

# State of New Hampshire Supreme Court

STATE OF NEW HAMPSHIRE

v.

GRAHAM JENSEN

N.H. Sup. Court. No. 2007-0667

## MOTION FOR REHEARING AND RECONSIDERATION

**N**OW COMES Graham Jensen, by and through his attorney, Joshua L. Gordon, and respectfully requests this honorable court to reconsider its November 21, 2008 decision and to reverse it, or in the alternative to order re-briefing and re-argument of the case to determine whether the State violated constitutional contracts clauses in repealing the use of New Hampshire Turnpike tokens.

As grounds it is stated:

1. In its decision, this Court cited several cases in which illegality was a defense to enforcement of a contract, but none of them are in the context of a *changed* law. *Minnesota Fire and Cas. Co. v. Greenfield*, 855 A.2d 854 (Pa. 2004) (heroin illegal before fire); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982) (union contract violated pre-existing antitrust law); *Town Plan. & Eng. Assoc., Inc. v. Amesbury Spec. Co., Inc.*, 342 N.E.2d 706 (Mass. 1976) (no suggestion that statute requiring presence of registered arose during pendency of contract). Because the illegality in each of these cases existed before the contract, there is no hint of a violation of the contracts clause of any constitution. As such the cases are inapposite.

2. Addressing when there is a change in the law, this Court ruled that “where the contract was originally legal, but because of a change in the law, performance of the acts prescribed in the contract by one of the parties has become illegal, any subsequent performance of such acts is against public policy.” The sole citation for this holding is a portion of *Williston on Contracts*. Two items are noteworthy regarding *Williston*. First, all of the cases and secondary authority cited in the *Williston* portion quoted by this Court involve two private parties; none involve a governmental contract. Second, none of the cases or secondary authority cited in the portion raise or discuss the issue of constitutional contracts clause jurisprudence, as did Mr. Jensen. *Reply Brf.* at 5-6 (citing state and federal contract clauses).

3. In *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977) (cited in *Reply Brief* at 6), bonds created by the State and held by the plaintiff lost some security and thus became less valuable due to subsequent legislation by the State. The United States Supreme Court first held that obligations created by state law are contracts for the purpose of constitutional contracts clause analysis when the “circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State,” *United States Trust Co.*, 431 U.S. at 18 n. 4, and that State contracts are a form of property that cannot be taken without compensation. *Id.* at 20. The Court recognized that “the Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation.” *Id.* at 21. In determining what interests are sufficient, it distinguished between impairment of *private* and *state* contracts. Because “laws intended to regulate existing contractual relationships” among private parties are

economic regulation, they must merely “serve a legitimate public purpose.” *Id.* at 22-23. When *state* contracts are in issue, however,

complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

*United States Trust Co.*, 431 U.S. at 26. In setting forth a test for determining when a state can abrogate its own contracts, the Court recognized that it is clearly unconstitutional when legislation results in a “total destruction” of the value of the contract, *id.*, but that impairment short of that is also unconstitutional, especially when less drastic measures are available. *Id.* at 30-31 (“[A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.”).

4. The contracts clause problem was raised by Mr. Jensen, but never addressed by the State. The decision as written creates uncertainty regarding constitutional protections against legislative abrogation of state, county, and municipal contracts in New Hampshire. It is thus reasonable to set this case for re-briefing and re-argument on this issue so that the court can have a fuller exposition by the parties of the implications of the contracts clauses on this case.

**W**HEREFORE, Graham Jensen respectfully requests this honorable Court to reverse its holding based on the State's violation of the state and federal constitutions' contracts clauses by repealing the use of tokens without any compensation, or in the alternative, to set this case for rehearing on this issue.

Respectfully submitted  
for Graham Jensen  
by his attorney,

Dated: December 1, 2008

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Joshua L. Gordon, Esq.  
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I hereby certify on this 1<sup>st</sup> day of December 2008, a copy of the foregoing is being forwarded to Susan P. McGinnis, Senior Assistant Attorney General.

Dated: December 1, 2008

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Joshua L. Gordon, Esq.