UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

ROGER A. SEVIGNY, in his official capacity as INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, as LIQUIDATOR OF THE HOME INSURANCE COMPANY, Plaintiff, v. THE UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES, Defendants.	Civil Action No. 13-401-PB

LIQUIDATOR'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS

The plaintiff, Roger A. Sevigny, in his official capacity as Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby opposes the motion to dismiss filed by the defendants the United States of America and Eric H. Holder, Jr., in his official capacity as Attorney General of the United States ("Attorney General" and, collectively, "United States" or "defendants").

The United States presents a variety of arguments, many of which seem to assume that only suits concerning past breaches of federal law are cognizable. However, this is a declaratory action. In Count I, the Liquidator seeks a declaration of non-liability under 31 U.S.C. § 3713 ("Federal Priority Statute" or "Priority Statute") to allow him to proceed with a 15% interim distribution to creditors of the insolvent Home with allowed Class II (policy level) claims. The Liquidator has alleged that there is an actual controversy over the United States' assertion of Priority Statute rights to unknown claims (rights that the Liquidator disputes); that the assertion

of those rights is injuring the Liquidator by preventing him from making a distribution of over $150 million – already approved by the supervising court – in fulfillment of his responsibilities as Liquidator; and that the acts of the United States present a clear threat of an action to enforce personal liability on the Liquidator under the Priority Statute if he makes the distribution. This threat is evident from (1) the United States' assertion of Priority Statute rights for unknown claims in a proof of claim filed in the Home liquidation; (2) its grant of waivers to the Liquidator "to permit" six early access distributions; (3) its continuing refusal to respond to the Liquidator's request for a waiver for the distribution here; and now (4) its shot-across-the-bow assertion that it has "7,000 possible claims." These actions have placed the Liquidator in the untenable position of either not making the distribution (and thus continuing to deny creditors any payment in the ten-year old Home liquidation) or facing potential personal liability for making the distribution. Declaratory relief is proper to resolve this dilemma. The Administrative Procedure Act ("APA") waives sovereign immunity to such relief, and the count presents a federal question because the threatened United States' action would arise under federal law.

The Liquidator also requests an order to compel the United States to respond to his request for a waiver. The proposed distribution will provide over $150 million to creditors (the first money paid out to creditors other than guaranty associations), and they are eagerly awaiting this 15% payment. The Liquidator – acting responsibly and in a manner respectful of the United States' asserted interests – requested that the United States provide a waiver, explaining that the interim distribution was conservatively calculated to account for projected liabilities at the 95% confidence level. At the time of the complaint, the United States had not responded to the request in 16 months other than by requesting information on two occasions. This substantial, unexplained delay presents a claim for relief. The APA waives immunity to this claim as well.

The United States' motion seeks to avoid both a declaration concerning the validity of its assertion of rights under the Federal Priority Statute and any obligation to respond to the Liquidator's request for a waiver of the asserted rights to permit the distribution. The motion would leave the Liquidator without remedy and the liquidation in limbo. It should be denied.

Background

1. The Home liquidation. The plaintiff is the present Insurance Commissioner of the State of New Hampshire as the Liquidator of Home. On June 13, 2003, the Superior Court for Merrimack County ("Supervising Court") declared that Home was insolvent and appointed the Insurance Commissioner and her successors as its Liquidator. Complaint (Dkt. # 1) ¶¶ 5-7. Under the New Hampshire Insurers Rehabilitation and Liquidation Act, N.H. RSA 402-C ("Act"), the Liquidator has exclusive authority, subject to oversight of the Supervising Court, to conduct the liquidation. Complaint ¶ 9; see RSA 402-C:21, :25. The liquidation proceeding is the proper forum for all claims against Home. Complaint ¶ 9; see RSA 402-C:57. The Act requires that the Supervising Court fix a deadline for filing of claims, and the deadline for Home was June 13, 2004. Complaint ¶ 11; see RSA 402-C:37. As a result of the liquidation, many claims under Home's policies were transferred to insurance guaranty associations. Complaint ¶ 12; see, e.g., RSA 404-B (establishing the New Hampshire Insurance Guaranty Association).

The object of an insurer liquidation is to determine claims, collect assets and distribute the assets to those with allowed claims in accordance with the statutory priorities. The Act provides for interim distributions of assets:

> Under the direction of the court, the liquidator shall pay dividends in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims.

RSA 402-C:46, I. The Act also provides for "early access" distributions to guaranty associations that are paying claims under policies issued by the insolvent insurer. RSA 402-C:29, III. Unlike general distributions, early access distributions are subject to "claw back" agreements under which guaranty associations will return distributions if necessary to pay claims of the same or higher priority. Id.

The Liquidator has made nine early access distributions to guaranty associations, six after receipt of waivers of Federal Priority Statute claims from the United States. Complaint ¶¶ 12-13. In February 2012, the Liquidator moved for approval of an interim 15% distribution to creditors with allowed Class II (policy level) claims. Id. ¶¶ 15-16. The Supervising Court approved that interim distribution on March 13, 2012. Id. ¶ 23. It has not been paid in light of the actions of the United States as described below.

2. The United States' "claims". The defendants the United States of America and its Attorney General are involved in the Home liquidation because the United States, through the Department of Justice, filed seven proofs of claim with the Liquidator. Six of those proofs of claim asserted known claims, and the Liquidator has addressed or provided for those claims. Complaint ¶¶ 25-31.[1] However, the United States also filed a "protective" proof of claim concerning unknown claims on June 11, 2004. Id. ¶¶ 25, 32. See Exhibit 1 (the Protective Proof of Claim). The Protective Proof of Claim stated that the United States, on behalf of four named agencies "and any other agencies that may have claims," filed "this protective Proof of Claim as it relates to any claims held by these agencies that are not currently known or are not currently known to relate to the Home Insurance Company." Id. ¶ 32 (emphasis added). It stated that "[i]f or when the United States learns of actual claims held by these agencies, the United States will

[1] The Liquidator has also addressed the three circumstances that may give rise to a federal claim of which he is aware. Complaint ¶¶ 33-36.

file an Amended Proof of Claim relating to the specific actual claim." Id. (emphasis added). The Protective Proof of Claim asserted rights under the Federal Priority Statute, saying that it "provides the United States with certain rights of priority that may be applicable." Id.

The Federal Priority Statute invoked by the United States provides that "[a] claim of the United States Government shall be paid first when . . . a person indebted to the Government is insolvent and . . . an act of bankruptcy is committed." 31 U.S.C. § 3713(a). To enforce this provision, the statute also provides for personal liability in 31 U.S.C. § 3713(b):

> A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

Liquidators of insolvent insurers have previously litigated with the United States concerning the application of the Federal Priority Statute. As a result, it is established that the McCarran-Ferguson Act, 15 U.S.C. § 1012, protects state liquidation priority statutes from preemption to the extent they serve to protect policyholders. United States Dep't. of Treasury v. Fabe, 508 U.S. 491, 493, 508-09 (1993); Ruthardt v. United States, 303 F.3d 375, 381-84 (1st Cir. 2002), cert. denied, 538 U.S. 1031 (2003). The policy-level claims afforded priority under the Act, RSA 402-C:44, II, thus have priority over non-policy claims of the United States assigned lower priority by RSA 402-C:44, III, notwithstanding the Priority Statute. See Fabe, 508 U.S. at 493. It is also established that liquidation filing deadlines do not apply to the United States. See Ruthardt, 303 F.3d at 384-86; Garcia v. Island Program Designer, Inc., 4 F.3d 57, 62 (1st Cir. 1993) (Breyer, C.J.). The United States thus may file claims in the Home liquidation regardless of state filing deadlines. See Ruthardt, 303 F.3d at 384-86; Complaint ¶¶ 38-39.

3. The Liquidator's requests for waivers and the United States' responses. The Liquidator has requested waivers of Federal Priority Statute claims from the United States to

permit distributions from the Home estate. The Liquidator has made nine early access distributions to guaranty associations. Complaint ¶ 12. At the Liquidator's request, the Supervising Court's orders approving the first six early access distributions provided that they were subject to receipt of a waiver of Federal Priority Statute claims from the United States. Id. ¶ 13. The Liquidator requested and the United States granted limited releases of claims under the Priority Statute with respect to the first six distributions. Id. See, e.g., Exhibit 2 (May 2010 Release Agreement between the United States and the Liquidator regarding the sixth early access distribution entered "[i]n order to permit a distribution of the assets of the estate").[2]

In February 2012, the Liquidator moved the Supervising Court for approval of an interim distribution of 15% on Class II (policy level) claims allowed by the Supervising Court. Complaint ¶ 16. The Supervising Court entered an order approving the distribution on March 13, 2012. Id. ¶ 23. In light of the position of the United States regarding the Federal Priority Statute, the order provided that the interim distribution is subject to receipt of a waiver of federal priority claims under the Priority Statute from the United States. Id.

To comply with New Hampshire law and assure equal treatment for all Class II claimants, the interim distribution needed to provide for all Class II obligations of Home even though they had not yet been determined. Complaint ¶ 19, Ex. A. The Liquidator engaged an internationally-known actuarial consulting firm to estimate Home's unpaid policy-related obligations, including both selected and 95% confidence level estimates. Id.[3] The Liquidator proposed a 15% interim distribution, which reflected the then-available assets ($1.382 billion)

[2] The United States was not willing to provide waivers for later early access distributions. Complaint ¶ 13. In light of the statutory claw back agreements with the guaranty associations, the Liquidator sought approval to make the seventh through ninth distributions without a waiver from the United States. Id.

[3] As in the case of financial statements of solvent insurers, the actuarial estimates include estimates of liability for known claims and also for claims that are not presently known ("incurred but not reported" or "IBNR" claims). Complaint ¶ 22. See Stephens v. Nat'l Distillers & Chem. Corp., 6 F.3d 63, 65 (2d Cir. 1993). The Liquidator's approach thus protects the interests of those with potential but unknown claims, including the United States.

less the projected expenses of the liquidation ($324 million) divided by the estimated Class II liabilities at the 95% confidence level ($6.584 billion). Id. ¶ 20. The 15% distribution left substantial assets available for later distributions. Based on claims and assets as of December 31, 2011, the distribution would involve $194.1 million ($152.7 million in cash and $41.1 million in early access distributions that would no longer be subject to claw back), leaving approximately $962 million in available assets. Id. ¶ 21. This is reasonable and prudent as it uses the 95% confidence level estimate of ultimate Class II liabilities and excludes from consideration future assets, including reinsurance recoveries and investment income. Id. ¶ 22.

On April 12, 2012, the Liquidator requested a waiver of federal priority claims from the United States Department of Justice to permit the interim distribution. Complaint ¶ 24, Ex. B. In response to a request made by the Department approximately three months later, on July 3, 2012, the Liquidator provided additional information on July 12, 2012. Id. ¶ 29. In response to another request made eight months later, on March 15, 2013, the Liquidator provided additional information on March 28, 2013. Id. Despite the Liquidator's offers to meet, provide information, and follow-ups in 2012 and 2013, the United States has not acted on the request. Id.

The United States' Memorandum ("US Mem."; Dkt. # 8 beginning at 4) states that – twenty months after the waiver request – the United States has conducted an "initial claims-identification process" that has "generated a list of 7,000 possible claims against policyholders as potentially responsible parties at Superfund sites," and that "[t]he EPA has been working diligently to refine this list of 7,000 potential claims." US Mem. at 4 n. 3. Noting that claim filing deadlines "do not apply" to it, the United States asserts that the process of "identifying specific claims" is time-consuming and that the EPA and other agencies "anticipate providing

the Liquidator with a refined list by December 2014." Id. It appears that the United States will not even consider providing a waiver to permit the distribution until sometime in 2015, if ever.[4]

STANDARD OF REVIEW

In ruling on a motion under Fed. R. Civ. P. 12(b)(1), the Court "must credit the plaintiff's well-pled factual allegations and draw all reasonable inferences in the plaintiff's favor." Merlonghi v. United States, 620 F.3d 50, 54 (1st Cir. 2010). It may also consider whatever evidence has been submitted. Id. A similar standard applies to Rule 12(b)(6) motions to dismiss for failure to state a claim. Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 52-53 (1st Cir. 2013). The Court may also look to documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice. Id. The Protective Proof of Claim and the Release Agreement to permit the sixth early access distribution are referenced in the Complaint (¶¶ 13, 32) and they are attached as Exhibits 1 and 2 to this opposition.

ARGUMENT

I. THE LIQUIDATOR'S CLAIM FOR DECLARATORY RELIEF TO PERMIT THE DISTRIBUTION IS PROPERLY BEFORE THE COURT.

The United States makes a number of arguments for dismissal of the Liquidator's count for declaratory relief. These arguments generally disregard the fact that the Liquidator requests a

[4] The bottom-up approach apparently being taken by the United States is unlikely to provide meaningful results. The United States appears to be attempting to identify claims against Home policyholders as responsible parties at Superfund sites based upon a list of the persons given notice of the Home liquidation. This requires assessment of the potential Home policyholders' involvements at a multitude of sites (a process which the United States apparently anticipates taking until December 2014). But that process will not be sufficient to determine if the United States has "specific" claims against Home because it fails to address recovery and coverage issues. To meaningfully identify claims, the United States will also have to consider whether the policyholder itself can satisfy its obligations, or if it has solvent insurance that would satisfy them. (The United States presumably will not pursue the insolvent Home if it is made whole from other sources.) Even if Home were the only potential source of recovery, any claim would depend upon many factors, including the type of policies issued to a policyholder (for example, workers compensation policies are irrelevant to pollution claims), when the Home policies were in effect (liability policies that preceded policyholder involvement at a site are irrelevant), the attachment point of coverage (excess liability coverage only attaches after underlying coverage is exhausted), and policy terms (liability policies may have various pollution exclusions). It is because of these types of complexities that solvent insurance companies – and the Liquidator in considering the appropriate percentage for an interim distribution – use actuaries to estimate liabilities including amounts for IBNR claims, which would encompass potential federal claims. See Complaint ¶¶ 22, 52.

declaration of non-liability under the Federal Priority Statute and act as if the Liquidator is somehow required to be seeking coercive relief for past "violations." The Liquidator, however, is seeking to resolve an actual controversy over the parties' rights and obligations under the Federal Priority Statute. The United States has created that controversy by asserting that the statute applies to unknown claims – an erroneous application of the statute – and causing the Liquidator to refrain from paying the interim distribution for fear of an action to impose personal liability. The Declaratory Judgment Act was enacted to provide for the resolution of paralyzing dilemmas such as that created by the *in terrorem* effect of the United States' assertion of rights under the Federal Priority Statute, and the United States' preliminary defenses fail.

A. The Administrative Procedure Act Waives The United States' Sovereign Immunity To Claims For Declaratory Relief.

The United States asserts sovereign immunity, but the APA provides a waiver of sovereign immunity in the second sentence of 5 U.S.C. § 702. That section "generally waives the Federal Government's immunity from a suit 'seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.'" Match-E-Be-Nash-She-Wish Band v. Patchak, 132 S.Ct. 2199, 2204 (2012) (quoting 5 U.S.C. § 702).[5] This waiver applies to the Liquidator's claim for declaratory relief against the Attorney General for the actions of the Department of Justice in asserting the Priority Statute in the Home liquidation.

The APA waiver covers "*all* equitable action for specific relief against a Federal agency or officer acting in an official capacity and thus applies to any suit whether under the APA or not." Commonwealth of Puerto Rico v. United States, 490 F.3d 50, 57-58 (1st Cir. 2007)

[5] The second sentence of 5 U.S.C. § 702 reads in full: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."

(quoting Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 186 (D.C. Cir. 2006)) (internal quotations and citations omitted; emphasis in original). The 1976 amendment that added the second sentence of § 702 was expressly intended to "withdraw[] the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus." S.Rep. No. 94-996, at 4 (1976); H.R.Rep. No. 94-1656, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6124. The waiver extends to "any" and "all" actions for non-monetary relief against an agency. S.Rep. No. 94-996, at 2; H.R.Rep. No. 94-1656, at 3, 9, reprinted in 1976 U.S.C.C.A.N. at 6123, 6129. It "is not limited to 'agency action' or 'final agency action,' as those terms are defined in the APA." Delano Farms Co. v. California Table Grape Comm'n, 655 F.3d 1337, 1344 (Fed. Cir. 2011) (waiver encompasses declaratory action); see Trudeau, 456 F.3d at 186 (same). See also Treasurer of New Jersey v. U.S. Dept. of Treasury, 684 F.3d 382, 397-400 (3d Cir. 2012) (discussing waiver cases from six circuits).

The United States contends that the Liquidator has not claimed that it acted or failed to act "unlawfully." US Mem. at 15-16. There is no such requirement in the second sentence of § 702, but the Liquidator has so alleged. The complaint alleges that the unknown claims asserted by the United States in the Protective Proof of Claim are not "claims" within the Federal Priority Statute, and that the assertion of unknown claims does not place the Liquidator on notice of claims within that statute. Complaint ¶¶ 50-51. See pages 21-22 below. The Attorney General has thus acted "unlawfully" in asserting Priority Statute rights as to unknown claims and in exercising oversight over the distributions on that basis. That is the dispute that the Liquidator seeks to resolve by declaratory relief. See Complaint, Prayer ¶¶ 1-3.[6]

[6] In light of the express waiver of sovereign immunity in 5 U.S.C. § 702 enacted in 1976, it is unnecessary to reach the question whether a waiver should also be found under Larsen v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949). That pre-§ 702 waiver case permitted actions to have a government official conform his conduct to federal law on the theory that "where an officer's powers are limited by statute, his actions beyond those limitations

B. The Liquidator's Claim For Declaratory Relief Regarding The Federal Priority Statute Properly Invokes Federal Question Jurisdiction.

The complaint invokes federal question jurisdiction under 28 U.S.C. § 1331, which provides jurisdiction over all civil actions "arising under" the laws of the United States. The defendants argue that the case does not "arise under" the Federal Priority Statute because the Liquidator is not asserting "rights or a cause of action" under it. US Mem. at 10-11. However, the complaint "arises under" the Priority Statute because the Liquidator seeks a declaration of the United States' rights under it. In the declaratory judgment context, the well-pleaded complaint rule asks whether there would be federal question jurisdiction "if the declaratory judgment defendant brought a coercive action to enforce its rights." Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 19 (1983). "Where the declaratory action is brought as an anticipatory defense to an expected . . . coercive action . . . it is the character of the threatened action . . . which will determine whether there is federal-question jurisdiction." Great Clips, Inc. v. Hair Cuttery of Greater Boston, 591 F.3d 32, 35 (1st Cir. 2010) (quoting Colonial Penn Group, Inc. v. Colonial Deposit Co., 834 F.2d 229, 233 (1st Cir. 1987)) (internal quotations omitted).

As discussed below, the Attorney General is effectively using the threat of an action under the Federal Priority Statute to prevent the Liquidator from making the interim distribution. The Priority Statute would "create[] the cause of action asserted" in a suit by the United States to impose personal liability on the Liquidator, and that action would present a federal question. See Gunn v. Minton, 133 S.Ct. 1059, 1064 (2013). The United States' assertion of federal rights under 31 U.S.C. § 3713 thus establishes jurisdiction over the Liquidator's declaratory complaint

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are considered individual and not sovereign actions." Muirhead v. Mecham, 427 F.3d 14, 19 (1st Cir. 2005) (quoting Larsen, 337 U.S. at 689). Here, the Attorney General has acted *ultra vires* by seeking to coerce the Liquidator into not making distributions authorized by state law based on a vastly overbroad application of the Priority Statute. At the least, that statute does not impose personal liability based on unknown claims of which the Liquidator cannot have notice. The United States' position is contrary to well-established law. See pages 21-22 below.

under 28 U.S.C. § 1331. See Great Clips, 591 F.3d at 35 (finding federal question jurisdiction in light of defendant's "likely assertion of federal rights"); PHC, Inc. v. Pioneer Healthcare, Inc., 75 F.3d 75, 78-79 (1st Cir. 1996) (same); 13D Wright, Miller, Cooper & Freer Federal Practice & Procedure: Jurisdiction § 3566 at 275-76 n. 28 and 282 n. 41 (3d ed. 2008) (citing cases).

C. There Is An Actual Controversy Concerning The Application Of The Federal Priority Statute To The Interim Distribution From The Home Liquidation.

The United States surprisingly contends this case should be dismissed for lack of an actual controversy. US Mem. at 11-12.[7] The Declaratory Judgment Act provides that, "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. "Actual controversy" refers to the "Cases" and "Controversies" that are justiciable under Article III. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126-27 (2007). To constitute a justiciable case or controversy

> require[s] that the dispute be definite and concrete, touching the legal relations of parties having adverse legal interests; and that it be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Id., 549 U.S. at 127 (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937)) (internal quotations omitted).

> Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

[7] The courts have declared rights under the Federal Priority Statute in declaratory actions brought by the liquidators of insolvent insurers against the United States in similar circumstances on several occasions. See U.S. Dept. of Treasury v. Fabe, 508 U.S. 491, 495 (1993) (liquidator filed declaratory action regarding priority of claims as to which the United States asserted priority); Ruthardt v. United States, 164 F.Supp.2d 232, 237 & n. 9 (D. Mass. 2001) (liquidator brought declaratory judgment action after United States stopped granting waivers), aff'd, Ruthardt, 303 F.3d at 379; Boozell v. United States, 979 F. Supp. 670, 671 (N.D. Ill. 1997); Gordon v. U.S. Dept. of Treasury, 668 F. Supp. 483, 485 (D. Md. 1987), aff'd, 846 F.2d 272 (4th Cir. 1988). The United States continues to actively litigate priority issues. See Solis v. Home Ins. Co., 848 F.Supp.2d 91 (D. N.H. 2012) (United States Secretary of Labor's declaratory judgment action challenging the Liquidator's assignment of federal claim to Class III priority).

Id. (quoting Maryland Cas. Co. v, Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)).

These standards are met here because there is a substantial controversy between the United States and the Liquidator over the application of the Federal Priority Statute to the interim distribution. The parties are legally adverse. The United States contends that the Priority Statute provides it with applicable rights of priority for unknown claims, as asserted in the Protective Proof of Claim, while the Liquidator contends that statute does not. The dispute arises in a concrete setting. The Liquidator has received approval of the Supervising Court to make the 15% interim distribution to policy-level claimants and is poised to make the distribution except for the *in terrorem* effect of the United States' invocation of the Priority Statute. The Liquidator has requested a waiver from the United States, but without success. The dispute over whether the Priority Statute applies in these circumstances is causing definite harm. It is preventing the Liquidator from fulfilling his statutory responsibility to make a distribution, to the detriment of the Class II creditors who stand to receive over $150 million.[8] Finally, the dispute can be conclusively resolved by specific relief: the requested declaration that the Liquidator may make the distribution without incurring personal liability to the United States under the Priority Statute.

The defendants' arguments that there is no justiciable controversy have no merit.

1. The Liquidator is not required to incur potential personal liability by making the interim distribution in order to challenge the United States' application of the Federal Priority Statute.

The United States contends that there is no justiciable dispute because the interim distribution is subject to receipt of a waiver so that the Liquidator can avoid liability by not making the distribution. US Mem. at 13, 14. However, the Supreme Court has expressly

[8] The Liquidator is charged with representing the interests of creditors and policyholders. See RSA 402-C:25, XIII (The Liquidator may "[p]rosecute any action which may exist in behalf of the creditors, members, policyholders or shareholders of the insurer against any officer of the insurer, or any other person.").

rejected the argument that a plaintiff's actions to avoid liability render a dispute non-justiciable. MedImmune, 549 U.S. at 128-37. In that case, the defendant contended that the plaintiff's continued payment of royalties meant there was no controversy. The Court disagreed. Id. It started with a summary of existing law that applies here:

> Our analysis must begin with the recognition that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat . . . . The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

Id. at 128-29 (emphasis in original). In the cases discussed by the Court, the plaintiff "had eliminated the imminent threat of harm by simply not doing what he claimed the right to do," but that "did not preclude subject matter jurisdiction because the threat-eliminating behavior was effectively coerced." Id. at 129. The dilemma posed by that coercion is "a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." Id. (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967)). See Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 534 (1st Cir. 1995) ("It is designed to enable litigants to clarify legal rights and obligations before acting upon them."). So here, the fact that the Liquidator is not distributing more than $150 million to creditors because of the threat of an action to impose personal liability under the Federal Priority Statute does not mean that there is no actual controversy. To the contrary, it shows the seriousness of the dispute.[9]

2. The Liquidator reasonably anticipates a United States' claim for personal liability if he makes the interim distribution.

The defendants contend that there is no controversy because "[t]he United States is not prohibiting the Liquidator from making the Interim Distribution" and the Liquidator "is free to

[9] In the event that a declaration of non-liability is issued, the Liquidator will ask the Supervising Court to remove the condition that the Liquidator receive a waiver from the United States before making the distribution. There is no reason that such a motion would not be promptly granted.

make the distribution at any time." US Mem. at 1; see id. at 13. However, they correctly understand that the Liquidator fears an action asserting personal liability. Id. at 12-13. The Liquidator "is personally liable for ignoring the Federal Priority [Statute]," Ruthardt, 303 F.3d at 385, and the threat of the Protective Proof of Claim and the United States' subsequent dealings with the Liquidator makes this dispute immediate, not speculative. The Liquidator has not alleged an express threat to sue, but that is only because this case presents the federal version of "the sad and saddening scenario that led to the enactment of the Declaratory Judgment Act" discussed in Cardinal Chemical Co. v. Morton Intern., Inc., 508 U.S. 83, 95-96 (1993):

> In the patent version of that scenario, a patent owner engages in a *danse macabre*, brandishing a Damoclean threat with a sheathed sword . . . . Before the Act, competitors victimized by that tactic were rendered helpless and immobile so long as the patent owner refused to grasp the nettle and sue. After the Act, those competitors were no longer restricted to an *in terrorem* choice between the incurrence of a growing potential liability for patent infringement and abandonment of their enterprises; they could clear the air by suing for a judgment that would settle the conflict of interests.

Id. (quoting Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, 734-35 (Fed. Cir. 1988)). The courts have long recognized that that there is no need to show that the defendant has made an explicit threat of litigation. It suffices that a party can "reasonably have anticipated" a claim against it such that there is not "an entirely speculative threat." PHC, 75 F.3d at 79; Hoyt Elec. Instrument Works, Inc. v. Isspro, Inc., 263 F.Supp.2d 280, 282-83 (D. N.H. 2003). The Liquidator reasonably anticipates a Priority Statute lawsuit if he makes the interim distribution.[10] Notwithstanding the United States' efforts to downplay the threat (e.g., by incorrectly saying that

[10] The United States refers to the "certainly impending" injury standard articulated in Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138,1147-50 (2013). US Mem. at 13-14. However, the Court there acknowledged that it also has found standing based on a "substantial risk" that harm would incur. Id. at 1150 n. 5; accord, id. at 1160-61 (Breyer, J., dissenting). In any event, Clapper presented a situation having nothing to do with this one. The Court there rejected the plaintiff journalists' and lawyers' attempt to rely on a "speculative chain of possibilities" to assert injury based on potential future surveillance activity directed at others that depended on "speculation about the decisions" of independent actors. Id. at 1150. The Court did not discuss MedImmune or other cases involving threatened enforcement action, and it distinguished cases where governmental policy "regulate[d], constrain[ed], or compel[led] any action" by plaintiffs. Id. at 1153. The Federal Priority Statute of course regulates and constrains the Liquidator, and the United States' actions here are directed specifically at him.

the proof is the Liquidator's "sole support," US Mem. at 12), the threat here is immediate. This is apparent from the following:

- The United States chose to file a Protective Proof of Claim for unknown claims against Home asserting Federal Priority Statute rights (Complaint ¶ 32), notwithstanding clear circuit precedent that state filing deadlines do not apply to the United States. Ruthardt, 303 F.3d at 384-86. Given this precedent, the only reason for such a filing (one not provided for by New Hampshire law) is to make clear the United States' position that the Federal Priority Statute and its potential for personal liability protects the United States' interests in unknown claims.

- Respectful of the United States and this implicit threat, the Liquidator has requested and received waivers for Federal Priority Statute claims to permit early access distributions. Complaint ¶ 13. The United States granted waivers for the first six early access distributions. Id.[11] The Release Agreements between the United States and the Liquidator specifically state they are entered "[i]n order to permit a distribution of the assets of the estate of The Home Insurance Company." E.g., Exhibit 2 at 1. The United States thus has asserted Priority Statute oversight regarding distributions. See id. at 2.

- The United States has been unwilling to grant a similar waiver to permit the interim distribution. The Liquidator requested that waiver in April 2012. Over the 16 months prior to the filing of the complaint, the United States made two requests for information (to which the Liquidator promptly responded). Complaint ¶ 24. Despite numerous follow-ups in 2012 and 2013, the United States has not acted on the request. Id.

- The United States now says that it has conducted an "initial-claims-identification process" that has generated a list of "7,000 possible claims" which it anticipates "refining" to identify "specific claims" by December 2014. US Mem. at 4 n. 3. This makes clear that the United States believes it has unidentified claims against Home that it wants to assert and protect, and the reference to the 7,000 possible claims is a "shot across the bow" that makes plain that the United States believes its unknown claims – and thus the Liquidator's exposure – may be substantial.

The United States' assertion of rights under the Priority Statute, its willingness to consider and grant waivers to "permit" six early access distributions, and its non-response to the Liquidator's request for a waiver for the interim distribution (even though it sought information)

[11] The United States was unwilling to grant waivers for the most recent early access distributions to guaranty associations. The Liquidator proceeded with those distributions nonetheless because early access distributions are subject to being "clawed back" from guaranty associations in the event the distributed funds are needed to pay other creditors at the same or higher priority. See RSA 402-C:29, III(b)(4). All the guaranty associations receiving early access distributions have entered into claw back agreement with the Liquidator agreeing to return the funds if requested. Thus, if the United States were to prevail on a Federal Priority Statute claim regarding those distributions, the Liquidator would be able to call the funds back from the guaranty associations. By contrast, the interim distribution is final as to the distributed funds, and the Liquidator would be unable to recall them.

reasonably cause the Liquidator to fear an enforcement action if he were to make the interim distribution. The United States' artful silence conveys an obvious threat. This is now confirmed by the United States' pointed reference to "7,000 possible claims" in its memorandum. Notwithstanding the United States' protestations that its proof of claim only said that the Federal Priority Statute "may" apply and that the Liquidator is "free" to make the interim distribution, the unmistakable inference is that the Liquidator acts at his peril and the United States waits with the cudgel of personal liability if the Liquidator makes a distribution.

The United States could remove the threat by providing assurance of non-enforcement. See Boozell, 979 F. Supp. at 675 (noting United States waived the right to assert contingent claims in the Reserve liquidation). The Liquidator requested such an assurance by seeking a waiver. The United States' unwillingness to provide that assurance – especially when contrasted with its prior grants of waivers – is obvious evidence that the threat of suit is real. See Babbitt v. United Farm Workers, 442 U.S. 289, 302 (1979); New Hampshire Right to Life PAC v. Gardner, 99 F.3d 8, 16-17 (1st Cir. 1996). Indeed, "far from eschewing enforcement," the United States has now sent a clear message that its asserted rights are "alive and well" by noting its investigative efforts and 7,000 possible claims in footnote 3 of its memorandum. See Rhode Island Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 31-32 (1st Cir. 1999).

The United States disparagingly asserts that the Liquidator is seeking a "security blanket." US Mem. at 2. However, the Liquidator – a public official appointed pursuant to state statute as liquidator of an insolvent insurance company – quite reasonably seeks the security of a declaratory judgment. Roger Sevigny is not required to bet his personal assets that the United States will not pursue or prevail on a Priority Statute claim if he fulfills his statutory responsibilities by making a distribution.

The Declaratory Judgment Act was intended to provide a means of addressing the kind of "Damoclean threat with sheathed sword" wielded by the United States here. Cardinal Chemical, 508 U.S. at 95-96. The threat of a Priority Statute lawsuit "hangs over [the Liquidator's] head" and creates a "here-and-now subservience" to the United States – demonstrated by the Liquidator's requests for waivers – that satisfies Article III. See Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 265 n. 13 (1991).

D. The Liquidator Has Standing To Seek Declaratory Relief To Permit The Interim Distribution.

The defendants also challenge the Liquidator's standing under Article III, which "requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743, 2752 (2010). This attack presents essentially the same issues as the "actual controversy" issue addressed above. See MedImmune, 549 U.S. at 128 n. 8; Igartua v. United States, 626 F.3d 592, 634 (1st Cir. 2010). In any event, the Liquidator satisfies the standing criteria. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992) (If "the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.").

The Liquidator's inability to make the court-approved distribution is a sufficient injury. See Katz v. Pershing, LLC, 672 F.3d 64, 71-72 (1st Cir. 2012). The injury is "particularized" because the Liquidator is unable to fulfill his statutory obligations to make distributions under N.H. RSA 402-C:46 because of the threat of personal liability under 31 U.S.C. § 3713(b). The injury is "concrete" because there is a specific distribution that is being prevented. The Liquidator cannot pay the distribution of 15% to the policy-level creditors of the insolvent Home

that has already been approved by the court supervising the liquidation. This injury is "actual or imminent" because the Liquidator has been in a position to make the distribution except for resolution of the Federal Priority Statute issue since April 2012. The injury is caused by – "fairly traceable" to – the defendants' assertion of rights under the Federal Priority Statute. That the Liquidator is presently refraining from the distribution to eliminate the threat of personal liability does not prevent standing. See MedImmune, 549 U.S. at 128 & n. 8. Finally, the injury can be "redressed" by a favorable decision. A declaration that the unknown claims of the Protective Proof of Claim are not "claims" within the Priority Statute, that the proof of claim does not place the Liquidator on "notice" of claims, and that the Liquidator will not incur personal liability by making the distribution would allow the distribution to proceed. The Liquidator has clearly "alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." Horne v. Flores, 557 U.S. 433, 445 (2009) (ultimately quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)) (internal quotations omitted, emphasis in original).

The United States asserts that the Federal Priority Statute does not create any rights for the Liquidator. US Mem. at 2, 10. While the United States does not say so, this might implicate prudential standing concerns. However, the prudential standing test only requires that the interest the plaintiff asserts "must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." Match-E-Be-Nash-She-Wish Band, 132 S.Ct. at 2210 (quoting Association of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)) (emphasis added). See Clarke v. Securities Industry Ass'n, 479 U.S. 388, 399 (1987)) ("In cases where the plaintiff is not itself the subject of the contested regulatory action, the [zone of interest] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably

assumed that Congress intended to permit suit.") (emphasis added); Snoqualmie Indian Tribe v. Fed. Energy Reg. Comm'n, 545 F.3d 1207, 1216-17 (9th Cir. 2008); 13A Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 3531.7 at 556 & n. 70 (3d ed. 2008).

The Liquidator is plainly within the zone of interests "regulated" by the Federal Priority Statute and asserted by the United States. The statute regulates representatives of insolvent estates by requiring that they pay the United States "first" on pain of personal liability. 31 U.S.C. § 3713. The Liquidator seeks to make the interim distribution without incurring personal liability. The action he seeks to take – paying money from the insolvent estate – is the focus of the Priority Statute. The Liquidator's interest in being free of the threat of Priority Statute enforcement action thus provides prudential standing. His interests are obviously "directly affected by a broad or narrow interpretation" of the statute. See Camp, 397 U.S. at 157. The standing inquiry does not require any "indication of congressional purpose to benefit the would-be plaintiff." Match-E-Be-Nash-She-Wish Band, 132 S.Ct. at 2210 (quoting Clarke, 479 U.S. at 399-400); see Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18, 30 (1st Cir. 2007).

F. The Liquidator States A Claim Regarding The Federal Priority Statute.

The defendants contend that the Liquidator has not stated a claim in Count I, US Mem. at 6, 11 (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Pierce v. Wagner, 134 F.2d 958 (9th Cir. 1943) (neither a declaratory action)), on the theory that he does not allege that the United States has "violated" the Federal Priority Statute. US Mem. at 2, 10. This is incorrect. The Liquidator has alleged that the United States has violated the Priority Statute by asserting rights it does not have under that statute. The Liquidator contends that the defendants have misapplied the Priority Statute in filing the Protective Proof of Claim and asserting priority rights because the statute does not provide the United States with rights concerning unknown claims. Complaint ¶¶ 50-51,

Prayers ¶¶ 1-3. To avoid any confusion, the Liquidator claims that – contrary to the Protective Proof of Claim and the United States' acts of oversight over distributions – the United States has no Priority Statute rights for claims that are unknown or unasserted at the time of a distribution.

Without delving deeply into the merits, for a representative to incur liability under the Priority Statute, the United States must have a "claim" against the insolvent estate at the time of the distribution. "Claim" is defined in 31 U.S.C. § 3701(b)(1), which provides in pertinent part:

> [T]he term "claim" or "debt" means any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency.

(emphasis added). This definition is plainly not satisfied by the references to claims "not currently known or are not currently known to relate to the Home Insurance Company" as described in the Protective Proof of Claim or the references to "possible" or "potential" claims in the United States' memorandum. This definition should control, but even if the Court were to look to decisions under predecessor statutes for guidance, see United States v. Renda, 709 F.3d 472, 483 & n. 13 (5th Cir. 2013), the mere possibility of a claim being identified in the future does not properly give rise to liability under the Priority Statute. "[G]overnment claims not currently in existence but which may arise in the future are not entitled to priority." Id. at 482 (citing In re Metzger, 709 F.2d 32, 34 (9th Cir. 1983)). Where the United States is not aware of a set of facts that give rise to an asserted priority claim, the Liquidator cannot be liable for making the interim distribution in the face of the Protective Proof of Claim.

Even if an unknown claim could constitute a "claim," it could not trigger personal liability under the Federal Priority Statute for making the interim distribution. There can only be personal liability where the representative makes a distribution with "knowledge of the debt owed by the estate to the United States or notice of facts that would lead a reasonably prudent person to inquire as to [its] existence." Renda, 709 F.3d at 480 (quoting United States v.

Coppola, 85 F.3d 1015, 1020 (2d Cir. 1996)). E.g., In re Gottheiner, 703 F.2d 1136, 1140 (9th Cir. 1983) ("One of the elements of a violation of federal priority laws is that the individual . . . knew of the corporation's debt to the United States at the time."); Want v. Commissioner of Internal Revenue, 280 F.2d 777, 783 (2d Cir. 1960) ("[I]t has long been held that a fiduciary is liable only if it had notice of the claim of the United States before making the distribution."); United States v. Mountzoures, 376 F.Supp.2d 13, 19 (D. Mass. 2005) ("Without notice of the claim, Mountzoures cannot be held liable under the federal priority statute.").

The Protective Proof of Claim asserted a right to priority for unknown claims but, not surprisingly, neither the proof nor the United States' memorandum referring to 7,000 "possible" claims identifies any particular factual circumstances alleged to give rise to liability on the part of Home. They thus do not place the Liquidator on notice of a claim so as to support imposition of personal liability under the Priority Statute for making the interim distribution. As one court said when the United States sought to impose personal liability for a claim first noticed after an estate was closed, the phrase "'debts due to the United States' . . . is properly interpreted to mean only those debts concerning which the Government has asserted a claim before the distribution is made." United States v. Vibradamp Corp., 257 F. Supp. 931, 936 (S.D. Cal. 1966). The Liquidator has stated a claim for relief concerning the proper application of the Priority Statute to the unknown claims asserted in the Protective Proof of Claim and the interim distribution.[12]

II. THE LIQUIDATOR'S CLAIM TO COMPEL AGENCY ACTION UNREASONABLY DELAYED SHOULD BE HEARD.

The United States also moves for dismissal of Count II, which seeks an order to "compel agency action . . . unreasonably delayed." 5 U.S.C. § 706(1). This claim reflects the impossible

[12] Where the United States purports to have asserted "claims" in the Protective Proof of Claim, counsel's advice regarding the effect of the claims does not provide the Liquidator with a defense to personal liability under the Federal Priority Statute. See Renda, 709 F.3d at 484-85 (discussing cases).

situation created by the United States' assertion of Federal Priority Statute rights as to unknown claims and its willingness to grant waivers to permit six early access distributions followed by its unexplained 16-month delay in responding to the Liquidator's request for a waiver for the interim distribution. Ten years into the Home liquidation, Class II creditors are pressing for payment of the 15% distribution otherwise approved in April 2012. The Liquidator has been unable to explain the delay because, despite numerous requests, the Department of Justice has chosen not to meet and has not engaged in dialogue concerning its review or explained its review process. The Liquidator consequently cannot predict when, if ever, the Department will act on his request. The new information provided in footnote 3 of the United States' Memorandum offers some explanation but indicates that the United States is engaged in a ground up process that is unlikely to be productive (see note 4 above) and that it will not respond for another year, if ever. This demonstrates the need for the declaratory relief sought in Count I to pretermit this process. Especially if a waiver is purely a matter of grace, then the parties' rights and obligations under the Priority Statute need to be resolved by declaration to permit the Home liquidation to move forward. In any event, the United States' arguments should be rejected.

1. The United States waived sovereign immunity with respect to claims for non-monetary relief in 5 U.S.C. § 702 as discussed at pages 9-10 above. That waiver "applies to any suit [for specific relief] whether under the APA or not." Commonwealth of Puerto Rico, 490 F.3d at 58. It thus encompasses claims under the APA, such as the claim under § 706(1).

2. The United States' contention that the Attorney General has unreviewable discretion over the waiver request (US Mem. at 7-9) is irrelevant at this stage. It goes to the reviewability of agency action. Here, however, the Liquidator seeks an order directing the Attorney General to act, but has not asked the Court to direct the Attorney General how to act.

See Complaint, Prayer ¶¶ 4-5. While the Liquidator believes that the only appropriate action would be to approve the request for all the reasons stated in the complaint at ¶¶ 17-22 and in Exhibit B, any challenge to a decision by the Attorney General could only follow that action.[13]

3. To state a claim under § 706, the plaintiff must allege that "an agency failed to take a *discrete* agency action that it is *required to take*." Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) (emphasis in original). See Scarborough Citizens Protecting Resources v. U.S. Fish & Wildlife Serv., 674 F.3d 97, 99 (1st Cir. 2012). Here, the failure of the Department of Justice to act upon the Liquidator's request for a waiver is a failure to take a discrete agency action. "Agency action" includes "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The waiver requested here would constitute either a "license" ("permit . . . approval . . . statutory exemption or other form of permission") or "relief" ("recognition of a claim, right, immunity, privilege, exemption, or exception" or "taking of other action on the application or petition of, and beneficial to, a person"). See 5 U.S.C. § 551 (8), (11). The Department of Justice's failure to act is a failure to take the discrete action of granting a license or relief. See Norton, 542 U.S. at 62-63.

The defendants contend they have no duty to act on the request for a waiver. While the Liquidator is not aware of a statute providing for waiver requests, the Attorney General has undertaken to consider such requests in this and other insurer liquidations (see Complaint ¶ 13;

[13] In any event, the exception from review of action "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), is applicable only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (quoting S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). That is, "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. 821, 830 (1985) (agency decisions not to take enforcement action against third parties presumed to be immune from judicial review). Here, the Department of Justice has impliedly threatened action against the Liquidator, and the Liquidator's request for a waiver to relieve him of that threat is subject to meaningful standards: the Priority Statute definition of "claim" and the cases making clear that "claims" that the United States has not identified to provide notice of do not impose personal liability. See pages 21-22 above. The Attorney General cannot exercise discretion beyond the law. See United States v. Carpenter, 526 F.3d 1237, 1241-42 (9th Cir. 2008), cert. denied, 556 U.S. 1147 (2009).

Ruthardt, 164 F.Supp.2d at 237 & n. 9), and is apparently embarked on a process to consider the request here. Given this practice – and its effect of preventing distributions while requests are pending – a decision by the Attorney General should be viewed as action he is "required to take" even in the absence of a statute. The APA obligates an agency "to conclude a matter presented to it" "within a reasonable time." 5 U.S.C. § 555(b). That direction is given substance by the courts' authority to compel agency action "unreasonably delayed." See Forest Guardians v. Babbitt, 174 F.3d 1178, 1189-90 (10th Cir. 1999). While the Court said in Norton that "a delay cannot be unreasonable with respect to action that is not required," 542 U.S. at 63 n. 1, it was not addressing a situation where the agency itself had undertaken to review a class of applications but an alleged agency failure to enforce statutes against third parties.

CONCLUSION

For the reasons set forth above, the United States' motion to dismiss should be denied.

Respectfully submitted,

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

JOSEPH A. FOSTER
ATTORNEY GENERAL

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(617) 542-2300

January 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Liquidator's Opposition to the United States' Motion to Dismiss has been served on counsel of record pursuant to the Court's electronic filing system on January 10, 2014.

/s/ Eric A. Smith

Exhibits

1. Protective Proof of Claim

2. Release Agreement

filed under GOUT 709514

Exhibit 1

PROOF OF CLAIM
The Home Insurance Company,
Merrimack County Superior Court, State of New Hampshire 03-E-0106
Read Carefully Before Completing This Form
Please print or type

FOR LIQUIDATOR'S USE ONLY

DATE PROOF OF CLAIM RECEIVED JUN 11 2004

HIGH

claim 705465

The Deadline for Filing this Form is June 13, 2004.

You should file this Proof of Claim form if you have an *actual or potential claim* against The Home Insurance Company of any of its former subsidiaries* ("The Home") *even if the amount of the claim is presently uncertain*. To have your claim considered by the Liquidator, this Proof of Claim must be postmarked no later than June 13, 2004. Failure to timely return this completed form will likely result in the DENIAL OF YOUR CLAIM. You are advised to retain a copy of this completed form for your records.

1. Claimant's Name: The United States of America on behalf of U.S. EPA, U.S. DOI and NOAA, DOD and other agencies.
2. Claimant's Address: Department of Justice P.O Box 7611, Ben Franklin Station, Washington, DC. 20044
3. Claimant's Telephone Number: 202-307-1859
   Fax Number: 202-616-2427
   Email address: myles.flint@usdoj.gov

If your name, address, e-mail address, or telephone number set forth above are incorrect, or if they change, you must notify the Liquidator so the can advise you of new information.

4. Claimant's Social Security Number, Tax ID Number or Employer ID Number: N/A
5. Claim is submitted by (check one):
   a) ___ Policyholder or former policyholder
   b) X Third Party Claimant making a claim against a person insured by The Home
   c) ___ Employee or former employee
   d) ___ Broker or Agent
   e) ___ General Creditor, Reinsurer, or Reinsured
   f) ___ State or Local Government Entity
   g) ___ Other; describe: _____

Describe in detail the nature of your claim. You may attach a separate page if desired. **Attach relevant documentation in support of your claim, such as copies of outstanding invoices, contracts, or other supporting documentation.**

See attachment A

6. Indicate the total dollar amount of your claim. If the amount of your claim is unknown, write the word "unknown", BUT be sure to attach sufficient documentation to allow for determination of the claim amount.

   $ unknown (if amount is unknown, write the word "unknown").

7. If you have any security backing up your claim, describe the nature and amount of such security. Attach relevant documentation

   N/A

8. If The Home has made any payments towards the amount of the claim, describe the amount of such payments and the dates paid: unknown

9. Is there any setoff, counterclaim, or other defense which should be deducted by The Home from your claim?

   unknown

10. Do you claim a priority for your claim? If so, why: The Federal Priority Act, 31 U.S.C. 3712, provides the United States with certain rights of priority that may be applicable.

11. Print the name, address and telephone number of the person who has completed this form
    Name: Myles E. Flint II
    Address: U.S. Dept. of Justice
    P.O. Box 7611, Ben Franklin Station, Washington, DC. 20044
    Phone Number 202-307-1859
    Email address: myles.flint@usdoj.gov

* The Home Indemnity Company, The Home Insurance Company of Indiana, City Insurance Company, Home Lloyds Insurance Company of Texas, The Home Insurance Company of Illinois, and The Home Insurance Company of Wisconsin.

12. If represented by legal counsel, please supply the following information.
    a. Name of attorney: ~~—~~
    b. Name of law firm: See no. 11
    c. Address of law firm: _____
    d. Attorney's telephone: _____
    e. Attorney's fax number: _____
    f. Attorney's email address: _____

13. If using a judgment against The Home as the basis for this claim:
    a. Amount of judgment _____
    b. Date of judgment _____
    c. Name of case _____
    d. Name and location of court _____
    e. Court docket or index number (if any) _____

14. If you are completing this Proof of Claim as a Third Party Claimant against an insured of The Home, you must conditionally release your claim against the insured by signing the following, as required by N.H. Rev. Stat. Ann. § 402-C:40 I:

~~I, _____ (insert claimant's name), in consideration of the right to bring a claim against The Home, on behalf of myself, my officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives hereby release and discharge _____ (insert name of defendant(s) insured by The Home), and his/her/its officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives, from liability on the cause(es) of action that forms the basis for my claim against The Home in the amount of the limit of the applicable policy provided by The Home; provided, however, that this release shall be void if the insurance coverage provided by The Home is avoided by the Liquidator.~~

The United States does not and cannot agree to the release as written.
Claimant's signature Date

15. All claimants must complete the following:

I, The United States (insert individual claimant's name or name of person completing this form for a legal entity) subscribe and affirm as true, under the penalty of perjury as follows: that I have read the foregoing proof of claim and know the contents thereof, that this claim in the amount of unknown dollars ($_____) against The Home is justly owed, except as stated in item 9 above, and that the matters set forth in this Proof of Claim are true to the best of my knowledge and belief. I also certify that no part of this claim has been sold or assigned to a third party.

Any person who knowingly files a statement of claim containing any false or misleading information is subject to criminal and civil penalties.

Claimant's signature Date 6/10/04

16. Send this completed Proof of Claim Form, postmarked by **June 13, 2004**, to:

The Home Insurance Company in Liquidation
P.O. Box 1720
Manchester, New Hampshire 03105-1720

You should complete and send this form if you believe you have an actual or potential claim against The Home even if the amount of the claim is presently uncertain.

ATTACHMENT A

The United States of America, on behalf of the U.S. Environmental Protection Agency, the U.S. Department of Interior, the National Oceanic and Atmospheric Administration of the Department of Commerce, the Department of Defense, and any other agencies that may have a claims, files this protective Proof of Claim as it relates to any claims held by these agencies that are not currently known or are not currently known to relate to the Home Insurance Company. If or when the United States learns of actual claims held by these agencies, the United States will file an Amended Proof of Claim relating to the specific actual claim. The United States reserves the right to supplement this Proof of Claim.

Exhibit 2

RELEASE AGREEMENT

In order to permit a distribution of the assets of the estate of The Home Insurance Company ("Home Insurance") pursuant to orders of the liquidation court, this Release Agreement is being executed by the United States and Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, in his sole capacity as statutory and court-affirmed Liquidator ("Liquidator") of Home Insurance.

I. PARTIES

The parties to this Release Agreement are the United States and the Liquidator (collectively, the "Parties").

II. RECITALS

1. The parties do not intend this Release Agreement to release any possible claims the United States may have or may acquire against anyone for tax, fraud (including, but not limited to, securities and pension benefit fraud), or criminal liabilities to the United States.

2. Except for the express terms of this Release Agreement, the parties do not intend to create, enhance, diminish, defeat or otherwise affect such claims, if any, as the United States may have against the Liquidator or Home Insurance's estate.

3. The parties understand that this Release Agreement may be subject to approval of the Court which is supervising the liquidation of Home Insurance.

4. The United States enters into this Release Agreement in reliance upon the representations contained in the November 13, 2009 Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, in Support of Approval of Sixth Early Access Distribution, with attachments ("Affidavit"), attached as Exhibit A to this Release Agreement.

III. AGREEMENT

1. Except only for possible federal tax, fraud, or criminal claims, the United States hereby releases and discharges the Liquidator, his agents and representatives from any and all liability under 31 U.S.C. § 3713(b) in connection with the Home Insurance Sixth Early Access Distribution to guaranty associations listed in the attachment to the Affidavit in the total amount of $37,046,864.48.

2. Under the terms of this Release Agreement, the United States or its duly authorized representative shall have the right, prior to the destruction of Home Insurance's records in accordance with the orders of the liquidation Court, during normal business hours, on a date and at a location agreed upon by the parties, to inspect, and if it wishes, to copy at its own expense, such documents, books, and records of the estate, and of the Liquidator, as shall be reasonably necessary to determine the existence and amount of claims the United States may have against the Home Insurance estate, or to determine the Liquidator's compliance with the terms of this Release Agreement. No documents, books, or records of the estate or Liquidator may be destroyed unless notice is given to the United States of any motion filed with the Court requesting approval of the destruction. If the Liquidator does not request approval from the Court, he must obtain prior written authorization from the United States before destruction of any documents, books, or records of the estate or Liquidator.

3. Except for the express undertakings of the Liquidator and the United States in this Release Agreement, nothing in this Release Agreement shall be construed

(a) to establish or perfect any claims, substantive rights, or procedural rights of the United States;

(b) to limit, restrict, diminish, or defeat any claim, substantive rights, or procedural rights of the United States;

(c) to establish or perfect any objections or defenses, substantive rights, or procedural rights of the Liquidator; or

(d) to limit, restrict, diminish, or defeat any defenses, substantive rights, or procedural rights of the Liquidator.

4. The parties agree that this Release Agreement shall not be effective unless and until it is approved by the Court, if approval is required, and the time for appeals of any such approval has expired. The parties further agree to cooperate with each other in seeking prompt approval of this Release Agreement from the Court, including but not limited to making the necessary witnesses available for testimony considered necessary or appropriate to provide the Court with an adequate record upon which to approve this Release Agreement.

SC Cw

Sharon C. Williams
Trial Attorney
Civil Division
Department of Justice

Attorney for the United States

Dated: 5/13/10

Roger A. Sevigny
Insurance Commissioner of the State of
New Hampshire, Liquidator of The Home Insurance
Company

Dated: 5-25-10

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

AFFIDAVIT OF PETER A. BENGELSDORF, SPECIAL DEPUTY LIQUIDATOR, IN SUPPORT OF APPROVAL OF SIXTH EARLY ACCESS DISTRIBUTION

I, Peter A. Bengelsdorf, hereby depose and say:

1. I was appointed Special Deputy Liquidator of The Home Insurance Company ("Home") by the Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of Home. I submit this affidavit in support of the Liquidator's Motion for Approval of Sixth Early Access Distribution to Insurance Guaranty Associations ("Motion"). The facts and information set forth below are either within my own knowledge gained through my involvement with this matter, in which case I confirm that they are true, or are based on information provided to me by others, in which case they are true to the best of my knowledge, information and belief.

2. The Motion seeks approval of the sixth early access distribution to insurance guaranty associations in an amount equal to the reported claims that the guaranty associations have paid under Home insurance policies from entry of the liquidation order through September 30, 2009 as reported by October 30, 2009, less (a) guaranty association recoveries, and (b) approved first, second, third, fourth, and fifth early access distribution amounts. The early access distributions will also be subject to deductions for unreturned deposits and questioned claim items and application of a distribution cap equal to forty percent of the total

incurred costs (paid amounts plus case reserves but not including incurred but not reported reserves) projected for each guaranty association.

3. On October 8, 2003, the Liquidator applied for approval of an Early Access Distribution Plan ("Plan") to provide for the disbursement of assets of the Home estate from time to time to the New Hampshire Insurance Guaranty Association ("NHIGA"), the New Hampshire Life and Health Insurance Guaranty Association, and any similar organization in another state (the "guaranty associations") in accordance with RSA 402-C:29, III. The Plan included a form of Early Access Distribution Agreement ("Agreement") to be entered into by guaranty associations receiving an early access distribution. The Court approved the Plan and Agreement by order entered October 22, 2003.

4. The statutory schemes adopted by New Hampshire and other states for the liquidation of insolvent insurers contemplate the ongoing payment by the guaranty associations of most claims under insurance policies issued by the insolvent insurer, subject to statutory and policy limits and conditions. The "covered claims" payable by guaranty associations generally are claims, including claims for unearned premiums, which arise out of and are within the coverage and not in excess of applicable limits of insurance policies issued by the insolvent insurer. The guaranty associations' obligations thus encompass both indemnity payments and defense expense payments (commonly referred to as allocated loss adjustment expense or "ALAE" payments) covered by a policy issued by Home. Such claims are Class II claims.[1]

5. On October 1, 2004, the Liquidator moved for approval of a first early access distribution to guaranty associations of approximately $40.9 million based on reported guaranty fund payments less recoveries through June 30, 2004, subject to deductions based on unreturned

[1] Certain guaranty associations have taken the position that ALAE is a Class I administration cost. The Liquidator agrees that the receipt of an early access distribution by a guaranty association shall not be deemed to constitute an admission by the guaranty association that ALAE is a Class II claim.

deposits held by various states. The Court approved the first early access distribution on October 15, 2004. The Liquidator applied deductions based on deposits held by certain states and made first early access distributions to guaranty associations totaling $35,321,789.43. The Liquidator moved for approval of a second early access distribution to guaranty associations of approximately $63.1 million on November 23, 2005, and the Court approved the second early access distribution on December 9, 2005. The Liquidator applied deductions based on deposits held by certain states and made second early access distributions totaling $57,334,436.82. The Liquidator moved for approval of a third early access distribution to guaranty associations of approximately $48.4 million on February 1, 2007, and the Court approved the third early access distribution on March 12, 2007. The Liquidator applied deductions and a 40% percentage cap and made third early access distributions totaling $39,276,227.69. The Liquidator moved for approval of a fourth early access distribution of approximately $36.4 million on October 30, 2007, and the Court approved the fourth early access distribution on November 16, 2007. The Liquidator applied deductions and a 40% percentage cap and made fourth early access distributions totaling $33,805,881.59 on November 13, 2008. The Liquidator moved for approval of a fifth early access distribution of approximately $39.1 million on November 25, 2008, and the Court approved the fifth early access distribution on January 12, 2009. The Liquidator applied deductions and a 40% percentage cap and made fifth early access distributions totaling $22,843,900.03 on March 18, 2009.

6. Since the commencement of this liquidation proceeding, fifty-seven guaranty associations have reported making indemnity or ALAE payments under insurance policies issued by Home. As of October 30, 2009, the guaranty associations have reported paying $293,865,033.75 under policies of insurance issued by Home through September 30, 2009

($260,025,857.37 in indemnity and $33,839,176.38 in ALAE). The guaranty associations also reported recoveries (e.g., subrogation, net worth and second injury fund recoveries) totaling $25,625,282.56, so the guaranty association payments after recoveries total $268,239,751.19 at this time. The approved first, second, third, fourth, and fifth early access distribution amounts – paid by the estate or through deduction of state deposits – totaled $231,192,886.71, so the potential total for the sixth early access distribution is $37,046,864.48.[2] A chart showing the payments and recoveries through September 30, 2009 (as reported by each guaranty association through October 30, 2009) together with the previous early access payments and the potential sixth early access distribution amounts is attached hereto as Exhibit A.

7. As of September 30, 2009, the unrestricted liquid assets of the Home estate in the Liquidator's control totaled $974,545,023 as set forth in the Statement of Net Assets attached hereto as Exhibit B. The liquid assets available to the Liquidator are thus approximately twenty-six times the amount of the guaranty associations' payments eligible for a sixth early access distribution, and they exceed those payments by approximately $937 million. The liquid assets that would remain after the proposed sixth early access distribution are approximately 3.5 times the amount of the guaranty associations' net payments through September 30, 2009.

8. To receive an early access distribution under the Plan, a guaranty association must execute the Agreement. The Agreement provides that the signatory guaranty association will return early access distributions that the Liquidator subsequently determines are necessary to pay claims of secured creditors or creditors whose claims fall into the same or a higher priority class than those of the guaranty association. This is sometimes referred to as "claw back". All but two guaranty associations have executed the Agreement. (Those two guaranty associations have

[2] The amounts paid by guaranty associations and the prior early access distribution amounts in this paragraph include the $3,148,212.13 paid to workers compensation claimants on behalf of guaranty funds during 2003 by the Liquidator as advances on early access distributions in order to avoid disruptions in payments to the claimants.

not received any early access distributions, although the deposits held in their states exceed their current paid amounts.)

9. It is expected that the guaranty associations will submit significant additional requests for reimbursement from the Home estate in the future due to their ongoing obligations on covered claims under policies of insurance issued by Home. The first two early access distributions equaled one hundred percent (100%) of the amounts the guaranty funds had paid as of September 30, 2005. The third, fourth and fifth early access distributions were based on 100% of guaranty fund payments as of September 30, 2006, September 30, 2007, and September 30, 2008 respectively, but they were subject to a distribution cap equal to forty percent (40%) of the total incurred costs (paid amounts plus case reserves but not including any incurred but not reported reserves) projected by each guaranty association. The Liquidator plans to apply this 40% cap to the proposed sixth early access distribution as well. The cap is designed to avoid situations in which a "claw back" pursuant to RSA 402-C:29, III(b)(4) may be necessary by keeping each guaranty association's total early access distributions at a level of no more than 40% of its total projected incurred costs. The cap is expected to affect twenty-two guaranty associations: Alaska Insurance Guaranty Association, Florida Insurance Guaranty Association, Florida Workers Compensation Insurance Guaranty Association, Hawaii Insurance Guaranty Association, Maryland Property and Casualty Insurance Guaranty Association, Massachusetts Insurers Insolvency Fund, Missouri Insurance Guaranty Association, Montana Insurance Guaranty Association, Nebraska Insurance Guaranty Association, New Hampshire Life and Health Insurance Guaranty Association, Nevada Insurance Guaranty Association, New Jersey Workers Compensation Security Fund, New York Liquidation Bureau, Ohio Insurance Guaranty Association, Ohio Life & Health Insurance Guaranty Association, Pennsylvania Worker's

Compensation Security Fund, South Dakota Property & Casualty Insurance Guaranty Association, Utah Insurance Guaranty Association, Vermont Insurance Guaranty Association, Washington Insurance Guaranty Association, West Virginia Insurance Guaranty Association, and the West Virginia Life and Health Insurance Guaranty Association. Use of the cap will reduce the amount distributed in the sixth early access distribution by a total of approximately $14.1 million.

10. Prior to liquidation, Home had made deposits in a number of states as required by the laws of those states. As contemplated by the Early Access Distribution Plan and the orders approving the prior early access distributions, the Liquidator deducted the amount of deposits in certain states from the prior distributions where the deposit had not been returned to the Liquidator. This served to provide equivalent reimbursement from Home to the various guaranty associations. Where deposits remain unreturned and were not deducted in connection with the prior early access distributions, the Liquidator may deduct the amount of a deposit in a particular state from the sixth early access distribution to the guaranty association in the state.

11. The Liquidator asks guaranty associations for clarification regarding payments or recoveries with respect to specific claims. There is now one such inquiry pending (with the Tennessee Insurance Guaranty Association), and the Liquidator plans to withhold the early access distribution based on such claim until the inquiry is resolved. The guaranty association has been contacted about the question.

12. As noted in the Plan, the United States Department of Justice has asserted in other insurer liquidations that the claim filing deadline does not apply to claims by the Federal Government in light of the federal priority act, 31 U.S.C. § 3713, so that it can at any time file claims entitled to payment by the Receiver on pain of personal liability. The Liquidator obtained

limited waivers of alleged federal priority claims as a precondition to making the prior early access distributions, and will need to obtain a waiver before making the sixth early access distribution as well.

Signed under the penalties of perjury this 13th day of November, 2009.

Peter A. Bengelsdorf
Special Deputy Liquidator of
The Home Insurance Company

STATE OF NEW YORK
COUNTY OF NEW YORK

Subscribed and sworn to, before me, this 13th day of November, 2009

Notary Public/Justice of the Peace]

NELLY M. GOMEZ
Notary Public, State of New York
No. 01GO5005271
Qualified in Bronx County
Certificate Filed in N.Y. County
Commission Expires December 7, 2010.

Guaranty Association Indemnity/ALAE and Recoveries
Through 09/30/09 (as reported by 10/30/09)

Guaranty Association	Guaranty Association Indemnity Payments	Guaranty Association ALAE Expense Payments	Total Guaranty Association Payments	Guaranty Association Recoveries	Net Guaranty Association Payments	Prior Approved Total of Early Access Amounts	Total for Sixth Early Access (subject to deductions and cap)
Alabama Insurance Guaranty Assoc.	$ 7,650,602.33	$ 490,827.64	$ 8,141,429.97	$ (1,578,290.16)	$ 6,563,139.81	$ 5,503,466.31	$ 1,059,673.50
Alaska Insurance Guaranty Assoc.	$ 873,780.54	$ 598,056.49	$ 1,471,837.03	$ (112,538.19)	$ 1,359,298.84	$ 1,250,232.26	$ 109,066.58
Arizona Industrial Commission	$ 2,130,139.62	$ 52,099.25	$ 2,182,238.87	$ -	$ 2,182,238.87	$ 1,592,706.22	$ 589,532.65
Arizona Property & Casualty	$ 199,800.00	$ 41,132.36	$ 240,932.36	$ -	$ 240,932.36	$ 241,537.59	$ (605.23)
Arkansas Property & Casualty Ins. Guaranty Assoc.	$ 749,716.61	$ 114,682.75	$ 864,399.36	$ (108,926.43)	$ 755,472.93	$ 673,963.39	$ 81,509.54
California Insurance Guarantee Assoc.	$ 18,565,154.53	$ 4,591,634.18	$ 23,156,788.71	$ (886,682.12)	$ 22,270,106.59	$ 16,819,761.19	$ 5,450,345.40
Colorado Insurance Guaranty Assoc.	$ 2,900,839.10	$ 336,403.35	$ 3,237,242.45	$ (567,445.06)	$ 2,669,797.39	$ 2,251,719.33	$ 418,078.06
Connecticut Insurance Guaranty Assoc.	$ 5,122,950.19	$ 516,975.26	$ 5,639,925.45	$ (1,117,145.40)	$ 4,522,780.05	$ 3,950,174.51	$ 572,605.54
Delaware Insurance Guaranty Assoc.	$ 980,649.79	$ 129,293.77	$ 1,109,943.56	$ (485,791.89)	$ 624,151.67	$ 545,940.20	$ 78,211.47
District of Columbia Insurance Guaranty Assoc.	$ 667,901.92	$ 127,879.08	$ 795,781.00	$ (7,551.39)	$ 788,229.61	$ 722,885.62	$ 65,343.99
Florida Insurance Guaranty Assoc.	$ 1,338,720.50	$ 587,994.76	$ 1,926,715.26	$ -	$ 1,926,715.26	$ 1,926,209.30	$ 505.96
Florida Workers Compensation Ins Guaranty Assoc.	$ 18,766,403.59	$ 1,349,151.28	$ 20,115,554.87	$ (1,937,275.59)	$ 18,178,279.28	$ 16,734,371.08	$ 1,443,908.20
Georgia Insurers Insolvency Pool	$ 7,147,741.73	$ 743,433.58	$ 7,891,175.31	$ (3,491,206.91)	$ 4,399,968.40	$ 4,003,928.99	$ 396,039.41
Hawaii Insurance Guaranty Assoc.	$ 934,809.42	$ 248,182.44	$ 1,182,991.86	$ (15,008.01)	$ 1,167,983.85	$ 1,114,806.40	$ 53,177.45
Idaho Ins. Guaranty Assoc.	$ 177,115.23	$ 3,024.90	$ 180,140.13	$ -	$ 180,140.13	$ 161,466.87	$ 18,673.26
Illinois Ins. Guaranty Assoc.	$ 2,227,773.38	$ 97,067.66	$ 2,324,841.04	$ (12,452.88)	$ 2,312,388.16	$ 2,182,112.62	$ 130,275.54
Indiana Insurance Guaranty Assoc.	$ 239,236.41	$ 3,745.21	$ 242,981.62	$ (21,619.82)	$ 221,361.80	$ 219,858.38	$ 1,503.42
Iowa Insurance Guaranty Assoc.	$ 593,846.39	$ 49,941.11	$ 643,787.50	$ -	$ 643,787.50	$ 537,847.56	$ 105,939.94
Kansas Insurance Guaranty Assoc.	$ 2,328,629.54	$ 66,498.79	$ 2,395,128.33	$ (68,887.71)	$ 2,326,240.62	$ 2,106,130.71	$ 220,109.91
Kentucky Insurance Guaranty Assoc.	$ 4,769,120.91	$ 84,630.73	$ 4,853,751.64	$ (578,206.06)	$ 4,275,545.58	$ 3,748,363.66	$ 527,181.92
Louisiana Insurance Guaranty Assoc.	$ 1,800,908.00	$ 342,235.73	$ 2,143,143.73	$ (75,176.17)	$ 2,067,967.56	$ 1,688,201.80	$ 379,765.76
Maine Insurance Guaranty Assoc.	$ 1,232,717.91	$ 113,886.41	$ 1,346,604.32	$ (11,199.65)	$ 1,335,404.67	$ 1,141,757.77	$ 193,646.90
Maryland Property & Casualty Ins. Guaranty Assoc.	$ 2,793,699.87	$ 252,032.54	$ 3,045,732.41	$ -	$ 3,045,732.41	$ 2,592,038.08	$ 453,694.33
Massachusetts Insurers Insolvency Fund	$ 7,294,026.64	$ 3,648,780.02	$ 10,942,806.66	$ (8,446.20)	$ 10,934,360.46	$ 10,254,407.52	$ 679,952.94
Michigan Property & Casualty Guaranty Assoc.	$ 6,984,534.77	$ 580,522.26	$ 7,565,057.03	$ (1,937,604.14)	$ 5,627,452.89	$ 4,905,889.18	$ 721,563.71
Minnesota Insurance Guaranty Assoc.	$ 21,332,757.99	$ 1,174,067.19	$ 22,506,825.18	$ (459,400.30)	$ 22,047,424.88	$ 18,279,779.66	$ 3,767,645.22
Mississippi Insurance Guaranty Assoc.	$ 1,663,335.02	$ 722,001.84	$ 2,385,336.86	$ (28,380.45)	$ 2,356,956.41	$ 2,063,575.48	$ 293,380.93
Missouri Property & Casualty Ins. Guaranty Assoc.	$ 1,214,875.11	$ 73,480.15	$ 1,288,355.26	$ -	$ 1,288,355.26	$ 1,023,226.65	$ 265,128.61
Montana Insurance Guaranty Assoc.	$ 858,992.14	$ 119,820.87	$ 978,813.01	$ (138,416.82)	$ 840,396.19	$ 710,947.83	$ 129,448.36
Nebraska Property & Liability Ins. Guaranty Assoc.	$ 779,049.64	$ 23,758.33	$ 802,807.97	$ -	$ 802,807.97	$ 513,975.96	$ 288,832.01
Nevada Insurance Guaranty Assoc.	$ 145,000.00	$ 5,896.00	$ 150,896.00	$ -	$ 150,896.00	$ 150,896.00	$ -
New Hampshire Insurance Guaranty Assoc.	$ 1,959,824.96	$ 82,149.66	$ 2,041,974.62	$ (35,123.70)	$ 2,006,850.92	$ 1,685,535.91	$ 321,315.01
New Hampshire Life & Health Guaranty Association	$ 1,304.33	$ -	$ 1,304.33	$ -	$ 1,304.33	$ 1,304.33	$ -
New Jersey Property-Liability Ins Guaranty Assoc.	$ 13,014,580.41	$ 3,391,523.73	$ 16,406,104.14	$ (728,779.38)	$ 15,677,324.76	$ 14,717,712.40	$ 959,612.36
New Jersey WC Security Fund C/O NJCRIB	$ 6,510,134.11	$ 904,140.83	$ 7,414,274.94	$ (157,230.39)	$ 7,257,044.55	$ 5,523,929.90	$ 1,733,114.65
New Mexico Ins. Guaranty Assoc.	$ 1,096,020.08	$ 172,268.63	$ 1,268,288.71	$ (216.66)	$ 1,268,072.05	$ 1,002,675.46	$ 265,396.59
North Carolina Ins Guaranty Assoc.	$ 2,693,479.88	$ 409,227.19	$ 3,102,707.07	$ (198,942.64)	$ 2,903,764.43	$ 2,585,278.26	$ 318,486.17
NY Superintendent of Insurance	$ 48,487,192.56	$ 3,686,716.40	$ 52,173,908.96	$ (5,451,602.16)	$ 46,722,306.80	$ 39,591,525.86	$ 7,130,780.94
Ohio Insurance Guaranty Assoc.	$ 5,000.00	$ 106,299.33	$ 111,299.33	$ -	$ 111,299.33	$ 111,299.33	$ -
Ohio Life & Health Ins Guaranty Assoc.	$ 29,600.00	$ -	$ 29,600.00	$ -	$ 29,600.00	$ 29,100.00	$ 500.00
Oklahoma P & C Ins. Guaranty Assoc.	$ 2,306,853.71	$ 108,468.57	$ 2,415,322.28	$ -	$ 2,415,322.28	$ 2,182,357.09	$ 232,965.19
Oregon Insurance Guaranty Assoc.	$ 2,056,251.74	$ 313,556.32	$ 2,369,808.06	$ (1,168,620.88)	$ 1,201,187.18	$ 1,100,434.84	$ 100,752.34
Pennsylvania Property & Casualty Ins. Guaranty Assoc.	$ 2,196,895.83	$ 1,296,989.57	$ 3,493,885.40	$ (300,288.06)	$ 3,193,597.34	$ 2,404,586.93	$ 789,010.41
Pennsylvania Workers' Compensation Security Fund	$ 28,888,075.55	$ 1,683,128.66	$ 30,571,204.21	$ -	$ 30,571,204.21	$ 26,744,720.82	$ 3,826,483.39
Puerto Rico Property & Casualty Ins. Guaranty Assoc.	$ -	$ 852.39	$ 852.39	$ -	$ 852.39	$ 852.39	$ -
Rhode Island Insurance Guaranty Assoc.	$ 1,108,267.99	$ 88,675.26	$ 1,196,943.25	$ (383,183.27)	$ 813,759.98	$ 687,214.83	$ 126,545.15
South Carolina Property & Casualty Ins. Guaranty Assoc.	$ 927,799.96	$ 239,325.78	$ 1,167,125.74	$ (9,411.05)	$ 1,157,714.69	$ 1,001,168.81	$ 156,545.88
South Dakota Property & Casualty Ins. Guaranty Assoc.	$ 777,327.30	$ 55,076.01	$ 832,403.31	$ -	$ 832,403.31	$ 790,824.24	$ 41,579.07
Tennessee Insurance Guaranty Assoc.	$ 2,139,690.00	$ 410,883.46	$ 2,550,573.46	$ (147,584.53)	$ 2,402,988.93	$ 2,166,842.82	$ 236,146.11
Texas Property & Casualty Insurance Guaranty Assoc.	$ 8,540,664.55	$ 1,791,102.72	$ 10,331,767.27	$ (1,163,529.44)	$ 9,168,237.83	$ 7,836,170.63	$ 1,332,067.20
Utah Property & Casualty Ins. Guaranty Assoc.	$ 1,043,449.04	$ 156,997.57	$ 1,200,446.61	$ (332,219.61)	$ 868,227.00	$ 919,309.57	$ (51,082.57)
Vermont Insurance Guaranty Assoc.	$ 229,758.63	$ 22,978.41	$ 252,737.04	$ (391.07)	$ 252,345.97	$ 249,612.74	$ 2,733.23
Virginia Insurance Guaranty Assoc.	$ 6,680,412.33	$ 1,043,962.37	$ 7,724,394.70	$ (846,692.49)	$ 6,877,702.21	$ 6,145,719.46	$ 731,982.75
Washington Insurance Guaranty Assoc.	$ 1,121,452.65	$ 237,361.93	$ 1,358,814.78	$ (915.64)	$ 1,357,899.14	$ 1,357,891.90	$ 7.24
West Virginia Insurance Guaranty Assoc.	$ 500,000.00	$ 182,907.04	$ 682,907.04	$ -	$ 682,907.04	$ 682,907.04	$ -
West Virginia Life & Health Ins. Guaranty Assoc.	$ 101,120.00	$ 15,420.00	$ 116,540.00	$ -	$ 116,540.00	$ 116,540.00	$ -
Wisconsin Insurance Security Funds	$ 3,145,872.74	$ 150,008.62	$ 3,295,881.36	$ (1,052,900.24)	$ 2,242,981.12	$ 1,945,193.03	$ 297,788.09
	$ 260,025,857.37	$ 33,839,176.38	$ 293,865,033.75	$ (25,625,282.56)	$ 268,239,751.19	$ 231,192,886.71	$ 37,046,864.48

This chart includes the $3,148,212.13 paid on behalf of guaranty associations by the Liquidator for worker's compensation claimants during 2003 as advances on early access distributions in order to avoid disruptions in payment to the claimants during the transition of the claims from Home to the guaranty associations.

Exhibit A

Exhibit B

The Home Insurance Company In Liquidation

Statement of Net Assets
(Modified Cash Basis)
(Unaudited)

	September 30, 2009	December 31, 2008
Assets		
Unrestricted bonds, short-term investments and cash at cost:		
Bonds (Note 2)	$910,567,517	$780,430,643
Short-term investments	9,509,750	49,738,716
Cash and cash equivalents	44,940,492	98,735,353
Total unrestricted bonds, short-term investments and cash at cost	**965,017,759**	**928,904,712**
Common stocks, marketable, at market value (Note 2)	215,431	277,937
Interest income due and accrued	9,278,667	7,060,880
Receivable from US International Reinsurance Company (Note 4)	33,166	23,088
Total unrestricted liquid assets	**974,545,023**	**936,266,617**
Unrestricted illiquid assets: (Note 1)		
Surplus notes	-	146,800
Common stocks	96,329	101,995
Limited partnership interests	1,688,725	2,014,731
Total unrestricted illiquid assets	**1,785,054**	**2,263,526**
Restricted liquid assets - cash (Note 5)	417,852	417,852
Total assets, excluding certain amounts	**976,747,929**	**938,947,995**
Liabilities		
Incurred but unpaid administrative expenses and investment expenses (Note 3)	4,116,867	5,080,004
Notices of Determination approved for Class I creditors (Note 8)	-	2,932,508
Claims checks payable (Note 1)	631	241,897
Total liabilities	**4,117,498**	**8,254,409**
Net assets, excluding certain amounts	**$972,630,431**	**$930,693,586**