

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2005-0740

IN THE MATTER OF THE LIQUIDATION OF
THE HOME INSURANCE COMPANY

**RULE 7 MANDATORY APPEAL OF FINAL DECISION ON THE MERITS OF AN
ORDER FROM THE SUPERIOR COURT FOR MERRIMACK COUNTY**

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS
IN SUPPORT OF RESPONDENT ROGER A. SEVIGNY,
INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE,
AS LIQUIDATOR OF THE HOME INSURANCE COMPANY

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

A. Identity of Amicus Curiae

Amicus curiae National Association of Insurance Commissioners (“NAIC”), is a Delaware non-profit corporation whose membership consists of the chief insurance regulatory officials of each state, the territories and insular possessions of the United States, and the District of Columbia. Created in 1871, it is the nation’s oldest association of state government officials.

The mission of the NAIC is:

to assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals ... : Protect the public interest; Promote competitive markets; Facilitate the fair and equitable treatment of insurance consumers; Promote the reliability, solvency and financial solidity of insurance institutions; and Support and improve state regulation of insurance.

NAIC Mission Statement.¹ NAIC members promote the objective of solvent insurance institutions in their two distinct capacities as the chief insurance regulators in each state and as the officer of each state charged with handling insurer receiverships² for that state. The NAIC’s members as liquidators of insolvent insurers have broad statutory authority to take appropriate action to marshal assets to pay claims.

As a not-for-profit organization, the NAIC’s purpose is to provide its members with a national forum for discussing common issues and interests and working cooperatively on regulatory matters transcending the boundaries of their own jurisdictions. Collectively, the commissioners work to develop model legislation, rules, regulations and white papers to

¹ See National Association of Insurance Commissioner, NAIC Mission Statement, *available at* http://www.naic.org/index_about.htm (last visited February 8, 2006).

² Insurer receivership is a collective term that refers to the regulatory control, supported by judicial order and review, of a troubled insurance company. This regulatory control may take the form of rehabilitation or liquidation. In this brief, receivership and liquidation are used interchangeably.

coordinate regulatory policy. Their overriding objective is to protect consumers and assist in maintaining the financial stability of the insurance industry.

The NAIC performs numerous crucial services on behalf of state government, including: the development and publication of model laws, regulations, bulletins and financial and accounting standards; the creation of task forces and working groups; the drafting and publication of white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*; the management of accreditation standards for, and coordination of, the review of insurance departments; the maintenance of financial and regulatory databases and regulatory analysis of insurance company financial data; the offering of education and training programs for state, federal and international financial regulators; and the operation of the Securities Valuation Office. Hundreds of state and federal laws assign duties to the NAIC and make reference to and incorporate NAIC standards, models and publications. 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.

B. Interest of Amicus Curiae

The NAIC submits this brief to apprise the Court of the regulatory framework supporting the liquidator's authority to enter agreements to preserve and collect assets of the estate, and to pay necessary administrative expenses. The outcome of this appeal has the potential to limit the liquidator's ability to collect on the obligations of reinsurers under their agreements with the insolvent insurer. The appellants contend that the Liquidator lacked authority to enter an agreement with certain entities reinsured by The Home Insurance Company for contingent payments to these entities based on realized asset recoveries from members of the ACE group of companies ("Agreement"). The appellants contend that the Superior Court erred in approving

the Agreement because it results in payments that violate the priority of distribution. Contrary to appellants' contention, the liquidator's ability to agree to pay administrative expenses is consistent with the successive iterations of NAIC model laws addressing insurer receiverships ("Model Act").³

As the New Hampshire statutes at issue are essentially the same as provisions in the Model Act and insurer liquidation statutes in other states, the NAIC as *amicus curiae* will provide this Court unique factual information about the national impact of the Court's decision. The NAIC has a particular interest in the construction of state insurer receivership statutes because these statutes are based on the Model Act, which is an integral part of the national system of state based regulation of insurance. In addition, the NAIC can supply information about the historical influences underlying the statutory provisions under scrutiny. The NAIC accordingly submits this brief in support of the position of the Insurance Commissioner of the State of New Hampshire as Liquidator of the Home Insurance Company.

The NAIC adopts the Liquidator's statements of The Questions Presented for Review, Statutes Involved, Statement of The Case and Statement of The Facts.

³ The term "Model Act" in this brief is intended to refer collectively to all iterations of NAIC model laws addressing receiverships, including the most recent revised version.

II. ARGUMENT

A. The Agreement Does Not Violate the Statutory Priority of Distribution in the Applicable Model Act.

1. The Model Act Confirms the Liquidator's Authority to Make Administrative Cost Payments to Creditors to Assist in the Collection of Assets for the Benefit of Creditors of the Estate.

To protect the insureds of companies in receivership and ensure prompt and orderly payment of claims, the NAIC has promulgated a comprehensive statutory framework for insurer receiverships in several versions of the Model Act over many years. Since 1936, progressively more comprehensive and modernized versions of the Model Act have served as a guide for NAIC members in promulgating laws that govern the conduct of statutory insurer rehabilitations and liquidations. Every state has adopted a version of the Model Act.⁴

In 1936, the NAIC adopted an early draft of the Uniform Insurance Liquidation Act as the Model Act.⁵ In 1969, the NAIC adopted the Wisconsin Insurers Rehabilitation and Liquidation Act ("Wisconsin Act")⁶ as the Model Act.⁷ The Wisconsin Act was the basis for successive versions and amendments of the Model Act, which were adopted on 15 separate instances by the NAIC between 1978 and 1999.⁸ The New Hampshire Insurers Rehabilitation and Liquidation Act ("New Hampshire Act")⁹ at issue here is based on the 1967 Wisconsin Act.

⁴ The dates and citations for state adoptions of the Model Act are shown in Appendix p. 122-126.

⁵ NAIC, *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 1936, p. 28-36 (1936). See Appendix p. 105-110.

⁶ 1967 Wis. Laws c. 89, § 17 (codified as amended at Wis. Stat. §§ 645.01 to 645.90). The Wisconsin Act was codified to include the drafter's annotations. The portions quoted in this brief are the annotated comments to selected sections of the Wisconsin Act.

⁷ NAIC, *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 1969, p. 168, 241, 271 (1969). See Appendix p. 111-114.

⁸ NAIC, *NAIC Model Laws, Regulations and Guidelines*, Vol. III, p. 555-96, Insurer Receivership Model Act (Jan. 2006). See Appendix p.104.

⁹ R.S.A. §§ 402-C:1-61.

In December 2005, the NAIC adopted extensive revisions to the Model Act, including a change in the title and reorganization of section numbers.¹⁰ This updated version of the Model Act is the Insurer Receivership Model Act (“IRMA”).¹¹ The relevant provisions of IRMA are consistent with existing provisions of the New Hampshire Act, such as the purpose provision and what constitutes an administrative expense. Other sections were significantly revised and expanded. Considerable attention was focused on modernizing the Model Act’s treatment of reinsurance receivables because of the significance of these assets to the administration of complex modern receiverships, as illustrated in this case.

IRMA clarifies that, in order to maximize the collection of estate assets, the necessity will arise for the liquidator to enter agreements to incentivize the prosecution of a claim, provided the agreement results in a net benefit to creditors of the estate. To avoid confusion on that point, the description of Class 1 administrative costs and expenses in Section 801 is followed by a drafting note expressly stating the liquidator’s authority to make such payments is implicit in the powers conferred by IRMA.¹² The drafting note further provides, “Payment of administrative costs in these circumstances do not constitute distributions so as to circumvent priority classes or establish subclasses within a class.”

Additional amendments to IRMA further support the Liquidator’s authority to enter the Agreement that was approved by the Superior Court in this case. Section 504(A)(3)(b) of IRMA specifically enumerates the power of the receiver to “pay Class 1 administrative costs of the estate, at the liquidator’s sole discretion and upon approval of the receivership court, where the payments assist or result in the collection or recovery of property of the insurer that provides a

¹⁰ NAIC, *Proceedings of the National Association of Insurance Commissioners*, 2005 4th Quarter, p. 31-33 (forthcoming Feb. 2006). See Appendix p. 119-121.

¹¹ NAIC, *NAIC Model Laws, Regulations and Guidelines*, Vol. 3, 555-1 to 555-96 (2006). See Appendix p. 10-104. Subsequent citations to IRMA in this brief will be identified by their respective section numbers within the model.

net benefit to creditors of the estate.”¹³ This power is a subset of the receiver’s general power, also contained in the New Hampshire Act, to collect all debts and moneys due the insolvent insurer.

2. The New Hampshire Act Should Be Read to Authorize the Liquidator to Enter the Agreement.

The drafting note, in addressing an IRMA provision similar to that in the New Hampshire Act, makes clear that the Liquidator has the implicit authority to make the type of administrative payment at issue in this case. This conclusion is based on the administrative expense priority for necessary collection costs and the general authority “[t]o do such other acts as are necessary or expedient to collect, conserve or protect its assets or property.”¹⁴ *Amicus curiae* NAIC urges the Court to affirm the Superior Court’s approval of the Agreement because of the expert regulatory view of the liquidator’s implicit powers embodied in the drafting note. This Court has previously relied on drafter’s comments in the context of another NAIC model law in interpreting statutory provisions based on a model.¹⁵ The U.S. Supreme Court has cited the NAIC as authoritative in connection with federal legislation based on NAIC model legislation.¹⁶

Further authority is attributable to the Model Act because of the expertise and due process reflected in the NAIC model drafting process. NAIC committees, task forces and working groups are comprised of chief insurance regulatory officials and their staffs. The drafting process is also informed by the participation of numerous interested parties, such as trade groups, industry practitioners and consumer representatives.

¹² IRMA § 801A. See Appendix page 92-93.

¹³ IRMA § 504A(3)(b). See Appendix page 52.

¹⁴ IRMA § 504(A)(3)(c); R.S.A. 402-C:25, VI.

¹⁵ *Benson v. N.H. Ins. Guar. Ass’n*, 864 A.2d 359, 364-367 (N.H. 2004) (referencing the NAIC Post-Assessment Property and Liability Insurance Guaranty Association Model Act).

¹⁶ *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 138 (1982) (quoting *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979)).

IRMA was subject to an extensive drafting process due to the complexity of the issues. The Model Act's development took four years, encompassing more than 70 three-hour open conference calls, public sessions of up to eight hours at each quarterly NAIC national meeting and multiple two-day interim meetings.¹⁷ Since March 2004, more than 60 drafts of the model were made available for comment.¹⁸ The committee responsible for the final draft held one public hearing, multiple two-day meetings and two intensive conference calls while receiving at least 29 written comments since May 2005 alone.¹⁹ Each of these meetings and calls was conducted in open session with ample opportunity for comment from industry representatives. It is instructive that, at the conclusion of this process, the NAIC membership unanimously adopted the relevant language as proposed—at two places within IRMA. It was the judgment of the NAIC that receivers should be authorized, subject to court approval, to devise appropriate means to preserve and collect assets of insolvent insurers in the many varied, complex and difficult to foresee situations that may arise in liquidating the business of insurers.

3. The Agreement Does Not Violate the Priority of Distribution.

Appellants contend that the Agreement results in the Liquidator making distributions on lower-priority claims, in conflict with the statutory order of priority.²⁰ This contention conflicts with the drafters' interpretation of the Model Act and the New Hampshire Act, as embodied by the drafting note stating, "Payment of administrative costs in these circumstances do not constitute distributions so as to circumvent priority classes or establish subclasses within a

¹⁷ NAIC, *Proceedings of the National Association of Insurance Commissioners*, 2005 3d Quarter, p. 462-465. See Appendix p. 115-118.

¹⁸ *Id.*

¹⁹ NAIC, *Proceedings of the National Association of Insurance Commissioners*, 2005 4th Quarter, p. 31-33. See Appendix p. 119-121.

²⁰ The priority of distribution in R.S.A. § 402C:44 is, in pertinent part: (1) administration costs, (2) policy related claims, (3) claims of the federal government, (4) wages, (5) residual classification.

class.”²¹ The Liquidator is agreeing to make a contingent payment that hinges on collection by the estate of an otherwise unavailable asset. The contingent payment is designed to realize an asset, resulting in a net benefit to the creditors of the estate to the extent of the amount recovered that is in excess of the amount paid. As stated in the drafting note, a Class 1 administrative expense payment under these circumstances should not be interpreted to constitute a violation of the priority of distribution.

Of significance in any liquidation, is the recognition that administrative expenses must be paid in order to collect the assets, including reinsurance, so that distributions on claims under policies can be made. The payments at issue in this case can be characterized as a necessary administrative expense to cause the cedents to prosecute their claims against the liquidation estate so that reinsurance may be collected. The Agreement provides that payments will only be made if reinsurance is collected and thus, the payments should be considered administrative expenses consistent with the New Hampshire Act. If the cedents have not filed claims, then the payments cannot be a distribution on their claims. The Liquidator may pay administrative expenses, however, to cause the cedents to file claims so that reinsurance due the estate may be collected.

A contrary interpretation would frustrate the policyholder protection purposes underlying the liquidation process and the priority of distribution itself. The statutory priority provision is intended to “carr[y] out sound public policy by minimizing the damage done to the insured community when an insurer fails.”²²

²¹ IRMA § 801A. See Appendix p. 93.

²² 1967 Wis. Laws c. 89, § 17 (codified as amended at Wis. Stat. § 645.68). See Appendix p. 3.

B. The Agreement Serves the Primary Purpose of Insurer Liquidation.

The primary purpose of insurer liquidation proceedings is to pay the greatest amount possible on claims, in particular on claims under insurance policies. The Agreement at issue in this case serves that primary purpose. Consistent with the Model Act, the New Hampshire Act provides that its purpose is “the protection of the interests of insureds, claimants, creditors and the public generally.”²³ In fulfillment of this public purpose, the chief insurance supervisory official of the state in which a troubled insurer is domiciled is to be appointed as rehabilitator and, if necessary, liquidator of the insurer.²⁴ The commissioner as receiver is uniquely positioned to protect the interests of all parties involved in the receivership proceeding.

In the context of a liquidation, the liquidator is “vested by operation of law with the title to all of the property, contracts and rights of action” of the insurer.²⁵ The Liquidator has broad authority “[t]o collect all debts and moneys due and claims belonging to” the insurer.²⁶ The assets collected are ultimately to be distributed to the creditors of the insurer. Where the insurer is insolvent, however, there must be an “[a]pportionment of any unavoidable loss.”²⁷ This is accomplished through the priority of distribution.

“Apportionment of any unavoidable loss” does not mean that a court sitting in equity determines what is equitable and apportions payments accordingly. Nor does it mean that all unsecured creditors will share equally. Rather, it means that creditors will share based on the equities established in the statutory priority system. Although priority statutes vary in details, they represent the legislative determination that certain creditors’ claims are more worthy of payment if, because of insolvency, not all can be paid. The Model Act, like the New Hampshire

²³ IRMA § 101E (see Appendix p. 12-13); R.S.A. 402-C:1, IV.

²⁴ IRMA §§ 301A, 501A (see Appendix p. 42); R.S.A. 402-C:16, 21.

²⁵ IRMA § 501A (see Appendix p. 49); R.S.A. 402-C:21, I

²⁶ IRMA § 504A(3) (see Appendix p. 51-52); R.S.A. 402-C:25.

Act and other states' laws, recognizes the social role of insurance in protecting the public and providing for payment of claims by and against policyholders.

The Model Act typifies insurer priority statutes by providing first priority to "costs and expenses of administration," which include the "actual and necessary costs of preserving or recovering the property of the insurer."²⁸ Payment of such expenses is necessary so that the liquidation may be conducted and assets marshaled.²⁹ The next class to receive distributions is "claims under policies of insurance."³⁰ "This class contains the claims central to the social role of insurance,"³¹ and this third priority class serves the public purpose of protecting policyholders and claimants under policies. Other claims are assigned lower priorities.

The purpose of maximizing payments to policyholders is further advanced where an administrative expense payment permits the liquidator to collect an otherwise unavailable asset so that distributions to policy level creditors will be increased. If an administrative expense payment to an entity with a lower-priority claim were not permissible where it would aid in the collection of otherwise unavailable assets, then the purposes of the priority of distribution would be frustrated. The priority schedule is intended to require distributions of available assets to pay administrative expenses and claims under policies first, not to deny lower priority creditors an administrative expense payment where it benefits policy-level creditors.

The Model Act establishes an absolute priority rule by providing, "Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the

²⁷ IRMA § 101(E)(4) (see Appendix p. 12); R.S.A. 402-C:1, IV(d).

²⁸ IRMA § 801A(1)(a) (see Appendix p. 92). See R.S.A. 402-C:44, I.

²⁹ IRMA now also provides a second administrative expense priority for the administrative expenses of guaranty funds, the statutory entities that handle "covered claims" under policies when an insurer is placed in liquidation. IRMA § 801B (see Appendix p. 93).

³⁰ IRMA § 801C (see Appendix p. 93-94); R.S.A. 402-C:44, II.

³¹ 1967 Wis. Laws c. 89, § 17 (codified as amended at Wis. Stat. § 645.68(3)). See Appendix p. 4.

next class receive payment,”³² and “No claim by a shareholder, policyholder or other creditor shall be permitted to circumvent the priority classes through the use of equitable remedies.”³³ This language seeks to prevent lower priority creditors from reducing assets available for distribution to the higher priority classes. It does not prevent an administrative expense payment that increases assets available for distribution, which would be the effect of the Agreement.

Appellants seek to prevent the payment of a necessary administrative expense by mischaracterizing the expense as a preferential distribution. To endorse the appellants’ position would create a windfall for them and sharply decrease the assets that would otherwise be available to pay policyholder claims. In essence, this challenge to the Liquidator’s authority, if successful, would provide precedent for debtors to attack any agreement to preserve and collect estate assets that involve the payment of administrative costs to creditors who happen to also have a lower priority claims against the estate. Such a limitation on the broad authority of insurance commissioners as liquidators of insolvent insurers would conflict with the fundamental purposes of insurer liquidation.

³² IRMA § 801 (see Appendix p. 92); R.S.A. 402-C:44.

³³ *Id.*

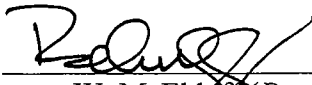
III. CONCLUSION

For the reasons stated, the Court should affirm the Order of the Superior Court to approve the proposed agreement.

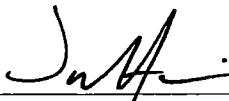
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Respectfully submitted,

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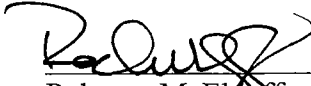
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I, Rebecca W. McElduff, certify that, on February 10, 2006, I caused two (2) true and correct copies of the foregoing Brief of *Amicus Curiae* National Association of Insurance Commissioners to be served upon the following, via First Class U.S. Mail:



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