THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

LIQUIDATOR'S MOTION FOR LEAVE TO FILE SUR-REPLY CONCERNING DEPARTMENT OF LABOR'S CLAIM

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby moves for leave to file the short sur-reply brief attached as Exhibit A concerning the claim of Hilda L. Solis, Secretary, United States Department of Labor ("DOL"), to address arguments first developed in DOL's Reply Brief in Further Support of Its Right to Class I or Class II Priority ("DOL Rep. Br."). As reasons therefor, the Liquidator states:

1. In its initial brief, DOL presented its arguments in five pages. DOL Br. at 9-13. In its reply, however, DOL expanded on its arguments in fifteen pages. DOL Rep. Br. at 3-17.

2. To respond to points made in DOL's expanded argument, the Liquidator seeks leave to file the five-page sur-reply brief submitted herewith. The sur-reply addresses the logical consequences of DOL's arguments concerning Class I priority in point 1, responds to DOL's statutory arguments with respect to Class II priority in point 2, and focuses on the critical distinction between the Special Fund and guaranty associations in point 3.

3. Counsel for the Liquidator has conferred with counsel for DOL and the guaranty associations concerning this motion. The DOL does not assent; the associations assent. In refusing to assent, DOL pointed to Section 15(a) of the January 19, 2005 Claims Procedures Order. That section does not contemplate either replies or sur-replies. In this case, DOL has

already been permitted to file a reply. Given the nature of the issues and DOL's significant development of its arguments in its reply, the Liquidator submits that it is appropriate to grant leave for a sur-reply in this instance.

WHEREFORE, the Liquidator respectfully request that the Court grant leave to file the Liquidator's sur-reply brief submitted herewith.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,

By his attorney,

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January 25, 2013

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Motion for Leave to File Sur-Reply Concerning Department of Labor's Claim was sent, this 25th day of January, 2013, by first class mail, postage prepaid to all persons on the attached service list.

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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company

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Exhibit A

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

Docket No. 03-E-0106

In the Matter of the Liquidation of The Home Insurance Company

LIQUIDATOR'S SUR-REPLY CONCERNING DEPARTMENT OF LABOR'S CLAIM

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), submits this sur-reply brief concerning the claim of Hilda L. Solis, Secretary, United States Department of Labor ("DOL") to address arguments first developed in DOL's Reply Brief in Further Support of Its Right to Class I or Class II Priority ("DOL Rep. Br."), which presented 15 pages of argument as opposed to the 5 pages in DOL's initial brief.[1]

1. DOL asserts that because the LHWCA assessments were billed and in part reflect second injury payments and expense projections after the Liquidation Order, that makes them Class I administration costs. DOL Rep. Br. 3-6. However, DOL's focus on the Special Fund's ongoing payments and future obligations only serves to obscure the critical fact that Home's obligation for such assessments stems from the existence of claims under pre-liquidation policies. The Special Fund's second injury payments are "attributable to" Home – and thus included in the calculation so as to produce an assessment against Home – only because they are made to claimants previously paid by Home. See Liq. Br. 7, 11. Home's obligation to pay such assessments thus arose at the time the workers were injured, even though their amount could only be calculated based on later payments and projections. DOL's argument in essence is that a

[1] In this sur-reply, the Liquidator uses defined terms as in the Liquidator's Section 15 Submission Concerning Department of Labor's Claim ("Liq. Br.").

right to payment that can only be calculated and billed at a post-liquidation date must have Class I priority. This is mistaken. By that logic, guaranty associations' and insureds' claims based on their post-liquidation payments under pre-liquidation policies should be Class I claims. However, such claims have only Class II priority.

Administration cost priority accordingly requires more than just a right existing (or even arising) post-liquidation. The claim must also arise from an authorized activity in furtherance of the liquidation, not from pre-liquidation circumstances. See In re the Liquidation of Home Ins. Co., 158 N.H. 396, 399 (2009). DOL contends that it satisfies this prong of the test because payment of the assessments is part of "dealing with the business and property of Home." DOL Rep. Br. 6-7. But the assessments do not stem from any action of the Liquidator in liquidating Home. The only post-liquidation actions giving rise to the assessments were those of the Special Fund in paying second injury claims (for which it is independently liable under Section 908), projecting future Special Fund expenses and calculating the assessments. These activities, and thus the assessments, have nothing to do with dealing with the business and property of Home in liquidation. DOL's argument would make any obligation becoming due post-liquidation into an administration expense, contrary to the express limitation of Class I priority to expenses "of administration." RSA 402-C:44, I.[2]

2. DOL contends that the phrase "policy related" in the priority statute includes more than just claims under policies, and that the Special Fund assessments "relate" to policies. DOL Rep. Br. 9-13. However, the Class II priority provision must be read as a whole. The

[2] The cases on which DOL relies are quite distinguishable. In In the Matter of the Liquidation of Home Ins. Co., 154 N.H. 472, 484-85 (2006), the court held only that payments under a post-liquidation contract entered by the Liquidator to collect reinsurance were entitled to Class I priority. There is no post-liquidation contract here. In North Carolina v. United States, 1998 WL 178374 *4 (4th Cir. Apr. 16, 1998), the court concluded that taxes on income that was realized by the insurer after liquidation (income whose receipt had been deferred and not been recognized pre-liquidation) were administration costs. Home has received no post-liquidation benefit here. The Liquidator has not done anything nor has the estate received any benefit that could give rise to a Class I claim.

"policy related claims" language at the beginning of RSA 402-C:44, II, is an operative part of the statute, as is shown by the use of a similar phrase in each of the priority classes in RSA 402-C:44, I-X, in one instance without any following text. RSA 402-C:44, III ("Claims of the Federal Government.").[3] Where there is additional text, such as the phrase "within the coverage of and not in excess of applicable limits," it serves to specify and clarify the application of the introductory phrase. However, the initial phrase encapsulates, and thus limits, the whole of the following text. DOL's assertion that the Class II priority for claims of guaranty associations is not limited to claims with respect to policies is thus mistaken.[4]

DOL suggests that the phrase "policy related" encompasses any "link" to policies, and that the Legislature would have chosen another phrase if it had meant claims under policies. DOL Rep. Br. 11-12. This is merely quarreling with the Legislature's wording when its intent is clear. The common meaning of "policy related claims" refers to claims for contractual obligations of the insurer under the policy. It does not encompass claims for assessments, which are not contractual obligations. If there were any ambiguity, it is clarified by the specification that insureds' and claimants' claims be "within the coverage of and not in excess of the applicable limits of insurance policies and contracts issued by the company." RSA 402-C:44, II. That phrase is unnecessary as to guaranty association claims because the "covered claims" paid by guaranty associations are by definition within policy coverage and limits. RSA 404-B:5, IV.

Most fundamentally, DOL's position that the Class II priority encompasses claims other than for policy obligations is contrary to the purpose of the Act to protect people insured by

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[3] Even if "policy related claims" were viewed as a title, "it provides significant indication of the legislature's intent in enacting the statute." Garand v. Town of Exeter, 159 N.H. 136, 142 (2009) (quoting State v. Gubitosi, 157 N.H. 720, 725 (2008)).

[4] The Liquidator has assigned various guaranty association claims to priority Classes I, II and V. See, e.g., Liquidator's Report of Claims and Recommendations as of September 7, 2010 , Schedule 1 at 1, 4, 6 (filed September 13, 2010), approved on September 22, 2010.

Home and people with claims against those insured by Home by reserving assets for them. See Liquidation of Home, 154 N.H. at 488. The Class II priority reserves assets for insureds, for claimants against insureds, and for guaranty associations that have paid "covered claims" of insureds and claimants against insureds. See Ruthardt v. United States, 303 F.3d 375, 382 (1st Cir. 2002) ("The priority that Massachusetts affords to guaranty funds is part and parcel of an integrated regime aimed at the protection of policyholders."), cert. denied, 538 U.S. 1031 (2003). That protection would be diluted by granting non-policy claims such as Special Fund assessments the same priority.

3. DOL contends that the Special Fund is "in part like" a guaranty association because it makes Section 918 payments (which are discretionary and less than 5 percent of Special Fund outlays) and therefore a "similar organization." DOL Rep. Br. 2, 14. This disregards the crucial distinction. Guaranty associations exist to step in and pay covered claims when an insurer becomes insolvent. The Special Fund does not. As the District Court held in this case, the Special Fund does not provide for protection against insurer insolvencies. See Solis v. Home Ins. Co., 848 F.Supp.2d 91, 97, 106 (D.N.H. 2012). Section 918 payments are intended to protect workers against an employer's failure to pay, not an insurer's. Id. (The DOL itself recognizes the role of guaranty associations and insurer deposits where an employer's insurer is insolvent. See Liq. Br. 6.) The "similar organizations" to NHIGA and NHLHIGA referred to in RSA 402-C:44, II, are the other guaranty associations. DOL's contention that the Special Fund is a "similar organization" disregards the legislative purpose to provide priority to these entities that pay claims under policies because the insolvent insurer cannot.

CONCLUSION

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

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,

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