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

U.S. DEPARTMENT OF LABOR'S REPLY BRIEF IN FURTHER SUPPORT OF ITS RIGHT TO CLASS I OR CLASS II PRIORITY

Claimant Hilda L. Solis, Secretary of the United States Department of Labor (Labor), provides this reply brief in further support of Labor's right to Class I or Class II priority for its Proof of Claim No. GOVT 700090-01 (Labor's Claim) against the Home Insurance Company in Liquidation (Home). Labor replies to the written submission filed on December 13, 2012, by New Hampshire Insurance Commissioner Roger A. Sevigny (Liquidator), as Liquidator of Home, and to the separate submission filed on January 2, 2013, by fifteen state insurance guaranty associations (Guaranty Associations)[1] who have intervened in this matter.[2]

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[1] The fifteen Guaranty Associations are: the New Hampshire Insurance Guaranty Association, Arkansas Property & Casualty Insurance Guaranty Fund, Colorado Insurance Guaranty Association, Connecticut Insurance Guaranty Association, District of Columbia Insurance Guaranty Association, Idaho Insurance Guaranty Association, Illinois Insurance Guaranty Fund, Kansas Insurance Guaranty Association, Maine Insurance Guaranty Association, Massachusetts Insurers Insolvency Fund, Montana Insurance Guaranty Association, Rhode Island Insurers' Insolvency Fund, Vermont Property and Casualty Insurance Guaranty Association, Virginia Property And Casualty Insurance Guaranty Association, and Washington Insurance Guaranty Association.

[2] According to the Court's October 11, 2012, "Order Regarding Disputed claim of United States Department of Labor," the Liquidator's December 13, 2012 filing made Labor's reply brief due fifteen days later, December 28, 2012. Due to counsel's travel plans around the Christmas and New Year's holidays, Labor moved on December 20, 2012—with the Liquidator's assent—to extend its reply deadline through January 11, 2013. At the time Labor is sending this reply brief to the Court on January 10, 2013, counsel is unaware of any ruling on Labor's assented-to motion, but complies with the January 11, 2013 deadline requested. Labor's reply to the Guaranty Associations' January 2, 2013 filing would be due January 17, 2013, but is incorporated here.

The Liquidator concedes that Home owes Labor $2.67 million in assessments for the "Special Fund" that exists for the benefit of injured workers under the Longshore and Harbor Workers' Compensation Act (the Longshore Act), 33 U.S.C. §§ 901-50, and that Labor's Claim for that amount should be allowed in full. Notice of Redetermination (Exh. C attached to Labor's November 14, 2012, Written Submission). However, the Liquidator and the Guaranty Associations insist that Labor's Claim deserves only Class III priority, a priority class that the Liquidator expects will not receive any payment from Home's estate. Their arguments are unavailing.

Home incurred a portion of its liability to Labor in 2003 and 2004, *after* this Court ordered Home's liquidation, and due to the Special Fund's ongoing payments to injured workers previously covered by Home's insurance policies. So the Special Fund assessments for 2003 and 2004 are administrative costs that must be paid as part of "dealing with the business and property of [Home]." N.H. RSA 402-C:25, IV. As such, they are entitled to Class I priority under New Hampshire's insurance insolvency priority statute. N.H. RSA 402-C:44 (Priority Statute).

Further, to the extent it does not receive Class I priority, Labor's Claim belongs in Class II, because it is "policy related" and the Special Fund is a "similar organization" to New Hampshire's insurance guaranty associations. Id. "Policy *related*" claims include more than just claims arising under insurance policies, and Labor's Claim clearly relates to Home's policies, without which Home never would have owed assessments to the Special Fund. And the Special Fund is a "similar organization" to the New Hampshire guaranty associations because it functions in part like a guaranty fund, protects injured workers from the occurrence and effects of insurer insolvencies, and regulates the financial condition of authorized insurers.

ARGUMENT

I. The 2003 and 2004 Assessments Are Class I Costs of Administration

A. The 2003 and 2004 Assessments Arose *After* the Order of Liquidation

The Liquidator and the Guaranty Associations concede that Labor billed Home for the 2003 and 2004 Special Fund assessments *after* the June 13, 2003, Order of Liquidation. Liq. Br. at 10; G.A. Br. at 7-8;[3] see Labor Exh. B at 11-12, 15-16.[4] Further, Home's payments of the 2003 and 2004 assessments were due 30 days after each bill, in August 2003 and 2004, respectively. Labor Exh. B at 11-12, 15-16. Accordingly, Home's liability for the 2003 and 2004 assessments arose after the Order of Liquidation and this portion of Labor's Claim meets the threshold post-liquidation timing requirement for administrative cost claims. In re Liquidation of the Home Ins. Co., 158 N.H. 396, 398 (2009) (Home II); see In re Liquidation of the Home Ins. Co., 154 N.H. 472, 484 (2006) (Home I).

Still, the Liquidator contends that all of Home's obligations to pay Special Fund assessments accrued before the liquidation and cannot constitute administrative costs. Liq. Br. at 12-13. While acknowledging, as he must, that Home's obligation to pay the 2003 and 2004 assessments became due after the Order of Liquidation, the Liquidator avers that these post-liquidation obligations "flowed from Home's pre-liquidation issuance of [insurance policies]." Id. at 13. But as Labor previously explained, see Labor Br. at 11, Home's continuing, post-liquidation obligations to pay Special Fund assessments are not based on Home's historical, pre-

[3] "Liq. Br." refers to the Liquidator's Brief filed December 13, 2012. "G.A. Br." refers to the Guaranty Associations' Brief filed January 2, 2013.

[4] References to "Labor Exh. __" refer to the exhibits attached to Labor's Written Submission filed November 14, 2012.

liquidation issuance of insurance policies, but rather on the Special Fund's *ongoing* payments to injured workers formerly covered by Home's policies.[5] 33 U.S.C. § 944(c)(2); Labor Exh. B. at 11-12, 15-16 (Home's share of assessments calculated entirely based on Secretary of Labor's estimate of Special Fund expenses, *i.e.*, payments, for 2003 and 2004, and percentage of Special Fund's 2002 and 2003 payments attributable to injured workers formerly covered by Home's policies).

Home owes the 2003 and 2004 assessments because the Special Fund continues to make payments to workers who were injured while they were covered by Home's policies. The fact that Home's 2003 and 2004 assessments are *calculated*, in part, based on payments the Special Fund made before the liquidation order, does not mean the 2003 and 2004 assessments *arise* from those pre-liquidation payments nor that the assessments serve to reimburse those payments. They do not. Labor collects the assessments to support the Special Fund's ongoing, prospective payments to injured workers. 33 U.S.C. § 944(c)(2).

The Liquidator fails to distinguish North Carolina v. United States, No. 97-2108, 1998 WL 178374 (4th Cir. Apr. 16, 1998), which held that an insolvent insurer's federal income taxes that accrued after the order of liquidation were administrative costs. Id. at *4. Critically, the income being taxed in North Carolina was attributable to premium payments the insurer received *before* the liquidation. Id. Under federal tax laws, the insurer was able to realize taxable income from the pre-liquidation premium payments over the life of its policies, so its post-liquidation income was directly tied to its pre-liquidation receipt of the premiums. Id. Despite the taxable income's direct link to the pre-liquidation premium payments, the taxes that became due in post-liquidation years also *accrued* after the liquidation. Id.

[5] "Labor Br." refers to Labor's Written Submission filed on November 14, 2012.

The New Hampshire Supreme Court reached a similar conclusion in this very liquidation. Home I, 154 N.H. at 484. Home I addressed claims by a group of creditors who had Class V priority claims under reinsurance agreements with Home. Id. at 477. Given that the Liquidator did not expect Home's assets to be sufficient to make any distributions to creditors below Class II, these Class V creditors had little incentive to file proofs of claim. Id. at 487. To induce this group of Class V creditors to file proofs of claim—whereby Home's estate could collect reinsurance payments from its solvent reinsurer—the Liquidator agreed to pay them half of the net reinsurance proceeds, some $78 million. Id. at 477. The Court approved the Liquidator's agreement and held that the reinsurance payments to these Class V creditors were actually Class I costs of administration because the Liquidator made them pursuant to the post-liquidation agreement. Id. at 485 ("While the [Class V creditors'] claims arose pre-liquidation, their right to payment for filing these claims in the liquidation proceeding will arise post-liquidation.").

North Carolina and Home I both establish that a claim meets the administrative cost post-liquidation timing requirement when the claimant's right to receive payment arises after the liquidation order. North Carolina, 1998 WL 178374 at *4; Home I, 154 N.H. at 485. Even when the post-liquidation right to payment is inextricably linked to pre-liquidation activities, like the receipt of premium payments in North Carolina and the accrual of the reinsurance claims in Home I, the post-liquidation right to payment still qualifies for Class I priority as a cost of administration. Id.

This principle compels the conclusion that Labor's Claim for 2003 and 2004 Special Fund assessments qualifies for Class I priority. By statute, Labor's right to receive Home's 2003 and 2004 assessments arose in those years, 2003 and 2004. 33 U.S.C. § 944(c)(2) (Secretary determines and collects assessments each calendar year). As such, Labor's right to receive the

2004 assessments unquestionably arose after the June 13, 2003, Order of Liquidation. And the record establishes that Labor did not determine and bill Home for the 2003 assessments until July 2003, also after the Order of Liquidation. Labor Exh. B at 11-12. Given that Home's 2003 assessment payment was due 30 days after the July 2003 bill, it is clear that Labor's right to receive the 2003 payment arose after the Order of Liquidation and qualifies as a post-liquidation cost of administration. North Carolina, 1998 WL 178374 at *4; Home I, 154 N.H. at 485.

B. The 2003 and 2004 Assessments Are Administrative Costs the Liquidator Must Pay as Part of "Dealing with the Business and Property of [Home]"

The Liquidator and the Guaranty Associations also object that the 2003 and 2004 Special Fund assessments cannot receive Class I priority because they are not costs of administering Home's estate. Liq. Br. at 10-11; G.A. Br. at 7-9. But this objection is grounded in the same error that undermines the Liquidator's timing argument. See above, pp. 3-5. Namely, the Liquidator and Guaranty Associations rely on the mistaken premise that Home's obligation to pay the 2003 and 2004 assessments "arise[s]" or "derive[s]" from Home's pre-liquidation issuance of insurance policies, not from any post-liquidation activity during the administration of the estate. Liq. Br. at 11; G.A. Br. at 8. As discussed above, however, Home must pay the 2003 and 2004 assessments, not because it issued insurance policies before its liquidation, but because the Special Fund continues—post-liquidation—to make payments to injured workers who were covered under Home's policies. See above, I.A. at 3-4; 33 U.S.C. § 944(c)(2).

Administration of Home's estate broadly includes "various actions such as '[d]efray[ing] all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business and property of the insurer.'" Home II, 158 N.H. 398-99 (quoting N.H. RSA 402-C:25, IV) (alterations in original). Part of the Liquidator's duty of

"dealing with the business and property of the insurer," is to pay debts and legal obligations that arise and become due after the liquidation order. N.H. RSA 402-C:25, IV; North Carolina, 1998 WL 178374 at *3-4.

North Carolina involved an almost identically-worded North Carolina insurance statute that empowered the liquidator "to defray from the funds or assets of the insurer all expenses of taking possession of, conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and property of the insurer." Id.; N.C. GEN. STAT. § 58-30-120(a)(4). The Fourth Circuit held that federal taxes that accrued post-liquidation were, under the same statutory language that applies here, administrative costs that must be paid as part of "dealing with the business and property of the" insolvent insurer. North Carolina, 1998 WL 178374 at *3. As here, the liquidator objected that payment of the post-liquidation taxes was neither "necessary nor beneficial to the estate" and so could not constitute a cost of administration. Id. at *4. The court rejected that view as "too narrow," explaining that "paying [post-liquidation] legal obligations is necessary and beneficial in the sense that it allows the receiver or liquidator to conduct the ongoing business of selling assets and distributing claims in an orderly manner." Id.

The Guaranty Associations attempt to distinguish North Carolina by wrongly asserting that the tax liability at issue there resulted not from the insolvent insurer's business but rather from the liquidator's activities of selling assets and distributing proceeds. G.A. Br. at 8-9. But in fact, the tax liability derived directly from the insolvent insurer's business; the taxable income resulted from premium payments the insurer received before the liquidation. North Carolina, 1998 WL 178374 at *4.

As with the taxes in North Carolina, the 2003 and 2004 Special Fund assessments are undisputedly "legal obligations" that Home owes to Labor,[6] and Labor has established that these obligations accrued *after* the June 13, 2003, Order of Liquidation. See above at 2-5. If Labor's Claim for the 2003 and 2004 assessments is valid, as the Liquidator admitted in his Notice of Redetermination, then the Claim is necessarily entitled to Class I priority as a cost of administration. By law, the "rights and liabilities" of Home and its creditors were "fixed" as of May 8, 2003, the date on which the New Hampshire Insurance Commissioned petitioned the Court for Home's liquidation. N.H. RSA 402-C:21, II. Since Labor's right to receive the 2003 and 2004 assessments had not accrued by that date, Labor's Claim for these post-liquidation assessments was not among the rights and liabilities so fixed. Id. Accordingly, Labor's admittedly valid claim for post-liquidation assessments must constitute Class I administration costs incurred during the liquidation, and cannot be classified among the various categories of creditor claims (Classes II-X) which were "fixed" as of May 8, 2003. Id.

Finally, the Liquidator's and Guaranty Associations' treatment of Home II, and the Liquidator's reliance on various bankruptcy cases are not persuasive. Both the Liquidator and Guaranty Associations rely heavily upon Home II to argue that payment of Labor's 2003 and 2004 assessments claim would not be in "furtherance of the liquidation." Home II, 158 N.H. 399. But Home II turned entirely on the issue of timing, and the Court held merely that "general litigation services rendered and payable prior to the liquidation do not constitute administration costs." Id. In contrast, Labor's 2003 and 2004 assessments claim arose post-liquidation and is not so disqualified from being "in furtherance of the liquidation." Home II does not speak to the

[6] Labor Exh. C at 1 (Notice of Redetermination allowing Labor's Claim in full, including the 2003 and 2004 assessment amounts).

type of claim at issue here. Likewise, the bankruptcy cases cited by the Liquidator, Liq. Br. at 12-13, are inapposite because the New Hampshire Priority Statute's definition of administrative costs "encompasses a much broader category of items and transactions than is found in the bankruptcy code." Home I, 154 N.H. at 484; N.H. RSA 402-C:44, I.

II. Labor's Claim for 2000-2002 Special Fund Assessments Belongs in Class II Because It Is "Policy Related" and the Special Fund Is a "Similar Organization in Another State"

The remainder of Labor's Claim, which seeks to collect Special Fund assessments Home owes for years 2000-2002, belongs in priority Class II because it is "policy related" and the Special Fund is a "similar organization in another state" under the Priority Statute. N.H. RSA 402-C:44, II.[7] The Liquidator and Guaranty Associations raise various objections, which Labor refutes below.

A. Labor's Claim for Special Fund Assessments Is "Policy Related"

The Liquidator and Guaranty Associations first contend that Labor's Claim is not "Policy Related" and therefore does not qualify for Class II priority. Liq. Br. at 14-17; G.A. Br. at 10-13. They derive this "policy related" requirement from the heading "Policy Related Claims" that precedes the Priority Statute's description of Class II claims. See N.H. RSA 402-C:44, II. In relevant part, the Priority Statute defines Class II claims as follows:

> All claims by policyholders, including claims for unearned premiums in excess of $50, beneficiaries, and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company, and liability claims against insureds which claims are within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims of the New Hampshire Insurance Guaranty Association,

[7] If the Court finds that Labor's Claim for Home's 2003 and 2004 assessments is not entitled to Class I priority as an administrative cost, then this argument for Class II priority also applies to the 2003 and 2004 assessments.

> the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state.

N.H. RSA 402-C:44, II. The statute thus describes three categories of Class II claims: (1) claims by "policyholders, . . . beneficiaries, and insureds;" (2) "liability claims against insureds;" and (3) "claims of the New Hampshire Insurance Insolvency Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and *any similar organization in another state*." Id. (emphasis added).

The first two categories are expressly limited to claims that are "within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company." Id. Significantly however, the third category—the one that includes Labor's Claim for Special Fund assessments—is not limited to claims covered by Home's insurance policies. Id. The Liquidator and Guaranty Associations urge the Court to ignore this distinction and to imply a limitation not found in the Priority Statute. Liq. Br. at 14-15; G.A. Br. at 12-13.

The Liquidator cites the venerable principle that "no statutory language should be treated as surplusage." Liq. Br. at 15 (citing Gordonville Corp. N.V. v. LR1-A L.P., 151 N.H. 371, 375 (2004). But his preferred interpretation of the Priority Statute would violate that very canon of construction. According the to the Liquidator, the statutory heading "Policy Related Claims" confines Class II claims to those that arise "under an insurance policy issued by the insurer." Liq. Br. at 15. Thus, the argument goes, it does not matter that the Priority Statute does not expressly limit claims of the New Hampshire guaranty associations and similar organizations in other states to those that are "within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company." See N.H. RSA 402-C:44, II. The limitation is implied from the statutory heading, argues the Liquidator. Liq. Br. at 15-16.

But the argument proves too much as it renders the express limitation ("within the coverage . . .") that applies to the first two categories of Class II claims mere surplusage. N.H. RSA 402-C:44, II; Gordonville, 151 N.H. at 375. The first two categories in Class II also come under the heading "Policy Related Claims," so if that heading really did the work the Liquidator claims, the express limitations would be unnecessary. The New Hampshire legislature clearly thought otherwise.

Likewise, the Guaranty Associations' invocation of the doctrine of *ejusdem generis* ("of the same genus") is inapplicable and unpersuasive. G.A. Br. at 13. The doctrine limits the meaning of general terms that follow a list of more specific terms; the general terms are understood as including only things of the same type or class as those to which the specific terms belong. See BLACK'S LAW DICTIONARY 218 (pocket ed. 1996). But the Priority Statute's description of claims of the New Hampshire guaranty associations and similar organizations in other states is not a "general term" that follows more specific terms. As the Liquidator himself admits, the claims of guaranty associations and similar organizations constitute one of three distinct categories of claims that qualify for Class II status. Liq. Br. at 14; N.H. RSA 402-C:44, II. This category stands on its own and is not merely "subjoined" to the two preceding categories of Class I claims. See Merrill v. Great Bay Disposal Svc., Inc., 125 N.H. 540, 543 (1984) (*ejusdem generis* commonly applies "where general words are subjoined to specific words").

The Court should give meaning to all the words of the statute and hold that the claims of the New Hampshire guaranty associations and similar organizations in other states are not strictly limited to those that arise under Home's insurance policies. See Gordonville, 151 N.H. at 375. This interpretation also gives force to the heading "Policy *Related* Claims." N.H. RSA 402-C:44, II (emphasis added). If the legislature wanted Class II to include only claims under

policies, surely the heading would more accurately read "Policy Claims" or "Claims Under Policies." By labeling Class II as "Policy Related Claims," the legislature indicated its intention that Class II would embrace at least some claims connected or related to, but not arising under, Home's insurance policies. N.H. RSA 402-C:44, II.

The Guaranty Associations protest that Class II cannot be interpreted to encompass all of the New Hampshire guaranty associations' claims because some qualify as Class I costs of administration. G.A. Br. at 12. True enough, but this does nothing to prove that any of the New Hampshire guaranty associations' claims—or those of similar organizations in other states—fall *below* Class II priority. Analogously, the Liquidator concedes that the Priority Statute's Class III designation for "Claims of the Federal Government" applies only to federal government claims that do not otherwise qualify for Class I or II priority. Liq. Br. at 8; N.H. RSA 402-C:44, III. Under the plain meaning of the statutory language, all claims of the New Hampshire guaranty associations and of similar organizations in other states—at least to the extent they are "policy *related*"—qualify for no less than Class II priority. N.H. RSA 402-C:44, II.

Labor's Claim for Special Fund assessments is clearly "related" to Home's insurance policies. As discussed at length above, pp. 3-6, Home's Special Fund assessments are calculated using a statutory formula that considers the amount of the Special Fund's payments to injured workers that are "attributable" to Home. 33 U.S.C. § 944(c)(2)(B); Labor Exh. B at 3-8, 11-12, 15-16 (noting amounts of Home's "8(f) Participation"). Special Fund payments are "attributable to Home when they are made to injured workers who were covered by Home's insurance policies when the Special Fund assumed responsibility for paying the workers. See 33 U.S.C. § 908(f)(2)(A); Labor Exh. B at 3-8, 11-12, 15-16. The link between Home's insurance policies and its obligation to pay Special Fund assessments is unmistakable. If Home had not issued

policies under the Longshore Act, the Special Fund would not have assumed responsibility under 33 U.S.C. § 908(f) for making payments to injured workers covered by Home's policies. Without any section 908(f) payments "attributable" to Home, Home would not owe any assessments to the Special Fund. 33 U.S.C. § 944(c)(2). The relationship is clear and Labor's effort to collect Home's Special Fund assessments is a "Policy Related Claim" that belongs in Class II.

B. The Special Fund Is a "Similar Organization in Another State"

In addition to being "policy related," Labor's Claim for Special Fund assessments qualifies for Class II priority because the Special Fund is a "similar organization in another state" under the Priority Statute. N.H. RSA 402-C:44, II. To so qualify, the Special Fund must be "similar" to the New Hampshire guaranty associations and must exist in a state outside New Hampshire. Id. Labor explained in its opening brief that the Special Fund is similar because it functions in part like a guaranty fund, insulates insurers and their insureds from the incidence and effects of insolvencies, and regulates insurers' financial conditions with goal of preventing insurer insolvencies. The Liquidator and Guaranty Associations respond that "similar organizations" only include the various state insurance guaranty associations, so the Special Fund does not qualify. Their view rewrites the Priority Statute and should be rejected.

Claims of the New Hampshire guaranty associations and "any similar organization in another state" are entitled to Class II priority. N.H. RSA 402-C:44, II. The Liquidator and Guaranty Associations contend that the Special Fund is not "similar" because its central purpose is making compensation payments to workers who suffer certain work-related injuries, unlike the New Hampshire guaranty associations' role in paying claims under the policies of insolvent insurers. Liq. Br. at 18-21; G.A. Br. at 13-18. But this proves no more than the uncontested fact

that the Special Fund is not a state guaranty association. The argument would gain traction if the Priority Statute limited Class II to claims of the New Hampshire guaranty associations and "any guaranty association or guaranty fund established by another state." But, of course, the Priority Statute does not so limit Class II. Rather, it more broadly embraces the claims of "any similar organization in another state." To be similar is not to be identical, and the Special Fund meets the "similarity" threshold. See Labor Br. at 12-13.

Labor pointed to the Special Fund's insolvency-related payments under 33 U.S.C. § 918(b) as evidence of the Special Fund's similarity to the New Hampshire guaranty associations. Under that provision, the Special Fund makes payments to injured workers who cannot collect compensation their employer owes them, "by reason of the employer's insolvency or other circumstances precluding payment." 33 U.S.C. § 918(b). The Liquidator and Guaranty Associations object that these payments are not similar enough. They note that the payments are discretionary (not mandatory), made for amounts owed by the employer (not an insurer), and account for less than five percent of the Special Fund's total expenditures.

But the discretionary nature of the section 918(b) insolvency payments and the fact that the Special Fund expends significant resources on other types of assistance to injured workers do not make those payments illusory or unimportant. Over the five-year period to which Labor's Claim applies, 2000-2004, the Special Fund paid approximately $23 million to compensate injured workers who could not collect due to their employer's insolvency or other circumstances precluding payment. Labor Exh. A at 2, 6, 10 ("Section 18(b)" payments). Just like the New Hampshire guaranty associations, when the Special Fund makes these guaranty-fund-like payments, the Secretary of Labor is subrogated to the employee's rights against the

employer to the extent of the Special Fund's payment. 33 U.S.C. § 918(b); N.H. RSA 404-B:11; N.H. RSA 408-B:8, XIII.

And the fact that the Special Fund's section 918(b) payments cover amounts owed by an employer does not make them unrelated to an insurer's insolvency. As indicated by the description of the "Section 18(b)" payments in the Special Fund's financial statements, these payments are most commonly made when a *self-insured* employer is insolvent. Labor Exh. A at 2, 6, 10 ("self-insurer in default"). In these cases, the employer's insolvency is also an *insurer* insolvency, so the supposed distinction between the two is meaningless. Further, even when an employer contracts with a separate insurance carrier to cover its Longshore Act liabilities, the Longshore Act and its implementing regulations impose liability for compensation directly on the insurance carrier as well as the employer. 33 U.S.C. § 935; 20 C.F.R. § 703.115 ("Any requirement under any compensation order . . . shall be binding upon such carrier in the same manner and to the same extent as upon the employer."). Under section 935, the insurance carrier "put[s] itself in the place of the employer so far as compensation benefits under the [Longshore] Act . . . [are] concerned." Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Spence, 591 F.2d 985, 987 (4th Cir. 1979); see also Chapman v. Hoage, 296 U.S. 526, 528 (1936). As a result, it is difficult to conceive of why the Special Fund would have occasion to pay section 918(b) compensation unless *both* the employer and the employer's insurer were insolvent. See B.S. Costello, Inc. v. Meagher, 867 F.2d 722, 726 (1st Cir. 1989) ("carrier liability is imposed *in addition to* . . . employer liability"). When the Special Fund makes such a section 918(b) payment, it is paying an amount owed by the insurance carrier as well as the employer.

The Liquidator and Guaranty Associations also fall short in their attempt to discount the similar roles the New Hampshire guaranty associations and the Special Fund play in preventing

insurer insolvencies through financial regulation. See Labor Br. at 13 (describing similar, even collaborative roles); 33 U.S.C. § 932(b). Cognizant of the similarities, they downplay them as "incidental," "tangential," or "ancillary" to the New Hampshire guaranty associations' core purpose, which they describe as paying policy claims when an insurer becomes insolvent. Liq. Br. at 22, n.8; G.A. Br. at 16. But the connection between preventing insurer insolvencies by regulating insurers' financial health and paying claims when those prevention efforts fail is plain. Far from making insolvency prevention "ancillary" or "incidental," the law expressly requires the New Hampshire guaranty associations to "assist in the detection and prevention of insurer insolvencies" and take other actions to "aid in the detection and prevention of insurer insolvencies." N.H. RSA 404-B:2; N.H. RSA 408-B:12. The Secretary of Labor's similar role in reviewing the financial health of insurers who apply to provide Longshore Act coverage supports the Special Fund's status as a "similar organization" to the New Hampshire guaranty associations. 33 U.S.C. § 932(b).

The Liquidator and Guaranty Associations also rely upon inapposite cases that do not support excluding Labor's Special Fund assessments claim from Class II. They cite cases that distinguished between state insurance guaranty associations and private companies that sought the benefit of commercial reinsurance agreements with insolvent insurers. Northwest Nat'l Ins. Co. v. Kezer, 812 P.2d 688, 690-91 (Colo. Ct. App. 1990); Foremost Life Ins. Co. v. Dept. of Ins., 409 N.E. 2d 1092, 1098 (Ind. 1980). But both cases turned on the commercial, for-profit interest asserted by the private reinsurance claimant, a factor that is wholly absent from Labor's Claim for Special Fund assessments. In Kezer, the court found dispositive the absence of any "altruistic intent to protect claimants and policyholders." Kezer, 812 P.2d at 691. Because the purpose of the reinsurance agreement "was to create a mutually beneficial business

arrangement," the commercial claimant could not qualify as a "similar organization" to the Colorado guaranty association. Id. Likewise, in Foremost, the court held that a private insurance company was not a "similar organization" because "the primary purpose of the [reinsurance agreement] was to further the commercial interest of the [claimant and insolvent insurer]. Foremost, 409 N.E. 2d at 1098. The Liquidator and Guaranty Associations also cite cases such as In re Liquidation of Am. Mut. Liab. Ins. Co., 747 N.E. 2d 1215, 1227 (Mass. 2001), but these establish no more than that the various state insurance guaranty associations qualify as "similar organizations" for purposes of gaining Class II priority. These cases do not hold that Class II is limited *only* to state insurance guaranty associations.

Finally, the Special Fund unquestionably exists "in another state," as required for a "similar organization" under the Priority Statute. N.H. RSA 402-C:44, II. The Liquidator does not even contest this point. The Special Fund is "in another state" because it operates nationwide. 33 U.S.C. § 903(a). Had the New Hampshire legislature wanted to restrict Class II only to "similar organization[s]" that exist in a single state—as the Guaranty Associations insist, G.A. Br. 18-19—it would have written the Priority Statute to require a "similar organization" to be a "creature of another state," or to be "established by another state," or to "exist in no more than one other state." As it is, the statute only requires that the Special Fund be "in another state," which it clearly is by virtue of its nationwide operation. 33 U.S.C. § 903(a).

CONCLUSION

For all the foregoing reasons, as well as those stated in the Written Submission Labor filed on November 14, 2012, Labor's Claim is entitled to Class I priority as a cost of administration for Home's 2003 and 2004 assessments, totaling $1,141,044, which accrued *after* the Order of Liquidation, and which the Liquidator must pay as part of "dealing with the business and property of" Home. Further, to the extent the Court finds that any part of Labor's Claim for Home's 2000-2004 assessments does not qualify for Class I priority, Labor's Claim is entitled to Class II priority as a "policy related claim" of an out-of state organization that is "similar" to the New Hampshire guaranty associations.

Dated: January 10, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing "U.S. Department of Labor's Reply Brief in Further Support of Its Right to Class I or Class II Priority," was sent today via first class U.S. Mail to all persons on the attached Service List.

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