

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

**Docket No. 217-2003-EQ-00106**

**In the Matter of the Liquidation of  
The Home Insurance Company**

**LIQUIDATOR'S OPPOSITION TO WESTERN TRUST'S OBJECTION**

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby opposes the Objection of the Western Asbestos Settlement Trust to the Liquidator's Allowance and Treatment of Certain Claims of the California Insurance Guarantee Association (the "Objection") filed January 27, 2016.

In the Objection, the Western Asbestos Settlement Trust ("Western Trust" or "Trust") challenges (1) the Liquidator's allowance as a claim in the Home estate of legal expenses paid by the California Insurance Guarantee Association ("CIGA") to defend against a suit brought by the Western Trust, and (2) the Liquidator's deduction of those legal expenses from the allowed amount used to determine the distribution amount to be paid into escrow under the settlement between the Trust and the Liquidator.

As set forth below, the Western Trust may not properly challenge the allowance of CIGA's expenses in the Home estate, but in any event, CIGA is entitled to allowance of the expenses as a Class I claim pursuant to RSA 404-B:11, II. With respect to the Liquidator's deduction of the CIGA expenses from the Western Trust's claim, the deduction is expressly provided for in the Settlement Agreement between the Trust and the Liquidator that was approved by the Court in 2011.

## Background

The Objection does not provide a clear summary of the relevant background, so the Liquidator offers the following (exhibits are included in the separate appendix):

1. Home and the Western Trust. Home was declared insolvent and ordered liquidated by the Order of Liquidation issued June 13, 2003. That order appointed the Insurance Commissioner as Liquidator of Home.

2. The Western Trust is the sole owner of Western Asbestos Company and pursuant to authority granted in the Order Confirming Second Amended Joint Plan of Reorganization and Granting Related Relief dated January 27, 2004 is authorized as the successor to MacArthur Co. and Western MacArthur Co. to “initiate, prosecute, defend and resolve” asbestos insurance actions in the name of MacArthur Co., Western MacArthur Co. and/or Western Asbestos Company (the “MacArthur Companies”). See Exhibit A (Trust/Liquidator Settlement Agreement), introductory paragraph.

3. The Liquidator/Western Trust settlement. After Home was placed in liquidation, the Western Trust filed proofs of claim asserting entitlement to in excess of \$1 billion under Home policies issued to the MacArthur Companies. On December 2, 2010, the Liquidator issued a Notice of Partial Redetermination denying the Western Trust’s claims in their entirety. The Western Trust filed an Objection on January 28, 2011, and the Liquidation Clerk issued a Notice of Disputed Claim Proceeding (2011-HICIL-48) on February 9, 2011.

4. On February 18, 2011, the Liquidator entered a Settlement Agreement and Mutual Release (the “Settlement Agreement” - Exhibit A) with the Western Trust and MacArthur Companies (referred to collectively as “Claimants” in the Settlement Agreement). Among other things, the Settlement Agreement provided for a Recommended Amount of \$242,500,000 to be

allowed as a Class II priority claim of Claimants in the Home estate. Settlement Agreement ¶ 3(A). The parties acknowledged that “the Recommended Amount is a compromise of matters in dispute and does not reflect the view of any Party as to the value of Claimants’ claims should the matter be adjudicated.” Settlement Agreement ¶ 5.

5. The Liquidator filed a motion for approval of the Settlement Agreement on March 7, 2011 (Exhibit B), and the Court approved the Settlement Agreement by order issued May 2, 2011 (Exhibit C). The Settlement Agreement became effective when it was approved. See Settlement Agreement ¶ 1.

6. At the time of the Settlement Agreement, the Western Trust was pursuing litigation against CIGA in the Superior Court for San Francisco County, California, as part of litigation known as the “Zurich Litigation.” See Settlement Agreement, fifth and seventh Whereas clauses. The Settlement Agreement provided that the Trust would dismiss or discontinue, without prejudice, its claims against CIGA in the Zurich Litigation within ten days of the Effective Date. Settlement Agreement ¶ 10(b). The Trust dismissed its claim against CIGA without prejudice following the Effective Date

7. The parties to the Settlement Agreement recognized that the Western Trust might again decide to pursue claims against CIGA or other insurance guaranty associations, and that such litigation could result in guaranty association claims against the Home estate for expenses and any recovery. See RSA 402-C:44 and RSA 404-B:11 (discussed below). The Settlement Agreement accordingly provided:

Claimants acknowledge that, in the event they pursue any claim under the Policies against any Insurance Guaranty Association, the Insurance Guaranty Association’s expenses of addressing the claim and any recovery may become a claim by the Insurance Guaranty Association in the Home liquidation. Claimants agree that any judgments, settlements, or other recoveries by claimants from any Insurance Guaranty Association with respect to the Policies (“Recovery” or

“Recoveries”) and the Insurance Guaranty Association’s Policies-related expenses incurred after the Effective Date of this Agreement (“Expenses”) shall be deducted from the Recommended Amount. In the event of such Expenses or Recovery, the amount allowed as a Class II claim in the Home liquidation shall be the Recommended Amount minus both (i) the Expenses, and (ii) any Recoveries.

Settlement Agreement ¶ 9(B)(1) (emphasis added).

8. In order to ensure that appropriate deductions are made before funds are distributed to the Western Trust, the Settlement Agreement also provided that if the Western Trust is pursuing a claim against any insurance guaranty association with respect to the Home policies at the time the Liquidator is to make a distribution, then the distribution amount shall be placed in escrow pending the resolution of the claim against the guaranty association and satisfaction of certain other conditions. Settlement Agreement ¶ 9(B)(3).

9. The renewed Western Trust/CIGA litigation (Snyder Action). On February 7, 2013, the Trustees of the Western Trust again filed suit against CIGA. Snyder, et al. v. California Ins. Guar. Ass’n, No. RG-13-666656 (Superior Court of California, County of Alameda) (the “Snyder Action”) (the complaint is Exhibit D). That action seeks a declaration that the Trust is entitled to obtain payments from CIGA for asbestos bodily injury liabilities that are covered by Home/MacArthur Companies policies. The action was initially dismissed on statute of limitations grounds, but the dismissal was reversed on appeal. Snyder v. California Ins. Guar. Ass’n, 229 Cal.App.4th 1196 (2014) (Exhibit E). The Snyder Action is pending, and the Trust and CIGA have agreed on a phased litigation. Joint Case Management Conference Statement at 14, Snyder v. CIGA, No. RG13666656 (January 29, 2016) (Exhibit F).

10. The deduction of CIGA expenses. On November 5, 2014, the Liquidator received the waiver of federal priority claims from the United States that was a condition to the making of the initial 15% interim distribution on allowed Class II claims pursuant to the Court’s Order

Approving Interim Distribution to Claimants with Allowed Class II Claims dated March 13, 2012 (as amended July 2, 2012) (Exhibit G). See Liquidator's Fifty-Fifth Report ¶¶ 9-10 (December 24, 2014) (describing the history of the interim distribution).

11. Since the Snyder Action against CIGA was pending when the Liquidator was to make the initial interim distribution in December 2014, the Western Trust's distribution was required to be placed in escrow pursuant to Settlement Agreement ¶ 9(B)(3). The Trust and the Liquidator agreed upon a form of escrow agreement, and the Liquidator filed a motion (Exhibit H) for approval of the escrow agreement on June 3, 2015. The Court approved the Escrow Agreement by order issued June 22, 2015 (Exhibit I).

12. CIGA's legal fees in responding to the Snyder action constitute expenses that CIGA is entitled to recover in the Home liquidation. See RSA 404-B:11, II. Accordingly, they are properly deducted from the Recommended Amount pursuant to Settlement Agreement ¶ 9(B)(1). Through January 8, 2015, CIGA had reported to the Liquidator that it had paid a total of \$311,660 in such legal fees. Under ¶ 9(B)(1) of the Settlement Agreement, the distribution amount to be placed in escrow is calculated by subtracting the \$311,660 of expenses from the Recommended Amount of \$242,500,000 and multiplying the resulting \$242,188,340 by the 15% distribution percentage, which equals \$36,328,251. That amount was placed in escrow on June 30, 2015. The deduction of CIGA's expenses reduced the amount placed in escrow by \$46,749 ( $\$311,660 \times 15\%$ ). The Western Trust contended that the \$311,660 should not have been deducted from the Recommended Amount, and both parties reserved their rights as to the disputed deduction in the Escrow Agreement. Escrow Agreement § 1.1 (attached to Exhibit H).

## The Statutory Framework

13. The liquidation statute. The Insurers Rehabilitation and Liquidation Act, RSA 402-C (“Act”), provides for the payment of claims against insolvent insurers in successive priority classes. RSA 402-C:44. The first priority (“Class I”) is for administration costs of the liquidation:

I. **Administration Costs.** The costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney’s fees.

RSA 402-C:44, I. The second priority (“Class II”) is for policy related claims, including claims of guaranty associations for their payments under policies of the insolvent insurer:

II. **Policy Related Claims.** All claims by policyholders, including claims for unearned premiums in excess of \$50, beneficiaries, and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company, . . . and claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state. . . .

RSA 402-C:44, II. Other priorities follow. The Liquidator does not anticipate that there will be sufficient assets to make any distribution to priority classes below Class II.

14. The guaranty association statute. The priority of guaranty association claims and expenses is also addressed in the New Hampshire Insurance Guaranty Association Act, RSA 404-B (“NHIGA Act”). The NHIGA Act establishes the New Hampshire Insurance Guaranty Association (“NHIGA”), which is “obligated to the extent of the covered claims” under insurance policies of an insolvent insurer, subject to certain limitations. RSA 404-B:8, I(a), (b).

15. The NHIGA Act provides NHIGA and other guaranty associations with certain rights in liquidation proceedings for insolvent insurers:

The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by settlements of covered claims by the association or a similar organization in another state. The court having jurisdiction shall grant such claims priority equal to that which the claimant would have been entitled in the absence of this chapter against the assets of the insolvent insurer. The expenses of the association or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses.

RSA 404-B:11, II. The second sentence of this subsection confirms that guaranty associations' payments of covered claims have Class II priority, and the underscored third sentence grants their expenses "in handling claims" Class I priority (the priority of the Liquidator's expenses).

16. The NHIGA Act authorizes NHIGA to "[h]andle claims" through its employees or through insurers or other persons designated as servicing facilities. RSA 404-B:8, I(f). The activities involved in "handling claims" are indicated by NHIGA's 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 deny all other claims." RSA 404-B:8, I(d). The association "shall have the final authority with respect to the processing and settlement of covered claims for which it becomes responsible pursuant to this chapter." RSA 404-B:8, I(h).

## ARGUMENT

The Western Trust complains that the Liquidator is allowing CIGA's claim for the expenses CIGA incurs in defending against the Snyder Action and deducting those amounts in determining distributions from the Home estate. With respect to the allowance, the Trust has no legal interest in CIGA's claim and thus lacks standing to attack the Liquidator's determination of the claim. In any event, CIGA is entitled to have its expenses allowed pursuant to the NHIGA Act. With respect to the deduction, the Trust disregards the terms of the contract with the Liquidator that was approved by the Court. Paragraph 9(B) of the Settlement Agreement expressly provides for CIGA's expenses to be deducted from the Recommended Amount.

**I. THE WESTERN TRUST'S ATTACKS ON THE ALLOWANCE OF CIGA'S EXPENSES SHOULD BE REJECTED.**

**1. The Western Trust Lacks Standing To Challenge The Allowance Of CIGA's Claim for Expenses.**

The Western Trust contends that CIGA's claim for Snyder expenses should not have been allowed by the Liquidator. However, the Act does not provide for claimants to oppose allowance of other claimants' claims. The Trust lacks statutory standing to attack the allowance because it has no legal interest in the allowance or denial of another's claim in the Home estate.

"In evaluating whether a party has standing to sue" (here to object to an allowance), the courts "focus on whether the party suffered a legal injury against which the law was designed to protect." Libertarian Party of N.H. v. Secretary of State, 158 N.H. 194, 195 (2008) (quoting Asmussen v. Comm'r, N.H Dep't of Safety, 145 N.H. 578, 587 (2000)). The Act is not designed to protect claimants against each other, and a claimant with an allowed claim suffers no legal injury from the allowance of another claimant's claim. The Act provides for the Liquidator to determine claims and make recommendations to the Court. See RSA 402-C:45. Where the Liquidator recommends allowance, there is no provision for others to oppose it. If the Liquidator denies a claim, he is to give notice to the claimant so that the claimant has an opportunity to file an objection with the Court. RSA 402-C:41. There is no provision for others to oppose the denial. Only if the claimant files an objection (not the case here) is there any mention of others. In that case, the Liquidator is to give notice of the hearing to "the claimant or his attorney and to any other persons directly affected." RSA 402-C:41, II.

The Western Trust is not "directly affected" by the allowance of CIGA's claim. "To prove that it is a 'person directly affected' for standing purposes, [a person] must show 'some direct, definite interest in the outcome of the action or proceeding.'" Hannaford Bros. Co. v.



Town of Bedford, 164 N.H. 764, 767 (2013) (quoting Golf Course Investors of NH v. Town of Jaffrey, 161 N.H. 675, 680 (2011)). The Trust has no such “direct, definite interest” in the outcome of CIGA’s claim. That claim concerns CIGA’s rights in the Home liquidation. The Western Trust does not have any right being determined when the Liquidator and Court act on CIGA’s claim.<sup>1</sup>

The Trust’s apparent interest is to deprive CIGA – the Trust’s litigation opponent in the Snyder Action – of funds to support its defense. That desire to increase costs for an opponent, however, is not an “interest” intended to be protected in the determination of claims under RSA 402-C:41 and :45. In those statutes, the legislature was concerned with protecting the rights of claimants against the insolvent insurer. The Trust has no legal interest in the funding for CIGA’s defense of the Snyder Action, and it suffers no legal injury from the allowance of CIGA’s claim.

The Settlement Agreement does provide for CIGA’s expenses to be deducted from the Recommended Amount. However, that incidental effect does not provide bootstrap standing to challenge the determination of a claim in which it has no legal interest. The Settlement Agreement does not provide for any Trust review of CIGA’s claims in the estate (see page 18 below). While the Trust may properly present its arguments concerning the propriety of the deduction under the settlement (which are addressed at pages 12-19 below), it lacks standing to object to the allowance of CIGA’s claim.

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<sup>1</sup> The allowance of another person’s claim may marginally diminish the amount to be distributed to a claimant because of the limited assets of the insolvent insurer’s estate. However, that is not sufficient to create standing. If it were, every claimant could oppose the allowance of every other claimant’s claim. That is a recipe for chaos, especially in a liquidation like this one, where there are thousands of claimants, some of whose claims – such as the Trust’s – are large enough to measurably affect the amounts distributed to other claimants. See Liquidator’s Fifty-Ninth Report ¶ 4 (December 23, 2015) (summarizing proofs of claim).

**2. The Statutes Require The Liquidator To Allow CIGA's Expenses In Handling Claims, Including Its Snyder Expenses.**

In any event, the Liquidator properly allowed CIGA's expenses because he is statutorily obligated to allow CIGA's legal expenses of defending the Snyder Action as a Class I claim. The NHIGA Act provides that "[t]he expenses of [NHIGA] or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses." RSA 404-B:11, II. These expenses thus constitute claims against the Home estate entitled to Class I priority under RSA 402-C:44, I, along with the Liquidator's expenses.

CIGA's expenses in defending the Snyder Action fall within RSA 404-B:11, II. Under the usual principles of statutory construction, a guaranty association's costs of defending an action brought against it to recover amounts under an insolvent insurer's policies are expenses "in handling claims." See In the Matter of Liquidation of Home Ins. Co., 166 N.H. 84, 88 (2014) (courts seek to determine "the legislature's intent as expressed in the words of the statute considered as a whole"; they first examine "the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used" with the goal "to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.")). The plain intent of the statute is to provide for payment of such guaranty association expenses from the insolvent insurer's estate.

The phrase "in handling claims" is broad. The breadth of activity encompassed by the phrase is evident from NHIGA's specific 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 deny all other claims." RSA 404-B:8, I(d). See Pelkey v. Dan's City Used Cars, Inc., 163 N.H. 483, 485 (2012) ("We do not read words or phrases in isolation, but in the context of the entire statutory scheme.")). The determination of claims contemplated

by the statute necessarily involves determinations under both the insolvent insurer's policies and the association's statute. It also includes litigation over these issues when the association denies obligations to an insured or other claimant and the claimant sues the association. See RSA 404-B:8, II(c) (NHIGA is authorized to "[s]ue or be sued").

The Western Trust's argument that the Snyder Action is a declaratory action and does not assert a "claim" against CIGA disregards the very purpose of the case. The whole point of the Snyder Action is to enable the Western Trust to recover from CIGA under the Home policies. The Trust concedes as much in its Objection. See Objection at 1 (The Western Trust "is seeking to recover the balance of Home's liability from [CIGA]. To that end, the Western Trust filed a lawsuit for declaratory relief against CIGA.") (emphasis added); id. at 5. The Snyder complaint itself alleges:

CIGA disputes its obligations to the Western Trust with respect to the Home policy obligations. Accordingly, the Western Trust seeks a declaration that CIGA is required to compensate the Western Trust for amounts paid by the Western Trust on account of asbestos bodily injury claims, to the extent such claims are covered under the Home policies and would have been paid in full by Home, but for Home's insolvency.

Snyder Complaint ¶ 2 (emphasis added). Where the Western Trust asserts a right to recover from CIGA under the Home policies, and CIGA disputes that right, CIGA's expenses in defending against the Western Trust's assertion are expenses "in handling claims."<sup>2</sup>

The fact that the Snyder Action includes questions concerning the extent of CIGA's statutory obligations does not somehow change this. Guaranty associations are statutory entities

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<sup>2</sup> The California Court of Appeal's decision in Snyder has no bearing on whether CIGA's Snyder expenses fall within RSA 404-B:11, II. The court's decision concerned application of the statute of limitations to a declaratory action, and it considered whether based on the pleadings a "covered claim" had accrued or a claim had been submitted more than three years before the complaint was filed. See Snyder, 229 Cal.App.4th at 1211-13. It sheds no light on what the New Hampshire legislature intended by the phrase "in handling claims" in a statute providing guaranty associations with priority rights.

that are only obligated to pay claims under insolvent insurer's policies to a limited extent and in certain circumstances. See, e.g., RSA 404-B:5, IV (defining "covered claim"); RSA 404-B:8, I(a) (establishing caps on NHIGA's liability); RSA 404-B:12, I (NHIGA's obligation to pay only arises after all other insurance has been exhausted); OB/GYN Assoc. of Southern N.H. v. N.H. Ins. Guar. Ass'n, 154 N.H. 553, 557 (2006). The determination of such statutory issues and litigation concerning them is as much a part of CIGA's handling of claims as making determinations under the Home's policies – which are also part of the Snyder Action. See Joint Case Management Conference Statement at 14, Snyder et al. v. CIGA, No. RG13666656 (January 29, 2016) (second trial phase is the "Contractual Coverage Phase" addressing coverage issues under the Home policies).

In sum, CIGA's expenses in defending the Snyder Action fall within RSA 404-B:11, II. Just like solvent insurers, guaranty associations incur expenses in responding to litigation asserting entitlements under policies. This is part of the association's duties in handling claims. While such expenses do not fall within Class II, the statute provides for them to be given the same priority as the Liquidator's expenses, that is, Class I.<sup>3</sup>

**II. CIGA'S COSTS OF DEFENDING AGAINST THE WESTERN TRUST'S SNYDER ACTION ARE PROPERLY DEDUCTED FROM THE RECOMMENDED AMOUNT PURSUANT TO THE SETTLEMENT AGREEMENT.**

In challenging the Liquidator's deduction of CIGA's Snyder Action expenses in determining distribution amounts, the Western Trust seeks to disregard the express terms of the Settlement Agreement. The plain meaning of Paragraph 9(B)(1) is that CIGA's expenses in

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<sup>3</sup> CIGA initially presented its Snyder expenses to the Liquidator along with policyholder defense expenses in other matters, and they were allowed at Class II. CIGA more recently requested that the Liquidator treat the Snyder expenses as Class I. This is the proper classification, and the Liquidator is now assigning the expenses to Class I. However, expenses previously allowed by the Court at Class II will not be reclassified as they are already final. See RSA 402-C:41, I, :45.

responding to Western Trust claims relating to Home policies are to be deducted from the Recommended Amount. See Liquidation of Home, 166 N.H. at 88 (“[W]e give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. Absent ambiguity, the parties’ intent will be determined from the plain meaning of the language used in the contract.”). The deduction serves to protect the Home estate and its creditors from adverse impacts of litigation between the Western Trust and insurance guaranty associations after the Liquidator’s settlement with the Trust has become effective.

**1. The Plain Meaning Of Paragraph 9(B)(1) Requires Deduction Of CIGA’s Snyder Expenses From The Recommended Amount.**

In Paragraph 9(B)(1), the Western Trust acknowledged that if it pursued any claim under the Home policies against CIGA, then CIGA in turn would have claims in the Home estate for both CIGA’s expenses of addressing that claim and any recovery obtained by the Trust:

Claimants acknowledge that, in the event they pursue any claim under the Policies against any Insurance Guaranty Association, the Insurance Guaranty Association’s expenses of addressing the claim and any recovery may become a claim by the Insurance Guaranty Association in the Home liquidation.

Settlement Agreement ¶ 9(B)(1) (emphasis added). The Western Trust thus acknowledged that a guaranty association’s expenses of addressing a Trust claim against the association could become a claim in the Home liquidation. The Trust then agreed that the association’s expenses would be deducted from the Recommended Amount:

Claimants agree that any judgments, settlements, or other recoveries by claimants from any Insurance Guaranty Association with respect to the Policies (“Recovery” or “Recoveries”) and the Insurance Guaranty Association’s Policies-related expenses incurred after the Effective Date of this Agreement (“Expenses”) shall be deducted from the Recommended Amount. In the event of such Expenses or Recovery, the amount allowed as a Class II claim in the Home liquidation shall be the Recommended Amount minus both (i) the Expenses, and (ii) any Recoveries.

Settlement Agreement ¶ 9(B)(1) (emphasis added). The plain meaning of this sentence is that the Trust agrees that any recovery from a guaranty association under the Home policies and the association's expenses related to the policies shall be deducted from the Recommended Amount.

CIGA's expenses in responding to the Snyder Action constitute expenses related to the Home policies. As noted above, the point of the Snyder Action is to recover under the Home policies. If the Trust did not claim rights under those policies, there would be no Snyder Action. Accordingly, the expenses are to be deducted from the Recommended Amount.

The Western Trust contends that the term "Expenses" is limited to the costs of defending the insureds against third party claims, relying on the reference to "Policies-related" in Paragraph 9(B)(1). This misconstrues the agreement. First, the phrase "Policies-related" itself is broad. See Webster's Third New Int'l Dictionary 1916 (2002) (defining "related" as "having relationship: connected by reason of an established or discoverable relation"). The phrase is not limited to expenses for third party claims against an insured. It encompasses all expenses "related" to the policies, which includes those incurred in defending actions like the Snyder Action that assert rights under the policies. Second, the paragraph must be read as a whole. As described above, the first sentence expressly identifies the expenses of concern as those in responding to the Western Trust's claim. That sentence explains the context for the following sentences, in which the Trust agrees to have expenses and recoveries deducted. The Settlement Agreement thus makes clear that it addresses expenses beyond those of defending third party claims. Third, the purpose of the phrase "Policies-related" is not to limit expenses to third party claims but to limit the expenses to those with respect to Home. "Policies" is a defined term specifying the MacArthur Companies' policies with Home. Settlement Agreement, first Whereas clause (defining "Policies" to mean listed policies "under which Claimants are named

insureds . . . together with all other insurance policies that Home may have issued to Claimants”). The phrase excludes CIGA expenses concerning Trust claims under policies of insolvent insurers other than Home that may have insured the MacArthur Companies. Absent the reference to “Policies,” CIGA’s expenses in responding to Trust claims under policies issued by other insolvent insurers could potentially be deducted.

In sum, the Snyder Action “relates” to the Home policies, and CIGA’s expenses in responding to it are “Expenses” to be deducted in accordance with the Settlement Agreement.

**2. Paragraph 9(B)(1) Protects The Home Estate And Its Creditors From The Trust’s Continued Pursuit of CIGA After the Settlement.**

While the plain meaning of Paragraph 9(B)(1) suffices to support the Liquidator, see Liquidation of Home, 166 N.H. at 88, the Liquidator also notes that the circumstances surrounding the settlement explain the purpose of the provision and further support his position. Paragraph 9(B) serves to protect the Home estate and its creditors in light of the unusual aspects of the settlement with the Western Trust which, unlike most policyholder settlements, allowed the Western Trust to continue to seek to recover from insurance guaranty associations under the Home policies. The Liquidator described these considerations and the purpose of Paragraph 9(B) in paragraphs 7-9 of the Liquidator’s Motion for Approval of Settlement Agreement with Western Asbestos Settlement Trust (March 7, 2011) (Exhibit B).

Almost all of the settlement agreements with policyholders entered by the Liquidator and approved by the Court resolve all matters under the Home policies involved. The settlement agreements typically contain releases by the policyholder of all matters under its proofs of claim and its Home policies. See, e.g., Liquidators’ Motion for Approval of Settlement Agreement with Champion, Ex. A, ¶ 3 (filed December 7, 2015) (Champion/Liquidator settlement including Champion’s release of all claims “arising from or related to the Proofs of Claim or the Policies”).

Those releases prevent the policyholder from subsequently pursuing insurance guaranty associations under the policies after they have settled with the Liquidator. Otherwise, if a policyholder pursued a guaranty association, the guaranty association would incur expenses and might pay recoveries that would become an additional claim in the Home liquidation.

This case was very unusual because the Western Trust was asserting claims against CIGA in the Zurich Litigation at the same time it was pursuing claims in the Home estate. The Western Trust was only willing to dismiss its claims against CIGA without prejudice (see Settlement Agreement ¶ 10(b)), and it would not agree to release the Home policies as part of its settlement with the Liquidator. The Trust wanted to reserve the right to pursue CIGA or other guaranty associations, and it would only provide a release of its proofs of claim. See Settlement Agreement ¶ 6 (releasing claims “arising from or related to the Proofs of Claim” and providing that “[s]uch release does not extend to . . . Insurance Guaranty Associations (subject to the provisions of . . . paragraph 9, below)”).

In these circumstances, the Liquidator was concerned that the Home estate could be subject to obligations beyond the Recommended Amount if the Western Trust successfully pursued CIGA (as recoveries from CIGA for indemnity or defense expenses covered by the policies would form a claim by CIGA in the estate). Further, even if the Trust was not successful against CIGA, CIGA’s expenses in responding to the Trust’s claim would be a claim in the estate. These concerns are not present in the usual settlement. The Liquidator accordingly sought provisions to maintain the position of the Home estate and its Class II creditors regardless of subsequent litigation between the Trust and CIGA. He negotiated to obtain the Trust’s acknowledgement that recoveries from a guaranty association and the association’s expenses of addressing a Trust claim could become a claim in the Home liquidation, and to provide that such



recoveries and expenses would be deducted from the Recommended Amount. Paragraph 9(B)(1) is the result, and it should be applied in accordance with its terms to mitigate the impact of the Western Trust's pursuit of CIGA in the Snyder Action.

### **III. THE TRUST'S OTHER ARGUMENTS ARE UNAVAILING.**

None of the Western Trust's remaining arguments have merit.

1. The Western Trust relies on the "American Rule" to the effect that parties to litigation presumptively bear their own litigation costs. See, e.g., Turner v. Shared Towers VA, LLC, 167 N.H. 196, 207 (2014) ("An award of attorney's fees must be grounded upon statutory authorization, a court rule, an agreement between the parties, or an established exception to the rule that each party is responsible for paying his or her own counsel fees."). That "rule" is not relevant here. CIGA is not a party, and it is not seeking an award of attorneys' fees from the Trust. CIGA is a claimant in the Home liquidation asserting a claim for expenses pursuant to RSA 404-B:11, II. The Trust has no role in that determination, which is a matter of statute as between CIGA and the Liquidator. While the Trust indirectly bears a portion of the CIGA's expenses as a result of the deduction from the Recommended Amount, that is not an award of fees. It is a contractually-agreed deduction to address the economic consequences to the Home estate of the Trust's continued litigation against CIGA. It results in the Trust bearing a small percentage – currently 15% – of CIGA's expenses. The Trust agreed to this in the Settlement Agreement. The "American Rule" provides no reason to disregard the NHIGA Act and the Trust's own contractual agreement.

2. The Western Trust asserts that the deduction of CIGA expenses somehow violates the requirement of the priority statute that no subclasses be created within a priority class. RSA 402-C:44 ("No subclasses shall be established within any class."). The deduction does not create

such a subclass. A subclass would be created where different distribution percentages apply to creditors within the same statutory priority class. Here, the Trust will receive the same percentage distribution as all other Class II creditors of the Home estate – the 15% initial interim distribution and additional percentages as allowed. The deduction does not affect the distribution percentage. It is instead a negotiated adjustment to the settlement amount agreed by the Trust and the Liquidator and approved by the Court. The Act expressly authorizes the Liquidator to “compound, compromise or in any other manner negotiate the amount for which claims will be recommended to the court.” RSA 402-C:45, I. The deduction is proper.

3. The Western Trust finally complains that it may not contest the reasonableness of the CIGA legal fees. However, the treatment of those fees is governed by statute, and the statute provides that guaranty association expenses in handling claims are entitled to administrative expense priority. RSA 404-B:11. The expenses at issue are actual CIGA payments to defense counsel, and they are properly allowed in the Home estate.<sup>4</sup> As discussed in Part I.1 above, the Trust has no legal interest that would support any right to review CIGA’s expenses under the statutes. Nor does the Settlement Agreement provide any such rights. Paragraph 9(B) of the Settlement Agreement does not provide the Trust with any right to review or object to CIGA’s legal fees. (By contrast, the indemnification provision of the Settlement Agreement grants the Trust rights to become involved in indemnified claims. Paragraph 9(A)(1) provides for the Trust to indemnify the Liquidator against claims under the Policies, and Paragraph 9(A)(2) grants the Trust certain rights as to indemnified claims. However, the indemnity expressly does not apply to guaranty association claims, which are carved out and “addressed in subparagraph B below.”

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<sup>4</sup> As payments for defense against asserted obligations under Home policies, the CIGA expenses are quite different from the allocations of guaranty association overhead expense that the Liquidator reviews for reasonableness. See Order [Concerning Claim of the Arizona Property and Casualty Insurance Guaranty Fund] (October 31, 2013).

Settlement Agreement ¶ 9(A)(1).) This avoids further entanglement of the Liquidator in matters between the Trust and CIGA and is consistent with the purpose of the Settlement Agreement to minimize any adverse impact of subsequent litigation between the Trust and CIGA on the Home estate and its policyholders and other creditors.

### CONCLUSION

For the foregoing reasons, the Western Trust's Objection should be denied.

Respectfully submitted,

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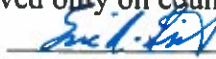
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March 10, 2016

### Certificate of Service

I hereby certify that a copy of the foregoing Opposition to Western Trust's Objection was sent, this 10th day of March, 2016, by first class mail, postage prepaid to all persons on the attached service list. The binder of exhibits was served only on counsel for the Western Trust.



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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of  
The Home Insurance Company  
Docket No. 217-2003-EQ-00106

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