STATE OF NEW HAMPSHIRE

NEW HAMPSHIRE INSURANCE DEPARTMENT

In the Matter of Colonial Green Products Distributors, LLC

Docket: INS No. 21-0050-DJ

COLONIAL'S MOTION FOR RECONSIDERATION

NOW COMES, Colonial Green Products Distributors, LLC ("Colonial"), by and through its counsel, Bernard & Merrill, PLLC, and requests reconsideration of the October 15, 2021 Insurance Department Order relative to Colonial's Request for Declaratory Ruling.

Procedural Background

The Insurance Department's ("Department") signed but undated Order[1] accurately reflects the procedural history of this claim except that on November 5, 2020 Colonial did not begin "NCCI's dispute resolution process with Travelers before the New Hampshire Workers (sic) Compensation Appeals Board (Board)[2]." It was on June 22, 2021, that Colonial requested to begin NCCI's Dispute Resolution Process ("Process") and requested that the Process be held in abeyance. In addition, Colonial also requested that NCCI provide "all procedural and discovery rules that govern the Process." NCCI has yet to respond to that request. NCCI has also failed to provide all communications between NCCI and Cincinnati and Travelers concerning Colonial's dispute that was requested on July 22, 2021. There are seemingly no rules

[1] The cover letter that accompanied the Order was dated October 15, 2021.

[2] The citation to the New Hampshire Workers' Compensation Appeals Board is not to be confused with the Board established pursuant to RSA 281-A:42-a. The Board the Department cites is established by and thorough the NCCI Basic Manual Dispute Resolution Process and is an administrative board controlled by NCCI.

that govern the Process concerning discovery, compelling witnesses to attend hearings, public access to hearings, general conduct of the hearing, and standards and burden of proof.

This declaratory ruling was filed with the Department pursuant to Ins. 209.01. The definition of declaratory ruling states ""Declaratory ruling" means "declaratory ruling" as defined in RSA 541-A:1, V." See, Ins.202.01 (g). While RSA 541-A:1, V states, "Declaratory ruling" means an agency ruling as to the specific applicability **of any statutory provision** or of any rule or order of the agency." (Emphasis added). Since Ins. 209 Petition for Declaratory Ruling does not have any rules applicable to the burden of proof it is NCCI and the insurers burden pursuant to RSA 491:22-a.

RSA 491:22-a, states "...the burden of proof concerning the coverage shall be upon the insurer whether he institutes the petition or whether the claimant asserting the coverage institutes the petition." The burden of proof is on the insurance carrier to determine "the existence of an insurance contract or that an existent insurance contract covers the particular incident in question, or both." Hodge v. Allstate Ins. Co., 130 N.H. 743, 747 (1998). In a declaratory judgment action to determine [terms] of an insurance policy, the burden of proof is always on the insurer, regardless of which party brings the petition." Cogswell Farm Condo. Ass'n v. Tower Group, Inc., 167 N.H. 245, 248 (2015) (quotation omitted). "The doctrine that ambiguities in an insurance policy must be construed against the insurer is rooted in the fact that insurers have superior understanding of the terms they employ." State Farm Mut. Ins. Co. v. Pitman, 148 N.H. 499, 501 (2002) (quotation omitted). See also, Exeter Hospital, Inc. v. Steadfast Insurance Co., 170 N.H. 170, 173 (N.H. 2017). Here, Cincinnati, Travelers and NCCI have not met the burden of proof that the NCCI manuals are applied to the policy which is a private contract. Without the NCCI Manuals being provided, as argued below, the contract does not come into existence.

Regulatory Framework

Colonial agrees that the Order sets out the regulatory framework by citing to RSA 412:23 (Advisory Organizations; Permitted Activity), and RSA 412:28 (Filing and Approval of Rates and Rating Plans). It is accepted that NCCI is an Advisory Organization to the Department and is provided authority to develop rules, rates, and procedures, etc. Essentially, NCCI is provided with a mantel of authority in developing rates, rules, and procedures for insurance policies with some oversite by the Department. In addition, the regulatory framework prohibits NCCI from agreeing with any insurer "to mandate use of any rate, prospective loss cost, rating plan, rating schedule, rating rule, policy or bond form, rate classification, rate territory, underwriting rule, survey, inspection or similar material." See, RSA 412:21 II.

The Order also sets out the procedure to obtain "pertinent information" relating to an insured's request under RSA 412:27. "Pertinent information" is not defined in the statute, but the Department's Order finds that the NCCI manuals are "pertinent information" requiring a payment of $1,600 for a subscription. The Department accurately cites to the statute indicating that if NCCI or the insurer do not provide the "pertinent information", then a hearing can be requested at the Department. Implicit in the Order, the Department declared the NCCI Manuals are not contract language, only "pertinent information."

RSA 412:5 I, however, states that, "Every insurer and advisory organization shall file policy forms, endorsements, and **other contract language** covered by this chapter...." NCCI has provided some, not all manuals[3], to the Department, apparently as part of the "other contract

[3] It has been determined that the NCCI Manuals in possession at the Department were only received on or around December 9, 2019. See, Order at Exhibit B. The dispute between Colonial and Cincinnati began in 2018, when Cincinnati was charging an excessive modification factor among other issues. The Department did not have NCCI Rules in its possession at the time of the dispute. Also, the Department does not have in its possession, NCCI's Policy and Proof of Coverage Guidebook; NCCI's Assigned Risk Supplement; or NCCI's Assigned Carrier Performance Standards. The Assigned Risk Supplement is supposedly available on-line; however, when using this

language covered by this chapter". The NCCI Assigned Carrier Performance Standards are not available to the Department[4] even though these "standards" are developed to provide "policy issuance and service level requirements... [and] residual market employers with uniform quality standards...." Exhibit B. These standards are contract obligations for carriers to follow, yet the Department, Colonial and other policyholders have no idea what these contractual obligations contain. Policyholders cannot determine if the insurer's performance have been fulfilled for the contract to be completed. The actions or obligations of one party to another must be accomplished. A contract cannot exist without each party fulfilling their respective obligations and service level requirements under the contract.

The Order makes clear that the NCCI Manuals are applicable to the policy. The Order, however, is unclear if the Department has declared that the NCCI Rules are "contract language" or are the NCCI Rules "pertinent information." If the NCCI Rules are contract language, then the NCCI Rules must be disclosed, without charge, as being part of the Policy. If the NCCI Rules are "pertinent information", then the NCCI Rules are not contract language and are unenforceable. A contract must define the scope of work or the terms and conditions of the agreement and clearly state the obligations and responsibilities of both parties. The Department's Order creates an ambiguity as to the actual contract terms entered into between private parties. The Department's Order is ambiguous as to this issue, i.e., are the manuals "pertinent information" or contract language?

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hyperlink https://www.ncci.com/ServicesTools/Pages/ARSUPP2010.aspx NCCI still requires a username and password. See, Exhibit A

[4] The NCCI Assigned Carrier Performance Standards are only available to "affiliated companies", so unless the Department is an "affiliated company" then the Department does not have access to this manual.

The Department indicates that the NCCI Manuals are available for viewing and copying[5]. The Department noted that it does not have coin operated copy machines, but "may bill recipients a modest fee" of .25 cents per page for copies. However, an insured is not allowed to copy entire manuals and the Department is unclear as to how many pages of the manual can be copied. Colonial believes that the entire manual is relevant as all rules are relevant or else there would be no rules.

The Order also goes to great lengths to avoid answering the issues presented, such as, whether NCCI is willfully and knowingly providing false information to consumers in violation of RSA 417: 4 I (a) and/or (h)[6]. Also, the Department neglected to address the issue of unfair insurance trade practices under RSA 417:4 of "rolling over disputed premiums into a subsequent policy term." In addition, the Department failed to address the issue of whether vacation, sick and holiday pay is incorporated into payroll for premium determination. There are no basic findings of fact, or any type of analysis contained in the Order that addresses these issues.

The Department "is not relieved from the obligation to generate basic findings of fact where" Colonial is seeking a ruling. Appeal of Tamm, 124 N.H. 107, 111 (N.H. 1983). "Without specific findings of fact to review, [a] court can neither adequately prevent or correct errors and abuses of the commission, nor determine whether the commission's findings could have reasonably been made." Id. (Citations omitted). Colonial requests a ruling on each issue presented.

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[5] The Department takes issue with Colonial for not attempting to review the rules in a timely manner. The Department seems to forget that State buildings were closed to the public from March 2020 through May 10, 2021 pursuant to the Governor's Emergency Orders. Therefore, Colonial was denied access to the NCCI Manuals while the Superior Court action was still proceeding.

[6] NCCI stated, the Department does not have "authority to override the Experience Rating Plan Manual rules..." See, Appendix to Petition, pg. 101.

Finally, as a result of the Department's Order, which has interpreted the statutory framework in such a way, the Order has created a violation of the contract clause of the United States Constitution, Art 1, Sec. 10 and the New Hampshire Constitution, Pt 1, Art. 23. The Order must be reconsidered.

Legal Argument

1) The regulatory framework as outlined by the Department's Order is in violation of the contract clause of the United States Constitution, Art 1, Sec. 10 and the New Hampshire Constitution, Pt 1, Art. 23.

Article 1, section 10 of the Federal Constitution declares that "[n]o state shall ... pass any ... law impairing the obligation of contracts...." Part I, article 23 of the New Hampshire Constitution states: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made ... for the decision of civil causes...." "'Retrospective law'" has been defined as follows: "every statute, which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past...." Opinion of the Justices, 135 N.H. 625, 630 (N.H. 1992). (Emphasis added). The New Hampshire Supreme Court "has relied on federal contract clause cases to resolve issues raised under part I, article 23 where contract impairment, and not simply retroactive application of a law, was alleged...." Id. The Court has interpreted "article I, section 10 and part I, article 23 to offer equivalent protections where a law impairs a contract...." Id. (Citations omitted). "Generally, the State and Federal Contract Clauses prohibit the adoption of laws that would interfere with the contractual arrangements between private citizens.'..." Tuttle v. New Hampshire Med. Mal. Joint Underwriting Ass'n, 992 A.2d 624, 636 (N.H. 2010).

The Contract Clause analysis "requires a threshold inquiry as to whether the legislation operates as a "substantial impairment of a contractual relationship." Tuttle, at 635. (Citations omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." Id. (quotation omitted). If the legislation substantially impairs the contract, "a balancing of the police power and the rights protected by the contract clauses must be performed, and ... the law... may pass constitutional muster only if it is reasonable and necessary to serve an important **public** purpose." Id. (Citations omitted, Emphasis added).

A) Contractual Relationship[7].

Here, there is a substantial impairment of the private contractual relationship between the policyholder and the insurer based on the Department's Order. The first component of the analysis is met, "whether there is a contractual relationship?" As found by the Court, "An insurance policy is a contract." Tuttle, at 636. The contract between the policyholder and the insurer is a private contract and basic contract principle apply to the contract.

The policyholder, however, does not enter into the contract with any other party, such as NCCI. There is no privity between NCCI and the policyholder. All terms, conditions and obligations to the contract must be produced by the party who drafted the contract in order to form a mutual understanding of each parties' obligations. "Among the requirements for contract formation is a meeting of the minds about terms--'each party must have the same understanding as to the terms of the agreement.'..." Simonds v. City of Manchester, 141 N.H. 742, 744 (N.H. 1997). Also, RSA 412:5 I states, "The commissioner may disapprove such form (policy) if it

[7] Colonial is proceeding based on the assumption that a contract exists; however, there may not be a binding contract due to contract formation issues. Therefore, Colonial's obligations under the policy are discharged.

contains provisions that does not comply with the **requirements of law**...". This section of the statute implies not just statutory law but basic contract law as well.

With NCCI and insurers refusing to produce the terms and obligations of the insurers, as outlined in the NCCI Assigned Carrier Performance Standards manual, there can be no contract. In the absence of a mutual understanding between two parties, the contract will not be considered legally binding. The Department must declare whether there is a binding contract between the parties even though insurers, terms, obligations, and standards are not produced. The policy provisions and statutory framework as interpreted by the Department do "not comply with the requirements of law."

The Department's Order must be reconsidered based on the determination that the undisclosed NCCI manuals apply to the contract which substantially impairs the contractual relationship and obligations between the parties.

B) Impairment of the Contractual Relationship.

Assuming there is a contract, the Department's Order interpreting the statutory framework impairs the contractual relationship between the policyholder and insurer. The Department vaguely determined the "Our Manuals" language in the contract include the NCCI Manuals and "once approved by the Department, are applicable to all workers' compensation policies to determine workers' compensation rates." Order, pg. 9. The policy, however, does not contain any provision in which the insurer is allowed to charge a policyholder for policy terms, conditions and obligations that may be "applicable" to the contract. As noted above, the policyholder, as well as the Department, is unable to obtain the NCCI Manual that provides the contract obligations and service requirements for carriers to follow, i.e., NCCI's Assigned Carrier Performance Standards, but the Department finds that Manual "applicable." Not all

Manuals are "applicable" to the contract as the Department suggests. There is no mutual understanding between the policyholders and insurers as the insurer's obligations and service requirements are being withheld and therefore, the contract is not legally binding.

The policy specifically states the insurer is "directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons **may enforce our duties**; so may an agency authorized by law." Appendix to Petition for Declaratory Ruling ("Appendix"), pg. 15, 64 (under Part One subsection H 3). How can the Department or "any person" enforce the insurer's duties, obligations and "service level requirements" when those duties, obligations and service requirements are contained in NCCI's Assigned Carrier Performance Standards manual which is not disclosed to the Department or available to any person? Yet, the Department's Order does not address this issue which substantially impairs not only the policyholder but "any person" who may be entitled to benefits under the contract.

The Department does not cite to, and Colonial cannot find, any statute or case law that requires a party to a contract to be forced to pay any amount for contract terms. Yet, the Order determined that $1,600 is a "reasonable charge" for such "applicable" contract terms. It is entirely unclear what analysis the Department undertook to determine this "reasonable charge" or did the Department simply accept NCCI's subscription fees[8] as being reasonable. It should be noted that in the Alex Builders case cited by Travelers and NCCI, Travelers demanded $150 for a copy of the NCCI Basic Manual which was declined by Alex Builders. It is unclear as to what a "reasonable charge" would be for each NCCI Manual.

The Department's Order also indicates that if a policyholder does not want to pay for the Manuals, the policyholder has the right to a hearing to obtain such manuals. This need to request

[8] It is equally unclear as to whether this "subscription fee" is on a monthly, yearly, bi-yearly or lifetime basis.

a hearing in order to obtain contract terms is imposing a substantial burden on policyholders to obtain "pertinent information" that affects the policy. The Department's Order interpreting the statutory framework is creating new obligations and imposes a new duty on the policyholder to pay for contract terms or to request a hearing to obtain those terms which is not contained in the contract. The policy does not state, under the "Our Manuals" provision, that policyholders need to pay for "Our Manuals", nor does it state that the policyholder must request a hearing with the Department to obtain the manuals. Nor does the policy indicate that RSA 412:27 applies in order to obtain "pertinent information." In fact, the "our manuals" language only states that "we may change our manuals and apply the changes to this policy if authorized..." Appendix, pg. 18, 67. This statement in no way apprises the policyholder of any obligation for the policyholder to pay or request a hearing to obtain "Our Manuals."

In the alternative, the Department indicates that the Manuals are available, and policyholders are welcome to review the Manuals at the Department. This notion that a policyholder can travel to a hearing or travel to the Department to view the Manuals creates an employment related risk not contemplated by the policyholder and substantially interferes with the contractual relationship between the private parties. The risk or hazard created by the Department's Order requires an employee of the policyholder to undertake a "special duty" or "special errand" which falls under the coming and going rule. The Supreme Court has long held "that when the employment requires travel, the employee is consequently exposed to hazards he or she would otherwise have the option of avoiding. Thus the hazards of the route become the hazards of the employment." Appeal of Griffin, 140 N.H. 650, 655 (1996). (Brackets and quotation omitted).

Should an employee be injured while traveling to obtain the manuals either through a hearing or to copy the manuals at the Department, this would adversely affect the policyholder's modification factor which thereby increases the premium. The duties imposed by the Department's Order creates a risk or hazard of employment that is not contemplated by the policyholder.

The way the Department interprets the statute creates a new obligation, imposes a new duty on the policyholder and substantially impairs the contract.

C) There is a substantial impairment of the contract.

In Tuttle, the Court recognized that "total destruction of contractual expectations is not necessary for a finding of substantial impairment...." Tuttle, at 641. (Citation omitted). "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." Id. (Citations omitted). "The intent of the parties is determined by an objective standard, and not by actual mental assent." Tsiatsios v. Tsiatsios, 140 N.H. 173, 178 (1995). (Quotation omitted). "An objective standard places a reasonable person in the position of the parties, and interprets [contractual terms] according to what a reasonable person would expect [them] to mean under the circumstances." Behrens v. S.P. Constr. Co., 153 N.H. 498, 502 (2006). "To survive a Contract Clause challenge, a legislative enactment that constitutes a substantial impairment of a contractual relationship 'must have a significant and legitimate public purpose.'..." Prof'l Fire Fighters of New Hampshire v. State, 167 N.H. 188, 193 (N.H. 2014). (Emphasis added).

Here, the clear expectation and intent of policyholders is to receive all contract terms when requested pursuant to basic contract principles, have the ability to enforce contract

provision against the insurer, receive premiums back from the insurer if overcharged, and for the policy to cover employment related risk created by the terms of employment and not risks or hazards imposed by statutory construction.

The Department's Order eliminates the policyholder's basic rights to receive all contract terms from the other contracting party, the insurer. Again, the Department cites to no authority that would allow a contracting party to forego the obligation to produce contract terms. Also, the contract is between the insurer and the policyholder and not between NCCI and the policyholder. There is no term, condition, or obligation on part of the policyholder to chase contract terms. The Department's Order substantially impairs policyholder's right to obtain all terms applicable to the policy, especially the insurers' obligations to the policyholder and "any person" who benefits under the policy.

The Department's Order states that all NCCI Manuals apply to the policy, but yet, neither the policyholder nor the Department have access to the insurer's obligations under the policy, i.e., NCCI's Assigned Carrier Performance Standards. Without the Performance Standards manual, this abrogates the policyholder's right to enforce the contract terms and obligations of the insurer. If the policyholder does not have the terms which define the insurer's obligations, it cannot enforce those provisions. Clearly, this substantially impairs the policyholder's right to enforce the contract.

The Department's Order also abridges the policyholder's right to enforce a proper premium audit and receive any overpayment of its premium assessment. The Department is accepting that NCCI has exclusive rights to determine the charges being assessed by the modification factor[9]. As noted above, NCCI stated, the Department does not have "authority to

[9] The Department, however, does not approve individual policyholders' modification factor assessed by NCCI.

override the Experience Rating Plan Manual rules..." See, Appendix to Petition, pg. 101. The Department simply disregards this issue and apparently is accepting NCCI's interpretation of its own rules. If NCCI can charge what it wants through the modification factor, then it appears that this would be incentive to violate RSA 404-C:5-a[10]. With no oversite by the Department on the modification factor, the policyholder is subject to "lose the entitlement to a premium discount", if the modification factor is 1.50 or greater. There is no evidence from Cincinnati or NCCI that would indicate the Department approved the 1.55 modification factor contained in Colonial's policy. See, Appendix, pg. 8, 11. In addition, Colonial is being subject to both a modification factor and a scheduled modification which is seemingly not allowed pursuant to the policy, statute or NCCI manuals. Appendix, pg. 11. The Order is allowing this overcharging of premiums, modification factor and schedule modifications without oversight which substantially impairs the contract.

Finally, the Department's Order substantially impairs the contract by expanding coverage of the policy by creating a statutory employment related risk. If an employee is required to travel to the Department to review the NCCI rules, that employee is now covered by the policy that was not considered by the policyholder. If the employee is injured while traveling to the Department and back to the employer's place of business, then the injury, as noted above, is covered under the policy as a "special errand" or "special duty." This would inevitably lead to an increase in the policyholder's modification factor which was not envisioned. This substantially alters coverage under the policy.

The Department must reconsider the Order.

[10] RSA 404-C:5-a states "...an employer with an experience modification factor of 1.50 or greater shall lose the entitlement to a premium discount."

D) There is no significant and legitimate public purpose that supports the Department's Order.

"To survive a contract clause challenge, a legislative enactment that constitutes a substantial impairment of a contractual relationship must have a significant and legitimate public purpose... The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests... The core task involved in resolving Contract Clause claims [is] striking a balance between constitutionally protected contract rights and the State's legitimate exercise of its reserved police power." See, Deere & Co. v. State, 168 N.H. 460, 472 (N.H. 2015) (Cleaned up). Tuttle indicates that "a balancing of the police power and the rights protected by the contract clauses must be performed, and ... the law... may pass constitutional muster *only* if it is reasonable and necessary to serve an important *public* purpose." Tuttle, at 635. (Citations omitted, Emphasis added). The statute's purpose must serve a "broad societal interests, not merely some `favored' special interest group.'..." Tuttle at 663.

As stated in Colonial's reply, "The mission of the New Hampshire Insurance Department is to promote and **protect the public good**..." and not curry favor with some special interest group. Colonial expressed concerns regarding public policy issues which the Department did not address. Colonial specifically noted that insurers are forcing undisclosed policy language that injures the interest of the public by charging inflated premiums based on undisclosed rules, assumptions and speculations of future payroll and inaccurate modification factor being assessed. As noted above, the Department's Order has created new obligations on policyholders to obtain the contract language to the policy which is a private contract. If terms of a contract are to be enforced, then the party drafting those terms must produce the terms, free of charge. In a private contract, there is no obligation for a party to pay for the terms of a contract or expend any effort

to obtain the terms other than to request them. If not produced, then the terms are unenforceable. The legislature cannot enact a law that violates that sanctity of private contracts without a legitimate interest.

The Department has not stated any legitimate reason why the legislature would draft a law that requires private citizens engaged in a private contract to initiate litigation in order for one party to obtain contract terms. See, RSA 417:27. The Department, also, has not stated any legitimate reason why the legislature would draft a law that requires private citizens engaged in a private contract to pay for "pertinent information" that supposedly applies to the policy. The policy language does not indicate that "pertinent information" pursuant to RSA 417:27 I is part of the policy. The "Our Manuals" language contained in the policy does not state that other "pertinent information" applies. "Pertinent information" as described by the Department is not policy contract language. The Department has performed an unsound analysis in arriving at its Order, only to protect NCCI and insurers interests and not public interests.

The Department must reconsider its Order in light of protecting the "broad societal interests, not merely some `favored' special interest group.'..." Tuttle at 663.

2) The Department must reconsider the Order concerning RSA 412:21 regarding the violation of prohibited activity between NCCI and insurers.

The Department has expressed no interest in reviewing Colonial's assertion that insurers and NCCI are engaging in prohibited activity and violating RSA 412:21. The Department must reconsider its Order to address this issue. RSA 412:21 II explicitly states, "No insurer shall agree with any other insurer or with an advisory organization to mandate adherence to or to mandate use of any rate, prospective loss cost, rating plan, rating schedule, rating rule, policy or bond form, rate classification, rate territory, underwriting rule, survey, inspection or similar material." (Emphasis added). On April 5, 2021, Cincinnati disclosed to Colonial that there is an

"Affiliation Agreement" between the insurer and NCCI. See, Exhibit C. Cincinnati, however, refused to produce the agreement.

The Department must decide whether this Affiliation Agreement falls under the vague and ambiguous definition of "pertinent information" under RSA 417:27. If the Department does not have possession of the Affiliation Agreement, then the Department must investigate this agreement to determine if the agreement violates the statute. If the Department does have the agreement, then it should be available for inspection to the public as "pertinent information."

The policy does not indicate that the insurer is "affiliated" with any other entity. However, the Affiliation Agreement, simply by the title of the document, demonstrates that insurers and NCCI are affiliated with each other. The definition of "affiliated" is "closely associated with another typically in a dependent or subordinate position." See, https://www.merriam-webster.com/dictionary/affiliated Insurers are in a subordinate position to NCCI and NCCI is requiring or mandating the use of NCCI manuals.

NCCI indicates that insurers are in a subordinate position and must follow NCCI directives. This is evidenced by NCCI's statement that "Travelers and the New Hampshire Department of Insurance do not have the authority to provide full access to NCCI's manuals." Appendix, pg. 100. NCCI is mandating all insurers to adhere to NCCI manuals in which the insurers do not have authority over those manuals. This is in clear violation of RSA 412:21 II.

3) The Department must reconsider its Order concerning the NCCI Dispute Resolution Process ("Process") which is in violation of Part I, Article 15 of the State Constitution and RSA 404-C:2 IV.

Colonial, hereby, incorporates the arguments contained in the Petition for Declaratory Ruling, Memo of Law and Reply concerning this constitutional issue. The Department's Order is lacking in findings of fact or analysis regarding Colonial's assertion of a violation of

constitutional due process and fundamental fairness principles. See, Reply, pg. 15 at 5. The Department does not provide any analysis regarding this issue, except to say the regulatory framework is "fair to insureds..." Order, pg. 11. The Department then questions whether Colonial's assertions are even recognized under the Constitution by relying on Midway Excavators v. Chandler, 128 N.H. 654, 659 (1984). The Department's reliance on Midway is misplaced.

First, the action in Midway "involves an alleged mistake in a bid by the plaintiff, Midway Excavators, Inc., on a highway construction project in the town of Franconia." Midway at 655. Colonial is not alleging any "mistake in a bid." Secondly, the plaintiff in Midway failed "to cite any authority to support its alleged due process right..." Midway at 659. The Midway court went on to say, "For the plaintiff to assert a successful due process claim, it must first assert that a protected liberty or property interest is at stake." Id. As a result, the Court never analyzed any constitutional provision when the decision was rendered. Here, Colonial has provided ample authority to support the constitutional due process claim which the Department chooses to ignore.

Colonial contends that the Process in inherently unfair and violates due process and fundamental fairness principles. First, by the insurer (the party to the contract) failing to provide all terms to the contract as argued above. Second, NCCI unilaterally closing disputes without informing policyholders. Third, not providing the "different rules" that may apply regarding the resolution of disputes. See, Reply, pg. 16. Forth, NCCI stating that the Department does not have the authority to override certain manuals which the Department neglects to address. Fifth, the Affiliation Agreement between insurers and NCCI promotes a chilling effect over the entire "Process." Sixth, NCCI not providing all correspondence between NCCI and the insurer when

attempting to resolve the dispute. And the policyholder being entrenched in the NCCI Process which is reviewed by NCCI. This so-called Process discourages policyholders from even entering the Process. Maybe that is why the Department "has received less than 1 request per year from insureds to review Board decision[s]" because of the inherent unfair playing field. Order, pg. 11.

Furthermore, as noted by the Department's Order, in support of the regulatory framework, the policy is also governed by RSA 404-C:5-a. However, RSA 404-C:2 IV specifically states that "any plan...shall...Establish procedures for applicants and participants to have grievances reviewed **by an impartial body**." (Emphasis added). How can NCCI be an impartial body when the purpose of the Process, created by NCCI, can only "review the application of NCCI Manual Rules to a Policy"? NCCI cannot be an impartial body when reviewing its own rules and being the administrator of the Board. As administrator of the Board, it serves as the technical advisor to Board members regarding its own Manual Rules. The fact that NCCI declares that it has no "conflict of interest" with any affiliated entity is simply untenable. See, Process Rules Appendix G 3 d (2). The fact that NCCI has entered an "Affiliation Agreement" with an insurer creates a conflict of interest once the agreement is signed and this conflict of interest cannot be waived by its own rule.

The policyholder does not create the conflict of interest, but certainly has a say in the matter as to whether to allow a waiver. The Court has held that when an administrator of a Board, which NCCI is, or a panel member has an affiliation with a party it "would be likely to influence his opinion and thus necessitated his removal from the panel." Appeal of Wal-Mart Stores, 145 N.H. 635, 637 (N.H. 2000). "An official is an 'interested party' if he or she (1) has 'a direct personal or pecuniary interest that is immediate, definite, and capable of demonstration,' **or**

(2) has **'any connection** with the parties in interest, as would be likely, improperly, to influence his or her judgment.'..." Id. NCCI's Affiliation Agreement creates a genuine conflict of interest which cannot be waived. The Process, therefore, is unconstitutional in not providing a fair and impartial hearing or at the very least a violation of RSA 404-C:2 IV.

Essentially, NCCI is interpreting its own rules for the Board members. This Process cannot interpret, apply, or provide an opinion on state law which is inevitably interwoven in premium disputes. This unfair Process only creates more litigation costs for the Policyholder which maybe another reason the Department only reviews 1 decision per year.

The Department must reconsider its Order to address these issues.

4) The Department's Order must be reconsidered to address whether the Department has the "authority to override the Experience Rating Plan Manual rules".

This specific issue directly relates to Colonial's due process and fundamental fairness argument concerning the Process and a violation of RSA 417:4 I (a) and/or (h). Colonial discussed this issue in its Memo of Law filed with the Petition for Declaratory Ruling which the Department did not acknowledge. Specifically, Colonial requested a ruling on NCCI stating that the Department does "not have the authority to provide full access to NCCI manuals[11]." Appendix, pg. 100. In addition, NCCI stated, the Department does not have "authority to override the **Experience Rating Plan Manual** rules that have been filed and approved for use in New Hampshire or to address the concerns on policies used in calculation of the 2019 experience rating modification." Id. at 101. (Emphasis original).

[11] This statement by NCCI saying the Department cannot grant full access to manuals is another reason, besides COVID, that Colonial did not previously attempt to view the Manuals at the Department.

Based on these statements alone, NCCI, as an approved advisory organization and state actor[12], is creating a chilling effect on a Policyholders' ability to have any confidence in trying to dispute any issue that may arise with the Policy. NCCI is saying to Policyholders, you cannot have the rules because the Department will not allow full access and even if you obtain the rules the Department has no authority to override the rules. NCCI, as a state actor, is violating due process notice principles by inaccurately informing policyholders that it cannot have an issue reviewed by the Department, unless of course this is a true statement.

These actions and statements by NCCI are clearly not in the public interest and violates RSA 412:1 X. If the statements by NCCI are accurate, in that the Department does not have authority over NCCI's "pertinent information", then the "Process" is a fallacy. Also, if true, then the "pertinent information" is governed by general contract principles and cannot apply to the Policy since the "pertinent information" is undisclosed. If the statements by NCCI are inaccurate, in that the Department does have authority over the NCCI's "pertinent information", then NCCI is willfully and knowingly providing false information to consumers and is a violation of RSA 417:4 I (a) and/or (h).

The Department must reconsider the Order and determine if NCCI's statements violate unfair insurance trade practices.

5) The Department's Order must be reconsidered to address the issue of Travelers' mid-term adjustments and "rolling over" disputed premiums into new a policy.

The Department's Order does not address this issue other than to convolute "rate disputes", "mandatory auditing process" and "the dispute resolution process" and simply declares it is not an "unfair trade practice." Order, pg. 9. Yet, the Order does not provide any

[12] See Colonial's Memo of Law Section VII, pg. 20 asserting NCCI is a state actor which also was not addressed by the Department Order and is hereby incorporated by reference.

findings, authority, statute, case law, NCCI rule or otherwise that allows an insurer to place a disputed premium from an expired policy into a new policy premium which is a separate contract. Unless terms are clearly indicated in the policy that this process of "rolling over" premiums is going to occur, it is a violation of the new policy terms. The Process that the Department relies heavily on during the course of the Order fails to acknowledge that the Process cannot interpret state law. So, the Process has no authority over this issue.

The Order goes on to state, "this issue is not ripe for review as it should be presented to the Board prior to review by the Department." Order, pg. 10. However, RSA 417:5, which is the section of the Statute that needs to be interpreted, states, "The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or any unfair or deceptive act or practice." The commissioner cannot abdicate responsibility to NCCI's "Board" to address unfair insurance trade practices. The NCCI's Board is "not authorized to interpret, apply, or provide an opinion on state or federal laws…." There is no right to have this issue addressed in the Process.

Colonial is not requesting a ruling on the merits but is simply requesting the Department to address this obvious violation of RSA 417:4 XII and RSA 417:4 XIV and declare whether this type of practice being employed by Travelers and possibly other insurers is in violation of the statute.

As each policy is a separate contract, by Travelers requesting that the disputed premium be paid in full by incorporating the disputed amount into the current policy, this action by Travelers is violating RSA 417:4 XII, by "Knowingly collecting as premium or charge for insurance any sum in excess of or less than the premium or charge applicable to such insurance

and **as specified in the policy**...." (Emphasis added). When a new policy is issued, the Policy only indicates that monthly payments are required until a final audit is performed. That is the language specified in the policy. In addition, this type of business practice is violating RSA 417:4 XIV which states a carrier is committing an unfair and deceptive act by "increasing premiums on any policy during its term, **without the consent of the insured**." (Emphasis added).

Even if the Department relies on NCCI's "pertinent information", that "pertinent information" is not legally valid. The Department's Order determined that NCCI's "pertinent information" is applied to the Policy "once approved by the Department." The Department's "approval" is invalid as the "pertinent information" conflicts with the statute as mentioned above. The approved "pertinent information" as well as administrative rules "may not add to, detract from, or modify the statute which they are intended to implement." In re Cover, 168 N.H. 614, 621 (N.H. 2016) (Citation omitted). The "pertinent information" as approved by the Department modifies and detracts from the statute by allowing an insurer to charge an excessive premium on the new policy by incorporating a disputed amount into the new policy. This violates RSA 417:4 XII. Also, the "pertinent information" violates RSA 417:4 XIV, by increasing the premium on the new policy without the insureds consent. As a result, any policy language, "pertinent information" or administrative rule that allows this type of action is invalid.

The Department must reconsider it Order to address this issue.

6) The Department's Order must be reconsidered to address the issue of vacation, sick and holiday pay being incorporated into policies as the Department has approved of such actions for furloughed employees.

Again, the Department fails to address this issue and attempts to foist this issue on NCCI's dispute resolution process. The Department declares, "this issue should be presented to

the Board, based upon the factual circumstances between the insured and the insurer, prior to review by the Department—as required by the dispute resolution process provided within the manuals." Order, pg. 12. As noted above, the NCCI's Board is "not authorized to interpret, apply, or provide an opinion on state or federal laws...." There is no right to have this issue addressed in the Process because this issue requires interpretation of RSA 412:35 as well as RSA 281-A:2 XI. This issue requires an analysis of whether vacation, holiday and sick pay can be incorporated into "a final premium... based upon **actual exposure** existing during the term of the policy coverage." RSA 417:35. Also, a determination must be made as to whether this issue violates RSA 281-A:2 XI, (causation of injury to employment) whereby the policy cannot become effective during the time when employees are not working; thereby insurers are overcharging policyholders[13].

Furthermore, the factual circumstances are already presented for review. Colonial is requesting a declaratory ruling based on whether the inclusion of vacation, sick and holiday pay being applied and incorporated into the premium violates the statutes noted above. There are no other factual determinations necessary to address this issue. The insurers say that the inclusion is legal; while Colonial says it is not legal. The Department Order is essentially requiring Colonial to exhaust administrative remedies as outlined by NCCI. However, that is a futile endeavor, unless, of course, NCCI and the insurers agree that vacation, sick and holiday pay cannot be incorporated into the premium.

"The rule requiring exhaustion of administrative remedies is designed to encourage the exercise of administrative expertise, preserve agency autonomy and promote judicial efficiency...the exhaustion of administrative remedies doctrine is flexible, and that exhaustion is

[13] See argument contained in Reply, pgs. 18-21 which is hereby incorporated by reference.

not required under certain circumstances. Exhaustion is not required, for example, when further administrative action would be useless." Porter v. City of Manchester, 151 N.H. 30, 40 (N.H. 2004). The administrative action in this case would be having Colonial go through the Process, where the Process cannot resolve the issue. Administrative action through the Process is useless.

The Department must reconsider its Order on this issue.

7) The Department's Order must clarify Question 3 as to whether the NCCI Manuals are administrative rules.

Finally, the Order must be clarified concerning whether the NCCI rules are administrative rules adopted by the Department. The Order regarding this specific question was not answered and referred the reader to Question 1. The Order addressing Question 1 does not indicate the process of approval the Department undertakes when NCCI Manuals are filed "with the Department **for approval every year**." Order, pg. 6. (Emphasis added). This begs the question of, if NCCI Manuals are submitted every year for approval, then why were the manuals not in the Department's possession until December 9, 2019? If the NCCI Manuals are received in electronic form, then the manuals should be available in electronic form through the Department's website. Governmental transparency must be adhered to.

Finally, as noted above, if NCCI will not allow access to NCCI's Assigned Carrier Performance Standards, (See, Exhibit A), then how could the Department "approve" that manual "**every year**"? Order, pg. 6.

Colonial is requesting the Department to clarify the Order and declare all NCCI Rules are "pertinent information", or contract language, and whether the NCCI manuals are administrative rules that would need to go through the rulemaking process of the Administrative Procedure Act.

Conclusion

The Department's Order is legally erroneous, against the weight of evidence, thereby being unreasonable, contrary to the applicable statutes, regulations and case law, and a reconsideration of the Department's Order must be made in favor of the Colonial on all issues.

WHEREFORE, Colonial Green, by and through its attorneys, respectfully requests that this Department:

A. Grant Colonial's Petition for Declaratory Judgment with respect to the controversy described in the Petition and issue the following declarations:

1) The statutory framework creates a violation of the contract clause of the United States Constitution, Art 1, Sec. 10 and the New Hampshire Constitution, Pt 1, Art. 23.

2) Question 1 – All NCCI Manuals are not contract language and are not applicable to the policy.

3) Question 2 – The non-disclosure of NCCI Manuals violate RSA 412:1 X and RSA 412:5 I.

4) Question 3 – NCCI Manuals are not part of the "Our Manuals" language contained in the policy.

5) Question 4 – NCCI Manuals are not administrative rules (the Order does not specifically state the Manuals are not administrative rules).

6) Question 5 – the charging and attempting to collect disputed premiums by rolling over the amount to a new policy is in violation of RSA 417:4 XII and XIV.

7) Question 6 – the Dispute Resolution Process violates RSA 421:5 V; RSA 417:4 XVII d and the Affiliation agreement violates RSA 412:21 which adversely affects the Process with a conflict of interest.

8) Question 7 – the non-disclosure of NCCI rules and the Dispute Resolution Process violates Part I, Article 15 of this State's Constitution.

9) Question 8 – inclusion of vacation, sick and holiday pay into payroll to determine premiums violates RSA 412:35 and RSA 281-A: 2 XI

B. Grant Colonial Green reasonable attorneys' fees and costs to be paid by the insurers and NCCI; and

C. Grant such other and further relief as may be just and equitable.

Respectfully submitted,

Colonial Green Products Distributors, LLC

By and through its attorneys,
BERNARD & MERRILL, PLLC

Dated: November 10, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been forwarded to Attorney Bethany Minich, as counsel for Cincinnati, Attorney Garrett Harris, as counsel for Travelers and Attorney Nathan Fennessy, as counsel for NCCI, all by way of email.

Dated: November 10, 2021

Gary S. Harding, Esq. (NH Bar #15335)

EXHIBIT A

Gary Harding

From: Heaton, Michelle <Michelle.C.Heaton@ins.nh.gov>
Sent: Friday, October 22, 2021 4:14 PM
To: Gary Harding
Subject: NCCI Manuals

Hi Attorney Harding,

I am reaching out to follow up about your inquiry yesterday into the availability of the NCCI Assigned Risk Supplement and the Assigned Carrier Performance Standards manuals. NCCI advised the Department that the Assigned Risk Supplement manual is available online to everyone at no charge. However, the Assigned Carrier Performance Standards manual is only available to affiliated companies. Therefore, the Department will be unable to make this manual available for your viewing.

Best,

Michelle Heaton, Esq.
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Insurance is complex. We are here to help.
Contact our Consumer Services Division with questions or complaints at (800) 852-3416 or
consumerservices@ins.nh.gov
https://www.nh.gov/insurance
Like us on Facebook: www.facebook.com/NHInsuranceDepartment
Follow us on Twitter: @NHInsuranceDept

EXHIBIT B

Assigned Carrier Performance Standards (2009 Edition)

LAUNCH

The *Assigned Carrier Performance Standards* provides policy issuance and service level requirements for assigned carriers in the residual market. NCCI's **Performance Standards** apply on a national basis, with some state-specific exceptions, in all NCCI administered Workers Compensation Insurance Plan states, and are effective January 1, 2009 for new and renewal assigned risk policies.

Available only online at **ncci.com**, these ***Performance Standards*** will help ensure that assigned carriers provide residual market employers with uniform quality standards, while containing residual market system costs.

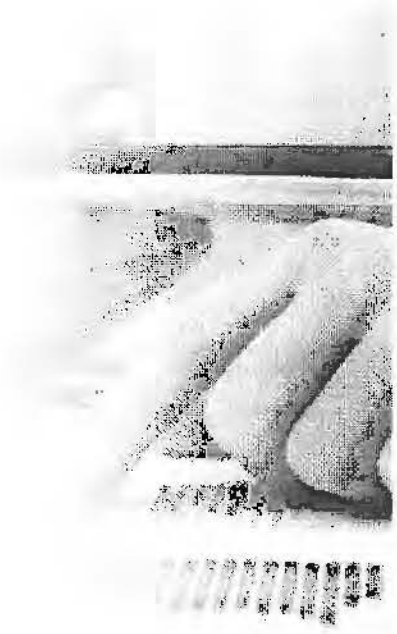

EXHIBIT C

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS SUPERIOR COURT

COLONIAL GREEN PRODUCTS DISTRIBUTORS, LLC

V.

THE CINCINNATI INSURANCE COMPANY

Case No. 213-2019-CV-00277

DEFENDANT'S SUPPLEMENTAL RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

Defendant, Cincinnati Insurance Company and Defendant in Counterclaim, Cincinnati Indemnity Company (collectively "Cincinnati"), for their supplemental answers and responses to Plaintiff's First Request for Production of Documents, states as follows:

GENERAL OBJECTIONS & RESPONSES

1. Cincinnati objects to Plaintiff's First Request for Production of Documents to the extent they seek to expand Cincinnati's obligation beyond the scope of permissible discovery established by Rules 35, 36, and 44 of the Rules of Superior Court of the State of New Hampshire.

2. Cincinnati objects to Plaintiff's First Request for Production of Documents to the extent that they call for information protected by the attorney-client privilege, the work-product doctrine, or any other applicable privileges or exemptions in that, as such, they exceed the scope of permissible discovery, and the information sought will not be provided.

3. Cincinnati objects to Plaintiff's First Request for Production of Documents to the extent that the information sought would be inadmissible at a trial and to the extent they do not appear reasonably calculated to lead to the discovery of admissible evidence. As such, they exceed

the scope of permissible discovery, and the information sought will not be provided.

4. All information and documents provided and/or made available for inspection and copying in connection with Cincinnati's Answers and Objections to Plaintiff's First Request for Production of Documents are provided and/or made available for use in connection with this litigation and for no other purpose. In producing documents and information responsive to Plaintiff's First Request for Production of Documents, Cincinnati does not waive its right to assert objections to the admissibility or use of any of those documents or information at trial.

5. While Plaintiff's First Request for Production of Documents contain vague or ill-defined terms, Cincinnati has nonetheless sought to respond in good faith based upon its reasonable understanding and interpretation of Plaintiff's Requests. Cincinnati reserves the right to revise, correct, add to, supplement, and clarify any of its responses or objections.

6. Cincinnati has set forth such objections as are apparent at this time based upon its understanding of Plaintiff's First Request for Production of Documents. Cincinnati reserves the right to assert additional objections, including but not limited to those based upon undue burden, which may become apparent in the course of providing and/or making available for inspection and copying information and documents to Plaintiff.

Subject to and without waiving its general objections, Cincinnati responds as follows:

SPECIFIC RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

24. Please produce all contractual agreements, including but not limited to any affiliation agreement, between Cincinnati and NCCI that allows the use of any NCCI materials for commercial purposes.

Response

Objection. This request is overly broad, unduly burdensome, unlimited in time, and seeks information that is neither relevant to the subject matter of the litigation nor likely to lead to

the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Cincinnati responds as follows:

Cincinnati has no such documents.

Supplemental Response

An Affiliation Agreement has been located and will be produces subject to the entry of an agreed-upon Protective Order, a proposed copy of which was forwarded on August 21, 2020.

Defendant,
Cincinnati Insurance Company
By its Attorneys,

April 5, 2021

Bethany P. Minich, NH Bar No. 265413
minich@litchfieldcavo.com
Litchfield Cavo, LLP
Six Kimball Lane
Lynnfield, MA 01940
(781) 309-1500

CERTIFICATE OF SERVICE

I, Bethany P. Minich, hereby certify that on April 5, 2021, a true copy of the above document was served via electronic mail to:

Gary S. Harding, Esquire
Bernard & Merrill, PLLC
814 Elm Street
Manchester, NH 03101
Gary@Bernard-Merrill.com

Bethany P. Minich