

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

2004 JUN 11
SUPERIOR COURT
Docket No. P 1: 34

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
and

PETER W. HEED, Attorney General of New Hampshire, in his official capacity

**PETITION IN EQUITY FOR PERMANENT
AND TEMPORARY INJUNCTIVE RELIEF**

NOW COME the Plaintiffs, Venise Theresa Gonya of Somersworth, New
Hampshire, as representative of the Estate of Joseph E. Gonya, deceased, individually
and on behalf of all others similarly situated, and Roxane S. Scaife of Amherst, New
Hampshire, as representative of the Estate of Arnold L. Stone, deceased, individually and
on behalf of all others similarly situated, by and through their attorneys, Watson &
Lemire, P.A. and Baron & Budd, P.C., and complain against 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,
and Peter W. Heed, Attorney General of New Hampshire, and say:

1. Plaintiff Venise Theresa Gonya is a citizen of the United States and
resides at 28 Kelwyn Drive, Somersworth, New Hampshire 03878. She acts as
representative of the Estate of Joseph E. Gonya, deceased. Mr. Joseph E. Gonya's estate

①

has tort claims against a company or companies insured by The Home Insurance Company.

2. Plaintiff Roxane S. Scaife is a citizen of the United States and resides at 16 Old Mont Vernon Road, Amherst, New Hampshire 03031. She acts as representative of the Estate of Arnold L. Stone. Mr. Stone's estate has tort claims against a company or companies insured by the Home Insurance Company.

3. Defendant Roger A. Sevigny is the Commissioner of the State of New Hampshire Insurance Department, having an address of 56 Old Suncook Road, Concord, New Hampshire 03301-5151. The Insurance Commissioner is charged with all duties pertaining to the enforcement and execution of insurance laws of the State of New Hampshire. He is being sued in his official capacity.

4. Defendant Peter W. Heed is the Attorney General of New Hampshire. The Office of the Attorney General has an address of 33 Capitol street, Concord, New Hampshire 03301-6397. As Attorney General, Mr. Heed is the State's chief legal and law enforcement officer. He is being sued in his official capacity.

5. This action is maintainable as a class action pursuant to Rule 27-A of the New Hampshire Superior Court Rules.

6. Plaintiffs represent a class of persons consisting of the following individuals:

a. Those persons having a third party claim against The Home Insurance Company or its subsidiaries;

b. Those persons having a potential third party claim against The Home Insurance Company or its subsidiaries.

7. This class is so numerous that joinder of all members is impracticable. The size of the class is presently unknown. It consists of persons with existing or potential claims against the Home Insurance Company or its subsidiaries.

8. There is a question of law common to the entire class, namely the constitutionality of New Hampshire Revised Statutes Annotated ("RSA") 402-C:40(I).

9. Each member of the class has claims or defenses which are typical to the claims or defenses of the class.

10. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declarative relief with respect to the class as a whole. The class action form is the superior method for the fair and efficient adjudication of this controversy.

11. Plaintiffs will fairly and adequately protect the interests of the class. Plaintiffs are represented by experienced counsel who will adequately represent the interests of the class.

12. RSA 402-C:40(I), part of the Insurers Rehabilitation and Liquidation Statute, provides for third party claims against an insolvent insurance company during liquidation. When an insurance company enters into formal liquidation proceedings, RSA 402-C:40(I) requires a third party claimant to relinquish his or her common law claim against the insured as a requisite for submitting a claim against the insurance company. RSA 402-C:40(I) forces a claimant to give up a common-law cause of action without procedural safeguards or meaningful access to information. This requirement violates equal protection and due process constitutional provisions in the New Hampshire Constitution.

13. Plaintiffs have been injured by tortious acts committed by entities insured or believed to be insured by The Home Insurance Company or its subsidiaries. The Home Insurance Company is being liquidated by the State of New Hampshire Insurance Department. The Insurance Commissioner instructed those persons who have a present claim against The Home Insurance Company to submit a Proof of Claim to preserve their right of payment by June 13, 2004. This instruction also applies to persons whom it is believed may have a claim against the company now or in the future. Paragraph 14 of the Proof of Claim form notifies claimants that pursuant to RSA 402-C:40(I), they are relinquishing the right to sue companies insured by The Home Insurance Company for their tortious conduct. As the contents of The Instructions for Filing a Proof of Claim Form and Claim Form are material to the allegations set forth herein, both documents are annexed hereto as Exhibit A.

14. RSA 402-C:40(I) provides:

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.

15. Under the liquidation scheme as it currently stands, claimants must waive a constitutionally protected right in exchange for the benefit of filing a claim.

16. This action arises under the Constitution of the State of New Hampshire. Jurisdiction for a declaratory judgment is proper in this court under RSA Chapters 1:17, 491.22 and 502-A:14. Plaintiffs have filed a constitutional challenge to the statute under

the United States Constitution in the federal district court, to address federal constitutional deficiencies.

17. Venue is proper in this court under RSA Chapters 1:17 and 502-A:16. The defendants reside within the State of New Hampshire. Defendant Roger A. Seigny's principal place of business is 56 Old Suncook Road, Concord, Merrimack County, New Hampshire 03301. Defendant Peter W. Heed's principal place of business is 33 Capitol Street, Concord, Merrimack County, New Hampshire 03301.

18. All of the events that are the subject of this complaint took place within the State of New Hampshire. All or a substantial part of the claim arose within this district.

19. There is a present and actual controversy between the parties to this action. A declaration of the constitutional deficiencies of RSA 402-C:40(I) addressed in this complaint is necessary and appropriate to determine the respective rights and duties of the parties.

20. Defendants have a clear, mandatory and ministerial legal duty to comply with the equal protection and due process provisions of the state constitution. Plaintiffs will suffer irreparable harm if Defendants do not comply with constitutional mandates.

21. No administrative remedies exist under RSA 402-C:40(I) to challenge the constitutionality of the claim process itself. Plaintiffs have no adequate remedy at law other than the relief requested in this complaint.

COUNT I
Facial Violation of Equal Protection

22. Plaintiffs realleges and incorporates herein each of the allegations set forth in paragraphs 1 through 21 above.

23. RSA 402-C:40(I) violates the equal protection provisions of the New Hampshire Constitution as codified in Part One, Articles Two, Twelve and Fourteen. On its face, RSA 402-C:40(I) fails to provide any adequate mechanism to ensure equal protection.

24. At all times mentioned herein, Defendants were acting under color of state law. The application of RSA 402-C:40(I) deprives Plaintiffs and the class they represent of rights, privileges and immunities secured to them by the laws of New Hampshire, in violation of the equal protection provisions of the New Hampshire Constitution.

COUNT II
Violation of Equal Protection as Applied

25. Plaintiffs reallege and incorporate herein each of the allegations set forth in paragraphs 1 through 24 above.

26. RSA 402-C:40(I) violates the equal protection provisions of the New Hampshire Constitution as codified in Part One, Articles Two, Twelve and Fourteen as applied to Plaintiffs. The procedure established by the liquidator for persons to file claims against The Home Insurance Company violates the equal protection provisions of the New Hampshire Constitution. As applied, RSA 402-C:40(I) fails to satisfy minimum requirements to ensure equal protection.

27. At all times mentioned herein, Defendants were acting under color of state law. The application of RSA 402-C:40(I) deprives Plaintiffs and the class they represent of rights, privileges and immunities secured to them by the laws of New Hampshire, in violation of the equal protection provisions of the New Hampshire Constitution.

COUNT III

Facial Violation of New Hampshire's Court Access Guarantee

28. Plaintiffs reallege and incorporate herein each of the allegations set forth in paragraphs 1 through 27 above.

29. RSA 402-C:40(I) violates the court access provision of the New Hampshire Constitution as codified in Part One, Article 14. On its face, RSA 402-C:40(I) fails to provide any adequate mechanism to ensure access to the court as required by the constitution.

30. At all times mentioned herein, Defendants were acting under color of state law. The application of RSA 402-C:40(I) deprives Plaintiffs and the class they represent of rights, privileges and immunities secured to them by the laws of New Hampshire, in violation of the court access provision of the New Hampshire Constitution.

COUNT IV

Violation of New Hampshire's Court Access Guarantee as Applied

31. Plaintiffs reallege and incorporate herein each of the allegations set forth in paragraphs 1 through 30 above.

32. RSA 402-C:40(I) violates the court access provision of the New Hampshire Constitution as codified in Part One, Article 14. RSA 402-C:40(I) fails to provide any adequate mechanism to ensure court access as required by the constitution as applied to Plaintiffs.

33. At all times mentioned herein, Defendants were acting under color of state law. The application of RSA 402-C:40(I) deprives Plaintiffs and the class they represent of rights, privileges and immunities secured to them by the laws of New Hampshire, in violation of the court access provision of the New Hampshire Constitution.

COUNT V
Facial Violation of Due Process

34. Plaintiffs reallege and incorporate herein each of the allegations set forth in paragraphs 1 through 33 above.

35. RSA 402-C:40(I) violates the due process provision of the New Hampshire Constitution as codified in Part One, Article 15. On its face, RSA 402-C:40(I) fails to provide any adequate mechanism to ensure due process as required by the constitution.

36. At all times mentioned herein, Defendants were acting under color of state law. The application of RSA 402-C:40(I) deprives Plaintiffs and the class they represent of rights, privileges and immunities secured to them by the laws of New Hampshire, in violation of the due process provision of the New Hampshire Constitution.

COUNT VI
Violation of Due Process as Applied

37. Plaintiffs reallege and incorporate herein each of the allegations set forth in paragraphs 1 through 36 above.

38. RSA 402-C:40(I) violates the due process provision of the New Hampshire Constitution as codified in Part One, Article 15 as applied to Plaintiffs. The procedure established by the liquidator for persons to file claims against The Home Insurance Company violates the due process provisions of the New Hampshire Constitution. As applied, RSA 402-C:40(I) fails to satisfy minimum requirements to ensure due process.

39. At all times mentioned herein, Defendants were acting under color of state law. The application of RSA 402-C:40(I) deprives Plaintiffs and the class they represent

of rights, privileges and immunities secured to them by the laws of New Hampshire, in violation of the due process provisions of the New Hampshire Constitution.

COUNT VII
Violation of the Doctrine of Unconstitutional Conditions

40. Plaintiffs reallege and incorporate herein each of the allegations set forth in paragraphs 1 through 39 above.

41. RSA 402-C:40(I) violates the doctrine of unconstitutional conditions because it makes the receipt of the benefit of filing a claim against the liquidated insurance company contingent on giving up a constitutionally protected right of action against the insured.

42. At all times mentioned herein, Defendants were acting under color of state law. The application of RSA 402-C:40(I) deprives Plaintiffs and the class they represent of rights, privileges and immunities secured to them by the laws of the New Hampshire, in violation of the equal protection and due process clauses of the constitution.

WHEREFORE, Plaintiffs respectfully pray for the following relief:

A. A determination in accordance with Rule 27-A of the New Hampshire Superior Court Rules that this action may be maintained as a class action;

B. An injunction against the enforcement of the June 13, 2004 deadline for filing third party claims with the liquidator;

C. A declaration that RSA 402-C:40(I) of the Insurers Rehabilitation and Liquidation Statute is unconstitutional as written and of no force or effect;

D. A declaration that RSA 402-C:40(I) of the Insurers Rehabilitation and Liquidation Statute is unconstitutional as applied to Plaintiffs in The Home Insurance Company liquidation proceeding and of no force or effect;

- E. A jury trial on all issues so triable;
- F. Such other relief as may be just and equitable.

Dated: June 10, 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

and

By: 

Jennifer A. Lemire, Esq.
NH Bar #11316
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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, Texas 75219-4281
Telephone: (214) 525-3729

INSTRUCTIONS FOR FILING A PROOF OF CLAIM FORM

If you have a claim against The Home Insurance Company or any of its former subsidiaries* ("The Home"), or believe that you might have a claim against The Home now or in the future, or if you have a claim but the amount is presently uncertain, **you must complete and submit the attached Proof of Claim form.** Filing a Proof of Claim is the only way you can preserve your right to payment.

Claims must be submitted by the date established by the Court (the "claim filing deadline"). After the claim filing deadline, the Liquidator will review and determine the priority of each timely filed Proof of Claim. If additional information is needed to determine the amount and priority of your claim, the Liquidator will contact the claimant. The Liquidator will then determine the extent to which the claims can be paid from the assets of The Home. Under New Hampshire law, all claims in a higher priority status must be paid in full before any claims in a lower priority status may be paid. Late filed claims may be paid, but they will receive a lower priority. ***It is very important to submit your claim before the claim filing deadline. If you do not file your Proof of Claim before the claim filing deadline, your claim will likely not be paid.***

THE CLAIM FILING DEADLINE FOR CLAIMS AGAINST THE HOME IS JUNE 13, 2004.

Please complete the Proof of Claim Form in its entirety based on all available information. The enclosed Proof of Claim form can be photocopied or downloaded from the New Hampshire Insurance Department website: www.state.nh.us/insurance. If information is not available, such as the exact amount of the claim, please indicate that on the form. Claims involving multiple transactions or occurrences or policies should be submitted on a single Proof of Claim Form, and all required supporting documentation for each transaction or occurrence should be attached. Although you should submit your Proof of Claim for the full amount, please note that New Hampshire law generally requires that the first \$50 of the amount allowed on each Proof of Claim must be deducted from the claim. The Liquidator will apply this deductible when she approves a Proof of Claim.

Mail your complete Proof of Claim form, together with the required documentation, to:

The Home Insurance Company In Liquidation
P.O. Box 1720
Manchester, New Hampshire 03105-1720

Do not send the Proof of Claim to the Court.

If you have any questions about this process or about how to fill out the Proof of Claim Form, please call 1-800-347-0014 during regular business hours (Monday-Friday, 8-5).

* The Home Indemnity Company, The Home Insurance Company of Indiana, City Insurance Company, Home Lloyds Insurance Company of Texas, The Home Insurance Company of Illinois, and The Home Insurance Company of Wisconsin.

PROOF OF CLAIM
The Home Insurance Company,

Merrimack County Superior Court, State of New Hampshire 03-E-0106

Read Carefully Before Completing This Form

Please print or type

FOR LIQUIDATOR'S USE ONLY

DATE PROOF OF
CLAIM RECEIVED

The Deadline for Filing this Form is June 13, 2004.

You should file this Proof of Claim form if you have an actual or potential claim against The Home Insurance Company of any of its former subsidiaries* ("The Home") even if the amount of the claim is presently uncertain. To have your claim considered by the Liquidator, this Proof of Claim must be postmarked no later than June 13, 2004. Failure to timely return this completed form will likely result in the DENIAL OF YOUR CLAIM. You are advised to retain a copy of this completed form for your records.

1. Claimant's Name: _____
2. Claimant's Address: _____

3. Claimant's Telephone Number: (_____) _____
Fax Number: (_____) _____
Email address: _____
4. Claimant's Social Security Number, Tax ID Number or Employer ID Number: _____
5. Claim is submitted by (check one):
 - a) _____ Policyholder or former policyholder
 - b) _____ Third Party Claimant making a claim against a person insured by The Home
 - c) _____ Employee or former employee
 - d) _____ Broker or Agent
 - e) _____ General Creditor, Reinsurer, or Reinsured
 - f) _____ State or Local Government Entity
 - g) _____ Other; describe: _____

If your name, address, e-mail address, or telephone number set forth above are incorrect, or if they change, you must notify the Liquidator so she can advise you of new information.

Describe in detail the nature of your claim. You may attach a separate page if desired. **Attach relevant documentation** in support of your claim, such as copies of outstanding invoices, contracts, or other supporting documentation.

6. Indicate the total dollar amount of your claim. If the amount of your claim is unknown, write the word "unknown", BUT be sure to attach sufficient documentation to allow for determination of the claim amount.

\$_____ (if amount is unknown, write the word "unknown").

7. If you have any security backing up your claim, describe the nature and amount of such security. Attach relevant documentation.

8. If The Home has made any payments towards the amount of the claim, describe the amount of such payments and the dates paid:

9. Is there any setoff, counterclaim, or other defense which should be deducted by The Home from your claim?

10. Do you claim a priority for your claim? If so, why: _____

11. Print the name, address and telephone number of the person who has completed this form.

Name: _____

Address: _____

Phone Number (_____) _____

Email address _____

* The Home Indemnity Company, The Home Insurance Company of Indiana, City Insurance Company, Home Lloyds Insurance Company of Texas, The Home Insurance Company of Illinois, and The Home Insurance Company of Wisconsin.

12. If represented by legal counsel, please supply the following information:

- a. Name of attorney: _____
- b. Name of law firm: _____
- c. Address of law firm: _____
- d. Attorney's telephone: _____
- e. Attorney's fax number: _____
- f. Attorney's email address: _____

13. If using a judgment against The Home as the basis for this claim:

- a. Amount of judgment _____
- b. Date of judgment _____
- c. Name of case _____
- d. Name and location of court _____
- e. Court docket or index number (if any) _____

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

15. All claimants must complete the following:

I, _____ (insert individual claimant's name or name of person completing this form for a legal entity) subscribe and affirm as true, under the penalty of perjury as follows: that I have read the foregoing proof of claim and know the contents thereof, that this claim in the amount of _____ dollars (\$ _____) against The Home is justly owed, except as stated in item 9 above, and that the matters set forth in this Proof of Claim are true to the best of my knowledge and belief. I also certify that no part of this claim has been sold or assigned to a third party.

Claimant's signature

Date

Any person who knowingly files a statement of claim containing any false or misleading information is subject to criminal and civil penalties.

16. Send this completed Proof of Claim Form, postmarked by **June 13, 2004**, to:

The Home Insurance Company in Liquidation
P.O. Box 1720
Manchester, New Hampshire 03105-1720

You should complete and send this form if you believe you have an actual or potential claim against The Home even if the amount of the claim is presently uncertain.

NOTICE

Pursuant to Laws 2002, Chapter 264 and Supreme Court Order of June 10, 2002 each party to any noncriminal case filed on or after July 1, 2002 in Merrimack County Superior Court may request that one Justice or, in Domestic Relations cases, one Marital Master, not be assigned to the case. Any such request must be submitted in writing and signed by the party or the party's attorney. The request must be filed with the court no later than 30 days after the return date or 3 business days before the first hearing, whichever occurs first.

The following Justices and Marital Masters are currently assigned to Merrimack County Superior Court:

Associate Justice Kathleen A. McGuire
Associate Justice Eduard J. Fitzgerald, III
Associate Justice Timothy J. Vaughan
Associate Justice Steven M. Houran
Marital Master Deborah K. Rein
Marital Master Michael H. Garner

Other Justices who are routinely assigned from time to time include:

Retired Senior Justice George L. Manias
Chief Justice Walter L. Murphy

Nothing herein should be construed as limiting the assignment of other Superior Court Justices and Marital Masters as circumstances warrant. A complete list of Justices and Masters can be obtained from their office of the Clerk of Court.

William S. McGraw, Clerk of Court

March 28, 2003

THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court
163 N. Main Street
P. O. Box 2880
Concord, NH 03301 2880
603 225-5501

ORDER OF NOTICE

Venise Theresa Gonya as representative v. Roger A. Sevigny, Commsr of Insurance
of the Estate of Joseph E. Gonya Peter W. Heed, Attorney General of NH
Roxane Scaife as representative
of the Estate of Arnold L. Stone

NO. 04-E-0208

RETURN DAY: 08/03/2004

You have been sued and named as a party in a case filed with the Merrimack County Superior Court. Attached is a copy of the pleading which began this case.

Venise Theresa Gonya as representative, of the Estate of Joseph E. Gonya, Roxane Scaife as representative, of the Estate of Arnold L. Stone shall notify each Defendant of the above action by serving the defendant(s) immediately with a copy of the pleading initiating the case, orders that the Court has already issued, and this Order in a manner allowed by law. Plaintiff shall file with the Clerk verification of the service process by August 03, 2004.

IMPORTANT NOTICE TO Roger A. Sevigny, Commsr of Insurance, Peter W. Heed, Attorney General of NH:

You must file a written appearance form with the Clerk on or before August 03, 2004. You must also file by September 02, 2004 a plea, answer or demurrer. Send a copy of the appearance form and any other documents filed with the court to the attorney for the party filing the pleading or to the party if there is no attorney. The name and address of the attorney or the party filing the pleading is contained in the pleading. If you do not comply with these requirements you will be considered in default, you will not have an opportunity to dispute the claim(s) and the court may issue orders in this matter which may affect you without your input.

NOTICE OF HEARING: A Hearing on the following matters is scheduled for July 27, 2004 at 9:00 AM. in Concord:

Temporary Hearing

Hearing will be limited to offers of proof, 15 minutes per party. Motions for a more extended hearing will be addressed at this hearing. Parties against whom ex parte relief has been issued may request a more immediate hearing. Service of this notice must be effected immediately.

Please advise clients, witnesses, and others that it is a class B felony to carry a firearm or other deadly weapon as defined in RSA 625:11,V in a courtroom or area used by a court.

RE: Venise Theresa Gonya et al v. Roger Sevigny et al

BY ORDER OF THE SUPERIOR COURT

06/30/2004

COURT COPY (clp)

William L McGraw

William McGraw
Clerk of Court