D.A. 35-92 047

FILED
SID J. WHITE
JAN 16 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

FLORIDA SUPREME COURT
CASE NO. 79,061

TOM GALLAGHER, as Florida Commissioner of Insurance and Treasurer; GERALD A. LEWIS, as Florida Comptroller; J. THOMAS HERNDON, 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 OF THE STATE OF FLORIDA,

Appellants/Cross Appellees,

v.

MOTORS INSURANCE CORPORATION; CIM INSURANCE CORPORATION; MIC PROPERTY AND CASUALTY INSURANCE CORP.; MIC INSURANCE CORPORATION; and MIC GENERAL INSURANCE CORPORATION,

Appellees/Cross Appellants.

APPELLANTS' INITIAL BRIEF

ROBERT A. BUTTERWORTH, ATTORNEY GENERAL
JOSEPH C. MELLICHAMP, III
FLORIDA DEPARTMENT OF LEGAL AFFAIRS

KATZ, KUTTER, HAIGLER, ALDERMAN, DAVIS, MARKS & RUTLEDGE, P.A.
First Florida Bank Building
215 S. Monroe Street, Suite 400
Tallahassee, Florida 32301

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STATEMENT OF THE CASE AND FACTS

References to the record in this case are designated "R___." References to trial exhibits in this case are designated by party and exhibit number.

This appeal arises from a final judgment entered by the Honorable Ted Steinmeyer, Circuit Judge, Florida Second Judicial Circuit, after a trial on the merits. The judgment declared that: (1) Section 624.509, et seq., Florida Statutes, (the insurance premium tax), as it read prior to July 1, 1988, (and during the period 1983-1988) violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of the Florida Constitution; (2) Section 624.429, Florida Statutes, (the "retaliatory tax") does not violate the Equal Protection Clause or the Due Process Clause of the United States Constitution; (3) Section 624.429, Florida Statutes, does not violate the Privileges and Immunities Clause (article IV, section 2) of the United States Constitution, nor does this section constitute an invalid delegation of legislative authority under article III of the Florida Constitution[1]; (4) the tax imposed by section 624.515, Florida Statutes (Fire Marshall tax) does not apply to insurance premiums for vehicles issued by Appellees (Plaintiffs below); and (5) Appellees (Plaintiffs below) failed to establish a violation of 42 U.S.C. § 1983. The trial court rendered judgment on N November 13, 1991. Appellants (Defendants below) timely noticed this appeal.

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[1] The trial court disposed of these constitutional challenges to the retaliatory tax on motions for summary judgment.

Appellees (plaintiffs below) are foreign corporations licensed by the State of Florida to write insurance in Florida (hereinafter referred to collectively as "Motors"). Motors was subject to premium tax, as it stood prior to July 1, 1988, and to tax under section 624.429, Florida Statutes (retaliatory tax). Motors paid premium taxes pursuant to section 624.509, et. seq., Florida Statutes, during the years 1983-1988.

Motors sought a declaratory judgment that Florida's premium tax imposed by section 624.509, Florida Statutes, as it read prior to July 1, 1988, unconstitutionally discriminated against it, by reason of its combined effect together with sections 624.512 and 624.514, Florida Statutes (in their pre-July, 1988 form), and demanded a refund of all premium taxes paid for the years 1983-1988.

Section 624.509, Florida Statutes, imposed a premium tax on insurers writing insurance in Florida at the rate of 2% of gross premiums written (excluding certain credits and exemptions not relevant here). Section 624.512, Florida Statutes, exempted insurance companies which (cumulatively) were organized under Florida law, maintained their home offices in Florida, and complied with the requirements of Sections 627.271 and 627.281, Florida Statutes, by maintaining their books and records in Florida and by maintaining physical possession of their assets in Florida. Section 624.514, Florida Statutes, granted a 50% reduction in the tax rate imposed by Section 624.509, Florida Statutes, to insurers organized under the laws of other jurisdictions, but electing to own and maintain a regional home office in Florida and to keep therein certain records pertaining to their activities.

Motors contended below that the result of this tax structure was discrimination of an invidious and unconstitutional nature against foreign, or non-domestic, insurers. (R1-13, 239-241, 303-326, 452-455).

Appellants (defendants below) (hereinafter collectively referred to as "the State") denied that the premium tax was unconstitutional. The State asserted, and substantiated with proof, that the premium tax statute advanced legitimate state regulatory goals. It asserted that, when considering the constitutionality of a statute under the Equal Protection Clause, the court may consider purposes in addition to those expressly noted by the legislature.[2] The evidence established, and the trial court found, that the State has a legitimate interest in acquiring the greatest possible degree of regulatory control over the insurance industry serving Florida citizens, and that Florida in fact, has more regulatory authority and control over a domestic insurer (as defined for purposes of the tax exemption) than it has, or can ever have, over a similarly situated foreign insurer. (R1443-1451, 1464-1466, 1469-1470; Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 48-51, 110-111, Vol. 2, pgs. 183-187; R1324-1325, 1340; R780)

The State asserted that the tax structure was rationally related to the regulatory goal of acquiring the greatest degree of regulatory control possible with respect to the insurance industry serving Florida citizens. The State asserted that the tax advanced that objective on two ways: encouraging the formation of insurers doing business here as domestic insurers,

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[2] The trial court agreed. (R780, 840-842).

subject to Florida's plenary control and influence[3], and by encouraging those foreign insurers which did not elect to redomesticate or form a Florida domestic subsidiary, to maintain regional home offices here, thereby subjecting themselves to increased, though not plenary, regulatory control by Florida. (R1373-1382, 1402; R231-233). The State contended, and the court agreed, that whether the statute actually accomplished those purposes is constitutionally irrelevant. (R840-842).

The State adduced first-hand evidence from representatives of insurance companies that the tax structure not only could be rationally conceived to have the intended effect of encouraging the formation of domestic insurers (thereby enhancing Florida's aggregate degree of regulatory control over the insurance industry), but that, in fact, the tax structure did influence insurers to form domestic insurance companies in Florida. (Defendants' Trial Exhibits No. 2, admitted in evidence at R1361-1362, No. 3, admitted in evidence at R1363-1365, and Exhibit No. 4, admitted in evidence at R1366-1367). One company's founder and president testified that, without the Florida domestic premium tax exemption, he would not have elected to domicile his company in Florida. (Defendants' Trial Exhibit No. 2, pgs. 4, 11). Motors' witness contested the degree to which Florida's tax differential would be effective in encouraging the formation of domestic insurers, but he did not dispute that it

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[3] Contrary to Motors' contentions, the premium tax statute, in particular, section 624.512, Florida Statutes, does not require an insurance company to redomesticate, or change its state of domicile, to Florida in order to qualify for the tax exemption. An insurance company may form a Florida subsidiary which qualifies for exemption, and at the same time, retain its original state of domicile.

could be a positive influence for domestication in Florida on a company making a choice of domicile. (Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 71-77, 84-86, 99, 116).

The trial court found that the State is not limited to purposes expressly voiced by the 1982 legislative session in section 624.512(2), Florida Statutes, and that it may support the constitutionality of the premium tax by showing it to be rationally related to objectives fairly inferred from the statutes, though not expressly mentioned by the 1982 amendments. (R836-842; R779-780). The court found that the objective asserted by the State - the acquisition of the greatest degree of regulatory control over the insurance industry serving Florida policyholders - is a legitimate state goal under Equal Protection Clause analysis (R780, 1102-1103).

The court found that the Legislature could rationally conclude that the premium tax structure in question would encourage the domestication of insurers in Florida and thereby increase the State's ability to regulate the insurance industry. (R780).

The court found that a domestic premium tax exemption does not, in fact, cause an insurance company to change its state of domicile. (R780). Yet, the court found it rational to conclude that the tax structure would encourage the formation of domestic insurers. (R780). Undisputed evidence showed that the tax structure did, in fact, induce several companies to form as Florida domestic insurers. (Defendants' Trial Exhibit Nos. 2, 3 and 4). Motors' witness testified that he could find no statistically significant correlation

between states offering domestic premium tax exemptions and states with the largest numbers of domiciled insurers. (Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 92-96; R1280-1285). However, that same witness noted that economic theory supports the view that the tax preference would encourage the formation of domestic insurers. (Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 77-80). He agreed that the absence of "statistically significant" correlation between states offering such a tax preference and states with large numbers of domiciled insurers is explainable by such influences as the nation's historical pattern of settlement and development of commercial centers. (Defendants' Composite Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 71-72, 76-77, 85-86). He further testified that the absence of such "statistically significant" correlation does not prove that such a preference was not a significant factor in the minds of company officials deciding where to domicile an insurance company. (Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pg. 96).

In light of that testimony, and the direct testimony of insurance company officers that Florida's domestic tax preference did influence the decision to domicile their companies in Florida, the court's finding on this point addresses the wisdom or utility of the inducement, *i.e*, that it would not alone cause an already-established foreign insurer to re-domesticate to Florida. It does not address the rationality of concluding that the inducement would

encourage the creation of insurers domiciled in Florida, either wholly independent companies or subsidiaries of existing foreign insurers.

The trial court concluded that not even legitimate regulatory interests of the State may be pursued by means of a residency-based distinction, and that employing such a distinction renders otherwise legitimate regulatory objectives illegitimate, for purposes of Equal Protection Clause analysis. (R780).[4] As a result, the court found that Section 624.509, et. seq., lacks a legitimate state purpose and therefore violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the Due Process Clause of the Florida Constitution.[5] (R780).

During the pendency of the case below, the State conducted an examination of Motors. The State determined that Motors had under-reported and underpaid premium tax due for a portion of the period for which Motors seeks a refund of premium tax. The State issued assessments of additional premium tax due. (Plaintiffs' Trial Exhibit No. 1, pg. 8,

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[4] "The Court finds that the purpose put forward by the Defendants for this discriminatory tax structure is to acquire a greater degree of regulatory control over insurance companies, which in itself is a legitimate state purpose. .... The Court finds that forcing a company to change its state of domicile is not a legitimate state purpose for imposing a discriminatory taxing statute ..... However, the Court further finds that the Legislature could have believed that the tax would have the effect of causing a company to change its state of domicile and therefore increase the State's ability to regulate such companies. " (R780, par. 3, 4, 5)

[5] Based on this finding, the court ordered a refund of premium taxes paid under the premium tax statute during the years 1983-1988, reduced by the amount of retaliatory taxes which Motors would have paid for those years had it not paid premium taxes. The parties below stipulated to the amount of premium taxes paid and the retaliatory taxes owed if the premium tax was declared unconstitutional.

paragraph 20, admitted into evidence at R1251-1252; R713; Defendants' Trial Exhibit No. 10, admitted into evidence at R1602-1603). Motors amended the complaint to challenge these assessments of additional premium tax on the same constitutional grounds. The trial court held the assessments of additional premium tax void due to its holding that the premium tax violated equal protection and due process guarantees. (R781).

The trial court rejected Motors' challenges to another tax, the "retaliatory tax" imposed under section 624.429, Florida Statutes (1987) [subsequently renumbered as section 624.5091, Florida Statutes (1991)]. (R781-782). The trial court ordered a refund of premium tax paid by Motors. As a part of the examination of Motors, the State computed, by means of pro forma assessments, the amount of retaliatory tax which Motors would have owed Florida had Motors not been obligated to Florida for premium tax in the amounts which Motors itself reported as due and owing under the premium tax statutes. The State introduced these calculations in evidence at trial. (Plaintiff's Trial Exhibit No. 1, admitted into evidence at R1251-1252; R731-737). The court, having found the retaliatory tax immune from Motors' constitutional attacks, ordered the premium tax refund offset by the amount of retaliatory tax computed in those pro forma assessments. (R781-782, 784).

The trial court also invalidated certain Fire Marshal assessments against Motors on non-constitutional grounds. (R782-783).

Finally, the trial court rendered judgment in favor of the State on Motors' claim under 42 U.S.C. § 1983. (R784).

The State appeals from that portion of the judgment below which declares the premium tax to be in violation of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the Due Process Clause of the Florida Constitution and from that portion of the judgment which declares void the assessments of additional premium tax due from Motors during the period in question.

QUESTION PRESENTED

1. Did the trial court err in holding that a distinction in tax treatment between foreign and domestic insurers based upon residency is always prohibited by the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, or by the Due Process Clause of the Florida Constitution, even where the distinction is rationally related to otherwise legitimate State regulatory objectives, and, upon that basis, declaring invalid the pre-July, 1988 premium tax structure of Sections 624.509, 624.512, and 624.514, Florida Statutes?

SUMMARY OF ARGUMENT

The question squarely presented in this case, and in the case of *State of Florida, et al. v. Melahn*, case no. 79,024 is this: Since Congress has expressly removed considerations of federalism from the States' regulation and taxation of the business of insurance, since it is undisputed that maximizing the State's regulatory influence and control of insurers serving Florida policyholders is a legitimate goal, and since Florida has comparatively more control over a domestic insurer than over a foreign insurer operating here, may the State, consistent with principles of equal protection and due process, posit a tax which encourages insurers operating in Florida to form as Florida domestic insurers, or to form domestic subsidiaries, serving Florida residents?

The state submits that the answer must be a resounding "yes."

The Congress is the repository of paramount power to protect and promote principles of federalism in the Union as those principles apply to the governance of interstate commerce. *Art. I, §8, cl. 3, United States Const.* Congress has declared that the interests of federalism are not harmed by insurance premium tax structures such as Florida's in relation to the business of insurance. 15 U.S.C. § 1011, and that the power of the States to impose such tax and regulatory structures "is in the public interest." *Id.* Given that policy decision by Congress, the body vested with direct constitutional power to decide the requirements of federalism in regard to interstate commerce, the courts should not construe

the Equal Protection Clause and the Due Process Clause as containing contrary implied notions of federalism regarding the taxation and regulation of insurance.

If the judiciary is to respect the power of Congress over the governance of interstate commerce, they may not construe the Equal Protection Clause or the Due Process Clause as empowering them to make a policy decision diametrically opposed to that of Congress on the subject. The courts cannot travel on the theory that the Equal Protection Clause or the Due Process Clause sub silentio incorporates notions of federalism coextensive with those of the Commerce Clause, and use their views of such silent notions to impose a rule which Congress has expressly rejected in regard to interstate commerce in insurance. To thus expand the reach of the Equal Protection Clause and the Due Process Clause is to eviscerate Congress' power to decide for the Union the acceptable means of governance of interstate insurance.

This Court therefore must not construe those clauses as equivalent in reach to the Commerce Clause. Yet that is what this Court would be doing, if it affirms the trial court's judgment that Florida's premium tax is unconstitutional. The State urges the Court that, instead, it must employ the traditional rational basis test to judge this tax. Under that standard, the premium tax is unquestionably constitutional.[6]

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[6] It is important here to note what the State does not contend. The State does not assert here that the Equal Protection Clause or the Due Process Clause may never play a role in support of the interests of federalism in our Union. In contexts where Congress has not spoken in the exercise of its Commerce Clause power, perhaps the Equal Protection Clause or the Due Process Clause may validly be viewed as incorporating some implied notions of federalism. However, irrespective of whether an "implied notions of federalism"

The trial court correctly found that the purpose advanced by the State for the tax structure is "in itself ... a legitimate state purpose." (R780). The trial court also correctly found that the tax structure was rationally related to (*i.e.*,could reasonably be viewed as advancing) that objective. (R780). Under appropriate Equal Protection Clause review standards, the trial court should have upheld the validity of the premium tax structure.

The trial court erred because it misunderstood *Metropolitan Life Ins. Co. v.Ward*, 470 U.S. 869 (1985) [hereinafter "*Ward*"]. *Ward* has been construed subsequently by the United States Supreme Court as holding only that "encouraging the formation of new domestic insurance companies within a State...[is] not, standing alone, [a] legitimate state purpose which could permissibly be furthered by discriminating against out-of-state corporations in favor of local corporations." *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 177 (1985) (emphasis supplied). Neither *Ward*, nor any case heretofore considering *Ward*, has interpreted it to hold that a distinction drawn between insurers on the basis of residency is invalid, where that distinction is rationally related to the accomplishment of a concededly valid regulatory goal. Yet, the decision below construes *Ward* to hold precisely that.

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analysis under those Clauses is appropriate in other contexts, it is exceptionally inappropriate where Congress has expressly exercised its constitutional dominion over interstate commerce and declared that interests of federalism are not offended by methods of taxation and regulation such as Florida's. In this context, the courts must employ traditional rational basis review standards to measure Florida's premium tax. To employ an "implied notions of federalism" analysis here, as a means to arrive at a conclusion exactly contrary to that of Congress, is merely to question the wisdom of Congress through a dangerous subterfuge.

The trial court found that "forcing a company to change its state of domicile is not a legitimate state purpose for imposing a discriminatory taxing statute." (R780). That finding evinces a misunderstanding of the challenged statutes. Florida law did not require an existing insurer organized elsewhere to change its own state of domicile and physically relocate all of its books, records and assets to Florida in order to take advantage of the tax inducement. Nothing prevented such an insurer from organizing a wholly-owned subsidiary in Florida, capitalizing that subsidiary to serve the Florida market and maintaining that subsidiary's home office, records, and assets here, in order to avail itself of favorable tax treatment.

Indeed, that is precisely the regulatory position in which Florida wishes to be. In relation to such a subsidiary, Florida, as the state of domicile, enjoys regulatory power which Florida could not otherwise exercise - the power to determine whether such company should be placed in rehabilitation or liquidation if the protection of Florida policyholders calls for such action. Those actions are *in rem*, and therefore may be undertaken only by the state of domicile. There is no bankruptcy protection for insurance consumers, 11 U.S.C. § 109 (b)(2),(3); only the state of domicile may act to protect their interests through such *in rem* proceedings. In contrast to such significant additional power which domestication of an insurer provides to Florida, the formation of a wholly-owned domestic subsidiary leaves the parent in control of the wealth and presents no significant impediment to operations.

Indeed the appellees here are all insurers which are subsidiaries of a parent corporation and are domiciled in different states.

Ward did not hold that never may regulatory interests support a difference in tax treatment based on residency. Contrary to the trial court's view, *Ward* is a narrow and non-dispositive opinion. It must be so regarded. It has been sharply limited to its facts by subsequent decisions of the United States Supreme Court and the subordinate federal courts. It is criticized among constitutional scholars who have addressed it. If the holding in *Ward* is expanded as the trial court here concluded it should be, it will upset the very allocation of power over the regulation of interstate commerce embodied in the Constitution of the United States itself.

The Commerce Clause, not of the Equal Protection Clause, functions to preclude distinctions based on residency, without regard to the legitimacy of reasons for the distinction. The Equal Protection Clause, on the other hand, historically has not been held to prohibit, as a class, all distinctions based on residency, but, instead, to prohibit only those which are conclusively shown not to be rationally related to a legitimate state interest.

Ward should therefore not be expanded beyond its narrow channel. If *Ward* is understood in the narrow sense in which it was intended, the separation of powers, which is at the core of our Constitution, will remain intact, and the tax in question is clearly constitutional.

ARGUMENT

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

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

A. THE HISTORICAL CONTEXT

Prior to 1944, insurance was not considered "commerce" under the Commerce Clause of the United States Constitution. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868). Thus, in contrast to the restrictions of the dormant Commerce Clause on the power of the states to regulate, burden, and impose barriers to the interstate transaction of other business, the states were free of those restraints in regard to the business of insurance. The states were free to treat foreign insurers differently, since the power to regulate insurance was viewed

as outside of the sphere of the national government's power. The states were the only line of defense to protect the interests of their citizens in regard to the business of insurance transacted within their borders. Because of the practical and legal impediments to projecting state power over insurers beyond the states' borders, the states commonly chose to impose premium taxes on foreign insurers operating within their borders, but to wholly or partially exempt companies organized under the laws of the particular state from such premium taxes, as an inducement for insurers to become organized under the laws of the particular state.

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

In response to *South-Eastern Underwriters*, Congress enacted the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 and 1012. Section 1 of the McCarran-Ferguson Act, 15 U.S.C. §1011, provides:

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

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

B. THE *WARD* DECISION

In 1985, a five-to-four majority of the Justices of the United States Supreme Court decided *Ward*. It is upon that decision that the trial court based its judgment declaring that the former provisions of Section 624.509, Florida Statutes, were in violation of the Equal Protection Clause.[7]

The *Ward* decision does not support the judgment below. *Ward* must be read as an isolated eddy in the main current of Equal Protection jurisprudence. Its result is explicable

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[7] In the trial court Motors also relied upon decisions of the courts of other states subsequent to *Ward* which applied *Ward* to invalidate differential premium taxes. As further discussed in text, *infra*, each of those decisions is inapposite to the facts of this case.

by the odd procedural posture in which the case was presented to the Supreme Court, and by the narrowness of the justification offered by the State of Alabama in defense of its statute. *Ward* is certainly not definitive, either by its own terms or in the light of subsequent treatment of the opinion.

The *Ward* case arrived for review at the United States Supreme Court having been treated by the lower courts only in summary proceedings. The Alabama trial court considered only two purposes advanced by the State of Alabama in support of the Alabama law. Both of those purposes constituted purely economic parochialism: encouraging investment in assets of the State of Alabama, and protecting or promoting Alabama's domestic insurance industry as a goal in and of itself. *See Ward,supra*, at 876. Indeed the Court in *Ward* analyzed the Alabama statute as "designed only to favor domestic industry within the state". *Id.* at 878 (emphasis supplied). The State of Alabama had offered numerous other state interests justifying the Alabama statute, but those interests were not considered by the Alabama courts, and the majority in *Ward* expressly declined to review and pass upon them and held that Alabama was free to advance them on remand. *Id.* at 875, n.5.[8]

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[8] "The State and the intervenors advanced some 15 additional purposes in support of the Alabama statute. As neither the Circuit Court nor the Court of Civil Appeals ruled on the legitimacy of those purposes, that question is not before us, and we express no view as to it. On remand, the State will be free to advance again its arguments relating to the legitimacy of those purposes. . . ."

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

Motors has argued that *Hanover Fire* invalidated a state premium tax. That is a mischaracterization of the case. The tax in question there was one measured by net receipts, and had been historically viewed as a specie of property tax by the state courts, and more recently viewed as an occupational tax. The discrimination in treatment complained of in that case was the imposition of tax on 100% of the net receipts of foreign insurers compared to taxation of only about two-thirds of the personal property of domestic insurers. Thus

Hanover Fire is more closely aligned with property tax cases such as *WHHY*, analyzed above, than with this case.

The tax here is not a property tax. It is a tax imposed on gross premium written in this state. It thus has a direct and proportionate relationship to the amount of insurance a company writes here and, therefore, a direct and proportionate relationship to Florida's desire to achieve the maximum control possible over the company. As the magnitude of a company's writing in this state grows, the state's need to regulate that company for the protection of Florida policyholders grows proportionately. Likewise, the amount of tax grows proportionately with the amount of business done here. As the amount of tax grows, the value of the exemption grows equally. Thus the magnitude of the inducement to domesticate offered by the domestic exemption grows proportionately with the amount of business done here, as well. It is difficult to conceive of a tax structure more symmetrically fitted to encouraging the greatest degree of Florida regulatory power over insurers doing business here. None of that analysis applies to a tax measured by net receipts. Net receipts do not measure the magnitude of insurance written in a state, since they measure a company's financial efficiency (revenues less expenses), rather than its total production of insurance. Thus, the court in *Hanover Fire* properly found that tax to be merely a revenue raising device.

In contrast to cases such as *WHHY* and *Hanover Fire*, another line of Equal Protection Clause cases preceded *Ward*, which *Ward* did not question, limit, or overrule.

This line of cases established the proposition that, where a reasoned difference exists between the state's relation to a foreign corporation and the State's relation to a domestic corporation, a tax, or other distinction, recognizing that difference is accepted by the Equal Protection Clause.

For instance, in *G. D. Searle v. Cohn*, 455 U.S. 404 (1982), the court, addressing an equal protection challenge, upheld a longer tolling period under the state's statute of limitations against foreign corporations than against domestic corporations, although remanding for consideration of a Commerce Clause claim (a claim not present in this case by virtue of the McCarran-Ferguson Act). The state justified that difference based on the greater burden on its citizens in locating and serving process upon foreign corporations. In *Madden v. Kentucky*, 390 U.S. 83 (1940) the state's greater difficulties in administering and collecting taxes levied upon deposits in foreign banks justified a differential in tax treatment. In *Board of Education v. Illinois*, 203 U.S. 553 (1906) the Court upheld an estate tax exemption for bequests to domestic, but not foreign, charitable organizations. The court noted that the state had more control over the operations of a domestic charity and therefore could better direct the benefits of its charitable activities to the state's own citizens, than in the case of a foreign charity.[9]

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[9] Motors purports to distinguish *Madden v. Kentucky* and *Board of Ed. v. Illinois* as not concerning discriminatory treatment of foreign residents, but rather discriminatory treatment of residents' property, when either placed in the possession of or given to a nonresident. That distinction is superficial. In both *Madden v. Kentucky* and *Board of Ed. v. Illinois* the effect of the discrimination was directed to and felt by the non-resident businesses. Yet, in neither case was the Equal Protection Clause offended because the distinctions in treatment

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

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

Ward, 470 U.S. 882, n. 10 (and associated text) (emphasis supplied). Thus the majority opinion in *Ward* recognized that a tax differential which serves state interests other than merely providing a commercial advantage to domestic insurers was not within its sweep.

Indeed, the court remanded the case for consideration of additional purposes which Alabama had put forward, but which had not been considered by the lower courts. *Ward, supra, at 875, n.5* If *Ward* were as broad as the trial court assumed, there would have been no occasion for the Supreme Court to remand the case for consideration of other potentially legitimate purposes. If *Ward* had adopted the principle that no state interest, regardless of

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were rationally related to state interests beyond the mere fact of foreign residency.

its legitimacy, may justify distinctions in tax treatment of insurers based on residency, then the remand ordered in *Ward* was a futile act; there would have been no need for further review of the additional justifications offered by Alabama, as none would suffice.

Moreover, to read *Ward* as the trial court did, is to read it as authorizing the judiciary to supplant its judgment as to what is best for the Union in regard to interstate commerce for that of the Congress. The Commerce Clause unequivocally reposes in Congress the power to regulate commerce among the states. Commerce Clause jurisprudence has consistently recognized that Congress may, in its wisdom, remove the strictures of the Commerce Clause from the states, through the exercise of its legislative power under that clause. *Prudential Ins. Co. v. Benjamin, supra*. Principal among the strictures of that Clause which the Congress may remove is the prohibition of virtually any discrimination in the treatment of foreign business based on residency. *E.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977). With respect to the business of insurance, Congress has removed that restriction from the states. Through the McCarran-Ferguson Act, Congress made the policy decision that the interests of interstate commerce are best served by allowing the states to distinguish between foreign and domestic insurers, where the distinction is rationally related to legitimate state regulatory concerns. Indeed, the Act broadly validated tax structures such as the one Florida imposed. *Prudential Insurance Co. v. Benjamin, supra*.

If *Ward* is given the breadth imbued to it by the decision below, however, that policy decision by the Congress, made in the exercise of its power to regulate commerce, will have been nullified by the judicial branch, ostensibly under the aegis of Equal Protection Clause analysis. The judicial branch will have determined that its wisdom, its view as to what is best for the Union regarding the regulation of commerce, supersedes that of Congress itself, the body expressly empowered by our Constitution to make those judgments and directly elected by the citizens to do so. If *Ward* is read as the trial court asserts that it should be, hereafter no state interest, regardless of its legitimacy, justifies residency-based distinctions toward insurers, even where the residence-sensitive treatment is rationally related to the state interest. That result would eviscerate the Congress' determination to the contrary in the McCarran-Ferguson Act.

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

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

1. Federal Cases

a. Subsequent Supreme Court treatment of *Ward*

The holding in *Ward* has been sharply limited to its facts by the United States Supreme Court itself. In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985), the court rejected an Equal Protection Clause challenge,

predicated on *Ward*, to Massachusetts and Connecticut statutes which permitted out-of-state bank holding companies domiciled in reciprocating New England states to acquire an in-state bank, but denied that privilege to holding companies domiciled in states outside of New England. The court characterized *Ward* as narrowly holding that "encouraging the formation of new domestic insurance companies within a state....[is] not, standing alone, [a] legitimate state purpose which could permissibly be furthered by discriminating against out-of-state corporations in favor of local corporations." *Id.* at 177 (emphasis supplied). *Northeast Bancorp* characterized *Ward* as simply holding that a domestic preference for its own sake is inconsistent with the Equal Protection Clause.

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

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

Id. at 178 (emphasis supplied). Justice O'Connor noted in concurrence that there was no meaningful distinction, for Equal Protection Clause purposes, between the Massachusetts and Connecticut statutes at issue in *Northeast Bancorp* and the Alabama statute at issue in *Ward*. She noted that insurance, like banking, is of "profound local concern." Further, she noted that, "[e]specially where Congress has sanctioned the barriers to commerce that fostering of local industries might engender, this Court has no authority under the Equal Protection Clause to invalidate classifications designed to encourage local businesses because of their special contributions." *Id.* at 179.

Thus, when *Ward* is read in light of its treatment in *Northeast Bancorp*, it does not hold that residency distinctions to encourage the formation of domestic insurers are invalid where domestication has a legitimate regulatory component. Rather, *Ward* simply holds that a higher tax on non-resident insurers solely because they are non-resident (*i.e.*, with no regulatory basis) is irrational under the Equal Protection Clause.

Surprisingly, Motors has argued that *Northeast Bancorp* is distinguishable on the premise that the Equal Protection Clause only applies once a State admits a foreign corporation within its borders, and that it does not apply, as in *Northeast Bancorp*, to the State's decision not to allow the corporation inside its borders. The United States Supreme Court explicitly held that proposition to be an "anachronism" in *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 657-669 (1981), and receded from the line of cases which established it. Indeed, *Northeast Bancorp*, itself, did not proceed from

the premise that the states were unrestrained by the Equal Protection Clause in their power to deny admission to foreign corporations. Instead, *Northeast Bancorp* held that the States' concern with fostering local banking institutions responsive to needs peculiar to local markets was legitimate, and that the statutes were rationally related to achieving that objective. *Northeast Bancorp* employed the quintessential "rational basis" analysis for judging statutes such as the one in challenge here.

Motors has further argued that *Northeast Bancorp* does not govern because it did not involve the taxing power. We are aware of no authority holding that the Equal Protection Clause applies to the exercise of some state powers but not to others. It seems specious to assert that the Equal Protection Clause allows the States to forbid non-resident corporations to engage in local banking, as was the case in *Northeast Bancorp*, but prevents the States from taking less drastic steps, such as creating an inducement to domesticate, in another fundamentally important industry, an inducement which this record shows, and the trial court found, to enhance the State's power to regulate the business of insurance.

Motors has finally attempted to distinguish this case from *Northeast Bancorp* by asserting that Congress has never expressed a policy in favor of prohibiting large interstate insurance firms. That assertion is baffling. Nothing in the challenged statutes is designed to prohibit the formation of large interstate insurance firms. What the challenged tax structure does, as shown by the record, is to encourage the formation of domestic insurers, or domestic subsidiaries of foreign insurers, so that the State's overall regulatory influence over

the insurance industry serving this State is thereby increased. The power of the State to make that policy choice, unfettered by countervailing principles of federalism, was unequivocally affirmed by Congress through the McCarran-Ferguson Act. *See* HR Rep. No. 143, 79th Cong., 1st Sess., 2 (1945); *see also Western and Southern Life Ins. Co., supra* at 654; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 427-428 (1946)[10] (higher premium tax on foreign insurers does not violate Commerce Clause).

b. Subsequent treatment of *Ward* in the lower federal courts

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

> . . . *Metropolitan Life* was sharply limited to its facts in *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 176....(1985). As the present case does not involve the taxing power and "the Equal Protection Clause permits economic regulation that distinguishes between groups that are legitimately different - as local institutions so often are, *id.* at 180....(O'Connor, J. concurring), we find

[10] "First, it follows from what has been said that we are not required to determine whether South Carolina's tax would be valid in the dormancy of Congress' power. For Congress has expressly stated its intent and policy in the Act. And, for reasons to be stated, we think that the declaration's effect is clearly to sustain the exaction and that this can be done without violating any constitutional provision." *Id.*

> no basis for concluding that the Steel Act contravenes the equal protection clause.

Id. at 915.

In *Associated Gen. Contractors of California, Inc. v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), the court also rejected a challenge based on *Ward*. The challenged ordinance gave preference in bidding for public contracts to minority-owned businesses and to local businesses. The court regarded *Ward* as limited to its facts. It distinguished *Ward*, holding that the preference granted by the challenged ordinance, in its view, was not a burden imposed "discriminatorily....on nonresident corporations solely because they are nonresidents, [but was] an attempt to lighten a [competitive] burden of San Francisco businesses not shared by others." *Id.* at 943 (quoting *Ward at* 470 *U.S.* 882, n.10). The court specifically held that the city's interest in encouraging businesses to locate in and remain in the city was legitimate for equal protection purposes and that the locality preference was rationally related to that purpose. *Id.*

Again, in *International Organization of Masters, Mates & Pilots v. Andrew*, 626 F. Supp. 1271 (D.Alaska 1986), *aff'd. in part, vacated in part on other grounds*, 831 F.2d 843 (9th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988), the court treated *Ward* as sharply limited and rejected a *Ward*-based equal protection challenge to an Alaska statute. The challenged statute mandated a higher pay differential to Alaska residents employed by a public conveyance company than to non-resident employees. The court expressly found that the

purposes offered by the state - including the assertion that Alaska employees are more acutely aware of local conditions and needs - were legitimate and that the statute was valid, notwithstanding *Ward*.

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

2. Cases From Other States

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

North Dakota defended a *Ward*-based equal protection challenge to its residency-distinct premium tax by asserting that the differential tax served in lieu of a tax on revenues generated by foreign insurers as a result of reinsurance transactions with domestic insurers. *Metropolitan Life Ins. Co. v. Commissioner of Ins.*, 373 N.W.2d 399 (N. D. 1985). However, domestic insurers were not taxed on their reinsurance premiums; thus the court concluded

that this asserted state interest was tantamount to asserting that discrimination, as its own objective, is legitimate; a proposition which the court rightfully rejected. North Dakota alternatively asserted that the higher premium tax on out-of-state insurers compensated the state for services rendered to such insurers and equalized the overall tax burdens imposed on foreign and domestic insurers, contentions which the court rejected as unsupported by the evidence. Finally, North Dakota asserted that the tax simplified the administration of North Dakota's tax and insurance laws and encouraged out-of-state insurers to transact business in the state; assertions which were self-evidently illogical. The court thus declared that statute invalid. Here, in contrast, no such contentions are asserted by Florida. The evidence below clearly supported the trial court's findings, both as to the legitimacy of the regulatory interests asserted by Florida and as to the rational connection between the tax treatment and the advancement of those interests.

Penn Mutual Life Insurance Co. v. Department of Licensing & Regulations, 412 N.W.2d 668 (Mich. Ct. App. 1987) is likewise not on point. There the court held that the purposes advanced by the state (establishing a reliable source of coverage in the state and increasing the availability of coverage where the need was greatest) were legitimate, but held that the means chosen were not rationally related to accomplishment of those objectives. In the alternative, the court held that, if the objective were merely the creation of domestic insurers, as an end in and of itself, such an objective was illegitimate in the court's understanding of *Ward*. Unlike Michigan, Florida asserted, and proved, that the Florida's

regulatory influence is at its zenith in relation to domestic insurers, that encouraging the formation of domestic insurers to serve Florida policyholders is therefore a logical means in fostering the goal of maximizing its aggregate regulatory power over the insurance industry in general (as opposed to being merely an end in itself), and that the tax structure is rationally related to that endeavor.

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

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

D. *WARD* DOES NOT CONTROL

Florida does not justify its tax by the purely economic goal of protecting domestic industry from its foreign competitors. Instead, the trial court here found that Florida's regulatory interests in respect to insurance are indeed served by encouraging the domestication of insurers serving Floridians. Therefore, *Ward* does not govern the outcome of this case.

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

By adhering to that well-established test, and according *Ward* its appropriately narrow place in the course of constitutional thought, the Court will preserve the

constitutional balance between the judiciary and the Congress. By confining *Ward* to its facts, the Court will avoid the prospect of that decision becoming an "unfortunate" one, one remembered for creating the constitutional quagmire resulting from a broad reading. *See Regan, D.H., "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," 84 Mich. L Rev. 1091, 1277-1278.* The admonitions of that unbroken line of equal protection analysis, and that scholarly admonition, are particularly cogent here. We here consider a challenge to the State's exercise of power to regulate interstate commerce in insurance, a power expressly delegated to the State by Congress in the McCarran-Ferguson Act. Therefore, the State's tax and regulatory structure is entitled to the same deference which this Court would give to a Congressional Act.

E. THE APPROPRIATE STANDARD OF REVIEW

1. The Standard

The appropriate constitutional standard of review is the rational basis test. *See, e.g., United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980). Under this test, it has long been held that distinctions in the treatment of business entities engaged in the same business activity are permissible and that statutory regulation may treat them differently, so long as the distinctions have some rational relationship to their distinguishing features. *Id.* To pass muster under this test, the statute's classification need only be supported by a showing of conceivable legitimate state objectives, and a showing that one may rationally conclude that

the statutes would further one or more of those objectives. *Western & Southern Life Ins. Co. v. State Board of Equalization of California, supra* .

The first prong of the test is a question of law. *See, e.g., Ward.* In addressing this question, the court is free to consider any conceivable purpose for the statute. *E.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). Under Equal Protection Clause analysis, "legislation will be presumed constitutional....[I]f any state of facts, known or assumed, justifies the law, the court's inquiry ends...." *Glendale Fed. Savings and Loan Ass'n. v. State of Florida*, 587 So.2d 534 (Fla. 1st DCA 1991), *pet. rev. pending*, case no. 79,025 (Fla. 1991) (citations omitted, emphasis supplied).

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

This Court has consistently applied these principles. *E.g., Fraternal Order of Police, Metro. Dade County v. Department of State*, 392 So.2d 1296, 1302 (1980), (Whether legislature chose the best means is of no consequence; means selected only need be not wholly unrelated to legitimate objective); *Eastern Air Lines, Inc. v. Department of Revenue*,

455 So.2d 311, 314 (Fla. 1984) (burden is on one attacking legislation to negate every conceivable basis which may support it). These are the controlling standards of review in this case.

Motors mistakenly relies on cases such as *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) and *Zobel v. Williams*, 457 U.S. 55 (1982) in its search for authority to support a more rigorous standard of review. *Weinberger* reviewed a gender-based statutory distinction, as to which a heightened standard of scrutiny is employed under the Equal Protection Clause. *E.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-441 (1985). Moreover, that case was decided on a overbreadth analysis under the Due Process Clause of the Fifth Amendment to the United States Constitution. Such is not the case at bar. The opinion in *Zobel*, upon which Motors relies, is a plurality opinion. Five of the Justices regarded the Alaska statute there in question as breaching the citizens' right of travel, finding that right to be a fundamental one. A strict-scrutiny analysis is applied under the Equal Protection Clause where fundamental rights are implicated. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253-255 (1974). Again, such is not the case at bar. Further, Justice Brennan, who was in concurrence in *Zobel* and in dissent in *Ward*, speaking for four justices in *Zobel*, said: "....discrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself." *Zobel, supra*, at 69 (emphasis added). Such an independent and valid state interest is exactly what exists in this case.

Motors' reliance on cases such as *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981) and *Minneapolis Star & Tribune Co. v. Minnesota Com'r. of Revenue*, 460 U.S. 575 (1983) is likewise misplaced. *Scheinberg* was an abortion case, in which the statute impinged upon the fundamental right of privacy. The tax under review in *Minneapolis Star* implicated first amendment rights. Both cases thus employed a strict-scrutiny analysis.

That distinction in the standard of review is important. In strict scrutiny cases the State has the burden of proving the existence of a compelling state interest justifying the statute. Conversely, in rational basis cases, such as this, the plaintiff has the burden of negating every conceivable legitimate state purpose before the statute may be held unconstitutional.

Motors' reliance on *Kassel v. Consolidated Freight Ways Corp. of Delaware*, 450 U.S. 662 (1981) and *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988) is equally untenable. *Kassel* and *Limbach* are cases decided upon the Commerce Clause principles, not under the Equal Protection Clause or the Due Process Clause. Statutes challenged under the Commerce Clause are subject to a different, more rigorous standard of scrutiny. The courts routinely engage in the process of attempting to ascertain the "true" purposes of the legislature in judging a statute under the Commerce Clause. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049 (1984). In the case of the business of insurance, however, the rigors of Commerce Clause scrutiny have been expressly removed by the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*

2. Application of the Standard

The trial court correctly held that the premium tax statute was structured to encourage the increase of Florida's control and influence over insurers doing business within the state.

As we noted above, the determination of whether that goal is legitimate is one of law. Moreover, all of the insurance experts who testified agreed that objective to be reasonable and desirable from an insurance regulator's perspective. (Defendants' Composite Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 50-51, Vol. 2, pgs. 183-187; R1324-1325, 1340; R1444-1465, 1469-1471). No one disagreed that Florida has more control and regulatory influence over a domestic insurer than over a foreign insurer. (R1373-1382, 1402; Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 110-111, Vol. 2, pgs. 183-187; R1324-1325; R1444-1456, 1464-1465, 1469-1471). There was no dispute that Florida is in a better position to protect the interests of Florida policyholders in the event of an insurer's financial instability if that insurer is domiciled in Florida. (Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 99, 116, Vol. 2, pgs. 183-187; R1444-1456, 1464-1465, 1469-1471).

In this connection it must be remembered that there is no bankruptcy protection for policyholders under federal law. 11 U.S.C. § 109 (b)(2),(3). Only the states provide policyholder protection in the event of an insurer's financial impairment or insolvency. State actions to place an insurer in rehabilitation or liquidation are the only means available to

protect policyholders under such circumstances. (R1444). Only the insurer's state of domicile can institute such proceedings. The state of domicile alone may elect when to institute such measures and which to employ. (R1444-1456, 1464-1465, 1469-1471; Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 2, pgs. 183-187). In the case of a foreign insurer, the protection of Florida policyholders is relegated to officials from other states, officials not answerable to the citizens of Florida. There was no dispute, therefore, that Florida can better safeguard Florida policyholders to the extent that it can position itself as the state of domicile of insurers operating here. (Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 50-51, Vol. 2, pgs. 183-187; R1444-1456, 1464-1465, 1469-1471).[11]

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[11] At trial Motors suggested that Florida's concerns regarding its power to protect Florida policyholders in the event of financial instability are unimportant because Florida has chosen to adopt the Uniform Rehabilitation and Liquidation Act. *See* Ch. 631, *Fla. Stat.*, Part I. That suggestion is wrong. A non-domiciliary state is accorded some additional protection in relation to insurers domiciled in other states which have adopted some form of the uniform act, compared to the situation where the foreign insurer is domiciled in a "non-uniform" state. These additional measures, however, do not afford Florida the power to control decisions necessary to fully protect its citizens. The power to place an insurer in liquidation or rehabilitation exists only when the state has in rem jurisdiction over the insurer's corporate charter and its assets. A non-domiciliary state has no such jurisdiction. An attempt by a non-domiciliary state to order liquidation or rehabilitation of an insurer would not be entitled to full faith and credit in other states. *E.g., Underwriters Nat. Assur. v. North Carolina Life & Acc.*, 455 U.S. 691, 704 (1982). *See also, Couch on Insurance* (2d), 22:63 at p. 660. Thus, whether Florida deals with a foreign insurer from a "uniform" or a "non-uniform" state, the decision as to whether liquidation or rehabilitation is needed to protect the interests of Florida policyholders is relegated to officials not accountable to Florida citizens. Only where Florida is the domiciliary state can it exercise the full panoply of regulatory power, as it sees fit, for the protection of Floridians. (cont'd next page)

Florida's premium tax was structured to encourage precisely that objective. Florida law requires, on pain of criminal penalty, that domestic insurers keep their books, records and assets in this State. Sections 628.271, 628.281, Florida Statutes (1991). Thus the tax inducement was not simply a means to induce incorporation here for economic reasons, but was aimed, as well, at inducing the maintenance of records and company assets in this state, subject to the plenary power and the in rem jurisdiction of Florida.

Indeed, the overall tax structure was designed to reward varying degrees of practical submission by insurers to the regulatory power and jurisdiction of this State. Those insurers which elected to own and occupy a regional office here brought valuable and fixed assets

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Motors likewise erroneously suggested that Florida could solve it regulatory concerns by altering the events which trigger payments from Florida's insurance guarantee associations. However, whether the guarantee associations commence payments to policyholders at the point of financial impairment or later, at the point of commencement of insolvency proceedings, this central fact remains: Only the state of domicile can decide whether and when liquidation or rehabilitation is in the best interests of Florida policyholders. Florida does not control the decision in the case of a non-domiciliary insurer.

Moreover, triggering payments from Florida's guarantee associations before the state of domicile has decided to liquidate an insurer involves substantial risks. Only in the event of liquidation can Florida's guarantee associations participate in the assets of the insurer to recoup association payments. If a Florida association were to pay Florida claims of a non-domiciled insurer in advance, and the domiciliary state does not liquidate, the Florida association would be left without recourse to recover its payments. Such unrecovered costs are passed on by insurers (which fund the guarantee associations through assessments) to Florida policyholders.

Thus, Motors' arguments are a quibble with legislative wisdom. They are made in an effort to distract attention from this central fact: Florida is in the best position to protect Florida policyholders when Florida is the insurer's state of domicile. In all other cases, the protection of Florida policyholders is relegated to officials who are not answerable to them. There is no dispute in this case that Florida enjoys more power to protect its citizens to the extent that it can encourage domestication of insurers serving Floridians. Nor could there be.

within the jurisdiction of Florida and maintained records of regional activities here, and thereby enabled Florida to obtain access to, and in rem control over, such assets and records directly, without the aid and assistance of any other jurisdiction. Such "regional home office" companies subjected themselves to Florida's influence to a greater degree than other foreign insurers, but they did not submit to the full breadth of power which Florida may exert over a domestic company. Such regional companies were rewarded by a 50% reduction in premium tax. Companies which elected to domesticate here and to maintain their records and the majority of their assets in this state[12] subjected themselves to the plenary and *in rem* authority of this state to decide whether and when they should be placed in quasi-bankruptcy proceedings, such as rehabilitation or liquidation. They were offered an exemption from premium tax as an inducement to subject themselves to Florida's plenary power.

Therefore, the premium tax statute encouraged domestication as a method to acquire maximum regulatory control and influence over insurers doing business in this state. The requirement of a legitimate state purpose is established by this record.

The second question under rational basis review is whether the legislature could rationally conclude that the challenged classification would assist in reaching the objective.

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

See, e.g., Western & Southern, supra. That prong of the test is likewise met here, as the trial court found.

The State presented uncontroverted evidence that the residency-based premium tax distinction did induce insurers to form domestic insurance companies in Florida. (Defendants' Trial Exhibit Nos. 2, 3, and 4). Motors' witness testified that he could find no statistically significant correlation between states offering domestic premium tax exemptions and states with the largest numbers of domiciled insurers. (Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 92-96; R1280-1285). However, that same witness agreed that economic theory supports the view that the tax preference would encourage the formation of domestic insurers. (Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 77-80; R1327-1328). He conceded that the absence of "statistically significant" correlation between states offering such a tax preference and states with large numbers of domiciled insurers may be explained by such influences as the nation's historical pattern of settlement and development of commercial centers. (Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. I, pgs. 71-72, 76-77, 85-86; R1335-1337). He further testified that the absence of such "statistically significant" correlation does not prove that such a preference was not a significant factor in the minds of company officials deciding where to domicile an insurance company. (Defendants' Composite Trial Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pg. 96; R1334). Moreover, the United States Supreme Court has

specifically rejected the notion that lack of "statistically significant" correlation is enough to establish that a tax is not rationally related to the state objective. *Western & So. Life Ins. Co. v. State Bd. of Equalization of California, supra*, at 671-674. Such evidence goes to the effectiveness or wisdom of the statute, not to its constitutionality, *See Id.*, as did the testimony of Motors' witness here, by his own admission. (Defendants' Composite Exhibit No. 8, deposition transcript of A. Hofflander, Vol. 1, pgs. 99, 116; R1285).

Therefore, the second prong of the rational basis test is likewise satisfied in this case.

CONCLUSION

For the foregoing reasons, the State asks the Court to reverse the judgment of the trial court insofar as it declares section 624.509, Florida Statues, as it existed prior to July 1, 1988, to be in violation of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, insofar as it declares section 624.509, Florida Statues, as it existed prior to July 1, 1988, to be in violation of the Due Process Clause of the Florida Constitution, and insofar as it declares void the assessment of additional premium tax due from Motors during the time period in contest.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
JOSEPH C. MELLICHAMP, III
Senior Assistant Attorney General
Tax Section
The Capitol
Tallahassee, Florida

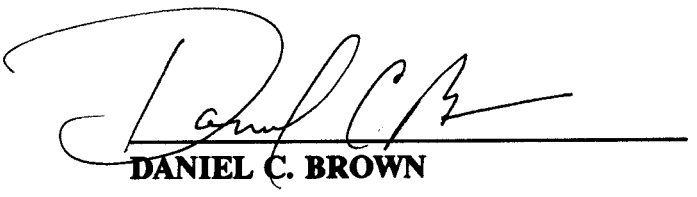
and

DANIEL C. BROWN
Florida Bar No. 0191049
MARGUERITE H. DAVIS
Florida Bar No. 0136563
Katz, Kutter, Haigler, Alderman,
Davis, Marks & Rutledge, P.A.
First Florida Bank Building
215 S. Monroe Street, Suite 400
Tallahassee, Florida 32301
(904) 224-9634

ATTORNEYS FOR
DEFENDANTS/APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to KENNETH R. HART, ESQ., Ausley, McMullen, McGehee, Carothers and Proctor, Post Office Box 391, Tallahassee, Florida 32302 this 16th day of January, 1992.



DANIEL C. BROWN

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