STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Peter D. Protopapas, as Receiver for Covil Corporation, Plaintiff, v. Wall, Templeton & Haldrup, P.A.; Sentry Casualty Company; United States Fidelity And Guaranty Company; Zurich American Insurance Company, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C.A. No. 2019-CP-40-02285
STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Sandra S. Hutto, individually and as Personal Representative of the Estate of Donald L. Hutto, et al., Plaintiffs, v. Covil Corporation et al., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C.A. No. 2019-CP-40-06956

ORDER GRANTING RECEIVER'S MOTION TO CLARIFY STATUS OF RECEIVERSHIP

This matter comes before the Court on the Receiver's July 21, 2020 Motion to Clarify Status of Receivership. Zurich American Insurance Company ("Zurich") filed its response on August 6, 2010, United States Fidelity and Guaranty Company ("USF&G") filed its response on August 21, 2020, and the Receiver filed his Reply on September 8, 2020. Through the Motion, the

Receiver asks this Court to clarify the impact, if any, of Zurich's and USF&G's (collectively, "the Insurers") affirmative defenses related to Covil's prior receivership.[1] After careful consideration of the parties' filings and applicable law, the Court hereby grants the Motion and finds Covil's prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil.

BACKGROUND

In 1991, the Greenville County Master in Equity, Judge Simmons, appointed L. Winston Lee as Receiver ("the Prior Receiver") for Covil Corporation in *First Savings Bank, FSB v. Covil Corporation et al.*, C.A. No. 91-CP-23-04445. In a May 12, 1992 Order, Judge Simmons judicially dissolved Covil and ordered the Prior Receiver to, among other things, provide known Covil claimants with notice of the dissolution pursuant to section 33-14-106 of the South Carolina Code and publish notice of the dissolution pursuant to section 33-14-107 of the South Carolina Code.

In a Petition filed November 11, 1992, the Prior Receiver, seeking to bring his receivership to a close, detailed the acts undertaken in his capacity as Covil's receiver, including that he "marshalled and liquidated the assets and collected the accounts of the Defendants," retained legal representation, "sold all the furniture, fixtures, inventory[,] and equipment of Covil," and addressed the presence and remediation of asbestos in inventory and materials sold to another company.

The following day, Judge Simmons entered an order that contained the following finding: "From the foregoing Petition of the Receiver, it appears and I find that he has fully complied with the previous Orders of this Court in liquidating the assets of the his [sic] Defendants, that his

[1] Specifically, Zurich's Tenth Defense in *Protopapas v. Wall, Templeton & Haldrup, P.A.*, C.A. No. 2019-CP-40-02285, and USF&G's Sixth Defense in *Hutto v. Covil Corporation et al.*, C.A. No. 2019-CP-40-06956.

accounting is in order[,] and that the relief sought by him should be approved." Judge Simmons provided for the Prior Receiver's discharge as Covil's then-receiver, thus ending the receivership, in a subsequent order entered on December 7, 1992. On May 4, 2020, Judge Simmons transferred *First Savings Bank* to this Court and this Court is the proper Court for both the 1991 Receivership and the present Receivership.

Documentary evidence as well as the testimony of corporate representatives of Zurich and USF&G conclusively evidence that both insurance companies were well aware of the Prior Receivership in 1991. Further, Zurich understood by at least 1994 that Covil still needed to file a Notice of Dissolution in the newspaper to effect dissolution of Covil.

First, USF&G's corporate representative, Craig Johnson, testified that a former claims representative of USF&G, Cynthia Knight, communicated with the Prior Receiver, L. Winston Lee, directly by telephone and through written correspondence. *See* Deposition of USF&G, Day 1, at 80-81. The notes memorializing the telephone call and Ms. Knight's letters to Mr. Lee both include reference to case number 91-CP-23-4445 and Judgment Roll number 91-5988. *Id.*at 84-85.

Second, Zurich's corporate representative, John Weiss, testified that Zurich received a letter from its counsel, Danny White, on November 14, 1991, in which counsel stated that he included a Notice to Creditors for Covil Corporation dated November 7, 1991. *See* Deposition of Zurich, Day 1, at 192-193. While he agreed that the letter in question was located in the Covil claims file, Zurich did not locate the enclosure. *See id.* at 194-198. Indeed, Mr. Weiss testified that he was not aware that Zurich performed any specific search for the enclosure which sets forth judgment roll and civil action numbers. *See id.* at 198.

LAW

Section 33-14-106 provides, in relevant part, "(a) A dissolved corporation may dispose of the known claims against it by following the procedure described in this section. . . . (d) For purposes of this section, 'claim' does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution."[2]

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

> (a) A dissolved corporation may publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.
>
> (b) The notice must:
> (1) be published once in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this State, its registered office) is or was last located;
> (2) describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and
> (3) state that a claim against the corporation is barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.
>
> (c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:
> (1) claimant who did not receive written notice under Section 33-14-106;
> (2) a claimant whose claim was timely sent to the dissolved corporation but not acted on.
>
> (d) A claim may be enforced under this section:
> (1) against the dissolved corporation to the extent of its undistributed assets; or
> (2) if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of his pro rata share of the claim or the corporate assets distributed to him

[2] This statute was last amended before Covil was dissolved; accordingly, its language is unchanged throughout the time period relevant to this motion.

> in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to him.

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

DISCUSSION

1. No Evidence Exists that Notice of Covil's Dissolution Was Ever Published.

The Insurers contend that in his November 11, 1992 Order, Judge Simmons found the Prior Receiver published notice of Covil's dissolution. However, upon close examination of the Order, read in context, the Court disagrees.

Critically, the order made no explicit findings related to publication, and the Court declines to presume that the Receiver did publish the notice, as USF&G urges. Instead, the order merely found that the prior receiver "fully complied with the previous Orders of this Court *in liquidating the assets of the . . . Defendants*, that his accounting is in order[,] and that the relief sought by him should be approved." This finding says nothing about publication of Covil's dissolution; instead, it only speaks to the Prior Receiver's compliance with Judge Simmons' instructions to "proceed with the collection of accounts and marshalling of assets, and the orderly liquidation of the business of Covil Corporation." *First Savings Bank, FSB v. Covil Corporation et al.*, May 11, 1992 Order.

Additionally, Judge Simmons' finding, by its own terms, was based entirely on the representations the Prior Receiver made in his Petition to the court: "*From the foregoing Petition of the Receiver, it appears* and I find that he has fully complied . . . ." November 12 Order (emphasis added). And while the Petition goes into great detail about the Prior Receiver's actions, it lacks any assertion that he published notice of Covil's dissolution. Accordingly, even if the Judge Simmons' language in the November 12 Order could be construed as a finding of compliance with

all of the court's prior orders, including the publication requirement, such a finding would have no factual basis as it relates to publication.

In addition to the lack of support for extrapolating Judge Simmons' finding to encompass publication, evidence also exists that contradicts such a reading. For example, the Prior Receiver's Petition contains a final accounting of reimbursable expenses, and nowhere in this accounting is there any mention of a publication expense to any newspaper. Further, when defense counsel provided the opportunity to pursue publishing a notice of dissolution in 1994, no one at Zurich followed up to insist that such action be taken. Additionally, a Zurich Claim File Activity Memorandum from March 2001 acknowledged there was "no evidence" that notice of Covil's dissolution had been published. Because Judge Simmons' November 12, 1992 finding is ambiguous as to publication, and evidence exists that would contradict interpreting the finding to encompass publication, the Court declines the Insurers' invitation to do so and finds that notice of Covil's dissolution was never published.

2. Section 33-14-107 Does Not Foreclose the Asbestos Claims Pending Against Covil.

Assuming *arguendo* that notice of Covil's dissolution was published, pending and future asbestos claims by personal injury claimants would nonetheless remain viable, as neither iteration of section 33-14-107 forecloses any claims against Covil as a matter of law. Despite USF&G's objection to the contrary, the Court further finds that the Receiver has standing to present this argument.

a. The Amended Statute Does Not Apply to Covil.

Section 33-14-107(c) operates as a statute of repose, and as such, it "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Langley v. Pierce*, 313 S.C. 401, 403–04, 438 S.E.2d 242, 243 (1993) (quoting *First United*

Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 865–866 (4th Cir.1989)); *see also* Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. Balt. L. Rev. 119, 131 (2014) (noting "courts have recognized that while statutes of limitations are procedural, statutes of repose are substantive").

Accordingly, subsection (c)(3), which was added to the statute in 2004, applies prospectively only to corporate dissolutions occurring after its enactment. *See Edwards v. State Law Enf't Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011) ("When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only."); *Indep. Ins. Co. v. Indep. Life & Acc. Ins. Co.*, 218 S.C. 22, 33, 61 S.E.2d 399, 404 (1950) ("Statutes tending to destroy private rights should be construed not only strictly, but as not retrospective in operation."); *see, e.g.*, *Corbett v. City of Columbia*, 294 S.C. 327, 331–32, 364 S.E.2d 459, 461 (1988) ("[W]e held that the repeal of § 42–9–100 involved substantive rights and that the amendment would not be applied retroactively."); *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011) (reasoning that because an act "create[d] substantive rights and impose[d] new obligations," it would "apply prospectively absent clear indication to the contrary by the Legislature").

The Insurers argue that, even if subsection (c)(3) applies prospectively, it nonetheless acts to bar claims brought more than ten years after its enactment, in 2014. However, this interpretation is incompatible with the plain statutory language, which mandates that a claim against a dissolved corporation must be filed "within ten years after the publication date of the newspaper notice." § 33-14-107(c). Under the Insurers' interpretation of the statute, claims against Covil that fall under subsection (c) must have been filed between 2004 and 2014; however, subsection (c) would also require that the claims be filed by 2002, ten years after the purported notice of Covil's

dissolution. The Insurers' desire for a favorable reading of section 33-14-107 must yield to the impossibility their interpretation presents.[3] Subsection (c)(3) simply cannot be applied to dissolutions that took place prior to its enactment.

b. The Unamended Statute Does Not Bar Unaccrued Claims.

The Insurers further claim that, even if the 2004 amendments to section 33-14-107 do not apply to Covil, the prior version of the statute, read alongside section 33-14-106, nonetheless bars the current asbestos claims brought against Covil. Again, however, the Insurers' position is belied by plain statutory language. The Insurers are correct that section 33-14-106 addresses "known" claims against a dissolved corporation, and subsection (d) excludes from the definition of "claim" "a contingent liability or a claim based on an event occurring after the effective date of dissolution." § 33-14-106. However, the fact that section 33-14-107 does not contain a similar exclusion does not suggest that the pre-2004 version of the statute encompasses such claims. "Unknown" as it is used in section 33-14-107 refers to claims unknown *to the dissolved corporation*, not to claims unknown *to the claimant*. This interpretation is consistent with the language of subsection (a), which provides that "[a] dissolved corporation may publish notice of its dissolution and request that *persons with claims* against the corporation present them in accordance with the notice." § 33-14-107(a) (emphasis added).

This interpretation is also consistent with the Reporter's Note accompanying section 33-14-107, which recognizes that the statute "does not contain subsection (c)(3) of Model Act Section

[3] Even taken out of the context of Covil's dissolution, for corporations that dissolved (and published notice of dissolution) in the ten years prior to the 2004 amendment, the Insurers' interpretation of the statute would also reduce the period during which claimants could bring claims against the dissolved corporation. For example, claims against a corporation that dissolved in 2000 would have to be brought between 2004 and 2010 to comply both with the Insurers' interpretation and the plain statutory language. This Court does not believe the legislature intended such disparate results when it amended section 33-14-107.

14.07 providing that contingent claims and those based on an event occurring after dissolution are subject to the five-year statute of repose, too. The statute of repose in the new provision only applies to claims existing at dissolution." South Carolina Reporter's Comments, § 33-14-107. This Comment reveals the intent of the South Carolina legislature to exclude nonexistent claims from the reach of both section 33-14-106 and -107 at the time of Covil's dissolution.

The Insurers' argument that the Reporter's Comments contradict "the plain meaning of the statutory text" is incorrect, as is their argument that the 2004 amendment adding subsection (c)(3) merely clarified existing law. In fact, the amendment stands strongly in opposition to the Insurer's position—if section 33-14-107 already encompassed nonexistent claims prior to 2004, the addition of subsection (c)(3) would have been entirely unnecessary and that language would be surplusage. *See Cannon v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 371 S.C. 581, 584, 641 S.E.2d 429, 430 (2007) ("It is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law."); *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." (quoting 82 C.J.S. *Statutes* § 346)).[4]

In sum, no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil. Furthermore, as the Receivership Court for the current and former Receiver, nothing from the prior Receivership precludes the current Receivership or personal injury asbestos claimants from filing lawsuits against Covil.

[4] The Insurers also argue section 33-14-107(d) does not authorize the filing of asbestos claims against Covil because Covil's insurance policies are not "undistributed assets." § 33-14-107(d). This Court disagrees. *See, e.g.*, *Moultis v. Degen*, 279 S.C. 1, 7, 301 S.E.2d 554, 558 (1983); *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 41, 664 S.E.2d 83, 88 (Ct. App. 2008); *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 293, 569 S.E.2d 371, 374 (Ct. App. 2002).

CONCLUSION

For the reasons stated above, the Court hereby **GRANTS** the Receiver's Motion and finds Covil's prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil.

AND IT SO ORDERED this _____ day of _____, 2020.

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Jean H. Toal, Chief Justice of the South Carolina Supreme Court, Retired; Acting Circuit Court Judge.

Richland Common Pleas

Case Caption:	Peter D Protopapas , plaintiff, et al vs Wall Templeton & Haldrup Pa , defendant, et al
Case Number:	2019CP4002285
Type:	Order/Other

So Ordered

Jean H. Toal