THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2020-CP-40-05802

Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance,

Respondents,

v.

Jessica K. Altman, as Rehabilitator of Senior Health Insurance Company of Pennsylvania, Patrick H. Cantilo, as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania, and Senior Health Insurance Company of Pennsylvania in Rehabilitation,

Appellants.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is an action under the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 *et seq*. It began with the filing of a detailed 27-page Complaint for Declaratory and Injunctive Relief in the Court of Common Pleas for Richland County, South Carolina on December 10, 2020, to settle rights, status and other legal relations under the laws of South Carolina, particularly with respect to Respondents' powers, duties and obligations to South Carolina policyholders and the public. (Compl.) *See* S.C. Code Ann. § 15–53–20 (1976); *see also, e.g., Town of Hilton Head Island v. Coalition of Expressway Opponents*, 307 S.C. 449, 453, 415 S.E.2d 801, 804 (1992). The Appellants are Senior Health Insurance Company of Pennsylvania (SHIP), which is in rehabilitation, and its Rehabilitator and Special Deputy Rehabilitator, who by operation of law presently serve in a managerial role in place of SHIP's officers and directors, who are suspended. *See* 40 Pa. Stat. § 221.16(b).

On January 11, 2021, Appellants removed this action to the United States District Court for the District of South Carolina pursuant to the federal diversity statute, 28 U.S.C. § 1332, and

then promptly moved for dismissal on the ground that the same court lacked subject matter jurisdiction. (Notice of Removal.) On February 10, 2021, Respondents filed a Motion to Remand, on the ground that Appellants had "'argued their way out of the District Court.'" *Farmer v. Altman*, CV 3:21-00097-MGL, 2021 WL 3223114 at *3 (D.S.C. July 29, 2021). The federal district court agreed and remanded the matter to the Richland County Court of Common Pleas by Memorandum Opinion and Order dated July 21, 2021. *Id.*

Following remand to the Court of Common Pleas, Respondents learned that Appellants intended to contact South Carolina policyholders about rate increases and policy modifications that had not been approved by the Department as required by South Carolina law. The increases and modifications were part of a plan of rehabilitation (the "Plan") approved by the supervising court in Pennsylvania by order finalized on November 4, 2021. (Exhs. 3 & 4 to Defs. Opp. to Mot. for TRO & Prelim. Inj.) That order, however, is presently under appeal before the Pennsylvania Supreme Court. Although Respondents are not parties to the ongoing Pennsylvania proceedings, the Plan and Appellants' efforts to implement that Plan during the pendency of the appeal affect the procedural and substantive rights of South Carolina policyholders. Accordingly, Respondents filed a Motion for Temporary Restraining Order (TRO), which the Honorable L. Casey Manning granted on November 19, 2021. (Motion for TRO; TRO.) Respondents also filed a Motion for a Temporary Injunction. (Mot. for Temp. Inj.)

After a hearing conducted on December 15, 2021, Judge Manning granted Respondents' Motion for a Temporary Injunction by Order dated January 20, 2022. (Order.) In that Order, Judge Manning enjoined the Appellants from:

> Communicating, implementing or enforcing in this State the Plan, otherwise interfering with the rights of SHIP long-term care insurance policyholders or otherwise violating the insurance laws of this State pertaining to long-term care insurance, including, but not limited to, notifying policyholders of proposed rate

> or benefit changes or requesting that they select rates or benefits different from those authorized by the appropriate state regulator and called for under the terms of the contract, charging additional premium, or withholding, delaying or encumbering benefits in whole or in part, until such time as specified herein.

(Order p. 18.) The effect of the temporary injunction is to impose a stay of implementation of the Plan in South Carolina until such time as the appeal of the order approving the Plan is adjudicated by the Pennsylvania Supreme Court. (*See id.* p. 19.[1]) On February 18, 2022, Appellants served on Respondents a Notice of Appeal from Judge Manning's Order of January 20, 2022. (Notice of App.)

FACTS

The salient facts are relatively straightforward and largely undisputed. SHIP is a long-term care insurance carrier domiciled in Pennsylvania and operating in forty-six (46) states, including South Carolina. (Compl. ¶¶ 5, 7, 60.) The average SHIP policyholder at the time this action was commenced in 2020 was approximately 86 years of age and the average policyholder on claim was approximately 89 years old. (*Id.* at ¶ 9.) In the years prior to the individual Appellants assuming control of SHIP, the insurer has always complied with South Carolina law, submitting requests for a number of rate increases, which were approved in 2011, 2012, 2013 and 2017. (*Id.* at ¶ 82.)

Due to a number of factors, SHIP has been financially troubled for years, having reported a deficit of approximately a half-billion dollars as of December 31, 2018. (*Id.* at ¶¶ 12-51.) SHIP's financial condition has continued to deteriorate, and it is now deeply insolvent,[2] with a

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[1] The Pennsylvania Supreme Court has scheduled oral argument in those proceedings for September 15, 2022. *See, e.g.*, Unified Judicial System of Pennsylvania Web Portal, Appeal Docket Sheet, Docket Number 71 MAP 2021, p. 13 of 21, <https://ujsportal. pacourts.us/Report/PacDocketSheet?docketNumber=71%20MAP%202021&dnh=7iXiaQR8dgr7VQqXHzgooQ%3D%3D>.

[2] *Compare* 40 Pa. Stat. § 221.3 (defining "Insolvency" within context of receivership) *with, e.g.*,

deficit of at least $1.2 billion. (Compl. ¶ 52-56, 77; Exh. A to Mot. for Temp. Inj. p. 44-45, 49.) Appellant Cantilo has admitted in previous testimony that "it is not likely that we will magically restore SHIP to solvency, but it is likely that the plan . . . would substantially reduce the deficit." (Exh. A to Mot. for Temp. Inj. p. 80 ln. 7-11.) By order of the Commonwealth Court of Pennsylvania dated January 29, 2020, SHIP was placed into rehabilitation. (Exh. C to Motion for Temp. Inj. p. 1.) The individual Appellants have been appointed as Rehabilitator and Special Deputy Rehabilitator for SHIP. (Exh. 1. ¶¶ 2, 14 & Exh. 2 p. 3-5 to Defs. Opp. to Mot. for TRO & Prelim. Inj.)

By order dated August 25, 2021, and finalized on November 4, 2021, the Pennsylvania court approved a plan of rehabilitation (the "Plan") devised and proposed by the individual Appellants. (Exhs. 3 & 4 to Defs. Opp. to Mot. for TRO & Prelim. Inj.) Under this Plan, policyholders must either pay drastic rate increases or face decreases to benefits promised under their policies.[3] (Compl. ¶¶ 64-70, 83-85; Exh. B to Mot. for Temp. Inj.) The changes are permanent, meaning that many policyholders will lose important guaranty association coverage in the event of liquidation, which seems inevitable. (*See id.*) The Plan shifts some of the burden of the insurer's insolvency back onto policyholders because the Rehabilitator did not deem it reasonable for taxpayers (due to tax offsets for assessed guaranty association member insurers) to contribute "hundreds of millions of dollars to pay claims" on underpriced policies. (Exh. A to Mot. for Temp. Inj.)

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40 Pa. Stat. § 991.1702 (defining "Insolvent insurer" in the context of triggering guaranty association coverage). SHIP has not been declared an "insolvent insurer."

[3] Importantly, this Plan does not entail a scenario where an insurer offers policyholders the option of paying an approved rate increase or a voluntary reduction in benefits, nor does it entail a negotiated restructuring of policies. Here, the State must stand aside while the insurer implements unilateral rate increases lest policyholders incur involuntary benefit reductions.

As noted, the appeal of the order approving the Plan is currently pending before the Pennsylvania Supreme Court and has been fully briefed. Respondents were not and are not parties in the Pennsylvania rehabilitation proceedings.[4] That action was commenced by the Pennsylvania Insurance Commissioner against SHIP. Although the substantial rights of policyholders are affected by the Plan, no record exists of policyholders being served with legal process and they were not represented by class representatives or legal counsel. Among those intervening in that action are several large health insurance companies, which support the Plan, and three insurance commissioners from other states, which have brought the appeal. An *amicus* brief signed by the District of Columbia and twenty-six (26) states, including South Carolina, has been submitted to the Pennsylvania Supreme Court in opposition to the Plan.[5]

Prior to the SHIP receivership, neither SHIP nor any other insurer doing business in South Carolina has ever asserted it is not required to submit rate increases or policy changes to the Department for approval. (*See* Compl. ¶¶ 82, 115-121.) In fact, evaluating the necessity for rate increases and the insurer's ability to obtain individual state approval for such increases is a typical checklist item for rehabilitators.[6] Nonetheless, SHIP now maintains that it is no longer required to seek approval from the Respondents for rate increases on policyholders called for in

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[4] Respondents joined the insurance regulators of what would ultimately be twenty-five (25) other states and the District of Columbia in filing, on December 22, 2021, a joint *amicus curiae* brief in the Pennsylvania Supreme Court but was not one of the three additional states that actually intervened in the lower court proceedings. (*See, e.g.*, Exh. 6 to Defs. Opp. to Mot. for TRO & Prelim. Inj.); *See generally* SHIP Receivership Court Documents, <https://www.shipltc.com/court-documents>.

[5] No state insurance regulator has either intervened or submitted an *amicus* brief in support of the Plan. *Id.*

[6] Nat'l Ass'n of Ins. Commrs., Receiver's Handbook for Insurance Company Insolvencies 12 (Apr. 2021 ed.), <https://content.naic.org/sites/default/files/publication-rec-bu-receivers-handbook-insolvencies.pdf>.

the Plan, some of which are well in excess of 200 percent.[7] (Compl. ¶ 66; Mot. for Temp. Inj. ¶ 13.) Appellants did offer individual states an "opt-out" provision under the Plan, under which SHIP would submit the rates for approval; however, when any state did not approve these rates in full, SHIP unilaterally imposes a draconian reduction of benefits on that state's policyholders. (Compl. ¶¶ 123-126; Exh. B to Motion for Temp. Inj.) The record establishes that even the Rehabilitator did not recommend to commissioners that they take this option. (Exh. B to Mot. for Temp. Inj. FAQ 9. [8])

The parties are at an impasse. Respondents maintain that, as a licensee, SHIP must still comply with South Carolina law governing all long-term care insurers licensed in this State, while Appellants insist it is not and that Respondents are bound by the Pennsylvania

[7] For perspective, a search of the Pennsylvania Department of Insurance's (PID) website, https://www.insurance.pa.gov/pages/search.aspx#, for "Long-Term Care Insurance Rate Decision" reveals that in September-October 2021, for example, MedAmerica Insurance Company requested an 11% increase on policies with non-lifetime benefits periods and 117.5% on policies with lifetime benefits and PID allowed an 11% increase on policies with non-lifetime benefits, but only a 20% increase on policies with lifetime benefits; the Prudential Insurance Company of America requested an increase of up to 123.1% but PID approved a capped 20% increase; Unum Life Insurance Company requested an increase of 34.50% on some policies and none on others but PID approved a capped 20% increase; and that Genworth Life Insurance Company requested an aggregate 54.2% rate increase and PID approved a 20% increase. *See Wise v. Wise*, 394 S.C. 591, 600-601, 716 S.E.2d 117, 122 (Ct. App. 2011) (original judicial notice of adjudicative facts at the appellate level limited to matters which are indisputable); *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984) (a fact may be subject to if its accuracy is capable of verification by reference to readily available sources of indisputable reliability); *see also Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015) (court may properly take judicial notice of matters of public record and other information that, under the rules of evidence constitute adjudicative facts); *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web."); *Jeandron v. Bd. of Regents of Univ. Sys. of Maryland*, 510 Fed. Appx. 223, 227 (4th Cir. 2013) (court may take judicial notice of information on a web site, so long as the web site's authenticity is not in dispute and it is capable of accurate and ready determination).

[8] Opt-out state approving lower rate increases would "result in additional downgrades [and] the Rehabilitator DOES NOT recommend that states opt out because that is generally expected to be disadvantageous to affected policyholders.").

proceedings. The temporary injunction issued by the circuit court prevents the Appellants from implementing the Plan in this State, but only until thirty (30) days after the Pennsylvania appeal is decided, with Respondents granted leave to file for an extension if necessary. (Order.)

ARGUMENTS

I. THE CIRCUIT COURT HAD JURISDICTION OVER THE SUBJECT MATTER.

"Whether a court has subject matter jurisdiction is a question of law we review de novo." *First Citizens Bank and Trust Company, Inc. v. Taylor*, 431 S.C. 149, 162, 847 S.E.2d 249, 256 (Ct. App. 2020) (quoting *Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp*, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019).

Appellants contend that South Carolina courts are without jurisdiction over the subject matter because Pennsylvania has "exclusive jurisdiction"[9] over the SHIP rehabilitation proceedings. This argument, however, misses the point. Respondents do not question that SHIP should be in receivership or that Pennsylvania should conduct those proceedings. Rather, Respondents merely contend that SHIP and its management must comply with the insurance

[9] None of the statutes cited by Appellants supports their assertion of an all-encompassing interstate mandate arising of SHIP's reorganization. Pa. Stat. §§ 221.15 and 221.16 are taken from the NAIC Model Act. As explained herein, Section 221.16 merely gives rehabilitators managerial powers. It merely provides that the insurance commissioner may petition for an order appointing him as rehabilitator and authorizing him to "take possession" of the assets of the insurer, as opposed to being vested with title like a liquidator under 40 Pa. Stat. § 221.20(c). Again, the statute emphasizes the *limited* nature of the rehabilitator's powers. 40 Pa. Stat. §§ 221.4 and 221.5 no more vest the Pennsylvania receivership court with national jurisdiction than the substantially identical provisions of S.C. Code Ann. §§ 38-27-60 &-70 (2015) permit a Richland county circuit court to rule the entire Nation from Columbia. Although Pa. Stat. 40 § 221.5(a) provides the Commonwealth Court with authority to issue injunctions for various reasons, § 221.5(b) acknowledges the territorial limitations on the Commonwealth Court's power: "The receiver may apply to any court outside of the Commonwealth for the relief described in subsection (a) or suspension of any insurance licenses issued by the commissioner." Finally, any sensible reading of 42 Pa. Stat. § 761(c)'s grant of "exclusive" jurisdiction to the Commonwealth Court over certain matters is with respect to other tribunals within the Commonwealth. It should go without saying that the Pennsylvania statutes do not prescribe the jurisdiction of forty-nine (49) other state judicial systems.

laws in those states in which SHIP does business. This is not an unusual position and does not intrude on the lawful power of any receiver or the jurisdiction of any receivership court. As Appellants point out, both Pennsylvania and South Carolina have adopted the NAIC's Insurers Rehabilitation and Liquidation Model Act (the "Model Act"). More than half a century has passed since the NAIC's adoption of that Model Act in 1969.[10] Yet, no party to this action has identified a single instance in the entire history of that Act in which it has been used to unilaterally set aside the power of other states to regulate rates and forms.

Respondents also do not question that the Pennsylvania courts exercise *in rem* jurisdiction over the insurer. However, as the Supreme Court confirmed in *Hanson v. Denckla*, 357 U.S. 235, 246 (1958), "the *in rem* jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States," and the "basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State." *See Thormann v. Frame*, 176 U.S. 350, 355 (1900) (judgment *in rem* binds only property within the control of the court). Moreover, even though the Pennsylvania Commonwealth Court exercises *in rem* jurisdiction in the rehabilitation proceedings, the *res* over which it exercises that jurisdiction is the corporation itself, the fictitious entity, not all of the corporation's property for all purposes and certainly not the rights of all persons wherever situated. *See Matter of Rehabilitation of Nat'l Heritage Life Ins. Co.*, 656 A.2d 252 (Del. Ch. 1994).

Appellants also assert that this Court is deprived of jurisdiction over the subject matter by S.C. Code Ann. § 38-27-60(b) (2015), which provides:

> No court of this State has jurisdiction to entertain, hear, or determine any complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation, or receivership of an insurer or praying for an injunction or

[10] *See* Proc. of the Nat'l Ass'n of Ins. Comm'rs., 1969 vol. 1 at 168-169, 241 & 271. (Exh. V to Pls. Mem. in Opp. to Mot. to Dismiss filed Mar. 9, 2022.)

> restraining order or other relief preliminary to, incidental to, or relating to the proceedings other than in accordance with this chapter.

This is the same argument raised by an out-of-state rehabilitator attempting to have a South Carolina lawsuit against him dismissed in *Smalls v. Weed*, 293 S.C. 364, 360 S.E.2d 531 (Ct. App. 1987). That rehabilitator argued that an earlier version of Section 38-27-60(b)[11] prevented suit against him. He maintained, as do the Appellants here, that because the receivership court exercised "jurisdiction of the whole field" and that the action against him fell within "relief . . . incidental to, or relating to the [rehabilitation] proceedings," it was barred by what is now Section 38-27-60. *Id.* The Court of Appeals rejected that argument, holding, "We find this Section inapplicable. This is not an action regarding or relating to the institution of rehabilitation proceedings. It is merely an action against an insurance company which happens to be in rehabilitation." *Id.* at 371, 360 S.E.2d at 534-535.

As in *Smalls*, Respondents do not seek to institute their own delinquency proceedings or unnecessarily insert themselves into the rehabilitation process whatsoever. Rather, they are pursuing declaratory relief to ascertain if an insurer that happens to be in rehabilitation must continue to comply with the laws by which it has always been bound. In light of Appellants' recent and emphatic refusal to so comply, this is a reasonable inquiry and an entirely appropriate use of the Uniform Declaratory Judgments Act. Respondents' action poses no challenge to the receivership or the lawful reorganization of the insurer. It also does not seek to assert claims against the assets of the insurer. It seeks only for the courts of this State to advise Respondents

[11] Former S.C. Code Ann. § 38–5–1840(B) was recodified as Section 38-27-60 by 1987 Act No. 155 of 1987, § 1. It provided, "No court of this State shall have jurisdiction to entertain, hear or determine any complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer, or praying for an injunction or restraining order or other relief preliminary to, incidental to or relating to such proceedings other than in accordance with this article." *See Smalls*, 293 S.C. at 371, 360 S.E.2d at 534 (quoting § 38–5–1840(B)).

whether the insurer is still required to obey the laws Respondents are commanded by the legislature to enforce.

Appellants' reliance on *Ballesteros v. N.J. Property Liab. Ins. Guar. Assn.*, 530 F. Supp. 1367 (D.N.J. 1982) is also misplaced. As a decision of a federal district court, *Ballesteros* is not binding on the courts of South Carolina. *See State Farm Mut. Auto. Ins. Co. v. Windham*, 432 S.C. 134, 149, 850 S.E.2d 633, 641 (Ct. App. 2020) (a federal court decision, even one interpreting South Carolina law, is not binding on Court of Appeals). Moreover, that case was decided under the Uniform Insurers Liquidation Act (UILA) (1939), which "does not adequately distinguish among" rehabilitators and liquidators, unlike the Model Act upon which the laws of Pennsylvania, South Carolina and a number of other states are based. *See* Act No. 89, Wis. Leg., 1967-1968 Sess., Ch. 89, Laws of 1967.[12] The Model Act "makes a more realistic and careful designation of the status of the rehabilitator than does" UILA. *Id.* The receivership in *Ballesteros*, by whatever name, was conducted as a liquidation, and was treated as such by the district court. *Compare Ballesteros*, 530 F. Supp. at 1369, 1371 (cancellation of policies and "in order to secure . . . liquidation and distribution of the assets of an insolvent corporation" and "proceedings for the liquidation of insolvent insurance companies") *with, e.g.*, S.C. Code Ann. § 38-27-380 and 40 Pa. Stat. § 221.21 (cancellation of coverage upon liquidation). Cancellation of coverage in liquidations is necessary, as coverage by a liquidated insurer is illusory, which is also why claims arising before the liquidation or cancellation are covered by guaranty associations (the claim at issue in *Ballesteros* came after those events). *Ballesteros* also does not hold that an insurance company in rehabilitation may bypass state regulatory review.

The mere existence of a rehabilitation proceeding in a state simply does not preclude

[12] Available online at <https://docs.legis.wisconsin.gov/1967/related/acts/89.pdf>. (*See also* Exh. U to Pls. Mem. in Opp. to Mot. to Dismiss filed Mar 9, 2022.

actions in other jurisdictions. *See, e.g., Smalls*, 293 S.C. at 371, 360 S.E.2d at 534 (South Carolina courts had subject matter jurisdiction over action against out-of-state rehabilitator); *Mathias v. Lennon*, 474 F. Supp. 949 (S.D.N.Y. 1979) (dispute between director of insurance in one state and rehabilitator of insurer in another state); *Aims Enterprises, Inc. v. Muir*, 609 F. Supp. 257 (M.D. Pa. 1985) (dispute between two states' insurance commissioners involving insolvent insurer). The purpose of the Model Act is, in pertinent part, to provide for "improved methods for rehabilitating insurers" and the "lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states." *See, e.g.,* 40 Pa. Stat. § 221.1 and S.C. Code Ann. § 38-27-30 (2015). This hardly equates to a wholesale relinquishment of sovereignty and the ability to regulate the business of insurance within one's borders whenever a financially troubled insurance company undergoes reorganization.

In an attempt to justify their overreach with respect to South Carolina and policyholders in this State, Defendants cite *Comm'r of Ins. v. Arcilio*, 561 N.W.2d 412, 422 (Mich. Ct. App. 1997), in which the court found some limited jurisdiction over certain policyholders who sought to bring a separate tort action in addition to pursuing claims in an insurance receivership. That case, however, is inapposite to this declaratory judgment action by South Carolina's chief insurance regulator in response to an insurance company's refusal to obey state law. The court in *Arcilio* found that the policyholders could be enjoined by the receivership court from bringing a civil action against the delinquent company's former officers and directors. *Id.* at 423. In support of that decision, the court held that by purchasing insurance from an out-of-state insurer, these policyholders had purposely availed themselves of the protection of the laws regarding delinquent insurers. *Id.* at 422.

If, however, Defendants consider SHIP's policyholders as having similarly availed

themselves of the protection of Pennsylvania law regarding insolvent and delinquent insurers, one can only wonder why they were not afforded that protection in the form of proper notice, class representation or appointment of a policyholders' committee and legal representation, all of which have been provided in other receiverships where policyholder rights have been affected, including in Pennsylvania. *See, e.g., Underwriters Nat. Assur. Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 696 (1982) (Rehabilitation Court certified a class consisting of all policyholders and appointed class representatives, and rehabilitation plan followed "extensive negotiations" between the insurer and the class representatives); *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1089 (Pa. 1992) (receivership court formed a policyholders committee whose purpose was to "consult with the statutory rehabilitator . . . and advise those represented," with "the express intent of assuring that policyholders *first and foremost* suffered the least amount of harm resulting from the" rehabilitation of the insurer) (italics in original.). Such a failure is especially difficult to understand where, unlike in *Arcilio*, SHIP's policyholders are being deprived of important statutory and contractual protections.

Moreover, essential to the *Arcilio* court's decision was that the policyholders' lawsuit asserted causes of action that belonged to the rehabilitator alone as an asset of the rehabilitation *res*. *See Koken v. Fid. Mut. Life Ins. Co.*, 803 A.2d 807, 822 (Pa. Commw. Ct. 2002). ("Significantly, the [*Arcilio*] court noted also that the injunction . . . contained an express exception for individual claims . . . 'which cannot be pursued by the Rehabilitator'" and "was in fact compelled to dissolve the injunction insofar as it proscribed actions" that did not belong to the rehabilitator.) *Id.* (quoting *Arcilio*, 561 N.W.2d at 420). Here, South Carolina policyholders have not asserted any cause of action, much less any cause of action belonging to the rehabilitator. Rather, the plaintiffs below are the State's insurance regulators, who brought this

action in their official capacity "to declare rights, status and other legal relations" under State law in accordance with the S.C. Code Ann. § 15-53-20 (1976).

Regardless, nothing in *Arcilio* (or any other case cited by Appellants) stands for the proposition that a delinquent insurer may unilaterally rewrite the very insurance contracts under which it is bound much less refuse to comply with the Insurance Law of the State in which it does business.[13] This points to one of the fundamental flaws of Defendant's untenable position: it relies on the exotic notion that Pennsylvania has jurisdiction over South Carolina and its government and can even thwart the routine application of this State's laws.

To the extent Appellants rely on "comity" to compel Respondents to obey whatever command might issue out of the receivership court, they again ask too much. Comity does not require this State to act contrary to the policy embodied in its statutes. *See Peterson v. Peterson*, 333 S.C. 538, 545, 548, 510 S.E.2d 426, 429, 431 (Ct. App. 1998). In 2019, the General Assembly passed a measure requiring all long-term care insurance providers to submit all premium rate schedules to the Department of Insurance and establishing certain procedures concerning the premium approval process. Act No. 6 of 2019 (the "Act"). Among other things, the Act requires that all premium rate schedules for long-term care insurance must be filed with the Department and are subject to the prior approval of the Director or his designee, and instructs long-term care insurers that they may not change the premium charged to an insured under a policy or contract of long-term care insurance until the applicable premium rate change has been filed with and approved by the Director or his designee. *See* S.C. Code Ann. § 38-72-75 (2019). The Act provides that the Director or his designee may disapprove or modify premium rates if he

[13] Again, Appellants are not offering policyholders the option of an approved rate increase or a voluntary reduction in benefits, nor have they engaged policyholders in negotiations to restructure policies. Rather, they expect Respondents to abdicate their statutory duties while the insurer implements unilateral rate increases; and, if Respondents refuse, Appellants will impose involuntary cuts in benefits on policyholders.

determines that the benefits provided are unreasonable in relation to the premiums charged, appear to be inadequate, unfairly discriminatory, or excessive. *Id.*

The Director or his designee may hold a public hearing or solicit public comments as a part of the process of reviewing long-term care insurance rate filings, and he must provide all individuals present at a public hearing held pursuant to Section 38-72-75 an opportunity to offer testimony or written comments. *Id.* Each premium rate filing and any supporting information filed and subject to disclosure must be open to public inspection after the filing becomes effective. *Id.* If the Director or his designee holds a public hearing or solicits public comments on a premium rate filing, he may open to public inspection some or all portions of the filing that are subject to disclosure as a part of the public hearing or solicitation of public comments. *Id.* Each decision of the Director or his designee about long-term care insurance premium rates is subject to judicial review in accordance with Section 38-3-210 of the South Carolina Code. And, just this year the General Assembly reiterated its intent that long-term care insurance rates are to be filed with the Department for approval. *See, e.g.,* Act No. 195 of 2022 § 2 (adding Section 38-72-78 to require specified notice to policyholders of increase in premium rate and prohibiting implementation of new rates until approved by the Department of Insurance pursuant to Section 38-72-75).

In addition to these statutes, the Department has promulgated, and the General Assembly has approved regulations governing long-term care insurance, which are codified at S.C. Code Regs. § 69-44. These regulations provide for, among other things, actuarial review of proposed rates. *Id. See also* S.C. Code Ann. § 38-61-20 (approval of forms by Director). *See also* S.C. Code Ann. § 43-21-130 (2018) (Long-Term Care Council to include one representative each of long-term care providers, long term care consumers, and "persons in the insurance industry

developing or marketing a long-term care product.") In creating this detailed, comprehensive and thorough legislative scheme, the General Assembly has implemented a strong policy of open, transparent regulation of long-term care insurance in which some of South Carolina's most vulnerable citizens may even participate. Respondents have neither the inclination nor the authority to set this clear statement of legislative policy aside, even in the name of comity. *See Peterson*, 333 S.C. at 545, 548, 510 S.E.2d at 429, 431.

Moreover, under the principle of comity, courts of one state or jurisdiction give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect. *Hsieh v. Sun*, 365 P.3d 1019 (Haw Ct. App. 2016) (defining "comity" as the "principle that courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction out of deference and mutual respect"); *Gnatkiv v. Machkur*, 372 P.3d 1010 (Ariz. Ct. App. 2016) ("The principle of comity is that the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect."); *see also Chicoine v. Wellmark, Inc.*, 894 N.W.2d 454 n.4 (Iowa 2017) (same). Because it is based on "mutual respect," genuine comity flows in both directions. Thus, if Appellants expect other states to extend "comity" to receivership proceedings in Pennsylvania, then it seems reasonable for them to refrain from using such proceedings to thwart the laws and judicial decisions of this State, which are equally deserving of deference and respect.

Indeed, respect for other states' laws would seem to be in the best interests of both Pennsylvania and its insurers. State laws governing the business of insurance, including statutes and regulations governing premium rates and authorization to do business, exist to protect consumers. *See, e.g., State ex rel. National Mut. Ins. Co. v. Conn*, 155 N.E. 138, 142 (Ohio 1927)

("The business of insurance is impressed with a public use and . . . a governmental agency may properly be created to protect the interests of policy holders.").[14] No rational consumer would purchase insurance from a foreign insurer knowing that it could later unilaterally change the agreement in total disregard of the laws of that consumer's state of residence. Accordingly, by insisting that a Pennsylvania insurer may flout the laws of other states, Appellants risk serious harm not just to the citizens of other states, but to all insurers domiciled in Pennsylvania.

Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy for the purposes of a declaratory judgment action. *Firemen's Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co.*, 302 S.C. 234, 236, 394 S.E.2d 855, 857 (Ct. App. 1990). As South Carolina's insurance regulators, Respondents have not just the legal right, but the obligation to enforce the insurance laws of this State, as they have been specifically charged with this duty by the legislature.

As a condition precedent to obtaining a certificate of authority to do business in South Carolina, the insurer agreed to conduct its business in compliance with South Carolina's insurance laws, including those described above. Its claim that it is no longer bound by those laws presents a novel question regarding the proper interpretation and application of these laws. The central conundrum facing Respondents is that on the one hand, the General Assembly, which holds unquestioned and exclusive power among the states to regulate the business of

[14] In the McCarran-Ferguson Act, which provides for continued regulation and taxation by the several states of "the business of insurance," 15 U.S.C. § 1011, the focus of Congress "was on the relationship between the insurance company and the policyholder." *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). "Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the 'business of insurance'" and "the fixing of rates is part of this business." *Id. See also* Nat'l Ass'n of Ins. Commrs., State Insurance Regulation 2 (available at <https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf>) ("The fundamental reason for government regulation of insurance is to protect American consumers.")

insurance within South Carolina, has expressly delegated that power to Respondents, primarily in the form of the South Carolina Insurance Law, Title 38 of the Code of Laws of South Carolina, 1976, as amended, *see* S.C. Code Ann. § 38-1-10 *et seq.* ("This title may be cited and is known as 'The Insurance Law'"), and on the other, SHIP insists that it may set its own rates, without regard to that same Insurance Law.

Cognizant of the looming risk of confusion and dismay among policyholders (not to mention the justifiable fury of their elected representatives) arising from any denial of the protections afforded them under the South Carolina insurance statutes, Respondents sought a declaration of the law from their State courts. Respondents have the right, indeed the obligation, to defend and protect consumers of long-term care insurance in South Carolina from apparent abuses, regardless of the source or underlying motivation for same. They are not required to stand idly by, awaiting an actual "violation of . . . rights or a disturbance of . . . relationships." *Thompson v. State*, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016). The purpose of a declaratory judgment action is to settle and afford relief from uncertainty and insecurity to a party with respect to that party's rights, status, and other legal relations. *See* S.C. Code Ann. § 15–53–130 (1976). *See also Town of Hilton Head Island*, 307 S.C. at 453-454, 415 S.E.2d at 801. This action was brought to accomplish just that: to obtain a declaration of the rights, status or other legal relations under South Carolina law as it pertains to Respondents, the public and the policyholders of this State.

The underlying dispute raises the question of whether a foreign insurer may by means of reorganization set aside state laws specifically designed by our state legislature to regulate its conduct in the insurance marketplace in order to protect policyholders. This issue goes to the heart of the State's sovereign power and the enforceability of the acts of the General Assembly

and is of such public importance as to require its resolution for future guidance. *See Adams v. McMaster*, 432 S.C. 225, 235, 851 S.E.2d 703, 708 (2020) (action for declaratory judgment may be brought where issue is of such public importance as to require its resolution for future guidance; *see also Davis v. Richland County Council,* 372 S.C. 497, 642 S.E.2d 740 (2007) (declaratory judgment action by commission members in individual and official capacity).

Appellants' Plan runs counter to long-standing principles of state-based regulation and fundamental expectations regarding each state's role of in the regulation of insurance and reflects a lack of respect for the statutory and constitutional authority of each state to regulate insurance within its borders. Not without reason, Respondents have expressed their concern that the Plan unlawfully seeks to (1) sweep aside the acts of the General Assembly and (2) re-delegate to Appellants the power of this State's legislature to regulate the business of insurance within South Carolina. Appellants are nonetheless determined to move forward with their Plan. Faced with Appellants' insistence in pursuing the Plan, and the potential harm and chaos it would create within the State, Respondents have properly sought the guidance of the judiciary through a declaratory judgment action. None of this interferes with the lawful conduct of an insurance company rehabilitation or the jurisdiction of a court overseeing such proceedings.

II. THE CIRCUIT COURT HAD PERSONAL JURISDICTION OVER APPELLANTS AND SHIP IS BARRED FROM RAISING THE ISSUE OF PERSONAL JURISDICTION FOR THE FIRST TIME ON APPEAL.

Appellant SHIP apparently contends, for the first time, that the circuit court lacked personal jurisdiction over it, which is rather extraordinary given that it is an insurer licensed and conducting the business of insurance in this state. Regardless, it is barred from raising this issue, as it is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Miller v. Dillon*, 432 S.C. 197, 207, 851 S.E.2d 462, 467 (Ct. App. 2020) (quoting *Wilder Corp. v. Wilke*, 330

S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). *See also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002): "'There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.'"). Because SHIP did not raise the issue of personal jurisdiction in the court below, this court may not consider it on appeal. *See Columbia (SC) Tchrs. Fed. Credit Union v. Newsome Chevrolet-Buick*, 303 S.C. 162, 164, 399 S.E.2d 444, 446 (Ct. App. 1990).

As for the two individual Appellants, the "question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). The circuit court's decision should be affirmed unless unsupported by the evidence or influenced by an error of law. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). 'At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits.' *Id.* 'When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.' *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008)." *Cribb v. Spatholt*, 382 S.C. 490, 496-497, 676 S.E.2d 714, 717 (Ct. App. 2009).

Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question is whether the exercise of personal jurisdiction would violate due

process. *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508. Determining whether the requirements of due process are satisfied involves a two-prong analysis: (1) the "power" prong, in which minimum contacts provide courts the "power" to adjudicate the action; and (2) the "fairness" prong, which requires the exercise of jurisdiction to be "reasonable" or "fair." *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 331, 594 S.E.2d 878, 884 (Ct. App. 2004).

Under the power prong, minimum contacts analysis requires a finding that the Appellant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. *Id.* at 331-332, 594 S.E.2d at 884. It is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* This "purposeful availment" element ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Id.*

The individual Appellants are vested with "all the powers of the directors, officers and managers, whose authority shall be suspended," 40 Pa. Stat. § 221.16(b). As SHIP's management, they have invoked the benefits and protections of the laws permitting the conduct by that company of the business of insurance in this State. Indeed, as special deputy to the Rehabilitator, Appellant Cantilo derives a pecuniary benefit from those laws, as well as those of other states in which it is licensed, as he is compensated out of the assets of SHIP. In fact, according to the March 31, 2022 Annual Report of the Rehabilitator on the Status of the Rehabilitation of Senior Health Insurance Company of Pennsylvania and the "Professional and Consulting Fees as of December 31, 2021 (Contents: SHIP Rehabilitation Expenses since Rehabilitation Order), Appellant Cantilo's firm has been paid $4,090,107 from inception to the

end of 2021 for services rendered.[15] *See also* 40 Pa. Stat. § 221.16 (rehabilitator shall make such arrangements for compensation as are necessary to obtain a special deputy of proven ability, who serves at his pleasure); (Exh. 1, p. 5 ¶ 14 and Exh. 2 p. 4-5 to Defs. Mem. in Opp. to Mot. for TRO & Prelim. Inj. filed Dec. 13, 2021).

Without question, the individual Appellants are the driving force behind SHIP's attempt to skirt South Carolina law. As a corporation, SHIP is a creature of legal fiction, which can act or speak only through its officers, directors, or other agents. *See Petrina v. Allied Glove Corp.*, 46 A.3d 795, 799 (Pa. Super. Ct. 2012). Exercising all the powers of management, the individual Appellants act and speak for SHIP. They are the ones who necessarily authored, presented and are implementing the Plan giving rise to this dispute. Without them, there *is* no action for declaratory judgment. It is they who maintain that SHIP is no longer required to obey South Carolina law and it is their Plan preventing the insurer's compliance. Appellants have also specifically directed their activities at South Carolina residents under the Plan that gives rise to this action. Under that Plan, they would require SHIP to raise rates on South Carolina citizens without first obtaining regulatory approval, in express defiance of this State's law. Not content with merely enjoying the benefits and protections of this State's laws, they have gone to great lengths to nullify those laws altogether. It is difficult to conceive of how any litigant could further direct one's activities to a state than to attack its laws and violate the rights of its citizens, forcing a state insurance department to vindicate a fundamental feature of insurance regulation. Far from random, fortuitous or attenuated, the individual Appellants' contacts with South

[15] *See* <https://www.shipltc.com/court-documents>, at "2022 Pennsylvania Commonwealth Court Proceedings (Docket No. 1 SHP 2020)," March 31, 2022 Annual Report of the Rehabilitator on the Status of the Rehabilitation of Senior Health Insurance Company of Pennsylvania, p. 21 of 35 (32 of 150 total pages). (<https://f853975b-cfdb-4bad-9155-ba48f6727135.usrfiles.com/ugd/f85397_f6a635555124482bab8ba9a044c82270.pdf>).

Carolina are systematic, intentional and substantial.[16]

In order to determine whether the exercise of jurisdiction over a foreign defendant meets the "fairness" prong, a court must consider the following: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508; *see also Leggett v. Smith*, 386 S.C. 63, 76, 686 S.E.2d 699, 706 (Ct. App. 2009). Which state's law controls is also a factor to be considered under the fairness prong. *Moosally*, 358 S.C. at 332, 594 S.E.2d at 885.

Under the Plan, the Appellants intend to communicate with South Carolina policyholders regarding their insurance contracts and propose to establish new policy rates and benefits. These actions would appear to permanently affect policyholders' rights under South Carolina law, both immediately and in the event of a liquidation. It is their specific decisions and actions with regard to rates and policy benefits that have prompted the dispute between the parties. Without them, there is no Plan, and it is the unique aspects of that Plan that form the basis for Respondents' lawsuit. It would be no less inconvenient for the Respondents to bring suit in Pennsylvania than for Appellants to defend their actions here; and, the State has an obvious interest in defending its sovereignty, its laws, and of course, its citizens. Finally, Respondents' action itself is for a declaration of South Carolina law. Under these circumstances, the Court's exercise of jurisdiction over the individual Appellants would also be fair. *See Moosally*, 358 S.C.

[16] The individual Appellants complain that South Carolina's exercise of personal jurisdiction over them exposes them to suit in every state in which SHIP does business; however, if this were to happen, it would be a result of their own overreach, not a breach of due process. Also, it is odd that they would assert that South Carolinians' insurance policies establish sufficient contacts (App. Brief at p. 22), but that their own actions affecting those same policyholders and policies, not to mention their scheme to divest this State of all regulatory power, are not.

at 328, 594 S.E.2d at 882.

The individual Appellants contend that it is unreasonable for them, as "state officials performing official duties," to be named as individual Appellants in this matter. As an initial matter, Appellant Cantilo is not a "state official," or even from Pennsylvania. He is a private citizen from Texas hired by the Rehabilitator as the Special Deputy Rehabilitator. As such, he is a contractor assigned the same duties and responsibilities as the Rehabilitator and is responsible for the day-to-day operation of the insurer. It logically follows that if the Acting Commissioner as Rehabilitator can be sued in his official capacity, his Special Deputy, who was hired by the preceding Commissioner from outside the government, may be subject to suit as well. Indeed, of the two individual Appellants, Cantilo has the greater personal connection to the instant dispute of the individual Appellants, having authored the Plan and having been thoroughly involved in the SHIP rehabilitation proceedings since their inception.[17]

That an insurance commissioner serving as rehabilitator can be sued is hardly a novel proposition, *see, e.g., Smalls*, 293 S.C. at 364, 360 S.E.2d at 531 (suit against rehabilitator upheld), and the cases are legion in which courts have drawn a clear distinction between an insurance commissioner as state government regulatory official and a commissioner in his role as receiver for a troubled insurer. *See e.g., Gross v. Weingarten*, 217 F.3d 208, 216 (4th Cir. 2000) (receiver assumes the identity of the insolvent insurer); *Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 973 n.4 (9th Cir. 1992) ("Although Montana courts have not decided this issue, those courts addressing this question have found that the liquidator stands in the insolvent's shoes. *Kemper Reinsurance Co. v. Corcoran,* 167 A.D.2d 75, 569 N.Y.S.2d 951, 954 (N.Y. App.

[17] In addition to his involvement with the Plan, Cantilo testified extensively at the hearing in Pennsylvania on the Rehabilitator's petition for approval of that Plan. (*See* Exh. A to Mot. for Temp. Inj.)

Div.1991), *aff'd,* 79 N.Y.2d 253, 582 N.Y.S.2d 58, 590 N.E.2d 1186 (1992); *In re Allstar Ins. Corp.*, 112 Wis. 2d 329, 332 N.W.2d 828 (Wis.App.1983), *appeal dismissed,* 461 U.S. 951 (1983); *Commonwealth v. Central Penn Nat'l Bank,* 31 Pa. Cmwlth. 190, 375 A.2d 874 (1977)."); *Navarro v. Allied World Surplus Lines Ins. Co.*, 544 F. Supp. 3d 229 (D. Conn. 2021) ("distinction between an insurance commissioner functioning as a regulatory authority and an insurance commissioner operating in a private role, such as a liquidator or rehabilitator"); *State of N.C. ex rel. Long v. Alexander & Alexander Services, Inc.*, 711 F. Supp. 257, 264 (1989) (insurance commissioner as rehabilitator is only a party to action as insurer's representative and actions as regulator and public official are irrelevant to those as receiver); *In re Reliance Group Holdings, Inc.*, 273 B.R. 374, 389 (Bankr. E.D. Pa. 2002) (in pursuing her role as rehabilitator, insurance commissioner is not acting as a "governmental unit"); *Reider v. Arthur Andersen, LLP*, 784 A.2d 464, 467 (Conn. Super. Ct. 2001) (liquidator stands in the shoes of the insolvent insurer); *Kentucky Cent. Life Ins. Co. By and Through Stephens v. Park Broadcasting of Kentucky, Inc.*, 913 S.W.2d 330, 334 (1996) (insurance commissioner and commissioner as rehabilitator are not one and the same entity); *Corcoran v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 532 N.Y.S.2d 376, 378 (App. Div. 1988) (superintendent of insurance as liquidator of insurer acts in a separate and distinct capacity from his role as regulator of the insurance industry and when insurer was liquidated, he was appointed to "step into the shoes" of the insurer); *Consolidated Edison Co. of New York, Inc. v. Insurance Dep't of New York*, 532 N.Y.S.2d 186, 189 (Sup. Ct. 1988) (superintendent of insurance as liquidator is not a state "agency" nor a "public officer"); *Benjamin v. Ernst & Young, L.L.P.*, 855 N.E.2d 128, 135 (Ohio Ct. App. 2006) (superintendent as liquidator is a separate entity from the superintendent as regulator); *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021, 1029 (Pa. Commw. Ct. 2006) (actions

of the insurance commissioner in her regulatory capacity cannot be asserted as affirmative defenses in an action commenced by rehabilitator or liquidator); *Foster v. Monsour Medical Foundation*, 667 A.2d 18, 20 (Pa. Commw. Ct. 1995) (actions of the insurance commissioner prior to the order of liquidation of an insurance company cannot be asserted as affirmative defenses in an action commenced by the liquidator, who steps into the shoes of the insurer). Accordingly, the circuit court correctly found that Respondents made the requisite showing of personal jurisdiction over the individual Appellants.

III. THE COURT OF COMMON PLEAS PROPERLY ISSUED A TEMPORARY INJUNCTION TO PRESERVE THE *STATUS QUO ANTE* BASED UPON RESPONDENTS' SHOWING THAT WITHOUT SUCH RELIEF THEY WILL SUFFER IRREPARABLE HARM, THAT THEY HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS, AND THAT THERE IS NO ADEQUATE REMEDY AT LAW.

The decision to grant an injunction is ordinarily left to the sound discretion of the circuit court in the exercise of its broad equitable power. *Metts v. Wenberg*, 158 S.C. 411, 417, 155 S.E. 734, 736 (1930). An abuse of discretion occurs when a circuit court's decision is either (1) unsupported by the evidence or (2) controlled by an error of law. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002).

A preliminary injunction should issue where necessary to preserve the *status quo ante*, upon a showing by the moving party that (1) without such relief it will suffer irreparable harm, (2) it has a likelihood of success on the merits, and (3) there is no adequate remedy at law. *Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010) (citing *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009). "'When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.'" *Columbia Broadcasting System, Inc. v. Custom Recording Co.*, 258 S.C. 465, 471-472, 189 S.E.2d 305, 308

(1972) (quoting *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969) (citing *D.W. Alderman & Sons Co. v. Wilson*, 69 S.C. 156, 48 S.E. 85 (1904)). The determination of whether an injunction should be granted should not be based on the merits of the underlying case except insofar as the merits may assist the court in determining whether a prima facie showing has been made. *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 626 S.E.2d 38 (Ct. App. 2005), *holding modified on other grounds by Poynter Invs., Inc.*, 387 S.C. at 587, 694 S.E.2d at 17.

The circuit court properly found that Respondents had shown a likelihood of success on the merits. Appellants' Plan is founded on a clearly erroneous reading of the law and appears likely to be overturned on appeal. Even if the Plan is not ultimately rejected, the order approving it would not be binding on Respondents or South Carolina policyholders. Both federal and State law support Respondents' position that insurers licensed by Respondents must obey the laws of this State.

The primary state insurance regulatory functions remain as they have been since the enactment of the McCarran-Ferguson [Act], in which "Congress . . . declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. "This allows . . . states to perform solvency oversight of the U.S. insurance industry and to regulate insurer behavior in the marketplace." *State Insurance Regulation*, National Association of Insurance Commissioners (NAIC), Center for Insurance Policy and Research (CIPR) (2011), <https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf>.

"State legislatures are the public policymakers that establish . . . broad policy for the

regulation of insurance by enacting legislation providing the regulatory framework under which insurance regulators operate. They establish laws which grant regulatory authority to regulators and oversee state insurance departments and approve regulatory budgets." *Id.* "State insurance regulatory systems are accessible and accountable to the public and sensitive to local social and economic conditions." *Id.* "State regulators protect consumers by ensuring that insurance policy provisions comply with state law, are reasonable and fair, and do not contain major gaps in coverage that might be misunderstood by consumers and leave them unprotected. The nature of the regulatory reviews of rates, rating rules and policy forms varies somewhat among the states depending on their laws and regulations." *Id.*

As noted, the South Carolina General Assembly has delegated its regulatory authority under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, to the Department. Pursuant to S.C. Code Ann. § 38-3-10 (2015), the General Assembly "established a separate and distinct department of this State, known as the Department of Insurance. The department must be managed and operated by a director appointed by the Governor upon the advice and consent of the Senate." S.C. Code Ann. § 38-3-60 (2015), "The director or his designee must follow the general policies and broad objectives enacted by the General Assembly regarding the operation of the insurance industry in this State." S.C. Code Ann. § 38-3-110 (2015) sets forth the Director's responsibilities, which include the duties to:

> (1) supervise and regulate the rates and service of every insurer in this State and fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be observed and followed by every insurer doing business in this State. Nothing contained in this title authorizes or requires a review by the department or the director of any order of the director's designee or the deputy director under the Administrative Procedures Act. This item does not grant any additional authority to the director or his designee with regard to insurance rates other than the ratemaking authority specifically granted to the director or his designee, or the Department of Insurance for certain kinds of insurance in other provisions of this title;

and:

> (2) see that all laws of this State governing insurers or relating to the business of insurance are faithfully executed and make regulations to carry out this title and all other insurance laws of this State, the enforcement or administration of which is not otherwise specifically provided for.

The legislature has also provided, pursuant to S.C. Code Ann. § 38-61-10 (2015), "All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State." And, as discussed in detail above, it has enacted and approved detailed and extensive statutes and regulations governing long-term care insurance policies and rates, including provisions for the approval of rates by the Department. *See, e.g.,* S.C. Code Ann. §§ 38-72-75 & -78; S.C. Code Regs. § 69-44.

In addition, our Supreme Court has held that because the authority to determine what insurance premium rates are just and reasonable is vested in the Department, not even courts should adjudicate what a reasonable rate might be in a collateral proceeding. *Cf. Temporary Services, Inc. v. American Intern. Group, Inc.*, 388 S.C. 348, 351, 697 S.E.2d 527, 529 (2010); § 2:34. Rates—Judicial review, 1 Couch on Ins. § 2:34 ("Ratemaking is generally not a judicial function. Indeed, many jurisdictions have adopted the filed rate doctrine which expressly prohibits courts from imposing rates different than those approved by the state insurance department.") To the extent Appellants might rely on the Pennsylvania court's ruling approving the Plan and the rate-setting scheme within, this would violate the filed rate doctrine. This doctrine preserves the stability, uniformity, and finality inherent in rates filed with the regulatory agency and what has been determined to be a reasonable rate by that agency. *Edge v. State Farm*

Mut. Auto. Ins. Co., 366 S.C. 511, 623 S.E.2d 387 (2005).

Pennsylvania law also militates in favor of Respondents. That state's highest court has made clear that as a creature of statute, an insurance commissioner acting as a rehabilitator "'can only exercise those powers which have been conferred upon it by the Legislature in clear and unmistakable language.'" *Aetna Cas. and Sur. Co. v. Com., Ins. Dept.*, 638 A.2d 194 (Pa. 1994) (quoting *Com., Human Relations Commission v. Transit Cas. Ins. Co.*, 387 A.2d 58, 62 (Pa. 1978)). *See also Koken v. Legion Ins. Co.*, 831 A.2d 1196 (Pa. Commw. Ct. 2003), *aff'd sub nom. Koken v. Villanova Ins. Co.*, 878 A.2d 51 (Pa. 2005). Appellants Rehabilitator and SDR have only those powers conferred upon them by 40 Pa. Stat. § 221.16. This statute prescribes the powers and duties of the rehabilitator, who has "all the powers of the directors, officers and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator" and "full power to direct and manage, to hire and discharge employees subject to any contract rights they may have, and to deal with the property and business of the insurer." *Id.* The emphasis in this language is on the rehabilitator's specific and limited role as manager. It does not contain "clear and unmistakable language" permitting a rehabilitator to unilaterally set new rates and policy terms nationwide. In fact, under Pennsylvania law, a rehabilitator's powers are sufficiently circumscribed as to prevent him from even amending an insurer's bylaws. *See Legion Ins. Co.*, 831 A.2d at 1227.

The legislative history of the receivership statutes of Pennsylvania (and other states, including South Carolina) confirms that rehabilitators, and the insurers they manage, must obey the insurance laws of the states in which they conduct the business of insurance. As noted, Pennsylvania's insurance company receivership laws, as well as those of South Carolina and many other states, are based on the Model Act. *Koken v. Reliance Ins. Co.*, 893 A.2d 70, 76, 83

(Pa. 2006). That Model, in turn, was based upon the comprehensive statutory scheme for the rehabilitation and liquidation of insolvent insurance companies that Wisconsin enacted in 1967. *Id.* at 83-84; *see* Act No. 89, Wis. Leg., 1967-1968 Sess., Ch. 89, Laws of 1967. The Pennsylvania Supreme Court has found "helpful" in interpreting the Pennsylvania receivership law "the Wisconsin legislature's comments in adopting what is, in essence, the blueprint for the Pennsylvania statute." *Koken*, 893 A.2d at 84.

The Wisconsin legislature included the following comments to Section 645.33 (Powers and Duties of the Rehabilitator) of the Act: "In this section, the rehabilitator is given only broadly stated powers. In general, this technique is adequate since he simply acts as manager subject to court approval . . .. Here the rehabilitator is merely made manager; under new management the insurer continues much as before. Rehabilitation must parallel the ordinary processes of management rather than the extraordinary actions in a liquidation." Act No. 89, Wis. Leg., 1967-1968 Sess., Ch. 89, Laws of 1967. The comment to Section 645.32(1) (Rehabilitation Orders) further explains that the Act "makes a more realistic and careful designation of the status of the rehabilitator than does [the older model, which] contemplates different categories of receivers, but does not adequately distinguish among them . . . [h]owever, in a rehabilitation proceeding, the rehabilitator is, in effect, simply the new management of the company." *Id.*

This explanation of legislative purpose, while not binding on this Court, "squares with what is conveyed by the plain language and structure of" 40 Pa. Stat. § 221.16. *See Koken*, 893 A.2d at 85. The rehabilitator has "all the powers of the directors, officers and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator" and "full power to direct and manage," but nothing more, and clearly not the power to set aside the sovereign

regulatory powers and legislative enactments of other states. *Id.* This conclusion also finds support in the NAIC's Receiver's Handbook for Insurance Company Insolvencies (Apr. 2021 ed.)[18], which lists among the "potential areas of concern and priority actions . . . to be addressed" by the receiver, "Rate increases needed on business and insurer's ability to secure those increases from regulatory authorities." *Id.* at 12.

In support of their claim to powers beyond those clearly prescribed by the applicable statutes, Appellants quote 26-161 Appleman on Ins. Law & Prac. Archive § 161.4 (2nd 2011) for the proposition that the "'usual powers granted to a rehabilitator include . . . cancelling insurance policies'" and that this alleged power is "separate from his assumption of the duties of officers and directors." What they neglect to add is that the footnote accompanying the quoted passage cites "Ga. Code Ann. § 33-37-12(c)" (part of Georgia's version of the Model Act) and "*Dardar v. Ins. Guar. Ass'n,* 556 So. 2d 272 (La. Ct. App. 1990) (rehabilitator may cancel policies subject to same rules and constraints as insurer cancelling policies)." 26-161 Appleman, § 161.4 at n.47

Significantly, Ga. Code Ann. § 33-37-12(c) reads "(c) Entry of an order of rehabilitation shall not constitute an anticipatory breach of any contracts of the insurer nor shall it be grounds for retroactive revocation or retroactive cancellation of any contracts of the insurer, *unless such revocation or cancellation is done by the rehabilitator pursuant to Code Section 33-37-13 [powers and duties of rehabilitator]*" (emphasis added), while its Pennsylvania counterpart, 40 Pa. Stat. 221.15(d) states only, "Entry of an order of rehabilitation shall not constitute an anticipatory breach of any contracts of the insurer," with no mention of the ability to cancel contracts.

Moreover, in *Dardar*, the Court of Appeal of Louisiana left no doubt as to the limited

[18] Available online at <https://content.naic.org/sites/default/files/publication-rec-bu-receivers-handbook-insolvencies.pdf>.

extent of a rehabilitator's powers, and not just as to contracts:

> We hold the rehabilitator, in an attempt to remove the causes and conditions which made the proceeding necessary, may cancel some or all of the issued policies. However, we hold that while the liquidation order cancels all policies as a matter of law, the rehabilitator is governed by [La. Stat. Ann. § 22:887 (formerly § 22:636)], which sets out the procedure for cancellation of a policy by the insurer. This is true because the Commissioner of Insurance in a rehabilitation order takes control of the insurer, has the authority to conduct business and only at his option may some or all of the issued policies be cancelled. Therefore, because the rehabilitator, in effect, steps into the shoes of the insurer, he is bound by the same constraints as is the insurer in the normal course of business. One of the constraints placed upon him is that he must follow the provisions of [La. Stat. Ann. § 22:887] in regards to cancelling an insured's policy.

Dardar, 556 So. 2d at 274 (emphasis added).

Even federal law casts doubt on the notion that receivership relieves an insurer of its obligations under state rate regulation laws. Insurers are not subject to the federal bankruptcy code, *see* 11 U.S.C. 109(b)(2); however, just as the liquidation of an insurer finds a parallel in Chapter 7 liquidation proceedings, a rehabilitation is roughly analogous to a reorganization under Chapter 11. Yet not even a federal bankruptcy court with national jurisdiction may set aside state rate regulation. Under 11 U.S.C. § 1129(a)(6) (confirmation of reorganization plan) provides that the bankruptcy court shall confirm a plan only if any "governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." Similarly, in 1993, when Congress briefly contemplated the establishment of "federally certified" insurers, subject to regulation by the national government, it took pains to preserve state insurance regulation "of rates and policy forms." H. R. 1290, 103rd Cong. § 207 (1993).

If Congress, which could have easily set aside the regulatory powers of the several states, refrained from doing so, then it would seem bold indeed for any state legislature to assert such far-reaching power. Indeed, the notion that a mere corporate reorganization administered by a

single state could bind the Nation and render null and void the enactments of nearly four-dozen state legislatures is utterly implausible. It is not even clear how the Pennsylvania legislature could accomplish such a feat if it tried. It cannot delegate to the rehabilitator powers it does not itself possess, and it has no authority whatsoever to regulate insurance rates in South Carolina. That rests solely with the South Carolina General Assembly, which has properly delegated its authority to Respondents.

SHIP policyholders' purchase and retention of their insurance policies contractually entitles them to the benefits of the bargain as set forth in their contract of insurance. *Fireman's Ins. Co. of Newark, New Jersey v. State Farm Mut. Auto. Ins. Co.*, 295 S.C. 538, 547, 370 S.E.2d 85, 90 (1988). Indeed, given their advanced age and the nature of the coverage, to pay for the substantial expenses associated with long-term illness often associated with age, this principle is of special importance. Moreover, as contracts formed in this State, they are subject to the statutes and regulations governing rate increases and policy changes as matter of law. *Ayres v. Crowley*, 205 S.C. 51, 30 S.E.2d 785 (1944) ("When parties enter into a contract, all the laws of the State that may relate to the subject matter of the contract are part of that contract.") *See also* S.C. Code Ann. § 38-61-10 (2015) ("All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State.")

Appellants contend that a rehabilitee may unilaterally impair contract rights, even if this results in dramatically increased rates and permanent and substantial reductions in policy benefits. In doing so, they ignore the law of their own jurisdiction. *E.g.*, *Grode v. Mutual Fire, Marine and Inland Ins. Co.*, 572 A.2d 798, 801, 805 (Pa. Commw. Ct. 1990), *aff'd in part,*

remanded in part sub nom. Foster v. Mutual Fire, Marine and Inland Ins. Co., 614 A.2d 1086, 1089, 1094 (1992). In that receivership, the Pennsylvania receivership court "formed [a] Policyholders Committee with the express intent of assuring that policyholders *first and foremost* suffered the least amount of harm resulting from the unfortunate series of events culminating in this insurance company's reorganization effort" and held that "contractual impairments that are insubstantial and reasonably necessary to implement a rehabilitation plan cannot be deemed unlawful." *Id.* at 801, 805 (italics in original). Transferring the burden of insolvency from large insurers and taxpayers onto elderly policyholders does not evince an "express intent of assuring that policyholders *first and foremost* suffered the least amount of harm resulting from the . . . insurance company's reorganization." *See id.* Massive increases in premium and decreases in benefits, permanently depriving policyholders of important guaranty association benefits in the almost certain event of liquidation is hardly "insubstantial," nor is usurping the sovereign regulatory power of dozens of other states or stripping away statutes and regulations specifically designed to protect policyholders.

In maintaining that South Carolina is bound by the Plan, Appellants also rely on the Full Faith and Credit Clause of the U.S. Constitution., which requires, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. iv, § 1. Appellants' reliance on the Full Faith and Credit Clause, however, is misplaced. This is not a matter of merely recognizing and enforcing a foreign judgment against the subject of that decree residing in this State. Here, Appellants developed an *ad hoc* scheme to achieve a desired result, an essential feature of which was exceeding the laws of both SHIP's domiciliary states and those of other states, and are now seeking Respondents' complicity, notwithstanding the clear commands of the General Assembly. What Appellants are advocating

is not full faith and credit, but, at worst, an unprecedented effort by a foreign insurer to impose its will on the very officials assigned to regulate it within this State and at best, an agreement by Respondents to unconstitutionally abdicate their statutory charge. As with comity, however, full faith and credit flows both ways. Without question, the South Carolina Insurance Law, S.C. Code Ann. §§ 38-1-10 *et seq.* is a "public Act" of this State. *Franchise Tax Bd. v. Hyatt,* 578 U.S. 171, 176 (2016) ("A statute is a 'public Act' within the meaning of the Full Faith and Credit Clause.")

Assuming, *arguendo*, that the Pennsylvania approval order is a "judgment" for purposes of full faith and credit, South Carolina is not obligated to obey it in contravention of its own laws. This is not a simple case of one state erroneously applying the law of another but nonetheless asking another state to enforce a judgment in the name of full faith and credit. Here, Appellants would require South Carolina to stand idly by while, in an extraordinary act of aggression, they substitute their own desires for acts of the State's General Assembly. As noted, the jurisdiction of the Pennsylvania receivership court and the extraterritorial reach of the rehabilitation proceedings is limited. *See, e.g., Smalls*, 293 S.C. at 371, 360 S.E.2d at 534; *see also Nat'l Heritage Life*, 656 A.2d at 259-260. Even the Pennsylvania court appears to admit that its order is binding only on those who appeared before it. Although that order is in places ambiguous as to its intended reach, the court does plainly state, "Once this Court renders a judgment on the Second Amended Plan, it is Maine, Massachusetts, and Washington [the three intervening regulators] that owe this Court's judgment full faith and credit." (Exh. 3 to Defs. Opp. to Mot. for TRO & Prelim. Inj. at p. 61.)

Moreover, full faith and credit requires only that every state give a foreign judgment the *res judicata* effect which that judgment would be accorded in the state which rendered it. *Durfee*

v. Duke, 375 U.S. 106 (1963). Under Pennsylvania law, application of *res judicata* requires that the two relevant proceedings possess several common elements, including identity of the parties. *Robinson Coal Co. v. Goodall*, 72 A.3d 685 (Pa. Super. 2013). Respondents were not parties to the Pennsylvania proceedings. The constitutional command of full faith and credit does not compel South Carolina to defer to a Pennsylvania court where the matter was neither fully and fairly litigated nor involved the relevant parties: "Before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree" and "[i]f that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." *Underwriters Nat'l Assurance Co.*, 455 U.S. at 705.

By erroneously attempting to expand rehabilitation beyond its statutorily-prescribed limits and to supplant the laws of South Carolina and other states, Appellants are advocating a "policy of hostility to the public Acts" of each of the forty-plus affected states, resulting in a direct injury to those states' sovereignty in violation of the Full Faith and Credit Clause. *See Franchise Tax Bd.,* 578 U.S. at 178-179 (state that disregards its own ordinary legal principles in rejecting another state's laws reflects a constitutionally impermissible "policy of hostility to the public Acts" of a sister state and lacks a "healthy regard" for another state's "sovereign status"); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Carroll v. Lanza*, 349 U.S. 408 (1955). "The very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *see also Alaska Packers Ass'n v. Indus. Accident Comm'n.*,

294 U.S. 532, 547 (1935).

Full faith and credit also need not be granted a judgment obtained in violation of procedural due process. *Purdie v. Smalls*, 293 S.C. 216, 359 S.E.2d 306 (Ct. App. 1987). An insurance policy is a contract between the insured and the insurance company. *Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 656 S.E.2d 17 (2007). Here, policyholders appear to have had their contract rights, including the statutory rights that are part of their policies, stripped of them without the benefit of due process. There is no evidence that policyholders, who were not respondents in the Pennsylvania proceedings, received proper service of process or were represented by class representatives or independent legal counsel. Appellants have yet to offer a justification for why policyholders, who Appellants would have bound by the Plan, were not afforded the process apparently due them. *Cf. Underwriters Nat. Assur. Co.*, 455 U.S. at 712 (example of policyholders being represented by legal counsel and class representatives who engaged in "extensive negotiations" with the insurer and the receiver); *Grode*, 572 A.2d at 801, 805, (formation of policyholders committee to protect policyholders, whose interests were "*first and foremost*"), *aff'd in part, remanded in part sub nom. Foster v. Mutual Fire, Marine and Inland Ins. Co.*, 614 A.2d at 1089, 1094 (same).

Moreover, although Appellants now claim that the approval order is final, in their previous filings they appear to concede that the Pennsylvania order is not a final order, but temporary or interlocutory, and thus not entitled to full faith and credit: "Even after approval . . . the Rehabilitator and the Commonwealth Court of Pennsylvania 'are obligated to interact in order to supervise, implement and regulate equitably the process engaged to rehabilitate an insolvent or financially hazardous insurer.' Thus, plan approval and implementation remain in the jurisdiction of the Commonwealth Court of Pennsylvania and within its supervision

throughout the proceedings." (Mem. of Law in Support of Defs. Mot. to Dismiss the Compl. filed Aug. 23, 2021, p.6.) *See Purdie*, 293 S.C. at 220, 359 S.E.2d at 308 (temporary or interlocutory order not entitled to full faith and credit).

A temporary injunction is necessary to preserve the *status quo ante* and prevent irreparable harm. Respondents are specifically charged by the South Carolina General Assembly to uphold the insurance laws of this State. Those laws are designed to protect the policyholders, whose contracts were formed in this State and are subject to its laws and regulations. Notwithstanding the clear mandate of South Carolina law, the insurer's past compliance with that law, the limited reach of the Pennsylvania proceedings, and the apparent defects in those proceedings, Appellants have made clear their position that SHIP is no longer subject to South Carolina law and have manifested their intention to not obey it and to move forward immediately with implementing changes to South Carolina policies and rates.

The State has a strong interest in protecting policyholders and ensuring that its laws are enforced. If those laws are not enforced, and Appellants are permitted to implement their Plan immediately, Respondents will have not upheld their statutory duty and policyholders will be permanently denied basic rights and suffer permanent and substantial economic harm. In short, Respondents would not have performed the very functions delegated to them by the General Assembly.[19]

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[19] Appellants never satisfactorily explain (nor could they) how limited *in rem* jurisdiction under which the rehabilitator takes possession and managerial control over an insurer domiciled within its borders vest them with unfettered power over not only policies and policyholders, but over states as well. Other than expediency, Appellants offer no legally plausible justification for their attempt to ignore the insurer's lawful obligations, the limits imposed on them by their own state's laws and the laws and sovereignty of this State. Although states routinely acknowledge and even enforce the lawful judgments of other states with regard to citizens of the various states, neither jurisdiction over a *res*, however broadly construed, nor full faith and credit permit one state to exercise supreme power over another, much less to compel this State's executive branch to disobey regulatory requirements prescribed by the South Carolina legislature in an

Even if Respondents were to fine SHIP or suspend or revoke its license, such after-the-fact measures would not reinstate any permanent or temporary loss of benefits or premium overcharges. The same is true of any lawsuit to recover damages for lost benefits or premium overcharges, which would also be impracticable given the advanced age and typically limited means of the victims. Similarly, a suit by Respondents for damages arising out of violation of this State's laws seems implausible, if not infeasible. An action at law by either Respondents or policyholders would also not undo the substantial confusion and disruption of the marketplace that would have occurred. *See Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 328, 721 S.E.2d 447, 450 (Ct. App. 2011) ("adequate" remedy at law is one that is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity). Conversely, Appellants need do no more than refrain from violating South Carolina law. If Appellants wish to implement a rate increase, they may do so in accordance with the laws of this State as they have done in the past, and they are free to do so again.

In the circuit court, Respondents made the requisite showing of a likelihood of success on the merits, and that they will suffer immediate, irreparable injury, with no adequate means of redress at law, in that, *inter alia*, without a temporary injunction, the *status quo* would be irretrievably altered with respect to the enforcement of the insurance laws, the order and stability of the insurance marketplace and the rights of policyholders Respondents have the statutory duty to protect. Therefore, the circuit court properly determined that Respondents were entitled to a

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exercise of that body's federally recognized power. *Cf. Clark v. Williard*, 294 U.S. 211, 215 (1935) ("Iowa may say that one who is a liquidator with title, appointed by her statutes, shall be so recognized in Montana with whatever rights and privileges accompany such recognition according to Montana law"; however, "Iowa may not say . . . that a liquidator . . . may set at naught Montana law.") Here, Appellants demand of Respondents nothing less than to abdicate their responsibilities under the constitution and laws of this State. This Respondents cannot and must not do, and it is not within the purview of Appellants to say otherwise.

temporary injunction pursuant to Rule 65, SCRCP.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully submitted,

August 1, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2020-CP-40-05802

Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance, Respondents,

v.

Jessica K. Altman, as Rehabilitator of Senior Health Insurance Company of Pennsylvania, Patrick H. Cantilo, as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania, and Senior Health Insurance Company of Pennsylvania in Rehabilitation, Appellants.

PROOF OF SERVICE OF INITIAL BRIEF OF RESPONDENTS

Respondents Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance, by and through counsel, hereby certify that a true and correct copy of the foregoing Initial Brief of Respondents has been served on Appellants, via electronic mail on the 1st day of August, 2022 (Delivery receipts attached hereto as Exhibit "A") as follows:

(Via Electronic Mail **(Delivered: 08/01/2022)**

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