

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