

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[FILED: NOVEMBER 19, 2018]

SHIRLEY D'AMICO, Individually, and :  
as Executrix for the ESTATE OF :  
FRANK D'AMICO, :  
*Plaintiff,* :

v. :

A.O. SMITH CORP., et al., :  
*Defendants.* :

C.A. No. PC-2012-0403

**DECISION**

**GIBNEY, P.J.** The Defendants—Amerisure Insurance Company, Great American Insurance Company f/k/a American National Fire Insurance Company, Insurance Company of North America, National Surety Corporation, and The American Insurance Company (collectively Defendants)—move to dismiss the Sixth Amended Complaint of Shirley D'Amico, Individually and as Executrix for the Estate of Frank D'Amico (Plaintiff), in the above-entitled action. Defendants argue that Plaintiff's claims are barred as direct actions against insurers of an alleged tortfeasor. Plaintiff objects contending said claims are allowed as direct complaints against liability insurers of an entity that has filed for bankruptcy. Jurisdiction is pursuant to Super. R. Civ. P. 12(b)(6).

**I**

**Facts and Travel**

Plaintiff's suit alleges that her husband, Frank D'Amico, died as a result of malignant mesothelioma proximately caused by occupational exposure to asbestos. This exposure,

according to Plaintiff, took place during Frank D’Amico’s service in the United States Navy and his subsequent employment at various golf courses.

Frank and Shirley D’Amico filed the original Complaint on January 25, 2012, prior to Frank D’Amico’s death. After multiple amendments, Shirley D’Amico filed the Fifth Amended Complaint on June 11, 2015, to include Grover S. Wormer Company (Grover), both Individually and as Successor-in-Interest to Wright-Austin Company, as a defendant. This Court dismissed Plaintiff’s claims against Grover on February 28, 2018, finding they were barred under the laws of Michigan, the state of Grover’s incorporation.<sup>1</sup> M.C.L.A. § 450.1842a(2); *D’Amico v. A.O. Smith Corp.*, No. 12-0403 (R.I. Super. Feb. 28, 2018) (Order).

Following Grover’s dismissal, Plaintiff filed the Sixth Amended Complaint, substituting Grover with the current Defendants before this Court. Each of the Defendants is a former insurance carrier of Grover, as identified by Wright-Austin Company in compliance with a July 6, 2017 Order from this Court. *D’Amico v. A.O. Smith Corp.*, No. PC-12-0403, 2017 WL 2998866. (R.I. Super. July 6, 2017) (Trial Order). Plaintiff makes no specific allegations against Defendants.

## II

### Standard of Review

It is well-settled that the sole function of a motion to dismiss is to test the sufficiency of the complaint. *Ryan v. State Dep’t of Transp.*, 420 A.2d 841, 842 (R.I. 1980); *Dutson v. Nationwide Mut. Ins. Co.*, 119 R.I. 801, 803-04, 383 A.2d 597, 599 (1978). “When ruling on a Rule 12(b)(6) motion, the trial justice must look no further than the complaint, assume that all

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<sup>1</sup> On January 21, 2008, Grover filed a Notice of Dissolution in compliance with M.C.L.A. § 450.1842a(2). (von Wormer Aff. ¶ 11, Apr. 11, 2017.) The notice indicated that claims against Grover would be barred unless such claims were brought within one year after the date of publication of the notice. *Id.* at ¶ 12.

allegations in the complaint are true, and resolve any doubts in a plaintiff's favor.'" *Estate of Sherman v. Almeida*, 747 A.2d 470, 473 (R.I. 2000) (quoting *R.I. Affiliate, Am. Civil Liberties Union, Inc. v. Bernasconi*, 557 A.2d 1232 (R.I. 1989)). However, "[i]f it appears beyond a reasonable doubt that plaintiff would not be entitled to relief, under any facts that could be established,' the Superior Court will grant a motion to dismiss. *McKenna v. Williams*, 874 A.2d 217, 225 (R.I. 2005).

### III

#### Analysis

Defendants move to dismiss all counts against them in Plaintiff's Sixth Amended Complaint. Specifically, Defendants argue that Plaintiff's claims are barred by G.L. 1956 § 27-7-2, which prohibits direct action against insurers of an alleged tortfeasor. *Maczuga v. Am. Universal Ins. Co.*, 92 R.I. 76, 80, 166 A.2d 227, 229-30 (1960) ("the legislature has placed a restraint on suits directly against the insurer [in § 27-7-2]"). Plaintiff objects, arguing that claims against Defendants survive under the exception to § 27-7-2 that allows direct claims against insurers of tortfeasors that have filed for bankruptcy. Sec. 27-7-2.4.

Rhode Island law generally bars direct actions against the insurer of an alleged tortfeasor. § 27-7-2; *see also Mendez v. Brites*, 849 A.2d 329, 340 n.2 (R.I. 2004) ("[a]n injured party . . . in his or her suit against the insured, shall not join the insurer as a defendant"). Instead, § 27-7-2 provides that "[t]he injured party . . . having obtained judgment against the insured alone, may proceed on that judgment in a separate action against the insurer." The First Circuit has interpreted this statute to extend to insurers of dissolved corporations. *Carreiro v. Rhodes Gill & Co., Ltd.*, 68 F.3d 1443, 1450 (1st Cir. 1995) (adopting the district court's determination that "§ 27-7-2 does not permit a direct action against the insurer of a dissolved corporation").

The Legislature has carved out limited exceptions to § 27-7-2. First, the statute permits a plaintiff to join an insurer directly as a defendant “[i]f the officer serving any process against the insured shall return that process ‘non est inventus,’ or where before suit has been brought and probate proceedings have not been initiated the insured has died.” Sec. 27-7-2. More significantly,

“[a]ny person . . . may file a complaint directly against the liability insurer of the alleged tortfeasor seeking compensation by way of a judgment for money damages *whenever the alleged tortfeasor files for bankruptcy*, involving a chapter 7 liquidation, a chapter 11 reorganization for the benefit of creditors or a chapter 13 wage earner plan.” Sec. 27-7-2.4 (emphasis added).

Defendants, relying on *Carreiro*, argue that as insurers of a dissolved entity, direct claims against them are barred by § 27-7-2. 68 F.3d at 1450 (“§ 27-7-2 does not permit a direct action against the insurer of a dissolved corporation”). Defendants further assert that none of the exceptions in § 27-7-2 (allowing certain direct actions against insurers of tortfeasors who have died or cannot be served with process) or in § 27-7-2.4 (allowing direct actions against insurers of entities that have filed for bankruptcy) applies to the within Complaint.

Plaintiff agrees that § 27-7-2 generally bars a direct suit of the insurer of an alleged tortfeasor, including one that is a dissolved entity as interpreted by the First Circuit in *Carreiro*, 68 F.3d. at 1450. However, Plaintiff notes the exception to § 27-7-2 set forth in § 27-7-2.4, which allows direct legal action against the insurer of an entity that has filed for bankruptcy. *Giroux v. Purington Bldg. Sys., Inc.*, 670 A.2d at 1227, 1229 (R.I. 1996). Plaintiff argues in its memorandum that the term ‘bankruptcy’ should be interpreted broadly to encompass corporate dissolution, which Plaintiff reasons “unquestionably can address insolvency issues.” Plaintiff, therefore, asks this Court to find Grover’s voluntary corporate dissolution the functional

equivalent of a bankruptcy, entitling Plaintiff to sue Defendants directly in place of Grover pursuant to § 27-7-2.4.

It is well-settled that “where the language of the statute is free from ambiguity and expresses a plain and sensible meaning, the meaning so expressed will be conclusively presumed to be the one intended by the Legislature.” *Markham v. Allstate Ins. Co.*, 116 R.I. 152, 155-56, 352 A.2d 651, 653 (1976) (quoting *State v. Ricci*, 107 R.I. 582, 588, 268 A.2d 692, 696 (1970)). Courts must apply the generally accepted meaning of words used in a statute “particularly . . . where the Legislature has not defined or qualified the words.” *Id.* at 156, 352 A.2d at 654 (citing *Ricci*, 107 R.I. at 589, 268 A.2d at 696).

Applying this principle to § 27-7-2 on numerous occasions, the Supreme Court has held the language of the statute is clear and unambiguous. *See, e.g., Maczuga*, 92 R.I. at 81, 166 A.2d at 230 (describing the language of § 27-7-2 as “unambiguous”); *see also Markham*, 116 R.I. at 156, 352 A.2d at 654 (characterizing the language of the statute as “crystal clear”). Likewise, the Supreme Court has repeatedly held that § 27-7-2.4 is free from ambiguity. *Giroux*, 670 A.2d at 1229; *D’Amico v. Johnston Partners*, 866 A.2d 1222, 1228 (R.I. 2005).

As the language of both § 27-7-2 and § 27-7-2.4 is clear and unambiguous, this Court must interpret the word “bankruptcy” according to its “natural and generally accepted meaning.” *Markham*, 116 R.I. at 156, 352 A.2d at 653-54. Bankruptcy is defined as the “statutory procedure by which a . . . debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor’s assets for the benefit of creditors,” while chapter 7, chapter 11, and chapter 13—as referenced in § 27-7-2.4—are forms of bankruptcy governed by the Federal Bankruptcy Code. *Black’s Law Dictionary* (10th ed. 2014); 11 U.S.C. §§ 101-1501. Corporate dissolution, on the other hand, is governed by state law and is a distinct legal process

from bankruptcy. *State-law Corporate Dissolutions*, 4 I.R.M. Abr. & Ann. § 5.17.13.12 (“[s]tate statutes provide for . . . the creation of the corporation . . . [and for] termination of its life”). As the plain meaning of bankruptcy does not encompass corporate dissolution, applying the provision to dissolved corporations would be contrary to the intent of the Legislature. Accordingly, Plaintiff’s claims are barred under § 27-7-2.4.

#### **IV**

#### **Conclusion**

This Court finds that Plaintiff’s claims against the Defendants are barred as a matter of law, as direct actions against insurers of alleged tortfeasors are barred by § 27-7-2, and the § 27-7-2.4 bankruptcy exception does not extend to corporate dissolution. Accordingly, this Court grants Defendants’ Motion to Dismiss as Plaintiff has failed to state a claim upon which relief can be granted. Counsel shall present the appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**

***Decision Addendum Sheet***

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**TITLE OF CASE:** Shirley D’Amico, Individually, and as Executrix for the Estate of Frank D’Amico v. A.O. Smith Corp., et al.

**CASE NO:** PC-2012-0403

**COURT:** Providence Superior Court

**DATE DECISION FILED:** November 19, 2018

**JUSTICE/MAGISTRATE:** Gibney, P.J.

**ATTORNEYS:**

For Plaintiff:	Vincent L. Greene, IV, Esq. Robert J. McConnell, Esq.
For Defendant	Brian D. Gross, Esq.