STATE OF SOUTH CAROLINA **RICHLAND COUNTY**	**IN THE COURT OF COMMON PLEAS** **FIFTH JUDICIAL CIRCUIT**
Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance, Plaintiffs, vs. Michael Humphreys, as Rehabilitator of Senior Health Insurance Company of Pennsylvania, Patrick H. Cantilo, as Special Deputy Rehabilitator of Senior Health Insurance, Company of Pennsylvania, and Senior Health Insurance Company of Pennsylvania in Rehabilitation, Defendants.	Civil Action No. 2020CP4005802 **ORDER DENYING DEFENDANTS' MOTION TO DISMISS, AFFIRMING AUTOMATIC STAY, AND GRANTING LEAVE TO REASSERT MOTION FOLLOWING APPEALLATE COURT RULING(S)**

Heard: March 16, 2022 via Webex Virtual Courtroom by Consent
Attorney for Plaintiffs: Geoffrey Ross Bonham
Attorneys for Defendants: Tracy Lynn Eggleston and Michael J. Broadbent
Court Reporter: None – Webex Virtual Court Recording

Defendants move to dismiss this case pursuant to Rules 12(b)(1), (2), (6) and (8), SCRCP, arguing that this Court lacks jurisdiction over the subject matter, that it lacks personal jurisdiction over the individual Defendants Humphreys and Cantilo, that Plaintiffs have failed to state facts sufficient to constitute a cause of action, and that another action is pending between the same parties for the same claim. The court has spent days reviewing the extensive submissions, arguments, and proposed orders from learned counsel. However, deciding the issues involved in this motion at this time is inappropriate because there is a detailed order from The Honorable L. Casey Manning, which is on appeal to the South Carolina Court of Appeals, dealing with most of

the same issues, and there is a pending appeal from an order in the Commonwealth of Pennsylvania. The Rule 12(b)(8) motion was not addressed to Judge Manning. It is denied at this stage, with leave to reassert. This decision is made based on the practicalities of issuing rulings on issues that are currently decided at the trial court level and are on appeal.

Any statements of fact are viewed in the light most favorable to the Plaintiffs and are not to be construed as binding upon any of the parties. To the extent that they come from sources outside the four corners of the Complaint, they are not an indication that this court is converting the Rule 12(b)(6) motion to one for summary judgment.

Senior Health Insurance Company of Pennsylvania ("SHIP") is a company domiciled in Pennsylvania which has issued policies of long-term health insurance in South Carolina and many other states. It is in serious financial trouble, resulting in a rehabilitation action being commenced in Pennsylvania by the Defendant Michael Humphreys, as the Acting Insurance Commissioner of Pennsylvania. Mr. Humphreys is the Statutory Rehabilitator for SHIP by law and by court order. 40 P.S. § 221.15. Defendant Patrick H. Cantilo is the Special Deputy Rehabilitator for SHIP. He is a resident of Texas who was appointed by the Statutory Rehabilitator under 40 P.S. § 221.16. Cantilo's appointment was affirmed and ordered by the Commonwealth Court. (Compl. ¶ 4; Defs' Ex. C, Rehabilitation Order ¶ 14.) The rehabilitators currently serve in a managerial role in place of SHIP's officers and directors, who are suspended. *See* 40 Pa. Stat. § 221.16(b).

Plaintiffs are the South Carolina Department of Insurance and its Director, Mr. Farmer. SHIP does not dispute that insurance companies are subject to the laws and regulations governing insurance policies in this state, and there is no question that the Plaintiffs are charged with the authority and responsibility to apply such laws and regulations.

A Pennsylvania court has approved the rehabilitation plan (the "Plan") proposed by the

Defendants. South Carolina is not a party to the Pennsylvania action, but did file an *amicus* brief in opposition to adoption. The Pennsylvania decision is currently on appeal, and the Defendants contend that the South Carolina declaratory judgment action is not ripe for review since the Pennsylvania decision has not been decided on appeal.

The Plaintiffs assert that the Plan illegally bypasses laws and regulations applicable to insurance companies that operate in South Carolina. They also maintain that, even though the Pennsylvania appeal is unresolved, SHIP has taken steps toward contacting South Carolina policyholders to assert SHIP's options under the Plan. Primarily for those reasons, the Plaintiffs instituted this action and sought injunctive relief to prevent SHIP from going forward with the provisions of the Plan in South Carolina. The Plaintiffs assert that all insurance companies, even those in rehabilitation, remain subject to Plaintiffs' approval of rate changes, among other things.

Insurance regulators in affected states were given the ability to opt out of the Plan. If a state opts out, SHIP has to submit changes in rates to the governing state departments. However, if a state's regulators in an opt-out state were not to approve SHIP's proposed rate increases, the Plan imposes a reduction of benefits on that state's policyholders without any approval being required. The Plaintiffs contend that this presents them with an impermissible Hobson's choice. Plaintiffs claim that the record establishes that even the Rehabilitator did not recommend that state commissioners opt out because of the probability of it being disadvantageous to that state's policyholders.[1] Plaintiffs also maintain that the record reveals that some opt-out states where SHIP has filed for increases have found its submissions incomplete and noncompliant, resulting

[1] *See* Pl. Motion for Temp. Inj. Exh. C, Opt-Out Election Notice FAQ 9 (Opt-out state approving lower rate increases would "result in additional downgrades [and] the Rehabilitator DOES NOT recommend that states opt out because that is generally expected to be disadvantageous to affected policyholders.").

in regulatory action against SHIP.[2] Plaintiffs' position is that the Plan is based on shifting some of the burden of the insurer's insolvency onto policyholders because the rehabilitators did not deem it reasonable for taxpayers (due to tax offsets for assessed guaranty association member insurers) to contribute "hundreds of millions of dollars to pay claims" on underpriced policies.[3]

So, the major point of contention is that the Plan would give SHIP, through its rehabilitators, the power to modify the terms of insurance policies issued to South Carolinians without having to go through any review process by the South Carolina Department of Insurance. Viewed in the light most favorable to the Plaintiffs, these could involve massive increases in premiums and/or a substantial reduction in benefits.

On January 11, 2021, Defendants removed this action to the United States District Court for the District of South Carolina pursuant to the federal diversity statute, 28 U.S.C. § 1332. By Order dated July 21, 2021, the case was remanded to this court.

The South Carolina Court of Common Pleas heard the motion for temporary injunction in this action. The Honorable L. Casey Manning issued a temporary injunction on January 20, 2022, effectively staying the enforcement of the Plan in South Carolina until the Pennsylvania appellate court has decided whether the adoption of the Plan is affirmed. (Judge Manning's order expires not more than 30 days after the Pennsylvania appellate court's decision, unless extended).

The primary dispute here relates to the ability of the South Carolina Department of Insurance to pursue this declaratory judgment action when Pennsylvania has issued a rehabilitation plan which the Defendants claim gives Pennsylvania exclusive jurisdiction. Both

[2] *See generally, e.g.*, Pl. Exhs. E-R.

[3] Pl. Exh. T, Cantilo Test. p. 78-79.

Pennsylvania and South Carolina have adopted the NAIC's Insurers Rehabilitation and Liquidation Model Act.[4] The Act provides that rehabilitation proceedings are commenced in the jurisdiction where the insurance company is domiciled. The Act places limitations upon jurisdictions in other states regarding rehabilitation proceedings. Our statute, S.C. Code Ann. § 38-27-60(b), contains the following language:

> No court of this State has jurisdiction to entertain, hear, or determine any complaint praying for the … rehabilitation… of an insurer or praying for an injunction or restraining order or other relief preliminary to, incidental to, or relating to the proceedings other than in accordance with [the Act].

The Plaintiffs assert that they are not attempting to become involved in the rehabilitation plan. They claim that they are only seeking a declaration that an insurance company that happens to be in rehabilitation must nonetheless submit requests for rate increases and benefit reductions to the Plaintiffs. *See*, S*malls v. Weed*, 293 S.C. 364, 360 S.E.2d 531 (Ct. App. 1987).

Smalls dealt with a similar situation to the one presented here. A Tennessee rehabilitator asserted that the Model Act established that the receivership court exercised "jurisdiction of the whole field." That rehabilitator's position was that Small's South Carolina action for breach of contract, bad faith refusal to pay insurance benefits, and outrage fell within "relief . . . incidental to or relating to such proceedings," and was barred by what is now Section 38-27-60. The South Carolina Court of Appeals ruled that the action filed in this state was, "merely an action against an insurance company which happens to be in rehabilitation."

The *Smalls* court determined that our courts have subject matter jurisdiction stating:

> Under the general rule, statutes which deprive a court of jurisdiction are to be strictly construed, and must be examined in light of the object of the enactments,

[4] *See* Proc. of the Nat'l Ass'n of Ins. Commrs., 1969 vol.1 at 168-169, 241 & 271.

> the purposes they are to serve, and the mischief they are to remedy, bearing in mind that the operation of such statutes must be restrained within narrower limits than their words import. *United States v. American Bell Tel. Co.*, 159 U.S. 548, 16 S.Ct. 69, 40 L.Ed. 255 (1895); 3A N. Singer, *Sutherland Statutory Construction*, Section 67.03 (4th ed. 1986); *see also Virginian Ry. Co. v. System Federation No. 40*, 84 F.2d 641 (4th Cir. 1936), *aff'd*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937) (statutes in derogation of court's equity powers are to be strictly construed).
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> *Id. 293 S.C. 364 at 368*

JUDGE MANNING'S ORDER

In granting the injunction temporarily prohibiting the Plan from being enforced in South Carolina, pending the decision on the Pennsylvania appeal, Judge Manning determined that the South Carolina Court of Common Pleas has jurisdiction over the subject matter of this action, that it has personal jurisdiction over the two individual Defendants, and that the Plaintiffs demonstrated a likelihood of success on the merits. His ruling is on appeal to the South Carolina Court of Appeals. No Rule 12(b)(8) issue was raised to Judge Manning.

As mentioned previously, part of the reason for the temporary injunction is that the Plaintiffs allegedly learned that Defendants were in the process of planning to contact South Carolina policyholders about rate increases and policy modifications that had not been approved by the South Carolina Department of Insurance, while the Pennsylvania appeal is pending. Any such contact is claimed to constitute a danger that South Carolinians would agree to permanent, unapproved modifications to their insurance contracts. Finding that procedural and substantive rights of South Carolina policyholders would likely be affected, Judge Manning enjoined the Defendants from:

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

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

Order at p. 18.

That language is broad. The pending motion for dismissal effectively asks this court to dissolve the temporary injunction issued by another judge. Judge Manning has included findings of fact that is currently under appeal. The court finds that such action would be inappropriate at this stage under the procedural posture of this case.

RULE 43(l), SCRCP: It is established law that, "One circuit court judge may not overrule another." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008); *see also Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986). In addition, Rule 43(l), SCRCP, provides, "If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action." Judge Manning has addressed issues and defenses raised in opposition to Plaintiffs' motion for temporary injunctive relief and ruled in Plaintiffs' favor in an detailed order.

Defendants argued before Judge Manning that the Court of Common Pleas lacks jurisdiction over the subject matter, that it lacks personal jurisdiction over the two individual Defendants, and that the Defendants could not establish grounds for injunctive relief. They essentially asserted the same issues, with the exception of a defense under Rule 12(b)(8), that they raise in the pending motion. All of the other Rule 12 issues raised in the pending motion, with the exception of the Rule 12(b)(8) claim, appear to have been decided by Judge Manning.

Judge Manning found that the Plaintiffs have no adequate remedy at law and would suffer irreparable harm, which are things that Defendants now assert that the Plaintiffs cannot establish.

See Def. Brief at pp. 24-25. His order granting a motion for temporary injunction and prescribing a specific event for termination of the injunction qualifies as a motion "be[ing] granted conditionally." *See* Rule 43(l), SCRCP. For this Court to rule in Defendants' favor on this motion would necessarily overrule Judge Manning's order and terminate the temporary injunction, which is prohibited by Rule 43(l) and *Salmonsen*.

RULE 205, SCACR: Almost all of the rulings requested by the Defendants would require this court to evaluate issues that are on appeal, without remand to this court. Recognizing that subject matter jurisdiction can be raised at any time, the assertion of that position would require a remand of the issue to the Court of Common Pleas under the appellate court rules.

Rule 205, SCACR, reads:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Judge Manning's order made findings and set forth reasons for his findings that go to the heart of the issues on appeal. Therefore, they are not matters unaffected by the appeal. He ruled that the Court of Common Pleas has jurisdiction over the subject matter and the individual Defendants. He found that there is a likelihood of success on the merits, stating strongly that South Carolina has an enforceable interest that can be asserted through this lawsuit. He found a justiciable controversy. Whether he is correct or incorrect in any way is for an appeals court to decide. For this court to interject rulings that might be inconsistent or bolstering is inappropriate, particularly where appellate courts in two states have material issues under consideration.

RULE 12(b)(8)

Rule 12(b)(8), SCRCP provides for dismissal where there is another action involving the

same parties, claims, subject matter, and remedies. Plaintiffs are not parties to the Pennsylvania proceedings, nor is this declaratory judgment action identical or substantially the same as the rehabilitation proceedings in Pennsylvania. *See Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 322, 328, 701 S.E.2d 39, 44, 48 (S.C. App. 2010) (to prevail on motion to dismiss pursuant to Rule 12(b)(8), movant must show that the actions in question are between the same parties in their same capacities); *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009) ("We interpret [Rule 12(b)(8)] narrowly such that the claim must be precisely or substantially the same in both proceedings" and "the administrative proceeding and the circuit court action are fundamentally and structurally different from each other. Therefore . . . dismissal . . . under Rule 12(b)(8), SCRCP was improper.").

Defendants argue that because Plaintiffs submitted an *amicus* brief along with other states in the Pennsylvania appeal, and because South Carolina has an obvious interest in the outcome, and because the Plaintiffs could have intervened in the rehabilitation proceedings in the lower Pennsylvania court, they are parties to those proceedings. An *amicus curiae* is not a party to an action, but a friend of the court, whose sole function is to advise or to make suggestions to the court. *Burger v. Lutheran General Hosp.*, 759 N.E.2d 533 (Ill. 2001). Pennsylvania has specifically recognized the distinction between an *amicus* and a party. *See, e.g., Wright v. Denny*, 33 A.3d 687 n.3 (Pa. Commw. Ct. 2011) (*amicus curiae* is not a party); *Temple University Hosp., Inc. v. Healthcare Management Alternatives, Inc.*, 832 A.2d 501 n.2 (Pa. Super. Ct. 2003) (same), *pet. for allowance of appeal denied*, 847 A.2d 1288 (2004). That Plaintiffs have an interest in the outcome of the Pennsylvania proceedings is irrelevant. By the nature of things, an *amicus* is not normally impartial and there is no rule that *amici* must be totally disinterested. *Tafas v Dudas*, 511 F. Supp. 2d 652, 661 (E.D. Va. 2007). Moreover, whether Plaintiffs could have intervened in

another state proceeding is immaterial. *See Brown v. Wright*, 137 F.2d 484, 487 (4th Cir. 1943) (that individual may have had the right to intervene in state proceeding is immaterial, since he did not in fact intervene).

The Plaintiffs are not parties to the Pennsylvania rehabilitation and there is no identity of issues. Rule 12(b)(8) does not permit dismissal at this stage.

RULE 12(b)(6)

The court is not going into detail concerning Rule 12(b)(6) based on the rulings stated above. However, it seems important to note that Rule 12(b)(6) motions are typically limited to the four corners of the Complaint. On the issue of ripeness, a court would benefit from additional discovery regarding what, if any, steps were being taken by SHIP directly with South Carolina policyholders, as alleged by the Plaintiffs. However, since Judge Manning's order deals with that issue and is on appeal, this court determines that it is not appropriate to evaluate the ripeness argument further.

CONCLUSION

The Court finds that dismissal of the Complaint is not warranted at this stage for the reasons stated herein.

IT IS THEREFORE ORDERED that Defendants' motion is denied, the action is stayed, and the Defendants may reassert these motions, in whole or in part, after further order(s) from the appellate court(s).

AND IT IS SO ORDERED.

[Judge's electronic signature follows on separate page]

Richland Common Pleas

Case Caption:	Raymond G Farmer , plaintiff, et al vs Jessica K Altman , defendant, et al
Case Number:	2020CP4005802
Type:	Order/Stay

Circuit Judge (Code #2050)

s/ William P. Keesley