

THE 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: GOVT18901-11
GOVT18901-12
Claimant Name: Arizona Property and Casualty
Insurance Guaranty Fund

**MEMORANDUM OF FACTS AND LAW OF CLAIMANT ARIZONA
PROPERTY AND CASUALTY INSURANCE GUARANTY FUND**

Pursuant to Section 15 of the Restated and Revised Order Establishing Procedures Regarding Claims Filed With the Home Insurance Company In Liquidation, Claimant Arizona Property and Casualty Insurance Guaranty Fund (the "Fund") submits this memorandum, together with the affidavits of Michael E. Surguine, Executive Director of the Fund, and Mark Steckbeck, Vice President, Legal Affairs of the National Conference of Insurance Guaranty Funds "NCIGF"), attached hereto as Appendix 1 and Appendix 2, respectively, in support of the Fund's position with respect to the two above-referenced disputed claims. Specifically, with respect to the Fund's Proof of Claim No. GOVT 18901-11, the Fund objects to and requests reversal of the Home Liquidator's disallowance of \$359,851.68 in administrative expenses that the Fund incurred and allocated to the Home insolvency. With respect to the Fund's Proof of Claim No. GOVT 18901-12, the Fund objects to and requests reversal of both the Liquidator's disallowance of a portion of NCIGF dues paid by the Fund and allocated to the Home Insolvency as administrative expenses in the amount of \$48,207.44, as well as the Liquidator's classification

of the NCIGF dues paid by the Fund (the total of \$75,881.97, which includes an amount allowed by the Liquidator of \$27,674.53) as a Class V “residual” claim, rather than a first-priority Class I claim for “administration expenses” pursuant to New Hampshire Revised Statutes Annotated (“RSA”) §§ 402-C:44 and 404-B:11.

The Liquidator’s decisions to disallow the Fund’s claimed administrative expenses and to classify the NCIGF dues paid by the Fund as a Class V claim are unjustified and unreasonable because they are not supported by the facts and applicable law as set forth below. Therefore, the Liquidator’s decisions should be reversed and the Fund’s claims in these proceedings should be allowed in the total amount of \$446,838.25 as Class I claims under RSA §§ 402-C:44 and 404-B:11.¹

First, the Liquidator’s disallowance of administrative expenses is based on the Liquidator’s misunderstanding of the facts and mistaken assumptions concerning the Fund’s handling of forty (40) lawsuits against Giant Industries, Inc. (the “Giant Claims”), an insured under a general liability policy issued by The Home Insurance Company (“Home”) for the period from August 3, 1980 to August 3, 1981 and another Home general liability policy for the period from August 3, 1982 to August 3, 1983 (the “Home Policies”). The Liquidator erroneously concluded that the Fund should have opened, and based its allocation of administrative expenses on, only two (2) claim files with respect to the Giant Claims, one file for each liability policy at issue. As discussed below, the Fund acted properly and reasonably in opening and working on

¹ As noted below, in a Notice of Partial Determination dated November 22, 2006 regarding the Fund’s Proof of Claim No. GOVT18901-04, the Liquidator disallowed \$11,104.60 that the Fund had claimed as administrative expenses with Class I priority and instead allowed said amount as a Class V priority claim. Those expenses were attributable to membership fees paid by the Fund to the NCIGF in and before 2006 . The Fund timely notified the Liquidator of its objection to that determination. The Fund requests that the amount of \$11,104.60 also be allowed as a Class I claim, bringing the total amount that should allowed to the Fund as a Class I claim to \$446,838.25.

eighty (80) claim files, one file for each of the Giant Claims for each of the two policies at issue, and then using those 80 claims in the formula for allocating to the Home insolvency the Fund's expenses, including NCIGF dues paid by the Fund.²

Second, the Liquidator's classification of NCIGF dues paid by the Fund as a Class V "residual" claim (for which there will not be any distribution from the Liquidator³) rather than a first priority Class I claim for administrative expenses, ignores the undisputed facts 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. Because the Fund has received substantial assistance in handling Home claims on account of the Fund's membership in the NCIGF, the Liquidator should have classified the entire amount of NCIGF dues paid by the Fund as a first priority Class I claim in accordance with RSA §§ 402-C:44 and 404-B:11.

STATEMENT OF FACTS

The facts relevant to these two disputed matters are set forth in the affidavit of Michael E. Surguine, dated July 24, 2012, with exhibits as attached hereto as Appendix 1 (hereafter "Surguine Aff.") and the affidavit of Mark Steckbeck, dated July 26, 2012 (hereinafter "Steckbeck Aff."), attached hereto as Appendix 2, and will be referenced specifically in the sections below.

² Significantly, as explained below, the Liquidator has not objected to the Fund's method of using the number of open claims as a basis for allocating administrative expenses to the Home insolvency. Instead, the Liquidator objected to the Fund's having opened a separate claim file for each of the 40 Giant Claims for each of the two Home Policies.

³ "[I]t is unlikely that there will be sufficient assets [in the Home estate] to make distributions to classes beyond Class II." In the Matter of Liquidation of Home Ins. Co., 154 N.H. 472, 477 (2006).

PROCEDURAL BACKGROUND

From inception of the insolvency of Home, the Fund has incurred and allocated to the Home in Liquidation \$798,464.26 in administrative expenses. Of that amount, \$88,139.58 is attributable to membership fees paid by the Fund to the NCIGF. See Surguine Aff. ¶ 2.

In a Partial Notice of Determination dated October 20, 2006 regarding the Fund's Proof of Claim No. GOVT18901-02, the Liquidator allowed the Fund \$163,806.95 in administrative expenses reported by the Fund from inception to December 31, 2005 in Class I. The Fund agreed to that determination. In a Notice of Partial Determination dated November 22, 2006 regarding the Fund's Proof of Claim No. GOVT18901-04, the Liquidator disallowed \$11,104.60 of certain administrative expenses submitted by the Fund as Class I priority and instead allowed said amount as a Class V priority claim. Those administrative expenses were attributable to membership fees paid by Claimant to NCIGF. The Fund timely notified the Liquidator of its objection to that determination. See Surguine Aff. ¶ 3

With respect to administrative expenses from January 1, 2006 through September 30, 2010, which is the basis for the Fund's Proof of Claim No. GOVT 18901-11 at issue in this proceeding, in its Notice of Partial Determination dated July 12, 2011, see Surguine Aff. Ex. A , the Liquidator allowed \$31,000 for each of 2008 and 2009 (after "removing" expenses for NCIGF dues and investment management fees from the administration expense claim), although the Fund had claimed expenses of \$254,982.76 and \$166,868.92, respectively, in those years. The basis for such determination by the Liquidator was that the administrative expenses submitted by the Fund for 2008 and 2009 were significantly higher than the \$31,084 amount which the Fund had submitted in 2007, and that such increase was attributable to an increase in

the number of open claims reported by the Fund in 2008 and 2009. The Liquidator disagreed with the number of the Fund's open claims for 2008 and 2009. Separate and apart from the reductions for NCIGF dues and investment management fees, this resulted in a disallowance of \$223,982.76 for 2008 and \$135,866.92 for 2009 – a total disallowance of \$359,851.68. The Liquidator's stated reason for this disallowance, and a work sheet summarizing the administrative expenses for the years 2006 through 2010, is set forth in correspondence from James Hamilton dated May 12, 2011 and December 24, 2009. See Surguine Aff. ¶ 4 and Exhibits B and C. The Fund timely notified the Liquidator of its objection to that determination.

With respect to administrative expenses attributable to membership fees paid by the Fund to NCIGF in the amount of \$75,881.97 for the period from 2006 to 2010, which were the basis for for the Fund's Proof of Claim No. GOVT 18901-12 at issue in this proceeding, in its Notice of Partial Determination, dated July 12, 2011 see Surguine Aff. Ex. N., the Liquidator allowed \$27,674.53. The Liquidator's stated reason for disallowing \$48,207.44 of the NCGIF dues paid was that the dues reported in the first quarter of 2009 were 10 times the amount reported in 2008. See Surguine Aff. Ex. B. The Liquidator also stated that the expense for NCGIF dues "does not appear to meet the definition of Class I administration expenses" and that the amount allowed will be as a Class V claim. Id. The Fund timely notified the Liquidator of its objection to these determinations.

ARGUMENT

I. The Liquidator Unjustifiably and Unreasonably Disallowed Administrative Expenses In the Amount of \$359,851.68 That the Fund Allocated to the Home Insolvency With Respect to the Giant Claims.

The Liquidator disallowed the Fund's administration expenses at issue based on the conclusion that the Fund's allocation of such expenses to the Home insolvency was improper

because it resulted from the Fund's opening of a separate claim file for each of the 40 Giant Claims under each of the two Home Policies, which the Liquidator asserted was not required because (according to the Liquidator) it was obvious and not open to question from the day the claims were first submitted to the Fund that the claims were barred by the Arizona time bar statute. Specifically, the Liquidator allowed only \$31,000 for each of 2008 and 2009 (after "removing" NCIGF dues and investment management fees from the administration expense claim). The basis for such determination by the Liquidator was that the administration expenses for the prior year (2007) were \$31,084. Putting aside the reductions for NCIGF dues and investment management fees, this resulted in the Liquidator disallowing \$223,982.76 for 2008 and \$135,866.92 for 2009 – a total disallowance of \$359,851.68.

The Liquidator's stated reason for this disallowance was expressed in correspondence from James Hamilton dated May 12, 2011 and December 24, 2009 as follows:

We appreciate that the Association has a statutory duty to investigate claims brought against the Fund and adjust, compromise, settle and pay covered claims to the extent of the Association's obligation and deny all other claims. In the instant matter, the Association's denied Giant's claim for coverage under two primary policies as the claims were filed after the statutory deadline for filing per applicable Arizona Guaranty Association Statutes and are, therefore, non-covered claims. Notwithstanding the evident lack of coverage as of the initial submission date, the Association established 40 basically identical claim records pertaining to the two primary policies based on potential allocated exposures. The change increased the number of open Home claims being handled by the Association from three, prior to the Giant's Claim, to 83 open claims thereafter. This approach resulted in an increase in asserted administration expenses submitted to The Home exceeding 300% over the previous submission. Given that the Association had Giant's action dismissed because of late notice, the Association clearly did not conduct work on a claim-by-claim basis. As late notice was a complete and immediately evident defense to the claim, the Association needed to establish only two claim records, i.e., one for each primary policy.

* * * * *

In contrast to The Home's handling of this matter, the Association established 80 claim records for Giant, broken into 40 claims per primary policy. Because the Association calculates its allocation of administration expenses to insolvencies based on the number of claim records it establishes, the creation of 80 basically identical claim records clearly, and disproportionately, impacts the amounts allocated to The Home. This approach resulted in an increase in administration expenses submitted to The Home of approximately 300% over its previous submission. Given that the Association had Giant's action dismissed because of late notice, the Association did not conduct work on a claim-by-claim basis. Thus, attempting to allocate on the basis that the Association was handling 80 individual claims does not reflect the underlying circumstances. Rather, as late notice was a policy level defense, the Association (consistent with The Home's approach) should have only established two claim records, i.e., one for each of primary policy.

See Surgine Aff. Exs. B and C.

The Liquidator's disallowance is unjustifiable and unreasonable because it is based on a fundamental misunderstanding of the facts and erroneous assumptions concerning the Fund's handling of the Giant Claims. First, the Liquidator's analysis incorrectly assumes that as of the date the claims were first submitted to the Fund in February 2008 it was evident and beyond dispute that the Giant Claims were time barred. This is simply not the case. Although the Fund took the position that the Giant Claims were time barred, Giant's parent company, Western Refining, Inc. ("Western"), disputed that the claims were time barred and it was not at all clear that the Giant Claims were time barred as asserted by the Fund.

The Arizona time bar statute provides as follows:

With respect to the handling of claims, the Fund may by resolution bar **known claims**, whether liquidated or unliquidated, not filed within four months from the date of notice to creditors.

See A.R.S. Section 20-679 (emphasis supplied).

In addressing the Giant Claims, the Fund took the position that the Giant Claims were time barred pursuant to the following resolution adopted by the Fund in 1998:

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

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 Surguine Aff. Ex. I (Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 5-6).

Significantly, A.R.S. § 20-679 only addresses the barring of “known claims” (see below). Further, A.R.S. § 20-679 arguably can be read as requiring “notice to creditors” that claims against the Fund will be barred if not filed within four months of such notice. In other words, it can be argued that a claimant must receive notice that his or her claim against the Fund for known claims will be barred unless filed with the Fund within four months from the date of such notice. In contrast, the Fund relied on the 1998 resolution for the proposition that the notice requirement of A.R.S. § 20-679 is satisfied by a notice to creditors by the receiver. It has not been established that a notice by the receiver satisfies A.R.S. § 20-679. It has not been established that a notice which fails to notify the recipient that the recipient’s claim against the Fund (as distinguished from the claim against the receiver) will be barred if not filed within a certain time frame, is sufficient to trigger A.R.S. § 20-679. It can be argued that A.R.S. § 20-679 requires a notice that informs the recipient that the recipient’s claim against the Fund will be barred if not timely filed. No such notice was given.

The “notice” relied on by the Fund for its position that the Giant Claims were time barred was paragraph bb of the June 13, 2003 Order of Liquidation of Home. Paragraph bb refers only

to a deadline for filing claims against the receiver. See *Surguine Aff. Ex. I* (Affidavit of Kevin L. Kelly which refers to RSA Section 402-C:26II (relating to filing with the liquidator), RSA 402-C:37I (relating to filing with the liquidator) and RSA 402-C:40II (filing by an insured “in the liquidation”)). A claimant who receives this type of notice is not informed that he or she will lose their rights against the Fund unless a claim is timely filed. Accordingly, it is arguable that there was no notice given pursuant to A.R.S. § 20-679 and that, accordingly, the Giant Claims were not time barred.

Further, A.R.S. § 20-679 only permits the barring of “known” claims. The Fund took the position that the bar date was June 13, 2004 (the Liquidator’s bar date). It appears that at least thirty-one (31) of the Giant Claims were not known claims until after June 13, 2004, and thus would not be barred even if the Fund were to prevail in its position that the bar date for claims against the Fund was June 13, 2004. See *Surguine Aff. ¶ 11 and Ex. F.*

It is undisputed that Western refused to agree with the Fund’s position that the Giant Claims were time barred. In April 2008, after the Fund had denied coverage for the Giant Claims, Western filed a declaratory judgment action against several insurers and the Fund in which Western alleged, among other things, that the Fund was obligated to provide coverage for the Giant Claims under the Home policies (the “Western Action”). See *Surguine Aff. Ex. G.* In June 2008 Western’s counsel informed the Fund of the basis for Western’s disagreement with the Fund’s position that the Giant claims were time barred and indicated that Western was prepared to stay the Western Action as to the Fund while Western pursued coverage for the Giant claims from other parties, including defendant (American International Group’s (“AIG”)). See *Surguine Aff. Ex. H.* On September 3, 2008, after informing Western of its intentions, the Fund filed a summary judgment motion in the Western Action, seeking a ruling that the Giant Claims were

time barred. See *Surguine Aff. Exs. I and J*. Western did not file response papers with respect to that motion because discussions commenced soon thereafter concerning a settlement proposal that Western had made to the Fund that was contingent on Western reaching a settlement with AIG. At that time Western informed the Fund that it planned “to oppose the Fund’s motion based on the statutory language in Section 20-679, which on its face only gives [the Fund] authority to bar ‘known claims.’” See *Surguine Aff. Ex. L*. As noted above, at least 31 of the 40 claims were not known claims until after the June 13, 2004 bar date asserted by the Fund.

Consequently, the fundamental assumption underlying the Liquidator’s disallowance of \$359,851.68 of the Fund’s administration expense claim, i.e., that this was an open and shut case that all of the Giant Claims were time barred and, thus, the Fund did not need to open and handle each of the Giant Claims individually, is erroneous and contrary to the undisputed facts. While the Fund took the position that the Giant Claims were time barred, Western disputed the Fund’s position and, had the time bar issue been litigated to a conclusion, the Fund was at risk of losing the time bar argument either as to all of the claims because of the lack of a time bar notice or partially because certain claims were unknown. The dispute concerning the time bar issue started on March 7, 2008 and continued throughout the litigation and settlement discussions through December 2008, when a settlement was concluded with Western. See *Surguine Aff.* ¶ 17. The Fund was dismissed from the Western Action in January 2009. Id.⁴

⁴ Contrary to the Liquidator’s assertion that the Fund “had Giant’s action dismissed because of late notice” (*Surguine Aff. Ex. C*), the action was dismissed by agreement because Western obtained a recovery from AIG. See *Surguine Aff.* ¶¶ 14-17.

The Fund opened and handled each of the Giant Claims as separate claims.⁵ Specifically, In February 2008 the Fund received written notices from Western of forty (40) separate lawsuits filed against Giant for which Western was demanding coverage under the Home Policies. See Surguine Aff. ¶ 7. Those 40 lawsuits were filed in a number of jurisdictions and each of the 40 suits involved separate alleged occurrences of MTBE pollution. On or about March 4, 2008, the Fund opened eighty (80) claim files, forty (40) claims 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, and because each lawsuit potentially triggered coverage under each of the Home Policies. See Surguine Aff. ¶ 8. These claims remained opened until 2009. See Surguine Aff. ¶ 17.

The Fund’s senior adjuster reviewed each of the complaints against Giant, and reviewed policy information from the Liquidator including information concerning any pollution exclusion clause. See Surguine Aff. ¶ 9. The Fund made a determination to deny the Giant Claims separately for each claim on the ground that the claims were filed after the bar date asserted by the Fund pursuant to a resolution of the Fund’s Board of Directors. Id. The Fund took the position in denying the claims that the bar date applicable to the claims was June 13, 2004 (the Liquidator’s bar date). Most of the Giant Claims were denied on March 5, 7, 10, 11, 12 and 14, 2008. See Surguine Aff. Ex. E. With respect to the Giant Claims, the Fund informed Western in those letters that because “notice of this loss was not received prior to the bar date [of June 13, 2004 as established by the Home Liquidation Order], it is deemed late” and the Fund “will not be able to extend coverage....” The Fund also informed Western that “[t]he Fund reserves all

⁵ As made clear in the Surguine Affidavit, there is no factual basis for the Liquidator’s assertion (Surguine Aff. Ex. B) that the Fund “did not conduct work on a claim-by-claim basis.”

statutory and/or policy defenses it may have in connection with this matter, whether stated or not in this letter” and “reserves its rights to modify its coverage position at any time upon receipt of additional information.” Thus, although the Fund initially denied the Giant Claims based on the assertion that the claims were time barred, the Fund also expressly reserved the right to assert policy defenses and undertook to consider those defenses as to each of the forty lawsuits under each of the Home Policies. In fact, the Liquidator admitted in his letter to the Fund dated December 24, 2009, that “there were various potential defenses available” to the Fund with respect to the Giant Claims. See *Surguine Aff. Ex. C.*

The Fund’s opening of a claim file for each of the Giant Claims under each of the two Home Policies was appropriate because the question of coverage for each of the 40 Giant claims must be determined based on the specific facts of each claim alleged in the suits against Giant as applied to the specific provisions of each of the two policies. Issues such as trigger of coverage, application of pollution and other potential exclusions, exhaustion of other insurance, and other policy defenses require a claim by claim, policy by policy review. A separate analysis of each claim under each policy is required because the Fund has an obligation to investigate claims brought against the Fund and adjust, compromise, settle and pay covered claims to the extent of the Fund’s obligation and to deny all other claims. See A.R.S. § 20-664.

The Fund allocates administrative expenses to open insolvency cases. See *Surguine Aff.* ¶ 5. The method of allocation is based on the number of open claims. Id. An allocation percentage for each open receivership estate is determined by dividing the number of open claims for a specific insolvency by the total population of open claims being handled by the Fund. Id. The total of the administrative expenses incurred by the Fund is then multiplied by the allocation percentage for each estate, and the product is reported to the Liquidator as the Fund’s

administrative expense for the applicable period. Id. The allocation percentages are recalculated each quarter.

By “open claim” the Fund means a claim that was opened because there was a demand for coverage under a policy issued by an insurer for which the Fund has been activated, and the claim has not yet been fully resolved. See Suguine Aff. ¶ 6. Generally, as mentioned above, one claim is opened for each incident or occurrence with regard to which a demand for coverage is made. Id. If the demand for coverage arising out of an incident or occurrence could trigger coverage under more than one policy issued by the insolvent insurer, then a separate claim would be opened as to each policy, as each policy requires a separate evaluation of coverage, declarations, conditions and endorsements. Id. The Fund is obligated to respond to the party seeking coverage, to investigate the matter and to make a determination as to whether Fund coverage applies to the claim. Id.

In this matter the Liquidator concluded that the Fund’s opening of a separate claim file for each of the Giant Claims under each of the Home Policies was not required because it was obvious and not disputed and not open to question from the day the claims were first submitted to the Fund that the claims were time barred. Based on the undisputed facts and statutory requirements set forth above, this was simply not the case. Accordingly, the Liquidator’s disallowance of \$359,851.68 in administrative expenses allocated to the Home insolvency by the Fund was unjustified and unreasonable and should be reversed.

II. The Liquidator Unjustifiably and Unreasonably Disallowed Administrative Expenses in the Amount of \$48,207.44 for NCIGF Dues That the Fund Allocated to the Liquidator With Respect to the Giant Claims.

The Fund contends that the methodology it used in allocating to the Home insolvency as administrative expenses the NCIGF dues that the Fund paid in 2009 was proper and that the Liquidator was not justified and acted unreasonably under the circumstances in disallowing \$48,207.44 of the Fund's claim for \$52,572.44 with respect to those dues. The Liquidator's stated reason for such disallowance was that the NCIGF dues reported and allocated by the Fund to the Liquidator in the first quarter of 2009 were 10 times the amount reported in 2008. See *Surguine Aff. Ex. B*. There is a simple and legitimate explanation for the increase in the amount reported in 2008. The Fund has reported its total yearly NCIGF dues payments in the first quarter of each year because the NCIGF typically bills for dues in late December and the Fund pays such amounts in the following January. See *Surguine Aff.* ¶ 19. The NCIGF dues paid by the Fund in January 2008 on account of the NCIGF billing in December 2007 did not reflect an allocation based on the Giant Claims because those files had not yet been opened as of January 2008. Id. Those files were opened beginning in March 2008 and remained open until 2009. Id.

As discussed above in Section I, the Fund's allocation to the Home insolvency of NCIGF dues (like other administration expenses) is based on the number of the Fund's open files with respect to the Home Policies. By the time the NCIGF billed the Fund in December 2008, 80 files were open on account of the Giant Claims, and the increase in the amount that the Fund allocated to the Home insolvency for those dues was attributable to those 80 open files. For the reasons set forth above in Section I, such allocation of NCIGF dues was proper and in accordance with the methodology accepted by the Liquidator. The Liquidator's disallowance of \$48,207.44 is

unjustifiable and unreasonable in view of the undisputed facts and applicable law and accordingly should be reversed.

III. The Liquidator's Classification of NCIGF Dues Paid by the Fund as a Residual Class V Claim, Instead of a First-Priority Class I Claim for Administrative Expenses, Is Unreasonable and Contrary to the Facts and Applicable Law.

The Liquidator's classification of NCIGF dues paid by the Fund as a Class V "residual" claim (for which there will not be any distribution from the Liquidator) rather than a first-priority Class I claim for administrative expenses is unreasonable and contrary to the undisputed facts and applicable law. All of the NCIGF dues paid by the Fund and allocated to the Home insolvency constitute an expense in handling claims under applicable law and accordingly should have been classified as a first-priority claim. RSA 404-B:11 provides in pertinent part that "[t]he expenses of the [New Hampshire] association or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses." It is undisputed that the Fund is a "similar organization" as that term is used in RSA 404-B:11. Further, by use of the term "shall," the legislature intended RSA 404-B:11 to be mandatory and, thus, the Liquidator does not have discretion to give the Fund's expenses a different priority than the Liquidator's expenses. See In the Matter of the Liquidation of Home Ins. Co., 157 N.H. 543, 554 (2008) (citing Theresa S. v. Sup't of YDC, 126 N.H. 53, 55 (1985)).

With respect to the priority classifications for distributions from the insolvent insurer's estate, RSA 402-C:44 provides in pertinent part as follows:

Order of Distribution. – The order of distribution of claims from the insurer's estate shall be as stated in this section... Subject to the \$50 deductible provision, 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. No subclasses shall be established within any class.

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.

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.

* * * * *

The Fund has received substantial assistance in handling Home claims on account of the Fund's membership in the NCIGF. See Surguine Aff. ¶ 19. The primary function of the NCIGF is to assist guaranty funds like the Fund in fulfilling their statutory responsibilities to handle claims. See Steckbeck Aff. ¶ 3. While the NCIGF does not itself handle particular claims, the

NCIGF plays an important role in assisting guaranty funds in handling claims. Id. The NCIGF assists guaranty funds in coordinating the handling of claims through insured coordinating committees which work directly with liquidators of insolvent insurers, such as the Home, to accomplish the efficient handling of claims by the guaranty funds. Id.

The NCIGF also plays an important role in distributing information from liquidators that is necessary for guaranty funds to handle claims, educating guaranty fund personnel in issues involved in handling claims, working with guaranty funds to resolve issues relating to the handling of claims, assisting in compliance with federal law requirements such as Medicare secondary reporting relating to the handling of claims, assisting in litigation issues relating to handling claims and maintaining a legal committee which addresses claims handling issues. See Steckbeck Aff. ¶ 4. Each year the NCIGF publishes a compilation of case law interpreting guaranty association law for the exclusive use of member guaranty funds as well as an annual update to the Guaranty Fund Laws Manual that is a resource to guaranty funds with respect to claims handling issues. See Steckbeck Aff. ¶ 5.

The primary benefit to guaranty funds of membership in the NCIGF is assistance to guaranty funds in claims handling. See Steckbeck Aff. ¶ 6. The services provided by the NCIGF decrease the overall cost to the guaranty funds of handling claims under the policies of insolvent insurers and, thus, directly benefit the insolvent insurer's estate, because the cost is spread among many guaranty funds as opposed to each guaranty fund dealing separately with matters addressed by the NCIGF. Id.

The dues paid by the Fund and other guaranty funds to the NCIGF are used to pay for the NCIGF staff and facilities required to carry out these activities. See Steckbeck Aff. ¶ 7.

Significantly, the dues charged by the NCIGF are not differentiated between dues relating to claims handling activities and dues relating to other functions. Id. The NCIGF has not established two categories of dues—dues relating to claims handling activities and dues relating to other functions. The dues support the NCIGF organization as a whole and the NCIGF does not permit guaranty funds to pick and choose what services they want and thereby receive a reduction in NCIGF dues. Id. A guaranty fund either belongs to the NCIGF and pays the full NCIGF dues and obtains NCIGF benefits including assistance in handling claims as set forth herein, or it does not belong to the NCIGF. Id.

The Fund recognizes that certain activities of the NCIGF may not constitute assistance relating to the handling of claims. However, this does not mean that NCIGF dues should be classified as a Class V claim. It is clear that the primary benefit to guaranty funds of membership in the NCIGF is assistance in claims handling. The fact that NCIGF affords other types of benefits to guaranty funds is not a legitimate basis on which to conclude that the NCIGF dues are not an expense incurred in handling claims.

In these circumstances, the Liquidator's classification of NCIGF dues as a Class V claim because both claims handling and non-claims handling functions are dealt with by NCIGF is unreasonable and not supported by the facts and applicable law. The Liquidator's classification of the NCGIF dues by the Fund as a Class V claim is an unreasonably narrow interpretation of "administrative expenses" and is inconsistent with the New Hampshire courts' liberal construction of RSA §§ 402-C:44 and 404-B:11. See In the Matter of the Liquidation of Home Ins. Co., 154 N.H. 472, 483-84 (2006).

The Liquidator's classification of NCIGF dues as a Class V claim (which in this case means no distribution on account of NCIGF dues) throws out the baby with the bath water and denies the Fund its rights under RSA 404-B:11. Because the Fund has received substantial assistance in handling Home claims on account of the Fund's membership in the NCIGF, the Liquidator's classification of NCIGF dues paid by the Fund should be reversed and the entire amount of NCIGF dues should be classified as a first-priority Class I claim.

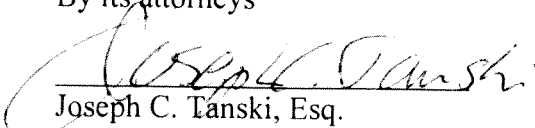
CONCLUSION

The Liquidator's decisions to disallow the Fund's claimed administrative expenses and to classify all of the NCIGF dues paid by the Fund as a Class V claim are unjustified and unreasonable because they are not supported by applicable law and are contrary to the facts as set forth in the affidavits and exhibits submitted by the Fund herewith. Therefore, the Liquidator's decisions should be reversed and the Fund's claims in these proceedings should be allowed in the total amount of \$446,838.25 as Class I claims in accordance with RSA §§ 402-C:44 and 404-B:11.

Respectfully submitted

ARIZONA PROPERTY AND CASUALTY
INSURANCE GUARANTY FUND

By its attorneys


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July 27, 2012

CERTIFICATE OF SERVICE

I hereby certify that the foregoing and all attachments hereto were served by email and first class mail on all parties in these proceedings on July 27, 2012.

A handwritten signature in black ink, appearing to read "Joseph C. Tanski", written over a horizontal line.

Joseph C. Tanski