

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JINO KURIAKOSE, Individually and)	
On Behalf of All Others Similarly Situated,)	
)	
Plaintiff,)	08-CV-7281 (JFK)
)	ECF Case
v.)	
)	
FEDERAL HOME LOAN MORTGAGE)	<u>ELECTRONICALLY FILED</u>
COMPANY, RICHARD SYRON,)	
PATRICIA L. COOK and ANTHONY S.)	
PISZEL)	
)	
Defendants.)	

**REPLY MEMORANDUM TO THE RESPONSE OF THE
ATTORNEY GENERAL OF NORTH CAROLINA TO THE
MOTION OF THE TREASURER OF NORTH CAROLINA FOR
APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF COUNSEL**

Richard H. Moore, as Treasurer of the State of North Carolina and as the Sole Trustee of the North Carolina Retirement Systems (“NCRS”), submits this reply memorandum of law to the response of the Attorney General of North Carolina to the motion of the Treasurer of North Carolina for appointment as lead plaintiff and approval of counsel.

INTRODUCTION

On October 17, 2008, NCRS timely filed their Motion for Appointment as Lead Plaintiff and Approval of their Selection of Counsel in this class action. (Dkt. 19.) On November 6, 2008, the Attorney General of North Carolina filed a memorandum in support of his response to NCRS’ motion for appointment as lead plaintiff and approval of counsel. (Dkt. 41.) In his response, the Attorney General argues that the Treasurer lacked authority to file the motion for appointment of NCRS as lead plaintiff, and that NCRS’ proposed lead counsel, Motley Rice LLC (“Motley Rice”), is not authorized to represent NCRS in this action. NCRS respectfully submits that the Attorney General is wrong on both counts.

ARGUMENT

POINT I

THE TREASURER OF NORTH CAROLINA HAD AUTHORITY TO FILE THE MOTION FOR APPOINTMENT OF NCRS AS LEAD PLAINTIFF

As Treasurer of North Carolina, movant Richard Moore is statutorily authorized “to demand, sue for, collect and receive all money and property of the State not held by some person under authority of law.” N.C. Gen. Stat. § 147-71 (attached as Ex. A to the Declaration of William H. Narwold (“Narwold Decl.”)). Furthermore, the Treasurer is empowered to “establish, maintain, administer, manage, and operate within the Department of State Treasurer one or more investment programs for the deposit and investment of assets pursuant to the provisions of G.S. 147-69.1 and G.S. 147-69.2.” *Id.* § 147-69.3(a) (Narwold Decl. Ex. B). Similarly, the “State

Treasurer has full powers as a fiduciary to hold, purchase, sell, assign, transfer, lend and dispose of any of the securities or investments in which any of the programs created pursuant to this section have been invested, and may reinvest the proceeds from the sale of those securities or investments and any other investable assets of the program.” Id. at (e).

As the Attorney General notes, the Attorney General is empowered by the State Constitution to “appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.” N.C. Const. art. III, § 7. Furthermore, the “Attorney General shall be counsel for all departments, officers, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.” N.C. Gen. Stat. § 147-17(b).

The Attorney General takes the position that the foregoing two provisions mandate that all lawsuits, including this suit, be initiated through the Department of the Attorney General at the discretion of the Attorney General. (AG Resp. at 5.) This position, however, has been rejected by several courts. For example, in Tice v. Department of Transportation, 312 S.E.2d 241 (N.C. Ct. App. 1984), the court considered whether the “Attorney General’s office, when representing a State department pursuant to G.S. 114-2(2), has authority to enter a consent judgment without the consent of the department.” Id. at 242. The court concluded: “We do not believe the legislature, by providing that the Attorney General would serve as counsel for State departments, intended to authorize him to make decisions in areas which have been specifically delegated to a designated department.” Id. at 245; see also Nash County Bd. of Ed. v. Biltmore Co., 464 F. Supp. 1027 (D.N.C. 1978) (noting that § 147-17(b) does not give authority to the Attorney General to be the sole representative of departments and officers; instead, the Attorney General may be able to litigate in conjunction with counsel selected by individual departments).

Thus, North Carolina statutory and common law provide that the Treasurer has the authority to bring this action and that the Attorney General has no ability to preclude the litigation or to otherwise make substantive decisions in derogation of the Treasurer's wishes.

In addition, the Attorney General seems to lose sight of the fact that the Treasurer is the fiduciary of the Trust established on behalf of the NCRS.¹ The assets of the Trust are managed on behalf of the current and former employees of various North Carolina governmental entities. See, e.g., Stone v. North Carolina, 664 S.E.2d 32, 42-43 (N.C. Ct. App. 2008) (“[N.C. Const. art. V, § 6(2)] demonstrates the strong public policy of North Carolina in favor of the inviolability of retirement funds.”) (citing John V. Orth, The North Carolina State Constitution 127 (1993) (“Money in the funds may not even be loaned to the state.”)). The fact that the Treasurer is the fiduciary of the Trust and the officer responsible for the assets of the Trust lends additional support to the position that the Treasurer may take legal action to preserve the assets of the Trust, especially when the Attorney General refuses to do so.

Finally, it is the Treasurer's office, through its Trustee, Mellon Trust – not the Attorney General's office – that routinely monitors the assets of the Trust, files and oversees claims in class actions, and protects the assets of the Trust. See Narwold Decl. Ex. D (BNY Mellon Asset Servicing Securities Class Action Service Description). The Attorney General's office is not the office that makes claims, signs releases, and collects money due on behalf of the pensions' Trust; it is the Treasurer's office. Following the Attorney General's authority argument to its logical extreme, releases signed by the Treasurer in collecting securities class action recoveries would be non-binding. But that is absurd.

¹ See Amended and Restated Agreement of Trust Continuing the Treasurer of the State of North Carolina Equity Investment Fund Pooled Trust, Established as of Feb. 1, 2002, Amended and Restated as of May 1, 2007, at 4 (Narwold Decl. Ex. C).

POINT II

NCRS HAD AUTHORITY TO RETAIN MOTLEY RICE TO REPRESENT THEM

N.C. Gen. Stat. § 147-69.3(g) provides that the “State Treasurer is authorized to retain the services of independent appraisers, auditors, actuaries, attorneys, investment counseling firms, statisticians, custodians, or other persons or firms possessing specialized skills or knowledge necessary for the proper administration of investment programs created pursuant to this section.” N.C. Gen. Stat. § 147-69.3(g) (emphasis added).²

In a prior advisory opinion, the Attorney General’s office recognized the “broad[] authority” of the State Treasurer with regard to the proper management of the retirement system’s investment program. See Advisory Opinion – Office of the Attorney General, State of North Carolina, 2002 WL 31995437, at 6 (Dec. 12, 2002) (recognizing that the “State Treasurer has statutory authority, pursuant to N.C.G.S. § 147-69.3(g)” to enter into agreements with counsel “possessing specialized skills or knowledge necessary for the proper administration of investment programs”). The Attorney General’s office should not now be allowed to ignore its prior position regarding the scope of the Treasurer’s authority pursuant to N.C.G.S. § 147-69.3(g). See, e.g., Goodman v. Albany Transp., Inc., 103 F. Supp. 2d 112, 118 (N.D.N.Y. 2000) (“[a] party may not freely maintain a position that is inconsistent with one it has previously maintained”).

The Attorney General’s current position is that N.C. Gen. Stat. § 147-69.3(g) is trumped by two separate codified provisions governing the Attorney General’s authority. N.C. Gen. Stat.

² Other statutes allow the Treasurer to retain outside counsel on matters not related to the instant lawsuit. See, e.g., N.C. Gen. Stat. § 116B-8 (statutes creating the unclaimed property program provide the Treasurer with exclusive authority to engage “persons possessing specialized skills or knowledge as the Treasurer deems necessary or appropriate for the administration of this Chapter” as well as specific authority to engage attorneys “to perform a title search or to provide an accurate legal description of real property which the Treasurer has reason to believe may have escheated”); N.C. Gen. Stat. § 159-83(a)(14) & 159-85, 159-84(g) (Treasurer also has authority to employ counsel for bond finance and certain special indebtedness purposes).

§ 147-17 provides:

(a) No department, officer, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor. The Governor shall give his approval only if the Attorney General has advised him, as provided in subsection (b) of this section, that it is impracticable for the Attorney General to render the legal services. In any case or proceeding, civil or criminal, in or before any court or agency of this State or any other state or the United States, or in any other matter in which the State of North Carolina is interested, the Governor may employ such special counsel as he may deem proper or necessary to represent the interest of the State, and may fix the compensation for their services.

(b) The Attorney General shall be counsel for all departments, officers, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State. Whenever the Attorney General shall advise the Governor that it is impracticable for him to render legal services to any State agency, officer, institution, commission, bureau or other organized activity, or to defend a State employee or former employee as authorized by Article 31A of Chapter 143 of the General Statutes, the Governor may authorize the employment of such counsel, as in his judgment, should be employed to render such services, and may fix the compensation for their services.

(c) The Governor may direct that the compensation fixed under this section for special counsel shall be paid out of appropriations or other funds credited to the appropriate department, agency, institution, commission, bureau, or other organized activity of the State or out of the Contingency and Emergency Fund.

N.C. Gen. Stat. § 147-17.

Similarly, N.C. Gen. Stat. § 114-2.3 provides that “Every agency, institution, department, bureau, board, or commission of the State, authorized by law to retain private counsel, shall obtain written permission from the Attorney General prior to employing private counsel.” N.C. Gen. Stat. § 114-2.3.

The Attorney General argues that N.C. Gen. Stat. § 147-17 requires that the Treasurer obtain authority from the Governor to retain outside counsel, notwithstanding the provisions of

N.C. Gen. Stat. § 147-71 and N.C. Gen. Stat. § 147-69.3(g), relying on Whitfield v. Gilchrist, 497 S.E.2d 412, 416 (N.C. 1998). But Whitfield is distinguishable from the instant case.

First, in Whitfield, the district attorney entering into the contract for legal services had no clear statutory authority to do so. But in this case, the Treasurer enjoys statutory authority pursuant to N.C. Gen. Stat. § 147-69.3(g). Furthermore, applicable rules of statutory construction in North Carolina provide “that where two statutory provisions conflict, one of which is specific or ‘particular’ and the other ‘general,’ the more specific statute controls in resolving any apparent conflict.” Furr v. Noland, 404 S.E.2d 885, 886 (N.C. Ct. App. 1991); see also Nat’l Food Stores v. N.C. Bd. Alcoholic Control, 151 S.E.2d 582, 586 (N.C. 1966) (“Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question . . .”).

Here, the provisions of N.C. Gen. Stat. § 147-69.3(g) are more specific than the terms in N.C. Gen. Stat. § 147-17, and, therefore, under the applicable statutory construction rules, are controlling. To conclude otherwise would render the language of N.C. Gen. Stat. 147-69.3(g) superfluous and meaningless, a result that has been consistently rejected by the North Carolina courts. Specifically, the North Carolina Supreme Court has held that an argument that a law or part of a law has no meaning and that statutory language is merely “surplusage” is not acceptable. Martin v. Thornburg, 359 S.E.2d 472, 547-48 (N.C. 1987); see also Stone, 664 S.E.2d at 37 (“we follow the maxims of statutory construction that words of a statute are not to

be deemed useless or redundant’’) (quoting Town of Pine Knoll Shores v. Evans, 416 S.E.2d 4, 7 (N.C. Ct. App. 1992)).

In Thornburg, the North Carolina Supreme Court considered whether the provisions of N.C. Gen. Stat. § 147-17 required the Governor to obtain permission from the Attorney General before hiring outside counsel to represent the State in legal proceedings. The court found that:

The first sentence of this statute provides inter alia that no officer of the State shall employ any counsel except with the approval of the Governor. The second sentence provides that the Governor shall give his approval only if the Attorney General has advised him that representation by the Attorney General would be impracticable. The Governor is clearly an officer of the State, and therefore if read alone the first two sentences of this statute would limit power of the Governor to employ special counsel to only those cases where the Attorney General has made the requisite certification.

359 S.E.2d at 547. However, the court recognized that the third sentence of the same paragraph provided direct authority for the Governor to hire counsel for the State: “the Governor may employ such special counsel as he may deem proper or necessary to represent the interest of the State, and may fix the compensation for their services.” In reconciling this provision – which is analogous to the Treasurer’s authority in N.C. Gen. Stat. § 147-69.3(g) – with the rest of the statute, and “construing the statute as a whole, we conclude that the last sentence of Section 147-17(a) gives the Governor the unrestricted right to ‘employ such special counsel as he may deem proper or necessary.’” Id. at 548.

Second, Whitfield is also distinguishable because the Treasurer is a Constitutional Officer, while the district attorney in Whitfield was not. See N.C. Const. art. III, § 7 (listing the Treasurer as an “other elective officer”). The Thornburg court did not decide on any constitutional issue involving possible conflicts between State officers, finding instead that:

While the parties argue other grave constitutional and statutory questions which may arise in the event of continued differences between the various executive officers of the State, we decline to decide them on this state of the

record. This is in keeping with the rule in this State that appellate courts will not “pass upon constitutional questions, even when properly presented, if there be also present some other ground upon which the case may be made to turn.”

Thornburg, 359 S.E.2d at 548 (quoting Reed v. Madison, 195 S.E. 620, 622 (N.C. 1938)).

The Attorney General also relies on N.C. Gen. Stat. § 114-2.3, which provides that every “agency, institution, department, bureau, board or commission of the State” obtain written permission from the Attorney General before retaining private counsel. (AG Resp. at 6.) This section, however, does not include or reference “officers” of the State. This significance is further heightened because the statute was passed at the same time as amendments to N.C. Gen. Stat. § 147-17. The amendments to N.C. Gen. Stat. § 147-17 specifically broadened the reach of that statute to include officers of the State, while N.C. Gen. Stat. § 114-2.3 does not list those same officers. Thus, it may be presumed that the legislature intended to exclude officers, including the Treasurer, from the reach of N.C. Gen. Stat. § 114-2.3, and therefore, the requirements are irrelevant to the instant dispute. See New Hanover Child Support Enforcement v. Rains, No. COA07-1286, 2008 WL 4468656, at *3 (N.C. Ct. App. Oct. 7, 2008) (“We rely on the general rule of statutory construction that the inclusion of certain items implies the exclusion of others.”).

CONCLUSION

For all the above reasons, NCRS respectfully requests that the Court grant the Motion of Richard H. Moore, as Treasurer of the State of North Carolina and as the Sole Trustee of the NCRS, for appointment as Lead Plaintiff and approval of Motley Rice as Lead Counsel.

Respectfully submitted this 13th day of November, 2008,

/s/ William H. Narwold
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