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

OBJECTION TO PETITION FOR ORDER OF LIQUIDATION AND REPLY MEMORANDUM ON MOTION TO MODIFY OF JOY ANN GARDNER, ROBERT BLANGERES and THE CERTIFIED 7-STATE CLASS THEY REPRESENT

NOW COME Intervenors Joy Ann Gardner, Robert Blangeres and the Certified Class of homeowners they represent in seven Western states (collectively the "Gardner Class" or "Intervenors"), by and through their attorneys, and hereby (1) object to the Rehabilitator's Verified Petition For Order Of Liquidation (the "Petition"), to the extent it seeks stays of litigation that are beyond the authority of RSA 404-B:18 (the authority now relied on by the Rehabilitator), and (2) reply to the "Response and Objection of Rehabilitator" to the Motion to Modify Rehabilitation Order, Etc. filed by the Gardner Class ("Rehabilitator's Objection to Gardner Motion").[1]

Notably, in her latest pleadings, the Rehabilitator avoids the language of those statutes in RSA Chapters 402-C and 404-B that expressly address the issuance of stays. The Rehabilitator invokes "liberal construction," but the actual wording of each of these statutes does not authorize the requested stays. This disconnection between the wording of these statutes and the authority claimed exceeds traditional standards of statutory construction and would be the equivalent of a legislative amendment of these statutes. We propose both revised language for paragraph (y) of

[1] The Rehabilitator's Objection to the Gardner Motion itself incorporates portions of her Petition for an Order of Liquidation. *See* Rehabilitator's Objection at 9-10. For that reason and to limit the paperwork before the Court, we combine here our Objection to the Petition and our Reply to the Rehabilitator's Objection to our Motion to Modify.

the proposed Order of Liquidation, and relief on our Motion to Modify the Rehabilitation Order, that conforms to the language of the applicable statutes.

I. STATEMENT OF FACTS

The Gardner Class has a consumer protection class action pending in Seattle, Washington, *not* against The Home Insurance Company ("The Home"), but rather against an unrelated Oregon forest products manufacturer, Stimson Lumber Company ("Stimson"). The case is entitled *Gardner et al. v. Stimson Lumber Company*, Superior Court of Washington in and for King County, Case No. 00-2-17633-3SEA (the "Gardner Class Action"). The case was filed three years ago and is still set for trial on August 11, 2003. Stimson has contended that at least 10 insurers (of which The Home is but one) owe it coverage. The Home has denied coverage. It is one of three primary insurers that has previously paid Stimson's defense costs in the Gardner Class Action under a reservation of rights, but it is not controlling Stimson's defense. The other two primary carriers have agreed to pay all of Stimson's defense costs in the event that The Home ceases to pay any part of them. According to paragraph 13 of the Petition, the Rehabilitator has now caused The Home and others to cease paying such costs.

The Order of Rehabilitation entered by this Court on March 5, 2003 (the "Rehabilitation Order") includes a 90 day stay against "the commencement or continuation of a judicial, administrative, or other action or proceeding against The Home *or any insured of The Home* ..." Rehabilitation Order, paragraph (g)(1) (emphasis added). On May 19, 2003 this Court extended this stay. However, the authorizing statute does not provide for a stay of lawsuits against "insureds"; it is expressly limited to lawsuits "against the insurer." RSA 402-C:18, I. Accordingly, the current stay as applied to the Gardner Class is broader in scope than the statute otherwise allows.

Deferring to the Rehabilitation Order, the Washington trial court in the Gardner Class Action granted a motion filed by Stimson to stay that lawsuit until June 3, 2003.

On May 8, 2003 the Gardner Class filed their Motion to Modify. On the same day, the Rehabilitator filed a Verified Petition for Order of Liquidation. In paragraph (x) of the Petition and paragraph (y) of the Proposed Order of Liquidation ("Proposed Liquidation Order") the Rehabilitator seeks a further six-month stay of "all actions against an insured of The Home in which The Home has an obligation to defend the insured." The Gardner Class objects to these portions of the Petition and the Proposed Liquidation Order.

II. ARGUMENT

A. The Current Stay In The Rehabilitation Order Exceeds The Authority Granted By The Statute

In her Objection to our Motion to Modify, the Rehabilitator invokes a "liberal construction" and broad policy goals as justifying the current stay in the Rehabilitation Order. Not once does the Rehabilitator parse, or even construe, the actual text of the statute that conferred this stay authority, RSA 402-C:18, I. Nor, in the original request of this stay without notice to affected parties, was the Court made aware of the "liberal construction" of RSA 402-C:18 that the Rehabilitator was seeking.

RSA 402-C:18 only authorizes stays of "actions and all proceedings against the *insurer*" (emphasis added) and only with respect to proceedings pending "in this state," New Hampshire. Nowhere in her pleadings does the Rehabilitator explain how the Gardner Class Action is a proceeding "against the insurer." As discussed in our Motion to Modify, it cannot be so construed. The Home is not a party and is not controlling the defense. Defense counsel was chosen by Stimson. The Home's financial contribution to the defense has been left to the two other insurers also sharing defense costs. The Home has denied coverage. Ten other insurers are

said to be at risk. This is not a proceeding "against the insurer" within the meaning of RSA 402-C:18,I.

"Liberal construction" without regard to the applicable statute's language is contrary to basic principles of statutory construction. "The starting point in any statutory interpretation case is the language of the statute itself." *Crowley v. Frazier*, 147 N.H. 387, 389, 788 A.2d 263 (2001). Courts "interpret legislative intent from the statute as written, and therefore, we will not consider what the legislature might have said or add words that the legislature did not include." *Petition of Gloria Walker,* 138 N.H. 471, 474, 641 A.2d 1021 (1994).

Rather than focus on the statute that authorizes stays in rehabilitation proceedings, RSA 402-C:18, the Rehabilitator (belatedly) cites RSA 402-C:5, a general statute relating to "injunctions and other orders". This violates another principle of New Hampshire statutory construction: "a specific law controls in a specific case over a general law." *City of Claremont v. Truell*, 126 N.H. 30, 43, 489 A.2d 581, 589 (1985); *accord State v. Gifford*, 148 N.H. 215, 217, 808 A.2d 1, 3 (2002) ("A specific law controls a specific case over a general law").[2]

Importantly, in the proposed Liquidation Order, the Rehabilitator no longer even argues that RSA Chapter 402-C confers "stay" authority other than against the insurer itself (*i.e.*, The Home). This implicit concession of overreaching is relevant because the scope of RSA 402-C:18 (authority to stay proceedings only "against the insurer" for rehabilitation purposes) parallels the authority in liquidation proceedings under RSA 402-C:28 (authority to abate litigation only "against the insurer"). Thus, in paragraph (m) of the Proposed Liquidation Order, the

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[2] RSA 402-C:5 grants a receiver the right to seek an injunction when it is deemed, *on a case-by-case basis*, "necessary and proper" to prevent specific action that might, for example, lesson the value of the insurer's assets, as set forth in that statute. It does not grant authority for a blanket stay of all proceedings, as the Rehabilitator suggests. The more specific statutes governing a stay of proceedings are RSA 402-C:18 and RSA 404-B:18.

Rehabilitator asks for the abatement of litigation "against The Home" (but not against "*insureds* of The Home"). Similarly, despite now claiming broad authority to have injunctions and other orders issued, the proposed Liquidation Order's paragraph (n) seeks an injunction only with respect to actions against The Home itself (not against "insureds of The Home"). Rather than relying on any claimed authority from RSA Chapter 402-C to achieve a stay of proceedings against "insureds," the Proposed Liquidation Order, in paragraph (y), now cites alleged authority from an entirely different chapter, RSA Chapter 404-B.

In sum, the language of the statute that authorized a stay in connection with The Home's rehabilitation did not authorize the present stay of the Gardner Class action or, indeed, any other case where the lawsuit is not one "against the insurer." RSA 402-C:18,I. We ask the Court to so hold in deciding our Motion to Modify.

B. The Proposed Stay In The Order Of Liquidation Also Exceeds The Authority Granted In RSA 404-B:18

In the proposed Liquidation Order, paragraph (y), the Rehabilitator seeks a stay of proceedings against insureds of The Home that would exceed the statutory authority cited for such a stay. In addition, as discussed in part C below, the requested stay would conflict with statutes of other states that apply to the guaranty associations in those states.

The Rehabilitator now seeks a stay of six months, plus possible extensions, of "all actions" anywhere against an insured of The Home in which The Home has an obligation to defend. Proposed Liquidation Order, paragraph (y). For this latest stay, the Rehabilitator expressly relies on RSA 404-B:18 (a provision related to the New Hampshire Insurance Guaranty Association). *See* Rehabilitator's Response to Gardner Motion at 9; Proposed Order of Liquidation, paragraph (y). RSA 404-B:18, however, does not provide any authority to stay "all actions" outside New Hampshire. Instead, RSA 404-B:18 provides:

> All proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court *in this state* shall be stayed for 6 months and any additional time as may be determined by the court from the date the insolvency is determined or an ancillary proceeding is instituted in this state, whichever is later, *to permit proper defense by the [New Hampshire Insurance Guaranty] association* of all pending causes of action.

(emphasis added).

Here, not only is the proposed stay in paragraph (y) not limited to actions "in this state," but the New Hampshire Insurance Guaranty Association does not have, and will not have, any duty to defend "all actions" in other states such as the Gardner Class Action. Out-of-state actions do not necessarily involve a "covered claim," to which any authority under RSA Chapter 404-B is limited. The New Hampshire Insurance Guaranty Association only has authority with respect to "covered claims." RSA 404-B:8 (conferring powers and duties on the association only "to the extent of the covered claims"); RSA 404-B:2 ("The purpose of this chapter is to provide a mechanism for the payment of covered claims"). The term "covered claims" is defined to include only a claim as to which "(a) the claimant or *insured is a resident of this state* [New Hampshire] at the time of the insured event; or (b) the property from which the claim arises is permanently located *in this state* [New Hampshire]." RSA 404-B:5,IV (emphasis added).

Neither the claimants nor the alleged insured in the Gardner Class Action are a "resident of this state." The defendant and alleged insured, Stimson, is an Oregon corporation. The property from which the claim arises (defective residential siding material) is not "permanently located in this state," New Hampshire, but is in Oregon, Washington, Idaho, Utah, Hawaii, California and Colorado (Stimson did not sell its product east of the Mississippi).

In addition, the text of RSA 404-B:18 expressly states that the purpose of a stay under that statute is "to permit proper defense by the [New Hampshire Insurance Guaranty] association" of pending causes of action. Even if the Gardner Class Action involved a "covered

claim" and was a proceeding in New Hampshire, this is not a case where the New Hampshire Insurance Guaranty Association (or any other guaranty association) needs time "to permit proper defense." The defendant, Stimson, controls the defense and will have that defense paid for by the other insurers involved.[3]

Once again, the Rehabilitator is apparently pleading for "liberal construction," without addressing the language to be construed. Again, any "construction" of a statute must begin with (and cannot circumvent) the language. "When *construing* the meaning of a statute, we first examine the language found in the statute...." *State v. Gordon*, 148 N.H. 681, 683, 815 A.2d 379 (2002) (emphasis added).

> The starting point in any statutory interpretation case is the language of the statute itself.... We will not consider what the legislature might have said or add words that the legislature did not include.

Appeal of Tennis, __ N.H. __, 816 A.2d 973, 975 (2003) quoting *Crowley v. Frazier*, 147 N.H. 387, 389, 788 A.2d 263 (2001). *See Petition of Gloria Walker,* 138 N.H. 471, 475, 641 A.2d 1021 (1994) (rejecting the interpretation of a government department that "ignore[ed] the plain language of the legislation"). The same principles apply when construing the Insurance Rehabilitation and Liquidation Act. *Hodge v. Allstate Ins. Co.*, 130 N.H. 743, 747, 546 A.2d 1078, 1080 (1988) ("In interpreting this statute [on insurance coverage], '[i]t is well established that the words in the statute itself are the touchstone of the legislature's intention.'") (citation omitted).

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[3] As explained in the memorandum in support of our Motion to Modify, Stimson is seeking coverage from at least ten insurers, none of those insurers (including The Home) is controlling the defense, and two of the insurers have agreed to pay all defense costs upon The Home ceasing to pay any part of them. That has now occurred, since the Rehabilitator has exercised her authority, under paragraph (h) of the Rehabilitation Order, to reject paying "any and all claims for losses, in whole or in part," including claims to pay defense costs. *See* Petition, paragraph 13, last sentence.

The Rehabilitator cannot rely on RSA 404-B:18, and then ignore its plain language. One cannot ignore that the statute's words limit it to "proceedings ... in any court *in this state.*" Nor can one ignore that all of RSA Chapter 404-B applies solely to "covered claims," RSA 404-B:2 and 404-B:8. Nor that a "covered claim" requires that the insured in question be "a resident of this state" or that the "property from which the claim arises is permanently located in this state." RSA 404-B:5,IV. Yet, paragraph (y) of the Proposed Liquidation Order is not so limited.

C. The Proposed Stay In The Order Of Liquidation Turns "Comity" On Its Head And Would Conflict With Statutes In Other States

The Rehabilitator invokes comity in two unorthodox ways. She argues (1) that the Gardner Class should not be heard on the Proposed Liquidation Order, no matter how *ultra vires*, until and unless the Washington court gives comity to the flawed Order; and (2) that the Order should be extremely broad so that courts in other states can give it comity. Both arguments turn "comity" on its head, and would frustrate applicable statutes both here and in other states.

1. A Party May Object To A Flawed Proposed Order and Need Not Wait Until A Foreign Court Applies That Order

The Gardner Class is not required to be silent in the face of a flawed stay provision in the proposed Liquidation Order. That is tantamount to saying that the Rehabilitator is entitled to have no opposition – no objection – to its proposed orders until long after they are adopted and applied. Or that citizens of other states (like those in the Gardner Class) are not entitled to appear in a New Hampshire court to object to a proposed order that is intended to affect them. Yet at the same time, the Rehabilitator urges the Court to issue an Order seeking comity "to the full extent ... to which the Orders of the Court are entitled." *See* Rehabilitator's Objection to Gardner Motion, at 8 ("If the liquidation stay is not honored in Washington after June 9th, then the liquidator has a problem"). Since the Rehabilitator (and soon to be liquidator) expressly

intends the stay in the proposed Liquidation Order to apply for at least six more months to the Gardner Class Action, fundamental due process requires that we now be heard. The Gardner Class Action is an avowed target of the expansively worded stay in the proposed Liquidation Order.

2. The Stay In The Order Of Liquidation Would Conflict With Guaranty Association Statutes In Other States

The Rehabilitator apparently believes that the stay provision in the proposed Liquidation Order should be overbroad, in order that other states might (under "comity") use the overly broad order to assist their own guaranty associations. That approach disregards, and conflicts with, the statutes in other states that specifically apply to their guaranty associations.

Each state which has an insurance guaranty association has its own set of statutes that establish the procedures and authority of that association. Those statutes are entitled to deference. For example, the defendant and alleged insured in the Gardner Class Action, Stimson, is an Oregon corporation and would be entitled to make a claim with the Oregon Insurance Guaranty Association under the Oregon statute, ORS 734.510 to ORS 734.710. Indeed, Stimson as an Oregon resident must apply to the Oregon Insurance Guaranty Association, not the guaranty association in New Hampshire or elsewhere. ORS 734.640(2) ("Any person who has a claim that may also be recovered from one or more insurance [guaranty associations] ... shall first seek recovery from whichever organization serves the place of residence of the insured"). Since Oregon is "the place of residence of the [alleged] insured" in the Gardner Class Action, the Oregon guaranty association is to receive the claim under Oregon law.

Significantly, the Oregon statute that would authorize a stay conflicts with RSA 404-B:18. It is more deferential to the needs of litigants, authorizing only a 60-day stay, not the six months (plus possible extensions) sought by the Rehabilitator:

> Any pending proceeding in which an insolvent insurer is a party or is obligated to defend a party in any court in this state *shall be stayed for 60 days* after the date a receiver is appointed by the court to permit the Oregon Insurance Guaranty Association time to prepare a defense in such proceedings.

ORS 734.700(1) (emphasis added). If a Washington court in the Gardner Class action is to give comity to any guaranty association statute, it should be the Oregon statute applicable to the alleged insured, not RSA 404-B:18 which by its terms does not apply.

By over-reaching and then expecting a Washington court to honor that over-reaching, the Rehabilitator would have this Court turn comity on its head. Instead of respecting the applicable Oregon statute, the Rehabilitator would have this Court preempt the statutes and procedures in Oregon and other states – thus, declining to give them comity.

> Comity is not a rule of law, but one of practice, convenience and expediency ... comity persuades; but it does not command.... It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals.

Mast, Foos & co. v Stover Mfg. Co., 177 U.S. 485, 488-89 (1900). The better course is for New Hampshire to proceed in conformance with its statutory authority, and to observe established practices with respect to comity.

D. A Determination That The Gardner Class Action Is Not Covered By The Stays In The Rehabilitation And Liquidation Orders Is Consistent With The Statutes And Fundamental Fairness

The Rehabilitator has argued that an order determining that the Gardner Class Action is not subject to the particular stays in the Rehabilitation Order, or in the Proposed Liquidation Order, "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." Rehabilitator's Objection to Gardner Motion, at 11. The Rehabilitator has it backwards. By requesting an order that exceeds the relevant statutory authorization, the Rehabilitator invites challenges to that order. By limiting its stays to the scope authorized by the New Hampshire statutes, this Court will be both applying the law of this state and respecting the orderly procedures of the laws of other states.

As for the stay in the Rehabilitation Order, this Court should make clear that it did not apply to the Gardner Class Action, because that lawsuit is not one "against the insurer" as required by RSA 402-C:18. If the Court agrees that this stay was overbroad with respect to our lawsuit, it should grant the relief we requested.

As for the stay in the Proposed Liquidation Order, it is doubly flawed. As discussed above, it exceeds the language and authority of RSA 404-B:18, and its scope and duration (six months with possible extensions) would, for the Gardner Class Action, conflict with the Oregon statute governing stays for its guaranty association (60 days, with no extensions). As an avowed "target" of this overly broad stay, the Gardner Class has standing to seek clarification that the stay ultimately adopted in the Liquidation Order does not apply to us. Moreover, we are not seeking an exception from what New Hampshire statutes authorize; rather, we seek clarification that those stays that are expressly authorized by New Hampshire statutes do not apply to our case.

WHEREFORE, the Gardner Class respectfully requests that this Honorable Court:

A. Strike paragraph (y) of the Proposed Order of Liquidation and substitute the following language:

> (y) All proceedings in any court in New Hampshire against an insured of The Home in which The Home has an obligation to defend, are stayed for a period of six months from the date of this Order and such additional time as the Court may determine pursuant to RSA 404-B:18 to

permit proper defense by the New Hampshire Guaranty Association of such pending causes of action. In addition, to the extent comity allows, a stay of the same duration is requested in all proceedings in other states against an insured in which The Home has an obligation to defend, provided that the proceeding includes one or more "covered claims" as defined in RSA 404-B:5,IV (*i.e.,* claims as to which "(a) the claimant or insured is a resident of this state [New Hampshire] at the time of the insured event; or (b) the property from which the claim arises is permanently located in this state [New Hampshire]").

B. Enter an order determining that:

a. The Gardner Class Action is not an action "against the insurer" within the meaning of RSA 402-C:18 and thus is not subject to the stay ordered in paragraph (g) of this Court's Order of Rehabilitation dated March 5, 2003; and

b. The Gardner Class Action is not a proceeding subject to RSA 404-B:18 and thus is not subject to any stay that may be ordered in paragraph (y) of the proposed Order of Liquidation filed by the Rehabilitator.

C. Grant such further relief as may be just and proper.

Respectfully submitted,

JOY ANN GARDNER, ROBERT BLANGERES AND THE CERTIFIED CLASS THEY REPRESENT

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Dated: May 30, 2003

CERTIFICATE OF SERVICE

I, Sherilyn Burnett Young, hereby certify that on this 30th day of May, 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, J. David Leslie, Esquire and Eric A. Smith, Esquire.

By: Sherry Young
Sherilyn Burnett Young, Esquire