

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Rehabilitation of
The Home Insurance Company

Docket No. 03-E-106

**MEMORANDUM OF LAW IN SUPPORT OF
INTERNATIONAL PAPER COMPANY and
MASONITE CORPORATION'S
MOTION TO CLARIFY REHABILITATION
ORDER OR, IN THE ALTERNATIVE, MOTION
FOR LIMITED RELIEF FROM STAY**

NOW COME International Paper Company ("International Paper") and Masonite Corporation ("Masonite"), by and through their attorneys, and file this Memorandum in Support of their Motion to Clarify Rehabilitation Order or, in the Alternative, Motion for Limited Relief from Stay.

FACTS

The Home Insurance Company ("The Home") is a New Hampshire corporation with statutory offices at 286 Commercial Street, Manchester, New Hampshire. International Paper, through its former subsidiary Masonite, is entitled to certain proceeds from certain of The Home's policies that were sold to Masonite. International Paper and Masonite are the Plaintiffs in an action pending since 1995 in the Superior Court for the State of California, in and for the City and County of San Francisco, entitled International Paper Company, et al. v. Affiliated FM Insurance Company, et al., Docket No. 974350 (hereinafter the "California Litigation"). The Home is one of approximately twenty insurers that are Defendants in said action, in which Plaintiffs seek a determination of CGL coverage for property damage liability in connection with an underlying products liability settlement which exceeds \$500 million. The Home's potential liability is a small portion (5%) of the Plaintiffs' claims that currently exceed \$500 million. The

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California Litigation has been pending for more than seven years and is currently scheduled for trial beginning April 7, 2003.¹

On or about March 4, 2003, the New Hampshire Insurance Commissioner filed in this Court a Verified Petition for Rehabilitation relative to The Home, seeking an Order of Rehabilitation pursuant to RSA Chapter 402-C appointing the Commissioner as Rehabilitator for The Home. The Petition was filed with a Proposed Order, which was signed by this Court on March 5, 2003 (hereinafter "the Rehabilitation Order"). The parties to the California litigation were not given notice of the proceeding nor an opportunity to be heard before the Court issued the Rehabilitation Order.

On March 24, 2003, approximately two weeks before its scheduled trial, The Home filed in the California Litigation a Motion to Implement a Ninety-Day Stay of the Entire Action. In said Motion, The Home argued that the New Hampshire Rehabilitation Order was entitled to "full faith and credit," and that the California Court was bound by a ninety-day stay purportedly set forth in the Rehabilitation Order. See The Home Insurance Company's Motion to Implement a Ninety-Day Stay of the Entire Action ("Home Motion") (Exhibit A). From the date of the Rehabilitation Order through and including today, The Home continues to participate in the California Litigation.

The purpose of this Motion and Memorandum is to clarify the scope of the Rehabilitation Order's stay in light of the statute under which it was issued, RSA 402-C:18. Specifically, the Motion seeks to have this Court clarify that the ninety-day stay set forth in the Rehabilitation Order is intended to apply solely to actions *pending in New Hampshire*. In the alternative, if this Court reads RSA 402-C:18 as authorizing a stay of out-of-state litigation, then International

¹ The facts set forth in this Memorandum have been verified by Robert H. Shulman, Esquire, who is one of the attorneys representing the Plaintiffs in the California Litigation. See p. _ of this Memorandum.

Paper and Masonite Corporation seek limited relief from the stay for purposes of allowing the California Litigation to go forward as scheduled.

ARGUMENT

This Court's Rehabilitation Order adopted verbatim a Proposed Order submitted by the Commissioner of Insurance for the State of New Hampshire. The stay provision of the Order is ambiguous as to whether it is intended to apply to out-of-state litigation as well as in-state litigation. However, the statute under which such a stay is authorized, RSA 402-C:18, specifically provides that any stay issued in the context of the Rehabilitation Order is limited to the actions pending in the courts of this State. Accordingly, this Court should clarify the stay provisions of its Order as being limited to actions pending in New Hampshire.

RSA Chapter 402-C has two separate provisions governing stays of litigation, which vary depending upon whether the insurer is in rehabilitation or in liquidation. In the rehabilitation context, stays are governed by RSA 402-C:18, which provides as follows:

On request of the rehabilitator, any court *in this state before which any action or proceeding by or against an insurer is pending* when a rehabilitation order against the insurer is entered shall stay the action or proceeding for such time as is necessary for the rehabilitator to obtain proper representation and prepare for further proceedings . . . The rehabilitator shall immediately consider all litigation pending *outside this state* and shall petition the courts having jurisdiction over that litigation for stays whenever necessary to protect the estate of the insurer. (Emphasis added).

Thus, the statute contemplates different treatment of in-state and out-of-state litigation: in-state litigation is automatically stayed at the request of the rehabilitator, whereas the rehabilitator must separately petition for a stay of out-of-state litigation *in the court of that state*, if the rehabilitator believes that such a stay is necessary to protect the estate of the insurer.

In a situation when an insurer is in liquidation, different rules apply:

Upon issuance of any order appointing the commissioner liquidator of a domestic insurer . . . all actions and proceedings against the insurer *whether in this state or*

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elsewhere shall be abated and the liquidator shall not intervene in them, except as provided in this section.

RSA 402-C:28 (emphasis added). Thus, when an insurer is in *liquidation*, the statute specifically references an attempt to abate all actions and proceedings, whether in-state *or* out-of-state, that may be pending. Because the action in this Court involves the rehabilitation of The Home and a liquidation order has not been sought, the statutory authority of this Court to grant a stay of litigation is limited to in-state litigation. The rehabilitator must separately petition courts in other states for such a stay, and must demonstrate that a stay of that particular litigation is necessary for the rehabilitator to “obtain proper representation and prepare for further proceedings” or that it is otherwise “necessary to protect the estate of the insurer.” RSA 402-C:18.

This Court’s Order of March 5, 2003, adopting verbatim the Proposed Order submitted by the Commissioner, provides as follows:

Any of the following actions are stayed: . . . The commencement or continuation of a judicial, administrative, or other action or proceeding against The Home or any insured of The Home that was or could have been commenced before the commencement of this case, or to recover a claim against The Home that arose before the commencement of the Rehabilitation, for ninety (90) days, except as may be modified by further order of this Court.

See Order at p. 2., Sec. (g)(1). Despite the limitations set forth in RSA 402-C:18, this provision could be read as applying to litigation outside New Hampshire. In fact, The Home has argued in the California Litigation that this Court’s Rehabilitation Order is entitled to “full faith and credit,” and has asked the California Court to “enforce the order of rehabilitation and grant a ninety-day stay of this action in its entirety.” Home Motion at 7 (Exhibit A). In addition, the Insurance Commissioner, in her position as Rehabilitator of The Home, has authorized The Home “to seek enforcement of the stay contained in paragraph (g)(1) of The Home’s rehabilitation order for litigation pending outside New Hampshire.” See letter dated March 24, 2003 (Exhibit B). Thus, both The Home and, apparently, the Rehabilitator have erroneously

concluded that the stay set forth in paragraph (g)(1) of the Rehabilitation Order can be “enforced” against litigation outside New Hampshire.

When read in conjunction with RSA 402-C:18, this Court’s Order cannot be applied to stay litigation pending outside New Hampshire. The statute specifically states that stays issued in the context of a rehabilitation apply to New Hampshire litigation only, and that the rehabilitator must separately seek a stay of any out-of-state litigation in those courts. Furthermore, the rehabilitator cannot simply ask for a stay of out-of-state litigation. The statute unambiguously requires a showing that such a stay is necessary “to protect the estate of the insurer.” As reflected in Home’s Motion, however, The Home has made no showing whatsoever that a stay of the California Litigation is necessary to protect the estate.² Indeed, The Home has sought to prejudice the due process rights of International Paper and Masonite to contest any such showing that the Rehabilitator may ultimately seek to make, as required. Thus, Plaintiffs seek an Order from this Court clarifying that, consistent with RSA 402-C:18, its Rehabilitation Order does not act as an automatic stay of pending out-of-state litigation. See Proposed Order attached to Motion to Clarify.

Assuming *arguendo* that this Court reads RSA 402-C:18 as authorizing a stay of out-of-state litigation, then this Court should grant limited relief from the stay provisions of its Rehabilitation Order to allow the California Litigation to go forward as scheduled. The Rehabilitation Order itself specifically contemplated that such relief may be sought and granted, noting that the ninety-day stay “may be modified by further order of the Court.” See Order at Sec. (g)(1). In light of the purpose of RSA 402-C:18 and the status of the California Litigation,

² Furthermore, it has come to our attention that The Home has been selective in the cases in which it has sought a stay in jurisdictions outside of New Hampshire. In at least two cases where The Home is a named defendant in pending litigation, it has not sought a stay of those proceedings. The selective use of

that litigation should be exempted from any stay which the Rehabilitation Order may seek to impose.

The purpose of the stay provision of RSA 402-C:18 is to allow “the rehabilitator to obtain proper representation and prepare for further proceedings.” RSA 402-C:18, I. A stay of the California Litigation will not serve those purposes. The Home has been represented by counsel in the California Litigation during the seven years that it has been pending, and has remained active in the case up to the present.³ Thus, no credible argument can be advanced that The Home needs additional time to “obtain proper representation” or to “prepare for further proceedings.”

Enforcement of a ninety-day stay will cause severe prejudice to Plaintiffs. The California litigation is an enormous case. In preparation for trial, Plaintiffs and Defendants have conducted significant amounts of discovery. The parties have deposed scores of witnesses, including more than forty experts. Numerous pre-trial pleadings have been filed, including numerous legal briefs, motions *in limine*, proposed jury instructions, and other substantive and procedural filings involving complex coverage issues and trial phasing. In preparing for the April 7, 2003 trial, schedules of countless individuals have been carefully organized. The San Francisco Superior Court has already called the jury pool, and the Court has gone to great lengths to prepare the large amount of trial space needed. More than twenty parties and twenty different law firms are involved, as well as numerous witnesses, including experts, whose schedules all must be coordinated for what is expected to be a lengthy trial. All parties are scheduled and prepared to proceed to trial within a matter of days. The logistics of this coordination have been challenging and costly, including the scheduling itself as well as the provision of travel and hotel accommodations. In the event of a stay, significant additional amounts would undoubtedly be

attempts to secure a stay have led courts to deny such requests on that basis alone. See generally, *Eastern Indemnity Company v. Jirschler, Fleisher, Weinberg, Cox & Allen*, 235 Va. 9 (1988).

³ See Exhibit C, attached containing copies of recent pleadings filed in the California Litigation by The Home dated March 27, 2003, after The Home sought a stay of that action.

incurred to restructure trial arrangements. The inconvenience to the Superior Court and the prejudice to the parties that would result from a stay are self-evident.⁴ possible footnote

Moreover, a stay of the California Litigation is unnecessary. The Home has stated in its Motion that it estimates a four-month trial. In light of this trial estimate, there is no chance that a judgment will be entered against The Home within the ninety-day period for which The Home seeks a stay. Indeed, even after the jury reaches its verdict in this action, there would be further proceedings concerning allocation and possibly other issues before any judgment would be entered. Then, presumably appeals and cross-appeals would be filed by the parties. Thus, allowing the California Litigation to go forward will not jeopardize The Home's estate in the next 90 days.

Furthermore, The Home's claim that it will suffer "insurmountable hardship" if this action is not stayed is completely unsubstantiated, and thus lacks the evidentiary showing contemplated by RSA 402-C:18. Indeed, contrary to The Home's contention, The Home actually will benefit if it is required to proceed to trial with the other Defendants. The Home is a member of a joint defense group composed of the approximately 20 defendants in the California Litigation. It has been Plaintiffs' experience in that case that The Home has been minimally involved in the joint defense group's preparations for trial. In most instances, Home has taken a secondary role and relied on the work product of other Defendants in this action.⁵ It is clear that The Home's trial presentation will necessarily rely on work performed by other members of the joint defense group that have been more active in the litigation. In essence, The Home's trial

⁴ These arguments are, of course, better addressed by the California Court in which the litigation is pending. That is why RSA 402-C:18 specifically provides that stay orders under that statute are limited to New Hampshire litigation and contemplates that the Rehabilitator must separately petition an out-of-state court to seek a stay of litigation there pending, and justify to that court the compelling basis for granting such a stay.

⁵ See for example, Exhibit C, attached, containing copies of recent pleadings filed in the California Litigation by The Home in which it joins in two of Defendant Wausau's Motions in Limine.

preparation has largely been completed by other Defendants. Accordingly, a stay of the litigation as to The Home is not warranted.

Recent case law also supports this Court exercising its discretion in favor of granting Plaintiffs' relief from the stay as applied to the California Litigation. In *Reliance Insurance Co. v. Plum Creek Timber Co.*, No. 99C-19-263, 2001 WL 1222090 (Del. Super. Ct. Sept. 26, 2001), the court denied a stay in light of the "rapidly approaching" trial date and the resulting prejudice to plaintiff:

Plum Creek counter argues that comity should not permit a stay of the proceedings, as this case has been ongoing for about a year and a half, discovery has been conducted, trial is rapidly approaching and prejudice will result if it is not allowed to reduce its claim to a judgment. The court agrees with Plum Creek that the principles of comity should not allow a stay of these proceedings. Prejudice will result to Plum Creek in delaying this action. Trial is scheduled in January and discovery has already been taken, at this point there is no persuasive reason for granting a stay of proceedings

Id. at 2.

SUMMARY

For the reasons set forth herein, this Court should clarify its Rehabilitation Order of March 5, 2003 by stating that the ninety-day stay set forth in Section (g)(1) of that Order is not intended to apply to out-of-state litigation, which must be addressed as set forth in RSA 402-C:18. Alternatively, if this Court finds that the aforementioned statute grants it authority to enter a stay as to out-of-state litigation, then this Court should grant limited relief from that stay to allow the California Litigation to go forward as scheduled.

Respectfully submitted,

**INTERNATIONAL PAPER COMPANY and
MASONITE CORPORATION**

By Their Attorneys,

RATH, YOUNG AND PIGNATELLI,
Professional Association

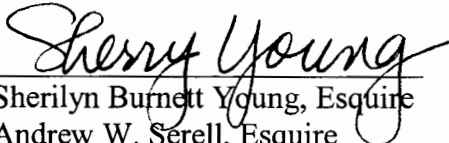
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Dated: April 2, 2003

By: 
Sherilyn Burnett Young, Esquire
Andrew W. Serell, Esquire

Verification of Facts in Memorandum

I, Robert H. Shulman, hereby attest that the facts regarding the California litigation, as set forth in this **Memorandum of Law in Support of International Paper Company and Masonite Corporation's Motion to Clarify Rehabilitation Order, or In the Alternative, Motion for Limited Relief From Stay**, are true and correct to the best of my knowledge and belief.

Sworn to and subscribed this 2nd day of April, 2003.

April 2, 2003

Robert H. Shulman

Robert H. Shulman, Esquire
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STATE OF CALIFORNIA
LOS ANGELES COUNTY, SS

On this 2nd day of April, 2003 before me personally appeared Robert H. Shulman, Esquire, who swore that the foregoing facts are true and accurate to the best of his knowledge and belief.



Cynthia Mejia
Justice of the Peace/Notary Public
My Commission Expires: 10/08/06

CERTIFICATE OF SERVICE

I, Andrew W. Serell, hereby certify that on this ____ day of April, 2003 a true and correct copy of the foregoing document was served via first class mail, postage paid to

By: _____
Andrew W. Serell, Esquire

CERTIFICATE OF SERVICE

I, Andrew W. Serell, hereby certify that on this 2nd day of April, 2003 a true and correct copy of the foregoing document was served via first class mail, postage paid to Peter C. L. Roth, Senior Assistant Attorney General and Martin P. Honigberg, Esquire .

By: Sherry Young for
Andrew W. Serell, Esquire