

JAN 13 1997

STATE OF ARIZONA

DEPARTMENT OF INSURANCE

DEPT. OF INSURANCE  
BY Kahn

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In the Matter of:	)	Docket No. 96A-144-INS
	)	Docket No. 96A-145-INS
SAFECO LIFE INSURANCE COMPANY,	)	Docket No. 96A-146-INS
	)	Docket No. 96A-147-INS
FIRST NATIONAL INSURANCE	)	
COMPANY OF AMERICA,	)	<b>ORDER</b>
	)	
GENERAL INSURANCE COMPANY OF	)	
AMERICA,	)	
	)	
SAFECO INSURANCE COMPANY OF	)	
AMERICA,	)	
	)	
Petitioners.	)	
	)	
	)	

On December 12, 1996, the Office of Administrative Hearings, through Administrative Law Judge Lorna B. Pederson, submitted "Recommended Decision of Administrative Law Judge" ("Recommended Decision"), a copy of which is attached and incorporated by this reference. The Director of the Arizona Department of Insurance has reviewed the Recommended Decision and enters the following order:

- A. The recommended findings of fact are adopted.
- B. Paragraph 1 of the recommended conclusions of law is adopted.
- C. Paragraph 2 and 3 of the recommended conclusions of law are rejected and will be

replaced with the following language:

1           2.       A.R.S. § 20-230 is ambiguous on the point in question because it does not set  
2 forth a balanced equation with respect to burdens imposed upon agents of insurers. On the one hand,  
3 burdens imposed upon the agents of domestic insurers by foreign law are ostensibly included. However,  
4 only the burdens “directly imposed upon similar insurers of such other state or foreign country under the  
5 statutes of this state” are included. The basic purpose of tax retaliation, as described and cited above,  
6 requires that the same burdens be considered under the laws of both states. Therefore, the issue is  
7 whether to require that burdens imposed upon the agents of insurers, or only burdens directly imposed  
8 upon insurers, be considered under the laws of both states for purposes of A.R.S. § 20-230(A).

9           3.       The California Attorney General’s Opinion cited by Petitioners, 67 Op. Atty. Gen.  
10 Cal. 84-402, is not instructive because the California constitutional provision at issue is fundamentally  
11 distinct from A.R.S. § 20-230. That provision expressly considers the burdens imposed upon the agents  
12 or representatives of insurers under the laws of both states. Moreover, that provision allows for separate  
13 retaliation against the agents or representatives of insurers.

14           4.       The Arizona Attorney General has interpreted A.R.S. § 20-230(A) as follows:  
15           . . . the phrase ‘aggregate . . . requirements or other obligations . . . directly  
16 imposed upon similar insurers . . .’, is conclusive that the intent of the  
17 Legislature was to allow for all burdens directly imposed upon the  
18 companies to be deducted. Occidental Life Ins. C. v. Holmes, 80 P.2d 383.  
19 Ariz. Atty. Gen. Op. No. 56-119. This reasoning is persuasive because, unlike the California  
20 constitutional provision, A.R.S. § 20-230(A) is limited to retaliation against insurers, and does not allow  
21 for separate retaliation against an insurer’s agents.



1  
2 The final decision of the Director may be appealed to the Superior Court of Maricopa  
3 County for judicial review pursuant to A.R.S. § 20-166.

4 EFFECTIVE this 13<sup>th</sup> day of January, 1997

5  
6 

7 Charles R. Cohen  
8 Acting Director of Insurance

9 A copy of the foregoing mailed  
10 this 13<sup>th</sup> day of January, 1997

11 Catherine O'Neil, Assistant Director  
12 Gary Torticill, Assistant Director  
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5 Safeco Insurance Company of America  
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7 Kathy Linder  
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**FINDINGS OF FACT**

1  
2 1. Petitioners are insurance companies domiciled in the State of Washington.  
3 The Petitioners each filed 1995 annual reports with the Department. A Retaliatory Fees  
4 and Taxes Worksheet used to calculate and report retaliatory tax was attached to the  
5 annual report. This worksheet is used to compare the fees, assessments and taxes  
6 imposed under the laws of the state of incorporation (in this case, Washington) with  
7 those imposed under the laws of Arizona. The amounts on the worksheet are then  
8 used to compute the retaliatory tax due.

9 2. Item number 5 on the worksheets for life insurers using Form E-163<sup>1</sup> requests  
10 amounts paid in Washington and Arizona for "company agent license fees" and refers  
11 to footnote #1, which states:

12 Insurers domiciled in the following states must complete 5a  
13 through 5c: Alabama, Arkansas, Connecticut, Kansas,  
14 North Carolina, North Dakota, Ohio, Oklahoma, South  
15 Carolina, South Dakota, Utah, and West Virginia. All other  
16 insurers are exempt from retaliation for agent license fees  
17 only.

18 3. Although Washington was not listed among the states from which the insurers  
19 were instructed to complete this section on company agent license fees, Petitioners  
20 nevertheless completed that portion of the worksheet and included agent license fees in  
21 its retaliatory tax calculation. Because Arizona agent license fees were higher than the  
22 Washington agent license fees, inclusion of the agent license fees in the calculation  
23 had the affect of reducing the amount of the retaliatory tax Petitioners owed.

24 4. The Department audited the Petitioners' 1995 returns and determined they  
25 had incorrectly included the agent license fees. The Department issued assessments  
26 for additional retaliatory taxes, as well as penalties.<sup>2</sup>

27 \_\_\_\_\_  
28 <sup>1</sup> In the case of non-life insurers using Form E-164, item number 6.

29 <sup>2</sup> The Department's assessment for Safeco Life Insurance Company reflects a refund due in the  
30 amount of \$687.93. The assessments for First National Insurance Company of America,  
General Insurance Company of America, and Safeco Insurance Company of America reflect

1 5. Petitioners filed an appeal of the assessments, pursuant to A.R.S. § 20-  
2 220(A) stating they disagree with the audit reports. Petitioners assert it is appropriate  
3 to include agent license fees on the worksheets for retaliatory tax based on language  
4 found in A.R.S. § 20-230 which includes the fees upon the agents of insurers in the  
5 calculation of retaliatory tax. Petitioners rely on a California Opinion of the Attorney  
6 General, 67 Op. Atty. Gen. Cal., 84-402, 341 (1984) as support for its position. In this  
7 published opinion, the California Attorney General states as follows:

8 The first question presented for resolution is whether the  
9 insurance agent license fees paid in California by insurance  
10 agents are includable in the retaliatory tax computations of  
11 nondomestic insurers. We conclude that they are.

12 Petitioners state that the Department offered no explanation as to why only the states  
13 listed in the footnote of the worksheet were allowed to include agent license fees.

14 6. The Department asserts that only in the states where insurers are required to  
15 pay the license fees of their agents can the agent license fees be included in the  
16 calculation of retaliatory tax. The Department did a survey of the various states and  
17 determined that in certain states, the insurers paid the agent license fees. These states  
18 were allowed to include the agent license fees in the retaliatory tax calculation,  
19 pursuant to the instructions in the footnote on the Retaliatory Fees and Taxes  
20 Worksheet. The Department argues that only agent license fees paid by the insurers  
21 are actually "fees upon the agent of such insurers" within the statutory language of  
22 A.R.S. § 20-230. Drawing a distinction between agent license fees paid by insurers  
23 and those paid by the agents avoids the problem of potential duplication, argues the  
24 Department, which could occur because many agents work for more than one  
25 insurance company. It is the Department's position that in states such as Washington,  
26 where the agent license is issued to the individual agent, and the agent, not the insurer,  
27 pays the license fee, such fees are excluded from the calculation.

28  
29 additional tax and penalty due in the amount of \$7,769.72, \$27,183.18 and \$25,442.88,  
30 respectively.



CONCLUSIONS OF LAW

1  
2 1. A.R.S. §20-230 provides that a retaliatory tax is charged upon insurers of  
3 other states doing business in Arizona if those other states impose greater taxes or  
4 fees upon insurers of Arizona doing business in those states. This statute provides as  
5 follows:

6 A. When by or pursuant to the laws of any other state or  
7 foreign country any premium or income or other taxes, or  
8 any fees, fines, penalties, licenses, deposit requirements or  
9 other material obligations, prohibitions or restrictions are  
10 imposed upon insurers of this state doing business, or that  
11 **upon the agents of such insurers**, which in the aggregate  
12 are in excess of such taxes, fees, fines, penalties, licenses,  
13 deposit requirements or other obligations, prohibitions or  
14 restrictions directly imposed upon similar insurers of such  
15 other state or foreign country under the statutes of this state,  
16 so long as such laws continue in force or are so applied, the  
17 same obligations, prohibitions and restrictions of whatever  
18 kind shall be imposed upon similar insurers of such other  
19 state or foreign country doing business in Arizona. . . .  
20 (emphasis added)<sup>3</sup>

21 Similar acts exist in most states, and have been an essential feature of the system of  
22 state supervision of the insurance industry for more than a century. See *Pacific Mutual*  
23 *Life Insurance Company v. Bushnell*, 97 Ariz. 18, 396 P.2d 251 (1964). The basic  
24 purpose of Retaliatory Tax Acts is to equalize taxation of insurance companies. *Id.*

25 2. The issue to be decided here is whether agent license fees imposed upon  
26 and paid by insurance agents are to be included in the calculation of the retaliatory tax.  
27 The Attorney General of California analyzed this very issue and concluded that the

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28 <sup>3</sup> Although the language of the statute is complicated, it can be explained simply as follows:  
29 "To the extent the laws of the state of domicile impose greater obligations than the laws of  
30 Arizona, retaliatory tax is due." Response Memorandum, page 3. Similar provisions have been  
upheld against a constitutional challenge by the United States Supreme Court in *Western and*  
*Southern Life Insurance Company v. State Board of Equalization of California*, 451 U.S. 646,  
101 S. Ct. 2070 (1981).

1 “literal language of the retaliatory tax law appears to be applicable to these fees.” 67  
2 Op. Atty. Gen. Cal., 84-402, 341 (1984). California’s retaliatory tax provision is  
3 contained in the California Constitution and is very similar to the retaliatory tax law in  
4 Arizona.<sup>4</sup> The opinion of the California Attorney General explained the basis for  
5 including agent license fees in the retaliatory tax computation as follows:

6  
7 The rationale for including such fees in the retaliatory tax  
8 computation (placing them on both the California and the  
9 foreign state sides of the equation) is that they represent a  
10 governmental economic burden upon the business of  
11 insurance within each state. They are mandatory, with  
12 payment a condition precedent directly related to the  
13 conducting of the business of insurance. If these fees were  
14 not part of the equation, states would be free to leave the  
15 gross premiums tax as is and raise the insurance agent  
16 license fees to whatever limit without the threat of retaliation.

17 . . .

18 Hence, we conclude that insurance agent license fees are  
19 part of the aggregate governmental exaction placed directly  
20 upon the business of insurance to be equalized under the  
21 retaliatory tax law.

22 This opinion reasons that retaliatory tax laws are designed to equalize the regulatory  
23 burdens on the insurance industry as a whole, not just the burdens on the insurer. This  
24 interpretation also avoids the problem of states attempting to circumvent the purpose of  
25 the retaliatory tax laws by shifting the regulatory burdens from the insurance companies  
26 to the agents. The Department points out that the State of Arizona is not obligated to  
27 follow the Attorney General opinion of the State of California. While this may be true,  
28 the Department has offered no authority to refute the California Attorney General  
29 opinion, and the analysis therein is persuasive.

30 \_\_\_\_\_  
<sup>4</sup> The California law refers to “taxes, licenses and other fees, in the aggregate, directly imposed upon similar insurers, or upon the agents or representatives of such insurers.” (emphasis added) Cal. Const, XIII, §28(f)



1 Original transmitted by mail this  
2 13 day of December, 1996, to:

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