

New Hampshire Association for Justice

Revenue Proposal in Support of Judicial Branch Budget

Summary Statement

The New Hampshire Association for Justice, a statewide association of trial attorneys committed to the protection of constitutional rights, timely access to our courts and justice for all, submits this revenue proposal in support of adequate revenue for the judicial system.

NHAJ Revenue Proposal

NHAJ believes additional revenues for the judicial branch can and should be collected as a part of the fees assessed by three regulatory agencies: the Department of Insurance, the Banking Commission and the Public Utility Commission.

New Hampshire state courts incur substantial costs at both the trial and appellate level pursuant to the statutory framework for regulating insurance companies, banks and public utilities. Regulatory matters represent a significant share of the more than 4,500 civil cases filed annually in state superior court, with regulatory disputes posing some of the more complex and time consuming court challenges.

Transferring funds to the courts from the three agencies need not involve any increase in regulatory fees over the biennium. The Office of Legislative Budget Assistant (LBA) has reviewed budget data and estimates an annual surplus of more than \$2 million/year over direct agency costs (\$4 million over the biennium) as follows:

- For the Department of Insurance, the LBA reports an ending balance (surplus) of over \$1 million at the end of each of the past two fiscal years (FY 08 and FY 09). LBA reports a current balance (as of March 2010) of \$2.8 million.
- For the Public Utilities Commission, the LBA reports an ending balance (surplus) of close to \$700,000 at the close of FY 08 and \$650,000 at the end of FY 2009. LBA reports a current balance (as of March 2010) of \$1 million.
- Finally, for the Banking Commission, the LBA reports an ending balance of over \$1 million at the end of FY08 and over ½ million dollars at end of FY 09. Prior positive end of year balances suggest that, while the Banking Commission does not currently have a surplus, it may well have one at the end of this fiscal year.

Legal Analysis

NHAJ has reviewed case law concerning limitations upon transfer of agency funds to cover the costs of related matters. In cases involving many different fees and agencies, the Supreme Court established a three part test to distinguish between legitimate fees and taxes. The Court has upheld fees that (1) reimburse the state for special services, (2) are incidental to the implementation of a regulatory program and not primarily intended to produce additional revenues, with (3) the characterization of the underlying statute determined by both its declared purpose and its essential characteristics. See *Horner v. Governor*, 157 NH 400 (2008). In *Horner*, the court approved the transfer of \$15 out of a \$17 sex offender registry fee to the state police, with \$2 transferred to the municipality where the offender registered, finding that

the fee was not intended to raise revenue but solely to support a governmental regulatory activity made necessary by the actions of those required to pay the charge.

The *Horner* case relied in large part on an earlier decision in *American Automobile Association v. State*, 136 N.H. 579 (1992), in which the Court upheld an increase in a motor vehicle and certificate of title fee from \$10 to \$20. The Court focused on the amount title fees earned compared to the total cost of the State's anti-theft activities, finding that the State's total anti-theft expenditures substantially exceeded the title fees collected under the earlier fee structure.

In *D'Antoni v. Commissioner of NHDHHS*, 153 NH 655 (2006), the Court considered a challenge to the \$45 license fee set forth in RSA 459:29 and the transfer of \$38 of that fee to DHHS for allocation to a special DOVE fund pursuant to RSA 173-B:15. The Court approved the amount of the fee, finding that it was not "grossly disproportionate" to the costs involved in issuing the marriage license. In other words, "the charges bore a reasonable relationship to, and approximated the expenses of, issuing the plaintiffs' marriage licenses."

Transferring fees to the courts for reimbursement of costs has ample precedent, as seen in the current budget which includes the transfer of \$2 million/fiscal year for both FY 10 and FY 11 from Highway Funds and \$332,000/fiscal year from DHHS from Section IV-D Federal Funds.

Budgetary Need

The reality is that our courts are not currently able to meet the needs of the people of New Hampshire. No matter how urgent the issue, regular people cannot be assured access to justice because budget cuts have meant closing our courts during regular business days. This on the heels of the suspension of jury trials last year and the present danger of further court closures to meet the legislative mandate of sustaining several district courts budgeted for consolidation.

To get a sense of the scope of cases impacted by these cuts, consider the 4,523 civil and 3,543 equity cases filed in superior court in CY 2008. Under the Governor's proposal, the courts would have to suspend all civil jury trials, close additional court sessions for lack of court security, and increase judicial caseloads to compensate for the soon to be four vacancies on the superior court bench. Consider as well the number of families looking to the court for resolution of critical issues: 19,575 cases filed in the Family Division in CY 2009; 18,835 filed in the family division and 4,069 filed in superior court in CY 2008. The AOC estimates that 21% of those cases were heard by either senior judges or per diem judges- judges whom the state could not afford to keep on the bench under the Governor's budget proposal.

Our courts simply cannot withstand any further cuts while still meeting their statutory and constitutional mandates.

NHAJ submits that accessing agency funds to reimburse the courts for the costs of services will allow the General Court to protect the independence and integrity of the third branch of government, while still saving the \$4 million general fund dollars recommended by the Office of the Governor.