

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

2012 OCT 22 A 9:57

In the Matter of the Liquidation of
The Home Insurance Company

NH SUPERIOR COURT
MERRIMACK COUNTY
CONCORD, NH

**GUARANTY FUND'S MEMORANDUM OF LAW IN SUPPORT OF
ASSENTED-TO MOTION TO INTERVENE**

Because the Guaranty Funds¹ have a substantial pecuniary stake in this Court's adjudication of the United States Department of Labor's ("DOL") disputed claim, the Guaranty Funds respectfully request that the Court grant them leave to intervene in this proceeding for the purpose of submitting a response to the DOL's submission pursuant to this Court's October 11, 2012 order granting adjudication of the DOL's claim.

I. PROCEDURAL BACKGROUND

In 2003, this Court declared The Home Insurance Company ("Home") insolvent, ordered its liquidation, and appointed as liquidator the Insurance Commissioner for the State of New Hampshire ("Liquidator"). As set forth in the Liquidator's Assented-to Motion for Court to Adjudicate Disputed Claim of United States Department of Labor and Set Schedule for Submissions, filed July 12, 2012 ("Motion to Adjudicate"), and the Liquidator's Report on Conclusion of Federal Action with United States Department of Labor, filed July 12, 2012 ("Federal Action Report"), the DOL filed a proof of claim (No. GOVT 700090-01) in the Home liquidation proceeding premised on assessments allegedly owed by Home under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). Motion to Adjudicate, ¶ 1. The

¹ The fifteen Guaranty Funds that seek intervention in this proceeding are set forth in full in the first paragraph of the Assented-to Motion to Intervene.

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Liquidator issued a notice of determination and, after the DOL requested review, a notice of redetermination. *Id.* The Liquidator valued the DOL's claim at over \$2.6 million and assigned the claim to Priority Class III under the New Hampshire priority statute, N.H. RSA 402-C:44. *Id.*, and Exhibit A attached thereto.

The DOL thereafter filed with this Court a Notice of Pending Federal Action to Resolve Its Objection to Liquidator's Notice of Redetermination Regarding Proof of Claim No. GOVT 7000090-01, dated December 22, 2010. *Id.*, ¶ 2, and Exhibit B attached thereto. At the same time, the DOL also filed a declaratory judgment action in the United States District Court for the District of New Hampshire, captioned *Hilda L. Solis, Secretary, United States Department of Labor v. The Home Insurance Company and Roger A. Sevigny, New Hampshire Insurance Commissioner, as Liquidator of The Home Insurance Company*, No. 10-cv-572 (D.N.H.) (the "Federal Action"). *Id.*, ¶ 3. The DOL's Federal Complaint alleged one cause under federal law—the DOL asserted that its claim should be accorded absolute priority because the New Hampshire priority statute is preempted by the LHWCA. Federal Complaint, ¶¶ 47-53, attached hereto as Exhibit 1. The DOL additionally asserted two alternative theories under state law—the DOL asserted that its claim should be given Class I priority (in part) and Class II (in part) under the provisions of RSA 402-C:44. *Id.*, ¶¶ 54-64.

This Court entered an order staying consideration of all matters regarding DOL's proof of claim pending a final decision in the Federal Action. Federal Action Report, ¶ 4. Meanwhile, the Liquidator moved to dismiss the Federal Action based on various abstention doctrines, and the Guaranty Funds moved to intervene in the Federal Action in order to submit their own motion to dismiss and to join the Liquidator in disputing the DOL's claims on the merits. *See*

Guaranty Funds' Application to Intervene, attached hereto as Exhibit 2.² The Guaranty Funds intervened primarily to protect their economic interests in the property being administered in the Home liquidation proceedings.

On August 30, 2011, the Federal District Court entered an order granting the Liquidator's motion to dismiss in part, denying it in part, and granting the Guaranty Funds permissive intervention. Federal Action Report, ¶ 5.a.; *Solis v. The Home Ins. Co.*, No. 10-cv-572, 2011 U.S. Dist. LEXIS 97582 (D.N.H. Aug. 30, 2011), attached hereto as Exhibit 3. The District Court dismissed the DOL's state law claims without prejudice, but permitted the DOL to pursue its federal preemption claim under the LHWCA. The DOL subsequently moved for summary judgment on its LHWCA claim. After all parties, including the Guaranty Funds, submitted briefing on the DOL's motion for summary judgment, the District Court denied DOL's motion and entered judgment denying the DOL's federal claim. Federal Action Report, ¶ 5.b., and Federal Order, dated January 27, 2012, attached as Exhibit C thereto. The District Court rejected DOL's argument that the LHWCA preempts the New Hampshire priority statute. *See id.* Although two appeals followed from that order, both appeals were voluntarily dismissed and the District Court's judgment became final. *Id.*, ¶ 6.

Thus, while the Federal Action resolved the DOL's contention that the New Hampshire priority statute was preempted by LHWCA, the Federal Action did not resolve DOL's state law contentions. Motion to Adjudicate, ¶ 6. The Liquidator accordingly requested this Court to adjudicate the DOL's remaining state law contentions. *Id.*, ¶ 7. As noted by the Liquidator, the

² Because the rationale for the Guaranty Funds' intervention now is much the same as it was when it intervened in the Federal Action, the Guaranty Funds submit as Exhibit 2-A and 2-B hereto, both the memorandum it filed in support of its Application to Intervene as well as the affidavit of Paul M. Gulko, dated February 10, 2011 ("Gulko Aff."), which establishes the factual basis for the Guaranty Funds' interest in the Home liquidation proceedings.

DOL's claim for assessments under the LHWCA is novel and presents legal questions of first impression that are likely to require determination by the New Hampshire Supreme Court. *Id.*, ¶ 8. Nevertheless, because the DOL's claim does not present disputed issues of fact, it is susceptible of resolution on briefs with supporting materials in accordance with Section 15 of the Claims Procedures Order. *Id.*, ¶ 9.

On October 11, 2012, this Court entered an order granting the Liquidator's Motion to Adjudicate and set forth a schedule for the DOL's submission and the Liquidator's response. By this motion, the Guaranty Funds seek the opportunity to be heard as well, as was permitted by the District Court in the Federal Action. Both the Liquidator and the DOL assent to the Guaranty Funds' intervention.

II. FACTUAL BACKGROUND: THE GUARANTY FUNDS' INTEREST

The Guaranty Funds' interest in contesting the DOL's disputed claim was previously established in the Guaranty Funds' Application to Intervene in the Federal Action. *See* Exhibit 2, attached hereto. The Guaranty Funds are statutory entities created and governed by the laws of their respective jurisdictions of organization to provide protection to policyholders against the hardships of property and casualty insurer insolvencies. *See* *Gulko Aff.*, ¶¶ 6-12. The Guaranty Funds are triggered upon a judicial finding of insolvency. *See, e.g.*, N.H. RSA 404-B:8 I and 404-B:10; *Gulko Aff.*, ¶10. In general, each state guaranty fund is obligated on covered policy claims of its residents. *See* *Gulko Aff.*, ¶ 7; *see also, e.g.*, N.H. RSA 404-B:5 IV, 404-B:8 I. Guaranty fund protection is provided for any insurer licensed to transact insurance in the state of the guaranty fund. *See* *Gulko Aff.*, ¶¶ 8-9, 15; *see also, e.g.*, N.H. RSA 404-B: 5V, 404-B:8 I. Most property/casualty lines of insurance are covered with certain stated exceptions. *See, e.g.*, N.H. RSA 404-B:3.

Upon this Court's determination of insolvency on June 13, 2003, the Guaranty Funds became obligated to pay "covered claims" arising under Home policies subject to the limitations provided in the respective statutes creating the Guaranty Funds. *See* Gulko Aff., ¶ 10; *see also*, *e.g.*, N.H. RSA 404-B:1 *et seq.* Covered claims are claims, subject to statutory limitations, which arise out of and are within the coverage of policies issued by the insolvent insurer. *See*, *e.g.*, N.H. RSA 404-B:5 IV; Conn. Gen. Stat. §38a-838(6) (1999); D.C. Code Ann. §35-3901(6) (2000); Me. Rev. Stat. Ann. §4435(4) (1999); N.H. Rev. Stat. Ann. §404-B:5(IV)(1999); R.I. Gen. Laws §27-34-5(8) (2000); Vt. Stat. Ann. Tit. Eight §3612(4) (2000); Va. Code Ann. §38.2-1603 (2000). The Guaranty Funds have similar obligations for covered claims under policies issued by other insolvent insurers determined to be insolvent in jurisdictions outside New Hampshire. *See* Gulko Aff., ¶¶ 20, 22-23. One or more of the Guaranty Funds have paid claims in at least thirty-five insurer insolvencies pending in over ten jurisdictions. *See id.*, ¶ 20.

The Guaranty Funds obtain the funds needed to pay claims by assessing member insurers. *See id.*, ¶ 16; *see also*, *e.g.*, N.H. RSA 404-B:8 I(c). Each insurer writing business in a particular state is required to be a member of that state's guaranty fund. *See* Gulko Aff., ¶ 15; *see also*, *e.g.*, N.H. RSA 404-B:5 VI, 404-B:6. Depending on the state, member insurers recoup assessments through increased rates and premiums or through premium tax offsets or policy surcharges. *See* Gulko Aff., ¶ 19. *See, e.g.*, N.H. RSA 404-B:16 (increased rates and premiums); VA Code Ann. § 38.2-1611.1 (tax offset); Hawaii Rev. Stat. § 431:16-115 (policy surcharge).

The Guaranty Funds have paid in excess of \$35 million in losses on claims arising under Home policies. *See* Gulko Aff., ¶ 20. In addition, the Connecticut Fund, the D.C. Fund, the Maine Fund, the Massachusetts Fund, the New Hampshire Fund, the Rhode Island Fund, the Vermont Fund and the Virginia Fund, alone, have pending claims in over thirty-five other

insolvent insurer estates in over ten jurisdictions and have recovered hundreds of millions of dollars. *See* Gulko Aff. at ¶¶ 20-23. Most, if not all of the other guaranty funds have also made significant covered claim payments in other insolvent insurer estates. *Id.* at ¶ 23.

The Guaranty Funds have statutory rights to recover from the Home estate and the estates of other insolvent insurers on a priority equal with other policy claimants. *See* Gulko Aff., ¶¶ 9, 17. Any policyholder recovering from a guaranty fund is deemed to have assigned to the guaranty fund his or her rights under the policy of the insolvent insurer. *Id.* *See, e.g.*, N.H. RSA 404-8:II (I) and RSA 402-C 44; Conn. Gen. Stat. §38a-844(1) (1999); D.C. Code Ann. §35-3908(a) (2000); Me. Rev. Stat. Ann. §4442 (1999); R.I. Gen. Laws §27-34-11(a)(2000); Vt. Stat. Ann. Tit. Eight §3618(a) (2000); Va. Code Ann. §38.2-1609(A.1) (2000).

The receiver of an insolvent insurer is bound by the settlements of claims by the guaranty funds and must grant, against the assets of the insolvent insurer, priority equal to that which the claimant would have been entitled in the absence of the guaranty fund statute. *See* Gulko Aff., ¶ 17. *See, e.g.*, N.H. RSA § 404-B:ii(II) and RSA 402-C 44; Conn. Gen. Stat. §38a-844(2) (1999); D.C. Code Ann. §35-3908(c) (2000); Me. Rev. Stat. Ann. §4442 (1999); R.I. Gen. Laws §27-34-11(2) (2000); Vt. Stat. Ann Tit. Eight § 3618(b) (2000); Va. Code Ann. §38.2-1609(B) (2000). In a liquidation proceeding in New Hampshire and in many other jurisdictions, the claims of the guaranty funds are afforded a priority equal with policyholders and ahead of non-policyholder claims of the United States. *See, e.g.*, N.H. RSA 402-C 44; Conn. Gen. Stat. §38a-944 (1999); Vt. Stat. Ann. Tit. Eight §7081 (2000). *See also* Gulko Aff., ¶¶ 9, 17.

The statutory estate distribution scheme provides estate funds to the guaranty funds and thus reduces the need for guaranty fund assessments on member insurers. *See* Gulko Aff., ¶ 18-19. This in turn lessens the burden on the insurance-buying public which pays for the Guaranty

Funds through increased premiums to cover guaranty fund assessments, *see, e.g.*, N.H. RSA 404-B:16, or in some states through premium tax offsets or policy surcharges. *See* Gulko Aff., ¶ 19. Distributions to guaranty funds pursuant to the statutory priority distribution scheme established by the New Hampshire priority statute thus ultimately will lessen the burden on the insurance-buying public. *See* Gulko Aff., ¶¶ 18-19.

The DOL asserts that it has a priority claim against the assets in the Home estate for unpaid assessments for the LHWCA special fund and that carriers nationwide are assessed for the LHWCA special fund and that it has made payments to injured workers whose insurers are insolvent. By reason of their payment of more than \$35 million of covered claims under Home policies, the Guaranty Funds are substantial claimants against the property being administered in the Home liquidation proceeding, and are entitled to the benefit of the statutory priority established for guaranty fund claims. The Guaranty Funds believe that a decision on the priority of the DOL's claim could impact the Guaranty Fund's claims in this liquidation as well as in insurer liquidation proceedings in other states with similar priority statutes.

III. ARGUMENT

Superior Court Rule 139 states in relevant part that “[a]ny person shown to be interested may become a party to any proceeding in equity on his petition briefly setting forth his relation to the cause;” The New Hampshire Supreme Court has repeatedly stated that “[t]he right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice.” *Lamarche v. McCarthy*, 158 N.H. 197, 200 (2008) (quoting *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 446 (2002)). Although it is within the trial court's discretion whether to grant intervenor status, “[a] trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein.”

Id. The New Hampshire standard for intervention is therefore akin to the discretionary standard for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure.

The interest of guaranty funds in insurer liquidation proceedings has been well established in previous cases. The Guaranty Funds involved in this liquidation have millions of dollars at stake. The Class II claims of the Guaranty Funds exceed \$35 million. *See Gulko Aff.*, ¶ 20. It is anticipated that the property to be distributed in the Home liquidation proceeding will be insufficient to satisfy in full all of the claims of the Class II claimants, including the Guaranty Funds. *See Federal Complaint*, ¶ 46. Thus, if the DOL were to prevail in its claim, the Guaranty Funds would be directly impacted because their recovery will be reduced.

Indeed, the Federal District Court permitted the Guaranty Funds' intervention in the Federal Action in part because of the "magnitude of the stakes" that had been established by the Guaranty Funds. *Solis v. The Home Ins. Co.*, No. 10-cv-572, 2011 U.S. Dist. LEXIS 97582, at *17 (D.N.H. Aug. 30, 2011) (granting permissive intervention under Fed. R. Civ. P. 24(b)). The District Court was persuaded by the similar circumstances presented when a group of guaranty funds successfully intervened in an appeal to the United States Court of Appeals for the First Circuit. *See Ruthardt v. United States*, 303 F.3d 375 (1st Cir. 2002). That case similarly involved a federal agency's assertion that its claims preempted the claims of the guaranty funds in an insurer liquidation in Massachusetts. *See id.* at 368-87 (granting permissive intervention to guaranty funds).

As in *Ruthardt*, the interest of the Guaranty Funds in the subject matter of this action is sufficiently "direct, significant, [and] legally protectable." *Id.* at 386 (holding that the guaranty funds satisfied the direct and substantial interest requirement of Fed. R. Civ. P. 24). The above federal rule standard echoes the New Hampshire requirement that the petitioner's interest must

be “direct and apparent.” *Lamarche*, 158 N.H. at 200. As in *Ruthardt*, the proposed intervenors here “unquestionably have an enormous practical stake in this case” because “guaranty funds are liable, under their own state laws, to reimburse numerous policyholders of [the liquidated insurer] who bought policies in their respective states.” *Ruthardt*, 303 F.3d at 386. Similarly, the Guaranty Funds’ priority in claiming the New Hampshire assets of the Home estate “depends on whether the [Liquidator] or the United States prevails” on the DOL’s disputed claim. *Id.* The Guaranty Funds have accordingly demonstrated both “an interest in the matter in controversy and a practical threat to that interest.” *Id.* (citing Fed. R. Civ. P. 24(a)(2)). Because the possibility remains that the DOL may obtain relief in its favor which entitles the DOL to the assets of the Home estate at the direct expense of the Guaranty Funds, the Guaranty Funds are compelled to intervene to protect their unique interests.

In addition, one or more of the Guaranty Funds have significant claims pending in over thirty-five other insolvent insurer estates in over ten states. *See Gulko Aff.*, ¶ 20. As a result, a decision by this Court in favor of the DOL could have a significant detrimental financial impact on the Guaranty Funds’ claims against the property held in other insolvent insurer estates in which the DOL asserts a priority claim for payment of LHWCA assessments.

Finally, both the District Court in *Solis* and the First Circuit in *Ruthardt* recognized that the Guaranty Funds’ “advocacy will likely prove ‘helpful’” to the court in resolving the disputed claims at issue. *Solis*, 2011 U.S. Dist. LEXIS 97582, at *17 (citing *Ruthardt*, 303 F.3d at 386). The same is true here. If this Court grants the Guaranty Funds’ motion to intervene, the Guaranty Funds will file a submission in response to the DOL’s submission, which will assist this Court in weighing the important public policy issues that lie at the heart of this dispute.


IV. CONCLUSION

In sum, because the Guaranty Funds have a substantial pecuniary stake in the Home liquidation proceedings, this Court should grant the Guaranty Funds' motion to intervene and allow them to submit a response to the DOL's submission within 30 days after the filing of the DOL's submission.

Respectfully submitted,

NEW HAMPSHIRE INSURANCE GUARANTY 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;

By their attorneys,



W. Daniel Deane, Esq. (NH Bar #18700)
NIXON PEABODY LLP
900 Elm Street, 14th Floor
Manchester, NH 03101
Telephone: (603) 628-4000
ddeane@nixonpeabody.com

Joseph C. Tanski, Esq. (BBO #492180)
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
Telephone: (617) 345-1000
jtanski@nixonpeabody.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of *Guaranty Funds' Memorandum of Law in Support of Assented-to Motion to Intervene* was sent, this 19th day of October 2012, by first class mail, postage prepaid, to all persons on the attached service list.



W. Daniel Deane

SERVICE LIST

Kyle Forsyth, Esq.
Trial Attorney, Civil Division
U.S. Department of Justice
P.O. Box 875
Washington, DC 20044

Gary S. Lee, Esq.
James J. DeCristofaro, Esq.
Kathleen E. Schaaf, Esq.
Morrison & Foerster
1290 Avenue of the Americas
New York, NY 10104-0050

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau, Pachos
& Haley, PLLP
57 North Main Street
P.O. Box 1318
Concord, NH 03302-1318

David M. Spector, Esq.
Dennis G. LaGory, Esq.
Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606

David H. Simmons, Esq.
Mary Ann Etzler, Esq.
Daniel J. O'Malley, Esq.
deBeaubien, Knight, Simmons,
Mantzaris & Neal, LLP
332 North Magnolia Avenue
P.O. Box 87
Orlando, FL 32801

Richard Mancino, Esq.
Willkie Farr & Gallagher, LLP
787 Seventh Avenue
New York, NY 10019

Albert P. Bedecarre, Esq.
Quinn Emanuel Urguhart Oliver
& Hedges, LLP

Lisa Snow Wade, Esq.
Orr & Reno
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550

Pieter Van Tol, Esq.
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022

George T. Campbell, III, Esq.
Robert A. Stein, Esq.
Robert A. Stein & Associates, PLLC
One Barberry Lane
P.O. Box 2159
Concord, NH 03302-2159

Michael Cohen, Esq.
Cohen & Buckley, LLP
1301 York Road
Baltimore, MD 21093

Martin P. Honigberg, Esq.
Sulloway & Hollis, P.L.L.C.
9 Capitol Street
P.O. Box 1256
Concord, NH 03302-1256

Joseph G. Davis, Esq.
Willkie Farr & Gallagher, LLP
1875 K Street, N.W.
Washington, DC 20006

Jeffrey W. Moss, Esq.
Morgan Lewis & Bockius, LLP
225 Franklin Street

50 California Street, 22nd Floor
San Francisco, CA 94111

Gerald J. Petros, Esq.
Hinckley, Allen & Snyder LLP
50 Kennedy Plaza, Suite 1500
Providence, RI 02903

Robert M. Horkoviceh, Esq.
Robert Y. Chung, Esq.
Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, NY 10020

John A. Hubbard
615 7th Avenue South
Great Falls, Montana 59405

Jim Darnell, Esq.
Jim Darnell, P.C.
310 N. Mesa Street, Suite 212
El Paso, TX 79901

Paul W. Kalish, Esq.
Ellen M. Farrell, Esq.
Kristine E. Nelson, Esq.,
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595

Michael S. Olsan, Esq.
Christine G. Russell, Esq.
Brendan D. McQuiggan, Esq.
Gregory T. LoCasale, Esq.
White and Williams, LLP
One Liberty Place, Suite 1800
Philadelphia, PA 19103-7395

J. David Leslie, Esq.
Eric A. Smith, Esq.
Rackemann Sawyer & Brewster
160 Federal Street
Boston, MA 02110

16th Floor
Boston, MA 02110

Christopher H.M. Carter, Esq.
Hinckley, Allen & Snyder LLP
11 South Main Street, Suite 400
Concord, NH 03301

Andrew B. Livernois, Esq.
Rarnsmeier & Spellman, P.C.
One Capitol Street
P.O. Box 600
Concord, NH 03302-0600

Adebowale O. Osijo
2015 East Pontiac Way, Suite 209
Fresno, CA 93726

Edmond J. Ford, Esq.
Ford & Weaver, P.A.
10 Pleasant Street, Suite 400
Portsmouth, NH 03801

Harry L. Bowles
306 Big Hollow Lane
Houston, TX 77042

J. Christopher Marshall, Esq.
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

HILDA L. SOLIS, Secretary, United States
Department of Labor,

Plaintiff,

v.

THE HOME INSURANCE COMPANY and
ROGER A. SEVIGNY, New Hampshire
Insurance Commissioner, as Liquidator of
The Home Insurance Company,

Defendants.

Civil Action No. 1:10-cv-572

COMPLAINT

Hilda L. Solis, in her official capacity as Secretary of the United States Department of Labor (DOL), brings this civil action pursuant to 28 U.S.C. §§ 2201(a) and 2202 against The Home Insurance Company (Home) and Roger A. Sevigny, in his official capacity as New Hampshire Insurance Commissioner and Liquidator of Home (Liquidator). DOL seeks declaratory and injunctive relief regarding its rights to priority of payment in Home's pending liquidation proceedings, based upon its claim for assessments that Home owes under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50. In support of this complaint, DOL alleges the following:

SUMMARY

1. The LHWCA establishes a mandatory, nationwide system of workers' compensation insurance for certain maritime workers and their employers.

2. Part of the system of workers' compensation insurance established by the LHWCA is the "Special Fund" which the Secretary uses to make payments to, or on behalf of, injured workers.

3. The Special Fund is financed almost entirely through the Secretary's collection of annual assessments from insurance carriers and self-insured employers, including Home, who are covered by the LHWCA.

4. The Superior Court of Merrimack County, New Hampshire (the State Court) declared Home insolvent and ordered Home's liquidation on or about June 13, 2003. In re Liquidation of The Home Ins. Co., No. 03-E-0106.

5. On or about June 26, 2003, DOL timely filed its proof of claim asserting a right to collect Home's unpaid Special Fund assessments for years 2000, 2001, and 2002. DOL amended its proof of claim on or about February 2 and April 8, 2005, to include Home's unpaid assessments for 2003 and 2004. The total amount claimed by DOL for 2000-2004 is \$2,672,527.¹

6. On August 20, 2010, the Liquidator issued a Notice of Determination allowing DOL's proof of claim in the reduced amount of \$2,035,643, assigning DOL's claim to priority Class III, and stating that the "Liquidator does not expect there to be assets sufficient to make a distribution to creditors below Class II."

7. Upon DOL's Request for Review, the Liquidator issued a Notice of Redetermination on October 28, 2010, allowing DOL's proof of claim in the full amount of \$2,672,527, but assigning DOL's claim to priority Class III, and again stating that the "Liquidator does not expect there to be assets sufficient to make a distribution to creditors below Class II."

¹ The dollar amounts attributed to Home throughout this Complaint include amounts attributable to Home and to The Home Indemnity Company which merged into Home.

8. DOL is entitled to: (a) a declaratory judgment that DOL's claim is entitled to absolute priority pursuant to federal preemption principles, and must be paid in full before any other claims are paid; (b) in the alternative to preemption, a declaratory judgment that DOL's claim is entitled to Class II priority as the claim of a guaranty fund or "similar organization"; (c) also in the alternative to preemption, a declaratory judgment that DOL's claim, to the extent it seeks payment of assessments from 2003 and 2004, which were assessed *after* the entry of Home's liquidation order, is entitled to Class I priority as an administrative expense; (d) an injunction enjoining Home and the Liquidator from treating DOL's claim or disbursing any funds from Home's estate inconsistently with the declaratory relief this Court awards to DOL; and (e) such further relief favoring DOL as this Court deems just and appropriate.

PARTIES

9. Plaintiff Hilda L. Solis (Secretary) files this suit in her official capacity as the Secretary of DOL. Congress has expressly authorized the Secretary to file this suit. 33 U.S.C. § 944(h).

10. Defendant Home is an insolvent New Hampshire corporation into which The Home Indemnity Company merged and that is currently being liquidated in a proceeding in the State Court as Case No. 03-E-0106.

11. Defendant Liquidator is the New Hampshire Insurance Commissioner and has been appointed the Liquidator of Home's estate by the State Court.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action under 28 U.S.C. § 1345 because an officer of the United States “expressly authorized to sue by Act of Congress” has commenced it.

13. Venue is proper in this district under 28 U.S.C. § 1391(b).

STATUTORY FRAMEWORK

The Longshore and Harbor Workers’ Compensation Act

14. The system of workers’ compensation insurance established by the LHWCA applies to certain maritime workers, to employers who employ such workers “in whole or in part, upon the navigable waters of the United States,” and to insurance carriers authorized to provide the workers’ compensation insurance required by the LHWCA. 33 U.S.C. § 902(3)-(5).²

15. The LHWCA defines “carrier” as “any person or fund authorized under [33 U.S.C. § 932] to insure under this chapter and includes self-insurers.” 33 U.S.C. § 902(5).

16. The LHWCA defines and prescribes the exclusive liability of employers, including the amounts of compensation due, for the employment-related injuries and deaths of their employees. 33 U.S.C. §§ 904-09.

17. Employers must secure payment of the compensation due to their employees under the LHWCA by contracting with an authorized insurance carrier or by obtaining the Secretary’s authorization to self-insure. 33 U.S.C. §§ 904, 932(a).

² As used in this complaint, the terms “employer,” “employee,” and “carrier” have the meanings given to them by the LHWCA. 33 U.S.C. § 902(3)-(5).

18. If an employee's right to receive compensation under the LHWCA is disputed, DOL may investigate, order an independent medical examination of the employee, hold hearings, or take other actions to resolve the dispute. 33 U.S.C. §§ 907(e-f), 914(h).

19. In addition to prescribing the amounts of workers' compensation due and empowering DOL to resolve disputes between employers/carriers and employees, the LHWCA regulates the relationship between insurance carriers and insured employees in many other ways, including, but not limited to: (a) authorizing officials within DOL to approve or disapprove of settlement agreements regarding any claim for compensation under the LHWCA; (b) prescribing claim processing procedures, including claim filing deadlines; (c) imposing schedules for payment of workers' compensation; (d) prohibiting agreements that require an employee to contribute towards an employer's insurance premium or self-insurance fund, or to waive the employee's rights to compensation under the LHWCA; (e) requiring employers to "conspicuous[ly]" post "in and about" their places of business information regarding the workers' compensation insurance under which their employees are covered; (f) mandating certain terms in insurance policies; (g) creating a "special fund" (Special Fund) that the Secretary uses, in part, to make payments to employees under certain circumstances; and (h) requiring carriers and self-insured employers, based in part on their insurance claims histories, to pay annual assessments to finance the Special Fund. 33 U.S.C. §§ 908(i), 913, 914, 915, 919, 934, 936, 944.

20. The Special Fund created by the LHWCA "is established in the Treasury of the United States" and is "held in trust" for the benefit of injured employees. 33 U.S.C. § 944(a).

21. The Secretary utilizes the assets of the Special Fund to make payments for, among other things, disability, death, medical benefits, and workers' compensation to injured employees

whose self-insured employers or carriers are unable to meet their obligations to make such payments; disability and death payments to employees who suffer certain injuries “increasing disability” that cause death or permanent disability; and medical, vocational, and rehabilitative services for injured employees. 33 U.S.C. § 944(a) and (i).

22. The Secretary collects annual assessments from carriers which she uses to finance the Special Fund’s activities. 33 U.S.C. § 944(c)(2).³

23. The Secretary determines the amount of a carrier’s annual assessment based upon a statutory formula that considers: (1) the amount of the worker’s compensation payments the carrier made under the LHWCA during the preceding calendar year, relative to the total amount of workers’ compensation payments made by all carriers under the LHWCA during the same period; (2) the amount of the workers’ compensation payments the Special Fund made for certain injuries “increasing disability” during the preceding calendar year which were attributable to the carrier, relative to the total amount of such payments the Special Fund made during the same period; and (3) the Secretary’s estimate of the Special Fund’s “probable expenses” for the current calendar year. 33 U.S.C. § 944(c)(2).

24. The LHWCA requires carriers to pay these annual assessments in the amounts determined by the Secretary. 33 U.S.C. § 944(c)(2).

³ Assessments provide the vast majority of the Special Fund’s revenue, but small amounts are also collected as death payments, fines, and penalties under 33 U.S.C. § 944(c)(1) and (3). For example, during the fiscal year that ended September 30, 2009, assessments accounted for more than 99 percent (\$129,934,530 out of \$130,252,696) of the Special Fund’s total revenue.

New Hampshire Insurance Insolvency Laws

25. Under New Hampshire law, a court's order to liquidate an insolvent insurer "shall appoint the [New Hampshire Insurance] [C]ommissioner and his successors in office" as liquidator of the insolvent insurer. N.H. RSA 402-C:21.

26. A liquidator appointed as described in the immediately preceding paragraph is "vested by operation of law with the title to all of the property, contracts and rights of action and all of the books and records of the insurer ordered liquidated." N.H. RSA 402-C:21, I.

27. A liquidator is required to "review all claims duly filed in the liquidation," "may compound, compromise or in any other manner negotiate the amount for which claims will be recommended to the court," and is further empowered, among other things, to "[d]efray all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business and property of the insurer." N.H. RSA 402-C:45, I; N.H. RSA 402-C:25, IV.

28. New Hampshire law prescribes the order in which the claims of unsecured creditors are to be paid when a court determines an insurer domiciled in New Hampshire is insolvent and orders the insurer's liquidation. N.H. RSA 402-C:44 (New Hampshire priority statute).

29. The New Hampshire priority statute gives first priority (Class I) to claims for the "costs and expenses of administration." N.H. RSA 402-C:44, I.

30. The New Hampshire priority statute gives second priority (Class II) to "policy related claims," including "claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state." N.H. RSA 402-C:44, II.

31. The New Hampshire priority statute gives third priority (Class III) to “claims of the federal government.” N.H. RSA 402-C:44, III.

32. The New Hampshire priority statute requires all claims of a priority class to be paid in full (or adequate funds retained for such payment in full) before any payment is made to claimants in the next lower priority class. N.H. RSA 402-C:44.

33. The New Hampshire Insurance Guaranty Association and the New Hampshire Life and Health Insurance Guaranty Association (together, the New Hampshire Guaranty Associations) provide, subject to limitations, payment of covered claims under certain insurance policies when an insurer is insolvent. N.H. RSA 404-B:8, I; N.H. RSA 408-B:8, III.

The Supremacy Clause

34. The Supremacy Clause of the United States Constitution states, in part: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

The McCarran-Ferguson Act

35. The McCarran-Ferguson Act provides, in part, that “[n]o 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, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance.*” 15 U.S.C. § 1012(b) (emphasis added).

FACTUAL BASIS FOR CLAIMS

36. The LHWCA applied to Home as a carrier during the years 1999 through 2004.

37. During calendar years 1999 through 2003, the Special Fund made payments under 33 U.S.C. § 908(f) for injuries “increasing disability,” which were attributable to Home, in the following amounts: \$1,037,713 in 1999; \$965,731 in 2000; \$966,416 in 2001; \$936,611 in 2002; and \$921,122 in 2003.

38. DOL billed Home for Special Fund assessments on the following dates and in the following amounts: June 16, 2000 for \$652,852; July 23, 2001 for \$595,796; January 29, 2002 for \$282,835; July 25, 2003 for \$554,449; and July 14, 2004 for \$586,595.

39. To date, Home has made no payment towards the Special Fund assessment bills described in the immediately preceding paragraph.

40. On or about June 13, 2003, the State Court declared Home insolvent, ordered Home’s liquidation and appointed New Hampshire Insurance Commissioner Paula T. Rogers, and her successors in office, as Liquidator of Home.

41. On or about June 26, 2003, DOL timely filed its Proof of Claim (POC) for Home’s unpaid Special Fund assessments for 2000, 2001, and 2002.

42. On or about February 2, 2005 and April 8, 2005, DOL twice amended its POC to include Home’s unpaid Special Fund assessments for 2003 and 2004.

43. The total amount of DOL’s claim, as amended, is **\$2,672,527**.

44. On August 20, 2010, the Liquidator issued a Notice of Determination regarding DOL’s claim. The Liquidator’s Notice of Determination allowed DOL’s claim in the reduced amount of

\$2,035,643, assigned DOL's claim to priority Class III, and stated that "[t]he Liquidator does not expect there to be assets sufficient to make a distribution to creditors in classes below Class II."

45. DOL timely filed a Request for Review of the Liquidator's Notice of Determination, disputing both the allowed amount and the priority classification of its claim.

46. On October 28, 2010, the Liquidator issued a Notice of Redetermination regarding DOL's claim. The Liquidator's Notice of Redetermination allowed DOL's claim in the full amount of \$2,672,527, assigned DOL's claim to priority Class III, and again stated that "[t]he Liquidator does not expect there to be assets sufficient to make a distribution to creditors in classes below Class II."

**COUNT I: FOR A DECLARATION THAT, AS APPLIED TO DOL'S CLAIM,
THE NEW HAMPSHIRE PRIORITY STATUTE IS PREEMPTED BY
THE LHWCA, AND THAT DOL'S CLAIM IS ENTITLED TO
ABSOLUTE PRIORITY AND MUST BE PAID IN FULL**

47. DOL re-alleges each fact asserted in the numbered paragraphs above.

48. As detailed above, the LHWCA required Home to pay annual assessments to the Special Fund, in amounts determined by the Secretary, pursuant to a statutory formula.

33 U.S.C. § 902(5); 33 U.S.C. § 944(c)(2).

49. In violation of its obligations under the LHWCA, Home has failed to pay \$2,672,527 in Special Fund assessments it owes for the years 2000 through 2004.

50. Home's and the Liquidator's compliance with the New Hampshire priority statute by paying Class I and Class II claims ahead of DOL's Class III claim, makes it impossible for Home and the Liquidator to comply with the LHWCA by paying Home's year 2000 through 2004 Special Fund assessments.

51. Further, Home's and the Liquidator's compliance with the New Hampshire priority statute and their resulting failure to pay Home's year 2000 through 2004 Special Fund assessments, deprive the Special Fund of money it is due and frustrate the Secretary's ability, as administrator of the Special Fund, to carry out Congress's full purposes and objectives under the LHWCA.

52. The LHWCA, including its requirement that carriers pay annual assessments to the Special Fund, is an "Act of Congress" that "specifically relates to the business of insurance," such that the McCarran-Ferguson Act does not protect laws "enacted by any State for the purpose of regulating the business of insurance" from preemption by the LHWCA.

15 U.S.C. § 1012(b).

53. DOL is entitled to a judgment declaring that, as applied to DOL's claim against Home, the New Hampshire priority statute is preempted by the LHWCA pursuant to the Supremacy Clause of the United States Constitution, and that DOL's claim is entitled to absolute priority and must be paid in full before any other claims are paid.

COUNT II: IN THE ALTERNATIVE TO COUNT I, FOR A DECLARATION THAT DOL'S CLAIM IS ENTITLED TO CLASS II PRIORITY BECAUSE THE SPECIAL FUND IS "SIMILAR" TO THE NEW HAMPSHIRE GUARANTY ASSOCIATIONS

54. DOL re-alleges each fact asserted in the numbered paragraphs 1-46.

55. DOL pleads this Count II in the alternative to Count I above and, with respect to the 2003 and 2004 assessments, in the alternative to Count III below.

56. The New Hampshire priority statute provides Class II priority to "policy related claims," including "claims of the New Hampshire Insurance Guaranty Association, the New Hampshire

Life and Health Insurance Guaranty Association and any similar organization in another state.”

N.H. RSA 402-C:44, II.

57. DOL’s Special Fund is a “similar organization in another state” within the meaning of the New Hampshire priority statute. N.H. RSA 402-C:44, II.

58. DOL is entitled to a judgment declaring that DOL’s claim against Home is the claim of a “similar organization in another state” under the New Hampshire priority statute and therefore belongs in priority Class II and must be paid on a par with all other Class II creditors.

N.H. RSA 402-C:44, II.

COUNT III: IN THE ALTERNATIVE TO COUNT I, FOR A DECLARATION THAT THE PORTION OF DOL’S CLAIM THAT SEEKS PAYMENT OF HOME’S SPECIAL FUND ASSESSMENTS FOR 2003 AND 2004 IS ENTITLED TO CLASS I PRIORITY AS A COST AND EXPENSE OF ADMINISTRATION

59. DOL re-alleges each fact asserted in the numbered paragraphs 1-46.

60. DOL pleads this Count III in the alternative to Count I above.

61. DOL’s claim against Home includes \$1,141,044 in Special Fund assessments that were assessed on July 13, 2003 and July 14, 2004, *after* the State Court ordered Home’s liquidation on June 13, 2003.

62. The New Hampshire priority statute provides Class I priority to claims for the “costs and expenses of administration” of an insolvent insurer’s estate. N.H. RSA 402-C:44, I.

63. The portion of DOL’s claim that seeks payment of \$1,141,044 in assessments that DOL assessed after the entry of Home’s June 13, 2003 liquidation order, is a claim for the “costs and expenses of administration” of Home’s estate.

64. DOL is entitled to a judgment declaring that DOL's claim against Home, to the extent it seeks payment of \$1,141,044 in assessments that DOL assessed after the entry of Home's June 13, 2003 liquidation order, is a claim for the "costs and expenses of administration" of Home's estate and therefore belongs in priority Class I and must be paid on a par with all other Class I creditors. N.H. RSA 402-C:44, I.

**COUNT IV: FOR AN ORDER PURSUANT TO 28 U.S.C. § 2202 ENJOINING
DEFENDANTS FROM TREATING DOL'S CLAIM OR DISBURSING
FUNDS FROM HOME'S ESTATE INCONSISTENTLY WITH
DECLARATORY RELIEF AWARDED BY THIS COURT**

65. DOL re-alleges each fact asserted in the numbered paragraphs 1-46.

66. A declaratory judgment can be used as a predicate to further relief under 28 U.S.C. § 2202, including an injunction.

67. DOL is entitled to an order enjoining Home and the Liquidator from treating DOL's claim or disbursing funds from Home's estate inconsistently with the declaratory relief this Court awards to DOL.

PRAYER FOR RELIEF

WHEREFORE, DOL respectfully requests that this Court grant it:

A. against Home and the Liquidator, a judgment under 28 U.S.C. § 2201 declaring that, as applied to DOL's claim against Home, the New Hampshire priority statute is preempted by the LHWCA, and that DOL's claim is entitled to absolute priority and must be paid in full before any other claims are paid;

or, in the alternative,

declaring that DOL's claim against Home is the claim of a "similar organization in another state" under the New Hampshire priority statute and therefore belongs in priority Class II under that statute and must be paid on a par with all other Class II creditors; and

declaring that DOL's claim against Home, to the extent it seeks payment of \$1,141,044 in assessments that DOL assessed after the entry of Home's June 13, 2003 liquidation order, is a claim for the "costs and expenses of administration" of Home's estate and therefore must be treated as a priority Class I claim under the New Hampshire priority statute and must be paid on a par with all other Class I creditors; and

B. against Home and the Liquidator, an order under 28 U.S.C. § 2202 enjoining them from treating DOL's claim or disbursing any funds from Home's estate inconsistently with the declaratory relief this Court awards to DOL; and

C. such further relief favoring DOL as this Court deems just and appropriate.

Dated: December 9, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

J. CHRISTOPHER KOHN
Director

RUTH A. HARVEY
Assistant Director

/s/ Kyle A. Forsyth
KYLE A. FORSYTH
Washington State Bar No. 34609
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Tel. (202) 307-0452
Fax. (202) 514-6163
Kyle.Forsyth@usdoj.gov

Attorneys for Hilda L. Solis
Secretary, U.S. Department of Labor

EXHIBIT 2A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

HILDA L. SOLIS, Secretary, United States
Department of Labor,

Plaintiff,

v.

Civil Action No. 1:10-CV-572-SM

THE HOME INSURANCE COMPANY, and
ROGER A. SEVIGNY, New Hampshire
Insurance Commissioner, as Liquidator of The
Home Insurance Company,

Defendants.

**MEMORANDUM OF STATE INSURANCE GUARANTY FUNDS
IN SUPPORT OF THEIR APPLICATION TO INTERVENE**

W. Daniel Deane, Esq. (Bar #18700)
NIXON PEABODY LLP
900 Elm Street, 14th Floor
Manchester, NH 03101
Telephone: (603) 628-4000
Facsimile: (603) 628-4041
ddeane@nixonpeabody.com

Joseph C. Tanski, Esq. (BBO #492180)
(Motion for *Pro Hac Vice* Pending)
Scott Sasjack, Esq. (BBO #669230)
(Motion for *Pro Hac Vice* Pending)
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
Telephone: (617) 345-1000
jtanski@nixonpeabody.com
ssasjack@nixonpeabody.com

*Attorneys for Proposed Intervenors State Insurance
Guaranty Funds*

Dated: February 11, 2011

The insurance guaranty funds and associations of fifteen states (the “Guaranty Funds”) submit this memorandum in support of their application to intervene (“Application”) in the above-captioned action to protect the Guaranty Funds’ rights in the distribution of property being administered in a New Hampshire insurer liquidation proceeding. The Guaranty Funds apply to intervene to seek dismissal of this action on jurisdictional and abstention grounds so that the claim of Hilda L. Solis, in her official capacity as Secretary of the United States Department of Labor (“DOL”) will continue to be handled in the New Hampshire liquidation proceeding. Alternatively, the Guaranty Funds apply to intervene to oppose the DOL’s claim and seek declaratory relief against the DOL in the event this action is not finally dismissed.

Introduction

The Guaranty Funds seek to intervene in this action to protect their economic interests in the property which is being administered in a New Hampshire liquidation proceeding, which property the DOL seeks to make the subject of this action, and to protect the Guaranty Funds’ economic interests in other insolvent insurer proceedings pending in other states that will or may be subject to the *stare decisis* effect or the non-binding precedential effect of a decision in this action. The Guaranty Fund’s economic interests are implicated both with respect to the question whether this Court may or should allow this action to proceed and the merits of the DOL’s priority claim. Intervention should be allowed as a matter of right, because the Guaranty Funds’ interests are not adequately protected by defendant liquidator (the “Liquidator”) of The Home Insurance Company (“Home”) whose interest is solely to seek a ruling on his responsibilities in the New Hampshire liquidation proceeding. Alternatively, the Guaranty Funds respectfully request that the Court exercise its discretion to permit intervention by the Guaranty Funds.

The DOL wrongly maintains that a federal statute, 33 U.S.C. §§ 901-50 (the “LHWCA”), must be applied so as to create an absolute priority for claims of the DOL over claims of state insurance guaranty funds in the Home liquidation proceeding, and that the McCarran-Ferguson Act, 15 U.S.C. § 1012, does not protect from preemption the New Hampshire statute governing priority of distributions in the Home liquidation proceeding, N.H. RSA 402-C 44 (the “N.H. Priority Statute”). The DOL’s contentions run directly counter to the priority scheme established by the N.H. Priority Statute and other state insurer liquidation statutes.

The Liquidator disputes the DOL’s unfounded interpretation of the LHWCA and the McCarran-Ferguson Act. In proceedings addressing the DOL’s proof of claim filed by the DOL in the New Hampshire liquidation proceeding, the Liquidator assigned the DOL’s claim to a Class III priority under the N.H. Priority Statute.¹

The Guaranty Funds have a direct and substantial interest in the subject matter of this action and should be allowed to intervene as a matter of right. See the affidavit of Paul M. Gulko (“Gulko Aff.”) submitted in support of the Guaranty Funds’ Application, the Guaranty Funds’ Proposed Motion to Dismiss and Memorandum In Support of Motion to Dismiss attached as Exhibit A to the Guaranty Funds’ Application, and the Guaranty Funds’ Proposed Answer and Counterclaim (“Int. Pl.”), at Counterclaim ¶¶ 9, 13, 22-23 attached as Exhibit B to the Guaranty Funds’ Application.

The DOL’s claim that the DOL has priority over the Guaranty Funds’ claims in the distribution of estate assets threatens to undermine New Hampshire’s statutory scheme designed

¹ Pursuant to the N.H. Priority Statute, statutory classes of priority include: (I) costs and expenses of administration; (II) policy related claims, including claims of the New Hampshire Insurance Guaranty Association (the “New Hampshire Association”) and similar organizations in another state; (III) claims of the federal government. See Complaint filed herein by DOL (“DOL Compl.”), ¶¶ 29-31.

to protect policyholders, by substantially devaluing the Guaranty Funds' significant claims in the New Hampshire proceeding and other insolvent insurer proceedings. See Int. Pl., at Counterclaim ¶¶ 11, 16-17, 22. The DOL's effort to have its claim against estate assets resolved outside the pending state liquidation proceeding having control over such estate assets, threatens to undermine the integrated state-based statutory scheme established for the distribution of assets of insolvent insurers. A decision in this case would have far reaching and potentially highly damaging ramifications which could impair the Guaranty Funds' financial interests and thereby undermine the state guaranty fund system enacted to protect policyholders. Id. at ¶¶ 7, 9, 12-14. If the DOL were to prevail in this action, claims for unpaid LHWCA assessments would enjoy priority over the more than \$35 million in claims that the Guaranty Funds have in the Home estate. Id. at ¶ 9. In addition, a decision by this Court that the DOL's claim for LHWCA assessments has a priority over all other claims in the estate, if upheld on appeal, would have a *stare decisis* effect, and in any event would have non-binding precedential effect that could result in priority for DOL claims over the Guaranty Funds' claims in the distribution of assets in other insolvent insurer liquidation proceedings pending in other jurisdictions and in future insolvent insurer liquidation proceedings. Id. at ¶¶ 7, 14-15.

The Guaranty Funds' interests are not adequately protected by the Liquidator. See id. at ¶¶ 22-23. The Liquidator does not have an economic interest in the outcome of this action. In addition, the Liquidator has no interest whatsoever in how the decision in this case affects the distribution of assets in the numerous other insolvent insurer estates outside New Hampshire. The Guaranty Funds, on the other hand, have a significant financial stake in the property which is the subject of this action and in the protection of the Guaranty Funds' priority over non-

policyholder DOL claims in this and numerous other pending and future insurer liquidation proceedings. See id. at ¶¶ 7, 14-15.

Accordingly, this Court should allow the Guaranty Funds to intervene in this action, either as of right or permissively, to seek dismissal of this action on jurisdictional and abstention grounds so that the DOL's claims to a distribution of Home's assets held by the Liquidator will continue to be resolved in the New Hampshire liquidation proceeding in which the DOL filed and prosecuted its claim. See Exhibit A to Application. See Geiger v. Foley Hoag LLP Retirement Plan, 521 F.3d 60, 64 (1st Cir. 2008) (affirming dismissal of federal action on *res judicata* and full faith and credit grounds where party had filed an application to intervene under Fed. R. Civ. P. 24(a) and a simultaneous motion to dismiss under Fed. R. Civ. P. 12(b)).

Alternatively, this Court should allow the Guaranty Funds to intervene either as of right or permissively to oppose the DOL's claim and to seek a declaration that the Guaranty Funds are entitled to priority over non-policyholder DOL claims, should this action not be dismissed. See Proposed Answer and Counterclaim of State Insurance Guaranty Funds attached as Exhibit B to the Application. In the event this action is finally dismissed the Proposed Answer and Counterclaim of State Insurance Guaranty Funds (Exhibit B to Application) would not be filed. The allegations as to jurisdiction and venue in the Proposed Answer and Counterclaim of State Guaranty Funds do not constitute an admission by the Guaranty Funds. The Guaranty Funds contend that this Court lacks jurisdiction for the reasons set forth in Exhibit A to the Application.

In a similar action in which the United States sought to assert priority under 31 U.S.C. § 3713 for federal claims over claims of state insurance guaranty funds in an insurer liquidation proceeding in Massachusetts, the First Circuit Court of Appeals granted the request of a number of state insurance guaranty funds, including certain of the Guaranty Funds, to intervene to protect

their interests. See Ruthardt v. United States, 303 F.3d 375, 386-87 (1st Cir. 2002), holding as follows:

The would-be [guaranty fund] intervenors candidly admit that their present concern is with the future. Rehearing *en banc* might be sought as to *Garcia* and the possibility exists of Supreme Court review. Given the magnitude of the stakes and the helpful advocacy the funds have provided to us, we choose in these unusual circumstances to exercise our own discretion to allow the guaranty funds to intervene in the case at this time on a going-forward basis.

Following intervention the guaranty funds participated as parties in a petition (unsuccessful) for a writ of certiorari. Al. Ins. Guar. Ass'n v. United States, 2005 U.S. LEXIS 3700 (U.S. May 19, 2003).

Here, intervention should be allowed as a matter of right under Fed. R. Civ. P. 24(a). Alternatively, for the same reasons as are set forth in Ruthardt, the Guaranty Funds request that this Court exercise its discretion to allow the Guaranty Funds to intervene permissively under Fed. R. Civ. P. 24(b).

The Guaranty Funds And Their Interests In This Matter

The Guaranty Funds are statutory entities created and governed by the laws of their respective jurisdictions of organization to provide protection to policyholders against the hardships of property and casualty insurer insolvencies. See Gulko Aff., ¶¶ 6-12; Int. Pl., at Counterclaim ¶ 6. Most state guaranty funds are based on the National Association of Insurance Commissioners' Post-Assessment Property and Liability Insurance Guaranty Association Model Act. Int. Pl., at Counterclaim ¶ 6. Virtually all states have set up such guaranty funds. See Ruthardt, 303 F.3d at 378. The Guaranty Funds are triggered upon a judicial finding of insolvency. See, e.g., N.H. RSA 404-B:8 I and 404-B:10; Gulko Aff., ¶10; Int. Pl., at Counterclaim ¶ 6. In general, each state guaranty fund is obligated on covered policy claims of

its residents. See Gulko Aff., ¶ 7; Int. Pl., at Counterclaim ¶ 6. See, e.g., N.H. RSA 404-B:5 IV, 404-B:8 I. Guaranty fund protection is provided for any insurer licensed to transact insurance in the state of the guaranty fund. See Gulko Aff., ¶¶ 8-9, 15; Int. Pl., at Counterclaim ¶ 6. See, e.g., N.H. RSA 404-B: 5V, 404-B:8 I. Most property/casualty lines of insurance are covered with certain stated exceptions. See Int. Pl., at Counterclaim ¶ 6. See, e.g., N.H. RSA 404-B:3.

Upon the New Hampshire Superior Court's determination of insolvency of Home on June 13, 2003, the Guaranty Funds became obligated to pay "covered claims" arising under Home policies subject to the limitations provided in the respective statutes creating the Guaranty Funds. See Gulko Aff., ¶ 10; Int. Pl., at Counterclaim ¶ 7. See, e.g., N.H. RSA 404-B:1 *et seq.* governing the N.H. Association. Covered claims are claims, subject to statutory limitations, which arise out of and are within the coverage of policies issued by the insolvent insurer. See Int. Pl., at Counterclaim ¶ 7. See, e.g., N.H. RSA 404-B:5 IV; Conn. Gen. Stat. §38a-838(6) (1999); D.C. Code Ann. §35-3901(6) (2000); Me. Rev. Stat. Ann. §4435(4) (1999); N.H. Rev. Stat. Ann. §404-B:5(IV)(1999); R.I. Gen. Laws §27-34-5(8) (2000); Vt. Stat. Ann. Tit. Eight §3612(4) (2000); Va. Code Ann. §38.2-1603 (2000). The Guaranty Funds have similar obligations for covered claims under policies issued by other insolvent insurers determined to be insolvent in jurisdictions outside New Hampshire. Gulko Aff., ¶¶ 20, 22-23. One or more of the Guaranty Funds have paid claims in at least thirty-five insurer insolvencies pending in over ten jurisdictions. See Gulko Aff., ¶ 20; Int. Pl., at Counterclaim ¶ 7.

The Guaranty Funds obtain the funds needed to pay claims by assessing member insurers. See Gulko Aff., ¶ 16; Int. Pl., at Counterclaim at ¶ 8. See, e.g., N.H. RSA 404-B:8 I(c). Each insurer writing business in a particular state is required to be a member of that state's guaranty fund. See Gulko Aff., ¶ 15; Int. Pl., at Counterclaim at ¶ 8. See, e.g., N.H. RSA 404-B:5 VI, 404-

B:6. Member insurers recoup assessments through increased rates and premiums (see, e.g., N.H. RSA 404-B:16) and in certain states through premium tax offsets or policy surcharges. See, e.g., VA Code Ann. § 38.2-1611.1 (tax offset); Hawaii Rev. Stat. § 431:16-115 (policy surcharge); See Gulko Aff., ¶ 19; Int. Pl., at Counterclaim ¶ 8.

The Guaranty Funds have paid in excess of \$35 million in losses on claims arising under Home policies. See Gulko Aff., ¶ 20; Int. Pl., at Counterclaim ¶ 9. In addition, the Connecticut Fund, the D.C. Fund, the Maine Fund, the Massachusetts Fund, the New Hampshire Fund, the Rhode Island Fund, the Vermont Fund and the Virginia Fund, alone, have pending claims in over thirty-five other insolvent insurer estates in over ten jurisdictions and have recovered hundreds of millions of dollars. See Gulko Aff. at ¶¶ 20-23. Most, if not all of the other Guaranty Funds have also made significant covered claim payments in other insolvent insurer estates. Id. at ¶ 23.

The Guaranty Funds have statutory rights to recover from the Home estate and the estates of other insolvent insurers on a priority equal with other policy claimants. See Gulko Aff., ¶¶ 9, 17; Int. Pl., at Counterclaim ¶¶ 10-11. Any person recovering from a guaranty fund is deemed to have assigned to the guaranty fund his or her rights under the policy of the insolvent insurer. Id. See, e.g., N.H. RSA 404-8:II (I) and RSA 402-C 44; Conn. Gen. Stat. §38a-844(1) (1999); D.C. Code Ann. §35-3908(a) (2000); Me. Rev. Stat. Ann. §4442 (1999); R.I. Gen. Laws §27-34-11(a)(2000); Vt. Stat. Ann. Tit. Eight §3618(a) (2000); Va. Code Ann. §38.2-1609(A.1) (2000).

The receiver of an insolvent insurer is bound by the settlements of claims by the Guaranty Funds and must grant, against the assets of the insolvent insurer, priority equal to that which the claimant would have been entitled in the absence of the guaranty fund statute. See Gulko Aff., ¶ 17; Int. Pl., at Counterclaim ¶ 11. See, e.g., N.H. RSA § 404-B:ii(II) and RSA 402-C 44; Conn. Gen. Stat. §38a-844(2) (1999); D.C. Code Ann. §35-3908(c) (2000); Me. Rev. Stat. Ann. §4442

(1999); R.I. Gen. Laws §27-34-11(2) (2000); Vt. Stat. Ann Tit. Eight § 3618(b) (2000); Va. Code Ann. §38.2-1609(B) (2000). In a liquidation proceeding in New Hampshire and in many other jurisdictions, the claims of the Guaranty Funds are afforded a priority equal with policyholders and ahead of non-policyholder claims of the United States. See, e.g., N.H. RSA 402-C 44; Conn. Gen. Stat. §38a-944 (1999); Vt. Stat. Ann. Tit. Eight §7081 (2000). See Gulko Aff., ¶¶ 9, 17; Int. Pl., at Counterclaim ¶¶ 10-11.

The statutory estate distribution scheme provides estate funds to the Guaranty Funds and thus reduces the need for Guaranty Fund assessments on member insurers. See Gulko Aff., ¶ 18-19; Int. Pl., at Counterclaim ¶ 12. This in turn lessens the burden on the insurance-buying public which pays for the Guaranty Funds through increased premiums to cover guaranty fund assessments (see, e.g., N.H. RSA 404-B:16) or in some states through premium tax offsets or policy surcharges. See Gulko Aff., ¶ 19; Int. Pl., at Counterclaim ¶ 12. Distributions to guaranty funds pursuant to the statutory priority distribution scheme established by the N.H. Priority Statute thus ultimately will lessen the burden on the insurance-buying public. See Gulko Aff., ¶¶ 18-19; Int. Pl., at Counterclaim ¶ 12.

The DOL asserts that it has a priority claim against the assets in the Home estate for unpaid assessments for the LHWCA special fund and that carriers nationwide are assessed for the LHWCA special fund and that it has made payments to injured workers whose insurers are insolvent. See Gulko Aff., Exhibit E, at pp. 2-3 (DOL's memorandum in support of Rule 65 motion for preliminary injunction). By reason of their payment of more than \$35 million of covered claims under Home policies, the Guaranty Funds are substantial claimants against the property being administered on the Home liquidation proceeding, and are entitled to the benefit of the statutory priority established for guaranty fund claims. A decision on the DOL's claim

against Home assets also will affect the Guaranty Fund's claims in insurer liquidation proceedings in other states.

Argument

A. The Guaranty Funds Are Entitled To Intervene In This Proceeding As Of Right.

Pursuant to Fed. R. Civ. P 24(a) ("Rule 24(a)"), an applicant is entitled to intervene in an action as of right where (1) the application is timely; (2) the applicant has a direct and substantial interest in the subject matter of the litigation; (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties. Fed. R. Civ. P. 24(a); Caterino v. Barry, 922 F.2d 37, 39-40 (1st Cir. 1990); United States v. Metropolitan Dist. Comm'n, 147 F.R.D. 1, 4 (D. Mass. 1993).

Rule 24(a) is construed liberally. United States v. Union Elec. Co., 64 F.3d 1152, 1158 (8th Cir. 1995), aff'd 132 F.3d 422 (8th Cir. 1997). As a result, "[a]ny doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors." Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993). See also Union Elec., 64 F.3d at 1158 ("we resolve all doubts in favor of the proposed intervenors").

Here, the Guaranty Funds satisfy the requirements of Rule 24(a). Consequently, the Guaranty Funds should be permitted to intervene in these proceedings as of right to protect their substantial interest in having all claims against the property which is the subject of the Home liquidation proceeding, resolved in the New Hampshire proceedings established for that purpose, and to protect their substantial property interest in the assets being administered in the Home liquidation proceeding and insurer liquidation proceedings in jurisdictions outside New

Hampshire.

1. The request to intervene is timely.

The Guaranty Funds' application is timely. The DOL's Complaint was filed on December 9, 2010, and the DOL's Rule 65 motion has been withdrawn as moot. No other action has been taken in this action. There is no prejudice as a result of the timing of this application.

2. The Guaranty Funds have a direct and substantial interest in the subject matter.

The Guaranty Funds have millions of dollars at stake in the interpretation of the LHWCA and its effect upon state insurer liquidation priority statutes. It is not expected that the property to be distributed in the Home liquidation proceeding is sufficient to satisfy in full the claims of Class II claimants, including the Guaranty Funds. See DOL Compl., ¶¶ 44-46. The Class II claims of the Guaranty Funds exceed \$35 million. See Gulko Aff., ¶ 20. Every dollar of Home assets that the DOL is claiming pursuant to its assertion of absolute priority would otherwise be distributed in significant part to the Guaranty Funds. The Guaranty Funds' interest in recoveries from property administered in state insurer liquidation proceedings was a central factor informing the Court's Rule 24 rulings in Ruthardt.

The Guaranty Funds also have a substantial interest in having the question of the application of the N.H. Priority Statute to the DOL's claims against Home property resolved in the New Hampshire liquidation proceeding established for that purpose.

In addition, one or more of the Guaranty Funds have significant claims pending in over thirty-five other insolvent insurer estates in over ten states. See Gulko Aff., ¶ 20; Int. Pl., Counterclaim at ¶ 7. As a result, a decision by this Court in favor of the DOL could have a significant detrimental financial impact on the Guaranty Funds' claims against the property held in other insolvent insurer estates in which the DOL asserts a priority claim for payment of

LHWCA assessments.

Thus, the interest of the Guaranty Funds in the subject matter of this action is sufficiently “direct, significant, [and] legally protectable” to satisfy the “interest in subject matter” prong of the Rule 24(a) test. See Ruthardt, 303 F.3d at 386 (holding that the guaranty funds satisfied the direct and substantial interest requirement of Rule 24):

The would-be intervenors unquestionably have an enormous practical stake in this case. The guaranty funds are liable, under their own state laws, to reimburse numerous policyholders of American Mutual who bought policies in their respective states. Similarly their priority in claiming Massachusetts assets of the estate depends on whether the Commissioner or the United States prevails on these appeals... Thus, the would-be intervenors meet the first two requirements for intervention as of right: an interest in the matter in controversy and a practical threat to that interest. Fed. R. Civ. P. 24(a)(2).

303 F.2d at 386.

3. The Guaranty Funds’ ability to protect their interests will be impaired or impeded in the absence of intervention.

As a practical matter, the Guaranty Funds must intervene to protect their unique interests. The Guaranty Funds risk the possibility that the DOL may obtain relief in its favor which entitles the DOL to the assets of the Home estate at the direct expense of the Guaranty Funds. There can be no doubt that this risk constitutes “impairment” under Rule 24(a)(2). See Ruthardt, 303 F.3d at 386 (holding that the guaranty funds satisfied the practical threat requirement of Rule 24). Given the Guaranty Funds’ claims in numerous other insolvencies, the potential *stare decisis* effect of a decision in this case, either on the question of whether this Court may or should hear this case or on the question of the DOL’s asserted priority, satisfies the practical threat requirement. See also Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994) (*stare decisis* effect of adverse judgment “impairs” applicant’s interests, for purpose of allowing intervention); Chiles v. Thornburgh, 865 F.2d 1197, 1214 (11th Cir. 1989) (a potential adverse *stare decisis*

effect “may supply that practical disadvantage which warrants intervention as of right”).

4. The Guaranty Funds’ interest is not adequately represented by the existing parties.

In order to intervene as of right, the Guaranty Funds “need only show that representation *may be* inadequate, not that it is inadequate.” Conservation Law Foundation, Inc. v. Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992) (emphasis added). This burden is “minimal.” Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972). See also Falls Chase, 983 F.2d at 216 (“[t]he proposed intervenors’ burden to show that their interests *may be* inadequately represented is minimal”) (emphasis in original). Given this standard, “the applicant should be treated as the best judge of whether the existing parties adequately represent his or her interests.” 6 James Wm. Moore et al., Moore’s Federal Practice ¶ 24.03[4][a] (3d ed. 1997).

Here, the Guaranty Funds have satisfied their burden. The Guaranty Funds have a specific legal and economic interest in (1) having the DOL’s claim resolved in the New Hampshire liquidation proceeding in which Home’s assets are being administered, and (2) the proper determination of the DOL’s rights -- interests which are distinct from those of the Liquidator and not adequately represented by the Liquidator. The Liquidator is charged with marshalling and distributing the assets of the Home estate. This Court’s determination as to whether this Court is empowered to or should address the DOL’s claim, or whether the LHWCA requires the Liquidator to pay DOL non-policyholder claims ahead of the Guaranty Funds’ claims, is of no economic consequence to the Liquidator. On the other hand, this Court’s decision as to where the DOL’s claim should be resolved and this Court’s interpretation of the LHWCA is of economic importance to the Guaranty Funds both as to the Home proceeding as well as numerous other pending and future proceedings involving the distribution of assets of insolvent insurers against which the Guaranty Funds have claims. The Liquidator has no interest

in any insolvent insurer proceedings which take place outside New Hampshire.

In situations where the purported representative lacks a direct interest in a case, courts permit the parties that have the direct interest to intervene. See, e.g., Berkeley Electric Coop., Inc. v. Mt. Pleasant, 394 S.E.2d 712, 716 (S.C. 1990) (“*Mt. Pleasant* lacks a direct economic interest in the outcome of the proceedings in that it will receive franchise fees regardless of who supplies the property . . . [Therefore, it] would be an inadequate representative of [the intervenor’s] asserted economic interest”). Even where the purported representative has some interest in the case, courts permit a party to intervene where it has a greater interest. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 546-547 (1st Cir. 2006) (subsidiary company met Rule 24(a)(2) requirements where it had a much greater economic interest than party subsidiary of same parent company; “without a perfect identity of interests, a court must be very cautious in concluding that a litigant will serve as a proxy for an absent party.”) (quoting Tell v. Trustees of Dartmouth Coll., 145 F.3d 417, 419 (1st Cir. 1998)).

The same is true where a purported representative is charged with representing the public interest broadly defined, because that person often cannot adequately protect a party with an economic stake. See, e.g., SEC v. Flight Transp. Corp., 699 F.2d 943, 948 (8th Cir. 1983) (“[t]he SEC’s primary goal is to protect the public by preventing further securities violations. The receiver is concerned with marshaling and protecting FTC’s assets for the benefit of all concerned parties. While [the intervenor’s] interests may not be adverse to those of the SEC or the receiver, they are sufficiently ‘disparate’ to warrant intervention”); see also Georgia v. United States Army Corp. of Engineers, 302 F.3d 1242, 1258-1259 (11th Cir. 2002) (holding that the United States did not adequately represent hydropower purchasing company; “The Corps seeks to protect its decision making process, whereas SeFPC seeks to protect the economic and

statutory interests of its members. We do not believe that a federal defendant with a primary interest in the management of a resource has interests identical to those of an entity with economic interests in the use of that resource.”)

Thus, given that the Liquidator’s interests in this litigation are solely to clarify the New Hampshire priority scheme while the Guaranty Funds have a substantial economic stake in the Home proceeding and in numerous other insurer liquidation proceedings in other jurisdictions, the Liquidator does not adequately represent the Guaranty Funds and the Guaranty Funds are entitled to intervene as of right in this action.

In Ruthardt, the Court of Appeals held that the district court had acted properly in denying the guaranty funds’ application to intervene as a matter of right. Ruthardt, 303 F.3d at 386. The Court stated that no concrete reason had been suggested why the Massachusetts Commissioner’s (receiver for the insolvent insurer) representation was inadequate. Id. Here, in contrast, the Guaranty Funds are better suited than the Liquidator to address the DOL’s claim that the DOL special fund is an organization similar to the New Hampshire Association within the meaning of N.H. RSA 402-C:44, II such that the DOL’s claim belongs in Class II under N.H. RSA 402-C:44. DOL Compl., ¶¶ 54-58. Further, the Guaranty Funds are familiar with the types of insurer liquidation proceedings in states outside New Hampshire and thus are best suited to address the jurisdictional issue, the abstention principles and the priority issues present in this action.

B. If This Court Determines That The Guaranty Funds Are Not Entitled To Intervene As Of Right, The Guaranty Funds Request That The Court Exercise Its Discretion To Allow Permissive Intervention By The Guaranty Funds In This Case.

Permissive intervention is allowable where: (1) the applicant’s claim and the main action have a question of law or fact in common; (2) intervention would not result in undue delay or

prejudice to the original parties; and (3) the applicant's interest is not adequately represented by an existing party. Tutein v. Daley, 43 F. Supp. 2d 113, 130 (D. Mass. 1999); Fed. Civ. P. 24(b). The third consideration is least important. Indeed, courts have held that the consideration of whether an intervenor's interests are adequately represented by existing parties is "at most a minor factor" in determining whether permissive intervention should be granted. State of New York v. Reilly, 143 F.R.D. 487, 490 (N.D.N.Y. 1992); Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 101 F.R.D. 497, 502 (E.D.N.Y. 1984), aff'd 813 F.2d 570 (2d Cir. 1987). In Ruthardt the Court of Appeals allowed intervention by guaranty funds even though it did not perceive inadequacy of representation. See, 303 F.3d at 386-87.

As in Ruthardt, all three requirements are satisfied here. First, as between the DOL's claim and the claims of the Guaranty Funds there are common questions of law and fact. The DOL seeks to have its claim resolved in this Court while the Guaranty Funds contend that the New Hampshire liquidation proceeding is the appropriate forum for the resolution of the dispute between the DOL and the Guaranty Funds. On the merits, the most significant overlapping question concerns the rights of the DOL against the property being administered in the Home liquidation proceeding. To wit, in the distribution of Home property is the DOL entitled to an absolute priority over all other claims against such property? Resolving these issues together would provide the most practical, efficient and just resolution of the Guaranty Funds' claims vis-à-vis the DOL's claims. See Schipporeit, 69 F.3d at 1381 ("the most obvious benefits of intervention in general are the efficiency and consistency that result from resolving related issues in a single proceeding").

Finally, allowing the Guaranty Funds to intervene in this action would in no way cause undue delay or prejudice to the Liquidator and the DOL.

Conclusion

For the foregoing reasons, the Guaranty Funds' application for intervention in this matter should be allowed as a matter of right. Alternatively, the Guaranty Funds respectfully request that the Court exercise its discretion to allow the Guaranty Funds to intervene. As in Ruthardt, the stakes for the Guaranty Funds are high, the questions involved in this action have significant implications to the state based system for the distribution of the assets of insolvent-insurance companies, and the participation of the Guaranty Funds will assist this court in reviewing the important public policy issues which lie at the heart of this case.

Respectfully submitted,

NEW HAMPSHIRE INSURANCE GUARANTY
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, and WASHINGTON INSURANCE
GUARANTY ASSOCIATION,

By their attorneys,

/s/ W. Daniel Deane

W. Daniel Deane, Esq. (Bar #18700)

NIXON PEABODY LLP

900 Elm Street, 14th Floor

Manchester, NH 03101

Telephone: (603) 628-4000

Facsimile: (603) 628-4041
ddeane@nixonpeabody.com

/s/ Joseph C. Tanski

Joseph C. Tanski, Esq. (BBO #492180)

(Motion for *Pro Hac Vice* Pending)

Scott Sasjack, Esq. (BBO #669230)

(Motion for *Pro Hac Vice* Pending)

NIXON PEABODY LLP

100 Summer Street

Boston, MA 02110

Telephone: (617) 345-1000

jtanski@nixonpeabody.com

ssasjack@nixonpeabody.com

Dated: February 11, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2011, the foregoing *Memorandum of State Insurance Guaranty Funds in Support of Their Application to Intervene* was electronically served on counsel of record in this matter who are registered with the Court's ECF filing system through ECF notification.

/s/ W. Daniel Deane

EXHIBIT 2B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

HILDA L. SOLIS, Secretary, United States
Department of Labor,

Plaintiff,

v.

Civil Action No. 1:10-CV-572-SM

THE HOME INSURANCE COMPANY, and
ROGER A. SEVIGNY, New Hampshire
Insurance Commissioner, as Liquidator of The
Home Insurance Company,

Defendants.

AFFIDAVIT OF PAUL M. GULKO

1. I, Paul M. Gulko, am the President of Guaranty Fund Management Services ("GFMS"), an unincorporated non-profit association consisting of the state insurance guaranty funds and associations of the six New England states, Virginia and the District of Columbia. GFMS administers these eight state insurance guaranty funds and associations (the "GFMS Funds").

2. I have personal knowledge of the matters hereinafter referred to, except those made on information and belief, and as to those I believe them to be true.

3. I make this affidavit in support of the application of certain state insurance guaranty funds and associations ("Guaranty Funds") to intervene in this action and in support of a motion to dismiss which the Guaranty Funds propose to file in this action.

4. I have been involved with the administration of state insurance guaranty funds for 36 years. I am personally responsible for the overall supervision of each of the

GFMS Funds subject to the direction and control of the respective Board of Directors of such guaranty funds.

5. I have represented the interests of guaranty funds in over 115 insurer insolvencies. I am familiar with the operation of state insurance guaranty funds including the processing of payments for policyholders, assessments of member insurers to pay claims, and recovery by guaranty funds from insolvent insurer estates.

6. Each state insurance guaranty fund is created and governed by a statute in its jurisdiction of organization. In New Hampshire, the statute is N.H. RSA 404-B:1 *et seq.*

7. In general each state guaranty fund provides protection for insureds and claimants residing in the state of the guaranty fund. See, e.g., N.H. RSA 404 B:5 IV and 404-B:8 I. Each of the fifty states plus the District of Columbia and the Commonwealth of Puerto Rico has a guaranty fund.

8. The guaranty funds provide protection for certain claims covered by property and casualty insurance policies. Most lines of insurance are covered with certain exceptions stated in the statute governing the particular guaranty fund. See, e.g., N.H. RSA 404-B:3, which governs the New Hampshire Insurance Guaranty Association (the "New Hampshire Association").

9. Each guaranty fund statute creates a mechanism for the payment of claims under certain insurance policies issued by property and casualty insurers to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer and to provide for an association to assess the cost of such protection among insurers. Some guaranty fund statutes state this purpose

explicitly. See, e.g., N.H. RSA 404-B:2. As explained herein the provision giving guaranty funds a priority equal to other policyholder claims in insurer liquidation proceedings is an integral part of the statutory mechanism for the payment of claims under policies of insolvent insurers.

10. Guaranty funds pay only “covered claims,” which are defined as claims which arise out of and are within the coverage of a policy issued by an insurer which is determined to be insolvent. See, e.g., N.H. RSA 404-B:5 IV. Policyholders are protected on both first party type claims (e.g. a fire loss) and third party type claims (e.g. tort claims).

11. Non-policy claims do not qualify as “covered claims.” All non-policy claims must be denied by the guaranty fund. See, e.g., N.H. RSA 404-B:8 I(d). Guaranty funds do not pay general creditor claims because they are not covered claims.

12. Guaranty funds protect policyholders in at least three ways. First, guaranty funds provide for prompt payment. Second, in most instances guaranty funds provide greater recoveries than would be available from distributions from the insolvent insurer’s assets. Third, guaranty funds provide a legal defense to the policyholder if the policy provides for such a defense.

13. Liquidation proceedings by their nature do not allow for prompt payment of claims because a liquidator is reluctant to pay out available estate assets without knowing the identity and amount of all claimants. Otherwise, funds might be unavailable for claims asserted or quantified later in time. Guaranty funds ameliorate the problem of delay in payment because guaranty funds commence paying claims immediately after an

insolvency and continue accepting claims until applicable time bar periods or statutes of limitation have run.

14. In addition to avoiding delay in payment, guaranty funds increase the amounts recovered by most policyholders because the guaranty funds pay each covered claim up to the lesser of policy limits or a specified dollar cap. The dollar cap for most guaranty funds is \$300,000 on a covered claim, except in the case of workers' compensation claims where there is no cap. See, e.g., N.H. RSA 404-B:8 I(a). In my experience, most non-workers' compensation claims are satisfied by the guaranty funds within the \$300,000 covered claim limitation and most workers' compensation claims are paid in full by guaranty funds. Thus, policyholders receive a far greater amount from guaranty fund payments than they would have recovered from distributions of the insolvent insurer's assets absent the guaranty funds.

15. Each guaranty fund is an association which consists of all licensed insurers writing the kinds of insurance covered by the guaranty fund in the state of the guaranty fund. See, e.g., N.H. RSA 404-B:5 V and 404-B:8 I. Thus, any insurer which elects to write business in a particular state is a member of that state's guaranty fund and subject to the assessment mechanism described below.

16. In order to obtain the monies needed to pay claims, each guaranty fund assesses its member insurers. See, e.g., N.H. RSA 404-B:8 I(c). Each state puts a percentage cap on guaranty fund assessments which can be made against an insurer in any given year. The cap is generally expressed as a percentage of the premium written by an insurer in the state of the guaranty fund in the year preceding the assessment. See, e.g., N.H. RSA 404-B:8 I(c) (2% assessment cap). The assessment cap helps to avoid

assessments causing a domino like series of insurer insolvencies, i.e., a large assessment causing additional insurers to become insolvent thereby necessitating further assessments on a smaller group of insurers with consequent additional insolvencies, further assessments, etc.

17. Guaranty fund statutes provide guaranty funds an additional source of funds by assigning to guaranty funds the policyholder's right to recover from estate assets in liquidation for claims which the guaranty funds pay, as well as the priority the claimant would have had without the guaranty fund. See, e.g., N.H. RSA 404-B:11 I. Guaranty funds generally have the same liquidation priority as policyholders. See, e.g., N.H. RSA 402-C44. In my experience policyholder claims, including guaranty fund claims, generally have a higher liquidation priority than general creditor claims.

18. Guaranty fund recoveries from estates may reduce the need for assessments. In my experience estate recoveries have often been applied as an offset against guaranty fund assessments thereby reducing the amounts required to be paid to the guaranty fund by member insurers.

19. Guaranty fund recoveries from estates also serve to lessen the burden on insurance policyholders in general who ultimately fund the guaranty fund system. Insurers are entitled to recoup guaranty fund assessments in the form of higher insurance rates and premiums (see, e.g., N.H. RSA 404-B:16) or in certain states by premium tax offsets (see, e.g., VA Code § 38.2-1611.1) or policy surcharges (see, e.g., Hawaii Rev. Stat. § 431:16-115). To the extent that funds are received by a guaranty fund from distributions of the assets of the insolvent insurer guaranty fund assessments may be

decreased and the need for increased rates and premiums or other public burdens is consequently decreased.

20. In addition to paying covered claims, guaranty fund operations consist of pursuing guaranty fund recoveries from insolvent insurer estates. For example, the eight GFMS Funds have pending claims in over 35 insurer estates (not including Home) in over 10 jurisdictions. Guaranty fund recoveries from estates have been substantial. Hundreds of millions of dollars have been recovered from insurer estates by the eight GFMS Funds. Since the Superior Court's determination of the insolvency of Home, the Guaranty Funds intervening in this suit have paid over \$35 million in losses on claims under Home policies. Such estate recoveries significantly aid the guaranty funds in paying policyholder claims and lowering the need for guaranty fund assessments on insurers and ultimately the burden on insurance policyholders generally.

21. Thus, statutory provisions giving a priority to guaranty fund claims in insurer estates protect policyholders and carry out the enforcement of insurance contracts by helping to ensure the payment of policyholders' claims despite the insurer's insolvency. Such provisions giving a priority to guaranty funds also protect policyholders generally by reducing the need to increase rates and premiums which policyholders must pay to fund the guaranty fund.

22. The following is a list of certain insurer insolvencies which triggered one or more of the GFMS Funds. The list shows the state in which each insurer was licensed. Upon information and belief, all of the estates listed below remain open:

<u>Company Name</u>	<u>State of Licensure</u>
American Mutual Insurance of Boston	All States
American Mutual Liability Insurance Company	All States

American Universal Insurance Company	CT, MA, ME, NH, RI, VT
Capital Casualty Insurance Company	DC
Carriers Insurance Company	NH
Casualty Reciprocal Exchange	CT, DC, MA, VT, VA
Consolidated Mutual Insurance Company	RI
Covenant Mutual Insurance Company	
Credit General Insurance Company	MA, ME, RI, VA
Eastern Casualty Insurance Company	CT, MA, NH, RI, VT
Employers Casualty Company	CT, VA
Fremont Indemnity Company	CT, DC, MA, NH, VA, VT
Home Insurance Company	All States
Ideal Mutual Insurance Company	CT, ME, NH, VA, VT
Imperial Casualty & Indemnity Company	CT, DC, VA, VT
Integrity Insurance Company	MA
Iowa National Mutual Insurance Company	VA
Legion Insurance Company	All States
LMI Insurance Company	VA
Midland Insurance Company	CT, DC, ME, VA
MIIX Insurance Company	CT, MA
Mission Insurance Company	MA, ME, RI
PHICO Insurance	CT, DC, NH, VA, VT
Reciprocal of America	DC, VA
Reliance Insurance	All States
Rockwood Insurance Company	VA
Shelby Casualty Insurance Company	CT, NH, VA
Shelby Insurance Company	CT, MA, NH, RI, VA
South Carolina Insurance Company	VA
Transit Casualty Company	CT, NH, VA
Trust Insurance Company	MA
United Community Insurance Company	MA, RI, VA
Vesta Fire Insurance Corporation	DC
Villanova Insurance Company	CT, MA, VA, VT
Western Employers Insurance Company	CT, MA, NH

23. Upon information and belief, many if not all of the guaranty funds which are proposed intervenors in this action have made significant covered claim payments in the insurer insolvent estates listed in paragraph 22, as well as other insolvent insurer estates and have recovered hundreds of millions of dollars from these estates.

24. In summary, state statutes providing a priority for the payment of guaranty fund claims in insurer liquidation proceedings, such as N.H. RSA 404-B:1 *et seq.*, operate to protect policyholders by helping to carry out the enforcement of insurance contracts by ensuring prompt payment of policyholders' claims. The priority statutes also protect policyholders by reducing the need for increased rates and the application of other statutory mechanisms used to fund the policyholder protection provided by guaranty funds.

25. Attached hereto as Exhibit A is a true copy of an Order of Liquidation, Doc. No. 03-E-0106 of the Merrimack County Superior Court of the State of New Hampshire.

26. Attached hereto as Exhibit B is a true copy of a Restated and Revised Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation issued on January 19, 2005 by the Merrimack County Superior Court of the State of New Hampshire.

27. Attached hereto as Exhibit C is a true copy of a report by the Liquidator of Home regarding proofs of claim filed in the Home liquidation proceeding.

28. Attached hereto as Exhibit D is a true copy of a report by the Liquidator of Home regarding amounts paid and anticipated to be paid by state insurance guaranty funds on claims under Home policies.

29. Attached hereto as Exhibit E is a true copy of the Department of Labor's Memorandum in Support of Rule 65 Motion for Preliminary Injunction in this matter (without the Memorandum's attachments).

Signed under oath on this 10th day of February, 2011.

/s/ Paul M. Gulko
Paul M. Gulko, President
Guaranty Fund Management Services

Personally appeared Paul M. Gulko and swore that the statements contained in this affidavit are true to the best of his knowledge, belief, and opinion.

DATED: February 10th, 2011

/s/ Andrea R. Willis
Notary Public
My Commission Expires: February 13, 2015

EXHIBIT 3



Hilda Solis, Secretary, United States Department of Labor, Plaintiff v. The Home Insurance Company and Roger A. Sevigny, New Hampshire Insurance Commissioner, as Liquidator of the Home Insurance Company, Defendants

Case No. 10-cv-572-SM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

2011 U.S. Dist. LEXIS 97582

August 30, 2011, Decided

August 30, 2011, Filed

NOTICE: NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Summary judgment denied by, Judgment entered by *Solis v. Home Ins. Co.*, 2012 U.S. Dist. LEXIS 9551 (D.N.H., 2012)

PRIOR HISTORY: *Sevigny v. OM Group, Inc.*, 2006 U.S. Dist. LEXIS 5680 (D.N.H., 2006)

COUNSEL: [*1] For US Department of Labor, Secretary, also known as Hilda L. Solis, Plaintiff: Kyle Forsyth, US Dept of Justice - Com'l Litigation (875), Washington, DC.

For The Home Insurance Company, NH Insurance Department, Commissioner, Liquidator of The Home Insurance Company also known as Roger A. Sevigny, Defendants: Eric A. Smith, J David Leslie, Rackemann Sawyer & Brewster, Boston, MA; J. Christopher Marshall, NH Attorney General's Office (DOJ), Department of Justice, Concord, NH.

For Virginia Property and Casualty Insurance Guaranty Association, Connecticut Insurance Guaranty Association, Washington Insurance Guaranty Association, Maine Insurance Guaranty Association, District of Columbia Insurance Guaranty Association, Rhode Island Insurers' Insolvency Fund, Colorado Insurance Guaranty Association, Idaho Insurance Guaranty Association, Montana Insurance Guaranty Association, Massachusetts Insurers Insolvency Fund, New Hampshire Insurance Guaranty Association, Vermont Property and Casualty Insurance

Guaranty Association, Kansas Insurance Guaranty Association, Arkansas Property & Casualty Insurance Guaranty Fund, Illinois Insurance Guaranty Fund, All Intervenor Defendants, Intervenor Defendants: [*2] Joseph C. Tanski, PRO HAC VICE, Nixon Peabody LLP (MA), Boston, MA; W. Daniel Deane, Nixon Peabody LLP, Manchester, NH.

For National Association of Insurance Commis, Amicus: Andrew W. Screll, LEAD ATTORNEY, Rath Young & Pignatelli PA (Concord), Concord, NH.

JUDGES: Steven J. McAuliffe, Chief United States District Judge.

OPINION BY: Steven J. McAuliffe

OPINION

ORDER

Plaintiff, Hilda L. Solis, Secretary of the United States Department of Labor ("DOL"), brings this declaratory judgment suit challenging - primarily on federal preemption grounds - New Hampshire's insurance insolvency priority statute. Defendants, The Home Insurance Company ("Home") and Roger A. Sevigny, New Hampshire Insurance Commissioner and liquidator of Home ("Liquidator"), move to dismiss DOL's claims. Document No. 13. They ask this court to refrain from exercising its jurisdiction so that the state court, in pending liquidation proceedings, may resolve the issues DOL has raised. ¹ Defendants argue several grounds for abstention, invoking *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.

Ct. 2137, 132 L. Ed. 2d 214 (1995), Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), and Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). Also before the court is the application [*3] of fifteen guarantee funds ("Guarantee Funds") to intervene for the purpose of seeking dismissal of this case on the same grounds advanced by the defendants, or alternatively, to answer and defend against DOL's claims. Document No. 17.

1 With the court's permission (see 3/11/11 endorsed order), the National Association of Insurance Commissioners filed an amicus brief in support of defendant's motion to dismiss. Document No. 27.

Background

Home, a New Hampshire insurance company, was declared insolvent in 2003 by the state court, which ordered its liquidation and appointed the New Hampshire Commissioner of Insurance as liquidator. Shortly thereafter, DOL filed a proof of claim with the Liquidator seeking over \$2.6 million in assessments owed by Home to a "Special Fund" administered by DOL pursuant to the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 902(5). Applying state law -- which establishes the priority in which payments from the assets of liquidated insurers are to be made -- the Liquidator assigned DOL's claim to priority Class III. Class III claims are paid after Class I claims (relating to administrative costs) and Class II claims (which include guarantee fund claims) [*4] have been paid in full. The Liquidator also rejected DOL's position that the federal worker's compensation statute preempts the state priority statute. Home's assets are generally thought to be insufficient to cover Class III claims, so it is unlikely that the DOL will recover anything substantial.

DOL thereafter filed this federal suit to press the preemption issue. It also filed a "Notice of Pending Federal Action to Resolve Its Objection to Liquidator's Notice of Redetermination" in the state court. Document No. 15-7. The DOL's Notice informed the state court judge of the federal case and also (apparently) operated as an objection to the Liquidator's determination, thus triggering commencement of proceedings before the state court on DOL's claim. ² Granting the Liquidator's assented-to motion (document no. 15-8), the state court later stayed its proceedings as to DOL's claims, pending the outcome of this federal suit, including any appeals. Document No. 15-9.

2 The parties dispute whether DOL initiated the state court proceeding on its claim when it

filed its Notice. Because the Notice expressly states that it "may be construed as an Objection to [the] Notice of Determination," the [*5] court assumes for present purposes that DOL's Notice initiated the state court proceeding on its claim. See *New Hampshire Rev. Stat. Ann. § 402-C:41*; see also state court's "Restated and Revised Order," Doc. 15-2, § 8.

In this litigation, DOL seeks a judicial declaration that its claim to Home's assets is entitled to first priority in the liquidation proceedings. It also seeks an injunction incidental to declaratory judgment, enjoining defendants from acting in any manner, including disbursement of Home's assets, that is inconsistent with whatever declaratory relief might be granted. DOL's principle legal claim is one of federal preemption. Its secondary claims, pled only in the alternative, rest on state statutory grounds.

Motion to Dismiss

"[T]he Declaratory Judgment Act . . . confer[s] on federal courts unique and substantial discretion in deciding whether to declare the rights of the litigants." *Wilton, 515 U.S. at 286* (citing 28 U.S.C. § 2201(a)). Under *Wilton*, where there is a parallel state proceeding "presenting the same issues, not governed by federal law, between the same parties," the breadth of that discretion is not cabined by the stringent "exceptional circumstances" standard [*6] of *Colorado River, Wilton, 515 U.S. at 282, 289* (holding that *Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942)*, and not *Colorado River*, governs a court's decision to accept or decline jurisdiction in a declaratory judgment action that raises the same state law issues raised in parallel state proceedings) (emphasis added). The Court in *Wilton*, however, "expressly declined 'to delineate the outer boundaries'" of federal court discretion where there are no parallel state proceedings or "in cases raising issues of federal law." *Verizon New England, Inc. v. Int'l Bhd. of Elec. Workers, Local No. 2322, 651 F.3d 176, 2011 U.S. App. LEXIS 13304, 2011 WL 2568008, at *9 (1st Cir. June 30, 2011)* (quoting *Wilton, 515 U.S. at 290*).

Here, although there is a parallel state proceeding involving the same issues and parties, the principal issue in both forums is one of federal, not state, law. For purposes of this case, therefore, the relevant question left unanswered in *Wilton* (and not resolved by the appellate court in *Verizon, 2011 U.S. App. LEXIS 13304, 2011 WL at *9*), is "whether the presence of a federal question in [this] . . . declaratory judgment action limit[s] the . . . court's discretion to decide or dismiss the action." *Sherwin-Williams Co. v. Holmes Cnty., 343 F.3d 383, 395 (5th Cir. 2003)*.

It [*7] appears that most courts that have considered the question, including district courts in this circuit and other circuit courts of appeals, apply the broad discretionary standard recognized in *Wilton*, even when the predominant issue is one of federal law. In those cases, the federal issue is treated as an important factor weighing against abstention,³ rather than as a mandate to retain jurisdiction. This court adopts that approach.⁴ See e.g. *Torres v. Bella Vista Hosp., Inc.*, 523 F. Supp. 2d 123, 147 (D.P.R. 2007) (applying broad discretionary standard of *Wilton*, and finding that "the existence of federal law issues" weighed in "favor[... of] retaining the case."); *Standard Fire Ins. Co. v. Gordon*, 376 F. Supp. 2d 218, 231 (D.R.I. 2005) (applying *Wilton*, and noting that "the absence of any federal law issue weighs in favor of dismissing [plaintiff's] declaratory judgment action."); *Sherwin-Williams*, 343 F.3d at 395 (explaining that existence of a federal question is one of several relevant considerations); *Verizon Communications, Inc. v. Inverizon Int'l, Inc.*, 295 F.3d 870, 874 (8th Cir. 2002) (holding district court abused its discretion in staying declaratory judgment action where, [*8] among other things, it "fail[ed] to consider" the "significant factor" that federal law governed the suit). But see *Youell v. Exxon Corp.*, 74 F.3d 373, 376 (2d Cir. 1996) (holding that presence of "novel question[...]" of federal law required district court to decide the request for declaratory relief; a "federal question of first impression must all but demand that the federal court hear the case.") (citation omitted). The unique circumstances of this "particular case" must be assessed, informed by "considerations of practicality and wise judicial administration." *Wilton*, 515 U.S. at 288. See also *Riva v. Massachusetts*, 61 F.3d 1003, 1013 (1st Cir. 1995) ("Though the declaratory judgment context may serve to relax a federal court's storied obligation to exercise [its] . . . jurisdiction, . . . the decision not to exercise jurisdiction must still be based on a careful balancing of efficiency, fairness, and the interests of both the public and the litigants.") (citations omitted). Relevant considerations include comity and judicial economy. *Id.* at 1013 (comity); *Pop Warner Little Scholars, Inc. v. New Hampshire Youth Football & Spirit Conference*, Case No. 06-cv-98-SM, 2007 U.S. Dist. LEXIS 15102, 2007 WL 676704, at *4 (D.N.H. March 1, 2007) [*9] (judicial economy and comity).

³ Although "not entirely accurate," *Medical Assur. Co. v. Hellman*, 610 F.3d 371, 378 (7th Cir. 2010), for short-hand the court will refer to declination of jurisdiction under *Wilton* as "abstention."

⁴ Even if analyzed under *Colorado River*, this case involves no exceptional circumstances that would justify abstention. The appellate court's decision in *Sevigny v. Employers Ins. of Wausau*,

411 F.3d 24, 30 (1st Cir. 2005), a case involving the same liquidation proceedings as here, is instructive. In that case, the magistrate judge abstained under *Colorado River*, leaving resolution of the issues to the state court. The appellate court reversed, finding no exceptional circumstances, even where "state law issues [were] predominant" in the federal action. *Sevigny*, 411 F.3d at 30. Here, because a federal issue predominates, the argument for abstention under *Colorado River* is far less compelling than in *Sevigny*.

Having considered the circumstances of this case, the court will exercise its jurisdiction over the declaratory judgment petition. Without doubt, some factors support the notion that federal jurisdiction should be declined. In particular, a similar state court [*10] proceeding is ongoing, involving the same parties, which affords DOL the opportunity to present the preemption issue for judicial resolution. In addition, this federal case would seem, at least on some level, to intrude on the Congressionally-recognized primacy of the states' interest in insurer liquidations, see McCarran-Ferguson Act, 15 U.S.C. § 1012(b), including the shared interest of all of the states in maintaining a coordinated and uniform nationwide scheme for the liquidation of insolvent insurance companies. See 3 NAIC Model Laws, Regulations and Guidelines, 555-104 (publishing record of state adoptions of the NAIC Insolvency Models) (2011).

But, in a broader context, the preemption issue is principally one of federal law, unarguably subject to federal disposition in a declaratory judgment action. See e.g. *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 498-510, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993) (reaching merits in declaratory judgment action presenting federal preemption challenge to state insurance liquidation priority laws); *Ruthardt v. United States*, 303 F.3d 375, 379-86 (1st Cir. 2002) (same). Indeed, there is no doubt that a declaratory judgment resolving the federal preemption issue would [*11] be useful to the parties in clarifying their respective rights. See *Verizon*, 2011 U.S. App. LEXIS 13304, 2011 WL 2568008, at *11 (finding declaratory relief would have "current utility" in helping the parties "understand[...]" their mutual obligations under the contract.) (quotation omitted).

In addition, there is little reason to think that the interests of comity or judicial economy would fare better if jurisdiction was not exercised. The state court's stay order reduces, if not eliminates, the risk of duplicated judicial effort, or disruptive federal intrusion into the state litigation. That order, which granted the state Liquidator's assented-to motion, halts all proceedings with respect to DOL's claims during the pendency of this case. Document Nos. 15-8; 15-9. The remaining aspects of the

state court proceeding continue. Document No. 15-9. See *Torres*, 523 F. Supp. 2d at 147-48 (stay of underlying Puerto Rico lawsuit pending resolution of federal declaratory action weighed against dismissal of federal case because the stay "prevent[ed] duplication of judicial efforts."). Moreover, it does not appear that there is any "need to await clarification by [the] state court" on factual issues that may be relevant [*12] to the federal preemption issue. *Riva*, 61 F.3d at 1012 (district court's decision to decide declaratory judgment action was warranted where resolution of the federal issue would not be hampered by "factual uncertainty").

Further, the Congressional policy favoring the primacy of state interests in insurer liquidations must be viewed against the backdrop of Congress' interest in making the federal courts available as forums of preference for the federal sovereign. See *Hudson Sav. Bank v. Austin*, 479 F.3d 102, 106 (1st Cir. 2007) ("Congress has conferred upon the federal sovereign the virtually absolute right to litigate claims brought either by or against it in the federal, rather than the state, courts.").

Finally, as already noted, the presence, and predominance, of an issue of federal law weighs significantly against abstention. See *Torres*, 523 F. Supp. 2d at 147. And, the fact that the federal issue is arguably "novel" (i.e., it is an issue of first impression in this circuit) adds more weight in favor of resolving that issue in a federal forum. Cf. *Youell*, 74 F.3d at 376 (holding federal court must retain jurisdiction to resolve novel federal issue). See also *Atlas Copco Const. Tools, Inc. v. Allied Const. Prods., LLC*, 307 F. Supp. 2d 228, 233 (D. Mass. 2004) [*13] (exercising broad discretion under DJA to stay federal action pending resolution of state case where, among other things, there were "no uniquely federal issues" of "first impression").

Finally, Younger does not require abstention in this case. Notwithstanding this court's discretion under the DJA, if all prerequisites for Younger abstention are met the court must refrain from hearing DOL's suit. See *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 68 (1st Cir. 2005) ("Younger abstention is mandatory if its conditions are met . . ."). One of those prerequisites is that the state court case must be a "coercive state enforcement proceeding." *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 522 (1st Cir. 2009) ("[P]roceedings must be coercive, and in most-cases, state-initiated, in order to warrant abstention.") (citing *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 259-61 (1st Cir. 1987)). The state court proceeding here fails to meet that test. DOL initiated the state court proceeding when it filed its objection to the Liquidator's priority determination, seeking redress for alleged errors. The state court proceeding to resolve that objection is, therefore, remedial, [*14] not coercive. See *Devlin v.*

Kalm, 594 F.3d 893, 895 (6th Cir. 2010) (holding Younger abstention in favor of ongoing state employee grievance proceedings was improper because the state proceedings were not coercive; they "were initiated by . . . the federal plaintiff, to redress a wrong allegedly committed by the state."). Moreover, even assuming the entire proceeding before the Liquidator constitutes the relevant state court proceeding for purposes of Younger, those proceedings, as to DOL, are also not coercive, but remedial. See *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053 (7th Cir. 1990), vacated on other grounds, 499 U.S. 933, 111 S. Ct. 1383, 113 L. Ed. 2d 441 (1991) (federal suit challenging constitutionality of state insurance statutes held not subject to Younger abstention where the federal plaintiff had not "engaged in conduct actually or arguably in violation of state law, thereby exposing himself to an enforcement proceeding in state court.").

Younger abstention is also not mandated for an additional reason. In suits, such as this one, brought by the United States against an agent of the state, the federal-state conflict is unavoidable. See *United States v. Morros*, 268 F.3d 695, 707 (9th Cir. 2001) ("[W]here [*15] the United States is a litigant," federal-state conflict is inherent.) Abstention, therefore, would not promote Younger's purpose of avoiding "unnecessary conflict between state and federal governments." *Id.* (quoting *United States v. Composite State Bd. of Medical Examiners*, 656 F.2d 131, 136 (5th Cir. 1981). See also *United States v. Pennsylvania, Dep't of Ervtil. Resources*, 923 F.2d 1071, 1078-79 (3d Cir. 1991) (district court abused its discretion in dismissing, under Younger, declaratory judgment action brought by United States against state agency).⁵

5 Defendants also argue that, under the doctrine of prior exclusive jurisdiction, this court cannot hear the case because it is an in rem or quasi in rem proceeding involving property over which the state court already exercises control. See *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 465-67, 59 S. Ct. 275, 83 L. Ed. 285 (1939). See also *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477, 56 S. Ct. 343, 80 L. Ed. 331 (1936) ("[T]he court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other" court.). The doctrine applies in cases where, "to give [*16] effect to its jurisdiction, the court must control the property." *Bank of New York*, 296 U.S. at 467. Although sometimes referred to as a jurisdictional mandate, the doctrine is probably a prudential one, under which courts may exercise some discretion. See *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 28 (n. 6 (1st Cir. 2010)). Here, this court need not control the assets

of the insolvent insurance company in order to grant the declaratory relief requested. In addition, this court's retention of jurisdiction would not, under the unique circumstances here, give rise to the situation that the doctrine seeks to avoid: an "unseemly conflict[...] between the federal and state court [...]." *Mandeville v. Canterbury*, 318 U.S. 47, 49, 63 S. Ct. 472, 87 L. Ed. 605 (1943).

Accordingly, given the circumstances of this particular case, considerations of practicality and wise judicial administration weigh in favor of adjudicating plaintiff's federal claim for declaratory relief in this federal forum. However, the court declines to accept jurisdiction over DOL's state law claims. Because DOL has pled those claims in the alternative only, they will be moot if DOL prevails on its federal claim. If DOL does not prevail, it can present [*17] its state law claims when the parties return to state court, as envisioned by *Brillhart* and *Wilton*.

Motion to Intervene

The Guarantee Funds seek to intervene as of right, or by permission of the court, to "seek dismissal of this action" and to "assert . . . defenses and claims." Document No. 17, pg. 2. Because the Guarantee Funds have not shown that the Liquidator's representation may be inadequate to protect their interests, they are not entitled to intervene as of right. See *Fed. R. Civ. P. 24(a)*; see also *Ruthardt*, 303 *F.3d* at 386 (affirming district court's

denial of guarantee funds' motion to intervene as of right because state Commissioner of Insurance adequately represented their interests). Nevertheless, as in *Ruthardt*, because of the "magnitude of the stakes," and because their advocacy will likely prove "helpful," the Guarantee Funds are granted permissive intervention under *Fed. R. Civ. P. 24(b)* for the purpose of filing their motion to dismiss and to assert defenses and claims. *Ruthardt*, 303 *F.3d* at 386 (granting permissive intervention even though intervenors had not established inadequacy of representation).

Conclusion

For these reasons, the court grants the Guarantee Funds' [*18] motion to intervene (document no. 17). Intervenors are directed to file their motion to dismiss, as it appears in Exhibit A to their application for intervention (document no. 17-1). Defendants' motion to dismiss (document no. 13), is denied in part and granted in part. DOL's state law claims are dismissed without prejudice.

SO ORDERED.

/s/ Steven J. McAuliffe

Steven J. McAuliffe

Chief Judge

August 30, 2011