

**STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION**

IN THE MATTER OF:

Local Government Center, Inc.; et al.

Case Number: C-2011000036

**LGC’S MOTION TO DISMISS COUNTS I & II OF THE AMENDED PETITION TO THE
EXTENT THEY ALLEGE CONDUCT WHICH OCCURRED PRIOR TO JUNE 14, 2010**

Respondents Local Government Center, Inc. and affiliated entities (“LGC”), submit this motion to dismiss Counts I & II of the New Hampshire Bureau of Securities Regulation’s (hereafter, “BSR”) Amended Petition to the extent that they allege conduct which occurred prior to June 14, 2010. Application of R.S.A. 5-B:4-a to conduct which occurred prior to the statute’s June 14, 2010, enactment would be an unjust retroactive application of the statute in violation of Part I, Article 23 of the New Hampshire Constitution.

I. R.S.A. 5-B:4-a Was Enacted on June 14, 2010, and is the Source of the Secretary of State’s Authority to Penalize Violations of R.S.A. 5-B.

1. Count I of the Amended Petition alleges that LGC¹ operated a pooled risk management program with a corporate structure that violated R.S.A. 5-B:5. Count II alleges that since 2002, LGC violated R.S.A. 5-B:5, I(c) by calculating reserves, earnings, and surplus using an inappropriate actuarial method, and thus improperly retained earnings and surplus.

2. In the Amended Petition, BSR states that the legislature amended R.S.A. 5-B on June 14, 2010, to include R.S.A. 5-B:4-a. This amendment granted the Secretary of State “the power to investigate pooled risk management programs, issue cease and desist orders, initiate adjudicatory proceedings, impose administrative fines, and order rescission, restitution, or disgorgement.” Amended Petition ¶22. The amendment does not contain any language addressing its prospective or retrospective application.

¹ The Amended Petition uses “LGC” to refer to a collection of “individuals and certain entities,” presumably encompassing all of the respondents and those entities listed in ¶¶3-21 of the Amended Petition.

3. Until 2009, R.S.A. 5-B:4 expressly provided that “[n]othing contained in this chapter shall be construed as enabling the department to exercise any rulemaking, regulatory or enforcement authority over any pooled risk management program formed or affirmed in accordance with this chapter.”

II. R.S.A. 5-B:4-a Cannot be Applied Retroactively

A. The New Hampshire Constitution Prohibits Retrospective Laws

4. Part I, Article 23 of the New Hampshire Constitution prohibits retrospective laws. The Constitution provides: “Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made either for the decision of civil causes, or the punishment of offenses.”

5. The New Hampshire Supreme Court has adopted the following definition of a retrospective law with respect to civil statutes: “every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.” *Norton v. Patten*, 125 N.H. 413, 415 (1984) (internal quotation marks omitted).

6. R.S.A. 5-B:4-a creates new obligations and duties with respect to violations of R.S.A. 5-B, in the form of newly created penalties such as rescission, restitution, disgorgement, and fines. If those penalties were imposed on LGC for conduct which occurred prior to June 14, 2010, it would amount to new obligations and duties being applied to LGC in respect to “transactions or considerations already past,” which would violate Part I, Article 23 of the New Hampshire Constitution.

B. New Hampshire Common Law Prohibits Retroactive Application of Law

7. “Where a law affects substantive rights and liabilities, it is presumed to apply only to future causes of action unless there is some evidence of legislative intent that the statute be applied retrospectively.” *Norton v. Patten*, 125 N.H. at 417; *see also Workplace Systems, Inc. v. Cigna*, 143 N.H. 322, 324 (1999); *State v. Johnson*, 134 N.H. 570, 572-73 (1991) (“The general rule that statutes are only to be applied prospectively is further buttressed by a presumption against retrospective application when the statute affects a party’s substantive rights.”).

8. Furthermore, where the statute contains no expression of the legislature's intent that it be applied retroactively, the presumption is that the statute applies prospectively only. *State v. Johnson*, 134 N.H. at 573-74.

9. R.S.A. 5-B:4-a affects substantive rights and liabilities, as it imposes financial penalties for certain proscribed conduct. It gives no indication that the legislature intended it to apply retroactively. Therefore, R.S.A. 5-B:4-a must only be applied prospectively, and cannot apply to any conduct which occurred prior to June 14, 2010.

10. Where a statute affects the substantive rights of a party, the presumption is that it cannot apply retroactively; if the statute affects only procedural or remedial rights then the presumption reverses. *See Norton v. Patten*, 125 N.H. at 417; *Workplace Systems, Inc. v. Cigna*, 143 N.H. at 324; *State v. Johnson*, 134 N.H. at 572-73. A statute affects substantive rights when it "enlarge[s] or diminish[es] the parties' rights and obligations." *Workplace Systems v. Cigna*, 143 N.H. at 324.

11. For example, an amendment shifting the burden of proving insurance coverage from the insured to the insurer was held to be substantive, as it enlarged or diminished a party's rights or obligations under the issued insurance policies, and therefore "fundamentally changed the relationship between the parties and [did] so in a fashion that significantly bears on the ultimate relationship of their rights." *Id.* at 325-26 (quoting *Liberty Mut. Ins. Co. v. Home Ins. Indem. Co.*, 117 N.H. 269, 271 (1977)).

12. Similarly, in the criminal context, the New Hampshire Supreme Court has stated that substantive changes are those which "alter the definition of the underlying offenses, increase the sentencing range for which a defendant was eligible . . . , or eliminate any available defenses." *In re Evans*, 154 N.H. 142, 153 (2006). Also in the criminal context, the court's analysis of *ex post facto* laws distinguishes procedural changes—which do not implicate the state constitution's *ex post facto* clause—from substantive changes, which are those that "augment[] the crime or increase[] the range of sentences that could be imposed for the charged crime." *Id.* at 147.

13. By contrast, statutes have been found to apply retrospectively where they do not affect substantive rights, but are instead procedural or remedial in nature. *See In re G.*, 120 N.H. 153, 155 (N.H. 1980) (statute giving probate court authority to order psychiatric evaluations was procedural and could be applied retrospectively); *Gelinas v. Mackey*, 123 N.H. 690, 695 (N.H. 1983)(statute setting rule for calculation of interest on judgments found to be “essentially remedial in nature” and thus could be applied retrospectively).

14. Here, R.S.A. 5-B:4-a contains no “expression of the legislature’s intent that it be applied retroactively.” *See State v. Johnson*, 134 N.H. at 573-74.

15. R.S.A. 5-B:4-a must be applied prospectively only because it affects the substantive rights of LGC. R.S.A. 5-B:4-a imposes penalties which were not previously in the statute, and thus enlarges LGC’s obligations and fundamentally changes the relationship between it and the Secretary. *See Workplace Systems v. Cigna*, 143 N.H. at 324-26. The change imposed by the enactment of R.S.A. 5-B:4-a is substantive, and any penalties imposed under R.S.A. 5-B:4-a—including (without limitation) fines, rescission, restitution and disgorgement—can only apply to conduct which occurred after the enactment of the statute on June 14, 2010.

16. Although this case is not a criminal investigation, R.S.A. 5-B:4-a’s newly created penalties are similar to newly created criminal penalties which increase “the range of sentences that could be imposed for the charged crime.” *See In re Evans*, 154 N.H. at 147. Such penalties are deemed to affect substantive rights. *See id.* Because R.S.A. 5-B:4-a made a substantive change to the pooled risk management program statute, it cannot apply retroactively.

17. The Amended Petition alleges violations of R.S.A. 5-B beginning in 2002. *See* Amended Petition ¶¶92. In fact, most of the allegations in the Amended Petition concern events between 1999 and 2008. *See e.g.*, Amended Petition ¶¶30, 57. To the extent that the conduct alleged to have violated R.S.A. 5-B occurred prior to the enactment of R.S.A. 5-B:4-a, LGC cannot be penalized under R.S.A. 5-B:4-a for that conduct.

III. Conclusion

18. The creation of new penalties by the June 14, 2010, amendments to the statute is a substantive change, and as such, retroactive application of the newly-enacted penalties to conduct that occurred prior to June 14, 2010, is prohibited by the New Hampshire Constitution and New Hampshire common law. R.S.A. 5-B:4-a can only be used to penalize conduct which occurred after its enactment. Therefore, Counts I & II of the Amended Petition should be dismissed to the extent that they seek to penalize LGC for conduct which occurred prior to June 14, 2010.

WHEREFORE, LGC respectfully requests that the Hearing Officer:

- A. Dismiss Counts I & II to the extent that they seek to penalize conduct which occurred prior to the June 14, 2010, enactment of R.S.A. 5-B:4-a;
and
- B. Grant any other such relief as may be necessary and proper.

Respectfully submitted,
LOCAL GOVERNMENT CENTER, INC.;
LOCAL GOVERNMENT CENTER
REAL ESTATE, INC.;
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HEALTHTRUST, LLC;
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PROPERTY-LIABILITY TRUST,
LLC;
HEALTHTRUST, INC.;
NEW HAMPSHIRE MUNICIPAL
ASSOCIATION PROPERTY-
LIABILITY TRUST, INC.;
LGC-HT, LLC; AND
LOCAL GOVERNMENT CENTER
WORKERS' COMPENSATION
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Dated: March 12, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of March delivered copies of this pleading to all counsel.

/s/William C. Saturley