

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of The Home Insurance Company

No. 03-E-106

ORDER

On June 26, 2003, the claimant, Hilda S. Solis, Secretary of the United States Department of Labor (“DOL”), filed a proof of claim seeking \$2,672,527 in assessments owed by The Home Insurance Company (“Home”) to the “Special Fund” of the Longshore and Harbor Workers’ Compensation Act (the “Longshore Act”), 33 U.S.C. §§ 901–50. On October 28, 2010, Liquidator Roger A. Sevigny issued a notice of redetermination allowing DOL’s claim in full but assigning it as a class III claim under RSA 402-C:44. Thereafter, the DOL sought a declaratory judgment in federal court; specifically, seeking an order declaring that the liquidator’s order was preempted under federal law. The federal action was dismissed. *See Solis v. Home Insurance Co.*, 848 F. Supp. 2d 91 (D.N.H. 2012). Before this court is the DOL’s appeal from the liquidator’s classification of DOL’s Special Fund assessments as a class III claim. The liquidator objects.¹ Because the liquidator appropriately classified the DOL claim as one entitled to class III priority, his determination is AFFIRMED.

On June 13, 2003, Home was declared insolvent and placed in liquidation by this court. RSA chapter 402-C governs the liquidation of insurers. Pursuant to RSA 402-C:21, I, RSA 402-C:25, VI and the superior court’s liquidation order, the liquidator is vested with title to and charged with administering and collecting Home’s assets for distribution to Home’s creditors.

¹ In addition, fifteen state guaranty associations intervened and filed a brief objecting to the DOL appeal.

The parties agree that Home was assessed \$2,672,527 in Special Fund assessments for 2000–2004 that it has failed to pay. As a preliminary matter, the court details the Special Fund assessments below.

The Longshore Act “creates an extensive workers’ compensation program that protects longshore and other specific classes of workers whose injuries occur upon navigable waters of the United States or adjoining facilities like piers and dry docks.” *Solis*, 848 F. Supp. 2d at 95 (citations and quotations omitted). Under the Longshore Act, employers are required to secure payment of compensation to injured employees “through a contract with an insurance carrier or ... by qualifying as a self-insurer with the DOL.” *Id.*, citing 33 U.S.C. § 932(a). Section 944 of the Longshore Act creates a “Special Fund” held in trust and administered by the DOL. 33 U.S.C. § 944(a). “The Special Fund operates primarily (1) to provide to ‘second injury’ workers compensation beyond that which employers are required to provide (33 U.S.C § 908), and (2) to provide compensation to workers in the event of employer insolvency (33 U.S.C § 918).”² *Solis*, 484 F. Supp. 2d at 96.

As indicated, payments from the Special Fund in the event of employer insolvency may be disbursed through Section 918 to an eligible employee. *See* 33 U.S.C. §§ 918(b), 944(I). “In other words, Section 918 payments from the Special Fund act as a safety net with respect to the relationship between worker and employer. However, the Special Fund does not pay compensation to claimants where an insurer becomes insolvent.” *See Solis*, 848 F. Supp. 2d at 97, citing 33 U.S.C. § 944 and *B.S. Costello v. Meagher*, 867 F.2d 722, 724 (1st Cir. 1989). Ultimately, the employer remains liable in the event the insurer is unable to pay the claim. *See B.S. Costello*, 867 F.2d at 724 (when insurer becomes insolvent, employer is liable for compensation).

² “Second injury” occurs when a partially disabled worker suffers a work-related injury that increases her disability. *See* 33 U.S.C. §908(f)(1).

The Special Fund is primarily funded through annual assessments made by the DOL Secretary against insurance carriers and self-insured employers. See 33 U.S.C. § 944(c)(2). “In determining how much to assess against each self-insured employer or insurance carrier, the Secretary applies a calculation that takes into consideration each entity’s compensation payments during the preceding calendar year and second injury payments made during the preceding calendar year that are ‘attributable to each entity.’” *Solis*, 848 F. Supp. 2d at 97, quoting *Reich v. Bath Iron Works Corp.*, 42 F.3d 74, 75–76 (1st Cir. 1994). If an insurance carrier fails to pay assessments, the Secretary is authorized to initiate a civil action to collect those unpaid assessments. See 33 U.S.C. § 944(h).

The DOL contends that the Special Fund assessments for years 2003 and 2004 are administrative costs and, thus, should be classified as claims under priority I. The DOL also asserts that the 2000–2004 assessments are policy related claims under priority II. The liquidator disagreed and designated the assessments as class III priority. The instant appeal followed.

RSA 402-C:44 governs the order of distribution of claims from a liquidated insurer’s estate and establishes classes of claimants as part of the distribution process. After a fifty-dollar per claim deductible, “every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment.” RSA 402-C:44. RSA 402-C:44 provides, in pertinent part, that “[t]he order of distribution of claims from the [insolvent] insurer’s estate shall be[:.]”

I. ADMINISTRATION COSTS. The costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney’s fees.

II. POLICY RELATED CLAIMS. 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, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state....

III. CLAIMS OF THE FEDERAL GOVERNMENT.

The court will first address the DOL's assertion that it is entitled to class I priority for the 2003 and 2004 assessments. The DOL claims class I priority for 2003 and 2004 Special Fund assessments because they were assessed after Home's liquidation on June 13, 2003 and are mandatory ongoing legal obligations, similar to income tax, that are unavoidable costs of administering the estate. The court disagrees.

"[The court is] the final arbiter of the intent of the legislature as expressed in the words of a statute. Where a statute fails to define a disputed term, [the court] assign[s] its plain and ordinary meaning. Moreover, [the court] interpret[s] the plain meaning of a statute to effectuate its underlying purpose." *Benson v. New Hampshire Guaranty Ins. Ass'n*, 151 N.H. 590, 594–95 (2004). "'Administer' (and by extension 'administration') appears within the statutory scheme only in relation to authorized activities undertaken in furtherance of the liquidation." *In re Liquidation of Home Ins. Co. (Home II)*, 158 N.H. 396, 399 (2009), quoting RSA 402–C:21. Thus, in order to constitute an administration cost, the assessments must be made in furtherance of the liquidation. *See id.* While the 2003 and 2004 assessments were assessed after Home's liquidation, they arose from Home's compensation and second injury payments of the previous calendar year and are separate and distinct from the liquidation. *Id.* at 399; *see In re Liquidation of The Home Insurance Co. (Home I)*, 154 N.H. 472 (2006) (upholding superior court's ruling that class V reinsurance claim settlements were administration costs because settlement was in furtherance of liquidation agreement). Because the Special Fund assessments do not further the liquidation or

preserve or recover assets of the estate, they cannot be assigned class I administration cost priority. *See* RSA 402-C:44, I.

The DOL's assertion that the assessments are similar to ongoing legal obligations like federal income tax is misplaced. The assessments are not a tax but instead a "user fee" and "fee attendant to regulation." *See Brock v. Washington Metro Area Transit Authority*, 796 F.2d 481, 485 (D.C. Cir. 1986). As explained above, these assessments arise out of Home's compensation and second injury payments in the previous calendar year, and they do not preserve or recover assets of the estate. Thus, the assessments cannot be classified as a cost of doing the liquidator's business in furtherance of liquidation.

The court will next address the DOL's claim of class II priority for the 2000–2004 assessments. The DOL contends the 2000-2004 Special Fund assessments are entitled to class II priority because the Special Fund is a "similar organization" to the New Hampshire Insurance Guaranty Association. As indicated above, RSA 402-C:44, II defines class II claims, in relevant part, as "claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state." The liquidator did not categorize the 2000–2004 assessments as class II claims because he determined that the Special Fund is not a "similar organization" to the New Hampshire Insurance Guaranty Association. The court agrees with the liquidator.

The New Hampshire Insurance Guaranty Association's express purpose is to protect insurance policy holders against financial loss due to an insolvent **insurer**. *See* RSA 404-B:2. As explained above, the Special Fund is a "safety net" in the event an **employer** becomes insolvent. *See Solis*, 848 F. Supp. 2d at 97. Thus, the Special Fund is not a similar organization to the New Hampshire Insurance Guaranty Association—it does not guaranty payment in the event an

insurer becomes insolvent. Instead, in the event an insurer becomes insolvent, the Special Fund requires that the employer is responsible for the unpaid payments. *See Solis*, 848 F. Supp. 2d at 97, citing *B.S. Costello*, 867 F.2d at 724.

The Special Fund assessments are a claim of the federal government. RSA 402-C:44 assigns such claims a class III priority. For the reasons, set forth above, the court concludes that the liquidator's assignment of the Special Fund assessments to class III priority was consistent with the statute. Accordingly, the liquidator's determination is AFFIRMED.

So ORDERED.

Date: October 8, 2013


LARRY M. SMUKLER
PRESIDING JUSTICE