

STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	)	SS:
COUNTY OF MARION	)	CAUSE NO. 49D10-1005-PL-02145
STATE OF INDIANA,	)	
Plaintiff,	)	
	)	
v.	)	
	)	
INTERNATIONAL BUSINESS	)	
MACHINES CORPORATION,	)	
Defendant.	)	
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INTERNATIONAL BUSINESS	)	
MACHINES CORPORATION,	)	
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF INDIANA,	)	
Defendant.	)	

**ATTORNEY GENERAL’S MOTION TO INTERVENE AS OF RIGHT OR, IN THE ALTERNATIVE, FOR PERMISSIVE INTERVENTION**

Pursuant to Trial Rule 24, the Attorney General of the State of Indiana, Gregory F. Zoeller, by Solicitor General Thomas M. Fisher, and Deputy Attorneys General Ashley Tatman Harwel and Heather Hagan McVeigh, respectfully moves for leave to intervene in this matter for the limited purpose of arguing that the Governor of Indiana is not subject to deposition regarding an official act. The Attorney General makes this motion based on either or both of two alternatives: 1. As of right under Trial Rule 24(A)(1) *as the Attorney General of Indiana*; 2. By permission under Trial Rule 24(B)(2) *on behalf of the Office of the Governor of the State of Indiana*. In support of this motion, the Attorney General asserts as follows:

1. On December 15, 2011, this Court entered an Order granting IBM's Motion to Compel Deposition of Governor Daniels. The Court observed that Indiana Code Section 34-29-2-1 excuses the Governor from "obeying any subpoena to testify[.]" Order at 7. Regardless, the Court ruled that "preclusion of a Governor's deposition in this unique and significant case is illogical – so therefore contrary to legislative intent." Order at 2.

2. The Attorney General wishes to intervene in this matter to defend the institutional interests of the Office of the Governor, and indeed the institutional interests of all State officials protected by the privilege accorded under Indiana Code Section 34-29-2-1. The Attorney General has general statutory authority to "represent the state in any matter involving the rights or interests of the state, including actions in the name of the state, for which provision is not otherwise made by law." Ind. Code § 4-6-1-6. And while a particular agency of the State is already a party, the Attorney General does not happen to represent that agency as counsel in this matter and therefore does not have the opportunity to defend the broader institutional concerns of State government. In addition, the Office of the Governor itself is not a party, and its particular institutional interests warrant defense and representation on the matter of whether the Governor may be subjected to deposition in a civil action.

Furthermore, by statute, the Attorney General "shall be required to attend to the interests of the state in all suits, actions or claims in which the state is or may become interested in the Supreme Court of this state." Ind. Code § 4-6-2-1. It is the

intention of the Family & Social Services Administration to urge the Indiana Supreme Court to review whether the Governor may be deposed in this case. The Attorney General concurs that immediate Supreme Court review is warranted; he seeks to intervene at this stage of the case to lay groundwork for carrying out his Section 4-6-2-1 responsibilities.

3. Under Trial Rule 24(A)(1), upon timely motion, “anyone shall be permitted to intervene in an action” where “a statute confers an unconditional right to intervene . . . .” A statute confers upon the Attorney General an unconditional right to intervene in this matter. Indiana Code Section 34-33.1-1-1(b) states that “[i]f a party to an action bases its claim or defense on: (1) a statute or executive order administered by a state officer or agency . . . the attorney general shall be permitted to intervene in the action.” Here, IBM has asked to depose Governor Mitch Daniels. A party to this action, the State of Indiana, acting on behalf of the Indiana Family & Social Services Administration, has based its defense against this deposition on a statute, Indiana Code Section 34-29-2-1. The Governor, a State governmental officer, administers this statute by invoking the privilege it confers as a shield against being deposed. Accordingly, the Attorney General has a right to intervene under Section 34-33.1-1-1(b).

4. In the alternative, the Governor of Indiana, represented by the Attorney General, should be allowed to intervene pursuant to Trial Rule 24(B)(2), which provides for a government agency to intervene when “a party to an action relies for ground of claim or defense upon any statute . . . administered by a federal

or state governmental officer.” Again, this case, and specifically the Court’s December 15 Order to depose the Governor, implicates a defense based on Indiana Code Section 34-29-2-1, which again is administered by the Governor as a privilege and shield against deposition. While the Governor has to this point relied on FSSA to invoke that privilege, he should now, in preparation for appeal, be permitted to invoke and defend it in his own official capacity. Permitting this intervention will add an important voice to the litigation, but it will not delay or prejudice the adjudication of the rights of the original parties.

WHEREFORE, Attorney General Gregory F. Zoeller respectfully moves for leave to intervene in this matter, either as Attorney General or on behalf of the Office of the Governor.

Respectfully submitted,

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Attorney General of Indiana  
Atty. No. 1958-98

By: \_\_\_\_\_

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Solicitor General

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Deputy Attorneys General

## CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon the parties of record listed below, by electronic transmission and United States Mail, postage pre-paid, on this 21st day of December, 2011.

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