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No. 1-23-0803

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE MATTER OF CONSERVATION OF NEXTLEVEL HEALTH PARTNERS,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division
DR. JACQUELINE STEVENS,	)	
Intervenor-Appellant,	)	No. 2020 CH 4431
v.	)	
PEOPLE OF THE STATE OF ILLINOIS *ex rel*. DANA POPISH SEVERINGHAUS *et al.*,	)	The Honorable PAMELA McLEAN MEYERSON,
Plaintiffs-Appellees.	)	Judge Presiding.

BRIEF AND SUPPLEMENTARY APPENDIX OF PLAINTIFF-APPELLEE ACTING DIRECTOR OF THE ILLINOIS DEPARTMENT OF INSURANCE

(Complete caption on following page)

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ORAL ARGUMENT REQUESTED

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Intervenor-Appellant,	)	
v.	)	
PEOPLE OF THE STATE OF ILLINOIS *ex rel*. DANA POPISH SEVERINGHAUS, Director of the Illinois Department of Insurance, and DANA POPISH SEVERINGHAUS, Director of the Illinois Department of Insurance, acting solely in her capacity as Conservator of NextLevel Health Partners, Inc.,	)	No. 2020 CH 4431
Plaintiffs-Appellees,	)	
and	)	
NEXTLEVEL HEALTH PARTNERS,	)	The Honorable PAMELA McLEAN MEYERSON, Judge Presiding.
Defendant-Appellee.	)	

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NATURE OF THE ACTION

Intervenor-Appellant Dr. Jacqueline Stevens appeals the denial of her motions seeking a declaration that the confidentiality provisions of section 188.1 of the Illinois Insurance Code, 215 ILCS 5/188.1 (2022), governing conservation proceedings, and related circuit court orders violate the United States and Illinois constitutions and Illinois law. In 2020, Plaintiff-Appellee People of the State of Illinois *ex rel.* Director of the Illinois Department of Insurance,[1] filed a complaint against Defendant-Appellee NextLevel Health Partners, Inc., an insurance company, to take temporary possession and control of its business, to conserve that its assets, and to ascertain its financial condition. Consistent with section 188.1 of the Code, the proceedings that followed and related court records were sealed under a sequestration order. After the Director moved to lift that sequestration order, Stevens intervened in the proceeding for the sole purpose of seeking a declaration that the sequestration order and section 188.1 violated the United States and Illinois constitutions. On October 5, 2022, the circuit court denied Stevens's motion to reconsider the denial of her prior motion, holding that the confidentiality provisions of section 188.1 were constitutional. Stevens appealed.

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[1] After Director Robert H. Muriel filed this conservation, he was replaced by Dana Popish Severinghaus. C432 V1. While this case has been on appeal, Ann Gillespie replaced Severinghaus and currently serves as the Department's Acting Director. Thus, Gillespie should be substituted for Severinghaus in the case caption. *See* 735 ILCS 5/2-1008(d) (2022).

No issues are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court correctly held that the confidentiality provisions of section 188.1 of the Code do not facially violate the First Amendment or common law presumption of public access to court proceedings or records.

2. Whether Stevens forfeited her arguments that the confidentiality provisions facially violate the federal Due Process Clause and the Separation of Powers and Special Legislation clauses of the Illinois Constitution, and;

3. Whether, if Stevens did not forfeit her arguments, the confidentiality provisions:

   a. do not violate separation of powers;

   b. do not violate due process; and

   c. do not constitute improper special legislation.

JURISDICTION

On October 5, 2022, the circuit court entered an order denying Stevens's motion to reconsider its order denying her motion to declare section 188.1 of the Code unconstitutional and declaring that Stevens's intervention in the proceeding was concluded. C1834 V2.[2] Because the conservation proceeding was ongoing and the court decided not to enter the finding required under Ill. Sup. Ct. R. 304(a) for immediate appeal of "a final judgment as to one or more but fewer than all of the parties or claims," C1834 V2; SR151, the October 5 order was not a final and appealable judgment, *see Puleo v. McGladrey & Pullen*, 315 Ill. App. 3d 1041, 1045-46 (1st Dist. 2000) (final order as to intervenor was not appealable because court did not enter language under Rule 304(a)).

Despite the court not entering a special finding under Rule 304(a), Stevens would have been required to immediately appeal an "order entered in the administration of a receivership, rehabilitation, liquidation, or other similar proceeding which finally determines a right or status of a party and which is not appealable under Rule 307(a)." Ill. Sup. Ct. R. 304(b)(2); *see In re Liquidation of Medcare HMO, Inc.*, 294 Ill. App. 3d 42, 46 (1st Dist. 1997)

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[2] This brief cites the three volumes of the common law record as "C_V_," the supplemental record on appeal as "SR_," the supplemental appendix to this brief as "SA_," Stevens's opening brief as "AT Br._," and NextLevel's response brief as "NextLevel Br._."

("Orders within the scope of [Rule] 304(b) must be appealed within 30 days of their entry."). But that provision did not apply to the October 5, 2022, order because it was "appealable under Rule 307(a)." See Ill. Ct. R. 304(b)(2). Stevens thus could have sought an interlocutory appeal of the October 5, 2022, order under Ill. Sup. Ct. R. 307(a)(1) as an appeal from an order refusing injunctive relief. *See, e.g.*, *People v. Kelly*, 397 Ill. App. 3d 232, 245-47 (1st Dist. 2009) (orders denying public access to proceedings are injunctive for purposes of Rule 307). And while she did not choose that option, she was not precluded from appealing it after final judgment. *See Salsitz v. Kreiss*, 198 Ill. 2d 1, 11-12 (2001) (appellant may await final judgment to appeal interlocutory order that was appealable under Rule 307(a)(1)).

On April 18, 2023, the circuit court entered a final order holding that the conservation proceeding was completed, discharging NextLevel from the conservation, and terminating the proceeding. C1904-08 V3; see Ill. Sup. Ct. R. 301. Within 30 days of that order, Stevens timely filed a notice of appeal on May 4, 2023, seeking review of the court's October 5 order denying her "motion to make court records public" and "sanctions." C1914-17 V3; see Ill. Sup. Ct. R. 303(a)(1) (party has 30 days to appeal from a final judgment). Therefore, this court has jurisdiction over this appeal under Ill. Sup. Ct. R. 301.

STATEMENT OF FACTS

In June 2022, the Director filed a verified complaint for conservation of assets and injunctive relief against NextLevel. C42-56 V1. NextLevel, a licensed Illinois health maintenance organization providing managed health care services, was regulated under the Code. C43, 359 V1. Along with rehabilitation and liquidation, conservation is a receivership proceeding available to the Director to address the financial insecurity and insolvency of insurance companies. 215 ILCS 5/Art. XIII (2022). Section 188.1 of the Code authorizes the Director to commence conservation proceedings by filing a complaint for a court order directing her, among other things, to take possession and control of the company's property and business to "ascertain the condition and situation of the company." 215 ILCS 5/188.1(1), (2) (2022).

The conservation proceeding

The complaint alleged that NextLevel was in hazardous financial condition, based on its recent financial statements, and that its continued business transactions would be hazardous to its policyholders, its creditors, and to the public. C47-48 V1. Relevant to this appeal, the circuit court promptly issued an order of sequestration sealing the conservation proceeding file and all related records under section 188.1(5). C80-81 V1. That provision makes court records and papers confidential until the circuit court orders otherwise. 215 ILCS 5/188.1(5) (2022); *see also id*. at § 188.1(4) (authorizing court to hold hearings in conservation proceedings "privately in chambers")

(collectively, "confidentiality provisions"). The order directed the clerk to remove the case from the court's public website. C81 V1. The court later lifted the sequestration order, except as to a few designated allegations in the complaint and related documents. C671-72 V1.

A few days after the circuit court entered the sequestration order, it issued an order of conservation, finding that the Director alleged sufficient facts to issue an order under section 188.1. C124-30 V1. The court appointed the Director as NextLevel's Conservator and authorized and directed her in that capacity to take possession and control of NextLevel's property and business "to conserve the same for the benefit of policyholders and creditors" and the public.[3] C125 V1. The court ordered the Conservator to ascertain NextLevel's financial condition and report on that condition to the court, and directed NextLevel and its officers to provide the Conservator with control and to cooperate with her. C126-29 V1. The court also directed the Conservator to serve the order on NextLevel. C130 V1.

That same month, the Conservator and NextLevel jointly moved for the circuit court to authorize and approve NextLevel's sale and transfer of assets to Meridian Health Plan of Illinois, Inc., a health maintenance organization that provides Medicaid benefits to Illinois residents. C358-67 V1. This

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[3] The Director subsequently participated in this proceeding separately as the state regulator, represented by the Attorney General, and as the Conservator through her appointed Special Deputy Conservator, separately represented by special counsel. *See* C358-67, 370 V1.

transaction resulted from a sales process that NextLevel had begun in 2018, and included the transfer of members to Meridian. C360-61 V1. After conducting a hearing, the court granted the parties' motion and approved the transfer agreement, finding that it was negotiated in a good-faith, arms-length transaction and would protect the interests of NextLevel, its creditors, and individuals served by NextLevel. C369-75 V1.

In May 2021, the circuit court allowed NextLevel and the Conservator to communicate with the Illinois Department of Health and Family Services, the primary remaining creditor, to address claims against NextLevel. C424 V1. In August 2021, the Director, in her capacity as regulator, moved to vacate the sequestration order and unseal the proceedings because the Conservator had completed her obligations under the conservation and NextLevel was in the process of resolving any remaining claims. C432-35, C516-23 V1. Over NextLevel's opposition, C483-95 V1, the court granted the Director's motion in September 2021, but stayed the order to allow NextLevel to identify any specific documents or information that should remain confidential, C526-27 V1.

NextLevel later requested that specified allegations in the complaint remain redacted under seal, along with the conservation order regarding NextLevel's risk-based capital and exhibits to the declaration of NextLevel's actuary. C560-68 V1. The Director and Conservator jointly opposed keeping the complaint's allegations and related portions of the order under seal and

took no position on NextLevel's exhibits. C662-68 V1. In November 2021, the circuit court vacated the sequestration order but granted NextLevel's request to maintain the declaration exhibits under seal and to redact the specified allegations in the complaint and conservation order ("protective order"). C671-72 V1.

Stevens's intervention

After the Director moved to vacate the sequestration order, Stevens moved for leave to intervene in the conservation proceeding under 735 ILCS 5/2-408(a) (2022) to challenge that sequestration order and declare section 188.1's confidentiality provisions unconstitutional and unlawful. C454-61 V1. She claimed that the confidentiality provisions violated the Clerks of Courts Act, 705 ILCS 105/16(6) (2022), the common-law and First Amendment presumption of access to judicial records, due process under the United States and Illinois constitutions, and art. II, sec. 1 of the Illinois Constitution. *See id.*; C472-79 V1. Based on these claims, Stevens also sought an order releasing all court documents and declaring all future insurance conservation proceedings public. C454 V1.

Although the Director did not object to Stevens intervening for the sole purpose of challenging the sequestration order, she opposed Stevens's intervention to challenge section 188.1. C547-50 V1. After the circuit court vacated the sequestration order and issued the protective order sought by NextLevel, the court granted Stevens leave to intervene as a matter of right

under 735 ILCS 5/2-408(a)(2) (2022). C673-74 V1. While the court recognized that the Director already opened the proceedings and most records, the court allowed Stevens to intervene "for the limited purpose" of raising her constitutional arguments challenging the protective order and the confidentiality provisions. *Id*.

Stevens then filed an amended motion seeking to vacate the protective order and a declaration that section 188.1 is unconstitutional. C888-917 V1. She repeated her argument that the confidentiality provisions violated her common law and First Amendment right of access to judicial records by mandating the confidentiality of conservation proceedings and records. C912-14 V1. Citing no authority, she also contended that the confidentiality provisions violated the *prima facie* public access to court records under 705 ILCS 105/16(6) (2022), her due process rights by providing no procedures to review the sealed records, and her equal protection rights by providing NextLevel's officials but not her with access to judicial records. C915-16 V1. Otherwise, Stevens asserted various accusations against NextLevel, its officers, other health care companies, and various government officials, claiming that the public had a right to access the proceeding's records. *See* C895-908 V1.

The Director and NextLevel separately responded that Stevens's motion was moot and, regardless, that the confidentiality provisions are constitutional and proper under the common law because she could not show that the

presumption of public access applied to insurance conservation proceedings. C944-59, 1019-27 V1. They argued that her constitutional challenge to section 188.1 was moot because the circuit court not only already vacated the sequestration order — the only order based on that provision — but also properly maintained the confidentiality of a small group of documents. C948-50, 1024-26 V1. Therefore, almost all the proceeding records were public, and any remaining protection was not based on the statute. *Id*.

On the merits, the Director and NextLevel explained that, for the media or public to have a presumptive right to judicial records under the First Amendment and common law, they must make the threshold showings that the type of proceedings at issue have been historically open to the public and that disclosure of the records would further the purpose and function of those proceedings. C951-52, 1026 V1. Stevens failed to make either showing, the defendants argued. *See* C1026-28 V1. Instead, the General Assembly included the confidentiality provisions since enacting the conservation proceeding in 1967, and previously included confidentiality protections for similar preceding regulatory proceedings since at least 1937. C952-54, 1022-23, 1026 V1; C1273-76. Identical or similar confidentiality provisions are also contained in the model insurer receivership statute and in other jurisdictions' insurance laws. C954-55, 1027 V1. And public disclosure would undermine the proceedings' purpose to maintain NextLevel's status quo while the Director ascertains its financial condition. C956, 1026-27 V1; C1273-76 V2. Rather, public

knowledge of such proceedings could create a "run on the bank" mentality that would irreparably harm the insurer. C956-57, 1027 V1. NextLevel also argued that Stevens's remaining constitutional arguments were only cursory and otherwise meritless. C957-58 V1; C1270-80 V2.

On June 13, 2022, the circuit court denied Stevens's motions. C1401-05 V2. At the outset, the court found that Stevens's constitutional challenge was not moot, explaining that it had kept the remaining four documents confidential based on its authority under section 188.1(5). C1403 V2. The court then rejected Stevens's non-constitutional challenges to section 188.1, holding that the more specific confidentiality provisions governed over either any common-law right to access to judicial records or 705 ILCS 105/16(6) (2022). *Id*.

As to Stevens's constitutional challenge, the court held that Stevens failed to show that the First Amendment's presumption of access applied to judicial records in conservation proceedings, underscoring the history of such proceedings not being historically open to the public. C1404 V2. The court also recognized that the disclosure of such proceedings would not further their function to ascertain and preserve NextLevel's financial condition. *Id.* The court agreed with the Director that disclosure could lead to creditors engaging in a "run on the bank," hampering the Director's ability to protect the interests of those creditors, policyholders, and the public. *Id*. As to the documents remaining confidential, the court determined, after an *in camera*

review, that the sensitivity of financial information would hamper the purpose of the conservation proceeding if publication occurred. *Id*. The circuit court also denied Stevens's supplemental motion as untimely and providing no basis for additional argument in most aspects.[4] C1404, 1411 V2.

After Stevens filed various motions continuing to challenge the confidentiality provisions and protective order, *see* C1465-67, 1484-87, 1495-1512 V2, the circuit court ordered Stevens to combine any arguments that she wished to pursue into a single amended motion to reconsider the June 13 order, C1541, 1552-53 V2. In compliance with that order, Stevens filed an amended motion, C1554-76 V2, arguing that the Director and NextLevel should bear the burden to prove that conservation proceedings were historically closed and that, under *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), this analysis must go back to the time of the nation's founders, C1558-64 V2. She asserted that bankruptcy proceedings are analogous to conservation proceedings, and that courts recognize that bankruptcies were historically public. C1564-68 V2. Stevens also disputed that the concept of "run on the bank" was applicable to the confidentiality provisions because NextLevel was not a bank, the Director's control of the company would alert creditors to the proceeding, and NextLevel's largest creditor was a state

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[4] The circuit court allowed Stevens to pursue her motion for sanctions against NextLevel, which was contained in the supplemental motion. C1411 V2. That motion was ultimately denied and is not at issue in this appeal. C1834 V3.

agency. C1569-71 V2.

Regarding the protective order, Stevens argued that because the circuit court clerk mistakenly made the sealed documents publicly accessible throughout the court record, their continued confidentiality was precluded. C1571-73 V2. She claimed that prohibiting her from obtaining or disclosing the sealed documents while allowing others to access those records violated the First Amendment. C1573-74 V2. Otherwise, she disputed the court's reasoning in ruling that her claims were not moot. C1574-76 V2.

The Director, joined by the Conservator, and NextLevel opposed Stevens's motion, C1744-76 V2, arguing that the circuit court correctly held that there is no presumption of public access to conservation proceedings based on the historical evidence, C1746-51, 1763-72 V2. As to any common law or statutory presumption of public access, it was abrogated by the specific and clear confidentiality provisions in section 188.1. C1763-65 V2. Concerning a presumption of access under the First Amendment, the Director reiterated that the Code provided confidentiality protections for conservation proceedings since their creation in 1967, and the model insurance receivership statute and other states' insurance codes used identical or similar confidentiality provisions for such proceedings. C1765-67 V2. Stevens waived her new argument relying on bankruptcy by not developing it previously. C1749 V2. Regardless, the Director and NextLevel noted that a presumption of access was determined by the history of the particular type of proceeding

rather than of other types of proceedings. C1767-68 V2. Furthermore, insurance companies were long excluded from federal bankruptcy law. C1749, 1768-69 V2. In addition, the Director and NextLevel explained that neither First Amendment authority nor *Bruen* required Founder-era law to be the touchstone for the historical analysis on the presumption of access here. C1747-48, 1769-70 V2.

In addition, the Director and NextLevel argued that the circuit court correctly found that public access would not further the purpose and function of conservation proceedings to maintain the company's status quo while ascertaining and addressing the insurer's financial condition. C1751, 1770-72 V2. Although not banks, insurance companies also are exempted from bankruptcy law because they also involve the public interest and are regulated closely by the states. C1771 V2. Thus, the phrase "run on the bank" explains the need for confidentiality so that the fear of insolvency that would be raised by public disclosure of a conservation proceeding does not harm the NextLevel's financial condition. C1771-72 V2.

As to the temporary public availability of the sealed documents, NextLevel argued that circuit courts retain the authority to maintain the confidentiality of documents despite such inadvertent disclosures on a public docket. C1751-54 V2. To the extent that Stevens challenged the protective order under equal protection, she was not similarly situated to the public because she had intervened as a party to the proceeding. C1754, 1772-75 V2.

Stevens replied that section 188.1 could not supplant any common law right of public access to court proceedings because it was enacted before the United States Supreme Court recognized that right. C1780-83 V2. She argued that *Bruen* requires courts to rely on the law in 1776 to determine whether there is a First Amendment presumption of access to a proceeding. C1783-86 V2. Stevens contended that the circuit court failed to balance the public interest in the presumption of public access to the proceeding with the purported interest in maintaining its confidentiality. C1786-87 V2. She disputed any concern of a "run on the bank" if conservation proceedings were public and asserted that one of the Director's cited sources for that concern, the National Association of Insurance Commissioners, represents insurance industry interests. C1787-90 V2. Otherwise, Stevens reasserted her as-applied challenge to the documents still under seal. C1791-95 V2.

In September 2022, the parties presented oral argument to the circuit court on Stevens's motions. SR64-128. As to whether the presumption of public access applies to conservation proceedings, the Conservator's counsel explained that the confidentiality provisions are intended to "prevent a run on the bank," in the sense that, if an insurer's policyholders discover that it was placed in conservation, there is a "strong likelihood" that they would cancel their policies and "pull out and take their premiums elsewhere." SR98-99. The Conservator also disputed Stevens's assertion that the sequestration order would not have been lifted but for her intervention. SR100-01. Rather, once

the Conservator decided to seek court approval for a claim procedure, she intended to seek to lift the sequestration order because the court would not otherwise approve such a process. *Id*.

At a later hearing, the circuit court denied Stevens's motions. SR132-37. As to her motion to reconsider, the court found that the historical precedent supported keeping conservation proceedings confidential. SR136. The court noted that Stevens disputed for the first time whether conservation proceedings were historically public. *Id*. After explaining that such new arguments were an improper basis for reconsideration, the court rejected Stevens's claims that it was necessary to rely on Founder-era history and found that bankruptcy proceedings do not dictate whether there is a presumption of access to insurance conservations. SR136-37. As to the protective order, the court refused to find that the court clerk's error in making sealed documents publicly available negated the court's protective order. SR137. Accordingly, it denied Stevens's motion to reconsider in total. *Id*. The court also denied Stevens's sanctions motion, ruling that its protective order was self-executing and NextLevel's counsel did not engage in any factual misstatements warranting sanctions. SR132-34. The court entered an order denying the motions and clarifying that Stevens's intervention had concluded. C1834 V2. After the conservation terminated in April 2023, this appeal followed. C1904-08, 1914-17 V3.

ARGUMENT

I. The standard of review is *de novo*.

The circuit court decision rejecting Stevens's constitutional and statutory challenges to the confidentiality provisions in section 188.1 presents a question of law reviewed *de novo*. *See Allegis Realty Invs. v. Novak*, 223 Ill. 2d 318, 334 (2006). Likewise, the applicability of a presumptive right of public access to the proceeding and records at issue here is reviewed *de novo*. *See Kelly*, 397 Ill. App. 3d at 255. Any question of statutory construction of the Code that is raised in addressing the court's decision is also reviewed *de novo*. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 16. Though not bound by an agency's interpretation, reviewing courts give substantial weight to the interpretation of an ambiguous statute by the agency charged with enforcing and administering that statute. *Citibank, N.A. v. Ill. Dep't of Revenue*, 2017 IL 121634, ¶ 39. The Director is charged with enforcing the Code both generally and with respect to receivership proceedings. 215 ILCS 5/187(1), 188.1(1), 401 (2022). On *de novo* review, this court may affirm the denial of a declaratory judgment on any basis supported by the record, regardless of the circuit court's reasoning. *Bd. of Educ. of Marquardt Sch. Dist. No. 15 v. Reg'l Bd. of Sch. Trs.*, 2012 IL App (2d) 110360, ¶ 16.

II. Insurance conservation proceedings

Like banks, insurance companies have long been excluded as debtors from federal bankruptcy law. 11 U.S.C. § 109(b)(2); *see, e.g., In re Prudence Co*., 79 F.2d 77, 78-80 (2d Cir. 1935) (denying motions to dismiss federal bankruptcy of investment company because it was neither bank nor insurer); *In re Union Guar. & Mortg. Co*., 75 F.2d 984, 984-85 (2d Cir. 1935) (granting state insurance regulator's motion to dismiss bankruptcy because debtor was insurer). Also like banks, insurance companies are affected with a public interest and subject to regulation requiring specialized knowledge and expertise. 9 New Appleman on Ins. Law Library Ed. § 96.01[1] at 96-3 (2018) ("New Appleman"); *see Union Guar.*, 75 F.2d at 985; *People ex rel. Benefit Ass'n v. Miner*, 387 Ill. 393, 397 (1944).

Accordingly, Article XIII of the Code authorizes the Director to initiate in court three forms of receivership to address the financial insecurity and insolvency of insurance companies: conservation, rehabilitation, and liquidation. *See* 215 ILCS 5/187-221 (2022). Although the Code does not define these terms, they each have commonly understood meanings in insurance regulation. In liquidation, the court appoints the Director as liquidator to wind down the company's business, marshal its assets, and pay its claimants to the extent possible, leaving no going concern. New Appleman § 96.03[5] at 94-24; *see* 215 ILCS 5/193(1) (2022). In rehabilitation, the court appoints the Director as rehabilitator to remedy the company's financial

problems that led to the proceeding so that it may emerge from receivership as a going concern. New Appleman § 96.03[8] at 96-25-26; *see* 215 ILCS 5/192(1) (2022). In each proceeding, the circuit court may appoint the Director as rehabilitator or liquidator only after the company was served with the complaint and provided an opportunity for a hearing, and the court then finds that sufficient grounds such as insolvency exist. 215 ILCS 5/190(1), (2), (5) (2022). In each proceeding, the Director is vested with title and control of the company's property, assets, contracts and rights of action, and is authorized to sell and dispose of that property and assets and sell or compromise its claims and debts. *Id*. at §§ 191, 192(2), 193(2), (4).

In conservation, also referred to as a summary or supervisory proceeding or seizure, the court appoints the "Director to ascertain the condition and situation of the company" to resolve any financial hazards and determine the appropriate course of action. *Id*. at § 188.1(1), (2); New Appleman § 96.03[3] at 96-23. Although the Director (as conservator) is not vested with title or the breadth of control under rehabilitation and liquidation, she takes "possession and control the property, business, books, records, and accounts of the company," while the company and its officers are enjoined from disposing of its property or transacting business without the conservator's approval. 215 ILCS 5/188.1(1) (2022). Unlike rehabilitation and liquidation, the court issues a conservation order upon the Director's filing of the verified complaint "without a hearing or prior notice" or the requirement

for specific findings. *Id*. Conservation is intended to be completed "[a]s soon as practical." *Id*. at § 188.1(2); New Appleman § 96.03[3] at 96-23 (conservations are "intended to be of short duration"). During that period, the conservator seeks to preserve the insurer's status quo while evaluating its financial condition to determine whether its condition is hazardous and, if so, can be corrected, or if its financial condition requires rehabilitation or liquidation. 215 ILCS 5/188.1(2) (2022); New Appleman § 96.03[3] at 96-23.

Rehabilitation and liquidation are public proceedings. *See* 215 ILCS 5/190(4) (2022). Conservation proceedings, in contrast, are confidential until the court orders otherwise or they are converted to rehabilitation or liquidation. *See id.* at § 188.1(4), (5). The confidentiality provisions provide that courts may hold hearings "privately in chambers, and shall do so" if the company requests, and that all "court records and papers" and related documents "shall be and remain confidential . . . unless and until the court," after hearing the Director's and company's arguments, "shall decide otherwise." *Id.*; *see* New Appleman § 96.03[3] at 96-23 (conservation proceedings are typically confidential until court orders otherwise). "Confidentiality is required by statute because if creditors and the public become aware of an insurer's potential problems, the insurer could suffer

irreparable harm even though the condition requiring conservation may be curable."[5]

III. The confidentiality provisions do not violate the presumptive right to access under the First Amendment or common law.

The circuit court correctly concluded that the confidentiality provisions do not violate the First Amendment or common law presumptive right of access to judicial proceedings or records. C1403-04 V2; SR135-37. The First Amendment presumption of public access does not apply to conservation proceedings because they were historically not open to the public, and such access would not preserve the insurer's status quo while the conservator ascertains and addresses its financial condition. Instead, public disclosure of the Director's investigatory proceeding would likely harm the insurer's financial condition as policyholders flee the company, ensuring the very crisis that the proceeding is intended to avoid or resolve. For the same reasons, the confidentiality provisions do not violate a common law presumption of public access to proceedings because that right is coterminous with the First Amendment right. Regardless, the legislature abrogated any such common law presumption as to conservation proceedings in enacting the confidentiality provisions.

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[5] Office of the Special Deputy Receiver website, Frequently Asked Questions at https://www.osdchi.com/faq/faq.htm#21 (last visited June 24, 2024) ("OSDR website").

A. The circuit court correctly concluded that the presumption of public access does not apply to insurance conservation proceedings.

The circuit court properly concluded that the confidentiality provisions do not violate the First Amendment because the presumption of public access does not apply to conservation proceedings. C1404 V2; SR135-37. "[S]tatutes carry a strong presumption of constitutionality, and a party challenging a statute has the burden of rebutting that presumption." *People v. McCarty*, 223 Ill. 2d 109, 135 (2006). To satisfy this burden, a party must "clearly establish any constitutional invalidity." *Allegis Realty Invs.*, 223 Ill. 2d at 334. Consequently, courts "will uphold a statute's validity whenever it is reasonably possible to do so." *Id*.

Stevens challenges the confidentiality provisions of section 188.1 as facially unconstitutional under the First Amendment. AT Br. 20-21; C455, 473 V1. Facial challenges to statutes are "the most difficult challenge to mount successfully because an enactment is facially invalid only if no set of circumstances exist under which it would be valid." *Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 305-06 (2008). "If any situation may be posited where the statute could be validly applied, the facial challenge must fail." *In re M.T.*, 221 Ill. 2d 517, 533 (2006). Indeed, "the specific facts related to the challenging party are irrelevant." *People v. Thompson*, 2015 IL 118151, ¶ 36. Rather, the challenging party must show "that the statute would be invalid under any imaginable set of circumstances. . . . So long as there exists a

situation in which a statute could be validly applied, a facial challenge must fail." *M.T.*, 221 Ill. 2d at 536-37 (cleaned up).

The First Amendment and common law provide parallel presumptive rights of public access to court proceedings and records. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 231-32 (2000).[6] To determine whether the First Amendment and common law presume a right to access to the proceeding or record at issue, courts apply the two-part "experience and logic" test: (1) have the type of proceedings "been historically open to the public"; and (2) do those proceedings "have a purpose and function that would be furthered by disclosure." *Kelly*, 397 Ill. App. 3d at 256 (*citing Skolnick*, 191 Ill. 2d at 232 and *Press-Enter. Co. v. Superior Ct. of Cal.*, 478 U.S. 1, 8 (1986)). For the presumption of access to apply, "the particular proceeding in question" must pass both parts of this test. *See Press-Enter.*, 478 U.S. at 9 (qualified right of access applies "[i]f the particular proceeding in question passes these tests of experience and logic").

If the presumption of access applies to the type of proceeding or record, the right is not absolute. *Id*. Then courts apply a separate balancing test to determine whether the presumption is "rebutted by demonstrating that

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[6] To the extent that Stevens claimed that the confidentiality provisions violated the free speech protection of the Illinois Constitution, Ill. Const. art. I, § 4, she abandoned that claim on appeal by failing to develop any such argument, *see Mercury Indem. Co. of Ill. v. Kim*, 358 Ill. App. 3d 1, 18-19 (1st Dist. 2005) (constitutional claim not adequately developed and supported is forfeited).

suppression is essential to preserve the higher values and is narrowly tailored to serve that interest." *Skolnick*, 191 Ill. 2d at 232 (cleaned up); *Kelly*, 397 Ill. App. 3d at 260-61. But if the presumption of access does not apply to the proceeding at issue, the "analysis ends there." *In re Gee*, 2010 IL App (4th) 100275, ¶ 26 (presumption did not apply to search warrant materials in murder trial). Here, the circuit court never reached the second test because it correctly concluded that the presumptions do not apply to conservation proceedings and records under the experience and logic test. C1404 V2.

1. Conservation proceedings were not historically open to the public.

Insurance conservation proceedings were not historically open to the public. The General Assembly enacted the confidentiality provisions in 1967 when it first enacted the preliminary conservation proceeding. 1967 Ill. Laws, p. 1762 § 1 (approved July 18, 1967); Ill. Rev. Stat. 1967 ch. 73 § 800.1. And the confidentiality provisions were an extension of confidentiality protections enacted in 1937 for the Director's prior regulatory proceeding to investigate an insurer's financial condition.

In 1937, the General Assembly redrafted the Code to provide a uniform set of insurance laws, including Article XIII, which provided the Director with expanded authority to address insurer insolvencies. Fred W. Netto, *The Ins. Dir. in Ill.*, 16 Chi.-Kent L. Rev. 246-27, 259-62 (1938). At that time, the Code provided the Director only with rehabilitation and liquidation proceedings for domestic companies; conservation then was a more limited proceeding

authorized only against non-Illinois insurers to conserve their "assets in this State." Ill. Rev. Stat. 1937 ch. 73 § 809(1); *see id*. §§ at 799-833. Instead, section 132 of the Code authorized the Director to conduct preliminary examinations of insurers' "books, records, documents, and assets" "for the purpose of ascertaining the assets, conditions, and affairs." *Id*. at § 744(1). While section 132 directed the Director to draft a report of that examination, it authorized her to "withhold any such report from public inspection for such time as [she] may deem proper" and to "publish any part or all of such report as [she] consider[ed] to be in the interest of the public." *Id*. § 744(3), (4). Similarly, the Code generally made the Director's records public "except as the Director, for good reason, may decide otherwise, or except as may be otherwise provided in this Code." *Id*. § 1016.

In 1967, the General Assembly enacted section 188.1 to authorize the Director to initiate conservation proceedings against domestic insurers similarly "to ascertain the condition and situation of the company." Ill. Rev. Stat. 1967 ch. 73 § 800.1(2). That section included the confidentiality provisions directing courts to maintain the confidentiality of the proceedings and all related records until the court orders otherwise. *Id*. at § 800.1(4), (5). Thus, the court is authorized to make all or some records public, the insurer could demand that the record be public, and the Director could file to convert the proceeding to a public rehabilitation or liquidation. *Id*.

The Illinois confidentiality provisions are nearly identical to the confidentiality provisions that Wisconsin enacted in 1967 in its insurance code to govern its analogous summary proceeding of a seizure order. Wis. Stat. Ann. §§ 645.22, 645.24(2), (3) (1968). In 1967, Wisconsin comprehensively revised its insurance code on delinquency proceedings following a comprehensive study, including creating similar summary proceedings under which the insurance commissioner could seek a seizure order to investigate a potentially insolvent insurer. *Id*. at §§ 645.21-645.24; *see id*. ch. 645, Preliminary Comment. As under section 188.1, the commissioner initiated a court proceeding for a seizure order directing him to take possession and control of the insurer to "ascertain the condition of the insurer." Wis. Stat. Ann. § 645.22(1), (2) (1968). In almost identical language to the section 188.1 confidentiality provisions, the Wisconsin code provided that the court hold hearings in such proceedings privately and that all documents and records related to the proceeding are confidential until the court orders otherwise. *Id*. at § 645.24(2), (3). Such proceedings were distinct from "formal proceedings" for rehabilitation and liquidation. *Id*. at §§ 645.31-49.

Wisconsin's code provisions, including its confidentiality protections for summary proceedings, were adopted by the National Association of Insurance Commissioners ("NAIC") to provide a model uniform insurer receivership statute for all states until the NAIC drafted and issued its own model insurer

receivership statute in 1977 ("Model Act").[7] New Appleman § 96.01[1] at 96-3. Like the Wisconsin statute, the Model Act provides for summary proceedings by state insurance directors, including a seizure order filed in court. Model Act § 10. As in a conservation under section 188.1, this provision authorizes a state director to seek an order directing him to take "possession and control" of the insurer's property to "ascertain the condition of the insurer." Model Act § 10(B), (C). And in almost identical language to the confidentiality provisions in section 188.1 and the Wisconsin statute, the Model Act provides for holding hearings in such proceedings "privately in chambers" and that all related court records remain confidential until the court orders otherwise or the insurer so requests. *Id*. at §§ 10(E), 11.

Accordingly, numerous jurisdictions include similar or identical confidentiality provisions to those in section 188.1 to govern similar conservation or summary proceedings and seizure orders.[8] *See* New Appleman

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[7] The NAIC is composed of States' top insurance regulators and creates model insurance laws and regulations for the States. *See Am. Fin. Grp. & Consol. Subsidiaries v. United States*, 678 F.3d 422, 423 (6th Cir. 2012). The 1977 Model Act is available at the NAIC website at: https://naic.soutronglobal.net/Portal/Public/enUS/DownloadImageFile.ashx?objectId=8283&ownerType=0&ownerId=25239 (last visited June 24, 2024).

[8] *E.g.*, Colo. Rev. Stat. Ann. §§ 10-3-509(5), 510 (2024); Conn. Gen. Stat. Ann. §§ 38a-912(e), 913 (2024); Del. Code Ann. Tit. 18, § 5944(a), (b) (2024); Ga. Code Ann. §§ 33-37-9(e), 33-37-10 (2024); Haw. Rev. Stat. § 431:15-203 (2024); Ind. Code §§ 27-9-2-3 (2024); Mich. Comp. Laws §§ 500.8110(5), 500.8111 (2024); La. Stat. Ann. § 22:2036(D), (E) (2024); Minn. Stat. Ann. § 60B.14(2), (3) (2024); Ohio Rev. Code Ann. §§ 3903.10(E), 11(A) (2024); 40 Pa. Cons. Stat.

at § 96.03[3] at 94-23 (conservations and seizures typically are sequestered and confidential until court orders otherwise).

Thus, since their creation in Illinois and other jurisdictions across the country, court proceedings for state regulators to seize temporary possession and control over insurers to investigate and address their financial condition have not been open to the public. To the contrary, such proceedings and related records and documents are treated as confidential until the presiding court orders otherwise, the insurer requests they are made public, or the state regulator files a complaint to convert the proceeding to a rehabilitation or liquidation.

2. Public disclosure would undermine, not promote, the purpose and function of conservation proceedings.

The circuit court also correctly found that public disclosure of conservation proceedings and records would undermine the dual purposes of such proceedings to maintain the insurer's status quo while the Director ascertains and addresses its financial condition. C1404 V2. Under the second prong of the experience and logic test, courts consider whether the particular proceeding "ha[s] a purpose and function that would be furthered by disclosure." *Kelly*, 397 Ill. App. 3d at 256; *see Press-Enter.*, 478 U.S. at 8 ("whether public access plays a significant positive role in the functioning of

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§ 221.13(a), (b) (2024); Tex. Ins. Code Ann. § 443.051(f), (i) (2024); Wis. Rev. Stat. Ann. §§ 645.24(2), (3) (2024).

the particular process in question"). Here, public access to conservation proceedings and records would undermine the purpose of those proceedings by harming the insurer's financial condition and thwarting the Director's ability to gauge that condition and potentially correct the company's financial problems. *See Gee*, 2010 IL App (4th) 100275, ¶¶ 35-37 (public access to warrant-application process and records would hinder criminal investigations); *Kelly*, 397 Ill. App. 3d at 260 (public access to jury questionnaires, pretrial motion to admit other crimes evidence, and related pretrial hearings would undermine their functions).

Conservation proceedings provide the Director with possession and control of the troubled insurer so that she may maintain its status quo while she "ascertain[s] the condition and situation of the company." 215 ILCS 5/188.1(1), (2) (2022); *see* OSDR website, Frequently Asked Questions (conservations "allow the Conservator to evaluate the condition of the company in order to determine its future direction"). In her role as Conservator, the Director protects the interests of policyholders, creditors, and the public "while maintaining the status quo while [she] ascertains the insurer's condition." New Appleman § 96.03[3] at 96-23 (citing 215 ILCS 5/188.1); *see id*. § 98.01[3][d] at 98-37 ("The purpose of conservation is for the commissioner to quickly ascertain and correct the insurer's problems and restore the insurer to normal operations"). Through an *ex parte* order, the conservator is granted broad control over the company's property, records, and

business activity to investigate its business and finances. *See* 215 ILCS 5/188.1(1), (2) (2022). Based on that investigation, the conservator may determine that the problems causing the company's hazardous condition were corrected (or not as serious as believed) and terminate the conservation, or she may conclude that because the company's condition cannot be corrected, conversion of the proceeding to a rehabilitation or liquidation is warranted, *see id*. § at 188.1(2); New Appleman § 96.03[3] at 96-23.

The confidentiality provisions are necessary to maintain the company's status quo and allow the conservator to carry out these investigatory and remedial functions. Consequently, public disclosure of the proceedings and related records would undermine those functions by harming the company's financial condition as policyholders cancel their policies or otherwise move their business. SR98-97.

As noted, section 188.1 and its confidentiality protections are nearly identical to Wisconsin's contemporaneously enacted provisions governing its similar seizure order proceeding. *See* 1967 Wis. Sess. Laws 242, 244-45 (ch. 89, §§ 645.22, 645.24). In revising its insurance code, Wisconsin included the comments of the Insurance Laws Revision Committee, which was appointed pursuant to statute to study and draft the revised code. *Id.* at 223-Preliminary Comment; *see* Spencer L. Kimball, *Rehab. and Liquidation of Ins. Cos.: Delinq. Proc. in Ins.*, 1967 Ins. L. J. 79, 79-80 (1967). The Committee's comments to the confidentiality section describe state commissioners' concerns that the

publicity of delinquency proceedings "might destroy a salvageable company, the same way that a report of difficultly is apt to start a run on a bank." Wis. Stat. Ann. § 645.24-1967 comments (West 2024) ("Wis. 1967 Comments").[9] As the Conservator in this matter explained, policyholders' fears that the company will not honor its policy obligations is likely to result in their flight to other companies or their withholding premiums. SR98-99; *see also, e.g.*, *Cohen v. State ex rel. Stewert*, 89 A.3d 65, 84-85 (Del. 2014) (discussing fear of "imminent 'run on the bank' caused by canceled policies and demands for premium refunds" following public disclosure of seizure order against insurer). Thus, "public knowledge of the matter, through the 'run on the bank' psychology, might destroy a sound insurer." Wis. 1967 Comments. Likewise, in its Handbook for state receivers, the NAIC recognizes that if "creditors and the public become aware of potential problems" due to disclosure of a seizure order, "the insurer could suffer irreparable harm even though the condition requiring seizure has been removed."[10]

Indeed, the confidential seizure order proceeding was intended to address state regulators' historical reluctance to initiate delinquency

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[9] The Committee's 1967 Comments are included in the supplementary appendix to this brief with the text of Wisconsin's section 645.24. *See* SA3-4.

[10] NAIC Receiver's Handbook for Ins. Co. Insolvencies at 9-10 (2024), available at https://content.naic.org/sites/default/files/publication-rec-bu-receivers-handbook-insolvencies.pdf (last visited June 24, 2024) ("NAIC Handbook").

proceedings until it was too late to address insurers' financial conditions because "the publicity attendant upon any proceeding was destructive to the company." Wis. 1967 Comments. Given the risks posed by public disclosure, "[w]ithout confidentiality the procedures [of a seizure order] probably would not be used much and the public would have no more information and a great deal less protection." *Id*. And the circuit court always maintains the discretion to determine that the interests of policyholders, creditors, or the public require that the proceeding be made public. *See* 215 ILCS 5/188.1(5) (2022); Wis. 1967 Comments (courts protect public interest through authority to make proceeding public). Thus, although the public has an interest in access to judicial hearings, conservation and seizure order proceedings "present a special case where the arguments for limitations on disclosure seem overwhelming." Wis. 1967 Comments.

As the United States Supreme Court recognized in establishing the First Amendment presumption of access, "there are some kinds of government operations that would be totally frustrated if conducted openly," including the "classic example . . . that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Press-Enter.*, 478 U.S. at 9 (cleaned up); *see In re Newark Morning Ledger Co.*, 260 F.3d 217, 221 (3d Cir. 2001) (no public right of access to grand jury proceedings and related proceedings that would disclose grand jury material). Similarly, the proper functioning of a conservation under section 188.1 depends on the proceeding's

confidentiality while the conservator completes her investigation of the insurer's finances and determines the best course of action to address them. Such proceedings "are investigatory in nature and purpose" and "are like grand jury investigations and deliberations, where it has always been regarded as reasonable for the proceedings to be as confidential as the nature of the matter permits." Wis. 1967 Comments. Although conducted under judicial supervision, the proceeding is an extension of the Director's regulatory oversight of the insurer through which she obtains broader authority over the insurer and its affairs. With that authority, the Director can ascertain the hazards posed by the insurer's financial condition (if any) and oversee their correction or determine that formal receivership proceedings are necessary. But presuming that the public have access to these proceedings and related records would undermine those investigative and remedial functions by potentially harming even a healthy, let alone financially troubled, insurer. *See* Wis. 1967 Comments; *see also Gee*, 2010 IL App (4th) 100275, ¶ 36 (public access to warrant-application process would undermine criminal investigation of which it is an extension); *Times Mirror Co. v. U.S.*, 873 F.2d 1210, 1215-16 (9th Cir. 1989) (same).

Accordingly, under the logic prong of the First Amendment test, public access to section 188.1 proceedings and records would not "play[ ] a significant positive role in the functioning of the particular process in question." *See Press-Enter.*, 478 U.S. at 8. To the contrary, it would hinder the proceedings'

purpose by undermining the Director's ability to ascertain and address the insurer's financial condition. *See Gee*, 2010 IL App (4th) 100275, ¶ 36; *Kelly*, 397 Ill. App. 3d at 260.

3. The common law presumption of access does not apply to conservation proceedings for the same reasons and, regardless, was abrogated by section 188.1.

For the same reasons, the circuit court properly found that there is no common law presumption of public access to conservation proceedings and records. *See* C1403-04 V2. This court has repeatedly recognized that, while the common law and first amendment presumptions arise from different sources, they are "parallel" and so analyzed together. *Gee*, 2010 IL App (4th) 100275, ¶ 24; *Kelly*, 397 Ill. App. 3d at 256; *see Skolnick*, 191 Ill. 2d at 231-33 (analyzing "parallel" First Amendment and state rights to access together). Accordingly, for the same reasons that there is no presumption of public access to conservation proceedings under the First Amendment, there also is no similar presumption under the common law. *See Gee*, 2010 IL App (4th) 100275, ¶¶ 36-38 (applying single analysis to find no qualified right of access to warrant records under First Amendment, common law, or statute); *Kelly*, 397 Ill. App. 3d at 256-60 (same to find no qualified right to pretrial jury questionnaire and other-crimes proceedings); *People v. Pelo*, 384 Ill. App. 3d 776, 780-83 (4th Dist. 2008) (same to find no qualified right to videotape deposition).

Even if the common law otherwise provided such a presumption of access, the General Assembly abrogated it through the explicit confidentiality provisions in section 188.1. C1403 V2. A state statute abrogates even well-established common law rules if it "speak[s] directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (cleaned up); *see Vancura v. Katris*, 238 Ill. 2d 352, 378 (2010) (statutes are construed "as changing the common law only to the extent the terms thereof warrant, or as necessarily implied from what is expressed") (internal quotation marks omitted). Here, the confidentiality provisions mandate that "court records and papers" related to the conservation proceeding "shall be and remain confidential," and that the circuit court hold proceedings privately until it orders otherwise. 215 ILCS 5/188.1(4), (5) (2022). These provisions "speak directly" to and necessarily evidence a clear "statutory purpose to the contrary" to any presumption of public access to conservation proceedings and records by explicitly providing that they are confidential. *See Texas*, 507 U.S. at 534. Therefore, to the extent that there was a presumption of access at common law, section 188.1 expressed the General Assembly's clear intent to abrogate it. *See Vancura*, 238 Ill. 2d at 378-79 (notary statute's plain language modified common law duty and liability of notaries' employers); *see also, e.g.*, *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 429-30 (9th Cir. 2011) (federal bankruptcy statute protecting certain documents abrogated common law right to records); *United States v. Gonzales*, 150 F.3d 1246, 1262-

63 (10th Cir. 1998) (federal statute abrogated any common law right of access to documents, records, and transcripts); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998) (federal rules of criminal procedure supplemented any common law right of access to grand jury-related information).

B. Stevens fails to show that the presumption of public access applies to conservation proceedings and records.

Stevens provides no basis to find that the confidentiality provisions in section 188.1 facially violate the First Amendment or a common law presumption of access. As an initial matter, contrary to Stevens's suggestion, AT Br. 21-23, the confidentiality provisions are not content-based restrictions on speech subject to strict scrutiny under the First Amendment. As Stevens recognizes elsewhere, *id*. at 20, 25, 33, the confidentiality provisions restrict public access to insurance conservation proceedings and related records, 215 ILCS 5/188.1(4), (5) (2022). Accordingly, none of Stevens's cited authority regarding content-based restrictions on speech applies. *See, e.g.*, *Reed v. Town of Gilbert, Az*., 576 U.S. 155 (2015) (municipal code restricting outdoor signs based on their subject matter was content-based restriction subject to strict scrutiny). After all, the First Amendment does not explicitly refer to a right of access to proceedings. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982). Rather, the Supreme Court recognized a qualified right of access to criminal trials as essential for "other First Amendment rights" because it safeguards "a major purpose of that Amendment . . . to protect the free

discussion of government affairs." *Id*. (cleaned up). Thus, whether the First Amendment provides a qualified right of access to a type of judicial proceeding or record in the first instance is governed by the distinct "experience and logic" test. *See Press-Enter.*, 478 U.S. at 8-9; *Kelly*, 364 Ill. App. 3d at 256-57. As explained, the circuit court correctly concluded that no such qualified right applies to conservations. *See supra* at pp. 24-34.

Stevens generally argues that the First Amendment presumption of access must apply to conservation proceedings because they are court proceedings. AT Br. 29-32, 35-37. But the First Amendment's presumptive right of access does not apply to all court proceedings and records. To the contrary, courts apply the "experience and logic" test to determine whether the presumption applies to the specific type of court proceeding or record to which access is sought. *Kelly*, 397 Ill. App. 3d at 255 (addressing whether presumptive right applied "to this particular type of court record or proceeding"); *Gee*, 2010 IL App (4th) 100275, ¶ 19 (same); *see, e.g.*, *Press-Enter.*, 478 U.S. at 9 (addressing "[i]f the particular proceeding in question passes these tests of experience and logic"); *id*. at 8 (analyzing "whether public access plays a significant positive role in the functioning of the particular process in question").

Under this test, the United States Supreme Court has held that the presumption applies to criminal trials and certain related criminal proceedings. *See id*. at 14-15 (preliminary hearings for criminal trial); *Globe*

Newspaper Co., 457 U.S. at 604 (criminal trials). And Illinois courts and lower federal courts have applied the presumptive right to several civil proceedings, such as a counterclaim to a defamation action, an action for declaratory relief to extinguish minors' probate claims, and a motion to terminate securities fraud claims. *See Skolnick*, 191 Ill. 2d at 232 (counterclaim to defamation action); *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 998 (1st Dist. 2004) (action for declaratory judgment under probate law); *Matter of Continental Ill. Sec. Lit.*, 732 F.2d 1302, 1304 n.1, 1309 (7th Cir. 1984) (motion to terminate shareholder fraud claims). But courts have also concluded that such presumptive right applied to other types of preliminary court proceedings or records, such as grand jury proceedings, other hearings and related records that might disclose secret grand jury information, search warrant proceedings and records, juvenile proceedings, and pretrial proceedings whether to admit other crimes evidence. *See Gee*, 2010 IL App (4th) 100275, ¶¶ 35-37 (no presumptive right of access to search warrant-application process and records); *Kelly*, 397 Ill. App. 3d at 260 (same for pretrial proceedings and motion practice regarding other crimes evidence); *In re Minor*, 205 Ill. App. 3d 480, 488 (4th Dist. 1990) (same for juvenile proceedings), *aff'd*, 149 Ill. 2d 247 (1992); *Newark Morning Ledger Co.*, 260 F.3d at 221-24 (same for grand jury proceedings and other proceedings where "secret grand jury material may be disclosed"); *United States v. Corbitt*, 897 F.2d 224, 228-37 (7th Cir. 1989) (same for presentence memoranda filed with court); *Times Mirror Co.*, 873

F.2d at 1215-16 (same for pre-indictment search warrants and supporting affidavits submitted to court).

The circuit court engaged in such an analysis to correctly find that Illinois' insurance conservation proceedings "have not historically been open to the public." C1401 V2; *see supra* at pp. 24-28. In addition, the court properly determined that providing a presumptive right of public access to such preliminary proceedings would undermine their central functions to maintain the insurer's status quo while the Conservator investigates the insurer's financial condition and determines the best course of action, if any, to address that condition. C1401 V2; *see supra* at pp. 28-34.

Rather than dispute this history, Stevens asserts that bankruptcy proceedings and records were historically open to the public. AT Br. 37-38. As the circuit court recognized, however, SR136, Stevens forfeited this argument by failing to develop it until her motion for reconsideration, *see Evanston Ins. Co. v. Riseborough*, 2014 IL 114271, ¶ 36 (arguments raised for first time in motions for reconsideration are forfeited on appeal). Regardless, like banks, insurance companies have been excluded from bankruptcy protection as debtors since at least 1898 because they affect the public interest, and their regulation requires specialized knowledge and expertise.[11] *See* 11 U.S.C. §

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[11] Contrary to Stevens's characterization, AT Br. 39, the debtors in *In re EIPC Assocs.*, 54 B.R. 445, 448 & n.2 (Bankr. E.D. Va. 1985), were not banks but separate real estate investment affiliates of a savings and loan,. The court

109(b)(2); *Prudence Co*., 79 F.2d at 78-80; *Union Guar. & Mortg. Co*., 75 F.2d at 984-85; New Appleman § 96.01[1] at 96-3. Accordingly, Illinois authorized its insurance regulator to maintain the confidentiality of investigations into insurer's financial condition for over eighty years. Ill. Rev. Stat. 1967 ch. 73 § 744(3), (4). Like other jurisdictions, when Illinois enacted the preliminary conservation proceeding at issue, it also provided that those proceedings and records would be kept confidential until the court orders otherwise, the insurer requested it be public, or the Director filed to convert the proceeding to a rehabilitation or liquidation. Ill. Rev. Stat. 1967 ch. 73 § 800.1(4), (5); *see supra* at pp. 24-28. Consequently, assuming that bankruptcy proceedings historically were open to the public, that history is irrelevant to determining whether the Director's investigative proceedings for conservation were open.

After all, conservation proceedings are not analogous to traditional civil trials or bankruptcy proceedings. Formal receivership proceedings for rehabilitation and liquidation of insurers may be compared in some respects to bankruptcy cases for reorganization and liquidation. *Compare* 215 ILCS 5/192, 193 (2022) *with* 11 U.S.C. Chs. 7, 11. Conservation proceedings, in contrast, are preliminary investigations conducted by the state regulator to determine whether formal receivership proceedings are necessary. *See* 215 ILCS 5/188.1(2) (2022); OSDR website, Frequently Asked Questions; New Appleman

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sealed the bankruptcy proceedings to protect the creditor-banks from potential bank runs. *Id*. at 450.

§ 96.03[3] at 96-23. Unlike civil actions and bankruptcy proceedings, conservation proceedings may be filed and ordered *ex parte* without notice to the insurer, allowing the Director to take possession and control of the insurer to properly carry out that investigation. 215 ILCS 5/188.1(1) (2022); New Appleman § 98.04[1] at 98-55. Thus, once the conservator is appointed, she need not rely on subpoenas or formal discovery to obtain the insurer's documents and information. *See* 215 ILCS 5/188.1(1) (2022). Nor do conservation proceedings typically involve adversary proceedings or even a claims process. *See id*. Instead, the conservator conducts her investigation, often with minimal judicial participation, and determines either that the insurer's financial condition is sound, that the insurer has taken action to resolve its financial difficulties, or that rehabilitation or liquidation proceedings are necessary. *See* New Appleman § 96.03[3] at 96-23.

Nor is Stevens's reliance on *In re Symington*, 209 B.R. 678 (Bankr. D. Md. 1997), to the contrary. *See* AT Br. 37. In *Symington*, a bankruptcy court ruled that the First Amendment presumption of access applied to federal bankruptcy examinations under Fed. R. Bankr. P. 2004. 209 B.R. at 681, 693-94. But as explained, from the time that such examinations were codified in the 1898 Act, *id*. at 693, insurers have not been considered debtors who are subjects of examinations. Moreover, unlike conservations, bankruptcy examinations are not preliminary investigations by a government regulator to determine whether insolvency proceedings or other actions are required.

Instead, they can be initiated by any party-in-interest who files a motion in an already-pending bankruptcy proceeding seeking information on the debtor's finances. *See id*. at 684 (Rule 2004 examinations "obviously require[ ] the pendency of a bankruptcy case"); Fed. R. Bankr. P. 2004(a) (court may order examination "[o]n motion of any party in interest"). And unlike the conservator's investigation of the insurer, the bankruptcy examination generally requires the use of subpoenas to compel production and testimony that is subject to the procedures and limitations of federal discovery. *See Symington*, 209 B.R. at 864-65. Regardless, to the extent that bankruptcy examinations involve a preliminary investigation, another bankruptcy court has since rejected *Symington*'s analysis to conclude that no presumption of access applies to such examinations. *See In re Thow*, 392 B.R. 860, 864-67 (W.D. Bankr. Wash. 2007).

Stevens argues that under *Bruen*, the analysis of the historical openness of the proceeding at issue must be determined by the time period of constitutional ratification (in the 1780s or 1860s), AT Br. 34-35. Yet *Bruen* addressed the meaning of the right to bear arms under the Second Amendment, not the First Amendment right of public access. 597 U.S. at 24-31. *Bruen* nowhere suggested that it changed any standard or analysis under the First Amendment generally, let alone to determine the presumption of access. *See id*. at 17-71. After all, the government's burden to provide the historical analysis under the Second Amendment applies only *after* the court

has determined that the Second Amendment "presumptively protects" the regulated conduct. *Id*. at 17, 24, 33. In contrast, litigants challenging a statute or order under the First Amendment right of access must show that the proceeding at issue was historically open to the public as part of the initial test necessary for the presumption of access to apply to the proceeding at all. *See Press-Enter.*, 478 U.S. at 8-9; *Kelly*, 364 Ill. App. 3d at 256-57. And if a presumption applies, then courts apply the type of means-end scrutiny that *Bruen* explicitly rejected for Second Amendment challenges. *Cf. Press-Enter.*, 478 U.S. at 9-10 *with Bruen*, 597 U.S. at 17-24. Therefore, *Bruen* provides no basis to alter the "experience of logic" test. *See Caulkins v. Pritzker*, 2023 IL 129453, ¶¶ 32-35 (declining to apply *Bruen* historical analysis to equal protection challenge to gun statute because challenges "are analyzed under different standards").

Moreover, *Bruen* did not hold that courts must rely on the history of the Founders even when interpreting the Second Amendment. The Supreme Court recognized that cases "implicating unprecedented societal concerns . . . may require a more nuanced approach," *Bruen*, 597 U.S. at 27, and that "a regular course of practice can liquidate [and] settle the meaning of disputed or indeterminate terms [and] phrases in the Constitution," *id*. at 35-36 (cleaned up); *see also Dist. Of Columbia v. Heller*, 554 U.S. 570, 605 (2008) ("legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification" is also "a critical tool of

constitutional interpretation"). That is precisely the situation in this case. Illinois and other jurisdictions created conservation proceedings to provide state regulators with an investigatory proceeding to address the specialized concerns of insurer financial crises and insolvencies. *See* New Appleman § 96.01[1] at 96-3, § 98.01[3][d]; Wis. 1967 Comments. And a critical component of these preliminary proceedings is that they remain confidential to maintain the insurer's financial status quo while the regulator determines what further action to take, if any, to protect the interests of the policyholders, creditors, and public. *See* New Appleman § 96.03[3] at 96-23; NAIC Handbook at 9-10, 296; Wis. 1967 Comments.

Stevens also contends that public access would not undermine the purpose or function of conservation proceedings because insurers are not banks. AT Br. 38-39. But both banks and insurers were excluded from federal bankruptcy law because of their effect on the public interest and specialized concerns. *See* New Appleman § 96.01[1] at 96-3; *Union Guar.*, 75 F.2d at 985; *Miner*, 387 Ill. at 397. Like banks' dependence on their depositors, insurers rely on the premiums paid by their policyholders, among whom they must sufficiently spread the risk of their provided coverage. *See Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1072 (7th Cir. 2004) (explaining the "purpose of insurance is to spread risk"). As the Conservator explained, if their policyholders become aware of the conservation, there is a substantial risk of a "run on the bank" in that those policyholders would move their business or

otherwise withhold premiums. SR98-99; *see* Wis. 1967 Comments (confidentiality provisions intended to avoid publicity that "might destroy a salvageable company, the same way that a report of difficulty is apt to start a run on a bank"). This flight, in turn, would undermine the core purpose of conservation proceedings to maintain the status quo while the conservator ascertains and addresses the insurer's financial condition. *See* New Appleman § 96.03[3] at 96-23; *supra* at pp. 28-34.

Stevens also asserts that NextLevel faced no risk from publicity because its largest creditor was the State and, she states, the later lifting of the sequestration order did not cause a financial crisis. AT Br. 39. In applying the "experience and logic" test, however, courts consider the "systemic effects of disclosure" on future proceedings of the type at issue, not on the specific case or record being litigated. *Corbitt*, 897 F.2d at 234. Courts balance the interests in confidentiality and public disclosure of the particular case or record at issue only if (and so *after*) they conclude that the presumption of access applies. *Gee*, 2010 IL App (4th) 100275, ¶ 26 (if court finds that "the presumption did not apply, [the court's] analysis ends there"); *see, e.g.*, *United States v. Smith*, 123 F.3d 140, 151 (3d Cir. 1997) (once court finds no presumptive right of access, the "inquiry ends [t]here," and it need not "reach the question whether the district court made particularized findings" or if "the need for closure outweighed the interest in public access"). Indeed, Stevens contends that the confidentiality provisions violate the First Amendment on

their face. AT Br. 20-21; C455, 473 V1. Thus, the particular facts of this case are irrelevant to her challenge. *Thompson*, 2015 IL 118151, ¶ 36.

Otherwise, Stevens argues that the confidentiality provisions are overbroad because their "mandatory language" withholds judicial discretion to consider whether public disclosure is appropriate in specific cases. AT Br. 23-24. Stevens, however, never raised any such overbreadth claim in the circuit court and so forfeited it on appeal. *See Gillard v. Nw. Mem'l Hosp.*, 2019 IL App (1st) 182348, ¶ 49 (constitutional arguments not raised in circuit court are forfeited). In addition, because Stevens's opening brief fails to explain how the purportedly mandatory nature of the provisions violates the First Amendment as overly broad, she doubly forfeited this argument on appeal. *See* AT Br. 23-24, 40; *Mercury Indem. Co.*, 358 Ill. App. 3d at 18-19 (constitutional claim not adequately developed and supported is forfeited).

Regardless, Stevens misconstrues both the First Amendment right of access and the confidentiality provisions. First, whether a First Amendment presumption of access applies to Illinois conservation proceedings at all is based on the effect of public access on the purpose and function of all such future conservation proceedings, not on weighing the equities of public access in this specific case. *See Corbitt*, 897 F.2d at 234. That analysis only applies *if* and *after* a court rules that the presumptive right applies. *See Gee*, 2010 IL App (4th) 100275, ¶ 26. Second, the confidentiality provisions preserve the court's discretion to make all or part of the proceeding or records public,

whether at the request of a party or on its own motion, if the court allows argument. 215 ILCS 5/188.1(5) (2022) (providing proceeding and records are confidential "unless and until . . . the court orders otherwise"); *see* Wis. 1967 Comments ("public interest is protected by the court" who "may order the proceedings to be made public" after hearing argument).

Accordingly, the circuit court granted the Director's motion to lift the sequestration order after the Conservator ascertained NextLevel's finances, allowed the sale of its assets and membership to another insurer, and was negotiating resolution of any remaining claims. C432-35, 526-27, 671-72 V1. Thus, Stevens has not shown how the confidentiality provisions violated a First Amendment right of access in this matter, let alone that they are overly broad. *See City of Chi. v. Alexander*, 2015 IL App (1st) 122858-B, ¶¶ 31-34 (local ordinance deemed not overly broad speech restriction absent showing of "substantial number of instances" of First Amendment violations "in relation to its plainly legitimate sweep") (cleaned up).

In sum, Stevens provides no basis to find that the confidentiality provisions facially violate either the First Amendment or common law presumptive right of public access because neither presumption applies to insurer conservation proceedings and records. [12]

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[12] NextLevel responds to Stevens's as-applied challenges to the confidentiality provisions and protective order thereunder. Nextlevel Br. Sec. III. The Director incorporates those arguments.

IV. Stevens forfeited her other challenges to the confidentiality provisions and, regardless, failed to show that they violate the separation of powers or due process clauses, or constitute special legislation.

A. Stevens forfeited her other facial challenges to the confidentiality provisions.

On appeal, Stevens claims that the confidentiality provisions violate the Due Process Clause of the Fourteenth Amendment and Separation of Powers and Special Legislation Clauses of the Illinois Constitution. AT Br. 35-36, 44-47. But Stevens forfeited these claims by failing to meaningfully argue them in the circuit court or on appeal. As to special legislation, she never raised such a challenge in the circuit court. Instead, on appeal she cites the record only for her perfunctory allegations of violations of other Illinois Constitution provisions. *See* AT Br. 46 (citing C915 V1). Stevens's amended motion to intervene repeated only the cursory allegation that the confidentiality of the proceedings violated due process without any supporting argument or authority. *See* C910, 916, 1137 V1. To the extent that Stevens later asserted any due process challenge, she argued that the charged fees for access to the court records database violated her due process rights — not any challenge to the confidentiality provisions resembling her argument on appeal. *Compare* C1495, 1511 V2 *with* AT Br. 44-46. Because Stevens never presented or developed her new due process and special legislation challenges in the circuit court, she forfeited them on appeal. *See Hulbert v. Edmonds*, 2022 IL App (4th) 220204, ¶ 37 (appellant forfeited claim for violation of Freedom of

Information Act by failing to develop it in circuit court); *Van Jacobs v. Parikh*, 97 Ill. App. 3d 610, 614 (1st Dist. 1981) (appellant forfeited constitutional challenge to statute by asserting only cursory claim in circuit court).

Although Stevens belatedly argued that that confidentiality provisions violated separation of powers principles in her motions for reconsideration of the June 13 order, C1506-07 V2, those untimely and perfunctory arguments are also forfeited on appeal, *see Evanston Ins. Co.*, 2014 IL 114271, ¶ 36 (arguments raised for first time in motions for reconsideration are forfeited on appeal); Ill. Const. art. II, § 1. Moreover, Stevens forfeited any such claim on appeal by failing to develop any argument in her opening brief. *See* AT Br. 35-36; *Mercury Indem. Co.*, 358 Ill. App. 3d at 18-19.

Regardless, Stevens fails to satisfy the high burden of overcoming the confidentiality provisions' "strong presumption of constitutionality" in any of these challenges. *See Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 31, 38 (2001).

B. The confidentiality provisions do not violate the separation of powers doctrine.

The General Assembly may regulate court practice or procedure without violating separation-of-powers principles if the statute does not "directly and irreconcilably conflict" with a supreme court rule or unduly encroach on the "inherent powers of the judiciary." *Burger*, 198 Ill. 2d at 33 (cleaned up). Even if a statute conflicts with a rule, courts "will seek to reconcile the legislation with the judicial rule, where reasonably possible." *Id.* And statutes

"may regulate the court's practice so long as they do not dictate to the court how it must adjudicate and apply the law or conflict with the court's right to control its procedures." *McAlister v. Schick*, 147 Ill. 2d 84, 95 (1992).

Stevens identifies no court rule with which the confidentiality provisions conflict, irreconcilably or otherwise. *See* AT Br. 35-36. To the extent that she suggests that they infringe on courts' inherent authority over its docket, the confidentiality provisions preserve the court's authority to lift its confidentiality orders over the proceedings and records. 215 ILCS 5/188.1(5) (2022); *see Burger*, 198 Ill. 2d at 48-49 (statute did not violate separation of powers where court "retains the full discretion afforded to it under supreme court rules"); *Niven v. Siqueira*, 109 Ill. 2d 357, 368-69 (1985) (statute requiring confidentiality of information in certain medical studies did not violate separation of powers by encroaching on court authority). And even if the confidentiality provisions encroached on judicial inherent authority (which they do not), they regulate only "the purely statutory creature" of insurance conservation proceedings whose parameters are defined by the legislature. *See In re S.G.*, 175 Ill. 2d 471, 490-92 (1997) (mandatory deadline for hearings on petitions for wardship of minors did not violate separation of powers). Thus, the confidentiality provisions do not impermissibly encroach on the court's authority so as to violate the separate of powers, facially or otherwise.

C. The confidentiality provisions do not violate due process.

Stevens also fails to show that the confidentiality provisions violate due process either on their face or as applied to her. She contends that the confidentiality provisions violate due process by depriving her and the public of knowledge of conservation proceedings and standing to challenge sequestration orders entered in those proceedings. AT Br. 44-46. Stevens, however, fails to demonstrate that she had a protected property right or interest in public access to conservation proceedings and records for which any process was due. Regardless, she was provided all the process required by this proceeding.

To make a procedural due process claim, the plaintiff must first show that the challenged statute deprived her of a protected liberty or property interest. *In re Phillip C.*, 364 Ill. App. 3d 822, 831 (1st Dist. 2006). "If no protected interest is present, due process protections are not triggered." *Big Sky Excavating, Inc. v. Ill. Bell Tel. Co.*, 217 Ill. 2d 221, 241 (2005). Interests protected by due process are not created by the Constitution but by an independent source such as state law. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005). To have an interest protected by due process, the plaintiff must have more than "an abstract need" or "unilateral expectation of it," but instead have "a legitimate claim of entitlement to it" under state law. *Id*. (cleaned up). Stevens contends that Illinois statute creates such an interest by generally providing that court records are public

and open to inspection. AT Br. 45; *see* 705 ILCS 105/16(6) (2022) (Court of Clerks Act).

As explained *supra* Sec. III.A.1, however, when the General Assembly created the investigative conservation proceeding over 50 years ago, it provided that those proceedings and related records are confidential until the circuit court orders otherwise. Ill. Rev. Stat. 1967 ch. 73, § 800.1(4), (5). And as the circuit court ruled here, C1404 V2, these more specific and later-enacted confidentiality provisions governing conservation proceedings and records control over the general statute that afforded public access to other court records, *see Knolls Cond. Ass'n v. Harms*, 202 Ill. 2d 450, 459 (2002) (more specific statutory provision controls and should be applied where two provisions relate to same subject); *State v. Mikusch*, 138 Ill. 2d 242, 254 (1990) (more recently enacted statutory provision usually controls over provision addressing same subject). Nor does the circuit court's authority to lift confidentiality create a protected property right or interest in public access to the conservation records. *See Town of Castle Rock*, 545 U.S. at 756 ("a benefit is not a protected entitlement if government officials may grant or deny it in their discretion"). Therefore, Illinois law provides neither Stevens nor the public with a protected interest in access to conservation proceedings and records for which any process is due. *See id*. at 759-68 (affirming dismissal of due process claim after finding state statute and law provided no protected entitlement to enforcement of restraining order).

Stevens suggests that the legislature violated due process by enacting the confidentiality provisions. *See* AT Br. 45-46. But to the extent any such right previously existed, it was abrogated decades before this conservation proceeding was initiated. Regardless, there is no vested right in the continuation of a law, and the legislature has an ongoing right to amend or change the law. *See Big Sky Excavating*, 217 Ill. 2d at 242. Even where the General Assembly enacts a statute that terminates plaintiffs' protected rights previously provided by statute, "the legislative process itself created all the procedural safeguards necessary to provide the plaintiffs with due process." *Fumarolo v. Chi. Bd. of Educ.*, 142 Ill. 2d 54, 106-07 (1990). Thus, even if Illinois law ever provided a protected interest in public access to conservation records (which it did not), the legislature could abrogate that interest without violating due process. *See id*. at 107-08; *see also, e.g.*, *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985) (Congress' reduction and elimination of food stamp benefits was not violation of due process); *Story v. Green*, 978 F.2d 60, 63 (2d Cir. 1992) (state repeal of exemption for veterans from peddling regulations extinguished any prior property interest necessary for due process claims).

Finally, even if Stevens had a protected interest in access to the conservation proceedings or records (which she did not), the Code provided her with any process that was due. Statutes satisfy due process by providing an opportunity to be heard at a meaningful time in a meaningful manner. *Phillip C.*, 364 Ill. App. 3d at 831. The Code applies the Illinois Code of Civil

Procedure to insurer receivership proceedings, including conservation proceedings, "insofar as [they are] not otherwise regulated by this Article." 215 ILCS 5/190(4) (2022). As Stevens's experience reveals, she had the opportunity to successfully intervene and to challenge both the confidentiality provisions and the sequestration and protective orders. *See* C454-79, 673-74 V1; C1401-05, 1834 V2; SR130-53. Therefore, even if Stevens had a protected interest in access to these proceedings (which she did not), the Code provided her all the process that was due.

D. The confidentiality provisions are not special legislation.

Finally, Stevens fails to establish that the confidentiality provisions violate the Special Legislation Clause. AT Br. 46-47; Ill. Const. art. IV, § 13. The Special Legislation Clause prohibits the General Assembly "from making classifications that arbitrarily discriminate in favor of a select group." *Big Sky Excavating*, 217 Ill. 2d at 235. Statues are not "improper special legislation merely because they affect only one class of entities and not another." *Id*. at 236. To violate the clause, they must provide a "class of persons or entities a special benefit or exclusive privilege that is denied to others who are similarly situated." *Id*. Accordingly, to determine if statutes are improper special legislation, courts apply the same standards used for equal protection claims. *Id*. at 237. Where, as here, the challenged statute does not affect a fundamental right or suspect classification, courts "review it under the deferential rational basis test," which provides that "the statute is

constitutional if the classification it establishes is rationally related to a legitimate state interest." *Id*. at 237-38. "If any set of facts can be reasonably conceived that justify distinguishing the class," the statute is not improper special legislation. *Id*. at 238.

On appeal, Stevens claims that confidentiality provisions are improper special legislation because they benefit only "insolvent insurance firms and no other corporations." AT Br. 46. But she fails to show either that insurers are similarly situated to other types of companies or that the confidentiality provisions are not rationally related to the legitimate state interest in regulating insurers to protect their policyholders, creditors, and the public. Insurers are excluded from bankruptcy law protection as debtors because they are different from other companies: they affect the public interest and require specialized regulatory oversight. New Appleman § 96.01[1] at 96-3; *see Miner*, 387 Ill. at 397. Like other jurisdictions, Illinois enacted special statutory proceedings to regulate potentially insolvent insurers where the Director takes possession and control of that insurer's property, assets, and records. 215 ILCS 5/188.1-193 (2022). Thus, insurers are hardly similarly situated to other companies either before or during the Code's delinquency proceedings.

Moreover, the confidentiality provisions apply only to the preliminary investigatory proceeding of conservation where the Director ascertains and, if necessary, corrects the insurer's financial condition. 215 ILCS 5/188.1(1), (2) (2022). As in other jurisdictions with similar preliminary proceedings, the

Director initiates a conservation under seal to preserve the insurer's status quo while she determines its condition. *See id*. § 188.1(4), (5); New Appleman § 96.03[3] at 96-23. Otherwise, public knowledge of the conservation could cause the insurer's policyholders, like bank customers, to cancel their policies or otherwise seek coverage elsewhere. Wis. 1967 Comments. This, in turn, would financially harm the insurer by not only changing its financial condition but also possibly "destroying a salvageable company." *Id*.; *see supra* at pp. 28-34; NAIC Handbook at 9-10; SR98-99. Indeed, the confidentiality provisions also address insurance regulators' historical reluctance to promptly initiate such proceedings due to this risk. *See* Wis. 1967 Comments.

Accordingly, because the application of the confidentiality provisions to conservation proceedings is rationally related to the "special public interest in regulation and control of for-profit insurers," Stevens has failed to demonstrate that the confidentiality provisions are improper special legislation. *See Mazur v. Hunt*, 227 Ill. App. 3d 785, 794 (1st Dist. 1992) (Code's preemption of certain common law claims by insureds against insurers were not improper special legislation).

For all these reasons, Stevens has failed to satisfy her burden to show that the confidentiality provisions governing insurer conservations under section 188.1 facially violate either the First Amendment, a common law presumptive right of access, the Due Process Clause, or the Separation of Powers and Special Legislation clauses of the Illinois Constitution.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee People of the State of Illinois *ex rel.* Acting Director of the Illinois Department of Insurance asks this court to affirm the circuit court order denying Intervenor Dr. Jacqueline Stevens's motion to declare the confidentiality provisions of section 215 ILCS 5/188.1 (2022) unconstitutional and unlawful.

Respectfully submitted,

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June 25, 2024

Table of Contents to Supplementary Appendix

215 ILCS 5/188.1
Formerly cited as IL ST CH 73 ¶ 800.1

5/188.1. Provisions for conservation of assets of a domestic, foreign, or alien company

Currentness

§ 188.1. Provisions for conservation of assets of a domestic, foreign, or alien company.

(1) Upon the filing by the Director of a verified complaint alleging (a) that with respect to a domestic, foreign, or alien company, whether authorized or unauthorized, a condition exists that would justify a court order for proceedings under Section 188, and (b) that the interests of creditors, policyholders or the public will probably be endangered by delay, then the circuit court of Sangamon or Cook County or the circuit court of the county in which such company has or last had its principal office shall enter forthwith without a hearing or prior notice an order directing the director to take possession and control of the property, business, books, records, and accounts of the company, and of the premises occupied by it for the transaction of its business, or such part of each as the complaint shall specify, and enjoining the company and its officers, directors, agents, servants, and employees from disposition of its property and from transaction of its business except with the concurrence of the Director until the further order of the court. Copies of the verified complaint and the seizure order shall be served upon the company.

(2) The order shall continue in force and effect for such time as the court deems necessary for the Director to ascertain the condition and situation of the company. On motion of either party or on its own motion, the court may from time to time hold such hearings as it deems desirable, and may extend, shorten, or modify the terms of, the seizure order. So far as the court deems it possible, the parties shall be given adequate notice of such hearings. As soon as practicable, the court shall vacate the seizure order or terminate the conservation proceedings of the company, either when the Director has failed to institute proceedings under Section 188 having a reasonable opportunity to do so, or upon an order of the court pursuant to such proceedings.

(3) Entry of a seizure order under this section shall not constitute an anticipatory breach of any contract of the company.

(4) The court may hold all hearings in conservation proceedings privately in chambers, and shall do so on request of any officer of the company proceeded against.

(5) In conservation proceedings and judicial reviews thereof, all records of the company, other documents, and all insurance department files and court records and papers, so far as they pertain to and are a part of the record of the conservation proceedings, shall be and remain confidential except as is necessary to obtain compliance therewith, unless and until the court, after hearing arguments in chambers from the Director and the company, shall decide otherwise, or unless the company requests that the matter be made public.

(6) Any person having possession of and refusing to deliver any of the property, business, books, records or accounts of a company against which a seizure order has been issued shall be guilty of a Class A misdemeanor.

Credits

Laws 1937, p. 696, § 188.1, added by Laws 1967, p. 1762, § 1. Amended by P.A. 77-2699, § 1, eff. Jan. 1, 1973; P.A. 84-551, § 42, eff. Sept. 18, 1985; P.A. 86-1154, § 1, eff. Jan. 1, 1991; P.A. 86-1156, § 4, eff. Aug. 10, 1990; P.A. 89-206, § 5, eff. July 21, 1995.

Formerly Ill.Rev.Stat.1991, ch. 73, ¶ 800.1.

Notes of Decisions (3)

215 I.L.C.S. 5/188.1, IL ST CH 215 § 5/188.1

Current through P.A. 103-583 of the 2023 Reg. Sess. Some statute sections may be more current, see credits for details.

W.S.A. 645.24

645.24. Conduct of hearings in summary proceedings

Currentness

(1) Confidentiality of commissioner's hearings. The commissioner shall hold all hearings in summary proceedings privately unless the insurer requests a public hearing, in which case the hearing shall be public.

(2) Confidentiality of court hearings. The court may hold all hearings in summary proceedings and judicial reviews thereof privately in chambers, and shall do so on request of the insurer proceeded against.

(3) Records. In all summary proceedings and judicial reviews thereof, all records of the company, other documents, and all office of the commissioner of insurance files and court records and papers, so far as they pertain to or are a part of the record of the summary proceedings, shall be and remain confidential except as is necessary to obtain compliance therewith, unless the court, after hearing arguments from the parties in chambers, orders otherwise, or unless the insurer requests that the matter be made public. Until the court order is issued, all papers filed with the clerk of the court shall be held by the clerk in a confidential file.

(4) Parties. If at any time it appears to the court that any person whose interest is or will be substantially affected by an order did not appear at the hearing and has not been served, the court may order that notice be given and the proceedings be adjourned to give the person opportunity to appear on just terms.

(5) Sanctions. Any person having possession or custody of and refusing to deliver any of the property, books, accounts, documents or other records of an insurer against which a seizure order or a summary order has been issued by the commissioner or by the court, is subject to s. 601.64.

Credits
<<For credits, see Historical Note field.>>

Editors' Notes

COMMENTS--L.1979, C. 93, § 16

One of the purposes of ch. 601 is to eliminate the fragmentation and variability of sanctions for violations of the insurance laws. For that reason this sanction is keyed to the appropriate general section in ch. 601.

COMMENTS--L.1967, C. 89, § 17

One of the factors that contribute to the commissioner's historical reluctance to institute formal delinquency proceedings is the fear that resulting publicity might destroy a salvageable company, in the same way that a report of difficulty is apt to start a run on a bank. If the commissioner can persuade an insurer to act voluntarily to remedy its weaknesses, all publicity can easily be avoided. At the opposite end of the spectrum, if a formal proceeding is needed and is commenced, it is neither possible nor desirable for it to be anything other than completely public. No proceeding so far-reaching and with so much latent capacity for harm to the public should be tolerated without the public having full access to information about it. Between informal negotiation and formal proceedings lie the summary proceedings. While the traditional Wisconsin opposition to secret hearings and meetings has great merit, and should be supported strongly as an abstract proposition, these summary proceedings present a special case where the arguments for limitations on disclosure seem overwhelming.

The reason for not compelling disclosure of the summary proceedings is that if they were open, as a practical matter they probably would never be used. The commissioner would do as he tended to do in the past, delay taking action until it is perfectly clear that the insurer is insolvent. Then when it would be too late to save the insurer or protect the interests of the policyholders and the public, he would precipitate a liquidation. Thus, insistence on disclosure, which is highly desirable in the abstract, would not result in more information being made available, but in inaction. The public would not know more, but it would in fact be protected much less. The principle of full disclosure should not be pushed indiscriminately and irrationally into a situation in which it does not belong.

Some summary proceedings, especially most seizure orders, are investigatory in nature and purpose. They are like grand jury investigations and deliberations, where it has always been regarded as reasonable for the proceedings to be as confidential as the nature of the matter permits. Other summary proceedings are preliminary and will be followed very quickly thereafter by formal proceedings. In such instances, the question of confidentiality is not important, since there will be full knowledge as soon as formal proceedings begin. There are other cases where what is wrong will be quickly corrected with a summary order. Moreover, there are the important instances in which the commissioner's action, though taken in good faith and reasonably, is mistaken and he wishes to and should back away quickly as soon as he learns that intervention is not justified. In the last 2 cases public knowledge of the matter, through the “run on the bank” psychology, might destroy a sound insurer. This section provides for all summary proceedings to be confidential in nature, without being intended in any way to disparage the traditional Wisconsin opposition to secret hearings and meetings. Without confidentiality the procedures probably would not be used much and the public would have no more information and a great deal less protection. The insurer is fully protected. It may always demand public hearings. The public interest is protected by the court, which also may order the proceedings to be made public under sub. (3), after first hearing argument on the question. The commissioner may easily make the matter public by beginning a formal proceeding. The process of disclosure and nondisclosure is subject to careful checks and balances provided by the insurer, the commissioner and the court.

W. S. A. 645.24, WI ST 645.24

Current through 2023 Act 86, except Acts 73 and 81, published December 7, 2023.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 13,407 words.

CERTIFICATE OF FILING AND SERVICE

I certify that on June 25, 2024, I electronically filed the foregoing Brief and Supplementary Appendix of Plaintiff-Appellee Acting Director of the Illinois Department of Insurance with the Clerk of the Court for the Illinois Appellate Court, First Judicial District, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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