THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

03-E-0106

In the Matter of the Rehabilitation of
The Home Insurance Co.

RESPONSE AND OBJECTION OF REHABILITATOR
TO MOTION OF JOY ANN GARDNER, ROBERT BLANGERES AND THE
CERTIFIED 7-STATE CLASS THEY REPRESENT
TO MODIFY REHABILITATION ORDER AND SCOPE OF THE ABATEMENT
OF CASES IN ANY FUTURE LIQUIDATION OF THE HOME

Paula Rogers, Commissioner of the New Hampshire Insurance Department and rehabilitator of The Home Insurance Company, pursuant to Order of this Court dated March 5, 2003, by her attorneys, the Office of the Attorney General, hereby responds and objects to the Motion of Joy Ann Gardner, Robert Blangeres and the Certified 7-State Class They Represent to Modify Rehabilitation Order and Scope of the Abatement of Cases in Any Future Liquidation of The Home (the "Gardner Blangeres Motion"). The Rehabilitator objects to the motion because the stay and the abatement is an essential element of the rehabilitation and liquidation, for the benefit of all creditors of the estate and protection of the public throughout the country and lifting it will cause irreparable harm to the rehabilitation and liquidation of The Home. Furthermore, the stay of actions against insureds of The Home is temporary and is designed, at least in part, to enable the Rehabilitator and, in liquidation, various state guaranty associations sufficient time to consider issues concerning the defense of such claims as those made by Gardner and Blangeres.

In support hereof, the Rehabilitator respectfully represents as follows:

34.

I. THE STAY OF ACTIONS AGAINST THE HOME'S INSUREDS IS WITHIN THE SCOPE OF THE REHABILITATION AND LIQUIDATION STATUTES

Gardner and Blangeres assert in their Motion that provisions in the order entered by this Court on March 5, 2003, and the one proposed by the Rehabilitator in the pending liquidation petition staying actions against The Home's insureds, exceeds the powers of the Court granted by RSA Chapter 402-C. Because the provisions of 402-C should be interpreted liberally and in means consistent with the goals of the Chapter, the broad injunctive powers afforded the Court easily include the power to stay an action against one of The Home's insureds.

A. The Court Should Interpret the Statutes Authorizing the Stay Liberally

The Insurers Rehabilitation and Liquidation Act "shall be liberally construed to effect [its] purposes." RSA 402-C:1, III. What this means is that "all reasonable doubts in statutory construction" should be resolved "to give the broadest reasonable effect to its remedial purpose." In re Denton, 147 N.H. 259, 260 (2001).

B. RSA 402-C:5 Provides Ample Latitude for Stay of Actions Against The Home's Insureds

The Act's purpose is "the protection of the interests of insureds, creditors and the public generally . . . through (b) improved methods for rehabilitating insurers . . . (c) enhanced efficiency and economy of liquidation . . . (d) equitable apportionment of any unavoidable loss . . . (e) lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extension of the scope of personal jurisdiction over debtors of the insurer outside of this state." RSA 402-C:1, IV (emphasis added). The Act provides the Rehabilitator and the liquidator

power to seek stays here and elsewhere to prevent interference with the proceedings, prevent waste, and prevent further prosecutions of actions or "any other threatened or contemplated action that might lessen the value of the insured's assets or prejudice the rights of policy holders, creditors or shareholders, or the administration of the proceeding." RSA 402-C:5. There can be little doubt that an action involving "thousands of homeowners"[1] in "Washington, Oregon, California, Idaho, Utah, Colorado and Hawaii"[2] seeking damages from one of The Home's insureds (including damages incurred during a four year period when The Home was primary coverage for Stimson),[3] whom The Home must defend and perhaps eventually indemnify, would be something that might "prejudice the rights of [a] policyholder[]," such as Stimson. *Id.* The first enumerated of the Chapter's purposes tells it all; the injunctive powers are exercisable for protection of the insureds of The Home in addition to creditors and the process itself. RSA 402-C:1, IV ("The purpose of this chapter is the protection of the interests of the insureds . . .."). To interpret the Act as not being sufficient for the Court to issue orders to protect the very insureds that the statute was designed to protect would be inconsistent with a liberal construction and would lead to absurd results. The Court should not assume that the legislature would enact language in the Act that would lead to an absurd result. State v. Woodman, 114 N.H. 497 (1974); Trustees of Philips Exeter Academy v. Exeter, 92 N.H. 473 (1943). Instead, the Court should construe the statute to give effect to its clearly stated underlying purposes. Appeal of Dell, 140 N.H. 484 (1995).

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[1] Memorandum of Law in Support of Motion of Joy Ann Gardner, Robert Blangeres and the Certified 7-State Class They Represent to Modify Rehabilitation Order and Scope of the Abatement of Cases in any Future Liquidation of The Home (the "Gardner Blangeres Memorandum") at 2.
[2] Id. at 3.

C. Movants Sweeping Disregard of the Broad Power Enumerated In RSA 402-C:18 is Inconsistent With Its Liberal Construction

Movants stress that because The Home is not a party to the litigation in Washington, there is no ability to stay it saying that

> for out of state lawsuits, the statute requires the rehabilitator to consider whether a stay is "necessary to protect the estate of the insurer." RSA 402-C:18, I. While that consideration may apply to lawsuits against The Home itself, in the Gardner Class Action it does not apply at all.
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> (Gardner Blangeres Memorandum at 8.)

Movants then refer to some factors which they believe lead to the conclusion that because of the activities of other insurers, some acting in litigation outside of Washington, "the 'estate of The Home' will be fully protected even if the plaintiff homeowners obtain a judgment against Stimson." Merely because —in a particular instance— other factors might provide some protection to an insurer, it does not make a sound basis for a determination that this Court should not protect an insurer with a stay of litigation against an insured. Movants would seem to concede that the Rehabilitation Order provides the Rehabilitator the discretion to determine what steps should be taken to protect The Home and its insureds. In the tumult of the commencement of the rehabilitation proceeding the Rehabilitator was faced with hundreds of claims still in active stages of litigation. In addition, the Stimson problem itself is daunting with active litigation involving The Home in several states, including a coverage action in Oregon; in this case alone, The Home may have as much as $8 million in exposure as a primary carrier. Under such circumstances the Rehabilitator and the Court are afforded the power

[3] Id. at 4 (see chart also at last page of tab 4 of movants' exhibits).

to seek or encourage others (as was done in this case)[4] to seek the enforcement of the stay, including those to protect the insureds. This is consistent with a liberal construction, not the pinched reading given by the movants. Moreover, without the stay, even with the "fully" protective factors asserted by the movants, the Rehabilitator faces the choice of either continuing to pay for the defense of Stimson or complaints from Stimson based on the policy and contribution claims from the other insurers. In any case, the existence of other factors such as those enumerated by movants is scant support for the sweeping generality of movants' assertion that the broad powers in RSA 402-C:18, liberally construed, should "not apply at all" to the Gardner lawsuit.

D. *Ex Parte Noble Trucking* Does Not Support Lifting the Stay In this Case at This Time

Movants quote from *Ex Parte* Noble Trucking Co., 675 So.2d 356 (Ala. 1996) for the proposition that stays of actions against insureds are not appropriate. Gardner Blangeres Memorandum at 9-10. Movants miss the context of *Ex Parte Noble Trucking* and argue its import in the wrong forum. *Ex Parte Noble Trucking* is a comity case where the Alabama court was asked, as a matter of comity, to enforce a stay issued by an

[4] Movants try to make much of the fact that neither The Home nor the Rehabilitator sought the stay in the Stimson case. This point was argued by movants in Washington and, significantly, the Washington Judge imposing the stay against Gardner Blangeres, and interpreting identical language in the Washington statute ruled to the contrary in her order. *See* Affidavit of Michael D. Sandler In Support of Motion of Joy Ann Gardner, et al to Modify Rehabilitation Order and Scope of the Abatement of Cases In Any Future Liquidation of The Home (the "Sandler Affidavit"), Exhibit 7 ("It is this Cts view that a petition from the Rehabilitator is not required in order for this Ct. to consider or to order a stay of the proceedings." (sic)).

Indiana court. 675 So.2d at 359-60. Remarkably, the trial court in Alabama actually did issue a stay of the action against an insured for 90 days, consistent with the stay issued by the rehabilitation court in Indiana. *Id.* at 357-58. This stay was not questioned or challenged either by the lower court or the Alabama Supreme Court. It was only where a longer stay was sought that the lower court demurred and an appeal was taken. *Id.* at 358.[5] The Alabama Court seemed to be of the belief that "a little comity is nice but not so much, thank you." *See id.* at 360. In the present case, the movants are asking this Court to 'second guess' the grant of comity by the Washington court to seek relief from the first stay granted in favor of the rehabilitator; arguments of comity are more appropriately raised in the foreign court. *See* Bruce v. United Equitable Life Ins. Co. (*Ex Parte* United Equitable Life Ins. Co.), 595 So.2d 1373, 1374-75 (Ala. 1992); Daktory v. E.S. Sutton Realty, 2003 WL 21075951 (N.J. Super. App. Div. May 14, 2003) ("The principles of comity compel us to conclude that absolute deference to the rehabilitation stay order for a time adequate to serve the needs of rehabilitation is ordinarily mandated. We therefore hold that comity demands deference to initial stay order."); Builders Transp., Inc. v. Grice-Smith, 63 S.W.3d 822 (Ct. Apps. Tex. 2001) (court enforces stay protecting insured of out of state insurer).

In addition, whether the Rehabilitator is entitled to 90 days more or less becomes a moot point where the Rehabilitator has filed a petition to liquidate the insurer and requesting a liquidation stay. Here the problem takes on a vastly different complexion not considered by the Court in *In re Noble Trucking*. Some might agree that indefinite stays for sometimes unclear purposes in rehabilitation proceedings can seem unfair or

[5] It is worthy of note that with stays during the appeal, the trial in *Noble Trucking* was delayed from May 3, 1994 through at least January, 1996.

unduly harsh. *See* Daktory v. E.S. Sutton Realty, *supra* at 6-8 (discussing the balancing of interests as time in rehabilitation extends, and the availability of relief from the stay in cases of "individualized hardship"); Smigierlski v. Brookwood School, Inc., 2003 WL 1906786 (Super. Ct. Mass. April 16, 2003) ("A full year would seem a reasonable period of time for the Rehabilitator to inform herself concerning the claim, the identity of defense counsel, and the status of the case, and to make an informed decision how to proceed" before the stay of actions against insureds should end).[6] But when the case becomes a liquidation different problems must be confronted and the purposes of the stay become much more concrete.

E. The Stay Is A Reasonable Restriction on Access to Courts

Movants argue that the stay improperly restricts their access to courts. Gardner Blangeres Memorandum at 9. This same argument was taken up in the context of an insurance liquidation in Florida in the case of *Snyder v. Douglas*. The Florida Court in *Snyder* held that the "brief respite" provided in a six month stay of an action against an insured of a company in liquidation "represents a reasonable restriction on respondents' access to the courts." Snyder v. Douglas, 647 So.2d 275, 278 (D. Ct. App. Fla. 1994); *see also* Daktory v. E.S. Sutton Realty, *supra* at 5 ("concerns for uniformity and for avoiding the rush to the courthouse which would result from a general lifting of the stay" outweigh access to court concerns).

[6] The New Jersey Court in *Daktory* cited a NJ insurance regulation as a source for a definition of "hardship." That definition includes, "extreme and immediate financial urgency" that cannot be resolved through other means, and that can result in the individual being unable to meet ordinary necessities of life, nursing or hospital care, or large medical expenses. *Daktory*, *supra* at 8-9.

II. THE COURT SHOULD DENY THE REQUEST TO MODIFY THE PROPOSED LIQUIDATION ORDER AS PREMATURE

Movants urge the Court to modify the stay of actions that is sought by the Rehabilitator for the liquidation petition she has filed. Gardner Blangeres lack standing because their claim for *relief* from the stay in liquidation is not ripe. The stay Stimson obtained in the Washington Court will expire on June 3, 2003. The liquidation stay may enter as soon as June 9, 2003. But there is no way of knowing now whether the Washington Court will grant comity and honor the new liquidation stay. If the liquidation stay is not honored in Washington after June 9th, then the liquidator has a problem, not the movants. In any case, the movants are inviting the Court to become entangled in an "abstract disagreement" about a stay that might never happen. *See, e.g.,* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

III. THE COURT SHOULD DENY MOVANTS REQUEST FOR RELIEF FROM THE LIQUIDATION STAY BECAUSE THE BALANCING OF HARDSHIPS TIPS IN FAVOR OF THE LIQUIDATION PREROGATIVES

Assuming the issue is sufficiently ripe and the Washington court is likely to extend comity to the liquidation stay, prospective relief from it should be denied because the movants have not shown sufficient hardship to justify interfering with the efforts of the liquidator and the guaranty associations that will be made more successful by a finite stay of actions against insureds.

A. The Liquidation Order Will Stay Actions Against Insureds For Six Months

As it is currently before the Court, the *Proposed* Liquidation Order would provide:

> To the full extent of the jurisdiction of the Court and the comity to which the orders are entitled, all actions or proceedings against an insured of The Home in which The Home has an obligation to defend an insured are hereby stayed for a period of six months from the date of the Order and such additional time as the Court may determine pursuant to RSA 404-B:18
>
> (*Proposed* Liquidation Order at (y))

Thus, proposed is an order of finite duration, although potentially subject to extension, if necessary. This reflects the legislative policy of RSA 404-B:18 which provides for a stay to assist the guaranty associations in getting into place to begin their claims processing and assessment efforts. Section 18 provides in pertinent part:

> All proceedings in which the insolvent insurer is a party or is obliged to defend a party in any court in this state shall be stayed for 6 months and any additional time thereafter as may be determined by the court from the date the insolvency is determined . . . to permit proper defense by the association of all pending causes of action.
>
> (RSA 404-B:18)

Clearly the application of the liquidation stay in the Stimson matter has far greater import than simply whether The Home is, as movants assert, a relatively insignificant party there. The liquidation stay touches on the vast machinery of the multi-state guaranty associations and upon litigation pending in several venues involving the Stimson claims.

B. The Liquidation Stay of Actions Against The Home's Insureds Is Designed to Preserve the Estate and Provide Opportunity for the Guaranty Associations to Take Over the Claims Administration and Defense

The purpose of the stay is to prevent The Home from being "picked to pieces by creditors" and to prevent a "chaotic scramble for assets in a variety of uncoordinated proceedings in different courts." Underwood v. Hilliard (In re Rimsat, Ltd.), 98 F.3d 956, 961 (7th Cir. 1996); *see* Bruce v. United Equitable Life Ins. Co. (*Ex Parte* United Equitable Life Ins. Co.), 595 So.2d 1373, 1374-75 (Ala. 1992) (stay designed to preserve equality of distribution); Koken v. Reliance Ins. Co., 784 A.2d 209, 211 (Pa. Commw. 2001) (stay exists to maximize asset pool and minimize disparity in payment of claims and provides rehabilitator distinct time period in which to analyze pending litigation and outline strategy to approach and resolve in orderly and fair manner competing issues pending against insurer). Courts have recognized the importance of the stay to enable guaranty associations to deal with the multitude of matters thrust upon them by the liquidation. *See* Snyder v. Douglas, 675 So.2d at 277-78 (stay provides "brief respite from the continued prosecution of a claim in a court proceeding [providing the Florida Guaranty Assoc.] . . . a better position to properly evaluate the claim and decide whether it should be settled without further delay, thereby avoiding continued financial loss to the claimant and the insured of the insurer."). In this case where Stimson involves many cases in many states it is certain that the guaranty associations will need every day of the six month stay to sort out the tangles of the Stimson litigation.

C. The Inconvenience of the Stay to Movants Does Not Constitute Hardship Sufficient to Merit the Relief They Request.

Movants urge the Court to grant them prospective relief from the liquidation stay because they are a couple of months away from trial, there are lots of them, Stimson is allegedly solvent and otherwise well insured, and because movants have been waiting a long time for their day in court. Yet none of these assertions is really unique to movants. There are many cases in which The Home is involved where large numbers of people have been allegedly harmed by insureds of The Home, matters that have taken years to come to trial and where other insurers are involved. Granting relief here may well lead to a rush to the courthouse and a floodtide of litigation involving The Home in state and federal courts all around the country (to say nothing of the multiplication of lift stay motions to this court).

On the other hand, many of the Gardner Blangeres claims against Stimson (if in fact covered by Stimson's policy with The Home) may be paid by the guaranty associations. The stay in the Liquidation Order is designed to provide the guaranty associations sufficient time and opportunity to take over the thousands of claims against The Home's insureds, including, we presume, Stimson. Great public policies, concerning the efficiency of this process and the best use of the available dollars to deal with a pressing insolvency of an insurer that for many years insured millions of people, are at stake. *See* Frontier Ins. Co. v. American Title Servs., 838 So.2d 1178, 1179 (D. Ct. App. Fla. 2003) (reciprocal stay of action against insured dictated by public policy); Daktory, *supra* at 6 (placing "considerable emphasis" on "potential adverse effects [locally] and nationwide" that a refusal to uphold the stay would cause).

WHEREFORE, the Rehabilitator prays that this Court enter an Order denying Gardner Blangeres request for modification of or relief from the stay, and granting such other and further relief as may be just.

Respectfully submitted,

PAULA T. ROGERS, COMMISSIONER
THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF INSURANCE

By her attorneys,

PETER W. HEED
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Dated: May 19, 2003

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CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on May 19, 2003 I served a true copy of the foregoing upon Sherilyn Burnett Young, Esq., Rath, Young & Pignatelli, 1 Capital Plaza, Concord, NH 03301 by first class mail, postage prepaid.

Dated: May 19, 2003

Peter C.L. Roth

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