

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

**MOTION FOR EXPEDITED HEARING OF MOTION TO MODIFY OF
JOY ANN GARDNER, ROBERT BLANGERES and
THE CERTIFIED 7-STATE CLASS THEY REPRESENT**

NOW COME Joy Ann Gardner, Robert Blangeres and the Certified Class of homeowners they represent in seven Western states (collectively the "Gardner Class"), by and through their attorneys, and move this Honorable Court for an expedited hearing on their Motion to Modify Rehabilitation Order and Scope of the Abatement of Cases in Any Future Liquidation of the Home Insurance Company in the above-captioned action ("Motion to Modify"). The Motion to Modify was filed on May 8, 2003.

IN FURTHERANCE, Movants state as follows:

1. 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" or the "Washington Class Action"). It was filed three years ago, the class was certified in June 2001 and the case is 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 for liability in this class action. The Home has denied coverage and has not intervened in the Gardner Class Action. The Home is one of three primary insurers paying Stimson's defense costs in the Gardner Class Action under a reservation of rights, but it is not controlling its defense.

2. The Home is a New Hampshire corporation with statutory offices in Manchester, New Hampshire. On or about March 4, 2003, the Commissioner of Insurance for the State of New Hampshire filed in this Court a Verified Petition for Rehabilitation for The Home, seeking an Order of Rehabilitation pursuant to RSA Chapter 402-C, appointing the Commissioner as Rehabilitator. This Court granted the Petition and entered a Rehabilitation Order dated March 5, 2003 (hereinafter "the Rehabilitation Order"). Intervenors were not served with the Petition and had no opportunity to respond to it before the issuance of the Rehabilitation Order.

3. Paragraph (g)(1) of the Rehabilitation Order purports to stay not only all lawsuits against The Home, but also all lawsuits against "any insured of The Home" (emphasis added). Relying upon this broad stay language in the Rehabilitation Order, the Washington Superior Court in the Gardner Class Action granted a motion filed by Stimson to stay that lawsuit until June 3, 2003. Neither The Home nor its Rehabilitator moved for this stay. Nor have they otherwise intervened or appeared in the Washington Class Action.

4. Early on May 8, 2003 the Gardner Class filed a motion to intervene in this action for the limited purpose of seeking modification of the stay in the Rehabilitation Order, and of any abatement of litigation in the event of a liquidation order, to permit the Washington Class Action to proceed to trial as may be scheduled by the Washington Superior Court. Legal counsel for Paula T. Rogers, Rehabilitator, concurred in the motion to intervene. The Gardner Class simultaneously filed their Motion to Modify together with a supporting memorandum of law and Affidavit of Michael D. Sandler. Counsel for the Rehabilitator advises that the Rehabilitator will object to the Motion to Modify. Upon information and belief, any such objection must be filed on or before May 19, 2003.

5. Later on May 8, 2003, the Rehabilitator filed a petition for liquidation in this action, seeking a further six-month stay that would purportedly apply to the Gardner Class

Action. That petition is scheduled for hearing on June 9, 2003. On May 9, 2003, the Rehabilitator filed a motion to extend the current stay “for an additional 30 days, to July 3, 2003, or such earlier date that the Court enters an order imposing a stay sought by the Liquidation Petition.”

6. Absent expedited consideration of the Motion to Modify, the Gardner Class will be prejudiced for reasons stated in detail in their memorandum of law in support of the Motion to Modify. The consequence of the Rehabilitation Order has already been to restrict the access of the Gardner Class Action plaintiffs to the court in Washington. As a result, thousands of homeowners who are members of the Gardner Class are currently prevented from pursuing their consumer protection claims against a solvent, commercial lumber company, not an insurer. If a liquidation order is entered that also purports to abate actions against insureds of the Home and/or if the stay imposed on the Rehabilitation Order is extended until such an order is entered, any prospect for a prompt trial date will be severely jeopardized, in a certified class action that has been pending for several years. Thousands of ordinary consumers should not lose their long-scheduled day in court, in a certified class action which has been pending for several years, in circumstances where The Home is not a party in their case, has never appeared, has denied coverage to the defendant, is one of at least ten insurers of the defendant, and is but one of three insurers paying defense costs under a reservation of rights.

7. The Gardner Class Action is currently stayed by the Washington court until June 3, 2003, consistent with the stay imposed in the Rehabilitation Order. That date is a little more than two months before the scheduled trial date of August 11, 2003 in the Gardner Class Action. If the stay is lifted on or before June 3, the parties will still have adequate time to complete their trial preparations and go forward with a trial on August 11. If the Motion to Modify is heard on an expedited basis, it would be possible for this Honorable Court to rule on whether any

continuing stay or abatement would apply to the Gardner case prior to the end of the stay currently imposed by the Washington court, and the parties could so report to the Washington court on June 3. In contrast, unless these issues are resolved before June 3, the Gardner Class of thousands of homeowners will certainly lose their August trial date and resolution of their claims will be significantly delayed. Consequently, the Gardner Class respectfully requests the Court to hear its Motion to Modify on an expedited basis or on before May 23, 2003.

8. Superior Court Rule 57-A Certification: Counsel for the Gardner Class have attempted to obtain the concurrence in this Motion of legal counsel for Paula T. Rogers, Rehabilitator, but said legal counsel does not concur.

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

- A. Grant their Motion for Expedited Hearing;
- B. Schedule a hearing on their Motion to Modify on or before May 23, 2003; and,
- C. Grant such further relief as may be just and proper.

Respectfully submitted,

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

By Their Attorneys,

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Dated: May 14, 2003

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

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CERTIFICATE OF SERVICE

I, Sherilyn Burnett Young, hereby certify that on this 14th 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.

By: Sherry Young
Sherilyn Burnett Young, Esquire

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U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE SENIOR ASSISTANT ATTORNEY GENERAL