

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 MOTION FOR SUMMARY JUDGMENT

NOW COMES Roger A. Sevigny, in his official capacity as Commissioner of Insurance ("Commissioner") and Liquidator ("Liquidator") of The Home Insurance Company ("Home"), and moves for summary judgment on all claims and states as follows.

1. 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.

2. 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.

3. Facts material to the determination of the Liquidator's Motion for Summary Judgment are a matter of record with the Court. The parties filed a joint Stipulation of Facts. In addition, the Liquidator previously filed an affidavit and exhibits in support of its Opposition to Plaintiffs' Request for Temporary Injunctive Relief. Those documents are incorporated herein by reference.

4. A legislative act is presumed constitutional and the Court will not declare it invalid except on unescapable grounds. Plaintiffs do not make out such a case here.

5. 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), do not violate the equal protection, court access, and due process provisions of the New Hampshire Constitution. Nor do these provisions contravene the so-called doctrine of unconstitutional conditions.

6. RSA 402-C:40, I does several things. It authorizes persons with claims against insureds of an insurer in liquidation (third party claimants) to file their claims with the liquidator. It also 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.

7. 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.

8. This statute does not contravene Part I, article 14 of the New Hampshire Constitution. Article 14 is not applicable 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. 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.

9. 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). Unless they so choose, the statute will have no effect on their tort claim. Even after filing a claim, the claimant may maintain an action against the tortfeasor for amounts in excess of the applicable policy limits. The statute does not impose any restriction.

10. 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.

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

12. 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.

13. The provision of the new right of direct action with a limited conditional release 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.

14. 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. 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.

15. 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.

16. Plaintiffs have not demonstrated that similarly situated persons are being treated differently.

17. The applicable standard here is rational basis review because the statute neither involves any suspect class nor implicates fundamental or important substantial rights. 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.

18. The statutory classifications satisfy rational basis review for the same reasons it satisfies the fair and substantial relation test. If the statute were subject to intermediate scrutiny under an equal protection analysis, for the reasons set forth above, the statute satisfies this test as well.

19. The so-called doctrine of unconstitutional conditions 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. 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.

20. 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.

21. For all of these reasons and other 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.

22. A more detailed Memorandum of Law is filed along with this Motion and incorporated herein by reference.

WHEREFORE, Roger A. Sevigny, in his official capacity as Commissioner of Insurance and Liquidator of The Home Insurance Company respectfully requests that this Court:

- A. Grant the Commissioner's Motion for Summary Judgment on all counts;
- and
- B. Grant such other relief as justice may require.

Respectfully submitted,


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

By his attorneys,

KELLY A. AYOTTE
ATTORNEY GENERAL

Date: 10/15/04



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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.



Suzanne M. Gorman