No. 99-292

In The

Supreme Court of the United States

SALLY B. MCCARTY, COMMISSIONER
OF THE INDIANA DEPARTMENT OF INSURANCE
AND LIQUIDATOR OF CLASSIC FIRE &
MARINE INSURANCE CO.,

Petitioner,

v.

ALICE BROWN, UNITED STATES FIRE
INSURANCE COMPANY and ROBERT HEARIN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Association of Insurance Commissioners (NAIC) respectfully moves this Court, pursuant to Rule 37.2(b), for leave to file a brief as an amicus curiae in this case in support of the Petition for a Writ of Certiorari, and in support of its motion states:

1. Counsel of record for NAIC attempted to obtain the consent of all parties to this matter to the filing of an amicus curiae brief by NAIC by contacting the parties' counsel of record.

2. The Petitioner, Sally B. McCarty, Commissioner of the Indiana Department of Insurance and Liquidator of Classic Fire and Marine Insurance Co., has consented to the filing of an amicus curiae brief by NAIC through her counsel of record, Matthew R. Gutwein of the firm of Baker & Daniels.

3. None of the Respondents have replied to NAIC's request for their consent.

4. NAIC has a strong interest in this case as set out fully in the brief submitted with this motion.

WHEREFORE, premises considered, the National Association of Insurance Commissioners (NAIC) respectfully moves this Court for leave to file a brief as amicus curiae in support of the Petition for a Writ of Certiorari in this case pursuant to Rule 37.2(b) of this Court.

Respectfully submitted,

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INTEREST OF THE NAIC[1]

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association established in 1871, whose membership consists of the principal insurance regulatory officials of the 50 States, the District of Columbia, and the territories and insular possessions of the United States.

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

> . . . assist 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.

The interest of the NAIC arises out of the responsibility vested in each insurance commissioner, superintendent or director (hereinafter commissioner) to regulate

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

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.

One of the most important activities conducted by the members of NAIC is the development of model laws and regulations to address problems and issues common to the various states. These models serve as guideposts for member commissioners and their respective staffs in developing proposed legislation for submission to State legislatures and in promulgating rules and regulations for the effective regulation of the business of insurance.

The fundamental goal of all insurance regulation is to make certain that insurance companies, having collected premiums from insurance consumers, are able to keep their commitment to pay claims under the policies issued to those consumers. When an insurer becomes financially impaired or worse, insolvent, the ability of the insurer to keep that fundamental commitment is jeopardized.

Each state has enacted laws that provide for an orderly scheme for the administration of the affairs of impaired or insolvent insurers. These laws are designed to facilitate the rehabilitation of the insurer if that is possible, and if not, the equitable distribution of the insurer's assets to those who have claims against it in accordance with a prescribed priority of distribution. Typically, these laws are either based on the NAIC Insurers Rehabilitation and Liquidation Model Act or are very similar to the Model Act in key respects. Each state legislature has granted the insurance commissioner in that state the exclusive authority to commence delinquency proceedings against impaired or insolvent insurers, and only the insurance commissioner may be appointed as receiver of such insurers. The insurance commissioner, once appointed as receiver by a state court, conducts the rehabilitation or liquidation of the insurer, subject to the court's supervision.

This case presents the question of whether a Louisiana state court must accord full faith and credit to the anti-suit injunctive provisions of an order of liquidation issued by an Indiana state court against an Indiana-domiciled insurance company. This issue has long troubled state insurance regulators. The first uniform rehabilitation and liquidation act, adopted by the NAIC in 1936, was designed to facilitate the cooperation of the states in the event of the receivership of an insurer operating in multiple states.

> "Commissioner Pink: I have a committee report on Interstate Liquidations. I think, Mr. President, we have all felt there is a very wasteful situation present where a large interstate company is liquidated in one state and you have to operate through receivers appointed by the courts of the various states in which that company has property or assets. We have found in New York that the system is tremendously wasteful and that the assets that should go to creditors are dispersed and merely wasted in this method of handling. There is no businesslike system whatsoever.
>
> A sub-committee was appointed to draft a proposed law which could be adopted as a uniform law in the various states and which would simplify this matter and give the home state control over the assets and over the liquidation of the company in the various states. . . ."

1936 *Proceedings of the National Association of Insurance Commissioners*, I, p. 29.

At the heart of the first model insurer rehabilitation and liquidation act were reciprocal provisions. These provisions establish the state of domicile of the subject insurer as the controlling forum for delinquency proceedings, and mandate the equitable treatment of all policyholders and creditors, regardless of their state of residence.

In 1969, the NAIC adopted the Wisconsin Liquidation Act as its model and recommended that other states adopt the Wisconsin Act. In 1978, the NAIC developed and adopted the Insurers Rehabilitation and Liquidation Model Act. Both the Wisconsin Act and the 1978 Model Act contain reciprocal provisions. Thirty-three states have adopted the NAIC Model Act or substantially similar legislation.[2] *NAIC Model Laws, Regulations and Guidelines, Vol. III*, pp. 63-67, Insurers Rehabilitation and Liquidation Model Act (July 1999).

In 1939, the Uniform Insurers Liquidation Act (UILA) was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. The UILA addresses issues of interstate

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[2] Indiana is one of the 33 jurisdictions that has adopted the NAIC Model Act or substantially similar legislation. While Louisiana is not considered to have adopted the NAIC Model Act, its statutory scheme for the administration of impaired or insolvent insurers is similar to that of Indiana, and contains the provisions of the Uniform Insurers Liquidation Act. Both states have enacted the statutory provisions necessary to be considered reciprocal jurisdictions by NAIC. (See App. A)

cooperation with regard to delinquency proceedings against multi-state insurers, and sets out provisions necessary for states to treat each other as reciprocals in such matters. Portions of the Prefatory Note to the UILA are particularly relevant to this case:

> "Depression conditions have resulted in recent years in the forced liquidation or reorganization of many insurance companies. These proceedings have brought to light certain problems peculiar to the liquidation of business having assets and liabilities in two or more states. Insurance company assets take the form, for the most part, of special deposits required by state law, balances in the hands of insurance agents, policy premiums due but unpaid, and investments of reserve funds. The greater number of these assets naturally have their situs in the state of domicile of the company, but a substantial portion is normally scattered over the entire territory within which the company carries on its business. This is necessarily true of the special deposits required by the laws of non-domiciliary states and the balances in the hands of non-resident agents. On the other side of the balance sheet the liabilities of insurance companies, consisting primarily of policy obligations, are also distributed over the several states in which the companies do business. This wide distribution of assets and liabilities creates a formidable assay of problems when liquidation, rehabilitation or reorganization proceedings become necessary for an insurer which has drifted into financial difficulties. The equitable and expeditious solution of these problems is rendered the more difficult by wide differences in the provision of the statutes of the several

states regarding such matters as special deposits, preferred claims, securities, set-off, and the administrative and judicial procedures to be followed. If statutory means can be provided which will facilitate delinquency proceedings by eradicating these difficulties they will be of great service.

Specific features of insurer delinquency proceedings causing the greatest embarassment are the following:

. . .

2. Very frequently the domiciliary receivers whether or not deemed statutory successors to the defunct companies, have but little authority in non-domiciliary states, and in some states they receive no recognition whatsoever. As a consequence, company assets located outside the home states are likely to be dissipated, and, unless ancillary proceedings are started, debtors living in such states are all too frequently able to avoid meeting their just obligations.

. . .

6. Finally, inequity often results from the fact that creditors in non-domiciliary states may, if they are sufficiently well informed and diligent, obtain preferences for themselves by commencing attachment or similar proceedings against such property as may be found in their respective states. Such proceedings can easily be commenced by properly informed creditors before ancillary proceedings are started, and as a result other less well-informed creditors suffer accordingly. There is no just reason for permitting such preferences to prevail.

> All of the foregoing difficulties may easily be eliminated if the several states will adopt a properly formulated uniform act containing appropriate reciprocal provisions. The Uniform Insurers Liquidation Act is designed to accomplish this end. . . . It is believed that a general adoption of the Act will greatly facilitate proceedings commenced for the liquidation, rehabilitation or reorganization of insurance companies and will promote the equitable distribution of the assets of defunct insurers."

13 *Uniform Laws Annotated,* pp. 322-323 (1986).

The business of insurance is and has always been an interstate business. An insurer based in one state may be licensed to conduct business in each of the other 49 states. The impairment or insolvency of a multi-state insurer involves many competing interests in the same pool of assets. Policyholders and creditors in each state where the company transacted business must be treated equitably. Absent cooperation between insurance regulators and the courts of each state with a stake in the affairs of the troubled company, chaos results. Both the NAIC Model Act and the UILA were designed to facilitate interstate cooperation and avoid such problems. The case at bar is an example of exactly the situation that both the NAIC Model Act and the UILA were designed to prevent, where one state has refused to recognize an order issued by the courts of another state as to one of its domestic insurance companies.

The members of the NAIC, as the chief insurance regulators in each state, have a compelling interest in seeing that the policyholders and other creditors who reside in their state are treated fairly in the event of the impairment or insolvency of a multi-state insurer. Likewise, each member of the NAIC has a strong interest in knowing that he or she will not be frustrated in their attempt to manage the receivership of a domestic insurance company by the failure of the courts of other states to honor orders issued by the courts of the state of domicile.

SUMMARY OF ARGUMENT

1. The interests involved in this case are not limited to those of the Petitioner, the Respondents, Indiana and Louisiana, but include all policyholders and creditors of the insolvent company. Only if the orders of the Indiana receivership court are accorded full faith and credit in other states can the Petitioner meet her fiduciary duty to all concerned.

2. The domiciliary regulator cannot effectively implement a plan of reorganization or rehabilitation without the cooperation of the courts in sister states. It is critical that the anti-suit injunctive provisions in rehabilitation orders be accorded full faith and credit in non-domiciliary states.

3. The prevention of preferences is critical to an orderly liquidation and the equitable distribution of assets. Anti-suit injunctive provisions in receivership orders facilitate an orderly liquidation by preventing creditors from obtaining preferences.

ARGUMENT

INTRODUCTION

The NAIC is vitally concerned with the enforceability of anti-suit injunctions in the setting of the rehabilitation or liquidation of a multi-state insurer. The decision below allows the courts of Louisiana to place the interests of one of its citizens above the interests of all other persons with a stake in the receivership of an Indiana-domiciled insurance company. The decision of the Supreme Court of Louisiana, if allowed to stand, will frustrate the efforts of Petitioner to conduct an orderly liquidation proceeding and to equitably distribute the assets of an insolvent insurer among all of its creditors.

I. THE ENFORCEABILITY OF ANTI-SUIT INJUNCTIONS UNDER THE FULL FAITH AND CREDIT CLAUSE IS CRITICAL, ESPECIALLY AS REGARDS INSURER DELINQUENCY PROCEEDINGS.

The enforceability of anti-suit injunctions under the Full Faith and Credit Clause is an important and recurring issue, especially as regards the rehabilitation or liquidation of a multi-state insurance company. This case presents the question of whether the courts of a non-domiciliary state must accord full faith and credit to the anti-suit injunctive provisions of an order of liquidation issued by a court in the state of domicile of an insolvent insurance company.

Classic Fire & Marine Insurance Company ("Classic Fire"), an Indiana-domiciled insurer, was placed in rehabilitation on January 7, 1998 and in liquidation on

December 18, 1998. Both the rehabilitation order and the liquidation order were issued by the Marion County, Indiana Circuit Court. Both orders contained provisions enjoining the prosecution of all lawsuits against Classic Fire in courts other than the Indiana receivership court. The issuance of such injunctions is specifically authorized by Ind. Code § 27-9-1-4 and Ind. Code § 27-9-3-12.

Petitioner Sally B. McCarty, the Insurance Commissioner for the State of Indiana and the duly appointed receiver of Classic Fire, entered an appearance in the Civil District Court for the Parish of Orleans, Louisiana for the purpose of seeking a stay of litigation pending in that court against Classic Fire. The Louisiana trial court denied McCarty's petition on the basis that Indiana is not a reciprocal state with Louisiana under the Uniform Insurers Liquidation Act. McCarty unsuccessfully sought to have the trial court's ruling overturned in the Louisiana Fourth Circuit Court of Appeals and the Supreme Court of Louisiana.

The NAIC supports Petitioner's effort to obtain review by this Court of the Supreme Court of Louisiana's order denying her application for a stay of the Louisiana lawsuit. As Petitioner notes in her Petition for a Writ of Certiorari, this Court "has not yet ruled on the credit due to a state court injunction barring a party from maintaining litigation in another State." *Baker v. General Motors Corp.*, 118 S.Ct. 657, 665 n. 9 (1998). As Petitioner demonstrates, the lower courts, both state and federal, have struggled with this issue and have reached conflicting results. The conflict existing among the lower courts and the importance of the matters at stake argue for this Court's review of this case.

A. The Interests Involved Are Not Limited to Indiana and Louisiana.

The interests involved in this case are not limited to those of the Petitioner, the Respondents or the States of Indiana and Louisiana. Classic Fire is a multi-state insurer. The company wrote business in at least 47 states.[3] Every policyholder with an unpaid claim or due a refund of unearned premium, regardless of their place of residence, has an interest in the liquidation proceeding in Indiana. Every creditor to whom Classic Fire owes a debt has an interest in the estate. Even the federal government may have an interest in the Classic Fire liquidation if the insurer owes federal income or other taxes.

Petitioner, as liquidator of Classic Fire, has been charged with the duty of protecting and reconciling these various and competing interests in a limited pool of assets in the Indiana liquidation proceeding. The interest of one citizen of the State of Louisiana should not take precedence over the good of all parties concerned. Only if the orders of the Indiana receivership court are accorded full faith and credit by the courts of other states can Petitioner effectively discharge her fiduciary responsibilities to all concerned.

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[3] 1996 Annual Statement.

B. Efforts to Rehabilitate a Troubled Insurer Are Hampered by the Refusal of other State Courts to Honor Anti-Suit Injunctions.

The efforts of the domiciliary commissioner to reorganize or rehabilitate a financially impaired insurer are hampered by the refusal of other state courts to honor the anti-suit injunctive provisions of orders of rehabilitation. In order to have any chance at the successful rehabilitation of a troubled insurance company, the domiciliary regulator must establish control of the company's assets and liabilities. The rehabilitator must be able to implement corrective action to improve the insurer's condition and negotiate transactions such as the sale of blocks of unprofitable business or infusions of needed capital.

It is impossible to achieve control of the company in the absence of the cooperation of insurance regulators and the courts in the other states where the company transacted business. The rehabilitator cannot focus on the problems of the troubled company and institute needed corrective action if he or she must defend multiple lawsuits in multiple jurisdictions. The goal of the domiciliary regulator in a rehabilitation proceeding is the restoration of the company to financial stability. The return of the company to financial stability is in the best interest of all concerned. However, absent the cooperation of the courts of sister states in honoring the provisions of the rehabilitation order, it is unlikely that such a proceeding will succeed. If policyholders and creditors of the troubled company in other jurisdictions are free to pursue their own selfish interests, without regard to the effect that their actions will have on the company and efforts to revive it, rehabilitation efforts are doomed from the start.

It is, therefore, critical that the anti-suit injunctive provisions in rehabilitation orders be accorded full faith and credit in jurisdictions other than the state of domicile.

C. An Orderly Liquidation Is Not Possible If Anti-Suit Injunctions Are Not Honored by Non-Domiciliary State Courts.

An orderly liquidation proceeding is not possible if the anti-suit injunctive provisions of the domiciliary court's liquidation order are not honored by the courts of non-domiciliary states. An insurance company liquidation proceeding consists of three parts. First, the liquidator must marshal all of the assets of the insolvent insurer. Second, the assets must be converted to cash or cash equivalents. Finally, the assets must be distributed to those with claims against the insolvent company according to an order of distribution prescribed by statute. This equitable distribution of the assets of the insolvent insurer is the end goal of a liquidation proceeding.

An equitable distribution of the assets of an insurer in liquidation cannot be achieved if creditors are allowed to obtain preferences by helping themselves to the insurer's assets outside the proceeding in the state of domicile. The most important purpose of anti-suit injunctive provisions in an order of liquidation is the prevention of preferences. Only if such orders are accorded full faith and credit and enforced by the courts of non-domiciliary states can the liquidator properly discharge his or her statutory duty to pay over to each creditor their fair share of the assets of the insurer.

CONCLUSION

It is critical to the efforts of state insurance regulators in managing the affairs of impaired or insolvent insurers to achieve the best result for all concerned that the anti-suit injunctive provisions in orders of rehabilitation or liquidation entered by the domiciliary receivership court be honored by non-domiciliary states. State and federal courts have been inconsistent in their rulings on the question of whether such orders should be accorded full faith and credit. The NAIC urges the Court to grant the Petition for a Writ of Certiorari so that this issue might be resolved.

Respectfully submitted,

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APPENDIX

APPENDIX A

NAIC
RECIPROCAL/NONRECIPROCAL STATES
UNDER THE LIQUIDATION ACTS

The following is a list of jurisdictions that are reciprocal and are not reciprocal under the various states' liquidation acts.

RECIPROCAL STATES

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
Florida
Georgia
Guam
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
South Dakota
Tennessee
Utah
Vermont
Virgin Islands
Washington
West Virginia
Wisconsin
Wyoming

App. 2

NONRECIPROCAL STATES

District of Columbia	Texas
Virginia	