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**May 15 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Joan H. Toal  
Acting Circuit Court Judge

Appellate Case No. 2023-000727

Lenora Childers, Individually and as Personal Representative of the  
Estate of Lewis C. Childers, ..... Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories, Inc.;  
General Boiler Casing Company, Inc.; HEFCO, Inc.; J.R. Dean  
Company, Inc.; Payne & Keller Company; SFB, Incorporated;  
Stafford Insulation Company; Standard Insulation Company of  
N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of  
Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-  
Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial  
Insulating Co., ..... Defendants,

Flame Refractories, Inc., United Construction Co. of Rome, Inc.,  
Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe &  
Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.,  
Payne & Keller Company, and PBI QSF, LLC, By and Through  
Their Duly Appointed Receiver Peter D. Protopapas, ..... Third-Party  
Plaintiffs,

v.

Zurich American Insurance Company (Individually and as  
Successor to Northern Insurance Company of New York, Maryland  
American General Insurance Company, and Maryland Casualty  
Company); Allstate Insurance Company; John Tighe; Sean  
Anthony Beatty; Dennis William Cahill; Catherine Ann Carlino;  
Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael  
Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel  
Robert Keddie; Julie Ann Fortune; Michael John Crall; James  
Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.;  
Arrowpoint Capital Corp.; Admiral Insurance Company;  
Continental Insurance Company (Individually and as Successor in  
interest to Harbor Insurance Company); Hartford Accident and

Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd’s of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman’s Fund Insurance Company,

Third-Party Defendants,

of which

Payne & Keller Company, by and through its Receiver Peter D. Protopapas, is the ..... Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company f/k/a Stonewall Insurance Company, individually and as successor in interest to Stonewall Surplus Lines Insurance Company; Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company are the ..... Appellants.

TRAVELERS’S RESPONSE REGARDING APPEALABILITY

The order on appeal is immediately appealable under South Carolina Code § 14-3-330(4) because it continues a receivership and modifies the scope of the Receiver’s responsibilities, both over objections by Travelers and others.

## **BACKGROUND**

The Payne & Keller Company was a Texas company that terminated in 1986 under Texas law by virtue of an order issued by the Texas Comptroller of Public Accounts. (App. 189–93, Dissolution Papers for Frentex Enterprises Company of Texas, f/k/a Payne & Keller Company (Nov. 25, 1986).)

In July 2021, Ms. Childers sued Payne & Keller in South Carolina as part of an asbestos personal injury suit, and she requested that the circuit court appoint a receiver for Payne & Keller, as well as numerous other companies. (App. 1, Mot. to Appoint Receiver.) The circuit court granted Ms. Childers’s motion, appointed a receiver for Payne & Keller, and directed him to “take any and all steps necessary to protect the interests of Payne & Keller whatever they may be.” (App. 4, Order Appointing Receiver at 1 (Aug. 27, 2021).)

The Receiver for Payne & Keller then filed suit against a host of Payne & Keller’s historic insurance carriers, including Travelers. In that case, the Receiver seeks declaratory relief against Travelers that it must turn over Payne & Keller’s old insurance policies to the Receiver and to resolve coverage issues regarding those policies. (App. 24–36, Am. Compl. in *Protopapas v. Am. Int’l Group*, Case No. 3:21-cv-4086-DCC (D.S.C.)) The carriers removed that suit to federal court, and procedural issues in that case are pending on appeal before the Fourth Circuit. *See generally Protopapas v. Am. Int’l Group*, Appeal No. 23-1339 (4th Cir.).

While the federal case was pending, the Receiver re-filed essentially the same claims against the carriers before the South Carolina circuit court, this time bolting them onto Ms. Childers’s case as purported third-party claims in a transparent attempt to dodge federal jurisdiction. (App. 46, Second Am. Third-Party Compl.) This procedural fencing is forbidden as a matter of South Carolina law, as declaratory judgments regarding an insurance policy’s terms are

not derivative claims allowed by Rule 14, SCRPC. In fact, the Supreme Court has specifically held that insurance carriers have no right to even voluntarily make themselves part of underlying tort cases in order to seek the type of declaratory rulings that the Receiver seeks. *Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93, 99–110, 847 S.E.2d 87, 91–96 (2020).

Travelers filed a motion to dismiss the third-party complaint and to dissolve the Payne & Keller receivership. But that motion was not based on a pleading technicality, such as the omission of a fact needed to support an element of a cause of action. Instead, it was based on Travelers’s contention that the receivership is a legal nullity and should no longer be allowed to exist. (App. 130, Travelers’s Mot. to Dismiss Third-Party Claims and to Dissolve the Payne & Keller Receivership.)

The basis for this argument is simple: Texas corporate law creates a repose period for terminated companies that bars any claim involving the company three years after it terminates. *See* Tex. Bus. Org. Code § 11.359(a) (providing that except in an inapplicable limited circumstance, “an existing claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity”). The Full Faith and Credit Clause requires this Court to enforce Texas law here, and because the repose period for claims both for and against Payne & Keller closed in 1989, the receivership is a nullity as a matter of law and should be dissolved. *See generally In re All Cases Against Sager Corp.*, 967 N.E.2d 1203, 1207–11 (Ohio 2012) (vacating a receivership appointed by the trial court over a dissolved foreign company because the repose period had expired against any potential claims involving that company). Moreover, South Carolina law does not authorize nationwide receiverships over foreign entities like Payne & Keller. S.C. Code Ann. § 15-65-10(4).

In opposing dissolution of the receivership, the Receiver—based on speculation regarding Payne & Keller’s motivation for terminating the business—argued that he should be able to potentially unwind the corporate termination that took place in Texas 37 years ago. (App. 164, Payne & Keller’s Response.) That could create liability for Payne & Keller that has been extinguished as a matter of law since 1989.

The circuit court denied Travelers’s motion and accepted the Receiver’s invitation for a South Carolina court to scrutinize and revisit the termination of a Texas company from 1986. In so doing, the circuit court issued an order that (1) denied Travelers’s motion to dissolve the receivership, instead, continued the receivership; and (2) modified the scope of the receivership to no longer “protect the interests” of Payne & Keller, but instead to potentially expose Payne & Keller to liabilities that have been barred as a matter of law for over three decades. (App. 216, Order Denying Motion to Dismiss and Dissolve the Payne & Keller Receivership.) This appeal followed and is properly before the Court.

### **DISCUSSION**

In South Carolina, any order—even an interlocutory order—“granting, continuing, modifying, or refusing the appointment of a receiver” is immediately appealable. S.C. Code Ann. § 14-3-330(4). And this immediate, regular appellate oversight makes perfect sense, as appointing a receiver is a “drastic remedy” that should only be done “with reluctance and caution” because it involves the judicial seizure of private property and placing it in the hands of someone else to manage—all while the receiver erodes those same limited resources by claiming a fee from them. *Midlands Util., Inc. v. S.C. DHEC*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). The order on appeal readily meets Section 330(4)’s terms for multiple reasons.

**Continuing a Receivership:** At the circuit court, Travelers expressly moved to discontinue the Payne & Keller receivership: “Thus, the receivership must be dissolved.” (App. 140, Travelers’s Mot. to Dismiss Third-Party Claims and to Dissolve the Payne & Keller Receivership at 11.) It reiterated this in its reply: “There is simply no basis for this receivership to continue. South Carolina, Texas, and federal constitutional law all prohibit it. The Court should dissolve the receivership (and dismiss Payne & Keller from this case) accordingly.” (App. 208, Reply in Support of Travelers’s Mot. to Dismiss and to Dissolve the Payne & Keller Receivership at 15.)

The circuit court denied that request and allowed the receivership to continue. Standing alone, that brings the order squarely within the scope of Section 14-3-330(4).

**Modifying the Receivership:** Not only did the circuit court continue the receivership despite Travelers’s objection, it fundamentally changed the scope of the receivership in a way that can only prejudice Payne & Keller. When the circuit court appointed the Receiver, it charged him with the duty to “take any and all steps necessary to protect the interests of Payne & Keller whatever they may be.” (App. 4, Order Appointing Receiver at 1 (Aug. 27, 2021).) But now the circuit court has authorized the Receiver “to explore this issue [of whether Payne & Keller was properly terminated] through the discovery process,” with an ultimate goal of “revo[king] Payne & Keller’s termination” under Texas law, which has barred any claims against Payne & Keller (and claims by Payne & Keller, for that matter) since 1989. (App. 220, Order Denying Motion to Dismiss and Dissolve the Payne & Keller Receivership at 5.)

This is a sea-change in the scope of the receivership and is prohibited as a matter of law. A South Carolina court does not have extraterritorial authority to reach into the affairs of Texas’s corporate law and undo an order of the Texas Comptroller of Public Accounts attesting to Payne & Keller’s termination, and to do so in order to create new potential liability for a Texas company.

*See, e.g.*, U.S. Const. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); S.C. Code Ann. § 33-15-105(c) (“This title does not authorize this State to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.”); *Carolina Trucks & Equip., Inc. v. Volve Trucks of N.A., Inc.*, 492 F.3d 484, 489–90 (4th Cir. 2007) (“The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude. One state may not ‘project its legislation’ into another.”). And because the order fundamentally modifies the receivership, South Carolina Code § 14-3- 330(4) vests Travelers with the right to immediately appeal that order.

### **CONCLUSION**

The appealability analysis is guided by “the effect of” the circuit court’s order. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539–40, 773 S.E.2d 144, 146–47 (2015); *see also Williams v. Northwestern Sec. Life Ins. Co.*, 307 S.C. 462, 464–65, 415 S.E.2d 809, 810 (1992) (holding that an order denying a motion to dismiss was immediately appealable under South Carolina Code § 14-3-330(4) because it had the effect of disregarding an injunction required by North Carolina law, and reversing the trial court’s refusal to give Full Faith and Credit to foreign law, just as the circuit court has done here).

Here, the circuit court’s order continues a receivership that should be barred as a matter of constitutional law, and it empowers the Receiver to create potential liability for the company whose interests he had been charged to protect. Because the order has “the effect of” both “continuing” and “modifying” the receivership, it is immediately appealable under South Carolina Code § 14-3-330(4).

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll  
S.C. Bar No. 74000  
todd.carroll@wbd-us.com  
M. Elizabeth O'Neill  
S.C. Bar No. 104013  
elizabeth.oneill@wbd-us.com  
1221 Main Street, Suite 1600  
Columbia, South Carolina 29201  
803.454.6504

STEPTOE & JOHNSON LLP

Harry Lee (*pro hac vice application  
forthcoming*)  
hlee@steptoe.com  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
202.429.3000

*Counsel for Appellant Third-Party Defendant Travelers Casualty  
and Surety Company*

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PROOF OF SERVICE

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I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Travelers's Response Regarding Appealability and Accompanying Appendix

Parties Served:

Peter D. Protopapas ([pdp@rplegalgroup.com](mailto:pdp@rplegalgroup.com))  
Brian M. Barnwell ([bb@rplegalgroup.com](mailto:bb@rplegalgroup.com))  
John B. White, Jr. ([jwhite@johnbwhitelaw.com](mailto:jwhite@johnbwhitelaw.com))  
Marghretta H. Shisko ([mshisko@johnbwhitelaw.com](mailto:mshisko@johnbwhitelaw.com))  
Christopher Jones ([cjones@johnbwhitelaw.com](mailto:cjones@johnbwhitelaw.com))  
Griffin Littlejohn Lynch ([glynch@johnbwhitelaw.com](mailto:glynch@johnbwhitelaw.com))  
Scott Shutte ([scott.schutte@morganlewis.com](mailto:scott.schutte@morganlewis.com))  
Brady Edwards ([brady.edwards@morganlewis.com](mailto:brady.edwards@morganlewis.com))

*Counsel for Respondent Payne & Keller Corp., through its Receiver Peter D. Protopapas*

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