

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

Case No. 2018-0702

STEVEN ZANNINI & a.  
Plaintiffs—Appellants

v.

PHENIX MUTUAL FIRE INSURANCE COMPANY  
Defendant—Appellee

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Rule 7 Mandatory Appeal from the  
New Hampshire Superior Court, Merrimack County  
Case No. 217-2018-CV-00122

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**REPLY BRIEF FOR PLAINTIFFS—APPELLANTS**

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## ARGUMENT

### I. THE ONE YEAR LIMITATION PERIOD IN THE STATUTORY FRAMEWORK APPLICABLE TO FIRE INSURANCE POLICIES DEMONSTRATES THAT THE SUITS AGAINST US PROVISION VIOLATES PUBLIC POLICY.

In its Brief, Phenix Mutual Fire Insurance Company ("Phenix Mutual" or "Appellee") argues for the first time that the one year limitation period in the New Hampshire Standard Fire Insurance Policy supports Phenix Mutual's argument that the Suits Against Us provision does not violate public policy. (Appellee Brief at pp. 15 – 16.) However, Phenix Mutual's argument lacks merit because it fails to acknowledge the entire statutory framework applicable to limitation periods in fire insurance policies.

In its Brief, Phenix Mutual focuses on the following language set forth in the New Hampshire Standard Fire Insurance Policy to argue that the legislature has approved of a one year limitation period that accrues from the date of loss:

No suit or action on the policy for the recovery of any claim shall be sustainable in any court of law or equity unless the requirements of this policy shall have been complied with, and unless commenced within 12 months after inception of the loss.

R.S.A. § 407:22. Phenix Mutual compares the foregoing clause to the Suits Against Us provision at-issue in the instant litigation, which provides:

No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.

(Appellant Appendix at p. 69.) Although these two limitation periods appear, at first, to be similar, a more thorough review of the applicable statutory framework demonstrates that Phenix Mutual's argument is misplaced.

Phenix Mutual failed to acknowledge that the limitation period applicable to fire insurance policies accrues from the date of denial, not the date of loss. As Phenix Mutual

explained, the New Hampshire Standard Fire Insurance Policy includes a twelve (12) month limitation period from the "inception of loss." See R.S.A. § 407:22. However, this provision is further defined in a preceding statute, which states that a fire insurance company must

provide written notice to the insured of any denial of coverage. The notice shall inform the insured that any action based upon the denial shall be barred by law if not commenced within 12 months from the date of the written denial.

R.S.A. § 407:15 (emphasis added). In other words, the one year limitation period applicable to fire insurance policies accrues from the date of the written denial – not the date of loss as suggested by Phenix Mutual. Further, the one year limitation period applicable to fire insurance policies is enforceable only if the insurer provides sufficient notice to the insured of any denial of coverage. See Forbes Farm Partnership v. Farm Family Mut. Ins. Co., 146 N.H. 200, 203 (2001) (explaining that R.S.A. § 407:15 provides that "unless the insurance company notifies the insured that it must bring an action within twelve months after notification, the insured may bring its action at any time" (emphasis added)).

In contrast to Phenix Mutual's argument, R.S.A. § 407 et seq. does not provide support for the conclusion that the Suits Against Us provision complies with public policy. In fact, to the extent R.S.A. § 407 et seq. provides any legislative intent about the enforceability of a one year contractual limitation period, the statute demonstrates that the legislature would likely approve of a one year limitation period that (1) accrues from the date of denial, and (2) is applicable only if the insurer provides the insured with sufficient written notice of any denial of coverage. Here, the Suits Against Us provision does not accrue from the date of denial, nor does it require sufficient written notice of any denial of coverage. As a result, Phenix Mutual's reliance on R.S.A. § 407:22 to argue that the Suits Against Us provision complies with public policy is misplaced.

Further, the language in R.S.A. § 407 et seq. demonstrates that the Suits Against Us provision violates public policy. As the Zanninis argued in their Opening Brief, a one year limitation period that accrues from the date of loss violates public policy because it fails to provide an insured with a sufficient amount of time to file suit. See City of Rochester v. Marcel A. Payeur, Inc., 169 N.H. 502, 508 (2016) (explaining that the public policy underpinnings of the statute of limitations is two-fold: to protect against stale claims and to ensure that a plaintiff has a reasonable period of time to seek recovery on an otherwise sound cause of action). The legislature appears to agree with the Zanninis, since it set forth two requirements for one year limitation periods in R.S.A. § 407:15, including (1) accrual from the date of denial, and (2) sufficient written notice to trigger the one year limitation period. See R.S.A. § 407:15. Here, the Suits Against Us provision does not commence from the date of denial, nor does it require written notice. As a result, the Suits Against Us provision does not comply with public policy, since it fails to include the requirements set forth in R.S.A. § 407:15. Therefore, the Suits Against Us provision is not enforceable.

### **CONCLUSION**

For the foregoing reasons and those set forth in the Zanninis' Opening Brief, the Zanninis respectfully request that this Honorable Court reverse the Trial Court's Order granting Phenix Mutual's Motion for Summary Judgment.

**CERTIFICATION OF WORD LIMIT**

I, Roy W. Tilsley, Jr., Esq., hereby certify that the total words in this brief do not exceed the maximum of 3,000 words.

/s/ Roy W. Tilsley, Jr., Esq.  
Roy W. Tilsley Jr. Esq.

Respectfully submitted,  
Steven and Pamela Zannini

By their attorneys,  
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Dated: June 4, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that I provided a true and exact copy of the foregoing to Gary M. Burt, Esq., counsel for Phenix Mutual via the New Hampshire Supreme Court's electronic filing system on June 4, 2019.

/s/ Roy W. Tilsley, Jr., Esq.  
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