THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Acting Circuit Court Judge

Appellate Case No. 2023-001461
Circuit Court Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs……Plaintiffs,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiw-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The

Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking ump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC……Defendants,

of which

Asbestos Corporation Limited is the…..…….....…….Appellant.

BRIEF OF *AMICI CURIAE*
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AND CERTAIN LONDON MARKET INSURANCE COMPANIES IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*

Certain Underwriters at Lloyd's, London and certain London market insurance companies ("Certain London Market Insurers" or "CLMI")[1] subscribing severally (not jointly) to certain excess liability insurance policies regarding Asbestos Corporation Limited ("ACL") are part of an insurance and reinsurance market located in the United Kingdom, which operates as a partially mutualized marketplace in which multiple financial backers pool and spread risk. The market dates to 1689 and operates today as the world's leading insurance and reinsurance marketplace. CLMI's ACL insurance policies do not allow CLMI to control the defense or settlement of any covered claim against ACL. Instead, they obligate CLMI to pay certain defense costs as well as certain judgments and settlements for covered claims.

As insurers of ACL, CLMI have experienced firsthand the tremendous, unanticipated costs and destabilizing effects of the trial court's imposition of a receivership on ACL: an active, solvent Canadian corporation. That appointment follows a well-established practice by the trial court, which is responsible for overseeing all asbestos litigation in South Carolina. The trial court has now appointed Peter Protopapas as receiver for *twenty-four* separate asbestos defendants over the past five years, the majority of which are non-South Carolina corporations and several of which, like ACL, are still active companies. *See* Travelers' Petition for Rehearing, pp. 17–18, *Childers v. Davis Mech. Contractors*, No. 2024-000005 (S.C. Apr. 11, 2024), *reh'g denied* (S.C. Apr. 17, 2024).

[1] Certain London market insurance companies as to which certain claims are administered by third-party claims administrator, Resolute Management Inc., consist of The Scottish Lion Insurance Company Ltd., Tenecom Ltd. (as successor to relevant liabilities of Winterthur Swiss Insurance Company), and Yasuda Fire and Marine Insurance Company (UK) Limited, now known as Tenecom Ltd.

Although—as demonstrated below—the appointment of Mr. Protopapas as Receiver for ACL is contrary to law, and although CLMI have argued as much to the trial court, both Mr. Protopapas and the trial court disagree, and Mr. Protopapas has sought and obtained a contempt order against CLMI for failing to comply with the trial court's receivership orders, including the one at issue here. But at the same time, ACL, through its duly appointed board and officers in Canada, has made demands upon CLMI directly at odds with Mr. Protopapas's directions. Thus, as a result of the trial court's appointment of Mr. Protopapas as ACL's Receiver, CLMI have been placed in the untenable position of deciding whether to follow the directives of ACL's board and officers—on pain of incurring potential civil liability to ACL if they do not—or the irreconcilable directions of ACL's Receiver—on pain of potential contempt sanctions for noncompliance. For example, after CLMI—in compliance with the Receiver's requests—recently extended funds to settle five asbestos cases pending against ACL, attorneys retained by ACL's board and officers in Canada accused CLMI of materially breaching their contractual obligations to ACL.

In two asbestos personal-injury cases in which CLMI are nonparties, the trial court has already sanctioned CLMI for allegedly failing to cooperate with the Receiver, imposing a staggering $50,000 daily penalty on CLMI and leaving it to the Receiver to decide when, if ever, CLMI have purged that contempt. *See* Order on Plaintiffs' and Receiver's Motion for Sanctions and Contempt, *Link v. 4520 Corp.*, No. 2022-CP-40-05543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Mar. 22, 2024) ("Sanctions Order"). CLMI's appeal of that order is now pending before this Court. *See Link v. 4520 Corp.*, No. 2024-000501. The trial court superseded the daily fine *nunc pro tunc* pending appellate review, but the penalty could be imposed anew if CLMI's appeal is unsuccessful. *See* Order of Supersedeas Staying Order

for Daily Monetary Sanctions, *Link v. 4520 Corp.*, No. 2022-CP-40-05543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Mar. 27, 2024) ("Supersedeas Order").

The trial court has also granted the Receiver's demand for onerous third-party discovery from CLMI in an order that requires CLMI to provide the Receiver with "detailed explanation[s]" of coverage, communications, and documentation dating back to 1982. Order on Discovery, pp. 3–4, *McDowell v. A.O. Smith Corp.*, No. 2023-CP-40-06157 (S.C. Ct. Common Pleas, 5th Cir. Mar. 22, 2024). In addition, the Receiver has filed a third-party complaint directly against CLMI and other ACL insurers in yet another asbestos personal-injury case, seeking a range of coverage-related declarations. *See Lewis v. Asbestos Corp.*, No. 2024-CP-40-00458 (S.C. Ct. Common Pleas, 5th Cir. Feb. 21, 2024). The costs to CLMI of complying with the trial court's orders, responding to the Receiver's motions and discovery demands, and defending against the Receiver's third-party complaint have been substantial. And those amounts have been compounded by the additional costs to CLMI of complying with the Receiver's requests to settle claims against ACL in amounts that may well exceed what CLMI would have been required to pay if ACL's board and officers were still controlling its defense.

This Court should not permit this *ultra vires* receivership activity to continue. The receivership that the trial court imposed on ACL displaced the board of a solvent foreign corporation—without authorization under South Carolina law and in clear contravention of the United States Constitution. Permitting that invalid order to stand would destabilize the relationship between insurers and insureds throughout South Carolina, increase the cost of obtaining insurance in the State, and deter insurers from issuing policies to companies potentially subject to suit in South Carolina—to the substantial detriment of South Carolina's residents, businesses, and

economy. The Court should vacate the Receivership Order and permit ACL's Canadian board and officers to resume their responsibilities under Canadian law for managing ACL's affairs.

STATEMENT OF THE CASE

ACL is a solvent corporation organized under the laws of Canada and actively managed by its board of directors and officers from its Québec headquarters. Affidavit of Richard Dufour ("Dufour Aff.") ¶ 2 (May 11, 2023). It has no assets or other property in South Carolina. *Id.* ¶¶ 7, 9. ACL has been named as a defendant in several South Carolina personal-injury cases, including this case, in which the plaintiffs are seeking recovery for asbestos-related injuries; all of those cases have been assigned to the trial-court judge whose order is at issue in this appeal.

ACL entered an appearance in this case to raise an objection to personal jurisdiction, which the trial court overruled. ACL subsequently filed an answer and responded to discovery requests to the extent it argued it could and remain compliant with confidentiality obligations under the Québec Business Concerns Records Act. *See generally* ACL's Memorandum in Opposition to Motion for Contempt, to Strike Answer and Appoint a Receiver (Aug. 9, 2023) ("ACL Contempt Opposition"). Plaintiffs nevertheless filed a motion to hold ACL in contempt and to strike its pleadings, arguing that ACL had failed to participate in discovery, and, shortly thereafter, filed a motion to appoint a receiver. The trial court granted Plaintiffs' motions. In an order entered on September 7, 2023, it found ACL in contempt and struck its pleadings. Order Holding Atlas Asbestos Company, Ltd. in Contempt (Sept. 7, 2023). And in the Receivership Order entered the same day, it found ACL in default and appointed Mr. Protopapas as Receiver for ACL as a sanction for ACL's supposed discovery violations. Order on Plaintiffs' Motion to Appoint a Receiver (Sept. 7, 2023) ("Receivership Order").

The Receivership Order grants the Receiver sweeping powers over ACL, including the powers (i) to "endorse and cash all checks and negotiable instruments payable to ACL relating to

insurance assets"; (ii) to "obtain from any financial institution, bank, credit union, savings and loan or title, credit bureau or any other third party, any financial records belonging to or pertaining to the insurance assets of ACL"; and (iii) to "assume control of the defense of asbestos claims made against ACL in the United States." Receivership Order, pp. 6–7.

The trial court subsequently reaffirmed the Receiver's powers in an order entered in two other asbestos personal-injury cases against ACL. In an order entered on February 23, 2024 (the "Mediation Order"), the trial court declared that "[t]he Receiver for . . . ACL shall be viewed as the named insured and the representative for . . . ACL in the defense of asbestos litigation matters and the management of any insurance or insurance-related assets." Order, p. 5, *Link v. 4520 Corp.*, No. 2022-CP-40-05543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Feb. 23, 2024). It further stated that "[t]he insurers for . . . ACL are expected to cooperate with the Receiver," including in discovery matters, and it directed the insurers to appear for mediation with "'full authority to settle the claim[s]'" against ACL. Mediation Order, pp. 5–6 (quoting SCRADR 6(b)(4)).

ACL's appeal in this case challenges the trial court's orders striking its pleadings and appointing a receiver.

ARGUMENT

The appointment of a receiver "is a drastic remedy" to be exercised with "reluctance and caution." *Midlands Util., Inc. v. S.C. Dep't of Health & Envt'l Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). The trial court failed to heed that admonition when it appointed a receiver for ACL, a solvent, active Canadian corporation, imposing what amounts to a corporate death penalty as a discovery sanction. Nothing in the South Carolina Code authorized the trial court to appoint a receiver to displace the duly appointed board and officers of a foreign corporation. The Receivership Order exceeds the trial court's authority under South Carolina law and violates the

United States Constitution, which reserves to the federal government the power to regulate commerce with foreign nations as well as the authority to oversee foreign affairs.

Vacatur is warranted not only to remedy these legal deficiencies and restore ACL's ability to control its own operations, but also to safeguard the stability of South Carolina's insurance market. Permitting the Receivership Order to stand—and endorsing the trial court's practice of serially appointing receivers to control litigation against out-of-state companies and companies with ongoing operations—would upset the settled expectations of insurers, increase the cost of obtaining insurance in South Carolina, and have a chilling effect on insurers' willingness to issue policies to companies that might find themselves subject to suit in South Carolina. Those pernicious outcomes would harm South Carolina's residents and business community and tarnish the State's reputation as a hospitable jurisdiction eager to attract out-of-state investments.

I. The Receivership Order Is Contrary to Law.

A. The Equitable Remedy of Receivership Is a Drastic and Temporary Remedy.

Receivership is not a cause of action but is a temporary and provisional remedy in equity in an already pending action, appropriate only where legal remedies are inadequate and there is clear and convincing proof that the specific property that is the subject of the pending action is in danger of being lost, dissipated, destroyed, or removed from the jurisdiction of the court. *See Vasiliades v. Vasiliades*, 231 S.C. 366, 376, 98 S.E.2d 810, 815 (1957) ("The appointment of a receiver *pendente lite* by the court was purely a provisional remedy—to preserve the assets of the estate."); *Ex parte Williams*, 17 S.C. 396, 403 (1882) ("'A receiver is an indifferent person between the parties to a cause, appointed by the Court to receive and preserve the property in litigation *pendente lite*.'"); *Porter v. Brown*, 149 S.C. 151, 161, 146 S.E. 810, 813 (1929) (where no separate action had been instituted against defendant, "the [Circuit] Court was without authority to appoint a receiver, and all proceedings connected therewith are *coram non judice*, and void"); *see also*

1 John Norton Pomeroy, Jr., *A Treatise on Equitable Remedies* § 62 at 106 (1905) ("By means of the appointment of a receiver, a court of Equity takes possession of the property which is the subject of the suit, preserves it from waste or destruction, secures and collects the proceeds or profits, and ultimately disposes of them according to the rights and priorities of those entitled.") (citation omitted); *id*. § 69, at 116 ("It is one of the fundamental principles on which receivers are granted that the applicant shall have no plain, adequate, and complete remedy at law.") (citation omitted).

"Receivership is a drastic course, allowed only under pressing circumstances and granted only with reluctance and caution." *Vasiliades*, 231 S.C. at 376, 98 S.E.2d at 815. This is so because "[p]roperty is not taken from a party in possession, claiming in good faith the right to it, before judgment in actions at law," and because receivership "is a serious interference, without the verdict of a jury and without a regular hearing, with the *prima facie* rights of the citizen, and should only be granted to prevent manifest wrong." 1 Pomeroy, *supra*, § 67, at 113–14 (citations and internal quotation marks omitted).

B. South Carolina Law on the Appointment of Receivers Codifies the Historical Practice of Courts of Equity.

In 1870, the General Assembly adopted the Code of Procedure, itself adapted from the New York Code of Civil Procedure of 1848–49. 1870 S.C. Acts 423 *et seq*.; Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846-76*, 36 J. Legal Hist. 152, 167 n.99 (2015) (listing South Carolina as among more than 25 States and territories that had adopted a version of the 1848 New York Code by the end of the 19th Century). Chapter V of that Act, titled "Provisional Remedies," included Section 267 on receivers, containing provisions now codified at S.C. Code Ann. § 15-65-10 *et seq.*:

CHAPTER V.

PROVISIONAL REMEDIES.

SEC. 267. A receiver may be appointed:

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had without application to the Court.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment-debtor refuses to apply his property in satisfaction of the judgment.

4. In the cases provided in this Code and by statute, when a corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases, of the property within this State of foreign corporations. Receivers of the property within this State of foreign or other corporations shall be allowed such commissions as may be fixed by the Court appointing them, not exceeding five per cent. on the amount received and disbursed by them.

5. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this Act.

When it is admitted, by the pleading or examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee, for another party, or which belongs or is due to another party, the Court may order the same to be deposited in Court, or delivered to such party, with or without security, subject to the further direction of the Court.

Subsection 5 of this section, allowing receiverships as "may be in accordance with the existing practice" (now S.C. Code Ann. § 15-65-10(5)), is a statutory reference to the practice of courts of equity regarding appointment of receivers (including all limitations and proscriptions recognized by those courts) prior to the enactment of the statute in 1870. *See Va.-Carolina Chem. Co. v. Hunter*, 84 S.C. 214, 220, 66 S.E. 177, 179 (1909) (This section "gives the old practice the force of a statute by the enactment that a receiver may be appointed 'in such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this Code of Procedure.' The first inquiry is whether the record shows a case warranting the appointment of a receiver *under the general jurisdiction and practice of the court of equity*, aside from the special provisions of the Code of Procedure[.]") (emphasis added). Because Subsection 5 codified preexisting equitable practices, it is not a general grant of authority to trial courts to

appoint receivers as "equitable," including by relying on their own "practice" of previously doing so. *See Hoiles v. Watkins*, 117 Ohio St. 165, 172, 157 N.E. 557, 559 (1927) (Ohio statute, adopted like South Carolina's from the New York Code of Civil Procedure, "necessitates an inquiry into the rule 'when the usages of equity' have permitted the appointment of receivers").

As discussed below, neither Subsection 5 nor any other provision of South Carolina law authorized the trial court to appoint a receiver for ACL.

C. The Receivership Order Violates South Carolina Law.

As a sanction for alleged discovery violations, the trial court relied on S.C. Code Ann. § 15-65-10(5) (2005) to appoint a receiver for ACL, a solvent Canadian corporation that is actively managing its own affairs. *See* Receivership Order, p. 2. That provision authorizes a court to appoint a receiver only where "provided by law" or "in accordance with the existing practice." S.C. Code Ann. § 15-65-10(5). Nothing in South Carolina law or practice authorizes a court to appoint a receiver for a solvent foreign corporation with no property in the State or to appoint a receiver for any corporation—foreign or domestic—as a discovery sanction.

South Carolina law does not authorize the appointment of a general receiver to manage a foreign corporation's affairs. Rather, the South Carolina Code provides that a court "in a judicial proceeding brought to dissolve a corporation" may "appoint receivers to wind up and liquidate . . . the business and affairs of the corporation." S.C. Code Ann. § 33-14-320(a) (2005). But the Code defines "[c]orporation" to encompass only a "domestic corporation" and to specifically *exclude* "a foreign corporation." *Id.* § 33-1-400(4) (defining "[c]orporation" as "a corporation for profit, which is not a foreign corporation, incorporated pursuant or subject to the provisions of Chapters 1 through 20 of this Title"). Thus, even if this case were a "judicial proceeding brought to dissolve a corporation" within the meaning of Section 33-14-320(a)—which, as an asbestos personal-injury

suit, it was *not*—the trial court would have lacked statutory authority to appoint a receiver for ACL, a Canadian corporation.

The in-state limits on the power to appoint a general receiver are confirmed by the well-settled "principle that state statutes generally have no extra-territorial effect," which "remains a foundation of the respect for individual sovereignty the states must share with one another." *Doctors Hosp. of Augusta, LLC v. CompTrust AGC Workers' Comp. Tr. Fund*, 371 S.C. 5, 9, 636 S.E.2d 862, 864 (2006). Because ACL is indisputably a foreign corporation—it is incorporated in Canada, not South Carolina—the trial court transgressed the territorial bounds on its authority by invoking Section 15-65-10(5) to appoint a receiver to take over ACL's affairs.

The only provision of South Carolina law that authorizes appointment of a receiver in connection with a foreign corporation is S.C. Code Ann. § 15-65-10(4), which, under specified circumstances, authorizes a receiver for the "property within this State of foreign corporations." But the trial court expressly disclaimed reliance on that provision to appoint Mr. Protopapas as receiver for ACL. Order on Motions for Stay, Motions to Dismiss, Motions to Strike, Motions for More Definite Statement, and Motion to Dissolve Receivership, p. 13, *Mitchell v. 3M Co.*, No. 2022-CP-40-02979 (S.C. Ct. Common Pleas, 5th Cir. Feb. 23, 2024). In any event, Section 15-65-10(4) would be inapplicable here because ACL has no property in South Carolina; is not "dissolved," "insolvent," or "in imminent danger of insolvency"; and has not "forfeited its corporate rights." S.C. Code Ann. § 15-65-10(4); *see also Boynton v. Consol. Indem. & Ins. Co.*, 180 S.C. 279, 293, 185 S.E. 731, 737 (1936) (reversing appointment of a receiver because there was a "total failure of any proof" that the foreign company "has property in this state").[2]

[2] In his brief to this Court, the Receiver also invokes a statutory provision authorizing the appointment of a receiver "[a]fter judgment, to carry the judgment into effect." *See* Receiver Br., p. 17 n.4 (citing S.C. Code Ann. § 15-65-10(2)). But the trial court did not rely on this provision

Nor does the appointment of the Receiver "accord[ ] with the existing practice" of South Carolina within the meaning of Section 15-65-10(5). The trial court pointed to no settled practice in equity of appointing receivers for solvent foreign corporations whose affairs are being actively managed by their own boards and officers. Indeed, courts universally recognize that the courts of one State may *not* appoint a corporate receiver for a foreign corporation. *See Boynton*, 180 S.C. at 293–94, 185 S.E. at 737 (circuit court "was without authority to appoint a Receiver" for New York corporation because it "is a foreign corporation; there is a total failure of any proof that it has property in this state"); *Pollock v. Carolina Interstate Bldg. & Loan Ass'n*, 48 S.C. 65, 75, 25 S.E. 977, 980 (1896) (North Carolina court's appointment of receiver for North Carolina bank had no effect in South Carolina; "Having the right to appoint a receiver in their territory alone, such appointee is a creature of the appointing power, and cannot have greater power than his creator.").[3]

Nor did the trial court point to any settled equitable practice of appointing receivers as a discovery sanction. The Receivership Order instead cites *Virginia-Carolina Chemical*, 84 S.C. at 220–21, 66 S.E. at 179, which the trial court described as reflecting a practice authorizing a court

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when appointing the Receiver, and it is plainly inapplicable as no judgment has been entered in this case.

[3] *See also Stafford v. Am. Mills Co.*, 13 R.I. 310, 310 (1881) (court had "no power to appoint a receiver of the estate of a foreign corporation"); *N. State Copper & Gold Min. Co. v. Field*, 20 A. 1039, 1040–41 (Md. 1885) (Maryland had no jurisdiction to control the internal affairs of a North Carolina corporation; "Our courts possess no visitorial power over [foreign corporations], and can enforce no forfeiture of charter for violation of law. . . . These powers belong only to the state which created the corporation.") (citing *Stafford*); *Republican Mtn. Silver Mines v. Brown*, 58 F. 644, 648 (8th Cir. 1893) (Colorado federal court had no power in equity to appoint liquidator to wind up corporation formed in Great Britain; "It is hardly necessary to remark that if courts of equity . . . have no jurisdiction to dissolve a domestic corporation, and to wind up its affairs, much less can they exercise such powers with respect to a foreign corporation."); *Holbrook v. Ford*, 39 N.E. 1091, 1094 (Ill. 1894) ("The general rule is that a court of equity will not appoint a receiver for a foreign corporation where such corporation has no property in the state[.]"); *Frankland v. Remington Phono. Corp.*, 119 A. 127, 127–28 (Del. Ch. 1922) (the proposition that courts can appoint general receivers for foreign corporations is "beyond doubt as not tenable").

to "grant any relief within its jurisdiction appropriate and effective to protect creditors" from "moral fraud" of a "debtor" attempting to defeat its creditors. Receivership Order, p. 3. In that case, the South Carolina Supreme Court concluded that a debtor's gift of the disputed assets to his sister to try to frustrate creditors constituted a "moral fraud" that justified appointment of a receiver. *Va.-Carolina Chem.*, 84 S.C. at 221–22, 66 S.E. at 179–80.

Applying the *Virginia-Carolina Chemical* standard in this case, the trial court reasoned that ACL's assertion of "personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions," along with "ACL's continued refusal to participate" in the proceedings, constituted "moral fraud" of a "debtor" that "warrant[ed] the appointment of a receiver." Receivership Order, p. 3. The trial court's reasoning was incorrect in multiple respects.

First, ACL was not a debtor in this case; when the Receiver was appointed, plaintiffs did not hold a judgment against ACL (and they still do not). *Cf.* S.C. Code Ann. § 15-35-910(2) (2005 & Cum. Supp.) ("'Judgment debtor' means the party against whom a foreign judgment has been rendered."). *Virginia-Carolina Chemical* is therefore inapplicable on its face.

Second, ACL has not defrauded anyone. ACL has appeared and defended itself in the asbestos personal-injury cases pending against it in South Carolina, and it has provided discovery responses to the extent consistent with its contentions regarding its confidentiality obligations under the Québec Business Concerns Records Act. *See generally* ACL Contempt Opposition.

Third, ACL's assertion of a personal-jurisdiction defense—which, together with its invocation of Canadian law to oppose certain discovery demands, was the impetus for the trial court's decision to appoint a receiver—was hardly fraudulent. ACL does not have any assets or property in South Carolina, and it has never conducted any business activities in South Carolina. *See* Dufour Aff. Moreover, under South Carolina law, any insurance proceeds to which ACL

might be entitled to satisfy a judgment entered against it at the end of a case do not constitute property in South Carolina at the case's inception. *See Howard v. Allen*, 254 S.C. 455, 460–61, 176 S.E.2d 127, 129 (1970) (rejecting plaintiff's efforts to "attac[h]" insurer's potential coverage obligations to defendant at inception of case because such potential obligations are not "property" of the insured, and holding that an insurer's obligations remain "inchoate, conditional, [and] contingent" unless there is a judgment imposing liability); *see also PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, 436 S.C. 254, 264–65, 871 S.E.2d 590, 595 (2022) (examining *Howard* and reaffirming that, prior to entry of judgment, "the duty to indemnify" is not "a debt subject to attachment" as property within the State, as "the insurer owes the insured nothing until the liability of the insured and the amount thereof has been determined" (internal quotation markets omitted)).

According to the trial court, *Sangamo Weston, Inc. v. National Surety Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992), establishes that "ACL's Insurance Assets" are assets within the state of South Carolina. Receivership Order, pp. 4–5. But *Sangamo* only involved a choice-of-law issue. *See* 307 S.C. at 147, 414 S.E.2d at 129 ("it must first be determined which state's law should be applied in interpreting these insurance contracts"). It did not address when or if an insurance policy may qualify as an asset. Nor did it consider whether a policy issued by an out-of-state insurance company to an out-of-state insured ever can be considered South Carolina property if the insured is sued in South Carolina. Instead, construing S.C. Code Ann. § 38-61-10—which states that "[a]ll contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State"—the court concluded that "South Carolina substantive law govern[ed] th[e] dispute" about the scope of coverage because the insured was seeking "coverage solely for the liability it incurred due to its operations within the State of South Carolina." *Id.* at 148–49, 414 S.E.2d at 130–31.

Plaintiffs cite three additional cases, which they believe support their overbroad reading of *Sangamo*. Pl. Br., pp. 22–23. But these cases, too, treat Section 38-61-10 as a choice-of-law provision. *See Hartsock v. Am. Auto. Ins. Co.*, 788 F. Supp. 2d 447, 450–52 (D.S.C. 2011) (determining "which state's law controls the validity and construction of the insurance contract at issue"); *Okatie Hotel Grp., LLC v. Amerisure Ins. Co.*, 2006 WL 91577, at *2–4 (D.S.C. Jan. 13, 2006) (assessing S.C. Code Ann. § 38-61-10 to ascertain "whether Florida or South Carolina law applies"); *Heslin-Kim v. CIGNA Grp. Ins.*, 377 F. Supp. 2d 527, 531 (D.S.C. 2005) (applying *Sangamo* "to determine what law applies").[4]

ACL was therefore well within its rights to raise a personal-jurisdiction defense, which was amply supported by U.S. Supreme Court precedent defining the due-process limits on States' jurisdiction over out-of-state companies. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) ("With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction.") (alterations and internal quotation marks omitted); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021) (to be subject to specific jurisdiction in a State, the defendant "must take some act by which it purposefully avails itself of the privilege of conducting activities within the forum State," and the "contacts must be the defendant's own choice and not random, isolated, or fortuitous") (alteration and internal quotation marks omitted). ACL has a due-process right "to present every available defense" to the claims against it, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted)—which

[4] Nor is it relevant that courts in other States have found that ACL has the requisite minimum contacts with those States to establish personal jurisdiction. Pl. Br., p. 5 (citing cases). None of those cases concerned ACL's contacts with South Carolina, and they thus have no bearing on whether ACL is subject to personal jurisdiction in South Carolina or on whether the insurance policies issued to ACL, a Canadian company, by non-South Carolina insurers are assets located in South Carolina.

includes jurisdictional defenses—and it cannot be punished through the appointment of a receiver for exercising that constitutional right, *see United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.") (internal quotation marks omitted).

Finally, *Virginia-Carolina Chemical* did not (and could not) authorize the trial court to issue a receivership order that exceeds its jurisdiction. Rather, the opinion emphasizes that any relief ordered must be "within [the court's] jurisdiction." 84 S.C. at 220, 66 S.E. at 179. Because ACL is a foreign corporation organized under the laws of Canada and headquartered in Québec—and the trial court's jurisdiction stops at South Carolina's borders—*Virginia-Carolina Chemical* provides no support for the trial court's appointment of a receiver over ACL. And where a receiver has been appointed, the authority of the receiver is no broader than that of the appointing court itself and is thus subject to the same territorial limits. *See Porter v. Sabin*, 149 U.S. 473, 480 (1893) ("The whole property of the corporation *within the jurisdiction of the court* which appointed the receiver . . . remains in its custody, to be administered and distributed by it.") (emphasis added); *see also Pollock*, 48 S.C. at 74, 25 S.E. at 980 ("The power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him.") (citation and internal quotation marks omitted).[5]

In addition to invoking *Virginia-Carolina Chemical*, the Receiver now points to *Philips Medical Systems International, B.V. v. Bruetman*, 982 F.2d 211 (7th Cir. 1992), to defend his

[5] In the Receivership Order, the trial court invoked *Porter* as support for its extraterritorial appointment of a receiver, stating that, under *Porter*, "'[t]he whole property of the corporation [is] within the jurisdiction of the court which appointed the receiver.'" Receivership Order, pp. 3–4 (quoting *Porter*, 149 U.S. at 480) (brackets added by trial court). But the trial court's bracketed addition of "is" fundamentally altered the meaning of *Porter*'s language, transforming a territorial *limit* on courts' receivership authority into a boundless *authorization* of extraterritorial powers.

appointment. *See* Receiver Br., p. 16. But that opinion is equally inapposite. There, the U.S. Court of Appeals for the Seventh Circuit affirmed a default judgment against, and the appointment of a receiver for, a defendant who failed to participate in discovery or otherwise obey court orders. *Philips*, however, involved an *in-state* individual defendant (not exclusively a foreign corporation) and therefore sheds no light on the issues here, where ACL is a foreign corporation incorporated under the laws of, and headquartered in, Canada. *See* 982 F.2d at 212 (noting that the defendant was "an Illinois citizen," and thus a citizen of the State in which the federal case was initiated); *see also Clark v. Walter T. Bradley Coal, Lime & Cement Co*., 6 App. D.C. 437, 443–49 (1895) (also considering receivership over in-state defendants). And the authority of a *federal* court to appoint a receiver based on discovery violations says nothing about whether a *South Carolina* court is authorized to appoint a receiver in similar circumstances—a proposition for which the trial court identified no support in South Carolina's statutes, rules, or case law.

More generally, South Carolina law provides that "[t]he appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution." *Midlands Util., Inc.*, 301 S.C. at 228, 391 S.E.2d at 538; *see also Brookshire v. Farmers' All. Exch.*, 73 S.C. 131, 132, 52 S.E. 867, 867 (1905) ("A court of equity is disinclined to take the control and management of the affairs of a corporation out of the hands of its officers and directors and substitute its receiver therefor.") (internal quotation marks omitted). Here, ACL exercised its constitutional right to contest the trial court's personal jurisdiction and explained why, as a matter of Québec law, it could not provide all of the discovery sought. *See* ACL's Contempt Opposition. In response, the trial court proceeded to hold ACL in contempt and strike its pleadings. With the pleadings struck, the court then found ACL in default and appointed a receiver to effectively dissolve the company. These drastic measures find no footing in South Carolina law or practice.

D. The Receivership Order Violates the United States Constitution.

The Receivership Order is also invalid because it violates the Commerce Clause of the United States Constitution and intrudes on the federal government's foreign-affairs authority. These constitutional limits reflect the territorial boundaries of state power and are consistent with the limits on the trial court's receivership authority embodied in the South Carolina statutes and case law discussed above.

The Commerce Clause of the United States Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. The negative implication of the Commerce Clause (sometimes called the "dormant Commerce Clause"), in turn, restricts States from infringing on Congress's authority in this area by enacting laws that unduly burden, impair, or discriminate against interstate or foreign commerce. *See Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 449 (1979); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988).

Considering these constitutional limits on States' regulation of interstate and foreign commerce, a corporation's State (or country) of incorporation is the only jurisdiction that can provide laws governing the formation—and dissolution—of a corporation. *See, e.g.*, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–90 (1987) (corporations are a "product of state law . . . organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation"); *see also* 17A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 8554 ("The general rule is that neither the courts of a particular state nor the federal courts sitting in the state have power to dissolve a corporation of another state or country. . . . The same is true regarding the appointment of a general receiver for a corporation.").

Accordingly, a State may not dissolve corporations incorporated in other States—or in other countries. Yet, the Receivership Order appoints a receiver to take over the affairs of ACL,

effectively dissolving a solvent Canadian corporation capable of actively managing its own affairs and displacing ACL's duly appointed officers and directors. *See Monmouth Inv. Co. v. Means,* 151 F. 159, 166 (8th Cir. 1906) ("the effect of placing a corporation in the hands of a receiver, displacing its governing board of directors, incidentally works its practical dissolution"); *La Société Francaise d'Epargnes et de Prévoyance Mutuelle v. Dist. Ct.*, 53 Cal. 495, 550 (1879) (appointment of a receiver to manage the affairs of a corporation "*dissolve*[*s*] a corporation; for the power of a Receiver, when put in motion, of necessity supersedes the corporate power"). By effectively dissolving ACL, the Receivership Order intrudes on the ability of Canada to govern the affairs of a Canadian corporation and the ability of Congress to regulate ACL's cross-border commercial activities. In so doing, the Order contravenes the dormant Commerce Clause. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867) (because the "Constitution deals with substance, not shadows," a state court cannot accomplish indirectly what it is forbidden to do directly).

The trial court nonetheless reasoned that "principles of comity, which deter a state court from reaching beyond a state's borders and asserting jurisdiction over . . . property located in another jurisdiction[,] . . . support a state court's authority to vest a statutory receiver to assert an insolvent corporation's rights of action." Receivership Order, p. 4 (citing *Hirson v. United Stores Corp.*, 263 A.D. 646 (N.Y. App. Div. 1st Dep't), *aff'd*, 43 N.E.2d 712 (N.Y. 1942)). But invoking comity to justify South Carolina's interference with the affairs of a Canadian corporation gets comity exactly backward. Comity demands *respecting* Canada's right to establish a legal framework governing ACL's affairs as well as ACL's own right under Canadian law to manage its affairs—not unilaterally imposing a South Carolina receiver and South Carolina law on a Canadian corporation. *See, e.g.*, *Republican Mountain Silver Mines, Ltd.*, 58 F. at 648 (reversing

order appointing receiver for British corporation because the "court had no inherent power, as a court of equity, to dissolve the company").

In any event, even if the trial court's version of comity were sound, principles of comity cannot prevail over constitutional demands. *See Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (comity interests are not "a matter of absolute obligation"). Indeed, in the *Hirson* opinion on which the trial court relied, Receivership Order, p. 4, the New York Appellate Division (affirmed by the Court of Appeals) held that the courts of New York could *not* appoint a receiver for a Delaware corporation, in part because "local policy is not permitted to dominate rules of comity" owed to other States' laws, in part because of the demands of full faith and credit. 263 A.D. at 649–50, 34 N.Y.S.2d at 127–28. *Hirson* thus rejects appointment of a receiver for a foreign corporation.

The Receivership Order also transgresses the federal government's exclusive authority over foreign affairs. *See* U.S. Const. art. I, § 10, cl. 1; *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). That authority preempts state laws, rules, or orders whenever there is a "likelihood" that the State's action will "produce something more than incidental effect" on foreign affairs. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003); *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000) (the Nation must speak "with one voice in dealing with [foreign] governments"). Here, that threshold is readily surpassed. The Receivership Order intrudes on the United States' foreign relations with Canada by effectively dissolving ACL, a solvent Canadian corporation whose affairs are being actively managed by its Canadian board and officers. The Order thus substantially impairs the federal government's ability to set national policies concerning international trade and to manage its diplomatic relationship with Canada, an essential trading partner and ally. *See generally Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (a State's

action may not "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

II. The Receivership Order Will Destabilize Insurance Markets, Harm South Carolina Insureds, and Damage South Carolina's Economy.

The trial court's Receivership Order effectively dissolved ACL, displacing the duly appointed board and officers of an active, solvent foreign corporation without authorization under South Carolina law and in violation of the United States Constitution. If the trial court's order were allowed to stand, this Court's decision would encourage the appointment of a receiver whenever an out-of-state corporation asserts its rights to raise jurisdictional defenses and object to discovery. And, perhaps even more troublingly, the Court's decision, by endorsing the appointment of a receiver as a discovery sanction, could open the door to the imposition of receiverships on active *South Carolina* corporations that raise good-faith objections to discovery. Control of these companies' defenses to litigation—and the right to direct the actions of their insurers—would be wrested from their boards and officers and transferred to a court-appointed receiver. The pernicious consequences of this unprecedented expansion of courts' receivership authority would be far-reaching and immediate. The Court's decision would destabilize the relationship between insurers and insureds in South Carolina by impairing the actuarial assumptions underlying policies issued to companies ordered into receivership, necessitate higher insurance premiums for South Carolina insureds to offset the substantial costs associated with these receiverships, and deter insurers from issuing policies to South Carolina companies as well as out-of-state companies that might be haled into court in the State. The Court should vacate the Receivership Order to stave off these costly, economically damaging consequences.

The insurance industry is a fundamental and essential component of modern economies. Policymakers have long acknowledged that injuries—whether car accidents, natural disasters, or

other types of unexpected losses—are unavoidable and that they can impose both individual and society-wide costs. These costs include the primary costs of personal injury and property damage. They also include secondary costs that may occur if the victim is not compensated for an injury because the party at fault lacks the ability to pay. *See generally* Guido Calabresi, *The Cost of Accidents* (1970). Insurance provides a critical means to address both these primary and secondary costs.

The economics of insurance are well understood. Businesses such as ACL take out insurance coverage because they prefer to pay the low, certain costs of insurance premiums over the high, uncertain costs of catastrophic damage. The insurance company consequently takes on the business's risk, subject to contractual terms, repeating this process with many businesses to diversify its risk and ensure its ability to pay out claims. *See* J. David Cummins, *Statistical and Financial Models of Insurance Pricing and the Insurance Firm*, 58 J. Risk & Ins. 261, 267 (1991) (illustrating statistically the benefits of risk diversification); John M. Marshall, *Insurance Theory: Reserves Versus Mutuality*, 12 Econ. Inquiry 476, 477 (1974) (discussing risk pooling). The insurance company may even buy its own "reinsurance" policy to further reduce its own risk of loss under policies it has issued. *See* Larry Schiffer, *The Theory of Reinsurance*, IRMI (Dec. 13, 2022). Without the availability of sufficient insurance at reasonable premiums, businesses may be forced into bankruptcy in the event of a large and unexpected loss. And, where those losses arise from liability to third parties, recoveries may be limited by the assets of the insolvent businesses, leaving victims with inadequate compensation for their injuries. This is exactly what occurred with asbestos claimants in the early 2000s, as litigation against manufacturers began to exhaust the defendants' resources and triggered a "wave" of bankruptcy filings. *See* Lester Brickman, *An*

Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005, 27 Cardozo L. Rev. 991, 1000 (2005).

The availability of well-priced insurance coverage is not guaranteed and cannot be taken for granted. It hinges on the ability of insurance companies to accurately assess their risks and price their policies. As described above, insurance companies balance risk, collecting premiums from a broad pool of clients in order to offset the potential costs of insuring any particular client. If premiums are too low, the insurer will lack sufficient funds to cover claims. And if premiums are too high, individuals and businesses may choose to forgo insurance entirely, risking bankruptcy in the event of an unexpected loss event. This delicate balance rests on detailed risk assessments. Indeed, an entire field of economics—actuarial science—is devoted to the study and calculation of optimal insurance premiums. *See* Sholom Feldblum, *Foundations of Casualty Actuarial Science* (4th ed. 2001). Today, actuarial science relies on sophisticated computer modeling and financial theory. *See* Richard Clarke & Ari Libarikian, *Unleashing the Value of Advanced Analytics in Insurance*, McKinsey & Co. (Aug. 1, 2014). This finely calibrated analysis ensures that risk is properly priced and pooled—with individual premiums calculated based on the insured's particular risk profile and then spread over a larger group of accurately priced insurance policies.

The legal environment in which a company operates is a key element in actuarial analysis of commercial liability policies. *See* Scott E. Harrington & Patricia M. Danzon, *The Economics of Liability Insurance*, *in* Handbook of Insurance 277, 297 (Georges Dionne ed., 2000). Changes in a governing legal regime can have a significant effect on the price of insurance policies covering litigation exposure. *See* J. François Outreville, *Theory and Practice of Insurance* 160 (1998) ("Rates based upon past experience are valid only if the conditions that prevailed in the past remain

unchanged during the period of the contract."). It is therefore critical for insurance companies to have accurate information regarding the applicable legal regime and its associated costs when pricing their policies.

The trial court's unprecedented interpretation of South Carolina receivership law disrupts the assumptions underlying insurers' pricing models for policies covering businesses newly susceptible to being placed in receivership in South Carolina. When CLMI agreed to issue insurance coverage for ACL, they did so on the understanding that they were insuring a Canadian company managed by a board of directors and officers operating under the settled principles of Canadian corporate law. They further understood that nothing in South Carolina law or practice—or, consistent with the dormant Commerce Clause and foreign-affairs power, the law of *any* U.S. State, for that matter—authorized a court, as a discovery sanction, to replace ACL's board and officers with a court-appointed receiver to manage its ongoing affairs.

These key assumptions in CLMI's policy-pricing determinations were upended by the trial court's order appointing a receiver for ACL, which unexpectedly injected a third party into CLMI's relationship with its insured. The trial court's ruling imposed substantial, unanticipated costs on CLMI, which suddenly became subject to the Receiver's requests with respect to resolving claims against ACL, even if those requests conflicted with those of ACL's board and officers and resulted in the resolution of claims in amounts higher than the board and officers would have accepted. In fact, ACL—which is still actively managing its affairs from its Canadian headquarters—has taken the position that the Receiver is without authority to act on ACL's behalf, including the authority to tender claims to CLMI and to control ACL's litigation defense. To that end, ACL's Canadian lawyers recently sent a letter to CLMI accusing them of materially breaching their contractual obligations to ACL by extending funds to settle claims against ACL in amounts requested by the

Receiver. As a result, the Receivership Order creates a practically untenable and legally intolerable Catch-22 for CLMI by requiring them to decide between following directions from ACL's Receiver—subject to potential contempt sanctions—or following directions from ACL's duly appointed board and officers—subject to potential liability to ACL.

The disruptive impact and associated costs of the Receivership Order extend well beyond the settlement of claims against ACL. They are exacerbated by the broad day-to-day powers wielded by the Receiver and the subsequent actions of the trial court. For example, on January 11, 2024, the Receiver purportedly served a subpoena on CLMI by delivery of the subpoena to the South Carolina Department of Insurance, directing CLMI to search for and produce a comprehensive record of all policies issued to ACL and all related underwriting files and communications for a period spanning approximately 80 years. The trial court overruled CLMI's objections to the Receiver's sweeping demands. Order on Discovery at 3–4, *McDowell v. A.O. Smith Corp.*, No. 23-CP-40-06157 (S.C. Ct. Common Pleas, 5th Cir. Mar. 22, 2024). Compliance with these onerous requests has consumed substantial resources on the part of CLMI and its third-party claims administrator, Resolute Management Inc.

Moreover, on February 23, 2024, the trial court issued the Mediation Order in two other asbestos personal-injury cases against ACL, *Link* and *Donaghy*. The Order purported to amend the terms of the insurance contract between ACL and CLMI by declaring that "[t]he Receiver for . . . ACL shall be viewed as the named insured and the representative for . . . ACL in the defense of asbestos litigation matters and the management of any insurance or insurance-related assets." Mediation Order, p. 5. It further declared that "[t]he insurers for . . . ACL are expected to cooperate with the Receiver," including in discovery matters, and it directed the insurers to appear for mediation through "'a representative of the insurance carrier who is not the carrier's outside

counsel and who has full authority to settle the claim.'" Mediation Order, pp. 5–6 (quoting SCRADR 6(b)(4)). When the Receiver moved for sanctions because CLMI had supposedly failed to adequately comply with the trial court's "expect[ation]" of cooperation, the trial court responded by finding CLMI in contempt and ordering CLMI "to pay into the registry of the Court fifty-thousand dollars ($50,000) per day for each day that they are in violation of [the] Court's orders"—a sanction that, if upheld on appeal, will remain in effect until the Receiver "advise[s] the Court" that "compliance with th[e] Court's orders is achieved." Sanctions Order, pp. 7–8.[6]

None of this was anticipated when CLMI assessed the risks of issuing insurance to ACL and set an appropriate premium to cover those risks. To be sure, CLMI and other insurers had long anticipated that South Carolina courts may impose sanctions on recalcitrant defendants, up to and including entering default judgments in severe cases. Rule 37(b)(2)(C), SCRCP; *see also Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990). And they were aware of South Carolina laws setting out the procedures for collecting on default judgments, *see* S.C. Code Ann. § 15-35-180, as well as Canadian law providing for the enforcement of such judgments against Canadian corporations, *see, e.g.*, *Morguard Invs. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (Can.) (establishing one such route for enforcement). But CLMI did not price into its models the costs of compliance with a receivership imposed as a discovery sanction on a solvent corporation that continues to actively manage its own affairs.

[6] The trial court granted supersedeas of the $50,000 daily sanction, but specified that "[t]he balance of the Sanctions Order will remain in effect." Supersedeas Order, p. 7. Despite CLMI's extensive efforts to demonstrate compliance—including producing all alleged ACL policies to the Receiver, providing the Receiver with settlement authority in the *Link* and *Donaghy* cases, and sending representatives to a mediation on March 27, *see* Supersedeas Order, p. 5—the trial court has not indicated that the contempt sanctions will be lifted.

In particular, CLMI could not and did not anticipate the costs and inefficiencies associated with the uncertainty as to whether they must take direction from the Receiver or ACL's board and officers. Nor did they account for the Receiver's onerous discovery demands, the $50,000 daily sanction ordered by the trial court for a supposed failure to cooperate with the Receiver, and the legal fees necessitated by CLMI's defense against the Receiver's third-party complaint. And CLMI is far from alone in having to navigate these unanticipated and highly disruptive developments—as evidenced by the *dozens* of insurers that the Receiver has named as defendants in his third-party complaint. *See Lewis v. Asbestos Corp. Ltd.*, No. 2024-CP-40-00458 (S.C. Ct. Common Pleas, 5th Cir. Feb. 21, 2024).

If this Court upholds the Receivership Order, that decision would give the Court's imprimatur to trial courts' appointment, as a discovery sanction, of receivers for solvent, active foreign corporations—and, potentially, solvent and active South Carolina corporations as well. Going forward, insurers would need to price these costs into their insurance models as insurers weigh the risks of issuing policies to South Carolina companies or companies at risk of being sued in South Carolina. The inevitable consequences will be higher insurance premiums for South Carolina residents and in-state companies as well as out-of-state companies looking to do business in South Carolina. And some of these companies might be unable to find insurance at all as insurers reconsider whether to do business in South Carolina, or with companies that do business in the State, to avoid the trial court's unpredictable, improper, and inequitable receivership procedures. These outcomes—all directly attributable to the trial court's unprecedented and untoward receivership appointment practices—will increase the cost of doing business in South Carolina, stifle economic growth, and imperil South Carolinians' ability to obtain essential insurance coverage.

* * *

The Receivership Order violates both South Carolina law and the United States Constitution. And it upends the settled expectations of insurers, increasing prices for South Carolina consumers, limiting choices in the South Carolina insurance market, and weakening the State's economy. The legally unjustified and practically misguided Order should not stand.

CONCLUSION

For the foregoing reasons, this Court should vacate the trial court's Receivership Order.

Respectfully submitted,

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April 26, 2024

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Acting Circuit Court Judge

Appellate Case No. 2023-001461
Circuit Court Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs……Plaintiffs,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiw-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould

Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking ump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC……Defendants,

of which

Asbestos Corporation Limited is the…..…….....…….Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Plaintiffs, Defendant, and the Receiver with the *Brief of* Amici Curiae *Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies in Support of Appellant* and the *Motion for Leave to File Brief of* Amici Curiae *Certain Underwriters at Lloyd's, London and*

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April 26, 2024

Charleston, South Carolina

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April 26, 2024

VIA EMAIL FILING

The Hon. Jenny A. Kitchings
Clerk of the Court of Appeals
Court of Appeals of South Carolina
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

RE: *John A. Tibbs v. Asbestos Corporation Limited*
Appellate Case No. 2023-001461

Dear Ms. Kitchings:

Please find enclosed for filing the *Brief of* Amici Curiae *Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies in Support of Appellant* and the *Motion for Leave to File Brief of* Amici Curiae *Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies in Support of Appellant* in the above referenced matter. I have also enclosed a Certificate of Service indicating service upon counsel for Plaintiffs, Defendant, and the Receiver. Please let me know if you need anything further.

Respectfully submitted,

Theodore L. Manos, Esq.

Enclosures as Stated
cc: Charles William Branham, III, Esq.
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