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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0106

2012 DEC 13 PM 3 43

In the Matter of the Liquidation of
the Home Insurance Company

[PROPOSED] GUARANTY ASSOCIATIONS' RESPONSE TO U.S. DEPARTMENT OF LABOR'S SUBMISSION IN SUPPORT OF ITS PURPORTED RIGHT TO CLASS I OR CLASS II PRIORITY

The United States Department of Labor ("DOL") attempts to avoid the Order of Distribution provision of the New Hampshire Insurers Rehabilitation and Liquidation statute, RSA 402-C:44 ("Priority Statute"). The DOL attempts this maneuver by arguing (1) that a portion of its claim for Special Fund assessments under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("Longshore Act") is an administration cost of liquidating The Home Insurance Company ("Home"), and thus entitled to Class I priority, and (2) that the Special Fund is "similar" to state insurance guaranty associations and therefore the assessments owed to the Special Fund are entitled to Class II priority in parity with claims of policyholders and guaranty associations.

The DOL's arguments are meritless. The priority scheme created by New Hampshire Priority Statute, which mirrors the scheme upheld by the Supreme Court in *United States Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993), is straight forward and unambiguous. Without exception or qualification, non-policy related claims of the federal government are accorded Class III priority. Consistent with *Fabe* and the First Circuit's decision in *Ruthhardt v. United States*, 303 F.3d 375 (1st Cir. 2002), New Hampshire lawmakers consciously placed policy related claims and costs and expenses of administration of the liquidation, ahead of claims by

other creditors, including non-policy related claims of the federal government. The statutorily created guaranty associations of the several states are afforded status for "covered claims" paid by guaranty associations in parity with policyholders because the central function of guaranty associations is to back stop insurance policies by paying the policyholder claims owed by insolvent insurance carriers. Under their respective guaranty association state statutes, the guaranty associations inherit policyholders' rights against the insolvent insurer to the extent their payments on policyholders' claims. The primary function of the Special Fund, on the other hand, is to make payments to disabled workers, particularly those workers who suffer a "second injury." The DOL fails to assert any persuasive basis for permitting the DOL to cut ahead in line ahead of the policyholders or guaranty associations. This Court should accordingly deny DOL's request for Class I or Class II priority in this proceeding and affirm the determination of the New Hampshire Insurance Commissioner as Liquidator of Home ("Liquidator") that the DOL's claim is a Class III claim of the federal government.

Pursuant to this Court's October 11, 2012 Order Regarding Disputed Claim, and Section 15 of this Court's January 19, 2005 Claims Procedures Order, the state insurance associations of fifteen states ([proposed] intervenors in this proceeding) submit this [proposed] response to the DOL's November 13, 2012 submission in support of the DOL's assertion of Class I and/or Class II priority for its Proof of Claim No. GOVT 700090-01 against Home. Those fifteen guaranty associations are: New Hampshire Insurance Guaranty Association (the "New Hampshire P&C Association"); Arkansas Property & Casualty Insurance Guaranty Fund; Colorado Insurance Guaranty Association; Connecticut Insurance Guaranty Association; District of Columbia Insurance Guaranty Association; Idaho Insurance Guaranty Association; Illinois Insurance Guaranty Fund; Kansas Insurance Guaranty Association; Maine Insurance Guaranty Association;

Massachusetts Insurers Insolvency Fund; Montana Insurance Guaranty Association; Rhode Island Insurers' Insolvency Fund; Vermont Property and Casualty Insurance Guaranty Association; Virginia Property and Casualty Insurance Guaranty Association; Washington Insurance Guaranty Association (collectively, the "Guaranty Associations" or "Associations"). As required by the Claims Procedures Order, the Associations include herewith (i) a counter statement of contested issues of fact and law, and (ii) a legal brief. Because the Associations found it unnecessary to further supplement the record, no exhibit list is included.

I. COUNTER STATEMENT OF CONTESTED ISSUES OF FACT AND LAW

A. Issues of Fact:

The Associations agree with the DOL that there are no material facts in dispute with respect to determining the priority of the DOL's claim.

B. Issues of Law:

1. Whether a portion of the DOL's claim for Special Fund assessments is a cost or expense of the administration of the liquidation of Home such that a portion of the DOL's claim is entitled to Class I priority under RSA 402-C:44?

2. Whether the DOL's claim for Special Fund assessments is a "policy related claim" for purposes of establishing entitlement to Class II priority under RSA 402-C:44?

3. Whether the Special Fund is a "similar organization" to the New Hampshire Associations (i.e., New Hampshire P&C and Life and Health Insurance Guaranty Associations) for purposes of establishing entitlement to Class II priority under RSA 402-C:44?

4. Even assuming *arguendo* the Special Fund is a "similar organization" to the New Hampshire Associations, whether the Special Fund is a "similar organization in another state" for purposes of establishing entitlement to Class II priority under RSA 402-C:44?

II. GUARANTY ASSOCIATIONS' LEGAL BRIEF

The DOL claims that the Home estate owes the DOL $2.67 million in Special Fund assessments under the Longshore Act, from which maritime workers are compensated for workplace injuries. The DOL argues that the Liquidator erroneously assigned DOL's claim Class III priority. According to the DOL, because the 2003 and 2004 Special Fund assessments arose after this Court declared Home insolvent in June 2003, Home's liability for those assessments is a post-liquidation administrative cost, and thus should be given Class I priority under RSA 402-C:44, I. With regard to the 2000, 2001, and 2002 Special Fund assessments, the DOL argues that those claims are entitled to Class II priority, the same priority given to Home's policyholders and the guaranty associations that have paid policyholders' claims, because the Special Fund is a "similar organization" to the New Hampshire Associations. RSA 402-C:44, II.

The DOL's arguments do not square with the plain language of the Priority Statute and the statute governing the New Hampshire P&C Association, RSA 404-B:1 *et seq.* (the "New Hampshire P&C Association Act"). The DOL's claim for Special Fund assessments is not a cost of administration incurred "in furtherance of the liquidation," and therefore cannot be accorded Class I priority. To the contrary, if given first priority, the DOL's claims will diminish the assets that would otherwise be distributed to policyholders (and guaranty associations) contrary to the legislature's intent. The Special Fund assessments are not "policy related," and the Special Fund is not a "similar organization" to the New Hampshire Associations nor does the Special Fund exist in "another state."

A. Standard of Review.

In interpreting statutes, New Hampshire courts give undefined terms their plain and ordinary meanings. *In re Liquidation of Home Ins. Co.*, 154 N.H. 472, 479 (2006) ("*Home I*"); *Benson v. New Hampshire Ins. Guar. Ass'n*, 151 N.H. 590, 594-95 (2004). Moreover, courts

"interpret the plain meaning of a statute" with a view toward "effectuat[ing] its underlying purpose." *Benson*, 151 N.H. at 595. When a statute's language is plain and unambiguous, a court need look no further. *Home I*, 154 N.H. at 479.

B. Historical Context Behind New Hampshire's Priority Statute.

The DOL's claims are resolved through a plain language analysis of the New Hampshire Priority Statute, RSA 402-C:44 and the New Hampshire P&C Association Act. Nevertheless, it is helpful to understand why the New Hampshire statutes, as opposed to federal law, are paramount here.

The McCarran-Ferguson Act, 33 U.S.C. § 1012(b), establishes a doctrine of "reverse preemption" that expressly exempts from federal preemption state statutes enacted to regulate the business of insurance, leaving the regulation of insurance to the individual states. In pertinent part, the Act provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 33 U.S.C. § 1012(b). In *Fabe*, the Supreme Court invoked the Act to resolve a conflict between the federal priority statute, which accords first priority to federal claims in some cases, and Ohio's insurer liquidation priority statute, which put federal claims well down the line. *See* 508 U.S. at 500-10.

In particular, the Supreme Court ruled that the Ohio insurer liquidation priority statute was enacted "for the purpose of regulating the business of insurance." *Id.* at 501. Therefore, because the state and federal statutes conflicted, the McCarran-Ferguson Act required the federal statute to "yield to the extent the Ohio statute furthers the interests of policyholders." *Id.* at 502. The Supreme Court concluded that the state statute "is enacted 'for the purpose of regulating the business of insurance' to the extent that it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims." *Id.* at 506. This did not mean that the state

priority statute trumped the federal priority statute entirely. Rather the Court granted reverse-preemption primacy only to those provisions of the state priority statute that enabled maximum recovery for policyholders. *See id.* at 508-09; *Ruthardt*, 303 F.3d at 382 (noting that *Fabe* not only upheld a state priority in favor of policyholders directly, but also the state priority for recovery of the administrative expenses of liquidation because such costs indirectly "facilitated payment to policyholders").

In *Ruthardt*, the First Circuit extended this line of reasoning to guaranty associations, holding that the priority that Massachusetts affords to guaranty associations "is part and parcel of an integrated regime aimed at the protection of policyholders." *See* 303 F.3d at 382. The First Circuit noted that the primary function of the guaranty associations is "with funding payment of promised benefits to policyholders, and payment of benefits to policyholders is just what *Fabe* said is within the general ambit of the McCarran-Ferguson Act." *Id.* Given the context of *Fabe* and *Ruthardt*, then, it is not surprising that the New Hampshire Priority Statute expressly accords first priority status to the costs of administering the liquidation, and second priority to the policy related claims of policyholders and guaranty associations that protect policyholders by ensuring timely payment on their claims notwithstanding the insurer's insolvency, ahead of non-policy related claims of the federal government. *See id.*

C. The DOL's Claim for Special Fund Assessments Is Not Entitled To Class I Priority Because It Is Not a Cost or Expense of Administration Under RSA 402-C:44, I.

The first priority for distribution in an insurance company liquidation in New Hampshire is the payment of the "costs and expenses of administration" of the liquidation. RSA 402-C:44, I. DOL, as a creditor of Home, makes the unusual argument that the Special Fund assessments are a cost of administration of the liquidation. The Liquidator has determined that they are not.

A plain and ordinary reading of the Priority Statute confirms the Liquidator's conclusion that the Special Fund's assessments are not costs of administration.

The term "'[a]dminister' (and by extension 'administration') appears within the statutory scheme only in relation to authorized activities undertaken *in furtherance of the liquidation*." *In re Liquidation of the Home Ins. Co.*, 158 N.H. 396, 399 (2009) ("*Home II*") (emphasis added). The statute provides illustrative examples of administration costs, including: "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," "fees and mileage payable to witnesses," and "reasonable attorney's fees." RSA 402-C:44, I. Administration activities also include notifying creditors and taking possession of, conserving, liquidating, disposing, and reducing the assets to "a degree of liquidity that is consistent with the effective *execution* of the liquidation." *Home II*, 158 N.H. at 399 (emphasis in original). All such activities "further" the liquidation process. *See id.* (recognizing that only attorney's fees that actually constitute "costs and expenses of *administration*" obtain Class I priority under RSA 402-C:44) (emphasis added). The Special Fund's assessments, to the contrary, are ordinary debt incurred by Home as part of its regular operations as an insurance company. This debt was not incurred in exercising or administering activities in furtherance of the liquidation of Home.

The DOL emphasizes the timing of the 2003 and 2004 assessments, arguing that the debts arose *after* the state court ordered the liquidation of Home in June 2003. To be sure, debts to the estate that arose *before* the liquidation cannot constitute administration costs. *Id.* But that does not mean the converse of that rule is always true – not every debt to the estate that arises after liquidation is a cost of administration. As noted above, the relevant question is whether the expenses were incurred in furtherance of the liquidation. Here, the Special Fund's 2003 and

2004 assessments were issued in July 2003 and July 2004, respectively. *See* DOL Submission, at p. 8. Each assessment was calculated, however, based on a statutory formula that considers, *inter alia*, the amount of workers' compensation payments made by Home under the Longshore Act, and the amount of the Special Fund's "second injury" payments that were attributable to Home, during the preceding calendar year. *See id.*, at pp. 6-7. The 2003 assessment was based on payments by Home in 2002. *See* DOL Submission, Ex. B, pp. 15-16. The 2004 assessment was based only on payments by the Special Fund, not on any payments made by Home prior to liquidation or by the Liquidator after Home's liquidation. *Id.* (Reflecting zero "Company Compensation Payments"). Thus, these assessments were derived from payments made by Home as part of Home's regular operations as an insurance company before its liquidation. These assessments did not arise in furtherance of the administration of Home's liquidation. The mere fact that these assessments were not levied until after the liquidation was ordered does not convert them from ordinary Class III claims into Class I administration costs.

The DOL's reliance on *North Carolina v. United States*, No. 97-2108, 139 F.3d 892, 1998 U.S. App. LEXIS 7513 (4th Cir. April 16, 1998) (unpublished) is misplaced for several reasons. First, the debt at issue in that case was federal income tax liability that had accrued after liquidation. The Special Fund's assessments are not taxes. *Brock v. Washington Metro. Area Transit Auth.*, 796 F.2d 481, 485 (D.C. Cir. 1986) (rejecting arguments that Special Fund assessments are a tax, and instead characterizing the obligation as a "user fee" or "fee attendant to regulation"). Moreover, the taxes in *North Carolina* not only accrued after liquidation, but they arose as a result of the "liquidator's ongoing business of selling assets and distributing claims in an orderly manner." *North Carolina*, 1998 U.S. App. LEXIS at *10. In other words, the tax was a cost of doing the *liquidator's* business. The same principle was at play in *Reading*

Co. v. Brown, 391 U.S. 471 (1968), where a receiver of an estate in bankruptcy was held liable for negligence during the pendency of Chapter 11 proceedings. The Supreme Court held that "damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to 'actual and necessary costs' of a Chapter XI arrangement." *Id.* at 485.

In contrast to *North Carolina*, the Special Fund's assessments arose from *Home's* business, not from the Liquidator's business or conduct administering Home's estate. Indeed, as noted above, the Special Fund had nothing to do with the liquidation, and payment of the assessments ahead of policyholder claims would thwart rather than further the liquidation. *Compare Home I*, 154 N.H. at 487-88 (upholding settlement that classified a creditor's claim as a Class I administration cost because the payment of that claim facilitated collection of additional assets with a net result that increased the recovery for the Class II claimants). The DOL has not and cannot explain how payment of the Special Fund assessments is necessary or beneficial to the liquidation of Home.

Finally, nothing in the Priority Statute indicates any intent to give priority to particular federal claims above Class III. The legislature could have easily created a separate priority class for particular federal claims, or could have listed particular federal claims in RSA 402-C:44, I. It did not. Instead, it provided for Class III priority for "Claims of the Federal Government." RSA 402-C:44, III. This Court need look no further than the plain and unambiguous language of the statute, which establishes that the Special Fund's assessment claim falls within Class III priority.

D. The DOL's Claim for Special Fund Assessments Is Not Entitled To Class II Priority.

The New Hampshire Priority Statute establishes the following for Class II priority:

> 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…

RSA 402-C:44, II.

The DOL's argument for Class II priority is based solely on its contention that the Special Fund is an organization in another state which is similar to the New Hampshire Associations – i.e., the New Hampshire P&C Association and the New Hampshire Life and Health Insurance Guaranty Association ("New Hampshire Life Association"). As explained below, the Special Fund's claim is not a "policy-related claim," and the Special Fund itself is not a "similar organization [to the New Hampshire Associations] in another state."

1. The Special Fund Assessments Are Not "Policy Related."

The DOL does not argue (nor can it) that the Special Fund's claim for assessments is a claim by a policyholder, beneficiary or insured that arises from and is within the coverage of a Home insurance policy. Instead, the DOL argues that the Special Fund is an organization similar to the New Hampshire Associations. As a threshold matter, the DOL's argument is based on the faulty assumption that *all* claims of the New Hampshire Associations and similar organizations fall within Class II. To the contrary, as explained below, the costs of the New Hampshire Associations (and similar organizations) in handling claims are accorded Class I priority.

In interpreting RSA 402-C:44, II as respects the claims of the New Hampshire Associations and similar organizations in other states, the provision must be read in conjunction with the overall statutory scheme. *See New Hampshire Motor Transp. Ass'n Employee Benefit Trust v. New Hampshire Ins. Guar. Ass'n*, 154 N.H. 618, 620 (2006) (interpreting the respective statutes governing the New Hampshire Associations). The New Hampshire P&C Association is governed by RSA 404-B:1 *et seq.* (the "New Hampshire P&C Act") and pays claims arising out

of and within the coverage of certain policies issued by property and casualty insurers who become insolvent. *See infra*, discussion at Part II.D.2. The New Hampshire Life Association is governed by RSA 408-B:1 *et seq*. (the "New Hampshire Life Act") and provides coverage on claims under life and health insurance policies issued by impaired or insolvent insurers. *See id.* As explained below, when RSA 402-C:44, II is read together with the New Hampshire P&C Act and the New Hampshire Life Act, it is clear that not all claims of the New Hampshire Associations and similar organizations in other states are classified as Class II claims.

Under the New Hampshire P&C Act, the New Hampshire P&C Association and other guaranty associations may assert two types of statutory claims against the estate of an insolvent insurer: a priority II claim for reimbursement of certain policy related claims paid by the New Hampshire P&C Association, and a priority I claim for expenses incurred by the New Hampshire P&C Association "in handling claims." RSA 404-B:11. The New Hampshire P&C Act and similar statutes governing state insurance guaranty associations in states other than New Hampshire are designed to subrogate state insurance guaranty associations to rights policyholders had with respect to claims paid by the guaranty associations under the insolvent insurer's policies. *See In re Liquidation of Am. Mut. Liab. Ins. Co.*, 434 Mass. 272, 288 (2001). The liquidator of an insolvent insurer is bound by settlements of "covered claims" by the New Hampshire P&C Association "or a similar organization in another state," and is required to grant such policy related claims priority equal to that which the original claimant would have been entitled in the absence of the New Hampshire P&C Act against the assets of the insolvent insurer. RSA 404-B:11, II.

Similarly, the New Hampshire Life Act provides that any person receiving benefits is deemed to have assigned to the New Hampshire Life Association the rights under the covered

policy or contract to the extent of the benefits received, and such subrogation rights of the New Hampshire Life Association shall have the same priority against the assets of the insolvent insurer as that possessed by the persons entitled to benefits under the new Hampshire Life Act, RSA 408-B:8, XIII. These policy related claims of the New Hampshire P&C Association, the New Hampshire Life Association, and similar organizations in other states are the claims that are referred to in Section 402-C:44, II. *See In re Liquidation of Am. Mut.*, 434 Mass. at 288-289 (construing M.G. L. c. 175, §180F(2), the Massachusetts equivalent to RSA 402-C:44, II, and holding that by referring to "any similar organization in another state" explicitly, §180F(2) gives priority to state insurance guaranty associations).

As set forth above, however, not *all* claims of the guaranty associations are afforded Class II priority. For example, under the New Hampshire P&C Act, the New Hampshire P&C Association and similar organizations in other states have a right to recover as a first priority claim the "expenses of the Association or similar organization in handling claims." RSA 404-B:11, II. Such claims for expenses in handling claims "shall be accorded the same priority as the liquidator's expenses." *Id.* The liquidator's expenses fall within priority Class I, Administration Costs. RSA 402-C:44, I. Accordingly, the claims of the New Hampshire P&C Association and similar organizations for expenses in handling claims are recoverable as a first priority claim under Section 402-C:44, I. This illustrates that the type of claim matters as much as the entity making the claim. Indeed, the phrase "Policy Related Claims" in RSA 402-C:44, II is not merely a heading, it is an operative part of the text. *Compare* RSA 402-C:44, III (the heading, "Claims of the Federal Government," is the only language in that subsection). But even to the extent the phrase "Policy Related Claims" is viewed as a heading, that phrase, in context of the larger statutory scheme, compels the conclusion that claims which do not arise under insurance policies

and contracts do not fall within Class II. *See State v. Yates*, 152 N.H. 245, 257 (2005) (considering "other indicia of legislative intent, such as the title of the statute, the statute in the context of its overall statutory scheme and the intent behind similar provisions").

This plain reading of RSA 402-C:44, II is further confirmed by the doctrine of *ejusdem gerenis*, which directs that the general word "claims," referring to claims of the New Hampshire Associations and any similar organization in another state, must be construed to embrace only claims similar in nature to those claims enumerated by the preceding specific words. *See* 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.17 (7th ed. 2007); *Merrill v. Great Bay Disposal Serv., Inc.*, 125 N.H. 540, 543 (1984). The claims by policyholders, beneficiaries, insureds and liability claims identified in RSA 402-C:44, II are claims arising under insurance policies and insurance contracts. Accordingly, the claims of the New Hampshire Associations (or similar organizations) referred to in RSA 402-C:44, II are only claims arising from and within the coverage of insurance policies and insurance contracts. Because the Special Fund's claim for assessments does not arise out of and is not within the coverage of a Home insurance policy, it is not entitled to priority as a policy related claim under Section 402-C:44, II. This alone is sufficient to defeat the DOL's claim for Class II priority.

2. The Special Fund Is Not A "Similar Organization."

The DOL argues that the Special Fund is an organization in another state similar to the New Hampshire Associations. Again, the DOL's argument is defeated by a plain reading of RSA 402-C:44.[1]

[1] Because the Special Fund's claim for unpaid assessments is not a policy related claim the Special Fund's claim for Class II status fails irrespective of whether the Special Fund is an organization similar to the New Hampshire Associations.

The New Hampshire P&C Association was created to provide for payments under insurance policies issued by certain property and casualty insurers who become insolvent. *See* RSA 404-B:2. The New Hampshire P&C Association pays one type of claim, defined as a "covered claim." RSA 404-B:8, I(a). Under RSA 404-B:5, IVA, a "covered claim" is a claim that arises out of and is within the coverage of an insurance policy, issued by a now insolvent insurer, to which the New Hampshire P&C Act applies (generally, property and casualty policies, RSA 404-B:3). The New Hampshire P&C Association pays on such a covered claim if the insured or the claimant is a New Hampshire resident. *Id.* The New Hampshire P&C Association obtains funds by assessing member insurers in New Hampshire, RSA 404-B:8, I(c), and it is authorized to refund member insurers when assets exceed liabilities, RSA 404-B:8, II(f). The New Hampshire P&C Association is governed by a board of directors selected by member insurers with the approval of the New Hampshire Commissioner of Insurance. RSA 404-B:7.

Similarly, the New Hampshire Life Association was created to provide protection against the impairment or insolvency of life and health insurers. *See* RSA 408-B:5, II(a). The purpose of the New Hampshire Life Association is to protect against failure in the performance of "contractual obligations, under life and health insurance policies and annuity contracts . . . because of the impairment or insolvency of the member insurer that issued the policies or contracts." RSA 408-B:2, I. Like the New Hampshire P&C Association, the New Hampshire Life Association obtains funds by assessing member insurers and the member insurers may receive a refund when assets exceed anticipated obligations. RSA 408-B:9. It is governed by a board of directors selected by member insurers subject to the Commissioner's approval. RSA 408-B:7.

In contrast to the New Hampshire Associations, the Special Fund was created primarily to make payments for covered injuries of workers who have suffered a work-related injury aggravating an existing disability ("second injuries") and payments are due after a specified period of weeks. 33 U.S.C. § 908(f)(2)(A); *see also B.S. Costello, Inc. v. Meagher*, 867 F. 2d 722, 724-725 (1st Cir. 1989). Such payments constitute the bulk of payments made by the Special Fund. According to the DOL, second injury payments constituted 92 percent of the Special Fund's total net costs in the years 2000-2004. *See* DOL Submission, at pp. 5-6, and Ex. A attached thereto. The Special Fund is also available, in the Secretary of Labor's *discretion*, to pay injured workers who cannot collect compensation owed under the Longshore Act due to the "employer's insolvency or other circumstances precluding payment." 33 U.S.C. §§ 918(b) and 944(i); *see also* DOL Submission, at p. 6. During the same time period, outlays for insolvency payments under Section 918(b) constituted only 3.5 percent of the Special Fund's total net costs. *See* DOL Submission, at p. 6.

The DOL emphasizes this latter discretionary role of the DOL to step in to pay claims in the event of an insolvency or similar circumstance, arguing that this function makes the Special Fund an organization similar to the New Hampshire Associations. *See id.*, at pp. 12-13. The DOL's reliance on § 918(b) is misplaced. First, that section refers to "the *employer's* insolvency," not to an insurer's insolvency. Second, the exhibits relied on by the DOL for the DOL's assertion that the Special Fund is used to pay for claims where an insurer is insolvent do not support such assertion. Moreover, the Longshore Act is not structured as a scheme requiring participating insurers to contribute to a fund that would secure against the default of one or more of such insurers. *See B.S. Costello*, 867 F. 2d at 726-727. The New Hampshire Associations, on

the other hand, exist *solely* to pay claims arising out of the insolvency of property and casualty insurers or the insolvency or impairment of life or health insurers.

Stretching further, the DOL argues that the Special Fund is an organization similar to the New Hampshire Associations because payments made to workers by the Special Fund pursuant to 33 U.S.C. § 908(f) spread risk to the entire insurance industry and this cushions individual insurers and their insureds from the risks of insolvency. *See* DOL Submission, at p. 13. But the New Hampshire Associations do not function in a similar capacity. Unlike the Special Fund, these associations do not provide coverage to lessen the burden on solvent insurers. Rather, the New Hampshire P&C Association is a solely post-insolvency mechanism whose purpose is to pay claims under policies of specific property and casualty insurers who become insolvent, RSA 404-B:2, while the New Hampshire Life Association pays claims under policies and contracts of specific life and health insurers who become insolvent or are impaired, RSA 408-B:2.

Finally, the DOL argues that the statutory schemes governing the Special Fund and the New Hampshire Associations both aim to prevent insurer insolvencies through regulation and investigation, and that both the Special Fund and the New Hampshire Associations have subrogation rights for payments they have made. *See* DOL Submission, at p.12. But the existence of these ancillary obligations and rights does not support an inference that in using the term "similar organization" in RSA 402-C:44, II, the New Hampshire legislature intended to include an organization such as the Special Fund as a Class II claimant.

To the contrary, the New Hampshire legislature undoubtedly intended that the "similar organizations" referred to in RSA 402-C:44, II would be interpreted to mean the state insurance guaranty associations in other jurisdictions. That meaning is apparent when the provision is interpreted with reference to the overall statutory scheme.

RSA Chapter 404-B, which created the New Hampshire P&C Association, is based on the Post-Assessment Property and Liability Insurance Guaranty Association Model Act ("Model Act"). *See Benson v. New Hampshire Ins. Guar. Ass'n*, 151 N.H. 590, 595 (2004). Nearly every state has adopted the Model Act in some form, and RSA Chapter 404-B is "virtually identical in both purpose and language to statutes in numerous other jurisdictions." *Id.* RSA 404-B:11, I provides that any person recovering from the New Hampshire P&C Association is deemed to have assigned their rights under the policy to the New Hampshire P&C Association to the extent of their recovery. RSA 404-B:11, II grants rights to the New Hampshire P&C Association and to "similar organization[s]" in other states to recover against the assets of the insolvent insurer for covered claims and expenses. The phrase "similar organization in another state" appearing in RSA 402-C:44, II has the same meaning as the identical phrase appearing in RSA 404-B:11, II. It refers to state insurance guaranty associations created by state statutes in jurisdictions other than New Hampshire. The Special Fund is not such an organization. *See In re Liquidation of Am. Mut.*, 434 Mass. at 288. *See also Northwestern Nat. Ins. Co. v. Kezer*, 812 P.2d 688, 691 (Colo. App. 1990) (reinsurer not a "similar organization" to guaranty association because its purpose is not "to protect claimants and policyholders by assuming an insolvent insurer's obligation"); *Foremost Life Ins. Co. v. Dep't of Ins., State of Indiana*, 409 N.E.2d 1092, 1098 (Ind. 1980) (reinsurer not similar to a guaranty association because its "primary purpose" is not "protecting policyholders of insolvent companies, as is a guaranty association").

Similarly, the New Hampshire Life Association is based on the National Association of Insurance Commissioners' Model Life and Health Insurance Guaranty Fund Association Act, which has been adopted in most states. *Principal Life Ins. Co. v. United States*, 70 Fed. Cl. 144, 151-152, 169 and 170 n.53 (Fed. Cl. 2006). RSA 408-B:8, XIII provides that any person

recovering from the New Hampshire Life Association shall be deemed to have assigned to the New Hampshire Life Association the rights under the covered policy or contract, and that such subrogation rights of the New Hampshire Life Association shall have the same priority against the assets of the impaired or insolvent insurer as that possessed by the person entitled to benefits under RSA 408-B:1 *et. seq.* RSA 408-B:8, XV provides that the New Hampshire Life Association "may join an organization of one or more other state associations of similar purposes, to further the purposes and administer the powers and duties of" the New Hampshire Life Association. The phrase "similar organization in another state" appearing in RSA 402-C:44, II once again refers to state insurance life and health guaranty associations.

Because of these statutory references and because the Special Fund has a purpose and function quite distinct from the state insurance guaranty associations, it is not a "similar organization" under RSA 402-C:44, II.

3. The Special Fund Is Not an Organization in "Another State."

Even assuming *arguendo* that the Special Fund's claim is "policy related, and further assuming *arguendo* that the Special Fund is a "similar organization" to the New Hampshire Associations, the DOL cannot explain how the Special Fund is a similar organization "in another state." The DOL asserts that the Special Fund is an organization "in another state" because the Special Fund "is part of a federal program that operates nationwide" and consequently operates in states other than New Hampshire. *See* DOL Submission, at p. 12.

The DOL's argument is meritless. The phrase "in another state" must be read together with the phrase "any similar organization" [to the New Hampshire Associations]. Each of the New Hampshire Associations is created by a state statute, consists of members licensed in a state, and operates in one state only. An organization in another state similar to the New Hampshire Associations refers to other such state-based entities. The New Hampshire

legislature certainly never intended that a federally created entity could assert status as a "similar organization" to the New Hampshire Associations for the purpose of giving itself Class II priority in parity with the guaranty associations and ahead of the priority explicitly set aside for claims of the federal government – i.e., Class III. This Court should reject the DOL's attempt to end run around the New Hampshire Priority Statute.

III. CONCLUSION

For the foregoing reasons, the Guaranty Associations respectfully request that this Court deny the DOL's request that this Court grant its claim for Special Fund assessments either Class I or Class II priority, and instead affirm the Liquidator's determination that the DOL's claim should be afforded Class III priority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of *[Proposed] Guaranty Associations' Response to U.S. Department of Labor's Submission in Support of Its Purported Right to Class I or Class II Priority* was sent, this 13th day of December 2012, by first class mail, postage prepaid, to all persons on the attached service list.

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