Draft date: 11/28/23

2023 Fall National Meeting
Orlando, Florida

SURPLUS LINES (C) TASK FORCE
Friday, December 1, 2023
11:30 a.m. – 12:00 p.m.
Hilton Orlando Bonnet Creek—Floridian Ballroom G–I—Level 1

ROLL CALL

James J. Donelon, Chair	Louisiana	Kathleen A. Birrane	Maryland
Larry D. Deiter, Vice Chair	South Dakota	Gary D. Anderson	Massachusetts
Mark Fowler	Alabama	Troy Downing	Montana
Lori K. Wing-Heier	Alaska	Remedio Mafnas	N. Mariana Islands
Peni Itula Sapini Teo	American Samoa	Scott Kipper	Nevada
Ricardo Lara	California	Mike Causey	North Carolina
Michael Conway	Colorado	Glen Mulready	Oklahoma
Karima M. Woods	District of Columbia	Michael Humphreys	Pennsylvania
Michael Yaworsky	Florida	Alexander S. Adams Vega	Puerto Rico
Michelle B. Santos	Guam	Michael Wise	South Carolina
Dean L. Cameron	Idaho	Carter Lawrence	Tennessee
Dana Popish Severinghaus	Illinois	Cassie Brown	Texas
Doug Ommen	Iowa	Tregenza A. Roach	Virgin Islands
Vicki Schmidt	Kansas	Mike Kreidler	Washington

NAIC Support Staff: Andy Daleo

AGENDA

1. Consider Adoption of its Summer National Meeting Minutes—*Commissioner James J. Donelon (LA)* — Attachment One

2. Consider Adoption of the Report of the Surplus Lines (C) Working Group—*Stewart Guerin (LA)*

3. Discuss Service of Process—*Commissioner James J. Donelon (LA)* — Attachment Two

4. Discuss Any Other Matters Brought Before the Task Force—*Commissioner James J. Donelon (LA)*

5. Adjournment

Draft Pending Adoption

Draft: 8/17/23

Surplus Lines (C) Task Force
Seattle, Washington
August 13, 2023

The Surplus Lines (C) Task Force met in Seattle, WA, Aug. 13, 2023. The following Task Force members participated: James J. Donelon, Chair, and Stewart Guerin (LA); Larry D. Deiter, Vice Chair, and Tony Dorschner (SD); Mark Fowler represented by Jimmy Gunn (AL); Peni Itula Sapini Teo (AS); Ricardo Lara represented by Libio Latimer (CA); Michael Conway represented by Keilani Fleming (CO); Karima M. Woods represented by Angela King (DC); Michael Yaworsky represented by Bradley Trim (FL); Doug Ommen represented by Travis Grassel (IA); Dean L. Cameron represented by Randy Pipal (ID); Vicki Schmidt represented by Craig VanAalst (KS); Gary D. Anderson represented by John Turchi (MA); Kathleen A. Birrane represented by Lynn Beckner (MD); Troy Downing represented by Bob Biskupiak (MT); Mike Causey represented by Tracy Biehn (NC); Scott Kipper represented by Nick Stosic (NV); Glen Mulready represented by Diane Carter (OK); Michael Humphreys represented by Michael McKenney (PA); Michael Wise represented by Will Davis (SC); Carter Lawrence represented by Trey Hancock (TN); Cassie Brown represented by Jamie Walker (TX); and Mike Kreidler represented by David Forte (WA).

1. Adopted its Spring National Meeting Minutes

Director Deiter made a motion, seconded by Beckner, to adopt the Task Force's March 21, 2023, minutes (*see NAIC Proceedings – Summer 2023, Surplus Lines (C) Task Force*). The motion passed unanimously.

2. Adopted the Report of the Surplus Lines (C) Working Group

Guerin reported that the Surplus Lines (C) Working Group met May 22 in regulator-to-regulator session, pursuant to paragraph 3 (specific companies, entities or individuals) of the NAIC Policy Statement on Open Meetings, to approve three insurers for admittance to the NAIC *Quarterly Listing of Alien Insurers*.

VanAalst made a motion, seconded by Biehn, to adopt the report of the Surplus Lines (C) Working Group. The motion passed unanimously.

3. Adopted its 2024 Proposed Charges

Commissioner Donelon stated that the 2024 proposed charges for the Task Force and the Surplus Lines (C) Working Group included a few edits to add clarification regarding non-U.S. domiciled insurers participating in the U.S. market.

Walker made a motion, seconded by Biehn, to adopt the Task Force's 2024 proposed charges (Attachment __). The motion passed unanimously.

4. Heard a Summary on Surplus Lines Industry Results

Daleo summarized the year-end 2022 surplus lines industry results (Attachment __). His summary included details on overall writings and trends in the industry. He also summarized market exposure for cybersecurity and private flood. Following his summary, he indicated that the results of the industry would be posted to the Surplus Lines (C) Working Group web page.

Having no further business, the Surplus Lines (C) Task Force adjourned.

Draft Pending Adoption

mwe.com

Thomas M. Dawson
Attorney at Law
tmdawson@mwe.com
+1 212 547 5419

August 24, 2023

VIA EMAIL

Andy Daleo
Senior Manager
P/C Domestic and International Analysis
Financial Regulatory Services
ADaleo@naic.org

Re: Service of Process on Surplus Lines Insurers after *Mallory vs. Norfolk Southern Railway Co.*

Dear Andy,

Further to our brief conversation during the recent NAIC National Meeting on this subject I am writing on behalf of the International Underwriting Association of London (IUA) to provide you and colleagues with a brief note on the *Mallory* decision – a new "consent to jurisdiction" case (attached) , a comparison of the service of process provisions in NAIC Model #870 and #850 (attached for ease of reference), the standard UCAA Form 12 service of process appointment form (also attached for ease of reference) and a very brief note on what we are finding as we look at state versions of #850 and #870. In short, the UCAA Form 12 service of process appointment form that many states require to be filed before placing surplus lines insurers on local approved/eligible lists is inconsistent with Models #850 and #870. This inconsistency is a significant concern for the 30+ IUA members that appear on the Quarterly Listing.

While we understand that amending service of process provisions in state insurance codes to make them internally consistent with a single standard of applicability (to all suits against the surplus lines insurer? to suits "arising under" surplus lines policies? to suits "arising under" surplus lines policies AND brought by or on behalf of insureds or beneficiaries?) is beyond the scope, we propose the much more modest step of creating a new "UCAA Form 12 SL" that is tailored to and consistent with Section 9 of Model #870 and Section 2.A. of Model #850. Not every state that requires filing of state service of process appointment forms uses UCAA Form 12 but enough states do so to make it worthwhile we believe to create a new "UCAA Form 12 SL."

The *Mallory* Decision

This past June a split Supreme Court decided that Norfolk Southern, having registered with the Pennsylvania Department of State and "consented" to be sued in Pennsylvania "on any cause of action" was bound by that decision, notwithstanding that Mr. Mallory's suit essentially had nothing to do with Pennsylvania. Norfolk Southern was domiciled and headquartered in Virginia and the plaintiff was also a Virginia resident, injured by the railroad while working in Virginia and in Ohio. Previous extensive jurisdictional case law requiring "minimum contacts" with the forum state such that requiring a defendant to appear in a local court would be consistent with "fair play and substantial justice" ---and therefore with the Due Process Clause of the 14th Amendment--was distinguished by the *Mallory* Court.

Model #850 and Model #870

Model #850 --the Unauthorized Insurers Process Law---was adopted by most states (if not all states) beginning in the late 1940's, after passage of the McCarran-Ferguson Act in 1945. In order to protect state residents, it authorizes, in Section 2.A., service of process "in any action, suit or proceeding instituted by or on behalf of an insured or beneficiary arising out of a contract of insurance" on the chief regulatory official if an unauthorized insurer engages in "the business of insurance." States reinforced their insurance codes after McCarran-Ferguson to demonstrate to Congress that they were in fact regulating the "business of insurance" in comprehensive fashion, not just regulating rates and forms used by admitted insurers. So, Unfair Trade Practices Laws, Unauthorized Insurers Process Laws (i.e. Model #850), etc. were developed and enacted around the country.

In Model #870, Section 9. ("Service of Process") starts a little differently by addressing *suits brought by regulators or by the state*: "in any action, suit or proceeding in any court by the commissioner or by the state". This appears to be a broad, general grant of authority with respect to actions by an "unauthorized person or a nonadmitted insurer" that constitute transacting insurance. If there are such actions the "unauthorized person or nonadmitted insurer" has appointed the chief insurance officer as agent for service of process "in any action, suit or proceeding in any court." That is about as broad as it gets but it is understandable if viewed from the perspective of protecting or vindicating the rights of consumers. We have no quarrel with that language.

But there is additional language in Section 9 that is relevant to suits against nonadmitted surplus lines insurers by persons other than the commissioner:

> "G. Notwithstanding conditions or stipulations in the policy or contract, a nonadmitted insurer may be sued upon any cause of action arising in this state, or relative to property, risks or exposures located or to be performed in this state, under any insurance contract made by it."

UCAA Form 12

As you will see from the form itself, it is a broad service of process appointment, extending to "any notice, process or pleading as required by law as reflected on Exhibit A in any action or proceeding

against it in the State(s) so designated." The language of Form 12 extends well beyond the scope of Section 9. G. in Model #870 Section and in Section 2. A. in Model #850.

We believe that UCAA Form 12 could be modified for surplus lines insurers with some simple edits so that it is consistent with both Model #870 and 850---as follows:

> "any notice, process or pleading as required by law as reflected on Exhibit A in any action or proceeding against it in the State(s) so designated, instituted by or on behalf of an insured or beneficiary under any insurance contract made by it, relative to property, risks or exposures located or to be performed in this state."

State Unauthorized Insurance Statutes

As these laws were enacted and particularly as states developed surplus lines laws, precursors of Model #870, integration with variants of Model #850 was uneven. Some explicitly provide that surplus lines insurance is not subject to the state's version of the Unauthorized Insurers Process law. Other states included surplus lines-specific service of process provisions (as Model #870 does) but did not link or cross-reference with the Unauthorized Insurers Process Law statutes. Adding further complexity and confusion, states developed their own service of process appointment forms for surplus lines insurers. We believe that a new, surplus lines-specific "UCAA Form 12 SL" would be a small step in the direction of promoting consistency with respect to state service of process practices after *Mallory*.

Sincerely,

Thomas M. Dawson

TMD/st

Cc: Helen Dalziel - IUA

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MALLORY *v.* NORFOLK SOUTHERN RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

No. 21–1168. Argued November 8, 2022—Decided June 27, 2023

Robert Mallory worked for Norfolk Southern as a freight-car mechanic for nearly 20 years, first in Ohio, then in Virginia. After he left the company, Mr. Mallory moved to Pennsylvania for a period before returning to Virginia. Along the way he was diagnosed with cancer. Because he attributed his illness to his work at Norfolk Southern, Mr. Mallory sued his former employer under the Federal Employers' Liability Act, 45 U. S. C. §§51–60, a federal workers' compensation scheme permitting railroad employees to recover damages for their employers' negligence. Mr. Mallory filed his lawsuit in Pennsylvania state court. Norfolk Southern—a company incorporated in Virginia and headquartered there—resisted the suit on the basis that a Pennsylvania court's exercise of personal jurisdiction over it would offend the Due Process Clause of the Fourteenth Amendment. Norfolk Southern noted that when the complaint was filed, Mr. Mallory resided in Virginia, and the complaint alleged that Mr. Mallory was exposed to carcinogens only in Ohio and Virginia. Mr. Mallory pointed to Norfolk Southern's presence in Pennsylvania, noting that Norfolk Southern manages over 2,000 miles of track, operates 11 rail yards, and runs 3 locomotive repair shops in Pennsylvania. In fact, Norfolk Southern has registered to do business in Pennsylvania in light of its "'regular, systematic, [and] extensive'" operations there. 266 A. 3d 542, 562; see 15 Pa. Cons. Stat. §411(a). And Pennsylvania requires out-of-state companies that register to do business in the Commonwealth to agree to appear in its courts on "any cause of action" against them. 42 Pa. Cons. Stat. §5301(a)(2)(i), (b). By complying with this statutory scheme, Mr. Mallory submitted, Norfolk Southern had consented to suit in Pennsylvania on claims just like his.

The Pennsylvania Supreme Court sided with Norfolk Southern.

Syllabus

That court found that the Pennsylvania law—requiring an out-of-state firm to answer in the Commonwealth any suits against it in exchange for status as a registered foreign corporation and the benefits that entails—violates the Due Process Clause.

Held: The judgment is vacated, and the case remanded. This case is controlled by *Pennsylvania Fire Ins. Co. of Philadelphia* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93. Much like the Missouri law that the Court in *Pennsylvania Fire* found to comport with the Due Process Clause, the Pennsylvania law at issue here provides that an out-of-state corporation "may not do business in this Commonwealth until it registers with" the Department of State. 15 Pa. Cons. Stat. §411(a). Among other things, Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general personal jurisdiction" over a registered foreign corporation, just as they can over domestic corporations. 42 Pa. Cons. Stat. §5301(a)(2). Norfolk Southern has complied with this law since 1998, when it registered to do business in Pennsylvania. Norfolk Southern applied for a "Certificate of Authority" from the Commonwealth which, once approved, conferred on Norfolk Southern both the benefits and burdens shared by domestic corporations, including amenability to suit in state court on any claim. For more than two decades, Norfolk Southern has agreed to be found in Pennsylvania and answer any suit there.

Pennsylvania Fire held that suits premised on these grounds do not deny a defendant due process of law. Mr. Mallory no longer lives in Pennsylvania and his cause of action did not accrue there. But none of that makes any difference. To decide this case, the Court need not speculate whether any other statutory scheme and set of facts would suffice to establish consent to suit. It is enough to acknowledge that the state law and facts before the Court fall squarely within *Pennsylvania Fire*'s rule.

In the proceedings below, the Pennsylvania Supreme Court seemed to recognize that *Pennsylvania Fire* dictated an answer in Mr. Mallory's favor but ruled for Norfolk Southern because, in its view, intervening decisions from this Court had "implicitly overruled" *Pennsylvania Fire*. See 266 A. 3d, at 559, 567. That was error. As this Court has explained: "If a precedent of this Court has direct application in a case," as *Pennsylvania Fire* does here, a lower court "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484. This is true even if the lower court thinks the precedent is in tension with "some other line of decisions." *Ibid.* Pp. 10–12.

266 A. 3d 542, vacated and remanded.

Syllabus

GORSUCH, J., announced the judgment of the Court, delivered the opinion of the Court with respect to Parts I and III–B, in which THOMAS, ALITO, SOTOMAYOR, and JACKSON, JJ., joined, and an opinion with respect to Parts II, III–A, and IV, in which THOMAS, SOTOMAYOR, and JACKSON, JJ., joined. JACKSON, J., filed a concurring opinion. ALITO, J., filed an opinion concurring in part and concurring in the judgment. BARRETT, J., filed a dissenting opinion, in which ROBERTS, C. J., and KAGAN and KAVANAUGH, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 21–1168

ROBERT MALLORY, PETITIONER *v.* NORFOLK SOUTHERN RAILWAY CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

[June 27, 2023]

JUSTICE GORSUCH announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III–B, and an opinion with respect to Parts II, III–A, and IV, in which JUSTICE THOMAS, JUSTICE SOTOMAYOR, and JUSTICE JACKSON join.

Imagine a lawsuit based on recent events. A few months ago, a Norfolk Southern train derailed in Ohio near the Pennsylvania border. Its cargo? Hazardous chemicals. Some poured into a nearby creek; some burst into flames. In the aftermath, many residents reported unusual symptoms.[1] Suppose an Ohio resident sued the train conductor seeking compensation for an illness attributed to the accident. Suppose, too, that the plaintiff served his complaint on the conductor across the border in Pennsylvania. Everyone before us agrees a Pennsylvania court could hear that lawsuit consistent with the Due Process Clause of the Fourteenth Amendment. The court could do so even if the conductor was a Virginia resident who just happened to be passing through Pennsylvania when the process server

[1] See U. S. Environmental Protection Agency, East Palestine, Ohio Train Derailment (June 21, 2023), https://www.epa.gov/east-palestine-oh-train-derailment.

caught up with him.

Now, change the hypothetical slightly. Imagine the same Ohio resident brought the same suit in the same Pennsylvania state court, but this time against Norfolk Southern. Assume, too, the company has filed paperwork consenting to appear in Pennsylvania courts as a condition of registering to do business in the Commonwealth. Could a Pennsylvania court hear that case too? You might think so. But today, Norfolk Southern argues that the Due Process Clause entitles it to a more favorable rule, one shielding it from suits even its employees must answer. We reject the company's argument. Nothing in the Due Process Clause requires such an incongruous result.

I

Robert Mallory worked for Norfolk Southern as a freight-car mechanic for nearly 20 years, first in Ohio, then in Virginia. During his time with the company, Mr. Mallory contends, he was responsible for spraying boxcar pipes with asbestos and handling chemicals in the railroad's paint shop. He also demolished car interiors that, he alleges, contained carcinogens.

After Mr. Mallory left the company, he moved to Pennsylvania for a period before returning to Virginia. Along the way, he was diagnosed with cancer. Attributing his illness to his work for Norfolk Southern, Mr. Mallory hired Pennsylvania lawyers and sued his former employer in Pennsylvania state court under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §§51–60. That law creates a workers' compensation scheme permitting railroad employees to recover damages for their employers' negligence. See *Norfolk Southern R. Co.* v. *Sorrell*, 549 U. S. 158, 165–166 (2007).

Norfolk Southern resisted Mr. Mallory's suit on constitutional grounds. By the time he filed his complaint, the com-

pany observed, Mr. Mallory resided in Virginia. His complaint alleged that he was exposed to carcinogens in Ohio and Virginia. Meanwhile, the company itself was incorporated in Virginia and had its headquarters there too.[2] On these facts, Norfolk Southern submitted, any effort by a Pennsylvania court to exercise personal jurisdiction over it would offend the Due Process Clause of the Fourteenth Amendment.

Mr. Mallory saw things differently. He noted that Norfolk Southern manages over 2,000 miles of track, operates 11 rail yards, and runs 3 locomotive repair shops in Pennsylvania. He also pointed out that Norfolk Southern has registered to do business in Pennsylvania in light of its "'regular, systematic, [and] extensive'" operations there. 266 A. 3d 542, 562 (Pa. 2021); see 15 Pa. Cons. Stat. §411(a) (2014). That is significant, Mr. Mallory argued, because Pennsylvania requires out-of-state companies that register to do business in the Commonwealth to agree to appear in its courts on "any cause of action" against them. 42 Pa. Cons. Stat. §5301(a)(2)(i), (b) (2019); see 266 A. 3d, at 564. By complying with this statutory scheme, Mr. Mallory contended, Norfolk Southern had consented to suit in Pennsylvania on claims just like his.

Ultimately, the Pennsylvania Supreme Court sided with Norfolk Southern. Yes, Mr. Mallory correctly read Pennsylvania law. It requires an out-of-state firm to answer any suits against it in exchange for status as a registered foreign corporation and the benefits that entails. 266 A. 3d, at 561–563. But, no, the court held, Mr. Mallory could not invoke that law because it violates the Due Process Clause. *Id.*, at 564–568. In reaching this conclusion, the Pennsylvania Supreme Court acknowledged its disagreement with the Georgia Supreme Court, which had recently rejected a

[2] After Mr. Mallory commenced this suit, Norfolk Southern relocated its headquarters to Georgia. See Brief for Respondent 5.

similar due process argument from a corporate defendant. *Id.*, at 560, n. 13 (citing *Cooper Tire & Rubber Co.* v. *McCall*, 312 Ga. 422, 863 S. E. 2d 81 (2021)).

In light of this split of authority, we agreed to hear this case and decide whether the Due Process Clause of the Fourteenth Amendment prohibits a State from requiring an out-of-state corporation to consent to personal jurisdiction to do business there. 596 U. S. ___ (2022).[3]

II

The question before us is not a new one. In truth, it is a very old question—and one this Court resolved in *Pennsylvania Fire Ins. Co. of Philadelphia* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93 (1917). There, the Court unanimously held that laws like Pennsylvania's comport with the Due Process Clause. Some background helps explain why the Court reached the result it did.

Both at the time of the founding and the Fourteenth Amendment's adoption, the Anglo-American legal tradition recognized that a tribunal's competence was generally constrained only by the "territorial limits" of the sovereign that created it. J. Story, Commentaries on the Conflict of Laws §539, pp. 450–451 (1834) (Story); see also *United States* v. *Union Pacific R. Co.*, 98 U. S. 569, 602–603 (1879). That principle applied to all kinds of actions, but cashed out differently based on the object of the court's attention. So, for example, an action *in rem* that claimed an interest in immovable property was usually treated as a "*local*" action that could be brought only in the jurisdiction where the property was located. 3 W. Blackstone, Commentaries on

[3] The Pennsylvania Supreme Court did not address Norfolk Southern's alternative argument that Pennsylvania's statutory scheme as applied here violates this Court's dormant Commerce Clause doctrine. See 266 A. 3d, at 559–560, nn. 9, 11. Nor did we grant review to consider that question. Accordingly, any argument along those lines remains for consideration on remand.

the Laws of England 117–118, 294 (1768). Meanwhile, an *in personam* suit against an individual "for injuries that might have happened any where" was generally considered a "*transitory*" action that followed the individual. *Id.*, at 294. All of which meant that a suit could be maintained by anyone on any claim in any place the defendant could be found. Story §538, at 450.

American courts routinely followed these rules. Chief Justice Marshall, for one, was careful to distinguish between local and transitory actions in a case brought by a Virginia plaintiff against a Kentucky defendant based on a fraud perpetrated in Ohio. *Massie* v. *Watts*, 6 Cranch 148, 162–163 (1810). Because the action was a transitory one that followed the individual, he held, the suit could be maintained "wherever the [defendant] may be found." *Id.*, at 158, 161–163; see also, *e.g.*, *Livingston* v. *Jefferson*, 15 F. Cas. 660, 663–664 (No. 8,411) (CC Va. 1811) (opinion of Marshall, C. J.); *Peabody* v. *Hamilton*, 106 Mass. 217, 220–221 (1870); *Bissell* v. *Briggs*, 9 Mass. 462, 468–470 (1813).

This rule governing transitory actions still applies to natural persons today. Some call it "tag" jurisdiction. And our leading case applying the rule is not so old. See *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604 (1990). The case began with Dennis Burnham's business trip to California. *Id.*, at 608 (plurality opinion). During his short visit, Mr. Burnham's estranged wife served him with a summons to appear in California state court for divorce proceedings. *Ibid.* This Court unanimously approved the state court's exercise of personal jurisdiction over Mr. Burnham as consistent with the Due Process Clause—and did so even though the Burnhams had spent nearly all their married life in New Jersey and Mr. Burnham still resided there. See *id.*, at 607–608, 616–619; *id.*, at 628 (White, J., concurring in part and concurring in judgment); *id.*, at 635–639 (Brennan, J., concurring in judgment); *id.*, at 640 (Stevens, J., concurring in judgment).

As the use of the corporate form proliferated in the 19th century, the question arose how to adapt the traditional rule about transitory actions for individuals to artificial persons created by law. Unsurprisingly, corporations did not relish the prospect of being haled into court for any claim anywhere they conducted business. "No one, after all, has ever liked greeting the process server." *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Court*, 592 U. S. ___, ___ (2021) (GORSUCH, J., concurring in judgment) (slip op., at 7). Corporations chartered in one State sought the right to send their sales agents and products freely into other States. At the same time, when confronted with lawsuits in those other States, some firms sought to hide behind their foreign character and deny their presence to defeat the court's jurisdiction. *Ibid.*; see Brief for Petitioner 13–15; see also R. Jackson, What Price "Due Process"?, 5 N. Y. L. Rev. 435, 438 (1927) (describing this as the asserted right to "both be and not be").

Lawmakers across the country soon responded to these stratagems. Relevant here, both before and after the Fourteenth Amendment's ratification, they adopted statutes requiring out-of-state corporations to consent to in-state suits in exchange for the rights to exploit the local market and to receive the full range of benefits enjoyed by in-state corporations. These statutes varied. In some States, out-of-state corporate defendants were required to agree to answer suits brought by in-state plaintiffs. See, *e.g.*, N. Y. Code Proc. §427 (1849); 1866 Wis. Laws ch. 1, §86.1; Md. Ann. Code, Art. 26, §211 (1868); N. C. Gen. Stat., ch. 17, §82 (1873). In other States, corporations were required to consent to suit if the plaintiff's cause of action arose within the State, even if the plaintiff happened to reside elsewhere. See, *e.g.*, Iowa Code, ch. 101, §1705 (1851); 1874 Tex. Gen. Laws p. 107; 1881 Mich. Pub. Acts p. 348. Still other States (and the federal government) omitted both of these limitations. They required all out-of-state corporations that registered to do

business in the forum to agree to defend themselves there against any manner of suit. See, *e.g.*, Act of Feb. 22, 1867, 14 Stat. 404; 1889 Nev. Stats. p. 47; S. C. Rev. Stat., Tit. 7, ch. 45, §1466 (1894); Conn. Gen. Stat. §3931 (1895). Yet another group of States applied this all-purpose-jurisdiction rule to a subset of corporate defendants, like railroads and insurance companies. See, *e.g.*, 1827 Va. Acts ch. 74, p. 77; 1841 Pa. Laws p. 29; 1854 Ohio Laws p. 91; Ill. Comp. Stat., ch. 112, §68 (1855); Ark. Stat., ch. 76, §3561 (1873); Mo. Rev. Stat., ch. 119, Art. 4, §6013 (1879). Mr. Mallory has collected an array of these statutes, enacted between 1835 and 1915, in his statutory appendix. See App. to Brief for Petitioner 1a–274a.[4]

---

[4] Norfolk Southern and the dissent observe that *some* state courts applied these laws narrowly. Brief for Respondent 43–44; *post*, at 11–12, and n. 4 (BARRETT, J., dissenting). But, as we will see in a moment, *others* did not. Part III, *infra*. Even state courts that adopted narrowing constructions of their laws did so by invoking statutory interpretation principles and discretionary doctrines. Notably, neither Norfolk Southern nor the dissent has identified a *single* case (or any other source) from this period holding that all-purpose jurisdiction premised on a consent statute violates the Due Process Clause. Indeed, some of the decisions they cite presumed just the opposite. See, *e.g.*, *Camden Rolling Mill Co.* v. *Swede Iron Co.*, 32 N. J. L. 15, 17–18 (1866) (a law like Pennsylvania's "could be judicially adopted" consistent with due process if clearly expressed); *Sawyer* v. *North Am. Life Ins. Co.*, 46 Vt. 697, 706–707 (1874) (similar). Nothing in this body of case law, then, comes close to satisfying Norfolk Southern's burden of establishing that consent statutes like Pennsylvania's "'offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked'" among those secured by the Due Process Clause. *Medina* v. *California*, 505 U. S. 437, 445–448 (1992). In saying this much, we hardly suggest, as the dissent supposes, that the practice of States or their courts is irrelevant. *Post*, at 11, n. 3. Our point is simply that Norfolk Southern has not met *its burden* of showing that original and historic understandings of due process foreclose consent statutes.

III

A

Unsurprisingly, some corporations challenged statutes like these on various grounds, due process included. And, ultimately, one of these disputes reached this Court in *Pennsylvania Fire*.

That case arose this way. Pennsylvania Fire was an insurance company incorporated under the laws of Pennsylvania. In 1909, the company executed a contract in Colorado to insure a smelter located near the town of Cripple Creek owned by the Gold Issue Mining & Milling Company, an Arizona corporation. *Gold Issue Min. & Milling Co.* v. *Pennsylvania Fire Ins. Co. of Phila.*, 267 Mo. 524, 537, 184 S. W. 999, 1001 (1916). Less than a year later, lightning struck and a fire destroyed the insured facility. *Ibid.* When Gold Issue Mining sought to collect on its policy, Pennsylvania Fire refused to pay. So, Gold Issue Mining sued. But it did not sue where the contract was formed (Colorado), or in its home State (Arizona), or even in the insurer's home State (Pennsylvania). Instead, Gold Issue Mining brought its claim in a Missouri state court. *Id.*, at 534, 184 S. W., at 1000. Pennsylvania Fire objected to this choice of forum. It said the Due Process Clause spared it from having to answer in Missouri's courts a suit with no connection to the State. *Id.*, at 541, 184 S. W., at 1002.

The Missouri Supreme Court disagreed. It first observed that Missouri law required any out-of-state insurance company "desiring to transact any business" in the State to file paperwork agreeing to (1) appoint a state official to serve as the company's agent for service of process, and (2) accept service on that official as valid in any suit. *Id.*, at 543, 184 S. W., at 1003 (internal quotation marks omitted). For more than a decade, Pennsylvania Fire had complied with the law, as it had "desir[ed] to transact business" in Missouri "pursuant to the laws thereof." *Id.*, at 545, 184 S. W., at 1003. And Gold Issue Mining had served process on the

appropriate state official, just as the law required. See *id.*, at 535, 184 S. W., at 1000.

As to the law's constitutionality, the Missouri Supreme Court carefully reviewed this Court's precedents and found they "clearly" supported "sustain[ing] the proceeding." *Id.*, at 569, 576, 184 S. W., at 1010, 1013; see *id.*, at 552–576, 601, 184 S. W., at 1005–1013, 1020–1021. The Missouri Supreme Court explained that its decision was also supported by "the origin, growth, and history of transitory actions in England, and their importation, adoption, and expansion" in America. *Id.*, at 578–586, 184 S. W., at 1013–1016. It stressed, too, that the law had long permitted suits against individuals in any jurisdiction where they could be found, no matter where the underlying cause of action happened to arise. What sense would it make to treat a fictitious corporate person differently? See *id.*, at 588–592, 600, 184 S. W., at 1016–1018, 1020. For all these reasons, the court concluded, Pennsylvania Fire "ha[d] due process of law, regardless of the place, state or nation where the cause of action arose." *Id.*, at 576, 184 S. W., at 1013.

Dissatisfied with this answer, Pennsylvania Fire turned here. Writing for a unanimous Court, Justice Holmes had little trouble dispatching the company's due process argument. Under this Court's precedents, there was "no doubt" Pennsylvania Fire could be sued in Missouri by an out-of-state plaintiff on an out-of-state contract because it had agreed to accept service of process in Missouri on any suit as a condition of doing business there. *Pennsylvania Fire*, 243 U. S., at 95. Indeed, the Court thought the matter so settled by existing law that the case "hardly" presented an "open" question. *Ibid.* The Court acknowledged that the outcome might have been different if the corporation had never appointed an agent for service of process in Missouri, given this Court's earlier decision in *Old Wayne Mut. Life Assn. of Indianapolis* v. *McDonough*, 204 U. S. 8 (1907). But the Court thought that *Old Wayne* had "left untouched"

the principle that due process allows a corporation to be sued on any claim in a State where it has appointed an agent to receive whatever suits may come. 243 U. S., at 95–96. The Court found it unnecessary to say more because the company's objections had been resolved "at length in the judgment of the court below." *Id.*, at 95.

That assessment was understandable. Not only had the Missouri Supreme Court issued a thoughtful opinion. Not only did a similar rule apply to transitory actions against individuals. Other leading judges, including Learned Hand and Benjamin Cardozo, had reached similar conclusions in similar cases in the years leading up to *Pennsylvania Fire*. See *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 F. 148, 150–151 (SDNY 1915) (Hand, J.); *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, 436–437, 111 N. E. 1075, 1076–1077 (1916) (Cardozo, J.). In the years following *Pennsylvania Fire*, too, this Court reaffirmed its holding as often as the issue arose. See, *e.g.*, *Louisville & Nashville R. Co.* v. *Chatters*, 279 U. S. 320, 325–326 (1929); *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 175 (1939); see also *Robert Mitchell Furniture Co.* v. *Selden Breck Constr. Co.*, 257 U. S. 213, 215–216 (1921); *Wuchter* v. *Pizzutti*, 276 U. S. 13, 20 (1928).

B

Pennsylvania Fire controls this case. Much like the Missouri law at issue there, the Pennsylvania law at issue here provides that an out-of-state corporation "may not do business in this Commonwealth until it registers with" the Department of State. 15 Pa. Cons. Stat. §411(a). As part of the registration process, a corporation must identify an "office" it will "continuously maintain" in the Commonwealth. §411(f); see also §412(a)(5). Upon completing these requirements, the corporation "shall enjoy the same rights and privileges as a domestic entity and shall be subject to the

same liabilities, restrictions, duties and penalties . . . imposed on domestic entities." §402(d). Among other things, Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general personal jurisdiction" over a registered foreign corporation, just as they can over domestic corporations. 42 Pa. Cons. Stat. §5301(a)(2)(i).

Norfolk Southern has complied with this law for many years. In 1998, the company registered to do business in Pennsylvania. Acting through its Corporate Secretary as a "duly authorized officer," the company completed an "Application for Certificate of Authority" from the Commonwealth "[i]n compliance with" state law. App. 1–2. As part of that process, the company named a "Commercial Registered Office Provider" in Philadelphia County, agreeing that this was where it "shall be deemed . . . located." *Ibid.* The Secretary of the Commonwealth approved the application, conferring on Norfolk Southern both the benefits and burdens shared by domestic corporations—including amenability to suit in state court on any claim. *Id.*, at 1. Since 1998, Norfolk Southern has regularly updated its information on file with the Secretary. In 2009, for example, the company advised that it had changed its Registered Office Provider and would now be deemed located in Dauphin County. *Id.*, at 6; see 15 Pa. Cons. Stat. §4144(b) (1988). All told, then, Norfolk Southern has agreed to be found in Pennsylvania and answer any suit there for more than 20 years.

Pennsylvania Fire held that suits premised on these grounds do not deny a defendant due process of law. Even Norfolk Southern does not seriously dispute that much. It concedes that it registered to do business in Pennsylvania, that it established an office there to receive service of process, and that in doing so it understood it would be amenable to suit on any claim. Tr. of Oral Arg. 62; *post*, at 2 (ALITO, J., concurring in part and concurring in judgment);

post, at 2–3 (JACKSON, J., concurring). Of course, Mr. Mallory no longer lives in Pennsylvania and his cause of action did not accrue there. But none of that makes any more difference than the fact that Gold Issue Mining was not from Missouri (but from Arizona) and its claim did not arise there (but in Colorado). See *Pennsylvania Fire*, 267 Mo., at 537, 184 S. W., at 1001. To decide this case, we need not speculate whether any other statutory scheme and set of facts would suffice to establish consent to suit. It is enough to acknowledge that the state law and facts before us fall squarely within *Pennsylvania Fire*'s rule. See *post*, at 2–4 (opinion of ALITO, J.).

In the proceedings below, the Pennsylvania Supreme Court seemed to recognize that *Pennsylvania Fire* dictated an answer in Mr. Mallory's favor. Still, it ruled for Norfolk Southern anyway. It did so because, in its view, intervening decisions from this Court had "implicitly overruled" *Pennsylvania Fire*. See 266 A. 3d, at 559, 567. But in following that course, the Pennsylvania Supreme Court clearly erred. As this Court has explained: "If a precedent of this Court has direct application in a case," as *Pennsylvania Fire* does here, a lower court "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express*, *Inc.*, 490 U. S. 477, 484 (1989). This is true even if the lower court thinks the precedent is in tension with "some other line of decisions." *Ibid.*[5]

---

[5]The dissent stresses that Pennsylvania's statute does not use the word "consent" in describing the jurisdictional consequences of registration. When the dissent finally comes around to addressing *Pennsylvania Fire* at the end of its opinion, it fleetingly seeks to distinguish the decision along the same lines—stressing that words like "agent" and "jurisdiction" do not appear "in Norfolk Southern's registration paperwork." *Post*, at 5, 17, and n. 8. But, as the dissent itself elsewhere acknowledges, "'[a] variety of legal arrangements have been taken to represent express or implied consent to'" personal jurisdiction consistent with due process.

IV

Now before us, Norfolk Southern candidly asks us to do what the Pennsylvania Supreme Court could not—overrule *Pennsylvania Fire*. Brief for Respondent 36–38. To smooth the way, Norfolk Southern suggests that this Court's decision in *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), has already done much of the hard work for us. That decision, the company insists, seriously undermined *Pennsylvania Fire*'s foundations. Brief for Respondent 34–36. We disagree. The two precedents sit comfortably side by side. See *post*, at 4 (opinion of ALITO, J.).

A

Start with how Norfolk Southern sees things. On the company's telling, echoed by the dissent, *International Shoe* held that the Due Process Clause tolerates two (and only two) types of personal jurisdiction over a corporate defendant. First, "specific jurisdiction" permits suits that "'arise out of or relate to'" a corporate defendant's activities in the forum State. *Ford Motor Co.*, 592 U. S., at ___–___ (slip op., at 5–6). Second, "general jurisdiction" allows all kinds of suits against a corporation, but only in States where the corporation is incorporated or has its "principal place of business." *Id.*, at ___ (slip op., at 5). After *International Shoe*, Norfolk Southern insists, no other bases for personal jurisdiction over a corporate defendant are permissible. Brief for Respondent 13–15; see *post*, at 2–4 (BARRETT, J., dissenting).

But if this account might seem a plausible summary of some of our *International Shoe* jurisprudence, it oversimplifies matters. Here is what really happened in *International*

Post, at 4. And neither *Pennsylvania Fire*, nor our later decisions applying it, nor our precedents approving other forms of consent to personal jurisdiction have ever imposed some sort of "magic words" requirement. See *infra*, at 22–23; *Pennsylvania Fire*, 243 U. S., at 95; *Neirbo Co.*, 308 U. S., at 175.

Shoe. The State of Washington sued a corporate defendant in state court for claims based on its in-state activities even though the defendant had *not* registered to do business in Washington and had *not* agreed to be present and accept service of process there. 326 U. S., at 312–313. Despite this, the Court held that the suit against the company comported with due process. In doing so, the Court reasoned that the Fourteenth Amendment "permit[s]" suits against a corporate defendant that has not agreed to be "presen[t] within the territorial jurisdiction of a court," so long as "the quality and nature of the [company's] activity" in the State "make it reasonable and just" to maintain suit there. *Id.*, at 316, 319–320. Put simply, even without agreeing to be present, the out-of-state corporation was still amenable to suit in Washington consistent with "'fair play and substantial justice'"—terms the Court borrowed from Justice Holmes, the author of *Pennsylvania Fire*. *International Shoe*, 326 U. S., at 316 (citing *McDonald* v. *Mabee*, 243 U. S. 90, 91–92 (1917)).

In reality, then, all *International Shoe* did was stake out an *additional* road to jurisdiction over out-of-state corporations. *Pennsylvania Fire* held that an out-of-state corporation that *has* consented to in-state suits in order to do business in the forum is susceptible to suit there. *International Shoe* held that an out-of-state corporation that *has not* consented to in-state suits may also be susceptible to claims in the forum State based on "the quality and nature of [its] activity" in the forum. 326 U. S., at 319. Consistent with all this, our precedents applying *International Shoe* have long spoken of the decision as asking whether a state court may exercise jurisdiction over a corporate defendant "'that *has not consented* to suit in the forum.'" *Goodyear Dunlop Tires Operations*, *S. A.* v. *Brown*, 564 U. S. 915, 927–928 (2011) (emphasis added); see also *Daimler AG* v. *Bauman*, 571 U. S. 117, 129 (2014). Our precedents have recognized, too, that "express or implied consent" can continue to

ground personal jurisdiction—and consent may be manifested in various ways by word or deed. See, *e.g.*, *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 703 (1982); *BNSF R. Co.* v. *Tyrrell*, 581 U. S. 402, 415 (2017). See also *post*, at 4 (opinion of ALITO, J.).[6]

That Norfolk Southern overreads *International Shoe* finds confirmation in that decision's emphasis on "'fair play and substantial justice.'" 326 U. S., at 316. Sometimes, *International Shoe* said, the nature of a company's in-state activities will support jurisdiction over a nonconsenting corporation when those activities "give rise to the liabilities sued on." *Id.*, at 317. Other times, it added, suits "on causes of action arising from dealings entirely distinct from [the company's] activities" in the forum State may be appropriate. *Id.*, at 318. These passages may have pointed the way to what (much) later cases would label "specific jurisdiction" over claims related to in-forum activities and "general jurisdiction" in places where a corporation is incorporated or headquartered. See, *e.g.*, *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408, 414–415, and nn. 8–9 (1984). But the fact remains that *International Shoe* itself eschewed any "mechanical or quantitative" test and instead endorsed a flexible approach focused on "the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 U. S., at 319. Unquestionably, too, *International Shoe* saw this flexible standard as expanding—not contracting—state court jurisdiction. See *Daimler*, 571 U. S., at 128, and n. 6. As we later put the point: "The immediate effect of [*International Shoe*] was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants." *Shaffer*

[6] Because *International Shoe* allowed a suit against a corporation that had *not* registered to do business in the forum State, if it disturbed anything it was only this Court's decision in *Old Wayne*, not *Pennsylvania Fire*. See *supra*, at 9–10; *Perkins* v. *Benguet Consol. Mining Co.*, 342 U. S. 437, 443–444 (1952).

v. *Heitner*, 433 U. S. 186, 204 (1977).

Given all this, it is no wonder that we have already turned aside arguments very much like Norfolk Southern's. In *Burnham*, the defendant contended that *International Shoe* implicitly overruled the traditional tag rule holding that individuals physically served in a State are subject to suit there for claims of any kind. 495 U. S., at 616 (plurality opinion). This Court rejected that submission. Instead, as Justice Scalia explained, *International Shoe* simply provided a "novel" way to secure personal jurisdiction that did nothing to displace other "traditional ones." *Id.*, at 619. What held true there must hold true here. Indeed, seven years *after* deciding *International Shoe*, the Court cited *Pennsylvania Fire* approvingly. *Perkins* v. *Benguet Consol. Mining Co.*, 342 U. S. 437, 446, n. 6 (1952).[7]

B

Norfolk Southern offers several replies, but none persuades. The company begins by pointing to this Court's decision in *Shaffer*. There, as the company stresses, the Court indicated that "'prior decisions . . . inconsistent with'" *International Shoe* "'are overruled.'" Brief for Respondent 35

[7] Norfolk Southern and the dissent observe that, today, few States continue to employ consent statutes like Pennsylvania's. Brief for Respondent 22; *post*, at 9–10, 15, n. 6. Surely, too, some States may see strong policy reasons for proceeding differently than Pennsylvania has. See, *e.g.*, *State ex rel. Am. Central Life Ins. Co.* v. *Landwehr*, 300 S. W. 294, 297 (1927) (abandoning construction of Missouri law at issue in *Pennsylvania Fire* based on "the legislative policy in th[e] state"); cf. *Cooper Tire*, 312 Ga., at 437, 863 S. E. 2d, at 92 (Bethel, J., concurring) (suggesting Georgia's consent scheme "creates a disincentive for foreign corporations to" do business in-state and conflicts with the State's claim to be "'business-friendly'"). But the meaning of the Due Process Clause is not measured by the latest popularity poll, nor does it come with some desuetude rule against a traditional practice like consent-based jurisdiction long held consistent with its demands. See *Ownbey* v. *Morgan*, 256 U. S. 94, 110–111 (1921).

(quoting *Shaffer*, 433 U. S., at 212, n. 39); *post*, at 15 (opinion of BARRETT, J.). True as that statement may be, however, it only poses the question whether *Pennsylvania Fire* is "inconsistent with" *International Shoe*. And, as we have seen, it is not. Instead, the latter decision expanded upon the traditional grounds of personal jurisdiction recognized by the former. This Court has previously cautioned litigants and lower courts against (mis)reading *Shaffer* as suggesting that *International Shoe* discarded every traditional method for securing personal jurisdiction that came before. See *Burnham*, 495 U. S., at 620–622 (plurality opinion); cf. *Daimler*, 571 U. S., at 126, 132–133. We find ourselves repeating the admonition today.[8]

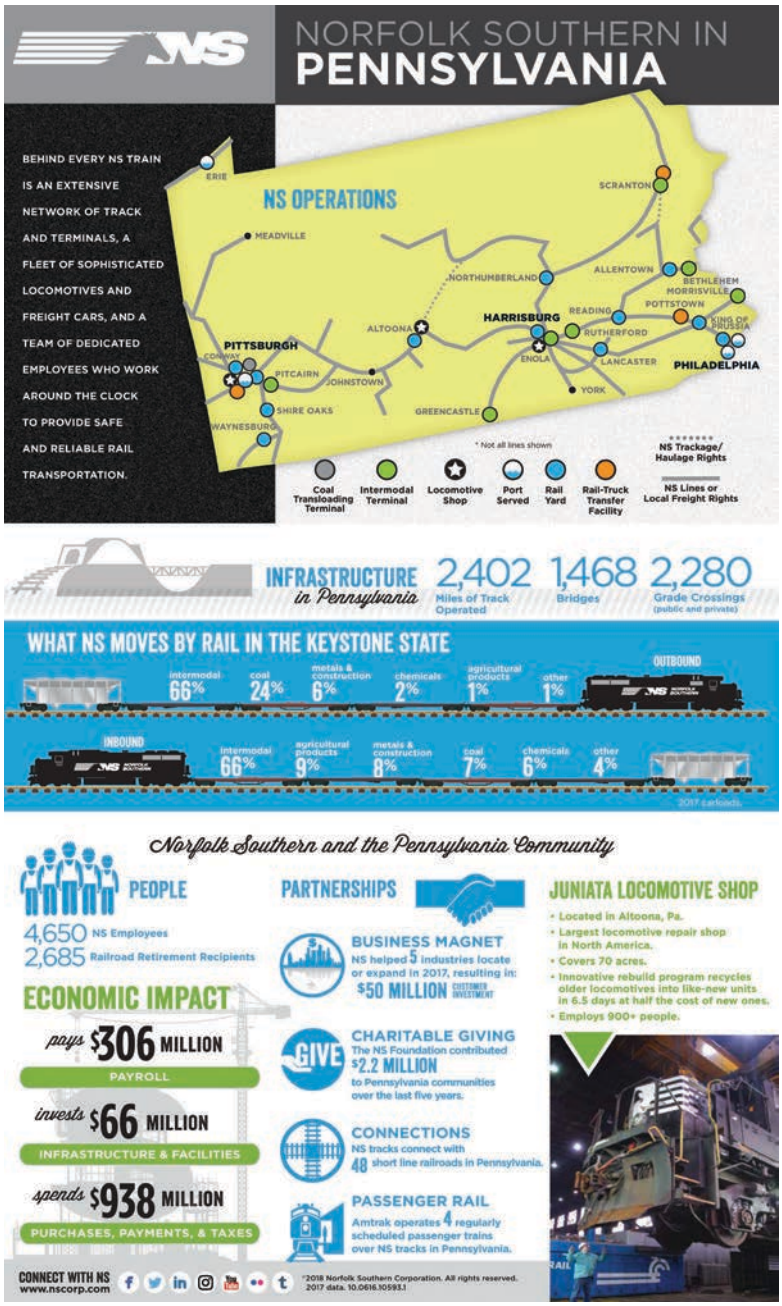
Next, Norfolk Southern appeals to the spirit of our age. After *International Shoe*, it says, the "primary concern" of the personal jurisdiction analysis is "[t]reating defendants fairly." Brief for Respondent 19 (internal quotation marks omitted). And on the company's telling, it would be "unfair" to allow Mr. Mallory's suit to proceed in Pennsylvania because doing so would risk unleashing "'local prejudice'" against a company that is "not 'local' in the eyes of the community." *Id.*, at 19–21.

But if fairness is what Norfolk Southern seeks, pause for a moment to measure this suit against that standard. When Mr. Mallory brought his claim in 2017, Norfolk Southern had registered to do business in Pennsylvania for

---

[8]Taking up the *Shaffer* baton from the company, the dissent insists that *International Shoe* "'cast . . . aside'" consent statutes in favor of a minimum contacts analysis. *Post,* at 13–14. But, as we have seen, nothing in *International Shoe* purported to address, let alone condemn, consent statutes. Even the dissent ultimately acknowledges, as it must, that "'a variety of legal arrangements'" can signal consent to jurisdiction after *International Shoe*, and these arrangements *can* include state laws requiring consent to suit in exchange "for access to [a State's] markets." *Post*, at 4, 6; see also *Neirbo Co.*, 308 U. S., at 175 (calling this form of consent "*real* consent" (emphasis added)).

many years. It had established an office for receiving service of process. It had done so pursuant to a statute that gave the company the right to do business in-state in return for agreeing to answer any suit against it. And the company had taken full advantage of its opportunity to do business in the Commonwealth, boasting of its presence this way:


NS
NORFOLK SOUTHERN IN PENNSYLVANIA
BEHIND EVERY NS TRAIN IS AN EXTENSIVE NETWORK OF TRACK AND TERMINALS, A FLEET OF SOPHISTICATED LOCOMOTIVES AND FREIGHT CARS, AND A TEAM OF DEDICATED EMPLOYEES WHO WORK AROUND THE CLOCK TO PROVIDE SAFE AND RELIABLE RAIL TRANSPORTATION.
NS OPERATIONS
ERIE
MEADVILLE
SCRANTON
NORTHUMBERLAND
ALLENTOWN
BETHLEHEM
MORRISVILLE
POTTSTOWN
READING
HARRISBURG
ALTOONA
RUTHERFORD
KING OF PRUSSIA
PITTSBURGH
CONWAY
ENOLA
LANCASTER
PHILADELPHIA
PITCAIRN
JOHNSTOWN
YORK
SHIRE OAKS
GREENCASTLE
WAYNESBURG
* Not all lines shown
NS Trackage/ Haulage Rights
Coal Transloading Terminal
Intermodal Terminal
Locomotive Shop
Port Served
Rail Yard
Rail-Truck Transfer Facility
NS Lines or Local Freight Rights
INFRASTRUCTURE in Pennsylvania
2,402 Miles of Track Operated
1,468 Bridges
2,280 Grade Crossings (public and private)
WHAT NS MOVES BY RAIL IN THE KEYSTONE STATE
OUTBOUND
intermodal 66%
coal 24%
metals & construction 6%
chemicals 2%
agricultural products 1%
other 1%
INBOUND
intermodal 66%
agricultural products 9%
metals & construction 8%
coal 7%
chemicals 6%
other 4%
2017 carloads
Norfolk Southern and the Pennsylvania Community
PEOPLE
4,650 NS Employees
2,685 Railroad Retirement Recipients
ECONOMIC IMPACT
pays $306 MILLION PAYROLL
invests $66 MILLION INFRASTRUCTURE & FACILITIES
spends $938 MILLION PURCHASES, PAYMENTS, & TAXES
PARTNERSHIPS
BUSINESS MAGNET
NS helped 5 industries locate or expand in 2017, resulting in: $50 MILLION CUSTOMER INVESTMENT
GIVE
CHARITABLE GIVING
The NS Foundation contributed $2.2 MILLION to Pennsylvania communities over the last five years.
CONNECTIONS
NS tracks connect with 48 short line railroads in Pennsylvania.
PASSENGER RAIL
Amtrak operates 4 regularly scheduled passenger trains over NS tracks in Pennsylvania.
JUNIATA LOCOMOTIVE SHOP
• Located in Altoona, Pa.
• Largest locomotive repair shop in North America.
• Covers 70 acres.
• Innovative rebuild program recycles older locomotives into like-new units in 6.5 days at half the cost of new ones.
• Employs 900+ people.
CONNECT WITH NS
www.nscorp.com
©2018 Norfolk Southern Corporation. All rights reserved.
2017 data. 10.0616.10593.1

Norfolk Southern Corp., State Fact Sheets–Pennsylvania (2018), https://nscorp.com/content/dam/nscorp/get-to-know-ns/about-ns/state-fact-sheets/pa-state-fact-sheet.pdf.

All told, when Mr. Mallory sued, Norfolk Southern employed nearly 5,000 people in Pennsylvania. It maintained more than 2,400 miles of track across the Commonwealth. Its 70-acre locomotive shop there was the largest in North America. Contrary to what it says in its brief here, the company even proclaimed itself a proud part of "the Pennsylvania Community." *Ibid.* By 2020, too, Norfolk Southern managed more miles of track in Pennsylvania than in any other State. Brief for Public Citizen as *Amicus Curiae* 21. And it employed more people in Pennsylvania than it did in Virginia, where its headquarters was located. *Ibid.* Nor are we conjuring these statistics out of thin air. The company *itself* highlighted its "intrastate activities" in the proceedings below. 266 A. 3d, at 560, 563 (discussing the firm's "extensive operations in Pennsylvania," including "2,278 miles of track," "eleven rail yards," and "three locomotive repair shops"). Given all this, on what plausible account could *International Shoe*'s concerns with "fair play and substantial justice" require a Pennsylvania court to turn aside Mr. Mallory's suit? See *post*, at 4–5 (opinion of ALITO, J.).[9]

---

[9]The dissent does not dispute the company's extensive in-state contacts but replies that counsel for Mr. Mallory abandoned any reliance on them at oral argument. *Post*, at 17–18, and n. 9. In support of its claim, however, the dissent shears from context two sentences counsel uttered in response to a question about "why [Mr. Mallory] sue[d] in Philadelphia." Tr. of Oral Arg. 48. In reply, counsel explained that Mr. Mallory "used to live . . . in Pennsylvania" and "his lawyers are from there." *Id.*, at 48–49. Counsel then agreed that "*[t]hose* contacts" would not establish jurisdiction and pointed this Court to Norfolk Southern's "consent" to suit in Pennsylvania. *Id.*, at 49 (emphasis added). All in all, it was a prosaic response to a simple question about why Mr. Mallory filed suit where he did. Nor, contrary to the dissent's suggestion, are we alone in discussing the company's in-state contacts; the lower court, the company, *and* the dissent all point to them too. See 266 A. 3d, at 547; Brief for Respondent 16–21; *post*, at 3–4.

Perhaps sensing its arguments from fairness meet a dead end, Norfolk Southern ultimately heads in another direction altogether. It suggests the Due Process Clause separately prohibits one State from infringing on the sovereignty of another State through exorbitant claims of personal jurisdiction. Brief for Respondent 16–19; see *post*, at 6–8 (opinion of BARRETT, J.). And, in candor, the company is half right. Some of our personal jurisdiction cases have discussed the federalism implications of one State's assertion of jurisdiction over the corporate residents of another. See, *e.g.*, *Bristol-Myers Squibb Co.* v. *Superior Court of Cal., San Francisco Cty.*, 582 U. S. 255, 263 (2017). But that neglects an important part of the story. To date, our personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State. After all, personal jurisdiction is a *personal* defense that may be waived or forfeited. See *Insurance Corp. of Ireland*, 456 U. S., at 704–705; see also *post*, at 8 (opinion of ALITO, J.); *post*, at 1–2 (opinion of JACKSON, J.).

That leaves Norfolk Southern one final stand. It argues that it has not *really* submitted to proceedings in Pennsylvania. Brief for Respondent 11–13; see *post*, at 5–6, 8 (opinion of BARRETT, J.). The company does not dispute that it has filed paperwork with Pennsylvania seeking the right to do business there. It does not dispute that it has established an office in the Commonwealth to receive service of process on any claim. It does not dispute that it appreciated the jurisdictional consequences attending these actions and proceeded anyway, presumably because it thought the benefits outweighed the costs. But, in the name of the Due Process Clause, Norfolk Southern insists we should dismiss all

that as a raft of meaningless formalities.[10]

Taken seriously, this argument would have us undo not just *Pennsylvania Fire* but a legion of precedents that attach jurisdictional consequences to what some might dismiss as mere formalities. Consider some examples we have already encountered. In a typical general jurisdiction case under *International Shoe*, a company is subject to suit on any claim in a forum State only because of its decision to file a piece of paper there (a certificate of incorporation). The firm is amenable to suit even if all of its operations are located elsewhere and even if its certificate only sits collecting dust on an office shelf for years thereafter. See, *e.g.*, *Goodyear*, 564 U. S., at 924. Then there is the tag rule. The invisible state line might seem a trivial thing. But when an individual takes one step off a plane after flying from New Jersey to California, the jurisdictional consequences are immediate and serious. See *Burnham*, 495 U. S., at 619 (plurality opinion).

Consider, too, just a few other examples. A defendant who appears "specially" to contest jurisdiction preserves his defense, but one who forgets can lose his. See *York* v. *Texas*, 137 U. S. 15, 19–21 (1890). Failing to comply with certain

---

[10] While the dissent joins Norfolk Southern in this argument, it wavers. At points, the dissent seems to insist that laws like Pennsylvania's "mak[e] no sense." *Post*, at 5–6. But the closest the dissent comes to identifying authority for the notion that laws like these are impermissible are two cases that did not involve personal jurisdiction or purport to interpret the Due Process Clause. *Post*, at 8 (citing *Home Ins. Co.* v. *Morse*, 20 Wall. 445 (1874); *Barron* v. *Burnside*, 121 U. S. 186 (1887)). The dissent's observation that one of those cases in turn cited *Lafayette Ins. Co.* v. *French*, 18 How. 404 (1856), hardly helps—that decision *approved* a consent-to-suit regime for out-of-state corporations under the Full Faith and Credit Clause. *Id.,* at 405–407. At other points, however, and as we have seen, the dissent rightly acknowledges that a "'variety of legal arrangements [may] represent express or implied consent'" to personal jurisdiction consistent with due process, and these arrangements can include requiring at least some companies to consent to suit in exchange "for access to [a State's] markets." *Post*, at 4, 6.

pre-trial court orders, signing a contract with a forum selection clause, accepting an in-state benefit with jurisdictional strings attached—all these actions as well can carry with them profound consequences for personal jurisdiction. See *Insurance Corp. of Ireland*, 456 U. S., at 703–706 (collecting cases); see also *post*, at 2 (opinion of JACKSON, J.).

The truth is, under our precedents a variety of "actions of the defendant" that may seem like technicalities nonetheless can "amount to a legal submission to the jurisdiction of a court." *Insurance Corp. of Ireland*, 456 U. S., at 704–705; see also Brief for Stephen E. Sachs as *Amicus Curiae* 10. That was so before *International Shoe*, and it remains so today. Should we overrule them all? Taking Norfolk Southern's argument seriously would require just that. But, tellingly, the company does not follow where its argument leads or even acknowledge its implications. Instead, Norfolk Southern asks us to pluck out and overrule just one longstanding precedent that it happens to dislike. We decline the invitation. *Post*, at 4 (opinion of ALITO, J.). There is no fair play or substantial justice in that.[11]

*

Not every case poses a new question. This case poses a very old question indeed—one this Court resolved more

[11] While various separate writings accompany this opinion, it should be apparent a majority of the Court today agrees that: Norfolk Southern consented to suit in Pennsylvania. *Supra*, at 10–11; *post*, at 2 (opinion of ALITO, J.). *Pennsylvania Fire* therefore controls this case. *Supra*, at 11–12; *post*, at 2–4 (opinion of ALITO, J.). *Pennsylvania Fire*'s rule for consent-based jurisdiction has not been overruled. *Supra*, at 13–14; *post*, at 4 (opinion of ALITO, J.). *International Shoe* governs where a defendant has not consented to exercise of jurisdiction. *Supra*, at 14–15; *post*, at 4 (opinion of ALITO, J.). Exercising jurisdiction here is hardly unfair. *Supra*, at 17–20; *post*, at 4–5 (opinion of ALITO, J.). The federalism concerns in our due process cases have applied only when a defendant has not consented. *Supra*, at 21; *post*, at 7–8 (opinion of ALITO, J.). Nor will this Court now overrule *Pennsylvania Fire*. *Supra*, at 21–23; *post*, at 4 (opinion of ALITO, J.).

than a century ago in *Pennsylvania Fire*. Because that decision remains the law, the judgment of the Supreme Court of Pennsylvania is vacated, and the case is remanded.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 21–1168

ROBERT MALLORY, PETITIONER *v.* NORFOLK SOUTHERN RAILWAY CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

[June 27, 2023]

JUSTICE JACKSON, concurring.

I agree with the Court that this case is straightforward under our precedents. I write separately to say that, for me, what makes it so is not just our ruling in *Pennsylvania Fire Ins. Co. of Philadelphia* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93 (1917). I also consider our ruling in *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694 (1982), to be particularly instructive.

In *Insurance Corp. of Ireland*, this Court confirmed a simple truth: The due process "requirement of personal jurisdiction" is an individual, waivable right. *Id.*, at 703. The requirement exists, we said, to ensure that the forum State has sufficient contacts with a defendant, such that "'the maintenance of the suit [does] not offend "traditional notions of fair play and substantial justice."'" *Ibid.* (quoting *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319 (1945)). We noted further that the interstate federalism concerns informing that right are "ultimately a function of the individual liberty interest" that this due process right preserves. 456 U. S., at 703, n. 10. Because the personal-jurisdiction right belongs to the defendant, however, we explained that a defendant can choose to "subject [itself] to powers from which [it] may otherwise be protected." *Ibid.* When that happens, a State can exercise jurisdiction over the defendant consistent with the Due Process Clause, even

if our personal-jurisdiction cases would normally preclude the State from subjecting a defendant to its authority under the circumstances presented. *Ibid.*

Waiver is thus a critical feature of the personal-jurisdiction analysis. And there is more than one way to waive personal-jurisdiction rights, as *Insurance Corp. of Ireland* also clarified. A defendant can waive its rights by explicitly or implicitly consenting to litigate future disputes in a particular State's courts. *Id.*, at 703–704. A defendant might also fail to follow specific procedural rules, and end up waiving the right to object to personal jurisdiction as a consequence. *Id.*, at 705–706. Or a defendant can voluntarily invoke certain benefits from a State that are conditioned on submitting to the State's jurisdiction. *Id.*, at 704 (citing *Adam* v. *Saenger*, 303 U. S. 59, 67–68 (1938)).

Regardless of whether a defendant relinquishes its personal-jurisdiction rights expressly or constructively, the basic teaching of *Insurance Corp. of Ireland* is the same: When a defendant chooses to engage in behavior that "amount[s] to a legal submission to the jurisdiction of the court," the Due Process Clause poses no barrier to the court's exercise of personal jurisdiction. 456 U. S., at 704–705.

In my view, there is no question that Norfolk Southern waived its personal-jurisdiction rights here. As the Court ably explains, Norfolk Southern agreed to register as a foreign corporation in Pennsylvania in exchange for the ability to conduct business within the Commonwealth and receive associated benefits. *Ante*, at 10–11; see also *post*, at 2 (ALITO, J., concurring in part and concurring in judgment). Moreover, when Norfolk Southern made that decision, the jurisdictional consequences of registration were clear. See 42 Pa. Cons. Stat. §5301(a)(2)(i) (1981) (expressly linking "qualification as a foreign corporation under the laws of th[e] Commonwealth" to the "exercise [of] general personal jurisdiction"); 266 A. 3d 542, 569 (Pa. 2021) (acknowledging

that "foreign corporations are given reasonable notice" of the jurisdictional implications of registration).

Nor was Norfolk Southern compelled to register and submit itself to the general jurisdiction of Pennsylvania courts simply because its trains passed through the Commonwealth. See, *e.g.*, 15 Pa. Cons. Stat. §403(a)(11) (2014); 1972 Pa. Laws pp. 1154–1155. Registration is required when corporations seek to conduct *local* business in a "regular, systematic, or extensive" way. 266 A. 3d, at 562–563 (internal quotation marks omitted). Norfolk Southern apparently deemed registration worthwhile and opted in.

Under *Insurance Corp. of Ireland*, the due process question that this case presents is easily answered. Having made the choice to register and do business in Pennsylvania despite the jurisdictional consequences (and having thereby voluntarily relinquished the due process rights our general-jurisdiction precedents afford), Norfolk Southern cannot be heard to complain that its due process rights are violated by having to defend itself in Pennsylvania's courts. Whether Pennsylvania could have asserted general jurisdiction over Norfolk Southern *absent* any waiver, see *post*, at 3–4 (BARRETT, J., dissenting), is beside the point.

In other areas of the law, we permit States to ask defendants to waive individual rights and safeguards. See, *e.g.*, *Brady* v. *United States*, 397 U. S. 742, 748 (1970) (allowing plea bargains to waive a defendant's trial rights and the right against self-incrimination); *Barker* v. *Wingo*, 407 U. S. 514, 529, 536 (1972) (waiver of speedy trial rights). Moreover, when defendants do so, we respect that waiver decision and hold them to that choice, even though the government could not have otherwise bypassed the rules and procedures those rights protect. Insisting that our general-jurisdiction precedents preclude Pennsylvania from subjecting corporations to suit within its borders—despite their waiver of the protections those precedents entail—puts the personal-jurisdiction requirement on a pedestal. But there is nothing

"unique about the requirement of personal jurisdiction [that] prevents it from being . . . waived like other [individual] rights." *Insurance Corp. of Ireland*, 456 U. S., at 706.

In short, *Insurance Corp. of Ireland* makes clear that the personal-jurisdiction requirement is an individual, waivable right, and I agree with the Court that Norfolk Southern waived that right by choosing to register as a foreign corporation under the circumstances presented in this case. Therefore, I perceive no due process problem with the registration statute at issue here.

SUPREME COURT OF THE UNITED STATES

No. 21–1168

ROBERT MALLORY, PETITIONER *v.* NORFOLK SOUTHERN RAILWAY CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

[June 27, 2023]

JUSTICE ALITO, concurring in part and concurring in the judgment.

The sole question before us is whether the Due Process Clause of the Fourteenth Amendment is violated when a large out-of-state corporation with substantial operations in a State complies with a registration requirement that conditions the right to do business in that State on the registrant's submission to personal jurisdiction in any suits that are brought there. I agree with the Court that the answer to this question is no. *Assuming* that the Constitution allows a State to impose such a registration requirement, I see no reason to conclude that such suits violate the corporation's right to "'fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945).

I am not convinced, however, that the Constitution permits a State to impose such a submission-to-jurisdiction requirement. A State's assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles that are protected by one or more constitutional provisions or by the very structure of the federal system that the Constitution created. At this point in the development of our constitutional case law, the most appropriate home for these principles is the so-called dormant Commerce Clause. Norfolk Southern appears to have as-

serted a Commerce Clause claim below, but the Pennsylvania Supreme Court did not address it. See 266 A. 3d 542, 559–560, nn. 9, 11 (2021). Presumably, Norfolk Southern can renew the challenge on remand. I therefore agree that we should vacate the Pennsylvania Supreme Court's judgment and remand the case for further proceedings.

I

When Virginia resident Robert Mallory initiated this suit, Norfolk Southern Railway Company, a railroad that was at that time incorporated and headquartered in Virginia, had long operated rail lines and conducted related business in Pennsylvania. Consistent with Pennsylvania law, the company had registered as a "foreign" corporation, most recently in 1998. 15 Pa. Cons. Stat. §411(a) (2014); App. 1–2. Then, as now, Pennsylvania law expressly provided that "qualification as a foreign corporation" was a "sufficient basis" for Pennsylvania courts "to exercise general personal jurisdiction" over an out-of-state company. 42 Pa. Cons. Stat. §5301(a)(2)(i) (2019). Norfolk Southern is a sophisticated entity, and we may "presum[e]" that it "acted with knowledge" of state law when it registered. *Commercial Mut. Accident Co.* v. *Davis*, 213 U. S. 245, 254 (1909). As a result, we may also presume that by registering, it consented to all valid conditions imposed by state law.

I do not understand Norfolk Southern to challenge this basic premise. Tr. of Oral Arg. 62 (acknowledging that "the railroad understood by filing [registration paperwork] that it was subject to [Pennsylvania's general jurisdiction] law"). Instead, Norfolk Southern argues that giving force to the company's consent would violate the Fourteenth Amendment's Due Process Clause. See *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 496–497 (1927).

That argument is foreclosed by our precedent. We addressed this question more than a century ago in *Pennsylvania Fire Ins. Co. of Philadelphia* v. *Gold Issue Mining &*

Milling Co., 243 U. S. 93 (1917). There, an Arizona mining company sued a Pennsylvania insurance company in a Missouri court, alleging claims arising from events in Colorado. *Id.*, at 94. The Pennsylvania insurance company had "obtained a license to do business in Missouri," and so had complied with a Missouri statute requiring the company to execute a power of attorney consenting to service of process on the state insurance superintendent in exchange for licensure. *Ibid.* The Missouri Supreme Court had previously construed such powers of attorney as consent to jurisdiction in Missouri for all claims, including those arising from transactions outside the State. *Gold Issue Mining & Milling Co.* v. *Pennsylvania Fire Ins. Co. of Philadelphia*, 267 Mo. 524, 549–550, 184 S. W. 999, 1003–1005 (1916) (citing *State ex rel. Pacific Mut. Life Ins. Co.* v. *Grimm*, 239 Mo. 135, 159–171, 143 S. W. 483, 490–494 (1911)). Because the insurance company had executed the power of attorney to obtain its license, the court held that Missouri had jurisdiction over the company in that suit. 267 Mo., at 610, 184 S. W., at 1024. We affirmed in a brief opinion, holding that the construction of Missouri's statute and its application to the Pennsylvania insurance company under the circumstances of the case did not violate due process. *Pennsylvania Fire*, 243 U. S., at 95.

The parallels between *Pennsylvania Fire* and the case before us are undeniable. In both, a large company incorporated in one State was actively engaged in business in another State. In connection with that business, both companies took steps that, under the express terms or previous authoritative construction of state law, were understood as consent to the State's jurisdiction in suits on all claims, no matter where the events underlying the suit took place. In both cases, an out-of-state plaintiff sued the out-of-state company, alleging claims unrelated to the company's forum-state conduct. And in both, the out-of-state company objected, arguing that holding it to the terms of its

consent would violate the Fourteenth Amendment's Due Process Clause. In *Pennsylvania Fire*, we held that there was no due process violation in these circumstances. Given the near-complete overlap of material facts, that holding, unless it has been overruled, is binding here.

Norfolk Southern has not persuaded me that *Pennsylvania Fire* has been overruled. While we have infrequently invoked that decision's due process holding, we have never expressly overruled it. Nor can I conclude that it has been impliedly overruled. See *post*, at 15–16 (BARRETT, J., dissenting). Norfolk Southern cites the *International Shoe* line of cases, but those cases involve constitutional limits on jurisdiction over *non-consenting* corporations. See *International Shoe*, 326 U. S., at 317; *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915, 927–928 (2011); *Daimler AG* v. *Bauman*, 571 U. S. 117, 129 (2014); *BNSF R. Co.* v. *Tyrrell*, 581 U. S. 402, 415 (2017) (declining to consider defendant's alleged consent because court below did not reach it). Consent is a separate basis for personal jurisdiction. *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 703 (1982); *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 472, n. 14 (1985); *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U. S. 873, 880–881 (2011) (plurality opinion). *Pennsylvania Fire*'s holding, insofar as it is predicated on the out-of-state company's consent, is not "inconsistent" with *International Shoe* or its progeny. *Shaffer* v. *Heitner*, 433 U. S. 186, 212, n. 39 (1977).

Nor would I overrule *Pennsylvania Fire* in this case, as Norfolk Southern requests. At the least, *Pennsylvania Fire*'s holding does not strike me as "egregiously wrong" in its application here. *Ramos* v. *Louisiana*, 590 U. S. ___, ___ (2020) (KAVANAUGH, J., concurring in part) (slip op., at 7). Requiring Norfolk Southern to defend against Mallory's suit in Pennsylvania, as opposed to in Virginia, is not so deeply unfair that it violates the railroad's constitutional right to due process. *International Shoe*, 326 U. S., at 316.

The company has extensive operations in Pennsylvania, 266 A. 3d, at 562–563; see also *ante*, at 17–20; has availed itself of the Pennsylvania courts on countless occasions, Brief for Academy of Rail Labor Attorneys as *Amicus Curiae* 4–5 (collecting cases); and had clear notice that Pennsylvania considered its registration as consent to general jurisdiction, 15 Pa. Cons. Stat. §411(a); 42 Pa. Cons. Stat. §5301(a)(2)(i). Norfolk Southern's "conduct and connection with [Pennsylvania] are such that [it] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 297 (1980).

If having to defend this suit in Pennsylvania seems unfair to Norfolk Southern, it is only because it is hard to see Mallory's decision to sue in Philadelphia as anything other than the selection of a venue that is reputed to be especially favorable to tort plaintiffs.[1] But we have never held that the Due Process Clause protects against forum shopping. Perhaps for that understandable reason, no party has suggested that we go so far.

For these reasons, I agree that *Pennsylvania Fire* controls our decision here, but I stress that it does so due to the clear overlap with the facts of this case.

II

A

While that is the end of the case before us, it is not the end of the story for registration-based jurisdiction. We have long recognized that the Constitution restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests. This principle, an "obviou[s]" and "necessary result" of our con-

[1] See, *e.g.*, U. S. Chamber of Commerce Institute for Legal Reform, Nuclear Verdicts: Trends, Causes, and Solutions 20 (2022); M. Behrens & C. Silverman, Litigation Tourism in Pennsylvania: Is Venue Reform Needed?, 22 Widener L. J. 29, 30–31 (2012).

stitutional order, is not confined to any one clause or section, but is expressed in the very nature of the federal system that the Constitution created and in numerous provisions that bear on States' interactions with one another. *New York Life Ins. Co.* v. *Head*, 234 U. S. 149, 161 (1914).[2]

The dissent suggests that we apply this principle through the Due Process Clause of the Fourteenth Amendment, *post*, at 6–8, and there is support for this argument in our case law, if not in the ordinary meaning of the provision's wording. By its terms, the Due Process Clause is about procedure, but over the years, it has become a refuge of sorts for constitutional principles that are not "procedural" but would otherwise be homeless as the result of having been exiled from the provisions in which they may have originally been intended to reside. This may be true, for example, with respect to the protection of substantive rights that might otherwise be guaranteed by the Fourteenth Amendment's Privileges and Immunities Clause. See *McDonald* v. *Chicago*, 561 U. S. 742, 754–759 (2010) (plurality opinion); *id.*, at 808–812 (THOMAS, J., concurring in part and concurring in judgment). And in a somewhat similar way, our due process decisions regarding personal jurisdiction have often invoked respect for federalism as a factor in their analyses.

In our first decision holding that the Fourteenth Amendment's Due Process Clause protects a civil defendant from suit in certain fora, the Court proclaimed that "no State can exercise direct jurisdiction and authority over persons or property without its territory." *Pennoyer* v. *Neff*, 95 U. S.

---

[2] See, *e.g.*, *Florida* v. *Georgia*, 17 How. 478, 494 (1855); *Bonaparte* v. *Tax Court*, 104 U. S. 592, 594 (1882); *Huntington* v. *Attrill*, 146 U. S. 657, 669 (1892); *Alaska Packers Assn.* v. *Industrial Accident Comm'n of Cal.*, 294 U. S. 532, 540 (1935); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 521–523 (1935); *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 571–572, and n. 16 (1996); *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 422 (2003).

714, 722 (1878). "The several States," the Court explained, "are of equal dignity and authority, and the independence of one implies the exclusion of power from all others." *Ibid.* The Court warned that, in certain circumstances, a State's exercise of jurisdiction over non-residents would be "an encroachment upon the independence of [another] State" and a "usurpation" of that State's authority. *Id.*, at 723. And the Court noted that this was not a newly-developed doctrine, but reflected "well-established principles of public law" that "ha[d] been frequently expressed . . . in opinions of eminent judges, and . . . carried into adjudications in numerous cases." *Id.*, at 722, 724; see, *e.g.*, *D'Arcy* v. *Ketchum*, 11 How. 165, 176 (1851); *Picquet* v. *Swan*, 19 F. Cas. 609, 612 (No. 11,134) (CC Mass. 1828) (Story, J.).

Our post-*International Shoe* decisions have continued to recognize that constitutional restrictions on state court jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation," but reflect "territorial limitations" on state power. *Hanson* v. *Denckla*, 357 U. S. 235, 251 (1958); see also *World-Wide Volkswagen*, 444 U. S., at 292 (in addition to "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum," due process "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); *id.*, at 293 ("The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment"); *J. McIntyre Machinery*, 564 U. S., at 884 (plurality opinion) (if a "State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States"). And we have recognized that in some circumstances, "federalism interest[s] may be decisive" in the due process analysis. *Bristol-Myers Squibb Co.*

v. *Superior Court of Cal., San Francisco Cty.*, 582 U. S. 255, 263 (2017).

Despite these many references to federalism in due process decisions, there is a significant obstacle to addressing those concerns through the Fourteenth Amendment here: we have never held that a State's assertion of jurisdiction unconstitutionally intruded on the prerogatives of another State when the defendant had consented to jurisdiction in the forum State. Indeed, it is hard to see how such a decision could be justified. The Due Process Clause confers a right on "person[s]," Amdt. 14, §1, not States. If a person voluntarily waives that right, that choice should be honored. See *Insurance Corp. of Ireland*, 456 U. S., at 703; *ante*, at 2–3 (JACKSON, J., concurring).

B

1

The federalism concerns that this case presents fall more naturally within the scope of the Commerce Clause.[3] "By its terms, the Commerce Clause grants Congress the power '[t]o regulate Commerce . . . among the several States.'" *Raymond Motor Transp., Inc.* v. *Rice*, 434 U. S. 429, 440 (1978) (quoting Art. I, §8, cl. 3). But this Court has long held that the Clause includes a negative component, the so-called dormant Commerce Clause, that "prohibits state laws that unduly restrict interstate commerce." *Tennessee Wine and Spirits Retailers Assn.* v. *Thomas*, 588 U. S. ___, ___–___ (2019) (slip op., at 6–7); see, *e.g.*, *Cooley* v. *Board of*

[3] Analyzing these concerns under the Commerce Clause has the additional advantage of allowing Congress to modify the degree to which States should be able to entertain suits involving out-of-state parties and conduct. If Congress disagrees with our judgment on this question, it "has the authority to change the . . . rule" under its own Commerce power, subject, of course, to any other relevant constitutional limit. *South Dakota* v. *Wayfair, Inc.*, 585 U. S. ___, ___–___ (2018) (slip op., at 17–18); see also *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 769–770 (1945).

Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots, 12 How. 299, 318–319 (1852); *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, 252 (1829).

While the notion that the Commerce Clause restrains States has been the subject of "thoughtful critiques," the concept is "deeply rooted in our case law," *Tennessee Wine*, 588 U. S., at ___ (slip op., at 7), and vindicates a fundamental aim of the Constitution: fostering the creation of a national economy and avoiding the every-State-for-itself practices that had weakened the country under the Articles of Confederation. See *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979); *Healy* v. *Beer Institute*, 491 U. S. 324, 335–336 (1989). The Framers "might have thought [that other provisions] would fill that role," but "at this point in the Court's history, no provision other than the Commerce Clause could easily do the job." *Tennessee Wine*, 588 U. S., at ___ (slip op., at 8).[4]

---

[4] In the past, the Court recognized that the Import-Export Clause, Art. I, §10, cl. 2, and the Privileges and Immunities Clause, Art. IV, §2, might restrict state regulations that interfere with the national economy. See, *e.g.*, *Brown* v. *Maryland*, 12 Wheat. 419, 445–449 (1827) (reading Import-Export Clause to prohibit state laws imposing duties on "importations from a sister State"); *Almy* v. *California*, 24 How. 169, 175 (1861) (applying Import-Export Clause to invalidate state law taxing gold and silver shipments between States); *Toomer* v. *Witsell*, 334 U. S. 385, 396, and n. 26 (1948) (observing that the Privileges and Immunities Clause guarantees out-of-state citizens the right to do business in a State on equal terms with state citizens (citing *Ward* v. *Maryland*, 12 Wall. 418 (1871))). But the Court has since narrowed the scope of these provisions. See *Woodruff* v. *Parham*, 8 Wall. 123, 136–137 (1869) (holding that the Import-Export Clause applies only to international trade); *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U. S. 648, 656 (1981) (observing that "the Privileges and Immunities Clause is inapplicable to corporations" (citing *Hemphill* v. *Orloff*, 277 U. S. 537, 548–550 (1928))). Whether or not these restrictive interpretations are correct as an original matter, they are entrenched. Unless we overrule them, we must look elsewhere if "a national economic union unfettered by state-imposed limitations on commerce" is to be preserved. *Healy*, 491 U. S., at 336.

In its negative aspects, the Commerce Clause serves to "mediate [the States'] competing claims of sovereign authority" to enact regulations that affect commerce among the States. *National Pork Producers Council* v. *Ross*, 598 U. S. ___, ___ (2023) (slip op., at 14). The doctrine recognizes that "one State's power to impose burdens on . . . interstate market[s] . . . is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 571 (1996) (citing *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–196 (1824)). It is especially appropriate to look to the dormant Commerce Clause in considering the constitutionality of the authority asserted by Pennsylvania's registration scheme. Because the right of an out-of-state corporation to do business in another State is based on the dormant Commerce Clause, it stands to reason that this doctrine may also limit a State's authority to condition that right. See *Granholm* v. *Heald*, 544 U. S. 460, 472 (2005); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 539 (1949).

2

This Court and other courts have long examined assertions of jurisdiction over out-of-state companies in light of interstate commerce concerns.[5] Consider *Davis* v. *Farmers Co-operative Equity Co.*, 262 U. S. 312 (1923), a case very much like the one now before us. In *Davis*, a Kansas company sued a Kansas railroad in Minnesota on a claim that

---

[5] See, *e.g.*, *Atchison, T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101, 103 (1924); *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492, 494–495 (1929); *Denver & Rio Grande Western R. Co.* v. *Terte*, 284 U. S. 284, 287 (1932); *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, 50–51 (1941); *Moss* v. *Atlantic Coast Line R. Co.*, 157 F. 2d 1005, 1007 (CA2 1946); *Kern* v. *Cleveland, C., C. & St. L. R. Co.*, 204 Ind. 595, 601–604, 185 N. E. 446, 448–449 (1933); *Hayman* v. *Southern Pacific Co.*, 278 S. W. 2d 749, 753 (Mo. 1955); *White* v. *Southern Pacific Co.*, 386 S. W. 2d 6, 7–9 (Mo. 1965).

was "in no way connected with Minnesota." *Id.*, at 314. Jurisdiction over the railroad was based on its compliance with a state statute regulating the in-state activities of out-of-state corporations: the railroad maintained a soliciting agent in Minnesota, and the Minnesota Supreme Court had interpreted state law as compelling out-of-state carriers, as a "condition of maintaining a soliciting agent," to "submit to suit" in Minnesota on any "cause of action, wherever it may have arisen." *Id.*, at 315.

The Minnesota Supreme Court upheld jurisdiction against the railroad, but we reversed, holding that Minnesota's condition "impos[ed] upon interstate commerce a serious and unreasonable burden, which renders the statute obnoxious to the [C]ommerce [C]lause." *Ibid.* "By requiring from interstate carriers general submission to suit," Minnesota's statute "unreasonably obstruct[ed], and unduly burden[ed], interstate commerce." *Id.*, at 317.[6]

Although we have since refined our Commerce Clause framework, the structural constitutional principles underlying these decisions are unchanged, and the Clause remains a vital constraint on States' power over out-of-state corporations.

C

In my view, there is a good prospect that Pennsylvania's assertion of jurisdiction here—over an out-of-state company in a suit brought by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania—violates the Commerce Clause.

Under our modern framework, a state law may offend the Commerce Clause's negative restrictions in two circumstances: when the law discriminates against interstate

[6] Because we resolved the case under the Commerce Clause, we declined to consider the railroad's Fourteenth Amendment challenges. *Davis* v. *Farmers Co-operative Equity Co.*, 262 U. S. 312, 318 (1923).

commerce or when it imposes "undue burdens" on interstate commerce. *South Dakota* v. *Wayfair, Inc.*, 585 U. S. ___, ___ (2018) (slip op., at 7). Discriminatory state laws are subject to "'a virtually *per se* rule of invalidity.'" *Ibid.* (quoting *Granholm*, 544 U. S., at 476). "[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,'" the law's proponent must "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine* v. *Taylor*, 477 U. S. 131, 138 (1986). Justification of a discriminatory law faces a "high" bar to overcome the presumption of invalidity. *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 278 (1988). Laws that "'even-handedly'" regulate to advance "'a legitimate local public interest'" are subject to a looser standard. *Wayfair*, 585 U. S., at ___ (slip op., at 7). These laws will be upheld "'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Ibid.* In these circumstances, "'the question becomes one of degree,'" and "'the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved.'" *Raymond Motor Transp.*, 434 U. S., at 441. See also *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).

There is reason to believe that Pennsylvania's registration-based jurisdiction law discriminates against out-of-state companies.[7] But at the very least, the law imposes a "significant burden" on interstate commerce by

[7] See, *e.g.*, J. Preis, The Dormant Commerce Clause as a Limit on Personal Jurisdiction, 102 Iowa L. Rev. 138–140 (2016). A state law discriminates against interstate commerce if its "'practical effect'" is to disadvantage out-of-state companies to the benefit of in-state competitors. *Maine* v. *Taylor*, 477 U. S. 131, 138 (1986); see *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 338 (2007). Pennsylvania's law seems to discriminate against out-of-state companies by forcing them to increase their exposure to suits on all claims in order to access Pennsylvania's market while Pennsylvania

"[r]equiring a foreign corporation . . . to defend itself with reference to all transactions," including those with no forum connection. *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U. S. 888, 893 (1988); see, *e.g.*, *Davis*, 262 U. S., at 315–317 (burden in these circumstances is "serious and unreasonable," "heavy," and "undu[e]"); *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492, 495 (1929) (burden is "heavy"); *Denver & Rio Grande Western R. Co.* v. *Terte*, 284 U. S. 284, 287 (1932) (burden is "serious"); *Atchison, T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101, 103 (1924) (jurisdiction "interfered unreasonably with interstate commerce").

The foreseeable consequences of the law make clear why this is so. Aside from the operational burdens it places on out-of-state companies, Pennsylvania's scheme injects intolerable unpredictability into doing business across state borders. Large companies may be able to manage the patchwork of liability regimes, damages caps, and local rules in each State, but the impact on small companies, which constitute the majority of all U. S. corporations, could be devastating.[8] Large companies may resort to creative corporate structuring to limit their amenability to suit. Small companies may prudently choose not to enter an out-of-state market due to the increased risk of remote litigation. Some companies may forgo registration altogether, preferring to risk the consequences rather than expand their exposure to general jurisdiction. "No one benefits from this 'efficient breach' of corporate-registration laws": corporations must manage their added risk, and plaintiffs face challenges in serving unregistered corporations. Brief

---

companies generally face no reciprocal burden for expanding operations into another State.

[8] Congressional Research Service, M. Keightley & J. Hughes, Pass-Throughs, Corporations, and Small Businesses: A Look at Firm Size 4–5 (2018) (in 2015, 62% of S corporations and 55% of C corporations had fewer than five employees).

for Tanya Monestier as *Amicus Curiae* 16. States, meanwhile, "would externalize the costs of [their] plaintiff-friendly regimes." Brief for Stephen E. Sachs as *Amicus Curiae* 26.

Given these serious burdens, to survive Commerce Clause scrutiny under this Court's framework, the law must advance a "'legitimate local public interest'" and the burdens must not be "'clearly excessive in relation to the putative local benefits.'" *Wayfair*, 585 U. S., at ___ (slip op., at 7). But I am hard-pressed to identify any *legitimate local* interest that is advanced by requiring an out-of-state company to defend a suit brought by an out-of-state plaintiff on claims wholly unconnected to the forum State. A State certainly has a legitimate interest in regulating activities conducted within its borders, which may include providing a forum to redress harms that occurred within the State. *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 422 (2003); *BMW of North America*, 517 U. S., at 568–569; *Hess* v. *Pawloski*, 274 U. S. 352, 356 (1927). A State also may have an interest "in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King*, 471 U. S., at 473. But a State generally does *not* have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the State. See, *e.g.*, *Edgar* v. *MITE Corp.*, 457 U. S. 624, 644 (1982). With no legitimate local interest served, "there is nothing to be weighed . . . to sustain the law." *Ibid.* And even if some legitimate local interest could be identified, I am skeptical that any local benefits of the State's assertion of jurisdiction in these circumstances could overcome the serious burdens on interstate commerce that it imposes. See, *e.g.*, *id.*, at 643–646; *Raymond Motor Transp.*, 434 U. S., at 444–446.

* * *

Because *Pennsylvania Fire* resolves this case in favor of

petitioner Mallory and no Commerce Clause challenge is before us, I join the Court's opinion as stated in Parts I and III–B, and agree that the Pennsylvania Supreme Court's judgment should be vacated and the case remanded for further proceedings.

SUPREME COURT OF THE UNITED STATES

No. 21–1168

ROBERT MALLORY, PETITIONER *v.* NORFOLK SOUTHERN RAILWAY CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

[June 27, 2023]

JUSTICE BARRETT, with whom THE CHIEF JUSTICE, JUSTICE KAGAN, and JUSTICE KAVANAUGH join, dissenting.

For 75 years, we have held that the Due Process Clause does not allow state courts to assert general jurisdiction over foreign defendants merely because they do business in the State. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 317 (1945). Pennsylvania nevertheless claims general jurisdiction over all corporations that lawfully do business within its borders. As the Commonwealth's own courts recognized, that flies in the face of our precedent. See *Daimler AG* v. *Bauman*, 571 U. S. 117, 139–140 (2014).

The Court finds a way around this settled rule. All a State must do is compel a corporation to register to conduct business there (as every State does) and enact a law making registration sufficient for suit on any cause (as every State could do). Then, every company doing business in the State is subject to general jurisdiction based on implied "consent"—not contacts. That includes suits, like this one, with no connection whatsoever to the forum.

Such an approach does not formally overrule our traditional contacts-based approach to jurisdiction, but it might as well. By relabeling their long-arm statutes, States may now manufacture "consent" to personal jurisdiction. Because I would not permit state governments to circumvent constitutional limits so easily, I respectfully dissent.

I

A

Personal jurisdiction is the authority of a court to issue a judgment that binds a defendant. If a defendant submits to a court's authority, the court automatically acquires personal jurisdiction. *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 703 (1982). But if a defendant *contests* the court's authority, the court must determine whether it can nevertheless assert coercive power over the defendant. That calculus turns first on the statute or rule defining the persons within the court's reach. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 290 (1980). It depends next on the Due Process Clause, which guards a defendant's right to resist the judicial authority of a sovereign to which it has an insufficient tie. *International Shoe*, 326 U. S., at 316. The Clause has the companion role of ensuring that state courts "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U. S., at 291–292.

Our precedent divides personal jurisdiction into two categories: specific and general. Both are subject to the demands of the Due Process Clause. Specific jurisdiction, as its name suggests, allows a state court to adjudicate specific claims against a defendant. When a defendant "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958), that State's courts may adjudicate claims that "'arise out of or relate to the defendant's contacts' with the forum," *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Court*, 592 U. S. ___, ___ (2021) (slip op., at 6) (quoting *Bristol-Myers Squibb Co.* v. *Superior Court of Cal., San Francisco Cty.*, 582 U. S. 255, 262 (2017)).

General jurisdiction, by contrast, allows a state court to adjudicate "'any and all claims' brought against a defendant." *Ford Motor*, 592 U. S., at ___ (slip op., at 5) (quoting

Goodyear Dunlop Tires Operations, S. A. v. *Brown*, 564 U. S. 915, 919 (2011)). This sweeping authority exists only when the defendant's connection to the State is tight—so tight, in fact, that the defendant is "'at home'" there. *Ford Motor*, 592 U. S., at ___ (slip op., at 5). An individual is typically "at home" in her domicile, *Goodyear*, 564 U. S., at 924, and a corporation is typically "at home" in both its place of incorporation and principal place of business, *Daimler*, 571 U. S., at 137. Absent an exceptional circumstance, general jurisdiction is cabined to these locations. *Id.*, at 139.

B

This case involves a Pennsylvania statute authorizing courts to exercise general jurisdiction over corporations that are not "at home" in the Commonwealth. All foreign corporations must register to do business in Pennsylvania, 15 Pa. Cons. Stat. §411(a) (2014), and all registrants are subject to suit on "any cause" in the Commonwealth's courts, 42 Pa. Cons. Stat. §§5301(a)(2)(i), (b) (2019). Section 5301 thus purports to empower Pennsylvania courts to adjudicate any and all claims against corporations doing business there.

As the Pennsylvania Supreme Court recognized, this statute "clearly, palpably, and plainly violates the Constitution." 266 A. 3d 542, 565–566 (2021). Look no further than *BNSF R. Co.* v. *Tyrrell*, a case with remarkably similar facts—and one that the Court conspicuously ignores. 581 U. S. 402 (2017). There, we assessed whether Montana's courts could exercise general jurisdiction over the BNSF railroad. No plaintiff resided in Montana or suffered an injury there. Like Mallory, one of the plaintiffs alleged that the railroad exposed him to toxic substances that caused his cancer. *Id.*, at 406. Like Norfolk Southern, BNSF had tracks and employees in the forum, but it was neither incorporated nor headquartered there. *Id.*, at 406–

407. We rejected Montana's assertion of general jurisdiction over BNSF because "in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in [the State]." *Id.*, at 414. *Daimler* and *Goodyear*, we explained, could not have made that any clearer. *BNSF*, 581 U. S., at 414.

The same rule applies here. The Pennsylvania statute announces that registering to do business in the Commonwealth "shall constitute a sufficient basis" for general jurisdiction. §5301(a). But as our precedent makes crystal clear, simply doing business is *insufficient*. Absent an exceptional circumstance, a corporation is subject to general jurisdiction only in a State where it is incorporated or has its principal place of business. *Ford Motor*, 592 U. S., at ___ (slip op., at 5); *Daimler*, 571 U. S., at 139; *Goodyear*, 564 U. S., at 924. Adding the antecedent step of registration does not change that conclusion. If it did, "every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler's* ruling would be robbed of meaning by a back-door thief." *Brown* v. *Lockheed Martin Corp.*, 814 F. 3d 619, 640 (CA2 2016).

II

A

The Court short-circuits this precedent by characterizing this case as one about consent rather than contacts-based jurisdiction. Consent is an established basis for personal jurisdiction, which is, after all, a waivable defense. "A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court," including contract, stipulation, and in-court appearance. *Insurance Corp. of Ireland*, 456 U. S., at 703–704. Today, the Court adds corporate registration to the list.

This argument begins on shaky ground, because Pennsylvania itself does not treat registration as synonymous with consent. Section 5301(a)(2)(i) baldly asserts that "qualification as a foreign corporation" in the Commonwealth is a sufficient hook for general jurisdiction. The *next* subsection (invoked by neither Mallory nor the Court) permits the exercise of general jurisdiction over a corporation based on "[c]onsent, to the extent authorized by the consent." §5301(a)(2)(ii). If registration were actual consent, one would expect to see some mention of jurisdiction in Norfolk Southern's registration paperwork—which is instead wholly silent on the matter. App. 1–7. What Mallory calls "consent" is what the Pennsylvania Supreme Court called "compelled submission to general jurisdiction by legislative command." 266 A. 3d, at 569. Corporate registration triggers a statutory repercussion, but that is not "consent" in a conventional sense of the word.

To pull §5301(a)(2)(i) under the umbrella of consent, the Court, following Mallory, casts it as setting the terms of a bargain: In exchange for access to the Pennsylvania market, a corporation must allow the Commonwealth's courts to adjudicate any and all claims against it, even those (like Mallory's) having nothing to do with Pennsylvania. Brief for Petitioner 27–28. Everyone is charged with knowledge of the law, so corporations are on notice of the deal. By registering, they agree to its terms.

While this is a clever theory, it falls apart on inspection. The Court grounds consent in a corporation's choice to register with knowledge (constructive or actual) of the jurisdictional consequences. *Ante*, at 10–11, 21 ("proceed[ing] anyway" in light of "the jurisdictional consequences attending these actions"); *ante*, at 2 (ALITO, J., concurring in part and concurring in judgment) (basing "consent" on "presume[d]" knowledge of state law); *ante*, at 3 (JACKSON, J., concurring) ("register[ing] and do[ing] business in Pennsylvania despite the jurisdictional consequences"). But on that logic, *any*

long-arm statute could be said to elicit consent. Imagine a law that simply provides, "any corporation doing business in this State is subject to general jurisdiction in our courts." Such a law defies our precedent, which, again, holds that "in-state business . . . does not suffice to permit the assertion of general jurisdiction." *BNSF*, 581 U. S., at 414. Yet this hypothetical law, like the Pennsylvania statute, gives notice that general jurisdiction is the price of doing business. And its "notice" is no less "clear" than Pennsylvania's. *Ante*, at 5 (opinion of ALITO, J.). So on the Court's reasoning, corporations that choose to do business in the State impliedly consent to general jurisdiction. The result: A State could defeat the Due Process Clause by adopting a law at odds with the Due Process Clause.

That makes no sense. If the hypothetical statute overreaches, then Pennsylvania's does too. As the United States observes, "[i]nvoking the label 'consent' rather than 'general jurisdiction' does not render Pennsylvania's long-arm statute constitutional." Brief for United States as *Amicus Curiae* 4. Yet the Court takes this route without so much as acknowledging its circularity.

B

While our due process precedent permits States to place reasonable conditions on foreign corporations in exchange for access to their markets, there is nothing reasonable about a State extracting consent in cases where it has "no connection whatsoever." 266 A. 3d, at 566; *Bristol-Myers*, 582 U. S., at 263; see *Lafayette Ins. Co.* v. *French*, 18 How. 404, 407 (1856). The Due Process Clause protects more than the rights of defendants—it also protects interstate federalism. We have emphasized this principle in case after case. For instance, in *Hanson* v. *Denckla*, we stressed that "restrictions" on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on

the power of the respective States." 357 U. S., at 250–251. In *World-Wide Volkswagen*, we explained that "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State . . . the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." 444 U. S., at 294. And in *Bristol-Myers*, we reinforced that "this federalism interest may be decisive." 582 U. S., at 263; see also, *e.g.*, *Ford Motor*, 592 U. S., at ___ (slip op., at 6); *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 113, 115 (1987); *International Shoe*, 326 U. S., at 317. A defendant's ability to waive its objection to personal jurisdiction reflects that the Clause protects, first and foremost, an individual right. But when a State announces a blanket rule that ignores the territorial boundaries on its power, federalism interests are implicated too.

Pennsylvania's effort to assert general jurisdiction over every company doing business within its borders infringes on the sovereignty of its sister States in a way no less "exorbitant" and "grasping" than attempts we have previously rejected.[1] *Daimler*, 571 U. S., at 121–122, 138–139. Conditions on doing in-state business cannot be "inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others." *Lafayette*, 18 How., at 407; *St. Clair* v. *Cox*, 106 U. S. 350, 356 (1882). Permitting Pennsylvania to impose a blanket claim of authority over controversies with no connection

[1] This case provides a "textbook example" of overreach at the expense of other States. 266 A. 3d 542, 567 (Pa. 2021). Virginia has considerable connections to Mallory's suit: Mallory lives in Virginia, Norfolk Southern is a Virginia corporation, Mallory's injuries arose—at least in part—from his employment in Virginia, and he was diagnosed with cancer there. See *ante*, at 2–3; Tr. of Oral Arg. 39. Pennsylvania, by contrast, "has no legitimate interest in a controversy with no connection to the Commonwealth that was filed by a non-resident against a foreign corporation." 266 A. 3d, at 567.

to the Commonwealth intrudes on the prerogatives of other States—domestic and foreign—to adjudicate the rights of their citizens and enforce their own laws. See *Ford Motor*, 592 U. S., at ___–___ (slip op., at 6–7); *Daimler*, 571 U. S., at 141–142.

The plurality's response is to fall back, yet again, on "consent." *Ante*, at 21, 23, n. 11. In its view, because a defendant can *waive* its personal jurisdiction right, a State can never overreach in demanding its *relinquishment*. *Ibid.*; see also *ante*, at 8 (opinion of ALITO, J.); *ante*, at 1–3 (opinion of JACKSON, J.). That is not how we treat rights with structural components. The right to remove a case to federal court, for instance, is primarily personal—it secures for a nonresident defendant a federal forum thought to be more impartial. See The Federalist No. 80, p. 478 (C. Rossiter ed. 1961) (A. Hamilton). At the same time, however, it serves federal interests by ensuring that federal courts can vindicate federal rights. See, *e.g.*, *Georgia* v. *Rachel*, 384 U. S. 780, 804–805 (1966). Recognizing this dual role, we have rejected efforts of States to require defendants to relinquish this (waivable) right to removal as a condition of doing business. See *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 453, 456–458 (1874) (citing *Lafayette*, 18 How., at 407); *Barron* v. *Burnside*, 121 U. S. 186, 196–198 (1887) ("[W]hile the right to remove a suit might be waived," a statute may not require a foreign corporation "to forfeit [its] rights at all times and on all occasions, whenever the case might be presented"). The same logic applies here. Pennsylvania's power grab infringes on more than just the rights of defendants—it upsets the proper role of the States in our federal system.

III

A

The plurality attempts to minimize the novelty of its conclusion by pointing to our decision in *Burnham* v. *Superior*

Court of Cal., *County of Marin*, 495 U. S. 604 (1990). There, we considered whether "tag jurisdiction"—personal service upon a defendant physically present in the forum State—remains an effective basis for general jurisdiction after *International Shoe*. *Burnham*, 495 U. S., at 607 (opinion of Scalia, J.). We unanimously agreed that it does. *Id.*, at 619, 622; *id.*, at 628 (White, J., concurring in part and concurring in judgment); *id.*, at 628–629 (Brennan, J., concurring in judgment); *id.*, at 640 (Stevens, J., concurring in judgment). The plurality claims that registration jurisdiction for a corporation is just as valid as the "tag jurisdiction" that we approved in *Burnham*. But in drawing this analogy, the plurality omits any discussion of *Burnham*'s reasoning.

In *Burnham*, we acknowledged that tag jurisdiction would not satisfy the contacts-based test for general jurisdiction. Nonetheless, we reasoned that tag jurisdiction is "both firmly approved by tradition and still favored," making it "one of the continuing traditions of our legal system that define[s] the due process standard of 'traditional notions of fair play and substantial justice.'" *Id.*, at 619 (opinion of Scalia, J.) (quoting *International Shoe*, 326 U. S., at 316); see also 495 U. S., at 635–637 (Brennan, J., concurring in judgment) (a jurisdictional rule that reflects "our common understanding *now*, fortified by a century of judicial practice, . . . is entitled to a strong presumption that it comports with due process"). *Burnham* thus permits a longstanding and still-accepted basis for jurisdiction to pass *International Shoe*'s test.

General-jurisdiction-by-registration flunks both of these prongs: It is neither "firmly approved by tradition" nor "still favored." 495 U. S., at 622 (opinion of Scalia, J.). Thus, the plurality's analogy to tag jurisdiction is superficial at best.

Start with the second prong. In *Burnham*, "[w]e [did] not know of a single state . . . that [had] abandoned in-state service as a basis of jurisdiction." *Id.*, at 615. Here, as Mallory concedes, Pennsylvania is the *only* State with a statute

treating registration as sufficient for general jurisdiction. Tr. of Oral Arg. 47. Indeed, quite a few have jettisoned the jurisdictional consequences of corporate registration altogether—and in no uncertain terms. See, *e.g.*, *Chavez* v. *Bridgestone Americas Tire Operations*, *LLC*, 2022–NMSC–006, ¶¶1, 53–54, 503 P. 3d 332, 336, 349 ("Reliance upon outdated legal fictions . . . would be absurd and, as explained above, inconsistent with contemporary understandings of due process"); *Genuine Parts Co.* v. *Cepec*, 137 A. 3d 123, 137 (Del. 2016) ("[W]e no longer live in a time where foreign corporations cannot operate in other states unless they somehow become a resident"); see also *DeLeon* v. *BNSF R. Co.*, 392 Mont. 446, 453, n. 1, 426 P. 3d 1, 7, n. 1 (2018) (listing States with statutes that do not permit the practice).[2] With the Pennsylvania Legislature standing alone, the plurality does not even attempt to describe this method of securing general jurisdiction as "still favored," *Burnham*, 495 U. S., at 622 (opinion of Scalia, J.), or reflective of "our common understanding now," *id.*, at 635–637 (Brennan, J., concurring in judgment) (emphasis deleted). Quite the opposite: The plurality denigrates "the spirit of our age"—reflected by the vast majority of States—and appeals to its own notions of fairness. *Ante*, at 17–20.

The past is as fatal to the plurality's theory as the present. *Burnham*'s tradition prong asks whether a method for securing jurisdiction was "shared by American courts at the crucial time"—"1868, when the Fourteenth Amendment

---

[2]The plurality offers only one other State that (through its Supreme Court) has treated foreign corporate registration as adequate support for general jurisdiction following *Daimler* and *Goodyear*. See *Cooper Tire & Rubber Co.* v. *McCall*, 312 Ga. 422, 436–437, 863 S. E. 2d 81, 92 (2021). There, a judicial precedent, not a long-arm statute, maintained that registration justified general jurisdiction. Applying the consent theory, the Georgia Supreme Court held that corporations that choose to do business in the State are on notice of the jurisdictional consequences of its case law. *Id.*, at 434, 863 S. E. 2d, at 90.

was adopted." 495 U. S., at 611 (opinion of Scalia, J.). But the plurality cannot identify a *single* case from that period supporting its theory.[3] In fact, the evidence runs in the opposite direction. Statutes that required the appointment of a registered agent for service of process were far more modest than Pennsylvania's.[4] And even when a statute was written more broadly, state courts generally understood it to implicitly limit jurisdiction to suits with a connection to the forum. The state reporters are replete with examples of judicial decisions that stood by the then-prevailing rule: Compliance with a registration law did not subject a foreign corporation to suit on *any* cause in a State, but only those related to the forum. *Smith* v. *Mutual Life Ins. Co. of N. Y.*,

---

[3] The plurality argues that the uniform practice of state courts at the time of ratification is inapposite because no state court held that general-jurisdiction-by-registration violates the Fourteenth Amendment. *Ante*, at 7, n. 4. This approach reflects a misunderstanding of *Burnham*. The inquiry is not whether courts rejected a process for obtaining jurisdiction as unconstitutional. It is whether courts *actually used*—and continue to use—the challenged process. 495 U. S., at 622 (opinion of Scalia, J.); see also *Hurtado* v. *California*, 110 U. S. 516, 528 (1884) ("[A] process of law . . . must be taken to be due process of law" if it "has been immemorially the actual law of the land"). Registration jurisdiction falls short on both fronts.

[4] Many States expressly limited their statutes to disputes with *a connection to the State*. See, *e.g.*, Ind. Code §25–2 (1852) (foreign corporations must consent to actions "arising out of any transaction in this State"), App. to Brief for Petitioner 47a; Conn. Gen. Stat. §7–389 (1866) (foreign insurance companies must appoint an in-state agent to accept process "in all suits before any court in this state, for any liability incurred by such company or association in this state"), App. to Brief for Petitioner 18a; Md. Code Ann. §26–211 (1868) (foreign corporation may be sued by nonresident "when the cause of action has arisen, or the subject of the action shall be situate[d] in this state"), App. to Brief for Petitioner 90a; S. C. Code Ann. §13–1–422(2) (1873) (nonresident may sue a foreign corporation "when the cause of action shall have arisen, or the subject of the action shall be situated, within this State"), App. to Brief for Petitioner 227a.

96 Mass. 336, 340–343 (1867); see also, *e.g.*, *Camden Rolling Mill* v. *Swede Iron Co.*, 32 N. J. L. 15, 18 (1866) (rejecting a statutory construction that would "place within the jurisdiction of our courts, all the corporations of the world"); *Newell* v. *Great W. R. Co. of Canada*, 19 Mich. 336, 345–346 (1869) (legislature "could never have intended . . . to make our tribunals, maintained by the people of Michigan, the arbiters of differences in which our citizens have no interest"); *Sawyer* v. *North Am. Life Ins. Co.*, 46 Vt. 697, 707 (1874) (broadly worded statute did not reach a corporate "party not a resident, on a cause of action which did not accrue here"); *Central R. & Banking Co.* v. *Carr*, 76 Ala. 388, 393 (1884) (collecting cases).[5] Our cases from this era articulate the same line. See, *e.g.*, *Lafayette*, 18 How., at 407 (statutory consent to suit may reach "contracts made and to be performed within that State"); *St. Clair*, 106 U. S., at 356–357 (statutory consent permitted for suits "arising out of [a foreign corporation's] transactions in the State"); *Old Wayne Mut. Life Assn. of Indianapolis* v. *McDonough*, 204 U. S. 8, 21 (1907) ("[I]t cannot be held that the company agreed that service of process . . . would alone be sufficient to bring it into court in respect of *all* business transacted by it, no matter where"); *Simon* v. *Southern R. Co.*, 236 U. S. 115, 130 (1915) ("statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states"). Although "plaintiffs typically did not sue defendants in fora that had no rational relation to causes of action," *Genuine Parts*, 137 A. 3d, at 146, courts repeatedly turned them away when they did.

---

[5] Mallory cannot find an example of an exercise of registration jurisdiction without a forum connection until 1882. See *Johnston* v. *Trade Ins. Co.*, 132 Mass. 432, 434–435. But even that example ignores Massachusetts's rejection of registration jurisdiction for cases with no connection to the forum in 1867—the year it ratified the Fourteenth Amendment. See *Smith*, 96 Mass., at 340–343.

B

Sidestepping *Burnham*'s logic, the plurality seizes on its bottom-line approval of tag jurisdiction. According to the plurality, tag jurisdiction (based on physical presence) and registration jurisdiction (based on deemed consent) are essentially the same thing—so by blessing one, *Burnham* blessed the other. See *ante*, at 1–2, 16. The plurality never explains why they are the same, even though—as we have just discussed—more than a century's worth of law treats them as distinct. See also *Burnham*, 495 U. S., at 610, n. 1 (opinion of Scalia, J.) (corporations "have never fi[t] comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person'"); *International Shoe*, 326 U. S., at 316–317. The plurality's rationale seems to be that if a person is subject to general jurisdiction anywhere she is present, then a corporation should be subject to general jurisdiction anywhere it does business. See *ante*, at 1–2, 5–6, 9–10, 16, 22. That is not only a non sequitur—it is "contrary to the historical rationale of *International Shoe*." *Wenche Siemer* v. *Learjet Acquisition Corp.*, 966 F. 2d 179, 183 (CA5 1992).

Before *International Shoe*, a state court's power over a person turned strictly on "service of process within the State" (presence) "or [her] voluntary appearance" (consent). *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (1878). In response to changes in interstate business and transportation in the late 19th and early 20th centuries, States deployed new legal fictions designed to secure the presence or consent of nonresident individuals and foreign corporations. For example, state laws required nonresident drivers to give their "implied consent" to be sued for their in-state accidents as a condition of using the road. *Hess* v. *Pawloski*, 274 U. S. 352, 356 (1927); *World-Wide Volkswagen*, 444 U. S., at 296, n. 11. And foreign corporations, as we have discussed, were required by statute to "consent" to the appointment of a res-

ident agent, so that the company could then be constructively "present" for in-state service. *Mutual Reserve Fund Life Assn.* v. *Phelps*, 190 U. S. 147, 158–159 (1903); see *St. Clair*, 106 U. S., at 356.

As Justice Scalia explained, such extensions of "consent and presence were purely fictional" and can no longer stand after *International Shoe*. *Burnham*, 495 U. S., at 618; see also, *e.g.*, *Shaffer* v. *Heitner*, 433 U. S. 186, 202–203 (1977) (*International Shoe* abandoned "both the fictions of implied consent to service on the part of a foreign corporation and of corporate presence"); *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 222 (1957) (*International Shoe* "abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [foreign] corporations"); *International Shoe*, 326 U. S., at 318. The very point of *International Shoe* was to "cast . . . aside" the legal fictions built on the old territorial approach to personal jurisdiction and replace them with its contacts-based test. *Burnham*, 495 U. S., at 618 (opinion of Scalia, J.); *id.*, at 630 (Brennan, J., concurring in judgment) (*International Shoe* abandoned the previous "'patchwork of legal and factual fictions'"). In *Burnham*, we upheld tag jurisdiction because it is not one of those fictions—it *is* presence. By contrast, Pennsylvania's registration statute is based on deemed consent. And this kind of legally implied consent is one of the very fictions that our decision in *International Shoe* swept away. See 326 U. S., at 318; *Ford Motor*, 592 U. S., at ___ (GORSUCH, J., concurring in judgment) (slip op., at 8).

C

Neither JUSTICE ALITO nor the plurality seriously contests this history. Nor does either deny that Mallory's theory would gut *Daimler*. Instead, they insist that we already decided this question in a pre-*International Shoe* precedent: *Pennsylvania Fire Ins. Co. of Philadelphia* v. *Gold Issue*

Mining & Milling Co., 243 U. S. 93 (1917).

In *Pennsylvania Fire*, an Arizona corporation sued a Pennsylvania corporation in Missouri for a claim arising from an insurance contract issued in Colorado and protecting property in Colorado. *Id.*, at 94. The defendant maintained that the Missouri court lacked personal jurisdiction over it because the plaintiff's claim had no connection to the forum. *Id.*, at 94–95. But in compliance with Missouri law, the defendant company had previously filed "a power of attorney consenting that service of process upon the superintendent [of the State's insurance department] should be deemed personal service upon the company." *Id.*, at 94. The Missouri Supreme Court construed that power of attorney as express consent to personal jurisdiction in Missouri in any case whatsoever, and this Court held that "the construction did not deprive the defendant of due process of law." *Id.*, at 95.[6]

The Court asserts that *Pennsylvania Fire* controls our decision today. I disagree. The case was "decided before this Court's transformative decision on personal jurisdiction in *International Shoe*," *BNSF*, 581 U. S., at 412, and we have already stated that "prior decisions [that] are inconsistent with this standard . . . are overruled," *Shaffer*, 433 U. S., at 212, n. 39. *Pennsylvania Fire* fits that bill. Time and again, we have reinforced that "'doing business' tests"—like those

[6]The plurality praises the Missouri Supreme Court's "carefu[l]" and "thoughtful opinion." *Ante*, at 9–10. Only a decade later, however, the same court unanimously concluded that it had misinterpreted the reach of the statute and overruled this aggressive approach. *State ex rel. Am. Central Life Ins. Co.* v. *Landwehr*, 318 Mo. 181, 190–192, 300 S. W. 294, 297–298 (1927) (requiring a connection to Missouri); *State ex rel. Phoenix Mut. Life Ins. Co. of Hartford* v. *Harris*, 343 Mo. 252, 258–260, 121 S. W. 2d 141, 145–146 (1938). This remains the rule in Missouri today: Compliance with its registration statute does not constitute consent to general jurisdiction. *State ex rel. Norfolk Southern R. Co.* v. *Dolan*, 512 S. W. 3d 41, 52–53, and n. 11 (Mo. 2017).

"framed before specific jurisdiction evolved in the United States"—are not a valid basis for general jurisdiction. *Daimler*, 571 U. S., at 140, n. 20. The only innovation of Pennsylvania's statute is to make "doing business" synonymous with "consent." If *Pennsylvania Fire* endorses that trick, then *Pennsylvania Fire* is no longer good law.

The plurality tries to get around *International Shoe* by claiming that it did no more than expand jurisdiction, affecting nothing that came before it.[7] *Ante*, at 14–15. That is as fictional as the old concept of "corporate presence" on which the plurality relies. We have previously abandoned even "ancient" bases of jurisdiction for incompatibility with *International Shoe*. *Shaffer*, 433 U. S., at 211–212 (repudiating *quasi in rem* jurisdiction). And we have repeatedly reminded litigants not to put much stock in our pre-*International Shoe* decisions. *Shaffer*, 433 U. S., at 212, n. 39; see also *BNSF*, 581 U. S., at 412. *Daimler* itself reinforces that pre-*International Shoe* decisions "should not attract heavy reliance today." 571 U. S., at 138, n. 18. Over and over, we have reminded litigants that *International Shoe* is "canonical," "seminal," "pathmarking," and even "momentous"—to give just a few examples. *Ford Motor*, 592 U. S., at ___ (slip op., at 4); *Bristol-Myers*, 582 U. S., at 262; *Daimler*, 571 U. S., at 128; *Goodyear*, 564 U. S., at 919. Yet the Court acts as if none of this ever happened.

In any event, I doubt *Pennsylvania Fire* would control this case even if it remained valid. *Pennsylvania Fire* distinguished between express consent (that is, consent "actually . . . conferred by [the] document") and deemed consent (inferred from doing business). 243 U. S., at 95–96; see also *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165,

---

[7] While *International Shoe* expanded the bases for *specific* jurisdiction, it did no such thing for *general* jurisdiction. On the contrary, *International Shoe* itself recognized that *general* jurisdiction for a corporation exists in its "'home' or principal place of business." 326 U. S. 310, 317 (1945). That line has remained constant.

175 (1939) (basing jurisdiction on "finding an *actual* consent" (emphasis added)). As Judge Learned Hand emphasized in a decision invoked by the plurality, without "express consent," the normal rules apply. *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 F. 148, 150–151 (SDNY 1915).

The express power of attorney in *Pennsylvania Fire* "made service on the [insurance] superintendent the equivalent of . . . a corporate vote [that] had accepted service in this specific case." 243 U. S., at 95. Norfolk Southern, by contrast, "executed no document like the power of attorney there." Brief for Respondent 31; see App. 1–7. The Court makes much of what Norfolk Southern did write on its forms, *ante*, at 11: It named a "Commercial Registered Office Provider," App. 1, 6, it notified Pennsylvania of a merger, *id.*, at 3–5, and it paid $70 to update its paperwork, *id.*, at 6. None of those documents use the word "agent," nothing hints at the word "jurisdiction," and (as the Pennsylvania Supreme Court explained) nothing about that registration is "voluntary." 266 A. 3d, at 570, and n. 20.[8] Consent in *Pennsylvania Fire* was contained in the document itself; here it is deemed by statute. If "mere formalities" matter as much as the plurality says they do, it should respect this one too. *Ante*, at 22.

IV

By now, it should be clear that the plurality's primary approach to this case is to look past our personal jurisdiction

[8] I agree with the Court that no "magic words" are necessary to establish valid consent. *Ante*, at 12–13, n. 5. But when the statutory scheme itself distinguishes between actual "consent" and registration, §§5301(a)(2)(i), (ii), and when the Pennsylvania Supreme Court sees a difference between the two, it is quite a stretch to treat them as one and the same.

precedent. Relying on a factsheet downloaded from the internet, for instance, the plurality argues that Norfolk Southern is such a "part of 'the Pennsylvania Community,'" and does so much business there, that its "presence" in Pennsylvania is enough to require it to stand for suits having nothing to do with the Commonwealth. *Ante*, at 17–20; see also *ante*, at 4–5 (opinion of ALITO, J.).[9] In *Daimler*, however, we roundly rejected the plaintiff's request that we "approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.'" 571 U. S., at 138. The established test—which the plurality barely acknowledges—is whether the corporation is "at home" in the State. "A corporation that operates in many places," and must therefore register in just as many, "can scarcely be deemed at home in all of them." *Id.*, at 140, n. 20.

* * *

Critics of *Daimler* and *Goodyear* may be happy to see them go. See, *e.g.*, *Ford Motor*, 592 U. S., at ___ (slip op., at 1) (ALITO, J., concurring in judgment); *id.*, at ___–___ (slip op., at 8–9) (GORSUCH, J., joined by THOMAS, J., concurring in judgment); *BNSF*, 581 U. S., at 416 (SOTOMAYOR, J., concurring in part and dissenting in part). And make no mistake: They are halfway out the door. If States take up the Court's invitation to manipulate registration, *Daimler* and *Goodyear* will be obsolete, and, at least for corporations, specific jurisdiction will be "superfluous." *Daimler*, 571 U. S., at 140; see *Goodyear*, 564 U. S., at 925. Because I would not work this sea change, I respectfully dissent.

---

[9] Mallory, by contrast, chooses to rest his case for jurisdiction on registration and registration alone. Tr. of Oral Arg. 49 ("We're relying on consent and consent alone. Without consent, we don't prevail"). Apparently dissatisfied with this concession, the plurality finds its own facts and develops its own argument. That is not how we usually do things. See *United States* v. *Sineneng-Smith*, 590 U. S. ___, ___–___ (2020) (slip op., at 3–4).

STATE OF NORTH CAROLINA FORSYTH COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 5279
HARRIS TEETER SUPERMARKETS, INC., et al., Plaintiffs, v. ACE AMERICAN INSURANCE COMPANY, et al., Defendants.	**ORDER AND OPINION ON DEFENDANTS' MOTION TO DISMISS AND MOTION TO STAY**

1. **THIS MATTER** is before the Court on the 27 March 2023 filing of Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Under the North Carolina Declaratory Judgment Act (the "Motion to Dismiss"), (ECF No. 135 ["Mot. Dismiss"]), and Defendants' Motion to Stay (the "Motion to Stay", and together with the Motion to Dismiss, the "Motions"), (ECF No. 137 ["Mot. Stay"]).

2. The Court held a hearing on the Motions on 19 July 2023 (the "Hearing"), (*see* ECF No. 206), and its Case Management Conference pursuant to Rule 9.3 of the North Carolina Business Court Rules ("BCR(s)") immediately following the Hearing.

3. For the reasons set forth herein, the Court **GRANTS** in part and **DENIES** in part the Motions.

Offit Kurman, P.A. by J. Alexander S. Barrett and Kurt A. Seeber, and Morgan, Lewis & Bockius, LLP by Gerald P. Konkel and Christopher M. Popecki, for Plaintiffs Harris Teeter Supermarkets, Inc., Harris Teeter, LLC, The Kroger Co., Kroger Limited Partnership I, and Kroger Limited Partnership II.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP by Agustin M. Martinez, Jim W. Phillips, Jr., and Jennifer K. Van Zant, Clyde & Co US LLP by Robert M. Mangino and Susan K. Sullivan, and Holwell

Shuster & Goldberg, LLP by Andrew C. Indorf, Blair E. Kaminsky, Neil R. Lieberman, Michael S. Shuster, and Daniel M. Sullivan, for Defendants ACE American Insurance Co., ACE Property and Casualty Insurance Co., and Federal Insurance Co.

James, McElroy & Diehl, P.A. by Adam L. Ross, and Kennedys CMK LLP by Christopher R. Carroll, Tara E. McCormack, Christina R. Salem, and Joshua S. Wirtshafter, for Defendants Allied World National Assurance Co., Starr Surplus Lines Insurance Co., and United States Fire Insurance Co.

Maynard Nexsen PC by James W. Bryan and Olivia F. Fajen, and Skarzynski Marick & Black, LLP by Karen M. Dixon, for Defendants American Guarantee and Liability Insurance Co., Steadfast Insurance Co., and Zurich American Insurance Co.

Bennett Guthrie, PLLC by Joshua H. Bennett, and BatesCarey LLP by Joshua A. Boggioni, Adam H. Fleischer, and Paige M. Houin, for Defendants Aspen American Insurance Co., Great American Alliance Insurance Co., Great American Assurance Co., Great America Insurance Co., Great American Insurance Co. of New York, Great American Spirit Insurance Co., and Westport Insurance Corp.

Teague Campbell Dennis & Gorham, LLP by William A. Bulfer and John M. Little, and Skarzynski Marick & Black LLP by Cheryl P. Vollweiler, for Defendant Axis Surplus Insurance Co.

James, McElroy & Diehl, P.A. by Edward T. Hinson, Jr. and Jennifer M. Houti, and and Dentons US LLP by Deborah J. Campbell, Kathryn M. Guinn, M. Keith Moskowitz, and Samantha Wenger, for Defendants Columbia Casualty Co., Continental Casualty Co., and Continental Insurance Co.

Poyner Spruill, LLP by J. Nicholas Ellis, Andrew H. Erteschik, and Colin R. McGrath, and Nicolaides Fink Thorpe Michaelides Sullivan, LLP by Amy J. Collins Cassidy, Stephanie M. Flowers, and Monica T. Sullivan, for Defendants Endurance American Insurance Co. and Endurance American Specialty Insurance Co.

Phelps Dunbar, LLP by Thomas M. Contois, Machaella M. Reisman, and Robert D. Whitney, and Dentons US LLP by Deborah J. Campbell, Kathryn M. Guinn, M. Keith Moskowitz, and Samantha Wenger, for Defendants Indian Harbor Insurance Co. and XL Insurance America, Inc.

Cranfill Sumner LLP by Jennifer A. Welch, and Choate, Hall & Stewart, LLP by John C. Calhoun and Robert A. Kole, for Defendants Liberty Insurance Underwriters, Inc., Liberty Surplus Insurance Corp., and Ohio Casualty Insurance Co.

Goldberg Segalla, LLP by David L. Brown, and Willkie Farr & Gallagher, LLP by Joseph G. Davis, John B. Goerlich, Christopher J. St. Jeanos, and Diana C. Vall-llobera, for Defendant National Union Fire Insurance Co. of Pittsburg, PA.

Manning, Fulton & Skinner, P.A. by Brianne M. Glass and Michael T. Medford, and Clausen Miller, P.C. by Amy R. Paulus, for Defendant Old Republic Insurance Co.

Womble Bond Dickinson (US) LLP by M. Elizabeth O'Neill, and Simpson Thacher & Bartlett, LLP by Bryce L. Friedman and Joshua C. Polster, for Defendants St. Paul Fire and Marine Insurance Co., The Travelers Indemnity Co., Travelers Property Casualty Co. of America, and United States Fidelity and Guaranty Co.

Young Moore and Henderson, P.A. by Brian O. Beverly, and Ruggeri Parks Weinberg LLP by Annette P. Rolain and James P. Ruggeri, for Defendant Twin City Fire Insurance Co.

HWG LLP by Amy E. Richardson and Lauren E. Snyder, and Nicolaides Fink Thorpe Michaelides Sullivan, LLP by So Young Lee, Richard H. Nicolaides, Jr., and Madison G. Satterly, for Defendant Mitsui Sumitomo Insurance Co. of America.

Robinson, Judge.

I. INTRODUCTION

4. This matter is primarily an insurance coverage dispute concerning whether Defendants, insurance companies that issued insurance policies to Plaintiffs, owe coverage obligations to Plaintiffs. Specifically, Plaintiffs seek a declaration from the Court that Defendants have certain duties under the policies with respect to nearly 800 underlying lawsuits brought by governmental entities, third-party payors, and

individuals seeking damages related to injuries allegedly caused by Plaintiffs' distribution and dispensing of opioid drugs.

5. At this stage, the Court is presented with preliminary questions. First, the Court must determine whether it is proper to exercise personal jurisdiction over the thirty-five foreign insurance company Defendants. In doing so, the Court is in the rare position of needing to address and apply recent United States Supreme Court precedent to the facts of this case. Next, the Court must address whether, under the North Carolina Declaratory Judgment Act, the Court should exercise its discretion to refuse to render a declaratory judgment as to the liabilities and obligations of Defendants, if any. Finally, the Court will address whether it is more appropriate to stay this action pending a final resolution of a similar, earlier-filed action initiated in the State of Ohio that involves some, but not all, of the parties to this action.

II. FACTUAL AND PROCEDURAL BACKGROUND

6. The Court sets forth herein only those portions of the procedural history relevant to its determination of the Motions.

7. "The Court does not make determinations of fact on motions to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule(s)") but only recites those factual allegations of the Amended Complaint that are relevant and necessary to the Court's determination of the motions to dismiss." *Gateway Mgmt. Servs. v. Carrbridge Berkshire Grp., Inc.*, 2018 NCBC LEXIS 45, at *9 (N.C. Super. Ct. May 9, 2018).

8. However, on the filing of a motion to dismiss for lack of personal jurisdiction, "[e]ither [side] may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615 (2000) (citations omitted). Neither side requests the Court do so. The Court therefore declines to make findings of fact in its later analysis of the Motion to Dismiss pursuant to Rule 12(b)(2).

A. <u>The Parties</u>

9. Plaintiffs The Kroger Co., Kroger Limited Partnership I, and Kroger Limited Partnership II (together, the "Kroger Plaintiffs") are Ohio corporations with their corporate headquarters in Cincinnati, Ohio. (Am. Compl. ¶¶ 10–12, ECF No. 25 ["Am. Compl."].) The Kroger Co. owned or operated pharmacies in North Carolina beginning in the 1980s. (Am. Compl. ¶ 10.)

10. Plaintiffs Harris Teeter Supermarkets, Inc. ("HT Supermarkets"), a North Carolina corporation, and Harris Teeter, LLC ("HT LLC," and together, "HT Plaintiffs," and with the Kroger Plaintiffs, "Plaintiffs"), a North Carolina limited liability company, each maintain their headquarters in Matthews, North Carolina. (Am. Compl. ¶¶ 7–8.) HT LLC's sole member is HT Supermarkets. (Aff. Taryn Mecia ¶ 14, ECF No. 180 ["Mecia Aff."].) The HT Plaintiffs are wholly owned subsidiaries of The Kroger Co., (Am. Compl. ¶ 10), and operate more than 250 stores across eight states, including 149 stores across North Carolina, (Am. Compl. ¶ 9).

11. Defendants are 35 insurance companies that one or more of the Plaintiffs purchased insurance policies from. (Am. Compl. ¶¶ 13–48.) None of the Defendants

is incorporated in North Carolina, and none maintains a principal place of business in this State. (*See* Am. Compl. ¶¶ 13–48.) Plaintiffs allege that Defendants maintain licenses to transact insurance business in North Carolina and that Defendants "issue[d] policies in North Carolina to commercial entities residing within North Carolina." (Am. Compl. ¶¶ 13–48.) The Court more fully addresses herein the respective policies Defendants issued to Plaintiffs. (*See infra* Part II.C.)

B. <u>The Underlying Opioid Lawsuits</u>

12. As of the filing of the Motions, the Kroger Plaintiffs were named as defendants in at least 797 lawsuits involving the increased overuse and misuse of, and overdose deaths attributed to, prescription opiates (the "Underlying Opioid Lawsuits"). (*See* Aff. Daniel M. Sullivan ¶¶ 5–6, Ex. B at 16–98, ECF No. 142.1 ["Sullivan Aff. (Ex(s).)"][1] (providing a color-coded spreadsheet of the opioid lawsuits naming the Kroger Plaintiffs and their affiliates as defendants as of February 2023).) Of those 797 lawsuits, 14 were initiated in North Carolina, (Sullivan Aff. Ex. B at 56–57), and 57 were initiated in Ohio, (Sullivan Aff. Ex. B at 58–61). At the Hearing, counsel represented that the Kroger Plaintiffs have since been named in additional lawsuits arising from similar allegations that the Kroger Plaintiffs distributed and/or dispensed prescription opiates in a wrongful manner.

13. As of the filing of the Motions, the HT Plaintiffs were named as defendants in only one of the Underlying Opioid Lawsuits, *Durham County v. AmerisourceBergen*

[1] In this instance, Mr. Sullivan's Affidavit and the exhibits to it may be identified by the same ECF No. Rather than citing in full at each citation to a new exhibit, the Court uses the abbreviation ("Sullivan Aff. Ex(s). [ ]–[ ] at [ ]") for brevity. The exhibits to Mr. Sullivan's Affidavit are located at ECF Nos. 142.1–.8.

Drug Corp., et al., Case No. 1:19-op-45346-DAP (the "*Durham County* Bellwether"). (*See* Sullivan Aff. Ex. B at 57, Ex. C.) The *Durham County* Bellwether was initiated in the U.S. District Court for the Middle District of North Carolina. (*See* Aff. Christopher J. St. Jeanos Ex. F at 1 n.3, n.6, 19, ECF No. 141.1 ["St. Jeanos Aff. (Ex(s).)"].)[2] That matter has since been transferred from North Carolina to the Multi-District Litigation ("MDL") before Federal District Court Judge Dan Aaron Polster in the Northern District of Ohio, bearing the same case caption and assigned MDL No. 2804. (St. Jeanos Aff. Ex. G.)

14. The *Durham County* Bellwether complaint alleges a claim for relief of public nuisance against Plaintiffs. (St. Jeanos Aff. Ex. F at 229–37.) Plaintiff Durham County alleges therein that Plaintiffs, as the natural defendants in that action, "created and maintained a public nuisance by marketing, distributing, dispensing, and selling opioids in ways that have subverted the public order, affected the health of Durham County's community, and caused an unreasonable interference with a right common to the general public." (St. Jeanos Aff. Ex. F at ¶ 730.)

15. The Kroger Plaintiffs were named in another bellwether action, which originated in Federal Court in Ohio, *Montgomery Cty. Bd. of Cty. Comm'rs v. Cardinal Health, Inc., et al.*, No. 1:18-op-46326-DAP (the "*Montgomery County* Bellwether"). (Sullivan Aff. Ex. MM at 1 n.3.) The *Montgomery County* Bellwether was transferred from the U.S. District Court for the Southern District of Ohio to the MDL before

[2] In this instance, Mr. St. Jeanos's Affidavit and the exhibits to it are identified by the same ECF No. To cite the exhibits to the Affidavit, the Court uses the abbreviation ("St. Jeanos Aff. Ex(s). [ ]–[ ] at [ ]") for brevity. The St. Jeanos Affidavit and Exhibits are located at ECF No. 141.1.

Judge Polster. (*See* Sullivan Aff. Ex. MM at ¶ 32.) The plaintiffs in that action allege that the Kroger Plaintiffs, as the natural defendants, "funneled far more opioids into Ohio and [Montgomery] County than could have been expected to serve legitimate medical use," but that they "did not report a single suspicious order in the County between 2007 and 2014." (Sullivan Aff. Ex. MM at ¶ 456.) The complaint also alleges that the Kroger Plaintiffs' policies and procedures were "particularly glaring" before 2005. (Sullivan Aff. Ex. MM at ¶ 465.)

16. The *Montgomery County* Bellwether complaint asserts a claim for qualified public nuisance, alleging that the Kroger Plaintiffs "created and maintained a public nuisance through their ongoing conduct of marketing, distributing, dispensing, and selling opioids . . . in a manner which caused prescriptions and sales to skyrocket in [p]laintiff's community." (Sullivan Aff. Ex. MM at 241–42.)

17. Several other complaints from the Underlying Opioid Lawsuits were filed in this matter for the Court's consideration. (*See* St. Jeanos Aff. Exs. E, M–N; Aff. Gerald P. Konkel Exs. 8–20, ECF Nos. 181, 181.2–.4 ["Konkel Aff. (Ex(s).)"] (providing the thirteen complaints for the Underlying Opioid Lawsuits initiated in North Carolina, excluding the *Durham County* Bellwether).)[3] For example, the Complaint filed in Kentucky action *Paintsville Hosp. Co., LLC, et al. v. Amneal Pharm., LLC, et al.*, No. 20-CI-00151 (Ky. Cir. Ct. June 8, 2020), contains seven claims for relief against at least 62 defendants, including the Kroger Plaintiffs. (St. Jeanos. Aff. Ex. E

[3] In this instance, the exhibits to Mr. Konkel's Affidavit may be identified by the same ECF No. Rather than citing in full at each citation to a new exhibit, the Court uses the abbreviation ("Konkel Aff. Ex(s). [ ]–[ ] at [ ]") for brevity. The exhibits to Mr. Konkel's Affidavit may be found at ECF Nos. 181.1–.5.

["Ky. Compl."].) The 380-page complaint alleges that the Kroger Plaintiffs, as a national operator of over 2,268 pharmacies, "distributed prescription opioids throughout the United States" and that the "volumes of opioids distributed to and dispensed by [Kroger] pharmacies were disproportionate to non-controlled drugs and other products sold by these pharmacies[.]" (Ky. Compl. ¶¶ 267, 269.) Like the complaints in the *Durham County* and *Montgomery County* Bellwethers, the *Paintsville* Complaint alleges a claim for nuisance. (*See* Ky. Compl. ¶¶ 821–35.)

18. Numerous additional complaints filed in the Underlying Opioid Lawsuits allege that the Kroger Plaintiffs engaged in similar conduct and raise nuisance claims against them. (*See, e.g.*, St. Jeanos Aff. Ex. M (Complaint in California action *Cty. of Yuba v. AmerisourceBergen Drug Corp., et al.*, alleging a claim for public nuisance against the Kroger Plaintiffs and others for their alleged unlawful distribution and sale of prescription opioids), Ex. N (Complaint in New York action *Painting Indus. Ins. Fund v. Purdue Pharma L.P., et al.*, alleging a claim for public nuisance against the Kroger Plaintiffs, among other claims, for their alleged unlawful conduct which "severely impacted public health" such that the "public nuisance is commonly referred to as a 'crisis' or an 'epidemic' ").)

C. Insurance Policies at Issue[4]

19. Plaintiffs allege that Defendants issued insurance and fronting policies to them, and that those policies covered "periods when the bodily injuries alleged in the

[4] Numerous policies that Plaintiffs purchased from Defendants were filed by the parties in support of and in opposition to the Motions. Rather than identifying each filed policy, for brevity the Court cites to those policies which appear in the record where appropriate.

[Underlying] Opioid Lawsuits potentially and/or actually took place." (Am. Compl. ¶ 51.) For purposes of this section only, the Court recites the allegations of the Amended Complaint without restating that they are Plaintiffs' allegations.

20. ACE American Insurance Company ("ACE American") issued at least nine policies to the HT Plaintiffs for the period 1 May 2014 to 1 March 2023, (Am. Compl. ¶ 57; *see, e.g.*, Sullivan Aff. Exs. II–KK (including the policies for the period 1 March 2020 to 1 March 2023)), and twenty-three policies to the Kroger Plaintiffs for the period 1 January 2003 to 1 March 2020, (Am. Compl. ¶ 58; Aff. Jay Chung Exs. 5–27, ECF Nos. 183.1–.2 ["Chung Aff. Ex(s)."]).[5]

21. ACE Property and Casualty Insurance Company ("ACE P&C") issued at least two policies to the Kroger Plaintiffs for the period 25 January 2018 to 1 March 2020. (Am. Compl. ¶ 60; Chung Aff. Exs. 28–29.)

22. Federal Insurance Company ("Federal Insurance" and, together with ACE American and ACE P&C, the "Chubb Defendants") issued at least three policies to the HT Plaintiffs for the period 1 May 1995 to 1 May 1998, (Am. Compl. ¶ 71), and twenty-five policies to the Kroger Plaintiffs for the period 1 January 1994 to 25 January 2019, (Am. Compl. ¶ 72; Chung Aff. Exs. 30–53 (excluding the policy issued for the period 1 January 1998 to 1 January 1999)).

23. National Union Fire Insurance Company of Pittsburgh, PA ("National Union") issued at least eleven policies to the Kroger Plaintiffs for the period

[5] In this instance, the exhibits to Mr. Chung's Affidavit may be identified by the same ECF No. Rather than citing in full at each citation to a new exhibit, the Court uses the abbreviation ("Chung Aff. Ex(s). [ ]–[ ] at [ ]") for brevity. The exhibits to Mr. Chung's Affidavit may be found at ECF Nos. 183.1–.16.

1 January 2000 to 25 January 2007, and 25 January 2015 to 25 January 2018. (Am. Compl. ¶ 59; Chung Aff. Exs. 54–63.)

24. Allied World National Assurance Company ("Allied World") issued at least one policy to the HT Plaintiffs for the period 1 May 2013 to 1 May 2014, (Am. Compl. ¶ 61; *see* Mecia Aff. Ex. 8, ECF No. 180.8 (providing the policy for the period 1 May 2013 to 1 May 2014)), and at least two policies to the Kroger Plaintiffs for the period 25 January 2016 to 25 January 2018, (Am. Compl. ¶ 62; Chung Aff. Exs. 64–65).

25. American Guarantee and Liability Insurance Company ("American Guarantee") issued at least three policies to the HT Plaintiffs for the period 1 May 2008 to 1 May 2011, (Am. Compl. ¶ 63), and at least fifteen policies to the Kroger Plaintiffs for the period 1 January 2001 to 1 March 2020, (Am. Compl. ¶ 64; Chung Aff. Exs. 66–80).

26. Aspen American Insurance Company ("Aspen American") issued at least three policies to the Kroger Plaintiffs for the period 25 January 2017 to 1 March 2020. (Am. Compl. ¶ 65; Chung Aff. Exs. 81–83.)

27. AXIS Surplus Insurance Company ("AXIS") issued at least one policy to the Kroger Plaintiffs for the period 25 January 2016 to 25 January 2017. (Am. Compl. ¶ 66; Chung Aff. Ex. 84.)

28. Columbia Casualty Company ("Columbia Casualty") issued at least one policy to the Kroger Plaintiffs for the period 25 January 2016 to 25 January 2017. (Am. Compl. ¶ 67; Chung Aff. Ex. 85.)

29. Continental Casualty Company ("Continental Casualty") issued at least five policies to the Kroger Plaintiffs for the period 1 January 1995 to 1 January 2000. (Am. Compl. ¶ 68; Chung Aff. Exs. 86–89 (missing only the policy allegedly issued for the period 1 January 1998 to 1 January 1999).)

30. Continental Insurance Company ("Continental Insurance") issued at least two policies to the Kroger Plaintiffs for the period 25 January 2018 to 1 March 2020. (Am. Compl. ¶ 69; Chung Aff. Exs. 90–91.)

31. Endurance American Specialty Insurance Company ("Endurance Specialty") issued at least four policies to the Kroger Plaintiffs for the period 25 January 2016 to 1 March 2020.[6] (Am. Compl. ¶ 70; Chung Aff. Exs. 92–95.)

32. Great American Alliance Insurance Company issued at least six policies to the HT Plaintiffs, (Am. Compl. ¶ 73); Great American Assurance Company issued at least three policies to the HT Plaintiffs, (Am. Compl. ¶ 74); Great American Insurance Company issued at least five policies to the HT Plaintiffs, (Am. Compl. ¶ 75); and Great American Insurance Company of New York ("Great American NY") issued at least thirteen policies to the HT Plaintiffs, (Am. Compl. ¶ 76; Mecia Aff. Ex. 6, ECF No. 180.6 (including the HT Plaintiffs' policy for the period 1 May 2013 to 1 May 2014)), and eight to the Kroger Plaintiffs, (Am. Compl. ¶ 77; Chung Aff. Exs. 96–103).

[6] One of the policies that Plaintiffs allege was issued by Endurance Specialty appears to have been issued by Endurance American Insurance Company for 25 January 2019 to 1 March 2020, bearing policy number ELD30000047103. (Chung Aff. Ex. 95.)

33. Great American Spirit Insurance Company ("Great American Spirit") issued at least five policies to the Kroger Plaintiffs for the period 25 January 2015 to 1 March 2020. (Am. Compl. ¶ 78; Chung Aff. Exs. 104–08.)

34. Travelers Indemnity Company ("Travelers Indemnity") issued at least four policies to the HT Plaintiffs for the period 1 June 2000 to 1 May 2004, (Am. Compl. ¶ 79), and Travelers Property Casualty Company of America ("Travelers Property") issued at least fifteen policies to the HT Plaintiffs for the period 1 May 1995 to 1 June 2000, and 1 May 2003 to 1 May 2013, (Am. Compl. ¶ 91; Mecia Aff. Ex. 5, ECF No. 180.5 (including the policy for the period 1 May 2012 to 1 May 2013)).

35. Indian Harbor Insurance Company ("Indian Harbor") issued at least two policies to the Kroger Plaintiffs for the period 25 January 2016 to 25 January 2018. (Am. Compl. ¶ 80; Chung Aff. Exs. 109–10.)

36. Liberty Insurance Underwriters, Inc. ("Liberty Underwriters") issued at least nine policies to the HT Plaintiffs for the period 1 May 2004 to 1 May 2014. (Am. Compl. ¶ 81; Mecia Aff. Ex. 7, ECF No. 180.7 (including the policy for the period 1 May 2013 to 1 May 2014).) Liberty Underwriters also issued at least eight policies to the Kroger Plaintiffs for the period 25 January 2009 to 25 January 2017. (Am. Compl. ¶ 82; Chung Aff. Exs. 111–17 (missing only the policy allegedly issued for the period 25 January 2016 to 25 January 2017).)

37. Liberty Surplus Insurance Corporation ("Liberty Surplus") issued at least three policies to the Kroger Plaintiffs for the period 25 January 2017 to 25 January 2019. (Am. Compl. ¶ 83; Chung Aff. Exs. 119–21.)

38. Ohio Casualty Insurance Company ("Ohio Casualty") issued at least one policy to the HT Plaintiffs for the period 1 May 2007 to 1 May 2008. (Am. Compl. ¶ 84.)

39. Old Republic Insurance Company ("Old Republic") issued at least three policies to the Kroger Plaintiffs for the period 1 January 2003 to 25 January 2006. (Am. Compl. ¶ 85; Chung Aff. Exs. 122–23 (missing only the policy allegedly issued for the period 1 January 2003 to 3 February 2004).)

40. St. Paul Fire and Marine Insurance Company ("St. Paul Fire") issued at least four policies to the HT Plaintiffs for the period 1 May 2003 to 1 May 2007, (Am. Compl. ¶ 86), and at least four policies to the Kroger Plaintiffs for the period 1 January 2002 to 25 January 2006, (Am. Compl. ¶ 87; Chung Aff. Exs. 124–27).

41. Starr Surplus Lines Insurance Company ("Starr") issued at least three policies to the Kroger Plaintiffs for the period 25 January 2012 to 25 January 2015. (Am. Compl. ¶ 88; Chung Aff. Exs. 128–30.)

42. Steadfast Insurance Company ("Steadfast") issued at least three policies to the Kroger Plaintiffs for the period 25 January 2016 to 25 January 2019. (Am. Compl. ¶ 89; Chung Aff. Exs. 131–33.)

43. Mitsui Sumitomo Insurance Company of America ("Mitsui Sumitomo") issued at least two policies to the HT Plaintiffs for the period 1 May 1994 to 1 May 1996. (Am. Compl. ¶ 90.)

44. Twin City Fire Insurance Company ("Twin City") issued at least four policies to the HT Plaintiffs for the period 1 May 1997 to 1 June 2000, and 1 May 2013

to 1 May 2014. (Am. Compl. ¶ 92; Mecia Aff. Ex. 9, ECF No. 180.9 (including the policy for the period 1 May 2013 to 1 May 2014).)

45. United States Fidelity and Guaranty Company ("U.S. Fidelity") issued at least three policies to the HT Plaintiffs for the period 1 June 2000 to 1 May 2003, (Am. Compl. ¶ 93), and at least one policy to the Kroger Plaintiffs for the period 1 January 2000 to 1 January 2003, (Am. Compl. ¶ 94; Chung Aff. Ex. 134).

46. United States Fire Insurance Company ("U.S. Fire") issued at least one policy to the HT Plaintiffs for the period 1 May 1995 to 1 May 1996. (Am. Compl. ¶ 95.)

47. Westport Insurance Corporation ("Westport") issued at least six policies to the HT Plaintiffs for the period 1 May 1996 to 1 May 2002. (Am. Compl. ¶ 96.)

48. XL Insurance America, Inc. ("XL America") issued at least twelve policies to the HT Plaintiffs for the period 1 May 2002 to 1 May 2014, (Am. Compl. ¶ 97; Mecia Aff. Ex. 10, ECF No. 180.10 (providing the policy for the period 1 May 2013 to 1 May 2014)), and at least nine policies to the Kroger Plaintiffs for the period 25 January 2006 to 25 January 2016, (Am. Compl. ¶ 98; Chung Aff. Exs. 135–43).

49. Zurich American Insurance Company ("Zurich") issued at least one policy to the HT Plaintiffs for the period 1 May 2004 to 1 May 2005. (Am. Compl. ¶ 99.)

D. The *Acuity* Decision and the Ohio Insurance Action

50. On 7 September 2022, the Supreme Court of Ohio filed its opinion in *Acuity v. Masters Pharm., Inc.*, 205 N.E.3d 460 (Ohio 2022). There, the Supreme Court of Ohio considered whether an insurer owed a duty to defend its insured in lawsuits

brought by city and county governments for losses allegedly caused by the opioid epidemic. *Acuity*, 205 N.E.3d at 462. The trial court held, in part, that the complaints in the underlying opioid lawsuits did not seek damages because of bodily injury as the governmental entities sought damages for economic loss. *Id.* at 463.

51. The Supreme Court of Ohio held that governmental entities suing for alleged economic losses sustained by their citizens caused by the opioid epidemic were not seeking "damages because of bodily injury."[7] *Id.* at 473 ("[T]he governments here do not seek damages because of any particular opioid-related injury sustained by a citizen."). The majority wrote that, "[t]o hold otherwise would be to conclude that a duty to defend exists simply because a consequence of the alleged public-health crisis is bodily injury, regardless of the fact that the underlying parties do not seek damages because of any particular bodily injury sustained by a person." *Id.* at 474.

52. Roughly a month later, on 12 October 2022, the Chubb Defendants initiated an action in Hamilton County, Ohio seeking declarations that they are not required to provide coverage to the Kroger Plaintiffs, as the natural defendants, for underlying

[7] The Court's analysis in *Acuity* draws attention to the "growing and diverging body of case law" on this issue. *Acuity*, 205 N.E.3d at 465. Importantly, the Court highlights the varying interpretations of the meaning of "damages because of bodily injury." On one side there are courts which have interpreted it to invoke the insurer's duty to defend because the governmental entities sought damages for bodily injuries to their citizens, and thus necessarily also sought to recover costs related to emergency medical treatment and additional services. *Id.* at 465–66 (citing *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771, 775 (7th Cir. 2016); *Giant Eagle, Inc. v. Am. Guar. & Liab. Ins. Co.*, 499 F. Supp. 3d 147 (W.D. Pa. 2020)). The Court contrasts that interpretation with the one it chooses, noting where other courts have concluded that no duty to defend existed because the governmental entities "sought to recover their own increased economic costs resulting from a public-health crisis" without tying their claims to "an individual opioid-related injury[.]" *Id.* at 466 (citing *ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239, 253–54 (Del. 2022); *Westfield Natl. Ins. Co. v. Quest Pharms., Inc.*, 2021 U.S. Dist. LEXIS 86931, at *18 (W.D. Ky. May 6, 2021)).

opioid litigation.[8] (St. Jeanos Aff. ¶ 16, Ex. J.) The Complaint in that action contains three claims for declaratory judgment, seeking a declaration that: (1) the Chubb Defendants have "no duty to defend or pay for Kroger's defense of the Opioid Lawsuits"; (2) "under the terms, conditions, and exclusions of the Policies, Chubb has no duty to indemnify Kroger for the Opioid Lawsuits"; and (3) if the Chubb Defendants are found liable under the policies issued to The Kroger Co., they are entitled "to the proper share of equitable contribution from the [o]ther [i]nsurers, including but not limited to a declaration that Chubb is not responsible for any share of Kroger's defense or indemnity costs attributable to periods outside the effective dates of the Chubb Policies." (St. Jeanos Aff. Ex. J at ¶¶ 45, 48, 50.) The Chubb Defendants also named many of the Kroger Plaintiffs' other insurers as defendants.[9] (St. Jeanos Aff. Ex. J at 1–4.)

53. On 13 October 2022, National Union did the same.[10] (St. Jeanos Aff. ¶ 17, Ex. K.) National Union's Complaint contains two claims for declaratory judgment, seeking a decree that (1) the policies issued by it to The Kroger Co. do not create a duty to defend with regard to the Underlying Opioid Lawsuits; and (2) under the

[8] That action is captioned *Ace Am. Ins. Co. et al. v. The Kroger Co., et al.*, A 2203712 (Hamilton Cty. Ct. C.P.). (*See* Sullivan Aff. ¶ 23.)

[9] The Chubb Defendants named four defendants which are not parties in this action: AIU Insurance Company; Lumbermens Mutual Casualty Company; XL Europe Limited; and XL Insurance Company of New York. (*See* St. Jeanos Aff. Ex. J.) At the Hearing, Plaintiffs' counsel represented to the Court that: AIU Insurance Company and XL Insurance Company of New York did not issue any policies to the Kroger Plaintiffs; Lumbermens Mutual Casualty Company was in liquidation, so Plaintiffs did not add it to this action; and XL Europe Limited did not issue any general liability policies to the Kroger Plaintiffs.

[10] That action is captioned *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa v. The Kroger Co.*, A 2203724, (Hamilton Cty. Ct. C.P.). (*See* Sullivan Aff. ¶¶ 24–25.)

terms of the policies it issued to The Kroger Co., National Union has no duty to indemnify. (St. Jeanos Aff. Ex. K at ¶¶ 33–34, 37–38.)

54. On 9 February 2023, the Ohio Court consolidated the two pending actions initiated by the Chubb Defendants and National Union (the "Ohio Insurance Action"). (Sullivan Aff. ¶ 25, Ex. J.)

55. This action was initiated by Plaintiffs shortly thereafter on 8 November 2022. (*See* Compl., ECF No. 28.) Several Defendants thereafter filed crossclaims in the Ohio Insurance Action.

56. On 29 November 2022, American Guarantee and Steadfast jointly filed their answer to the Chubb Defendants' Complaint, and a crossclaim for declaratory judgment. (*See* Sullivan Aff. ¶ 40, Ex. Y.)

57. On 5 December 2022, the Kroger Plaintiffs filed their Motion to Dismiss or Stay in the Ohio Insurance Action. (St. Jeanos Aff. Ex. L.) That matter came on for hearing on 4 April 2023 before Hon. Lisa Allen in the Court of Common Pleas of Hamilton County, Ohio. (*See* St. Jeanos Aff. ¶ 18; Sullivan Aff. Ex. J.) As far as the Court is aware, no order has been entered.

58. From 12 December to 15 December 2022, Allied World, Aspen American, Endurance American, Endurance Specialty, Great American Insurance, Great American NY, Great American Spirit, Old Republic, Starr, St. Paul Fire, and U.S. Fidelity filed answers and crossclaims to the Chubb Defendants' Complaint in the Ohio Insurance Action. (Sullivan Aff. ¶¶ 33–39, Exs. R–X.) In January 2023, AXIS, Columbia Casualty, Continental Insurance, Indian Harbor, Liberty Underwriters,

National Union, and XL Insurance also filed answers and crossclaims to the Chubb Defendants' complaint. (Sullivan Aff. ¶¶ 26–32, Exs. K–Q.)

59. The Motions in this action were thereafter filed on 27 March 2023. (Mot. Dismiss; Mot. Stay.)

E. The Parties' North Carolina Contacts

1. Plaintiffs' Business in North Carolina

60. As discussed above, the HT Plaintiffs are North Carolina corporations. On 28 January 2014, HT Supermarkets merged with Hornet Acquisition, Inc., a corporate holding company organized under the laws of North Carolina with its mailing address in Cincinnati, Ohio. (St. Jeanos Aff. Ex. B.) It is undisputed that the HT Plaintiffs became wholly owned subsidiaries of the Kroger Plaintiffs on this date. (*See* Defs.' Br. Supp. Mot. Dismiss 5, ECF No. 136 ["Br. Supp. Mot. Dismiss"] (citing St. Jeanos Aff. Ex. B); Mecia Aff. ¶ 11.) The Kroger Co. has roughly 200 wholly owned subsidiaries, at least twelve of which are incorporated in North Carolina. (*See* St. Jeanos Aff. Ex. A at 103–09 (providing the subsidiaries of The Kroger Co. in its Annual Report for the 2021 fiscal year).)

61. According to the HT Supermarkets 2021 Annual Report, its registered agent is in Raleigh, North Carolina, and its principal office is in Matthews, North Carolina. (Sullivan Aff. Ex. NN.) Four of the corporation's ten officers reside in North Carolina, with the remaining six residing in Ohio. (Sullivan Aff. Ex. NN.)

62. The HT Plaintiffs and their predecessor entities have operated grocery stores in North Carolina since the 1960s and pharmacies since 1993. (Mecia Aff.

¶¶ 16–17.) The HT Plaintiffs have 149 of their 257 total grocery stores in this State, with food distribution centers in Greensboro and Indian Trail, North Carolina. (Mecia Aff. ¶ 18.)

63. The HT Plaintiffs have "not maintained independent business activities in Ohio and ha[ve] never been registered to do business in Ohio." (Mecia Aff. ¶ 22.) Furthermore, HT Supermarkets maintained "its own general liability insurance program and was issued policies providing annual primary and excess insurance" prior to its acquisition by The Kroger Co. in 2014. (Mecia Aff. ¶ 25; Mecia Aff. Exs. 5–10, ECF Nos. 180.5–.10 (providing insurance policies that HT Supermarkets purchased from various Defendants).)

64. The Kroger Plaintiffs are Ohio corporations doing business in North Carolina. (Am. Compl. ¶¶ 10–12.) Plaintiffs allege that The Kroger Co. has "owned and operated pharmacies in North Carolina since the 1980s, employing and serving thousands of North Carolinians." (Am. Compl. ¶ 10.)

65. The Kroger Plaintiffs are registered to do business in North Carolina and The Kroger Co. filed its most recent annual report here on 24 April 2023. (Aff. Jay Chung ¶ 8, ECF No. 183 ["Chung Aff."].) The Kroger Plaintiffs operated grocery stores in North Carolina from 1989 to 2018, but they closed the remaining fourteen North Carolina stores in 2018, selling eight to the HT Plaintiffs. (Chung Aff. ¶¶ 10–11.)

66. Presently, the Kroger Plaintiffs are "in the process of opening a customer fulfillment center in North Carolina, the purpose of which is to enable Kroger to deliver groceries to e-commerce customers" in this State. (Chung Aff. ¶ 13.)

2. Defendants' North Carolina Insurance Business

67. As noted previously, none of the Defendants is incorporated in North Carolina, and none maintains its principal place of business or registered agent in this State. (*See* Am. Compl. ¶¶ 13–47; ECF Nos. 141.3–.21 (providing the affidavits of counsel for various Defendants, which affirm that those Defendants are not incorporated in this State, and providing the states in which they are incorporated and/or the cities where they maintain a principal place of business).)

68. It appears that Great American Spirit maintained a North Carolina Professional Risk Office at 11325 N. Community House Rd. Suite 200 in Charlotte from at least 25 January 2015 to 25 January 2020. (*See* Chung Aff. Exs. 104–08 (providing at Item 6 that "All other Notices . . . [t]o the Company" should be sent to that office in Charlotte).) Based on the record before the Court, Great American Spirit is the only Defendant which maintained an office in this State.

69. Plaintiffs allege that Defendants are licensed insurers in the State of North Carolina, and that they issued policies in North Carolina to commercial entities residing in this State. (Am. Compl. ¶¶ 13–47.) Furthermore, it appears that Defendants each appointed the North Carolina Commissioner of Insurance ("Commissioner") to be their agent for purposes of service of process pursuant to N.C.G.S. §§ 58-16-30 or 58-21-100. (Konkel Aff. Ex. 21.) Doing so was a requirement

for licensure pursuant to Chapter 58, Articles 16 and 21 of the North Carolina General Statutes.

70. As discussed in detail herein, Defendants issued insurance policies to The Kroger Co. and HT Supermarkets beginning as early as 1994. (*See* Chung Aff. Ex. 30 (providing a policy The Kroger Co. purchased from Federal Insurance for the period 1 January 1994 to 1 January 1995, which referenced associated policies with Continental Casualty).)

71. A vast majority of the policies in the record were issued when Plaintiffs were engaged in selling pharmaceuticals from their grocery store pharmacies in North Carolina. In fact, of the roughly 140 policies the Kroger Plaintiffs purchased from Defendants, only sixteen provided coverage for 2018 or the years after. (*See generally* Chung Aff. Exs. 5–143 (providing the insurance policies of record that the Kroger Co. purchased from Defendants).)

72. Based on the information of record, it appears that from 2013 to 2021, Defendants generated $10,464,066,455.00 in total direct premiums written in North Carolina and $10,238,904,079.00 in total direct premiums earned in North Carolina. (Konkel Aff. Ex. 22 (providing annual dollar amount totals of each Defendant's property and casualty insurance business in this State); Chirozzi Aff. Exs. 1, 3, 5, 7, 9, 11, 13, 32–33, ECF Nos. 184, 184.1–.5 (providing the data that was ultimately combined and summarized to get the total numbers stated in this paragraph).) Further, Defendants paid a combined $5,166,729,074.00 in total direct losses in North

Carolina and incurred a combined $5,567,378,332.00 in direct losses incurred in North Carolina. (Konkel Aff. Ex. 22.)

73. Following full briefing on the Motions, the Court held the Hearing on 19 July 2023, at which all parties were present and represented through counsel. (*See* ECF No. 206.) The Motions are ripe for resolution.

III. LEGAL STANDARD

A. Motion to Dismiss Pursuant to Rule 12(b)(2)

74. When a defendant moves to dismiss a complaint under Rule 12(b)(2) for lack of personal jurisdiction, the plaintiff carries the burden of establishing that the trial court possesses personal jurisdiction over the defendant. *See Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 68 (2010). "When the parties have submitted affidavits and other documentary evidence, a trial court reviewing a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) must determine whether the plaintiff has established that jurisdiction exists by a preponderance of the evidence." *State ex rel. Stein v. E. I. du Pont de Nemours & Co.*, 382 N.C. 549, 555 (2022). Once affidavits and evidence challenging personal jurisdiction are submitted, "unverified allegations in a complaint conflicting with that evidence may no longer be taken as true[,]" though "allegations in [the] complaint uncontroverted by [the evidence] are still taken as true." *Weisman v. Blue Mt. Organics Distrib., LLC*, 2014 NCBC LEXIS 41, at **2 (N.C. Super. Ct. Sept. 5, 2014) (citing *Banc of Am. Sec., LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693–94 (2005)).

B. Motion to Dismiss Pursuant to Rule 12(b)(6)

75. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court reviews the allegations in the Amended Complaint in the light most favorable to Plaintiffs. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). The Court's inquiry is "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987) (citation omitted). The Court accepts all well-pleaded factual allegations in the relevant pleading as true. *See Krawiec v. Manly*, 370 N.C. 602, 606 (2018). The Court is therefore not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274 (2005) (cleaned up).

76. Furthermore, the Court "can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016) (citation omitted). The Court may consider these attached or incorporated documents without converting the Rule 12(b)(6) motion into a motion for summary judgment. *Id.* (citation omitted). Moreover, the Court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001) (citation omitted).

77. Our Supreme Court has noted that "[i]t is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166 (2002)). This standard of review for Rule 12(b)(6) is the standard our Supreme Court "uses routinely . . . in assessing the sufficiency of complaints in the context of complex commercial litigation." *Id.* at 615 n.7 (citations omitted).

IV. ANALYSIS

78. The Court addresses the Motions in turn, beginning with the Motion to Dismiss. The Court first considers whether it is proper to exercise personal jurisdiction over certain Defendants, and then turns to whether the Court should exercise its discretion to refuse to render a declaratory judgment as to the liabilities and obligations, if any, of Defendants. The Court concludes its analysis of the Motions by addressing the Motion to Stay.

A. Motion to Dismiss Pursuant to Rule 12(b)(2)

79. Allied World, American Guarantee, Aspen American, AXIS, the Chubb Defendants, Columbia Casualty, Continental Casualty, Continental Insurance, Endurance American, Endurance Specialty, Great American Spirit, Indian Harbor, Liberty Underwriters, Liberty Surplus, National Union, Old Republic, St. Paul Fire, Starr, Steadfast, U.S. Fidelity, and XL Insurance (together, the "PJ Moving

Defendants") request dismissal pursuant to Rule 12(b)(2) for lack of personal jurisdiction.[11] (Mot. Dismiss 2 n.2.)

80. Plaintiffs allege that the Court has personal jurisdiction over Defendants "pursuant to applicable North Carolina law" because:

> (i) the Defendant Insurers have engaged in substantial business activity within North Carolina including but not limited to being authorized to sell or write insurance in North Carolina, (ii) the Harris Teeter Plaintiffs were and are residents of and the Kroger Plaintiffs had and have substantial operations alleged to be at issue in underlying Opioid Lawsuits in North Carolina when the events out of which the claims in this action arose took place, (iii) the Policies at issue are contracts of insurance on property, lives, or interests in this State, (iv) the performance of the Insurers' duties under the Policies at issue are required to be undertaken in North Carolina, and/or (v) injurious consequences of Defendant Insurers' denial of their contractual obligations to provide coverage have been or will be sustained in North Carolina.

(Am. Compl. ¶ 49.)

81. Following the filing of the Motions, and the completion of briefing, Plaintiffs filed their Suggestion of Subsequently Decided Authority Under BCR 7.9 ("Suggestion of Subsequent Authority"). (ECF No. 228 ["BCR 7.9 Filing"].) In the Suggestion of Subsequent Authority, Plaintiffs cite to the United States Supreme Court's recent decision, *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023), arguing that "consistent with due process, a state may require a foreign

[11] Great American Alliance Insurance Company, Great American Assurance Company, Great American Insurance Company, Great American NY, Ohio Casualty, Mitsui Sumitomo, Travelers Indemnity, Travelers Property Casualty, Twin City Fire, U.S Fire, Westport Insurance Corporation, and Zurich American Insurance Company do not challenge personal jurisdiction. (*See* Mot. Dismiss 1–2 n.2; Def. Twin City Joinder Mot. Dismiss, ECF No. 139 (Twin City Fire joining in the Motion to Dismiss only pursuant to Rule 12(b)(6)); ECF No. 140 (Mitsui Sumitomo joining in the Motion to Dismiss only pursuant to Rule 12(b)(6)).)

corporation to consent to personal jurisdiction before registering to do business within a state." (BCR 7.9 Filing.) Plaintiffs contend that the *Mallory* decision supports the Court's exercise of personal jurisdiction over PJ Moving Defendants because the PJ Moving Defendants each registered to do insurance business in North Carolina. (*See* BCR 7.9 Filing (citing N.C.G.S. §§ 1-75.4(1)(d), 58-16-5, 58-16-30).)

82. Determining whether a non-resident defendant is subject to personal jurisdiction in this State's courts involves a two-step analysis. "First, North Carolina's long-arm statute, N.C.G.S. § 1-75.4, must authorize a court to exercise jurisdiction." *Shaeffer v. SingleCare Holdings, LLC*, 384 N.C. 102, 106 (2023) (citation omitted). Second, the Fourteenth Amendment's Due Process Clause must permit the Court to exercise jurisdiction over a defendant. *Id.* (citation omitted). "In practice, the analysis often collapses into one inquiry because the North Carolina Supreme Court has broadly construed the long-arm statute 'to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process.' " *State ex rel. Stein v. Bowen*, 2022 NCBC LEXIS 127, at **10 (N.C. Super. Ct. Oct. 27, 2022) (citing *Beem USA LLLP v. Grax Consulting, LLC*, 373 N.C. 297, 302 (2020)).

83. Due process requires a defendant to have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (cleaned up). "Minimum contacts are established through 'some act by which the defendant purposefully avails itself of the privilege of conducting activities

within the forum State, thus invoking the benefits and protections of its laws.' " *Shaeffer*, 384 N.C. at 107 (quoting *Beem USA*, 373 N.C. at 303). Plaintiffs have the burden of proving that PJ Moving Defendants "deliberately reached out beyond [their] home—by, for example, exploiting a market in the forum State or entering a contractual relationship centered there." *Mucha v. Wagner*, 378 N.C. 167, 171 (2021) (cleaned up).

84. "Minimum contacts may give rise to one of two forms of jurisdiction: general or specific jurisdiction." *Schaeffer*, 384 N.C. at 107 (citation omitted). "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe*, 326 U.S. at 317). "When a defendant's conduct in a state is not so extensive, [specific] jurisdiction may . . . be proper if 'the litigation results from the alleged injuries that arise out of or relate to the defendant's activities.' " *Shaeffer*, 384 N.C. at 107 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

1. Long Arm Statute

85. North Carolina's long-arm statute, N.C.G.S. § 1-75.4, provides that the Court may exercise personal jurisdiction over a party that is "engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)d. Our Supreme Court has interpreted this provision as permitting "North Carolina courts [to exercise] the full jurisdictional powers

permissible under federal due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676 (1977); *see also Schaeffer*, 384 N.C. at 106. Thus, the Court may exercise jurisdiction over PJ Moving Defendants to the extent permitted by federal due process.

86. PJ Moving Defendants contend that, under N.C.G.S. § 1-75.4(1)d, whether personal jurisdiction is appropriate depends on whether the alleged harm at issue arises out of the PJ Moving Defendants' contacts with North Carolina. (Br. Supp. Mot. Dismiss 19.) The Court agrees, and therefore, must proceed to the Due Process analysis.

2. Due Process Analysis

a. Recent Supreme Court Precedent

87. PJ Moving Defendants contend that general personal jurisdiction is "unavailable." (Br. Supp. Mot. Dismiss 15.) However, given recent United States Supreme Court precedent raised by Plaintiffs in the Suggestion of Subsequent Authority, and Plaintiffs' citation to N.C.G.S. § 58-16-30 in their response brief, (*see* Pls.' Br. Opp. Mot. Dismiss 8, 16, ECF No. 186 ["Br. Opp. Mot. Dismiss"]), the Court disagrees.

88. In *Mallory*, Defendant Norfolk Southern Railway ("Norfolk Southern") challenged the Pennsylvania courts' exercise of personal jurisdiction over it, arguing that doing so would offend Due Process. 143 S. Ct. at 2033. Norfolk Southern was incorporated in Virginia and maintained its headquarters there. *Id.* However, the company was registered to do business in Pennsylvania, which required "out-of-state

companies that register to do business in the Commonwealth to agree to appear in its courts on 'any cause of action' against them." *Id.* (citing 42 Pa. Cons. Stat. § 5301(a)(2)(i), (b) (2019)). Plaintiff, Mr. Mallory, argued that Norfolk Southern consented to be sued in Pennsylvania and could not contest personal jurisdiction. *Id.* The United States Supreme Court, reversing the Pennsylvania Supreme Court, sided with Mr. Mallory and addressed whether the Due Process Clause prohibits states "from requiring an out-of-state corporation to consent to personal jurisdiction to do business there." *Id.*

89. In analyzing this issue, the Supreme Court relied largely on its analysis in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issues Mining & Milling Co.*, 243 U.S. 93 (1917). In that case, Pennsylvania Fire was an insurance company incorporated under the laws of Pennsylvania being sued in Missouri, and it argued that, under the Due Process Clause, it could not be sued in Missouri because it had no connection with the state. *Pennsylvania Fire*, 243 U.S. at 94–95; *Mallory*, 143 S. Ct. at 2036. Missouri, at least at that time, required out-of-state insurance companies to file "with the Superintendent of the Insurance Department a power of attorney consenting that service of process upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the State." *Pennsylvania Fire*, 243 U.S. at 94. There, the Supreme Court ultimately held that "there was 'no doubt' Pennsylvania Fire could be sued in Missouri by an out-of-state plaintiff on an out-of-state contract because it had agreed

to accept service of process in Missouri on any suit as a condition of doing business there." *Mallory*, 143 S. Ct. at 2036 (quoting *Pennsylvania Fire*, 243 U.S. at 95).

90. The *Mallory* Court found that *Pennsylvania Fire* was still controlling,[12] concluding that the Pennsylvania law at issue which required an out-of-state corporation to register with the Department of State operated just like the Missouri law at issue in *Pennsylvania Fire*—both permitted state courts to "exercise general personal jurisdiction" over a registered foreign corporation, just as they could over domestic corporations, because the foreign corporation completed the mandatory statutory registration procedures. *Mallory*, 143 S. Ct. at 2037. Therefore, the Supreme Court rejected Norfolk Southern's argument that it could not be subject to general personal jurisdiction in Pennsylvania because it already submitted to suit there. *Id.* at 2043 ("[O]ur personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State. After all, personal jurisdiction is a personal defense that may be waived or forfeited.").

[12] Perhaps most notably, the Supreme Court expressly declined to overturn *Pennsylvania Fire*, holding that the precedent fits squarely within the personal jurisdiction analysis understood since *International Shoe*. *Mallory*, 143 S. Ct. at 2039 (citing *Int'l Shoe*, 326 U.S. 310). The *Mallory* Court explained:

> *Pennsylvania Fire* held that an out-of-state corporation that has *consented* to in-state suits in order to do business in the forum is susceptible to suit there. *International Shoe* held that an out-of-state corporation that has *not consented* to in-state suits may also be susceptible to claims in the forum State based on "the quality and nature of [its] activity" in the forum.

Mallory, 143 S. Ct. at 2039 (emphasis added) (quoting *Int'l Shoe*, 326 U.S. at 319).

b. North Carolina's Insurance Statutes

91. North Carolina has a statutory scheme similar to the Missouri law at issue in *Pennsylvania Fire*. The laws of this State provide:

> [N.C.G.S. § 58-3-5:] Except as provided in [N.C.]G.S. [§]58-3-6,[13] it is unlawful for any company to make any contract of insurance upon or concerning any property or interest or lives in this State, or with any resident thereof, or for any person as an insurance producer to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of Articles 1 through 64 of this Chapter.
>
> [N.C.G.S. § 58-16-5:] A foreign or alien insurance company may be licensed to do business when it: . . . (10) Files with the Commissioner [of Insurance] an instrument appointing the Commissioner as the company's agent on whom any legal process under [N.C.]G.S. [§]58-16-30 may be served. This appointment is irrevocable as long as any liability of the company remains outstanding in this State. A copy of this instrument, certified by the Commissioner, is sufficient evidence of this appointment; and service upon the Commissioner is sufficient service upon the company.
>
> [N.C.G.S. § 58-16-30:] As an alternative to service of legal process under . . . Rule 4, the service of such process upon any insurance company or any foreign or alien entity licensed or admitted and authorized to do business in this State under the provisions of this Chapter may be made by . . . delivering and leaving a copy of the process in the office of the Commissioner with a deputy or any other person duly appointed by the Commissioner for that purpose; or acceptance of service of the process may be made by the Commissioner or a duly appointed deputy or person.

N.C.G.S. §§ 58-3-5, 58-16-5(10), 58-16-30.

92. Importantly, N.C.G.S. § 58-16-5 sets forth *requirements* for foreign insurance companies to be admitted and authorized to do business in North Carolina. *See Crain & Denbo, Inc. v. Harris & Harris Constr. Co.*, 250 N.C. 106, 109 (1959)

[13] North Carolina General Statutes § 58-3-6 concerns charitable organizations, as defined more thoroughly by the Internal Revenue Code §§ 501(c)(3), 170(c), and charitable gift annuities. This section is inapplicable to the facts of this case and PJ Moving Defendants.

(describing the statute, as it was formerly codified at § 58-150, as prescribing "the conditions for a foreign insurance company to be admitted and authorized to do business in North Carolina"). Thus, filing an instrument appointing the Commissioner of Insurance as agent for purposes of service of process under subsection 10 is mandatory in this State for foreign insurance companies.

c. Analysis as to PJ Moving Defendants Except AXIS

93. Here, it is undisputed that, as confirmed by the Court at the Hearing, all PJ Moving Defendants except AXIS are licensed to conduct insurance business in North Carolina. (Tr. 30:16–21, 95:8–12.) It is also undisputed that all PJ Moving Defendants except AXIS filed an instrument appointing the Commissioner as their agent on whom any legal process under N.C.G.S. § 58-16-30 may be served.

94. Further, the record demonstrates that all PJ Moving Defendants accepted service of process through the Commissioner pursuant to N.C.G.S. § 58-16-30. (*See* Konkel Aff. ¶ 22; Konkel Aff. Ex. 21 (providing the affidavit of Plaintiffs' counsel indicating that the civil summonses and complaints were mailed to the Insurance Section of the North Carolina Department of Justice, and providing that acceptance of service was made by the Special Deputy for Service of Process on behalf of Mike Causey, the current Commissioner); Tr. 59:23–60:1.) Each of the letters indicating acceptance of service were filed by Plaintiffs in opposition to the Motion to Dismiss, indicating that service was accepted on 14 November 2022. (Konkel Aff. Ex. 21.)

95. Therefore, the Court concludes that all PJ Moving Defendants except AXIS consented to suit in this State by completing the statutorily required registration

procedures for foreign corporations. Doing so rendered Defendants essentially at home in this State and Defendants submitted to suit in this State. *See Espin v. Citibank, N.A.*, 2023 U.S. Dist. LEXIS 176241, at *10–11 (E.D.N.C. Sept. 29, 2023) (determining that the court has general personal jurisdiction over Citibank, and that "[t]his conclusion does not offend due process, even if it took Citibank by surprise, as Citibank has taken full advantage of its opportunity to do business in North Carolina").

96. As a result, the Court's exercise of general personal jurisdiction over these defendants is proper. The Motion to Dismiss is therefore **DENIED** in part, to the extent it requests dismissal of PJ Moving Defendants, except AXIS, for lack of personal jurisdiction.

d. Analysis as to AXIS

97. AXIS is a surplus lines insurance company and is subject to different licensing requirements than foreign insurance companies, as set forth in the North Carolina Surplus Lines Act, N.C.G.S. § 58-21-1 *et seq*. Therefore, the Court must address AXIS separately.

98. North Carolina General Statutes § 58-21-2 provides that, unless "specifically referenced in a particular section of this Chapter, no sections contained in Articles of this Chapter other than this Article apply to surplus lines insurance, surplus lines licensees, nonadmitted domestic surplus lines insurers, or nonadmitted insurers." N.C.G.S. § 58-21-2.

99. Article 21 goes on to provide the following:

> A surplus lines insurer may be sued upon any cause of action arising in this State, under any surplus lines insurance contract made by it or evidence of insurance issued or delivered by the surplus lines licensee, pursuant to the procedure provided in [N.C.]G.S. [§]58-16-30. Any such policy issued by the surplus lines licensee shall contain a provision stating the substance of this section and designating the person to whom the Commissioner shall mail process.

N.C.G.S. § 58-21-100(a). "Each surplus lines insurer engaging in surplus lines insurance shall be deemed thereby to have subjected itself to this Article." N.C.G.S. § 58-21-100(b). This statute has yet to be interpreted by the courts of this State, and therefore, the Court is presented with an issue of first impression.

100. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992) (citation omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614 (2005).

101. Here, the plain meaning of the statute is clear. Given that § 58-21-100(a) specifically references the procedures set forth in § 58-16-30 to achieve service of process upon foreign surplus lines insurance companies, (*see supra* ¶¶ 91, 99), and that the policies issued by that company must include a provision that instructs the Commissioner where to subsequently send process it may receive, it logically follows that the legislature intended service of process to be made upon the Commissioner as the agent of the foreign insurance company. *See Beck*, 359 N.C. at 614 ("The primary endeavor of courts in construing a statute is to give effect to legislative intent."). As

a result, the Court interprets the statute to mean that a surplus lines insurer may be sued in this State upon a cause of action arising here under any surplus lines insurance contract made by that insurer, so long as service of process is made upon the Commissioner pursuant to N.C.G.S. § 58-16-30.

102. This parallels the licensure requirement for insurance companies set forth in § 58-16-5, but without requiring action by the insurer in order to obtain a license to do business in this State. While there are separate licensure requirements set forth in Article 21, it appears that engaging in surplus lines insurance in this State is enough to be subject to this section.

103. Thus, under the limited circumstance where the surplus lines insurer is sued in this State under a policy issued by it, and service of process is made upon the Commissioner, the surplus lines insurer has consented to general jurisdiction in this State. This interpretation is supported by the statutory requirement that each contract of insurance issued by the insurer must contain a provision designating the person to whom the Commissioner shall mail process.

104. Here, the record demonstrates that the AXIS policy issued to The Kroger Co. for the period 25 January 2016 to 25 January 2017 was filed by Plaintiffs in opposition to the Motions. (Chung Aff. Ex. 84.) The AXIS policy contains a "Service of Suit Clause" which provides that AXIS designates the "Commissioner or Director of Insurance, or his/her designee, as its true and lawful attorney upon whom may be served any lawful process in any action . . . instituted by [the insured] . . . under this

Policy against the Company arising out of this Policy," and then goes on to provide a Georgia address for Claims Administration. (Chung Aff. Ex. 84 at 10.)

105. The record also demonstrates that AXIS accepted service of process for this lawsuit through the Commissioner pursuant to N.C.G.S. § 58-16-30. (*See* Konkel Aff. Ex. 21 at 14 (providing the Acceptance of Service of Process for AXIS).)

106. The Court, therefore, is unable to imagine how this procedure differs from that for foreign insurance companies as set forth in the previous section. (*See supra* Part IV.A.2.c.) While the North Carolina Surplus Lines Act does not *expressly* require foreign surplus lines insurers to appoint the Commissioner as its agent in order to do business in this State, it appears to *implicitly* require that appointment. In fact, it goes so far as to require the appointment in writing within endorsements like AXIS's Service of Suit provision. (*See* Chung Aff. Ex. 84 at 10.) To conclude otherwise would fail to give effect to the legislative intent, particularly because the Surplus Lines Act expressly rejects all other Articles in the Chapter concerning insurance companies but specifically references § 58-16-30 as the exception to that general rule.

107. The Court concludes that AXIS, by doing business in this State, agreed to be subject to the laws and regulations set forth herein. Doing so constituted a consent to the exercise of general personal jurisdiction over it by North Carolina courts because the statutory framework requires service of process upon the Commissioner as AXIS's agent for causes of action arising in this State under insurance contracts made by it. Therefore, the Motion to Dismiss is **DENIED** in part to the extent it requests dismissal of AXIS for lack of personal jurisdiction.

B. Motion to Dismiss Pursuant to Rule 12(b)(6)

108. Defendants argue that the Court should refuse to hear this case because the Kroger Plaintiffs' filing of this action constituted forum shopping, and courts of this State have rejected declaratory judgment suits in like circumstances.[14] (Br. Supp. Mot. Dismiss 23.) As an initial matter, Defendants do not challenge Plaintiffs' standing to assert a declaratory judgment claim pursuant to N.C.G.S. § 1-254, and therefore, the Court turns directly to its discretionary authority to dismiss the claim under § 1-257.

109. "Under North Carolina law, a declaratory judgment is a statutory remedy that grants a court the authority to declare rights, status, and other legal relations, when an actual controversy exists between parties to a lawsuit." *Coley v. Its Thundertime LLC*, 2016 NCBC LEXIS 55, at *10 (N.C. Super. Ct. July 15, 2016) (cleaned up). The Court may decline to "enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding . . . ." N.C.G.S. § 1-257. The decision to do so rests in the sound discretion of the trial judge. *Augur v. Augur*, 356 N.C. 582, 587 (2002).

110. "[A] declaratory judgment should issue (1) when it will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Id.* at 588 (cleaned up). The Court must consider that "[a]

[14] All Defendants except U.S. Fidelity join in the Motion to Dismiss pursuant to Rule 12(b)(6). (Mot. Dismiss 1–2 n.1.)

declaratory remedy should not be invoked to try a controversy by piecemeal, or to try particular issues without settling the entire controversy." *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 578 (2000) (cleaned up). Further, a party "should not be permitted to bring a declaratory suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum." *Id.* at 579. Put more simply, North Carolina Courts "cannot condone using the Declaratory Judgment Act to obtain a more preferable venue in which to litigate a controversy." *Id*. at 581.

111. "[W]hen the record shows that there is no basis for declaratory relief," the Court may dismiss a declaratory judgment action through a Rule 12(b)(6) motion. *Kirkman v. Kirkman*, 42 N.C. App. 173, 176 (1979). The Court, in deciding whether to issue a declaratory judgment, may consider information related to another pending action involving overlapping issues. *See Coley*, 2016 NCBC LEXIS 55, at *12–15.

112. Defendants contend that the Court should exercise its discretion to dismiss this action in full because (1) "the limits of its jurisdiction and the pendency of the Ohio [Insurance] Action mean that nothing close to complete relief is available to Kroger in this Court[,]" (Br. Supp. Mot. Dismiss 23); and (2) failing to dismiss would "reward Kroger's forum shopping" because Kroger brought this suit as a means of obtaining a more preferable forum, (Br. Supp. Mot. Dismiss 26–27).

113. Defendants appear to take issue only with the Kroger Plaintiffs' request for declaratory judgment, contending that the timing of Plaintiffs' filing of this action is suspect, and arguing that the Kroger Plaintiffs communicated with their insurers for

five years but failed to file an action to resolve their dispute until shortly after the Ohio Insurance Action commenced. (Br. Supp. Mot. Dismiss 27.) Defendants also argue that the Kroger Plaintiffs' inclusion of the HT Plaintiffs was a strategic choice which amounts to impermissible forum shopping. (Br. Supp. Mot. Dismiss 27.)

114. In response, Plaintiffs contend that this Court is the only forum which may provide complete relief and terminate the uncertainty regarding the insurance coverage dispute. (Br. Opp. Mot. Dismiss 27.) Plaintiffs argue that (1) the Ohio Insurance Action is less comprehensive because it includes fewer insurers and does not include the HT Plaintiffs, and (2) there has been no forum shopping by Plaintiffs, but rather that Defendants' "insistence that Ohio law governs their contracts, against all evidence, reveals them to be guilty of the very sin they ascribe to Plaintiffs: forum shopping." (Br. Opp. Mot. Dismiss 28.)

115. Since the Kroger Plaintiffs and the HT Plaintiffs each seek a declaration from this Court as to their rights, if any, under the terms of the various insurance policies issued by Defendants, and because Defendants appear to take issue largely with the Kroger Plaintiffs rather than the HT Plaintiffs, the Court, in its discretion, elects to address them separately.[15]

[15] The Court is unaware of any precedent in this State which would support the proposition that N.C.G.S. § 1-257 may be analyzed on a plaintiff-by-plaintiff basis, nor of the inverse, that the Court may *not* analyze it in that manner. However, the standard for applying § 1-257 is discretionary. Thus, the Court determines that it may exercise its discretion to apply the statute to particular facts on a plaintiff-by-plaintiff basis.

1. The Kroger Plaintiffs

116. The Court agrees with Defendants that this action will not settle the entire controversy giving rise to the proceeding as this action relates to the Kroger Plaintiffs because the issue of the Kroger Plaintiffs' rights under their insurance policies issued by Defendants is already being litigated in the Ohio Insurance Action.

117. In the Ohio Insurance Action, The Kroger Co.'s insurers seek a declaration that they have no duty to defend the Kroger Plaintiffs against the Underlying Opioid Lawsuits, have no duty to indemnify the Kroger Plaintiffs, and seek a declaration that no coverage is owed to the Kroger Plaintiffs under any of the insurance policies issued to them. (St. Jeanos Aff. Ex. J at ¶¶ 45–50.)

118. In this action, the Kroger Plaintiffs seek a decree from the Court that Defendants have a duty to pay or reimburse defense costs, and settlement or judgment costs associated with the Underlying Opioid Lawsuits. (Am. Compl. ¶ 111.)

119. Thus, this action and the Ohio Insurance Action are disputes between many of the same parties seeking a declaration from two courts regarding whether Defendants have a duty to indemnify the Kroger Plaintiffs under the insurance policies issued to The Kroger Co. (*Compare,* St. Jeanos Aff. Ex. J at ¶¶ 44, 47, *with,* Am. Compl. ¶ 111.) Therefore, this action cannot settle the entire underlying controversy as it relates to the Kroger Plaintiffs' rights, if any, under their insurance policies because the Ohio Insurance Action was first filed, remains pending, and will address the same or similar issues.

120. Our Courts have been clear that a party "should not be permitted to bring a declaratory suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum." *Coca-Cola*, 141 N.C. App. at 579. The Court agrees with Defendants that, as to the Kroger Plaintiffs, the filing of this action appears to be an attempt by them to avoid their home state of Ohio and the Supreme Court of Ohio's holding in *Acuity*.[16]

121. In light of these considerations, the Court determines that it is appropriate for the Court to decline to enter a declaratory judgment regarding the Kroger Plaintiffs' rights, if any, under the insurance policies they purchased from Defendants. The Court's decree would not end the uncertainty giving rise to the proceeding, and it appears that the Kroger Plaintiffs may be attempting to circumvent their home state to obtain a more preferable venue.

122. Therefore, the Court hereby **GRANTS** in part the Motion to Dismiss and declines to grant declaratory relief as it relates to the Kroger Plaintiffs. As a result, the Kroger Plaintiffs' claims for declaratory judgment against Defendants are **DISMISSED**. This includes the Kroger Plaintiffs' claims against U.S. Fidelity, notwithstanding its failure to join in the Motion to Dismiss, because the Court will

[16] As the Court has already explained, the Kroger Plaintiffs are Ohio corporations that filed this suit shortly after the *Acuity* decision was filed, and after certain Defendants filed suit against the Kroger Plaintiffs in Ohio. Importantly, the *Acuity* decision held that the "government[al entities] d[id] not seek damages because of bodily injury" against a wholesale distributor of drugs, and thus the insurance company did not owe "a duty to defend it in the underlying suits." *Acuity*, 205 N.E.3d at 474. As a result, the Kroger Plaintiffs' may have filed this action to avoid the application of *Acuity* when the Ohio court ultimately interprets their insurance policies and rights to coverage, if any.

not reward attempted forum shopping, particularly when the Kroger Plaintiffs can presumably seek to join U.S. Fidelity as a party to the Ohio Insurance Action.

123. The Court's decision in this regard is expressly contingent upon each of the insurers affected by this determination, who are not already parties in the Ohio Insurance Action, being able to join in that proceeding. In the event the Kroger Plaintiffs raise any time-related defenses, based on the period between the initial filing of the Ohio Insurance Action and the filing by the affected insurers of a motion to join that action, the Court may reconsider its discretionary ruling here upon the filing of an appropriate motion.

2. The HT Plaintiffs

124. The facts relevant to the HT Plaintiffs are notably different.

125. First, and perhaps most importantly, the HT Plaintiffs are not party to the Ohio Insurance Action, and as far as the Court is aware, no party to that action has sought to join the HT Plaintiffs in that action. (*See* St. Jeanos Aff. Exs. J–K.)

126. Next, based on the allegations in the Amended Complaint, twenty Defendants allegedly issued insurance policies to the HT Plaintiffs, including: ACE American; Federal Insurance; Allied World; American Guarantee; Great American Alliance Insurance Company; Great American Assurance Company; Great American Insurance Company; Great American NY; Travelers Indemnity; Travelers Property; Liberty Underwriters; Ohio Casualty; St. Paul Fire; Mitsui Sumitomo; Twin City; U.S. Fidelity; U.S. Fire; Westport; XL America; and Zurich. (*See supra* Part II.C.) Of those Defendants, only nine are parties to the Ohio Insurance Action: ACE American,

Federal Insurance, Allied World, American Guarantee, Great American Insurance Company, Great American NY, St. Paul Fire, U.S. Fidelity,[17] and XL America. (St. Jeanos Aff. Exs. J–K.) Thus, eleven of the HT Plaintiffs' insurers are not party to the Ohio Insurance Action.

127. Further, the HT Plaintiffs' initiation of this action does not reek of forum shopping. The HT Plaintiffs are at home in this State, and there is no contention or reason to suspect that the HT Plaintiffs are fleeing a lawsuit to which they are not a party, initiated in a state in which they are not registered to do business. (*See* Mecia Aff. ¶ 22.)

128. Further, there is no indication that the insurance policies issued to the HT Plaintiffs by their aforementioned insurers are being litigated in another forum. Rather, the Ohio Insurance Action names only the Kroger Plaintiffs, and seeks only a declaration that the insurers owe no duties to the Kroger Plaintiffs. While Defendants assert that the Ohio Insurance Action is "a comprehensive action that will resolve essentiallyall [sic] claims between Kroger and its insurers[,]" and that may very well be true, the Ohio Insurance Action has no bearing on the HT Plaintiffs or the meaning of their insurance policies.

129. A decree of this Court as to the meaning of the HT Plaintiffs' insurance policies would serve a useful purpose in clarifying and settling the legal relations at issue, and it would terminate the uncertainty and controversy giving rise to the proceeding, at least as to directly affected parties, as required by N.C.G.S. § 1-257.

[17] As noted previously, U.S. Fidelity does not seek dismissal of Plaintiffs' Amended Complaint and joins only in the Motion to Stay.

Additionally, the HT Plaintiffs have separate and distinct rights in the insurance policies issued to them, particularly as to the insurance policies issued prior to the merger with The Kroger Co., meaning this case will not result in piecemeal litigation.

130. Therefore, the Court, in its discretion, hereby **DENIES** in part the Motion to Dismiss because the Court can terminate the controversy and afford relief from uncertainty as it relates to the HT Plaintiffs' interests in this proceeding.

C. Motion to Stay

131. As a preliminary matter, because the Court has granted Defendants' Motion to Dismiss in part pursuant to Rule 12(b)(6) as it relates to the Kroger Plaintiffs' claims for relief, the Motion to Stay, as it relates to the Kroger Plaintiffs, is **DENIED** in part as moot. The claims between the Kroger Plaintiffs and the Defendants that issued insurance policies only to them have been dismissed.

132. All Defendants join in the Motion to Stay. (*See* Mot. Stay 1 n.1.) Defendants ask the Court to stay this action pursuant to N.C.G.S. § 1-75.12 in favor of the Ohio Insurance Action. (Defs.' Br. Supp. Mot. Stay 14, ECF No. 138 ["Br. Supp. Mot. Stay"].) Defendants argue that a stay would permit the parties to focus their dispute on the Kroger Plaintiffs, "rather than its all but irrelevant Harris Teeter subsidiary." (Br. Supp. Mot. Stay 14.)

133. North Carolina General Statutes § 1-75.12 provides that,

> [i]f, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another

> jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

N.C.G.S. § 1-75.12(a). "Entry of an order under [N.C.]G.S. [§]1-75.12 is a matter within the sound discretion of the trial judge[.]" *Home Indem. Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325 (1990).

134. In deciding whether to grant a stay, our courts consider the following convenience factors and policy considerations:

> (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356 (1993) (citation omitted). "It is not necessary to consider each factor or to find that every factor weighs in favor of a stay." *Cardiorentis AG v. IQVIA, Ltd.*, 2018 NCBC LEXIS 243, at *7 (N.C. Super. Ct. Dec. 31, 2018), *aff'd per curium*, 373 N.C. 309 (2020) (citations omitted). "Rather, the trial court must be able to conclude that (1) a substantial injustice would result in the absence of a stay, (2) the stay is warranted by the factors that are relevant and material, and (3) the alternative forum is convenient, reasonable, and fair." *Id.* at *7–8 (citation omitted).

135. The Court, having considered all the factors deemed relevant to its determination, determines that a stay is not warranted or reasonable as related to the HT Plaintiffs' claims. The Court focuses its analysis below on the factors relevant and material to this decision.

1. Plaintiffs' Choice of Forum

136. "Our courts generally begin with the presumption that a plaintiff's choice of forum deserves deference[,]" but the amount of deference "varies with the circumstances." *Cardiorentis*, 2018 NCBC LEXIS 243, at *8. This Court has held that, when a plaintiff sues outside its home forum, that choice deserves less deference. *Id.* (citation omitted). The inverse is also true, and a plaintiff's choice to sue in its home forum is given great deference. *La Mack v. Obeid*, 2015 NCBC LEXIS 24, at **16–17 (N.C. Super. Ct. Mar. 5, 2015) ("[A] plaintiffs' choice of forum ordinarily is given great deference, especially when plaintiffs select their home forum to bring suit.").

137. The HT Plaintiffs elected to initiate this suit in their home forum, and therefore, this factor weighs against granting a stay.

2. Availability of Compulsory Process to Produce Witnesses & the Relative Ease of Access to Sources of Proof

138. Here, Defendants have not argued that "nonparty witnesses would participate only if compelled to do so," and therefore, "the availability of compulsory process should be given little weight in the overall balancing scheme[.]" *Cardiorentis*, 2018 NCBC LEXIS 243, at *20 (cleaned up).

139. To the extent discovery is necessary in this matter, the HT Plaintiffs maintain their corporate headquarters in Matthews, North Carolina. (Sullivan Aff. Ex. NN at 1.) Defendants contend that "most of the relevant witnesses and documents are located at Kroger's corporate headquarters in Cincinnati, Ohio[,]"

including "a majority of Harris Teeter's corporate officers[.]" (Br. Supp. Mot. Stay 28–29 (emphasis removed).)

140. Notwithstanding that contention, this case is primarily an insurance contract dispute which will require the Court and, if necessary, a jury, to interpret those contracts and declare what rights, if any, the HT Plaintiffs have in them. *See, e.g., Northrop Corp. v. Am. Motorists Ins. Co.*, 270 Cal. Rptr. 233, 239 (Cal. Ct. App. 1990) (explaining that insurance coverage disputes "principally concern questions of law and language, not physical fact, and involve more paper than live witnesses").

141. The Court agrees with Plaintiffs that some of the most important evidence in this action will be documents that may be exchanged electronically between counsel and which are accessible in any forum. (Pls.' Br. Opp. Mot. Stay 27, ECF No. 187 ["Br. Opp. Mot. Stay"].) Further, Defendants are insurance companies incorporated across the country and their corporate representatives or counsel will be required to travel regardless of where this action is litigated. (*See* Br. Opp. Mot. Stay 27.)

142. This factor does, however, weigh slightly in favor of a stay because more of the HT Plaintiffs' potential corporate witnesses reside in Ohio than in North Carolina.

3. Desirability of Litigating Matters of Local Concern in Local Courts

143. In evaluating this factor, the Court must consider the nature of the case and whether North Carolina or Ohio have a local interest in resolving the controversy.

144. Having decided the Motion to Dismiss, this matter now concerns the HT Plaintiffs' insurance coverage rights, if any, under the policies the HT Plaintiffs purchased from certain Defendants. Further, the record before the Court demonstrates that, as of the filing of the Motion to Stay, the HT Plaintiffs were named as defendants in only one Underlying Opioid Lawsuit—the *Durham County* Bellwether—which was initiated in the Middle District of North Carolina. (*See* St. Jeanos Aff. Ex. F at 1 n.3, n.6, 19.)

145. The HT Plaintiffs operate grocery stores across North Carolina, with over half their stores located here and operating 120 pharmacies in this State. (Mecia Aff. ¶¶ 18–20.) Further, the HT Plaintiffs are not registered to do business in Ohio and have never conducted business in Ohio. (Mecia Aff. ¶ 22.) While the HT Plaintiffs are now wholly owned subsidiaries of The Kroger Co., the HT Plaintiffs own and operate their stores with separate corporate formalities. (Mecia Aff. ¶¶ 22–24; Chung Aff. ¶¶ 15–16.)

146. The Court concludes that this factor weighs against granting a stay. North Carolina and its residents have a stronger interest in this Court determining the HT Plaintiffs' rights under their insurance policies, particularly given that the only Underlying Opioid Lawsuit they are party to was initiated by a governmental entity in this State.

4. Fair and Reasonable Forum

147. As a prerequisite to the entry of a stay, the moving parties "must stipulate [their] consent to suit in another jurisdiction." N.C.G.S. § 1-75.12(a). This condition

is met here, with the exception of Great American Alliance and Great American Assurance, which are Ohio companies. (Tr. 133:12–16; ECF Nos. 141.3–.21 (affidavits of counsel confirming the Defendants that are not party to the Ohio Insurance Action consent to being joined there).)

148. The statute also requires that the alternative forum be reasonable and fair. *Id.* This too is satisfied. The Court is not concerned that the Ohio courts would fail to be fair and impartial. Therefore, this factor weights in favor of granting a stay.

5. Applicable Law

149. "State and federal courts alike agree that the need to apply foreign law favors a stay in a *forum non conveniens* analysis." *Cardiorentis*, 2018 NCBC LEXIS 243, at *20 (citations omitted). "To evaluate this factor, the Court need not definitively determine which law governs[.]" *Id.* at *21.

150. Defendants contend that, under the doctrine of *lex loci contractus*, the substantive law of the state where the last act to make a binding insurance contract occurred governs the interpretation of the contract. (Br. Supp. Mot. Stay 26 (citing *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428 (2000)).) Defendants state that the place of delivery is the place where the insured resides at the time of the issuance of the policy controls, in the absence of specific evidence reflecting a contrary intention. (Br. Supp. Mot. Stay 26.)

151. Using this reasoning, the HT Plaintiffs' policies allegedly providing coverage for the periods prior to 2014 would be governed by North Carolina law.

152. Additionally, Plaintiffs point out in the briefing on the Motion to Stay that Defendants' insurance policies lack choice of law provisions, (Br. Opp. Mot. Stay 18), and the Court's review of the nearly 145 insurance policies in the record reflected the same.

153. Plaintiffs cite to N.C.G.S. § 58-3-1, which provides that all insurance contracts "on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof." N.C.G.S. § 58-3-1. Thus, North Carolina must have a "close connection" to the insured loss. *Collins & Aikman Corp. v. Hartford Accident & Indem. Co.*, 335 N.C. 91, 94–95 (1993). "The test is simply stated but not so simply applied as its application revolves around the facts of particular cases from which no formula may be easily derived." *Am. Realty Advisors v. Lexington Ins. Co.*, 2019 NCBC LEXIS 59, at *8 (N.C. Super. Ct. Sept. 10, 2019).

154. It is reasonably possible that the undisputed facts may support the application of North Carolina law, with respect to the insurance policies the HT Plaintiffs purchased. However, the Court lacks sufficient facts to make that determination, given the early stage of this litigation.

155. Therefore, the Court concludes that this factor weighs against entry of a stay, as it is reasonably possible that a majority of the insurance policies the HT Plaintiffs purchased from Defendants will require this Court to apply North Carolina law.

156. After considering the relevant factors, the Court, in its sound discretion, determines that this case should not be stayed pursuant to N.C.G.S. § 1-75.12(a) as Defendants have not demonstrated that continuing the prosecution of this action would work a substantial injustice on them. *See Muter v. Muter*, 203 N.C. App. 129, 134 (2010) (explaining that the Court is "not required to decide the most convenient or ideal venue for resolving this matter but only to determine whether defendant[s] proved that proceeding in North Carolina would work a substantial injustice on [them]").

157. The Court's dismissal of a portion of this action has changed the nature of the case from one concerning primarily issues which may be appropriately litigated in Ohio, to one that concerns plaintiffs who are at home in this State and the harm alleged to have largely occurred—and thus allegedly requiring insurance coverage—in North Carolina. Therefore, the Motion to Stay is hereby **DENIED**. Based on the Court's analysis of the *Lawyers Mutual* factors, a stay is not warranted because a substantial injustice will not result from denial of the Motion to Stay, notwithstanding the fact that Ohio is a fair and reasonable alternative forum.

V. CONCLUSION

158. For the foregoing reasons, the Court hereby **GRANTS** in part and **DENIES** in part the Motions as follows:

a. Defendants' Motion to Dismiss pursuant to Rule 12(b)(2) is **DENIED**;

b. Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is **GRANTED** in part to the extent it seeks dismissal of the Kroger Plaintiffs' claims for declaratory judgment pursuant to N.C.G.S. § 1-75.12(a). Except as expressly granted, Defendants Motion to Dismiss pursuant to Rule 12(b)(6) is otherwise **DENIED**; and

c. Defendants' Motion to Stay is **DENIED**.

IT IS SO ORDERED, this the 10th day of October, 2023.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases

NONADMITTED INSURANCE MODEL ACT

Table of Contents

Section 1. Short Title
Section 2. Purpose—Necessity for Regulation
Section 3. Definitions
Section 4. Placement of Insurance Business
Section 5. Surplus Lines Insurance
Section 6. Insurance Independently Procured—Duty to Report and Pay Tax
Section 7. Penalties
Section 8. Violations
Section 9. Service of Process
Section 10. Legal or Administrative Procedures
Section 11. Enforcement
Section 12. Suits by Nonadmitted Insurers
Section 13. Severability
Section 14. Effective Date

Section 1. Short Title

This Act shall be known and may be cited as "The Nonadmitted Insurance Act."

Section 2. Purpose—Necessity for Regulation

This Act shall be liberally construed and applied to promote its underlying purposes which include:

A. Protecting persons seeking insurance in this state;

B. Permitting surplus lines insurance to be placed with reputable and financially sound nonadmitted insurers and exported from this state pursuant to this Act;

C. Establishing a system of regulation which will permit orderly access to surplus lines insurance in this state and encourage admitted insurers to provide new and innovative types of insurance available to consumers in this state;

D. Providing a system through which persons may purchase insurance other than surplus lines insurance, from nonadmitted insurers pursuant to this Act;

E. Protecting revenues of this state; and

F. Providing a system pursuant to this Act which subjects nonadmitted insurance activities in this state to the jurisdiction of the insurance commissioner and state and federal courts in suits by or on behalf of the state.

Section 3. Definitions

As used in this Act:

A. "Admitted insurer" means an insurer licensed to engage in the business of insurance in this state.

B. ''Affiliate'' means, with respect to an insured, any entity that controls, is controlled by, or is under common control with the insured.

C. ''Affiliated group'' means any group of entities that are all affiliated.

D. "Commissioner" means the insurance commissioner of [insert name of state], or the commissioner's deputies or staff, or the commissioner, director or superintendent of insurance in any other state.

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term "commissioner" appears.

E. "Control" means with respect to an insured:

(1) A person, either directly or indirectly, or acting through one or more other persons, owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other entity; or

(2) The entity controls in any manner the election of a majority of the directors or trustees of the other entity.

F. [OPTIONAL: "Domestic surplus lines insurer" means a surplus lines insurer domiciled in this state, that may write insurance in this state on a surplus lines basis.]

G. "Eligible surplus lines insurer" means a nonadmitted insurer with which a surplus lines licensee may place surplus lines insurance pursuant to Section 5 of this Act.

H. "Exempt commercial purchaser" means any person purchasing commercial insurance that, at the time of placement, meets the following requirements:

(1) Has paid aggregate nationwide commercial property and casualty insurance premiums in excess of $100,000 in the immediately preceding 12 months; and

(2) (a) Meets at least one of the following criteria:

(i) Possesses a net worth in excess of $20,000,000;

(ii) Generates annual revenues in excess of $50,000,000;

(iii) Employs more than 500 full-time or full-time equivalent employees per individual insured or is a member of an affiliated group employing more than 1,000 employees in the aggregate;

(iv) Is a not-for-profit organization or public entity generating annual budgeted expenditures of at least $30,000,000; or

(v) Is a municipality with a population in excess of 50,000 persons.

(b) Effective on July 21, 2010, every five years on January 1, the amounts in Subsections (i), (ii), and (iv) of Section 3H(2)(a) shall be adjusted to reflect the percentage change for such five-year period in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor.

Drafting Note: The definition of "exempt commercial purchaser" follows the language of the federal Nonadmitted and Reinsurance Reform Act (NRRA). Some states have chosen not to adopt the inflation adjustment. The NRRA uses the term "municipality," which some states may find limiting. States may choose to use terminology consistent with state law to expand this provision to include counties and other public entities.

I. "Export" means to place surplus lines insurance with a nonadmitted insurer.

J. "Home state" with respect to an insured, means:

(1) The state in which an insured maintains its principal place of business or, in the case of a natural person, the person's principal place of residence;

(2) If 100 percent of the insured risk is located out of the state referred to in Section 3J(1), the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated; or

(3) If the insured is an affiliated group with more than one member listed as a named insured on a single nonadmitted insurance contract, the home state is the home state of the member of the affiliated group that has the largest percentage of premium attributed to it under the insurance contract.

Drafting Note: The NRRA definition of "home state" includes Subsections (1), (2), and (3) of Section 3J. The NRRA definition does not expressly cover unaffiliated groups. States have taken different approaches to the taxation of unaffiliated group policies. Some states tax based on the "home state" of the group policyholder. Other states tax based on the "home state" of the group member or certificate holder under the unaffiliated group policy. Some states assess tax on the "home state" of the person that pays the premium. Not all states have an express provision to address unaffiliated group policies.

K. "Nonadmitted insurance" means any insurance written on properties, risks or exposures, located or to be performed in this state, by an insurer not licensed to engage in the business of insurance in this state [or a domestic surplus lines insurer].

L. "Nonadmitted insurer" means an insurer not licensed to engage in the business of insurance in this does not include a risk retention group pursuant to the federal Liability Risk Retention Act of 1986.

M. "Person" means any natural person or business entity, including, but not limited to, individuals, partnerships, associations, trusts or corporations.

N. "Premium" means any payment made as consideration for an insurance contract.

O. "Principal place of business" means:

(1) The state where a person maintains its headquarters and where the person's high-level officers direct, control, and coordinate business activities; or

(2) If the person's high-level officers direct, control, and coordinate the business activities in more than one state, or if the person's principal place of business is located outside any state, then it is the state to which the greatest percentage of the person's taxable premium for that insurance contract is allocated.

P. "Principal residence" means:

(1) The state where the person resides for the greatest number of days during a calendar year; or

(2) If the person's principal residence is located outside any state, the state to which the greatest percentage of the person's taxable premium for that insurance contract is allocated.

Q. "Surplus lines insurance" means any insurance permitted to be placed through a surplus lines licensee with an eligible surplus lines insurer, pursuant to Section 5 of this Act.

R. "Surplus lines insurer" means a nonadmitted [or domestic surplus lines] insurer that is eligible to accept the placement of surplus lines insurance pursuant to Section 5 of this Act.

S. "Surplus lines licensee" means any person licensed under Section 5 of this Act to place surplus lines insurance in this state with an eligible surplus lines insurer.

T. "Taxable premium" means any premium less return premium that is not otherwise exempt from tax pursuant to this Act. [OPTIONAL: Premium on property risk or exposure that is properly allocated to federal or international waters or is under the jurisdiction of a foreign government is not taxable in this state.]

U. "Transaction of insurance"

(1) For purposes of this Act, any of the following acts in this state effected by mail or otherwise by a nonadmitted insurer or by any person acting with the actual or apparent authority of the insurer, on behalf of the insurer, is deemed to constitute the transaction of an insurance business in or from this state:

(a) The making of or proposing to make, as an insurer, an insurance contract;

(b) The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety;

(c) The taking or receiving of an application for insurance;

(d) The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration for insurance or any part thereof;

(e) The issuance or delivery in this state of contracts of insurance to residents of this state or to persons authorized to do business in this state;

(f) The solicitation, negotiation, procurement or effectuation of insurance or renewals thereof;

(g) The dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, the fixing of rates or investigation or adjustment of claims or losses or the transaction of matters subsequent to effectuation of the contract and arising out of it, or any other manner of representing or assisting a person or insurer in the transaction of risks with respect to properties, risks or exposures located or to be performed in this state;

(h) The transaction of any kind of insurance business specifically recognized as transacting an insurance business within the meaning of the statutes relating to insurance;

(i) The offering of insurance or the transacting of insurance business; or

(j) Offering an agreement or contract which purports to alter, amend or void coverage of an insurance contract.

(2) The provisions of this subsection shall not operate to prohibit employees, officers, directors or partners of a commercial insured from acting in the capacity of an insurance manager or buyer in placing insurance on behalf of the employer, provided that the person's compensation is not based on buying insurance.

(3) The venue of an act committed by mail is the location where the matter transmitted by mail is delivered or issued for delivery or takes effect.

Drafting Note: States may need to alter this subsection to reflect their decision as to whether they intend to permit citizens to directly purchase coverage within the state from a nonadmitted insurer, or if self-procurement of coverage will be permitted only when it occurs outside the state. States electing to allow direct procurement will need to insert an appropriate exemption in Section 4A of this Act. Additionally, states should consider whether the preceding definition of "transaction of insurance" is consistent with other statutory definitions of this phrase in the state. Finally, states may want to consider whether group insurance purchases or the maintenance of insurance books and records in this state should fall within the scope of the definition of "transaction of insurance."

V. "Wet marine and transportation insurance" means:

(1) Insurance upon vessels, crafts, hulls and other interests in them or with relation to them;

(2) Insurance of marine builder's risks, marine war risks and contracts of marine protection and indemnity insurance;

(3) Insurance of freight and disbursements pertaining to a subject of insurance within the scope of this subsection; and

(4) Insurance of personal property and interests therein, in the course of exportation from or importation into any country, or in the course of transportation coastwise or on inland waters, including transportation by land, water or air from point of origin to final destination, in connection with any and all risks or perils of navigation, transit or transportation, and while being prepared for and while awaiting shipment, and during any incidental delays, transshipment, or reshipment; provided, however, that insurance of personal property and interests therein shall not be considered wet marine and transportation insurance if the property has:

(a) Been transported solely by land; or

(b) Reached its final destination as specified in the bill of lading or other shipping document; or

(c) The insured no longer has an insurable interest in the property.

Drafting Note: In addition to the definitions provided in this section, individual states may wish to consider adopting definitions for "agent," "broker" or "producer" in a manner consistent with its other laws. Additionally, states may want to cross-reference the definition of "insurance" as it appears elsewhere in the state insurance code. The definition of insurance should reach illegal unauthorized activities.

Section 4. Placement of Insurance Business

A. An insurer shall not engage in the transaction of insurance unless authorized by a license in force pursuant to the laws of this state or exempted by this Act or the insurance laws of this state.

B. A person shall not directly or indirectly engage in a transaction of insurance with or on behalf of a nonadmitted insurer in this state.

C. A person who represents or aids a nonadmitted insurer in violation of this section shall be subject to the penalties set forth in Section 7 of this Act. No insurance contract entered into in violation of this section shall preclude the insured from enforcing his rights under the contract in accordance with the terms and provisions of the contract of insurance and the laws of this state, to the same degree those rights would have been enforceable had the contract been lawfully procured.

D. If the nonadmitted insurer fails to pay a claim or loss within the provisions of the insurance contract and the laws of this state, a person who assisted or in any manner aided directly or indirectly in the procurement of the insurance contract, shall be liable to the insured for the full amount under the provisions of the insurance contract.

E. Section 4B or 4D shall not apply to a person in regard to an insured who independently procures insurance as provided under Section 6. This section shall not apply to a person, properly licensed as an agent or broker in this state who, for a fee and pursuant to a written agreement, is engaged solely to offer to the insured advice, counsel or opinion, or service with respect to the benefits, advantages or disadvantages promised under any proposed or in-force policy of insurance if the person does not, directly or indirectly, participate in the solicitation, negotiation or procurement of insurance on behalf of the insured.

Drafting Note: If a state collects tax on unlicensed transactions which violate this Act, it may consider imposing liability for payment of those taxes on persons who violate this Act by assisting in the procurement of nonadmitted insurance.

Drafting Note: Some states permit other licensed professionals to engage in these activities as provided in their insurance statutes or other state statutes. Those states may want to amend Section 4E to include those professionals, to the extent they act within the scope of their licenses.

F. This section shall not apply to a person acting in material compliance with the insurance laws of this state in the placement of the types of insurance identified in Paragraphs (1), (2), (3) and (4) below:

(1) Surplus lines insurance as provided in Section 5. For the purposes of this subsection, a licensee shall be deemed to be in material compliance with the insurance laws of this state, unless the licensee committed a violation of Section 5 that proximately caused loss to the insured;

(2) Transactions for which a certificate of authority to do business is not required of an insurer under the insurance laws of this state;

(3) Reinsurance provided that, unless the commissioner waives the requirements of this subsection:

(a) The assuming insurer is authorized to engage in the business of insurance or reinsurance in its domiciliary jurisdiction and is authorized to write the type of reinsurance in its domiciliary jurisdiction; and

(b) The assuming insurer satisfies all legal requirements for such reinsurance in the state of domicile of the ceding insurer;

(4) The property and operation of railroads or aircraft engaged in interstate or foreign commerce, wet marine and transportation insurance;

(5) Transactions subsequent to issuance of a policy not covering properties, risks or exposures located, or to be performed in this state at the time of issuance, and lawfully solicited, written or delivered outside this state.

Drafting Note: States may also wish to consider exempting from Section 4A of this Act self-procured insurance or industrial insurance purchased by a sophisticated buyer who does not necessarily require the same regulatory protections as an average insurance buyer. Additionally, some states allow other insurance transactions with nonadmitted insurers. Examples include certain aviation and railroad risks. Other states may want to narrow the scope of the exemptions above or reserve the right to approve exemptions on a case-by-case basis.

Section 5. Surplus Lines Insurance

A. Surplus lines insurance may be placed by a surplus lines licensee if:

(1) Each insurer is eligible to write surplus lines insurance; and

(2) Each insurer is authorized to write the type of insurance in its domiciliary jurisdiction; and

(3) Other than for exempt commercial purchasers, the full amount or type of insurance cannot be obtained from insurers who are admitted to engage in the business of insurance in this state. The full amount or type of insurance may be procured from eligible surplus lines insurers, provided that a diligent search is made among the insurers who are admitted to transact and are actually writing the particular type of insurance in this state if any are writing it; and

(4) All other requirements of this Act are met.

Drafting Note: The diligent search requirement of Section 5A(3) must be satisfied in accordance with the statutes and regulations of the governing state. Diligent search statutes and regulations vary from state to state in terms of the number of declinations required and the person designated to conduct the search. Several states permit surplus lines placement without a diligent search for or without regard to the availability of admitted coverage. States may want to consider changing diligent search requirements in light of electronic transactions. Section 5A(3) does not prohibit a regulatory system in which a surplus lines licensee may place with an eligible nonadmitted insurer any coverage listed on a current "Export List" maintained by the commissioner. The export list would identify types of insurance for which no admitted market exists. The commissioner may waive the diligent search requirement for any such type of insurance.

Drafting Note: Utilizing the "full amount" standard in Section 5A(3) of this Act may have certain market implications. An alternative to this approach would be to require that whatever part of the coverage is attainable through the admitted market be placed in the admitted market and only the excess part of the coverage may be exported.

B. Subject to Section 5A(3) of this Act, a surplus lines licensee may place any coverage with an eligible surplus lines insurer, unless specifically prohibited by the laws of this state.

[Alternative Subsection B]

[B. Subject to Section 5A(3) of this Act, a surplus lines licensee may place only the following types of coverage with an eligible surplus lines insurer: (list acceptable coverage).]

Drafting Note: The two statutory alternatives described in Section 5B represent different regulatory approaches to defining those coverages which may be placed in the nonadmitted market and they would impact the admitted market in different manners.

C. A surplus lines licensee shall not place surplus lines insurance, unless, at the time of placement, the surplus lines licensee has determined that the insurer:

Drafting Note: Current numbering is retained in this Model to remain consistent with the reference within the NRRA.

2. Is eligible to write surplus lines insurance under one of the following subsections:

a. For a nonadmitted insurer domiciled in another United States jurisdiction, the insurer shall have both of the following:

(i) The authority to write the type of insurance in its domiciliary jurisdiction; and

(ii) Capital and surplus or its equivalent under the laws of its domiciliary jurisdiction that equals the greater of:

(I) (A) The minimum capital and surplus requirements under the law of this state; or

(B) $15,000,000;

(II) The requirements of Subparagraph (a)(ii)(I) may be satisfied by an insurer possessing less than the minimum capital and surplus upon an affirmative finding of acceptability by the commissioner. The finding shall be based upon such factors as quality of management, capital and surplus of any parent company, company underwriting profit and investment income trends, market availability and company record and reputation within the industry. In no event shall the commissioner make an affirmative finding of acceptability when the nonadmitted insurer's capital and surplus is less than $4,500,000; or

b. For a nonadmitted insurer domiciled outside the United States, the insurer shall be listed on the *Quarterly Listing of Alien Insurers* maintained by the International Insurers Department of the National Association of Insurance Commissioners (NAIC); [or]

c. [For an insurer domiciled in this state, the insurer is a domestic surplus lines insurer.]

D. The placement of surplus lines insurance shall be subject to the statutory and regulatory requirements solely of the insured's home state.

Drafting Note: Section 522(d) of the federal Nonadmitted and Reinsurance Reform Act provides a workers' compensation exception to home state authority; specifically, that this section may not be construed to preempt any State law, rule, or regulation that restricts the placement of workers' compensation insurance or excess insurance for self-funded workers' compensation plans with a nonadmitted insurer. In addition, Section 527(9) of the NRRA provides that the term ''nonadmitted insurance'' means any property and casualty insurance permitted to be placed directly or through a surplus lines broker with a nonadmitted insurer eligible to accept such insurance and is not applicable to accident and health insurance. States may consider whether to add language making these exceptions explicit when codifying Section 5D into state law.

E. Insurance procured under this section shall be valid and enforceable as to all parties.
.

F. If at any time the commissioner has reason to believe that a surplus lines insurer is no longer eligible under Section 5C, the commissioner may, after notice and an opportunity for a hearing, declare it ineligible. The commissioner shall promptly publish notice of all such declarations in a timely manner reasonably calculated to reach to each surplus lines licensee or surplus lines advisory organization, for distribution to all surplus lines licensees.

Drafting Note: Individual states should consider whether such declarations of ineligibility are appropriate in view of the state's other due process and administrative procedure requirements. Eligibility criteria are independent of other considerations such as compliance with other laws, for example, 18 USC 1033, relating to felons participating in the insurance business.

G. Surplus Lines Tax

(1) In addition to the full amount of gross premium charged by the insurer for the insurance, every person licensed pursuant to Section 5I of this Act shall collect and pay to the commissioner a sum equal to [insert number] percent of the gross premium charged, less any return premium, for surplus lines insurance provided by the licensee pursuant to the license. Where the insurance covers properties, risks or exposures located or to be performed both in and out of this state, the sum payable shall be paid entirely to the home state of the insured. The tax on any portion of the premium unearned at termination of insurance having been credited by the state to the licensee shall be returned to the policyholder directly by the surplus lines licensee or through the producing broker, if any. The surplus lines licensee is prohibited from rebating, for any reason, any part of the tax.

(2) At the time of filing the [insert monthly, quarterly, annual] report as set forth in Subsection S of this section, each surplus lines licensee shall pay the premium tax due for the policies written during the period covered by the report.

H. Collection of Tax

If the tax owed by a surplus lines licensee under this section has been collected and is not paid within the time prescribed, the same shall be recoverable in a suit brought by the commissioner against the surplus lines licensee and the surety on the bond filed under Subsection I of this section. The commissioner may charge interest at the rate of [insert number] percent per year for the unpaid tax.

I. Surplus Lines Licenses

(1) A person shall not procure a contract of surplus lines insurance with a surplus lines insurer unless the person possesses a current surplus lines insurance producer license issued by the commissioner.

(2) The commissioner may issue a resident surplus lines license to a qualified holder of underlying property and casualty licenses, but only when the producer has:

(a) Remitted the $[insert amount] annual fee to the commissioner;

(b) Submitted a completed license application on a form supplied by the commissioner;

(c) In the case of a resident agent, filed with the commissioner, and continues to maintain during the term of the license, in force and unimpaired, a bond or errors and omissions (E&O) policy in favor of this state in the penal sum of $[insert amount] aggregate liability, with corporate sureties approved by the commissioner. The bond or E&O policy shall be conditioned that the Surplus Lines Licensee will conduct business in accordance with the provisions of this Act and will promptly remit the taxes as provided by law. No bond or E&O policy shall be terminated unless at least thirty (30) days prior written notice is given to the licensee and commissioner;

Drafting Note: Under Public Law No. 106-102 (the "Gramm-Leach-Bliley Act"), it is believed that a requirement for a nonresident agent to file a bond may contravene the reciprocity provisions. The requirement for a resident agent to file a bond would not, seemingly, contravene these provisions, and there may be methodologies whereby such resident bonds could become reciprocal between states. Some states have expressed concern that their bonding requirements constitute important consumer protections, and that elimination of these simply to comply with Gramm-Leach-Bliley may result in unintended consequences, and a lack of control over possibly unscrupulous nonresident agents.

(d) If a resident, established and continues to maintain an office in this state.

(3) A nonresident person shall receive a nonresident surplus lines license if:

(a) The person is currently licensed as a surplus lines licensee and in good standing in his or her home state;

(b) The person has submitted the proper request for licensure and has paid the fees required by [insert appropriate reference to state law or regulation];

(c) The person has submitted or transmitted to the insurance commissioner the application for licensure that the person submitted to his or her home state, or in lieu of the same, a completed Uniform Application; and

(d) The person's home state awards nonresident surplus lines licenses to residents of this state on the same basis.

Drafting Note: In accordance with Public Law No. 106-102 (the "Gramm-Leach-Bliley Act") states should not require any additional attachments to the Uniform Application or impose any other conditions on applicants that exceed the information requested within the Uniform Application.

(4) The insurance commissioner may verify the person's licensing status through the Producer Database maintained by the NAIC, its affiliates or subsidiaries.

(5) A nonresident surplus lines licensee who moves from one state to another state or a resident surplus lines licensee who moves from this state to another state shall file a change of address and provide certification from the new resident state within thirty (30) days of the change of legal residence. No fee or license application is required.

(6) The insurance commissioner shall waive any requirements for a nonresident surplus lines license applicant with a valid license from his or her home state, except the requirements imposed by this subsection, if the applicant's home state awards nonresident surplus lines licenses to residents of this state on the same basis.

(7) Each surplus lines license shall expire on [insert date] of each year, and an application for renewal shall be filed before [insert date] of each year upon payment of the annual fee and compliance with other provisions of this section. A surplus lines licensee who fails to apply for renewal of the license before [insert date] shall pay a penalty of $[insert amount] and be subject to penalties provided by law before the license will be renewed.

Drafting Note: States may wish to reference their specific licensing statutes in this section.

Drafting Note: Some states allow surplus lines licensees to hold binding authorities on behalf of surplus lines insurers. States which allow such binding authorities might want to establish minimum standards for the related agreements. In addition, states might want to consider requiring surplus lines licensees with such binding authorities to submit the related agreements to state regulators for review and approval.

J. Suspension, Revocation or Nonrenewal of Surplus Lines Licensee's License

The commissioner may suspend, revoke or refuse to renew the license of a surplus lines licensee after notice and an opportunity for a hearing as provided under the applicable provision of this state's laws for:

(1) Violation of any provision of this Act; or

(2) For any cause for which an insurance license could be denied, revoked, suspended or renewal refused under Sections [insert applicable citation].

K. Actions Against Eligible Surplus Lines Insurers Transacting Surplus Lines Business

(1) An eligible surplus lines insurer may be sued upon a cause of action arising in this state under a surplus lines insurance contract made by it or evidence of insurance issued or delivered by the surplus lines licensee. A policy issued by the eligible surplus lines insurer shall contain a provision stating the substance of this section and designating the person to whom the commissioner shall mail process.

(2) The remedies provided in this section are in addition to any other methods provided by law for service of process upon insurers.

L. Duty to File Evidence of Insurance and Affidavits

Within [insert number] days after the placing of any surplus lines insurance, each producing broker shall execute and each surplus lines licensee shall execute where appropriate, and file a written report regarding the insurance which shall be kept confidential by the commissioner, including the following:

(1) The name and address of the insured;

(2) The identity of the insurer or insurers;

(3) A description of the subject and location of the risk;

(4) The amount of premium charged for the insurance;

(5) Such other pertinent information as the commissioner may reasonably require; and

(6) An affidavit on a standardized form promulgated by the commissioner as to the diligent efforts to place the coverage with admitted insurers and the results of that effort or the insured is an exempt commercial purchaser. The affidavit shall be open to public inspection. The affidavit shall affirm that the insured was expressly advised in writing prior to placement of the insurance that:

(a) The surplus lines insurer with whom the insurance was to be placed is not licensed in this state and is not subject to its supervision; and

(b) In the event of the insolvency of the surplus lines insurer, losses will not be paid by the state insurance guaranty fund.

Drafting Note: Surplus lines licensees will frequently communicate with the insured through a producing broker rather than communicate with the insured directly. In preparing affidavit forms, states may wish to recognize that, as a result of communications passing through the producing broker, the surplus lines licensee may not be in a position to affirm, based upon personal knowledge, that the insured received from the producing broker the written information required by this subsection.

M. Surplus Lines Advisory Organizations

(1) There is hereby created a nonprofit association to be known as the [insert name]. All surplus lines licensees shall be deemed to be members of the association. The association shall perform its functions under the plan of operation established pursuant to Paragraph (3) of this subsection and must exercise its powers through a board of directors established under Paragraph (2) of this subsection. The association shall be supervised by the commissioner. The association shall be authorized and have the duty to:

Drafting Note: The preceding paragraph provides that all surplus lines licensees are deemed to be members of the association. Some states, however, may choose not to establish a surplus lines advisory organization; in those states Subsection M would not be necessary.

(a) Receive, record, and subject to Subparagraph (b) of this paragraph, stamp all surplus lines insurance documents which surplus lines brokers are required to file with the association pursuant to the plan of operation;

Drafting Note: Subparagraph (a) of this paragraph authorizes the association to receive, record and stamp all surplus lines documents which must be submitted to the association pursuant to the plan of operation. Documents to be submitted to the association for stamping are likely to vary by state.

(b) Refuse to stamp submitted insurance documents, if the association determines that a nonadmitted insurer does not meet minimum state financial standards of eligibility, or the commissioner orders the association not to stamp insurance documents pursuant to Paragraph (9) of this subsection. The association shall notify the commissioner and provide an explanation for any refusal to stamp submitted insurance documents other than a refusal based upon the order of the commissioner;

(c) Prepare and deliver annually to each licensee and to the commissioner a report regarding surplus lines business. The report shall include a delineation of the classes of business procured during the preceding calendar year, in the form the board of directors prescribes;

(d) Encourage compliance by its members with the surplus lines law of this state and the rules and regulations of the commissioner relative to surplus lines insurance;

(e) Communicate with organizations of agents, brokers and admitted insurers with respect to the proper use of the surplus lines market;

(f) Employ and retain persons as necessary to carry out the duties of the association;

(g) Borrow money as necessary to affect the purposes of the association;

(h) Enter contracts as necessary to affect the purposes of the association; and

(i) Provide such other services to its members as are incidental or related to the purposes of the association.

(2) The association shall function through a board of directors elected by the association members, and officers who shall be elected by the board of directors.

(a) The board of directors of the association shall consist of not less than five (5) nor more than nine (9) persons serving terms as established in the plan of operation. The plan of operation shall provide for the election of a board of directors by the members of the association from its membership. The plan of operation shall fix the manner of voting and may weigh each member's vote to reflect the annual surplus lines insurance premium written by the member.

(b) The board of directors shall elect officers as provided for in the plan of operation.

(3) The association shall establish a plan of operation. The plan of operation shall provide for the formation, operation and governance of the association. The plan and any amendments shall be effective upon approval by the commissioner, which shall not be unreasonably withheld or delayed. All association members shall comply with the plan of operation or any amendments to it. Failure to comply with the plan of operation or any amendments shall constitute a violation of the insurance law and the commissioner may issue an order requiring discontinuance of the violation.

(4) The association shall file with the commissioner:

(a) A copy of its plan of operation and any amendments to it;

(b) A current list of its members revised at least annually;

(c) The name and address of a resident of this state upon whom notices or orders of the commissioner or processes issued at the direction of the commissioner may be served; and

(d) An agreement that the commissioner may examine the association in accordance with the provisions of Paragraph (5) of this subsection.

(5) The commissioner shall, at least once in [insert number] years, make or cause to be made an examination of the association. The reasonable cost of an examination shall be paid by the association upon presentation to it by the commissioner of a detailed account of each cost. The officers, managers, agents, and employees of the association may be examined at any time, under oath, and shall exhibit all books, records, accounts, documents or agreements governing its method of operation. The commissioner shall furnish a copy of the examination report to the association and shall notify the association that it may request a hearing within thirty (30) days on the report or on any facts or recommendations contained in it. If the commissioner finds the association to be in violation of this section, the commissioner may issue an order requiring the discontinuance of the violation. A director may be removed from the association's board of directors by the commissioner for cause, stated in writing, after an opportunity has been given to the director to be heard.

(6) There shall be no liability on the part of and no causes of action of any nature shall arise against the association, its directors, officers, agents or employees for any action taken or omitted by them in the performance of their powers and duties under this section, absent gross negligence or willful misconduct.

(7) Within [insert number] days after a surplus lines policy is procured, a licensee shall submit to the association for recording and stamping all documents which surplus lines brokers are required to file with the association. Every insurance document submitted to the association pursuant to this subsection shall set forth:

(a) The name and address of the insured;

(b) The gross premium charged;

(c) The name of the nonadmitted insurer; and

(d) The class of insurance procured.

Drafting Note: The appropriate time limits for submitting documents required for stamping will vary by state.

(8) It shall be unlawful for an insurance agent, broker or surplus lines broker to deliver in this state any insurance document which surplus lines brokers are required to file with the association unless the insurance document is stamped by the association or is exempt from such requirements. However, a licensee's failure to comply with the requirements of this subsection shall not affect the validity of the coverage.

(9) The services performed by the association shall be funded by a stamping fee assessed for each premium-bearing document submitted to the association. The stamping fee shall be established by the board of directors of the association from time to time. The stamping fee shall be paid by the insured.

(10) The commissioner may declare a nonadmitted insurer ineligible and order the association not to stamp insurance documents issued by the nonadmitted insurer and issue any other appropriate order.

N. Evidence of the Insurance and Subsequent Changes to the Insurance

(1) Upon placing surplus lines insurance, the surplus lines licensee shall promptly deliver to the insured or the producing broker the policy, or if the policy is not then available, a certificate as described in Paragraph (4) of this subsection, cover note, binder or other evidence of insurance. The certificate described in Paragraph (4) of this subsection, cover note, binder or other evidence of insurance shall be executed by the surplus lines licensee and shall show the description and location of the subject of the insurance, coverages including any material limitations other than those in standard forms, a general description of the coverages of the insurance, the premium and rate charged and taxes to be collected from the insured, and the name and address of the insured and surplus lines insurer or insurers and proportion of the entire risk assumed by each, and the name of the surplus lines licensee and the licensee's license number.

(2) A surplus lines licensee shall not issue or deliver any evidence of insurance or purport to insure or represent that insurance will be or has been written by any surplus lines insurer or a nonadmitted insurer unless the licensee has authority from the insurer to cause the risk to be insured or has received information from the insurer in the regular course of business that the insurance has been granted.

(3) If, after delivery of any evidence of insurance, there is any change in the identity of the insurers, or the proportion of the risk assumed by any insurer, or any other material change in coverage as stated in the surplus lines licensee's original evidence of insurance, or in any other material as to the insurance coverage so evidenced, the surplus lines licensee shall promptly issue and deliver to the insured or the original producing broker an appropriate substitute for, or endorsement of the original document, accurately showing the current status of the coverage and the insurers responsible for the coverage.

(4) As soon as reasonably possible after the placement of the insurance, the surplus lines licensee shall deliver a copy of the policy or, if not available, a certificate of insurance to the insured or producing broker to replace any evidence of insurance previously issued. Each certificate or policy of insurance shall contain or have attached a complete record of all policy insuring agreements, conditions, exclusions, clauses, endorsements or any other material facts that would regularly be included in the policy.

(5) The surplus lines licensee shall give the following consumer notice to every person, applying for insurance with a nonadmitted insurer. The notice shall be printed in 16-point type on a separate document affixed to the application. The applicant shall sign and date a copy of the notice to acknowledge receiving it. The surplus lines licensee shall maintain the signed notice in its file for a period of five (5) years from expiration of the policy. The surplus lines licensee shall tender a copy of the signed notice to the insured at the time of delivery of each policy the licensee transacts with a nonadmitted insurer. The copy shall be a separate document affixed to the policy.

*"**Notice**: A nonadmitted or surplus lines insurer is issuing the insurance policy that you have applied to purchase. These insurers do not participate in insurance guaranty funds. The guaranty funds will not pay your claims or protect your assets if the insurer becomes insolvent and is unable to make payments as promised. For additional information about the above matters and about the insurer, you should ask questions of your insurance agent, broker or surplus lines broker. You may also contact your insurance department consumer help line."*

Drafting Note: This notice is intended to inform personal lines customers and smaller commercial risks of the nature of the coverage they are purchasing. A state may wish to add language to this statute providing that this notice need not be given to commercial risks meeting defined criteria for size and insurance expertise.

O. Licensee's Duty to Notify Insured

(1) No contract of insurance placed by a surplus lines licensee under this Act shall be binding upon the insured and no premium charged shall be due and payable until the surplus lines licensee or the producing broker has notified the insured in writing, in a form acceptable to the commissioner, a copy of which shall be maintained by the licensee or the producing broker with the records of the contract and available for possible examination, that:

(a) The insurer [other than a domestic surplus lines insurer] with which the licensee places the insurance is not licensed by this state and is not subject to its supervision; and

(b) In the event of the insolvency of the surplus lines insurer, losses will not be paid by the state insurance guaranty fund.

(2) Nothing herein contained shall nullify any agreement by any insurer to provide insurance.

Drafting Note: To ensure the meaningfulness of the notice required by this subsection, the commissioner might want to establish criteria related to readability, font, and size of the notice.

P. Effect of Payment to Surplus Lines Licensee

A payment of premium to a surplus lines licensee acting for a person other than itself in procuring, continuing or renewing any policy of insurance procured under this section shall be deemed to be payment to the insurer, whatever conditions or stipulations may be inserted in the policy or contract notwithstanding.

Q. Surplus Lines Licensees May Accept Business from Other Producers

A surplus lines licensee may originate surplus lines insurance or accept such insurance from any other producing broker duly licensed as to the kinds of insurance involved, and the surplus lines licensee may compensate the producing broker for the business.

R. Records of Surplus Lines Licensee

(1) Each surplus lines licensee shall keep a full and true record of each surplus lines insurance contract placed by or through the licensee, including a copy of the policy, certificate, cover note or other evidence of insurance showing each of the following items applicable:

(a) Amount of the insurance, risks and perils insured;

(b) Brief description of the property insured and its location;

(c) Gross premium charged;

(d) Any return premium paid;

(e) Rate of premium charged upon the several items of property;

(f) Effective date and terms of the contract;

(g) Name and address of the insured;

(h) Name and address of the insurer;

(i) Amount of tax and other sums to be collected from the insured; and

(j) Identity of the producing broker, any confirming correspondence from the insurer or its representative, and the application.

(2) The record of each contract shall be kept open at all reasonable times to examination by the commissioner without notice for a period not less than five (5) years following termination of the contract. In lieu of maintaining offices in this state, each nonresident surplus lines licensee shall make available to the commissioner any and all records that the commissioner deems necessary for examination.

Drafting Note: States may wish to extend the five-year period prescribed for open access to insurance records because of the long-term nature of this business.

S. Reports—Summary of Exported Business

On or before the end of the month following each [insert month, quarter, year], each surplus lines licensee shall file with the commissioner, on forms prescribed by the commissioner, a verified report in duplicate of all surplus lines insurance transacted during the preceding period, showing:

(1) Aggregate gross premium written;

(2) Aggregate return premium;

(3) Amount of aggregate tax remitted to this state; and

(4) Amount of aggregate tax due or remitted to each other state for which an allocation is made pursuant to Subsection G of this section.

Drafting Note: States desiring to have taxes remitted annually may call for more frequent detailed listing of business.

T. [OPTIONAL: Domestic Surplus Lines Insurers

(1) The commissioner may designate a domestic insurer as a domestic surplus lines insurer upon its application, which shall include, as a minimum, an authorizing resolution of the board of directors and evidence to the commissioner's satisfaction that the insurer has capital and surplus of not less than fifteen million dollars.

(2) A domestic surplus lines insurer:

(a) Shall be limited in its authority in this state to providing surplus lines insurance.

(b) May be authorized to write any type of property and casualty [or accident and health] insurance in this state that may be placed with a surplus lines insurer pursuant to this Subpart.

(c) Be subject to the legal and regulatory requirements applicable to domestic insurers, except for the following:

(i) Premium taxes, fees, and assessments applicable to admitted insurance;

(ii) Regulation of rates and forms;

(iii) Assessment or coverage by insurance guaranty funds.]

Section 6. Insurance Independently Procured—Duty to Report and Pay Tax

A. Each insured whose home state is this state, who procures or continues or renews insurance with a nonadmitted insurer, other than insurance procured through a surplus lines licensee, shall, within [insert number] days after the date the insurance was so procured, continued or renewed, file a written report with the commissioner, upon forms prescribed by the commissioner, showing the name and address of the insured or insureds, name and address of the insurer, the subject of the insurance, a general description of the coverage, the amount of premium currently charged, and additional pertinent information reasonably requested by the commissioner.

Drafting Note: Subsection A may need to be revised in those states exempting from taxation insurance procured by nonprofit educational institutions and their employers, from nonprofit educational insurers.

B. Premium charged for the insurance, less any return premium, is subject to a tax at the rate of [insert number] percent. At the time of filing the report required in Subsection A of this section, the insured whose home state is this state shall pay the tax on all taxable premium to the commissioner, who shall transmit the same for distribution as provided in this Act.

Drafting Note: Existing state laws and procedures may require that the tax report be forwarded to another state agency, such as the Department of the Treasury, rather than to the commissioner. In addition, some states may require the tax to be paid on a periodic basis (e.g., annually) rather than at the time of the filing required by Subsection A. Subsections A and B may need to be revised in these states.

C. Delinquent taxes hereunder shall bear interest at the rate of [insert number] percent per year.

D. This section does not abrogate or modify and shall not be construed or deemed to abrogate or modify any other provision of this Act.

Section 7. Penalties

A. A person who in this state represents or aids a nonadmitted insurer in violation of this Act may be found guilty of a criminal act and subject to a fine not in excess of $[insert amount].

Drafting Note: Some states might want to specify "misdemeanor" or "felony" rather than "criminal act" in Section 7A.

B. In addition to any other penalty provided herein or otherwise provided by law, including any suspension, revocation or refusal to renew a license, any person, firm, association or corporation violating any provision of this Act shall be liable to a civil penalty not exceeding $[insert amount] for the first offense, and not exceeding $[insert amount] for each succeeding offense.

C. The above penalties are not exclusive remedies. Penalties may also be assessed under [insert citation to trade practices and fraud statute] of the insurance code of this state.

Section 8. Violations

Whenever there is evidence satisfactory to the commissioner that a person is violating or about to violate the provisions of this Act, the commissioner may cause a complaint to be filed in the [insert appropriate court] Court for restitution and to enjoin and restrain the person from continuing the violation or engaging in or doing any act in furtherance thereof. The court shall have jurisdiction of the proceeding and shall have the power to make and enter an order of judgment awarding such preliminary or final injunctive relief and restitution as in its judgment is proper.

Section 9. Service of Process

A. Any act of transacting insurance by an unauthorized person or a nonadmitted insurer is equivalent to and shall constitute an irrevocable appointment by the unauthorized person or insurer, binding upon it, its executor or administrator, or successor in interest of the [insert title of appropriate state official] or his or her successor in office, to be the true and lawful attorney of the unauthorized person or insurer upon whom may be served all lawful process in any action, suit or proceeding in any court by the commissioner or by the state and upon whom may be served any notice, order, pleading or process in any proceeding before the commissioner and which arises out of transacting insurance in this state by the unauthorized person or insurer. Any act of transacting insurance in this state by a nonadmitted insurer shall signify its acceptance of its

agreement that any lawful process in such court action, suit or proceeding and any notice, order, pleading or process in such administrative proceeding before the commissioner so served shall be of the same legal force and validity as personal service of process in this state upon the unauthorized person or insurer.

B. Service of process in the action shall be made by delivering to and leaving with the [insert title of appropriate state official], or some person in apparent charge of the office, two (2) copies thereof and by payment to the [insert title of appropriate state official] of the fee prescribed by law. Service upon the [insert title of appropriate state official] as attorney shall be service upon the principal.

Drafting Note: Existing state laws and procedures may require that service of process be made upon either the commissioner or another state official.

C. The [insert title of appropriate state official] shall forward by certified mail one of the copies of the process or notice, order, pleading or process in proceedings before the commissioner to the defendant in the court proceeding or to whom the notice, order, pleading or process in the administrative proceeding is addressed or directed at its last known principal place of business and shall keep a record of all process so served on the commissioner which shall show the day and hour of service. Service is sufficient, provided:

(1) Notice of service and a copy of the court process or the notice, order, pleading or process in the administrative proceeding are sent within ten (10) days by certified mail by the plaintiff or the plaintiff's attorney in the court proceeding or by the commissioner in the administrative proceeding to the defendant in the court proceeding or to whom the notice, order, pleading or process in the administrative proceeding is addressed or directed at the last known principal place of business of the defendant in the court or administrative proceeding; and

(2) The defendant's receipt or receipts issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person or insurer to whom the letter is addressed, and an affidavit of the plaintiff or the plaintiff's attorney in a court proceeding or of the commissioner in an administrative proceeding, showing compliance are filed with the clerk of the court in which the action, suit or proceeding is pending or with the commissioner in administrative proceedings, on or before the date the defendant in the court or administrative proceeding is required to appear or respond, or within such further time as the court or commissioner may allow.

D. A plaintiff shall not be entitled to a judgment or a determination by default in any court or administrative proceeding in which court process or notice, order, pleading or process in proceedings before the commissioner is served under this section until the expiration of forty-five (45) days from the date of filing of the affidavit of compliance.

E. Nothing in this section shall limit or affect the right to serve any process, notice, order or demand upon any person or insurer in any other manner now or hereafter permitted by law.

F. Each nonadmitted insurer assuming insurance in this state, or relative to property, risks or exposures located or to be performed in this state, shall be deemed to have subjected itself to this Act.

G. Notwithstanding conditions or stipulations in the policy or contract, a nonadmitted insurer may be sued upon any cause of action arising in this state, or relative to property, risks or exposures located or to be performed in this state, under any insurance contract made by it.

H. Except with regard to exempt commercial purchasers, independently procured insurance, [aviation], and wet marine and transportation insurance, conditions or stipulations in the policy or contract notwithstanding, a nonadmitted insurer subject to arbitration or other alternative dispute resolution mechanism shall conduct the arbitration or other alternative dispute resolution mechanism in the home state of the insured.

Drafting Note: Provisions of a state's constitution, statutes, regulations, and public policy may necessitate amendment of the prior Section 9H. States should consider adoption or modification of Section 9H in light of their own laws on arbitration or other alternative dispute resolution in insurance and commercial transactions. States should cross-reference their state insurance code to verify the inclusion of "Aviation" within this provision.

I. A policy or contract issued by the nonadmitted insurer or one which is otherwise valid and contains a condition or provision not in compliance with the requirements of this Act is not thereby rendered invalid but shall be construed and applied in accordance with the conditions and provisions which would have

applied had the policy or contract been issued or delivered in full compliance with this Act.

Section 10. Legal or Administrative Procedures

A. Before any nonadmitted insurer files or causes to be filed any pleading in any court action, suit or proceeding or in any notice, order, pleading or process in an administrative proceeding before the commissioner instituted against the person or insurer, by services made as provided in this Act, the insurer shall either:

(1) Deposit with the clerk of the court in which the action, suit or proceeding is pending, or with the commissioner of Insurance in administrative proceedings before the commissioner, cash or securities, or file with the clerk or commissioner a bond with good and sufficient sureties, to be approved by the clerk or commissioner in an amount to be fixed by the court or commissioner sufficient to secure the payment of any final judgment which may be rendered in the action or administrative proceeding; or

(2) Procure a certificate of authority to transact the business of insurance in this state. In considering the application of an insurer for a certificate of authority, for the purposes of this paragraph the commissioner need not assert the provisions of [insert sections of insurance laws relating to retaliation] against the insurer with respect to its application if the commissioner determines that the company would otherwise comply with the requirements for a certificate of authority.

B. The commissioner of insurance, in any administrative proceeding in which service is made as provided in this Act, may in the commissioner's discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Subsection A of this section and to defend the action.

C. Nothing in Subsection A of this section shall be construed to prevent a nonadmitted insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in this Act, on the ground that the nonadmitted insurer has not done any of the acts enumerated in the pleadings.

D. Nothing in Subsection A of this section shall apply to placements of insurance which were lawful in the home state of the insured and which were not unlawful placements under the laws of this state. Without limiting the generality of the foregoing, nothing in Subsection A shall apply to a placement made pursuant to Section 5 of this Act.

Section 11. Enforcement

A. The commissioner shall have the authority to proceed in the courts of this state or any other United States jurisdiction to enforce an order or decision in any court proceeding or in any administrative proceeding before the commissioner of insurance.

B. It shall be the policy of this state that the insurance commissioner shall cooperate with regulatory officials in other United States jurisdictions to the greatest degree reasonably practicable in enforcing lawfully issued orders of such other officials subject to public policy and the insurance laws of the state. Without limiting the generality of the foregoing, the commissioner may enforce an order lawfully issued by other officials provided the order does not violate the laws or public policy of this state.

Section 12. Suits by Nonadmitted Insurers

A nonadmitted insurer may not commence or maintain an action at law or in equity, including arbitration or any other dispute resolution mechanism, in this state to enforce any right arising out of any insurance transaction except with respect to:

A. Claims under policies lawfully placed pursuant to the law of the home state of the insured;

B. Liquidation of assets and liabilities of the insurer (other than collection of new premium), resulting from its former authorized operations in this state;

C. Transactions subsequent to issuance of a policy not covering domestic risks at the time of issuance, and lawfully procured under the laws of the jurisdiction where the transaction took place;

D. Surplus lines insurance placed by a licensee under authority of Section 5 of this Act;

E. Reinsurance placed under the authority of [insert citations of state's reinsurance intermediary act and other reinsurance laws];

F. The continuation and servicing of life insurance, health insurance policies or annuity contracts remaining in force as to residents of this state where the formerly authorized insurer has withdrawn from the state and is not transacting new insurance in the state;

G. Servicing of policies written by an admitted insurer in a state to which the insured has moved but in which the company does not have a certificate of authority until the term expires;

H. Claims under policies covering wet marine and transportation insurance;

I. Placements of insurance which were lawful in the jurisdiction in which the transaction took place and which were not unlawful placements under the laws of this state.

Drafting Note: Provisions of a state's constitution, statutes, regulations, and public policy may necessitate amendment of the opening paragraph of this section.

Section 13. Severability

If any provisions of this Act, or the application of the provision to any person or circumstance, shall be held invalid, the remainder of the Act and the application of the provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Section 14. Effective Date

This Act shall take effect [insert appropriate date].

Chronological Summary of Actions (all references are to the Proceedings of the NAIC).

1994 Proc. 3rd Quarter 14, 16-17, 24, 28-46 (adopted).
1996 Proc. 3rd Quarter 9, 42, 1110, 1168, 1169-1173, 1189-1190 (amended).
1997 Proc. 4th Quarter 25, 27-28, 1004, 1029 (amended).
1999 Proc. 3rd Quarter 25, 26, 1080, 1135, 1151-1153 (amended).
2002 Proc. 2nd Quarter 14, 250-251, 344, 347, 349-350 (amended).
2023 Summer National Meeting (amended).

This model draws from and replaces three earlier NAIC models:

Model Surplus Lines Law
1983 Proc. I 6, 36, 834, 900, 913-922 (adopted).
1985 Proc. II 11, 24, 702, 722, 723-724 (amended).
1986 Proc. I 9-10, 24, 799, 813, 814-821 (amended).
1990 Proc. I 6, 30, 840-841, 897-898, 900-901 (amended).
1991 Proc. I 9, 18, 908, 949, 950, 952-961 (amended and reprinted).

Unauthorized Insurers Model Act
1969 Proc. I 168, 218, 222-227, 271 (adopted).
1978 Proc. I 13, 15, 348, 350 (amended).
1990 Proc. II 7, 13-14, 159-160, 187-191 (amended and reprinted).

Model Nonadmitted Insurance Act
1983 Proc. 1 6, 36, 834, 899-900, 923-926 (adopted).

UNAUTHORIZED INSURERS PROCESS ACT

Table of Contents

Introduction
Section 1. Purpose of Act
Section 2. Service of Process Upon Unauthorized Insurer
Section 3. Defense of Action by Unauthorized Insurer
Section 4. Attorney Fees
Section 5. Constitutionality
Section 6. Short Title

Introduction

An Act relating to insurers not authorized to transact business in this state; providing for actions in this state against and for the service of process upon these insurers; prescribing how a defense may be made by these insurers; and providing for the allowance of attorneys' fees in actions against these insurers.

Section 1. Purpose of Act

The purpose of this Act is to subject certain insurers to the jurisdiction of courts of this state in suits by or on behalf of insureds or beneficiaries under insurance contracts.

The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to these residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under these policies. In furtherance of the state interest, the legislature herein provides a method of substituted service of process upon the insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this state, and also exercises powers and privileges available to the state by virtue of United States Code tit. 15 § 1011, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

Section 2. Service of Process Upon Unauthorized Insurer

A. Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer is equivalent to and shall constitute an appointment by the insurer of the Commissioner of Insurance and the commissioner's successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding instituted by or on behalf of an insured or beneficiary arising out of a contract of insurance, and any act shall be signification of its agreement that the service of process is of the same legal force and validity as personal service of process in this state upon the insurer.

(1) The issuance or delivery of insurance contracts to residents of this state or to corporations authorized to do business in the state;

(2) The solicitation of applications for insurance contracts;

(3) The collection of premiums, membership fees, assessments or other considerations for insurance contracts; or

(4) Any other transaction of insurance business.

Drafting Note: Insert the title of the chief regulatory official wherever the term "commissioner" appears.

B. Service of process shall be made by delivering to and leaving with the commissioner or some person in apparent charge of the office two (2) copies thereof and the payment of the fees prescribed by law. The commissioner shall forthwith mail by registered mail one of the copies of the process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon the commissioner. The service of process is sufficient, provided notice of such service and a copy of the process are sent within ten (10) days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing compliance are filed with the clerk of the court in which the action is pending on or before the date the defendant is required to appear, or within a further time the court may allow.

C. Service of process in an action, suit or proceeding shall, in addition to the manner provided in Subsection B of this section, be valid if served upon a person within this state who, in this state on behalf of the insurer, is:

(1) Soliciting insurance; or

(2) Making, issuing or delivering any contract of insurance; or

(3) Collecting or receiving any premium, membership fee, assessment or other consideration for insurance;

and a copy of the process is sent within ten (10) days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which the action is pending on or before the date the defendant is required to appear, or within a further time the court may allow.

D. A plaintiff or complainant shall not be entitled to a [insert appropriate state procedure, either judgment by default, or a judgment with leave to prove damages, or a judgment *pro confesso*] under this section until the expiration of thirty (30) days from the date of the filing of the affidavit of compliance.

E. Nothing in this section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

Section 3. Defense of Action By Unauthorized Insurer

A. Before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, the unauthorized insurer shall deposit with the clerk of the court in which the action, suit or proceeding is pending, cash or securities or file with the clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in the action; or procure a certificate of authority to transact the business of insurance in this state.

B. The court in any action, suit or proceeding in which service is made in the manner provided in Section 2B or 2C may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Subsection A of this section and to defend the action.

C. Nothing in Subsection A of this section is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Section 2B or 2C on the ground either that:

(1) The unauthorized insurer has not done any of the acts enumerated in Section 2A; or

(2) The person on whom service was made pursuant to Section 2C was not doing any of the acts therein enumerated.

Section 4. Attorney Fees

In an action against an unauthorized foreign or alien insurer upon a contract of insurance issued or delivered in this state to a resident thereof or to a corporation authorized to do business therein, if the insurer has failed for thirty (30) days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that the refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include the fee in any judgment that may be rendered in the action. The fee shall not exceed twelve and one-half percent (12-1/2%) of the amount that the court or jury finds the plaintiff is entitled to recover against the insurer, but in no event shall the fee be less than $25. Failure of an insurer to defend an action shall be deemed *prima facie* evidence that its failure to make payment was vexatious and without reasonable cause.

Section 5. Constitutionality

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Section 6. Short Title

This Act may be cited as the Unauthorized Insurers Process Act.

Chronological Summary of Actions (all references are to the Proceedings of the NAIC).

1949 Proc. 126-130, 132, 315-316 (adopted).
1951 Proc. 166-168, 182 (printed and reaffirmed).

Applicant Company Name: _____ NAIC No. _____
FEIN: _____

Uniform Certificate of Authority Application (UCAA)
Uniform Consent to Service of Process

_____ Original Designation _____ Amended Designation
(must be submitted directly to states)

Applicant Company Name: _____

Previous Name (if applicable): _____

Statutory Home Office Address: _____

City, State, Zip: _____ NAIC CoCode:_____

The Applicant Company named above, organized under the laws of _____ , and regulated under the laws of _____ for purposes of complying with the laws of the State(s) designate hereunder relating to the holding of a certificate of authority or the conduct of an insurance business within said State(s), pursuant to a resolution adopted by its board of directors or other governing body, hereby irrevocably appoints the officers of the State(s) and their successors identified in Exhibit A, or where applicable appoints the required agent so designated in Exhibit A hereunder as its attorney in such State(s) upon whom may be served any notice, process or pleading as required by law as reflected on Exhibit A in any action or proceeding against it in the State(s) so designated; and does hereby consent that any lawful action or proceeding against it may be commenced in any court of competent jurisdiction and proper venue within the State(s) so designated; and agrees that any lawful process against it which is served under this appointment shall be of the same legal force and validity as if served on the entity directly. This appointment shall be binding upon any successor to the above named entity that acquires the entity's assets or assumes its liabilities by merger, consolidation or otherwise; and shall be binding as long as there is a contract in force or liability of the entity outstanding in the State. The entity hereby waives all claims of error by reason of such service. The entity named above agrees to submit an amended designation form upon a change in any of the information provided on this power of attorney.

Applicant Company Officers' Certification and Attestation

One of the two Officers (listed below) of the Applicant Company must read the following very carefully and sign:

1. I acknowledge that I am authorized to execute and am executing this document on behalf of the Applicant Company.

2. I hereby certify under penalty of perjury under the laws of the applicable jurisdictions that all of the forgoing is true and correct, executed at _____.

_____ _____
Date Signature of President

_____
Full Legal Name of President

_____ _____
Date Signature of Secretary

_____
Full Legal Name of Secretary

Uniform Certificate of Authority (UCAA)
Uniform Consent to Service of Process
Exhibit A

Place an "X" before the names of all the States for which the person executing this form is appointing the designated agent in that State for receipt of service of process:

____	AL	Commissioner of Insurance # and Resident Agent*	__	MO	Director of Insurance #
____	AK	Director of Insurance #	__	MT	Resident Agent*
____	AZ	Director of Insurance # ^	__	NE	Officer of Company* or Resident Agent* (circle one)
____	AR	Resident Agent *	__	NH	Commissioner of Insurance #
____	AS	Commissioner of Insurance #	__	NV	Commissioner of Insurance Commission # ^
____	CO	Resident Agent*	__	NJ	Commissioner of Banking and Insurance #^
____	CT	Commissioner of Insurance #	__	NM	Superintendent of Insurance #
____	DE	Commissioner of Insurance #	__	NY	Superintendent of Financial Services #
____	DC	Commissioner of Insurance and Securities Regulation # or Local Agent* (circle one)	__	NC	Commissioner of Insurance
____	FL	Chief Financial Officer # ^	__	ND	Commissioner of Insurance # ^
____	GA	Commissioner of Insurance and Safety Fire # and Resident Agent*	__	OH	Resident Agent*
____	GU	Commissioner of Insurance #	__	OR	Resident Agent*
____	HI	Insurance Commissioner # and Resident Agent*	__	OK	Commissioner of Insurance #
____	ID	Director of Insurance # ^	__	PR	Commissioner of Insurance #
____	IL	Director of Insurance #	__	RI	Superintendent of Insurance ^
____	IN	Resident Agent* ^	__	SC	Director of Insurance #
____	IA	Commissioner of Insurance #	__	SD	Director of Insurance # ^
____	KS	Commissioner of Insurance ^	__	TN	Commissioner of Insurance #
____	KY	Secretary of State #	__	TX	Resident Agent*
____	LA	Secretary of State #	__	UT	Resident Agent* ^
____	MD	Insurance Commissioner #	__	VT	Resident Agent*
____	ME	Resident Agent* ^	__	VI	Lieutenant Governor/Commissioner#
____	MI	Resident Agent *	__	WA	Insurance Commissioner #
____	MN	Commissioner of Commerce ~	__	WV	Secretary of State # @
____	MS	Commissioner of Insurance and Resident Agent* BOTH are required.	__	WY	Commissioner of Insurance #

For the forwarding of Service of Process received by a State Officer complete Exhibit B listing by state the entities (one per state) with **full name and address where service of process is to be forwarded**. Use additional pages as necessary. Exhibit not required for New Jersey, and North Carolina. Florida accepts only an individual as the entity and requires an email address. New Jersey allows but does not require a foreign insurer to designate a specific forwarding address on Exhibit B. SC will not forward to an individual by name; however, it will forward to a position, e.g., Attention: President (or Compliance Officer, etc.). Washington requires an email address on Exhibit B.

* Attach a completed Exhibit B listing the Resident Agent for the Applicant Company (one per state). Include state name, Resident Agent's **full name and street address**. Use additional pages as necessary. (DC* requires an agent within a ten-mile radius of the District), (MT requires an agent to reside or maintain a business in MT).

^ Initial pleadings only.

@ Form accepted only as part of a Uniform Certificate of Authority application.

MA will send the required form to the Applicant Company when the approval process reaches that point.

~ Minnesota does not forward Service of Process. To effectively serve the Commissioner of Commerce, use the process under Minn. Stat. § 45.028. Applicant Company may complete Exhibit B to provide a Service of Process address that Commerce may keep on file.

Exhibit A

Uniform Certificate of Authority (UCAA)
Uniform Consent to Service of Process
Exhibit B

Complete for each state indicated in Exhibit A:

State: _____ Name of Entity: _____

Phone Number: _____ Fax Number: _____

Email Address: _____

Mailing Address: _____

Street Address: _____

State: _____ Name of Entity: _____

Phone Number: _____ Fax Number: _____

Email Address: _____

Mailing Address: _____

Street Address: _____

State: _____ Name of Entity: _____

Phone Number: _____ Fax Number: _____

Email Address: _____

Mailing Address: _____

Street Address: _____

State: _____ Name of Entity: _____

Phone Number: _____ Fax Number: _____

Email Address: _____

Mailing Address: _____

Street Address: _____

State: _____ Name of Entity: _____

Phone Number: _____ Fax Number: _____

Email Address: _____

Mailing Address: _____

Street Address: _____

Resolution Authorizing Appointment of Attorney

BE IT RESOLVED by the Board of Directors or other governing body of

_____ ,
(Applicant Company Name)

this _____day of _____ , 20 _____ , that the President or Secretary of said entity be and are hereby authorized by the Board of Directors and directed to sign and execute the Uniform Consent to Service of Process to give irrevocable consent that actions may be commenced against said entity in the proper court of any jurisdiction in the state(s) of

_____

_____

in which the action shall arise, or in which plaintiff may reside, by service of process in the state(s) indicated above and irrevocably appoints the officer(s) of the state(s) and their successors in such offices or appoints the agent(s) so designated in the Uniform Consent to Service of Process and stipulate and agree that such service of process shall be taken and held in all courts to be as valid and binding as if due service had been made upon said entity according to the laws of said state.

CERTIFICATION:

I, _____, Secretary of

_____ ,
(Applicant Company Name)

state that this is a true and accurate copy of the resolution adopted effective the ____ day of _____, 20 _____by the Board of Directors or governing board at a meeting held on the _____ day of _____, 20 _____ or by written consent dated _____ day of _____, 20 ___.

Date_____ _____
Secretary