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 MOTION OF
JOY ANN GARDNER, ROBERT BLANGERES and
THE CERTIFIED 7-STATE CLASS THEY REPRESENT
TO MODIFY REHABILITATION ORDER
AND SCOPE OF THE ABATEMENT OF CASES
IN ANY FUTURE LIQUIDATION OF THE HOME**

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 file this Memorandum in Support of their Motion to Modify Rehabilitation Order and the Scope of the Abatement of Cases in any Future Liquidation of The Home.

The Gardner Class has a consumer protection class action pending in Seattle, Washington, (the "Gardner Class Action"), *not* against The Home Insurance Company ("The Home"), but rather against an unrelated Oregon forest products manufacturer, Stimson Lumber Company ("Stimson"). The case was filed three years ago and is set for trial on August 11, 2003. Stimson has contended that at least ten 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 The Home is not controlling the defense.

The Gardner Class Action has been stayed by the Washington Superior Court on the basis of this Court's Rehabilitation Order. (*See* Order Granting Defendant's Motion For Stay, No. 00-

2-17633-3 SEA, of the Superior Court of the State of Washington for King County, dated April 10, 2003, attached as Ex. 7 to Sandler Aff. [1]). This Court's Rehabilitation Order as currently worded stays all actions against The Home and "*any insured of The Home*." Unless this Court provides relief to the Movants, thousands of homeowners who are members of the Gardner Class will have their lawsuit delayed for an indefinite term; and, if a liquidation order for The Home is subsequently entered by this Court, it could result in the abatement of their entire class action.

The purpose of this Motion and Memorandum is to modify the scope of the Rehabilitation Order's stay in light of the statute under which it was issued, RSA 402-C:18, and to clarify the scope of any future abatement of lawsuits under RSA 402-C:28. Specifically, the Motion seeks to have this Court modify the Rehabilitation Order to provide limited relief from the stay, and from any future abatement in a liquidation proceeding, to allow the Gardner Class Action against Stimson to proceed to trial (as may be scheduled by the Washington Superior Court) because the current stay is inconsistent with this court's statutory authority and allowing the case to proceed is in the interests of justice and would have no effect on the estate of The Home.

FACTS

The Washington Class Action Against Stimson

This motion is brought in light of the unique circumstances posed by a class action pending in the State of Washington, 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"). In May 2001, the Washington court certified a class predominantly of homeowners in seven states. The class is defined as:

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[1] The facts in this Memorandum are established by the Affidavit of Michael D. Sandler In Support of Motion of Joy Ann Gardner et al. To Clarify Rehabilitation Order ("Sandler Aff."), attached hereto. Mr. Sandler is one of the attorneys representing the Gardner Class in the Washington litigation.

> "All persons in the states of Washington, Oregon, California, Idaho, Utah, Colorado, and Hawaii who own or have owned buildings clad with Stimson Series 400 or Series 500 hardboard siding ("Forestex hardboard siding") installed after January 1, 1985."

Sandler Aff. ¶ 2 and Ex. 1. The sole defendant is Stimson Lumber Company, a solvent Oregon corporation engaged in the manufacture of forest products ("Stimson"). The Home is *not* a party. *Id* ¶3. The Home has not appointed Stimson's counsel and is not controlling Stimson's defense. *Id.* ¶8. The sole claim of plaintiff homeowners is that Stimson engaged in deceptive acts and practices in making and marketing a defective hardboard exterior siding product, and thereby violated the consumer protection statutes of the seven states involved. *Id.* ¶3. Extensive discovery has taken place over the past several years. Tens of thousands of pages of documents have been produced by the parties. More than 40 depositions have been taken; others, including expert depositions, have been suspended because of the stay that has been imposed. Trial is scheduled to begin less than four months from now, on August 11, 2003. *Id.* ¶3. The stay imposed in this matter currently extends through June 3, 2003. *Id.* ¶10 and Ex. 7.

The Oregon Coverage Litigation Between Stimson and Its Insurers

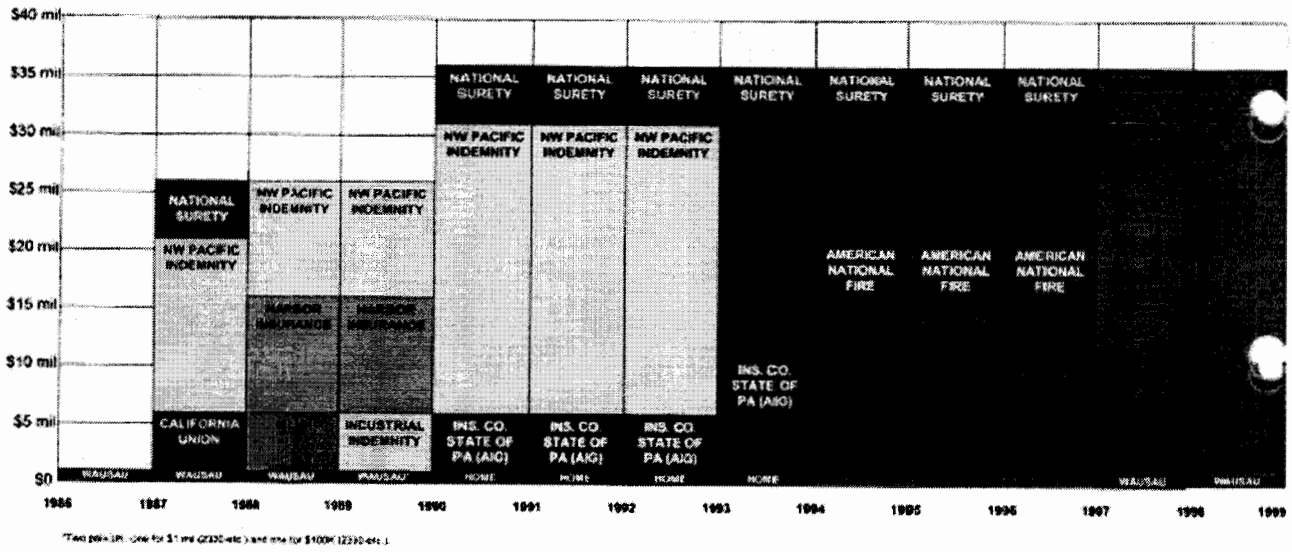
Stimson, in turn, is in a dispute with approximately ten insurers that issued policies to it during the class period, January 1, 1985 to the present. Plaintiff homeowners are not a party to this coverage dispute. Plaintiff homeowners' claims and litigation are solely against Stimson.

There are three primary insurers of Stimson (of which The Home is one) and the rest are excess insurers. *Id.* ¶4. The three primary insurers have brought a declaratory judgment action against Stimson in federal court in Oregon, entitled *The Home Indemnity Company, et al. v. Stimson Lumber Company, et al.*, U.S. District Court for the District of Oregon, Civil No. 01-CV-514-HU (the "Oregon Coverage Litigation"). This separate litigation between Stimson and

its insurers has also currently been stayed by the Oregon federal court, based on the New Hampshire Rehabilitation Order. Plaintiff homeowners are not challenging this stay.

In the Oregon Coverage Litigation, all of the primary carriers (including The Home) have denied coverage for any liability arising out of the homeowners' suit against Stimson. Sandler Aff. ¶5 and Ex. 2 (p. 22). Even if coverage is ultimately found, The Home would have a small share of the risk, estimated to be well below 5%. *Id.* ¶6. The following coverage chart submitted by the primary and the excess insurers in that lawsuit illustrates this:

STIMSON LUMBER COVERAGE CHART



A larger copy of the chart is at Sandler Aff. Ex. 4 (last page).

While reserving their rights, the three primary insurers have each separately agreed to advance Stimson's defense costs. *Id.* ¶7. In fact, the other two primary insurers (Wausau and California Insurance Company) have informed the federal court in the Oregon Coverage Litigation that if The Home "ceases to participate in the defense of the pending claims [in the Washington Class Action], Wausau and California will share defense costs on a fifty/fifty basis."

Id. Ex. 4 (p. 2). Thus, if the underlying Washington Class Action is permitted to proceed, the defense by Stimson will not be adversely affected by the stay in the Oregon Coverage Litigation.

Under paragraph (h) of the Rehabilitation Order issued by this Court, the Rehabilitator of The Home now has "discretion" whether or not "to pay any and all claims for losses, in whole or in part," including claims to pay defense costs. Again, if the Rehabilitator decides against providing defense costs to Stimson to protect the estate of The Home, the Stimson defense will not be adversely affected since both Wausau and California will pick up The Home's share of the defense costs.

The Rehabilitation Order's Broadly-Worded Stay of Cases Against "Any Insured"

On March 5, 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. The Petition was filed with the assent of The Home Insurance Company, and a Proposed Order was attached to the Petition. There was no opposition to the Petition, and the Proposed Order was accepted verbatim and issued by this Court on the same day ("the Rehabilitation Order"). The parties to the Washington Class Action were given neither any notice of the proceeding nor any opportunity to be heard before the Court issued the Rehabilitation Order.

Paragraph (g)(1) of the Rehabilitation Order broadly ordered a stay of any "judicial, administrative, or other action or proceeding against The Home *or any insured of The Home*... for ninety (90) days" (emphasis added). However, the authorizing statute does not provide for any stay of lawsuits against "insureds"; it is expressly limited to lawsuits "against the insurer." *See* RSA 402-C:18, I. Accordingly, the draft order that was presented to this Court was much broader than the statutory authority granted to the Insurance Commissioner, and is unreasonable and unfair as applied to the plaintiff homeowners in the Gardner Class Action.

Stay of the Washington Class Action Based on the New Hampshire Rehabilitation Order

On March 12, 2003, *Stimson* filed in the Washington Class Action a motion for a 90-day stay based upon the New Hampshire Rehabilitation Order. Sandler Aff. ¶9 and Ex. 6. Notably, neither The Home nor the Rehabilitator filed or joined, or otherwise sought to intervene, in Stimson's motion in the Washington Class Action. Stimson argued that the New Hampshire Rehabilitation Order was simply entitled to "full faith and credit" and to automatic respect under the Uniform Insurers Liquidation Act – and that the Washington Court was bound by the 90-day stay in paragraph (g)(1) of the Rehabilitation Order. *Id.* ¶9 and Ex. 6. On April 10, 2003, based on the Rehabilitation Order's stay provision, the Washington court granted Stimson's motion and stayed the Washington class action at least through June 3, 2003. *Id.* ¶10 and Ex. 7. The federal court in Oregon has also issued a stay in the Coverage Litigation, but did so on the direct motion of The Home itself (which is a party in the Oregon Coverage Litigation), supported by a letter from the Rehabilitator. *Id.* ¶11 and Ex. 8. As noted above, plaintiff homeowners are not challenging the Rehabilitation Order with respect to the stay issued in the Oregon Coverage Litigation.

ARGUMENT

I. THE REHABILITATION ORDER'S STAY SHOULD NOT APPLY TO THE GARDNER CLASS ACTION

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 in the Order, paragraph (g)(1), is overly broad and unfair in these circumstances because it stays not just cases in which The Home is a party, but the Gardner Class Action in which The Home has never appeared, has denied coverage, and is but one of several insurers that may be at risk.

The New Hampshire statute authorizing a stay of litigation while an insurer undergoes rehabilitation does not apply to an insured in a case such as this:

> "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...."

RSA 402-C:18, I (emphasis added).

Here, the Rehabilitation Order was issued without notice to the many affected parties throughout the country, and was expansively worded to apply not just to "any action or proceeding by or against [the] insurer" (as authorized by the statute), but also to lawsuits against "*any insured of the Home.*" Rehabilitation Order, paragraph (g)(1) (emphasis added). This overly broad imposition of a stay of the Gardner Class Action – which is solely against an *insured* of The Home and in which The Home does not stand in the shoes of the defendant -- cannot lawfully be imposed by Order of this Court.

As applied to the Gardner Class Action, the Rehabilitation Order's stay of pending litigation is uniquely unfair. It has resulted in the stay of a case in which The Home is not a party, has never appeared, has denied coverage, 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. In addition, neither The Home nor the Rehabilitator sought the stay in the Washington case. It was sought by Stimson. In these circumstances, there is no basis to claim that the Washington Class Action is an "action or proceeding by or against [the] insurer" within the meaning of RSA 402-C:18. It also points to several reasons why the Rehabilitation Order's broadly-worded stay is inappropriate as applied to the Gardner case.

First, RSA 402-C:18 authorizes this Court to grant a stay for a limited purpose: to allow "the rehabilitator to obtain proper representation and prepare for further proceedings." RSA 402-

C:18, I. This purpose cannot be served in cases against "any insured" where The Home itself is neither a party nor is controlling the defense. This purpose is irrelevant to the Washington Class Action. The Home has not appointed Stimson's counsel in the Washington litigation. Sandler Aff. ¶8. The Home has no need "to obtain proper representation" within the meaning of RSA 402-C:18(I). Nor does The Home have any responsibility "to prepare for further proceedings" in the Washington Class Action. *Id.* ¶8.

Second, for out-of-state lawsuits, the statute requires the Rehabilitator to consider whether a stay is "necessary to protect the estate of the insurer." RSA 402-C:18, I. While that consideration may apply to lawsuits against The Home itself, in the Gardner Class Action it does not apply at all. The Home is one of three insurers currently paying (under reservation of rights) defense costs in the Washington Class Action. Paragraph (h) of the Rehabilitation Order gives the Rehabilitator discretion not to pay such claims. Further, the other two contributing insurers have confirmed that if The Home "ceases to participate in the defense of the pending claims, [they] will share defense costs on a fifty/fifty basis." *See* Insurers' Joint Response to Order of March 25, 2003, p. 2, attached as Ex. 4 to Sandler Affidavit. Accordingly, the Gardner Class Action in Washington may proceed to trial against Stimson, and Stimson will be afforded its full defense, whether or not The Home continues to participate in the funding of the defense. If Stimson is found liable to the plaintiff homeowners in the Washington Class Action, Stimson may have a claim against The Home, or a guaranty association in the event of The Home's insolvency. *Id.* Ex. 4 (p. 4). Any such claim will be resolved in the Oregon Coverage Litigation, if allowed to proceed with The Home participating, or through a claims process in the rehabilitation/liquidation of The Home. In either case, the "estate of The Home" will be fully protected even if the plaintiff homeowners obtain a judgment against Stimson.

Third, this Court has a duty to narrowly tailor its orders when access to the courts is at risk. Orders must be "narrowly tailored" when "necessary to prevent infringement on the litigant's right of access to the courts." *Sires v. Gabriel*, 748 F.2d 49, 51 (1st Cir. 1984). *See DeLong v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990) (same, citing *Sires v. Gabriel*); *Cok v. Family Court*, 985 F.2d 32, 35 (1st Cir. 1993) (party "should have been given an opportunity by the court to oppose the entry of so broad an order placing restrictions on court access").

Here, where numerous states have adopted the Uniform Insurers Liquidation Act or similar reciprocal insurance statutes (*see* RSA 402-C:3, IX and 402-C:54), one should expect that this Court's rehabilitation and liquidation orders generally will be given effect, as a matter of comity, by courts in sister states. That is precisely what happened in the Gardner Class Action. Sandler Aff. ¶¶9, 10. A Washington Superior Court has given full effect to this Court's order staying all actions against "any insured" of The Home. The consequence of such an order has 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 prevented from pursuing their consumer protection claims against a solvent, commercial lumber company, not an insurer. And an August 2003 trial date has been put at severe risk, in a certified class action that has been pending for several years. As other courts have recognized, orders that enjoin lawsuits not only against an insurer, but also against its insureds, may seriously prejudice the claims of parties in the pending action.

> Additional considerations ... including the fact that American [the insurer] is, in this action, only an indirect participant, the action itself being against American's insureds.... Indeed, an injunction as broad as this one carries a clear potential for oppression, injustice, and prejudice to both parties in pending actions, resulting from the lapse of time and its consequent effect on the memories of witnesses and the availability of witnesses and evidence.

Ex Parte Noble Trucking Co., Inc., 675 So. 2d 356, 359-60 (Ala. 1996) (refusing to grant a stay of a lawsuit against insureds in the context of an insurer's rehabilitation).

A temporary stay in the Gardner Class Action results in no benefit to The Home's "estate" because this case against Stimson will proceed to trial *at some point,* whether the Rehabilitator chooses to participate in the defense or not. The Rehabilitator cannot permanently prevent the Gardner Class of thousands of homeowners from pursuing their claims against Stimson. Again, other insurers stand ready to fund the defense and Stimson itself is solvent. Accordingly, it is merely a matter of when, not if, the case will proceed. The Gardner Class Action is scheduled for trial to commence in a matter of weeks. The parties have been preparing for this trial for several years. Under the circumstances, the prejudice to the Movants if their case remains stayed (or is abated) and the trial date is extended, far outweighs any alleged benefit (which we claim is none) such a delay will provide to the Rehabilitator in terms of "protecting The Home's estate". RSA 402-C:18, I requires the court that entered the rehabilitation order to "...order the rehabilitator to take such action respecting the pending litigation as the court deems necessary in the interests of justice and for the protection of creditors, policyholders and the public." In this instance, granting relief from the stay to the Gardner Class is what is "necessary in the interests of justice" while still protectingcreditors, policyholders and the public.

For the reasons set forth above, the Court should modify its prior Order and allow the Washington Class Action to go forward in accordance with the schedule set by the Washington Superior Court.

II. IN ANY FUTURE LIQUIDATION, AN ABATEMENT OF LAWSUITS SHOULD NOT APPLY TO THE GARDNER CLASS ACTION

According to the Verified Petition for Rehabilitation filed by the Insurance Commissioner with this Court on March 5, 2003, The Home has been under an Order of Supervision issued by the New Hampshire Insurance Department since March of 1997. *See* Petition, Para. 4. On March 5, 2003, the Insurance Commissioner believed that circumstances warranted placing The Home in rehabilitation, with the Insurance Commissioner taking possession of, and administering, The Home's assets. If the Commissioner determines that The Home cannot be successfully rehabilitated, it will seek Court approval to terminate the rehabilitation and convert it to a liquidation. *See* RSA 402-C:19, I. Upon a liquidation order being entered, "all actions and all proceedings *against the insurer* whether in this state or elsewhere shall be abated...." RSA 402-C:28, I (emphasis added).

Based on the choice of wording in the Rehabilitation Order, the Gardner Class is concerned that, in the event of a liquidation of The Home, the Insurance Commissioner will seek an order abating all litigation – not only against The Home itself but against "any insured of The Home." Hence, we ask that the Court issue an Order making it clear that the Gardner Class Action may continue to proceed in the event of a liquidation of The Home.

We incorporate here by reference our points and authorities under Part I above. In addition, we again note that the language of the abatement statute, like the language of RSA 402-C:18, is directed solely to actions against the insurer.

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

RSA 402-C:28 (emphasis added). The circumstances described in Part I above require that this Court be especially vigilant in framing a liquidation order, and in limiting any abatement to what the statute authorizes – proceedings "against the insurer," not to those against "any insured."[2]

III. THE COURT HAS THE AUTHORITY TO GRANT THIS RELIEF

Even if the Court reads RSA 402-C:18 as authorizing a stay of litigation against "any insured" of The Home – or reads RSA 402-C:28 as authorizing abatement of litigation against "any insured" of The Home – this Court nevertheless has the authority to revise the Rehabilitation Order, and limit any future liquidation order, to allow the Gardner Class Action to go forward. The Rehabilitation Order itself specifically contemplates such relief, noting that the 90-day stay "may be modified by further order of the Court." *See* Order, paragraph (g)(1).

This is an appropriate case to modify the stay. Leaving the Gardner Class Action subject to the stay provision of the Rehabilitation Order, and to an abatement of lawsuits that a future liquidation order may seek to impose, will deny thousands of consumers a right of access to the courts and prejudice their imminent trial. And it would do so in a lawsuit in which The Home cannot legitimately be considered either a party or tantamount to a party -- and in which any financial interest of The Home (which is at best indirect, conditional and highly attenuated) is also fully protected both by the stay in the Oregon Coverage Litigation and by the willingness of the other insurers to provide and pay for a defense.

The Court also has general discretion to limit the scope of its orders that have the effect of prejudicing other litigation. In *Reliance Insurance Co. v. Plum Creek Timber Co.,* No. 99C-

[2] Furthermore, the liquidation statute would provide additional means to protect the estate of The Home, without indiscriminately abating actions against its insureds. Thus, all insureds will be given notice "of impairment and termination of coverage under RSA 402-C:22 ... and 1) notice of withdrawal of the insurer from the defense of any case in which the insured is interested and 2) notice of the right to file a claim [in the liquidation proceeding] under RSA 402-C:40." RSA 402-C:26(I)(b).

19-263, 2001 WL 1222090 (Del. Super. Ct. Sept. 26, 2001), the court declined to grant a stay of a lawsuit involving an insurer in rehabilitation, because 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. *See* also *Ex Parte Noble Trucking Co., Inc., supra*, 675 So. 2d at 359-60 (a stay order against insureds "as broad as this one carries a clear potential for oppression, injustice, and prejudice"). The Court should not allow a broadly-worded order issued in an uncontested proceeding here in New Hampshire to derail an unrelated case in the State of Washington that is on the verge of being tried, will affect thousands of homeowners in the certified consumer class against a solvent, commercial lumber company, and will have no effect on the estate of The Home.

CONCLUSION

For the above reasons, this Court should enter the Proposed Order filed herewith, granting limited relief from the Rehabilitation Order, and from any future liquidation order, to allow the Gardner Class Action to proceed to trial as scheduled by the Washington Superior Court.

Respectfully submitted,

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

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Dated: May 8, 2003

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

CERTIFICATE OF SERVICE

I, Sherilyn Burnett Young, Esquire, hereby certify that on this 8th 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