THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

P 3: 45

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR TEMPORARY INJUNCTIVE RELIEF

NOW COME the Defendants Roger A. Sevigny, Commissioner of the State of New Hampshire Insurance Department, in his official capacity as Insurance Commissioner ("Commissioner") and Liquidator of The Home Insurance Company ("Liquidator"), and Peter W. Heed, Attorney General of New Hampshire, in his official capacity ("Attorney General"), and object to the plaintiffs' request for temporary injunctive relief and state as follows.

FACTUAL BACKGROUND

The Litigation

This is an action for declaratory and injunctive relief contending that the third party claimant release provision, RSA 402-C:40, I, of the New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C, violates the New Hampshire

Constitution on a number of grounds. The plaintiffs have also filed a companion action challenging RSA 402-C:40, I, on federal constitutional grounds in federal court. Complaint ¶ 16.

Allegations of the Complaint. The allegations of the complaint may be briefly summarized as follows. The plaintiffs are representatives of two decedent's estates, each of which has tort claims against a company or companies insured or believed to be insured by The Home Insurance Company ("Home") or its subsidiaries. Complaint ¶¶ 1, 2, 13. The defendants are the Commissioner, as such and as Liquidator of Home, and the Attorney General. Id. ¶¶ 3, 4. Home is being liquidated. Id. ¶ 13. A provision of the Act, RSA 402-C:40, I, provides for third party claims against an insolvent insurer in liquidation and provides that the filing of a third party claim in the liquidation operates as a (partial) release of the insured. Id. ¶ 12; see RSA 402-C:40, I. The Liquidator instructed persons who have or may have a claim against Home to file a proof of claim by the claim filing deadline of June 13, 2004. Id. ¶ 13, Ex. A (proof of claim form and instructions). Item 14 of the proof of claim form notifies third party claimants (that is, persons with a claim against an insured of Home) that to file that claim in the Home liquidation they must conditionally release the insured in the amount of the limit of the applicable Home insurance policy. Id., Ex. A at 3 (proof of claim item 14).

The plaintiffs allege that the third party release requirement "forces" a claimant to give up a common law cause of action without procedural safeguards or meaningful access to information, and that under the Act claimants "must waive a constitutionally protected right in exchange for the benefit of filing a claim."

Complaint ¶¶ 12, 15. They contend that RSA 402-C:40, I, deprives them of rights secured by New Hampshire law in alleged violation of the equal protection provisions (Counts I and II), the court access provision (Counts III and IV) and the due process provision (Counts V and VI) of the New Hampshire Constitution, in each case both facially and as applied. They also claim that the statute violates "the doctrine of unconstitutional conditions." Count VII. They seek (1) to certify the action as a class action, (2) an injunction "against the enforcement of the June 13, 2004 deadline for filing third party claims with the liquidator," (3) a declaration that RSA 402-C:40, I, is unconstitutional as written, and (4) a declaration that RSA 402-C:40, I, is unconstitutional as applied to the plaintiffs in the Home liquidation proceeding. Complaint, Prayer.

The Liquidation. 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. On June 13, 2003, the Court entered an Order of Liquidation ("Liquidation Order") concerning Home pursuant to RSA 402-C:21. A copy of the Liquidation Order is attached as Exhibit A. Among other things, the Liquidation Order declared that Home was insolvent and appointed the Commissioner as Liquidator of Home. Liquidation Order ¶¶ (b), (d). It directed the Liquidator to take possession of the assets of Home to administer them under the orders of the Court, and it vested the Liquidator with title to all property, contracts and rights of action of Home. Id. ¶ (f). 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).

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. A copy of the Order Approving Notice is attached as Exhibit B. That Order approved the forms of proof of claim (and instructions) pursuant to RSA 402-C:38. Order Approving Notice, Exhibit B, Findings of Fact and Conclusions of Law, ¶ 1, Orders ¶ 2, and Ex. 3 (form of proof of claim and instructions for Home liquidation). 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. Order Approving Notice, Exhibit B ¶¶ 6, 9-10.

The Liquidator reported on the notice process in the Liquidator's First Report dated July 3, 2003. A copy of the Liquidator's First Report is attached as Exhibit C. The Liquidator gave notice of the Liquidation Order and claim filing deadline by mailing over 330,000 notices and proof of claim forms and by publication in 94 newspapers and a trade publication in the states and countries in which Home did business. See Liquidator's First Report ¶¶ 5, 9 and Exhibits C and D to Report (form of publication notice and list of publications). The Liquidator gave notice to mass tort claimants by mailing notices to their attorneys at the names and addresses on Home's computer systems. Id. ¶ 5(b). Additional mailings have been made at intervals since July, 2003.

The law firm of Baron & Budd, P.C., was among the claimants' firms that were mailed notices of the liquidation and proof of claim forms. According to the Liquidator's records, 83 separate copies of the notice of the liquidation order and claim filing deadline and the proof of claim form were mailed to Baron & Budd, P.C.: seven on June 18, 2003, one on December 29, 2003, and 75 on March 10, 2004. Affidavit of Michael Averill ("Averill Aff."), attached as Exhibit D, ¶ 5.

The external costs of the 330,000 piece mailing and the publication notice given during the summer of 2003 were more than $276,000. Averill Aff. ¶¶ 2-3.

The Court has also entered an Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company In Liquidation on December 19, 2003 (the "Claims Procedures Order"). A copy of the Claims Procedures Order is attached as Exhibit E. That Order expands upon RSA 402-C:41 and RSA 402-C:45, which provide that the Liquidator is to investigate and determine claims filed in the liquidation and present recommendations to the Court, and that a claimant who disagrees with the Liquidator's determination may file an objection and obtain a hearing before the Court or a Court-appointed referee.

The Statute

The New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C ("Act"), provides a comprehensive framework for the rehabilitation and liquidation of insurance companies.[1] The present action concerns the third party claimant release

[1] The rehabilitation or liquidation of troubled insurers in the United States is a matter of state law governed by a national scheme of interrelated state laws. Every state of the United States has now enacted a version of the Insurers Rehabilitation and Liquidation Model Act approved by the National Association of Insurance Commissioners ("NAIC"), see III NAIC Model Laws,

provision of the Act, RSA 402-C:40, I, and the related section requiring inclusion of release language for third party claims in the proof of claim form. RSA 402-C:38, I(a)(7).

The conditional, limited third party claimant release. The statute provides:

> Third Party's Claim. 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.

RSA 402-C:40, I. The statute thus does several things. *First*, it authorizes persons with claims against insureds of an insurer in liquidation (third party claimants) to file their claims with the liquidator. *Second*, it provides that, as a matter of law, such a filing operates as a conditional, limited release of the insured's liability to the third party claimant. The release is limited because it only releases liability "on that cause of action in the amount of the applicable policy limit." The release does not release claims to the extent they exceed the applicable policy limit or involve a separate cause of action. Thus, the claimant may continue to seek recovery from the insured for amounts in excess of the policy limits. The release is conditional because it "shall be void if the insurance coverage is avoided by the liquidator." That is, if the Liquidator

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Regulations and Guidelines 555-1 (2004) ("NAIC Model Laws"), or the Uniform Insurers' Liquidation Act ("UILA") adopted by the Commissioners on Uniform State Laws, see 13 U.L.A. 321 (Master ed. 1986). See NAIC Model Laws 555-63 to 555-67. The New Hampshire Act, RSA 402-C, was enacted by 1969 N.H. Laws 272:1, based on the Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. § 645, which was enacted by 1967 Wis. Laws c. 89, § 17, and recommended for adoption by the NAIC in 1969. See NAIC Model Laws at 555-62. These statutes provide for coordinated United States proceedings for insolvent insurers centralized in a single state, the insurer's domiciliary state, with the possibility of ancillary proceedings in other states and countries.

were to determine that the claim is not covered by the insurance policy, then the release has no effect. *Third*, the statute requires the Liquidator to include language constituting the release in the proof of claim form even though the release operates as a matter of law.

The requirement that the Liquidator include the release in the proof of claim is reiterated in RSA 402-C:38, I, which specifies that the proof of claim is to include "[i]n the case of any third party claim based on a liability policy issued by the insurer, a conditional release of the insured pursuant to RSA 402-C:40, I." RSA 402-C:38, I(a)(7).

As required by the Act, the proof of claim form approved by the Court, distributed by the Liquidator and attached to the Complaint includes a conditional release to be executed by third party claimants as item 14. See Complaint, Ex. A at 3 (item 14). The proof of claim form (and the instructions) also advise the claimant of the June 13, 2004 claim filing deadline. Id., Ex. A at 1, 2, 3.

The legislative intent of the third party release provision. As noted above, the New Hampshire Act, RSA 402-C, originally enacted by 1969 N.H. Laws 272:1, is based on the Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. § 645, enacted by 1967 Wis. Laws c. 89, § 17. The Wisconsin Legislature enacted the drafters' commentary as part of the 1967 Wisconsin law, and that commentary accordingly provides legislative history for the Wisconsin Act and those of other states, such as New Hampshire, that enacted similar laws.

Wis. Stat. § 654.64 is essentially identical to RSA 402-C:40, and the commentary to the Wisconsin Act explains the purpose of the third party claimant release provision:

> The goal was to devise a more subtle and discriminating method of handling third party claims than now exists, which would both do greater equity and also encourage quick termination of the liquidation. . . . This section provides for the third party claimant to make a choice between pursuing his claim against the insured and presenting his claim in the liquidation. At first blush it would seem harsh and unnecessary to force such a choice. But this is not the case. Before he has to choose, the claimant has every opportunity to determine whether the insured is individually financially responsible. If he is, the claimant can proceed against him, rather than take his chances in the liquidation.

1967 Wis. Laws c. 89, § 17, introductory comment to Wis. Stat. § 645.64 (attached as Exhibit F). The commentary further identifies the legislative purpose of protecting policyholders:

> By putting pressure on the third party to release the insured to the extent of the applicable policy limit if he wishes to make a claim in the proceeding, the liquidation can at least help make the insurance fund do the job of protecting the policyholder. It is unfortunate that the innocent third party must relinquish his right against the insured in order to claim in the liquidation but in no other way is it possible to settle the matter expeditiously, efficiently and equitably. The notion that the election is valid only if there is effective insurance does elementary justice.

1967 Wis. Laws c. 89, § 17, comment to Wis. Stat. § 645.64(1). Further:

> It is entirely fair to the third party claimant to compel him to elect whether to share in the liquidation or exercise rights against the insured. This is a burden upon him, but is a reasonable allocation to him of part of the total burden imposed by an insolvency. If he claims in the liquidation, he must release the insured. If he does not claim, but pursues the insured instead, then of course the insured will have to pay any judgment in full if he is not judgment proof.

1967 Wis. Laws c. 89, § 17, comment to Wis. Stat. § 645.64(2).

The statute thus serves two fundamental purposes. *First*, by permitting third party claimants to file claims directly with the insurer in liquidation, the statute facilitates a more expeditious resolution of the liquidation proceeding by encouraging third party claimants to file claims so they can be determined through the relatively informal claims determination process under RSA 402-C:41 and C:45, instead of the more protracted litigation process. Third party claimants ordinarily would not be able to proceed directly against the alleged tortfeasor's insurer. *Second*, by conditioning such direct claims on a conditional release of the third party claimant's claim up to the applicable policy limits, the statute provides insureds with the protection usually provided by a liability insurance policy (a defense and indemnity to the policy limit), notwithstanding that the insurer's insolvency prevents it from providing that protection. The statute does not, however, deprive a third party claimant of the ability to pursue litigation against the insured. The claimant may always choose not to take advantage of the ability to file a claim in the liquidation and instead proceed against the alleged tortfeasor/insured as it would have done absent the insurer's insolvency. The third party claimant is free to conduct whatever investigation it desires into the solvency of the insured before making its choice.

ARGUMENT

The plaintiffs' request for the extraordinary relief of a temporary injunction should be denied because they will suffer no "immediate irreparable harm." See Thompson v. New Hampshire Bd. of Med., 143 N.H. 107, 109 (1998). The June 13, 2004 claim filing deadline has already passed, and plaintiffs point to nothing that will happen before decision on the merits that would support or require injunctive relief.

In any event, plaintiffs have not shown that they will "likely succeed on the merits." See Kukene v. Genualdo, 145 N.H. 1, 4 (2000). The limited, conditional release of the insured called for by RSA 402-C:40, I, does not violate the New Hampshire Constitution. Further, the balance of harm weighs against temporary relief as it would place undue burden on the liquidation and create confusion contrary to the public interest. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14-15 (1987).

I. PLAINTIFFS FAIL TO SHOW ANY IMMEDIATE DANGER OF IRREPARABLE HARM, AND AN INJUNCTION WOULD BURDEN THE LIQUIDATION AND CONFUSE CLAIMANTS AND THE PUBLIC.

A person seeking a temporary injunction must show there is an immediate danger of irreparable harm. "Injunctive relief is one of the peculiar and extraordinary powers of equity normally to be exercised only when warranted by imminent danger of great and irreparable damage." New Hampshire Donuts, Inc. v. Skipitaris, 129 N.H. 774, 779 (1987) (quotations and citations omitted).

The plaintiffs apparently seek a temporary injunction "against the enforcement of the June 13, 2004 deadline for filing third party claims with the liquidator." See Complaint, Prayer B. It is unclear whether Plaintiffs seek an injunction of enforcement of the proof of claims deadline for the named plaintiffs or the entire proposed class. Where the Court has not yet certified a class, Plaintiffs' request for temporary relief should be limited to the named plaintiffs.[2] Either way, Plaintiffs have not shown that they are in imminent danger of irreparable harm.

[2] Defendants object to certification of a class in this action. Plaintiffs have not and likely will not establish the requirements for class certification under Superior Court Rule 27-A. For example, a class action is not "superior to other available methods for the fair and efficient adjudication of

There is no immediate danger of irreparable harm that could support preliminary relief. The salient fact is that the claim filing deadline passed approximately six weeks ago. The plaintiffs thus seek not to preserve the status quo, but to revive a deadline that has already passed. Cf. Kukene, 145 N.H. at 4 ("[A] preliminary injunction is a provisional remedy . . . that . . . preserves the status quo pending a final determination on the merits.") (citation omitted). Moreover, the plaintiffs have not pointed to anything that will happen during the pendency of this litigation that would irreparably harm them.

First, Plaintiffs' claim of immediate irreparable harm at this late date is somewhat suspect, given that their counsel was on notice of the third party claimant release requirement in June 2003, see Averill Aff. ¶ 5, Ex. A, but delayed filing this action until June 10, 2004 –three days before the claim filing deadline.

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the controversy," as required by Superior Court Rule 27-A(a)(5). Plaintiffs seek declaratory relief that, if granted, would apply across the board, even absent class action status. See Private Truck Council of America, Inc. v. State, 128 N.H. 466, 477 (1986) (court denied prospective injunctive relief, presuming the "State would abide by the consequences of [the court's] decision" finding statute unconstitutional). Plaintiffs bring a facial constitutional challenge to a State statute. A final ruling by the State's highest court that the statute is unconstitutional would be applicable to all potential class members regardless of their participation in this litigation. Certification of a class would only add unnecessary complication, expense and confusion.

The plaintiffs also cannot show that their claims are "typical of the claims or defenses of the class." Superior Court Rule 27-A(a)(3). The circumstances of all third party claimants and potential claimants will vary widely: some have filed proofs of claim, some have not; some seek recovery from solvent insureds, some do not; some seek recovery from insureds with other insurance, some do not; some have claims that exceed the value of the insureds' policy limits, some do not. Plaintiffs' proposed class is vague and overly broad. Identification of the members of the class is impossible as it would require determining all persons who have potential claims against any entity to which Home issued a liability insurance policy. Home did business around the United States and in several other countries, and its predecessors began business in 1853. Further, if certified, any notice to the class under Superior Court Rule 27-A(e) would be a burdensome and costly process. Initial notice of the liquidation, for instance, required a 330,000 piece mailing and published notice in 95 publications at a total cost of over $276,000.

In any event, where the relief sought is essentially retroactive and there is no prospect of immediate harm during the case, preliminary relief should be denied. If plaintiffs were to prevail on the merits at the conclusion of the case, any relief that could be granted now may be granted then. If the statute were declared to be unconstitutional and that determination were upheld by the State's highest court, the defendants – public officials – can be presumed to act in accordance with and implement the law as determined by the courts. See Private Truck Council of America, Inc. v. State, 128 N.H. at 477.

In contrast, the potential harm to the liquidation caused by temporary injunctive relief would be significant. If the injunction applies to all potential third party claimants, to make an injunction meaningful notice would likely be necessary in order to inform third party claimants that, at least on a temporary basis, and for a period of time yet to be determined, the deadline will not be enforced. This would be tremendously burdensome. Since the identity of third party claimants who have not filed claims is unknowable (the potential class consists of all tort claimants that have claims against persons insured by Home), notice would have to be extensive. The initial notice of the liquidation and claim filing deadline, for instance, required mailings totaling over 330,000 pieces and publication in 94 newspapers and one trade journal to cover the states and countries in which Home did business; it cost over $276,000. Averill Aff. ¶¶ 2-3. While notice to third party claimants would involve a smaller mailing, publication would be necessary to attempt to reach the many claimants unknown to Home, so notice would represent a significant expense.

Any notice at this preliminary stage would also create substantial confusion, as it would presumably advise that the injunction could end if the defendants prevail on the merits, although the date of that event would be uncertain. Moreover, at the conclusion of the litigation, in the event the Defendants prevail, notice would again be necessary to inform potential claimants that the injunction was lifted and the deadline had expired. Claimants thus would likely be confused as to when claims must be filed and whether they should file claims now given that they may want to withdraw the claims later. If the defendants prevail, and the temporary injunction is vacated, claims filed during the pendency of the litigation would be untimely. It would also be unclear whether late filing claimants have filed on the basis of the belief that the release was unenforceable and whether these claimants would now seek to withdraw their claims. The potential for disruption and confusing third party claimants and the public over the effectiveness of the claim filing deadline is contrary to the public interest and weighs heavily against preliminary relief.

The statutory claim filing deadline serves the Act's purposes of promoting quick, efficient and fair liquidation proceedings by encouraging parties to act. See Sizemore v. United Physicians Ins. Risk Retention Group, 56 S.W.3d 557, 565 (Tenn. App. 2001). Filing deadlines reflect a legislative goal of finality intended to permit determination and distributions on claims. See Mercado-Boneta v. Administracion del Fondo del Compensacion al Paciente, 125 F.3d 9, 17-18 (1st Cir. 1997). The orderly proof of claims deadlines and processes serve the public interest and should not be enjoined absent a strong showing of irreparable harm.

II. PLAINTIFFS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS.

A person seeking temporary injunctive relief "must show that it would likely succeed on the merits." Kukene, 145 N.H. at 4; see UniFirst, 130 N.H. at 14-15. The plaintiffs have made no such showing, and they have no likelihood of success.

"[C]ourts will never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond all reasonable doubt." Petition of Boston & Maine Corporation, 109 N.H. 324, 325 (1969). Rather, a legislative act is presumed constitutional and the Court will not declare it invalid "except on unescapable grounds." Niemiec v. King, 109 N.H. 586, 587 (1969). Plaintiffs have not shown that they will likely meet this standard of proof.[3]

A. The Statute Does Not Violate New Hampshire's Court Access Provision.

Plaintiffs contend that RSA 402-C:40, I, is inconsistent with the New Hampshire Constitution's provision for court access. N.H. Constitution, Part I, article 14. That provision "makes civil remedies readily available and guards against arbitrary and discriminatory infringements on access to the courts. However, the right to a remedy is necessarily relative and 'does not prohibit all impairments of the right of access.'" City of Dover v. Imperial Cas. & Indemn. Co., 133 N.H. 109, 116 (1990), citing and quoting Estate of Cargill v. City of Rochester, 119 N.H. 661, 665

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[3] While the plaintiffs purport to allege that the statute violates constitution provisions both facially and "as applied," they fail to articulate anything beyond a facial challenge. They do not allege any facts to show that application of the statute to them could be unconstitutional or that the defendants took any particular action with respect to them, and they only request relief that the statutory condition cannot be applied to anyone. This does not make out an as applied claim. See Dow v. Effingham, 148 N.H. 121, 128-29 (2002).

(1979); see also Minuteman, LLC & Assoc. v. Microsoft Corp., 147 N.H. 634, 640 (2002). This article "is basically an equal protection clause in that it implies that all litigants similarly situated may appeal to the courts both for relief and for defense under like conditions and with like protections and without discrimination." Opinion of the Justices (Limitation on Civil Actions), 137 N.H. 260, 265 (1993), quoting State v. Basinow, 117 N.H. 176, 177 (1977). "[S]tatutory classifications restricting a right to recover for an injury" must "be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation." Id. at 266, quoting City of Dover, 133 N.H. at 116.

1. The statute does not violate the court access provision because it does not impair the ability to maintain tort actions but provides a new and optional right of direct action.

As an initial matter, Article 14 is not applicable here because RSA 402-C:40, I, does not "restrict" or "impair" plaintiffs' ability to maintain actions in tort. It provides third party claimants with a new right to file a claim against the tortfeasor's insurer that they otherwise would not have. Absent RSA 402-C:40, I, a tort claimant would have no right to file a claim in the insurer's liquidation proceeding or to otherwise proceed directly against a tortfeasor's insurer. See Metropolitan Prop. & Liab. Ins. Co. v. Kirkwood, 729 F.2d 61, 63 (1st Cir. 1984) (Breyer, J.) ("New Hampshire law prohibits direct action"), citing Burke v. Fireman's Fund Ins. Co., 120 N.H. 365, 367-68 (1980) (no direct action against insurer under RSA 268:16, I: "Before the insurer's duty to provide indemnity arises, the plaintiff must first have the liability of the insured judicially imposed."). Where a tort claimant had no pre-

existing right to direct recovery from a tortfeasor's insurer, a statute creating such a right (where the insurer is in liquidation) subject to a condition does not implicate the right to a remedy. See Appeal of Wintle, 146 N.H. 664 (2001). In Wintle, the court held that an amendment to the workers' compensation law that limited liability for double compensation to State employers did not implicate a "right to a remedy" at all, in part because the plaintiff "had no analogous right to double recovery" at common law. Id. at 667. Similarly, here, plaintiffs have no right to recover directly from a tortfeasor's insurer. Burke, 120 N.H. at 367.

Further, a claimant may continue to pursue litigation against alleged tortfeasors regardless of the statute. Third party claimants can choose whether or not to file a claim in the liquidation and potentially obtain a distribution from the insolvent insurer's estate (a right which they would not otherwise have). See Riley v. The Heil Co., 624 F. Supp. 695, 698 (S.D. Ohio 1985) (third party claimants are not required to file claim in liquidation). Unless they so choose, the statute will have no effect on their tort claim. (Indeed, even after filing a claim, the claimant may maintain an action against the tortfeasor for amounts in excess of the applicable policy limits.) Unlike municipal immunity or a cap on private medical malpractice awards, a condition on an new and optional direct action does not impair the claimant's right to proceed against the tortfeasor. Cf. City of Dover, 133 N.H. 109; Carson v. Maurer, 120 N.H. 925 (1980). The statute does not impose any restriction. The claimant just has an option to conditionally release the insured up to policy limits and pursue payment from the insolvent insurer up to those limits. There is nothing unusual about a tort claimant releasing a tortfeasor, see RSA 507:7-h (release of joint

tortfeasor not presumed to release all joint tortfeasors); Gagnon v. Lakes Region Gen. Hosp., 123 N.H. 760, 765 (1983), and the placing of a condition on a newly created, optional right to pursue recovery directly from an insurer in liquidation is not a restriction or impairment of a right of access to the courts.[4] Indeed, the Florida courts have upheld the Florida third party claimant release provision against state constitutional challenge on this ground:

> We do not find that such a provision amounts to a denial to access to the courts pursuant to Article I, Section 21 of the Florida Constitution (1968) as the injured party has a right to either seek relief against alleged tortfeasors or waive same and seek relief from the receiver of the insolvent insurer.

Ramos v. Jackson, 510 So.2d 1241, 1241-42 (Fla. App. 1987).[5]

2. The statute satisfies the "fair and substantial" standard of review.

Even if the statute were viewed as a restriction on the right to maintain actions in tort, it comports with Article 14 because it is "reasonable, not arbitrary, and . . . rests on a ground of difference having a fair and substantial relation to the object of the legislation." Opinion of the Justices, 137 N.H. at 266. In conducting review under this standard, the courts "will not secondguess the legislature as to the wisdom

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[4] "Constitutional rights can be waived." Tomasko v. Dubuc, 145 N.H. 169, 176 (2000) (right to travel). See, e.g., Funai v. Metropolitan Prop. & Cas. Co., 145 N.H. 642, 646 (2000) (right to trial by jury); In re W., 121 N.H. 123, 125 (1981) (waiver of parental rights, even if not knowingly done). "The benefit of statutory and constitutional provisions, both in civil and criminal jurisprudence, may be waived by a party interested. A person ought not to be heard to complain of that to which he has consented." State v. Albee, 61 N.H. 423, 428 (1881) (citations omitted).

[5] New Hampshire is not alone in enacting a third party claimant release provision. Five other states have statutes with language identical or nearly identical to RSA 402-C:40, I. See Fla. Stat. Ann. § 631.193; Ky. Rev. Stat. Ann. § 304.33-390(1); Minn. Stat. § 60B.40(1); Pa. Stat. Ann. tit. 40, § 221.40(a); Wis. Stat. § 645.64(1).

of or necessity for legislation. [Their] sole inquiry is whether the legislature could reasonably conceive to be true the facts on which the challenged legislative classifications are based." Carson, 120 N.H. at 933 (citations omitted).

As shown by the commentary to the Wisconsin Act on which the New Hampshire Act was based set forth at pages 8-9 above, the Legislature had two related purposes in enacting RSA 402-C:40, I. See Riley, 624 F. Supp. at 697-98 (relying on Wisconsin commentary). *First*, it sought to facilitate expeditious liquidation proceedings by encouraging tort claimants to submit claims in the liquidation. This will permit determination of those claims through the streamlined claim determination process, instead of tort litigation, and so encourage quicker resolution of the insurance claims related to those lawsuits. Without third party claim filings, the liquidation would have to wait for the results of the underlying tort litigation, which may take significant time. See RSA 402-C:40, III (distributions on an insured's claim are dependent on the underlying tort litigation). The statute thus provides for quicker resolution of claims to make possible earlier distributions from the estate. *Second*, the Legislature intended to provide insureds with some of the benefits they had sought to obtain by purchasing insurance in the first place: the protection of having provided for the defense and payment of claims against it. The insurer's insolvency prevents it from providing a defense and paying or settling claims. By encouraging the filing of claims and the release of the insured, the statute serves to restore the benefits of insurance to a limited degree. Both purposes are in furtherance of the overall purpose of the Act: "protection of the interests of the insureds, creditors, and the public generally." RSA 402-C:1.

These purposes are plainly legitimate and reasonable, and the statutory classifications reflect differences that have a fair and substantial relation to the objects of the legislation. The statute creates two classifications, both related to the tortfeasor's insurance coverage. It distinguishes (a) between tort claimants asserting claims against defendants insured by an insurer in liquidation and tort claimants against other defendants, whether insured or uninsured, and (b) between third party claimants in the liquidation whose release is void because the insurance coverage is "avoided" by the Liquidator and those whose release remains in effect because coverage exists. Each classification is reasonable and properly related to a legitimate State purpose.

The provision of the new right of direct action only to those claimants whose tortfeasor has an insurer in liquidation is directly tied to the legislative purposes. It links the right to the goals of promoting the more expeditious resolution of insurer liquidation proceedings and quicker distributions to creditors in those proceedings and of restoring insurance protection to policyholders. There is thus a fair and substantial relation between the classification and the legislative purpose.

The statutory distinction between third party claimants whose release is void and other third party claimants also substantially relates to the object of the statute by limiting the release to claims where there is insurance coverage. Third party claimants are allowed to file claims in a liquidation to have their claims determined and receive distributions on allowed amounts. If, however, the Liquidator determines that the claim is not covered by the insurance policy ("avoids" the coverage), there will be no distributions regardless of the merits of the tort claim. In those

circumstances, it is appropriate to void the release and restore the status quo before the third party claim filing. The classification fits the release condition to its purpose (encouraging third party claimants with covered claims against insureds to file them) while not harming those claimants whose claims are not covered by insurance.

The statute accordingly is consistent with Article 14. Cf. Minuteman, LLC & Assoc. v. Microsoft Corp., 147 N.H. at 640 (distinction between direct and indirect purchasers for purposes of maintaining an antitrust action not arbitrary or discriminatory infringement of access to courts in violation of Part I, Article 14).

B. The Statute Does Not Violate Equal Protection.

The plaintiffs also claim that RSA 402-C:40, I, violates the equal protection provisions of the New Hampshire Constitution, Part 1, articles 2 and 12. The New Hampshire equal protection guaranty "is essentially a direction that all person similarly situated should be treated alike." Verizon New England, Inc. v. City of Rochester, (No. 2003-572), slip op. at 5 (N.H. Supreme Ct. July 16, 2004). The first question is the appropriate standard of review, based on examination of the "purpose and scope of the State-created classification and the individual rights affected." In re Sandra H., 846 A.2d 513, 517-18 (N.H. 2004). The applicable standard here is rational basis review because the statute neither involves any suspect class such as race, creed, color gender, national origin or legitimacy, nor implicates fundamental or important substantial rights. See Verizon, slip op. at 5.[6] The statute concerns a new,

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[6] It is well established that the "right to recover for one's injuries is not a fundamental right." City of Dover, 133 N.H. at 116, citing Estate of Cargill, 119 N.H. at 667. Plaintiffs may contend that the statute burdens a "right to a remedy," and that this is an important substantive right warranting intermediate scrutiny. See City of Dover, 133 N.H. at 116; Carson, 120 N.H. at 931-

optional right for tort claimants to assert a claim directly against a tortfeasor's insurer in liquidation. Legislation regulating such "economic benefits and burdens" is reviewable under the rational basis test. See Emond v. N.H. Dep't of Labor, 146 N.H. 230, 231 (2001) (rational basis review of statute conditioning authority to conduct independent medical examinations on board certification or commissioner's approval).

Under the rational basis test, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate State interest." Verizon, slip op. at 5, citing Estate of Robitaille v. N.H. Dep't of Rev. Admin., 149 N.H. 595, 596-97 (2003). Because plaintiffs are challenging the statute, they have "the burden to prove that the classification is arbitrary or without some reasonable justification." Id., citing Robitaille, 149 N.H. at 597.[7]

The statutory classifications satisfy this rationality review for the reasons set forth in Part II(A)(2) above with respect to the "fair and substantial relation" test. The statutory authorization for direct action limited to insurers in liquidation serves legitimate State purposes in a rational way. The statute facilitates an expeditious liquidation by encouraging tort claimants to submit claims that may be determined through the more summary claim determination process so that claims against the

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32. However, for the reasons set forth in Part II(A)(1) above, the statute does not implicate the right to maintain a tort action.

[7] If the statute were subject to intermediate scrutiny, the test is essentially the same: whether the legislative classification is "reasonable and rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation." Sandra H., 846 A.2d at 517, citing In re Hamel, 137 N.H. 488, 491 (1993). For the reasons set forth in Part II(A)(2) above, the statute satisfies this test.

insurer may be promptly resolved. This avoids the need to await the results of the underlying tort litigation and promotes earlier distributions from the estate. The statute provides insureds with the insurance benefits of a defense and payment of claims (to applicable policy limits) that otherwise would be prevented by the insurer's insolvency. The classification thus could be reasonably perceived to promote the more expeditious resolution of insurer liquidation proceedings and protection of policyholders.

The distinction concerning void releases ensures that the statute serves its policyholder protective purpose but only where the claim is in fact subject to coverage. Where the Liquidator "avoids" the coverage, the policyholder is not entitled to protection and the claimant will not receive distributions regardless of the merits of the tort claim. The provision for voiding the release thus rationally fits the benefit to policyholders to the actually applicable insurance coverage.[8]

C. The Statute Does Not Violate The So-Called "Doctrine Of Unconstitutional Conditions."

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[8] This analysis also addresses any substantive due process challenge to the statute that may lurk in the Complaint. The "appropriate inquiry" in substantive due process cases "is whether the claimant has proved that [the statute] constitutes a restriction on [protected] rights that is not rationally related to the [legislature's] legitimate goals." Dow v. Effingham, 148 N.H. at 125 (concerning ordinances). The court "has never employed the fair and substantial relationship standard for substantive due process claims." Id. Under the applicable standard, there is "a presumption favoring the constitutionality of the [statute]." Id.

There can also be no procedural due process challenge to a statute, because the legislative determination "provides all the process that is due." Atkins v. Parker, 472 U.S. 115, 130 (1985); see Kerouac v. Town of Hollis, 139 N.H. 554, 560 (1995). The effect of the filing of a third party claim in conditionally releasing an insured up to applicable policy limits results by operation of law, not by any action of the defendants. "All citizens are presumptively charged with knowledge of the law." See, e.g., Miller v. Slania Enters., 843 A.2d 939, 944 (N.H. 2004). Further, the proof of claim form notified third party claimants of the release by including express release language. See RSA 402-C:40, I; Complaint Ex. A, item 14.

Plaintiffs also assert that the statute violates the "doctrine of unconstitutional conditions." The New Hampshire Supreme Court has not expressly adopted this doctrine,[9] but the federal courts have described it as follows:

> The doctrine of unconstitutional conditions bars government from arbitrarily conditioning the grant of a benefit on the surrender of a constitutional right, regardless of the fact that the government might have refused to grant the benefit at all. Not all conditions are prohibited, however; if a condition is germane—that is, if the condition is sufficiently related to the benefit—then it may validly be imposed. In the final analysis, "the legitimacy of a government proposal depends on the degree of relatedness between the condition of a benefit and the reasons why government may withhold the benefit altogether."

National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 747 (1st Cir.), quoting Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1457 (1989), cert. denied, 515 U.S. 1103 (1995).

As an initial matter, this doctrine does not apply here because RSA 402-C:40, I, does not confer a "governmental benefit." The statute allows a third party claimant to assert claims directly against a tortfeasors' insurer when it is in liquidation. This is not a benefit within the federal cases, which have been summarized in the leading law review article as concerning "exemption from regulation, taxation, or some other burden that constitutionally might have been imposed" or "direct subsidy or provision of other governmental largesse." Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. at 1424. Here, the government is not distributing a benefit. It is instead determining under what circumstances a person should be authorized to assert a claim directly against a private entity, an insurer, albeit that the insurer is under the control of the Court through the Commissioner as Liquidator pursuant to RSA 402-C:21. See

[9] It was referred to in passing in State v. Farrow, 118 N.H. 296, 304 (1978), and Ratti v. Hinsdale Raceway, 109 N.H. 270, 274 (1969) (Kenison, C.J., dissenting).

Rand v. Merrimack River Sav. Bank, 86 N.H. 351, 354 (1933) (court controls bank through appointment of commissioner of banks as receiver under statute).[10]

Even if the statutory authorization for third party claimants were viewed as a governmental benefit, it is not prohibited by the doctrine because the condition is germane to the benefit. As described above, the condition that third party claimants conditionally release the tortfeasor (up to the applicable policy limits) in order to file a claim is directly related to the reasons for allowing them to file a claim at all. The Legislature chose to permit third party claims to expedite the liquidation (by resolving the claims through the claims determination process instead of through litigation) and provide insureds with protection that they would have had under their policies absent liquidation (by avoiding the involvement of the insured in litigation). 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.

Plaintiffs' suggestion that their ability to exercise their rights is somehow impaired by the timing of the proof or claims and release is a red herring. The Liquidator has no constitutional duty to provide third party claimants with information as to prospective merits of the choice before them and could not do so in any event. As a practical matter, it is Plaintiffs who are in the best position to determine whether to pursue recovery on their tort claims from the insureds. As the

[10] Moreover, the cases that find the conditioning of a government benefit on abandonment of litigation rights to be unconstitutional involved facts far removed from this case. See, e.g., Hall v. Ochs, 817 F.2d 920, 923-24 (1st Cir. 1987) (defendants conditioned plaintiff's release from jail and dropping of charges against him on his waiver of right to sue).

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 conditionally release their claim (to applicable policy limits) by filing a claim in the liquidation. See 1967 Wis. Laws, c. 89, § 17, intro. comment to § 645.64 (p. 8, above). Since the insurer in liquidation is by definition insolvent, it is apparent that they are unlikely to receive payment in full in the liquidation. [11]

In these circumstances, the Legislature properly could condition the filing of third party claims on a conditional release of the tortfeasor/insured up to applicable policy limits.

CONCLUSION

Plaintiffs have failed to meet their burden to show that they will suffer immediate irreparable harm or that they are likely to succeed on the merits of their claims. Further, the potential harm to the Defendants and to the public interest that would result if the Court were to the broad temporary injunctive relief requested by the Plaintiffs would far outweigh any potential benefit to the Plaintiffs. Plaintiffs' request should therefore be denied.

WHEREFORE, the Defendants respectfully request that this Court:

A. Deny Plaintiffs' request for temporary injunctive relief; and

B. Grant such other relief as justice may require.

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[11] The ultimate distribution to claimants in a liquidation will depend on (1) the total allowed claims in each priority class, and (2) the total assets ultimately collected by the liquidator. Neither of these elements will be known with any degree of certainty until long after the claim filing deadline, which must be no more than one year after entry of a liquidation order. See RSA 402-C:26, II. Thus, it is not generally possible to provide additional meaningful information before the claim filing deadline.

Respectfully submitted,

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<u>Certificate of Service</u>

I hereby certify that a copy of the foregoing was forwarded this 26th day, of July 2004, to Thomas R. Watson, Esq. and Jennifer A. Lemire, Esq., Watson & Lemire, P.A., 75 Congress Street, Suite 211, Portsmouth, NH 03801 and Alan Rich, Esq. and Stephen Blackburn, Esq., Baron & Budd, P.C., 3102 Oak Lawn Avenue, Suite 1100, Dallas, TX 75219-4281.

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