

**IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
MIDDLE SECTION**

**LESLIE L. NEWMAN, Commissioner
of the Tennessee Department of
Commerce and Insurance,**

Petitioner-Appellee,

v.

**SMART DATA SOLUTIONS, LLC,
AMERICAN TRADE ASSOCIATION,
INC., AMERICAN TRADE
ASSOCIATION, LLC, SERVE
AMERICA ASSURANCE, BART S.
POSEY, SR., ANGIE POSEY, OBED
W. KIRKPATRICK, SR., LINDA
KIRKPATRICK, RICHARD
BACHMAN, KRISTY WRIGHT,
WILLIAM M. WORTHY, II, and
COLIN YUELL,**

Respondents-Appellants.

Case No: M2010-01938-COA-R3-CV

Davidson Co. Chancery No. 10-507-III

**BRIEF OF APPELLANTS SMART DATA SOLUTIONS, LLC
and AMERICAN TRADE ASSOCIATION, INC.**

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE

- I. Whether companies that have never contracted to indemnify another against loss, liability, or damages caused by a contingent or unexpected event are “insurers” subject to summary seizure and liquidation under the Tennessee Insurers Rehabilitation and Liquidation Act.

STATEMENT OF THE CASE

This is an enforcement action brought by the Commissioner of the Tennessee Department of Commerce and Insurance against a membership organization (American Trade Association, Inc., or “ATA”), a management company (Smart Data Solutions, LLC, or “SDS”), an insurance company (Serve America Assurance), and eight individuals associated with those organizations. The State also filed suit against an Arkansas company, American Trade Association, LLC; because the Arkansas company does not appear to be directly involved in the issues before the Court, all references to “ATA” will be to the Indiana corporation. The portion of the case before this Court on appeal concerns the seizure and proposed liquidation of the membership organization and management company based on regulations and remedies applicable to insurance companies. The central issue presented by the appeal is whether ATA and SDS are insurance companies subject to summary seizure and liquidation under the Tennessee Insurers Rehabilitation and Liquidation Act.

The State initiated this case by filing a petition¹ and an application for ex parte seizure.² The trial court held an ex parte hearing at which it reviewed affidavit testimony offered by the State and authorized the State to seize ATA, SDS, and Serve America.³

¹Petition, T.R. Vol. I, p. 1.

²Application for Ex Parte Seizure, T.R. Vol. I, p. 57.

³Order of Seizure, T.R. Vol. V, p. 701.

The State raided ATA's and SDS's offices and froze the companies' bank accounts, effectively putting them out of business before they had received notice of this lawsuit.

The trial court then held a hearing on the State's request to liquidate ATA and SDS, at which the court considered affidavits submitted by the parties and considered written and oral arguments. In its April 14, 2010 Memorandum and Order, the court held that ATA and SDS were insurers and that they were subject to liquidation because their continued operation would be hazardous to the public.⁴ Anticipating an appeal, the court ordered a further hearing on an alternate ground for liquidation: whether ATA and SDS were insolvent.⁵ At that hearing, the trial court considered oral and affidavit testimony, and determined that ATA and SDS were insolvent and that insolvency was another ground for liquidation.⁶

The court then entered a final order appointing the Commissioner of the Tennessee Department of Commerce and Insurance receiver for ATA and SDS, and ordering that the companies be liquidated.⁷ Holding that there was no just reason for delay, the court designated the order an appealable final order under TENN. R. CIV. P. 54.02.⁸

⁴T.R. Vol. XII, p. 1662.

⁵*Id.* at 17-19, T.R. XII, pp. 1678-80.

⁶April 27, 2010 Memorandum and Order; T.R. Vol. XII, p. 1709.

⁷Final Order, T.R. Vol. XIII, p. 1828.

⁸*Id.*, T.R. Vol. XIII, p. 1831.

Respondents ATA, SDS, and William Worthy filed timely motions asking the trial court to alter or amend its rulings.⁹ These motions focused on the trial court's findings that Serve America and its parent company, Beema-Pakistan Company, Ltd., did not exist and the court's finding that ATA and SDS were insurance companies. Although the trial court modified or clarified its findings, it denied the motions.¹⁰ ATA and SDS then filed a timely notice of appeal.¹¹

⁹Worthy Motion to Alter or Amend, T.R. Vol. XIII, p. 1852; Respondents' Motion to Alter or Amend and to Make Additional Findings, T.R. Vol. XIII, p. 1860.

¹⁰July 14, 2010 Order, T.R. Vol. XIX, p. 2706.

¹¹Notice of Appeal, T.R. Vol. XIX, p. 2739.

STATEMENT OF FACTS

A. American Trade Association, Inc.

ATA is a membership association incorporated in Indiana that sells memberships to consumers.¹² ATA members pay a fee and receive benefits from third party vendors, including discounts from Direct TV, EyeMasters, Lenscrafters, Beltone, Quest Labs, Hertz, Costco, and Best Buy. ATA members also receive access to health insurance plans underwritten by third party insurers.¹³

ATA members receive access to insurance coverage through a “master policy” issued to ATA members.¹⁴ ATA’s new member welcome kits for Serve America insurance policies specifically state that members’ insurance benefits are underwritten by Serve America Assurance.¹⁵ An ATA member’s insurance certificate identifies ATA as the “Policyholder.”¹⁶ Similarly, the master policy for Andone insurance policies identifies the “Members of the American Trade Association, Inc.” as the “Insured/Reinsured.”¹⁷

¹²Posey Affid., ¶6, T.R. Vol. IX, p. 1215.

¹³*Id.* at ¶7; T.R. Vol. IX, p. 1216.

¹⁴*See* Serve America Assurance Master Policy of Insurance, Exhibit B to Exhibit 1 to Petition, T.R. Vol. I, p. 101; Andone Binder, Exhibit 16 to Suppl. Posey Affid., T.R. Vol. XIV, p. 1948.

¹⁵Petition, ¶¶69, 70; T.R. Vol. I, p. 26; Exhibits C and D to Exhibit 1 to Petition; T.R. Vol. I, pp. 130, 139, T.R. Vol. II, pp. 209, 225.

¹⁶Exhibits C and D to Exhibit 1 to Petition; T.R. Vol. I, p. 123, Vol. II, p. 206.

¹⁷Exhibit 16 to Suppl. Posey Affid., T.R. Vol. XIV, p. 1948.

ATA has never held itself out as an insurance company and has never purported to underwrite any insurance coverage.¹⁸

In March of 2008, ATA hired SDS to provide management and administrative services.¹⁹ As part of its duties under the contract, SDS accepted ATA's share of membership fees collected by third party billing companies and distributed funds to vendors, including insurance companies.²⁰ After taking a fee, SDS disbursed a portion of these membership fees to ATA.²¹ In 2008 and 2009, SDS paid on ATA's behalf \$11,797,817.33 to insurance carriers or persons or entities purporting to represent insurance carriers, including Transamerica/Key Benefits, Beema/Serve America, Aegis/American Sentinel, Ameritas, Express Scripts, and Andone Insurance Company.²²

The record does not contain any allegation or evidence that ATA has ever contracted to indemnify another against loss, liability, or damages caused by a contingent or unexpected event.

¹⁸Posey Affid., ¶¶13, 20; T.R. Vol. IX, pp. 1218, 1220.

¹⁹Suppl. Posey Affid., ¶8; T.R. Vol. XIV, p. 1874; Exhibit 8 to Suppl. Posey Affid., T.R. Vol. XIV, p. 1894.

²⁰Posey Affid., ¶10; T.R. Vol. IX, p. 1217.

²¹Suppl. Posey Affid., ¶41; T.R. Vol. XIV, p. 1883.

²²Suppl. Posey Affid., ¶26; T.R. Vol. XIV, p. 1878.

B. Smart Data Solutions, LLC

SDS is a management company and third party administrator. Before the State seized the company, SDS's primary business was providing management services to ATA, performing customer service functions for ATA members, and processing insurance claims for Beema/Serve America and Andone.²³ Under TENN. CODE ANN. § 56-6-401, an entity that collects premiums or adjusts or settles claims in connection with health insurance coverage is a third party "administrator." Although SDS is not properly licensed to act as a third party administrator, there is no doubt that it actually acted in that capacity.

According to a petition and supporting affidavit filed by the State in an administrative proceeding in the Tennessee Department of Commerce and Insurance, SDS began administering health insurance plans underwritten by Serve America in 2008.²⁴ In that proceeding, the Commissioner of the Tennessee Department of Commerce and Insurance — who is also the petitioner in the pending case — found that SDS administered several insurance plans underwritten by Serve America.²⁵ A number of other

²³Posey Affid., ¶18; T.R. Vol. IX, pp. 1219-20.

²⁴Administrative Petition, ¶¶4-7, Collective Exhibit 2 to Memorandum in Support of Motion to Dismiss; Heisse Affid., ¶¶4-7, Exhibit to Administrative Petition, Collective Exhibit 2 to Memorandum in Support of Motion to Dismiss. (Collective Exhibit 2 was apparently omitted from the appellate record; the respondents will move to supplement the record to include the exhibit).

²⁵Summary Order to Cease and Desist, ¶¶4-7, Collective Exhibit 2 to Memorandum in Support of Motion to Dismiss. (As is noted above, Collective Exhibit 2 was omitted from the appellate record; the respondents will move to supplement the record to include the exhibit).

states have also instituted administrative proceedings against SDS.²⁶ In these proceedings, SDS is accused of being an unlicensed third party administrator. In none of these proceedings is SDS accused of being an insurer.²⁷

As of January 1, 2008, Beema/Serve America appointed SDS to act as its third party administrator.²⁸ As a third party administrator, SDS was to collect insurance premiums and forward the net premiums to Beema/Serve America's trustee.²⁹ SDS was also required to process claims, determine which claims were payable, and forward a list of claims to be paid to Beema/Serve America.³⁰ Beema/Serve America was then to wire funds to a special "claims account" from which SDS was to pay claims.³¹ SDS's responsibilities under this agreement are those of a third party administrator under TENN. CODE ANN. § 56-6-401.

As is noted above, information sent to ATA members concerning their health insurance benefits identified Serve America Assurance as the insurance underwriter.³²

²⁶See Exhibit G to Exhibit 1 to Petition; T.R. Vol. II, p. 249 to Vol. IV, p. 474.

²⁷Posey Suppl. Affid., ¶49; T.R. Vol. XIV, p. 1884.

²⁸Posey Suppl. Affid., ¶5; T.R. Vol. XIV, p. 1873; Exhibit 5 to Posey Suppl. Affid., T.R. Vol. XIV, p. 1891.

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²Petition, ¶¶69, 70; T.R. Vol. I, p. 26; Exhibits C and D to Exhibit 1 to Petition; T.R. Vol I, pp. 130, 139, T.R. Vol. II, pp. 209, 225.

SDS is identified as the administrator or administrative office.³³ SDS has never held itself out as an insurance company and has never purported to underwrite any insurance coverage.³⁴ Further, the record does not contain any allegation or evidence that SDS has ever contracted to indemnify another against loss, liability, or damages caused by a contingent or unexpected event.

C. The insurers and their representatives: Beema-Pakistan Company, Ltd., Serve America Assurance, Colin Youell, and William Worthy

1. The Record

Beema-Pakistan Company, Ltd. is the largest insurance company in Pakistan,³⁵ and it has been in business since 1960.³⁶ According to Respondent William Worthy, Beema controlled a Bermuda captive, Serve America Assurance, which was Beema's United States representative.³⁷ The record contains evidence of conflicting statements made on Beema's behalf about its connections with Respondents Serve America, William Worthy, and Colin Youell:

- Beema's chairman and CEO states in a March 29, 2010 letter to the State's counsel (1) that Serve America is a captive division within Beema, (2) that as Foreign Marketing Director, Colin Youell made re-insurance arrangements on behalf of

³³Petition, ¶69; T.R. Vol. I, p. 26; Exhibits C and D to Exhibit 1 to Petition; T.R. I, p. 123, T.R. Vol. II, p. 206.

³⁴Posey Affid., ¶¶13, 20; T.R. Vol. IX, pp. 1218, 1220.

³⁵Posey Suppl. Affid., ¶4; T.R. Vol. XIV, pp. 1872-73.

³⁶Exhibit 38 to Posey Suppl. Affid.; T.R. Vol. XVI, p. 2223.

³⁷Posey Suppl. Affid. ¶¶4-5; T.R. Vol. XIV, pp. 1872-73.

Serve America before August 31, 2009, and (3) that Beema was prepared to pay all legitimate claims at issue in this case arising before August 31, 2009.³⁸

- Beema's chairman and CEO states in a May 6, 2010 letter (1) that Beema owns Serve America, and (2) that Serve America issued an insurance contract for the benefit of ATA's members.³⁹
- An unattributed, unsigned, unaddressed, undated letter on behalf of Beema denies that Beema owns any subsidiaries outside of Pakistan or that it has appointed any agent outside of Pakistan.⁴⁰
- Beema's chief underwriter states in an undated letter (1) that Serve America is an offshore captive owned by Beema, (2) that Serve America issued a master policy covering ATA members, and (3) that the plans issued to ATA members are administered through SDS.⁴¹
- Beema director Colin Youell states in a March 18, 2008 letter that William Worthy is authorized to act as Beema's agent with respect to attachment of insurance coverage and collection of premiums.⁴²
- Beema's chairman and CEO states in an April 2, 2010 letter to the State's counsel (1) that Serve America was a division of Beema, (2) that Serve America was created to manage business generated by Colin Youell, and (3) that Serve America did not have any "production dimension."⁴³
- Beema's chairman and CEO states in an April 1, 2010 affidavit (1) that Serve America is a division of Beema formed to provide reinsurance outside of Pakistan,

³⁸Exhibit 37 to Posey Suppl. Affid.; T.R. Vol. XVI, p. 2222.

³⁹Exhibit 38 to Posey Suppl. Affid.; T.R. Vol. XVI, p. 2223.

⁴⁰Exhibit 9 to Exhibit H to Exhibit 1 to Petition; T.R. Vol. IV, p. 535; April 14, 2010 Memorandum and Order, at 3; T.R. Vol. XII, p. 1664.

⁴¹Exhibit 10 to Posey Suppl. Affid.; T.R. Vol. XIV, p. 1896.

⁴²Exhibit 7 to Posey Suppl. Affid.; T.R. Vol. XIV, p. 1893.

⁴³Exhibit 1 to Notice of Filing, T.R. Vol. IX, p. 1154.

and (2) that a hospital indemnity benefits plan issued in the name of Serve America was not issued with the knowledge or consent of Beema.⁴⁴

Excepting only the unattributed, unsigned, unaddressed, undated letter, Beema's position is that (1) it created Serve America for the purpose of providing insurance outside of Pakistan, (2) Colin Youell and William Worthy were authorized representatives of Serve America, and (3) Beema did not specifically authorize Serve America to issue any particular insurance policy and did not know that Serve America had issued any insurance policy.

The record reflects that Colin Youell and William Worthy disagree with Beema on at least one point. As is noted above, in his capacity as a Beema director, Youell provided Worthy a letter authorizing Worthy to attach insurance coverage and collect insurance premiums. And Worthy consistently and repeatedly represented that Beema/Serve America had authorized the issuance of Beema/Serve America insurance policies covering ATA members.⁴⁵

But regardless of the extent of Beema's knowledge or approval, there is no doubt that Serve America, acting through Youell and Worthy, actually did issue insurance policies covering ATA members. In fact, in the State's administrative proceeding against

⁴⁴Exhibit 1 to Notice of Filing, T.R. Vol. IX, p. 1155.

⁴⁵*E.g.*, Posey Suppl. Affid., ¶¶4-9, 12, 14-15; T.R. Vol. XIV, pp. 1872-75.

SDS, the State alleged⁴⁶ and found⁴⁷ that Serve America was the underwriter of the policies.

Unfortunately, as the State also found, Beema and Serve America were not licensed to issue insurance policies in the United States. At least in this sense, then, the Beema/Serve America insurance coverage was unauthorized or nonexistent. But even though Beema and Serve America were not licensed to issue insurance policies, their agents did in fact issue policies covering ATA members.

2. *The Trial Court's Findings*

The trial court made certain findings concerning Serve America that invite misinterpretation. In its April 14, 2010 order, the court repeatedly stated that Beema or Service America did not exist.⁴⁸ In response to motions to alter these findings, the trial court explained that the statements that Beema or Serve America did not exist “were not

⁴⁶Administrative Petition, ¶¶4-7, Collective Exhibit 2 to Memorandum in Support of Motion to Dismiss; Heisse Affid., ¶¶4-7, Exhibit to Administrative Petition, Collective Exhibit 2 to Memorandum in Support of Motion to Dismiss. (As is noted above, Collective Exhibit 2 was omitted from the appellate record; the respondents will move to supplement the record to include the exhibit).

⁴⁷Summary Order to Cease and Desist, ¶¶4-7, Collective Exhibit 2 to Memorandum in Support of Motion to Dismiss. (As is noted above, Collective Exhibit 2 was omitted from the appellate record; the respondents will move to supplement the record to include the exhibit).

⁴⁸July 14, 2010 Order, at 3 (citing four pages on which the court made such findings); T.R. Vol. XIX, p. 2708.

meant to be taken literally but were used as a short form reference” for other findings.⁴⁹ Unfortunately, these other findings are themselves subject to misinterpretation.

The court explained that the statements that Beema or Serve America did not exist were meant to be shorthand for a series of findings that may be summarized as (1) Serve America does not exist in the United States, (2) Serve America has never issued an insurance policy in the United States, and (3) Beema/Serve America insurance coverage is unauthorized and nonexistent.⁵⁰ Again, it appears that the trial court does not intend for these statements to be taken literally. The court means that Serve America is not licensed to issue insurance in the United States, and that the policies it did issue are therefore unlicensed and unauthorized, and that in that sense they are non-existent. This interpretation is supported by the evidence cited by the trial court in support of its findings.

In support of the findings that Serve America and its insurance coverage did not exist in the United States, the trial court references five pages in its April 14, 2010 Memorandum and Order.⁵¹ The evidence cited on those pages supports the inference that the trial court characterized Serve America and its insurance coverage as non-existent because Serve America and its parent company are not licensed insurers in the United States — not because the companies and the insurance policies literally do not exist. The

⁴⁹*Id.*

⁵⁰*See id.* at 2-3; T.R. Vol. XIX, pp. 2707-08.

⁵¹*Id.* at 2; T.R. Vol. XIX, p. 2707.

court relied most heavily on findings in a North Carolina cease and desist order, including the following:

Since at least February 1, 2008, Kirkpatrick, SDS, Posey, Bachman, AGBAI, NAA, and PBC Direct have been enrolling individuals in *a group health insurance policy issued in North Carolina to AGBAI by Beema Insurance Company* [“Beema”], *an unauthorized, alien insurer located in Pakistan for which SDS provides third party administrator services*. The NAA, PBC Direct, SDS, AGBAI, and their principals have also been marketing and selling *the bogus Beema product*.⁵²

The trial court emphasized the findings that the Beema/Serve America insurance was “unauthorized” and “bogus.”⁵³ But the North Carolina findings also acknowledge (1) that Beema exists, (2) that Beema actually issued the insurance coverage at issue, and (3) that SDS actually provided Beema third party administrator services. Further, it is clear in context that the Beema product is referred to as “bogus” because it was issued by an “unauthorized” insurer — not because the product was not issued by an actual insurance company or because the product literally does not exist.

If, however, the Court were to interpret literally the trial court’s statements that the Beema/Serve America insurance policies were never issued and did not exist, the Court would have to reject the findings. On appeal, this Court reviews a trial court’s findings of fact de novo with a presumption of correctness, unless the evidence preponderates otherwise. TENN. R. APP. P. 13(d). And because the trial court’s findings are based on its

⁵²North Carolina Cease and Desist Order, ¶19, T.R. Vol. III, p. 363 (emphasis added) (cited in April 14, 2010 Memorandum and Order, at 8, T.R. Vol. XII, p. 1669).

⁵³April 14, 2010 Memorandum and Order, at 8; T.R. Vol. XII, p. 1669.

review of affidavits, this Court is not required to defer to the trial court's judgment concerning the weight or credibility of the evidence. *See Bryant v. Baptist Health System Home Care of East Tennessee*, 213 S.W.3d 743, 750 (Tenn. 2006). Evidence weighing in favor of a finding that Beema/Serve America actually issued insurance policies covering ATA members includes the following evidence identified above: the master insurance policy itself, correspondence from Beema's chairman, correspondence from Beema's chief underwriter, correspondence from Colin Youell, multiple written and oral representations from William Worthy, and the findings of the North Carolina Department of Insurance and other state insurance commissioners. The contrary evidence cited by the trial court is ATA's allegation in its lawsuit against Worthy that the unattributed, unsigned, unaddressed, undated letter denying that Beema owns any subsidiaries outside of Pakistan was provided to SDS and "allegedly produced by Beema."⁵⁴ Obviously, a draft letter that may never have been sent is insufficient to overcome the overwhelming evidence that Beema/Serve America actually issued insurance policies.

D. Termination of the relationship between ATA, SDS, and Beema/Serve America

During the approximately two years that SDS acted as Serve America's third party administrator, Serve America paid out millions of dollars in claims for the benefit of ATA members. But Serve America was often delinquent in its funding of the claims account

⁵⁴April 14, 2010 Memorandum and Order, at 3 (citing ¶22, Exhibit H to Exhibit 1 to Petition); T.R. Vol. XII, p. 1664 (citing T.R. Vol. 4, p. 479).

administered by SDS. The record in this case reflects numerous occasions on which SDS representative Bart Posey clashed with Serve America representative William Worthy over late or incomplete transfers into the claims account.⁵⁵

The relationship between SDS and Serve America further deteriorated when several state insurance commissioners began investigating the companies. Worthy repeatedly represented that Serve America would address the issues raised by the insurance commissioners.⁵⁶ Although Serve America's response was inadequate, Worthy did produce a letter from Beema's chief underwriter confirming that Beema's offshore captive Serve America had issued a master insurance policy insuring ATA members.⁵⁷

In February of 2009, North Carolina issued the cease and desist order discussed above.⁵⁸ Although the trial court notes that the North Carolina findings may not be "completely accurate,"⁵⁹ the order did provide notice of the allegation that Beema/Serve America was not an authorize insurer. Also in February of 2009, SDS representative Bart Posey and the company's counsel met with representatives of the Tennessee

⁵⁵See Posey Suppl. Affid., ¶13; T.R. Vol. XIV, p. 1874; Exhibit 12 to Posey Suppl. Affid., T.R. XIV, p. 1908.

⁵⁶Posey Suppl. Affid., ¶¶14-15; T.R. Vol. XIV, pp. 1874-75.

⁵⁷Posey Suppl. Affid., ¶14; T.R. Vol. XIV, pp. 1874-75; Exhibit 13 to Posey Suppl. Affid.; T.R. XIV, p. 1937 (back of page).

⁵⁸April 14, 2010 Memorandum and Order, at 8; T.R. Vol. XII, p. 1669.

⁵⁹July 14, 2010 Order, at 4; T.R. Vol. XIX, p. 2709.

Commissioner of Commerce and Insurance concerning SDS and its operations.⁶⁰ Posey discussed SDS's operation as a third party administrator and offered to do whatever the State asked him to do.⁶¹

In October of 2009, ATA and SDS determined that they could no longer do business with Serve America because of Serve America's failure to meet its claims obligations and its failure to adequately respond to the actions taken by state insurance commissioners. On October 21, 2009, SDS provided Serve America the required 60 days written notice of its intent to cancel the parties' contract.⁶² Based in part on the termination notice, the parties agreed that SDS would suspend further premium payments to Serve America, and that premium payments would instead be deposited in the claims account and used to pay claims.⁶³ SDS continued to pay claims out of the claims account, and it provided Worthy weekly reports reflecting the claims being paid on behalf of Beema/Serve America.⁶⁴

In December of 2009, Andone Insurance Company agreed to provide insurance to ATA members beginning January 1, 2010.⁶⁵ On December 30, 2009, SDS wired to

⁶⁰Posey Suppl. Affid., ¶50; T.R. Vol. XIV, p. 1884.

⁶¹*Id.*

⁶²Posey Suppl. Affid., ¶16; T.R. Vol. XIV, p. 1875; Exhibit 15 to Posey Suppl. Affid.; T.R. Vol. XIV, p. 1946.

⁶³Posey Suppl. Affid., ¶16; T.R. Vol. XIV, p. 1875.

⁶⁴Posey Suppl. Affid., ¶17; T.R. Vol. XIV, p. 1875.

⁶⁵Posey Suppl. Affid., ¶18; T.R. Vol. XIV, p. 1875.

Andone a premium payment of \$582,966.85.⁶⁶ For reasons that are not yet clear, Andone failed to provide the promised insurance coverage and failed to return the premium payment.⁶⁷

In March of 2010, ATA filed suit against William Worthy and two of his companies alleging fraud, conversion, unjust enrichment, and violation of the Tennessee Consumer Protection Act.⁶⁸ Since seizing ATA, the State has reportedly dismissed that lawsuit.

⁶⁶Posey Suppl. Affid., ¶19; T.R. Vol. XIV, pp. 1875-76; Exhibit 17 to Posey Suppl. Affid.; T.R. Vol. XIV, p. 1951.

⁶⁷Posey Suppl. Affid., ¶19; T.R. Vol. XIV, pp. 1875-76.

⁶⁸Exhibit H to Exhibit 1 to Petition; T.R. Vol. IV, p. 474.

ARGUMENT

A. **ATA and SDS are not insurance companies subject to the Tennessee Insurers Rehabilitation and Liquidation Act.**

The primary question presented by this appeal is whether ATA and SDS are “insurers” subject to the Insurers Rehabilitation and Liquidation Act, TENN. CODE ANN. §§ 56-9-101, *et seq.* This is a question of law subject to de novo review on appeal. *See Blair v. Brownson*, 197 S.W.3d 681, 683 (Tenn. 2006). The State contends, and the trial court held, that the statute defines an “insurer” to include anyone who delivers an insurance contract, collects insurance premiums, or transacts business arising out of an insurance contract. ATA and SDS contend that under Tennessee statutory and common law, and under the common understanding of the term, an “insurer” is one who undertakes a contractual obligation to indemnify another against loss, liability, or damages caused by a contingent or unexpected event. The State has not alleged that ATA or SDS has any such contractual obligation, and the trial court did not find that ATA or SDS has any such contractual obligation. Therefore, the seizure and liquidation provisions of the Insurers Rehabilitation and Liquidation Act do not apply to ATA or SDS. *See* TENN. CODE ANN. §§ 56-9-201, 56-9-305 & 56-9-306 (providing for the seizure or liquidation of insurers); *see also* April 14 Memorandum and Order, at 2 (holding that Tennessee law authorizes the seizure and liquidation of insurance companies).

The statute defines an “insurer” as a person (1) doing an “insurance business” and (2) subject to the authority of an insurance commissioner. TENN. CODE ANN. § 56-9-

103(14). Since at least 1911, Tennessee statutory law and common law have defined the “insurance business” as the making of contracts of insurance. *See American Sur. Co. of New York v. Folk*, 135 S.W. 778, 779 (Tenn. 1911). The term “contract of insurance” has a similarly well-established definition:

[A] contract of insurance [is] “an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury, loss or damage, of something in which the other party has an insurable interest.”

Id. (quoting Chapter 160, § 2, Acts of 1895; chapter 31, Acts of 1899); *see also* TENN. CODE ANN. § 56-7-101(a) (containing the same definition, with a minor grammatical alteration).

The definition of an “insurer” as a person who makes a contract promising to provide a benefit to the other party in the event of some loss or damage is consistent with the definitions of “insurer” found in other parts of the Tennessee insurance code, such as the insurance fraud provisions:

“Insurer” means any person purporting to engage in the business of insurance or authorized to do business in this state or subject to regulation by the state, *who undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event. . . .*

TENN. CODE ANN. § 56-53-101(6) (emphasis added). The State relies in part on this definition in its petition.⁶⁹ The traditional statutory and common law definition of “insurer” is also consistent with the common understanding of the term. For example,

⁶⁹Petition, ¶74; T.R. Vol. I, p. 28.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "insurer" as "one that contracts to indemnify another by way of insurance" or "one that makes certain or secure." (Merriam-Webster 2002).

But despite the apparent clarity of the term "insurer," the trial court accepted the State's suggestion that the insurance code expands the scope of the term far beyond its usual meaning. The court held that TENN. CODE ANN. §§ 56-9-103(5) and 56-2-107 provide that the following activities "constitute doing insurance business in Tennessee":

- (1) issuing or delivering contracts of insurance to Tennessee residents, (2) soliciting applications for contracts of insurance, (3) collecting premiums, membership fees or other considerations for contracts of insurance, or (4) transacting matters subsequent to the execution of contracts of insurance and arising out of them⁷⁰

This holding is based on a misreading of these sections.

Section 56-9-103(5) does not purport to define "insurer" or "doing insurance business"; it defines the phrase "[d]oing business":

(5) "Doing business" includes any of the following acts, whether effected by mail or otherwise:

- (A) The issuance or delivery of contracts of insurance to persons resident in this state;
- (B) The solicitation of applications for the contracts, or other negotiations preliminary to the execution of the contracts;
- (C) The collection of premiums, membership fees, assessments or other consideration for the contracts;

⁷⁰April 14 Memorandum and Order, at 12; T.R. Vol. XII, p. 1673.

(D) The transaction of matters subsequent to execution of the contracts and arising out of them; or

(E) Operating under a license or certificate of authority, as an insurer, issued by the department of commerce and insurance

Thus, when the act intends to refer to those doing *insurance* business, it specifically refers to an “*insurer* doing business.” See TENN. CODE ANN. § 56-9-502(2) (emphasis added); see also TENN. CODE ANN. § 56-9-311(a) (referring to jurisdictions in which an “insurer is doing business”). Therefore — contrary to the trial court’s holding — under § 56-9-103(5), anyone engaging in the four activities listed by the court is simply “doing business.”

In contrast, § 56-2-107 does identify at least some of those “transacting insurance business” in Tennessee. And § 56-2-107 does list the four activities listed by the trial court. But § 56-2-107 provides that those activities constitute “transacting insurance business” only when they are performed in this state by an “unauthorized insurer”:

Any of the following acts in this state, effected by mail or otherwise *by an unauthorized insurer*, are included among those deemed to constitute transacting insurance business in this state:

- (1) The issuance or delivery of contracts of insurance to residents of this state;
- (2) The solicitation of applications for contracts of insurance;
- (3) The collection of premiums, membership fees, assessments or other considerations for contracts of insurance; or
- (4) The transaction of matters subsequent to the execution of contracts of insurance and arising out of them.

(emphasis added). Section 56-2-107 does not further define the term “insurer.” But the section certainly does not state or imply that anyone who performs any of the four listed activities is by definition an “insurer.”

Sections 56-9-103(5) and 56-2-107 are not intended to help define the term “insurer.” The sections are intended to help identify when an insurer is subject to Tennessee insurance regulations because it is “doing business” in Tennessee. If the trial court’s interpretation of these sections were adopted, the results would be absurd:

- The U.S. Postal Service would be considered an insurer for engaging in the “delivery of contracts of insurance to persons resident in this state.” *See* TENN. CODE ANN. § 56-9-103(5)(A).
- An employer with workers compensation insurance would be considered an insurer for participating in “negotiations preliminary to execution of [insurance] contracts.” *See* TENN. CODE ANN. § 56-9-103(5)(B).
- A lawyer would be considered an insurer for negotiating a settlement with an insurance company, which constitutes “transaction of matters subsequent to execution of [insurance] contracts and arising out of them.” *See* TENN. CODE ANN. § 56-9-103(5)(D).

Further, under the trial court’s interpretation and application of §§ 56-9-103(5) and 56-2-107, any third party administrator would also be an insurer. This result contradicts TENN. CODE ANN. § 56-6-401, which excludes authorized insurers from the definition of “administrator.”

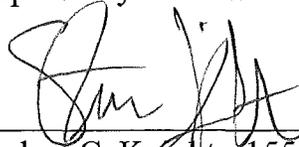
CONCLUSION

The circumstances underlying this case warranted state action — but they did not warrant the summary seizure and liquidation of ATA and SDS. Under Tennessee law, those extreme remedies are reserved for failing insurance companies. The trial court's finding that ATA and SDS are insurance companies should be reversed because (1) the court applied the wrong legal standard, and (2) under the correct standard, there is no allegation, evidence, or finding that ATA or SDS contracted to indemnify another against loss, liability, or damages caused by a contingent or unexpected event.

Reversal of the seizure and liquidation orders does not, of course, leave the State without a remedy. The State is entitled to pursue its claims against the respondents for violations of Tennessee insurance regulations. But the respondents are entitled to a fair opportunity to present a defense, which includes the opportunity to conduct discovery and to present their cases in a full trial.

The seizure and liquidation orders should be reversed, and the case should be remanded for further proceedings on the State's remaining claims.

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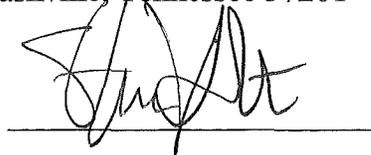
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