STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: July 22, 2014)

RHODE ISLAND ECONOMIC DEVELOPMENT CORPORATION, Plaintiff,	:	
v.	:	**C.A. No. PB 12-5616**
	:	***(Consolidated With)***
WELLS FARGO SECURITIES, LLC; BARCLAYS CAPITAL, INC.; FIRST SOUTHWEST COMPANY; STARR INDEMNITY AND LIABILITY COMPANY; CURT SCHILLING; THOMAS ZACCAGNINO; RICHARD WESTER; JENNIFER MACLEAN; ROBERT I. STOLZMAN; ADLER POLLOCK & SHEEHAN, P.C.; MOSES AFONSO RYAN LTD.; ANTONIO AFONSO, JR.; KEITH STOKES; and J. MICHAEL SAUL, Defendants.	:	

J. MICHAEL SAUL and KEITH STOKES, Plaintiffs,	:	
v.	:	**C.A. No. PB 14-3346**
	:	***(Consolidated)***
MOSES AFONSO RYAN LTD., ANTONIO AFONSO, JR., ADLER POLLOCK & SHEEHAN P.C., and ROBERT I. STOLZMAN, Defendants.	:	

DECISION

SILVERSTEIN, J. Before the Court in the above-captioned 2012 Civil Action, hereinafter the 2012 Action, for approval is the Joint Petition to Approve Settlement Among Plaintiff, Antonio

Afonso, Jr. and Moses Afonso Ryan, Ltd. (MAR Defendants), hereinafter the Joint Petition. The settlement was made pursuant to G.L. 1956 § 42-64-40 (38 Studios Settlement Act). Multiple Defendants, including Wells Fargo Securities, LLC (Wells Fargo), First Southwest Company (First Southwest), and J. Michael Saul (Saul), have objected to the approval of the settlement by challenging the constitutionality of the 38 Studios Settlement Act.

Also before the Court for decision are the issues of whether the suit filed by Saul against Robert I. Stolzman (Stolzman), Adler Pollock & Sheehan, P.C. (AP&S), and the MAR Defendants, PB-14-3346, hereinafter the 2014 Action, should be dismissed because of Super. R. Civ. P. 13, and if so, whether leave to amend should be granted to file a counterclaim in the 2012 Action. Additionally, the Defendants in the 2014 Action have sought to dismiss that action pursuant to Super. R. Civ. P. 12(b)(6).

I

Facts & Travel

As this Court previously stated in its Decision on the Motion to Dismiss,

> "[t]he basic plot is well-known: 38 Studios, LLC (38 Studios) was induced to move its business to the Ocean State in exchange for a massive financial accommodation; less than two years later, 38 Studios went bankrupt. Much has been written about that plot in the media. Much has been discussed and debated—and continues to be discussed and debated—in the other two branches of government." R.I. Econ. Dev. Corp. v. Wells Fargo Sec., LLC, PB-12-5616, 2013 WL 4711306, at *2 (R.I. Super. Aug. 28, 2013).

A further recitation of the facts is unnecessary at this juncture, but can be found in this Court's Decision on the Motion to Dismiss. Id.

Relevant to the within matters before the Court is that the Case Management Order required Defendants to assert cross-claims and third-party claims by September 17, 2013. The MAR Defendants asserted cross-claims against all Defendants, including Saul. In response, First

Southwest and the 38 Studio Defendants (Curt Schilling, Thomas Zaccagnino, Richard Wester, and Jennifer Maclean) asserted cross-claims against the MAR Defendants. After this deadline, on February 13, 2014, the Governor signed into law House Bill H7050 and Senate Bill S2008, which were later codified at § 42-64-40. The 38 Studios Settlement Act, in its entirety, provides:

> "SECTION 1. Chapter 42-64 of the General Laws entitled "Rhode Island Commerce Corporation" is hereby amended by adding thereto the following section:
>
> "42-64-40. Court-approved settlements. – (a) Notwithstanding any provisions of law to the contrary, a person, corporation, or other entity who has resolved its liability to the Rhode Island commerce corporation in a judicially approved good faith settlement is not liable for claims for contribution or equitable indemnity regarding matters addressed in the settlement. The settlement does not discharge any other joint tortfeasors unless its terms provide, but it reduces the potential liability of the joint tortfeasors by the amount of the settlement.
>
> "(b) The provisions of this section apply solely and exclusively to settlements of claims asserted or previously asserted by the Rhode Island economic development corporation or the Rhode Island commerce corporation or hereafter asserted by the Rhode Island commerce corporation arising out of or relating to the issuance by the Rhode Island economic development corporation of seventy-five million dollars ($75,000,000) in revenue bonds denominated "THE RHODE ISLAND ECONOMIC DEVELOPMENT CORPORATION JOB CREATION GUARANTY PROGRAM TAXABLE REVENUE BOND (38 STUDIOS, LLC PROJECT) SERIES 2010" and shall not be construed to amend or repeal the provisions of chapter 6 of title 10 relating to contributions among joint tortfeasors, other than as specifically provided in this section.
>
> "(c) For purposes of this section, a good faith settlement is one that does not exhibit collusion, fraud, dishonesty, or other wrongful or tortious conduct intended to prejudice the non-settling tortfeasor(s), irrespective of the settling or non-settling tortfeasors' proportionate share of liability.
>
> "SECTION 2. This act shall take effect upon passage and shall apply to all claims pending at the time of passage or asserted thereafter; provided, however, that this act shall not apply to, affect or impair releases executed before the date of passage."

Thus, the 38 Studios Settlement Act precludes any non-settling Defendant from seeking contribution or equitable indemnity from any Defendant that settles with the Rhode Island Commerce Corporation f/k/a the Rhode Island Economic Development Corporation (Plaintiff/EDC) and additionally reduces any potential future judgment against non-settling Defendants by the amount of the settlement as opposed to a proportionate share of liability of any settling Defendant. The 38 Studios Settlement Act also requires that the settlement be in good faith. Incidentally, the 38 Studios Settlement Act rebuffs the current contribution scheme under Rhode Island joint tortfeasors law and brings this case closer to the rule as it existed under the common law.

On June 27, 2014, the MAR Defendants and Plaintiff filed the Joint Petition, requesting approval of the settlement of the claims asserted against the MAR Defendants for $4,370,000, which represents the remaining portion of the MAR Defendants' $5,000,000 insurance policy. Multiple Defendants[1] have challenged the Joint Petition on grounds that the 38 Studios Settlement Act is unconstitutional. Additionally, Saul filed the 2014 Action on July 3, 2014, alleging legal malpractice against the MAR Defendants, Stolzman, and AP&S.[2]

[1] The Court will simply refer to the challengers of the 38 Studios Settlement Act as Defendants and the proponents as Plaintiff, even though some of the proponents are actually captioned as Defendants and some Defendants did not join in the objection.

[2] Originally Defendant Keith Stokes (Stokes) was a co-Plaintiff with Saul; however, Stokes voluntarily dismissed his claims.

II

Discussion

A

Constitutional Challenge to 38 Studios Settlement Act

Our Supreme Court found in R.I. Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 100 (R.I. 1995) (hereinafter Brown) that the "determination of the constitutionality of the DEPCO Act [was] the linchpin of the settlement in the underlying cause of action and all future settlements in DEPCO litigation." Id. at 100. Similarly, the determination of the constitutionality of the 38 Studios Settlement Act is the "linchpin" of the Joint Petition and all future settlements in the 38 Studios litigation. [3]

1

Equal Protection

The Fourteenth Amendment to the United States Constitution guarantees to all persons within the jurisdiction of any state "the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Rhode Island Constitution similarly guarantees equal protection in article 1, section 2. See Brown, 659 A.2d at 100.

While the Fourteenth Amendment provides for equal protection of the laws, not all distinctions are impermissible, and, in fact, "the Fourteenth Amendment permits states a wide

[3] Defendants have not challenged that the settlement was made in good faith. It is the non-settling Defendants' burden to prove that the settlement was not made in good faith. See Dacotah Mktg. & Research, L.L.C. v. Versatility, Inc., 21 F. Supp. 2d 570, 578 (E.D. Va. 1998); Gray v. Derderian, CA 04-312L, 2009 WL 1575189 (D.R.I. June 4, 2009) ("[T]here is a presumption that the settlement has been made in good faith, and the burden is on the challenging party to show that the settlement is infected with collusion or other tortious or wrongful conduct."). As non-settling Defendants have failed to undertake their burden of proving why the settlement was not made in good faith, this Court finds that the settlement was entered into in good faith.

scope of discretion in enacting laws that affect some classes of citizens differently from others." Boucher v. Sayeed, 459 A.2d 87, 91 (R.I. 1983) (citing Burrillville Racing Ass'n v. State, 118 R.I. 154, 157, 372 A.2d 979, 981-82 (1977)). Part of this discretion is the well-established principle that "legislative enactments of the General Assembly are presumed to be valid and constitutional." Brown, 659 A.2d at 100 (citing Kennedy v. State, 654 A.2d 708, 712 (R.I. 1995); Kass v. Ret. Bd. of the Emps.' Ret. Sys. of the State of R.I., 567 A.2d 358, 360 (R.I. 1989)). Further, the party that challenges the constitutionality bears the burden of persuading the court that the statute violates either the Rhode Island or United States Constitution. Id. (citing Brennan v. Kirby, 529 A.2d 633, 639 (R.I. 1987)). Courts will not invalidate a legislative enactment unless the challenger can prove "beyond [a] reasonable doubt" that the statute is "repugnant to some provision in the Constitution." Gorham v. Robinson, 57 R.I. 1, 7, 186 A. 832, 837 (1936); see also City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995) ("[T]his court will not invalidate a legislative enactment unless the party challenging the enactment can prove beyond a reasonable doubt to this court that the statute in question is repugnant to a provision in the constitution."). Finally, the court "will make every reasonable intendment in favor of the constitutionality of a legislative act, and so far as any presumption exists it is in favor of so holding." State v. Garnetto, 75 R.I. 86, 93, 63 A.2d 777, 781 (1949).

The initial step in conducting an equal protection analysis is to determine what level of scrutiny to apply. In doing so, the Court must examine both the nature of the classification established by the statute and the individual rights that may be impacted by the act. Boucher, 459 A.2d at 91. When a statute infringes upon either a fundamental right or results in a creation of a suspect classification, the statute must be examined with strict scrutiny. Brown, 659 A.2d at 100; see also Loving v. Virginia, 388 U.S. 1 (1967). If a statute employs a gender based

classification, then review utilizes a middle-tier level of scrutiny, often referred to as intermediate scrutiny. See Craig v. Boren, 429 U.S. 190, 204 (1976). Finally, "purely economic legislation that does not disadvantage a suspect class or impinge upon a fundamental right passes constitutional muster if a rational basis exists for it." Brown, 659 A.2d at 100.

Here, it has been conceded by the parties that the 38 Studios Settlement Act is a purely economic statute that does not concern a fundamental right or result in the creation of a suspect classification. Accordingly, this Court will proceed by applying a rational basis level of scrutiny. Thus, the Court must "merely determine[] whether the differential treatment bears a reasonable or rational relationship to a legitimate state interest." Boucher, 459 A.2d at 91; see also State v. Faria, 947 A.2d 863, 868 (R.I. 2008) (A statute "will survive this minimal scrutiny if 'a rational relationship exists between the provisions of [the statute] and a legitimate state interest.'"). Additionally, "even if the General Assembly had a constitutionally improper motive when it passed legislation, the legislation would still hold up to rational basis scrutiny if this [C]ourt could find any legitimate objective." Faria, 947 A.2d at 868 (internal quotations omitted).

Plaintiff argues that the 38 Studios Settlement Act is rationally related to the legitimate purpose of encouraging settlement, particularly in the face of "defense-within-limits" or "cannibalizing" insurance policies. Plaintiff also advocates that the 38 Studios Settlement Act furthers the state interest in protecting the public fisc.

Defendants argue that there is no legitimate purpose that is rationally related to the disparate treatment that results from the 38 Studios Settlement Act. In particular, Defendants rely heavily upon Boucher, arguing that a statute aimed at remedying a crisis will "ordinarily contain a declaration of legislative findings of fact" and without such a declaration, the Court should "decline to speculate about unexpressed or unobvious permissible state interests."

Boucher, 459 A.2d at 93. Defendants contend that this case is more akin to Boucher, where no legislative findings were made, as opposed to Brown, where findings were made. Additionally, Defendants attempt to distinguish Brown, asserting that there was an actual crisis in Brown, as opposed to here, where no such crisis exists.

In Boucher, the Rhode Island Supreme Court found that amendments to the state's Medical Malpractice Reform Act (MMRA) failed to satisfy a rational basis review under the equal protection clause. Id. at 91. There, the MMRA initially took effect on September 1, 1976. MMRA was enacted as a response to a medical malpractice crisis that existed during the mid-1970s, which included threatened strikes by doctors. Id. at 88. Part of the original act required any medical malpractice suit to be considered initially by a panel of a special master, a physician, and an attorney. During the 1976 General Assembly session, the Joint Underwriting Association (JUA) was established and given the authority to issue malpractice insurance. The JUA obviated the medical malpractice crisis that had previously existed by providing insurance coverage for doctors. Id. at 90-91. Despite there no longer being a crisis, the legislature amended the MMRA in 1981 by repealing the three-person panel requirement and instead requiring that a Superior Court justice hold a preliminary hearing to determine if there was a legitimate question of liability or if the case was merely an unfortunate medical result. Id. at 89-90.

The Boucher Court affirmed the trial justice in holding that the statute was unconstitutional. In doing so, the Court found that the trial justice had properly taken judicial notice of the fact that no medical malpractice crisis existed in 1981. Id. at 93. The Court went on to state that: "[s]tatutes aimed at providing relief in a time of crisis depend for their validity upon a proper exercise of the police power and ordinarily contain a declaration of legislative findings of fact involving the public health, safety, or morals." Id. The Court determined that

because no declaration was made in the statute, and no obvious crisis existed, it would not "speculate about unexpressed or unobvious permissible state interests." Id. The Court went on to state that "[a]bsent a crisis to justify the enactment of such legislation, we can ascertain no satisfactory reason for the separate and unequal treatment that it imposes on medical malpractice litigants." Id.

Over a decade after the Boucher decision, the Rhode Island Supreme Court again had occasion to deal with an equal protection challenge under a rational basis analysis in Brown. In July 1993, the legislature adopted a settlement statute that was practically identical to the 38 Studios Settlement Act, by amending the legislation that created the Rhode Island Depositors Economic Protection Corporation (DEPCO) (the DEPCO Settlement Act). DEPCO was formed following the banking emergency that was created when then-Governor Sundlun ordered the closing of the Rhode Island Share and Deposit Indemnity Corporation (RISDIC) and forty-five financial institutions and credit unions that RISDIC insured. The Brown Court found that "[a]s a result of the closing of the credit unions a financial crisis ensued in which depositors were prevented from withdrawing their funds." Brown, 659 A.2d at 98. The DEPCO Settlement Act was adopted after DEPCO had initiated its suit. Id. at 99.

In conducting an equal protection analysis, the Brown Court recognized the "dispositive pronouncement in *Boucher*" that without a crisis to justify the act, there was no satisfactory reason for the separate treatment that was imposed by the MMRA amendment. Id. at 101. After acknowledging this pronouncement, the Brown Court went on to find the defendants in the case before the Court were insured under "defense-within-limits" or "wasting asset" insurance policies. Id. These policies provided that the costs of defense, including attorneys' fees, were to be paid by the insurance companies and deducted from the policy limits, "thereby reducing the

amount of insurance coverage available to pay settlements or satisfy judgments." Id. The Brown Court, in finding a rational basis existed for the DEPCO Settlement Act, held "that encouraging payment of insurance proceeds to DEPCO in the form of settlements, instead of allowing them to be dissipated through payment of costs of defense of protracted litigation, is certainly a legitimate legislative objective." Id.

Here, this Court finds that the "differential treatment bears a reasonable or rational relationship to a legitimate state interest." Boucher, 459 A.2d at 91. As an initial matter, our Supreme Court has already recognized that encouraging settlement, particularly in the face of "cannibalizing" insurance policies, "is certainly a legitimate legislative objective." Brown, 659 A.2d at 101. Other courts have similarly held that encouraging settlement is a legitimate objective that will pass a rational basis equal protection analysis. See Latham v. First Marine Ins. Co., 16 Fed. Appx. 834, 840 (10th Cir. 2001) ("Among others, one possible rational basis for the statute is Oklahoma's presumed desire to encourage prompt and efficient settlement of insurance claims."); Murphy v. Amoco Prod. Co., 729 F.2d 552, 560 (8th Cir. 1984) ("We cannot say that the legislature's careful design to encourage nonlitigated settlements, of which the fees and costs provision is a part, lacks a rational basis."); Fust v. Attorney Gen. for the State of Mo., 946 S.W.2d 424, 432 (Mo. 1997) ("There are legitimate reasons for the legislature to distinguish between punitive damages awarded by court judgment and punitive damages recovered through settlement. The legislature may have sought to encourage settlement so as to avoid the burden litigation imposes on the parties and the judicial system. . . . Clearly, these considerations provide a rational basis for the treatment of punitive damages awarded by court judgment in a manner different from punitive damages recovered through settlement.").

In a factually similar case, encouraging settlement was held to be a legitimate legislative purpose. Kansas Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., 261 Kan. 17 (1996). There, the Kansas Public Employees Retirement System (KPERS) sued to recover losses suffered as a result of direct placement investments. KPERS sought recovery from an investment firm, as well as law firms, alleging fraud, misuse of funds, failure to disclose, and failure to advise. Id. at 21. The Kansas legislature enacted a settlement statute specific to the KPERS litigation whereby the settling defendant was discharged from all liability for contribution or noncontractual indemnity. Id. at 22-23. After passage of the settlement statute, one of the defendant law firms settled with KPERS. That settlement was challenged by the investment firm, who argued that their claims against the law firm for contribution should be governed by the law as it existed before the settlement statute was enacted. See id. at 23.

The KPERS court, which also presumes the constitutionality of statutes, found that the settlement statute "advances the legitimate legislative purpose of encouraging settlement between defendants in litigation with KPERS[.]" Id. at 42. In making its findings, the court highlighted several key points. First, the court noted that "[f]rom the legislative materials available, it is obvious that [the settlement statute] was enacted for the purpose of encouraging settlement between KPERS and various defendants in litigation over the losses incurred in direct placement investments." Id. at 31. Second, the court recognized that "contribution in Kansas is governed by statute . . . and the legislature is free to alter the effects of such statute by a subsequent enactment." Id. at 36. While the available Rhode Island legislative history does not rise to the level of the reports available in KPERS, the Court, as discussed infra, did find certain hearings of the General Assembly enlightening as to the purpose behind the 38 Studios

Settlement Act. Additionally, in Rhode Island, the right to contribution is a statutorily created right, just as in KPERS.

The treatment called for in the 38 Studios Settlement Act encourages settlement by the Defendants, especially with "cannibalizing" policies, which is a legitimate state interest. As the Brown Court stated, "[w]e cannot ignore the reality of the situation before us. The possibility that the liability insurance . . . may be depleted before any judgment is derived from protracted litigation is not out of the realm of possibility." Brown, 659 A.2d at 101. Additionally, this Court has gleaned from the Rhode Island General Assembly that the 38 Studios Settlement Act was partly adopted to encourage settlement and because many of the Defendants have "cannibalizing" policies. During the Senate Judiciary hearing on January 23, 2014, the Plaintiff's Attorney, Max Wistow, testified as to the need for the 38 Studios Settlement Act. Attorney Wistow stated that the Rhode Island Supreme Court had previously recognized the existence of a "cannibalizing" policy as justification for such legislation in the Brown case. See Senate Judiciary Hr'g 1/23/14 at 11:30. Attorney Wistow repeated this belief to the House Judiciary Committee, but further added that another justification was instances where the legislation sought to protect the taxpayer interest generally. See House Judiciary Hr'g 1/28/14 at 20:15. Both committees passed the 38 Studios Settlement Act. When the Senate considered the 38 Studios Settlement Act, Chairman McCaffrey of the Senate Judiciary Committee, when recommending the bill for passage, specifically stated that a number of the Defendants had "cannibalizing" policies and explained this to the Senate membership as "defense costs [that will] reduce that policy." See Senate Hr'g 1/30/14 at 15:20. Besides specifically mentioning the "cannibalizing" policies, the Chairman stated that "he [Attorney Wistow] believes this will help to lead to settlements." See id. While the question for this Court to decide is whether the General

Assembly "could" have had a legitimate purpose in mind when passing the 38 Studios Settlement Act, see Kennedy, 654 A.2d at 712, it is evident that the General Assembly did have a legitimate purpose in mind when passing the 38 Studios Settlement Act.[4]

This Court finds unavailing the argument that a "crisis" must exist to support the enactment of the 38 Studios Settlement Act. In Boucher, the Court determined that the absence of a crisis necessarily meant the absence of a legitimate purpose; put differently, the crisis was the legitimate purpose purportedly relied upon in Boucher. Here, as in DEPCO, one of the legitimate purposes is the encouraging of settlement of claims, particularly where "cannibalizing" policies are present. Nonetheless, this Court can take judicial notice of the fact that a crisis similar to the one that existed in Brown exists here. See Boucher, 459 A.2d at 93 (trial justice judicially noticed that no crisis existed). In Brown, the Court found that facilitating settlement of the DEPCO litigation "would ultimately relieve to some extent the taxpayers' cost of the bailout." Brown, 659 A.2d at 104. While the DEPCO litigation involved the collection of

[4] This Court is mindful that "[t]here is no recorded legislative history in Rhode Island from which to ascertain legislative intent." Such v. State, 950 A.2d 1150, 1158 (R.I. 2008) (quoting Laird v. Chrysler Corp., 460 A.2d 425, 428 (R.I. 1983)). Despite this dearth of legislative history, the hearings for S2008 and H7050, of which this Court takes judicial notice, are replete with instances where legislators either inquire or comment on the purpose of the bill to encourage settlement. See Senate Judiciary Hr'g 1/23/14 at 19:00 (Senator Hodgson asks which Defendants this will incentivize to settle); at 26:15 (Senator Hodgson states he was inclined to support the bill for the reasons cited by Attorney Wistow and because of the prior success of similar legislation); at 29:45 (Senator Lombardi comments that this narrow legislation is important to maximize settlement for this case); House Judiciary Hr'g 1/28/14 at 27:20 (Rep. Marcello recognizes that similar legislation has passed previously to help recover taxpayer money in the form of settlement); at 31:10 (Rep. Craven mentions that, from his experience as a prosecutor in the DEPCO case, the DEPCO Act was effective in getting settlements); House Hr'g 2/11/14 at 20:40 (Rep. Mattiello states that this will encourage settlement of people with limited resources); at 60:55 (Rep. Marcello states that the bill will make it easier to settle as well as protect taxpayers); see also Press Release of Rep. Morgan, 2/26/14, Morgan's bill to help victims receive settlements ("Two weeks ago, the General Assembly passed another exclusion for the 38 Studios litigation. The rationale for this bill's passage two weeks ago was to induce settlements with smaller defendants.").

funds after the RISDIC collapse, part of the crisis was the resulting taxpayer burden of funding the bailout. Here, taxpayers are faced with the possibility of funding current and future moral obligation payments because of the collapse of 38 Studios.[5] Thus, the taxpayers of the state face the possibility of having to pay millions of dollars to bail out the bond payments of the now-bankrupt 38 Studios, just as taxpayers faced the same scenario after the collapse of RISDIC.

Additionally, in the Boucher case, a limitless number of people could be affected by the disparate treatment for which the MMRA amendment called. In Boucher, any medical malpractice litigant would have been subject to the preliminary hearing requirement. In contrast, the 38 Studios Settlement Act has limited applicability, as it only affects the litigants of the 38 Studios litigation. Similarly, the DEPCO Settlement Act had limited applicability as it could have only affected the litigants of the DEPCO litigation. Here, not only is the 38 Studios Settlement Act limited in its application, but it also can only apply to a wrongdoing Defendant. That is because a Defendant that does not settle and is later found not liable will not be affected at all by losing the ability to seek contribution from a settling Defendant, since any non-settling Defendant has no liability.

Finally, the Defendants suggest that there was a better alternative for the legislature to adopt in order to encourage settlements. However, such a review by the Court would be improper. "The role of this Court is not to second guess the legislature." Parella v. Montalbano, 899 A.2d 1226, 1256 (R.I. 2006) (refusing to "pit the two plans against one another and find which one is better" and "second guess the legislature" in redistricting challenge); see also LaBonte v. New England Dev. R.I., 2012-328-A, 2014 WL 2802772 (R.I. June 20, 2014) ("We

[5] See House Judiciary Hr'g 1/28/14 at 32:46 (Rep. Craven questions Attorney Wistow if the legislation will be helpful in obtaining settlements so "taxpayers won't be on the hook for payments in the near future").

are well aware that the General Assembly has opted for a rather draconian manner of dealing with the problem of usury. But we certainly cannot say that the General Assembly's strong medicine in this domain is arbitrary or wrongful, and our role is not to second-guess such legislative judgments.") (emphasis added). The Court's task is to determine if the 38 Studios Settlement Act, as enacted by the General Assembly, "could . . . effectuate a resolution to a legitimate problem." Power v. City of Providence, 582 A.2d 895, 902 (R.I. 1990). The "[C]ourt's belief that the legislature's alleged goals could be accomplished through more reasonable means is irrelevant to rational-basis review." Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001). Therefore, whether the Court believes the 38 Studios Settlement Act could have better accomplished the goals of the statute is irrelevant to whether or not the 38 Studios Settlement Act passes an equal protection analysis under a rational basis level of review.

For the reasons stated above, the Court finds that the 38 Studios Settlement Act does not lack a rational basis, and thus, conforms with the requirements of equal protection under both the United States and Rhode Island Constitutions.

2

Due Process Challenge

The Due Process Clause of the Fourteenth Amendment provides that "no state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Due process requirements guarantee that a statute may not retroactively "abrogate a property interest unless that action is, at a minimum, justified by a legitimate legislative purpose furthered by rational means." Brown, 659 A.2d at 102. Additionally, when our Supreme Court has been confronted with a due process challenge to a retroactive statute, it has held that the benefit of the statute must outweigh the unfairness of the retroactivity. Id. (citing Lawrence v.

Anheuser-Busch, Inc., 523 A.2d 864, 870 (R.I. 1987); Raymond v. Jenard, 120 R.I. 634, 639, 390 A.2d 358, 360 (1978)).

Defendants argue that the 38 Studios Settlement Act violates the due process protections because it impermissibly and retroactively destroys property rights of non-settling Defendants. Defendants set forth several arguments as to why the 38 Studios Settlement Act does not pass a due process analysis. First, Defendants assert that no rational basis exists for the statute, particularly because there is not a crisis present as there was in Brown. Second, Defendants argue that they placed great reliance on the fact that they would have contribution rights under the Rhode Island joint tortfeasor scheme, G.L. 1956 §§ 10-6-1 et seq. Third, Defendants assert that any alleged public interest in the 38 Studios Settlement Act is outweighed by the unfairness to the non-settling Defendants.

As an initial matter, the Court notes that the Brown Court dealt with the same due process challenge to the DEPCO Settlement Act. Id. at 101-04. There, our Supreme Court determined that the DEPCO Settlement Act was retroactive and impaired a property right, that is the right to contribution. Id. at 102-03. Thus, this Court will adopt the findings of the Brown Court with respect to the fact that the 38 Studios Settlement Act constitutes retroactive application and that contribution is considered a property interest subject to the protections of due process. Additionally, this Court finds, as it did above, that there exists a public interest in the 38 Studios Settlement Act. Therefore, the question becomes whether the public interest outweighs the unfairness to the Defendants. Id. at 103. "If the unfairness outweighs the benefit, the statute lacks a rational basis." Id. (citing Lawrence, 523 A.2d at 870-71).

"The unfairness of a retroactive statute is 'measured best by the party's reliance on the preexisting state of the law.'" Id. (quoting Brennan, 529 A.2d at 640). As the Brown Court

found, this Court similarly finds that it is "highly unlikely" that a party would commit negligent acts in reliance on joint tortfeasor contribution schemes. Id. Perhaps just as instructive was the opinion of our Supreme Court in Raymond, 120 R.I. 634, 390 A.2d 358, where the Court considered the unfairness in retroactively applying a newly-enacted comparative negligence law, as opposed to the prior rule of contributory negligence. If contributory negligence had applied, then the defendant would have been relieved of liability. Id. at 639, 390 A.2d at 361. Despite this, the Court found that:

> "[h]ere, the conclusion seems inescapable that defendants did not act in substantial reliance upon the contributory negligence rule when they committed their allegedly tortious act. Neither did they exercise a lesser or greater degree of care based upon a reasonable expectation that their liability would be excused by plaintiffs' failure to establish their own freedom from contributory negligence. Rather, as Dean Prosser points out:
> '(i)n the usual case, the negligence on both sides will consist of mere inadvertence or inattention, or an error in judgment, and it is quite unlikely that forethought of any legal liability will in fact be in the mind of either party.'" Id. at 639, 390 A.2d at 360 (quoting Prosser, Torts § 67 at 433 (4th ed. 1971)).

Thus, under a due process analysis, when balancing the public interest in minimizing the taxpayers' liability for any present and future 38 Studios moral obligation payments against the asserted unfairness to non-settling Defendants that will be denied pre-existing contribution rights, this Court finds that the public interest outweighs any unfairness. This finding is consistent with Brown, where the Court found that limiting the taxpayers' liability for the RISDIC bailout outweighed the loss of contribution rights. Brown, 659 A.2d at 104.

Therefore, this Court holds that public interest in the 38 Studios Settlement Act outweighs the unfairness to non-settling Defendants, and therefore, the 38 Studios Settlement Act does not lack a rational basis and does not offend the Due Process Clause of the United States and Rhode Island Constitutions.

3

Fifth Amendment Takings Challenge

The Takings Clause provides that "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V, § 1. The Rhode Island Constitution contains a nearly identical prohibition against takings. See Harris v. Town of Lincoln, 668 A.2d 321, 326 (R.I. 1995). In determining if a law constitutes a violation of the Takings Clause, courts consider (1) the economic impact of the law; (2) the interference of the law with the reasonable expectations of the person whose property is being taken; and, (3) the nature of the government's action. Philip Morris, Inc. v. Reilly, 312 F.3d 24, 33 (1st Cir. 2002).

Defendants argue that the statute works an unconstitutional taking of non-settling Defendants' rights to seek contribution. Defendants assert that they had a reasonable expectation when performing the work at issue that they would be subject to Rhode Island's traditional joint tortfeasor scheme. Defendants further argue that the right to offset any amounts actually settled for does not constitute just compensation.

Plaintiff counters by arguing that the contribution claims at issue here are not vested for purposes of a Takings Clause analysis. Additionally, Plaintiff asserts that the pro-tanto credit provided for in the 38 Studios Settlement Act provides just compensation to non-settling Defendants for the loss of contribution rights. Finally, Plaintiff argues that because our Supreme Court found in In re Advisory Op. to Governor (DEPCO), 593 A.2d 943 (R.I. 1991), that unsecured creditors that had claims based on contractual or tort liability had no interests in any specific property, this Court should similarly find that any claims asserted are at best unsecured tort claims, and thus, no interest in any specific property exists.

The Brown Court found that claims for contribution are "a species of property protected by the Fourteenth Amendment's Due Process Clause[,]" Brown, 659 A.2d at 102-03, similar claims have been found not to be vested property for purposes of the Takings Clause. However, "the Takings Clause and the Due Process Clause . . . are distinctly different constitutional provisions that require separate analysis." Rhode Island Econ. Dev. Corp. v. The Parking Co., 892 A.2d 87, 97 (R.I. 2006). When determining if a cause of action is protected for purposes of the Takings Clause, the claim has to be reduced to a final, unreviewable judgment. See Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co., 993 F.2d 269, 273 n.11 (1st Cir. 1993). "The reason an accrued cause of action is not a vested property interest for Takings Clause purposes until it results in a final unreviewable judgment, is that it is inchoate and does not provide a certain expectation in that property interest." Bowers v. Whitman, 671 F.3d 905, 914 (9th Cir. 2012) (internal quotations omitted). Thus, even though the contribution rights of the non-settling defendants were considered vested for purposes of the Due Process Clause analysis, they are not to be considered vested for purposes of the Takings Clause analysis, and therefore, there can be no expectation of a property interest for the non-settling defendants.

Further, even if the contribution claims were considered vested for purposes of a Takings Clause analysis, a mere "reduction in the value of property" is "not necessarily equated with a taking." Andrus v. Allard, 444 U.S. 51, 66 (1979). In fact, our Supreme Court found that "a diminution in value alone is insufficient to present a cognizable takings claim." Kashmanian v. Rongione, 712 A.2d 865, 868 (R.I. 1998). At most, the right to a proportionate setoff of any settling defendants' liability has only been reduced in value by the difference between such a percentage and the amount that is actually settled for. In fact, there may well exist a scenario where a settling defendant settles for a greater amount than what its proportionate fault may have

been. Thus, even if the contribution claims constituted vested property rights for purposes of a Takings Clause analysis, any reduction in value of the property is merely that, and not sufficient to establish an improper taking of property.

Therefore, this Court holds that the 38 Studios Settlement Act does not violate the Takings Clause of the United States and Rhode Island Constitutions.

B

The 2014 Action[6]

Turning now to the 2014 Action originally brought by two of the Defendants in the 2012 Action against four of their co-Defendants (J. Michael Saul, et al. v. Moses Afonso Ryan Ltd., et al., PC 14-3346) filed July 3, 2014, one business day prior to the scheduled hearing as to the legality and propriety of the MAR Defendants' good-faith settlement with the EDC pursuant to the provisions of the 38 Studios Settlement Act discussed above (§ 42-64-40).

That suit, which subsequently was ordered consolidated with the 2012 Action, essentially alleges that the Defendants therein (sometimes hereafter the "Law Firm/Lawyer Defendants"), two law firms which represented the EDC in connection with the so-called 38 Studios matter and the particular attorney at each of the law firms assigned by that firm to EDC matters, owed a duty of care to the employees of the EDC.

The Complaint in the 2014 Action further alleges, inter alia, that Plaintiff Saul relied upon legal advice provided by these Law Firm/Lawyer Defendants; that Law Firm/Lawyer Defendants knew or should have known that Plaintiff Saul would rely upon Law Firm/Lawyer Defendants' legal advice; that Law Firm/Lawyer Defendants failed to advise or warn Plaintiff

[6] It is important to note, so as to avoid confusion with references used above when referring to the 2012 Action, that Saul is the single Plaintiff in the 2014 Action, while the Defendants are the MAR Defendants, AP&S, and Stolzman. As indicated supra, Stokes heretofore filed a voluntary dismissal.

Saul that there was potential probable cause for and/or a good faith basis to claim violation by Plaintiff Saul of §§ 42-64-1, et seq. Plaintiff Saul further asserts that in the 2012 Action he has been sued both for violating said law and for negligence by his former employer, the EDC. As pled, Plaintiff Saul labels the single count in the Complaint "Legal Malpractice."

On the first court day following the filing and service of the Complaint, this Court was first advised of the new suit and, after hearing argument of counsel, scheduled what the Court then referred to as a Show Cause Hearing to be held on July 14, 2014—the parties were given an opportunity to file memoranda with respect to the propriety of the filing of the Complaint. The Court ordered that hearing predicated on allegations by counsel for the named Law Firm/Lawyer Defendants and by the EDC, ranging from bad faith in connection with the filing to various legal issues, hereinafter discussed. The Court received a number of memoranda of law from various parties and on July 14, 2014, the Court heard argument on what, by agreement, was deemed to be a Super. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted.

Succinctly, four arguments are advanced by the Law Firm/Lawyer Defendants as to why the Complaint in the 2014 Action must be dismissed. In no particular order, the arguments are: First, it is claimed that the Case Management Order entered by this Court in the 2012 Action on February 14, 2013, precludes the filing of the new lawsuit because it is (i) untimely and (ii) in direct contravention of the Case Management Order. Second, it is claimed that because the MAR Defendants timely filed a cross-claim against Plaintiff Saul to which Plaintiff Saul's claims here would constitute a compulsory counterclaim and because no such counterclaim was brought by Plaintiff Saul, this Complaint must be dismissed. Third, it is claimed that representation of an entity by counsel does not give rise to an independent duty of care to the

entities' officers, directors and/or employees. Further, that absent a duty of care to Saul as an officer or employee, there can be no support for his legal malpractice claim. Fourth and final, the Law Firm/Lawyer Defendants contend that while labeled a count for "legal malpractice," the claim asserted by Plaintiff Saul in reality constitutes a claim for equitable indemnification which, in keeping with the above findings and discussion of the 38 Studios Settlement Act, bars the relief here sought by Plaintiff Saul, at least as to the MAR Defendants.

The Court assumes, arguendo, without further discussion, that the contention that the 2014 Action is untimely and in contravention of the Case Management Order is without merit.

The Case Management Order does not explicitly refer to or set any time limit with respect to the filing of cross-claims, nor does it mention or refer to any separate suit which might be brought arising out of the matters involved in the 2012 Action. However, that does not preclude the invocation of the Superior Court Rules of Civil Procedure by the MAR Defendants in the 2014 Action. Specifically, the Defendants in this action, who in the 2012 Action had filed cross-claims against Saul, here invoke the provisions of Rule 13 of the Rules of Civil Procedure. Rule 13(a) reads as follows:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action, or if the opposing party's claim is for damage arising out of the ownership, maintenance, operation, use, or control of a motor vehicle by the pleader." Super. R. Civ. P. 13(a).

While Saul now notes that he, in the 2012 Action, had raised an affirmative defense with respect to the question of whether or not a cause of action had been stated by the MAR Defendants, he

never filed a counterclaim with respect to this cross-claim. An analysis of the facts and claims in the 2012 Action with those brought against the MAR Defendants in the 2014 Action clearly disclose that they arise out of the same transaction or occurrence. Accordingly, under the Superior Court Rules of Civil Procedure, the claims now brought against the MAR Defendants would constitute a compulsory counterclaim and, as noted in Kent, Simpson, Flanders and Wollin, Rhode Island Civil and Appellate Procedure § 13:3 (November 2013) "failure to plead a compulsory counterclaim prevents the pleader from subsequently making it the subject of an independent action" as Saul here attempts to do as to the MAR Defendants. Plaintiff Saul's claim should have been asserted in the 2012 Action as a compulsory counterclaim to the asserted cross-claim of the MAR Defendants. In Miller v. LHKM, 751 P.2d 1356, 1361 (Alaska 1988), the court stated,

> "requiring the cross-claim Defendant to raise any claim arising out of the same transaction or occurrence as the cross-claim will further the goal of judicial economy by avoiding multiple suits and encouraging the determination of the entire controversy among the parties before the Court with the minimum of procedural steps."

While the Rhode Island Supreme Court has not been confronted heretofore with this issue, this Court adopts the reasoning of the foregoing decision. Accordingly, with respect to the claims asserted against the MAR Defendants in the 2014 Action, this Court, for this and other reasons hereinafter set forth, grants the motion of the MAR Defendants. Because no cross-claim appears to have been filed by AP&S and/or Stolzman against Saul, the foregoing discussion does not pertain to the claims against the AP&S and Stolzman in the 2014 Action.

As set forth above, with respect to the substance of the 2014 Action, Plaintiff Saul's claim is that the failure of the Law Firm/Lawyer Defendants to advise or warn him that there was a good faith basis for EDC, his employer, to claim that he breached duties, fiduciary or

otherwise, which he had to the EDC, gave rise to the negligence claim asserted by EDC against Saul in the 2012 Action. Further, the same contention is made as to the violation of law by Saul with respect to §§ 42-64-1, et seq. as pled by EDC in the 2012 Action. Plaintiff Saul's Complaint in the 2014 Action alleges inter alia that the Law Firm/Lawyer Defendants "acted as legal counsel to RIEDC, to the RIEDC Board and to RIEDC's officers and employees in their capacities as officers and employees of the RIEDC, including Plaintiff[] [Saul], specifically in connection with and throughout the negotiations surrounding the 38 Studios Deal." Compl. ¶ 10.

The 2014 Complaint further sets forth that the 2012 Action was brought in the Superior Court against various Defendants, including Saul.

Distilled to its essence, the Complaint asserts that the Law Firm/Lawyer Defendants, as counsel to EDC, its directors, officers, and employees, including Plaintiff Saul, owed a duty of care to their various clients and claims a breach of that duty insofar as it was owed to Plaintiff Saul. The Law Firm/Lawyer Defendants here clearly recognize that well-pleaded facts for the purpose of a Rule 12(b)(6) motion are taken as true and, further, that the Court must examine the facts in a light most favorable to Plaintiff Saul; however, legal conclusions, as opposed to facts, are not entitled to the same deferential treatment. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).[7]

The Complaint's factual allegations do not allege that the Law Firm/Lawyer Defendants were counsel or had a lawyer-client relationship with Saul—to the contrary, the allegations state that at all significant times relative to the matters averted to in the Complaint, the MAR Defendants provided professional legal services to and AP&S and Stolzman acted as general counsel to the EDC. Our Supreme Court has held, that

[7] A concept predating the newer "plausablity standard" stemming from Bell Atl. Corp. v. Twombley, 550 U.S. 544 (2007).

> " . . . because a corporation is a legal entity separate from its shareholders, directors and officers, the general rule is that an attorney who represents a corporation owes the duties enumerated in the relevant code or rules of professional responsibility to the client corporation and not to its officers, directors or any one shareholder." DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 769 (R.I. 2000).

This Court, in the face of the general rule endorsed as a settled general rule of American jurisprudence, suggests that, in order to avoid dismissal at the pleading stage, Plaintiff Saul has a duty to allege facts and not legal conclusions in order to avoid application of the general rule. Facts must be alleged that, if established, would demonstrate the existence of an attorney-client relationship between the Law Firm/Lawyer Defendants so as to create a duty of care to Plaintiff Saul (an employee) rather than, or in addition to, EDC, his employer. Here, this has not been done. Accordingly, the Court also holds that as to the Law Firm/Lawyer Defendants, the motion to dismiss should be granted.

Finally, with respect to the contention of the Law Firm/Lawyer Defendants that Plaintiff Saul's Complaint, while denominated as sounding in "legal malpractice," really is a disguised claim for equitable indemnification, see Gacksletter v. Frawley, 135 Cal.App.4th 1257, 1271 (2006), the Court turns to the relief sought and notes that the relief requested is as follows:

1. Attorneys' fees and costs accumulated by Saul to date, paid and unpaid, incurred in his defense in the 2012 Action.
2. Attorneys' fees and costs which continue to accrue with respect to the defense of Saul in connection with the 2012 Action.
3. Any judgment which may be entered against Saul in the 2012 Action.

Saul claims that these potential damages have been, are being, and would be incurred by him because of the acts and failure to act of the Law Firm/Lawyer Defendants.

Law Firm/Lawyer Defendants assert in reliance on our case law, see Muldowney v. Weatherking Prods., Inc., 509 A.2d 441, 443 (R.I. 1986), that it is clear from the now-pending actions that it is claimed that Saul is liable to EDC, that the Law Firm/Lawyer Defendants are claimed to be liable to EDC, and that if Saul is liable it is because of the acts or failure to act of the Law Firm/Lawyer Defendants, and as between Saul and the Law Firm/Lawyer Defendants, it is the Law Firm/Lawyer Defendants who ought to be required to pay EDC. Accordingly, the Court finds that the Complaint in the 2014 Action is in effect a request for equitable indemnification by Saul, labeled as a claim for legal malpractice. In view of the Court's determination with respect to the 38 Studios Settlement Act and as to its constitutionality, the Court finds that the "disguised claim" for equitable indemnification with respect to the MAR Defendants would be futile.

C

Proposed Amendment to the 2012 Answer by Saul

Defendant Saul in the 2012 Action has filed a motion in the alternative for leave to amend his answer to the cross-claim of the MAR Defendants in that action, by alleging his legal malpractice complaint in the 2014 Action as a counterclaim to the MAR Defendants cross-claim as against him. Here, Saul did not claim that through oversight, inadvertence, or excusable neglect he failed to file a counterclaim against MAR Defendants. Rather, Defendant Saul asks leave to amend as aforesaid predicated upon the provisions of Super. R. Civ. P. 13(f) and Super. R. Civ. P. 15. In his memorandum and in argument, Saul urges upon the Court the concept that amendments freely are allowed and that, when justice requires, clearly leave to amend should be granted. This Court does not quarrel with Saul's statements of law; here, however, the Court finds that justice does not so require. In dispensing justice and granting leave to amend, this

Court must look to the issue of prejudice to the party or parties that would be impacted by the proposed amendment. Here, the MAR Defendants have, subject to approval by this Court, entered into a settlement agreement with EDC. The effect of that settlement (which, as indicated above, will be and is approved by this Court) is that the MAR Defendants will be removed as parties to the 2012 Action (and to the 2014 Action). Clearly, the last minute amendment sought by Saul is extremely prejudicial to the MAR Defendants and to the concept behind the 38 Studios Settlement Act discussed above. Accordingly, Saul's motion in the alternative for leave to amend hereby is denied.

III

Conclusion

Based on the foregoing analysis, the Court finds that the 38 Studios Settlement Act is constitutional. The Joint Petition, entered into in good faith, is therefore approved. Additionally, the Court holds that the claims brought by Saul in the 2014 Action were compulsory counterclaims as to the MAR Defendants, as the MAR Defendants had asserted cross-claims against Saul in the 2012 Action. Further, Saul's motion for leave to amend his answer to the cross-claims in 2012 Action is denied because of the prejudicial effect such an amendment would have. Moreover, this Court finds that facts have not been alleged in the 2014 Action as to create a duty between Saul and the Law Firm/Lawyer Defendants, and thus the motion to dismiss is granted.

Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Rhode Island Economic Development Corporation v. Wells Fargo Securities, LLC, et al.** **Consolidated With** **J. Michael Saul and Keith Stokes v. Moses Afonso Ryan Ltd., et al.**
CASE NO:	**PB 12-5616** **Consolidated With** **PB 14-3346**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**July 22, 2014**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
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