



SPRINGFIELD, ILLINOIS

IN THE OFFICE OF
SECRETARY OF STATE

EXECUTIVE ORDER

NUMBER 5 (2000)

**Executive Order Establishing the Administration of Credits in Regard to Payments of
Illinois Privilege Tax, 215 ILCS 5/409, and the Illinois Insurance Retaliatory Tax,
215 ILCS 5/444, for 1997 and Earlier**

WHEREAS, prior to 1998, the Illinois Department of Insurance taxed domestic, foreign, and alien insurers doing business in Illinois in accordance with the requirements of the Illinois Insurance Code, which imposed several taxes, fees, and assessments on such insurers including the Privilege Tax, 215 ILCS 5/409, and the Retaliatory Tax, 215 ILCS 5/444;

WHEREAS, a number of claims have been asserted against the State by foreign and alien insurers regarding the imposition of the Privilege Tax and the Retaliatory Tax for the period before 1998;

WHEREAS, approximately 150 foreign and alien insurers made certain tax payments under protest to the Department of Insurance for the 1993 to 1997 tax years in accordance with the Protest Fund Act, 30 ILCS 230/1, and approximately \$107 million so paid remains in the Protest Fund;

WHEREAS, prior to 1998, the Privilege Tax was assessed at the rate of 2% of the insurer's Illinois net taxable premium written, with the tax being reduced by credits for the payment of Illinois income tax, personal property replacement tax, and other taxes, fees, and assessments. Illinois domestic insurers could avoid liability for the Privilege Tax by, *inter alia*, maintaining their principal place of business in the State;

WHEREAS, during the period in dispute, foreign insurers were subject to the Retaliatory Tax which required foreign insurers to pay fees, charges, and taxes in Illinois at the rate those foreign insurers' home States imposed such fees, charges, and taxes upon Illinois domestic insurers doing business in their States;

WHEREAS, during the period prior to 1998, the foreign insurers' Retaliatory Tax liability was reduced by credits for the Privilege Tax paid;

WHEREAS, protesting foreign insurers filed litigation in the Circuit Court of Cook County, Illinois, against the Director of the Department of Insurance and the Treasurer of the State of Illinois, contesting their liability for such taxes;

WHEREAS, the Protest Fund lawsuits filed by these foreign insurers were consolidated for decision in a single proceeding styled: *Milwaukee Safeguard Insurance Co., et al. v. Selcke*, Circuit Court of Cook County, Illinois, County Department, Tax and Miscellaneous Remedies Division, Nos. 93 L 50663-50665, 50668, 50674, 50698, 50699, 50971-50977, 50988, 50997-51001, 51038-5042, 51057, 51066, 51371, 51373, 51374, and 51377, 93 CH 9266-9269, 94 L 419, 50629, and 50915, 94 L 50874, and 50875, 96 L 51106, 51107, 51124, 55125, and 51141, 97 L 50032-0037, and 50468, and 98 L 50012 (Consolidated);

APR 11 2000

IN THE OFFICE OF
SECRETARY OF STATE

WHEREAS, the Complaints filed by the protesting insurers alleged in Count I that the Privilege Tax as applied to them during 1993-1997 violated the Equal Protection Clauses of the United States and Illinois Constitutions and the Uniformity Clause of the Illinois Constitution;

WHEREAS, the Complaints filed by the protesting insurers alleged in Count II that it would violate the Equal Protection Clauses of the United States and Illinois Constitutions and the Uniformity Clause of the Illinois Constitution, for the Director and the Treasurer to apply the Retaliatory Tax for the 1993 through 1997 tax years to the protested payments to the extent that such protesting insurers' home States taxed Illinois insurers at or below Illinois 2% Privilege Tax rate for these years;

WHEREAS, on August 9, 1996, Hon. Randy A. Kogan issued a Memorandum and Decision and on September 6, 1996, entered an Order in *Milwaukee Safeguard* ruling, on Count I of the Complaints, that the Privilege Tax imposed on the protesting foreign insurers violated the Equal Protection Clauses of the United States and Illinois Constitutions and the Uniformity Clause of the Illinois Constitution;

WHEREAS, an appeal was taken from Judge Kogan's ruling to the Supreme Court of Illinois. The Supreme Court issued its Opinion on October 23, 1997, holding that the Privilege Tax imposed upon the protesting insurers violated the Uniformity Clause of the Illinois Constitution, *Milwaukee Safeguard Ins. Co., et al. v. Selcke, Director of Insurance*, 179 Ill. 2d 94 (1997);

WHEREAS, the Supreme Court did not address the issue whether its holding was to be applied prospectively or retroactively, and did not address the issue of remedy if the holding were to be applied retroactively to the protesting insurers;

WHEREAS, the Supreme Court remanded to the Circuit Court of Cook County for further proceedings, which requires a decision on the issue of prospective or retroactive application, and a decision on a remedy if the Supreme Court's holding is to be applied retroactively;

WHEREAS, upon remand, the cases were assigned to Hon. Alexander P. White, who, on June 15, 1999, issued a Memorandum Decision and Judgment ruling that applying the Retaliatory Tax to the payments made by the protesting insurers for the period 1993 through 1997, in lieu of the Privilege Tax, would violate the Equal Protection Clauses of the United States and Illinois Constitutions and the Uniformity Clause of the Illinois Constitution;

WHEREAS, the Director moved the Circuit Court of Cook County to reconsider its decision of June 15, 1999, which motion is pending, and thereafter requested that the Circuit Court defer ruling on this Motion to Reconsider, vacate its decision of June 15, 1999, and address and adjudicate, including a trial on the merits, the retroactivity and remedy issues described above;

WHEREAS, if the Supreme Court's *Milwaukee Safeguard* holding regarding the constitutionality of the Privilege Tax is applied retroactively, Illinois domestic insurers doing business in other States will incur discriminatory treatment, because in most instances they will be unable to recover Retaliatory Tax credits or refunds to which they are legally entitled because of the tax rules or statutes of limitation of such States.

WHEREAS, numerous foreign and alien insurers, including some plaintiffs in *Milwaukee Safeguard*, have requested that the Director refund Privilege Tax and Retaliatory Tax payments made beginning in 1991, but which were not paid under protest in accordance with the Protest Fund Act. As appropriate, the Chief Counsel of the Department of Insurance has notified foreign insurers who have sought such refunds that the Director does not have authority under 215 ILCS 5/412 to consider their requests. Some of those insurers have filed suit against the Director in the Circuit Courts of Sangamon County and Cook County under the Administrative Review Act, 735 ILCS 5/3-101, *et seq.*;

WHEREAS, in 1998, the Illinois General Assembly enacted a comprehensive new scheme of insurance taxes (P.A. 90-583) which, *inter alia*, repealed the former Privilege Tax and

enacted a new residence neutral Privilege Tax, repealed the Life Insurance Valuation Fee imposed on Illinois domestic life insurers, 215 ILCS 5/408.1, and amended Retaliatory Tax providing, in detail, which Illinois taxes are to be included in the calculation of an insurer's Retaliatory Tax for 1997 and later years. The legislation did not address the matters with respect to payment of the Privilege Tax and Retaliatory Tax for tax years prior to 1997;

WHEREAS, it is the policy of the Executive Branch of the Illinois Government to administer the Privilege Tax and the Retaliatory Tax without discriminating against foreign or domestic insurers in a manner which would violate the Equal Protection Clauses of the United States and Illinois Constitutions and the Uniformity Clause of the Illinois Constitution; and

WHEREAS, the resolution of the issues involved in the cases pending before the Circuit Courts of Cook County and Sangamon County, and existing and future administrative proceedings pending before the Illinois Director of Insurance, will be facilitated by the promulgation of comprehensive procedural rules made necessary by the *Milwaukee Safeguard* decision of the Supreme Court.

NOW, THEREFORE, I, George H. Ryan, Governor of Illinois, order the following:

1. An inter-departmental Task Force, with public members, appointed by, and reporting to, the Governor, has been constituted to consider and evaluate the matters set forth in the foregoing recitals, which are incorporated herein by this reference. After gathering such factual information as is necessary to make a reasoned and informed decision, the Task Force shall propose to the Governor a remedy and a procedure for administering that remedy. The implementation of any recommended remedy and procedure is conditioned upon a final decision by the Supreme Court that the holding in *Milwaukee Safeguard* regarding the constitutionality of the Privilege Tax is to be applied retroactively to the Privilege Tax payments of the plaintiff insurers.
2. The Task Force shall develop and recommend to the Governor a procedure consistent with the U.S. Supreme Court decision of *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), and its progeny, as well as applicable authority in Illinois, to remedy the discriminatory imposition of the Privilege Tax on foreign insurers doing business in Illinois. The evaluation of any remedy should include an analysis of the effect such remedy will have on the taxation of Illinois domestic insurers, including taxation under other States' retaliatory taxes. The remedies to be evaluated shall include, without limitation, reducing the effective tax rate applied to such foreign companies; increasing the rate applied to the domestic companies to equal that applied to foreign companies; or a combination of both.
3. In evaluating the appropriate remedy, the Task Force shall determine what Illinois domestic insurers have paid in taxes, fees and assessments, expressed as a percentage of net taxable premium for underwriting Illinois risks, in the years indicated, as follows:

Year	Property & Casualty Insurers (including fidelity and mortgage guarantee)	Life & Health Insurers
1993		
1994		
1995		
1996		
1997		

The foregoing data shall be used by the Task Force, on a year-by-year, individual-insurer basis, to quantify the discrimination, if any, in taxation of each individual insurer.

4. Until there is a final judicial decision by the Supreme Court on whether the unconstitutionality of the Illinois Privilege Tax is to be applied prospectively or retroactively, the Director shall not:

FILED
INDEX DEPARTMENT

APR 11 2000

IN THE OFFICE OF
SECRETARY OF STATE

- (a) administratively grant, allow or approve any amended Privilege or Retaliatory Tax returns, or
- (b) grant any credit or make any refund of such taxes

for any period pre-dating the 1998 tax year to the extent the basis of such amended return or claim for credit or refund, is the Illinois Supreme Court's decision in *Milwaukee Safeguard*.

- 5. Except as otherwise required by court order, the Director shall follow the rules specified in paragraph 4 incident to any Protest Fund Act litigation.
- 6. The Director shall require any insurer seeking a refund of a payment made for 1997 or prior tax years of Privilege Tax or Retaliatory Tax to establish that it has borne the economic burden of such taxes, and has not passed such burdens on to its policyholders directly or indirectly by including such Privilege and Retaliatory Taxes in its premium rates or by reducing policy dividends; provided, however, that nothing herein shall prohibit the Director from issuing credits or refunds as, in his discretion, he deems appropriate when an overpayment has been made because of some mistake of fact, error in calculation, or erroneous interpretation of a statute of this or any other State, as allowed under 215 ILCS 5/412.
- 7. In determining whether a claimant has borne the economic burden of the tax, pursuant to paragraph 6 the following shall be taken into account for each line of insurance underwritten by the claimant in Illinois:
 - (i) any direct billing of the Privilege Tax to policyholders;
 - (ii) documents which show whether the Privilege Tax or Retaliatory Tax was included in establishing premium rates;
 - (iii) legal or actuarial requirements that Privilege and Retaliatory Taxes be included in rate bases; and
 - (iv) rate filings in any State.

Such taxes will not be deemed passed on in proportion that the combined loss ratio on any line of insurance exceeds 100% for a tax year; provided, however, that this exception shall not apply if the policyholder was directly billed for Illinois Privilege Taxes.

- 8. The Illinois Director of Insurance shall, in all instances wherein he is required by law to redetermine the Illinois Privilege and Retaliatory Tax obligations of an insurer for any tax period prior to 1997, consider only the following Illinois taxes, fees, and assessments when calculating the insurer's Retaliatory Tax:
 - 1) Annual Statement Filing Fee paid;
 - 2) Certificate of Authority Fee paid;
 - 3) Financial Regulation Fee paid;
 - 4) Policy Form Filing Fee paid;
 - 5) The amount of Illinois Corporate Income and Personal Property Replacement Tax paid;
 - 6) The amount of Fire Department tax paid;
 - 7) State Fire Marshal tax paid;

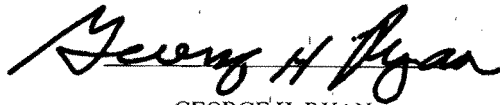
FILED
INDEX DEPARTMENT
APR 11 2000
IN THE OFFICE OF
SECRETARY OF STATE

- 8) Guaranty Association tax offset allowed for an individual company pursuant to Section 531.13 of the Code [215 ILCS 5/531.13];
 - 9) The amount paid as a fee for valuation of life insurance policies; and
 - 10) Other fees paid per Section 408 of the Code [215 ILCS 5/408].
9. When comparing such taxes, fees and assessments imposed by Illinois to those imposed on the business of insurance for like purposes by the taxpayer's State of domicile, the Director shall consider the taxes, fees and assessments actually paid to such foreign jurisdiction during the time period concerned.
10. The Director shall conduct a survey and undertake such other investigation, as the Task Force deems necessary, to ascertain the effects of:
- (a) the Supreme Court's holding that the Illinois Privilege Tax is unconstitutional will have on the Retaliatory Tax burdens of Illinois domestic insurers doing business in other States; and
 - (b) the decision of the Circuit Court of Cook County holding the Illinois Retaliatory Tax unconstitutional will have on the relative tax burdens during 1993 through 1997 of foreign and alien insurers compared to Illinois domestic insurers.

Such survey shall determine discriminatory and adverse effects on Illinois insurers so as to determine, among other things, if remedial legislation or administrative action by the Director is required.

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This Executive Order Number 5 (2000) shall be effective upon filing with the Secretary of State.



GEORGE H. RYAN
Governor

April 11, 2000

FILED
INDEX DEPARTMENT
APR 11 2000
IN THE OFFICE OF
SECRETARY OF STATE