

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

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HILDA L. SOLIS, Secretary, United States )  
Department of Labor, )

Plaintiff, )

v. )

Civil Action No. 1:10-cv-572-SM

THE HOME INSURANCE COMPANY )  
And ROGER A. SEVIGNY, New )  
Hampshire Insurance Commissioner, as )  
Liquidator of The Home Insurance )  
Company, )

Defendant. )

**AMICUS CURIAE BRIEF OF THE NATIONAL  
ASSOCIATION OF INSURANCE COMMISSIONERS  
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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## **I. IDENTITY OF AMICUS CURIAE**

The National Association of Insurance Commissioners (“NAIC”) is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, and the territories and insular possessions of the United States. Founded in 1871, it is the nation’s oldest association of state government officials. The NAIC represents the coordinated and considered views of the state government officials that regulate the insurance industry and enforce the insurance laws of the country.

In submitting this amicus curiae brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, to:

[A]ssist state insurance regulators, individually and collectively, in serving the public interest in achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:

1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
2. Promote the reliability, solvency and financial solidity of insurance institutions; and
3. Support and improve State regulation of insurance.

About the NAIC, NAIC, [http://www.naic.org/index\\_about.htm](http://www.naic.org/index_about.htm) (last visited Feb. 16, 2011).

The NAIC’s purpose is to provide its members with a national forum enabling them to work cooperatively on regulatory matters that transcend the boundaries of their own jurisdictions. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, white papers and actuarial guidelines that promote and establish uniform

regulatory policy. Their overriding objectives are to protect consumers as well as assist in maintaining the financial stability of the insurance industry.

The NAIC performs numerous crucial services on behalf of state governments including developing and publishing model laws, regulations, bulletins, financial and accounting standards, white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*. Hundreds of state laws assign duties to the NAIC and incorporate NAIC standards, models and other publications. In addition, the NAIC manages and coordinates the accreditation of insurance departments for purposes of financial solvency, as well as maintains regulatory and financial databases of insurance company financial data. Any member of the NAIC may request the filing of an amicus brief. A request requires approval by the Executive Committee of the NAIC. The Executive Committee has approved the filing of this amicus brief.

## **II. INTEREST OF AMICUS CURIAE**

The interest of the NAIC arises most fundamentally out of the responsibility vested in each insurance commissioner, superintendent or director (hereinafter commissioner) to regulate the business of insurance by virtue of the authority vested in the states by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and pursuant to state laws.

More specifically, the interest of the NAIC in this case arises out of each member's interest in monitoring the solvency of insurance institutions in the member's capacity as the chief insurance regulator in each state and as the officer charged by statute with handling insurer receiverships for the state. As liquidators of insolvent insurers, the NAIC's members have broad statutory authority to take appropriate action to marshal assets to pay claims. Individually and collectively, NAIC members and the state agencies over which they preside have a wealth of experience in the management of insolvent insurers. NAIC members understand the interest of

insurance consumers and other stakeholders affected by the circumstances of insurer insolvency, and work daily to protect those interests. NAIC members are uniquely qualified and situated to assist this Court by presenting the regulatory and public policy concerns involved in this case.

The NAIC also has an interest in the interpretation of its model laws and regulations. The order of distribution of claims from an insolvent insurer's estate under New Hampshire law, N.H. Rev. Stat. Ann. § 402-C ("New Hampshire Act"), is based upon the NAIC's model laws addressing insurance company insolvencies. More than seventy years ago, the NAIC promulgated its first model law on rehabilitation and liquidation, key to which was a provision on the priority of distribution of claims in the liquidation of an insolvent insurer. *See 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs* 33 (1936). Various iterations of this model have been developed over the years ("NAIC Insolvency Models"), but the primary purpose of the law has remained—to protect the interests of policyholders and to ensure that those most affected by the insolvency of an insurer are protected. Given the NAIC's long-standing interest in promoting effective regulation through protecting consumers and ensuring the orderly operation of liquidation proceedings in state courts, the NAIC and its members have a compelling interest in maintaining the integrity of the statutory priority of distribution.

### **III. SUMMARY OF ARGUMENT**

The Court should abstain from hearing the complaint filed by Plaintiff Hilda L. Solis, Secretary, U.S. Department of Labor ("DOL"), because the pending state liquidation proceedings should be the exclusive jurisdiction and forum for resolving disputes related to the liquidation of an insolvent insurer, especially for the application of the priority of distribution. The exclusivity of the State Court's jurisdiction is a long-standing principle of insurer receivership law that

contributes to the efficiency of estate administration and the strength of state-based insurance regulation.

#### **IV. ARGUMENT**

The NAIC adopts the motion to dismiss and memorandum of Defendant Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire and Liquidator (“Liquidator”) and of Defendant The Home Insurance Company (“Home”), specifically the Liquidator’s and Home’s analysis of the *Bank of New York, Wilton, Colorado River* and *Younger* abstention doctrines. The NAIC seeks to aid this Court by offering the legal position and public policy perspectives of our Association and the NAIC member states as they relate to the motion to dismiss.

##### **A. The Purposes of the Statutory Liquidation Proceedings Are Aligned with *Wilton’s* Focus on Practicality and Wise Judicial Administration.**

The NAIC would add to the Liquidator’s and Home’s analysis a reason why the ongoing state proceeding should retain exclusive jurisdiction as to the determination of claim priority: enhanced efficiency and economy of liquidation. This reason embodies the “considerations of practicality and wise judicial administration” highlighted in *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). Efficiency and economy of litigation are closely tied to the statutory receivership scheme. These concepts are recognized in the statement of the purposes of the New Hampshire Act, which provides in relevant part that “[t]he purpose of this article is the protection of the interest of insureds, creditors and the public generally, . . . through . . . [e]nhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation.” N.H. Rev. Stat. Ann. § 402-C:1, IV(c).

This provision of the New Hampshire liquidation chapter is taken directly from a series of NAIC Insolvency Models dating back to the version adopted in 1969. At that time, the NAIC



adopted Wisconsin's Rehabilitation and Liquidation Act (Wis. Stat. Ch. 645 (1967)) as the NAIC Model Law<sup>1</sup> ("1969 Model"). See 1 *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 168, 241 and 271 (1969). During legislative consideration in Wisconsin, the 1969 model was supplemented with substantial annotation by the principal drafter, Professor Spencer L. Kimball, then Seymour Logan Professor of Law at the University of Chicago Law School. Wis. Stat. Ch. 645 (1967). Professor Kimball's comments were adopted in full by the NAIC, thereby providing great insight into the rationale for certain model provisions. See 1 *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 168, 241 and 271 (1969). The New Hampshire Act was initially adopted in 1969, and thus was likely informed by the 1969 Model, which was adopted in Wisconsin two years earlier.

The commentary on the "enhanced efficiency and economy of liquidation" purpose provision of the 1969 Model provides:

Par. (c) recognizes the fact that insurance codes have traditionally given only skeletal treatment to delinquency procedures, leaving regulators and courts with inadequate and uncertain directions. This chapter attempts to put flesh on the skeleton of the law dealing with delinquency proceedings in order to provide more ample and more certain directions, thereby lessening the need for litigation. General directions are not enough in an area where there is too little experience to build firm tradition.

Wis. Stat. § 645.01(4) (1967). Without a doubt, since these comments were added, regulators and courts have accumulated extensive experience in delinquency procedures. However, these comments illustrate the historical significance of regulatory and judicial attempts to fashion a comprehensive, equitable and efficient system to handle insurer insolvency at the state level, consistent with the determination of Congress in the McCarran-Ferguson Act to defer to the states in the regulation of the business of insurance.

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<sup>1</sup> The NAIC adopted the Wisconsin statute in its entirety and used the statute as its model law between December 1968 and December 1978. 1 *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 168, 241, and 271 (1969) and 1 *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 13, 15, 211, 238-241, 242-275 (1978).

The NAIC Insolvency Models have evolved over time from a general statement of intent to protect unsecured creditors to a specific scheme to be followed in the conservation, liquidation or rehabilitation of an insolvent insurer. With every revision, the NAIC Insolvency Models have become more specific and detailed<sup>2</sup> in an effort to promote greater nationwide consistency and certainty in the course of a liquidation or rehabilitation. Major revisions to the model were adopted in 1969, 1978, 1994 and 2005.<sup>3</sup> All states have adopted some version of the NAIC Insolvency Models. 3 *NAIC Model Laws, Regulations and Guidelines*, 555-101 to 555-106 (2011). These efforts demonstrate the presence of a cohesive and uniform statutory scheme in New Hampshire and elsewhere designed to maximize economy of litigation related to the liquidation. It would be impractical and thus contrary to the *Wilton* doctrine for this Court to interfere on an issue so central to the liquidation as the application of the priority of distribution.

If the Court were to hear the DOL complaint, the immediate effect of this undertaking would be to introduce uncertainty into determinations properly before the Liquidator in the instant case and in other ongoing determinations that could be needlessly infected by interference with the statutory liquidation process. Uncertainty would be introduced at this stage through the DOL filing of its complaint in federal court. The liquidation proceedings regarding the DOL claim have adhered to the principles of practicality and wise judicial administration. It is undisputed that the DOL has taken each opportunity available to it to present and advance its claim in the state liquidation proceedings. It is undisputed that the DOL timely and amended filed its claim, that the Liquidator allowed the claim and assigned it to priority Class III, that the DOL requested review, that the Liquidator redetermined the allowed amount and maintained the

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<sup>2</sup> 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 (2011).

<sup>3</sup> The NAIC Model has been amended numerous additional times, but those revisions were not extensive and did not affect provisions related to this brief. *See Proceedings cited supra note 1, 4th Qtr. Proc. of the Nat'l Ass'n of Ins. Comm'rs* 14, 20, 593-594, 596-634 (1994) and 1 *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 32, 48-122 (2005).

Class III assignment, and that DOL filed an objection with the State Court, which has been stayed pending the instant claim. For the DOL now to seek to overturn the Liquidator's priority determination in a separate forum contradicts the statutory purpose of "minimiz[ing] legal uncertainty and litigation."

**B. The Ongoing State Proceedings Implicate Important Interests of New Hampshire and Other States Because the Priority of Distribution Is Central to State Administration of Liquidation Assets.**

The Liquidator's and Home's analysis of the *Younger* abstention doctrine addresses the "important state interests" factor in terms of the State Court's jurisdiction over the *res* of the Home estate. The NAIC as amicus wishes to bolster this point with information on the historical significance of the priority of distribution provision.

Since its formation in 1871, at which time the Committee on Winding Up Insolvent Companies was formed, the NAIC has addressed issues regarding the treatment of insolvent or troubled insurers. 1 *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 18 (1871). Initially, insurance company delinquency proceedings were handled by state courts under their traditional equity powers. States then began moving away from judicial receiverships, and individual state laws were developed setting forth specific grounds for receivership and conferring on the insurance commissioner broad discretionary powers to rehabilitate or liquidate a troubled insurance company. James W. Schacht and Lynne Prescott Hepler, *Insolvencies In-Depth Series (Part 1): Failing at Failures*, Risk & Ins., Jan. 1, 2007, at 23.

In 1936, the NAIC adopted the first of the NAIC Insolvency Models, the Uniform Rehabilitation, Reorganization, or Liquidation Act ("1936 Model"). 1 *Proc. of the Nat'l Ass'n of Ins. of Comm'rs* 33 (1936). The 1936 Model first created a uniform procedure so that all creditors, including policyholders and claimants residing in reciprocal states, were on an equal

footing with those in the domiciliary state. *Id.* at 31-33. The original 1936 Model was intended to provide more relief and give greater priority to the claims of policyholders, other unsecured creditors, and those who were most adversely affected by insolvency. *Id.* at 31 (1936). Like the 1936 Model, New Hampshire's order of distribution at N.H. Rev. Stat. Ann. § 402-C:44 reflects the legislature's intent to favor policyholders and those third party claimants who have suffered unpaid covered losses over all other parties in the order of the distribution of assets.

Section 645.01(4) of the 1969 Model provided that the purpose of the rehabilitation and liquidation law was the "protection of the interests of insureds, creditors, and the public generally . . . through the (d) equitable apportionment of any unavoidable loss." Wis. Stat. § 645.01(4) (1967). New Hampshire's law has the same language at N.H. Rev. Stat. Ann. § 402-C:1, IV(d). The 1969 Model comments to the purposes provision declare, "Paragraph (d) states a pervasive goal of this chapter. The priority system has been structured to make the insurance institution do its job better and to apportion loss equitably." Wis. Stat. § 645.68 (1967). The introductory comment to the order of distribution section provides:

When an insurer must be liquidated, the outcome is often tragic. While many of the losers will merely be inconvenienced, others may suffer losses or delays in receiving payment that will subject them at least to a hardship and may even deprive them of the necessities of life. It becomes apparent that claims that are socially more important need to be paid ahead of those that are less important. . . .

In an effort to minimize the harm done by liquidation, and especially to lessen it for those persons least able to bear it, much thought and consultation went into the structuring of the priority system.

Wis. Stat. § 645.68 (1967).

According to the comments to the 1969 Model, the priority of distribution section was "designed to establish a complete system of priorities among unsecured creditors, based on the

relative social and economic importance of claims likely to be asserted against an insurer.” Wis. Stat. § 645.68 (1967). Moreover, as a Pennsylvania court stated:

If, after all, insurance is to perform its function of risk assumption and distribution of loss, then those statutes that govern it must first protect the insuring public, particularly in situations where the insurer becomes incapable of covering the risks it contracted to assume. Rehabilitation and liquidation are of vital importance to the consumer, who relies in the first place on the industry itself and then on its regulators for protection.

*Grode v. Mutual Fire, Marine and Inland Ins. Co.*, 572 A.2d 798, 807 (Pa. Commw. Ct. 1991).

In its role of apportioning the harm done by liquidation, the State Court is best situated to apply the statutory system. The State Court should be permitted to carry out its duties without interference on a matter so central to the important state interests underlying the statutory system.

**C. The Ongoing State Proceedings Implicate an Important State Interest Because an Intricate System of Interstate Reliance Is Premised on the Exclusivity of State Liquidation Proceedings Managed by the Insurance Commissioner.**

As discussed above, New Hampshire has an important interest in maintaining the integrity of liquidation proceedings at the State Court level, especially with regard to the fundamental process of classifying claims in a liquidation within the priority of distribution. The NAIC as amicus wishes to inform the Court of the broader implications—at once both state and national—of priority of distribution determinations being made outside of the liquidation proceedings.

All states have enacted insolvency statutes based on some version of the NAIC Insolvency Models or similar legislation. 3 *NAIC Model Laws, Regulations and Guidelines*, 555-101 to 555-106 (2011). The NAIC publishes a record of state adoptions of the NAIC Insolvency Models, which shows New Hampshire as among the states that have enacted an earlier version than the current NAIC Insolvency Model adopted in 2005. *Id.* at 555-104.

Dating back to the 1969 Model, the insurance commissioner of the state where an insurer is domiciled has exclusive authority to commence a delinquency proceeding involving that insurer. Wis. Stat. § 645.04(1) (1967). The 2005 version of the Jurisdiction and Venue section of the Model remains largely unchanged from the 1969 Model and provides as follows: “No delinquency proceeding under this Act shall be commenced by a person other than the commissioner of this state and no court shall have jurisdiction to entertain, hear or determine any delinquency proceeding commenced by any other person.” 3 *NAIC Model Laws, Regulations and Guidelines* at 555-9 (2011). New Hampshire’s equivalent provision at N.H. Rev. Stat. Ann. § 402-C:4, I is identical.

The similarities among the NAIC Insolvency Models and state adoptions thereof result from more than the simplified drafting process afforded by model legislation. Similarities among many aspects of state insurance codes are tied to the NAIC’s Financial Regulation Standards and Accreditation Program, which accredits states based upon their compliance with NAIC financial regulation standards developed to promote effective solvency regulation of insurers by the states. Financial Regulation Standards and Accreditation Program, NAIC, 2, available at [http://www.naic.org/documents/committees\\_f\\_FRSA\\_pamphlet.pdf](http://www.naic.org/documents/committees_f_FRSA_pamphlet.pdf) (last visited Feb. 16, 2011). As of February 2011, 51 jurisdictions, including New Hampshire, were accredited by the NAIC. Financial Regulation Standards and Accreditation Committee, NAIC, [http://www.naic.org/committees\\_f.htm](http://www.naic.org/committees_f.htm) (last visited Feb. 16, 2011). The benefit of accreditation to the NAIC members is that accredited states may rely on one another’s financial regulation of domestic companies. Specifically, each state’s laws or regulations on financial examinations contain a provision that all licensed companies are to be examined periodically; however, in lieu of performing an examination, a state may accept the examination report prepared by an

insurance department that was accredited at the time of the examination. *See* Model Law on Examinations, 3 *NAIC Model Laws, Regulations and Guidelines*, 390-2 to 390-3 (2011). New Hampshire adopted this model provision at N.H. Rev. Stat. Ann. § 400-A:37 I.(c) (2010). The accreditation program formalizes interstate reliance and ultimately saves millions of dollars in duplicative examination costs.

As part of the accreditation process, the NAIC reviews a state's laws and regulations to ensure that the state can and does regulate the solvency, insolvency and associated features of its multi-domestic insurance industry. Financial Regulation Standards and Accreditation Program, NAIC, 7-9, available at [http://www.naic.org/documents/committees\\_f\\_FRSA\\_pamphlet.pdf](http://www.naic.org/documents/committees_f_FRSA_pamphlet.pdf) (last visited Feb. 16, 2011). In particular, the standards require that state law should set forth a receivership scheme based on the NAIC's Insurer Receivership Model Act for treatment of insurance companies found to be insolvent. *Id.* at 9. An action by this Court to take up the DOL's complaint and step into the shoes of the Liquidator for purposes of assigning the DOL's claim within the priority classification could call into question whether New Hampshire's receivership scheme produces the stability and uniformity that the accreditation standard requires.

Thus, if this Court entertains the DOL's complaint, doing so could affect the interpretation and application of the NAIC Insolvency Models and other state insolvency statutes. Because all states have adopted some version of the NAIC Insolvency Models, and since decisions of courts with similar or identical versions of the models can be persuasive authority in other jurisdictions, the outcome of this matter may affect receivership proceedings in other states as well as the web of interstate reliance fostered through the accreditation program.

**VI. CONCLUSION**

For these reasons, the NAIC urges this Court to abstain from hearing this action and dismiss it in favor of the State Court proceedings regarding the DOL's claim in the Home liquidation.

Respectfully submitted,

**NATIONAL ASSOCIATION OF  
INSURANCE COMMISSIONERS**

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March 16, 2011

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**CERTIFICATE OF SERVICE**

I, Andrew W. Serell, hereby certify that the foregoing document was filed with the Court through the ECF system on the 16th day of March, 2011, and service will be made electronically by the Court's system to all counsel of record.

March 16, 2011

By: /s/ Andrew W. Serell  
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**Other Documents**

1:10-cv-00572-SM US Department of Labor v. The Home Insurance Company et al

**U.S. District Court****District of New Hampshire****Notice of Electronic Filing**

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