

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In Re Liquidator Number:	2011-HICIL-50 2011-HICIL-51
Proof of Claim Number:	GOVT 18901-11 GOVT 18901-12
Claimant Name:	Arizona Property and Casualty Insurance Guaranty Fund

LIQUIDATOR'S SUR-REPLY

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), submits this sur-reply brief to address a factual contention advanced in the Reply Memorandum ("Reply") filed by the claimant Arizona Property and Casualty Insurance Guaranty Fund ("Arizona Fund" or "Fund").

1. In the Reply, the Arizona Fund implies – without saying directly – that the Fund devoted time and effort to reviewing policy information and considering policy defenses as to each of the forty lawsuits based upon individualized analysis of the underlying allegations and facts. Reply at 6-8. It also asserts that the Liquidator has not supported his contrary position. Id. This disregards the Fund's own documents submitted by the Liquidator. As noted in the Liquidator's Section 15 Submission, the Fund immediately identified late-filing as an issue (Liq. Ex. 12) and promptly denied the claims as late-filed (Liq. Ex. 15). It thus never needed to undertake individualized coverage analysis because the denials (Liq. Ex. 15) and the later summary judgment motion (Liq. Ex. 18) were based on timeliness. The Fund did not even have the pertinent policy language to evaluate coverage at the time the coverage action was served.

Liq. 17 at 2. The Fund has offered no evidence that it ever conducted individualized coverage analysis, yet it contends this supposed effort supports its allocation.¹

2. The burden of proving its claim rests on the Arizona Fund, so in the absence of evidence that the Fund performed individualized analysis the Liquidator could let the matter rest. However, the Liquidator is concerned that the question of actual Fund effort will become a matter of disputed inference and characterization before the Referee. To avoid this, the Liquidator has again reviewed the Fund's claim files on the Giant matters. (The Fund transferred the files to the Liquidator after closing them.²) Those files consist of the "master file" on the Albertson Water District matter and the files for the other matters such as the Roslyn Water District matter (see case notes in Liq. Ex. 17) and the New Jersey American Water Company (case notes attached as Liquidator's Exhibit 34).

3. The Fund's notes in the files other than the master file do not contain any policy or individualized coverage analysis. The notes previously provided as Liquidator's Exhibit 17 are typical (see also Liq. Ex. 34). They include:

¹ Contrary to the Fund's Reply, the Surguine affidavit does not identify any individualized coverage review or, indeed, any individual 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). The affidavit never says that the adjuster actually considered policy defenses as to each matter. The Fund has provided no documentation regarding any individualized analysis.

² The Arizona Fund presumably still has access to its case notes and emails on its computer system. If counsel for the Fund wishes to review the files, however, the Liquidator will make them available at a mutually convenient time.

- An initial March 2008 note summarizing the claim as presented in the initial notice. Liq. Ex. 17 at 6-7. The summary states that the policy documentation “do[es] not have the general liability coverage terms” so “[i]t cannot be determined at this time if the Home policies would have afforded coverage for this loss.” Id. at 7. It concludes “PLAN: 1. Deny coverage for bar date.” Id.; Liq. Ex. 34 at 7.
- The Fund’s March 2008 letter denying the matter as late. Liq. Ex. 17 at 4-5; Liq. Ex. 34 at 4-5.
- An April 2008 note of receipt of the coverage action complaint. Liq. Ex. 17 at 3; Liq. Ex. 34 at 3.
- An April 2008 note summarizing the allegations of the coverage action complaint. Liq. Ex. 17 at 2-3. It states: “Policy defenses cannot be outlined as we do not have a copy of the BOP policy language for review, assuming the above [bar date and other insurance] defenses were deemed inapplicable.” Id. at 2; Liq. Ex. 34 at 2.

This shows there was no individualized analysis of coverage for the various matters before they were denied or before the coverage action complaint was received.

4. The notes and emails in the master file show that the Fund obtained policy coverage terms after the coverage action was filed, but that the Fund’s adjuster spent minimal time reviewing them. The only notes and emails that relate to policy coverage issues are in April and May, 2008. These notes and emails are attached as Liquidator’s Exhibit 35. They are:

- 4/18/08: A request from the Arizona Fund’s counsel, Ryan Talamante, to Kevin Kelly at the Home liquidation for the policy terms and conditions. Liq. Ex. 35 at 4.
- 4/25/08: An email from Mr. Kelly to Mr. Talamante forwarding the policy provisions. Liq. Ex. 35 at 4.
- 4/29/08 at 11:39 a.m.: An email from Mr. Talamante to the Fund’s claims adjuster John Draftz forwarding the policy provisions. Liq. Ex. 35 at 3.
- 4/29/08 at 3:04 p.m.: An email from Mr. Draftz to Mr. Talamante stating “I have reviewed the policy language and here are my initial impressions.” Those initial impressions are then set forth in two paragraphs. Liq. Ex. 35 at 2 and 9 (showing time).

- 5/16/08: A 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.

5. It thus appears that Mr. Draftz spent less than 3 ½ hours (between 11:39 and 3:04 on April 29, 2008) on coverage issues, and that he addressed them only at a high level for all of the matters combined. Mr. Talamante only responded briefly to that brief analysis. (The Arizona Fund did not raise coverage issues with Western Refining. Mr. Talamante’s letter dated May 29, 2008 to Western Refining’s counsel setting forth the Arizona Fund’s position expressly “forego[es]” any discussion of policy defenses. Liq. Ex. 36 at 1. The Fund’s summary judgment motion merely “reserves” the right to contest coverage. Liq. Ex. 18 at 5.)

6. The Arizona Fund has failed to show it performed any individualized analysis of the Giant claims beyond its initial review of the complaints enclosed with the notice letters. It dealt with them on the common ground of timeliness.³ In these circumstances, the Arizona Fund’s reliance on 80 “open claims” as a basis for allocating overhead expenses to the Home liquidation is disproportionate and unreasonable.

³ The Fund contends that it did not resolve the claims on this basis (Reply 7-8), but it denied the claims and moved for summary judgment in the coverage action on timeliness grounds. Liq. Ex. 15, 18. The Fund’s point apparently is that the coverage action was dismissed by agreement, not a court ruling. But that says nothing about the resources actually devoted to the claims and whether the Fund ever performed individualized analysis. The Fund’s present position that the timeliness defense did not actually apply to all of the claims (Reply 11) is equally irrelevant. It is also contrary to the position the Fund 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 (“[T]he bar applies even to those claims that Plaintiffs did not know about (and could not have known about) until sometime after June 13, 2004.”).

Conclusion

For these reasons and those set forth in the Liquidator's § 15 Submission, the Referee should sustain the Liquidator's determinations.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER
OF THE STATE OF NEW HAMPSHIRE, SOLELY AS
LIQUIDATOR OF THE HOME INSURANCE
COMPANY,

By his attorney,

MICHAEL A. DELANEY,
ATTORNEY GENERAL,

J. Christopher Marshall
NH Bar ID No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650



J. David Leslie
NH Bar ID No. 16859
Eric A. Smith
NH Bar ID No. 16952
Rackemann, Sawyer & Brewster, P.C.
160 Federal Street
Boston, MA 02110
(617) 542-2300

October 3, 2012

Certificate of Service

I hereby certify that the foregoing Liquidator's Sur-Reply including attachments was served by email on counsel for the Arizona Property and Casualty Insurance Guaranty Fund this 3d day of October, 2012.



Eric A. Smith

06/05/2009 10:33 AM

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<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
36	PCO-036-0067	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: ALLEGED MTBE CONTAMINATION - SEE X-CLAIM #PCO-036-0068

BAR DATE

Date: 06/03/2009

Type: User

User ID: igfjdd

Subject: CLOSED FILE

CLOSED FILE

All MTBE claims by Giant/Western have been dismissed as to the Fund and Receiver. All fee bills have been paid and no exposures remain. Closing file as planned.

Date: 08/09/2008

Type: User

User ID: igfldn

Subject: Adjuster & management notes will be maintained in master file

Adjuster & management notes will be maintained in master file #PCO-036-0027, unless specifically pertinent to this claim.

Date: 04/11/2008

Type: User

User ID: igfldn

Subject: Reviewed claim on mgr's diary. Handled appropriately. Thanks,
Reviewed claim on mgr's diary. Handled appropriately. Thanks, John.

Arizona Property & Casualty Insurance Guaranty Fund
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<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
36	PCO-036-0067	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: ALLEGED MTBE CONTAMINATION - SEE X-CLAIM #PCO-036-0068

BAR DATE

Date: 04/08/2008

Type: User

User ID: igfjdd

Subject: Received and reviewed Summons and Complaint.

Received and reviewed Summons and Complaint.

Western Refining f/k/a Giant Industries has filed a Complaint for Declaratory Relief, Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing. The named defendants are:

National Union (AIG)
Illinois National (AIG)
American Home (AIG)
American International Specialty (AIG)
Omaha Indemnity
Fireman's Fund
USF&G
Assicurazioni Generali
The Fund

The AIG companies are the focus of the litigation. The Breach of Contract and Breach of Implied Covenant of Good Faith are only pled against AIG. The other named defendants are solely involved in the Declaratory Relief action.

The Complaint alleges that AIG has been involved in a factually similar matter in the same US District Court that is handling the MTBE litigation, referred to as the Sunco matter, where it was found to owe a duty to defend under its CGL policies. AIG's position, and that which appears to have been upheld by the court, is that MTBE is not a pollutant, but a product as it is not harmful until an intervening cause leads to a spill or release. Thus, they have specifically excluded their excess insurers and pollution policies and are focusing on a products-liability claim. They claim the court has already ruled that joint and several does not apply and that a possible market-share allocation may apply, should liability be found against the manufacturers/distributors. The court also dismissed the punitive damage aspects of the claims stating they cannot apply on a market-share allocation claim.

They list all pending lawsuits against Giant in their factual scenario and are seeking coverage for all of the claims.

The Complaint does not name Home. It does note the insolvency and bar date. It glosses over the bar date and talks about the Fund owing them duties to the insured as the insolvent insurer would. This is incorrect and does not continue on to cite the "in accordance with the statutes" language in the Dickey case. They also claim the Fund has refused to supply them with copies of the policies. They fail to note that the policies were never requested from the Fund.

Finally, they claim AIG is defending under a "limited basis" under some policies. However, they are attempting to apply AZ's allowance of the insured to choose a policy when more than one apply to opt for coverage from AIG's National Union policy GL 541-96-88 (11/1/90-91) in order to perfect their bad faith and breach of contract claims.

Applicable defenses appear to be bar date and other insurance. Policy defenses cannot be outlined as we do not have a copy of the BOP policy language for review, assuming the above defenses were deemed inapplicable.

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<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
36	PCO-036-0067	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: ALLEGED MTBE CONTAMINATION - SEE X-CLAIM #PCO-036-0068

BAR DATE

I discussed with L. Nestor and we will utilize Ryan Talamante as defense counsel. We will also utilize the Albertson Water District claim PCO-036-0027 as the Master File and will keep all further notes and pay all bills from that file.

Date: 04/04/2008

Type: User

User ID: igfjdn

Subject: Rec'd Summons & Complaint filed against the Guaranty Fund itself

Rec'd Summons & Complaint filed against the Guaranty Fund itself by policyholder Giant Industries. It demands a defense from the Fund and from the other defendants, who are other insurers that provided coverage to the policyholder during the timeframe presented in the subject MTBE lawsuit. Complaint indicates multiple lawsuits for MTBE contamination filed by numerous plaintiffs, demands a defense from the insurers/Fund listed, and alleges bad faith specifically against other insurers AIG.

Assigned lawsuit to adjuster to defend based on bar date and the presence of other insurance, etc.

Date: 04/02/2008

Type: User

User ID: igfjdd

Subject: Reviewed file on diary. Claim presented after the bar date and

Reviewed file on diary. Claim presented after the bar date and has been denied. No response to denial. I will pend file for 90 days and close if no response.

Arizona Property & Casualty Insurance Guaranty Fund
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<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
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Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: ALLEGED MTBE CONTAMINATION - SEE X-CLAIM #PCO-036-0068

BAR DATE

Date: 03/10/2008

Type: User

User ID: igfjdd

Subject: Arizona Property and Casualty

Arizona Property and Casualty
Insurance Guaranty Fund 03/10/08

Arizona Department of Insurance

Telephone: (602) 364-3863

Facsimile: (602) 364-3872

JANET NAPOLITANO 1110 W. Washington, Suite 270 CHRISTINA URIAS

Governor Phoenix, Arizona 85007 Director of Insurance

www.id.state.az.us

March 10, 2008

W. Brent Chandler - Vice President

Western Refining
123 West Mills Avenue
STE 200
El Paso, TX 79901

RE: Home Insurance Company, in Liquidation

STYLE OF CASE: New Jersey American Water Company v. Amerada Hess Corporation et al.

INSURED: Giant Industries

CLAIMANT: New Jersey American Water Company

CLAIM NUMBER: PCO-036-0067 and PCO-036-0068

Dear Mr. Chandler:

We are in receipt of your letter dated February 26, 2008, requesting the Fund review the above captioned matter for possible coverage under Giant's liability policies with the now insolvent Home Insurance Company. Pursuant to the Home Liquidation Order, the court has established a filing deadline, or "bar date," for claims against Home of June 13, 2004, and no new claims will be accepted for coverage under the receivership estate after that date. The receivership had to receive notice of the claim prior to June 13, 2004 in order for coverage via the cancelled Home policy to apply. The first notice of the above claim was your letter of February 26, 2008. The Fund in turn forwarded a copy to the Receiver. As notice of this loss was not received prior to the bar date, it is deemed late.

The Fund must honor the bar dates established by receivership courts. In a resolution adopted on April 16, 1998, the Fund has specifically stated that "... any and all claims against the FUND, whether liquidated or unliquidated, not filed with the receiver or the FUND within four months from the date of the notice to creditors by the receiver, or on or before the claims bar date established by the receiver, whichever is later, shall be barred as to the FUND;" Notice of this claim was not provided prior to the bar date established. For that reason, we will not be able to extend coverage for this matter under the Fund.

The Fund reserves all statutory and/or policy defenses it may have in connection with this matter, whether stated

Arizona Property & Casualty Insurance Guaranty Fund
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<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
36	PCO-036-0067	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: ALLEGED MTBE CONTAMINATION - SEE X-CLAIM #PCO-036-0068

BAR DATE

or not in this letter. The Fund reserves its rights to modify its coverage position at any time upon receipt of additional information. Should you have any additional information regarding the notice of this claim that you would like for us to consider, please contact me.

Sincerely,

John Draftz
Senior Claims Adjuster
(602) 364-3869

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<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
36	PCO-036-0067	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: ALLEGED MTBE CONTAMINATION - SEE X-CLAIM #PCO-036-0068

BAR DATE

Date: 03/10/2008

Type: User

User ID: igfjdd

Subject: Reviewed new claim from the Home insolvency.

Reviewed new claim from the Home insolvency.

This is a first notice claim filed after the bar date and has been deemed late. Western Refining claims to have purchased all of Giant Industries stock as of 5/31/07, and is requesting the Fund review this matter for possible coverage as Giant was domiciled in AZ. The notice letter was received 2/27/08 and Home's bar date was 6/13/04. As such, a denial letter citing the bar date will be sent.

There are two files set up for this loss, one for each policy: PCO-036-0067 and PCO-036-0068.

This loss relates to suit in US District Court in NY, 04CV1726, filed by 16 water companies, the lead being New Jersey American Water Company. The Plaintiffs are various water distribution corporations, assigned with the preservation and distribution of groundwater to residents in NJ. The Plaintiffs filed suit against numerous defendants, all dealing with the extraction, exploration, refining, design, manufacture, distribution or marketing of petroleum, specifically the creation and utilization of Methyl Tertiary Butyl Ether (MTBE). Included in the list of defendants are; Shell, Exxon, Chevron, Texaco, Mobil etc... as well as the insured, Giant Industries. Giant is actually named as Giant Yorktown, Inc., and is listed to be domiciled out of Scottsdale, AZ, the same corporate location as Giant Industries.

The Complaint lists causes of action to include: Public Nuisance, Private Nuisance, Strict Liability for Design Defect, Strict Liability for Failure to Warn, Negligence, Trespass, Violation of the Toxic Substances Control Act, Civil Conspiracy and Violation of the New Jersey Spill Compensation and Containment Act. They are seeking to have the defendants clean the water and install early warning MTBE detectors at the water tables. In addition, the Plaintiffs are requesting compensatory damages as well as punitive damages, to be proven at trial.

It is alleged that the defendants knowingly used MTBE, a chemical only created through the refining of petroleum, as a fuel oxygenator despite knowing its propensity to be highly water soluble and being a known carcinogen. MTBE has been found to spread further, faster and last longer than any other petroleum by-product, up to 24 times faster. It is not naturally found in gasoline and is only found as an additive. It also lasts much longer due to its resistance to natural and chemical forces.

It is further alleged that in addition to soil and groundwater contaminations from spills, either industrial or by the consumer, MTBE, when burned through an engine, evaporates and returns through rainwater, thus making containment almost impossible.

It is claimed that the defendants, as far back as 1980, created the American Petroleum Institute and were members of the Toxicology Committee created to review MTBE. Named defendants Exxon, Shell, Mobil, Arco, Tosco and Chevron were listed to have been on the API Committee. It is alleged that they shared information regarding MTBE and its propensity to contaminate groundwater. Despite said findings, the defendants continued to refute EPA studies as to the effects of MTBE and its possible hazards even though various internal memos warned of said dangers.

It is further claimed that despite the dangers of MTBE, the defendants chose to use it as an oxygenator that they already had on hand from refining rather than utilize another party for safer oxygenators such as Ethanol, while

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<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
36	PCO-036-0067	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: ALLEGED MTBE CONTAMINATION - SEE X-CLAIM #PCO-036-0068

BAR DATE

continuing to claim that its utilization created cleaner burning fuel that was more environmentally friendly. Subsequent studies refute that MTBE in any way helped keep the air cleaner.

Overall, the Complaint generally alleges that the defendants knowingly used a harmful additive to gasoline, rather than a safer alternative, to boost profits. In addition, while doing so, they went to great lengths to combat studies showing the potential hazards of MTBE while all along knowing the harm they could cause, thus deceiving the EPA and the general public.

COVERAGE: Giant Industries was insured by two Business Owner's policies with Home:

1. BOP 8816174 (8/3/80-81) and extended by endorsement through 8/3/82
2. BOP 8931246 (8/3/82-83)

Both are noted to have \$500,000 limits with a \$1,000 deductible to all claims. The copies of the policies and Dec pages that were forwarded by the Receiver include endorsement language such as Auto, Liquor, Accounts Receivable and Extended Business Liability but do not have the general liability coverage terms. It cannot be confirmed at this time if the Home policies would have afforded coverage for this loss. Areas of concern would be punitives, fraud, known hazard etc...

FUND COVERAGE: Loss was presented after the 6/13/04 bar date and is deemed late. As such, coverage will be denied.

OTHER INSURANCE: According to the schedule of insurers provided, the insured carried multiple primary and excess policies including GL, Excess Liability, Pollution Liability including certain policies for only pollution liability defense costs, Umbrella Liability and UST Pollution policies. There are very few policies that were issued by insolvent insurers such as Home and Reliance.

LIABILITY: Unknown at this time.

PENDS: Demand for coverage from Western Refining, successor to Giant Industries.

PLAN:

1. Deny coverage for bar date. Send denial letter to:

W. Brent Chandler - Vice President
Western Refining
123 West Mills Avenue
STE 200
El Paso, TX 79901

TELEPHONE (915) 534-1400

2. Diary for 30 days.

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36	PCO-036-0067	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: ALLEGED MTBE CONTAMINATION - SEE X-CLAIM #PCO-036-0068

BAR DATE

Date: 03/10/2008

Type: New Claim

User ID: igftlg

Subject: Posted from Notice to Claim

Posted from Notice to Claim

06/09/2009 3:50 PM

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<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
36	PCO-036-0027	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: Alleged MTBE Contamination - See X-claim #PCO-036-0028

BAR DATE

Date: 05/30/2008

Type: User

User ID: igfjdd

Subject: Received a copy of D/A Talamante's letter to Western/Giant's CA

Received a copy of D/A Talamante's letter to Western/Giant's CA counsel outlining the Fund's position IE bar date and lack of valid claims. They are to respond in kind within 30 days.

Date: 05/16/2008

Type: User

User ID: igfjdd

Subject: Spoke with D/A Talamante. He had a brief conversation with

Spoke with D/A Talamante. He had a brief conversation with Western/Giant's CA counsel. We are the only defendant who has filed an answer and they needed our permission to file an amended complaint. The new allegations have nothing to do with the Fund and D/A Talamante gave his consent. He has a teleconference scheduled for next Friday to discuss the merits of the case against the Fund RE bar date. We agreed it would probable be beneficial for him to send an e-mail outlining the basis for our likely MSJ and therefore have a meaningful discussion on Friday regarding what Western/Giant's believed defenses will be. He also reviewed my e-mail RE policy terms and [REDACTED] with my coverage assessment.

Date: 05/09/2008

Type: User

User ID: igfjdd

Subject: Received invoice #1 dated April 30, 2008 from D/A Talamante for

Received invoice #1 dated April 30, 2008 from D/A Talamante for services through 4/30/08 for \$6,065.33. Appears appropriate and paid same.

06/09/2009 3:50 PM

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<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
36	PCO-036-0027	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: Alleged MTBE Contamination - See X-claim #PCO-036-0028

BAR DATE

Date: 04/29/2008

Type: User

User ID: igfjdd

Subject: POLICY TERMS

POLICY TERMS

Received and responded to the following e-mail from D/A Talamante that included the policy terms:

Ryan:

I have reviewed the policy language and here are my initial impressions:

[REDACTED]

I would appreciate your thoughts after you have had an opportunity to review the policy language.

John Draftz, Senior Claims Adjuster

Arizona Insurance Guaranty Funds

1110 W. Washington Street, Suite 270

Phoenix, AZ 85007

(602) 364-3869

(602) 364-3872 (fax)

jdraftz@azinsurance.gov

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<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
36	PCO-036-0027	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: Alleged MTBE Contamination - See X-claim #PCO-036-0028

BAR DATE

From: Ryan J. Talamante [mailto:rtalamante@glovervancott.com]
Sent: Tuesday, April 29, 2008 11:39 AM
To: John Draftz
Subject: FW: Giant Industries

John – Kevin Kelly sent the attached. It appears to be the CGL terms for the applicable policies. I haven't reviewed the terms yet, but I'll let you know when I do.

Also, Kelly says that he has located BOP8931246. However, he has already sent us that policy. What we need is a copy of BOP 8828551. I'll write him back and clarify.

Ryan J. Talamante

GLOVER & VAN COTT, P.A.

2025 N. Third St., Suite 260

Phoenix, AZ 85004

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(602) 257-9180 fax

rtalamante@glovervancott.com

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Arizona Property & Casualty Insurance Guaranty Fund
Notes

06/09/2009 3:50 PM

Page 4 of 12

<u>IGA</u>	<u>Claim No</u>	<u>Policy No</u>	<u>Insured</u>	<u>LOB</u>	<u>Examiner</u>	<u>Status</u>
36	PCO-036-0027	BOP8816174	GIANT INDUSTRIES	OTHER	igfjdd	Closed

Close Dt: 06/03/2009

DOL: 08/03/1980

Claim Description: Alleged MTBE Contamination - See X-claim #PCO-036-0028

BAR DATE

From: kevin.kelly@homeinsco.com [mailto:kevin.kelly@homeinsco.com]
Sent: Friday, April 25, 2008 12:31 PM
To: Ryan J. Talamante
Subject: Fw: Giant Industries

Ryan

Attached are the policy provisions for policies BOP-8 82 85 51 and BOP-8 81 61 74. I have been informed that policy BOP8931246 has been located. I'll send that along to you on Monday. Regards, Kevin

----- Forwarded by Kevin Kelly/New York/Homeins on 04/25/2008 01:58 PM -----

"Ryan J. Talamante" <rtalamante@glovervancott.com>

04/18/2008 12:42 PM

To
<kevin.kelly@homeinsco.com>

cc

"John Draftz" <jdraftz@azinsurance.gov>

Subject

RE: Giant Industries

Kevin – I looked through the policy information you sent. From the declarations, I can tell that the policies included CGL coverage, but I did not see the actual terms of that coverage in the materials you sent me. Can you send me the terms and conditions of the CGL coverage so that I can determine whether or not the insured's claims fall with the insuring clause of that coverage and, if so, whether any exclusions might apply.

06/09/2009 3:50 PM

Page 4 of 12

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BAR DATE

Thanks for your help.

Ryan J. Talamante
GLOVER & VAN COTT, P.A.
2025 N. Third St., Suite 260
Phoenix, AZ 85004
(602) 257-9160 phone
(602) 257-9180 fax
rtalamante@gloverbancott.com

From: kevin.kelly@homeinsco.com [mailto:kevin.kelly@homeinsco.com]
Sent: Thursday, April 17, 2008 10:45 AM
To: Ryan J. Talamante
Cc: John Draftz
Subject: Fw: Giant Industries

----- Forwarded by Kevin Kelly/New York/HomeIns on 04/17/2008 12:29 PM -----

Kevin Kelly/New York/HomeIns

04/17/2008 11:53 AM

To
rtalamante@gloverbancott.com

cc

Subject
Fw: Giant Industries

06/09/2009 3:50 PM

Page 4 of 12

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BAR DATE

I believe the delivery problem, relating to the size of the documents, has been resolved.

----- Forwarded by Kevin Kelly/New York/Homelns on 04/17/2008 11:52 AM -----

Kevin Kelly/New York/Homelns

04/17/2008 08:14 AM

To
rtalamante@glovervancott.com

cc
"John Draftz" <jdraftz@azinsurance.gov>

Subject
Giant Industries

Ryan,

Attached are scanned documents relating to policies BOP8816174 (8/3/80 - 81) and BOP8931246 (8/3/82 - 83). For some reason we do not have BOP8828551, which I will request from our Records Dept. and hopefully be able to send to you. Please let me know if you should have any questions or need anything further. Regards, Kevin

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Claim Description: Alleged MTBE Contamination - See X-claim #PCO-036-0028

BAR DATE

Kevin Kelly
The Home Insurance Company in Liquidation
59 Maiden Lane
New York, NY 10038
kevin.kelly@homeinsco.com
Tel. 212-530-4106
Fax 212-299-4201

***** PLEASE NOTE *****

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John Draftz

From: John Draftz
Sent: Tuesday, April 29, 2008 3:04 PM
To: 'Ryan J. Talamante'
Subject: RE: Giant Industries

Ryan:

I have reviewed the policy language and here are my initial impressions:

1. 

2. 

I would appreciate your thoughts after you have had an opportunity to review the policy language.

*John Draftz, Senior Claims Adjuster
Arizona Insurance Guaranty Funds
1110 W. Washington Street, Suite 270
Phoenix, AZ 85007
(602) 364-3869
(602) 364-3872 (fax)
jdraftz@azinsurance.gov*

From: Ryan J. Talamante [mailto:rtalamante@glovervancott.com]
Sent: Tuesday, April 29, 2008 11:39 AM
To: John Draftz
Subject: FW: Giant Industries

John – Kevin Kelly sent the attached. It appears to be the CGL terms for the applicable policies. I haven't reviewed the terms yet, but I'll let you know when I do.

Also, Kelly says that he has located BOP8931246. However, he has already sent us that policy. What we need is a copy of BOP 8828551. I'll write him back and clarify.

*Ryan J. Talamante
GLOVER & VAN COTT, P.A.
2025 N. Third St., Suite 260
Phoenix, AZ 85004
(602) 257-9160 phone
(602) 257-9180 fax
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Thanks for your help.

Ryan J. Talamante

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Kevin Kelly/New York/HomeIns

4/29/2008

10

LAW OFFICES OF
GLOVER & VAN COTT
A PROFESSIONAL ASSOCIATION
THE BROOKSTONE
2025 NORTH THIRD STREET, SUITE 260
PHOENIX, ARIZONA 85004

MICHAEL R. GLOVER
JOYCE N. VAN COTT*
DARI S. HING
RYAN J. TALAMANTE

*ADMITTED IN ARIZONA AND CALIFORNIA

TEL (602) 257-9160
FAX (602) 257-9180
gvc.law@glovervancott.com

May 29, 2008

Philip C. Hunsucker
Resolution Law Group PC
3717 Mt. Diablo Blvd., Suite 200
Lafayette, CA 94549

Re: *Western Refining Southwest, et al. v. National Union, et al.*
Maricopa County Case No. CV 2009-007299

Dear Phil:

As a follow-up to our telephone call of May 23, 2008, I have set forth below a summary of the Guaranty Fund's statutory defenses to the claims asserted against it by your clients in the above-referenced litigation. For purposes of this letter, I will forego any discussion of the Guaranty Fund's policy defenses (i.e., those defenses based on the terms of the underlying insurance policy) and focus solely on the statutory defenses, which would form the crux of the Guaranty Fund's motion for summary judgment.

By way of background, the Arizona Property and Casualty Insurance Guaranty Fund is a creature of statute. It was created by the Arizona legislature as a separate entity within the Arizona Department of Insurance, and is governed by a board whose powers, obligations, and responsibilities are defined in Title 20 of the Arizona Revised Statutes ("A.R.S."), Sections 661 through 680. One of the main purposes of the Guaranty Fund board is to investigate claims brought against the Guaranty Fund and to "adjust, compromise, settle and pay covered claims to the extent of the fund's obligation and deny all other claims." See A.R.S. § 20-664(A)(1). A "covered claim" is defined in A.R.S. § 20-661 as an "unpaid claim . . . which arises out of and is within the coverage of an insurance policy." As stated above, I will assume for purposes of this discussion that the claims asserted by your clients against the Guaranty Fund constitute "covered claims." If, however, this case proceeds to be litigated, the Guaranty Fund reserves the right to assert all policy defenses, including, but not limited to, the application of policy exclusions that would prevent coverage under the underlying insurance contract.

There are three main statutory defenses that I would like to call your attention to. These defenses are based on the following three statutes that govern the Guaranty Fund: (1) A.R.S. § 20-667 (dealing with the timing of the existence of “covered claims”); (2) A.R.S. § 20-679 (dealing with the claims bar date); and (3) A.R.S. § 20-673 (dealing with other insurance).

1. A.R.S. § 20-667

Section 667 states that the Guaranty Fund is obligated “solely to the extent of covered claims existing during any of the following periods: (1) Before the determination of insolvency and arising within thirty days after the determination of insolvency; (2) Before the policy expiration date if less than thirty days after the determination of insolvency; (3) Before the insured replaces the policy or on request effects cancellation, if the insured does so within thirty days of the determination of insolvency.” A.R.S. § 20-667(A). In essence, 667(A) says that, not only does the claim have to be “covered claim” (as defined in Section 661), but that in order for it to be an obligation of the Guaranty Fund, the covered claim must have been in existence by no later than 30 days after the determination of insolvency.

The underlying insurer in this case, The Home Insurance Company, was declared insolvent by an Order of Liquidation, entered by the Superior Court in Merrimack County, New Hampshire on June 13, 2003. A copy of the Order of Liquidation is enclosed (see subsection (b) on page 2). Therefore, only those covered claims that were in existence as of July 13, 2003 are obligations of the Guaranty Fund.

Based on the case numbers listed in this complaint, it appears that most, if not all, of the cases brought against your clients were instituted after July 13, 2003. In fact, all but four of the cases have case numbers beginning with “04” or later, indicating that they were filed after 2003. If none of the four pre-2004 cases arose before July 13, 2003, then there are no covered claims in this case that fall within one of the time periods sets forth in A.R.S. § 20-667(A) and the Guaranty Fund would, therefore, have no obligation to pay those covered claims or any of the defense costs associated with those covered claims.¹

¹It should be noted that, if there are any covered claims that were in existence prior to July 13, 2003, any obligation of the Guaranty Fund on those claims is limited to \$99,900 pursuant to 20-667(B). Although that subsection was recently amended to increase the limit to \$299,900, that increased limit only applies to insolvencies activated after September 19, 2007 – the effective date of that amendment. A copy of the Arizona Session Laws showing the previous version of the statute and changes made to it in 2007 is enclosed.

In responding to this defense, I would appreciate it if you could provide me with the dates that the four pre-2004 cases were filed against your clients.

2. A.R.S. § 20-679

Even assuming that there are one or two cases that fall within the time frames set forth in A.R.S. § 20-667, there was no timely notice of any of those claims provided to either the Home liquidator or to the Guaranty Fund. Pursuant to A.R.S. § 20-679, the Guaranty Fund “may by resolution bar known claims, whether liquidated or unliquidated, not filed within four months from the date of notice to creditors.” In accordance with that authority, the Guaranty Fund passed the following resolution on April 16, 1998:

1. Unless otherwise provided by the resolution of the Board applicable to a specific receivership, any and all claims against the FUND, whether liquidated or unliquidated, not filed with the receiver or the FUND within four months from the date of notice to creditors by the receiver or on or before the claims bar date established by the receiver, whichever is later, shall be barred as to the FUND; and
2. Notice to creditors by the receiver shall be treated and deemed as notice by the FUND and proof of any claim filed with the receiver shall be treated and deemed as filed with the FUND.

See Resolution of the Arizona Property and Casualty Insurance Guaranty Fund Adopted April 16, 1998. A copy of this Resolution was previously provided to you.

Therefore, in order to be an obligation of the Guaranty Fund, notice of the claim must be provided to the receiver of the insolvent insurer (or directly to the Guaranty Fund) at least by the claims bar date.

In this case, the June 13, 2003 Order of Liquidation established the claims bar date as one year from the entry of that Order – or June 13, 2004. See subsection (bb) on page 8 of the Order of Liquidation. Since none of the claims listed in the complaint were noticed to the Home liquidator or the Guaranty Fund on or before June 13, 2004, they are all barred as to the Guaranty Fund under A.R.S. § 20-679. The policy behind establishing a claims bar date for guaranty funds is to allow for the efficient administration of insurance insolvencies, and its application to situations like this has been upheld by numerous courts. *See, e.g., Satellite Bowl, Inc. v. Michigan Property & Cas. Guar. Ass’n*, 419 N.W.2d 460, 462 (Mich. App. 1988) (upholding the guaranty association’s statutory obligation to only accept timely filed claims and commenting that to hold otherwise “would prolong

distribution of the insolvent company's assets to the detriment of other claimants and would adversely affect the guaranty associations"); *Bassi v. Rhode Island Insurers' Insolvency Fund*, 661 A.2d 77, 80 (R.I. 1995) ("Without a deadline for filing claims, the liquidation of an insolvent insurance company could not be effected until the statutes of limitations on all potential claims had expired.").

3. A.R.S. § 20-673.

Section 20-673 deals with the situation, like this one, where more than one insurance policy may be applicable to cover the loss. Both subsections (A) and (C) of the statute are applicable. Subsection (C) states:

Where more than one policy may be applicable, a policy issued by the insolvent insurer shall be deemed to be excess coverage. The claimant shall be required to exhaust all rights under other applicable coverage or coverages. Any recovery pursuant to this article shall be reduced by the amount of the recovery under the claimant's insurance policy.

....

In other words, anyone seeking to recover monies from the Guaranty Fund must first exhaust all other applicable insurance coverage. Not only that, but any recovery from that other insurance reduces the amount that the Guaranty Fund would otherwise have to pay. So once your clients recover \$99,900 from any other insurance, the Guaranty Fund's obligation on the covered claim is reduced to zero. *See Jangula v. Jangula*, 88 P.3d 182 (Ariz. App. 2004) (holding that recoveries from other insurance are applied to offset the \$99,900 that the Guaranty Fund may otherwise be required to pay). And once there is no longer any obligation to pay on a covered claim, the Guaranty Fund has no obligation to pay defense costs.

The complaint here not only states on its face that there are other insurance policies issued by solvent insurers that are applicable to these claims, but that those policies have yet to be exhausted. Until your clients' rights under those policies have been exhausted, there is no claim against the Guaranty Fund. Moreover, any recoveries under those policies will effectively reduce the Guaranty Fund's obligation on any covered claims (and thus its obligation for defense costs) to zero.

Philip C. Hunsucker
May 29, 2008
Page 5

As we have discussed, you have agreed to provide me with a response to the above defenses within 30 days detailing any discovery you believe is necessary to address the issues that I have raised. In the meantime, if there is any other information that I can provide you with that would facilitate your review, please let me know.

Very truly yours,

GLOVER & VAN COTT, P.A.

A handwritten signature in black ink, appearing to read "R. Talamante", written over a horizontal line.

Ryan J. Talamante

RJT/dpa
Encls.