

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

**REPLY MEMORANDUM IN SUPPORT OF THE WESTERN TRUST'S  
OBJECTION TO THE LIQUIDATOR'S ALLOWANCE AND TREATMENT OF  
CERTAIN CLAIMS OF THE CALIFORNIA INSURANCE GUARANTEE ASSOCIATION**

**I. INTRODUCTION**

In his Opposition (“Opposition”) to the Western Trust’s Objection (“Motion”), the Liquidator<sup>1</sup> fails to reference any clear authority refuting either argument advanced by the Western Trust in its Motion, namely (i) that the Expenses incurred by CIGA to date in the Alameda Action are not costs “in handling claims” meriting treatment as a Class I claim against the Home estate, or (ii) that such Expenses do not reduce the Western Trust’s Allowed Claim.

First, the Liquidator unconvincingly questions whether the Western Trust’s *undisputed* interest in the ultimate outcome of the Liquidator’s reimbursement of CIGA’s Expenses – *i.e.*, a *dollar-for-dollar* reduction in the Western Trust’s Allowed Claim – confers standing on the Western Trust for purposes of its Motion. This readily quantifiable injury, which inures to the detriment of the asbestos victims for whose benefit the Western Trust solely exists, not only is sufficient for standing, but also eliminates any concern the Liquidator or this Court may have that allowing the Western Trust to advance its Motion could disrupt the orderly administration of the Home estate. As acknowledged by the Liquidator, the Western Trust stands apart from other Class II claimants in that only its Allowed Claim is subject to reduction on account of certain costs, namely *recoveries* under the Policies from insurance guaranty associations.

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<sup>1</sup> Capitalized terms herein bear the same meaning as those ascribed in the Motion.

Far from having recovered from CIGA, the Western Trust has not even submitted a claim to CIGA under the Policies. Thus, CIGA necessarily has not incurred claims handling expenses in the Alameda Action. As acknowledged by the Liquidator, the Alameda Action is phased litigation. Questions concerning the construction of the Policies as well as any amounts owing thereunder to the Western Trust will be addressed only after the court clarifies (via declaratory relief) the currently pending issues of statutory interpretation. The Liquidator should not be diminishing the limited assets of the Home estate by reimbursing in full what constitutes at best a residual claim, particularly where he fails to identify any clear authority that allows him to do so.

More saliently, the Liquidator should not be reducing the Western Trust's Allowed Claim by these amounts. Per the terms of the parties' Agreement, the Liquidator only may reduce the Recommended Amount to the extent of the Western Trust's Recoveries (*i.e.*, indemnification) under the Policies from insurance guaranty associations and such associations' Policies-related expenses (*i.e.*, costs incurred in the defense of the Western Trust against third-party claims, another policyholder benefit). According to the Liquidator, CIGA's Expenses in the Alameda Action are not "Policy Related Claims" under the Liquidation statute, but instead are Class I claims under the statute. His suggestion in the face of this admission that they nonetheless are Policies-related expenses *under the Agreement* strains any reasonable reading of the Agreement. In so construing the Agreement, the Liquidator deprives the Western Trust of its rightful interim distribution and thereby threatens to impair the interests of the very claimants whose rights the Liquidation statute is designed to protect.

## II. ARGUMENT

### A. *The Western Trust Has Standing to Challenge the Liquidator's Reimbursement of CIGA's Expenses.*

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The Liquidator concedes – and, thus, no dispute exists – that the Western Trust “may

properly present its arguments concerning the propriety of the deduction under the settlement.” Opposition at p. 9. Accordingly, the question whether the Western Trust lacks standing to contest the Liquidator’s reimbursement of CIGA’s Expenses is not dispositive of the parties’ dispute. *See* Motion at § IV (requesting an order disallowing CIGA’s Expenses, *or* directing the Liquidator to pay Western Trust’s Allowed Claim without any reduction for CIGA’s Expenses).

The Liquidator nevertheless asserts that the Western Trust lacks standing to bring its Motion. He may be correct that a claimant *ordinarily* suffers no more than a “marginal” and, therefore, legally insufficient injury (for purposes of standing) on account of the allowance of *another’s claim*; no reasonable dispute, however, exists that the Western Trust has suffered a quantifiable and, thus, legally cognizable injury because of the Liquidator’s reimbursement of the Expenses, and his corresponding reduction in the amount of the Western Trust’s Allowed Claim. *See Libertarian Party of N.H. v. Sec’y of State*, 158 N.H. 194, 195 (2008) (internal quotations omitted) (standing analysis concerns whether the party has suffered a legal injury).

First, the Western Trust is not (as the Liquidator contends) “*indirectly* bear[ing] *a portion* of the CIGA’s expenses as a result of the deduction from the Recommended Amount.” Opposition at p. 17 (emphasis added). Rather, the Liquidator has reduced the Western Trust’s Allowed Claim *dollar-for-dollar* to the extent of his reimbursement of CIGA’s Expenses. Opposition at p. 5. Accordingly, the Western Trust assuredly has a “direct, definite interest” in the Liquidator’s allowance of CIGA’s claim(s) because such allowance, according to the Liquidator (as disputed by the Western Trust), compels a commensurate reduction of the Western Trust’s Allowed Claim. *Hannaford Bros. Co. v. Town of Bedford*, 164 N.H. 764, 767 (2013) (internal quotations omitted).

The Western Trust agrees with the Liquidator (for purposes of this Motion only) that the Agreement is “atypical” insofar as it reserves the Western Trust’s right to seek recoveries from insurance guaranty associations. For this very reason, however, the Liquidator’s assertion that allowing the Western Trust to oppose reimbursement of CIGA’s Expenses is a “recipe for chaos” is unfounded. Opposition at p. 9, n. 1. As discussed above, the Western Trust is positioned differently from other Class II claimants in that its settlement with the Liquidator contemplates certain deductions (albeit, not for CIGA’s Expenses) to the Western Trust’s Allowed Claim, *i.e.*, a direct, definite interest sufficient to confer standing. *See Hannaford*, 164 N.H. at 767.

Allowing the Western Trust to contest such claims against the Home estate, therefore, will not open the door for claimants, generally, to oppose the Liquidator’s allowance of other claims, or for the Western Trust to oppose the Liquidator’s allowance of claims that do not result in a dollar-for-dollar reduction of the Western Trust’s Allowed Claim. In the absence of any provision to the contrary in the Liquidation statute (which, consequently, the Liquidator has failed to identify), the Western Trust’s interest in protecting its rights should prevail.

This conclusion is only bolstered when the *reason* for the Western Trust’s retention of its rights against insurance guaranty associations is considered. Unlike other Class II claimants, the Western Trust exists for the sole purpose of compensating asbestos victims injured by the business operations of the Western Companies. The Western Trust filed proofs of claim in these proceedings asserting entitlement to over \$1 billion under the Policies. Opposition at p. 2. Ultimately, the Western Trust and the Liquidator settled the Western Trust’s disputed claim for a Recommended Amount of \$242.5 million, of which roughly half is expected to be disbursed. *Id.* Considering its purpose, the Western Trust could not leave hundreds of millions of insurance

dollars (*i.e.*, the balance of the Home’s liability under the Policies) “on the table.”<sup>2</sup> Thus, the Liquidator’s reimbursement of CIGA’s Expenses and commensurate reduction of the Western Trust’s Allowed Claim has far more than an “incidental effect” on the Western Trust, or – more to the point – on the beneficiaries for whose interest the Western Trust solely exists.

With this in mind, it is critical to point out, contrary to the Liquidator’s bald assertion, that the Western Trust’s interest in contesting the reimbursement of CIGA’s Expenses is *not* “to deprive CIGA – the Trust’s litigation opponent . . . – of funds to support its defense” or to “increase costs for an opponent.” Opposition at p. 9. Rather, the Western Trust’s sole purpose in doing so is to minimize its expenses and thus to maximize funds available for distribution to asbestos victims of the Western Companies, an objective that is in perfect lockstep with the purpose underlying the Liquidation statute. *See* N.H. Rev. Stat. § 402-C:1 (“The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally”); *see also* Opposition at p. 9 (in enacting the Liquidation statute, “the legislature was concerned with protecting the rights of claimants against the insolvent insurer”).

The Liquidator’s reimbursement of CIGA’s Expenses not only reduces *dollar-for-dollar* the amounts available to compensate the Western Trust’s beneficiaries, but also intensifies the natural insurance-related defense incentives of CIGA to stall, delay and assert every imagined legal argument in the absence of any downside risk in doing so. In fact, the Liquidator’s reimbursement of CIGA’s Expenses with funds that otherwise would inure to the benefit of the Western Companies’ asbestos victims assists *CIGA* in increasing costs for *its* litigation opponent, the Western Trust. *See* Opposition at Ex. F (“The Trust . . . questions whether CIGA has any desire to move this case expeditiously toward resolution. The case already has been on

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<sup>2</sup> For the same reason, the Western Trust did not – and would not – consent to its Allowed Claim being reduced by costs incurred by insurance guaranty associations in *disclaiming* coverage obligations to the Western Trust.

file for nearly three years, yet the adjudication of *CIGA's defense*, as opposed to the Trust's affirmative positions, still seems a long way off.”) (Emphasis in original.)

***B. CIGA's Expenses Are Not Costs "In Handling Claims" and thus Not a Class I Claim against the Home Estate.***

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Setting aside any question of standing, the Liquidator next asserts that he was statutorily obligated to reimburse CIGA's Expenses as a Class I claim, citing to the provision of the Liquidation statute that requires insurance guaranty association's expenses "in handling claims" to be "accorded the same priority as the liquidator's expenses." N.H. Rev. Stat. § 404-B:11(II). In support of his position, the Liquidator contends the phrase "in handling claims," as informed by the New Hampshire Insurance Guaranty Association's statutory authority to "[i]nvestigate claims brought against the association and adjust, compromise, settle, and pay covered claims to the extent of the association's obligation and to deny all other claims," is broad enough to encompass CIGA's Expenses "[u]nder usual principles of statutory construction." Opposition at p. 10 (citing N.H. Rev. Stat. § 404-B:8(I)(d)).

What the Liquidator ignores, however, is that all Expenses incurred by CIGA in the Alameda Action to date relate expressly to the interpretation of California statutory law, and do not concern the Policies. As noted by the Liquidator, the parties to the Alameda Action have agreed to phased litigation. *See* Opposition at p. 4 and Ex. F. Presently, the case is in Phase I, which concerns only the following legal issues:

- Whether insurance recoveries held by the Western Trust constitute "other" available insurance under Cal. Ins. Code § 1063.1(c)(9)(A) and, if so, whether enforcement of this statutory provision is preempted by the Bankruptcy Code; and
- Whether the Western Trust's settlements with its solvent insurers have exhausted those insurers' coverage within the meaning of Cal. Ins. Code § 1063.1(c)(9)(A) and, if not, whether enforcement of this statutory provision is preempted by the Bankruptcy Code.

*See* Opposition at Ex. F. (p. 14). Neither of these issues concerns the Policies. Indeed, “foundational insurance coverage issues based on interpretation of the Home policies” and the “determin[ation] [of] the specific amount, if any, that CIGA owes the Trust” expressly are left for Phases II and III, respectively. *Id.* (pp. 14-15). Thus, CIGA presently is not “handling claims” under the Policies; in fact, no such claim even has been tendered by the Western Trust. *See* Motion at p. 6. Because they bear no direct relation to the Policies, CIGA’s Expenses at best constitute a residual claim against the Home estate that only should be reimbursed after disbursements to all higher priority classes. *See* N.H. Rev. Stat. § 402-C:44(V). While the phrase “in handling of claims” may be broad – despite the Liquidator’s failure to provide clear authority to support this proposition – it cannot be so broad as to encompass costs unrelated to the Policies.

That the “whole point” of the Alameda Action, according to the Liquidator, is to “enable the [Western Trust] to recover from CIGA under the Home policies” does not change the fact that the instant Expenses do not constitute costs “in handling claims.” Opposition at p. 11. Even if, during a later phase of the case, CIGA’s expenses in the Alameda Action constitute costs “in handling claims” (a matter about which the Western Trust expressly reserves all rights), the Expenses for which the Liquidator already has reimbursed CIGA – as well as any additional costs incurred by CIGA in Phase I of the Alameda Action – do not warrant treatment as a Class I claim. The Liquidator’s wholly unsupported contention that “[t]he determination of such statutory issues and litigation concerning them” in the context of a declaratory judgment action “is as much as part of CIGA’s handling of claims as making determinations under the Home’s policies” cannot substitute as controlling authority. *See* Opposition at p. 12.

In fact, as noted by the Western Trust in its Motion, “[w]here a plaintiff seeks a declaratory judgment, *he is not seeking to enforce a claim* against the defendant, but rather a judicial determination as to the existence and effect of a relation between him and the defendant.” *Benson, M.D. v. N.H. Guar. Ass’n*, 151 N.H. 590, 593 (2004) (emphasis added). In this way, “[t]he remedy of declaratory relief affords relief from uncertainty and insecurity created by a doubt as to rights, status or legal relations existing between parties” before such controversy leads to repudiation of rights or commissions of wrongs. *Id.* at 593-594. Axiomatically, declaratory relief is used to *declare* rights rather than to *execute* them. *Travers v. Loudon* (1967) 254 Cal. App. 2d 926, 931.

Phase I of the Alameda Action – which concerns only the above-referenced matters of law – is far removed from the execution of rights and obligations between the Western Trust and CIGA. Instead, its sole purpose is to declare whether “other” insurance remains available to the Western Trust so that the parties’ dispute concerning this issue can be resolved *before* claims are tendered to CIGA for handling and disposition. Otherwise, CIGA could find itself in breach of its obligations if the Western Trust were to tender claims to CIGA now and CIGA were to deny coverage on the basis of the availability of other insurance, if it were later determined that no other insurance remained available. By employing the declaratory relief procedure, the parties will avoid this circumstance and instead allow the court’s ruling on this statutory issue to guide their actions in a manner that does not result in the commission of a future wrong for which compensation is due. CIGA cannot look to the Home estate to reimburse (at 100%) its Expenses related to the declaratory resolution of this purely statutory issue.

C. *CIGA’s Expenses Do Not Reduce the Western Trust’s Allowed Claim.*

However broad the phrase “in handling claims” is construed, the Liquidator concedes that



expenses “in handling claims” do not constitute Policy Related Claims (*i.e.*, Class II claims) against the Home estate. *See* Opposition at p. 12, n. 3; *see also* N.H. Rev. Stat. § 402-C:44(II). Rather, Policy Related Claims, according to the Liquidator, encompass indemnity recoveries and “policyholder defense expenses” as well as “claims of guaranty associations for their *payment* under policies of the insolvent insurer.” Opposition at pp. 6, 12 and n. 3 (emphasis added).

Likewise, “Policies-related expenses” under Section 9B(1) of the Agreement – as distinguished from expenses “in handling claims” – only encompass policyholder defense expenses. The Liquidator hardly can argue that in negotiating the Agreement with the Western Trust, he did not have his own operating statute in mind. The Liquidation statute provides the best evidence of what the parties’ to the Agreement intended by “Policies-related expenses.”

The Liquidator’s three-part argument to the contrary does nothing to change this result. Addressing them in turn, as noted above, regardless of whether “Policies-related” is broad, the Liquidator concedes that costs “in handling claims” (administrative Class I expenses) do not encompass “Policies Related Claims” under the Liquidation statute, as expressly distinguished from policyholder defense expenses (which are part of the policyholder benefit and Class II). *See* Opposition at p. 12 and n. 3.

Next, the Liquidator argues that the Western Trust’s acknowledgment in the first sentence of Section 9B(1) – namely, that in the event the Western Trust pursues any claim against an insurance guaranty association, the association’s claims handling expenses as well as any recovery by the Western Trust could become a claim against the Home estate – describes the costs identified in the second sentence of Section 9B(1) that the parties agreed would be deducted from the Western Trust’s Allowed Claim. This construction strains logic. Rather, the Western Trust’s acknowledgment (in the first sentence) of *all* costs that could be incurred by an

insurance guaranty association on account of a claim by the Western Trust immediately followed by (in the second sentence) an itemization of *specific* costs warranting reduction of the Recommended Amount demonstrates that only certain costs incurred by insurance guaranty associations on account of a claim by the Western Trust can be deducted from the Western Trust's Allowed Claim. *See* Opposition at pp. 3-4. If the parties instead intended for all of the costs identified in the first sentence of Section 9B(1) to reduce the Recommended Amount, they would have so stated in the second sentence, rather than enumerating from among the universe of potential costs identified in the first sentence the specific items appropriate for deduction.

Lastly, the Liquidator's suggestion that the purpose of the phrase "Policies-related" was to "limit the expenses to those with respect to Home" is nonsensical. Opposition at p. 14. It is simply not true that "[a]bsent reference to 'Policies,' CIGA's expenses in responding to Trust claims under policies issued by other insolvent insurers could potentially be deducted" from the Western Trust's Allowed Claim in the Home liquidation proceedings. Opposition at p. 15. Only claims pertaining to the Home can be submitted to the Liquidator of the Home.

Thus, the term "Policies-related expenses" in Section 9B(1) of the Agreement is co-extensive with the term "Policy Related Claims" in the Liquidation statute. *See id.* at pp. 3-4; *see also* N.H. Rev. Stat. § 402-C:44(II). In agreeing to the reduction of its Allowed Claim to the extent of its *recoveries* (whether for policyholder defense expenses and/or indemnity recoveries) from insurance guaranty associations, the Western Trust resolved the Liquidator's concern that the Home estate could be called upon to distribute in duplicate – once to the Western Trust and again to an insurance guaranty association as assignee of the Western Trust – funds pertaining to the same liability under the Policies. The Western Trust, however, did not agree to allow costs

that inured to the detriment of its asbestos victims (like costs incurred “in handling claims”) to reduce its recovery from the assets of the Home estate.

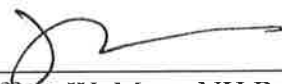
### III. CONCLUSION

For all the foregoing reasons as well as those set forth in its Motion, the Western Trust respectfully requests that this Court issue an order disallowing the reimbursement of CIGA’s Expenses (at least as a Class I claim), or directing the Liquidator to pay the Western Trust’s Allowed Claim without any reduction for these Expenses.

Respectfully submitted,

WESTERN ASBESTOS SETTLEMENT TRUST

By Its Attorneys,



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Dated: March 30, 2016

### CERTIFICATE OF SERVICE

I hereby certify that a copy of *Reply Memorandum in Support of the Western Trust’s Objection to the Liquidator’s Allowance and Treatment of Certain Claims of the California Insurance Guarantee Association* was sent this 30th day of March 2016 by regular mail to all persons on the attached service list.



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