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S.C. SUPREME COURT

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
Appellate 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.

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WOMBLE BOND DICKINSON (US) LLP

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, SC 29201
(803) 454-6504

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel
Pro Hac Vice
afrankel@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Petitioner United States Fidelity and Guaranty Company

April 17, 2024

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

of which

United States Fidelity and Guaranty Company is the Appellant.

Appellate Case No. 2020-001437

Appeal From Richland County
Jean Hoefer Toal, Acting Circuit Court Judge

Opinion No. 6037
Heard October 11, 2023 – Filed November 22, 2023

AFFIRMED

Matthew Todd Carroll, of Womble Bond Dickinson (US), LLP, of Columbia, Mary Elizabeth O'Neill, of Womble Bond Dickinson (US), LLP, of Charlotte, NC, Andrew T. Frankel, of New York, NY, and Mary Beth Forshaw, of New York, NY, all for Appellant.

G. Murrell Smith, Jr., Jonathan M. Robinson, and Shanon N. Peake, all of Smith Robinson Holler DuBose Morgan, LLC, of Columbia, for Respondent.

MCDONALD, J: This appeal arises from an action brought by the dissolved Covil Corporation's appointed Receiver, Peter D. Protopapas, against one of Covil's insurers, United States Fidelity and Guaranty Company (USF&G). USF&G appeals the special circuit court's order clarifying the status of the Receivership and rejecting USF&G's argument that South Carolina's statute of repose available to dissolved corporations bars asbestos personal injury claims against Covil. We affirm the order of the special circuit court.

Facts and Procedural History

Covil sold insulation products for many years, and some of these products contained asbestos. Covil's operations also included the installation and removal of insulation at industrial facilities throughout South Carolina. Thus, Covil has been named as a defendant in asbestos bodily injury suits since 1976. Plaintiffs in these lawsuits alleged that during specified periods, Covil made, manufactured, sold, distributed, installed, or removed insulation materials containing asbestos.

Covil ceased business operations in 1991, and the South Carolina Secretary of State revoked Covil's corporate charter in 1993. Throughout the course of Covil's operations, it had insurance coverage through various insurers, including USF&G, Zurich, Sentry, Hartford, and TIG.

In 1991, the Greenville County master-in-equity appointed a receiver for Covil (the Prior Receiver). By order filed May 12, 1992, the master judicially dissolved Covil and ordered the Prior Receiver to provide known claimants with notice of dissolution pursuant to section 33-14-106 of the South Carolina Code and to publish the notice required by section 33-14-107. The master also ordered the Prior Receiver to gather and dispose of Covil's assets.

On November 11, 1992, the Prior Receiver filed a petition to terminate his receivership. The petition described the actions taken by the Prior Receiver and included an accounting of the Prior Receiver's expenditures. This accounting does not reference any expenses paid to publish a notice of dissolution or otherwise paid to a newspaper. In a November 12, 1992 order, the master discharged the Prior Receiver, finding he had "fully complied with the previous Orders of this Court in

liquidating the assets of his Defendants, that his accounting is in order and that the relief sought by him should be approved."

In 2018, Covil defaulted in two mesothelioma cases, and in November 2018, the special circuit court appointed Receiver to represent Covil's interests. The Receiver later filed a motion to clarify the special circuit court's Appointment Order. The circuit court granted this motion, finding Receiver was vested with all rights of Covil, including the right to access files retained by two law firms Covil's insurers retained to represent their insured.

On April 24, 2019, the Receiver filed a bad faith action against USF&G, Zurich, and Sentry (Insurers) as well as a legal malpractice action against one of the law firms (Law Firm) that represented Covil. The Receiver alleged Insurers acted as Covil's alter ego in conducting Covil's post-dissolution affairs prior to Receiver's appointment, including making decisions as to the disposition of litigation against Covil and the treatment and characterization of claims against Covil's insurance policies. The Receiver further asserted Insurers and Law Firm acted in bad faith in choosing not to appear in the two 2018 cases in which Covil was held in default.

The Receiver subsequently sought an order of contempt to address Insurers' failures to comply with several special circuit court orders, including an order requiring Insurers to provide Receiver with requested insurance documentation. Following a hearing, the special circuit court issued a January 8, 2020 order describing the troubling issues that have arisen in Covil's asbestos litigation involving Insurers. This order noted Insurers had been "operating an otherwise defunct Covil for purposes of managing Covil's asbestos litigation" for over two decades and had failed to cooperate with the Receiver despite several court orders directing them to do so. The special circuit court explained that despite repeated instructions and discovery orders, Insurers failed to provide the Receiver with all relevant insurance policy limits and documentation necessary for the Receiver to participate in mediating Covil's asbestos litigation. This order further noted the Receiver had gone to great lengths in his effort to piece together the necessary coverage information. Notably, the special circuit court found the Receiver had submitted evidence demonstrating USF&G's prior claims practice involved the systematic destruction of historical insurance coverage documentation in the hope that policyholders would be unable to produce the policy records necessary to establish coverage. The special circuit court found USF&G spoliated relevant evidence and noted it would "issue an appropriate sanction to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field."

On December 12, 2019, Sandra Hutto, personal representative of the Estate of Donald L. Hutto, and other family members filed an action against numerous defendants, including Covil and Insurers. Hutto's complaint included wrongful death and survival claims arising from Donald's exposure to asbestos-containing materials and raised additional claims related to Insurers' handling of Covil's asbestos litigation. These included Hutto's claims that Insurers acted as Covil's alter ego and with others to effectuate "their common purpose of exclusive, unilateral control by running Covil's affairs in all material respects." Hutto claimed Insurers controlled Covil for nearly thirty years and "made Covil's defense of asbestos litigation nearly, if not completely, impossible." She further asserted Insurers' conduct made them "fully responsible for all of Covil's liabilities prior to appointment of the Receiver."

On February 21, 2020, Covil, by and through Receiver, crossclaimed against USF&G and Zurich. Covil claimed USF&G and Zurich were fully responsible for all of Covil's liabilities prior to Receiver's appointment because they acted as Covil's alter ego in managing Covil's assets and in acting on Covil's behalf. Covil also brought a crossclaim against these insurers for their bad faith failure to defend Covil in the Hutto litigation. USF&G answered, raising as an affirmative defense the statute of repose available to dissolved corporations through sections 33-14-106 and 33-14-107 of the South Carolina Code. USF&G asserted that if it were found to be Covil's alter ego, it was entitled to assert all claims and defenses to which Covil would be entitled, including this statute of repose.

On April 10, 2020, the special circuit court granted joint motions to establish the Covil Qualified Settlement Fund (QSF) and to approve settlements between the Receiver and Sentry and two other insurers.[1] Following the approval of the settlement agreements and the establishment of the QSF, all claims against Hartford, Sentry, and TIG were assigned to the QSF.

On July 20, 2020, the Receiver filed an amended complaint in the bad faith and legal malpractice action against Law Firm, USF&G, and Zurich. USF&G timely answered and raised several affirmative defenses. Among these was USF&G's affirmative defense that all claims against Covil or any entity alleged to be Covil's

[1] Hartford, Sentry, and TIG all agreed to buy back their policies in excess of the policy limits.

alter ego were barred by the statute of repose for claims against dissolved corporations. Zurich raised the same statute of repose defense.[2]

On July 21, 2020, the Receiver filed a motion to clarify the status of the Receivership. In this motion, the Receiver asked that the special circuit court "clarify the impact, if any, of these affirmative defenses and thus finally adjudicate this issue of South Carolina law."

In its September 25, 2020 order clarifying the status of the receivership, the special circuit court held "nothing from the prior Receivership precludes the current Receivership or personal injury asbestos claimants from filing lawsuits against Covil." The circuit court further found no evidence exists to support a finding that notice of Covil's dissolution was ever published as was required to trigger the statute of repose. The special circuit court specifically referenced the 1992 master's orders addressing the Prior Receivership, explaining the November 1992 order stated only that the Prior Receiver complied with previous orders to liquidate Covil's assets—the 1992 order made *no* finding as to whether the notice of dissolution was ever published. The circuit court determined that even if the notice of dissolution had been published, claims against Covil were not barred as a matter of law under the post-2004 section 33-14-107(c) because the amended version of the statute applied only to corporate dissolutions subsequent to its 2004 enactment. Yet, the circuit court further noted claims against Covil were not barred under the prior version of the statute either because the statute's reference to "unknown claims" referred to claims unknown to the corporation, not those unknown to the claimant. Finally, the circuit court found the Reporter's Comment for § 33-14-107 revealed the intent of the Legislature "to exclude nonexistent claims from the reach of both section 33-14-106 and -107 at the time of Covil's dissolution."

USF&G appealed and in July 2023, the Receiver moved to dismiss this appeal as moot, asserting all underlying cases alleging USF&G acted as Covil's alter ego had settled. USF&G opposed this motion, arguing certain claims remained and the question of whether Covil is subject to future asbestos claims is not moot. The Receiver timely filed a reply and on August 3, 2023, this court requested that USF&G file a surreply responding to five specific questions relevant to the court's mootness inquiry. USF&G filed a surreply largely unresponsive to the court's questions, and the Receiver sought leave to respond. The court granted such leave and accepted the Receiver's response as filed. Although the court declined to

[2] The Receiver ultimately settled the claims against Law Firm and Zurich.

dismiss the appeal, it instructed the parties to be prepared to address mootness, in addition to the issues raised in their briefs, at oral argument.

Standard of Review

"Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015) (quoting *Grier v. AMISUB of S.C., Inc.,* 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012)). As to findings of fact, however, a circuit court's order "will only be disturbed on appeal if the findings are wholly unsupported by the evidence or controlled by an erroneous application of the law." *Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011).

Analysis

I. Standing

USF&G argues the Receiver lacked standing to seek a ruling on section 33-14-107 that could increase Covil's liability by eliminating an affirmative defense to asbestos personal injury actions. We disagree with USF&G's characterization of the Receiver's filing and with its standing argument.

"A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a 'real party in interest.'" *Stoney v. Stoney*, 425 S.C. 47, 64, 819 S.E.2d 201, 210 (Ct. App. 2018) (quoting *Ex Parte Gov't Emps. Ins. Co.*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007)); *see also Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (To have standing, "one must be a real party in interest. 'A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.'" (quoting *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999))).

In *Sea Pines*, our supreme court explained:

> In *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), the United States Supreme Court enunciated a stringent standing test. *Lujan* set forth the "irreducible

> constitutional minimum of standing," which consists of the following three elements:
>
> > First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Sea Pines Ass'n for Prot. of Wildlife, Inc., 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan* at 559–61) (alterations in original).

Here, the special circuit court appointed Receiver "with the power and authority to fully administer all assets of Covil [including] the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers." Thus, the Receiver clearly has an interest in determining whether Covil is subject to future claims as it seeks to fulfill the requirements of the Appointment Order. Moreover, it appears Covil has suffered injury through the conduct of USF&G in the Hutto (and perhaps other) asbestos litigation. The Receiver's need for clarification in considering Covil's potential future liability and proper available defenses 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.[3] 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. We accordingly find the Receiver had standing to seek—and properly sought—clarification of the special circuit court's Appointment Order.[4]

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[3] The parties disagree as to whether any such claims remain.

[4] USF&G argued to the special circuit court that the Prior Receivership barred both the institution of the current Receivership and all subsequent litigation by or

II. Mootness

"An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Croft as Tr. of James A. Croft Tr. v. Town of Summerville*, 433 S.C. 473, 480, 860 S.E.2d 352, 356 (2021) (quoting *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001)). "A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006).

> In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc. v. Alexander, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015) (internal citations omitted) (quoting *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596)).

The Receiver argues this appeal is moot because all matters in which USF&G has raised the statute of repose as an affirmative defense have been resolved. Such matters include Covil's action against Law Firm, its alter ego claims against USF&G, and the underlying claims in the cases in which USF&G chose to default.

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against Covil. To the extent USF&G seeks to pursue such an argument beyond the context of the statute of repose arguments discussed *infra* in Section III, we find such argument meritless. Abundant evidence in this record establishes USF&G's problematic claims handling and litigation practices related to Covil. This behavior, including but not limited to the policy of systematic document destruction, alone necessitated the appointment of the current Receiver. The deliberate decisions to default in the two 2018 cases further reflect the need for the special circuit court's appointment and clarification orders.

But, even if the prior settlements rendered the current case moot (which USF&G strongly disputes), an exception to the mootness doctrine applies here. *See Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc.*, 414 S.C. at 359, 778 S.E.2d at 900 ("[If the] decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." (quoting *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596)).

Under the Appointment Order, the Receiver has authority and control over Covil's assets, including available insurance coverage. Therefore, it is imperative that the Receiver understand Covil's potential remaining liabilities in order to properly manage Covil's assets and any further claims against Covil that may arise. Whether Covil will be subjected to future claims involving USF&G policy coverage remains unclear, but our decision here would likely affect such claims or have collateral consequences for the parties should USF&G or another insurer attempt to raise this affirmative defense in future litigation. Because an appellate ruling addressing the statute of repose may have consequences beyond the current case, we decline to dismiss this appeal as moot.

III. Statute of Repose

In addition to its arguments challenging Receiver's standing and the procedural posture of the motion to clarify, USF&G asserts "the statute of repose bars claims against Covil regardless of whether the 2004 or 1992 version of the statute applies." We disagree.

USF&G argues the special circuit court erred in finding the pre-2004 version of section 33-14-107—effective at the time of Covil's 1992 dissolution—was the applicable version of the statute. Still, USF&G further asserts claims against Covil are barred under either version of the statute because the master's November 1992 order is dispositive as to the question of whether the Prior Receiver published the notice of Covil's dissolution necessary to trigger the statute of repose.

At the time of Covil's dissolution, section 33-14-107 provided, in pertinent part:

> (a) A dissolved corporation may publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(b) The notice must:

(1) be published once in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this State, its registered office) is or was last located;

(2) describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(3) state that a claim against the corporation is barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:

(1) a claimant who did not receive written notice under Section 33-14-106;

(2) a claimant whose claim was timely sent to the dissolved corporation but not acted on.

S.C. Code Ann. § 33-14-107 (a)-(c) (1988).

Subsection (c) of 33-14-107 was amended in 2004, and now reads as follows:

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within ten years after the publication date of the newspaper notice:

> (1) a claimant who did not receive written notice pursuant to Section 33-14-106;
>
> (2) a claimant whose claim was timely sent to the dissolved corporation but not acted on; and
>
> (3) a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution.

S.C. Code Ann. § 33-14-107(c) (2006). The 2004 amendment added subsection (c)(3)'s bar for claimants whose claims are "contingent or based on an event occurring after the effective date of the dissolution." *Id.* This amendment also extended the repose period for claims against a dissolved corporation from five to ten years "after the publication date of the newspaper notice." *Id.*

"It is well-established that '[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.'" *Grier*, 397 S.C. at 535, 725 S.E.2d at 695 (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "What the General Assembly says in the text of the statute is the best evidence of its intent, and this Court is bound to give effect to the legislature's expressed intent." *Aiken v. S.C. Dep't of Revenue*, 429 S.C. 414, 419, 839 S.E.2d 96, 99 (2020). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 10–11, 760 S.E.2d 785, 790 (2014) (quoting *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010)).

Based on the plain language of either version of section 33-14-107, a statutorily compliant notice of publication was necessary to trigger application of the statute of repose available to a dissolved corporation. But the record here is devoid of evidence that Covil or the Prior Receiver *ever* published the necessary notice of dissolution. USF&G references the master's 1992 order finding the Prior Receiver complied with the court's prior orders, but the order merely states the Prior Receiver "fully complied with the previous Orders of this Court in liquidating the assets of his Defendants." The master made *no finding* as to whether a notice of dissolution was published—the order simply does not address publication. Further, when the Prior Receiver filed the petition seeking to dissolve that receivership, he attached a document detailing his expenses; this accounting makes

no mention of funds paid to publish a notice of dissolution nor does it reference payment to a newspaper. More notably, a 2001 claim file activity memorandum from a different Covil insurer notes "Covil no longer around . . . dissolution was filed[,] however no evidence that formal notice was filed [illegible] published . . . will investigate; push the law firm that handled the dissolution to file notice.

In sum, 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. Moreover, there is no evidence in the record to support an argument that Covil published a notice of dissolution following the 2004 statutory amendment.[5] Accordingly, we affirm the order of the special circuit court, including the findings that "no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil" and "nothing from the prior Receivership precludes the current Receivership or personal injury asbestos claimants from filing lawsuits against Covil."[6]

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[5] In a case involving Covil and Zurich, a North Carolina District Court similarly addressed the lack of published notice of Covil's dissolution. *See Finch v. Covil Corp.*, No. 1:16-CV-1077-CCE-JEP, Memorandum Opinion Order at 9 (M.D.N.C. Oct. 14, 2020) ("The Court finds that the receiver did not publish the notice in compliance with § 33-14-107(b)" and "[t]here is no evidence that Covil published a notice of dissolution after the 2004 provision was enacted, and the Court finds that it did not.").

[6] Because USF&G cannot satisfy the necessary predicate of publication, we need not address which version of § 33-14-107(c) might apply had such publication occurred or further consider the operation of the statute. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting a reviewing court need not address remaining issues when disposition of a prior issue is dispositive). And, we reject USF&G's argument that a "presumption of regularity" establishing the Prior Receiver faithfully discharged all responsibilities applies to the question of publication. The crux of USF&G's position as to this claimed presumption appears to be that it would be problematic to allow the Receiver to rely on the absence of evidence of publication to conclude "that such absence implies noncompliance." In light of the evidence of non-publication previously referenced, we disagree with USF&G's contention that the special circuit court used "a negative inference to overcome a well-established presumption." *See also Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000) (acknowledging "the well-established rule that the party pleading an affirmative defense 'has the burden of proving it'" (quoting *Hoffman v.*

Conclusion

Based on the foregoing, the order of the special circuit court is

AFFIRMED.

VINSON, J., and BROMELL HOLMES, A.J., concur.

Greenville County, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963))). We further disagree that the special circuit court's findings serve to collaterally attack the master's November 1992 order. Like the circuit court, we do not read the 1992 order to include the finding USF&G so strenuously urges us to presume.

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

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Circuit Court Case No. 2019-CP-40-02285

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v.

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

Of Which:

United States Fidelity and Guaranty Company is the..... Appellant,

And

Peter D. Protopapas, in his capacity as Receiver of Covil Corporation, is the..... Respondent.

BRIEF OF APPELLANT UNITED STATES FIDELITY AND GUARANTY COMPANY

WOMBLE BOND DICKINSON (US) LLP
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, SC 29201
(803) 454-6504

SIMPSON THACHER & BARTLETT LLP
Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

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STATEMENT OF ISSUES ON APPEAL

This is an appeal of an order granting a motion filed by Peter D. Protopapas, the court-appointed receiver ("Receiver") for Covil Corporation ("Covil"), a defunct corporation that was judicially dissolved in 1992 during a prior receivership proceeding but remains a defendant in ongoing asbestos litigation. The Receiver's motion sought to "clarify the status of [his] receivership" over Covil by obtaining a ruling that the ten-year statute of repose for claims against dissolved corporations set forth in S.C. Code Ann. § 33-14-107 did not prevent plaintiffs from bringing asbestos personal injury tort claims against Covil. The circuit court (Toal, C.J., Ret., sitting by designation as Acting Circuit Court Judge) granted the requested relief. This order was erroneous and raises several issues for appellate review:

1. Did the Receiver have standing to ask the circuit court for a ruling that Covil cannot benefit from the ten-year statute of repose for claims against dissolved corporations contained in S.C. Code Ann. § 33-14-107, given that the ruling sought and obtained by the Receiver benefits Covil's litigation adversaries, not Covil?

2. Does S.C. Code Ann. § 33-14-107, as amended in 2004, which bars unknown claims arising after corporate dissolution, apply prospectively from the date of the amendment to bar post-dissolution asbestos claims against Covil asserted more than ten years later?

3. If the 2004 amendment to Section 33-14-107 does not apply to Covil, does the pre-amendment version of the statute, which applies to all claims other than those for which claimant-specific notice is given under S.C. Code Ann. § 33-14-106, bar post-dissolution claims against Covil?

4. Section 33-14-107's repose period bars claims ten years after publication of a notice of dissolution, which Covil's prior receiver was ordered to publish pursuant to the prior receivership court's judicial dissolution decree. That court subsequently found that the prior

receiver complied with the receivership court's orders. In view of that finding as well as the presumption that receivers comply with court orders and their fiduciary obligations, did the circuit court err in reaching a contrary finding, decades after the prior final orders judicially dissolving Covil, by concluding that the prior receiver failed to publish notice of Covil's dissolution and on that basis that the statute of repose does not bar claims against Covil?

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 Appellant United States Fidelity and Guaranty Company ("USF&G")—which has been sued under the novel 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 seek to maximize Covil's liabilities. The circuit court's contrary finding that the Receiver had standing to bring this motion was error.

The order on appeal is also wrong on the merits. The circuit court principally concluded that the 2004 amendments to S.C. Code Ann. § 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. This ruling is erroneous because it refuses to apply the statute 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.

In addition, the circuit court erred in other important respects, including by misinterpreting the pre-amendment version of the statute; declining to apply the presumption that Covil's prior receiver complied with court orders; and resolving fact issues in the Receiver's favor on an incomplete record. As discussed further below, each of these errors mandates reversal.

A. **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 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]

B. **Covil's Dissolution And Receiverships**

Covil Corporation was a South Carolina-based insulation contractor that was involved in the distribution and/or 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,

[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.

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 "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

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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").

[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").

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 policies. 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 attorney Peter D. Protopapas as Covil's 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 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

[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).

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

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 Dean Omar firm began to sue directly USF&G and Covil's other insurers as Covil's alleged alter egos, naming them 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. The Receiver has settled claims against certain of Covil's insurers and defense counsel since his appointment and, based on the information disclosed, has been awarded fees of 33.3% of these recoveries, shared between the Receiver's law firm and his outside counsel.[14]

C. **The Receiver's "Motion To Clarify Status Of Receivership"**

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 ("Zurich"), 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

[14] *See, e.g.*, R. p. 67-68; Order Granting Joint Motions to Establish Covil Qualified Settlement Fund and to Approve Settlements, *Taylor* at 23-24 (awarding 33.3% contingency fee in settlements with Hartford, TIG, and Sentry).

against Wall Templeton 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). The Receiver's claims against USF&G and Zurich in the *Wall Templeton* action remain 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.[15] Because plaintiffs have dismissed their claims against Covil, USF&G anticipates that plaintiffs will likewise dismiss their vicarious liability claims against USF&G that were based on Covil's alleged primary liability.

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

[15] 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*.

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 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). USF&G's Sixth Defense was asserted as a defense to the *Hutto* plaintiffs' alter ego claims:

> 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. Plaintiffs' claims against USF&G are necessarily barred also because Plaintiffs' claims against USF&G are derivative of underlying asbestos claims against Covil.[16]

USF&G's Eleventh Defense asserted this same time-bar against Covil's alter ego cross-claims:

> 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. Covil's claims against USF&G are necessarily barred also because Covil's alleged claims against USF&G are derivative of underlying asbestos claims against Covil.[17]

The Zurich defense identified by the Receiver in *Wall Templeton* similarly raised the time-bar under S.C. Code Ann. §§ 33-14-106 and 33-14-107.[18] USF&G also asserted this defense in

[16] R. p. 401; USF&G Answer, *Hutto* at 16.

[17] R. p. 420; USF&G Answer, *Hutto* at 35.

[18] 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. p. 238-239; Zurich Answer to Compl., *Wall Templeton* at ¶¶ 90–94.

Wall Templeton, using substantially the same wording as in its Eleventh Defense in *Hutto*.[19] 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.[20] 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" 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. p. 10-13; *id.* at 6-9). The court also found, as a factual matter, that "notice of Covil's dissolution was never published," and for that reason the statute of repose was never triggered. (R. p. 9-10; *id.* at 5-6). In conclusion, the court 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. p. 13-14; *id.* at 9-10).

STANDARD OF REVIEW

"Questions of statutory construction are a matter of law." *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011). "The Court reviews questions of law de novo."

[19] 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.").

[20] R. p. 712; USF&G Opposition to Motion to Clarify.

Matter of Chapman, 419 S.C. 172, 178, 796 S.E.2d 843, 846 (2017) (citing *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012)). Accordingly, the circuit court's construction of South Carolina's statute of repose is subject to de novo review by this Court.

ARGUMENT

I. RESOLUTION OF THE *HUTTO* ACTION DOES NOT AFFECT THIS APPEAL

Before addressing the merits, USF&G first addresses the impact of the plaintiffs' recent dismissal of claims against Covil and anticipated dismissal of claims against USF&G in the *Hutto* action. If this were an appeal from a ruling that simply struck or dismissed specific defenses in an order that only applied in the action in which it was entered, the resolution of claims against Covil and USF&G in *Hutto* might have the effect of mooting the appeal insofar as it relates to the *Hutto* action. That is not the case, however, for two reasons.

First, the circuit court entered its clarification order in both the *Wall Templeton* and *Hutto* actions, and both were the subject of this appeal. Thus, dismissal of the *Hutto* action has no impact on the pendency of this appeal.

Second, the order appealed from does not simply determine the viability of a defense in a specific action. Rather, it is an order "granting, continuing, modifying, or refusing the appointment of a receiver" under S.C. Code. Ann. § 14-3-330(4). Specifically, by "clarify[ing the] status of [the] receivership," it purports to "continu[e]" and "modify[]" the receivership. Specifically, the order provides, in terms generally applicable to the receivership, that "no version of" South Carolina's statute of repose for dissolved corporations "precludes an asbestos personal injury plaintiff from bringing claims against Covil," and that "nothing from the prior Receivership precludes the current Receivership or personal injury asbestos claimants from filing lawsuits

against Covil." (R. p. 13; Order at 9; *see also* R. p. 14; *id.* at 10 ("Covil's prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil.")).[21]

Because the orders entered by the circuit court are part of its overall management of Covil's receivership and purport to be of general application, rather than being limited to the individual matters on whose dockets they are filed, their appealability as "orders continuing [or] modifying . . . the appointment of a receiver" under S.C. Code. Ann. § 14-3-330(4) is not affected by the resolution of individual actions. USF&G remains aggrieved by the relief granted in the order so long as the receivership remains pending and USF&G faces claims that implicate the statute of repose. At this time, numerous actions are pending against Covil on the asbestos docket, in many of which plaintiffs have asserted alter ego claims against USF&G and those actions continue to be filed on a regular basis.[22] The *Hutto* order on appeal, just as the order in *Wall Templeton*, purports

[21] This order is not the only instance of the Receiver moving for, and the circuit court granting, non-case specific relief of general applicability to the receivership via motions filed in individual actions pending on the asbestos docket. As one example, on September 22, 2020, the circuit court granted a "Motion to Clarify Order Appointing a Receiver for Covil Corporation" filed by the Receiver in an asbestos personal injury action captioned *Tracy Jolly Pavlish, et al. v. Covil Corp.*, C/A No. 2019-CP-42-03968 (Ct. Com. Pl., Spartanburg Cty.) ("*Pavlish*"). *See* R. p. 75. Despite being filed in the *Pavlish* action, that motion, and the resulting order, did not concern any matters actually at issue in that action. Instead, the motion arose from "Covil's insurers hav[ing] removed several actions to South Carolina federal court and asserted counterclaims there against Covil" seeking declaratory judgments as to insurance coverage issues, and sought an order "requiring that parties seeking to sue the Receiver of Covil outside of this Court obtain leave of this Court prior to doing so." R. p. 75-76; Order at 1–2, *Pavlish* (Sept. 22, 2020). In granting the motion, the circuit court rejected USF&G's argument that the order fell outside the circuit court's delegated authority to "serve as the Chief Judge for Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system," finding broad ancillary authority to enter orders affecting Covil's receivership generally. R. p. 82; Order at 8, *Pavlish* (Sept. 22, 2020) (quoting May 28, 2019 S.C. Sup. Ct. Order); *see also id.* ("Justice Beatty further gave this Court the authority 'to perform such other duties as appropriate in her role as Chief Judge for Administrative Purposes[.]'. . . Covil's receivership arose out of, and was necessitated by, asbestos litigation filed in the South Carolina court system. The Court has the authority to manage and oversee the Receivership.").

[22] Excluding *Hutto*, seventeen asbestos actions are pending against Covil in which USF&G has also been named as a defendant. *See James M. Bailey, et al. v. Aerco International, Inc., et al.*,

to eliminate a defense to Covil's liability that would, if successfully asserted, result in Covil's dismissal from all actions filed after the repose period, and does so as an exercise of the circuit court's asserted general authority to manage and oversee Covil's receivership.

II. THE RECEIVER LACKED STANDING TO SEEK TO ELIMINATE COVIL'S POTENTIAL DEFENSES TO LIABILITY

Through his Motion to Clarify, the Receiver curiously sought and obtained a ruling that increases Covil's liability by finding that the statute of repose contained in S.C. Code Ann. § 33-14-107 "[does not] preclude[ ] an asbestos personal injury plaintiff from bringing claims against Covil." (R. p. 13; Order at 9). That ruling should be vacated for the threshold reason that the Receiver for Covil does not have standing to seek rulings that eliminate Covil's own defenses to liability in asbestos personal injury actions.

C/A No. 2020-CP-10-03949 (Ct. Com. Pl., Charleston Cty.); *Norma D. Bowlin, as Personal Representative of the Estate of Gary Jay Moss v. Covil Corp., et al*., C/A No. 2020-CP-40-02692 (Ct. Com. Pl., Richland Cty.); *Richard F. Carpenter, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-04475 (Ct. Com. Pl., Richland Cty.); *Robbie M. Efird, as Administrator of the Estate of Robin M. Efird, et al. v. Arconic, Inc., et al*., C/A No. 2020-CP-40-05869 (Ct. Com. Pl., Richland Cty.); *Joe Eldra Goodwin, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-04613 (Ct. Com. Pl., Richland Cty.); *Mildred F. Hagan, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-00265 (Ct. Com. Pl., Richland Cty.); *Stephen C. Horton, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-05526 (Ct. Com. Pl., Richland Cty.); *Tracy Jolly Pavlish, et al. v. Covil Corp., et al*., C/A No. 2019-CP-42-03968 (Ct. Com. Pl., Spartanburg Cty.); *Shea Jonas King, individually and as the Administrator CTA of the Estate of Ronnie J. Jonas v. Air & Liquid Systems Corp., et al*., C/A No. 2020-CP-40-01163 (Ct. Com. Pl., Richland Cty.); *Dianne McCullough, et al. v. 4520 Corp., Inc., et al*., C/A No. 2020-CP-40-01952 (Ct. Com. Pl., Richland Cty.); *Edward R. Morgan, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-05731 (Ct. Com. Pl., Richland Cty.); *Nicholas Leon Murphy, et al. v. Covil Corp., et al*., C/A No. 2020-CP-40-01364 (Ct. Com. Pl., Richland Cty.); *Robert B. Picklesimer, et al. v. 4520 Corp., Inc., et al*., C/A No. 2020-CP-40-02868 (Ct. Com. Pl., Richland Cty.); *Joseph Franklin Rampey, Jr., as Personal Representative of the Estate of Joseph Franklin Rampey v. Covil Corp., et al*., C/A No. 2020-CP-40-00585 (Ct. Com. Pl., Richland Cty.); *Katherine R. Shields, Executrix of the Estate of James Joseph Reilly, et al. v. Covil Corp., et al.*, C/A No. 2020-CP-40-00952 (Ct. Com. Pl., Richland Cty.); *Eunice H. Sims, Individually and as the Personal Representative of the Estate of Waymon F. Sims, Jr. v. 3M Co., et al*., C/A No. 2020-CP-40-05935 (Ct. Com. Pl., Richland Cty.); *Jack E. Taylor v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-06134 (Ct. Com. Pl., Richland Cty.).

"Standing refers to a '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (quoting BLACK'S LAW DICTIONARY 1413 (7th ed. 1999)); *see also Lennon v. South Carolina Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 907–08 (1998). The requirements of standing are well-established. First, the party "must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. Second, a causal connection must exist between the injury and the challenged conduct. Third, it must be likely that a favorable decision will redress the injury." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (citing *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001)). This Court has defined standing as "that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." *Powell ex rel. Kelley*, 379 S.C. at 444, 665 S.E.2d at 241 (quoting 1A C.J.S. Actions § 101 (2005)). As such, standing is not only relevant to the question of whether a party has the right to commence an action, but also to whether it may seek particular relief. *See, e.g.*, *Ex parte Lexington Cty.*, 314 S.C. 220, 442 S.E.2d 589 (1994) (holding that a party lacked standing to participate in a particular hearing).

For an injury to be particularized, "it must affect the [purportedly injured party] in a personal and individual way." *Carnival Corp.*, 407 S.C. at 75, 753 S.E.2d at 850 (citing *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292 and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). Put another way, the injury must be more than "conjectural or hypothetical." *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. The injury cited by a party in support of standing must be suffered *by that party*, not by others. *See Carnival Corp.*, 407 S.C. at 77-79, 753 S.E.2d at 851-852 (plaintiffs lacked standing because their "allegations [were] simply complaints about

inconveniences suffered broadly by all persons residing in or passing through the City of Charleston" and because they did not qualify as "adjacent or neighboring property" owners with standing under a zoning statute); *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 135, 526 S.E.2d 218, 220 (2000) (third party to an insurance contract who was not a named insured lacked standing to pursue a claim against the insurer for bad faith refusal to pay benefits). By adhering to limitations on standing, courts also enforce the rule that "[c]ourts do not give advisory opinions or answer questions that are not asked." *State v. Harrison*, No. 2018-002128, 2021 WL 193122, at *7 (S.C. Jan. 20, 2021).[23]

Here, the Receiver cannot establish that he or Covil would suffer a particularized injury to a legally protected interest if asbestos claims against Covil were held to be barred by the statute of repose. To the contrary, it is readily apparent that Covil would only stand to *benefit* from courts' application of the statute of repose to bar untimely claims against Covil. Indeed, Covil itself asserted in its Answer filed in the *Hutto* action the defense that "the claims set forth in the Complaint are barred by the applicable statutes of limitations and/or repose in this State or other states as may be applicable."[24] Application of the statute of repose would reduce Covil's liability, while a ruling eliminating the statute of repose as a viable defense only serves to increase Covil's potential liability. The Receiver has identified no legal principle conferring on him an interest in *increasing* Covil's liability to asbestos claimants and, thus, cannot identify a legally cognizable injury that is redressed by the order on appeal. Indeed, in responding to USF&G's challenge to

[23] *See, e.g.*, 16 C.J.S. Constitutional Law § 390, *Advisory Opinions* ("[W]hen a person who does not have standing to file suit nevertheless asks for relief, it is tantamount to a request for an advisory opinion."); *Zahn v. Barr*, No. 2:19-cv-3553-DCN, 2020 WL 3440801, at *2 (D.S.C. June 23, 2020) (dismissing action where plaintiff "lacks standing and asks the court to issue an advisory opinion").

[24] R. p. 358; Receiver's Answer, *Hutto*, Fourth Defense at 30.

his standing before the circuit court, the Receiver's primary argument was not that such an injury exists, but rather that he was not required to satisfy the standing requirement, or demonstrate what legally protected interest was implicated by the motion. (*See* R. p. 766-767; Reply in Support of Motion to Clarify at 2-3).

The Receiver's only attempt at identifying a particularized injury that conferred standing was the assertion that "the Insurers' defenses, and by extension the pending Motion, could profoundly affect Covil's receivership." (R. p. 767; Reply in Support of Motion to Clarify at 3 n.1). But the fact that application of the statute of repose might benefit Covil and further its ability to wind down does not give the Receiver standing to challenge the defense. *Cf. Townsend v. Townsend*, 323 S.C. 309, 314, 474 S.E.2d 424, 428 (1996) (attorney's interest in collecting fees is not sufficient to confer standing).

The Receiver's argument that USF&G's assertion of the statute of repose argument "caus[es] the courts of our state, Respondent, and other litigants to expend valuable resources repeatedly litigating [the] issue[ ]"[25] fares no better. The statute of repose defense inures to the benefit of Covil and derivatively USF&G because tort claimants and the Receiver seek to hold USF&G vicariously liable for Covil's torts. Moreover, USF&G's insurance contract with Covil requires Covil, and thereby the Receiver, to cooperate and assist in the defense of third-party claims against Covil so long as USF&G has an obligation to defend and potentially indemnify. The Receiver's purported subjective belief that the statute of repose defense lacks merit is not only wrong (as addressed below), it does not entitle, much less require, the Receiver to seek judicial rulings that undermine that defense based on arguments more appropriately made by the claimants who are suing Covil. As this Court has explained: "[w]e are unaware of any law . . . supporting

[25] R. p. 813; Receiver's Memorandum on Appealability at 7.

the idea that one party may acquire standing by asserting the interest of an adverse party" and, even where an issue may have some indirect impact on the party seeking standing, "[n]ot every practical concern equates to the legal interest required for standing." *Powell*, 379 S.C. at 445, 665 S.E.2d at 241.[26]

Third-party practice under Rule 14 of the Federal Rules of Civil Procedure (upon which South Carolina's Rule 14 is modeled) is instructive. Impleader complaints under Rule 14, SCRCP, like the cross-claims Covil has asserted under Rule 13(g), SCRCP, seek to hold a third party liable to the plaintiff if and to the same extent the first party defendant is liable. *See* 6 FED. PRAC. & PROC. CIV. § 1444, *Subject-Matter Jurisdiction Over Impleader Claims* (3d ed.) (Rule 13 cross-claims and Rule 14 impleader claims are "cognate field[s]" of the law.). In this context, because of "the derivative nature of the third-party defendant's potential liability," courts "permit[] [the third party defendant] essentially to stand in the [first-party] defendant's shoes and assert its defenses," even where the first-party defendant fails to do so. *Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1141, 1149 (D. Haw. 2007) (quoting MOORE'S FED. PRAC. 14.25 (3d ed.)). This "prevents the prejudice or unfairness that could result from [the first-party defendant's] failure to assert the appropriate defenses." *Beaver v. Tarsadia Hotels*, 315 F.R.D. 346, 349 (S.D. Cal. 2016) (internal quotation marks omitted). *See also* Rule 14(a), FRCP, Advisory Comm. Notes to 1946 Amendment ("This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action."). It also "helps to

[26] In *Powell*, this Court held that a bank lacked standing to challenge the apportionment of escrowed funds as between a minor child and his mother, rejecting the bank's "argument that it is seeking to protect [the minor's] best interest." 379 S.C. at 445, 665 S.E.2d at 241. The Court determined that "the Bank's desire to limit its potential exposure in [the minor's] underlying action [by ensuring that he received a greater portion of the escrowed funds] . . . falls far short of the 'injury in fact' standing requirement." *Id.*

reduce the risk of collusion between" the plaintiff and the underlying defendant against the third party, "a concern of increased importance" where, as here, such parties may have shared financial interests or incentives. *Lindner*, 515 F. Supp. 2d at 1148.

These concerns apply with equal force here. As a party sought to be held vicariously liable for Covil's torts under plaintiffs' and the Receiver's novel alter ego claims, USF&G is entitled to assert Covil's defenses to those torts, whether or not Covil chooses to pursue them. The Receiver, as Covil's court-appointed representative, has no right to gratuitously waive Covil's defenses and then enforce that waiver against USF&G, so as to increase USF&G's potential vicarious liability to asbestos tort plaintiffs. Nor may the Receiver simultaneously assert Covil's alleged right to require USF&G to defend and indemnify Covil in connection with the numerous pending lawsuits against Covil without complying with its concomitant contractual obligation to assist and cooperate in Covil's defense.

Under these circumstances, the circuit court erred in holding that the Receiver had standing to seek an order finding that the statute of repose in S.C. Code Ann. § 33-14-107 "presents no impediment to the assertion of asbestos personal injury claims against Covil." (R. p. 14; Order at 10). The order should be vacated for this reason alone.

III. THE STATUTE OF REPOSE BARS ASBESTOS CLAIMS AGAINST COVIL

The circuit court found that application of the current version of the statute of repose to Covil would be impermissibly retroactive, even though under the application urged by USF&G, the statute would run for the full ten-year period beginning as of its enactment, consistent with the treatment of other newly-enacted limitations and repose periods. The circuit court also incorrectly found the prior version of the statute did not apply to asbestos claims that might accrue in the future, even though by its terms it applies to all claims other than claims known by the corporation as of its dissolution. And, the circuit court also declined to apply the presumption of regularity as

to the prior receiver's compliance with court orders, and, based on that, improperly determined that notice of dissolution was never published. Should this Court find that the Receiver had standing to seek the order on appeal and reach its merits, the order should be reversed.

A. **Applicable Law**

The South Carolina Business Corporation Act ("SCBCA"), Title 33, Chapters 1 through 20 of the South Carolina Code, regulates for-profit corporations in South Carolina. It is based on the American Bar Association's 1984 revision of the Model Business Corporation Act ("MBCA").[27] The South Carolina legislature adopted the SCBCA in 1988 and, as relevant here, subsequently amended it in 2004.[28] Chapter 14 of the SCBCA governs corporate dissolution. Article I addresses voluntary dissolution and the legal effect of dissolution generally (*see* S.C. Code Ann. §§ 33-14-101–107); Article II addresses administrative dissolution (*id.* §§ 33-14-200–230); Article III addresses judicial dissolution (*id.* §§ 33-14-300–330); and Article IV contains certain miscellaneous provisions (*id.* §§ 33-14-400–420).

Under the SCBCA, a corporation survives after its dissolution for the purpose of winding up its affairs and for litigation. Specifically, S.C. Code Ann. § 33-14-105 ("Section 105") provides: (i) "[a] dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs" and (ii) "[d]issolution of a corporation does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name" or "abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution." This post-dissolution continuation of the

[27] *See, e.g.*, Tim Orr, *Successor Liability,* S.C. LAW. 33, 35 (Mar. 2006) (The SCBCA generally "follow[s] the Model Business Corporation Act").

[28] *See* 2004 S.C. Acts 221, Section 18, amending Title 33, S.C. Code Ann. § 33-14-107.

corporation is a departure from the common law, under which "a corporation which has been dissolved is as if it did not exist. All actions pending against it are abated and no new actions may be begun unless there is some statutory authority (of the state of incorporation) for the prolongation of its life, even for litigation purposes." *Auto-Owners Ins. Co. v. Gordon & Assocs., Inc.*, No. 9:15-4063-RMG, 2016 WL 11509704, at *2 (D.S.C. Aug. 23, 2016) (quoting *Johnson v. RAC Corp.*, 491 F.2d 510, 513 n.3 (4th Cir. 1974)); *see also Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 259 (1927) ("[D]issolution of a corporation at common law abates all litigation.").

The SCBCA contains two statutes of repose applicable to claims against dissolved corporations. First, S.C. Code Ann. § 33-14-106 ("Section 106"), concerning known claims against dissolved corporations, provides that a dissolved corporation "may dispose of the known claims against it by . . . notify[ing] its known claimants in writing of the dissolution at any time after its effective date" and explaining in the notice the procedures for making a claim against the corporation, including a deadline for making such claims. S.C. Code Ann. § 33-14-106(b). If the corporation complies with these procedures, known claims are barred (i) if the claimant does not make the claim by the deadline or (ii) if the claimant does not commence court proceedings within 90 days of receiving a notice that the corporation has rejected the claim. S.C. Code Ann. § 33-14-106(c). "For purposes of [Section 106], [the term] 'claim' does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution." S.C. Code Ann. § 33-14-106(d).

Second, S.C. Code Ann. § 33-14-107 ("Section 107") sets forth a statute of repose for unknown claims against dissolved corporations, barring such claims once a prescribed period (five years under the original 1988 version of the statute, later extended to ten years in 2004) passes after publication of notice of dissolution. Specifically, Section 107 provides for publication notice

"once in a newspaper of general circulation in the county where the dissolved corporation's principal office . . . was located." Subsection (c) of Section 107 further provides that:

> [T]he claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within ten years after the publication date of the newspaper notice:
>
> (1) a claimant who did not receive written notice pursuant to Section 33-14-106;
>
> (2) a claimant whose claim was timely sent to the dissolved corporation but not acted on; and
>
> (3) a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution.

Clause (3) of subsection (c) was added to Section 107 as part of the 2004 amendments to the SCBCA; clauses (c)(1) and (c)(2) were included in the statute's original 1988 enactment.

The SCBCA specifically contemplates that the statutes of repose set forth in Sections 106 and 107 apply when a corporation is judicially dissolved, and provides that when a court enters a decree of judicial dissolution, "the court ***shall*** direct the winding up and liquidation of the corporation's business and affairs in accordance with Section 33-14-105 and the notification of claimants in accordance with Sections 33-14-106 and 33-14-107." S.C. Code Ann. § 33-14-330(b) (emphasis added).[29]

[29] Prior to the enactment of the SCBCA, South Carolina corporate law contained a two-year repose period for claims against dissolved corporations. The Code of Laws of 1912 provided that dissolution "shall not bar an action, for two years thereafter against the corporation or any of the members, for any liability incurred during the existence of the corporation." *Henry Mercantile Co. v. Georgetown & W.R. Co.*, 104 S.C. 478, 89 S.E. 480, 481 (1916) (quoting S.C. Code 1912, § 2812). The Civil Code of 1922 and Code of Laws of 1952 provided that dissolution of a corporation did "not bar an action for two years thereafter against the corporation or any of its members for any liability incurred during the existence of the corporation." S.C. Code 1952, § 12-644. The statute in effect before the SCBCA was enacted also "require[d] that after dissolution of a corporation, any party having a claim against the corporation commence an action thereon within two years from the dissolution or have the claim barred." *S.C. Dep't of Social Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 560, 320 S.E.2d 464, 467 (S.C. Ct. App. 1984). A similar

B. The Statute of Repose Bars Claims Against Covil Regardless Of Whether The 2004 or 1992 Version Of The Statute Applies

The circuit court held that "[a]ssuming arguendo that notice of Covil's dissolution was published, pending and future asbestos claims by personal injury claimants would nonetheless remain viable," both under the current version of Section 107—including clause (c)(3) of the current statute, which expressly bars the claim of "a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution"—and under the prior version in effect as of Covil's dissolution, which did not include clause (c)(3) . (R. p. 10; Order at 6). In so holding, the circuit court concluded that the current version of subsection (c)(3) of Section 107 "applies prospectively only to corporate dissolutions occurring after its enactment," and that the prior version of the statute did not foreclose contingent claims. (R. p. 12; Order at 8). For the reasons discussed below, both rulings are incorrect and should be reversed.

1. The Current Version Of The Statute Applies To Plaintiffs' Claims

It is undisputed that the current version of Section 107 expressly forecloses all claims against a dissolved corporation brought after the ten-year statute of repose period. If Covil had dissolved in 2004 in accordance with the amended statute, asbestos claims against Covil would plainly be barred as of and after 2014, ten years later, and actions such as *Hutto* would be subject to dismissal. The question before the Court is whether, because Covil dissolved *before* 2004, such claims against Covil should persist indefinitely into the future, notwithstanding the ten-year time bar set forth in Section 107.

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provision was found in the pre-1984 version of the MBCA, stating that dissolution would not "take away or impair any remedy . . . for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution." 1969 MBCA § 105; COX & HAZEN ON CORPORATIONS § 26.10.

The circuit court concluded the amended statute does not apply to Covil and thus that claims against Covil remain viable indefinitely. (R. p. 10-11; Order at 6–7). In so holding, the circuit court found that because Section 107 "operates as a statute of repose," it is "substantive" (unlike statutes of limitations, which are "procedural"), and as such may be applied "prospectively only to corporate dissolutions occurring after its enactment." (R. p. 10-11; *id.*). In addition, the circuit court decided that application of the statute would be impermissibly retroactive in cases where, if applied literally, the time period set out in the statute of repose would start to run on a date earlier than that of the statute's enactment.

The circuit court's reasoning is flawed in both respects. No authority supports the contention that "procedural" statutes of limitations can be applied retroactively while "substantive" statutes of repose cannot. Instead, courts have found that retroactive application of both types of time bar is constitutionally problematic only to the extent that it would extinguish previously-*timely* claims without affording the claimant a reasonable time to assert such claims after the statute's enactment. As the United States Supreme Court long ago explained:

> When a statute declares generally that no action, or no action of a certain class shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional.

Sohn v. Waterson, 84 U.S. (17 Wall.) 596, 599 (1873); *see also Brown v. Angelone*, 150 F.3d 370, 373 (4th Cir. 1998) ("[T]here is nothing talismanic about identifying a rule as procedural if its application results in genuinely retroactive effects. . . . When application of a new limitation period would wholly eliminate claims for substantive rights or remedial actions considered timely under the old law, the application is 'impermissibly retroactive.'") (citing *Landgraf v. USI Film Prods.*,

511 U.S. 244, 275 n. 29 (1994)); *Texaco, Inc. v. Short*, 454 U.S. 516, 528 (1982) ("[W]hen the practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the . . . analysis is the same.").[30]

Importantly, however, courts have also recognized that declining altogether to apply a new statutory time bar to pre-enactment claims or events would be contrary to legislative intent and create arbitrary outcomes, as the legislature could not reasonably have intended to treat older claims more favorably than newer ones. *See Sohn*, 84 U.S. at 599 ("One [possible solution] is to make the statute apply only to causes of action arising after its passage. But as this construction leaves all actions existing at the passage of the act, without any limitation at all (which, it is presumed, could not have been intended) . . ."). For this reason, courts apply the newly-enacted statute to claims or events that predate its enactment, but treat the statutory period as running from the date of enactment. As the Supreme Court explained in *Sohn*:

> A third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others. It was substantially adopted by this court in the cases of *Ross v. Duval*[, 38 U.S. (13 Pet.) 45 (1839)] and *Lewis v. Lewis*[, 48 U.S. (7 How.) 776 (1849)]. In those cases certain statutes of limitation—one in Virginia and the other in Illinois—had originally excepted from their operation non-residents of the State, but this exception had been afterwards repealed; and this court held that the non-resident parties had the full statutory time to bring their actions after the repealing acts were passed, although such actions may have accrued at an earlier period. 'The question is,' says C. J. Taney

[30] In any event, contrary to the circuit court's analysis, statutes that specify the time period in which claims may be brought against dissolved corporations are considered "remedial measures" that are presumptively applied "retroactive[ly]." *United States v. Vill. Corp.*, 298 F.2d 816, 819–20 (4th Cir. 1962). These measures "alter[] no substantive right"; rather, they "only alter[] the procedure by which substantive rights may be judicially enforced." *Id.* at 820; *see also* 16A FLETCHER CYC. CORP. § 8142 ("[S]tatutes that provide to some degree for the survival of remedies or claims for a limited period of time after dissolution of the corporation . . . are remedial in nature."); 9 CYC. OF FED. PROC. § 27:20 (3d ed.) (same). However, as discussed herein, courts treat statutes of limitations and repose similarly for purposes of retroactivity, so this Court need not resolve the issue.

> (speaking in the latter of the cases just cited), 'from what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided.'

Sohn, 84 U.S. at 600. This approach avoids the constitutional problems of retroactivity, while also effectuating legislative intent. Under this approach, the 2004 amendments to Section 107 apply to prior corporate dissolutions, but the 10-year statute would start to run in 2004 and lapse in 2014, even where under a literal application it would have run as of an earlier date.[31] As the Fourth Circuit subsequently explained, this is a *prospective*, not retroactive application:

> 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. The fact that such rights may have accrued prior to the passage of the statute does not give to the owner, as a matter of right, an unlimited time within which to assert them; and there is just as much reason why [the legislature] should apply a time limitation upon their assertion as upon the assertion of rights subsequently accruing.

The Fred Smartley, Jr., 108 F.2d 603, 608 (4th Cir. 1940).

This rule of construction is followed by state and federal courts across the country. As the Delaware Chancery Court noted: "'[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." *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 530 (Del. Ch. 2005) (quoting *Reuther v. Trustees of the Trucking Emps. of Passaic*

[31] The circuit court's concern that applying the 2004 amendments to Covil "would also require that" claims against Covil "be filed by 2002," ten years after the 1992 events that would have triggered the statute as to Covil (R. p. 11-12; Order at 7-8), is thus misplaced. Under the *Sohn* rule, where the trigger for a newly-enacted time bar occurs prior to its enactment, the trigger is deemed to occur as of the new statute's effective date. *See Sohn*, 84 U.S. at 600.

& Bergen County Welfare Fund, 575 F.2d 1074, 1078 n.4 (3rd Cir. 1978)). The Washington Supreme Court's decision in *Unruh v. Cacciotti*, 172 Wash. 2d 98, 257 P.3d 631 (Wash. 2011), provides a recent example of *Sohn*'s continued vitality. *Unruh* concerned a 2006 Washington statutory amendment imposing an eight-year statute of repose for medical malpractice claims. The alleged malpractice took place in 1999, just over eight years before the action was filed in 2007. *Id.* at 106. The defendant argued that the 2006 amendment meant that the eight-year repose period began to run in 1999 and expired in 2007. The court rejected that argument and found that the new repose period began to run when the statute was enacted, and therefore would not have expired until 2014. *Id.* at 116. Numerous decisions of courts across the county are in accord. *See, e.g.*, *State ex rel. Brady*, 870 A.2d at 531 ("Applying *Sohn*, the limitation period set forth in § 2506 applies to causes of action that accrued before its enactment, and calculation of that period commences when the causes of action were first subjected to the statute, here, on July 17, 1998, the date of its enactment."); *Fust v. Arnar-Stone Laboratories, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984) ("We conclude that a claim which antedated the effective date of R.S. 9:5628 remained viable for three years after the effective date of that statute and thereafter succumbed to the absolute bar impressed by the Louisiana Legislature."); *Redmon v. LeFevre*, 503 S.W. 2d 97 (Tenn. 1973) (statute providing for shortened limitations period applied to actions accruing prior to effective date, but began running from effective date of the amended statute).[32]

[32] *See also Trax-Fax, Inc. v. Hobba*, 277 Ga. App. 464, 627 S.E.2d 90 (Ga. 2006) (law was not improperly applied retroactively where certain of 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); *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (Neb. 1994) (holding that if a statute operates to shorten a limitation period without providing for a reasonable period for bringing an accrued cause of action, a reasonable period in the present case was the longest repose period contained in the statute); *Torkelson v. Roerick*, 24 Wash. App. 877, 879, 604 P.2d 1310, 1311 (Wash. Ct. App. 1979) ("[A]new statutory limitation may operate on a claim that has accrued prior to the amendment of the statute of limitations by beginning to run as

Quintana v. Los Alamos Medical Center, Inc., 889 P.2d 1234 (N.M. Ct. App. 1994), is particularly instructive. There, the plaintiff's son died after a dental procedure in 1959. *Id.* at 1234. In 1987, the plaintiff discovered that the defendant had caused his son's death and filed suit. *Id.* The defendant moved to dismiss, arguing that it dissolved in 1963 and that New Mexico's two-year statutory bar foreclosed the plaintiff's claims. *Id.* The plaintiff contended that the statutory bar did not apply because it was enacted in 1975, *after* the defendant's dissolution. *Id.* at 1236. The court rejected this argument, reasoning that application of the statute to bar the plaintiff's claims was not impermissibly retroactive—"[t]he lawsuit filed in this case was filed years after the effective date of the survival statute, and thus to apply the statute is to affect activity that occurred after the effective date of the statute." *Id.* The court further explained that "the legislature would have intended the same time limitation to apply to" corporations that "dissolved prior to the 1975 Act as those dissolved subsequently," and that "the reasons for repose would be *stronger* for pre-1975 dissolutions." *Id.* (emphasis added).

The same reasoning applies here. There is no reason to believe that the South Carolina legislature intended the arbitrary outcome that the circuit court's ruling creates, under which claims against a corporation that dissolved in 2003 or before would persist indefinitely, whereas claims against a corporation that dissolved in 2004 would be barred after ten years. *See State ex rel. Brady*, 870 A.2d at 530–31 (it would be "illogically inconsistent" to bar claims arising five years

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of the effective date of the amended statute"); *Niagara Fire Ins. Co. v. Cole*, 235 Cal. App. 2d 40 (Cal. App. 5th Dist. 1965) (a shortened limitations period may not be applied retroactively if effect would be to extinguish the action with no opportunity for plaintiff to commence the action, and the proper resolution is to apply the new limitations period running from its effective date); *Olivas v. Weiner*, 127 Cal. App. 2d 597, 600, 274 P.2d 476 (Cal. Ct. App. 2d Dist. 1954) (barring claim where the plaintiff was born 10 years before the statute took effect and claim was filed 12 years after the effective date of the statute because "[a]nyone having a right of action under the statute had six years after the amendment became effective within which to file his complaint").

after the enactment date but permit claims arising before the enactment, which "are thus even more stale," to "linger indefinitely"). This Court should apply the well-established rules of construction set forth in *Sohn* and its progeny and hold that Section 107, as amended, bars claims against Covil accruing after its dissolution no later than 2014. Doing so would give effect to the plain language and obvious intent of Section 107, and in a manner that applies prospectively, not retroactively as the circuit court erroneously concluded.

2. The Prior Version of the Statute Also Bars Future Claims

Even if the amended version of Section 107 is deemed not to apply prospectively to bar claims against Covil (contrary to the plain language and legislative intent and the numerous authorities discussed above), the claims would nonetheless be barred by the statute of repose set forth in the pre-2004 version of Section 107. The pre-2004 version of the SCBCA (like the current version) divided claims into "known claims" subject to Section 106 and "unknown claims" subject to Section 107. At all relevant times, Section 106 has provided that, "[f]or purposes of this section, 'claim' does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution." S.C. Code Ann. § 33-14-106(d). Section 107, in contrast, has never included such a limitation; rather, it has always expressly applied to bar *all* claims (without limitation) of "claimant[s] who did not receive written notice under § 33-14-106." S.C. Code Ann. § 33-14-107(c)(1). Thus, Section 107 has at all times created a statute of repose applicable to contingent and post-dissolution claims. *See Gilliam v. Hi-Temp Products Inc.*, 677 N.W.2d 856, 868 (Mich. Ct. App. 2003) (explaining that "the intent of the Legislature to bar claims that are both unknown and that arise after the dissolution of the corporation is shown by" Michigan's version of Section 107(c)(1), "which bars a claim by a 'claimant who did not receive written notice under'" Michigan's version of Section 106).

In concluding that the pre-2004 version of Section 107 did not apply to post-dissolution asbestos claims against Covil, the circuit court relied on the Reporters' Comment to the original version of Section 33-14-107 (R. p. 13; Order at 9), which stated that because the provision, as enacted in 1988, did not include clause (3) of the Model Act's subsection (c), "[t]he statute of repose . . . only applies to claims existing at dissolution." South Carolina Reporters' Comments, S.C. Code Ann. § 33-14-107. This commentary is not dispositive. When the legislature added subsection (c)(3) in the 2004 Amendments, it clarified existing law, and the plain meaning of the statutory text cannot be altered or rendered ambiguous by the statute's subsequent legislative history or by ambiguous statements in its annotations. *See Gasque v. Eagle Mach. Co.*, 270 S.C. 499, 243 S.E.2d 831, 832 (1978) (refusing to consider "alleged Reporter's comments as to the statute's meaning" where the statutory text is clear).

A construction of the pre-amendment statute that applies it to all potential claims against a dissolved corporation is also more consistent with the overall statutory scheme and its history. As noted above, under the common law, claims against dissolved corporations immediately abated. The SCBCA's post-dissolution claims survival statutes are thus "statutes . . . in derogation of the common law," which "must be strictly construed." *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 308, 831 S.E.2d 429, 430 (2019). For this reason, courts interpreted the pre-1984 MBCA two-year survival statutes that did not specifically address claims arising after dissolution to bar post-dissolution claims, given that such suits were abated at common law. *See, e.g.*, *Bazan v. Kux Machine Co.*, 190 N.W.2d 521 (Wis. 1971); *Stone v. Gibson Refrigerator Sales Corp.*, 366 F. Supp. 733 (E.D. Pa. 1973); *Chadwick v. Air Reduction Co.*, 239 F. Supp. 247, 251 (N.D. Ohio 1965) ("It is, therefore, quite clear that under the Model Business Corporation Act, and those statutes patterned after it, a corporation may be sued for pre-dissolution torts only."); *Authement*

v. Holan Mfg., Inc., 812 F. Supp. 663, 665 (E.D. La. 1993) ("This Court cannot think of any substantial reason why the Georgia Legislature would place a limit on claims that arise when a corporation is viable, and not place at least the same limit on claims that arise after that corporation has dissolved. Accordingly, the Court finds that § 14–2–293 also applied to claims arising after dissolution."). Finding legislative intent to continue corporate post-dissolution liability indefinitely, as the circuit court concluded here, cannot be squared with this historical context.[33]

C. The Circuit Court Erred in Concluding that Alleged Lack of Publication of Notice of Dissolution Rendered the Statute of Repose Ineffective

Section 33-14-107(c)(3) provides a ten-year statute of repose for unknown, contingent claims arising after dissolution, such as those at issue here. The circuit court found that "notice of Covil's dissolution was never published" and, thus, the statutory repose period could not have run. (R. p. 10; Order at 6). Orders from Covil's prior receivership, however, establish—or, at a

[33] The circuit court also observed in a footnote that it "disagree[d]" with the argument that "section 33-14-107(d) does not authorize the filing of asbestos claims against Covil because Covil's insurance policies are not 'undistributed assets.'" (R. p. 13; Order at 9 n.4). But whether insurance policies constitute "undistributed assets" is irrelevant, since claims can only be brought until the statute of repose expires, regardless of whether the corporation retains undistributed assets. Specifically, subsection 107(d) provides that "[a] claim may be enforced under this section" (1) "against the dissolved corporation to the extent of its undistributed assets" and (2) "against a shareholder . . . to the extent of his pro rata share" of the corporation's distributed assets. Because the provision expressly sets forth how a claim "may be enforced *under this section*" (emphasis added), it incorporates all of the preceding provisions of Section 107, including the repose period. Indeed, as explained in the Official Comment to Section 107, the statute of repose contained therein is "believed to be a reasonable compromise between the competing considerations of providing a remedy to injured plaintiffs and providing a period of repose after which dissolved corporations *may distribute remaining assets free of all claims and shareholders may receive them secure in the knowledge that they may not be reclaimed*." (emphasis added). Construing subsection 107(d) to authorize recovery in perpetuity against shareholders of the dissolved corporation and the corporation's undistributed assets would completely undermine this statutory purpose. *See* 16A FLETCHER CYC. CORP. § 8141, *Post-dissolution causes of action* ("A claim for tort or products liability cannot be brought after the statutory survival period, and it makes no difference whether there are undistributed corporate assets available that could be used to satisfy such a claim.").

minimum, create a strong presumption—of publication, and the circuit court should not have dismissed this out of hand and reached a contrary conclusion based on the record before it.

As discussed above, on May 12, 1992, the court overseeing Covil's prior receivership directed Covil's first receiver to "publish the Notice required by § 33-14-107."[34] 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."[35] The court thereafter approved "the abandonment by the Receiver of all remaining assets" of Covil, finalized Covil's dissolution, and discharged the receiver. *See supra* p. 5.

Contrary to the circuit court's finding, these orders establish that Covil's first receiver published notice of Covil's dissolution in 1992, and those final orders cannot be collaterally attacked decades later. Under South Carolina law, there is a strong presumption that receivers comply with court orders and their fiduciary obligations. "[T]he presumption is always in favor of the correct performance of his duty by an officer, and every reasonable intendment will be made in support of such presumption." *Whitcomb v. Manderville*, 90 S.C. 384, 73 S.E. 775, 777 (1912) (internal quotation marks omitted). *See also Womack v. State*, 507 S.E.2d 425, 428 (Ga. 1998) (noting "the presumption that the . . . receiver ha[s] faithfully discharged [his] duties"); *B.E. Capital Mgmt. Fund LP v. Fund.com Inc.*, 171 A.3d 140, 146 n.28 (Del. Ch. 2017) ("The Receiver shall be presumed to have acted in good faith, reasonably, and in compliance with his fiduciary duties.") (internal quotation marks omitted). Here, the court unambiguously ordered the first receiver to publish the Notice, thereby triggering the presumption under South Carolina law that he faithfully discharged that duty.

[34] R. p. 704; May 12 Order at 5 ¶ 9.

[35] R. p. 709; Nov. 12 Order at 2.

In addition, 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,"[36] without ever suggesting that the Receiver failed to carry out one of the duties that he had been expressly directed to discharge, as required by the SCBCA. That order is controlling as a matter of South Carolina law. *See 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") (internal quotation marks omitted); *see also 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."). Moreover, the court subsequently approved the abandonment by the Receiver of Covil's remaining assets, finalized Covil's dissolution, and discharged the first receiver in a Final Order fully winding up Covil's affairs.[37] The court could have done so only if he had been fully satisfied that all prior steps necessary to complete Covil's dissolution and winding-up had been completed as ordered. *See* S.C. Code Ann. § 33-14-330(b). The Final Order and the proceedings held in that matter are not facially deficient, and thus are "absolutely impregnably fortified against collateral attack" and may not be re-examined elsewhere, absent exceptions not present here. *Stone v. Mincey,* 180 S.C. 317, 185 S.E. 619, 621 (1936); *see also Travelers Indemn. Co. v. Bailey*, 557 U.S. 2195 (2009) (once orders become final on direct review they may not be collaterally attacked, even in the absence of subject matter jurisdiction).

The circuit court concluded that the evidence did not establish publication based in part on its finding that "the Prior Receiver's Petition contains a final accounting of reimbursable expenses, and nowhere in this accounting is there any mention of a publication expense to any newspaper."

[36] R. p. 709; Nov. 12 Order at 2.

[37] R. p. 738; Nov. 30 Order at 3 ¶¶ 7–8.

(R. p. 10; Order at 6). In doing so, the Court ignored the fact that the prior receiver's accounting of reimbursable expenses contains a general category called "Receiver Expense" totaling $1,576.50, which clearly could have included the newspaper-publication expenses.[38] A presumption must be rebutted by "substantial evidence of opposition" for it to lose its force, 30 S.C. JUR. EVIDENCE § 21, and a negative inference and speculation about the absence of a specific line item in the first receiver's accounting does not meet this test. *See Whitcomb*, 90 S.C. 384, 73 S.E. at 777; *see also United States v. Young,* 324 F. Supp. 69, 72 (D. Minn. 1970) (noting that "negative inferences" cannot undermine "the presumption of regularity").[39]

In any event, questions of publication and sufficiency of notice present factual disputes that should not have been resolved in the Receiver's favor on the incomplete record presented by the Motion to Clarify. As noted above, the showing required to rebut a presumption under South Carolina law is one of "substantial evidence," and whether a notice requirement has been met "is a fact-intensive analysis that 'depends on the circumstances of a particular case.'" *In re Weiand Auto. Indus.*, 612 B.R. 824, 851 (Bankr. D. Del. 2020) (quoting *Wright v. Owens Corning*, 679 F.3d 101, 108 (3d Cir. 2012)). Courts are therefore loathe to resolve such questions without full

[38] *See* R. p. 671; Petition of Receiver, *FSB v. Covil* (Nov. 11, 1992) (Ex. L to Motion to Clarify) at Ex. A.

[39] *See also Kline v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 877 F.2d 1175, 1180 n.15 (3d Cir. 1989) (explaining that it would be "problematic to allow the absence of evidence in a record to be sufficient to rebut a presumption" because "[t]he purpose of a presumption is to shift the burden of affirmative proof to the party seeking to rebut the presumed fact"); *SummitBridge Nat'l Invs. III, LLC v. Faison*, 915 F.3d 288, 294 (4th Cir. 2019) (holding that an "argument by negative inference" was insufficient to rebut the presumption that claims enforceable under state law are permitted in bankruptcy unless they are expressly disallowed); *People v. Fedalizo*, 200 Cal. Rptr. 3d 653, 659–60 (Cal. Ct. App. 2016) (rejecting attempt to invoke a negative inference that defendant had not authorized his lawyer to represent him where a "presumption exists that an attorney who appears on behalf of a party has authority to do so") (internal quotation marks omitted).

fact development. *See, e.g.*, *Weiand*, 612 B.R. at 851 (denying summary judgment on the adequacy of publication notice).[40]

Moreover, even *assuming* that notice was not published, that would not be fatal to application of the statute of repose where, as here, the creditor who allegedly did not receive notice could not have been prejudiced thereby. *See, e.g.*, *Winyah Nursing Homes, Inc.*, 282 S.C. at 562, 320 S.E.2d at 468 ("Failure to strictly comply with the mandates of the dissolution statutes effectively continues the corporation with respect to creditors *whose rights are prejudiced by the noncompliance*.") (emphasis added). As other courts have recognized, the "clear implication" of decisions such as *Winyah Nursing* is that "the dissolution would be valid as against" creditors *not* prejudiced by lack of notice. *Licht v. Ass'n Servs., Inc.*, 463 N.W.2d 566, 569–70 (Neb. 1990) (citing, *inter alia*, *Winyah Nursing*, 320 S.E.2d 464, and *Bonsall v. Piggly Wiggly Helms, Inc.*, 275 S.C. 593, 274 S.E.2d 298 (1981)). Whether notice was published in 1992, 2004, or not at all, is inconsequential to current claimants whose claims would not have accrued at that time (or, if they had, would clearly be time barred by the statute of limitations). Here, for example, plaintiffs in *Hutto* allege that the decedent, Donald Hutto, was diagnosed with asbestos-related mesothelioma

[40] *In re New Century TRS Holdings, Inc.*, 450 B.R. 504, 514 (Bankr. D. Del. 2011) ("Although the Debtors arguably complied with the stated minimum requirements of the Bar Date Order, without a more fully developed factual record, I am unable to determine whether the publication notice was reasonably calculated to provide notice to consumer mortgagors like the Whites."); *Albemarle Realty & Mortg. Co. v. Peoples Bank of Virginia Beach*, 34 N.C. App. 481, 485, 238 S.E.2d 622, 625 (N.C. Ct. App. 1977) (holding that "summary judgment for plaintiffs was improvidently entered" because a material issue of fact existed regarding compliance with a notice requirement prior to a foreclosure sale); *see also Deutsche Bank Nat. Tr. Co. v. Perfetto*, No. 288652, 2010 WL 571823, at *3 (Mich. Ct. App. Feb. 18, 2010) ("A genuine issue of material fact may exist regarding whether the weekly adjournment notices were actually posted by a sheriff's deputy at the place where the sheriff's sale was scheduled to occur or published in the newspaper in which the original notice was published.").

on March 14, 2013.[41] Any failure to publish notice of Covil's dissolution years before Mr. Hutto would have been aware he had a claim (and thus before it had even accrued) would not have prejudiced plaintiffs as a result. Notice of dissolution (or lack thereof) is of no consequence to a person who would not have been aware of the existence of a claim against the dissolved corporation at that time, and a statute of repose, unlike statutes of limitation, reflects the legislature's judgment that there should be an "absolute time limit beyond which liability no longer exists" and therefore bars a claim even before it accrues. *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). Thus, even if the circuit court properly found that Covil's prior receiver did not comply with statutory notice requirements despite the prior final orders to the contrary, it was error to end the analysis there, without considering whether any particular creditor would have been prejudiced by such alleged noncompliance.

In sum, all the Receiver cited to counter the presumption that the prior receiver published the notice in accordance with his duties was, essentially, a lack of documentary evidence corroborating the presumption of publication. Under any possibly relevant standard, that cannot suffice to conclusively establish that notice was not published as a matter of fact. Accordingly, the circuit court erred in resolving factual questions and drawing inferences in the Receiver's favor on a motion filed on an incomplete discovery record. At a minimum, to the extent the Court considers the question of publication to be relevant and unresolved by application of the presumption, the Court should vacate the order and remand so that the matter can be appropriately considered on a full record at summary judgment or trial.

[41] R. p. 290; Complaint, *Hutto* at ¶ 52.

CONCLUSION

The circuit court's September 25, 2020 order granting the Receiver's Motion to Clarify should be reversed.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
todd.carroll@wbd-us.com
S.C. Bar No. 74000
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

October 4, 2021

CERTIFICATE OF COMPLIANCE

The undersigned hereby certify that this Final Brief complies with Rule 211(b), SCACR.

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
todd.carroll@wbd-us.com
S.C. Bar No. 74000
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

October 4, 2021

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): Brief of Appellant

Parties Served:

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanon@smithrobinsonlaw.com)

Counsel for the Respondent Receiver for Covil Corporation

By: /s/ M. Todd Carroll

October 4, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.), Acting Circuit Court Judge

Case No. 2019-CP-40-02285

Appellate 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; Zurich American Insurance Company, Defendants,

of which

United States Fidelity and Guaranty Company is the Appellant.

FINAL BRIEF OF RESPONDENT

G. Murrell Smith, Jr. (S.C. Bar. # 66263)
Jonathan M. Robinson (S.C. Bar # 68285)
Shanon N. Peake (S.C. Bar # 102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, Third Floor
Columbia, South Carolina 29205
(803) 254-5445

Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

This appeal arises from a suit by an administratively dissolved company—Covil Corporation ("Covil")—through its court appointed Receiver, Respondent Peter D. Protopapas ("the Receiver"), against its insurer, Appellant United States Fidelity and Guaranty Company ("USF&G"). The Receiver alleges, among other things, that USF&G grossly mishandled asbestos litigation against Covil, specifically the case of *Hill v. Covil Corporation*, CA NO. 2018 –CP-40-04680, in breach of the relevant insurance policy and the duty of good faith. USF&G appeals from an interlocutory order of the Circuit Court granting the Receiver's motion for clarification of the impact, if any, of USF&G's affirmative defense asserting that acts taken during a prior Covil receivership bars asbestos claims against Covil and, by means of some unstated derivation, also bars the Receiver's claims against USF&G alleging mismanagement, breach of contract, and bad faith. As it has unsuccessfully argued before,[1] USF&G contends that the ten-year statute of repose for claims against dissolved corporations set forth in section 33-14-107 of the South Carolina Code bars the Receiver's claims. Every court to have considered this defense has rejected it.

Retired Supreme Court Chief Justice and acting Circuit Court Judge Jean H. Toal has consistently held that Covil's prior receivership does not implicate the statute of repose and presents no impediment to the Receiver's claims against USF&G, and a North Carolina federal district court agreed. In light of this disposition, the following issues are presented for review:

1. Did the Circuit Court correctly hold that the Receiver has standing to oppose USF&G's statute of repose affirmative defense to the Receiver's claims against USF&G?

[1] *See* Order Denying Motions to Reconsider and Motion to Stay, *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155 (Ct. Com. Pl., May 7, 2020) ("The Court refuses to ignore the plain language of the statute and the clearly expressed legislative intent that section 33-14-107 does not bar claims that did not exist at the time of Covil's dissolution . . . ."); *Finch v. Covil Corp.*, No. 1:16-CV-01077, 2020 WL 6063054, at *5 (M.D.N.C. Oct. 14, 2020) ("The Court finds that the receiver did not publish a notice in compliance with § 33-14-107(b).").

2. Section 33-14-107's repose period is triggered on publication of notice to potential claimants. Did the Circuit Court correctly hold that there is no evidence that such notice was ever published and, therefore, that the statute of repose has not been triggered?

3. Did the Circuit Court correctly hold that, even if the required notice had been published, USF&G's affirmative defense still fails because the version of section 33-14-107 in effect at the time of Covil's administrative dissolution in 1992 does not apply to the contingent and post-dissolution claims at issue in this case?

4. Did the Circuit Court correctly hold that the legislature's 2004 amendment of section 33-14-107 is irrelevant because the 2004 amendment does not retroactively apply to corporate dissolutions that occurred prior to the amendment's passage?

INTRODUCTION

Covil was an insulation contractor in the business of installing, repairing, and removing asbestos-containing insulation in industrial facilities in North Carolina, South Carolina and throughout the Southeast. Covil ceased these operations in 1992, after which it came under the control of its insurers, including Appellant USF&G. The insurers, including USF&G, grossly mismanaged the defense of asbestos personal injury litigation against Covil, in violation of the relevant insurance policies and the duty of good faith. When the insurers' mismanagement of Covil reached the point that they allowed two default judgments to be entered against Covil, Justice Toal, who oversees all asbestos litigation pending in South Carolina, granted a motion to appoint a new receiver for Covil.

In November 2018, Justice Toal appointed Peter Protopapas to serve as the new receiver. Thereafter the Receiver filed suit against Covil's insurers, including USF&G. Since his appointment, the Receiver has succeeded in marshaling over 45 million dollars of Covil's assets into a fund available to compensate those injured South Carolina citizens who may have legitimate asbestos claims against Covil. The Receiver has also brought actions against USF&G for its role in this decades-long scheme of misusing Covil to serve its and other insurers' interests.

USF&G has stubbornly resisted its obligations and sought to evade responsibility for its nearly thirty-year history of mismanaging Covil's litigation across multiple cases in various courts. This appeal represents yet another such effort, and arises from USF&G's assertion of an affirmative defense and arguments against the Receiver's claims that Justice Toal characterized as "specious," "frivolous," "absurd," and "unethical."[2] Yet despite multiple rulings rejecting these

[2] Order Denying Motions to Reconsider and Motion to Stay, *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155 (Ct. Com. Pls., May 7, 2020).

arguments in both the Circuit Court and in a related case in federal district court for the Middle District of North Carolina—and being admonished by the Circuit Court—USF&G repeats its unsuccessful arguments again on appeal.[3]

This appeal centers around USF&G's assertion of an affirmative defense to the Receiver's claims under the 10-year statute of repose set out in section 33-14-107 of the South Carolina Code. USF&G contends that the statute of repose bars asbestos claims against Covil following its administrative dissolution and, by means of some unstated derivation, also bars the Receiver's claims against USF&G alleging mismanagement of Covil, breach of contract, and bad faith. If USF&G's defense were sustained, then USF&G would avoid millions of dollars of insurance obligations to South Carolinians and others injured by Covil's actions in the 1970s.

From 1976–2016, Covil collectively settled hundreds of lawsuits for under $500,000. Since Justice Toal's appointment of the Receiver, Covil has collectively settled cases for over $20 million. USF&G seeks to avoid its contractual obligations to Covil so that it can be unjustly enriched at the expense of South Carolinians suffering from asbestos-related cancer. That result should not be permitted, and the ruling below should be affirmed in its entirety. Justice Toal correctly held that USF&G's statute of repose defense is legally and factually meritless for two main reasons, neither of which are undermined by USF&G's arguments on appeal.

First, section 33-14-107's repose period is triggered only if a notice of the corporation's dissolution is published in a newspaper. USF&G contends that such a notice was published in

[3] Order Denying Motions to Reconsider and Motion to Stay, C/A No. 2015-CP-46-02155 (Ct. Com. Pls., May 7, 2020) ("The Court refuses to ignore the plain language of the statute and the clearly expressed legislative intent that section 33-14-107 does not bar claims that did not exist at the time of Covil's dissolution . . . ."); *Finch v. Covil Corp.*, No. 1:16-cv-1077, 2020 WL 6063054, at *5 (M.D.N.C. Oct. 14, 2020) ("The Court finds that the receiver did not publish a notice in compliance with § 33-14-107(b).").

1992, but Justice Toal correctly found that none of the evidence gathered over the intervening thirty-year period demonstrates that notice was ever published, and all available evidence supports the opposite conclusion. Thus, Justice Toal correctly found the statute of repose does not apply, and, because the issue is dispositive, this Court could affirm on this ground alone.

Second, Justice Toal correctly held that even if the required notice had been published, the version of section 33-14-107 in effect when Covil was administratively dissolved in 1992 does not apply to contingent or future claims. It is undisputed that the claims at issue here are contingent and future claims, therefore section 33-14-107 is inapplicable. While the South Carolina Legislature later amended section 33-14-107 to extend its reach to contingent and future claims, the amendment does not avail USF&G. Amendments to statutes of repose are presumed to apply only prospectively—not retroactively—and nothing in the text of the amendments alters that presumption. As a result, the amendments to section 33-14-107 do not apply to corporate dissolutions that occurred before the amendments, like Covil's administrative dissolution in 1992.

For these reasons and others discussed below, Justice Toal's ruling that USF&G's statute of repose affirmative defense is legally and factually deficient is correct and should be affirmed.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Covil's Insurers, Including USF&G, Controlled and Mismanaged Covil's Asbestos Litigation Following Covil's Administrative Dissolution.

Covil went out of business in 1991, and the corporation administratively dissolved in 1992. (R. p. 6.) From at least 1964 until 1991, Covil installed, removed, and repaired insulation in industrial facilities. (R. pp. 115–16.) It has been alleged that, through at least 1986, Covil's operations involving the repair, replacement, removal, or disturbance of insulation exposed persons to asbestos, which has resulted in numerous asbestos personal injury lawsuits against

Covil. (R. p. 116.) Personal injury plaintiffs have continued to sue Covil for asbestos-related injuries following its administrative dissolution in 1992. (R. pp. 115–16)

For more than 25 years after Covil ceased its business operations, USF&G and other insurers controlled Covil's defenses in these lawsuits, made all litigation and settlement decisions, determined how to use and dispose of Covil's remaining assets (primarily, Covil's insurance policies), and otherwise conducted all of Covil's affairs. (R. pp. 116–17.) During this period, USF&G and other insurers treated Covil as their alter ego and wielded it to suit their interests, not Covil's interests. (R. pp. 116–17.) Among other things, USF&G and the other insurers hired counsel ostensibly to represent Covil in the asbestos cases, but that counsel took direction from USF&G and the other insurers exclusively, without regard for Covil's interests. (R. p. 118.)

B. Justice Toal Appointed a New Receiver for Covil, Who Sued USF&G and Other Insurers for Breach of the Insurance Policies and Bad Faith.

Sitting by designation as Acting Circuit Court Judge and Chief Administrative Judge over all asbestos litigation filed in South Carolina, Justice Toal "observed several irregularities in the way that Covil conducted itself in its litigation," and granted a motion to appoint a new receiver. (R. p. 23.) These irregularities included Covil having "inexplicably defaulted on two mesothelioma asbestos cases" in late 2018. (R. p. 23.) Thereafter, on November 2, 2018, Justice Toal appointed Peter Protopapas as receiver to manage Covil's litigation. (R. pp. 16–18, 42–44.)

The Receiver soon learned of USF&G's and the other insurers' gross mismanagement of asbestos lawsuits against Covil, including in particular the case of *Hill v. Covil Corporation*, CA NO. 2018 –CP-40-04680, the case at issue here. In April 2019, the Receiver sued USF&G, Zurich American Insurance Company ("Zurich"), Sentry Casualty Company, and the lawyers the insurers hired to represent Covil in the *Hill* lawsuit, Wall Templeton. The Receiver asserts claims against

USF&G for liability as Covil's alter ego, breach of Covil's insurance policies, bad faith handling of Covil's insurance claims, and negligence. (R. pp. 124–33.)

II. PROCEDURAL HISTORY

A. USF&G Asserted a Statute of Repose Affirmative Defense to the Receiver's Claims Against It.

In answer to the Receiver's complaint, USF&G and Zurich (which has since settled) asserted as an affirmative defense to Covil's claims against them that:

> 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.

(R. p. 255.) While USF&G's statute of repose affirmative defense is vague, it merely rehashes the same arguments previously rejected in other proceedings. There is nothing new here, and no reason to overturn prior rulings.

USF&G's statute of repose defense focuses on a prior Covil receivership that was formed, administered, and terminated in *First Savings Bank, FSB v. Covil Corp.*, C/A No. 91-CP-23-04445 (Ct. Com. Pl.) ("*FSB v. Covil*"), in Greenville County in the early 1990s. There, on May 12, 1992, Judge Charles B. Simmons, Jr. appointed a receiver ("the prior receiver") to marshal and liquidate Covil's assets and distribute the resulting proceeds.[4] (R. pp. 463–66.) In the same order, Judge Simmons also instructed that, "to the extent not already accomplished, the Receiver shall publish the Notice required by § 33-14-107[.]" (R. p. 466.) Six months later, the prior receiver detailed all the steps he took to marshal and liquidate Covil's assets and submitted a detailed accounting of his expenditures. (R. pp. 663–79.) The prior receiver's submissions did not mention any

[4] In May of 2020, Judge Simmons transferred the receivership to Justice Toal's court.

newspaper publication, and his detailed accounting does not reflect any expenses associated with a newspaper publication of a notice of dissolution. (R. pp. 663–79.) As a result, there is no evidence in the record that the prior receiver published the notice of dissolution required to begin the statute of repose.

Nevertheless, the crux of USF&G's statute of repose argument contends that, as part of the prior receiver's efforts to wind down the corporation, the prior receiver in fact published a notice to potential creditors in 1992, which triggered the statute of repose under section 33-14-107. USF&G further argues that the statute of repose, as amended in 2004—12 years after Covil was administratively dissolved—bars all asbestos claims against Covil, including unknown or contingent claims such as the Receiver's claims against USF&G here.

As noted above, USF&G and Zurich raised the same argument in other cases:

- In *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155, which also was before Justice Toal, USF&G attempted to intervene in order to object to a settlement agreement between the Receiver and several other insurers over Covil's asbestos liability. USF&G argued in its objection that the settlement was barred by the actions of the prior receiver because the statute of repose had run on asbestos claims against Covil. Justice Toal firmly rejected USF&G's "newly found, self-serving argument that Covil no longer has any underlying liabilities in asbestos cases in South Carolina due to its dissolution," because section "33-14-107(a) and (b) are clearly inapplicable in the context of these asbestos claims against Covil."[5] Justice Toal further found that USF&G's "late and seemingly frivolous objection simply raises additional questions about the propriety" of

[5] (R. p. 645.)

USF&G's management of Covil's litigation prior to the appointment of the Receiver, because USF&G had never raised the same defense in Covil's behalf before then. (*Id.* at 15.)

- Similarly, in *Finch v. Covil Corporation*, 1:16-CV-01077, 2020 WL 6063054, at *9 (M.D.N.C. Oct. 14, 2020), Zurich asserted the same statute of repose argument in a motion to intervene and for relief from a judgment against Covil. Zurich argued that it had recently learned of the 1991–92 receivership administratively dissolving Covil, that the receiver published a notice of dissolution, and as a result the statute of repose barred the *Finch* plaintiff's claims against Covil. The Federal District Court rejected Zurich's statute of repose argument for several reasons, including that "Zurich has submitted no evidence from any newspaper showing that the notice was actually published, much less that any published notice met the statutory requirements set by § 33-14-107(b)." (*Id.* at *10.)

B. The Receiver Moved for Clarification of the Status of the Receivership in Light of USF&G's Statute of Repose Affirmative Defense and Justice Toal Granted the Receiver's Motion.

As discussed above, in connection with the Circuit Court's order overruling USF&G's attempted objection to approval of the settlement in *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155, Justice Toal had already rejected USF&G's statute of repose argument. Accordingly, after service of USF&G's Answer to the Receiver's Complaint in this case in which USF&G asserted the very same statute of repose argument—this time in the form of an affirmative defense—the Receiver moved for an order that would fully and finally adjudicate the impact, if any, that the prior receivership had on the current receivership and this case. (R. pp. 429–43.)

As he had argued in opposition to USF&G's objection to the *Falls v. CBS Corp.* settlement, the Receiver argued in the Motion for Clarification that there is no evidence that the prior receiver published the notice required by 3-14-107(c), and therefore the repose period never started running. (R. pp. 437–38.) The Receiver further argued that even if the notice had been published,

the version of section 33-14-107 in effect at the time of Covil's administrative dissolution did not bar the future or contingent claims at issue here, and that the 2004 amendment to the statute of repose did not apply retroactively to dissolutions prior to 2004. (R. pp. 440–42.)

In response to the Receiver's motion, USF&G argued primarily that the Receiver lacks standing to challenge its affirmative defense to the Receiver's claims because, according to USF&G, the statute of repose defense purportedly would benefit Covil if it had merit. As USF&G put it, "Covil does not have a legally-protected interest in exposing itself to tort judgments, and parties sued as vicariously responsible for Covil's torts are entitled to assert those same defenses—even if Covil acts against its own legal interests by gratuitously waiving them."[6]

Justice Toal had previously considered and rejected USF&G's standing argument in *Falls v. CBS Corp*. There, Justice Toal held that the "Receiver is certainly under no obligation to advance frivolous arguments or to assert specious defenses to Covil's asbestos cases," and that "[n]on-Party USF&G's contention that the Receiver . . . is undermining Covil's asbestos defenses by refusing to behave unethically (at USF&G's behest) is absurd." (R. p. 646.) Justice Toal adhered to her prior reasoning and rejected USF&G's argument that the Receiver lacked standing to challenge USF&G's affirmative defense.

On the merits, USF&G rehashed the same arguments it asserted in *Falls v. CBS Corp.*, and Justice Toal rejected them yet again, holding that the prior receivership has no effect on claims against Covil and, therefore, no effect on the Receiver's claims against USF&G. (R. pp. 5–15.) In particular, Justice Toal found the evidence showed that the prior receiver had not published any newspaper notice and that the statute of repose therefore had not begun to run. (R. pp. 9–10.) Justice Toal also reviewed Judge Simmons's November 11, 1992 order, and "upon close

[6] (R. p. 714.)

examination," determined that the order does not reflect any finding that notice was published. (R. pp. 9–10.) Justice Toal further held that, even if a notice had been published, USF&G's defense lacks merit because: (1) the version of the statute in effect in 1992 plainly did not preclude contingent and future claims, like those at issue here; and, (2) the 2004 amendment expanding the statute to cover such claims is not retroactive. (R. pp. 10–13.)

Justice Toal granted the Receiver's motion, and this appeal followed.

STANDARD OF REVIEW

The Circuit Court's interpretation of statutes are reviewed by this Court *de novo,* and its factual findings are entitled to deference. *See Town of Arcadia Lakes v. State Dep't of Health & Env't Control*, 433 S.C. 47, 52, 855 S.E.2d 325, 328 (Ct. App. 2021); *Eddins v. Eddins*, 304 S.C. 133, 136, 403 S.E.2d 164, 166 (Ct. App. 1991); *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 661, 521 S.E.2d 749, 751 (Ct. App. 1999). "This court will be bound by the factual findings of the trial court made in response to motions preliminary to trial where the findings are supported by evidence and not clearly wrong or controlled by error of law." *Doe v. Howe*, 362 S.C. 212, 215, 607 S.E.2d 354, 355 (Ct. App. 2004).

ARGUMENT

I. THE RECEIVER HAS STANDING TO CHALLENGE USF&G'S STATUTE OF REPOSE DEFENSE

Justice Toal correctly rejected USF&G's argument that the Receiver lacks standing to challenge USF&G's "specious" statute of repose defense, and thus the ruling below should be affirmed. USF&G identifies no error in Justice Toal's order.[7] Indeed, USF&G's arguments on

[7] (R. p. 646.)

appeal (App. Br. 13–18) merely restate the same arguments that Justice Toal derided as "absurd," and USF&G makes no effort to show that Justice Toal's reasoning or conclusions are incorrect.[8]

As an initial matter, "standing" does not describe the argument that USF&G is actually making. Standing means having "a personal stake in the subject matter of a lawsuit." *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769 (2016). South Carolina courts generally use the United States Supreme Court's formulation for the elements of standing: "(1) the plaintiff must have suffered an 'injury in fact;' (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be 'redressed by a favorable decision.'" *Id.* (*quoting Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001)).

The Receiver, standing in Covil's shoes, plainly satisfies all of the foregoing requirements and has standing to sue USF&G to recover damages for USF&G's bad faith mismanagement of Covil's assets.[9] Nor can there be any debate that, as the plaintiff in an action against USF&G, the Receiver has standing to petition the Circuit Court for an order rejecting an affirmative defense to the Receiver's own claims against USF&G.

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[8] (R. p. 646.)

[9] All of the cases USF&G cites in support of its argument that the concept of standing relates to whether a party can seek a particular form of relief or file a particular type of motion are inapposite because they all involved non-parties attempting to seek relief from the court. *See, e.g.*, *Ex Parte Lexington Cnty.*, 314 S.C. 220, 442 S.E.2d 589 (1994) (finding non-party Lexington County did not have standing to participate in *ex parte* proceeding to determine the reasonableness of investigative or expert services related to a death penalty defense); *Townsend v. Townsend*, 323 S.C. 309, 314, 474 S.E.2d 424, 427–28 (1996) (finding a non-party attorney did not have standing to file a motion to reconsider an order removing him from a case).

Rather than a "standing" argument, USF&G argues that by challenging USF&G's statute of repose affirmative defense, the Receiver is acting against what *USF&G* perceives to be Covil's interest. That is not a standing argument—it is essentially an argument that the Receiver should somehow be estopped from challenging USF&G's affirmative defense because it would be inconsistent with the purpose of a receivership to act against Covil's interest. Even if that were a valid argument (it is not), *USF&G* has no capacity to decide what is, or is not, in *Covil's* interest. That power and responsibility rests exclusively with the court-appointed Receiver, who is "charged with marshaling Covil's assets and prudently using those assets to address Covil's asbestos liabilities in a responsible fashion." (R. p. 646.) The Receiver has determined that Covil's interest is served by defeating USF&G's statute of repose defense because it is legally and factually meritless and serves only as a barrier to the Receiver's claims against USF&G.

USF&G's self-serving assertion that the Receiver's "purported subjective belief that the statute of repose defense lacks merit . . . does not entitle, much less require, the Receiver to seek judicial rulings" overruling its affirmative defense is unsupported by any authority, is not an argument about standing, and is wrong. (App. Br. at 18.) As Justice Toal correctly reasoned, the Receiver is neither required nor permitted "to advance frivolous arguments," nor to "assert specious defenses" like USF&G's bogus statute of repose defense. (R. p. 646.) It is the Receiver's duty to exercise reasoned judgment, acknowledge the reality that asbestos claims against Covil are *not barred* by the statute of repose, and to pursue coverage from USF&G and Covil's other insurers. The Receiver has been doing exactly that.

USF&G's similar insinuation that, by opposing its meritless affirmative defense, the Receiver is somehow failing to comply with its "contractual obligation to assist in cooperating in Covil's defense" is not a standing argument either, and also is meritless. (App. Br. at 18.) Justice

Toal correctly held that USF&G's "contention that the Receiver is somehow not cooperating with Covil's insurers and is undermining Covil's asbestos defenses by refusing to behave unethically (at USF&G's behest) is absurd." (*Id.*) USF&G does not even acknowledge Justice Toal's rebuke, much less attempt to refute it.

The Receiver has sued USF&G for profiting from intentionally mismanaging asbestos litigation against Covil. The Receiver has no duty to cooperate with USF&G's bad faith, no duty to support USF&G's frivolous affirmative defense, and has standing to seek an order from the Court overruling USF&G's affirmative defenses to the Receiver's claims. USF&G's arguments must be rejected, and the ruling below should be affirmed.

II. THE CIRCUIT COURT CORRECTLY HELD THAT USF&G'S STATUTE OF REPOSE DEFENSE FAILS AS A MATTER OF FACT AND LAW

Justice Toal correctly held that USF&G's statute of repose defense fails as a matter of both fact and law, and that USF&G's arguments are irreconcilable with the plain text and legislative purposes of the act. Section 33-14-106 provides, in relevant part, that "a dissolved corporation may dispose of the **known claims** against it by following the procedure described in this section. . . . (d) For purposes of this section, '**claim' does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution**." (emphasis added).

Section 33-14-107, as it existed at the time of Covil's administrative dissolution, provided:

> (a) A dissolved corporation may publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.
>
> (b) The notice must:
>
> (1) be published once in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this State, its registered office) is or was last located;
>
> (2) describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

> (3) state that a claim against the corporation is barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.
>
> (c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:
>
> (1) claimant who did not receive written notice under Section 33-14-106;
>
> (2) a claimant whose claim was timely sent to the dissolved corporation but not acted on.
>
> (d) A claim may be enforced under this section:
>
> (1) against the dissolved corporation to the extent of its undistributed assets; or
>
> (2) if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of his pro rata share of the claim or the corporate assets distributed to him in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to him.

In 2004, section 33-14-107 was amended to add subsection (c)(3), which created a bar to claims for "a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution."

USF&G's statute of repose defense fails because, as Justice Toal correctly held, notice of dissolution is required to trigger the statute of repose and there is no evidence that such notice was ever published. Moreover, even if notice had been published, the plain text of the statute in effect in 1992, when Covil was administratively dissolved, does not reach future claims like those at issue here, and the 2004 amendments are not retroactive and so have no effect on this case.

A. The Statute of Repose is Triggered By Publication of Notice.

As originally enacted and as amended, section 33-14-107 of the South Carolina Code provides a conditional period of repose. Specifically, section 33-14-107(a) provides that "[a] dissolved corporation may publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice." S.C. Code Ann. § 33-14-107(a); *accord* S.C. Code Ann. § 33-14-107(a) (1988). Section 33-14-107(b) thereafter provides requirements for the notice if a corporation chooses to publish one. S.C. Code Ann. § 33-14-107(b); *accord* S.C. Code Ann. § 33-14-107(b) (1988). Finally, section 33-14-107(c) sets forth the statute of repose—five years for the previous version of the statute and ten years as later amended. S.C. Code Ann. § 33-14-107(c); S.C. Code Ann. § 33-14-107(c) (1988).

By its plain text, the repose period is triggered only "[i]f the dissolved corporation publishes a newspaper notice in accordance with subsection (b)." S.C. Code Ann. § 33-14-107(c); *accord* S.C. Code Ann. § 33-14-107(c) (1988). USF&G nevertheless argues that the statutory notice "is inconsequential," positing that the statue of repose applies even if notice is not published unless the party whose claims are to be foreclosed demonstrates prejudice from the lack of notice. (App. Br. 34–35.) This argument is unpreserved because USF&G raises it for the first time on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Even if the argument could be considered, it must be rejected because it violates the principal rule of statutory interpretation that the plain and unambiguous statutory language must be applied as written. *See Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 598, 654 S.E.2d 284, 289 (Ct. App. 2007) ("When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this court has

no right to impose another meaning."). The text here is unambiguous. A dissolved corporation "*may*" publish a newspaper notice, and any such notice "*must*" comply with statutory requirements. S.C. Code Ann. § 33-14-107(a)–(b) (emphases added). The statute is equally unambiguous that publication is an absolute pre-requisite to trigger the ten-year repose period. *Id.* § 33-14-107(c) ("***If*** the dissolved corporation publishes a newspaper notice . . . the claim of each of the following claimants is barred . . . .") (emphasis added). Absent such notice, there is no statute of repose in effect and claims may continue to be brought against the dissolved corporation.

USF&G seemingly admits that publication of notice is required for the repose period to begin. (App. Br. at 20 ("[Section 33-14-107] sets forth a statute of repose for unknown claims against dissolved corporations, barring such claims once a prescribed period . . . passes *after publication of notice of dissolution*." (emphasis added)).) Nevertheless, USF&G argues that even if notice was never published, the statute of repose may still apply against a creditor who was not prejudiced by the lack of notice. (App. Br. at 34.) USF&G's strained interpretation has no foundation in the text of the statute and must be rejected. Section 33-14-107 says nothing about prejudice to creditors, its notice provision includes no exceptions, and the courts are not empowered to create exceptions where the Legislature has declined to do so. *See Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 119, 328 S.E.2d 621, 622 (1985) (refusing to "carve an exception" to statutory requirements because "[s]uch a change is the function of the legislature, and this Court refuses to usurp legislative authority in this matter.").

USF&G's purported concern that if the statute is applied as written "claims against Covil should persist indefinitely into the future" is incorrect. (App. Br. 3, 22.) Section 33-14-107(c) provides that the repose period starts running at any time by publication of a notice, which means that such a notice may be filed at some point in the future. But even if that were not so, it would

be no reason to reconfigure the statute contrary to its text. *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language . . . .").

USF&G's reliance on *Department of Social Services v. Winyah Nursing Home*, 282 S.C. 556, 320 S.E.2d 464, 468 (Ct. App. 1984) is misplaced. The statute of repose at issue in *Winyah*, section 33-21-220(a), required that after dissolution of a corporation, any party having a claim against the corporation commence an action within two years from the dissolution or have the claim barred. Unlike the statute at issue here, which makes publication of notice optional, section 33–21–60(b) *mandated* that immediately subsequent to filing with the Secretary of State its intent to dissolve, the corporation shall cause notice of the filing to be mailed to each known creditor and to the South Carolina Tax Commission. The corporation was also required to publish such notice in a newspaper. The evidence in *Winyah* showed that the defendant corporation's notice of dissolution was not provided to the plaintiff/creditor as required by the statute. This Court therefore held that the defendant's "[f]ailure to strictly comply with the mandates of the dissolution statutes effectively continues the corporation with respect to creditors whose rights are prejudiced by the noncompliance." *Winyah*, 282 S.C. at 562.

Winyah is no help to USF&G because it does not hold—as USF&G argues—that the claims of a plaintiff who was not prejudiced by lack of notice are barred as though notice had actually been provided. More importantly, however, is that section 33-14-107 simply operates differently than section 33-21-220(a). Unlike the statute in *Winyah*, the publication of notice under 33-14-107(c) is optional and there is no repose period unless and until "the dissolved corporation publishes a newspaper notice in accordance with subsection (b)." S.C. Code Ann. § 33-14-107(c).

Whether or not a claimant is prejudiced is irrelevant to the statutory requirements for triggering section 33-14-107(c)'s repose period.

USF&G's argument essentially boils down to a bald request for the Court to rewrite section 33-14-107(c) to provide for a blanket statute of repose. The plain language of the statute and the intent of the Legislature compel the Court to deny USF&G's improper request.

B. Justice Toal Correctly Found No Evidence That The Prior Receiver Published Notice of Dissolution.

Because the statute of repose turns on publication of notice of dissolution, USF&G's defense depends entirely on demonstrating that such a notice was published by Covil's first receiver in 1992. Absent evidence that such a notice was published according to the statutory requirements, USF&G's statute of repose defense necessarily crumbles.

No such evidence exists. Justice Toal surveyed the record, which had been transferred to Justice Toal's court along with the Covil receivership in 2020, and correctly held that there is *zero evidence* that the first receiver ever published the statutory notice. (R. p. 10.). USF&G does not dispute Justice Toal's reasoning or findings of fact. Instead, USF&G's arguments on appeal merely reassert the same wholly speculative presumption that notice was published sometime in 1992 despite the absence of any evidence.

1. The record is devoid of evidence of publication of notice.

Publication of the notice of dissolution was mentioned only once during the initial receivership proceedings. Specifically, by order dated May 12, 1992, the court detailed many instructions for the prior receiver, including the following: "to the extent not already accomplished,

the [r]eceiver shall publish the Notice required by § 33-14-107[.]"[10] (R. p. 466.) Publication of notice of dissolution was never addressed again, either by the prior receiver or the court.

The remainder of the May 12, 1992 order instructed and empowered the prior receiver to marshal and liquidate Covil's assets. (R. pp. 7–10.) The court directed, "upon liquidation of Covil Corporation . . . , the [r]eceiver shall submit an accounting to this Court and petition for authority to make final disbursement of the proceeds from such liquidation." (R. pp. 467–68.) On November 11, 1992, the prior receiver submitted the accounting and petitioned for authority to make final disbursements of the proceeds from the liquidation, as instructed. (R. pp. 662–79.) On the same date, the court concluded that the receiver had "fully complied with the previous Orders of this Court in liquidating the assets" and "that his accounting is in order." (R. p. 709.)

On this record, USF&G contends that notice of dissolution was published in 1992. But USF&G has not produced a copy of a notice of dissolution, nor has it produced any other record from which it might be inferred that a notice was published. Nor has USF&G been able to conjure even a single witness who recollects publication of a notice of dissolution.

All USF&G has is the November 11, 1992 order itself—which says nothing about publication of a notice of dissolution. USF&G nevertheless contends that the November 11, 1992 order establishes that the prior receiver did, in fact, publish notice of Covil's administrative dissolution under section 33-14-107(b). (App. Br. 31.) So interpreted, USF&G contends that the November 11 order cannot be questioned. (*Id.* at 32.)

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[10] Importantly, section 33-14-107 has never *required* notice of dissolution to be published. It has always been a decision that was left to the discretion of the dissolving company. (*See* S.C. Code Ann. § 33-14-107(a) ("A dissolved corporation *may* publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice." (emphasis added)); *accord* S.C. Code Ann. § 33-14-107(a) (1988) (same).) The Court directed the prior receiver to publish any notice *required* by section 33-14-107. Since no notice is *required* by section 33-14-107, it is unreasonable to assume from that direction alone that notice was published.

The November 11, 1992 order does not say what USF&G wants it to say. Plainly read, the order reflects the court's finding that the prior receiver "fully complied" with the court's orders "*in liquidating the assets*." (*Id.* (emphasis added)). The order does not state that the prior receiver "fully complied" with any requirement to publish notice of dissolution. Accordingly, Justice Toal found that the November 11, 1992 order provides no basis to presume that notice of dissolution was published, and as the judge with authority over the prior receivership, Justice Toal's interpretation is entitled to deference. *Cf. Eddins*, 304 S.C. at 136, 403 S.E.2d at 166.

Justice Toal's interpretation also is supported by more than the plain language of the November 11, 1992 order. It is supported by the "Petition of Receiver" on which the November 11, 1992 order was expressly based. (R. p. 709.) In that petition, the prior receiver detailed the acts he took as Covil's receiver. According to the prior receiver, he "marshalled and liquidated the assets and collected the accounts of" Covil; retained counsel; "sold all the furniture, fixtures, inventory[,] and equipment of Covil Corporation at public auction"; and addressed remediation of hazardous materials in inventory sold to another company. (R. pp. 664–66.) The petition says nothing about the publication of a notice of dissolution in a newspaper.

The prior receiver's accounting also says nothing about publication of notice. The accounting details, line-by-line, every disbursement the prior receiver made while carrying out his duties, none of which show payment for publication, to a publication company, or to a newspaper. (R. p. 671.) USF&G's retort that the "Receiver Expense" line-item "clearly *could have* included the newspaper-publication expenses," (App. Br. 33 (emphasis added)), is pure speculation, and unreasonable speculation at that.

The prior receiver attested that these expenses were compensable "in accordance with the previous Orders" of the court. (R. p. 664.) The court's prior orders authorized the prior receiver

to "incur and pay . . . reasonable expenses," such as "the expense of the premium" for the bond the court required and "the cost of labor, including sales and/or other employees." (R. p. 463–64.) If the notice had been published and paid for with funds for which the receiver expected to be reimbursed, then a copy of the notice likely would have been included with the receiver's petition and included in the case files transferred to Judge Toal in 2020.

That no such copy exists is reason enough to find that no notice was ever published. It is far more reasonable to conclude instead that the "Receiver Expenses" line-item reflects the cost of bond premiums and the labor and other expenses the prior receiver incurred carrying out the acts described in his petition—including selling all "furniture, fixtures, inventory[,] and equipment . . . at public auction" (R. p. 664)—than to infer that these expenses were for an act the receiver did not mention and for which there is no evidence. (R. p. 664).

2. There are no disputed facts that require development.

USF&G complains that even if the record lacks evidence that notice was published, the record is "incomplete" and the question whether notice was published should be adjudicated later, after additional "fact development." (App. Br. 33–34.) This argument was correctly rejected below. USF&G does not and cannot identify what other facts it might develop to raise a genuine dispute over whether notice was published after all this time. Indeed, a March 2001 memorandum in the files of USF&G's former co-defendant, Zurich, expressly acknowledges that there was "no evidence" that the notice was published. (R. pp. 850–51.)

USF&G's plea for further fact development also defies common sense. As the federal district court for the Middle District of North Carolina concluded after considering precisely the same arguments and evidence at issue here, if notice had been published in a newspaper, one would reasonably assume that there would be direct evidence of that publication. *Finch v. Covil Corp.*, No. 1:16-cv-1077, 2020 WL 6063054, at *10 (M.D.N.C. Oct. 14, 2020) ("Any inference of

compliance is rebutted by the absence of direct proof of publication, which one could reasonably expect to exist . . . ."). That direct evidence does not exist.

USF&G has had nearly thirty years to gather additional facts and ample motivation to do so: from 1991 through the Receiver's appointment in 2018, USF&G actively litigated all manner of asbestos-related claims asserted against Covil. That the evidence it speculates may exist has not appeared in all this time is proof positive that such evidence does not exist.

3. The "presumption of regularity" adds no merit to USF&G's arguments.

USF&G's alternative contention (App. Br. 31) that under the presumption of regularity the Court must presume notice was published simply because the prior receiver was instructed, "to the extent not already accomplished," to "publish the Notice required by § 33-14-107" is meritless and only underscores the factual and logical leaps USF&G requires to stitch its arguments together. (R. p. 515.)

The presumption of regularity has no role to play here; it applies only "in the absence of any evidence to the contrary." *Kirton v. Howard*, 137 S.C. 11, 134 S.E. 859, 866 (1926). As discussed, there is ample evidence that the prior receiver in fact did not publish the notice, including the prior receiver's sworn petition, his detailed accounting, the Zurich memo, and the common-sense proposition that there would be affirmative evidence of a 1991 newspaper publication (as opposed to say, a 1921 publication), if any such publication occurred.

Justice Toal's finding that notice was never published is correct, supported by evidence, and is therefore binding. *Howe*, 362 S.C. at 215, 607 S.E.2d at 355; *see United States v. SCA Servs. of Indiana, Inc.*, 837 F. Supp. 946, 952–53 (N.D. Ind. 1993) (finding a corporation "failed to take advantage of" statute of repose and claims against the corporation were not barred where corporation did not give notice of its dissolution pursuant to Indiana's similar statute); *Futch v.*

McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to "address remaining issues when disposition of [a] prior issue is dispositive").

C. Justice Toal Correctly Held That Even If Notice Had Been Published The Statute Of Repose Does Not Apply To The Claims At Issue Here.

Because there is no evidence that the statutory notice was published, this Court need not reach USF&G's other arguments and can affirm on that basis alone. If the Court nevertheless considers USF&G's other arguments, it should reject them and affirm Justice Toal's holding that the statute of repose does not reach the claims at issue here whether or not notice was published.

The version of the statute of repose in effect in 1992, when Covil was administratively dissolved, did not reach contingent or future claims. USF&G asserts its statute of repose defense to various asbestos-related claims asserted against Covil and to the Receiver's claims and cross-claims for bad faith, breach of contract, and alter ego liability. None of these claims were known or could have been known to Covil—contingent or extant—when Covil administratively dissolved in 1992, because at that time USF&G's bad faith mismanagement of asbestos litigation against Covil had not yet occurred. Because these are contingent or future claims, they cannot be barred by section 33-14-107.

Section 33-14-107 was enacted in 1988 and derived, nearly verbatim, from Section 14.07 of the 1984 Model Business Corporation Act ("Model Act"). Official Comment, § 33-14-107; *see also* Official Comment & S.C. Reporters' Comments, S.C. Code Ann. § 33-1-101.[11] The

[11] USF&G argues the Court should ignore the South Carolina Reporter's Comments. (App. Br. 29.) However, this Court and the South Carolina Supreme Court have routinely looked to the South Carolina Reporter's Comments to provide important context when interpreting statutes, especially any amendments or revisions to statutes. *See Conran v. Yager*, 263 S.C. 417, 422, 211 S.E.2d 228, 230 (1975) (finding the South Carolina Reporter's Comments persuasive); *Adams v. Grant*, 292 S.C. 581, 586, 358 S.E.2d 142, 144 (Ct. App. 1986) (citing the South Carolina Reporter's Comments); *C. Ray Miles Const. Co. v. Weaver*, 296 S.C. 466, 470, 373 S.E.2d 905, 907 (Ct. App. 1988) (same); *Jones Leasing, Inc. v. Gene Phillips & Assocs.*, 282 S.C. 327, 331, 318 S.E.2d 31, 33 (Ct. App. 1984) (same); *Nat'l Equip., Ltd. v. David Jones Sales, Trucking Div.,*

Legislature, however, deviated from Section 14.07 of the Model Act in one significant way. Section 14.07(c) of the Model Act and the original section 33-14-107(c) applied a statute of repose to (1) claims held by persons who did not receive direct written notice of dissolution, if such notice was required under Section 14.06 of the Model Act or section 33-14-106 of the South Carolina Code; and (2) claims that were timely sent to the dissolved corporation but not acted upon. § 33-14-107(c) (1988).

However, Section 14.07(c) of the Model Act also applied to (3) *contingent claims or claims based on post-dissolution events*. Notably, the South Carolina Legislature omitted that provision from section 33-14-107(c). *See id.*; S.C. Reporters' Comments, § 33-14-107 ("[T]he new provision does not contain subsection (c)(3) of the Model Act Section 14.07 providing that contingent claims and those based on an event occurring after dissolution are subject to the . . . statute of repose, too."). As the Reporters' Comments correctly observe, the statue of repose "only applie[d] to claims existing at dissolution." S.C. Reporters' Comments, § 33-14-107.

The Legislature did not expand the reach of the statute of repose to contingent and future claims until 2004. *See* § 33-14-107(c); 2004 S.C. Acts 221, § 18. USF&G posits that this amendment merely clarified that section 33-14-107(c) reached contingent and future claims all along. (App. Br. 28–29.) That position lacks merit. *See Cannon v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 371 S.C. 581, 584, 641 S.E.2d 429, 430 (2007) ("It is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law."); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 433–34, 468 S.E.2d 861, 865 (1996) (finding when one statutory

Inc., 268 S.C. 551, 554, 235 S.E.2d 125, 126 (1977) ("The South Carolina Reporter's Comment is likewise persuasive[.]"); *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 283, 711 S.E.2d 912, 916 (2011) (looking to the South Carolina Reporter's Comments to provide context for "the purpose for the 1988 revision of the statute").

provision does not include a right that is included in another statutory provision, legislative intent is that a right will not be implied where it does not exist).

Moreover, it is a settled principle of statutory interpretation that, absent some contrary indication, a legislature's deviations from a model or uniform act are deliberate. *See* 2B SUTHERLAND STATUTORY CONSTRUCTION § 52:5 (7th ed.) ("[W]hen a legislature models a statute after a uniform act, but does not adopt particular language, courts conclude that the omission was 'deliberate,' or 'intentional[.]'").[12] This is especially true when only a few, non-stylistic changes are made. The more similar two provisions are, the more significant are their differences. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071–72 (2018) (noting a difference between statute and the statute it was modeled on "requires respect, not disregard").

The 1988 Legislature's decision not to enact Section 14.07(c)(3) of the Model Act—a provision in the middle of a section the Legislature otherwise enacted in full—plainly was deliberate. And the 2004 Legislature's decision to change course and add that provision to the statute was intentional and, contrary to USF&G's position, not a mere clarification of existing law. Nothing in the text of the amendment, its legislative history, or any other relevant authority suggests that the 2004 Legislature added an entirely new-but-superfluous subsection—subsection (c)(3)—simply for clarification. *See, e.g.*, *Edwards v. State Law Enf't Div.*, 395 S.C. 571, 578, 720 S.E.2d 462, 466 (2011) (explaining that when a statute is silent on a topic there is "no language for the subsequent amendments to clarify"). In fact, the amendment stands strongly in opposition

[12] This proposition is not controversial. *See, e.g.*, *Donajkowski v. Alpena Power Co.*, 596 N.W.2d 574, 580 n.14 (Mich. 1999) ("Deviation from the language in a model act is presumed to be deliberate[.]"); *Newbold v. Globe Life Ins. Co.*, 274 S.E.2d 905, 909 (N.C. App. 1981) (same); *Johnson v. Ryan*, 346 P.3d 789, 794 (Wash. Ct. App. 2015) (same); *Doemer v. Callen*, 847 F.3d 522, 532 (7th Cir. 2017) (same); *Hughes Elecs. Corp. v. Citibank Del.*, 15 Cal. Rptr. 3d 244, 257 (Cal. Ct. App. 2004) (same).

to USF&G's position. If section 33-14-107 already encompassed nonexistent claims prior to 2004, the addition of subsection (c)(3) would have been entirely unnecessary and that language would be surplusage. *See Pike v. State Dep't of Transp.*, 332 S.C. 605, 618, 506 S.E.2d 516, 523 (Ct. App. 1998) ("[A] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.").

Especially in light of these clear indications of the Legislature's intent, section 33-14-106(d) of the South Carolina Code cannot bear the weight of USF&G's contrary argument. Section 33-14-106(d) provides: "For purposes of this section, 'claim' does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution." The fact that section 33-14-107 does not contain a similar exclusion does not suggest that the pre-2004 version of the statute encompasses such claims. That provision explains what the word "'claim' *does not*" mean, and only "[f]or purposes of this section [33-14-106]." § 33-14-106(d) (emphasis added). That provision, by its own terms, says nothing about what the word "claim" *does* mean in the statute at issue, section 33-14-107.

Further, the term "Unknown" in the title to section 33-14-107 refers to claims unknown *to the dissolved corporation*, not to claims unknown *to the claimant*. This interpretation is consistent with the language of subsection (a), which provides that "[a] dissolved corporation may publish notice of its dissolution and request that *persons with claims* against the corporation present them in accordance with the notice." § 33-14-107(a) (emphasis added). Absent the explicit contradictory language in subsection (c)(3), which was not added until the 2004 amendment, the plain language of subsection (a) and the remainder of section 33-14-107 is most reasonably read to apply only to existing unknown claims—not nonexistent claims.

D. The 2004 Amendments to the Statute of Repose are Not Retroactive.

Finally, USF&G argues that the statute of repose may reach the claims at issue here even though they are future and contingent claims because, according to USF&G, amendments to the statute in 2004 intended to extend the statute to such claims can be read retroactively. Justice Toal properly rejected this argument as well under well-established principles of South Carolina law.

Statutes of repose, like all statutes, presumptively do not apply retroactively. *Snavely v. Perpetual Fed. Sav. Bank*, 306 S.C. 348, 350–51, 412 S.E.2d 382, 383–84 (1991). Only "a specific provision *of clear legislative intent to the contrary*" suffices to rebut that presumption. *Id.* The 2004 amendment does not reflect such intent, and USF&G does not argue otherwise.

Section 33-14-107(c) is a statute of repose, not a statute of limitations, because it "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Langley v. Pierce*, 313 S.C. 401, 403–04, 438 S.E.2d 242, 243 (1993) (citation omitted) (quoting *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 865–866 (4th Cir. 1989))); *see also Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) ("[T]he statute of repose portion of section 15-3-545(A) is substantive law, unlike a statute of limitations, which is procedural law."); Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. Balt. L. Rev. 119, 131 (2014) (noting "courts have recognized that while statutes of limitations are procedural, statutes of repose are substantive").

The distinction between substantive laws like statutes of repose and procedural laws like statutes of limitation is relevant here because statutes implicating substantive rights are strictly interpreted to be *prospective* in application. *See Edwards*, 395 S.C. at 579, 720 S.E.2d at 466 ("When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only."); *Indep. Ins. Co. v. Indep. Life & Acc. Ins. Co.*, 218 S.C. 22, 33, 61 S.E.2d 399, 404 (1950) ("Statutes tending to destroy private rights should be construed not only

strictly, but as not retrospective in operation."); *see, e.g.*, *Corbett v. City of Columbia*, 294 S.C. 327, 331–32, 364 S.E.2d 459, 461 (1988) ("[W]e held that the repeal of § 42–9–100 involved substantive rights and that the amendment would not be applied retroactively."); *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011) (reasoning that because an act "create[d] substantive rights and impose[d] new obligations," it would "apply prospectively absent clear indication to the contrary by the Legislature").

Other courts have similarly held statutes of repose apply prospectively only. *See Bielski v. Alfred Saliba Corp.*, 984 F. Supp. 2d 1170, 1174 (M.D. Ala. 2013) ("Since statutes of repose such as § 6-5-221 are substantive and not remedial law, they apply only prospectively—to claims which accrue after the effective date of the statute."); *Hamilton v. Myerow*, No. 303223CWT, 2009 WL 885957, at *5 (Mass. Land Ct. Apr. 1, 2009) ("[A] statute of repose is, generally, considered to affect substantive rights and, so, only applies prospectively.").

USF&G fails to grapple with this well-settled South Carolina law. Instead, USF&G urges the Court to hold that the ten-year period of repose began anew in 2004 for contingent and future claims. (App. Br. 25.) The authority USF&G relies on, however, is inapposite. Those cases involved statutes of limitations (procedural laws) that the courts determined *did* apply retroactively, forcing the courts to fashion solutions to the fundamental unfairness of retroactive application that, without notice, destroys various rights to sue. *See, e.g.*, *Sohn v. Waterson*, 84 U.S. 596, 599–600 (1873).

Nor does USF&G's work-around make sense in context of the specific statute of repose here. A statute of repose begins to run, by operation of law, on "the date of the last culpable act or omission of the defendant." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014). Such a statute

reflects legislative judgment that there be an outer limit and "an absolute bar on a defendant's temporal liability." *Id.* But section 33-14-107 is different. The period of repose is conditional, triggered only by a corporation publishing the requisite notice; it is not automatic or absolute. § 33-14-107(c). Once triggered, the repose period runs from "*the publication date* of the newspaper notice," *id.* (emphasis added), not the date of liability-triggering conduct.

USF&G ignores this distinct feature of section 33-14-107. (R. p. 12.) Publication is not merely the statutory trigger for beginning the repose period; it is the means the Legislature determined was necessary to fairly put claimants on notice of the steps they must take to protect their rights. USF&G's approach would deem persons whose claims were nonexistent or contingent in 1991 to have received notice in 1991. That is precisely the sort of retroactive application that, absent clear legislative intent, is forbidden under South Carolina law. *See, e.g.*, *Indep. Ins. Co.*, 218 S.C. at 33, 61 S.E.2d at 404 ("Statutes tending to destroy private rights should be construed not only strictly, but as not retrospective in operation.").

CONCLUSION

For all the foregoing reasons, the Circuit Court's decision below finding USF&G's statute of repose affirmative defense to be factually and legally meritless should be affirmed.

Respectfully submitted,

s/ Shanon N. Peake
G. Murrell Smith, Jr. (S.C. Bar # 66263)
Jonathan M. Robinson (S.C. Bar # 68285)
Shanon N. Peake (S.C. Bar #102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, Third Floor
Columbia, South Carolina 29205
(803) 254-5445

Attorneys for Respondent

October 4, 2021.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.), Acting Circuit Court Judge

Case No. 2019-CP-40-02285

Appellate Case No. 2020-001437

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

v.

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

of which

United States Fidelity and Guaranty Company is the Appellant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that this brief complies with the provisions of Rule 211(b), SCACR.

s/ Shanon N. Peake
Shanon N. Peake (S.C. Bar #102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, Third Floor
Columbia, South Carolina 29205
(803) 254-5445

October 4, 2021.

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
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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,

Of Which:

United States Fidelity and Guaranty Company is the..... Appellant,

And

Peter D. Protopapas, in his capacity as Receiver of Covil Corporation, is the..... Respondent.

REPLY BRIEF OF APPELLANT UNITED STATES FIDELITY AND GUARANTY COMPANY

WOMBLE BOND DICKINSON (US) LLP
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, SC 29201
(803) 454-6504

SIMPSON THACHER & BARTLETT LLP
Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

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INTRODUCTION

Respondent's brief on appeal fails to demonstrate either that Covil's Receiver[1] had standing to seek and obtain a ruling that strips Covil of a significant defense in underlying asbestos lawsuits against it, or, even if the Receiver had standing to undermine its own defenses, that the circuit court's ruling should be upheld on the merits.

First, the Receiver fails to show that he has standing to seek a ruling that the statute of repose does not bar third-party tort plaintiffs from asserting claims against Covil. Instead, the Receiver argues the uncontested but irrelevant point that he had standing to bring his underlying claims against USF&G, and attempts to bootstrap standing through the circular argument that he has standing to move against Covil's own defenses so long as he believes those defenses lack merit. This Court should reject these arguments and affirm that a receiver has no standing to attack the receivership entity's own defenses or otherwise seek to increase its potential liability, which is precisely the sort of abuse of the adversary process that the standing doctrine exists to prevent.

Second, the Receiver fails to defend the circuit court's legally flawed conclusion that notice of Covil's dissolution was never published during Covil's judicial dissolution proceedings in 1992. The record is clear that the court overseeing the judicial dissolution directed Covil's prior receiver to publish notice pursuant to the statute governing judicial dissolutions. The record is also clear that the court subsequently found that his orders had been complied with and, on that basis, discharged the prior receiver. In spite of this, the circuit court held that because a copy of the published notice has not been located three decades later, and the prior receiver's accounting records did not contain a specific line item reflecting payment of the costs of publication, the judge who oversaw the dissolution failed to ensure that the statutorily mandated publication had

[1] Capitalized terms have the meanings given them in USF&G's initial brief.

occurred, and the prior receiver disobeyed an explicit court order. These conclusions run counter to well-settled evidentiary presumptions as to the regularity and finality of prior court orders. It also was error to make conclusive factual determinations on the limited record presented by the Receiver's motion. Moreover, even if factual questions about publication of notice existed, they should be resolved at summary judgment or trial in a manner consistent with South Carolina's rules of civil procedure and rules of evidence—not summarily disposed of via ad hoc receivership motions.

Third, the Receiver's argument that the statute of repose does not apply to future, contingent claims brought against Covil is also wrong. The Receiver's primary contention is that because Covil dissolved in 1992, applying the current version of the statute, enacted in 2004, would be impermissibly retroactive. No such retroactivity concerns apply here, however, because, as numerous courts have recognized, the proper way to apply a newly-enacted time bar *prospectively* is to run it from the date of enactment, such that the ten-year period relevant here would start in 2004 and expire in 2014. Indeed, there is no reason to assume the Legislature, in enacting the current version of the statute, would have desired the illogical outcome under which claims against corporations that dissolved in 2004 or later would become time-barred starting in 2014, but claims against corporations that dissolved before 2004 would persist indefinitely into the future.

Finally, the Court should disregard the various unsubstantiated attacks on USF&G scattered throughout the Receiver's briefing. Those disputed allegations have absolutely nothing to do with any of the issues on appeal. Whether USF&G purportedly "mismanaged" the defense of asbestos cases brought against Covil after it dissolved—which USF&G vigorously denies—has not been adjudicated by any trial court and is not now before this Court. The same is true of the Receiver's baseless accusations that "USF&G seeks to avoid its contractual obligations to Covil

so that it can be unjustly enriched at the expense of South Carolinians suffering from asbestos-related cancer." *See* Resp. Br. 4. Similarly, the Receiver's intimation that this appeal is somehow improper because the circuit court rejected USF&G's arguments makes no sense. *See* Resp. Br. 3-4 ("Yet despite multiple [lower court] rulings rejecting these arguments … USF&G repeats its unsuccessful arguments again on appeal."). USF&G, like every appellant who appears before this Court, filed this appeal precisely because its position did not prevail in the court below and thus it is for this Court to decide these important issues of South Carolina law.

For these reasons, and as discussed further below and in USF&G's initial brief, the decision on appeal granting the Receiver's Motion to Clarify should be reversed.

ARGUMENT

I. THE RECEIVER FAILS TO DEMONSTRATE THAT HE HAS A COGNIZABLE INTEREST IN SEEKING TO ELIMINATE COVIL'S DEFENSES

The Receiver contends that he, "standing in Covil's shoes, plainly … has standing to sue USF&G to recover damages for USF&G's bad faith mismanagement of Covil's assets." (Resp. Br. 12). That, however, is not the standing question presented on this appeal. Instead, the relevant question is whether the Receiver has legal standing to seek and obtain a ruling that—in the words of the order on appeal, which was drafted by the Receiver and adopted by the circuit court—(i) "Covil's prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil"; (ii) "no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil"; and (iii) "nothing from the prior Receivership precludes … personal injury asbestos claimants from filing lawsuits against Covil." (R. p. 6, 13; Sept. 25, 2020 Order Granting Receiver's Motion To Clarify at 2, 9). Conspicuously absent from the Receiver's brief is any explanation as to why he, as Receiver for Covil, has any legally

cognizable interest in stripping Covil of a substantial defense in underlying asbestos suits against Covil.

The Receiver asserts that "[s]tanding means having 'a personal stake in the subject matter of a lawsuit.'" (Resp. Br. 12) (quoting *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769 (2016)). That is true, but standing also requires "'an invasion of a *legally protected interest* which is (a) concrete and particularized, and (b) "actual or imminent"' rather than conjectural or hypothetical." *Opternative, Inc. v. S.C. Bd. of Med. Examiners*, 433 S.C. 405, 859 S.E.2d 263, 267–68 (Ct. App. 2021), *reh'g denied* (July 1, 2021) (quoting *ATC S., Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992))) (emphasis added). Covil's Receiver, standing in Covil's shoes, has no *legally protected interest* in obtaining a judicial determination validating adverse nonparty asbestos tort plaintiffs' legal rights to sue Covil, and nothing the Receiver cites suggests otherwise. A receiver's professional interest in the continuation of a receivership does not suffice, just as the attorneys' interests in continued representation of their clients did not suffice in *Townsend v. Townsend*, 323 S.C. 309, 314, 474 S.E.2d 424, 427 (1996) and *Bailey v. Bailey*, 312 S.C. 454, 441 S.E.2d 325 (1994).

Rather than articulating any legally protected interest Covil has in a ruling removing an "impediment to the assertion of asbestos personal injury claims against Covil," the Receiver asserts that (i) he has standing to "petition the Circuit Court for an order rejecting an affirmative defense to the Receiver's own claims against USF&G"; (ii) USF&G's standing argument is actually an estoppel argument; (iii) he has sole discretion to determine what is in Covil's best interests; and (iv) an alleged breach of Covil's contractual obligations to cooperate with its insurers does not

implicate the Receiver's standing. (Resp. Br. 13-14). None of these arguments withstands scrutiny.

First, had the Receiver sought only to strike the defense asserted by USF&G on the grounds that it did not provide a viable defense to the Receiver's claims against USF&G, standing would likely not be at issue. That, however, is not what the Receiver did. Instead, the Receiver filed a "Motion to Clarify Status of Receivership" which sought general declarations for the benefit of *adverse* nonparty asbestos plaintiffs against Covil. The Receiver did not, for instance, seek a ruling that the statute of repose has no impact on the viability of the Receiver's claims against USF&G; he sought and obtained rulings that "no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil" and that "nothing from the prior Receivership precludes … personal injury asbestos claimants from filing lawsuits against Covil." (R. p. 13; Sept. 25, 2020 Order Granting Receiver's Motion To Clarify at 9). These declarations do not vindicate any right of the Receiver but instead expressly *impair* Covil's rights for the benefit of unspecified nonparty "personal injury asbestos claimants" in lawsuits *against* Covil, and whose claims the Receiver has no right to assert. *See Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 445, 665 S.E.2d 237, 241 (2008) ("We are unaware of any law (and the Bank has cited none) supporting the idea that one party may acquire standing by asserting the interest of an adverse party. … [W]hile we understand the Bank's desire to limit its potential exposure in [the] underlying action, this practical concern falls far short of the 'injury in fact' standing requirement. Not every practical concern equates to the legal interest required for standing.").

Second, the contention that USF&G is asserting some type of estoppel argument is simply incorrect. The Receiver's lack of a legally protected interest in seeking rulings for the direct benefit of tort plaintiffs who may assert claims against Covil is a question of standing under clear

precedent requiring an inquiry into whether an invasion of a legally protected interest exists. *See, e.g.*, *ATC S., Inc.*, 380 S.C. 191, 669 S.E.2d 337. The Receiver provides no support for his claim that USF&G is actually arguing "that the Receiver should somehow be estopped from … act[ing] against Covil's interest." (Resp. Br. 13). Whether unspecified estoppel principles might be implicated where a party seeks to attack its own legal defenses has no relevance to the standing analysis.

Third, the Receiver's assertion that he has sole discretion to determine Covil's interests and litigation positions is similarly misplaced. The scope of the Receiver's authority is not at issue here, nor is the wisdom of the Receiver's litigation positions or whether they comport with the Receiver's duties of cooperation under any insurance policy. Whatever the Receiver's authority is to take positions on Covil's behalf in litigation, including in the numerous cases against Covil that the Receiver has demanded be defended by USF&G, the Receiver remains subject to the same rules of standing and justiciability as any other litigant. And those rules clearly do not support a finding that Covil's Receiver has standing to affirmatively seek a judicial declaration that the statute of repose is legally inapplicable to asbestos personal injury plaintiffs' claims against Covil.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT NOTICE WAS NEVER PUBLISHED

As USF&G established in its initial brief, and the Receiver acknowledges, Judge Charles B. Simmons, Jr., who presided over Covil's prior receivership and judicial dissolution, directed Covil's first receiver, Winston Lee, on May 12, 1992, to "publish the Notice required by § 33-14-107."[2] Six months later, on November 12, 1992, the prior receivership court issued an order

[2] R. p. 704; May 12 Order at 5 ¶ 9. The May 12 Order also instructed Mr. Lee to "provide the claimants of Covil Corporation … known to him with the Notice as required by [S.C. Code] § 33-14-106," and set forth a detailed procedure, consistent with the procedure set forth in Section 33-

"find[ing] that [the receiver] has fully complied with the previous Orders of this Court in liquidating [Covil's] assets."[3] The court went on to finalize Covil's dissolution and discharge the prior receiver in a November 30, 1992 Final Order fully winding up Covil's affairs.[4]

As USF&G's initial brief also demonstrated, South Carolina's judicial dissolution statute provides, as it did in 1992, that "[a]fter entering the decree of dissolution, *the court shall direct* the winding up and liquidation of the corporation's business and affairs in accordance with Section 33-14-105 and *the notification of claimants in accordance with Sections 33-14-106 and 33-14-107*." S.C. Code Ann. § 33-14-330(b) (emphases added). Thus, South Carolina's judicial dissolution statute explicitly requires that statutory notice to creditors *shall* be given during the course of judicial dissolution proceedings. As a result, in directing the prior receiver to "publish the Notice required by § 33-14-107," Judge Simmons was enforcing a statutory requirement governing such proceedings. And he unambiguously held that the receiver complied with his orders. Accordingly, Judge Simmons's orders and his findings of compliance with the statutory publication requirement are controlling under South Carolina law and, as USF&G asserted in its initial brief and the Receiver did not dispute or even address, one circuit court judge "does not have the authority to set aside the order of another." *See* App. Br. 32 (quoting *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986)). It was therefore error for the circuit court to reach a contrary determination below.

14-106(c), for resolution of claims asserted by such known claimants. *See* R. p. 704; May 12 Order at 5 ¶ 10.

[3] R. p. 709; Nov. 12 Order at 2.

[4] R. p. 738; Nov. 30 Order at 3 ¶¶ 7–8.

The Receiver makes two arguments in defending the circuit court's determination that, in substance, Winston Lee disobeyed Judge Simmons's order and failed to publish notice, and that Judge Simmons incorrectly found Mr. Lee in compliance and dissolved the receivership notwithstanding this failure. First, the Receiver argues that Judge Simmons's order merely gave Mr. Lee the option to publish the notice. Second, the Receiver argues that the absence of other affirmative evidence of publication is sufficient to conclusively demonstrate that publication did not in fact occur. Both arguments are meritless.

A. Judge Simmons's Order Required The Prior Receiver To Publish Notice

The Receiver is incorrect that Judge Simmons merely gave Mr. Lee the option to publish notice. The Receiver contends that while Judge Simmons ordered that Mr. Lee "shall publish the Notice required by § 33-14-107," Section 107 only states that a corporation "may" publish notice of dissolution and leaves the decision to publish "to the discretion of the dissolving company." (Resp. Br. 20 n.10). From this, the Receiver reasons that "[s]ince no notice is *required* by section 33-14-107, it is unreasonable to assume from that direction alone that notice was published." *Id.* The Receiver's argument, however, ignores the plain words of Judge Simmons's order. The court's use of the word "shall" clearly *required* Mr. Lee to publish the notice. *See Lawrence v. Gen. Panel Corp.*, 425 S.C. 398, 406, 822 S.E.2d 800, 804 (2019) ("[T]he term 'shall' means the action is mandatory."). Yet according to the Receiver, because Section 33-14-107 provides that "[a] dissolved corporation *may* publish notice," it technically does not "require" anything, and therefore Judge Simmons's order did not command Mr. Lee to take any particular action, but rather just advised him of an option he already had. In other words, according to the Receiver, had Judge Simmons ordered that Mr. Lee "shall publish the Notice *contemplated* by § 33-14-107," Mr. Lee would have been required to do so, but since Judge Simmons ordered that Mr. Lee "shall publish the Notice *required* by § 33-14-107," Mr. Lee was somehow *not required* to publish notice. This

interpretation is contrary to the language of the order and contrary to settled law that court orders should not be construed in a way that would render them meaningless or ineffective. *See, e.g.*, *Emery v. Smith*, 361 S.C. 207, 219, 603 S.E.2d 598, 604 (Ct. App. 2004) (rejecting interpretation under which a "provision of the decree … would be rendered meaningless").

Moreover, the Receiver's argument that publication was optional fails to take account of S.C. Code Ann. 33-14-330(b) as discussed in USF&G's initial brief. *See* App. Br. 21, 32. Reading Section 107 in the context of Section 330(b) further demonstrates that publication was not optional. Section 107 is contained within Article 1 of Chapter 14 of the SCBCA, governing voluntary dissolutions. Its introductory statement that "[a] dissolved corporation *may* publish notice of its dissolution" is relevant in the voluntary dissolution context, where the dissolving corporation is acting on its own behalf, through its board of directors. By contrast, Section 330(b), set forth in Article 3 of Chapter 14 concerning judicial dissolutions, states that in the context of a judicial dissolution, "the court *shall* direct … the notification of claimants in accordance with," *inter alia*, Section 107 (emphasis added). Thus, the SCBCA gives corporations that voluntarily dissolve the option to publish notice, but makes publication mandatory where, as here, the corporation is judicially dissolved. The Receiver's contention that publication remains optional in the judicial dissolution context cannot be reconciled with this plain statutory language.

As a result, despite the Receiver's efforts to avoid these conclusions, the circuit court's finding that notice was not published amounts to a holding that (i) Covil's prior receiver Winston Lee disobeyed an explicit court order by failing to publish notice, and (ii) Judge Simmons failed to ensure that notice was published as required by the SCBCA's judicial dissolution provisions, and instead closed the proceedings and dissolved the receivership with this statutory requirement unsatisfied. These findings were made not because of any evidence actually establishing that

notice was not published, but instead merely based on negative inferences drawn from the lack of additional corroborating evidence of publication. This result is contrary to South Carolina law.

B. The Presumption Of Regularity Has Not Been Rebutted

The Receiver does not dispute that South Carolina law presumes that a receiver has acted in compliance with court orders and his or her fiduciary obligations. *See Whitcomb v. Manderville*, 90 S.C. 384, 73 S.E. 775, 777 (1912) ("the presumption is always in favor of the correct performance of his duty by an officer, and every reasonable intendment will be made in support of such presumption") (internal quotations and citation omitted). This presumption can be disregarded only where there is "substantial evidence of opposition." 30 S.C. JUR. EVID. § 21. A core function of this presumption is to establish as an evidentiary matter that officials complied with orders where, as here, there is no direct proof. *See, e.g.*, *Rice v. Bamberg*, 72 S.C. 384, 51 S.E. 987, 987 (1905) ("There is no positive proof that the sheriff and the clerk carried out the order of the court; but, in the absence of proof to the contrary, the presumption is that these officers performed the duties required of them and that the proceeds of sale were applied to claims adjudged by the court in that cause to be valid debts of the estate of the testator."); *Kirton v. Howard*, 137 S.C. 11, 134 S.E. 859, 866 (1926) ("[T]he '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.").[5]

[5] The Receiver cites findings made by the U.S. District Court for the Middle District of North Carolina on a motion for relief from judgment filed by another insurer in another action. *See Finch v. Covil Corp.*, No. 1:16-CV-1077, 2020 WL 6063054 (M.D.N.C. Oct. 14, 2020). USF&G was not a party to that case or to that motion, which applied the exacting standard applicable to a motion

Here, the Receiver points to nothing in the record that evidences noncompliance with the order requiring publication. Instead, the Receiver relies on the absence of evidence, including filings from the prior receivership that do not expressly mention notice, and concludes that such absence implies noncompliance. This contention is precisely what the presumption forbids. For example, the Receiver cites Mr. Lee's petition and his accounting records, which do not reference publication of notice, as evidence that Mr. Lee in fact disobeyed the court order requiring publication. But neither the Receiver nor the circuit court explain why the presumably modest expenses of publishing a notice in a local newspaper would warrant a distinct line item in Mr. Lee's accounting records, as opposed to being folded into a general line item such as the $1,576.50 "Receiver Expense" cited by USF&G.

The Receiver goes so far as to contend that the lack of a copy of the notice attached to the petition "is reason enough to find that no notice was ever published" and that it is "unreasonable speculation" to account for the possibility that publication of notice could be encompassed by the "Receiver Expense" line item on the accounting. (Resp. Br. 22). Yet if the absence of a copy of the notice and a separate line item for the publication expense in Mr. Lee's petition and accounting are purportedly such strong evidence that Mr. Lee had not complied with Judge Simmons's order directing publication, they would have been similarly strong evidence of noncompliance to Judge Simmons, who had issued the order requiring compliance and was tasked with overseeing the receivership.

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seeking to vacate a final judgment, which requires "egregious error" or that the judgment be "void." *See id.* at *10. Those heightened standards have no relevance here, nor did that court purport to apply (or even reference) the presumption of regularity that the Receiver concedes applies.

The Receiver also argues that the November 12 Order does not support a finding of compliance with the prior order requiring publication because it states that Mr. Lee "has fully complied with the previous Orders of this Court *in liquidating [Covil's] assets[.]*"[6] However, liquidation of Covil's assets was the primary purpose of the receivership. (R. p. 700-701; May 12 Order at 1-2) ("It appears and I find that this appointment as a general receiver is necessary[,] just and proper *for the purpose of liquidating the assets of Covil Corporation* . . . it is therefore ORDERED, ADJUDGED AND DECREED . . . [t]hat L. Winston Lee be, and he hereby is, appointed the permanent Receiver of Covil Corporation . . . for the purpose of marshalling and liquidating such assets.") (emphasis added). Therefore, in finding that Mr. Lee had complied with the court's previous orders "in liquidating [Covil's] assets," Judge Simmons was not suggesting that Mr. Lee had *not* complied with other aspects of his prior orders. To the contrary, in the very same sentence of the November 12 Order, Judge Simmons also found that "the relief sought by [Mr. Lee] should be approved," including the discharge of Mr. Lee from his duties as receiver and the entry of a final judgment closing the proceedings—relief that would only have been warranted had the court's prior orders been complied with in full.

In sum, the only evidence that exists shows that Mr. Lee complied with Judge Simmons's order requiring publication of notice, and the mere absence of additional proof of such publication some three decades later is not sufficient to rebut the presumption of regularity that attaches to the conduct of Mr. Lee and Judge Simmons in the prior proceedings. Given this, the circuit court clearly erred in finding that the record conclusively demonstrated that Mr. Lee disobeyed Judge Simmons's orders, notice was never published as required by South Carolina law, and Judge Simmons disregarded Mr. Lee's noncompliance.

[6] R. p. 709; Nov. 12 Order at 2 (emphasis added).

C. The Circuit Court Otherwise Erred In Addressing Publication And Its Impact On The Statute Of Repose

The circuit court also erred in making conclusive factual determinations against USF&G on an ad hoc motion brought on an incomplete record. The South Carolina Rules of Civil Procedure provide the proper framework for addressing the viability of a defense asserted by a defendant in its answer. The plaintiff may move at the outset of the case under Rule 12(f), SCRCP, to strike "any insufficient defense" as a matter of law. The plaintiff may also move under Rule 56(a), SCRCP, for partial summary judgment where "there is no genuine issue as to any material fact." Rule 56(c), SCRCP. Or, if factual disputes prevent pretrial resolution, the merits of a defense are determined on a full evidentiary record at trial. Here, by contrast, the circuit court conclusively resolved disputed factual matters against the non-movant in the novel context of a "motion to clarify," without regard to the status of discovery in any proceeding, the rules of evidence, or the rules of civil procedure. This impermissibly lax approach to procedural due process is exemplified by the Receiver's primary reliance, in arguing that "[t]here are no disputed facts that require development," on 20-year-old handwritten notes allegedly written by an employee of an unaffiliated insurer, the admissibility of which under the rules of evidence would be questionable at best. *See* Resp. Br. 23. This disregard for normal court procedures provides independent grounds for this Court to vacate the circuit court's order and clarify that the South Carolina Rules of Civil Procedure are not suspended merely because a receiver has been appointed for one of the parties.

Finally, the Receiver makes much of USF&G's statement that even assuming notice had not been published, no party with a currently viable claim against Covil could have been prejudiced, claiming that it "boils down to a bald request for the Court to rewrite section 33-14-107(c) to provide for a blanket statute of repose." (Resp. Br. 19). The Receiver's argument only

serves to further demonstrate that the circuit court should not have resolved questions of notice against USF&G on this motion.[7] The Receiver's extensive discussion of *Department of Social Services v. Winyah Nursing Home*, 282 S.C. 556, 320 S.E.2d 464, 468 (Ct. App. 1984), is particularly instructive. The Receiver attempts to distinguish *Winyah*, which construed a predecessor dissolution statute, by claiming that "[u]nlike the statute at issue here, which makes publication of notice optional," the statute in *Winyah* "mandated" such publication. (Resp. Br. 18). But, as discussed in detail above, the statute at issue here also makes publication of notice mandatory where, as here, the corporation is judicially rather than voluntarily dissolved. *See* S.C. Code § 33-14-330(b) ("After entering the decree of dissolution, the court shall direct … the notification of claimants in accordance with Sections 33-14-106 and 33-14-107."). Therefore, assuming no notice was published, *Winyah* is on all fours with this appeal, and the questions *Winyah* presents regarding whether any specific creditors were actually prejudiced by noncompliance should be considered—in the concrete context of an actual claim brought by a creditor claiming such prejudice rather than the abstract context of the Receiver's motion—before the impact of potential non-publication on the running of the statute is adjudicated.

[7] The Receiver is incorrect that USF&G failed to preserve this point. In response to the Receiver's citation below, in his Motion to Clarify Status of Receivership, to *S.C. Dep't of Social Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (S.C. Ct. App. 1984), USF&G's opposition to that brief pointed out the rule in *Winyah* that "a defect in the dissolution procedure 'continues the corporation with respect to creditors *whose rights are prejudiced by the noncompliance*.'" *See* R. p. 724; USF&G's Opposition to Motion to Clarify at 11 n.4 (quoting *Winyah* at 562) (emphasis added in brief below); *see also* R. p. 724; USF&G's Opposition to Motion to Clarify at 11 n.4 (citing *Licht v. Ass'n Servs., Inc.*, 463 N.W.2d 566, 570 (Neb. 1990) for the holding that the "clear implication" of *Winyah* is that a technically defective "dissolution would be valid as against" "unprejudiced creditors"). USF&G's opposition brief below went on to observe that "[e]ven if the Receiver were permitted to assert the rights of asbestos plaintiffs or otherwise seek to maximize Covil's liabilities, asbestos plaintiffs seeking to pursue claims against Covil in 2019 were also in no way prejudiced by the Clerk of Court's supposed failure to deliver the dissolution order to the Secretary of State in 1992." (R. p. 724; USF&G's Opposition to Motion to Clarify at 11 n.4). This is precisely the argument USF&G made in its initial brief in this appeal.

III. THE STATUTE OF REPOSE FORECLOSES CLAIMS AGAINST COVIL

The Receiver does not dispute that the current version of Section 107, as amended in 2004, expressly forecloses contingent or future claims, arguing instead that this version of the statute does not apply to Covil because Covil dissolved in 1992 and applying the 2004 statute to Covil would be improperly "retroactive." (Resp. Br. 28). However, as USF&G explained in its initial brief, Section 107 is properly applied *prospectively* by running the repose period for corporate dissolutions that predate the 2004 amendment from the date of that enactment, under the well-established rule set forth in *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596 (1873) and its progeny. (App. Br. 23-28). The *Sohn* rule strikes a balance that avoids both unfair retroactive effect and arbitrarily disparate treatment of claims, and the Receiver fails either to undermine the *Sohn* rule or to make a persuasive case for the application of a different rule in this context.

The Receiver begins by discussing the uncontroversial principle that retroactive application of statutes is generally disfavored. (Resp. Br. 28-29). This, of course, is wholly consistent with the *Sohn* rule and the reasons it was adopted. *See Sohn*, 84 U.S. at 599-600 (explaining that the legislature should not be presumed to intend for a newly enacted limitations period to immediately extinguish previously-timely claims). From there, however, the Receiver contends that the *Sohn* rule is itself a form of retroactive application that is only permissible if applied to statutes of limitations, which are "procedural," as opposed to statutes of repose, which are "substantive." (Resp. Br. 28-29). That is not the case. As the Fourth Circuit has explained, the *Sohn* rule *does not* "amount[] to giving [a new time bar] a retroactive effect . . . because [t]he 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." *The Fred Smartley, Jr.*, 108 F.2d 603, 608 (4th Cir. 1940).[8]

Nor does the procedural/substantive distinction bear the weight the Receiver ascribes to it in this context. "Legislative intent governs whether a statute of limitations will have prospective or retrospective application," *S.C. Nat. Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989), and "there is nothing talismanic about identifying a rule as procedural if its application results in genuinely retroactive effects." *Brown v. Angelone*, 150 F.3d 370, 373 (4th Cir. 1998) (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 275 n.29 (1994)). Thus, "[w]hen application of a new limitation period would wholly eliminate claims for substantive rights or remedial actions considered timely under the old law, the application is impermissibly retroactive." *Id.* (internal quotations and citations omitted). Indeed, if the Receiver's argument were correct, there would be no need to apply the *Sohn* rule to statutes of limitations, since, as mere procedural rules, their application to matters arising before their enactment would not raise concerns about retroactivity in the first instance. *See Landgraf*, 511 U.S. at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment *without raising concerns about retroactivity*.") (emphasis added); *Sarfati v. Wood Holly Assocs.*, 874 F.2d 1523, 1528 (11th Cir. 1989) (citing *Sohn* for the proposition that "a limitations statute which substantively limits the

[8] The Receiver's contrary contention appears to arise from the *Sohn* Court's observation that a "literal interpretation" of the statute at issue in that case could have the (retroactive) effect of immediately barring an action that accrued more than two years before its enactment. 84 U.S. at 598. But there is nothing in the text of the current version of Section 107 to indicate that it would not apply to dissolutions predating the 2004 amendments. Like the statute in *Sohn*, a literal application of Section 107 to dissolutions occurring more than ten years before the 2004 amendment would have the effect of immediately barring contingent claims upon that 2004 enactment. Thus, *Sohn* crafted a rule to address the potential unfairness arising from precisely the sort of enactment at issue here.

right will not be applied retroactively to cover causes of action already in existence at the time of enactment absent a clear legislative intent").

Because of this, the *Sohn* rule applies irrespective of whether a time bar is considered a statute of limitations or a statute of repose. *See* App. Br. 26 (discussing *Unruh v. Cacciotti*, 172 Wash. 2d 98, 257 P.3d 631 (Wash. 2011) (applying *Sohn* to a statute of repose) and *Fust v. Arnar-Stone Laboratories, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984) (applying *Sohn* to statute that imposed an "absolute bar" on claims after three years)); *see also* App. Br. 27 (discussing *Quintana v. Los Alamos Medical Center, Inc.*, 889 P.2d 1234 (N.M. Ct. App. 1994) (applying corporate dissolution time bar to corporation that dissolved before time bar was enacted)). Treating limitations and repose periods similarly for these purposes furthers legislative intent because repose periods, which provide an absolute bar to liability after a defined time period, are typically *more* protective of defendants than limitations periods, which can be tolled. A newly-enacted statute of limitations running from discovery of a claim could bar claims just as easily as a new statute of repose barring claims a certain number of years after the last act of the defendant, and it is illogical to presume that by enacting a more protective repose period, as opposed to a less-protective limitations period, the legislature intended to leave defendants facing *staler* liabilities entirely unprotected. *See, e.g.*, *Quintana*, 889 P.2d at 1236 (reasoning that "the legislature would have intended the same time limitation to apply to" corporations that "dissolved prior to the 1975 Act as those dissolved subsequently," and that "the reasons for repose would be stronger for pre-1975 dissolutions"); *Sohn*, 84 U.S. at 599 (rejecting an approach that would apply a time bar only to claims arising after its enactment as inconsistent with legislative intent, as it would "leave[] all actions existing at the passage of the act, without any limitation at all").

Moreover, the Receiver expressly concedes that Section 107 "is different" from other statutes of repose, in that it is "conditional" rather than operating as an "absolute bar" on liability. (Resp. Br. 30). This completely undercuts the Receiver's argument that *Sohn* cannot apply here because of an ill-founded and formalistic substance/procedure distinction between statutes of repose and statutes of limitations. The "substantive" nature of statutes of repose is linked to the fact that they impose an "absolute bar" on claims. *See, e.g.*, *Heaton v. Stirling*, No. CV 2:19-0540-RMG, 2020 WL 728604, at *3 (D.S.C. Feb. 13, 2020) ("Unlike a statute of limitations, the statute of repose cannot be equitably tolled because it 'creates a substantive right' and 'an absolute limit beyond which liability no longer exists…'") (quoting *United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989)). Thus, to the extent a substance/procedure distinction controlled here, the Receiver fails to demonstrate that Section 107 would be characterized as substantive. Indeed, as USF&G noted in its initial brief (App. Br. 24 n.30), authorities that have considered the issue have concluded that statutes that specify the time period in which claims may be brought against dissolved corporations "alter[ ] no substantive right" but "only alter[ ] the procedure by which substantive rights may be judicially enforced," and are therefore considered "remedial measures" that can be applied "retroactive[ly]." *United States v. Vill. Corp.*, 298 F.2d 816, 819–20 (4th Cir. 1962). *See also* 16A FLETCHER CYC. CORP. § 8142 ("[S]tatutes that provide to some degree for the survival of remedies or claims for a limited period of time after dissolution of the corporation . . . are remedial in nature."); 9 CYC. OF FED. PROC. § 27:20 (3d ed.) (same).[9]

[9] None of the authorities the Receiver cites support the proposition that Section 107 or similar statutes are "substantive" or operate solely prospectively, much less that the *Sohn* rule cannot be applied to such statutes. Most do not discuss retroactivity at all, but instead address the substantive nature of statutes of repose in inapposite contexts. *See Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993) (tolling does not apply to statutes of repose); *First United Methodist Church v. U.S.*

The Receiver's final argument is that applying the *Sohn* rule to Section 107 would be unfair to claimants against Covil, because the repose period in Section 107 is dependent on notice in order to "fairly put claimants on notice of the steps they must take to protect their rights." (Resp. Br. 30). According to the Receiver, if the *Sohn* rule applied, such claimants would only receive constructive notice and would not be able to adequately protect their rights. *See id.* ("USF&G's approach would deem persons whose claims were nonexistent or contingent in 1991 to have received notice in 1991"). As a matter of standing, such arguments should be made *by such claimants*, not by Covil's Receiver. But in any event, the statute expressly contemplates that creditors with contingent future claims as of the date of dissolution will *never* receive anything more than constructive notice. For instance, had Covil dissolved in 2004 and published the requisite notice at that time, there would be no dispute that contingent tort claims against Covil would be barred as of 2014, ten years later. A claimant who first discovered his or her claim against Covil after 2014 would have no right to recover, even though such a claimant would not have received actual notice and could not have protected his or her right to recover against Covil before that time. Any hardship imposed on such claimants simply reflects the Legislature's balancing of competing interests in recovery and repose. *See Langley*, 313 S.C. at 404, 438 S.E.2d

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Gypsum Co., 882 F.2d 862 (4th Cir. 1989) (same); *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 678 S.E.2d 809 (2009) (addressing whether a statute of repose for medical malpractice claims applied to claims asserting government liability under the Tort Claims Act); Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. BALT. L. REV. 119 (2014) (discussing preemption). The only cases the Receiver cites specifically for the proposition that a statute of repose is treated differently from a statute of limitations in the retroactivity context are *Bielski v. Alfred Saliba Corp.*, 984 F. Supp. 2d 1170, 1174 (M.D. Ala. 2013) and *Hamilton v. Myerow*, No. 303223CWT, 2009 WL 885957, at *5 (Mass. Land Ct. Apr. 1, 2009). *Bielski* is an Alabama federal district court case applying a statute of repose for construction claims "prospectively" to claims that accrue after its enactment without addressing the *Sohn* rule, and *Hamilton*, a Massachusetts land court case, held that a particular statute of limitations *did* apply retroactively, but did not address what would constitute "retroactive" or "prospective" application of a statute of repose. Neither case supports the Receiver's position.

at 244 ("Statutes of repose are based upon considerations of the economic best interests of the public as a whole . . . Society benefits when claims and causes are laid to rest after having been viable for reasonable time. When causes of action are extinguished after such time, society generally may continue 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.") (citation omitted). The Receiver's notice argument thus presents no basis not to apply Section 107 to claims against Covil.

Moreover, as USF&G argued in its initial brief, the version of Section 107 in effect at the time of Covil's dissolution also bars contingent and future claims against Covil, as evidenced by the inclusion in Section 106(d) (concerning known claims) of an express carve-out for contingent liabilities, indicating that Section 107—which lacked such a carve-out—encompassed contingent claims. (App. Br. 28). The Receiver argues that Section 106(d) "says nothing" about Section 107. (Resp. Br. 28). However, the Court is obligated to construe prior Section 107 in the context of the entire statute, including Section 106(d). *See Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004) ("Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction."). Additionally, as discussed in USF&G's initial brief, the history of the statutory scheme supports a construction of the prior statute that would not have permitted corporate post-dissolution liability to continue indefinitely by containing no bar against future and contingent claims. *Id.* ("Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law."). The Receiver's interpretation of the prior version of Section 107 should be rejected because it elevates a Reporter's comment

above a construction that harmonizes parallel provisions and honors the overarching purpose of the statute.

CONCLUSION

The circuit court's September 25, 2020 order granting the Receiver's Motion to Clarify should be reversed.

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, SC 29201
(803) 454-6504

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

October 4, 2021

CERTIFICATE OF COMPLIANCE

The undersigned hereby certify that this Final Reply Brief complies with Rule 211(b), SCACR.

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
todd.carroll@wbd-us.com
S.C. Bar No. 74000
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

October 4, 2021

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): Reply Brief of Appellant

Parties Served:

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanon@smithrobinsonlaw.com)

Counsel for the Respondent Receiver for Covil Corporation

By: /s/ M. Todd Carroll

October 4, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2019-CP-40-02285

Appellate 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; Zurich American Insurance Company, Defendants,

of which

United States Fidelity and Guaranty Company is the Appellant.

MOTION TO DISMISS

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Respondent Peter D. Protopapas, as Receiver for Covil Corporation (collectively, "the Receiver"), by and through the undersigned counsel, respectfully request the Court dismiss the Notice of Appeal filed by United States Fidelity and Guaranty Company ("USF&G") on October 26, 2020, because the underlying cases have now settled, and there is no longer a justiciable controversy for this Court to hear.

Background

A. This Appeal Seeks Review of Affirmative Defenses Raised in Now Settled Asbestos Cases

In 2020, asbestos personal injury plaintiffs sued USF&G in a series of actions, alleging that

USF&G acted as alter ego of Covil. In its answers to those actions, including *Hutto v. Covil Corp., et al.*, C/A No. 2019-CP-40-06956 ("Hutto"), USF&G asserted affirmative defenses related to Covil's corporate status, including the following:

> 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. Plaintiffs' claims against USF&G are necessarily barred also because Plaintiffs' claims against USF&G are derivative of underlying asbestos claims against Covil.

See Appellant's Initial Brief at 9.

In a Motion to Clarify the Status of the Receivership, the Receiver for Covil sought clarification of the impact, if any, of Covil's prior receivership and dissolution on the cases pending before the court, specifically whether asbestos plaintiffs were able to maintain personal injury claims against Covil in light of USF&G's affirmative defenses. *See* Sept. 25, 2020 Order, C.A. No. 2019-CP-40-02285.

On September 25, 2020, the circuit court (Chief Justice Jean Hoefer Toal, retired) granted the Receiver's Motion to Clarify and found, "Covil's prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil." (Order at 10). The September 25, 2020 Order, which clarified USF&G's ability to rely on a particular defense is the subject of the instant appeal.

B. During the Pendency of this Appeal, All Cases in which USF&G Asserted this Affirmative Defense Have Been Resolved

In addition to the *Hutto* matter, USF&G's opening brief in this appeal identified seventeen additional asbestos personal injury claims in which USF&G had been sued as the alter ego of Covil and had asserted the same affirmative defenses related to Covil's corporate status.[1]

[1] *James M. Bailey, et al. v. Aerco International, Inc., et al*., C/A No. 2020-CP-10-03949 (Ct. Com. Pl., Charleston Cty.); *Norma D. Bowlin, as Personal Representative of the Estate of Gary Jay Moss v. Covil Corp., et al*., C/A No. 2020-CP-40-02692 (Ct. Com. Pl., Richland Cty.); *Richard F. Carpenter, et al. v. Armstrong International, Inc., et al*.,

During the pendency of this appeal, Covil has resolved each of the 18 asbestos personal injury actions in which USF&G asserted the affirmative defense at issue. The claims against USF&G in those actions likewise have been dismissed. USF&G is not a party to any pending Covil asbestos case, and no action otherwise provides an opportunity for USF&G to assert the affirmative defense made the basis of this appeal.

Further, the issues in the action styled *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") also have been resolved: Covil's claims against its former defense lawyers have been settled and paid; Covil's alter ego claims against USF&G and Zurich have been settled and paid; and the asbestos claims in *Hill* and *Taylor* have been settled and paid.

In short, all of the actions in which USF&G asserted the affirmative defense at issue have been resolved. This appeal therefore should be dismissed as moot.

DISCUSSION

A threshold inquiry for any court is a finding of justiciability, specifically, whether the litigation presents a case or controversy. *See Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634,

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C/A No. 2020-CP-40-04475 (Ct. Com. Pl., Richland Cty.); *Robbie M. Efird, as Administrator of the Estate of Robin M. Efird, et al. v. Arconic, Inc., et al*., C/A No. 2020-CP-40-05869 (Ct. Com. Pl., Richland Cty.); *Joe Eldra Goodwin, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-04613 (Ct. Com. Pl., Richland Cty.); *Mildred F. Hagan, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-00265 (Ct. Com. Pl., Richland Cty.); *Stephen C. Horton, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-05526 (Ct. Com. Pl., Richland Cty.); *Tracy Jolly Pavlish, et al. v. Covil Corp., et al*., C/A No. 2019-CP-42-03968 (Ct. Com. Pl., Spartanburg Cty.); *Shea Jonas King, individually and as the Administrator CTA of the Estate of Ronnie J. Jonas v. Air & Liquid Systems Corp., et al*., C/A No. 2020-CP-40-01163 (Ct. Com. Pl., Richland Cty.); *Dianne McCullough, et al. v. 4520 Corp., Inc., et al*., C/A No. 2020-CP40-01952 (Ct. Com. Pl., Richland Cty.); *Edward R. Morgan, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-05731 (Ct. Com. Pl., Richland Cty.); *Nicholas Leon Murphy, et al. v. Covil Corp., et al*., C/A No. 2020-CP-40-01364 (Ct. Com. Pl., Richland Cty.); *Robert B. Picklesimer, et al. v. 4520 Corp., Inc., et al*., C/A No. 2020-CP-40-02868 (Ct. Com. Pl., Richland Cty.); *Joseph Franklin Rampey, Jr., as Personal Representative of the Estate of Joseph Franklin Rampey v. Covil Corp., et al*., C/A No. 2020-CP-40-00585 (Ct. Com. Pl., Richland Cty.); *Katherine R. Shields, Executrix of the Estate of James Joseph Reilly, et al. v. Covil Corp., et al*., C/A No. 2020-CP-40-00952 (Ct. Com. Pl., Richland Cty.); *Eunice H. Sims, Individually and as the Personal Representative of the Estate of Waymon F. Sims, Jr. v. 3M Co., et al*., C/A No. 2020-CP-40-05935 (Ct. Com. Pl., Richland Cty.); and *Jack E. Taylor v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-06134 (Ct. Com. Pl., Richland Cty.). *See* Appellant's Initial Brief at 12, fn. 22.

637 (Ct. App. 2002). "The court does not concern itself with moot or speculative questions." *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). "A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (S.C. 2006) (citing *Mathis v. South Carolina State Highway Dep't.*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (S.C. 1973)). The Court "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Mathis*, 260 S.C. at 346 (citing *Fabian's Uptown v. South Carolina Tax Commission*¸ 247 S.C. 164, 146 S.E.2d 608 (S.C. 1966)). "This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief." *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 603, 567 S.E.2d 514, 517 (Ct. App. 2002) (*quoting Byrd v. Irmo High School*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996)). The settlement or dismissal of a case is an event that makes it impossible for this Court to grant effectual relief. *See S.C. State Highway Dep't v. McKeown Food Store No. 9*, 254 S.C. 180, 183, 174 S.E.2d 342, 343 (1970) ("The settlement ended the litigation and rendered moot the issue which appellant now seeks to have the court decide."); *Cheap-O's Truck Stop, Inc.*, 350 S.C. at 603, 567 S.E.2d at 517 ("Because we find the present case was settled and the settlement is enforceable, the issue is moot.").

Any decision as to the potential impact of USF&G's past affirmative defense would have no practical legal effect because there is no longer any pending case wherein USF&G has asserted this affirmative defense. Further, none of the three exceptions to the mootness doctrine apply. *See Sloan v. Greenville Cty*., 380 S.C. at 535, 670 S.E.2d at 667.

First, the discrete issue regarding USF&G's affirmative defense is not "capable of

repetition but evading review." *See Curtis v. State*, 345 S.C. 557, 568, 549 S.E. 2d 591, 596 (2001). The Covil alter ego allegations against which USF&G raised its affirmative defenses were asserted in 18 asbestos personal injury cases in 2020, but those cases have been resolved. Since that time, no other asbestos personal injury claim has been filed against USF&G as alter ego of Covil. While those causes of action are capable of repetition, personal injury litigation is not a quickly dissipating activity that would evade review. *See generally Byrd*, 321 S.C. 426, 468 S.E.2d 861 (1996*)* (finding exception applied to a review of school suspension activity); *Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc*., 185 W.Va. 168, 406 S.E.2d 65 (1991) (finding exception applied to review of an appeal from a trial court's injunction).

Second, USF&G does not present "questions of imperative and manifest urgency." *See Curtis*, 345 S.C. at 568, 549 S.E.2d at 596. This case presents a narrow legal issue regarding the impact of a specific affirmative defense related to potential applicability and interpretation of a receivership statute that was last amended in 2004. That the issue has not been addressed in the intervening nineteen years demonstrates the lack of urgency for this Court.

Third, a decision by this Court will not "affect future events, or have collateral consequences for the parties." *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596. Because all the underlying actions in which USF&G sought to rely on the affirmative defense raised in this appeal have been resolved, a decision in this Court would have no collateral consequences to the parties.

Because no actual controversy remains and no exception to the mootness doctrine applies, this Court should dismiss this appeal to avoid giving an opinion on an abstract or theoretical matter.

CONCLUSION

The resolution of all eighteen underlying asbestos personal injury actions with claims directly against USF&G, as well as all issues raised in the *Protopapas v. Wall Templeton* matter,

has rendered USF&G's Notice of Appeal in the instant action moot. *See Sloan v. Greenville Cty*., 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) ("The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation.").

Respectfully submitted,

/s/ Jescelyn Spitz
Jescelyn Spitz (SC Bar 101880)
Rikard & Protopapas
2110 N. Beltline Blvd.
Columbia, South Carolina 29204
803.978.6111

ATTORNEYS FOR RESPONDENT

July 13, 2023.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2019-CP-40-02285

Appellate 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; Zurich American Insurance Company, Defendants,

of which

United States Fidelity and Guaranty Company is the Appellant.

PROOF OF SERVICE

I certify that a true copy of the Motion to Dismiss in this case has been served on the following, this 13th day of July, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (g)(3) of the South Carolina Supreme Court's March 20, 2020 Order, as amended May 29, 2020. Pursuant to subsection (g)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

Counsel Served: **E-Mail**

Matthew Todd Carroll – todd.carroll@wbd-us.com
M. Elizabeth O'Neill – elizabeth.oneill@wbd-us.com

Womble Bond Dickinson (US) LLP
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

Mary Beth Forshaw – mforshaw@stblaw.com
Andy T. Frankel – afrankel@stblaw.com
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

Attorneys for Appellant United States Fidelity and Guaranty Company

Respectfully submitted,

/s/ Jescelyn Spitz
Jescelyn Spitz (SC Bar 101880)
Rikard & Protopapas
2110 N. Beltline Blvd.
Columbia, South Carolina 29204
803.978.6111

ATTORNEYS FOR RESPONDENT

July 13, 2023.

From:	Danny Nieto
To:	Carroll, Todd; O"Neill, Elizabeth; mforshaw@stblaw.com; afrankel@stblaw.com
Cc:	Jescelyn Spitz; Lindsay Valek; Jon Robinson; Shanon Peake; murrell@smithrobinsonlaw.com; Dot Faulkenberry
Subject:	Appellate Case No. 2020-001437 - Respondent"s Motion to Dismiss
Date:	Thursday, July 13, 2023 4:35:33 PM
Attachments:	image001.png image002.png image003.png image004.png 2023.07.13 Covil - USFG Appeal - Motion to Dismiss as Moot.pdf 2023.07.13 POS for Covil - USFG Appeal - Motion to Dismiss as Moot.pdf

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Dear counsel,

Attached for service upon you please find Respondent's Motion to Dismiss in the above reference matter, which we are filing with the Court of Appeals today.

Daniela (Danny) Nieto
Paralegal

RIKARD+ PROTOPAPAS

Phone: 803.978.6111
Fax: 803.978.6112
danny@rplegalgroup.com
rplegalgroup.com

2110 N. Beltline Blvd.
Columbia, SC 29204

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,

Of Which:

United States Fidelity and Guaranty Company is the..... Appellant,

And

Peter D. Protopapas, in his capacity as Receiver of Covil Corporation, is the..... Respondent.

RETURN IN OPPOSITION TO MOTION TO DISMISS APPEAL

The Receiver's latest attempt to dodge this appeal is puzzling. Briefing closed and the appeal was perfected in October 2021. After nearly two years, the Receiver now asks the Court to dismiss this appeal on grounds of alleged mootness. Because the issue on appeal remains very much alive and in dispute, the Court should reject this transparent attempt to avoid appellate review, allow this appeal to proceed, and hold that the Covil Corporation is immune from suit due to the expiration of the statute of repose for dissolved South Carolina corporations.

BACKGROUND

Covil was a South Carolina-based insulator that was involved in the distribution or installation of insulation materials, some of which contained asbestos. In 1991, it ceased all operations, and one of its creditors sought judicial appointment of a receiver to marshal Covil's assets. *First Savings Bank, F.S.B. v. Covil Corp.*, Case No. 91-CP-23-4445 (Ct. Com. Pl. Greenville Cty.). The circuit court agreed and appointed L. Winston Lee to serve as Covil's receiver. (R. p. 651.) It then expanded Mr. Lee's authority to serve as "a general receiver for Covil Corporation" and granted his request for Covil to "be judicially dissolved." (R. pp. 700–01.)

As part of the order vesting Mr. Lee with authority as Covil's general receiver, the circuit court instructed him to publish notice of Covil's dissolution consistent with South Carolina Code § 33-14-107. (R. p. 704.) The dissolution statute triggers a repose period after which all claims against Covil are barred, making it a key part of any receiver's responsibility to preserve the dissolved company's assets and minimize its liabilities. And six months after instructing Mr. Lee to publish notice of Covil's dissolution, the circuit court issued an order stating that Mr. Lee "has fully complied with the previous Orders of this Court in liquidating [Covil's] assets." (R. p. 701.) It then approved Mr. Lee's decision to "abandon[]" all of Covil's "remaining assets," finalized the judicial dissolution, and discharged Mr. Lee as Covil's receiver. (R. p. 738.)

The expiration of the statutory response period following Covil's judicial dissolution in 1992 should have been sufficient to protect it from future claims, including from asbestos plaintiffs. Yet, instead of protecting Covil from claims, the current Receiver—appointed in 2018 at the request of an asbestos plaintiff, the day after that plaintiff requested the appointment, and without a hearing—filed a motion with the circuit court seeking "clarification" regarding "the impact of Covil's prior receivership" with respect to the statute of repose. Rather than ***protect*** the

interests of Covil, the new receiver sought (and obtained) a ruling that Covil should be subject to ongoing lawsuits without the protections afforded it as a result of its prior dissolution. (R. p. 430.)

In the order on appeal, the circuit court held that South Carolina's statute of repose against dissolved companies does not block claims against Covil here. It determined that "no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil," "Covil's prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil," and "pending and future asbestos claims" against Covil "remain viable" despite the statute of repose. (R. pp. 10, 13–14.)

Covil has remained a defendant in underlying asbestos suits continuously since that ruling, and it remains subject to suits to this day. USF&G has, and continues, to fund Covil's defense to these suits notwithstanding settlement of certain litigation between USF&G and the new Receiver. The circuit court's finding that Covil should not be afforded the protections of a dissolved corporation constituted legal error and should be corrected by this Court, and the Receiver's attempt to dodge appellate scrutiny should be denied.

ARGUMENT

I. The underlying litigation remains ongoing.

In his motion, the Receiver argues "the issues in the action styled *Peter D. Protopapas as Receiver for Covil Corp. v. Wall, Templeton & Haldrup, P.A.*, C/A No. 2019-CP-40-02285 also have been resolved," making this appeal moot. (Mot. at 3.) But this is not true.

The last filing in this case at the circuit court—filed in October 2021—was an order granting a partial motion to dismiss some of the claims between the Receiver and USF&G. The Receiver refused to dismiss this action in its entirety and insisted that remaining claims go forward.

The order granting partial dismissal is attached as Exhibit A, and it could not be clearer about the ongoing dispute between the parties:

> It is hereby ordered that the Parties' Joint Motion to Dismiss With Prejudice is granted, and all claims and allegations between Covil and USF&G in the above-captioned action are dismissed ***to the extent such claims or allegations relate to Finch v. BASF Catalysts, LLC, et al., C.A. No. 1:16-cv-01077 (M.D.N.C.), and Finch v. Sentry Casualty Company et al., C.A. No. 2019-CP-40-03003 (S.C. Com. Pl.).*** This dismissal is with prejudice, and each party shall bear its own attorney's fees and costs. ***All other claims and allegations between Covil and USF&G are not impacted by this order and remain pending.***

(Ex. A, Order Granting Joint Motion to Dismiss with Prejudice, at 1 (Oct. 19, 2021) (emphasis added).)

Because Covil's amenability to suit remains a central issue relevant to the ongoing dispute between the parties, the Receiver's mootness argument is simply incorrect. His motion should be denied accordingly.

II. The underlying issue remains ongoing.

The issue on appeal before the Court is whether Covil is immune from suit going forward due to the expiration of the statute of repose for dissolved South Carolina corporations. Instead of protecting Covil from liability, the Receiver has staked out a position that Covil is able to be sued—a position that keeps Covil's insurance carriers (including USF&G) on the hook to endlessly defend Covil against asbestos claims. The order on appeal strikes the statute of repose as a defense for Covil against "pending and future asbestos claims." (R. p. 10.)

Because the circuit court's order on its face applies to all future asbestos claims against Covil—and there have been at least seven new asbestos cases filed in 2023 alone naming Covil as

a defendant[1]—the propriety of that ruling is obviously not moot. Without this Court's assessment of the interplay between the prior receivership and the statute of repose, Covil will continue to be a serial defendant in asbestos litigation despite its prior dissolution.

To dodge this straightforward point, the Receiver styles the statute of repose as an affirmative defense for USF&G. (*E.g.*, Mot. at 4–5.) But it is not so limited. It is an affirmative defense that USF&G is asserting in its capacity as one of Covil's historic insurance carriers. To summarize USF&G's appellate argument:

Covil was dissolved by court order in 1992. That order held that the court-appointed receiver had complied with all of the court's prior instructions regarding winding up Covil's affairs, including publishing notice of Covil's dissolution. By South Carolina law, the prior receiver triggered a repose period that has unquestionably expired, thereby blocking all future claims against Covil.

If this Court agrees with USF&G's position, then pursuant to South Carolina Code § 33-14-107, Covil is done with litigation, period. It can no longer be sued, it no longer has any potential exposure to liability, and the parties and the circuit court can close the books on this second receivership.

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[1] *E.g.*, *Sawyer v. 3M Co.*, Case No. 2023-CP-38-00132 (filed Jan. 26, 2023); *Flynn v. Standard Insulation Co. of N.C.*, Case No. 2023-CP-40-00633 (filed Feb. 6, 2023); *McLeod v. Air & Liquid Sys. Corp.*, Case No. 2023-CP-40-01652 (filed Mar. 29, 2023); *Tibbs v. 3M Co.*, Case No. 2023-CP-40-01759 (filed Apr. 5, 2023); *Berley v. AECOM Energy & Constr. Inc.*, Case No. 2023-CP-40-02840 (filed May 31, 2023); *Donaghy v. 4520 Corp.*, Case No. 2023-CP-40-03108 (filed June 14, 2023); *Reich v. Air & Liquid Sys. Corp.*, Case No. 2023-CP-40-03243 (June 22, 2023). Including these matters, USF&G's records indicate that there have been 96 new cases filed against Covil since the new Receiver was appointed, 22 of which remain open with the claims against Covil unresolved. The issues presented on appeal are clearly not moot.

If this Court disagrees with USF&G's position, then Covil will continue to be a defendant in asbestos cases unless and until the Receiver re-publishes notice of Covil's dissolution and the repose period re-expires.

But if this Court does nothing and dismisses this appeal as "moot" despite USF&G's direct ongoing interest in the outcome of this appeal, then plaintiffs, USF&G, and Covil will continue to litigate the viability of the statute of repose from the prior receivership as a defense to asbestos claims against Covil, and they will no doubt end up right back in front of this Court making the very same arguments that have been fully briefed and ready for oral argument with this Court since October 4, 2021. In the meantime, USF&G will continue to be required to pay fees to defend Covil against claims that should be barred as a matter of law.

Because the issue on appeal continues to be contested and continues to impact not only the instant litigation but also scores of other "pending and future asbestos claims" (R. p. 10), the Receiver's mootness argument is plainly wrong. This matter is active and needs resolution by the state's appellate courts.

CONCLUSION

The Court should deny the Receiver's motion, allow this appeal to proceed, and hold that the 1992 judicial dissolution of Covil triggered a now-expired repose period that blocks all claims against Covil.

Signature Page Attached

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, SC 29201
(803) 454-6504

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

July 24, 2023

EXHIBIT A

Order Granting Joint Motion to Dismiss with Prejudice (Oct. 19, 2021)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas, Plaintiff, Vs. Wall Templeton & Haldrup, P.A., et al., Defendants.	Case Number 2019-CP-40-02285 **ORDER GRANTING JOINT MOTION TO DISMISS WITH PREJUDICE**

Before the Court is the Joint Motion to Dismiss With Prejudice submitted by Covil Corporation ("Covil") and United States Fidelity and Guaranty Company ("USF&G").[1] Upon consideration thereof and for good cause shown,

IT IS HEREBY ORDERED that the Parties' Joint Motion to Dismiss With Prejudice is **GRANTED**, and all claims and allegations between Covil and USF&G in the above-captioned action are dismissed to the extent such claims or allegations relate to *Finch v. BASF Catalysts LLC, et al.*, C.A. No. 1:16- cv-01077 (M.D.N.C), and *Finch v. Sentry Casualty Company et al.*, C.A. No. 2019-CP-40-03003 (S.C. Com. Pl.).[2] This dismissal is with prejudice, and each party shall bear its own attorney's fees and costs. All other claims and allegations between Covil and USF&G are not impacted by this order and remain pending.

IT IS SO ORDERED.

[1] The Court also notes that Receiver previously settled with (1) Zurich American Insurance *(Finch v. Sentry Casualty Company et al.*, C.A. No. 2019-CP-40-03003 (S.C. Com. Pl.)) and (2) Wall Templeton & Haldrup, P.A., et al. (in this civil action). *See* Orders Granting Joint Motion to Dismiss with Prejudice dated March 2,2021

[2] USF&G has appealed an Order to Clarify which is pending before the Court of Appeals (App. Case No. 2020-001437). USFG's and Receiver's Joint Motion to Dismiss certain claims involves matters not affected by the appeal. The parties have also effectuated dismissals of Finch related claims in the companion cases *Finch v. BASF Catalysts LLC, et al.*, C.A. No. 1:16- cv-01077 (M.D.N.C.) (Joint Stipulation of Dismissal, ECF No. 450) and *Finch v. Sentry Casualty Company et al.*, C.A. No. 2019-CP-40-03003 (S.C. Com. Pl.) (Order Granting Joint Motion to Dismiss with Prejudice for Finch related claims filed simultaneously herewith).

Richland Common Pleas

Case Caption: Peter D Protopapas , plaintiff, et al vs Wall Templeton & Haldrup Pa , defendant, et al

Case Number: 2019CP4002285

Type: Order/Dismissal

So Ordered

Jean H. Toal

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): Return in Opposition to Motion to Dismiss Appeal

Parties Served:

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanon@smithrobinsonlaw.com)

Counsel for the Respondent Receiver for Covil Corporation

By: /s/ M. Todd Carroll

July 24, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2019-CP-40-02285

Appellate 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; Zurich American Insurance Company, Defendants,

of which

United States Fidelity and Guaranty Company is the Appellant.

REPLY IN SUPPORT OF RECEIVER'S MOTION TO DISMISS

This appeal is moot. There is currently no relevant case in which third-party claims, crossclaims, or direct claims are pending against USF&G. All such claims have been dismissed. As a result, there is no case—including the case on appeal—in which USF&G is raising or could raise the affirmative defense that is the subject of this appeal. The appeal should be dismissed.

In response, USF&G asserts that "the issue on appeal remains very much alive and in dispute" (Return at 1) but is careful not to indicate ***in which case*** that is allegedly so. That is because the issue in this case is not alive and is not in dispute. All the parties have settled. And there is currently ***no case*** where USF&G has raised or could raise the affirmative defense at issue here. Accordingly, USF&G's jurisdictional arguments are meritless.

DISCUSSION

The Motion to Dismiss explained why the settlement of this case (and every case in which USF&G could raise the affirmative defense at issue in this appeal) has rendered this appeal moot. *See* Motion at 3-5. In response, USF&G does not meaningfully challenge the facts as laid out in the Motion and does not mention a single South Carolina case dealing with the mootness doctrine (let alone argue these facts qualify for any of the three exceptions to that doctrine). Thus, this Court should grant the motion and dismiss this appeal as moot.

As an initial matter, it is undisputed that this Court should not (and cannot) consider this appeal if it is moot. Motion at 3-4 (citing *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002); *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009)). A case is moot and should not be considered if "no actual controversy capable of specific relief exists," "when judgment, if rendered, will have no practical legal effect upon the existing controversy," or "when some event occurs making it impossible" to "grant effectual relief." *Sloan*, 380 S.C. at 535. Nor is there any dispute that settlement of a case moots the issues that previously would have been decided on appeal. Motion at 4 (citing *S.C. State Highway Dep't v. McKeown Food Store No. 9*, 254 S.C. 180, 183, 174 S.E.2d 342, 343 (1970); *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 603, 567 S.E.2d 514, 517 (Ct. App. 2002)).

USF&G does not cite or challenge the applicability of any of this mootness case law. Instead, it simply argues that, based on the circumstances here, this appeal is "obviously not moot." Return at 5.[1]

[1] USF&G also never mentions, let alone argues that it qualifies for, any of the three exceptions to the mootness doctrine the Motion discussed (at 5). That choice waives any argument that, if the appeal is moot, USF&G may qualify for an exception from the mootness doctrine. *See Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 657, 780 S.E.2d 263, 275 (Ct. App. 2015)

USF&G's response brief also does not dispute that the asbestos personal injury suits brought against it directly as Covil's alter ego (including *Hutto v. Covil Corp.*) in which USF&G asserted the affirmative defense relating to Covil's dissolution and corporate status, all have settled with all claims against USF&G being dismissed. *See* Motion at 2-3; *id.* at 2 n.1 (listing cases). Nor does USF&G dispute that it is not a party to any pending or active asbestos case in which it is asserting or could assert the affirmative defense at issue in this appeal. *Id.* at 3. So, resolving the issue on appeal will have no "practical effect on the existing controversy" because USF&G's affirmative defense no longer exists in the underlying case, and it would not "grant effectual relief" because USF&G is not currently in ***any case*** where it has raised or could raise this (incorrect) defense.

Not disputing the above, USF&G argues the appeal is not moot for two reasons. Both are meritless.

First, USF&G asserts that the issues in the underlying case—*Peter D. Protopapas as Receiver for Covil Corp. v. Wall, Templeton & Haldrup, P.A.*, C/A No. 2019-CP-40-02285—have not been resolved and cites an order dismissing with prejudice all claims between Covil and USF&G related to *Finch v. BASF Catalysts LLC* and *Finch v. Sentry Casualty Company* but not dismissing any "other claims" between the two. True enough, the October 19, 2021 dismissal order includes that language. What USF&G omits, however, is that since that Order, the case has fully resolved. As noted in the Motion (at 3) and not disputed by USF&G, Covil has now settled its malpractice claim against Covil's former lawyers—Wall, Templeton & Haldrup—and settled with Zurich and the underlying asbestos plaintiffs. Put simply, there are now no "other claims"

(explaining that argument is waiver, or not "preserved," when not made in opposition to motion). For the reasons the Motion explained, it cannot qualify for any of those exceptions.

between Covil and USF&G in the underlying litigation, and there is no "ongoing dispute between the parties." *Contra* Return at 4.

USF&G never says what ongoing issues there are between Covil and itself (or anyone else) in the underlying litigation. The reason is simple: there are none. The case is fully resolved (though not officially closed on the docket).[2] And importantly for purposes of mootness, there is no possible argument—USF&G certainly does not make one—that USF&G's affirmative defense has any relevance to the underlying case in which all parties have settled.

Second, USF&G notes generally that there have been other asbestos cases filed against Covil. Return at 4-5 & n.1. But even if Covil "will continue to be a serial defendant in asbestos litigation," *id.* at 5-6, that does not mean ***USF&G's*** affirmative defense for suits brought ***against USF&G*** is somehow ripe for review. Perhaps recognizing this, USF&G also predicts that in the future "plaintiffs, USF&G, and Covil will continue to litigate the viability of the statute of repose," *id.*, but it has pointed to no existing case where it is a defendant, third-party defendant, or crossclaim defendant for that litigation to take place.

Courts decide cases—not differences of opinion. A disputed issue in the abstract is not enough for justiciability. It must be present in an actual case or controversy between the parties—and USF&G conspicuously fails to identify a single case where that is true. Even if USF&G is right that, in the future, "the viability of the statute of repose" will be at issue and thus similar arguments will be brought to this Court in a future case, Return at 6, that is no reason for the Court to resolve that ***future case*** "when judgment, if rendered, will have no practical legal effect ***upon the existing controversy***." *Sloan*, 380 S.C. at 535 (emphasis added). To do so would require this

[2] The last docket activity was over two years ago on July 12, 2021 (the dismissal of Zurich from the case). The last docket activity from the asbestos personal injury plaintiffs was in May 2021, and they have now settled.

Court to issue a true advisory opinion on potential future events. And, as the Motion argued (at 5) and USF&G does not dispute, if the issue does come up in the future, there is no reason to think it will evade review. Parties may (or may not) settle future litigation as they have done here, but that is not a reason to decide an issue no longer relevant to this appeal.

Finally, USF&G contends that it will be required "to endlessly defend Covil against asbestos claims"—but this is exactly the thing that it specifically contracted to do as Covil's insurer. Return at 4. Attempting to avoid contractual duties is not a compelling reason for this Court to ignore the principle of mootness.

If, in a future case where USF&G is a defendant or has an adverse litigation position with Covil and seeks to raise its affirmative defense to Covil's corporate status, it may do so.[3] So long as that case does not become moot, USF&G may appeal any such decision. But it has presented no reason or argument overcoming mootness here.

CONCLUSION

"The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation." *Sloan v. Greenville County*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). The Court should grant the Motion and dismiss this appeal as moot.

(Signature page follows)

[3] USF&G also asserts (at 5) that its defense at issue on appeal "is not so limited" to just an affirmative defense, but "is an affirmative defense that USF&G is asserting in its capacity as one of Covil's historic insurance carriers." But USF&G cites no case law allowing it to raise an argument that Covil does not wish to raise, nor any reason USF&G can raise this affirmative defense if it is not party to a case. It presently is not—so the appeal is moot.

Respectfully submitted,

s/Shanon N. Peake
G. Murrell Smith, Jr. (S.C. Bar # 66263)
Jonathan M. Robinson (S.C. Bar # 68285)
Shanon N. Peake (S.C. Bar #102723)
Austin T. Reed (S.C. Bar #102808)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street
Columbia, South Carolina 29205
(803) 254-5445

ATTORNEYS FOR RESPONDENT

July 31, 2023.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case Nos. 2019-CP-40-06956 and 2019-CP-40-02285

_____

Appellate Case No. 2020-001437

_____

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

v.

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

AND

Sandra S. Hutto, individually and as Personal Representative of the Estate of Donald L. Hutto, Brian Hutto, and Candace H. Youngblood, Plaintiffs,

v.

Covil Corporation; Sentry Insurance A Mutual Company; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of South Carolina, Inc.; United States Fidelity & Guarantee Company; Zurich American Insurance Company; 3M Company; AECOM; Armstrong International, Inc.; Aurora Pump Company; BW/IP, Inc.; Carboline Company; CBS Corporation; CGR Products, Inc.; Daniel International Corporation; Fisher Controls International, L.L.C.; Fluor Constructors International, Inc.; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; The Goodyear Tire And Rubber Company; Grinnell, LLC; Hajoca Corporation; IMG Industries, Inc.; John Crane, Inc.; Metropolitan Life Insurance Company; Spirax Sarco, Inc.; Trane U.S., Inc.; Uniroyal Holding, Inc; Velan Valve Corporation; Viking Pump, Inc.; Weir Valves & Controls U.S.A., Inc., Defendants,

of which

United States Fidelity and Guaranty Company is the Appellant,

and

Covil Corporation, by and through its Receiver, Peter D. Protopapas and Peter D. Protopapas, in his capacity as Receiver of Covil Corporation are the Respondents.

PROOF OF SERVICE

I certify that a true copy of the Reply in Support of the Receiver's Motion to Dismiss in this case has been served on the following, this 31st day of July, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (g)(3) of the South Carolina Supreme Court's March 20, 2020 Order, as amended May 29, 2020. Pursuant to subsection (g)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

Counsel Served: **E-Mail**

Matthew Todd Carroll – todd.carroll@wbd-us.com
M. Elizabeth O'Neill – elizabeth.oneill@wbd-us.com
Womble Bond Dickinson (US) LLP
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

Mary Beth Forshaw – mforshaw@stblaw.com
Andrew T. Frankel – afrankel@stblaw.com
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
Admitted Pro Hac Vice

Attorneys for Appellant United States Fidelity and Guaranty Company

(Signature page follows)

s/ Shanon N. Peake
G. Murrell Smith, Jr. (S.C. Bar # 66263)
Jonathan M. Robinson (S.C. Bar # 68285)
Shanon N. Peake (S.C. Bar #102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, Third Floor
Columbia, South Carolina 29205
(803) 254-5445

Attorneys for Respondents

July 31, 2021.

From: Shanon Peake
To: todd.carroll@wbd-us.com; Elizabeth.ONeill@wbd-us.com; Forshaw, Mary Beth; Frankel, Andy T
Cc: Jon Robinson; Dot Faulkenberry; Lindsay Valek; Danny Nieto; Jescelyn Spitz
Subject: Appellate Case No. 2020-001437
Date: Monday, July 31, 2023 5:45:00 PM
Attachments: POS Reply, 2.pdf
REPLY ISO Motion to Dismiss, 2.pdf

Good Afternoon,

Please find attached for service the Receiver's reply in support of the motion to dismiss in the above-referenced appeal that we are filing in the Court of Appeals today.

Thank you,
Shanon

SMITH ROBINSON
Forward thinking. Results driven.
Smith Robinson Holler DuBose and Morgan, LLC
www.SmithRobinsonLaw.com

Shanon Peake
Attorney at Law

E: shanonp@smithrobinsonlaw.com
P: 803.254.5445
D: 803.704.1102
F: 803.254.5007

Columbia Office
2530 Devine Street
Columbia, SC 29205

The South Carolina Court of Appeals

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

v.

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

of which

United States Fidelity and Guaranty Company is the Appellant.

Appellate Case No. 2020-001437

ORDER

Within twenty (20) days of the date of this order, USF&G shall provide a response by way of Surreply to the following questions raised by the Receiver's Motion to Dismiss, USF&G's Return, and the Receiver's July 31, 2023 Reply:

1) Identify any pending case in which "the issue on appeal remains very much alive and in dispute";

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;

3) Clarify any exception to the mootness doctrine USF&G asserts may be applicable here;

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4) Identify any issue in the underlying case of *Peter D. Protopapas as Receiver for Covil Corp. v. Wall, Tenpleton & 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. (*See* USF&G's Return at pp. 3-4 and Exhibit A to the Return); and

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.

Stephanie P. McDonald

_____, J.

FOR THE COURT

Columbia, South Carolina

cc:
Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
Robert G. Rikard, Esquire
Jescelyn Tillman Spitz, Esquire
Ashley K. Brathwaite, Esquire
G. Murrell Smith, Jr., Esquire
Jonathan M. Robinson, Esquire
Shanon N. Peake, Esquire
Mark Weston Hardee, Esquire
Andrew T. Frankel, Esquire
Mary Beth Forshaw, Esquire

FILED
Aug 03 2023

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,

Of Which:

United States Fidelity and Guaranty Company is the..... Appellant,

And

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.[1]

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").

[1] 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 "untrammeled 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.[2]

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.[3]

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[2] 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").

[3] 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 arusing 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.[4]

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.

[4] 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,

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, SC 29201
(803) 454-6504

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

August 23, 2023

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

Parties Served:

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanon@smithrobinsonlaw.com)

Counsel for the Respondent Receiver for Covil Corporation

By: /s/ M. Todd Carroll

August 23, 2023

The South Carolina Court of Appeals

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

v.

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

of which

United States Fidelity and Guaranty Company is the Appellant.

Appellate Case No. 2020-001437

ORDER

The Receiver's Motion to Dismiss is denied; however, the parties should be prepared to address mootness—as well as the other appellate issues before the court—at oral argument. Argument limits have been extended to 15-15-5, and the panel will adjust as may be necessary to provide additional argument time should the parties need it.

FOR THE COURT

Columbia, South Carolina

cc:

FILED
Aug 28 2023

Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
Robert G. Rikard, Esquire
Jescelyn Tillman Spitz, Esquire
Ashley K. Brathwaite, Esquire
G. Murrell Smith, Jr., Esquire
Jonathan M. Robinson, Esquire
Shanon N. Peake, Esquire
Mark Weston Hardee, Esquire
Andrew T. Frankel, Esquire
Mary Beth Forshaw, Esquire

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Dec 06 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

Opinion No. 6037
Appellate 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..... Appellant.

PETITION FOR REHEARING AND REHEARING EN BANC

WOMBLE BOND DICKINSON (US) LLP

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, SC 29201
(803) 454-6504

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel
Pro Hac Vice
afrankel@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

December 6, 2023

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INTRODUCTION

More than thirty years ago, Covil Corporation ("Covil") 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 court's final order judicially dissolving Covil would have been invalid otherwise.

In affirming the decision below, the panel upheld a collateral attack on that final order by a new receiver who inexplicably sought and obtained a ruling by a different circuit judge that the statute of repose applicable to dissolved corporations was unavailable to Covil, effectively invalidating Covil's prior judicial dissolution decades after the fact. Respectfully, for the reasons discussed below, USF&G requests the Court rehear this case, including *en banc*, and vacate the circuit court's order. Rule 221(a), SCACR.

ARGUMENT

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

The panel should reconsider its decision because it finds standing for the Receiver where none exists. The panel accepts 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 panel 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.[1]

Because the Receiver lacked standing to seek a ruling from the circuit court that was designed to create, rather than limit, Covil's liability going forward, the panel's decision should be reconsidered accordingly and the circuit court's order vacated for this threshold reason.

II. The panel 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 panel acknowledged as much on Page 1 of its decision. (Op. at 1.) But this undisputed point has significant legal implications that the panel appears to have overlooked and which are dispositive here.

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,

[1] Additionally, it is unclear what the panel may be referring to 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.

id. § 33-14-330(b), a point of law the panel never acknowledged. 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).

Tellingly, 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 contrast, publication is mandatory when, as with Covil, the dissolution ordered by a court. *See id.* § 33-14-330(b) (stating "the court ***shall*** direct" publication of the dissolution for judicially-dissolved corporations) (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 panel's opinion fails to account for this 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 this 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 panel's failure to account for (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 reconsidered.

Publication Was Required by the 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 legal backdrop—and even assuming the circuit court and this Court had authority to invalidate another court's final orders through a collateral attack (which they do not)—the panel 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 reconsideration.

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 panel 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.) This was a fundamental error of law warranting the Court's reconsideration.

No Evidence Exists to Rebut Presumption. The panel (like the circuit court) incorrectly held that it was USF&G's burden to "satisfy the necessary predicate of publication" by Mr. Lee. (Op. at 12 n.6.) As the party challenging the prior judicial dissolution and the prior receiver's compliance with his legal duties, if anything the burden of proof was on the Receiver, not on USF&G. Regardless, 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).[2]

Here, in addition to improperly shifting the burden of proof to USF&G (the non-moving party), the only "evidence" cited by the panel 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 panel); (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.

[2] Footnote 6 on Page 12 of the panel's 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 panel 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 panel's 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, 341 S.E.2d 137, 139 (1986) (reversing and remanding because "the lower court improperly shifted the burden of proof").

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 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.[3]

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

[3] 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.)

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 panel 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 panel does not address 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 panel 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 panel 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 American Insurance Company, 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-one 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 panel opinion cites to 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 panel's 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 panel's 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 panel decision should be reconsidered and vacated, and the Court should make clear that the statute of repose under South Carolina Code § 33-14-107 bars all pending and future claims against Covil.[4]

III. The panel's repeated reliance on a void, non-final circuit court order was improper.

Just as the panel's ruling on the merits improperly relied on the absence of evidence to overcome a legal presumption, so too did the panel 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.[5]

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[4] The panel declined to address the Receiver's retroactivity arguments and how the statute of repose would resolve current and future claims against Covil under a prior version of the statute, but there is no legitimately retroactivity issue presented here. Even if there were, either version of Section 33-14-107 would bar all claims against Covil for the reasons discussed in USF&G's appellate briefs.

[5] (*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 panel 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

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 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 three-and-a-half years later. USF&G has made its intent to appeal this extraordinary order clear by filing a precautionary notice of appeal with this Court on February 7, 2020, and a precautionary petition with the Supreme 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.[6] Under these circumstances, rehearing is necessary to ensure that the panel's decision was not wrongly based on that non-final, void-on-its-face, factually

"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 panel's statement on this point.

[6] The Supreme 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 multi-year failure to rule on the Rule 59 motion continues to prevent USF&G from obtaining appellate review.

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 its petition for rehearing, vacate the panel's and circuit court's decisions, and issue an order finding that claims against Covil are barred based on the statute of repose for dissolved South Carolina corporations.

SUGGESTION OF REHEARING *EN BANC*

Pursuant to Rule 219, SCACR, USF&G requests that the Court rehear this matter *en banc*. Though the standards for *en banc* consideration are narrow, this case readily meets them, as the panel's decision affirms what appears to be the first time in South Carolina history where a court-appointed receiver has been authorized to create, rather than limit, liability for the company over which he has been appointed. This is a dangerous precedent that should not be endorsed, especially in light of the fact that the same circuit court judge has appointed the same receiver over two dozen companies now, always at the request of the same plaintiffs' attorneys.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
todd.carroll@wbd-us.com
S.C. Bar No. 74000
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

M. Elizabeth O'Neill
elizabeth.oneill@wbd-us.com
S.C. Bar No. 104013
One Wells Fargo Center, Suite 3500
301 South College Street
Charlotte, NC 28202-6037
(704) 350-6310

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel
Pro Hac Vice
afrankel@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

December 6, 2023

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 Rehearing and Suggestion for Rehearing *En Banc*

Parties Served:

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanon@smithrobinsonlaw.com)

Attorneys for the Respondent Receiver for Covil Corporation

/s/ M. Todd Carroll

December 6, 2023

The South Carolina Court of Appeals

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

v.

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

of which

United States Fidelity and Guaranty Company is the Appellant.

Appellate Case No. 2020-001437

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

A.J.

FILED
Mar 18 2024

Columbia, South Carolina

cc:
Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
Robert G. Rikard, Esquire
Jescelyn Tillman Spitz, Esquire
Ashley K. Brathwaite, Esquire
G. Murrell Smith, Jr., Esquire
Jonathan M. Robinson, Esquire
Shanon N. Peake, Esquire
Mark Weston Hardee, Esquire
Andrew T. Frankel, Esquire
Mary Beth Forshaw, Esquire
The Honorable Jean Hoefer Toal