Received 4/26/2022 2:37:50 PM Supreme Court Middle District

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 7 MAP 2022

In Re: Penn Treaty Network America Insurance Company (In Liquidation)
In Re: American Network Insurance Company (In Liquidation)

Appeal of: Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania

On Appeal from the Order of the Commonwealth Court of Pennsylvania dated December 22, 2021, Docket No. 1 PEN 2009, No. 1 ANI 2009

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS IN SUPPORT OF APPELLANT

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Other Authorities

U.S. Department of the Treasury, *Long-Term Care Insurance: Recommendations for Improvement of Regulation*, *Report of the Federal Interagency Task Force on Long-Term Care Insurance*, (Aug. 2020), https://home.treasury.gov/system/files/136/Report-Federal-Interagency-Task-Force-Long-Term-Care-Insurance.pdf. 20, 21, 23

NOLHGA, *Consumer Protection Comparison: The Federal Pension System and the State Insurance System* (May 22, 2016), https://www.nolhga.com/pressroom/article.cfm?articleID=1069......................12

NAIC Authorities

NAIC, *Financial Regulation Standards and Accreditation Program*, (2022), https://content.naic.org/sites/default/files/inline-files/FRSA-Pamphlet-1-2022.pdf.8

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I. IDENTITY AND INTEREST *AMICUS CURIAE*[1]

Founded in 1871, the National Association of Insurance Commissioners ("NAIC") is the United States' standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five United States territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, coordinate regulatory oversight, and represent the collective views of all state regulators domestically and internationally. The NAIC's members, together with the centralized resources of the NAIC, form the national system of state-based insurance regulation in the United States. Throughout its history, the NAIC's purpose has been to provide its members with a national forum, which enables them to work cooperatively on regulatory matters that transcend the boundaries of their own jurisdictions. This allows for the development of standards to be applied by each state in regulating companies doing business in multiple states and provides a central point of communication and facilitation for joint initiatives with federal and international regulators. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, handbooks, white papers, and actuarial

[1] This *amicus* brief was not authored in whole or in part by either party's counsel. Neither a party nor a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

guidelines that promote and establish uniform regulatory policy. The overriding objectives of the NAIC and its members are to protect consumers, promote competitive markets, and maintain the financial solvency of insurance companies and the financial stability of the insurance industry as a whole.

The NAIC has an interest in promoting the uniformity of insurance laws and regulations among the states. Over the years, the NAIC has drafted and adopted various iterations of a model law governing receivership. Every state has adopted a version of this model law, including Pennsylvania. While some of the specific provisions in these versions may differ, the underlying premise behind them remains the same: state insurance commissioners have authority and discretion to allocate the insolvent insurer's estate assets in a way that best protects policyholders. The Commonwealth Court's decision at issue in this appeal misinterpreted Pennsylvania law, which threatens the interpretation of the NAIC model act as enacted in other states. The NAIC members are uniquely qualified and situated to assist this Court by presenting the regulatory and public policy concerns involved in this case.

Individually and collectively, the NAIC members and the state agencies over which they preside have a wealth of experience in the regulation of insurance. Regulators have unique knowledge of and expertise in the insurance industry, and their expertise should be recognized by courts, particularly in liquidation proceedings. The Commonwealth Court in this instance substituted its judgment for

that of the appellant Commissioner by denying over-the-limit benefits to policyholders.

The NAIC endorses the brief of the Commissioner and seeks to aid this Court by offering the legal position and public policy perspectives of the NAIC and its member states.

II. SUMMARY OF ARGUMENT

The question at issue here is whether the Liquidator has authority to disburse estate assets to policyholders of an insolvent long-term care insurance company who have incurred covered expenses above state guaranty fund limits. The Commonwealth Court held that such authority does not exist under Pennsylvania law, calling liquidation proceedings "rigid" and "inflexible." *In Re: Penn Treaty Network Am. Ins. Co. (In Liquidation)*, 259 A.3d 1028, 1041, 1049 (Pa. Commw. Ct. 2021) ("Penn Treaty I"); *In Re: Penn Treaty Network Am. Ins. Co.*, 268 A.3d 1154, 1163 (Pa. Commw. Ct. 2021) ("Penn Treaty II"). The NAIC disagrees. Pennsylvania's receivership law, 40 P.S. §§ 221.1-221.63, and the Pennsylvania Life and Health Insurance Guaranty Association Act, 40 P.S. §§ 991.1701-1717, both of which are based upon model laws adopted by the NAIC, provide the Liquidator with authority and discretion to equitably disburse the assets of the estate.

This case is of national significance to the NAIC membership because the Court's decision could affect the interpretation of the NAIC Receivership Model

Laws (as defined below) and the Life and Health Insurance Guaranty Association Model Act ("LHIGA Model Act"). NAIC, *LHIGA Model Act*, (2018), https://content.naic.org/sites/default/files/MO520.pdf. Since most states have adopted some version of these model laws, and since decisions of courts with similar or identical versions of the models can be used as persuasive authority in other jurisdictions, the outcome of this matter may affect receivership and liquidation proceedings in other states.

III. ARGUMENT

A. The NAIC Receivership Model Laws and the Life and Health Insurance Guaranty Association Model Act, upon which Pennsylvania's and other state laws are based, were enacted to ensure policyholders in all states are uniformly protected in the event of insolvency and must be construed consistent with that purpose.

Pennsylvania's Statutory Construction Act "directs that '[s]tatutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.'" *Koken v. Reliance Ins. Co.*, 893 A.2d 70, 83 (Pa. 2006) (quoting 1 Pa.C.S.A. § 1927 and applying it to the Pennsylvania receivership law at issue here). This mandate from the Pennsylvania Legislature (the "Legislature") is a critical consideration in resolving this case. Particularly in the realm of insurance regulation, uniformity is vital to regulatory efficiency, state reciprocity, and equitable treatment of consumers

and policyholders across the country. To aid that process, the NAIC membership has adopted more than 200 model laws and regulations addressing a variety of insurance regulatory matters. Two of the NAIC's model laws, both of which have been adopted by Pennsylvania, are at issue in this case and should be interpreted in a manner consistent with the goal of promoting uniformity.

At its founding convention in 1871, the NAIC recognized insurer insolvency to be "the greatest calamity that can happen to the persons insured," and established the Committee on Winding Up Insolvent Companies. [2] Proceedings of the NAIC, 1871 vol. II, 60 (1871), *available at* https://naic.soutronglobal.net/Portal/DownloadImageFile.ashx?fieldValueId=4793. Since that time, the NAIC has continued to address issues regarding the treatment of insolvent or troubled insurers to promote a uniform system of insurance supervision.

In 1936, the NAIC adopted the first of its receivership model laws,[3] the Uniform Rehabilitation, Reorganization, or Liquidation Act (the "1936 Model"). Proceedings of the NAIC, 1936 Vol. I, 33 (1936), *available at* https://naic.soutronglobal.net/Portal/DownloadImageFile.ashx?fieldValueId=4871. The 1936 Model first created a uniform procedure so that all creditors, including

[2] The Proceedings of the NAIC are the official published minutes of the meetings of the NAIC.
[3] Collectively, the "NAIC Receivership Model Laws."

policyholders and claimants residing in reciprocal states, were on an equal footing with those in the domiciliary state. *Id*. at 31-33.

In 1969, the NAIC adopted Wisconsin's Rehabilitation and Liquidation Act[4] as the NAIC model law (the "Wisconsin Model") and used the statute as its model law from December 1968 until December 1977. Proceedings of the NAIC, 1969 Vol. I, 168, 241, 271 (1969), *available at* https://naic.soutronglobal.net/Portal/DownloadImageFile.ashx?fieldValueId=5039. The Wisconsin statute[5] was adopted in full by the NAIC, thereby providing great insight into the rationale for provisions of the model. The Pennsylvania receivership law was based on the Wisconsin Model. *See Koken*, 893 A.2d at 84. The Wisconsin Model was the "blueprint for the Pennsylvania statute." *Id*.

The NAIC Receivership Model Laws have evolved over time from a general statement of intent to protect the status of policyholders as creditors to a comprehensive statutory scheme to govern the rehabilitation or liquidation of an insolvent insurer. With every revision of the NAIC Receivership Model Laws, each

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[4] Wis. Stat. Ann. § 645 (1967).

[5] "Following a relatively uncommon though not entirely unprecedented procedure, the Wisconsin legislature enacted S. 303 of 1967 as Chapter 89, Laws of 1967, including in the bill and in the session laws not only the statutory language but also the comments of the Insurance Laws Revision Committee." *See* Wisconsin Model, Introductory Comment to Wis. Stat. Ann. § 645 (1967).

model has become more specific and detailed[6] to promote greater nationwide consistency and certainty in the course of a rehabilitation or liquidation.

The NAIC Receivership Model Laws are created and revised with input from the insurance commissioners and other interested parties.[7] Each version of the NAIC Receivership Model Laws represents the collective wisdom and best practices of the state insurance commissioners. The 2005 version, the Insurer Receivership Model Act ("IRMA"), is the version of the model law in effect today. Recognizing the importance of protecting policyholders, all states have adopted a version of the NAIC Receivership Model Laws based, in part, on either IRMA or its predecessors.[8]

After the receivership scheme had been long-established, the NAIC adopted the Insurance Guaranty Association Model Bill in 1969, a model law "to provide a mechanism for the payment of covered claims . . . and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." Proceedings of the NAIC, 1970 Vol. I, 253 (1970), *available at* https://naic.soutronglobal.net/Portal/DownloadImageFile.ashx?fieldValueId=5047.

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[6] The 1936 Model was two pages, Proceedings of the NAIC, 1936 Vol. I, 33 (1936), whereas the current version of the NAIC model is 78 pages. NAIC, *Insurer Receivership Model Act* (2007), https://content.naic.org/sites/default/files/MO555.pdf.

[7] *See* NAIC, *NAIC Model Laws* (Apr. 19, 2022), https://content.naic.org/cipr-topics/naic-model-laws (explaining process of creating and adopting NAIC model law involves participation by state regulators, consumers, and industry representatives; public hearings, public meetings, and written comments are considered in drafting process; model law drafting process may take months or years in order to reach consensus).

[8] *See* NAIC, *Insurer Receivership Model Act: State Page Key* (2021), https://content.naic.org/sites/default/files/ST555_0.pdf.

The first version of this model focused on property and liability insurance. *Id.* The NAIC Model Life and Health Insurance Guaranty Association Act was then adopted in 1971. Proceedings of the NAIC, 1971 Vol. I, 160 (1971), *available at* https://naic.soutronglobal.net/Portal/DownloadImageFile.ashx?fieldValueId=5053. That model, now known as the LHIGA Model Act, has been amended several times since its adoption, most recently in 2017. Every state has a version of this model law as well.[9]

Uniformity in the interpretation of the state receivership and guaranty association laws and consistency in their application are important concerns to the NAIC. The NAIC provides a certificate of accreditation to a state insurance department once it has demonstrated it has met and continues to meet an assortment of legal, regulatory, and organizational standards as determined by a committee of its peers. NAIC, *Financial Regulation Standards and Accreditation Program*, (2022), https://content.naic.org/sites/default/files/inline-files/FRSA-Pamphlet-1-2022.pdf. The purpose of the accreditation program is for state insurance departments to meet baseline standards of solvency regulation, particularly with respect to regulation of multi-state insurers. NAIC accreditation allows non-domestic states to rely on the accredited domestic regulator to fulfill a baseline level

[9] *See* NAIC, *Life and Health Insurance Guaranty Association Model Act: State Page Key* (2020), https://content.naic.org/sites/default/files/ST520.pdf.

of effective financial regulatory oversight. This creates substantial efficiencies for insurance regulators, who are then able to coordinate and rely on each other's work. NAIC, *Accreditation* (Mar. 10, 2022), https://content.naic.org/cipr-topics/accreditation. As of this date, all 50 states, the District of Columbia and the United States Virgin Islands are accredited by the NAIC. As a requirement for accreditation, each state must enact a receivership scheme similar to IRMA and a regulatory framework such as that contained in the LHIGA Model Act, and its counterpart model law governing property and casualty insurers, for the administration, by the insurance commissioner, of companies found to be insolvent.

Together, the NAIC Receivership Model Laws and the LHIGA Model Act provide the Liquidator with the ability to equitably disburse the insolvent insurer's estate assets as the Liquidator did here. The Commonwealth Court's decision to strike down the Liquidator's mechanism for paying the policyholders with the heaviest expenses could affect the interpretation of the NAIC Receivership Model Laws and the guaranty fund models, as they have been adopted by the states. Since most states have adopted some version of these model laws, and since decisions of courts with similar or identical versions of the models can be persuasive authority in other jurisdictions, this Court should ensure uniform interpretation for consistency with the courts of other states.

B. The LHIGA Model Act and the state laws based upon it give the Liquidator the authority and discretion to determine how to equitably disburse the insolvent insurer's estate.

As the Commonwealth Court recognized, a drafting note to the LHIGA Model Act explains: "Since this Act imposes the obligation upon the Association to continue coverage for policyholders . . . of insolvent insurers, *the assets of the insolvent insurer ought to be used, to the extent available, for the purpose of continuing such coverage.*" *Penn Treaty I*, 259 A.3d at 1044 (emphasis in original) (quoting LHIGA Model Act Drafting Note to Section 14). The Commonwealth Court emphasized that point, but then did the opposite in its decision, curtailing coverage for policyholders in order to provide an additional subsidy to defray the cost to insurers and taxpayers, upsetting the balance struck by the Legislature. *Id.*, generally.

Another drafting note in the LHIGA Model Act, accompanying the Purpose Clause, declares:

> The primary purpose of this model act is to protect policy or contract owners, insureds, beneficiaries, health care providers, annuitants, payees and assignees against losses (both in terms of paying claims and continuing coverage) which might otherwise occur due to an impairment or insolvency of an insurer. Unlike the property and liability lines of business, life and annuity contracts in particular are long-term arrangements for security. An insured may have impaired health or be at an advanced age so as to be unable to obtain new and similar coverage from other

> insurers. The payment of cash values alone does not adequately meet such needs. Thus it is essential that coverage be continued.

NAIC, *LHIGA Model Act*, at MO-520-1.

Every state's version of the LHIGA Model Act addresses the need for continuation of coverage by directing the guaranty association to take over the policies, including both the collection of premiums and the payment of claims, along with the right to actuarially justified rate increases if a solvent insurer would have been entitled to an increase in similar circumstances. The most common cap on benefits for long-term care policies is $300,000, like the NAIC model and Pennsylvania law.

The question at issue here is: What is the purpose and effect of the guaranty association cap? The intent of the NAIC when it adopted the LHIGA Model Act was that the cap represents the maximum cost that the guaranty association might be unconditionally obligated to pay a claimant, whether or not estate assets are available to reimburse the guaranty association. Below the limit, claimants are guaranteed payment in full, but once the limit is breached, the guaranty association is off the hook and the claimant is left only with his or her share of the estate assets. The Commonwealth Court, by contrast, treats the cap as an "inflexible" ceiling on the total benefits the claimant can receive from either the guaranty fund *or* the estate, no

matter how big the pot of estate assets is left to go around. *Penn Treaty I*, 259 A.3d at 1049.

As the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA") described the interstate insurance guaranty fund protection scheme in a 2016 report, the continuation of coverage is based on "an 'A plus B' approach, allowing a policyholder with benefits exceeding guaranty association coverage levels to receive both (A) the guaranty association coverage level of benefits; and (B) benefits supported by the policyholder's share as a priority claimant of the insurer's remaining assets, which are usually substantial." NOLHGA, *Consumer Protection Comparison: The Federal Pension System and the State Insurance System*, at p. 21 (May 22, 2016), https://www.nolhga.com/pressroom/article.cfm?articleID=1069.

The operative language is found at Section 3C(2)(f) and Section 14C of the LHIGA Model Act, codified almost verbatim in Pennsylvania at Clause 1703(c)(1)(ii)(F) and Subsection 1712(c) of the Pennsylvania Life and Health Insurance Guaranty Association Act:

> The limitations set forth in this subsection are limitations on the benefits for which the Association is obligated before taking into account either its subrogation and assignment rights or the extent to which those benefits could be provided out of the assets of the impaired or insolvent insurer attributable to covered policies. The costs of the Association's obligations under this Act may be met by the use of assets attributable to covered policies or reimbursed to the Association pursuant to its subrogation and assignment rights.

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> For the purpose of carrying out its obligations under this Act, the Association shall be deemed to be a creditor of the impaired or insolvent insurer to the extent of assets attributable to covered policies reduced by any amounts to which the Association is entitled as subrogee pursuant to Section 8K. Assets of the impaired or insolvent insurer attributable to covered policies shall be used to continue all covered policies and pay all contractual obligations of the impaired or insolvent insurer as required by this Act. Assets attributable to covered policies or contracts, as used in this subsection, are that proportion of the assets which the reserves that should have been established for such policies or contracts bear to the reserves that should have been established for all policies of insurance or health benefit plans written by the impaired or insolvent insurer.

NAIC, *LHIGA Model Act*, §§ 3C(2)(f), 14C; *see also* 40 P.S. §§ 1703(c)(1)(ii)(F), 1712(c).

The first provision clarifies that subrogation recoveries *do not increase* the guaranty association's obligations and that payments of excess claims out of estate assets *do not decrease* the guaranty association's obligations. And the second provision makes *all* of the estate assets attributable to a covered policy available to pay claims. Conceptually, attributable assets are the proportionate share of the policy obligations for which sufficient assets exist to meet those obligations. If the company's liability on a policy is $100,000, and the estate has enough assets to pay 80% of policy-level claims (Class (b) in Pennsylvania), then the attributable assets are $80,000. This provision constitutes what NOLHGA calls layer "A" – covered claims within the guaranty fund limits. The entire claim is paid by the guaranty association as its unconditional obligation. The guaranty association is then

subrogated to the claimant and collects the claimant's proportionate share from the estate. Then, if the policyholder's covered expenses exhaust the guaranty fund limits, the guaranty association applies the remaining attributable assets to pay or arrange for the payment of layer "B," the excess claims.

While this "A plus B" mechanism is more clearly codified in IRMA § 502D, as the Commonwealth Court acknowledged, the fact that Pennsylvania has not adopted that specific provision should not prevent the Liquidator from employing this method. *Penn Treaty I*, 259 A.3d at 1049. IRMA, and its immediate predecessor, the 1994 Insurers Rehabilitation and Liquidation Model Act ("IRLMA"), are still instructive, as they are the NAIC receivership model laws that were drafted after the life and health guaranty association system was already established in its present form. Proceedings of the NAIC, 1994 4th Quarter, 596 (1994) https://naic.soutronglobal.net/Portal/DownloadImageFile.ashx?fieldValueId=5695. Both IRMA and IRLMA expressly provide that the 30-day cancellation is not automatic for policies that are within the scope of the life and health guaranty association. As such, they provide essential guidance, consistent with the statutory mandate quoted above, to construe uniform laws consistent with their uniform intent, regarding both the intent of the LHIGA Model Act, which Pennsylvania (and all other states but one) have uniformly adopted in relevant part, and also the impact of the guaranty association laws upon receivership laws such as Article V.

C. The NAIC Receivership Model Laws and the state laws based upon them give the Liquidator the authority and discretion to determine how to equitably disburse the insolvent insurer's estate.

The Commonwealth Court's conclusion that "the liquidation of an insolvent insurer follows a rigid procedure and does not confer discretion upon the Liquidator to disburse the assets of the estate in the way the Liquidator thinks is equitable" reveals a fundamental misunderstanding of the insurance commissioner's role in a liquidation proceeding, is contrary to Pennsylvania law, and inconsistent with the laws of other states. *Penn Treaty II*, 268 A.3d at 1163.

State insurance commissioners are not simply the administrators of an insolvency. They have responsibility for overseeing the life cycle of companies chartered to do business in their state and are relied upon for their expertise during a company's liquidation. The Legislature understood this when it adopted the receivership law, providing the Liquidator with the ability to exercise professional judgment in carrying out the assigned duties.

Article V "shall be liberally construed to effect the purpose . . . [of protecting] the interests of insureds, creditors, and the public generally." 40 P.S. § 221.1(b) – (c). With this broad mandate, the Liquidator is "vested by operation of law with the title to all of the property, contracts and rights of action and all of the books and records of the insurer ordered liquidated, wherever located, as of the date of the filing of the petition for liquidation." 40 P.S. § 221.20(c). Once vested with title to the

property, the Liquidator then has the power to "exercise and enforce all the rights, remedies, and powers of any creditor, shareholder, *policyholder* or member" and "exercise all powers now held or hereafter conferred upon receivers by the laws of this Commonwealth not inconsistent with the provisions of this article." 40 P.S. §§ 221.23(19), (22) (emphasis added).

Discretion is universally viewed as necessary since "receiverships vary greatly in size and complexity; therefore, there is no one uniform approach to their administration." NAIC, *Receiver's Handbook for Ins. Co. Insolvencies*, iii (Apr. 2021), https://content.naic.org/sites/default/files/publication-rec-bu-receivers-handbook-insolvencies.pdf. In this case, when the captive insurer was formed to assume portions of the long-term care policies, the Liquidator was doing what was in the best interest of those policyholders who had paid up to thousands of dollars in premiums so they could receive benefits in their time of need.

Due to the unique situation of each insolvency, the Liquidator must be trusted to determine what is best for the affected insureds. The Legislature anticipated that the Liquidator would need flexibility throughout this complicated process:

> [t]he enumeration . . . of the powers and authority of the liquidator shall not be construed as a limitation . . . nor shall it exclude in any manner [the liquidator's] right to do such other acts not herein specifically enumerated, or otherwise provided for, as may be necessary or expedient for the accomplishment of or in aid of the purpose of liquidation.

40 P.S. § 221.23(23).

The Commonwealth Court's holding that Article V does not provide authority "to divide up the insurance policy of an insolvent insurer and send part to a guaranty association and the remainder to an excess insurer" is simply wrong. *Penn Treaty II*, 268 A.3d at 1161.[10]

The Commonwealth Court fixated on the fact that IRMA, which has not been adopted by Pennsylvania, "provides a statutory liquidator with the tools proposed to be used by the Liquidator in creating the Captive," which are lacking in Article V. *Id.* at 1161 n.8. But this only strengthens the argument that IRMA specifically enumerates what had always been allowed as a power "*not herein specifically enumerated*" under Article V. 40 P.S. § 221.23(23) (emphasis added).

As explained above, Pennsylvania's receivership law is based upon the Wisconsin Model, which was drafted before the guaranty fund models were conceived. This means that before 1978, when the Pennsylvania Life and Health Insurance Guaranty Association was created, if a Liquidator created a captive (or moved policies to another solvent insurer), it did not require splitting up or

[10] Indeed, it was the Commonwealth Court that unfairly "divided up" the policies. A truly rigid and inflexible interpretation of Article V would not allow policies to be transferred to guaranty associations at all, because Article V was drafted before that process existed and was never expressly amended to accommodate it. The court properly applied equitable principles to enable the guaranty associations to continue a portion of the coverage, transferring a portion of the policies and extinguishing the remainder, an inequitable result that has no basis in the plain statutory language upon which the court professed to rely.

portioning the policies with the guaranty fund, as none had existed. Yet, doing something like this has always been allowed. The Legislature provided the Liquidator with discretionary authority since it could not conceive of every possible tool "necessary or expedient for the accomplishment of or in aid of the purpose of liquidation." 40 P.S. § 221.23(23).

This Court has repeatedly acknowledged the Liquidator's discretion:

> It has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion *in the absence of bad faith, fraud, capricious action or abuse of power*. . . That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion.

Foster v. Mut. Fire, Marine & Inland Ins. Co., 614 A.2d 1086, 1092 (Pa. 1992) (quoting *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037, 1047 (Pa. 1980) (quoting *Blumenschein v. Housing Auth.*, 109 A.2d 331, 334-35 (Pa. 1954) (emphasis added))).

Affording discretion to the Liquidator is consistent with other state courts' interpretation of their respective receivership laws, each of which are also based on the NAIC Receivership Model Laws. *See, e.g., Ito v. Invs. Equity Life Holding Co.*, 346 P.3d 118, 131 (Haw. 2015) ("These statutes demonstrate the broad discretionary powers of the Liquidator and the liquidation court to effect the equitable distribution

of assets and apportionment of losses."); *Minor v. Stephens*, 898 S.W.2d 71, 83 (Ky. 1995) ("The trial court's primary role is a supervisory one and the standard of the court's review of the Commissioner's actions is one of abuse of discretion."); *Ratchford v. Proprietors' Ins. Co.,* 546 N.E.2d 1299, 1300 (Ohio 1989) ("[W]e believe that the intent of the General Assembly, as expressed in [the receivership law], was to give a Liquidator broad general authority and responsibility to dispose of assets of an insolvent insurance company subject only to judicial review to assure that there is no fraud or abuse of discretion in the process."].

In keeping with the interpretation of receivership laws nationally, this Court should find the Liquidator has the authority to determine the best way to equitably distribute the insolvent insurer's estate. This Court has held that it would approve the Liquidator's proposed plan if it would greatly serve the public interest. *Foster*, 614 A.2d at 1095.[11] Here, the Liquidator has determined that equitable distribution of the insolvent insurer's estate utilizing a captive insurer to pay the proportionate share of over-the-limit benefits is the best way to protect policyholders. Therefore, this Court should allow the Liquidator to protect policyholders by allowing them to receive benefits over the guaranty fund limit. Both the subrogation statute, 40 P.S. § 991.1706(l)(2), and the early-access distribution statute, 40 P.S. § 221.36(b)(4),

[11] In *Foster*, this Court was reviewing a plan of rehabilitation, not liquidation. *Foster*, 614 A.2d at 1095.

expressly call for the guaranty associations to share in the estate *at the same level* as policyholders and policy beneficiaries, not to supplant them to their detriment.

D. The Liquidator correctly applied principles of equity allowed under Pennsylvania's receivership law and guaranty fund law in dispersing the insolvent insurer's estate.

If the insolvency of an insurance company is "the greatest calamity that can happen to the persons insured," Proceedings of the NAIC, 1871 vol. II, 60 (1871), then it is even more so in the context of a long-term care insurance company. In this case, the Liquidator's equitable remedy favoring policyholders was not only authorized by Pennsylvania law, but it was also justified under fairness principles. To reach this conclusion requires an understanding of long-term care insurance and what makes it distinct from nearly every other type of insurance coverage.

Long-term care insurance typically covers services for those needing assistance with activities of daily living, including: eating, toileting, transferring, bathing, dressing, and continence. U.S. Department of the Treasury, *Long-Term Care Insurance: Recommendations for Improvement of Regulation*, *Report of the Federal Interagency Task Force on Long-Term Care Insurance*, 10 (Aug. 2020), https://home.treasury.gov/system/files/136/Report-Federal-Interagency-Task-Force-Long-Term-Care-Insurance.pdf. These services can be "provided in individuals' homes or in institutional settings such as assisted living facilities or nursing homes." *Id.* Under most long-term care insurance policies, "the insured is

not eligible to submit a claim for benefits until he or she becomes 'chronically ill'" as defined by state and federal law. *Id.* at 33. "Because a diagnosis of severe cognitive impairment triggers coverage under most [long-term care insurance policies], many . . . claims (roughly half, according to some industry sources), are filed by policyholders with Alzheimer's or other dementias." *Id.* at 13. According to the U.S. Department of Treasury, "[a]pproximately half of Americans turning age 65 today will need some type of [long-term care] in their lives." *Id.* at 3. "The older a person is, the more likely it is that he or she will need [long-term care] at some point." *Id.*

Those claiming benefits under long-term care insurance policies are the most vulnerable and most in need. Long-term care services can be quite expensive, which means that "unlike short-term medical insurance . . . the structure of [long-term care insurance] relies on the pre-funding of benefits." *Id.* at 15. Often, policyholders purchase their coverage in their fifties or sixties "and then hold the insurance while paying premiums for a lengthy period, often over twenty years." *Id.*

When purchased, a long-term care insurance policy becomes an integral part of one's financial plan. Long-term care insurance, like other long-duration insurance products, including most types of annuities and life and disability insurance, is issue-age rated on a level premium basis. Policyholders in the early years of coverage are paying primarily for the promise that the policy will be renewable for life, so that

coverage will still be there when it is needed. This means that if a consumer waits too long to purchase a policy, the coverage will be prohibitively expensive.

For these reasons, the Commonwealth Court erred in citing *Warrantech* for the proposition that the universe of claims is fixed 30 days after the liquidation order is entered for a long-term care insurer. *See Penn Treaty I*, 259 A.3d at 1042, 1048 (citing *Warrantech Consumer Prod. Servs., Inc. v. Reliance Ins. Co. in Liquidation*, 96 A.3d 346 (Pa. 2014)). There is a crucial distinction between life and health insurance on the one hand, and property and casualty insurance on the other, in the nature of the protection the guaranty funds must provide. For property and casualty policies (as well as for health policies sold and rated on a year-to-year basis), policyholders can, and often do, shop for coverage every year, and coverage from competing insurers will be offered and rated on a basis comparable to the renewal terms offered by the incumbent carrier. *Warrantech* involved a casualty policy issued to a commercial entity. *Id.*, generally. Although not discussed in the opinion, it is likely that it was nonrenewable at will, so the termination of coverage left the policyholder in essentially the same position as if the customer relationship with a solvent insurer had dissolved for business reasons.

Long-duration insurance, by contrast, does not offer a market for replacement coverage. Long-term care insurance is issue-age rated and medically underwritten. *Long-Term Care Insurance: Recommendations for Improvement of Regulation*,

Report of the Federal Interagency Task Force on Long-Term Care Insurance, at 19. This means that if policyholders buy long-term care policies at age 50 and lose them at age 80, for reasons beyond their control, the impact is disastrous. The continuation of coverage – impaired by the insolvency but supplemented by the protection available from the guaranty fund – is all these policyholders have left.

In this case, the Liquidator appropriately used the tools provided pursuant to Article V and the Pennsylvania Life and Health Insurance Guaranty Association Act to equitably distribute the estate assets in a way that benefits the most vulnerable of those impacted by the insolvency.

IV. CONCLUSION

The NAIC, as *amicus curiae*, respectfully requests that this Court reverse the judgment of the Commonwealth Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 531

I, Gerald E. Arth, Esquire, hereby certify that the Brief of *Amicus Curiae* National Association of Insurance Commissioners in Support of Appellant complies with the word count limits set forth in Pa.R.A.P. 531 and does not exceed 7,000 words. The Brief contains approximately 5,395 words.

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I, Gerald E. Arth, Esquire, hereby certify that the Brief of *Amicus Curiae* National Association of Insurance Commissioners in Support of Appellant complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently that non-confidential information and documents.

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IN THE SUPREME COURT OF PENNSYLVANIA

In Re: American Network Insurance Company (In Liquidation) Appeal of: Mike Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania	: : :	7 MAP 2022

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