THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 04-E-0208

2004 OCT 15 P 4:01

VENISE THERESA GONYA, as representative of the Estate of Joseph E. Gonya, deceased, individually and on behalf of all others similarly situated, et al.

v.

ROGER A. SEVIGNY, Commissioner of the State of New Hampshire Insurance Department, in his official capacity as Insurance Commissioner and liquidator of The Home Insurance Company

COMMISSIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Roger A. Sevigny, in his official capacity as Commissioner of Insurance (Commissioner) and Liquidator ("Liquidator") of The Home Insurance Company ("Home"), submits this Memorandum of Law in support of his motion for summary judgment.

INTRODUCTION

This case concerns one aspect of the liquidation of Home, which is the subject of liquidation proceedings in the Merrimack County Superior Court (the "Court"), In the Matter of the Liquidation of The Home Insurance Company, Docket No. 03-E-0106. The plaintiffs challenge a provision of the Insurers Rehabilitation and Liquidation Act that allows third party claimants against insureds of an insolvent insurer to file claims in the insurer's liquidation, but provides that the filing operates as a contingent, limited release of the insured. RSA 402-C:40, I. The plaintiffs contend this provision violates the equal protection, court access, and due process provisions of the New Hampshire Constitution as well as "the doctrine of unconstitutional conditions."

FACTUAL BACKGROUND

The essential facts pertinent to this motion are not in dispute. The Home Insurance Company ("Home") is a New Hampshire domiciled insurance company. Home wrote workers compensation, liability and other types of insurance throughout the United States. Stipulation of Facts ("Stipulation") ¶ 1. The named plaintiffs are representatives of two decedent's estates, each of which has a pending tort action against a company or companies that were insureds or additional named insureds on policies issued by Home. Id. ¶¶ 2-3.

On June 13, 2003, the Court entered an Order of Liquidation ("Liquidation Order") concerning Home pursuant to RSA 402-C:21. Stipulation ¶ 4, Ex. 1 (the Liquidation Order). Among other things, the Liquidation Order declared that Home was insolvent and appointed the Commissioner as Liquidator of Home. Liquidation Order ¶¶ (b), (d). It also permanently enjoined all persons from commencing or continuing any action or proceeding against Home or the Liquidator and from any act to collect, assess or recover a claim against Home, other than the filing of a proof of claim with the Liquidator. Id. ¶ (n)(1), (6). It further set the deadline for the filing of claims against Home as one year from the date of the Liquidation Order, i.e., June 13, 2004. Id. ¶ (bb).

Home is being liquidated by the Commissioner, as Liquidator, under the supervision of the Court, pursuant to the Insurers Rehabilitation and Liquidation Act, RSA 402-C. See Stipulation ¶ 4, Ex. 1. The complaint names the Commissioner, as such and as Liquidator of Home, as the defendant. Complaint ¶¶ 3, 4.[1]

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[1] The Attorney General was originally also named as a defendant. At the July 27, 2004, hearing on plaintiffs' request for temporary relief, the plaintiffs agreed to dismissal of the Attorney General as a party. The parties also agreed to defer issues concerning class certification until after a decision on the merits.

The Court issued directions concerning notice of the liquidation and claim filing deadline and the form of proof of claim in an Order Approving Notice entered on June 11, 2003. That Order approved the form of notice concerning the Liquidation Order and the form of proof of claim (and instructions) pursuant to RSA 402-C:26 and RSA 402-C:38. The Order also gave directions for the provision of notice of the Liquidation Order and claim filing deadline to potential claimants pursuant to RSA 402-C:26. Stipulation ¶ 5, Ex. 2. The Liquidator gave notice pursuant to the Order as described in the Liquidator's First Report to the Court.[2] See Stipulation Ex. 3-7.[3]

In accordance with RSA 402-C:40, I, and RSA 402-C:38, I(a)(7), the proof of claim form included the following provision:

> 14. If you are completing this Proof of Claim as a Third Party Claimant against an insured of The Home, you must conditionally release your claim against the insured by signing the following, as required by N.H. Rev. Stat. Ann. § 402-C:40 I:
>
> I, ______________________________________ (insert claimant's name), in consideration of the right to bring a claim against The Home, on behalf of myself, my officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives hereby release and discharge ______________________ (insert name of defendant(s) insured by The Home), and his/her/its officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives, from liability on the cause(es) of action that forms the basis for my claim against The Home in the amount of the limit of the applicable policy provided by The Home; provided, however, that this release shall be void if the insurance coverage provided by The Home is avoided by the Liquidator.
>
> ____
>
> Claimant's signature   Date

Stipulation ¶ 7. See Stipulation Ex. 4 (item 14).

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[2] See Affidavit of Michael Averill dated July 23, 2004 ("Averill Aff.") ¶ 2 (Exhibit D to Def. Opp. to Plain. Req. for Temp. Injunct. Relief); Liquidator's First Report (Exhibit C to same). Pursuant to the Order Approving Notice, the Liquidator mailed approximately 330,000 notices of the liquidation (including proof of claim) and published notice of the liquidation in 94 newspapers and a trade publication at an external cost of over $276,000. Averill Aff. ¶ 2, 3. The Liquidator gave notice to mass tort claimants by mailing notices to their attorneys at the names and addresses on Home's computer systems. Liquidator's First Report, Exhibit C at ¶ 5(b). Averill Aff. ¶¶ 2-3. Additional mailings have been made at intervals since July, 2003. Id. ¶ 4. The law firm of Baron & Budd, P.C., which represents the named plaintiffs in the tort cases, was among the claimants' firms that were mailed notices of the liquidation and proof of claim forms. Averill Aff. ¶ 5. No individual notice was directed to the named plaintiffs. Stipulation ¶ 8.

[3] The Liquidator notes that the date of the claim filing deadline (June 13, 2004) was filled in on the versions of Exhibits 3-5 that were mailed.

The claim filing deadline under RSA 402-C:26, II, must be no more than one year after entry of a liquidation order. Stipulation at ¶ 11. Pursuant to the Order of Liquidation, RSA 402-C:26, II, and RSA 402-C:37, I, persons asserting claims against Home, including third party claimants, were required to file proofs of claim with the Liquidator on or before June 13, 2004. Late filed claims are subject to the provisions of RSA 402-C:37, II and III. Stipulation ¶ 9.

Proofs of claim submitted in the liquidation will be determined in accordance with RSA 402-C:41 and RSA 402-C:45 and the Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company In Liquidation entered by the Court on December 19, 2003 and as amended June 9, 2004 (the "Claims Procedures Order"). Stipulation ¶ 10, Ex. 8. The Claims Procedures Order implements RSA 402-C:41 and RSA 402-C:45, which provide that the liquidator is to investigate and determine claims filed in the liquidation and present recommendations to the Court, and that a claimant who disagrees with the liquidator's determination may file an objection and obtain a hearing before the Court or a Court-appointed referee.

RSA 402-C:40, I, provides a right to file a claim directly with the insurer that a third party claimant would not have otherwise. Claims under policies of insurance issued by an insurer, including claims by third party claimants, have second priority under RSA 402-C:44, II. Stipulation ¶ 11.

Claimants filing proofs of claim in the liquidation of an insolvent insurer have no guarantee they will have any recovery from the liquidated estate. The distributions to claimants in the second priority class who file proofs of claim against an insolvent insurer

in liquidation under RSA 402-C depend on the total assets of the insurer ultimately marshaled by the liquidator after payment of administration costs and the total amount of allowed claims in the second priority under RSA 402-C:44. Stipulation ¶ 12.

Neither of the named Plaintiffs has submitted a proof of claim in the Home liquidation. Stipulation ¶ 14. They filed this action on June 10, 2004.

THE STATUTE AT ISSUE

The New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C ("Act"), provides a comprehensive framework for the rehabilitation and liquidation of insurance companies.[4] This action concerns the third party claimant release provision of the Act, RSA 402-C:40, I, and the related section requiring inclusion of release language for third party claims in the proof of claim form. RSA 402-C:38, I(a)(7).

The statute provides:

> Third Party's Claim. Whenever any third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file a claim with the liquidator. The filing of the claim shall release the insured's liability to the third party on that cause of action in the amount of the applicable policy limit, but the liquidator shall also insert in any form used for the filing of third party claims appropriate language to constitute such a release. The release shall be void if the insurance coverage is avoided by the liquidator.

RSA 402-C:40, I, Appendix; see also RSA 402-C:38, I(a)(7) (requiring proof of claim to include "[i]n the case of any third party claim based on a liability policy issued by the insurer, a conditional release of the insured pursuant to RSA 402-C:40, I"). The statute

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[4] The rehabilitation or liquidation of troubled insurers in the United States is a matter of state law governed by a national scheme of interrelated state laws. Every state of the United States has now enacted a version of the Insurers Rehabilitation and Liquidation Model Act approved by the National Association of Insurance Commissioners ("NAIC"), see III NAIC Model Laws, Regulations and Guidelines 555-1 (2004) ("NAIC Model Laws"), or the Uniform Insurers' Liquidation Act ("UILA") adopted by the Commissioners on Uniform State Laws, see 13 U.L.A. 321 (Master ed. 1986). See NAIC Model Laws 555-63 to 555-67. The New Hampshire Act, RSA 402-C, was enacted by 1969 N.H. Laws 272:1, based on the Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. § 645, which was enacted by 1967 Wis. Laws c. 89, § 17, and recommended for adoption by the NAIC in 1969. See NAIC Model Laws at 555-62.

thus does several things. *First*, it authorizes persons with claims against insureds of an insurer in liquidation (third party claimants) to file their claims with the liquidator. *Second*, it provides that, as a matter of law, such a filing operates as a conditional, limited release of the insured's liability to the third party claimant. The release is limited because it only releases liability "on that cause of action in the amount of the applicable policy limit." The release does not release claims to the extent they exceed the applicable policy limit or involve a separate cause of action, and the claimant may continue to seek recovery from the insured for amounts in excess of the policy limits. The release is conditional because it "shall be void if the insurance coverage is avoided by the liquidator." If the Liquidator were to determine that the claim is not covered by the insurance policy, then the release has no effect. *Third*, the statute requires the Liquidator to include language constituting the release in the proof of claim form even though the release operates as a matter of law.

ARGUMENT

Standard of Review

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. There is no genuine dispute of fact material to the determination of plaintiffs' constitutional challenge to RSA 402-C:40, I, and plaintiffs' claims fail as a matter of law.

It is well established that "courts will never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond all reasonable

doubt." In re Boston & Maine Corp., 109 N.H. 324, 325 (1969), quoting Rich v. Flanders, 39 N.H. 304, 312 (1859). Rather, a legislative act is presumed constitutional and the Court will not declare it invalid "except on unescapable grounds." Niemiec v. King, 109 N.H. 586, 587 (1969), quoting Chronicle & Gazette Publ'g Co. v. Attorney General, 94 N.H. 148 (1946). Plaintiffs do not make out such a case.[5]

I. THE STATUTE SERVES THE LEGITIMATE PURPOSE OF EXPEDITING CLOSURE OF INSURER LIQUIDATION AND PROVIDING INSUREDS WITH THE INSURANCE PROTECTION THEY PURCHASED.

All of the plaintiffs' constitutional challenges turn on whether the statute serves a legitimate purpose and whether the statutory limitations advance that purpose. The Legislature intended the third party release statute to advance the expeditious closure of insurer liquidation proceedings and to provide the policyholders of an insolvent insurer in liquidation with the protection of the insurance they had purchased. It did this by allowing third party claimants to file claims directly in the liquidation and providing that the claim operates as a limited, conditional release of the insured. (The release is limited by the applicable policy limits, and it is conditional because it will not apply if the Liquidator determines there is no coverage.) If a third party claimant chooses to file directly in the liquidation, the insured obtains the protection that would have been afforded by the insurance absent the liquidation – freedom from a claim covered by insurance up to the applicable policy limits. The liquidation also will not need to wait for

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[5] While the plaintiffs purport to allege that the statute violates constitutional provisions both facially and "as applied," see Counts I, III, V, VII (facial), II, IV, VI (as applied), they fail to articulate anything beyond a facial challenge. They do not allege any facts to show that application of the statute to them could be unconstitutional or that the Liquidator took any particular action with respect to them. (The Liquidator merely used a proof of claim form that, as required by statute, includes a conditional release to be executed by third party claimants. See Stipulation ¶ 7, Ex. 4 (item 14).) Further, plaintiffs only request relief that the statutory provision cannot be applied to anyone. This does not make out an as applied claim. See Dow v. Effingham, 148 N.H. 121, 128-29 (2002).

the end of the underlying tort litigation. The third party claimant, however, is not obligated to file in the liquidation but may choose to pursue its claim against the insured as it would absent the liquidation.

The Legislative intent is clear from the legislative history of the Wisconsin statute on which the New Hampshire statute is based. Like other states, New Hampshire drew its Insurer Rehabilitation and Liquidation Act from the Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. § 645, enacted by 1967 Wis. Laws c. 89, § 17. See note 4 above. The Wisconsin Act contains a third party release provision that is essentially identical to the New Hampshire statute. Compare RSA 402-C:40 and Wis. Stat. § 654.64 (Appendix). The commentary to the Wisconsin statute describes its purpose:

> The goal was to devise a more subtle and discriminating method of handling third party claims than now exists, which would both do greater equity and also encourage quick termination of the liquidation. . . . This section provides for the third party claimant to make a choice between pursuing his claim against the insured and presenting his claim in the liquidation. At first blush it would seem harsh and unnecessary to force such a choice. But this is not the case. Before he has to choose, the claimant has every opportunity to determine whether the insured is individually financially responsible. If he is, the claimant can proceed against him, rather than take his chances in the liquidation.

1967 Wis. Laws c. 89, § 17, introductory comment to Wis. Stat. § 645.64 (Appendix).

The commentary further identifies the legislative purpose of protecting policyholders:

> By putting pressure on the third party to release the insured to the extent of the applicable policy limit if he wishes to make a claim in the proceeding, the liquidation can at least help make the insurance fund do the job of protecting the policyholder. It is unfortunate that the innocent third party must relinquish his right against the insured in order to claim in the liquidation but in no other way is it possible to settle the matter expeditiously, efficiently and equitably. The notion that the election is valid only if there is effective insurance does elementary justice.

1967 Wis. Laws c. 89, § 17, comment to Wis. Stat. § 645.64(1). Further:

> It is entirely fair to the third party claimant to compel him to elect whether to share in the liquidation or exercise rights against the insured. This is a burden upon him, but is a reasonable allocation to him of part of the total burden imposed by an insolvency. If he claims in the liquidation, he must release the insured. If he does not claim, but pursues the insured instead, then of course the insured will have to pay any judgment in full if he is not judgment proof.

1967 Wis. Laws c. 89, § 17, comment to Wis. Stat. § 645.64(2).

The statute thus serves two fundamental purposes. *First*, by permitting third party claimants to file claims directly with the insurer in liquidation, the statute facilitates a more expeditious resolution of the liquidation proceeding by encouraging third party claimants to file claims so they can be determined through the relatively informal claims determination process under RSA 402-C:41 and C:45, instead of the more protracted litigation process. Third party claimants ordinarily would not be able to proceed directly against the alleged tortfeasor's insurer. See Stipulation ¶ 11. *Second*, by conditioning such direct claims on a conditional release of the third party claimant's claim up to the applicable policy limits, the statute provides insureds with the protection usually provided by a liability insurance policy (a defense and indemnity to the policy limit), notwithstanding that the insurer's insolvency prevents it from providing that protection.[6] The statute does not, however, deprive a third party claimant of the ability to pursue litigation against the insured. The claimant may always choose not to take advantage of the ability to file a claim in the liquidation and instead proceed against the alleged tortfeasor/insured as it would have done absent the insurer's insolvency. The third party

[6] Claims under policies by the insurer, like other claims, must be filed and determined in the liquidation. See RSA 402-C:37, RSA 402-C:41, RSA 402-C:45; see also Liquidation Order ¶ n, Exhibit 1 to Stipulation (injunction barring assertion of claims against Home except by filing proofs of claim). Distributions on allowed claims then may be made in accordance with the statutory priorities to the extent the assets of the insurer permit. See RSA 402-C:44.

claimant is free to conduct whatever investigation it desires into the solvency of the insured before making its choice.

II. THE STATUTE DOES NOT VIOLATE NEW HAMPSHIRE'S COURT ACCESS PROVISION.

Plaintiffs contend that RSA 402-C:40, I, is inconsistent with Part I, article 14 of the New Hampshire Constitution. Part I, art. 14 "makes civil remedies readily available and guards against arbitrary and discriminatory infringements on access to the courts. However, the right to a remedy is necessarily relative and 'does not prohibit all impairments of the right of access.'" City of Dover v. Imperial Cas. & Indemn. Co., 133 N.H. 109, 116 (1990), citing and quoting Estate of Cargill v. City of Rochester, 119 N.H. 661, 665 (1979); see also Minuteman, LLC & Assoc. v. Microsoft Corp., 147 N.H. 634, 640 (2002). This article "is basically an equal protection clause in that it implies that all litigants similarly situated may appeal to the courts both for relief and for defense under like conditions and with like protection and without discrimination." Opinion of the Justices (Limitation on Civil Actions), 137 N.H. 260, 265 (1993), quoting State v. Basinow, 117 N.H. 176, 177 (1977). "Statutory classifications restricting a right to recover for an injury, therefore, 'must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation.'" Id. at 266, quoting City of Dover, 133 N.H. at 116 (emphasis in original).

A. The Statute Does Not Violate The Court Access Provision Because It Does Not Impair The Ability To Maintain Tort Actions But Provides A New And Optional Right Of Direct Action.

As an initial matter, Article 14 is not applicable here because RSA 402-C:40, I, does not "restrict" or "impair" plaintiffs' ability to maintain actions in tort. It provides third party claimants with a new right to file a claim against the tortfeasor's insurer that

they otherwise would not have. Absent RSA 402-C:40, I, a tort claimant would have no right to file a claim in the insurer's liquidation proceeding or to otherwise proceed directly against a tortfeasor's insurer. See Metropolitan Prop. & Liab. Ins. Co. v. Kirkwood, 729 F.2d 61, 63 (1st Cir. 1984) (Breyer, J.) ("New Hampshire law prohibits direct action"), citing Burke v. Fireman's Fund Ins. Co., 120 N.H. 365, 367-68 (1980) (no direct action against insurer under RSA 268:16, I: "Before the insurer's duty to provide indemnity arises, the plaintiff must first have the liability of the insured judicially imposed."). Stipulation ¶ 11. Where a tort claimant had no pre-existing right to direct recovery from a tortfeasor's insurer, a statute creating such a right (where the insurer is in liquidation) subject to a condition does not implicate the right to a remedy. See Appeal of Wintle, 146 N.H. 664 (2001). In Wintle, the court held that an amendment to the workers' compensation law that limited liability for double compensation to State employers did not implicate a "right to a remedy" at all, in part because the plaintiff "had no analogous right to double recovery" at common law. Id. at 667. Similarly, plaintiffs here have no right to recover directly from a tortfeasor's insurer. Burke, 120 N.H. at 367.

Further, a claimant may continue to pursue litigation against alleged tortfeasors regardless of the statute. Third party claimants can choose whether or not to file a claim in the liquidation and potentially obtain a distribution from the insolvent insurer's estate (a right which they would not otherwise have). See Riley v. The Heil Co., 624 F. Supp. 695, 698 (S.D. Ohio 1985) (third party claimants are not required to file claim in liquidation). Unless they so choose, the statute will have no effect on their tort claim. Indeed, even after filing a claim, the claimant may maintain an action against the tortfeasor for amounts in excess of the applicable policy limits. Unlike municipal

immunity or a cap on private medical malpractice awards, a condition on a new and optional direct action does not impair the claimant's right to proceed against the tortfeasor. Cf. City of Dover, 133 N.H. 109; Carson v. Maurer, 120 N.H. 925 (1980). The statute does not impose any restriction. The claimant just has an option to conditionally release the insured up to policy limits and pursue payment from the insolvent insurer up to those limits. There is nothing unusual about a tort claimant releasing a tortfeasor, see RSA 507:7-h (release of joint tortfeasor not presumed to release all joint tortfeasors); Gagnon v. Lakes Region Gen. Hosp., 123 N.H. 760, 765 (1983), and the placing of a condition on a newly created, optional right to pursue recovery directly from an insurer in liquidation is not a restriction or impairment of a right of access to the courts.[7]

Indeed, the Florida courts have upheld the Florida third party claimant release provision, Fla. Stat. Ann. § 631.193, against an "access to courts" state constitutional challenge on this very ground:

> We do not find that such a provision amounts to a denial to access to the courts pursuant to Article I, Section 21 of the Florida Constitution (1968) as the injured party has a right to either seek relief against alleged tortfeasors or waive same and seek relief from the receiver of the insolvent insurer.

Ramos v. Jackson, 510 So. 2d 1241, 1241-42 (Fla. Dist. Ct. App. 1987).[8]

B. The Statute Satisfies The "Fair And Substantial" Standard Of Review.

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[7] "Constitutional rights can be waived." Tomasko v. Dubuc, 145 N.H. 169, 176 (2000) (right to travel). See, e.g., Funai v. Metropolitan Prop. & Cas. Co., 145 N.H. 642, 646 (2000) (right to trial by jury); In re W., 121 N.H. 123, 125 (1981) (waiver of parental rights, even if not knowingly done). "The benefit of statutory and constitutional provisions, both in civil and criminal jurisprudence, may be waived by a party interested. A person ought not to be heard to complain of that to which he has consented." State v. Albee, 61 N.H. 423, 428 (1881) (citations omitted).

[8] New Hampshire is not alone in enacting a third party claimant release provision. Five other states have statutes with language identical or nearly identical to RSA 402-C:40, I. See Fla. Stat. Ann. § 631.193; Ky. Rev. Stat. Ann. § 304.33-390(1); Minn. Stat. § 60B.40(1); Pa. Stat. Ann. tit. 40, § 221.40(a); Wis. Stat. § 645.64(1).

Even if the statute were viewed as a restriction on the right to maintain actions in tort, it comports with Article 14 because it is reasonable, not arbitrary, and rests on a ground of difference having a fair and substantial relation to the object of the legislation. See Opinion of the Justices, 137 N.H. at 266. In reviewing legislation under this standard, the courts "will not secondguess the legislature as to the wisdom of or necessity for legislation. [Their] sole inquiry is whether the legislature could reasonably conceive to be true the facts on which the challenged legislative classifications are based." Carson, 120 N.H. at 933 (citations omitted).

As shown by the commentary to the Wisconsin Act on which the New Hampshire Act was based (see pages 8-9 above), the Legislature had two related purposes in enacting RSA 402-C:40, I. *First*, it sought to facilitate expeditious liquidation proceedings by encouraging tort claimants to submit claims in the liquidation. This will permit determination of those claims through the streamlined claim determination process of RSA 402-C:41 and RSA 402-C:45, instead of tort litigation, and so encourage quicker resolution of the insurance claims related to those lawsuits. Without third party claim filings, the liquidation would have to wait for the results of the underlying tort litigation, which may take significant time. See RSA 402-C:40, III (distributions on an insured's claim are dependent on the underlying tort litigation). The statute thus provides for quicker resolution of claims to make possible earlier distributions from the estate. *Second*, the Legislature intended to provide insureds with some of the benefits they had sought to obtain by purchasing insurance in the first place: the protection of having provided for the defense and payment of claims against it. The insurer's insolvency prevents it from providing a defense and paying or settling claims.

By encouraging the filing of claims and the release of the insured, the statute serves to restore the benefits of insurance to a limited degree. Both purposes are in furtherance of the overall purpose of the Act: "protection of the interests of the insureds, creditors, and the public generally." RSA 402-C:1, IV.

These purposes are plainly legitimate and reasonable, and the statutory classifications reflect differences that have a fair and substantial relation to the objects of the legislation. The statute creates two classifications, both related to the tortfeasor's insurance coverage. It distinguishes (a) between tort claimants asserting claims against defendants insured by an insurer in liquidation and tort claimants against other defendants, whether insured or uninsured, and (b) between third party claimants in the liquidation whose release is void because the insurance coverage is "avoided" by the Liquidator and those whose release remains in effect because coverage exists. Each classification is reasonable and properly related to a legitimate State purpose.

The provision of the new right of direct action only to those claimants whose tortfeasor has an insurer in liquidation is directly tied to the legislative purposes. It links the right to the goals of promoting the more expeditious resolution of insurer liquidation proceedings and quicker distributions to creditors in those proceedings and of restoring insurance protection to policyholders. There is thus a fair and substantial relation between the classification and the legislative purpose.

The statutory distinction between third party claimants whose release is void and other third party claimants also substantially relates to the object of the statute by limiting the release to claims where there is insurance coverage. Third party claimants are allowed to file claims in a liquidation to have their claims determined and receive

distributions on allowed amounts. If, however, the Liquidator determines that the claim is not covered by the insurance policy (i.e., "avoids" the coverage), there will be no distributions regardless of the merits of the tort claim. In those circumstances, it is appropriate to void the release and restore the status quo before the third party claim filing. The classification fits the release condition to its purpose (encouraging third party claimants with covered claims against insureds to file them) while not harming those claimants whose claims are not covered by insurance.

The statute accordingly is consistent with Article 14. Cf. Minuteman, LLC & Assoc., 147 N.H. at 640 (distinction between direct and indirect purchasers for purposes of maintaining an antitrust action not arbitrary or discriminatory infringement of access to courts in violation of Part I, Article 14).

III. THE STATUTE DOES NOT VIOLATE EQUAL PROTECTION.

The plaintiffs also claim that RSA 402-C:40, I, violates the equal protection provisions of the New Hampshire Constitution, Part 1, articles 2 and 12. The New Hampshire equal protection guaranty "is essentially a direction that all persons similarly situated should be treated alike." Verizon New England, Inc. v. City of Rochester, 855 A.2d 497, 503 (N.H. 2004). Where a classification realistically reflects the fact that two groups are not similarly situated in certain circumstances, and the legislation's differing treatment of the groups is sufficiently related to a governmental interest, it will survive an equal protection challenge. Id.

The first question is the appropriate standard of review, based on examination of the "purpose and scope of the State-created classification and the individual rights affected." In re Sandra H., 150 N.H. 634, 637 (2004), quoting Estate of Robitaille v. NH

Dept of Rev. Admin., 149 N.H. 595, 596 (2003). The applicable standard here is rational basis review because the statute neither involves any suspect class such as race, creed, color gender, national origin or legitimacy, nor implicates fundamental or important substantive rights. See Verizon, 855 A.2d at 503.[9] The statute concerns a new, optional right for tort claimants to assert a claim directly against a tortfeasor's insurer in liquidation. Legislation regulating such "economic benefits and burdens" is reviewable under the rational basis test. See Emond v. N.H. Dep't of Labor, 146 N.H. 230, 231 (2001) (rational basis review of statute conditioning authority to conduct independent medical examinations on board certification or commissioner's approval).

Under the rational basis test, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate State interest." Verizon, 855 A.2d at 503. Because plaintiffs are challenging the statute, they have "the burden to prove that the classification is arbitrary or without some reasonable justification." Id..[10]

The statutory classifications satisfy this rationality review for the reasons set forth in Part II(B) above with respect to the "fair and substantial relation" test. The statutory authorization for direct action limited to insurers in liquidation serves legitimate State purposes in a rational way. The statute facilitates an expeditious liquidation by encouraging tort claimants to submit claims that may be determined through the more

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[9] It is well established that the "right to recover for one's injuries is not a fundamental right." City of Dover, 133 N.H. at 116. Plaintiffs may contend that the statute burdens a "right to a remedy," and that this is an important substantive right warranting intermediate scrutiny. See City of Dover, 133 N.H. at 116; Carson, 120 N.H. at 931-32. However, for the reasons set forth in Part II(A) above, the statute does not implicate the right to maintain a tort action.

[10] If the statute were subject to intermediate scrutiny, the test is similar: whether the legislative classification is "reasonable and rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation." Sandra H., 150, N.H. at 638. For the reasons set forth in Part II(B) above, the statute satisfies this test.

summary claim determination process so that claims against the insurer may be promptly resolved. This avoids the need to await the results of the underlying tort litigation and promotes earlier distributions from the estate. The statute provides insureds with the insurance benefits of a defense and payment of claims (to applicable policy limits) that otherwise would be prevented by the insurer's insolvency. The classification thus could be reasonably perceived to promote the more expeditious resolution of insurer liquidation proceedings and protection of policyholders. The classification also furthers the legislature's overarching goal of apportioning the adverse effects of the insurer's insolvency equitably among affected persons. See RSA 402-C:1, IV (purpose of liquidation statute is the protection of the interests of the insureds, creditors and the public generally through, among other things, enhanced efficiency and economy of liquidation and equitable apportionment of unavoidable loss).

The distinction concerning void releases ensures that the statute serves its policyholder protective purpose but only where the claim is in fact subject to coverage. The provision for voiding the release thus rationally fits the benefit to policyholders to the actually applicable insurance coverage.[11]

IV. THE STATUTE DOES NOT VIOLATE THE SO-CALLED "DOCTRINE OF UNCONSTITUTIONAL CONDITIONS."

[11] The analysis set forth in this Memorandum also addresses any substantive due process challenge to the statute that may lurk in the Complaint. The "appropriate inquiry" in substantive due process cases "is whether the claimant has proved that [the statute] constitutes a restriction on [protected] rights that is not rationally related to the [legislature's] legitimate goals." Dow v. Effingham, 148 N.H. at 125 (concerning ordinances). The court "has never employed the fair and substantial relationship standard for substantive due process claims." Id. Under the applicable standard, there is "a presumption favoring the constitutionality of the [statute]." Id. There can also be no procedural due process challenge to a statute, because the legislative determination "provides all the process that is due." Atkins v. Parker, 472 U.S. 115, 130 (1985); see Kerouac v. Town of Hollis, 139 N.H. 554, 560 (1995). The effect of the filing of a third party claim in conditionally releasing an insured up to applicable policy limits results by operation of law, not by any action of the defendant. "All citizens are presumptively charged with knowledge of the law." Atkins, 472 U.S. at 130. See, e.g., Miller v. Slania Enters., 150 N.H. 655, 662 (2004). Further, the proof of claim form notified third party claimants of the release by including express release language. See RSA 402-C:40, I, Stipulation ¶ 7, Ex. 4, item 14.

Plaintiffs also assert that the statute violates the "doctrine of unconstitutional conditions." The New Hampshire Supreme Court has not expressly adopted this doctrine,[12] but the federal courts have described it as follows:

> The doctrine of unconstitutional conditions bars government from arbitrarily conditioning the grant of a benefit on the surrender of a constitutional right, regardless of the fact that the government might have refused to grant the benefit at all. Not all conditions are prohibited, however; if a condition is germane—that is, if the condition is sufficiently related to the benefit—then it may validly be imposed. In the final analysis, "the legitimacy of a government proposal depends on the degree of relatedness between the condition on a benefit and the reasons why government may withhold the benefit altogether."

National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 747 (1st Cir.), quoting Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1457 (1989), cert. denied, 515 U.S. 1103 (1995).

As an initial matter, this doctrine does not apply here because RSA 402-C:40, I, does not confer a "governmental benefit." The statute allows a third party claimant to assert claims directly against a tortfeasors' insurer when it is in liquidation. This is not a benefit within the federal cases, which have been summarized in the leading law review article as concerning "exemption from regulation, taxation, or some other burden that constitutionally might have been imposed" or "direct subsidy or provision of other governmental largesse." Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. at 1424. Here, the government is not distributing a benefit. It is instead determining under what circumstances a person should be authorized to assert a claim directly against a private entity, an insurer, albeit that the insurer is under the control of the Court through the Commissioner as Liquidator pursuant to RSA 402-C:21. See RSA 402-C:25. See

[12] It was referred to in passing in State v. Farrow, 118 N.H. 296, 304 (1978), and Ratti v. Hinsdale Raceway, 109 N.H. 270, 274 (1969) (Kenison, C.J., dissenting).

also Rand v. Merrimack River Sav. Bank, 86 N.H. 351, 354 (1933) (court controls bank through appointment of commissioner of banks as receiver under statute). [13]

Even if the statutory authorization for third party claimants were viewed as a governmental benefit, it is not prohibited by the doctrine because the condition is germane to the benefit. As described above, the condition that third party claimants conditionally release the tortfeasor (up to the applicable policy limits) in order to file a claim is directly related to the reasons for allowing them to file a claim at all. The Legislature chose to permit third party claims to expedite the liquidation (by resolving the claims through the claims determination process instead of through litigation) and provide insureds with protection that they would have had under their policies absent liquidation (by avoiding the involvement of the insured in litigation). Since the avoidance of the underlying tort action is central to the purposes of allowing third party claims in the liquidation, the filing of those claims may properly be conditioned on the release.

Plaintiffs' suggestion that their ability to exercise their rights is somehow impaired by the timing of the proof or claims and release is a red herring. As the plaintiffs know the identity of the alleged tortfeasors, they are in the best position to conduct whatever investigation of the insured's solvency they desire before deciding whether to pursue recovery on their tort claims from the insureds or to conditionally release their claim (up to applicable policy limits) by filing a claim in the liquidation. See 1967 Wis. Laws, c. 89, § 17, intro. comment to § 645.64 (p. 8, above). Since the

[13] Moreover, the cases that find the conditioning of a government benefit on abandonment of litigation rights to be unconstitutional involved facts far removed from this case. See, e.g., Hall v. Ochs, 817 F.2d 920, 923-24 (1st Cir. 1987) (defendants conditioned dropping charges and releasing plaintiff from jail on his waiver of right to sue).

insurer in liquidation is by definition insolvent, it is apparent that plaintiffs are unlikely to receive payment in full in the liquidation. See Stipulation ¶ 12 ("no guarantee" of recovery).[14]

In these circumstances, the Legislature properly could condition the filing of third party claims on a conditional release of the tortfeasor/insured up to applicable policy limits.

CONCLUSION

For all of these reasons, there is no dispute of material fact and the Commissioner is entitled to judgment as a matter of law. The Court should grant the Commissioner's motion for summary judgment and enter a judgment declaring that RSA 402-C:40, I, is constitutional.

Respectfully submitted,

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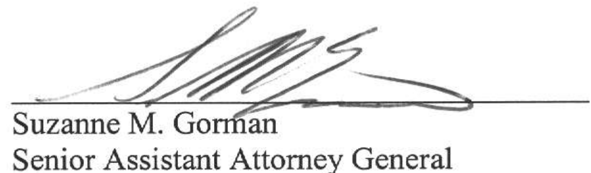

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[14] The distribution to claimants in the second priority class (including third party claimants, see Stipulation ¶ 11) in an insurer liquidation will depend on the total assets ultimately marshaled by the liquidator, after payment of administration costs, and the total allowed claims in the second priority class under RSA 402-C:44. Stipulation ¶ 12. Neither of these elements will be known until after the claim filing deadline, which must be no more than one year after entry of a liquidation order. See RSA 402-C:26, II; Stipulation ¶ 13.

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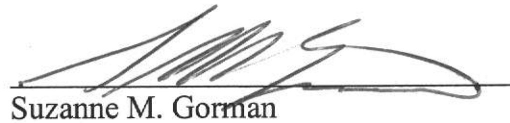
Certificate of Service

I hereby certify that a copy of the foregoing was sent this 15th day, of October 2004, first class, postage prepaid to Thomas R. Watson, Esq. and Jennifer A. Lemire, Esq., Watson & Lemire, P.A., 75 Congress Street, Suite 211, Portsmouth, NH 03801 and Alan Rich, Esq. and Stephen Blackburn, Esq., Baron & Budd, P.C., 3102 Oak Lawn Avenue, Suite 1100, Dallas, TX 75219-4281.



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