

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 INTERNATIONAL
PAPER COMPANY AND MASONITE CORPORATION'S MOTION TO
CLARIFY REHABILITATION ORDER OR, IN THE ALTERNATIVE, MOTION
FOR LIMITED RELIEF FROM STAY

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 International Paper Company and Masonite Corporation's Motion to Clarify Rehabilitation Order Or, In the Alternative, Motion for Limited Relief From Stay (the "IP&MC Motions"). The Rehabilitator responds to the clarification part of the IP&MC Motions by saying that this Court should decline to make the requested "clarification" because the point is moot and because of prudential considerations. If the Court nonetheless believes that clarification is necessary, the Rehabilitator urges the Court to rule in a manner consistent with a liberal interpretation of the statute. Such a ruling would have the stay apply to those parties before it. Such a liberal interpretation would also determine that the Rehabilitator's request for the stay in the California proceeding, which was granted on April 10th (as to The Home only) is sufficient to comply with New Hampshire law. The Rehabilitator objects to the motion for limited relief from stay because the stay is an essential element of the rehabilitation, for the benefit of all

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creditors of the estate and protection of the public throughout the country and lifting it will cause irreparable harm to the rehabilitation of The Home.

In support hereof, the Rehabilitator respectfully represents as follows:

I. THE DECLARATORY RELIEF SOUGHT BY IP&MC SHOULD BE DENIED BECAUSE THE QUESTION IS MOOT

IP&MC ask the court to “clarify” whether the provisions of RSA 402-C:18 require the Rehabilitator to appear in foreign courts and seek application of the stay or in contrast, whether the stay issued by this Court operates *ex proprio vigore* to require stay of foreign proceedings in which The Home is involved. But this request is moot because the Rehabilitator has already asked for a stay from the California court and IP&MC have appeared before this Court and are now subject to the Court’s jurisdiction. *See* Exhibit A to Movants’ Memorandum of Law. In fact, on April 10, 2003, the California court granted the Rehabilitator’s request—but only as to The Home, and not the remaining parties to the litigation. A true copy of the California stay order is attached hereto as Exhibit X.

In effect, RSA 402-C:18 offers alternatives: either the stay applies around the country (and foreign courts will honor it out of comity or by full faith and credit) or the Rehabilitator can, if necessary “petition the courts having jurisdiction over [foreign] litigation for stays whenever necessary to protect the estate of the insurer.” RSA 402-C:18, I. IP&MC suggest in their Motions that the Rehabilitator’s request of the California court is insufficient and have asserted in California that this Court’s March 5, 2003, order does not reach the proceedings in California.

The Rehabilitator has, however, already petitioned the California court to honor this Court’s order and to stay the proceedings in California and, at least in part, that

request has been granted. Significantly, IP&MC have now also appeared here and subjected themselves to this Court's jurisdiction so the long arm application of the stay is no longer an issue. Thus, the clarity that IP&MC seek is an academic point. There is no case or controversy when all that is sought is a legal opinion over an issue that has already been resolved in two separate ways. *E.g.* Exeter Hosp. Med. Staff v. Board of Trustees of Exeter Health Resources, Inc., 148 N.H. 492, 498 (2002) (court should dismiss as moot when "question no longer presents justiciable controversy because issues involved have become academic or dead . . ."); Appeal of Mascoma Valley Regional School Dist., 141 N.H. 98, 99 (1996) (dismiss as moot when issue complained about is rectified); Dolcino v. Thalasinis, 114 N.H. 353, 354 (1974) (dismiss in absence of "true controversy which affects the legal relations of the parties to the litigation").

II. THE COURT SHOULD DENY THE REQUEST FOR CLARIFICATION TO AVOID CREATING CONFLICTING RULINGS ON THE QUESTION IN TWO FORA WITH JURISDICTION OVER THE PARTIES

At this juncture the Rehabilitator has requested a stay in the proceedings in California where IP&MC are plaintiffs. Similarly, IP&MC have come to this Court and subjected themselves to this Court's jurisdiction on the question of the applicability of the stay. As a result, this Court and the California court both have before them IP&MC, the Rehabilitator and the question of the applicability of the stay. The California court has already granted a partial stay. As a prudential consideration, the Court should not attempt to clarify this question where the Rehabilitator and IP&MC have already raised issues concerning the reach of, or comity for, the rehabilitation stay with the California court. *Accord* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817

(1976) (court should abstain on a question in the interest of “wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation”). Entertaining this question creates a distinct possibility of an unnecessary conflict between the view of this Court, and the court in California, which has just decided this same question.

III. IN DECLARING THE MEANING OF RSA 402-C:18 THE COURT SHOULD INTERPRET THAT PROVISION LIBERALLY AND DECLARE THAT THE STAY APPLIES TO IP&MC.

If the Court does believe that IP&MC’s question should be answered, then the Rehabilitator respectfully states that RSA 402-C:18 must be interpreted in the most liberal way possible so as to protect the insurer and enhance the prospects of the rehabilitation. RSA 402-C: 1, II (“This chapter shall be liberally construed to effect the purpose stated in paragraph IV.”) The most liberal and reasonable interpretation is that (i) courts where foreign proceedings are ongoing should honor this Court’s stay order as a matter of judicial comity or through full faith and credit, (ii) litigation that could have an adverse impact on the rehabilitation estate should be stayed in its entirety (because otherwise the estate would be prejudiced by final rulings), (iii) where parties voluntarily subject themselves to this Court’s jurisdiction, they must, of necessity, be bound by this Court’s stay orders, unless relief is granted them, and (iv) in cases where foreign courts require more from the Rehabilitator, she can respond (as she did here) by petitioning those courts for imposition of the stay.

IP&MC have asserted to the California court that this Court’s March 5, 2003, rehabilitation order is not entitled to full faith and credit in the California proceedings as

against IP&MC because “the New Hampshire court did not have jurisdiction over Plaintiffs.” *See* Plaintiff’s Opposition to The Home Insurance Company’s Motion to Implement a Ninety-Day Stay of the Entire Action; and Memorandum of Points and Authorities in Support Thereof (dated March 28, 2003 and filed with the Superior Court of San Francisco, docket number 97 43 50) at 6, attached hereto as Exhibit Y. That disability to the application of full faith and credit is gone now that IP&MC have come before this Court.

IV. NO RELIEF FROM THE STAY IS WARRANTED BECAUSE THE STAY IS NECESSARY FOR AN EFFECTIVE REHABILITATION AND TO PRESERVE THE ASSETS OF THE HOME; THE STAY SHOULD BE ENFORCED AGAINST IP&MC

The New Hampshire Insurers Rehabilitation and Liquidation 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. The Act provides the Rehabilitator power to seek stays here and elsewhere to prevent interference with the Rehabilitator or 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.

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); Snyder v. Douglas, 647 So.2d 275, 278 (Dist. Ct. App. Fla. 1994) (stay allows rehabilitator time to evaluate claims and determine whether to settle and save money on litigation); 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).

There can be little doubt that an action to determine a \$25 million obligation of The Home that continues without The Home’s participation will prejudice the rights of the creditors and interfere with the work of the Rehabilitator. The continued prosecution of the California proceedings by IP&MC—even if stayed as to The Home— will irreparably harm the rights of its creditors and the administration of the rehabilitation. The partial stay of the proceedings ordered in California presents the Rehabilitator a Hobson’s choice: stand aside and have the California trial go on without The Home and thus deprive The Home of a meaningful opportunity to defend its interests, or not to enforce the stay and spend time and money to go forward. Either way, the Rehabilitator is deprived of her ability, which the stay is designed to protect, to assess the litigation for

settlement and strategic purposes and focus on the rehabilitation of The Home. In this light, the Rehabilitator asks the Court to deny IP&MC's request to lift the stay.

WHEREFORE, the Rehabilitator prays that this Court enter an Order dismissing IP&MC's request for clarification as moot or imprudent, or alternatively declaring that the stay applies either *ex proprio vigore* through comity and full faith and credit or upon request of the Rehabilitator, and denying IP&MC's request for limited 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
ATTORNEY GENERAL

Dated: April 11, 2003

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CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on April 11, 2003 I served a true copy of the foregoing upon Sherilyn Burnett Young, Esq., Rath, Young & Pignatelli, 1 Capital Plaza, Concord, NH 03301, and Martin Honigberg, Esq., Sulloway & Hollis, 9 Capitol Street, Concord, NH 03301, by first class mail, postage prepaid.

Dated: April 11, 2003


Peter C.L. Roth