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**Aug 23 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 Jean H. Toal  
Acting Circuit Court Judge

Appellate Case No. 2020-001437  
Circuit Court Case No. 2019-CP-40-02285

Peter D. Protopapas, in his capacity as Receiver for Covil Corporation, .....	Plaintiff,
v.	
Wall, Templeton & Haldrup, P.A.; Sentry Casualty Company; United States Fidelity and Guaranty Company; Zurich Insurance Company,.....	Defendants,
<i>Of Which:</i>	
United States Fidelity and Guaranty Company is the .....	Appellant,
<i>And</i>	
Peter D. Protopapas, in his capacity as Receiver of Covil Corporation, is the.....	Respondent.

SURREPLY IN OPPOSITION TO MOTION TO DISMISS APPEAL

The issue at stake in this appeal is whether a prior receivership involving the Covil Corporation (“Covil”), which resulted in its judicial dissolution three decades ago, also triggered a statute of repose that forecloses the continued prosecution of claims against Covil. The current Receiver not only refuses to assert this statutory defense on Covil’s behalf, he has affirmatively sought and obtained a ruling from the court below that Covil has no such defense and may be subjected to ongoing litigation in perpetuity. And because USF&G is one of the insurance carriers responsible for paying claims brought against Covil—as demanded by Covil’s current Receiver—it is the only party able to seek review of the circuit court’s erroneous ruling.

Indeed, every month the Receiver spends more of USF&G's money to pay defense and settlement costs on claims against Covil that should be barred as a matter of law. In these circumstances, the issues on appeal are far from moot and require appellate review.

In response to the Receiver's latest attempt to avoid any such appellate review, the Court has asked USF&G to answer five questions by way of surreply. In responding to the Court's questions, it is critical to understand USF&G's responses below in the proper context: the Receiver is refusing to allow the assertion of a defense that would prevent current and future claims by the asbestos plaintiffs' counsel who appointed him.<sup>1</sup>

### **RESPONSES TO THE COURT'S QUESTIONS**

**Question 1:** Identify any pending case in which “the issue on appeal remains very much alive and in dispute.”

**Response:** By its very terms, the circuit court's order on appeal applies to every case to which Covil is a party, including the instant one. That fact alone makes this appeal not moot. *See, e.g., S.C. Pub. Interest Found. v. S.C. DOT*, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017) (explaining that a case becomes moot only when a ruling from the court would have no “practice legal effect upon the existing controversy”).

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<sup>1</sup> This exact same dynamic is happening in other cases as well, including the Payne & Keller receivership, where a Texas statute of repose blocks all claims against that long-dissolved Texas company, yet the same Receiver—appointed at the request of the same lawyers—has insisted on allowing barred claims to proceed. That issue is also before this Court in Appellate Case No. 2023-000727. The Receiver's refusal to assert dispositive defenses available to the companies over whose assets he has been appointed a receiver is directly inconsistent with South Carolina law. *See, e.g., Penn. Mut. Life Ins. Co. v. Cudd*, 172 S.C. 88, 91–92, 172 S.E. 787, 788–89 (1934) (holding that only someone “untrammled in his relations, entirely indifferent between the parties, and absolutely fair and impartial” can serve as a receiver); *Va.-Carolina Chem. Co. v. Hunter*, 84 S.C. 214, 224, 66 S.E. 177, 180 (1909) (concluding that a receiver who is not “entirely impartial,” but who instead serves as an “agent[] of the plaintiff, actively pressing its claims against the defendant,” cannot continue service as a receiver).

As USF&G explained on Pages 11 through 13 of its opening appellate brief, dismissal of claims against USF&G (partial or otherwise) does not moot the issues on appeal. By seeking an order clarifying the status of the receivership, the Receiver sought an order that would apply in all cases in which Covil is a party. The purpose of that motion was not limited to addressing defenses asserted by USF&G in the two cases subject to this appeal, but rather to enable Covil to continue to be sued without regard to the statute of repose in all of the underlying asbestos actions brought by claimants. As he put when moving before the trial court: “For the foregoing reasons, Covil requests that this Court clarify its ruling [regarding the South Carolina statute of repose] and provide finality for the parties.” (R. p. 443.)

It is no surprise, then, the order before this Court states that Covil’s prior judicial dissolution “presents no impediment to the assertion of asbestos personal injury claims against Covil,” and that “pending and future asbestos claims” against Covil “remain viable” despite South Carolina Code § 33-14-107. (R. pp. 10, 13–14 (emphasis added).) Both the Receiver’s motion and the circuit court’s order on appeal were designed to apply beyond this case.

Because the issue on appeal expressly applies to every case in which Covil is a defendant, including this one, each of the following pending cases will be impacted by Court’s resolution of the issue on appeal:

**List of Known Active Cases Involving Covil**

*Protopapas, as Receiver for Covil Corp. v. Wall, Templeton & Haldrup, P.A.*, Case No. 2019-CP-40-02285

*Sawyer v. 3M Co.*, Case No. 2023-CP-38-00132

*Flynn v. Standard Insulation Co. of N.C.*, Case No. 2023-CP-40-00633

*McLeod v. Air & Liquid Sys. Corp.*, Case No. 2023-CP-40-01652

*Tibbs v. 3M Co.*, Case No. 2023-CP-40-01759

*Berley v. AECOM Energy & Constr. Inc.*, Case No. 2023-CP-40-02840

*Donaghy v. 4520 Corp.*, Case No. 2023-CP-40-03108

*Reich v. Air & Liquid Sys. Corp.*, Case No. 2023-CP-40-03243

*Childers v. 3M Co.*, Case No. 2021-CP-40-03484

*Dandridge v. 3M Co.*, Case No. 2015-CP-10-06411

*Dean v. 3M Co.*, Case No. 2023-CP-40-03441

*Gonce v. Air & Liquid Sys. Corp.*, Case No. 2023-CP-40-02933

*Green v. 3M Co.*, Case No. 2022-CP-40-06627

*Hale v. Beaty Investments, Inc.*, Case No. 2023-CP-40-00811

*Hinson v. AGCO Corp.*, Case No. 2023-CP-40-03576

*Covil Corp. v. Penn. Nat'l Mut. Cas. Ins. Co.*, 2020-CP-40-02098

*Johnson v. 4520 Corp.*, Case No. 2022-CP-40-05808

*Kelly v. 3M Co.*, Case No. 2022-CP-40-06035

*Lewis v. A.W. Chesterton Co.*, Case No. 2023-CP-38-01053

*Link v. 3M Co.*, 2022-CP-40-05543

*Mitchell v. 3M Co.*, 2022-CP-40-02979

*Pierce v. 3M Co.*, 2022-CP-40-06194

*Taylor v. Aurora Pump Co.*, 2021-CP-42-03883

*Widner v. 3M Co.*, 2022-CP-40-06712

*Woody v. Beaty Investments, Inc.*, 2023-CP-40-02067

\* \* \* \* \*

As one of Covil's insurers, USF&G itself is not a party in those underlying tort cases, but it is a party to this case in which the circuit court issued the order under review—*Protopapas v.*

*Wall, Templeton & Haldrup, PA*, Case No. 2019-CP-40-02285. USF&G has rightly raised this critical issue through this appeal—an issue about which the Receiver told the circuit court he sought “finality for the parties.” (R. p. 443.) Until this defense is fully addressed on appeal, USF&G is obligated to continue paying a share of defense and indemnity costs in these cases, as has been demanded by the Receiver. USF&G, in fact, has paid several hundred thousand dollars annually in defense costs and expenses. In short, USF&G remains aggrieved by those orders, given its continuing obligation to pay defense and indemnity on Covil’s behalf. And because the Receiver not only has refused to permit Covil to assert its statutory immunity, but has taken the position that Covil is not immune and may continue to be sued (contrary to Covil’s own best interests), USF&G is the only party with standing and an interest in Covil’s defense able to challenge the orders on direct appeal.<sup>2</sup>

Moreover, if the Court were to dismiss the instant appeal and the orders under appeal therefore become unreviewable and final, Covil risks being forever barred from asserting a statutory immunity defense provided by South Carolina law under principles of res judicata and collateral estoppel in all of the underlying tort actions. If Covil’s Receiver were to have a change of heart and attempt to assert Covil’s right to immunity in any of the numerous pending or future asbestos suits, plaintiffs would unquestionably contend that Covil is barred from even raising the argument under principles of res judicata or collateral estoppel, given the position successfully advanced by the Receiver on Covil’s behalf in the instant actions.<sup>3</sup>

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<sup>2</sup> The fact that the Receiver refuses to assert the defense does not weaken it as a matter of South Carolina law. See *G&P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003) (explaining that a statute of repose is not subject to equitable defenses, “such as waiver, tolling, and estoppel”).

<sup>3</sup> In the event the Court of Appeals is inclined to dismiss the instant appeal notwithstanding the above, the Court should at a minimum make clear that the order “clarifying the receivership” has

Similarly, if USF&G were forced to file a new declaratory judgment action collaterally challenging the circuit court's order clarifying the receivership to strip Covil from its defense, such a collateral attack could be barred on the basis that the order has become final. USF&G remains a party in this appeal, the issues are not moot, either for purposes of the instant action or in the numerous other actions in which Covil is a party, and the order should be reviewed on this already-fully-briefed direct appeal.

**Question 2:** Identify any pending case in which USF&G has raised or could raise the affirmative defense at issue in the filings before this court.

**Response:** As noted above, given its role as an insurance company, this case is the only case in which USF&G can directly raise this defense, as it is not a party to the other cases where Covil's statutory immunity would bar claims. The Supreme Court has been clear that an insurance carrier has no right to intervene in a tort case, *Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93, 99–100, 847 S.E.2d 87, 90–91 (2020), leaving the instant matter as the appropriate case for the Court to address this issue.

Consider the alternative: if the Court dismisses this appeal, then the Receiver can effectively ensure that the statute of repose question may **never** arise again. The Receiver will always refuse to assert the statute of repose as an affirmative defense for Covil; USF&G will be forced to continue paying defense costs while Covil's statutory defense remains chambered; USF&G is prohibited by *Builders Mutual* from intervening in those underlying cases; and the Receiver could simply pay settlements to plaintiffs to ensure that USF&G never has a chance to raise the point in a post-judgment proceeding. Yet, this is a question of law that could save scores

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no effect in any other case and that it may be subject to collateral attack in the future, notwithstanding principles of collateral estoppel, res judicata, or other doctrine.

of public and private resources if it is answered with “finality for the parties,” just as the Receiver told the trial court he wanted by bringing a motion to clarify the status of the entire Covil “receivership.” (R. p. 443.) The appeal is fully briefed, and the conflicts-for-oral-argument letters have been sent. The Court should deny the instant motion to dismiss and proceed with the appeal.

**Question 3:** Clarify any exception to the mootness doctrine USF&G asserts may be applicable here.

**Response:** There is no need to rely on an “exception” to the mootness doctrine, as this case remains active and pending. If the Court grants the relief sought by USF&G, then this entire case would be dismissed and Covil would be subject to dismissal as a tort defendant in the numerous cases listed above. There is a very obvious and real “practical legal effect” that would come with a favorable ruling to USF&G on this appeal, rendering the case not moot. *S.C. Pub. Interest Found.*, 421 S.C. at 121, 804 S.E.2d at 860.

However, to the extent the Court believes it needs an exception to the mootness doctrine to proceed, all three recognized exceptions to mootness apply here: (1) capable of repetition, yet evading review; (2) important public interest; and (3) impacting future events or have collateral consequences for the parties. *Id.*

Regarding the first exception, the “alternative” scenario explained above in response to Question 2 makes it obvious that issues regarding Covil’s statute of repose defense will continue to be present—Covil is a serial asbestos defendant—yet the Receiver can artificially engineer litigation in a way to ensure that no court will ever have to actually address the defense arising from its prior dissolution. Because the issue is “*capable of repetition*,” yet the Receiver controls whether it could ever be reviewed, this exception to mootness is readily applicable. *Id.* (emphasis supplied by the Supreme Court).

The “important public interest” exception is equally applicable. Already, the trial court has appointed Mr. Protopapas as a receiver over more than a dozen companies, all stemming from the “Asbestos Docket.” This is truly an unprecedented situation; quite literally, everything this Receiver does is precedent-setting—including his refusal to assert statutory affirmative defenses for the corporate defendants whose assets a receiver is charged to protect. Because each receivership appointment brings with it the dedication of enormous sums of public and private resources, there is an “imperative and manifest urgency to establish a rule for future conduct” of the Receiver, including protecting companies like Covil that have statutory defenses the Receiver refuses to assert. *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

Finally, as explained above in response to Question 1, a decision in USF&G’s favor on this appeal would both “affect future events” and “have collateral consequences for the parties.” *Id.* (citing 5 Am. Jur. 2d *Appellate Review* § 649). Enforcing the South Carolina statute of repose here would end the need for a Covil receivership; it would prevent Covil from being sued henceforth, and it would prevent USF&G from having to continue expending resources defending claims against a dissolved entity that should be entitled to statutory immunity from suit. For this third reason as well, this appeal remains justiciable even if the Court somehow determines that the instant case is moot.

**Question 4:** Identify any issue in the underlying case of *Peter D. Protopapas as Receiver for Covil Corp. v. Wall, Templeton & Haldrup, P.A.*, C/A No. 2019-CP-40-02285, which has not been resolved and describe any “other claims and allegations between Covil and USF&G” not impacted by the partial dismissal order that remain pending.

**Response:** The current complaint alleges that USF&G and other insurance carriers provided a contractually-required defense to Covil when it would be sued post-judicial dissolution,

and that by doing so, Covil became the carriers’ “agent, intermediary, subsidiary, alter ego, and/or controlled entity.” (R. p. 117.) From this root allegation—which finds no support in fact or law from anywhere in the United States—the Receiver asserts the following “claims” against USF&G:

- (1) “aiding and abetting the breach of a fiduciary duty” (R. p. 124);
- (2) “breach of contract—bad faith failure to defend” two non-*Finch* state court cases (*id.*);
- (3) “breach of contract—bad faith processing of claims” related to two state court cases (R. p. 125);
- (4) “tort action—bad faith processing of claims” related to two state court cases (R. p. 126);
- (5) “primary insurers are fully responsible for conduct prior to November 2, 2018, as Covil’s alter ego, agency, or instrumentality” (R. p. 127);
- (6) “single business enterprise/amalgamation” (R. p. 129);
- (7) “negligence” (R. p. 130); and
- (8) “declaratory judgment as to the primary insurers and the primary insurers’ policies” related to two state court cases (*id.*)

The only dismissal in the record addresses the above claims to the extent the Receiver was relying on the *Finch* case for factual support of each claim. Though the Receiver claims that the underlying actions giving rise to his complaint against USF&G have been resolved, he has not dismissed his remaining claims against USF&G, and even a cursory review of the operative pleading and the Public Index below reveal additional claims against USF&G (beyond the *Finch*-related claims that were dismissed) remain. Accordingly, to USF&G’s knowledge, these claims remain pending, have not been resolved or dismissed with prejudice, and Covil’s statutory immunity is directly relevant to each of these claims; namely, if the statute of repose protects Covil

from underlying tort litigation, is correct, then each of these claims fails as a matter of law and, at a minimum, Covil would have no cognizable damages.<sup>4</sup>

**Question 5:** Explain how any judgment rendered on the issues raised in the current appeal may have a practical legal effect upon any case or controversy or other pending litigation between USF&G and Covil. Identify the case or controversy referenced and identify any such pending litigation.

**Response:** If the Court agrees with USF&G’s appellate argument, there will be no other litigation against Covil, period, because the statute of repose for dissolved corporations would bar such claims. That would include resolving all claims pending against USF&G in the instant case and avoiding the need for future coverage litigation between Covil and its insurers. In addition, as noted above, the dissolution issues raised by this appeal would not only impact litigation in which USF&G is a party as Covil’s insurer, but would also resolve all of the underlying claims involving Covil in the cases listed above in response to Question 1, as well as future tort claims against Covil in which USF&G has a direct financial stake but itself is not a proper party.

### **CONCLUSION**

This appeal is not moot. The issue on appeal matters tremendously to not only both of these parties, but also to future tort plaintiffs and to the public at large. The Receiver secured the order on appeal by requesting that the trial court “provide finality for the parties.” (R. p. 443.) USF&G now requests the same from the State’s appellate courts.

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<sup>4</sup> Even in the event the Court were to treat the Receiver’s filings on this motion as a voluntary dismissal with prejudice of these claims—and such dismissal was entered—the issue on appeal would remain justiciable for the reasons explained above in response to Question 3. Each exception to mootness applies here, and the issue on appeal requires “finality for the parties” from the South Carolina appellate courts in connection with numerous additional pending and future actions against Covil. (R. p. 443.)

Respectfully submitted,

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**PROOF OF SERVICE**

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) specified below by emailing them as the addresses below:

Pleading(s): Surreply in Opposition to Motion to Dismiss Appeal

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