

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 04-E-0208

2004 JUL 26 P 3: 45

**Venise Theresa Gonya, as representative of the Estate of Joseph E. Gonya, deceased,
individually and on behalf of all others similarly situated
and
Roxanne Scaife, as representative of the Estate of Arnold L. Stone, deceased, individually
and on behalf of all others similarly situated**

v.

**Roger A. Sevigny, Commissioner of the State of New Hampshire Insurance Department, in
his official capacity as Insurance Commissioner and liquidator of The Home Insurance
Company
and
Peter W. Heed, Attorney General of New Hampshire, in his official capacity**

MOTION TO DISMISS ATTORNEY GENERAL AS A DEFENDANT

NOW COMES the Defendants, Roger A. Sevigny, Commissioner of the State of New Hampshire Insurance Department, in his official capacity as Insurance Commissioner and Liquidator of The Home Insurance Company (the Commissioner), and Peter W. Heed, Attorney General of New Hampshire, in his official capacity (the Attorney General)¹, and move to dismiss the Attorney General as Defendant and state as follows.

1. Plaintiffs have filed a class action lawsuit challenging the constitutionality of RSA 402-C:40, I. Plaintiffs purport to bring a facial and as applied challenge under the New Hampshire Constitution.

2. Plaintiffs have named as Defendants both the Commissioner and the Attorney General.

¹ As of July 14, 2004, the Attorney General of the State of New Hampshire is Kelly A. Ayotte. Since Peter Heed was named in his official capacity, Kelly Ayotte, as the new Attorney General, should be substituted for Mr. Heed.

3. Plaintiffs' Petition in Equity for Permanent and Temporary Injunctive Relief contains no allegations specific to the Attorney General other than the description of the Attorney General as the State's chief legal and enforcement officer in the State of New Hampshire. See Petition at ¶ 4. As such, the Petition fails to state a claim against him.

4. The Attorney General is not an appropriate party to a constitutional challenge to a State statute administered by the Commissioner. The Attorney General is acting in this matter as counsel to the Commissioner. It is neither necessary nor appropriate to sue counsel for the party in interest.

5. There is no case and controversy between the Attorney General and the Plaintiffs. See RSA 491:22 (any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties). As the chief law enforcement officer, the Attorney General is charged with enforcing all of the laws of the State. However, the Attorney General is not charged specifically with administering or enforcing the particular insurance statute in question here.

6. Moreover, in the event the statute is finally declared unconstitutional by the State's highest court, it may be fairly presumed that the Attorney General will not seek to enforce the statute in violation of such a ruling. Cf. O'Neil v. Thomson, 114 N.H. 155, 165 (1974). No separate injunction against the Attorney General is necessary or appropriate.

7. It has long been the role and practice of the Attorney General to defend the constitutionality of State statutes unless to do so would conflict with the Attorney General's duties as the State's chief counsel and law enforcement officer. To name the Attorney General in every lawsuit wherein a party challenges a State statute that is subject to enforcement by the Attorney General would place the Attorney General in the unique and untenable position of

being both the lawyer and the client in virtually every case brought against the State. The potential for conflicts would be significant, and the potential cost and use of resources that such a practice would engender would overwhelm the office and the limited resources of the State.

8. No prejudice would result to the Plaintiffs by the dismissal of the Attorney General. The case can still proceed against the appropriate named defendant, the Commissioner.

9. Prejudice to the Defendant by denying this motion, on the other hand is significant. The Attorney General will be forced to defend this litigation both as the client and counsel or consider engaging outside counsel. The Attorney General should not be placed in this position for no valid purpose.

WHEREFORE, the Defendants respectfully request that this Court:

- A. Dismiss the Attorney General as a named Defendant;
- B. Grant such other and further relief as justice may require.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER OF
THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT, IN HIS
OFFICIAL CAPACITY AS INSURANCE
COMMISSIONER AND LIQUIDATOR OF
THE HOME INSURANCE COMPANY
AND PETER W. HEED, ATTORNEY
GENERAL OF NEW HAMPSHIRE, IN HIS
OFFICIAL CAPACITY

By their attorneys,

Kelly A. Ayotte
Attorney General

Date: 7/26/04



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Certificate of Service

I hereby certify that a copy of the foregoing was forwarded this 26th day, of July 2004, to Thomas R. Watson, Esq. and Jennifer A. Lemire, Esq., Watson & Lemire, P.A., 75 Congress Street, Suite 211, Portsmouth, NH 03801 and Alan Rich, Esq. and Stephen Blackburn, Esq., Baron & Budd, P.C., 3102 Oak Lawn Avenue, Suite 1100, Dallas, TX 75219-4281.



Suzanne M. Gorman