

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-106

ORDER

The issue before the court arises from a settlement agreement entered into by the Western Asbestos Settlement Trust (the "Western Trust") and the Liquidator of the Estate of The Home Insurance Company ("Home Insurance"). The agreement capped the amount Western Trust, as an insured claimant, could recover from Home Insurance for Class II claims, per the Insurers Rehabilitation and Liquidation Act, RSA 402-C:44. The agreement further provided that the capped amount would be reduced by the amount of "any judgments, settlements, or other recoveries by [Western Trust] from an Insurance Guaranty Association with respect to the [Home Insurance] Policies [] and the Insurance Guaranty Association's Policy-Related expenses incurred after the Effective Date of [the] Agreement[.]" Western Trust objects to the Liquidator's reduction of the cap for legal fees incurred by California Insurance Guarantee Association ("CIGA") in connection with litigation in which CIGA disputes its obligation to compensate Western Trust under the pertinent California Guaranty Association statute. Most central to the dispute is the parties' disagreement as to what constitutes "claims" and "Policy-related expenses." After consideration of the parties' pleadings and arguments, and the applicable law, the court finds and rules as follows.

Factual Background

Western Trust was created in January 2004 as a result of a bankruptcy reorganization of the Western Companies, a series of companies involved in the asbestos industry.¹ As part of the bankruptcy reorganization, Western Trust became the holder of the Western Companies rights and responsibilities under numerous insurance policies with Home Insurance. See In re W. Asbestos Co., No. 02-36284 (Bankr. N.D. Cal.). Western Trust exists solely to compensate asbestos-related victims of the Western Companies and is funded by the proceeds from the Western Companies' insurance settlements.

An Order of Liquidation was issued on June 13, 2003 as a result of Home Insurance's insolvency. Under that order, the Liquidator of the Estate of the Home Insurance Company began settling claims of various claimants to the Home Insurance estate.² Western Trust reached a Settlement Agreement (the "Agreement") with the Liquidator on February 18, 2011. Under that Agreement, Western Trust has an allowed claim of \$242.5 million (the "Allowed Claim"), which is a small portion of the \$1 billion Western Trust claims it was owed by Home Insurance. The Agreement was approved by this court on May 2, 2011. The Allowed Claim is considered a Class II priority claim in the liquidation of Home Insurance under the New Hampshire Insurers Rehabilitation and Liquidation Act. See RSA 402-C:44, II.

At the time the Agreement was being negotiated, Western Trust had pending litigation against CIGA in California. CIGA is a state-run insurance guaranty association that exists to make up the difference between what a now-insolvent insurance company

¹ Namely, Western Asbestos Company, Western MacArthur Company, and MacArthur Company.

² The Liquidator here is Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire.

pays out on a claim and what the insured was owed on that claim, subject to limitations. It is funded by a mandatory fee levied on all insurance companies in California. The Agreement required Western Trust to dismiss its claims against CIGA, without prejudice, within ten (10) days of the effective date of the Agreement. Western Trust did so. The Agreement also provided the following:

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.

Agreement ¶ 9B(1). (Emphasis added).

On February 7, 2013, Western Trust filed a new action against CIGA (the "2013 Action"), seeking a declaration of its right to apply to recover the difference between the Allowed Claim and the total amount owed by Home Insurance from CIGA.³ The 2013 Action was pending at the time of the first distribution to Class II claimants by the Liquidator, so the funds to be paid to Western Trust were placed into escrow pending resolution. The 2013 Action is a phased litigation, by agreement of the parties, and is currently in Phase I.

Over Western Trust's objection, the Liquidator is currently considering CIGA's legal expenses incurred in defending the 2013 Action as expenses that CIGA is entitled

³ Docketed as Snyder, et al. v. California Ins. Guar. Ass'n, No. RG-13-666656 (Super. Ct. Calif., Cty of Alameda).

to recover from the Home Insurance liquidation, pursuant to RSA 402-C:44, I and RSA 402 C:44, II. Although the Liquidator initially considered CIGA's claimed expenses as Class II claims, consistent with CIGA's objection, he is now treating the attorney's fees as Class I priority "Administrative Costs" and is paying them to CIGA in full. The real point of dispute is that the Liquidator is reducing the amount of Western Trusts Allowed Claim by the amount being paid to CIGA for its expenses incurred in the declaratory judgment action, which the Liquidator contends is allowed by the terms of the Agreement. As of June 2015, the Liquidator has paid \$311,660 to CIGA but, because the first distribution was made at 15%, the amount held in escrow for Western Trust has only been reduced by \$46,749. According to the parties, the 2013 Action is not close to reaching its conclusion and CIGA's attorney's fees will continue to grow.

Analysis

Western Trust first objects to the Liquidator's treatment of CIGA's attorney's fees as a Class I claim, and, secondly, objects to having the amount of attorney's fees deducted from their Allowed Claim. As a threshold matter, the Liquidator challenges Western Trust's standing to object to the Liquidator's actions regarding CIGA's allowed Class I claim. "[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Duncan v. State, 166 N.H. 630, 642–43 (2014) (internal citations omitted). "In evaluating whether a party has standing to sue, [the court] focus[es] on whether the party suffered a legal injury against which the law was designed to protect." In re Estate of Couture, 166 N.H. 101, 105 (2014) (citation omitted).

The Liquidator argues that New Hampshire statutes do not specifically allow a claimant to object to the payment to another claimant, and, therefore, Western Trust does not have standing to challenge the Liquidator's payments to CIGA or his categorization of its expenses. The court agrees. To the extent that the Liquidator has determined that CIGA's claims should be allowed as Class I claims, Western Trust does not have standing to challenge this determination. Although it is true that the total asset pool available to estate claimants is reduced each time any claim is paid, Western Trust is in no different position than any other claimant or any other insured of an insurance company and suffers no legal injury. There is no entitlement under statute or common law that would constrain the Liquidator's administration of the estate by individual claimants or provide one claimant the right to object to the payment to another claimant. Therefore, the court will not address whether the claims by CIGA are allowable Class I claims.

To the extent, however, the amount the Liquidator allows to CIGA as Class I claims, for administrative costs incurred, reduces Western Trust's Allowed Claim, Western Trust is directly affected by the Liquidator's actions and is being specifically injured by them. The amount in Western Trust's Allowed Claim is inversely related to the amount paid to CIGA for attorney's fees -- when CIGA's attorney's fees are paid, that amount reduces the amount remaining in Western Trust's Allowed Claim. The injury to Western Trust is not speculative and is more tightly connected to the payment of CIGA than it is to the payment of other claims. In contrast, payouts to other Class I claimants reduce the remaining funds from which Western Trust is paid, but do not reduce Western Trust's payment dollar-for-dollar. Instead, the impact of payouts to

other Class I claimants is spread out over the whole class. Therefore, because CIGA's attorney's fees are being deducted from Western Trust's Allowed Claim only, the impact is much more specific than a class-wide reduction and is contrary to the priority statute, RSA 402-C:44, which is designed, in part, to protect claimants from uneven treatment in a given class.

Furthermore, Western Trust has asserted a contract injury that other claimants would not suffer. But for the Agreement between Home Insurance and Western Trust, Class I payments would not impact individually the amount of insurance coverage that would be available to Western Trust as a Class II claimant, and the Liquidator under the priority statute would have no authority to offset such payments. Under RSA 402-C:44, Western Trust would stand in the same position as all other Class II claimants and receive a like proportionate payout. To the extent that Western Trust has a claim that the Liquidator is breaching the terms of the Settlement Agreement, and that it is being treated differently than other members of the Class II class, Western Trust is entitled to seek declaratory relief. The court finds, therefore, that Western Trust has standing to challenge the Liquidator's actions in making specific deductions from Western Trust's Allowed Claim to pay CIGA's attorney's fees.

Turning to Western Trust's central argument, Western Trust contends that the language of the Agreement and the relevant statutes do not authorize the Liquidator to deduct the Class I payments to CIGA to reduce Western Trust's Allowed Claim. The question of whether the Liquidator is authorized to deduct CIGA's attorney's fees from Western Trust's Allowed Claim requires the court to interpret the Agreement with an understanding of the applicable statutes. Two statutes are relevant. First, the Insurers

Rehabilitation and Liquidation Act, RSA 402-C, sets out the classifications for claimants seeking payment from an insolvent insurer. Class I is called “Administrative Costs” and Class II is called “Policy Related Claims.”

I. Administrative 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.

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 liability claims against insureds which claims are 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, I-II. (Emphasis added).

Second, RSA 404-B:11 speaks to the position of guaranty associations in liquidation payouts.

I. Any person recovering under this chapter shall be deemed to have assigned his rights under the policy to the association to the extent of his recovery from the association. Every insured or claimant seeking the protection of this chapter shall cooperate with the association to the same extent as such person would have been required to cooperate with the insolvent insurer. The association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims of the association shall not operate to reduce the liability of insureds to the receiver, liquidator, or statutory successor for unpaid assessments.

II. 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, I-II. (Emphasis added).

When interpreting a contract, the court “will 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.” Ryan James Realty v. Villages at Chester Condo. Assoc., 153 N.H. 194, 197 (2006). “Absent ambiguity, however, [the court] will determine the parties' intent from the plain meaning of the language used in the contract.” Glick v. Chocorua Forestlands Ltd. P'ship, 157 N.H. 240, 248 (2008). “The language of a contract is ambiguous if the parties to the contract could reasonably disagree as to the meaning of that language.” Birch Broad. v. Capitol Broad. Corp., 161 N.H. 192, 196 (2010). “If the agreement's language is ambiguous, it must be determined, under an objective standard, what the parties, as reasonable people, mutually understood the ambiguous language to mean.” Id.

Pursuant to the contract, Western Trust agreed that if it “pursue[d] any claim under the Policies against” CIGA, CIGA’s “expenses of addressing the claim” may become a claim by CIGA in the Home liquidation. Western Trust further agreed that CIGA’s “Policy-related expenses” would be deducted from its Allowed Claim. Specifically, the parties agreed “the amount allowed [Western Trust] as a Class II claim in the Home liquidation shall be the Recommended Amount [of 242.5 million] minus both (i) the [Policy-related] Expenses, and (ii) any [Policy] Recoveries.”

Western Trust argues that as of yet it has not pursued any “claim under the Policies” against CIGA. It contends that the 2013 Action is a declaratory judgment

action that seeks only an interpretation of the relevant California statutes to determine if Western Trust can make a claim against CIGA. This argument makes a temporal and qualitative distinction between attorney's fees incurred currently during the declaratory judgment action and attorney's fees potentially incurred later if Western Trust makes a claim for recovery under the terms of Home policies for indemnity or defense. Considering the circumstances and the context in which the agreement was negotiated, the court finds Western Trust's argument more persuasive.

While closely related, the declaratory action and any future claims made against CIGA for any Home Insurance shortfall are different. Western Trust's legal action seeking a declaratory judgment is not a "claim under the Policies," first, because Western Trust has not yet demanded payment or a defense as a result of a contractual benefit owed under the terms of the Home Insurance policies, and second, because the California litigation is not related to whether the insured or its assignee, the guaranty association, is entitled to a Class II claim for a policy related claim. In other words, the subject of the declaratory action is not a declaration of the rights or responsibilities under the policy, but rather a declaration of the responsibilities under the California statute.

The modifier "Policy related" in the Agreement must have meaning, otherwise it would be superfluous. To understand its meaning, one must look to the relevant statutes and the agreement as a whole. Pursuant to RSA 402-C, II, there are three possible types of claims that fall into a Class II category: 1. "[a]ll claims by policyholders, [] beneficiaries, and insureds arising from [] insurance policies and insurance contracts issued by the [insolvent] company, [2.] liability claims against insureds which claims are

within the coverage of [] insurance policies and insurance contracts issued by the [insolvent] company[,] and 3. claims by a Guaranty Association, such as CIGA. However, a guaranty association's Class II claim, as a statutory assignee, is no different in kind than that of a the policy holder, insured, beneficiary or third party claimant under the pertinent insurance policy or contract. In other words, the claims prioritized in section II are all policy related. The use of the term Policy-related expenses in the Agreement is consistent with the title of the Class II claim section, Policy Related claims, suggesting strongly that the use of the modifier was intended to speak to the same category, Class II claims and Class II expenses.

Class I claims are not policy or benefit related. They are related to the administration of the liquidation, including the handling of claims, similar to expenses incurred by an insurer operating a company and processing claims. RSA 404-B:11, II recognizes a distinction between expenses of a guaranty association: The first categorical provision is that claims made by a guaranty association after settlement are accorded "priority equal to that which the claimant would have been entitled ...against the assets of the insolvent insurer[,]” claims which are necessarily under the terms of and related to the policy -- in other words, Class II claims. The second is the allowance that "expenses of the [guaranty] association in handling claims shall be accorded the same priority as the liquidator's expense" -- in other words, Class I claims. The pertinent paragraph of the Agreement recognized the same distinction by qualifying and limiting the expense type that would result in the Allowed Claim reduction. To hold that CIGA should be indemnified by Western Trust for any and all expense CIGA incurs in connection with Western trust would ignore this limiting language.

Home directs the focus narrowly on the first sentence of Paragraph 9B(1) of the Agreement that reads:

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[.]

and specifically the broad language "any claim." However, this sentence gives CIGA no more right to recovery than it enjoys under RSA 404-B:11, and it does not alter Home Insurance's obligation to CIGA or Western Trust beyond recognizing that the Agreement provides no release of guaranty association claims. It makes clear that, should CIGA incur expenses, it may in turn look to Home Insurance for payment, for both Class I and Class II claims, the former which CIGA has done. It is the second sentence that specifically prescribes what expenses will be allowed to reduce to the Allowed Claim, "policy-related expenses only, that is, Class II claims.


This interpretation is logical when considering the statutory scheme and the circumstances when the Agreement was negotiated. The Agreement served to protect Home Insurance against potentially duplicative payments to CIGA and Western Trust. The pertinent statutes recognize the dual roles played by guaranty association, and provide different priorities for the related expenses, as does the Agreement. If the court were to accept Home Insurance's interpretation, the delineation of the expense types would be obviated; and rather than setting off Class II expenses against a Class II recovery cap, Class I expenses would be set off against a Class II cap. This is inconsistent with the statutory scheme that recognizes the different expenses.

Furthermore, to adopt the interpretation Home insurance presses would result in Western Trust funding the litigation against itself, which would be contrary to the interest of the asbestos injured persons for whom the Trust has a duty to maximize and preserve assets. Both parties were aware of the California litigation, and were aware that, despite the agreement to withdraw the claim upon execution of the Agreement, that Western Trust might refile the lawsuit. It makes no sense that Western Trust would agree to fund litigation against itself in a manner that could greatly compromise a recovery for its beneficiaries and greatly lessen the incentive for its opponent to resolve the dispute expeditiously.

Based on the foregoing, the court rules that the Liquidator is not entitled under the Agreement to deduct Class I expenses paid to CIGA in connection with the 2013 Action from Western Trust's Allowed Claim.

SO ORDERED.

Date: 9/23/2016



Diane M. Nicolosi
Presiding Justice

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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September 29, 2016

Case Name: **In the Matter of Rehabilitation of The Home Insurance Company**
Case Number: **217-2003-EQ-00106**

Order

Tracy A. Uhrin
Clerk of Court

(003)

C: John F O'Connor, ESQ; Carey Almond, ESQ; Lawrence J Eisenstein, ESQ; Gerald J Petros, ESQ; Christopher H.M. Carter, ESQ; Melinda S Gehris, ESQ; John A Hubbard; Richard Mancino, ESQ; Joseph G Davis, ESQ; Albert P Bedecarre, ESQ; Marc E Rosenthal; Mark J Steger, Partner; Eric A Smith, ESQ; J. David Leslie, ESQ; Gary S Lee, ESQ; Mary Ann Etzler, ESQ; David H Simmons, ESQ; David M Spector, ESQ; Dennis G LaGory, ESQ; Peter Bengelsdorf; Michael Cohen, ESQ; Kathleen E Schaff, ESQ; J. Christopher Marshall, ESQ; Peter C.L. Roth, ESQ; Paul W. Kalish, ESQ; Ellen M. Farrell, ESQ; Andrew Livernois, ESQ; Harry L. Bowles; Daniel J. O'Malley, ESQ; Kyle A. Forsyth, ESQ; Lisa Snow Wade, ESQ; Jeffrey W. Moss, ESQ; Linda Faye Peeples; Gregory T. LoCasale, ESQ; Kristine E. Nelson, ESQ; William D. Deane, ESQ; William F. Wills; Joseph C. Tanski, ESQ; John S. Stadler, ESQ; Steven J. Lauwers, ESQ; Michael S. Lewis, ESQ; Robert E. Murphy, JR; Michael J. Tierney, ESQ; Mark J. Andreini, ESQ; Paul A. Zevnik, ESQ; Michael Y. Horton, ESQ