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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning, Chief Administrative Judge, Fifth Judicial Circuit

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2020-CP-4005802

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

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

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BRIEF OF APPELLANTS

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Defendants-Appellants Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania and Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania ("Rehabilitator"), Special Deputy Rehabilitator Patrick Cantilo ("SDR"), and Senior Health Insurance Company of Pennsylvania ("SHIP," and, together with the Rehabilitator and SDR, the "SHIP Rehabilitation Appellants") hereby submit their Initial Brief of Appellants in this appeal from the preliminary injunction order entered on January 20, 2022 ("Preliminary Injunction Order") in favor of Plaintiffs-Respondents South Carolina Department of Insurance and the Director of the South Carolina Department of Insurance ("SCDOI Respondents").

For the reasons set forth herein, the SHIP Rehabilitation Appellants respectfully request that this Court vacate the preliminary injunction and, should this Court agree that jurisdiction is lacking, dismiss the SCDOI Respondents' Complaint entirely. As will be seen, this case presents the question of whether Plaintiffs, the SCDOI Respondents, can block and overturn those parts of a rehabilitation Plan with which they disagree, even after that Plan is approved by the Pennsylvania domiciliary court having jurisdiction over the Plan, through injunctions from Court of Common Pleas of Richland County, South Carolina. Just as the answer would have to be in the negative were this a South Carolina domiciliary rehabilitation subjected to injunctive challenge in another state's court, the answer here must also be no. The SCDOI Respondents are not aided by their efforts to portray this as an action to enforce South Carolina insurance law or regulations. The law and regulations on which they rely are aimed at insurers active in the marketplace whose assets are not within the *in rem* jurisdiction of another state's domiciliary rehabilitation court, as is the case for SHIP here.

I. STATEMENT OF ISSUES ON APPEAL

The SHIP Rehabilitation Appellants present the following issues for consideration on appeal:

1. Did the Court of Common Pleas err in finding that it possessed subject-matter jurisdiction sufficient to permit the issuance of a preliminary injunction as to SHIP's rehabilitation plan despite the language in S.C. Code § 38-27-60(b) prohibiting injunctions related to receivership matters outside of receiverships initiated by the South Carolina Department of Insurance?

2. Did the Court of Common Pleas err in finding that it possessed subject-matter jurisdiction sufficient to permit the issuance of a preliminary injunction having the effect of controlling SHIP's rehabilitation and the distribution of SHIP's assets when exclusive jurisdiction over such decisions is vested with the Commonwealth Court of Pennsylvania?

3. Should the SCDOI Respondents' Complaint be dismissed for lack of subject-matter jurisdiction as stated in Issue 1 or Issue 2?

4. Did the Court of Common Pleas err in finding that it possessed personal jurisdiction over the SHIP Rehabilitation Appellants sufficient to permit the issuance of a preliminary injunction where none of the defendants directed their actions to South Carolina and the exercise of jurisdiction would be unfair given defendants' status as state actors and SHIP's status in rehabilitation?

5. Did the Court of Common Pleas err in finding that SCDOI Respondents established irreparable harm in the absence of a preliminary injunction, where implementation will not harm policyholders and SCDOI Respondents offered no evidence beyond mere speculation as to the impact of the Plan on policyholders?

6. Did the Court of Common Pleas err in finding that SCDOI Respondents established a likelihood of success on the merits where full faith and credit principles will bar SCDOI Respondents' claims?

7. Did the Court of Common Pleas err in finding that SCDOI Respondents established a likelihood of success on the merits where SCDOI Respondents failed to show that the Plan violated South Carolina law because no cited South Carolina law applied to SHIP's actions in receivership?

8. Did the Court of Common Pleas err in finding that SCDOI Respondents established a likelihood of success on the merits because the Commonwealth Court correctly found that the Rehabilitator had the authority to implement SHIP's Plan, including through the policy modifications described therein?

II. STATEMENT OF THE CASE

Plaintiffs-Appellees South Carolina Department of Insurance ("SCDOI") and Acting Director of the SCDOI Michael Wise ("Acting Director Wise" and, together with SCDOI, the "SCDOI Respondents") commenced this action by the filing of a Complaint in the Court of Common Pleas of Richland County on December 10, 2020.[1] (*See generally* R. p. 50 (Complaint ("Compl.").) The Complaint seeks relief by way of a declaratory judgment and permanent injunction with respect to the implementation of a plan of rehabilitation for SHIP, an insurer domiciled in Pennsylvania that was and is currently in receivership proceedings in Pennsylvania pursuant to its statutory receivership scheme. (*See* R. pp. 50-51 74-75 (Compl. ¶ 3 (rehabilitation order); ¶ 5 (domiciled in Pennsylvania); ¶¶ 132-133 (declaratory relief) ¶¶ 134-136 (permanent injunction)).) *See also* 42 P.S. § 761(a)(3) and (b) (providing Commonwealth Court of Pennsylvania with original jurisdiction over all proceedings arising under Pennsylvania receivership law and recognizing that its jurisdiction is exclusive in this context); 40 P.S. § 221.16(d) (the Commonwealth Court of Pennsylvania may approve, disapprove, or modify a proposed rehabilitation plan).

A. SHIP's Rehabilitation Proceedings in Pennsylvania

SHIP is a long-term care insurance ("LTCI") company organized under the laws of the Commonwealth of Pennsylvania. (*See* R. p. 51 (Compl. ¶ 5); R. pp. 982, 983 (Declaration of Patrick H. Cantilo ("Cantilo Dec.") at ¶ 6 (submitted with the SHIP Rehabilitation Appellants' opposition to preliminary injunction ("Preliminary Injunction Opposition")).) On January 29,

[1] The Complaint was filed by former SCDOI Director Raymond Farmer and SCDOI, and Director Farmer remains the named Plaintiff. Acting Director Wise was appointed in April 2022 as the successor to former Director Raymond Farmer. For ease of reference and understanding, the SHIP Rehabilitation Appellants will refer to SCDOI, Director Farmer, and Acting Director Wise as the "SCDOI Respondents" unless reference to a specific Plaintiff-Appellee is necessary.

2020, as a result of its long financial decline, the Commonwealth Court placed SHIP in rehabilitation under the Pennsylvania Insurance Department Act, 40 Pa. Stat. §§ 221.1–221.63 ("PID Act"). (*See* R. p. 50 (Compl. ¶ 3); R. p. 1045 (Preliminary Injunction Opposition Exhibit 1, Rehabilitation Order).) By law, rehabilitation proceedings are designed "to protect the interests of insureds, creditors, and the public generally." 40 P.S. §§ 221.4–221.5. South Carolina has adopted a similar scheme with a similar purpose. *See* S.C. Code § 38-27-30 (purpose of receivership laws is "the protection of the interests of insureds, claimants, creditors, and the public generally."). On May 17, 2021, the Commonwealth Court began a week-long hearing on the plan which included certain intervening state regulators from Maine, Massachusetts, and Washington (the "Intervening Regulators"), who argued that the proposed plan did not benefit policyholders and improperly usurped state rate making authority. (R. pp. 984-85 (Cantilo Dec. ¶ 17); *see also* R. pp. 1057, 1101-1136 (Preliminary Injunction Opposition, Exhibit 3, Order and Opinion Approving Plan ("Approval Order") (describing arguments)).) On August 24, 2021, the Commonwealth Court of Pennsylvania entered its order and opinion approving the proposed rehabilitation plan for SHIP ("Approved Plan") and authorizing the Rehabilitator to offer policyholders various options for modifying the premium rates and benefits associated with their policies.[2] (*See* R. p. 1057 (Approval Order); *see also* R. p. 985 (Cantilo Dec. ¶ 18).)

The Approval Order is now on appeal to the Supreme Court of Pennsylvania, but the matter has not been stayed and the Rehabilitator is moving forward with implementation. (R. p. 985 (Cantilo Dec. ¶ 22).) On October 1, 2021, the Intervening Regulators filed a motion in the Commonwealth Court of Pennsylvania seeking a stay of implementation of the Approved Plan

[2] The Approval Order was amended in minor ways in November 2021; the Approval Order submitted to the Court of Common Pleas is the amended order.

pending appeal. (R. p. 985 (Cantilo Dec. ¶ 23).) That motion was denied, and the Court found that a stay should not be entered because, *inter alia*, delay was damaging for policyholders and the prospects of the plan. (R. p. 986 (Cantilo Dec. ¶ 24); R. p. 1144 (Preliminary Injunction Opposition, Exhibit 4, Stay Denial Opinion).) Then, on November 8, the Intervening Regulators filed a motion in the Supreme Court of Pennsylvania seeking a stay. (R. p. 986 (Cantilo Dec. ¶ 26).) The Intervening Regulators primarily sought to prevent the Rehabilitator from sending and accepting opt-in and opt-out decisions by state regulators that were due for submission by November 15, 2021. (R. p. 986 (Cantilo Dec. ¶ 25).) The Intervening Regulators did not seek expedited relief, however, and the opt-in and opt-out deadline passed on November 15, 2021 without an order of the Supreme Court. (R. p. 986 (Cantilo Dec. ¶ 27).) The appeal remains pending, and implementation is moving forward.

B. The South Carolina Proceedings

After the SCDOI Respondents filed their Complaint, the SHIP Rehabilitation Appellants removed to federal court on the basis of diversity, but the matter was remanded after the United States District court for the District of South Carolina concluded that it "necessarily lack[ed] original jurisdiction over a case over which the Commonwealth Court of Pennsylvania has exclusive jurisdiction." *Farmer v. Altman*, No. CV 3:21-00097-MGL, 2021 WL 3223114, at *3 (D.S.C. July 29, 2021). The matter proceeded thereafter in the Court of Common Pleas for Richland County.

Through their Complaint, the SCDOI Respondents seek to prohibit the Rehabilitator from implementing the Plan of Rehabilitation for SHIP ("Approved Plan"), which was approved by the Commonwealth Court of Pennsylvania on August 24, 2021. (R. p. 1057 (Approval Order)).[3] In

[3] The Complaint was filed prior to the Approval Order.

their Complaint, SCDOI Respondents allege that the rehabilitation plan proposed (and now approved) is unlawful and that its implementation will violate South Carolina law governing the regulation of insurance rates. (*See generally* R. p. 50 (Compl.).) Specifically, SCDOI Respondents claimed that the Approved Plan was invalid and unenforceable as a result of the rate and benefit modification process in the Approved Plan, which the Commonwealth Court of Pennsylvania approved and determined was in service of certain public policy goals favoring the rehabilitation of insurers, equity amongst policyholders, and the ability of policyholders to make their own decisions regarding policy terms. (R. pp. 71-72 (Compl. ¶ 121); *see generally* R. p. 1057 (Approval Order).) The options available to policyholders under the Approved Plan are determined through one of two mechanisms controlled in the first instance by the Issuing State:

> a. An Issuing State could actively or passively "opt-in" to the premium rate setting provisions of the Approved Plan, in which case the Rehabilitator would offer a defined set of policy options determined by the actuarially justified methods described in the Approved Plan; or
>
> b. An Issuing State could "opt-out" of that portion of the Approved Plan, in which case the chief insurance regulator of that state would be presented with premium rates for review and approval, and the options available to policyholders of policies issued in that state would be determined based on the rates approved by that insurance regulator.

(R. p. 1081 (Approval Order p. 22).) The deadline to "opt-out" of the Approved Plan was November 15, 2021. (R. p. 985 (Cantilo Dec. ¶ 19).) For purposes of the Approved Plan, South Carolina is an "opt-in" state because it did not opt-out: SCDOI Respondents' Complaint does not allege that South Carolina is an opt-out state, and no evidence was provided establishing that South Carolina is an opt-out state. Should the injunction be vacated and no further injunction be entered, policyholder election material will be sent to the holders of policies issued in South Carolina. (R. p. 985 (Cantilo Dec. ¶ 20).) Importantly, with or without an injunction, the Rehabilitator has stated that no policy will be modified until the earlier of a decision by the Supreme Court of Pennsylvania

with respect to the appeal of the Approval Order or October 1, 2022. (*See* Annual Report filed in SHIP Proceedings on March 31, 2021, at 8, *available at* http://shorturl.at/bfDQZ.)[4]

The SHIP Rehabilitation Appellants oppose the declaratory and injunctive relief requested by the SCDOI on a number of grounds, including: the Court of Common Pleas lacks subject-matter jurisdiction and personal jurisdiction; the Commonwealth Court of Pennsylvania has exclusive jurisdiction over SHIP's assets and thus no order can be entered which would require specific disposition of those assets in contravention of the Approved Plan; the SCDOI Respondents' Claims are barred by full faith and credit principles; and the SCDOI Respondents' cannot show that the Approved Plan is improper under South Carolina law—or Pennsylvania law—assuming that jurisdiction is properly exercised and the SCDOI Respondents' claims are not barred.

The SHIP Rehabilitation Appellants filed a motion to dismiss on August 23, 2021 raising arguments as to the lack of jurisdiction, failure to state a claim, and mandatory dismissal under Rule 12(b)(8).[5] (*See generally* R. p. 128 (Motion to Dismiss).) Following the Commonwealth Court's approval of SHIP's rehabilitation plan—which coincidentally occurred the next day, August 24, 2021—the SHIP Rehabilitation Appellants filed a supplement to bring the Approval Order to the attention of the Court. (*See generally* R. p. 780 (Motion to Supplement).) The SCDOI Respondents did not file a response to the SHIP Rehabilitation Appellants' motion to dismiss or

[4] This Court can take judicial notice of the Annual Report and the Rehabilitator's statement therein that policy modifications are delayed. *See* S.C.R.Evid. 201 (permitting judicial notice of fact at any stage of the proceedings when fact in question is not subject to reasonable dispute and capable of determination by resort to sources that cannot be questioned)

[5] The SHIP Rehabilitation Appellants raised certain other arguments regarding the premature nature of the SCDOI Respondents' Complaint, but those arguments were mooted by the Commonwealth Court's Approval Order.

motion to supplement. No briefing schedule for the Motion to Dismiss was set, and no hearing date was set.

Instead, on November 12, 2021, the SCDOI Respondents filed a Motion for a Temporary Injunction ("Injunction Motion") and then, on November 15, the SCDOI Respondents filed a Motion for Temporary Restraining Order. Four days later, on November 19, 2021, Judge L. Casey Manning entered a temporary restraining order and scheduled a hearing for November 29, 2021. (*See* R. p. 1 (Temporary Restraining Order).) By agreement—but without waiving any claims or defenses—the parties agreed to reschedule the hearing. (*See* R. p. 8 (Consent Order).) The parties thereafter submitted briefs for and against the preliminary injunction, and later appeared before Judge Manning on December 15, 2021, as ordered. (*See* R. p. 947 (Amended Notice of Hearing); R. p. 990 (Transcript of Proceedings of December 15, 2021 ("Injunction Hearing Transcript")).)

No witnesses appeared at the preliminary injunction hearing and no exhibits were introduced. (*See* R. p. 991 (Injunction Hearing Transcript p. 2).) The SCDOI Respondents attached to their Injunction Motion selected portions of a transcript from the Pennsylvania proceedings (R. p. 896), selected portions of the SHIP rehabilitation plan as proposed (R. p. 905), and a letter dated September 30, 2021, related to opt-out elections (R. p. 930). In their opposition briefing, the SHIP Rehabilitation Appellants attached a Declaration of the SDR, Patrick Cantilo, as well as the Order of Rehabilitation for SHIP (R. p. 1045), the court-approved Form of Notice for the rehabilitation proceedings sent to all policyholders and interested parties (R. p. 1051), the Approval Order (R. p. 1057) a Commonwealth Court order denying a stay of implementation (R. p. 1144), the application filed by certain intervening state regulators seeking a stay of implementation (R. p. 1158), and an *amicus* brief filed in the Supreme Court of Pennsylvania joined by the SCDOI Respondents (R. p. 1785).

Following the hearing on December 15, 2021, Judge Manning directed the parties to submit proposed orders. (*See* R. p. 12.) Then, on January 20, 2022, Judge Manning entered the Preliminary Injunction Order adopting entirely the position of the SCDOI Respondents and thus enjoining the SHIP Rehabilitation Appellants from taking any steps to implement the Approved Plan or communicate with policyholders regarding the Approved Plan. (*See* R. p. 15 (Preliminary Injunction Order)). Appellants timely filed a notice of appeal from the Preliminary Injunction Order on February 22, 2022.[6]

C. Post-Appeal Proceedings

Following the Notice of Appeal taken from the Preliminary Injunction Order, the Court of Common Pleas proceeded to hear argument on the SHIP Rehabilitation Appellants' Motion to Dismiss. On April 15, 2022, relying on the entry of Judge Manning's Preliminary Injunction Order and the pendency of this appeal, Judge William P. Keesley entered an order denying the Motion to Dismiss and staying further proceedings until the resolution of this appeal, with leave to refile a Motion to Dismiss following an order of this Court should the matter not be terminated. (*See* R. p. 37 (Order Denying Defendants' Motion to Dismiss, Affirming Automatic Stay, and Granting Leave to Reassert Motion Following Appellate Court Ruling(s)).) Judge Keesley concluded that addressing the merits of the motion to dismiss would require (a) overruling Judge Manning's Preliminary Injunction Order in violation of S.C.R.C.P. 43(l), and (b) evaluating issues on appeal without remand in violation of S.C.R.A.P. 205. (*See id.* R. p. 44.)

[6] The thirtieth day following the Preliminary Injunction Order fell on Saturday, February 19, 2022. Monday, February 21, 2022 was George Washington's Birthday / President's Day, a federal and state holiday. As a result, the deadline to file a notice of appeal fell upon the next business day, Tuesday, February 22, 2022. *See* S.C.R.A.P. 203 (deadline to file notice of appeal); S.C.R.A.P. 263 (regarding computation of time).

III. STANDARD OF REVIEW

The SHIP Rehabilitation Appellants present threshold questions of subject-matter jurisdiction and personal jurisdiction. "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Whether a court has subject matter jurisdiction is a question of law we review de novo. *Deborah Dereede Living Trust dtd Dec. 18, 2013 v. Karp*, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019) (quotation marks and internal citation omitted). With respect to personal jurisdiction, the Court on appeal examines "the facts of each particular case" to determine whether the trial court's decision is "unsupported by the evidence or influenced by an error of law." *Hidria, USA, Inc. v. Delo*, 415 S.C. 533, 539, 783 S.E.2d 839, 842 (Ct. App. 2016). The SCDOI Respondents have the burden of establishing a *prima facie* case of personal jurisdiction through their complaint or in affidavits. *Id.*

Assuming that jurisdiction is proper here, the SHIP Rehabilitation Appellants challenge the entry of the Preliminary Injunction Order as improper, and this Court should vacate the Preliminary Injunction if it concludes that the Court of Common Pleas abused its discretion. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005). An abuse of discretion arises if a court's conclusions are unsupported by the evidence or controlled by an error of law. *State v. King*, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017).

IV. SUPPLEMENTAL BACKGROUND FOR ARGUMENT

A. Pennsylvania and South Carolina both regulate distressed insurers through statutory schemes providing exclusive authority to the state of domicile.

The Pennsylvania Insurance Department Act ("PID Act") establishes the Commonwealth Court of Pennsylvania as the exclusive forum for judicial review of the Rehabilitation proceedings. *See Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1091 (Pa. 1992) (internal quotation omitted); 40 P.S. §§ 221.4–221.5. The Commonwealth Court assumed jurisdiction over

SHIP by placing it in rehabilitation January 29, 2020. (R. p. 983 (Cantilo Dec. ¶ 8); *see also* R. p. 1045 (SHIP Rehabilitation Order).) That Court also affirmed the authority of Defendant Michael Humphreys, Acting Insurance Commissioner for Pennsylvania, to act as Rehabilitator for SHIP by "tak[ing] possession of the assets of the insurer" and "administer[ing] them under orders of the [Commonwealth Court of Pennsylvania]." 40 P.S. § 221.15(c).[7] The Rehabilitator is granted broad powers to effectuate equitably the intent of rehabilitation—that is, "to minimize the harm to *all* affected parties"—under the PID Act. *Foster*, 614 A.2d at 1094 (emphasis in original). The PID Act further provides that the Rehabilitator "may appoint a special deputy who shall have all the powers of the rehabilitator" granted under the Act. 40 P.S. § 221.16. Defendant Patrick H. Cantilo was duly appointed as Special Deputy Rehabilitator pursuant to this authority. (R. p. 983 (Cantilo Dec. ¶ 9); R. p. 1045, 1049 (SHIP Rehabilitation Order ¶ 14).)

South Carolina has its own corresponding statutory scheme of rehabilitation for insolvent insurers domiciled in South Carolina, the Insurers Rehabilitation and Liquidation Act, S.C. Code §§ 38-27-10, *et seq.* (the "IRLA"). Much like the PID Act, the IRLA provides the Director of the South Carolina Department with broad powers as rehabilitator to "take any action he considers necessary or appropriate to reform and revitalize" insolvent South Carolina insurance companies. *Id.* § 38-27-330(b); *accord id.* § 38-27-20 (IRLA "must be liberally construed to effect" its stated purpose). Also, like the PID Act, the IRLA is designed to broadly protect "the interests of insureds, claimants, creditors, and the public generally," *id.* § 38-27-30, and allows the Director to apply for

[7] The Order provides for then-Commissioner Jessica Altman and her successor Commissioners to serve as Rehabilitator for SHIP. (*See* R. p. 1045 (SHIP Rehabilitation Order ¶ 2).) Acting Commissioner Humphreys is the successor to former Commissioner Altman, and thus the successor Rehabilitator for SHIP.

restraining orders and injunctions to prevent "interference with the receiver or with a [rehabilitation] proceeding" commenced in South Carolina under the IRLA. *Id.* § 38-27-70.

B. The SHIP Rehabilitation Appellants provided notice and an opportunity to be heard to all policyholders as well as other state regulators, and the SCDOI Respondents' arguments were considered and rejected as a result.

Upon being placed in rehabilitation, notice was provided to, *inter alia*, all policyholders—including those residing in or with policies issued in South Carolina—as well as insurance regulators across the country. (R. pp. 983-84 (Cantilo Dec. ¶ 10); *see also* R. p. 1051 (Preliminary Injunction Opposition Exhibit 2, Form of Notice approved by Commonwealth Court).) Insurance regulators, including former Director Farmer, were already familiar with the possibility of rehabilitation, as the Rehabilitator and SDR Cantilo made numerous outreach efforts prior to filing the application for rehabilitation in the Commonwealth Court. (R. p. 984 (Cantilo Dec. ¶ 11).)

On June 12, 2020, the Commonwealth Court of Pennsylvania ordered that any interested party could offer input on any proposed rehabilitation plans by submitting an Informal Comment or by filing a Formal Comment, and further ordered that any interested party could seek leave to intervene in the proceedings. (R. p. 984 (Cantilo Dec. ¶ 12).) Insurance regulators from five states filed formal comments, and insurance regulators from three states intervened. (R. p. 984 (Cantilo Dec. ¶ 13).) SCDOI Respondents participated in SHIP's rehabilitation proceeding but did not seek to intervene, instead submitting separate comments opposing both the Initial Rehabilitation Plan and the Amended Plan to put their arguments before the Commonwealth Court. (R. p. 984 (Cantilo Dec. ¶¶ 14, 15).) According to SCDOI Respondents, they "fully supported the positions taken by the three intervening state insurance regulators" in the Commonwealth Court of Pennsylvania. (R. p. 984 (Cantilo Dec. ¶ 16).)[8]

[8] The "three intervening state insurance regulators" are the chief insurance regulators of Maine, Massachusetts, and Washington, referred to herein as the "Intervening Regulators."

After the plan was approved, the SCDOI Respondents filed a motion to be heard as *amici* in the Supreme Court of Pennsylvania on the Intervening Regulators' stay request and possibly on the merits. (R. p. 986 (Cantilo Dec. ¶ 29); R. p. 1785 (Preliminary Injunction Opposition Exhibit 6, *Amici* Filing).) The proposed *amicus* brief regarding a stay was authored by counsel for SCDOI Respondents and for the chief insurance regulator of Louisiana. (*See* R. p. 1812 (*Amici* Filing, Brief p. 6).) As SCDOI Respondents and the other proposed *amici* explained, they joined entirely in the arguments set forth by the Intervening Regulators regarding the stay. (R. p. 1788 (*Amici* Filing, Motion p. 4).) Thus, the SCDOI Respondents stated their agreement with the Intervening Regulators' position that any alleged harm to policyholders from receiving election packages and making policy elections is and would be reparable. (*See* R. pp. 1203-04 (Preliminary Injunction Opposition Exhibit 5, Intervening Regulators' Application for Stay p. 40-41).)

V. ARGUMENT

The SCDOI Respondents' Complaint and preliminary injunction motion were part of an unusual challenge to a court-approved rehabilitation plan and the state officials implementing that plan. The SHIP Rehabilitation Appellants ask this Court to vacate the Preliminary Injunction and bring an end to the SCDOI Respondents' improper efforts to assert control over SHIP, its rehabilitation, and its policyholders. It is well established, however, that an injunction "is a drastic remedy' that may be issued only "to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907–08 (S.C. 2004). "The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001) (citation omitted). Even if an injunction seems appropriate, a court must have first resolved whether it has subject matter jurisdiction over the underlying claims at issue. *See Hunt v. Avondale Mills, Inc.*, 385 S.C. 616, 616, 686 S.E.2d 190

(S.C. 2009) (vacating temporary injunction because "the circuit court did not have subject matter jurisdiction to entertain this matter"). Based on these principles, the Court of Common Pleas erred in entering the Preliminary Injunction Order, for three primary reasons.

First, the Preliminary Injunction Order must be vacated and this matter must be dismissed because South Carolina courts are without subject matter jurisdiction over the claims at issue in the Complaint. South Carolina statutes limit jurisdiction in receivership matters, and the SCDOI Respondents' Complaint does not fall within the type of permitted injunction requests. Even absent that limitation, the Commonwealth Court of Pennsylvania has exclusive jurisdiction of SHIP's rehabilitation and the distribution of its assets, and, as a result, any request for preliminary or permanent relief that purports to or will control the distribution of SHIP's assets is beyond the Court of Common Pleas' jurisdiction.

Second, South Carolina courts also lack personal jurisdiction over the SHIP Rehabilitation Appellants with respect to the claims asserted by SCDOI Respondents. The Complaint does not allege any acts of the SHIP Rehabilitation Appellants, which are targeted to South Carolina, and, instead, the SCDOI Respondents conflate the proper exercise of the Commonwealth Court of Pennsylvania's undisputed exclusive *in rem* jurisdiction over SHIP's assets with requisite minimum contacts on which personal jurisdiction over the Rehabilitator and Special Deputy Rehabilitator may be based. This proper exercise of power by a state court or state officer does not equate to minimum contacts upon which personal jurisdiction over the Rehabilitator and Special Deputy Rehabilitator can be grounded.

Third, even if the Court of Common Pleas had jurisdiction, it erred in finding that the SCDOI Respondents satisfied the requirements for a preliminary injunction, in significant part because the SCDOI Respondents failed to offer allegations or evidence sufficient to establish

irreparable harm from plan implementation. The SCDOI Respondents also failed to show a likelihood of success, and the Court of Common Pleas erred in its application of full faith and credit principles when holding otherwise.

For the Court of Common Pleas to grant any temporary or permanent relief to SCDOI Respondents, it must challenge the authority of Pennsylvania courts and Pennsylvania officials, subjecting South Carolina officials to similar challenges in other states exceeding its jurisdictional authority, disrupting the rehabilitation of SHIP to the detriment of policyholders in South Carolina and nationwide. Policyholders are not a party to this action and there is no evidence—unlike the rehabilitation proceedings—that they even received notice of its filing. In keeping with established national insurance regulation practice, this matter should have been and was resolved in the rehabilitation proceedings in Pennsylvania, where a single court and a single regulator are tasked with ensuring the equitable and fair treatment of all policyholders and other stakeholders. Thus, and as set forth below, the preliminary injunction must be vacated and because jurisdiction is lacking, the Complaint matter must be dismissed.

A. The Court of Common Pleas lacks subject-matter jurisdiction in this case.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Deborah Dereede Living Trust dtd Dec. 18, 2013*, 427 S.C. at 346, 831 S.E.2d at 441. A trial court must have subject-matter jurisdiction over the underlying claims at issue to enter even temporary relief. *See Hunt v. Avondale Mills, Inc.*, 385 S.C. 616, 616, 686 S.E.2d 190 (S.C. 2009) (vacating temporary injunction because "the circuit court did not have subject matter jurisdiction to entertain this matter"); *Floyd v. Horry Cty. Sch. Dist.*, 351 S.C. 233, 569 S.E.2d 343, 344–45 (2002) (affirming decision vacating temporary injunction because circuit court lacked subject matter jurisdiction over underlying claims); *accord* 43A C.J.S. INJUNCTIONS § 314 ("A trial court may not grant a preliminary injunction if it lacks

subject matter jurisdiction over the claim before it."); 42 AM. JUR. 2D INJUNCTIONS § 217 ("If a trial court lacks subject matter jurisdiction over a case, it similarly lacks jurisdiction to render even a temporary injunction."). The Court of Common Pleas entered its Preliminary Injunction Order despite the absence of subject-matter jurisdiction over this dispute, and, as a result, the preliminary injunction must be vacated and the matter must be dismissed.

1. South Carolina's receivership statutes prohibit the exercise of subject-matter jurisdiction over the injunctive relief sought by the SCDOI Respondents.

The Court of Common Pleas is without jurisdiction to entertain a collateral challenge to the Commonwealth Court of Pennsylvania's rehabilitation proceedings. In South Carolina, the Insurers Rehabilitation and Liquidation Act, S.C. Code §§ 38-27-10, *et seq.* (the "IRLA") governs all matters related to insurance receivership, including rehabilitation and liquidation proceedings for insurers domiciled in South Carolina and elsewhere. Under the IRLA, South Carolina state courts only have jurisdiction "to entertain, hear, or determine" rehabilitation proceedings commenced by the Director of the South Carolina Department of Insurance ("SCDOI"), S.C. Code § 38-27-60(a), not rehabilitation proceedings commenced by the chief insurance regulators of other states, as in SHIP's case. The SCDOI director's authority to commence IRLA proceedings is limited to initiating the receivership of "a domestic insurer or an alien insurer domiciled in [South Carolina]." *See* S.C. Code § 38-27-310 (Director authorized to petition for rehabilitation); S.C. Code § 38-27-360 (Director authorized to petition for liquidation of "a domestic insurer or an alien insurer domiciled in [South Carolina]"); S.C. Code § 38-27-220 (Director may initiate delinquency proceedings for "a domestic insurer").[9] Thus, the Director has not—and cannot—commence IRLA proceedings as to SHIP.

[9] The Director's authority as to non-domiciliary insurers is very narrow. He may seek appointment as a conservator or liquidator "[i]f a domiciliary liquidator has not been appointed" and other

Importantly, *no* provision of the IRLA authorizes the SCDOI Respondents to seek the injunctive and declaratory relief set forth in their Complaint. To the contrary, South Carolina Code section 38-27-70 authorizes certain "Injunctions and orders" *only* for "receiver[s] appointed in a proceeding under [the IRLA]," and SCDOI Respondents are not receivers appointed in an IRLA proceeding. As a result, the Court of Common Pleas lacks jurisdiction over SCDOI Respondents' claims because the IRLA expressly prohibits the exercise of jurisdiction over injunctive relief except as authorized by the IRLA, and the IRLA does not authorize SCDOI Respondents' claims. As stated in S.C. Code § 38-27-60(b).

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

That is the precise—and prohibited—relief that the SCDOI Respondents now seek in this Court: declaratory and injunctive relief relating to rehabilitation proceedings commenced in Pennsylvania by the Insurance Commissioner for Pennsylvania for an insolvent insurer domiciled in Pennsylvania. The relief SCDOI Respondents seek would be far more than "incidental to" or "relating to" SHIP's Rehabilitation proceedings: if granted, it would eviscerate that proceeding entirely for South Carolina policyholders and residents by declaring SHIP's present Rehabilitation Plan "invalid and unenforceable" and by "permanently enjoining the enforcement or implementation of any order of the Commonwealth Court or any plan or directive of the [SHIP

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requirements are met. *See* S.C. Code Ann. § 38-27-910 (conservator); S.C. Code Ann. § 38-27-920 (liquidator). Alternatively, he may seek appointment as an ancillary liquidator "[i]f a domiciliary liquidator has been appointed for an insurer not domiciled in [South Carolina]." S.C. Code Ann. § 38-27-940 (ancillary formal proceedings). The SCDOI Respondents have not sought appointment under those statutes, however, and thus the SCDOI Respondents cannot obtain any orders under any authority that could exist even if they were so appointed.

Rehabilitation Appellants]" seeking to implement that Plan. (R. pp. 74-75 (Compl. ¶¶ 133, 135).)[10] Accordingly, the Court of Common Pleas was without jurisdiction under the IRLA to entertain the SCDOI Respondents' claims, making the preliminary injunction void and the Complaint subject to immediate dismissal.

2. South Carolina courts lack subject-matter jurisdiction over SHIP's rehabilitation and over claims that determine the distribution of SHIP's assets because the Pennsylvania courts have exclusive jurisdiction over such matters.

Even if the IRLA did not prohibit jurisdiction over the SCDOI Respondents' claims, subject-matter jurisdiction would be lacking here because the IRLA codifies and reflects the nationwide consensus that an insurer's domiciliary regulator and court system have exclusive authority over rehabilitation matters and the distribution of the distressed insurer's assets. SHIP's rehabilitation proceedings—and any challenges to any provisions in SHIP's Rehabilitation Plan—are within the exclusive jurisdiction of the Commonwealth Court of Pennsylvania, just as South Carolina courts have exclusive jurisdiction over their own domiciliary rehabilitation proceedings commenced pursuant to the IRLA. *See* 42 P.S. § 761(a)(3) and (b) (providing Commonwealth Court of Pennsylvania with original jurisdiction over all proceedings arising under the PID Act and recognizing that its jurisdiction is exclusive in this context); 40 P.S. § 221.16(d) (the

[10] *Smalls v. Weed*, 293 S.C. 364, 360 S.E.531 (Ct. App. 1987) does not hold otherwise. In *Smalls*, the Court of Appeals found that an individual claimant could bring causes of action against an insurer in liquidation in Tennessee for breach of contract, bad faith refusal to pay insurance benefits, and outrage in South Carolina. The Court permitted the claims to move forward because the insurer was not in liquidation, and thus the liquidation claim procedures did not apply, and because the breach of contract and related actions were not relief "incidental to or relating to" receivership proceedings because the claims were as to an insurer "which happens to be in rehabilitation." *Id.* at 371, 360 S.E.2d at 534. The opposite is true here: the SCDOI Respondents' claims against the SHIP Rehabilitation Appellants arise solely because of SHIP's rehabilitation proceedings, in which the Court overseeing that rehabilitation authorized the very action of which the SCDOI Respondents now complain—*i.e.*, implementation of a nationwide rate and benefit modification procedure—that is at the center of those rehabilitation proceedings.

Commonwealth Court of Pennsylvania may approve, disapprove, or modify a proposed rehabilitation plan). No other court may interfere with the Commonwealth Court of Pennsylvania's exclusive jurisdiction of SHIP's Rehabilitation proceeding and adjudicate the propriety of the Rehabilitation Plan. *See Ballesteros v. New Jersey Prop. Liab. Ins. Guar. Ass'n*, 530 F. Supp. 1367, 1371 (D.N.J. 1982) (recognizing that in insurer delinquency proceedings, "other courts, except when called upon by the court of primary jurisdiction for assistance, are excluded from participation") *aff'd sub nom. Appeal of Ballesteros*, 696 F.2d 980 (3d Cir. 1982); *accord All Star Advert. Agency, Inc. v. Reliance Ins. Co.*, 898 So. 2d 369, 382–83 (La. 2005) (holding because Pennsylvania is a reciprocal state under Louisiana's receivership statutes, Louisiana courts are deprived of subject matter jurisdiction over matters over which a Pennsylvania receivership court has asserted exclusive control). Indeed, "[t]he need for giving one state exclusive jurisdiction over delinquency proceedings has long been recognized in the courts[.]" *Ballesteros*, 530 F. Supp. at 1371 (collecting cases).[11]

The Commonwealth Court of Pennsylvania's exclusive jurisdiction to resolve questions of its own jurisdiction and to determine the propriety of the proposed Rehabilitation Plan is built into the statutory scheme and common law because it is necessary to successfully rehabilitate insurers like SHIP. It would be entirely unworkable and flatly contradictory to Pennsylvania's

[11] For this reason, federal courts generally abstain from exercising jurisdiction in cases involving ongoing rehabilitation proceedings. *E.g.*, *Brandenburg v. Seidel*, 859 F.2d 1179, 1191 (4th Cir. 1988) (abstaining from exercising jurisdiction because Maryland's "comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations" would be "greatly impeded by the involvement of more than one decision-making authority"), *overruled on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Eden Fin. Grp., Inc. v. Fid. Bankers Life Ins. Co.*, 778 F. Supp. 278, 283 (E.D. Va. 1991) (declining to exercise jurisdiction because "federal courts must defer to the exclusive jurisdiction of state proceedings over the rehabilitation of insurance companies"). The Court of Common Pleas should have reached a similar outcome.

comprehensive scheme for rehabilitation—and South Carolina's own corresponding statutory scheme—if each state could collaterally challenge SHIP's rehabilitation proceeding. The proper mechanism for the SCDOI Respondents to challenge the Rehabilitation Plan or its implementation has always been for the SCDOI Respondents to participate in the Rehabilitation Proceedings, not to collaterally challenge those proceedings in their own state court. *See Hunt*, 385 S.C. at 616, 686 S.E.2d at 190 (Circuit court lacked subject matter jurisdiction to issue injunction where "statutes clearly provide a mechanism by which respondents could have and should have raised the issue" in separate forum.). Indeed, the SCDOI Respondents have implicitly recognized this through their support of the Intervening Regulators in SHIP's rehabilitation and by joining an *amicus* brief filed in the Supreme Court of Pennsylvania. (*See* R. pp. 1144-1830 (Preliminary injunction opposition Exs. 4-6).) The IRLA and PID Act prohibit the filing of challenges to Pennsylvania rehabilitation proceedings in South Carolina courts, and the Court of Common Pleas was and is without jurisdiction to entertain a collateral challenge on SHIP's ongoing rehabilitation proceedings.

3. The Court of Common Pleas' Preliminary Injunction Order improperly ignored the material defects in subject-matter jurisdiction.

The Preliminary Injunction Order contains only a limited analysis of subject-matter jurisdiction, and this Court must reverse the conclusions reached therein. The Preliminary Injunction Order found that the Commonwealth Court of Pennsylvania cannot "adjudicate the rights of South Carolina policyholders and claimants who are neither parties in the Pennsylvania proceedings nor subject to the jurisdiction of the Commonwealth Court." (R. p. 23 (Preliminary Injunction Order p. 9).) Notably, those parties were actually not before the court below and its decision is therefore, at best, *dicta*. Importantly, however, unlike the South Carolina Court of Common Pleas, the Commonwealth Court of Pennsylvania *can* adjudicate the rights of policyholders nationwide and *can* resolve policyholder claims even if they do not appear in the

Commonwealth Court. SHIP's rehabilitation proceeding is an *in rem* proceeding that is necessarily binding on all policyholders. *See, e.g.*, *Ballesteros*, 530 F. Supp. at 1370-71 (collecting cases) ("A rehabilitation proceeding is an in rem action in which the state court generally has exclusive control over the assets of the impaired insurance company."); *In re Rehab. of Manhattan Re-Ins. Co.*, No. 2844-VCP, 2011 WL 4553582, at *4 (Del. Ch. Oct. 4, 2011) ("[T]his Court does possess original and exclusive jurisdiction over the *in rem* proceedings of the rehabilitation."); *Garamendi v. Exec. Life Ins. Co.*, 21 Cal. Rptr. 2d 578, 583–90 (Cal Ct. App. 1993) (holding "A State Court Overseeing an Insurance Insolvency Proceeding Has In Rem Jurisdiction Over the Assets of Third Parties Which Have an 'Identity of Interest' With the Insolvent Insurer."). Because of the *in rem* nature of the proceedings, it is well established that, "[a]s a general rule, a court's decree approving the rehabilitation plan for an insolvent insurer domiciled in its state has a res judicata effect upon out-of-state policyholders so as to preclude a subsequent attack upon the plan in another state." 1 COUCH ON INS. § 5:31. *See also United States v. Obaid*, 971 F.3d 1095, 1098–105 (9th Cir. 2020) (recognizing "minimum contacts" is not a required component of in rem jurisdiction); *FDIC v. De Cresenzo*, 616 N.Y.S.2d 638, 639 (N.Y. App. Div. 1994) (recognizing a judgment stemming from application of *in rem* jurisdiction is entitled to full faith and credit); *Denny v. Searles*, 143 S.E. 484, 493 (Va. 1928) (same). Thus, the Approval Order *is* a binding resolution of policyholder claims. In contrast, the court below did not have *in rem* jurisdiction of SHIP's assets and therefore no jurisdiction to adjudicate the same claims.

Even if the *in rem* nature of SHIP's rehabilitation was not controlling, the mere fact that all policyholders did not appear in the rehabilitation is not a basis on which the SCDOI Respondents could challenge the effect of the Approved Plan. SHIP's policyholders consented to the jurisdiction of the Pennsylvania regulatory authorities with respect to SHIP's LTCI policies

when those policyholders "'reach[ed] out beyond [their home] state and create[d] continuing relationships and obligations with [a] citizen[] of another state [*i.e.*, SHIP].'" *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (quoting *Travelers Health Ass'n v. Com. of Va. ex rel. State Corp. Comm'n*, 339 U.S. 643, 647 (1950)). As a result, SHIP's policyholders are understood to have "availed themselves of the protection of [Pennsylvania] law regarding insolvent and delinquent insurers," making the exercise of jurisdiction over them as non-parties proper. *Comm'r of Ins. v. Arcilio*, 561 N.W.2d 412, 422 (Mich. Ct. App. 1997).[12] These principles are not limited to receivership cases: the due process clause does not provide the same protections or establish the same standards for potential claimants—such as the policyholders here as to SHIP—as it would for potential defendants. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (addressing due process rights of absent class-action plaintiffs and finding that "the plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (internal quotations omitted). Here, the SHIP Rehabilitation Appellants gave notice and an opportunity to be heard to all policyholders and all stakeholders. (*See* R. p. 1051 (Form of Notice); R. p. 984 (Cantilo Dec. ¶ 12).) Thus, under receivership law specifically and due process requirements generally, the Approved Plan is effective as to all policyholders, regardless of whether they appeared in the Commonwealth Court.

[12] Although decided by the Michigan Court of Appeals, *Arcilio* was later cited with approval by the Supreme Court of Michigan in defining personal jurisdiction, *Green v. Wilson*, 565 N.W.2d 813, 816 (Mich. 1997), and by the Commonwealth Court of Pennsylvania in an analysis of receivership law. *Koken v. Fidelity Mut. Life Ins. Co.*, 803 A.2d 807, 821-22 (Pa. Commw. Ct. 2002).

The same is true as to the SCDOI Respondents and other regulators, because the real parties in interest are SHIP's policyholders, not state regulators, and the issues presented in the Complaint relate to the resolution of a policyholder's interest in receiving benefits from SHIP once it entered receivership. The Plan does not need to bind the SCDOI Respondents if the SCDOI Respondents have no claim against SHIP's assets, because the only question is whether the SCDOI Respondents have a regulatory right to interfere with policyholders' ability to resolve their claims against SHIP's assets by making voluntary elections under the court-approved Plan. The Preliminary Injunction Order recognized no authority giving the SCDOI Respondents a veto over the Commonwealth Court's resolution of policyholder claims and decisions regarding SHIP's assets.[13] *Smalls v. Weed*, 293 S.C. 364, 360 S.E.531 (Ct. App. 1987) does not require a different result, because the instant litigation is not "merely an action against an insurance company which happens to be in litigation." If it were such an action, the SCDOI Respondents would not have sought an order barring implementation of the court-approved Plan of Rehabilitation, Here, the SCDOI Respondents' claims are not happenstance as they were in *Smalls*; they directly relate to the implementation of the rehabilitation order and thus fall within the scope of prohibited injunctions in S.C. Code § 38-27-60.

The Court of Common Pleas properly recognized the Commonwealth Court's *in rem* jurisdiction over SHIP's assets, but it ignored the practical impact of any injunction in South Carolina, which has the effect of asserting jurisdiction over SHIP's assets—*i.e.*, the *res*. Benefit payments require a distribution of SHIP's assets: thus, if a South Carolina injunction would prevent

[13] Even if jurisdiction were required, however, notice and an opportunity to be heard would be sufficient as to regulators, just as it is for policyholders. *See, e.g., Phillips Petroleum*, 472 U.S. at 812 (due process does not require affirmative "opt-in" for potential claimants in state class action proceedings).

the distribution of assets to South Carolina policyholders in accordance with the Plan because South Carolina policies would not be modified under the Plan, then any injunction in SCDOI Respondents' favor would govern the distribution of SHIP's assets through benefit payments. And, even assuming arguendo that the Approved Plan is enjoined as to policies issued in South Carolina but the Plan remains enforceable elsewhere, what then? The SCDOI Respondents have never explained what happens under those circumstances, and the reason is obvious: an injunction precluding Plan implementation in South Carolina will result in a reduction in benefits to South Carolina policyholders without any recourse for those policyholders to achieve a different outcome and may impact policyholders nationwide as well.

South Carolina courts lack jurisdiction over claims seeking to control the rehabilitation proceedings generally and the distribution of assets in rehabilitation specifically, and the SCDOI Respondents' Complaint must be dismissed as a result.

B. South Carolina courts lack personal jurisdiction over the SHIP Rehabilitation Appellants.

The Court of Common Pleas also lacked personal jurisdiction permitting any injunction of implementation of the Approved Plan. *See State v. Nathans*, 49 S.C. 199, 27 S.E. 52, 61 (1897) (order of injunction "was a nullity" where court lacked personal jurisdiction over defendant); *accord* 43A C.J.S. INJUNCTIONS § 329 ("[U]nless a court has acquired personal jurisdiction over a defendant by service of process, a court may not use its contempt power against the defendant to enforce a temporary injunction."). As a result, the preliminary injunction must be vacated even if subject-matter jurisdiction is present.

Under South Carolina's Long-Arm Statute, S.C. Code § 36-2-803(A), the exercise of personal jurisdiction over non-residents such as SHIP, the Rehabilitator and the SDR must not exceed the limits of the South Carolina and United States Constitutions. *See Cockrell v. Hillerich*

& Bradsby Co., 363 S.C. 485, 611 S.E.2d 505, 508 (2005) ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process."). "Personal jurisdiction over a non-resident defendant may be invoked only if the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements," and SCDOI Respondents bear the burden of demonstrating personal jurisdiction. *Power Prods. & Servs. Co. v. Kozma,* 379 S.C. 423, 665 S.E.2d 660, 664–65 (Ct. App. 2008). "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005). Moreover, "[t]he due process requirements must be met as to each defendant and thus the Court is to assess individually each defendant's contacts with South Carolina." *Id.*

Personal jurisdiction is exercised as general jurisdiction or specific jurisdiction. *Cribb v. Spatholt,* 382 S.C. 475, 481, 676 S.E.2d 706, 709 (Ct. App. 2009) (citing *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte,* 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007)). Neither one is present here, and the Court of Common Pleas erred in finding otherwise.

1. The SHIP Rehabilitation Appellants are not subject to general jurisdiction in South Carolina.

The SCDOI Respondents made no claim of general jurisdiction; they cited no "enduring relationship with the forum state" or any substantial "continuous and systematic" contacts that would justify the exercise of general jurisdiction. *Cockrell,* 611 S.E.2d at 509-10 (citation and quotation marks omitted).

2. The SHIP Rehabilitation Appellants are not subject to specific jurisdiction in South Carolina with respect to the SCDOI Respondents' challenges to the Approved Plan.

In the absence of general jurisdiction, the SCDOI Respondents were required to show specific jurisdiction, but their Complaint failed to set forth allegations showing a single act of the Rehabilitator or Special Deputy Rehabilitator directed to South Carolina or any act of SHIP targeting South Carolina with respect to the Approved Plan. The Court of Common Pleas erred in finding otherwise, making the Preliminary Injunction Order void for lack of jurisdiction.

"Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process." *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508. First, the court must find that a defendant has sufficient minimum contacts with South Carolina, and second, the court must find that the exercise of personal jurisdiction would be reasonable and fair. *Power Prods.*, 379 S.C. at 431-32, 665 S.E.2d at 665. The Court of Common Pleas erred in finding that personal jurisdiction is present here by improperly treating the fortuitous impact of the nationwide implementation of SHIP's court-approved rehabilitation plan as commercial acts targeting South Carolina.

To satisfy the minimum contacts requirement, a defendant must "direct[] his activities to residents of South Carolina," purposefully availing itself of the laws of South Carolina, and those activities must give rise to the cause of action. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331-32, 594 S.E.2d 878, 884 (Ct. App. 2004). Here, the actions of which the SCDOI Respondents complain are (a) "impos[ing] rates for use nationwide through approval of the rehabilitation plan by the Commonwealth Court"; (b) "unilaterally reduc[ing] benefits nationwide without individual state regulator approval, again through the Commonwealth Court" for any state that opts-out of the rehabilitation plan; and (c) sending communications to policyholders nationwide regarding the options available under the approved plan. (*See* R. pp. 62-63 (Compl. ¶¶ 77-79).) The first two

acts occurred and will occur exclusively in Pennsylvania, and thus outside of South Carolina; to the extent they impact South Carolina, even the Complaint makes clear that such impact is merely incidental through "nationwide" rate and benefit changes. (*Id.*) The third act—sending information to policyholders and inviting them to make a plan option election as part of the nationwide plan—is the only one, which *may* involve South Carolina residents, but it is not enough for specific jurisdiction. *See Cockrell*, 611 S.E.2d at 510 (citing with approval a prior appellate decision refusing to find specific jurisdiction over "the producer of a nationwide television program and the author of a book distributed nationwide"). Indeed, as the SCDOI Respondents alleged, the plan that the SHIP Rehabilitation Appellants are implementing involves options calculated for rates and benefits determined *independent of the state of issuance or state of residence nationwide*. To the extent a policyholder has a particular option offered to him or to her, there is only a fortuitous and attenuated connection to South Carolina.

The SCDOI Respondents appear to have invoked S.C. Code § 36-2-803, subsections (A)(1) and (A)(6), asserting that the SHIP Rehabilitation Appellants are "transacting the business of insurance" by "disseminating information as to coverage or rates" and other ways. (*See* R. pp. 15-16 (Compl. ¶¶ 88, 89).) To establish that the SHIP Rehabilitation Appellants are conducting "business" in South Carolina, however, the SCDOI Respondents relied on the statute prohibiting insurance business without a certificate of authority. S.C. Code § 38-25-110. There was no allegation that any of the SHIP Rehabilitation Appellants are operating in violation of the statute by conducting business without a certificate of authority, however, and this licensing provision does not—and cannot—define the constitutional limits of personal jurisdiction. For example, Section 38-25-110(6) includes "indirectly acting as an agent . . . in the dissemination of information as to coverage or rates," language which would make even the fortuitous and indirect mailing of a

single piece of rate-related information that eventually arrives in South Carolina sufficient to establish personal jurisdiction despite clearly exceeding the constitutional limits of due process.

Even if this statute could define transacting business in South Carolina, the SHIP Rehabilitation Appellants are not conducting "business" within the meaning of the long-arm statute. Put differently, the SHIP Rehabilitation Appellants are not purposefully availing themselves of the benefits of doing business in South Carolina: the fact that SHIP or a predecessor issued policies in South Carolina in the past which may now be altered under the plan is fortuitous as to SHIP in rehabilitation, the Rehabilitator and Special Deputy Rehabilitator. Any acts seeking approval of or implementing the plan have occurred outside of South Carolina and were directed to the Pennsylvania court and to the SHIP *res* in Pennsylvania, and none of which were purposefully directed toward South Carolina as opposed to SHIP and its policyholders as a whole. *See, e.g., ESAB Group, Inc. v Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997) (analyzing constitutional limits of due process when applying South Carolina long-arm statute). In addition, SCDOI Respondents claim that the SHIP Rehabilitation Appellants seek to use the plan to evade South Carolina law, and thus SCDOI Respondents have not alleged that SHIP Rehabilitation Appellants' "activities are shielded by 'the benefits and protections' of [South Carolina] law" such that the exercise of personal jurisdiction would be proper. *Burger King*, 471 U.S. at 476.

The SCDOI Respondents conflated the proper exercise of the Commonwealth Court of Pennsylvania's undisputed exclusive in rem jurisdiction over SHIP's assets with requisite minimum contacts on which personal jurisdiction over the Rehabilitator and Special Deputy Rehabilitator may be based. This proper exercise of power by a state court or state officer does not equate to minimum contacts upon which personal jurisdiction over the Rehabilitator and Special Deputy Rehabilitator can be grounded. *Cf. Burger King Corp.*, 471 U.S. at 476 (describing

exercise of jurisdiction over "commercial actor" directing actions to resident of another state); *Trump v. Committee on Ways and Means*, 415 F. Supp. 3d 98, 106-107 (D.D.C. 2019) (state official engaged in official business was not conducting the type of commercial or business-related activities within the meaning of the phrase "transacting business" under District of Columbia long-arm statute).[14]

Thus, even contacting policyholders located in South Carolina in order to effectuate the Commonwealth Court of Pennsylvania's orders is insufficient to establish personal jurisdiction over SHIP, the Rehabilitator, and Special Deputy Rehabilitator with respect to SCDOI Respondents' claims. In implementing the Approved Plan, SHIP, the Rehabilitator, and the Special Deputy Rehabilitator have only taken action in the Commonwealth of Pennsylvania and pursuant to the orders of the Commonwealth Court of Pennsylvania. The SHIP Rehabilitation Appellants did not purposefully avail themselves of South Carolina's laws and benefits and could not reasonably anticipate being hauled before a South Carolina Court to defend the propriety and lawfulness of the Approved Plan. Requiring the SHIP Rehabilitation Appellants to answer the

[14] For this reason, the SCDOI Respondents' suggestion of personal jurisdiction has been rejected in analogous cases involving nonresident state officials performing official duties because exercising jurisdiction in such circumstances would exceed constitutional limits, and the Court of Common Pleas should have reached the same conclusion. *See, e.g.*, *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 480–81, 484 (5th Cir. 2008) (found insufficient contacts for a Texas federal court to exercise jurisdiction over the commissioner of the Arizona Department of Real Estate); *Shotton v. Pitkin*, No. CIV-15-0241-HE, 2015 WL 5091984, at *1 (W.D. Okla. Aug. 28, 2015) (no personal jurisdiction over Connecticut officials sending communications to plaintiff in Oklahoma); *Berry Coll., Inc. v. Rhoda*, No. 4:13-CV-0115-HLM, 2013 WL 12109374, at *11 (N.D. Ga. June 12, 2013) (Tennessee officials were not "nonresidents" because they were functional equivalent of Tennessee and the officials' "attempt[] to perform their regulatory duties" was not purposeful availment of Georgia's benefits and laws, notwithstanding communications directed at plaintiff in Georgia); *Steelman v. Carper*, 124 F. Supp. 2d 219, 223–24 (D. Del. 2000) (holding that "subjecting out of state officials to personal jurisdiction for actions taken out of state, even if done at the request of [in-state] officials," would violate "traditional notions of fair play and substantial justice").

complaints of another state's regulator based solely on the performance by the Rehabilitator and Special Deputy Rehabilitator of their statutory duties and pursuant to the Commonwealth Court of Pennsylvania's proper exercise of its exclusive in rem jurisdiction to allocate SHIP's insufficient assets would offend "traditional notions of fair play and substantial justice," *Cockrell*, 611 S.E.2d at 508–509, and therefore does not comport with due process.

C. Even if jurisdictional requirements were satisfied, the Preliminary Injunction Order should be vacated because the SCDOI Respondents failed to satisfy its requirements.

Should the Court find that South Carolina courts have subject-matter jurisdiction and personal jurisdiction over the SHIP Rehabilitation Appellants and the SCDOI Respondents' claims, it nevertheless should vacate the Preliminary Injunction Order because the Court of Common Pleas erred in finding that the SCDOI Respondents had established the elements of a preliminary injunction, which include "irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *See Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018) (elements of preliminary injunction). Additionally, "in order to receive the aid of a Court of equity to enjoin a public corporation or department of government in the performance of actions or duties provided by statute, there must be allegations or showing that the public department or corporation has exercised its power in an arbitrary, oppressive or capricious manner." *Id.*; *accord* 42 AM. JUR. 2D INJUNCTIONS § 158 ("Generally, the courts will not grant an injunction against a public official or public body when to do so would involve the review of a judgment that was not arbitrary, made in bad faith, or in the exercise of fraud."); 43A C.J.S. INJUNCTIONS § 205 ("Courts of equitable jurisdiction lack power to restrain public agencies or officers by injunction from performing any official act which they are by law required to perform, or acts which are not in excess of the authority and discretion reposed in them.").

The SHIP Rehabilitation Appellants disagree with each of the Court of Common Pleas' findings in the Preliminary Injunction Order, but the most serious—and reversible—errors arise in the findings of irreparable harm and a substantial likelihood of success. The court's findings on irreparable harm are not supported by the evidence because there was no such evidence, and its findings on the SCDOI Respondents' likelihood of success are based on errors of law. *See King*, 422 S.C. at 54, 810 S.E.2d at 22 (defining abuse of discretion).

1. The SCDOI Respondents failed to establish irreparable harm, and the Court of Common Pleas had no evidentiary basis for finding irreparable harm here.

Irreparable harm is "the most important requirement for an injunction," and it must be "substantial" as well as "likely and not merely possible." 42 AM. JUR. 2D INJUNCTIONS § 35; *see also Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15, 17 (2010) (emphasizing importance of irreparable harm). Irreparable harm arises, *inter alia*, upon some immediate and irremediable interference with the use and enjoyment of property (*AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009)) or a threat to "business as a whole" (*Professional Wiring Installers, Inc. v. Sims*, No. 2008-UP-173, 2008 WL 9840409, at *3 (S.C. Ct. App. Mar. 12, 2008)). Neither such harm was alleged or established here.

a. Policyholders are not harmed by implementation of the Plan.

First, absolutely no effort was been made by SCDOI Respondents to show any actual harm to them as Plaintiffs as a result of the SHIP Rehabilitation Appellants' conduct as defendants, relying instead on alleged harms to policyholders not before the court. That is by itself dispositive on the issue of irreparable harm. *See Scratch Golf Co.*, 361 S.C. at 121, 603 S.E.2d at 907–08 (injunction issued only "to prevent irreparable harm *suffered by the plaintiff*") (emphasis added); *Zabinski*, 346 S.C. at 601, 553 S.E.2d at 121 ("The sole purpose of a temporary injunction is to preserve the status quo and thus *avoid possible irreparable injury to a party* pending litigation.")

(emphasis added).[15] Second, even assuming that, as they strive to do, SCDOI Respondents could rely on supposed harm, not to themselves but to policyholders who are not before the court, there is no such harm from the acts of which SCDOI Respondents complain. There can be no harm from sending election packages to policyholders, because the mere receipt and review of such material does not impair policyholders' rights in any way. Policies remain in force as-is during the period of time in which election materials will be sent and reviewed, and SCDOI Respondents made no showing that policyholders will be confused by such material in the event the plan is not implemented in South Carolina or if different options are offered to South Carolina policyholders. Even if such confusion could arise, however, it is plainly reparable; the parties could provide further updates to policyholders informing them of any change in the proceedings or process. (*Cf.* R. pp. 1203-04 (Intervening Regulators' Application for Stay p. 40-41 admitting plan implementation was not irreparable harm); *see also* R. p. 1788 (Amici Filing, Motion p. 4 (SCDOI Respondents joining entirely in arguments of Intervening Regulators)).)

Allowing policyholders to exercise their right to make an election under the plan also fails to demonstrate any irreparable harm. Similarly, by speaking about policyholders as a whole, the SCDOI Respondents made no showing of actual, definitive harm to anyone at all, only the mere

[15] The only reference to "harm" as to the SCDOI Respondents is that, if the Plan is implemented, the SCDOI Respondents "will not have upheld their statutory duty," (R. p. 31 (Preliminary Injunction Order p. 17)), but SCDOI Respondents presented no legal support for any cause of action arising out of an invasion of their *right* to regulate insurance policies, because no such right exists. Similarly, the SCDOI Respondents presented no legal or factual basis for finding that they would suffer any negative outcome for failing to regulate the insurance marketplace in South Carolina, even if they had presented evidence of injury to the marketplace as a result of the Plan. The SCDOI Respondents simply cannot be harmed by the operation of full faith and credit principles as to SHIP's rehabilitation or the Approved Plan, and thus SCDOI Respondents failed to show any irreparable harm entitling them to an injunction against Plan implementation. *See Walde v. Association Ins. Co.*, 401 S.C. 431, 442-443, 737 S.E.2d 631, 637 (Ct App. 2012) (citing Black's Law Dictionary in defining "injury" to be "the violation of another's legal right, for which the law provides a remedy")

possibility of harm for some *unknown* policyholder or policyholders not before the court and who might voluntarily choose to pay premiums in excess of that which SCDOI Respondents would have approved. The SCDOI Respondents offered no discussion of what premiums or benefits SCDOI Respondents might allow, nor is there any analysis of why requiring all policyholders to accept SCDOI Respondents' preferred premium rate or benefit package would be better for any specific policyholder, let alone policyholders as a group. Indeed, SCDOI Respondents' broad-strokes approach ignores the obvious: there is no harm to giving policyholders choice and agency in deciding which policy option might best suit their needs. For example, a policyholder who wishes to stop paying premiums entirely but keep at least some coverage will be better with a plan option rather than the choices available outside of the plan. (R. p. 987 (Cantilo Dec. ¶ 33).)[16] At most, the SCDOI Respondents have shown that some state courts have found that their commissioners *could* deny a rate request filing in the ordinary course if it does not comply with state regulations. (*See* R. p. 71 (Compl. ¶ 118 citing decisions of New Hampshire, Maryland, and Massachusetts).) None of those cases involve rehabilitation matters, and none of them arose under South Carolina law.

Even if policies had been modified in March or April of 2022—the earliest date by which such changes could have been made according to policyholder elections—policyholders would not have been inherently damaged by paying actuarially justified premiums, and SCDOI Respondents

[16] For this reason, should the Court enter permit the survival of an order enjoining the SHIP Rehabilitation Appellants from communicating with policyholders regarding the plan, notice and an opportunity to be heard must be provided to any and all policyholder impacted by the injunction, as many or all of those policyholders may dispute the SCDOI Respondents' position and seek to learn about and exercise their right to make plan option elections. The Complaint and related motions lack any evidence demonstrating that SCDOI Respondents' allegations of harm to policyholders are supported by information from actual policyholders or an analysis of policyholder interests.

make no showing to the contrary. And, even if those changes *could* be a harm to policyholders, that harm is not irreparable, and certainly is not a harm to the SCDOI Respondents. As with the mailing of election packages, the SCDOI Respondents joined with the Intervening Regulators' arguments on their motion for a stay in the Pennsylvania Supreme Court, and, as the Intervening Regulators' admitted in their briefing, undoing the elections might be difficult but not impossible—and thus not irreparable. (R. pp. 1203-04 (Intervening Regulators' Application for Stay p. 40-41).)

b. <u>There was no evidence of harm presented in the Complaint, the preliminary injunction motion, or at the hearing.</u>

As noted, the preliminary injunction hearing had no witnesses and no exhibits; the Court of Common Pleas based its decision solely on the Complaint, the motion submitted by SCDOI Respondents, and the SHIP Rehabilitation Appellants' filings. The Complaint and the SCDOI Respondents filings, however, failed to establish any irreparable harm to Plaintiffs or even to policyholders. As a result, the factual findings of the Court of Common Pleas are clearly erroneous as based on a wholesale adoption of the SCDOI Respondents' unsupported conclusions. For example, the court found that the Plan would have a "permanent adverse effect on policyholders' guaranty association benefits in the likely event that SHIP is placed into liquidation at a later date," relying on a statement by the SDR that the Plan would not "magically restore SHIP to solvency," a statement which is silent as to guaranty association benefits. (R. pp. 19-20 (Preliminary Injunction Order ¶ 22).) Importantly, however, it is *liquidation*, not rehabilitation, that will permanently terminate certain guaranty association benefits: policyholders have the ability to retain their existing benefits during rehabilitation (*see* R. p. 1088 (Approval Order p. 29 describing option to keep current benefits even if they exceed guaranty association limits)), whereas liquidation will permanently and irreparably eliminate those benefits the moment a liquidation

order is entered. *See* S.C. Code § 38-29-40(3)(b) (limiting guaranty association coverage in liquidation to $300,000). A finding to the contrary ignores the Plan as it will be implemented as well as the governing provisions of South Carolina law, and therefore reflects an abuse of the Court's discretion.

The Court of Common Pleas also found that "policyholders will be permanently denied basic rights and suffer permanent and substantial economic harm," but there is no citation to the record supporting that conclusion—nor can there be, because policyholders did *not* lose any basic rights and do *not* suffer any harm under the Plan. As noted, the finding that rehabilitation rather than liquidation will permanently affect guaranty association coverage is plainly erroneous and unsupported by the record. So too are the other findings of purported harm—*i.e.*, the potential for significant rate increases, a reasonable expectation of lapse, and possible coercion. (R. pp. 19, 20 (Preliminary Injunction Order ¶¶ 18, 23).) These findings have no support whatsoever in the record: the SCDOI Respondents did not allege facts in the Complaint or present any evidence of the actual rate increases or premiums for modified policies that South Carolina policyholders could or would pay, and SCDOI Respondents presented no evidence of the possibility or likelihood of lapse as a result of any premium increase. Similarly, the court's finding of possible coercion was based solely on SCDOI Respondents' purported "concerns" rather than any actual evidence. (R. p. 20 (Preliminary Injunction Order ¶ 23).)

This is not a problem of weighing the evidence; there simply was no evidence of harm or potential harm, let alone irreparable harm. There are no analyses of policyholder outcomes, no statements of policyholders as to the impact of rate increases, no actuarial calculations as to benefits and rates that would be in place in liquidation, no predictive modeling of lapse outcomes—only the mere suspicion of the SCDOI Respondents. That suspicion is, without more, insufficient

to establish irreparable harm. *Cf. AJG Holdings*, 382 S.C. at 509, 674 S.E.2d at 52 (party submitted affidavits showing acts caused noise and traffic in neighborhood in which they sought injunction to prevent commercial activity); *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 465, 626 S.E.2d 38, 41-42 (Ct. App. 2005) (irreparable harm established by showing that loss of hospital privileges would eliminate access to patients for referrals and entire loss of professional practice would arise if plaintiff was no longer competent to practice as a physician in the field). In short, the SCDOI Respondents have made no effort to show harm to themselves, choosing instead to rely on supposed harm to policyholders not before the court—and, even as to that supposed harm, the SCDOI Respondents offered argument and conjecture, but no evidence.

2. The SCDOI Respondents cannot establish a likelihood of success on the merits and thus no injunction should have been entered.

The Commonwealth Court of Pennsylvania found that the SHIP Rehabilitation Appellants have the authority to implement the plan as proposed, including the opt-out process and the rate and benefit setting mechanisms. The SCDOI Respondents never established otherwise, nor did they establish that the plan should not have been approved or that the plan should not be implemented in South Carolina. As a result, the Court of Common Pleas abused its discretion by relying on an error of law in finding that the SCDOI Respondents were likely to succeed on the merits.

a. <u>Plan approval is entitled to full faith and credit because the Approval Order is final and the Commonwealth Court had jurisdiction over SHIP's policyholders.</u>

Under the United States Constitution, "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. "Full faith and credit 'generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it.'" *Ware v. Ware*, 404

S.C. 1, 743 S.E.2d 817, 823 (S.C. 2013) (citations omitted). Thus, the validity and effect of a foreign judgment must be determined by the laws of the state that rendered the judgment. *Minorplanet Sys. USA Ltd. v. Am. Aire, Inc.*, 368 S.C. 146, 628 S.E.2d 43, 45 (2006). The Approval Order is entitled to full faith and credit in South Carolina and will bar the SCDOI Respondents' claims accordingly, making the likelihood of any success an impossibility.

First, the Approval Order is a final order. Although the Court of Common Pleas cast some doubt on this issue, its findings had no basis in law or fact: the Commonwealth Court intended its approval order to be final and binding on all policyholders, and Pennsylvania law would recognize the Commonwealth Court's authority to bind SHIP and its policyholders through the Approval Order. The Pennsylvania Supreme Court has made clear that "[a] judgment is deemed final for [preclusive] purposes unless or until it is reversed on appeal." *Shaffer v. Smith*, 543 673 A.2d 872, 874 (Pa. 1996). No stay has been entered—indeed, two stay applications filed in the Pennsylvania courts were denied—and Plan implementation is moving forward consistent with the Approval Order's directives and findings. Unless and until the Approval Order is overturned by the Pennsylvania Supreme Court (or the Supreme Court of the United States) on appeal, it must be considered final and "qualifies for recognition throughout the land." *V.L. v. E.L.*, 577 U.S. 404, 407 (2016).

Second, the Approval Order properly exercised personal jurisdiction over SHIP's policyholders. For full faith and credit purposes, "personal jurisdiction is presumed when a foreign judgment appears on its face to be a record of a court of general jurisdiction." *Ware*, 743 S.E.2d at 823 (citation and quotation marks omitted). As set forth herein, the Court of Common Pleas erred in its jurisdictional analysis as to the effect of the Plan: the mere fact that all of South Carolina's policyholders did not appear in the rehabilitation proceedings after receiving notice

regarding the matter and having an opportunity to intervene is not enough to overcome full faith and credit requirements. Critically, SHIP's rehabilitation proceeding is an in rem proceeding. *See, e.g.*, *Ballesteros*, 530 F. Supp. at 1370–71 ("A rehabilitation proceeding is an in rem action in which the state court generally has exclusive control over the assets of the impaired insurance company."); *In re Rehab. of Manhattan Re-Ins.*, 2011 WL 4553582, at *4 ("[T]his Court does possess original and exclusive jurisdiction over the in rem proceedings of the rehabilitation."); *Garamendi*, 21 Cal. Rptr. 2d at 583–90 (holding "A State Court Overseeing an Insurance Insolvency Proceeding Has In Rem Jurisdiction Over the Assets of Third Parties Which Have an 'Identity of Interest' With the Insolvent Insurer."). The SCDOI Respondents cannot avoid the preclusive effect of any final judgment in the Commonwealth Court of Pennsylvania, and the constitutional requirement that any such final judgment be given full faith and credit, by simply electing not to formally participate in the rehabilitation proceedings as parties. *See Obaid*, 971 F.3d at 1098–105 (recognizing "minimum contacts" is not a required component of in rem jurisdiction); *United States v. Real Prop. Located in Los Angeles*, 4:20-CV-2524, 2020 WL 7212181, at *4 (S.D. Tex. Dec. 4, 2020) (same); *De Cresenzo*, 616 N.Y.S.2d at 639 (recognizing a judgment stemming from application of in rem jurisdiction is entitled to full faith and credit); *Denny*, 143 S.E. at 493 (same).

The very nature of receivership proceedings, including SHIP's rehabilitation, confirms that the Commonwealth Court's Order is entitled to full faith and credit in South Carolina. For example, in *Ballesteros*, later affirmed by the Third Circuit, the plaintiff unsuccessfully challenged the rehabilitation efforts of a New York Court-appointed Superintendent when the Superintendent sent notices of cancellation of policies to a New Jersey insured. 530 F. Supp. at 1367, 1370-71. The federal district court recognized that a "rehabilitation proceeding is an in rem action in which

the state court generally has exclusive control over the assets of the impaired insurance company… The need for giving one state exclusive jurisdiction over delinquency proceedings has long been recognized in the courts." *Id.* at 1370-71. Further noting the "benefits of centralizing the management over delinquency proceedings in the courts of one state," this Court continued on to explain that, for the sake of economy, efficiency, and order:

> it is essential that the title, custody, and control of the assets be intrusted [sic] to a single management under the supervision of one court. Hence other courts, except when called upon by the court of primary jurisdiction for assistance, are excluded from participation.

Id. at 1371 (citation omitted). *See also Motor Club. of Am. v. Weatherford*, 841 F. Supp. 610 (D.N.J. 1994) (court abstained in favor of the Oklahoma insolvency proceedings because the plaintiff's claims were "really part and parcel of the liquidation proceedings pending in Oklahoma" and Oklahoma's regulatory scheme provided for exclusive jurisdiction over delinquency proceedings in Oklahoma); *Colonial Penn Ins. Co. v. Am. Centennial Ins. Co.*, No 92 Civ. 3791, 1992 WL 350838 (S.D.N.Y. Nov. 17, 1992) (rejecting collateral attack on rehabilitation plan and finding, in part, that success in such an attack would deplete assets and interfere with the receivership). The Approval Order is not limited in the way suggested by the Court of Common Pleas, and its decision on this issue reflects a clear misreading of the law.

Third, the Approval Order comports with due process, not only because of the *in rem* nature of SHIP's rehabilitation, but also because the due process clause does not provide the same protections for potential claimant-policyholders. *See, e.g.*, *Phillips Petroleum*, 472 U.S. at 812 (addressing due process rights of absent class-action SCDOI Respondents and finding that "the plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

and afford them an opportunity to present their objections" (quotation marks omitted)).[17] Moreover, SHIP's policyholders availed themselves of the law of a foreign jurisdiction with respect to SHIP's potential receivership, making the exercise of jurisdiction over them as non-parties proper. *Arcilio*, 561 N.W.2d at 422. As explained herein, sufficient notice was provided to all policyholders (R. p. 1051 (Form of Notice)), and the Plan is binding as a result.

The Court of Common Pleas found that implementing the Plan would be hostile to the acts of South Carolina, but this too is an error of law. South Carolina limits the reach of its own receivership authority and respects the receivership authority of other states. *See* S.C. Code § 38-27-60; S.C. Code § 38-27-310 (Director authorized to petition for rehabilitation); S.C. Code § 38-27-360; S.C. Code § 38-27-220. Indeed, the governing statute expressly recognizes the goal of "[l]essening the problems of interstate rehabilitation" and "[i]mproved methods of rehabilitating insurers," both of which are goals shared by the Plan, as well as "[e]quitable apportionment of any unavoidable loss," a goal which will be disserved if some policyholders cannot make elections under the Plan. *See* S.C. Code § 38-27-30 (purposes of receivership law). As with other states, South Carolina has given its stamp of approval to the Plan and other rehabilitation plans nationwide by limiting its own authority to domiciliary insurers and deferring to the decisions of the domiciliary state's regulator and courts. *See Ballesteros*, 530 F. Supp. at 1371 (D.N.J.) ("The need for giving one state exclusive jurisdiction over delinquency proceedings has long been recognized in the courts," and states give their approval to such proceedings through their public policies reflected in statutes favoring "centraliz[ed] management over delinquency proceedings in

[17] The Court of Common Pleas' due process analysis would represent a radical departure from well-settled principles recognizing that states have the authority to modify contracts—or even terminate those contracts—as part of a receivership proceeding, as set forth in Section V.C.2.c herein.

the courts of one state"). The Court of Common Pleas' disagreement with the conclusions of the Commonwealth Court of Pennsylvania are not enough to warrant a finding that full faith and credit will bar the SCDOI Respondents' claims here. *See Milliken v. Meyer*, 311 U.S. 457, 462 (1940) ("the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based."); *accord V.L.*, 577 U.S. at 407 ("A State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits."). The Court of Common Pleas erred in refusing to recognize that it must give full faith and credit to the decisions of a Pennsylvania court in receivership, and the Preliminary Injunction Order reflects an abuse of discretion arising out of that error.

b. The Plan does not violate any South Carolina law.

Even if full faith and credit principles did not bar the SCDOI Respondents' requested relief, the Preliminary Injunction Order would be subject to reversal because the Court of Common Pleas based its decision on an erroneous reading of the Plan's relationship to South Carolina law. The SCDOI Respondents only vaguely asserted that they have regulatory authority to approve of any increase in premium rates *and* changes in benefits, and they failed to identify any specific regulatory authority to support the latter. (*See* R. pp. 71-73 (Compl. ¶¶ 115, 121–22, 126).) In fact, South Carolina's LTCI regulations make clear that "[a] reduction in benefits shall ***not*** be considered a premium change," a legal principle completely ignored by the Court of Common Pleas. S.C. Code Regs. 69-44 § 6 (F)(3) (emphasis added).

None of the regulations relied on by the SCDOI Respondents specifically govern in the rehabilitation context, and none provide authority permitting SCDOI Respondents to control the outcome of SHIP's rehabilitation. The statutory authority on which they rely was intended to apply to insurers in the marketplace, not in receivership, but, in contrast with SHIP, the assets of

those insurers are not in *custodia legis* of the Rehabilitation court and no court is overseeing their operation for the protection of policyholders. Here, it cannot be contested that the Pennsylvania Commonwealth Court has exclusive *in rem* jurisdiction over SHIP's assets. As a result, statutes intended to govern the conduct of unsupervised insurers that are not in rehabilitation and whose assets are not in the *in rem* jurisdiction of a rehabilitation court have no bearing on whether a rehabilitation plan should be approved or implemented. Allowing the enforcement of LTCI regulation authority over SHIP, as suggested by SCDOI Respondents, would amount to substituting their views as to how SHIP's assets should be distributed for that of the Pennsylvania court which undeniably has exclusive jurisdiction of those assets.

A rehabilitation court necessarily has the power to change premium rates and benefits for policyholders in order to further the goals of the rehabilitation itself. Requiring piecemeal approval by (or litigation with) each individual state's insurance regulators across the country would create an obvious collective action problem and could doom the possibility of a successful rehabilitation. For this reason, the power of a state's rehabilitation court to affect changes to policies nationwide has long been recognized and largely left unchallenged. *E.g.*, *Neblett v. Carpenter*, 305 U.S. 297 (1938) (leaving unchallenged California's power as domiciliary state to make rate and form decisions for all of the insolvent company's policies, wherever issued, as part of a national rehabilitation plan); *Underwriters Nat. Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 697 (1982) (rehabilitation plan that was later approved "proposed that the Rehabilitation Court reform the policies to require increased premiums and reduced benefits," including with respect to out-of-state policies); *Mathias v. Lennon*, 474 F. Supp. 949, 957 (S.D.N.Y. 1979) (rejecting argument that New York rehabilitation court "lacked jurisdiction to affect the property interests of the Illinois policyholders"); *see Foster*, 614 A.2d at 1094 (Under

Pennsylvania law, the Rehabilitator is "afforded broad powers" to "minimize the harm to *all* affected parties," and explaining that "the exigencies attendant to a major commercial insolvency and the goals of rehabilitation necessitate the reality that individual interests may need to be compromised in order to avoid greater harm to a broader spectrum of policyholders and the public."). The Court of Common Pleas erred as a matter of law when it found that the implementation of a court-approved rehabilitation plan would violate South Carolina's rate-regulation statutes governing businesses in the ordinary course, making the Preliminary Injunction Order subject to immediate reversal.

c. The Commonwealth Court's decision was correct when entered and it is correct now.

The Court of Common Pleas erred in revisiting the issues decided in the rehabilitation proceeding in Pennsylvania. The South Carolina Court of Common Pleas had no basis for finding that the Commonwealth Court of Pennsylvania erred in its interpretation of its own state laws, nor did the Court of Common Pleas have a basis for deviating from the authority establishing that a rehabilitation plan may modify policy benefits and increase premiums through a centralized plan. *See, e.g., Underwriters Nat'l Assurance Co.*, 455 U.S. at 696-97 (discussing approved rehabilitation plan where rehabilitation court increased premiums and reduced benefits despite state regulatory requirements); *Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 581 (1st Cir. 2007) (New Jersey rehabilitator could offer out-of-state policyholders the option to receive cash value or have their policies restructured); *Ballesteros*, 530 F. Supp. at 1372 (overruling objections to policy restructuring in rehabilitation by out-of-state policyholder).

The Court of Common Pleas also erred in finding that the Plan exceeded the Rehabilitator's broad authority granted under 40 P.S. § 221.16 and other provisions of the PID Act[18]. "It is well settled that [a legislature] may enact a statute in broad outlines, leaving to the executive officials the duty of arranging the details." *Application of People, by Van Schaick*, 268 N.Y.S. 88, 96 (App. Div. 1933), *aff'd sub nom. People, by Van Schaick, v. Nat'l Sur. Co.*, 191 N.E. 521 (N.Y. 1934) (citing *Field v. Clark*, 143 U. S. 649 (1892); *Buttfield v. Stranahan*, 192 U. S. 470 (1904); *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 83 N. E. 693 (N.Y. 1908)). Accordingly, it is properly, and exclusively, within the Rehabilitator's domain to determine how the law should be reasonably interpreted and applied. *See Starr v. Dep't of Envtl. Res.*, 607 A.2d 321, 323 (Pa. Commw. Ct. 1992) ("[T]he construction given a statute by those charged with its execution and application is entitled to great weight and should not be disregarded unless it is clear that the agency's interpretation is incorrect.") (citing *T.R.A.S.H., Ltd. v. Department of Environmental Resources*, 574 A.2d 721 (Pa. Commw. 1990), *appeal denied*, 527 Pa. 659, 593 A.2d 429 (1990); *Slovak–American Citizens Club of Oakview v. Pennsylvania Liquor Control Board*, 549 A.2d 251 (Pa. Commw. Ct. 1988)); *In re Ambac Assur. Corp.*, 841 N.W.2d 482, 495 (Wis. Ct. App. 2013) (holding a rehabilitator's interpretation of a governing statute will be affirmed if it is "reasonable, even if . . . another interpretation is more reasonable."); 44 C.J.S. INSURANCE § 268 ("The courts will defer to the insurance commissioner's interpretation and application of statutes governing rehabilitation.").

[18] Indeed, the Court of Common Pleas' finding that the Commonwealth Court erred in its decision as to the Rehabilitator's authority shows that the Complaint seeks relief beyond a finding of violations of South Carolina rate-regulation law. Even if South Carolina courts have authority over rate regulation in South Carolina, they have no jurisdiction to decide questions of Pennsylvania law with respect to the statutory and common law powers of the Rehabilitator.

The Court of Common Pleas wrongfully found that the Rehabilitator's authority is limited to the second sentence of 40 P.S. § 221.16, which grants to the Rehabilitator the same authority as the insurer's directors, officers, and managers. (R. p. 27 (Preliminary Injunction Order p. 13).) The Court relied on this limited scope of power in finding that the SCDOI Respondents were likely to succeed on the merits (*id.*), but, in so holding, the Court ignored unmistakably clear language granting other powers to the Rehabilitator when he or she acts with the permission and under the authority of the Commonwealth Court of Pennsylvania.

By statute, the Rehabilitator "may take such action as he deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer." *See* 40 P.S. § 221.16 ("Powers and Duties of the Rehabilitator"). His powers include the ability to cancel contracts (*see* 26-161 APPLEMAN ON INS. LAW & PRAC. ARCHIVE § 161.4 (2nd 2011) ("The usual powers granted to a rehabilitator include . . . cancelling insurance policies")) and are separate from his assumption of the duties of officers and directors. *Id.*; *see also* 40 P.S. § 221.16. The Full Faith and Credit clause does not require the Rehabilitator to limit his authority—an exercise of the state's police power—to comply with the statutes of the non-domiciliary states. *See Ferrelli v. Commonwealth*, 783 A.2d 891, 894 (Pa. Commw. Ct. 2001) ("'[T]he Full Faith and Credit Clause does not require a state to subordinate public policy within its borders to the laws of another state'" (citation omitted)); *Neyman v. Buckley*, 153 A.3d 1010, 1018 (Pa. Commw. Ct. 2016) ("[W]e recognize that the legal principle of comity should only be utilized when the application of another 40 state's law contradicts no public policy of Pennsylvania."); *Foster*, 614 A.2d at 1091-1094 (recognizing "the significant interest on behalf of the state to regulate the fiscal affairs of its insurers for the welfare of the public" and that "it is not

the function of the courts to reassess the determinations of . . . public policy made by the Rehabilitator").

Thus, acting under the Commonwealth Court's supervision, the Rehabilitator's powers clearly exceed those granted to an insurer's directors or officers. The Rehabilitator has the specific authority to "pursue all appropriate legal remedies on behalf of the insurer," avoid fraudulent transfers, and prepare and implement a plan for the "reorganization, consolidation, conversion, reinsurance, merger or other transformation of the insurer." 40 P.S. § 221.15 (authorization to pursue remedies); 40 P.S. § 221.16 (rehabilitation plan).[19] Rehabilitation plans are recognized as an exercise of the state's police power under well-settled receivership law nationwide. *See, e.g., In re Ambac Assur. Corp.,* 841 N.W.2d at 594 ("it is axiomatic that the commissioner, in the reasonable exercise of the state's police power, may structure a rehabilitation plan that has the potential to adversely affect the interests of individual policyholders when the plan advances the broader interests of the policyholders, the creditors, and the public as a whole," including by the impairment of contracts); *In re Exec. Life Ins. Co.*, 38 Cal. Rptr. 2d 453, 479-80 (Cal. Ct. App. 1995) ("[T]he police power of the state exercised by the Commissioner as conservator permits modification of insurance contracts issued by an insolvent insurer.") Pennsylvania law clearly

[19] South Carolina law is identical in all material respects, reflecting the state's policy of granting broader authority to a Rehabilitator than would be available to the company itself. *See* S.C. Code § 38-27-330(b) ("The rehabilitator may take any action he considers necessary or appropriate to reform and revitalize the insurer," separate and apart from authority as director and officer); § 38-27-330(c) (authorization to pursue legal remedies); § 38-27-330(d) (regarding rehabilitation plan). There is little authority interpreting these statutes, but they are nearly identical to those adopted in Pennsylvania, whose opinions should be considered as persuasive authority. Similarly, SCDOI Respondents alleged that both Pennsylvania and South Carolina adopted the so-called Wisconsin Model for their receivership statutes (*see* R. pp. 66-68 (Compl. ¶¶ 97-102)), and, like Pennsylvania's courts, Wisconsin courts have recognized that rehabilitation plans reflect a proper exercise of the state's police power and thus permit the modification and impairment of policyholder contracts. *In re Ambac Assur. Corp.*, 841 N.W.2d at 594.

authorizes the Commonwealth Court to permit the Rehabilitator to exceed further the authority granted to officers and directors. The Rehabilitator may act to avoid, *inter alia*, certain business transactions, property transfers, "interference with the receiver or with the proceeding," waste, dissipation of assets, "the institution or further prosecution of any actions or proceedings," "the obtaining of preferences," and other actions "that might lessen the value of the insurer's assets or prejudice the rights of policyholders…." 40 P.S. § 221.5. In reviewing the Rehabilitator's authority, the Commonwealth Court gives deference to the Rehabilitator's status as an insurance regulator. *See Foster*, 614 A.2d at 1091-92 ("the involvement of the judicial process is limited to the safeguarding of the [P]lan from any potential abuse of the Rehabilitator's discretion"). The Court of Common Pleas erred in refusing to recognize these principles and finding instead that vague assertions of potential violations of law were sufficient to show a likelihood of success on the merits. The Preliminary Injunction Order must be vacated accordingly if this matter proceedings.

VI. CONCLUSION

Thus, for the reasons set forth herein, the SHIP Rehabilitation Appellants respectfully request that this Court vacate the injunction and dismiss the Complaint.

Respectfully submitted,

November 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, Chief Administrative Judge, Fifth Judicial Circuit

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2020-CP-4005802

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

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

November 1, 2022

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