THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

DOCKET NUMBER 03-E-0106

In Re Liquidator Numbers: 2011-HICIL-50
2011-HICIL-51

2013 FEB 11 PM 2:03 SUPERIOR COURT

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CLAIMANT ARIZONA PROPERTY AND CASUALTY INSURANCE GUARANTY FUND'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO RECOMMIT AND OBJECTIONS TO ORDER ON THE MERITS BY REFEREE FILED ON DECEMBER 20, 2012

Claimant Arizona Property and Casualty Insurance Guaranty Fund (the "Fund") hereby submits this reply memorandum in response to the Liquidator's Objection and in further support of the Fund's Motion to Recommit and Objections to the Order on the Merits filed by the Referee on December 20, 2012 (the "Order") with respect to two proofs of claims that the Fund filed with the Home Liquidator and are referenced as Liquidation Numbers 2011-HICIL-50 ("Claim No. 50") and 2011-HICIL-51 ("Claim No. 51") (collectively, the "Claims"). The Fund seeks a total of $446,838.25 on the claims as Class I claims in accordance with RSA 402-C:44 and 404-B:11. The Liquidator's Objection has no merit for the reasons described herein and does not provide any basis for sustaining the Referee's Order.

1. The Liquidator's Objection is predicated on his arguments that he has authority to review the "reasonableness" of the *amount* of expenses which the Fund allocated to Home for 2008 and 2009, that the Fund has the burden of proving that such allocated *amounts* were "reasonable," and that the *amount* of the Fund's expenses allocated to Home in those two years were not "reasonable" because, the Liquidator alleges, (1) the *amounts* allocated were "not reflective of actual time and effort spent in handling" the Giant Claims, (2) the Fund "did not

perform 'substantial' work on the Giant Claims, and (3) the *amounts* allocated are somehow "disproportionate" when compared to the Fund's legal expense in defending the coverage action involving the Giant Claims, compared to the amounts allocated by the Fund to the Home in prior years, or compared to the percentage of the Fund's overall expenses. See Liquidator's Objection at 13-19. However, as set forth more fully in the Fund's Motion, these arguments have no statutory or other legal support and are based on fallacious comparisons and factual misstatements which are directly contradicted by the Liquidator's admissions in his Objection and by the Referee's findings in her Order.[1]

Most important, the Liquidator's contentions have no relevance in view of the Liquidator's express admissions at page 14 of his Objection both (1) that the Liquidator accepted as "reasonable" the open claims formula which the Fund and other guaranty associations used for several years prior to 2008 to allocate a portion of their expenses to the Home policies, and (2) that the Liquidator issued payments to the Fund in those prior years with respect to the Fund's allocation of expenses based on the open claims formula (which payments included categories of administrative expenses that were treated as incurred in handling claims, such as rent, employee costs, accounting expenses, office postage, telephone costs etc.).

Similarly wide of the mark are the Liquidator's contentions that RSA 404-B:11 does not permit guaranty associations to allocate all of their administrative expenses incurred in handling

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[1] For example, in arguing that the Fund "did not need to (and did not) devote significant time and effort on the [Giant] claims,", the Liquidator erroneously states at pages 20-21 of his Objection that the Fund should have treated the Giant Claims as one claim per policy year because the Fund denied coverage for all of those claims based on a "late notice" and time bar defense and because the coverage action brought against the Fund with respect to the Giant Claims was resolved on the basis of late notice/time bar. However, the Referee in her Order found that the late notice time/bar defense was never accepted by the policyholder, "was not clearly a winning argument against coverage at the time," and was not a basis for the Fund being dismissed from the coverage action because [the policyholder] dismissed the action after it collected its money from other insurers." See Order at 4.

the estates of insolvent insurers, that only "actual expenses" that "an association incurred in adjusting claims under the policies of an insolvent insurer—the expenses in 'handling claims'" are permitted, and that the statute "does not provide for allocations at all." See Objection at 14. Indeed, those contentions are directly contradicted by the Liquidator's admission on the very same page of his Objection that the use of the open claims method treats or deems all administrative expenses as being incurred in handling claims for purposes of allocations to Home. The Liquidator explained that all administrative expenses can be properly treated under the open claims method as expenses incurred in handling claims "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 line distinctions among individual expenses is generally not productive." Id.

Therefore, it is beyond dispute that the Liquidator approved as permissible under RSA 404-B:11 the open claims formula as used in prior years by the Fund and several other guaranty associations.[2] The open claims allocation formula presumes that each open claim file is counted equally for purposes of allocating expenses, all of which expenses are treated as having been incurred in handling claims, and the open claims formula does not in any manner allocate expenses to Home based on the actual time spent in handling each claim file. Significantly, at no time before rejecting the Fund's allocations for 2008 and 2009 did the Liquidator inform the Fund that the Fund could not use the open claim allocation formula and must instead use the "time spent" method. Moreover, at no time before rejecting the Fund's claims at issue here did

[2] As the Referee determined, the Fund is not the only state guaranty fund which has calculated and allocated administrative expenses to Home in this matter over the years: '[o]f the fifty-two states or other entities with Guaranty Funds, 6 use the number of open claims, 39 use the "time spent" on the file method, and 7 use a combination of the two." See Order at 5.

the Liquidator inform the Fund that the Fund would be required to keep and submit to the Liquidator time records or similar documents showing the actual amount of time spent by the Fund's staff in handling claims involving the Home policies. In addition, at no time before rejecting the Fund's claims at issue here did the Liquidator tell the Fund that the open claims formula was merely a temporary "proxy" for the "time spent" method of allocating expenses to Home. Nor did the Liquidator tell the Fund that he reserved the right at any time both to reject as "unreasonable" allocations of administrative expenses that were based on the open claims formula as well as to insist that allocations be made on the "time spent" method as supported by time records for each claim handled.

In submitting its claims to Home for 2008 and 2009, the Fund reasonably relied on the Liquidator's past practice of accepting the Fund's allocations of all expenses as Class 1 expenses based on the open claims method. His past practice is an admission that the expenses that the Fund allocated to Home based on the open claims method were in fact incurred in claims handling. The Liquidator should be estopped and not be permitted now to reject the Fund's claims for 2008 and 2009 unless he can prove, which the Liquidator cannot, that those allocations were based on sham claim files.[3] See The Cadle Company v. Bourgeois, 149 N.H.

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[3] Significantly, the Referee did not conclude, and made no such finding, that the Fund's opening of 80 claim files for the Giant Claims was a sham or improper in any manner. Moreover, based on the undisputed evidence, no reasonable person could conclude that the Fund created out of whole cloth multiple open claims under Home policies that were not attributable to any underlying lawsuits or claims for damages presented to the Fund by a Home policyholder. Indeed, the evidence is directly to the contrary—that each of the Giant Claims opened by the Fund were in fact attributable to 40 separate lawsuits which had been brought by many different plaintiffs (municipalities, water districts, school boards, and counties, among others), which had been filed in many different jurisdictions, and which involved separate alleged occurrences of MTBE pollution over the span of decades. The Fund opened 80 claim files—40 claim files under each of the two Home policies—because each lawsuit represented an unpaid claim, and could therefore constitute a covered claim under the Fund's enabling act, A.R.S. §§ 20-661 through 20-680, and because each lawsuit potentially triggered coverage under each of the Home policies. See Surguine Aff. ¶ 8. The Liquidator did not submit any evidence to show that the claim files that the Fund opened for the Giant Claims were sham files, and the Liquidator made no attempt, as he had a right to do, to take the deposition of the Fund or to request an evidentiary hearing with respect to how and why the Fund opened claim files for the Giant Claims. See Restated and Revised

(Footnote continued on next page)

410 (2003). Contrary to the Liquidator's suggestion, there is nothing in RSA 404-B:11 which authorizes the Liquidator, after accepting the Fund's open claims method as a reasonable approach for allocating expenses incurred in handling claims, to do an about-face and require the Fund to use a time spent method to recover a portion of its expenses.

2. Similarly baseless is the Liquidator's argument that the Fund has the burden of proving "actual time and effort spent in handling Home claims" in order to recover a portion of the Fund's expenses from Home. It is disingenuous for the Liquidator to make this assertion where the Liquidator did not give the Fund any advance notice that the Liquidator could reject as "unreasonable" in amount the Fund's allocations based on the open claims formula and that the Liquidator would require the Fund to create, maintain and submit to the Liquidator time records and other documentation showing the Fund's efforts in handling claims. Quite simply, by belatedly requiring time records and other proof of actual time spent on claims handling, years after the claims were resolved and closed by the Fund, the Liquidator has left the Fund in the lurch. In these circumstances, it is fitting that the Liquidator bear the burden of proving a proper basis for rejecting the Fund's claims, which the Liquidator has not done for the reasons set forth in the Fund's motion.[4] See In the Matter of First Central Ins. Co. v. Auerbach, 791 N.Y.S.2d (N.Y. App. Div. 2005)

Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation entered on January 19, 2005, §§ 11, 14c.

[4] The case cited by the Liquidator for the proposition that the Fund has the burden of proof with respect to its claims against Home—Resources Ins. Co. v. Lilley, 474 N.Y.S.2d 736 (N.Y. App. Div. 1984)—is distinguishable on its facts. That case involved a claimant who sustained personal injuries resulting from an accident between claimant's automobile and an uninsured vehicle and who sought uninsured motorist coverage under his own policy issued by an insolvent insurer. The Court ruled in that case that the claimant had the burden of establishing that the other vehicle was uninsured in order to qualify for coverage under the claimant's insolvent policy. The decision addressed whether a claimant injured in an automobile accident had the burden to show that the other vehicle was uninsured in order to establish coverage under the insolvent policy. That case did not address whether an insurance guaranty association has the burden of proof under a liquidation statute with respect to its claims seeking to allocate a portion of its expenses to an insolvent insurer, the issue presented here.

3. Even assuming *arguendo* that the Fund has the burden of showing both that the amount of the Fund's expenses allocated to Home were "reasonable" and that the Fund performed "substantial work" on the Giant Claims, the Fund has clearly met such burden and no reasonable person could conclude otherwise based on the record evidence. The Fund's evidence clearly shows that in 2008 and 2009 the Fund individually reviewed, evaluated and handled each lawsuit as a separate claim, reviewed policy information from the Liquidator including information concerning any pollution exclusion clause, and devoted effort in considering policy defenses on an individualized basis as to each of the Giant Claims. See Surguine Aff. ¶¶ 8, 10 ; Draftz Aff. ¶¶ 3, 5-8. Tellingly, the Liquidator did not submit any competent evidence, let alone the substantial evidence required by Huff v. The Integral Insurance Co., 354 S.W.3d 228, 2011 Mo.App. LEXIS 1441 (Mo. Cir. Ct. 2011), to contest the Fund's evidence.

Rather than coming forward with competent evidence, the Liquidator attempts to disparage the Fund's evidence by asserting that the Fund's affidavits are "conclusory" and do not sufficiently specify "the actual amount of time and effort devoted to the Giant claims." That contention rings hollow in view of the detailed references in the Fund's affidavits to the substantial work done by the Fund in reviewing the complaints at issue and evaluating the coverage issues implicated by the various liability theories set forth in the complaints. Indeed, the Fund's notes for each of the 80 claim files reflect that the Fund reviewed the allegations of each Giant Claim and that, in addition to noting the late notice/time bar defense, the Fund referenced with respect to each Giant Claim various other defenses to general liability coverage which could be implicated by the Claims, including but not limited to other insurance, "punitives, fraud, known hazard, etc." See Draft Aff. ¶ 6 and Exhibits 1 through 80 thereto. Although the claim notes describing the Fund's work on the files are similar in some respect for

each of the Giant Claims, the notes differ based on the varying allegations in the lawsuits concerning the plaintiffs involved, the causes of action asserted, and the type and amount of relief requested. See Draftz Aff. ¶ 7.

The Liquidator also attempts to minimize the Fund's efforts in handling the Giant Claims over the course of months by cherry-picking those claim notes and narrowly focusing on only a handful of entries. See Objection at 22-23. However, the Liquidator's argument, as is the Referee's finding of "insubstantial" time spent, is based on the false assumption that all of the work done by the Fund on each file is reflected in the claim notes, which is not supported by any evidence. The number of pages of each claim file, and the fact that no entries were made for a number of months as a matter of law is not a sufficient basis on which to conclude that such files should be disregarded for purposes of allocating expenses. Moreover, the Liquidator's argument ignores the fact that experienced claim handlers like Mr. Draftz exercise substantial and efficient expertise in reviewing pleadings and policy information and formulating coverage positions with respect to claims, and that the full value and extent of such effort is not fully reflected in the notes as they appear in the claim file.

Again, although the rules applicable to the Home liquidation permitted him to do so, the Liquidator did not submit any evidence to contest the Fund's affidavits and exhibits, he did not seek to take the deposition of the Fund, and he did not request an evidentiary hearing at which the Liquidator could question the Fund about the amount of time and effort the Fund spent on handling the Giant Claims. Because the Liquidator is trying after the fact to change the rules for the Fund charging expenses to Home from an open claim formula to a "time spent" method, the Liquidator should be required to come forward with more than just his idiosyncratic readings of

the claim notes and his reflexive boiler-plate allegation that the Fund's affidavits are "conclusory." .

4. With respect to the Fund's claim for recover of the NCIGF dues paid by the Fund, as described above and in the Fund's Motion to Recommit,, the Liquidator, and not the Fund, has the burden of proving that the Fund's claim is a Class V "residual claim" (for which the Liquidator and Referee concede there will not be a distribution from the estate), rather than a first-priority Class I claim for expenses in handling claims pursuant to RSA 404B:11. Even assuming *arguendo* that the Fund has the burden of proof on this issue, the Fund has met its burden in view of the Referee's express finding that "the Fund has demonstrated that [NCIGF's] activities assist [the Fund's] personnel in handling claims," see Order at 7, and the undisputed testimony submitted by the Fund from the NCIGF's Assistant Vice President that shows that the primary function of the NCIGF is to assist guaranty funds, including the Fund, in fulfilling their responsibilities in handling claims, and that the NCIGF dues paid by members like the Fund are all of one piece as the NCIGF has not established two categories of dues—dues relating to claims handling activities and dues relating to its other functions. See Steckbeck Aff. ¶ ¶ 3-7. Tellingly, even though it had the right to do so under the rules, the Liquidator did not take the deposition of the Fund or the NCIGF and did not request an evidentiary hearing at which it could try to contest the Fund's evidence on this issue.

The NCIGF dues paid by the Fund and allocated to Home in 2008 and 2009 should have been classified as a first priority Class I claim in accordance with RSA 402-C:44 and 404-B:11 because it is undisputed that the primary function of the NCIGF is to assist the Fund and other guaranty associations in handling claims, that the Fund has received substantial assistance in handling Home claims on account of the Fund's membership in the NCIGF and that the NCIGF

dues are all of one piece and are not differentiated between dues relating to claims activities and dues relating to other activities and, thus, cannot be segregated out by the Fund. See Fund's Motion to Recommit at 14-15.

CONCLUSION

For the foregoing reasons and those set forth in the Fund's Motion to Recommit, the Fund asserts that, in upholding the Liquidator's disallowances in Claim Nos. 50 and 51, the Referee erred as a matter of law and made factual determinations which no reasonable person could have reached in view of the record evidence or which have no legal significance. The Fund respectfully requests that this Court: (a) grant this Motion to Recommit; (b) review and reject the legal rulings and findings by the Referee set forth in the Referee's December 20, 2012 Order on the Merits; and (c) vacate the Referee's December 20, 2012 Order on the Merits. The Fund also requests that this Court grant a full hearing and oral argument on this Motion.

Respectfully submitted,

ARIZONA PROPERTY AND CASUALTY INSURANCE GUARANTY FUND

By its attorneys,

February 11, 2013

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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of February 2013, the foregoing *Claimant Arizona Property and Casualty Insurance Guaranty Fund's Reply Memorandum in Further Support of its Motion to Recommit and Objections to Order on the Merits by Referee Filed on December 20, 2012* was served by e-mail and first class mail on counsel for Roger A. Sevigny, Insurance Commissioner, as Liquidator of the Home Insurance Company, and by first class mail on the Liquidation Clerk for The Home Insurance Company in Liquidation:

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