POSTED

NEW HAMPSHIRE
SUPREME COURT
RECEIVED

2004 JUN 24 A 9:19

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2004 Term
June Session

No. 2004-0319

In the Matter of the Liquidation of
The Home Insurance Company

APPEAL FROM THE FINAL DECISION OF THE
MERRIMACK COUNTY SUPERIOR COURT

**BRIEF OF AMICUS CURIAE,
REINSURANCE ASSOCIATION OF AMERICA
IN SUPPORT OF RESPONDENTS-APPELLANTS**

Debra J. Hall, Esq.
Cynthia J. Lamar, Esq.
Matthew T. Wulf, Esq.
REINSURANCE ASSOCIATION OF AMERICA
1301 Pennsylvania Avenue, N.W. #900
Washington, DC 22201
(202) 638-3690

Attorneys for *Amicus Curiae*,
Reinsurance Association of America

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

IDENTITY OF AMICUS CURIAE AND ITS INTEREST IN THIS CASE 1

THE PURPOSE OF REINSURANCE 2

REINSURANCE IS AN INTERNATIONAL MARKET 4

REINSURANCE IS A CONTRACT OF INDEMNITY 6

REINSURANCE AND RECEIVERSHIPS 8

ARGUMENT 13

I. The Liquidator's Agreement with AFIA Cedents is a Manipulation of New Hampshire's Statutory Receivership Structure 14

II. Respondents-Appellants' Standing in the Case at Bar is Indisputable 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Allemannia Fire Ins. Co v Firemen 's Ins. Co.., 209 U.S. 326, 332 (1908).......... 7
American Cast Iron v. Statesman Ins. Co., 343 F. Supp. 860 (D. Minn. 1972).......... 10
American Ins. Co. v. North Am. Co. for Property & Cas. Ins., 697 F.2d 79 (2d Cir. 1982) 7
Arrow Trucking Co. v. Continental Ins. Co., 465 So. 2d 691 (La. 1985) 7
Bennett v. Liberty Nat 'l Fire. Ins. Co., 968 F.2d 969 (9th Cir. 1992) 9
Calvert Fire Ins. Co. v. Yosemite, 573 F.Supp. 27 (D.N.C. 1983) 8
Carr v. Hamilton, 129 U.S. 252 (1889) 15
Commissioner of Ins. v. Munich American Reins. Co., 706 N.E.2d 694 (Mass. 1999) 15
Dalton v. Sturdivant Bank, 76 S.W. 425 (Mo. App. 1934) 15
Downey v. Humphreys, 227 P.2d 484 (Cal. 1951) 15
Eastern Engineering & Elevator Co. v. Am. Re-Ins. Co., 455 A.2d 1235 (Sup. Ct. Pa. 1983) ... 10
Excess and Casualty Reinsurance Ass 'n. v. Ins. Commissioner of Ca., 656 F. 2d 491 (Ill. 1974). 7
Fontenot v. Marquette Cas. Co., 247 So. 2d 572(La. 1971) 4, 7
Forsythe v. Kimball, 91 U.S. 291 (1876) 15
Kemper Reinsurance Co. v. Corcoran, 590 N.E.2d 1186 (N.Y. 1992) 16
Grode v. Mutual Fire, Marine & Inland Ins. Co., 8 F.3d 953 (3d Cir. 1993) 11
In re Dein Host, Inc., 835 F.2d 402 (1st Cir. 1978) 17
Massachusetts Motor Vehicle Reinsurance Facility v. Commissioner of Ins., 379 Mass. 527, 400 N.E.2d 221 (Mass. 1980) 15
Matter of Midland Ins. Co., 590 N.E.2d 1186 (N.Y. 1992) 10, 15
McFarling v. Mayfield, 510 S.W.2d 108 (Tex. Ct. Civ. App. 1974) 10
Morrow v. Burlington Basket Co., 66 S.W.2d 746 (Tex. Ct. Civ. App. 1933) 10
Pacific Mut. Life Ins. Co. v. Pacific Sur. Co., 232 P. 728, 736-37 (Cal.Dist.Ct.App. 1924) 8
People ex rel. Baylor v. Highway Insurance Co., 316 N.E. 2d 633 (Ill. 1974). 7
People v. Cosmopolitan Ins. Co., 233 N.E.2d 90 (Ill. App. Ct. 1967) 10
Perry v. Pye, 215 Mass. 403, 102 N.E. 653 (1913) 15
Prudential Reins. Co. v. Superior Court, 842 P.2d 48 (Cal. 1992) 15
Scammon v. Kimball, 92 U.S. 362 (1876) 15
Scott v. Armstrong, 146 U.S. 499, 507 (1892) 15
Stamp v. Insurance Co. of North America, 908 F.2d 1375(7th Cir. 1990) 4, 15, 16
State v. Security Gen. Ins. Co., 140 N.W.2d 676 (S.D. 1966) 10
Todd v. Deposit Guar. Nat'l Bank, 849 F. Supp. 1149 (S.D. Miss. 1994) 9
Transit Cas. Co. v. Selective Ins. Co., 137 F.3d 540 (8th Cir. 1998) 15
United States v. Consumer Life Ins. Co., 430 U.S. 725(1977) 3

Statutes

New Hampshire RSA § 402-C:1 *et seq.* .... passim
New Hampshire RSA § 402-C:20 8
New Hampshire RSA § 402-C:21 .... 9, 10
New Hampshire RSA § 402-C:25 14
New Hampshire RSA § 402-C:34 14
New Hampshire RSA § 402-C:36 9
New Hampshire RSA § 402-C:44 .... 11, 13
New Hampshire RSA § 402-C:45 8
New Hampshire RSA § 402-B:1 *et seq.* 10

Other Authorities

Graydon S. Staring, *Law of Reinsurance* § 16:2. 6
K. Black, Jr. & H. Skipper, Jr., *Life Insurance* (12th ed.1994) 2, 3, 4, 5
K. Gerathewohl, et al, *Reinsurance Principles and Practice*, Vol. I, (1980) 3
Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents, February 11, 2004 14
Olsen, *Reinsurer's Liability to the Insolvent Reinsured*, 41 Notre Dame L. Rev. 13 (1965) 4
Robert I. Mehr & Emerson Cammack, *Principles of Insurance* 821-835 (6th ed. 1976). 6
Thompson, *Reinsurance* (4th ed. 1966) 2, 4, 6
RAA, Alien Reinsurance in the U.S. Market: 1996 Data 13 (1998) 5
Ross Phifer, *Reinsurance Fundamentals* 193 (1996) 4

IDENTITY OF AMICUS CURIAE AND ITS INTEREST IN THIS CASE

The Reinsurance Association of America ("RAA") files this brief of *amicus curiae* pursuant to Rule 30 of the New Hampshire Supreme Court Rules. The RAA files its brief in support of Respondents-Appellants and in support of the reversal of the Superior Court's Order approving the Proposed Agreement.

The RAA is a non-profit trade association incorporated in the District of Columbia. Its seventeen member companies are reinsurers principally engaged in the business of assuming property and casualty reinsurance. The RAA also has nineteen Affiliate companies, seven of which are life reinsurers principally engaged in the business of assuming life, health, and other related forms of reinsurance.

RAA members are either domestic U.S. companies or U.S. branches of foreign reinsurers authorized and licensed in at least one state. Fifteen of the RAA's member companies are licensed or authorized in the State of New Hampshire. Together RAA members write a majority of the reinsurance assumed by U.S. property and casualty reinsurers. Furthermore, the RAA's life and health reinsurers are all in the top twenty of leading life reinsurers in North America ranked by in-force assumed reinsurance.

Amicus curiae hereby adopts the complete Questions Presented for Review, Statutes Involved, Statement of the Case and Statement of Facts as stated by Respondents-Appellants.

The RAA has an interest in this proceeding because resolution of the receivership issues at bar will have direct ramifications as binding legal precedent on the reinsurance agreements of its member companies. Matters of receivership administration are watched with a close eye by the industry and regulators across the nation alike. Significant deviations from standard law and practice will draw much attention and could disrupt the administration of receiverships far

beyond New Hampshire. Moreover, the RAA believes the lower court ruled in error on the Order of the Merrimack County Superior Court (McGuire, J.), dated April 29, 2004, Order Establishing Procedures for Review of Certain Agreements to Assume Obligations or Dispose of Assets (the "Order"). Contrary to the lower court's ruling, the RAA asserts that the liquidator of an insolvent insurer does not have the authority under the New Hampshire Rehabilitation and Liquidation Act, RSA §§ 402-C:1 *et seq.* (the "Liquidation Act"), to enter into an agreement with a subclass of Class V creditors under § 402-C:44 of the Act whereby those creditors would receive a distribution of assets from the estate of an insolvent insurer before claimants in prior classes have been paid in full, and in an amount different than the rest of the Class V creditors. Further, the RAA contends that the issue of the Respondents-Appellants' standing was determined below and the Respondents-Appellants are "persons aggrieved" under established Law.

Based on the foregoing, the RAA has a very strong interest in this proceeding and requests that the Court grant Respondents-Appellants' request to reverse the Order.

THE PURPOSE OF REINSURANCE

Reinsurance is insurance coverage taken out by an insurance company on risks that it has originally insured.[1] In essence, reinsurance is insurance for insurance companies.[2] Reinsurance serves the public interest (i) by allowing all insurers to adequately distribute their risks, (ii) by enabling risks which are large and difficult to place to be covered, and (iii) by permitting small insurers to compete on a level playing field with large competitors. Reinsurance further benefits the public interest by making insurance more affordable and more readily available.

---

[1] K. Black, Jr. & H. Skipper, Jr., *Life Insurance* (12th ed. 1994).

[2] Thompson, *Reinsurance* (4th ed. 1966) at 9, 24-25.

When an insurance policy is issued, the policyholder is said to have "insurance" because the policyholder has shifted the risk of economic loss to a company which is willing to undertake that risk.[3] The business of insurance, however, not only consists of shifting a risk but also of spreading risks which have been shifted from insureds to the insurer. To effectuate this spread of risk, insurers employ a form of insurance known as "reinsurance."[4]

In the absence of reinsurance, some risk amounts would be so large that no one company could cover them. Reinsurance neutralizes the potentially devastating effect of an unexpected catastrophic loss, which would otherwise deplete an insurance company's resources. Risk distribution contributes to the solvency of insurers by stabilizing a company's results. Reinsurance mitigates the unpredictable and variable costs of insurance (payouts on policyholder claims) with a predictable and fixed cost (reinsurance premium).[5]

The amount of risk an insurer is able to accept from policyholders largely depends on the size of the insurance company. Generally, a large insurance company will have a greater ability to absorb more risk and the attendant claim fluctuations than smaller firms. Reinsurance reduces the drain on a company's surplus capital caused by writing new business, increasing the capacity of small or growing insurance companies to issue insurance.[6] In the absence of reinsurance, only

---

[3] K. Gerathewohl, et al, *Reinsurance Principles and Practice*, Vol. I, (1980) at 1, 37.

[4] In the language of the industry, a primary insurer "cedes" to a reinsurer a portion of the risk it originally insured. The reinsurer then "assumes" the risk from the primary insurer. As a result, a primary insurer is sometimes referred to as the "ceding company" or "cedent," and the reinsurer is referred to as the "assuming insurer." Additionally, a reinsurer may sometimes insure risks it assumed from a primary insurer. This type of transaction is called a "retrocession" and the reinsurer ceding the risk is called the "ceding company," "cedent," or "retrocedent," and the assuming insurer is referred to as the "retrocessionaire."

[5] *See* Black & Skipper, *supra*, at 431.

[6] *See United States v. Consumer Life Ins. Co.*, 430 U.S. 725, 737-38 (1977).

large companies would be able to write policies covering large risks, and small companies would be relegated to writing small policies.[7]

Allowing small insurers to compete with large insurers on an equal footing furthers the public interest.[8] Reinsurance enables both large and small insurance companies to issue policies to the public in larger, more profitable quantities, while maintaining an adequate distribution of risk. Consequently, reinsurance enhances the competitiveness of insurance pricing and provides coverage where it most likely would not otherwise be available.

Reinsurance is intended to benefit insurance companies and the public interest by (i) increasing an insurance company's capacity to accept new risks and allowing it to write risks that might otherwise be beyond its capacity, (ii) by stabilizing an insurance company's operating results, (iii) by enabling the spread of catastrophic risks, and (iv) by allowing greater competition among insurers.[9]

In sum, reinsurance provides the financial vehicle necessary to spread and distribute risks among insurance companies and, thus, is vital to the operation of the insurance business. The insurance business, and consequently the reinsurance business, is a crucial component of the U.S. economy.

REINSURANCE IS AN INTERNATIONAL MARKET

The scope of the receivership issue at bar is particularly important in this industry because of its great size and international scope. To better understand the vast size and complexity of the reinsurance market, consider a treaty reinsurer will have an in-force treaty

---

[7] *See*, Black & Skipper, *supra*, at 431.

[8] *Stamp v. Insurance Co. of North America*, 908 F.2d 1375, 1380 (7th Cir. 1990).

[9] *Fontenot v. Marquette Cas. Co.*, 247 So. 2d 572, 575-76 (La. 1971); Thompson, *supra*, at 9, 24-25; Olsen, *Reinsurer's Liability to the Insolvent Reinsured*, 41 Notre Dame L. Rev. 13, 15-16 (1965).

count ranging from several hundred to perhaps a few thousand contracts. The contract counts for a facultative reinsurer are substantially greater, reaching from 20,000 to more than 200,000 in-force agreements. Therefore, a reinsurer with just 100,000 contracts would be a small operation while a large reinsurer may have contracts that number in the seven digits.[10] Additionally, as previously noted, reinsurers often reinsure their risks with other reinsurers (retrocessionaires)[11], further spreading the risk of loss and further complicating the interrelationships in the industry. Reinsurers spread their risks both nationally and internationally, and the U.S market depends heavily on this international capacity. Non-U.S. reinsurers account for a large portion of the U.S. reinsurance market. In 2002, there were more than 4,000 companies from 96 non-U.S. jurisdictions which assumed U.S. reinsurance risks or owed reinsurance recoverables to U.S. insurers.[12] Reinsurers outside the United States account for approximately 46 percent of all reinsurance assumed from insurers in the United States.[13] Where contracts commonly cross numerous national boundaries, consistency in the interpretation of contractual liability reduces the expense and costliness of international recovery efforts by reinsurers.

It is in this factual context of a large, complex and global reinsurance network that this Court should consider the instant appeal. An adverse decision will have far-reaching effects outside the present litigation and outside the confines of the United States.

---

[10] Ross Phifer, *Reinsurance Fundamentals* 193 (1996).

[11] *See Supra* note 1.

[12] RAA, Alien Reinsurance in the U.S. Market: 2002 Data 2 (2003).

[13] *Id.*, at 13.

REINSURANCE IS A CONTRACT OF INDEMNITY

When a primary insurance company issues a policy it does several things. It negotiates coverage with the insured and issues policy language intended to embody the coverage negotiated. Additionally, the insurer must comply with a host of state laws regulating the sale of insurance, including laws regulating premium rates, expenses, reserves, valuation of assets, policy forms, and other matters.[14]

An insurer is not obligated to reinsure its insurance contracts. However, if the insurer chooses to purchase reinsurance protection, it does so for its benefit alone. The reinsurance contract is a completely separate and unrelated transaction from the insured's perspective. In fact, the insured usually is not even aware of the existence of a reinsurer.[15] Further, a reinsurer typically is not a party to negotiations between an insurer and its insured, which result in the contract of insurance. Writing the insurance contract and managing the account is the responsibility of the insurer alone.[16] The primary insurer is almost always the only party to ever deal directly with the policyholder, and despite its reinsurance, the primary insurer remains fully liable to the policyholder on the entire risk covered.

When a claim is made by the insured to the insurer, investigating and managing the claim continues to be the sole responsibility of the insurer, unless the reinsurer agrees otherwise.[17] The reinsurer is not required to reimburse the insurer for its portion of the responsibilities under the insurance contract until the insurer determines whether it, the insurer, is liable to pay a covered

---

[14] *See*, Robert I. Mehr & Emerson Cammack, *Principles of Insurance* 821-835 (6th ed. 1976).

[15] Graydon S. Staring, *Law of Reinsurance* § 16:2 at 11.

[16] *See*, Thompson, *supra*, at 2, 6.

[17] Thompson, *supra*, at 182, 190.

claim.[18] Hence, the reinsurer has no responsibility for a claim until a coverage determination is made and that coverage in turn falls under the terms of the reinsurance agreement.

As a result of the foregoing, a contract of primary insurance (between a policyholder and a primary insurer) is known as a "contract of liability." The risk assumed by the reinsurer is of a more limited nature, constituting a "contract of indemnity" with the obligation to indemnify flowing only to the ceding company.[19] That is why courts have consistently held that a reinsurer is obligated to indemnify a primary insurer only upon the primary insurer's payment of the coverage amounts, above its retention, to insureds: "reinsurance is a mere contract of indemnity in which an insurer reinsures risks in another company."[20] Thus, the coverage afforded by reinsurance is different than the primary coverage with which it is associated.

This distinction between primary and reinsurance coverage is particularly important in an insolvency, where many policyholders may have valid claims against the estate wholly separate from any reinsurance recoverables. Generally, reinsurers will have no obligation under reinsurance agreements where they can demonstrate collusion or fraud, where there is an ex gratia payment (except where expressly permitted) or where the underlying coverage is shown not to exist. It has been held, for example, that where it is clear that a claim is not covered, there is no duty for a reinsurer to reimburse a cedent, even in light of the cedent's actual payment to its insured.[21] Similarly, where it can be shown that the underlying coverage does not even exist, the

---

[18] *Allemannia Fire Ins. Co v Firemen's Ins. Co.*, 209 U.S. 326, 332 (1908).

[19] *See Excess and Casualty Reinsurance Ass'n. v. Ins. Director of Ca.*, 656 F. 2d 491, 492 (Ill. 1974); *People ex rel. Baylor v. Highway Ins. Co.*, 316 N.E. 2d 633, 634 (Ill. 1974); *Arrow Trucking Co. v. Continental Ins. Co.*, 465 So. 2d 691, 698 (La. 1985).

[20] *Fontenot*, 247 So. 2d at 575; *See also*, *Arrow Trucking*, 465 So. 2d at 695.

[21] *American Ins. Co. v. North Am. Co. for Property & Cas.* Ins., 697 F.2d 79 (2d Cir. 1982) (no reinsurance coverage for payment of punitive damages to the insured where such damages are not covered under the underlying policy.).

reinsurer has no obligation.[22] Moreover, where it can be demonstrated that the coverage sought is unambiguously outside the scope of the reinsuring agreement, coverage will not be afforded.[23] Common to these defenses is a lack of any valid contractual obligation to be indemnified under the terms of the reinsurance agreement.

In the case at bar, although a contractual obligation to indemnify AFIA cedents may exist, the obligation is nonetheless dependent on AFIA filing valid claims approved by the liquidation court.[24] As discussed in detail below, an entire statutory system is in place to address insurance companies in receivership – a system which was enacted by the legislature after weighing the various associated interests and public policy concerns. Allowing the Liquidator to circumvent this legislatively prescribed statutory system in order to allegedly enhance the value of the estate will fly in the face of state law as well as New Hampshire public policy.

REINSURANCE AND RECEIVERSHIPS

When an insurance company becomes unable to meet its financial obligations, the Insurance Commissioner may petition a state court for an order declaring the insurer insolvent.[25] If the court agrees that the insurer is insolvent, it will issue an order requiring the Commissioner to take possession of the property, business, and affairs of the insurer and to rehabilitate or liquidate the company. *Id.* The Commissioner of Insurance is also vested by operation of law with title to all property, contracts, and rights of action of the insurer as of the date of the order

---

[22] *Pacific Mut. Life Ins. Co. v. Pacific Sur. Co.*, 232 P. 728, 736-37 (Cal.Dist.Ct.App. 1924) (Before a reinsured may recover from a reinsurer, it must show that the settlement was grounded on a valid insurance agreement.).

[23] *Calvert Fire Ins. Co. v. Yosemite*, 573 F.Supp. 27 (D.N.C. 1983) (Despite a "follow the liability" clause in the reinsurance agreement, given that the agreement expressly limited the reinsurer's obligation to amounts paid in excess of the insured's self-insured retention limits the reinsurer incurred no obligation with respect to certain additional payments required of the primary insurer following the insured's declaration of bankruptcy.).

[24] New Hampshire RSA § 402-C:45, Liquidator's Recommendations to the Court.

[25] New Hampshire RSA § 402-C:20, Grounds for Liquidation.

directing rehabilitation or liquidation.[26] As a result, the Commissioner, as liquidator of an insurance company, is said to "stand in the shoes" of the insolvent, taking all the rights and obligations under the pre-liquidation contracts entered into by the insolvent.[27] For example, the Commissioner has the right to collect reinsurance recoverables under the insolvent's pre-liquidation reinsurance agreements. As the Liquidator has noted by his Agreement, the formal allowance of an insured's claim in the liquidation proceeding establishes the "liability" of the cedent, and forms the basis for the submission of a claim against the reinsurer.

In order for an insurer to reap the full financial benefit of reinsurance in on-going business, New Hampshire law requires that reinsurance contracts contain a provision mandating that, should the insurer become insolvent, the reinsurer pay monies owed under the agreement only to the insurer's receiver.[28] The purpose of these provisions are to clarify the reinsurer's obligations as to covered claims only, not to expand the scope of reinsurance coverage because of insolvency. The insolvency clause assures that a receiver is not barred from recovering reinsurance proceeds actually owed under the terms of the reinsurance contract because of an inability, due to cash flow or preference considerations, to first pay claims actually made by the policyholders. Although the insolvency clause conditions reinsurer payment on the basis of claims allowed rather than actual payment to the insured, it does not alter the terms of the reinsurance contract, or confer any greater rights on the Liquidator than would have been available prior to liquidation.

---

[26] New Hampshire RSA § 402-C:21, Liquidation Orders.

[27] *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).

[28] New Hampshire RSA § 402-C:36, Liability of Insurer.

The contractual rights to which the Liquidator succeeds under New Hampshire law are restricted to those contractual rights and causes of action that the ceding company had prior to the order of liquidation.[29] Further, the liquidator cannot demand that which the company would not have been entitled to prior to liquidation.[30]

The Commissioner uses reinsurance monies, and other sums he has marshaled, to pay the receivership's administrative expenses, claims of policyholders against the estate, and sums needed by the state guaranty association, a statutorily-created association which performs policyholder claims-handling functions for the receivership estate.[31]

As made evident by this statutory procedure, allowing the liquidator to offer incentives to claimants to file claims by paying them directly from reinsurance proceeds would undercut the receivership process adopted in New Hampshire. Further, such actions invite delays and inequitable treatment of claimants, excessive legal fees, and are contrary to the indemnity nature of the reinsurance contract. Hence, a body of case law has developed which demonstrates that, absent an intent to benefit directly or create rights in insureds or other third parties, reinsurance proceeds are payable only to the domiciliary liquidator.[32] This body of case law supports the New Hampshire statutory law requiring payment of reinsurance proceeds directly to the receiver, absent the existence of certain exceptions.

---

[29] New Hampshire RSA § 402-C:21, Liquidation Orders.

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

[31] New Hampshire RSA § 402-C:1 *et seq.;* New Hampshire RSA § 402-B:1 *et seq.*

[32] *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).

Although the Liquidator is receiving all reinsurance proceeds and in turn paying monies out through the estate, the consequential effect is a direct payment of reinsurance proceeds to certain cedents to the detriment of others in the same class. The Liquidator in this case is attempting to furnish AFIA cedents with more than their fair share. The Agreement proposed by the Liquidator redirects reinsurance monies in contradiction to the statutory distribution scheme.[33] These monies available for redirection to certain Class V claimants are being guaranteed in advance by the liquidator, thus changing the indemnity nature of the reinsurance contracts. The direct payment of reinsurance proceeds to claimants as incentives to file claims was not contemplated in the formation of the terms and conditions of the reinsurance agreements. Therefore, the use of such proceeds was not factored into the cost of the reinsurance programs. Guarantying up-front money to claimants in an insurance receivership not only provides incentives for filing valid claims, but also creates incentives for individuals to file claims that do not exist and other forms of insurance fraud. This is especially true where, as in the case at bar, the liquidator will allow claims to be filed by AFIA Cedents that include claims that have been denied previously or that have no merit. If such claims are allowed to proceed in order to stimulate reinsurance recoveries, even if they ultimately fail, the agreement saddles Respondents-Appellants with obligations wholly uncontemplated and unassociated with ongoing concern companies or lawful liquidations.

Where a contract is in place, a receiver can no more ask to expand the reinsurance coverage than a reinsurer can ask to diminish the same coverage. The receiver's rights and duties as well as the reinsurer's rights and duties are fixed as of the date of the liquidation order. A receiver thus has no more basis to change its contracts after liquidation than the insolvent had before liquidation. But that is exactly what the Liquidator requests in the instant case: he desires

[33] New Hampshire RSA § 402-C:44, Order of Distribution.

to collect reinsurance outside the scope of the normal liquidation context by employing an extra-statutory process designed to persuade claim submittal and in contravention of New Hampshire law.

The precedential effect of such a decision could be an interpretation allowing the unilateral modification of contract rights without consent. If reinsurance or any other contracts are permitted to be unilaterally modified after receivership where does the unilateral rewriting stop? If a receivership court can redirect reinsurance recoveries absent a valid, statutorily recognized cut-through clause, what other modifications are in the purview of the court? To reinsurers, the danger of suggesting that contract rights may be legitimately modified without their consent despite the overwhelming case law to the contrary[34] is perfectly illustrated in the Liquidator's attempts in this case to make the end justify the means. These arguments by the Liquidator present a slippery slope for some well-established areas of reinsurance law. What's next? Can a court determine that excluded risks should have been covered, or that premium charged and paid by the insolvent estate was too high?

The Order of the Superior Court profoundly affects the nature of reinsurance contracts in the liquidation context, which consequently affects all parties to a liquidation. In particular with large assets of the estate, such as reinsurance, all parties in a receivership could suffer if the Liquidator's overly broad interpretation of his authority to use any action "necessary or expedient for the accomplishment of or in aid of the purpose of liquidation" is allowed to stand.

Reinsurance recoveries become assets of the estate once claims are approved in accordance with statutory parameters.[35] Those recoveries are distributed in accordance with a

---

[34] *See Supra* note 32.

[35] New Hampshire RSA § 402-C:1 *et seq.*

priority established by the legislature.[36] The legislature has weighed the public policy interests of various creditors. The Agreement struck by the Liquidator undercuts those public policy decisions by redirecting and reprioritizing the distribution of estate assets.

Where a contract is in place, a receiver has no more basis to change the contract after receivership than the insurer had before receivership. Nor does the Liquidator have a basis to ignore statutory mandates. But that is exactly what the Liquidator has requested and the Superior Court has granted in the instant case – they desire to force after-the-fact, direct cedent payment, in excess of what is allowed by statute, without the reinsurer's consent and in contravention of the public policy established by the New Hampshire legislature. As a result, *amicus curiae* respectfully requests this Court accept Respondents-Appellants position and reverse the Order of the Superior Court.

ARGUMENT

The Merrimack County Superior Court erred as a matter of law when it ruled that the Liquidator had the authority under the New Hampshire Rehabilitation and Liquidation Act, RSA §§ 402-C:1 et seq., to enter into an agreement with a subclass of Class V creditors under § 402-C:44 of the Liquidation Act whereby those creditors would receive a distribution of assets from the estate of the insolvent insurer before claimants in prior classes have been paid in full, and in an amount different than the rest of the Class V creditors. Further, any contention that the Respondents-Appellants lack standing because they are not "persons aggrieved" by the Order is entirely without merit.

[36] New Hampshire RSA § 402-C:44, Order of Distribution.

I. The Liquidator's Agreement with AFIA Cedents is a Manipulation of New Hampshire's Statutory Receivership Structure

The grant of authority in the Liquidation Act is not so broad as to allow the Liquidator unlimited discretion to ignore the statutory distribution structure. The Liquidator lacks the statutory authority to enter into an agreement with the AFIA cedents that violates the order of distribution section of the Liquidation Act. The Liquidator asserts numerous justifications for his departure from the statutory scheme, primarily relying on the fact that the departure may be approved if it is "fair and reasonable and in the best interests of the liquidation and the policyholders and other creditors of The Home."[37] This contention is inconsistent with the mandatory application of § 402-C:44 and with the judicial view of statutory receivership schemes generally.

Although the Liquidator does possess some modicum of discretion in administering receiverships, this 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 in choosing among lawful alternative methods of administering an insolvent insurer's estate, the Liquidator has no power to act contrary to the Act's provisions. That section 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.**"[38]

---

[37] Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents, February 11, 2004, at paragraph 21.

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

The issue is analogous to the long running debate over reinsurers' rights to setoff in receivership. In regards to setoff, liquidators in other states have attempted to circumvent a specific statutory receivership scheme and deny reinsurers their right to setoff in order to access reinsurance recoveries on a "need" basis. The majority trend at this time is for courts to permit reinsurers to exercise their setoff rights in a broad fashion. This includes permitting contractual setoff in the absence of a setoff statute, based on common law setoff, and permitting setoff between multiple contracts.[39]

The U.S. Supreme Court recognized common law setoff early on, holding that even when no statutory setoff was available, mutual debts and credits could be set off.[40] For example, the Court found that the setoff statute in the federal bankruptcy law merely incorporated and preserved the common law right of setoff.[41] The common law of the states recognizes the same, traditional setoff right.[42] Likewise, every state has an insurance setoff statute and those statutes typically codify the common law concepts of mutuality.[43]

---

[39] Cases exemplifying this majority trend include *Commissioner of Ins. v. Munich American Reins. Co.*, 706 N.E.2d 694 (Mass. 1999); *Transit Cas. Co. v. Selective Ins. Co.*, 137 F.3d 540 (8th Cir. 1998); *Prudential Reins. Co. v. Superior Court*, 842 P.2d 48 (Cal. 1992); *In re Midland Ins. Co.*, 590 N.E.2d 1186 (NY 1992); *Stamp v. Insurance Co. of N. Am.*, 908 F.2d 1375 (7th Cir. 1990).

[40] *Carr v. Hamilton*, 129 U.S. 252 (1889); *See Scott v. Armstrong*, 146 U.S. 499, 507 (1892); *Forsythe v. Kimball*, 91 U.S. 291 (1876); *Scammon v. Kimball*, 92 U.S. 362 (1876).

[41] *Hamilton* at 256. Courts recognize that most states modeled their insurance setoff laws after the setoff statute in the Federal Bankruptcy Code. *Stamp v. Insurance Co. of N. Am.*, 908 F.2d 1375, 1379 (7th Cir. 1990); *In re Midland Ins. Co.*, 590 N.E.2d 1186, 1189 (NY 1992).

[42] *See e.g., Massachusetts Motor Vehicle Reinsurance Facility v. Commissioner of Ins.*, 379 Mass. 527, 400 N.E.2d 221, 227 (Mass. 1980)("In the absence of a statute, there is power in equity to 'compel a set-off of cross demands or judgments...whenever necessary for the proper administration of justice'")(quoting *Perry v. Pye*, 215 Mass. 403, 413, 102 N.E. 653, 657 (1913); *Dalton v. Sturdivant Bank*, 76 S.W. 425, 426 (Mo. App. 1934)(Missouri common law permits setoff "[w]henever it is necessary to effect a clear equity or to prevent an irremedial injustice"); *Transit Cas. v. Selective Ins. Co.*, 137 F.3d 540, 544-45 (8th Cir. 1998)("[T]o allow setoff aligns Missouri with almost all other states"); *Downey v. Humphreys*, 227 P.2d 484 (Cal. 1951).

[43] The setoff statutes in states' insurance codes are all substantially similar to New Hampshire's statute found at, New Hampshire RSA § 402-C:34.

Further, courts and legislatures alike have determined that reinsurance setoff is good public policy. In *Stamp v. Insurance Co. of North America*,[44] the Seventh Circuit rejected a receiver's claim that setoff was against Illinois public policy. The court allowed reinsurance pool members to set off amounts owed to an insolvent insurer against amounts the insurer owed the other pool members. In doing so, the court made the following comment:

> The liquidator maintains that Illinois uses its insolvency rules to protect its policyholders. If so, then Illinois must protect the integrity of reinsurance pools, which spread risk more effectively and so yield great benefits for policyholders . . . Offsetting debts in a reinsurance pool not only spreads risk but also acts as mutual security for performance . . . If the instant one member fails, the other members' exposure becomes the gross rather than net obligation, then the mutual security of the offsetting debts is destroyed. Pools become less useful; the premium charged to bear risk will rise.[45]

Likewise, courts agree that public policy is set forth by a state legislature in the statutes it enacts. Where a legislature has enacted a setoff statute, setoff must be presumed to be in the public's interest.[46]

The same is and should be said about states priority of distribution statutes.[47] Like prior liquidator's attempts to deny setoff, the Liquidator in the case at bar is endeavoring to maximize reinsurance recoveries in direct contravention of a state statute on point. However, as shown in the issue of setoff, where the legislature has spoken with statutory specificity, the public policy debate has already transpired and liquidators, as well as the courts, are without authority to

---

[44] 908 F.2d 1375 (7th Cir. 1990).

[45] *Id.* at 1380.

[46] *Cf. Kemper Reinsurance Co. v. Corcoran*, 590 N.E.2d 1186 (N.Y. 1992) (holding that state legislature resolved competing interests to find that setoff is a lawful form of preference).

[47] *See* Respondents-Appellants' discussion of various courts' consideration of whether groups of creditors may be allowed to circumvent the statutory priority scheme – the cases presented show that liquidators and courts cannot avoid the effect of the statutory distribution scheme through "equitable relief."

second-guess such public policy determinations. The statutory order of distribution scheme in New Hampshire could not be clearer in its language or purpose.

The RAA respectfully asserts that the Liquidator's proposed agreement is a misapplication of the law. Approval of the Agreement is not necessary to "effectuate" the liquidation, the liquidation will progress naturally over time. Approval of the Agreement serves only to incentivize questionable claim filing and contradict important provisions of New Hampshire law.

Accordingly, *amicus curiae* again request that this Court reverse the Order of the Superior Court.

II. Respondents-Appellants' Standing in the Case at Bar is Indisputable

The Liquidator's Agreement with AFIA Cedents clearly has a direct and tangible economic effect on Respondents-Appellants sufficient enough to qualify them as "persons aggrieved" under any standard and thusly providing them standing to appeal. The Liquidator's prior motion sets forth the requirements that in order to meet the criteria of a "person aggrieved," a party must be directly and adversely affected pecuniarily" by the order appealed from because that order diminishes the party's property, increases its burdens or detrimentally affects its rights.[48] Beyond the payment of tens, if not hundreds, of millions of dollars which will likely result from the Order, Respondents-Appellants will be faced with entirely new obligations related to the Liquidator's Agreement. Respondents-Appellants will be forced to spend resources to adjust, determine and otherwise reconcile claims that may not have been submitted in the liquidation absent the Agreement because the Agreement will likely result in the filing of

[48] *In re Dein Host, Inc.*, 835 F.2d 402 (1st Cir. 1978).

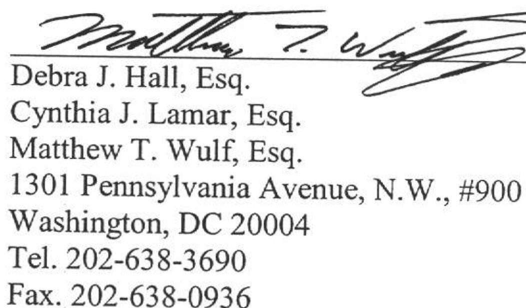
claims that have already been denied or that have no merit. Further, as discussed in the introduction to this brief, reinsurance is often the largest asset of an insolvent insurer's estate. In that sense, a reinsurer is always profoundly affected by the administration of a receivership.

Even absent the fact that Respondents-Appellants were granted the right to intervene in the Superior Court and the Liquidator assented to their standing in this proceeding, viewing Respondents-Appellants as purely reinsurers does not negate their standing in this case. The reinsurers' contractual rights will be altered by the Liquidator's agreement causing ample legal injury to qualify as a "person aggrieved."

CONCLUSION

As explained herein, allowing the ruling of the lower court to stand conflicts with the purpose and operation of reinsurance as transacted around the world, with the law of all jurisdictions of the United States, and with the law of New Hampshire. Allowing the Liquidator to act directly contrary to established receivership law, and in essence rewrite reinsurance contracts, will have grave ramifications as precedent for the reinsurance industry and the orderly administration of New Hampshire receiverships. Such a decision will put New Hampshire far out of line with other states in matters of insurance receivership. Ultimately, the result would filter through and have negative ramifications for all insureds in New Hampshire. Therefore, *amicus curiae* requests that this Court reverse the Superior Court Order and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,
REINSURANCE ASSOCIATION OF AMERICA



Debra J. Hall, Esq.
Cynthia J. Lamar, Esq.
Matthew T. Wulf, Esq.
1301 Pennsylvania Avenue, N.W., #900
Washington, DC 20004
Tel. 202-638-3690
Fax. 202-638-0936

Counsel for Amicus Curiae

Date: June 24, 2004

CERTIFICATE OF SERVICE

I, Matthew T. Wulf, certify that, on June 23, 2004, I caused two (2) true and correct copies of the foregoing Brief of *Amicus Curiae* to be served upon the following, via First Class U.S. Mail:

Peter C. L. Roth
Senior Assistant Attorney General
Environmental Protection Bureau
New Hampshire Department of Justice
Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397

Suzanne M. Gorman, Esq.
Civil Bureau
New Hampshire Department of Justice
Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397

J. David Leslie, Esq.
Rackermann, Sawyer & Brewster
One Financial Center
Boston, MA 02111

Eric. A. Smith, Esq.
Rackermann, Sawyer & Brewster
One Financial Center
Boston, MA 02111

Andre Bouffard, Esq.
Downs, Rachlin, Martin, PLLC
199 Main Street
Box 190
Burlington, VT 05402

Eric D. Jones, Esq.
Downs, Rachlin, Martin PLLC
199 Main Street
Box 190
Burlington, VT 05402

Gary S. Lee, Esq.
Lovells
900 Third Avenue, 16th Floor
New York, NY 10022

Eric A. Haab, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue
Suite 1900
Chicago, IL 60611

Gail M. Goering, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue
Suite 1900
Chicago, IL 60611

Pieter Van Tol, Esq.
Lovells
900 Third Avenue, 16th Floor
New York, NY 10022

Adam Goodman, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue
Suite 1900
Chicago, IL 60611