THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

2004 NOV -1 A 11:21

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

On October 15, 2004, Plaintiffs and Defendant moved this Court for summary judgment on the question of whether RSA 402-C:40, I, of the New Hampshire Insurers Rehabilitation and Liquidation Act ("Act") is unconstitutional. This reply will clarify Plaintiffs' position on issues raised by the Commissioner in defense of the unconstitutional release provision contained in the statute.

I. STANDARD OF REVIEW.

Plaintiffs base their challenge of the release provision contained in RSA 402-C:40, I, on the New Hampshire Constitution's court access provision (N.H. CONST. Pt. 1, art. 14), equal protection clauses (N.H. CONST. Pt. 1, arts. 2, 12) and due process clause (N.H. CONST. Pt. 1, art. 15). Plaintiffs and Defendants both agree that the "fair and substantial" intermediate-scrutiny test applies to challenges under New Hampshire's court access provision. *See* Commissioner's Memorandum of Law in Support of Motion for Summary Judgment at 10; Plaintiff's Cross-Motion for Summary Judgment at 7. Defendant's assertion that a rational basis test applies to Plaintiffs' equal protection challenge is incorrect as a matter of law for the reasons set forth below. The

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appropriate standard of review for Plaintiff's due process challenge is not addressed in the Commissioner's memorandum, but is analyzed under the two-part test set forth *Bragg v. N.H. Department Motor Vehicles*, 141 N.H. 677 (1997), and *Opinion of the Justices* (*Limitations on Civil Actions*), 137 N.H. 260 (1993) (the first prong of the analysis determines whether a legally protected right is implicated, and if so, the second prong is whether the procedures at issue have provided the plaintiff the appropriate safeguards). *See* Plaintiff's Cross-Motion for Summary Judgment at 16-20.

A. The Equal Protection Analysis Under Articles 2 and 12 is the "Fair and Substantial Relationship" Intermediate-Scrutiny Test.

The Commissioner is incorrect that rational basis scrutiny applies to Plaintiffs' equal protection challenge based on Articles 2 and 12. The New Hampshire Supreme Court clearly explained:

> We have applied the "fair and substantial relation" test not only in scrutinizing gender-based classifications, but also in examining economic and social legislation and ordinances which did not involve distinctions based on gender or illegitimacy. We therefore hold that, in determining whether RSA ch RSA 507-C (Supp. 1979) denies medical malpractice victims equal protection of the laws, the test is whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation.

Carson v. Maurer, 120 N.H. 925, 930-32 (1980) (discussing classifications which place restrictions on an individual's right to recover in tort under Articles 2 and 12); *see also, Brannigan v. Usitalo*, 134 N.H. 50, 52 (1991) (holding RSA 508:4-d violated Article 12); *City of Dover v. Imperial Casualty & Indemnity Co.*, 133 N.H. 109, 120 (1990) ("we hold that RSA 507-B:2, I, is not constitutionally justified because it violates equal protection provisions found in part I, articles 2 and 12 of the State Constitution by impermissibly denying parties injured on municipal highways and sidewalks a right to recover as provided in part I, article 14"). While RSA 402-C:40, I, may not *automatically* take away a third party's cause of action against a policyholder, it is nonsensical to

suggest that RSA 402-C:40, I, does not *implicate* a third party's important substantive right to sue for a redress of injuries.[1] Under the statutes at issue in *Carson* and *Brannigan*, the plaintiffs never lost the right to sue. The statutes were nevertheless declared unconstitutional by the New Hampshire Supreme Court using intermediate scrutiny -- not the rational basis test.

The Commissioner's reliance on *Verizon New England, Inc. v. City of Rochester*, 855 A.2d 497 (N.H. 2004) is misplaced, and completely ignores the fact that the classifications at issue here involve "an important substantive right." *Carson*, 120 N.H. at 931-32. In *Verizon,* the issue before the court was a city amendment of a pole license. The Court applied the rational basis test in *Verizon* by following the Court's most recent clarification of New Hampshire's equal protection jurisprudence. In *In re Sandra H.,* the court explained that if the classification **did not involve** either a suspect class, a fundamental right **or an 'important substantive right;'** the rational basis test would apply. 150 N.H. ---, 846 A.2d 513, 518 (2004) (emphasis added). Contrary to the impression that may be created by the Commissioner's memorandum, the Court's analyses of the equal protection challenges in *Carson*, *City of Dover*, and *Brannigan* remain good law. The intermediate-scrutiny fair and substantial relationship test applies to Plaintiffs' equal protection challenge because it involves the same important substantive right at stake in those cases.

B. RSA 402-C:40, I, Violates Equal Protection Because it Creates Unconstitutional Distinctions Between Otherwise Similarly Situated Tort Victims.

As set forth in Plaintiff's Cross-Motion for Summary Judgment and consistent with the Court's analysis in *Carson, City of Dover* and *Brannigan*, RSA 402-C:40, I, creates several classifications among otherwise similarly situated tort victims. For instance, it creates unconstitutional distinctions between:

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[1] If Plaintiffs wish to file a claim, they must release the policyholder. If this does not *implicate* their

- All tort victims *versus* victims of Home insureds

- Claimants relinquishing their common law causes of action to participate in the Home liquidation *versus* non-claimants who chose to maintain causes of action against the insured

- Claimants relinquishing their common law causes of action against insolvent insureds *versus* claimants relinquishing their common law causes of action against insureds who have sufficient assets and/or solvent insurance coverage to respond in damages.

- Plaintiffs who maintain their common law causes of action with damages exceeding an insured's policy limits *versus* plaintiffs who maintain their common law causes of action or claimants in the liquidation with damages within the insured's policy limits[2]

- Persons who are injured only by Home insureds *versus* persons who may suffer from an injury caused by multiple parties

- Persons injured by insureds with only Home policies *versus* persons injured by insureds with policies from both the Home and other, solvent carriers

- Third Parties against insureds whose primary insurance company is Home *versus* those insureds having excess policies with Home

- Claimants whose claims are avoided by the liquidator *versus* claimants whose claims are not avoided[3]

- Plaintiffs with punitive damage claims which may allow discovery into a policyholder's assets *versus* plaintiffs without punitive damage claims or any other way of discovering a policyholder's financial condition[4]

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substantive right to sue, it is unclear what *would* implicate that right.

[2]The Commissioner has provided no indication as to how a plaintiff or claimant is supposed to obtain information about a policyholder's insurance policy since the release provision would prevent them from obtaining such information in discovery.

[3] Ironically, if there are insufficient funds in the liquidation a claimant might be better off if the liquidator avoids coverage on the claim. If the proof of claim winds up being worth an insubstantial amount, those people receiving nominal compensation for injuries worth tens of thousands of dollars will not regain the right to sue, but those whose claims are avoided will regain that right. On the other hand, if the liquidator avoids coverage it is unclear what will happen to a claimant whose statue of limitations period has run in the meantime.

[4] Defendant stated in the preliminary injunction pleading and summary judgment motion that because "the plaintiffs know the identity of the alleged tortfeasors, they are in the best position to conduct whatever investigation of the insured's solvency they desire before deciding whether to pursue recovery on their tort claims from the insureds or to conditionally release their claim (up to applicable policy limits) by filling a

These classifications created by RSA 402-C:40, I, violate the equal protection principles found in Articles 2 and 12 of the New Hampshire Constitution.

II. THE COMMISSIONER'S PRIMARY ARGUMENT FAILS AS A MATTER OF LAW.

The crux of the Commissioner's argument is that because there was no common law right to recover directly from an insurance company prior to judgment, the State may condition the benefit of filing a claim in the liquidation on the release of the insured. The problem with this argument is twofold. First, while the Commissioner argues on the one hand that RSA 402-C:40, I, does not violate the doctrine of unconstitutional conditions because it does not create a state benefit,[5] the Commissioner argues that the right to file a claim in the liquidation is a new and different right granted by the state through RSA 402-C:40, I.[6] Either it is a governmental benefit, in which case the State may not condition the benefit on the relinquishment of a constitutional right; or it is somehow not a governmental benefit, in which case the release provision cannot possibly have a rational relationship -- let alone a fair and substantial relationship -- to the ability to file a claim in the liquidation. The argument that the State has created a new remedy obscures the fact that the State has not only created a new remedy but has conditioned the receipt of that remedy on waving

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claim in the liquidation." Commissioner's Memorandum of Law in Support of Motion for Summary Judgment at 19. This simply ignores the reality of litigation. While some financial information about publicly traded companies may be available, in many cases plaintiffs will have no discovery right or device to obtain such information from potential defendants. Moreover, as repeatedly pointed out in Plaintiffs' Cross-Motion, third parties need some indication of what funds might be available in the liquidation estate before being able to make an informed, knowing and intelligent decision to give up their common law cause of action to file a claim in the liquidation. Rather than being a "red herring," the timing of the deadline matters because plaintiffs simply had no information upon which to base their decision at the time they were being asked to blindly waive their constitutionally protected right to seek a remedy in a court. The only time it would make sense for a third party to blindly give up a right to sue in tort is where the insured is known to be completely without assets, including insurance assets and other indemnity rights.

[5] Commissioner's Memorandum of Law in Support of Motion for Summary Judgment at 18.

[6] Commissioner's Memorandum of Law in Support of Motion for Summary Judgment at 10-11; *see also*, Stipulation of Facts at ¶ 11.

an important constitutional right.[7] The Commissioner treats the ability to file a claim as if it were an *additional* remedy, however, it is actually a *substitute* remedy because of the release provision; that is, the victim cannot pursue an insured in both the liquidation estate and in court. If the ability to file a claim is merely an insignificant benefit, it cannot support a "fair and substantial relationship" justification for requiring the release of a substantive constitutional right.

The Commissioner's argument that the State may condition the right to file a claim on the release of the insured also rests on an implicit assumption that the legislature may attach whatever strings it wishes to new remedies it creates that did not exist at common law. This argument has been rejected by the Supreme Court. For instance, in *Gould v. Concord Hospital*, 126 N.H. 405 (1985), the Court struck down a statute of limitations involving a wrongful death claim—a claim not recognized under the common law. As the court clearly pointed out elsewhere while examining a court access provision challenge under Article 14, "[e]ven legislatively created rights... must be constitutional." *Trovato v. DeVeau*, 143 N.H. 523, 526 (1999).

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[7] The Commissioner's reliance on the idea that the state may condition a benefit on the waiver of a constitutional right if it is "germane," is apparently based on an out of context analysis of Prof. Sullivan's seminal law review article discussed in *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 747 (1st Cir. 1995). Professor Sullivan spoke of "germaneness" as but one of several competing analytical devices for understanding the Supreme Court's reasoning underlying the doctrine of unconstitutional conditions . *See* Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413, 1420, 1457-1490 (1989). "None of these three approaches suffices: coercion theory focuses too narrowly on the individual beneficiary, germaneness theory focuses wrongly on legislative process, and inalienability theory focuses too generally on problems with exchange." *Id.* at 1490. Plaintiffs have set forth the standard identified by the United States Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374, 386-91 (1994) as a question of whether or not there is an "essential nexus" between the "legitimate state interest" and the condition imposed. *See* Plaintiffs' Cross-Motion for Summary Judgment at 5. This is primarily because the "essential nexus" standard tracks the "reasonable nexus" standard employed by the New Hampshire Supreme Court, applying the fair and substantial relationship test to a court access challenge under Article 14 in *Trovato v. DeVeau*, 143 N.H. 523, 526 (1999). Regardless of the terminology employed, RSA 402-C:40, I, fails to meet the any of the tests discussed by Professor Sullivan. *See* Plaintiffs' Cross-Motion for Summary Judgment at 9-16.

A. RSA 402-C:40, I, Implicates a Right to a Remedy.

Defendant argues that *In re Wintle*, 146 N.H. 664 (2001), supports his position, since in *Wintle* the Court found that a workers' compensation law limiting liability for "double compensation" did not implicate a right to a remedy because "plaintiff 'had no analogous right to double recovery' at common law." 146 N.H. at 667. First, Plaintiffs are not asking for the ability to recover twice for their injuries nor is a double recovery possible; Plaintiffs are merely asking that they be allowed to file a proof of claim without having to waive their constitutional right of access to court. If the statue allowed this -- as the NAIC model rules and forty-four[8] other state laws do -- the unconstitutional classifications created in violation of Articles 2 and 12 discussed above in Part I would not exist. If Plaintiffs were to recover the full judgment from the policyholder, obviously they could not recover again from the liquidation proceedings.

More importantly, the *Wintle* case is not an apt analogy. RSA 402-C:40, I, implicates a "right to a remedy" because it forces Plaintiffs to give up their *constitutionally protected* common law cause of action in exchange for the benefit of the *state-created* right to seek a pre-judgment recovery directly from the insurance company. It must be remembered that in the absence of liquidation proceedings, prevailing against an insured tortfeasor gives rise the insurer's duty to indemnify the insured for that judgment – and the right of the post-judgment-creditor to proceed directly against both the insured, and the insurer. Yet, under RSA 402-C:40, I, a third party who chooses to maintain his or her tort suit loses the remedy and benefits of having a claim filed in the

[8] Plaintiffs' Cross-Motion for Summary Judgment incorrectly stated forty-five other states do not require third parties to release insureds when filing a third party claim. Including New Hampshire, there are six states with such release provisions, making forty-four the number of states not requiring third parties to release insureds in the third party claims process.

liquidation, should the tort defendant be judgment-proof.[9] In forty-four other states, third parties would be permitted to pursue their tort claims and submit a proof of claim in the event of the policyholder's insolvency. By preventing the ability to both file a claim and maintain the tort suit, RSA 402-C:40, I, interferes with Plaintiffs' right to a remedy, including the right a post-judgment creditor has at common law to execute the judgment against both the tortfeasor and its insurer. *Wintle* is irrelevant because it involved an amendment preventing an outcome not possible under the common law. Conversely, RSA 402-C:40, I, prevents the usual common law outcome, and this interference is unconstitutional under Article 14 of the New Hampshire Constitution.

There is a further point that cannot be understated, as RSA 402-C:40, I also places in grave jeopardy a victim's ability to collect a judgment against an insured with primary insurance from the Home. If that third party pursued the liquidation estate and therefore is forced to release the tortfeasor up to the policy limits -- but continues to pursue a tort action against the insured for damages in excess of the policy limits -- that third party would lose the ability to trigger any of the insured's solvent excess insurance coverage. A simple example illustrates this serious problem. Compare the following two scenarios: First, a situation where there is not a forced release of the insured. If the insured has a Home primary policy with a $1 million limit and the victim gets a $1.5 million judgment, the victim would normally receive the proceeds of the $1 million primary policy, plus the victim can collect from the first-layer excess carrier the remaining $500,000. Significantly, since a $1.5 million legal liability has been created, even if the primary insurance were exhausted or otherwise unavailable, the victim could at least collect $500,000 from the excess carrier. Second, if the victim avails him or herself of the state benefit of filing a proof of claim in the

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[9] In this way RSA 402-C:40, I, operates similarly to the non-economic damage caps at issue in *Carson* and *Brannigan*. Under RSA 402-C:40, I, a person's recovery on a tort claim in the absence of a proof of claim filed in the liquidation may be affected by the absence of insurance coverage in the same way a statutory cap limits a person's right to a remedy.

liquidation with the forced release of the tortfeasor, and then obtains a $1.5 million judgment, the victim would not be able to collect any money from the excess insurance company on the claim. This results because the excess insurer's responsibility to pay for claims in excess of the policy limit is triggered *by legal liability of the insured in excess of primary policy limits*. If, using the example's $1 million primary layer, the tortfeasor has been released from legal liability for the first million dollars of the judgment, a $1.5 million dollar judgment against the insured results only in legal liability for $500,000 (the $1.5 million judgment minus the $1 million released). Therefore, since the insured's legal liability in not excess of the $1 million primary layer, the victim can collect nothing from the excess carrier. As a result, in any liquidation where the payment is less than 100% (which always is the case), the victim is being denied the ability to collect on valid claims from insurance companies who are solvent and not even an object of the statute's protections.

This has the same unconstitutional result of penalizing those most injured as the damages cap which was invalidated by the New Hampshire Supreme Court in *Brannigan*, 134 N.H. at 58. If the statute were constitutional and were written following the NAIC model law, the third party could collect much of his or her judgment from the excess insurer. That the statute makes it impossible for the third party to reach any of the insured's other carriers' excess insurance policies makes the statute clearly unconstitutional.

III. THE COMMISSIONER'S OWN MEMORANDUM DEMONSTRATES THAT RSA 402-C:40, I, HAS NO FAIR OR SUBSTANTIAL RELATIONSHIP TO THE OBJECT OF THE LEGISLATION.

Defendant argues the statute serves the legitimate purpose of expediting closure of the insurance liquidation; yet, the Commissioner's own memorandum of law belies this assertion. "If a third party claimant chooses to file directly in the liquidation.... *The liquidation also will not need to wait for the end of the underlying tort litigation*." Commissioner's Memorandum of Law in Support

of Motion for Summary Judgment at 7-8 (emphasis added). "Since the avoidance of the underlying tort action is central to the purposes of allowing third party claims in the liquidation, the filing of those claims may properly be conditioned on the release." *Id.* at 19. The Commissioner's own statements demonstrate that if third parties pursue tort claims and elect not file claims, the liquidation will be delayed by the underlying tort litigation. By failing to follow the NAIC model law and the vast majority of states, the statute creates a situation where it will be advisable for many – if not most -- third party claimants to retain their tort suit instead of 'taking their chances' with the liquidation.[10] This will actually *prolong* the outcome of the liquidation, rather than enabling the Third Party Release Provision to meet the *Wisconsin* Legislature's goal of expediting the liquidation proceeding.[11] RSA 402-C:40, I, cannot possibly have a fair or substantial relationship to the goal of expediting the liquidation where its effect is just the opposite.

IV. CONCLUSION

For all of the forgoing reasons, Defendant's motion for summary judgment should be denied, Plaintiffs' cross-motion should be granted, and this court should order such further relief as is fair and equitable.

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[10] The Commissioner quotes the Wisconsin's legislature as saying that "in no other way is it possible to settle the matter expeditiously efficiently and equitably," yet fails to explain how it is that the NAIC model law and forty-four other states do not include the third party release requirement in their versions of their insurers rehabilitation and liquidation statutes. Commissioner's Memorandum of Law in Support of Motion for Summary Judgment at 8 (citing 1967 Wis. Laws. C. 89, § 17, comment to Wis. Stat. § 645.64(1)). *See also*, n.4, *supra*.

[11] Moreover, this assumes New Hampshire intended to adopt Wisconsin's rationale in passing the statute, a proposition for which the Commissioner has yet to offer any proof or authority. If instead the goal of the legislation was simply to protect the people of New Hampshire as Sen. Manson described it, then a provision conditioning a substantial state benefit on releasing a constitutionally protected cause of action simply fails to comport with this legislative intent. *See* Plaintiffs' Cross-Motion for Summary Judgment at 9, citing *N.H.S. Jour.* 934 (1969).

Dated: November 1, 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 Plaintiffs' Reply to Commissioner's Memorandum of Law in Support of 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: November 1, 2004

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Thomas R. Watson, Esq.