

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

**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.