THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

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Docket No. 04-E-0208

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

and

ROXANE S. SCAIFE, as representative of the Estate of Arnold L. Stone, deceased, individually and on behalf of all others similarly situated

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

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Thomas R. Watson, Esq.
NH Bar #2670
Jennifer A. Lemire, Esq.
NH Bar #11316
WATSON & LEMIRE, P.A
75 Congress Street, Suite 211
Portsmouth, NH 03801
Telephone: (603) 436-7667

OF COUNSEL:

Alan Rich, Esq.
Stephen Blackburn, Esq.
BARON & BUDD, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219
Telephone: (214) 525-3729

DATE: 15 October, 2004

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CONCISE STATEMENT OF ISSUE PRESENTED

Whether the “Special Provisions for Third Party Claims” subsection of the New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C:40, I, which requires a third party to release its claims against a liquidating insurer's policy-holder in order to file a claim with the liquidator, violates Part I, articles Two, Twelve, Fourteen and Fifteen of the New Hampshire Constitution.

CONTROLLING AUTHORITIES

CASES

Brannigan v. Usitalo, 134 N.H. 50, 587 A.2d 1232 (1991).

Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

City of Dover v. Imperial Casualty & Indemnity Co., 133 N.H. 109, 575 A.2d 1280 (1990).

Gould v. Concord Hospital, 126 N.H. 405, 493 A.2d 1193 (1985).

Opinion of the Justices (Limitations on Civil Actions), 137 N.H. 260, 628 A.2d 1069 (1993).

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N.H. CONST. Pt. 1 art. 14.

N.H. CONST. Pt. 1 art. 15.

MISCELLANEOUS

III *NAIC Model Laws, Regulations and Guidelines,* 555-1 (2004).

Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413 (1989).

TABLE OF AUTHORITIES

CASES

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L.C. & S., Inc. v. Warren County Area Planning Commission, 244 F.3d 601 (7th Cir. 2001) 17

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Opinion of the Justices (Limitations on Civil Actions), 137 N.H. 260, 628 A.2d 1069 (1993) ....iv, 3, 7, 8, 16, 17, 18

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INTRODUCTION

Plaintiffs move this Court for summary judgment on the grounds that RSA 402-C:40, I, of the New Hampshire Insurers Rehabilitation and Liquidation Act ("Act") is unconstitutional both facially and as applied to Plaintiffs. The Act forces a plaintiff to give up his or her common law cause of action against an insured tortfeasor in exchange for the benefit of filing a claim with the Liquidator in the State's liquidation proceeding. While all fifty states have adopted some version of either the Insurers Rehabilitation and Liquidation Model Act[1] or the Uniform Insurers' Liquidation Act,[2] New Hampshire is one of only five states requiring a third party claimant to relinquish his or her rights against an insured company in order to file a proof of claim.[3] RSA 402-C:40, I, unconstitutionally conditions the receipt of a benefit provided by the State on the relinquishment of a protected constitutional right. The statute must be declared unconstitutional because the release requirement fails the constitutional requirement that it be reasonable, not arbitrary, and rest on a ground of difference having a fair and substantial relation to the object of the legislation.

STATEMENT OF UNDISPUTED FACTS

The facts pertinent to this Court's determination are simple and undisputed. The Home Insurance Company ("Home") is a New Hampshire domiciled insurance company. Stipulation of Facts at ¶ 1. On June 13, 2003, an Order of Liquidation was entered by the Superior Court for Merrimack County, New Hampshire (the "Court"), placing Home in liquidation and appointing the Commissioner of Insurance of the State of New Hampshire and her successors in office as Liquidator of Home. *Id.* at ¶ 4. The liquidation proceedings for Home are being conducted

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[1] Approved by the National Association of Insurance Commissioners ("NAIC"). *See* III *NAIC Model Laws, Regulations and Guidelines,* 555-1 (2004) ("NAIC Model Laws").

[2] Adopted by the Commissioners on Uniform State Laws. *See* 13 U.L.A. 321 (Master ed. 1986).

[3] Defendant's Opposition to Plaintiffs' Request for Temporary Injunctive Relief at n.5.

pursuant to the New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C (the "Act"). *Id.*

Plaintiffs in this action are persons who have (or would have) third party claims in the liquidation. *Id.* at ¶¶ 2, 3. 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. *Id.* at ¶ 10. 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. *Id.* at ¶ 12. Prior to the June 13, 2004 claims filing deadline, the Liquidator had not provided potential claimants information to determine what portion of a claim, if any, might be recovered by submitting a proof of claim with the Liquidator. *Id.* at ¶ 14. Claimants filing proofs of claim in the liquidation of an insolvent insurer have no guarantee they will have any recovery from the liquidated estate. *Id.* at ¶ 13.

ARGUMENT

I. RSA 402-C:40, I, VIOLATES THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS.

A well-established principle of constitutional law is that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. *See e.g., Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Welch v. Paicos*, 66 F.Supp.2d 138, 180 (D. Mass. 1999); 16 Am. Jur. *Const. Law* § 395; Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413 (1989). Once a State has established a benefit, the state may not use the benefit to compel people to surrender rights the state may not directly infringe by creating the appearance of a voluntary choice. The requirement that a person release a common law claim against an insured company in order to obtain the

benefit of filing a proof of claim with the liquidator is precisely the scenario prohibited by the doctrine of unconstitutional conditions.

A. The State May Not Condition Receipt of a Benefit on the Waiver of a Constitutional Right.

New Hampshire courts have recognized there is an important substantive right in a cause of action, requiring "a more rigorous judicial scrutiny than allowed under the rational basis test." *Carson v. Maurer,* 120 N.H. 925, 931-32 (1980). In cases involving equal protection challenges under Part 1, article 14, the supreme court has applied an intermediate-scrutiny test[4] which holds the statute "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation' in order to satisfy State equal protection guarantees." *Carson*, 120 N.H. at 932 (citations omitted); *see also Opinion of the Justices (Limitations on Civil Actions)*, 137 N.H. 260 (1993); *Brannigan v. Usitalo*, 134 N.H. 50 (1991). In order for the state to condition the benefit of filing a claim in the liquidation on the waiver of the constitutionally protected right to sue for a redress of injuries, the state's condition must meet the intermediate-scrutiny test articulated in *Carson.*

B. The Proof of Claims Process Established by RSA 402-C:40, I, Is a State Benefit within the Meaning of the Doctrine of Unconstitutional Conditions.

Providing a "new" and additional way for an injured person to recover money for damages sustained from an injury — in this case to recover directly from an insurance carrier — is a State benefit created by the Act. Once the State has created such a benefit, it may not condition the

[4] In *Opinion of the Justices*, 134 N.H. 266 (1991), one of the questions certified to the Court by the legislature was whether a law providing for municipal immunity violated article 14. The court explained that since *Carson*, it never had occasion to determine whether a law violates article 14 directly, but went on to state "because the right to recover for one's injuries is an important substantive right, the middle-tier 'substantial relation' test should be used to judge both direct and indirect violations of that right." *Opinion of the Justices*, 134 N.H. at 274 (citations omitted).

receipt of this benefit "on the exaction of a price." *See Blackburn v. Snow*, 771 F.2d 556, 568 (1st Cir. 1985). While it is true that Plaintiffs may retain their tort claim, direct access prior to judgment to an insured's insurance proceeds is a substantial benefit. It may permit recovery where the insured is insolvent; it provides a far less costly method to recover; it may also provide a faster way to recover for Plaintiffs' injuries. Plaintiffs would like to participate in the claims process, but simply cannot do so unless they are willing to irrevocably waive their common law causes of action — a valuable constitutional right. RSA 402-C:40, I, is unconstitutional because the benefit is available only to those who are willing to give up their common law cause of action to participate in the claims process.

The State has argued 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." Defendant's Opposition to Plaintiffs' Request for Temporary Injunctive Relief at 15. Simultaneously, the State argues that RSA 402-C:40, I, does not violate the doctrine of unconstitutional conditions because it "does not confer a 'governmental benefit'" within the definition of Professor Sullivan's leading law review article on the doctrine. *Id.* at 23. Yet as Professor Sullivan describes governmental benefits, "this category includes most government benefits, as the Court has taken a broad view of permissible redistribution and a narrow view of affirmative obligations. It excludes only that handful of government benefits that are independently forbidden or compelled." Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. at 1422. The State ignores this expansive definition of governmental benefits, and instead relies on mere examples of governmental benefits cited by the professor, such as exemptions from regulation or taxation, or subsidies or other governmental largesse in concluding that the proof of claim process is not a governmental benefit contemplated by the doctrine of unconstitutional conditions. Limiting "governmental benefits" to such a narrow class

would not encompass those "benefits" contemplated by the First Circuit when applying the doctrine of unconstitutional conditions. *See Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 46 (1st Cir. 2002) (holding that a Massachusetts law requiring tobacco companies to disclose their ingredients subjected them to an unconstitutional condition); *Clifton v. Federal Election Comm'n*, 114 F.3d 1309, 1315 (1st Cir. 1997) (doctrine of unconstitutional conditions applied to situation where an FEC rule required a surrender of rights in order to publish political information in voter guides); *Blackburn v. Snow*, 771 F.2d 556, 568 (1st Cir. 1985) (doctrine of unconstitutional conditions applied to a situation where a sheriff conditioned access to visit a prisoner on a person's consent to a strip search). Based on these examples, providing a method of direct recovery against an insurance company is a benefit contemplated by the doctrine of unconstitutional conditions. Conditioning the receipt of such a benefit on a waiver of constitutional rights is impermissible under the doctrine of unconstitutional conditions.

C. Receipt of the Benefit of the Statute and the Relinquishment of Plaintiffs' Common Law Causes of Action are Not Sufficiently Related to Each Other so as to be Constitutional.

The standard employed by the Supreme Court when considering whether state action violates the doctrine of unconstitutional conditions is whether there is an "essential nexus" between the "legitimate state interest" and the condition imposed. *Dolan*, 512 U.S. at 386. If there is a nexus, the second prong of the analysis is whether the exaction(s) demanded bears the required relationship to the conditions imposed. *Id*. at 389-91 (discussing differing state court standards for the adequacy of the relationship).[5]

The State of course argued requiring third party claimants release the tortfeasor and filing a claim with the liquidator are sufficiently related. Plaintiffs first point out that New Hampshire is

one of only five states with a Special Provision for Third Party Claims forcing such a choice.[6] The fact that forty-five other states are able to administer insurance liquidations without such a provision alone strongly undercuts any purported justification — the important state interest — this State may have for requiring the condition.[7] Allowing third parties to file claims without simultaneously requiring them to relinquish their constitutionally protected rights would do little or nothing to disrupt the liquidation proceedings. On the other hand, allowing the State to enforce the release provision allows it to condition a substantial benefit on the relinquishment of an important constitutional right in violation of the doctrine of unconstitutional conditions. The release requirement is not only unnecessary to the administration of the liquidation, it does not even achieve its purported legislative goals. Moreover, since RSA 402-C:40, I, fails to fairly and substantially relate the condition that third parties release insureds in exchange for the benefit of

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[5]The "essential nexus" standard resembles the "reasonable nexus" standard used by New Hampshire Supreme Court in of *Trovato v. DeVeau*, 143 N.H. 523, 526 (1999) citing *City of Dover v. Imperial Casualty & Indemnity Co.*, 133 N.H. 109, 120 (1990).

[6] The vast majority of other states have Special Provisions for Third Party Claims allowing third parties to file claims with the liquidator without giving up their common law cause of action against the insured. *See e.g.*, CONN. GEN. STAT. § 38a-940. ("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 on or before the last day for filing claims."); VT. STAT. ANN. tit. 8, § 7077 (1991) ("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.").

[7] Florida is one of the five states requiring third parties to release claims against insureds. Defendant's Opposition to Plaintiffs' Request for Temporary Injunctive Relief at n.5. Florida's provision was challenged under Article I, Section 21 of the Florida Constitution in *Ramos v. Jackson*, 510 So.2d 1241 (Fla. Dist. Ct. App. 1987) and upheld. Unfortunately, the one paragraph opinion by the intermediate appellate court does not address whether the doctrine of unconstitutional conditions was raised, nor the level of scrutiny the court found appropriate to apply. It is certainly plausible that in the Florida case, the court applied a vastly more lenient level of scrutiny than the fair and substantial relationship test. Regardless of what the rationale underlying the cursory opinion may have been, the posture of the present case is rather dissimilar. Plaintiffs here have not made a "choice" as to whether to file a claim or pursue the tort action. Plaintiffs here lacked adequate information to make such a choice at the time of the claim-filing deadline, and instead brought the instant suit to establish that the choice itself is unconstitutional. *See Blackburn*, 771 F.2d at 568 ("Nor is it any answer to say that Blackburn could have left at any time, or declined to return after the first strip search, for it is the *very choice to which she was put* that is constitutionally intolerable.") (emphasis supplied).

filing a claim to the object of the legislation, it is unconstitutional for the reasons set forth in Section II.B below.

II. RSA 402-C:40, I, VIOLATES PLAINTIFFS' EQUAL PROTECTION RIGHTS GUARANTEED BY PART 1, ARTICLES 2, 12, AND 14 OF THE NEW HAMPSHIRE CONSTITUTION.

Part 1, article 14 of the New Hampshire Constitution is considered an equal protection clause by the New Hampshire Supreme Court. *See Opinion of the Justices (Limitations on Civil Actions)*, 137 N.H. 260, 266, 268 (1993). Article 14 makes "civil remedies readily available" and its purpose is "to guard against arbitrary and discriminatory infringements on access to the courts." *City of Dover v. Imperial Casualty & Indemnity Co.*, 133 N.H. 109, 116 (1990) quoting *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 665 (1979). The New Hampshire Supreme Court elsewhere has explained that under Article 14, "all citizens have a right to the redress of their actionable injuries. These principles required that the substantive rights of plaintiffs to maintain actions in tort be accorded solicitous protection." *Gould v. Concord Hospital*, 126 N.H. 405, 409 (1985).

RSA 402-C:40, I, violates Part I, articles 2, 12 and 14 of the constitution because it violates the equal protection rights of third party claimants by treating them differently from similarly situated tort plaintiffs. *See Brannigan v. Usitalo*, 134 N.H. at 52-6. Equal protection under the New Hampshire Constitution is not limited to suspect classes as under the United States Constitution. *Carson*, 120 N.H. at 932-33. In order for RSA 402-C:40, I, to be constitutional, this court must find it to be reasonable, not arbitrary, and resting on some ground of difference having a fair and substantial relation to the object of the legislation. Consistent with the analyses of the New Hampshire Supreme Court in applying the "fair and substantial relationship" test in cases such as *Carson, City of Dover,* and *Gould,* RSA 402-C:40, I, violates Plaintiffs' equal protection rights.

A. RSA 402-C:40, I, Treats Similarly Situated Persons Differently, Violating Plaintiffs' Equal Protection Rights.

The operation of RSA 402-C:40, I, violates Plaintiffs' equal protection rights because only those persons with claims against a company insured by Home are forced to make a decision as to whether to give up their common law cause of action in exchange for filing a proof of claim. Other persons with claims against insured or uninsured companies need not make such an election. Moreover, the statute creates a distinction between Home Claimants, who give up their common law cause of action, and those who do not sign the release. Persons realizing claims against Home insureds after the deadline cannot participate in the claims process, even if they are willing to give up their tort claims.

"The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently." *Opinion of the Justices (Limitations on Civil Actions)*, 137 N.H. at 266 quoting *Appeal of Marmac*, 130 N.H. 53, 58 (1987). *In Opinion of the Justices (Limitations on Civil Actions)*, the New Hampshire Supreme Court considered a bill mandating that defendants of sexual assault cases stay any civil actions against the victim of the alleged crime if the action revolved around statements or reports made by the victim pertaining to the sexual assault. The Court explained, "The bill thereby divides the class of plaintiffs with civil actions into those plaintiffs who are also defendants accused of sexual assault and those plaintiffs who are not also defendants.... In this manner the bill treats similarly situated plaintiffs differently." *Id.* at 266. RSA 402-C:40, I, singles out tort victims with claims against companies insured by Home from all other tort victims. Unlike the situation in *Opinion of the Justices*, however, third party claimants are

not merely forced to stay their civil actions — they lose them entirely.[8] *Accord City of Dover*, 133 N.H. at 120 (municipal liability statute created "a category of plaintiffs who are disenfranchised from their right to a remedy simply because the defendant is a municipality.").

B. RSA 402-C:40, I, Fails the Fair and Substantial Relationship Test.

1. RSA 402-C:40, I, Is Not Reasonable Because it is Not Substantially Related to the Administration of the Liquidation.

The NAIC model act and forty-five other states do not require third parties to release insured companies in exchange for the benefit of filing a claim with the Liquidator. In this context, conditioning the ability to participate in the claims process on the willingness to give up a constitutional right is not reasonable. The State did not rely on any findings or commentary by the New Hampshire Legislature to support the legislative intent of the provision in its opposition to the preliminary injunction. Instead, the State relies on the legislative history of the Wisconsin Act upon which New Hampshire's Insurers Liquidation and Rehabilitation Act was based.[9] *See* 1967 Wis. Laws c. 89, § 17. According to the Wisconsin legislature, the third party provision accomplishes two goals: 1) it encourages the quick termination of the liquidation, and 2) it protects the policyholder by to the extent "the innocent third party must relinquish his right against the insured in order to claim in the liquidation." 1967 Wis. Laws c. 89, § 17, comment to Wis. Stat. § 645.64(1). While there is little New Hampshire legislative history regarding RSA 402-C, Senator Manson explained in a committee report concerning RSA 402C that the five companion bills being considered were "designated to provide additional safeguards for New Hampshire people." *N.H.S. Jour.* 934 (1969). There is no evidence

[8] The State argues the release is both conditional and limited. As applied to Plaintiffs in this case, however, the release acts as a irrevocable waiver of a constitutionally protected right. Once the election is made, the third party can do nothing to regain his or her common law cause of action.

[9] The state did not cite any authority for the proposition that the New Hampshire Legislature meant to adopt the Wisconsin Legislature's intent when RSA 402-C was enacted by 1969 N.H. Laws 272:1. The State provided no authority for what, if any, rationale New Hampshire relied on in enacting the release requirement in the Special Provisions for Third Party Claims, nor has the State provided any reason to

whatsoever New Hampshire intended to protect policy holders in the way the Wisconsin Legislature attempted to do with their release provision, nor is there any evidence the New Hampshire legislature included the release provision to expedite the liquidation.

The Wisconsin legislature stated:

> 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 (emphasis added). There are several problems with this stated rationale. While the Wisconsin Legislature recognized the harshness of the release requirement, it justified the release requirement on the theory that a third party has time to assess whether the insured is financially able to pay a judgment rendered before it forces the third party to "take his chances in the liquidation." *Id.* First, it is not true since it ignores the reality of litigation. The discovery of a defendant's financial viability is not usually permitted, especially in cases where there is no claim for punitive damages. *See e.g., Sawyer v. Boufford*, 113 N.H. 627 (1973). Second, there is absolutely no assurance that what little information whiich may be made available to a claimant in litigation will be "timely" as a rule to justify a blanket waiver of all claims. Finally, the third party has no ability whatsoever to assess whether third party claims will be paid ten cents on the dollar, two cents on the dollar, or whether there will be any money whatsoever left over in the *liquidation proceedings* to pay any third party claims. Without that information, third parties cannot make a rational, knowing and intelligent election between filing a claim and pursuing expensive litigation.

The Wisconsin legislature explained "[i]t 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

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presume New Hampshire meant to adopt Wisconsin's legislative intent. Without any proof as to its

possible to settle the matter expeditiously, efficiently and equitably." 1967 Wis. Laws c. 89, § 17, comment to Wis. Stat. § 645.64(1) (emphasis added). This is simply not true, as evidenced by the NAIC model act and the forty-five other states not requiring third parties to sign such a release. Another problem with the rationale is that the Wisconsin legislature deemed it "fair" to force a third party to make the election because doing so is "a reasonable allocation to him of part of the total burden imposed by an insolvency." 1967 Wis. Laws c. 89, § 17, comment to Wis. Stat. § 645.64(2). This legislative finding, however, does not comport with New Hampshire case law. *See Gould*, 126 N.H. at 409.

a. Efficiency Does Not Justify an Infringement of the Third Parties' Constitutional Rights.

The goal of administrative efficiency in the liquidation of the estate is insufficient to justify the third party release provision. When the *Gould* court determined a statute of limitations governing plaintiffs in survival actions violated equal protection, it found the state's rationale of administrative efficiency inadequate. In two previous cases, *Herbert v. Herbert*, 120 N.H. 369 (1980) and *Burke v. Fireman's Fund Ins. Co.*, 120 N.H. 365 (1980), the court had upheld the statute because "[a]t the time those cases were decided, the operative constitutional standard was the rational basis test, not the middle tier analysis of *Carson*." *Gould*, 126 N.H. at 409. Under the *Carson* test, however, the court concluded:

> [T]he State's interest in the prompt administration of estates is not sufficiently important to justify discrimination against plaintiffs in survival actions, relative to plaintiffs in other tort actions. By establishing a short limitations period for survival actions, the State facilitates more seasonable distribution of estates and thereby helps prevent overcrowding of the dockets of the probate courts. Although these are entirely reasonable goals, we find that the substantive rights of survival plaintiffs merit greater deference.

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legislative purpose, it is unclear RSA 402-C:40, I, could even survive a deferential rational basis review.

126 N.H. at 409. RSA 402-C:40, I, shows no deference to the substantive rights of third party claimants because it unreasonably forces them to relinquish an important substantive right for the allegedly reasonable goal of an expeditious litigation proceeding. Even if there were evidence that New Hampshire's legislature relied on the Wisconsin legislature's stated goal of encouraging the quick termination of the liquidation to justify RSA 402-C:40, I, that would not save the statute because this goal violates the third parties' substantive rights as set forth in *Gould*.

b. The Constitutional Rights of Injured Victims Outweigh the Goal of Insulating Policy Holders from Liability.

Under the *Carson* analysis, the constitutional protection afforded by article 14 of the constitution "depends upon whether the restriction of private rights sought to be imposed is not so serious that it outweighs the benefits sought to be conferred on the general public." *Gould v. Concord Hospital*, 126 N.H. at 409 (1985) (citations omitted). Although it is unclear what the New Hampshire legislature was attempting to accomplish, the Wisconsin legislature stated that it intended to balance the rights of a tortfeasor to have the protection afforded by its insurance company against the constitutionally protected right of innocent third parties to recover for their injuries. Again, under the New Hampshire Constitution, distributing the burden of the carrier's liquidation in this way loses sight of the principle that "[t]he law of torts is premised on the policy that a person who unreasonably interferes with the interests of another should be liable for the resulting injury." *Id.* (citation omitted). As between a tortfeasor and an innocent third party, the expectation of insurance coverage is simply inadequate to justify the burden of a release. This is especially true where the release serves to actually dissuade claimants from filing claims, instead opting to pursue their tort claims.[10] The constitutional rights of third party claimants deserve far

[10] A judgment against even an insolvent insured could be worth more to a third party than a claim in the liquidation if there are no assets left in the liquidated estate to distribute to third party claimants. The harshness of the release coupled with the lack of availability of information upon which to base a choice

greater deference under the New Hampshire Constitution than the expectation of policyholders to have a defense provided by their insurers.

2. RSA 402-C:40, I, Is Arbitrary Because it Is Not Substantially Related to the Administration of the Liquidation.

The most critical problem with the Wisconsin Legislature's rationale is that although the NAIC used it as a model when it drafted the model act, **the NAIC did not include the requirement that third parties release insureds in order to file claims in the liquidation proceedings**. *See NAIC Model Laws, Regulations and Guidelines,* 555-1 & 555-62. Thus, even were the Wisconsin Legislature's stated goals of the third party release provision entitled to great deference -- which it is not under the *Carson* intermediate scrutiny test -- the State cannot overcome the arbitrary nature of the release requirement. Being in no way essential to the administration of the liquidation, the release provision is no more than an arbitrary and needlessly discriminatory infringement on third party claimants' constitutional rights.

3. RSA 402-C:40, I, Has No Fair and Substantial Relation to the Object of the Legislation.

The requirement that the limitation on a right to a remedy have a fair and substantial relation to the object of the legislation requires more than rational basis scrutiny. "If a court were to defer to a legislature's findings that a statute bore a 'fair and substantial relation' to the object of the legislation, it would be abdicating its judicial role." *Brannigan v. Usitalo*, 134 N.H. at 57. In *Gould*, as discussed in the proceeding section, the court found under the "fair and substantial relation" test that the plaintiffs' substantive constitutional rights trumped the State's interest "in the prompt administration of estates." 126 N.H. at 409. In this case, the Defendant has asserted that the

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actually deters rather than entices third parties into filing claims with the liquidator, which is quite contrary to the ostensible goal of expediting the administration of the liquidation. Under RSA 402-C:40, III, the ultimate distribution is still dependent on the outcome of litigation between third parties who do not file and insured tortfeasors who have filed insured's claims.

principle object of the legislation is the prompt administration of the insurance estate in liquidation. The substantive constitutional rights of Plaintiffs necessitate the same solicitous protection, and RSA 402-C:40, I, should be deemed to violate equal protection for the same reason RSA 556:11 was found to violate plaintiffs' equal protection rights in *Gould*.

In *City of Dover*, likewise, the court balanced the need to protect municipalities form tort liability with an injured party's right to a civil remedy, and determined the statute at issue, RSA 507-B:2, violated plaintiffs' equal protection rights. 133 N.H. at 117-120. The court found a purpose of the legislation — that it is "unworkable" to hold municipalities to an ordinary negligence standard — to be "legitimate." *Id.* at 118. Nevertheless, applying the "fair and substantial relationship" test, the court held the statute denied plaintiffs equal protection because it closed the courthouse doors to them "simply because the defendant is a municipality." *Id.* at 120. In the present case, third party claimants are forced into releasing their claims in order to participate in the claims process simply because the tortfeasor was insured by Home. The goal of protecting the policyholder in the liquidation proceeding is surely no greater than the goal of protecting municipalities from tort liability.

In *Brannigan*, the court revisited the question addressed in *Carson* of whether a cap on non-economic damages violated equal protection, but the cap at issue in *Brannigan* applied to all tort claimants rather than only medical malpractice victims. Relying on *stare decisis* established by a unanimous court in *Carson*, the *Brannigan* court declared RSA 508:4-d unconstitutional. 134 N.H. at 52. The *Brannigan* court looked to *Carson,* the first case to have applied the "fair and substantial relationship" test to statutes said to violate article 14 of the New Hampshire Constitution (RSA 507-C:3-C:10). The statutes at issue in *Carson* set forth rigorous standards for expert testimony, created a special two-year statute of limitations, required notice of intent to sue, prohibited the statement of the total damages claimed, abolished the collateral source rule, limited

non-economic damages to $250,000, and established a contingent fee scale for attorneys in medical malpractice actions. 120 N.H. at 930. The goal of these statues was to "contain the costs of the medical injury reparations system." *Id.* Plaintiffs contended that "restricting the means by which they may sue" violated their equal protection rights, and the court agreed. *Id.* at 931.

Carson highlights the constitutional deficiency in RSA 402-C:40, I, because under the statutes at issue in *Carson*, plaintiffs at least maintained the right to sue. For instance, RSA 507-C:5 required a plaintiff to file a notice of claim before commencing suit. The court found that this requirement did not "substantially relate to any legitimate legislative objective" because "the effect of this notice requirement is to unjustly hinder the prosecution of many claims." *Id.* at 937-38. Just as the notice requirement at issue in *Carson* violated plaintiffs' equal protection rights, the choice of relinquishing the right to sue under RSA 402-C:40, I, violates third party claimant's equal protection rights. In *Carson*, at least the plaintiffs were able to re-file their lawsuits if they failed to follow the notice requirement. Under RSA 402-C:40, I third party claimants irrevocably release their claims against the insured in exchange for participating in the claims process, but this requirement bears no more fair or substantial a relationship to the object of the legislation than those statutes struck down in *Carson*.

In the more recent case of *Trovato v. DeVeau*, 143 N.H. 523 (1999), the New Hampshire Supreme Court found RSA 556:13 unconstitutional because the distinction between decedents whose death was causally related to the injury -- and those whose deaths were unrelated — was arbitrary and lacked any fair and substantial relation to the object of the legislation. As demonstrated in Part I and II, RSA 402-C:40, I, unconstitutionally conditions a third party's ability to participate in a substantial benefit offered by the state upon that person's relinquishment of a constitutionally protected right. In order for such a condition to be justified, the statute must pass the "fair and substantial relationship" test that it be reasonable, not arbitrary, and must rest upon

some ground of difference having a fair and substantial relation to the object of the legislation in order to satisfy State equal protection guarantees. Since RSA 402-C:40, I, fails each aspect this test, it must be declared unconstitutional.

III. RSA 402-C:40, I, VIOLATES PLAINTIFFS' DUE PROCESS RIGHTS UNDER THE NEW HAMPSHIRE CONSTITUTION.

Third party claimants should not be forced to make a decision to waive a constitutionally protected right in order to file a claim with the Liquidator. To the extent that the state may require the release at all, the state must at least allow Plaintiffs to obtain enough information to make a reasoned, intelligent and voluntary choice in order to satisfy due process under the New Hampshire Constitution.[11] Pursuant to RSA 402-C:40, I, the Liquidator is instead requiring that Plaintiffs blindly choose to file a claim or pursue their common law cause of action without any basis upon which to make a decision.[12] At a minimum, due process requires the right to a hearing before requiring such a release be made. *See Bragg v. N.H. Dept. Motor Vehicles*, 141 N.H. 677,

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[11] The "due process" clause of Part 1, article 15 of the Constitution generally involves the rights of a person accused of a crime, or being penalized in some way. *See Bragg v. N.H. Dept. Motor Vehicles*, 141 N.H. 677, 678 (1997) (involving the suspension of a driver's license); *Opinion of the Justices (Limitations on Civil Actions)*, 137 N.H. 260 (1993) (analyzing a mandatory stay on civil actions by defendants in sexual assault cases under both articles 14 and 15 of the New Hampshire Constitution). The New Hampshire Supreme Court has also analyzed procedural concerns such as the right to a pre-taking hearing under the equal protection provisions of the state constitution. *See Gazzola v. Clements*, 120 N.H. 25 (1980). In *Gazzola*, the court considered the lack of a hearing prior to a violation of articles 1, 10, 12 and 14 of the New Hampshire Constitution, finding an equal protection violation where the plaintiffs were denied a hearing because their land was sought for park purposes rather than highway purposes. Plaintiffs here challenge RSA 402-C:40, I, on procedural due process grounds as well as equal protection grounds, because the choice third parties are put to if they wish to file a claim in the liquidation acts as a penalty.

[12] The disclosure of assets filed with the court in the liquidation proceedings pursuant to RSA 402-C:29, I, does not provide third party claimants an opportunity to make a voluntary, knowing and intelligent choice between filing a claim and pursuing their claim against the insured. Before the State should be permitted to force the choice to release the insured for the benefit of filing a claim, information enabling plaintiffs to estimate what value, if any, will be paid on the claim must be made available. The total assets of the insurer obviously depends on the administration costs and the total amount of allowed claims in the second priority under RSA 402-C:44, *see* Stipulation of Facts at ¶ 12, and may be hard to predict. If no estimation can be made, rather than allowing the State to force persons to release their constitutionally protected right to sue blindly, the State should prohibited from forcing the decision.

678 (1997). This hearing must take place *prior* to waiving the common law right to sue in order to protect Plaintiffs' due process rights.

The State has thus far attempted to dismiss the substantial procedural due process concerns in this case by conclusorily stating, "[t]here can also be no procedural due process challenge to a statute, because the legislative determination provides all the process that is due." Defendants' Opposition to Plaintiffs' Request for Temporary Injunctive Relief at n.8 citing *Atkins v. Parker*, 472 U.S. 115, 130 (1985) and *Kerouac v. Town of Hollis*, 139 N.H. 554, 560 (1995). Normally the legislative process does provide due process, by virtue of the fact that a legislature will generally act reasonably when affecting a large number of people.[13] In this case, however, under the statute, third party claimants are being *forced* to release the insured party and give up a valuable property right; therefore, the analysis under article 15 employed by the court in *Opinion of the Justices (Limitation on Civil Actions)* applies. Here, the coercive nature of the choice third parties must make necessitates the same due process safeguards they would be entitled to if the decision were being made in an administrative or adjudicative proceeding. For example, in *Opinion of the Justices (Limitations on Civil Actions)*, the court found no due process concern because the infringement on the plaintiff's access to the courts created by the bill was only temporary. 137 N.H. at 268. In this case, however, once the third party makes the decision to file a proof of claim the release is irrevocable by the third party.

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[13] The Supreme Court has long recognized an implicit difference between legislative conduct and conduct that is administrative or adjudicative for the purposes of procedural due process claims. *L.C. & S., Inc. v. Warren Co. Area Planning Comm'n*, 244 F.3d 601, 606 (7th Cir. 2001) (Judge Cudahy, concurring) citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). Plaintiffs object to RSA 402-C:40, I, as presenting case where although there is no official adjudicative or administrative proceeding, third parties wishing to file claims are effectively being penalized by being given that "choice" to make for themselves. "[T]he character of the action, rather than its label, determines whether those affected by it are entitled to constitutional due process." *Id.* at 606.

The other material difference between the statute at issue in *Opinion of the Justices (Limitations on Civil Actions)* and RSA 402-C:40, I, is that in this case plaintiffs can *choose* not to file a proof of claim. This does not make the scheme constitutional, however, because when plaintiffs choose not to file they cannot participate in the benefit. Arbitrary refusals to allow individuals access to established state courts are invalid under the most minimal due process standards. *See Logan v. Zimmerman Brush Co,* 455 U.S. 422 (1982) (post-termination tort action does not provide due process where a state system destroys a complainant's property interest). In the event this Court finds nothing objectionable with the State's unconstitutional conditioning of a benefit on the relinquishment of a protected right, at the very least it must be recognized that the State cannot force this choice to be made in the absence of any procedural due process safeguards ensuring a knowing, voluntary and intelligent release.[14]

A. Third Party Claimants Have a Legally Protected Right to Recover From Insured Tortfeasors.

New Hampshire courts employ a two-part analysis in considering due process claims. *Bragg*, 141 N.H. at 678. First, courts will ascertain whether a legally protected right has been implicated. *Id.*; *Logan,* 455 U.S. at 428. If so, the second prong of the analysis is to determine whether the procedures provided to the plaintiff afforded her the appropriate safeguards. "The fundamental requisite of due process is the right to be heard at a meaningful time and in a meaningful manner." *Appeal of Portsmouth Trust Co.,* 120 N.H. 753, 756 (1980).

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[14] It may be possible for the State to require third party claimants to release insured tortfeasors under certain circumstances. For instance, if the "release" acted as a mandatory stay like the stay in civil litigation at issue in *Opinion of the Justices (Limitations on Civil Actions)*, 137 N.H. at 267, then it might or might not satisfy due process under the court's analysis in that opinion. Likewise, if the state provided third party claimants with a hearing or provided some other disclosure of Home's assets and liabilities such that third parties could assess the likelihood of recovery from the claims process before being forced to make the decision of whether to file a claim or pursue litigation, that may or may not satisfy procedural due process. Putting third parties to the choice in the absence of any such procedural guarantees, however, does not meet minimum standards for due process identified in *Opinion of the Justices (Limitations on Civil Actions)*.

The Supreme Court long ago stated, "a vested right of action is property in the same sense in which tangible things are property, and is equally protected from arbitrary interference." *Pritchard v. Norton*, 106 U.S. 124, 132, 1 S.Ct. 102, 107 (1882). The Supreme Court recognized elsewhere, "[t]he right to sue and defend in the courts is... one of the highest and most essential privileges of citizenship...." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 149 (1907). *Carson* and the line of cases following it have established that the right to court access is an important legally protected substantive right deserving more than rational basis scrutiny. Thus, the first prong of the analysis is satisfied.

B. The Notice Provided to Third Party Claimants is Insufficient, Standing Alone, to Ensure Due Process.

The only remaining question in the due process analysis is whether RSA 402-C:40, I, provides adequate safeguards to ensure the constitutionally protected substantive right is protected. On its face and as applied, RSA 402-C:40, I, provides no such safeguards. The State argues that the statute satisfies due process because the state has provided notice of the liquidation to Plaintiffs and the release is conditional and limited. As applied to third parties with claims or potential claims in the Home liquidation, however, these safeguards are inadequate to satisfy due process concerns. Without requiring more information to be made available prior to the deadline for having to choose between filing a claim or retaining the common law cause of action, RSA 402-C:40, I, does not protect a third party's constitutional rights to procedural due process because the State's notice does not allow an intelligent waiver of the right. While a claimant is likely not to receive the full value of his or her claim in the liquidation, a third party has no guarantee of any recovery whatsoever if he or she chooses to file a claim with the liquidator. As applied to Plaintiffs, the release is neither conditional nor limited because Plaintiffs themselves

have no control over the outcome once they make the election to waive their constitutionally protected right in order to obtain the benefit of filing a claim.

CONCLUSION

The third party release provision at issue in this case is not only harsh and unfair; it is unconstitutional. The state may not condition the benefit of the claims process on a claimant's willingness to relinquish a constitutional right where the release provision does not bear a fair and substantial relation to the proposed object of the legislation. For the above reasons, Plaintiffs respectfully move this court to grant their motion for summary judgment.

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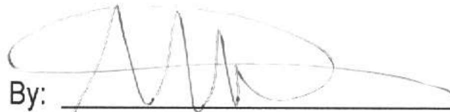
CONCLUSION

The third party release provision at issue in this case is not only harsh and unfair; it is unconstitutional. The state may not condition the benefit of the claims process on a claimant's willingness to relinquish a constitutional right where the release provision does not bear a fair and substantial relation to the proposed object of the legislation. For the above reasons, Plaintiffs respectfully move this court to grant their motion for summary judgment.

Dated: October 14, 2004

Respectfully submitted,
Venice Theresa Gonya and
Roxanne S. Scaife, Plaintiffs
By their attorneys
WATSON & LEMIRE, P.A.

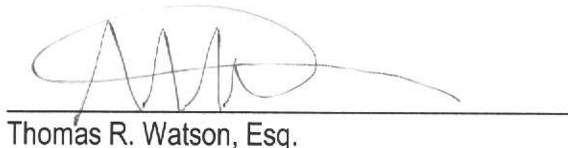


By: ______________________________

Thomas R. Watson, Esq. NH Bar #2670
Jennifer A. Lemire, Esq. NH Bar #11316
75 Congress Street, Suite 211
Portsmouth, NH 03801
Telephone: (603) 436-7667

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintifs' Cross-Motion for Summary Judgment was on this date mailed, postage prepaid to Attorney Suzanne M. Gorman, New Hampshire Attorney General's Office, 33 Capital Street, Concord, NH 03301-6397.



Dated: October 14, 2004

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Thomas R. Watson, Esq.