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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

Appellate Case No. 2024-000623  
Court of Appeals Opinion No. 6037

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 ..... Defendant,

of which

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## **PRELIMINARY STATEMENT**<sup>1</sup>

As the Receiver's Opposition brief makes clear, the Receiver has, at most, a generalized interest in determining the scope of Covil's liabilities. An interest without injury does not confer standing. Yet that is all this action is predicated on: the Receiver wants to invalidate Covil's defenses to ongoing and future asbestos litigation, thereby maximizing Covil's liability. But the Receiver's only legitimate interest is minimizing Covil's liability. Covil cannot, as a matter of law, be injured by an affirmative defense which, if successful, benefits Covil in accordance with well-settled law. This alone is sufficient grounds to grant certiorari and vacate the rulings below.

Even if the Receiver had standing, the decision of the Court of Appeals warrants review on the merits. The Court of Appeals improperly permitted a collateral attack of a long-final order by concluding that Covil's prior Receiver failed to publish notice, even though the receivership court necessarily held that the prior Receiver published notice as required both by South Carolina law and the receivership court's dissolution decree. In the very least, Judge Simmons' orders trigger the presumption of regularity, which the Court of Appeals improperly rejected. Finally, the Court of Appeals relied on a void order entered in an action to which USF&G was not a party. Although that order is factually incorrect and prejudicial to USF&G, the lower courts have refused to allow that order be reviewed on appeal for four years, in blatant violation of due process of law. The Court of Appeals consideration of that order—and apparent reliance on that order to establish the Receiver's standing—warrants review.

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<sup>1</sup> Unless otherwise noted, capitalized terms have the same definition as in USF&G's Petition for Writ of Certiorari ("Petition" or "Pet.").

## **I. The Receiver Lacked Standing to Seek a Declaration Undermining Covil's Own Defenses and Maximizing its Liabilities**

Although the Receiver concedes that Covil must have suffered an injury in fact to confer standing, he fails to identify any injury whatsoever.<sup>2</sup> Instead, the Receiver argues only that he has an “interest” in determining the scope of Covil’s asbestos liabilities. (Opp. at 14-15). But interest alone does not confer standing. Rather, there must be “an *invasion* of a legally protected interest” caused by Defendants’ conduct. *Youngblood v. S.C. DSS*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) (emphasis added). Here, however, the Receiver alleges only that Covil’s insurers pled a statute of repose defense on Covil’s behalf. But this defense, if successful, would *serve* Covil’s interest. As a matter of law and common sense, a court-appointed receiver does not have a legally cognizable interest to seek to expand a dissolved company’s liabilities.

In Opposition, the Receiver fails to explain how the statute of repose defense injures Covil. Contrary to the Receiver’s contention, this defense does not “serve[] only as a barrier to the Receiver’s claims against USF&G” (Opp. at 15)—it serves as a barrier to claims against *Covil*. The defense raised by USF&G, and challenged by the Receiver, was that “Covil is a dissolved corporation and claims against [Covil] . . . are barred.”<sup>3</sup> If the defense prevails, it would not only provide a defense to the claims asserted by the Receiver against USF&G, it would benefit Covil’s interests in the numerous claims that have been asserted by tort claimants against Covil.

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<sup>2</sup> The Receiver does not defend the Court of Appeals’ conclusion that Covil “suffered injury” in the “Hutto (and perhaps other)” cases (Op. at 7.). Nor could he: as explained in the Petition, Covil’s insurers resolved those claims “without any contribution by Covil” (Pet. at 13, n.19).

<sup>3</sup> (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.”).)

The Receiver has not alleged that Covil’s insurers have relied on the defense to Covil’s detriment in any way.<sup>4</sup> The insurers have not, for example, refused to provide Covil a defense on claims which the insurers believe are barred by the statute of repose. Nor have the insurers objected to Covil’s settlement of any claims on these grounds. Indeed, although the Receiver suggests otherwise (Opp. at 15), USF&G could have asserted this affirmative defense without Covil’s support. USF&G merely preserved its *own* ability to raise this defense—not to Covil’s detriment, but to USF&G and Covil’s mutual benefit.

Even if one could conjure up a scenario in which the statute of repose defense somehow caused injury to Covil, the relief sought by the motion was not related to that hypothetical, counterintuitive and imagined injury. The Receiver’s passing contention that he had standing to bring the Motion to Clarify because he had standing to object to an “affirmative defense” (Opp. at 14) is plainly without merit. The Motion to Clarify did not request that any affirmative defenses be stricken. Nor was the relief sought by the Motion limited to actions between Covil and its insurers. The Receiver did not, for example, argue that USF&G was collaterally estopped from raising the defense when Covil sought to recover from USF&G. Instead, the Receiver sought a declaration that neither Covil nor USF&G could raise the statute of repose as a defense in any asbestos action against Covil across the entire Receivership. As a result, the Motion to Clarify sought to increase the liability of Covil—and derivatively, the liability of its insurers—vis-à-vis third party asbestos tort claimants. Indeed, the procedural mechanism in which the Receiver sought this relief is unheard of under South Carolina law or procedure. It was not brought as a motion

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<sup>4</sup> The Receiver falsely claims, without any citation to the record, that USF&G “destroyed policies in order to avoid contractual obligations to defend and indemnify Covil.” (Opp. at 4). But USF&G has agreed to provide Covil with a defense, and cooperated with the Receiver, under the terms of the only policy applicable to Covil.

challenging the sufficiency of the affirmative defense on the pleadings under Rule 12, or for summary judgment under Rule 56. Instead, it sought an advisory opinion by the trial court to “clarify the status of Covil’s receivership” in all cases against Covil that asbestos personal injury claimants can continue to bring claims against Covil without regard to its judicial dissolution and the statute of repose.

In all, neither the Receiver nor the Court of Appeals identified a cognizable injury other than the Receiver’s generalized “interest in determining whether Covil is subject to future claims.” (Opp. at 14). All companies with significant litigation exposure have an interest in determining the scope of their liability in the future. Indeed, this theory of “interest” as injury is not only insufficient as a matter of law to establish standing; it undermines the purpose of the standing doctrine entirely. As the United States Supreme Court has explained, injury in fact is “not just an empty formality.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 581 (1992). Rather, it “preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome.” *Id.* The Court of Appeals’ ruling turns that principle on its head.

At bottom, the Receiver did not file the Motion to Clarify to redress an injury. As a result, the Receiver did not have standing to request, nor did the circuit court have authority to grant, a broad-sweeping declaration detrimental to Covil’s own interests. For that reason, USF&G respectfully requests that the Court of Appeals’ decision be reviewed via certiorari and vacated.

## **II. The Court of Appeals’ Conclusion that Notice Had Not Been Published Was an Improper Collateral Attack and Incorrect as a Matter of Law**

Even if the Receiver had standing to invalidate Covil’s statute of repose defense (he does not), his argument fails on the merits. In order to finally dissolve Covil, Judge Simmons necessarily found that Mr. Lee published the notice of dissolution required both by the South Carolina Code

and his own order. That holding cannot be disturbed by another circuit court judge merely because additional evidence of publication cannot be located thirty years after the fact. In the very least, the lower courts should have applied the presumption that Mr. Lee complied with his legal duty to published notice—a long-established presumption of regularity that the Court of Appeals simply disregarded without any meaningful consideration.

**A. Judge Simmons Necessarily Concluded That Covil’s Prior Receiver Published Notice Sufficient to Trigger the Statute of Repose**

The Court of Appeals improperly permitted a collateral attack by holding that Covil had not published notice of dissolution. In Opposition, the Receiver does not dispute that the circuit court lacked the power to collaterally attack Judge Simmons’ prior orders. Instead, the Receiver argues that the November 12 Order does not encompass the publication of notice because publication was neither required to effectuate Covil’s judicial dissolution nor expressly mentioned in Judge Simmons’ final order. Neither contention has merit. First, the publication of Covil’s dissolution notice was not “discretionary” (Opp. at 16)—it was a *necessary* condition of Covil’s dissolution. Second, Judge Simmons expressly held that Mr. Lee fully complied with the orders of the court, including the very dissolution and liquidation order that dictated publication. Either way, Judge Simmons found and necessarily held that Mr. Lee published notice. That holding is the law of the case, and that finding cannot be collaterally attacked by a different circuit judge decades after the fact. *See* Pet. at 15 (collecting cases).

First, Judge Simmons could not have judicially dissolved Covil unless he found that notice had been published. The plain text of Section 33-14-330 makes clear that if a court “enter[s] a decree of dissolution,” that court “*shall direct* . . . the notification of claimants in accordance with Sections 33-14-106 and 33-14-107.” S.C. Code Ann. § 33-14-330 (emphasis added). The statute’s use of “shall” . . . indicates the legislature’s intent to enact a mandatory requirement.” *Collins v.*

*Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002). Accordingly, in order to judicially dissolve a company, the court has the duty—not the discretion—to direct the publication of notice. *Cf. Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (holding that a statutory mandate that a court “shall direct” leaves “no place for the discretion of the district court”). The Receiver cites no authority to the contrary. Judge Simmons recognized that duty and ordered—at the prior Receiver’s own request—that the prior Receiver publish the “notice *required*” by law. (R. p. 704; May 11 Order at 5 ¶ 9) (emphasis added)). Accordingly, Judge Simmons necessarily found that notice of Covil’s dissolution had been published as required when entering the November 1992 Order finalizing Covil’s dissolution.<sup>5</sup>

Although the statute requires the court to direct the publication of notice, the Receiver argues that the notice of judicial dissolution must be “in accordance with” the discretionary notice that applies to a *voluntary* dissolution (Opp. at 16–17). According to the Receiver, the dissolving company’s discretion to publish notice is incorporated into—and somehow overrides the plain text of—the mandatory notice of a *judicial* dissolution (Opp. at 17). The Receiver cites no authority (or even the dictionary) defining “in accordance with” to mean “incorporated in full” (Opp. at 17). But, as this Court has repeatedly held, statutory text must be interpreted consistent with its “plain and ordinary meaning.” *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citation omitted). And the phrase “in accordance with” means “in a manner not repugnant to or in conflict or inconsistent therewith.” *Black’s Law Dictionary* 34 (Rev. 4th ed. 1968). As applied here, this phrase means that the notice of judicial dissolution must be consistent with the requirements for voluntary dissolution, including that it be published in a newspaper and provide certain information. S.C. Code Ann. § 33-14-107(b)(1)-(3). This interpretation makes

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<sup>5</sup> (R. p. 709; Nov. 12 Order at 2).

sense: the Legislature intended notice to take the same form, and have the same effect, whether it was a voluntary or judicial dissolution. *See also id.* § 33-14-210 (incorporating the same notice requirements for administrative dissolution).

Further, if the statute merely empowered receivers with the “choice” to effectuate notice, this authority would be listed in Section 33-14-320(b)—the provision outlining the “powers and duties of the receiver or custodian.” S.C. Code Ann. § 33-14-320(b). Instead, the Legislature gave the court the duty, not the receiver discretion, to direct notice. *Id.* § 33-14-330. Indeed, the Legislature’s decision to place the mandatory notice requirement in the section entitled the “Decree of Dissolution” demonstrates its intent to require publication of notice as part and parcel of judicial dissolution. *Cf. Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 350, 549 S.E.2d 243, 248 (2001) (relying on the titles of statutory provisions to interpret scope and legislative intent). Further, the Receiver’s interpretation improperly reads the phrase “shall direct . . . notice” out of the statute entirely. If a receiver has the sole discretion to publish notice, there is no notice for the court to direct. *See CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (“we must read the statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous’”). In short, the Receiver conflates the process for voluntary dissolution with judicial dissolution. Yet Covil was judicially dissolved, not voluntarily dissolved.<sup>6</sup>

Second, even if the law somehow did not require notice for *all* judicially dissolved corporations, it was required by Judge Simmons for Covil’s dissolution. When Judge Simmons appointed Mr. Lee, he required the “dissolution of Covil” to be “continued under [the] Court’s supervision.”<sup>7</sup> It is beyond dispute that Judge Simmons had statutory authority to dictate the

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<sup>6</sup> (*See* R. p. 700, 701; May 11 Order at 1-2).

<sup>7</sup> (*See* R. p. 701; May 11 Order at 2 ¶ 5).

“powers and duties of the Receiver.” S.C. Code Ann. § 33-14-320(c). It is beyond dispute that Judge Simmons expressly required Mr. Lee to publish notice.<sup>8</sup> And it is beyond dispute that Judge Simmons thereafter found that Mr. Lee “fully complied” with the “previous Orders in liquidating the assets.”<sup>9</sup> In Opposition, the Receiver argues that these facts are irrelevant because the November 12 Order itself does not expressly say that Mr. Lee published notice (Opp. at 18-19). But the Receiver cites no authority stating that a circuit court order’s immunity from collateral attack extends only to the words on the page of the order. To the contrary, court orders include all holdings necessary to the ultimate judgment. As explained above, publication was necessary. Judge Simmons himself held that notice was “required.”<sup>10</sup>

In any event, the Receiver reads the November 12 Order too narrowly. Judge Simmons held that Mr. Lee “fully complied” with the previous orders in liquidating the assets. He was not required to specify in such granular detail every act of the Receiver undertaken by the Receiver in compliance with every prior order. Moreover, notice and liquidation are not severable portions of the dissolution order, as the Receiver suggests. To the contrary, the May 11 Order requiring Mr. Lee to liquidate assets also required Mr. Lee to publish notice.<sup>11</sup> That is consistent with the requirements of judicial dissolution—indeed, the same provision of the South Carolina Code requires the court to direct notice *and* liquidation. S.C. Code Ann. § 33-14-330 (“After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation’s

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<sup>8</sup> (R. p. 704; *id.* at 5 ¶ 9 (“[T]he Receiver shall publish the Notice required by § 33-14-107 of the Code of Laws of the State of South Carolina[.]”).)

<sup>9</sup> (R. p. 709; Nov. 12 Order at 2).

<sup>10</sup> (*See* R. p. 704; May 11 Order at 5 ¶ 9).

<sup>11</sup> (*Compare id.* (requiring notice), *with* R. p. 701, *id.* at 2 ¶¶ 3-4 (appointing Mr. Lee for the liquidation of assets).)

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.”). Judge Simmons’ conclusion that Mr. Lee “fully complied” with all prior orders concerning liquidation necessarily included the specific provision of the liquidation order requiring notice.

In all, by entering the November 12 and November 30 Orders finally dissolving Covil and discharging the Receiver, Judge Simmons held that Mr. Lee published notice. The Court of Appeals improperly permitted the circuit court to attack that holding thirty years after the fact.

**B. The Law Presumes Mr. Lee Published Notice and that Presumption Has Not Been Rebutted**

Even if Judge Simmons’ November 12 Order did not conclusively determine that Mr. Lee published notice, his order, in the very least, establishes that the presumption of regularity applies. Mr. Lee—whom, as the receivership court concluded, “ha[d] served this Court many times as a Receiver”<sup>12</sup>—was ordered to publish notice. The Receiver cites no order in which Judge Simmons relieved Mr. Lee of that duty. Nor does the Receiver argue that Mr. Lee sought leave to be excused from his duty to publish notice, or proffer any reason why Mr. Lee would have refused to publish notice. As a result, courts are required to presume that Mr. Lee, as a court appointed officer under the direction of Judge Simmons, complied with his legal duties. *See 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)) (“The presumption is always in favor of the correct performance of his duty by an officer.”).

Neither the Receiver nor the Court of Appeals meaningfully explains why the long-standing presumption of regularity should not apply here. Although the Receiver in passing

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<sup>12</sup> (R. p. 558; Order at 1-2, *FSB v. Covil* (Nov. 27, 1991)).

contends that notice was not “required” (Opp. at 22), the Receiver ignores that Judge Simmons expressly ordered notice. And Judge Simmons plainly had authority to determine the scope of Mr. Lee’s duties. *See* S.C. Code Ann. § 33-14-320(c). Thus, even if the South Carolina Code did not require notice (it does), Mr. Lee had a legal duty to publish notice. That alone triggers the presumption of regularity. *See Whitcomb*, 90 S.C. at 393, 73 S.E. at 778 (“All persons are presumed to have duly discharged any duty imposed by law.”).

The Receiver also argues that the presumption of publication has been rebutted by the *lack* of evidence of publication (Opp. 18-19). But it is black letter law that presumptions cannot be rebutted through a lack of evidence. *See State Accident Fund v. S.C. Second Injury Fund*, 409 S.C. 240, 246, 762 S.E.2d 19, 22 (2014) (“When a presumption shifts the burden of production to the opposing party, that party must present substantial evidence in order to rebut the presumption”). This is especially true for paper records created before the advent of computers, which are highly susceptible to fire, deterioration, misplacement, and misfiling. And as explained in the Petition, Covil’s judicial records were often misfiled, incomplete, and in some cases destroyed (Pet. at 20). Under the Receiver’s theory, the conduct of court officials—and the finality provided thereby—can be impugned decades after the fact because paper records no longer exist. That is precisely why the presumption of regularity exists. As a result, the presumption of regularity—like all evidentiary presumptions—shifts the burden to the Receiver to proffer substantial affirmative evidence disproving publication.

The Receiver failed to carry that burden. The Receiver argues that Mr. Lee did not describe notice in his petition (Opp. at 19) or his invoice to the court (*id.* at 19–20). But that is the absence of evidence, not affirmative evidence, and such negative inferences are insufficient as a matter of law. The Receiver does not argue that Mr. Lee was required to specifically identify notice in either

document. Moreover, the Receiver concedes that Mr. Lee addressed liquidation procedures in that petition (R. pp. 664–66) (noting that Mr. Lee “marshalled and liquidated the assets and collected the accounts” of Covil)). As discussed above, publication is part and parcel of liquidation under a decree of judicial dissolution. Further, if Mr. Lee elected not to publish notice required by Judge Simmons, one would expect that—as an officer of the court and an experienced receiver—Mr. Lee would have explained that decision in the dissolution petition as well. Similarly, the invoice cannot rebut the presumption (Opp. 19–20). As explained in the Petition, the invoice includes line items for unenumerated expenses and costs (Pet. at 20). A notice clearly falls within either of these categories, and the Receiver cites no law requiring Mr. Lee to separately itemize notice expenses. At most, there are competing, plausible inferences to be drawn from these documents, as even the Receiver seems to concede. (Opp. at 19) (speculating on what costs and fees could include in an invoice). This is precisely where the presumption of regularity requires the court to presume that the prior receiver complied with his legal obligations in acting as receiver.

The Receiver appears to argue that because USF&G has the burden to establish an affirmative defense, USF&G cannot be entitled to any rebuttable presumption relating to any of the facts necessary to that defense (Opp. at 21). But that is not the law. If a rebuttable presumption applies to an affirmative defense, the litigant bears the burden only in establishing that the presumption has been triggered. USF&G has carried its burden here: it has established that Mr. Lee, an experienced Receiver, was under the supervision of a court which concluded that Mr. Lee fully complied with his duties. In any event, the Receiver did not move to strike any affirmative defense in his Motion to Clarify. Instead, the Receiver sought a free-standing declaration establishing the viability of defenses of Covil and USF&G vis-à-vis third-party tort claimants.

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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. It is especially significant here, where the collateral attack is made decades after the fact and based on the other party’s supposed failure to produce evidence no longer readily available. The notice of Covil’s dissolution has been published as a matter of law, either as a necessary predicate of Covil’s dissolution or as an unrebutted presumption that Mr. Lee complied with his legal duties. Because the Court of Appeals improperly disregarded these legal principles, the decision below should be reviewed and vacated.

### **III. The Circuit Court Incorrectly Held that the Statute of Repose Was Inapplicable**

The Receiver does not dispute that Section 33-47-107(c), as amended in 2004, expressly forecloses contingent or future claims. Instead, the Receiver argues that applying the 2004 statute to Covil would be improperly “retroactive.” (Opp. at 23). But USF&G does not request a *retroactive* application of the statute of repose—*i.e.*, barring claims against Covil based on the date of the 1992 notice. To the contrary, applying the statute of repose as of the date of 2004 amendment is a prospective application of the statute.

This prospective application gives effect to the intent of the South Carolina legislature. Courts, including the United States Supreme Court, have long recognized that declining to apply a new statutory time bar to pre-enactment claims or events would be contrary to legislative intent, as the legislature could not reasonably have intended to treat older claims more favorably than newer ones. *See Sohn v. Waterson*, 84 U.S. 596, 599 (1873) (“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. . . . 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 (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 any 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 it would have run as of an earlier date under a literal application.

The Receiver argues that *Sohn* is inapplicable because it concerned “procedural” statutes of limitation, rather than “substantive” statutes of repose. But this procedural/substantive distinction is irrelevant here. “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.”)

This interpretation also makes sense. Under the Receiver’s theory, companies that dissolved well before 2004 can be sued indefinitely unless all of these companies are resurrected for the sole purpose of publishing notice. This would unduly burden the court system and effectively subject long-dissolved (and presumably assetless) companies to a decade of new tort claims. But nothing in the legislative history of the amendment suggests that the legislature intended to discriminate between companies that dissolved before 2004 and those that dissolved after. In Opposition, the Receiver does not address this issue, but instead, argues that running the statute of repose from 2004 “would deem persons whose claims were nonexistent or contingent to have received notice in 1991” (Opp. at 24).<sup>13</sup> But that is the balance the General Assembly struck, not a result USF&G asks this Court to create out of whole cloth. Pursuant to the 2004 statute, dissolved companies can issue notices that bar contingent and unknown claims. Those claimants are presumed to have notice, even if their injuries accrue after the notice was published. Regardless of when the statute of repose period is triggered, claimants are presumed to have notice before they are injured. In this way, statutes of repose are intended to provide finality and certainty—finality that neither the courts below nor Covil’s new Receiver had authority to extinguish.

#### **IV. The Court of Appeals Improperly Relied on a Void, Non-Final Order**

As explained in the Petition, the Court of Appeals improperly relied on a non-final order issued by the circuit court in an action to which USF&G was not even a party (Pet. at 24).

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<sup>13</sup> If anything, this argument demonstrates why the Receiver lacks standing to seek this declaration. Whether claimants have received sufficient notice to trigger a statute of repose should be litigated between the claimant and the tortfeasor—not between the tortfeasor and its insurer which, in almost all cases, share an interest in triggering the repose period.

USF&G’s objection to that order has been pending for over four years, depriving USF&G of any opportunity for appellate review (*id.* at 25). That order states blatantly untrue accusations as if they were facts—a pattern the Receiver repeats in Opposition by, among other things, falsely stating that USF&G improperly destroyed documents relating to Covil (Opp. at 4).

Although the Receiver suggests otherwise, the Court of Appeals did rely on that void January 8, 2020 Order (Pet. 24, n. 23). Indeed, the only “injury” supporting standing identified by the Court of Appeals was USF&G’s alleged litigation misconduct—a grossly false, misleading, and one-sided narrative found in the void order obtained (and indeed drafted) by the Receiver himself. *Compare* Op. at 7 (noting that the “concerning conduct on the part of USF&G” supported standing) *with id.* at 3 (relying on the January 8, 2020 Order to establish alleged misconduct). In Opposition, the Receiver argues that the circuit order was properly part of the appellate record (Opp. at 25). But that is irrelevant. The Court of Appeals cannot rely on a void order, regardless of whether it is in the appellate record. Finally, the Receiver confusingly asserts the void order cannot be collaterally attacked. But USF&G was not a party to the case, or properly served, before the circuit court issued the order. It is black letter law that lack of jurisdiction is a basis to collaterally attack a court order.

### **CONCLUSION**

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

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