

THE STATE OF NEW HAMPSHIRE

MERRIMACK,SS

SUPERIOR COURT

DOCKET NO. 03-E-0106

IN THE MATTER OF THE REHABILITATION OF  
THE HOME INSURANCE COMPANY

**PETITIONER'S RESPONSE TO COURT ADVISING OF PETITIONER'S  
REQUESTED RELIEF**

Now comes the Petitioner, Misty Dawn Stapel, and moves as follows:

1. In reply to the response filed by the Liquidator of The Home Insurance Company, Misty Dawn Stapel part must reply regarding the Honorable Court's inclusion of Risk Enterprise Management, (REM), a separate and distinct corporate entity, with its own errors and omission coverage, and which is not party to any underlying litigation which involves The Home. See excerpt of deposition of Joel M. Ross, Associate General Counsel for REM, taken by West Virginia Counsel, Thomas Schultz on January 14, 2003, at Page 70, Line 18, where separate coverage is confirmed, attached as Exhibit A.

2. Misty Dawn Stapel filed a separate distinct claim against Risk Enterprise Management Limited, Zurich Insurance Company, John Reamer and Mark Lauderbaugh in the United States District Court For The Northern District of West Virginia. The Home Insurance Company is not a party to that Complaint.

3. The New Hampshire Court's inclusion of Risk Enterprise Management, (REM) as part of the injunction against suit (stay) portion of the order of liquidation, unfairly prejudices Stapel's individual right to pursue her personal claims against parties not subject to this Court's determination of insolvency or liquidation.

4. REM, according to their marketing material is a "world class provider of claims in risk management solutions to the property and casualty insurance industry." REM is a third party administrator contracted by The Home to provide certain services. However, REM is a Zurich Financial Services company that provides services across the United States through a staff of 600 people located in various offices and service locations.

5. The Liquidator cites A. H. Robins. V. Piccinin 788 F.2d 994, 998 (4<sup>th</sup> Cir. 1986) for the proposition that stays protecting non-debtors in bankruptcy is appropriate. The reliance upon bankruptcy precedent is not only inappropriate but should be found unpersuasive on this point.

6. Insurance company liquidations are substantively different than bankruptcy proceedings on one very important point. The liquidation of an insurance company prefers certain policyholder

creditors above other general creditors. See N.H.R.S.A. 402-C. The inclusion of REM under the stay provision of the liquidation order is in fact a preference of REM, a mere general creditor under a administrator agreement calling for certain limited indemnification rights in the event that REM is found responsible for The Home's liabilities. REM's claims are subordinate under New Hampshire law to the claims of other creditors including policyholder's, claimants, the guaranty association and the federal government.

7. To protect REM from legitimate claims such as those of Ms. Stapel to the detriment of claimants of a higher priority in violation of the New Hampshire law creates a preference for REM over these other claimants. Insurance companies are not subject to a single pot of unsecured creditors like a bankruptcy. The indemnification arrangement between REM and The Home does not place them on equal footing with other creditors.

8. Whether Misty Dawn Stapel is a claimant against The Home does not preclude her right and ability to bring liability claims against third parties outside the liquidation proceeding such as the one she has filed against REM. See University of Maryland v. Peat Marwick & Company, 923 2d 265 (3<sup>rd</sup> Cir. 1991) which dealt with the viability of an independent tort claim against an auditor of an insurer in Rehabilitation. The Rehabilitator sought to have the case dismissed, but the Court rejected the Rehabilitator's arguments and held that the plaintiffs had the right to prosecute their suit in the Federal Court. See copy of case attached as Exhibit C. Misty Dawn Stapel has such a right against all of the named defendants in the West Virginia action, and those rights should not be impeded by the Court in New Hampshire.

9. Misty Dawn Stapel does not object to nor has there been any allegation that the stay as to HOME should be lifted to provide her with any exceptional remedy with regard to The HOME.

10. Should such allegations have been perceived by this Honorable Court as seeking said relief, then this Response is intended to advise the Court that such was not the case. The primary purpose of the suit in West Virginia is to hold REM responsible for wrongs that they committed.

11. Ms. Stapel has a distinct and separate cause of action against REM and Zurich as well as the two individuals who are former employees of HOME, John Reamer and Mark Lauderbaugh. Reamer and Lauderbaugh handled the claims of Misty Stapel in 1986, but they left HOME's employment after Zurich took over in about 1995.

12. The Liquidator's response admits The HOME has no employees. Therefore, the protection being provided to REM under an anticipated third party administrator contract with the HOME, which is evidently no longer in effect, are not the equivalent of an employer - employee relationship.

13. The Liquidator's response to the fact that "REM has certain rights to indemnification under the services agreement." is also without merit, as a review of the services agreement, attached as Exhibit B, Page 10, Section 6, reveals that there is protection for REM provided "that such REM Indemnitee acted (or failed to act) in good faith and such action or inaction does not constitute actual fraud, gross negligence or wilful or wanton misconduct." In the West Virginia action against REM,

it is alleged that REM did not act in good faith, and that their actions or inactions did constitute actual fraud, gross negligence or wilful or wanton conduct. Hence, no indemnification lies for these sorts of activities.

14. The Petitioner asks this Court to lift the stay either explicitly in order that Misty Dawn Stapel can pursue her cause of action in the Northern District of West Virginia as it relates to REM and the named individual Defendants in that matter, or modify the Order of Liquidation concerning the stay of protection provided to a third party such as REM. Such an order will in no way lead to a chaotic scramble for assets described by the Liquidators petition.

15. Petitioner is not advocating that the stay be lifted as to Petitioner's claims against HOME, but is asking that Misty Dawn Stapel be permitted to pursue her claims directly against REM, and to defend all claims brought against her by any party.

16. For further clarification, the HOME would not be party to any of this but for the fact that REM chose to direct a separate declaratory action styled The Home Insurance Company v. Misty Dawn Stapel to be filed, which action is still pending in West Virginia.

17. Further, Liquidator responds through Counsel, Peter Roth, that the letter of the Petitioner's Counsel dated June 17, 2003, attached as an exhibit to his response, seeks to assert that Petitioner seeks special treatment from HOME. After discussion that occurred with Attorney Roth prior to sending the letter, it seemed prudent to follow the discussion with an attempt to settle this matter as expeditiously as possible, and therefore, an offer of settlement was provided, so that the Liquidator could determine how this matter would be handled going forward. Any offer of settlement or compromise between the parties should not have been submitted to this Court in this fashion, and Counsel's use of the letter in this fashion is disingenuous, and should be stricken from the pleadings.

18. Additionally, the Court's order grants protection to agents, employees and representatives of HOME other than REM. Jon Reamer and Mark Lauderbaugh, former HOME employees, have committed torts against Misty Dawn Stapel even after their employment with HOME ended. There is not legitimate basis for HOME to be defending Reamer and Lauderbaugh in West Virginia in Stapel v. REM, et al., nor for HOME to be funding Reamer and Lauderbaugh's defense.

19. Moreover, HOME's attorneys in West Virginia have committed torts against Misty Stapel, so by referencing agents and representative as protected parties in the Liquidation Order, HOME's attorneys in West Virginia are also arguably protected from suit for and conduct related to HOME's representation. In light of anticipated Malicious Prosecution Cases to be brought in West Virginia, this language provides protection to individuals who are not entitled to it.

WHEREFORE, the Petitioner, Misty Dawn Stapel, prays that this Honorable Court as follows:

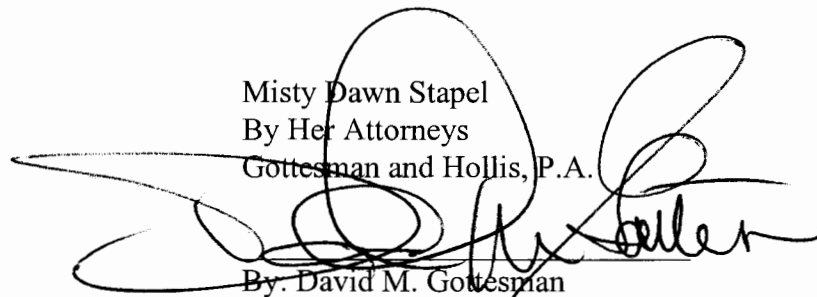
A. Enter an order modifying the order of liquidation striking REM from the injunctive protection previously granted and explicitly authorizing Misty Dawn Stapel to pursue her claims styled Stapel v. REM, Zurich, Reamer, and Lauderbaugh.

B. Enter an order modifying the order of Liquidation striking protection to agents, employees, representatives, and attorneys of HOME, and specifically referencing Jon Reamer and Mark Lauderbaugh, former HOME employees, and any agents, employees, attorneys or representatives who had any dealings with the Misty Dawn Stapel claims, suits, petitions, or investigations.

B. Strike Petitioner's Counsel's letter of June 17, 2003, from Liquidator's pleadings.

C. And for such other and further relief as may be just.

Misty Dawn Stapel  
By Her Attorneys  
Gottesman and Hollis, P.A.

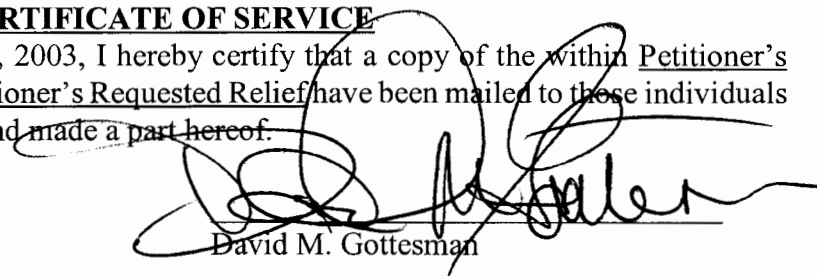


By: David M. Gottesman

July 14 2003

**CERTIFICATE OF SERVICE**

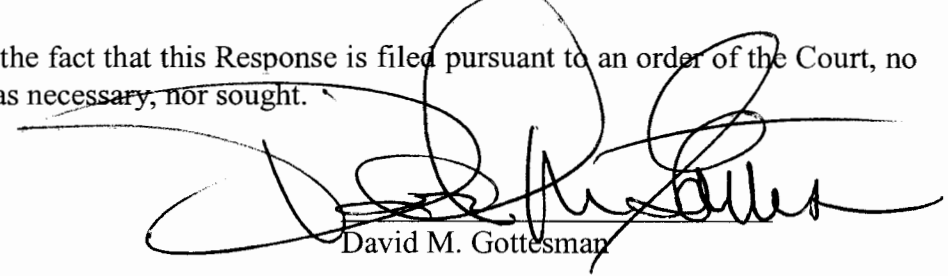
On this the 9th day of June, 2003, I hereby certify that a copy of the within Petitioner's Response to Court Advising of Petitioner's Requested Relief have been mailed to those individuals on the service list attached hereto and made a part hereof.



David M. Gottesman

**CERTIFICATE OF CONCURRENCE**

In light of the fact that this Response is filed pursuant to an order of the Court, no attempt at concurrence was necessary, nor sought.



David M. Gottesman

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