

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 LIQUIDATOR
TO EMERGENCY EX PARTE MOTION TO INTERVENE OF MISTY DAWN
STAPEL AND PARTIAL OBJECTION TO ORDER OF LIQUIDATION AND
TEMPORARY AND PERMANENT INJUNCTION AS TO ANY RELEASE OF
LIABILITIES OF RISK ENTERPRISE MANAGEMENT LIMITED**

Paula Rogers, Commissioner of the New Hampshire Insurance Department and Liquidator of The Home Insurance Company, pursuant to Order of this Court dated June 13, 2003, by her attorneys, the Office of the Attorney General, hereby responds and objects to the above captioned Ex Parte Motion to Intervene of Misty Dawn Stapel and Partial Objection to Order of Liquidation and Temporary and Permanent Injunction as to Any Release of Liabilities of Risk Enterprises Management Limited (the "Stapel Motion"). The Liquidator objects to the Stapel Motion because the stay protecting agents and employees of The Home is an essential protection for the orderly liquidation of The Home and the maintenance of the order of priorities as set forth in the New Hampshire statute. The Liquidator also objects because some of the relief the movant seeks will be moot because the relationship with Risk Enterprises Management ("REM") has been terminated by action of the Liquidator.

A. UNDERSTANDING AND NARROWING THE SCOPE OF THE RELIEF REQUESTED IN LIGHT OF THE JUNE 9, 2003 HEARING AND THE TERMINATION OF THE REM SERVICES AGREEMENT.

The Liquidator, in order to make the wide-ranging requests for relief more manageable for purposes of the Liquidator's response and the Court's consideration and decision, states that Stapel's Motion at this point seeks essentially two things. The first is relief from the scope of the Liquidation Order dated June 13, 2003, so that Stapels may pursue her claims against REM in its West Virginia action. Secondly, Stapels seeks a ruling that the Liquidator should not be able to employ REM to assist her in the liquidation of The Home.

At the hearing before the Court on June 9, 2003, the Court allowed Stapel's request to intervene and indicated that the question of whether the stay would be modified to allow her suit against REM to go forward would be reserved for later consideration. The Court entered the proposed Liquidation Order on June 11, 2003 which Order includes a stay protecting REM and other agents and employees from "any judicial, administrative, or other action or proceeding . . ." Liquidation Order ¶ (m)(2).

On June 19, 2003, the Liquidator informed REM by letter (see attached Exhibit "A"), that she had exercised her power under RSA 402-C:25, XI to disavow and reject the REM services agreement effective June 11, 2003, thereby terminating REM's services. The result of this for the Stapel Motion is that her requests for injunctive relief barring the Liquidator from hiring REM are moot.

Also on June 19, 2003, counsel to the Liquidator received a letter from Attorney Gottesman making clear that what is at stake here is not Stapel's right to pursue claims against REM or any issue about REM's suitability for working for the Liquidator.

Instead, what Stapel seeks is a preferential dividend from The Home. See letter dated June 17, 2003 attached as Exhibit “B” hereto; Stapel Motion ¶ 10. It is precisely this sort of strategic conduct that the stay protecting The Home’s agents and employees is designed to guard against.

B. THE STAY OF ACTIONS AGAINST THE HOME’S AGENTS AND EMPLOYEES SHOULD NOT BE MODIFIED

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 REM

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 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.

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

Stapel's Motion suggests that the stay protecting REM improperly restricts her access to courts. Staples Motion at ¶¶5, 6, & 19. 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*, 2003 WL 21075951 (N.J. Super. App. Div. May 14, 2003) ("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).

d. Relief From The Liquidation Stay of Actions Against The Home's Agents and Employees Should Be Denied Because Stapel Has Not Shown Sufficient Particularized Reason For It.

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); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 998 (4th Cir. 1986) (the purpose of the stay "is to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors, and to provide the debtor and its executives with a reasonable respite from protracted litigation . . . and to harmonize all of the creditors' interests with one another"); *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).

A stay protecting REM is appropriate here because The Home for many years has had no employees of its own. Instead, REM and its employees did the claims adjusting work for The Home. REM has certain rights to indemnification under the services agreement. *See, e.g., A.H. Robins Co. v. Piccinin*, 788 F.2d at 999 (stay protecting non-debtor in bankruptcy appropriate where “there is such an identity between the debtor and the third-party defendant that the debtor may be said to be the real defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. An illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case.”).

As shown above, restriction of access to courts is not, by itself, a sufficient basis to grant modification of the stay. As set forth in *Daktory*, claimants such as Stapel should be prepared to make a showing of individualized hardship. *See Daktory*, supra at 8-9. The Liquidator does not dispute that under the circumstances as outlined in the Stapel Motion, her counsel had little time to prepare her intervention papers. As presented, however, there is no compelling need for relief demonstrated, and the Stapel Motion should be denied. However, it may be appropriate to permit Stapel to amend her Motion with additional pleading to carry her burden on the equities warranting modification of the stay for her to proceed against REM.¹ The Liquidator can then review those

¹ It should not be sufficient for Stapel to simply incorporate by references allegations in pleadings made in other courts.

allegations and determine whether there is merit to her reasons for pursuing REM (as opposed to simply filing a claim against The Home like other policy claim-holders), and if not, properly join them in dispute and prepare for an evidentiary hearing or such other hearing as may be appropriate. *See* Stapel Motion at ¶¶ 17 & 18.

WHEREFORE, the Liquidator prays that this Court enter an Order denying the Stapel Motion, and granting the Liquidator 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
ATTORNEY GENERAL

Dated: June 19, 2003

By: 
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CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on June 19, 2003 I served a true copy of the foregoing upon the attached service list, by first class mail, postage prepaid.

Dated: June 19, 2003


Peter C.L. Roth

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