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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby
Master-in-Equity

Appellate Case No. 2023-000017

South Carolina Board of Financial Institutions .... Appellant,

v.

CDM Corporation, Inc., and Guardian Fiduciary Services, LLC ...... Respondents.

RESPONDENTS' OPPOSITION TO MOTION TO PUBLISH

Respondents CDM Corporation, Inc. and Guardian Fiduciary Services, LLC hereby file this response in opposition to Appellant South Carolina Board of Financial Institution's Motion to Publish Opinion No. 2025-UP-169, issued May 28, 2025. As detailed in Respondents' Petition for Rehearing, the Opinion issued in this matter should be reconsidered. Respectfully, it is an expansive ruling that conflicts with the plain language of the statute, and the General Assembly's unmistakable intent, and the historic interpretations of Section 34-21-10 by both the Bank Board itself and the Attorney General.

Further, the fact the Bank Board seeks through its Motion to Publish to expand its jurisdiction to reach fiduciary roles and appointments of other companies who, like the Respondents, provide fiduciary services unrelated to "trust business" should prompt the Court to pause and give careful reconsideration to its earlier ruling. If such expansion of an executive agency's authority is to happen, it can and should only be done by the General Assembly after

evaluating the full scope of what's being asked, not through a request that the Judiciary construe the phrase "trust business" to mean "both trust and non-trust business."

As it stands, the Court's construction of "trust business" reaches *inter alia* guardians who are appointed by the Probate Court to care for wards and help them make decisions about where to live, whether they can travel, whether they can operate a vehicle, and whether they can vote. S.C. Code Ann. § 62-5-304A(A). If the Legislature truly intended the Bank Board to have any role over such non-trust fiduciaries, then it can say so. But the fact that the Bank Board craves such authority without going through the legislative process and without any legitimate basis—what possible expertise does that agency have in overseeing such healthcare, end-of-life, daily activities decisions?—should prompt the Court to look favorably on the Respondents' petition for rehearing.

I The Opinion should be reconsidered.

The Court's Order holds companies that provide ***any*** fiduciary services fall within the term "trust business," and are therefore regulated by the Board of ***Financial Institutions****,* even where the fiduciary company does not provide services relating to trusts or investing in common trust funds. Respectfully, this decision goes against the Board's historic understanding of its own authority, (R. p. 199; Mantell Aff. ¶ 12), how the Attorney General has historically advised the public, (R. p. 219; 1996 S.C. AG LEXIS 25, at *7 (Feb. 9, 1996)), and numerous well-established rules of statutory construction that are outlined in the Respondents' rehearing petition.

To summarize: the Court improperly isolated the last sentence of South Carolina Code § 34-21-10 when interpreting "trust business." In doing so, the Court appears to misunderstand the purpose of the last sentence of Section 34-21-10, which is to harmonize South Carolina law with the language of 12 U.S.C. § 92a passed before it. Further, the very sentence upon which the Court based its analysis distinguishes "trustee" from all other types of fiduciary roles. But the only

fiduciary role over which the General Assembly actually gave the Board jurisdiction is for "trust business." When a statute specifically includes one item, it necessarily excludes all other items that the Legislature did not include. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting Black's Law Dictionary 602 (7th ed. 1999))).

The Court's reliance on Article 3 within Chapter 21 to reinforce its conclusion is likewise misplaced. The purpose of Article 3 is to regulate banks and "trust institutions" investing ***trust money*** in a ***common trust fund***—which has nothing to do with Respondents or the fiduciary services they provide. Article 3 and the definitions therein are inapplicable to Respondents because they do not invest trust money into a common trust fund.

At bottom, Section 34-21-10 grants the Bank Board regulatory authority over companies engaged in "trust business." Respondents are not engaged in "trust business." They provide fiduciary services to elderly, disabled, or otherwise compromised individuals of South Carolina to ensure their physical, emotional, and medical needs are protected, specifically in situations where there is no one else to serve in that role (issues about which the Bank Board has absolutely no expertise or experience). The Respondents do their work at the appointment of, direction of, and supervision of the Probate Court, which has the expertise the Bank Board entirely lacks over such issues. The Court's opinion expanding "trust business" beyond its statutory bounds should be reconsidered.

II. The Court should consider the Board's motivation for seeking such a vast expansion of power outside of the legislative process.

Respondents respectfully ask the Court to pause and reflect upon what the Board is requesting and why. The agency was established for the following purpose: "The Board may

supervise all banks and building and loan associations and provide regulations and instructions for the direction, control and protection of all such institutions, the conservation of their assets and the liquidation thereof, as may be necessary or proper to effectuate the purposes of this Title." S.C. Code Ann. § 34-1-60. That has nothing to do with the Respondents' services as a non-trustee fiduciary, and it appears to be a far cry from the result of the Court's Opinion, which construes the phrase "trust business" to reach fiduciaries who are providing non-trustee, non-financial services.

By asking the Court to publish its Opinion so that the Bank Board can regulate other non-trustee companies in addition to these Respondents, the executive-branch agency appears to be trying to use the Judiciary, rather than the legislative process, to expand the limited jurisdiction over "trust business" the Legislature gave the agency. If the Bank Board truly believes its jurisdiction should expand to regulate non-trustee fiduciaries—such as those serving wards, or the vulnerable, or the incapacitated, irrespective of the subject matter of the fiduciary's appointment—then it should go to the General Assembly and explain why it needs this additional jurisdiction.[1]

But more importantly, seeking to expand its jurisdiction through the Judiciary and outside of the legislative process is inconsistent with basic separation of powers, and the agency's Motion to Publish appears to be precisely the type of overreach that the Supreme Court specifically warned against in *Joseph v. S.C. LLR*, 417 S.C. 436, 461, 790 S.E.2d 763, 777 (2016) (Kittredge, J., concurring).

Accordingly, the Respondents respectfully request that the Court reconsider its earlier Opinion, both in light of the unintended consequences of its expansive construction of "trust

[1] Such an explanation is of course implausible, as the Bank Board is obviously not qualified to regulate the medical, end-of-life, daily-activities, and other non-financial decisions entrusted by the Probate Court to fiduciaries.

business" and the agency's attempt to parlay that Opinion into an expansion of its jurisdiction beyond that which could have been intended by the General Assembly.

CONCLUSION

Respondents respectfully request the Court deny Appellant's Motion to Publish.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Respondents, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by emailing a copy of the same to the following address(es):

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