

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Jean H. Toal  
Acting Circuit Court Judge

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Dec 01 2020

SC Court of Appeals

Appellate Case No. 2020-001437  
Circuit Court Case Nos. 2019-CP-40-02285 and 2019-CP-40-06956

Peter D. Protopapas, in his capacity as Receiver of Covil Corporation..... Plaintiff,

v.

Wall, Templeton & Haldrup, P.A.; Sentry Casualty Company; United States Fidelity and Guaranty Company; Zurich Insurance Company..... Defendants,

*And*

Sandra S. Hutto, Individually and as Personal Representative of the Estate of Donald L. Hutto and Brian Hutto and Candace H. Youngblood,..... Plaintiffs,

v.

Covil Corporation; Sentry Insurance A Mutual Company; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of South Carolina, Inc.; United States Fidelity & Guaranty Company; Zurich American Insurance Company; 3M Company; AECOM; Armstrong International, Inc; Aurora Pump Company; BW/IP, Inc.; Carboline Company; CBS Corporation; CGR Products, Inc.; Daniel International Corporation; Fisher Controls International, L.L.C.; Fluor Constructors International, Inc.; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; The Goodyear Tire And Rubber Company; Grinnell, LLC; Hajoca Corporation; IMG Industries, Inc.; John Crane, Inc.; Metropolitan Life Insurance Company; Spirax Sarco, Inc.; Trane U.S., Inc.; Uniroyal Holding, Inc.; Velan Valve Corporation; Viking Pump, Inc.; Weir Valves & Controls U.S.A., Inc..... Defendants,

*Of which:*

United States Fidelity and Guaranty Company is the ..... Appellant,

*And*

Covil Corporation, by and through its Receiver, Peter D. Protopapas and Peter D. Protopapas, in his capacity as Receiver of Covil Corporation are the..... Respondents.

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## USF&G'S RESPONSE REGARDING APPEALABILITY

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The Covil Corporation was an insulator that was judicially dissolved by order of Judge Simmons in Greenville County in 1992. Both before and since that dissolution, Covil has been a serial defendant in personal-injury asbestos litigation. After it was dissolved, Covil's insurers—including USF&G, Zurich, Sentry, and several others—provided a defense for the company in asbestos litigation pursuant to their respective insurance policies that were issued to Covil through the years.

In the cases on appeal—as well as numerous others pending in the circuit court—the current Receiver for the Covil Corporation and personal-injury plaintiffs allege that USF&G and Covil's other insurers somehow became Covil's "alter ego" because they provided a legal defense for the company in asbestos litigation following its dissolution. In effect, both the Receiver and asbestos plaintiffs are pushing this novel theory in order to end-run the limits of Covil's historic insurance policies, and to shift all of Covil's actual and potential liabilities to Covil's insurers.

No court anywhere in the country has ever adopted such an "alter ego" approach based only upon an insurer providing defense or indemnity coverage pursuant to an insurance contract.

Regardless, one of the issues raised by these actions is the extent of Covil's liability in the first place in light of its prior judicial dissolution and South Carolina Code §33-14-107, which provides a ten-year statute of repose for dissolved companies. USF&G and Zurich have raised this statute as a potential defense that would dispose of most, if not all, of these cases. Inexplicably, the Receiver—who should have an interest in minimizing Covil's tort liabilities—has joined with personal-injury plaintiffs in objecting to this statute as a defense.

On September 25, 2020, the circuit court issued the order on appeal, which strikes the statute of repose as an affirmative defense from these cases. As the circuit court put it: “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.” (Order at 2.) It concluded: “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.” (*Id.* at 9.) Though couched as a motion to “clarify” the order appointing a receiver, the motion and the circuit court’s ruling effectively strikes one of USF&G’s affirmative defenses for purposes of trial.

USF&G timely served its notice of appeal of that decision on October 26, 2020. On November 6, 2020, this Court issued a letter requesting that the parties address the appealability of this order. Respectfully, the order is appealable, as it meets the appealability elements of several different statutes that vest appellate jurisdiction over the order. *See Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 178–79 (1990) (acknowledging that an order may be appealable for multiple reasons).

**S.C. Code Ann. § 14-3-330(1)**: An order becomes immediately appealable, even if interlocutory, when it “involv[es] the merits in actions commenced in the court of common pleas.” S.C. Code Ann. § 14-3-330(1). A decision “involv[es] the merits” when it “finally determin[e]s some substantial matter forming the whole or a part of some cause of action or defense” between the litigants. *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d

777, 780 (1993) (quoting *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)).

Here, the order on appeal terminates a complete affirmative defense. If the statute of repose precludes claims against Covil commenced after the statutory repose period, and Covil can no longer have any liability for such claims, then there can be no “alter ego” liability that flows from Covil to its insurers (even assuming *arguendo* that such a theory is viable in the first place, which it is not). Because the order eliminates the statute of repose as a defense, it is immediately appealable.

**S.C. Code Ann. § 14-3-330(2)**: Similarly, an order becomes immediately appealable when it “strikes out an answer or any part thereof or any pleading in any action.” S.C. Code Ann. § 14-3-330(2). As explained above, the statute of repose is an affirmative defense in this litigation; the order on appeal even acknowledges as much at the outset of its discussion. (*See* Order at 1–2 (“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.”).)

By determining that the statute of repose is unavailable as an affirmative defense in this litigation, the circuit court has stricken a part of USF&G’s answer, and a complete defense to liability. The order is appealable for this additional reason.

**S.C. Code Ann. § 14-3-330(4)**: Finally, any order from the circuit court “granting, continuing, modifying, or refusing the appointment of a receiver” is immediately appealable. S.C. Code Ann. § 14-3-330(4). The order on appeal “continu[es]” and “modif[ies]” the Covil receivership by erasing an affirmative defense that would have rendered the receivership a nullity. If the statute of repose was available as a defense to future liability, then Covil would have no

exposure going forward. That, in turn, would have effectively dissolved the receivership, as there would be no reason to marshal potential insurance proceeds—Covil’s last remaining assets—to protect against future claims.

Accordingly, the order on appeal has the effect of continuing the receivership and modifying it such that USF&G may not rely on activities of the prior receivership and judicial dissolution proceedings to mitigate or eliminate Covil’s liability going forward. As such, the order is immediately appealable for this third reason as well.

### **CONCLUSION**

USF&G’s appeal of the circuit court’s order striking the statue-of-repose defense is properly before the Court. However, USF&G is sensitive to the oft-repeated concerns of judicial economy and avoiding piecemeal appeals. Accordingly, though this order is immediately appealable under multiple provisions of the South Carolina Code, so long as the issue is preserved and not deemed waived, USF&G would not object to a stay of this appeal until either of these cases reaches a final judgment.

*Signature Page Attached*

Respectfully submitted,

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Attorneys for Appellant United States Fidelity and  
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December 1, 2020

**PROOF OF SERVICE**

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them as the addresses below:

Pleading(s):                   USF&G's Response Regarding Appealability

Parties Served:

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*Counsel for the Respondent Receiver for Covil Corporation*

By: /s/ M. Todd Carroll

December 1, 2020

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## Carroll, Todd

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**From:** Carroll, Todd  
**Sent:** Tuesday, December 1, 2020 6:50 PM  
**To:** Shanon Peake; Jon Robinson; Dot Faulkenberry; Jescelyn Spitz; Lindsay Valek; Murrell Smith; Austin Reed  
**Cc:** Frankel, Andy T; O'Neill, Elizabeth; Davis, William P.; Forshaw, Mary Beth  
**Subject:** RE: Appellate Case No. 2020-001437 - Memorandum on Appealability  
**Attachments:** USFG's Response Regarding Appealability of Statute of Repose Order (Appellate Case No. 2020-001437).pdf

Thanks, Shanon. Attached is USF&G's response to the Court of Appeals's correspondence regarding appealability, which we are serving via this email and filing with the Court today. Have a good evening, and best regards,

Todd

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**Subject:** Appellate Case No. 2020-001437 - Memorandum on Appealability

Good Afternoon,

Attached for service please find Respondents' Memorandum on Appealability which we are filing with the Court of Appeals today. The exhibits were too large to send as attachments to this email, so please find below a box link to view and download the exhibits:

<https://app.box.com/s/p35dkwzko1favvhscvmgk9nz24cfh2eo>

Thank you,  
Shanon

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