

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 2011-HICIL-50
2011-HICIL-51
Proof of Claim Number: GOVT18901-11
GOVT18901-12
Claimant Name: Arizona Property and Casualty
Insurance Guaranty Fund

**CLAIMANT ARIZONA PROPERTY AND CASUALTY
INSURANCE GUARANTY FUND'S MOTION FOR LEAVE
TO FILE RESPONSE TO LIQUIDATOR'S SUR-REPLY**

Claimant Arizona Property and Casualty Insurance Guaranty Fund (the "Fund") moves for leave to file the attached Response and related exhibits to respond to evidence submitted and an argument thereon raised by the Liquidator ("Liquidator") of The Home Insurance Company ("Home") in his proposed Sur-Reply Brief. As reasons therefor, the Fund states as follows:

1. In an attempt to rebut the express sworn statements set forth in paragraph 9 of the Affidavit of Michael E. Surguine (the "Surguine Affidavit") submitted by the Fund, the Liquidator contends in his Sur-Reply Brief that the Fund did not conduct any individualized review and coverage analysis with respect to the forty lawsuits that had been brought against Giant Industries, Inc. ("Giant). The Liquidator proposes to submit three additional exhibits from the Fund's files to try to support the assertion in his motion for leave that the Fund "has not devoted effort to individualized coverage analysis, and only minimal effort to coverage regarding the claims as a group."

2. In his motion for leave, the Liquidator contends that the three exhibits which he cherry-picked from the Fund's files "fill out the record" in this matter and are "the most direct way to address the question of individualized coverage analysis." Not so. Those three exhibits provide evidence on only a small part of what in fact occurred in the Fund's handling of the Giant Claims because they reflect the handling of only two of the forty Giant lawsuits. The Liquidator's proposed exhibits portray only a very narrow slice of the evidence showing the Fund's efforts in reviewing the allegations of each of the Giant lawsuits and analyzing coverage issues with respect to those claims. The Referee should have the entire picture.

3. Therefore, the Fund requests leave to submit the attached Response which includes the Affidavit of John Draftz (the "Draftz Affidavit"), the Fund's Claims Manager who was responsible for handling the Giant Claims, along with the referenced exhibits. The Fund's proposed Response is short—only 6 pages—and explains how the file notes from each of the eighty Giant Claims as referenced in the Draftz Affidavit reflect a more complete and accurate picture of the efforts undertaken by the Fund to review the various allegations of those claims and to analyze the coverage issues presented.

4. On information and belief, the exhibits being attached to the Draftz Affidavit were provided to the Liquidator during the Liquidator's investigation of the Fund's claims. See Liquidator's Proposed Sur-Reply at ¶ 2.

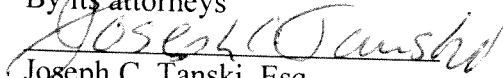
5. Counsel for the Fund has conferred with counsel for the Liquidator and the

Liquidator assents to the relief requested in this motion, and the Fund assents to the relief requested in the Liquidator's Motion for Leave to File a Sur-Reply .

Respectfully submitted

ARIZONA PROPERTY AND CASUALTY
INSURANCE GUARANTY FUND

By its attorneys


Joseph C. Tanski, Esq.

NIXON PEABODY LLP

100 Summer Street

Boston MA 02110

617-345-1000

October 15, 2012

CERTIFICATE OF SERVICE

I hereby certify that the foregoing and all attachments hereto were served by email and first class mail on all parties in these proceedings on October 15, 2012.



Joseph C. Tanski

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE
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Claimant Name: Arizona Property and Casualty
Insurance Guaranty Fund

**RESPONSE OF CLAIMANT ARIZONA PROPERTY AND CASUALTY
INSURANCE GUARANTY FUND TO LIQUIDATOR'S SUR-REPLY**

Pursuant to Section 15 of the Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company In Liquidation, Claimant Arizona Property and Casualty Insurance Guaranty Fund (the "Fund") submits this response to address several incorrect assertions set forth in the Sur-Reply filed in this matter by the Liquidator ("Liquidator") of The Home Insurance Company ("Home"). In his Sur-reply the Liquidator continues to paint an inaccurate picture of the Fund's handling of the claims made by Giant Industries, Inc. ("Giant") against the Fund (the "Giant Claims"). The Liquidator ignores the undisputed facts showing that the Fund devoted time and effort in reviewing each of the Giant Claims and analyzing various coverage issues with respect to those claims. The Fund's review of the Giant Claims was not limited to the time bar defense. The 80 files created for the Giant Claims were not sham files.

1. The Liquidator mistakenly asserts throughout his Sur-Reply that the Fund did not conduct any "individualized coverage analysis" with respect to the Giant Claims under the Home Policies. In fact, as set forth in the affidavit of John Draftz (the "Draftz Aff." submitted

herewith) who was the Senior Claims Adjuster of the Fund responsible for handling the Giant Claims, the Fund reviewed the allegations of each of the Giant Claims as they were submitted by Giant to the Fund. See Draftz Aff. ¶ 3. The Fund also analyzed those portions of the Home policies, declaration pages and other insurance information that Home had provided to the Fund to determine whether the Home policies may provide coverage for any of the Giant Claims. Id.; see also Surguine Aff. Ex. I (Ex. 2 to Affidavit of Kevin Kelley attached to Fund's Statement of Facts in Support of Motion for Summary Judgment in the Giant coverage action). The Fund devoted time and effort in both reviewing the policy information that was then available and considering policy defenses on an individualized basis as to each of the Giant Claims. Id.; see also Surguine Aff. ¶ 9.

The Fund preliminarily concluded both (a) that the Fund appeared to have no statutory obligation because each of the Giant Claims had been presented after the bar date established by the Home Liquidation Order, and (b) that based on the policy information then available to the Fund, the Fund may also not have any coverage obligation under the Home Policies to the extent that the Giant claims sought punitive damages, alleged fraud, or alleged knowledge by Giant of the MBTE hazard before inception of the Home Policies, among other things. See Draftz Aff. ¶ 4. The Fund also preliminarily concluded that the Fund may not have any statutory obligation under the Home Policies because, according to the schedule of other insurers for Giant that Home had provided to the Fund, the insured had other primary and excess policies including policies for general liability, excess liability, pollution liability (including pollution liability defense costs), umbrella liability, and underground storage tank pollution, and the Arizona statute governing the Fund required exhaustion of other insurance. Id.

Moreover, the Fund's notes in its files for each of the Giant Claims refer to the Fund's analysis of the allegations of the Giant Claims and coverage issues and defenses with respect to those claims. Those notes clearly show, contrary to the Liquidator's assertion, that the Fund spent time and effort reviewing the allegations of the Giant complaints for the purpose of evaluating coverage under the two Home policies. In addition to noting the time bar defense, the Fund referenced with respect to each of the Giant Claims the various other defenses to general liability coverage which could be implicated by the complaint, including, but not limited to, time bar, other insurance, "punitives, fraud, known hazard, etc." See Draftz Aff. ¶ 6 and Exhibits 1-80 attached thereto.

Although the file notes describing the Fund's work are similar in some respect for each of the Giant Claims, those notes differ based on the varying allegations in the forty lawsuits as to the plaintiffs involved (municipalities, water districts, states, private corporations), the causes of action asserted (claims for public and private nuisance, strict liability for design defect and failure to warn, negligence, violations of various state statutes regarding environmental contamination and unfair trade practices, among others), and the type and amount of relief requested (varying amounts requested for compensatory damages and punitive damages and for equitable relief). See Draftz Aff. ¶ 7 and Exhibits 1-80. The Liquidator seeks to turn a blind eye to the Fund's efforts on each of the Giant Claims by submitting, as his Exhibits 17, 34 and 35, the file notes for only three of the Giant Claims and branding them as "typical."

Consequently, as reflected in Fund's file notes for the Giant Claims and in Mr. Draftz's affidavit, the Fund conducted individualized review and coverage analysis for each and every one of the Giant Claims before the Fund issued its letters with respect to the Giant Claims on March 5, 7, 10, 11, 12 and 14, 2008. See Draftz Aff. ¶ 8. In those letters, the text of which is set

forth in the file notes for each of the Giant Claims, the Fund informed the insured both that the Fund was denying coverage based on the bar date established by the Home Liquidation Order and that the Fund was reserving “all statutory and/or policy defenses it may have in connection with [the Giant Claims, whether stated or not in this letter.” See Draftz Aff. ¶ 5. That review and coverage analysis was in addition to the review and analysis that the Fund later conducted, with the assistance of the Fund’s coverage counsel Ryan Talamante, in April and May 2008 after the Giant coverage action had been brought and after the Fund had received from the Liquidator additional information regarding the Home Policies, as referenced in Exhibit 35 to the Liquidator’s Sur-Reply.

Based on these undisputed facts and documentary evidence, there is no basis for the Liquidator’s assertion at page 2 of his Sur-Reply that the “Fund’s notes in the files other than the master file do not contain any policy or individualized coverage analysis,” or for the Liquidator’s conclusions stated at page 4 of his Sur-Reply that it appears that the time that the Fund spent on coverage issues for the Giant Claims was “less than 3 ½ hours (between 11:39 and 3:04 on April 29, 2008” and that the Fund addressed them “ only at a high level for all of the matters combined.”

2. Second, the Liquidator persists in mistakenly asserting his conclusion, at page 1 and footnote 3 of his Sur-Reply, that the Fund “never needed to undertake any individualized coverage analysis because [the Fund’s] denials [of coverage] (Liq. Ex. 15) and the later summary judgment motion (Liq. Ex. 18) were based on timeliness.” As explained in the Fund’s Memorandum of Facts and Law at 7-10, it was far from an open and shut case that the Arizona time bar statute eliminated all liability of the Fund. To the contrary, Western Refining, Inc. (“Western”), made clear to the Fund that Western disagreed with and would contest the time

bar/late notice defense to coverage asserted by the Fund if Western did not obtain full relief from other insurers. See Surguine Aff. ¶ 15 and Ex. L. Indeed, in view of the evidence suggesting that at least 31 of the 40 Giant lawsuits were not known claims until after June 13, 2004 (the Liquidator's bar date), see Surguine Aff. ¶ 11 and Ex. F, it appears that many of the Giant Claims would not have been time barred if Western had not been able to obtain the relief it needed from other insurers and instead went forward with its plan to litigate the time bar issue with the Fund. Thus, the Fund acted reasonably in undertaking the individualized coverage analysis for the Giant Claims as described in the affidavits of Michael E. Surguine and John Draftz.

CONCLUSION

Accordingly, the Fund's 80 files were not sham files as contended by the Liquidator. Each of the 40 Giant lawsuits was a distinct claim which required and received individualized coverage analysis with respect to the two Home policies. The Liquidator has not met his burden of showing a sufficient basis on which to disallow the Fund's claim. See In the Matter of First Central Insur. Co. v. Auerbach, 15 A.D.3d 658, 659 791 N.Y.S.2d 123, 124 (App. Div. 2nd Dept. 2005) (Superintendent of Insurance who is responsible for providing an economical liquidation of insolvent insurance companies failed to satisfy his burden of demonstrating a sufficient basis for disclaiming coverage for claim).¹

The Liquidator's decisions to disallow the Fund's claimed administrative expenses and to classify all of the NCIGF dues paid by the Fund as a Class V claim are unjustified and unreasonable because they are not supported by applicable law and are contrary to the facts as set forth in the affidavits and exhibits submitted by the Fund herewith. Therefore, the Liquidator's decisions should be rejected and the Fund's claims in these proceedings should be allowed in the

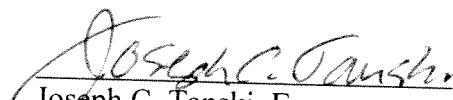
¹ The Liquidator contends at page 2 of his Sur-Reply that "the burden of proving its claim rests on the [Fund]." Significantly, the Liquidator cites no statutory or legal authority to support that assertion.

total amount of \$446,838.25 as Class I claims in accordance with RSA §§ 402-C:44 and 404-B:11.

Respectfully submitted

ARIZONA PROPERTY AND CASUALTY
INSURANCE GUARANTY FUND

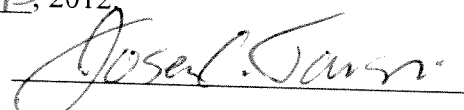
By its attorneys


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October 15, 2012

CERTIFICATE OF SERVICE

I hereby certify that the foregoing and all attachments hereto were served by email and first class mail on all parties in these proceedings on October 15, 2012.


Joseph C. Tanski