

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE DIRECTOR OF THE DIVISION OF INSURANCE**

In the Matter of)	
)	
EMPLOYERS COMPENSATION)	OAH No. 22-0738-INS
INSURANCE COMPANY)	Agency No. D22-11
_____)	

DECISION ON SUMMARY ADJUDICATION

I. Introduction

Employers Compensation Insurance Company (ECIC) is a California domiciled insurance company that does business in Alaska. The Alaska Department of Commerce, Community & Economic Development, Division of Insurance (Division) assessed a \$3,586 "retaliatory fee" against ECIC as part of ECIC's Alaska Premium Tax payment for 2021. ECIC requested a hearing to challenge the Division's assessment of the retaliatory fee for 2021 and to seek a refund for retaliatory fees it paid in the two preceding years of 2019 and 2020.

The parties cross-moved for summary adjudication. As discussed more fully below, there being no genuine issues of material fact, ECIC's motion for summary adjudication is denied and summary adjudication is entered in favor of the Division. This decision finds that ECIC is liable for payment of the retaliatory fee in the amount of \$3,586 for 2021 and denies its request for refund of the retaliatory fees paid for 2019 and 2020.

II. Facts and Procedural History¹

A. ECIC Retaliatory Fee History

Insurers who write premiums in Alaska are required to "pay a tax on the total direct premiums written during the year ending on the preceding December 31 ... "² As part of the statutory scheme, that tax may include what is referred to as a retaliatory fee or tax, which applies to foreign domiciled insurers doing business in Alaska.³

ECIC is a California-domiciled insurance company that does business in Alaska. It filed annual Alaska Premium Tax reports for 2019, 2020, and 2021. In April 2020, the Division of Insurance assessed ECIC a retaliatory fee of \$3,476 as part of its 2019 Alaska Premium Tax.⁴ At

The undisputed facts set out below are derived from the exhibits attached to the parties' pleadings, which were admitted without objection, and from ECIC's appeal documents.

² AS 21.09.210(d).

³ AS 21.09.270. *See generally, Premera v. State*, 171P.3d1110, 1112-113 (Alaska 2007).

⁴ Agency Record (AR) 12.

that time, the Division explained that it included California's "fraud assessment" fee, which is imposed on all insurers, in its calculation of whether a retaliatory fee was due. The Division's tax auditor explained:

The 2019 tax report for Employers Compensation Insurance Company did not include the California Department of Insurance's fraud fee on the domicile side of the retaliatory schedule. CA law requires that all insurers doing business in CA, which means actively servicing policies and/or collecting premiums, are subject to the fraud assessment. The Alaska retaliatory law does not exclude this type of special purpose fee from the calculation and neither does the CA retaliatory law as all companies including foreign companies are subject to this fee; thus, this fraud fee belongs in the retaliatory calculation per Alaska statute 21.09.270.⁵

ECIC responded that ECIC would "arrange to have this paid as soon as possible."⁶

In April 2021, the Division again assessed ECIC a retaliatory fee of \$3,466 as part of its 2020 Alaska Premium Tax report.⁷ ECIC again did not dispute the retaliatory fee assessment. When ECIC filed its 2021 Alaska Premium Tax report in early 2022, it again did not account for the "fraud fee" charged by California. In April 2022, the Division again assessed a retaliatory fee.⁸ As in prior years, the Division calculated the size of the 2021 retaliatory fee by comparing the amounts of "taxes, licenses, and other fees" that ECIC would pay in Alaska versus in California based upon its \$26,333 in premiums. The amount for Alaska was \$3,061, while the amount for California- with the fraud fee included- was \$6,647. The difference in total fees between the two states - \$3,586 - is the amount assessed by the Division as ECIC's 2021 retaliatory fee.⁹

B. ECIC Challenge to 2021 Retaliatory Fee

ECIC disputed the requirement to pay the 2021 retaliatory fee. In July 2022, after correspondence between the parties had failed to resolve the issue, ECIC queried the Division about whether the Department would "issue a final, appealable ruling." One week later, the Division Director issued an "Order Imposing Retaliatory." The Order August 2, 2022 Order concluded that "the California fraud fee is analogous to the Alaska certificate of authority

⁵ AR 12.

⁶ AR 17.

⁷ AR22.

⁸ AR27

⁹ ECIC's original "Retaliatory Schedule" filing is attached at Ex. 2, p. 4 to its October 14, 2022 *Dispositive Motion*. The Division's interlineated "Retaliatory Schedule" showing the addition of the California Fraud fee and the resultant calculation of the retaliatory fee amount is attached as its Amended Ex. 1, p. 4 filed on November 4, 2022

renewal fee that funds the Alaska fraud section," and reiterated the Division's earlier finding that ECIC's premium tax obligation included a \$3,586 retaliatory fee.¹⁰

C. *Procedural History*

ECIC requested a hearing in this matter on August 8, 2022.¹¹ In its hearing request, ECIC took issue with the Division's characterization of California's "fraud fee" as a fee "imposed upon" insurers. Instead, ECIC contended, the fraud fee is actually imposed on policyholders, so should not be included in the universe of fees from which the retaliatory fee calculation is made. Based on this reasoning, ECIC's hearing request not only challenged the 2021 retaliatory fee assessment, but also "request[ed] a refund of the full amount of retaliatory fee paid in each of those years: \$3476.00 in 2019 and \$3466.00 in 2020."

The parties filed cross-motions for summary adjudication in this case and oral argument was held on those motions on December 6, 2022. At oral argument, this tribunal raised, *sua sponte*, the issue of whether ECIC could properly request a refund of retaliatory fee for Tax Premium years 2019 and 2020 as part of this case. The parties provided supplemental briefing on this point.

III. Discussion

A. *Issues Presented*

The primary issue is whether ECIC is subject to a retaliatory fee for tax year 2021. The secondary issue is whether ECIC may, in addition to challenging the 2021 retaliatory fee, also request a refund of its payment of retaliatory fees for 2019 and 2020.

The Division does not dispute that ECIC may raise the issue of the 2019 and 2020 retaliatory fee refund in this case.¹² The applicable statute AS 21.09.210(k), allows an insurer to request a refund "[i]f within three years after the date the tax under this section was due, and insurer discovers a mistake or misinterpretation that resulted in an overpayment of the tax in an amount exceeding \$250 in any one calendar year." Because ECIC's argument, as discussed below, is that the retaliatory fee for all three years, 2019, 2020, and 2021, is based upon a mistake or misinterpretation of the applicable statutes, the issue of whether ECIC is entitled to a refund for 2019 and 2020 is appropriate for decision.

¹⁰ Ex. 3.

¹¹ R. 32.

¹² See the Division's December 21, 2022 "Response to Request for Supplemental Briefing," p. 3.

B. Summary Adjudication Standard

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.¹³ It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that one side or the other must prevail, the evidentiary hearing is not required.¹⁴

C. Is ECIC Subject to a Retaliatory Fee?

The statutory scheme imposing a tax on insurance premiums written in Alaska permits the imposition of a retaliatory fee or tax on foreign domiciled insurers doing business in Alaska.¹⁵ Alaska Statute 21.09.270 sets forth the conditions upon which a retaliatory fee may be assessed upon that foreign domiciled insurer:

If, under the laws of another state ... taxes, licenses, and other fees, in the aggregate ... are or would be imposed upon Alaska insurers ... that are in excess of the taxes, licenses, or other fees, in the aggregate ... directly imposed upon similar insurers ... of another state ... under the statutes of this state ... the same taxes, licenses, and other fees in the aggregate ... shall be imposed by the director [of Insurance] upon the insurers ... of the other state ... doing business or seeking to do business in [Alaska].¹⁶

As explained by the Alaska Supreme Court, in its decision upholding the assessment of a retaliatory fee, "the purpose of AS 21.09.270 of equalizing and lowering taxes across states is fairly and substantially furthered by imposition of the retaliatory tax ... "¹⁷

ECIC is domiciled in California. The question to be resolved is therefore whether California imposes insurance "taxes, license, or other fees, in the aggregate" that exceed the "taxes, licenses, or other fees, in the aggregate" imposed by Alaska. If so, the Division may impose a retaliatory tax upon California domiciled insurers doing business in Alaska. If not, then the Division may not. For instance, in the *Premera* case, the Alaska Supreme Court held that Alaska could assess a retaliatory tax against Premera Blue Cross, a Washington domiciled non-profit hospital and medical services corporation that did business in Alaska, because the

¹³ See, e.g., *Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000).

¹⁴ See *Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

¹⁵ AS 21.09.210(d).

¹⁶ AS 21.09.270.

¹⁷ *Premera Blue Cross v. State, Dept. of Commerce & Economic Development, Division of Insurance*, 171 P.3d 1110, 1124 (Alaska, 2007).

State of Washington taxed its non-profit health care services corporations at a higher rate than Alaska.¹⁸

The Division assessed a retaliatory fee against ECIC based upon the inclusion of the California fraud assessment fee in its calculation of the retaliatory fee. The crux of the parties' dispute involves whether it should have been included in that calculation. California requires that "an insurer doing business in this state shall pay an annual special purpose assessment to be determined by the commissioner, not to exceed five thousand one hundred dollars (\$5,100), to be used exclusively for the support of the Fraud Division."¹⁹ The insurer paying that assessment "may" pass that assessment on to its clientele "by way of a surcharge on premiums charged for the insurance policies to which those sections apply or by including the assessments within the insurer's rates."²⁰

Alaska does not have a direct fraud assessment.²¹ It does have a \$2,250 "annual continuation of a certificate of authority fee." The Director's "Order Imposing Retaliatory" provides that "[t]he California fraud fee is analogous to the Alaska certificate of authority renewal fee that funds the Alaska fraud section".

1. Has ECIC Demonstrated that it is Entitled to Summary Adjudication in Favor of Eliminating its 2021 Retaliatory Fee?

ECIC made two arguments in support of its position that it was not subject to a retaliatory fee. Its first argument was that Alaska could not include the California Fraud fee in its calculations because that fee was not "imposed" upon insurers. Its second argument was that the Alaska Insurance Guaranty Association (AIGA) fee required of insurers was analogous to the California Fraud fee and, that if the California Fraud fee was included in the retaliatory fee calculation, it should also be included. Each of these arguments is addressed below.

a. Is the California Fraud Assessment "Imposed" Upon Insurers?

ECIC argues that the California Fraud assessment is not "imposed" upon insurers because it has the option of passing that fee onto its insureds. "Impose" is defined as "to levy or exact (a tax or duty)."²² California requires the insurer to pay the assessment: it exacts a duty upon the insurer to pay the assessment. This meets the definition of "imposed." The fact that the

¹⁸ *Id.* At 1123 - 1124.

¹⁹ Cal. Ins. Code § 1872.86(a).

²⁰ Cal. Ins. Code § 1872.87(a).

²¹ See AS 21.09.210 and 3 AAC 31.050 for a list of standard fees.

²² *Impose*, Black's Law Dictionary (11th ed. 2019).

insurer can pass the assessment on to its insureds does not relieve the insurer of the underlying obligation. Accordingly, this argument is not persuasive.

b. Should the AIGA Fee be Included in the Retaliatory Fee Calculation?

ECIC's second argument is that the Division's calculation failed to account for a fee charged to Alaska-based insurers by AIGA.

AIGA is a non-profit corporation created by statute to "provide a mechanism for the payment of covered claims ... to avoid excessive delay in payment and ... to minimize financial loss to claims or policyholders because of the insolvency of an insurer."²³ Insurers doing business in Alaska, with some limited exceptions, are required to be members of AIGA as a condition of their doing business in the state.²⁴ AIGA members are assessed a yearly fee, which they are required to pay as a condition of membership.²⁵

ECIC argued that AIGA yearly fees, the amount of which is not contained in the record, should have been included in Alaska's retaliatory fee calculation, which it undisputedly was not. ECIC's argument is based upon its position that the AIGA yearly fee is analogous to the California Fraud fee. This argument is not well taken.

The purpose behind the AIGA member fee is for the protection of insureds in the event that their insurer is insolvent. The California Fraud fee is to provide funding to the California Insurance Fraud Division.²⁶ It is not to protect insureds in the event of their insurer's insolvency. This conclusion is further supported by the fact that California has its own California Insurance Guarantee Association, which applicable insurers are required to join, and the stated purpose of which- like AIGA - is "to provide for each member insurer insolvency insurance."²⁷ Its members, similar to the members of AIGA, are also required to pay "premium payments from its member insurers sufficient to discharge its obligations."²⁸ In other words, comparing the AIGA assessment and the California Fraud fee is comparing apples and oranges.

A review of the Alaska *Premera* case lends further support to the conclusion that the AIGA fee should not be included in the retaliatory fee calculation. In that case, health insurers

²³ AS 21.80.010; AS 21.80.040(a).

²⁴ AS 21.80.040(a).

²⁵ AS 21.80.060(a)(3).

²⁶ Cal. Ins. Code § 1872.86.

²⁷ Cal. Ins. Code § 1063(a).

²⁸ Cal. Ins. Code § 1063.5

were required to participate in two entities, ACHIA and SEHRA. ACHIA and SEHRA were statutorily created non-profit associations. ACHIA's purpose was to provide a Medicare supplement to older high risk Medicare recipients. SEHRA's purpose was to help assist with health insurance coverage for small employers.²⁹ Premera Blue Cross argued that the fees paid to ACHIA and SEHRA should be included in the calculation of the retaliatory rate. The Alaska Court rejected that argument, noting that that the ACHIA and SEHRA charges were not "imposed by, payable to, or collected by the State, the ACHIA and SEHRA charges are levied by specially created non-profit institutions."³⁰ Similarly, AIGA is a specially created non-profit, not a state agency. Under the ruling in *Premera*, AIGA assessments may not be used in determining a retaliatory fee.

As shown above, a review of the Alaska statutes regarding the AIGA, the California statutes regarding the California Insurance Guarantee Association, and the California Fraud fee, demonstrates that the AIGA assessments are not even slightly analogous to the California Fraud fee, nor are they imposed by a state agency. Consequently, ECIC's argument on this point fails.

2. Has the Division Established that it is Entitled to Summary Adjudication Upholding the 2021 Retaliatory Fee?

In addition to opposing ECIC's motion, the Division cross-moved for summary adjudication in its own favor.

The Division's position is a simple one. California has a Fraud fee, which the Division included in its calculation of the retaliatory fee. After its calculation and comparison of the California insurance renewal fees, including the Fraud fee, and the Alaska insurance renewal fees, the Division concluded that California's insurance renewal fees exceeded Alaska's by \$3,586 in 2021. Consequently, ECIC as a California domiciled insurer was required to pay that difference of \$3,586 as a retaliatory fee pursuant to AS 21.09.270.

As discussed above ECIC made two arguments why the Division's assessment of the retaliatory fee was made in error. Neither of those arguments are persuasive: the California Fraud fee is "imposed", and it is not the equivalent of the AIGA fee. Further, as stated by ECIC in its opening summary adjudication brief: "ECIC concedes that that proceeds from the [Alaska

²⁹ *Premera* at 1113.

³⁰ *Premera* at 1120.

certificate of renewal fee and the California Fraud fees] may be used for similar purposes."³¹ Both of these fees are part of the "taxes, licenses, and other fees, in the aggregate" required by each state and both were used in the Division's calculation of the retaliatory fee.

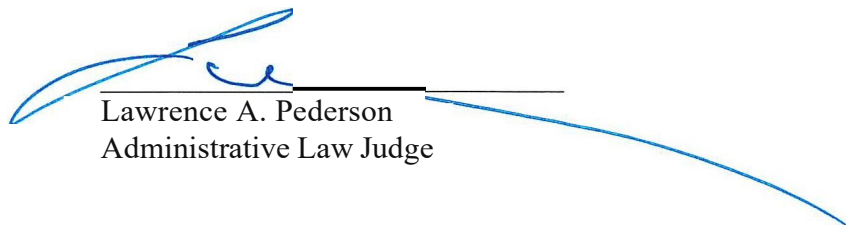
Summary judgment is appropriate where there are no disputed facts, and the undisputed facts, viewed in the light most favorable to the non-moving party, demonstrate that the moving party is entitled to judgment as a matter of law. Here, the Division has established, as a legal matter, that it correctly included the California Fraud fee in its retaliatory fee calculation, and likewise that it correctly excluded the AIGA assessment in the calculation. No other aspect of the retaliatory fee calculation is in dispute here. Consequently, the Division has established that ECIC is liable for the 2021 retaliatory fee of \$3,586.

It therefore follows that the Division did not make a mistake, nor did it misinterpret the retaliatory fee statute when it included the California Fraud fee in its calculations when it held ECIC liable for retaliatory fees in 2019 and 2020. Accordingly, the Division has established that ECIC is not entitled to a refund of the retaliatory fees paid for 2019 and 2020.

IV. Conclusion and Order

Entry of summary adjudication is appropriate because there are no genuine issues of material fact. Under Alaska law, a non-Alaska domiciled insurer doing business in Alaska is required to pay the Division as part of its annual Premium Tax, a retaliatory fee if its domiciliary state requires payment of "taxes, license, or other fees, in the aggregate" that exceed the "taxes, licenses, or other fees, in the aggregate" that would be required by Alaska. The undisputed facts show that ECIC's domiciliary state, California, required payments of "taxes, license, or other fees, in the aggregate" that exceeded Alaska's. Accordingly, summary adjudication is entered in the Division's favor as to the three tax years of 2019, 2020, and 2021.

Dated: February 8, 2023



Lawrence A. Pederson
Administrative Law Judge

³¹ ECIC's October 14, 2022 *Dispositive Motion*, p. 3.

Adoption

The undersigned adopts this Decision, under the authority of AS 44.64.060(e)(l), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 28th day of March, 2023.

BY: 

Lori Wing-Heier
Director, Division Insurance