THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Opinion No. 6037
Court of Appeals Case No. 2020-001437

Peter D. Protopapas, as Receiver for Covil Corporation, ... Respondent,

v.

Wall, Templeton & Haldrup, P.A.; Sentry Casualty Company; United States Fidelity and Guaranty Company; and Zurich American Insurance Company..... Defendants,

of which

United States Fidelity and Guaranty Company is the..... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for United States Fidelity & Guaranty Company certify that it filed a petition for rehearing with the Court of Appeals on December 6, 2023. (Appx. 171.) The Court of Appels denied that petition on March 18, 2024, rendering this Petition timely. (Appx. 190.)

INTRODUCTION

More than thirty years ago, Covil Corporation was judicially dissolved pursuant to a now long-final order. The South Carolina Code is clear that a *judicial* dissolution cannot happen absent the publication of notice of the dissolution, which is exactly what Judge Simmons ordered Covil's prior receiver to do in 1992. When Judge Simmons subsequently approved of and affirmed the receiver's work, finding that the receiver fully complied with the court's prior orders and thereafter judicially dissolving Covil, Judge Simmons necessarily found that notice of the dissolution had been published. The order judicially dissolving Covil would have been invalid otherwise.

With that judicial dissolution came finality for Covil. The General Assembly has declared that a judicial dissolution, with its requisite publication of notice of that dissolution, triggers a repose period after which a dissolved company can have no further exposure to liability. At the time of Covil's dissolution, the repose period was five years; two decades after Covil's judicial dissolution, the Legislature extended the repose period to ten years. Under either version of the statute, Covil can no longer be exposed to future liability as a matter of South Carolina law.

This appeal involves an improper collateral attack on Judge Simmons's order and the now-expired repose period for claims against Covil. The circuit court appointed a new receiver over Covil, and the new receiver, instead of working for the benefit of the corporation it now oversaw, inexplicably sought and obtained a ruling in the Asbestos Docket that the statute of repose was

unavailable to Covil, effectively invalidating Covil's prior judicial dissolution decades after the fact and exposing Covil to liability that the Legislature has forbidden.

Respectfully, the circuit court's ruling runs contrary to settled principles of South Carolina law, including the plain language of the South Carolina Code regarding judicial dissolutions and the statute of repose, as well as numerous decisions from the Judiciary regarding the impenetrability of final judgments and rulings by other circuit court judges. To be clear, though: USF&G does not seek to unwind prior settlements involving the new receiver and tort plaintiffs, including Ms. Finch, who sought this new appointment after securing a multi-million dollar verdict against Covil after a federal trial in North Carolina in which Covil did not assert its statute-of-repose defense. Nor does it seek to unwind prior settlements involving the new receiver and Covil's insurance carriers. This case deals with Covil's exposure to current and future claims only, and because the law is clear that Covil can have no more liability, USF&G respectfully requests that the Court grant this Petition, reverse the decisions below, and close the Covil chapter of the receiverships that are currently pending on the Asbestos Docket.

QUESTIONS PRESENTED FOR REVIEW

This Petition presents four questions for this Court's review:

1. Standing: Did the Court of Appeals err when it held that a court-appointed receiver can attempt to create liability against the company whose assets he has been ordered to marshal?

2. Judicial Dissolutions: Did the Court of Appeals err when it disregarded the legal impact of and, in effect, vacated Covil's judicial dissolution despite the fact that the dissolution order was final, unappealable, and not subject to collateral attack?

3. Statute of Repose: Did the circuit court err when it held that no version of the statute of repose for dissolved companies bars current and future claims against Covil?

4. Prior Order Still Pending Review: Did the Court of Appeals err when it based its decision on a January 2020 circuit court order from another case that was issued without jurisdiction and that has not been reviewed on appeal because of a still-pending Rule 59 motion?

STATEMENT OF THE CASE

Through the order on appeal, Covil's Receiver, who is charged with *defending* Covil in asbestos litigation, obtained a ruling that one of Covil's own defenses was not viable. The Receiver had, and has, no legally cognizable interest in seeking what is effectively an advisory opinion that claims against Covil are *not* barred by South Carolina's statute of repose. Nor does the fact that the defense was asserted vicariously by USF&G—which has been sued under the novel, unprecedented theory that Covil's insurers, including USF&G, became Covil's alter egos after Covil dissolved—change the analysis. USF&G plainly has the right to assert Covil's defenses when defending vicarious liability claims. USF&G has also continued to defend Covil in ongoing asbestos litigation. To the extent that a statute-of-repose defense prevailed, it would limit both Covil's and USF&G's liability in the same measure, and Covil's Receiver does not have standing to obtain rulings that further the interests of Covil's litigation adversaries and maximize Covil's liabilities. The circuit court's contrary finding that the Receiver had standing to bring this motion was error, as was the Court of Appeals' summary affirmance of that ruling.

The order on appeal is also wrong on the merits. The circuit court principally concluded that the 2004 amendments to South Carolina Code § 33-14-107—which would, if applicable, undisputedly bar asbestos claims currently being asserted against Covil—did not apply because Covil dissolved in 1992, before those amendments were passed. In so holding, the circuit court determined that the only way these amendments could be applied would involve running the ten-year repose period retrospectively so that claims would become time-barred in 2002, ten years

after Covil's dissolution. According to the circuit court, applying the amended statute to companies that had dissolved previously would constitute an improper "retroactive" application. Thus, according to the circuit court, claims against corporations that dissolved prior to the 2004 amendments would remain viable indefinitely into the future.

That ruling is erroneous because it refused to apply the statute of repose prospectively. For over one hundred years, state and federal courts considering similar questions have concluded that newly enacted statutes of limitations and statutes of repose *do* apply to prior claims and events, but that the new statutory period runs prospectively from the date of enactment. That is the very position USF&G urged below. This rule of construction addresses the retroactivity problems identified by the circuit court, while also avoiding the arbitrary and anomalous consequences that result from declining to apply the statute altogether. The Legislature's goals of providing repose for dissolved corporations would be thwarted if claims against corporations that dissolved before 2004 remain viable indefinitely, while claims against corporations that dissolved later are barred.

Critically, the Court of Appeals did not address the core question of how to apply the statute of repose, finding instead that it did not apply based on the absence of evidence in the record that Covil's initial receiver published notice of the dissolution in a local newspaper in 1992. But that ruling itself is wrong as a matter of law for several reasons and should be reversed.

I. Procedural History

This appeal arises from a "Motion to Clarify Status of Receivership" ("Motion to Clarify") filed by the Receiver on July 21, 2020 in two actions pending before the circuit court, *Peter D. Protopapas as Receiver for Covil Corp. v. Wall, Templeton & Haldrup, P.A., et al.*, C/A No. 2019-CP-40-02285 ("*Wall Templeton*") and *Sandra S. Hutto, et al. v. Covil Corp., et al.*, C/A No. 2019-CP-40-06956 ("*Hutto*"). (R. p. 429; Motion to Clarify.)

The *Wall Templeton* action was filed by the Receiver against USF&G and certain other defendants not party to this appeal on April 24, 2019. (R. p. 88; Compl., *Wall Templeton*; *see also* R. p. 114; Am. Compl., *Wall Templeton*.) The *Hutto* action was filed on December 12, 2019, by asbestos tort plaintiffs who are not parties to this appeal against USF&G, Covil, and additional defendants not parties to this appeal. (R. p. 269; Compl., *Hutto*.) Covil, through the Receiver, subsequently asserted cross-claims against USF&G and other defendants. (R. p. 368; Receiver's Cross-Claims, *Hutto*.) USF&G and its co-defendants asserted defenses to the claims and cross-claims in *Hutto* and *Wall Templeton*, including the statute-of-repose defense that was the subject of the Motion to Clarify and is now at issue on this appeal.[1]

The circuit court issued the order on appeal, which granted the Receiver's Motion to Clarify, on September 25, 2020. (R. p. 5; Order.) USF&G filed notices of appeal from the order on October 26, 2020. (R. p. 782; USF&G's Notice of Appeal, *Hutto*; R. p. 791; USF&G's Notice of Appeal, *Wall Templeton*.) On November 6, 2020, the Court of Appeals requested briefing on the issue of the appealability of the September 25, 2020 order. (R. p. 796; Request for Memoranda on Appealability.) Following submissions concerning appealability on December 1, 2020, and on January 5, 2021, the Court notified the parties that this appeal should proceed.[2]

On July 13, 2023, the Receiver moved to dismiss this appeal as moot. (Appx. 125.) After the motion was briefed, the Court of Appeals sent a list of interrogatories to USF&G regarding the status of the statute-of-repose issue and its presence in other matters. (Appx. 155.) On August 23, 2023, USF&G provided a thorough, detailed response to the Court's questions. (Appx. 157.) On

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[1] (R. p. 242; USF&G's Answer to Am. Compl., *Wall Templeton*; R. p. 226; Zurich American Insurance Company's Answer to Compl., *Wall Templeton*; R. p. 386; USF&G's Answer, *Hutto*.)

[2] (R. p. 798, USF&G's Memorandum on Appealability; R. p. 807; Receiver's Memorandum on Appealability; R. p. 820; Letter Retaining Appeal from the Court of Appeals.)

October 11, 2023, the Court of Appeals held oral argument. It issued its opinion affirming the circuit court's order on November 22, 2023. (Appx. 1.) USF&G timely sought rehearing, which was denied on March 18, 2024. (Appx. 171, 190.)

II. Factual Background: Covil's Dissolution and Receiverships

Covil was a South Carolina-based insulation contractor that was involved in the distribution and installation of insulation materials, some of which contained asbestos. In 1991, Covil ceased all business operations and The First Savings Bank, F.S.B., a creditor of Covil, sought appointment of a receiver to marshal Covil's assets in order to satisfy its debts.[3] On October 11, 1991, the Greenville Court of Common Pleas appointed L. Winston Lee as receiver of certain of Covil's personal and real property.[4] Subsequently, on May 12, 1992, the receivership court granted a motion by Mr. Lee to "have his appointment responsibility and authority broadened to that of a general receiver for Covil Corporation" and to have Covil "be judicially dissolved."[5] In that same order, the court directed Mr. Lee to publish notice of Covil's dissolution.[6] The May 12 Order stated that dissolution was "effective as of the date of [its] filing," *i.e.*, May 12, 1992.[7]

Six months later, the court issued an order "find[ing] that [the receiver] has fully complied with the previous Orders of this Court in liquidating [Covil's] assets."[8] The court then approved

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[3] (*See The First Savings Bank, F.S.B. v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (Ct. Com. Pl. Greenville Cty.) ("*FSB v. Covil*").)

[4] (*See* R. p. 651; Order for Appointment of Receiver, *FSB v. Covil* (October 11, 1991) (Ex. J to Motion to Clarify).)

[5] (R. p. 700-701; Order at 1-2, *FSB v. Covil* (May 12, 1992) (Ex. V to Motion to Clarify) ("May 12 Order").)

[6] (*See* R. p. 704; *id.* at 5 ¶ 9 ("[T]o the extent not already accomplished, the Receiver shall publish the Notice required by § 33-14-107 of the Code of Laws of the State of South Carolina[.]").)

[7] (R. p. 701; *id.* at 2 ¶ 1.)

[8] (R. p. 709; Order at 2, *FSB v. Covil* (Nov. 12, 1992) (Ex. W to Motion to Clarify) ("Nov. 12 Order").)

"the abandonment by the Receiver of all [Covil's] remaining assets," finalized the dissolution, and discharged Mr. Lee as receiver.[9] The May 12 Order judicially dissolving Covil also directed the clerk of court to deliver a certified copy of the dissolution decree to the South Carolina Secretary of State. However, the South Carolina Secretary of State does not appear to have officially recorded Covil's dissolution decree. Instead, on July 30, 1993, the Secretary of State issued a Certification of Revocation of Authority against Covil for failure to file its annual report and/or pay franchise tax.[10]

Over the next 25 years, Covil was named as a defendant in various asbestos personal injury lawsuits. Covil's insurers retained defense counsel to defend and settle these lawsuits, as the insurers were obligated to do under the terms of their insurance contracts. Then, on November 1, 2018, plaintiffs in *Taylor v. Air & Liquid Systems Corp., et al.*, C.A. No. 2018-CP-40-04940 ("*Taylor*") moved to appoint a receiver for Covil, arguing that an appointment was appropriate because (i) Covil was dissolved; (ii) a $32.7 million judgment had been entered against Covil in a North Carolina federal action, *Finch v. Covil Corp.*, No. 16-cv-1077 (M.D.N.C.); and (iii) Covil had allegedly failed to answer in *Taylor* and another asbestos tort case, *Hill v. Advanced Auto Parts Inc., et al.*, C.A. No. 2018–CP-40-04680 ("*Hill*").[11]

The circuit court granted the motion the next day and appointed Mr. Protopapas as Covil's new receiver.[12] Since that time, Mr. Protopapas has aggressively litigated claims against Covil's insurers and its prior defense counsel under a variety of novel theories of liability, including that

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[9] (R. p. 738; Final Order at 3 ¶¶ 7–8, *FSB v. Covil* (Nov. 30, 1992) (Ex. B to USF&G's Opposition to Motion to Clarify) ("Nov. 30 Order").)

[10] (R. p. 680; Certificate of Revocation of Authority (Ex. M to Motion to Clarify).)

[11] (*See* R. p. 778; Plaintiffs' Motion to Appoint a Receiver over Covil Corporation Pursuant to S.C. Code § 15-65-10(4), *Taylor* (Nov. 1, 2018).)

[12] (*See* R. p. 16; Order Appointing Receiver, *Taylor* (Nov. 2, 2018).)

Covil's insurers are directly liable for Covil's torts as a result of Covil's insurers' alleged control of Covil's defense and settlement of asbestos tort claims after it ceased business operations in 1991.[13] In addition, the Receiver has alleged that Covil's insurers aided and abetted Covil's prior attorneys' alleged breaches of their fiduciary duties to Covil, breached their duties to defend Covil, and handled Covil's insurance claims in bad faith. (*See, e.g.*, R. p. 124-127; Am. Compl., *Wall Templeton* at 11–14.) USF&G disputes the factual and legal bases for these claims. Following the Receiver's lead, other asbestos plaintiffs represented by the same firm began to sue directly USF&G and Covil's other insurers as Covil's alleged alter egos, naming them as first-party defendants along with Covil. (*See, e.g.*, R. p. 269; Compl., *Hutto*.)

USF&G has continued to defend and indemnify Covil in the asbestos suits. USF&G has worked with the Receiver since his November 2018 appointment in defending the claims against Covil, while simultaneously defending against the Receiver's various coverage claims and the novel alter ego claims the Receiver has pursued along with the underlying asbestos claimants.

III. The Receiver's "Motion to Clarify Status of Receivership" and Subsequent Appeal

As noted above, the Motion to Clarify that gives rise to this appeal was brought in response to USF&G and another of Covil's insurers, Zurich American Insurance Company, having asserted defenses based on South Carolina's statute of repose applicable to claims against dissolved corporations in two actions, *Wall Templeton* and *Hutto*. *Wall Templeton* was filed by the Receiver against USF&G, Zurich, and Wall, Templeton & Haldrup, P.A., Covil's former defense counsel. Although Covil's insurers resolved the claims against Covil in the *Hill* and *Taylor* cases ***without any contribution by Covil***, the Receiver in *Wall Templeton* asserts claims against Wall Templeton

[13] (*See, e.g.*, R. p. 127; Am. Compl., *Wall Templeton* at 14; R. p. 377; Receiver's Cross-Claims, *Hutto* at 10.)

for professional negligence and breach of fiduciary duty arising from default judgments entered in the *Hill* and *Taylor* cases, and claims against USF&G and Zurich for aiding and abetting Wall Templeton's breach of fiduciary duty, breach of the duty to defend, bad faith claims processing, and negligence. (R. p. 121-126; Am. Compl., *Wall Templeton* at 8–13.) The Receiver also seeks to hold Covil's insurers liable as its alter egos and a declaratory judgment claim regarding the insurance available to Covil in *Hill* and *Taylor*. (R. p. 127, 130; *id.* at 14, 17.) While some of the claims against USF&G and Zurich have been dismissed, *Wall Templeton* remains pending.

The *Hutto* action asserted claims under the Wrongful Death Act for alleged asbestos-related bodily injury. Plaintiffs in *Hutto* named Covil as a product seller potentially responsible for the decedent's injuries, and USF&G and Covil's other insurers as Covil's alleged alter egos. (R. p. 269; Compl., *Hutto*.) Covil, through the Receiver, subsequently asserted its own alter ego and declaratory judgment insurance coverage cross-claims against Covil's insurers in *Hutto*. (R. p. 368; Receiver's Cross-Claims, *Hutto.*) On January 20, 2021, Covil withdrew its cross-claims against USF&G, and on February 17, 2021, the *Hutto* plaintiffs dismissed their claims against Covil without prejudice.[14]

The Motion to Clarify filed in *Wall Templeton* and *Hutto* allegedly sought to clarify "the impact of Covil's prior receivership" on the current receivership in light of USF&G's and Zurich's assertion of Covil's statute of repose defense. (R. p. 430; Mot. at 2.) The Motion to Clarify asked the circuit court to "finally adjudicate" issues of South Carolina law relevant to application of the statute of repose to claims against Covil and, in substance, to declare that the statute of repose was not a viable defense for Covil or its insurers in any asbestos tort lawsuit against Covil. The motion

[14] (R. p. 425; Receiver's Notice of Withdrawal Without Prejudice of Cross-Claims Against USF&G and Zurich, *Hutto*; R. p. 427; Stipulation of Dismissal of Covil Corporation Without Prejudice, *Hutto*.)

did not explicitly seek to strike or dismiss USF&G's and Zurich's defenses, but instead was framed as a "clarif[ication]" of the "status" of the receivership as a whole, *i.e.*, in every case in which Covil was a party.

In the Motion to Clarify, the Receiver focused on USF&G's Sixth and Eleventh Defenses in *Hutto*. (R. p. 430; Mot. at 2.) These defenses were based on the expiration of the South Carolina statute of repose for claims against Covil.[15] The Zurich defense identified by the Receiver in *Wall Templeton* similarly raised the time-bar under South Carolina Code §§ 33-14-106 and 33-14-107.[16] USF&G also asserted this defense in *Wall Templeton*, using substantially the same wording as in its Eleventh Defense in *Hutto*.[17]

USF&G opposed the Motion to Clarify, arguing that Covil's Receiver lacked standing to attack the viability of Covil's own statute-of-repose defense, whether asserted by Covil or vicariously by USF&G as Covil's alleged alter-ego, and that the statute-of-repose defense was meritorious.[18] On September 25, 2020, the circuit court entered a proposed order drafted by the Receiver and granted the Motion to Clarify. The order concluded that "[d]espite USF&G's objection to the contrary," Covil's Receiver "has standing to present th[e] argument" that "pending and future asbestos claims [against Covil] by personal injury claimants . . . remain viable"

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15 (R. p. 401, 420; USF&G Answer, *Hutto* at 16, 35.)

16 The defense provided in relevant part that "pursuant to S.C. Code Ann. §§ 33-14-106 and 33-14-107, underlying asbestos claims against Covil Corporation are barred. Plaintiffs' claims against Zurich are necessarily barred as well because Plaintiff's alleged claims against Zurich are derivative of underlying asbestos claims against Covil." (R. pp. 238–239; Zurich Answer to Compl., *Wall Templeton* at ¶¶ 90–94.)

17 (R. p. 255; USF&G Answer to Am. Complaint, *Wall Templeton*, Eleventh Defense, at 14 ("Covil is a dissolved corporation and claims against it, including against any entity alleged to be Covil's 'alter ego' are barred under S.C. Code Ann. § 33-14-106 and 33-14-107. Plaintiff's claims against USF&G are necessarily barred also because Plaintiff's alleged claims against USF&G are derivative of underlying asbestos claims against Covil.").)

18 (R. p. 712; USF&G Opposition to Motion to Clarify.)

notwithstanding the statute of repose. (R. p. 10; Order at 6.) As to the legal issues presented by Covil's motion, the court found that neither the version of the statute of repose in effect at the time of Covil's dissolution nor the version in effect today barred any claims against Covil. (R. pp. 10–13; *id.* at 6–9.) The court also found, as a factual matter, that "notice of Covil's dissolution was never published," thus never triggering the statute of repose. (R. pp. 9–10; *id.* at 5–6.) It ultimately ruled that "no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil" and that "Covil's prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil." (R. pp. 13–14; *id.* at 9–10).

USF&G appealed and argued that the Receiver did not have standing to try and generate liability against Covil by seeking to invalidate a core defense based on the statute of repose, and that no matter what version of the statute applies, the repose period for claims against judicially-dissolved companies had expired. The Court of Appeals affirmed the standing argument, but it did not reach issues involving the statute of repose, finding instead that the statute was never triggered due to the absence of evidence of publication of notice of the now-final dissolution.

In its rehearing petition, USF&G pointed out in rehearing that the Court of Appeals' ruling was wrong as a matter of South Carolina law, as (1) a judicial dissolution cannot happen in this state without publication of notice of dissolution; (2) the judge who oversaw the dissolution found as a factual matter that the initial receiver had done all of the tasks that had been assigned to him to effectuate the dissolution; (3) the time for appealing the judicial dissolution order had long expired and could not be collaterally attacked thirty years later; (4) the law creates an evidentiary presumption that the repose period was triggered, and there is no competent evidence in the record to rebut that presumption; and (5) one circuit court judge cannot undo the ruling of another. The Court of Appeals denied rehearing without addressing any of these defects. This petition follows.

ARGUMENT

I. The Receiver lacked standing to deprive Covil of a critical statute of repose defense.

The Court should grant this Petition and vacate the rulings below because they find standing for the Receiver where none exists. The Court of Appeals accepted that in order for a plaintiff to seek relief from a court, it must have standing to do so. Standing has three familiar components: the plaintiff must have suffered a concrete "injury-in-fact," that injury must have a causal connection to the defendant's conduct, and a favorable decision must be able to "redress the injury." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014). A mere "interest" in the litigation does not confer standing. *E.g.*, *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 135, 526 S.E.2d 218, 220 (2000).

The Court of Appeals concluded the Receiver had standing to seek an order stripping Covil of its statute of repose defense because "the Receiver clearly has an interest in determining whether Covil is subject to future claims," because "Covil has suffered injury through the conduct of USF&G in the Hutto (and perhaps other) asbestos litigation," and because "Covil's potential future liability and proper available defense relates concretely to the management of Covil's assets and is particularly pertinent to any claims handling or bad faith claims that may remain against USF&G." (Op. at 7.)

There is no question that the current Receiver—charged with responsibility for acting on *behalf* of Covil—has an interest in determining whether Covil may be subject to future claims. While that interest may have justified efforts to *minimize* Covil's liabilities, neither Covil nor its current Receiver suffered any injury that could have possibly been redressed by the Receiver's request for a ruling greatly *increasing* Covil's liabilities. Yet, that is precisely what the Receiver sought by his request for an order that Covil's prior judicial dissolution and its accompanying

statute of repose posed no obstacle to the continued assertion of tort actions against Covil for years to come.

Similarly, there is no dispute that a receiver can have standing to pursue valid claims for insurance coverage. But while insurance coverage issues may be disputed, nonetheless insureds and their insurers share a common interest in defending the insured from third-party claims and minimizing the insured's liabilities. No interest in pursuing insurance coverage or insurance bad faith claims provides the insured—whether or not a receiver is standing in its shoes—with a legitimate interest in affirmatively seeking to deprive itself of a critical defense.[19]

Because the Receiver lacked standing to seek a ruling from the circuit court that was designed to create liability for Covil and waste assets, rather than eliminate Covil's liability and conserve assets, the Court should review and vacate the Court of Appeals' decision, as it is directly contrary to the very purpose of receiverships.

II. The Court of Appeals wrongly disregarded the South Carolina Code's requirements for a judicial dissolution, permitted an improper collateral attack, and improperly rejected the legal presumption that should have been afforded to the prior dissolution.

There is no dispute that Judge Simmons judicially dissolved Covil in 1992. He entered an order specifically saying so (R. pp. 700–06), and the Court of Appeals acknowledged as much on Page 1 of its decision. (Op. at 1.) But this undisputed point has significant legal implications that the Court of Appeals ignored but which are dispositive here.

[19] Additionally, it is unclear to what the Court of Appeals may be referring in concluding that "Covil has suffered injury through the conduct of USF&G in the Hutto (and perhaps other) asbestos litigation." (Op. at 7.) Covil was dismissed from the Hutto case (R. pp. 427–28), and in the two cases in which Covil suffered defaults, Covil's insurers resolved those claims "without any contribution by Covil," as USF&G noted on page 7 of its opening brief. And even if Covil had suffered some concrete injury as a result of the defense afforded by its insurers—it did not—it is difficult to fathom how a ruling paving the way for additional lawsuits against Covil for years to come could possibly redress any such hypothetical injury.

Publication Was Required by Statute. The General Assembly has created three ways to dissolve a South Carolina company: voluntarily (S.C. Code Ann. §§ 33-14-101 to -107), administratively (*id.* §§ 33-14-200 to -230), or judicially (*id.* §§ 33-14-300 to -330). The requirements for each type of corporate dissolution are defined by statute, and they vary depending on the type of dissolution.

Covil was judicially dissolved. As a matter of South Carolina law, a court may not judicially dissolve a South Carolina corporation without publication of notice of the dissolution, a point of law the Court of Appeals never acknowledged. *See id.* § 33-14-330(b) (stating "the court ***shall*** direct" publication of the dissolution for judicially-dissolved corporations) (emphasis added). In turn, Section 33-14-107 provides that publishing a single notice of a corporation's dissolution in a newspaper begins a repose period after which all new claims against the corporation are "barred." *Id.* § 33-14-107(c).

By contrast, when owners *voluntarily* dissolve a corporation, they retain discretion as to whether they publish notice of the dissolution. *See id.* § 33-14-107(a) (providing that "[a] dissolved corporation ***may*** publish notice of its dissolution") (emphasis added). By establishing different instructions depending on who is responsible for the dissolution, the General Assembly made publication essential to a judicial dissolution. *See Machin v. Carus Corp.*, 419 S.C. 527, 545, 799 S.E.2d 468, 477 (2017) ("The legislature's use of two separate terms makes clear that it intended two separate meanings.").

By requiring publication, the Legislature built finality and repose into the dissolution process so judicially-dissolved corporations do not have indefinite exposure to claims. In other words, when a court dissolves a corporation, there is a certain date after which the corporate entity no longer exists for any purpose, which is the finality and predictability that the law intends:

> Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.
>
> Society benefits when claims are causes are laid to rest after having been viable for reasonable time. When causes of action are extinguished after such time, society generally may conduct its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission. This is not only for the convenience of society but also due to necessity. At that point, society is secure and stable.

Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 242, 243–44 (1993) (quoting *Kissel v. Rosenbaum*, 579 N.E.2d 1322, 1326–28 (Ind. Ct. App. 1991)).

The Court of Appeals' opinion was dismissive of the point that publication is a legal requirement for a judicial dissolution, but Judge Simmons could not have lawfully dissolved Covil in 1992 without the notice of dissolution being published. The order judicially dissolving Covil has been final for three decades and is not subject to collateral attack by an appellate court, *see Atl. Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("While his calculation of damages may have been incorrect, an unappealed ruling, right or wrong, is the law of the case."); or by the circuit court, *see Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another."); *see generally Long v. McMillan*, 226 S.C. 598, 610, 86 S.E.2d 477, 482 (1955) (the "records of a court cannot be impugned upon matters within its jurisdiction, when offered in evidence, by counter evidence").

The Court of Appeals' dismissive treatment of (a) the South Carolina Code's requirement of publication as an essential component of Covil's judicial dissolution, and (b) the limits on the

circuit court's or this Court's ability to collaterally attack a final order entered by another court, were legal errors that should be reviewed and reversed.

Publication Was Required by the Circuit Court. Not only is publishing notice of dissolution required as a matter of South Carolina law for judicially-dissolved corporations, Judge Simmons specifically ordered the court-appointed receiver, Winston Lee, to undertake that precise act as part of Covil's judicial dissolution:

> In addition to the foregoing [notice under Section 33-14-106], and to the extent not already accomplished, the Receiver shall publish the Notice required by § 33-14-107 of the Code of Laws of the State of South Carolina, 1976 as amended.

(R. p. 704.)

Judge Simmons gave Mr. Lee that instruction on May 11, 1992. Six months later, Judge Simmons discharged Mr. Lee after finding "that he has ***fully complied with the previous Order of this Court*** in liquidating the assets of the Defendants, that his accounting is in order and that the relief sought by him should be approved." (R. p. 709) (emphasis added).

The Law Presumes Publication. Against this indisputable backdrop—and even assuming the circuit court and appellate courts had authority to invalidate another court's final orders through a collateral attack, which they do not—the Court of Appeals incorrectly held that, as a factual matter, Mr. Lee did not publish notice of Covil's dissolution. But as discussed further below, this conclusion, like that of the circuit court's below, impermissibly rested on the ***absence of evidence,*** not on any actual, affirmative, or substantial evidence demonstrating that the prior receiver failed to publish notice of Covil's dissolution as the law required and the prior court ordered. This is an error of law requiring reversal.

In South Carolina, as elsewhere, the law ***presumes*** that a court-appointed officer has complied with his or her duties and legal obligations:

> "The presumption is always in favor of the correct performance of his duty by an officer . . . . The presumption is that no official person, acting under oath of office, will do aught which is against his official duty to do, or will omit aught which his official duty requires to be done."

Howell v. Littlefield, 211 S.C. 462, 468, 46 S.E.2d 47, 49 (1947) (quoting *Whitcomb v. Manderville*, 90 S.C. 384, 392–93, 73 S.E. 775, 777–78 (1912)).

Unless the presumption is rebutted with substantial affirmative proof, it acts to establish that officials complied with prior orders and duties even where there may be no ***direct*** proof that they did. In fact, it is precisely where there may be no direct proof that the presumption most often comes into play. *See, e.g.*, *Kirton v. Howard*, 137 S.C. 11, 30, 134 S.E. 859, 866 (1926) ("While the 'case' fails to show that the certificate of appointment of the new trustee, Sanders, was indorsed upon the original deed, if said deed was found, or that such appointment was recorded in the office of the clerk of court, as required in the statute, to which we have called attention, *yet in the absence of any evidence to the contrary, the court is bound to assume that the designated public officers performed the duties required of them by the act*.") (emphasis added); *Whitcomb*, 90 S.C. at 393, 73 S.E. at 778 ("All persons are presumed to have duly discharged any duty imposed by law." (quoting *Douglass v. Owens*, 39 S.C. L. 534 (5 Rich. 534, 536))).

The presumption of regularity is not a mere technicality. It has been followed in South Carolina and throughout the country for important policy reasons—it promotes efficiency, fosters trust in public officers, and promotes finality and certainty. Those policy goals work hand-in-glove with the policies of finality and predictability underlying statutes of repose, including those the General Assembly affords to judicially-dissolved South Carolina corporations after the repose period has expired. Yet, the Court of Appeals summarily dismissed this legal presumption in a brief footnote, stating that it was "reject[ing] USF&G's argument that a 'presumption of regularity' establishing the Prior Receiver faithfully discharged all responsibilities applies to the question of

publication." (Op. at 12 n.6.) Through this rejection, the Court of Appeals implicitly created a new burden on USF&G to re-prove something that occurred 30 years prior and presumed that Judge Simmons entered the dissolution order without a proper foundation. These were fundamental errors of law warranting this Court's review and reversal.

No Evidence Exists to Rebut Presumption. Like the circuit court, the Court of Appeals incorrectly held that it was USF&G's burden to "satisfy the necessary predicate of publication" by Mr. Lee. (Op. at 12 n.6.) To be clear, Judge Simmons's order is entitled to full and final credit, and neither party can lawfully challenge the order's validity or its underlying factual predicate. Thus, neither party should bear the burden of challenging it, as South Carolina law forbids any challenge to that order at this point. However, if a challenge is allowed, the party seeking to invalidate that long-final order—the Receiver—must bear that burden, not USF&G. Where, as here, the law presumes a fact, the burden of proof shifts to the adverse party. *State Accident Fund v. S.C. Second Injury Fund*, 409 S.C. 240, 246, 762 S.E.2d 19, 22 (2014).[20]

[20] Footnote 6 on Page 12 of the Court of Appeals' opinion begins "[b]ecause USF&G cannot satisfy the necessary predicate of publication," and it contains a "*see also*" citation that opaquely suggests USF&G did not carry its burden of proof regarding "an affirmative defense." The Receiver's motion to "clarify the status of Covil's receivership" however, did not seek any adjudication of USF&G's affirmative defenses. It was not brought as a motion for summary judgment under Rule 56, nor as a motion for judgment on any affirmative defense as a matter of law under Rule 12, for example. Nor was this a trial on the merits in which USF&G would have been afforded an opportunity to present and cross-examine witnesses or offer other evidence. The Court of Appeals' opinion did not address this procedural irregularity. Regardless, as noted above, as the proponent of this effort to invalidate Covil's prior dissolution as a matter of law, any burden was necessarily on the Receiver. And, as also noted above, the legal presumption that applies to Mr. Lee's conduct as Covil's prior receiver would have satisfied USF&G's burden as a matter of law and shifted the burden to the current Receiver to come forward with "substantial evidence" to the contrary regarding Mr. Lee's conduct. *State Accident Fund*, 409 S.C. at 246, 762 S.E.2d at 22. The current Receiver did not come close to carrying his burden, as there is no evidence, much less "substantial evidence," showing that Mr. Lee failed to do exactly as he was required by the South Carolina Code and by court order. To the extent the circuit court's and Court of Appeals' ruling suggests that USF&G failed to carry the initial burden or that the burden of proof did not shift to the current Receiver, those are reversible errors of law. *See Hudson v. Leopold*, 288 S.C. 194, 196,

Here, in addition to improperly shifting the burden of proof to USF&G (the non-moving party), the only "evidence" cited by the Court of Appeals was (1) the fact that "[t]the master made ***no finding***" in his 1992 order that the Prior Receiver "fully complied with the previous Orders of this Court in liquidating the assets of [Covil]" as to whether a notice of dissolution was published (Op. at 11) (emphasis by Court of Appeals); (2) the unremarkable fact that the Prior Receiver's accounting "makes ***no mention*** of funds paid to publish a notice of dissolution ***nor does it reference*** payment to a newspaper" (*id*. at 12) (emphasis added); and (3) a handwritten note in 2001 by "a different Covil insurer" that this unnamed insurer claim representative was unaware of whether formal notice of dissolution was published (*id*.). None of this suffices to overcome the presumption of regularity.

As to the receivership court's 1992 finding that the prior receiver fully complied with the court's prior orders, while that constituted affirmative evidence of publication, the fact that this finding did not specifically discuss publication of notice to draw an adverse inference to the contrary is clearly an ***absence*** of evidence, not affirmative evidence necessary to overcome a presumption. Critically, a legal presumption cannot be overcome by speculation, inadmissible evidence, or negative inferences based on the ***absence*** of proof. "When a presumption shifts the burden of production to the opposing party, that party must present ***substantial evidence*** in order to rebut the presumption." *State Accident Fund*, 409 S.C. at 246, 762 S.E.2d at 23 (emphasis added); *see generally Barr's Next of Kin v. Cherokee, Inc*., 220 S.C. 447, 464–68, 68 S.E.2d 440, 448–49 (1951) (vacating a lower court order that relied on inadmissible evidence to overcome a legal presumption). As noted above, the presumption most often applies and is most necessary

341 S.E.2d 137, 139 (1986) (reversing and remanding because "the lower court improperly shifted the burden of proof").

where direct proof may no longer be available. *E.g.*, *Kirton*, 137 S.C. at 30, 134 S.E. at 866; *Whitcomb*, 90 S.C. at 393, 73 S.E. at 778.[21] It is precisely for this reason why a 30-year-old order should be—and indeed is—presumptively valid.

Moreover, the Greenville court was obviously familiar with and oversaw the prior receiver's work in the months leading to that order, and there is no reason why that court would have been required to, or as a practical matter would have, set forth each of the prior acts in complying with the court's prior orders (including the order requiring publication of notice) with that degree of specificity. Nevertheless, the presumption of regularity ***presumes*** that the prior receiver faithfully performed his duties and complied with his legal obligations in effecting Covil's judicial dissolution ***irrespective*** of the Greenville court's finding that he did so, demonstrating further that the ***absence*** of a specific finding in that order proves nothing and falls far short of the kind of affirmative proof necessary to overcome the presumption.

Likewise, the fact that, as the Court of Appeals states, the prior receiver's accounting "makes no mention of funds paid to publish a notice of dissolution nor does it reference payment to a newspaper" (Op. at 11–12) is legally irrelevant. As with absence of a specific finding detailing publication of notice in the court's dissolution order, the absence of details about publication of notice in the prior receiver's accounting is clearly just that: the absence of proof, which is insufficient. Beyond that fundamental flaw, the Court of Appeals never addressed the fact that Mr. Lee's accounting contained two categories of unenumerated expenses, either of which could have easily included publication of a single notice in a local Greenville newspaper in 1992: "Attorney Costs" of $100, and "Receiver Expense" of $1576.50. (R. p. 710.) It is legal error for the Court of

[21] Notably, the judicial records of Covil's prior dissolution and the work of the prior receiver were, as the record here reflects, in disarray through no fault of USF&G (or Covil for that matter): records were misfiled by the court, incomplete, and in some cases destroyed. (R. 598–603.)

Appeals to have drawn an adverse inference and assumed Mr. Lee ignored both the South Carolina Code and an order from Judge Simmons because his accounting contains generalized categories of expenses, rather than having a specific line item for the cost of publishing a single notice.

Finally, so too was it error for the Court of Appeals to rely on "a 2001 claim file activity memorandum from a different Covil insurer" regarding whether "formal notice was filed." (Op. at 12.) This third-party memorandum is classic inadmissible hearsay. Rule 802, SCRE. Even if it could have been considered (and it should not have been), it is hardly "substantial evidence" that undercuts the presumption that Mr. Lee did precisely what the South Carolina Code required him to do and what Judge Simmons ordered him to do.

This "memorandum" was nothing more than handwritten notes from an unknown author, apparently produced by Zurich, which is not even a party to this appeal. It was purportedly written in 2001, nearly a decade after Covil's judicial dissolution. It purports to record notes from a conversation that its unknown author had with a lawyer who was retained to defend Covil in underlying asbestos litigation, and who (like Covil's insurers) was ***not involved in Covil's judicial dissolution***. Clearly, the scrawl of an unknown author, who had no responsibility for Covil's dissolution, regarding defense counsel's secondhand-at-best speculation of what Mr. Lee may have done a decade earlier with respect to Covil's judicial dissolution cannot possibly suffice as "substantial evidence" to overcome the law's presumption that Mr. Lee faithfully performed his duties and did what he was required to do by both the South Carolina Code and a direct order from Judge Simmons.

* * * * *

The current Receiver asked the circuit court in Richland County to deprive Covil of the benefit of the statute of repose that, by law, should have been available to Covil based on a judicial dissolution entered in Greenville County more than three decades ago. Instead of undertaking a

forensic exploration as to what the record may have reflected as respects the court-appointed receiver's efforts to wind up Covil's affairs thirty-two years earlier, the law presumes Mr. Lee did what was required of him by the South Carolina Code and by Judge Simmons. Neither the current Receiver nor the Court of Appeals identifies a single case in South Carolina or elsewhere where a presumption was simply rejected out of hand in this manner, or overcome by the kind of negative implication, speculation, and the absence of evidence as relied on here to justify the collateral attack on a long-final judicial dissolution. Indeed, the need to afford finality to a corporation's prior dissolution, the acts of a prior receiver in fulfilling his duties, and a prior court's findings and orders, is particularly acute in this case. All of these facts, findings, and orders occurred or were entered decades ago, and they are being wrongly revisited in the context of an improper collateral attack by a party who lacks standing and where direct evidence is no longer readily available.

Accordingly, the Court of Appeals' conclusion that "evidence in the record supports the special circuit court's finding that publication of the dissolution notice necessary to trigger the statute of repose did not occur during the Prior Receivership" was patently incorrect and based on a flawed analysis as a matter of law. (Op. at 12.) The Court of Appeals' opinion does not address or account for any of the legal principles discussed above—the South Carolina Code's requirement that judicial dissolutions must include publication of the dissolution, the inappropriate shifting of the burden of proof to USF&G, the legal presumption attaching to Mr. Lee's work, the finality of Judge Simmons's orders, and the inability of one court to collaterally attack the findings and orders of another. Respectfully, the Court of Appeals' decision should be reviewed via certiorari and vacated, and this Court should make clear that the statute of repose under South Carolina Code § 33-14-107 bars all pending and future claims against Covil.

III. The circuit court wrongly applied the statute of repose, holding that applying it to Covil would somehow render the "retroactive," which is contrary to long settled law.

The Court of Appeals avoided addressing the applicability of the statute of repose for dissolved South Carolina corporations by ruling, incorrectly, that the statute was never triggered in the first place. But the circuit court's order below continues to be in error on this point, as the circuit court held that applying the statute of repose to block current and future claims would somehow apply the statute retroactively. (R. p. 12; Order at 8.) This is a clear error of law and requires correction by this Court.

The parties fully briefed the issue to the Court of Appeals. (Appx. 39–51 (Opening Brief), 89–95 (Response Brief), 116–122 (Reply Brief).) In summary, the circuit court's construction of Section 33-14-107 would allow contingent claims to be brought against any South Carolina corporation that dissolved prior to 2004 ***unless*** such long-deceased corporations re-published notice of their prior dissolution. There is no way that the General Assembly intended to resurrect hundreds and hundreds of South Carolina corporations strictly for purposes of either re-publishing notice of a dissolution that happened decades earlier or facing brand new tort claims for actions that happened generations ago.

Not surprisingly, courts construing statutes of repose that have undergone amendment through the years reject the construction ordered by the circuit court here. Instead, they hold that the repose period runs from the point of the statutory amendment.[22] Here, the current repose period

[22] *See, e.g.*, *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 599–600 (1873) (holding that parties have "the full statutory time to bring their actions after the repealing acts were passed," but treating the statutory period as running from the date of law's enactment); *The Fred Smartley, Jr.*, 108 F.2d 603, 608 (4th Cir. 1940) ("We do not think that such a construction of [a new time bar] amounts to giving it a retroactive effect. The limitation is applied not to divest vested rights or to invalidate proceedings theretofore had, or to affect in any way conditions existing prior to its enactment, but merely to limit the time within which existing rights may be asserted."); *see also Trax-Fax, Inc. v. Hobba*, 627 S.E.2d 90 (Ga. 2006) (law was not improperly applied retroactively where certain of

was adopted in 2004, meaning that the statute of repose for claims against Covil expired in 2014. The Court should grant certiorari, vacate the circuit court's errant ruling on this point, and give the parties the finality demanded by the statute of repose to bar claims against Covil.

IV. The Court of Appeals' repeated reliance on a void, non-final circuit court order was improper.

Just as its ruling on the merits improperly relied on the absence of evidence to overcome a legal presumption, so too did the Court of Appeals improperly appear to rely on inaccurate and baseless statements contained in a January 8, 2020 order from the circuit court, which cannot be considered in this appeal for numerous reasons.[23]

First, the factual allegations contained in the January 8, 2020 order are simply not true. That order was drafted by the current Receiver and entered by the circuit court despite having no jurisdiction over USF&G, ***as it was not a party to any of the cases in which it was entered***, nor was it ever served with a summons or a subpoena or anything else that would have even allowed

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the payments sought to be recovered took place before the enactment of the statute, and statute took effect more than two years before the insurer sought to recover any of the payments); *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 530 (Del. Ch. 2005) ("'[T]he century-old *Sohn* rule still enjoys great viability.' And for good reason, as it is a sensible and fair way to implement a legislature's intentions as to the effect of a new statute of limitations on pending cases." (quoting *Reuther v. Trustees of the Trucking Emps. of Passaic & Bergen County Welfare Fund*, 575 F.2d 1074, 1078 n.4 (3rd Cir. 1978))).

[23] (*See, e.g.*, Op. at 3 (stating that the January 8, 2020 order "describe[es] troubling issues that have arisen in Covil's asbestos litigation involving Insurers"); *id.* at 7 ("The record reveals years of concerning conduct on the part of USF&G and others as they prepared for the onslaught of asbestos litigation to come."); *id.* at 8 n.4 ("Abundant evidence in this record establishes USF&G's problematic claims handling and litigation practices related to Covil.").) The Court of Appeals also stated: "The deliberate decisions to default in the two 2018 cases further reflect the need for the special circuit court's appointment and clarification orders." (*Id.* at 8 n.4.) This is directly contrary to the actual record, which contains an affidavit from Mark Wall, Esq, explaining that the alleged "default" in those cases resulted from confusion as to whether service had been effected on Covil. (R. pp. 136–40.) Mr. Wall specifically testified: "In fact, the Carriers never made a decision to place Covil into default." (R. p. 139.) The actual record evidence is impossible to square with the Court of Appeals' statement on this point.

jurisdiction to attach. Under those circumstances, the January 8, 2020 order is void *ab initio*. *See, e.g.*, *Long v. McMillan*, 226 S.C. 598, 608–09, 86 S.E.2d 477, 482 (1955) (holding that a contempt order is "absolutely void" if the entity against which it is entered is not "allowed to offer evidence and argument in his defense," and that "disobedience of a void Order, Judgment, or Decree, or one issued without jurisdiction of subject matter and parties litigant, is not 'contempt'").

USF&G timely filed a Rule 59 motion to reconsider that order in each of the five cases in which it was entered, citing numerous grounds to vacate it. The Court can take judicial notice of the pendency of that motion. Rule 201, SCRE. USF&G's Rule 59 motion was filed on January 17, ***2020***, and it remains pending to this day, more than four years later. USF&G has made its intent to appeal this extraordinary order clear by filing a precautionary notice of appeal with the Court of Appeals on February 7, 2020, and a precautionary petition with this Court for a writ of supersedeas to ensure that courts did not mistakenly rely on the January 8, 2020 order while the Rule 59 motion remains pending.[24] Under these circumstances, certiorari is necessary to vacate the Court of Appeals' decision for being wrongly based on that non-final, void-on-its-face, factually baseless and legally erroneous order. *Cf. Wessinger v. Rauch*, 288 S.C. 157, 159, 341 S.E.2d 643, 644 (Ct. App. 1986).

CONCLUSION

For the reasons set forth above, USF&G respectfully requests that the Court grant this petition, vacate the lower courts' decisions, and issue an order finding that claims against Covil are barred based on the statute of repose for dissolved South Carolina corporations.

[24] This Court denied the petition on that basis, holding that it could not issue a writ of supersedeas until an appeal is pending. (Appellate Case No. 2020-000791.) The circuit court's failure to rule on the Rule 59 motion since 2020 continues to prevent USF&G from obtaining appellate review of that order, which is void *ab initio*.

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 the below parties in this action with a copy of the pleading(s) specified below by emailing a copy of the same to the following address(es):

Pleading: Petition for a Writ of Certiorari and Accompanying Appendix

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