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**COPY**

APR 01 2008

16 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
17 **IN AND FOR THE COUNTY OF MARICOPA**

18 WESTERN REFINING SOUTHWEST,  
19 INC. f/k/a GIANT INDUSTRIES  
20 ARIZONA, INC., GIANT INDUSTRIES,  
21 INC., and WESTERN REFINING  
22 YORKTOWN, INC. f/k/a GIANT  
23 YORKTOWN, INC.,

24 Plaintiffs,

25 vs.

26 NATIONAL UNION FIRE INSURANCE  
27 COMPANY OF PITTSBURGH, PA;  
28 ILLINOIS NATIONAL INSURANCE  
COMPANY; AMERICAN HOME  
ASSURANCE COMPANY; AMERICAN  
INTERNATIONAL SPECIALTY LINES  
INSURANCE COMPANY; OMAHA  
INDEMNITY COMPANY; FIREMAN'S  
FUND INSURANCE COMPANY;  
UNITED STATES FIDELITY AND  
GUARANTY COMPANY;  
ASSICURAZIONI GENERALI S.p.A.  
(U.S. BRANCH); ARIZONA PROPERTY  
AND CASUALTY INSURANCE  
GUARANTY FUND; AND, DOES 1 - 100,

Defendants.

Case No.: 012008-007299

**COMPLAINT FOR DECLARATORY  
RELIEF, BREACH OF CONTRACT  
AND BREACH OF IMPLIED  
COVENANT OF GOOD FAITH AND  
FAIR DEALING**

(Demand for Jury Trial)

Plaintiffs Western Refining Southwest, Inc. f/k/a Giant Industries Arizona, Inc.  
("Giant Arizona"), Giant Industries, Inc. ("Giant Industries") and Western Refining  
Yorktown, Inc. f/k/a Giant Yorktown, Inc. ("Giant Yorktown") hereby file this Complaint

1 for Declaratory Relief, Breach of Contract and Breach of Implied Covenant of Good Faith  
2 and Fair Dealing ("Complaint") against Defendants National Union Fire Insurance Company  
3 of Pittsburgh, PA ("National Union"); Illinois National Insurance Company ("Illinois  
4 National"); American Home Assurance Company ("American Home"); American  
5 International Specialty Lines Insurance Company ("AISL"); Omaha Indemnity Company  
6 ("Omaha Indemnity"); Fireman's Fund Insurance Company ("Fireman's Fund"); United  
7 States Fidelity and Guaranty Company ("USF & G"); Assicurazioni Generali S.p.A. (U.S.  
8 Branch) ("Generali-U.S. Branch"); the Arizona Property and Casualty Insurance Guaranty  
9 Fund ("Arizona Guaranty Fund"); and, Does 1 through 100 (collectively, "the Insurers") and  
10  
11  
12 allege as follows:

#### 13 PARTIES

14  
15 1. Plaintiff Giant Arizona is an Arizona corporation, with its headquarters in  
16 Scottsdale, Maricopa County, Arizona. At all relevant times, Plaintiff Giant Arizona has  
17 been a wholly-owned subsidiary of Giant Industries.

18 2. Plaintiff Giant Industries is a Delaware corporation, with its headquarters in  
19 Scottsdale, Maricopa County, Arizona.

20 3. Plaintiff Giant Yorktown is a Delaware corporation, with its headquarters in  
21 Scottsdale, Maricopa County, Arizona. At all relevant times, Plaintiff Giant Yorktown has  
22 been a wholly-owned subsidiary of Giant Industries. For purposes of this Complaint, Giant  
23 Arizona, Giant Industries and Giant Yorktown collectively are referred to as "the  
24 Policyholders."

25 4. Defendant National Union is a Pennsylvania corporation with its headquarters  
26 at 70 Pine Street, New York, New York 10270. National Union is a member of "the AIG  
27 Group," as defined in paragraph 39 below. National Union has been authorized to do  
28 business in all states and the District of Columbia. National Union was authorized and  
licensed to do business by the State of Arizona on August 10, 1920. At all relevant times,

1 Branch office located at 2201 E. Camelback Road, Suite 400B, Phoenix, Maricopa County,  
2 Arizona 85016.

3 5. Defendant Illinois National is an Illinois corporation with its headquarters at  
4 500 West Madison Street, Chicago, Illinois 60661. Illinois National is a member of the AIG  
5 Group. Illinois National has been authorized to do business in all states and the District of  
6 Columbia, except Arkansas, California, North Carolina and Virginia. Illinois National was  
7 authorized and licensed to do business by the State of Arizona on March 7, 1980. At all  
8 relevant times, Illinois National was authorized to transact and did transact business in the  
9 State of Arizona. Along with all the other members of the AIG Group, Illinois National  
10 maintains a Regional Branch office located at 2201 E. Camelback Road, Suite 400B,  
11 Phoenix, Maricopa County, Arizona 85016.

12 6. Defendant American Home is a New York corporation, with its headquarters  
13 at 70 Pine Street, New York, New York 10270. American Home is a member of the AIG  
14 Group. American Home has been authorized to do business in all states and the District of  
15 Columbia. American Home was authorized and licensed to do business by the State of  
16 Arizona on May 8, 1929. At all relevant times, American Home was authorized to transact  
17 and did transact business in the State of Arizona. Along with all the other members of the  
18 AIG Group, American Home maintains a Regional Branch office located at 2201 E.  
19 Camelback Road, Suite 400B, Phoenix, Maricopa County, Arizona 85016.

20 7. Defendant AISL is an Arkansas corporation with its headquarters at 70 Pine  
21 Street, New York, New York 10270. AISL is a member of the AIG Group. AISL has been  
22 authorized to do business as a surplus lines insurer in all states and the District of Columbia,  
23 except New Jersey. AISL is listed by the Arizona Department of Insurance as an insurer for  
24 which a sponsoring Surplus Lines Broker has filed documents required to qualify AISL to  
25 transact surplus lines insurance in Arizona. At all relevant times, AISL was authorized to  
26 transact and did transact business in the State of Arizona. Along with all the other members  
27 of the AIG Group, AISL maintains a Regional Branch office located at 2201 E. Camelback  
28 Road, Suite 400B, Phoenix, Maricopa County, Arizona 85016.

1           8.     Defendant Omaha Indemnity is a Wisconsin corporation with its headquarters  
2 at Mutual of Omaha Plaza, Omaha, Nebraska 68175. Omaha Indemnity has been authorized  
3 to do business in all states and the District of Columbia. Omaha Indemnity was authorized  
4 and licensed to do business by the State of Arizona on  
5 January 15, 1969. At all relevant times, Omaha Indemnity was authorized to transact and  
6 did transact business in the State of Arizona.

7           9.     Defendant Fireman's Fund is a California corporation, with its headquarters at  
8 777 San Marin Drive, Novato, California 94998. Fireman's Fund has been authorized to do  
9 business in all states and the District of Columbia. Fireman's Fund was authorized and  
10 licensed to do business by the State of Arizona on March 31, 1899. At all relevant times,  
11 Fireman's Fund was authorized to transact and did transact business in the State of Arizona.

12          10.    Defendant USF & G is a New York corporation, with its headquarters in  
13 Maryland. USF & G is a member of the Travelers Group of Companies. USF & G was  
14 authorized and licensed to do business by the State of Arizona at the time it issued insurance  
15 policies to the Policyholders. At all relevant times, USF & G was authorized to transact and  
16 did transact business in the State of Arizona.

17          11.    Defendant Generali-U.S. Branch is part of an Italian corporation,  
18 Assicurazioni Generali S.p.A., and has its headquarters at One Liberty Plaza, New York,  
19 New York 10006. Assicurazioni Generali S.p.A. is Italy's largest insurance company. It  
20 controls almost 300 companies, more than a third of which sell insurance. Genamerica  
21 Management Corporation, New York, conducts and carries on the daily operations of  
22 Generali-U.S. Branch. Generali-U.S. Branch has been authorized to do business in all states  
23 and the District of Columbia, except Hawaii, Massachusetts, Rhode Island and Vermont.  
24 Generali-U.S. Branch was authorized and licensed to do business by the State of Arizona on  
25 October 19, 1982. At all relevant times, Generali-U.S. Branch was authorized to transact  
26 and did transact business in the State of Arizona.

27          12.    Defendant Arizona Guaranty Fund is a fund within the Arizona Department of  
28 Insurance created by the Property and Casualty Insurance Guaranty Fund Act, codified at

1 A.R.S. § 20-662. The Arizona Guaranty Fund is charged with protecting the interests of  
2 persons holding covered claims against insolvent insurance companies, including their  
3 policyholders or claimants who are residents of Arizona. Home Insurance Company  
4 (“Home Insurance”), which issued comprehensive general liability (“CGL”) insurance  
5 policies to the Policyholders, was declared insolvent in the State of New Hampshire in 2003.  
6 The Arizona Guaranty Fund assumed the rights and liabilities of Home Insurance as an  
7 insolvent insurer and is obligated to pay covered claims. The Arizona Guaranty Fund is  
8 obligated, under Arizona law, to defend the Policyholders to the same extent Home  
9 Insurance would have been required to defend the Policyholders had it not become  
10 insolvent.

11 13. The true names and capacities, whether individual, corporate, associate, or  
12 otherwise, of Defendant Does 1 through 100 are unknown to the Policyholders at this time  
13 and the Policyholders’ claims are asserted against such Doe Defendants using fictitious  
14 names, pursuant to Rule 4(c) of the Arizona Rules of Civil Procedure. When the true names  
15 and capacities of said Doe Defendants have been ascertained, the Policyholders will amend  
16 this Complaint accordingly.

17 14. The Policyholders allege that each of the Defendants sued as Does 1 through  
18 100 issued one or more CGL insurance policies to the Policyholders or to another entity  
19 naming the Policyholders as an insured, named insured, additional insured, or additional  
20 named insured.

21 **VENUE AND JURISDICTION**

22 15. Pursuant to A.R.S. § 12-401, venue is proper in Maricopa County because  
23 Plaintiff Giant Industries resides in Maricopa County. Giant Industries’ corporate office is  
24 located at 23733 N. Scottsdale Road, Scottsdale, Arizona 85255.

25 16. Pursuant to A.R.S. § 12-401, venue also is proper in Maricopa County because  
26 Plaintiff Giant Yorktown resides in Maricopa County. Giant Yorktown’s corporate office is  
27 located at 23733 N. Scottsdale Road, Scottsdale, Arizona 85255.

28

1 17. Pursuant to A.R.S. § 12-401, venue also is proper in Maricopa County because  
2 the Insurers contracted in writing to perform an obligation in Maricopa County.

3 18. Pursuant to A.R.S. § 12-401, venue also is proper in Maricopa County because  
4 this is an action against insurance companies and the claims for relief asserted by the  
5 Policyholders against the Insurers arose in Maricopa County.

6 19. Pursuant to A.R.S. § 12-401, venue also is proper in Maricopa County because  
7 the Insurers have agents and/or representatives in Maricopa County.

8 20. Pursuant to A.R.S. § 12-401, venue also is proper in Maricopa County because  
9 the Insurers conduct business in Maricopa County.

10 21. This Court has jurisdiction over the Insurers because each Insurer has  
11 substantial, systematic and continuous contact with the State of Arizona. In addition, the  
12 Insurers maintain offices, agents, and/or representatives in the State of Arizona. The  
13 Insurers have purposely availed themselves of the privilege of conducting business in the  
14 State of Arizona. This lawsuit arises directly from the activities of the Insurers in the State  
15 of Arizona.

16 22. This Court has jurisdiction over Defendant Arizona Guaranty Fund because it  
17 is an entity created by Arizona statute and is a resident of the State of Arizona.

18 **NATURE OF THE ACTION**

19 23. The Insurers (except for the Arizona Guaranty Fund) sold the CGL insurance  
20 policies, including those listed in paragraphs 825 through 1040 below (collectively, the  
21 "CGL Insurance Policies") to three residents of the County of Maricopa, Arizona, Giant  
22 Arizona, Giant Industries and Giant Yorktown, then wrongfully failed to defend their  
23 policyholders in over fifty (50) product liability lawsuits. Through the insolvency of Home  
24 Insurance, the Arizona Guaranty Fund, like the other Insurers, is liable for the defense of the  
25 Policyholders.

26 24. All of the CGL Insurance Policies issued by the Insurers that are relevant to  
27 this action were purchased and delivered to the Policyholders at or in Maricopa County,  
28 Arizona.

1           25.    The over fifty (50) product liability lawsuits filed against the Policyholders are  
2 described more fully in paragraphs 90 to 820 of this Complaint (collectively, “the  
3 Underlying Product Liability Lawsuits”).

4           26.    Although the Underlying Product Liability Lawsuits were filed in many states  
5 across the country – from the West to the Northeast and the South – almost all of the  
6 Underlying Product Liability Lawsuits have been consolidated in the United States District  
7 Court for the Southern District of New York in a single proceeding as part of the multi-  
8 district litigation, In re: Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation  
9 No. 1:00-1898 MDL 1358 (S.D.N.Y.) (“MTBE Products Liability MDL”). The  
10 Policyholders vigorously have contested the Underlying Product Liability Lawsuits,  
11 including those in the MTBE Products Liability MDL.

12           27.    The Underlying Product Liability Lawsuits generally are not specific as to  
13 exactly when, where, and how the alleged damages were caused and the plaintiffs in the  
14 Underlying Product Liability Lawsuits have not made this information available, if it exists  
15 at all. Instead, the plaintiffs in the Underlying Product Liability Lawsuits have concentrated  
16 their efforts on the MTBE manufacturing industry and gasoline refining industry through  
17 theories of collective liability such as “Market Share Liability,” “Alternative Liability,”  
18 “Enterprise Liability,” and “Concert of Action Liability.” The plaintiffs in the Underlying  
19 Product Liability Lawsuits generally allege that the claimed damages arise out of products  
20 that were manufactured or sold by the Policyholders and that the Policyholders’ alleged  
21 liability arises from the sale of a product – reformulated gasoline (“RFG”) – that allegedly  
22 contained MTBE.

23           28.    Typical of the product liability allegations in the Underlying Product Liability  
24 Lawsuits are allegations from State of New Mexico v. Amerada Hess Corp., et al., Case No.  
25 06-CV-5496 (see paragraphs 93 to 106 below), one of the many Underlying Product  
26 Liability Lawsuits in the MTBE Products Liability MDL, in which the plaintiffs allege:

27           a.    “Oil companies began blending MTBE into gasoline in the late 1970’s.  
28                Initially used as an octane enhancer, MTBE was used throughout the

1 1980's at low concentrations in some gasoline by some refiners, primarily  
2 in high-octane grades." (State of New Mexico v. Amerada Hess Corp., et  
3 al., Case No. 06-CV-5496, Original Complaint, ¶47.)

4 b. "Refiners, including Defendants, significantly increased their use of MTBE  
5 in gasoline after 1990, when Congress established the Reformulated  
6 Gasoline Program ('RFG Program') in section 211(k) of the Clean Air Act,  
7 42 U.S.C. §7545(k)." (State of New Mexico v. Amerada Hess Corp., et al.,  
8 Case No. 06-CV-5496, Original Complaint, ¶48.)

9 c. "The defendants in this action are major oil and chemical companies that  
10 manufacture MTBE, blend MTBE into gasoline, and/or supply gasoline  
11 containing MTBE to the State. The defendants include MTBE  
12 manufacturers and refiners and major brand marketers of gasoline  
13 containing MTBE, which entered and continues to enter the stream of the  
14 State's commerce. Gasoline containing MTBE has damaged and continues  
15 to damage the waters of the State and State property." (State of New  
16 Mexico v. Amerada Hess Corp., et al., Case No. 06-CV-5496, Original  
17 Complaint, ¶5.)

18 d. "MTBE is a fungible product. Once released into the environment, MTBE  
19 lacks characteristics or a chemical signature that would enable  
20 identification of the refinery or company that manufactured the product."  
21 (State of New Mexico v. Amerada Hess Corp., et al., Case No. 06-CV-  
22 5496, Original Complaint, ¶39.)

23 e. "Gasoline containing MTBE from various refiners is commingled during  
24 transmission from refineries to distribution centers. The gasoline at any  
25 particular service station comes from many different refiners. Thus, a  
26 subsurface plume, even if released from a single identifiable tank, pipeline,  
27 or vessel, is the product of mixed batches of gasoline originating from  
28



1 different refiners.” (State of New Mexico v. Amerada Hess Corp., et al.,  
2 Case No. 06-CV-5496, Original Complaint, ¶40.)

3 f. “When Defendants placed gasoline containing MTBE into the stream of  
4 commerce, it was defective, unreasonably dangerous, and not reasonably  
5 suited for its intended, foreseeable and ordinary transportation, storage,  
6 handling, and uses . . .” (State of New Mexico v. Amerada Hess Corp., et  
7 al., Case No. 06-CV-5496, Original Complaint, ¶63.)

8 29. The first MTBE product liability cases were filed in 1998 in Millett v. Atlantic  
9 Richfield Co. in Cumberland County, Maine. Several more MTBE product liability cases  
10 were filed in 1999, such as Maynard v. Amerada Hess Corp. in New Hanover County, North  
11 Carolina, Communities for a Better Env’t v. Unocal Corp. in San Francisco County,  
12 California, and, South Tahoe Pub. Util. Corp. v. Atlantic Richfield Co. in San Francisco  
13 County, California. More MTBE product liability cases were filed between 1999 and 2004.  
14 In October 2000, the United States Judicial Panel on Multidistrict Litigation transferred  
15 purported class action cases brought on behalf of private well owners in 18 states against  
16 nearly all refiners operating in the United States District Court for the Southern District of  
17 New York for consolidated proceedings. These consolidated cases were collectively  
18 referred to as “MDL 1358, In re MTBE Product Liability Litigation”  
19 ([http://www.jpml.uscourts.gov/Docket\\_Info/Products\\_Liability/MDL-1358/mdl-1358.html](http://www.jpml.uscourts.gov/Docket_Info/Products_Liability/MDL-1358/mdl-1358.html)),  
20 the MTBE Products Liability MDL. Judge Shira A. Scheindlin of the United States District  
21 Court for the Southern District of New York has presided over the MTBE Products Liability  
22 MDL.

23 30. Almost all of the MTBE product liability lawsuits in the United States were  
24 sent to Judge Scheindlin for handling as a part of the MTBE Products Liability MDL. By  
25 2004, over 60 MTBE product liability cases were pending as part of the MTBE Products  
26 Liability MDL.

27 31. Judge Scheindlin continues to oversee the MTBE Products Liability MDL and  
28 thus, oversees almost all of the Underlying Product Liability Lawsuits. In a 2001 decision in

1 **Policies Issued by Fireman's Fund**

2 1006. On information and belief, Fireman's Fund issued CGL Policy No.  
3 MXP3583217, effective May 3, 1980 through August 3, 1980.

4 1007. On information and belief, CGL Policy No. MXP3583217 requires Fireman's  
5 Fund to defend all suits against Giant Industries potentially seeking damages because of  
6 bodily injury or property damage to which the insurance policy applies.

7 1008. On information and belief, CGL Policy No. MXP3583217 did not contain any  
8 exclusion that eliminates Fireman Fund's duty to defend Giant Industries in the Underlying  
9 Product Liability Lawsuits.

10 1009. On information and belief, CGL Policy No. MXP3583217 does not have any  
11 deductible or self-insured retention applicable to any of the Underlying Product Liability  
12 Lawsuits.

13 1010. At this time, the Policyholders do not have a copy of CGL Policy No.  
14 MXP3583217. The Policyholders have requested a copy of CGL Policy No. MXP3583217,  
15 but Fireman's Fund has not provided it.

16 **Policies Issued by Home Insurance**

17 1011. On information and belief, Home Insurance issued insurance to Giant  
18 Industries under a Business Owner Insurance package that included CGL policies.

19 1012. On information and belief, Home Insurance issued Business Owner Policy No.  
20 BOP8816174, effective August 3, 1980 through August 3, 1981.

21 1013. On information and belief, Policy No. BOP8816174 requires Home Insurance  
22 (now Arizona Guaranty Fund) to defend Giant Industries in all suits potentially seeking  
23 damages because of bodily injury or property damage to which the insurance policy applies.

24 1014. On information and belief, Policy No. BOP8816174 does not contain any  
25 exclusion that eliminates Home Insurance's (now Arizona Guaranty Fund's) duty to defend  
26 Giant Industries in the Underlying Product Liability Lawsuits.

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28

1           1015. On information and belief, Policy No. BOP8816174 does not have any  
2 deductible or self-insured retention applicable to any of the Underlying Product Liability  
3 Lawsuits.

4           1016. At this time, the Policyholders do not have a copy of Policy No. BOP8816174.  
5 The Policyholders have requested a copy of Policy No. BOP8816174, but Arizona Guaranty  
6 Fund has not provided it.

7           1017. On information and belief, Home Insurance issued Business Owner Policy No.  
8 BOP8828551 (renewal of BOP8816174), effective August 3, 1981 through August 3, 1982.

9           1018. On information and belief, Policy No. BOP8828551 requires Home Insurance  
10 (now Arizona Guaranty Fund) to defend Giant Industries in all suits potentially seeking  
11 damages because of bodily injury or property damage to which the insurance policy applies.

12           1019. On information and belief, Policy No. BOP8828551 does not contain any  
13 exclusion that eliminates Home Insurance's (now Arizona Guaranty Fund's) duty to defend  
14 Giant Industries in the Underlying Product Liability Lawsuits.

15           1020. On information and belief, Policy No. BOP8828551 does not have any  
16 deductible or self-insured retention applicable to any of the Underlying Product Liability  
17 Lawsuits.

18           1021. At this time, the Policyholders do not have a copy of Policy No. BOP8828551.  
19 The Policyholders have requested a copy of Policy No. BOP8828551, but Arizona Guaranty  
20 Fund has not provided it.

21           1022. The Superior Court of Merrimack County, New Hampshire, placed Home  
22 Insurance in liquidation on June 13, 2003. By order of the court, the deadline for filing  
23 claims against Home Insurance was set as June 13, 2004.

24           1023. Pursuant to the Arizona Property and Casualty Insurance Guaranty Fund Act,  
25 A.R.S. § 20-662, the Arizona Department of Insurance oversees the Arizona Guaranty Fund  
26 which handles claims against insolvent insurers by Arizona policyholders.

27           1024. Under Arizona law, the Arizona Guaranty Fund must "step into the shoes" of  
28 Home Insurance and assume its obligations and rights under the CGL Insurance Policies. As

1 a result, under Policy No. BOP8816174 and BOP8828551, the Arizona Guaranty Fund is  
2 required to defend Giant Industries in all suits potentially seeking damages because of bodily  
3 injury or property damage to which the Home Insurance policy applies.

4 1025. The Arizona Guaranty Fund has denied the Policyholders' claims for defense  
5 of the Underlying Product Liability Lawsuits.

#### 6 Policies Issued by USF & G

7 1026. On information and belief, USF & G issued CGL Policy No. MP67583,  
8 effective August 19, 1982 through August 3, 1983.

9 1027. On information and belief, CGL Policy No. MP67583 requires USF & G to  
10 defend Giant Industries in all suits potentially seeking damages because of bodily injury or  
11 property damage to which the insurance policy applies.

12 1028. On information and belief, CGL Policy No. MP67583 did not contain any  
13 exclusion that eliminates USF & G's duty to defend Giant Industries in the Underlying  
14 Product Liability Lawsuits.

15 1029. On information and belief, CGL Policy No. MP67583 does not have any  
16 deductible or self-insured retention applicable to any of the Underlying Product Liability  
17 Lawsuits.

18 1030. At this time, the Policyholders do not have a copy of CGL Policy No.  
19 MP67583. The Policyholders have requested a copy of CGL Policy No. MP67583, but USF  
20 & G has not provided it.

#### 21 Policies Issued by Omaha Indemnity

22 1031. Omaha Indemnity issued CGL Policy No. CL000151, effective August 3, 1983  
23 through August 3, 1986.

24 1032. Giant Industries is a named insured under CGL Policy No. CL000151, as well  
25 as "all divisions, subsidiaries and joint ventures now existing or as may later be constituted."  
26 Giant Arizona and Giant Yorktown are wholly-owned subsidiaries of Giant Industries, so  
27 Giant Arizona and Giant Yorktown also are Named Insureds under CGL Policy No.  
28 CL000151.

1 1078. National Union issued Umbrella Policy No. BE 139-96-75, effective  
2 November 1, 2002 through November 1, 2003.

3 1079. National Union issued Umbrella Policy No. BE 298-80-58, effective  
4 November 1, 2003 through November 1, 2004.

5 1080. National Union issued Umbrella Policy No. BE 598-39-11, effective  
6 November 1, 2004 through November 1, 2005.

7 1081. National Union issued Umbrella Policy No. 2979948, effective November 1,  
8 2005 through November 1, 2006.

9 1082. National Union issued Umbrella Policy No. 4485768, effective November 1,  
10 2006 through November 1, 2007.

11 1083. None of the Umbrella Policies issued by National Union are applicable to the  
12 defense of the Underlying Product Liability Lawsuits. The Policyholders only are seeking  
13 defense of the Underlying Product Liability Lawsuits through this Complaint and none of  
14 the policy limits of the underlying primary CGL Insurance Policies have been exhausted so  
15 as to trigger coverage under the Umbrella Insurance Policies.

16 **Policies Issued by Home Insurance**

17 1084. Home Insurance issued Umbrella Policy No. HXL-1 57 65 17, effective  
18 August 3, 1983 though August 3, 1984.

19 1085. The Umbrella Policy issued by Home Insurance is not applicable to the  
20 defense of the Underlying Product Liability Lawsuits. The Policyholders only are seeking  
21 defense of the Underlying Product Liability Lawsuits through this Complaint and none of  
22 the policy limits of the underlying primary CGL Insurance Policies have been exhausted so  
23 as to trigger coverage under the Umbrella Insurance Policies.

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1 1154. Enforcement of a judgment for the claims for relief asserted by the  
2 Policyholders in the Complaint would be enforceable in Arizona because the Policyholders  
3 each are residents of Arizona; Arizona Guaranty Fund is an Arizona resident; each Insurer is  
4 registered and does business in Arizona; and, almost every other state has adopted the  
5 Uniform Enforcement of Judgments Act, the Arizona version of which is codified at A.R.S.  
6 § 12-1702.

7 1155. On information and belief, the docket in Maricopa County, Arizona is no more  
8 congested than the dockets in other forums potentially available, and most likely is less  
9 congested. In fact, on information and belief, the time to trial on most civil matters in  
10 Maricopa County, Arizona is a little more than a year.

11 1156. Trial in Arizona would be at home with the state law that would govern the  
12 case because under the choice of law analysis outlined in the Restatement Second, which  
13 Arizona follows in determining choice of law, Arizona law applies to the Complaint.  
14 Section 188 of the Restatement Second provides that, where the parties have not chosen the  
15 applicable law, the rights and duties of the parties, with respect to a contract issue, will be  
16 determined by the local law of the State which, as to that issue, has the most significant  
17 relationship to the transaction and to the parties. Arizona, as the state in which the contract  
18 was formed, the policyholder resides, the insurance broker resides, and the majority of  
19 witnesses reside, thus has the most significant relationship to the transaction at issue.

20 **FIRST CLAIM FOR RELIEF**

21 **DECLARATORY RELIEF**

22 **(Multiple Policies Apply to the Defense of the Policyholders and Policyholders Can**  
23 **Select One AIG Group Policy to Pay 100% of the Reasonable and Necessary Defense**  
24 **Costs of the Underlying Product Liability Lawsuits – Against All Defendants)**

25 1157. The Policyholders refer to and re-allege the allegations set forth in paragraphs  
26 1 through 1156 of this Complaint and incorporate them by reference.

27 1158. The Insurers are obligated to fully investigate and defend, or to pay the costs  
28 of investigation and defense in connection with lawsuits that contain allegations that are

1 potentially covered under the CGL Insurance Policies from May 3, 1980 to November 1,  
2 2002.

3 1159. The Underlying Product Liability Lawsuits are covered, or, at a minimum,  
4 potentially covered, under each of the Insurers' CGL Insurance Policies.

5 1160. Under the terms of the Insurers' CGL Insurance Policies, the Insurers have a  
6 duty to investigate fully the Underlying Product Liability Lawsuits and to provide a full  
7 defense to the Policyholders in connection with the Underlying Product Liability Lawsuits.

8 1161. The Insurers that are members of the AIG Group have failed and refused fully  
9 to acknowledge, accept or undertake their duty to fully investigate and defend the  
10 Policyholders in the Underlying Product Liability Lawsuits.

11 1162. Under Arizona law which is applicable to this dispute, the Policyholders are  
12 entitled to select one of the Insurers' CGL Insurance Policies to provide 100% of the  
13 Policyholders' defense of the Underlying Product Liability Lawsuits.

14 1163. The Policyholders have selected National Union Policy No. GL 541-96-88  
15 RA, effective November 1, 1990 through November 1, 1991, to provide 100% of the  
16 Policyholders' defense of the Underlying Product Liability Lawsuits.

17 1164. Should it cure its breach of contract and bad faith, National Union has the right  
18 to seek subrogation or contribution from each of the other Insurers that have an obligation to  
19 defend the Policyholders against the Underlying Product Liability Lawsuits, provided that in  
20 doing so it does not attempt to shift any portion of its obligation to fully defend the  
21 Policyholders and pay 100% of the Policyholders' defense of the Underlying Product  
22 Liability Lawsuits.

23 1165. There exists an actual justiciable controversy between the Policyholders and  
24 the Insurers as to the Insurers' obligations under the CGL Insurance Policies to investigate  
25 and provide a defense to the Policyholders in connection with the Underlying Product  
26 Liability Lawsuits, and as to whether the obligations between the Insurers are several.  
27 Declaratory relief will settle that controversy and clarify the Parties' rights and obligations.  
28

1 1166. Pursuant to the Uniform Declaratory Judgments Act, A.R.S. § 12-1831 et seq.,  
2 the Policyholders seek a declaration that:

- 3 a. The Insurers, under the CGL Insurance Policies, have a duty to defend  
4 fully and to pay or reimburse in full the Policyholders' past, present and  
5 future costs of investigation and defense in the Underlying Product  
6 Liability Lawsuits;
- 7 b. The Insurers' duties to defend fully and to pay or reimburse in full are  
8 separate and independent of any duties that any other of the Insurers have  
9 or may not have to the Policyholders;
- 10 c. The Insurers each are fully liable for the entire defense of the Policyholders  
11 in connection with the Underlying Product Liability Lawsuits and the  
12 entire investigation of those claims and all of the Policyholders' past and  
13 future costs of defense investigation in connection with the Underlying  
14 Product Liability Lawsuits; and,
- 15 d. The Policyholders are authorized by law to select one CGL Insurance  
16 Policy to pay 100% of the defense of the Underlying Product Liability  
17 Lawsuits.

18 1167. The Policyholders seek these declarations based upon the language of the CGL  
19 Insurance Policies, the allegations in the Underlying Product Liability Lawsuits, the  
20 reasonable expectations of the Policyholders under the Insurers' CGL Insurance Policies and  
21 on the insuring obligations implied or imposed under Arizona law.

22 **SECOND CLAIM FOR RELIEF**

23 **BREACH OF CONTRACT**

24 **(Failure to Defend – Against the AIG Group Members Only)**

25 1168. The Policyholders refer to and re-allege the allegations set forth in paragraphs  
26 1 through 1167 of this Complaint and incorporate them by reference.

27  
28



1 z. Seeking to avoid the ruling on the duty to defend against the AIG Group on  
2 the same claims as determined in the Third Federal Circuit against the AIG  
3 Group in Sunoco, Inc. v. Illinois Nat'l Ins. Co., 226 Fed.Appx. 104, 2007  
4 WL 295267 (3d Cir. 2007), decided under Pennsylvania law which in most  
5 relevant respects is similar to Arizona law.

6 1187. As a result of the wrongful refusal to defend the Policyholders by the Insurers  
7 who are members of the AIG Group, the Policyholders have paid for their own defense in  
8 the Underlying Product Liability Lawsuits, including costs and fees for:

- 9 a. Engaging counsel to defend the Underlying Product Liability Lawsuits;  
10 b. Incurring additional costs in connection with the defense of the Underlying  
11 Product Liability Lawsuits which are covered; and,  
12 c. Compelling the Policyholders to initiate this Complaint just to obtain the  
13 policy benefits to which they already are entitled.

14 1188. The Insurers who are members of the AIG Group acted with knowledge that  
15 their actions were likely to cause unjustified and significant damages to the Policyholders.

16 1189. The conduct of the Insurers' who are members of the AIG Group, as herein  
17 alleged, was and is oppressive, outrageous and intolerable in that it was and is taken in  
18 conscious disregard of the Policyholders' rights under the CGL Insurance Policies with the  
19 intent to vex, injure or annoy the Policyholders, such as to constitute oppression, fraud or  
20 malice under Arizona law, and justifies an award of exemplary and punitive damages against  
21 the Insurers.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff Policyholders respectfully request that judgment be entered  
24 in their favor for the following:

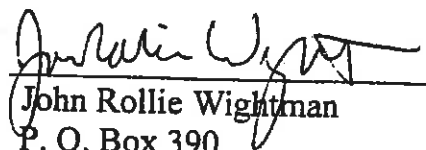
- 25 A. On the First, Second and Third Claims for Relief, an award of direct, indirect,  
26 consequential, incidental, special compensatory and other damages, due to the  
27 alleged breaches of contract and in tort as set forth above, in an amount to be  
28 proven at trial;

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- B. On the First, Second and Third Claims for Relief, an award of attorneys' fees and costs, pursuant to A.R.S. § 12-341.01(A);
- C. On the First Claim for Relief, a declaration that Insurers, collectively, and each Insurer, severally, are obligated to fully defend Policyholders and that the Policyholders have the right to select one policy to provide 100% of the defense;
- D. On the First Claim for Relief, costs pursuant to the Uniform Declaratory Judgments Act, A.R.S. § 12-1840;
- E. On the Third Claim for Relief, punitive and exemplary damages;
- F. On all Claims for Relief, such orders as are necessary to effectuate this Prayer for Relief or to preserve this Court's jurisdiction over the Parties and issues herein;
- G. For costs of suit; and,
- H. For such further and other relief that the Court deems just and proper.

DATED this 1st day of April, 2008.

**JOHN ROLLIE WIGHTMAN, P.C.**

By:   
John Rollie Wightman  
P. O. Box 390  
Phoenix, AZ 85001  
Attorneys for Plaintiffs

**RESOLUTION**  
**LAW GROUP P.C.**

**PHILIP D. HUNBUCKER**  
**ATTORNEY**

**DIRECT 925-299-5104**  
**E-MAIL PHUNBUCKER@RESLAWGRP.COM**

June 25, 2008

**Via E-Mail and U.S. Mail**

Ryan J. Talamante  
Glover & Van Cott  
2025 North Third Street, Suite 260  
Phoenix, AZ 85004  
Ph: (602) 257-9160

**RE:** **Western Refining Southwest, Inc., et al. v. National Union Fire Ins. Co of Pittsburgh, PA, et al., Case No.: CV2008-007299 (the "Coverage Case")**

**Insured:** Western Refining Southwest, Inc., f/k/a Giant Industries, Inc.  
**Lawsuit:** Underlying Product Liability Lawsuits Per Appendix 1, attached, ("the Underlying Product Liability Lawsuits")

**Companies:** Arizona Property and Casualty Insurance Guaranty Fund for The Home Insurance Company in insolvency and any other affiliated company that issued any other general liability policy issued to an Insured at that term is defined above or is defined in any general liability policy issued to an Insured

**Policies:** BOP 8816174 (Effective Dates: 8/3/80 - 8/3/81); BOP 8931246 (Effective Dates: 8/3/82 - 8/3/83); and, any other general liability policy issued to an Insured as that term is defined above or is defined in any general liability policy issued to an Insured

**Your Claim #:** Unknown

Dear Ryan:

This letter follows up on our conversation on May 23, 2008 and specifically responds to your letter to me dated May 29, 2008 (the "Guaranty Fund's Letter"). As you are aware, The Home Insurance Company ("Home Insurance") issued several comprehensive general liability insurance policies ("CGL Policies") to Giant Industries, Inc., now known as Western Refining Southwest, Inc. Home Insurance was declared insolvent by the Superior Court in Merrimack County, New Hampshire on June 13, 2003. The Arizona Property and Casualty Insurance Guaranty Fund (the "Guaranty Fund") was created by statute within the Department of Insurance to investigate and

pay covered claims of insolvent insurers. The Guaranty Fund is deemed to be the insolvent insurer to the extent of its obligation on the covered claims and to such extent has the rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent. A.R.S. § 20-667.

### **Response to the Guaranty Fund's Assertion of Statutory Defenses**

The Guaranty Fund's Letter called attention to three "statutory defenses" asserted on behalf of the Guaranty Fund. As you will recall, the Guaranty Fund's Letter did not contain a discussion of the Guaranty Fund's policy defenses under the CGL Policies. The Guaranty Fund claims defenses based on: (1) A.R.S. § 20-667; (2) A.R.S. § 20-679; and, (3) A.R.S. § 20-673. The Policyholders respond to the Guaranty Fund's assertion of a statutory defense under each statute in turn below.

#### **1. A.R.S. § 20-667**

The Guaranty Fund's Letter asserts that only those "covered claims" that were in existence as of July 13, 2003 are obligations of the Guaranty Fund. The Policyholders currently are investigating whether any of the Underlying Product Liability Lawsuits were filed prior to that time. It is our understanding that a number of the Underlying Product Liability Lawsuits were filed in 2003, and at least one of them was filed prior to July 13, 2003. For example, we believe that County of Suffolk v. Amerada Hess Corp., et al., Case No. 04-CV-5424 ("County of Suffolk"), initially was filed in 2002, before being transferred to the Southern District of New York. County of Suffolk, along with all of the other Underlying Product Liability Lawsuits, is consolidated in a single multi-district proceeding pending in the United States District Court for the Southern District of New York entitled In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, No. 1:00-1898 MDL 1358 (S.D.N.Y.) (the "MTBE Products Liability MDL"). Therefore, all of the claims now in the MTBE Products Liability MDL existed in 2002.

In addition, we note that under the statutory language, and as is acknowledged in the Guaranty Fund's Letter, a "covered claim" is defined in A.R.S. § 20-661 as "an unpaid claim . . . which arises out of and is within coverage of an insurance policy." The statute does not specify, and we have found no case law which clarifies, whether the litigation must have arisen prior to that time, or whether the claim underlying the litigation must arise prior to July 13, 2003. The Underlying Product Liability Lawsuits assert claims that MTBE was placed into reformulated gasoline beginning in the late 1970s, and certainly prior to July 13, 2003. Therefore, the Policyholders assert all of the claims in the Underlying Product Liability Lawsuits did arise prior to the time Home Insurance went into insolvency.

#### **2. A.R.S. § 20-679**

Your discussion of A.R.S. § 20-679 in the Guaranty Fund's Letter asserts that even assuming there are claims that fall within section 20-667, the Guaranty Fund has barred known claims not filed within four months from the date of notice to creditors by

the receiver or on or before the claims bar date established by the receiver, whichever is later. You further assert: "Since none of the claims listed in the complaint were noticed to the Home liquidator or the Guaranty Fund on or before June 13, 2004, they are all barred as to the Guaranty Fund under A.R.S. § 20-679."

As discussed above, a number of the Underlying Product Liability Lawsuits were filed prior to June 13, 2004. It is unclear to us at this time whether any of these claims were noticed to the Home Insurance Liquidator prior to June 13, 2004. We believe discovery is necessary to determine if any claims were tendered to Home Insurance in insolvency and, if so, when such claims were tendered. Part of this discovery will necessitate a review of documents potentially in the possession of brokers, the Home Insurance Liquidator and the Guaranty Fund.

### 3. A.R.S. § 20-673

A.R.S. section 20-673 states: "Where more than one policy may be applicable, a policy issued by the insolvent insurer shall be deemed to be excess coverage. The claimant shall be required to exhaust all rights under other applicable coverage or coverages."

The Policyholders acknowledge that they are pursuing coverage under a number of other CGL Policies issued to the Policyholders by the AIG Group of insurers and several other primary insurers. However, at this time, none of the other insurers have paid any money to the Policyholders for the Underlying Product Liability Lawsuits. As a result, it may not be possible to determine the Guaranty Fund's liability, if any, until all of the Underlying Product Liability Lawsuits have been resolved.

### Proposed Informal Stay of Claims against the Guaranty Fund

Per our previous discussions and the Guaranty Fund's Letter, we agreed to include in this response a description of discovery necessary to address the issues raised by the Guaranty Fund. In response, we believe that it is necessary for the Policyholders to pursue discovery from the brokers and the Home Insurance Liquidator, in the form of a document subpoena pursuant to the Arizona Rules of Civil Procedure, Rule 45, and by a Rule 34 request for documents to the Guaranty Fund.

As a result of ongoing discussions with other primary insurers with potentially-applicable CGL Policies, the Policyholders' need for discovery regarding whether and when Home Insurance received notice of claims against the Policyholders and the fact that the Guaranty Fund's liability, if any, may not be determined until resolution of the Underlying Product Liability Lawsuits, the Policyholders suggest a stay of the claims asserted against the Guaranty Fund in the Coverage Case, while they pursue coverage under other potentially-available CGL Policies.

We believe the above information sufficiently responds to the Guaranty Fund's Letter. Please let me know as soon as possible if the Guaranty Fund will agree to an informal stay of the claims asserted against it by the Policyholders. Please call me if you have any other questions.

Very truly yours,

RESOLUTION LAW GROUP, P.C.



Philip C. Hunsucker

PCH:mm  
cc: Client

**APPENDIX 1:****LIST OF UNDERLYING PRODUCT LIABILITY LAWSUITS**

1. State of New Mexico v. Amerada Hess Corp., et al., Case No. 06-CV-5496, filed in New Mexico;
2. City of South Bend, Indiana v. Amerada Hess Corp., et al., Case No. 04-CV-2056, filed in Indiana;
3. Town of Campbellsburg, Indiana v. Amerada Hess Corp., et al., Case No. 04-CV-4990, filed in Indiana;
4. North Newton School District v. Amerada Hess Corp et al., Case No. 04-CV-2057, filed in Indiana;
5. Town of Middleborough, et al. v. Amerada Hess Corp., et al., Case No. 06-CV-3741, filed in Massachusetts;
6. City of Lowell v. Amerada Hess Corp., et al., Case No. 05-CV-4018, filed in Massachusetts;
7. Town of Duxbury et al. v. Amerada Hess Corp., et al., Case No. 04-CV-1725, filed in Massachusetts;
8. Town of Billerica, et al. v. Amerada Hess Corp., Case No. 06-CV-1381, filed in Massachusetts;
9. Town of Lakeville et al. v. Amerada Hess Corp., et al., Case No. 07-CV-8360, filed in Massachusetts;
10. Northampton Bucks County Municipal Authority v. Amerada Hess Corp., et al., Case No. 04-CV-6993, filed in Pennsylvania;
11. Craftsbury Fire District #2 v. American Refining Group, Inc., et al., Case No. 04-CV-3419, filed in Vermont;
12. Town of Hartland, County of Windsor, Vermont v. Amerada Hess Corp., et al., Case No. 04-CV-2072, filed in Vermont;
13. American Distilling & Manufacturing Co., Inc. v. Amerada Hess Corp., et al.

- 1 Case No. 04-CV-1719, filed in Connecticut;
- 2 14. Columbia Board of Education, Horace Porter School v. Amerada Hess Corp.,
- 3 et al., Case No. 04-CV-1716, filed in Connecticut;
- 4 15. Our Lady of the Rosary Chapel v. Amerada Hess Corp., et al., Case No. 04-
- 5 CV-1718, filed in Connecticut;
- 6 16. Town of East Hampton v. Amerada Hess Corp., et al., Case No. 03-CV-1720,
- 7 filed in Connecticut;
- 8 17. United Water Connecticut, Inc. v. Amerada Hess Corp., et al., Case No. 04-
- 9 CV-1721, filed in Connecticut;
- 10 18. City of Dover v. Amerada Hess Corp., et al., Case No. 04-CV-2067, filed in
- 11 New Hampshire;
- 12 19. City of Portsmouth v. Amerada Hess Corp., et al., Case No. 04-CV-2066, filed
- 13 in New Hampshire;
- 14 20. State of New Hampshire v. Amerada Hess Corp., et al., Case No. 03-C-550,
- 15 filed in New Hampshire;
- 16 21. New Jersey American Water Co., Inc. v. Amerada Hess Corp., et al., Case No.
- 17 04-CV-1726, filed in New Jersey;
- 18 22. New Jersey Department of Environmental Protection v. Amerada Hess Corp.,
- 19 et al., Case No. 08-CV-00312, filed in New Jersey;
- 20 23. Water-Sewer Utility of the City of Vineland v. Amerada Hess Corp., et al.,
- 21 Case No. 05-CV-9070, filed in New Jersey;
- 22 24. County of Suffolk v. Amerada Hess Corp., et al., Case No. 04-CV-5424, filed
- 23 in New York;
- 24 25. United Water New York Inc. v. Amerada Hess Corp., et al., Case No. 04-CV-
- 25 2389, filed in New York;
- 26 26. Albertson Water District v. Amerada Hess Corp., et al., Case No. 07-CV-
- 27 2406, filed in New York;
- 28



- 1 27. City of Glen Cove Water District v. Amerada Hess Corp., et al., Case No. 07-  
2 CV-2403, filed in New York;
- 3 28. City of Greenlawn Water District v. Amerada Hess Corp., et al., Case No. 07-  
4 CV-2407, filed in New York;
- 5 29. City of Rockport v. Amerada Hess Corp., et al., Case No. 04-CV-1724, filed  
6 in New York;
- 7 30. City of Mishawaka v. Amerada Hess Corp., et al., Case No. 04-CV-2055, filed  
8 in New York;
- 9 31. City of New York v. Amerada Hess Corp., et al., Case No. 04-CV-3417, filed  
10 in New York;
- 11 32. County of Nassau v. Amerada Hess Corp., et al., Case No. 03-CV-9543, filed  
12 in New York;
- 13 33. Franklin Square Water District v. Amerada Hess Corp., et al., Case No. 04-  
14 CV-5423, filed in New York;
- 15 34. Hicksville Water District v. Amerada Hess Corp., et al., Case No. 04-CV-  
16 5421, filed in New York;
- 17 35. Incorporated Village of Sands Point v. Amerada Hess Corp., et al., Case No.  
18 04-CV-3416, filed in New York;
- 19 36. Long Island Water Corp. v. Amerada Hess Corp., et al., Case No. 04-CV-  
20 2068, filed in New York;
- 21 37. Port Washington Water District v. Amerada Hess Corp., et al., Case No. 04-  
22 CV-3415, filed in New York;
- 23 38. Roslyn Water District v. Amerada Hess Corp., et al., Case No. 04-CV-5422,  
24 filed in New York;
- 25 39. Town of Huntington/Dix Water District v. Amerada Hess Corp., et al., Case  
26 No. 07-CV-2405, filed in New York;
- 27 40. Town of Wappinger v. Amerada Hess Corp., et al., Case No. 04-CV-2388,  
28

1 filed in New York;

2 41. Village of Pawling v. Amerada Hess Corp., et al., Case No. 04-CV-2390, filed  
3 in New York;

4 42. Water Authority of Great Neck North v. Amerada Hess Corp., et al., Case No.  
5 04-CV-1727, filed in New York;

6 43. Water Authority of Western Nassau v. Amerada Hess Corp., et al., Case No.  
7 03-CV-9544, filed in New York;

8 44. Town of Matoaka, West Virginia, Matoaka Water System v. Amerada Hess  
9 Corp., et al., Case No. 04-CV-3420, filed in West Virginia;

10 45. Buchanan County School Board v. Amerada Hess Corp., et al., Case No. 04-  
11 CV-3418, filed in Virginia;

12 46. County of Greensville v. Amerada Hess Corp., et al., Case No. 05-CV-1310;

13 47. Patrick County School Board v. Amerada Hess Corp., et al., Case No. 04-CV-  
14 2070, filed in Virginia;

15 48. Village of Island Lake v. Amerada Hess Corp., et al., Case No. 04-CV-2053,  
16 filed in Illinois;

17 49. City of Crystal River v. Amerada Hess Corp., et al., Case No. 07-CV-6848,  
18 filed in Florida;

19 50. City of Inverness Water District v. Amerada Hess Corp., et al., Case No. 07-  
20 CV-4011, filed in Florida;

21 51. City of Tampa Bay Water District v. Amerada Hess Corp., et al., Case No. 07-  
22 CV-4012, filed in Florida;

23 52. Homosassa Water District v. Amerada Hess Corp., et al., Case No. 07-CV-  
24 4009, filed in Florida; and,

25 53. Plainview Water District v. Amerada Hess Corp., et al., Case No. 08-CV-  
26 0278, filed in New York.

27

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Exh. B-I

**Michael Surguine**

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**From:** Michael Surguine  
**Sent:** Friday, May 04, 2012 1:17 PM  
**To:** 'Smith, Eric A. EAS'  
**Subject:** FW: Disputed Claim Proceeding with Home Liquidator

**Attachments:** Funds Western Motion for Summary Judgment 9-3-2008.pdf; Funds Western SOF in Support of MSJ 9-3-2008.pdf; Funds Western Affidavit of Kelly for MSJ 9-3-2008.pdf; Funds Western Affidavit of Surguine for MSJ 9-3-2008.pdf



Funds Western Motion for Summary Judgment 9-3-2008.pdf  
Funds Western SOF in Support of MSJ 9-3-2008.pdf  
Funds Western Affidavit of Kelly for MSJ 9-3-2008.pdf  
Funds Western Affidavit of Surguine for MSJ 9-3-2008.pdf

Eric,

Attached are the requested documents in the Western Refining matter.

**Michael E. Surguine**  
**Executive Director**

**Arizona Property and Casualty Insurance Guaranty Fund Arizona Life and Disability Insurance Guaranty Fund 1110 W. Washington Street, Suite 270 Phoenix, AZ 85007**  
**(602) 364-3866 (Phone)**  
**(602) 364-3872 (Facsimile)**  
**msurguine@azinsurance.gov**

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**GLOVER & VAN COTT, P.A.**  
2025 North Third Street, Suite 260  
Phoenix, Arizona 85004  
(602) 257-9160

Ryan J. Talamante — 15323

Attorney for Defendant Arizona Property  
and Casualty Insurance Guaranty Fund

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MARICOPA**

Western Refining Southwest, Inc., et al.,	)	Case No. CV2008-007299
	)	
Plaintiffs,	)	<b>DEFENDANT ARIZONA</b>
	)	<b>PROPERTY AND CASUALTY</b>
v.	)	<b>INSURANCE GUARANTY</b>
	)	<b>FUND'S MOTION FOR</b>
National Union Fire Insurance Company of	)	<b>SUMMARY JUDGMENT</b>
Pittsburgh, Pa; et al.,	)	
	)	(Assigned to the Honorable
Defendants.	)	John Buttrick)
	)	

Pursuant to Rule 56(b), Arizona Rules of Civil Procedure, Defendant Arizona Property and Casualty Insurance Guaranty Fund (the "Guaranty Fund") hereby moves the Court to enter summary judgment in its favor. This Motion is based on the following Memorandum of Points and Authorities and the separately-filed Separate Statement of Facts.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. CASE BACKGROUND

3 This lawsuit arises out of the fact that one or more of the Plaintiffs have been sued in  
4 numerous "MTBE" lawsuits throughout the country. Plaintiffs bring this lawsuit seeking,  
5 among other things, a declaration that the defendants in this case are obligated to defend the  
6 Plaintiffs in those MTBE lawsuits under various policies of insurance that have been issued  
7 to Plaintiffs over the years. However, unlike every other defendant named in this case, the  
8 Guaranty Fund is not an insurance company, but is a statutorily-created fund maintained  
9 within the Arizona Department of Insurance. It is this unique nature of the Guaranty Fund  
10 that gives rise to the instant Motion.

11 A. The Unique Nature of the Guaranty Fund

12 The Guaranty Fund is governed by Article 6 of Chapter 3 of Title 20 of the Arizona  
13 Revised Statutes (A.R.S. §§ 20-661 through 20-680 – collectively referred to sometimes as  
14 the "Arizona Guaranty Fund Statutes"). The Guaranty Fund is controlled by an 11-member  
15 board appointed by the Governor of Arizona, and is designed to handle the administration  
16 of claims brought in Arizona against insolvent insurance companies. *See* A.R.S. §§ 20-662  
17 and 20-663. As set forth in A.R.S. § 20-664, the main purpose of the Guaranty Fund is to  
18 "[i]nvestigate claims brought against the fund and adjust, compromise, settle and pay *covered*  
19 *claims* to the extent of the fund's obligations *and deny all other claims.*" (Emphasis added.)  
20  
21

1 A "covered claim" is defined in A.R.S. § 20-661 as:

2 an unpaid claim . . . which arises out of and is within the  
3 coverage of an insurance policy to which this article applies  
4 issued by an insurer, if such insurer becomes an insolvent  
5 insurer after August 27, 1977 and the claimant or insured is a  
resident of this state at the time of the insured event or the  
property from which the claim arises is permanently located in  
this state.

6 A.R.S. § 20-661(3).

7 Above and beyond qualifying as a "covered claim," there are numerous other  
8 provisions contained in the Arizona Guaranty Fund Statutes that limit the ability of the  
9 Guaranty Fund to pay claims. For example, A.R.S. § 20-667 limits the maximum amount that  
10 the Guaranty Fund can pay on a claim to \$99,900, A.R.S. § 20-673 requires that a claimant  
11 first exhaust all other sources of other insurance coverage before seeking any payment from  
12 the Guaranty Fund, and A.R.S. § 20-679 authorizes the Guaranty Fund to bar claims not  
13 submitted within certain time frames.<sup>1</sup>

14 Thus, the Guaranty Fund is not simply a substitute for the insolvent insurer. As the  
15 Arizona Guaranty Fund Statutes and accompanying case law make clear, the Guaranty Fund  
16 steps into the shoes of the insolvent insurer *only to the extent that it has an obligation under*  
17 *the statutes to pay a "covered claim."* See A.R.S. § 20-667(C) ("The fund is deemed the  
18 insurer to the extent of its obligation on the covered claims . . .") (emphasis added); see also  
19 *Arizona Property and Casualty Ins. Guar. Fund v. Herder*, 751 P.2d 519, 521 n.3, 156 Ariz.

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20 <sup>1</sup>The limitations found in A.R.S. §§ 20-673 and 20-679 both have application to the claims  
21 in this case and form the basis for Guaranty Fund's request for summary judgment. Both statutes are  
analyzed in detail below in Section III of this Motion.

1 203, 205 n.3 (1988) (noting that “the Fund is deemed the insurer to the extent of the Fund’s  
2 obligations on the covered claims, *and not to the extent of the insolvent insurer’s*”) (emphasis  
3 added). As the Arizona Court of Appeals recently stated: “The Fund exists to mitigate the  
4 adverse effects caused by the insolvency of insurers, not to fully replace the coverage that  
5 would have existed if those insurers were solvent.” *Jangula v. Jangula*, 207 Ariz. 468, 472  
6 (¶21), 88 P.3d 182, 186 (¶ 21) (App. 2004).

7 **B. The Guaranty Fund’s Role in this Case**

8 The Guaranty Fund has been named as a defendant in this case because of the  
9 insolvency of The Home Insurance Company, a New Hampshire insurance company that was  
10 authorized to write business in Arizona. SOF ¶1. Home Insurance was placed into liquidation  
11 by the Superior Court in Merrimack County, New Hampshire by order of June 13, 2003. SOF  
12 ¶2. Home Insurance had issued certain policies of insurance to one or more of the Plaintiffs.  
13 According to the Complaint, the only Home Insurance policies at issue in this case are: (1)  
14 a Business Owner’s Policy issued to Giant Industries, Inc. (No. BOP 8816174), covering the  
15 period August 3, 1980 to August 3, 1981; and (2) a Business Owner’s Policy to Giant  
16 Industries, Inc. (No. BOP 8828551), covering the period August 3, 1981 to August 3, 1982.  
17 SOF ¶3. Plaintiffs allege that these two policies provide coverage for some or all of the  
18 claims at issue in the MTBE lawsuits that have been filed against the Plaintiffs, and,  
19 therefore, Home Insurance (and now the Guaranty Fund) is obligated to defend the Plaintiffs  
20 in those lawsuits. SOF ¶4. The Guaranty Fund disagrees.  
21

1 As set forth below, the Arizona Guaranty Fund Statutes bar payment of Plaintiffs'  
2 claims, and, thus, no defense is owed by the Guaranty Fund.

3 **III. ARGUMENT**

4 Before turning to the substance of the Guaranty Fund's argument, it is important to  
5 point out that the Guaranty Fund is *not* arguing any policy defenses to Plaintiffs' claims at  
6 this time. In fact, for purposes of this Motion, the Guaranty Fund will assume that the  
7 underlying insurance policies issued by Home Insurance provide coverage for some or all  
8 of the claims alleged against the Plaintiffs in the MTBE lawsuits.<sup>2</sup> Therefore, while there is  
9 likely to be a great amount of time and effort devoted in this case to exploring the terms and  
10 exclusions contained in the numerous underlying insurance policies at play, none of those  
11 issues need be dealt with in this Motion.

12 **A. Plaintiffs' Claims Against the Guaranty Fund Are Barred by  
13 A.R.S. § 20-679**

14 A.R.S. § 20-679, entitled "Limitation on filing of creditor's claims," provides:

15 With respect to the handling of claims, the fund may by  
16 resolution bar known claims, whether liquidated or unliquidated,  
17 not filed with the within four months from the date of notice to  
18 creditors.

19 In accordance with the authority granted by A.R.S. § 20-679, the Guaranty Fund  
20 passed the following resolution on April 16, 1998:

- 21 1. Unless otherwise provided by the resolution of the Board  
applicable to a specific receivership, any and all claims

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<sup>2</sup>The Guaranty Fund reserves the right to contest coverage under the Home Insurance policies if it remains a defendant in this litigation beyond the summary judgment stage.



1 against the FUND, whether liquidated or unliquidated,  
2 not filed with the receiver or the FUND within four  
3 months from the date of notice to creditors by the  
4 receiver or on or before the claims bar date established  
5 by the receiver, whichever is later, shall be barred as to  
6 the FUND; and

- 7 2. Notice to creditors by the receiver shall be treated and  
8 deemed as notice by the FUND and proof of any claim  
9 filed with the receiver shall be treated and deemed as  
10 filed with the FUND.

11 SOF ¶5.

12 Therefore, in order to be an obligation of the Guaranty Fund, notice of the claim must  
13 be provided to the receiver of the insolvent insurer or directly to the Guaranty Fund at least  
14 by the claims bar date.<sup>3</sup> In this case, the claims bar date set in the Home Insurance liquidation  
15 proceeding was June 13, 2004. SOF ¶6. Therefore, in order to be a valid claim as against the  
16 Guaranty Fund, notice of that claim must have been provided to the Home Insurance  
17 liquidator or the Guaranty Fund on or before June 13, 2004. Plaintiffs, however, did not  
18 notify the Home Insurance liquidator of any of the MTBE lawsuits filed against them until  
19 April of 2007, and did not provide any notice of those lawsuits to the Guaranty Fund until  
20 February of 2008. SOF ¶¶7-8. Accordingly, all of the claims at issue in this case are barred  
21 as to the Guaranty Fund. As explained below, this includes even those claims arising from  
lawsuits that were initiated against the Plaintiffs *after* the June 13, 2004 claims bar date.

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<sup>3</sup>Although A.R.S. § 20-679 authorizes the Guaranty Fund to bar claims not filed within four months of notice to creditors, the Guaranty Fund's resolution of April 16, 1998 expanded that time frame to allow for notice of claims filed anytime before the claims bar date.

1           Although there are no Arizona cases directly commenting on the application of A.R.S.  
2 § 20-679, similar guaranty fund statutes from other states have been consistently construed  
3 as barring any claims submitted after the claims bar date. For example, that was the  
4 conclusion reached by the court in *Satellite Bowl, Inc. v. Michigan Property & Casualty*  
5 *Guaranty Association*, 419 N.W.2d 460 (Mich. App. 1988). In that case, Satellite Bowl, Inc.,  
6 a company doing business in Michigan, was insured by Proprietor's Insurance Company, an  
7 Ohio insurer authorized to do business in Michigan. On August 5, 1981, Proprietor's was  
8 declared insolvent by an Ohio court. A receiver was appointed and the claims bar date was  
9 set for one year after the date of insolvency – August 5, 1982. Not until after the claims bar  
10 date had passed did Satellite Bowl become aware of two lawsuits filed against it. Satellite  
11 Bowl promptly notified the Michigan Property & Casualty Guaranty Association of the  
12 claims, but the Association refused to defend because no notice of the claims had been  
13 received by the Association or by Proprietor's receiver prior to the claims bar date. Satellite  
14 Bowl then brought suit seeking a determination that the Association was obligated to defend  
15 Satellite Bowl in the two lawsuits. *See Satellite Bowl*, 419 N.W.2d at 461.

16           The Michigan Guaranty Association filed a motion for summary judgment, claiming  
17 that, under the Michigan Property and Casualty Guaranty Association Act (the "Michigan  
18 Act"), the Association was only obligated to pay those "covered claims" that were presented  
19 to the Association "on or before the last date fixed for the filing of claims" (i.e., the claims  
20 bar date). The trial court agreed with the Association and Satellite Bowl appealed. *See id.* at  
21 462. On appeal, Satellite Bowl argued that the Association should be required to accept the

1 late-filed claim because the purpose of the Michigan Act was to eliminate risk for  
2 policyholders doing business with an insolvent insurer. In rejecting that argument and  
3 upholding the trial court's ruling, the Michigan appeals court stated:

4           While that is indeed the purpose of the act [i.e., to protect  
5 policyholders], the deadline requirement in § 7925(1)(c)  
6 [Michigan's claims bar date statute] indicates that the  
7 Legislature did not intend to make this protection absolute,  
8 indemnifying any claim no matter when it arose. The  
9 requirement in the statute that claims be presented before the  
10 filing deadline evidences an intent on the part of the Legislature  
11 to provide a cutoff date after which the association is no longer  
12 obligated to accept claims. The language implies that some  
13 claims, those filed after the filing deadline, would not be  
14 indemnified. The statute does not authorize extension of the  
15 filing deadline for equitable reasons.

16 *Id.*

17           In addition to its plain language interpretation of the claims bar date statute, the court  
18 in *Satellite Bowl* found further support for its opinion in the fact that, under the Michigan  
19 Act, claimants who seek payment from the Michigan Guaranty Association are required to  
20 assign their rights against the insolvent insurer to the Association so that the Association can  
21 then seek reimbursement from the insolvent insurer's estate. The court explained:

          There must be reasonable limits to the association's liability and  
          finality to the liquidation proceeding. . . . It is important,  
          therefore, to the statutory scheme that the association be able to  
          recover as much of the claim as possible from the insolvent  
          insurer's estate. Thus, the association is obligated under the act  
          to accept only claims timely filed which entitle it to participate  
          in the liquidation proceedings.

1 *Id.*<sup>4</sup>

2 After citing cases from other jurisdictions that had construed other states' guaranty  
3 fund statutes in a similar manner, the *Satellite Bowl* court concluded:

4 We agree with these decisions that allowance of delinquent  
5 claims would prolong distribution of the insolvent company's  
6 assets to the detriment of other claimants and would adversely  
7 affect the guaranty associations.

8 *Id.*; see also *Ohio Ins. Guar. Ass'n v. Berea Roll & Bowl, Inc.*, 482 N.E.2d 995, 998 (Ohio  
9 C.P. 1984) ("The purpose of permitting the court to set a date beyond which no claim shall  
10 be presented allows the early liquidation of the insolvent insurance company and, therefore,  
11 benefits the claimants and policyholders of the insolvent company.").

12 Another case with facts similar to this case is *Cannelton Industries, Inc. v. Aetna  
13 Casualty & Surety Co.*, 460 S.E.2d 18 (W.V. App. 1994). Cannelton Industries was involved  
14 in the coal business in West Virginia and had been insured over the years by numerous  
15 insurers, including Midland Insurance Company and Integrity Insurance Company. Both  
16 Midland and Integrity were eventually declared insolvent, and claims bar dates were set in  
17 each estate – April 3, 1987 for Midland, and March 25, 1988 for Integrity. *Cannelton*, 460  
18 S.E.2d at 20.

19 On June 23, 1988 – after both bar dates had passed – Cannelton received notice from  
20 the United States Environmental Protection Agency that Cannelton may be a responsible

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21 <sup>4</sup>The Arizona Guaranty Fund Statutes contain a similar requirement. See A.R.S. § 20-672  
("Any person recovering pursuant to this article shall be deemed to have assigned his or her rights  
under the policy to the fund . . .").

1 party for an environmental pollution problem that had occurred at a Michigan site owned by  
2 Cannelton. Eleven months later, on May 25, 1989, the EPA issued a formal environmental  
3 claim against Cannelton. After the EPA issued the formal claim, Cannelton notified the  
4 liquidators of both Midland and Integrity, requesting coverage under the respective policies.  
5 Because Cannelton was a West Virginia company, both claims were forwarded to the West  
6 Virginia Insurance Guaranty Association ("WVIGA") for handling. The WVIGA denied  
7 coverage under both policies because notice of the claim had not been presented prior to the  
8 expiration of the claims bar date in either estate. Cannelton then brought a declaratory  
9 judgment action against the WVIGA and approximately 56 of its insurance carriers, seeking  
10 coverage for the EPA claim. *Id.* at 20-21.

11 The WVIGA filed a motion to dismiss (later treated as a motion for summary  
12 judgment) arguing that it had no obligation (or even authority) to pay under the Midland or  
13 Integrity policies because no notice of the claim had been received prior to the expiration of  
14 the claims bar dates. The trial court granted the motion, and Cannelton appealed. *Id.* at 21.

15 After reviewing the provisions of the West Virginia Guaranty Association Act that  
16 defined "covered claims" (in terms virtually identical to the definition found in A.R.S. § 20-  
17 661) and established the claims bar date limitation, the appellate court agreed that  
18 Cannelton's claim against the WVIGA was barred, stating:

19 The fact that there might have been a *potential* claim obviously  
20 did not surface until well after the bar dates for filing proofs of  
21 claims had expired . . . . Clearly, by the time Cannelton was  
faced with a viable claim (on May 25, 1989, the day the USEPA  
issued its environmental claim), it was no longer a "covered  
claim" under the Act.

1 *Id.* at 23 (emphasis in original).

2         Similar reasoning was used by the court in *Bassi v. Rhode Island Insurers' Insolvency*  
3 *Fund*, 661 A.2d 77 (R.I. 1995). In that case, Ishkhan Tavitian was injured while working for  
4 AAMCO Electric, a Rhode Island business owned and operated by Fred Bassi. At the time  
5 of Tavitian's injury, Bassi had workers' compensation coverage from American Universal  
6 Insurance Company. However, on January 8, 1991 – about six months after Tavitian's injury  
7 – American Universal was declared insolvent by the Rhode Island Superior Court, and a  
8 claims bar date was set for one year later – January 8, 1992. *See Bassi*, 661 A.2d at 78.

9         There were no claims filed against Bassi or American Universal regarding Tavitian's  
10 injury until September of 1992, when United States Fidelity and Guaranty ("USF&G") – a  
11 workers' compensation carrier for a prior employer of Tavitian – filed a petition for  
12 apportionment against Bassi in the Workers' Compensation Court. Since American Universal  
13 was insolvent, Bassi turned to the Rhode Island Insurers' Insolvency Fund to defend and  
14 indemnify him in the apportionment action by USF&G. The Rhode Island Fund refused to  
15 do so, citing to a Rhode Island statute that provides that the Fund is not obligated to pay "any  
16 claim filed with the fund after the final date set by the court for the filing of claims against  
17 the liquidator or receiver of an insolvent insurer." *See id.* at 80 (citing to Section 27-34-  
18 8(a)(1)(iii) of the Rhode Island Insurers' Insolvency Act). Bassi then brought suit against the  
19 Rhode Island Fund.

20         On motion for summary judgment, the Rhode Island Fund argued that, because  
21 Bassi's claim was not filed with the American Universal receiver by the claims bar date, the

1 claim was barred as to the Fund per the Rhode Island statutes. The fact that Bassi had no  
2 knowledge of the USF&G claim until nine months after the claims bar date passed (thereby  
3 making it impossible to have timely filed the claim) was irrelevant according to the Rhode  
4 Island Fund. *See id.* at 78-79. The trial court agreed with the Fund, and Bassi appealed.

5 On appeal, the appellate court upheld the trial court ruling, stating:

6 Although it is unfortunate for Bassi that he was not aware of the  
7 claim filed against him until after the filing date had passed, this  
8 court has no authority upon which to allow the filing of an out-  
9 of-time claim in this case.

10 *Id.* at 80.

11 The court in *Bassi* explained that the statute clearly prohibited late-filed claims as  
12 against the Rhode Island Fund and left no room for any other interpretation.

13 Furthermore, although the Legislature has provided protection  
14 for claimants and policyholders of specific insurance companies  
15 that become insolvent, that protection is not absolute. Without  
16 a deadline for filing claims, the liquidation of an insolvent  
17 insurance company could not be effected until the statutes of  
18 limitations on all potential claims had expired.

19 *Id.* (citations omitted).

20 Other courts interpreting their state's insurance insolvency provisions have come to  
21 the same conclusion. *See, e.g., Berea Roll & Bowl, Inc.*, 482 N.E.2d at 998 (holding that the  
Ohio Insurance Guaranty Association had no obligation to pay a claim filed five months after  
the claims bar date passed); *In re Professional Ins. Co. of New York*, 413 N.Y.Supp.2d 17,  
affirmed 402 N.E.2d 143 (1979) (holding that New York security fund's decision to reject  
a late-filed claim was correct even though the claimant did not learn of the possibility of a

1 malpractice suit until after the claims bar date had passed); *Union Gesellschaft Fur Metal*  
2 *Industrie Co. v. Illinois Ins. Guar. Fund*, 546 N.E.2d 1076, 1079 (App. Ill. 1989) (holding  
3 that the Illinois Insurance Guaranty Fund was not obligated to indemnify the insured's late-  
4 filed claims, even though the insured "could not have filed any information respecting the  
5 two specific claims by the filing deadline" because it had no knowledge of them at that time).

6 Much like the statutes involved in the above-cited cases, A.R.S. § 20-679 expressly  
7 authorizes the Arizona Guaranty Fund to bar claims that are not presented by the prescribed  
8 deadline. There is no ambiguity surrounding that statute, nor is there any question that the  
9 Guaranty Fund properly exercised that grant of authority in establishing the claims bar date  
10 as the latest date by which claims must be presented.

11 As set forth above, neither the Home Insurance liquidator nor the Guaranty Fund  
12 received notice, prior to the claims bar date of June 13, 2004, of *any* of the claims now  
13 alleged against Plaintiffs. Accordingly, those claims are now barred as to the Guaranty Fund.  
14 This includes not only those claims that Plaintiffs knew or could have known about on or  
15 before June 13, 2004, but, as the cases cited above make clear, the bar applies even to those  
16 claims that Plaintiffs did not know about (and could not have known about) until sometime  
17 after June 13, 2004.

18 It should be noted that Plaintiffs are not be wholly without remedy, as they may be  
19 able to establish a late-filed claim in the Home Insurance liquidation process. But regardless  
20 of whether they are successful in doing so, their claims against the Guaranty Fund are barred  
21 under the authority granted to the Guaranty Fund by the legislature in A.R.S. § 20-679.



1           **B. Plaintiffs' Claims Against the Guaranty Fund Are Premature**

2           Even if Plaintiffs' claims were not barred by A.R.S. § 20-679, they are premature  
3 under A.R.S. § 20-673. Section 20-673 deals with the situation, like this one, where more  
4 than one insurance policy may be applicable to cover the loss. Section 673 states, in part:

5                     Where more than one policy may be applicable, a policy issued  
6                     by the insolvent insurer shall be deemed to be excess coverage.  
7                     The claimant shall be required to exhaust all rights under other  
8                     applicable coverage or coverages. Any recovery pursuant to this  
9                     article shall be reduced by the amount of the recovery under the  
10                    claimant's insurance policy. . . . .

11           A.R.S. § 20-673(C).

12           In other words, anyone seeking to recover monies from the Guaranty Fund must first  
13 exhaust all other applicable insurance coverage. Not only that, but any recovery from other  
14 insurance is applied to reduce the \$99,900 that the Guaranty Fund would otherwise have to  
15 pay.<sup>5</sup> As a result, once a claimant recovers \$99,900 from any other insurance, the Guaranty  
16 Fund's obligation on the covered claim is reduced to zero. *See Jangula*, 207 Ariz. at 471 (¶  
17 14), 88 P.3d at 185 (¶ 14) (holding that recoveries from other insurance are applied to offset  
18 the \$99,900 that the Guaranty Fund may otherwise be required to pay). And once there is no  
19 longer any obligation to pay on a covered claim, the Guaranty Fund has no obligation to pay  
20 defense costs.  
21

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<sup>5</sup>A.R.S. § 20-667 was amended in 2007 to increase the maximum amount payable on a covered claim to \$299,900. *See* 2007 Ariz. Session Laws Ch. 115, § 3. That amendment, however, only applies to insolvent estates that are activated after the effective date of that amendment (September 19, 2007). *See* A.R.S. § 1-244. Since Home Insurance was declared insolvent on June 13, 2003, the previous version of A.R.S. § 20-667 applies in this case.

1 The complaint here not only states on its face that there are other insurance policies  
2 issued by solvent insurers that are applicable to these claims, but that those policies have yet  
3 to be exhausted. SOF ¶9. Until Plaintiffs have exhausted their rights under those other  
4 policies, there is no claim against the Guaranty Fund.<sup>6</sup> Moreover, any recoveries under those  
5 policies will effectively reduce the Guaranty Fund's obligation on any covered claims (and  
6 thus its obligation for defense costs) to zero.

7 **III. CONCLUSION**

8 Plaintiffs' claims against the Guaranty Fund are barred by A.R.S. § 20-679 and the  
9 resolution passed by the Guaranty Fund in accordance with that statute. The barred claims  
10 include not only those claims that Plaintiffs' knew about as of June 13, 2004 (the Home  
11 Insurance claims bar date), but also those claims that did not come into existence until after  
12 that date passed. Even if Plaintiffs claims were not barred by A.R.S. § 20-679, the policies  
13 issued by Home Insurance are deemed excess pursuant to A.R.S. § 20-673 and cannot be  
14 accessed until all other insurance is exhausted. Accordingly, Plaintiffs have no claim against  
15 the Guaranty Fund at this time.

16 For the foregoing reasons, the Guaranty Fund requests that the Court grant this Motion  
17 and enter summary judgment in its favor.

18 **DATED** this 3<sup>rd</sup> day of September, 2008.

19 \_\_\_\_\_  
20 <sup>6</sup>As stated in A.R.S. § 20-673(C), the policies issued by Home Insurance are deemed to be  
21 "excess policies," and, like the other excess policies issued to Plaintiff, should not be a part of this case.

**GLOVER & VAN COTT, P.A.**

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this 3<sup>rd</sup> day of September, 2008.

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Attorney for Defendant Arizona Property  
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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MARICOPA**

Western Refining Southwest, Inc., et al.,	)	Case No. CV2008-007299
	)	
Plaintiffs,	)	<b>DEFENDANT ARIZONA</b>
	)	<b>PROPERTY AND CASUALTY</b>
v.	)	<b>INSURANCE GUARANTY FUND'S</b>
	)	<b>SEPARATE STATEMENT OF</b>
National Union Fire Insurance Company of	)	<b>FACTS IN SUPPORT OF MOTION</b>
Pittsburgh, Pa, et al.,	)	<b>FOR SUMMARY JUDGMENT</b>
	)	
Defendants.	)	(Assigned to the Honorable
	)	John Buttrick)

Pursuant to Rule 56(c)(2), Arizona Rules of Civil Procedure, Defendant Arizona Property and Casualty Insurance Guaranty Fund ("Guaranty Fund") hereby sets forth the specific facts relied upon in support of its separately-filed Motion for Summary Judgment.

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STATEMENT OF FACTS

1. The Guaranty Fund has been named as a defendant in this case as a result of the insolvency of The Home Insurance Company, a New Hampshire insurance company that was authorized to write business in Arizona. See First Amended Complaint For Declaratory Relief, Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing (hereinafter "First Amended Complaint") ¶ 10.

2. Home Insurance was declared insolvent and placed into liquidation by the Superior Court in Merrimack County, New Hampshire by order of June 13, 2003. See Affidavit of Kevin L. Kelly in Support of Defendant Arizona Property and Casualty Insurance Guaranty Fund's Motion for Summary Judgment (hereinafter "Kelly Affidavit"), a copy of which is attached hereto as Exhibit 1; see also First Amended Complaint ¶ 306.

3. Home Insurance had issued certain policies of insurance to one or more of the Plaintiffs. According to the Complaint, the only policies at issue in this case are: (1) a Business Owner's Policy issued to Giant Industries, Inc. (No. BOP 8816174), covering the period August 3, 1980 to August 3, 1981; and (2) a Business Owner's Policy to Giant Industries, Inc. (No. BOP 8828551), covering the period August 3, 1981 to August 3, 1982. See First Amended Complaint ¶¶ 295-309.

1 4. Plaintiffs allege that policies BOP 8816174 and BOP 8828551 provide  
2 coverage for some or all of the claims at issue in the numerous lawsuits that have been filed  
3 against the Plaintiffs, and, therefore, Home Insurance (and now the Guaranty Fund) is  
4 obligated to defend the Plaintiffs in those lawsuits. See First Amended Complaint ¶ 308.

5 5. In accordance with the authority granted by A.R.S. § 20-679, the Guaranty  
6 Fund passed the following resolution on April 16, 1998:

- 7 1. Unless otherwise provided by the resolution of the Board  
8 applicable to a specific receivership, any and all claims  
9 against the FUND, whether liquidated or unliquidated,  
10 not filed with the receiver or the FUND within four  
11 months from the date of notice to creditors by the  
12 receiver or on or before the claims bar date established  
13 by the receiver, whichever is later, shall be barred as to  
the FUND; and
- 14 2. Notice to creditors by the receiver shall be treated and  
15 deemed as notice by the FUND and proof of any claim  
16 filed with the receiver shall be treated and deemed as  
17 filed with the FUND.

18 See Affidavit of Michael E. Surguine in Support of Defendant Arizona Property and Casualty  
19 Insurance Guaranty Fund's Motion for Summary Judgment (hereinafter "Surguine  
20 Affidavit") ¶ 3, a copy of which is attached hereto as Exhibit 2.

21 6. In this case, the claims bar date set in the Home Insurance liquidation  
proceeding was June 13, 2004. See First Amended Complaint ¶ 306; see also Order of  
Liquidation, dated June 13, 2003, p. 8, a copy of which is attached as Exhibit 1 to the Kelly  
Affidavit.



1 7. Plaintiffs did not notify the Home Insurance liquidator of any of the MTBE  
2 lawsuits filed against them until April of 2007. See Kelly Affidavit ¶5.

3 8. Plaintiffs did not notify the Guaranty Fund of any of the MTBE lawsuits filed  
4 against them until February of 2008. See Surguine Affidavit ¶ 6.

5 9. Plaintiffs admit that there are other insurance policies issued by solvent insurers  
6 that are applicable to these claims, but that those policies have yet to be exhausted. See First  
7 Amended Complaint ¶¶ 105-108.

8 **DATED** this 3<sup>rd</sup> day of September, 2008.

9 **GLOVER & VAN COTT, P.A.**

10 By: /s/ Ryan J. Talamante  
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19  
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21

1 Steven Plitt  
Joshua D. Rogers  
2 KUNZ PLITT HYLAND DEMLONG & KLEIFIELD  
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Attorneys for Defendants National Union  
4 Fire Insurance Company of Pittsburgh, PA,  
Illionois National Insurance Company,  
5 American Home Assurance Company and  
American International Specialty Lines Ins. Co.

6 J. Karren Baker  
7 SINNOTT, DITO, MOURA & PUEBLA  
555 Montgomery Street, Suite 720  
8 San Francisco, California 94111  
Attorneys for Defendants National Union  
9 Fire Insurance Company of Pittsburgh, PA,  
Illionois National Insurance Company,  
10 American Home Assurance Company and  
American International Specialty Lines Ins. Co.

11  
12 /s/ Danielle Avery

# EXHIBIT 1

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

Western Refining Southwest, Inc., et al., )

Plaintiffs, )

v. )

National Union Fire Insurance Company of )  
Pittsburgh, Pa, et al., )

Defendants. )  
\_\_\_\_\_ )

Case No. CV2008-007299

**AFFIDAVIT OF KEVIN L.  
KELLY IN SUPPORT OF  
DEFENDANT ARIZONA  
PROPERTY AND CASUALTY  
INSURANCE GUARANTY  
FUND'S MOTION FOR  
SUMMARY JUDGMENT**

(Assigned to the Honorable  
John Buttrick)

State of New York            )  
  ) ss.  
County of Bronx             )

**KEVIN L. KELLY**, being first duly sworn, upon his oath, deposes and says:

1. I am over the age of 18 and I am a resident of the State of New Jersey. I know the following facts of my own personal knowledge.

2. I am the Chief Environmental Officer for The Home Insurance Company in Liquidation ("Home Insurance"), and I am familiar with the operation of the Home Insurance liquidation proceeding.

3. By order dated June 13, 2003 (hereinafter the "Order of Liquidation"), Home Insurance was declared insolvent by the Superior Court in Merrimack County, New Hampshire. A true and correct copy of the Order of Liquidation is attached hereto as Exhibit 1.

4. Paragraph (bb) of the Order of Liquidation states: "The deadline for the filing of claims pursuant to RSA 402-C:26, II, RSA 402-C:37, I, and RSA 402-C:40, II, shall be one year from the date of this Order." See Order of Liquidation ¶ (bb).

5. The first notice of any of the MTBE lawsuits filed against the Plaintiffs in the above-captioned case was provided to Home Insurance in April of 2007. See letter, dated April 11, 2007, from Kathleen A. Lovett (on behalf of Giant Industries, Inc.) to (among others) Home Insurance, a copy of which is attached hereto as Exhibit 2.

FURTHER AFFLIANT SAYETH NAUGHT.

*M. E. Actor*  
Chief Environmental Officer

SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day of August, 2008, by

*Mary E Actor*  
Notary Public

My Commission Expires: 2011

MARY E. ACTOR  
Notary Public - State of New York  
No. 02AC8101148  
Qualified in New York County  
My Commission Expires November 3, 2011

**EXHIBIT 1**  
**to Kelly Affidavit**



THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

ES. 17 SUPERIOR COURT

Docket No. 03-E-0496

In the Matter of the Rehabilitation of  
The Home Insurance Company

**ORDER OF LIQUIDATION**

This proceeding was commenced on March 4, 2003, upon the Verified Petition for Rehabilitation of Paula T. Rogers, Commissioner of Insurance for the State of New Hampshire (the "Commissioner"). The Commissioner filed the Verified Petition for Rehabilitation pursuant to RSA 402-C:13, seeking appointment as receiver of The Home Insurance Company ("The Home") for the purpose of rehabilitating and conserving the assets of The Home. On March 5, 2003, this Court entered an Order Appointing Rehabilitator, in which the Commissioner was appointed Rehabilitator of The Home. The Commissioner, as Rehabilitator, has now determined pursuant to RSA 402-C:19 that further attempts to rehabilitate The Home would be futile, that The Home is insolvent within the meaning of RSA 402-C:7 and RSA 402-C:20, II, and that it should be liquidated. On May 8, 2003, the Commissioner, as Rehabilitator, filed a Verified Petition for Order of Liquidation pursuant to RSA 402-C:5, RSA 402-C:19 and RSA 402-C:20 (the "Petition"); in which she has sought an order of liquidation for The Home, her appointment as Liquidator, and the requested permanent injunctions. After having heard and considered the facts set forth in the Petition, the Court finds that the law and facts are

as the Commissioner has alleged in the Petition and that there exists a present necessity for the entry of this order.

WHEREFORE, it is hereby ordered, adjudged and decreed that:

(a) The proceeding for the rehabilitation of The Home is hereby terminated pursuant to RSA 402-C:1B;

(b) The Home is declared to be insolvent;

(c) Sufficient cause exists for an order to liquidate The Home;

(d) Paul F. Rogers, Commissioner of Insurance for the State of New Hampshire, and her successors in office, is hereby appointed Liquidator of The Home;

(e) The Liquidator shall cancel all in-force contracts of insurance and bonds effective as of 30 days after the date of this Order;

(f) The Liquidator is directed forthwith to take possession of the assets of The Home wherever located and administer them under the orders of the Court. The Liquidator is vested with title to all of the property, contracts and rights of action and all of the books and records of the Home, wherever located, and in whomsoever's possession they may be found;

(g) The Liquidator is directed to secure all of the assets, property, books, records, accounts and other documents of The Home (including, without limitation, all data processing information and records comprised of all types of electronically stored information, master tapes, source codes, passwords, or any other recorded information relating to The Home);

(h) The Liquidator is authorized to transfer, invest, re-invest and otherwise deal with the assets and property of The Home so as to effectuate its liquidation;

(f) The Liquidator is authorized to acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable without prior permission of the Court in the ordinary course of business;

(g) The Home and its directors, officers, employees, agents, and representatives are prohibited from proceeding with the business of The Home, except upon the express written authorization of the Liquidator;

(h) The Home and its directors, officers, employees, agents, and representatives, and any persons acting in concert with The Home, are prohibited from disposing, using, transferring or removing any property of The Home, without the express written authorization of the Liquidator, or in any way (i) interfering with the conduct of the Liquidator or (ii) interfering with the Liquidator's possession and rights to the assets and property of The Home;

(i) Any bank, savings and loan association or other financial institution or other legal entity is prohibited from disposing of or allowing to be withdrawn in any manner property or assets of The Home, except under the express written authorization of the Liquidator or by further order of this Court.

(j) All actions and all proceedings against The Home whether in this state or elsewhere shall be abated in accordance with RSA 402-C:2B and RSA 402-C:5, except to the extent the Liquidator sees fit and obtains leave to intervene;

(k) To the full extent of the jurisdiction of the Court and the comity to which the orders of the Court are entitled, all persons are hereby permanently enjoined and restrained from any of the following actions:

(1) commencing or continuing any judicial, administrative, or other action or proceeding against The Home or the Liquidator;

(2) commencing or continuing any judicial, administrative, or other action or proceeding against The Home's, the Rehabilitator's or the Liquidator's present or former directors, officers, employees, agents, representatives, or consultants, including, without limitation, Risk Enterprise Management Limited and each of its officers, directors and employees, arising from their actions on behalf of The Home, the Rehabilitator or the Liquidator;

(3) enforcing any judgment against The Home or its property;

(4) any act to obtain possession of property of The Home or to exercise control over property of The Home;

(5) any act to create, perfect, or enforce any lien against property of The Home;

(6) any act to collect, assess, or recover a claim against The Home other than the filing of a proof of claim with the Liquidator; and

(7) the setoff of any debt owing to The Home; provided, however, that notwithstanding anything in this Order to the contrary, nothing herein is intended nor shall it be deemed to stay any right of setoff of mutual debts or mutual credits by reinsurers as provided in and in accordance with RSA 409-C:34;

(c) The Court hereby seeks and requests the aid and recognition of any Court or administrative body in any State or Territory of the United States and any Federal Court or administrative body of the United States, any Court or administrative body in any Province or Territory of Canada and any Canadian Federal Court or

administrative body, and any Court or administrative body in the United Kingdom or elsewhere to act in aid of and to be complementary to this Court in carrying out the terms of the Order;

(f) All persons doing business with The Home on the date of the Liquidation Order are permanently enjoined and restrained from terminating or attempting to terminate such relationship for cause under contractual provisions on the basis of the filing of the petition to rehabilitate The Home, The Home's assent to the entry of the Rehabilitation Order, the entry of the Rehabilitation Order, the filing of this Petition, the entry of the Liquidation Order, the rehabilitation or liquidation proceedings for The Home, or The Home's financial condition during the rehabilitation or liquidation proceedings;

(g) All persons in custody or possession of any property of The Home are hereby directed and ordered to turn over any such property to the Liquidator;

(h) The Liquidator is authorized, in her discretion, to pay expenses incurred in the course of liquidating The Home, including the actual, reasonable, and necessary costs of preserving or recovering the assets of The Home, wherever located, and the costs of goods and services provided to The Home either in this and other jurisdictions. Such costs shall include, but not be limited to: (1) reasonable professional fees for accountants, actuaries, attorneys and consultants with other expertise retained by the Department, the Commissioner or the Liquidator to perform services relating to the liquidation of The Home or the feasibility, preparation, implementation, or operation of a liquidation plan; (2) compensation and other costs related to representatives, employees or agents of The Home or its affiliates who perform services for The Home in liquidation;

and (3) the costs and expenses of and a reasonable allocation of costs and expenses associated with time spent by New Hampshire Insurance Department personnel and New Hampshire Department of Justice personnel in connection with the rehabilitation and the liquidation of The Home;

(e) The Liquidator is authorized to employ or continue to employ, to delegate authority to and fix the compensation of such appropriate personnel, including attorneys, accountants, consultants, special counsel, and counsel in this and other jurisdictions, as she deems necessary to carry out the liquidation of The Home and its worldwide operations, subject to compliance with the provisions of RSA 402-C, the supervision of the Liquidator, and of this Court. The Liquidator is authorized to continue in her sole discretion to retain the services of Risk Enterprise Management Limited, subject to court approval;

(f) The Liquidator is authorized to appoint, and determine the compensation and terms of engagement of, a special deputy to act for her pursuant to RSA 402-C:25, 1.

(g) The actual, reasonable and necessary costs of preserving, recovering, distributing or otherwise dealing with the assets of The Home, wherever located, and the costs of goods or services provided to The Home estate under paragraph (b) of the Rehabilitation Order, during the Rehabilitation proceeding, and under paragraphs (d) (1) and (v) of the Liquidation Order, during the Liquidation proceeding, shall be treated as "costs and expenses of administration," pursuant to RSA 402-C:24, 1.

(h) The Liquidator is authorized and directed to work with any joint provisional liquidator or other person of comparable position appointed by a foreign

tribunal with respect to all or any portion of the estate of The Home located outside the United States (the "foreign estates") for the purpose of preserving, recovering and incorporating into the domiciliary estate all assets of The Home located outside the United States. The Liquidator is authorized to fund from the domiciliary estate the costs and expenses of administering the foreign estates.

(w) The Liquidator is directed to administer and make payments on all claims against The Home estate filed with the Liquidator in the domiciliary proceeding, including the claims of claimants residing in foreign countries (provided the assets of such foreign estate are transferred to the Liquidator), in accordance with New Hampshire's priority statute, RSA 402:624.

(x) The amounts recoverable by the Liquidator from any reinsurer of The Home shall not be reduced as a result of the prior rehabilitation proceeding or this liquidation proceeding or by reason of any partial payment or distribution on a reinsured policy, contract or claim, and each reinsurer of The Home is, without first obtaining leave of this Court, hereby enjoined and restrained from terminating, canceling, failing to extend or renew, or reducing or changing coverage under any reinsurance policy or contract with The Home. The Liquidator may, in her discretion, commute any contract with a reinsurer or reinsurers.

(y) To the full extent of the jurisdiction of the Court and the county to which the orders of the Court are entitled, all actions or proceedings against an insured of The Home in which The Home has an obligation to defend the insured are hereby stayed for a period of six months from the date of the Order and such additional time as the Court may determine pursuant to RSA 404-B:18.

(z) Within one year of the entry of this Order, and then annually thereafter, the Liquidator shall file with the Court a financial report, as of the preceding December 31, in accordance with RSA 402-C:21, V, which shall include, at a minimum, the assets and liabilities of The Home and all funds received or disbursed by the Liquidator during the period;

(aa) The Liquidator shall have full power and authority given the Liquidator under RSA 402-C of Title XXXVII, and under provisions of all other applicable laws, as are reasonable and necessary to fulfill the duties and responsibilities of the Liquidator under RSA 402-C of Title XXXVII, and under the Order, specifically including, but not limited to, each and every power and authority bestowed upon the Liquidator under RSA 402-C:25, I, XXII, the provisions of which are incorporated by reference in their entirety into this Order, and the common law of New Hampshire and

(bb) The deadline for the filing of claims pursuant to RSA 402-C:26, II, RSA 402-C:37, I, and RSA 402-C:40, II, shall be one year from the date of this Order.

Date:  
Time:

6/13/03

By:

  
Patricia M. Lane  
Presidential Justice



RECEIVED  
JUN 13 PM 2:17  
SUPERIOR COURT  
MERRIMACK, SS

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

In the Matter of the Rehabilitation of  
The Home Insurance Company

Docket No. 03-E-0006

ORDER

The Court's Order of Liquidation dated June 11, 2001 (Case No. 01-0006) is VACATED and superseded by Order of Liquidation dated June 13, 2003.

So Ordered.

June 13, 2003

  
KENNETH M. KEENE  
Residing Justice

**EXHIBIT 2**  
**to Kelly Affidavit**

# Willis

Telephone: 802-787-8207  
Fax: 1-877-883-2744  
Website: [www.willis.com](http://www.willis.com)  
E-mail: [Kathleen.Lovett@willis.com](mailto:Kathleen.Lovett@willis.com)

April 11, 2007

**SENT VIA UPS**

**AIG Domestic Claims**  
Ms. Jerri Walker  
101 Hudson Street, 30<sup>th</sup> Floor  
Jersey City, NJ 07302

**Allied World Assurance**  
c/o Willis Bermuda Limited  
58 Par La Ville Road  
Hamilton HMHX  
Bermuda  
Attention: Robert Lane

**ARCH**  
1 Liberty Plaza  
53<sup>rd</sup> Floor  
New York, NY 10006-1471

**XL Environmental**  
ECS/Reliance/Indian Harbor  
520 Eagleview Blvd.  
Exton, PA 19341

**Great American Insurance Group**  
Mr. Troy Galley  
49 East 4<sup>th</sup> Street, Suite 700  
Cincinnati, OH 45202-3801

**Home Insurance**  
Ms. Joy Ricigliani  
59 Maiden Lane  
New York, NY 10038

Claim Advocate Group  
Willis North America, Inc.  
11201 N Tatum Blvd, Suite 310  
Phoenix, AZ 85028

Page 2  
Giant Industries  
April 11, 2007

**Lloyds of London**  
c/o Ropner Insurance Services Limited  
7/17 Jewry Street  
London EC3N 2HP  
England

**Lumbermen's Insurance**  
300 East Center Drive, Suite 101  
Vernon Hills, IL 60061

**Reliance Excess Claims**  
77 Water Street, 8<sup>th</sup> Floor  
New York, NY 10005

**Zurich Insurance**  
Mr. David Ziegler  
Environmental Unit  
1400 American Lane  
Tower 2, 7<sup>th</sup> Floor  
Schaumburg, IL 60196-1056

Re: Seven New Suits alleging MTBE Contamination  
Insured: Giant Industries, Inc.  
Plaintiffs: Various  
Date of Loss: Various  
Our Reference No.: 00041736-00/038615

Dear Sir or Madam:

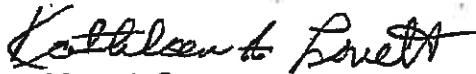
As insurance broker for Giant Industries, Inc., we are submitting the enclosed Compact Disc containing seven suits that have been filed against Giant Industries, Inc. and other defendants, alleging MTBE contamination of groundwater. We were advised that Giant Industries, Inc.'s counsel will be responding to the suits. The contact at Giant Industries is Ms. Jacque Cumbie, telephone: 480-585-8762.

Page 3  
Giant Industries  
April 11, 2007

We are enclosing a Schedule of Insurance, including some policies that may not be applicable to this loss, and request that each carrier provide defense and indemnity to the insured, pursuant to their respective policies and any and all other policies that that may have been issued to the insured by your companies. We ask that each carrier kindly provide us with your claim number, the name of the assigned adjuster, and his/her direct phone number, the name and address of the defense firm, if assigned, and the name and telephone number of the specific defending attorney.

Finally, please copy me in on all communications regarding coverage.

Very truly yours,



Kathleen A. Lovett  
Claim Advocate

Enclosures:  
CD containing seven lawsuits  
Schedule of Insurance

Giant Industries, Inc.  
Schedule of Insurance

TYPE	POLICY	INCEPTION	EXPIRATION
Excess Liability (Allied)	C001547/001	1/15/2003	11/1/2003
Excess Liability (Allied)	C001547/002	11/1/2003	11/1/2004
Excess Liability (Allied)	C001547/003	11/1/2004	11/1/2005
Excess Liability (Allied World)	C001547/005	11/1/2006	9/1/2007
Excess Liability (Arch Specialty)	B4-URP0333700	11/1/2003	11/1/2004
Excess Liability (Arch Specialty)	B4-URP0333700	11/1/2004	11/1/2005
Excess Liability (Arch Specialty)	B4-URP0333700	11/1/2005	11/1/2006
Excess Liability (Arch Specialty)	URP0018655	11/1/2006	9/1/2007
Excess Liability (Great American)	EXC8727892	11/1/1995	11/1/1996
Excess Liability (Great American)	EXC1803579	11/1/1996	11/1/1997
Excess Liability (Home Ins.)	HXL 1 57 56 87	8/3/1984	8/3/1985
Excess Liability (Lumbermens)	9SR 070464-00	11/1/2001	11/1/2002
Excess Liability (Reliance)	NEA 0111998	11/1/1994	11/1/1995
Excess Liability (Reliance)	NEA 0111998	11/1/1995	11/1/1996
Excess Liability (Reliance)	NEA 0111998	11/1/1996	11/1/1997
Excess Liability (Zurich)	ZGEB-0021 L	11/1/1997	11/1/1998
Excess Liability (Zurich)	ZGEB-0021 L	11/1/1998	11/1/2001
Excess Liability (Zurich)	ZGEB-0021 L	11/1/2001	11/1/2002
Excess Liability (Zurich)	ZGEB-0021 L	11/1/2002	11/1/2003
General Liability (AIG)	GL 773-54-06 FA	11/1/1994	11/1/1995
General Liability (AIG)	GL 818-14-48RA	11/1/1995	11/1/1996
General Liability (AIG)	GL 818-73-86	11/1/1996	11/1/1997
General Liability (AIG)	GL 819-41-18 RA	11/1/1997	11/1/1998
General Liability (AIG)	GL 267-00-19 RA	11/1/1998	11/1/1999
General Liability (AIG)	GL 544-13-74 RA	11/1/1999	11/1/2000
General Liability (AIG)	GL 544-13-74 RA	11/1/2000	11/1/2001
General Liability (AIG)	GL 544-13-74 RA	11/1/2001	11/1/2002
General Liability (AIG)	GL 544-26-71	11/1/2002	11/1/2003
General Liability (AIG)	GL 360-20-73	11/1/2003	11/1/2004
General Liability (AIG)	GL 069-21-71	11/1/2004	11/1/2005

**Giant Industries, Inc.  
Schedule of Insurance**

General Liability (American Home) (AIG)	GL 069-21-71	11/1/2005	9/1/2007
General Liability (Yorktown) (AIG)	GL 544-24-97 RA	5/13/2002	11/1/2002
General Liability (Lloyds)	ME 331191	11/1/1991	11/1/1992
Pollution 3rd party (AIG)	PLL 1177240	1/21/1985	1/21/1986
Pollution 3rd party (Intl Surplus Lines)	GAS2282	5/23/1988	5/23/1987
Pollution (legal) (Zurich)	PEC 0005325	11/1/2005	11/1/2008
Pollution 3rd party (Indian Harbor/XL Environmental)	PEC 0019115	8/1/2005	8/1/2015
Pollution 3rd party (Indian Harbor/XL Environmental)	PEC 0019121	8/1/2005	8/1/2009
Pollution 3rd party (AIG)	PLL 7077185	1/21/1987	1/21/1988
Pollution 3rd party (Intl Surplus Lines)	GAS 3724	5/23/1987	5/23/1988
Pollution 3rd party (AIG)	PLL 5872240	1/21/1988	1/21/1989
Pollution 3rd party (AIG)	PLL	1/21/1989	1/21/1990
Pollution 3rd party (AIG)	PLL 7166281	1/21/1990	1/21/1991
Pollution 3rd party (ECS)	NTA201575204	11/1/1995	11/1/1996
Pollution 3rd party (ECS)	NTA201575205	11/1/1996	11/1/1997
Pollution 3rd party (ECS)	NTA201575206	11/1/1997	11/1/1998
Pollution 3rd party (ECS)	NTL2511121	11/1/1998	11/1/1999
Pollution 3rd party (Canc) (ECS)	NTL251112101	11/1/1999	11/1/2002
Pollution 3rd party (legal def) (ECS)	PEC0005325	7/26/2000	11/1/2002
Pollution 3rd party (legal def) (ECS)	PEC0005325	11/1/2002	11/1/2005
Pollution 3rd party (legal liab) (ECS)	PEC0005325	11/1/2002	11/1/2005
Pollution 3rd party (legal) (ECS)	PEC0005325	7/26/2000	11/1/2002
Pollution 3rd party (remed) (ECS)	PEC0005325	7/26/2000	11/1/2002
Pollution 3rd party (remed) (ECS)	PEC0005325	11/1/2002	11/1/2005
Pollution 3rd party (Yorktown) (ECS)	PEC0005325	11/1/2002	11/1/2005
Umbrella (AIG)	BE 932-36-58	11/1/1996	11/1/1997
Umbrella (AIG)	BE 932-81-64	11/1/1997	11/1/1998
Umbrella (AIG)	BE 357-40-67	11/1/1998	11/1/2001
Umbrella (AIG)	BE 139-03-52	11/1/2001	11/1/2002
Umbrella (AIG)	BE 298-80-58	11/1/2003	11/1/2004

**Giant Industries, Inc.  
Schedule of Insurance**

Umbrella (AIG)	BE 139-96-75	11/1/2002	11/1/2003
Umbrella (AIG)	BE 298-80-8	11/1/2003	11/1/2004
Umbrella (AIG)	BE 568-39-11	11/1/2004	11/1/2005
Umbrella (Cancelled) (AIG)	BE 309-63-74	11/1/1995	11/1/1997
UST Pollution Liability (Petromark)	88000746	5/23/1988	5/23/1989
UST Pollution Liability (Petromark)	89000746	5/23/1989	5/23/1990
UST Pollution Liability (Lloyd's)	UST 90000110	5/23/1990	5/23/1991
UST Pollution Liability (Lloyd's)	UST 91000110	5/23/1991	5/23/1992
UST Pollution Liability (Lloyd's)	UST 92000110	5/23/1992	5/23/1993
UST Pollution Liability (Lloyd's)	UST 94000110	5/23/1994	5/23/1995
UST Pollution Liability (Lloyd's)	UST 95000110	5/23/1995	5/23/1996
UST Pollution Liability (Lloyd's)	UST 96000110	5/23/1996	11/1/1997
UST Pollution Liability (Zurich)	USC 8508530-3	11/1/1997	11/1/1998
UST Pollution Liability (Zurich)	USC 8508530-4	11/1/1999	11/1/2000
UST Pollution Liability (Zurich)	USC 8508530-6	11/1/2000	11/1/2001
UST Pollution Liability (Zurich)	USC 8508530-7	11/1/2001	11/1/2002
UST Pollution Liability (Zurich)	USC 8508530-8	11/1/2002	11/1/2003
UST Pollution Liability (Zurich)	USC 8508530-9	11/1/2003	11/1/2004
UST Pollution Liability (Zurich)	USC 8508530-10	11/1/2004	11/1/2005
UST Pollution Liability (Zurich)	USC 8508530	11/1/2005	11/1/2007



# EXHIBIT 2

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**GLOVER & VAN COTT, P.A.**  
2025 North Third Street, Suite 260  
Phoenix, Arizona 85004  
(602) 257-9160

Ryan J. Talamante — 15323

Attorney for Defendant Arizona Property  
and Casualty Insurance Guaranty Fund

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MARICOPA**

**GLOVER & VAN COTT, P.A.**  
2025 NORTH THIRD STREET, SUITE 260  
PHOENIX, ARIZONA 85004 ♦ (602) 257-9160

Western Refining Southwest, Inc., et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 National Union Fire Insurance Company of )  
 Pittsburgh, Pa, et al., )  
 )  
 Defendants. )

Case No. CV2008-007299  
**AFFIDAVIT OF MICHAEL E.  
SURGUINE IN SUPPORT OF  
DEFENDANT ARIZONA  
PROPERTY AND CASUALTY  
INSURANCE GUARANTY  
FUND'S MOTION FOR  
SUMMARY JUDGMENT**

(Assigned to the Honorable  
John Buttrick)

1 State of Arizona                    )  
  ) ss.  
2 County of Maricopa                )

3  
4                    **MICHAEL E. SURGUINE**, being first duly sworn, upon his oath, deposes and says:

5                    1.        I am over the age of 18 and I am a resident of the State of Arizona. I know the  
6 following facts of my own personal knowledge.

7                    2.        I am the Executive Director of the Arizona Property and Casualty Insurance  
8 Guaranty Fund ("Guaranty Fund"), and I am familiar with the internal organization and  
9 operation of the Guaranty Fund.

10                   3.        In accordance with the authority granted by A.R.S. § 20-679, the Guaranty  
11 Fund passed the following resolution on April 16, 1998:

- 12                                1.        Unless otherwise provided by the resolution of the Board  
13 applicable to a specific receivership, any and all claims  
14 against the FUND, whether liquidated or unliquidated,  
15 not filed with the receiver or the FUND within four  
16 months from the date of notice to creditors by the  
17 receiver or on or before the claims bar date established  
18 by the receiver, whichever is later, shall be barred as to  
19 the FUND; and
- 20                                2.        Notice to creditors by the receiver shall be treated and  
21 deemed as notice by the FUND and proof of any claim  
filed with the receiver shall be treated and deemed as  
filed with the FUND.

22 See Resolution of the Arizona Property and Casualty Insurance Guaranty Fund Adopted  
23 April 16, 1998, a true and correct copy of which is attached hereto as Exhibit 1.

GLOVER & VAN COTT, P.A.  
2025 NORTH THIRD STREET, SUITE 260  
PHOENIX, ARIZONA 85004 ♦ (602) 257-9160

1 4. Pursuant to A.R.S. § 20-665, the April 16, 1998 resolution was incorporated  
2 into the Guaranty Fund's Plan of Operation as of January 12, 1999.

3 5. The April 16, 1998 resolution was effective at the time The Home Insurance  
4 Company ("Home Insurance") was placed into liquidation proceedings by the Superior Court  
5 in Merrimack County, New Hampshire on June 13, 2003.

6 6. No notice of any of the MTBE lawsuits that were filed against the Plaintiffs in  
7 the above-captioned case was provided to the Guaranty Fund until February of 2008. A  
8 complete listing of the MTBE lawsuits identified by Plaintiffs in this case and exact date  
9 upon which the Guaranty Fund was first provided notice of those lawsuits is attached hereto  
10 as Exhibit 2.

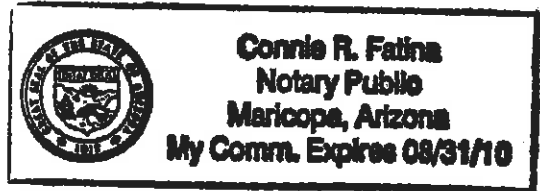
11 FURTHER AFFIANT SAYETH NAUGHT.

12 Michael E. Sarguine

13 SUBSCRIBED AND SWORN to before me this 25<sup>th</sup> day of August, 2008, by  
14 Michael E. Sarguine

15 Connie R. Fatina  
16 Notary Public

17 My Commission Expires: \_\_\_\_\_



**EXHIBIT 1**  
**to Surguine Affidavit**

**RESOLUTION OF THE  
ARIZONA PROPERTY AND CASUALTY INSURANCE GUARANTY FUND  
ADOPTED APRIL 16, 1998**

**WHEREAS**, A.R.S. §20-679 provides that, with respect to the handling of claims, the FUND may, by resolution, bar known claims, whether liquidated or unliquidated, not filed within four months from the date of notice to creditors;

**AND WHEREAS**, the Board of Directors of the Arizona Property and Casualty Insurance Guaranty Fund hereby determines that it should ratify, confirm and memorialize its position that all claims against the FUND, whether liquidated or unliquidated, not filed with the receiver or the FUND on or before the claims bar date established by the receiver shall be barred as to the FUND, provided the receiver's claims bar date is at least four months from the date of the notice to creditors by the receiver. Notice to creditors by the receiver shall be treated and deemed as notice by the FUND and proof of any such claim filed with the receiver shall be treated and deemed as filed with the FUND.

**NOW THEREFORE** be it resolved that:

1. Unless otherwise provided by the resolution of the Board applicable to a specific receivership, any and all claims against the FUND, whether liquidated or unliquidated, not filed with the receiver or the FUND within four months from the date of the notice to creditors by the receiver or on or before the claims bar date established by the receiver, whichever is later, shall be barred as to the FUND; and

2. Notice to creditors by the receiver shall be treated and deemed as notice by the FUND and proof of any claim filed with the receiver shall be treated and deemed as filed with the FUND.

Adopted this 16<sup>th</sup> day of April, 1998

  
\_\_\_\_\_  
Diane A. Klem, Chair

Attest:

  
\_\_\_\_\_  
James H. Unmacht, II, Secretary/Treasurer

**EXHIBIT 2**  
**to Surguine Affidavit**

Western Refining Southwest, Inc., et al.

vs.

Arizona Property and Casualty Insurance Guaranty Fund, et al.

Table of Cases Listed In Plaintiffs' Complaint

Case Name	Case No.	State	Defendant			Original Complaint Paragraph Nos.	Total Pages Exhibits	Notice to Guaranty Fund
			Grant Inductran Arizona, Inc.	Grant Industries, Inc.	Grant Industries, Inc.			
State of New Mexico v. Amerada Hess Corp., et al.	06-CV-5496	New Mexico	X	X	X	93-106	1	3/11/2008
City of South Bend, Indiana v. Amerada Hess Corp., et al.	04-CV-2056	Indiana				107-120	2	NONE
Town of Campbellsburg, Indiana v. Amerada Hess Corp., et al.	04-CV-4990	Indiana				121-134	3	NONE
North Newton School District v. Amerada Hess Corp., et al.	04-CV-2057	Indiana				135-148	4	NONE
Town of Middleborough, et al. v. Amerada Hess Corp., et al.	06-CV-3741	Massachusetts	X			149-162	5	2/28/2008
City of Lowell v. Amerada Hess Corp., et al.	05-CV-4018	Massachusetts				163-176	6	2/21/2008
Town of Duxbury, et al. v. Amerada Hess Corp., et al.	04-CV-1725	Massachusetts				177-190	7	2/27/2008
Town of Billerica, et al. v. Amerada Hess Corp.	06-CV-1381	Massachusetts				191-204	8	2/27/2008
Town of Lakeville, et al. v. Amerada Hess Corp., et al.	07-CV-8360	Massachusetts				205-218	9	2/28/2008
Northampton Bucks Cty. Municipal Auth. v. Amerada Hess Corp., et al.	04-CV-6993	Pennsylvania				219-232	10	2/26/2008
Craftsbury Fire District #2 v. American Refining Group, Inc., et al.	04-CV-3419	Vermont				233-246	11	NONE
Town of Hartland, Cty. of Windsor, VT v. Amerada Hess Corp., et al.	04-CV-2072	Vermont				247-260	12	NONE
American Distilling & Mfg. Co., Inc. v. Amerada Hess Corp., et al.	04-CV-1719	Connecticut				261-274	13	2/21/2008
Columbia Bd. of Ed., Horace Porter School v. Amerada Hess Corp., et al.	04-CV-1716	Connecticut				275-288	14	NONE
Our Lady of the Rosary Chapel v. Amerada Hess Corp., et al.	04-CV-1718	Connecticut				289-302	15	2/26/2008
Town of East Hampton v. Amerada Hess Corp., et al.	03-CV-1720	Connecticut				303-316	16	2/27/2008
United Water Connecticut, Inc. v. Amerada Hess Corp., et al.	04-CV-1721	Connecticut				317-330	17	2/28/2008
City of Dover v. Amerada Hess Corp., et al.	04-CV-2067	New Hampshire				331-344	18	NONE
City of Portsmouth v. Amerada Hess Corp., et al.	04-CV-2066	New Hampshire				345-358	19	NONE
State of New Hampshire v. Amerada Hess Corp., et al.	03-C-550	New Hampshire				359-372	20	2/29/2008
New Jersey American Water Co., Inc. v. Amerada Hess Corp., et al.	04-CV-1726	New Jersey		X		373-386	21	2/26/2008
New Jersey Dept. of Environ. Protection v. Amerada Hess Corp., et al.	07-CV-5284	New Jersey		X		387-400	22	2/26/2008
Water-Sewer Utility of the City of Vineland v. Amerada Hess Corp., et al.	05-CV-9070	New Jersey		X		401-414	23	2/28/2008
County of Suffolk v. Amerada Hess Corp., et al.	04-CV-5424	New York				415-428	24	3/11/2008
United Water New York, Inc. v. Amerada Hess Corp., et al.	04-CV-2389	New York				429-442	25	2/28/2008
Albertain Water District v. Amerada Hess Corp., et al.	07-CV-2406	New York				443-456	26	2/20/2008
City of Glen Cove Water District v. Amerada Hess Corp., et al.	07-CV-2403	New York				457-470	27	2/21/2008
City of Greenlawn Water District v. Amerada Hess Corp., et al.	04-CV-2407	New York				471-484	28	2/21/2008
City of Rockport v. Amerada Hess Corp., et al.	04-CV-1724	New York				485-498	29	NONE



Western Refining Southwest, Inc., et al.

vs.

Arizona Property and Casualty Insurance Guaranty Fund, et al.

Table of Cases Listed in Plaintiffs' Complaint

Case Name	Case No.	State	Exhibitors			Original Complaint Paragraph No.	First Unrecorded Exhibits No.	Notes to Guaranty Fund
			Guar. Industries Arizona, Inc.	Guar. Industries, Inc.	Guar. Industries, Voluntary, Inc.			
City of Mishawaka v. Amerada Hess Corp., et al.	04-CV-2055	New York				499-512	30	NONE
City of New York v. Amerada Hess Corp., et al.	04-CV-3417	New York				513-526	31	2/21/2008
County of Nassau v. Amerada Hess Corp., et al.	03-CV-9543	New York				527-540	32	2/22/2008
Franklin Square Water District v. Amerada Hess Corp., et al.	04-CV-5423	New York				541-554	33	2/22/2008
Richville Water District v. Amerada Hess Corp., et al.	04-CV-5421	New York				555-568	34	2/22/2008
Incorporated Village of Sands Point v. Amerada Hess Corp., et al.	04-CV-3416	New York				569-582	35	2/22/2008
Long Island Water Corp. v. Amerada Hess Corp., et al.	04-CV-2068	New York				583-596	36	2/26/2008
Port Washington Water District v. Amerada Hess Corp., et al.	04-CV-3415	New York				597-610	37	2/27/2008
Roslyn Water District v. Amerada Hess Corp., et al.	04-CV-5422	New York				611-624	38	2/27/2008
Town of Huntington/Dix Water District v. Amerada Hess Corp., et al.	07-CV-2405	New York				625-638	39	2/27/2008
Town of Wappinger v. Amerada Hess Corp., et al.	04-CV-2388	New York				639-652	40	2/28/2008
Village of Pawling v. Amerada Hess Corp., et al.	04-CV-2990	New York				653-666	41	2/28/2008
Water Authority of Great Neck North v. Amerada Hess Corp., et al.	04-CV-1727	New York				667-680	42	2/28/2008
Water Authority of Western Nassau v. Amerada Hess Corp., et al.	03-CV-9544	New York				681-694	43	2/28/2008
Town of Matoaka, WV, Matoaka Water Sys. v. Amerada Hess Corp., et al.	04-CV-3420	West Virginia				695-708	44	NONE
Buchanan County School Board v. Amerada Hess Corp., et al.	04-CV-3418	Virginia		X		709-722	45	2/21/2008
County of Greensville v. Amerada Hess corp., et al.	05-CV-1310	Virginia		X		723-736	46	2/22/2008
Patrick County School Board v. Amerada Hess Corp., et al.	04-CV-2070	Virginia		X		737-750	47	2/26/2008
Village of Island Lake v. Amerada Hess Corp., et al.	04-CV-2053	Illinois				751-764	48	NONE
City of Crystal River v. Amerada Hess Corp., et al.	07-CV-6848	Florida				765-778	49	2/21/2008
City of Inverness Water District v. Amerada Hess Corp., et al.	07-CV-4011	Florida				779-792	50	2/21/2008
City of Tampa Bay Water District v. Amerada Hess Corp., et al.	07-CV-4012	Florida				793-806	51	2/22/2008
Homosassa Water District v. Amerada Hess Corp., et al.	07-CV-4009	Florida				807-820	52	2/22/2008

From: Phil Hunsucker [mailto:PHunsucker@reslawgrp.com]  
Sent: Tuesday, August 26, 2008 6:31 PM  
To: Ryan J. Talamante  
Cc: Allison McAdam  
Subject: Western Refining  
Sensitivity: Confidential

Exh. B-J

Ryan:

It was a pleasure meeting you in person yesterday.

When we spoke a few weeks ago, we agreed that, in an effort to save our clients' costs, before filing the Arizona Guaranty Fund's planned motion for summary judgment, you would send me the draft affidavits you plan to use to support the motion. As you are aware, Giant is seeking a defense from several other carriers and views the Guaranty Fund as secondary to those carriers. However, so far no other carrier has paid any money.

So as to preserve both our clients' fees, we believe it would be preferable to meet and confer further prior to the Fund filing any summary judgment motion, so that we can fully assess any discovery that might be necessary to oppose the motion. Are you still planning on sending your affidavits for review prior to filing the Guaranty Fund's motion?

Philip C. Hunsucker

www.reslawgrp.com  
3717 Mt. Diablo Blvd., Suite 200

Lafayette, CA 94549

Phone: 866.284.0860

Fax: 925.284.0870

phunsucker@reslawgrp.com

Ex. B-K

---

From: Phil Hunsucker [mailto:PHunsucker@reslawgrp.com]  
Sent: Wednesday, September 17, 2008 9:01 AM  
To: Ryan J. Talamante; Allison McAdam  
Subject: RE: Western Refining v. National Union et al.: Guaranty Fund's MSJ

Ryan:

In order to avoid unnecessary attorney's fees, would your client be interested in a deal with us that required dismissals for a waiver of costs, timed within a certain number of days from completion of a settlement with AIG? Since AIG seems to have (survived with the help of the USA), we expect to complete our settlement very shortly. I believe I can get my client to agree to this type of approach and it is consistent with how the Guaranty Fund statutes seem to work (as excess insurance).

Philip C. Hunsucker

www.reslawgrp.com  
3717 Mt. Diablo Blvd., Suite 200

Lafayette, CA 94549

Phone: 866.284.0860

Fax: 925.284.0870

phunsucker@reslawgrp.com



From: Phil Hunsucker [mailto:PHunsucker@reslawgrp.com]  
Sent: Thursday, September 18, 2008 5:16 PM  
To: Ryan J. Talamante  
Cc: Allison McAdam  
Subject: RE: Western Refining v. National Union et al.: Guaranty Fund's MSJ

Exh. B-L

Ryan:

Considering the confidentiality of the discussions which are being conducted under the protection of a mediation, here is the information I can provide you at this time regarding Giant's tentative agreement for settlement with AIG: Since the second mediation session with AIG on July 15, several rounds of drafts settlement agreements have been exchanged between Giant and AIG, but language has not been agreed upon and finalized. We hope to finalize the settlement within the next two weeks, before Giant's opposition to AIG's Motion to Strike is due on October 8, 2008. However, as with any settlement, we can not guarantee an agreement will be completed within this timeframe. Under our proposal, Giant would file a Second Amended Complaint, at which time Giant would dismiss the Guaranty Fund if the Guaranty Fund agrees to exchange a mutual release of attorneys' fees and costs.

As you are aware, Giant's opposition to the Guaranty Fund's motion for summary judgment is due October 3, 2008. We plan to oppose the Fund's motion based on the statutory language in Section 20-679, which on its face only gives the Guaranty Fund authority to bar "known claims." The Guaranty Fund has admitted there is no Arizona law interpreting section 20-679 and none of the cases cited by the Guaranty Fund involve similar statutory language. In fact, Arizona's statute is the only such statute in the United States to include "known," as a modifier of "claims" that are barred. Further, Arizona's statutory rules of construction provide that "[w]ords and phrases shall be construed according to the common and approved use of the language." A.R.S. § 1-213. In our view, the phrase "known claims" is not the same as "claims," as the summary judgment motion suggests.

In addition, the disc the Guaranty Fund referenced in its motion, but just now provided to Giant, shows that seven lawsuits were tendered to Home Insurance less than a month after they were known to Giant. Pursuant to Section 20-665(C)(4), "notice of claims to the receiver, conservator or liquidator of the insolvent insurer shall be deemed notice to the fund or its agents." These claims are not barred under the statutory language of Section 20-679 because they were not known to Giant until it was served.

Moreover, we will argue that the Guaranty Fund clearly exceeded its statutory authority in the Resolution adopted on April 16, 1998, which barred "any and all" claims when the statute allows for barring only "known claims."

As stated, we plan to proceed with an argument similar to that outlined above. We do not believe this is an argument the Guaranty Fund should want to address publicly, either at the trial or appellate level. As such, we believe it makes sense for both parties to agree to a release of fees in exchange for a dismissal following Giant's settlement with AIG.

Please let us know whether your client will agree to a dismissal, with an agreement to waive fees and costs, following settlement with AIG. This certainly would be a sensible way to prevent incurring attorneys' fees.

Philip C. Hunsucker

---

**Date:** 10/01/2008

**Type:** User

**User ID:** igfjdd

**Subject:** Received a copy of D/A Talamante's e-mail to Giant/Western's

Received a copy of D/A Talamante's e-mail to Giant/Western's counsel confirming the tentative agreement:

Phil – Following up on our telephone conversation yesterday, you stated that Giant is willing to settle this matter with the Fund under the terms set forth in my e-mail below, provided that the release is limited to all past, present and future MTBE claims. I have confirmed that that modification is acceptable to the Guaranty Fund.

To summarize, the parties agree to settle under the following terms:

1. Giant dismisses all counts against the Guaranty Fund with prejudice;
2. Both parties waive all fees and costs; and
3. Both parties release each other from all past, present and future MTBE claims.

In order to provide the parties an opportunity to consummate this settlement, the Guaranty Fund agrees to extend the deadline for Giant's response to the Fund's motion for summary judgment for 30 days. My understanding is that Allison is working on a stipulation to that effect now.

Please let me know if I have misstated anything. Thanks.

Ryan J. Talamante

GLOVER & VAN COTT, P.A.

2025 N. Third St., Suite 260

Phoenix, AZ 85004

(602) 257-9160 phone

(602) 257-9180 fax

rtalamante@gloverbancott.com

Exh. B-N

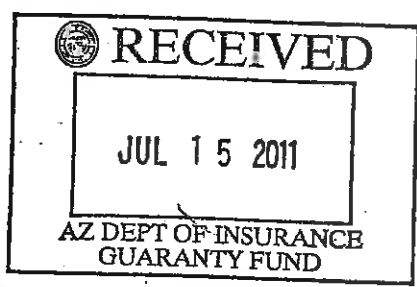
**THE HOME INSURANCE COMPANY IN LIQUIDATION**

P.O. Box 1720  
Manchester, New Hampshire 03105-1720  
Tel: (800) 347-0014

Date: July 12, 2011

Class V Creditor

Michael Surguine, Executive Director  
Arizona Property & Casualty Insurance Guaranty Association  
1110 West Washington St. #270  
Phoenix, AZ 85007



RE: NOTICE OF PARTIAL DETERMINATION  
Proof of Claim No.: GOVT18901-12

Determination Summary

Expenses incurred and reported to the Liquidator ("Liquidator") of The Home Insurance Company ("Home"), for the period beginning 01/01/06 through 12/30/2010 (see copy of May 12, 2011 correspondence and Attachment A for details.)

Amount Allowed by Liquidation: \$27,674.53

Dear Mr. Surguine:

Further to our correspondence of May 12, 2011, the purpose of this letter is to provide the Arizona Property & Casualty Insurance Guaranty Association (the "Association") with a determination regarding expenses that have been presented to the Liquidator of the Home, under the Proof of Claim enumerated and captioned above. The determination is consistent with that which was outlined in the referenced May 12, 2011 correspondence for which no disagreement or other response was furnished the Liquidator. The Liquidator expects to present notice of this determination to the Superior Court for Merrimack County, New Hampshire (the "Court") for approval in accordance with New Hampshire Revised Statutes Annotated ("RSA") §402-C:45. Read this Notice of Determination carefully as it sets forth your rights and obligations in detail.

The Liquidator has now made a Determination on the claim as set forth above in accordance with The Home's Claim Procedures (the "Procedures")<sup>1</sup> approved by the Court. If the claim has been allowed, in whole or in part, it has been assigned a Class V priority as a "residual claim" pursuant to the Order of Distribution set forth in RSA §§402-C:44 and 404-B:11 and it will be placed in line for payment as directed by the Court from the assets of The Home.

<sup>1</sup> A copy of the January 19, 2005 *Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation* may be obtained from the website of the Office of the Liquidation Clerk for The Home Insurance Company in Liquidation and US International Reinsurance Company in Liquidation, [www.hicileclerk.org](http://www.hicileclerk.org).

You may have other claims against The Home for which you will receive other Notices of Determination. You will have a separate right to dispute each Notice of Determination. If your claim has been allowed in whole or in part, this Notice of Determination does not mean that your claim will immediately be paid, or that it will be paid in full. The Liquidator will make distributions from The Home's assets on allowed claims in accordance with orders of the Court as may be entered from time to time. If you have any questions please contact James Hamilton VP Claims Systems at the above captioned address.

Any and all distributions of assets may be affected and/or reduced by any payments you have received on this claim from any other sources. Distributions by The Home are based on The Home's knowledge and/or understanding of the amounts you have received in settlement and/or reimbursement of the expenses forming the subject of this Notice of Determination from all other sources at the time of the allowance or thereafter. Should The Home subsequently become aware of prior recoveries from other sources, The Home has the right to reduce its future distribution payments to you to the extent of such other recoveries or to seek and obtain repayment from you with respect to any previous distributions that were made to you.

Further, if you seek or receive any future payment from any other source after you receive a distribution payment from The Home, you must notify The Home at the address below, and The Home has the right to recover from you the distribution payments in whole or in part, to the extent of any such other future recoveries.

The following instructions apply to this Notice of Determination:

#### Claim Allowed

1. If this claim has been allowed in whole or in part and you agree with the determination, sign and date the enclosed Acknowledgment of Receipt of the Notice of Determination and mail the completed Acknowledgment to The Home.

#### Claim Disallowed

2. A. If all or part of your claim has been disallowed or you wish to dispute the determination or creditor classification for any reason, you may file a Request for Review with the Liquidator. The Request for Review is the first of two steps in the process of disputing a claim determination. The Request for Review must be received by the Liquidator within thirty (30) days from the date of this Notice of Determination.

#### REQUEST FOR REVIEW FILING REQUIREMENTS:

- (a) Sign and return the attached Acknowledgment of Receipt form.

- (b) On a separate page, state specifically the reasons(s) you believe that the determination is in error and how it should be modified. Please note the Proof of Claim number on that page and sign the page.
- (c) Mail the Request for Review to:  
The Home Insurance Company in Liquidation  
P.O. Box 1720  
Manchester, NH 03105-1720

You should keep a copy of this Notice of Determination, Acknowledgment of Receipt and Request for Review, then mail the Original Request for Review to us by U.S. Certified Mail.

- (d) The Request for Review must be received by the Liquidator within thirty (30) days from the date of this Notice of Determination. The Request for Review must be in writing.
- (e) The Liquidator will inform you of the outcome of the review and issue to you a Notice of Redetermination.

**IF THE REQUEST FOR REVIEW IS NOT FILED WITHIN THE THIRTY (30) DAY PERIOD, YOU MAY NONETHELESS DIRECTLY FILE AN OBJECTION WITH THE COURT WITHIN SIXTY (60) DAYS FROM THE MAILING OF THIS NOTICE. You do not have to file the Request for Review as a prerequisite to dispute the Notice of Determination. Please see Section 2B for the Objections to Denial of Claims.**

2. B. If your claim is disallowed in whole or in part, you may file an Objection with the Court at

Office of the Clerk, Merrimack County Superior Court  
163 N Main Street, P.O. Box 2880  
Concord, New Hampshire 03301  
Attention: The Home Docket No.03-E-0106

within sixty (60) days from the mailing of the Notice of Determination and bypass the Request for Review procedures as noted in Section 2A (above). If the Request for Review is timely filed as outlined in Section 2A the Liquidator will inform you of the outcome of the review and issue to you a Notice of Redetermination. If the redetermination is to disallow the claim, you may still file an Objection with the Court. You have sixty (60) days from the mailing of the Notice of Redetermination to file your Objection. Please also sign and return the Acknowledgment of Receipt form and mail a copy of the Objection to the Liquidator.

**IF YOU DO NOT FILE AN OBJECTION WITH THE COURT WITHIN EITHER SIXTY (60) DAYS FROM THE MAILING OF THE NOTICE OF**



DETERMINATION OR SIXTY (60) DAYS FROM THE MAILING OF THE NOTICE OF REDETERMINATION, YOU MAY NOT FURTHER OBJECT TO THE DETERMINATION.

A timely filed Objection will be treated as a Disputed Claim and will be referred to the Liquidation Clerk's Office for adjudication by a Referee in accordance with the Procedures.

3. You must notify the Liquidator of any changes in your mailing address. This will ensure your participation in future distributions, as applicable. For purposes of keeping The Home informed of your current address, please notify us at the address given above.

Sincerely yours,

Peter Bengelsdorf, Special Deputy Liquidator  
For Roger A. Sevigny, Liquidator  
of THE HOME INSURANCE COMPANY

THE HOME  
INSURANCE  
COMPANY IN  
LIQUIDATION



---

61 Broadway 6<sup>th</sup> FL  
New York, New York 10006-2504

James Hamilton  
TEL: 212 530 3113  
FAX: 212 530 4063

May 12, 2011

Michael Surguine, Executive Director  
Arizona Property & Casualty Ins. Guaranty Association  
1110 West Washington St. #270  
Phoenix, AZ 85007

Re: Administration expenses allocated to The Home

Dear Mike:

Further to our earlier conversation and my letter of December 24, 2009, the purpose of this correspondence is to provide the Arizona Property & Casualty Insurance Guaranty Association (the "Association") with a preliminary response to the Association's classification of certain asserted administration expenses. Said charges have been submitted to the Liquidator ("Liquidator") of The Home Insurance Company ("Home") seeking to be allowed as an authorized estate expenditure.

Our review has identified three items within the Association's administration expenses, as reported in their Quarterly Financial Information Questionnaires ("FIQ") that raise concerns. The most significant issue involves the *Giant Industries, Inc.* ("Giant") groundwater pollution claims. Specifically, allocated expenses incurred as respects Giant during the period March 1, 2008 thru June 30, 2009 were submitted for reimbursement. The request for NCIGF dues and Investment Management Fees is also problematic.

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

**THE HOME  
INSURANCE  
COMPANY IN  
LIQUIDATION**




work on a claim-by-claim basis. As late notice was a complete and immediately evident defense to the claim, the Association needed to establish only two claim records, i.e., one for each primary policy.

Since the yearly administration expense in 2007 totaled \$31,000.00 based on five claims, the Liquidator is willing to allow that same amount for the 2008 and 2009 years. Based on the calculations shown in the attached work sheet, the Liquidator intends to issue a Notice of Determination for a class I allowance of \$150,694.92 for the period beginning 01/01/2006 through 12/31/2010. Of course, you will have a right to dispute the Liquidator's determination (once it is issued) via the established claim procedures for seeking redetermination by the Referee or the Court.

The NCIGF dues, reported as \$75,881.97 on the FIQ will be subject of a separate Notice of Determination. This expense does not appear to meet the definition of Class I administration expenses. Additionally, the allocation of the expense category reported in the first quarter of 2009, totaled \$52,572.44, which is 10 times the prior amounts. The Liquidator intends to allow as a Class V claim the same amount reported in 2008 or \$4,365.00. The Claim V notice will total \$27,674.53. You will have a separate right to dispute each Notice of Determination.

The investment fees relate to the Association's handling of its investment portfolio maintained for current and future insolvencies. Such costs of handling are, or should be, offset by commensurate growth in investment value. Furthermore, the Association is holding The Home's Special Deposit of \$1,000,000.00 and no accounting has been produced to show that the asserted investment expenses are solely being incurred to manage The Home's funds or to reflect interest earned on the account. Before issuing a Notice of Determination, the Liquidator wants to afford the Association with an opportunity to provide an accounting and support for the submitted amount.

Given the significant issues referenced above, we seek to engage in an open dialogue prior to issuing determinations, and we request a response within thirty days. Attached for your reference is my supporting work sheet reconciling the FIQ's. I look forward to hearing from you.

Regards,  
  
James Hamilton  
VP Claims Systems

cc: Peter Bengelsdorf, Special Deputy Liquidator  
Christopher Marshall, Assistant Attorney General

HOME INSURANCE CO. IN LIQUIDATION  
DRAFT - FOR DISCUSSION PURPOSES ONLY

AZ P&C SUMMARY OF FINANCIAL INFORMATION REPORTED ("FIG")

Description	Home's Code	Amount
Accounting/Legal	2658	\$ 3,863.88
Administrative	2681	\$ 120,199.70
Misc	2677	\$ 11,315.00
Equip & Maint	2665	\$ 18,864.94
Postage	2669	\$ 1,123.81
Rent	2663	\$ 7,334.98
Telephone	2674	\$ 1,104.68
NCIGF Dues	2670	\$ 11,104.60
Bank fees	2681	\$ -
		\$ 174,911.55

The Home's Notices of Determination  
Date Issued Class I  
GOVT18901-02 10/24/2008 Class I  
GOVT18901-04 11/22/2008 Class V

Amount  
\$ 163,806.95  
\$ 11,104.60 Pending Request for Review  
\$ 174,911.55

AZ P&C Reported :

Description	Home's Code	Year 2006		Year 2006		Year 2007		Year 2007		Year 2008		Year 2008		Year 2009		Year 2009		Year 2010		Year 2010		Converted to UDS to Date 12/31/2010
		Reported activity	FIG	Reported adjustments	FIG	Reported activity	FIG	Reported adjustments	FIG	Reported activity	FIG	Reported adjustments	FIG	Reported activity	FIG	Reported adjustments	FIG	Reported activity	FIG	Reported adjustments	FIG	
Accounting/Legal	2658	\$ 1,126.17				\$ 986.70				\$ 8,773.02				\$ 582.42				\$ 146.10				\$ 15,458.28
Split out Legal 01/09	2658																					\$ 10,591.49
Administrative	2681	\$ 26,246.32		\$ (0.01)		\$ 21,796.40				\$ 185,604.98		\$ (0.01)		\$ 9,428.39				\$ 1,163.08				\$ 10,591.49
Misc	2677	\$ 1,700.57		\$ (2,051.43)		\$ 1,158.55				\$ 7,109.48				\$ 131,326.19				\$ 15,756.72				\$ 500,909.28
Equip & Maint	2665	\$ 3,974.89		\$ (8,140.30)		\$ 2,428.21				\$ 19,124.47				\$ 295.86								\$ -
Postage	2669	\$ 331.86		\$ 0.01		\$ 113.26				\$ 317.51				\$ 68.59								\$ -
Rent	2663	\$ 662.95		\$ (0.01)		\$ 1,427.27				\$ 52.76				\$ 62.76				\$ 17.29				\$ (1,956.48)
Telephone	2674	\$ 320.92				\$ 324.95				\$ 17,576.00				\$ 2,812.14				\$ 716.67				\$ 30,529.98
NCIGF Dues	2670	\$ 5,930.75		\$ 1,153.00		\$ 3,917.36				\$ 4,366.72				\$ 1,757.79				\$ 207.80				\$ (5,973.70)
Bank fees	2681	\$ 2,770.57		\$ 23,817.92		\$ 2,847.66				\$ 14,219.72				\$ 513.68				\$ 209.83				\$ (44,310.78)
Split out Office Exp 01/09	2666													\$ 1,639.85				\$ 100.46				\$ 1,740.31
Split out Investment Mgr Fees 01/09	2654													\$ 54,802.44				\$ 2,178.92				\$ 216,899.94
		\$ 43,084.80		\$ 14,779.18		\$ 35,001.36				\$ 259,348.48		\$ (0.01)		\$ 238,874.19				\$ 32,484.72				\$ 798,464.27

Average number of claims per Year :	9 Claims per month	5 Claims per month	10 months of 82 claims	6 months of 82 claims	1 Claim per month
Remove from the totals above	\$ (5,930.75)	\$ (3,917.36)	\$ (4,366.72)	\$ (52,572.44)	\$ (9,095.70)
NCIGF Dues	\$ -	\$ -	\$ -	\$ (19,432.83)	\$ (2,912.15)
Investment Mgr Fees	\$ -	\$ -	\$ -	\$ 166,868.92	\$ 20,476.87
Adjusted Net per Year	\$ 37,134.05	\$ 31,084.00	\$ 254,982.76	\$ 166,868.92	\$ 20,476.87

Proposed Home Class I Recommendation:	\$ 37,134.05	\$ 34,084.00	\$ 31,000.00	\$ 31,000.00	\$ 20,476.87	\$ 150,694.92
Proposed Home Class V Recommendation:	\$ 5,930.75	\$ 3,917.36	\$ 4,366.72	\$ 4,365.00	\$ 9,095.70	\$ 27,674.53