

**NEW HAMPSHIRE SUPREME COURT  
RULE 7 NOTICE OF MANDATORY APPEAL**

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; or (6) a probation revocation proceeding.

**1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT**

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.

Docket No. 04-E-0208

**2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)**

Merrimack County Superior Court; Judge Kathleen A. McGuire presiding.

**3A. NAME AND ADDRESS OF APPEALING PARTY. IF REPRESENTING SELF, PROVIDE TELEPHONE NUMBER**

VENISE THERESA GONYA, as representative of the Estate of Joseph E. Gonya, deceased, and ROXANE S. SCAIFE, as representative of the Estate of Arnold L. Stone, deceased.

**3B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL**

Thomas R. Watson, Esq. NHBA #2670  
Jennifer A. Lemire, Esq. NHBA #11316  
WATSON & LEMIRE, P.A.,  
75 Congress Street, Suite 211  
P.O.Box 469  
Portsmouth, NH 03801  
(603) 436-7667

**4A. NAME AND ADDRESS OF OPPOSING PARTY**

ROGER A. SEVIGNY,  
Commissioner of the State of New  
Hampshire Insurance Dept.  
21 South Fruit Street, Suite 14  
Concord, NH 03301

**4B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL**

Suzanne M. Gorman, Esq.,  
Senior Assistant Attorney General  
33 Capital Street  
Concord, N.H. 03301-6379  
(603) 271-3658

**5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT**

Co-Counsel representing Plaintiffs *pro hoc vice* were: Alan Rich and Stephen Blackburn of BARON & BUDD, P.C., 3102 Oak Lawn Avenue, Suite 1100, Dallas, TX 75219 (214) 525-3729. They are filing applications to appear *pro hoc vice* in this appeal.

Special Counsel representing the Defendant was Eric A. Smith of RACKEMANN, SAWYER & BREWSTER, One Financial Center, Boston, MA 02111 (617) 542-2300.

PETER W. HEED, Attorney General of New Hampshire was sued in his official capacity in the original complaint, but was dismissed by agreement.

**6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING. ATTACH COPY OF NOTICE AND DECISION.**

Notice of Decision dated 2/11/05

**DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY. ATTACH COPY OF NOTICE AND DECISION.**

N/A

**7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS**

N/A

**8. APPELLATE DEFENDER REQUESTED?**

IF SO, CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4)

N/A

**9. IS ANY PART OF CASE CONFIDENTIAL? IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.**

N/A

**10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.**

N/A

**11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE? \_\_\_\_YES   X  NO**

IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

**12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?**

  X  YES \_\_\_\_NO

IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

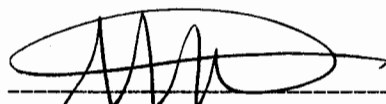
13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(b).

This Appeal concerns whether the "Special Provisions for Third Party Claims" subsection of the New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C:40, I, which requires a third party to release its claims against a liquidating insurer's policy-holder in order to file a claim with the liquidator, violates Part I, articles Two, Twelve, Fourteen and Fifteen of the New Hampshire Constitution. Specifically:

- 1) Whether RSA 402-C:40, I, violates the doctrine of unconstitutional conditions.
- 2) Whether RSA 402-C:40, I, violates New Hampshire's court access/right to a remedy provision of N.H. CONST. Pt. I, art. 14.
- 3) Whether RSA 402-C:40, I, violates New Hampshire's equal protection provisions of N.H. CONST. Pt. I, arts. 2 & 12.
- 4) Whether RSA 402-C:40, I, violates New Hampshire's due process provision of N.H. CONST. Pt. I, art. 15.

#### 14. CERTIFICATIONS

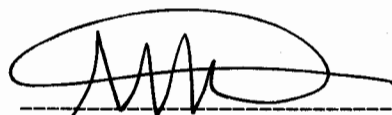
I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.



\_\_\_\_\_  
Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

MARCH 1, 2005  
Date



\_\_\_\_\_  
Appealing Party or Counsel

## TRANSCRIPT ORDER FORM

**INSTRUCTIONS:**

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Superior Court Administrative Rule 3-1), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the trial court. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.

LIST EACH PORTION OF CASE PROCEEDINGS TO BE TRANSCRIBED.						
DATE OF PROCEEDING	TYPE OF PROCEEDING	LENGTH OF PROCEEDING	NAME OF JUDGE(S)	NAME OF COURT REPORTER (IF PROCEEDING WAS RECORDED SO INDICATE)	PORTIONS PREVIOUSLY PREPARED **	DEPOSIT (SEE SCHEDULE BELOW)
11/5/04	Oral Arg. On cross-motions for summary judgment	1 hour	Kathleen A. McGuire			\$ 175
						\$
						\$
						<b>TOTAL DEPOSIT: \$ 175</b>

### SCHEDULE OF DEPOSITS

Length of Proceeding

- Hearing or trial of one hour or less
- Hearing or trial up to ½ day
- Hearing or trial of more than ½ day
- Previously prepared portions

Deposit Amount

- \$ 175
- \$ 450
- \$ 900/day
- Number of pages x \$.50 per page per copy  
if additional copies are needed

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

\*\* For portions of the transcript that have been previously prepared, indicate number of copies that were prepared.

**THE STATE OF NEW HAMPSHIRE  
Merrimack County Superior Court**

163 N. Main Street  
P. O. Box 2880  
Concord, NH 03301 2880  
603 225-5501

**NOTICE OF DECISION**

THOMAS R WATSON ESQ  
WATSON & BOSEN  
P O BOX 469  
PORTSMOUTH NH 03802

04-E-0208 Venise Theresa Gonya et al v. Roger Sevigny et al

Enclosed please find a copy of the Court's Order dated 2/11/2005  
relative to:

**Court Order**

02/11/2005

William McGraw  
Clerk of Court

cc: Jennifer A. Lemire, Esq.  
Suzanne M. Gorman, Esq.  
Stephen Blackburn, Esq.  
Alan Rich, Esq.

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 04-E-208

Venise Theresa Gonya et al

v.

Roger A. Sevigny

**ORDER**

Plaintiffs in this matter, Venise Theresa Gonya, representative of the Estate of Joseph E. Gonya, and Roxane S. Scaife, representative of the Estate of Arnold L. Stone, have filed an action for declaratory and injunctive relief. Before the Court are cross-motions for summary judgment addressing the plaintiffs' constitutional challenges to RSA 402-C: 40, I, a provision governing the filing of third party claims in the New Hampshire Insurers Rehabilitation and Liquidation Act. Plaintiffs and defendant, Roger A. Sevigny, in his official capacity as Liquidator of The Home Insurance Company, filed a stipulation of agreed facts and a hearing on this matter was held on November 5, 2004.

**BACKGROUND**

To address the rehabilitation and liquidation of troubled insurance companies, each state has adopted a version of either the Insurers Rehabilitation and Liquidation Model Act developed by the National Association of Insurance Commissioners (NAIC), or the Uniform Insurers Liquidation Act adopted by the Commissioners on Uniform State Laws. Liquidations of domestic insurance companies are governed by the provisions of RSA Chapter 402-C, a version of the NAIC model adopted in 1969. Although there are state to state variations as to specific provisions, a reasonably uniform and coordinated regulatory framework addressing liquidations of troubled companies has been achieved.

The Home Insurance Company was placed into liquidation on June 13, 2003. Persons or entities wishing to assert claims against The Home Insurance Company were required to file claims within one year of the order of liquidation, the maximum extension of the claim filing period allowed under RSA 402-C:26, II. Any claims filed after June 13, 2004 are subject to the provisions of RSA 402-C: 37, II and III.

In compliance with various provisions of RSA Chapter 402-C, insureds of record and known claimants of the company were provided timely notice by first class mail of the liquidation order, the claim filing deadline, and proof of claim forms. Instructions for the filing of claims were also provided. Several subsequent informational mailings were made. This information, as well as court orders relevant to claims procedures, were published on the internet and continue to be accessible through the New Hampshire Insurance Department website, and on the website maintained by the liquidation clerk.

The plaintiffs acknowledge that their attorneys received mailings from The Home Insurance Company in Liquidation providing notice of the liquidation, claims filing deadline, proof of claims forms, and instructions. Neither plaintiff has submitted a proof of claim in the liquidation; instead, plaintiffs challenge the constitutionality of the third party release provision in RSA 402-C:40, I.

### **DISCUSSION**

Plaintiffs argue that RSA 402-C: 40, I violates the New Hampshire Constitution's court access provision (NH.CONST. Pt I, art. 14), equal protection clauses (NH.CONST. Pt I, arts. 2, 12) and due process clause (NH.CONST. Pt. I, art. 15). Plaintiffs also invoke the "doctrine of unconstitutional conditions".

Plaintiffs decline to file claims because they object to language in RSA 402-C:40, I requiring that third party claimants release the insured of liability to the limit of the policy at issue. Plaintiffs cite Paragraph 14 of the Proof of Claim Form which gives notice to third party claimants that “in consideration of the right to bring a claim against The Home”, third party claimants must release the insured “in the amount of the limit of the applicable policy”, although it is noted, the release may be voided if the “insurance coverage provided by The Home is avoided by the Liquidator.”

### **Standard of Review**

Plaintiffs bear a substantial burden if they are to prevail in their challenge. In asserting a facial challenge to the constitutionality of RSA 402-C:40, I, plaintiffs must overcome a presumption that the legislature intended to confine its action within constitutional bounds: Niemiec v. King 109 N.H. 586 (1969). While the Court may exercise its power to review and nullify a statute, a statute is presumed to be constitutional and will be construed to avoid conflict with constitutional rights whenever reasonably possible. Appeal of Public Service Co. of New Hampshire, 122 N.H. 919 (1982). While plaintiffs point out that New Hampshire is one of a small minority of jurisdictions that has adopted the release provision in question, and they note that the efficiency of liquidations in other jurisdictions does not appear to be adversely affected by the lack of such a provision, the Court “will not second guess the legislature as to the wisdom of or the necessity for legislation.” Carson v. Maurer, 120 N.H. 925, 933 (1980).

### **Court Access/ Right to Remedy**

Plaintiffs argue that RSA 402-C:40, I violates their rights to equal protection under, Part I, articles 2 and 12 of the New Hampshire Constitution, and, in so doing,



impermissibly restricts their right to recovery under Part 1, article 14. The general purpose of Part I, article 14 is to provide all litigants with ready access to civil remedies and to protect litigants from arbitrary impairments of protected court access. Opinion of the Justices, 137 N.H. 260 (1993).

Importantly, RSA 402-C:40, I does not require plaintiffs to forego prosecution of their pending civil suits, it simply affords potential third party claimants the alternative of a direct action against an insurer, a right third party claimants would not otherwise have. While a potential third party claimant in a liquidation will be required to make an election between pursuit of the insured in a court action, and the filing of a claim directly against the insurer in liquidation, the election of either course is unfettered by anything other than a determination of which course may be more economically advantageous.

Accordingly, plaintiffs' claim that RSA 402-C:40, I violates Part I, article 14's guarantees of rights to court access and to a remedy must be rejected.

### **Equal Protection**

The Court next considers whether RSA 402-C: 40, I violates the equal protection provisions of the New Hampshire Constitution. See N.H. CONST. pt. I, art. 2, 12, 14. While the Court has determined that the provision, does not directly diminish plaintiffs' access to the courts, the equal protection implication of Part 1, article 14 of the New Hampshire Constitution is that "all litigants similarly situated may appeal to the court for relief under like conditions and with like protection and without discrimination". State v. Basinow, 117 N.H. 176, 177 (1977).

Plaintiffs argue that the statute creates the potential of disparate classifications based upon whether individuals choose to pursue claims, the size of claims that may be

pursued, the likely avoidance of some claims by the Liquidator, and a number of other potential scenarios created by operation of the challenged provision. Further, plaintiffs argue that by operation of RSA 402-C:40, I they are treated differently from all other tort plaintiffs.

“The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently.” *LeClair v. LeClair* 137 N.H. 213, 222 (1993). “If the persons are not similarly situated, . . . no equal protection problem is involved.” *Id.* (citation omitted)

A determination as to whether individuals or entities are “similarly situated” for equal protection purposes is not always susceptible to precise demarcation. *Barrington Cove Limited Partnership v. Rhode Island Housing and Mortgage Finance Company*, 246 F. 3d 1, 8 (2001). Plaintiffs seek to cast a wide net in advancing “all tort plaintiffs” as the class from which they are distinguished. However, in this instance the logical analysis is within the context of New Hampshire’s comprehensive statutory scheme addressing the rehabilitation and liquidation of insurers. Within that statutory scheme, and with the general purpose of effecting an orderly, efficient, and fair liquidation for the benefit of all claimants, necessary distinctions and classifications are drawn with regard to the order of distribution from the liquidating estate. See RSA 402-C: 44. There the plaintiffs would be situated in class II with all other policy-related claimants, entitled to the same order and level of distribution on allowed claims, whether those claims are first or third party claims. However, for purposes of “an apples to apples”, equal protection comparison, plaintiffs are similarly situated only with other claimants in that class that have a cause of action against a defendant who is a policyholder of the liquidating

insurer. All such third party claimants are treated the same. They must make an election between pursuing court action or filing a claim in the liquidation. Because RSA 402-C:40, I uniformly treats third party claimants, the equal protection inquiry should end here.

Nonetheless, for purposes of further analysis, the Court will assume that the plaintiffs are treated differently from all other tort plaintiffs. Because the provision being challenged implicates the important, substantive right to tort recovery, the classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation.” Carson v. Maurer, 120 N.H. 925, 932 (1980).

The Court has carefully considered the legislative history, and reviewed the express purposes of RSA Chapter 402-C as specifically articulated in RSA 402-C:1. While New Hampshire’s legislative history is not particularly helpful in articulating the specific legislative purpose and objective behind RSA 402-C:40, I, or expressly explaining how that specific provision relates to the general purpose clause, the legislative history does make specific reference to Wisconsin’s enactment of similar legislation two years earlier. That legislative history provides insight into the purpose of the third-party release provision. It reveals that the purposes and expected effects of the provision include enhanced policyholder protection, more equitable sharing of the burden posed by the insolvent insurer, and a more efficient liquidation. See 1967 Wis. Laws c. 89, § 17, comments to Wis. Stat. § 645.64 and 645.64(1).

The third party claimant release provision provides a reasonable measure of protection for the policyholder within the liquidation scheme and it is consonant with the

general purpose sought to be served by RSA Chapter 402-C. More specifically, the waiver provision is directly related to the purpose articulated in RSA 402-C:1, IV (d), which speaks to the goal of an “equitable sharing of the burden of unavoidable loss.” The Court finds the measure of protection that is afforded policyholders by the waiver provision of RSA 402-C:40, I is in “substantial relation to the object of the legislation.” In re Sandra H., 150 N.H. 634 (2004). Even if plaintiffs were able to establish that they were differently treated than others similarly situated, the legislative purposes of the RSA Chapter 402-C, and the direct relationship of the waiver provision to those purposes, would withstand challenge under the necessary middle-tiered, equal protection review.

### **Unconstitutional Conditions**

Plaintiffs also challenge RSA 402-C:40, I on the ground that the provision indirectly compromises and burdens their right to tort recovery in violation of the “doctrine of unconstitutional conditions”. Such challenges are made when a discretionary government benefit is conditioned upon relinquishment of a constitutional right. Under that doctrine, the burden placed upon the plaintiffs’ right to tort recovery by the waiver requirement would require justification.

Plaintiffs request that the Court embrace an expansive definition of “governmental benefit” in its analysis to include within the definition any benefit that “government is permitted but not compelled to provide.” Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1422. Assuming, for purposes of argument, that the legislatively established opportunity to file a claim in the liquidation may constitute a governmental benefit, and that the waiver requirement of the statute implicates a constitutionally protected interest, the Court next considers whether the burden imposed

on the protected interest is justifiable. In making such a determination, the Court must examine the relationship between the benefit provided and the condition imposed. Nollan V. California Coastal Comm'm, 483 US 825,837 (1987).

Plaintiffs do not assert that the operation of RSA 402-C:1, IV triggers a strict scrutiny analysis because it pressures a “preferred constitutional liberty” or a fundamental constitutional right; instead, plaintiffs urge application of a middle-tiered analysis, as would be applied in an equal protection analysis when a challenged classification has implication for an individual’s recovery in tort. See Carson v. Maurer, 120 N.H. at 931-932. The Court agrees with the plaintiffs that a “fair and substantial relation” test should be applied to determine whether an “essential nexus” exists between the condition imposed and “a legitimate state interest”, so as to avoid unreasonable restrictions on private rights. Brannigan v. Usatilo, 134 N.H. 50 (1991).

The Court again concludes that an analysis of the legislative purposes of the provision, and the provision’s relationship to those purposes, would satisfy the “intermediate” standard of review. Furthermore, any potential restriction of private rights under RSA 402-C: 40, I is tempered by both the voluntary nature of the waiver, and the limitations on the waiver.

### **Procedural Due Process**

Finally, plaintiffs challenge RSA 402-C:40, I upon procedural due process grounds, asserting that the provision requires third party claimants to choose between filing a claim with the liquidation and pursuing the insured directly, without the opportunity to make a voluntary, knowing, and intelligent choice. In determining whether a particular enactment violates the due process requirement of the State

Constitution, "it must first be determined whether a State action has deprived plaintiffs of a protected liberty or property interest." Opinion of the Justices, 137 N.H. 260 (1993).


While it is clear that the plaintiffs have important substantive rights and interests in the tort actions that lay beneath their challenge to RSA 402-C:40, I, it is also clear that plaintiffs retain full control of those interests. Plaintiffs may wrestle with determining whether the alternative provided under RSA 402-C: 40, I better suits their economic purposes; nonetheless, plaintiffs are entirely free to pursue their tort claims through litigation. Plaintiffs suggest that there is insufficient information available to determine in a meaningful way what their financial prospects may be if a claim is filed with the liquidation. While there is inherent uncertainty regarding the eventual distributions on allowed claims in any liquidation, plaintiffs are best positioned to gauge the financial strength of their defendants to determine whether they would fare better pursuing litigation or filing a claim with the liquidation estate.

In sum, the legislative intention to afford a measure of protection to the policyholder appears to be a reasonable and legitimate state interest. Any burden brought to bear on the substantive rights of the plaintiffs by operation of RSA 402-C: 40, I is a justifiable one. The Court finds no constitutional infirmities in the challenged provision.

Accordingly, defendant's Motion for Summary Judgment is **GRANTED**, and Plaintiffs' Cross-Motion for Summary Judgment is **DENIED**.

So Ordered.

Dated: 2/18/05

  
Presiding Justice