NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

JAMES J. DONELON
IN HIS OFFICIAL CAPACITY
AS COMMISSIONER OF INSURANCE
FOR THE STATE OF LOUISIANA AND
THE LOUISIANA DEPARTMENT OF
INSURANCE

Plaintiff

VERSUS

JESSICA K. ALTMAN, IN HER CAPACITY AS
STATUTORY REHABILITATOR OF SENIOR HEALTH
INSURANCE COMPANY OF PENNSYLVANIA
AND
SENIOR HEALTH INSURANCE COMPANY OF
PENNSYLVANIA, IN REHABILITATION

Defendant

NUMBER: 713794

SECTION: 22

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' PRAYER FOR ISSUANCE OF A PRELIMINARY INJUNCTION

Dated: January 7, 2022

COZEN O'CONNOR, P.C.
MICHAEL J. BROADBENT (*Pro hac vice* pending)
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Tel: (215) 665-4732
Fax: 215.701.2288
mbroadbent@cozen.com

-and-

JONES WALKER LLP
BRANDON K. BLACK (La. 24298)
COVERT J. GEARY (La. 14280)
445 North Boulevard, Suite 800
Baton Rouge, LA 70802
Tel: (225) 248-3128
Fax: (225) 248-3128
bblack@joneswalker.com

Counsel to Defendant Jessica K. Altman in her capacity as Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania in rehabilitation, and Defendant Senior Health Insurance Company of Pennsylvania in Rehabilitation

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules

Other Authorities

TABLE OF CONTENTS

Page

I.
INTRODUCTION

This Court should deny Plaintiffs' prayer for a preliminary injunction, part of an extraordinary collateral attack on a court-approved rehabilitation plan and the state officials implementing that plan. Indeed, Plaintiffs ask this Court to assert jurisdiction over out-of-state officials and enjoin those officials from exercising their statutory authority under the order and supervision of a Pennsylvania court, despite that Plaintiffs deliberately and voluntarily ignored every opportunity to stake out their position in the proper forum. Plaintiffs also ask this Court to assert authority over the rehabilitation of a financially-distressed insurer domiciled in Pennsylvania, despite that the insurer is already within the exclusive jurisdiction of a Pennsylvania court. This Court must decline Plaintiffs' invitation to enjoin a state-officer defendant and an insurer under the authority and control of a Pennsylvania state court, and this Court similarly must decline Plaintiffs' invitation to violate Full Faith and Credit principles and thereby create conflicting court decisions regarding the plan. Indeed, granting relief to Plaintiffs here could establish precedent and authority inviting others to challenge the authority of Pennsylvania courts and Pennsylvania officials, as well as the authority of Louisiana courts, officials, and agencies in its own receivership matters. Defendants respectfully ask that this Court refuse to endorse such a result through the drastic remedy of a preliminary injunction.

II.
STANDARD OF REVIEW ON PRAYER FOR PRELIMINARY INJUNCTION

Louisiana Code of Civil Procedure article 3601A provides that "[a]n injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law." La. Code Civ. Proc. art. 3601. A preliminary injunction is a "harsh, drastic remedy that should only issue where the petitioner is threatened with irreparable harm and has no adequate remedy at law." *Ballay v. Cormier*, 2017-0512 (La. App. 4 Cir. 12/13/17), 234 So. 3d 1013, 1020 (internal citation and quotation marks omitted). To obtain a preliminary injunction, the petitioner must establish by a preponderance of the evidence a *prima facie* showing that: "(1) it will suffer irreparable injury, loss, or damage if the motion for preliminary injunction is not granted and (2) it is entitled to the relief sought through at least a showing that it will likely prevail on the merits of the case." *Id.*; *see also Brookwood-Riverside, L.L.C. v. Baton Rouge Water Works Co.*, 2020-1173 (La. App. 1 Cir. 5/25/21), 327 So. 3d 1, 4.

An irreparable injury is "an injury or loss that cannot be adequately compensated in money damages, or is not susceptible to measurement by pecuniary standards." *Ballay*, 234 So. 3d at

1020. Mere inconvenience, even "great inconvenience," to the petitioner is not sufficient to show irreparable injury. *Hobbs v. Gorman*, 595 So. 2d 1264, 1266 (La. Ct. App. 1992). Further, "the proof of irreparable harm cannot be speculative or based upon some uncertain future event." *Faubourg Marigny Imp. Ass'n, Inc. v. City of New Orleans*, 2015-1308 (La. App. 4 Cir. 5/25/16), 195 So. 3d 606, 616. Additionally, in determining whether to issue a preliminary injunction, "the trial court should consider whether the threatened harm to the plaintiff outweighs the potential for harm or inconvenience to the defendant and whether the issuance of the preliminary injunction will disserve the public interest." *Harvey v. State*, 2014-0156 (La. App. 4 Cir. 12/16/15), 183 So. 3d 684, 700, *writ denied*, 2016-0105 (La. 3/4/16), 188 So. 3d 1060; *see also Kruger v. Garden Dist. Ass'n* (La. App. 4 Cir. 1/17/01), 779 So. 2d 986, *writ denied*, 2001-0733 (La. 5/4/01), 791 So. 2d 658 (instructing courts to conduct a "duty-risk analysis" in determining whether to issue a preliminary injunction).

III.
RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A "court may hear an application for a preliminary injunction . . . upon the verified pleadings or supporting affidavits, or may take proof as in ordinary cases." La. Code Civ. Proc. art. 3609. The arguments of counsel shall not be accepted as evidence. *E.g.*, *Perez v. Evenstar*, 2012-0941 (La. App. 4 Cir. 1/30/13), 108 So. 3d 898. For purposes of the hearing on the merits of the prayer for a preliminary injunction, Defendants rely on the pleadings, the Declaration of Special Deputy Rehabilitator Patrick H. Cantilo, and the exhibits filed herewith. To the extent Defendants cite or refer to the parties' stipulation of fact or any of Plaintiffs' seventeen exhibits, Defendants cite to that material for purposes of this Memorandum only and reserve their right to challenge the admission or use of such facts or exhibits for relevance, completeness, or other grounds beyond authenticity.

A. SHIP is a Pennsylvania long-term care insurer in rehabilitation under the court-ordered and court-supervised authority of Defendant Altman.

SHIP is a long-term care insurance ("LTCI") company organized under the laws of the Commonwealth of Pennsylvania. (Declaration of Patrick H. Cantilo ("Cantilo Dec.") filed herewith, at ¶ 6.) On January 29, 2020, as a result of its long financial decline, the Commonwealth Court placed SHIP in rehabilitation under the Pennsylvania Insurance Department Act, 40 P.S. §§ 221.1–221.63 ("PID Act"). (*Id.* at ¶ 7; *see also* Rehabilitation Order, attached hereto as Exhibit 1.) By law, rehabilitation proceedings are designed "to protect the interests of insureds, creditors, and the public generally." 40 P.S. §§ 221.4–221.5. Louisiana has adopted a similar scheme with

a similar purpose. *See, e.g.*, *Donelon v. Shilling*, 2019-00514 (La. 4/27/20), ---So. 3d---, 2020 WL 2079362, at *7 (recognizing that a rehabilitator must consider the "public interest foremost in mind" and that a rehabilitator's responsibilities include as well the "protection of policyholders, creditors, and the insurer itself." (citations and quotation marks omitted)).

The PID Act establishes the Commonwealth Court of Pennsylvania as the exclusive forum for receivership matters, including judicial review of rehabilitation plans and plan implementation. *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1091 (Pa. 1992) (citing 40 P.S. § 221.4). The Commonwealth Court assumed jurisdiction over SHIP by placing it in rehabilitation January 29, 2020. (Cantilo Dec. at ¶ 8; *see also* Ex. 1.) That Court also affirmed the authority of Defendant Jessica K. Altman, 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). 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. Patrick H. Cantilo was duly appointed as Special Deputy Rehabilitator pursuant to this authority. (Cantilo Dec. at ¶ 9; Ex. 1 at ¶ 14.)

B. The Commonwealth Court approved a Rehabilitation Plan involving policy modifications following more than a year of comment and consideration by the interested parties.

Upon being placed in rehabilitation, notice was provided to, *inter alia*, all policyholders (including those with policies issued in Louisiana) as well as insurance regulators across the country. (Cantilo Dec. at ¶ 10; *see also* Form of Notice, attached hereto as Exhibit 2.) Insurance regulators, including Commissioner Donelon and the Louisiana Department of Insurance, were already familiar with the possibility of rehabilitation, as Defendants and Mr. Cantilo made numerous outreach efforts prior to filing the application for rehabilitation in the Commonwealth Court. (Cantilo Dec. at ¶ 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. (Cantilo Dec. at ¶ 12.)

Insurance regulators from five states filed formal comments, and insurance regulators from three states intervened. (Cantilo Dec. at ¶ 13.) Plaintiffs refused to participate in SHIP's rehabilitation proceeding in the Commonwealth Court (Cantilo Dec. at ¶ 14), instead electing to rely on the fact that three other regulators (the "Intervening Regulators") did choose to intervene in the Commonwealth Court of Pennsylvania and raise challenges to the plan. (Cantilo Dec. at ¶¶ 14-16.)[1]

On May 17, 2021, following a lengthy period in which the Rehabilitator made significant data available to parties and non-party regulators, the Commonwealth Court began a week-long hearing on the plan which included the Intervening Regulators presenting their arguments that the proposed plan did not benefit policyholders and improperly usurped state rate making authority. (Cantilo Dec. at ¶ 17.)

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] (Opinion and Order, attached as Exhibit 3; *see also* Cantilo Dec. at ¶ 18.) Policyholder elections would be effected through one of two mechanisms: (1) states could actively or passively "opt-in" to the premium rate setting provisions of the 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 (2) states could "opt-out" of that portion of the 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. (*Id.* at ¶ 39.)

The deadline to "opt-out" of the Approved Plan was November 15, 2021. Plaintiffs chose not to opt-out, and, under the Commonwealth Court's opinion and the Approved Plan, Louisiana is an "opt-in" state. (Cantilo Dec. at ¶¶ 19, 20.) Policyholders were scheduled to receive the election packages for opt-in states in January 2022, but Plaintiffs and Defendants voluntarily agreed not to send election packages or otherwise communicate with policyholders of policies issued in Louisiana pending a decision on the motion for injunction. (Cantilo Dec. at ¶ 21.) Should

---

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

[2] The Plan Approval Opinion was amended in minor ways in November 2021; Exhibit 3 is the amended opinion.

no further injunction be entered, however, policyholder election material will be sent to the holders of policies issued in Louisiana, as will have been for nearly all of SHIP's policyholders. (Cantilo Dec. at ¶ 22.) Importantly, no policy would be modified until April 2022 at the earliest, following receipt of policyholder elections and the planned audit of the election process to ensure accuracy. (Cantilo Dec. at ¶ 22.)

The Commonwealth Court's order on the Approved Plan is now on appeal to the Supreme Court of Pennsylvania, but the matter has not been stayed pending appeal, and the Rehabilitator is moving forward with implementation with the Commonwealth Court's approval. (Cantilo Dec. at ¶ 23.) 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 pending appeal. (Cantilo Dec. at ¶ 24.) That motion was denied, and the Commonwealth Court found that a stay should not be entered because, *inter alia*, delay was damaging for policyholders and the prospects of the plan. (Cantilo Dec. at ¶ 25; Stay Denial Opinion, attached hereto as Exhibit 4.)

Then, on November 8, 2021, the Intervening Regulators filed a motion in the Supreme Court of Pennsylvania seeking a stay. (Cantilo Dec. at ¶ 27.) The Intervening Regulators primarily sought to prevent the Rehabilitator from sending and accepting opt-in and opt-out submissions by state regulators which were due by November 15, 2021. (Cantilo Dec. at ¶ 26.) The Intervening Regulators did not seek expedited relief, however, and the opt-in and opt-out deadline passed without an order of the Supreme Court staying implementation of the Approved Plan. (Cantilo Dec. at ¶ 28.) As the Intervening Regulators admitted in arguments joined by Plaintiffs here, any alleged harm to policyholders from receiving election packages and making policy elections consistent with opt-in or opt-out decisions is and would be reparable. (*See* Intervening Regulators' Application for Stay, attached hereto as Exhibit 5, at 40-41 (explaining how state opt-in/out process and policyholder elections could be undone if necessary).)

C. Plaintiffs tried and failed to stop the Pennsylvania courts from even considering the proposed rehabilitation plan.

Plaintiffs did not file formal comments in the rehabilitation proceedings, and they did not seek to intervene despite receiving notice of the invitation to do so. Instead, Plaintiffs commenced a collateral attack on the plan by filing suit in federal court prior to plan approval, asking the federal court to intervene and issue declaratory and injunctive relief that would upend SHIP's rehabilitation and prevent the consideration and implementation of the proposed plan. *Donelon v. Altman*, No. 20-604, 2021 WL 4205654 (M.D. La. Sept. 15, 2021). Soon after the plan was

approved (Ex. 3), the federal court litigation matter was dismissed on the grounds that "the existence of a rehabilitation plan" that might impact Louisiana policyholders was "not a concrete and particularized injury" giving standing to Commissioner Donelon. *See Donelon*, 2021 WL 4205654, at *4 (granting defendants' motion to dismiss and finding as well that case was "not ripe" because there were too many contingencies). The case was dismissed without prejudice, but Plaintiffs did not refile in federal court at any point after plan approval. *Id.* at *5.

D. Plaintiffs allowed the Issue State Rate Approval deadline to come and go without exercising their rights, yet now come before this Court alleging that the plan is illegal, bad for policyholders, and must be stopped immediately.

Plaintiffs took no action in this court or in federal court to stop implementation of the plan prior to the Issue State Rate Approval deadline for opting-out, thus allowing Defendants to continue implementing in Louisiana. In fact, Plaintiffs did not act until just before the opt-out submissions were due, and then only to file a motion with certain other states seeking to be heard as *amici* on the Intervening Regulators' stay request filed four days earlier in the Supreme Court of Pennsylvania, and possibly on the merits. (Cantilo Dec. at ¶ 30; *see also Amici* Filing, attached hereto as Exhibit 6.)[3] The proposed *amici* brief regarding the stay was authored by counsel for Plaintiffs and for the chief insurance regulator of South Carolina. (*Id.*, Brief at 6.) As Plaintiffs and the other states explained in that *amici* filing, they joined entirely in the arguments set forth by the Intervening Regulators regarding the stay. (*Id.*, Motion at 4.)[4]

No stay was entered before the November 15 opt-in and opt-out deadline, and no stay has yet been entered in Pennsylvania. The deadline passed without an effective opt-out by Plaintiffs and implementation is proceeding as to nearly all SHIP policyholders; as noted, this deliberate decision by Commissioner Donelon and the Louisiana Department of Insurance made Louisiana an opt-in state under the premium rate setting provisions of the Plan. (Cantilo Dec. at ¶ 33.)

On December 3, 2021—*i.e.*, after failing to opt-out—Plaintiffs filed a new Complaint in this Court seeking to stop plan implementation in Louisiana by way of a permanent injunction. (*See generally* Compl.) Plaintiffs also sought a preliminary injunction that would stop Defendants

---

[3] Pennsylvania law does not contemplate *amici* briefs on matters outside of the merits or a request for permissive appeal. *See* Pa. R.A.P. 531 ("Participation by *Amicus Curiae*").

[4] The *amici* request did not specify which states would later file a brief on the merits, and no proposed brief was submitted. On December 22, 2021, the stay *amici* litigants (together with a number of new states) filed an *amici* brief on the merits brief. The motion to be heard as *amici* on the stay and on the merits remains pending. (Cantilo Dec. at ¶ 36; *see also Amici* Filing on the Merits, attached hereto as Exhibit 7.)

from sending election packages or modifying policies based on those elections, and that matter is currently before this Court. (*See generally* Pltfs' Preliminary Injunction filings.)

IV.
JURISDICTIONAL ARGUMENTS

The Petition seeking a preliminary injunction is flawed in numerous respects, but its fundamental defect is that it seeks an injunction from this Court despite the absence of jurisdiction over the subject matter or the defendants. Specifically, this Court lacks subject matter jurisdiction over Plaintiffs' claims seeking to invalidate or bar implementation of the court-approved rehabilitation plan, and this Court lacks personal jurisdiction over the Rehabilitator charged with implementing that plan or SHIP acting under her direction in implementing the plan. Without conclusive findings of jurisdiction on both fronts, this Court must refuse to enter a preliminary injunction.

A. This Court lacks subject matter jurisdiction over Plaintiffs' claims seeking a declaratory order and injunction preventing implementation of the Rehabilitation Plan because the Commonwealth Court of Pennsylvania has exclusive jurisdiction over plan approval and implementation.

The Petition must be denied because Louisiana courts are without subject matter jurisdiction over the claims at issue in the Complaint. It is uncontroverted that under the respective laws of both Pennsylvania and Louisiana, the court overseeing an insurer's rehabilitation proceedings has *exclusive* jurisdiction over the rehabilitation and any plan of rehabilitation. It necessarily follows that any challenge to a rehabilitation plan ***must*** be made in the rehabilitation court that is exercising that exclusive jurisdiction (or to a higher court within that state through a direct appeal), regardless of the purported merit (or lack thereof) of that challenge. Thus, under both Pennsylvania and Louisiana law, the courts of any other state lacks jurisdiction and authority to interfere with a rehabilitation court's rehabilitation orders.

In order to enter a preliminary injunction, a court must have first resolved whether it has subject matter jurisdiction over the underlying claims at issue. *See Succession of Thompson*, 2020-0536 (La. App. 4 Cir. 7/14/21), ---So.3d---, 2021 WL 2956057, at *5 (Court must resolve whether it has subject matter jurisdiction "[b]efore we address the merits of the case"); *Louisiana Pub. Def. Bd. v. Dorroh*, 2015-1277 (La. App. 1 Cir. 5/12/16), 195 So. 3d 522, 528 (reversing trial court's order granting preliminary injunction where it "had no subject matter jurisdiction to grant the injunctive relief ordered"); *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.").

Plaintiffs seek a preliminary injunction to prevent Defendants from (a) "attempting to enforce against any Louisiana policyholders" the Rehabilitation Plan that was duly approved by the Commonwealth Court of Pennsylvania pursuant to its exclusive jurisdiction of SHIP's Rehabilitation, and (b) "soliciting any Louisiana policyholders of SHIP to select 'options' under" the approved Rehabilitation Plan. (*See* Plaintiffs' Memorandum ("Pltfs' Memo") at 26.) This Court lacks subject matter jurisdiction to enter any injunction because Louisiana courts are without jurisdiction to entertain a collateral attack on the Commonwealth Court of Pennsylvania's exclusive jurisdiction over SHIP's rehabilitation proceedings.

It is well established that the Commonwealth Court of Pennsylvania has exclusive jurisdiction over the rehabilitation of insurers domiciled in Pennsylvania, including the exclusive jurisdiction to approve a plan of rehabilitation. *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 Commonwealth Court of Pennsylvania may approve, disapprove, or modify a proposed rehabilitation plan); *FBT Bancshares, Inc. v. Mut. Fire, Marine, & Inland Ins. Co.*, No. CIV. A. 95-1702, 1995 WL 599039, at *4 (E.D. La. Oct. 11, 1995) (Pennsylvania's "statutory scheme establishes the Commonwealth Court as the forum for judicial review of the Rehabilitation proceedings."). As such, any challenges to the provisions of SHIP's Rehabilitation Plan or the authority of the Rehabilitator to implement that plan are within the exclusive jurisdiction of the Commonwealth Court of Pennsylvania. 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 or the scope of the Rehabilitator's authority. *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); 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).[5]

The same holds true in Louisiana—that is, Louisiana courts have exclusive jurisdiction over their own rehabilitation proceedings commenced pursuant to the RCLA. *See, e.g., Brown v. Associated Ins. Consultants, Inc.*, 97-1396 (La. App. 1 Cir. 6/29/98), 714 So. 2d 939, 942 (The RCLA's "statutory scheme for the liquidation and/or rehabilitation of insurers is comprehensive and exclusive in scope," and holding that "any attempt ... to enjoin the Commissioner (through the appointed liquidator) from performing his role as liquidator would clearly violate the exclusivity of the rehabilitation scheme provided by law."); *State ex rel. Guste v. ALIC Corp.*, 595 So. 2d 797, 799 (La. Ct. App. 1992) (The statutory scheme for "[r]eceivership proceedings for Louisiana insurance companies ... is comprehensive and *exclusive*."); *LeBlanc v. Bernard*, 554 So. 2d 1378, 1383 (La. Ct. App. 1989), *writ denied*, 559 So. 2d 1357 (La. 1990) (Louisiana's statutory scheme for liquidation and rehabilitation is an "exercise of the police power of the State of Louisiana," and the statutory scheme "is comprehensive and exclusive"); *see also Shilling*, 2020 WL 2079362, at *7 (The RCLA "grants the Commissioner the right to choose the forum for his action" and holding that Commissioner Donelon acting as rehabilitator may not be deprived of that right and compelled to arbitration because arbitration "would clearly violate the exclusivity of the rehabilitation scheme."). Just as a Louisiana court's rehabilitation plan of a Louisiana insurer may only be challenged in Louisiana courts, so too SHIP's Rehabilitation Plan may only be challenged in Pennsylvania's courts. Holding otherwise would open the door for chief insurance regulators of other states to challenge in their own state courts the decisions and actions of Commissioner Donelon and the Louisiana Department of Insurance, as well as this Court, in receivership matters. Such a result would defy logic—and, importantly, Louisiana law.

Louisiana law also recognizes a receiver's broad authority in rehabilitation to serve the public interest together with the interests of policyholders, creditors, and the insurer. *Shilling*,

---

[5] For this reason, federal courts generally abstain from exercising jurisdiction in cases involving ongoing rehabilitation proceedings. *See, e.g., Klein v. Fed. Ins. Co.*, Civ. A. No. 7:03-CV-102-D, 2012 WL 2886679, at *3 (N.D. Tex. July 14, 2012) ("[T]he insurance insolvency context presents the classic example [for abstention's] goal of preventing needless conflict with state policy," because states "have primary responsibility for regulating the insurance industry and have comprehensive receivership and liquidation regulations."); *accord 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*, 517 U.S. 706 (1996). Plaintiffs offer this Court no reason to deviate from that practice.

2020 WL 2079362, at *2-*3. As in Pennsylvania, the RCLA authorizes the Commissioner as rehabilitator to "take such steps towards removal of the causes and conditions which have made such proceedings necessary as may be expedient." La. Rev. Stat. § 22:2009.A. In Louisiana—again as in Pennsylvania—the rehabilitator can take many steps, both enumerated and within his general powers, to effect a rehabilitation plan, including imposing liens on policyholders, "[t]o enter into such agreements or contracts as necessary to carry out the full or partial plan for rehabilitation, and "to affirm or disavow any contracts to which the insurer is a party." *Id.* at 2009.A, E. The laws of Pennsylvania and Louisiana are plainly similar on the question of a rehabilitators' broad authority—including to modify contracts—in rehabilitation.

In fact, as Plaintiffs concede, Louisiana treats Pennsylvania as a "reciprocal state" for purposes of the RCLA. (Pltfs' Memo at 7.) When a reciprocal state such as Pennsylvania exercises its exclusive jurisdiction in receivership proceedings, Louisiana courts lack subject matter jurisdiction to consider challenges to those matters. *See Steamship Mut. Underwriting Ass'n (Bermuda), Ltd. v. Sun Life Assur. Co. of Canada*, 2006-1082 (La. App. 1 Cir. 6/8/07), 965 So. 2d 883, 885, *writ denied*, 2007-1390 (La. 10/12/07), 965 So. 2d 400 ("It is clear, then, that Pennsylvania is exerting exclusive jurisdiction over the matters at issue before us. Accordingly, we lack subject matter jurisdiction to consider them."); *Chavers v. Bright Truck Leasing*, 2006-1011 (La. App. 3 Cir. 12/6/06) 945 So. 2d 838, 844 (Louisiana courts "divested of subject matter jurisdiction over the claims against Reliance" where "liquidation proceedings involving Reliance were instituted in the state of Pennsylvania, the domiciliary state of Reliance's incorporation"); *see also ALIC Corp.*, 595 So. 2d at 802 (only the court in which the receivership proceeding was brought had jurisdiction over claims against the insurer, and "any other district court was without subject matter jurisdiction to hear any claims against that company").

Despite this clear statutory authority, Plaintiffs seek to reopen and relitigate the Commonwealth Court's findings and conclusions of law regarding the Rehabilitator's authority, questions this Court is not authorized to consider or address.[6] Indeed, both the RCLA and Pennsylvania law, expressly allow for rehabilitation courts to issue restraining orders and injunctions to ***prevent*** precisely what Plaintiffs now ask this Court to do—interfere with a rehabilitation court's exclusive jurisdiction over rehabilitation proceedings commenced in that

[6] Plaintiffs' impermissible effort to conduct parallel rehabilitation proceedings is evident through their discussion of the scope of Pennsylvania law.

state. *Compare* La. Rev. Stat. § 22:2006 (Louisiana courts may issue restraining orders and injunctions to "prevent interference with the [rehabilitation] proceedings" commenced in Louisiana under the RCLA) and *Shilling*, 2020 WL 2079362 at *4 (RCLA grants Commissioner the ability "to seek to enjoin interference with rehabilitation proceedings"), *with* 40 P.S. § 221.5 (a)(iii) (Commonwealth Court of Pennsylvania may grant injunctions to prevent "interference with the receiver or with the [rehabilitation] proceeding").

SHIP's rehabilitation proceeding is an *in rem* proceeding. *See, e.g.*, *Ballestros*, 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. Co.*, No. CIV.A. 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 (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."). Plaintiffs do not—and cannot—dispute that they received adequate notice of SHIP's Rehabilitation proceedings, and Plaintiffs similarly do not—and cannot—show that there was any lack of due process for policyholders in Louisiana. Quite the contrary, Plaintiffs were apprised of SHIP's rehabilitation every step of the way and invited to fully participate in those proceedings. That Plaintiffs voluntarily elected not to participate does not somehow render the Commonwealth Court's *in rem* and exclusive jurisdiction ineffective. Such an illogical proposition would effectively eviscerate the comprehensive and exclusive nature of *all* rehabilitation proceedings—including in Louisiana.

The proper mechanism for Plaintiffs to challenge the Rehabilitation Plan or its implementation has always been for Plaintiffs to participate in the Rehabilitation Proceedings, not to collaterally attack those proceedings in their own state court. Indeed, Plaintiffs have implicitly recognized this by filing *amicus* briefs in the Pennsylvania Supreme Court in support of Plaintiffs' proxies, the Intervening Regulators, on their stay motion and on the merits. What Plaintiffs appear to be doing is tactically seeking two bites of the proverbial apple: that is, (1) collaterally attacking the Rehabilitation Plan in their own state court by claiming the Pennsylvania court cannot bind Louisiana policyholders, while (2) advancing Plaintiffs' very same claims and legal arguments in the Rehabilitation Proceedings on appeal as an *amicus* supporting the arguments of the Intervening

Regulators. The RCLA and PID Act—as well as the very nature of rehabilitation proceedings—prohibit these improper collateral attacks on Pennsylvania's ongoing rehabilitation proceedings.

B. The Court lacks personal jurisdiction over the Rehabilitator, a government officer exercising statutory authority under Pennsylvania law and under the supervision and appointment of the Pennsylvania courts.

Similarly, the Court lacks personal jurisdiction to enjoin the Rehabilitator from implementing the court-approved rehabilitation plan for SHIP. *See Overstreet v. Tangipahoa Par. Sheriff's Off.*, No. CIVA 06-2425, 2007 WL 756440, at *4 (E.D. La. Mar. 8, 2007) ("In order to have jurisdiction to issue an injunction ... a district court must have *in personam* jurisdiction over the person to whom the injunction is directed."); *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.").

Under Louisiana's Long-Arm Statute, La. Rev. Stat. § 13:3201, the exercise of personal jurisdiction over non-residents must not exceed the limits of the Louisiana State Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. La. Rev. Stat. § 13:3201(B); *Lewis v. Pine Belt Multipurpose Cmty. Action Acquisition Agency, Inc.*, 48,827 (La. App. 2 Cir. 4/9/14), 138 So. 3d 776, 781, *writ denied*, 2014-0965 (La. 8/25/14), 147 So. 3d 1119 (Louisiana long-arm statute is "coextensive" with constitutional due process). "The exercise of personal jurisdiction over a non-resident defendant comports with due process when the following two prongs are satisfied: (i) the defendant has certain 'minimum contacts' with the forum state; and (ii) as a result of those contacts, the maintenance of the suit would not offend traditional notions of fair play and substantial justice." *Ohle v. Uhalt*, 2016-0569 (La. App. 4 Cir. 2/1/17), 213 So. 3d 1, 6. As the party asserting that jurisdiction is proper, Plaintiffs bear "[i]nitial burden of providing sufficient minimal contacts to establish personal jurisdiction" (*id.* at 7), and in doing so, "may not aggregate factual allegations concerning multiple defendants in order to demonstrate personal jurisdiction over any individual defendant." *Id.* at 9 (internal quotation marks omitted).

Plaintiffs make no claim of general jurisdiction over the Rehabilitator; they cite no substantial "continuous and systematic" contacts which would justify the exercise of general jurisdiction. *Lewis*, 138 So. 3d at 782. Thus, this Court can grant relief to Plaintiffs only if it finds specific jurisdiction, yet Plaintiffs fail to identify *a single act* of the Rehabilitator (or SHIP) directed to Louisiana sufficient to establish specific jurisdiction with respect to Plaintiffs' claims

arising out of the rehabilitation. Instead, Plaintiffs tersely conclude that because the Rehabilitator "stands in the shoes of SHIP's former managers," the Court may exercise personal jurisdiction over the Rehabilitator based exclusively on SHIP's pre-existing and current contacts with Louisiana. But as explained above, Plaintiffs "may not aggregate factual allegations concerning multiple defendants" to demonstrate personal jurisdiction (*Ohle*, 213 So. 3d at 9), which is precisely what Plaintiffs now seek to do.

Moreover, Plaintiffs are wrong that the Rehabilitator in this lawsuit "is not a state officer" and simply "stands in the shoes of SHIP's former managers." (Pltfs' Memo at 11.) Plaintiffs are not claimants against the assets of SHIP; Plaintiffs are challenging the very nature of the Rehabilitator's statutory powers conferred by the Pennsylvania legislature, as well as the power and jurisdiction of the Commonwealth Court and the Rehabilitator, to adopt the Approved Plan. The Pennsylvania legislature has granted the Rehabilitator the broad authority to "take such action as [s]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." *Foster*, 614 A.2d at 1091 (citing 40 P.S. § 221.16(b)). As the Pennsylvania Supreme Court has recognized, "[t]his mandate explicitly defers all actions to the skill of the Rehabilitator and implicitly recognizes her expertise in these matters." *Id.* In her capacity as Rehabilitator, Commissioner Altman is afforded broad discretion to use these statutory powers for "the protection of the interests of insureds, creditors, and the public generally." 40 P.S. § 221.1(c).[7] It is for this exact reason that the Louisiana Supreme Court has recognized that Commissioner Donelon, when acting as rehabilitator, "does not stand precisely

[7] The cases cited by Plaintiff do not overcome these principles. In *Di Loreto v. Costigan*, 600 F. Supp. 2d 671 (E.D. Pa. 2009), *aff'd*, 351 F. App'x 747 (3d Cir. 2009), a Pennsylvania federal court refused to recognize specific personal jurisdiction over the New York Insurance Department and certain insurance department officials based on their efforts to enforce a civil jury verdict to recover assets for the insolvent estate of Nassau Insurance Company. On the jurisdictional issue, *Di Loreto* involved an imputation analysis of the New York Liquidation Bureau ("NYLB") as to the agency and official defendants. *Id.* at 677-683. The court relied on New York's own analysis of the government defendants and NYLB, not any analysis of Pennsylvania agencies or officers. *Di Loreto*, 600 F. Supp. 2d at 684. The NYLB is a "unique" entity not truly analogous to the Rehabilitator herself or the PID Office of Liquidations and Rehabilitation. *See* Home Page, New York Liquidation Bureau, https://www.nylb.org/home.htm (last visited Jan. 7, 2022). The remaining Pennsylvania cases cited by Plaintiffs are similarly inapplicable here, because none of those cases examined the status of a Rehabilitator in an out-of-state challenge to the Rehabilitator's authority to implement under Pennsylvania law or Louisiana law. *See In re Reliance Grp. Holdings, Inc.*, 273 B.R. 374 (Bankr. E.D. Pa. 2002) (analyzing whether Commissioner as rehabilitator or liquidator is a "governmental unit" and the real party in interest when seeking to recover assets within the meaning of federal bankruptcy statutes); *Kelly v. Commw. Mut. Ins. Co.*, 299 A.2d 604 (Pa. 1973) (addressing estoppel of liquidator's authority to assess members of mutual insurance company); *Koken v. Cologne Reinsurance (Barbados), Ltd.*, 34 F. Supp. 2d 240, 253 (M.D. Pa. 1999) (recognizing authority of Pennsylvania to assert exclusive jurisdiction over the interpretation of a rehabilitation plan or the rehabilitation itself).

in the shoes of [the insurer]." *Shilling*, 2020 WL 2079362, at *3 (internal quotations omitted). The Rehabilitator's implementation of SHIP's Approved Plan "is the exercise of the police power" of the Commonwealth of Pennsylvania. *See LeBlanc*, 554 So. 2d at 1383. It is that exercise of the Rehabilitator's police power that Plaintiffs challenge, and as such, the Rehabilitator does not stand in the shoes of SHIP for purposes of this lawsuit.[8]

Plaintiffs 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 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*** can be grounded. *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (describing exercise of jurisdiction over "commercial actor" directing actions to resident of another state); *Trump v. Committee on Ways and Means, United States House of Representatives*, 415 F. Supp. 3d 98 (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).

Plaintiffs' 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. For example, the Fifth Circuit found insufficient contacts for a Texas federal court to exercise jurisdiction over the commissioner of the Arizona Department of Real Estate. *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 480–81, 484 (5th Cir. 2008). Even the Arizona commissioner's act of reaching out to Texas and directing communications to Texas to identify violations of Arizona law were insufficient to reasonably anticipate being haled into the forum state's federal court to defend the non-forum state's statutes. *Id.* at 484–86. Other courts addressing this question have reached similar results. *See, e.g.*, *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*

[8] Plaintiffs' citations to *Green v. Group Programs, Inc.*, 622 So.2d 275 (La. Ct. App. 19931 Cir 7/2/93), 622 So.2d 275, and *Washington v. Baker Petrolite Corp.*, No. 09-07926, 2010 WL 3430494 (E.D. La. Aug. 24, 2010), are plainly inapposite. *Green* involved a paid, out-of-state private entity sued by the Insurance Commissioner for recovery of assets lost as a result of the entity's mismanagement of a Louisiana insurance trust. 622 So.2d at 276, 277. Similarly, *Washington* involved an out-of-state private entity—which had previously admitted to the existence of jurisdiction in Louisiana—sued by a Louisiana resident over injuries suffered at a Louisiana oil refinery owned by the private entity's predecessor-in-interest. *Washington*, 2010 WL 3430494, at *1-*3.

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").

Louisiana state courts take the same approach. In *Drake v. Hammon Square*, the Louisiana Court of Appeal refused to find personal jurisdiction over the Commissioner of Insurance of Oregon, acting as liquidator of an insolvent insurer, because the Commissioner did not have sufficient minimum contacts with Louisiana in her capacity as liquidator. 525 So. 2d 261, 263 (La. App. 1 Cir. 1998). The Court of Appeal found that neither (1) traveling to Louisiana to assume control over the insurance company's subsidiary, nor (2) traveling to Louisiana in her capacity as a Receiver for the insurance company in rehabilitation to meet with Louisiana policyholders were sufficient to exercise jurisdiction. *Id.* As receiver, the Oregon Commissioner did not benefit from Louisiana laws and "did not have fair warning that she might eventually be subject to Louisiana jurisdiction." *Id.* at 265. Ultimately, haling the Rehabilitator into this Court to answer the complaints of another state's regulator—based solely on the Rehabilitator's filings in Commonwealth Court—offends "traditional notions of fair play and substantial justice" (*see id.*) and does not comport with due process.

Plaintiffs do not identify any authority in Louisiana or elsewhere permitting them to sue and enjoin state officials performing their official authority.[9] Indeed, by Plaintiffs' logic, the Rehabilitator should anticipate being haled into ***nearly any court in the country***—notwithstanding her contacts (or lack thereof) with the relevant state—solely because SHIP is licensed to operate in 46 states, as well as the District of Columbia and the U.S. Virgin Islands. The Rehabilitator has only taken action in the Commonwealth of Pennsylvania and seeks only to implement the orders

[9] The same is true for SHIP in rehabilitation acting under the control of the Rehabilitator in her implementation of the plan. SHIP should not anticipate being haled into those same courts on claims challenging the authority of the Rehabilitator to implement the court-approved plan, particularly when SHIP, its business, and its assets are all within the exclusive jurisdiction, control, and supervision of the Pennsylvania courts.

of the Commonwealth Court of Pennsylvania. The Rehabilitator did not purposefully avail herself of Louisiana's laws and benefits, and could not reasonably anticipate being haled into a Louisiana Court. Requiring the Rehabilitator or SHIP to answer the complaints of another state's regulator based solely on the performance of the Rehabilitator's statutory duties pursuant to the Commonwealth Court of Pennsylvania's proper exercise of its exclusive *in rem* jurisdiction "would offend traditional notions of fair play and substantial justice," *Delahoussaye v. Boelter*, 2015-1790 (La. App. 1 Cir. 7/28/16), 199 So. 3d 633, 638, *writ denied*, 2016-01626 (La. 11/18/16), 210 So. 3d 290and does not comport with due process.

C. Plaintiffs' reliance on statutory provisions purporting to provide for jurisdiction over insurers operating in the ordinary course does not cure the jurisdictional defects here.

In their Memorandum, Plaintiffs deny that the Rehabilitator is a state actor for purposes of the jurisdictional analysis, and that, together with SHIP in rehabilitation, Defendants are merely transacting the business of insurance such that they are within the jurisdiction of this Court under La. Rev. Stat. §§ 22:868 and 22:971.1. Not so. In their Complaint and related filings, Plaintiffs challenge the Rehabilitator's implementation of SHIP's Approved Plan, an act that "is the exercise of the police power" of the Commonwealth of Pennsylvania rather than the act of a private entity. *LeBlanc*, 554 So. 2d at 1383. As explained herein, Louisiana law—like Pennsylvania law—recognizes that a court-appointed statutory rehabilitator "does not stand precisely in the shoes of [the insurer]." *Shilling*, 2020 WL 2079362, at *3 (internal quotations omitted). Accordingly, neither La. Rev. Stat. § 22:868 or § 22:971.1 places Defendants within the jurisdiction of this Court.

La. Rev. Stat. § 22:868 establishes certain mandatory provisions in any "insurance contract[s] delivered or issued for delivery *and* covering subjects located, resident, or to be performed in this state, or any group health and accident policy insuring a resident of this state regardless of where made or delivered." The statute does not *create* jurisdiction in Louisiana or even establish any exclusive jurisdiction within Louisiana; rather, it prohibits policy forms from adopting out-of-state law as controlling and from eliminating jurisdiction in Louisiana. Specifically, the statute states that a policy may not include terms "[r]equiring it to be construed according to the laws of any other state or country" or "[d]epriving the courts of this state of the jurisdiction or venue of action against the insurer." *Id.* at 868.A(1) and (2). Here, however, Plaintiffs have not alleged that any SHIP policy was "delivered" or "issued for delivery" with any such provisions, nor have Plaintiffs even alleged that Defendants intend to modify SHIP's policies

in a way that assigns some other governing law or eliminates jurisdiction in Louisiana. Controlling law and questions of jurisdiction are established by other principles, not this statute.[10]

La. Rev. Stat. § 22:971.1 addresses the "Regulation of health insurers." It purports to provide for a presumption of jurisdiction for the Commissioner of Insurance over entities issuing or providing health insurance coverage, and Plaintiffs interpret its language as giving this Court personal jurisdiction over the Defendants here. Notably, however, § 22:971.1 is silent as to regulation of or jurisdiction over state actors and agencies, court-appointed statutory rehabilitators, insurers in rehabilitation, or insurers operating under the exclusive control and supervision of another court. The statute is also silent as to any jurisdiction of this Court, providing only that the Commissioner would have jurisdiction over covered entities, and later describing the types of actions permitted by the statute to include the Commissioner's authority to examine the insurer. La. Rev. Stat. § 22:971.1.B(4). Absent any statutory language actually applying to the facts here, Plaintiffs go too far in their interpretation of the jurisdictional language of § 22:971.1.

V.
ARGUMENTS ON THE MERITS OPPOSING A PRELIMINARY INJUNCTION

This Court can and should refuse Plaintiffs' prayer for a preliminary injunction because Plaintiffs have not established that this Court has jurisdiction over Plaintiffs' claims. At a minimum, Defendants have demonstrated that there are sufficient and significant jurisdictional questions yet unresolved that should preclude the entry of a preliminary injunction. Should this Court turn to the merits, however, it nevertheless will find that Plaintiffs have not carried their burden of showing irreparable harm, the lack of any adequate remedy, the need for an injunction to maintain the status quo, or a likelihood of success on the merits.

A. Plaintiffs cannot establish that they will suffer irreparable injury in the absence of a stay, and accordingly no injunction should be entered.

1. Plaintiffs must show that irreparable injury will result absent a stay.

[10] *Bonura v. United Bankers Life Insurance Co.*, (La. App. 1 Cir. 11/14/89) 552 So. 2d 1248, cited by Plaintiffs, does not require a different result. In *Bonura*, the Court found that it could exercise subject matter jurisdiction over a claim for policy benefits by a Louisiana resident against a Texas insurer in liquidation. Importantly, however, *Bonura* found that Texas was not a reciprocal state and conducted its analysis based on that finding. 552 So. 2d at 1251-52. In contrast, Plaintiffs have admitted that Pennsylvania is a reciprocal state (Pltfs' Memo at 7), and therefore Louisiana law would require all claims against SHIP in liquidation—including claims like the one at issue in *Bonura*—to be asserted in the Pennsylvania courts. La. Rev. Stat. § 22:760. Moreover, *Bonura* involved a claim by an insured seeking to enforce her policy against the insurer in liquidation and against special deposits located in Louisiana. 552 So. 2d at 1251-53. Here, Plaintiffs are seeking to enforce a purported right to regulate; they are not seeking to recover any funds from SHIP or a special deposit in Louisiana, and they have alleged no facts supporting a finding that they are suing on behalf of one or more actual policyholder.

The arguments set forth in Plaintiffs' Memorandum begin with a sleight of hand. After acknowledging that a preliminary injunction requires a showing of irreparable harm to the applicant (*i.e.*, to Commissioner Donelon and the La. DOI), Plaintiffs quietly seek to excuse themselves from that burden by asserting that "absence of irreparable injury need not be shown when the act sought to be enjoined is unlawful as in this case." (Pltfs' Memo at 2.) Tellingly, Plaintiffs omit any discussion of the elements required to allow the exception, and Plaintiffs therefore fail to establish any right to a preliminary injunction in the absence of irreparable harm.

Plaintiffs specifically rely on the limited-scope jurisprudential exception to the irreparable harm requirement recognized by the Supreme Court of Louisiana in *Jurisich v. Jenkins*, 99–0076, p. 4 (La. 10/19/99), 749 So.2d 597, 599. In *Jurisich*, the Court explained that "a petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, *i.e.*, when the conduct sought to be enjoined constitutes a *direct* violation of a prohibitory law and/or a violation of a constitutional right." *Jurisich*, 749 So. 2d at 599 (emphasis added).[11] Plaintiffs must allege facts to support—and this Court must reach—three findings: (1) "that the conduct that is sought to be enjoined violates a prohibitory law (whether an ordinance or a statute or the constitution)," (2) that the injunction is prohibitory and does not mandate action, and (3) that Plaintiffs have made the necessary allegations of a violation of the prohibitory law. *See, e.g.*, *Faubourg Marigny Improvement Ass'n,* 195 So. 3d at 616. (finding that exception did not apply where plaintiff did not show that the allegedly unlawful statute as applied violated any prohibitory law). Plaintiffs cannot carry this burden.

The centrality of irreparable harm to Plaintiffs' burden on a preliminary injunction—and Plaintiffs' failure to address the applicability of the unlawfulness exception issue in any meaningful way—should bar Plaintiffs from addressing it in detail for the first time in their reply. Even if Plaintiffs had addressed the requirements for applying this exception, however, this Court

---

[11] In so holding, the Supreme Court was creating new law by interpreting and applying *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 550 So.2d 1370 (La. 1990), which found that a showing of irreparable harm "is not necessary when the deprivation of a constitutional right is involved." *S. Cent. Bell Tel.*, 550 So.2d at 1372, and a Court of Appeals decision regarding ongoing violations of the Comprehensive Environmental Response, Compensation and Liability Act. *See Ouachita Parish Policy Jury v. American Waste and Pollution Control Co.*, 606 So.2d 1341 (La. Ct. App. 1992), *writ denied*, 609 So. 2d 234 (La. 1992) (affirming injunction prohibiting defendant from violating federal environmental law). The Supreme Court of Louisiana has not applied the exception since *Jurisch* was decided twelve years ago.

would find them unsatisfied. *First*, the conduct Plaintiffs seek to enjoin is the implementation of the rehabilitation plan approved in Pennsylvania for an insurer with policies issued in Louisiana. Plaintiffs have only those "powers and duties authorized by [the Louisiana Constitution] or provided by law," but there are no constitutional or statutory provisions authorizing the Commissioner or Department to interfere with the implementation of an approved rehabilitation plan. *See* LA. CONST. ART IV, § 11 ("Commissioner of Insurance; Powers and Duties"). Louisiana law gives Commissioner Donelon certain duties and authority in the event he is appointed as a rehabilitator (La. Rev. Stat. § 22:2009), and Louisiana law defines how to address receiverships opened in other states, but no order has been entered here granting any powers to Commissioner Donelon as to SHIP. Even assuming Plaintiffs could establish this Court's jurisdiction to reconsider or challenge plan approval, Plaintiffs do not and cannot identify any law or constitutional prohibition on implementing a rehabilitation plan properly approved in the court having jurisdiction over the matter. Plaintiffs' failure to identify a direct violation of law is fatal here. *Jurisich*, 749 So. 2d at 599; *Barber v. La. Workforce Comm'n*, 2017-0844 (La. App. 1 Cir. 10/19/18), 266 So. 3d 368, *writ denied*, 2018-1878 (La. 2/18/19), 264 So. 3d 451 (citing *Jurisich* exception and requirement of a "direct violation of a prohibitory law"); *see also Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Auth.* 2004-0211 (La. 3/18/2004) 867 So.2d 651, 656 (applying exception in case involving bids to municipal authority and recognizing that exception applied only where specific threatened action—accepting a bid—was in direct violation of a prohibitory law).

Plaintiffs not only fail to identify any prohibitory law, they also fail to overcome the impact of the broad grant of powers to rehabilitators in Pennsylvania and Louisiana. *See Foster*, 614 A.2d at 1091 (rehabilitator may "take such action as [s]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." citing 40 P.S. § 221.16(b)); La. Rev. Stat. § 22:2009.A (rehabilitator may "take such steps towards removal of the causes and conditions which have made such proceedings necessary as may be expedient."). Louisiana courts recognize that the statutory schemes governing receiverships are specifically targeted to rehabilitation and liquidation, and, given this specificity and the importance of orderly and equitable receiverships, a statutory scheme for rehabilitation and liquidation can overcome general statutory provisions or other law that may be in conflict with receivership law "or the purposes behind it." *See, e.g.*, *Shilling*, 2020 WL 2079362, at *7 (statute

governing choice of forum for rehabilitation and liquidation matters pre-empted arbitration requirements); *Crist v. Benton Casing Serv.*, (La. App. 1 Cir. 10/16/90) 572 So.2d 99 (rehabilitation and liquidation statutes prevailed as to general contract law); *see also* La. Rev. Stat. § 22:2005. At best, Plaintiffs have shown a potential and theoretical violation of Louisiana law on a complex question not properly addressed at this early stage. *Cf. Two Canal Street Investors, Inc. v. New Orleans Bldg. Corp.*, 2015-0924 (La. App. 4 Cir. 4/20/16), 193 So. 3d 278 (recognizing that violation must be direct and clear rather than arguable). Accordingly, Plaintiffs can satisfy neither the first nor third elements required for the unlawfulness exception.

Second, even if Plaintiffs had alleged the existence and violation of a prohibitory law, the exception would remain inapplicable because the injunction seeks to mandate action by Defendants. The Pennsylvania courts have not entered a stay, and thus the status quo is plan implementation, meaning that nearly all policyholders have received election packages and an invitation to make an election under the plan. (*See* Stipulated Exhibit 17 (election materials).) Should Plaintiffs succeed in obtaining an injunction that bars implementation of the plan as to policies issued in Louisiana, Defendants will be forced to honor the Louisiana policies as written even if those policies are underpriced. Moreover, Pennsylvania law and the orders of the Commonwealth Court limit the Rehabilitator's authority to use assets outside of the Approved Plan, and, in the event of a future liquidation, Pennsylvania specifically prohibits the creation of subclasses and requires equal treatment of all claimants. 40 P.S. § 221.44. Accordingly, if most of the 30,000 policies are modified in accordance with the plan, any claims payment or continuation of coverage on unmodified policies issued in Louisiana will create risk of an unlawful preferential payment, which in turn could be challenged in court and result in remedies being sought against Louisiana policyholders.

Third, had Plaintiffs briefed this issue, they likely would have argued that Plaintiffs only seek to enjoin specific actions: (a) soliciting Louisiana policyholders to select from amongst certain plan options approved by the Pennsylvania court and (b) modifying the Louisiana policies in accordance with policyholder elections or any applicable default procedure.[12] (*See* Pltfs'

[12] As discussed *infra*, Commissioner Donelon elected against sending an opt-out notice even after the Rehabilitator assured him that sending the notice would not be understood as a waiver of his jurisdictional arguments. (Cantilo Dec. at ¶ 45; *see also* Pltfs' Ex. 10 (Rehabilitator letter responding to Non-Decision Letter from Plaintiffs).) Policyholders of policies issued in Louisiana are therefore entitled to choose from amongst one of the five options provided in the Approved Plan.

Proposed Preliminary Injunction Order at 2.) Whether timely or belated, however, this argument would be insufficient to excuse Plaintiffs from the irreparable harm requirement. In fact, Plaintiffs remain bound by the irreparable harm requirement unless they demonstrate that that the code provisions on which they rely apply to the Rehabilitator and SHIP in rehabilitation, *and* that the applicable code provisions prohibit acts taken or proposed to be taken by Defendants. Plaintiffs can do neither. As noted, Defendants are implementing a court-approved rehabilitation plan, not conducting the business of insurance such that they fall within the general requirement to comply with the Insurance Code in Title 22 or any of the related jurisdictional provisions cited by Plaintiffs.

But even assuming jurisdiction and the general obligation to comply with the Louisiana insurance codes could be established in the first instance, Plaintiffs still cannot cite any law prohibiting the acts covered by the proposed preliminary injunction. With respect to their purported authority over policy modifications in rehabilitation, Plaintiffs appear to rely primarily on the rate filing provisions of La. Rev. Stat. § 22:1091 *et seq.*, along with related regulations in LAC 37:46.19.1901 *et seq.* and part of the Insurance Code covering long-term care and appearing at La. Rev. Stat. § 22:1181 *et seq.* (*See* Pltfs' Memo at 17.) But none of these cited sections are prohibitory as to the actions in the proposed injunction: these laws and regulations do not prohibit a Rehabilitator or insurance company in rehabilitation from soliciting elections from policyholders or modifying policies by agreement with policyholders or otherwise according to an approved rehabilitation plan under the supervision of a court with jurisdiction over the proceedings and over the assets of the insurer.

In fact, there is no rule cited by Plaintiffs which would prohibit absolutely a Rehabilitator or insurer in rehabilitation—or even an insurance company in the ordinary course—from changing the rates it charges or the benefits it offers. La. Rev. Stat. § 22:1092 requires only that "health insurance issuer[s]" file the "proposed rate[s] to be used in connection with all of its particular products." The remaining regulations cited by Plaintiffs explain how rate increases may be sought and how rates should be calculated when seeking a rate increase. Knowing that benefit modifications are part of the plan the Rehabilitator has been directed to implement, Plaintiffs seek to force Defendants to comply with the rules specifying how rate increases requests shall be submitted in the ordinary course as a prerequisite to that implementation, making clear that Plaintiffs seek a mandatory injunction. Moreover, despite having full access to the actuarial

analyses on which the Rehabilitator has acted, there is no allegation that the rates or benefits to be offered by the Rehabilitator under the plan would not satisfy any governing regulations addressed to whether the rates associated with various options would be actuarially justified. (Cantilo Dec. at ¶ 44.) Plaintiffs' allegation is limited to the claim that Defendants failed to comply with certain mandatory process requirements as part of the plan implementation authorized by the Pennsylvania court, not that the rates or benefits or policies are themselves unlawful.[13] On these facts, the Court cannot find that Plaintiffs seek to enforce a prohibitory law enacted in Louisiana such that they are excused from the irreparable harm requirement.

B. Plaintiffs fail to establish irreparable harm.

Irreparable injury 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. In Louisiana, "[i]rreparable means an injury that cannot be adequately measured or compensated by money." *Jarquin v. Blanks*, 2018-0157 (La. App. 4 Cir. 8/15/18), 254 So. 3d 10, 12. Here, Plaintiffs' Memorandum fails to even *attempt* to prove irreparable injury, relying instead on their unsupported claim that the unlawfulness exception applies here. This is fatal to the Petition—and any conclusory assertions that Plaintiffs will suffer irreparable injury are insufficient to resuscitate it. *See Concerned Citizens for Proper Plan., LLC v. Par. of Tangipahoa*, 2004-0270 (La. App. 1 Cir. 3/24/05), 906 So. 2d 660, 665 (overturning trial court's judgment issuing a preliminary injunction where "we can find no evidence of irreparable harm, merely speculation").

Nor could Plaintiffs show irreparable injury even if they had chosen not to ignore this requirement, and for several reasons. As threshold matter, the actions which could impact Plaintiffs in theory have already taken place: that is, the Commonwealth Court approving a Rehabilitation Plan for SHIP that would provide for policy modifications through the plan's centralized process or through the Issue State Rate Approval option. The Rehabilitator's implementation of the Plan through sending election packages to policyholders and reviewing those materials is merely complying with the prior orders of the Commonwealth Court. "[T]he purpose of injunctive relief is to prevent future action, not to overturn an action that has already taken place." *Jarquin*, 254 So. 3d at 12 (upholding lower court's dismissal of application for

[13] Plaintiffs assume but do not establish that the rate regulation process requirements apply to SHIP's policies. The governing regulations for long-term care insurance are set forth in LAC 37:46.19.1937 and LAC 37.46.19.1939, but those provisions apply only to policies issued after 2005. *See* LAC 37:46.19.1937 (rules and process applicable to policies issued after 2005 but before 2018) and LAC 37.46.19.1939 (rules and process applicable to policies issued after 2018).

injunctive relief where the action complained of—a meeting where plaintiff alleged he was illegally removed from his position as manager of an LLC—had already taken place).[14] Plaintiffs cannot circumvent this requirement by framing their injunctive relief against the instrument carrying out the Rehabilitation court's orders—that is, the Rehabilitator—when the true object they complain of is the Approved Plan itself. Because the Plan has already been approved, Plaintiffs cannot show irreparable injury.

More fundamentally, Plaintiffs cannot show that allowing policyholders to exercise their right to make an election under the Plan constitutes irreparable harm. By speaking about policyholders as a whole, Plaintiffs make no showing of actual, definitive harm to anyone at all—only the mere *possibility* of harm for some *unknown* policyholder or policyholders who might voluntarily choose to pay actuarially-justified premiums in excess of that which Plaintiffs would have approved. Plaintiffs offer no discussion of what premiums or benefits Commissioner Donelon might allow, nor is there any analysis of why requiring all policyholders to accept Commissioner Donelon's preferred premium rate or benefit package would be better for any specific policyholder, let alone all policyholders collectively.

Indeed, Plaintiffs ignore the obvious: there is no harm in—and indeed the public interest is served by—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 served better by a plan option rather than the choices available outside of the plan. (Cantilo Dec. at ¶ 47.)[15] Moreover, the alternative to rehabilitation that Plaintiffs appear to advocate for—immediate liquidation—will *also* result in premium increases, limitations to benefits; unlike with rehabilitation, however, liquidation offers little to no flexibility and deprives policyholders of any last opportunity to select a better mix of benefits and premiums. (Ex. 4, Order Denying Stay at 6.) There is no irreparable injury to Plaintiffs (or anyone else) from the Rehabilitator exercising the discretion granted to her by the Pennsylvania legislature and

[14] As a result, no injunction could enter which would undo Plaintiffs' deliberate decision not to opt-out of the plan.

[15] Should the Court enter an order enjoining Defendants 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 Plaintiffs' position and seek to learn about and exercise their right to make plan option elections. The Petition and related filings lack any evidence demonstrating any harm to policyholders supported by information from actual policyholders or an analysis of policyholder interests.

making the policy determination that rehabilitation, rather than liquidation, is in the best interests of all policyholders.

Even if policies are modified in April of 2022—the earliest date by which such changes could be made according to policyholder elections—policyholders are not inherently damaged by paying actuarially justified premiums, and Plaintiffs make no showing to the contrary. (Cantilo Dec. at ¶ 22.) And, even if those changes *could* be a harm to policyholders, that harm is plainly reparable, as Plaintiffs effectively admitted by joining the Intervening Regulators' assertion in their motions for a stay that undoing the elections is possible. (Cantilo Dec. at ¶ 35.)

C. The status quo is preserved by permitting implementation to proceed, not by the entry of a preliminary injunction.

Plaintiffs also fail to satisfy the requirement than an injunction be entered only to maintain the status quo. "A preliminary injunction is an interlocutory procedural device designed to preserve the status quo as it exists between the parties, ***pending trial on the merits.***" *Hyman v. Puckett*, 2015-0930 (La. App. 4 Cir. 5/4/16), 193 So. 3d 1184, 1189 (emphasis in original). No policy modifications will be made until, at the earliest, April of 2022, providing enough time for the Court to hear the merits of Plaintiffs' claims should jurisdiction be properly exercised in this Court. (Cantilo Dec. at ¶ 22.) This Court cannot enjoin operation of the plan without a finding that the plan violates Louisiana law and that Plaintiffs have the authority to launch a collateral attack barring implementation and approval of a rehabilitation plan within the jurisdiction of another court. Importantly, however, a finding on that issue at this time would be improper as it would fail to preserve the parties' positions pending a decision on the merits.

Here, the status quo is plan implementation nationwide pursuant to the Commonwealth Court's order approving the plan. Absent the Petition, policyholders in Louisiana—like policyholders nationwide—were set to receive information on options available to them under the plan in January 2022 so that they could make an election. An injunction upending this process would disturb the status quo, not preserve it, and thus should not be entered.

D. Plaintiffs chose not to opt-out of the plan, and Plaintiffs cannot pursue relief from plan implementation that results from that decision.

As explained above, injunctions are proper only when necessary to prevent the threat of irreparable injury necessary to the moving party. The moving parties in this case, however, lack any interest in the Approved Plan or policyholder elections whatsoever: they do not allege that Commissioner Donelon is a policyholder or that he will suffer any personal harm from plan implementation, only that he will not have an opportunity to review rates for policies issued in

Louisiana. But as Plaintiffs admit, even that harm is non-existent: Plaintiffs *had* an opportunity to approve rates, and they deliberately ignored it. The Approved Plan and approval order provided for an opt-out procedure for the plan's premium rate-setting provisions through the Issue State Rate Approval option, in which state regulatory authorities could elect to receive rate increase filings and then exercise their purported authority over those requests by approving or rejecting the rates requested. (Pltfs' Memo at 21.) Commissioner Donelon and the Department elected *not* to exercise that right—despite knowing that it would cause Louisiana policyholders to be considered opt-in states, despite knowing that Plaintiffs would not have an opportunity to review the rate increase filing before policyholder elections were sent under the Approved Plan, and despite knowing that the Commonwealth Court had refused to stay the plan's implementation. Having failed to avail themselves of this opportunity, there are no "rights" held by Plaintiffs which an injunction can, should, or must protect. *See* 43A C.J.S. Injunctions § 87 ("[a]n injunction is not available if the petitioner personally has an adequate means of redress"). Plaintiffs exercised their regulatory authority by refusing to opt-out of the plan, and no additional order is necessary.

To the extent Plaintiffs claim that the opt-out procedure is coercive or damages policyholders by limiting the available options, that argument is mooted by Plaintiffs' decision not to opt out. Indeed, the effect of Plaintiffs' inaction is to make all policy options available to Louisiana policyholders, the very harm Plaintiffs claim to be caused by Defendants here. Plaintiffs should not be permitted to obtain an injunction against out-of-state government officials for the alleged purpose of protecting Louisiana from Plaintiffs' own actions and inaction.

E. Plaintiffs—and policyholders—had and have adequate remedies at law.

Similarly, Plaintiffs' Petition also fails because they have always had an adequate remedy at law: participation in SHIP's rehabilitation proceedings. The same is true for SHIP's policyholders, none of whom have appeared in these proceedings—because, it seems, none have even received notice that Plaintiffs seek to deprive Louisiana policyholders of their right to exercise elections under the Approved Plan and to deprive other policyholders of the right to be treated fairly. Plaintiffs cannot dispute that they intentionally chose not to formally participate in SHIP's rehabilitation proceedings, nor can they dispute that Plaintiffs and SHIP's policyholders were provided with adequate notice. (*See* Ex. 2 (Notice form); Cantilo Dec. at ¶¶ 10, 43 (regarding notice).) Indeed, Plaintiffs and policyholders had the ability to participate in SHIP's rehabilitation proceedings, and thus the ability to participate in any appeal or address the question of a stay

pending appeal as a party, but they chose not to exercise that right.[16] To the extent an adequate remedy is *not* available, Plaintiffs have voluntarily released and relinquished any rights they may have held, and this Court should not permit an injunction to enter where the moving party has manufactured the very exigent need on which it seeks relief.

F. The non-existent harm to Plaintiffs does not outweigh the potential for harm to Defendants, and issuance of an injunction is against the public interest.

"Before issuing a preliminary injunction, the trial court should consider whether the threatened harm to the plaintiff outweighs the potential for harm or inconvenience to the defendant and whether the issuance of the preliminary injunction will disserve the public interest." *Harvey*, 183 So. 3d at 700. Here, the potential for harm and inconvenience to Defendants and the public interest cannot be overstated—granting an injunction presents an existential threat to Pennsylvania's comprehensive statutory scheme of rehabilitation. Rather than having a rehabilitation plan approved, or disapproved, exclusively and comprehensively in the Commonwealth Court—the single, exclusive forum for resolving this issue, *see* 40 P.S. § 221.16(d)—courts across the country would instead resolve the same legal question in potentially inconsistent ways. That would necessarily threaten the prospects for rehabilitating SHIP, and indeed, any financially distressed insurers domiciled in Pennsylvania.

Moreover, an injunction would prevent the Rehabilitator from taking the necessary steps to effectuate the Rehabilitation, delaying implementation of the Approved Plan and potentially harming SHIP's other policyholders. As the Commonwealth Court explained, the Approved Plan "is designed to be implemented as quickly as possible so that policyholders can minimize any potential loss or burden from SHIP's receivership," and "any harm to policyholder interests caused by a delay in implementing the Plan will be irreparable." (Ex. 4, Order Denying Stay at 9–10.) An injunction as applied to only Louisiana policyholders would also perpetuate the discriminatory premium rate structure—that is, similarly situated policyholders in different states paying radically different prices for the same benefits—that the Plan was designed to correct. (*See* Ex. 3, Order Approving Plan at 67–69.) This would further harm the public interest.

G. No injunction should be entered because Plaintiffs are unlikely to prevail on the merits of claims which were resolved or could have been resolved in the Pennsylvania courts.

[16] Their *amicus* filing reflects Plaintiffs' attempt to pursue this collateral attack while simultaneously (and mistakenly) asserting that the Pennsylvania orders are not binding because Plaintiffs did not join the rehabilitation as a party.

The Commonwealth Court of Pennsylvania found that the Rehabilitator has the authority to implement the plan as proposed, including the opt-out process and the rate and benefit setting mechanisms. (*See generally* Ex. 3.) In this collateral attack, Plaintiffs cannot establish that the plan should not have been approved or that the plan should not be implemented in Louisiana, and, accordingly, Plaintiffs fail to show a likelihood of success on the merits.

1. The plan approval order is entitled to full faith and credit and thus cannot be undone by a Louisiana court.

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 that "a foreign judgment is entitled to at least the res judicata effect to which it would be entitled in the state that rendered the judgment." *Munnerlyn v. Munnerlyn*, 2015-739 (La. App. 3 Cir. 11/4/15), 179 So. 3d 747, 750. The validity and effect of a foreign judgment must be determined by the laws of the state which rendered the judgment—*i.e.*, Pennsylvania. *See Total Minatome Corp. v. Patterson Servs., Inc.*, 1999-0422 (La. App. 1 Cir. 5/12/00), 762 So. 2d 175, 177, *writ denied*, 2000-1721 (La. 9/15/00), 769 So. 2d 544 (Full faith and credit principles "mandate that we apply Texas' res judicata in order to determine whether our court should give the [foreign] judgment ... preclusive effects in the Louisiana litigation."); *Anderson v. Collins*, 26,142 (La. App. 2 Cir. 1/6/95), 648 So. 2d 1371, 1381, *writ denied*, 95-0629 (La. 4/21/95), 653 So. 2d 576, and *writ denied*, 95-0783 (La. 4/21/95), 653 So. 2d 576 (Louisiana courts permit collateral attacks on foreign judgments only "where the rendering state would have permitted such an attack"). "One seeking to escape the operation of a judgment rendered in another state has the burden of proof." *In re Succession of Aguilera*, 2007-77 (La. App. 3 Cir. 5/2/07), 956 So. 2d 718, 721, *writ denied*, 2007-1090 (La. 9/14/07), 963 So. 2d 998

Here, Plaintiffs' tersely conclude that the Commonwealth Court's Approved Plan is not entitled to full faith and credit because it is "not a final order" and because that court lacked "adjudicatory authority over the subject matter and persons governed by the judgment." (Pltfs' Memo at 16.) Plaintiffs are wrong on both accounts. *First*, the Commonwealth Court's Approved Plan ***is*** a final order entitled and must be given full faith and credit in courts throughout the country. The question of whether the Plan is a "final order" for purposes of full faith and credit is a question Pennsylvania law. *Total Minatome Corp.*, 762 So. 2d at 177. And under Pennsylvania law, the Pennsylvania Supreme Court has made clear that "[a] judgment is deemed final for purposes of *res judicata* or collateral estoppel unless or until it is reversed on appeal." *Shaffer v. Smith*, 673

A.2d 872, 874 (Pa. 1996). Thus, unless and until enforcement of the Commonwealth Court's Approved Plan is stayed or otherwise overturned by the Pennsylvania Supreme Court (or United States Supreme Court) 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). It is likely for this very reason that Plaintiffs are now actively seeking to participate as *amicus curiae* in the Pennsylvania Supreme Court alongside their proxies, the Intervening Regulators.

Second, Plaintiffs' assertion that the Commonwealth Court lacked jurisdiction to enter the Approved Plan is utterly meritless. Plaintiffs ignore that the Commonwealth Court's final order approving the Plan "is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *See Underwriters Nat. Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) (quotations omitted); *id.* at 706–07 (explaining that if an Indiana rehabilitation court "fully considered and finally determined [the question of subject matter jurisdiction] in the rehabilitation proceedings, the judgment was entitled to full faith and credit in the North Carolina courts"). Any "jurisdictional inquiry" on full faith and credit questions "is a limited one." *V.L.*, 577 U.S. at 407. "[I]f the judgment on its face appears to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself." *Id.* (quotations omitted).

Here, the Commonwealth Court fully considered and finally determined the precise jurisdictional issues raised by Plaintiff—whether the Rehabilitator may implement a national plan of rehabilitation for SHIP without state-by-state approval of rate increases and/or policy modifications, subject to the opt-out provisions in the Plan. Indeed, Plaintiffs cannot seriously dispute that the Commonwealth Court considered this issue *at length*, and repeatedly. (*See* Ex. 3, Order Approving Plan at 48–61, 74; Ex. 4, Order Denying Stay at 7–10.) Once these issues were fully and fairly litigated "in the rehabilitation proceedings, the judgment [is] entitled to full faith and credit in the [Louisiana] courts." *Underwriters Nat. Assur. Co.*, 455 U.S. at 706.

Moreover, there is no basis for Plaintiffs to assert that the Commonwealth Court lacked jurisdiction over SHIP's policyholders in Louisiana. As explained above, SHIP's rehabilitation proceeding is an *in rem* proceeding that is necessarily binding on all out-of-state policyholders. *See, e.g.*, *Ballestros*, 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."). 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.

The mere fact that all of Louisiana's policyholders did not appear in the rehabilitation proceedings after receiving notice regarding the matter and having an opportunity to intervene is simply not a basis to overcome the exacting full faith and credit requirements. Importantly, the due process clause does not provide the same protections for potential claimants—such as policyholders here—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). To hold otherwise for rehabilitations and liquidations would undermine and eviscerate the efficiency and uniformity sought by receivership laws around the country.

Like policyholders, Plaintiffs cannot voluntarily choose to forego formally participating in the Rehabilitation proceedings and then raise the same arguments as the Intervening Regulators in a separate and improper forum based on the alleged rights of those policyholders. If Plaintiffs believed they had the right and obligation to protect policyholders from the plan options, Plaintiffs should have intervened in the proceedings, made an opt-out election, or taken some other affirmative step to do so. Instead, Plaintiffs and other states engaged in a coordinated effort to have a proverbial second bite at the apple by again raising the same arguments already considered by the Rehabilitation Court in other jurisdictions, even if doing so risked waiving or relinquishing any right to protect that regulators' policyholders. Plaintiffs 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 by electing not to formally participate in the rehabilitation proceedings as parties. *See 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); *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); *F.D.I.C. 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). This is especially true where Plaintiffs avoided the rehabilitation proceedings during the review phase only to appear as purported *amici* on appeal.

Finally, any effort by Plaintiffs to attack the merits of the Commonwealth Court's Order is misguided for purposes of any full faith and credit analysis, and is thus immaterial. "[T]he 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." *Milliken v. Meyer*, 311 U.S. 457, 462 (1940); *accord Brown v. Brown*, 377 So. 2d 438, 441 (La. App. 2d 1979) (The decision as to whether the Arkansas policy is good or bad and whether we desire to follow it is one we are not empowered to make. It is of the essence of Full Faith and Credit that one state may not inquire into the rightness or wrongness of another state's policy when enforcing the judgment."), *writ granted sub nom.*, 379 So. 2d 1101 (La. 1980), *and aff'd*, 387 So. 2d 565 (La. 1980).

2. The Commonwealth Court's order is preclusive as to any challenge in this Court.

The Commonwealth Court's decision precludes reconsideration of the rate setting and benefit modification issues under Louisiana law, even setting aside principles of reciprocity or full faith and credit. The concept of "res judicata" under Louisiana law, as codified in La. Rev. Stat. § 13:4231, includes "both claim preclusion (res judicata) and issue preclusion (collateral estoppel)." *Mandalay Oil & Gas, L.L.C. v. Energy Dev. Corp.*, 2001-0993 (La. App. 1 Cir. 8/4/04), 880 So. 2d 129, 135, *writ denied*, 2004-2426 (La. 1/28/05), 893 So. 2d 72. "Thus, res judicata used in the broad sense has two different aspects: (1) foreclosure of relitigating matters that have never been litigated, but should have been advanced in the earlier suit; and (2) foreclosure of relitigating matters that have been previously litigated and decided." *Id.* "Inherent in the concept of *res judicata* is the principle that a party had the opportunity to raise the claim in the first

adjudication." *Bourgeois v. Select Oilfield Servs., LLC*, 2020-0170 (La. App. 4th Cir. 10/7/20), ---So. 3d---, 2020 WL 5939216, at *5.

Issue preclusion applies where there is: "(1) a valid and final judgment; (2) identity of the parties; and (3) an issue that has been actually litigated and determined if its determination was essential to the prior judgment." *Glob. Mktg. Sols., L.L.C. v. Chevron U.S.A. Inc.*, 2018-1765 (La. App. 1 Cir. 9/27/19), 286 So. 3d 1054, 1061, *writ denied*, 2019-01886 (La. 2/10/20). Parties do not have to be identical for issue preclusion or res judicata to apply. Rather, "[i]dentity of parties exists whenever the same parties, their successors, or others appear, so long as they share the same 'quality' as parties." *Mandalay Oil & Gas*, 880 So. 2d at 140; *accord Glob. Mktg. Sols.*, 286 So. 3d at 1062.

All of these factors are met by the rehabilitation proceedings. The Commonwealth Court decision addressed the proposed rehabilitation plan in its entirety following a five-day hearing with factual and legal argument presented, and the Court found that the Rehabilitator has the authority to (a) propose a nationwide rate-setting mechanism, (b) accept opt-out and opt-in decisions, and (c) modify benefits down for opt-out policies. (*See generally* Ex. 2.) Plaintiffs knew of the rehabilitation proceedings, received notice of the rehabilitation, and were invited to intervene—yet they deliberately chose not to do so. Instead, as made plain by the *amici* filings and other filings in support, Plaintiffs relied on the Intervening Regulators to serve as a proxy by advancing the very same legal arguments on their behalf as they now raise in this collateral attack. Under such circumstances, Plaintiffs had a full and fair opportunity to litigate these issues and should be precluded from re-litigating them.[17]

Similarly, any dispute over the Rehabilitator's authority over policyholder premiums and benefits was resolved in the Commonwealth Court such that *res judicata* (or claim preclusion) bars relitigation of that issue here. To establish res judicata, the following elements must be shown:

> (1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation.

[17] At a minimum, there are questions of fact precluding a finding of likelihood of success on the merits (and thus precluding a preliminary injunction) because Defendants are entitled to examine the degree of coordination between Plaintiffs and other regulators to address the preclusion issues raised here.

Myers v. Nat'l Union Fire Ins. Co., (La. App. 4 Cir. 5/19/10), 43 So. 3d 207, *writ denied*, 2010-2049 (La. 11/12/10), 49 So. 3d 892. Parties are the "same" for purposes of res judicata where they appear in the same capacity or are in privity. *E.g.*, *E.g.*, *Burguires v. Pollingue*, 2002-1385 (La. 2/25/2004) 843 So.2d 1049, 1054. Here, Plaintiffs' claims related to plan approval and implementation, and specifically the regulatory authority over rates and benefits, were addressed and decided in the Commonwealth Court proceedings. Indeed, the Intervening Regulators purported to advocate for the interests of regulators and policyholders nationwide. (Cantilo Dec. at ¶ 16.) Plaintiffs are not permitted to assert the rights of policyholders simply because they deliberately avoided participating in the proper proceedings after the Intervening Regulators advanced arguments on their behalf.

1. The Full Faith and Credit Clause does not entitle Plaintiffs to injunctive relief.

Plaintiffs' attempt to argue that the Rehabilitator is prohibited from implemented the Commonwealth Court's orders and judgments under the Full Faith and Credit Clause is fundamentally flawed. (Pltfs' Memo at 14–16.) As has been repeatedly recognized, the United States Supreme Court "differentiates the credit owed to laws (legislative measures and common law) and to judgments" under the Full Faith and Credit Clause. *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998). "Whereas the full faith and credit command is exacting with respect to [a] final judgment ... rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, it is less demanding with respect to choice of laws." *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 494 (2003) (internal quotations omitted). As such, "the Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Id.* (internal quotations omitted).

Accordingly, Plaintiffs turn the Supreme Court's interpretation of full faith and credit on its head. The Full Faith and Credit Clause is "exacting" with respect to judgments, and as such, it is the Commonwealth Court's final judgment approving the Rehabilitation Plan that must be recognized by this Court. In contrast, the full faith and credit owed to Louisiana's laws is "less demanding," and Louisiana cannot now seek to compel Pennsylvania to substitute Louisiana's statutes in the place of Pennsylvania comprehensive statutory scheme of rehabilitation. *See Succession of King*, 170 So. 2d 129, 131–32 (La. Ct. App. 1964), *writ refused*, 171 So. 2d 666 (La. 1965) ("[I]t is quite clear that the presence of the tangible subject property within the territorial

jurisdiction of Louisiana gives the courts of this state jurisdiction In rem, sovereignty prevents the use of the full faith and credit clause of the Federal Constitution to compel any state to substitute the laws of another state for its own laws in dealing with such a subject matter, and the state having jurisdiction In rem may make a binding distribution to legatees." Once again, the Commonwealth Court addressed and rejected Plaintiffs' very same argument—made nearly verbatim by the Intervening Regulators—in the course of approving the Rehabilitation Plan. (Ex. 3, Order Approving Plan at 56–57; Ex. 4, Order Denying Stay at 19–20.)

2. The Commonwealth Court correctly approved the plan, and Defendants reserve all rights to contest Plaintiffs claims on the merits.

This Court should not—and cannot—revisit the issues decided in the rehabilitation proceedings, and Defendants do not address them in depth here. Should the Court examine this question, however, it must follow the existing authority recognizing that a rehabilitation plan may modify policy benefits and increase premiums through a centralized plan. *See, e.g.*, *Underwriters Nat'l Assurance*, 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); *Ballestros*, 530 F. Supp. at 1372 (overruling objections to policy restructuring in rehabilitation by out-of-state policyholder); *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").

Moreover, this Court would need to address clear authority under Pennsylvania law—largely ignored by Plaintiffs—that the discretion and authority granted to the Rehabilitator under 40 P.S. § 221.16 is necessarily broad, and that "[i]t 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. § 268 ("The courts will defer to the insurance commissioner's interpretation and application of statutes governing rehabilitation."). As such, the Rehabilitator as Commissioner is not constrained by other states' laws. *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. Super. 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"). Should this Court enter an injunction, Defendants reserve the right to make arguments on the substance of any governing law.

In any event, Defendants briefly address here certain misleading and otherwise incorrect assertions in Plaintiffs' Memorandum for the benefit of the Court. *First*, as discussed above, the Court need not delve into the merits of Plaintiffs' assertions, but even a cursory review of Plaintiffs' claims reveals that they are without merit. The regulations cited by Plaintiff are notably silent as to their application in the rehabilitation context, where both Pennsylvania and Louisiana recognize that the Rehabilitator "does not stand precisely in the shoes of [the insurer]" because she must perform her duties "with the public interest foremost in mind" and broadly consider the "protection of the policyholders, creditors, and the insurer itself." *See Shilling*, 2020 WL 2079362, at *3; *accord* 40 P.S. § 221.1(c). Indeed, the Pennsylvania Supreme Court has addressed in detail precisely why rehabilitation alters the ordinary regulatory landscape, 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." *Foster*, 614 A.2d at 1094 (internal quotation

marks omitted); *see also Schilling*, 2020 WL 2079362 and *Crist*, 572 So.2d 99 (recognizing that rehabilitation scheme can overcome laws in conflict with the language or purpose behind that scheme).

Moreover, nowhere do Plaintiffs identify any statute or regulation that prohibits the Rehabilitator from modifying policy benefits. Instead, Plaintiffs attempt to equate any modification in policy benefits with a rate increase—and notwithstanding that Louisiana's LTCI regulations make clear that "[a] reduction in benefits shall ***not*** be considered a premium change." LAC 37:46.19.1909(F)(3) (emphasis added). But as explained above, it is widely recognized that the powers of the Rehabilitator necessarily include restructuring and modifying policies[18]—as they must, in order to effectuate the "equitable apportionment of any unavoidable loss." 40 P.S. § 221.1(c). Plaintiffs offer no reasoned basis—and certainly no statutory authority—depriving the Rehabilitator of this inherent power conferred by the Pennsylvania legislature.

Second, as the Commonwealth Court correctly addressed at length, the Approved Plan's opt-out provision cures any purported "harm" and preserves all of the regulatory authority Plaintiffs may have otherwise possessed under Louisiana law. (Ex. 3, Order Approving Plan at 58, 69–74; Ex. 4, Order Denying Stay at 8.) If Plaintiffs did not agree that Louisiana policyholders should be afforded the flexibility to choose the most appropriate level of coverage and premiums for their policies going forward, and if Plaintiffs believed the dubious proposition that they must formally approve any policy changes for an insurer in rehabilitation, the Plan provided them with the means to simply opt-out and retain that regulatory authority. They chose not to exercise that authority.

Plaintiffs' assertion that the opt-out provision is "coercive" overlooks several important points. As a threshold matter, there is nothing "coercive" in having all policyholders pay actuarially justified rates for their insurance coverage. As the Commonwealth Court explained, the opt-out provision is not "coercive" because "it provides the issue state with a meaningful way

---

[18] *See also Foster*, 614 A.2d at 1094 n.4, 1105 (affirming the approval of a rehabilitation plan restructuring the contractual rights of the insurer's creditors); *Koken v. Legion*, 831 A.2d 1196, 1241–42 (Pa. Commw. Ct. 2003), *aff'd sub nom.*, 878 A.2d 51 (Pa. 2005) (recognizing that "Article V authorizes reformation and novation [of contracts through a rehabilitation plan] where appropriate to avoid prejudice to policyholders"); *Ballesteros*, 530 F. Supp. at 137; *In re Executive Life Ins. Co.*, 38 Cal. Rptr. 2d 453 (Ct. App. 1995) ("[T]he police power of the state exercised by the Commissioner as [Rehabilitator] permits modification of insurance contracts issued by an insolvent insurer."); *Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 587 (Ky. 1995) ("The policyholders' contracts as well as others with interest in the company, are subject to a reasonable exercise of state police power [in receivership]."); 44 C.J.S. § 270 ("[C]ourt approval of a rehabilitation plan is not precluded because policyholder benefits are modified.").

to control the mix of benefit reductions and premium rate increases" while also preventing "the opt-out state from interfering with Pennsylvania's ability to rehabilitate SHIP." (Ex. 3, Order Approving Plan at 58.) More fundamentally, Plaintiffs cannot identify with any precision the specific "regulatory authority" that the opt-out provision actually fails to preserve. All of their rate-setting oversight is maintained through the opt-out provision, to the extent it is even applicable in the rehabilitation context, including their alleged right to approve of any increase in rates. In any event, this precise issue was already decided after a week-long evidentiary hearing in the proper forum—that is, of the Commonwealth Court.

Third, the Approved Plan does not "reject" guaranty association protection. (*See* Pltfs' Memo at 23.) Again, the Commonwealth Court addressed this identical argument, explaining that "the Plan does not impair any policyholder's Guaranty Association coverage." (Ex. 4, Order Denying Stay at 8.) Policyholders have no right to guaranty association coverage in rehabilitation, only in the event of liquidation, and, as the Commonwealth Court further explained, under the Plan, "[a]ll policyholders have an option to retain the full measure of their Guaranty Association coverage." (*Id.*)

Plaintiffs' argument regarding guaranty association coverage ignores that Pennsylvania public policy generally *favors* the rehabilitation of an insurer over liquidation. *E.g.*, *Foster*, 614 A.2d at 1094 ("the benefits of rehabilitation ... [are] preferable to and distinct from, the ordinary procedures of liquidation"). And with good reason: by attempting to rehabilitate SHIP through the Approved Plan, the Rehabilitator ensures that policyholders will have greater options to retain their full benefits at actuarially justified rates, keep their existing premiums to the extent possible, or strike a balance between premiums and coverage, all while retaining full guaranty association for those very same benefits if in the event SHIP is liquidated. In a liquidation, the guaranty associations would *still* seek rate increases and limit policyholders to the coverage amounts provided by state law—while also "having little or no choice for their coverage." (Ex. 4, Order Denying Stay at 6.) Accordingly, for this and several other policy reasons, the Rehabilitator determined that rehabilitation was preferable over immediate liquidations, and the Commonwealth Court upheld that determination as a proper exercise of the Rehabilitator's discretion. (Ex. 3, Order Approving Plan at 44–48.) To be clear, ***none*** of these considerations are appropriate for this Court to consider—rather, they were already properly considered by the Commonwealth Court in accordance with its exclusive jurisdiction to approve the Plan. Defendants are simply

highlighting the fact that Plaintiffs' "disagreement with the Rehabilitator's exercise of discretion" (*see id.* at 67) is not a basis to collaterally attack the Plan or the Rehabilitator's authority to implement the Plan outside of the rehabilitation proceedings, in a court that lacks jurisdiction to consider these issues, as Plaintiffs seek to do here.

Finally, Defendants reiterate that the very nature of Plaintiffs' present lawsuit is one designed to circumvent the exclusive and comprehensive jurisdiction of the rehabilitation court. Permitting such an attack to succeed, even on a preliminary basis, sets a dangerous precedent, one that could upend Pennsylvania's comprehensive statutory scheme for the rehabilitation of distressed or insolvent insurers as well as Louisiana's own corresponding statutory scheme. Any challenges to the propriety of the Plan—and thus, the Rehabilitator's authority to implement the Plan—should have been brought in the Commonwealth Court in the course of the Rehabilitation proceedings. Plaintiffs instead have deliberately stood on the sidelines knowing that their proxies, the Intervening Regulators, would advance the same arguments on their behalf in the Rehabilitation proceedings and on appeal in the Pennsylvania Supreme Court, with Plaintiffs even filing *amicus* briefs in those proceedings. Plaintiffs cannot not now avoid the exclusive jurisdiction of the Rehabilitation court by having their own state courts sit in collateral review of the Commonwealth Court's decision and conduct an analysis of the propriety of the now-Approved Plan. Doing so will necessarily mean that *every* state's court could have the ability to approve, or disapprove, of the Approved Plan's provisions or the provisions of any plan approved an implemented in Louisiana, all of which will necessarily eviscerate the comprehensive nature of rehabilitation and, as a practical matter, make it impossibly costly and inefficient.

Plaintiffs already tried and failed to have a federal court enjoin the Approved Plan. This Court should likewise reject Plaintiffs' improper attempt to collaterally attack the plan, the Commonwealth Court's authority to approve the plan, and the Rehabilitator's authority to implement the court-approved plan.

3. Plaintiffs have not established a likelihood of success on the merits with respect to their claim that plan implementation will violate Louisiana law.

Even if Plaintiffs could overcome these significant defects, Plaintiffs still must establish a likelihood of success on merits of their claim that implementation of the Approved Plan violates Louisiana law and that Plaintiffs are permitted to enjoin implementation as a result. As explained, however, Plaintiffs have no basis for asserting that plan implementation itself or solicitation of policyholder elections is unlawful, and their arguments that the plan should not have been

approved were already addressed in the proper forum and should not be revisited here. Accordingly, Plaintiffs are left with only one viable argument on which they could succeed: that implementation of policyholder elections would lead to violation of certain rate and benefit provisions of Louisiana law. But the rate-setting provisions, by their own terms, do not even apply to SHIP's policies. Thus, this argument fails as well.

Louisiana is an opt-in state, and as a result Louisiana policyholders will receive the full menu of plan options when the plan is implemented. Although Plaintiffs loudly complain about rate increases, they ignore the actual impact of the plan elections once made:

- **Option 1:** Benefit downgrade to align the premium with the If Knew premium rate.
- **Option 2:** Benefit and premium downgrade to a basic policy.
- **Option 2A:** Benefit and premium downgrade to an enhanced version of the basic policy.
- **Option 3:** Enhanced non-forfeiture option reducing benefits and eliminating premiums.
- **Option 4:** Premium increase to match the If Knew rate for existing policy benefits.

Put differently, policyholders can elect to reduce their benefits and/or premiums (Options 1, 2, and 2A), eliminate premiums through a non-forfeiture option (Option 3), or voluntarily pay a premium increase to keep their existing coverage (Option 4). (Cantilo Dec. at ¶ 46.)

As the Rehabilitator has argued, Louisiana law does not define the authority of the Rehabilitator or that of the Commonwealth Court of Pennsylvania with respect to the plan. Assuming *arguendo* that the plan must comply with existing Louisiana law, however, it is far from clear that Plaintiffs will succeed on the merits because Plaintiffs have not alleged facts or presented governing law showing that Defendants must comply with the rate requirements or that the plan options do not comply with those requirements. For example, policyholders have an inherent right to reduce their coverage, lower their premiums, or select a non-forfeiture option, as occurs in Options 1 through 3, *See* La. Rev. Stat. § 22:1188; LAC 37:46.19.1953; LAC 37:46.19.1955. Importantly, however there are no allegations or analysis by Plaintiffs showing that Defendants' proposed options—which follow the widely-accepted If Knew premium methodology, satisfy the 60% loss ratio requirements of Louisiana, and offer a generous non-forfeiture option—cannot not satisfy these regulations for policyholders choosing to reduce their coverage or select a non-forfeiture. (Cantilo Dec. at ¶¶ 41, 44.) In part, this is true because Plaintiffs do not know which policyholders will elect to reduce their coverage or elect a non-forfeiture option because Plaintiffs

refuse even to allow Defendants to ask policyholders their preferences, but Plaintiffs do not attempt to address the issue regardless of that limitation.

Only Option 4, the voluntary payment of the additional premiums required to maintain existing coverage at an actuarially justified rate, may require a rate increase. Yet Plaintiffs still fail to show that the rate increase process requirements would apply here, either because the rate increase would be adopted as a part of a rehabilitation plan or because the policies issued before the effective date of the rate statutes they rely on. The regulations governing rate increases for long-term care policies appear in LAC 37.46.19.1937 and 1939, but by their own terms those regulations apply only to policies issued after 2005. *See* LAC 37.46.19.1937 (rate increase requirements for policies issued between August 19, 2005 and January 1, 2018) and LAC 37.46.19.1939 (rate increase requirements for policies issued after January 1, 2018). All of the policies impacted by Plaintiffs proposed preliminary injunction were issued *prior* to August 19, 2005. (Cantilo Dec. at ¶ 40.) The Louisiana Department of Insurance issued guidance on this very issue, setting forth specific rules that apply to policies issued before or after August 19, 2005; for policies issued before August 19, 2005, there are no rate increase requirements and policies are required to do no more than have a loss ratio "of at least 60%," a standard satisfied by Defendants' proposed If Knew premium. *See* La. Department of Insurance, FILING AND REPORTING REQUIREMENTS – LTC – LA (Sept. 2, 2015), at FILING FOR FORMS AND RATES, Rate Increase Filings (post-8/19/2005 requirements); *id.* at FILING FOR FORMS AND RATES, Loss Ratios for Policies Issued Before Effective Date (requirements for policies issued before 8/19/2005). (*See also* Cantilo Dec. at ¶ 41.) On this record, Plaintiffs have failed to show such a likelihood of success on the merits because Plaintiffs do not draw any factual or legal connection between the Approved Plan options as proposed, the rate requirements, and the options as they may be implemented based on elections.

VI.
CONCLUSION

For the reasons set forth herein, Defendants respectfully ask that this Court deny Plaintiffs' request for a preliminary injunction.

Dated: January 7, 2022

Respectfully submitted,

/s

COZEN O'CONNOR, P.C.
MICHAEL J. BROADBENT
(*Pro hac vice* pending)
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Tel: (215) 665-4732
Fax: 215.701.2288
mbroadbent@cozen.com

-and-

JONES WALKER LLP
BRANDON K. BLACK (La. 24298)
COVERT J. GEARY (La. 14280)
445 North Boulevard, Suite 800
Baton Rouge, LA 70802
Tel: (225) 248-3128
Fax: (225) 248-3128
bblack@joneswalker.com

Counsel to Defendant Jessica K. Altman in her capacity as Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania in Rehabilitation, and Defendant Senior Health Insurance Company of Pennsylvania in Rehabilitation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been e-mailed on this 7th day of January, 2022, to the following:

David Rubin
David.Rubin@butlersnow.com
Counsel for Plaintiffs

Brandon K. Black

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

JAMES J. DONELON IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA AND THE LOUISIANA DEPARTMENT OF INSURANCE	**NUMBER: 713794**
	SECTION: 22

Plaintiff

VERSUS

JESSICA K. ALTMAN, IN HER CAPACITY AS STATUTORY REHABILITATOR OF SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA AND SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, IN REHABILITATION

Defendant

AFFIDAVIT OF PATRICK H. CANTILO

COMES NOW, Patrick H. Cantilo, Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania, who , being first duly sworn, states as follows:

Preliminary Matters

1. My name is Patrick H. Cantilo. I am over the age of 21 years and competent to make this affidavit. I am an attorney licensed in Texas and Pennsylvania and recognized expert in the field of insurance receiverships, including rehabilitation and liquidation. Defendant Jessica K. Altman appointed me as Special Deputy Rehabilitator ("SDR") of Senior Health Insurance

Company of Pennsylvania ("SHIP") and, in that capacity, I have acquired personal knowledge of the facts set forth herein.

2. I have reviewed the Complaint and other pleadings filed in this matter, and I submit this Declaration in support of Defendants' opposition to the motions filed by Plaintiffs seeking injunctive and declaratory relief, although I dispute that this Court has jurisdiction over Plaintiffs' claims and over the Defendants in this case.

3. This Declaration is submitted subject to and without waiving Defendants' arguments contesting jurisdiction, and this Declaration should not be treated as consent to personal jurisdiction.

4. I submit these arguments solely in support of Defendants' objections to jurisdiction and the entry of an injunction. Should this Court conclude that Defendants or I must submit to the Court's jurisdiction to submit this Declaration, then I withdraw its submission.

5. I have reviewed each of the exhibits filed with Defendants' Memorandum of Law in Opposition to Plaintiffs' Prayer for Issuance of a Preliminary Injunction. I have personal knowledge of those documents and I hereby affirm that each document is a true and correct copy of a document filed in the rehabilitation proceedings in the Commonwealth Court of Pennsylvania, *In re Senior Health Insurance Company of Pennsylvania*, 1 SHP 2020.

Factual and Procedural Matters

6. SHIP is a long-term care insurance ("LTCI") company organized under the laws of the Commonwealth of Pennsylvania.

7. On January 29, 2020, as a result of its long financial decline, the Commonwealth Court placed SHIP in rehabilitation under the Pennsylvania Insurance Department Act, 40 P.S. §§ 221.1–221.63.

8. The Commonwealth Court assumed jurisdiction over SHIP by placing it in rehabilitation and entering a Rehabilitation Order on that date. (*See* Rehabilitation Order, attached to Defendants' opposition papers as Exhibit 1.)

9. In the Rehabilitation Order, the Commonwealth Court appointed Defendant Jessica K. Altman, Insurance Commissioner of Pennsylvania, as Statutory Rehabilitator, and she appointed me as SDR. (Ex. 1 at ¶¶ 2, 14.)

10. Upon being placed in rehabilitation, notice was provided to, *inter alia*, all policyholders—including those residing in or with policies issued in Louisiana—as well as insurance regulators across the country. (*See* Notice, attached to Defendants' opposition papers as Exhibit 2.)

11. Insurance regulators, including Commissioner Donelon and the Louisiana Department of Insurance, were already familiar with the possibility of rehabilitation, as Commissioner Altman and I made numerous outreach efforts prior to filing the application for rehabilitation in the Commonwealth Court.

12. 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.

13. Insurance regulators from five states filed formal comments, and insurance regulators from three states intervened.

14. Plaintiffs refused to participate in SHIP's rehabilitation proceeding throughout the Commonwealth Court proceedings in review of the plan, although, as explained below, they did join two *amici* briefs in the Supreme Court of Pennsylvania.

15. Plaintiffs did not submit formal comments or formal comments, nor did they intervene.

16. According to the Plaintiffs' *amici* filings, they fully support the positions taken by the three intervening state insurance regulators in the Commonwealth Court of Pennsylvania. The "three intervening state insurance regulators" are the chief insurance regulators of Maine, Massachusetts, and Washington, referred to herein as the "Intervening Regulators." Throughout the proceedings, the Intervening Regulators purported to advocate for the interests of policyholders and regulators nationwide, not simply their own interests or the interests of the policyholders in Maine, Massachusetts, and Washington.

17. On May 17, 2021, following a lengthy period in which the rehabilitator made significant data available to parties and non-party regulators, the Commonwealth Court began a week-long hearing on the plan which included the Intervening Regulators presenting their arguments that the proposed plan did not benefit policyholders and improperly usurped state rate making authority.

18. 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.[1] (*See* Opinion and Order approving plan attached to Defendants' moving papers as Exhibit 3.)

19. The deadline to "opt-out" of the premium rate setting provisions of the Approved Plan was November 15, 2021.

[1] The Plan Approval Opinion was amended in minor ways in November 2021; Exhibit 3 is the amended opinion.

20. Plaintiffs chose not to opt-out, and, under the Commonwealth Court's opinion and the Approved Plan, Louisiana is thus an "opt-in" state.

21. Plaintiffs and Defendants voluntarily agreed not to send election packages or otherwise communicate with policyholders of policies issued in Louisiana, pending a decision on the motion for injunction.

22. Should no further injunction be entered, however, policyholder election material will be sent to the holders of policies issued in Louisiana, as it will have been for nearly all of SHIP's policyholders. Importantly, however, no policy would be modified until April 2022 at the earliest, following receipt of policyholder elections and the planned audit of the election process to ensure accuracy.

23. The Commonwealth Court's order on the Approved Plan 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.

24. 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 pending appeal.

25. 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. (*See* Stay Denial Opinion, attached as Exhibit 4 to Defendants' opposition papers.)

26. The Intervening Regulators primarily sought to prevent the Rehabilitator from sending and accepting opt-in and opt-out decisions by state regulators which were due for submission by November 15, 2021.

27. Then, on November 8, the Intervening Regulators filed a motion in the Supreme Court of Pennsylvania seeking a stay.

28. 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.

29. The Intervening Regulators' motion to stay remains pending but, as they admit, any alleged harm to policyholders from receiving election packages and making policy elections is and would be reparable. (*See* Intervening Regulators' Application, attached hereto as Exhibit 5).)

30. That same day, Plaintiffs and a number of other states 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. (*See Amici* Filing, attached as Exhibit 6 to Defendants' opposition papers.)

31. The proposed *amici* brief regarding a stay was authored by counsel for Plaintiffs and for the chief insurance regulator of South Carolina.

32. As Plaintiffs and the other states explained in their proposed *amici* brief, they joined entirely in the arguments set forth by the Intervening Regulators regarding the stay.

33. The November 15, 2021, opt-in and opt-out deadline passed without an effective opt-out election by Plaintiffs, and this deliberate decision by Commissioner Donelon and the Louisiana Department of Insurance made Louisiana an opt-in state under the plan.

34. The plan offers options for policyholders which are better than those offered in the ordinary course of business or in liquidation. 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.

35. Plaintiffs have 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.

36. The *amici* request did not specify which states would later file a brief on the merits, and no proposed brief was submitted. Then, on December 22, 2021, the stay *amici* litigants (together with a number of new states) filed an *amici* brief on the merits brief. (*See Amici* Filing on the Merits, attached as Exhibit 7 to Defendants' opposition papers.)

Facts Relevant to Opposition to Plaintiffs' Prayer for Preliminary Injunction

37. There are a number of important facts relevant to Defendants' opposition to the motion for preliminary injunction, in addition to the points made herein regarding the SHIP rehabilitation proceedings.

38. The Approved Plan and plan approval order adopt the Issue State Rate Approval option through which a state can opt-out of the plan's premium rate-setting provisions, as referenced herein and in Defendants' Memorandum.

39. As a result, policyholder elections would be effected through one of two mechanisms: (1) states could actively or passively "opt-in" to the premium rate setting provisions of the 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 (2) states could "opt-out" of that portion of the 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. (*See generally* Ex. 2.)

40. All of the policies issued in Louisiana were issued prior to 2005.

41. The If Knew rate methodology proposed by the Rehabilitator satisfies the 60% loss ratio requirements set forth in the laws of many states, including Louisiana.

42. SHIP faces a significant deficit, but no court has entered an order of insolvency. SHIP is in rehabilitation, not liquidation. I am not aware of any efforts by Commissioner Donelon to begin an ancillary liquidation proceeding.

43. If not made clear herein, all interested stakeholders—including Plaintiffs and policyholders of all policies issued in Louisiana—received notice of the proceedings and had an opportunity to be heard.

44. Plaintiffs frequently reference significant rate increases in the plan, but their filings are devoid of any meaningful analysis of rate increases or the plan options, and I am not aware of any analysis completed by Plaintiffs. This is so despite that Plaintiffs had access to detailed rate information and other data related to the plan through the Rehabilitator's Secure Data Site. Moreover, the plan is designed to give choices precisely to avoid forcing policyholders to lose coverage, as they would in an immediate liquidation or if rate increases were applied as would occur in the ordinary course.

45. To the extent Plaintiffs suggest Defendants will unilaterally dictate policy terms, that is untrue. Opt-out states may set their own rates and thus determine the available options, and opt-in state policyholders will receive the full panel of options for coverage types and costs. In that way, it is policyholders, not Defendants or Plaintiffs, who set the policy terms. Here, Commissioner Donelon and the Louisiana Department of Insurance chose not to exercise their right to opt-out, even after the Rehabilitator and her team assured Plaintiffs that sending an opt-out letter would not constitute a waiver of their jurisdictional arguments. (*See* Pltfs' Ex. 10 (Rehabilitator letter responding to Non-Decision Letter from Plaintiffs).)

46. Accordingly, Louisiana is an opt-in state, and, as a result Louisiana policyholders will receive the full menu of plan options when the plan is implemented. Those options may be summarized as:

- **Option 1:** Benefit downgrade to align the premium with the If Knew premium rate.
- **Option 2:** Benefit and premium downgrade to a basic policy.
- **Option 2A:** Benefit and premium downgrade to an enhanced version of the basic policy.
- **Option 3:** Enhanced non-forfeiture option reducing benefits and eliminating premiums.
- **Option 4:** Premium increase to match the If Knew rate for existing policy benefits.

47. The Rehabilitator concluded that there is no harm to – and indeed the public interest would be better served by – 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 served better by a plan option rather than the choices available outside of the plan.

48. Plaintiffs suggest that the plan prioritizes the insurance industry over the interests of policyholders, but that is untrue as well. The purposes of the plan include providing policyholders with a significant degree of autonomy and choice over options available to them, as well as eliminating subsidies and rate inequities by asking policyholders to pay actuarially justified rates across the board.

49. If accepted by the Court, the foregoing statements are made subject to the penalty of perjury for willfully providing false or misleading testimony.

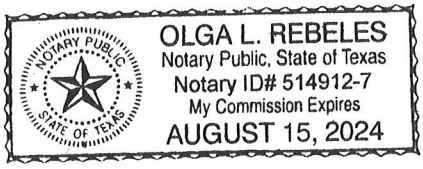
January 7, 2022

Patrick H. Cantilo

STATE OF TEXAS

COUNTY OF TRAVIS

Before me, the undersigned authority, personally appeared PATRICK H. CANTILO, known to me to be the person whose name is subscribed to the foregoing Affidavit, and upon his oath stated that the facts therein set forth are true and correct to his personal knowledge.



Name:
Notary public in and for Travis Count Texas.

My commission expires: 08/15/2024

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Senior Health Insurance Company of Pennsylvania In Rehabilitation	:	No. 1 SHP 2020

ORDER OF REHABILITATION

AND NOW, this 29th day of January, 2020, upon consideration of the Application for Order Placing Senior Health Insurance Company of Pennsylvania in Rehabilitation (Petition for Rehabilitation) filed by Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, it is hereby ORDERED as follows:

1. The Petition for Rehabilitation is GRANTED, and effective January 29, 2020, Senior Health Insurance Company of Pennsylvania (SHIP) is placed into rehabilitation in accordance with the provisions of Article V of The Insurance Department Act of 1921, Act of May 17, 1921, P.L. 789, *as amended*, 40 P.S. §§221.1-221.63, on the ground that rehabilitation has been requested by and consented to by SHIP's board of directors and the trustees of the Senior Health Care Oversight Trust.

2. Insurance Commissioner Jessica K. Altman and her successors in office are hereby appointed Rehabilitator of SHIP and invested with the full powers and authority of a rehabilitator as set forth in Section 516 of The Insurance Department Act of 1921, 40 P.S. §221.16.

3. The Rehabilitator is hereby directed to rehabilitate the business of SHIP; to take possession of the assets of SHIP; and to administer the SHIP assets in accordance with the orders of this Court. Specifically, the Rehabilitator is directed to:

(a) Inform all banks, investment banks, and other financial institutions or persons with custody of SHIP assets to identify and report these assets to the Rehabilitator and advise these institutions not to disburse, transfer, hypothecate or encumber such assets without the prior written consent of the Rehabilitator.

(b) Inform all banks and other financial institutions with SHIP accounts that checks or other payments that have been processed and transmitted may be honored without prejudice to the ability of the Rehabilitator to recover said amounts from the recipient or payee in accordance with applicable law.

(c) Inform all insurance producers, agents, managing general agents, brokers or other persons who have collected premiums on behalf of SHIP to account for all earned and unearned premiums and commissions to the Rehabilitator at the offices of SHIP within thirty (30) days of the date of this Order and that premium monies owed to SHIP must be remitted to the Rehabilitator.

(d) Inform all attorneys employed or retained by SHIP that within thirty (30) days of this Order they must report to the Rehabilitator the name of the case or claim they are handling; the claim or docket number, if one is assigned; the status of each such case; and, further, that the Rehabilitator will not make payment for any unsolicited reports.

(e) Inform all vendors providing claims or data processing services to SHIP that they shall continue such services unless and until instructed to the contrary by the Rehabilitator.

(f) Inform all vendors with custody or control of any data processing information and electronic records belonging to SHIP to preserve these electronic files and information and to transfer the data to the control of the Rehabilitator upon request.

4. The filing or recording of this Order with the Prothonotary of the Commonwealth Court shall impart the same notice as is imparted by any deed, bill of sale or other evidence of title duly filed or recorded.

5. The Rehabilitator shall take such actions as are necessary to correct the condition that prompted SHIP's board of directors and the Senior Health Care Oversight Trust to request and consent to the rehabilitation of SHIP.

6. The Rehabilitator shall authorize, where appropriate and necessary, the payment of expenses, including employee compensation, incurred in the ordinary course of SHIP's business, as well as the actual, reasonable, and necessary costs of preserving or recovering the assets of SHIP.

7. The Rehabilitator shall prepare a plan of rehabilitation, which may include a consolidation, merger or other transformation of SHIP and to that end may retain accountants, actuaries, attorneys and other consultants at the expense of SHIP.

8. In the event this Court should determine that a rehabilitation of SHIP is not feasible and a liquidation of SHIP is ordered, the actual, reasonable and necessary costs of goods or services provided to and approved by the Rehabilitator during the period of rehabilitation will be treated as costs and

expenses of administration for purposes of Section 544 of The Insurance Department Act of 1921, 40 P.S. §221.44.

9. The Rehabilitator may, in her discretion, pay claims, in whole or in part, arising under SHIP's contracts of insurance; provided, however, that the Rehabilitator may not pay bad faith claims or claims for extra-contractual charges or damages.

10. The Rehabilitator may, in her discretion, write new and renewal policies or may cancel or refuse to renew existing policies, as she deems appropriate.

11. In accordance with Section 515 of The Insurance Department Act of 1921, 40 P.S. §221.15(c), the Rehabilitator is authorized to take possession of the statutory deposits held by any state or territory and to do all things necessary to manage and apply the deposits in accordance with the application agreements; provided, however, the Rehabilitator shall not post additional statutory security deposits in any state or territory on behalf of SHIP.

12. All court actions, arbitrations and mediations currently or hereafter pending against SHIP in the Commonwealth of Pennsylvania are stayed for ninety (90) days from the effective date of this Order and such additional time as the Rehabilitator may request, to allow the Rehabilitator an opportunity to review litigation and where appropriate retain new counsel.

13. The Rehabilitator is directed to review all litigation pending outside the courts of the Commonwealth of Pennsylvania and petition these other courts or tribunals for a ninety (90) day stay of litigation where necessary to protect the estate of SHIP.

14. The Rehabilitator may appoint a Special Deputy Rehabilitator to be compensated from SHIP's assets, and such Special Deputy Rehabilitator shall have all the same rights and authority under this Order and applicable law as the Rehabilitator, subject to oversight and supervision by the Rehabilitator and this Court.

15. This Order is not, and shall not be considered, a finding or declaration of insolvency that can activate the provisions of the Pennsylvania Life and Health Insurance Guaranty Act, *as added by* the Act of Dec. 18, 1992, P.L. 1519, 40 P.S. §§991.1701-991.1718, or the provisions of similar acts of any other state or territory.

16. On or before April 22, 2020, the Rehabilitator shall file a preliminary plan of rehabilitation with the Court, which shall include a timeline for the preparation of a final plan of rehabilitation.

17. This Court shall retain jurisdiction of this proceeding to the full extent necessary to enforce the terms of this Order and to issue such other orders that may be required in the course of the rehabilitation.

MARY HANNAH LEAVITT, Judge

Certified from the Record

JAN **2 9** 2020

And Order Exit

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Senior Health Insurance Company of Pennsylvania In Rehabilitation	: : :	No. 1 SHP 2020

NOTICE OF APPLICATION FOR APPROVAL OF PLAN OF REHABILITATION

TO: All Interested Parties

PLEASE TAKE NOTICE that Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as the statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania (SHIP), has filed with the Commonwealth Court of Pennsylvania in the above-captioned matter an Application for Approval of a Plan of Rehabilitation for SHIP (Application), including the proposed Plan of Rehabilitation (Plan) attached thereto.

THE PROPOSED PLAN IS SUBJECT TO REVIEW BY THE COURT AND THE COURT'S APPROVAL, DISAPPROVAL OR MODIFICATION. NEITHER THE PROPOSED PLAN NOR ANY MODIFICATION TO THE PROPOSED PLAN WILL BE EFFECTIVE OR IMPLEMENTED UNLESS APPROVED BY THE COURT. IF APPROVED BY THE COURT, THE PROPOSED PLAN WILL AFFECT THE RIGHTS AND BENEFITS AFFORDED TO SHIP'S POLICYHOLDERS, CREDITORS AND OTHERS. ALL PERSONS WHO MAY BE INTERESTED IN THE

REHABILITATION OF SHIP SHOULD READ THE PLAN CAREFULLY AND CONSULT WITH THEIR LEGAL, BUSINESS, FINANCIAL AND TAX ADVISORS ABOUT THE PLAN DOCUMENTS.

Copies of the Application and the proposed Plan are available for viewing, downloading and/or printing at https://www.shipltc.com/court-documents (Site), which is also accessible under the "Rehabilitation" section of the website. The Site contains a link to all documents filed with the Court by the Rehabilitator in portable document format (PDF).

If any person receiving this Notice does not have access to a computer or is otherwise unable to view, download or print the Application, the proposed Plan or other court documents at the Site, they may be placed on the "hard copy" service list and receive copies of all Court orders and filings by the Rehabilitator in this matter by making a written request, together with an affirmation to the Court as described below that they either do not have regular access to a computer or adequate device or are unable to view, download or print the applicable documents. Requests for placement on the "hard copy" service list should be made by writing to the following address: Senior Health Insurance Company of Pennsylvania (In Rehabilitation), Attention: Rehabilitation Administrator, 550 Congressional Boulevard, Suite 200, Carmel, IN 46032; or by facsimile to the attention of Senior Health Insurance Company of Pennsylvania (In Rehabilitation), Attention: Rehabilitation Administrator, at the following number: (317) 566-7588; or by email to rehabilitation@shipltc.com. The request should be signed and contain the following statement:

> ***In making this request, I hereby affirm to the Commonwealth Court of Pennsylvania that I do not have regular access to a computer or other device providing me internet access to the***

Site or I am otherwise unable to view, download or print documents from the Site related to this matter.

The Court will conduct a pre-hearing conference on the proposed Plan of Rehabilitation on October 20, 2020 at 10:00 a.m. in Courtroom 3002 in the Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania, or by telephonic or other means established by the Court and posted to the Site. The hearing to consider approval of the proposed Plan of Rehabilitation will be scheduled by the Court by separate order.

Informal Comments in support of or in objection to the proposed Plan of Rehabilitation may be sent to Patrick H. Cantilo, Special Deputy Rehabilitator, at the following address: Senior Health Insurance Company of Pennsylvania (In Rehabilitation), 550 Congressional Blvd., Suite 200, Carmel, IN 46032; or by email to: plan.comments@shipltc.com.

Formal Comments in support of or objecting to the proposed Plan of Rehabilitation shall be filed with the Court on or before September 15, 2020. Formal Comments shall be identified at the top of the document as being filed in "In re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation), No. 1 SHP 2020." Formal Comments shall state with specificity the facts on which the comments are based and any suggested modifications to the proposed Plan of Rehabilitation. A person may submit Formal Comments without participating in the hearing on the proposed Plan of Rehabilitation.

A Commenter who intends to participate in the hearing must notify the Court of that intention in his Formal Comments. Additionally, any Commenter who intends to call or cross examine witnesses or introduce exhibits at the Hearing or participate in any discovery that may be allowed by the Court must file an application with the Court to intervene in the proceeding under the Pennsylvania

Rules of Appellate Procedure on or before July 31, 2020, and must also file their Formal Comments in accordance with this Order. Any response to an application to intervene shall be filed and served on or before August 21, 2020. Any Commenter who is permitted to intervene shall file with the Court and serve on the Rehabilitator on or before September 30, 2020, (i) a narrative or other description of the substance of the direct testimony of each witness the Commenter intends to call at the Hearing and (ii) the exhibits the Commenter intends to introduce at the Hearing.

Formal Comments to the proposed Plan of Rehabilitation shall be filed with the Court at the following address:

Office of Prothonotary of the Commonwealth Court of Pennsylvania
ATTN: 1 SHP 2020
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
Harrisburg, PA 17106

Service by Commenters on the Rehabilitator shall be made by electronic delivery to the Rehabilitator's counsel and the Special Deputy Rehabilitator at the following addresses:

Counsel	**SDR**
Cozen O'Connor	Patrick Cantilo
shipcomments@cozen.com	service@cb-firm.com

A Commenter who is unable to make service on the Rehabilitator by electronic delivery may serve the Rehabilitator by first-class mail or overnight delivery service to the Rehabilitator's counsel and the Special Deputy Rehabilitator at the following physical addresses:

James R. Potts
Cozen O'Connor
One Liberty Place
1650 Market Street
Suite 2800
Philadelphia, PA 19103

Patrick Cantilo
Cantilo & Bennett, L.L.P.
11401 Century Oaks Terrace
Suite 300
Austin, Texas 78758

Any materials served by this method must contain an affirmation to the Court that the Commenter is unable to serve the Rehabilitator by electronic delivery. Commenters who fail to comply with the requirements of this Notice shall be prohibited from submitting objections to the proposed Plan of Rehabilitation or participating in the hearing.

All other dates and requirements established by the Court relevant to the proceedings concerning the proposed Plan, including any changes to the dates and procedures set forth in this notice, will be posted to the Site and will not be delivered by mail or other means except as provided herein.

The Rehabilitator may, in her discretion, provide policyholders and other interested parties supplemental information concerning the proposed Plan and the proceedings relating thereto, including clarifications or amendments of the proposed Plan, and summaries and Questions and Answers concerning the proposed Plan and the proceedings, by mail or by posting information on the Site and by operating a call center. ALL INTERESTED PARTIES ARE ADVISED TO CHECK THE SITE FREQUENTLY FOR UPDATED INFORMATION AND DEADLINES.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Senior Health Insurance	:	
Company of Pennsylvania	:	
In Rehabilitation	:	No. 1 SHP 2020

RE: Application for Approval of the Plan of Rehabilitation for Senior Health Insurance Company of Pennsylvania

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge

FILED: August 24, 2021

OPINION AND ORDER

TABLE OF CONTENTS

I. Introduction

Before the Court is the application of Jessica K. Altman, Pennsylvania Insurance Commissioner, which she filed in her capacity as Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania (SHIP). By this application, the Rehabilitator seeks approval of her Second Amended Plan of Rehabilitation (Second Amended Plan or Plan) for SHIP pursuant to Section 516(d) of Article V of The Insurance Department Act of 1921 (Article V), Act of May 17, 1921, P.L. 789, *added by* the Act of December 14, 1977, P.L. 280, 40 P.S. §221.16(d). The Rehabilitator has the statutory responsibility to develop a plan to correct the conditions that caused SHIP's hazardous financial condition. Giving deference to the Rehabilitator's discretion in formulating this Plan, this Court must decide whether to approve the Plan, approve the Plan with modifications, or disapprove the Plan.

At present, SHIP has approximately $1.4 billion in assets and $2.6 billion in liabilities, producing a deficit of approximately $1.2 billion (also referred to as the Funding Gap). The Second Amended Plan's ultimate goal is to eliminate the Funding Gap by increasing premium revenue and modifying the existing terms of most of the approximately 39,000 policies in force. The Plan is structured to maximize policyholder choice in several ways. Depending on his circumstances and preferences, a policyholder may choose to continue his policy with all benefits and terms unchanged by paying the actuarially justified annual premium for that policy. Alternatively, the policyholder may choose to reduce some policy coverages as more suitable to the policyholder's current circumstances in order to avoid or temper a premium increase. A policyholder who is 95, for example, may decide to reduce the

maximum coverage period from 10 to 5 years in lieu of paying the premium required for a policy with a 10-year period of coverage.

The Second Amended Plan also seeks to correct SHIP's discriminatory premium rate structure. At present, SHIP policyholders pay substantially different premiums for the same coverages. The difference in premiums is attributed to the decisions of different state regulators on SHIP's proposed rate increases. The state where the policy is issued retains authority for all rate increases, even after the policyholder moves to another state. Policyholders whose state of issue has approved the requested rate increase pay more for the same coverages than policyholders whose state of issue has disapproved the requested rate increase. As a result, the former group of policyholders pays more than its fair share of the costs of providing the coverages and the latter group pays less than its fair share. The Second Amended Plan seeks to eliminate these inequities.

The Court conducted a hearing on the Second Amended Plan from May 17, 2021, through May 21, 2021. The parties submitted post-hearing briefs on June 21, 2021, and June 28, 2021. On July 21, 2021, the Rehabilitator and Intervening Agents and Brokers filed an application for the Court's approval of a settlement agreement, which will amend Part VI.N of the Plan. The Rehabilitator's application for approval of the Second Amended Plan is ready for disposition, with the exception of Part VI.N, on which a decision will be deferred for 30 days to allow a hearing on the Rehabilitator's settlement agreement with the Intervening Agents and Brokers.

II. Findings of Fact

A. Business and History of SHIP

SHIP is a Pennsylvania life and health insurance company. Its origins date to 1887, when its corporate predecessor, the Home Beneficial Society,

commenced business. By the 1980s, the company was known as American Travelers Insurance Company and was primarily writing long-term care insurance. In 1996, the company was acquired by, and merged into, CIHC, Inc., a wholly-owned subsidiary of Conseco, Inc., and renamed Conseco Senior Health Insurance Company. In 2002, Conseco, Inc. filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code.[1] In 2003, Conseco, Inc. emerged from bankruptcy as CNO Financial Group. In 2003, Conseco Senior Health Insurance Company ceased writing long-term care insurance and limited its operations to the administration and servicing of existing policies. In October 2008, Conseco Senior Health Insurance Company changed its name to Senior Health Insurance Company of Pennsylvania (SHIP), and its ownership was transferred from CNO Financial Group to the newly-formed nonprofit Senior Health Care Oversight Trust, which has managed the run-off of SHIP's long-term care insurance business since 2008.

SHIP was licensed in 46 states (excluding Connecticut, New York, Rhode Island, and Vermont), the District of Columbia, and the U.S. Virgin Islands. Through its predecessors, SHIP issued approximately 645,000 long-term care policies; as of December 31, 2020, 39,148 policies remained in force. Exhibit (Ex.) RP-33 at 3.[2] SHIP's policies cover long-term care services provided in congregant settings, such as nursing homes and assisted living facilities, as well as home-based health care services and adult day care. The states with the greatest number of SHIP

[1] 11 U.S.C. §§101-1532.

[2] As of the date of the hearing on the Plan, SHIP had approximately 45,000 policies in force that are not long-term care policies. These policies are not material to the Second Amended Plan or the proposed rehabilitation of SHIP; they do not consume SHIP resources, either because they are reinsured or because claims under those policies are paid through a trust which is adequately funded.

long-term care policies in force as of December 31, 2020, are Texas with 4,960 policies; Florida with 4,040 policies; Pennsylvania with 3,862 policies; California with 3,183 policies; and Illinois with 1,753 policies. Ex. RP-22 at 2. By contrast, the three states represented by the intervening state regulators in this matter have comparatively fewer policies in force; as of year-end 2020, there were 316 policies in force in Maine, 296 in Massachusetts, and 1,287 in Washington. *Id*.

The average age of a SHIP long-term care policyholder is 86, and the average age of a policyholder on claim is 89. Only 53% of SHIP long-term care policyholders pay premium. This is because the remaining 47% of policyholders either are on premium waiver[3] or have previously taken a non-forfeiture option, which allows the policyholder to discontinue paying premiums in exchange for a period of coverage equal to the premiums previously paid to the company less any benefits previously received. Approximately 13% of SHIP's long-term care policyholders are on claim, and the Rehabilitator expects that number to rise to 32% of all policyholders by 2050. Ex. RP-56 at 21. The Rehabilitator also expects the volume of SHIP's claims to continue outpacing its premium collections. Specifically, in the absence of the Rehabilitator's plan, SHIP will pay another $3 billion in claims but collect only $230 million in premiums. *Id*. at 20.

B. SHIP's Financial Condition

SHIP has approximately $1.4 billion in assets and $2.6 billion in liabilities, *i.e.,* a Funding Gap of $1.2 billion. Ex. RP-31 at 1-2. The major causes

[3] Approximately 99% of SHIP's long-term care policies provide that a policyholder who receives benefits under his policy for a specified period of time (such as 90 days) is no longer required to pay premiums for coverage after that time period as long as the policyholder remains eligible for benefits or receives a specified level of care. "Once the policyholder's eligibility for benefits ends, the policyholder is required to resume paying premiums." Ex. RP-55 at 86 (Second Amended Plan).

of SHIP's insolvency were the use of erroneous actuarial assumptions to develop initial premium rates, poor investment returns, high operating costs, and the inability to obtain the approval of actuarially justified rate increases from state insurance regulators. Two significant adverse events exacerbated SHIP's financial situation. In 2018, following the appointment of a Special Deputy Rehabilitator and a revision of SHIP's key actuarial assumptions, SHIP recorded a $374 million premium deficiency reserve; a $44 million increase in claim reserves; and a $176 million investment loss from the so-called Beechwood investment program. These accounting entries increased SHIP's 2018 deficit by $500 million. *See* Ex. RP-56 at 23. In 2019, revised actuarial assumptions required an increase in reserves, thereby adding another $400 million to SHIP's deficit. *Id*. SHIP's annual premium revenue as of December 31, 2020, is $58 million. *Id*. at 14.

C. Rehabilitation Plan

Given SHIP's negative capital and surplus, the Insurance Department applied to this Court for an order placing SHIP in rehabilitation, with the consent of the Senior Health Care Oversight Trust and SHIP's directors. On January 29, 2020, the Court granted the application and appointed the Pennsylvania Insurance Commissioner to serve as Rehabilitator of SHIP; to take steps to address SHIP's financial challenges; and to protect its policyholders and other creditors.

The Rehabilitator engaged a Special Deputy Rehabilitator, Patrick Cantilo, and actuarial consultants, including Oliver Wyman, to study SHIP's financial condition and to manage the company while they developed corrective measures. On April 22, 2020, the Rehabilitator filed a plan for the rehabilitation of SHIP. The Court issued a case management order which, *inter alia*, solicited formal

and informal comments from any interested person. Several intervened to offer comments on the rehabilitation plan and participate in any proceedings, including:[4]

1) The Maine Superintendent of Insurance, the Massachusetts Commissioner of Insurance, and the Washington Insurance Commissioner (Intervening Regulators);

2) The National Organization of Life and Health Guaranty Associations (NOLHGA);

3) ACSIA Long Term Care, Inc.; Global Commission Funding LLC; LifeCare Health Insurance Plans, Inc.; Senior Commission Funding LLC; Senior Health Care Insurance Services, Ltd., LLP; and United Insurance Group Agency, Inc. (Intervening Agents and Brokers);

4) Anthem, Inc.; Health Care Service Corporation; Horizon Health Care Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey; and UnitedHealthcare Insurance Company (Intervening Health Insurers); and

5) James Lapinski, a policyholder and agent, and Georgianna Parisi, a policyholder.

After reviewing the formal and informal comments, the Rehabilitator filed an amended rehabilitation plan on October 21, 2020. Following a second comment period and a pre-hearing conference, the Rehabilitator filed the Second Amended Plan on May 3, 2021.

The Second Amended Plan is designed to be implemented in three phases. Phase One, beginning immediately upon Court approval, is the principal phase and seeks to reduce substantially or eliminate the Funding Gap. This phase identifies the SHIP policies that require modification because their current premium

[4] The original intervening persons also included Transamerica Life Insurance Company and Primerica Life Insurance Company, both of which issued policies reinsured and administered by SHIP. These parties are no longer actively participating in the proceeding.

falls below the "If Knew Premium" for the benefits provided by the policies. Ex. RP-55 at 10. The If Knew Premium rate is the rate that, if charged from inception, would have produced an underwriting loss ratio of 60% for each policy form. *Id*. at 27. If Knew Premium rates are intended to price policies adequately on a lifetime basis, but not to recoup losses due to inadequate pricing in the past. Further, the policyholder's age and current medical condition are not taken into account when setting the If Knew Premium rate. The If Knew Premium is an accepted methodology for setting premiums for long-term care insurance policies.

Policyholders whose current premium (including the premium they would be paying but for a premium waiver) falls below the If Knew Premium for the policy's benefits will be required to elect one of four options:

> Option 1: continue paying the current premium or maintain the premium waiver if one is in effect, but if the current or waived premium is less than the If Knew Premium, have the policy benefits reduced in accordance with Plan provisions so that the premium for the reduced benefits (including waived premium) is equal (on an If Knew Premium basis) to the current premium. The benefit reductions will be selected automatically by the Plan.
>
> Option 2: select certain policy endorsements that provide essential benefits (sometimes greater than the benefits provided by Option 1) for an actuarially justified premium. The maximum benefit period is capped at four years, the maximum daily benefit is capped at $300 and inflation protection is capped at 1.5%.
>
> Option 2A: an enhanced alternative with a five-year benefit period and 2% inflation rider. Options 2 and 2A will not be subject to further rate increases or benefit reductions in Phase Two of the Plan. Options 2 and 2A are designed to provide reasonable coverage at reasonable premium rates.
>
> Option 3: Non-forfeiture Option (NFO) through which the policyholder will receive a Reduced Paid-up (RPU) policy providing limited benefits but for which no future premiums will

> be charged. Under the Plan, this option will include more generous benefits than the typical industry non-forfeiture option or reduced paid-up policy, most notably in that it will offer as much as a 30-month benefit period unless the current policy has a shorter benefit period. Moreover, policyholders who select this option will never have to pay additional premiums and this policy will never lapse.
>
> Option 4: retain the current policy benefits and pay the corresponding If Knew Premium (unless equal to or lower than the policyholder's current premium). For many policyholders this may require a substantial increase in premium.

See Ex. RP-55 at 11-12. Policyholders who presently pay a premium at or above the If Knew Premium may elect Option 2 or Option 3 if preferable, given their present circumstances. Otherwise, these policyholders will not have their policies modified in any respect.

Before making an election, each policyholder will receive information detailing the premiums and benefits associated with each option. Special elections will apply to policyholders who are not currently paying premium due to a premium waiver provision in their or their spouses' policies. Most of these policyholders have a current premium (what they would be paying but for the waiver) that is lower than the If Knew Premium. These policyholders will be required to pay a differential premium, which represents the difference between (1) the premium they would be paying but for the premium waiver in effect (the current premium), and (2) the If Knew Premium appropriate for their policy coverages. Ex. RP-55 at 12. Should the premium waiver terminate, these policyholders will then be required to pay the full applicable If Knew Premium. Similar options will be offered to policyholders on claim.

For every policyholder there will be a default option that applies automatically if no election is made. For the policyholder whose current premium falls at or above the If Knew Premium, the default option leaves the policy unchanged. For the policyholder whose current premium falls below the If Knew Premium, the default option will be identified in the election materials. For policyholders on premium waiver, the default option will be Option 1 (the benefit downgrade). Where the nonforfeiture option would provide these policyholders better benefits than the downgrade, Option 3 will be the default option. For policyholders paying premium, Option 2 (basic policy endorsements) will be the default option.

In Phase Two of the Second Amended Plan, the results of Phase One will be evaluated to determine whether additional policy modifications may be necessary for certain policies that are still underpriced. It is expected that modifications in Phase Two will largely be based on achieving a self-sustaining premium for every policy. The goal of Phase Two will be to eliminate any Funding Gap not eliminated in Phase One. In Phase Three, the Rehabilitator will complete the run-off of SHIP's long-term care insurance business remaining in force.

The Second Amended Plan corrects the condition that caused SHIP's insolvency: the underpricing of policies. The Plan will address the Funding Gap by increasing premiums or modifying policy coverages. The Rehabilitator has concluded that a modification of coverages will do more to reduce the Funding Gap than premium increases. Further, many policyholders are paying for more coverage than they are likely to use.

The Rehabilitator designed the Plan around the core principle of policyholder choice. All policyholders will have at least one option for preserving

their current coverage (by paying an increased premium) and at least one option for preserving their current premium (by reducing policy benefits). The Plan's premium rate structure takes rate increase history and product differences into account, and it will develop premium rate increases based solely on the characteristics of each policy and not on the policyholder's state of residence or the state where the policy was issued.

The payment of commissions owed to agents under agreements made prior to the inception of rehabilitation proceedings will be suspended under the Second Amended Plan until policyholders' claims have been paid in full and adequate provision made for reasonably anticipated future claims. Accrual of commissions will also be suspended as of the effective date of the Plan, *i.e.*, the date the policyholder elections become effective. Claims for commissions owed to agents and brokers will be subordinated to policyholder claims. The Plan's treatment of agent and broker commissions reflects the Rehabilitator's belief that most policyholders do not maintain a close relationship with their agent after purchasing their policy. They typically contact SHIP or another trusted professional when they have questions about their policy.

D. Hearing on Second Amended Plan

At the hearing on the Second Amended Plan, the Rehabilitator offered testimony from the following witnesses: Special Deputy Rehabilitator Patrick Cantilo, who was admitted as an expert in insurer insolvency matters, specifically as to long-term care insurers; Marc Lambright, an actuarial consultant to the Rehabilitator, who testified as a fact witness; and Vincent Bodnar, an actuarial consultant to the Rehabilitator, who was admitted as an actuarial expert and as an expert on long-term care insurance, including product development and sales

practices, the rate setting and approval process for insurers, and the liquidation of financially troubled insurers.

i. Rehabilitator's Evidence

a. Patrick Cantilo

Special Deputy Rehabilitator Patrick Cantilo provided the history of the business of SHIP, summarized above, and his involvement in the rehabilitation since 2018.

He first discussed the effects of the COVID-19 pandemic on SHIP's business and financial condition. Cantilo testified that since the beginning of the pandemic in 2020, SHIP has experienced a moderate increase in mortality, *i.e.*, more of its insureds died than would normally be expected, which generated a moderate increase in policy lapses. There was a small increase in morbidity, *i.e.*, the expected incidence of disease. The pandemic adversely affected SHIP's expected yield on invested assets. Cantilo opined that the aggregate effects of the pandemic had a relatively moderate impact on SHIP's financial condition and are not material to the Second Amended Plan.

Cantilo focused his testimony on the approximately 39,000 long-term care policies of SHIP. Approximately 53% of SHIP's current policyholders are paying premium, generating $58 million in revenue as of year-end 2020. The remaining 47% of policyholders are on claim, have previously selected a non-forfeiture option or are on premium waiver. *See* Ex. RP-56 at 14. Many policyholders have been paying less premium than is necessary to fund their coverages, and this premium deficiency has existed for years. SHIP policies that create the greatest liability have a 5% compounded inflation rider; unlimited lifetime benefits; and are non-tax qualified, meaning that they have lower benefit triggers

and shorter elimination periods. The effect of the inflation rider has been to increase the maximum daily benefit up to $650, without regard to actual inflation levels or the actual cost of the policyholder's care. Cantilo testified that the inflation rider is a "big contributor" to SHIP's overall deficit. Notes of Testimony (N.T.), 5/17/2021, at 34.

Cantilo testified that the majority of policyholders pay an annual premium of less than $2,500 per year. N.T., 5/17/2021, at 37-38. *See* Ex. RP-56 at 14. The group is 71% female, and the majority are in their 80s and 90s. Approximately 70% of the policies in force provide comprehensive coverage for both home health care and facility care in either an assisted living facility or nursing home. Inflation protection is a feature of 47% of these policies. The majority of policies, 54%, provide between one and four years of benefits; 27% provide lifetime benefits. Ex. RP-56 at 17.

Cantilo opined that SHIP's claims, when compared to premiums, do not present "a good picture." N.T., 5/17/2021, at 41. The number of policies in force has declined since SHIP began operating in 2009, and at present, the claim costs outpace the premium revenue. Of the total premium revenue that SHIP is expected to collect prior to the expiration of the policies in force, approximately $7.4 billion, it has already collected $7.1 billion. Stated otherwise, SHIP expects to collect only about $300 million in additional premium. On the other hand, SHIP's expected claims during that same period total approximately $11 billion; it has paid only $7.7 billion so far. In short, SHIP can expect to pay another $3 billion in claims but to collect only $300 million in premium, unless its business is restructured in a rehabilitation.

Cantilo testified that SHIP is not atypical in the industry. Long-term care insurers collect more premium than needed in the early years of writing policies. They invest the excess, put it aside, and then tap into those invested assets to pay claims. When a company stops writing new business, as SHIP did 18 years ago, the premium curve begins to flatten and the claim curve begins to rise. Cantilo testified that the assets set aside for the purpose of paying claims did not earn the expected income that was needed to meet liabilities.

Cantilo discussed the reasons for SHIP's insolvency, beginning with the erroneous actuarial assumptions made when the policies were first issued. SHIP underestimated the number of people who would become ill and qualify for benefits. At the same time, SHIP overestimated how quickly people would recover and stop needing care, referred to in the industry as morbidity improvement. SHIP overstated mortality by assuming more people would die before submitting claims than actually did. Relatedly, SHIP overestimated the number of policies that would lapse by reason of death or non-payment of premium. Cantilo estimated that through 2040, when most of the block of business will have terminated, the aggregate effect of the erroneous actuarial assumptions approximately equals the total deficit of $1.2 billion. *See* Ex. RP-56 at 29.

Another factor in SHIP's insolvency is its investment history. SHIP experienced lower market yields than it anticipated while it was selling and pricing its long-term care policies. To counter the effects of economic conditions, in 2009, SHIP invested in two programs, the Beechwood program and Roebling Re. Instead, these programs produced investment losses between $150 million and $300 million (as reported in 2018).

Cantilo testified that a significant cause of SHIP's insolvency is its discriminatory premium rate structure. As SHIP management realized its premium rates were inadequate, it began seeking premium rate increases from state regulators across the country from 2009 to 2021. SHIP received wildly different rate approvals. *See* Ex. RP-56 at 45. Cantilo testified that from 2009 to 2019, SHIP lost $312 million in cumulative premium due to rejected rate increase filings, or $371 million using an assumed 3.5% interest rate of return on investments. N.T., 5/17/2021, at 63-64; Ex. RP-56 at 50-51. The different responses of state regulators to SHIP's requested rate increases have created a discriminatory rate structure, which has been the focus of criticism in the regulatory community. Policyholders whose state of issue has approved rate increases are effectively subsidizing policyholders whose state of issue has not approved rate increases. Similarly situated policyholders are paying vastly different premiums for the same coverage. Cantilo opined that this has created an unfortunate side effect: states inclined to approve actuarially justified rate increase requests become hesitant to do so because of the failure of other states to act in kind.

The Rehabilitator's team had to decide whether to pursue a rehabilitation or liquidation of SHIP. Cantilo testified that the team chose rehabilitation because SHIP is financially able to provide a reasonable package of coverages to the remaining 39,000 policyholders. The Rehabilitator also considered that, in a liquidation, guaranty association coverage will be triggered, resulting in taxpayers contributing hundreds of millions of dollars to pay claims of policyholders who have not paid an appropriate premium. Rather than shifting the burden of the inadequate premium to taxpayers, the team concluded that the better course was to right-size the existing policies to an actuarially justified premium. Acknowledging

that no rehabilitation plan will magically restore SHIP to solvency, Cantilo testified the Second Amended Plan will, at a minimum, substantially reduce the Funding Gap and correct SHIP's inequitable premium rate structure. He explained that the Plan must be implemented quickly because of the advanced age of the policyholders.

In preparing the Second Amended Plan, the Rehabilitator relied on the combined expertise of Cantilo; Vincent Bodnar and other actuarial analysts at Oliver Wyman; Robert Robinson, who was appointed Chief Rehabilitation Officer of SHIP and who served as Chief Rehabilitation Officer and Chief Liquidation Officer for Penn Treaty;[5] Pennsylvania Insurance Department legal counsel and staff; and SHIP technical staff. The Rehabilitator also sought and considered the input of state insurance regulators, staff of the National Association of Insurance Commissioners, policyholders and other formal and informal commenters. The Rehabilitator's team prepared extensive analyses of SHIP's finances, its policyholders, the long-term care insurance market, and other matters relevant to SHIP's condition and prospects for rehabilitation. Key data and information have been made available to interested persons through a data site, which included actuarial files relating to assumptions and analyses, a seriatim actuarial file for every policy at issue, and tailored reports related to the Second Amended Plan.

Cantilo explained how the Second Amended Plan will operate. He described it as "completely scaleable," meaning that the elements of the Plan can

[5] Penn Treaty Network America Insurance Company, a Pennsylvania insurer, and its subsidiary, American Network Insurance Company (collectively, Penn Treaty), provided long-term care insurance to over 126,000 policyholders in all 50 states and the District of Columbia. Penn Treaty became insolvent for many of the same reasons that SHIP is insolvent, *i.e.*, benefit-rich policies were underpriced at inception and the company's active live reserves became understated. Penn Treaty was placed into rehabilitation by the Pennsylvania Insurance Commissioner on January 6, 2009. Rehabilitation ultimately proved unsuccessful, and on March 1, 2017, this Court ordered the liquidation of Penn Treaty.

respond to changes in the amount of the Funding Gap as SHIP moves through Phase One and into Phase Two and Phase Three. N.T., 5/17/2021, at 97. In Phase One, the policyholder's options are based on the If Knew Premium, and in Phase Two the options will be developed to establish a self-sustaining premium structure.[6] Cantilo testified that it was important to give each policyholder at least two options: (i) retain his current coverages by paying the actuarially justified premium (Option 4) or (ii) retain his current premium by adjusting coverages to match that premium (Option 1). Between those two options there is a non-forfeiture option (Option 3) that is more generous than a non-forfeiture option in liquidation and basic policy options (Options 2 and 2A), which provide a reasonable package of long-term care coverage at an affordable price.

Cantilo testified that the If Knew Premium was selected to establish the premium in Phase One because it is generally accepted by regulators across the country; it was the methodology used by guaranty associations to increase premium rates for policyholders in the Penn Treaty liquidation; it is an easy rate methodology to explain to policyholders; and it achieves the goal of putting policyholders on a level playing field when it is calculated on a seriatim basis.

Cantilo explained in detail each Phase One option in the Second Amended Plan. Option 1 is the downgrade option. It allows the policyholder to keep his current premium but reduces benefits until the premium is adequate, on an If Knew basis. The policyholder will not choose which benefits to downgrade, which was discovered to be too complicated in the Penn Treaty liquidation. The methodology for reducing benefits under Option 1 will proceed in the following

[6] The scope of Phase Two can only be determined after the completion of Phase One and an assessment of the remaining Funding Gap. Cantilo anticipates that the Rehabilitator will return to the Court at that point in the rehabilitation process.

sequence: elimination of benefit restoration provisions; elimination of benefit extension provisions; adoption of tax-qualified benefit triggers; discontinuation of return of premium provisions; removal of inflation protection and locking of maximum daily benefit at current levels; conversion from indemnity to reimbursement of actual expenses up to the maximum daily benefit amount; reduction in the maximum daily benefit; extension of any elimination period to 90 days and applying it to each period of care; reduction in the policy's maximum benefit period; elimination of all premium waiver provisions; and conversion of the policy to a pool of money with a reduction of the maximum benefit period to the amount required to match the current premium. Ex. RP-55 at 45-46; Ex. RP-56 at 69. If the first revision is sufficient to match the policy's coverages to the existing premium, no further coverage modifications will be made.

Under Option 2, the policyholder selects basic policy coverages and a corresponding If Knew Premium. After extensive policyholder outreach, the Rehabilitator selected the key components of long-term care that most policyholders desire if they cannot afford the most expensive package of coverages. These include a maximum benefit period equal to the lesser of the current benefit period or four years; a maximum daily benefit equal to the lesser of 80% of the current daily benefit or $300 for nursing facility care;[7] and an annual inflation adjustment capped at 1.5%. Option 2A, which is an enhanced version of Option 2, provides a maximum benefit period of five years and an annual inflation adjustment of 2% for a higher premium. Policyholders who elect Option 2 or 2A will not be expected to participate in Phase Two of the Second Amended Plan.

[7] The maximum daily benefit for facility care other than nursing home care is $225. The maximum daily benefit for home health care is $150.

Option 3 is the non-forfeiture option, which offers the policyholder a maximum benefit period of 2.5 years and a maximum daily benefit equal to the lesser of 80% of the current daily benefit or $300 for nursing facility care.[8] Cantilo contrasted Option 3 with the standard non-forfeiture option in the industry, which offers the policyholder the equivalent of accumulated premium less claims. Typically, this results in only several months of coverage, particularly where the policy is rich in benefits. By contrast, Option 3 provides a reasonable alternative to a "luxurious" policy. Policyholders who elect Option 3 will not be required to participate in Phase Two of the Plan.

Option 4 allows the policyholder to keep his current coverages by paying the If Knew Premium. Cantilo testified that this option is the least favored by the Rehabilitator because if the majority of policyholders choose this option the Funding Gap will only be reduced by half. N.T., 5/17/2021, at 191. This is because the If Knew Premium does not cover the prior years of premium inadequacy.

Cantilo explained that the options will vary depending on whether the policyholder is on claim or paying premium. A policyholder on premium waiver may choose to pay a differential premium, *i.e.*, the difference between the waived premium and the If Knew premium. The policyholder may choose not to pay the differential premium, but the benefits of his policy will be reduced in a commensurate amount. Cantilo testified that the rationale behind the differential premium is to apportion the burden of rehabilitation among all policyholders, not just the subset still paying premium. It would be unfair for the 13% of policyholders on premium waiver to be immunized from a premium adjustment at the expense of the other 87%.

[8] The maximum daily benefit for facility care other than nursing home care is $225. The maximum daily benefit for home health care is $150.

Cantilo described the option election process, which will begin with the Rehabilitator sending every policyholder a packet of information containing three sections. The first section describes the policyholder's current policy, including the monthly premium, available benefits, maximum policy value and the applicable statutory guaranty association limit were SHIP to be liquidated. The second section provides information on each option and how it changes the key provisions of the policy, *e.g.*, duration of benefit period and maximum daily benefit amount. The amount of the maximum policy value not covered by the applicable guaranty association is also provided. The third section contains two key pieces of information: the policyholder's estimated annual premium should a liquidation be ordered and the policyholder's estimated self-sustaining premium in Phase Two of the rehabilitation. Cantilo explained that these two numbers will enable policyholders to better choose among the options, especially since Options 1 and 4 will subject them to Phase Two.

To create user-friendly policyholder election materials, the Rehabilitator has engaged consultants who specialize in preparing Medicare supplement materials. The election forms will use graphics and be intuitively easy to follow. The Rehabilitator also plans to post a video tutorial online to guide the policyholder through the election forms. Cantilo testified that the Rehabilitator's goal is 100% policyholder participation. If a policyholder whose current premium is below the If Knew Premium does not make an election by the deadline, there are default options. For policyholders on premium waiver, the default option is Option 1, the downgrade option, unless Option 3 will provide better coverage, in which case it will be the default. For policyholders paying premium, the default option is Option 2, the basic policy endorsements.

The Rehabilitator conducted considerable outreach about the rehabilitation of SHIP beginning in the early stages of the rehabilitation. The Rehabilitator participated in regular meetings of the National Association of Insurance Commissioners and organized numerous meetings and conference calls with state regulators. The goal was to design a rehabilitation plan to address all concerns, particularly those expressed about state-of-issue responsibility for premium rate review. The Rehabilitator set up a secure data site for interested persons that contains all of the exhibits to this proceeding, including the seriatim actuarial files for every policy. Individual reports were generated for each state explaining how resident policyholders of that state would fare under the plan.

To date, the Rehabilitator has received comments from approximately 100 policyholders. Cantilo testified that this was far fewer than the number of comments in Penn Treaty. As expected, most policyholder concerns related to reduction of benefits and rate increases. Cantilo was surprised how many policyholders were supportive of a rehabilitation and the plans submitted by the Rehabilitator.

The principal concerns raised by state insurance regulators related to the following areas: (1) treatment of reinsurance assumed; (2) setting of premium rates by the Rehabilitator and this Court rather than by state-of-issue regulators; (3) desirability of liquidation instead of rehabilitation; and (4) feasibility of the Second Amended Plan. Cantilo discussed each of these areas in turn.

On the first concern, Cantilo explained that SHIP's assumed reinsurance involved approximately 2,000 long-term care policies originally issued by American Health and Life, Primerica and TransAmerica, or the predecessors of those companies. SHIP's predecessors entered into agreements to reinsure 100% of

these policies and administer claims. In the case of TransAmerica, on December 29, 2020, this Court approved an agreement by which TransAmerica recaptured its policies from SHIP. Cantilo opined that the recapture was consistent with industry norms.

With regard to premium rates, Cantilo acknowledged the objections of the Intervening Regulators. They contend that the state where the policyholder resided when the policy was issued is solely responsible for the regulation of the policy's premium rate. Cantilo opined that this makes sense for solvent insurers, but when an insurer enters rehabilitation, the domiciliary state has sole responsibility for the insolvent insurer and the restructuring of its business. This responsibility includes the adjustment of premiums and policy coverages where necessary to correct the insurer's financial condition.

Cantilo testified that the Intervening Regulators' legal assertion that they have the right to review and approve premium rates for policies issued by SHIP in their states creates "some ironic consequences." N.T., 5/17/2021, at 157. For example, 34 policies issued in Maine, 84 policies issued in Massachusetts and 89 policies issued in Washington are held by policyholders who now reside in other states. Thus, the Intervening Regulators assert the right to set the rates for 207 policyholders who live outside of their states. Ex. RP-56 at 97. Further, 21 policyholders who reside in Maine, 83 policyholders who reside in Massachusetts and 87 policyholders who reside in Washington had their policies issued in other states. Under the Intervening Regulators' legal assertion, other state regulators would set the rates for 191 policyholders residing in the states represented by Intervening Regulators. *Id*. at 98. In short, their inflexible view of rate regulation results in approximately 400 policyholders residing in Maine, Massachusetts and

Washington having their rates set by states in which they do not reside. The better approach, in Cantilo's view, is for the domiciliary regulator of an insurer in rehabilitation to manage rate and contract modifications as part of a comprehensive rehabilitation plan.

Nevertheless, the Second Amended Plan contains an Issue State Rate Approval Option. As Cantilo explained, every state will be given the option of opting out of the rate approval section of the Second Amended Plan. If a state opts out, the Rehabilitator will file an application to increase premium rates for policies issued in that state to the If Knew Premium level. No rate increase will be sought for policies on premium waiver or which are already at or above the If Knew Premium. The Rehabilitator will file the application on a seriatim basis to eliminate subsidies and restore a level playing field. The regulator for the opt-out state will then render a decision on the application; if it is only partially approved, the Rehabilitator will downgrade the benefits for the affected policies.[9] Cantilo testified that this is essential to eliminate the subsidies that exist between policyholders across states by virtue of uneven rate increase approvals over the years. Each opt-out state policyholder will still have four options, which are not exactly the same as those offered in the Second Amended Plan. They are: (1) pay the approved premium and have benefits reduced to match; (2) accept a downgrade of benefits to match the current premium; (3) accept an issue-state non-forfeiture option; or (4) keep the current benefits and pay the If Knew Premium. Cantilo pointed out that the non-forfeiture option available to opt-out policyholders will not be as generous as the enhanced non-forfeiture option in Option 3 of the Second Amended Plan. There will also be no "basic policy benefits" option, *i.e.*, Option 2 in the Plan.

[9] If the state takes no action on the rate application within 60 days, it will be deemed denied.

Cantilo next addressed the Intervening Regulators' argument that immediate liquidation of SHIP is preferable to rehabilitation. In this regard, the Intervening Regulators focus on the present value of future benefits less the present value of future premiums, also referred to as the "Carpenter value," to support their view that policyholders would fare better in a liquidation. N.T., 5/17/2021, at 175.[10] Cantilo criticized this measure because it does not give an accurate picture of a policyholder's situation. He offered the example of an actual 92-year-old SHIP policyholder currently paying $2,761 for a policy with unlimited benefits. Ex. RP-56 at 102. Using the Intervening Regulators' preferred methodology, the "Carpenter value" of that policy is $33,890, which is higher than the "Carpenter value" produced under any of the four Plan options. However, to receive this value of $33,890, the policyholder would have to pay $11,520 in annual premium. By contrast, this policyholder could choose Option 3, a paid-up policy with a slightly lower "Carpenter value" of $33,550. With a paid-up policy, however, this policyholder would receive 2.5 years of coverage and never pay another premium. Cantilo offered other examples where Option 3 would be the best option for a policyholder, given the amount of premium the policyholder would be required to pay to the guaranty association in a liquidation. *See, e.g.*, Ex. RP-56 at 103. Cantilo opined that these are not exceptions; "[t]here are many cases where the raw projection of future benefits less future premium doesn't really tell you what the real value of the policy is." N.T., 5/17/2021, at 177.

Cantilo discussed several different ways to compare the value of the Plan options to what would be available in a liquidation. Using the Intervening

[10] "Carpenter value" refers to the United States Supreme Court's decision in *Neblett v. Carpenter*, 305 U.S. 297 (1938), which is often cited for the proposition that, in order for a rehabilitation plan to be constitutional, policyholders must fare as well in rehabilitation as they would in a liquidation.

Regulators' standard of present value of future benefits less present value of future premiums, 85% of policyholders will have at least one option as favorable as liquidation and 15% will not. Ex. RP-56 at 105. Using the present value of future benefits divided by annual premiums, those numbers are 79% and 21%. *Id*. at 106. Using the maximum policy value divided by annual premium, those numbers are 89% and 11%. *Id*. at 107. Using the maximum policy value less present value of future premiums, those numbers are 96% and 4%. *Id*. at 108. Finally, using the Rehabilitator's preferred standard of maximum policy value, also referred to as the "benefit account value" or "lifetime maximum benefit" in some policies, *id*. at 104, 100% of policyholders will have at least one option in the Plan that offers the same or a better value than in a liquidation. *Id*. at 109.

Cantilo acknowledged that these are actuarial techniques that rely on the exercise of professional judgment. He opined that the maximum policy value is what policyholders use when they purchase an insurance policy, *i.e.*, the maximum daily benefit and the maximum benefit period.

Cantilo offered additional reasons to explain why rehabilitation is preferable to liquidation. First and foremost is the value of policyholder choice. Second, the Second Amended Plan contains features that would not be available to policyholders in liquidation, such as an option to retain their current policy level of coverage, which may exceed the applicable guaranty association cap, by paying the If Knew Premium. Third, there is the enhanced non-forfeiture option that provides reasonable coverage for no additional premium. In a liquidation, the non-forfeiture option would be locked into the policy's present coverages and terms, which may result in a very short period of coverage. Fourth, the Plan reduces or eliminates the subsidies in the current rate structure, which cannot be done in a liquidation.

Finally, Cantilo testified about the likelihood of success of the Second Amended Plan. He opined that the Plan is designed to eliminate the Funding Gap over three phases. This is not likely to happen in Phase One, but Phase One will materially reduce the Funding Gap.

Cantilo offered an exhibit illustrating the amount of the Funding Gap reduction under 11 hypothetical policyholder election scenarios. In general, the more that policyholders elect to pay the If Knew Premium for their current benefits (Option 4), the worse the outcome for the Funding Gap. For example, in Scenario 1, where 7% elect Option 1, 8% elect Option 2 or 2A, 4% elect Option 3 and 81% elect Option 4, the Funding Gap is reduced by $525 million. Ex. RP-56 at 113. At the other extreme, in Scenario 11, where a very small number of policyholders elect Option 4 and the rest split evenly among Options 1, 2, 2A and 3, the Funding Gap is completely eliminated. *Id*. This underscores how the policyholders will be the masters of the fate of SHIP. No matter how much of the Funding Gap is eliminated in Phase One, SHIP will be in better shape if it eventually has to be liquidated because the discriminatory subsidies in the premium rate structure will be eliminated, and the policies will be right-sized for the premium the policyholder is willing to pay.

On examination by the Intervening Health Insurers, Cantilo testified that the SHIP policies contain provisions that allow SHIP to modify the premium rate. Some policies provide that rate increases will require the approval of state regulators, while others specify that rate increases may be sought only where an increase is warranted given the claims experience of the cohort of policyholders covered by the same policy form. Cantilo stated that these provisions are standard in long-term care insurance policies. The Rehabilitator designed the If Knew

Premium methodology in the Second Amended Plan to be consistent with the standards for setting long-term care insurance premium rates, which are substantially the same in every state.

b. Marc Lambright

Marc Lambright, an accident and health insurance actuary with Oliver Wyman, testified for the Rehabilitator. Lambright testified that the Pennsylvania Insurance Department engaged Oliver Wyman in early 2017 to conduct a targeted examination of SHIP's reserves and the assumptions used by its actuarial firm, Milliman, to set the reserves. Following its examination, Oliver Wyman submitted a report making several observations: Milliman's cash flow testing assumptions were too optimistic; claim reserves for the preceding years were inadequate; and the Beechwood investment program was riskier than assumed in the 2016 cash flow test report. Ex. RP-56 at 53. Oliver Wyman made several recommendations for the ongoing financial monitoring of SHIP. They included using more recent experience to develop morbidity, lapse and termination assumptions. *Id*. Milliman largely rejected Oliver Wyman's recommendations.

In 2018, after SHIP was placed under the supervision of the Insurance Department, Cantilo asked SHIP to devise a corrective action plan.[11] Cantilo also asked Oliver Wyman to continue analyzing SHIP's financial condition. Lambright testified that much of 2018 was spent pressing SHIP to substantiate some of its actuarial assumptions. Lambright testified that the Beechwood investment losses ($176 million) and the premium deficiency reserve booked in 2018 ($347 million) had a significant impact on SHIP's financial picture. N.T., 5/18/2021, at 374. In

[11] Section 510(a) of Article V authorizes the Insurance Commissioner to "make and serve upon the insurer and any other persons involved, such orders … as are reasonably necessary to correct, eliminate or remedy" the insurer's condition that required the supervision. 40 P.S. §221.10(a).

2019, Lambright assisted Vincent Bodnar as he built the corrective action plan that would become the rehabilitation plan.

c. Vincent Bodnar

Vincent Bodnar, an actuary at Oliver Wyman with a specialty in long-term care insurance, testified as an expert witness. Bodnar performed actuarial work for the Rehabilitator and was involved in developing the Second Amended Plan, including the Phase One options to be offered to the policyholders.

Bodnar described the seriatim model as the core of the Second Amended Plan. A seriatim model, which produces actuarial projections for each policy individually, has become the industry standard in the past five years. The input to the seriatim model consists of individual policyholder characteristics such as age, gender, issue age, benefit features of the policy, and the premium charged. Applied to the input file are actuarial assumptions, including morbidity and mortality rates, lapse rates, and exhaustion rates, which Oliver Wyman has developed using SHIP's historical experience. The seriatim model projects future premiums and future claims for each policy on a month-by-month basis. N.T., 5/18/2021, at 397.

Bodnar explained that the If Knew Premium methodology employed in Phase One determines the premium an insurer would charge had it known when the policy was issued what it knows today, *i.e.*, that it would experience lower returns on investments, lower mortality rates, lower lapse rates, and higher claim incidence rates. The If Knew Premium assumes a 60% lifetime loss ratio from inception of a policy, *i.e.*, the use of 60% of expected premium to pay benefits to policyholders. The other 40% of expected premium is used to pay salaries, administrative overhead, premium taxes, federal taxes and profit for the insurer. The goal of the lifetime loss ratio is to establish a premium level that is reasonable in relation to the benefits paid.

The 60% lifetime loss ratio is the benchmark required for a premium rate increase in most states. The If Knew Premium methodology employed in Phase One will be actuarially justified and will not recoup past underpricing losses, although several states allow such recoupment. In the Penn Treaty liquidation, guaranty associations sought premium rate increases from the states based on an If Knew Premium methodology similar to the one employed in Phase One.

Because the Second Amended Plan intends to set premium rates on a seriatim basis, each policyholder will receive an individual premium increase calculated on the benefit features of his policy and the policyholder's characteristics. The model does not consider individual claim experience but, rather, "all the various variants that make up a given assumption" for a risk class. N.T., 5/18/2021, at 412. By contrast, in a traditional rate application process, insurers request state approval of an aggregate premium rate increase, although their models might be developed on a seriatim basis.

Bodnar testified that it is common for an insurer to receive mixed responses to a premium rate increase request from state regulators because each state has its own approach to reviewing rates. Additionally, the rate review process typically takes between 90 days and 2 years. Protracted rate reviews with drastically different outcomes have resulted in some SHIP policyholders paying a premium rate that subsidizes the inadequate premium rates of other SHIP policyholders. The Second Amended Plan seeks to eliminate this inequitable discrimination in premium payments.

Based on his experience with insurance product development and consumer choices, Bodnar testified that, generally, policyholders look at maximum policy value, *i.e.,* the maximum daily benefits, elimination period and premium rate,

in choosing an insurance policy. Bodnar considered all these factors in developing the options in the Second Amended Plan. Option 1 allows policyholders to retain their current premium rates with reduced benefits. Options 2 and 2A provide policyholders with basic policy coverages at corresponding If Knew Premium rates. The basic policy retains the key components of long-term care insurance and reduces or eliminates some features, such as a 4.5% inflation rider, that are not so important to policyholders. The maximum daily benefit, although reduced, would continue to provide meaningful coverage to most policyholders. The policyholders who elect Option 2 or 2A would not be subject to a rate increase in Phase Two, which is an appealing feature. In the Penn Treaty liquidation, policyholders were offered a benefit reduction option similar, but not identical to, Options 1 and 2 or 2A, but Bodnar did not recall how that affected their premium level. N.T., 5/19/2021, at 517, 520. By contrast, the Second Amended Plan proposes to offer policyholders three options by which to reduce their coverages and save premiums.

Option 3 of the Second Amended Plan offers a non-forfeiture option, which allows policyholders to receive up to 2.5 years of coverage and stop paying any additional premium. This is more generous than the standard non-forfeiture option, which caps coverage to the amount of premiums the policyholder has paid from inception. Policyholders in the Penn Treaty liquidation who chose the standard non-forfeiture option received continued coverage for a shorter period of time, sometimes only months. *Id*. at 435.

Option 4 of the Second Amended Plan allows policyholders to keep their current policy benefits and pay the If Knew Premium rate to retain those benefits. The guaranty associations in the Penn Treaty liquidation did not offer an equivalent option to policyholders whose coverages exceeded the statutory limits.

Instead, they offered a rate increase option that retained the policy's coverages up to the statutory maximum amount allowed for each resident.

Bodnar explained how the different Phase One options relate to Phase Two of the Plan. Policyholders who elect Options 1 and 4 and have a policy providing coverage in excess of the guaranty association limits will be subject to a rate increase in Phase Two. Phase Two seeks to deploy a self-sustaining premium rate methodology, which will keep the lifetime loss ratio at 60% and thus be actuarially justified. Phase Two is not absolutely necessary under the Second Amended Plan because Phase One could close the Funding Gap, or the assumptions deployed in Phase One could play out differently than projected. Bodnar opined that any meaningful reduction in the Funding Gap during the rehabilitation would be a success.

Bodnar opined that a rehabilitation as proposed in the Second Amended Plan, as opposed to an immediate liquidation, presents policyholders with better options; sets the premium rates to equitable levels; and reduces SHIP's Funding Gap. There is no formulaic method to determine whether policyholders are better off in a rehabilitation or in a liquidation; the so-called "Carpenter test" is not an actuarial test. Policyholders who choose Option 4 will have a policy with a net present value greater than or equal to what they would have in liquidation because it will not be capped at the level set forth in the applicable guaranty association statute. However, Option 4 has the least effect on reducing the Funding Gap. N.T., 5/19/2021, at 512-513.

Bodnar opined that policyholders are likely to consider the maximum policy value/premiums analysis or the maximum policy value analysis in making determinations. The present value analysis, or "Carpenter test," is appropriate for

evaluating the impact of the Phase One options on SHIP's liabilities. However, he explained that policyholders do not use a present value analysis when they choose their long-term care insurance coverage. Nor would they rely solely on the present value analysis to select one of the options offered under the Second Amended Plan.

Upon approval of the Second Amended Plan, Bodnar and the actuarial team at Oliver Wyman will prepare an actuarial memorandum in support of the If Knew Premium rates, similar to what would be submitted to state regulators in a rate increase filing. In developing the Second Amended Plan, Oliver Wyman has prepared an actuarial report describing the If Knew Premium rating methodology and an assumption report, Ex. RP-16 and Ex. RP-17, and has gathered all the information needed for the actuarial memorandum. N.T., 5/19/2021, at 460.

ii. Intervening Regulators' Evidence

a. Frank Edwards

Frank Edwards, the vice president and chief life and health actuary of INS Consultants, testified as a fact witness on behalf of the Intervening Regulators. Edwards testified that under the Second Amended Plan, policyholders bear the responsibility for the $1.2 billion Funding Gap through benefit reductions and premium increases. By contrast, in liquidation, policyholders would bear a burden of approximately $397 million, and the guaranty associations would bear a burden of approximately $837 million. This represents the difference between the net amount the guaranty associations would pay to policyholders and the distributions they would receive from the SHIP estate. Because a rehabilitation does not trigger the guaranty associations, these funds will not be available to benefit policyholders under the Second Amended Plan.

Edwards observed that among the four options in the Second Amended Plan for Phase One, Option 4 provides a net present value for approximately 83% of policyholders that is greater than they would receive in a liquidation. The other options provide policyholders with a net present value that is lower than they would receive in liquidation.

Oliver Wyman presented 10 scenarios to illustrate the potential results of the Second Amended Plan for SHIP's liabilities, each leaving a deficit that ranged from $699 million to $186 million. Ex. RP-16 at 11. Only Scenario 11, later added, eliminates the Funding Gap. Based on the information provided by Oliver Wyman, Edwards calculated a "Best Interest" scenario, which assumed that each policyholder will choose the option that provides the greatest net present value, or "Carpenter value." Ex. SIR 5-4. Option 4 would give 67.13% of the policyholders the greatest net present value and would reduce SHIP's Funding Gap by $184 million. *Id.*

Edwards addressed a comparison of rehabilitation to liquidation under Phase Two. Edwards calculated the effects of hypothetical Phase Two premium increases on policyholders who selected Option 4 in Phase One. Assuming a premium increase of 50% in Phase Two, the percentage of policyholders receiving a net present value greater than in a liquidation under Option 4 drops to 33.89%. The percentage of policyholders in a rehabilitation, in the aggregate, that would receive a net present value greater than liquidation is 54.57%. Assuming a premium increase of 100% in Phase Two, the percentage of policyholders for whom Option 4 provides a net present value greater than in a liquidation drops to 22.92%. The percentage of all policyholders in a rehabilitation, in the aggregate, that would receive a net present value greater than in a liquidation is 47.21%. Even so, these

hypothetical premium increases of 50% and 100% would leave remaining a Funding Gap of approximately $858 million and $676 million, respectively. Ex. SIR 5-5.

Edwards observed that the information presented by Oliver Wyman indicated that the net present value of Option 2 for policies with benefits in excess of guaranty association limits is typically less than the net present value of the guaranty association limits. Ex. SIR 5-6.

Edwards did not evaluate Oliver Wyman's work. He compared the Second Amended Plan to liquidation using hypotheticals in which policyholders made elections based solely on maximizing the present value of future policy benefits minus the present value of future premiums, or the "Carpenter value."

iii. Intervenor NOLHGA's Evidence

a. Peter Gallanis

Peter Gallanis, the president of NOLHGA, testified as a fact witness. NOLHGA intervened in this proceeding to offer its suggestions on the Second Amended Plan; provide background information on the guaranty association system; and identify and request certain information material to its guaranty association members.

NOLHGA's members are life and health guaranty associations, one for each state and the District of Columbia, which are nonprofit entities created by state statutes to protect policyholders when a life or health insurance company is liquidated. In multi-state insurance insolvencies, the guaranty associations collaborate and coordinate through NOLHGA to fulfill their statutory obligations. NOLHGA has been involved in approximately 100 multi-state insurance receiverships, nine of which involved long-term care insurance. If SHIP goes into liquidation, most NOLHGA member guaranty associations would be activated to

provide coverage to SHIP policyholders, subject to the statutory limit on coverage in the member's state, which is generally $300,000 per resident.

Gallanis testified that the Second Amended Plan should emphasize that the options that policyholders select in Phase One will be permanent. The Second Amended Plan's discussion of SHIP's unfunded liability needs clarification, or it should be eliminated. The subject need not be addressed until a liquidation may occur.

He testified that the Rehabilitator's sample Illustrative Policyholder Guidance Pages on guaranty association coverage and premium rates in liquidation could be misleading. In response, NOLHGA prepared a sample Summary of Policyholder Protection by Guaranty Associations in Liquidations that it believes should be sent to policyholders during Phase One. Ex. N-1. Gallanis believes NOLHGA should review all policyholder communications that refer to liquidation or guaranty associations and be allowed to comment on these communications before they are sent to policyholders.

Gallanis testified that NOLHGA wants more information on SHIP's reinsurance agreements with Transamerica, American Health and Life Insurance Company, and Primerica Life Insurance Company. NOLGHA also seeks more information on SHIP's in-force policies that are not long-term care policies.

Gallanis explained that members of a guaranty association are licensed life and health insurers. If SHIP is placed under an order of liquidation, the guaranty associations will provide resident policyholders with coverage up to the lesser of the maximum benefit level provided in the policy or the statutory limit for guaranty

association coverage, which is $300,000 per resident in most states.[12] The guaranty associations may continue coverage under the policy; work with the receiver to transfer the business to a financially solvent insurer; or issue alternative policies. The guaranty associations may seek premium rate increases or offer policyholders modified benefits based on current premium rates, as was recently done in the Penn Treaty liquidation. The guaranty associations generally do not charge premiums to policyholders who have been on premium waiver. The options offered by the guaranty associations in the Penn Treaty liquidation are illustrative of what could be offered in a potential SHIP liquidation.

In a liquidation, the guaranty associations will assess their member insurers, using the methodology set forth in their governing statutes to determine each member insurer's assessment. The member insurers pay the assessments from their general accounts. In some states, the member insurers can offset a portion of the assessment against state premium taxes that the insurers would otherwise owe. Member insurers can also impose surcharges on their policyholders to fund assessments. The guaranty associations are not funded by state revenues.

Gallanis explained that NOLHGA does not endorse or oppose the Second Amended Plan. NOLHGA intends to monitor the rehabilitation if this Court approves the Second Amended Plan, so that the guaranty associations will be prepared if SHIP ultimately is liquidated.

b. Matthew Morton

Matthew Morton, an actuary with the Long Term Care Group and an advisor to NOLHGA, testified as a fact witness about guaranty association coverage

[12] The guaranty association limits range between $100,000 in Puerto Rico, $300,000 in 42 states and the District of Columbia, $500,000 in 6 states, $615,525 in California, and no limit in New Jersey.

and premium rate increases in liquidation. Morton assisted NOLHGA in several long-term care insurer insolvencies, including the Penn Treaty liquidation.

In a liquidation, a policyholder receives a continuation of coverage from a guaranty association. The policy's benefits are paid in full until the policyholder exhausts the maximum benefit amount or maximum coverage period set forth in the policy, or until the payments reach the statutory coverage limit. Many long-term care policyholders are not affected by the statutory coverage limit because: (1) the policy's maximum benefit amount is less than the statutory coverage limit; (2) the policyholder never goes on claim; or (3) the policyholder does not stay on claim long enough to reach the statutory coverage limit.

In the Penn Treaty liquidation, the guaranty associations implemented a nationwide rate increase program, which resulted in 34 states approving 100% of the requested rate increases; 11 states approving between 80% and 100% of the requested rate increases; and 3 states approving less than 60% of the requested rate increases. No state denied a rate increase request. The majority, 44 states, approved the initial rate increase filing within 15 months. The guaranty associations spent 6 to 12 months preparing and filing the rate increase applications.

The guaranty associations' methodology for calculating premium rate increases in the Penn Treaty liquidation was similar to the If Knew Premium methodology proposed in the Second Amended Plan, with two exceptions. First, the Second Amended Plan proposes to calculate rate increases seriatim, or individually, while Penn Treaty's rate increase applications were developed on a cohort basis, by which policyholders were grouped together by policy form. The cohort basis is the industry standard for an insurer that is a going concern. Second, the Second Amended Plan proposes to calculate rate increases based on the total maximum

value of the policy. In Penn Treaty's liquidation, the premium rates were calculated based on benefits being capped at the guaranty association statutory limits.

Morton testified that the premium rate increase methodology used by the guaranty associations in the Penn Treaty liquidation "largely" addressed the inequities in premium rates and the cross-state rate subsidization issue. N.T., 5/20/2021, at 806. When asked on cross-examination to expound on his understanding of "largely," Morton acknowledged that using a cohort method to adjust premium rates results in some policyholders paying more than the If Knew Premium. *Id*. at 817-18. If a seriatim method is used, all policyholders will pay the If Knew Premium and no more.

In the Penn Treaty liquidation, the default option for policyholders who failed to make elections was to accept the rate increase. Policyholders were offered policy modifications, including lowering daily benefits or the inflation rider; a reduced paid-up policy; or a cash-out option in exchange for termination of the policy. Only one state approved the cash-out option. Approximately 76% of the Penn Treaty policyholders accepted the rate increase, among which "a little bit less than a half" took the option by default; 13% of the policyholders reduced their benefits; 8% of the policyholders elected to cash out; and 3% of the policyholders elected a reduced paid-up policy. *Id*. at 812. The guaranty associations treated Penn Treaty policyholders on premium waiver the same before and after the liquidation by continuing the waiver.

iv. Intervening Agents and Brokers' Evidence

a. Daniel Schmedlen

Daniel Schmedlen, Chief Executive Officer of LTC Global, testified on behalf of the Intervening Agents and Brokers. These agents and brokers are all

employed by LTC Global and are paid commissions by SHIP. The commission is set forth in the agency agreement and based on a percentage of premium. The policyholder pays a premium to the insurer, which deducts a certain percentage of the premium and remits it to the agent as a commission. The agent is not obligated to contact the insured after issuance of the policy, although the agent might accept the initial premium payment on behalf of the insurer.

A sample agent agreement was introduced into evidence by the Rehabilitator. It provided that the agent and successors "shall have the vested right to receive all commissions payable under this [a]greement." Ex. RP-10 at 3. Schmedlen understood this language as creating the agent's vested property interest in that part of any premium collected by SHIP that it owed to the agent as a commission. LTC Global expects that its agents will continue to receive commissions during SHIP's rehabilitation, as they did during Penn Treaty's rehabilitation.

The insurer determines the amount of commission payable to the agents. Once a policy is issued and delivered, the agent is paid a commission in accordance with the commission schedule set forth in the agency agreement. The first-year commission is higher than the renewal commission, and the amount of renewal commission changes with time. The commission schedule in the sample agent agreement showed that the first-year commission ranged from 45% to 70% of the first-year premium, depending on the age of the policyholder. After 10 years, the commission is typically reduced to a percentage of premium in the "middle single digits." N.T., 5/20/2021, at 850. If the insurer has to refund any portion of the premium to the insured, the agent returns his commission to the insurer in proportion

to the refunded premium. Where there is no premium paid, there is no commission owed to the agent.

v. Intervening Health Insurers' Evidence

Intervening Health Insurers introduced into evidence six sample insurance policies issued by SHIP's predecessors and assumed by SHIP. The policies provided that SHIP may increase premium rates over time without specifying the methodology to be used in calculating the rate increases. The policies are silent on agent and broker commissions.

vi. Intervening Policyholders' Evidence

a. James Lapinski

Intervenor James Lapinski, a policyholder of SHIP as well as a broker, testified on his own behalf. He expressed concern about the Second Amended Plan's discussion of the impact of the COVID-19 pandemic on the long-term care insurance industry. He requested that the Rehabilitator update the discussion with more recent data. Lapinski presented a three-page excerpt from the Society of Actuaries report, dated September 30, 2020, which indicated that COVID-19 has had an impact on emerging long-term care insurance experience through higher mortality and lower claim incidence. An excerpt of a newsletter produced by Fairfax County, Virginia, suggested that more than 80% of COVID-19 deaths have been adults over 65 years old. Further, 34% of COVID-19 deaths in the United States have been seniors living in long-term care facilities, which accounts for less than 1% of the U.S. population. Lapinski opined that a combination of a decline in claim utilization and increase in lapse or cancellation of policies suggests that SHIP has experienced a major decrease in claims experience due to the pandemic.

Lapinski presented a balance sheet of SHIP showing that the value of SHIP's bond holdings as of December 31, 2020, declined by approximately $500 million from the previous year. SHIP's reported cash on hand and short-term investment income also declined from the previous year by approximately $500,000. This does not correlate with the decrease in the value of the bonds. Lapinski questioned the changes in reserves shown in the balance sheet. Specifically, he requested the Rehabilitator to explain the decline in SHIP's capital and surplus from approximately $12 million in 2017 to a deficit of $916 million in 2019, as well as the decline in the number of policies in force from 151,000 in 2009 to approximately 39,000 as of the filing of the Second Amended Plan. Observing that the Second Amended Plan contains excerpts from SHIP's unfiled 2019 statutory financial statement and the internal 2020 financial information (*see* Appendix B of the Second Amended Plan), Lapinski requested that SHIP file its 2019 and 2020 statutory financial statements before this Court rules on the Second Amended Plan.

Lapinski and his wife pay annual premiums totaling $9,000 for their three policies. Over the past 25 years, they have paid over $200,000 in premiums. He estimated that skilled nursing facilities cost $500 per day, which they cannot afford without insurance coverage. Lapinski raised concerns with the timing of the rehabilitation and stated his desire for SHIP to avoid the lengthy process that Penn Treaty had gone through prior to liquidation.

b. Rose Marie Knight

Rose Marie Knight, a policyholder, also testified. She agreed with Lapinski's testimony. She has been a policyholder for 22 years and currently pays an annual premium of $1,200. She questioned why SHIP has not raised her premium for the last four or five years. Knight's policy has a lifetime benefit period. She will

have to pay a higher premium to retain this maximum coverage period under the Second Amended Plan. Knight expressed concern about her ability to pay a higher premium and becoming a burden on her children. N.T., 5/21/2021, at 935. She noted that the government has recently incurred great debts, which will cause inflation that "is starting to hit." *Id*. at 933-34.

Both Lapinski and Knight expressed concern and confusion as to the Second Amended Plan's proposed policy restructuring, which they interpreted as removing benefits or cancelling guaranty association coverage.

III. Standard of Review

Section 516(b) of Article V authorizes the Rehabilitator to "take such action as [she] deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer. … [She] shall have full power … to deal with the property and business of the insurer." 40 P.S. §221.16(b). The legislatively stated purpose of Article V, to which the Court must give effect, is "the protection of the interests of insureds, creditors, and the public generally...." and the "equitable apportionment of any unavoidable loss" through, *inter alia*, "improved methods for rehabilitating insurers...." *Grode v. Mutual Fire, Marine and Inland Insurance Co.*, 572 A.2d 798, 803 (Pa. Cmwlth. 1990) (*Mutual Fire I*) (single-judge opinion) (quoting Section 501 of Article V, 40 P.S. §221.1).

The Pennsylvania Supreme Court has explained this Court's role in a rehabilitation as follows:

> In overseeing the course of rehabilitation to check any abuse of discretion by the Commissioner, the Commonwealth Court is authorized to "approve or disapprove the plan [of rehabilitation] proposed, or may modify it and approve it as modified. If it is approved, the rehabilitator shall carry out the plan." 40 P.S. §

> 221.16(d). Therefore, in order for the Plan to warrant the Commonwealth Court's imprimatur it must be found to be free from any abuse of the Rehabilitator's discretion.

Foster v. Mutual Fire, Marine and Inland Insurance Co., 614 A.2d 1086, 1091 (Pa. 1992) ("*Mutual Fire II*"). Further, "it is not the function of the courts to reassess the determinations of fact and public policy made by the Rehabilitator." *Id*. Our Supreme Court has explained:

> 'It has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion *in the absence of bad faith, fraud, capricious action or abuse of power* .... That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion.'

Id. at 1092 (quoting *Norfolk and Western Railway Co. v. Pennsylvania Public Utility Commission*, 413 A.2d 1037, 1047 (Pa. 1980) (emphasis in original)).

With the above principles in mind, the Court considers whether the Rehabilitator abused her discretion in formulating the Second Amended Plan. The Court is also mindful that "the Rehabilitator is constrained by constitutional mandate[s]." *Mutual Fire I*, 572 A.2d at 804.

IV. Legal Analysis

A. The Second Amended Plan Serves a Rehabilitative Purpose and is within the Discretion of the Rehabilitator

1. Goals of the Plan

There is no fixed goal that every rehabilitation plan must satisfy to obtain this Court's approval. Specifically, the Pennsylvania Supreme Court has stated that a

> rehabilitation, in order to be legitimate, does not have to restore the company to its exact original condition. So long as the rehabilitation properly conserves and equitably administers "the assets of the involved corporation in the interest of investors, the public and others, (with) the main purpose being the public good" the plan of rehabilitation is appropriate.

Mutual Fire II, 614 A.2d at 1094 (quoting 2A COUCH ON INSURANCE 2d §22.10).

The unrefuted testimony of the Rehabilitator's witnesses established two overarching goals of the Second Amended Plan: (i) to reduce or eliminate the Funding Gap and (ii) to eliminate SHIP's inequitable and discriminatory premium rate structure, which is marked by cross-policyholder subsidies. The Plan will meet these goals by setting premium rates for all policyholders pursuant to an actuarially sound methodology, the If Knew Premium rate, which is widely accepted by regulators across the country, and by offering policyholders meaningful options. Instead of being forced to accept rate increases commensurate with their current coverages, policyholders will have the option to reduce coverages, thereby reducing their indicated premium increase.

In pursuing these goals, the Second Amended Plan addresses one of the major causes of SHIP's financial distress: policy underpricing. The Plan will address underpricing by (i) resetting premiums, on a prospective basis, to what they would have been without the erroneous actuarial assumptions and (ii) doing so on a seriatim basis, thereby ensuring that the premiums going forward are consistent across the entire pool of policyholders so that similarly situated policyholders will not be paying different premiums. The Plan will give policyholders meaningful choices for coverage in lieu of rate increases, without placing the cost of SHIP's historical policy underpricing upon the public through the guaranty association system. These goals serve the public good. *See Mutual Fire II*, 614 A.2d at 1094,

n.4 (determining that the state's interest in "regulat[ing] the fiscal affairs of its insurers for the welfare of the public" is a legitimate and significant public purpose).

2. No Contrary Evidence

The Intervening Regulators, who object to the Second Amended Plan in its totality, did not introduce an expert witness to dispute any of the Rehabilitator's actuarial projections, including the impact of the various options on policyholders and the Funding Gap, or the Plan's proposed premium rate methodologies. The Intervening Regulators' actuary, Frank Edwards, testified as a fact witness, and he acknowledged that he was not asked to evaluate the Rehabilitator's work.

Edwards' testimony consisted of "mathematical exercises," N.T., 5/19/2021, at 564, that compared the Plan to a liquidation. He assumed that policyholders are "better off" with the "maximum present value" of their policies. *Id*. at 568. Known as the "Carpenter value," maximum present value is future benefits minus future premiums, adjusted to their present value. Edwards acknowledged that he could not opine on policyholder preferences. Cantilo and Bodnar, both qualified experts, testified persuasively that policyholders do not make choices based on the maximum present value of their policies. Rather, policyholders will rely on other metrics, most notably the maximum policy value, such as maximum daily benefit and maximum benefit period, to make choices. Using those metrics provides a better outcome for policyholders than they would experience in liquidation.

B. The Goals of the Plan Could Not Be Achieved in Liquidation

The Rehabilitator's evidence demonstrated that immediate liquidation of SHIP would be improvident for several reasons. First, a liquidation of SHIP will not address the Funding Gap. Second, a liquidation will not address the existing

inequitable premium rate structure and cross-policyholder subsidies. Instead, it will perpetuate those problems. Third, a liquidation of SHIP will unnecessarily delay any resolution of SHIP's financial condition. Fourth, the options available to policyholders under the Second Amended Plan are better than what would be offered by guaranty associations in a liquidation.

1. Liquidation Will Not Address the Funding Gap

As noted, the Funding Gap is largely attributable to significant historical underpricing of SHIP's policies. In a liquidation, the entire cost of this shortfall will be shifted to the guaranty association system and, ultimately, to the public. As NOLHGA's Peter Gallanis acknowledged, the guaranty associations will fund the cost of the underpricing by assessing their member companies, which, in turn, fund the assessments from their policyholder generated funds. These insurers will then recoup some portion of the loss through premium tax offsets or by raising rates they charge to their own policyholders. The Rehabilitator concluded that shifting the burden to taxpayers and policyholders of other life and health insurers will not serve the "public good." *Mutual Fire II*, 614 A.2d at 1094. That determination is within her discretion and is entitled to deference. *Id*. at 1091 ("[T]he involvement of the judicial process is limited to the safeguarding of the plan from any potential abuse of the Rehabilitator's discretion.").

2. Liquidation Will Perpetuate the Inequitable Premium Rate Structure

In a liquidation of SHIP, assuming the guaranty associations would seek rate increases as they did in the Penn Treaty liquidation, similarly situated policyholders will continue to pay different rates. NOLHGA's actuary, Matthew Morton, acknowledged that this is attributable to the guaranty associations' practice of seeking rate increases for cohorts of policyholders. Using a cohort method results

in some policyholders paying more than the If Knew Premium in liquidation. The Second Amended Plan will adjust premium rates on a seriatim basis, which eliminates the possibility of any policyholder paying more than the If Knew Premium.

Further, the guaranty associations must request rate increases from the state of issue, not the state where the policyholder resides. The experience from the Penn Treaty liquidation showed that states do not act uniformly. For example, Florida (one of Penn Treaty's largest states by premium) granted only 50% of the guaranty associations' requested, and actuarially justified, rate increases for policies written in that state. Florida similarly has refused to grant SHIP's requested rate increases, and there is no reason to believe the result would be any different in a liquidation. *See* Ex. RP-53 (showing that since 2009, SHIP has requested approximately $62.6 million in premium rate increases from the Florida Insurance Department, but only $7.6 million has been approved).

The Intervening Regulators' States of Maine, Massachusetts and Washington are illustrative of the problem. Since 2009, only Massachusetts has approved a significant percentage of the rate increases sought by SHIP. *See* Ex. RP-53 (showing a 90% approval ratio in Massachusetts but an 11% approval ratio in Maine and a 63% approval ratio in Washington). The Rehabilitator's evidence demonstrated that a liquidation will not alleviate SHIP's premium rate inequities and cross-policyholder subsidization issues.

3. Liquidation Involves Inherent Delays

At a minimum, a liquidation would cause a material delay in addressing the policy underpricing which lies at the root of SHIP's insolvency. NOLHGA's actuary testified that in the Penn Treaty liquidation it took six months to a year to

prepare and file the rate applications on behalf of the guaranty associations. It took an additional 15 months to receive decisions from most of the state insurance regulators, with the final state's approval taking more than 4 years. Bodnar testified that the rate approval process can take anywhere from 90 days to 2 years or more. Thus, at best, in a liquidation of SHIP it would take nearly two years to prepare, file and receive approvals on rate increase requests, and there would be no certainty that the rates would be approved at the requested actuarially justified level.

By contrast, the Second Amended Plan can be implemented quickly, thereby addressing the causes of SHIP's financial distress, preserving assets, and reserving flexibility for Phase Two and beyond. Cantilo testified that it would take approximately six months to prepare and transmit election packages to policyholders and gather any Issue State Opt-out elections. Upon implementation of the Plan, the Rehabilitator will know within approximately eight months how much of the Funding Gap will be eliminated. The outcome of Phase One will determine whether Phase Two will be necessary and, if so, its scope. While the self-sustaining premium methodology proposed for Phase Two is actuarially justified according to Bodnar's undisputed expert testimony, the Rehabilitator may consider alternatives as necessary depending on the outcome of Phase One. The Rehabilitator will also provide reports to the Court at the appropriate times with her recommendations regarding Phase Two. A liquidation does not offer this kind of flexibility. *See Mutual Fire I*, 572 A.2d at 803 ("[T]he benefits of rehabilitation – its flexibility and avoidance of inherent delays – are preferable to the static and cumbersome procedures of statutory liquidation.").

4. Policyholders Will Have Fewer Choices in Liquidation

In a liquidation of SHIP, policyholders will not be offered the choices provided under the Second Amended Plan. NOLHGA's witnesses acknowledged that the benefit modification offers made by the guaranty associations in the Penn Treaty liquidation, which were the first of their kind in a long-term care insurance liquidation, do not match the options offered under the Plan. Specifically, there was no equivalent to the basic policy coverages provided in Option 2/2a. There was no enhanced non-forfeiture option similar to Option 3. There was no option similar to Option 4 that could provide coverage above the applicable guaranty association cap. The Plan provides greater flexibility for policyholders than they would have in liquidation by offering meaningful policy modification alternatives that will also alleviate the Funding Gap and inequitable rate structure.

C. The Plan Meets the Legal Standards for Confirmation

1. The Plan's Rate Approval Mechanism and Issue-State Rate Approval Alternative are Permissible Under Pennsylvania Law and the United States Constitution

The Intervening Regulators object to the Second Amended Plan for the stated reason that the Plan proposes to have premium rates set by the Rehabilitator and this Court rather than by state-of-issue regulators. Intervening Regulators' Memorandum of Law, 6/14/2021, at 41. The Intervening Regulators assert that the Rehabilitator's power under Article V to "direct and manage" the "property and business of the insurer," Section 516(b) of Article V, 40 P.S. §221.16(b), does not include authority to change "SHIP's policies and rates without required regulatory approvals." Intervening Regulators' Memorandum of Law at 44. They also assert that the Plan's deviation from the ordinary state-by-state rate review process violates

the Full Faith and Credit Clause of the United States Constitution[13] and is inconsistent with the principle of comity. The Plan's Issue State Rate Approval Option does not cure these infirmities because it is coercive and offers, at most, a "nominal deference" to the state of issue's authority to regulate the premium rates for policies issued in that state. Intervening Regulators' Memorandum of Law at 50, 52.

We begin with a review of Section 516 of Article V, which sets forth the powers and duties of the Rehabilitator. It states, in pertinent part, as follows:

> (b) *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*. He shall have all the powers of the directors, officers and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator. He shall have full power to direct and manage, to hire and discharge employes subject to any contract rights they may have, and to deal with the property and business of the insurer.
>
> * * *
>
> (d) The rehabilitator may prepare a plan for the reorganization, consolidation, conversion, reinsurance, merger or other transformation of the insurer. Upon application of the rehabilitator for approval of the plan, and after such notice and hearing as the court may prescribe, the court may either approve or disapprove the plan proposed, or may modify it and approve

---

[13] It states:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, §1. A statute is a "public Act" within the meaning of the Full Faith and Credit Clause. *Franchise Tax Board of California v. Hyatt*, 136 S.Ct. 1277, 1281 (2016) (*Hyatt II*) (citing *Carroll v. Lanza*, 349 U.S. 411, 412 (1955)).

> it as modified. If it is approved, the rehabilitator shall carry out the plan. In the case of a life insurer, the plan proposed may include the imposition of liens upon the equities of policyholders of the company, provided that all rights of shareholders are first relinquished. A plan for a life insurer may also propose imposition of a moratorium upon loan and cash surrender rights under policies, for such period and to such an extent as may be necessary.

40 P.S. §221.16(b)(d) (emphasis added).

The Rehabilitator may "take such action as [she] deems necessary or expedient to correct the condition" that caused the need for rehabilitation, 40 P.S. §221.16(b), and in doing so, she may prepare a rehabilitation plan to "*impair the contractual rights of some policyholders* in order to minimize the potential harm to all of the affected parties." *Consedine v. Penn Treaty Network American Insurance Co.*, 63 A.3d 368, 452 (Pa. Cmwlth. 2012) (*Penn Treaty*) (citing *Mutual Fire II*, 614 A.2d at 1094) (emphasis added). This authority includes a reduction of coverage to match the policyholder's existing premium. It has long been understood that the legislature has vested the Rehabilitator with broad discretion in proposing a rehabilitation plan. *Mutual Fire I*, 572 A.2d at 804, *affirmed, Mutual Fire II*, 614 A.2d at 1086 (observing that the insurance commissioner, as statutory rehabilitator of an insurer, is given broader discretion to structure a rehabilitation plan than is given to a statutory liquidator).

In the *Mutual Fire* rehabilitation, the plan amended the policyholders' contractual right to full payment on covered claims by reducing all claim payments by an equal percentage. Here, the Rehabilitator could have done something similar by reducing the coverage of each policy to match the premium being paid. This would equitably address the Funding Gap. However, this would not give

policyholders a choice. Further, policyholders whose premium is very inadequate might find themselves with a policy with very limited coverage.

Mutual Fire was a different receivership. There, the policies lapsed during the rehabilitation, and the sole object of the rehabilitation was to pay outstanding claims to the fullest extent possible. By contrast, here, the SHIP policies are still in force and will remain in force until SHIP emerges from rehabilitation. In this respect, SHIP's rehabilitation is more complex.

A core cause of SHIP's insolvency is policy underpricing, and the Rehabilitator proposes to "correct the condition" through a combination of benefit modifications and premium rate increases. Section 516(b) of Article V, 40 P.S. §221.16(b). Policyholders will be able to decide which of the four options offered under the Second Amended Plan best fits their individual circumstances. The Plan follows the principles of *Mutual Fire I* and *II* and extends them to a different context, as appropriate for a long-term care insurer. The Plan falls within the Rehabilitator's "broad powers … to effectuate equitably the intent of the Rehabilitation statutes." *Mutual Fire II*, 614 A.2d at 1094. The Plan's mechanism for setting actuarially justified rates also falls within the Rehabilitator's broad powers, and they will be reviewed by the Court as part of the rehabilitation proceeding.

Arguably, the only contract "right" given up by the SHIP policyholder is the expectation that the state where the policy was issued will approve the premium rate for each of the four options in Phase One. No policyholder commented on this "right" to state-by-state rate regulation. Policyholder Rose Marie Knight expressed concern about the fact that her premium had not been increased for years. N.T., 5/21/2021, at 933.

The Intervening Regulators assert that the Plan's rate approval provisions "override the insurance laws of other [s]tates" and, thus, violate the Full Faith and Credit Clause of the United States Constitution. Intervening Regulators' Memorandum of Law at 38. Alternatively, the Intervening Regulators contend that this Court should refrain from approving the Plan under the principle of comity because the Plan's "displacement of the rate setting authority of the individual [s]tates" is a "blatant intrusion" on the sovereignty of other states. Intervening Regulators' Memorandum of Law at 49. The Court finds no merit to these arguments.

Article V empowers this Court to rehabilitate the business of "a domestic insurer or an alien insurer domiciled in this Commonwealth." Section 515(a) of Article V, 40 P.S. §221.15(a). As a general rule, the insolvent insurer's state of domicile "has an overriding interest in assuring that the rehabilitation, if possible, is effectuated." *Matter of Mutual Benefit Life Insurance Co.*, 609 A.2d 768, 777 (N.J. Super. 1992). The 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 INSURANCE 3d §5:31.

Maine, Massachusetts, and Washington have adopted, in substantial part, the Uniform Insurers Liquidation Act (UILA),[14] which was approved by the National Conference of Commissioners on Uniform State Laws in 1939. The UILA addressed the difficulties that arise in the receivership of an insolvent insurer with assets and liabilities located in several states; the UILA provides a "uniform system

[14] *See* 24-A Me. Stat. Ann. §4363; *In re Liquidation of American Mutual Liberty Insurance Company*, 747 N.E.2d 1215, 1225 n.13 (Mass. 2001); and *American Star Insurance Co. v. Grice*, 865 P.2d 507, 509 (Wash. 1994).

for the orderly and equitable administration of the assets and liabilities of defunct multistate insurers." *Altman v. Kyler*, 221 A.3d 687, 692 n.6 (Pa. Cmwlth. 2019) (quotations omitted). Pennsylvania, on the other hand, adopted the Insurer's Supervision, Rehabilitation and Liquidation Model Act (Model Act) approved by the National Association of Insurance Commissioners. *See Koken v. Reliance Insurance Co.*, 893 A.2d 70, 76 (Pa. 2006). Following the Model Act, Article V addresses "the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extending the scope of personal jurisdiction over debtors of the insurer outside this Commonwealth." Section 501(c) of Article V, 40 P.S. §221.1(c).

Because Maine, Massachusetts, and Washington have adopted the UILA and Pennsylvania has adopted the similar Model Act, a single, cohesive, uniform handling of SHIP's rehabilitation through a single state is consistent with those laws. Notably, the laws of Maine, Massachusetts and Washington also designate the domiciliary insurance commissioner as the receiver of an insurer undergoing liquidation or rehabilitation.[15] The Intervening Regulators have presented no reason to set aside Pennsylvania's primacy in SHIP's receivership.

Nor does the Full Faith and Credit Clause require this Court to apply the insurance rate regulatory laws of Maine, Massachusetts, and Washington with respect to the establishment of the If Knew Premium rate in the Second Amended Plan. The purpose of the full faith and credit command

> was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy

[15] *See* 24-A Me. Stat. Ann. §4364; Mass. Gen. Laws Ann. 175 §180B; Wash. Rev. Code §48.99.020.

> upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Baker by Thomas v. General Motors Corporation, 522 U.S. 222, 232 (1998) (citation omitted). Congress' Full Faith and Credit Act[16] requires that "all courts ... treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Standard Chartered Bank v. Ahmad Hamad Al Gosaibi and Brothers Co.*, 99 A.3d 936, 941 (Pa. Super. 2014) (citing *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 373 (1996)).

The relevant precedent differentiates between the credit owed to *laws* and the credit owed to *judgments* under the Full Faith and Credit Clause. *Baker*, 522 U.S. at 232. The Full Faith and Credit Clause "does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter [] which it is competent to legislate." *Id*. (citation omitted). Instead, "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 496 (2003) (*Hyatt I*). By contrast, "[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Baker*, 522 U.S. at 233. A court may be guided by the forum state's public policy

---

[16] It provides:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. §1738.

Likewise, the Pennsylvania legislature has enacted the Uniform Enforcement of Foreign Judgments Act, which defines "foreign judgment" as "any judgment, decree, or order of a court of the United States or of any other court requiring the payment of money which is entitled to full faith and credit in this Commonwealth." 42 Pa. C.S. §4306.

in determining the law applicable to a controversy, but there is no "public policy exception" to the full faith and credit due a court's judgment. *Id*. at 233.

At issue here is whether the Second Amended Plan, if approved by this Court, would give full faith and credit to the insurance laws of Maine, Massachusetts, and Washington. The Court concludes that it would.

In *Carroll v. Lanza*, 349 U.S. 411 (1955), the United States Supreme Court considered a negligence action brought by a Missouri worker against a general contractor in Arkansas, where he sustained injuries. Both Missouri and Arkansas had enacted a workers' compensation law that provided the exclusive remedy of the employee for a work-related injury. The Arkansas law, however, also allowed the injured employee to pursue common-law tort claims against a third party. The Supreme Court held that the Full Faith and Credit Clause did not make Missouri's statute a bar to enforcement of Arkansas' law. Arkansas had sufficient grounds to apply its own law because of its interest in protecting persons injured within its borders and, thus, "opened its courts to negligence suits against prime contractors, refusing to make relief by way of workmen's compensation the exclusive remedy." *Id*. at 412-13. In sum, Missouri law (compared with Arkansas Law) embodied "a conflicting and opposed policy," and Arkansas law did not embody "any policy of hostility to the public Acts of Missouri." *Id*. at 413.

Likewise, in *Hyatt I*, 538 U.S. 488, a former California resident who had moved to Nevada brought tort actions in Nevada state court against the California franchise tax board, alleging negligent misrepresentation, invasion of privacy, fraud, and other torts in connection with the board's assessments and penalties for taxes he allegedly owed. The Nevada Supreme Court applied Nevada law, which gave state agencies immunity for negligence but not for intentional torts.

Accordingly, the Nevada Supreme Court ordered the trial court to dismiss the negligence claim for lack of jurisdiction but allowed the intentional tort claims to proceed to trial. The tax board appealed.

The United States Supreme Court upheld the Nevada Supreme Court's decision. The Court emphasized that the Full Faith and Credit Clause does not require one state to apply another state's law that violates its "own legitimate public policy." *Id.* at 497 (internal quotations omitted). Nevada's choice of law in that case did not "exhibi[t] a policy of hostility to the public Acts of a sister State." *Id.* at 499 (citing *Carroll*, 349 U.S. at 413). Further, Nevada had "sensitively applied principles of comity with a healthy regard for California's sovereign status" by "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.* at 499.

Following remand, a jury found in the taxpayer's favor and awarded him almost $500 million in damages and fees. The tax board again appealed to the Nevada Supreme Court, arguing that the Full Faith and Credit Clause required Nevada to limit damages to $50,000, the maximum that Nevada law would permit in a similar suit against its own agencies. The Nevada Supreme Court affirmed $1 million of the award. Instead of applying the Nevada statute applicable to suits against Nevada's own agencies, the Nevada Supreme Court applied a special rule for one case. On further appeal, the United States Supreme Court held that this decision of the Nevada Supreme Court violated the Full Faith and Credit Clause because it lacked the "healthy regard for California's sovereign status" and "reflect[ed] a constitutionally impermissible policy of hostility to the public Acts of a sister State." *Franchise Tax Board of California v. Hyatt*, 136 S.Ct. 1277, 1282-83 (2016) (*Hyatt II)* (citation omitted).

In the case *sub judice*, the evidence demonstrated that the Rehabilitator will use the If Knew Premium methodology in the implementation of the Plan. This methodology will assume a 60% lifetime loss ratio, which is the benchmark for a premium rate increase in Pennsylvania and most other states. The If Knew Premium methodology is used by insurance regulators nationwide to set long-term care insurance premium rates. The self-sustaining premium to be implemented in Phase Two of the Plan will likewise use a 60% lifetime loss ratio. *See* 31 Pa. Code §89a.117 ("Benefits under long-term care insurance policies shall be deemed reasonable in relation to premiums provided the expected loss ratio is at least 60%[.]").

A review of the insurance statutes of Maine, Massachusetts, and Washington shows that these sister states share Pennsylvania's interest in ensuring that long-term care insurance premium rates are not excessive, unfairly discriminatory, or unreasonable in relation to the benefits provided under the policy.[17] This commonly-shared interest will be advanced, rather than impaired, by the Second Amended Plan, which seeks to correct SHIP's discriminatory premium rate structure; sets the premium rates to appropriate levels; and employs the If Knew

[17] The Maine Insurance Code requires that the state insurance regulator determine that the rate filings on health insurance policies comply with "the requirements that rates not be excessive, inadequate or unfairly discriminatory." 24-A Me. Stat. Ann. §2736. The insurance statute in Massachusetts provides that the insurance commissioner may "disapprove such form of policy if the benefits provided therein are unreasonable in relation to the premium charged, or if it contains any provision which is unjust, unfair, inequitable, misleading or deceptive, or which encourages misrepresentation as to such policy[.]" Mass. Gen. Laws Ann. Ch. 175 §108(8)(A). Likewise, the insurance statute in Washington provides that long-term care insurance rate increases are not permitted "if the benefits provided therein are unreasonable in relation to the premium charged." Wash. Rev. Code §48.18.110. These standards are similar to the Pennsylvania standard for adjusting long-term care insurance premium rates. *See* Section 353 of The Insurance Company Law of 1921, Act of May 17, 1921, P.L. 682, *as amended*, *added by* the Act of June 23, 1931, P.L. 904, 40 P.S. §477a.

Premium methodology to establish a premium level that is reasonable in relation to the benefits paid.

Alternatively, under an Issue-State Rate Approval Option, a state may opt out of the rate approval section in the Plan. If a state opts out, the Rehabilitator will file an application to increase rates for policies issued in that state to the If Knew Premium level. The regulator for the opt-out state will render a decision on the Rehabilitator's rate increase application; if it is only partially approved, the Rehabilitator will downgrade the benefits under the affected policies accordingly. Cantilo testified that policyholders in an opt-out state will still have four options, although they are not exactly the same as those offered in the Second Amended Plan. This does not render the Issue-State Rate Approval Option "coercive" or "nominal," as the Intervening Regulators assert; rather, it provides the issue state with a meaningful way to control the mix of benefit reductions and premium rate increases. It prevents the opt-out state from interfering with Pennsylvania's ability to rehabilitate SHIP. In sum, the Second Amended Plan gives a "healthy regard" for the insurance laws of other states by "relying on the contours of [Pennsylvania insurance law] as a benchmark for its analysis." *Hyatt I*, 538 U.S. at 499.

The Second Amended Plan does not follow the ordinary rate review process for a solvent insurer, but it preserves the substantive rights of SHIP's policyholders to have their premium reviewed by a qualified actuary and an insurance regulator to ensure that the rate is actuarially justified and reasonable in relation to the benefits. The Plan changes the forum for the premium determinations to the state responsible for the rehabilitation of SHIP, *i.e.*, Pennsylvania. The conflict between Pennsylvania law and the laws of Maine, Massachusetts, and Washington, if any, is one of procedure, to which this Court owes no deference. *See*

Wilson v. Transport. Ins. Co., 889 A.2d 563, 571 (Pa. Super. 2005) (citation omitted) (the "choice of law" analysis applies only to conflicts of substantive law, which "creates the rights and duties of the parties to a judicial proceeding").

The insistence of the Intervening Regulators that the Rehabilitator submit rate increase applications to 46 states, the District of Columbia, and the U.S. Virgin Islands renders a rehabilitation of SHIP an impossibility. Pennsylvania has a compelling interest in enforcing Article V, which protects "the interests of insureds, creditors, and the public generally" through

> *(i) early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures; (ii) improved methods for rehabilitating insurers, involving the cooperation and management expertise of the insurance industry;* (iii) enhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation; *(iv) equitable apportionment of any unavoidable loss;* (v) lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extending the scope of personal jurisdiction over debtors of the insurer outside this Commonwealth; and (vi) regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.

Section 501(c) of Article V, 40 P.S. §221.1(c) (emphasis added).[18] Furthermore, as this Court observed in *Mutual Fire I*,

> the benefits of rehabilitation—its flexibility and avoidance of inherent delays—are preferable to the static and cumbersome procedures of statutory liquidation. The statute's purpose is, in the end, that to which we must give effect. That legislatively

[18] Section 501(b) of Article V states that its provisions "shall be liberally construed to effect the purpose stated in subsection (c)." 40 P.S. §221.1(b).

> stated purpose is "the protection of the interests of insureds, creditors, and the public generally...." and the "equitable apportionment of any unavoidable loss" through, *inter alia*, "improved methods for rehabilitating insurers...." Section 501 of the Act, 40 P.S. §221.1. No interest is served by adding to the delay which has already occurred in this case. On the contrary, the goals of Article V of the Act are better served by a rehabilitation which effectively ensures more distribution in a shorter period of time than would occur in liquidation.

572 A.2d at 803.

Here, the evidence established that the ordinary rate filing process often involves 6 to 12 months of preparation and years of review in some states. "No interest is served by adding to the delay which has already occurred in this case." *Mutual Fire I*, 572 A.2d at 803. Further, a state-by-state rate filing process would not address the inconsistent rate approvals from state insurance regulators, which leave SHIP with less revenue than needed and similarly situated policyholders paying vastly different premiums for the same coverage. Cantilo credibly testified that the Plan's premium rate methodologies and approval mechanisms are necessary to address the inequities in SHIP's current rate structure. The use of the If Knew Premium across all policies will put all policyholders on a level playing field because it is calculated on a seriatim basis.

In sum, under Article V, the Rehabilitator has the authority to propose, and this Court has the authority to approve, the Second Amended Plan's provisions regarding the establishment of premium rates for the four policyholder options in Phase One. The Full Faith and Credit Clause does not require the Rehabilitator to submit these premium rates to 46 states, the District of Columbia, and the U.S. Virgin Islands for their review and approval. This would fracture Pennsylvania's "own legitimate public policy" in the rehabilitation of SHIP, a Pennsylvania-

domiciled insurer. *Hyatt I*, 538 U.S. at 497. In no way does this aspect of the Second Amended Plan reflect "a policy of hostility to the public Acts of a sister State." *Id.* at 499. To the contrary, the interests of Maine, Massachusetts, and Washington in ensuring that long-term care insurance premium rates are not excessive, unfairly discriminatory, or unreasonable to the benefits provided will be advanced, rather than impaired, by the Plan.

Finally, the Court rejects the Intervening Regulators' arguments on comity. Application of comity is "a matter of judicial discretion," and Pennsylvania courts exercise comity "when application of another state's law contradicts no public policy of Pennsylvania and instead furthers a Pennsylvania policy." *Chestnut v. Pediatric Homecare of America, Inc.*, 617 A.2d 347, 350 (Pa. Super. 1992). The Plan has "sensitively applied principles of comity with a healthy regard" for the insurance laws of other states by "relying on the contours of [Pennsylvania insurance law] as a benchmark for its analysis." *Hyatt I*, 538 U.S. at 499.

Once this Court renders a judgment on the Second Amended Plan, it is Maine, Massachusetts, and Washington that owe this Court's judgment full faith and credit. *See Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Association*, 455 U.S. 691 (1982). *See also* 1 COUCH ON INSURANCE 3d §5:31 (discussing state court's violation of Full Faith and Credit Clause by refusing to treat prior judgment of another state's insurance rehabilitation court as *res judicata*).

2. The Plan Satisfies all Constitutional Requirements

The Intervening State Insurance Regulators argue that the Second Amended Plan is unconstitutional because it does not satisfy the standard that "[c]reditors and policyholders must fare at least as well under a rehabilitation plan

as they would under a liquidation." *Koken v. Fidelity Mutual Life Insurance Co.*, 803 A.2d 807, 826 (Pa. Cmwlth. 2002) (citing *Neblett v. Carpenter*, 305 U.S. 297 (1938)). In applying the *Carpenter* standard, this Court is guided by the three-part test adopted in *Mutual Fire II*.[19] The "threshold inquiry" is whether the state action "has operated to substantially impair a contractual relationship" in violation of Article I, Section 10 of the United States Constitution and Article I, Section 17 of the Pennsylvania Constitution.[20] *Mutual Fire II*, 614 A.2d at 1094 n.4. An impairment of contractual rights is not a *per se* violation of law. *Id.* If a particular policyholder is found to be worse off under a rehabilitation plan, the impairment could be considered "substantial," but the Court still needs to determine whether (1) the rehabilitator has acted for a legitimate and significant public purpose and (2) the adjustment of contractual rights is reasonable and of a nature appropriate to that public purpose. *Id*. To that end, the Court must be mindful that Article V is intended to protect "the interests of insureds, creditors, and the public generally[.]" Section 501(c) of Article V, 40 P.S. §221.1(c).

i. The Plan Satisfies Pennsylvania's Interpretation of *Carpenter*

Under the so-called "*Carpenter* test," a rehabilitation plan should be confirmed if creditors will fare at least as well under the plan as they would in liquidation. *Mutual Fire II*, 614 A.2d at 1093-94. As our Supreme Court has

---

[19] Several of the objectors to the Mutual Fire rehabilitation plan argued that the plan impaired their contractual rights. In analyzing their argument, our Supreme Court expressly adopted the three-part test announced by the United States Supreme Court in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983), for determining when a state law may impair a contractual right. *Mutual Fire II*, 614 A.2d at 1094 n.4. Thus, whether an alleged contractual impairment is caused by a receiver's workout plan or a statute, the analysis is the same.

[20] Article I, Section 10 of the United States Constitution states, in pertinent part: "No State shall … pass any … Law impairing the Obligation of Contracts[.]" U.S. CONST. art. 1, §10. Article I, Section 17 of the Pennsylvania Constitution states: "No … law impairing the obligation of contracts … shall be passed." PA. CONST. art. I, §17.

explained, this does not mean that every single policyholder must satisfy that test. *See id*. at 1102 ("individual interests might have to be sacrificed or compromised in order to preserve the ultimate goal of [the rehabilitation] process[.]"); *see also Penn Treaty*, 63 A.3d at 453 ("[*Carpenter*] did not establish the broad principle that a rehabilitation plan is *per se* invalid unless every policyholder will fare as well in rehabilitation as in liquidation."). Instead, the Court is guided by the three-part test established by *Mutual Fire II*. *Penn Treaty*, 63 A.3d at 453.

Under that test, if a particular policyholder is found to be worse off under a rehabilitation plan than in liquidation, and that impairment is "substantial," the Court should confirm the plan so long as the Rehabilitator has acted for a legitimate and significant public purpose and the contractual modification is reasonable and appropriate to that public purpose. *Id.* In this regard, "[t]he Court must consider the greater good, including the consequences to the larger class of policyholders and the taxpaying public." *Id.* (citing *Vickodil v. Insurance Department*, 559 A.2d 1010, 1013 (Pa. Cmwlth. 1989)).

The Second Amended Plan meets that test. Even assuming, *arguendo*, that the Plan substantially impairs policies, it serves a legitimate and significant public purpose, and the policy modifications are reasonable and appropriate to that purpose. At the hearing, Special Deputy Rehabilitator Cantilo aptly observed:

> And the question that we were debating [was], is it reasonable, if a policyholder has been paying a quarter for a dollar's worth of insurance for decades, to adopt, as the workout plan, a plan in which the taxpayers step up to pay their remaining 75 cents.
>
> And what we concluded is that we could right size the policy, and we could create a set of options for policyholders that would enable them to get fundamental [long term care] coverage but pay reasonable rates like the rest of the country for that coverage and not shift all that burden to the taxpayers.

N.T., 5/17/2021, at 78-79. In short, the Plan narrows the Funding Gap, promotes fairness and equity among policyholders, and appropriately balances the interests of the policyholders and the broader taxpaying public.

ii. The Intervening Regulators' Interpretation of *Carpenter* is Flawed

The Intervening Regulators urge a rigid application of *Carpenter*, *i.e.*, that all policyholders must fare as well in rehabilitation as they would in liquidation. To that end, the Intervening Regulators compared the net present value of the benefits policyholders will receive under the Second Amended Plan with the net present value of the benefits they can expect to receive in a liquidation. Notably, the Court in *Carpenter* was comparing the cash payment to policyholders under a rehabilitation plan with the cash payment they would receive in a liquidation, at a time when there was no guaranty association protection for policyholders.[21] Here, the alternatives are not cash payments but continued insurance coverage. The value comparison of coverage to SHIP policyholders in a rehabilitation as compared to a liquidation cannot be reduced to dollar amounts.

The Intervening Regulators' metric is one not actually used by policyholders when making the decision to purchase long-term care insurance. As testimony from Cantilo and Bodnar established, consumers choose their policy benefits and limits according to their personal circumstances. For example, a

[21] The judicially created requirement that a rehabilitation must treat policyholders better than would a liquidation pre-dates the creation of guaranty associations. Arguably, guaranty association protection should not be part of that analysis because the associations exist as a matter of legislative grace. Legislatures can repeal the guaranty association statutes or reduce the benefit caps. As it is, there is commonality but not uniformity. In any event, the existence of guaranty association protection was part of the Rehabilitator's analysis and, practically speaking, that protection cannot be ignored. Nor can its cost to other stakeholders, *i.e.*, policyholders of the guaranty associations' member insurers and taxpayers.

policyholder may wish to protect his estate against dissipation by an extended stay in a nursing home. Each policyholder will have different goals and different financial situations that will affect the type and amount of coverage they purchase. Not a single witness testified that the liquidation value of a policy figures into this analysis. Cantilo and Bodnar opined that the comparison methodology policyholders use is the maximum policy value, not the *Carpenter* value. Cantilo provided compelling examples of actual SHIP policyholders whose *Carpenter* value, using the Intervening Regulators' proposed net present value metric, would, in fact, produce a poor option for that policyholder. *See* Ex. RP-56 at 102-03. The Court credits Cantilo's statement that "[t]here are many cases where the raw projection of future benefits less future premiums [doesn't] really tell you what the real value of the policy is." N.T., 5/17/2021, at 177.

In any event, even under the Intervening Regulators' metric, 85% of SHIP policyholders will be offered one option with a value equal to or higher than the value of the policy they will have in liquidation. Several other metrics produced even higher percentages of policyholders who will fare at least as well under the Plan as in liquidation.

3. The Plan is Feasible to the Extent Required by Pennsylvania Law

The Intervening Regulators argue that the Second Amended Plan is not feasible because it is unlikely to eliminate the Funding Gap and restore SHIP to solvency. To begin, there is no statutory requirement in Pennsylvania that a rehabilitation plan must be "feasible" in order to be approved, nor has that standard been adopted in our decisional law. The only reference to feasibility anywhere in Pennsylvania law occurred in the Mutual Fire receivership during the implementation of an already approved rehabilitation plan. *Mutual Fire II*, 614 A.2d

1086. The Intervening Regulators have not cited any other case in which "feasibility" appears. Notably, in *Mutual Fire*, the rehabilitator raised "feasibility" to support a request to modify the Court-approved rehabilitation plan. *Id*. at 1090. The Intervening Regulators' attempt to read a non-existent pre-approval "feasibility" requirement into Article V has no support in *Mutual Fire II*.

The Intervening Regulators argue that a "feasible" rehabilitation plan must be "reasonably likely to succeed in restoring the company to solvency" in order to be approved. Intervening Regulators' Post-Hearing Memorandum at 5.

First, the Court notes that the meaning of "company solvency" is context specific. The peak of SHIP's activity in the insurance marketplace was in the late 1990s, when it had more than 300,000 policies in force. N.T., 5/17/2021, at 40; Ex. RP-56 at 18. By 2003, when SHIP discontinued writing new business and went into run-off, the number of policies in force was already in a steep decline. *Id.* The Second Amended Plan, if successful, will restore SHIP to what it was pre-receivership, *i.e.*, an insurer winding down its long-term care insurance business and able, as a going concern, to continue coverage and pay the claims of its existing policies. The Court rejects the Intervening Regulators' suggestion that a return to solvency by SHIP requires more than a return to its pre-receivership status. SHIP had long ceased being an active and growing presence in the insurance marketplace.

Second, the Pennsylvania Supreme Court has stated that "[s]o long as the rehabilitation properly conserves and equitably administers 'the assets of the involved [insurer] in the interest of investors, the public and others, (with) the main purpose being the public good' the plan … is appropriate." *Mutual Fire II*, 614 A.2d at 1094 (quoting 2A COUCH ON INSURANCE 2d §22.10). Simply, the Court rejected

the notion that a rehabilitation plan must contemplate a resuscitation of the insolvent insurer's operations.

Under any outcome, the Second Amended Plan will materially reduce the Funding Gap and significantly improve SHIP's financial condition. The Intervening Regulators offered no substantive evidence to overcome the Rehabilitator's evidence on this issue. The Intervening Regulators correctly point out that the ultimate goal of the Mutual Fire rehabilitation plan was to restore the company to solvency. The Second Amended Plan has, as its ultimate goal, SHIP's return to solvency. It "does not have to restore the company to its exact original condition." *Mutual Fire II*, 614 A.2d at 1094.

Further, as a matter of public policy the rehabilitation of an insurer, where possible, is the preferred course. *Penn Treaty*, 63 A.3d at 440 (recognizing liquidation as a remedy of last resort); *Koken v. Legion Insurance Co.*, 831 A.2d 1196, 1230 (Pa. Cmwlth. 2003) (same); and *Mutual Fire II*, 614 A.2d at 1094 (same). As this Court explained, "a liquidation, no matter how 'successful,' is certain to cause harm to the policyholders, creditors and taxpaying public[.]" *Penn Treaty*, 63 A.3d at 461.

In summary, Article V does not require the Second Amended Plan be "feasible" in order to be approved, and the Intervening Regulators' arguments to the contrary simply voice a disagreement with the Rehabilitator's exercise of discretion. The Plan will eliminate or reduce the Funding Gap, which is a legitimate purpose. The ultimate goal of the Second Amended Plan is to return SHIP to the level of solvency needed to run-off its long-term care insurance business.

4. The Plan is Fair and Equitable

As stated, SHIP's current premium rate structure is unfairly discriminatory because policyholders with substantially similar coverage are not paying the same premium, thereby burdening some policyholders with subsidizing the premium payments of other policyholders. This Court has recognized that eliminating these unfair "subsidies between policyholders in different states and between different groups of policyholders" is itself a legitimate goal of rehabilitation. *Penn Treaty*, 63 A.3d at 443, 460.

The Intervening Regulators argue that unless the Plan maintains SHIP's current unequal treatment of policyholders on a state-by-state basis, then the Plan is unlawful. The Intervening Regulators' position fails for several reasons.

First, the Intervening Regulators lack standing to assert the claim that the Plan treats "policyholders in different States differently." Intervening Regulators' Post-Hearing Memorandum at 32. They expressly disavowed that they were appearing in a *parens patriae* or other representative capacity for policyholders in their states. N.T., 5/19/2021, at 541-47. Even so, the Intervening Regulators failed to present any evidence showing how policyholders in their respective states would be unfairly treated by the Plan's proposal to eliminate unfair subsidies between groups of policyholders.

Second, the Plan will end the existing unequal treatment of similarly situated policyholders. The Intervening Regulators strain to characterize some policyholders as receiving "more" by "suffering smaller benefit cuts" when compared to other policyholders receiving "less" by "suffering greater benefit cuts." Intervening Regulators' Post-Hearing Memorandum at 38. This is a function of the fact that many policyholders presently pay an inadequate premium. The Court

rejects the Intervening Regulators' characterization of right sizing premium to policy coverage as itself an act of unequal treatment.

To eliminate the unfair subsidies between policyholders, the change in rates or coverages will have a greater impact on the more underpriced (and over-subsidized) policies that have benefited at the expense of other policyholders. The Plan will require similarly situated policyholders to pay the same premium for the same coverage. The Plan's elimination of unfair subsidies between policyholders aligns with this Court's precedent in the Penn Treaty receivership, which recognized that a rehabilitation plan may properly eliminate such subsidies. *Penn Treaty*, 63 A.3d at 443, 460.

Third, the Intervening Regulators improperly invoke Section 544(b) of Article V, 40 P.S. §221.44(b), which states that no subclasses may be created within the policyholder class in a liquidation. As a threshold matter, this is a rehabilitation, not a liquidation. More fundamentally, the Plan does not give "some policyholders greater consideration than others." Intervening Regulators' Post-Hearing Memorandum at 35. To the contrary, the Second Amended Plan treats similarly situated policyholders the same regardless of the state in which their policy was issued.

D. Other Concerns and Objections Raised at the Hearing are Overruled or Have Been Adequately Addressed

1. Intervening Regulators' Application for Reconsideration

At the close of the hearing on May 21, 2021, this Court granted the Rehabilitator's oral motion "for judgment in the nature of a directed verdict" against the Intervening Regulators regarding the Issue State Rate Approval Option in the Second Amended Plan. N.T., 5/21/2021, at 981. The Rehabilitator argued that the Intervening Regulators did not present any evidence that their interests would be

harmed by the Issue State Rate Approval Option, and as such, their objection to the Issue State Rate Approval Option cannot serve as a basis for this Court to disapprove the Plan. *Id*. at 986-88.

On June 1, 2021, the Intervening Regulators filed an application for reconsideration for the stated reason that the Rehabilitator's motion was vague, was made without notice and lacked support in the applicable court rules. More specifically, the Intervening Regulators contend that the term "[I]ssue [S]tate [R]ate [A]pproval [O]ption" is not "meaningful," as "it is impossible to tell" whether it was referring to the "opt-out" provision under the Second Amended Plan. Application for Reconsideration at 7. They also contend that a motion for a directed verdict can be filed only in a "jury case" or an "adversarial proceeding," which is not the case here. *Id*. at 8, 12. Even so, to grant a motion for a directed verdict requires this Court to consider "all of the evidence before it in the light most favorable to the [Intervening] Regulators." *Id*. at 14. They assert that the Rehabilitator's motion "[f]ails on the [r]ecord" because Cantilo and Bodnar testified that the Plan seeks to "supersede the existing state rate approval system," which would impact state regulators and policyholders. *Id*. at 14-15. The Intervening Regulators' arguments are not persuasive.

To begin, the Rehabilitator's motion for a directed verdict was not vague. In moving for a directed verdict, the Rehabilitator's counsel stated that "the [Intervening Regulators] have failed to put on any evidence which would or could support an interest they purport to represent with respect to the issue[] state rate approval option." N.T., 5/21/2021, at 981-82. Counsel went on to assert that "absent any testimony as to the ways in which a regulator is constrained or harmed by that option, the [Intervening Regulators] here have no argument to present which would

show that [the option] does not sufficiently address the concerns that they have raised at some earlier stage in these proceedings." *Id*. at 986. The Intervening Regulators objected to the motion for the reason that granting a directed verdict would be improper under the circumstances as the case presents "significant open legal issues." *Id*. at 989. The Rehabilitator's counsel responded:

> To be clear, we're only seeking the directed verdict on the [I]ssue [S]tate [R]ate [A]pproval [O]ption issue. I don't have here where it was raised in the memorandum. We're not seeking a directed verdict as to, generally, the questions of whether the [P]lan is fair and equitable or the exercise of the [R]ehabilitator's discretion generally. This is a narrow motion, Your Honor, on the [I]ssue [S]tate [R]ate [A]pproval [O]ption and the opt-out offer thereunder[.]

Id. at 991.

After hearing arguments from both parties, the Court granted the motion. It stated that "there is an opt-out option that preserves the right of the [] … state of issue to pursue a state rate approval powers and [Intervening Regulators'] witness did not address why the [P]lan was deficient … in that way." *Id*. at 994. In short, the motion was not vague.

This Court also rejects the Intervening Regulators' argument that the Rehabilitator's motion for a directed verdict lacked due notice. The Intervening Regulators do not cite, and this Court did not find, any legal authority which would have required such notice. The Rehabilitator did not need to disclose her litigation strategy at the hearing with the Intervening Regulators. In any event, the Intervening Regulators were given an opportunity to file with this Court an application for reconsideration, which they did on June 1, 2021.

Nor did the Intervening Regulators cite any legal authority to support their proposition that a directed verdict can only be entered in a jury trial. Notably, the Intervening Regulators' proposition is at odds with their earlier position that this Court should have ruled on the legal issues before holding an evidentiary hearing on the Second Amended Plan.

Pennsylvania Rule of Appellate Procedure 106 provides:

> Unless otherwise prescribed by these rules the practice and procedure in matters brought before an appellate court within its original jurisdiction shall be in accordance with the appropriate general rules applicable to practice and procedure in the courts of common pleas, so far as they may be applied.

PA. R.A.P. 106. However, the Intervening Regulators point to Pennsylvania Rule of Appellate Procedure 3783(b), which provides that "[t]he Pennsylvania Rules of Civil Procedure shall apply to adversarial proceedings."[22] PA. R.A.P. 3783(b). Because an action to rehabilitate an insurer pursuant to Article V is a "formal proceeding," not an "adversarial proceeding," PA. R.A.P. 3772(f), the Intervening Regulators argue that it is not subject to the Rules of Civil Procedure.

The Intervening Regulators overlook the precept that the Court has discretion to conduct a statutory proceeding as is expedient and appropriate to move the case to a conclusion in a methodical fashion. *See, e.g., In re Tax Sale Held*

---

[22] Rule 3772(c) defines "adversarial proceeding" as

> [a]ny action (1) initiated by the rehabilitator or liquidator against persons other than the insurer, (2) asserting a right or interest afforded by Article V and for which neither Article V nor prior orders of the Court provide an avenue for redress, and (3) that the Court determines shall be governed by Pa. R.A.P. 3783 (adversarial proceedings) as an adversarial proceeding.

PA. R.A.P. 3772(c). Pennsylvania Rules of Appellate Procedure 3771 to 3784 (Summary and Formal Proceedings Against Insurers) apply to all actions in the Commonwealth Court arising under Article V. PA. R.A.P. 3771-3784.

September 10, 2003 by Tax Claim Bureau of County of Lackawanna, 859 A.2d 15, 18 (Pa. Cmwlth. 2004) (recognizing that while a trial court is not required to use the Pennsylvania Rules of Civil Procedure in tax sale proceedings, it has discretion to use the Rules of Civil Procedure where appropriate).

Here, the Rehabilitator seeks approval of the Second Amended Plan in this Court's original jurisdiction.[23] Pennsylvania Rule of Civil Procedure 226(b) provides that a trial court may, "[a]t the close of all the evidence … direct a verdict upon the oral or written motion of any party." PA. R.C.P. No. 226(b). This Court has affirmed the entry of a directed verdict following a single-judge bench trial. *See, e.g., Geschwindt v. Wagner*, 1 A.3d 970 (Pa. Cmwlth. 2010) (affirming directed verdict entered by trial court following bench trial). This Court has entered directed verdicts in matters brought within its original jurisdiction. *See, e.g., Pennsylvania Human Relations Commission v. School District of Philadelphia*, 651 A.2d 177 (Pa. Cmwlth. 1993) (granting a school district's motion for a directed verdict by treating it as a motion for a compulsory nonsuit[24] against the Pennsylvania Human Relations Commission on the ground that it had failed to demonstrate that mandatory desegregation measures were feasible).

A directed verdict can be entered in one of two circumstances:

> one, the movant is entitled to judgment as a matter of law and/or two, the evidence is such that no two reasonable minds could

---

[23] 42 Pa. C.S. §761(a)(3) (This Court has "original jurisdiction of all civil actions or proceedings … [a]rising under Article V of the act of May 17, 1921 (P.L. 789, No. 285), known as 'The Insurance Department Act of 1921.'").

[24] While the trial court may, "[*a*]*t the close of all the evidence* … direct a verdict upon the oral or written motion of any party," PA. R.C.P. No. 226 (emphasis added), "the court, on oral motion of the defendant, may enter a nonsuit on any and all causes of action if, *at the close of the plaintiff's case on liability*, the plaintiff has failed to establish a right to relief." PA. R.C.P. No. 230.1(a)(1) (emphasis added).

> disagree that the outcome should have been rendered in favor of the movant. With the first, the court reviews the record and concludes that, even with all factual inferences decided adverse to the movant, the law nonetheless requires a verdict in his favor. Whereas with the second, the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.

Hall v. Episcopal Long Term Care, 54 A.3d 381, 395 (Pa. Super. 2012) (quoting *Campisi v. Acme Markets, Inc.*, 915 A.2d 117, 119 (Pa. Super. 2006)).

The issue raised in the Rehabilitator's motion for a directed verdict is a narrow one: whether the Issue State Rate Approval Option is unlawful as the Intervening Regulators alleged. This is a mixed question of law and fact. The Intervening Regulators assert that the Issue State Rate Approval Option is coercive and provides them with no meaningful review of the rate filings. In their application for reconsideration, the Intervening Regulators contend that the "opt-out" provision cannot be "separated from the larger concern over superseding [s]tate rate approval statutes[.]" Application for Reconsideration at 7.

The Intervening Regulators did not present any evidence to support their challenge to the opt-out provision of the Plan. Cantilo credibly testified that if a state chooses to exercise the Issue State Rate Approval Option, the Rehabilitator will file an application on a seriatim basis to increase rates for policies issued in that state. The Intervening Regulators assert that the requirement that opt-out states act within 60 days and review the rate filings on a seriatim basis is "inconsistent" with "state practices." Application for Reconsideration at 16. However, no evidence in the record supports this claim.

In sum, the Intervening Regulators did not show that the Issue State Rate Approval Option is unconstitutional or otherwise is harmful to their interests.

Collectively, those interests involve approximately 2,000 of the 39,000 policyholders affected by the Plan. Ex. RP-22 at 2. This Court properly entered a directed verdict on the Intervening Regulators' objection to the Issue State Rate Approval Option. However, this Court disagrees with the Rehabilitator's proposition that the Intervening Regulators should be dismissed from the rehabilitation proceeding. The Rehabilitator's motion was a narrow one, as was this Court's order granting the motion.

For the foregoing reasons, this Court denies the Intervening Regulators' application for reconsideration.

2. Policy Restructuring

NOLHGA and Lapinski raised concerns about the policy restructuring provisions in the Second Amended Plan that impact SHIP's tax liability. The restructuring will address potential taxable income owed by SHIP for cancellation of indebtedness and will bifurcate policy liabilities into funded and unfunded portions. This policy restructuring will not affect coverage for policyholders either now or in the event of a liquidation. Cantilo testified that the restructuring does not affect policyholder choices and will not be performed on a seriatim basis. N.T., 5/17/2021, at 143.

As a result of the concerns raised at the hearing, the Rehabilitator will file a separate application with this Court to address the restructuring and tax issues. N.T., 5/21/2021, at 996. All parties will have an opportunity at that point to raise objections.

3. Policyholder Communications

NOLHGA raised concerns regarding policyholder communications, especially with respect to information related to guaranty associations and their

coverage limit. However, NOLHGA's president and fact witness, Peter Gallanis, acknowledged that the Rehabilitator has not refused to engage with NOLHGA regarding its concerns with the Plan or consider NOLHGA's proposed changes. N.T., 5/20/2021, at 686. NOLHGA is free to propose modifications to the Plan and continue to communicate with the Rehabilitator, as NOLHGA has done to date. Gallanis acknowledged that the Rehabilitator is a "capable commissioner" who understands the "important aspects" of the guaranty association system. *Id*. at 680.

4. COVID-19 Pandemic

Policyholder James Lapinski raised concerns regarding the impact of COVID-19 on long-term care insurance experience through higher mortality and lower claim incidence. With regard to this issue, Cantilo credibly testified that SHIP has experienced a moderate increase in mortality since the beginning of the pandemic in 2020, which generated a moderate increase in lapses of policies. The pandemic also caused a small increase in morbidity and adversely affected SHIP's expected yield on invested assets. However, the actuarial report prepared by Oliver Wyman shows that the aggregate effects of the pandemic had a moderate impact on SHIP's financial condition and are not material to the implementation of the Second Amended Plan. N.T., 5/17/2021, at 26; N.T., 5/21/2021, at 944.

Lapinski requested that the Second Amended Plan's discussion on COVID-19 be updated with more recent data. Oliver Wyman's actuarial report noted the evolving nature of COVID-19's impact and stated that while certain assumptions "were developed based on claims data predating the effects of COVID-19[,] [the actuarial team] will consider the effects of COVID-19 when [they] update [their] actuarial assumptions in 2021." Ex. RP-16 at 28. As Bodnar testified, upon approval of the Plan, Oliver Wyman will prepare an actuarial memorandum in

support of the If Knew Premium rates, similar to one that would ordinarily be submitted to state regulators in a rate increase filing. All parties will have an opportunity at that point to raise objections.

5. Funding Gap and SHIP's Balance Sheet

Lapinski questioned the size of SHIP's Funding Gap and the decline of SHIP's capital and surplus and value of its bond holdings as reflected in its balance sheet ending December 31, 2020. In that regard, Cantilo provided extensive testimony on SHIP's hazardous financial condition, the causes of SHIP's insolvency, and the actions taken by the Pennsylvania Insurance Department prior to rehabilitation. The evidence that the Second Amended Plan will substantially reduce the Funding Gap and address SHIP's inequitable rate structure was extensive. As for the decline in the value of SHIP's bond holdings, Cantilo credibly explained that it was due to a decline in yield in the markets in which SHIP's bonds were invested, which added to SHIP's deficit from 2019 to 2020. N.T., 5/21/2021, at 950-51.

6. Timing

Finally, Lapinski raised concerns with the timing of the rehabilitation proceeding and stated his desire for SHIP to avoid the lengthy process that Penn Treaty went through prior to liquidation. This Court shares Mr. Lapinski's desire to address SHIP's financial condition swiftly, as does the Rehabilitator. Cantilo testified that the Plan can be implemented quickly: within eight months of approval, the Rehabilitator anticipates receiving policyholder elections, which will enable her to measure the precise impact of Phase One on SHIP's Funding Gap. N.T., 5/18/2021, at 339-40.

V. Conclusions of Law

1. The Rehabilitator is authorized to "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." Section 516(b) of Article V, 40 P.S. §221.16(b). This includes preparing "a plan for the reorganization, consolidation, conversion, reinsurance, merger or other transformation of the insurer." Section 516(d) of Article V, 40 P.S. §221.16(d).

2. Upon application of the Rehabilitator for approval of a plan of rehabilitation, and after notice and a hearing thereon, "the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified. If it is approved, the rehabilitator shall carry out the plan." Section 516(d) of Article V, 40 P.S. §221.16(d).

3. "[I]t is not the function of the courts to reassess the determinations of fact and public policy made by the Rehabilitator[]" in formulating a plan of rehabilitation. *Mutual Fire II*, 614 A.2d at 1091. "Rather, the involvement of the judicial process is limited to the safeguarding of the plan from any potential abuse of the Rehabilitator's discretion." *Id.*

4. The Rehabilitator's evidence established that the Second Amended Plan will conserve and equitably administer the assets of SHIP in the interest of policyholders, creditors and the public, "with the main purpose being the public good." *Id*. at 1094. The Plan is designed to return SHIP to its pre-receivership status as a run-off company able to meet its obligations as they come due.

5. The Rehabilitator's evidence established that the Second Amended Plan will reduce or eliminate the Funding Gap and eliminate SHIP's inequitable and

discriminatory premium rate structure by offering policyholders meaningful choices to modify their long-term care insurance policies.

6. The Rehabilitator's evidence established that policyholders will fare as well or better under the Second Amended Plan than they would in liquidation. The Plan will provide the benefits of rehabilitation, such as flexibility and the accelerated disposition of claims, which is preferable to the static procedures of liquidation.

7. The Rehabilitator is authorized under Article V to establish actuarially sound premium rates for SHIP policyholders, as needed to rehabilitate SHIP, and without the additional approval of the state insurance department where the policy was initially issued.

8. The Rehabilitator did not abuse her discretion in formulating the Second Amended Plan.

VI. Conclusion

The Rehabilitator has made a compelling case in support of her Second Amended Plan of Rehabilitation. Indeed, her evidence was not contradicted on any material fact. The Intervening Regulators suggest that they would have exercised their discretion differently, but this is not a basis for the Court to disapprove the Plan.

The opposition of the Intervening Regulators is based upon their belief that the state-by-state regulation of premium rates must be the starting point of any plan to rehabilitate an insolvent insurer. The Court has several responses.

First, the standard for an appropriate premium rate is substantially the same in every state: the premium must be reasonable in relation to the coverage provided in the policy. The evidence presented at the hearing demonstrated that the premium rates used in the four options in Phase One of the Second Amended Plan

will satisfy that standard. The Rehabilitator will be tasked with proving satisfaction of that standard in her actuarial memorandum. The Intervening Regulators presented no evidence that she cannot or will not be able to do so.

Second, the Issue State Rate Approval Option preserves the state-by-state procedure for those states that share the concerns of the Intervening Regulators. To the extent a state does not believe that the Rehabilitator, and this Court, should be solely responsible for the task of establishing the seriatim premiums used for the four policyholder options in Phase One, the state can assume responsibility to do so by opting out of this aspect of the Second Amended Plan.

Neither SHIP's policies nor state rate regulatory statutes insulate policyholders from paying a reasonable premium for their coverage. To the contrary, they require the opposite. The Second Amended Plan will advance, not undermine, a reasonable and non-discriminatory premium rate structure, which is the point of rate regulation.

Essentially, the Intervening Regulators exalt the process by which insurance premium rates are set over the rehabilitation of an insolvent insurer whose condition was caused by an inadequate and discriminatory premium structure. As was established by the Rehabilitator's evidence, a rehabilitation of SHIP cannot be accomplished by placing the correction of the company's premium rates into the hands of 46 states.

In all respects, the Second Amended Plan satisfies applicable constitutional requirements. Neither the Full Faith and Credit Clause nor principles of comity require this Court to apply the insurance rate regulatory laws of other states when considering a plan to rehabilitate SHIP, a Pennsylvania domiciled insurer in receivership. Nevertheless, the Seconded Amended Plan, consistent with Article V,

does not evidence "a policy of hostility" to the laws of sister states. Rather, it advances their shared interests in insurance premium rates that are not unfairly discriminatory and reasonable in relation to the benefits provided in the policy.

The Intervening Regulators support a liquidation because it will require guaranty associations to solve SHIP's Funding Gap. However, a liquidation will do nothing to address SHIP's discriminatory premium structure. As NOLHGA's actuary, Matthew Morton, explained, guaranty associations can make rate filings with the state of issue but only on a cohort basis, for the segment of policies covered by the filing guaranty association. As a consequence, Morton opined that in a liquidation, many SHIP policyholders will pay more than the If Knew Premium rate for their coverage while others will pay less. Guaranty associations have no opportunity to propose or implement the seriatim If Knew Premium rate that is central to the Second Amended Plan's correction of the current inadequate and discriminatory premium rate structure. This reason alone supports the Rehabilitator's decision not to liquidate SHIP.

There is nothing unfair about expecting every policyholder to pay an actuarially justified premium for their coverage. That is expected in any insuring system. In the case of SHIP, it will not happen in the absence of the implementation of the Second Amended Plan.

The Rehabilitator has persuaded the Court that rehabilitation is preferred for another reason. A liquidation will place the burden of an actuarially justified premium upon the policyholders of member insurers of the applicable guaranty associations and, ultimately, upon the taxpayers in those states. No one has provided the Court with an explanation as to why, as a matter of policy, the premium burden of SHIP's policyholders should be borne by others.

For these reasons, the Court rejects the arguments of the Intervening Regulators. The Court concludes that the Rehabilitator has appropriately exercised her discretion in devising a plan that will address SHIP's financially hazardous condition while protecting the interests of the policyholders, creditors and public generally.

s/Mary Hannah Leavitt
Mary Hannah Leavitt, President Judge Emerita

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Senior Health Insurance Company of Pennsylvania In Rehabilitation	: : :	No. 1 SHP 2020

O R D E R

AND NOW this 24th day of August, the Court hereby ORDERS as follows:

1. The Application for Approval of the Plan of Rehabilitation for Senior Health Insurance Company of Pennsylvania (SHIP) filed by Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as Statutory Rehabilitator of SHIP, is GRANTED. The Second Amended Plan of Rehabilitation, filed on May 3, 2021, is APPROVED, with the exception of Section VI.N of the Plan (relating to suspension of agent and broker commissions).

2. The Court defers resolution of the Joint Application for Approval of Settlement Agreement, filed by the Rehabilitator and Intervenors ACSIA Long Term Care, Inc., Global Commission Funding LLC, LifeCare Health Insurance Plans, Inc, Senior Commission Funding LLC, Senior Health Care Insurance Services, Ltd., LLP, and United Insurance Group Agency, Inc., pending a hearing to be scheduled by separate order. The Rehabilitator shall continue paying commissions until Phase One of the Second Amended Plan of Rehabilitation is implemented.

3. The Rehabilitator shall promptly submit an actuarial memorandum in support of the If Knew Premium rates to be used in Phase One of the Second Amended Plan of Rehabilitation to the Pennsylvania Insurance Department for its review and approval.

4. The Rehabilitator, in her capacity as Insurance Commissioner, shall designate an appropriate deputy insurance commissioner to review the actuarial memorandum submitted to the Insurance Department. Thereafter, the Rehabilitator shall submit the approved actuarial memorandum to the Court.

s/Mary Hannah Leavitt
Mary Hannah Leavitt, President Judge Emerita

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Senior Health Insurance Company of Pennsylvania In Rehabilitation	:	No. 1 SHP 2020

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: November 4, 2021

Before the Court is an application for a stay pending appeal (Stay Application) filed by Intervenors Superintendent of Insurance of the State of Maine, Commissioner of Insurance of the Commonwealth of Massachusetts and Insurance Commissioner of the State of Washington (collectively, Intervening Regulators). The Intervening Regulators seek a stay of this Court's August 24, 2021, order granting the application of Jessica K. Altman, Insurance Commissioner of Pennsylvania, in her capacity as the Statutory Rehabilitator (Rehabilitator) of Senior Health Insurance Company of Pennsylvania (SHIP), for approval of the Second Amended Plan of Rehabilitation for SHIP. The Intervening Regulators also seek a stay of the Court's May 21, 2021, ruling granting the Rehabilitator's motion in the nature of a directed verdict regarding issue state rate approval and the Court's August 25, 2021, order denying reconsideration of that ruling. Because the Intervening Regulators fail to meet the requirements for a stay pending appeal, the Court denies the Stay Application.

On August 24, 2021, this Court approved the Rehabilitator's Second Amended Plan of Rehabilitation (Plan)[1] for SHIP, a long-term care insurer that currently has an operating deficit of approximately $1.2 billion. In broad terms, the Plan seeks to reduce or eliminate SHIP's deficit by increasing premium revenue and modifying the existing terms of most of the approximately 39,000 policies in force. The multi-phased Plan does so by offering policyholders an array of options to either maintain their coverages and pay an actuarially justified premium or reduce their coverages to avoid or temper a premium increase. The Plan also seeks to correct SHIP's discriminatory premium rate structure, whereby policyholders whose state of issue has approved requested rate increases over the years are paying more for the same coverages than policyholders whose state of issue has disapproved requested rate increases. The Plan contains an Issue State Rate Approval Option, by which a state may opt out of the rate approval section of the Plan.[2]

The Intervening Regulators objected to the Plan in its totality. One of their principal objections to the Plan was that, in their view, it unlawfully allows premium rates to be set by the Rehabilitator and this Court rather than by state-of-issue regulators. The Intervening Regulators asserted that the Plan's deviation from the ordinary state-by-state rate review process violated the Full Faith and Credit

---

[1] The Second Amended Plan of Rehabilitation is now known as the "Approved Plan." *See* Praecipe to Substitute Approved Plan of Rehabilitation, filed September 30, 2021, and the Court's order filed October 28, 2021, approving the substitution.

[2] If a state opts out, the Rehabilitator will file an application to increase rates for policies issued in that state to an actuarially justified level. The regulator for the opt-out state will render a decision on the Rehabilitator's rate increase application; if it is only partially approved, the Rehabilitator will downgrade the benefits under the affected policies accordingly. The Rehabilitator's unrefuted evidence established that policyholders in an opt-out state will, like their counterparts in opt-in states, have four options for adjusting their coverages and premium rate. Their choices will not, however, be exactly the same as those offered in the Plan.

Clause of the United States Constitution[3] and was inconsistent with the principle of comity. They argued that the Plan's Issue State Rate Approval Option did not cure these infirmities because it is coercive and provides them with no meaningful review of the rate filings.

At the close of the hearing on the Plan on May 21, 2021, the Rehabilitator made an oral motion for judgment in the nature of a directed verdict on the claim of the Intervening Regulators that the Issue State Rate Approval Option was unlawful. In support, the Rehabilitator argued that the Intervening Regulators had not presented any evidence that their interests would be harmed by the Issue State Rate Approval Option, and as such, their objection to that aspect of the Plan could not serve as a basis for the Court to disapprove the Plan. The Court granted the Rehabilitator's motion from the bench. The Intervening Regulators sought reconsideration of the Court's ruling, which the Court denied by order dated August 25, 2021. In doing so, the Court reasoned, *inter alia*, that the Intervening Regulators had not presented any evidence to support their challenge to the opt-out provision.

The Intervening Regulators have appealed the Court's orders approving the Plan, granting the directed verdict and denying reconsideration of that verdict. Pursuant to Pa. R.A.P. 1732,[4] they seek a stay of those orders pending a decision by the Pennsylvania Supreme Court. Under Pennsylvania law,

---

[3] It states:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, §1.

[4] Rule of Appellate Procedure 1732(a) provides, in relevant part, that an "[a]pplication for a stay of an order of a trial court pending appeal ... must ordinarily be made in the first instance to the trial court. Pa. R.A.P. 1732(a).

> on an application for a stay pending appeal the movant is required to make a substantial case on the merits and to show that without the stay, irreparable injury will be suffered. Additionally, before granting a request for a stay, the court must be satisfied the issuance of the stay will not substantially harm other interested parties in the proceedings and will not adversely affect the public interest.

Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz, 573 A.2d 1001, 1003 (Pa. 1990) (citing *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983)).

Under the first prong of the *Process Gas* standard, the Intervening Regulators must establish a substantial case on the merits of their appeal. In summary, the Intervening Regulators argue on appeal that the Plan is not feasible as required by law; constitutes an abuse of discretion because it does not serve the best financial interests of policyholders; fails to place policyholders in at least as good a position as in a liquidation, as required under *Neblett v. Carpenter*, 305 U.S. 297 (1938); exceeds the Rehabilitator's authority under Article V of the Insurance Department Act of 1921 (Article V);[5] and violates the Full Faith and Credit Clause of the United States Constitution by superseding the regulatory authority of other states over premium rates.

The first impediment to the Intervening Regulators' case on appeal is their lack of standing to assert claims on behalf of policyholders. The Intervening Regulators' position in SHIP's rehabilitation proceedings is uncontroverted: they do not represent any policyholders, even those with policies issued in their own

[5] Act of May 17, 1921, P.L. 789, added by Section 2 of the Act of December 14, 1977, P.L. 280, *as amended*, 40 P.S. §§221.1 – 221.63.

respective states.[6] The Court granted the Intervening Regulators' request for limited intervention in the hearing on the Plan based on their purported interests as regulators, and not in any *parens patriae* or other representative capacity for policyholders. Indeed, at the hearing, counsel for the Intervening Regulators expressly disavowed that they are acting in any "sort of a parens patriae capacity on behalf of . . . policyholders [from their respective states] who have chosen not to intervene." Notes of Testimony (N.T.), 5/19/2021, at 543. As a result, the Court held that the Intervening Regulators lacked standing to assert claims on behalf of policyholders that they do not purport to represent.

The Court's opinion in this matter addressed at length the substance of the Intervening Regulators' arguments. *See generally In Re: Senior Health Insurance Company In Rehabilitation* (Pa. Cmwlth., No. 1 SHP 2020, filed August 24, 2021) (*In Re: SHIP*). For purposes of the *Process Gas* analysis, the Court will summarize the portions of its analysis relevant to the Intervening Regulators' likelihood of success on the merits.

First, the Intervening Regulators continue to assert that the Plan is not "feasible." They are not likely to prevail on this argument, however, because, as the Court explained, Article V does not require that the Plan be "feasible" in order to be approved. *Id.* at 68. In any event, the Court also held that the Plan is feasible to the extent such a requirement exists, because the Plan will materially reduce the Funding Gap, significantly improve SHIP's financial condition, and if successful, will restore SHIP to its pre-receivership condition of an insurer winding down its long-term care insurance business. The Intervening Regulators have not offered any evidence in support of a different conclusion.

---

[6] Notably, the number of policies issued in Maine, Massachusetts and Washington, 1,405, is approximately 4% of the policies in force as of January 21, 2021. *See* Exhibit RP-30.

Second, the Intervening Regulators contend that the Plan is not in the best financial interests of policyholders. Setting aside that the Intervening Regulators lack standing to assert such an argument, their position reflects only that "they would have exercised their discretion differently" than the Rehabilitator, which the Court held "is not a basis for the Court to disapprove the Plan." *Id.* at 80. The Intervening Regulators favor an immediate liquidation of SHIP because that will trigger guaranty association coverage. The Intervening Regulators cannot establish that they are likely to prevail on the merits simply because they disagree with the Rehabilitator's exercise of her discretion in deciding that a rehabilitation is to be preferred for several sound policy reasons. Moreover, they do not address the Court's finding that in a liquidation, some policyholders will pay less than the actuarially justified premium for their coverage and other policyholders will, as a result, pay more for identical coverage. Nor do the Intervening Regulators address the fact that in a liquidation, policyholders will have little or no choice over their coverage once their policies are terminated, as is required by a liquidation order. Their replacement policy from the guaranty association will cap the limits of coverage.

Third, the Intervening Regulators continue to misconstrue *Neblett v. Carpenter*, 305 U.S. 297 (1938). Even accepting their interpretation, however, 85% of SHIP's policyholders will be offered at least one option with a value equal to or higher than the value of the policy that they might have in liquidation. Accordingly, the Court held that even if the Plan substantially impairs policies, under any measure created by *Carpenter* "it serves a legitimate and significant public purpose, and the policy modifications are reasonable and appropriate to that purpose." *In Re: SHIP* at 63. The Stay Application offers no basis for overturning the Court's findings.

Finally, the Intervening Regulators argue that the Plan exceeds the Rehabilitator's authority under Article V and violates the Full Faith and Credit Clause. The Stay Application does not identify any specific statutory provision that the Plan violates, and this Court's opinion approving the Plan explained at length how the Plan's provisions fully comport with Pennsylvania law. The Court also explained why the Full Faith and Credit Clause does not require the Rehabilitator to submit premium rate increase requests to 46 states, the District of Columbia, and the U.S. Virgin Islands for their review and approval. To the contrary, such a requirement "would fracture Pennsylvania's 'own legitimate public policy' in the rehabilitation of SHIP," in contravention of the Full Faith and Credit Clause. *Id.* at 61. The Intervening Regulators cannot satisfy their burden under *Process Gas* by simply repeating these failed arguments.

Having determined that the Intervening Regulators cannot make a substantial case on the merits of their appeal, the Court could deny the Stay Application without considering the remaining three *Process Gas* factors. *See Maritrans*, 573 A.2d at 1004 ("In view of that failure [to show a substantial case on the merits, the court] need not scrutinize compliance with the remaining three criteria."). Even so, the Intervening Regulators cannot satisfy the remaining factors.

Under the second *Process Gas* factor, the Intervening Regulators must establish that without the stay, they will suffer irreparable injury. They allege here that a stay is necessary to prevent "harm [to] both policyholders and regulators because both will be forced to make decisions that may not be reversible even if the Court's decision is reversed on appeal." Stay Application at 29. This argument fails for several reasons.

First, the Intervening Regulators cannot request a stay based on hypothetical harm to third parties, *i.e.*, policyholders and other state regulators. When our Supreme Court adopted the federal law on supersedeas, it defined the second factor as requiring "'the petitioner [to] show[] that without the requested relief, *he* will suffer irreparable injury.'" *Process Gas*, 467 A.2d at 808 (emphasis added). In granting the stay in that case, the Supreme Court found a "sufficient showing of irreparable harm likely to result to the [movants]," a group of industrial gas consumers directly impacted by the surcharge allocation at issue. *Id.* at 809. Thus, a stay can only be entered upon a showing of irreparable harm to the moving party. To the extent the Intervening Regulators allege that other regulators or policyholders will be harmed absent a stay, such allegations are immaterial to the *Process Gas* analysis.

Second, to the extent the Intervening Regulators argue they will themselves be harmed absent a stay, the Court notes that their asserted right to regulatory authority over policies issued in their states and the rate review process is preserved by the Issue State Rate Approval Option. To date, the Intervening Regulators have offered no evidence to support their challenge to the legality of this opt-out provision in the Plan. For this reason, the Court entered a directed verdict in favor of the Rehabilitator on that issue.

Third, the alleged harms cited by the Intervening Regulators are not irreparable or imminent. The only alleged injury to the Intervening Regulators themselves, *i.e.*, the decision to participate in the Plan or opt out, is reparable because if the Court's approval of the Plan is reversed, then the decision to participate or opt out will be rendered moot. Even if the Intervening Regulators are correct that it may be "administratively difficult and confusing . . . to undo" implementation of the Plan,

Stay Application at 30, that situation would not constitute irreparable harm under *Process Gas*.[7]

Regarding the final two *Process Gas* factors, harm to other parties and harm to the public interest, the Intervening Regulators' arguments are unpersuasive. They assert that a stay will not cause injury to other parties before the Court because it will maintain the status quo, *i.e.*, policyholders will continue to receive coverage, the agents and brokers have settled, and the guaranty associations have not been triggered. With respect to the public interest, the Intervening Regulators claim their appeal is designed to benefit policyholders and other regulators, and that the requested stay supports that mission.

The record before this Court established that delay itself is damaging to the rehabilitation of SHIP and, thus, to policyholders. The Court emphasized that rehabilitation is preferable to liquidation in part because it avoids delay: "a plan can be implemented quickly, thereby addressing the causes of SHIP's financial distress, preserving assets, and reserving flexibility." *In Re: SHIP* at 47. In reaching that conclusion, the Court noted that the Rehabilitator could learn the impact of Phase One and the potential scope of Phase Two within a year of approval, which is a favorable timeline over liquidation, where rate approvals could take as long as two years, and in which there would be little certainty as to the impact on policyholders for some time. The Plan is designed to be implemented as quickly as possible so that policyholders can minimize any potential loss or burden from SHIP's receivership by allocating the premiums and coverages available to best suit their individual

---

[7] The Intervening Regulators also argue that a stay should be entered because, if the Plan is implemented before the appeal is heard and decided, the Rehabilitator may contend that the appeal should be dismissed under the doctrine of equitable mootness. *See In re Tribune Media Co.*, 799 F.3d 272 (3d Cir. 2015). The question of mootness is not before the Court at this time, and the mere possibility that the Rehabilitator may raise an argument in the future is not an imminent harm.

needs. The Court notes, further, that any harm to policyholder interests caused by a delay in implementing the Plan will be irreparable.[8]

The Intervening Regulators' arguments with respect to the public interest are similarly unpersuasive. They point to the various state legislatures' allocation of the burden of policyholder losses through the guaranty association system, claiming that a deeper deficit cannot harm the public because using guaranty association funds to cover SHIP's deficit, regardless of its size, is simply the system functioning as intended. But SHIP is not yet in liquidation, and the Pennsylvania legislature, like that of many other states, has enacted a law that favors meaningful efforts at rehabilitation over immediate liquidation. As this Court has previously observed, "[t]he legislatively stated purpose of Article V, to which the Court must give effect, is 'the protection of the interests of insureds, creditors, and the public generally' and the 'equitable apportionment of any unavoidable loss' through, *inter alia*, 'improved methods for rehabilitating insurers. . . .'" *Grode v. Mutual Fire, Marine and Inland Insurance Co.*, 572 A.2d 798, 803 (Pa. Cmwlth. 1990) (quoting Section 501 of Article V, 40 P.S. §221.1). Similarly, "[t]he benefits of rehabilitation— its flexibility and avoidance of inherent delays—are preferable to the static and cumbersome procedures of statutory liquidation." *Id.* Thus, recognizing the legislative interest in effective and meaningful efforts at rehabilitation, allowing estate assets to be depleted during an appeal can only harm the public interest by making the rehabilitation process more difficult.

---

[8] In addressing the need for a bond in the event a stay is granted, the Rehabilitator estimates that the irreparable damage from a one-year delay would be between $55 and $70 million. The Rehabilitator posits that such damage equates to one year of the most costly long-term care services for approximately 500 policyholders.

For all of the above reasons, the Court denies the Intervening Regulators' application for a stay pending appeal.

MARY HANNAH LEAVITT, President Judge Emerita

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Senior Health Insurance Company of Pennsylvania In Rehabilitation	:	No. 1 SHP 2020

ORDER

AND NOW, this 4th day of November, 2021, the Application for Stay Pending Appeal filed by Intervenors Superintendent of Insurance of the State of Maine, Commissioner of Insurance of the Commonwealth of Massachusetts and Insurance Commissioner of the State of Washington is DENIED. The Intervenors' Application for Expedited Ruling on Application of Stay Pending Appeal is DISMISSED as moot.

MARY HANNAH LEAVITT, President Judge Emerita

Received 11/8/2021 12:14:16 PM Supreme Court Middle District

Filed 11/8/2021 12:14:00 PM Supreme Court Middle District
71 MAP 2021

IN THE
SUPREME COURT OF PENNSYLVANIA

IN RE: SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA (IN REHABILITATION)	**:**	**No. 71 MAP 2021**

APPEAL OF: THE SUPERINTENDENT OF INSURANCE OF THE STATE OF MAINE, THE COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON

STATE INSURANCE REGULATORS' APPLICATION FOR STAY PENDING APPEAL

Of Counsel:
J. David Leslie (*pro hac vice* pending)
dleslie@rackemann.com
Eric A. Smith (*pro hac vice* pending)
esmith@rackemann.com
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110-1700
Tel. 617-951-1131
Tel. 617-951-1127

Counsel to the Maine Superintendent of Insurance, the Massachusetts Commissioner of Insurance, and the Washington Insurance Commissioner and Massachusetts Special Assistant Attorneys General and Washington Special Assistant Attorneys General

Stephen G. Harvey
steve@steveharveylaw.com
1880 John F. Kennedy Blvd.
Suite 1715
Philadelphia, PA 19103
Tel. 215-438-6600

Attorneys for the Maine Superintendent of Insurance, the Massachusetts Commissioner of Insurance, and the Washington Insurance Commissioner

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Rules

Other Authorities

Pursuant to Pa. R.A.P. 123 and 1732(a), the Appellants/Intervenors Superintendent of Insurance of the State of Maine, Commissioner of Insurance of the Commonwealth of Massachusetts, and Insurance Commissioner of the State of Washington ("State Insurance Regulators"), hereby move for a stay pending appeal of the trial court's August 24, 2021 Order granting the application of the Insurance Commissioner of the Commonwealth of Pennsylvania as Rehabilitator ("Rehabilitator") of Senior Health Insurance Company of Pennsylvania ("SHIP") for approval of the Second Amended Plan of Rehabilitation ("Plan") for SHIP, as well as the related May 21, 2021 ruling granting the Rehabilitator's motion in the nature of a directed verdict regarding issue state rate approval and the August 25, 2021 Order denying reconsideration of that ruling (the "Orders").

The Orders approve the Plan and overrule objections to the Plan. The State Insurance Regulators filed their appeal from the Orders on September 21, 2021.

The Orders and the Memorandum Opinion re Application for Approval of the Plan of Rehabilitation for SHIP issued by the single Judge of the Commonwealth Court (the "Court" or "trial court")[1] are attached to the State Insurance Regulators' Jurisdictional Statement filed September 21, 2021.

[1] The Commonwealth Court has original jurisdiction of proceedings for the rehabilitation or liquidation of insurance companies under 42 Pa. C.S. § 761(a)(3).

Background

1. Application to the Trial Court for Stay Pending Appeal

As required by Pa. R.A.P. 1732(a), the State Insurance Regulators applied for a stay pending appeal in the first instance from the trial court. The State Insurance Regulators filed their Application for Stay Pending Appeal with the Court on October 1, 2021. The Rehabilitator filed her opposition on October 15, 2021, as did the Intervenor Health Insurers.

On November 2, 2021, the State Insurance Regulators filed an Application for Expedited Ruling on Application for Stay Pending Appeal in light of the upcoming November 15, 2021 "opt-out" deadline.

On November 4, 2021, the trial court issued a Memorandum Opinion and Order denying the State Insurance Regulator's Application for Stay ("Stay Op."). Also on November 4, 2021, the Court issued an Amendment Order amending the August 24, 2021 Memorandum Opinion and an Order designating the amended Memorandum Opinion as an Opinion ("Op.") for publication.

The Appendix to the State Insurance Regulators' Application to Stay Pending Appeal ("SIR Appendix" or "SIR App.") filed herewith includes (1) the State Insurance Regulators' Application for Stay Pending Appeal (SIR App. 314), (2) the Rehabilitator's Opposition (SIR App. 351), (3) the Health Insurers' Response (SIR App. 394), (4) the Application for Expedited Ruling (SIR App.

428), (5) the Memorandum Opinion and Order denying the Application for Stay (SIR App. 433), and (6) the November 4, 2021 Opinion (SIR App. 446).

2. Overview

This appeal involves an unprecedented plan of rehabilitation for an insolvent insurance company. The Plan places the entire $1.2 billion burden of the insolvency on 30,000 of SHIP's remaining policyholders through benefit cuts and premium increases even though, in a liquidation, based on the Rehabilitator's own comparison analysis, the policyholders would only bear a loss of $400 million, as insurance guaranty associations would provide over $800 million of additional support. The Plan also supersedes the authority of insurance regulators in States other than Pennsylvania to review rates for policies issued in their States.

The Court approved the Plan over the objections of the Intervenor State Insurance Regulators. It disagreed with the Intervenors' position that the policyholders' best financial interest must be protected in an insolvency and that state regulators control rates in their states. The Court instead took the view that (a) SHIP's policies were historically "underpriced" so that policyholders should bear the burden of insolvency instead of the guaranty associations, and (b) the state-based rate review system historically resulted in "discriminatory" rates so that rates should be set nationwide by the Rehabilitator and the Court.

In their appeal, the State Insurance Regulators present several fundamental issues. First, they contend that the Rehabilitator was required as a matter of law to protect the financial interest of policyholders in their contracts, rather than pursuing other goals, and that the Rehabilitator and Court must take the policies as they find them. Deeming policyholders unworthy of guaranty association protection and deciding instead to protect those who fund the guaranty associations is contrary to the purpose of the guaranty association statutes. Second, the Plan was constitutionally required, but fails, to provide all policyholders an option with a value at least equal to the value they would receive in liquidation. Third, the Plan exceeds statutory authority and violates the Full Faith & Credit Clause by displacing insurance regulators from their statutory role in reviewing rates applicable to policies issued in their States.[2]

These novel and important issues should be resolved by the Supreme Court before the Plan is implemented and the rights of policyholders and insurance regulators permanently impaired. The Plan will not correct SHIP's insolvency. However, implementation of the Plan will alter the *status quo* and may permanently reduce the contract rights of policyholders so that they will have less protection from insurance guaranty associations when SHIP is inevitably

[2] The appeal also involves additional and more specific issues. This relatively brief application does not address all grounds for the appeal. The State Insurance Regulators reserve and do not waive any grounds not discussed herein.

liquidated. It will also require insurance regulators to decide whether to "opt-out" of the Plan to the detriment of policyholders in their States.

3. Schedule for Implementation of the Plan

The Rehabilitator is now moving to implement the Plan, which involves three basic steps. First, state insurance regulators must make so-called "opt out" decisions concerning whether the Rehabilitator should apply for approval of rates in their states (subject to the restrictions, limitations and consequences imposed by the Plan). The Rehabilitator has established a November 15, 2021 deadline for state insurance regulators to make these so-called "opt-out" decisions. *See* the Special Deputy Rehabilitator's letter of September 30, 2021 (SIR App. 9). Second, the Rehabilitator is to send election packages to SHIP's policyholders so they may make elections regarding permanent "adjustments" (benefit cuts and premium increases) to their policies under the Plan. The election packages are to be sent out around year-end 2021. Third, the Rehabilitator will make the adjustments effective in April 2022. As the Rehabilitator has advised:

> Implementation of the Plan commenced following the entry of the Court's Memorandum Opinion and Order. We anticipate that most policyholders will be sent Policyholder Election Packages around year-end and be asked to make their elections by around mid March, 2022, becoming effective in April of next year.

Notice of Filing of Approved Plan, Ex. A, p. 19 (Sept. 24, 2021) (SIR App. 7).[3]

Standard for Stay Pending Appeal

The standard governing this application for stay is well-established.

> On an application for stay pending appeal the movant is required to make a substantial case on the merits and to show that without the stay, irreparable injury will be suffered. Additionally, before granting a request for a stay, the court must be satisfied the issuance of the stay will not substantially harm other interested parties in the proceedings and will not adversely affect the public interest.

Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz, 573 A.2d 1001, 1003 (Pa. 1990) (decision of Nix, C.J.) (citing *Pa. Pub. Util. Comm'n v. Process Gas Consumers Grp.*, 467 A.2d 805, 808-809 (Pa. 1983)).

SUMMARY OF ARGUMENT

The State Insurance Regulators have a compelling case on the merits of their arguments that the Plan should not be approved. As discussed below, the Plan is not feasible as required by law; constitutes an abuse of discretion and error of law because it does not serve the best financial interest of policyholders and ignores guaranty associations; fails to place policyholders in at least as good a position as in a liquidation as required by *Neblett v. Carpenter*, 305 U.S. 297 (1938); and

[3] Exhibit A to the Notice is the Approved Plan of Rehabilitation as substituted in accordance with the Court's Order of October 28, 2021 regarding the Praecipe to Substitute Approved Plan of Rehabilitation (September 30, 2021). The Approved Plan is the Second Amended Plan (Ex. RP-55). *See* SIR App. 28, 531.

exceeds statutory authority and violates the Full Faith and Credit Clause in superseding the regulatory authority of other States over rates. The State Insurance Regulators are properly present here to protect the interests of elderly policyholders, who relied on SHIP insurance policies to protect them in the last stages of their lives, against a plan that seeks to unnecessarily cut their benefits and exclude state insurance regulators.

The policyholders of SHIP and the State Insurance Regulators will suffer irreparable injury if the Plan is implemented during the appeal. The Plan will permanently reduce policyholders' contract rights and displace state insurance regulators from their statutory role in reviewing rates. If the Plan is implemented before the appeal is decided, the Rehabilitator may contend that the appeal is equitably moot. If that were correct, this would leave policyholders with reduced coverage and reduced guaranty association protection in the inevitable liquidation, and regulators with no role in determining rates in their States.

The interests of policyholders should be the central concern, and it would be a potentially disastrous result for policyholders for the Plan to be implemented and evade appellate review. The Plan requires policyholders to absorb $800 million in losses that should be borne by insurance guaranty associations because the Rehabilitator and trial court concluded in hindsight that the policies were underpriced and then chose not to trigger the guaranty associations. The Plan fails

to satisfy the constitutional requirement that policyholders be treated at least as well in rehabilitation as in liquidation.

Issuance of a stay pending appeal will not harm other interested persons. It will preserve the *status quo*. Policyholders will continue to pay premiums at the lawfully approved rates as before, and those on claim will continue to receive claim payments as they have during the pendency of the Rehabilitator's application for approval of the Plan. The intervenor agents and brokers have settled their issues by the settlement approved by the Court on September 13, 2021. Finally, so long as the appeal is pending, SHIP will not be liquidated and the intervenor health insurers will not need to pay guaranty association assessments.

A stay will not adversely affect the public interest. This appeal protects the financial interests of policyholders that are intended to be protected by the insurer receivership statutes and the guaranty association system and protects the state-based rate regulatory system. The Rehabilitator contends that delaying benefit cuts and premium increases under the Plan will increase SHIP's insolvency and the burden on the guaranty associations, their member insurers and, in many States, on taxpayers. That is not cognizable "harm" because the guaranty associations were created specifically to protect policyholders in the event of an insolvency, and the legislatures have determined how to allocate the burden of that protection.

Facts Relied Upon

This appeal arises from the Rehabilitator's application for approval of a plan of rehabilitation for SHIP. The Second Amended Plan of Rehabilitation (the "Plan", Ex. RP-55) provides an overview. Ex. RP-55 at 81-82, 86-87 (SIR App. 108-109, 113-114). *See also* Op. at 2-5. In brief, SHIP wrote long term care ("LTC") insurance policies. It stopped writing policies in 2003 and has been in run-off paying claims since that time. Its remaining policyholders have an average age of 86, and the policyholders on claim have an average age of 89. SHIP is insolvent. It was placed in rehabilitation proceedings and the Pennsylvania Insurance Commissioner was appointed Rehabilitator on January 29, 2020.

On April 22, 2020, the Rehabilitator applied for approval of a plan of rehabilitation. The Court issued a case management order regarding the application. In accordance with that order, the State Insurance Regulators applied to intervene in the proceedings concerning the proposed plan by application filed July 31, 2020 and joinder filed September 15, 2020 (SIR App. 534, 555). The Court allowed the State Insurance Regulators to intervene by orders entered September 15 and 18, 2020 (SIR App. 568, 569).

A hearing on the Plan was held on May 17-21, 2021. After post-hearing briefing, the Court issued its Memorandum Opinion and approved the Plan in the Orders on August 24 and 25, 2021.

While the matter is complex, the essential facts are as follows.

1. SHIP's policies are enforceable contracts, and the premiums charged on the policies historically and on the rehabilitation date were lawfully approved rates. Tr. 227-229, 282 (SIR App. 271-273, 275).

2. SHIP is insolvent, with a deficit or "funding gap" of approximately $1.2 billion. Ex. RP-55 (the Plan) at 87 (SIR App. 114). *See* Op. 13 (referring to "SHIP's insolvency").

3. Under the Plan, the burden of reducing or eliminating the $1.2 billion funding gap will rest on the 30,000 remaining SHIP policyholders who have not taken non-forfeiture options. Tr. 290-292; Ex. RP-55 at 102-103 (SIR App. 277-279; 129-130). The Plan seeks to reduce the funding gap by reducing policy benefits and increasing premiums. Ex. RP-55 at 10, 102-103 (SIR App. 37, 129-130).

4. The Plan requires policyholders to select among options, only one of which (Option 4) retains the policyholders' full benefits in Phase One. The other options (Options 1, 2, 2a, and 3) all reduce benefits in Phase One. Ex. RP-55 at 23-24; Tr. 113-117 (SIR App. 50-51; 244-245). Policyholders who choose Option 4 in Phase One face the possibility of additional substantial rate increases or benefit reductions in Phase Two. Ex. RP-55 at 15 ("[P]olicyholders selecting

Option Four would face the possibility of additional substantial rate increases or benefit reductions in Phase Two of the Plan."), 58 (SIR App. 42, 85).

5. In a liquidation, virtually all of SHIP's policies would be covered by one of the guaranty associations created by statute in each state, subject to the individual state statutory limits on guaranty association coverage. Ex. RP-55 at 93 (SIR App. 120).

6. If SHIP were liquidated now so that guaranty associations are triggered, policyholders will absorb only approximately $397 million of the funding gap, based on the Rehabilitator's comparison file. Ex. SIR 5-1, Table 1; Tr. 564 (SIR App. 224; 304). This is because guaranty associations would provide approximately $837 million in additional support to benefit policyholders, also based on the Rehabilitator's comparison file. Ex. SIR 5-1, Table 2; Tr. 565-66 (SIR App. 224; 310-311). The Plan does not trigger the guaranty associations, Ex. RP-55 at 92, so these additional funds will not be available to benefit policyholders under the Plan. (SIR App. 119).[4]

7. The policyholder elections under the Plan will be permanent in that guaranty association coverage may be given up. If SHIP is placed in liquidation after the Plan is implemented, the policies to which guaranty association coverage

[4] The State Insurance Regulators' exhibits were admitted into evidence at the hearing (Tr. 550-553) (SIR App. 300-303), and the Court summarized the testimony of Frank Edwards on these points (Tr. 560-566) (SIR App. 305-311) in its opinion. Op. 31.

will apply will be the policies as modified as a result of the elections. Ex. RP-55 at 14, 92; Tr. 300-301, 313 (SIR App. 41, 119; 282-283, 286). As stated in the Plan:

> Policyholder Elections under the Plan will be permanent. This means that if the Plan does not succeed in rehabilitating SHIP fully and the Company has to be placed in liquidation, the policies to which guaranty association coverage and limits . . . will apply will be those as modified as a result of the Policyholder Elections.

Ex. RP-55 at 14 (SIR App. 41).

8. The Plan is highly unlikely to eliminate the funding gap and restore SHIP to solvency, even considering both Phase One and Phase Two. Tr. 80, 306 (SIR App. 237, 284). In all likelihood, the Plan will not eliminate the deficit, just reduce it materially. Tr. 189-190 (SIR App. 266-267).

9. The Plan will not provide all policyholders with an option with a net present value (present value of future benefits less present value of future premiums – the "Carpenter value") at least as great as the net present value in liquidation. Only 85% of policyholders will have at least one Phase One option with a net present value equal to or greater than liquidation. Ex. RP-7; Tr. 183, 185, 510, 512 (SIR App. 226; 262, 264, 296, 298). This 85% rests principally on Option 4. Tr. 510, 512-513, 572; Ex. SIR 5-2 (SIR App. 296, 298-299, 313; 225). Option 4 has the least impact on the funding gap, and it is subject to further adjustment in Phase Two. Tr. 259, 513; Ex. RP-55 at 14 (SIR App. 274, 299; 41).

10. Under state statutes, long term care insurance rates are reviewed and approved by the insurance regulatory official of the state in which the policy is issued. Tr. 155, 157 (SIR App. 249, 251). Each state has its own approach to reviewing rates. Tr. 413-414 (SIR App. 290-291). The Plan does not follow this issue state rate approval process. Ex. RP-55 at 33-34, 96; Tr. 158-159 (SIR App. 60-61, 123; 252-253). It removes state insurance regulators from their role in reviewing rates, which is "unprecedented." Ex. RP-55 at 33-34; Tr. 82 (SIR App. 60-61; 239). The Rehabilitator will not seek approval of rates from state regulators under their statutes but instead from the Commonwealth Court. Ex. RP-55 at 33-34, 96 (SIR App. 60-61, 123).

11. The Plan has an "issue state rate approval" section under which state regulators purportedly may "opt-out" of having the Commonwealth Court approve rates. Ex. RP-55 at 108 (SIR App. 135). The section provides that, unless the "opt-out" state approves the Rehabilitator's rate application, in full, within 60 days, it is deemed denied. Ex. RP-55 at 111 (SIR App. 138). In that case, the options available to policyholders in that state will be more limited than the options available in other states, and the state's policyholders will be disadvantaged. Ex. RP-55 at 109, 116; Tr. 169-170 (SIR App. 136, 143; 257-258). *See* Special Deputy Liquidator's September 30, 2021 Letter at Frequently Asked Questions Response

"Q9" (opting out "is generally expected to be disadvantageous to affected policyholders") (SIR App. 16).

ARGUMENT

I. THE STATE INSURANCE REGULATORS HAVE A COMPELLING CASE ON APPEAL.

The State Insurance Regulators have substantial arguments that the Court's approval of the Plan should be reversed because the Plan is based on errors of law. To warrant approval under 40 P.S. § 221.16, the Plan must be free from any abuse of the Rehabilitator's discretion. *Foster v. Mutual Fire, Marine and Inland Ins. Co.*, 614 A.2d 1086, 1091 (Pa. 1992) ("*Mutual Fire II*"), *cert. denied* 506 U.S. 1080 and 1087 (1993). "It is a paradigmatic abuse of discretion for a court [or the Rehabilitator] to base its judgment upon an erroneous view of the law." *Commonwealth v. Taylor*, 230 A.3d 1050, 1072 (Pa. 2020).

As an initial matter, the State Insurance Regulator may properly raise policyholder interests. In its ruling, the Court held that the State Insurance Regulators lack standing to "assert claims" on behalf of policyholders, adding that it granted limited intervention based on their interests as regulators, not as representatives for policyholders. Stay Op. at 4-5. This cramped view disregards the essential purpose of our nation's state-based insurance regulatory system and its regulators – <u>to protect policyholders</u>.

The State Insurance Regulators are public officials seeking to protect policyholders in furtherance of their public responsibilities. They are long-serving chief insurance regulators, one the longest serving in the United States and another being a past president of the National Association of Insurance Commissioners, and do not take this step lightly. They are not asserting "claims" for policyholders but contending in their regulatory capacity that the Plan unlawfully impairs policyholder interests. As stated in the applications to intervene, the State Insurance Regulators are charged with enforcing state insurance laws and regulating insurers,[5] and they have "a regulatory interest in seeing that contract rights of [the State's] policyholders are respected and that the standards and protections of the statutory rate-setting process are honored." Joint Application for Intervention of the Maine Superintendent of Insurance and the Massachusetts Commissioner of Insurance at 11 ((July 31, 2020) (emphasis added); Joinder of the Washington Insurance Commissioner at 6 (Sept. 15, 2020) (SIR App. 544, 560).

The Court's Orders of September 15 and 18, 2021 granting intervention did not limit the interests the State Insurance Regulators could protect or restrict them to addressing rate review. The State Insurance Regulators sought intervention "for the limited purpose of participating in the proceedings concerning and potentially

[5] *See, e.g.,* 24-A Me. Rev. Stat. § 211; Mass. G.L. c. 175, § 3A; Wash. Rev. Code §§ 48.01.020, 48.02.060.

opposing" the Rehabilitator's Application for Approval of the Plan. Joint Application at 14; Washington Joinder at 8 (SIR App. 547, 562).[6] The Court granted that intervention without qualification (SIR App. 568, 569).

The Court's erroneous reliance on standing serves to prevent this Court's scrutiny of the impact of the Plan on policyholders. It avoids discussion of the undisputed facts that (1) in a present liquidation the guaranty associations would provide over $800 million in support of policy benefits, so that the burden of SHIP's insolvency on its very elderly policyholders would be about $400 million, while under the Plan those policyholders will bear the full $1.2 billion deficit; and (2) the policyholder elections under the Plan are permanent so that policyholder recoveries from guaranty associations in the future liquidation will be limited to the reduced benefits instead of the benefits under the original policies.

These core issues should have been addressed squarely given the Court's supervisory role. This is not private party litigation but a proceeding pursuant to statute for rehabilitation of an insurer with a Plan that will affect the rights of thousands of policyholders across the country. "[T]o warrant the Commonwealth Court's imprimatur," a rehabilitation plan must be found to be free from any abuse of the Rehabilitator's discretion. *Mutual Fire II*, 614 A.2d at 1091. This means

---

[6] The applications sought "limited" intervention because the State Insurance Regulators did not seek to intervene in the rehabilitation proceeding generally but only as to the application for approval of the proposed plan of rehabilitation.

that the Plan must not violate statutory or constitutional requirements. If, as the State Insurance Regulators contend, the Plan is based on an error of law, it constitutes an abuse of that discretion. *See Taylor*, 230 A.3d at 1072; *Bedford Downs Mgt. Corp. v. State Harness Racing Com'n*, 926 A.2d 908, 916 (Pa. 2007). The issues raised by the State Insurance Regulators in their official capacities were properly before the Court, worthy of consideration, and are now ripe for appellate review.

A. The Court Erred In Holding That There Is No Feasibility Requirement And That The Plan Was Feasible In The Absence of Evidence It Is Likely To Restore SHIP To Solvency.

The goal of the Plan as originally presented to the Court was to restore SHIP to solvency – "to restore SHIP to a financially self-sustaining long-term care insurance company." Rehabilitator's Application for Approval of the Plan of Rehabilitation ¶ 2 (April 22, 2020) (SIR App. 22-23). At the hearing, however, the Special Deputy Rehabilitator conceded that "it is not likely that we will magically restore SHIP to solvency." Tr. 80 (SIR App. 237). The Court seemed to acknowledge this (Op. 14, 24-25), but it later said that the Plan "will reduce or eliminate" the funding gap (Op. 78) as if elimination were a reasonable possibility. The Special Deputy Rehabilitator made clear it was not. He testified that: "In all likelihood [the Plan] will not eliminate [the deficit]. In all likelihood, it will just reduce it materially." Tr. 190 (SIR App. 267). Further:

> Q. . . . Yesterday you testified that it was unlikely, I think highly unlikely, that the plan could eliminate the funding gap. Did you mean Phase One or did you mean Phase One and Phase Two?
>
> A. I meant Phase One and Phase Two. . . .

Tr. 306 (SIR App. 284). As the Court implicitly acknowledged, the most that can be said is that the Plan will "materially reduce" the funding gap. *See* Op. 66-67.[7] That the Plan may be intended or designed to eliminate the funding gap is irrelevant. Where the Plan is expected only to materially reduce the funding gap, it is not feasible, as SHIP will still need to be liquidated.

The Court held that feasibility is not required, and that it is sufficient if the Plan reduces the funding gap because it also pursues other goals. This was error.

1. A Rehabilitation Plan Must Be Feasible.

To be approved, a rehabilitation plan for an insolvent insurer must be reasonably likely to restore the insurer to solvency. This commonsense requirement reflects the fact that if the insurer continues to be insolvent after the plan, it will still need to be liquidated. It is not enough that the "ultimate goal" of a plan is to restore the company to solvency if the plan is not actually likely to do so.

---

[7] The Court asserted that the State Insurance Regulators did not offer evidence on this point (Stay Op. at 5), suggesting they were obligated to present a witness. That is incorrect. The Special Deputy Rehabilitator testified on direct examination and the State Insurance Regulators elicited clarifying testimony on cross as described above. The record is clear that the Plan is not expected to restore SHIP to solvency.

Feasibility is a well-recognized requirement. *See* 1 *Couch on Ins. 3d* § 5:24 (2021) ("Above all, the rehabilitation plan must be feasible . . . ."). Contrary to the Opinion (Op. 65), feasibility has been recognized as a requirement in Pennsylvania. *See Sheppard v. Old Heritage Mut. Ins. Co.*, 425 A.2d 304, 310 (Pa. 1980) ("It is clear that [the company] has the burden of showing that rehabilitation is feasible.") (citing *Comm. Ins. Dep't v. Safeguard Ins. Co.*, 336 A.2d 674, 680 (Pa. Commw. 1975)). In *Mutual Fire II*, the Supreme Court detailed the history of the rehabilitator's and trial court's consideration of feasibility. 614 A.2d at 1090. While feasibility was not an issue on appeal, the discussion shows that a rehabilitation plan that is not feasible should not be approved. *See also Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 688 A.2d 233, 234 (Pa. Commw. 1996) (noting that court had required the rehabilitator to report on feasibility and that the initial plan did not proceed because it was not feasible). The feasibility requirement also rests on the statutory standard for conversion to a liquidation. Tr. 90 (SIR App. 241). Where rehabilitation is "futile," it should not proceed. *See* 40 P.S. § 221.18.

Feasibility is particularly important here because the Plan is expressly intended to permanently reduce policyholders' benefits and increase their premiums. Ex. RP-55 at 14, 92 (SIR App. 41, 119). If SHIP is liquidated after the

Plan is implemented, the guaranty associations and liquidation estate will only cover contractual obligations as reduced under the Plan.

2. The Court's Redefinition of Feasibility is Unlikely to be Upheld.

The Court refashioned feasibility, holding that it means "properly conserving and equitably administering the assets of the involved insurer." Op. 66. This deprives feasibility of any meaning. The quoted language from *Mutual Fire II* did not describe the purpose of rehabilitation but only that a plan need not restore the insurer "to its exact original condition." 614 A.2d at 1094.

"The goal of rehabilitation is to manage the affairs of an insolvent insurer with the intended result of restoring the entity to sound fiscal status." *Mutual Fire II* at 1096 (emphasis added). *See Kueckelhan v. Fed. Old Line Ins. Co.*, 444 P.2d 667, 674 (Wash. 1968) (*en banc*) (rehabilitation aims to "restore the company to a viable status for the benefit of the policyholders"). The Plan's feasibility must be measured against the goal of restoring SHIP to solvency.[8]

Where the insurer is insolvent, measuring feasibility against goals other than financial viability is improper. Whatever the merits of the other goals, liquidation will follow if the insurer remains insolvent. Rehabilitation must be reasonably

[8] The State Insurance Regulators have not contended that feasibility requires SHIP to resume operation as an insurer writing insurance in the market, only that the Plan (assuming it were otherwise proper) must be reasonably likely to restore SHIP to solvency so that it can run off its obligations paying them in accordance with the options selected pursuant to the Plan.

likely to avoid liquidation, and not just serve as a means to reduce policyholders' contract rights on the way to liquidation.

B. The Plan Is Contrary To Law By Disregarding The Financial Interest Of Policyholders And The Guaranty Association System.

The Court's approval of the Plan is an unprecedented departure from the fundamental goal of insurer rehabilitations – to protect to the maximum extent possible the contractual rights of policyholders. Instead of seeking to protect those contract rights, the Court approved reductions in those rights on the theory that the policies were historically "underpriced." Op. 43, 51, 63-64. The Court explicitly rejected triggering the insurance guaranty associations established to protect policyholders' contract rights because that would impose a burden on the association's insurer members and, ultimately, taxpayers. Op. 45, 63, 81. The Court also relied on its view that the state-based rate approval system resulted in "discriminatory" rates contrary to the public good. Op. 45, 68-69, 80-81.

The Court's approval of the Plan on these policy grounds is contrary to the purpose of the rehabilitation statute to protect policyholders to the maximum extent possible and frustrates the legislative judgment that the policyholders of insolvent insurers warrant guaranty association coverage. "[T]he power of courts to formulate pronouncements of public policy is sharply restricted. . . . Generally speaking, the Legislature is the body to declare the public policy of a state and to

ordain changes therein." *Conway v. Cutler Grp., Inc.*, 99 A.3d 67, 72 (Pa. 2014) (quoting *Mamlin v. Genoe (City of Phila. Police Beneficiary Ass'n)*, 17 A.2d 407, 409 (Pa. 1941)). Contrary to the Court's assertion that this is a question of discretion (Stay Op. 6), it is a matter of law. The Court improperly disregarded the statutory mandates to advance its policy views at the expense of policyholders.

1. The Plan Is Adverse to the Best Financial Interest of Policyholders.

SHIP is massively insolvent, with a deficit of $1.2 billion. Accordingly, it could be placed in liquidation on grounds of insolvency, *see* 40 P.S. § 221.19, § 221.14(1), which would trigger guaranty association coverage. The undisputed evidence, based on the Rehabilitator's own Comparison File, is that in a liquidation the guaranty associations would provide over $800 million in additional support, so that in liquidation the policyholders would bear a loss of only $397 million from SHIP's insolvency. Ex. SIR-5-1; Tr. 564-566 (SIR App. 224; 309-310). While the Court acknowledged this (Op. 31-32), its decision disregards this undisputed adverse financial impact on policyholders.

Under the Plan, the entire $1.2 billion burden of SHIP's insolvency rests on SHIP's 30,000 remaining non-NFO policyholders through benefit cuts and premium increases. The benefits foregone under the Plan will be given up permanently, and they cannot form the basis for a claim to guaranty association benefits or a liquidation dividend in any subsequent liquidation. In a present

liquidation, by contrast, the policyholders stand to receive the benefit of guaranty association coverage based on their original policies plus potentially a liquidation dividend on the excess.

The Rehabilitator and Court thus chose to place the entire burden of the insolvency on the remaining policyholders and to forgo over $800 million in guaranty association support that in a liquidation would fill much of the funding gap, spread the loss, and reduce the burden of insolvency on policyholders.

2. Intentionally Placing the Burden of Insolvency Solely on Policyholders is Contrary to the Purpose of the Rehabilitation Statute.

This disregards the fundamental purpose of the rehabilitation statute – to protect policyholders by preserving their contract rights to the maximum extent possible. A rehabilitator's "first duty [is] to the 'grave and important public interest' in not depriving the . . . policyholders of the protection of their policies." *In re Exec. Life Ins. Co.*, 38 Cal. Rptr. 2d 453, 465 (Cal. Ct. App. 1995) (emphasis added) (quoting *Carpenter v. Pacific Mut. Life Ins. Co. of Cal.*, 74 P.2d 761, 775 (Cal. 1937) ("*Carpenter*"), *aff'd sub nom. Neblett v. Carpenter*, 305 U.S. 297 (1938) (brackets omitted)). The goal of rehabilitation is not just to restore the company to solvency, but to do so in a way that benefits policyholders. *See Kueckelhan*, 444 P.2d at 674 (rehabilitation aims to "restore the company to a viable status for the benefit of the policyholders") (emphasis added). A

rehabilitation plan must minimize harm to policyholders, as the statutes aim to protect them. *See* 40 P.S. § 221.16.

To support its efforts to "correct" historical underpricing and rates and avoid burdening those who fund the guaranty associations, the Court relied on general statements in *Mutual Fire II* that rehabilitation is intended to protect "the public good." *See* Op. 42-44 (quoting *Mutual Fire II,* 614 A.2d at 1094 & n. 4). *See* 40 P.S. § 221.1. Those generalized statements, however, do not address the question here: whether a plan can advantage other persons to the detriment of policyholders. That issue was not presented in *Mutual Fire II*. Indeed, the Supreme Court recognized the primacy of policyholder interests elsewhere in that decision. *See Mutual Fire II*, 614 A.2d at 1100 ("If, after all, insurance is to perform its function of risk assumption and distribution of loss, then those statutes which govern it must first protect the insuring public.") (quoting *Grode v. Mutual Fire, Marine and Inland Ins. Co.*, 572 A.2d 798, 807 (Pa. Commw. 1990) ("*Mutual Fire I*") (emphasis added); *id*. at 1102 (referring to "the ultimate goal of this process, the overall good of the general public and the insurer's policyholders") (emphasis added); *id*. at 1104 (referring to "the statutorily charged duty of the Rehabilitator to protect the interests of Mutual Fire insureds") (emphasis added). The Supreme Court's initial, general statements do not provide the Rehabilitator with a roving

commission to adjust contract rights and refuse guaranty association support as she chooses.

The rehabilitation statute is limited. It provides for a rehabilitator to "correct" the conditions that constituted the ground for the rehabilitation order (here, insolvency), not to require the policyholders to exclusively bear the consequences. 40 P.S. § 221.16(b), (d). A rehabilitator is to honor policies to the extent possible and treat policyholders equally. *See* 40 P.S. § 221.15(d) (rehabilitation order "shall not constitute an anticipatory breach of any contracts of the insurer"); 40 P.S. § 221.44 (preferring policy obligations by giving them priority and prohibiting subclasses within a priority class). The statutes do not contemplate that a rehabilitator will decide that policyholders have been "underpaying" for "Cadillac" policies and should have their benefits cut. Tr. 78, 102 (SIR App. 235, 242). This may leave SHIP as an entity in "better shape" (Op. 25), but its policyholders are worse off. A plan that only attempts to materially reduce the size of the insolvency at the sole expense of policyholders, but still leaves the company insolvent, is not a proper rehabilitation plan.

3. The Court Improperly Rejected Guaranty Association Protection for Policyholders.

The Court approved the Plan because, in its view, SHIP's policyholders should have paid more for their coverage so that it is "unjustified" to seek to trigger the guaranty associations because that would burden others through the

assessment mechanism. Op. 43, 45, 63, 81. This rationale is legally erroneous. The Court's view that it "serves the public good" (Op. 43) to avoid triggering guaranty associations is contrary to the very purpose of having such associations. The legislatures in Pennsylvania and other states have chosen to protect policyholders of insolvent insurers by establishing guaranty associations to provide coverage (subject to certain limits), and they have chosen how to spread the burden of those protections through the assessment mechanism. It is not within the Rehabilitator's or Court's discretion to reject these statutory protections because they deem the policyholders unworthy of guaranty association support. *See Weaver v. Harpster*, 975 A.2d 555, 563 (Pa. 2009) ("[I]t is for the legislature to formulate the public policies of the Commonwealth.")

Guaranty associations have been established around the country to protect policyholders by fulfilling the insolvent insurer's contractual obligations (subject to statutory limits). For instance, the Pennsylvania guaranty association statute provides:

> The purpose of this article is to protect, subject to certain limitations, [policyholders] against failure in the performance of contractual obligations, under life, health and annuity policies, plans or contracts . . . because of the impairment or insolvency of the member insurer that issued the policies, plans or contracts.

40 P.S. § 991.1701. *See Pennsylvania Life and Health Ins. Guar. Assn. v. Pennsylvania Ins. Dept.*, 218 A.3d 9, 14 (Pa. Commw. Ct. 2019); *cf. Illinois Ins.*

Guar. Fund v. Reliance Ins. Co. in Liquidation, 88 A.3d 313, 317 (Pa. Commw. Ct. 2014) (referring to "the primary policy objective of the [property/casualty guaranty association] Act to protect innocent policyholders whose insurance carriers have become insolvent"). The statutes do not limit guaranty association coverage based upon the insufficiency of premiums that the policyholders paid in the past. They seek to honor the insurer's contractual obligations, subject to specific limits. *E.g.*, 40 P.S. § 991.1703, § 991.1706(b).

The legislatures also chose how to allocate the burden of honoring the insurer's contractual obligations. The guaranty association statutes generally fund the associations through assessments on member insurers. *See, e.g.*, 40 P.S. § 991.1707. They typically permit the member insurers to offset the assessments against their premium tax obligations or to recoup assessments by a surcharge on premiums. *See, e.g.*, 40 P.S. § 991.1711. The legislatures chose to spread the burden of an insurer's insolvency broadly, including on taxpayers, not to focus it exclusively on the insurer's policyholders.

The Court improperly overrode these legislative judgments.

C. The Court Misapplied *Neblett v. Carpenter*.

The State Insurance Regulators also have substantial arguments that the Plan fails to satisfy the requirement of *Neblett v. Carpenter*, 305 U.S. 297 (1938), that the Plan must place policyholders in no worse off a position than they would

face in a liquidation of SHIP. Contrary to the Court's opinion (Op. 62-64), this fundamental standard was recognized by the Supreme Court in *Mutual Fire II*, 614 A.2d at 1093-94 ("Under *Neblett*, creditors must fare at least as well under a rehabilitation plan as they would under a liquidation . . . ."), at 1096 (plan provision "ensures that the creditors herein, at a minimum, will fare at least as well under the rehabilitation as they would in a liquidation proceeding as mandated by the holding of *Neblett*"), and at 1096 n. 6 (noting "the fundamental right of the creditors to be treated, at a minimum, as well under the rehabilitation as they would in a liquidation").[9]

Under this standard, the Plan must provide policyholders with an option that provides at least the value of the policyholder's policy in liquidation. *See Neblett,* 305 U.S. at 305 (policyholders were not forced to accept policy modifications "but are given the option of a liquidation which on this record appears as favorable to them as that which would result from the sale of the assets and pro rata distribution in solution of all resulting claims for breach of outstanding policies."). The

[9] The Commonwealth Court previously shared this understanding of *Neblett*. In the decision leading to *Mutual Fire II,* the Commonwealth Court said "[T]he Rehabilitator agrees that *Neblett* requires claimants be treated the same or better than in liquidation. We shall not belabor this point except to agree with the parties that the Plan must also be viewed in the light of this principle." *Mutual Fire I*, 572 A.2d at 804. *See also Koken v. Fidelity Mut. Life Ins. Co.*, 907 A.2d 1149, 1155 (Pa. Commw. Ct. 2006) ("Under the Plan, [creditors] have received or will receive at least as much as they would receive in a forced liquidation, as is required if a rehabilitation plan is to be deemed fair and equitable," citing *Mutual Fire II*.

Supreme Court in *Mutual Fire II* did not replace the *Neblett* standard with the three-part test of *Energy Reserves Grp., Inc. v. Kansas Power and Light*, 459 U.S. 400 (1983). It treated them as two separate issues.

Neblett established a floor of liquidation value that each policyholder should be able to obtain if desired. It is undisputed that the Plan fails to provide every policyholder with such an option based on the "Carpenter value" of net present value (present value of benefits less present value of premiums). Based on the Rehabilitator's own Comparison File, only 85% of policyholders have such an option in Phase One. Op. 65. Moreover, this percentage falls sharply if Phase Two is considered. The Court cited evidence showing that the 85% figure principally reflects the availability of Option 4 in Phase One, that Option 4 is subject to benefit reductions and premium increases in Phase Two, and that premium increases alone can bring the percentage of policyholders with net present value in excess of liquidation value below 50%. Op. 31-32. However, the Court did not address the significance of these points.

The Court instead rejected the net present value "Carpenter value" relied on by the State Insurance Regulators (and, initially, by the Rehabilitator) in favor of the Rehabilitator's new "maximum policy value" approach. Op. 65. This does not comport with *Neblett*. The United States Supreme Court there set the constitutional floor as the value that would result "from the sale of the assets and

pro rata distribution in solution of all resulting claims for breach of outstanding policies." *Neblett*, 305 U.S. at 305. That is the expected value of a policyholder's claim at the time of the breach, which is the policy's net present value, not its policy limit. As stated in a leading treatise:

> The measure of damages adopted must be that which will, as nearly as possible, put the policyholders in as good a financial position as they would have been in if there had been no breach, which has been calculated as the present value of the benefits that would have been payable if there had been no insolvency, less the present value of the gross premiums which would have become payable upon the policies.

1 *Couch on Ins. 3d* § 6:1 (2021) (footnotes omitted) (citing *Commissioner of Ins. v. Massachusetts Acc. Co.*, 50 N.E.2d 801, 808-809 (Mass. 1943)).

The "maximum policy value" of a policy is not the value of a claim for breach of the policy. It is just the maximum amount that a policy could pay. *See* Ex. RP-55 at 126 (defining "Maximum Policy Value" as the Maximum Daily Benefit times the Maximum Benefit Period) (SIR App. 153). It is an "outer boundary" (Tr. 468) (SIR App. 293) that does not consider the likely amount (projected value) of a claim or the cost (projected premiums) of the policy. RP-55 at 126 (SIR App. 153). Maximum policy value is not an economic value, and it is not a proper measure for the constitutional standard under *Neblett*.

D. The Court Erred In Overriding The States' Regulatory Authority Over Rates.

The State Insurance Regulators also have strong grounds to contend that the Court's approval of the Plan should be overturned because the Plan's rate provisions exceed the Rehabilitator's authority under the Pennsylvania statutes and violate the Full Faith & Credit Clause. Rate regulation has long been committed to the individual States. *See* 1 *Couch on Ins. 3d* § 2:31 (2021); *German All. Ins. Co. v. Lewis*, 233 U.S. 389 (1914); *Ins. Dep't v. City of Phila.*, 173 A.2d 811, 813 (Pa. Super. Ct. 1961). The states regulate rates for long-term care insurance by providing for review by the insurance regulator of the State in which the policyholder resided when the policy was issued and judicial review in the courts of that State. *See, e.g.,* 24-A Me. Rev. Stat. § 2736; Mass. Gen. Laws ch. 175, § 108; Wash. Rev. Code § 48.19.010(2), §§ 48.83, 48.84, § 48.18.110. The Court improperly overrode these statutes.[10]

This presents an important question of first impression. The Rehabilitator acknowledges that this aspect of the Plan is "unprecedented," Tr. 82 (SIR App. 239), and the State Insurance Regulators are not aware of any plan of rehabilitation that has purported to supersede state regulation and set rates payable by

[10] Contrary to the Court's assertion (Stay Op. at 7), the statutory basis for state rate regulation was cited in the State Insurance Regulators' Application at 23 (SIR App. 336).

policyholders in other states without review and approval by the insurance regulators of those states.

1. The Rehabilitation Statute Does Not Authorize Displacement of State Regulatory Authority.

The Court's expansive view of the Rehabilitator's powers (Op. 49-50) is not consistent with the statutory language. "A creature of statute, such as the Insurance Commissioner acting as rehabilitator, can only exercise those powers which have been conferred by the Legislature in clear and unmistakable language." *Koken v. Legion Ins. Co.*, 831 A.2d 1196, 1227 (Pa. Commw. Ct. 2003). The statutes do not authorize the Rehabilitator and Court to impose rates in disregard of the long-standing state-based system for review and approval of insurance rates. The rehabilitation statutes provide the Rehabilitator with control over assets and the business of the insurer. They do not oust state regulation of the insurer.

An order to rehabilitate an insurer "shall appoint the commissioner . . . rehabilitator and shall direct the rehabilitator forthwith to take possession of the assets of the insurer . . . and to administer them under the orders of the court." 40 P.S. § 221.15(c). Subject to court approval, a 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." 40 P.S. § 221.16(b). Nothing in this language provides the rehabilitator with authority beyond the insurer itself. Its limited scope is confirmed by the sentences that

follow, which specify that the rehabilitator "shall have all the powers of the directors, officers and managers" and "full power to direct and manage, to hire and discharge employees subject to any contract rights they may have, and to deal with the property and business of the insurer." *Id*. (emphasis added). The statutes authorize the Rehabilitator to manage SHIP. *See Koken*, 831 A.2d at 1227-1228. They do not authorize her to disregard State regulation.[11]

Nor does the provision for rehabilitation plans exempt insurers in rehabilitation from State regulation. A rehabilitator may "prepare a plan for the reorganization, consolidation, conversion, reinsurance, merger or other transformation of the insurer." 40 P.S. § 221.16(d). This does not authorize a rehabilitator to change contracts and rates without required regulatory approvals. Nothing in the text allows the Rehabilitator or Court to supplant otherwise applicable regulatory authority over the business of the insurer in other States.

A domiciliary state has an interest in rehabilitation, but it is not "overriding" (Op. 52). The rehabilitation statutes recognize that a rehabilitator must seek relief from courts in other jurisdictions as to litigation in other states. 40 P.S. § 221.5(b) ("The receiver may apply to any court outside of the Commonwealth for the relief

[11] The language describing Article V's purpose further demonstrates the intent to authorize displacement of private, not public actors: "The purpose of this article is the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers . . . ." 40 P.S. § 221.1(c) (emphasis added). *See also* 40 P.S. § 221.6 (requiring cooperation by officers and employees).

described in subsection (a) or suspension of any insurance licenses issued by the commissioner."); 40 P.S. § 221.17(a). Article V also specifies that it "shall not be interpreted to limit the powers granted the commissioner by other provisions of the law." 40 P.S. § 221.1(a). Where the Article expressly does not limit the Pennsylvania Commissioner's regulatory authority, it cannot reasonably be interpreted to limit the regulatory authority of other States.

The purpose of rehabilitation is "to rehabilitate the business of an insurer," 40 P.S. § 221.15(b), not to supersede regulation of the insurer. *Cf. Koken v. Fidelity Mut. Life Ins. Co.*, 803 A.2d 807, 826-827 (Pa. Commw. 2002). (rehabilitation plan provided that "FLIC obtain all necessary regulatory approvals to do business in the respective states"). The Plan's displacement of other states' regulatory authority exceeds statutory authority and is likely to be reversed.

2. The Full Faith & Credit Clause Protects Other States' Regulation Over Rates.

Finally, the State Insurance Regulators have compelling arguments that the Court's ruling concerning the Full Faith and Credit Clause is erroneous. The clause "was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others." *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Milwaukee Cnty. v. M.E. White Co.*, 296

U.S. 268, 277 (1935)). The Court's view that it can set rates in other states and supersede their statutes requiring review by their officials violates this command.

Insurance rates are a matter of particularly local concern and regulation, and the States have placed responsibility for rates on their own insurance officials. *See* page 31 above. The cases cited by the Court do not support extraterritorial jurisdiction to set rates in other states. The Plan works more than a "change[] in forum" (Op. 58), and the Court's assertion that the rate setting statutes are all essentially alike (Opp. 57) ignores the evidence that rates have historically varied across states, and that state rate setting practices differ. *See* Ex. RP-55 at 88; Tr. 413-414 (SIR App. 115; 290-291). *See* Op. 14, 28. A Pennsylvania court cannot dictate to other States what rates are to be applied to policies issued in those States, nor can it require that they "surrender[]" (Tr. 169) (SIR App. 257) their authority and substitute itself (or the Pennsylvania Commissioner) for the officials designated to review rates.

The Court's decision reflects hostility to state-based rate setting and the different rates that may result from it. *See* Op. 14-15 (describing rate structure resulting from different responses of state regulators to SHIP's requested rate increases as "discriminatory" and "inequitable"), 43, 60, 80. Indeed, the Court states an intent to use the Full Faith and Credit Clause as a sword to compel other states to respect its judgment to disregard their statutes and arrogate to itself the

power to set rates. Op. 61-62. It thus seeks to "require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *See Franchise Tax Bd. Of Cal. v. Hyatt*, 136 S. Ct. 1277, 1281 (2016) (quoting *Carroll v. Lanza*, 349 U.S. 408, 412 (1955)).

The Court also erred in holding that the Plan's "issue state rate approval" section cured the constitutional violation by allowing state insurance regulators to "opt-out" of the Plan's rate-setting mechanism. That provision does not allow state regulators to apply their statutes and meaningfully review rates. The undisputed evidence is that it imposes requirements as to timing and methodology for the various states to follow, and penalties if they do not. Ex. RP-55 at 111; Tr. 410-414 (SIR App. 138; 287-291). It requires that "opt-out" states approve the Rehabilitator's seriatim rate application in full within 60 days, absent which their policyholders will face different options from policyholders in other states. The Court downplays the differences by allowing only that the options under the provision "are not exactly the same" (Op. 58). This disregards the evidence. The Plan itself acknowledges that the options are likely to be worse, Ex. RP-55 at 109 (SIR App. 136), and the Special Deputy Rehabilitator testified that "[i]n terms of policyholders, we think that [states opting out] will be harmful." Tr. 170 (SIR

App. 258).[12] Indeed, the Rehabilitator has recently advised regulators that in her view opting out "may not be in the best interest of the affected policyholders." *See* Rehabilitator's Letter to Commissioners dated August 26, 2021 at 1 (SIR App. 20). *See also* Special Deputy Rehabilitator's Letter to Commissioners dated September 30, 2021 at 6 (Q1), 7-8 (Q8, Q9) (SIR App. 14, 15-16).

This is coercive. The Plan seeks to present the appearance of deference to State rate review while in fact requiring the States to approve the Rehabilitator's rates, in full, on pain of punishing policyholders in the State.

II. ABSENT A STAY, REGULATORS AND POLICYHOLDERS WILL SUFFER IRREPARABLE INJURY.

The Rehabilitator is moving to implement the Plan. *See* Notice of Filing of Approved Plan, Ex. A at 19; Special Deputy Rehabilitator's September 30 Letter (SIR App. 7; 9). This is likely to irreparably harm both policyholders and regulators because they will be forced to make decisions that may not be reversable even if the Court's decision is reversed. (The Court's narrow focus on the State Insurance Regulators, *see* Stay Op. 8, allowed it to avoid addressing the impact of the Plan and the denial of a stay on policyholders. This is anomalous.

[12] The Court asserts that the State Insurance Regulators did not offer evidence concerning the "opt out" provision (Stay Op. 8), implicitly suggesting that the State Insurance Regulators were obligated to call a witness. That is incorrect. As discussed above, the Plan and the testimony (direct and cross) of the Rehabilitator's witnesses provides all the necessary evidentiary record for the State Insurance Regulators' position.

Policyholders should be the central consideration in rehabilitation plan proceedings.)

First, most imminently, state insurance regulators face the November 15, 2021 "opt-out" deadline. By that date, the State Insurance Regulators and other regulators across the country will be required to decide whether or not to "opt-out" of the Plan's rate approval provision. A regulator can only "opt-out" before the opt-out deadline; otherwise he or she is deemed to have "opted" into the Plan. Ex. RP-55 at 109-110 (SIR App. 136-137).

This requires insurance regulators to decide whether to nominally retain the appearance of rate review under their states' laws at the expense of policyholders in the State. As noted above, if an "opt-out" regulator does anything other than approve the Rehabilitator's rate proposal in full within 60 days (*see* Ex. RP-55 at 111) (SIR App. 138), the policyholders in the State will be disadvantaged by being left with options that are worse than those available in other states. This is spelled out in the Plan (Ex. RP-55 at 109) (SIR App. 136) and in the Frequently Asked Questions attachment to the Special Deputy Rehabilitator's September 30, 2021 Letter at 6, 7-8 (SIR App. 14, 15-16).[13]

[13] FAQ Responses "Q1" and "Q8" note that "opt-out policyholders" in opt-out states will not have the same options as "opt-in policyholders" in that three options will not be available to them. Response "Q1" notes that in certain circumstances, opt-out policyholders may end up paying a higher premium than they would if the state had not opted out. Response "Q9" states

The Plan thus requires insurance regulators to act on behalf of the policyholders whose policies were issued in their states. It positions regulators to either acquiesce in the Rehabilitator's and Court's usurpation of their role in reviewing rates or to approve the rates in full within sixty days on pain of placing policyholders in their states in a worse position than policyholders in other states.

Second, starting around year-end 2021 and through March 2022, SHIP's policyholders will be required to select options under the Plan that will permanently reduce their contract benefits. *See* Ex. RP-55 at 14, 92 (SIR App. 41, 119). This reduces their rights not only against SHIP but also against guaranty associations. As stated in the Plan:

> Policyholder Elections under the Plan will be permanent. This means that if the Plan does not succeed in rehabilitating SHIP fully and the Company has to be placed in liquidation, the policies to which guaranty association coverage and limits . . . will apply will be those as modified as a result of the Policyholder Elections.

Ex. RP-55 at 14 (SIR App. 41). Options 1 through 3 under the Plan reduce policy benefits, so policyholders who elect those options will be placed in a worse position in the event SHIP is liquidated after Phase One. As discussed above in connection with feasibility, it appears that liquidation is inevitable.

---

that opting out "is generally expected to be disadvantageous to affected policyholders." (Emphasis added).

The Rehabilitator has contended that the $800 million in guaranty association support will still be available if SHIP is liquidated after the Plan is implemented. This is erroneous. The $800 million in guaranty association support is calculated based on the existing SHIP policy obligations. If those obligations are reduced by policyholders selecting options under the Plan, then the contribution of guaranty associations in a liquidation will also be reduced. Policyholder elections that reduce policyholders' contract benefits reduce their rights as against SHIP and also against guaranty associations in the liquidation that will inevitably follow, potentially by hundreds of millions of dollars.

Thus, absent a stay, the Plan will impair the contract rights of the affected policyholders and require regulators to take steps that may be detrimental to policyholders in their states. The required elections and "opt-outs" under the Plan will fix contractual rights, and they are intended to be permanent. They will be "effective" sometime around April 2022, at which point the policyholders will begin receiving reduced benefits and paying revised premiums in accordance with the Plan. *See* Notice of Approved Plan, Ex. A at 19 (SIR App. 7).

These steps could potentially be undone by deeming the policyholder elections and regulator opt-outs nullities in the event the Court's approval is reversed. However, it will be administratively difficult and confusing to the

policyholders and regulators to undo those steps. A stay preserving the *status quo* would prevent such problems.

The Rehabilitator contended, with respect to state rate approval, that the harm to the State Insurance Regulators is reparable if the Plan is reversed. Rehabilitator's Opposition at 31. The Court agreed. Stay Op. 8. However, neither the Rehabilitator nor the Court clearly contended that the harm to policyholders is reparable. The State Insurance Regulators expressed concern that the Rehabilitator may later contend that the Plan has been "substantially consummated" so that the appeal should be dismissed under the doctrine of equitable mootness. *See, e.g., In re Tribune Media Co.*, 799 F.3d 272, 277 (3d Cir. 2015). The Rehabilitator responded by carefully noting that the doctrine rests on equitable considerations and expressly taking "no position" on its potential applicability. Rehabilitator's Opposition at 31-32. The Court also declined to express any view on potential equitable mootness. Stay Op. 9, n.7.

The State Insurance Regulators believe that the equitable mootness doctrine should not apply. There is a "strong presumption that appeals from confirmation orders of reorganization plans . . . need to be decided," *Tribune Media*, 799 F.3d at 278. Further, "third parties with interests protected by equitable mootness generally rely on the emergence of a reorganized entity from court supervision," *Id*. at 280, and that will not happen here for a long time if ever, as the

implementation of the Plan is subject to the continuing jurisdiction of the Court. However, given the significant contractual interests at stake for the policyholders and the important regulatory interests at stake for the regulators, the possibility that review could be denied if the Plan goes forward warrants a stay.

III. ISSUANCE OF A STAY WILL NOT HARM OTHER INTERESTED PERSONS.

Issuance of a stay pending appeal will not harm other interested persons. It will preserve the *status quo*. SHIP's policyholders have paid the lawfully approved rates for their coverage, and they will continue to do so. Policyholders who are on claim will continue to receive claim payments as they have during the pendency of the Rehabilitator's application for approval of the Plan. The intervenor agents and brokers have settled. The intervenor health insurers will not need to pay guaranty association assessments.

The Rehabilitator contended that SHIP's insolvency will increase during the appeal, and that this will reduce amounts that can be paid to policyholders. The Court agreed. Stay Op. 9-10. However, this reflects the intended working of the Plan, which places the entire burden of SHIP's insolvency on policyholders through benefits cuts and premium increases and specifically avoids triggering guaranty associations. *See* Op. 45, 63. The State Insurance Regulators' appeal, by contrast, seeks to protect policyholders by triggering guaranty associations.

The Court responded to this by citing an abstract preference for rehabilitation. *See* Stay Op. 10. But that fails to address the concrete harm from the Plan, which places the burden of insolvency on the policyholders. By contrast, if the State Insurance Regulators are correct and guaranty associations must be triggered, then an additional $800 million in support for policyholders will be available. *See* Op. 31-32. The balance of a somewhat deeper insolvency against the benefit of reversal weighs in favor of a stay. Under the Plan, the policyholders will bear the full existing $1.2 billion deficit, while a successful appeal will bring $800 million in guaranty association support and reduce the burden of insolvency on policyholders to approximately $400 million.

IV. ISSUANCE OF A STAY WILL NOT HARM THE PUBLIC INTEREST.

Nor will a stay adversely affect the public interest. The State Insurance Regulators pursue this appeal to protect the financial interests of policyholders that are intended to be protected by the rehabilitation statutes and the guaranty association system, and also the interests of regulators in their statutory role in reviewing the rates charged for policies issued in their states.

The Rehabilitator contends that delaying benefit cuts and premium increases under the Plan will increase SHIP's insolvency and thus the burden on the guaranty associations, their member insurers and, in many States, on taxpayers when SHIP is liquidated. That is not cognizable "harm" to the public interest. As described

above, the guaranty associations were created specifically to protect policyholders in the event of an insolvency (*see, e.g.*, 40 P.S. § 991.1701) by honoring the insurer's contractual obligations, subject to specific limits. *E.g.*, 40 P.S. § 991.1703, § 991.1706(b). The legislatures determined how to allocate the burden of that protection. *See, e.g.*, 40 P.S. § 991.1707, § 991.1711. Where the legislatures have chosen to provide protection to policyholders and how to fund that protection, allowing that process to work is not contrary to the public interest. Similarly, the legislatures have chosen to place rate review with their regulatory officials, and protecting that statutory choice and the application of the States' rate approval statutes is not contrary to the public interest.

CONCLUSION

For the above reasons, the State Insurance Regulators request that the Supreme Court issue an order staying the trial court's Orders approving the Plan pending appeal.

November 8, 2021

Respectfully submitted,

By: Steve Harvey Law LLC,

/s/ Stephen G. Harvey

Stephen G. Harvey
steve@steveharveylaw.com
1880 John F. Kennedy Blvd.
Suite 1715
Philadelphia, PA 19103
Tel. 215-438-6600

Attorneys for the Maine Superintendent of Insurance, the Massachusetts Commissioner of Insurance, and the Washington Insurance Commissioner

Of Counsel:

J. David Leslie
dleslie@rackemann.com
Eric A. Smith
esmith@rackemann.com
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110-1700
Tel. 617-951-1131
Tel. 617-951-1127
(*pro hac vice* pending)

Counsel to the Maine Superintendent of Insurance, the Massachusetts Commissioner of Insurance, and the Washington Insurance Commissioner and Massachusetts Special Assistant Attorneys General and Washington Special Assistant Attorneys General

Received 11/8/2021 12:14:16 PM Supreme Court Middle District

Filed 11/8/2021 12:14:00 PM Supreme Court Middle District
71 MAP 2021

IN THE
SUPREME COURT OF PENNSYLVANIA

IN RE: SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA (IN REHABILITATION)	**:**	**No. 71 MAP 2021**

APPEAL OF: THE SUPERINTENDENT OF INSURANCE OF THE STATE OF MAINE, THE COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON

STATE INSURANCE REGULATORS' APPENDIX REGARDING APPLICATION FOR STAY PENDING APPEAL INCLUDING BRIEFS USED IN THE TRIAL COURT

Stephen G. Harvey
steve@steveharveylaw.com
1880 John F. Kennedy Blvd.
Suite 1715
Philadelphia, PA 19103
Tel. 215-438-6600
Attorneys for the Maine Superintendent of Insurance, the Massachusetts Commissioner of Insurance, and the Washington Insurance Commissioner

Of Counsel:
J. David Leslie (*pro hac vice* pending)
dleslie@rackemann.com
Eric A. Smith (*pro hac vice* pending)
esmith@rackemann.com
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110-1700
Tel. 617-951-1131
Tel. 617-951-1127

Counsel to the Maine Superintendent of Insurance, the Massachusetts Commissioner of Insurance, and the Washington Insurance Commissioner and Massachusetts Special Assistant Attorneys General and Washington Special Assistant Attorneys General

No.	Material Cited in SIR Application for Stay Pending Appeal	SIR App. Page
1	Notice of Filing of Approved Plan of Rehabilitation (September 24, 2021) with page 19 from Exhibit A (the Approved Plan as substituted by Praecipe to Substitute Approved Plan of Rehabilitation (September 30, 2021) and directed by Order dated October 28, 2021)	4
2	Special Deputy Liquidator's Letter to Commissioners dated September 30, 2021 (Exhibit 1 to State Insurance Regulators' Application for Expedited Ruling on Application for Stay (November 2, 2021))	8
3	Rehabilitator's Email to Commissioners dated September 20, 2021 (Exhibit A to State Insurance Regulators' Application for Stay Pending Appeal (October 1, 2021))	19
4	Rehabilitator's Letter to Commissioners dated August 26, 2021 (Exhibit B to State Insurance Regulators' Application for Stay Pending Appeal (October 1, 2021))	20
5	Rehabilitator's Application for Approval of Plan of Rehabilitation (April 22, 2020), without exhibit	22
6	Hearing Ex. RP-55 (the Second Amended Plan of Rehabilitation)	28
7	Hearing Ex. SIR 5-1	224
8	Hearing Ex. SIR 5-2	225
9	Hearing Ex. RP-7	226
10	Excerpts from Transcript of Hearing held May 17-21, 2021	228
11	State Insurance Regulators' Application for Stay Pending Appeal (October 1, 2021) (Exhibits omitted, see above)	314
12	Rehabilitator's Answer and Brief in Opposition to the Intervenor State Insurance Regulators' Application for Stay Pending Appeal (October 15, 2021)	351

IN THE SUPREME COURT OF PENNSYLVANIA

No. 71 MAP 2021

In Re: Senior Health Insurance Company of Pennsylvania
(In Rehabilitation)

Appeal from the Order of the Commonwealth Court Entered on August 24, 2021 in 1 SHP 2020

MOTION FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE STATE INSURANCE REGULATORS
[Identified on Following Page]

November 12. 2021

Butler Snow LLP
James J. Lawless, Jr. (PA. I.D. No. 50848)
1414 Millard Street
Bethlehem, PA 18018
Jim.Lawless@butlersnow.com
Telephone: (610) 691-3308| Fax: (610) 691-8507
Counsel for Proposed Amici Curiae State Insurance Regulators

Proposed Amici Curiae State Insurance Regulators

ARKANSAS INSURANCE DEPARTMENT, BY ALAN MCCLAIN, COMMISSIONER
CONNECTICUT INSURANCE DEPARTMENT, BY ANDREW N. MAIS, COMMISSIONER
IDAHO DEPARTMENT OF INSURANCE, BY DEAN L. CAMERON, DIRECTOR
DOUGLAS M. OMMEN, INSURANCE COMMISSIONER OF THE STATE OF IOWA
LOUISIANA DEPARTMENT OF INSURANCE, BY JAMES J. DONELON, COMMISSIONER
MARYLAND INSURANCE ADMINISTRATION, BY KATHLEEN A. BIRRANE, COMMISSIONER
MISSISSIPPI DEPARTMENT OF INSURANCE, BY MIKE CHANEY, COMMISSIONER
TROY DOWNING, MONTANA COMMISSIONER OF SECURITIES AND INSURANCE AND STATE AUDITOR
NEW HAMPSHIRE DEPARTMENT OF INSURANCE, BY CHRISTOPHER R. NICOLOPOULOS, COMMISSIONER
NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, BY MAUREEN CARIDE, COMMISSIONER
HON. RUSSELL TOAL, SUPERINTENDENT OF INSURANCE FOR THE STATE OF NEW MEXICO
NORTH CAROLINA DEPARTMENT OF INSURANCE, BY MIKE CAUSEY, COMMISSIONER
NORTH DAKOTA INSURANCE DEPARTMENT, BY JON GODFREAD, COMMISSIONER
OKLAHOMA DEPARTMENT OF INSURANCE, BY GLEN MULREAY, COMMISSIONER

[*continued on next page*]

SOUTH CAROLINA DEPARTMENT OF INSURANCE, BY RAYMOND G. FARMER, DIRECTOR
SOUTH DAKOTA COMMISSIONER OF INSURANCE, BY LARRY DEITER, DIRECTOR
UTAH INSURANCE DEPARTMENT, BY JONATHAN T. PIKE, COMMISSIONER
WISCONSIN OFFICE OF THE COMMISSIONER OF INSURANCE, BY MARK AFABLE, COMMISSIONER
WYOMING DEPARTMENT OF INSURANCE, BY JEFFREY P. RUDE, COMMISSIONER

AND NOW comes the Departments of Insurance, through their regulators, of the nineteen states indicated in the above caption (the "Proposed Amici Curiae State Insurance Regulators") and respectfully request leave from this Honorable Court to file briefs as amici in this matter (a) supporting the Application for Stay Pending Appeal of the Order ("Order") Approving the Second Amended Plan ("Plan") of Senior Health Insurance Company of Pennsylvania ("SHIP") and/or, if one or more of them deem it to be helpful (b) supporting the position on the merits of this appeal filed by appellants-intervenors the Superintendent of Insurance of the State of Maine, the Commissioner of Insurance of the Commonwealth of Massachusetts,and the Insurance Commissioner of the State of Washington ("Appellants").

The proposed Amici Curiae are the chief insurance regulatory officials for their respective states. The instant appeal involves issues of due process and constitutional importance to proposed amici, policyholders of SHIP, and policyholders of future insurer insolvencies. The state-based system of regulation exists for the protection of insurance policyholders. It is the legislature of each state that establishes policy for the regulation of insurance by enacting appropriate legislation. Only the state legislature may delegate its police power (*i.e.,* regulatory

and enforcement authority) to its state insurance regulator, and it alone writes the insurance laws it charges the regulator with administering and enforcing within its state.

Approval of the Plan by the receivership court does not cure the unconstitutional exercise of authority by the Rehabilitator. The Plan unconstitutionally authorizes the Rehabilitator to set rates in states other than Pennsylvania through imposition of the If-Knew or self-sustaining premium and the consequential reduction of benefits for policyholders in states that refuse to delegate to the Rehabilitator the authority that has been conferred upon state regulators by their legislatures. Courts, including those overseeing rehabilitation proceedings, do not have the authority to set rates different from those filed and approved by each state insurance commissioner. The receivership court's Order conflicts with the insurance laws of the states of the proposed amici that require insurance policy rates to be reviewed and approved by the state's insurance director or designee. By requiring an affirmative opt-out, the Rehabilitator attempts to coerce states into a Plan that they never opted into. While the approved Plan purports to allow the insurance regulator of an opt-out state to approve rates, if the regulator determines

not to approve a rate increase in the amount determined by the Rehabilitator, the Plan will reduce the benefits of the policyholders in that state unless policyholders agree to continue to pay more for less benefits or select a nonforfeiture option. The downgrade of policy benefits for the same or higher premiums is a rate increase.

Proposed Amici Curiae submit that this case presents *res nova* issues of extraordinary national impact and importance for the protection of insurance consumers. Amici believe, as do Appellants, that rehabilitation of SHIP is unlikely, liquidation is inevitable, and the Plan circumvents the guaranty fund system that exists for the very reason to protect policyholders from insurer insolvencies.

It is well-established that the regulation of policy rates and benefits for insurance policies issued in a state is within the exclusive jurisdiction of the insurance regulators of each state. Proposed Amici Curiae State Insurance Regulators believe that this unconstitutional Plan will be sought to be imposed in future insurer insolvencies where the insurance industry attempts avoid its policy obligations to the detriment of policyholders. Proposed Amici Curiae submit that they could be of assistance to this Honorable Court by offering information and analysis on the impact of this decision on the policyholders as well as the laws of

their states that may be useful to the Court in addressing the novel issue before it. The Order that is the subject of this appeal violates the rights of policyholders, the insurance laws of the various states, and attempts to unconstitutionally reject and override the authority reserved to and exercised by the individual states to protect the rights of their policyholders.

WHEREFORE the Proposed Amicus Curiae State Insurance Regulators respectfully request this Honorable Court to allow the filing of briefs amici curiae as referenced above.

Respectfully submitted,

BUTLER SNOW LLP

By: /s/James J. Lawless, Jr.
James J. Lawless, Jr. (PA. I.D. No. 50848)
Jim.Lawless@butlersnow.com
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507
Counsel for Proposed Amici Curiae State Insurance Regulators

(None of the counsel shown below are admitted in Pennsylvania)

ARKANSAS INSURANCE DEPARTMENT, BY ALAN MCCLAIN, COMMISSIONER
Jim Brader (Ark. Bar No.: 2001056)
Deputy Commissioner & General Counsel
Arkansas Insurance Department
1 Commerce Way, Suite 504
Little Rock, AR 72202
(501) 371-2825
jim.brader@arkansas.gov

CONNECTICUT INSURANCE DEPARTMENT, BY ANDREW N. MAIS, COMMISSIONER
Jared T. Kosky (CT Juris No. 427653)
General Counsel, Connecticut Insurance Department
153 Market Street, 7th Floor
Hartford, CT 06103
Telephone: 860-297-3800/Fax: 860-566-7410
Email: jared.kosky@ct.gov
Attorney for Andrew N. Mais, Insurance Commissioner for the State of Connecticut

IDAHO DEPARTMENT OF INSURANCE, BY DEAN L. CAMERON, DIRECTOR
LAWRENCE G. WASDEN
ATTORNEY GENERAL, STATE OF IDAHO
MICHAEL WITRY (ID Bar No. 7960)
Deputy Attorney General
Idaho Department of Insurance
700 W. State St., 3rd Floor
PO Box 83720
Boise, Idaho 83720-0043
Telephone No. (208) 334-4219/Facsimile No. (208) 334-4298
michael.witry@doi.idaho.gov
Attorneys for Dean L. Cameron, Director of the Idaho Department of Insurance

DOUGLAS M. OMMEN, INSURANCE COMMISSIONER OF THE STATE OF IOWA
ADAM KENWORTHY (IA Bar AT0012137)
Insurance Division Counsel
1963 Bell Avenue, Suite 100
Des Moines, Iowa 50315
adam.kenworthy@iid.iowa.gov
Attorney for Douglas M. Ommen, Commissioner of Insurance for the State of Iowa

LOUISIANA DEPARTMENT OF INSURANCE, BY JAMES J. DONELON, COMMISSIONER
JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL (LA. 20685)
murrille@ag.louisiana.gov
Solicitor General
Louisiana Department of Justice
Post Office Box 94005
Baton Rouge, LA 70804
(225) 456-7544
-and-
BUTLER SNOW LLP
David S. Rubin (LA. 11525)
David.Rubin@butlersnow.com
445 North Boulevard, Suite 300 (70802)
Baton Rouge, Louisiana 70802
Telephone: (225) 325-8700/Facsimile: (225) 325-8800
Attorneys for James J. Donelon, Commissioner of Insurance for the State of Louisiana

MARYLAND INSURANCE ADMINISTRATION, BY KATHLEEN A. BIRRANE, COMMISSIONER
J. Van Lear Dorsey
Assistant Attorney General
Maryland Insurance Administration
200 St. Paul Place, Suite 2700
Baltimore, MD 21202
(410) 468-2023
van.dorsey@maryland.gov

MISSISSIPPI DEPARTMENT OF INSURANCE, BY MIKE CHANEY, COMMISSIONER
Christina Kelsey (MS Bar No. 9853)
General Counsel, Mississippi Department of Insurance
P.O. Box 79, Jackson, MS 39205-0079
Telephone: 601-359-3577/Fax: 601-359-2474
christina.kelsey@mid.ms.gov
Attorney for Mike Chaney, Commissioner of Insurance
State of Mississippi

TROY DOWNING, MONTANA COMMISSIONER OF SECURITIES AND INSURANCE
Montana State Auditor
Ole Olson, Chief Legal Counsel
Office of the Montana State Auditor
Commissioner of Securities and Insurance
840 Helena Ave.
Helena, MT 59601
406-444-1295
OOlson@mt.gov

NEW HAMPSHIRE DEPARTMENT OF INSURANCE BY CHRISTOPHER R. NICOLOPOULOS, COMMISSIONER
John M. Formella, Attorney General
Anthony J. Galdieri, Solicitor General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03310
Tel. 603-271-3650/ Fax: 603-271-2110
Anthony.J.Galdieri@doj.nh.gov

NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, BY MARLENE CARIDE, COMMISSIONER
Andrew J. Bruck
Acting Attorney General
By: /s/Richard E. Wegryn, Jr.
Richard E. Wegryn, Jr. (PA Bar. No. 71563)
richard.wegryn@law.njoag.gov
Deputy Attorney General
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 117
Trenton, New Jersey 08625-0117
(609)376-2965
Attorney for Marlene Caride, Commissioner of the New Jersey Department of Banking and Insurance

HON. RUSSELL TOAL, SUPERINTENDENT OF INSURANCE FOR THE STATE OF NEW MEXICO
Bryan E. Brock
General Counsel
1120 Paseo de Peralta, 4th Floor
P.O. Box 1689
Santa Fe, NM 87504-1689
bryan.brock@state.nm.us

NORTH CAROLINA DEPARTMENT OF INSURANCE
MIKE CAUSEY, COMMISSIONER
By: Daniel Snipes Johnson (NC State Bar No. 9289)
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6620
djohnson@ncdoj.gov

NORTH DAKOTA INSURANCE DEPARTMENT, BY JON GODFREAD, COMMISSIONER.
Johannes (Johnny) Palsgraaf
General Counsel (ND Bar No. 06631)
N.D. Insurance Department
600 East Boulevard Avenue, Dept. 401
Bismarck, ND 58505
Ph. (701) 328-2577/Fax (701) 328-4880
jpalsgraaf@nd.gov

OKLAHOMA DEPARTMENT OF INSURANCE, BY GLEN MULREAY, COMMISSIONER
Kimberly C. Bailey
Kim.Bailey@oid.ok.gov
General Counsel, Oklahoma Bar No. 16625
Oklahoma Insurance Department
400 N.E. 50th Street
Oklahoma City, OK 73105
Telephone: (405)522-6335/Facsimile: (405)521-6635

SOUTH CAROLINA DEPARTMENT OF INSURANCE, BY RAYMOND G. FARMER, DIRECTOR
Geoffrey R. Bonham (SC Bar No. 13058)
S.C. Department of Insurance
P.O. Box 100105 Columbia SC 29202-3105
Telephone: 803-737-6200/Fax: 803-737-6229
gbonham@doi.sc.gov
Attorneys for Raymond G. Farmer, Director of Insurance for the State of South Carolina

SOUTH DAKOTA DIVISION OF INSURANCE, BY LARRY D. DEITER, DIRECTOR
Frank A. Marnell (SD Bar No. 4219)
Senior Legal Counsel
South Dakota Division of Insurance
124 S. Euclid Ave., 2nd Floor
Pierre, SD 57501
Telephone: 605-773-3563/Fax: 605-773-5369
Frank.Marnell@state.sd.us
Attorney for Larry D. Deiter, South Dakota Director of Insurance

UTAH INSURANCE DEPARTMENT, BY JONATHAN T. PIKE, COMMISSIONER
Perri Ann Babalis (Utah Bar No. 5658)
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Fl.
P.O. Box 140874
Salt Lake City, UT 84114-0874
Telephone: 807-718-1270
Email: pbabalis@agutah.gov
Attorney for Jonathan T. Pike, Utah Insurance Commissioner

WISCONSIN OFFICE OF THE COMMISSIONER OF INSURANCE, BY MARK AFABLE, COMMISSIONER
RICHARD B. WICKA (WI Bar No. 1041858)
Chief Legal Counsel
Wisconsin Office of the Commissioner of Insurance
125 S. Webster St.
Madison, WI 53703
Telephone: (608)261-6018
richard.wicka@wisconsin.gov
Attorney for Mark Afable, Commissioner of Insurance for the State of Wisconsin

WYOMING DEPARTMENT OF INSURANCE, BY JEFFREY P. RUDE, COMMISSIONER
JEFFREY P. RUDE
Wyoming Commissioner of Insurance
106 E. 6th Ave
Cheyenne, WY 82002
Telephone: (307)777-7401
Jeff.rude@wyo.gov

PUBLIC ACCESS POLICY CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

November 12, 2021

Respectfully Submitted,

BUTLER SNOW LLP
By: /s/James J. Lawless, Jr.
James J. Lawless, Jr. (PA. I.D. No. 50848)
Jim.Lawless@butlersnow.com
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507
Counsel for Proposed Amici Curiae State Insurance Regulators

PROOF OF SERVICE

I, James J. Lawless, hereby certify that on November 12, 2021, the foregoing document was served via mail or e-mail upon the following counsel:

Counsel for Statutory Liquidator of Senior Health Insurance Company ofPennsylvania
Michael Broadbent, Esq.Cozen O'Connor
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Email: mbroadbent@cozen.com
Dexter Hamilton
Email: dhamilton@cozen.com
Haryle Kaldis
Email: hkaldis@cozen.com

Amy Daubert
Pennsylvania Department of Insurance1341 Strawberry Square
Harrisburg, PA 17120
Email: adaubert@state.pa.us
Jodi Frantz
Email: jodfrantz@state.pa.us
Kathryn McDermott Speaks
Email: kspeaks@pa.gov

Preston M. Buckman
Pennsylvania Insurance
Department901 N. 7th
Street, Suite 200
Harrisburg, PA 17102
Email:pbuckman@pa.gov

Leslie Greenspan
Tucker Law Group, LLCTen Penn Center
1801 Market Street, Suite 2500
Philadelphia, PA 1910
Email: lgreenspan@tlgattorneys.com

Counsel for Anthem, Inc.; Health Care ServiceCorporation; Horizon Healthcare Services, Inc.d/b/a Horizon Blue Cross Blue Shield of New Jersey; and UnitedHealthcare Insurance Company

Harold S. Horwich
Benjamin J. Cordiano
MORGAN, LEWIS & BOCKIUS LLP
One State Street
Hartford, Connecticut 06103
harold.horwich@morganlewis.com
benjamin.cordiano@morganlewis.com

John P. Lavelle, Jr.
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
john.lavelle@morganlewis.com

Non-Parties

Counsel for the Senior Health Care Oversight Trust

Thomas Jenkins
6498 N. Lazulite Place
Tucson, AZ 85750
Email: tjenkins5714@gmail.com

Matthew D. Coble
3401 North Front Street
Harrisburg, PA 17110
Email: mdcoble@mette.com

Intervenors

Counsel for Intervenor National Organization of Life and Health InsuranceGuaranty Associations (NOLGHA)

Caryn M. Glawe
Faegre Drinker Biddle &
Reath LLP 300 North
Meridian Street, Suite 2500
Email: caryn.glawe@faegredrinker.com

D. Alicia Hickok
Faegre Drinker Biddle &
Reath LLPOne Logan
Square, Suite 2000
Email: alicia.hickok@faegredrinker.com
Jane Dall Wilson
Email: jane.wilson@faegredrinker.com

Counsel for Intervenor Primerica Life Insurance Company

Kevin Eldridge, Assistant General
CounselPrimerica Life Insurance
Company
Office of the General
Counsel1 Primerica
Parkway
Duluth, GA 30099-0001
Email: Kevin.Eldridge@primerica.com

Counsel for Intervenor Primerica Life Insurance Company

Jim Gkonos, Counsel
Saul Ewing Arnstein & Lehr LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
Email:jim.gkonos@saul.com

Counsel for Intervenors Maine Superintendent of Insurance, Massachusetts Commissioner of Insurance and Washington Insurance Commissioner

Stephen G. Harvey Steve Harvey Law LLC
1880 John F. Kennedy Blvd., Suite 1715
Philadelphia, PA 19103
Email: steve@steveharveylaw.com
J. David Leslie
Eric A. Smith
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110-1700
dleslie@rackemann.com
esmith@rackemann.com

Counsel for Intervenors ACSIA Long Term Care, Inc.; Global Commission Funding LLC, LifeCare Health Insurance Plans, Inc., Senior Commission Funding LLC, Senior Health Care Insurance Services, Ltd., LLP, and UnitedGroup Agency, Inc.

Joseph M. Donley
Clark Hill PLC
Two Commerce Square
2001 Market Street, Suite 2620
Philadelphia, PA 19103
Email: jdonley@clarkhill.com
Scott B. Galla, Senior Attorney
Email: sgalla@clarkhill.com

Pro Se Intervenor James F. Lapinski

James F. Lapinksi
P.O. Box 29135
Port Orange, FL 32129

Pro Se Intervenor Georgianna I. Parisi

Georgianna I. Parisi
257 Regency Ridge Dr.
Dayton, OH 45459

Dated: November 12, 2021

BUTLER SNOW LLP
By: /s/James J. Lawless, Jr.
James J. Lawless, Jr. (PA. I.D. No. 50848)
Jim.Lawless@butlersnow.com
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507
Counsel for Proposed Amici Curiae State Insurance Regulators

IN THE SUPREME COURT OF PENNSYLVANIA

No. 71 MAP 2021

In Re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation)

Appeal from the Order of the Commonwealth Court Entered on August 24, 2021 in 1 SHP 2020

BRIEF OF AMICI CURIAE STATE INSURANCE REGULATORS IN SUPPORT OF APPELLANTS' APPLICATION FOR STAY PENDING APPEAL

November 12, 2021

Butler Snow LLP
James J. Lawless, Jr. (PA. I.D. No. 50848)
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507
Jim.Lawless@butlersnow.com
Counsel for Amici Curiae State Insurance Regulators

Filed by:

ARKANSAS INSURANCE DEPARTMENT, BY ALAN MCCLAIN, COMMISSIONER
CONNECTICUT INSURANCE DEPARTMENT, BY ANDREW N. MAIS, COMMISSIONER
IDAHO DEPARTMENT OF INSURANCE, BY DEAN L. CAMERON, DIRECTOR
DOUGLAS M. OMMEN, INSURANCE COMMISSIONER OF THE STATE OF IOWA
LOUISIANA DEPARTMENT OF INSURANCE, BY JAMES J. DONELON, COMMISSIONER
MARYLAND INSURANCE ADMINISTRATION, BY KATHLEEN A. BIRRANE, COMMISSIONER
MISSISSIPPI DEPARTMENT OF INSURANCE, BY MIKE CHANEY, COMMISSIONER
TROY DOWNING, MONTANA COMMISSIONER OF SECURITIES AND INSURANCE AND STATE AUDITOR
NEW HAMPSHIRE DEPARTMENT OF INSURANCE, BY CHRISTOPHER R. NICOLOPOULOS, COMMISSIONER
NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, BY MAUREEN CARIDE, COMMISSIONER
HON. RUSSELL TOAL, SUPERINTENDENT OF INSURANCE FOR THE STATE OF NEW MEXICO
NORTH CAROLINA DEPARTMENT OF INSURANCE, BY MIKE CAUSEY, COMMISSIONER
NORTH DAKOTA INSURANCE DEPARTMENT, BY JON GODFREAD, COMMISSIONER
OKLAHOMA DEPARTMENT OF INSURANCE, BY GLEN MULREAY, COMMISSIONER

[continued on next page]

SOUTH CAROLINA DEPARTMENT OF INSURANCE, BY RAYMOND G. FARMER, DIRECTOR
SOUTH DAKOTA COMMISSIONER OF INSURANCE, BY LARRY DEITER, DIRECTOR
UTAH INSURANCE DEPARTMENT, BY JONATHAN T. PIKE, COMMISSIONER
WISCONSIN OFFICE OF THE COMMISSIONER OF INSURANCE, BY MARK AFABLE, COMMISSIONER
WYOMING DEPARTMENT OF INSURANCE, BY JEFFREY P. RUDE, COMMISSIONER

TABLE OF CONTENTS

STATUTES

RULES

INTRODUCTION

The Departments of Insurance of the Amici Curiae State Insurance Regulators through their chief insurance regulatory officials having been granted permission by this Honorable Court respectfully submit this Brief as *amici curiae* in support of the Application for Stay filed by Appellants Superintendent of Insurance of the State of Maine, the Commissioner of Insurance of the Commonwealth of Massachusetts, and the Insurance Commissioner of the State of Washington (collectively, "SIR Appellants").

STATEMENT OF INTEREST

The Amici Curiae State Insurance Regulators are the statutory insurance regulators in their respective states. Each state regulator is charged with enforcing the insurance laws and regulations affecting policyholders within their respective jurisdiction. The policyholders of Senior Health Insurance Company of Pennsylvania (In Rehabilitation) ("SHIP") reside in or have policies governed by the laws of each such state.

The Second Amended SHIP Rehabilitation Plan ("Plan") approved by the Commonwealth Court violates long-standing law and jurisprudence providing that

the regulation of rates for insurance policies issued in a state is within the sole jurisdiction of the insurance regulators of each state of issuance. The Plan directly affects the authority of the Amici State Insurance Regulators and contradicts and is inconsistent with the law governing the jurisdiction and authority of a rehabilitator. The Amici Curiae State Insurance Regulators have a duty to protect the policyholders within their states from the unconstitutional exercise of the authority by the Pennsylvania Rehabilitator. They must maintain and act consistently with the regulatory authority that has been delegated to them by the legislatures of their respective states for the protection of policyholders and reject any attempts by others to exercise that police power.

This brief was prepared by counsel for the Departments of Insurance for the States of South Carolina and Louisiana, was paid for the Departments of Insurance for the States of South Carolina and Louisiana and was reviewed and approved by each of the Amici Curiae State Insurance Regulators. Pursuant to Pa. R.A.P. 531(b)(2), no other person or entity has paid for the preparation of or authored this brief in whole or in part.

ARGUMENT FOR AMICI CURIAE

This Court has broad authority to consider the interests of justice and grant the motion for a stay to ensure the implementation of the Plan does not proceed and render moot SIR Appellants' claims during the pendency of this appeal. The requested stay is necessary to preserve the status quo and prevent irreparable harm to SHIP policyholders and protect Amici Curiae State Insurance Regulators and insurance consumers while this matter proceeds on appeal. The interests in this action are not limited to the 39,000 policyholders of SHIP. Rather, the decision in this matter affects the insurance guaranty fund system – the safety net that protects insurance consumers – the regulation of insurer insolvencies, and the federal adoption of the state-based system of insurance regulation and rate-making.

The Amici Curiae State Insurance Regulators support the Application seeking a stay of the Orders approving the Rehabilitator's Plan. As set forth by SIR Appellants, each state regulator is confronted with the Rehabilitator's impending deadline for state insurance regulators requiring each to make a decision whether on behalf of the policyholders in their states to "opt-out" of the Plan. By design, states are deemed to be in the Plan unless they execute the opt-out

election.

One of the key provisions of the Plan is that the Rehabilitator will submit proposed rate increases and policy modifications to the Commonwealth Court for opt-in states but not to the insurance regulators in the states in which the policies were issued. (Plan, pp. 33-34.) The Rehabilitator will only make rate filings in states where the state regulator makes an opt-out election. Under those circumstances, if the proposed premium rate increase is not granted in full, the benefits of a policyholder under an existing policy will be downgraded or otherwise altered to a benefit level determined by the Rehabilitator that "may include a reduced number of meaningful options for affected policyholders" and "[i]n addition, some policyholders who do not make an election may face involuntary benefit reductions." (Plan, p. 109.) Rates will be set by the Rehabilaitor on a seriatim basis by policyholder; consequently, policyholders in the same state could pay different premium rates based on the benefits in their policies. Whether a state opts-in or opts-out, the Rehabilitator will be setting rates for policyholders in states other than Pennsylvania either directly via the opt-in approach or indirectly via benefit downgrades for states that decide to opt-out.

The approval of policy premiums and policy benefits is one of the principal consumer protection responsibilities of state insurance regulators. This Plan attempts to unconstitutionally usurp that authority under the guise of allowing an "opt-out" state to review and approve a rate application. However, if the opt-out state disapproves the application based on the laws and regulations in its state that it is constitutionally and statutorily bound to follow, its policyholders will pay the price through increased rates or benefit reductions.

In 1945, Congress enacted the McCarran-Ferguson Act, 15 U.S.C. §1011, by which Congress stated the following as a declaration of policy: "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." Section 1012(a) of the McCarran-Ferguson Act provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The empowerment of each state with respect to the business of insurance was reinforced by Congress in 1999 with the

enactment of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6701 *et seq*. In that Act, Congress stated that the McCarran-Ferguson Act "remains the law of the United States" and that "the insurance activities of any person…shall be functionally regulated by the States."

Granting the application for stay will allow this Honorable Court time to thoroughly review (1) this matter of utmost importance to insurance consumers and state insurance regulators and (2) the merits of the other issues regarding the Plan presented on appeal while maintaining the status quo. Therefore, the Amici Curiae State Insurance Regulators respectfully request that SIR Appellants' Application for a Stay be granted pending the appeal of the Court Order Approving the Second Amended Plan of Rehabilitation.

Respectfully Submitted,

BUTLER SNOW LLP
By: /s/James J. Lawless, Jr.
James J. Lawless, Jr. (PA. I.D. No. 50848)
Jim.Lawless@butlersnow.com
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507
Counsel for Amici Curiae State Insurance Regulators

(None of the counsel shown below are admitted in Pennsylvania)

ARKANSAS INSURANCE DEPARTMENT, BY ALAN MCCLAIN, COMMISSIONER
Jim Brader (Ark. Bar No.: 2001056)
Deputy Commissioner & General Counsel
Arkansas Insurance Department
1 Commerce Way, Suite 504
Little Rock, AR 72202
(501) 371-2825
jim.brader@arkansas.gov

CONNECTICUT INSURANCE DEPARTMENT, BY ANDREW N. MAIS, COMMISSIONER
Jared T. Kosky (CT Juris No. 427653)
General Counsel, Connecticut Insurance Department
153 Market Street, 7th Floor
Hartford, CT 06103
Telephone: 860-297-3800/Fax: 860-566-7410
Email: jared.kosky@ct.gov
Attorney for Andrew N. Mais, Insurance Commissioner for the State of Connecticut

IDAHO DEPARTMENT OF INSURANCE, BY DEAN L. CAMERON, DIRECTOR
LAWRENCE G. WASDEN
ATTORNEY GENERAL, STATE OF IDAHO
MICHAEL WITRY (ID Bar No. 7960)
Deputy Attorney General
Idaho Department of Insurance
700 W. State St., 3rd Floor (PO Box 83720)
Boise, Idaho 83720-0043
Telephone No. (208) 334-4219/Facsimile No. (208) 334-4298
michael.witry@doi.idaho.gov
Attorneys for Dean L. Cameron, Director of the Idaho Department of Insurance

DOUGLAS M. OMMEN, INSURANCE COMMISSIONER OF THE STATE OF IOWA
ADAM KENWORTHY (IA Bar AT0012137)
Insurance Division Counsel
1963 Bell Avenue, Suite 100
Des Moines, Iowa 50315
adam.kenworthy@iid.iowa.gov
Attorney for Douglas M. Ommen, Commissioner of Insurance for the State of Iowa

LOUISIANA DEPARTMENT OF INSURANCE, BY JAMES J. DONELON, COMMISSIONER
JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL (LA. 20685)
murrille@ag.louisiana.gov
Solicitor General
Louisiana Department of Justice
Post Office Box 94005
Baton Rouge, LA 70804
(225) 456-7544
-and-
BUTLER SNOW LLP
David S. Rubin (LA. 11525)
David.Rubin@butlersnow.com
445 North Boulevard, Suite 300 (70802)
Baton Rouge, Louisiana 70802
Telephone: (225) 325-8700/Facsimile: (225) 325-8800
Attorneys for James J. Donelon, Commissioner of Insurance for the State of Louisiana

MARYLAND INSURANCE ADMINISTRATION, BY KATHLEEN A. BIRRANE, COMMISSIONER
J. Van Lear Dorsey
Assistant Attorney General
Maryland Insurance Administration
200 St. Paul Place, Suite 2700
Baltimore, MD 21202
(410) 468-2023
van.dorsey@maryland.gov

MISSISSIPPI DEPARTMENT OF INSURANCE, BY MIKE CHANEY, COMMISSIONER
Christina Kelsey (MS Bar No. 9853)
General Counsel, Mississippi Department of Insurance
P.O. Box 79, Jackson, MS 39205-0079
Telephone: 601-359-3577/Fax: 601-359-2474
christina.kelsey@mid.ms.gov
Attorney for Mike Chaney, Commissioner of Insurance
State of Mississippi

TROY DOWNING, MONTANA COMMISSIONER OF SECURITIES AND INSURANCE
Montana State Auditor
Ole Olson, Chief Legal Counsel
Office of the Montana State Auditor
Commissioner of Securities and Insurance
840 Helena Ave.
Helena, MT 59601
406-444-1295
OOlson@mt.gov

NEW HAMPSHIRE DEPARTMENT OF INSURANCE BY CHRISTOPHER R. NICOLOPOULOS, COMMISSIONER
John M. Formella, Attorney General
Anthony J. Galdieri, Solicitor General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03310
Tel. 603-271-3650/ Fax: 603-271-2110
Anthony.J.Galdieri@doj.nh.gov

NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, BY MARLENE CARIDE, COMMISSIONER
Andrew J. Bruck
Acting Attorney General
By: /s/Richard E. Wegryn, Jr.
Richard E. Wegryn, Jr. (PA Bar. No. 71563)
richard.wegryn@law.njoag.gov
Deputy Attorney General
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 117
Trenton, New Jersey 08625-0117
(609)376-2965
Attorney for Marlene Caride, Commissioner of the New Jersey Department of Banking and Insurance

HON. RUSSELL TOAL, SUPERINTENDENT OF INSURANCE FOR THE STATE OF NEW MEXICO
Bryan E. Brock
General Counsel
1120 Paseo de Peralta, 4th Floor
P.O. Box 1689
Santa Fe, NM 87504-1689
bryan.brock@state.nm.us

NORTH CAROLINA DEPARTMENT OF INSURANCE
MIKE CAUSEY, COMMISSIONER
By: Daniel Snipes Johnson (NC State Bar No. 9289)
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6620
djohnson@ncdoj.gov

NORTH DAKOTA INSURANCE DEPARTMENT, BY JON GODFREAD, COMMISSIONER.
Johannes (Johnny) Palsgraaf
General Counsel (ND Bar No. 06631)
N.D. Insurance Department
600 East Boulevard Avenue, Dept. 401
Bismarck, ND 58505
Ph. (701) 328-2577/Fax (701) 328-4880
jpalsgraaf@nd.gov

OKLAHOMA DEPARTMENT OF INSURANCE, BY GLEN MULREAY, COMMISSIONER
Kimberly C. Bailey
Kim.Bailey@oid.ok.gov
General Counsel, Oklahoma Bar No. 16625
Oklahoma Insurance Department
400 N.E. 50th Street
Oklahoma City, OK 73105
Telephone: (405)522-6335/Facsimile: (405)521-6635

SOUTH CAROLINA DEPARTMENT OF INSURANCE, BY RAYMOND G. FARMER, DIRECTOR
Geoffrey R. Bonham (SC Bar No. 13058)
S.C. Department of Insurance
P.O. Box 100105 Columbia SC 29202-3105
Telephone: 803-737-6200/Fax: 803-737-6229
gbonham@doi.sc.gov
Attorneys for Raymond G. Farmer, Director of Insurance for the State of South Carolina

SOUTH DAKOTA DIVISION OF INSURANCE, BY LARRY D. DEITER, DIRECTOR
Frank A. Marnell (SD Bar No. 4219)
Senior Legal Counsel
South Dakota Division of Insurance
124 S. Euclid Ave., 2nd Floor
Pierre, SD 57501
Telephone: 605-773-3563/Fax: 605-773-5369
Frank.Marnell@state.sd.us
Attorney for Larry D. Deiter, South Dakota Director of Insurance

UTAH INSURANCE DEPARTMENT, BY JONATHAN T. PIKE, COMMISSIONER
Perri Ann Babalis (Utah Bar No. 5658)
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Fl.
P.O. Box 140874
Salt Lake City, UT 84114-0874
Telephone: 807-718-1270
Email: pbabalis@agutah.gov
Attorney for Jonathan T. Pike, Utah Insurance Commissioner

WISCONSIN OFFICE OF THE COMMISSIONER OF INSURANCE, BY MARK AFABLE, COMMISSIONER
RICHARD B. WICKA (WI Bar No. 1041858)
Chief Legal Counsel
Wisconsin Office of the Commissioner of Insurance
125 S. Webster St.
Madison, WI 53703
Telephone: (608)261-6018
richard.wicka@wisconsin.gov
Attorney for Mark Afable, Commissioner of Insurance for the State of Wisconsin

WYOMING DEPARTMENT OF INSURANCE, BY JEFFREY P. RUDE, COMMISSIONER
JEFFREY P. RUDE
Wyoming Commissioner of Insurance
106 E. 6th Ave
Cheyenne, WY 82002
Telephone: (307)777-7401
Jeff.rude@wyo.gov

PUBLIC ACCESS POLICY CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

I further certify that pursuant to Pa. R. App. P 531(b)3() that this Brief contains no more than 2876 words which is less than the allowable 7000 words.

November 12, 2021.

BUTLER SNOW LLP
By: /s/James J. Lawless, Jr.
James J. Lawless, Jr. (PA. I.D. No. 50848)
Jim.Lawless@butlersnow.com
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507
Counsel for Amici Curiae State Insurance Regulators

PROOF OF SERVICE

I, James J. Lawless, hereby certify that on November 12, 2021, the foregoing document was served via mail or e-mail upon the following counsel:

Counsel for Statutory Liquidator of Senior Health Insurance Company ofPennsylvania
Michael Broadbent, Esq.Cozen O'Connor
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Email: mbroadbent@cozen.com
Dexter Hamilton
Email: dhamilton@cozen.com
Haryle Kaldis
Email: hkaldis@cozen.com

Amy Daubert
Pennsylvania Department of Insurance1341 Strawberry Square
Harrisburg, PA 17120
Email: adaubert@state.pa.us
Jodi Frantz
Email: jodfrantz@state.pa.us
Kathryn McDermott Speaks
Email: kspeaks@pa.gov

Preston M. Buckman
Pennsylvania Insurance
Department901 N. 7th
Street, Suite 200
Harrisburg, PA 17102
Email:pbuckman@pa.gov

Leslie Greenspan
Tucker Law Group, LLCTen Penn Center
1801 Market Street, Suite 2500
Philadelphia, PA 1910
Email: lgreenspan@tlgattorneys.com

Counsel for Anthem, Inc.; Health Care ServiceCorporation; Horizon Healthcare Services, Inc.d/b/a Horizon Blue Cross Blue Shield of New Jersey; and UnitedHealthcare Insurance Company

Harold S. Horwich
Benjamin J. Cordiano
MORGAN, LEWIS & BOCKIUS LLP
One State Street
Hartford, Connecticut 06103
harold.horwich@morganlewis.com
benjamin.cordiano@morganlewis.com

John P. Lavelle, Jr.
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
john.lavelle@morganlewis.com

Non-Parties

Counsel for the Senior Health Care Oversight Trust

Thomas Jenkins
6498 N. Lazulite Place
Tucson, AZ 85750
Email: tjenkins5714@gmail.com

Matthew D. Coble, CounselMette Evans & Woodside
3401 North Front Street
Harrisburg, PA 17110
Email: mdcoble@mette.com

Intervenors

Counsel for Intervenor National Organization of Life and Health InsuranceGuaranty Associations (NOLGHA)

Caryn M. Glawe
Faegre Drinker Biddle &
Reath LLP 300 North
Meridian Street, Suite 2500
Email: caryn.glawe@faegredrinker.com

D. Alicia Hickok
Faegre Drinker Biddle &
Reath LLPOne Logan
Square, Suite 2000
Email: alicia.hickok@faegredrinker.com
Jane Dall Wilson
Email: jane.wilson@faegredrinker.com

Counsel for Intervenor Primerica Life Insurance Company

Kevin Eldridge, Assistant General
CounselPrimerica Life Insurance
Company
Office of the General
Counsel1 Primerica
Parkway
Duluth, GA 30099-0001
Email: Kevin.Eldridge@primerica.com

Counsel for Intervenor Primerica Life Insurance Company

Jim Gkonos, Counsel
Saul Ewing Arnstein & Lehr LLP
Centre Square West
1500 Market Street,
38th FloorPhiladelphia,
PA 19102-2186
Email:
jim.gkonos@saul.com

Counsel for Intervenors Maine Superintendent of Insurance, MassachusettsCommissioner of Insurance and Washington Insurance Commissioner

Stephen G. Harvey Steve Harvey Law LLC
1880 John F. Kennedy Blvd.,
Suite 1715Philadelphia, PA
19103
Email: steve@steveharveylaw.com

J. David Leslie
Eric A. Smith
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110-1700
dleslie@rackemann.com
esmith@rackemann.com

Counsel for Intervenors ACSIA Long Term Care, Inc.; Global Commission Funding LLC, LifeCare Health Insurance Plans, Inc., Senior Commission Funding LLC, Senior Health Care Insurance Services, Ltd., LLP, and UnitedGroup Agency, Inc.

Joseph M. Donley
Clark Hill PLC
Two Commerce Square
2001 Market Street, Suite 2620
Philadelphia, PA 19103
Email: jdonley@clarkhill.com
Scott B. Galla, Senior Attorney
Email: sgalla@clarkhill.com

Pro Se Intervenor James F. Lapinski

James F. Lapinksi
P.O. Box 29135
Port Orange, FL 32129

Pro Se Intervenor Georgianna I. Parisi

Georgianna I. Parisi
257 Regency Ridge Dr.
Dayton, OH 45459

Dated: November 12, 2021

BUTLER SNOW LLP
By: /s/James J. Lawless, Jr.
James J. Lawless, Jr. (PA. I.D. No. 50848)
Jim.Lawless@butlersnow.com
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507
Counsel for Amici Curiae State Insurance Regulators

IN THE SUPREME COURT OF PENNSYLVANIA

No. 71 MAP 2021

In Re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation)

Appeal of: The Superintendent of Insurance of the State of Maine, The Commissioner of Insurance of the Commonwealth of Massachusetts and the Insurance Commissioner of the State of Washington

Appeal from the Order of the Commonwealth Court Entered on August 24, 2021, in 1 SHP 2020

BRIEF OF AMICI CURIAE INSURANCE REGULATORS IN SUPPORT OF APPELLANTS' APPEAL OF THE ORDER OF THE PENNSYLVANIA COMMONWEALTH COURT

December 21, 2021

Butler Snow LLP
James J. Lawless, Jr. (PA. I.D. No. 50848)
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507
Jim.Lawless@butlersnow.com
Counsel for Amici Curiae Insurance Regulators

Filed by:

Amici Curiae Insurance Regulators

ALAKSA, DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT, BY LORI WING-HEIER, DIRECTOR

ARIZONA DEPARTMENT OF INSURANCE AND FINANCIAL INSTITUTIONS, BY EVAN G. DANIELS, DIRECTOR

ARKANSAS INSURANCE DEPARTMENT, BY ALAN MCCLAIN, COMMISSIONER

CONNECTICUT INSURANCE DEPARTMENT, BY ANDREW N. MAIS, COMMISSIONER

DISTRICT OF COLUMBIA DEPARTMENT OF INSURANCE, SECURITIES, AND BANKING, BY KARIMA M. WOODS, COMMISSIONER

IDAHO DEPARTMENT OF INSURANCE, BY DEAN L. CAMERON, DIRECTOR

INDIANA DEPARTMENT OF INSURANCE, BY AMY L. BEARD, COMMISSIONER

DOUGLAS M. OMMEN, INSURANCE COMMISSIONER OF THE STATE OF IOWA

LOUISIANA DEPARTMENT OF INSURANCE, BY JAMES J. DONELON, COMMISSIONER

[*continued on next page*]

MARYLAND INSURANCE ADMINISTRATION, BY KATHLEEN A. BIRRANE, COMMISSIONER

MISSISSIPPI DEPARTMENT OF INSURANCE, BY MIKE CHANEY, COMMISSIONER

TROY DOWNING, MONTANA COMMISSIONER OF SECURITIES AND INSURANCE AND STATE AUDITOR

NEW HAMPSHIRE DEPARTMENT OF INSURANCE, BY CHRISTOPHER R. NICOLOPOULOS, COMMISSIONER

NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, BY MARLENE CARIDE, COMMISSIONER

HON. RUSSELL TOAL, SUPERINTENDENT OF INSURANCE FOR THE STATE OF NEW MEXICO

NORTH CAROLINA DEPARTMENT OF INSURANCE, BY MIKE CAUSEY, COMMISSIONER

NORTH DAKOTA INSURANCE DEPARTMENT, BY JON GODFREAD, COMMISSIONER

OHIO DEPARTMENT OF INSURANCE, BY DAVE YOST, ATTORNEY GENERAL

OKLAHOMA DEPARTMENT OF INSURANCE, BY GLEN MULREAY, COMMISSIONER

[*continued on next page*]

RHODE ISLAND DIVISION OF INSURANCE, BY ELIZABETH KELLEHER DWYER, SUPERINTENDENT

SOUTH CAROLINA DEPARTMENT OF INSURANCE, BY RAYMOND G. FARMER, DIRECTOR

SOUTH DAKOTA COMMISSIONER OF INSURANCE, BY LARRY DEITER, DIRECTOR

UTAH INSURANCE DEPARTMENT, BY JONATHAN T. PIKE, COMMISSIONER

VERMONT DEPARTMENT OF FINANCIAL REGULATION, BY KEVIN GAFFNEY, DEPUTY COMMISSIONER

WEST VIRGINIA OFFICES OF THE INSURANCE COMMISSIONER, BY ALLAN L. MCVEY, COMMISSIONER

WISCONSIN OFFICE OF THE COMMISSIONER OF INSURANCE, BY MARK AFABLE, COMMISSIONER

WYOMING DEPARTMENT OF INSURANCE, BY JEFFREY P. RUDE, COMMISSIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules & Statutes

INTRODUCTION

The 27 Departments of Insurance of the Amici Curiae Insurance Regulators (Amici Curiae) through their chief insurance regulatory officials respectfully submit this Brief as *amici curiae* in support of the appeal filed by Appellants Superintendent of Insurance of the State of Maine, the Commissioner of Insurance of the Commonwealth of Massachusetts, and the Insurance Commissioner of the State of Washington (collectively, SIR Appellants). The Amici Curiae adopt and incorporate by reference from the brief of the SIR Appellants the following: (1) Statement of Jurisdiction; (2) Order in Question; (3) Statement of the Scope of Review and the Standard of Review; (4) Statement of the Questions Involved; and (5) Statement of the Case.

STATEMENT OF INTEREST

The 27 Amici Curiae are the statutory insurance regulators in their respective jurisdictions charged with enforcing the insurance laws and regulations affecting policyholders within their respective jurisdictions. Each has a duty and is empowered to protect and, where necessary, represent the interests of policyholders and consumers within their jurisdiction and has a vital interest in this matter. Each Amici Curiae either issued a certificate of authority to Senior Health Insurance Company of Pennsylvania (SHIP) or its predecessor to transact insurance business within its respective jurisdiction, has policyholders whose

policies are governed by the laws of such jurisdiction, or objects to the precedent that would be established by the Plan of Rehabilitation.

This brief was prepared by counsel for the insurance regulators of the Departments of Insurance for the States of South Carolina and Louisiana, was paid for the by Departments of Insurance for the States of South Carolina and Louisiana and was reviewed and approved by each of the Amici Curiae State Insurance Regulators. Pursuant to Pa. R.A.P. 531(b)(2), Amici Curiae affirm that no other person or entity has paid for the preparation of or authored this brief in whole or in part.

SUMMARY OF ARGUMENT

It is a well-established principle of law that the authority to approve insurance policy rates and forms and the jurisdiction over the insurance contract is vested in the insurance regulators of the state of policy issuance.[1] The Second Amended SHIP Rehabilitation Plan (Plan) violates the rate and form regulation statutes of the Amici Curiae States as well as the comprehensive receivership and guaranty fund statutes enacted by state legislatures for the protection of policyholders and creditors. The Plan usurps 1) the authority conferred upon and reserved to all states to regulate the business of insurance by both state and federal

[1] Attached as Exhibit 1 is a chart of each of the prior regulatory approval statutes for each Amici

laws, including the McCarran-Ferguson Act[2] and 2) the police power exercised by each jurisdiction's legislature for the protection of its citizens. The Order approving the Plan confers authority beyond the statutory responsibilities of the Rehabilitator and the Court. As such, it is an unconstitutional exercise of authority and an abuse of discretion that should be reversed.

Amici Curiae file this brief to protect policyholders from the unconstitutional exercise of authority and extraterritorial overreach by the Rehabilitator and strongly oppose her unconstitutional actions. The Plan is directly contrary to the Rehabilitator's statutory authority, the laws of the Amici Curiae, and is wholly unsupported by any law or prior legal precedent. The Plan imposes a result that places policyholders in a worse position than if SHIP were liquidated.

Amici Curiae have a substantial and real interest in this appeal because it involves novel issues that affect state-based insurance regulation. This Court's decision will affect the rights of policyholders of insolvent insurers and the future interpretation and application of state receivership and guaranty association statutes nationwide in derogation of the laws of Amici Curiae. Amici Curiae are in the best position to emphasizing the national and regulatory implications of the Plan.

---

[2] 15 U.S.C.§1011-1012, reinforced by the Gramm-Leach-Bliley Act, 15 U.S.C. §67-1 *et seq.*

ARGUMENT FOR AMICI CURIAE

A. THE COMMONWEALTH COURT'S ORDER SHOULD BE REVERSED BECAUSE THE PLAN CONTRAVENES THE AUTHORITY OF AMICI AND IS AN ABUSE OF DISCRETION BY THE REHABILITATOR AND THE COURT.

1. The Commonwealth Court Erred in Approving an Infeasible Plan of Rehabilitation that violates the laws of Pennsylvania and the Amici States.

a. The Plan violates the basic principles of state-based insurance regulation.

State-based regulation of insurance exists to protect insurance consumers. "The primary state insurance regulatory functions remain as they have been since the enactment of [the] McCarran-Ferguson [Act]. This allows . . . states to perform solvency oversight of the U.S. insurance industry and to regulate insurer behavior in the marketplace...State legislatures are the public policymakers that establish broad policy for the regulation of insurance by enacting legislation providing the framework under which insurance regulators operate. They establish laws which grant regulatory authority to regulators and oversee state insurance departments and approve regulatory budgets...State insurance regulatory systems are accessible and accountable to the public and sensitive to local social and economic conditions. State regulation has proven that it effectively protects consumers and ensures that promises made by insurers are kept. Insurance regulation is structured around several key functions, including insurer licensing, producer licensing, product regulation (review and approval of rates (including benefits) and forms),

market conduct, financial regulation and consumer services...State regulators protect consumers by ensuring that insurance policy provisions comply with state law, are reasonable and fair, and do not contain major gaps in coverage that might be misunderstood by consumers and leave them unprotected. The nature of the regulatory reviews of rates, rating rules and policy forms varies somewhat among the states depending on their laws and regulations."[3]

b. The Plan violates the comprehensive statutory system for the receivership of insolvent insurers enacted by states and jurisdictions for the protection of policyholders and creditors.

One of the fundamental principles of insurance regulation is to ensure that companies fulfill and honor their policyholder obligations. Insurance regulators protect policyholders through solvency monitoring and financial analysis; and when companies fail, through the receivership and guaranty association laws enacted by states.

State legislatures enacted receivership laws and established guaranty associations to protect policyholders and equitably and broadly spread the losses from insurance company failures rather than impose such losses on individual policyholders. Receivership laws provide for a uniform, orderly and equitable method of claim adjudication and a fair procedure for distribution of the assets of

[3] *State Insurance Regulation*, National Association of Insurance Commissioners (NAIC), Center for Insurance Policy and Research (CIPR) (2011).

the insolvent insurer to policyholders and creditors. Guaranty association laws complement and are instrumental to the protections afforded by the receivership process.

Guaranty associations were created to ensure policyholders receive substantially the contractual benefits for which they paid. "GA coverage provides a level of policyholder protection unavailable in any scenario where the GAs are not triggered to provide protection. The Order of the Commonwealth Court reveals certain misapprehensions as to (a) the status of the GAs as creditors of the failed insurer; (b) the rights and obligations of GAs in their relationships with policyholders; and (c) the level of protection provided to policyholders in the event of liquidation."[4]

"Funding for the guaranty associations comes from assessments on solvent insurers. These assessments are not open-ended, but subject to certain annual limitations. The NAIC Life and Health Insurance Guaranty Association Model Act permits life/health insurers to consider the amount reasonably necessary to meet their assessment obligations in the determination of the premiums they charge" and also allows life/health insurers to recoup assessments via premium tax

---

https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf. Reference is also made to the text of the statutes cited in Exhibit 1.

credits.[5] Thus, the insurer's insolvency is not imposed fully and only on the policyholder as the SHIP Plan does, but is spread throughout the United States at a minimal cost to individual taxpayers.

The Plan abandons the receivership and guaranty association safety net for policyholders thus supplanting the laws and the protections enacted by the legislature of each jurisdiction. The Plan does this by altering the allocation of loss at the behest of the Rehabilitator and some members of the industry. In doing so, it places the interests of the impaired insurer and insurance industry over policyholders and disregards the legislative enactments of the Amici Curiae jurisdictions.

2. By law, the Rehabilitator only has those powers conferred by statute.

In Pennsylvania, an insurance commissioner acting as a rehabilitator "'can only exercise those powers which have been conferred upon it by the Legislature in clear and unmistakable language.'" *Aetna Cas. and Sur. Co. v. Com., Ins. Dept.*, 638 A.2d 194 (Pa. 1994) (quoting *Commonwealth, Human Relations Commission v. Transit Casualty Insurance Company*, 478 Pa. 430, 438, 387 A.2d 58, 62 (1978). *See also Koken v. Legion Ins. Co.*, 831 A.2d 1196 (Pa. Commw.

---

[4] Brief of Amici Curiae Pennsylvania Health and Life Guaranty Association, et al., *In re: Penn Treaty Network America Insurance Company in Rehabilitation,* 2013 WL 9743966 (Pa.), 5.

[5] https://content.naic.org/cipr_topics/topic_guaranty_associationsfunds.htm

Ct. 2003), *aff'd sub nom. Koken v. Villanova Ins. Co.*, 878 A.2d 51 (Pa. 2005). The Rehabilitator has only those powers conferred by 40 Pa. Stat. Ann. §§ 221.1 *et seq.*, which are circumscribed to those of new management. Insurers in rehabilitation are required to comply with the insurance laws of each jurisdiction in which they conduct the business of insurance. Nowhere in the rehabilitation statutes is there "clear and unmistakable language" permitting a statutory rehabilitator (i.e., company management) to displace rate regulatory authority in other jurisdictions and substantially modify policy terms without the requisite regulatory approvals. Rehabilitators must comply with the law and do not have the authority to rewrite state laws because of a disagreement with regulatory policy. Indeed, even to continue the runoff of its policies SHIP must maintain its licensing requirements in each jurisdiction which includes approval of rates and forms. Callous and erroneous disregard for existing and well-established law does not fall within the Rehabilitator's discretion; it constitutes an abuse of it.[6]

a. The Plan violates state laws by bypassing the rate review process enacted by state legislatures and authorizes the Rehabilitator, in her capacity, as Insurance Commissioner to set rates nationally.

The Order issued by the Commonwealth Court seeks to conflate the role of commissioner and rehabilitator. Specifically, it provides that the Rehabilitator ***in***

[6] *Commonwealth v. Taylor*, 230 A.3d 1050, 1072 (Pa. 2021), and cases cited therein.

her capacity as Insurance Commissioner shall designate a deputy commissioner to review the actuarial memorandum as described in the Plan by which the Rehabilitator will only seek approval from the Commonwealth Court for rates to be imposed on a seriatim basis nationwide. Thereafter, the Rehabilitator shall submit the approved actuarial memorandum to the Court.[7] Thus, the Rehabilitator is allowed to step out of her Rehabilitator role and into the role of a foreign state insurance regulator *vis-à-vis* the Amici jurisdictions, and then in her role as Pennsylvania Insurance Commissioner determine rates for SHIP policyholders in every jurisdiction nationwide.

This is unconstitutional. Nothing in the Plan (or in any law) provides that "[T]he Rehabilitator, *in her capacity as Insurance Commissioner*" would (or could) be the rate-setter or approver for SHIP's 30,000 remaining policyholders nationwide, bypassing Amici's prior regulatory approval statutes. The Commonwealth Court's order allows the Pennsylvania Commissioner to arrogate to herself the position of "national rate maker," "rate enforcer," and "benefit downgrader" under a plan that she, as "Rehabilitator," prepared. Amici Curiae are unaware of any provision of any law – in Pennsylvania or elsewhere – that empowers the Pennsylvania Commissioner *qua* Commissioner (or otherwise) with

---

[7] *See* Record 3115a, Memorandum Opinion and Order, p. 85, para. 4 (August 24, 2021.)

extraterritorial rate-setting authority.

The rate increases under the Plan are extreme, in some cases more than double the amount of the current premium. This can be expected to force unnecessary policy lapses for elderly policyholders who have paid premiums for many years in contemplation of the need for long term care. Policyholders may be able to avoid some of the increases, but only if they agree to lower their contractually guaranteed benefits resulting in many cases of benefit reductions beyond what would otherwise be covered by guaranty associations.

3. The Plan violates the goals and purposes of the rehabilitation process.

The goal of rehabilitation is to manage the affairs of an insolvent insurer with the intended result of restoring the entity to sound fiscal status. *See Foster v. Mutual Fire, Marine and Inland Ins. Co.*, 531 Pa. 598, 614 A.2d 1086 (1992). The Rehabilitator must conduct the company's business in compliance with the law. The Rehabilitation Order did not alter SHIP's status as an insurer in each of the jurisdictions in which it operates. Accordingly, the Rehabilitator, in her capacity as SHIP's management, must comply with the laws of each state in which SHIP transacts business.

The Rehabilitator also has a duty to act with a broad view toward minimizing financial harm to all policyholders, creditors, and the general public.[8] The Plan fails to minimize the harm to policyholders, and it certainly appears that the Rehabilitator's goal is solely to reduce SHIP's deficit before it is placed into liquidation which is wholly inconsistent with the goals and purposes of the rehabilitation process.

B. THE COMMONWEALTH COURT ERRED AS A MATTER OF LAW IN APPROVING THE PLAN.

This Court's review of the Commonwealth Court's actions is based on an abuse of discretion standard. *See Foster v. Mutual Fire, Marine and Inland Ins. Co.*, 531 Pa. 598, 614 A.2d 1086 (1992). "An abuse of discretion ... requires a manifest unreasonableness, or partiality, prejudice, bias or ill-will or such a lack of support as to be clearly erroneous."[9] The role of the Court is to safeguard the Plan from any potential abuse and that includes abuse of the Rehabilitator's discretion. *See Mills v. Florida Asset Fin. Corp,* 31 A.3d 849, 850, 818 N.Y.S.2d 333 (3d Dept. 2006). It is clear from the Record in this Case that the Commonwealth Court exceeded its statutory authority when it approved this Plan. Instead of preventing an abuse of discretion, the Commonwealth Court approved a Plan that frustrates

---

[8] *Vickodil v. Com., Ins. Dept.,* 126 Pa. Commw. Ct. 390, 559 A.2d 1010 (1989).

[9] *Parr v. Ford Motor Co.*, 109 A.3d 682, 690–91 (Pa. Super. 2014) (*quoting Grady v. Frito–Lay, Inc.*, 839 A.2d 1038, 1046 (Pa. 2003); *Keystone Dedicated Logistics, LLC v. JGB Enterprises, Inc.*, 77 A.3d 1, 11 (Pa. Super. 2013)

the purpose of the rehabilitation process (which is to safeguard the rights of policyholders) and exceeds the statutory authority of the Rehabilitator.

Deference to the Rehabilitator's discretion does not require the Court to accede to or embolden the misuse of the receivership or rate review processes. *See* 40 P.S. § 221.18(a); *Koken v. Villanova*, 583 Pa. 400, 878 A.2d 51 (2005); *State ex rel Flowers v. Universal Care of Tenn.*, 2007 WL 3072776 (Tenn. Ct. App. 2007).

C. THE ORDER MUST BE REVERSED BECAUSE THE PLAN IS NOT DESIGNED TO BE FAIR AND EQUITABLE TO ALL POLICYHOLDERS.

1. The Court's Order must be reversed because the Plan is not feasible or fair and equitable to all policyholders.

a. The Plan is not fair and equitable to all policyholders.

The Plan improperly discriminates between policies in the same class and policyholders in different jurisdictions. In a liquidation, policyholders must receive equal percentage distributions.[10] This is also true in a rehabilitation.[11] The disparate treatment of policyholders does not bear any reasonable relationship to the public interest in *rehabilitating* the insurer and is not necessary to preserve the rights of

[10] 40 P.S. § 221.44 and 221.61(a).

[11] "Article V does not authorize giving some policyholders greater consideration than others." *Koken*, 831 A.2d at 1246.

all policyholders.[12] There is no basis in law for the variability in treatment of policyholders.

b. SHIP Policyholders will not fare better under this Plan than in liquidation.

The record does not support the Rehabilitator's contention that SHIP policyholders will fare better under this Plan than in liquidation. This Plan requires policyholders to give up benefits they would be able to keep in liquidation. For example, some policyholders have lifetime benefits. Under the Plan, those policyholders must pay the If-Knew premium to keep those benefits or receive a benefit reduction that would reduce the maximum length of the contract to four years depending on the option selected. In liquidation, the policyholders' benefits would not change substantially. They would be able to keep that benefit subject to guaranty association limits.

Under the Plan, policyholders on claim who are not paying the If-Knew premium must pay the premium differential to keep their premium waivers.[13] In liquidation, the guaranty associations would likely honor the policyholder's

---

[12] *See Commercial National Bank v. Superior Court*, 14 Cal App.4th 393, 17 Cal. Rptr. 2d 393 (1993) (court set aside order that established a two-tier valuation system the improperly discriminated between substantially identical policies in the same class).

[13] It is not a premium waiver if the policyholder must pay for it.

premium waiver. Detailed explanations of the options and benefit downgrades proposed are set forth in the Plan.

Some policyholders will make the difficult choices proposed by the Plan possibly believing that it will help SHIP because it is in "rehabilitation." They will likely act based on the Rehabilitator's representation that "[i]n the event SHIP would be ordered to be liquidated, it is probable that policyholders will retain benefits in excess of the guaranty fund limits"[14] and the approval of the Plan by the Commonwealth Court while not understanding that SHIP's liquidation is inevitable and any preservation of benefits is short-lived. The option s presented to policyholders in the various Plan phases are designed to coerce policyholders into paying higher premiums for the same or substantially less coverage and to coerce them into selecting significant benefit downgrades for the same cost or to select a nonforfeiture option.

The Plan does not minimize the financial harm to SHIP policyholders; it forces policyholders to reduce or drop coverage. Its purpose is ***not*** to honor policyholder contractual obligations but rather to reduce SHIP's liabilities before it goes into liquidation. The Rehabilitator acknowledges that the Plan places additional burdens on policyholders and is intended to decrease SHIP's deficit by

[14]https://www.shipltc.com/_files/ugd/630dfc_30441fe77fd7464ba4d7da30983450ba.pdf at FAQ 12.

increasing premium revenue and reducing policyholder benefits.[15] The Special Deputy Rehabilitator admitted at hearing that, "it is not likely that we will magically restore SHIP to solvency, but it is likely that the plan ...would substantially reduce the deficit."[16]

The Special Deputy Rehabilitator also admitted at the hearing that the purpose of the Plan is to transfer the burden of insolvency from legislatively-crafted guaranty associations and their member insurers to the policyholders because the Rehabilitator does not believe policyholders who paid the premiums set by law paid enough.[17] Guaranty associations are future creditors (to be considered in the liquidation process) and only the present creditors and policyholders are to be considered in a rehabilitation proceeding. The Commonwealth Court erred in approving a Plan that placed liquidation considerations over the rehabilitation process.

---

[15] Transcript May 17, 2021 Record 1631a-1814a (transcript p. 80, 289-292).

[16] Transcript May 17, 2021 Record 1631a-1814a (transcript p. 80).

[17]The Rehabilitator attributes SHIP's insolvency to inadequate rates. However, t significant contributors to SHIP's insolvency include the erroneous actuarial assumptions, declines in its investments and poor investment decisions by its management. Transcript May 17, 2021 Record 1631a-1814a (transcript p. 46, 49, 51.)

c. State receivership laws, including Pennsylvania's, require rehabilitation plans to be feasible to be approved.

The Plan does not comply with the feasibility standard articulated under Pennsylvania law. *Sheppard v. Old Heritage Mut. Ins. Co.*, 492 Pa. 581, 594, 425 A.2d 304, 310 (1984) (company [through the Rehabilitator] has the burden of demonstrating the feasibility of the Plan). The evidence presented at the hearing shows the Plan frustrates the goals of the rehabilitation process. The weight of the evidence presented at the hearing does not demonstrate that the Plan is feasible or that SHIP can bridge the $1.2 billion funding gap and avoid liquidation.

Instead of restoring SHIP to solvency the Plan is designed to run-off SHIP's remaining 30,000 policyholders. The Plan enables the insurer to use the insolvency process to avoid or repudiate its policyholder obligations for products it did not properly price from inception. The Plan shifts the burden of its insolvency to its policyholders contrary to the laws enacted to protect insurance consumers in the Amici jurisdictions.

D. EXTRATERRITORIAL ENFORCEMENT OF THE PLAN IS UNCONSTITUTIONAL.

Finally, and of utmost interest to Amici Curiae, it is respectfully submitted that enforcement of any final order of this Court in another jurisdiction violates the law of each jurisdiction and is unconstitutional. Before a court or State is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis

of the foreign judgment court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given. "[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 421, 99 S.Ct. 1182, 1188, 1189, 59 L.Ed.2d 416 (1979). *See also Ferrelli v. Commonwealth of Pennsylvania,* 783 A. 2d 891 (Pa. Cmwlth. 2001). States are precluded from "adopt[ing] any policy of hostility to the public Acts" of other states. *Franchise Tax Board of California v. Hyatt,* 139 S. Ct. 1485, 1497. Under the circumstances, Amici Curiae respectfully contend that allowing the Pennsylvania Commissioner of Insurance to set the premium rates for policies governed by the law of other states violates the law and public policy of each Amici jurisdiction, if not all other jurisdictions with SHIP policyholders.

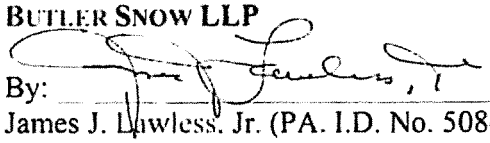
E. CONCLUSION

The Plan abrogates the power expressly reserved to each Amici insurance regulator to approve rates and policy forms for insurers within their jurisdiction and disregards long-standing federal and state laws. The Plan is not feasible, is wholly inconsistent with the goals and purposes of a rehabilitation proceeding, circumvents state laws, and improperly shifts the burden of filling the deficit from the statutorily enacted receivership and guaranty association process to SHIP's elderly policyholders.

The Amici join Appellants in urging this Court to reverse the Order of the Commonwealth Court. The requested relief is necessary to preserve the laws and regulatory principles of the system of state-based insurance regulation and to prevent irreparable harm to SHIP policyholders.

Respectfully Submitted,

BUTLER SNOW LLP



By: _____

James J. Lawless, Jr. (PA. I.D. No. 50848)
Jim.Lawless@butlersnow.com
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507
Counsel for Amici Curiae State Insurance Regulators

AMICI INSURANCE REGULATORS EXHIBIT 1
PRIOR RATE APPROVAL AUTHORITY STATUTES

State	Statutory Citation
Arizona	Arizona Revised Statutes 20-1691.08
Arkansas	Ark. Code Ann. § 23-79-109 and Ark Code Ann. § 23-79-110
District of Columbia	D.C. Off.Code § 31-4712(a) and under 26-A DCMR §§ 2600 et seq.
Connecticut	Conn. Gen. Stat §§ 38a-501 and 38a-528
Idaho	§41IDSTAT 41:Ch.18§41:1812; 41:Ch.46: §41-4608; IDAPA 18.04, 11.024, 11.025
Indiana	IC 27-8-5-1; 27-8-5-1.5; 760 IAC 2-13-1
Iowa	IA Code ch. 514G. Iowa Code § 514G.111; Admin. Code rule 191-39.28
Louisiana	LA. Rev.Stat. 22:12,1095,1181-1191; LAC 37:46.19.1901 *et seq.*
Maryland	Md. Code Ann., Ins. Art. § 11-703(c)(2), § 18-116(b); § 18-116.1; § 12-203(b)(1); Code of MD. Reg. 31.14.01.36
Mississippi	Miss. Code Ann. §83-9-1; and 9-3(5-6), 9-5 (7) (Supp. 2020)
Montana	Mont. Code Ann. §33-16-203-211
New Hampshire	NH RSA 415:1 and NH RSA 415-D:11, Admin Rule Ins. 3601.19
New Jersey	N.J.S.A.17B:27E-10 and N.J.S.A.17B:27E-11
New Mexico	NMSA 1978 ch.59A, articles 18, 44, 46,47; NMAC 13.10.15.34
North Carolina	NCGS §58-51-95 (2021)
North Dakota	N.D.C.C. § 26.1-30-19
Ohio	Ohio Rev. Code §§ 3901.011, 3923.45, 3923.46, 3923.47; Ohio Adm.Code 3901-4-01
Oklahoma	36_O.S. §332, 902, 2028, 3610, 3611, 3648, 4426(F), 4430, 6002, 7004; OAC 365:10-5-47.1, 10-5-48, 10-5-54, 10-5-46, 10-5-48.6
Rhode Island	R.I. Gen. Laws § 27-18-8; R.I. R.I. Gen. Laws Chapter 27-34.2
South Carolina	§38-3-110(1) (2019);38-3-110(1) (2019); § 38-72-75 (2019); § 38-61-10 (2015)
South Dakota	SDCL 58-6-1, 58-1-5, 58-6-46, 58-17-4.1 et seq., SDCL Ch. 58-18, SDCL 58-18B, and ARSD Ch. 20:06:21
Utah	UT Code §§ 31A-2-201.1; 31A-21-201; 31A-22-602; 31A-22-1404(24); Rule R590-148-24 and R590-220
Vermont	8 Vt. Stat. Ann. § 3541; 8 Vt. Stat. Ann. Ch. 154; LTC Rule H-2009-01; Ins. Bulletin No. 216
West Virginia	W.Va. Code §§ 33-6-8 and 33-6-9.; § 33-15A-1, et seq., *Long-Term Care Insurance Act;* State Rules Title 114, Series 32
Wisconsin	Wis.Stat. ch. 625 and 632.20, Wis.Adm.Code Ins. 3.455(9)(9m)
Wyoming	W.S. 26-15-110; 26-38-101 - 26-38-106 and 26-38-110; 26-38-105(r); Reg. Ch. 37

THE SIGNATURES ON THE ATTACHED PAGES ON BEHALF OF THE AMICI CURIAE ARE INCLUDED DUE TO A PRIOR REQUEST FROM THE CLERK OF COURT AND DO NOT CONSTITUTE AN APPEARANCE OTHER THAN TO REPRESENT THE AUTHORITY OF EACH REGULATOR TO BE AN AMICI CURIAE

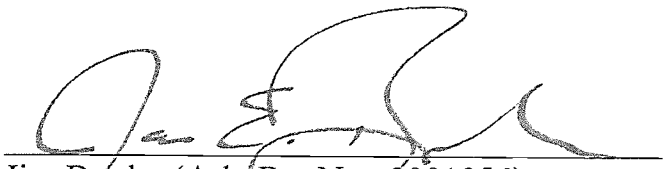
(None of the attorneys shown below are admitted in Pennsylvania unless otherwise indicated)

ARIZONA DEPARTMENT OF INSURANCE AND FINANCIAL INSTITUTIONS, BY EVAN G. DANIELS, DIRECTOR

Lynette Evans (Bar No.: 021069)
Unit Chief Counsel
Arizona Attorney General's Office
2005 North Central Avenue
Phoenix, Arizona 85004
(602) 542-7701
Lynette.Evans@azag.gov
Attorney for Evan G. Daniels, Director of the Arizona Department of Insurance and Financial Institutions

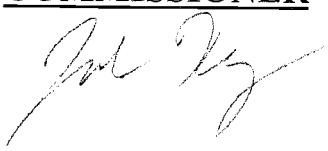
(None of the counsel shown below are admitted in Pennsylvania)

ARKANSAS INSURANCE DEPARTMENT, BY ALAN MCCLAIN, COMMISSIONER



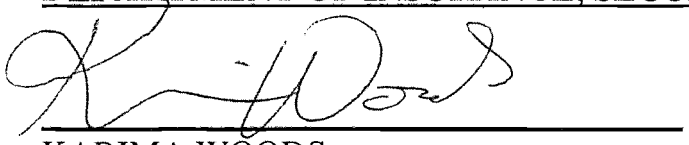
Jim Brader (Ark. Bar No.: 2001056)
Deputy Commissioner & General Counsel
Arkansas Insurance Department
1 Commerce Way, Suite 504
Little Rock, AR 72202
(501) 371-2825
jim.brader@arkansas.gov

CONNECTICUT INSURANCE DEPARTMENT, BY ANDREW N. MAIS, COMMISSIONER



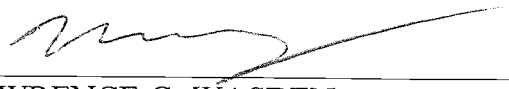
Jared T. Kosky (CT Juris No. 427653)
General Counsel, Connecticut Insurance Department
153 Market Street, 7th Floor
Hartford, CT 06103
Telephone: 860-297-3800/Fax: 860-566-7410
Email: jared.kosky@ct.gov
Attorney for Andrew N. Mais, Insurance Commissioner for the State of Connecticut

KARIMA WOODS, COMMISSIONER, DISTRICT OF COLUMBIA DEPARTMENT OF INSURANCE, SECURITIES AND BANKING



KARIMA WOODS
Commissioner
Department of Insurance, Securities and Banking
1050 First Street, NE, #800
Washington, DC 20002
Telephone: (202)727-8000
Karima.Woods@dc.gov

IDAHO DEPARTMENT OF INSURANCE, BY DEAN L. CAMERON, DIRECTOR



LAWRENCE G. WASDEN
ATTORNEY GENERAL, STATE OF IDAHO
MICHAEL WITRY (ID Bar No. 7960)
Deputy Attorney General
Idaho Department of Insurance
700 W. State St., 3rd Floor
PO Box 83720
Boise, Idaho 83720-0043
Telephone No. (208) 334-4219/Facsimile No. (208) 334-4298
michael.witry@doi.idaho.gov
Attorneys for Dean L. Cameron, Director of the Idaho Department of Insurance

INDIANA DEPARTMENT OF INSURANCE, BY AMY L. BEARD, COMMISSIONER

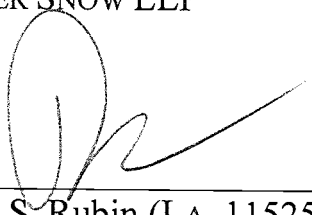
By: _____

THEODORE E. ROKITA
ATTORNEY GENERAL, STATE OF INDIANA
THOMAS M. FISHER (active IN Bar No. 17949-49; admitted but inactive PA Bar No. 77473)
Solicitor General
Office of the Attorney General
200 West Washington Street, Room 219
Indianapolis, IN 46204

DOUGLAS M. OMMEN, INSURANCE COMMISSIONER OF THE STATE OF IOWA

ADAM KENWORTHY (IA Bar No. AT0012137)
Insurance Division Counsel
1963 Bell Avenue, Suite 100
Des Moines, Iowa 50315
adam.kenworthy@iid.iowa.gov
Attorney for Douglas M. Ommen, Commissioner of Insurance for the State of Iowa

LOUISIANA DEPARTMENT OF INSURANCE, BY JAMES J. DONELON, COMMISSIONER
JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL (LA. 20685)
murrille@ag.louisiana.gov
Solicitor General
Louisiana Department of Justice
Post Office Box 94005
Baton Rouge, LA 70804
(225) 456-7544
-and-
BUTLER SNOW LLP



David S. Rubin (LA. 11525)
David.Rubin@butlersnow.com
445 North Boulevard, Suite 300 (70802)
Baton Rouge, Louisiana 70802
Telephone: (225) 325-8700/Facsimile: (225) 325-8800
Attorneys for James J. Donelon, Commissioner of Insurance for the State of Louisiana

MARYLAND INSURANCE ADMINISTRATION, BY KATHLEEN A. BIRRANE, COMMISSIONER

J. Van Lear Dorsey
Assistant Attorney General
Maryland Insurance Administration
200 St. Paul Place, Suite 2700
Baltimore, MD 21202
(410) 468-2023
van.dorsey@maryland.gov

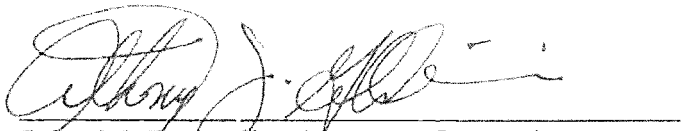
MISSISSIPPI DEPARTMENT OF INSURANCE, BY MIKE CHANEY, COMMISSIONER

Christina Kelsey (MS Bar No. 9853)
General Counsel, Mississippi Department of Insurance
P.O. Box 79, Jackson, MS 39205-0079
Telephone: 601-359-3577/Fax: 601-359-2474
christina.kelsey@mid.ms.gov
Attorney for Mike Chaney, Commissioner of Insurance
State of Mississippi

TROY DOWNING, MONTANA COMMISSIONER OF SECURITIES AND INSURANCE

Montana State Auditor
Ole Olson, Chief Legal Counsel
Office of the Montana State Auditor
Commissioner of Securities and Insurance
840 Helena Ave.
Helena, MT 59601
406-444-1295
OOlson@mt.gov

NEW HAMPSHIRE DEPARTMENT OF INSURANCE BY CHRISTOPHER R. NICOLOPOULOS, COMMISSIONER



John M. Formella, Attorney General
Anthony J. Galdieri, Solicitor General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03310
Tel. 603-271-3550/ Fax: 603-271-2110
Anthony.J.Galdieri@doj.nh.gov

NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, BY MARLENE CARIDE, COMMISSIONER

[NOTE: COUNSEL SHOWN BELOW IS ADMITTED IN PENNSYLVANIA]

Andrew J. Bruck
Acting Attorney General
Richard E. Wegryn, Jr. (PA Bar. No. 71563)
richard.wegryn@law.njoag.gov
Deputy Attorney General
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 117
Trenton, New Jersey 08625-0117
(609)376-2965
Attorney for Marlene Caride, Commissioner of the New Jersey Department of Banking and Insurance

HON. RUSSELL TOAL, SUPERINTENDENT OF INSURANCE FOR THE STATE OF NEW MEXICO

Richard B. Word
Associate Legal Counsel
1120 Paseo de Peralta, 4th Floor
P.O. Box 1689
Santa Fe, NM 87504-1689
Richard.word@stae.nm.us

NORTH CAROLINA DEPARTMENT OF INSURANCE
MIKE CAUSEY, COMMISSIONER

M. Denise Stanford

M. Denise Stanford (NC State Bar No. 17601)
Special Deputy Attorney General
Daniel Snipes Johnson (NC State Bar No. 9289)
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6615
dstanford@ncdoj.gov
djohnson@ncdoj.gov

NORTH DAKOTA INSURANCE DEPARTMENT, BY JON GODFREAD, COMMISSIONER.

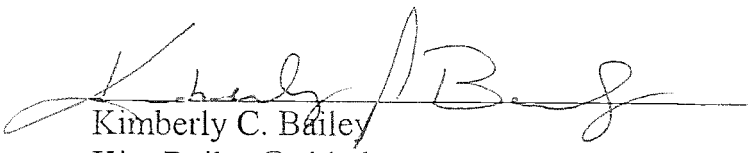
Johannes (Johnny) Palsgraaf
General Counsel (ND Bar No. 06631)
N.D. Insurance Department
600 East Boulevard Avenue, Dept. 401
Bismarck, ND 58505
Ph. (701) 328-2577/Fax (701) 328-4880
jpalsgraaf@nd.gov

OHIO DEPARTMENT OF INSURANCE, BY JUDITH L. FRENCH, DIRECTOR

DAVE YOST (OH Bar No. 0056290)
Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Telephone No. (614) 466-8980/ Facsimile No. (614) 466-5087
Dave.yost@OhioAGO.gov

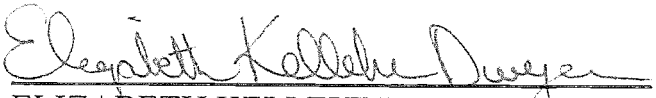
Attorney for Judith L. French, Director of the Ohio Department of Insurance

OKLAHOMA DEPARTMENT OF INSURANCE, BY GLEN MULREADY, COMMISSIONER



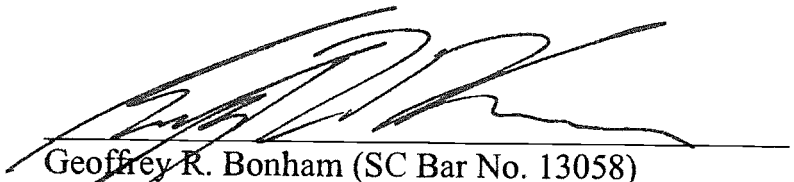
Kimberly C. Bailey
Kim.Bailey@oid.ok.gov
General Counsel, Oklahoma Bar No. 16625
Oklahoma Insurance Department
400 N.E. 50th Street
Oklahoma City, OK 73105
Telephone: (405)522-6335/Facsimile: (405)521-6635

RHODE ISLAND DIVISION OF INSURANCE, BY ELIZABETH KELLEHER DWYER, SUPERINTENDENT



ELIZABETH KELLEHER DWYER
Rhode Island Superintendent of Insurance
1511 Pontiac Avenue
Cranston, Rhode Island 02920
Telephone: (401) 462 9615
elizabeth.dwyer@dbr.ri.gov

SOUTH CAROLINA DEPARTMENT OF INSURANCE, BY RAYMOND G. FARMER, DIRECTOR



Geoffrey R. Bonham (SC Bar No. 13058)
S.C. Department of Insurance
P.O. Box 100105 Columbia SC 29202-3105
Telephone: 803-737-6200/Fax: 803-737-6229
gbonham@doi.sc.gov
Attorneys for Raymond G. Farmer, Director of Insurance for the State of South Carolina

SOUTH DAKOTA DIVISION OF INSURANCE, BY LARRY D. DEITER, DIRECTOR

Frank A. Marnell (SD Bar No. 4219)
Senior Legal Counsel
South Dakota Division of Insurance
124 S. Euclid Ave., 2nd Floor
Pierre, SD 57501
Telephone: 605-773-3563/Fax: 605-773-5369
Frank.Marnell@state.sd.us
Attorney for Larry D. Deiter, South Dakota Director of Insurance

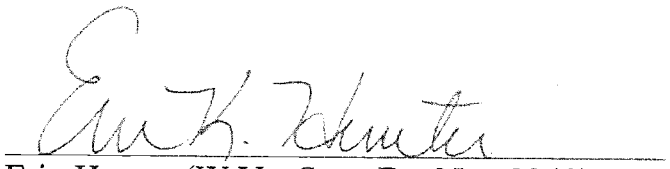
UTAH INSURANCE DEPARTMENT, BY JONATHAN T. PIKE, COMMISSIONER

Perri Ann Babalis (Utah Bar No. 5658)
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Fl.
P.O. Box 140874
Salt Lake City, UT 84114-0874
Telephone: 807-718-1270
Email: pbabalis@agutah.gov
Attorney for Jonathan T. Pike, Utah Insurance Commissioner

VERMONT DEPARTMENT OF FINANICAL REGULATION
MICHAEL PIECIAK, COMMISSIONER

Kevin Gaffney
Deputy Commissioner
89 Main Street
Montpelier, VT 05620-3101
802-828-3301

WEST VIGINIA OFFICES OF THE INSURANCE COMMISSIONER, BY ALLAN L. MCVEY, COMMISSIONER



Erin Hunter (W.Va. State Bar No.: 9349)
Deputy Commissioner & General Counsel
Gregory Elam (W.Va. State Bar No.: 6026)
Associate General Counsel
West Virginia Offices of the Insurance Commissioner
900 Pennsylvania Ave.
Charleston, WV 25302
(304) 558-6279
Erin.K.Hunter@wv.gov
Greg.A.Elam@wv.gov

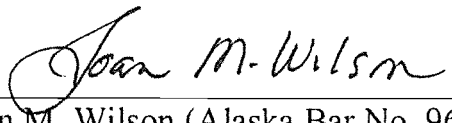
WISCONSIN OFFICE OF THE COMMISSIONER OF INSURANCE, BY MARK AFABLE, COMMISSIONER

RICHARD B. WICKA (WI Bar No. 1041858)
Chief Legal Counsel
Wisconsin Office of the Commissioner of Insurance
125 S. Webster St.
Madison, WI 53703
Telephone: (608)261-6018
richard.wicka@wisconsin.gov
Attorney for Mark Afable, Commissioner of Insurance for the State of Wisconsin

WYOMING DEPARTMENT OF INSURANCE, BY JEFFREY P. RUDE, COMMISSIONER

JEFFREY P. RUDE
Wyoming Commissioner of Insurance
106 E. 6th Ave
Cheyenne, WY 82002
Telephone: (307)777-7401
Jeff.rude@wyo.gov

ALASKA, DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT, DIVISION OF INSURANCE, BY LORI WING-HEIER, DIRECTOR

By: 

Joan M. Wilson (Alaska Bar No. 9611069)
Senior Assistant Attorney General
Alaska Department of Law
1031 W. Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5100
joan.wilson@alaska.gov

PUBLIC ACCESS POLICY CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

I further certify that pursuant to Pa. R. App. P 531(b)(3) that this Brief contains no more than 5534 words which is less than the allowable 7000 words.

December 21, 2021.

BUTLER SNOW LLP

By: _____
James J. Lawless, Jr. (PA. I.D. No. 50848)
Jim.Lawless@butlersnow.com
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507
Counsel for Amici Curiae Insurance Regulators

PROOF OF SERVICE

I, James J. Lawless, hereby certify that on December 21, 2021, the foregoing document was served via email only upon the following counsel:

COUNSEL FOR STATUTORY LIQUIDATOR OF SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA

Michael Broadbent, Esq.Cozen O'Connor
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Email: mbroadbent@cozen.com
Dexter Hamilton
Email: dhamilton@cozen.com
Haryle Kaldis
Email: hkaldis@cozen.com

Amy Daubert
Pennsylvania Department of Insurance1341 Strawberry Square
Harrisburg, PA 17120
Email: adaubert@state.pa.us
Jodi Frantz
Email: jodfrantz@state.pa.us
Kathryn McDermott Speaks
Email: kspeaks@pa.gov

Preston M. Buckman
Pennsylvania Insurance Department 901 N. 7th Street, Suite 200
Harrisburg, PA 17102
Email:pbuckman@pa.gov

Leslie Greenspan
Tucker Law Group, LLCTen Penn Center
1801 Market Street, Suite 2500
Philadelphia, PA 1910
Email: lgreenspan@tlgattorneys.com

Counsel for Anthem, Inc.; Health Care ServiceCorporation; Horizon Healthcare Services, Inc.d/b/a Horizon Blue Cross Blue Shield of New Jersey; and UnitedHealthcare Insurance Company

Harold S. Horwich
Benjamin J. Cordiano
MORGAN, LEWIS & BOCKIUS LLP
One State Street
Hartford, Connecticut 06103
harold.horwich@morganlewis.com
benjamin.cordiano@morganlewis.com

John P. Lavelle, Jr.
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
john.lavelle@morganlewis.com

Non-Parties

Counsel for the Senior Health Care Oversight Trust

Thomas Jenkins
6498 N. Lazulite Place
Tucson, AZ 85750
Email: tjenkins5714@gmail.com

Matthew D. Coble, CounselMette Evans & Woodside
3401 North Front Street
Harrisburg, PA 17110
Email: mdcoble@mette.com

Intervenors

Counsel for Intervenor National Organization of Life and Health InsuranceGuaranty Associations (NOLGHA)

Caryn M. Glawe
Faegre Drinker Biddle & Reath LLP 300 North Meridian Street, Suite 2500
Email: caryn.glawe@faegredrinker.com

D. Alicia Hickok
Faegre Drinker Biddle & Reath LLP One Logan Square, Suite 2000
Email: alicia.hickok@faegredrinker.com
Jane Dall Wilson
Email: jane.wilson@faegredrinker.com

COUNSEL FOR INTERVENOR PRIMERICA LIFE INSURANCE COMPANY

Kevin Eldridge, Assistant General Counsel Primerica Life Insurance Company
Office of the General Counsel 1 Primerica Parkway
Duluth, GA 30099-0001
Email: Kevin.Eldridge@primerica.com

COUNSEL FOR INTERVENOR PRIMERICA LIFE INSURANCE COMPANY

Jim Gkonos, Counsel
Saul Ewing Arnstein & Lehr LLP
Centre Square West
1500 Market Street,
38th FloorPhiladelphia,
PA 19102-2186
Email:
jim.gkonos@saul.com

COUNSEL FOR INTERVENORS MAINE SUPERINTENDENT OF INSURANCE, MASSACHUSETTS COMMISSIONER OF INSURANCE AND WASHINGTON INSURANCE COMMISSIONER

Stephen G. Harvey Steve Harvey Law LLC
1880 John F. Kennedy Blvd., Suite 1715Philadelphia, PA 19103
Email: steve@steveharveylaw.com

J. David Leslie
Eric A. Smith

Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110-1700
dleslie@rackemann.com
esmith@rackemann.com

COUNSEL FOR INTERVENORS ACSIA LONG TERM CARE, INC.; GLOBAL COMMISSION FUNDING LLC, LIFECARE HEALTH INSURANCE PLANS, INC., SENIOR COMMISSION FUNDING LLC, SENIOR HEALTH CARE INSURANCE SERVICES, LTD., LLP, AND UNITED GROUP AGENCY, INC.

Joseph M. Donley
Clark Hill PLC
Two Commerce Square
2001 Market Street, Suite 2620
Philadelphia, PA 19103
Email: jdonley@clarkhill.com
Scott B. Galla, Senior Attorney
Email: sgalla@clarkhill.com

PRO SE INTERVENOR JAMES F. LAPINSKI

James F. Lapinksi
P.O. Box 29135
Port Orange, FL 32129

PRO SE INTERVENOR GEORGIANNA I. PARISI

Georgianna I. Parisi
257 Regency Ridge Dr.
Dayton, OH 45459

Dated: December 21, 2021

BUTLER SNOW LLP

By: _____

James J. Lawless, Jr. (PA. I.D. No. 50848)
Jim.Lawless@butlersnow.com
1414 Millard Street
Bethlehem, PA 18018
Telephone: (610) 691-3308| Fax: (610) 691-8507

Counsel for Amici Curiae Insurance Regulators