Arguments for PRMP Coverage Waiving Public Entity Immunities Pursuant to RSA 507-B:7-a.

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RSA 507-B:7-a provides for the waiver of most public entity immunities to the extent there is insurance coverage for a tort claim. The waiver is triggered when the defendant entity obtains insurance coverage "described in RSA 412". Since 1987, public entities have increasingly sought coverage through RSA 5-B Pooled Risk Management Programs ["PRMP"] and have taken the position that such coverage is *not* insurance that triggers RSA 507-B:7-a because PRMPs are not subject to or regulated by RSA 412. Several New Hampshire Superior Court Orders support this argument.[2] However, these Orders do not address many of the issues necessary for a thorough vetting of this legal question. This article identifies some of the arguments in favor of finding that PRMPs do provide RSA 507-B:7-a insurance as currently structured.

History of RSA 507-B:7-a (formerly RSA 412:3) and RSA 412:1

RSA 507-B:7-a is triggered by insurance "described in" RSA 412. The legislature did not use terms such as "subject to", "procured under" or "regulated by"; rather it described a category of insurance without requiring the insurance contract or the issuer follow any of the dictates in RSA 412. This limited use of the term "described in" is supported by the relevant legislative history and cases applying to RSA 507-B:7-a and RSA 412.

What is now RSA 507-B:7-a was originally enacted in 1951 and re-codified as RSA 412:3.[3] The language of the original enactment stated "insurance described in section 1 of this chapter".[4] In 1975, the term "described in section 1 of this chapter" was replaced with "described in RSA 412:1".[5]

RSA 412:3, prior to being moved to RSA 507:7-a, was the subject of numerous New Hampshire Supreme Court opinions.[6] In *Marcotte v,. Timberland/Hampstead School District* the public entity insurance policy limited recovery to the RSA 507-B:4 damages cap or $1,000,000 if the cap did not apply. The *Marcotte* Court rejected that maneuvering and held that the RSA 507-B:4 cap on damages does not apply when insurance coverage is available for damages in excess of the cap. In support of its ruling, the *Marcotte* Court provided a history of RSA 412:3 as follows:

> Our holding flows from the intent behind RSA 412:3. In *Cushman v. Grafton*, 97 N.H. 32, 79 A.2d 630 (1951), this court concluded that a county's purchase of liability insurance did not render the then-existing rule of municipal immunity inapplicable. *Id.* at 34-35, 79 A.2d at 632. We reasoned that liability insurance is designed to protect the insured in the event of liability, not to create or increase liability that would otherwise not exist. *Id.* at 35, 79 A.2d at 632. Following the *Cushman* decision, the legislature promptly enacted the predecessor to RSA 412:3. *See* Laws 1951, ch. 197; *see also Consoli v. Insurance Company*, 97 N.H. 224, 226, 84 A.2d 926, 927 (1951). Since the purpose of RSA 412:3 is *to permit recovery of damages* against governmental units up to the limit of insurance purchased, *see Merrill v. Manchester*, 114 N.H. 722, 727, 332 A.2d 378, 382 (1974), we refuse to adopt an interpretation of the interplay among RSA 412:3, RSA 507-B:4, I, and the school district's primary policy that would *limit* the recovery of damages despite the purchase of additional insurance coverage.[7]

A reasonable construction of the *Marcotte* decision is that public entities are forbidden from conducting shell games or other maneuvers in an effort to limit exposure of insurance coverage to the RSA 507-B:4 cap on damages.

In 2003, RSA 412:3 was repealed and re-enacted as RSA 507-B:7-a. The only change to the language of the statute was from "described in RSA 412:1" to "described in RSA 412".[8] This was because RSA 412 was repealed and re-written to conform more closely with insurance

regulatory laws in other states. There was nothing in the legislative history of this change to suggest the legislature intended to change the scope of insurance that triggers RSA 507:7-a.[9]

The language of RSA 412:1 prior to the 2003 rewrite indicated that the "insurance" that triggers the loss of public entity immunities was *any* kind of insurance that might provide liability coverage for a claim which is consistent with the current version of RSA 412:2 (scope) (stating "This chapter applies to all types of casualty insurance . . .").

The language of RSA 412:1 (2002) remained very similar to the wording of its original enactment[10] and stated:

> No corporation or other insurer shall issue or deliver any policy of insurance against loss or expense by reason of claims made upon the assured for damages on account of bodily injuries . . ..

Noticeably absent from all prior versions of RSA 507-B:7-a (going back to 1951) is any requirement that the insurance policy at issue be "subject to" or "procured under" RSA 412, be issued by an insurance company, or otherwise be "regulated" by the insurance commissioner. The language of RSA 507-B:7-a has always been triggered by the type of insurance "described" in RSA 412. Thus, RSA 507-B:7-a and its predecessors have continually expressed the legislative intent that if a public entity acquires any kind of insurance that provides coverage for the tort claim at issue, the immunity/damages-cap is waived to the extent there is coverage.[11] This distinction is important in that it would encompass insurance that was, for whatever reason, not issued by a New Hampshire registered insurer, was illegally sold or otherwise was issued by an entity not considered to be an insurance company or otherwise not regulated by the insurance commissioner.

The legislature has not hesitated to limit the scope of RSA 412:3. Since 1975, language was added to RSA 412:3 so it would not apply to statutory immunities requiring a standard of care other than negligence.[12] The legislature knew how to restrict the scope of this immunity waiver statute and chose not to do so when it empowered PRMPs in 1987 through RSA 5-B to issue insurance policies.

Given the history of RSA 507-B:7-a and RSA 412:1, whether the entity issuing coverage is legally defined as an insurance company or an insurer subject to insurance company regulations and taxation should have nothing to do with whether the coverage at issue triggers the loss of immunities through the application of RSA 507-B:7-a.

History of RSA 5-B (authorizing PRMPs)

It is also clear from the legislative history of RSA 5-B that the legislature intended for PRMPs to provide insurance coverage for New Hampshire public entities. The legislative history for RSA 5-B (HB 608 (1987)) contains numerous statements by legislative sponsors, committee reports, testimony, and documents submitted by the New Hampshire Municipal Association ["NHMA"] (predecessor to the Local Government Center ["LGC"] and PRIMEX), that tout the fact that PRMPs were always intended to provide insurance at a more stable and lesser rate than insurance companies. NHMA even presented a plan for how the casualty coverage they would provide to public entity members would allow the purchase of group excess or re-insurance from commercial carriers at a reduced rate.

For example, NHMA provided the House committee with standards for pools entitled "PRIMA Standards for Pool Administration" that included a section entitled "II. INSURANCE"

which stated, in part: "The fund bylaws should provide trustees with the power to approve the amount of reinsurance to be purchased by the pool."; and "There should be evidence of appropriate underwriting including sufficient funding, credible loss experience, and adequate spread of risk employing actuarial review and projection where relevant."[13]

Likewise, at the April 24, 1987 Senate Insurance Committee hearing, Senator Delahunty (the senate sponsor of HB 608) opened the committee hearing as follows:

> There will be no opposition to this bill. This bill is a reaction [to] some concerns of the Insurance Commissioner relative to what I think is some very fine work of the Municipal Association in setting up the ability to provide quality insurance for its members . . . .

It is clear from the legislative history of HB 608 (1987), including the information and business plan presented by NHMA, that RSA 5-B was enacted so that PRMPs could provide insurance coverage to public entities. It is also clear that PRMPs were to be exempt from regulation and taxation applicable to traditional insurance companies so that they could pass the savings on to pool members in the form of reduced premiums and/or dividends. Any suggestion that RSA 5-B was intended to provide insurance-like coverage (with the exception of a true self-insurance program) without somehow being insurance coverage for purposes of RSA 507:7-a appears to be nothing more than a post-enactment construct of convenience by PRMP entities.

Nor does a fair reading of RSA 5-B indicate that PRMPs were not intended to provide insurance coverage to its public entity members as one of several different types of benefits/programs. Rather, the statutory intent was to give PRMPs an advantage by not having to comply with RSA 412 and other insurance regulations when their products, absent regulatory and tax exemption, would be subject to such statutes.

RSA 5-B:3, I, enables political subdivisions to obtain "insurance by any combination of the provisions of this paragraph." This statute then provides that a PRMP has the power to pool risks and acquire "insurance, excess loss insurance, or reinsurance". According to 1 Holmes' Appleman on Insurance 2d (1996), § 2.15 at 313 reinsurance and excess insurance is only available if the underlying contract provides insurance coverage.[14] RSA 5-B:3, III(a) then specifically authorizes PRMPs to provide property and casualty coverage for its members.

RSA 5-B:6, I, then declares that PRMPs are not insurers "under the laws of this state" and that the business of PRMPs "shall not constitute doing an insurance business for purposes of regulation or taxation." What the statue does not do is declare that the products offered by PRMPs are not insurance or that the activities of a PRMP do not include providing insurance coverage to its members. Thus, the statute recognizes the fact that an entity other than in insurance company can issue a policy of insurance and takes the extra step to protect PRMPs from regulation and taxation when they are in fact issuing insurance contracts.

The concept that PRMPs provide insurance is also supported by New Hampshire case law. In *Professional Firefighters of N.H. v. Healthtrust, Inc.* the court noted that the PRMP in question "performs the essential government function of providing insurance and pooled risk management programs to political subdivisions" and "provides products and services similarly supplied by private entities, and competes with private entities in the market for the sale of these products and services".[15] Further, New Hampshire law recognizes that an insurance policy is nothing more than a form of contract.[16]

Case law from other jurisdictions also supports the concept that the substance of the contract, regardless of the terminology used to describe the contract or the nature of the entities entering into the contract, controls whether or not the contract provides insurance coverage. For example in *Associated Hospital Service of ME v. Mahoney* the Court stated: "Plaintiff, in discussing its operations, assiduously refrains from speaking of its programs in insurance terms, (membership or subscriber's fees, rather than premiums; service or benefits rather than insurance, operational cost, rather than underwriting expenses) but the program is properly to be categorized, not by what it is called, but by what it in fact does."[17] Likewise in *Strength v. Alabama Dept. of Finance* the Court stated: "If it looks like a duck, walks like a duck, and quacks like a duck, it must be a duck. And so it is with this 'duck'; it must be insurance."[18] Thus, whether an entity issuing an insurance policy is an insurer subject to insurance regulations and taxation is a different analysis from whether the contract/insurance-policy at issue provides some form of insurance coverage triggering RSA 507-B:7-a.

The Language of New Hampshire PRMP Contracts Is for Insurance Coverage

A PRMP coverage document for PRIMEX was quoted recently in a pleading relative to Hillsborough County.[19] Correspondence from PRIMEX to Hillsborough County dated October 30, 2002 stated: "Welcome to the Primex Property and Casualty Package Program. We are extremely pleased that *Hillsborough County* has decided to entrust its property and liability coverage to Primex. This letter will serve to bind coverage effective November 1, 2002."

The first page of "Section One – General Provisions" stated, in part, that: "Each section of this self-insurance member agreement is designed to provide coverage similar to that afforded

by traditional insurance." The General Provisions defined "Deductables", explained respective duties in the "Event of Occurrence", and discussed cancellation and renewal procedures. All of these provisions mimic language found in generally available insurance policies. The General Provisions provided 10 pages of definitions that also appear to be lifted from standard insurance contracts. As with any other insurance policy, the contract provided standard defense and indemnification against claims.

Under the Hillsborough contract, PRIMEX's coverage obligations continued if Hillsborough entered into bankruptcy. Hillsborough also went from claims-made insurance coverage to occurrence-based coverage when switching to PRIMEX. As such, if Hillsborough went bankrupt, chose to leave PRIMEX or was terminated by PRIMEX, PRIMEX would remain obligated to pay claims against Hillsborough that occurred during the covered period of time for years after Hillsborough's bankruptcy or departure without PRIMEX having any recourse relative to further contributions from Hillsborough.

The PRIMEX contract also took advantage of the statutory authority to re-insure with a traditional insurance carrier. This was consistent with the business plan presented to the legislature by NHMA in 1987.[20] The money PRIMEX used to purchase this excess or re-insurance coverage can only come from its member entities. Thus, not only are the PRMPs in New Hampshire providing insurance coverage, they are using public entity money to purchase insurance coverage from traditional insurance companies to pay for part of the promised coverage.

In the past, a PRMP argued that it, not its member entity, purchased and benefited from the reinsurance. In the case of *Lucas v. Swain Cty Bd of Ed.* the Court rejected this argument stating:

> We do not interpret the statute so narrowly as to exempt a school board from waiver where the board contracts with an intermediary to then procure the board's insurance through the commercial insurance market, ...[21]

The *Lucas* Court went on to explain that this was consistent with prior cases finding waiver when a public entity was named as an additional insured through a contract with a service provider or other contractor.[22]

Entities Other than an Insurer Can Issue an Insurance Contract

It has long been held that whether an entity issued insurance depended upon the nature of the contract, not the nature of the entity. In *People v. Roschli*, the Court addressed whether the "Plate Glass Fund" operated by the Manhattan & Bronx Retail Grocers' Association in the 1930s was a form of insurance. The Court reasoned that: "What is in substance a contract of insurance cannot be changed into something else by giving it another name."[23] The Court based its reasoning on the following:

> This fund was a device whereby the contributors, through a chain of reciprocal agreements, undertook to insure each other at cost. In its essentials it was 'that system whereby individuals, partnerships or corporations engaged in a similar line of business undertake to indemnify each other against a certain kind or kinds of losses by means of a mutual exchange of insurance contracts, usually through the medium of an attorney in fact appointed for that purpose by each of the underwriters, under agreements whereby each member separately becomes both an insured and an insurer with several liability only.' G. J. Couch, Reciprocal or Inter-insurance, 94 A.L.R. 836.[24]

Furthermore, just because an entity issued insurance contracts does not make the entity an insurance company. In *Kolesar v. Slovak Evangelical Union, Augsburg Confession of America* the defendant fraternal benefit society was issuing life insurance to its members and was sued in accordance with the statute providing jurisdiction over insurance companies. The *Kolesar* Court determined that the statute granting jurisdiction through a specific form of service for insurance companies did not apply, reasoning: "It may be that the defendant society is going beyond its corporate powers and issuing policies of insurance rather than benefit certificates, but that does not make it an insurance company."[25]

Nor have these determinations changed over time. In the 2011 case of *McMullin v. Enterprise Financial Grp, Inc.* the Court determined that vehicle service contracts were insurance policies even though the company issuing them was not an insurer subject to state insurance regulations and explained:

> Vehicle service contracts are written like insurance policies. The obvious purpose of a vehicle service contract is to protect the purchaser from the expenses associated with an unexpected mechanical breakdown, or an expensive but necessary repair. The purchaser pays a premium and buys an agreement to shift any potential hazard they may face to the vehicle service provider. The vehicle service provider agrees to indemnify the consumer for mechanical repair costs. In other words, the consumer has purchased insurance — regardless of whether the vehicle service company is labeled as an insurance company and regardless of whether it labels its agreements insurance.[26]

The *McMullin* Court concluded that: "Although vehicle service providers may not be subject to the exact same requirements and regulations as insurance providers, vehicle service contracts meet the definition of and are designed to function and perform as 'insurance.'"[27]

The New Hampshire PRMP Model Is Not Self-Insurance

RSA 5-B authorized PRMPs to provide self-insurance for its members. However, the PRMP model presented to the legislature in 1987 and as exemplified by the Hillsborough County contract with PRIMEX is not self-insurance. In the cases of *Dionne v. City of Manchester*[28] and *Coltey v. N. E. Telephone and Telegraph Co.*[29] the New Hampshire Supreme Court addressed whether a city and a private company were self-insured for the purposes of the motor vehicle financial responsibility act. In both cases, the court found dispositive the lack of any contract that could be construed as an insurance policy. Unlike these cases, New Hampshire PRMPs provide extensive contracts with their member entities providing for, amongst other things, indemnification and defense to a set limit with the potential of never being fully reimbursed.

It has been noted that "self-insurance is not insurance at all. It is the antithesis of insurance. The essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer. The essence of self-insurance, a term of colloquial currency rather than of precise legal meaning, is the retention of the risk of loss by the one upon whom it is directly imposed by law or contract."[30] Self-insurance has also been described as follows:

> a planned program of paying from a company's own funds for losses sustained, where it recognizes reasonably the potential losses that might be incurred, does all that it can to avoid or reduce this potential, and then provides a means to process and pay for the losses remaining. What distinguishes self-insurance from other forms of insurance is that the risk of loss is assumed by the self-insured entity; it is not shared among a group of entities. Self-insurance is also distinguishable from going "bare," i.e., not providing any means for paying incurred losses, in that a planned program is involved. A true self-insurance plan contemplates the establishment of a fund based on projections of future losses and the identification and measurement of *possible* and *actual* claims against the self-insured entity so that money from the fund may be set aside to pay those claims if and when they come due.[31]

And:

> Whether a self-insured party is considered to be providing "insurance" depends in large part on (1) the purpose of the analysis, (2) whether the arrangement described as self-insurance is, in reality, an effort by the party to assume insurable risks or merely amounts to a "deductible," and (3) whether the entity has made a conscious, calculated decision to estimate its risk and set aside sufficient funds to cover expected losses, or simply and somewhat off-handedly decided to save the cost of purchasing insurance by merely hoping that no losses would occur.[32]

The New Hampshire PRMP model meets none of these descriptions of self-insurance – and depending on the reinsurance or excess coverage purchased by the PRMP, the PRMP may merely amount to a 'deductable' plan.

Of note is the fact that the entirety of the risk assumed by the contract is not retained by liable PRMP member entities. Based on the business model presented to the New Hampshire Legislature in 1987, at most, an adverse claim experience reduces any right to re-imbursement a member may have if it does not terminate its coverage with the PRMP. Even without any adverse claims, according to the Hillsborough PRMP contract the right to re-imbursement is significantly less than 50% of the premium paid for the coverage.

Also undermining any claim that the model followed by PRMPs in New Hampshire is self-insurance is the fact that any amount payable out of the "pool" is a payment shared amongst a group of entities insuring for similar risks. None of the entities in the "pool" makes any "conscious, calculated decision to estimate its risk" as the PRMP professionally underwrites each entity and charges a rate just like an insurance company. Furthermore, the PRMPs do not appear to charge a set administrative fee. Rather the PRMPs reap more income with lower claim experience just like an insurance company.

New Hampshire PRMPs argue that they do not keep profits; rather they return them to their members. But so do mutual insurance companies. Unlike a true self-insurance pool, if membership in a PRMP is terminated that member's contribution toward increased income for the PRMP is not returned to the terminated member; rather it goes to current members just like a dividend from a mutual insurer. The PRMPs also continue to provide coverage for its members in bankruptcy which is impossible for a self-insured entity. In further support of the concept that New Hampshire PRMPs are operated as a mutual insurance companies is Appleman on Insurance, 2d (1996) § 2.18 which states: "group self insurance by groups of potential insureds with similar risks is not self-insurance but merely the creation of a mutual insurer". Additionally, New Hampshire PRMPs have grown substantially since 1987 with PRIMEX alone claiming to have about 450 member entities in its property/casualty PRMP in any given year.

Nor does the argument that an adverse claim history will increase a member's future premium payments or reduce re-imbursement/dividends prove that PRMPs are some sort of group self-insurance. Such increases are no different than if a private insurer or a mutual insurer provided the coverage at issue. As explained in *Gossler v. City of Manchester*: "It is common knowledge that insurance premiums are based on loss record experience."[33]

It has also been held that purchasing excess or re-insurance distinguishes a pooled plan from self-insurance. In *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange* the Court distinguished the PRMP under review from others because of the inclusion of premiums paid to a commercial carrier to share the risk stating: "Here, unlike in *Benes* or any of the other cited cases, CHRPP, like ISMIE, has chosen to include an 'other

insurance' clause in its Trust Agreement. By doing so, it seeks to share the risk of loss with a commercial carrier when they have coincidental coverage, and it is therefore something other than a pure self-insured which, as stated previously, chooses to retain all of its risk."[34]

Similar Litigation Across the Country

The issue of whether a PRMP provides insurance that waives part of a public entity immunity statute has been addressed in other states. However, care must be used when considering such cases as the statutes and case law leading up to the decisions invariably differ from what has happened in New Hampshire. Other states fall on both sides of this issue, and sometimes another jurisdiction will have cases going both ways. It is also important to note that states may have changed their statutory scheme over time.

The law review comment, *Waiving Local Government Immunity in North Carolina: Risk Management Programs* Are *Insurance*, 27 Wake Forrest L. Rev. 709 (1992), provided a history of the development of PRMPs across the country and discussed the split of authority on whether such programs were "insurance" that waived various governmental immunities. The article portrayed the public entity insurance crises that spurred the formation of PRMPs as arising from the expansion of public sector liability through § 1983 claims and diminishing state law immunities in combination of the search for "deep pocket" defendants. Absent from the 1992 article is any mention of the development of statutes across the country limiting liability to a defendant's proportionate fault as noted in the New Hampshire cases of *Nilsson v. Bierman*, 150 N.H. 393 (2003), *DeBenedetto v. CLD Consulting Engineers, Inc.*, 153 N.H. 793 (2006), and the

Restatement (Third) of Torts, Apportionment of Liability. These changes effectively reduce the liability exposure of public entities purchasing insurance coverage that would trigger RSA 507-B:7-a, thereby reducing identified concerns about holding that pooled risk programs provide insurance that waives immunity/damage-cap provisions.

Illinois appears to hold that pools similar to New Hampshire PRMPs are not insurance when the pool members are public entities but are insurance when pool members are charitable institutions.[35] This Illinois distinction appears to be based on the concern that no public funds be put at risk relative to tort claims.[36] This is a concern that New Hampshire rejected in *Merrill v. City of Manchester*, 114 N.H. 722 (1974) (abolishing municipal immunity for torts).

Indiana has held that PRMPs similar to the model followed in New Hampshire provide insurance in all cases. In *Eakin v. Indiana Intergovernmental Risk Management Authority* the Indiana Insurance Commissioner sought to have the PRMP at issue determined to be issuing insurance. The Court held that the pool was providing insurance to its member entities.[37] The provisions at issue in the *Eakin* PRMP are strikingly similar to the provisions in the Hillsborough contract with PRIMEX and the PRMP business model presented to the New Hampshire legislature in 1987.

Public Perception Is Important in New Hampshire

It was understood after the enactment of the RSA 507-B:4 damages cap in New Hampshire that the general public has input into whether a public entity purchases insurance. In the case of *Cargill v. City of Rochester* the court noted that: "A municipality's decision whether

to purchase insurance that provides coverage above the statutory level, RSA 412:3 (Supp.1977), can also be influenced by the views of its residents, the persons most in danger of sustaining bodily injuries as a result of the city's actions."[38] As such, the public perception that PRMPs provide insurance is a factor to consider when determining if such contracts are in fact insurance waiving immunities pursuant to RSA 507-B:7-a.

In New Hampshire, newspaper articles related to various municipal losses, such as the sewer disks discharged by Hooksett into the Merrimack River and damage to the Rochester Opera House, all identify the relevant PRMPs as insurers providing insurance coverage. PRMPs are thus viewed by the public as both providing insurance coverage and as being the equivalent of insurance companies.[39]

Excluding PRMP contracts from triggering the waiver in RSA 507-B:7-a by judicial decree effectively undermines any influence the residents of a community may have relative to acquiring RSA 507-B:7-a insurance. If the public believes that there is already insurance coverage in place for their protection they will not be influencing their elected officials to purchase such insurance. Further, as exemplified by the legislative history of RSA 5-B and in the referenced newspaper articles, PRMPs hold themselves out to the legislature, the communities that they do business with, and the general public as providing insurance coverage for public entities. In the meantime, the same PRMPs deny that they provide RSA 507-B:7-a insurance coverage when faced with litigation. Such double-dealing undermines the overall statutory scheme that relies in part on democratic-principles/public-sentiment relative to the availability of

RSA 507-B:7-a insurance coverage for the torts committed by public entities and their employees.

Summary

These, and possibly other, arguments have not yet been addressed by courts in New Hampshire. As such it remains an open question whether, under the current business model, New Hampshire PRMPs provide liability coverage that can trigger the immunity waiver in RSA 507-B:7-a.

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[2] *See Doe v. Concord School Dist.*, Merrimack Cty. Super. Ct. No. 07-C-0422 (10-26-2010, Smuckler, J.); *Fifield v. Pittsfield School Dist.*, Grafton Cty. Super. Ct. No. 08-C-0155 (04-09-2009, Vaughan, J.); *Farm Family Cas. Ins. Co. v. Rollinsford*, Strafford Cty. Super. Ct. No 05-C-0203 (09-13-2006, Mohl, J.); *Zolton v. Meier*, Grafton Cty. Super. Ct. No. 03-C-0158 (08-03-2004, Burling, J.); *McGonigle v. Salem School Dist.*, Rockingham Cty. Super. Ct. No. 00-C-0934 (07-31-2002, McHugh, J.).

[3] *See* legislative history for HB 425 (1951) as codified at N.H. Rev. L. Ch. 329 § 2-a (1951).

[4] *See* HB 425 (1951); N.H. Rev. L. Ch. 329 § 2-a (1951); N.H. Rev. L. Ch. 197 (1951).

[5] *See* RSA 412:3 (2002) (showing history).

[6] *See Villars v. City of Portsmouth*, 100 N.H. 453 (1957) (RSA 412:3 superseded the common law principle that a tort plaintiff had no right to examine a defendant's insurance policies); *Merchants Mut. Ins. Co. v. City of Concord*, 117 N.H. 482, 490 (1977) ("RSA 412:3 (Supp.1975) provides for a waiver of sovereign immunity to the extent any municipal subdivision, including cities and counties, has acquired insurance against the risk involved when damages result from the performance of governmental functions."); *Brown v. City of Laconia*, 118 N.H. 376, 378 (1978) ("Pursuant to RSA 412:3 (Supp.1977), the city loses its immunity up to the limit of insurance coverage on any risk insured against."); *Bancroft v. Town of Canterbury*, 118 N.H. 453, 457 (1978) ("We believe that the legislature in enacting RSA 412:3 intended to modify not only judicially imposed municipal immunity but also such statutes as RSA 238:6, which relieve municipalities from certain liabilities that might otherwise accrue were the municipalities to be

treated as private corporations."); *Continental Ins. Co. v. N.H. Ins. Co.*, 120 N.H. 713, 715 (1980) ("Thus in order for an insurance policy issued to the State to afford coverage, the State must, in the absence of sovereign immunity, be liable for the injuries complained of and the policy must insure the risk involved."); *Marcotte v. Timberland/ Hampstead School Dist.*, 143 N.H. 331, 335 (1999) ("We conclude that RSA 507-B:4, I, does not apply when a governmental unit purchases liability insurance that would apply but for the statutory liability limit itself."); *and others*.

[7] *Marcotte*, 143 N.H. at 335-336 (emphasis original).

[8] *Compare* RSA 412:3 (2002) *with* RSA 507-B:7-a (2011).

[9] *See* legislative history for HB 460 (2003) and HB 684 (2003) including *Notes on HB 460* dated February 11, 2003, page 2, "Section 14".

[10] *See* N.H. L. Ch. 95 (1913)

[11] *See Brown v. City of Laconia*, 118 N.H. 376, 378 (1978) ("Pursuant to RSA 412:3 (Supp. 1977), the city loses its immunity up to the limit of insurance coverage on any risk insured against.").

[12] *Compare* NH Laws Ch. 483 (1975) (changing RSA 412:3 as part of adopting RSA 507-B) *with* RSA 412:3 (2002).

[13] The legislative history contains a green folder holding information about "pooling" and the PRMP business plan provided by NHMA. The folder was entitled "NHMA PROPERTY-LIABILITY INSURANCE TRUST, INC. HB608-FN". Printed on the inside of the front cover of folder itself is a list of NHMA provided services including "Group Insurance". NHMA also provided a graphic illustration showing how after the $1,000 deductable and the next $150,000 in liability covered by pool assets, excess insurers, including Lloyds of London, Unites States Liability Insurance Company, and Hartford Fire Insurance Company would be responsible for the remainder of any liability up to the $1,000,000 or $5,000,000 coverage limits.

[14] This concept is also recognized by Superior Court Rule 111(K)(2)(f) which forbids an annuity company from reinsuring minor settlement annuity contracts with any carrier that fails to meet minimum requirements for the ceding carrier.

[15] 151 N.H. 501, 504-505 (2004).

[16] *Bates v. Phenix Mut. Fire Ins. Co.*, 156 N.H. 501, 504-505 (2004) (stating "The fundamental goal of interpreting an insurance policy, *as in all contracts*, is to carry out the intent of the

contracting parties." (emphasis supplied)).

[17] 213 A.2d 712 (Me. 1965).

[18] 622 So.2d 1283, 1289 (Ala. 1993).

[19] *See* plaintiff's summary judgment pleading in *McEvoy v. PRIMEX*, Hillsborough Cty Super. Ct, Northern District, docket no. 216-2011-CV-0113.

[20] *See Stratford School Dist. v. Employers Reinsurance Corp.*, 162 F.3d 718, 719 (1st Cir. 1998) (PRMP for school district had "self-insured retention" of $75,000 after which reinsurance provided coverage).

[21] *Id.* at 542.

[22] *Lucas*, 357 S.E.2d at 542-543.

[23] *Id.* at 764.

[24] *Id.*

[25] 186 A. 302, 304 (Pa. Super. 1936).

[26] 247 P.3d 1173, 1178 (Okla. 2011).

[27] *Id.* at 1180.

[28] 134 N.H. 225 (1991).

[29] 135 N.H. 223 (1991).

[30] *Fellhauer v. Alhorn*, 838 N.E.2d 133, 137 (Ill. App. 4th Dist. 2005).

[31] *Dubray Land Services, Inc. v. Schroder Ventures, U.S.*, 488 F.Supp.2d 1109, 1115 (D. Mont. 2007) (quoting THOMAS W. RAYNARD, *The Local Government as Insured or Insurer*, 20 The Urban Lawyer 103 (1988) (emphasis in original) (citations omitted)).

[32] *Dubray Land Services*, 488 F.Supp.2d at 1116 (quoting LEE R. RUSS AND THOMAS F. SEGALLA, *1A Couch on Insurance 3D*, § 10:2 (2006).); *Fellhauer*, 838 N.E.2d at 138 (same).

[33] 107 N.H. 310, 314 (1966).

[34] 758 N.E.2d 353, 362 (Ill. App. 1st Dist, 2001).

[35] *Compare Antiporek v. Village of Hillsdale*, 499 N.E.2d 1307 (Ill. 1986) (PRMP participation does not waive municipal liability), *with Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 758 N.E.2d 353, 359 (Ill. App. 1st Dist. 2001) ("Based upon the particular provisions in this Trust Agreement, CHRPP should be treated no differently than a traditional insurer for purposes of applying common law insurance principles as they relate to coverage issues.").

[36] *See Antiporek*, 499 N.E.2d at 1308.

[37] 557 N.E.2d 1095 (Ind. App. 4th Dist. 1990).

[38] 119 N.H. 661, 666 (1979).

[39] *Disks prove costly*, New Hampshire Union Leader, March 31, 2011 ("The town's insurance provider, Local Government Center, does not want to pay more than $10,000 to clean up millions of disks that escaped from the local sewage treatment plant because they consider them hazardous waste, local officials confirmed Wednesday night."); *Rochester's Opera House sued over damage to floor*, New Hampshire Union Leader, October 27, 2010 ("The Local Government Center is suing the Rochester Opera House to recoup a $20,000 insurance claim it paid the City of Rochester, which owns the building, to fix the theatre's century old moving floor."); *Rochester insurance company files suit against opera house*, Foster's Daily Democrat, October 27, 2010 ("The city's insurance company is seeking $20,000 in damages from the Rochester Opera House in relation to a 2007 incident where the opera house's moveable floor was damage." (and identifying the insurance company as the "Local Government Center")); *Government Center accused of misusing tax money*, Manchester Union Leader, November 18, 2010 (". . . the LGC is a quasi-governmental agency that handles health, property and liability and worker compensation insurance for cities and towns statewide" and noting it has "about $100 million in insurance reserves").