THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

LIQUIDATOR'S SECTION 15 SUBMISSION CONCERNING DEPARTMENT OF LABOR'S CLAIM

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), files this brief and exhibits concerning the claim of Hilda L. Solis, Secretary, United States Department of Labor ("DOL") pursuant to § 15 of the Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company In Liquidation dated January 19, 2005 and the Order Regarding Disputed Claim of United States Department of Labor dated October 11, 2012.

DOL asserts claims for "Special Fund" assessments under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). The Liquidator allowed the claims in full at Priority Class III under RSA 402-C:44, and DOL challenged the priority classification. The United States District Court rejected DOL's claim to an "absolute" priority under federal law, see Solis v. Home Ins. Co., 848 F.Supp.2d 91 (D.N.H. 2012), and DOL now asserts rights to Class I or II priority under state law. However, its claim to Class I "Administration Cost" priority fails because the assessments do not arise from activity in furtherance of the Home liquidation. Nor is its claim within Class II "Policy Related Claims" priority. The LHWCA assessments are not claims under insurance policies. DOL's argument that the Special Fund is "similar" to the New Hampshire Insurance Guaranty Association ("NHIGA") erroneously assumes that all NHIGA claims – not just those reflecting policy obligations – are Class II. In any event, the Special Fund

is not "similar" to NHIGA. It does not fulfill NHIGA's primary function – stepping in to pay policy claims when an insurer becomes insolvent. Accordingly, DOL's claim is properly assigned to Class III "Claims of the Federal Government" priority.

ISSUES PRESENTED

1. Is DOL's claim for the LHWCA assessments that were billed post-liquidation entitled to Class I "Administration Cost" priority where the assessments do not arise from authorized activities undertaken in furtherance of the liquidation but from Home's issuance of policies before the liquidation began?

2. Is DOL's claim entitled to Class II "Policy Related Claim" priority where it does not seek amounts under policies issued by Home but assessments to fund all the activities of the Special Fund?

3. Is DOL's claim entitled to Class II priority on the ground that the Special Fund is an organization "similar" to NHIGA where the Special Fund does not fulfill the essential purpose of insurance guaranty associations – stepping in to pay claims under policies issued by an insurer when the insurer becomes insolvent?

EXHIBITS

The Liquidator's exhibits are listed in the addendum, attached to the Affidavit of Peter A. Bengelsdorf ("Bengelsdorf Aff."), and referred to as "Liq. Ex. __." The Liquidator also cites to exhibits attached to the Affidavit of Cheryl B. Jordan, which are referred to as "DOL Ex. __."

BACKGROUND

Home is an insurance company that stopped writing insurance policies in 1995 and 1996. Bengelsdorf Aff. ¶ 3. Home was declared insolvent and placed in liquidation by this Court on June 11, 2003; the operative Order of Liquidation issued on June 13, 2003. Id. ¶ 2, Liq. Ex. 1.

DOL filed a proof of claim with the Liquidator on June 26, 2003, seeking Special Fund assessments that Home allegedly owed under the LHWCA for years 2000-2002. DOL Ex. B at 1. In 2005, DOL amended its proof of claim to include assessments that Home allegedly owed under the LHWCA for years 2003 and 2004. DOL Ex. B at 9, 13.

On October 28, 2010, the Liquidator issued a notice of redetermination allowing DOL's claim in the full asserted amount of $2,672,527 and assigning it to Class III priority under RSA 402-C:44. DOL Ex. C at 1. The Liquidator does not expect there to be assets sufficient to make a distribution to creditors in classes below Class II. DOL Ex. C at 2.

On December 9, 2010, DOL filed an action in the United States District Court challenging the Liquidator's priority determination. Solis v. The Home Insurance Co., et al., C.A. No. 1:10-cv-572-SM (D. N.H.). On December 22, 2010, DOL filed a notice of the federal action with this Court that served as an objection, and on December 30, 2010, the Court issued an Order Staying Consideration of U.S. Department of Labor's Proof of Claim.

The Liquidator moved to dismiss the federal action. The District Court denied the motion as to DOL's claims under federal law but abstained from hearing the state law claims. See Solis, 848 F.Supp.2d at 95 (Liq. Ex. 2). DOL moved for summary judgment on its federal law claims. On January 27, 2012, the District Court issued its order rejecting those claims and directing that judgment enter for the defendants. Id. at 106.

This Court set a schedule for briefing the remaining state law issues in its Order Regarding Disputed Claim of United States Department of Labor dated October 11, 2012.

THE LEGAL FRAMEWORK

Except for statements concerning the finances of the Special Fund, DOL's description of the background consists of conclusions of law that rest upon the LHWCA and state statutes. The

Liquidator accordingly summarizes the pertinent provisions below. The District Court also summarized the relevant LHWCA provisions in its decision. Solis, 848 F.Supp.2d at 95-98.

1. The LHWCA

The LHWCA, 33 U.S.C. §§ 901-950, provides a workers compensation program to protect longshore and harbor workers whose injuries occur upon navigable waters or adjoining facilities. 33 U.S.C. § 903(a); § 902(3) (defining "employee"). See generally Reich v. Bath Iron Works Corp., 42 F.3d 74, 75 (1st Cir. 1994). The LHWCA is similar to state workers compensation programs for non-maritime workers in that it provides compensation from employers "irrespective of fault as a cause of injury." 33 U.S.C. §§ 904, 906-908. The LHWCA prescribes the amount and duration of compensation payments. 33 U.S.C. §§ 906, 908, 909.

The LHWCA provides that each "employer shall be liable for and shall secure the payment to his employees of . . . compensation." 33 U.S.C. § 904(a). Employers secure the payment of compensation (1) by insurance with an insurer authorized under state law and by the DOL or (2) by qualifying as a self insurer with the DOL. 33 U.S.C. § 932(a). Employers remain liable for compensation despite insurance. See B.S. Costello, Inc. v. Meagher, 867 F.2d 722, 724 (1st Cir. 1989) ("notwithstanding the important role carved out for insurance carriers, Congress had no intention of releasing employers from the basic liability clearly stated in section 904").

The LHWCA established a Special Fund in the Treasury administered by DOL consisting of monies held in trust that are not the monies of the United States. 33 U.S.C. § 944(a). The Special Fund is used to make various payments as provided in the LHWCA. 33 U.S.C. § 944(i).

a. Section 908 Second Injury Payments

The Special Fund is principally used to make so-called "second injury" or "Section 908" payments under § 908(f). 33 U.S.C. § 944(i). When a partially disabled worker suffers a

subsequent work-related injury that increases his or her disability, the employer's liability for compensation for the injury is limited to a set period, generally 104 weeks. 33 U.S.C. § 908(f)(1); 20 C.F.R. 702.145(b) (2012) (cited regulations are in Liq. Ex. 4). After that time liability is shifted from the employer to the Special Fund. 33 U.S.C. § 908(f)(2); E.P. Paup Co. v. Director, OWCP, 999 F.2d 1341, 1352 (9th Cir. 1993). This is intended to encourage employers to hire workers who have previously suffered a partial permanent disability by limiting employers' liability for subsequent injuries. Director, OWCP v. Bath Iron Works Corp., 129 F.3d 45, 50 (1st Cir. 1997); see Bath Iron Works, 42 F.3d at 77.

Second injury payments were the largest category of Special Fund payments for fiscal years 2000-2004, accounting for over 90% of Special Fund payments. DOL Ex. A at 2, 6, 10.

b. Section 918 Discretionary Payments

The Special Fund may also be used by the Secretary, in her discretion, to pay compensation as provided under § 918 where an employer has defaulted on paying compensation. 33 U.S.C. § 944(i). This relief is only available to an employee who has obtained a federal court judgment against the employer for compensation due under a compensation order, and where the judgment cannot be satisfied "by reason of the employer's insolvency or other circumstance precluding payment." 33 U.S.C. § 918 (a), (b). If discretionary relief is given to the employee, the employer is liable to the Special Fund. Id. See B.S. Costello, 867 F.2d at 725.

Section 918 payments accounted for less than 5% of Special Fund payments for fiscal years 2000-2004. DOL Ex. A at 2, 6, 10.[1]

[1] The Fund may also be used to provide workers with information and legal advice under § 939(c) and to defray expenses of examinations under § 907. See 33 U.S.C. § 944(i). These payments represent even smaller fractions of the Special Fund's expenditures.

c. Payment of Compensation on Insolvency of an Insurer

Contrary to DOL's argument (DOL Br. at 4, 6, 12), the Special Fund does not provide for payment of compensation under the LHWCA to claimants when an insurer becomes insolvent. Section 918 payments are not available where the insurer, and not the employer, becomes insolvent. B.S. Costello, 867 F.2d at 725-27 (when insurer becomes insolvent, employer is liable for compensation). Where an insurer becomes insolvent, DOL "routinely seeks payment from the employer before turning to any deposited security." Liq. Ex. 3 at 43226 (DOL Notice re: Regulations Implementing the Longshore and Harbor Workers' Compensation Act and Related Statutes, 70 Fed. Reg. 43224 (July 26, 2005)).

DOL has recognized that State insurance guaranty associations or funds may pay LHWCA compensation under an insurer's policies when the insurer becomes insolvent. It has evaluated whether the guaranty association in each State will pay LHWCA compensation under an insolvent insurer's policies. See 20 C.F.R. 703.202(b) ("[DOL] will identify States without guaranty funds and States with guaranty funds that do not fully and immediately secure LHWCA obligations and will post its findings on the Internet . . .") DOL has set forth its findings in its "State Guarantee Fund Longshore Security Factor Chart". Liq. Ex. 5.

Security deposits posted by the insurer may also be available to pay LHWCA compensation. Since 1990, DOL "has required insurance carriers it has authorized to write [LHWCA] coverage to deposit security in an amount sufficient to secure the payment of their LHWCA obligations in States without guaranty or analogous funds and in States whose funds do not fully secure such obligations." Liq. Ex. 3 at 43224. Security deposits "secure the payment of compensation and medical benefits when a carrier becomes insolvent and such obligations are not otherwise fully secured by a State guaranty fund." 20 C.F.R. 703.201.

In 1992, DOL required Home to make a security deposit in the amount of $800,000 to secure its LHWCA obligations. Bengelsdorf Aff. ¶ 8, Liq. Exs. 6, 7. DOL has placed $25,000 of the deposit in a sub-account to pay claims for LHWCA compensation; the remaining $775,000 continues to be held as a security deposit. Bengelsdorf Aff. ¶ 9, Liq. Ex. 8, 9.

d. LHWCA Assessments

Insurers and self-insured employers covered by the LHWCA are required to make payments to the Special Fund on a prorated assessment by the Secretary calculated based on a statutory formula. 33 U.S.C. § 944(c). The statutory formula reflects the Secretary's estimate of "the probable expenses of the fund during that calendar year" and the amount of payments required "to maintain adequate reserves in the fund." 33 U.S.C. § 944(c)(2). The assessment for each carrier and self-insurer is determined by a formula based upon (1) the ratio of the carrier's or self-insurer's compensation payments during the preceding calendar year to the total of such payments by all carriers and self-insureds during such year and (2) the ratio of the second injury payments under § 908(f) during the preceding calendar year which are "attributable to" the carrier or self-insurer to the total of such payments during such year. 33 U.S.C. § 944(c)(2)(A) and (B); 20 C.F.R. 702.146(c). The "attributable to" payments are the Special Fund's second injury payments to workers whose claims were paid by the insurer or self-insured employer before the statutory time limit on employer liability ended. See Bath Iron Works, 42 F.3d at 75-76.

Assessments on insurers and employers supplied the vast majority of Special Fund revenues for fiscal years 2000-2004. DOL Ex. A at 3, 7, 11. (The Special Fund is also funded by payments from employers where there is no person entitled to receive death benefits and by amounts collected as fines and penalties. 33 U.S.C. § 944(c)(1), (3); 20 C.F.R. 702.146.)

2. The New Hampshire Insurer Liquidation Act and Priority Provision

The New Hampshire Insurers Rehabilitation and Liquidation Act, N.H. RSA 402-C ("Act"), provides a statutory framework for the rehabilitation or liquidation of troubled insurance companies. The Act is part of an integrated nationwide scheme, as similar statutes have been adopted in all of the other States and the District of Columbia, in most instances based on model laws promulgated by the National Association of Insurance Commissioners ("NAIC"). See III NAIC Model Laws, Regulations and Guidelines, at ST-555-3 to ST-555-8 (2012).

The Act provides that the assets of an insolvent insurer are to be distributed by the liquidator "[u]nder the direction of the court" in accordance with the statutory priorities. RSA 402-C:46, I. The priorities are set forth in RSA 402-C:44 (the "priority statute"). The priority statute provides that every claim in each successive priority class is to be paid in full (or adequate funds retained for payment) before any member of the next class receives any payment. RSA 402-C:44. It sets forth ten priority classes, the first three of which are pertinent here:

> I. Administration Costs. The costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees.
>
> II. Policy Related Claims. All claims by policyholders, including claims for unearned premiums in excess of $50, beneficiaries, and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company, and liability claims against insureds which claims are within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state. . . .
>
> III. Claims of the Federal Government. [federal claims that do not fall within Classes I and II above].

These classes are followed by wages (Class IV), a residual classification (Class V) and various subordinated classes. Id.

3. The New Hampshire Insurance Guaranty Association Act

NHIGA, referred to in the priority statute, was established by the New Hampshire Insurance Guaranty Association Act ("NHIGA Act"), RSA 404-B. Similar statutes have been enacted in all States, usually based on NAIC model acts. See III NAIC Model Laws, Regulations and Guidelines at ST-540-3 to ST-540-8. The NHIGA Act provides that:

> The purpose of this chapter is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers.

RSA 404-B:2 (emphasis added).[2]

NHIGA is "obligated to the extent of the covered claims" subject to certain statutory limits, RSA 404-B:8, I(a), and "deemed the insurer to the extent of its obligation on the covered claims." RSA 404-B:8, I(b). The term "covered claim" is defined in pertinent part as:

> [A] net unpaid claim . . . which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if such insurer . . . is declared insolvent . . . and (a) the claimant or insured is a resident of this state at the time of the insured event; or (b) the property from which the claim arises is permanently located in this state.

RSA 404-B:5, IV.

The NHIGA Act provides that "any person recovering under this chapter shall be deemed to have assigned his rights under the policy to the association to the extent of his recovery from the association." RSA 404-B:11, I. The liquidator of an insolvent insurance company "shall be

[2] The priority statute also refers to the New Hampshire Life and Health Insurance Guaranty Association ("NHLHIGA") established by the NHLHIGA Act, RSA 404-D. Since Home did not write and the LHWCA does not concern life or health insurance, the Liquidator will not separately discuss the NHLHIGA Act. Again, similar statutes for life and health associations, usually based on NAIC model laws, have been enacted in all other States. See III NAIC Model Laws, Regulations and Guidelines at ST-520-3 to ST-520-8.

bound by settlements of covered claims by the association or a similar organization in another state." RSA 404-B:11, II. Such claims shall have "priority equal to that which the claimant would have been entitled in the absence of this chapter against the assets of the insolvent insurer." Id.

ARGUMENT

DOL'S CLAIM FOR ASSESSMENTS IS PROPERLY ASSIGNED CLASS III PRIORITY.

DOL contends that part of its claim for Special Fund assessments is entitled to Class I "Administration Cost" priority and that the remainder (or all) of the claim is entitled to Class II "Policy Related Claim" priority. Neither position is correct. The DOL's claim is properly assigned to Class III "Claims of the Federal Government" priority under RSA 402-C:44.

I. The 2003 And 2004 Assessments Are Not Administration Costs.

DOL first contends that the 2003 and 2004 LHWCA assessments are entitled to Class I administration cost priority under RSA 402-C:44, I. This argument is based solely on the date the assessments were invoiced. See DOL Br. at 8, 9. It disregards the fundamental requirement that administration costs must arise from authorized activities in furtherance of the liquidation.

The New Hampshire Supreme Court addressed the criteria for administration cost priority in In re Liquidation of The Home Ins. Co., 158 N.H. 396, 399 (2009) (rejecting such priority for pre-receivership attorneys' fees). The Court first concluded that "[t]he statutory text draws a clear distinction in time separated by the order to liquidate." Id. But the Court held that priority does not turn just on time. It continued: "'Administer' (and by extension 'administration') appears within the statutory scheme only in relation to authorized activities undertaken in furtherance of the liquidation." Id. (emphasis added) (citing N.H. RSA 402-C:21, I (liquidation order is to direct the liquidator to "administer" the assets of the insurer). The Court held that

"expenses only gain Class I priority when they actually constitute 'costs and expenses of *administration.*'" Id. (emphasis in original).

The 2003 and 2004 assessments do not "actually constitute" expenses of administration of the Home estate. They may have been assessed after the liquidation date, but they do not stem from activity authorized by the Liquidator in furtherance of the liquidation. Instead, they are obligations that arise from Home's pre-liquidation issuance of insurance policies. As described at page 7 above, Special Fund assessments for a year start with DOL's projection of Special Fund expenses, which are assessed based upon ratios of an insurer's or self-insurer's compensation payments for the preceding year to all compensation payments and of the Special Fund's second injury payments "attributable to" the insurer or self-insurer to all second injury payments. 33 U.S.C. § 944(c). Home was issued Special Fund assessment notices for 2003 and 2004 because the Special Fund had made Section 908(f) second injury payments during the preceding calendar years which were "attributable to" Home. See DOL Ex. B at 11, 12, 15, 16 (assessment notices showing 2002 and 2003 "Company 8(f) Participations"). Those payments were "attributable to" Home because they were made to workers whose second injury claims had formerly been paid by Home. See Solis, 848 F.Supp.2d. at 96 ("After [the statutory] period, liability for [second injury] payments shifts to the Special Fund.").

The 2003 and 2004 assessments thus arise from Home's issuance of policies and payment of claims before its liquidation began in June 2003. Home stopped writing insurance in 1995 and 1996. Bengelsdorf Aff. ¶ 3. The Special Fund's second injury payments in 2002 and 2003 used in the formula for 2003 and 2004 assessments are "attributable to" Home only because Home issued policies and paid claimants prior to its liquidation. (Indeed, the Special Fund second injury payments in 2002 and the first half of 2003 that inform the assessments for 2003

and 2004 were themselves before Home's liquidation.) Since Home's obligation for Special Fund assessments arises from the pre-liquidation policies and claims, not from any activity connected with Home's liquidation, DOL's claim is not entitled to administration cost priority.[3]

DOL contends that the assessments are analogous to the income taxes at issue in the unpublished decision North Carolina v. United States, No. 97-2108, 1998 WL 178374 (4th Cir. Apr. 16, 1998). The case, however, merely concluded that the question of administration cost priority "comes down to a question of timing, that is, when the taxes accrued." Id. at *4. It acknowledged that "[t]axes that accrued before . . . liquidation cannot be considered administrative expenses . . . ." Id. It did not discuss the critical question of what was meant by "accrued." See id. However, bankruptcy cases – including those cited in North Carolina – show that the question is when the liability is incurred, not when it is billed or payable, and that this depends on when the underlying events giving rise to the tax occurred. See In re Columbia Gas Transmission Corp., 37 F.3d 982, 985, 986 (3d Cir. 1994) (property tax based on pre-petition ownership not an administrative expense); In re Connecticut Motor Lines, Inc., 336 F.2d 96, 108 (3d Cir. 1964) (taxes arising from wages for services rendered pre-bankruptcy, but paid during bankruptcy, not administrative expense). Cf. United States v. Friendship College, Inc., 737 F.2d 430, 431-32 (4th Cir. 1984) (taxes based on post-petition wages are administrative expenses). A similar distinction was drawn in In re Boston Regional Medical Center, Inc., 291 F.3d 111, 125-126 (1st Cir. 2002), concerning a state fund's claims for reimbursement of unemployment compensation the fund paid after the medical center filed for bankruptcy. The court held that the

[3] DOL notes that administration of the estate includes "various actions such as '[d]efray[ing] all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business and property of the insurer," citing Liquidation of Home, 158 N.H. at 399. DOL Br. at 10. But DOL fails to explain how the assessments are expenses of liquidating Home's business as opposed to obligations that flow from its pre-liquidation business. They do not arise from "authorized activities undertaken in furtherance of the liquidation" as required by Liquidation of Home, 158 N.H. at 399.

claims had administrative expense priority only to the extent they sought reimbursement of compensation "paid on the basis of *work* done *after* the petition," not compensation paid "based on prepetition work." Id. at 125 (emphasis in original). This accords with the "activities undertaken in furtherance of the liquidation" standard of Liquidation of Home, 158 N.H. at 399. Obligations resulting from liquidation activity – such as sales taxes on items purchased by a liquidator – are administrative expenses. But obligations based on pre-liquidation events are not, even if billed post-liquidation.

The assessments obligation here arose from Home's activity in writing the policies and the claims that occurred during the policy periods. Once the claims occurred, Home was obligated for whatever assessments were later calculated using payments regarding the claims. While the Special Fund became liable under § 908 and made payments that figured into the assessment formula later, everything flowed from Home's pre-liquidation issuance of the policy. The Home liquidation did nothing to cause the assessments; no activity in the Home estate gave rise to them; and they do not further its administration. They are not costs "of administration."

II. DOL's Claim For Assessments Is Not A Class II Policy Related Claim.

DOL next contends that the assessments are entitled to Class II "Policy Related Claim" priority under RSA 402-C:44, II. This is wrong for two reasons. First, Class II priority is only for "Policy Related Claims," and DOL's claim for assessments is not a claim under an insurance policy issued by Home. Second, even if Class II could encompass non-policy claims of guaranty associations, the Special Fund is not a "similar organization in another state" to NHIGA because it does not step in to pay claims under an insurer's policies when the insurer becomes insolvent.

In construing statutes, the courts "first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." George v. Al

Hoyt & Sons, Inc., 162 N.H. 123, 128 (2011). In conducting their analysis, the courts, "focus on the statute as a whole, not on isolated words or phrases." Id. Further, the courts "interpret statutes not in isolation, but in the context of the overall statutory scheme." In re Pennichuck Water Works, Inc., 160 N.H. 18, 27 (2010). The analysis "must start with consideration of the plain meaning of the relevant statutes, construing them, where reasonably possible, to effectuate their underlying policies. Insofar as reasonably possible, [the courts] will construe the various statutory provisions harmoniously." Id. (citation omitted).

A. The "Policy Related Claims" Priority Class is for Obligations under Insurance Policies, and Does Not Include Assessments.

DOL seeks Class II priority based on the assertion that the Special Fund is a "similar organization" to the New Hampshire insurance guaranty associations. DOL Br. at 11. This leaps over the more fundamental question whether the claim for assessments is a "policy related" claim. Class II encompasses only claims under policies issued by the insolvent insurer. DOL's claim for Special Fund assessments, however, is not a claim for amounts due under a Home policy but a claim for assessments under § 944, which spreads expected costs of the Special Fund across industry. See page 7 above.

The plain meaning of the Class II priority encompasses only the policy obligations of the insolvent insurer. The statute begins by identifying the priority class as "Policy Related Claims." RSA 402-C:44, II. The ordinary meaning of that phrase refers to claims related to insurance policies and excludes other types of claims. The statute then identifies three types of claimants who can assert such claims: (i) "policyholders, . . . beneficiaries, and insureds;" (ii) "liability claims against insureds" – that is, claims by third party claimants permitted to assert direct action claims against the insolvent insurer by RSA 402-C:40, I; and (iii) NHIGA, NHLHIGA or a "similar organization in another state." RSA 402-C:44, II. The placement of these three

categories following the phrase "Policy Related Claims" shows that each claimant must assert a claim under an insurance policy issued by the insurer. This point is emphasized by the statute's specification that the claims of "policyholders, . . . beneficiaries, and insureds" and the "liability claims against insureds" both must be "within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company." Id.

DOL's argument depends on the unexamined assumption that the reference to claims of guaranty associations encompasses all guaranty association claims of any type. See DOL Br. at 11-12. This presumably rests on the theory that the absence of "within the coverage" language from the guaranty associations category implies that any type of guaranty association claim falls in Class II. Reliance on that principle in this instance produces the implausible result of lumping disparate policy and non-policy claims into the same priority class, disregards the guaranty associations' principal function of paying claims under policies, and is inconsistent with the statutes providing the associations' payments the same priority as the policyholders and claimants they pay. The Class II priority only includes guaranty associations' claims for payments under policies.

As an initial matter, the Legislature specified that Class II claims are "Policy Related Claims." RSA 402-C:44, II. DOL's position disregards this statutory language, contrary to the principle that no statutory language should be treated as surplusage. See Gordonville Corp. N.V. v. LR1-A L.P., 151 N.H. 371, 375 (2004). Even looking only to the following language, DOL's position is contrary to the rule that "[w]here general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same kind or class as those specifically mentioned." State v. Beckert, 144 N.H. 315, 318 (1999) (quoting

Black's Law Dictionary 517 (6th ed. 1990)). Here, the first two categories (policyholders and liability claims) are limited to claims "within the coverage" of policies, so the guaranty associations' claims are similarly limited.

More fundamentally, express limitation of guaranty association Class II claims to claims "within the coverage" of policies in the priority statute is unnecessary. Under the NHIGA Act, NHIGA only pays covered claims, and the NHIGA Act provides those claims with the priority of policyholders and claimants. Construing the priority statute and the NHIGA Act priority provisions together, it is clear that the Legislature intended guaranty associations' claims for amounts they pay under policies to have the same priority as the claims of policyholders and claimants – Class II priority. See State Employees Ass'n v. N.H. Div. of Personnel, 158 N.H. 338, 343 (2009) ("When interpreting two statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes.") (quotation omitted).

The object of the NHIGA Act is to provide for payment of policy obligations. The NHIGA Act provides that NHIGA's purpose is "payment of covered claims under certain insurance policies," RSA 404-B:2, and that NHIGA is only obligated for "covered claims." RSA 404-B:8. See N.H. Ins. Guar. Ass'n v. Pitco Frialator, Inc., 142 N.H. 573, 576 (1998) ("Central to the statute is the concept of a 'covered claim.'"). That term is in pertinent part defined – in language almost identical to that in the priority statute – as a claim "which arises out of and is within coverage and not in excess of the applicable limits of an insurance policy . . . issued by an insurer . . . declared insolvent." RSA 404-B:5, IV. See Pitco Frialator, Inc., 142 N.H. at 578 (NHIGA's obligation "will be measured by the terms of both the statute and the applicable insurance policy"). These provisions of the NHIGA Act were enacted in 1970, 1970 N.H. Laws

37:3, so the Legislature reasonably understood guaranty association claims to be for amounts "within the coverage" of insurance policies when it added the reference to guaranty associations to the priority statute in 1977 by 1977 N.H. Laws 499:1.

The NHIGA Act itself gave guaranty association claims for reimbursement of policy payments the same priority that the policyholder or claimant has under the Act. The NHIGA Act provides that "[a]ny person recovering under this chapter shall be deemed to have assigned his rights under the policy to the association to the extent of his recovery from the association. RSA 404-B:11, I (emphasis added). Further, the liquidator "shall be bound by settlements of covered claims by the association or similar organization in another state" and the court shall grant such claims "priority equal to that which the claimant would have been entitled in the absence of this chapter." RSA 404-B:11, II (emphasis added).[4] NHIGA shall file "statements of the covered claims paid by the association" with the liquidator to "preserve the rights of the association against the assets of the insolvent insurer." RSA 404-B:11, III.

Viewing the statutes as a harmonious whole, the reference to guaranty associations in RSA 402-C:44, II, serves to confirm the priority for the guaranty associations' payments under policies provided by RSA 404-B:11. It clarifies the relationship between the Act's and the NHIGA Act's priority provisions and avoids any confusion over the interaction of RSA 402-C:44 and RSA 404-B:11. Cf. Grimes v. Oklahoma Property & Cas. Ins. Guar. Ass'n, 796 P.2d 352 (Okla. 1990) (receiver disputed association's assertion of policy priority for its payments on covered claims notwithstanding priority provision in guaranty association statute).

Finally, understanding the Class II guaranty association priority as limited to claims for payments under policies is consistent with the priority statute's purposes. It treats all claims for

[4] The NHIGA Act also provides that the guaranty associations' expenses "in handling claims" have the same priority as the Liquidator's expenses. RSA 404-B:11, II.

amounts due under Home policies alike and serves "the purpose of [the Act] to protect preferred creditors by reserving assets for them, including people insured by Home, and people with claims against those insured by Home." In the Matter of the Liquidation of The Home Ins. Co., 154 N.H. 472, 488 (2006). That purpose would be frustrated by giving non-policy claims "policy related claim" priority. DOL's claim for assessments is not a Class II claim.

B. The Special Fund Is Not "Similar" To A Guaranty Association Because It Does Not Step In To Pay Policyholders And Claimants When An Insurer Becomes Insolvent.

DOL's argument that the Special Fund is entitled to Class II priority as a "similar organization" to NHIGA also fails on its own terms. The Special Fund does not fill the role of insurance guaranty associations in protecting policyholders and claimants by stepping in to pay claims under policies issued by an insurer when the insurer becomes insolvent.

The plain and ordinary meaning of the phrase "or similar organization in another state" following mention of the two New Hampshire insurance guaranty associations refers to the guaranty associations established by other States. See RSA 402-C:3, V ("'State' means any state of the United States and the Panama Canal Zone."). The States have all created insurance guaranty associations like NHIGA and NHLHIGA, usually based on NAIC model acts. See Benson v. N.H. Ins. Guar. Ass'n, 151 N.H. 590, 595 (2004) ("Nearly every State has since adopted the Model Act in some form.").[5] By "similar organization[s] in another state," the Legislature plainly intended the other States' guaranty associations, however denominated. See In the Matter of the Liquidation of American Mut. Liab. Ins. Co., 747 N.E.2d 1215, 1226-27 (Mass. 2001) ("any similar organization in another state" in Massachusetts priority statute refers to guaranty funds from other jurisdictions); Stephens v. Colaiannia, 942 P.2d 1374, 1378-79

[5] The statutes are listed in III NAIC Model Laws, Regulations and Guidelines at ST-540-3 (property/casualty guaranty association legislation in 50 States, the District of Columbia, and Puerto Rico) and ST-520-3 (life and health guaranty association legislation in 50 States, the District of Columbia, and Puerto Rico).

(Colo. App. 1997) (Louisiana Insurance Guaranty Association is a "similar organization in another state" under Colorado priority statute).

DOL seeks to expand this plain meaning by focusing on the word "similar," but it fails to identify the critical similarity. An organization can only be "similar" to NHIGA and NHLHIGA if it serves the same purpose or function that entitles the state insurance guaranty associations to "policy related" priority. "The meaning of 'similar' includes 'having characteristics in common: very much alike: COMPARABLE' and 'alike in substance or essentials.'" State v. Addison, 160 N.H. 732, 763 (2010) (quoting Webster's Third New International Dictionary at 2120 (unabridged ed. 2002)). Thus, the statutory term "similar organization" includes only organizations that "share characteristics, substance or essentials that are common to or very much like" NHIGA or NHLHIGA. See id.[6]

The essential purpose of NHIGA is "to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." RSA 404-B:2. See, e.g., N.H. Motor Transp. Ass'n Employee Benefit Trust v. N.H. Ins. Guar. Ass'n, 154 N.H. 618, 620 (2006). That is, NHIGA exists to protect policyholders and claimants by paying claims under an insurer's policies when the insurer becomes insolvent, subject to policy and statutory limitations. See N.H. RSA 404-B:5, IV (defining "covered claim" in pertinent part as a claim "which arises out of and is within coverage and not in excess of the applicable limits of an insurance policy . . . issued by [an insurer that is declared insolvent]"); N.H. RSA 404-B:8, I

[6] The Liquidator does not reject DOL's claim to priority simply because the Special Fund is a federal, not a state, entity. The statute arguably might be "liberally construed" to accord priority to a federal organization that actually served the same purpose as state guaranty associations by paying claims under policies when an insurer becomes insolvent. See RSA 402-C:1, III. That is not the case here.

(association is obligated for specified covered claims); Pitco Frialator, 142 N.H. at 576-77.[7] DOL's own regulations recognize that the critical function of State guaranty associations is to pay claims under an insolvent insurer's policies. In determining the amount of an insurer's required security deposit, DOL considers "the extent to which a State guaranty fund secures the insurance carrier's LHWCA obligations in that State." 20 C.F.R. 703.202(a). The deposit is reduced or eliminated where the guaranty association in the state provides coverage for LHWCA claims. 20 C.F.R. 703.201-202; Liq. Ex. 5.

The Special Fund does not fulfill the defining function of a guaranty association – stepping in to pay claims under an insurer's policies when the insurer becomes insolvent. The Special Fund's primary function is to pay second injury claims under § 908 and, to a much lesser extent, to pay benefits under § 918 when an employer cannot. Neither role involves paying claims under an insurer's policies when the insurer becomes insolvent. Since the Special Fund does not protect policyholders and claimants by paying policy claims upon insurer insolvency, it is not a "similar organization" to NHIGA. See Northwestern Nat. Ins. Co. v. Kezer, 812 P.2d 688, 690-91 (Colo. App. 1990) (reinsurer is not a "similar organization" to guaranty association because its purpose is not "to protect claimants and policyholders by assuming an insolvent insurer's obligation"); Foremost Life Ins. Co. v. Department of Ins., 409 N.E.2d 1092, 1098 (Ind. 1980) (reinsurer is not a "similar organization" to guaranty association as its primary purpose is not "protecting policy holders of insolvent companies, as is a guaranty association").

DOL first focuses on payments under § 918 (representing less than 5% of its payments) and contends that they show that the Special Fund functions "in part" as a guaranty association.

[7] Similarly, the purpose of NHLHIGA is to protect policyholders and others "against failure in the performance of fair and equitable contractual obligations due to the impairment of the insurer issuing such policies or contracts." RSA 404-D:2. An "impaired insurer" is one that has been "declared insolvent" and placed in liquidation or "deemed by the commissioner . . . to be unable to fulfill its contractual obligations." RSA 404-D:5, VI.

DOL Br. at 6, 12. This is mistaken. Under § 918, the Special Fund protects against non-payment by an employer, not against insurer insolvency. As the District Court held, "Section 918 payments from the Special Fund act as a safety net with respect to the relationship between worker and employer. . . . [T]he Special Fund does not pay compensation to claimants where an insurer becomes insolvent." Solis, 848 F.Supp.2d at 97 (footnote omitted); see id. at 106. Section 918 payments are discretionary and limited to situations where the employee has obtained a judgment against the employer in federal court that cannot be satisfied by the employer due to insolvency or another circumstance precluding payment. 33 U.S.C. § 918(b). They are not triggered by insolvency of the employer's insurer. See B.S. Costello, 867 F.2d at 725 (when insurer becomes insolvent, employer is liable for compensation). Indeed, DOL has a policy of seeking payment from the insured employer in the event of an insurer's insolvency. Liq. Ex. 3 (70 Fed. Reg. 43226). Further, DOL has recognized that guaranty associations may be responsible in that situation, and it requires security deposits to protect LHWCA claimants where they are not. Liq. Ex. 5; see Solis, 848 F.Supp.2d at 97 n.4. In sum, as the First Circuit stated:

> A legislative scheme requiring all participating insurers in the nation to contribute to a fund that would secure against the default of one or more of their number might be a good addition to the present statute. Be that as it may, the LHWCA simply is not structured in that way.

B.S. Costello, 867 F.2d at 726-27 (emphasis added).

DOL next contends that second injury payments under § 908 "insulate" workers from the effects of insurer insolvencies. DOL Br. at 12-13. However, this is merely a side effect of the federal scheme. The Special Fund makes second injury payments because Congress has chosen to limit the extent of the employer's liability to pay compensation so as to encourage employment of previously partially disabled workers. See 33 U.S.C. § 908(f)(1), (2); Newport News Shipbuilding & Dry Dock Co. v. Winn, 326 F.3d 427, 432 (4th Cir. 2003); Bath Iron

Works, 129 F.3d at 50. "After [the statutory] period, liability for payments shifts to the Special Fund." Solis, 848 F.Supp.2d. at 96. That the Special Fund may make some § 908 payments where an insurer has become insolvent is incidental. The Special Fund makes those payments because it is liable under the LHWCA, not because the insurer is insolvent. DOL's further assertion that insurers remain "indirectly and partially liable" for second injury claims through assessments, DOL Br. at 13, uses the word "liable" in a remarkably attenuated sense and is beside the point. The assessments are a means of spreading the expected cost of future second injury payments (and other Special Fund costs) across industry, not of making a particular insurer responsible for particular claims after employer liability has ended. Spreading the risk of second injuries does not make the Special Fund similar to guaranty associations, since the risk spreading has nothing to do with insurer insolvency. As the District Court concluded, "there is no provision in Section 944 providing a safety net in the event of *insurance carrier* insolvency." Solis, 848 F.Supp.2d at 106 (emphasis in original).[8]

In sum, the Special Fund does not step in and pay claims under insurance policies when an insurer becomes insolvent. The phrase "similar organization" refers to organizations with that fundamental purpose. The Special Fund does not qualify, and its claim for assessment is not a policy related claim.

[8] DOL also points to an alleged "similarity" that "relates to insolvency prevention." DOL Br. 13. DOL is charged with deciding whether to authorize insurers to insure LHWCA compensation, 33 U.S.C. § 932, while NHIGA's duties include a potential role "[t]o aid in the detection and prevention of insurer insolvencies," RSA 404-B:13. Even if authorizing the writing of coverage and aiding in the detection and prevention of insurer insolvencies were considered "similar" functions, detection/prevention of insolvencies is an incidental part of the guaranty associations' role tangential to their central function –paying policy claims when an insurer becomes insolvent.

CONCLUSION

For the reasons set forth above, the Court should sustain the Liquidator's determination to assign DOL's claim to Priority Class III.

Respectfully submitted,

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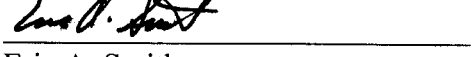
December 12, 2012

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Section 15 Submission Concerning Department of Labor's Claim and the Affidavit of Peter A. Bengelsdorf were sent, this 12th day of December, 2012, by first class mail, postage prepaid to all persons on the attached service list.



Eric A. Smith
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Addendum

Liquidator's Exhibits
(Attachments to Affidavit of Peter A. Bengelsdorf)

Exhibit 1	Order of Liquidation dated June 13, 2003
Exhibit 2	Solis v. Home Ins. Co., 848 F.Supp.2d 91 (D.N.H. 2012)
Exhibit 3	DOL Notice re: Regulations Implementing the Longshore and Harbor Workers' Compensation Act and Related Statutes, 70 Fed. Reg. 43224 (July 26, 2005)
Exhibit 4	20 C.F.R. 702.143-148 and 20 C.F.R. 703.201-213 (2012)
Exhibit 5	DOL State Guarantee Fund Longshore Security Factor Chart
Exhibit 6	Letter from DOL to Home dated February 27, 1992
Exhibit 7	Agreement and Undertaking dated June 1, 1992
Exhibit 8	Email string
Exhibit 9	Agreement and Undertaking dated July 6, 2012

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

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