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THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2004-0319

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

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APPEAL FROM A FINAL ORDER OF THE  
MERRIMACK COUNTY SUPERIOR COURT

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**BRIEF OF AMICUS CURIAE  
NATIONAL CONFERENCE OF INSURANCE GUARANTY FUNDS  
IN SUPPORT OF THE COMMISSIONER OF INSURANCE  
AS LIQUIDATOR OF THE HOME INSURANCE COMPANY**

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**STATEMENT OF INTEREST OF AMICUS CURIAE  
NATIONAL CONFERENCE OF INSURANCE GUARANTY FUNDS**

Amicus curiae National Conference of Insurance Guaranty Funds (“NCIGF”) is a non-profit corporation whose members include the property and casualty insurance guaranty funds and associations in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands (the “Guaranty Funds”). NCIGF submits this brief in support of the Liquidator’s Motion for Approval of Agreement and Compromise with the AFIA Cedents, which was granted by the Superior Court for Merrimack County in its April 29, 2004 Order (the “Order”). In the Order, the Superior Court noted that the NCIGF Reinsurance Commutation Subcommittee for the Home Insurance Company in Liquidation did not object to the proposed agreement and compromise with the AFIA Cedents. Order, p. 2. NCIGF submits this brief on behalf of its member Guaranty Funds, which collectively will be the single largest policyholder level creditors in the Home estate.

The Guaranty Funds were created by state statutes to protect policyholders and claimants from financial loss as a result of insurance company insolvencies. Each state guaranty fund is a non-profit, unincorporated association comprised of property and casualty insurance companies licensed to transact insurance in that state. The Guaranty Funds serve as limited but vital safety nets by paying claims of policyholders and claimants that qualify as “covered claims” under the state guaranty fund statutes.

The purposes for which the NCIGF was organized include: (i) providing national assistance for guaranty funds relating to their operational activities, (ii) assisting in the coordination of activities between liquidators and Guaranty Funds involved in multi-state insurance company insolvencies, such as The Home Insurance Company insolvency, (iii)

monitoring activities nationwide that impact guaranty funds, and (iv) filing amicus curiae briefs when appropriate. NCIGF By-Laws, Art. I, § 3.

NCIGF's interest in this issue arises from the following facts: (i) All Guaranty Funds in the United States were triggered by the insolvency of The Home Insurance Company ("Home") and are paying claims on behalf of Home policyholders and claimants; (ii) based on the lines of business written by Home and the outstanding loss reserves, the Guaranty Funds will collectively be the largest policyholder level creditors of Home with total estimated liabilities projected at \$1 billion; and (iii) the only other policyholder level creditor in this dispute is appellant Benjamin Moore & Company ("Benjamin Moore"), which objects to the Liquidator's Agreement with the AFIA Cedents and has appealed the Superior Court's April 29, 2004 Order. NCIGF believes that Benjamin Moore does not adequately or accurately represent the interests of the policyholder claimants against the Home estate. NCIGF submits this brief in order to put into context the significant beneficial effect the Liquidator's proposed Agreement will have on the Class II policyholder level creditors under the distribution scheme in RSA 402-C:44 of New Hampshire's Insurers Rehabilitation and Liquidation Act, RSA 402-C.

#### **THE STATE GUARANTY FUNDS**

The Home Order of Liquidation triggered the obligations and rights of the Guaranty Funds under their respective state statutes. The New Hampshire Insurance Guaranty Association ("NHIGA"), for example, which was created by RSA 404-B:1 *et seq.*, began handling and paying "covered claims," like the other Guaranty Funds, shortly after entry of the Home Liquidation Order on June 13, 2003. "Covered claims" are generally defined as unpaid obligations of the insolvent insurer that arise out of insurance contracts issued by the insolvent

insurer (while it was still solvent), which are payable to residents of the guaranty fund's state.

See, e.g., RSA 404-B:5, IV.

NHIGA, like the other state Guaranty Funds, was created in part "to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." RSA 404-B:2; *New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc.*, 142 N.H. 573, 576 (N.H. 1998). See also *Satellite Bowl v. Michigan Prop. & Cas. Guar. Ass'n*, 419 N.W.2d 460, 462 (Mich. Ct. App. 1988) ("The [Michigan] act is designed to protect the public against financial losses to policyholders or claimants because of the insolvency of insurers."); *Ursin v. Ins. Guar. Ass'n*, 412 So.2d 1285, 1288 (La. 1982) ("The [Louisiana] fund is created to protect insureds and claimants in instances when the insurer becomes insolvent"); *Hunnihan v. Mattatuck Mfg. Co.*, 705 A.2d 1012, 1018 (Conn. 1997) ("The [Connecticut] association was established for the purpose of providing a limited form of protection for policyholders and claimants in the event of insurer insolvency.").

Since their inception in the late 1960's and early 1970's, Guaranty Funds have paid out over \$9 billion in claims in over 400 insolvencies, providing immediate protection to those who otherwise would have to wait years for a distribution from the insolvent estate. Guaranty Funds fund the payment of covered claims and their administrative expenses through assessments on the member insurance companies of each state guaranty fund. Under their respective statutes, Guaranty Funds are only allowed to assess their member insurance companies on an annual basis between one percent (1%) and two percent (2%) of the net direct premiums written by the member companies in the state during the preceding calendar year. (NHIGA's assessment cap is limited to two percent (2%) per year. RSA 404-B:8, I(c).) Because of the increase in insurance

company insolvencies in the last few years, many state Guaranty Funds are assessing at or near their assessment caps on an annual basis.

In order for the Guaranty Funds to meet their covered claims obligations, they also receive distributions from the insolvent estates to reimburse them in part for their administrative and loss payment expenses. Under the guaranty fund system, when a guaranty fund pays a covered claim, it takes a statutory assignment of the claim against the insolvent insurer's estate and is accorded priority status as a creditor in the estate. The NHIGA Act provides, for example, that "Any person recovering under this chapter shall be deemed to have assigned his rights under the policy to the association to the extent of his recovery from the association." RSA 404-B:11, I. Section II of RSA 404-B:11 is representative of how payments and expenses of the Guaranty Funds are treated in a liquidation:

The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by settlements of covered claims by the association or a similar organization in another state. *The court having jurisdiction shall grant such claims priority equal to that which the claimant would have been entitled in the absence of this chapter against the assets of the insolvent insurer.* The expenses of the association or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses.

RSA 404-B:11, II (emphasis added).

The state liquidation statutes, in turn, contain distribution priority provisions, which set forth the order of priority for the payment of claimants in the estate. In the distribution scheme, Guaranty Funds are always accorded priority status for the claims they pay to policyholders and claimants under the insolvent insurer's insurance policies. Under New Hampshire's Insurers Rehabilitation and Liquidation Act, the Guaranty Funds are Class II claimants in the Home estate and are entitled to receive distributions along with other policyholders, such as Benjamin Moore, who are in the same creditor class. The Act defines Class II claims as follows:

II. Policy Related Claims. All claims by policyholders, . . . beneficiaries, and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company, and liability claims against insureds which claims are within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company *and claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state.*

RSA 402-C:4, II (emphasis added). The Class II distributions serve to partially reimburse the Guaranty Funds for the enormous outlay of funds they make to policyholders and claimants for the payment of covered claims, and such distributions are an integral component of this country's guaranty fund/insolvency system.

To date, the Guaranty Funds have reported to the Home Liquidator approximately \$36 million of claim payments. The Guaranty Funds estimate that based on the lines of business written by Home and their current loss reserves, their liabilities could exceed \$1 billion in the Home estate alone. As such, the Guaranty Funds collectively are likely to be the largest policyholder level creditors in the Home estate.

#### **THE NCIGF REINSURANCE COMMUTATION SUBCOMMITTEE**

The NCIGF Reinsurance Commutation Subcommittee is a subcommittee of the NCIGF Home Coordinating Committee. The Home Coordinating Committee is comprised of the Guaranty Funds having the greatest exposure in the Home insolvency. The Home Reinsurance Commutation Subcommittee (the "NCIGF Subcommittee") is a smaller group of Guaranty Funds, which, at the Liquidator's request and under confidentiality agreements, review information concerning potential commutation agreements with the reinsurers of Home that may be proposed by the Liquidator.



Prior to filing the Motion for Approval of Agreement and Compromise with AFIA Cedents, the Liquidator presented the proposed Agreement with the AFIA Cedents to the NCIGF Subcommittee. The NCIGF Subcommittee advised the Liquidator that it had no objection to the proposed compromise with the AFIA Cedents, and the Liquidator so advised the Superior Court in the Motion. *See* Motion, ¶ 22, p. 13; *see also* Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, in Support of Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents, ¶ 23.

**THE AGREEMENT WITH THE AFIA CEDENTS IS IN THE BEST INTERESTS OF  
THE CLASS II POLICYHOLDER LEVEL CREDITORS**

The Agreement and Compromise with the AFIA Cedents is consistent with the purpose of the state liquidation statutes, including the New Hampshire Insurers Rehabilitation and Liquidation Act, which is the protection of the interests of insureds, creditors and the public generally. *See* RSA 402-C:1, IV. That protection is accomplished by recovering assets owed to the insolvent insurer by third parties, such as the ACE reinsurers in this case. The Liquidation Act specifically authorizes the Liquidator to expend "the actual and necessary costs of preserving or recovering the assets of the insurer." RSA 402-C:44, I. In this case, any assets recovered from the ACE Companies will directly benefit the Class II creditors, including the Guaranty Funds and Benjamin Moore, through priority distributions made to the Class II claimants. The Liquidator's compromise with the AFIA Cedents will bring substantial assets into the estate, which otherwise would be beyond the Liquidator's reach, and will *increase* the size of the distributions going to Class II insureds and creditors.

The compromise with the AFIA Cedents is also in the best interests of the entire guaranty fund system and the public at large, because it is the taxpayers and/or policyholders who pay for insurance company insolvencies through policyholder surcharges, premium tax offsets or rate

increases. To the extent that the Home Liquidator is unable to collect sufficient assets for the estate, it will be the taxpayers and/or policyholders who will bear these costs. Put another way, if the ACE Companies are allowed to reap a windfall here, it is the ordinary citizens who will pay for it.

The Guaranty Funds have already paid out \$36 million in claims to Home policyholders and claimants and their liabilities could exceed \$1 billion in the Home estate alone. Policyholder class distributions will partially reimburse the Guaranty Funds for the substantial amount of loss claims that they have already paid and will pay, thus serving to replenish and supplement the Guaranty Funds' limited resources. Therefore, NCIGF supports the Liquidator's Agreement with the AFIA Cedents as being within the Liquidator's authority and in the best interests of the Class II policyholder level creditors in the Home estate.

**CONCLUSION**

For the reasons stated above, the NCIGF requests that this Court affirm the April 29, 2004 Order of the Superior Court.

Respectfully submitted,

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July 7, 2004

**ORAL ARGUMENT**

No request for oral argument is made.

## CERTIFICATE OF SERVICE

I certify that two (2) copies of the foregoing Brief of Amicus Curiae National Conference of Insurance Guaranty Funds have been mailed this date to the following persons, via First Class U.S. Mail:

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