IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

ROGER A. SEVIGNY, in his official Capacity as INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, as LIQUIDATOR OF THE HOME INSURANCE COMPANY,	)	Civil No. 13-401-PB
Plaintiff,	)	United States' Reply to Opposition to Motion to Dismiss the Complaint
v.	)	
THE UNITED STATES OF AMERICA And ERIC H. HOLDER, JR., in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES,	)	
Defendants.	)	

UNITED STATES' REPLY MEMORANDUM
TO THE OPPOSITON TO ITS MOTION TO DISMISS THE COMPLAINT
PURSUANT TO FED. R. CIV. P. 12(b)(1) AND (6)

Defendants United States of America and Eric H. Holder, Jr. in his official capacity as Attorney General of the United States (together, United States or Attorney General), hereby reply with the attached memorandum to plaintiff Roger A. Sevigny, in his official capacity as Insurance Commissioner of the State of New Hampshire, as Liquidator of the Home Insurance Company (the Liquidator)'s Opposition (Docket (dkt.) 10) to the United States' Motion to Dismiss (dkt. 8) (hereinafter, Opposition or Opp. and Motion, respectively).

February 12, 2014

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UNITED STATES' REPLY MEMORANDUM

Dismissal of the Complaint is required. The Liquidator aptly explains his perceived need for an advisory opinion. But the desire for judicial clarity is not sufficient to state a claim or invoke the Court's jurisdiction. Indeed, the First Circuit emphasizes that attempts by receivers of insolvent insurance companies to seek judicial-help may be understandable, but are, nonetheless, "misguided." *Ruthardt v. United States*, 303 F.3d 375, 385-86 (1st Cir. 2002).

Count One, which requests an order compelling the Attorney General to act on the Liquidator's request for a release of the United States' potential claims under the Federal Priority Statute, 31 U.S.C. § 3713 (the Compel Count), does not state a claim for relief. The Attorney General is not required to act on the Liquidator's request. Because the Court can only compel agency conduct based on a non-discretionary legal requirement, the Compel Count must be dismissed.

Second, Count Two, which seeks declarations that the Federal Priority Statute does not apply to unknown claims and that the Liquidator will not be liable under the statute if he makes the distribution (the Declaration Count), also does not state a claim for relief. The Declaratory Judgment Act provides a remedy, but not a cause of action or federal rights. The Liquidator bases his cause of action and claim for relief on the Federal Priority Statute, but he does not allege any elements of a Federal Priority Statute cause of action. Nor can the Liquidator state a cause of action for adjudication of the United States' right to recover from the Liquidator personally. Because a cause of action is a condition precedent to obtaining the remedy under the Declaratory Judgment Act, the Declaration Count necessarily fails to state a claim and also must be dismissed.

The record before the Court also demonstrates that the Complaint is not justiciable. The only record-facts about the agency's actions are: (1) a proof of claim that notified the Liquidator that the Federal Priority Statute may provide the United States with a priority right of payment in the liquidation proceeding;[2] and (2) the United States' failure to release the Liquidator from personal liability for a planned distribution to some of Home's creditors. The Opposition repeatedly asserts: "[t]he *United States contends* that the Priority Statute provides it with applicable rights of priority for unknown claims, *as asserted in* the Protective Proof of Claim . . . ." *See* Opp. 13 and 1, 2, 10, 16, *passim* (emphasis added). But the Proof of Claim asserts only that, "[t]he Federal Priority Act, 31 U.S.C. 3712 [sic], provides the United States with certain rights of priority that *may* be applicable" (emphasis added).

I. The Attorney General's Broad Discretion Over Litigation Matters Requires Dismissal of the Compel Count.

The Attorney General's discretion is dispositive of the Compel Count. Motion 7-9; *see also Minnesota Milk Producers Ass'n v. Glickman*, 153 F.3d 632, 642 (8th Cir. 1998) ("a decision to do nothing is entitled to more deference than a decision to act"); *contra.* Opp. 23 (arguing discretion is "irrelevant"). The Attorney General's alleged failure to respond to the release request is part and parcel of the Attorney General's litigation discretion and is presumptively unreviewable.[3] *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). At a minimum, this discretion includes deciding what matters warrant investigation and whether to grant, or even act upon, a request for release from liability.

The Liquidator fails to rebut the argument that Rule 12(b)(6) requires dismissal of the Compel Count. Opp. 24-25. Conceding the Attorney General is not required to respond to the

[2] *See* Opp. Ex. 1 Proof of Claim, Item 10; Comp. ¶ 32.

[3] Given the breadth of discretion Congress granted to the Attorney General over such matters (Motion 7-9), there is effectively nothing for the Court to review.

release request (Opp. 24), the Liquidator instead suggests that the Court create a duty requiring the government to act.[4] *Id.* at 25. The proposed "new duty" is inconsistent with the Supreme Court's reasoning that section 706(1) tracks the pre-existing mandamus remedy. Like mandamus, the section 706(1) cause of action, empowers a court *only* to compel an agency "to perform a ministerial or *non-discretionary* act." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (emphasis added). Because the decision to act – or not – on a request for release from liability is a discretionary act by the Attorney General, even under the "new legal duty" theory proffered by the Liquidator, the Compel Count fails as a matter of law.

II. The Court Should Dismiss the Declaration Count.

A. The Declaration Count Fails to State a Claim on Which Relief can Be Granted.

The Opposition does not repair the Declaration Count's fatal flaw of failing to state a cause of action under the Federal Priority Statute. The Liquidator provides no statutory elements of his cause of action under the Federal Priority Statute (*see* Appendix setting forth 31 U.S.C. § 3713), or how he satisfies them. Opp. 20-21. Particularly, the Liquidator does not allege: his rights under the Federal Priority Statute; the duties owed to him under the statute; the government's actions that violate his rights or fail to satisfy a legal duty; and that the statute provides him a remedy. Instead, the Liquidator presents arguments about how the words "claim" and "notice" should be interpreted. Opp. 20-21. But the interpretation of these statutory terms is irrelevant. He does not plead a cause of action under the Federal Priority Statute because he cannot -- the

[4] Because the Attorney General is not required to act on release requests, whether that action is discrete (Opp. 24 (arguing release requests are the "discrete action of granting a license or relief")) or not is irrelevant. *See, e.g.*, *Scarborough Citizens Protecting Res. v. U.S. Fish and Wildlife Serv.*, 674 F.3d 97, 100 (1st Cir. 2012) (explaining "[t]he limitation to *required* agency action rules out judicial direction of even *discrete* agency action that is not demanded by law") (first emphasis in original and internal citation omitted).

Federal Priority Statute provides him neither a cause of action nor rights. It confers both on the United States alone.[5]

The failure to allege a cause of action is the death-knell of the Declaration Count. The Declaratory Judgment Act "creates a remedy, not a cause of action." *See, e.g., Muirhead v. Mecham*, 427 F.3d 14, 17 n.1 (1st Cir. 2005). Because the Liquidator does not allege a cause of action under the federal law on which he basis his suit, he cannot satisfy the condition precedent for obtaining the remedy provided by the Declaratory Judgment Act. *Id.*[6]

B. The Liquidator has Not Alleged Facts Supporting Federal Question Jurisdiction.

The Liquidator's argument that -- if the parties were "flipped" (i.e., the United States were the plaintiff rather than the defendant) federal question jurisdiction would exist -- is untenable. Opp. 11-12. Even if this construct were appropriate against the United States,[8] it is not satisfied here.

Chiefly, as the "plaintiff," the government could not at this time allege the elements for a Federal Priority Statute cause of action against the liquidator. *See* 31 U.S.C. § 3713 (the government must allege that a representative paid any part of a debt before paying a claim of the government and that the representative is unable to pay the government's claim). It follows, then, that, if the declaratory-judgment defendant (i.e., the United States) cannot bring a justiciable claim, "flipping" the parties does not provide subject matter jurisdiction.

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[5] The Liquidator tacitly concedes he is not suing to vindicate *his* federally created rights under the Federal Priority Statute but for a declaration of the *United States'* rights. *See* Opp. 11 (emphasizing that his suit is for a declaration of the *United States'* rights) and 21 (arguing he states a claim, to wit that "the Liquidator claims that . . . the United States has no Priority Statute rights . . . .")

[6] This case is unlike the insurance insolvency cases the Liquidator cites as examples of courts declaring "rights under the Federal Priority Statute in declaratory actions brought by liquidators of insolvent insurers against the United States." Opp. 12, n.7. The issue in those cases was whether a state's insurance insolvency code protected policyholders, such that it enjoyed reverse-preemption under the McCarran-Ferguson Act. While the courts indeed discussed the Federal Priority Statute, the relevant statute was the McCarran-Ferguson Act, not the Federal Priority Statute.

[8] A court's jurisdiction over a suit by the United States would be pursuant to 28 U.S.C. § 1345.

Moreover, if it is the "*character of the threatened* action" that determines federal question jurisdiction (Opp. 11-12 citing cases (emphasis added)), then here too, the facts show jurisdiction is lacking. In *U.S. Bank v. U.S. Dep't of Homeland Security*, where the plaintiff also sought a declaration that the "U.S. has no rights . . . under the Federal Priority Statute" and relied on the nature of the defendant-government's claim to argue for jurisdiction, the government's conduct was far more substantial than the proof of claim here. No. 2:13-00072, 2014 WL 494577, at *2 (E.D. Wis. Feb. 6, 2014). In *U.S. Bank*, the government sent a letter informing plaintiff (1) of the government's claim; (2) that the claim was entitled to priority under the Federal Priority Statute; (3) it would be personally liable for any amounts distributed in violation of the statute; and (4) that if the plaintiff took the challenged action, it would violate the statute. *Id.* at *1. Since this more substantial conduct in *U.S. Bank* was insufficient to establish jurisdiction (*id.* at *3), it follows that the character of the action here – i.e., filing a proof of claim notifying the Liquidator nine years ago that he should be cognizant of the requirements of the Federal Priority Statute as he administered the liquidation of the insolvent estate – is also insufficient to establish jurisdiction.

The party-flipping cases on which the Liquidator relies also demonstrate that the character of the government's action here does not establish jurisdiction. In *Great Clips v. Hair Cuttery*, 591 F.3d 32, 34-35 (1st Cir. 2010), the declaratory-judgment defendant (1) advised it planned to sue, (2) set forth how the plaintiff was violating the law, and (3) demanded plaintiff stop using the mark. In *PHC, Inc. v. Pioneer Healthcare, Inc.*, 75 F.3d 75, 78 (1st Cir. 1996), the declaratory-judgment defendant similarly (1) sent letters asserting its rights and (2) demanded the plaintiff stop taking action. Unlike these cases, the declaratory-judgment defendant here (the United States) has (1) not advised the Liquidator that it will sue; (2) not told the Liquidator he is violating federal law; and (3) not requested that he stop making distributions that give a preference to other creditors. Indeed, the government did not object to the Liquidator's state-court motion to authorize the distribution.

C. The Declaration Count is Not Justiciable.

The Liquidator's assertions about the United States' conduct are legally insufficient to demonstrate justiciability (Opp. 14-17) or an imminent threat (Opp. 2, 16). First, although the Liquidator cites to the Proof of Claim to show this case is justiciable, the United States' 2004 notification that rights *may* be applicable, does not create a specific and immediate controversy. Moreover, the Liquidator's contention that, the "United States *has asserted* Federal Priority Statute Rights for unknown claims" (Opp. 16) and "the United States *contends* that the Priority Statute provides it with applicable rights of priority for unknown claims, as asserted in the Protection Proof of Claim" (Opp. 13) are not record-facts; these statements are not in the United States' Protective Proof of Claim or the factual record. *See* Opp. Exhibit (Ex.) 1.

Likewise, the Opposition's speculation about the United States' motive for filing the Protective Proof of Claim in 2004 (Opp. 16) is anemic, and perhaps irrelevant, compared to the unequivocal, actual, and concrete government action in other insurance insolvency cases. *See, e.g., Fabe v. U.S. Dep't of Treasury*, 939 F.2d 341, 343 (6th Cir. 1991) ("[t]he *United States notified* Fabe . . . that *it would seek first priority* for its claims by virtue of the federal superpriority statute"); *Ruthardt*, 303 F.3d at 378 ("*United States has asserted throughout* that all of its *claims are entitled to priority* . . . ") (all emphasis added). Here, the United States has neither notified the Liquidator that it would seek priority for its claims nor asserted throughout that its claims are entitled to priority.

Next, the Liquidator over-argues the significance of the United States' non response to his current request for a release from liability. Opp. 2, 16. The government is under no legal obligation to devote its limited resources to investigate the Liquidator's request for a release from a claim that the Liquidator says does not exist. That the government has not acted on the release request does not equate to an imminent threat to sue. Again, when contrasted with the definitive government action in other insurance insolvency cases (Opp. 12, n.7) where the request for a Federal Priority Statute release was plainly *denied*, the government's non response is an inadequate basis for justiciability. *See, e.g.*, *Ruthardt*, 164 F. Supp. 2d 232, 235 and n.9 (D. Mass. 2001).

Finally, the Liquidator hypothesizes that the EPA's explanation of its good faith effort to refine its claims reveals the government's "threat" to sue him if he makes the distribution. Opp. 16-17. The EPA's pending investigation is not an imminent threat of suit against the Liquidator. It has been nearly two years since the Liquidator requested court permission for the distribution. That the United States *did not then and has not since objected to the distribution*, negates any inference that the United States is threatening the Liquidator with suit. But even if the United States were threatening the Liquidator, as recently emphasized in *U.S. Bank*, "a threat of litigation is not a sufficient injury under Article III." No. 2:13-00072, 2014 WL 494577, at *3 (also that Declaratory Judgment Act cannot be used "by a party who would be a defendant in a coercive action" to win the "proverbial race to the courthouse") (internal citations omitted).

D. The Liquidator Fails to Satisfy Any of the Prongs of the Standing Triad.

Regarding injury, the Liquidator complains only that he believes he is "unable to fulfill his statutory obligations to make distributions." Opp. 18.[12] *But it was the Liquidator who requested*

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[12] The Liquidator bears the burden of proof for each element of standing. *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012). Notably, he does not allege that he is harmed by the purported "inability" to make the distribution.

that the state court condition the distribution upon a release of the Liquidator from personal liability. But, even if true, waiting to make the distribution is a legally-condoned frustration, not a justiciable injury. The First Circuit has repeatedly emphasized that the situation in which the Liquidator believes himself to be is one that the law permits due to the interplay of *Fabe*, 508 U.S. 491 (1993), the McCarran-Ferguson Act, the state insurance insolvency laws, and the Federal Priority Statute. *See Ruthardt*, 303 F.3d 375 and *Garcia v. Island Program Designer, Inc*., 4 F.3d 57 (1st Cir. 1993). Acknowledging the case law bemoaning this type of situation, the First Circuit nonetheless emphasizes that attempts to seek judicial self-help -- such as the Complaint here -- are understandable, but "misguided." *Ruthardt*, 303 F.3d at 385-86.

Similarly, the Liquidator's claimed inability to make the distribution is not traceable to the United States' Proof of Claim but instead to his request that the distribution be contingent on obtaining a release from the United States.

Finally, the purported injury is not redressable. Because the Liquidator does not state a cause of action under the Federal Priority Statute, the condition precedent to the remedy provided by the Declaratory Judgment Act is not satisfied (*see supra* page 4). The "injury" is not redressable where the Court is not empowered to grant the relief sought.

E. The APA Does Not Waive Sovereign Immunity.

Lastly, sovereign immunity has not been waived under 5 U.S.C. § 702's second sentence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (plaintiff carries the burden of establishing jurisdiction). This case is fundamentally different from the Administrative Procedure Act cases on which the Liquidator relies as his sole support that immunity here is waived. Opp. 10. Unlike here, those plaintiffs were seeking to enforce their federal rights

While the Liquidator sets forth at length the New Hampshire scheme for insurance liquidations (Opp. 3-6), nowhere does he say he faces liability for waiting to make distributions.

provided by either specific statutes or the Constitution. *See Trudeau v. Federal Trade Comm'n*, 456 F.3d 178 (D.C. Cir. 2006) (asserting that the FTC violated his rights under the First Amendment); *see also Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382 (3rd Cir. 2012) (asserting Tenth Amendment rights); *Delano Farms Co. v. California Table Grape Comm'n*, 655 F.3d 1337 (Fed. Cir. 2011) (asserting a patent right); *Puerto Rico v. United States*, 490 F.3d 50 (1st Cir. 2007) (asserting constitutional rights). Here, the Liquidator does not allege that he seeks vindication of a statutory or Constitutional right.

Section 702's waiver does not apply and should not apply to suits where a plaintiff alleges no violation of a federal right at all. But under the Liquidator's theory, Congress waives the United States' immunity from suit in section 702's second sentence based solely on the identity of the defendant and the nature of the relief. To put it another way, sovereign immunity is waived even if the plaintiff asserts no federal cause of action. Such an unsupportable consequence of his argument demonstrates that immunity is not waived. *See, e.g., Delano Farms Co.*, 655 F.3d at 1344 (explaining that section 702 second sentence was added to waive immunity "*for causes of action* brought under other laws, such as a particular statute or the Constitution") (emphasis added).

In any event, the Liquidator does not satisfy section 702's waiver because he has not alleged that the *actual* agency action challenged in this case is unlawful. The Liquidator's only argument that the government acts unlawfully is premised on the United States' 2004 Protective Proof of Claim. Opp. 10.[14] Taking the record-facts – i.e., that the government has said it has rights that "may" be applicable – the government's action is not unlawful. The second sentence

[14] Opp. 10 (stating that by filing the Protective Proof of Claim, the "Attorney General has thus acted 'unlawfully' in asserting Priority Statute rights as to unknown claim . . . "). *Contra* Opp. Ex.1, Item 10. For motions to dismiss, the Court is not required to accept "*unsupported conclusions* or interpretations of law." *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995) (emphasis added)).

of section 702 was added to eliminate "immunity in any action . . . seeking relief other than money damages and *stating a claim based on the assertion of **unlawful** official action* by an agency . . . ." *Treasurer of New Jersey*, 684 F.3d at 400 (quoting the legislative history) (emphasis added); *Delano Farms Co.*, 655 F.3d at 1345 (same).[15] And because he did not allege that the United States acted unlawfully in notifying the Liquidator of his responsibilities under the Federal Priority Statute, the Liquidator has not satisfied the waiver of immunity in section 702's second sentence.

As explained above, even if the Court accepts the Liquidator's characterization of the proof of claim as a "threat" to sue, such threats do not create an "actual controversy" under Article III or the Declaratory Judgment Act. *U.S. Bank*, No. 2:13-00072, 2014 WL 494577, at *3; *Hyatt Int'l v. Coco*, 302 F3d 707, 711-12 (7th Cir. 2002). Surely Congress did not intend the immunity waiver in section 702 to apply to agency "acts" that are so insubstantial that they do not even give rise to an Article III case or controversy. In sum, to the extent that section 702's waiver applies at all when a plaintiff is not seeking to vindicate his rights, it requires an agency "act" far more substantial and consequential than a nine-year-old proof of claim.

III. CONCLUSION

The Motion can be granted on Rule 12(b)(6) grounds alone. The Compel Count cannot survive the Supreme Court's holding that a section 706(1) claim must be based on action the government is *legally required* to take. And the Declaration Count does not allege a cause of action under the Federal Priority Statute. Dismissal under Rule 12(b)(1) is also required: the Complaint is not justiciable, the Liquidator lacks standing, and sovereign immunity is not waived.

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15 While the Liquidator is correct that section 702's second sentence does not contain the word "unlawful" (Opp. 10), it belies the statute's purpose and history to infer that Congress waived immunity to review agency action alleged to be lawful.

CERTIFICATE OF SERVICE

I, Frances M. McLaughlin, hereby certify that on February 12, 2014, the United States' Reply Memorandum to the Liquidator's Opposition to the United States' Motion to Dismiss the Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1) & (6) was served on counsel of record pursuant to the Court's electronic filing system.

s/ Frances M. McLaughlin

Appendix

31 U.S.C. § 3713 provides:

Priority of Government claims

(a)(1) A claim of the United States Government shall be paid first when--
(A) a person indebted to the Government is insolvent and--
(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
(ii) property of the debtor, if absent, is attached; or
(iii) an act of bankruptcy is committed; or
(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.
(2) This subsection does not apply to a case under title 11.
(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.