial Brief at 31) Without requiring the State to assert a purpose for its retaliatory tax, the court had no way of knowing if the State would have asserted the same purpose as that

asserted in Western & Southern or whether it would have asserted other purposes, as it has now done with regard to its discriminatory insurance premium tax.

The type of retaliatory tax addressed by the Court in Western & Southern is different from Florida's retaliatory tax because the State of California, which was imposing the tax, did not discriminate against foreign insurers. Furthermore, four of the five Taxpayers in this case were domiciled in states which did not discriminate against foreign insurers. (R. 714) However, Florida, a state which discriminates against foreign insurers, is apparently seeking to retaliate against other states even though such states do not discriminate against Florida insurers. As a result of Florida's retaliatory tax, a foreign insurer will pay twice the taxes a Florida insurer pays when transacting the same business. (R. 1315-16; Plaintiffs' Exh. 19)

The trial court also found that the State can assess pro forma assessments for increased assessments in the retaliatory tax because the premiums tax was found unconstitutional and refunds were ordered. (R. 782) The result of this use of the retaliatory tax is to allow the State to collect an unconstitutional tax through its retaliatory tax statute. This is an unconstitutional application of the tax. It also violates well-recognized rules of statutory construction.

The trial court found that the State's assessments for tax years 1983 and 1984 for insurance premium tax, retaliatory tax, and for other state taxes are barred by the statute of limitations. (R. 782) The court also found, however, that the pro forma assessments for 1983 and 1984 were valid because it found that all parties knew that this matter would some day be litigated. (R. 782)

Through the pleadings, Stipulations of Fact, and evidence at trial, the Taxpayers alleged and proved that the Defendants, Tom Herndon, Tom Gallagher, and Gerald Lewis, are

responsible for administering the State's tax assessments and tax refunds at issue in this case and that such taxes and assessments are unconstitutional and invalid. (R. 709-10) Even though the tax was repealed on July 1, 1988, the period for enforcement of the tax extends until the statute of limitations for assessments based on this tax expires. This period can be from five to seven years beyond the effective date of the repeal of the tax. § 95.091, Fla. Stat. (1991). Thus, Taxpayers are currently at risk from the enforcement of these unconstitutional taxes. This is clearly demonstrated by the State's issuance of additional assessments in June of 1991 which were based on the State's unconstitutional taxes. (R. 713) In fact, the State acknowledged that the potential for these assessments is always there. (R. 1065)

Because of the State's ability to continue to issue and enforce assessments based on these taxes, as well as its willingness to do so, Taxpayers sought injunctive relief to prevent such enforcement by the State. The trial court found the insurance premium tax unconstitutional, and this finding will prevent the enforcement of the collection of additional insurance premium tax. As a result, there should be no dispute that Taxpayers are entitled to relief under 42 U.S.C. § 1983. However, the trial court denied relief under 42 U.S.C. § 1983 on the grounds that no personal involvement by the individual Defendants in issuing the assessments was shown. (R. 784) In making such a finding, the trial court overlooked not only the clear and uncontroverted law on this issue but also the fact that the individual Defendants are, in fact, asserting the premium tax's constitutionality and attempting to enforce these unconstitutional assessments in this proceeding. The Defendants are legally charged with the appropriate responsibility and by seeking to enforce the assessments through these proceedings, they demonstrate their personal

involvement on a continuing basis. It is not only the issuance of the assessments but their continued enforcement which violates 42 U.S.C. § 1983.

References to the record in this case are designated "(R. __)." References to the trial exhibits are designated by party and exhibit number. Taxpayers' Appendix is designated "(Appellees' Appendix at ____)."

SUMMARY OF THE ARGUMENT

The trial court declared the former provisions of sections 624.509 and 624.512, Florida Statutes, unconstitutional because such statutes violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of the Florida Constitution by taxing foreign insurers in a discriminatory manner. The determination of whether such discriminatory taxes violate 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 purposes found to be legitimate were rationally related to the discriminatory tax.

The tax at issue fails on all points. Florida has set forth its purposes in the statute itself. These purposes include promoting a domestic insurance industry and raising tax revenue from non-Florida residents. The United States Supreme Court has determined that such purposes are not legitimate purposes for a discriminatory tax, and a tax based on such purposes is unconstitutional. The State has conceded that the purposes for the discriminatory tax set forth in the statute are not legitimate state purposes and have not appealed the trial court's finding on this issue. Thus, there is no dispute that the discriminatory tax was enacted for an unconstitutional purpose.

In response to its predicament, the State has simply conjured an additional purpose in order to support their position in this litigation. During the trial, counsel for the State admitted that the purpose now asserted by the State is a legal fiction. Furthermore, the asserted purpose is simply some of the additional consequences which the State alleges will result from promoting a domestic insurance industry, an objective already determined to be unconstitutional. Florida's tax is based solely on residency, and the State 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 that the discriminatory taxes were not rationally related to the additional purpose 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, the foreign insurer continued to be taxed at a higher rate than domestic insurers. Thus, even though a foreign insurer may have invested substantial assets, 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. Furthermore, the State's statutory scheme for regulating insurance is voluntarily adopted by the State of Florida and the differences in the regulation of foreign and domestic insurers are adopted by the State because it is in the State's best interest to do so.

To achieve the State's asserted purpose would have required a taxpayer to change its state of domicile, or a portion of it, to the state of Florida. However, the trial court found that such statutes do not cause companies to change their state of domicile. Thus, even under the purpose now asserted by the State of Florida, the former statutes are unconstitutional because the statutes did not serve, and could not have served, the State's asserted purpose. 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 non-Florida residents.

In essence, the State argues that its discriminatory tax did not violate the Equal Protection Clause because, although it was enacted for an admittedly unconstitutional purpose, the State is legally entitled to now assert a fictitious purpose for the tax and, that, although the tax was not related to the fictitious purpose, a Legislature could have believed that it was. Such an approach trivializes the importance of the Equal Protection Clause.

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 the State and the Florida Legislature knew this tax was unconstitutional, and accordingly, the Legislature repealed it as of July 1, 1988.

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 entitled to refunds and to have the State enjoined from enforcing future assessments based on this tax.

The trial court also declared the provisions of the retaliatory tax, section 624.429, Florida Statutes, constitutional. The retaliatory tax, however, is also unconstitutional because it incorporates the laws and obligations of other states. For example, if a city, county, or state government of New York, for example, adopts additional taxes, fees, or other obligations, that

tax or obligation is automatically imposed on any New York company doing business in Florida. Thus, the amount of taxes paid by a New York company doing business in Florida is determined by the statutes and laws of New York which are incorporated by reference into Florida's law. The Taxpayer is, therefore, entitled to have section 624.429 declared unconstitutional, to a refund of the retaliatory taxes paid, and to have any assessments of retaliatory tax and pro forma retaliatory tax declared invalid.

The retaliatory tax is also unconstitutional because it discriminates against foreign insurers in favor of domestic insurers and is therefore unconstitutional for the same reasons that the insurance premium tax is unconstitutional. Furthermore, the State has not articulated any legitimate state purpose for its discriminatory retaliatory tax. No court has held the retaliatory tax of a state whose own insurance tax discriminates against foreign insurers to be constitutional under the Equal Protection Clause. Four of the five Taxpayers in this case are domiciled in states which do not have discriminatory taxes and this tax is, therefore, unconstitutional as applied to these Taxpayers. The State's application of its retaliatory tax in this case is also unconstitutional as applied because it is being used to collect an otherwise unconstitutional tax.

Since the insurance premium tax was found unconstitutional under the federal constitution, the Taxpayers are entitled to relief under 42 U.S.C. § 1983. The state trial court, however, denied such relief on the grounds that personal involvement in certain assessments by the named defendants was not proven. There should be no dispute that the State is otherwise in violation of 42 U.S.C. § 1983. With regard to this issue, the trial court was simply wrong. Federal courts have clearly held that personal involvement of named defendants is not required to entitle a taxpayer seeking to prevent the future enforcement of an unconstitutional tax.

Furthermore, the personal involvement of the individual Defendants is clearly shown by their participation in this litigation in which they are attempting to have the statute declared constitutional and to enforce and collect the assessment. In fact, the answer filed in this litigation by the individual Defendants seeks to enforce an unconstitutional tax and contains all of the elements necessary to entitle Taxpayers to relief under 42 U.S.C. § 1983. As Taxpayers are clearly entitled to a finding of liability under § 1983, this action should be remanded for a determination of the amount of relief to which the Taxpayers are entitled.

ARGUMENT

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

A. FLORIDA'S STATUTORY SCHEME (1980-1988).

During the period 1980-June 30, 1988, Florida's insurance premium tax, section 624.509, Florida Statutes, imposed 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 provided a full exemption from the tax to domestic insurers who meet certain criteria.

There is no dispute that Florida's insurance premium tax scheme, under all circumstances, imposed a greater rate of tax on foreign insurers than on similarly situated domestic insurance companies. (R. 710-11) Regardless of its activities in Florida, no foreign insurer could have ever qualified for the exemption granted to domestic companies. (R. 680) Thus, there is no dispute that Florida's insurance premium tax was discriminatory, and that it was specifically designed to discriminate based solely on residency. The result is that the tax produced

substantial revenue from foreign insurance companies while exempting substantially all domestic insurers.

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 an unanimous opinion, the Court held 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 discriminatory insurance premium taxes in Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), and held that certain purposes asserted by the State of Alabama in support of the premiums tax -- promoting a domestic insurance industry and encouraging investment in the state -- were not

legitimate purposes under the Equal Protection Clause for discriminating against foreign taxpayers.

Subsequent to Ward, seven other states 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. Comm'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); (Appellees' Appendix at 08-88).

Hanover Fire Ins. and Ward are directly on point and are dispositive of this case. To rule for the State would require this Court to overrule established constitutional principles set forth by the U.S. Supreme Court. Although the State has 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 based on residency 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 taxing schemes that discriminated on the basis of residency, such as Florida's, were unconstitutional and various foreign insurance

companies doing business in Florida filed claims for refunds of taxes they had paid. (Plaintiffs' Exh. 51) 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 the tax was unconstitutional. Under Florida law, the exclusive remedy for a taxpayer to receive a refund of taxes paid is to file a claim for refund and for the State to then act upon it. See § 215.26(2), Fla. Stat. (1989); (R. 578-80). 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. Ch. 87-99, Laws of Fla. Then, apparently still unsure as to how to deal with the pending refund claims, the State 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.) (Plaintiffs' Exh. 51); Gerald Lewis, et al. v. Continental Ins. Co., Case No. 88-782 (Fla. 2d Cir.). (Plaintiffs' Exh. 51) In these actions, the State, who was the plaintiff in both actions, alleged that it was "in doubt" as to the constitutionality of section 624.509 and was accordingly unsure as to the status of parties seeking refunds under the statute. However, before the court could decide the constitutionality of section 624.509, the State, as part of an agreement with various insurance companies, made changes to the tax in return for certain insurance companies waiving their refund claims. (Plaintiffs' Exh. 52) The final statutory provisions were

adopted in the 1988 legislative session and made effective July 1, 1988. Ch. 88-206, Laws of Florida.

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 actions going to trial, the State dismissed its complaint. (Plaintiffs' Exh. 51) 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 claims of Taxpayers. 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, 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 any unfiled refund claims. (State's Reply Brief in Melahn) Thus, the State of Florida clearly 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 the Taxpayers in this action and Taxpayers immediately filed suit contesting the denial of these claims. (R. 1)

C. 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 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 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, because of the discrimination 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 its 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 any identified 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.

The State argues that Taxpayers are urging a more rigorous standard of review upon this Court. That claim is baseless. At trial, Taxpayers negated every conceivable basis for the tax and proved that the tax is not rationally related to any legitimate state purpose. Furthermore, the State's Brief incorrectly asserts that Taxpayers have erroneously cited certain cases on this issue when such cases are not cited in this Brief or in the Amici Brief filed by Taxpayers in Melahn.[7]

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

1. The Purpose For Florida's Discriminatory Tax Asserted By The State Is Pretextual And the Trial Court Erred In Finding It To Be The Purpose For Florida's Discriminatory Tax.

There is no dispute that the taxing statutes at issue are 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 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

[7]State v. Melahn, Case No. 79,024, is presently pending before this Court, and Taxpayers participated in that action as Amici Curiae.

> 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;
>
> (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

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[8]Foreign insurers, including Taxpayers, 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.).

[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).

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 that the purpose for the taxing statute is to acquire a greater degree of regulatory control. (R. 780)[10] The State of Florida, however, never introduced evidence which would support such a factual finding. (R. 172-214, 244-71) The State merely asserted, through its counsel, that its purpose for the discriminatory insurance premium tax was to acquire greater regulatory control over foreign insurers. (R. 1540-41) The State, however, never attempted to introduce any evidence during the trial which established this to be a purpose for Florida's insurance premium tax. The evidence presented during trial, instead, shows that the assertion of such a purpose is a legal fiction, and counsel for the State admitted to the court that this is the State's approach. (R. 1258-59) Thus, the purpose now asserted by the State in support of the premiums tax is a fiction, manufactured solely for the purpose of this litigation. There has been no attempt by the State to tie this purpose to Florida's discriminatory tax.[11]

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 the State regarding this issue deal with statutes which either were facially

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[10]In doing so, the trial court was adopting the legal fiction requested by the State. (R. 1258-59) The State did not present any evidence as to the other two purposes which it asserted in Melahn, Case No. 79,024. The purposes that the State tried to establish by summary affidavits in Melahn it could not prove in an evidentiary trial.

[11]Indeed, during litigation in this matter, the Taxpayers sought to take the deposition of representatives of the State as to the legislative history of Florida's insurance premium tax. (R. 289, 291) The State, however, indicated that it had no witness who would testify on this issue. (R. 299-302)

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.

Clearly, the identification of the purposes of the tax is a question of fact. 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).[12]

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,[13] ... 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, ...

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[12]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).

[13]Foreign insurers, including Taxpayers, 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.)

[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 encouraging investment in Florida. In Ward, these purposes were specifically found not to be legitimate state purposes for a discriminatory tax. Any purpose identified by the State beyond the purposes 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.[14] 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). (R. 1255-70)

Indeed, the legislative reports indicate that the reason for including the purposes in the insurance premium statute was to "express the public policy goal of having insurers employ individuals in this State thereby aiding employment." (Plaintiffs Exh. 6.) By 1987, after the Supreme Court decided Ward, the Legislature knew the tax was unconstitutional but still intended 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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[14]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 this legislative history. (R. 637)

> 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.

(Plaintiffs' Exh. 11.)

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.
>
> 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 ....

(Plaintiffs' Exh. 13.) 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.

(Plaintiffs' Exh. 13.)

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.

(Plaintiffs' Exh. 16.) See also June 1, 1987 House Floor debate. (Plaintiffs' Exh. 17)

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 regulatory reasons now asserted by the State are pretextual and manufactured for purposes of this litigation.

In making a finding that the purpose of the premiums tax is for increased regulatory control, the trial court confused the purpose of insurance regulation with the purpose of the discriminatory tax at issue. The State of Florida offered no evidence that this purpose was related to Florida's discriminatory tax. Simply asserting this purpose as an objective of insurance regulations does not demonstrate, in any way, that this is a purpose for Florida's discriminatory tax, let alone that such purpose is rationally related to Florida's discriminatory tax.

There can be no serious dispute that the State did not, in fact, adopt the discriminatory premium tax for the purpose now asserted by the State, that of gaining regulatory control over

foreign insurers. By 1987, the Legislature acknowledged the statute's unconstitutionality and repealed the statute effective July 1988. See Ch. 87-99, Laws of Fla. The new statute, however, was designed by the Legislature to continue promoting economic development and not to provide regulatory control over foreign insurers. The State replaced the exemption provided to domestic companies with a credit for local to all insurance companies. § 624.509, Fla. Stat. By using salary credits, the Legislature obviously sought to continue promoting the economic development of the State. Absolutely no effort is made in the new statute to tie the credits for the premiums tax to regulatory control or any other regulatory issue.

Moreover, because of the amount of tax collected, it is clear that generating tax revenue from foreign residents is a primary purpose for Florida's insurance premium tax. (R. 1241) An exhibit introduced at trial sets forth an estimate of the amount of insurance premium taxes collected from foreign insurers for the period 1981 through 1989. (Plaintiffs' Exh. 4)[15] 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, using the tax for the purpose of funding general revenue. (Plaintiffs' Exh. 23) 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,

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[15]For purposes of the trial the parties stipulated that these estimates were reasonable for 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. (Plaintiffs' Exh. 52). Second, in the event of refunds, the State makes certain other tax adjustments which it claims result from such refunds. Third, the statute of limitations has run on all unfiled claims.

Case No. 87-3353 (1st Div. Chanc. Ct. April 1, 1991), Arkansas' premium tax 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 found not to be a legitimate purpose in Ward, supra. As the court noted:

> It is clear to this court that [the premiums 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 this case 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 Indiana 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].")

2. The Trial Court Correctly Found, As A Matter Of Law, That The Purpose Asserted By The State Is Not A Legitimate Purpose For Florida's Discriminatory Tax.

a. 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. (R. 515)

The State attempts to distinguish the tax challenged in Hanover as being more in the nature of a property tax than an insurance premium tax. Although the challenged tax taxed net premiums rather than gross premiums, the distinction was immaterial to the Supreme Court. Instead, the Court's focus was upon the discriminatory nature of the tax after the foreign corporation was admitted to do business in the state:

> 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 ... 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 14th Amendment.

Id. at 515. Here, the State admits, and the evidence presented to the Court showed, that a primary purpose of Florida's tax was to generate substantial revenue. (R. 1241)

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.[16]

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.

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

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[16]The State attempts to distinguish WHYY, Wheeling Steel, and Southern R. Co., as concerning property taxes that discriminated against non-residents for no apparent justification. However, none of those courts made such a distinction and all were based upon the discriminatory nature of the particular taxes. That discriminatory feature is present in the tax at issue.

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.[17]

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 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

[17]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.

> 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 type of unlimited 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 the State would require this Court to overrule clearly established principles of law.

Thus, the U.S. Supreme Court has uniformly held that, with respect to 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 domestic corporations when 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. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 532 (1959); Ward, 470 U.S. at 878

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 discriminatory taxing statute which bears disproportionately on foreign residents as such statute avoids state's political processes, increasing the risk of unduly burdensome taxes); see also Austin v. State of New Hampshire, 420 U.S. 656 (1975). 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.

The State argues in its Brief that the above cases are inapplicable as they allegedly involve a different standard of review; yet, nowhere does the State challenge the logic of the statements by the various courts concerning the effect of taxation on selected groups. (State's Initial Brief at 38). Clearly, the power to tax differentially is a powerful weapon against the Taxpayers selected. Similarly, the political constraints that prevent the imposition of burdensome taxes are weakened when a particular class of taxpayers is singled out. This is particularly troublesome where, as here, the class singled out lacks political representation. These cases were not cited for their standard of review, but for their explanation of the impact of such taxes on selected

groups.

This Court, in Dep't of Rev. v. Amrep Corp., 358 So.2d 1343 (Fla. 1978), 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 court's finding of unconstitutionality is

consistent with the precedent of this Court and the U.S. Supreme Court.

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

In asserting the purpose of promoting the State's regulatory power, the State has merely restated the same objectives as those originally set forth in the statute, the promotion of a domestic insurance industry. Indeed, the State's purpose is simply the consequence 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. Ward, 470 U.S. at 878, 882.

The fallacy of the State's position is illustrated by understanding that, regardless of the degree a foreign company seeks to comply with the State's regulatory objectives, it can never receive the exemption provided to domestics. For example, the State asserts that domestic insurance companies have more assets in the state. The tax exemption, however, does not relate to whether a company keeps its assets in Florida. A domestic company gets the exemption regardless of the degree that its assets are here. On the other hand, no matter how many assets a foreign insurance company keeps in Florida, it is denied the exemption. This is the reason that the exemption is said to be based solely on residency. Residency is the only distinguishing feature as to whether a taxpayer gets the exemption. The Alaska Supreme Court analyzed this type of relationship between a discriminatory tax and an asserted purpose and reached the same conclusion, finding Alaska's insurance premium tax unconstitutional. See Principal Mut. Life Ins. Co. v. Div. of Ins., 780 P.2d 1023, 1027-28 (Alaska 1989).

The logical implication of the State's position is far-reaching. If the purpose asserted by the State is sufficient to allow discrimination against foreign insurers, then surely the specter of unlimited discrimination against non-residents is present. Indeed, the State's purpose can easily be extended to rates of taxation far in excess of that present here and to other lines of business. If the Court accepts the State's position, it is difficult to imagine any limitation upon a state from imposing onerous burdens on foreign competitors.

c. 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.[18]

Although the State has sought to characterize Ward as an aberration, 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

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[18]Although Principal Mutual and Mutual Life have been previously cited to the State, the State doesn't even attempt to respond to these cases.

this defense, the State ignores 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 a state may assert for promoting a domestic insurance industry before the clear principles established by the Court over the last century are accepted by the various states.

The State argues 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 McCarran-Ferguson Act, 15 U.S.C. § 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. The State's argument that the McCarran-Ferguson Act validated such discriminatory taxing statutes was specifically rejected in Ward. (State's Initial Brief at 17-18, 24-25). Relying on its holding in Western & Southern, the Court in Ward again found that the legislative history of the McCarran-Ferguson Act clearly reflects that Congress did not intend to give the states more power to tax or regulate the insurance industry than the various states already possessed. "Thus, Congress expressly left undisturbed this Court's decisions holding that the Equal Protection Clause places limits on a state's ability to tax out-of-state corporations." 470 U.S. at 880, n.8.[19] The State's 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

[19]Ward also noted the differences between the Commerce Clause and the Equal Protection Clause, as the former protects interstate commerce and free trade and the latter protects persons from unconstitutional discrimination. 470 U.S. at 881. The fact that application of both might have the same result in certain instances is of no import. Id.

various states has absolutely nothing to do with a proper application of the Equal Protection Clause.

The State also argues that other decisions require a different result, 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). The trial court, however, 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. The State calls this proposition "surprising," and asserts that Western & Southern held this proposition to be an "anachronism." State's Initial Brief at 27. Yet, the Equal Protection Clause states that "No State shall make any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." By its own terms, it does not apply to persons not within its jurisdiction. Indeed, in Western & Southern, the court specifically held 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..." Id. at 668. That case specifically limited itself to application of the Equal Protection Clause after a foreign corporation had been admitted.

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. See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.; Kassell v. Consolidated Freightways Corp; Austin v. State of New Hampshire. The State argues that it knows of no cases which have made a distinction based on the taxing power of a state. Brief at 28. The Supreme Court in Wheeling Steel, however, made that distinction. Id. at 572. And the State, on the next page of its Brief, quotes from a case that makes a similar distinction. State's Initial Brief at 29, quoting Trojan Technologies, Inc. v. Commonwealth of Pa., 916 F.2d 903, 915 (3d Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2814 (1991).

Further, although the Court in Northeast Bancorp 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 or to permit their discriminatory treatment. See Ward, 470 U.S. at 880, n.8. See, e.g., McCarran-Ferguson Act. Congress' public policy determination to encourage development of local 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. The fact that it did not do so demonstrates that the State is not correct in its analysis of Ward. 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 the State in section 624.512(2) for the tax at issue directly relate to 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. The State contends that this distinction is "superficial," but it is, in fact, a critical distinction because the

State is not discriminating against nonresidents, but rather between its own residents. See Allied Stores, supra. Indeed, contrary to the State's assertion (State's Initial Brief at 22), Ward summarily dismissed Board of Educ. as being "irrelevant." 470 U.S. at 876, n.6. And International Org., is not applicable because 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. of Indiana v. Limbach, 486 U.S. 269, 277 (1988).

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.[20]

3. Florida's Discriminatory Insurance Premium Tax Is Not Rationally Related To The Purpose Asserted By The State And The Trial Court Did Not Hold There Is Such A Relationship.

a. 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 purpose offered by the State 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.

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[20]Furthermore, because Florida's insurance premium tax is not rationally related to any legitimate state purpose, it also violates the Due Process Clause of the U.S. and Florida Constitutions, as the trial court so found. (R. 780) The State did not discuss this issue in its brief.

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 which the courts, without exception, have not allowed. 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 the 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 insurance

premium 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.

The State attempts to counter this by arguing that the tax is directly proportionate to the activity conducted by a foreign insurer and therefore proportionately induces the taxpayer to domesticate here. State's Initial Brief at 21. The State's argument proves that the tax is not related to asserted regulatory objectives, but rather to encouraging domestication. If the State were legitimately interested in accomplishing certain regulatory objectives, the tax would be tied to those objectives, and not to domestication.

b. The Court Did Not And Could Not Have Found The Insurance Premium Tax Rationally Related To The Purpose Of Acquiring Greater Regulatory Control

This issue of whether an identified purpose is rationally related to a statute is, in part, a question of fact. Based on the evidence presented at trial, 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 purpose now asserted for the tax. All five of the purposes set forth in section 624.512(2) by the Florida Legislature in support of the statute relate to the promotion of a domestic insurance industry for economic reasons, which the lower court held were not legitimate purpose under the Equal Protection Clause. Significantly, the State conceded as much (R. 829) and did not appeal this finding. Thus, it is clear that the Legislature could not have reasonably believed that Florida's insurance premium taxing scheme was rationally related to the purpose now advocated by the State, that of acquiring a greater degree of regulatory control.

For the purpose to be rationally related to the discriminatory tax, a number of factual relationships must be established. Since the purpose relates to differences between a 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.

In its Final Judgment, the trial court did not find the tax to be rationally related to the purpose of regulatory control. In its ruling, the trial court specifically stated:

> Well, I don't think you can have a rational relationship to an illegal purpose.

(R. 1642).

(1) The Trial Court Erred In Finding That The legislature Could Have Believed That The Tax Would Cause Insurance Companies To Change Their State Of Domicile.

The clear and undisputed evidence shows that the statutes did not serve to induce companies to change their state of domicile and the trial court so found. (R. 780) For this reason, the statutes cannot be rationally related to the purposes now identified by the State as the basis for the tax.

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." (R. 780) This finding of fact by the trial court was based on the undisputed testimony of Dr. Alfred E. Hofflander, Professor of Finance and Insurance 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. (R. 1282-86) 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. Id.

Significantly, the State is unable to present any evidence to even dispute this finding. Both of the State's expert witnesses, Dr. Lilly and Mr. Castellanous, admitted that they did not know if Florida's insurance premium tax induced insurance companies to domesticate in Florida. Indeed, Dr. Lilly testified that for large companies like Taxpayers, it is improbable that any state can induce a company do change its state of domicile. (R. 1427)

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. (Defendants Exhs. 2-4) The trial court, however, clearly rejected this testimony when it found that the tax did not, in fact, cause companies to domesticate in a particular state. (R. 780)

The State asserts that a foreign insurer may avoid the discriminatory tax by forming a Florida subsidiary. (State's Initial Brief at 4.) The trial court made no finding as to such and it is absurd to assert that 100 years of Equal Protection analysis could have been resolved simply by requiring foreign corporations to form a local subsidiary. Clearly, the effect of requiring a foreign corporation to form a local subsidiary is the same as requiring that corporation to domesticate or else face discrimination solely as a result of its foreign status. Such discrimination is not permissible.

The trial court was correct in finding Florida's discriminatory insurance tax does not cause insurance companies to domesticate in Florida. The clear and unrebutted testimony established that a discriminatory insurance premium tax does not induce domestication.

(2) The Trial Court Did Not Find That The State Has A Greater Degree Of Regulatory Power And Influence Over Domestic Insurers Than Foreign Insurers And Could Not Have Made Such A Finding

The State's assertion that the trial court found that it has a greater degree of regulatory control over domestic insurance than over foreign insurance is inaccurate and the State has not, and cannot cite to such a finding in the Final Judgment. (State's Initial Brief at 3.)

Furthermore, with regard to the issue of whether the State has a greater degree of regulatory control over domestic insurers than foreign insurers which do business in the State, the evidence shows that this is not true and that any differences in such regulation are those that Florida has adopted voluntarily. (R. 1292, 1477) 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. (R. 1324) The Florida Statutes for insurance span over 600 pages, more than any other regulated industry in the State of Florida. 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

as to such, acknowledging that Florida's regulatory system is voluntary and is in Florida's best interest, even with regard to its current regulation of foreign insurers. (R. 1477, 1466-78)

Dr. Hofflander testified at length that there are direct ways to regulate foreign companies if the State's objective is greater regulatory control over foreign insurers. The State could require assets to be held in Florida, impose minimum capital and surplus requirements to only admit strong companies, and even tie the tax incentives directly to the regulatory objectives, such as providing a tax break for maintaining books and records kept in the state. (R. 1292) The only limitation for achieving regulatory control directly is "the imagination that people have." (R 1293) See, e.g., § 624.310, Fla. Stat. (State may issue cease and desist orders to any entity that demonstrates lack of fitness or trustworthiness to engage in the business of insurance or that might be hazardous to the public.)

In fact, it is generally recognized that the State of Florida can 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. Dr. Lilly testified that foreign insurers fill a need that domestic insurers do not. (R. 220-21) Exhibits introduced at trial showed that foreign insurers have written, over the last decade, well over 80% of the Florida insurance market. (Plaintiffs' Exhs. 23-34; R. 1289, 1301-12) 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, fictitious. 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 legal fiction. Trying to construct a rational, but fictitious, argument regarding a legal fiction often produces such inconsistencies.

Finally, the State argues that it is in the best position to protect the interests of Florida insurance consumers in the event of financial impairment or insolvency. By statute, the State has specific capital and surplus requirements and restrictions on the amount of premiums that can be written by an insurer. See § 624.4095, Fla.Stat. The state also dictates the type of deposits required within the State of Florida and requires annual experience reporting. See §§ 624.411, 624.424, Fla. Stat. 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. (R. 1290-93) Florida's statutory scheme for the regulation of foreign insurers is also largely voluntary. (R. 1290-93)

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 the economic development of Florida.

II. THE TRIAL COURT ERRED IN DECLARING THAT FLORIDA'S RETALIATORY TAX DOES NOT VIOLATE FLORIDA'S CONSTITUTIONAL PROHIBITION AGAINST THE UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY

In its September 12, 1991 Order and in its Final Judgment, the lower court erred in determining that Florida's retaliatory tax does not violate Florida's prohibition against unlawful delegation of legislative authority. Florida's retaliatory tax adopts the various laws and taxing schemes of the 49 other states (and their local governments) and of foreign countries as such laws and taxing schemes existed on the date of enactment and then unconstitutionally incorporates any future changes to such laws and taxing schemes. By structuring the retaliatory tax in this manner, Florida has unconstitutionally delegated its legislative authority to other states and countries to determine the amount of tax due to the State of Florida and to determine what additional obligations are required of foreign insurers operating in Florida.[21]

Article II, section 3 of the Florida Constitution prohibits the delegation of legislative authority:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any power appertaining to either of the other branches unless expressly provided herein.

Id. As a result of this constitutional mandate, "[t]he legislature may not, absent constitutional authority to the contrary, delegate its legislative power to others." D'Alemberte v. Anderson, 349 So.2d 169 (Fla. 1977). See also Conner v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968). The rule for determining the question of unlawful delegation of legislative authority was set forth in State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969 (1908):

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[21]Such obligations could include, for example, asset deposit or surplus requirements. See, e.g., § 624.412, Fla. Stat. (1985).

> The Legislature may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials with definite and valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.

47 So. at 976. See also Chiles v. Children A, B, C, 589 So.2d 260 (Fla. 1991). As a result, Courts have recognized two types of unlawful delegation. The first involves the failure of the legislature to provide sufficient guidelines for agencies to interpret enacted statutes. The second involves the legislature's delegation of its legislative responsibilities to another legislative body such as Congress or another state legislature. Taxpayers have challenged Florida's retaliatory tax under the latter theory.

Florida's retaliatory tax imposes a tax upon foreign insurers equal to the difference between all taxes, licenses, and fees imposed by the state or county of domicile of the foreign insurers doing business in Florida and all taxes, licenses, and fees imposed by the State of Florida on foreign insurers doing business in Florida.[22] In addition to taxes, the statute also incorporates into Florida law other types of obligations which are imposed by other states on insurers. By setting one of the two benchmarks by which the tax will be measured for entities doing business in this State, the Florida Legislature has made half the determination. But the other half of that benchmark by which the tax is measured is being set by other state legislatures each and every year.

Clearly, if it constitutes a legislative act for the Florida Legislature to set, lower, eliminate, or leave unchanged its half of the benchmark, then it also constitutes a legislative act for another

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[22]Section 624.429(3) exempts from the retaliatory tax those foreign insurers who maintain a regional home office in this State, as set forth in section 624.514, Florida Statutes.

state legislature to set the other half of that benchmark. Florida has thus delegated to the other 49 state legislatures and to other countries, on an annual and recurring basis, the policy determination of what taxes, fees, and obligations a company doing business the State of Florida will be subjected to. Such obligations could include, for example, asset deposit or surplus requirements. See, e.g., § 624.412, Fla. Stat. This delegation constitutes an unlawful delegation of legislative authority and responsibility which is in violation of Florida's Constitution.

Over a long line of cases, this Court has made clear that the State may not delegate its legislative authority to others by adopting, in advance, future enactments of other legislative bodies. In Presbyterian Homes of Synod of Florida v. Wood, 297 So.2d 556 (Fla. 1974), this Court considered the constitutionality of a statute which adopted future acts of the federal government. The action had challenged the constitutionality of an "income test" as the criteria for tax exemption on homes for the aged because the income restriction was adjusted in accordance with certain federal laws. Id. at 558. This Court found, among other things, that the statute was unconstitutional as a state may not adopt in advance a future, unknown statute or regulation of the federal government.

Similarly, in Freimuth v. State, 272 So.2d 473 (Fla. 1972), the Florida Supreme Court stated that, "it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or such administrative body might see fit to adopt in the future." Id. at 476, quoting Florida Industrial Comm'n v. State, 155 Fla. 772, 21 So.2d 599 (1945). This prohibition extends to the adoption of future laws of other states as well. 272 So.2d at 476. In his concurrence, Justice Drew set forth the following standard:

> The Legislature may lawfully adopt provisions of other laws or regulations which are in existence (and are therefore presumable incorporated in the legislative act) at the time of the enactment. But the courts have uniformly and without deviation held that any attempt by the Legislature or other law making branch of any segment of the government to incorporate into a law future regulations of administrative bodies or laws of other jurisdictions is an unconstitutional delegation of a power it alone possess....

Id. (emphasis in original). See also State v. Camil, 279 So.2d 832 (Fla. 1973); State v. Welch, 279 So.2d 11 (Fla. 1973); State v. Carswell, 557 So.2d 183, 184 (Fla. 3rd DCA 1990) (State can "adopt the regulatory and statutory standards of the federal government so long as those standards were in existence at the time of the enactment of the statute.")

Against this impressive array of decisions, the lower court declared Florida's retaliatory tax constitutional. The lower court did so based upon Eastern Air Lines, Inc. v. DOR, 455 So.2d 311 (Fla. 1984), appeal dismissed, 474 U.S. 892 (1985), which is clearly inapplicable. In Eastern Air Lines, the Florida Legislature set forth the manner in which the Department of Revenue was to calculate the price for a gallon of fuel in order to impose a tax. Under the statute, the price per gallon was to be adjusted annually using the Consumer Price Index ("CPI"). Because CPI's are, by their very nature, a matter of fact which can be quantified, this Court found that the adoption of the CPI constituted a ministerial act and not an unlawful delegation.

By contrast, in this case, each of the other 49 states may substantially and substantively amend their laws and taxing schemes at any time and, as a result, change the obligations and the rate of tax imposed on foreign insurers doing business in Florida. Questions as to what taxes, licenses, fees or other charges are to be included, and what are to be excluded, are policy

determinations, not factual determinations, and such policy determinations are now being left to the legislators of other states and not to the State of Florida.

This distinction is critical and formed the basis for this Court's decision in Eastern Air Lines:

> We think the language of Welch and Freimuth should be interpreted to apply to statutes which incorporate federal statutes or administrative rules which substantively change the law, and not to a statute which incorporates a federal index to provide aid in making a ministerial determination.

Id. at 316.

During argument on this issue, the State conceded that the State is adopting policy determinations of other states:

> The way Florida, and every other state that has a retaliatory tax, attempts to influence that policy is to let it be known that, if you change your policy and factually the taxes go up, your companies will owe proportionally more tax in Florida, because we will measure it, and we will compare it to the Florida tax .... [T]he way Florida gets there is to say: We can't change your policy. We can't tell you what laws to adopt. But we will adopt a measuring device, so that if the intent of your policy is to raise taxes, that will have an effect on tax levels in Florida with your companies.

(R. 1003, 1015) Such is clearly a delegation of policymaking authority that only the Florida Legislature may possess.

The Florida Legislature is aware that adopting taxing schemes of other jurisdictions constitutes an unlawful delegation of legislative authority. Under Florida's Income Tax Code, Chapter 220, the Florida Legislature has adopted the United States Internal Revenue Code. See § 220.03(1)(n), Florida Statutes (1989). However, in order to keep Florida's version current with the Internal Revenue Code, Florida adopts the Code each and every year, as such Code exists on January 1 of each year. See, e.g., § 220.03(1)(n) (1991, 1990, 1989, et seq.); Chapter

91-19, Chapter 90-132, Chapter 90-203, and Chapter 89-356, Laws of Florida. The Florida Legislature does this because of the constitutional prohibition against adopting prospective changes to the Code. See Florida State and Local Taxes, vol. I, published by Tax Section of The Florida Bar, § 12.03(2)(a) (1984); A. England, Report to the House on Proposed Corporate Income Tax Legislation (Nov. 3, 1971).

In enacting section 624.429, the Florida Legislature has, in essence, adopted, on an annual and recurring basis, the laws and taxing schemes of 49 other states and foreign countries. There are, thus, 49 different versions of section 624.429, that may undergo significant and substantive changes each and every year. Each of those changes is a policy determination that is not being made by the Florida Legislature. As such, Florida's retaliatory tax violates the prohibition on unlawful delegation of legislative authority and should be declared unconstitutional.

III. THE TRIAL COURT ERRED IN DECLARING THAT FLORIDA'S RETALIATORY TAX, WHICH DISCRIMINATES AGAINST FOREIGN INSURERS, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

A. THE TRIAL COURT ERRED IN NOT REQUIRING THE STATE TO ARTICULATE A LEGITIMATE STATE PURPOSE FOR ITS RETALIATORY TAX

The lower court erred in not declaring that Florida's retaliatory tax is unconstitutional under the Equal Protection Clause of the U.S. Constitution. (R. 871) The court was in error because the State failed to articulate a purpose for Florida's retaliatory tax and because the purposes found constitutional by the U.S. Supreme Court in Western & Southern Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981), do not apply to Florida's retaliatory tax.

The lower court should have required the State to articulate a legitimate state purpose to support Florida's retaliatory tax or its facially discriminatory provisions. This was a matter of

proof which the State is required to prove. See Scheinberg; Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 874 (1985). See infra. Because this is a matter of proof, the lower court erred in not requiring the State to produce such proof. Because the State never presented any evidence as to the purpose for its retaliatory tax, the lower court was left to hypothesize as to such purposes with absolutely no basis in support of such.

B. FLORIDA'S RETALIATORY TAX LACKS A LEGITIMATE STATE PURPOSE

The lower court also erred by finding that the purposes for California's retaliatory tax, which were found constitutional by the U.S. Supreme Court in Western & Southern, applied to Florida's retaliatory tax.[23]

In Western & Southern, the U.S. Supreme Court found that, because the amount of revenue raised by California's tax was relatively modest, the purpose of California's retaliatory tax was not to generate revenue, but rather to act as a deterrent to the discriminatory and excessive state taxation of the insurance industry. The Court held this to be a legitimate state purpose. 451 U.S. at 670.

Such a purpose, however, does not apply to Florida's retaliatory tax because of a significant distinction between the way in which California and Florida tax insurance.[24] Unlike Florida, California imposed no discriminatory insurance premium tax on foreign insurers, but

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[23]In the Final Judgment, the lower court found, "That this tax is similar in structure to that declared constitutional by the United states Supreme Court in Western & Southern Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981). Accordingly, the retaliatory tax does not violate the Equal Protection Clause or the Due Process Clause ..." (R. 781)

[24]A retaliatory tax compares relative tax burdens imposed by states upon foreign insurers, with the primary measure being the insurance premium tax imposed by each of the various states.

rather taxed equally the insurance premiums of both foreign and domestic insurers. Florida, by contrast, taxed only the premiums of foreign insurance companies, exempting entirely the premiums of domestic insurance companies. (R. 1276-77, 1315-16; Exhs. 19-20) At trial, Dr. Hofflander testified that, as a result of Florida's retaliatory tax, a foreign insurer writing insurance in both Florida and its domicile will pay twice the taxes a Florida insurer will pay for writing the same business. Florida's retaliatory tax unconstitutionally discriminates in favor of Florida insurers. (R. 1315-16; Plaintiffs' Exh. 19)

California, therefore, was in a legitimate position to seek to deter other states from enacting discriminatory or excessive taxes as its tax structure was not discriminatory. Because Florida had enacted and was receiving significant tax revenues from its discriminatory insurance premium tax, it was not in a position to retaliate against states with no discriminatory taxing schemes. It is simply inconsistent for a state to retaliate against the insurance premium taxes of other states when that state engages in and receives substantial and significant revenues as a result of its own discriminatory tax. Florida's retaliatory tax, therefore, lacks a legitimate state purpose.

Indeed, Florida's tax creates the anomalous situation of retaliating against certain states, including states in which some of the Taxpayers are domiciled, even though those states did not have discriminatory taxes. (R. 1315-16) Florida's retaliatory tax is, thus, invalid under the holding in Ward.

The State may argue that, regardless of the discriminatory nature of its own tax, it should be permitted to impose a tax upon states that enact excessive, but not discriminatory, taxes. The State, however, did not assert that the taxes imposed by Taxpayers' state of domicile are

excessive. (R. 1361-1478.) In addition, there is no logic in applying Western & Southern to excessive taxation since, as long as a tax is not discriminatory against nonresidents, one state does not have an interest in the level of taxes in other states. The State of Florida's interest in the taxing structures of other states, so long as they are not discriminatory, does not constitute a legitimate state purpose, and Florida's retaliatory tax is therefore violative of the Equal Protection Clause. See infra.[25]

C. FLORIDA'S RETALIATORY TAX IS NOT RATIONALLY RELATED TO THE PURPOSE ASSERTED BY OTHER STATES

With regard to the second prong of the equal protection test, the State also failed to identify how Florida's retaliatory tax is rationally related to any legitimate state purpose. This relationship is clearly a factual issue for which the State has failed to present any proof. See Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 465 (1981). This precluded the court from entering judgment in favor of the State.

Moreover, it is clear from the evidence presented by Taxpayers that the Florida Legislature could not have rationally believed that Florida's retaliatory tax would further any legitimate state purpose. As set forth above, because Florida's insurance premium tax is discriminatory, it would not have been rational for the Florida Legislature to believe that, as a

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[25]Finally, Florida's retaliatory tax lacks a legitimate state purpose and is unconstitutional under due process because Florida is using a discriminatory tax to encourage other states to abolish their discriminatory and unconstitutional taxing structures. As the courts have held, the remedy lies not in enacting a discriminatory tax, but rather in challenging the unconstitutional taxing structures. See, e.g., New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988); Sporhase v. Nebraska, 458 U.S. 941 (1982); Great Atlantic & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976); Austin v. New Hampshire, 420 U.S. 656 (1975); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920); DABT v. McKesson Corp., 524 So.2d 1000 (Fla. 1988); DOR v. Private Truck Council of America, Inc., 531 So.2d 367 (Fla. 1st DCA 1988).

result of its retaliatory tax, those states which had discriminatory tax structures would abandon theirs where Florida had not. Neither is it rational for the Florida Legislature to believe that states with uniform taxing rates greater than Florida's would lower their tax rate as a result of Florida's retaliatory tax when Florida continued to discriminate against foreign insurers in its insurance premium tax.

Accordingly, Florida's retaliatory tax is not rationally related to any legitimate state purpose and it, as such, violates the Equal Protection Clause. Finally, the trial court erred in declaring Florida's retaliatory tax constitutional even though the tax discriminates between foreign insurers without being rationally related to a legitimate state purpose. (R. 634-35) See § 624.429(3), Fla. Stat. (1985). The State freely admits that the purpose for discriminating between foreign insurers is to encourage domestication and investment of assets in Florida, purposes which were declared not to be legitimate in Ward.

D. THE STATE'S APPLICATION OF FLORIDA'S RETALIATORY TAX IS UNCONSTITUTIONAL AS APPLIED AND VIOLATES RECOGNIZED PRINCIPLES OF STATUTORY CONSTRUCTION.

The trial court also erred in not declaring that Florida's retaliatory tax is unconstitutional under the Equal Protection Clause as applied to Taxpayers in this case. By applying the retaliatory tax to offset refunds due Taxpayers under Florida's insurance premium tax, the State, in effect, is collecting an unconstitutional tax through the retaliatory tax.

Florida's retaliatory tax was designed to collect a tax based on the difference between the premium tax imposed by Florida on a foreign insurer operating in this state and the premium tax imposed by the foreign insurer's domicile. At no time, however, was the retaliatory tax designed to capture the tax imposed by Florida's insurance premium tax. Indeed, if that were

true, there would have been no need for the premium tax, as Florida's retaliatory tax, by itself, would have captured the amount imposed by Florida's premiums tax. It is a fundamental proposition that, in construing a statute, a court should avoid an absurd conclusion, see Mills v. Korash, 249 So.2d 765 (Fla. 1st DCA 1971), cert. denied, 263 So.2d 579 (Fla. 1972), and with regard to taxing statutes, resolve all ambiguities against the state and in the taxpayer's favor. See, e.g., Mikos v. Ringling Bros. Barnum & Bailey Combined Shows, Inc., 497 So.2d 630 (Fla. 1986). Accordingly, it was error for the court to hold that the State could collect a premiums tax which the court declared unconstitutional through the State's retaliatory tax when the retaliatory tax was specifically designed by the Legislature not to include the premiums tax.

It is well settled that insurance retaliatory statutes are punitive in nature should be "strictly construed, executed with care, applied only to cases that clearly come within [their] terms." Equitable Fire & Marine Ins. Co. v. Commonwealth, 195 Va. 752, 80 S.E.2d 549, 554 (1954); Republic Ins. Co. v. Comm'r of Taxation, 272 Min. 325, 138 N.W.2d 776, 780-81 (1955); Occidental Life Ins. Co. of California v. Commonwealth, 6 Pa. Cmwlth. 532, 295 A.2d 853, 855-56 (1972). As the Supreme Court of Illinois commenting in interpreting the Illinois retaliatory tax:

> The statute of the states here under consideration is plainly a retaliatory statute and as such must be strictly construed. We are not permitted to read into it words and meanings not found in the body of the act itself.

Pacific Mutual Life Ins. Co. of California v. Lowe, 354 Ill. 398, 198 N.E. 436, 439 (1933). See also Couch on Insurance, 2d § 21:93 at 585-87 (1959).

IV. THE TRIAL COURT ERRED IN REFUSING TO APPLY FLORIDA'S STATUTE OF LIMITATIONS TO THE PRO FORMA RETALIATORY TAX ASSESSMENTS

The trial court further erred in refusing to apply Florida's statute of limitations to the 1983 and 1984 pro forma retaliatory tax assessments issued by Appellant DOR on June 6, 1991, which assessments were issued subsequent to the initiation of this suit.[26] The pro forma assessments sought to impose retaliatory taxes under section 624.429 against Appellees for tax years 1983 through 1988. The pro forma assessments were issued in order to assert a claim for an increase in retaliatory taxes in the event Florida's insurance premium tax was struck for being unconstitutional. The 1983 and 1984 pro forma assessments, however, are barred by the statute of limitations contained in section 95.091, Florida Statutes.

The statute of limitations operates to bar the assessments of other retaliatory taxes by the State for the tax years 1983 and 1984. See generally Henry v. Halifax Hospital Dist., 368 So.2d 432 (Fla. 1st DCA 1979); Florida Industrial Comm'n v. Felda Lumber Co., 154 Fla. 507, 18 So.2d 362 (1944).[27] Indeed, the trial court found that the 1983 and 1984 proposed assessments issued by DOR on June 6, 1991, under section 624.429 were barred by the statute of limitations. (R. 782) Because Florida's statute of limitations bars the State's 1983 and 1984 proposed assessments, Florida's statute of limitation similarly applies to bar the State's 1983 and 1984 pro forma assessments. The State has not appealed the lower court's decision holding that the 1983

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[26]On that same day, Appellant DOR also issued proposed retaliatory tax assessments against Appellees MIC and CIM for tax years 1983 through 1988, based upon adjustments made by Appellant to Appellees' 1983-1988 tax returns.

[27]The State is precluded, under sub-paragraph (a), from enforcing any assessments beyond five years after the date the tax is due, any return with the respect to the tax is due, or such return is filed.

and 1984 assessments are barred and there is no dispute as to the time periods involved as barring the pro forma assessments.

The State's only argument as to this issue relates to asking the court to apply equitable principles to use the pro forma assessments to offset any refunds owed Taxpayers in the event Florida's insurance premium tax is declared unconstitutional. However, under Florida's tax refund scheme, the State was at fault for failing to timely issue pro forma assessments and for failing to timely deny Taxpayers claims for refunds. The State, therefore, failed to timely issue the pro forma assessments and failed to timely deny Appellees' claims for refunds. Section 213.25, Florida Statutes, specifically states that an assessment must be final before it can be offset against a refund claim.

V. THE TRIAL COURT ERRED IN DENYING RELIEF TO TAXPAYERS UNDER 42 U.S.C. § 1983 AND § 1988

A. TAXPAYERS PLED AND PROVED THE STATE'S LIABILITY UNDER 42 U.S.C. § 1983 AND § 1988.

The lower court also erred in denying Taxpayers' relief under 42 U.S.C. §§ 1983 and 1988. Taxpayers sought, in their Amended Complaint, to enjoin the State under 42 U.S.C. § 1983, from enforcing sections 624.509 et seq., Florida Statutes, as such statutes were unconstitutional under the Equal Protection and Due Process Clauses of the U.S. Constitution.[28] (R. 303, 342, 452, 457) In order to succeed under a section 1983 count, Taxpayers were required to show that the State was acting under color of state law and that, as a result,

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[28]42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...."

Taxpayers' constitutional rights would be violated. See Cooper v. State of Utah, 684 F.Supp. 1060 (D. Utah 1987).[29] Taxpayers alleged and proved these elements.

In their Amended Complaint, Taxpayers sued Tom Gallagher, in his official capacity as Florida Commissioner of Insurance and Treasurer, including his capacity as a member of the Cabinet of the State of Florida; Gerald A. Lewis, in his official capacity as Florida Comptroller, including his capacity as a member of the Cabinet of the State of Florida; and J. Thomas Herndon, as Executive Director of the Department of Revenue, State of Florida. All of these officials are charged, in some manner, with the enforcement of Florida's insurance premium tax. (R. 303, 342, 452, 457, 709-10)

Tom Gallagher, as Florida Commissioner of Insurance and Treasurer and a member of the Cabinet, is charged with exercising the general powers granted in section 624.307 and the specific powers granted through Florida's Insurance Code, Chapters 624-634, 637-639, 642, and 651, Florida Statutes. Under section 624.509(2), the Department of Insurance is authorized to share information with the Department of Revenue as is necessary to verify a taxpayer's premium tax liability arising under such tax.

Gerald Lewis, as Florida Comptroller, is the Chief Fiscal officer of the State of Florida, head of the Department of Banking and Finance, and a member of the Cabinet. As such, Lewis has the authority to settle accounts and refund moneys paid to the Treasury of the State which constitutes an overpayment of tax or payment when no tax is due, including taxes paid pursuant to section 624.509.

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[29]It is by now well-settled that suits against state officials in their official capacity, when sued for prospective relief, are permissible under 42 U.S.C. § 1983, as suits against the state. See Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989).

Under section 624.509(2), Florida Statutes (1989), the Department of Revenue is authorized to administer, audit, and enforce the assessment and collection of taxes under section 624.509, including the authority to collect and to assess penalties and interests, and to settle and compromise such assessments. The head of the Department of Revenue is the Governor and the Cabinet, which Cabinet includes Tom Gallagher and Gerald Lewis. Section 20.21, Florida Statutes. The chief administrative officer of the Department of Revenue is its Executive Director, currently J. Thomas Herndon, who is in charge of all executive functions of the Department of Revenue. See Rule 12-2.002, Fla. Admin. Code.

In its September 12, 1991 Order, the trial court held that Taxpayers' Complaint stated a cause of action under 42 U.S.C. § 1983 and the State has not appealed that ruling. (R. 634-35) As a result, the State has conceded that 42 U.S.C. § 1983 applies to tax cases and that the Complaint in this action stated a cause of action. Furthermore, the U.S. Supreme Court has ruled that 42 U.S.C. § 1983 applies to tax cases. Dennis v. Higgins, ___ U.S. ____, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). Therefore, the only remaining issue is whether Taxpayers proved the allegations in their Complaint.

Because Taxpayers have challenged the prospective enforcement of a statute, there can be no question that the individual Defendants are acting under state law. See Cooper at 1070. Similarly, there can be no question that by the State's enforcement of section 624.509, Taxpayers' equal protection and due process rights under the Constitution would be violated, as the trial court so found.[30] Accordingly, Taxpayers presented sufficient evidence to entitle them

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[30]The U.S. Supreme Court has construed the "state action" requirement of the Fourteenth Amendment to be the same as that required under section 1983. See Cooper, at 1070; Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

to relief under their 42 U.S.C. § 1983, and the trial court erred in not granting Taxpayers appropriate relief.

B. THE TRIAL COURT ERRED IN REQUIRING TAXPAYERS TO PROVE THE INDIVIDUAL DEFENDANTS' PERSONAL INVOLVEMENT IN THE UNCONSTITUTIONAL ASSESSMENTS.

The lower court refused to grant Taxpayers relief under their 42 U.S.C. § 1983 count by erroneously holding that in order to be successful under a 42 U.S.C. § 1983 action, Taxpayers must show that the individually-named defendants were personally involved in issuing the proposed assessments. The court apparently reached this erroneous conclusion because personal involvement is required under 42 U.S.C. § 1983 suits which seek damages. (R. 1062-64); see Monell v. Dept. of Social Services, 436 U.S. 658 (1978). Monell and its requirement of personal involvement is not applicable, however, where prospective, injunctive relief is sought.

In Monell, the U.S. Supreme Court held for the first time that municipalities and their counties were "persons" under 42 U.S.C. § 1983 and that their officials could be held liable under section 1983 where they had "direct and personal" involvement in causing a deprivation of a plaintiff's constitutional rights. Monell, however, does not apply where a plaintiff challenges a state statute seeking prospective, injunctive relief against the statute's enforcement. In such circumstances, personal involvement is not necessary; rather, plaintiff must only establish that the defendant officials, who are sued in their official capacity, had some involvement in the enforcement of the challenged statute.

The seminal decision on the involvement required by a defendant in an action challenging the enforcement of a state statute is Ex parte Young, 209 U.S. 123 (1908). In Ex parte Young,

the U.S. Supreme Court held that officials, named as defendants in a suit to enjoin the enforcement of an allegedly unconstitutional law, were proper parties in a section 1983 action where the state officials had "some connection" with the enforcement of the challenged law. 209 U.S. at 157-61. There, the Court found that the state attorney general had sufficient connection with regards to the enforcement of a statute setting the rates for railroad transportation to make him a proper party to the suit. Id. at 161.

Although Monell was decided subsequent to Ex parte Young, Monell did not alter the involvement required from state officials because Monell applied only to actions which seek retrospective relief and not to actions which seek prospective, injunctive relief. In a case directly on point, the Ninth Circuit applied Ex parte Young and rejected the lower court's finding that Monell applied to challenges to the enforcement of state statutes. In Chaloux v. Killeen, 886 F.2d 247 (9th Cir. 1989), the court held that for actions seeking prospective relief against state officials in their official capacity, Monell and its requirements of personal involvement of the official does not apply as Monell applies only to actions seeking retrospective relief. Therefore, there must only be "some connection" between the state official and the statute sought to be enjoined. In Chaloux, county sheriffs were held to be the proper persons to be sued under section 1983 in an action challenging Idaho's post-judgment garnishment statute as the sheriffs were charged with and had the sole duty of enforcing the statute: "Because [the county sheriffs] had the statutory duty to enforce and administer allegedly unconstitutional state statutes, the performance of their duties had the same effect upon Appellant's right that the Court found critical in Ex parte Young." Id. at 251-52. See also Glass v. Coughlin, 1991 WL 102619 (S.D.N.Y. May 29, 1991)(personal involvement not necessary where official sued in official

capacity for injunctive relief); Brooks v. Taylor, 1991 WL 67166 (S.D.N.Y. April 18, 1991) (same); Downs v. Dep't of Public Welfare, 368 F.Supp. 454 (E.D. Pa. 1973).

Similarly, in Ogden v. U.S., 758 F.2d 1168 (7th Cir. 1985), a case also directly on point, the Seventh Circuit reversed the decision of the lower court as to the proper parties in an action seeking to enjoin the enforcement of a Navy regulation, finding Monell's requirement of "personal involvement" to be inapplicable. In Ogden, the lower court had dismissed the Secretaries of the Defense and of the Navy from an action challenging the issuance of a military regulation issued by the commander of a Naval Training Center. The Seventh Circuit reversed, holding that Monell's requirement of "direct and personal" involvement was not required in order to hold high-level officials responsible for the actions of subordinates where injunctive, as opposed to monetary, relief was sought. The court found that where a statute or regulation is challenged as being facially unconstitutional, the Secretaries of the Defense and of the Navy are properly subject to suit for nonmonetary relief without any particular showing of personal involvement. Id. at 1177. See also Cooper v. State of Utah, 684 F.Supp. 1060 (D. Utah 1987).

Although the trial court erred as a matter of law, in requiring personal involvement in the issuance of the assessments, the trial court ignored the facts established by the pleadings and stipulations which show that the named individuals are, in fact, attempting to enforce these unconstitutional taxes and to collect these assessments. The State freely admits that the officials sued are charged with the responsibility of enforcing these statutes, (R. 1081), and, by participating in this litigation and in their pleadings, they have demonstrated individual involvement in enforcing these assessments on a continuing basis.

As set forth above, the record establishes that the individual Defendants were sued in their official capacity to enjoin enforcement of the unconstitutional taxing statute and the proposed assessments and that such officials had "some involvement" with Florida's insurance premium tax as they were the officials charged with the enforcement, assessment, and collection of the tax. The record also shows that the individual Defendants are actively seeking to enforce these unconstitutional taxes. Thus, Taxpayers presented evidence entitling them to relief under their section 1983 count, and the lower court's decision is in clear conflict with decisions of the U.S. Supreme Court and federal courts and must, therefore, be reversed.

VI. THE TRIAL COURT ERRED IN DETERMINING THAT THE PRIVILEGES AND IMMUNITIES CLAUSE DOES NOT APPLY TO CORPORATIONS AND THAT THE TAXES AT ISSUE DO NOT VIOLATE THIS CLAUSE

The lower court erred in holding that the Privileges and Immunities Clause of the United States Constitution does not apply to corporations and in not granting relief under this constitutional provision. The Privileges and Immunities Clause states that the "citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.

As a result, a state may not impose a discriminatory tax upon nonresidents absent a substantial reason for the different treatment. Austin v. State of New Hampshire, 420 U.S. 656 (1975). Courts will scrutinize such taxing schemes because of the non-residents' lack of representation in the state's legislative halls. Id. at 662. As set forth above, the State lacks a legitimate purpose for the taxes at issue, let alone a substantial purpose for such discrimination.

The trial court refused to apply the Privileges and Immunities to this case because the Taxpayers are corporations. In Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), the United

States Supreme Court first held that the Privileges and Immunities Clause does not apply to corporations. The legal underpinnings of Paul v. Virginia, however, have been eroded to the extent that it no longer applies. Paul involved a challenge to a Virginia statute which required foreign, but not domestic, insurance companies to post bonds of various sorts. This applied equally to agents of foreign insurers, including plaintiff. Plaintiff challenged the statute on the grounds that the statute violated both the Commerce Clause and the Privileges and Immunities Clause.

The Court rejected the Commerce Clause challenge on the basis that insurance was not commerce covered by the Commerce Clause. This ruling was subsequently reversed in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). This reversal of the earlier ruling in Paul was due to changed national economic circumstances and can only be described as based on a change in the judicial view of what constitutes commerce.

Paul also rejected the Privileges and Immunities claim on the grounds that corporations were not citizens, as that phrase is used in the clause. The distinction was based upon the "special nature" of corporations which, at that time, required that corporations be created only with the approval of state legislatures, as well as the purely local nature of this existence, and a state's absolute right to exclude foreign corporations from interstate activities. 75 U.S. at 177, 181.

By the beginning of this century, however, as general acts of incorporation were adopted and corporations no longer required special legislative acts for incorporation. Thus, the special nature of corporations, while certainly a common feature at the time of the Paul decision, is no longer applicable. Clearly, corporations today are citizens, or at least mere extensions of

citizens. As a result, the underpinnings of Paul have either been overruled, expressly or implicitly, or relate to a set of legal circumstances that are no longer relevant.[31]

Consequently, the Privileges and Immunities Clause should be applied to this action and Florida should be prohibited from enacting legislation that deprives nonresidents of privileges and immunities granted residents of the state, including "an exemption from higher taxes or impositions ... ." Austin v. New Hampshire, 420 U.S. 656, 661 (1975). See also Barnard v. Thorstenn, 489 U.S. 546 (1989) (same).

CONCLUSION

For the reasons set forth above, this Court should affirm the trial court's finding that Florida's insurance premium tax is unconstitutional under the Equal Protection and Due Process Clauses of the United States Constitution and the Due Process Clause of the Florida Constitution.

This Court should, however, reverse the trial court's various decisions with regard to Florida's retaliatory tax and should find that this statute is unconstitutional under the Equal Protection Clause of the United States Constitution or that it is unconstitutional as applied to the Taxpayers in this case because it is being used by the State to collect an otherwise unconstitutional insurance premium tax. Alternatively, the Court should find that the insurance premium tax constitutes an unlawful delegation of Florida's legislative authority because it incorporates the laws of other states and countries, that the tax violates the Due Process Clauses of the United States and Florida Constitutions, and that the tax violates the Privileges and Immunities Clause

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[31]In addition, the U.S. Supreme Court has made reference to the fact that the Privileges and Immunities Clause was not raised in certain tax cases. New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988); Hooper v. Bernalillo County Assessor, 472 U.S. 612, n.12 (1985); Tyler Pipe Industries, Inc. v. Washington, 483 U.S. 232, 265 (1987).

of the United States Constitution. The Court should find that the State's pro forma assessments are in violation of the statutory provisions of Florida's retaliatory tax or, alternatively, that the statute of limitations applies to such assessments for tax years 1983 and 1984.

This Court should also reverse the trial court's finding as to liability under section 42 U.S.C. § 1983 and should remand this count for a determination as to relief to which the Taxpayers are entitled.

Respectfully submitted,

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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 and Daniel C. Brown, Esquire, Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, P.A., 215 South Monroe Street, Suite 400, Tallahassee, Florida 32301, on this 27 day of January, 1992.

ATTORNEY