

LEXSEE 561 NW2D 412

**INSURANCE COMMISSIONER OF MICHIGAN, Petitioner-Appellee, v REYNALDO ARCILIO, ISADORE LEVY, and ANTHONY V. MONTALTO, Respondents-Appellants.**

No. 187813

## COURT OF APPEALS OF MICHIGAN

*221 Mich. App. 54; 561 N.W.2d 412; 1997 Mich. App. LEXIS 7*

**May 9, 1996, Submitted**  
**January 10, 1997, Decided**

**PRIOR HISTORY:** [\*\*\*1]

Ingham Circuit Court. LC No. 94-78300-CR.

**DISPOSITION:**

Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant policyholders filed separate class actions against an insurer's former directors and officers for common-law fraud, negligent misrepresentation and unlawful securities transactions. Petitioner insurance commissioner (commissioner), as appointed rehabilitator of the insurer, moved for and was granted an injunction by the Ingham Circuit Court (Michigan). The policyholders appealed.

**OVERVIEW:** Pursuant to the state's insurance rehabilitation and liquidation act (IRLA), *Mich. Comp. Laws* § 500.8101 et seq. (Mich. Stat. Ann. § 24.18101 et seq.), the commissioner had been granted a petition placing the insurer in rehabilitation and seizing its assets. The policyholders initiated their suits in federal courts outside of Michigan. The court held that pursuant to § 8114(3) of the IRLA, the general assets of the insurer included the type of action brought by the policyholders. The purpose of the legislation was to protect the interest of insureds by avoiding piecemeal litigation and potential inequitable distribution of the assets. The court refused to give a narrow reading to the language of the IRLA giving the commissioner authority to maintain suits on behalf of the insurer, and held that the statute included the authority to pursue causes of action on behalf of policyholders as well. However, the determination of whether the insurance products purchased by the policyholders constituted securities within the meaning of federal law was within the exclusive jurisdiction of the federal courts.

**OUTCOME:** The circuit court's injunction was affirmed to the extent that it enjoined the policyholders' common-law fraud and misrepresentation claims. The circuit court was without jurisdiction to determine whether the policyholders had stated a claim for violation of federal securities law.

**LexisNexis(R) Headnotes**

***Insurance Law > Regulation of Insurance > Limitations on Federal Regulation***

[HN1] The McCarran-Ferguson Act, 15 U.S.C.S. § 1011 et seq., provides that no act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance unless such act specifically relates to the business of insurance. 15 U.S.C.S. § 1012(b).

***Insurance Law > Regulation of Insurance > Limitations on Federal Regulation***

[HN2] State laws enacted for the purposes of regulating the business of insurance do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.

***Insurance Law > Regulation of Insurance > Insurer Insolvency***

[HN3] Section 8113(1) of the Insurer's Rehabilitation and Liquidation Act (act), codified at *Mich. Comp. Laws* § 500.8113(1) (Mich. Stat. Ann. § 24.18113(1)), authorizes the rehabilitator to take immediate possession of the assets of the insurer, and to administer them under the court's general supervision. Once an order of rehabilitation is issued by the court, the insurer shall by operation of law vest title to all assets of the insurer in the rehabilitator. The act defines an insolvent insurer's general assets as including all property, real, personal, or otherwise. *Mich. Comp. Laws* § 500.8103(g) (Mich. Stat. Ann. § 24.18103(g)). In Michigan, personal property connotes intangible as well as tangible personal property and must include choses in

action.

***Insurance Law > Regulation of Insurance > Insurer Insolvency***

[HN4] See *Mich. Comp. Laws* § 500.8114(3) (Mich. Stat. Ann. § 24.18114(3)).

***Insurance Law > Regulation of Insurance > Insurer Insolvency***

[HN5] The general assets of the insurer includes causes of action based in tort against a third party whose breach of the appropriate standard of care is alleged to have defrauded the insurer and its policyholders.

***Insurance Law > Regulation of Insurance > Insurer Insolvency***

[HN6] Section 8114(2) of the Insurer's Rehabilitation and Liquidation Act authorizes a rehabilitator to take such action as he or she considers necessary or appropriate to reform and revitalize the insurer.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction***

[HN7] In deciding whether personal jurisdiction may be asserted, a court must generally conduct a two-step inquiry: first, whether exercising personal jurisdiction would violate the Due Process Clause and, second, whether the exercise of personal jurisdiction over the individual nonresident defendant is authorized by the state's long-arm statute.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction***

[HN8] See *Mich. Comp. Laws* § 600.705 (Mich. Stat. Ann. § 27A.705).

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction***

[HN9] The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which the person has established no meaningful contacts, ties, or relations. The requirement of minimum contacts serves to protect a defendant from litigating in a distant forum and to ensure that a state does not extend its judicial power beyond the limits imposed by our federal system of government.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction***

[HN10] Under Michigan law, the relevant considerations in determining whether sufficient minimum contacts exist to justify the exercise of limited personal jurisdiction over a nonresident defendant are: (1) the defendant must be found to have purposefully availed itself of the privilege of conducting activities in Michigan, (2) the cause of action must arise from those activities, and (3) the exercise of jurisdiction must be reasonable. However, the

primary focus of personal jurisdiction is on reasonableness and fairness. Each case, therefore, must turn on its own merits.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction***

[HN11] Parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for the consequences of their activities.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction***

[HN12] Where the threshold requirement of minimum contacts is satisfied, a court must determine whether the exercise of personal jurisdiction comports with fair play and substantial justice.

***Insurance Law > Regulation of Insurance > Insurer Insolvency***

[HN13] See *Mich. Comp. Laws* § 500.8115(1) (Mich. Stat. Ann. § 24.18115(1)).

***Civil Procedure > Injunctions > Elements***

[HN14] The granting of injunctive relief is within the sound discretion of the trial court, although the decision must not be arbitrary and must be based on the facts of the particular case. In determining whether to issue a preliminary injunction, the court must consider four factors: (1) harm to the public interest if an injunction issues, (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted, (3) the strength of the applicant's demonstration that the applicant is likely to prevail on the merits, and (4) demonstration that the applicant will suffer irreparable injury if the relief is not granted.

***Insurance Law > Regulation of Insurance > Insurer Insolvency***

[HN15] The Insurer's Rehabilitation and Liquidation Act specifically authorizes a receiver to apply for, and the circuit court to grant, an injunction enjoining threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders or the administration of a proceeding under this chapter. *Mich. Comp. Laws* § 500.8105(1)(k) (Mich. Stat. Ann. § 24.18105(1)(k)).

**COUNSEL:**

Bodman, Longley & Dahling LLP (by James J. Walsh), and Cadwalader, Wickersham & Taft (by Michael L. Sonkin and Gregory M. Petrick), for the Commissioner of Insurance. Detroit, New York, NY.

Sinas, Dramis, Brake, Bough ton, McIntyre & Reisig, P.C. (by Bernard Finn), Milberg Weiss Bershad Hynes &

Lerach (by Melvin I. Weiss, Jerome M. Congress, and Brad N. Friedman), and Arthur R. Miller, for Reynaldo Arcilio, Isadore Levy, and Anthony V. Montalto. Lansing; New York NY; Cambridge, MA.

**JUDGES:** Before: Holbrook, Jr., P.J., and Saad and W.J. Giovan \*, JJ.

\* Circuit judge, sitting on the Court of Appeals by assignment.

**OPINION:** [\*57] [\*\*414]

PER CURIAM.

On August 11, 1994, pursuant to this state's insurers rehabilitation and liquidation act (IRLA), *MCL 500.8101 et seq.*; *MSA 24.18101 et seq.*, the Commissioner of Insurance petitioned the Ingham Circuit Court for an order of rehabilitation and an ex [\*\*415] parte order for seizure of the assets of Confederation Life Insurance Company (CLIC), the United States branch of a Canadian insurance company whose state of entry was Michigan. n1 The court granted the petition [\*\*\*2] on August 16, 1994, placing CLIC's business in the United States in rehabilitation and appointing petitioner as rehabilitator.

n1 In this opinion, CLIC's United States branch will be referred to as CLIC, while the Canadian corporation will be referred to as CLIC-Canada.

As a condition of being permitted to sell insurance in the United States, CLIC-Canada was required to establish and maintain on deposit in a trust sufficient assets to satisfy the liabilities owed to policyholders in this country. See *MCL 500.43 1a-c*; *MSA 24.143 1(a)-(c)*. [\*58] Precipitating CLIC's financial instability was the 1991 removal of more than \$600 million in government securities and cash from the trust by the financial management division of CLIC-Canada. CLIC-Canada allegedly accomplished the scheme by replacing the funds with promissory notes and then filing statements with the Michigan Insurance Bureau that failed to disclose the condition of the trust.

On September 27, 1994, the Ingham Circuit Court entered an amended and restated [\*\*\*3] order of rehabilitation, which elaborated on petitioner's powers and responsibilities as rehabilitator. The restated order granted petitioner exclusive control of all CLIC's assets in the United States, including causes of action, and contained a general injunction against "bringing, maintaining or further prosecuting any action at law, suit in equity, special or other proceeding against Confederation [CLIC-Canada]

or Confederation U.S., the Estate in Rehabilitation or against the Commissioner and his successors in office." In addition, the order prohibited any person from "disturbing or interfering in any manner with the Rehabilitator's occupation, use, possession, title and rights to the Estate in Rehabilitation, and from disturbing or interfering in any manner with the conduct of the rehabilitation. . . ." The order also provided:

Those persons, corporations, partnerships, associations and all other entities are hereby enjoined and restrained from wasting transferring, selling, concealing, terminating, cancelling, destroying, disbursing, disposing of or assigning any assets, contracts, causes of action, funds, records or other property of any nature of Confederation. . . [\*\*\*4]

Subsequently, in October 1994, Reynaldo Arcilio, Isadore Levy, and Anthony V. Montalto, none of [\*59] whom are residents of Michigan, filed three separate class actions against CLIC's former directors and officers, as well as an independent auditor and several private insurance-rating agencies, seeking monetary damages for common-law fraud, negligent misrepresentation, and unlawful federal securities transactions. n2 One action was filed in the Supreme Court of the State of New York in New York County, a second was filed in the United States District Court for the Northern District of Georgia, and a third was filed in the Georgia Superior Court in Cobb County. In each of the class actions, the plaintiffs purported to represent policyholders who purchased or renewed policies or annuities issued by CLIC or by Confederation Life Insurance and Annuity Company (CLIAC), a wholly owned subsidiary of [\*\*416] CLIC based in Atlanta, Georgia, during the period from May 27, 1993, through August 12, 1994. According to the complaint in the federal court action, Arcilio and Montalto purchased [\*60] whole life insurance policies from CLIC, while Levy purchased a single-premium deferred annuity. These persons have [\*\*\*5] conceded that their goal in bringing these lawsuits was to reach the proceeds of four directors' and officers' liability policies (D&O policies) that, in total, provided \$50 million of coverage in Canadian funds.

n2 In addition to the three class actions in which the present respondents were the named plaintiffs, a fourth class action was filed in the Superior Court of Essex County, New Jersey, on behalf of Allen and Shelley Glushakow, naming CLIC, Confederation Life Insurance and Annuity Company (CLIAC), former officers and directors of CLIC, and Ernst &

221 Mich. App. 54, \*60; 561 N.W.2d 412, \*\*416;  
1997 Mich. App. LEXIS 7, \*\*\*5

Young, CLIC's auditor, as defendants and alleging that the Glushakows were defrauded when they purchased CLIAC insurance policies. *See Glushakow v Confederation Life Ins Co, 1994 U.S. Dist. LEXIS 20325, \*5. No. 94-4201 (D NJ, December 5, 1994).* After the action was removed to the federal district Court in New Jersey, the court stayed the action on two separate grounds. The first basis for the stay was "the strong policy of the state of New Jersey to defer to the rehabilitation actions of other states" and "the principle of comity." The court also found that the *Burford [v Sun Oil Co, 319 U.S. 315; 63 S. Ct. 1098; 87 L. Ed. 1424 (1943)]* abstention doctrine applied.

A fifth class action was filed in the United States District Court for the Northern District of Georgia on behalf of Rosemary Oloffson and Marianne Snyder. That complaint also named as defendants CLIC's former officers and directors and alleged breach of fiduciary duty. These plaintiffs apparently withdrew their federal action and intend to intervene in respondents' Georgia federal court action.

[\*\*\*6]

On May 3, 1995, petitioner moved for an injunction pursuant to *MCL 500.8105*; MSA 24.18105 n3 on the grounds that the cause of action against CLIC's former officers and directors was an asset of the rehabilitation [\*61] estate, that the \$50 million of coverage provided by the D&O policies was a potential source of funding for all policyholders, and that the suits by respondents Arcilio, Levy, and Montalto were disruptive to the administration of the estate. n4 On June 26, 1995, the Ingham Circuit Court entered an injunction enjoining "all persons or entities" from commencing or continuing "any claims or actions" against CLIC's former or present directors and officers, its independent auditor Ernst & Young, or Harris Trust & Savings Bank "for actions arising out of business or transactions with" CLIC, and enjoining any attempt to represent CLIC "policyholders or creditors in any class actions or in any other lawsuit in any forum." The court specifically exempted from the scope of the injunction the pursuit of claims "personal to such persons or entities alone and which cannot be pursued by the Rehabilitator." Also exempted from the scope of the injunction were respondents' federal securities [\*\*\*7] claims, provided those claims were brought in respondents' individual capacities. Respondents sought rehearing, which the lower court denied. This Court granted respondents' application for leave to appeal.

n3 Section 8105 provides:

(1) A receiver appointed in a proceeding under this chapter may at any time apply for, and the circuit court for Ingham County may grant, a restraining order, preliminary injunction, permanent injunction, and any other order as may be considered necessary and proper to prevent any of the following:

(a) The transaction of further business by the insurer.

(b) The transfer of property.

(c) Interference with the receiver or with a proceeding under this chapter.

(d) Waste of the insurer's assets.

(e) Dissipation and transfer of bank accounts.

(f) The institution or further prosecution of any actions or proceedings.

(g) The obtaining of preferences, judgments, attachments, garnishments, or liens against the insurer, its assets, or its policyholders.

(h) The levying of execution against the insurer, its assets, or its policyholders.

(i) The making of a sale or deed for nonpayment of taxes or assessments that would lessen the value of the insurer's assets.

(j) The withholding from the receiver of books, accounts, docu-

ments, or other records relating to the insurer's business.

(k) Other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors, or shareholders, or the administration of a proceeding under this chapter

(2) The receiver may apply to the court outside of the state for the relief described in subsection (1).

\*\*\*8]

n4 Subsequently, on June 28, 1995, petitioner filed a complaint in the Ingham Circuit Court on behalf of the estate in rehabilitation against the former directors and officers of CLIC, Ernst & Young (CLIC's auditor) and Harris Trust & Savings Bank (trustee of the trust funds established for the protection of the policyholders in the United States), claiming breach of trust, negligence, breach of fiduciary duty, conversion, common-law fraud, professional malpractice, breach of contract, and negligent misrepresentation.

[\*62] I

A

Respondents first argue that the Ingham Circuit Court was precluded either by the Supremacy Clause of the United States Constitution, art VI, cl 2, or by United States Supreme Court precedent from enjoining their federal court action based on individual and class-action claims of common-law fraud and misrepresentation. We find no merit to this claim.

Chapter 81 of the Insurance Code of 1956 governs the supervision, rehabilitation, and liquidation of delinquent insurers. *MCL 500.8101 et seq.*; *MSA 24.18101 et seq.* Congress has declared, through its [\*417] enactment of [HN1] the [\*9] McCarran-Ferguson Act, *15 USC 1011 et seq.*, that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business

of insurance . . ." *15 USC 1012(b)*. Recently, in *United States Dep't of Treasury v Fabe*, *508 U.S. 491, 507; 113 S. Ct. 2202; 124 L. Ed. 2d 449 (1993)*, the Supreme Court stated that § 2(b) of the McCarran-Ferguson Act reverses the normal relationship between state and federal law with regard to the regulation of insurance, establishing "a rule that [HN2] state laws enacted 'for the purposes of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *Id.* Thus, a state law, such as Michigan's IRLA, that has as its purpose the regulation of the business of insurance preempts conflicting federal law.

Respondents argue that this case is controlled by *Donovan v City of Dallas*, *377 U.S. 408; 84 S. Ct. 1579; [\*63] 12 L. Ed. 2d 409 (1964)*, and its progeny. In *Donovan*, the United States Supreme Court held, at 412:

Early in the history [\*\*\*10] of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida v Thompson*, *305 U.S. 456, 465-468; 59 S. Ct. 275; 83 L. Ed. 285 (1939)*. In *Princess Lida* this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." *Id.* at 466.

See also *General Atomic Co v Felter*, *434 U.S. 12, 18; 98 S. Ct. 76; 54 L. Ed. 2d 199(1977)*.

Respondents assert that the Ingham Circuit Court could not enjoin their pursuit of common-law claims of fraud and negligent misrepresentation in federal court because those claims were brought against CLIC's former directors and officers [\*\*\*11] and others, not against CLIC itself' and because the source of recovery, i.e., the proceeds of the D&O policies, is not a part of the rehabilitation res. Hence, respondents assert that their federal claims are in personam and the exception for in rem or quasi in rem claims expressed in *Donovan* is inapplicable. While these arguments have superficial appeal, we are not

persuaded.

[HN3] Section 8113(1) of the IRLA, *MCL 500.8113(1)*; MSA 24.18113(1) under which petitioner was appointed as rehabilitator, authorizes the "rehabilitator to take immediate possession of the assets of the insurer, and [\*64] to administer them under the court's general supervision." Once an order of rehabilitation is issued by the court, "the insurer shall by operation of law vest title to all assets of the insurer in the rehabilitator." The act defines an insolvent insurer's "general assets" as including "all property, real, personal, or otherwise." *MCL 500.8103(g)*; MSA 24.18103(g). In Michigan, "personal property" connotes intangible as well as tangible personal property and must include choses in action." *Royal Oak Twp v City of Berkley*, 309 Mich. 572, 580; 16 N.W.2d 83 (1944). Here, respondents argue that they [\*\*\*12] are not seeking to attach or interfere with an asset of the rehabilitation res because they intend to satisfy any potential judgment with the proceeds of the D&O policies, which petitioner and the circuit court concede are not assets of the estate. Respondents' argument misses the point, however, because it is the tort claim itself (i.e., a chose in action) that is an asset of the rehabilitation res. Respondents' federal court action usurps the rehabilitator's exclusive authority to pursue such claims.

[HN4] Indeed, § 8114(3) states:

[\*\*418] If it appears to the rehabilitator that there has been criminal or tortious conduct or breach of a contractual or fiduciary obligation detrimental to the insurer by an officer, manager, agent, broker, employee, or other person, he or she may pursue *all appropriate legal remedies on behalf of the insurer.* [*MCL 500.8114(3)*; MSA 24.18114(3).]

Hence, [HN5] the general assets of the insurer clearly includes causes of action based in tort against a third party whose breach of the appropriate standard of care is alleged to have defrauded the insurer and its policyholders.

[\*65] Although respondents contend that petitioner is only authorized by statute to maintain [\*\*\*13] suits "on behalf of the insurer" under § 8114(3), this narrow reading of the statute is at odds with its declared purpose and has been rejected in other jurisdictions that have adopted some version of the model act. n5 See *Foster v Peat Marwick Main & Co*, 138 Pa. Commw. 147; 587 A.2d 382 (1991); *In re Liquidation of Integrity Ins Co*, 240 N.J. Super. 480; 573 A.2d 928 (1990); *Corcoran v Frank B. Hall & Co, Inc*, 149 A.D.2d 165; 545 N.Y.S.2d 278 (1989). See also *In re Liquidation of American Mutual Liability Ins Co*, 417 Mass. 724; 632 N.E.2d 1209 (1994). In *Foster*, *supra*, 138 Pa. Commw. at 153-154, the court

construed Pennsylvania's counterpart to Michigan's IRLA to allow a rehabilitator to sue on behalf of an insolvent insurer's policyholders where the injuries suffered were common to all policyholders. Peat Marwick argued, as respondents do here, that under Pennsylvania's statute only a liquidator may bring claims on behalf of policyholders and creditors. According to Peat Marwick's interpretation of [\*66] the statute, the rehabilitator was limited to bringing claims "on behalf of the insurer" for injury to the insurer. *Id. at 152*; see also *MCL 500.8121(m)*; MSA 24.18121(m), *MCL 500.8114(3)*; [\*\*\*14] MSA 24.18114(3). The *Foster* court disagreed, stating at 155:

There is ample authority for overruling Peat Marwick's objection brought on the ground that the Rehabilitator has failed to assert a claim for relief. In addition to the estate's claims, which Peat Marwick concedes are properly brought by the Rehabilitator, Article V gives [the rehabilitator] broad, remedial powers to insure the protection of persons other than the estate. The weight of authority in other jurisdictions militates toward a determination that the Rehabilitator has such standing.

n5 Notably, in *1996 PA 117*, effective March 6, 1996, the Legislature amended § 8114(3) to delete the phrase "on behalf of the insurer." The act also substantially modified § 8114(2) to provide:

The rehabilitator may take such action as he or she considers necessary or appropriate to reform and revitalize the insurer including, but not limited to, the powers in section 8121(1)(f), (l), (m), (r), and (u). The rehabilitator has all the powers of the directors, officers, and managers, whose authority shall be suspended, except as they are re-delegated by the rehabilitator. The rehabilitator has the 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.

The clear import of these amendments was to clarify, rather than limit or expand, the rehabilitator's broad authority to take whatever action is deemed necessary or appropriate to reform and revitalize the insurer.

[\*\*\*15] [HN6]

Section 8114(2) of the IRLA authorizes a rehabilitator to "take such action as he or she considers necessary or appropriate to reform and revitalize the insurer." Because the Legislature has mandated that the IRLA be liberally construed to protect the interests of the insureds and the public by avoiding piecemeal litigation and the resulting potential for inequitable distribution of the assets, *MCL 500.8101(2)*; MSA 24.18101(2), § 8114 must be construed to include the authority to pursue causes of action on behalf of all policyholders. See also *Trosper v Ingham Circuit Judge*, 293 Mich. 438, 440; 292 N.W. 360 (1940) (in Michigan, "the common interest of all policyholders is, by the insurance law, intrusted to the commissioner of insurance").

Moreover, because CLIC is a mutual insurance company, its policyholders (including respondents here) are both insureds and insurers, given their ownership interest in the company. See *43 Am Jur 2d, Insurance*, §§ 65, 73. Consequently, even in the [\*419] absence of the [\*67] liberal interpretation mandated by § 8101(2), petitioner is specifically authorized by § 8114(3) to take appropriate legal action against any person for tortious or criminal conduct [\*\*\*16] or for breach of a contractual or fiduciary obligation on behalf of respondents on the basis of their status as insurers. The amended and restated order of rehabilitation authorizing petitioner to "bring or defend any action. . . or other legal proceeding. . . on behalf of Confederation . . . in any court" authorizes petitioner to bring suit on behalf of all policyholders, who collectively constitute the ownership of CLIC. Thus, respondents' contention that petitioner lacked standing to bring Suit on behalf of CLIC's policyholders is without merit.

The rehabilitation order issued by the circuit court specifically stated that "the injunction herein granted shall not enjoin persons or entities . . . from individually commencing, continuing or otherwise pursuing any claims or actions . . . personal to such persons or entities alone and which cannot be pursued by the Rehabilitator." Thus, respondents have not been enjoined from pursuing their individual, in personam tort claims. The authority relied on by respondents, however, undermines their position that their claims are personal and cannot be asserted by petitioner on their behalf. In *Cotten v Republic Nat'l Bank of Dallas*, 395 [\*\*\*17] S.W.2d 930, 941 (Tex. Civ. App., 1965), cited in respondents' brief on appeal, the court stated:

But some actions for fraud are by their nature personal to each creditor, or each stockholder, or each policyholder, and the receiver may not then maintain a suit in his representative capacity for their joint benefit. In such

case each claimant and he alone may bring and maintain suit himself for the action is personal . . . For example, one who [\*68] proves that he relied on false representations as to the corporation's financial condition and was thereby induced to extend credit to the corporation, or to purchase stock in it, or to take out an insurance policy with it, must in his own name maintain a separate suit for his damages against the person who uttered the fraudulent representations.

Hence, unlike "injuries to individuals *over and above* or *not common* to those injuries suffered by all policyholders," which warrant an individual action for fraud or misrepresentation, claims based on injuries common to all policyholders must be maintained by the rehabilitator in his representative capacity for their collective benefit. See *Foster, supra* at 154 (emphasis added). [\*\*\*18] Here, respondents' federal claims allege the type of personal injury that can be pursued by the rehabilitator on behalf of the rehabilitation estate. Moreover, we note that petitioner has commenced a suit on behalf of all policyholders against most of the same parties named in respondents' federal actions in Georgia. Accordingly, continuation of respondents' common-law claims would result in wasteful and duplicative litigation that would run the risk of potentially conflicting outcomes. Consequently, we affirm the circuit court's order enjoining respondents from pursuing their common-law claims for fraud and misrepresentation in the federal court.

## B

Respondents next argue that the Ingham Circuit Court was precluded from enjoining their attempt to certify a class action in the federal court regarding federal securities violations because the insurance products purchased by respondents constitute "securities," which involve an area of law over which the [\*69] federal courts have exclusive jurisdiction. *15 USC 78aa*.

In *Riley v Simmons* 45 F.3d 764 (CA 3, 1995), the Third Circuit Court of Appeals considered a factually similar case in which purchasers of annuities from an insolvent insurer [\*\*\*19] sought to certify a class action against the former officers and directors of the insurer for violations of federal securities laws. The defendants had moved in the district court to dismiss the complaint on grounds of abstention, among others, or alternatively to stay the action until the conclusion of the insurance commissioner's separate rehabilitation proceeding in state court. The commissioner moved to intervene and join the defendants' motion to dismiss the complaint or to issue a stay. The district court granted the commissioner's

motion to intervene and dismissed the complaint on the [\*\*420] basis of abstention, finding that the plaintiffs' federal securities claims were essentially the equivalent of the common-law fraud claims being pursued by the commissioner in the state rehabilitation proceeding. 45 *F.3d* at 766, 771-772. In reversing the order of dismissal, the Court of Appeals initially noted that it remained to be determined whether in fact the plaintiffs' annuities were "securities," and that "the Securities Exchange Act, 15 *USC* 78aa, granted federal courts exclusive jurisdiction over Plaintiffs' Rule 1 Ob-5 claims and necessarily deprives New Jersey state courts of jurisdiction over [\*\*\*20] that claim." *Id* at 773. The court expressed concern that allowing the federal action to proceed would likely impede the commissioner's efforts to marshal the assets of the insurer and equitably distribute them among all claimants, and that such action would inevitably lead to "a race for collection" [\*70] of a \$20 million D&O liability policy, the proceeds of which would be significantly diminished after the payment of the defendants' legal fees. *Id* at 775. The court stated:

We, like the district court, are troubled by diversion of funds from Mutual Benefit and its policyholders to the cost of litigation that benefits only one class of persons injured by the acts of the Company's officers and directors. A remedy for that problem, however, is beyond the power of this panel under existing statutory law and what we believe is binding Supreme Court precedent and circuit procedure. Governing case law seems to us to make it clear that mere interference with the Commissioner's ability to marshal [sic] the Company's assets cannot justify *Burford* [*v Sun Oil Co*, 319 U.S. 315; 63 S. Ct. 1098; 87 L. Ed. 1424(1943)] abstention over claims exclusively subject to federal jurisdiction. [\*\*\*21] [45 *F.3d* at 776.]

In this case, as in *Riley*, the factual determination whether respondents' insurance products are "securities" within the meaning of federal law remains to be made. This Court is without jurisdiction to make that determination. See *Cotler v Inter-County Orthopaedic Ass'n*, 526 *F.2d* 537, 542 (CA 3, 1975). See also *Central States, Southeast & Southwest Areas Health & Welfare Fund v Old Security Life Ins Co*, 600 *F.2d* 671, 677 (CA 7, 1979) (Missouri's insurer insolvency act "cannot be interpreted as precluding a party from pursuing a congressionally created federal claim in the only courts able to provide affirmative relief on that claim"). While we echo the concerns of the *Riley* court, we also are compelled to hold that, to the extent the Ingham Circuit Court injunction precluded

such a determination from being made, it is dissolved. We further conclude that, in the event the federal courts determine that respondents' insurance products [\*71] are not securities within the meaning of federal securities law, respondents' putative class-action claim falls within the ambit of their common-law fraud and misrepresentation claims, which were determined in Part IA [\*\*\*22] of this opinion to be enjoined under the circuit court injunction.

### C

Respondents further argue that the right to certify a class action under *FR Civ. P* 23 is a federal right that cannot be enjoined by a state court. We disagree.

Because Rule 23 does not specifically relate to the business of insurance, and because petitioner was designated by § 8114(3) as the sole representative of the insurer, the federal rule is preempted by conflicting provisions of Michigan insurance law. See 15 *USC* 1012(b). Moreover, the authority relied on by respondents undercuts their assertion of a substantive right to certify a class in federal court, because the United States Supreme Court recognized, in *Deposit Guaranty Nat'l Bank v Roper*, 445 U.S. 326, 331, 332; 100 S. Ct. 1166; 63 L. Ed. 2d 427(1980), that the right of a litigant to employ Rule 23 in appropriate circumstances is a procedural right only, ancillary to the litigation of substantive claims.

### D

In conclusion, we find that the in rem exception to the rule of *Donovan* is controlling insofar as respondents' pursuit of individual and class-action claims for common-law fraud and misrepresentation usurps an asset of the rehabilitation estate [\*\*\*23] that is within [\*\*421] the exclusive control of the rehabilitator. The circuit court injunction is affirmed with respect to respondents' [\*72] common-law fraud and misrepresentation claims. With respect to respondents' federal securities claims, a determination remains to be made whether in fact the insurance products purchased by respondents constitute securities within the meaning of federal law. This factual determination is within the exclusive jurisdiction of the federal court to make. Finally, under § 2(b) of the McCarran-Ferguson Act, any federal right of respondents to certify a class action under Rule 23 is pre-empted by the authority conferred on petitioner by *MCL* 500.8114(3); *MSA* 24.18114(3) to act as the sole representative of the policyholders.

### II

Next, respondents argue that as residents of Georgia they were not subject to the limited personal jurisdiction of a Michigan circuit court. We disagree.

[HN7] In deciding whether personal jurisdiction

221 Mich. App. 54, \*72; 561 N.W.2d 412, \*\*421;  
1997 Mich. App. LEXIS 7, \*\*\*23

may be asserted, a court must generally conduct a two-step inquiry: first, whether exercising personal jurisdiction would violate the Due Process Clause and, second, whether the exercise of personal jurisdiction over the individual nonresident [\*\*\*24] defendant is authorized by the Michigan long-arm statute, *MCL 600.705*; *MSA 27A.705*. n6 See *Khalaf v Bankers & Shippers Ins Co*, [\*73] 404 Mich. 134, 146; 273 N.W.2d 811(1978); *Green v Wilson*, 211 Mich. App. 140, 142; 535 N.W.2d 233 (1995). Because our long-arm statute has been interpreted to grant the broadest basis for jurisdiction consistent with due process, *Schneider v Linkfield*, 389 Mich. 608, 616; 209 N.W.2d 225 (1973), where it is found that personal jurisdiction does not offend due process, it consequently cannot violate this state's long-arm statute. See *Burger King Corp v Rudzewicz*, 471 U.S. 462, 471; 105 S. Ct. 2174; 85 L. Ed. 2d 528(1985).

n6 Michigan's long-arm statute, [HN8] *MCL 600.705*; *MSA 27A.705*, provides in pertinent part:

The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:

(1) The transaction of any business within the state.

[\*\*\*25] [HN9]

The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which the person has established no meaningful "contacts, ties, or relations." *Int'l Shoe Co v Washington*, 326 U.S. 310, 316, 319; 66 S. Ct. 154; 90 L. Ed. 95 (1945). The requirement of minimum contacts serves to protect a defendant from litigating in a distant forum and to ensure that a state does not extend its judicial power beyond the limits imposed by our federal system of government. *Jeffrey v Rapid American Corp*, 448 Mich. 178, 186; 529 N.W.2d 644 (1995). Here, because of the nature of the controversy, we are as concerned with respondents' individual liberty interests as we are with the concept of federalism. In order to satisfy the requirements of due process in this case, the nonresident respondents must have had minimum contacts with the State of Michigan such that enforcement of the injunc-

tion does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co*, *supra* at 316. In *Jeffrey*, *supra* at 186, our Supreme Court, quoting *Mozdy v Lopez*, 197 Mich. App. 356, 359; 494 N.W.2d 866 (1992), distilled [HN10] the relevant [\*\*\*26] considerations in determining whether sufficient minimum contacts exist to [\*74] justify the exercise of limited personal jurisdiction over a nonresident defendant: (1) the defendant must be found to have purposefully availed itself of the privilege of conducting activities in Michigan, (2) the cause of action must arise from those activities, and (3) the exercise of jurisdiction must be reasonable. However, 'the primary focus of personal jurisdiction is on reasonableness' and 'fairness.' Each case, therefore, must turn on its own merits." *Jeffrey*, *supra* at 186.

With respect to interstate contractual obligations, the United States Supreme [\*\*\*422] Court has emphasized that [HN11] parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other state for the consequences of their activities. *Travelers Health Ass'n v Virginia*, 339 U.S. 643, 647; 70 S. Ct. 927; 94 L. Ed. 1154 (1950); *Rudzewicz*, *supra*, 471 U.S. at 473. Recognizing that physical presence in the forum state is not required to assert personal jurisdiction, the Supreme Court has found it to be an inescapable fact of modern commercial [\*\*\*27] life that a substantial amount of business is transacted solely by mail or wire communications across state lines." *Id* at 476.

Here, respondents entered into a contract of insurance with CLIC, an insurance company domiciled in Michigan and subject to Michigan law regarding insurer insolvency, rehabilitation, and liquidation. See *MCL 500.431b*; *MSA 24.1431(b)*, *MCL 500.8102*; *MSA 24.18102*. Although respondents are not commercial actors as in the usual case, they deliberately reached out beyond their home state's borders and purchased long-term insurance products from an alien insurer [\*75] whose state of entry was Michigan. *McGee v Int'l Life Ins Co*, 355 U.S. 220, 223; 78 S. Ct. 199; 2 L. Ed. 2d 223 (1957). Consequently, respondents purposefully availed themselves of the protection of Michigan law regarding insolvent and delinquent insurers. See *Rudzewicz*, *supra*, 471 U.S. at 476; *Khalaf supra* at 153. Indeed, CLIC represented, in marketing materials provided to United States policyholders, that it was a stable company in part because of the special protections provided by the trust and that it was required to establish under Michigan law. The second prong of the inquiry is satisfied because [\*\*\*28] petitioner's request for injunctive relief arose out of the contractual activities connecting respondents to this state. But for their status as policyholders of an alien insurer domiciled in Michigan,

respondents would have no standing to maintain their federal action. Accordingly, respondents' minimum contacts with Michigan provided "reason to expect to be haled before" Michigan courts. *Shaffer v Heitner*, 433 U.S. 186, 216; 97 S. Ct. 2569; 53 L. Ed. 2d 683 (1977).

[HN12] Where, as here, the threshold requirement of minimum contacts is satisfied, a court must determine whether the exercise of personal jurisdiction comports with fair play and substantial justice. Given that the injunction at issue did not require respondents' physical presence in this state, and that modern communication devices provided for nearly instantaneous exchange of litigation-related documents, we conclude that the exercise of personal jurisdiction by the circuit court did not unduly burden respondents' individual liberty interests. See *McGee*, *supra*, 355 U.S. at 222-223; *Rudrewicz*, *supra*, 471 U.S. at 477. Moreover, because of the pending state rehabilitation proceeding, the forum [\*76] state and the rehabilitator had a significant [\*\*\*29] interest in obtaining the most efficient resolution of the controversy. *Jeffrey*, *supra* at 189. Given respondents' minimum contacts with Michigan and the significant public policies underlying the IRLA, any concern that the circuit court's assertion of personal jurisdiction over respondents implicated the concept of federalism is abated. Accordingly, the circuit court's exercise of limited personal jurisdiction over respondents pursuant to this state's long-arm statute did not offend due process.

### III

Respondents next argue that the circuit court injunction was invalid because petitioner failed to petition the Georgia federal district court for a stay of the proceedings as provided by *MCL 500.8115(1)*; *MSA 24.18115(1)*. We disagree.

[HN13] Section 8115 of the IRLA provides, in pertinent part:

(1) A court in this state before which an action or proceeding in which the insurer is a party, or is obligated to defend a party, is pending when a rehabilitation order against the insurer is entered shall stay the action or proceeding for 90 days and such additional time as is necessary for the rehabilitator to obtain proper representation and prepare for further proceedings. [\*\*423] The rehabilitator [\*\*\*30] shall take action respecting the pending litigation as he or she considers necessary in the interests of justice and for the protection of creditors, policyholders, and the public. *The rehabilitator shall consider immediately all litigation pending out-*

*side this state and shall petition the courts having jurisdiction over that litigation for stays if necessary to protect the insurer's estate.* [*MCL 500.8115(1)*; *MSA 24.18115(1)*. (emphasis added).]

[\*77] Contrary to respondents' argument, we view § 8115(1) as expanding, rather than restricting, the authority of the rehabilitator to control all pending litigation involving the rehabilitation estate. Read in context, the rehabilitator is directed under § 8115(1) to seek stays in actions "pending" outside the state "immediately" after the rehabilitation order is entered. In this case, defendants' federal court actions were not "pending" at the time the rehabilitation order was first entered. Nothing in § 8115 limits petitioner's powers as rehabilitator to seek after the entry of a rehabilitation order appropriate injunctions in Michigan to prevent litigation against third parties in other courts that would disrupt or impede the rehabilitation [\*\*\*31] proceeding. Such injunctions are consistent with the broad grant of power to the rehabilitator to do all things necessary to effectuate an orderly rehabilitation.

### IV

Finally, respondents contend that the circuit court abused its discretion in issuing the injunction because petitioner failed to demonstrate the presence of irreparable injury. We find no abuse of discretion.

[HN14] The granting of injunctive relief is within the sound discretion of the trial court, although the decision must not be arbitrary and must be based on the facts of the particular case. *Roy v Chevrolet Motor Car Co*, 262 Mich. 663, 668; 247 N.W. 774 (1933). In determining whether to issue a preliminary injunction, the court must consider four factors: (1) harm to the public interest if an injunction issues, (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is [\*78] granted, (3) the strength of the applicant's demonstration that the applicant is likely to prevail on the merits, and (4) demonstration that the applicant will suffer irreparable injury if the relief is not granted. *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich. [\*\*\*32] 152, 157-158; 365 N.W.2d 93 (1984). In this case, respondents challenge only whether petitioner sufficiently demonstrated that irreparable injury would occur if the injunction was not issued.

[HN15] The IRLA specifically authorizes a receiver to apply for, and the Ingham Circuit Court to grant, an injunction enjoining "threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders . . . or the administration of a proceeding under this chapter." *MCL 500.8105(1)(k)*;

221 Mich. App. 54, \*78; 561 N.W.2d 412, \*\*423;  
1997 Mich. App. LEXIS 7, \*\*\*32

MSA 24.18105(1)(k). Under this provision, the rehabilitator and the circuit court were expressly authorized by the Legislature to act to enjoin defendants' federal court action, which clearly constituted a threat to the rights of policyholders and to the orderly administration of the estate. Accordingly, we find no abuse of discretion by the circuit court in issuing the injunction.

The circuit court injunction is affirmed to the extent

that it enjoins respondents' common-law fraud and misrepresentation claims. The circuit court was without jurisdiction to determine whether respondents had stated a claim for violation of federal securities law.

/s/ Donald E. Holbrook, [\*\*\*33] Jr.

/s/ Henry W. Saad

/s/ William J. Giovan

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