

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

**In the Matter of the Liquidation of
The Home Insurance Company**

No. 2005-0740

APPEAL FROM THE FINAL DECISION OF THE
MERRIMACK COUNTY SUPERIOR COURT

**BRIEF OF AMICUS CURIAE
REINSURANCE ASSOCIATION OF AMERICA
IN SUPPORT OF APPELLANTS CENTURY INDEMNITY COMPANY, ACE
PROPERTY AND CASUALTY INSURANCE COMPANY, PACIFIC EMPLOYERS
INSURANCE COMPANY AND ACE AMERICAN REINSURANCE COMPANY**

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IDENTITY OF AMICUS CURIAE AND ITS INTEREST IN THIS CASE

The Reinsurance Association of America (“RAA”) files this *amicus curiae* brief pursuant to Rule 30 of the New Hampshire Supreme Court Rules. The RAA files its brief in support of Appellants’ request that the Court (a) reverse the Superior Court’s Orders and (b) enter an order that the Proposed Agreement violates New Hampshire RSA 402-C:44.

The RAA represents a majority of the U.S. domestic reinsurance industry and has long-standing expertise on reinsurance issues to offer this Court. The RAA is a non-profit trade association incorporated in the District of Columbia. Its seventeen member companies are reinsurance companies principally engaged in the business of assuming property and casualty reinsurance. RAA members are either domestic U.S. companies or U.S. branches of foreign reinsurers authorized and licensed in at least one state. Sixteen of the RAA’s member companies are either licensed or authorized to do business in the state of New Hampshire. The RAA also has nineteen affiliate companies representing life reinsurers, reinsurance intermediaries and non-U.S. reinsurers. Together, RAA members write nearly 2/3 of the gross reinsurance coverage provided by U.S. property and casualty reinsurers and/or their affiliates.

The RAA has a strong interest in this proceeding because the resolution of receivership issues can have a significant impact on current and future reinsurance agreements of its member companies. Specifically, the RAA is concerned that the Superior Court’s Orders are contrary to New Hampshire statutory law and general receivership principles and may encourage other receivers to disregard statutory law. The RAA is not aware of any other receivership statute or receiver that has taken the position articulated by the Liquidator in this case. Allowing the Superior Court’s Orders to stand would disrupt the reinsurance marketplace by decreasing contract certainty and subjecting reinsurance agreements to being re-written in the event of a

cedent's insolvency. The RAA is keenly interested in protecting the integrity of reinsurance agreements and fostering predictability in the reinsurance marketplace.

Based on the foregoing, the RAA has a very strong interest in this proceeding and requests that the Court grant Appellants' request to reverse the Superior Court's Orders and to enter an order that the Proposed Agreement violates New Hampshire RSA 402-C:44. *Amicus curiae* hereby adopts the complete Questions Presented for Review, Statutes Involved, Statement of the Case and Statement of the Facts set forth in Appellants' Brief.

ARGUMENT

I. The Liquidator Has Inappropriately Relied Upon the Adoption of the Insurer Receivership Model Act as Support For His Position

The Liquidator's February 10, 2006 appeal brief ("Liquidator's Brief") asserts that a drafting note in the National Association of Insurance Commissioners' ("NAIC") recently adopted Insurer Receivership Model Act ("IRMA"), somehow validates the Liquidator's position that accelerated payments to a certain group of Class V creditors ("the AFIA Cedents") to incentivize them to file claims in the liquidation are Class I administrative costs. (Liquidator's Brief at 21). Not only does IRMA not support this, but the Liquidator's position is contrary to the New Hampshire Liquidation Act and widely accepted principles of receivership law. As set forth herein, the Liquidator's reliance upon a drafting note in IRMA is misplaced and irrelevant to this Court's analysis.

First, a drafting note to a model law that was adopted by the NAIC in December 2005 is irrelevant to this Court's interpretation of the New Hampshire Liquidation Act ("the Liquidation Act"). The Liquidator's Brief concedes that legislatures speak by enacting legislation and that "the legislative history of a proposed amendment rejected by a subsequent legislature does not alter [the] interpretation of the statute, particularly since the proposed amendment purported to

clarify, not change existing law.” (Liquidator’s Brief at 21, footnote 19). That logic applies with full force to this case. The New Hampshire Liquidation Act articulates a clear statutory scheme for the priority of distributions in a liquidation, including what constitute appropriate Class I administrative costs. A drafting note to a model act that was adopted by the NAIC three months ago provides no insight into how this court should interpret statutes passed by its legislature.

Moreover, the drafting note relied upon by the Liquidator does nothing more than articulate the general principle that, in certain circumstances -- which are not present here -- lower priority creditors may receive payment as administrative costs. However, the drafting note does not address the issue on appeal in this case: namely, whether the AFIA Cedents are entitled to receive claim distribution payments as Class I administrative expenses before all the Class I – Class IV creditors have been paid in full.

In fact, the NAIC explicitly rejected the inclusion of such language in the text of IRMA. In December 2004, the Liquidator submitted language to the NAIC Model Act Revision Working Group (“MARG”), that would expressly authorize a liquidator to classify “...as Class 1 administrative costs, [payments] to claimants in lower priority classes where those payments assist or result in the collection or recovery of assets or property....” MARG (which consisted entirely of state receivers) rejected this language in January 2005 because it was unnecessarily broad and invited too much mischief. Opponents of the language noted that its inclusion in the model act could entice companies to refuse to cooperate with a receiver unless they received these incentives as Class I administrative costs.

The Liquidator then submitted the language twice more to MARG and it was rejected both times. The Liquidator proposed similar language a fourth time in April 2005. Once again, language expressly authorizing payment to claimants in lower priority classes as administrative

expenses was rejected by MARG. MARG did agree to include language in IRMA that confirmed the liquidator's discretion to incur administrative expenses in the collection of assets as the group believed that this discretion already existed. Accordingly, the model law language in section 504(A)(3)(b) of IRMA states:

- A. The liquidator shall have the power:
 - (3) To collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose:
 - (b) 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 net benefit to creditors of the estate;

Upon the insistence of the Liquidator, the drafting note was inserted at the same time section 504 was included. Contrary to the Liquidator's assertions, however, that drafting note does not "implicitly" empower the Liquidator to ignore the statutory distribution scheme or to rewrite the reinsurance agreement. What is apparent from the drafting process at the NAIC is the fact that the Liquidator's desired language was explicitly rejected for inclusion in the text of IRMA.

II. The Liquidator Has Inappropriately Interpreted His Authority Pursuant to the New Hampshire Liquidation Act

A. The Liquidator's Proposed Agreement with AFIA Cedents is Inconsistent with New Hampshire's Statutory Receivership Law

This Court need only look at the statute to determine that the Superior Court erred as a matter of law when it ruled that the Liquidator had authority under § 402-C:44 of the Liquidation Act to enter into an agreement with a subclass of Class V creditors whereby those creditors would receive a distribution of assets from the estate before claimants in prior classes are paid in full and in an amount different than the rest of the Class V creditors ("Proposed Agreement"). The Proposed Agreement clearly violates the order of distribution section of the Liquidation Act.

The Liquidator has limited discretion in administering a receivership and that discretion must be exercised within the statutory framework. Section 402-C:25 of the Liquidation Act makes clear that although the Liquidator has broad discretion to choose among lawful alternative methods of administering an insolvent insurer's estate, the Liquidator has no power to act contrary to the Act's provisions. Section 402-C:25 empowers the Liquidator, upon commencement of insolvency proceedings, to "[e]xercise all powers now held or hereafter conferred upon receivers **by the laws of this state not inconsistent with this chapter.**"¹ This means that the Liquidator can take possession of the assets of the insurer but must administer them under the orders of the court in accordance with the Liquidation Act, including the priority of distribution provision.

Where a legislature has enacted a priority of distribution statute, as New Hampshire has, the liquidator cannot second-guess the statute's distribution scheme. In this case, the Liquidator is endeavoring to maximize reinsurance recoveries by directly contravening the Liquidation Act's priority of distribution scheme. The Liquidation Act provision addressing the distribution order and what constitutes Class I expenses could not be clearer. Liquidation Act §402-C:44 is limited to only those "costs" and "expenses" that arise post-liquidation (unlike the proposed payments to AFIA Cedents that arise from their pre-liquidation claims) and does not allow the Liquidator to create two subclasses within a class (which is the effect of the distributions to AFIA Cedents despite their reclassification as administration costs).

The Liquidator has attempted to justify departing from the statutory scheme by asserting that the departure is authorized if it is "fair and reasonable and in the best interests of the liquidation and the policyholders and other creditors of The Home." Specifically, the Liquidator

¹ New Hampshire RSA § 402-C:25, Powers of Liquidator, paragraph XXI.

has asserted that the Proposed Agreement is in the best interest of the liquidation because the AFIA Cedents would not otherwise file their claims. Not only is this not a proper basis for ignoring the clear statutory distribution scheme but, as set forth in more detail in Appellants' December 27, 2005 brief ("Appellants' Brief"), this assertion is factually incorrect. Ample evidence was presented to the lower court demonstrating that the AFIA Cedents would have filed and prosecuted their claims even without the incentives provided by the Proposed Agreement. (Appellants' Brief at 33).

B. The Liquidator's Proposed Agreement with AFIA Cedents Improperly Alters the Terms of ACE's Reinsurance Agreements

The RAA is also concerned that the Proposed Agreement with the AFIA Cedents improperly alters the terms of the reinsurance agreements. In a liquidation proceeding, the liquidator is vested with title to all property, contracts, and rights of action of the insurer as of the date of the order directing rehabilitation or liquidation.² The liquidator of an insolvent insurance company, "stands in the shoes" of the insolvent, taking all the rights and obligations under the pre-liquidation contracts entered into by the insolvent.³ The liquidator cannot, however, unilaterally alter the terms of those agreements. That is exactly what the Liquidator is attempting to do in this case.

New Hampshire law requires that reinsurance contracts contain an insolvency clause which mandates that, upon an insurer's insolvency, the reinsurer shall pay monies owed under the reinsurance agreement to the insurer's receiver.⁴ The purpose of this provision is to clarify

² New Hampshire RSA § 402-C:21, Liquidation Orders.

³ *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953 (3d Cir. 1993); *Bennett v. Liberty Nat'l Fire. Ins. Co.*, 968 F.2d 969, 972 n.4 (9th Cir. 1992); *Todd v. Deposit Guar. Nat'l Bank*, 849 F. Supp. 1149 (S.D. Miss. 1994).

⁴ New Hampshire RSA § 402-C:36, Liability of Insurer.

the reinsurer's obligation to pay covered claims, not to expand the scope of reinsurance coverage because the ceding company is now insolvent. Although the insolvency clause requires the reinsurer to pay its entire share of the claim allowed by the estate regardless of the amount that the insurer pays to the insured, it does not alter the terms of the reinsurance agreement or confer any greater rights on the liquidator than were available to the insurer prior to liquidation. Under New Hampshire law, the contractual rights to which the liquidator succeeds are restricted to those contractual rights and causes of action that the ceding company had prior to the liquidation order.⁵ The liquidator cannot demand that which the company would not have been entitled to prior to liquidation.⁶

The liquidator has the right to collect reinsurance recoverables under the insolvent's pre-liquidation reinsurance agreements in accordance with the Liquidation Act. Case law interpreting receivership statutes similar to the New Hampshire Liquidation Act require payment of reinsurance proceeds directly to the receiver absent the existence of certain exceptions.⁷ As set forth in Appellants' Brief at pages 11-12, none of the exceptions apply in this case. Allowing the Liquidator to collect reinsurance proceeds and then immediately pay them out to certain creditors in contravention of the distribution scheme has the same effect as a direct payment of reinsurance proceeds to selected cedents to the detriment of others in the same class. In this case, the Liquidator is providing the AFIA Cedents with an unauthorized preference by paying them sooner, and no doubt more money, than they would otherwise be entitled to receive under

⁵ New Hampshire RSA § 402-C:21, Liquidation Orders.

⁶ *Matter of Midland Ins. Co.*, 79 N.Y.2d 253, 258 (1992).

⁷ *Eastern Engineering & Elevator Co. v. Am. Re-Ins. Co.*, 455 A.2d 1235 (Sup. Ct. Pa. 1983); *See American Cast Iron v. Statesman Ins. Co.*, 343 F. Supp. 860 (D. Minn. 1972); *People v. Cosmopolitan Ins. Co.*, 233 N.E.2d 90 (Ill. App. Ct. 1967); *State v. Security Gen. Ins. Co.*, 140 N.W.2d 676 (S.D. 1966); *McFarling v. Mayfield*, 510 S.W.2d 108 (Tex. Ct. Civ. App. 1974); *Morrow v. Burlington Basket Co.*, 66 S.W.2d 746 (Tex. Ct. Civ. App. 1933).

the statute. By guaranteeing reinsurance recoverables before the underlying claims are even approved by the liquidation court, the Liquidator is improperly changing the indemnity nature of the reinsurance contracts. The Liquidator's Proposed Agreement also inappropriately guarantees money to lower class claimants in a receivership thereby creating incentives for the filing of invalid or fraudulent claims.

This accelerated payment of reinsurance proceeds directly to lower class claimants as incentives to file their claims is contrary to statutory law and case law and was not contemplated by the parties in the pricing and negotiation of the reinsurance agreements. The Superior Court's Orders establish a slippery slope for allowing liquidators to unilaterally modify reinsurance agreements post-receivership, thereby resulting in uncertainty in the New Hampshire marketplace and beyond.

CONCLUSION

Upholding the Proposed Agreement sets a dangerous precedent not only in New Hampshire, but in receiverships generally in the United States. Allowing the Liquidator to act in a manner that is directly contrary to New Hampshire statutory law and to rewrite reinsurance contracts will adversely affect the orderly administration of New Hampshire receiverships and contract certainty for reinsurers. That uncertainty in the marketplace may ultimately have a negative impact on insureds in New Hampshire. For the foregoing reasons, *amicus curiae* requests that this Court reverse the Superior Court Order and enter an order that the Proposed Agreement violates New Hampshire RSA 402-C:44.

WAIVER OF ORAL ARGUMENT

Amicus curiae waives oral argument.

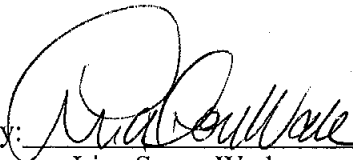
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Certificate of Service

I, Lisa Snow Wade, Esq., hereby certify that on this 2nd day of March, 2006, I have caused a copy of the foregoing MOTION OF REINSURANCE ASSOCIATION OF AMERICA FOR LEAVE TO FILE REPLY BRIEF AS AMICUS CURIAE to be forwarded by first class US mail to:

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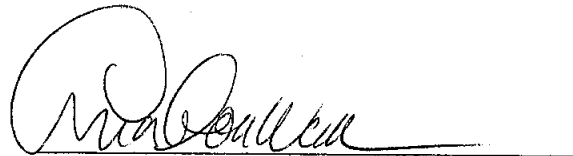
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