THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Hon. Joe M. Crosby, Master-in-Equity

Case No. 2020-CP-22-00882

Appellate Case No. 2023- 000017

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

v.

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

REPLY

July 7, 2023

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ARGUMENT

I. THE MASTER-IN-EQUITY'S RULING CONTRADICTS SOUTH CAROLINA LAW, AND THE EFFECT OF UPHOLDING THIS RULING WOULD BE FAR-REACHING AND INDUSTRY-CHANGING.

The question before the Court in this case is simple: what did the General Assembly mean when it prohibited entities from conducting "trust business" without BOFI's prior approval?

BOFI asserts that "trust business," which it is statutorily obligated to license and regulate, includes serving in the fiduciary roles of trustee, conservator, guardian, personal representative, and agent. This interpretation gives meaning to the plain language of S.C. Code Ann. § 34-21-10, which prohibits any entity from conducting trust business in this state without BOFI's approval, and exempts *only individuals and national banks* from obtaining BOFI's approval to qualify and act as "trustee, executor, administrator, guardian, committee or in any other fiduciary capacity."

The Master-in-Equity, however, held that an entity needs BOFI's prior approval to conduct "trust business" only when it is "involved with the administration of trusts." **(R. p. 8)** (Summary Judgment Order). The Master-in-Equity further held that BOFI lacks authority to regulate any entity serving in "non-trustee fiduciary roles including conservator, guardian, attorney-in-fact in accordance with a power attorney, personal representative, or executor." Id.

This ruling, if upheld, will allow **any entity**—whether a bank, local LLC, or foreign corporation— to seek and potentially obtain complete financial control over the estates and assets of the most vulnerable citizens of this State without meeting any licensure requirements and without any examination or regulatory oversight.

The Master-in-Equity's holding is unjustifiable. Without explanation, it eviscerates any meaning from the final phrase of Section 34-21-10 as well as numerous other sections, ignores case law, refuses to give BOFI's interpretation deference, and declines to consider voluminous

evidence proving that the usual and customary meaning of "trust business" includes conservator, guardian, personal representative, and agent.

BOFI asks that this Court reverse the Master-in-Equity and find that Respondents have conducted unlawful trust business in violation of Section 34-21-10 by serving as conservator, guardian, personal representative, and agent, without obtaining BOFI's written approval to do so.

II. THE MASTER-IN-EQUITY'S NARROW INTERPRETATION OF "TRUST BUSINESS," AND OF BOFI'S AUTHORITY TO REGULATE IT, CANNOT BE RECONCILED WITH THE PLAIN LANGUAGE OF TITLE 34.

Nearly every statute in Title 34 addressing "trust business," "trust company," "trust institution" or banks with "trust powers" explicitly discusses serving as conservator, guardian, personal representative, and/or agent. See e.g., S.C. Code Ann. § 34-21-10; § 34-210(2), (4), and (7); § 34-21-220; §§ 34-15-10 and 20; § 34-3-830; § 34-3-850; § 34-1-180(9). Neither the Master-in-Equity nor Respondents offer any explanation as to why the General Assembly would repeatedly list these supposedly irrelevant fiduciary roles in statutes concerning trust business. The Master-in-Equity's narrow interpretation of "trust business," and of BOFI's authority to regulate it, cannot be reconciled with the plain language of these statutes. There is only one explanation for the General Assembly naming these fiduciary roles in connection with trust business: serving in any of these roles constitutes "trust business" subject to BOFI's approval and oversight. Thus, Master-in-Equity's definition of trust business must be reversed.

III. THE USUAL AND CUSTOMARY MEANING OF "TRUST BUSINESS" INCLUDES SERVING AS CONSERVATOR, GUARDIAN, PERSONAL REPRESENTATIVE, AND AGENT.

The Master-in-Equity's interpretation of the term "trust" discussed in Title 34 ignores the usual and customary definition of "trust" in the context of "trust business," which includes a broad range of fiduciary activities.

As Corpus Juris Secundum confirms, the usual and customary meaning of "trust" refers broadly to various fiduciary roles:

> A trust is defined as the right, enforceable solely in equity, to the beneficial enjoyment of property, the legal title to which is vested in another, but the word "trust" also is frequently employed to indicate duties, relations, and responsibilities that are not strictly technical trusts.

90 C.J.S. *Trusts* § 1 (Trust, defined). Courts have acknowledged and applied a similarly broad definition of "trust" specifically in the context of trust business.[1]

The Master-in-Equity fails to acknowledge the context of the word "trust," as used in "trust business." The Master erroneously applies the Probate Code's definition of "trust" to define trust business, even though that definition applies only "in this Code," (i.e. the Probate Code), and only "unless the context otherwise requires." S.C. Code Ann. § 62-1-201. The Probate Code does not purport to define trust business, nor does it discuss the licensure or regulation of entities conducting trust business. The Probate Code's definition of "trust" was clearly never intended to be used to define trust business.

The Master-in-Equity also cites a definition of "trust" from thelawdictionary.org to narrowly define "trust business," while ignoring the more applicable entry in that same resource:

> TRUST COMPANY - Business that works solely in fiduciary relationships with organizations and individuals and acts as guardian, executor, trustee in the administration of all custodial arrangements, trust funds and estates.

[1] A trust company chartered "To accept and execute all such trusts of every description as may be committed to them," could lawfully serve as conservator because "the powers thus conferred are broad enough to cover a trust of this character." Glaser v. Priest, 29 Mo. App. 1, 9 (1888). A trust company, "by virtue of its general powers… to 'execute trusts of every description,' must be presumed to have corporate capacity to act as committee of the lunatic [i.e. guardian/conservator]." Equitable Tr. Co. v. Garis, 190 Pa. 544, 549, 42 A. 1022, 1023 (1899). "The enumeration of the forms of transactions which may be regarded as germane to the purposes of the modern trust company is by no means a simple task…" and includes a "variety of transactions… as a matter of common knowledge..." State v. Cent. Tr. Co., 106 Md. 268, 67 A. 267, 270 (1907).

https://thelawdictionary.org/?s="trust+company".

Likewise, the Master-in-Equity and Respondents quote an entry called "Distinction between bank and trust company," in Corpus Juris Secundum to define trust company as "a corporation or institution organized to take and administer trusts." 9 C.J.S. *Banks and Banking* § 650. This entry does not purport to define "trust company," nor does Corpus Juris Secundum ever define "trust company." It does, however, define "trust," noting in the very first sentence that the word "is frequently employed to indicate duties, relations, and responsibilities that are not strictly technical trusts." 90 C.J.S. *Trusts* § 1.

Respondents also selectively quote an Attorney General's opinion defining "trust company" as "any corporation found for the purposes of acting as trustee," but ignore *the next sentence* further defining "trust company" as "a corporation formed for the purposes of… acting as testamentary trustee, executor, guardian, etc." **(R. p. 220)** Op. S.C. Att'y Gen (Feb. 9, 1996).

BOFI asks this Court to apply the correct usual and customary meaning of "trust" in "trust business," as used in S.C. Code Ann. § 34-21-10, and find that Respondents have unlawfully served as conservator, guardian, personal representative, and agent without BOFI's prior approval.

IV. BOFI IS EMPOWERED BY STATUTE TO REGULATE ENTITIES SERVING IN FIDUCIARY ROLES.

Respondents incorrectly assert that BOFI's authority is limited to regulating only "banks and building and loan associations." S.C. Code Ann. § 34-1-60. S.C. Code Ann. § 34-21-20 provides BOFI with the authority to regulate, and examine Respondents:

> All state chartered banks, building and loan associations, savings associations, savings and loan associations, savings banks, trust companies, and fiduciary corporations authorized to conduct a trust business in this State are subject to examination by the State Board of Financial Institutions and are further subject to rules and regulations promulgated by the Board.

Respondents acknowledge Section 34-21-20, but only to argue that its reference to "fiduciary corporations authorized to conduct a trust business" somehow proves that corporations may serve in any fiduciary role in South Carolina, other than trustee, without BOFI approval.

This is simply not so. "Fiduciary corporation" is merely a catch-all term at the end of a list of entities which may potentially be authorized to conduct trust business. Discussing an earlier version of this very statute, Supreme Court has acknowledged that this law undertakes to "subject corporate fiduciaries to examination." Ex parte Michie, 167 S.C. 1, 1,165 S.E. 359, 367 (1932).

Since Respondents have conducted trust business by serving as conservator, guardian, personal representative, and agent, they are subject to BOFI's regulation and examination.

V. BOFI'S INTERPRETATION OF "TRUST BUSINESS," AS USED IN S.C. CODE ANN. § 34-21-10, IS WORTHY OF DEFERENCE AS IT IS SUPPORTED LEGALLY, HISTORICALLY, AND IS CONSISTENT WITH EVERY OTHER STATE AND FEDERAL REGULATOR.

To the extent this Court finds S.C. Code Ann. 34-21-10 ambiguous, BOFI's interpretation should be applied. BOFI's Policy Statement articulates BOFI's good faith interpretation of the law, and is supported by a myriad of statutory, historical, and regulatory resources from South Carolina, other states, and the federal level. **(R. pp. 101-102)** (BOFI Policy Statement).

Respondents refer to a concurring opinion by Justice Kittredge which states that "an administrative agency may not make law without legislative oversight and approval." Joseph v. S.C. LLR, 417 S.C. 436, 461, 790 S.E.2d 763, 777 (2016) (Kittredge, J., concurring). Regardless of the non-precedential nature of this quote, BOFI is in full agreement with its sentiment.

BOFI has never claimed to "make law;" however, an agency must interpret the laws it is obligated to enforce. S.C. Code Ann. § 1-23-10(4) indicates that State agencies have the authority to issue "policy or guidance… other than in a regulation," with the caveat that such guidance does not have the force or effect of law. Guidance setting forth an agency's interpretation of statute is

generally afforded deference. "[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts ... will defer to the agency's interpretation absent compelling reasons...." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014).

BOFI's Policy Statement was appropriately issued as it is the agency charged with administering the provisions of Title 34. BOFI did indeed issue its Policy Statement during this litigation. The purpose of this guidance was to provide a clearly articulated statement to the public as well as to the Master-in-Equity, regarding the Board's interpretation of Section 34-21-10. Candidly, before this case, BOFI was unaware of any dispute as to the meaning of "trust business." Once aware of the issue, the Board spoke by unanimous vote in a duly called meeting to issue this guidance.

The timing of the Policy Statement notwithstanding, BOFI[2] has regulated entities serving as conservator, guardian, personal representative, and agent in South Carolina for over 100 years. In 1932, the Supreme Court noted that statutes now codified at Sections 34-21-20 through 70 "undertake to… subject corporate fiduciaries to examination," recalling the following history:

> The lawmakers, when they granted them power to become **executors, administrators, guardians, and trustees,** must have realized that they were creating for them a different status in the law than that of an individual executor, but had faith in their fidelity and the security of the funds intrusted [*sic*] to them. The epidemic of bank failures which followed in the years preceding 1930 showed them the fallacy of their faith and induced the passage of the act of 1930, which accurately **defines the duties of such fiduciaries in the handling of trust funds.**

Ex parte Michie, 167 S.C. 1, 165 S.E. 359, 367 (1932). Moreover, there is significant evidence in the record showing that the Policy Statement represents BOFI's longstanding position and

[2] Including its predecessors, the Board of Bank Control, the State Bank Examiner, etc.

interpretation of its duties to approve and regulate entities serving as conservator, guardian, personal representative, and agent. See **(R. p. 52)** (Green Aff., ¶6), **(R. p. 57)** (J. Earle Financial Consent Order); **(R. pp. 107-109)** (CSBS Cooperative Agreement, Section 1.1). There are also ample resources corroborating BOFI's Policy Statement as a matter of regulatory understanding of "trust business." See **(R. pp. 120-159)** (Trust Business Definitions By State), **(R. pp. 253-260)** (OCC Interpretive Letter #1176), **(R. p. 48)** (Hinds Aff., ¶4-5).

In light of these considerations, the definition of "trust business," set forth in BOFI's Policy Statement is worthy of deference. If the law is silent or ambiguous as to the meaning of "trust business," BOFI's interpretation should be applied, and the Master-in-Equity should be reversed.

VI. BOFI'S ALTERNATIVE ARGUMENT, SET FORTH IN SECTION IV OF ITS BRIEF, WAS PRESERVED FOR THIS APPEAL.

The question of what fiduciary roles constitute "trust business" is at the center of this litigation, and has been thoroughly preserved, as evidenced by trial court briefs and orders.

Respondents object to the attempted application of their own definition of trust business to the facts of this case, contending that BOFI failed to preserve the question of whether each of Respondents' fiduciary activities involve "the administration of trusts" constituting unauthorized "trust business" according to the Master-in-Equity's erroneous definition. **(R. p. 8)** (Summary Judgment Order).

Even to the extent that this issue is somehow distinct and requires more specific preservation, it has been preserved. BOFI raised the issue in its Summary Judgment Motion, describing each fiduciary role, comparing it to a trustee, and noting that, in some cases, the Probate Code explicitly names these roles "trustee." **(R. pp. 82-86).** The argument concludes (as Respondents acknowledge) "there is no relevant legal distinction between the duties of trustee, conservator, guardian, personal representative, or agent pursuant to a power of attorney." **(R. p.**

85). The Master-in-Equity ruled on this issue, stating "The Probate Code's explicit exclusion of these non-trustee fiduciary roles the definition of trust, confirms that these activities are not included in the definition of the term 'trust business' as contemplated by Section 34-21-10." **(R. p. 10)** (Summary Judgment Order).

Thus, the issue has been preserved and this Court has jurisdiction to hold that Respondents, even by their own narrow definition of "trust business," have conducted unauthorized trust business as a matter of law by serving as conservator, guardian, personal representative, and agent.

CONCLUSION

For the foregoing reasons, BOFI requests that this Court reverse the Master-in-Equity's granting of Respondents' Motion for Summary Judgment, declare that trust business requiring BOFI's prior approval includes the fiduciary roles of conservator, guardian, personal representative and agent, and declare that BOFI properly licenses and regulates non-exempt entities serving in these roles.

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CERTIFICATE OF SERVICE

This is to certify that today undersigned counsel for the served one (1) copy of the REPLY OF APPELLANT by electronic mail delivery of same to the recipients listed, and at their Attorney Information System provided email addresses, via the attached E-mail:

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