

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

I. INTRODUCTION

In the present case, Plaintiff seeks damages due to “modal” payments that she made to Old Line Insurance Company of America (“Old Line”) for life insurance policies she purchased from Old Line. The total of these payments, Plaintiff alleges, were more than the costs would have been if she had not made these modal payments, or payments made more than once a year. According to Plaintiff, this extra charge should have been disclosed in the language of the insurance policies. Plaintiff also seeks the certification of her claims as a class action lawsuit, including within the class Old Line policyholders in various states, including Ohio.

The Superintendent seeks intervention in this action not to support the positions advanced by the Plaintiffs or Defendants, but rather, to defend his statutory right and duty under Ohio Law to regulate all matters pertaining to insurance within the geographic confines of the State of Ohio.

II. LAW AND ARGUMENT

New Mexico rule of Civil Procedure 1-024 for governing intervention provides in pertinent part:

- A. Intervention of right. Upon timely application anyone shall be permitted to intervene in an action timely application anyone shall be permitted to intervene in an action.
 2. when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impeded the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

B. Permissive intervention. Upon timely application anyone may be permitted to intervene in an action timely application anyone may be permitted to intervene in an action.

2. when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.

In exercising its discretion pursuant to this paragraph, the court shall consider whether the intervention will be unduly delay or prejudice the adjudication of the rights of the original parties.

The principle arguments raised by the Superintendent in his objections to class certification stem from his unique interest in the litigation and the potential impact it may have on the Superintendent's ability to regulate. The regulation of insurance is almost exclusively an issue of individual state law. Courts have consistently held that each state has the authority to regulate insurance within its borders and that the law of any one state should not be given extra-territorial effect. This interest in protecting the regulatory integrity of the Ohio Department of Insurance is unique to the Superintendent as regulator and will not be advanced by the existing parties to this action.

Furthermore, any decision this Court might make could have ramifications for the insurance industry in Ohio. If one company is ordered to make disclosures that Ohio Law would not impose on other companies, then the competitive balance at the market place would be upset. Maintaining this balance is a unique interest of the regulator.

Modal Premiums have not been addressed by the courts of Ohio. Consequently, disclosure requirements would be a case of first impression. The current parties to this action

have no stake in Ohio's interest to have its courts or regulators decide what Ohio Law is or should be.

For these reasons, the Superintendent contends that intervention should be granted as a right because the interest he has in the pending action will not be adequately represented by the existing parties. Additionally, as part of the class certification decision, this Court will be required to determine whether the law of New Mexico is similar to the law of Ohio. Given the lack of binding precedence and the state law origins of insurance law, any decision this Court makes may have potentially binding impact on the Superintendent of the Ohio Department of Insurance.

Alternatively, the Superintendent contends that permissive intervention should be granted at a minimum. The Superintendent seeks only to object to class certification. He does not intend to present evidence or participate in discovery or trial. As such, intervention by the Superintendent will not unduly delay the proceedings or prejudice the existing parties.

In light of the foregoing, J. Lee Covington II, respectfully request that this Court grant his motion to intervene and permit him to file and argue his memorandum in opposition to class certification.

Respectfully submitted,

BETTY D. MONTGOMERY (0007102)
Attorney General

SCOTT MYERS (0040686)
LAWRENCE D. PRATT (0021870)
Assistant Attorney General
Health and Human Services Section
30 E. Broad Street, 26th Flr.
Columbus, Ohio 43215-3428
(614) 466-8600

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Intervene of J. Lee Covington II, Superintendent of the Ohio Department of Insurance has been forwarded by regular U.S. Mail, postage prepaid, this _____ day of February, 2002 to:

David A. Freedman
Susan G. White
20 First Plaza, Suite 700
Albuquerque, NM 87102

James O. Browning
Charles R. Peifer
Robert E. Hanson
BROWNING & PEIFER, P.A.
P.O. Box 25245
20 First Plaza, Suite 725
Albuquerque, NM 8725-5245

John M. Eaves, Paul Bardacke
Peter S. Kierst, Kerry Kiernan
Karen S. Mendenhall
EAVES, BARDACKE, BAUGH,
KIERST & KIERMAN, P.A.
6400 Uptown Blvd., N.E., Suite 110-W
Albuquerque, NM 87110

Dennis M. McCary, Esq., Floyd D. Wilson, Esq.
Barbara Pryor, Esq., Alan R. Wilson, Esq.
MCCARY, WILSON & PRIOR
6707 Academy Road, N.E.
Albuquerque, NM 87109

Alan Konrad, Esq.
LAW OFFICE OF ALAN KONRAD
901 Rio Grande Blvd., N.W.
#172, PMB 571
Albuquerque, NM 87204

Andrew G. Schultz
RODEY, DICKASON, SLOAN, AKIN, AND
ROBB, P.A.
P.O. Box 1888
Albuquerque, NM 87103

Daniel M. Reilly
Barbara Z. Blumenthal
HOFFMAN, REILLY, POZNER &
WILLIAMSON, LLP
511 16th Street, Suite 700
Denver, CO 80202

SCOTT MYERS
Assistant Attorney General