

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

2004 JUN 11
SUPERIOR COURT
Docket No. P 1: 34

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

**PETITION IN EQUITY FOR PERMANENT
AND TEMPORARY INJUNCTIVE RELIEF**

NOW COME the Plaintiffs, Venise Theresa Gonya of Somersworth, New
Hampshire, as representative of the Estate of Joseph E. Gonya, deceased, individually
and on behalf of all others similarly situated, and Roxane S. Scaife of Amherst, New
Hampshire, as representative of the Estate of Arnold L. Stone, deceased, individually and
on behalf of all others similarly situated, by and through their attorneys, Watson &
Lemire, P.A. and Baron & Budd, P.C., and complain against 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, and say:

1. Plaintiff Venise Theresa Gonya is a citizen of the United States and
resides at 28 Kelwyn Drive, Somersworth, New Hampshire 03878. She acts as
representative of the Estate of Joseph E. Gonya, deceased. Mr. Joseph E. Gonya's estate

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has tort claims against a company or companies insured by The Home Insurance Company.

2. Plaintiff Roxane S. Scaife is a citizen of the United States and resides at 16 Old Mont Vernon Road, Amherst, New Hampshire 03031. She acts as representative of the Estate of Arnold L. Stone. Mr. Stone's estate has tort claims against a company or companies insured by the Home Insurance Company.

3. Defendant Roger A. Sevigny is the Commissioner of the State of New Hampshire Insurance Department, having an address of 56 Old Suncook Road, Concord, New Hampshire 03301-5151. The Insurance Commissioner is charged with all duties pertaining to the enforcement and execution of insurance laws of the State of New Hampshire. He is being sued in his official capacity.

4. Defendant Peter W. Heed is the Attorney General of New Hampshire. The Office of the Attorney General has an address of 33 Capitol street, Concord, New Hampshire 03301-6397. As Attorney General, Mr. Heed is the State's chief legal and law enforcement officer. He is being sued in his official capacity.

5. This action is maintainable as a class action pursuant to Rule 27-A of the New Hampshire Superior Court Rules.

6. Plaintiffs represent a class of persons consisting of the following individuals:

a. Those persons having a third party claim against The Home Insurance Company or its subsidiaries;

b. Those persons having a potential third party claim against The Home Insurance Company or its subsidiaries.

7. This class is so numerous that joinder of all members is impracticable. The size of the class is presently unknown. It consists of persons with existing or potential claims against the Home Insurance Company or its subsidiaries.
8. There is a question of law common to the entire class, namely the constitutionality of New Hampshire Revised Statutes Annotated ("RSA") 402-C:40(I).
9. Each member of the class has claims or defenses which are typical to the claims or defenses of the class.
10. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declarative relief with respect to the class as a whole. The class action form is the superior method for the fair and efficient adjudication of this controversy.
11. Plaintiffs will fairly and adequately protect the interests of the class. Plaintiffs are represented by experienced counsel who will adequately represent the interests of the class.
12. RSA 402-C:40(I), part of the Insurers Rehabilitation and Liquidation 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. RSA 402-C:40(I) forces a claimant to give up a common-law cause of action without procedural safeguards or meaningful access to information. This requirement violates equal protection and due process constitutional provisions in the New Hampshire Constitution.

13. Plaintiffs have been 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. This instruction also applies to persons whom it is believed may have a claim against the company now or in the future. Paragraph 14 of the Proof of Claim form notifies claimants that pursuant to RSA 402-C:40(I), they are relinquishing the right to sue companies insured by The Home Insurance Company for their tortious conduct. As the contents of The Instructions for Filing a Proof of Claim Form and Claim Form are material to the allegations set forth herein, both documents are annexed hereto as Exhibit A.

14. 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.

15. Under the liquidation scheme as it currently stands, claimants must waive a constitutionally protected right in exchange for the benefit of filing a claim.

16. This action arises under the Constitution of the State of New Hampshire. Jurisdiction for a declaratory judgment is proper in this court under RSA Chapters 1:17, 491.22 and 502-A:14. Plaintiffs have filed a constitutional challenge to the statute under