

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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Planned Parenthood of Northern New		
England, Concord Feminist Health Center,		
Feminist Health Center of Portsmouth,		
and Wayne Goldner, M.D.		
	Plaintiffs-Appellees,	
	v.	No. 03-491-JD
Kelly Ayotte, Attorney General of New		
Hampshire, in her official capacity,		
	Defendant-Appellant.	
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**DEFENDANT'S MOTION FOR BRIEFING SCHEDULE ON  
THRESHOLD LIABILITY**

Defendant, through counsel, the Attorney General’s office, respectfully requests the Court to establish a briefing schedule limiting initial submissions and briefing to threshold liability for fees and costs and deferring evaluation issues, for the reasons stated below.

1. This Court’s July 10, 2007 Order dismissed as moot all issues other than attorneys’ fees and costs and, upon remand, would set a briefing schedule to address fees and costs. On July 20, 2007, the Court of Appeals remanded. On July 27, 2007, Plaintiffs moved for a briefing schedule to provide Plaintiffs sixty days to submit their application for fees, expenses and costs. *See Plaintiffs’ Motion for Briefing Schedule on Matter of Attorneys’ Fees, Expenses and Costs.* Defendant objects to the extent that Plaintiffs’ motion, if granted, would require simultaneous litigation of all issues on such

application. *See Defendant's Objection to Plaintiffs' Motion for Briefing Schedule*, filed concurrently with this motion and incorporated by reference herein.

2. Bifurcating submissions and briefing is the most efficient approach in this case. This Court's ruling on liability is a threshold matter that will determine whether the Plaintiffs are eligible for fees and costs in any amount. Defendant intends to establish that, based upon controlling precedent, Plaintiffs are not entitled to any attorneys' fees or costs. *See Buckhannon v. West Virginia*, 532 U.S. 598, 600 (2001) (where claims mooted by legislation before court judgment on merits, plaintiff is not "prevailing party" under fee-shifting statute); *Sole v. Wyner*, 127 S. Ct. 2188 (2007) (final disposition of case and not interim relief determines "prevailing party" status); *Farrar v. Hobby*, 506 U.S. 103 (1992) (where no money damages assessed, unreasonable to award fees to prevailing party). If the Court agrees, there will be no need for protracted litigation over each billing record submitted by Plaintiffs.

3. Under the Federal Rules of Civil Procedure, this Court "may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court." F.R.Civ.P. 54(d)(2)(C). This approach is especially appropriate here, as liability for fees will be determined in large part upon the procedural history of the case.

4. Limiting initial briefing to threshold liability would be consistent with the Supreme Court's preference that "[a] request for attorneys' fees should not result in a second major litigation." *Buckhannon*, 532 U.S. at 609 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). The scope of potential issues on evaluation of Plaintiffs' fees

and costs is extensive and, unless deferred, could result in lengthy and complicated proceedings that may ultimately prove to be unnecessary.

5. Without an appropriate order limiting initial submissions and briefing to threshold liability, granting Plaintiffs' request for submission of their application with supporting documentation would require Defendant to conduct a resource-intensive review of billing records and to file appropriate cost-specific objections. Both the parties' and this Court's limited resources would be preserved if such individual review and objection were deferred until after a threshold ruling on liability. Plaintiffs would suffer no prejudice as a result, regardless of the outcome on liability.

6. As the grounds for this motion are stated herein, a separate memorandum of law is unnecessary. LR 7.1(a)(2).

7. Although Defendant has made a good faith attempt to obtain Plaintiffs' concurrence in the relief sought herein, Plaintiffs do not assent. LR 7.1(c).

WHEREFORE, Defendant respectfully requests that the Court:

A. Grant Defendant's motion or otherwise set a briefing schedule limiting initial submissions and briefing to threshold liability and deferring submissions and briefing on evaluation;

B. Deny *Plaintiffs' Motion for Briefing Schedule* to the extent that it would not limit initial submissions and briefing to threshold liability; and

C. Grant such other relief deemed just and appropriate.

Respectfully submitted,

KELLY A. AYOTTE  
ATTORNEY GENERAL

By and through her counsel

Date: August 2, 2007

By: [/s/]Maureen D. Smith  
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Senior Assistant Attorney General  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing *Defendant's Motion for Briefing Schedule On Threshold Liability* was served this day upon counsel of record through the Court's ECF system.

By: [/s/]Maureen D. Smith  
Maureen D. Smith