

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

The claimant, Arizona Property and Casualty Insurance Guaranty Fund (the “fund”), moves to recommit and objects to the Order on the Merits filed by the referee on December 20, 2012. The liquidator argues that the referee was correct in her determination. Because the court is satisfied that the referee lawfully disallowed unreasonable expenses and correctly assigned the fund’s claims to the appropriate classes, the claimant’s motion to recommit is DENIED.

Legal Standard

The court reviews the referee’s legal conclusions *de novo*. See *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 546 (2008). “The standard of judicial review for findings of fact made by a judicial referee is whether a reasonable person could reach the same conclusion based upon the evidence presented.” *Bianco, P.A. v. Home Ins. Co.*, 147 N.H. 249, 253 (2001), citing *Drucker’s Case*, 133 N.H. 326, 329 (1990).

Background

Giant Industries, Inc. (“Giant Industries”) was insured under a general liability policy issued by the Home Insurance Company (“Home”) for the period of August 3, 1980 to August 3, 1981 and under another general liability policy issued by Home for the period of August 3, 1982 to August 3, 1983. In 2008, the fund and the liquidator received copies of lawsuits against Giant Industries for alleged MTBE contamination. While the liquidator opened two files, one for each

year the policy was in place, the fund opened a separate file for each claim in each year—40 for each period for a total of 80 claims against Giant Industries.

As part of its proof of claim, the fund sought \$798,464.26 in administrative expenses for the period of January 1, 2006 to September 3, 2010. The requested expenses were based on an allocation to the Home estate of a varying percentage of the fund's total overhead expenses for those years. The fund determined its percentage allocation to the Home estate by applying the ratio of the number of open claims it was handling with respect to Home to its total number of open claims. The liquidator allowed only a portion of those expenses.

With respect to the 2008 and 2009 claims, the fund sought administrative expenses totaling \$254,982.86 and \$166,868.92 respectively. The fund based its calculation on the open claims count of 82 or 83 with respect to Home. The liquidator allowed expenses of \$31,000.00 for each of those years. The liquidator based his calculation on previous years in which the Giant Industries claims were not open. The liquidator believed that the allocation of administrative expenses to Home based on 80 individual claims files was unreasonable. The referee ultimately concluded that the fund's initial allocation was unreasonable and agreed with the liquidator's assessment of expenses incurred.

The fund also submitted a claim for administrative expenses for dues paid to the National Council of Insurance Guaranty Funds ("NCIGF"). For the years 2006 through 2010, the fund sought reimbursement of dues to NCIGF totaling \$75,881.97. The liquidator accepted the fund's request for the years 2006, 2007, 2008 and 2010; however, he reduced the 2009 amount to \$4,365.00 from the fund's requested \$52,572.44. Additionally, the liquidator assigned the NCIGF dues to Class V because they were not expenses incurred to handle claims. The fund seeks recovery of the NCIGF 2009 dues not recognized by the liquidator and also asserts that the

dues should be classified as Class I rather than Class V. The referee upheld the liquidator's assessment and classification of the NCIGF dues. The instant motion to recommit followed.

Analysis

The claimant objects to the referee's order on the following grounds: (1) the referee erred as a matter of law in ruling that the liquidator may disallow the fund's claim for expenses whenever the use of the open claims formula results in an amount of allocated expenses that the liquidator deems unreasonable; and (2) the referee erred in classifying all NCIGF dues as a Class V "residual claim" rather than a first-priority Class I claim for expenses in handling the claims pursuant to RSA 402-C:44 and 404-B:11. The liquidator disagrees. The court will address the parties' arguments in turn.

Disallowance

The claimant's first argument is directed at the disallowance of the funds claim for expenses incurred as a result of the Giant Industries claims. The referee ruled that the liquidator may disallow the fund's claim for expenses whenever the use of the open claims formula results in an amount of allocated expenses that the liquidator deems unreasonable based on: (a) the liquidator's assessment that the time spent by the fund in handling the claims was not substantial; (b) the liquidator's comparisons to the lesser amount and percentages of the total expenses allocated by the fund to Home in prior years; or (c) the liquidator's comparison of such allocated operating expenses to costs incurred by the fund in defending a coverage action involving the Giant Industries claims. The claimant asserts that this ruling is incorrect as a matter of law. Specifically, the claimant argues that the statutory scheme permits it to recover costs associated with handling the Giant Industries claims no matter how unreasonable the amount. Thus, according to the claimant, the liquidator lacks the authority to modify the allocation of expenses based on the open claims formula, even if it is unreasonable. The court disagrees.

RSA 402-C *et seq.* establishes the duties and powers of the liquidator and also sets forth the purpose of the statutory scheme. The purpose of RSA 402-C is to protect “the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors....” RSA 402-C, IV. The liquidator’s duties include investigating and determining claims, subject to the court’s approval. *See* RSA 402-C:38, II, :41, :45. “The Liquidator must review each claim submitted within the requirements set forth in the statute and make a determination that comport[s] with his duties under the statute.” Ref.’s Order at 6. “The statute further provides the liquidator with the authority ‘to do such other acts not herein specifically enumerated or otherwise provided for as are necessary or expedient for accomplishment of or in aid of the purpose of liquidation.’” *In re Home Insurance*, 154 N.H. 472, 480 (2006) (discussing RSA 402-C:25). Thus, the liquidator has broad power and discretion to effectuate the statutory purpose. The liquidator acted within his prescribed powers when he reviewed the fund’s claim amount for reasonableness.

Moreover, nothing in the statute supports the claimant’s position that it should be permitted to collect unreasonable expenses. A determination that the claimant could collect allocated expenses that are unreasonable, without the liquidator retaining the ability to modify the allocated expenses, would run contrary to the very purpose of the statute and the duties of the liquidator. The court concludes that liquidator is legally permitted to assess the claims for reasonableness.

Having established that the statutory scheme permits the liquidator to assess each claim for reasonableness, the court further upholds the referee’s finding that the evidence supports the liquidator’s determination. As the facts indicate, the claimant attempted to submit a claim for over 40 percent of its total operating expense for 2008 and 2009 by using an “open claims” count

of 82 or 83. The operating expenses calculated based on these counts were disproportionate to operating expenses submitted in other years. The liquidator found that the claimant had not conducted work on a claim-by-claim basis. Of particular note, the claimant submitted numerous claim file notes for the 80 files, but the liquidator found that these files were mostly repetitive with minor differences in each. On this basis, the liquidator appropriately believed that these amounts were unreasonable and asked the claimant to revise its claims. The claimant failed to do so. The referee concluded that the facts supported the liquidator's modification of the allocation expenses in light of their initial unreasonableness. The referee's decision to uphold the liquidator's determination is reasonable and supported by the evidence.

Classification

The claimant next argues that the referee erred in classifying the dues it paid to the NCIGF as a Class V "residual claim" rather than a first-priority Class I claim. It asserts that the referee erred for two reasons. First, the claimant argues that the referee erred as a matter of law in concluding that the fund rather than the liquidator has the burden of proving that all of the NCIGF dues allocated by the fund to Home are related to claims handling and should be identified as Class I claims. The claimant contends that the referee should have ruled that the liquidator has the burden of proving that the claim for NCIGF expenses should be assigned to Class V. Second, even if the court assumes that the fund bears the burden of proof, the claimant contends that it has met its burden based on the referee's express ruling. The court disagrees.

RSA 402-C:44 establishes the order of claims distribution from the insurer's estate as follows:

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. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds or investment values, shall be treated as loss claims. That portion of any loss for which indemnification is provided by other benefits or advantages recovered or recoverable by the claimant shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment made by an employer to an employee shall be treated as a gratuity.

III. CLAIMS OF THE FEDERAL GOVERNMENT.

IV. WAGES.

(a) Debts due to employees for services performed, not to exceed \$1,000 to each employee which have been earned within one year before the filing of the petition for liquidation. Officers shall not be entitled to the benefit of this priority.

(b) Such priority shall be in lieu of any other similar priority authorized by law as to wages or compensation of employees.

V. RESIDUAL CLASSIFICATION. All other claims including claims of any state or local government, not falling within other classes under this section. Claims, including those of any non-federal governmental body, for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction or proceeding out of which the penalty or forfeiture arose with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under paragraph VIII.

Here, the liquidator determined that the claim for NCIGF dues should be assigned to Class V—the residual classification. The referee sustained the liquidator's determination.

Relying on *Matter of First Cent. Ins. Co.*, 15 A.D.3d 658, 659 (N.Y. App. Div. 2d 2005), the claimant first contends that the liquidator bears the burden of proving that the claimant's dues should be assigned to Class V. The claimant's reliance on this authority is misplaced as it in-

volved an issue where New York substantive law shifts the burden to a defending insurer. *Cf.* RSA 491:22-a (statutory shift of burden to insurer in a declaratory judgment action adjudicating liability coverage). There is no substantive shift of the burden in the instant matter. The liquidator correctly argues that claimants are required to file “proofs of claim,” and these proofs consist of specified information about the claim. RSA 402-C:37 and RSA 402-C:38, I. The statute requires the claimant to 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). Thus, the claimant bears the burden of establishing that the dues paid to the NCIGF should be treated as a Class I claim. *See Huff v. Integral Ins. Co.*, 354 S.W.2d 228, 233 (Mo. Ct. App. 2011) (claimant has the burden of proof when establishing administrative expenses).

The claimant argues in the alternative that even if it bears the burden, it has sustained it in this instance “in view of the Referee’s express finding that ‘the Fund has demonstrated that [NCIGF’s] activities assist [the Funds’s] personnel in handling claims....’” Claimant’s Reply Brief at 8. The claimant’s selective use of this quote fails to capture the liquidator’s message.

The referee stated:

While the NCIGF provides necessary assistance and support to the Fund, that support and assistance is for many functions including: advocacy in law making; education; outreach; and public policy development. These are important functions, but are not specific to claims handling or preserving and recovering assets of the Home estate. Although the Fund has demonstrated that activities assist its personnel in handling claims, the Fund has not provided any analysis of which portion of the funds are so related.

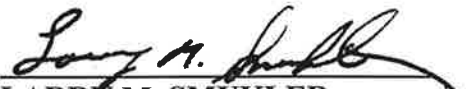
Ref.’s Order at 7–8. As is reflected in the order, the referee found that providing assistance with handling claims was one of many services provided by the NCIGF—the remaining services are not related to handling claims. As the claimant has failed to sustain its burden of showing the portion of NCIGF dues applicable to the handling of claims, the referee correctly determined that the dues was properly classified as a Class V claim.

Conclusion

Based on the foregoing, the court concludes that a reasonable person could reach the same conclusion as the referee based upon the evidence presented and, additionally, that the referee did not err in applying the law. Accordingly, the claimant's motion to recommit is DENIED.

So ORDERED.

Date: October 31, 2013


LARRY M. SMUKLER
PRESIDING JUSTICE