

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**PHARMACEUTICAL RESEARCH)
AND MANUFACTURERS OF)
AMERICA,)
)
 PLAINTIFF)
)
v.)
)
**COMMISSIONER, MAINE)
DEPARTMENT OF HUMAN)
SERVICES, ET AL.,)
)
 DEFENDANTS)****

Civil No. 00-157-B-H

ORDER ON MOTION TO INTERVENE

On October 26, 2000, I granted a preliminary injunction in favor of the plaintiff against specified parts of Maine’s prescription drug pricing legislation. On November 9, 2000, the state defendants appealed. On November 13, 2000, certain would-be intervenors filed a motion to intervene under Fed. R. Civ. P. 24, along with a motion to alter or amend judgment and motion to dismiss Count V of the plaintiff’s Complaint. They also requested that I grant them an extension of time, if they are allowed to intervene, to file their own notice of appeal from the preliminary injunction of October 26, 2000. These would-be intervenors have previously participated in the lawsuit by filing an *amicus* brief.

The law on this subject—private plaintiffs attempting to intervene in support of state legislation at the same time the Maine Attorney General is

defending the legislation—is well established in this Circuit. See Daggett v. Comm’n on Gov’t Ethics & Election Practices, 172 F.3d 104, 109-111 (1st Cir. 1999).

For intervention as of right, I examine four factors: timeliness; interest in the property or transaction that is the subject of the lawsuit; effect on ability to protect that interest; and adequacy of representation.

(1) The motion to intervene is timely as to any further proceedings in this trial court because at this point no scheduling order has been entered, no discovery has taken place and the lawsuit is only beginning. It is untimely, however, as to the preliminary injunction issues. Those issues were fully briefed and argued orally following conferences with the Court in preparation for those events. There was abundant opportunity for the intervenors to have moved earlier to intervene. The preliminary injunction has now issued and been appealed and a briefing schedule has been set for the appeal. There is no good excuse for the intervenors not to have moved to intervene earlier if preliminary injunction was their concern.

(2) The would-be intervenors have a distinct and real interest in the lawsuit. Specifically, they are two individuals who cannot otherwise afford needed prescription medication, a membership-based organization that advocates on behalf of Maine’s seniors particularly with regard to affordable healthcare, and a family practice physician whose prescription practices are affected by the ability of his patients to pay for medication.

(3) Disposition of this lawsuit will undoubtedly affect dramatically the proposed intervenors' ability to protect their interests because the constitutionality of Maine's attempt to lower the prices for prescription drugs will be determined by the outcome.

(4) As in Daggett, the primary issue is adequacy of representation. 172 F.3d at 111 (noting that the "heart of the case" is whether the Attorney General adequately represented their interests). Here, as in Daggett, the Attorney General's Office is aggressively defending the statute. Unlike Daggett, this statute did not result from a citizen initiative, but is a statute actively supported by the Governor and the Legislature. The would-be intervenors argue that because their health is at stake the normal presumption in favor of adequate representation by the Attorney General should be reduced. But I do not rely on presumption. The Attorney General *is* vigorously defending the case, far more than just "adequately." In addition, they point to two arguments they want to make that the Attorney General has not made. The first argument—that the plaintiff is not irreparably harmed—goes only to the preliminary injunction where, I have concluded, the motion to intervene is untimely. The second argument goes to the merits. The intervenors want to argue that the plaintiff has no standing to make its supremacy challenge based upon federal Medicaid law, an argument that the State did not make at the time of preliminary injunction arguments. As in Daggett, however, such tactical disagreements are not enough to require intervention as of right automatically. 172 F.3d 104, 112 (1st Cir. 1999). The

refusal to present an obvious argument must be “extreme.” *Id.* These would-be intervenors can present their argument fully and ably through “*amicus plus*” status, which I now grant them. Unlike factual development, it does not require intervenor status. Moreover, it may well be that the State will see fit to adopt the argument on the merits after the preliminary injunction stage. Lawyers must make tactical and strategic choices as to what arguments to press given the limits of time for oral arguments and page limits for briefs. The fact that a lawyer chooses not to make a particular argument at a given stage does not demonstrate inadequacy of representation. Instead, the record makes abundantly clear that the Attorney General is vigorously defending this legislation with the full support of state government.

Finally, permissive intervention serves no useful purpose here where *amicus plus* status is granted and the Attorney General is representing all the interests of the State in defending the legislation. I make the following Order as I did in Daggett v. Webster, 190 F.R.D. 12 (D. Me. 1998).

1. Notice and service of all documents and events shall be given to the would-be intervenors’ counsel just as if they were parties in the case.

2. If there are witnesses at trial or deposition where the Attorney General’s Office is willing to let the would-be intervenors’ lawyer conduct the examination or cross-examination in place of an Assistant Attorney General, that is permitted. What is not permitted is examination or cross-examination by both.

3. I expect that, as appropriate, the Attorney General’s Office will take

full advantage of any offer of resources, evidence or assistance from the would-be intervenors where to do so will help the Attorney General defend the constitutionality of the statute.

4. Finally, the motion to intervene can be renewed if and when the would-be intervenors have evidence that the case is not being fully and properly presented by the Attorney General.

For these reasons, the motion to intervene is **DENIED** and the motion for extension of time to file a notice of appeal is **DENIED** because I have denied the motion to intervene. No action is necessary on the motion to alter or amend judgment and to dismiss Count V of the plaintiff's Complaint.

SO ORDERED.

DATED THIS 14TH OF DECEMBER, 2000.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

U.S. District Court
District of Maine (Bangor)
Civil Docket For Case #: 00-CV-157

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