

THE STATE OF NEW HAMPSHIRE
MERRIMACK, SS. **SUPERIOR COURT**

Docket No. 04-E-0208 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

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).

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.