THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of The Home Insurance Company

LIQUIDATOR'S OBJECTION TO CLAIMANT ARIZONA FUND'S MOTION TO RECOMMIT

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the motion to recommit filed by the claimant Arizona Property and Casualty Insurance Guaranty Fund (the "Arizona Fund" or "Fund") concerning the Referee's Order on the Merits dated December 20, 2012 (the "Order") in disputed claim proceedings 2011-HICIL-50 and 51.

Introduction

This motion presents two issues concerning the Arizona Fund's claim for Class I administrative expenses. The first is whether the Fund's allocation of overhead expenses to Home for 2008 and 2009 is unreasonable, as the Liquidator determined and the Referee agreed. The Fund's allocation results in over 40% -- $498,222.64 -- of its expenses for those two years being allocated to Home, a disproportionate amount that does not reflect effort actually devoted to handling Home claims. It far exceeds the 5% to 7% allocated to Home for 2006, 2007 and 2010, and the claimed expense for 2008 and 2009 is ten times the total of loss and defense expense paid by the Fund under Home policies for the two years. As a Missouri appellate court observed concerning another Arizona Fund claim for overhead expenses, such a disparity "lack[s] credibility." Huff v. Integral Ins. Co., 354 S.W.3d 228, 233 (Mo. App. 2011).

The Arizona Fund based its allocation for the two years on 80 "open" claim files regarding 40 methyl tertiary butyl ether ("MTBE") lawsuits against Home policyholder Giant

Industries, Inc. ("Giant"). While the Fund may maintain files in this manner for its own purposes, the 80 "open claims" are not a reasonable basis for allocating expense to Home. The Giant matters were addressed based on a single, common timeliness issue and did not require substantial effort. The Fund identified the time bar issue when the suits were noticed to the Fund in February 2008, and it promptly denied the claims on that ground in early March 2008. When the Fund was named in a coverage action, it raised the time bar issue by summary judgment motion and was then dismissed by agreement without further activity. The Fund paid counsel only $28,817.38 to defend that action. Given the minimal resources devoted to Giant, the Referee reasonably found that the Fund's allocation based on 80 "open claims" is unreasonable.

The second question is the priority for the Arizona Fund's claim for dues to the National Conference of Insurance Guaranty Funds ("NCIGF"). The Liquidator classified the NCIGF dues as priority Class V under RSA 402-C:44, and the Referee agreed. The dues are not expenses "in handling claims" as required for Class I priority by RSA 404-B:11, II. The NCIGF does not handle claims. It is a national association whose activities include lobbying on behalf of guaranty funds before Congress, state legislatures and the National Association of Insurance Commissioners ("NAIC"). While some NCIGF's activities may support guaranty fund efforts concerning claims, the Fund did not show what portion of the dues concern those efforts. The Referee properly held that the Fund failed to meet its burden and assigned the dues to Class V.

Background

A. The Statutory Framework

1. The liquidation statute. The Insurers Rehabilitation and Liquidation Act, RSA 402-C ("Act"), provides for the payment of claims against insolvent insurers in successive priority classes. RSA 402-C:44. The first priority ("Class I") is for administration costs of the

liquidation. RSA 402-C:44, I. The second priority is for policy related claims, including claims of guaranty associations for their payments under policies of the insolvent insurer. RSA 402-C:44, II. After priorities for federal government claims and wages, the statute assigns remaining claims (other than subordinated claims) to the Class V residual classification. RSA 402-C:44, V.

2. The guaranty association statute. Guaranty association priority is also addressed in the New Hampshire Insurance Guaranty Association Act, RSA 404-B ("NHIGA Act"). The NHIGA Act establishes the New Hampshire Insurance Guaranty Association ("NHIGA"), which is "obligated to the extent of the covered claims" under insurance policies of an insolvent insurer, subject to certain limitations. See RSA 404-B:8, I(a), (b); RSA 404-B:5, IV (definition of "covered claim"). NHIGA is funded by assessments on its member insurers, see RSA 404-B:8, I(c), who are authorized to recoup the assessments in "rates and premiums." RSA 404-B:16.

The NHIGA Act provides that: "The expenses of [NHIGA] or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses." RSA 404-B:11, II (emphasis added). Guaranty associations' expenses "in handling claims" thus have Class I priority under RSA 404-C:44, I. The meaning of that phrase is illustrated by other sections of the NHIGA Act. NHIGA is authorized to "[h]andle claims" through its employees or through one or more insurers or other persons designated as servicing facilities. RSA 404-B:8, I(f). The activities involved in "handling claims" are indicated by the authority to "[i]nvestigate claims brought against [NHIGA] and adjust, compromise, settle, and pay covered claims to the extent of the association's obligation and deny all other claims." RSA 404-B:8, I(d).

The NHIGA Act recognizes that guaranty associations have duties and expenses other than in handling claims. NHIGA is to aid in the detection and prevention of insurer insolvencies, RSA 404-B:13, and respond to examination by the Commissioner, RSA 404-B:14. NHIGA is to

"[e]mploy or retain such persons as are necessary to handle claims and perform other duties of the association." RSA 404-B:8, II(a) (emphasis added). NHIGA is to assess members for "amounts necessary to pay the obligations of [NHIGA] under paragraph I(a) subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, the cost of examinations under RSA 404-B:13 and other expenses authorized by this chapter." RSA 404-B:8, I(c) (emphasis added). Similarly, NHIGA is to reimburse servicing facilities for "expenses incurred by the facility while handling claims on behalf of [NHIGA] and shall pay the other expenses of the association authorized by this chapter." RSA 404-B:8, I(g) (emphasis added).[1]

B. Factual Background.[2]

1. The Arizona Fund's Claim and Liquidator's Determinations

The Arizona Fund attempts to recover its entire overhead costs from the estates of insolvent insurers. Liq. Ex. 10 (Arizona Fund Interrogatory Answers), Answer 1(b). It filed a

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[1] The Arizona Fund statute is quite similar to the NHIGA Act. The Arizona Fund is to "[i]nvestigate claims brought against the fund and adjust, compromise, settle and pay covered claims to the extent of the fund's obligation and deny all other claims." Ariz. R.S. § 20-664(A)(1); Ariz. R.S. § 20-661(3) (definition of "covered claim"). It is to "[h]andle claims" through its employees or through servicing facilities. Ariz. R.S. § 20-664(A)(6). The Fund has duties regarding "the prevention and detection of insolvencies," Ariz. R.S. § 20-665(D), (E), and is subject to examination. Ariz. R.S. § 20-678. It is to reimburse servicing facilities "for expenses incurred by the facility while handling the claims on behalf of the fund and pay the other expenses of the fund." Ariz. R.S. § 20-664(A)(7). The Fund is authorized to "[e]mploy or retain such persons as are necessary to handle claims and perform other duties of the fund." Ariz. R.S. § 20-664(B)(2). It is funded by assessments of its member insurers, see Ariz. R.S. § 20-664(A)(4), and the assessments are to be "in such amounts as are necessary to pay the obligations of the fund pursuant to § 20-667 subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, the cost of examinations and other expenses authorized pursuant to this article." Ariz. R.S. § 20-666(A). Member insurers may recoup assessments through a premium tax offset. Ariz. R.S. § 20-674. Unlike the NHIGA Act, the Arizona statute provides that the Arizona Fund "may by resolution bar known claims . . . not filed within four months from the date of notice to creditors." Ariz. R.S. § 20-679.

[2] The Liquidator submitted 36 exhibits (cited as "Liq. Ex.") to the Referee, 33 of which are included as Exhibit E to the Arizona Fund's motion to recommit. Liquidator's Exhibits 34-36 are included in the Liquidator's Appendix submitted herewith.

claim for administrative expenses in the Home estate, see Liq. Ex. 1 (Proof of Claim), and sought to recover $608,773.55 from the Home estate as administrative expenses for the years 2006 through 2010. Liq. Ex. 8 (Liquidator summary, see Affidavit of James Hamilton ¶ 3 (Liq. Ex. 33)). The costs include numerous categories: accounting, legal, administrative fees, miscellaneous office expenses, travel, office expense, postage, rent, telephone, NCIGF dues, banking fees, investment fees. See Liq. Ex. 21 (Arizona Fund claim worksheets).

The $608,773 is an allocation to the Home estate of varying percentages of the Arizona Fund's total overhead expenses for the 2006 – 2010 years. See Liq. Ex. 22 (see Liq. Ex. 33 ¶ 5). The Fund determined its percentage allocation to the Home liquidation by applying the ratio of the number of "open claims" it was handling with respect to Home to its total number of open claims. See Liq. Ex. 9 (Fund Mandatory Disclosures) at 2.[3] For the 16-month period from March 2008 through June 2009, the Fund used an "open claims" count of 82 or 83 with respect to Home. Liq. Ex. 8. Eighty of these claims reflected 40 claim letters submitted in February 2008 by Western Refining, Inc. ("Western Refining"), the parent of Home policyholder Giant.

The Arizona Fund's use of allocation percentages based on these 80 asserted "open claims" resulted in administrative expense allocations to Home for 2008 and 2009 of $259,348.48 and $238,874.19, amounts more than five times greater than those for 2006, 2007 or 2010 ($43,064.80, $35,001.36 and $32,484.72, respectively). See Liq. Ex. 8. It also resulted in allocations that billed Home for over 40% of the Fund's total operating expenses for those years, as compared to 5% to 7% for 2006, 2007 and 2010. See Liq. Ex. 22.[4]

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[3] Most guaranty funds – 39 of 52 – allocate expenses based on hours of staff time devoted to Home claims compared with the hours spent on claims respecting other insurers in liquidation. Liq. Ex. 23 (chart) (see Liq. Ex. 33 ¶ 6).

[4] The numbers in this paragraph include both NCIGF dues and investment management fees in order to present the total effect of the Fund's proposed allocations.

The Liquidator viewed the Arizona Fund's allocation for 2008 and 2009 as unreasonable. Liquidation staff had only opened two claim files on the Giant matters (one for each primary policy Home issued to Giant). Liq. Ex. 13 (Fund note of March 4, 2008 call with liquidation staff). The Liquidator raised issues concerning the allocation with the Fund and asked it to reconsider in calls and a letter dated December 24, 2009. Liq. Ex. 2. The Liquidator also asked the Fund to revise the claim counts and allocation and raised the priority of NCIGF dues in a letter to the Fund dated May 12, 2011. Liq. Ex. 3. The Fund did not respond.

The Liquidator accordingly determined the claim. Liq. Exs. 4 and 5 (Notices of Determination). The Liquidator concluded that the Arizona Fund had not conducted work on a "claim-by-claim basis," but that it had opened 80 claims which resulted in a large increase in the administrative expenses sought from Home. Liq. Ex. 4 at 7-8. Since the Fund had only two or three non-Giant claims open for Home during 2008 and 2009, the Liquidator concluded that a claim count of five for allocation purposes was appropriate for those years. Id. at 8. As there were five open Home claims with the Arizona Fund in 2007, and the Fund's expense allocation to Home for that year was $31,084.00, the Liquidator determined to use $31,000 for 2008 and 2009 as well. Id. The Liquidator accepted the Arizona Fund's expense allocation numbers for the 2006, 2007 and 2010 years. Using the Fund's numbers for 2006, 2007 and 2010 and the Liquidator's revised numbers for 2008 and 2009 resulted in a Class I allowance of $150,694.92 (excluding NCIGF dues and investment management fees). Id. at 8-9 (worksheet); Liq. Ex. 8.

The Arizona Fund's claim for administrative expenses included $75,881.97 of NCIGF dues. Use of the Fund's allocation based on the 80 open claim count resulted in an allocation of NCIGF dues for 2009 of $52,572.44. This was five to thirteen times greater than for 2006, 2007, 2008 or 2010 ($5,930.75; $3,917.36; $4,365.72; and $9,095.70 respectively). See Liq. Ex. 5

at 7. The Liquidator determined to use the Fund's $4,365 NCIGF dues number from 2008 for the 2009 year as well.[5] The Liquidator accepted the Fund's numbers for 2006, 2007, 2008 and 2010 for a total NCIGF dues allowance of $27,674.53. Id. at 6, 7. Because NCIGF dues are not expenses "in handling claims," the Liquidator assigned them to Class V. Id.

The Liquidator allowed a total of $178,369.45: a Class I claim in the amount of $150,694.92 and $27,674.53 of NCIGF dues at priority Class V. Liq. Exs. 4 and 5.[6]

2. The Giant Lawsuits and Allocation of Administrative Expenses

In late February 2008, the Arizona Fund received 40 letters from Western Refining advising that Giant had been served with suits alleging MTBE contamination. E.g., Liq. Ex. 14.

Immediately following receipt of the first letters, on February 26, 2008, the Arizona Fund asked the Liquidator for policy information. Liq. Ex. 12. In that email, Fund staff noted that "[i]f these are the first notices of the lawsuits, they are obviously past the bar date" and that if the Liquidator did not find claims "we will be denying for bar date". Id. Liquidation staff advised that they would assign two claim numbers, one for each policy, to the cases as a group. Liq. Ex. 13 (handwritten note). The Fund, however, assigned two claim numbers to each of the 40 cases.

Approximately two weeks later, between March 5 and 14, 2008, the Arizona Fund sent Western Refining 40 essentially identical one-page letters denying coverage for the Giant matters because they were late-filed. Liq. Ex. 10, Answer 9. E.g., Ex. 15 (sample letters). The letters advised Western Refining that the claims were late because notice had not been given prior to the

[5] The allocation of NCIGF dues for 2008 was not affected by the Giant matter because the dues were billed in January and Western Refining's letters were received in February.

[6] These allowances did not address $22,344.98 in claimed investment management fees, which are not at issue here. The Liquidator had previously allowed the Arizona Fund's claim for administrative expenses for the years 2003 through 2005 in the amount of $163,806.95 at Class I, which the Fund accepted, and $11,104.60 in NCIGF dues at Class V. The Fund filed a request for review of the priority of the NCIGF dues, which will be determined by this proceeding.

June 13, 2004 "bar date" established in the Home liquidation order as required under a resolution adopted by the Fund. Liq. Ex. 15. Because the claims were denied as untimely, the Arizona Fund did not address the underlying facts of the lawsuits or any coverage issues. It merely "reserve[d] all statutory and/or policy defenses." Id.

In early April 2008, Western Refining and Giant filed a coverage action against various insurers and the Arizona Fund seeking coverage for over 50 MTBE lawsuits. Western Ref. Southwest, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA,, No. CV2008-007299 (Sup. Ct. Maricopa County, Ariz.) (the "coverage action"). Liq. Ex. 10, Answer 10; Liq. Ex. 16.

On September 3, 2008, the Arizona Fund moved for summary judgment on the claims against it in the coverage action "on the basis that the claims were filed subsequent to the bar date." Liq. Ex. 10, Answer 11; Liq. Ex. 18 (motion for summary judgment). The Fund contended that the claims were barred because the claims were filed after the June 13, 2004 claim filing deadline in the Home liquidation proceeding. See Liq. Ex. 18 at 5-6. Because the motion concerned only timeliness issues, the Fund did not need to investigate or address the underlying claims and any coverage issues. The motion reserved such issues. Id. at 5 n. 2.

Western Refining never responded to the Arizona Fund's motion. Instead, there were discussions which resulted in an agreement on December 3, 2008. See Liq. Ex. 10, Answer 10. The plaintiffs "agreed to waive any MTBE claims against Home, [the Arizona Fund] and any other insolvent carrier, and [the Fund] agreed to waive attorneys' fees and costs." Liq. Ex. 10, Answer 11. The Court entered an order dismissing the Fund from the coverage action on January 21, 2009. Liq. Ex. 19; Liq. Ex. 10, Answer 10. Notwithstanding the dismissal, the Arizona Fund kept 80 claims "open" until June 2009. Liq. Ex. 10, Answer 12. The Fund spent a total of $28,817.38 defending the coverage action. Liq. Ex. 20 (summary) (see Liq. Ex. 33, ¶ 4).

3. The Arizona Fund's claim file notes

The Arizona Fund's submitted voluminous but mostly repetitive claim file notes for the 80 files as exhibits to the affidavit of John Draftz. They show that Mr. Draftz, reviewed the claims and issued the Fund's denials over six days in early March 2008. The entries in each of the 80 claim files are as follows:

- An initial entry captioned "Posted from Notice to Claim" dated between March 4 and 14, 2008. The entry just notes receipt of the claim. E.g., Draftz Aff. Ex. 1 at 7.
- An entry captioned "Reviewed new claim from Home insolvency" dated between March 5 and 14, 2008. E.g., Draftz Aff. Ex. 1 at 5-6. Each entry consists of several paragraphs:
  - A summary first paragraph stating that the claim "has been deemed late" late and will be denied.
  - A summary of the underlying complaint. These paragraphs are generally similar, although they note differing causes of action.
  - A "Coverage" paragraph stating that the policy documentation "do[es] not have the general liability coverage terms" so "[i]t cannot be confirmed at this time if the Home policies would have afforded coverage for this loss" but that "[a]reas of concern would be punitives, fraud, known hazard etc." These paragraphs are the same – verbatim – in all of the files.
  - A "Fund Coverage" paragraph stating that the loss is "deemed late" and "coverage will be denied." These paragraphs are the same – verbatim – in all of the files.
  - A "Plan" paragraph that is redacted in most files but where it does appear (Draftz Aff. Ex. 1 and 72 and Liq. Exs. 17 and 34) stating "[d]eny coverage for bar date".
- A copy of the letter to claimant sent between March 7 and March 14, 2008. E.g., Draftz Ex. 1 at 3-4. Except for the identification of the claim, the letters are all identical and deny the claims as late while reserving coverage issues.

The first entry in any of the files is dated March 4, 2008, and the dates of the other entries show that Mr. Draftz reviewed and denied the claims as untimely over six other days during the period March 4 to March 14, 2008. The "reviewed new claim" entries show that he reviewed 2 claims (of 80) on March 5; 22 on March 7; 22 on March 10; 16 on March 11; 12 on March 12; and 6 on March 14. See the chart of dates included in the Liquidator's Appendix. The "letter to

claimant" entries show he issued 12 denial letters (of 40) on March 7; 11 on March 10; 8 on March 11; 6 on March 12; and 3 on March 14. Id.

The 80 files each also contain two entries with respect to the coverage action:

- An entry captioned "Rec'd Summons and Complaint against the Guaranty Fund itself" dated April 4, 2008 noting receipt of the complaint. E.g., Draftz Aff. Ex. 1 at 2. This entry is the same – verbatim – in each file.
- An entry captioned "Received and reviewed Summons and Complaint" dated April 8, 2008 summarizing the allegations in the coverage action. E.g., Draftz Aff. Ex. 1 at 1. This entry is the same – verbatim – in each file, although it appears that something may have been cut off. A copy provided to the Liquidator also states "Policy defenses cannot be outlined as we do not have a copy of the BOP policy language for review." Liq. Ex. 17 at 2.

The dates of these entries show that Mr. Daftz summarized the coverage action complaint and copied that summary into each of the files during two days in early April 2008. The Fund established a "Master File" on April 8, 2008, using one file to "keep all further notes and pay all bills from that file" instead of 80 files. Liq. Ex. 10, Answer 6; Liq. Ex. 17 at 3.

As shown by the entries underscored above, Mr. Draftz did not have the policy language to conduct individualized coverage analysis before denying the claims. This is confirmed by the notes and emails in the master file relating to coverage, which consist of:

- A request dated April 18 from the Arizona Fund's counsel, Ryan Talamante, to Kevin Kelly of the Home liquidation staff for the policy terms and conditions. Liq. Ex. 35 at 4.
- An email dated April 25 from Mr. Kelly to Mr. Talamante forwarding the policy provisions. Liq. Ex. 35 at 4.
- An email dated April 29 at 11:39 a.m. from Mr. Talamante to the Fund's claims adjuster John Draftz forwarding the policy provisions. Liq. Ex. 35 at 3 and 9.
- An email dated April 29 at 3:04 p.m. from Mr. Draftz to Mr. Talamante stating "I have reviewed the policy language and here are my initial impressions." Those impressions follow in two paragraphs. Liq. Ex. 35 at 2 and 9 (showing time).
- A May 16 note of a conversation between Mr. Draftz and Mr. Talamante which concludes with a sentence: "He [Talamante] also reviewed my [Draftz's] email RE policy terms and [redacted] with my coverage assessment." Liq. Ex. 35 at 1.

Mr. Draftz thus spent less than 3 ½ hours (between 11:39 and 3:04 on April 29) reviewing policy coverage language for all matters combined, and Mr. Talamante responded in a telephone call.[7]

4. The NCIGF Dues

The Arizona Fund's administrative expense claim includes $75,881.97 for NCIGF dues allocated to Home for the years 2006 through 2010. Liq. Ex. 8. During those years, the Fund's NCIGF dues ranged from a low of $60,309 for 2008 to a high of $69,618 for 2007. Liq. Ex. 24 (NCIGF dues billings). The Fund's NCIGF dues totaled $327,187.47 for the years 2006 – 2010. Id. The dues fund the NCIGF's annual budget. They consist of two parts: a per capita "fixed annual membership fee" for each association and a pro-rata portion based upon the ratio of premium written by insurers in the association's state to the premium written in all states, subject to various caps. Liq. Ex. 10, Answer 14; see Liq. Exs. 25 at 4, 26 at 2, 27 at 2, 28, 29.

The NCIGF does not handle claims. Its website states that: "The NCIGF does not process or pay claims." Liq. Ex. 31 (www.ncigf.org/public/claimsquestions (visited August 24, 2012)). The NCIGF website describes the NCIGF as:

> a non-profit, member-funded association that provides national assistance and support to the property and casualty guaranty funds located in each of the 50 states and the District of Columbia. Incorporated in December 1989, the NCIGF monitors national insurance activities, coordinates information for multi-state insolvencies and provides legal, informational, administrative, communications and public policy and administrative support to our members. The NCIGF works in close cooperation with the property and casualty insurance trade associations to monitor and respond to issues that might impact state guaranty funds. The group serves as a trusted expert, informing trade and other organizations as they develop model legislation related to state guaranty fund laws.

Liq. Ex. 32 (www.ncigf.org/about (visited August 24, 2012)).

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[7] This is not surprising. The Arizona Fund denied the claims based on timeliness and so did not need to address coverage with Western Refining. Mr. Talamante's letter dated May 29, 2008 to Western Refining expressly "forego[es]" any discussion of policy defenses, Liq. Ex. 36 at 1, and the summary judgment motion merely "reserves" the right to contest coverage. Liq. Ex. 18 at 5.

As summarized in the "Benefits of Your NCIGF Membership" from the 2008 NCIGF dues package (Liq. Ex. 27 at 7-9), the NCIGF conducts activities in a number of areas:

- Communications. The NCIGF seeks to provide "communications on important insolvency issues" with "guaranty associations, primary insurers and their trade associations." This involves a website and published bulletins and commentary.
- Coordinating Committees. The NCIGF supports coordinating committees "organized for multi-state insolvencies in which issues affecting a number of guaranty funds are present." This involves assigning staff to provide "critical assistance and support by doing whatever is necessary to ensure that guaranty fund interests are properly treated with respect to a particular insolvency."
- Model Legislation. The NCIGF works to fashion "legislative and other solutions to problems encountered in insurance insolvencies" including preparing model guaranty association legislation and working on efforts to enact legislation in various states.
- Congressional Education Program. The NCIGF conducts "a program of educating and informing key members of Congress and their staffs about the functioning of the state-based guaranty association system." It serves as a "technical resource to Congressional staff members on issues affecting guaranty associations."
- Liaison to NAIC. The NCIGF works with the NAIC on model legislation "to do what is possible to ensure guaranty fund issues are fairly treated."
- Educational Forums for the Guaranty Fund Community. The NCIGF conducts various educational meetings.
- Uniform Data Standards. The NCIGF is involved in "the development of uniform standards for the transfer of data between guaranty associations and Liquidators."
- Data Communication. The NCIGF "has become a clearinghouse of data transmissions" between liquidators and guaranty funds including loss, claim, and unearned premium data for multi-state insolvencies as well as premium, historical expense, and assessment data.
- Data Security. The NCIGF has developed a data security and privacy policy.

ARGUMENT

The Court should sustain the Order upholding the Liquidator's determination that the Arizona Fund's allocation of overhead expenses to Home for 2008 and 2009 is unreasonable. The Referee correctly held that the Fund's claimed overhead expense may be reviewed for reasonableness and that the Fund's allocation of $254,982.86 and $238,874.19 for 2008 and 2009 is unreasonable and not reflective of actual time and effort spent in handling Home claims. The Court should also sustain the Referee's ruling assigning the Fund's claim for NCIGF dues to Class V. Only expenses "in handling claims" are entitled to Class I priority, and the Fund did not meet its burden of proving that NCIGF dues are expenses "in handling" Home claims.

I. THE REFEREE PROPERLY SUSTAINED THE LIQUIDATOR'S DISALLOWANCE OF OVERHEAD EXPENSES UNREASONABLY ALLOCATED TO HOME BY THE FUND.

The Arizona Fund contends that the Liquidator is bound by the Fund's allocation of its overhead expenses to Home, which the Liquidator must pay no matter how unreasonable. This is incorrect. The Liquidator may review the Fund's allocation for reasonableness, and the burden of proof rests with the Fund.

A. The Fund's Allocation May Be Reviewed For Reasonableness.

The Arizona Fund takes the striking position that it has the right to recover overhead expenses it allocates to the Home estate without regard to the reasonableness of the amount claimed, see Arizona Fund's Motion to Recommit ("AF Br.") at 4 ("The reasonableness of the result of . . . [the] formula is not a condition of recovery . . .") (emphasis added), and that recovery can be denied only in the event of a "sham" submission – that is, if the Fund attempts to perpetrate a fraud. AF Br. 19-20. There is no support for this in the statutes. The Fund is not entitled to recover overhead expenses it chooses to assign to Home no matter how unreasonable.

Contrary to the Fund's position, there is no statutory right for guaranty associations to simply pass through all their expenses to the estates of insolvent insurers as administration costs. The statute provides priority only to actual expenses that an association incurred in adjusting claims under the policies of the insolvent insurer – the expenses "in handling claims." RSA 404-B:11, II. It does not provide for allocations at all. The Liquidator has permitted them because the line separating expenses "in handling claims" from other expenses is not always clear, the associations' most significant function is paying claims, and expending the Home estate's limited resources attempting to draw fine distinctions among individual expenses is generally not productive. The Liquidator has accordingly accepted most categories of association expenses as related to claims handling, construed the statute to allow allocations of overhead expenses, and accepted most allocations. Nevertheless, allocations are not binding without regard to reasonableness. The Legislature did not intend such a "wasteful and illogical" result. See Ruel v. N.H. Real Estate Appraiser Bd., 163 N.H. 34, 39 (2011).

1. The Liquidator is charged with investigating and determining claims, subject to approval by the Court. See RSA 402-C:38, II, :41, :45. As the Referee noted (Order at 6), the intent of the Act is to protect the interests of insureds, creditors and the public generally. See RSA 402-C:1, IV. Given that statutory purpose and the specific statutory charge, the Liquidator properly must review all claims except where the Legislature has expressly said otherwise. Nothing in RSA 404-B:11 makes allocations of overhead expenses binding and exempt from review. The statute provides that the Liquidator "shall be bound by settlements of covered claims by the association or a similar organization in another state." RSA 404-B:11, II (emphasis added). With respect to expenses "in handling claims," however, it only provides for priority and does not address whether they are binding. Id. It does not refer to allocations at all.

Thus, while the statute is reasonably construed to permit allocations as a proxy for actual expenses "in handling" Home claims, there is no language that makes allocations binding and unreviewable.[8] An allocation is only a method of approximating what the Legislature intended, and the Liquidator properly may review it for reasonableness pursuant to his authority to review claims. Otherwise improper (non-claim handling) expenses would be passed through as Class I costs to the detriment of policyholders and other claimants against the insolvent insurer's estate.

2. The allocations of expenses must reflect the statutory purpose of providing reimbursement only for expenses "in handling claims" under the insolvent insurer's policies. See Pandora Indus., Inc. v. Department of Revenue Admin., 118 N.H. 891, 894 (1978) (statutory allocation must be viewed "within the context of the whole statute and in relation to the purpose of [the section]."). Thus, whatever allocation methodology is used, the question is whether the result reflects the effort actually devoted to Home claims. Only then will an allocation approximate the Fund's expenses "in handling" Home claims as opposed to handling other claims or conducting other business of the Fund. The Arizona Fund's allocation of overhead based on "open claims" is only a proxy – as shown below, a flawed proxy – for more direct measures of the relative resources devoted to handling Home claims. Since the allocation is just

[8] The one case cited by the Fund on this point is irrelevant. The statute in Robertson v. Northern R.R., 63 N.H. 544 (1886), provided that a party "may recover twenty-five cents a mile for actual travel of himself or his attorney" for attending a deposition noticed by the other party that did not go forward. Id. at 547 (quoting former Gen. Laws c. 229, §10). The court held that it could not limit recovery to actual expenses or an amount equitably due where the Legislature specified the amount to be recovered. Id. at 548-49. RSA 404-B:11 contains no analogous directive. To have similar effect, the statute would need to provide that NHIGA shall recover "an allocation of all overhead expenses as determined by the association in its sole discretion." It is noteworthy that the court said that if the issue had been of first impression the judges "all would be in favor of limiting the recovery to the amount found to be equitably due," Robertson, 63 N.H. at 549, and that the statute was later amended to that effect. See Ott v. Hentall, 70 N.H. 231, 235 (1900) (quoting Pub. Stat. c. 225, §12).

a proxy, it can only be used if the results are reasonable. It is appropriate for the Liquidator to review the results for reasonableness to see that this is the case.[9]

3. The Arizona Fund's position that allocations of general overhead expenses are binding is inconsistent with the express statutory limitation of priority to expenses "in handling claims." RSA 404-B:11, II. The Fund contends that it is entitled to obtain recovery for all expenses by allocating them to open insolvencies. See Liq. Ex. 10, Answer 1(b). Indeed, it goes so far as to say that if it had no other claims it could require Home to pay all of its operating expenses. AF Br. 27. However, there is no statutory right for guaranty associations to allocate their overhead expenses to the estates of insolvent insurers as administration costs. By providing priority only for expenses "in handling claims," the Legislature limited the priority to the actual expenses that a guaranty association incurred in adjusting claims under the policies of the insolvent insurer. Otherwise the words "in handling claims" would be surplusage, contrary to the rule that "[w]hen construing a statute, [the courts] must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words." New Hampshire Motor Transp. Ass'n Employee Benefit Trust v. New Hampshire Ins. Guar. Ass'n, 154 N.H. 618, 625 (2006) (quoting Winnacunnet Coop. Sch. Dist. v. Town of Seabrook, 148 N.H. 519, 525-26 (2002)).[10] The provisions of the NHIGA Act that provide NHIGA with both claim and non-claim responsibilities and distinguish between expenses "in handling claims" and other expenses confirm that the phrase does not encompass all guaranty associations expenses. See Mortgage

[9] The "sham" standard advocated by the Arizona Fund (AF Br. 19, 22) represents an attempt to set the bar so low that allocations would be effectively binding even though the statute does not make them so. Moreover, questions of "shams" and "fabrications" present issues of intent and motive that would produce unseemly, expensive litigation between the Liquidator and guaranty associations. An objective reasonableness standard avoids such concerns.

[10] The NHIGA Act's "liberal construction mandate does not give [the courts] the authority to ignore the legislature's use of" terms or phrases. New Hampshire Motor Transp., 154 N.H. at 625.

Specialists, Inc. v. Davey, 153 N.H. 764, 774 (2006) ("[Courts] examine the language of the statute, ascribing to its words their plain and ordinary meanings, and interpret it in the context of the overall legislative scheme and not in isolation.").[11]

4. Allowing guaranty associations to pass through all expenses at Class I priority would shift the burden of supporting the guaranty association system from the member insurers to insolvent estates. However, the NHIGA Act provides NHIGA with both claim and non-claim responsibilities, and it provides for NHIGA to be supported by assessments for all expenses (including expenses "of handling covered claims"), with Class I reimbursement only for expenses "in handling claims." See note 11. The Legislature thus intended for associations' non-claim handling expenses (at least) to rest on their members. Contrary to the Fund's assertion (AF Br. 26-27), insolvent estates are not obligated to pay for the guaranty association "safety net" to exist.

5. Finally, the Arizona Fund's concerns over "arbitrary action" and "second guessing" by the Liquidator (AF Br. 21, 23) are misplaced. The Liquidator does not exercise the authority to review allocations lightly. The Liquidator has allowed, and the Court has approved, guaranty associations' Class I expenses totaling over $47 million. See Liquidator's Forty

[11] The Legislature provided NHIGA with both claim and non-claim responsibilities. NHIGA is to "[h]andle claims" through its employees or through servicing facilities, RSA 404-B:8, I(f), but it is also to perform other, non-claim functions. See, e.g., RSA 404-B:13 (aiding in detection and prevention of insurer insolvencies); RSA 404-B:14 (responding to examination). NHIGA is thus authorized to "[e]mploy or retain such persons as are necessary to handle claims and perform other duties of the association." RSA 404-B:8, II(a) (emphasis added). The Legislature also expressly distinguished between claim and non-claim expenses. See RSA 404-B:8, I(c) (NHIGA is to assess members for "amounts necessary to pay the obligations of [NHIGA] under paragraph I(a) subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, the cost of examinations under RSA 404-B:13 and other expenses authorized by this chapter.") (emphasis added); RSA 404-B:8, I(g) (NHIGA is to reimburse servicing facilities for "obligations of the association paid by the facility and for expenses incurred by the facility while handling claims on behalf of [NHIGA] and shall pay the other expenses of the association authorized by this chapter.") (emphasis added).

Seventh Report ¶ 9 (January 7, 2013). This case is the first dispute with an association over an allocation. In any event, the Liquidator's determinations are themselves subject to review.

B. The Burden Of Showing Reasonableness Rests On The Arizona Fund.

The Arizona Fund contends that the burden of proof rests on the Liquidator so that the Liquidator must disprove the Fund's claim. AF Br. 16, 28. This is backwards. Generally, a plaintiff bears the burden of proving its claim. See, e.g., Nashua Housing Auth. v. Wilson, 162 N.H. 358, 361 (2011) ("In a civil action the burden of proof is generally on the plaintiff to establish its case by a preponderance of the evidence.") (quoting State v. Lavoie, 155 N.H. 477, 481 (2007)). The Act follows that usual understanding. It requires that claimants file "proofs of claim," which are to consist of a "verified statement" that includes specified information about the claim. RSA 402-C:37, :38, I (emphasis added). In particular, the claimant must state that "the sum claimed is justly owing and that there is no setoff, counterclaim or defense to the claim." RSA 402-C:38, I(a)(4). On request of the Liquidator, the claimant must provide additional information and evidence. RSA 402-C:38, II. Thus, the claimant must prove its claim. The Liquidator does not have to disprove it. As the Missouri appellate court held in rejecting another attempt by the Fund to recover overhead expense from an insolvent insurer, "[t]he Arizona Fund had the burden to establish the validity of its claims." Huff, 354 S.W.3d at 233 (citing Mo. Stat. 375.1208, the Missouri analogue of RSA 402-C:38).[12]

The Arizona Fund's position that the Liquidator must disprove its claim makes no sense, as it puts the burden on the person with less information. This would increase claim determination expense and likely lead to increased numbers of disputed claims and inflated claim

[12] The Fund attempts to distinguish Huff based on language in the Missouri statutes (AF Br. 19 n. 1, 21), but the court's ruling concerning the Fund's burden of proof and the credibility of the Fund's claim constituted a ground for decision separate from the statutory issue. See 354 S.W.3d at 233 ("In the alternative . . . .").

allowances, all to the detriment of claimants with readily valued claims. Not surprisingly, the Fund is unable to cite to any statute in support of its position. It reliance on the one case it cites, In the Matter of First Central Ins. Co., 791 N.Y.S.2d 123 (N.Y. App. Div. 2005) (AF Br. 16, 27), is misplaced. The summary opinion does not describe the issues involved, but the claimants' brief shows that the principal question was late notice. Brief of Claimants-Appellants, 2004 WL 3417540 at *6-11. On that issue, substantive law places the burden on the insurer to demonstrate prejudice. Id. (quoting Brandon v. Nationwide Mut. Ins. Co., 743 N.Y.S.2d 53, 58 (N.Y. 2002) (New York courts "place the burden of proving prejudice on the insurer because it has the relevant information about its own claims-handling procedures and because the alternative approach would saddle the policyholder with the task of proving a negative.")). The case turned on a particular substantive issue, and it does not support placing a burden of disproving a claim in an insurer insolvency on the Liquidator. See Resources Ins. Co. v. Lilley, 474 N.Y.S.2d 736, 737 (N.Y. App. Div. 1984) (claimant bears burden of proving his claim in liquidation).

C. The Referee Reasonably Concluded That The Arizona Fund's Allocation Of Expenses Is Unreasonable.

The Arizona Fund acknowledges that the Referee's findings should be upheld unless a reasonable person could not reach the same conclusion based on the evidence presented. Arizona Br. 15-16. See In re Reiner's Case, 152 N.H. 594, 597 (2005); Bianco P.A. v. Home Ins. Co., 147 N.H. 249, 253 (2001). In this case, the Referee's conclusion that the Fund's submissions for 2008 and 2009 were unreasonable was amply supported by the record and certainly within the range of conclusions a reasonable person could reach. It should be sustained. See Boston & Maine Corp. v. State, 109 N.H. 547, 550 (1970) (upholding Public Utilities Commission allocation where "[t]he basic facts found by the commission may be reasonably considered to warrant the conclusion reached."). The open claim methodology, using

80 open claims for the Giant suits, produced an unreasonable result because it does not reflect substantial work while allocating over 40% of the Arizona Fund's overhead expenses to Home.

1. The Use Of 80 "Open Claims" As A Proxy Does Not Correspond To The Effort Devoted To Handling The Giant Matters.

The Arizona Fund's use of 80 "open claims" for purposes of allocation is inappropriate because it does not reflect the rather minimal effort involved in handling the Giant matters.

a. The claims for coverage of the 40 Giant lawsuits do not warrant weighting as 80 "open claims" because they were denied based on the single, common timeliness issue and ultimately resolved for no payment after that issue was presented in the single coverage action.

The Arizona Fund did not need to (and did not) devote significant time and effort on the claims because they were promptly denied based on one common issue – late filing – and that issue was the only one raised in the single declaratory action that followed before it was dismissed by agreement. The claims are properly treated as a group of related lawsuits potentially implicating two policies.

1. The claims were denied as late promptly after submission. The first claim was received by the Arizona Fund on February 22, 2008. The Fund identified the lateness issue and advised the Liquidator of the potential denial within days of receiving the first claim letter. See Liq. Ex. 12 (February 26, 2008 email: "If these are first notices of the lawsuits, they are obviously past the bar date.") The Liquidator provided the answer to the only factual question – whether notice had been given to the Liquidator of lawsuits before June 13, 2004 – the next day. See Liq. Ex. 13 (February 27, 2008 email advising "the initial claim [was] submitted in April 2007."). The Fund then issued virtually identical denial letters for all 40 claims between March 5 and 14, 2008. Liq. Ex. 10, Answer 9. E.g., Liq. Ex. 15. As the Fund acknowledges, "[t]he claims were denied because the claims were filed after the bar date adopted by the Fund pursuant

to its enabling act and a resolution by the Fund's Board of Directors." Liq. Ex. 10, Answer 9. Issues beyond late-filing were simply reserved. Liq. Ex. 15.

2. The coverage action dealt with the claims together. Western Refining then included the Arizona Fund in the coverage action. Liq. Ex. 16. That coverage action was itself a single proceeding, and the complaint alleged that the underlying cases had also almost all been consolidated into a "single proceeding." Id. ¶ 26. Indeed, when the coverage action was filed, the Fund decided to use one file (for the Albertson Water District claim) "as the Master File and [to] keep all further notes and pay all bills from that file." Liq. Ex. 17 at 3; Liq. Ex. 10, Answers 5-6. This is a very practical demonstration that the matters were for all intents and purposes one.

3. The coverage action was addressed solely on timeliness grounds. The Arizona Fund responded to the complaint on the preliminary ground of timeliness. It moved for summary judgment "on the basis that the claims were filed subsequent to the bar date." Liq. Ex. 10, Answer 11; AF Ex. 18 at 5-13.[13] It did not address coverage. Ex. 18 at 5. Giant then agreed to dismiss the case without ever responding to the motion. See Liq. Ex. 10, Answers 10, 11.

4. The Fund merely reserved coverage issues. In both its denial letters and its summary judgment motion, the Fund simply reserved the right to assert policy defenses. Liq. Ex. 15; Liq. Ex. 18 at 5. It did not need to consider the individual facts of the underlying claims and attempt to apply the policies to those facts. Indeed, as of the date the coverage action complaint was received, the Arizona Fund did not have a copy of the policy coverage language and could not "outline" policy defenses. Liq. Ex. 17 at 2.

Weighting the claims as 80 is disproportionate to the effort involved in denying and disputing them on a single, common timeliness issue. The Fund's assertion that the Liquidator's

[13] The Fund also asserted that the claim was premature because the claimant was required to exhaust other insurance. Liq. Ex. 18 at 14-15.

position depends on the timeliness issue being "open and shut" (AF Br. 13-14) is incorrect. The Liquidator's position does not rest on the strength of the time-bar argument but on what actually occurred. The Fund asserted the time bar as the ground for denying the claims (reserving any other issues); when sued, the Fund asserted the time bar claim as a basis for summary judgment (noting that this meant that other issues need not be reached); Western Refining and the Fund then reached an agreement to dismiss the Fund for no payment, and the Fund was dismissed. The Liquidator's point is that the Fund treated the Giant lawsuits as presenting a single common issue, and they were addressed on that basis.[14] Given the time-bar argument, the Arizona Fund never needed to (and did not) address the merits of individual claims and take positions on coverage issues.

b. The Arizona Fund did not perform "substantial" work on the files.

Notwithstanding the effect of the time-bar issue, the Arizona Fund essentially contends that its affidavits require a finding that it devoted time and effort sufficient to support the reasonableness of its 80 claim allocation. However, the Referee reasonably found that the time spent was not substantial. The Referee properly disregarded the conclusory affidavits submitted by the Fund, which offer nothing more than summary assertions concerning the Fund's activities, and relied upon the claim file records before her. Cf. Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529, 535 (2009) ("conclusory allegation[s]" in affidavit "unsupported by any factual basis" do not defeat motion for summary judgment); New England Tel. & Tel. Co. v. City of Franklin, 141 N.H. 449, 454 (1996) (same).

[14] The Fund's present position that the timeliness defense did not apply to all of the claims is contrary to the position it took in the summary judgment motion. Liq. Ex. 18 at 6 ("[A]ll of the claims at issue in this case are barred as to the Guaranty Fund. As explained below, this includes even those claims arising from lawsuits that were initiated against the Plaintiffs after the June 13, 2004 claims bar date.") (emphasis in original); id. at 13.

The Fund's affidavits are conspicuously silent on the actual amount of time and effort devoted to the Giant claims. The Surguine affidavit on which the Fund first relied does not identify any individualized effort beyond the initial review of the various underlying complaints. See Surguine Aff. ¶¶ 9-12. It merely observes that – at an unspecified time – the Fund's adjuster "reviewed policy information from the Liquidator including information concerning any pollution exclusion clause" (¶ 9); that the Fund denied the claims based on the bar date (¶¶ 9, 10); that the Fund "reserved" its right to assert policy defenses and "undertook to consider" those defenses (¶ 11); and that the Fund moved for summary judgment based on time-bar (¶ 14). .

After the Liquidator pointed out that the case file emails show that the claims handler did not have the policy language prior to the denials and spent less than 3 ½ hours analyzing coverage when the language was received (see pages 9-11 above), the Fund submitted the Draftz affidavit attaching the claim file notes. However, the affidavit does not attempt to quantify the time and effort involved. It just states that Mr. Draftz "reviewed the allegations" of the claims, analyzed "those portions of the Home policies . . . that Home had provided to the Fund at that time", and "devoted [unspecified] time and effort" in reviewing available policy information and in considering policy defenses "on an individualized basis" in coming to "preliminary" conclusions (¶¶ 3, 4) (emphasis added); and sent letters "denying coverage based on the bar date" and reserving "all statutory and/or policy defenses" (¶ 5). Even when it disputes the 3 ½ hours spent on coverage by pointing to earlier review of the underlying complaints, the affidavit is resoundingly silent on the time Mr. Draftz spent (¶ 8).

Given the generality of the Fund's affidavits, the Referee looked to the claim file notes attached to the Draftz affidavit and concluded that the Fund had not devoted substantial time to the claims. As set forth at pages 9-10 above, the claim file notes show that Mr. Draftz spent time

on 6 days to review and deny the claims, and time on 2 days to review the coverage action complaint. As the Referee noted, the individual files have no substantive notations after April 8. Roughly doubling the pre-April 9 time to allow for Mr. Draftz' monitoring of the coverage litigation (including the few hours spent reviewing the policies when received, the initial letters from counsel regarding the timeliness issue, the summary judgment motion on that issue, and the agreement to dismiss the action), this would amount to only about 15 days in 2008. That is not "substantial," as it represents only about three weeks – or 6% (3/50) – of his time in 2008. (There was no need for substantive attention to the files in 2009, as all that was involved was receipt of the dismissal order, payment of the final fee bills and closing the files.) The Referee's conclusion that "the claims handler did not spend 'substantial' time on those files, given the limited notes regarding work done" (Order at 5) is amply supported and quite reasonable.

c. The Arizona Fund used the 80 "claims" as a basis for allocation for an excessive period.

While the Referee did not focus on it, the length of time the 80 claims were held open was also excessive. The Arizona Fund weighted its claim for administration expenses using the 80 "open claims" for the period from March 2008 through June 2009. See Liq. Ex. 8; Liq. Ex. 10, Answers 7, 8, 12. It kept the 80 files "open" after March 2008, when it denied the claims for late-notice, even though there was only a single coverage action. Even after the coverage action was dismissed by court order in January 2009 (Liq. Ex. 10, Answer 10; Liq. Ex. 19), the Fund kept the 80 claims open for five more months, until June 2009. Liq. Ex. 10, Answer 12. The last counsel's invoice was paid in early February. Liq. Ex. 20. Holding 80 claims "open" for these prolonged periods after March 2008 is inappropriate for allocation purposes.

2. The Arizona Fund's Allocation Results In An Unreasonable Allocation Of Overhead Expense To Home.

The Referee's finding that the Arizona Fund's allocation was unreasonable (Order at 6) should be sustained. The allocation of $498,222 to the Home estate for 2008 and 2009 based on 80 "open claims" for Giant is disproportionate in several ways. The Fund's arguments that these considerations are irrelevant merely restate its view that its allocation is binding.

First, the actual expense and effort of handling the Giant claims does not reasonably relate to the overhead that the Arizona Fund seeks to recover. As discussed above, the effort was not substantial, involving about 6% of a claims handler's time in 2008 and much less in 2009. Further, the Fund spent a total of only $28,817.38 in legal expense to defend against and resolve the coverage action in 2008 and 2009. Liq. Ex. 20. The Fund seeks to recover $498,222 of overhead expense from Home for those two years. Liq. Ex. 8. A matter that was defended for $28,817 should not result in an administrative expense claim of seventeen times as much. The amount claimed is simply disproportionate to the effort and expense involved in resolving (for no payment) the claims that the Fund weighted as 80. The Fund's allocation could properly be rejected on this ground alone. The Missouri Court of Appeals denied an expense claim by the Arizona Fund that involved a much smaller disparity on the ground it "lacked credibility." Huff, 354 S.W.3d at 230, 233 (rejecting Arizona Fund claim for $16,720.74 in general administrative expenses for a claim on which the Fund paid $3,887.39 and spent an hour in administration).

Second, the $498,222 bill to the Home estate for 2008 and 2009 represents over 40% of Fund's overhead for those years. Given the relatively small amount of effort involved in handling the claims in 2008 and the absolutely minimal effort in 2009, allocating over 40% of the Fund's overhead to Home for those years is clearly excessive. The $498,222 is 43% of the Arizona Fund's total overhead expenses for 2008 and 2009, as opposed to 5% to 7% for the other

years. See Liq. Ex. 22. The annual amounts for 2008 and 2009 ($259,348 and $238,874) are approximately seven times greater than the annual allocations to Home for 2006, 2007 or 2010 ($43,064.80, $35,001.36 and $32,484.72, respectively). Id. The Giant matters cannot support such percentage and absolute differentials.[15]

Third, the $498,222 allocation is ten times the total of $48,170.51 in loss and defense expense (allocated loss adjustment expense) paid by the Fund under Home policies, all on other claims, for the two years. Liq. Ex. 21 at 2 and 3 ($1,142.54 for 2009 and $47,027.97 for 2008).

In sum, the Arizona Fund's denial of a batch of related claims by one Home insured on timeliness grounds does not support having Home pay over 40% of the costs of keeping the Fund in operation for two years. Expenses are not properly passed through to Home by expansive allocations unrelated to actual efforts and expenses in handling claims. The Referee's approval of the Liquidator's determination is reasonable and should be sustained.

II. THE NCIGF DUES ARE PROPERLY ASSIGNED TO PRIORITY CLASS V.

The Referee correctly held that NCIGF dues are not entitled to Class I priority because the Arizona Fund has not shown they constitute expenses "in handling claims." Order at 7-8. As discussed above, the Fund bears the burden of proving its claim (pages 18-19), and the phrase "in handling expenses" in RSA 404-B:11, II, limits the expenses entitled to priority (pages 16-17). Thus, to obtain administration cost priority, the Arizona Fund must show that NCIGF dues constitute an expense in handling claims. It failed to do so. [16]

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[15] If the Arizona Fund were handling thousands of claims, treating the Giant matter as 80 claims might not be significant. But where the 80 asserted claims are a substantial portion of the Arizona Fund's open claims (see Liq. Ex. 11), the Fund's weighting produces absurd results.

[16] The Fund's challenge to the allocation of NCIGF dues presents the same issues as the allocation of the Fund's claimed expenses generally and is addressed in Part I above.

The NCIGF does not handle claims. The NCIGF website expressly states that the NCIGF "does not process or pay claims." Liq. Ex. 31. Moreover, the NCIGF dues do not correlate with any claim handling activity. They are membership dues set by the NCIGF to support the NCIGF's annual budget. See Liq. Ex. 10, Answer 14; Liq. Ex. 26, 27, 28, 29. That budget is allocated among guaranty associations through the dues, which have two parts: a per-fund fixed fee and a pro rata share allocated by the amount of premium written in the various states. Id. The dues thus do not reflect claims handling activity.

The Arizona Fund contends that it received "substantial assistance" in handling Home claims on account of its membership in the NCIGF. AF Br. 14, 29. However, the Surguine affidavit it cites provides nothing more than that conclusory assertion and lacks any supporting detail (¶ 19). The Fund also argues that, while the NCIGF does not handle claims, its "primary function" is to assist guaranty associations in handling claims and that it provides support by, e.g., coordinating, distributing information, educating association personnel, assisting in compliance with law. AF Br. 14; Steckbeck Aff. ¶¶ 3-5. With the possible exceptions of coordinating associations' actions regarding certain large claims and assigning claims among associations, however, these activities are so general that to grant them priority would render meaningless the "in handling claims" limitation established by RSA 404-B:11, II.

More fundamentally, the Arizona Fund fails to mention significant NCIGF activities that, as the Referee noted, have nothing to do with claims handling. See Order at 7 (noting "advocacy in law making; education; outreach; and public policy development"). The NCIGF serves as an advocate for guaranty association interests before Congress, other federal policymakers, state legislatures, and the NAIC. NCIGF documents in the record describe its activities in developing

model legislation, congressional education,[17] and as liaison to the NAIC (Liq. Ex. 27 at 9); in addressing state legislatures and working with the NAIC over model receivership and guaranty association laws (Liq. Ex. 25 at 2-3); and generally in communications, education, outreach and public policy development. Liq. Ex. 26 at 4-5; Liq. Ex. 29 at 3, 6. These functions serve the guaranty associations. They are not activities "in handling claims."

Where the NCIGF devotes significant efforts to advocacy of guaranty fund interests in various forums, its dues are not expenses "in handling claims." The Fund contends that if some of the dues concern claim handling then the entire dues should have Class I priority because they are "all of one piece." AF Br. 29. This effort to make a virtue out of necessity fails. The Fund bears the burden of showing the expenses fit within the class given priority by the Legislature. The NCIGF's unwillingness to attempt to specify how much of the dues may relate to the handling of claims, see Steckbeck Aff. ¶ 7, does not permit the Fund to bootstrap expenses that are not within the statutory priority into Class I. The Referee properly concluded that the Fund had not met its burden of proof and classified the NCIGF dues as Class V priority.

[17] The NCIGF has increased its budget to support its efforts to respond to federal scrutiny of guaranty funds and federal rules that might affect them. Liq. Ex. 30 at 1-2, 4-5.

Conclusion

For these reasons, the Court should sustain the Referee's decision.

Respectfully submitted,

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February 4, 2013

Certificate of Service

I hereby certify that the foregoing Liquidator's Objection to Claimant Arizona Fund's Motion to Recommit and the Liquidator's Appendix was served by mail and email on counsel for the Arizona Property and Casualty Insurance Guaranty Fund this 4th day of February, 2013, and by mail on the other persons on the attached list.

Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

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