IN THE SUPREME COURT OF OHIO

ANN H. WOMER BENJAMIN, Superintendent, Ohio Department of Insurance,	:	CASE NO.
Appellant,	:	On Appeal from the Franklin County Court of Appeals,
vs.	:	Tenth Appellate District
METROHEALTH SYSTEM,	:	Court of Appeals Case No. 02APE01 0089
Appellee.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

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EXPLANATION BY *AMICUS CURIAE* OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The National Association of Insurance Commissioners (the "NAIC") respectfully submits this Memorandum in Support of Jurisdiction as *amicus curiae*. This case presents a matter of public and great general interest of critical importance to the regulation of both financially sound and troubled insurance companies. Its impacts will likely extend well beyond insurance regulation in, and the insured population of, the state of Ohio. The holdings of the court below in relation to the receivership of Personal Physicians Care, Inc. ("PPC") frustrate the fundamental purposes of the examiner work paper confidentiality statute. Assuring confidentiality of the documents submitted pursuant to an examination allows the Department of Insurance to exercise its regulatory powers to the fullest extent thereby ensuring complete and useful examinations.

The impact of the decisions of the Court of Appeals is far-reaching. Insurance companies will be reluctant to supply necessary documents during financial examinations if the Department of Insurance may not be able to keep these confidential. This is especially true for troubled companies where the Department's need for documents is greatest.

Most significant from the NAIC's perspective are the ways in which other states will be impacted by the subject decisions. For example, regulators from a number of states frequently cooperate on examinations. In such cases, if Ohio eventually needs to commence recovery litigation against parties involved with the examined company, then other states' work papers may be subject to the breach of confidentiality that these decisions can bring about. The subject decisions then not only emasculate Ohio's examination confidentiality, but also endanger the examination confidentiality statutes of other states participating in examinations with Ohio.

Other ways in which other states may be impacted by the decisions below are covered in the next section.

STATEMENT OF INTEREST BY *AMICUS CURIAE*

The NAIC is a non-profit corporation whose membership consists of the principal insurance regulatory officials (Commissioners) of the 50 States, the District of Columbia, the territories and insular possessions of the United States. Started in 1871, it is the nation's oldest association of state government officials. The individual state members of the NAIC completely control its actions.

Only a member may request consideration of the NAIC's filing an *amicus curiae* brief and such requires approval of the Executive Committee of the NAIC made up of at least 15 of the NAIC's members. *See* Bylaws of the National Association of Insurance Commissioners *at* http://www.naic.org/1consumer_protection/htm_files/NAIC_certificate_bylaws.htm (last visited January 20, 2003).

This memorandum is consistent with the mission and purposes of the NAIC. The mission of the NAIC as set out in its Certificate of Incorporation is to:

> … assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:
>
> (a) Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
> (b) Promote, in the public interest, the reliability, solvency, and financial solidity of insurance institutions; and
> (c) Support and improve state regulation of insurance.

at http://www.naic.org/1consumer_protection/htm_files/NAIC_certificate_bylaws.htm (last visited January 20, 2003).

The members of the NAIC are uniquely qualified and situated to assist the Court by presenting the regulatory and public policy concerns involved in this case. Individually and collectively, the members of the NAIC have a wealth of experience in (a) the examination and supervision of insurance companies and (b) the administration of insurance company ("insurer") receiverships. The NAIC's members understand the interests of insurance consumers and others affected by the unfortunate circumstances of insurer insolvency, and work daily to protect those interests in their two different and separate capacities as (a) the chief insurance regulators in each state and (b) as the state officers charged with handling insurer receiverships.

The members established the NAIC Financial Regulations Standards and Accreditation Program in June 1989 to ensure that each state satisfies certain baseline requirements deemed necessary to an effective regulatory system. The role of the insurance commissioner in insurer insolvency proceedings is so critical that it is the subject of one of the 18 standards with regard to the laws and regulations that must be in place for a state to be accredited by the NAIC. The standard provides:

> 13. Receivership
>
> State law should set forth a receivership scheme for the **administration, by the insurance commissioner**, of insurance companies found to be insolvent as set forth in the NAIC's Insurers Rehabilitation and Liquidation Model Act.

The NAIC Financial Regulation Standards and Accreditation Program (1997) (emphasis added).

This standard reflects the belief of the members of the NAIC that the commissioner of insurance is the most appropriate person to be entrusted with the protection of the public interest in the event of insurer insolvency.

The members of the NAIC are concerned with all areas of the regulation of the business of insurance. In relation to the mission component of promoting reliability – the ultimate

delivery of the product of paid claims under policies of insurance – the members of the NAIC are particularly concerned with (a) the examination of companies and the administration of troubled companies and (b) insurer receiverships for rehabilitation or for liquidation. This is shown in the first standard with regard to the laws and regulations and the third standard with regard to regulatory practices that must be in place for a state to be accredited by the NAIC, which are set forth below.

1. Examination Authority

> The Department should have the authority to examine companies whenever it is deemed necessary. Such authority should include complete access to the company's books and records and, if necessary, the records of any affiliated company, agent, and/or managing general agent. Such authority should extend not only to inspect books and records but also to examine officers, employees, and agents of the company under oath when deemed necessary with respect to transactions directly or indirectly related to the company under examination. The **NAIC Model Law on Examinations or substantially similar provisions shall be part of state law**.
>
> * * *

3. Communication With States and Procedures for Troubled Companies

(a) Communication With States

> States should allow for the sharing of otherwise confidential information, administrative or judicial orders, or other action with other state regulatory officials **providing that those officials are required, under their law, to maintain its confidentiality.** The Department should have a documented policy to cooperate and share information with respect to domestic companies with other state regulators directly and also indirectly through committees established by the NAIC which may be reviewing and coordinating regulatory oversight and activities. This policy should also include cooperation and sharing information with respect to domestic companies subject to delinquency proceedings.

(b) Procedures for Troubled Companies

> The Department should generally follow and observe procedures set forth in the NAIC's Troubled Insurance Company Handbook. Appropriate variations in application of procedures and regulatory requirements should be commensurate with the identified financial concerns and operational problems of the insurer.

The NAIC Financial Regulation Standards and Accreditation Program (1997) (emphasis added).

The decisions below affect how Ohio's "officials are required, under their law, to maintain [the] confidentiality" of information obtained through the examination of companies and could, consequently, affect Ohio's status as an accredited state.

Each of the members of the NAIC is charged by statute with the duty of representing their state in presiding over the rehabilitation of financially troubled insurers and the liquidation of insolvent insurers. There are successive steps in the usual process of an insurer going from troubled company examination, to administrative supervision, to rehabilitation, and usually, then to liquidation, and the rights and liabilities of the insurer and parties interested in it are fundamentally changed at each step. *See generally Ch. 1 – Takeover and Administration & Ch. 9 – Legal Considerations*, NAIC Handbook for Insurance Company Insolvencies (1999) (the "Receivers Handbook"). Two of the fundamental changes in these steps that appear to have not been noted in the decisions below are in the roles of (a) the insurance commissioner (superintendent in Ohio), and (b) the insurer's management - in relation to the insurer. While a company is being examined **and while it is in administrative supervision**, the commissioner is in the role of regulator and the company's management remains in control of the insurer. After a company is ordered into rehabilitation or liquidation then the role of the commissioner is as statutory receiver in control of the insurer - a completely separate role to that of regulator. The company's management is no longer in control and its role otherwise, all too often, shifts to being a debtor to the estate of the company based on what it did while it was in control.

The NAIC provides services to its members through, among other things, the promulgation of model laws and regulations. These model laws and regulations serve as standards to be used by the members of the NAIC in developing insurance laws and regulations for their individual states, and in carrying out their regulatory and receivership duties. Consistent with its mission, the NAIC helps its members and the insurance departments that they lead in explaining these model laws and regulations to legislatures, courts, other divisions of the executive branch, industry, consumers and the general public.

The NAIC promulgated the Model Act. In its several versions since 1936, the Model Act has served as a guide for NAIC members in discharging their duties as rehabilitators and liquidators of insurers. In 1936, the NAIC adopted an early version of the Uniform Insurance Liquidation Act, 13 U.L.A. 321-53 (1986) ("UILA"), as its Model Act. *See* 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 29-33 (1936).

The Model Act, and the NAIC's program of tracking its implementation by states, together serve to promote consistency in the approach to the rehabilitation and liquidation of insurers. This also holds for the treatment of the policyholders, claimants and other creditors of and debtors to insolvent insurers. The NAIC tracks the action states take regarding its various model acts. Since 1936, virtually every state has at some point adopted the then-current version of the Model Act. This can be seen in Appendix 3, a reproduction of the table published by the NAIC of the state adoption of the Model Act, which shows in the "MODEL/SIMILAR LEGIS." column that Ohio is among 33 states that have the post-1969 version of the Model Act. These 33 states have substantially adopted a version of the Model Act after the NAIC adopted the Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. § 645 (1968), as the NAIC Model Act instead of the UILA. *See* 1 Proc. of the Nat'l Ass'n Ins. Comm'rs 168, 241 & 271

(1969). States in the "RELATED LEGIS./REGS." column generally have statutes based on the UILA.

As every state has some version of the Model Act, the outcome in this case may have some effect on the dozens of ongoing insurer receivership proceedings in those states. Courts dealing with insurer receivership proceedings frequently review the Model Act and how the states have adopted it.

The members of the NAIC have a common interest with plaintiff in this case in the orderly, efficient and timely resolution of the insurer receivership that is impacted by the decisions below. The liquidation of an insurer domiciled in one state usually affects the citizens of other states. It is common for most of the unpaid losses due to policyholders and claimants in any insurer liquidation to be in ancillary states, meaning states other than the insurer's domicile. *See generally* NAIC Report on Receiverships (1998). Interstate effect may not be the case with PPC (it is not uncommon for HMO type insurers to do business only in their state of domicile), but the decisions below are likely to impact other liquidation cases in Ohio where business was done in other states.

Decisions that impact a states' ability to make recoveries, lower the amount that may be distributed to claimants in other states. This can include the guaranty associations in those states, which will cause an increased cost to its member companies. In those states that allow premium tax offsets to member companies these costs will be passed on to the taxpayers in those states.

STATEMENT OF CASE AND OF FACTS

The NAIC as *amicus curiae* adopts and incorporates herein the Statement of The Case and Facts set forth in the Memorandum In Support of Jurisdiction of the Appellant the Ohio Department of Insurance.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW No. 1: The Plain Wording Of R.C. 3901.48(B) Means That The Work Papers Related To An Examination Are Confidential And Are Not Subject To Subpoena

The statute that was interpreted in the decisions below to give access to work papers to former management of PPC, *Covington v. Saffold*, Supreme Ct. Case No. 03-0008, and to a provider of health services in relation to coverages by PPC, this case, very plainly states as follows.

> The **work papers** of the superintendent or of the person appointed by the superintendent, resulting from the conduct of an examination made pursuant to section 3901.07 of the Revised Code, **are confidential** and are not a public record as defined in section 149.43 of the Revised Code. The original work papers and any copies of them **are not subject to subpoena** and shall not be made public by the superintendent or any other person.

R.C. 3901.48(B), as enacted by S.B. No. 67, effective June 4, 1997, subsequently amended by S.B. No. 138, effective June 18, 2002 (emphasis added). The work papers are confidential and not subject to subpoena. There is nothing in the statute about any exception where the workpapers are needed in relation to a case brought by a receiver to recover assets of an insurer for the benefit of its claimants. This statute does not say "the work papers are confidential and not subject to subpoena, unless a court for good cause shown orders otherwise." In the decisions below this is the meaning read into the statute, however, in conflict with its plain meaning.

There is nothing in either of the decisions below finding the provisions of R.C. 3901.48(B) to be ambiguous. In regard to the absence of such a finding the decisions below are correct because the provisions of R.C. 3901.48(B) are clear and unambiguous. As stated by this Supreme Court:

> The first general maxim of interpretation . . . is, that it is not allowable to interpret what has no need of interpretation. *Lawler v. Burt* (1857), Ohio St.340, 350. It is a cardinal rule of statutory construction that where the terms of the statute are clear and unambiguous, the statute should be applied without interpretation.

Wingate v. Hordge (1979), 60 Ohio St.2d 55, 58 as quoted in *Ohio Counsel AFSCME v. City of Cincinnati* (1994), 69 Ohio St.3d 677, 683.

This reasoning alone leads to reversal of the decisions below. It is consistent with the reasoning of this Supreme Court in, *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, at 521, ("*Plain Dealer"*) that "the Department is bound to follow the legislative mandate of treating documents submitted pursuant to *R.C. 3901.321* as public, and keeping confidential those documents submitted due to an *R.C. 3901.07* examination. That mandate must be followed by the implementation of clear and careful procedures." In the *Plain Dealer* case documents were released, but only because these were found to be other than confidential documents submitted due to an examination.

This is all that is needed in regard to *Covington v. Saffold*, Supreme Ct. Case No. 03-0008, but leaves remaining the questions of (a) if holdings in the decisions below regarding waiver should be reversed, and (b) if the documents requested in this case were "documents submitted due to an *R.C. 3901.07* examination." This question is not addressed in the decision below, which did not reach it because of its focus on waiver. Thus, this case could be remanded to have that *Plain Dealer* determination made[1]. Such remand would be of no real use, however, if this court determines that approval of the subject settlement by the Department could not be used to prevent the Liquidator from making a recovery.

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[1] It should be noted that it is not uncommon for a financial examination to continue throughout the steps outlined above regarding an insurer moving from examination to liquidation.

<u>PROPOSITION OF LAW No. 2</u>: The Actions Approved During Supervision Under R.C. 3903.09 Cannot Be Used To Prevent Recovery By A Subsequent Liquidator

That the actions approved during supervision of an insurer cannot be used to prevent recovery by a subsequent liquidator follows from the discussion above (in the Interest of *Amicus Curiae* section) regarding the separate roles of the regulator and the receiver.

While R.C. 3903.09 regarding administrative supervision is part of Ohio's adoption of the 1978 version of the Model Act and is within those sections that, "may be cited as "the insurers supervision, rehabilitation, and liquidation act."" R.C. 3903.02(A), later versions of the Model Act removed the provisions regarding supervision into the Administrative Supervision Model Act, NAIC, *Model Laws, Regulations and Guidelines*, Vol. III, p. 558, to reflect the separate roles. *See*, 1 Proc. of the Nat'l Ass'n Ins. Comm'rs 6, 26, 173, 175-178 (1990).

That these roles are separate is still reflected in these provisions in Ohio. For example, if the requirements of a supervision order are not met, R.C. 3903.09(D) provides that "the superintendent may commence proceedings under section 3903.12 or 3903.17 of the Revised Code to have a rehabilitator or liquidator appointed, or extend the period of supervision."

While an insurer is under administrative supervision the superintendent is attempting to get the insurer's management, which is still in control of the insurer, to do everything possible to save the insurer. Sometimes it is impossible to save the insurer. But, transactions that would create preferences if the insurer were to go into liquidation are often part of everything possible to save an insurer. Not allowing the management to enter into any transactions that could create preferences, if a liquidation is needed, would likely lead to more liquidations being necessary.

More insurer liquidations would be the unfortunate result if transactions approved during supervision could be used to prevent recoveries in liquidation. This should not be the result from a public policy standpoint and should not be the result if the estoppel argument made here is examined in light of the separate roles of the supervisor and the liquidator.

For estoppel to hold, (1) there must be a representation by the party to be estopped, (2) the representation must be misleading at a minimum, (3) the party asserting estoppel must have actually relied on the communication and (4) the party would be prejudiced unless the first party is estopped from asserting an otherwise valid right in contradiction to his earlier representation. *Johnson v. Franklin* (1989), 64 Ohio App.3d 205, 210. The estoppel argument fails on the first requirement because the statutory liquidator can make no representations prior to being appointed as such. Prior to liquidation there is only the regulator and the insurer's management.

PROPOSITION OF LAW No. 3: The Provisions In R.C. 3901.48(B) Keeping Work Papers Related To An Examination Confidential And Not Subject To Subpoena Are Within Provisions Applicable To The Effective Regulation Of Insurers That Are Comprehensive And Exclusive Of The General Law

The decisions below based on the Department having waived its privilege over the documents under the subject matter waiver doctrine expressed in *Hearn v. Rhay* (E.D. Wash. 1975), 68 F.R.D. 574, apply a rule that is in conflict with the comprehensive and exclusive rules applicable to insurers. A federal law may only partially pre-empt this comprehensive and exclusive set of rules, *See, United States Dept. of the Treasury v. Fabe*, 508 U.S. 491 (1993), but a doctrine that conflicts with both the plain language and apparent intent of a provision within that set of rules, a doctrine that had previously only been applied outside the context of the regulation of the business of insurance, should not.

<u>PROPOSITION OF LAW No. 4</u>: Keeping Work Papers Related To An Examination Confidential And Not Subject To Subpoena Is Critical To Effective Regulation Of Insurers

Officials from various state insurance departments wrote the NAIC Model Law on Examinations, *NAIC Model Laws, Regulations and Guidelines*, Vol. II, p. 390 (1991). The model was written in a quasi-legislative format, subjected to public comment and ultimately adopted as a model act by all state insurance commissioners, directors and superintendents. The purpose of the model law is "to provide an effective and efficient system for examining the activities, operations, financial condition and affairs of all persons transacting the business of insurance in this state and all persons otherwise subject to the jurisdiction of the Commissioner." Section 1, NAIC Model Law on Examinations.

The Ohio confidentiality provision, R.C. 3901.48, is nearly identical to the NAIC Model Law on Examinations, 5F. (Reproduced in pertinent part in the Appendix 4). Therefore it represents a principle of importance to all state insurance commissioners. In fact, 38 state legislatures have adopted the same confidentiality provision, based on the NAIC model. (Appendix5). Another 10 states have adopted statutory provisions that establish a commissioner's discretionary authority to maintain the confidentiality of examination documents. In total, 48 state legislatures have adopted statutes recognizing the need to maintain the confidentiality of examination documents.

Furthermore, the NAIC includes the examination law as a standard required for its solvency accreditation program. Forty-nine state insurance departments have been accredited by the NAIC. To attain accreditation, a state insurance department must satisfy certain accreditation standards regarding department operations and staffing resources. Additionally, a state must have

certain insurance statutes considered to be necessary to adequately regulate the business of insurance in the state. States that do not have an examination law, and more specifically, the confidentiality provision, jeopardize their accreditation status. All these facts provide evidence of the national significance insurance regulators attach to the confidentiality provision.

CONCLUSION

The issues presented in the decisions below are very significant. The holdings will affect both insurance regulation and the insured population of the state of Ohio as well as numerous other states. This Court should accept jurisdiction of this case and settle the application of this law for the sake of the State of Ohio and the many other states that will be affected otherwise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum In Support of Jurisdiction of *Amicus curiae* The National Association of Insurance Commissioners was sent via regular U.S. Mail on this ____ day of January, 2003, to

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