BRYAN CAVE LLP
Stephanie A. Blazewicz (SBN 240359)
Two Embarcadero Center, Suite 1410
San Francisco, CA 94111-3907
Telephone: (415) 675-3400
Facsimile: (415) 675-3434

Attorneys for *Amicus Curiae*
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

FULLER-AUSTIN ASBESTOS SETTLEMENT TRUST; et al.,

Plaintiffs,

vs.

ZURICH-AMERICAN INSURANCE COMPANY, et al.,

Defendants.

Case No. CGC 04-431719
Case No. CGC 04-436181
Case No. CGC 05-442140
Case No. CGC 05-442745

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS IN SUPPORT OF DEFENDANTS' TRIAL BRIEF

[Filed concurrently with Application for Leave to File *Amicus Curiae* in Support of Defendants' Trial Brief]

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WESTERN ASBESTOS SETTLEMENT TRUST, et al., Plaintiffs, vs. ZURICH-AMERICAN INSURANCE COMPANY, et al., Defendants.	CASE NO. CGC 04-436181
PEPSIAMERICAS, INC., et al., Plaintiffs, vs. ZURICH-AMERICAN INSURANCE COMPANY et al., Defendants.	CASE NO. CGC 05-442140
PNEUMO ABEX LLC, Plaintiff, vs. ZURICH-AMERICAN INSURANCE COMPANY, et al., Defendants.	CASE NO. CGC 05-442745

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The National Association of Insurance Commissioners ("NAIC") respectfully submits the following brief as *amicus curie* in order to provide the Court additional background and information related to the complex regulatory issues involved in the above-captioned matters.

I. STATEMENT OF INTEREST

NAIC is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty states, the District of Columbia, and the territories and insular possessions of the United States. Founded in 1871, it is the nation's oldest association of state government officials. The NAIC represents the coordinated and considered views of the state government officials that regulate the insurance industry and enforce the insurance laws of the country.

The NAIC's purpose is to provide its members with a national forum enabling them to work cooperatively on regulatory matters that transcend the boundaries of their own jurisdictions. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, white papers, and actuarial guidelines that promote and establish uniform regulatory policy. Their overriding objectives are to protect consumers as well as to assist in maintaining the financial stability of the insurance industry.

The NAIC performs numerous crucial services on behalf of state governments including: developing and publishing model laws, regulations, bulletins, financial and accounting standards, white papers, consumer guides, handbooks, periodicals, and the *Proceedings of the NAIC.* Hundreds of state and federal laws assign duties to the NAIC and incorporate NAIC standards, models, and other publications. In addition, the NAIC manages and coordinates the accreditation review of insurance departments as well as maintains regulatory and financial databases of insurance company financial data.

The interest of the NAIC in this case arises from each member's interest in promoting the dual and often competing objectives of consumer protection while simultaneously protecting insurers' solvency. The NAIC has a strong interest in ensuring that regulators retain the necessary discretion to balance all relevant considerations when

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making the expert decisions that are required. Individually and collectively, the NAIC members and the state agencies over which they preside have a wealth of experience in the regulation of insurance. The NAIC members understand the interests of insurance consumers and work daily to protect those interests. The NAIC members are uniquely qualified and situated to assist this Court by presenting the regulatory and public policy concerns involved in this case.

The NAIC also has an interest in the interpretation of its model laws and regulations and in promoting the uniformity of these laws and regulations among the states. New Hampshire, California, Illinois, Indiana, New Jersey, New York, Texas, and Wisconsin all participated in hearings or approved the recapitalization transaction at the center of this dispute. State regulators utilized the change in control process prescribed by the NAIC Insurance Holding Company Regulatory System Act ("Model Holding Company Act") and the NAIC Insurance Holding System Company Model Regulation with Reporting Forms and Instructions ("Model Holding Company Regulation"). *See* 3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Holding Company System Regulatory Act, pp. 440-1 to 440-28 (2001) and 3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Holding Company System Model Regulation with Reporting Forms and Instructions, pp. 450-1 to 450-26 (2001). In addition, the states all have enacted legislation based on NAIC model laws regarding insurer receivership. *See, e.g.*, 3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Receivership Model Act, pp. 555-1 to 555-98 (2007). These model laws and associated regulatory frameworks were developed to ensure that all interested states would have the opportunity to hear and participate in proceedings related to the change in control of an insurer or group of affiliated insurers as well as ensure the orderly and equitable distribution of claims in a liquidation. The model laws provide a statutory and public policy foundation for managing and handling the complex issues associated with insurance groups, including situations involving troubled insurers where the regulatory interest in consumer protection is greatest. Consequently, the NAIC has a significant interest in this matter to ensure that

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1 its model laws and the state statutes based on these models are interpreted and applied
2 consistently. We seek to aid this Court by offering the legal position and public policy
3 perspectives of the NAIC and its member states.

4 **II. STATEMENT OF THE FACTS**

5 *Amicus*, the NAIC, agrees with the facts set forth in the trial brief submitted by the
6 Defendants and respectfully incorporates by reference the Defendants' Statement of Facts.

7 **III. INTRODUCTION**

8 Plaintiffs attempt to revisit and re-litigate actions taken by the New Hampshire
9 Insurance Department and other insurance departments through various state proceedings
10 several years ago. Plaintiffs seek to effectively contest the recapitalization of an insurer,
11 now in liquidation, years after the opportunity to object to the recapitalization or
12 participate in proceedings pursuant to the Model Holding Company Act provisions, as
13 enacted by states on a nationwide uniform basis. Plaintiffs, who were allegedly harmed by
14 the recapitalization of The Home Insurance Company ("The Home"), were entitled to (and
15 in some cases did) participate and/or object to the recapitalization transaction during the
16 hearings following submission of the "change in control" documents (also known as a
17 "Form A" filing) in the relevant states. Plaintiffs should be required to comply with the
18 comprehensive procedures established by the states to facilitate the approval and denial of
19 the Form A process. Additionally, plaintiffs should not be allowed to circumvent the New
20 Hampshire liquidation process to the detriment of other policyholders of The Home.
21 Allowing plaintiffs to do so would adversely impact the ability of regulators to manage
22 troubled companies, coordinate a response among regulators and interested parties to
23 protect policyholders, and resolve or liquidate insurers in an orderly manner.

24 **IV. ARGUMENT**

25 **A. The Model Holding Company Act, And State Laws Based Upon It, Establishes**
26 **The Procedures To Participate In And Contest The Acquisition Or Change In**
27 **Control Of A Domestic Insurer.**

28 In the mid-1960s, in response to the proliferation of holding companies involvement

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in the business of insurance, the NAIC began to study and implement methods to regulate holding companies that acquire and control insurers. "The public interest would seem to require that [insurance commissioners] initiate steps to supervise management, control and operation of holding companies." II *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 308 (1966). In 1969, the NAIC developed and adopted the Model Holding Company Act which requires prior approval of a change in control of a domestic insurer. II *Proc. of the Nat'l Ass'n of Ins. Comm'rs*, 736, 737, 738-751, 756 (1969). The drafters of the Model Holding Company Act sought to balance the need for effective regulation with the need not to discourage potential investors. II *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 49 (1982). The Model Holding Company Act reflects the following goals and policies: "(1) to maintain the solvency of insurers; (2) to protect policyholders by supervising the adequacy of the insurer's surplus; (3) to provide standards for fair intrasystem transactions; (4) to encourage state regulation of insurance; and (5) to base regulatory efforts on the principles of registration, disclosure and prior approval of certain transactions . . . ." *Id.*

Subsequently, in 1971, the NAIC adopted the Model Holding Company Regulation which sets forth the required forms, filings and information necessary to allow the insurance commissioner to approve mergers and acquisitions. I *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 54, 58, 134, 149 (1971). The Model Holding Company Regulation supplements the Model Holding Company Act by prescribing requirements related to the form and content of information submitted to the insurance commissioner for various transactions occurring within or affecting an insurance holding company system.

In June 1980, the NAIC amended the Model Holding Company Act by adding a section that applies specifically to any acquisition or merger of a domestic insurer which would result in a change in control. *Id.* II *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 22, 26, 29, 42-46 (1980) (*amended, added Section 3.1*). Section 3 of the Model Holding Company Act was intended to provide protections against detrimental takeovers of insurance companies by regulating mergers and acquisitions. I *Proc. of the Nat'l Ass'n of*

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Ins. Comm'rs 222 (1978).[1] The section required persons who proposed to acquire or merge with a domestic insurer to file a statement giving financial and other information; provided that takeovers were subject to prior approval; and set forth grounds upon which a denial must be based, such as a finding that the proposed takeover might lead to the insurer's insolvency or undercut a policyholder's interests. *Id.* The Model Holding Company Regulation was revised in 1986 to conform to the revised Holding Company Model Act. II *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 93 (1986).

Various iterations of the Model Holding Company Act and Model Holding Company Regulation have developed throughout the years, but the primary purpose of the models has remained largely unchanged. That is, the models have sought to allow state insurance commissioners to analyze and approve the change in control of an insurer for the purposes of ensuring financial solvency of the insurer and protecting the interests of policyholders. Every state has adopted a version of the Model Holding Company Act and Model Holding Company Regulation that is substantially similar to the current NAIC models. *See* Exhibit A, NAIC Model Holding Company Act State Page and NAIC Insurance Holding Company Model Regulation with Reporting Forms and Instructions State Page. Additionally, state enactment of the model laws is an element of the NAIC Financial Regulatory Accreditation Program. In order to be accredited for financial solvency regulation, a state must have enacted various key elements of the Model Holding Company Law and Model Holding Company Regulation. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, FINANCIAL REGULATION STANDARDS AND ACCREDITATION PROGRAM (2010) [2].

[1] The NAIC began discussions to amend the Model Holding Company Act by adding Section 3 in 1978. The amendments were adopted in 1980.

[2] Found at http://www.naic.org/documents/committees_f_FRSA_pamphlet.pdf. Accreditation is the process by which a program has been certified as fulfilling certain standards by a national professional association. In the terms of insurance financial solvency regulation, accreditation is a certification given to a state insurance department once it has demonstrated it has met and continues to meet an assortment of legal, financial and organizational standards as determined by a committee of its peers. The Financial Regulation Standards and Accreditation (F) Committee of the NAIC, consisting of regulators from across the country, ultimately decides whether a state meets the requirements set forth in the Standards. Full Accreditation Reviews occur once every five years subject to interim annual reviews. The review entails a full review of laws and regulations, the financial analysis and financial examinations functions, and

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The Model Holding Company Act, and substantially similar provisions enacted in all states, sets forth a complete and comprehensive procedure for filing, approval and for objecting to and or appealing the acquisition or recapitalization of an insurer. Section 3.A.(1) of the Model Holding Company Act provides that a change in control may not be effectuated without the prior approval of the insurance commissioner:

> No person shall make a tender offer for. . . acquire or seek to acquire any voting security of a domestic insurer, if after the consummation thereof, such person would directly or indirectly. . . be in control of the insurer, and no person shall enter into an arrangement to merge with or otherwise to acquire control of a domestic insurer. . . unless such person has filed with the commissioner. . . a statement containing all the information required by this section and the offer, request, invitation, agreement or acquisition has been approved by the commissioner in the manner set forth in this Act . . . .

3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Holding Company System Regulatory Act, pp. 440-4 (2001). Section 3.A.(1), therefore, provides the commissioner with the discretion to review and request pertinent information in a Form A filing and ensures prior commissioner approval is required. Section 3.D.(1) of the Model Holding Company Act sets forth the standards governing the commissioner's review of the Form A filing:

> The commissioner shall approve any merger or acquisition of control. . . unless, after a public hearing, the commissioner finds that. . . the financial condition of any acquiring party is such as might jeopardize the financial stability of the insurer, or prejudice the interests of policyholders; the plans or proposals which the acquiring party has to liquidate the insurer, sell its assets or consolidate or merge it with any person, or make any other material change in its business or corporate structure or management, are unfair or unreasonable to policyholders of the insurer and not in the public interest; . . . the acquisition is likely to be hazardous or prejudicial to the insurance-buying public. . . .

3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Holding Company System Regulatory Act, pp. 440-7 (2001). Section 3.D.(1) is clear that the

organizational and personnel practices to assist in determining a state's compliance with the accreditation standards. As of October 2010, all fifty states and the District of Columbia are accredited.

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financial condition of the insurer and the protection of policyholders are among the factors to be considered by the commissioner in reviewing the proposed transaction. Further, Section 3.D.(2) provides for a public hearing to consider the Form A filing, with notice provisions as well as the opportunity for participation by parties affected by the transaction:

> The public hearing shall be held within (30) days after the statement required . . . is filed, and at least 20 days notice shall be given. . . . At the hearing, the person filing the statement, the insurer and any person to whom notice was sent, and any other person whose interest might be affected shall have the right to present evidence . . .

3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Holding Company System Regulatory Act, pp. 440-7 to 440-8 (2001). Finally, where interested parties remain aggrieved by or opposed to an action taken by the insurance commissioner, Section 14.A allows for such parties to seek redress through the judicial system. Specifically, Section 14.A allows "[a]ny person aggrieved by any act, determination, rule regulation or order or any other action of the commissioner pursuant to this Act may appeal to the [appropriate state district] Court. The court shall conduct its review without jury trial and by trial *de novo*. . . ." 3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Holding Company System Regulatory Act, pp. 440-25 (2001). In sum, the Model Holding Company Act establishes the requirements for reviewing Form A filings, sets a standard by which the commissioner's decision is held accountable, allows for interested party participation, and provides for judicial review. In other words, the Model Holding Compact Act was drafted to ensure the fair and orderly completion of transactions such as the one at issue here.

State legislatures have enacted many of these provisions into their insurance codes in recognition of the need for a fair and orderly process for resolving complex insurance company transactions. Similar provisions have been enacted by the states that approved the Form A filings at issue in these proceedings. CAL. INS. CODE § 1215 (2009) (filing requirements); CAL. INS. CODE § 12940 (2010) (judicial review); 215 ILL. COMP. STAT.

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ANN. 5/131.4 (2009) (filing requirements); 215 ILL. COMP. STAT. ANN. 5/131.8 (2009) (hearing requirements); 215 ILL. COMP. STAT. ANN. 5/131.27 (2009) (judicial review); IND. CODE ANN. § 27-1-23-2 (2010) (filing and hearing requirements); IND. CODE ANN. § 27-1-23-12 (2010) (judicial review); N.H. REV. STAT. ANN. § 401-B:3 (2009) (filing and hearing requirements); N.H. REV. STAT. ANN. § 401-B:14 (2009) (judicial review); N.J. STAT. ANN. § 17:27A-2 (2009) (filing and hearing requirements); N.J. STAT. ANN. § 17:27A-12 (2009) (judicial review); TEX. INS. CODE ANN. § 823.154 (2009) (filing requirements); TEX. INS. CODE ANN. § 823.159 (2009) (hearing requirements); TEX. INS. CODE ANN. § 823.013 (2009) (judicial review); WIS. STAT. ANN. § 611.72 (2009) (filing requirements); WIS. ADMIN. CODE INS. § 40.02 (2010) (filing requirements); WIS. STAT. ANN. § 227.42 (2009) (hearing requirements); WIS. STAT. ANN. § 601.62 (2009) (judicial review).[3]

Therefore, the models and state enactment of the models generally provide ample opportunity for policyholders to do what plaintiffs seek to do in the present matter: raise objections to the substance of a change of control transaction and request administrative and judicial review of the transaction. To permit plaintiffs to pursue the present action would achieve a result whereby aggrieved parties may circumvent uniformly enacted statutes and uniformly established procedures carried out under the laws of one state by filing a separate, distinct action in the court of another state.

In addition to statutory provisions, the state regulatory system related to troubled company situations is buttressed by cooperative programs and procedures. State insurance regulators often work in coordination with one another regarding the financial stability of companies operating in multiple states. The regulators rely upon each other and the expertise of other regulators with specific knowledge of a company in order to ensure that companies remain financially stable. For example, the NAIC has created the Financial

[3] Note that California, Texas and Wisconsin do not have the public hearing requirement but still do provide methods through which a policyholder or interested party can appeal or challenge the decision of a commissioner with respect to the approval or denial of an acquisition or merger. Moreover, although these states do not have the public hearing requirement, all interested parties were able to participate in the New Hampshire public hearing.

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Analysis Working Group ("FAWG"), which consists of various state regulators to analyze nationally significant insurers and groups that exhibit characteristics of trending toward or being financially troubled and to determine if appropriate action is being taken. FAWG interacts with domiciliary regulators and "lead states" to assist and advise as to what might be the most appropriate regulatory strategies, methods and actions and support, encourage, promote and coordinate multi-state efforts in addressing solvency problems, including identifying adverse industry trends. FAWG and similar regulatory tools provide for domestic deference with other states' participation. *See* III *Proc. of the Nat'l Assoc. of Ins. Comm'rs* 193-196 (1988) (describing FAWG). In the underlying transaction in the present matter, New Hampshire assumed an active role similar to that of a lead state in developing a solution – in tandem with other regulators – that improved the financial stability of the insurer and protected policyholder interests.

In the early 2000s, the NAIC, through its National Treatment Working Group, began discussions regarding Form A filings involving the acquisition or merger of insurance groups involving insurers domiciled in multiple states. *See*, II *Proc. of the Nat'l Ass'n of Ins. Comm'rs 4th Qtr*. 546 (2001). The Group envisioned a lead state concept where a single lead state with a greater understanding of the insurance group's overall business operations would coordinate the Form A filings. The non-lead states would still conduct their reviews and hearing processes in accordance with their respective state insurance statutes. *Id.* To facilitate the lead state process and to ensure proper coordination, the NAIC's Insurance Holding Company (E) Working Group, developed a Framework for Insurance Holding Company Analysis. This framework endorses the lead state concept, explains factors used to determine which states are considered leads, and clarifies the role of the lead states and the role of the other states. The lead state concept allows one state to coordinate the regulatory processes and allows for complete and open communications among the states. A similar concept was employed with the transactions involved in this matter with New Hampshire serving as the lead regulator working in conjunction with the other interested states prior to approving the transaction. For example,

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1 New Hampshire, California and other regulators participated in the negotiations between
2 the parties prior to agreement to the transaction. New Hampshire hired experts to prepare
3 reports that were used in the review of the recapitalization and held public hearings in
4 which other states participated and were represented.

5 As the record reflects, the insurance departments of the states involved in the
6 transaction all participated in or held hearings regarding the proposed acquisition.
7 Following a public hearing in New Hampshire, on May 26, 1995, the New Hampshire
8 Commissioner of Insurance entered a final order approving the Zurich Insurance Company
9 ("Zurich") transaction to acquire The Home. California and New Jersey issued their
10 respective orders approving the transaction on June 9, 1995, after participating in the New
11 Hampshire public hearing. Texas and Wisconsin also participated in the hearing, issuing
12 their respective final orders approving the transaction on June 8, 1995. Illinois also
13 approved the transaction on June 9, 1995. Indiana held a public hearing on the proposed
14 transaction on April 13, 1995, and issued its order approving the transaction on June 7,
15 1995.

16 Based on the reasoned analysis of the state regulators and based on all forms and
17 evidence presented, the commissioners of the aforementioned states approved the
18 transaction they believed would be in the best interests of the policyholders. The plaintiffs
19 had the opportunity to participate in the New Hampshire hearing, present evidence and
20 object to the final orders if they so chose pursuant to the state holding company statutes.
21 N.H. REV. STAT. ANN. § 401-B:14 (2009) ("Any person aggrieved by any act,
22 determination, rule, regulation, or order of any other action of the commissioner pursuant
23 to this chapter may appeal [pursuant to the administrative procedures act]."); See also e.g.,
24 215 ILL. COMP. STAT. ANN. 5/131.27 (2009); IND. CODE ANN. § 27-1-23-12 (2010); N.J.
25 STAT. ANN. § 17:27A-12 (2009); TEX. INS. CODE ANN. § 823.013 (2009). The statutes and
26 regulations governing the prior approval of acquisitions of insurers set forth a
27 comprehensive scheme that has been enacted in all states. The commissioners worked in
28 coordination with one another to ensure financial stability of a company and to consider

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the best interests of policyholders in approving these transactions. Plaintiffs' action potentially upsets a system that has been enacted, coordinated and successfully implemented. Allowing plaintiffs to upset this system would call into question the ability of insurance regulators to manage and coordinate complex transactions such as the one led by New Hampshire with the active participation and approval of several sister state insurance departments.

B. The NAIC Receivership Model Laws, And State Legislation Based Upon Them, Provide The Regulatory Framework For Insurer Liquidation, Including The Handling And Management Of Plaintiffs' Claims.

The NAIC's Insurance Receivership Model Act ("IRMA") and its predecessor model laws have established comprehensive schemes that govern receivership and liquidation proceedings, including a mechanism for disputing and bringing claims following a liquidation.

Since its formation in 1871, at which time the Committee on Winding Up Insolvent Companies was formed, the NAIC has addressed issues regarding the treatment of insolvent or troubled insurers. 1 *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 18 (1871). In 1936, the NAIC adopted the first of the NAIC receivership models, the Uniform Rehabilitation, Reorganization, or Liquidation Act ("1936 Model"). 1 *Proc. of the Nat'l Ass'n of Ins. of Comm'rs* 33 (1936). The 1936 Model first created a uniform procedure so that all creditors, including policyholders and claimants residing in reciprocal states, were on an equal footing with those in the domiciliary state. *Id.* at 31-33.

The NAIC receivership models have evolved over time from a general statement of intent to protect unsecured creditors to a comprehensive statutory scheme to govern the liquidation or rehabilitation of an insolvent insurer. With every revision of the NAIC model, the model has become more specific and detailed[4] in an effort to promote greater nationwide consistency and certainty in the course of a liquidation or rehabilitation. The

[4] The 1936 Model was two pages; the current version of the NAIC model is 98 pages. *See*, Insurer Receivership Model Act, 3 *NAIC Model Laws, Regulations and Guidelines*, 555-1 to 555-98 (2007).

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NAIC receivership models are created and revised with input from the insurance commissioners and other interested parties.[5] Each version of the receivership models represents the collective wisdom and best practices of the state insurance commissioners. The 2005 version of the receivership models, referred to as IRMA, is the version of the model law in effect today.

More specifically, the receivership models and state statutes based on the models clearly set forth the authority of the liquidator and are intended to prevent collateral challenges such as the claims brought by the plaintiffs in this action. All states have adopted a version of the NAIC model, based, in part, on either IRMA or its predecessors. *See* Exhibit B, NAIC Insurer Receivership Model Act State Page and Exhibit C, NAIC Insurers Rehabilitation and Liquidation Model Act State Page. As a requirement for accreditation, each state must enact a receivership scheme similar to the NAIC model, for the administration, by the insurance commissioner, of companies found to be insolvent. As stated in IRMA, one of the purposes of the Act "is the protection of the interests of insureds, claimants, creditors and the public generally through enhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation." 3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Receivership Model Act, § 101 Purpose and Scope, pp. 555-3 to 555-4 (2007); *See e.g.*, N.H. REV. STAT. ANN. § 402-C:1 (2010) ("The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors, through. . . [e]nhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation . . ." and "[l]essening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process") and N.J. STAT. ANN.§ 17B:32-31 (2010); TEX. INS. CODE ANN. § 443.001

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[5] See, generally, Carolyn Johnson, *How a Model Becomes a Law, Contingencies, March/April 1997*, at 33-35 (explaining the process of creating and adopting a NAIC model law involves participation by state regulators, consumers, and industry representatives; public hearings, public meetings, and written comments are considered in the drafting process; the model law drafting process may take months or years in order to reach a consensus)

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(2010); WIS. STAT. § 645.01 (2010).

In order to facilitate cooperation between the states and ensure orderly liquidations, the insurance commissioners often work together on liquidation proceedings, particularly where they involve multi-state insurers. In addition, the NAIC established a Receivership and Insolvency (E) Task Force, whose mission includes monitoring the effectiveness and performance of state administration of receiverships and the state guaranty fund system; coordinating cooperation and communication among regulators, receivers and guaranty funds; monitoring ongoing receiverships and reporting on such receiverships to NAIC members.

Moreover, IRMA and state statutory liquidation schemes are intended to grant the domestic insurance commissioner exclusive jurisdiction of claims both for and against an insurance company in liquidation. 3 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES, Insurance Receivership Model Act, pp. 555-1 to 555-98 (2007) ("to prosecute or assert with exclusive standing any action that may exist on behalf of the creditors, members, policyholders or shareholders of the insurer or the public against any person"); N.H. REV. STAT. ANN. § 402-C:21 (2010) ("The liquidator shall be vested by operation of law with the title to all of the property, contracts and rights of action and all of the books and records of the insurer ordered liquidated") and N.H. REV. STAT. ANN. § 402-C:25 (2010) ("Prosecute any action which may exist in behalf of the creditors, members, policyholders or shareholders of the insurer against any officer of the insurer, or any other person") and CAL. INS. CODE § 1037 (2010) ("prosecute and defend any and all suits and other legal proceedings"); *see also* 215 ILL. COMP. STAT. 5/191 (2010) and 215 ILL. COMP. STAT. 5/193 (2010); N.J. STAT. ANN. § 17B:32-50 (2010); IND. CODE §§ 27-9-3-7 and 27-9-3-9 (2010); TEX. INS. CODE ANN. § 443.154 (2010); and WIS. STAT. § 645.46 (2010).

Clearly, IRMA intended to provide the liquidator, not individual policyholders, with the authority to bring the types of claims asserted in this action. Allowing this case to proceed in California, in the midst of liquidation proceedings in New Hampshire, not only

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adds uncertainty to the liquidation process, but also would benefit only a small number of policyholders to the detriment of the remaining policyholders who have properly presented claims pursuant to the liquidation proceedings in New Hampshire.

Aside from the practical necessity of having one state and its court oversee and manage an insurer liquidation, exclusive single-state jurisdiction means that claims of policyholders must be brought in the state where the liquidation is proceeding. The reason is the "paramount interest of the. . . [s]tates in seeing that insurance companies domiciled within their respective boundaries are liquidated in a uniform, orderly and equitable manner without inference from external tribunals." *Lac D'amiante Du Quebec, Ltee v. Am. Home Assurance Co.*, 864 F.2d 1033, 1041 (3d Cir. 1988) (*citing G.C. Murphy Co. v. Reserve Ins. Co.*, 429 N.E.2d 111, 117 (1981)). Although plaintiffs in this matter have properly filed claims in the liquidation matter, they attempt to circumvent the authority of the New Hampshire commissioner to manage an orderly liquidation by bringing claims in this Court.

Plaintiffs attempt to bring a claim in a California state court, years after the transaction at the root of their claims was approved in several states and also following the entry of an order of liquidation in New Hampshire. This course of action conflicts with the New Hampshire commissioner's authority and powers under both the New Hampshire holding company law and the New Hampshire rehabilitation and liquidation law. In *Brown v. Associated Ins. Consultants*, the court held that shareholders of an insurance company in liquidation may be precluded from objecting to the actions of an insurance commissioner in furtherance of a liquidation order because the objection improperly interferes with the powers and duties of the commissioner and collaterally attacks the order. *Brown v. Associated Ins. Consultants*, 714 So.2d 939 (La. App. 1989). The shareholders in *Brown* sought an injunction to prevent the sale of certain assets of the insurer. The court found the rehabilitation and liquidation statutes in Louisiana, which are similar in nature to those at issue here, were comprehensive and exclusive. *Id.* at 942. The Commissioner was specifically entitled, pursuant to statute, to sell or dispose of property

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pursuant to court order. *Id.* Consequently, based on the statutory liquidation scheme, the shareholders were not entitled to bring an action outside of the liquidation proceeding which would interfere with the powers and duties of the commissioner. Plaintiffs in this action, similarly attempt to interfere with the powers and duties of the New Hampshire liquidator by bringing claims in California state court which, if heard, could substantially affect the rights of other claimants in the liquidation proceeding and clearly interfere with the New Hampshire liquidator's ability to fairly and equitably pay the claims of other policyholders.

C. Full Faith And Credit And The Principle Of Comity Require That The Final Holdings And Orders Of The Insurance Regulators Of Several States Be Upheld And Given Proper Deference.

As demonstrated above, the intent of the Form A filing process and approval is to allow all parties to participate in and contest, if they so choose, the decisions of the commissioner. The Model Holding Company Act[6] sets forth a comprehensive scheme for hearing and appealing the decisions of the Commissioner. Rather than choose to follow the established procedures set forth in the statutes, plaintiffs attempt to circumvent those procedures by bringing a California state tort claim, which essentially requires the trial court to determine whether the Form A filings were properly approved 15 years ago.

In *Shah v. Metropolitan Life Ins. Co.*, a New York Court dismissed policyholder claims that a demutualization plan approved by the New York superintendent of insurance was unfair and inequitable to the policyholders. *Shah v. Metropolitan Life Ins. Co*, 2003 WL 728869 (N.Y. Sup.) (2003). The court found that since the claim was "directed at the very issues that were explicitly considered and addressed by the Superintendent, in his review and approval of the plan, it constitute[d] a collateral attack on that decision." *Id.* at 11. The court further found that "permitting plaintiffs to simply disregard and bypass the

[6] States which include similar provisions are Illinois, Indiana, New Hampshire, New Jersey, and Texas. See e.g., 215 ILL. COMP. STAT. ANN. 5/131.27 (2009); IND. CODE ANN. § 27-1-23-12 (2010); N.H. REV. STAT. ANN. § 401-B:14 (2009); N.J. STAT. ANN. § 17:27A-12 (2009); TEX. INS. CODE ANN. § 823.013 (2009).

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Superintendent's decision, and bring an action directly against MetLife on the very issues necessarily encompassed in that decision, would not be consistent with the overall legislative scheme." *Id.* at 12. Similarly, in this matter, plaintiffs should not be entitled to contest claims outside of the established procedures in the holding company laws nor should they be entitled to relitigate issues considered by the insurance commissioners who approved the recapitalization.

The final decisions of the insurance commissioners of the seven states that approved the recapitalization of The Home should be entitled to full faith and credit. U.S. Const. art. IV, § 1 In *State ex rel Low v. Imperial Insurance*, an Arizona appellate court held that full faith and credit must be given to California court rulings as they related to proceedings involving the liquidation of an insurer. *State ex rel Low v. Imperial Insurance*, 682 P.2d 431, 438 (Ariz. App. 1984); *See also Underwriters Nat'l Assur. Co. v. North Carolina Life and Guar. Assoc.*, 455 U.S. 691, 692 (1982) *quoting Durfee v. Durke*, 375 U.S. 106, 111 (1963) ("a judgment is entitled to full faith and credit. . . when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the final judgment").

In considering the approval of the recapitalization of The Home, seven state insurance departments participated in hearings, employed experts and ultimately determined that the acquisition and recapitalization would protect policyholders. Instead of allowing plaintiffs to ask this Court to revisit and re-litigate the recapitalization transactions already fully and finally determined by seven states, the orders approving the recapitalization should be entitled to full faith and credit in this Court.

Additionally, the principles of comity require that this Court not permit plaintiffs to re-litigate the commissioner's approval of the recapitalization. In *Schuster v. Superior Court*, regarding a trustee to a will, the court stated, "dissatisfaction on the part of litigants with the orders and decrees of that court should not prompt the courts of a sister jurisdiction to attempt an interference." *Schuster v. Superior Court*, 98 Cal. App. 619, 623-624 (1929). The Court recognized that comity required the California courts owed the

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SAN FRANCISCO, CA 94111-3907

highest degree of courtesy and recognition to the sister state's acts and jurisdiction. *Id.* at 628. Additionally, the California insurance commissioner, like the commissioners in the other states, participated and approved the recapitalization of The Home. This Court should defer not only to the sound and reasoned decisions of the commissioners of the other states but also to the expertise and order of its own commissioner.

In *A.P.I. Inc. v. Home Ins. Co.*, the United States District Court for the District of Minnesota, citing principles of comity, refused to hear claims regarding fraudulent transfer and tortuous interference which were brought against Zurich arising out of the same recapitalization transaction at issue in this matter. *A.P.I. Inc. v. Home Ins. Co*, 706 F. Supp. 2d 926 (D. Minn. 2010). The court held that under New Hampshire liquidation law, the liquidator had the exclusive right to bring a fraudulent transfer action on behalf of Home's creditors and policyholders. *Id.* at 936. Similarly, relying on principles of comity, the court dismissed the plaintiff's tortuous interference claims. *Id.* at 939. Relying on this decision, this court should also apply principles of comity and respect the liquidator's exclusive authority to bring claims by refusing to re-litigate plaintiffs' claims.

Moreover, allowing this litigation to proceed contrary to the established procedures of the holding company statutes would potentially call into question numerous other Form A proceedings that have been heard, considered, and finally approved in various states. The same uncertainty would affect the receivership and liquidation processes. The purpose of the NAIC model laws regarding holding company acquisitions and receiverships, and the state statutes based upon them, would be thwarted by allowing plaintiffs to re-litigate these issues in a distant venue. Those aspects of the state regulatory system where state insurance departments actively engage and work cooperatively to develop comprehensive solutions to troubled company situations would be similarly affected. The NAIC and its state members developed the model laws and subsequently worked for enactment of those models in their respective states, to ensure uniformity, efficiency and finality of their orders and proceedings and to protect the interests of all policyholders. That uniformity, efficiency and finality are potentially jeopardized by an

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Two Embarcadero Center, Suite 1410
San Francisco, CA 94111-3907

action such as the present matter.

V. CONCLUSION

For the foregoing reasons, the NAIC respectfully suggests that the plaintiffs should not be entitled to re-litigate and second guess the final orders of several insurance commissioners or interfere with the New Hampshire liquidator's authority to prosecute relevant claims on behalf of all policyholders.

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BRYAN CAVE LLP

By: ______________________
Stephanie A. Blazewicz
Attorneys for *Amicus Curiae*
NATIONAL ASSOCIATION OF
INSURANCE COMMISSIONERS

BRYAN CAVE LLP
TWO EMBARCADERO CENTER, SUITE 1410
SAN FRANCISCO, CA 94111-3907