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5 NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN FRANCISCO

10 FULLER-AUSTIN ASBESTOS
11 SETTLEMENT TRUST; et al.,

12 Plaintiffs,

13 vs.

14 ZURICH-AMERICAN INSURANCE
15 COMPANY, et al.,

16 Defendants.

Case No. CGC 04-431719
Case No. CGC 04-436181
Case No. CGC 05-442140
Case No. CGC 05-442745

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF
INSURANCE COMMISSIONERS IN
SUPPORT OF DEFENDANTS'
TRIAL BRIEF

[Filed concurrently with Application for
Leave to File *Amicus Curiae* in Support
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WESTERN ASBESTOS SETTLEMENT
TRUST, et al.,

Plaintiffs,
vs.

ZURICH-AMERICAN INSURANCE
COMPANY, et al.,

Defendants.

CASE NO. CGC 04-436181

PEPSIAMERICAS, INC., et al.,

Plaintiffs,
vs.

ZURICH-AMERICAN INSURANCE
COMPANY et al.,

Defendants.

CASE NO. CGC 05-442140

PNEUMO ABEX LLC,

Plaintiff,
vs.

ZURICH-AMERICAN INSURANCE
COMPANY, et al.,

Defendants.

CASE NO. CGC 05-442745

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1 The National Association of Insurance Commissioners (“NAIC”) respectfully
2 submits the following brief as *amicus curie* in order to provide the Court additional
3 background and information related to the complex regulatory issues involved in the
4 above-captioned matters.

5 **I. STATEMENT OF INTEREST**

6 NAIC is a non-profit corporation whose membership consists of the principal
7 insurance regulatory officials of the fifty states, the District of Columbia, and the territories
8 and insular possessions of the United States. Founded in 1871, it is the nation’s oldest
9 association of state government officials. The NAIC represents the coordinated and
10 considered views of the state government officials that regulate the insurance industry and
11 enforce the insurance laws of the country.

12 The NAIC’s purpose is to provide its members with a national forum enabling them
13 to work cooperatively on regulatory matters that transcend the boundaries of their own
14 jurisdictions. Collectively, the state insurance commissioners work to develop model
15 legislation, rules, regulations, white papers, and actuarial guidelines that promote and
16 establish uniform regulatory policy. Their overriding objectives are to protect consumers
17 as well as to assist in maintaining the financial stability of the insurance industry.

18 The NAIC performs numerous crucial services on behalf of state governments
19 including: developing and publishing model laws, regulations, bulletins, financial and
20 accounting standards, white papers, consumer guides, handbooks, periodicals, and the
21 *Proceedings of the NAIC*. Hundreds of state and federal laws assign duties to the NAIC
22 and incorporate NAIC standards, models, and other publications. In addition, the NAIC
23 manages and coordinates the accreditation review of insurance departments as well as
24 maintains regulatory and financial databases of insurance company financial data.

25 The interest of the NAIC in this case arises from each member’s interest in
26 promoting the dual and often competing objectives of consumer protection while
27 simultaneously protecting insurers’ solvency. The NAIC has a strong interest in ensuring
28 that regulators retain the necessary discretion to balance all relevant considerations when

1 making the expert decisions that are required. Individually and collectively, the NAIC
2 members and the state agencies over which they preside have a wealth of experience in the
3 regulation of insurance. The NAIC members understand the interests of insurance
4 consumers and work daily to protect those interests. The NAIC members are uniquely
5 qualified and situated to assist this Court by presenting the regulatory and public policy
6 concerns involved in this case.

7 The NAIC also has an interest in the interpretation of its model laws and regulations
8 and in promoting the uniformity of these laws and regulations among the states. New
9 Hampshire, California, Illinois, Indiana, New Jersey, New York, Texas, and Wisconsin all
10 participated in hearings or approved the recapitalization transaction at the center of this
11 dispute. State regulators utilized the change in control process prescribed by the NAIC
12 Insurance Holding Company Regulatory System Act (“Model Holding Company Act”) and the NAIC Insurance Holding System Company Model Regulation with Reporting
13 Forms and Instructions (“Model Holding Company Regulation”). *See* 3 NAIC MODEL
14 LAWS, REGULATIONS AND GUIDELINES, Insurance Holding Company System Regulatory
15 Act, pp. 440-1 to 440-28 (2001) and 3 NAIC MODEL LAWS, REGULATIONS AND
16 GUIDELINES, Insurance Holding Company System Model Regulation with Reporting
17 Forms and Instructions, pp. 450-1 to 450-26 (2001). In addition, the states all have
18 enacted legislation based on NAIC model laws regarding insurer receivership. *See, e.g.*, 3
19 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Receivership Model Act,
20 pp. 555-1 to 555-98 (2007). These model laws and associated regulatory frameworks were
21 developed to ensure that all interested states would have the opportunity to hear and
22 participate in proceedings related to the change in control of an insurer or group of
23 affiliated insurers as well as ensure the orderly and equitable distribution of claims in a
24 liquidation. The model laws provide a statutory and public policy foundation for
25 managing and handling the complex issues associated with insurance groups, including
26 situations involving troubled insurers where the regulatory interest in consumer protection
27 is greatest. Consequently, the NAIC has a significant interest in this matter to ensure that
28

1 its model laws and the state statutes based on these models are interpreted and applied
2 consistently. We seek to aid this Court by offering the legal position and public policy
3 perspectives of the NAIC and its member states.

4 **II. STATEMENT OF THE FACTS**

5 *Amicus*, the NAIC, agrees with the facts set forth in the trial brief submitted by the
6 Defendants and respectfully incorporates by reference the Defendants' Statement of Facts.

7 **III. INTRODUCTION**

8 Plaintiffs attempt to revisit and re-litigate actions taken by the New Hampshire
9 Insurance Department and other insurance departments through various state proceedings
10 several years ago. Plaintiffs seek to effectively contest the recapitalization of an insurer,
11 now in liquidation, years after the opportunity to object to the recapitalization or
12 participate in proceedings pursuant to the Model Holding Company Act provisions, as
13 enacted by states on a nationwide uniform basis. Plaintiffs, who were allegedly harmed by
14 the recapitalization of The Home Insurance Company ("The Home"), were entitled to (and
15 in some cases did) participate and/or object to the recapitalization transaction during the
16 hearings following submission of the "change in control" documents (also known as a
17 "Form A" filing) in the relevant states. Plaintiffs should be required to comply with the
18 comprehensive procedures established by the states to facilitate the approval and denial of
19 the Form A process. Additionally, plaintiffs should not be allowed to circumvent the New
20 Hampshire liquidation process to the detriment of other policyholders of The Home.
21 Allowing plaintiffs to do so would adversely impact the ability of regulators to manage
22 troubled companies, coordinate a response among regulators and interested parties to
23 protect policyholders, and resolve or liquidate insurers in an orderly manner.

24 **IV. ARGUMENT**

25 **A. The Model Holding Company Act, And State Laws Based Upon It, Establishes**
26 **The Procedures To Participate In And Contest The Acquisition Or Change In**
27 **Control Of A Domestic Insurer.**

28 In the mid-1960s, in response to the proliferation of holding companies involvement

1 in the business of insurance, the NAIC began to study and implement methods to regulate
2 holding companies that acquire and control insurers. “The public interest would seem to
3 require that [insurance commissioners] initiate steps to supervise management, control and
4 operation of holding companies.” II *Proc. of the Nat’l Ass’n of Ins. Comm’rs* 308 (1966).
5 In 1969, the NAIC developed and adopted the Model Holding Company Act which
6 requires prior approval of a change in control of a domestic insurer. II *Proc. of the Nat’l*
7 *Ass’n of Ins. Comm’rs*, 736, 737, 738-751, 756 (1969). The drafters of the Model Holding
8 Company Act sought to balance the need for effective regulation with the need not to
9 discourage potential investors. II *Proc. of the Nat’l Ass’n of Ins. Comm’rs* 49 (1982). The
10 Model Holding Company Act reflects the following goals and policies: “(1) to maintain
11 the solvency of insurers; (2) to protect policyholders by supervising the adequacy of the
12 insurer’s surplus; (3) to provide standards for fair intrasystem transactions; (4) to
13 encourage state regulation of insurance; and (5) to base regulatory efforts on the principles
14 of registration, disclosure and prior approval of certain transactions” *Id.*

15 Subsequently, in 1971, the NAIC adopted the Model Holding Company Regulation
16 which sets forth the required forms, filings and information necessary to allow the
17 insurance commissioner to approve mergers and acquisitions. I *Proc. of the Nat’l Ass’n of*
18 *Ins. Comm’rs* 54, 58, 134, 149 (1971). The Model Holding Company Regulation
19 supplements the Model Holding Company Act by prescribing requirements related to the
20 form and content of information submitted to the insurance commissioner for various
21 transactions occurring within or affecting an insurance holding company system.

22 In June 1980, the NAIC amended the Model Holding Company Act by adding a
23 section that applies specifically to any acquisition or merger of a domestic insurer which
24 would result in a change in control. *Id.* II *Proc. of the Nat’l Ass’n of Ins. Comm’rs* 22, 26,
25 29, 42-46 (1980) (*amended, added Section 3.1*). Section 3 of the Model Holding
26 Company Act was intended to provide protections against detrimental takeovers of
27 insurance companies by regulating mergers and acquisitions. I *Proc. of the Nat’l Ass’n of*
28

1 *Ins. Comm'rs* 222 (1978).¹ The section required persons who proposed to acquire or
2 merge with a domestic insurer to file a statement giving financial and other information;
3 provided that takeovers were subject to prior approval; and set forth grounds upon which a
4 denial must be based, such as a finding that the proposed takeover might lead to the
5 insurer's insolvency or undercut a policyholder's interests. *Id.* The Model Holding
6 Company Regulation was revised in 1986 to conform to the revised Holding Company
7 Model Act. II *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 93 (1986).

8 Various iterations of the Model Holding Company Act and Model Holding
9 Company Regulation have developed throughout the years, but the primary purpose of the
10 models has remained largely unchanged. That is, the models have sought to allow state
11 insurance commissioners to analyze and approve the change in control of an insurer for the
12 purposes of ensuring financial solvency of the insurer and protecting the interests of
13 policyholders. Every state has adopted a version of the Model Holding Company Act and
14 Model Holding Company Regulation that is substantially similar to the current NAIC
15 models. *See* Exhibit A, NAIC Model Holding Company Act State Page and NAIC
16 Insurance Holding Company Model Regulation with Reporting Forms and Instructions
17 State Page. Additionally, state enactment of the model laws is an element of the NAIC
18 Financial Regulatory Accreditation Program. In order to be accredited for financial
19 solvency regulation, a state must have enacted various key elements of the Model Holding
20 Company Law and Model Holding Company Regulation. NATIONAL ASSOCIATION OF
21 INSURANCE COMMISSIONERS, FINANCIAL REGULATION STANDARDS AND ACCREDITATION
22 PROGRAM (2010)².

23 _____
24 ¹ The NAIC began discussions to amend the Model Holding Company Act by adding Section 3 in 1978. The
amendments were adopted in 1980.

25 ² Found at http://www.naic.org/documents/committees_f_FRSA_pamphlet.pdf. Accreditation is the process by which
26 a program has been certified as fulfilling certain standards by a national professional association. In the terms of
27 insurance financial solvency regulation, accreditation is a certification given to a state insurance department once it
28 has demonstrated it has met and continues to meet an assortment of legal, financial and organizational standards as
determined by a committee of its peers. The Financial Regulation Standards and Accreditation (F) Committee of the
NAIC, consisting of regulators from across the country, ultimately decides whether a state meets the requirements set
forth in the Standards. Full Accreditation Reviews occur once every five years subject to interim annual reviews. The
review entails a full review of laws and regulations, the financial analysis and financial examinations functions, and

1 The Model Holding Company Act, and substantially similar provisions enacted in
2 all states, sets forth a complete and comprehensive procedure for filing, approval and for
3 objecting to and or appealing the acquisition or recapitalization of an insurer. Section
4 3.A.(1) of the Model Holding Company Act provides that a change in control may not be
5 effectuated without the prior approval of the insurance commissioner:

6 No person shall make a tender offer for . . . acquire or seek to
7 acquire any voting security of a domestic insurer, if after the
8 consummation thereof, such person would directly or
9 indirectly . . . be in control of the insurer, and no person shall
10 enter into an arrangement to merge with or otherwise to
11 acquire control of a domestic insurer. . . unless such person has
12 filed with the commissioner . . . a statement containing all the
13 information required by this section and the offer, request,
14 invitation, agreement or acquisition has been approved by the
15 commissioner in the manner set forth in this Act

12 3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Holding
13 Company System Regulatory Act, pp. 440-4 (2001). Section 3.A.(1), therefore, provides
14 the commissioner with the discretion to review and request pertinent information in a Form
15 A filing and ensures prior commissioner approval is required. Section 3.D.(1) of the
16 Model Holding Company Act sets forth the standards governing the commissioner's
17 review of the Form A filing:

18 The commissioner shall approve any merger or acquisition of
19 control. . . unless, after a public hearing, the commissioner
20 finds that. . . the financial condition of any acquiring party is
21 such as might jeopardize the financial stability of the insurer,
22 or prejudice the interests of policyholders; the plans or
23 proposals which the acquiring party has to liquidate the insurer,
24 sell its assets or consolidate or merge it with any person, or
25 make any other material change in its business or corporate
26 structure or management, are unfair or unreasonable to
27 policyholders of the insurer and not in the public interest; . . .
28 the acquisition is likely to be hazardous or prejudicial to the
insurance-buying public. . . .

25 3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Holding
26 Company System Regulatory Act, pp. 440-7 (2001). Section 3.D.(1) is clear that the

27 organizational and personnel practices to assist in determining a state's compliance with the accreditation standards.
28 As of October 2010, all fifty states and the District of Columbia are accredited.

1 financial condition of the insurer and the protection of policyholders are among the factors
2 to be considered by the commissioner in reviewing the proposed transaction. Further,
3 Section 3.D.(2) provides for a public hearing to consider the Form A filing, with notice
4 provisions as well as the opportunity for participation by parties affected by the
5 transaction:

6 The public hearing shall be held within (30) days after the
7 statement required . . . is filed, and at least 20 days notice shall
8 be given. . . . At the hearing, the person filing the statement, the
9 insurer and any person to whom notice was sent, and any other
10 person whose interest might be affected shall have the right to
11 present evidence . . .

12 3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Holding
13 Company System Regulatory Act, pp. 440-7 to 440-8 (2001). Finally, where interested
14 parties remain aggrieved by or opposed to an action taken by the insurance commissioner,
15 Section 14.A allows for such parties to seek redress through the judicial system.
16 Specifically, Section 14.A allows “[a]ny person aggrieved by any act, determination, rule
17 regulation or order or any other action of the commissioner pursuant to this Act may
18 appeal to the [appropriate state district] Court. The court shall conduct its review without
19 jury trial and by trial *de novo*. . . .” 3 NAIC MODEL LAWS, REGULATIONS AND
20 GUIDELINES, Insurance Holding Company System Regulatory Act, pp. 440-25 (2001). In
21 sum, the Model Holding Company Act establishes the requirements for reviewing Form A
22 filings, sets a standard by which the commissioner’s decision is held accountable, allows
23 for interested party participation, and provides for judicial review. In other words, the
24 Model Holding Compact Act was drafted to ensure the fair and orderly completion of
25 transactions such as the one at issue here.

26 State legislatures have enacted many of these provisions into their insurance codes
27 in recognition of the need for a fair and orderly process for resolving complex insurance
28 company transactions. Similar provisions have been enacted by the states that approved
the Form A filings at issue in these proceedings. CAL. INS. CODE § 1215 (2009) (filing
requirements); CAL. INS. CODE § 12940 (2010) (judicial review); 215 ILL. COMP. STAT.

1 ANN. 5/131.4 (2009) (filing requirements); 215 ILL. COMP. STAT. ANN. 5/131.8 (2009)
2 (hearing requirements); 215 ILL. COMP. STAT. ANN. 5/131.27 (2009) (judicial review);
3 IND. CODE ANN. § 27-1-23-2 (2010) (filing and hearing requirements); IND. CODE ANN. §
4 27-1-23-12 (2010) (judicial review); N.H. REV. STAT. ANN. § 401-B:3 (2009) (filing and
5 hearing requirements); N.H. REV. STAT. ANN. § 401-B:14 (2009) (judicial review); N.J.
6 STAT. ANN. § 17:27A-2 (2009) (filing and hearing requirements); N.J. STAT. ANN. §
7 17:27A-12 (2009) (judicial review); TEX. INS. CODE ANN. § 823.154 (2009) (filing
8 requirements); TEX. INS. CODE ANN. § 823.159 (2009) (hearing requirements); TEX. INS.
9 CODE ANN. § 823.013 (2009) (judicial review); WIS. STAT. ANN. § 611.72 (2009) (filing
10 requirements); WIS. ADMIN. CODE INS. § 40.02 (2010) (filing requirements); WIS. STAT.
11 ANN. § 227.42 (2009) (hearing requirements); WIS. STAT. ANN. § 601.62 (2009) (judicial
12 review).³

13 Therefore, the models and state enactment of the models generally provide ample
14 opportunity for policyholders to do what plaintiffs seek to do in the present matter: raise
15 objections to the substance of a change of control transaction and request administrative
16 and judicial review of the transaction. To permit plaintiffs to pursue the present action
17 would achieve a result whereby aggrieved parties may circumvent uniformly enacted
18 statutes and uniformly established procedures carried out under the laws of one state by
19 filing a separate, distinct action in the court of another state.

20 In addition to statutory provisions, the state regulatory system related to troubled
21 company situations is buttressed by cooperative programs and procedures. State insurance
22 regulators often work in coordination with one another regarding the financial stability of
23 companies operating in multiple states. The regulators rely upon each other and the
24 expertise of other regulators with specific knowledge of a company in order to ensure that
25 companies remain financially stable. For example, the NAIC has created the Financial

26 _____
27 ³ Note that California, Texas and Wisconsin do not have the public hearing requirement but still do provide methods
28 through which a policyholder or interested party can appeal or challenge the decision of a commissioner with respect
to the approval or denial of an acquisition or merger. Moreover, although these states do not have the public hearing
requirement, all interested parties were able to participate in the New Hampshire public hearing.

1 Analysis Working Group (“FAWG”), which consists of various state regulators to analyze
2 nationally significant insurers and groups that exhibit characteristics of trending toward or
3 being financially troubled and to determine if appropriate action is being taken. FAWG
4 interacts with domiciliary regulators and “lead states” to assist and advise as to what might
5 be the most appropriate regulatory strategies, methods and actions and support, encourage,
6 promote and coordinate multi-state efforts in addressing solvency problems, including
7 identifying adverse industry trends. FAWG and similar regulatory tools provide for
8 domestic deference with other states’ participation. *See III Proc. of the Nat’l Assoc. of Ins.*
9 *Comm’rs* 193-196 (1988) (describing FAWG). In the underlying transaction in the present
10 matter, New Hampshire assumed an active role similar to that of a lead state in developing
11 a solution – in tandem with other regulators – that improved the financial stability of the
12 insurer and protected policyholder interests.

13 In the early 2000s, the NAIC, through its National Treatment Working Group,
14 began discussions regarding Form A filings involving the acquisition or merger of
15 insurance groups involving insurers domiciled in multiple states. *See, II Proc. of the Nat’l*
16 *Ass’n of Ins. Comm’rs 4th Qtr.* 546 (2001). The Group envisioned a lead state concept
17 where a single lead state with a greater understanding of the insurance group’s overall
18 business operations would coordinate the Form A filings. The non-lead states would still
19 conduct their reviews and hearing processes in accordance with their respective state
20 insurance statutes. *Id.* To facilitate the lead state process and to ensure proper
21 coordination, the NAIC’s Insurance Holding Company (E) Working Group, developed a
22 Framework for Insurance Holding Company Analysis. This framework endorses the lead
23 state concept, explains factors used to determine which states are considered leads, and
24 clarifies the role of the lead states and the role of the other states. The lead state concept
25 allows one state to coordinate the regulatory processes and allows for complete and open
26 communications among the states. A similar concept was employed with the transactions
27 involved in this matter with New Hampshire serving as the lead regulator working in
28 conjunction with the other interested states prior to approving the transaction. For example,

1 New Hampshire, California and other regulators participated in the negotiations between
2 the parties prior to agreement to the transaction. New Hampshire hired experts to prepare
3 reports that were used in the review of the recapitalization and held public hearings in
4 which other states participated and were represented.

5 As the record reflects, the insurance departments of the states involved in the
6 transaction all participated in or held hearings regarding the proposed acquisition.
7 Following a public hearing in New Hampshire, on May 26, 1995, the New Hampshire
8 Commissioner of Insurance entered a final order approving the Zurich Insurance Company
9 (“Zurich”) transaction to acquire The Home. California and New Jersey issued their
10 respective orders approving the transaction on June 9, 1995, after participating in the New
11 Hampshire public hearing. Texas and Wisconsin also participated in the hearing, issuing
12 their respective final orders approving the transaction on June 8, 1995. Illinois also
13 approved the transaction on June 9, 1995. Indiana held a public hearing on the proposed
14 transaction on April 13, 1995, and issued its order approving the transaction on June 7,
15 1995.

16 Based on the reasoned analysis of the state regulators and based on all forms and
17 evidence presented, the commissioners of the aforementioned states approved the
18 transaction they believed would be in the best interests of the policyholders. The plaintiffs
19 had the opportunity to participate in the New Hampshire hearing, present evidence and
20 object to the final orders if they so chose pursuant to the state holding company statutes.
21 N.H. REV. STAT. ANN. § 401-B:14 (2009) (“Any person aggrieved by any act,
22 determination, rule, regulation, or order of any other action of the commissioner pursuant
23 to this chapter may appeal [pursuant to the administrative procedures act].”); See also e.g.,
24 215 ILL. COMP. STAT. ANN. 5/131.27 (2009); IND. CODE ANN. § 27-1-23-12 (2010); N.J.
25 STAT. ANN. § 17:27A-12 (2009); TEX. INS. CODE ANN. § 823.013 (2009). The statutes and
26 regulations governing the prior approval of acquisitions of insurers set forth a
27 comprehensive scheme that has been enacted in all states. The commissioners worked in
28 coordination with one another to ensure financial stability of a company and to consider

1 the best interests of policyholders in approving these transactions. Plaintiffs' action
2 potentially upsets a system that has been enacted, coordinated and successfully
3 implemented. Allowing plaintiffs to upset this system would call into question the ability
4 of insurance regulators to manage and coordinate complex transactions such as the one led
5 by New Hampshire with the active participation and approval of several sister state
6 insurance departments.

7 **B. The NAIC Receivership Model Laws, And State Legislation Based Upon**
8 **Them, Provide The Regulatory Framework For Insurer Liquidation,**
9 **Including The Handling And Management Of Plaintiffs' Claims.**

10 The NAIC's Insurance Receivership Model Act ("IRMA") and its predecessor
11 model laws have established comprehensive schemes that govern receivership and
12 liquidation proceedings, including a mechanism for disputing and bringing claims
13 following a liquidation.

14 Since its formation in 1871, at which time the Committee on Winding Up Insolvent
15 Companies was formed, the NAIC has addressed issues regarding the treatment of
16 insolvent or troubled insurers. 1 *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 18 (1871). In
17 1936, the NAIC adopted the first of the NAIC receivership models, the Uniform
18 Rehabilitation, Reorganization, or Liquidation Act ("1936 Model"). 1 *Proc. of the Nat'l*
19 *Ass'n of Ins. of Comm'rs* 33 (1936). The 1936 Model first created a uniform procedure so
20 that all creditors, including policyholders and claimants residing in reciprocal states, were
21 on an equal footing with those in the domiciliary state. *Id.* at 31-33.

22 The NAIC receivership models have evolved over time from a general statement of
23 intent to protect unsecured creditors to a comprehensive statutory scheme to govern the
24 liquidation or rehabilitation of an insolvent insurer. With every revision of the NAIC
25 model, the model has become more specific and detailed⁴ in an effort to promote greater
26 nationwide consistency and certainty in the course of a liquidation or rehabilitation. The

27 _____
28 ⁴ The 1936 Model was two pages; the current version of the NAIC model is 98 pages. *See*, Insurer Receivership
Model Act, 3 *NAIC Model Laws, Regulations and Guidelines*, 555-1 to 555-98 (2007).

1 NAIC receivership models are created and revised with input from the insurance
2 commissioners and other interested parties.⁵ Each version of the receivership models
3 represents the collective wisdom and best practices of the state insurance commissioners.
4 The 2005 version of the receivership models, referred to as IRMA, is the version of the
5 model law in effect today.

6 More specifically, the receivership models and state statutes based on the models
7 clearly set forth the authority of the liquidator and are intended to prevent collateral
8 challenges such as the claims brought by the plaintiffs in this action. All states have
9 adopted a version of the NAIC model, based, in part, on either IRMA or its predecessors.
10 See Exhibit B, NAIC Insurer Receivership Model Act State Page and Exhibit C, NAIC
11 Insurers Rehabilitation and Liquidation Model Act State Page. As a requirement for
12 accreditation, each state must enact a receivership scheme similar to the NAIC model, for
13 the administration, by the insurance commissioner, of companies found to be insolvent. As
14 stated in IRMA, one of the purposes of the Act “is the protection of the interests of
15 insureds, claimants, creditors and the public generally through enhanced efficiency and
16 economy of liquidation, through clarification of the law, to minimize legal uncertainty and
17 litigation.” 3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance
18 Receivership Model Act, § 101 Purpose and Scope, pp. 555-3 to 555-4 (2007); See e.g.,
19 N.H. REV. STAT. ANN. § 402-C:1 (2010) (“The purpose of this chapter is the protection of
20 the interests of insureds, creditors, and the public generally, with minimum interference
21 with the normal prerogatives of proprietors, through. . . [e]nhanced efficiency and
22 economy of liquidation, through clarification and specification of the law, to minimize
23 legal uncertainty and litigation . . .” and “[l]essening the problems of interstate
24 rehabilitation and liquidation by facilitating cooperation between states in the liquidation
25 process”) and N.J. STAT. ANN. § 17B:32-31 (2010); TEX. INS. CODE ANN. § 443.001

26 ⁵ See, generally, Carolyn Johnson, *How a Model Becomes a Law, Contingencies*, March/April 1997, at 33-35
27 (explaining the process of creating and adopting a NAIC model law involves participation by state regulators,
28 consumers, and industry representatives; public hearings, public meetings, and written comments are considered in the
drafting process; the model law drafting process may take months or years in order to reach a consensus)

1 (2010); WIS. STAT. § 645.01 (2010).

2 In order to facilitate cooperation between the states and ensure orderly liquidations,
3 the insurance commissioners often work together on liquidation proceedings, particularly
4 where they involve multi-state insurers. In addition, the NAIC established a Receivership
5 and Insolvency (E) Task Force, whose mission includes monitoring the effectiveness and
6 performance of state administration of receiverships and the state guaranty fund system;
7 coordinating cooperation and communication among regulators, receivers and guaranty
8 funds; monitoring ongoing receiverships and reporting on such receiverships to NAIC
9 members.

10 Moreover, IRMA and state statutory liquidation schemes are intended to grant the
11 domestic insurance commissioner exclusive jurisdiction of claims both for and against an
12 insurance company in liquidation. 3 NAIC MODEL LAWS, REGULATIONS AND
13 GUIDELINES, Insurance Receivership Model Act, pp. 555-1 to 555-98 (2007) (“to
14 prosecute or assert with exclusive standing any action that may exist on behalf of the
15 creditors, members, policyholders or shareholders of the insurer or the public against any
16 person”); N.H. REV. STAT. ANN. § 402-C:21 (2010) (“The liquidator shall be vested by
17 operation of law with the title to all of the property, contracts and rights of action and all of
18 the books and records of the insurer ordered liquidated”) and N.H. REV. STAT. ANN. § 402-
19 C:25 (2010) (“Prosecute any action which may exist in behalf of the creditors, members,
20 policyholders or shareholders of the insurer against any officer of the insurer, or any other
21 person”) and CAL. INS. CODE § 1037 (2010) (“prosecute and defend any and all suits and
22 other legal proceedings”); *see also* 215 ILL. COMP. STAT. 5/191 (2010) and 215 ILL.
23 COMP. STAT. 5/193 (2010); N.J. STAT. ANN. § 17B:32-50 (2010); IND. CODE §§ 27-9-3-7
24 and 27-9-3-9 (2010); TEX. INS. CODE ANN. § 443.154 (2010); and WIS. STAT. § 645.46
25 (2010).

26 Clearly, IRMA intended to provide the liquidator, not individual policyholders, with
27 the authority to bring the types of claims asserted in this action. Allowing this case to
28 proceed in California, in the midst of liquidation proceedings in New Hampshire, not only

1 adds uncertainty to the liquidation process, but also would benefit only a small number of
2 policyholders to the detriment of the remaining policyholders who have properly presented
3 claims pursuant to the liquidation proceedings in New Hampshire.

4 Aside from the practical necessity of having one state and its court oversee and
5 manage an insurer liquidation, exclusive single-state jurisdiction means that claims of
6 policyholders must be brought in the state where the liquidation is proceeding. The reason
7 is the “paramount interest of the . . . [s]tates in seeing that insurance companies domiciled
8 within their respective boundaries are liquidated in a uniform, orderly and equitable
9 manner without inference from external tribunals.” *Lac D’amiante Du Quebec, Ltee v. Am.*
10 *Home Assurance Co.*, 864 F.2d 1033, 1041 (3d Cir. 1988) (citing *G.C. Murphy Co. v.*
11 *Reserve Ins. Co.*, 429 N.E.2d 111, 117 (1981)). Although plaintiffs in this matter have
12 properly filed claims in the liquidation matter, they attempt to circumvent the authority of
13 the New Hampshire commissioner to manage an orderly liquidation by bringing claims in
14 this Court.

15 Plaintiffs attempt to bring a claim in a California state court, years after the
16 transaction at the root of their claims was approved in several states and also following the
17 entry of an order of liquidation in New Hampshire. This course of action conflicts with the
18 New Hampshire commissioner’s authority and powers under both the New Hampshire
19 holding company law and the New Hampshire rehabilitation and liquidation law. In
20 *Brown v. Associated Ins. Consultants*, the court held that shareholders of an insurance
21 company in liquidation may be precluded from objecting to the actions of an insurance
22 commissioner in furtherance of a liquidation order because the objection improperly
23 interferes with the powers and duties of the commissioner and collaterally attacks the
24 order. *Brown v. Associated Ins. Consultants*, 714 So.2d 939 (La. App. 1989). The
25 shareholders in *Brown* sought an injunction to prevent the sale of certain assets of the
26 insurer. The court found the rehabilitation and liquidation statutes in Louisiana, which are
27 similar in nature to those at issue here, were comprehensive and exclusive. *Id.* at 942. The
28 Commissioner was specifically entitled, pursuant to statute, to sell or dispose of property

1 pursuant to court order. *Id.* Consequently, based on the statutory liquidation scheme, the
2 shareholders were not entitled to bring an action outside of the liquidation proceeding
3 which would interfere with the powers and duties of the commissioner. Plaintiffs in this
4 action, similarly attempt to interfere with the powers and duties of the New Hampshire
5 liquidator by bringing claims in California state court which, if heard, could substantially
6 affect the rights of other claimants in the liquidation proceeding and clearly interfere with
7 the New Hampshire liquidator's ability to fairly and equitably pay the claims of other
8 policyholders.

9 C. **Full Faith And Credit And The Principle Of Comity Require That The Final**
10 **Holdings And Orders Of The Insurance Regulators Of Several States Be**
11 **Upheld And Given Proper Deference.**

12 As demonstrated above, the intent of the Form A filing process and approval is to
13 allow all parties to participate in and contest, if they so choose, the decisions of the
14 commissioner. The Model Holding Company Act⁶ sets forth a comprehensive scheme for
15 hearing and appealing the decisions of the Commissioner. Rather than choose to follow
16 the established procedures set forth in the statutes, plaintiffs attempt to circumvent those
17 procedures by bringing a California state tort claim, which essentially requires the trial
18 court to determine whether the Form A filings were properly approved 15 years ago.

19 In *Shah v. Metropolitan Life Ins. Co.*, a New York Court dismissed policyholder
20 claims that a demutualization plan approved by the New York superintendent of insurance
21 was unfair and inequitable to the policyholders. *Shah v. Metropolitan Life Ins. Co.*, 2003
22 WL 728869 (N.Y. Sup.) (2003). The court found that since the claim was "directed at the
23 very issues that were explicitly considered and addressed by the Superintendent, in his
24 review and approval of the plan, it constitute[d] a collateral attack on that decision." *Id.* at
25 11. The court further found that "permitting plaintiffs to simply disregard and bypass the
26

27 ⁶ States which include similar provisions are Illinois, Indiana, New Hampshire, New Jersey, and Texas. See e.g., 215
28 ILL. COMP. STAT. ANN. 5/131.27 (2009); IND. CODE ANN. § 27-1-23-12 (2010); N.H. REV. STAT. ANN. § 401-B:14
(2009); N.J. STAT. ANN. § 17:27A-12 (2009); TEX. INS. CODE ANN. § 823.013 (2009).

1 Superintendent's decision, and bring an action directly against MetLife on the very issues
2 necessarily encompassed in that decision, would not be consistent with the overall
3 legislative scheme." *Id.* at 12. Similarly, in this matter, plaintiffs should not be entitled to
4 contest claims outside of the established procedures in the holding company laws nor
5 should they be entitled to relitigate issues considered by the insurance commissioners who
6 approved the recapitalization.

7 The final decisions of the insurance commissioners of the seven states that approved
8 the recapitalization of The Home should be entitled to full faith and credit. U.S. Const. art.
9 IV, § 1 In *State ex rel Low v. Imperial Insurance*, an Arizona appellate court held that full
10 faith and credit must be given to California court rulings as they related to proceedings
11 involving the liquidation of an insurer. *State ex rel Low v. Imperial Insurance*, 682 P.2d
12 431, 438 (Ariz. App. 1984); *See also Underwriters Nat'l Assur. Co. v. North Carolina Life*
13 *and Guar. Assoc.*, 455 U.S. 691, 692 (1982) *quoting Durfee v. Durke*, 375 U.S. 106, 111
14 (1963) ("a judgment is entitled to full faith and credit. . . when the second court's inquiry
15 discloses that those questions have been fully and fairly litigated and finally decided in the
16 court which rendered the final judgment").

17 In considering the approval of the recapitalization of The Home, seven state
18 insurance departments participated in hearings, employed experts and ultimately
19 determined that the acquisition and recapitalization would protect policyholders. Instead
20 of allowing plaintiffs to ask this Court to revisit and re-litigate the recapitalization
21 transactions already fully and finally determined by seven states, the orders approving the
22 recapitalization should be entitled to full faith and credit in this Court.

23 Additionally, the principles of comity require that this Court not permit plaintiffs to
24 re-litigate the commissioner's approval of the recapitalization. In *Schuster v. Superior*
25 *Court*, regarding a trustee to a will, the court stated, "dissatisfaction on the part of litigants
26 with the orders and decrees of that court should not prompt the courts of a sister
27 jurisdiction to attempt an interference." *Schuster v. Superior Court*, 98 Cal. App. 619, 623-
28 624 (1929). The Court recognized that comity required the California courts owed the

1 highest degree of courtesy and recognition to the sister state's acts and jurisdiction. *Id.* at
2 628. Additionally, the California insurance commissioner, like the commissioners in the
3 other states, participated and approved the recapitalization of The Home. This Court
4 should defer not only to the sound and reasoned decisions of the commissioners of the
5 other states but also to the expertise and order of its own commissioner.

6 In *A.P.I. Inc. v. Home Ins. Co.*, the United States District Court for the District of
7 Minnesota, citing principles of comity, refused to hear claims regarding fraudulent transfer
8 and tortuous interference which were brought against Zurich arising out of the same
9 recapitalization transaction at issue in this matter. *A.P.I. Inc. v. Home Ins. Co.*, 706 F.
10 Supp. 2d 926 (D. Minn. 2010). The court held that under New Hampshire liquidation law,
11 the liquidator had the exclusive right to bring a fraudulent transfer action on behalf of
12 Home's creditors and policyholders. *Id.* at 936. Similarly, relying on principles of comity,
13 the court dismissed the plaintiff's tortuous interference claims. *Id.* at 939. Relying on this
14 decision, this court should also apply principles of comity and respect the liquidator's
15 exclusive authority to bring claims by refusing to re-litigate plaintiffs' claims.

16 Moreover, allowing this litigation to proceed contrary to the established procedures
17 of the holding company statutes would potentially call into question numerous other Form
18 A proceedings that have been heard, considered, and finally approved in various states.
19 The same uncertainty would affect the receivership and liquidation processes. The
20 purpose of the NAIC model laws regarding holding company acquisitions and
21 receiverships, and the state statutes based upon them, would be thwarted by allowing
22 plaintiffs to re-litigate these issues in a distant venue. Those aspects of the state regulatory
23 system where state insurance departments actively engage and work cooperatively to
24 develop comprehensive solutions to troubled company situations would be similarly
25 affected. The NAIC and its state members developed the model laws and subsequently
26 worked for enactment of those models in their respective states, to ensure uniformity,
27 efficiency and finality of their orders and proceedings and to protect the interests of all
28 policyholders. That uniformity, efficiency and finality are potentially jeopardized by an

1 action such as the present matter.

2 **V. CONCLUSION**

3 For the foregoing reasons, the NAIC respectfully suggests that the plaintiffs should
4 not be entitled to re-litigate and second guess the final orders of several insurance
5 commissioners or interfere with the New Hampshire liquidator's authority to prosecute
6 relevant claims on behalf of all policyholders.

7
8 Dated: October 26, 2010

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