

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

**REHABILITATOR'S REPLY TO GARDNER PLAINTIFFS'  
OBJECTION TO PETITION FOR ORDER OF LIQUIDATION**

Paula T. Rogers, Commissioner of Insurance for the State of New Hampshire, as Rehabilitator of The Home Insurance Company, by her attorneys, The Office of the Attorney General, hereby replies to the Objection to Petition for Order of Liquidation filed by Joy Ann Gardner and Robert Blangeres and the certified plaintiffs' class they represent. The Rehabilitator replies because the Gardner Plaintiffs' objection manifests a fundamental misconception of the nature of the national scheme for liquidation of The Home with a cramped reading of a statute that is intended to create a remedial program for the benefit of policy holders (including Stimson), creditors (eventually perhaps including the Gardner Plaintiffs), and the public around the entire country.

In their Objection, the Gardner plaintiffs present the issues as if the Court should properly leave them to be dealt with only on a state-by-state basis. This misconceives the liquidation of an insurer that operated around the United States and abroad, as a localized, fragmented problem. The New Hampshire insurer receivership statutes, RSA 402-C, are part of an integrated national scheme of regulation by the States that contemplates that the Commissioner, as Liquidator, and this Court will

have a central role in overseeing the liquidation as it affects insureds, creditors and the general public wherever The Home did business.

The states have all enacted statutes to govern the liquidation of insolvent insurance companies similar to the Insurers Rehabilitation and Liquidation Model Act (“Model Act”) promulgated by the National Association of Insurance Commissioners (“NAIC”), III NAIC Model Laws, Regulations and Guidelines 555 (2002) (“NAIC Model Laws”), or the Uniform Insurers Liquidation Act (“UILA”), 13 U.L.A. 321 (Master ed. 1986). *See* III NAIC Model Laws 555-63 to 555-67 (listing statutes). The New Hampshire statute is similar to the Model Act, *see id.* at 555-65, and—like the statutes in other states—its purpose is “the protection of the interests of insureds, creditors, and the public generally” through, among other things, “[l]essening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process.” RSA 402-C:1, IV(e). *Cf.* Model Act 1(D)(5).

The state statutes accordingly provide for coordinated proceedings for insolvent insurers centralized in a single state. *See, e.g., Superintendent of Ins. v. International Equip. Leasing, Inc.*, 247 N.J. Super. 119, 588 A.2d 883, 885 (App. Div.), *certif. denied*, 126 N.J. 389, 599 A.2d 165 (1991). They achieve this end by providing for a predominant “domiciliary” proceeding in the insurer’s “domiciliary state”—the state in which the insurer is “incorporated or organized.” RSA 402-C:3, VII; Wash. Rev. Code § 48.99.020. The chief insurance regulator of that state may commence a “domiciliary” receivership in a state court, and the regulators of other states may commence “ancillary” receiverships with respect to assets in their states.

See RSA 402-C:4, I, III, RSA 402-C:20, RSA 402-C:54 and RSA 402C:55. The statutes contemplate that there may be multiple proceedings with respect to a single insurer, with the domiciliary liquidator having the primary role in marshaling assets and determining claims and making distributions from general assets. See RSA 402-C:57, RSA 402-C:60, RSA 402-C:61.

To expedite the resolution and payment of claims and limit financial loss and hardship to policyholders, New Hampshire and all other states have also established insurance guaranty funds. See RSA 404-B:2 (statutory purpose); Wa. Rev. Code § 48.32.010; III NAIC Model Laws at 540-17 to 540-520 (listing statutes). The New Hampshire insurance guaranty association founding statute, RSA 404-B, is based on the Post-Assessment Property and Liability Insurance Guaranty Association Model Act (the “Guaranty Association Model Act”) promulgated by the NAIC. III NAIC Model Laws at 540-19. Under these statutes, the guaranty association is to pay “covered claims”--claims “which arise[] out of and [are] within the coverage and not in excess of the applicable limits of an insurance policy” issued by an insolvent insurer. *E.g.* RSA 404-B:5, IV. Guaranty associations pay covered claims up to the lesser of the policy limits or a statutory cap, usually \$300,000, except in the case of workers’ compensation claims where there is no cap. *E.g.* RSA 404-B:8, I(a). The guaranty associations are funded by assessments on their member insurers, which are entitled to recoup the assessments in higher rates and premiums. See, *e.g.*, RSA 404-B:8, I(c), RSA 404-B:16. These burdens on the insurance-buying public are reduced by payments from the insolvent insurer’s estate. Guaranty associations are statutorily assigned the rights of the insureds and claimants who they pay, *e.g.* RSA 404-B:11, I,

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and they are also accorded policyholder priority by RSA 402-C:44, II. The Liquidator is to apply for approval of an “early access” plan to distribute assets to guaranty associations that agree to return monies if the assets are needed to pay higher or equal priority creditors. RSA 402-C:29.

Guaranty associations thus play an integral role in handling claims and, in cases where the insurer had an obligation to defend its insured, in defending lawsuits. The transfer of claim handling and defense responsibilities to the guaranty associations is a complex and time-consuming process. The Home, for instance, has approximately 11,000 open claims, most of which will need to be transferred to the guaranty associations upon the entry of a liquidation order. This will require the Liquidator to determine which files go to which guaranty association, a determination that may depend on—among other things—where the claimant or the insured was a resident at the time of the insured event or where the property from which the claim arises is permanently located, and in the case of the Gardner/Stimson case, could involve as many as 7 states’ guaranty associations. *See, e.g.*, RSA 404-B:5, IV. The Liquidator will then need to transfer the files (many of which are quite large) from The Home and its various field offices and third-party administrators to the applicable guaranty associations.<sup>1</sup> Those associations will then have to become familiar with the claims and make determinations as to whether the claims are “covered claims” and, if so, how to handle and defend them.

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<sup>1</sup> The Rehabilitator has been working with the National Conference of Insurance Guaranty Funds and individual associations to plan for an orderly transfer of claim files.

To permit this transfer to proceed in an orderly fashion, and to protect the interests of insureds who are the subject of claims where the insurer has a defense obligation, the New Hampshire guaranty association statute, like other such statutes around the United States, provides for a six month stay of proceedings where the insurer is a party or is obligated to defend a party:

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 thereafter as may be determined by the court from the date the insolvency is determined . . . to permit proper defense by the association of all pending causes of action.

RSA 404-B:18. *Accord* Guaranty Association Model Act § 18. While some states' statutes provide other stay periods, it makes sense to have one period generally applicable to all guaranty funds involved in a liquidation. This is particularly the case where some underlying actions, such as the Gardner Plaintiffs' class action, involve plaintiffs and property in multiple states.<sup>2</sup> Otherwise, some associations' obligations may be triggered while others will remain stayed. The domiciliary court can properly look to the public policy articulated by the legislature in its state statutes in framing a national stay order. If there are unique circumstances that make it proper for a

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<sup>2</sup> The stay periods of the other state statutes arguably implicated in the Gardner class action are 180 days in Washington (the state where the case is pending), Wash. Rev. Code § 48.32.160; up to 6 months and additional time in the court's discretion in Hawaii, Haw. Rev. Stat. § 431:16-117(a); until the last day fixed by the court for filing claims (here one year) in Idaho and Utah, Idaho Code § 41-3618, Utah Code Ann. § 31A-28-218(1); and 60 days in California, Colorado and Oregon, Cal. Ins. Code § 1063.6, Colo. Rev. Stat. § 10-4-518, Or. Rev. St. § 734.700(1).

particular case to proceed, the court in which the action is pending can consider them and its own state law in determining the comity to be accorded to the domiciliary stay order. The liquidation order, however, should have only one stay period.

The implication of the Gardner Objection (right down to their proposed language for the liquidation order<sup>3</sup>), however, is that this Court should abdicate its domiciliary court responsibilities, not issue any stay to protect insureds other than in New Hampshire, and leave out of state insureds and the guaranty association process in a chaotic balkanized state. Such a program would disregard the context of The Home's national and multi-national business, but more importantly, would ignore the national program represented in the statutes of all fifty states designed for "the protection of the interests of insureds, creditors, and the public generally" through "[l]essening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process." RSA 402-C:1, IV(e); Wa. Rev. Code § 48.99.080 (2) ("This Uniform Insurers Liquidation Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.").<sup>4</sup> The relief proposed by the Gardner Plaintiffs would

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<sup>3</sup> Some of which was taken from RSA 404-B:5(IV).

<sup>4</sup> See In re Handy Andy Home Improvement Centers, Inc., 144 F.3d 1125, 1128 (7<sup>th</sup> Cir. 1998) (Posner, J.) ("When context is disregarded, silliness results.")

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stymie the salutary effects on the "problems of interstate relations," that the statutes around the country were designed to have, by the evisceration of the national liquidation process.

Respectfully submitted,

NEW HAMPSHIRE INSURANCE  
DEPARTMENT  
PAULA T. ROGERS, COMMISSIONER

By her attorneys

PETER W. HEED, ATTORNEY GENERAL



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Dated: June 5, 2003

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CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on June 5, 2003 I served a true copy of the foregoing upon Sherilyn Burnett Young, Esq., and Andrew W. Serrell, Esq., Rath, Young & Pignatelli, 1 Capital Plaza, Concord, NH 03301, by first class mail, postage prepaid, and telecopy.

Dated: June 5, 2003

  
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