

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
PETITION IN EQUITY FOR PERMANENT AND
TEMPORARY INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

This action challenges the constitutionality of New Hampshire Revised Statute Annotated ("RSA") 402-C:40(I). The 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. The statute effectively forces a claimant to give up a common-law cause of action in exchange for the benefit of filing a claim.

The statute places Plaintiffs in an egregiously unconstitutional dilemma by forcing them to choose between two important rights. Plaintiffs have a right to sue the insured tortfeasor, protected by the New Hampshire Constitution. Plaintiffs also have a

right to file a claim in the liquidation as a benefit created by the state. Under RSA 402-C:40(I), however, Plaintiffs must make an irrevocable choice between pursuing one constitutionally protected right or the other. The state will not allow people to participate in the liquidation claims process unless they give up their right to sue the insured companies. Conversely, if a plaintiff wishes to retain the right to sue the insured tortfeasor, he or she will lose the right to petition the state for compensation available to other claimants.

Plaintiffs filing claims in liquidation have absolutely no guarantee to any recovery. The statute provides no recourse for a claimant if the insurance company's assets are inadequate to pay the claims. Yet, Plaintiffs cannot regain the cause of action against the tortfeasor unless the insurance commissioner avoids coverage for their claim. Some people may receive no compensation whatsoever, while others who would have likewise received no compensation may regain the right to sue. Whether one will regain his or her common law cause of action is not based on the underlying remedy or the substantive merit of his or her claim, but rather on whether the insurance commissioner successfully avoids coverage for the time period of the alleged injury.

As of the filing deadline, Plaintiffs have no basis to predict what their recovery may be, or whether they may recover any compensation by submitting a claim to the liquidator. At a minimum, the state's liquidation procedure should give third parties adequate information and enough time to make a knowing and informed choice. Instead, the statute forces Plaintiffs to make an irrational decision to give up one or the other constitutionally protected right based solely on speculation and guesswork. Plaintiffs maintain the state cannot condition the receipt of the benefit of filing a claim on the

surrender of constitutional rights. Compelling a choice between filing a claim against the carrier--or filing a lawsuit against the insured--forces them to choose which right to surrender. This is not constitutionally permissible.

The named Plaintiffs represent a class 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. (*See Instructions for Filling a Proof of Claim Form and Claim Form attached as Exhibit A.*) This instruction also applies to potential claimants who may have claims against the company in the future. Pursuant to RSA 402-C:40(I), claimants must relinquish the right to sue companies insured by The Home Insurance Company for their tortious conduct if they wish to receive the benefit of filing a claim. (*See Proof of Claim ¶ 14, Exhibit A.*)

Plaintiffs seek preliminary injunctive relief from this court to prevent irreparable harm to their constitutional rights. Plaintiffs have also filed a separate suit in federal court addressing claims under the Constitution of the United States. For this reason, only rights protected by the New Hampshire Constitution are addressed below.

STATUTORY FRAMEWORK

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.

On the face of the statute, third party claimants are not entitled to a hearing or any discovery process allowing them to make an informed decision to waive the cause of action against the insured in order to file a claim with the liquidator. The Proof of Claim process as it is being applied to Plaintiffs does not provide any hearing or other procedural safeguards ensuring a rational basis for Plaintiffs' decision whether to file a claim or instead retain his or her common law cause of action.

ARGUMENT

Courts must consider four factors in determining whether to grant a preliminary injunction: (1) whether the plaintiff is likely to succeed on the merits; (2) whether the plaintiff will be irreparably harmed if the injunction is denied; (3) whether the balance of hardships tips in plaintiff's favor; and (4) whether the court's ruling will serve the public interest. *See Unifirst Corp. v. City of Nashua*, 130 N.H. 11, 13, 533 A.2d 372, 373-74 (1987). Plaintiffs satisfy the elements necessary for a preliminary injunction in this action, as set forth below.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE ACT IS UNCONSTITUTIONAL.

A. RSA 402-C:40(I) Violates Plaintiffs' Equal Protection Rights.

A person's interest in a common law cause of action is constitutionally protected. *See* N.H. CONST. Pt. 1 arts. 2, 12, 14. Two decades ago the New Hampshire Supreme Court 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, 931-32 424 A.2d 825, 830 (1980). RSA 402-C:40(I) interferes with a claimant's substantial interest in his or her cause of action by forcing him or her to

release a tortfeasor in exchange for the benefit of filing a claim against the liquidating insurance carrier. The state may not condition the benefit of filing a claim with the insurance liquidator on giving up this protected right.

1. Standard of Review

In cases involving challenges to the constitutionality of damage caps in medical malpractice and other tort suits, New Hampshire courts have found such limits on the right to recovery a violation of the equal protection of laws. The standard that applies to RSA 402-C:40(I) is that it ““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*, 424 A.2d at 831 (citations omitted); *see also Opinion of the Justices*, 137 N.H. 260, 628 A.2d 1069 (1993); *Brannigan v. Usitalo*, 134 N.H. 50, 587 A.2d 1232 (N.H. 1991).

Equal protection under the New Hampshire Constitution is not limited to suspect classes as under the United States Constitution. *Carson*, 424 A.2d at 831. In *Brannigan v. Usitalo*, the court confronted an argument posed by insurance companies that a statutory cap of \$875,000 on non-economic losses in personal injury actions could not violate the state equal protection clause because it applied to *all* personal injury claims rather than being limited to a certain category, such as medical malpractice claims in *Carson*. 587 A.2d at 1233. The supreme court found an equal protection violation because only plaintiffs with noneconomic damages totaling more than \$875,000 were affected by the cap. Thus, categories that violate equal protection provisions need not be explicitly created by the state, but may be *de facto* as well.

2. RSA 402-C:40(I) Is Not Reasonable.

Only claimants who are injured by companies insured by a liquidating insurance company, in this particular case The Home Insurance Company, are forced to give up the constitutionally protected right to sue the insured companies as a condition to filing a claim. These claimants are situated no differently from anyone else having a common law cause of action, but for the unfortunate liquidation of the tortfeasor's insurance company. The liquidation scheme, in essence, forces a waiver of a property right. Though people have to "voluntarily" sign the release, they do so in order to obtain the state provided benefit of filing the claim. Forcing a person to give up this right, especially without access to information enabling that choice, is not reasonable.

In *Gazzola v. Clements*, 120 N.H. 25, 411 A.2d 147 (N.H. 1980), the court held that denying landowners procedural safeguards otherwise available simply because their land was sought for state park purposes rather than to build a highway was a denial of equal protection of state laws. Property owners whose land was to be used for a highway were entitled to hearings, but the state sought to take land for a state park without such hearings. 411 A.2d at 151. The court determined that because the landowners were otherwise similarly situated, the denial of a hearing was a violation of equal protection under N.H. CONST. pt. 1 arts. 1, 10, 12 and 14. *Id.* As the court noted in *Gazzola*, "[t]he State must grant privileges, as well as impose restrictions, with an even hand." *Id.* (citations omitted).

Under RSA 402-C:40(I), the state is essentially providing insured companies immunity from suit for their tortuous conduct in exchange for the right to file a claim. In this regard, the constitutional challenge presented by the Plaintiffs is perhaps analogous

to the challenge presented in *City of Dover v. Imperial Casualty & Indemnity Co.*, 133 N.H. 109, 116, 575 A.2d 1280, 1284 (N.H. 1990). In *City of Dover*, the supreme court held a statute which provided complete immunity to municipalities for injuries related to negligence in maintaining highways, streets and sidewalks violated state equal protection rights under N.H. CONST. Pt. 1, Arts. 2, 12, and 14. The court declared, “[t]he statute is unreasonably broad, is arbitrary, and does not bear a fair and substantial relation to the legislative objective.” 575 A.2d at 1286. While the court explained limits on recovery from municipalities are permissible, the court objected to the statute’s failure to provide for liability when there was time to fix the condition and notification of the problem. *Id.* In this case, the state is not trying to protect municipalities; it is shielding insured companies from lawsuits through the liquidation claims process. Whatever the reasons the state may have for establishing the claims system in this way, protecting the tortfeasors from liability is unreasonable and unnecessary.

3. RSA 402-C:40(I) is Arbitrary.

Forcing someone to give up a constitutionally protected right of indemnity for a personal injury in RSA 402-C:40(I) is arbitrary. There is no rational reason why a person with a third-party claim should be forced to give up rights against an insured’s insurance company in exchange for the benefit of filing a claim against their insured. As the court recognized in *Gazzola*, “[s]uch dissimilar treatment of members of a class who are distinguishable only with reference to the way the State government intends to use their property is the essence of arbitrariness. To deny a hearing in this case violates the equal protection guarantees of our State constitution.” 411 A.2d at 152. It is as arbitrary to deny Plaintiffs a right to pursue their claims against insured companies in the tort system

in the present case as it was to categorically deny claims against municipalities in *City of Dover*, or allow the state to take land away from people without a hearing based on the purpose for which the state sought the land in *Gazzola*. In the same way the plaintiffs in *Gazzola* should have been entitled to a hearing, in this case Plaintiffs are entitled to have their common law causes of action heard by a court. The state may not condition the receipt of the benefit of filing a claim with the liquidator on arbitrarily giving up this right.

4. RSA 402-C:40(I) Does Not Rest on a Ground of Difference Having a Fair and Substantial Relation to the Object of the Legislation.

Conditioning the filing of a third party claim on the release of the insured bears no fair and substantial relation to any conceivable object of the legislation. It is not immediately clear what the state intends the actual purpose of RSA 402:C:40(I) to be. The state may argue the provision might ease the state's administrative burden of administering the liquidation, but it does so by infringing a substantial right of the third party claimants. Moreover, it is not readily apparent how releasing the companies responsible for causing plaintiffs' injuries in exchange for the right to submit a claim against that company's insurance company would ease the administration of the liquidation. If the intention is to minimize the amount of tort claims against insured companies The Home Insurance Company may be responsible for defending, RSA 402-C:40(I) fails terribly. Claimants simply have been given no incentive or information as to whether filing a claim will afford them any redress whatsoever.

In *Gould v. Concord Hospital*, 126 N.H. 405, 493 A.2d 1193 (N.H. 1985), the state supreme court explained:

[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 reasonable 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.

493 A.2d at 1196.

The court also held that a twelve-year statute of repose governing products liability actions which eliminates a cause of action before the wrong may be discovered is unconstitutional as neither reasonable nor substantially related to the legislative object of reducing liability insurance rates. *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 464 A.2d 288 (1983). While undoubtedly the state has an interest in the efficient administration of the liquidation of insolvent insurance carriers, it may not sacrifice Plaintiffs' constitutional rights to achieve that end. This case is analogous to *Gould* and *Heath* in that the state is asking for a private right of action to be relinquished in exchange for administrative efficiency. As in *Gould* and *Heath*, the goal of efficiency does not make the waiver requirement constitutional.

B. RSA 402-C:40(I) Violates Plaintiffs' Due Process Rights.

Plaintiffs' being forced to waive the right to sue in exchange for the benefit of filing a claim constitutes a due process violation in addition to the equal protection violation. Not only is the Plaintiff class treated dissimilarly to all other common law claimants, they are being forced into waving a constitutional right before the value of the liquidation estate is known. At a bare minimum, due process requires an adversarial hearing allowing Plaintiffs access to such information before they can be required to relinquish their constitutional rights. Plaintiffs should not be forced to make a decision to

waive a constitutionally protected right. To the extent that the state may require this at all, the state must at least allow Plaintiffs to obtain enough information to make a reasoned, intelligent and voluntary choice. RSA 402-C:40(I) instead requires that Plaintiffs blindly to choose to file a claim or pursue their common law cause of action without any basis upon which to make a decision.

In *Opinion of the Justices*, 134 N.H. 266, 592 A.2d 180 (1991), one of the questions certified to the Court by the legislature was whether a law providing for municipal immunity violates part I, article 14 of the constitution. The court explained that since *Carson*, it never had occasion to determine whether a law violates article 14 directly. But the court went on to state:

[W]hen no suspect classification is involved in an equal protection analysis, such as race or national origin... and the statute at issue is held to violate equal protection because one group's right to recover is violated while another's is not, it follows that the statute also directly violates the right to recover.

Opinion of the Justices, 592 A.2d at 184. In keeping with the above analysis, Plaintiffs frame their challenge to RSA 402-C:40(I) as a violation of part I, article 14 primarily as an equal protection challenge, though as the supreme court noted, it may more properly be considered a direct challenge to the constitutionality of RSA 402-C:40(I) based on its direct violation of article 14.

1. The State Has Not Provided Any Adequate Procedural Safeguards.

Should the court determine that RSA 402-C:40(I) bears a fair and substantial relation to the objectives of the Insurers Rehabilitation and Liquidation statute, it remains constitutionally deficient because it conditions the receipt of a benefit on the condition of a waiver of a substantive constitutional right without the benefit of any procedural due

process safeguards. At a minimum, due process requires the right to a hearing. See *Bragg v. N.H. Dept. Motor Vehicles*, 141 N.H. 677, 678, 690 A.2d 571, 572-73 (N.H. 1997). This hearing must take place prior to waiving the common law right to sue in order to protect Plaintiffs' due process rights.

New Hampshire courts employ a two-part analysis in considering due process claims. *Bragg*, 690 A.2d at 573. First, courts will ascertain whether a legally protected right has been implicated. *Id.*; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 1152 (1982). 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, 423 A.2d 603, 605 (1980).

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:

The right to sue and defend in the courts is... one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 149, 28 S. Ct. 34, 36 (1907).

While perhaps not considered by New Hampshire courts to be "fundamental," a common law cause of action is something a person has a substantive right to exercise. See *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 666; 406 A.2d 704, 706 (1979);

Carson 424 A.2d at 830. 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.

C. RSA 402-C:40(I) Violates Plaintiffs' Constitutional Rights By Creating an Unconstitutional Condition.

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, 114 S.Ct. 2309 (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). The procedure embodied by RSA 402-C:40(I) and illustrated in Plaintiff's attached Exhibit "A" violates the doctrine of unconstitutional conditions.

The First Circuit most recently referred to the doctrine of unconstitutional conditions in *Philip Morris, Inc. v. Reilly*, when holding that a Massachusetts law requiring tobacco companies to disclose their ingredients subjected them to an unconstitutional condition. 312 F.3d 24, 46 (1st Cir. 2002). The case involved a statute requiring cigarette manufacturers to either disclose their intellectual property or not sell their products in Massachusetts. The court determined that forcing cigarette manufacturers to make this choice fell under the unconstitutional conditions doctrine. The question as the court viewed it was whether through the Disclosure Act the state could "constitutionally condition the right to sell tobacco products in Massachusetts on submission to this scheme." *Id.* The court concluded it could not.

The First Circuit articulated the unconstitutional conditions doctrine elsewhere citing a litany of cases where it was applied by the Supreme Court:

Since *Frost* [*v. Railroad Commission*, 271 U.S. 583, 593-94, 46 S.Ct. 605, 607], which struck down a state statute conditioning the use of public highways on compliance with regulatory requirements otherwise violative of the due process clause, the doctrine of unconstitutional conditions has been applied in the context of numerous constitutional protections, e.g., *Perry v. Sindermann*, 408 U.S. 593, 598, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972) (state may not condition continued public employment on relinquishment of protected speech rights); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1967) (state may not condition receipt of unemployment benefits on relinquishment of right to free exercise of religion); *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (state may not condition continued public employment on relinquishment of right to invoke Fifth Amendment privilege against self-incrimination); *id.* at 500, 87 S.Ct. at 620 (collecting cases discussing other "rights of constitutional stature whose exercise a state may not condition by the exaction of a price")....

Blackburn v. Snow, 771 F.2d 556, 568 (1st Cir. 1985); *see also, Clifton v. Federal Election Comm'n*, 114 F.3d 1309, 1315 (1st Cir. 1997) (doctrine of unconstitutional conditions applied to situation where FEC rule required a surrender of rights in order to publish political information in voter guides).

If giving up an intellectual property right in exchange for being allowed to sell cigarettes is substantial enough an imposition to fall under the unconstitutional conditions doctrine, injured individuals being forced to give up rights secured by the New Hampshire Constitution to access the courts for "all injuries he may receive in his person" and "to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial..." raises even more serious constitutional concerns. N.H. CONST. Pt. 1 art 14. Filing a claim with the liquidator cannot be conditioned on releasing a constitutionally protected right to sue an insured company. Under the *status quo ante*, Plaintiffs have a right to recovery for their damages from the insured and from the insurance company if the insurance carrier is liable on the policy to the insured.

The statute forces Plaintiffs to give up one of these two rights by conditioning the receipt of the benefit of filing a claim on relinquishing the right to access the courts.

II. AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM.

Violations of equal protection and due process rights lead to irreparable harm. The supreme court explained that where “a party raises a due process violation that fundamentally impedes the fairness of an underlying proceeding resulting in immediate and irreparable harm to that party.” *Thompson v. N.H. Bd. of Medicine*, 143 N.H. 107, 110, 719 A.2d 609, 612 (1998). Forcing Plaintiffs to make a decision without adequate information violates both equal protection and due process rights. Since this harm is immediate and irreparable, an injunction should be issued to prevent this violation of rights.

III. THE BALANCE OF HARDSHIPS FAVORS THE INJUNCTION.

The third party claimants represent a relatively small portion of the total claims against The Home Insurance Company. Extending the deadline of June 13, 2004 until such time as third party claimants are allowed a hearing to determine the constitutionality of relinquishing their substantial right to sue insured companies in favor of filing a Proof of Claim will not substantially interfere with the liquidation proceedings.

IV. THE INJUNCTION SERVES THE PUBLIC INTEREST.

Protecting Plaintiffs’ equal protection and due process rights is in the public interest. *Unifirst*, 533 A.2d at 374. The court determined that the plaintiff in *Unifirst* had a property interest that was entitled to protection under the due process clause, just as here the substantive right to a cause of action is protected by the due process clause, citing U.S. CONST. amend. XIV § 1 and N.H. CONST. pt. I, art. 15. Here too, the court

should act to preserve the rights of Plaintiffs by ensuring they are not forced to give up their rights of action against insured companies without constitutionally required equal protection and due process of law.

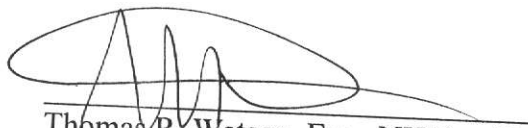
CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request this Court grant Plaintiffs' Petition in Equity for Permanent and Temporary Injunctive Relief.

Dated: July 27, 2004

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

By:

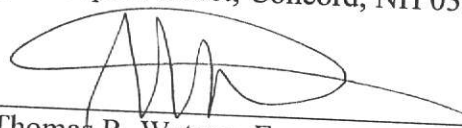


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Law was on this date mailed, postage prepaid/ hand delivered to Attorney Suzanne M. Gorman, New Hampshire Attorney General's Office, 33 Capital Street, Concord, NH 03301-6397.

Dated: July 27, 2004



Thomas R. Watson, Esq.