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

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

This is an appeal of an order granting a motion filed by Peter D. Protopapas, the court-appointed receiver ("Receiver") for Covil Corporation ("Covil"), a defunct corporation that was judicially dissolved in 1992 during a prior receivership proceeding but remains a defendant in ongoing asbestos litigation. The Receiver's motion sought to "clarify the status of [his] receivership" over Covil by obtaining a ruling that the ten-year statute of repose for claims against dissolved corporations set forth in S.C. Code Ann. § 33-14-107 did not prevent plaintiffs from bringing asbestos personal injury tort claims against Covil. The circuit court (Toal, C.J., Ret., sitting by designation as Acting Circuit Court Judge) granted the requested relief. This order was erroneous and raises several issues for appellate review:

1. Did the Receiver have standing to ask the circuit court for a ruling that Covil cannot benefit from the ten-year statute of repose for claims against dissolved corporations contained in S.C. Code Ann. § 33-14-107, given that the ruling sought and obtained by the Receiver benefits Covil's litigation adversaries, not Covil?

2. Does S.C. Code Ann. § 33-14-107, as amended in 2004, which bars unknown claims arising after corporate dissolution, apply prospectively from the date of the amendment to bar post-dissolution asbestos claims against Covil asserted more than ten years later?

3. If the 2004 amendment to Section 33-14-107 does not apply to Covil, does the pre-amendment version of the statute, which applies to all claims other than those for which claimant-specific notice is given under S.C. Code Ann. § 33-14-106, bar post-dissolution claims against Covil?

4. Section 33-14-107's repose period bars claims ten years after publication of a notice of dissolution, which Covil's prior receiver was ordered to publish pursuant to the prior receivership court's judicial dissolution decree. That court subsequently found that the prior

receiver complied with the receivership court's orders. In view of that finding as well as the presumption that receivers comply with court orders and their fiduciary obligations, did the circuit court err in reaching a contrary finding, decades after the prior final orders judicially dissolving Covil, by concluding that the prior receiver failed to publish notice of Covil's dissolution and on that basis that the statute of repose does not bar claims against Covil?

STATEMENT OF THE CASE

Through the order on appeal, Covil's Receiver, who is charged with *defending* Covil in asbestos litigation, obtained a ruling that one of Covil's own defenses was not viable. The Receiver had, and has, no legally cognizable interest in seeking what is effectively an advisory opinion that claims against Covil are *not* barred by South Carolina's statute of repose. Nor does the fact that the defense was asserted vicariously by Appellant United States Fidelity and Guaranty Company ("USF&G")—which has been sued under the novel theory that Covil's insurers, including USF&G, became Covil's alter egos after Covil dissolved—change the analysis. USF&G plainly has the right to assert Covil's defenses when defending vicarious liability claims. USF&G has also continued to defend Covil in ongoing asbestos litigation. To the extent that a statute of repose defense prevailed, it would limit both Covil's and USF&G's liability in the same measure, and Covil's Receiver does not have standing to obtain rulings that further the interests of Covil's litigation adversaries and seek to maximize Covil's liabilities. The circuit court's contrary finding that the Receiver had standing to bring this motion was error.

The order on appeal is also wrong on the merits. The circuit court principally concluded that the 2004 amendments to S.C. Code Ann. § 33-14-107—which would, if applicable, undisputedly bar asbestos claims currently being asserted against Covil—did not apply because Covil dissolved in 1992, before those amendments were passed. In so holding, the circuit court determined that the only way these amendments could be applied would involve running the ten-

year repose period retrospectively so that claims would become time-barred in 2002, ten years after Covil's dissolution. According to the circuit court, applying the amended statute to companies that had dissolved previously would constitute an improper "retroactive" application. Thus, according to the circuit court, claims against corporations that dissolved prior to the 2004 amendments would remain viable indefinitely into the future. This ruling is erroneous because it refuses to apply the statute prospectively. For over one hundred years, state and federal courts considering similar questions have concluded that newly enacted statutes of limitations and statutes of repose *do* apply to prior claims and events, but that the new statutory period runs prospectively from the date of enactment. That is the very position USF&G urged below. This rule of construction addresses the retroactivity problems identified by the circuit court, while also avoiding the arbitrary and anomalous consequences that result from declining to apply the statute altogether. The legislature's goals of providing repose for dissolved corporations would be thwarted if claims against corporations that dissolved before 2004 remain viable indefinitely, while claims against corporations that dissolved later are barred.

In addition, the circuit court erred in other important respects, including by misinterpreting the pre-amendment version of the statute; declining to apply the presumption that Covil's prior receiver complied with court orders; and resolving fact issues in the Receiver's favor on an incomplete record. As discussed further below, each of these errors mandates reversal.

A. **Procedural History**

This appeal arises from a "Motion to Clarify Status of Receivership" ("Motion to Clarify") filed by the Receiver on July 21, 2020 in two actions pending before the circuit court, *Peter D. Protopapas as Receiver for Covil Corp. v. Wall, Templeton & Haldrup, P.A., et al.*, C/A No. 2019-CP-40-02285 ("*Wall Templeton*") and *Sandra S. Hutto, et al. v. Covil Corp., et al.*, C/A No. 2019-CP-40-06956 ("*Hutto*"). (R. p. __; Motion to Clarify).

The *Wall Templeton* action was filed by the Receiver against USF&G and certain other defendants not party to this appeal on April 24, 2019. (R. p. __; Compl., *Wall Templeton*; *see also* R. p. __; Am. Compl., *Wall Templeton*). The *Hutto* action was filed on December 12, 2019 by asbestos tort plaintiffs who are not parties to this appeal against USF&G, Covil, and additional defendants not parties to this appeal. (R. p. __; Compl., *Hutto*). Covil, through the Receiver, subsequently asserted cross-claims against USF&G and other defendants. (R. p. __; Receiver's Cross-Claims, *Hutto*). USF&G and its co-defendants asserted defenses to the claims and cross-claims in *Hutto* and *Wall Templeton*, including the statute of repose defense that was the subject of the Motion to Clarify and is now at issue on this appeal.[1]

The circuit court issued the order on appeal, which granted the Receiver's Motion to Clarify, on September 25, 2020. (R. p. __; Order). USF&G filed notices of appeal from the order on October 26, 2020. (R. p. __; USF&G's Notice of Appeal, *Hutto*; R. p. __; USF&G's Notice of Appeal, *Wall Templeton*). On November 6, 2020, the Court requested briefing on the issue of the appealability of the September 25, 2020 order. (R. p. __; Request for Memoranda on Appealability). Following submissions concerning appealability on December 1, 2020, and on January 5, 2021, the Court notified the parties that this appeal should proceed.[2]

B. **Covil's Dissolution And Receiverships**

Covil Corporation was a South Carolina-based insulation contractor that was involved in the distribution and/or installation of insulation materials, some of which contained asbestos. In 1991, Covil ceased all business operations and The First Savings Bank, F.S.B., a creditor of Covil,

[1] R. p. __; USF&G's Answer to Am. Compl., *Wall Templeton*; R. p. __; Zurich American Insurance Company's Answer to Compl., *Wall Templeton*; R. p. __; USF&G's Answer, *Hutto*.

[2] R. p. __, USF&G's Memorandum on Appealability; R. p. __; Receiver's Memorandum on Appealability; R. p. __; Letter Retaining Appeal from the Court of Appeals.

sought appointment of a receiver to marshal Covil's assets in order to satisfy its debts.[3] On October 11, 1991, the Greenville Court of Common Pleas appointed L. Winston Lee as receiver of certain of Covil's personal and real property.[4] Subsequently, on May 12, 1992, the receivership court granted a motion by Mr. Lee to "have his appointment responsibility and authority broadened to that of a general receiver for Covil Corporation" and to have Covil "be judicially dissolved."[5] In that same order, the court directed Mr. Lee to publish notice of Covil's dissolution.[6] The May 12 Order stated that dissolution was "effective as of the date of [its] filing," *i.e.*, May 12, 1992.[7]

Six months later, the court issued an order "find[ing] that [the receiver] has fully complied with the previous Orders of this Court in liquidating [Covil's] assets."[8] The court then approved "the abandonment by the Receiver of all [Covil's] remaining assets," finalized the dissolution, and discharged Mr. Lee as receiver.[9] The May 12 Order judicially dissolving Covil also directed the clerk of court to deliver a certified copy of the dissolution decree to the South Carolina Secretary of State. However, the South Carolina Secretary of State does not appear to have officially recorded Covil's dissolution decree. Instead, on July 30, 1993, the Secretary of State issued a

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[3] *See The First Savings Bank, F.S.B. v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (Ct. Com. Pl. Greenville Cty.) ("*FSB v. Covil*").

[4] *See* R. p. __; Order for Appointment of Receiver, *FSB v. Covil* (October 11, 1991) (Ex. J to Motion to Clarify).

[5] R. p. __; Order at 1-2, *FSB v. Covil* (May 12, 1992) (Ex. V to Motion to Clarify) ("May 12 Order").

[6] *See* R. p. __; *id.* at 5 ¶ 9 ("[T]o the extent not already accomplished, the Receiver shall publish the Notice required by § 33-14-107 of the Code of Laws of the State of South Carolina[.]").

[7] R. p. __; *id.* at 2 ¶ 1.

[8] R. p. __; Order at 2, *FSB v. Covil* (Nov. 12, 1992) (Ex. W to Motion to Clarify) ("Nov. 12 Order").

[9] R. p. __; Final Order at 3 ¶¶ 7–8, *FSB v. Covil* (Nov. 30, 1992) (Ex. B to USF&G's Opposition to Motion to Clarify) ("Nov. 30 Order").

Certification of Revocation of Authority against Covil for failure to file its annual report and/or pay franchise tax.[10]

Over the next 25 years, Covil was named as a defendant in various asbestos personal injury lawsuits. Covil's insurers retained defense counsel to defend and settle these lawsuits, as the insurers were obligated to do under the terms of their policies. Then, on November 1, 2018, plaintiffs in *Taylor v. Air & Liquid Systems Corp., et al.*, C.A. No. 2018-CP-40-04940 ("*Taylor*") moved to appoint a receiver for Covil, arguing that an appointment was appropriate because (i) Covil was dissolved; (ii) a $32.7 million judgment had been entered against Covil in a North Carolina federal action, *Finch v. Covil Corp.*, No. 16-cv-1077 (M.D.N.C.), and (iii) Covil had allegedly failed to answer in *Taylor* and another asbestos tort case, *Hill v. Advanced Auto Parts Inc., et al.*, C.A. No. 2018–CP-40-04680 ("*Hill*").[11] The circuit court granted the motion the next day and appointed attorney Peter D. Protopapas as Covil's receiver.[12] Since that time, Mr. Protopapas has aggressively litigated claims against Covil's insurers and its prior defense counsel under a variety of novel theories of liability, including that Covil's insurers are directly liable for Covil's torts as a result of Covil's insurers' alleged control of Covil's defense and settlement of asbestos tort claims after it ceased business operations in 1991.[13] In addition, the Receiver has alleged that Covil's insurers aided and abetted Covil's prior attorneys' alleged breaches of their fiduciary duties to Covil, breached their duties to defend Covil, and handled Covil's insurance

[10] R. p. __; Certificate of Revocation of Authority (Ex. M to Motion to Clarify).

[11] *See* R. p. __; Plaintiffs' Motion to Appoint a Receiver over Covil Corporation Pursuant to S.C. Code § 15-65-10(4), *Taylor* (Nov. 1, 2018).

[12] *See* R. p. __; Order Appointing Receiver, *Taylor* (Nov. 2, 2018).

[13] *See, e.g.*, R. p. __; Am. Compl., *Wall Templeton* at 14; R. p. __; Receiver's Cross-Claims, *Hutto* at 10.

claims in bad faith. (*See, e.g.*, R. p. __-__; Am. Compl., *Wall Templeton* at 11-14). USF&G disputes the factual and legal bases for these claims. Following the Receiver's lead, other asbestos plaintiffs represented by the Dean Omar firm began to sue directly USF&G and Covil's other insurers as Covil's alleged alter egos, naming them along with Covil. (*See, e.g.*, R. p. __; Compl., *Hutto*).

USF&G has continued to defend and indemnify Covil in the asbestos suits. USF&G has worked with the Receiver since his November 2018 appointment in defending the claims against Covil, while simultaneously defending against the Receiver's various coverage claims and the novel alter ego claims the Receiver has pursued along with the underlying asbestos claimants. The Receiver has settled claims against certain of Covil's insurers and defense counsel since his appointment and, based on the information disclosed, has been awarded fees of 33.3% of these recoveries, shared between the Receiver's law firm and his outside counsel.[14]

C. **The Receiver's "Motion To Clarify Status Of Receivership"**

As noted above, the Motion to Clarify that gives rise to this appeal was brought in response to USF&G and another of Covil's insurers, Zurich American Insurance Company ("Zurich"), having asserted defenses based on South Carolina's statute of repose applicable to claims against dissolved corporations in two actions, *Wall Templeton* and *Hutto*. *Wall Templeton* was filed by the Receiver against USF&G, Zurich, and Wall, Templeton & Haldrup, P.A., Covil's former defense counsel. Although Covil's insurers resolved the claims against Covil in the *Hill* and *Taylor* cases without any contribution by Covil, the Receiver in *Wall Templeton* asserts claims against Wall Templeton for professional negligence and breach of fiduciary duty arising from

[14] *See, e.g.*, R. p. __-__; Order Granting Joint Motions to Establish Covil Qualified Settlement Fund and to Approve Settlements, *Taylor* at 23-24 (awarding 33.3% contingency fee in settlements with Hartford, TIG, and Sentry).

default judgments entered in the *Hill* and *Taylor* cases, and claims against USF&G and Zurich for aiding and abetting Wall Templeton's breach of fiduciary duty, breach of the duty to defend, bad faith claims processing, and negligence. (R. p. __-__; Am. Compl., *Wall Templeton* at 8-13). The Receiver also seeks to hold Covil's insurers liable as its alter egos and a declaratory judgment claim regarding the insurance available to Covil in *Hill* and *Taylor*. (R. p. __, __; *id.* at 14, 17). The Receiver's claims against USF&G and Zurich in the *Wall Templeton* action remain pending.

The *Hutto* action asserted claims under the Wrongful Death Act for alleged asbestos-related bodily injury. Plaintiffs in *Hutto* named Covil as a product seller potentially responsible for the decedent's injuries, and USF&G and Covil's other insurers as Covil's alleged alter egos. (R. p. __; Compl., *Hutto*). Covil, through the Receiver, subsequently asserted its own alter ego and declaratory judgment insurance coverage cross-claims against Covil's insurers in *Hutto*. (R. p. __; Receiver's Cross-Claims, *Hutto*). On January 20, 2021, Covil withdrew its cross-claims against USF&G, and on February 17, 2021, the *Hutto* plaintiffs dismissed their claims against Covil without prejudice.[15] Because plaintiffs have dismissed their claims against Covil, USF&G anticipates that plaintiffs will likewise dismiss their vicarious liability claims against USF&G that were based on Covil's alleged primary liability.

The Motion to Clarify filed in *Wall Templeton* and *Hutto* allegedly sought to clarify "the impact of Covil's prior receivership" on the current receivership in light of USF&G's and Zurich's assertion of Covil's statute of repose defense. (R. p. __; Mot. at 2). The Motion to Clarify asked the circuit court to "finally adjudicate" issues of South Carolina law relevant to application of the statute of repose to claims against Covil and, in substance, to declare that the statute of repose was

[15] R. p. __; Receiver's Notice of Withdrawal Without Prejudice of Cross-Claims Against USF&G and Zurich, *Hutto*; R. p. __; Stipulation of Dismissal of Covil Corporation Without Prejudice, *Hutto*.

not a viable defense for Covil or its insurers in any asbestos tort lawsuit against Covil. The motion did not explicitly seek to strike or dismiss USF&G's and Zurich's defenses, but instead was framed as a "clarif[ication]" of the "status" of the receivership as a whole, *i.e.*, in every case in which Covil was a party.

In the Motion to Clarify, the Receiver focused on USF&G's Sixth and Eleventh Defenses in *Hutto*. (R. p. __; Mot. at 2). USF&G's Sixth Defense was asserted as a defense to the *Hutto* plaintiffs' alter ego claims:

> 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. Plaintiffs' claims against USF&G are necessarily barred also because Plaintiffs' claims against USF&G are derivative of underlying asbestos claims against Covil.[16]

USF&G's Eleventh Defense asserted this same time-bar against Covil's alter ego cross-claims:

> 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. Covil's claims against USF&G are necessarily barred also because Covil's alleged claims against USF&G are derivative of underlying asbestos claims against Covil.[17]

The Zurich defense identified by the Receiver in *Wall Templeton* similarly raised the time-bar under S.C. Code Ann. §§ 33-14-106 and 33-14-107.[18] USF&G also asserted this defense in

[16] R. p. __; USF&G Answer, *Hutto* at 16.

[17] R. p. __; USF&G Answer, *Hutto* at 35.

[18] The defense provided in relevant part that "pursuant to S.C. Code Ann. §§ 33-14-106 and 33-14-107, underlying asbestos claims against Covil Corporation are barred. Plaintiffs' claims against Zurich are necessarily barred as well because Plaintiff's alleged claims against Zurich are derivative of underlying asbestos claims against Covil." R. p. __; Zurich Answer to Compl., *Wall Templeton* at ¶¶ 90–94.

Wall Templeton, using substantially the same wording as in its Eleventh Defense in *Hutto*.[19] USF&G opposed the Motion to Clarify, arguing that Covil's Receiver lacked standing to attack the viability of Covil's own statute of repose defense, whether asserted by Covil or vicariously by USF&G as Covil's alleged alter-ego, and that the statute of repose defense was meritorious.[20] On September 25, 2020, the circuit court entered a proposed order drafted by the Receiver and granted the Motion to Clarify. The order concluded that "[d]espite USF&G's objection to the contrary," Covil's Receiver, "has standing to present th[e] argument" that "pending and future asbestos claims [against Covil] by personal injury claimants . . . remain viable" notwithstanding the statute of repose. (R. p. __; Order at 6). As to the legal issues presented by Covil's motion, the court found that neither the version of the statute of repose in effect at the time of Covil's dissolution nor the version in effect today barred any claims against Covil. (R. p. __-__; *id.* at 6–9). The court also found, as a factual matter, that "notice of Covil's dissolution was never published," and for that reason the statute of repose was never triggered. (R. p. __-__; *id.* at 5–6). In conclusion, the court ruled that "no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil" and that "Covil's prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil." (R. p. __-__; *id.* at 9–10).

STANDARD OF REVIEW

"Questions of statutory construction are a matter of law." *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011). "The Court reviews questions of law de novo."

[19] R. p. __; 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.").

[20] R. p. __; USF&G Opposition to Motion to Clarify.

Matter of Chapman, 419 S.C. 172, 178, 796 S.E.2d 843, 846 (2017) (citing *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012)). Accordingly, the circuit court's construction of South Carolina's statute of repose is subject to de novo review by this Court.

ARGUMENT

I. RESOLUTION OF THE *HUTTO* ACTION DOES NOT AFFECT THIS APPEAL

Before addressing the merits, USF&G first addresses the impact of the plaintiffs' recent dismissal of claims against Covil and anticipated dismissal of claims against USF&G in the *Hutto* action. If this were an appeal from a ruling that simply struck or dismissed specific defenses in an order that only applied in the action in which it was entered, the resolution of claims against Covil and USF&G in *Hutto* might have the effect of mooting the appeal insofar as it relates to the *Hutto* action. That is not the case, however, for two reasons.

First, the circuit court entered its clarification order in both the *Wall Templeton* and *Hutto* actions, and both were the subject of this appeal. Thus, dismissal of the *Hutto* action has no impact on the pendency of this appeal.

Second, the order appealed from does not simply determine the viability of a defense in a specific action. Rather, it is an order "granting, continuing, modifying, or refusing the appointment of a receiver" under S.C. Code. Ann. § 14-3-330(4). Specifically, by "clarify[ing the] status of [the] receivership," it purports to "continu[e]" and "modify[]" the receivership. Specifically, the order provides, in terms generally applicable to the receivership, that "no version of" South Carolina's statute of repose for dissolved corporations "precludes an asbestos personal injury plaintiff from bringing claims against Covil," and that "nothing from the prior Receivership precludes the current Receivership or personal injury asbestos claimants from filing lawsuits

against Covil." (R. p. __; Order at 9; *see also* R. p. __; *id.* at 10 ("Covil's prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil.")).[21]

Because the orders entered by the circuit court are part of its overall management of Covil's receivership and purport to be of general application, rather than being limited to the individual matters on whose dockets they are filed, their appealability as "orders continuing [or] modifying . . . the appointment of a receiver" under S.C. Code. Ann. § 14-3-330(4) is not affected by the resolution of individual actions. USF&G remains aggrieved by the relief granted in the order so long as the receivership remains pending and USF&G faces claims that implicate the statute of repose. At this time, numerous actions are pending against Covil on the asbestos docket, in many of which plaintiffs have asserted alter ego claims against USF&G and those actions continue to be filed on a regular basis.[22] The *Hutto* order on appeal, just as the order in *Wall Templeton*, purports

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[21] This order is not the only instance of the Receiver moving for, and the circuit court granting, non-case specific relief of general applicability to the receivership via motions filed in individual actions pending on the asbestos docket. As one example, on September 22, 2020, the circuit court granted a "Motion to Clarify Order Appointing a Receiver for Covil Corporation" filed by the Receiver in an asbestos personal injury action captioned *Tracy Jolly Pavlish, et al. v. Covil Corp.*, C/A No. 2019-CP-42-03968 (Ct. Com. Pl., Spartanburg Cty.) ("*Pavlish*"). *See* R. p. __. Despite being filed in the *Pavlish* action, that motion, and the resulting order, did not concern any matters actually at issue in that action. Instead, the motion arose from "Covil's insurers hav[ing] removed several actions to South Carolina federal court and asserted counterclaims there against Covil" seeking declaratory judgments as to insurance coverage issues, and sought an order "requiring that parties seeking to sue the Receiver of Covil outside of this Court obtain leave of this Court prior to doing so." R. p. __-__; Order at 1–2, *Pavlish* (Sept. 22, 2020). In granting the motion, the circuit court rejected USF&G's argument that the order fell outside the circuit court's delegated authority to "serve as the Chief Judge for Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system," finding broad ancillary authority to enter orders affecting Covil's receivership generally. R. p. __; Order at 8, *Pavlish* (Sept. 22, 2020) (quoting May 28, 2019 S.C. Sup. Ct. Order); *see also id.* ("Justice Beatty further gave this Court the authority 'to perform such other duties as appropriate in her role as Chief Judge for Administrative Purposes[.]'. . . Covil's receivership arose out of, and was necessitated by, asbestos litigation filed in the South Carolina court system. The Court has the authority to manage and oversee the Receivership.").

[22] Excluding *Hutto*, seventeen asbestos actions are pending against Covil in which USF&G has also been named as a defendant. *See James M. Bailey, et al. v. Aerco International, Inc., et al.*,

to eliminate a defense to Covil's liability that would, if successfully asserted, result in Covil's dismissal from all actions filed after the repose period, and does so as an exercise of the circuit court's asserted general authority to manage and oversee Covil's receivership.

II. THE RECEIVER LACKED STANDING TO SEEK TO ELIMINATE COVIL'S POTENTIAL DEFENSES TO LIABILITY

Through his Motion to Clarify, the Receiver curiously sought and obtained a ruling that increases Covil's liability by finding that the statute of repose contained in S.C. Code Ann. § 33-14-107 "[does not] preclude[ ] an asbestos personal injury plaintiff from bringing claims against Covil." (R. p. __; Order at 9). That ruling should be vacated for the threshold reason that the Receiver for Covil does not have standing to seek rulings that eliminate Covil's own defenses to liability in asbestos personal injury actions.

C/A No. 2020-CP-10-03949 (Ct. Com. Pl., Charleston Cty.); *Norma D. Bowlin, as Personal Representative of the Estate of Gary Jay Moss v. Covil Corp., et al*., C/A No. 2020-CP-40-02692 (Ct. Com. Pl., Richland Cty.); *Richard F. Carpenter, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-04475 (Ct. Com. Pl., Richland Cty.); *Robbie M. Efird, as Administrator of the Estate of Robin M. Efird, et al. v. Arconic, Inc., et al*., C/A No. 2020-CP-40-05869 (Ct. Com. Pl., Richland Cty.); *Joe Eldra Goodwin, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-04613 (Ct. Com. Pl., Richland Cty.); *Mildred F. Hagan, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-00265 (Ct. Com. Pl., Richland Cty.); *Stephen C. Horton, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-05526 (Ct. Com. Pl., Richland Cty.); *Tracy Jolly Pavlish, et al. v. Covil Corp., et al*., C/A No. 2019-CP-42-03968 (Ct. Com. Pl., Spartanburg Cty.); *Shea Jonas King, individually and as the Administrator CTA of the Estate of Ronnie J. Jonas v. Air & Liquid Systems Corp., et al*., C/A No. 2020-CP-40-01163 (Ct. Com. Pl., Richland Cty.); *Dianne McCullough, et al. v. 4520 Corp., Inc., et al*., C/A No. 2020-CP-40-01952 (Ct. Com. Pl., Richland Cty.); *Edward R. Morgan, et al. v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-05731 (Ct. Com. Pl., Richland Cty.); *Nicholas Leon Murphy, et al. v. Covil Corp., et al*., C/A No. 2020-CP-40-01364 (Ct. Com. Pl., Richland Cty.); *Robert B. Picklesimer, et al. v. 4520 Corp., Inc., et al*., C/A No. 2020-CP-40-02868 (Ct. Com. Pl., Richland Cty.); *Joseph Franklin Rampey, Jr., as Personal Representative of the Estate of Joseph Franklin Rampey v. Covil Corp., et al*., C/A No. 2020-CP-40-00585 (Ct. Com. Pl., Richland Cty.); *Katherine R. Shields, Executrix of the Estate of James Joseph Reilly, et al. v. Covil Corp., et al*., C/A No. 2020-CP-40-00952 (Ct. Com. Pl., Richland Cty.); *Eunice H. Sims, Individually and as the Personal Representative of the Estate of Waymon F. Sims, Jr. v. 3M Co., et al*., C/A No. 2020-CP-40-05935 (Ct. Com. Pl., Richland Cty.); *Jack E. Taylor v. Armstrong International, Inc., et al*., C/A No. 2020-CP-40-06134 (Ct. Com. Pl., Richland Cty.).

"Standing refers to a '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (quoting BLACK'S LAW DICTIONARY 1413 (7th ed. 1999)); *see also Lennon v. South Carolina Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 907–08 (1998). The requirements of standing are well-established. First, the party "must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. Second, a causal connection must exist between the injury and the challenged conduct. Third, it must be likely that a favorable decision will redress the injury." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (citing *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001)). This Court has defined standing as "that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." *Powell ex rel. Kelley*, 379 S.C. at 444, 665 S.E.2d at 241 (quoting 1A C.J.S. Actions § 101 (2005)). As such, standing is not only relevant to the question of whether a party has the right to commence an action, but also to whether it may seek particular relief. *See, e.g.*, *Ex parte Lexington Cty.*, 314 S.C. 220, 442 S.E.2d 589 (1994) (holding that a party lacked standing to participate in a particular hearing).

For an injury to be particularized, "it must affect the [purportedly injured party] in a personal and individual way." *Carnival Corp.*, 407 S.C. at 75, 753 S.E.2d at 850 (citing *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292 and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). Put another way, the injury must be more than "conjectural or hypothetical." *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. The injury cited by a party in support of standing must be suffered *by that party*, not by others. *See Carnival Corp.*, 407 S.C. at 77-79, 753 S.E.2d at 851-852 (plaintiffs lacked standing because their "allegations [were] simply complaints about

inconveniences suffered broadly by all persons residing in or passing through the City of Charleston" and because they did not qualify as "adjacent or neighboring property" owners with standing under a zoning statute); *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 135, 526 S.E.2d 218, 220 (2000) (third party to an insurance contract who was not a named insured lacked standing to pursue a claim against the insurer for bad faith refusal to pay benefits). By adhering to limitations on standing, courts also enforce the rule that "[c]ourts do not give advisory opinions or answer questions that are not asked." *State v. Harrison*, No. 2018-002128, 2021 WL 193122, at *7 (S.C. Jan. 20, 2021).[23]

Here, the Receiver cannot establish that he or Covil would suffer a particularized injury to a legally protected interest if asbestos claims against Covil were held to be barred by the statute of repose. To the contrary, it is readily apparent that Covil would only stand to *benefit* from courts' application of the statute of repose to bar untimely claims against Covil. Indeed, Covil itself asserted in its Answer filed in the *Hutto* action the defense that "the claims set forth in the Complaint are barred by the applicable statutes of limitations and/or repose in this State or other states as may be applicable."[24] Application of the statute of repose would reduce Covil's liability, while a ruling eliminating the statute of repose as a viable defense only serves to increase Covil's potential liability. The Receiver has identified no legal principle conferring on him an interest in *increasing* Covil's liability to asbestos claimants and, thus, cannot identify a legally cognizable injury that is redressed by the order on appeal. Indeed, in responding to USF&G's challenge to

[23] *See, e.g.*, 16 C.J.S. Constitutional Law § 390, *Advisory Opinions* ("[W]hen a person who does not have standing to file suit nevertheless asks for relief, it is tantamount to a request for an advisory opinion."); *Zahn v. Barr*, No. 2:19-cv-3553-DCN, 2020 WL 3440801, at *2 (D.S.C. June 23, 2020) (dismissing action where plaintiff "lacks standing and asks the court to issue an advisory opinion").

[24] R. p. __; Receiver's Answer, *Hutto*, Fourth Defense at 30.

his standing before the circuit court, the Receiver's primary argument was not that such an injury exists, but rather that he was not required to satisfy the standing requirement, or demonstrate what legally protected interest was implicated by the motion. (*See* R. p. __-__; Reply in Support of Motion to Clarify at 2-3).

The Receiver's only attempt at identifying a particularized injury that conferred standing was the assertion that "the Insurers' defenses, and by extension the pending Motion, could profoundly affect Covil's receivership." (R. p. __; Reply in Support of Motion to Clarify at 3 n.1). But the fact that application of the statute of repose might benefit Covil and further its ability to wind down does not give the Receiver standing to challenge the defense. *Cf. Townsend v. Townsend*, 323 S.C. 309, 314, 474 S.E.2d 424, 428 (1996) (attorney's interest in collecting fees is not sufficient to confer standing).

The Receiver's argument that USF&G's assertion of the statute of repose argument "caus[es] the courts of our state, Respondent, and other litigants to expend valuable resources repeatedly litigating [the] issue[ ]"[25] fares no better. The statute of repose defense inures to the benefit of Covil and derivatively USF&G because tort claimants and the Receiver seek to hold USF&G vicariously liable for Covil's torts. Moreover, USF&G's insurance contract with Covil requires Covil, and thereby the Receiver, to cooperate and assist in the defense of third-party claims against Covil so long as USF&G has an obligation to defend and potentially indemnify. The Receiver's purported subjective belief that the statute of repose defense lacks merit is not only wrong (as addressed below), it does not entitle, much less require, the Receiver to seek judicial rulings that undermine that defense based on arguments more appropriately made by the claimants who are suing Covil. As this Court has explained: "[w]e are unaware of any law . . . supporting

[25] R. p. __; Receiver's Memorandum on Appealability at 7.

the idea that one party may acquire standing by asserting the interest of an adverse party" and, even where an issue may have some indirect impact on the party seeking standing, "[n]ot every practical concern equates to the legal interest required for standing." *Powell*, 379 S.C. at 445, 665 S.E.2d at 241.[26]

Third-party practice under Rule 14 of the Federal Rules of Civil Procedure (upon which South Carolina's Rule 14 is modeled) is instructive. Impleader complaints under Rule 14, SCRCP, like the cross-claims Covil has asserted under Rule 13(g), SCRCP, seek to hold a third party liable to the plaintiff if and to the same extent the first party defendant is liable. *See* 6 FED. PRAC. & PROC. CIV. § 1444, *Subject-Matter Jurisdiction Over Impleader Claims* (3d ed.) (Rule 13 cross-claims and Rule 14 impleader claims are "cognate field[s]" of the law.). In this context, because of "the derivative nature of the third-party defendant's potential liability," courts "permit[] [the third party defendant] essentially to stand in the [first-party] defendant's shoes and assert its defenses," even where the first-party defendant fails to do so. *Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1141, 1149 (D. Haw. 2007) (quoting MOORE'S FED. PRAC. 14.25 (3d ed.)). This "prevents the prejudice or unfairness that could result from [the first-party defendant's] failure to assert the appropriate defenses." *Beaver v. Tarsadia Hotels*, 315 F.R.D. 346, 349 (S.D. Cal. 2016) (internal quotation marks omitted). *See also* Rule 14(a), FRCP, Advisory Comm. Notes to 1946 Amendment ("This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action."). It also "helps to

[26] In *Powell*, this Court held that a bank lacked standing to challenge the apportionment of escrowed funds as between a minor child and his mother, rejecting the bank's "argument that it is seeking to protect [the minor's] best interest." 379 S.C. at 445, 665 S.E.2d at 241. The Court determined that "the Bank's desire to limit its potential exposure in [the minor's] underlying action [by ensuring that he received a greater portion of the escrowed funds] . . . falls far short of the 'injury in fact' standing requirement." *Id.*

reduce the risk of collusion between" the plaintiff and the underlying defendant against the third party, "a concern of increased importance" where, as here, such parties may have shared financial interests or incentives. *Lindner*, 515 F. Supp. 2d at 1148.

These concerns apply with equal force here. As a party sought to be held vicariously liable for Covil's torts under plaintiffs' and the Receiver's novel alter ego claims, USF&G is entitled to assert Covil's defenses to those torts, whether or not Covil chooses to pursue them. The Receiver, as Covil's court-appointed representative, has no right to gratuitously waive Covil's defenses and then enforce that waiver against USF&G, so as to increase USF&G's potential vicarious liability to asbestos tort plaintiffs. Nor may the Receiver simultaneously assert Covil's alleged right to require USF&G to defend and indemnify Covil in connection with the numerous pending lawsuits against Covil without complying with its concomitant contractual obligation to assist and cooperate in Covil's defense.

Under these circumstances, the circuit court erred in holding that the Receiver had standing to seek an order finding that the statute of repose in S.C. Code Ann. § 33-14-107 "presents no impediment to the assertion of asbestos personal injury claims against Covil." (R. p. __; Order at 10). The order should be vacated for this reason alone.

III. THE STATUTE OF REPOSE BARS ASBESTOS CLAIMS AGAINST COVIL

The circuit court found that application of the current version of the statute of repose to Covil would be impermissibly retroactive, even though under the application urged by USF&G, the statute would run for the full ten-year period beginning as of its enactment, consistent with the treatment of other newly-enacted limitations and repose periods. The circuit court also incorrectly found the prior version of the statute did not apply to asbestos claims that might accrue in the future, even though by its terms it applies to all claims other than claims known by the corporation as of its dissolution. And, the circuit court also declined to apply the presumption of regularity as

to the prior receiver's compliance with court orders, and, based on that, improperly determined that notice of dissolution was never published. Should this Court find that the Receiver had standing to seek the order on appeal and reach its merits, the order should be reversed.

A. **Applicable Law**

The South Carolina Business Corporation Act ("SCBCA"), Title 33, Chapters 1 through 20 of the South Carolina Code, regulates for-profit corporations in South Carolina. It is based on the American Bar Association's 1984 revision of the Model Business Corporation Act ("MBCA").[27] The South Carolina legislature adopted the SCBCA in 1988 and, as relevant here, subsequently amended it in 2004.[28] Chapter 14 of the SCBCA governs corporate dissolution. Article I addresses voluntary dissolution and the legal effect of dissolution generally (*see* S.C. Code Ann. §§ 33-14-101–107); Article II addresses administrative dissolution (*id.* §§ 33-14-200–230); Article III addresses judicial dissolution (*id.* §§ 33-14-300–330); and Article IV contains certain miscellaneous provisions (*id.* §§ 33-14-400–420).

Under the SCBCA, a corporation survives after its dissolution for the purpose of winding up its affairs and for litigation. Specifically, S.C. Code Ann. § 33-14-105 ("Section 105") provides: (i) "[a] dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs" and (ii) "[d]issolution of a corporation does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name" or "abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution." This post-dissolution continuation of the

[27] *See, e.g.*, Tim Orr, *Successor Liability,* S.C. LAW. 33, 35 (Mar. 2006) (The SCBCA generally "follow[s] the Model Business Corporation Act").

[28] *See* 2004 S.C. Acts 221, Section 18, amending Title 33, S.C. Code Ann. § 33-14-107.

corporation is a departure from the common law, under which "a corporation which has been dissolved is as if it did not exist. All actions pending against it are abated and no new actions may be begun unless there is some statutory authority (of the state of incorporation) for the prolongation of its life, even for litigation purposes." *Auto-Owners Ins. Co. v. Gordon & Assocs., Inc.*, No. 9:15-4063-RMG, 2016 WL 11509704, at *2 (D.S.C. Aug. 23, 2016) (quoting *Johnson v. RAC Corp.*, 491 F.2d 510, 513 n.3 (4th Cir. 1974)); *see also Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 259 (1927) ("[D]issolution of a corporation at common law abates all litigation.").

The SCBCA contains two statutes of repose applicable to claims against dissolved corporations. First, S.C. Code Ann. § 33-14-106 ("Section 106"), concerning known claims against dissolved corporations, provides that a dissolved corporation "may dispose of the known claims against it by . . . notify[ing] its known claimants in writing of the dissolution at any time after its effective date" and explaining in the notice the procedures for making a claim against the corporation, including a deadline for making such claims. S.C. Code Ann. § 33-14-106(b). If the corporation complies with these procedures, known claims are barred (i) if the claimant does not make the claim by the deadline or (ii) if the claimant does not commence court proceedings within 90 days of receiving a notice that the corporation has rejected the claim. S.C. Code Ann. § 33-14-106(c). "For purposes of [Section 106], [the term] 'claim' does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution." S.C. Code Ann. § 33-14-106(d).

Second, S.C. Code Ann. § 33-14-107 ("Section 107") sets forth a statute of repose for unknown claims against dissolved corporations, barring such claims once a prescribed period (five years under the original 1988 version of the statute, later extended to ten years in 2004) passes after publication of notice of dissolution. Specifically, Section 107 provides for publication notice

"once in a newspaper of general circulation in the county where the dissolved corporation's principal office . . . was located." Subsection (c) of Section 107 further provides that:

> [T]he claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within ten years after the publication date of the newspaper notice:
>
> (1) a claimant who did not receive written notice pursuant to Section 33-14-106;
>
> (2) a claimant whose claim was timely sent to the dissolved corporation but not acted on; and
>
> (3) a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution.

Clause (3) of subsection (c) was added to Section 107 as part of the 2004 amendments to the SCBCA; clauses (c)(1) and (c)(2) were included in the statute's original 1988 enactment.

The SCBCA specifically contemplates that the statutes of repose set forth in Sections 106 and 107 apply when a corporation is judicially dissolved, and provides that when a court enters a decree of judicial dissolution, "the court ***shall*** direct the winding up and liquidation of the corporation's 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." S.C. Code Ann. § 33-14-330(b) (emphasis added).[29]

[29] Prior to the enactment of the SCBCA, South Carolina corporate law contained a two-year repose period for claims against dissolved corporations. The Code of Laws of 1912 provided that dissolution "shall not bar an action, for two years thereafter against the corporation or any of the members, for any liability incurred during the existence of the corporation." *Henry Mercantile Co. v. Georgetown & W.R. Co.*, 104 S.C. 478, 89 S.E. 480, 481 (1916) (quoting S.C. Code 1912, § 2812). The Civil Code of 1922 and Code of Laws of 1952 provided that dissolution of a corporation did "not bar an action for two years thereafter against the corporation or any of its members for any liability incurred during the existence of the corporation." S.C. Code 1952, § 12-644. The statute in effect before the SCBCA was enacted also "require[d] that after dissolution of a corporation, any party having a claim against the corporation commence an action thereon within two years from the dissolution or have the claim barred." *S.C. Dep't of Social Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 560, 320 S.E.2d 464, 467 (S.C. Ct. App. 1984). A similar

B. The Statute of Repose Bars Claims Against Covil Regardless Of Whether The 2004 or 1992 Version Of The Statute Applies

The circuit court held that "[a]ssuming arguendo that notice of Covil's dissolution was published, pending and future asbestos claims by personal injury claimants would nonetheless remain viable," both under the current version of Section 107—including clause (c)(3) of the current statute, which expressly bars the claim of "a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution"—and under the prior version in effect as of Covil's dissolution, which did not include clause (c)(3) . (R. p. __; Order at 6). In so holding, the circuit court concluded that the current version of subsection (c)(3) of Section 107 "applies prospectively only to corporate dissolutions occurring after its enactment," and that the prior version of the statute did not foreclose contingent claims. (R. p. __; Order at 8). For the reasons discussed below, both rulings are incorrect and should be reversed.

1. The Current Version Of The Statute Applies To Plaintiffs' Claims

It is undisputed that the current version of Section 107 expressly forecloses all claims against a dissolved corporation brought after the ten-year statute of repose period. If Covil had dissolved in 2004 in accordance with the amended statute, asbestos claims against Covil would plainly be barred as of and after 2014, ten years later, and actions such as *Hutto* would be subject to dismissal. The question before the Court is whether, because Covil dissolved *before* 2004, such claims against Covil should persist indefinitely into the future, notwithstanding the ten-year time bar set forth in Section 107.

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provision was found in the pre-1984 version of the MBCA, stating that dissolution would not "take away or impair any remedy . . . for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution." 1969 MBCA § 105; COX & HAZEN ON CORPORATIONS § 26.10.

The circuit court concluded the amended statute does not apply to Covil and thus that claims against Covil remain viable indefinitely. (R. p. __-__; Order at 6–7). In so holding, the circuit court found that because Section 107 "operates as a statute of repose," it is "substantive" (unlike statutes of limitations, which are "procedural"), and as such may be applied "prospectively only to corporate dissolutions occurring after its enactment." (R. p. __; *id.*). In addition, the circuit court decided that application of the statute would be impermissibly retroactive in cases where, if applied literally, the time period set out in the statute of repose would start to run on a date earlier than that of the statute's enactment.

The circuit court's reasoning is flawed in both respects. No authority supports the contention that "procedural" statutes of limitations can be applied retroactively while "substantive" statutes of repose cannot. Instead, courts have found that retroactive application of both types of time bar is constitutionally problematic only to the extent that it would extinguish previously-*timely* claims without affording the claimant a reasonable time to assert such claims after the statute's enactment. As the United States Supreme Court long ago explained:

> When a statute declares generally that no action, or no action of a certain class shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional.

Sohn v. Waterson, 84 U.S. (17 Wall.) 596, 599 (1873); *see also Brown v. Angelone*, 150 F.3d 370, 373 (4th Cir. 1998) ("[T]here is nothing talismanic about identifying a rule as procedural if its application results in genuinely retroactive effects. . . . When 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.'") (citing *Landgraf v. USI Film Prods.*,

511 U.S. 244, 275 n. 29 (1994)); *Texaco, Inc. v. Short*, 454 U.S. 516, 528 (1982) ("[W]hen the practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the . . . analysis is the same.").[30]

Importantly, however, courts have also recognized that declining altogether to apply a new statutory time bar to pre-enactment claims or events would be contrary to legislative intent and create arbitrary outcomes, as the legislature could not reasonably have intended to treat older claims more favorably than newer ones. *See Sohn*, 84 U.S. at 599 ("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. It was substantially adopted by this court in the cases of *Ross v. Duval*[, 38 U.S. (13 Pet.) 45 (1839)] and *Lewis v. Lewis*[, 48 U.S. (7 How.) 776 (1849)]. 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

[30] In any event, contrary to the circuit court's analysis, statutes that specify the time period in which claims may be brought against dissolved corporations are considered "remedial measures" that are presumptively applied "retroactive[ly]." *United States v. Vill. Corp.*, 298 F.2d 816, 819–20 (4th Cir. 1962). These measures "alter[] no substantive right"; rather, they "only alter[] the procedure by which substantive rights may be judicially enforced." *Id.* at 820; *see also* 16A FLETCHER CYC. CORP. § 8142 ("[S]tatutes that provide to some degree for the survival of remedies or claims for a limited period of time after dissolution of the corporation . . . are remedial in nature."); 9 CYC. OF FED. PROC. § 27:20 (3d ed.) (same). However, as discussed herein, courts treat statutes of limitations and repose similarly for purposes of retroactivity, so this Court need not resolve the issue.

> (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 the 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 under a literal application it would have run as of an earlier date.[31] As the Fourth Circuit subsequently explained, this is a *prospective*, not retroactive application:

> We do not think that such a construction of [a new time bar] amounts to giving it a retroactive effect. The limitation is applied not to divest vested rights or to invalidate proceedings theretofore had, or to affect in any way conditions existing prior to its enactment, but merely to limit the time within which existing rights may be asserted. The fact that such rights may have accrued prior to the passage of the statute does not give to the owner, as a matter of right, an unlimited time within which to assert them; and there is just as much reason why [the legislature] should apply a time limitation upon their assertion as upon the assertion of rights subsequently accruing.

The Fred Smartley, Jr., 108 F.2d 603, 608 (4th Cir. 1940).

This rule of construction is followed by state and federal courts across the country. As the Delaware Chancery Court noted: "'[T]he century-old *Sohn* rule still enjoys great viability.' And for good reason, as it is a sensible and fair way to implement a legislature's intentions as to the effect of a new statute of limitations on pending cases." *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 530 (Del. Ch. 2005) (quoting *Reuther v. Trustees of the Trucking Emps. of Passaic*

[31] The circuit court's concern that applying the 2004 amendments to Covil "would also require that" claims against Covil "be filed by 2002," ten years after the 1992 events that would have triggered the statute as to Covil (R. p. __-__; Order at 7–8), is thus misplaced. Under the *Sohn* rule, where the trigger for a newly-enacted time bar occurs prior to its enactment, the trigger is deemed to occur as of the new statute's effective date. *See Sohn*, 84 U.S. at 600.

& Bergen County Welfare Fund, 575 F.2d 1074, 1078 n.4 (3rd Cir. 1978)). The Washington Supreme Court's decision in *Unruh v. Cacciotti*, 172 Wash. 2d 98, 257 P.3d 631 (Wash. 2011), provides a recent example of *Sohn*'s continued vitality. *Unruh* concerned a 2006 Washington statutory amendment imposing an eight-year statute of repose for medical malpractice claims. The alleged malpractice took place in 1999, just over eight years before the action was filed in 2007. *Id.* at 106. The defendant argued that the 2006 amendment meant that the eight-year repose period began to run in 1999 and expired in 2007. The court rejected that argument and found that the new repose period began to run when the statute was enacted, and therefore would not have expired until 2014. *Id.* at 116. Numerous decisions of courts across the county are in accord. *See, e.g.*, *State ex rel. Brady*, 870 A.2d at 531 ("Applying *Sohn*, the limitation period set forth in § 2506 applies to causes of action that accrued before its enactment, and calculation of that period commences when the causes of action were first subjected to the statute, here, on July 17, 1998, the date of its enactment."); *Fust v. Arnar-Stone Laboratories, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984) ("We conclude that a claim which antedated the effective date of R.S. 9:5628 remained viable for three years after the effective date of that statute and thereafter succumbed to the absolute bar impressed by the Louisiana Legislature."); *Redmon v. LeFevre*, 503 S.W. 2d 97 (Tenn. 1973) (statute providing for shortened limitations period applied to actions accruing prior to effective date, but began running from effective date of the amended statute).[32]

[32] *See also Trax-Fax, Inc. v. Hobba*, 277 Ga. App. 464, 627 S.E.2d 90 (Ga. 2006) (law was not improperly applied retroactively where certain of the payments sought to be recovered took place before the enactment of the statute, and statute took effect more than two years before the insurer sought to recover any of the payments); *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (Neb. 1994) (holding that if a statute operates to shorten a limitation period without providing for a reasonable period for bringing an accrued cause of action, a reasonable period in the present case was the longest repose period contained in the statute); *Torkelson v. Roerick*, 24 Wash. App. 877, 879, 604 P.2d 1310, 1311 (Wash. Ct. App. 1979) ("[A]new statutory limitation may operate on a claim that has accrued prior to the amendment of the statute of limitations by beginning to run as

Quintana v. Los Alamos Medical Center, Inc., 889 P.2d 1234 (N.M. Ct. App. 1994), is particularly instructive. There, the plaintiff's son died after a dental procedure in 1959. *Id.* at 1234. In 1987, the plaintiff discovered that the defendant had caused his son's death and filed suit. *Id.* The defendant moved to dismiss, arguing that it dissolved in 1963 and that New Mexico's two-year statutory bar foreclosed the plaintiff's claims. *Id.* The plaintiff contended that the statutory bar did not apply because it was enacted in 1975, *after* the defendant's dissolution. *Id.* at 1236. The court rejected this argument, reasoning that application of the statute to bar the plaintiff's claims was not impermissibly retroactive—"[t]he lawsuit filed in this case was filed years after the effective date of the survival statute, and thus to apply the statute is to affect activity that occurred after the effective date of the statute." *Id.* The court further explained that "the legislature would have intended the same time limitation to apply to" corporations that "dissolved prior to the 1975 Act as those dissolved subsequently," and that "the reasons for repose would be *stronger* for pre-1975 dissolutions." *Id.* (emphasis added).

The same reasoning applies here. There is no reason to believe that the South Carolina legislature intended the arbitrary outcome that the circuit court's ruling creates, under which claims against a corporation that dissolved in 2003 or before would persist indefinitely, whereas claims against a corporation that dissolved in 2004 would be barred after ten years. *See State ex rel. Brady*, 870 A.2d at 530–31 (it would be "illogically inconsistent" to bar claims arising five years

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of the effective date of the amended statute"); *Niagara Fire Ins. Co. v. Cole*, 235 Cal. App. 2d 40 (Cal. App. 5th Dist. 1965) (a shortened limitations period may not be applied retroactively if effect would be to extinguish the action with no opportunity for plaintiff to commence the action, and the proper resolution is to apply the new limitations period running from its effective date); *Olivas v. Weiner*, 127 Cal. App. 2d 597, 600, 274 P.2d 476 (Cal. Ct. App. 2d Dist. 1954) (barring claim where the plaintiff was born 10 years before the statute took effect and claim was filed 12 years after the effective date of the statute because "[a]nyone having a right of action under the statute had six years after the amendment became effective within which to file his complaint").

after the enactment date but permit claims arising before the enactment, which "are thus even more stale," to "linger indefinitely"). This Court should apply the well-established rules of construction set forth in *Sohn* and its progeny and hold that Section 107, as amended, bars claims against Covil accruing after its dissolution no later than 2014. Doing so would give effect to the plain language and obvious intent of Section 107, and in a manner that applies prospectively, not retroactively as the circuit court erroneously concluded.

2. The Prior Version of the Statute Also Bars Future Claims

Even if the amended version of Section 107 is deemed not to apply prospectively to bar claims against Covil (contrary to the plain language and legislative intent and the numerous authorities discussed above), the claims would nonetheless be barred by the statute of repose set forth in the pre-2004 version of Section 107. The pre-2004 version of the SCBCA (like the current version) divided claims into "known claims" subject to Section 106 and "unknown claims" subject to Section 107. At all relevant times, Section 106 has provided that, "[f]or 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." S.C. Code Ann. § 33-14-106(d). Section 107, in contrast, has never included such a limitation; rather, it has always expressly applied to bar *all* claims (without limitation) of "claimant[s] who did not receive written notice under § 33-14-106." S.C. Code Ann. § 33-14-107(c)(1). Thus, Section 107 has at all times created a statute of repose applicable to contingent and post-dissolution claims. *See Gilliam v. Hi-Temp Products Inc.*, 677 N.W.2d 856, 868 (Mich. Ct. App. 2003) (explaining that "the intent of the Legislature to bar claims that are both unknown and that arise after the dissolution of the corporation is shown by" Michigan's version of Section 107(c)(1), "which bars a claim by a 'claimant who did not receive written notice under'" Michigan's version of Section 106).

In concluding that the pre-2004 version of Section 107 did not apply to post-dissolution asbestos claims against Covil, the circuit court relied on the Reporters' Comment to the original version of Section 33-14-107 (R. p. __; Order at 9), which stated that because the provision, as enacted in 1988, did not include clause (3) of the Model Act's subsection (c), "[t]he statute of repose . . . only applies to claims existing at dissolution." South Carolina Reporters' Comments, S.C. Code Ann. § 33-14-107. This commentary is not dispositive. When the legislature added subsection (c)(3) in the 2004 Amendments, it clarified existing law, and the plain meaning of the statutory text cannot be altered or rendered ambiguous by the statute's subsequent legislative history or by ambiguous statements in its annotations. *See Gasque v. Eagle Mach. Co.*, 270 S.C. 499, 243 S.E.2d 831, 832 (1978) (refusing to consider "alleged Reporter's comments as to the statute's meaning" where the statutory text is clear).

A construction of the pre-amendment statute that applies it to all potential claims against a dissolved corporation is also more consistent with the overall statutory scheme and its history. As noted above, under the common law, claims against dissolved corporations immediately abated. The SCBCA's post-dissolution claims survival statutes are thus "statutes . . . in derogation of the common law," which "must be strictly construed." *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 308, 831 S.E.2d 429, 430 (2019). For this reason, courts interpreted the pre-1984 MBCA two-year survival statutes that did not specifically address claims arising after dissolution to bar post-dissolution claims, given that such suits were abated at common law. *See, e.g.*, *Bazan v. Kux Machine Co.*, 190 N.W.2d 521 (Wis. 1971); *Stone v. Gibson Refrigerator Sales Corp.*, 366 F. Supp. 733 (E.D. Pa. 1973); *Chadwick v. Air Reduction Co.*, 239 F. Supp. 247, 251 (N.D. Ohio 1965) ("It is, therefore, quite clear that under the Model Business Corporation Act, and those statutes patterned after it, a corporation may be sued for pre-dissolution torts only."); *Authement*

v. Holan Mfg., Inc., 812 F. Supp. 663, 665 (E.D. La. 1993) ("This Court cannot think of any substantial reason why the Georgia Legislature would place a limit on claims that arise when a corporation is viable, and not place at least the same limit on claims that arise after that corporation has dissolved. Accordingly, the Court finds that § 14–2–293 also applied to claims arising after dissolution."). Finding legislative intent to continue corporate post-dissolution liability indefinitely, as the circuit court concluded here, cannot be squared with this historical context.[33]

C. The Circuit Court Erred in Concluding that Alleged Lack of Publication of Notice of Dissolution Rendered the Statute of Repose Ineffective

Section 33-14-107(c)(3) provides a ten-year statute of repose for unknown, contingent claims arising after dissolution, such as those at issue here. The circuit court found that "notice of Covil's dissolution was never published" and, thus, the statutory repose period could not have run. (R. p. __; Order at 6). Orders from Covil's prior receivership, however, establish—or, at a

[33] The circuit court also observed in a footnote that it "disagree[d]" with the argument that "section 33-14-107(d) does not authorize the filing of asbestos claims against Covil because Covil's insurance policies are not 'undistributed assets.'" (R. p. __; Order at 9 n.4). But whether insurance policies constitute "undistributed assets" is irrelevant, since claims can only be brought until the statute of repose expires, regardless of whether the corporation retains undistributed assets. Specifically, subsection 107(d) provides that "[a] claim may be enforced under this section" (1) "against the dissolved corporation to the extent of its undistributed assets" and (2) "against a shareholder . . . to the extent of his pro rata share" of the corporation's distributed assets. Because the provision expressly sets forth how a claim "may be enforced *under this section*" (emphasis added), it incorporates all of the preceding provisions of Section 107, including the repose period. Indeed, as explained in the Official Comment to Section 107, the statute of repose contained therein is "believed to be a reasonable compromise between the competing considerations of providing a remedy to injured plaintiffs and providing a period of repose after which dissolved corporations *may distribute remaining assets free of all claims and shareholders may receive them secure in the knowledge that they may not be reclaimed*." (emphasis added). Construing subsection 107(d) to authorize recovery in perpetuity against shareholders of the dissolved corporation and the corporation's undistributed assets would completely undermine this statutory purpose. *See* 16A FLETCHER CYC. CORP. § 8141, *Post-dissolution causes of action* ("A claim for tort or products liability cannot be brought after the statutory survival period, and it makes no difference whether there are undistributed corporate assets available that could be used to satisfy such a claim.").

minimum, create a strong presumption—of publication, and the circuit court should not have dismissed this out of hand and reached a contrary conclusion based on the record before it.

As discussed above, on May 12, 1992, the court overseeing Covil's prior receivership directed Covil's first receiver to "publish the Notice required by § 33-14-107."[34] Six months later, the court issued an Order "find[ing] that [the Receiver] has fully complied with the previous Orders of this Court in liquidating [Covil's] assets."[35] The court thereafter approved "the abandonment by the Receiver of all remaining assets" of Covil, finalized Covil's dissolution, and discharged the receiver. *See supra* p. 5.

Contrary to the circuit court's finding, these orders establish that Covil's first receiver published notice of Covil's dissolution in 1992, and those final orders cannot be collaterally attacked decades later. Under South Carolina law, there is a strong presumption that receivers comply with court orders and their fiduciary obligations. "[T]he presumption is always in favor of the correct performance of his duty by an officer, and every reasonable intendment will be made in support of such presumption." *Whitcomb v. Manderville*, 90 S.C. 384, 73 S.E. 775, 777 (1912) (internal quotation marks omitted). *See also Womack v. State*, 507 S.E.2d 425, 428 (Ga. 1998) (noting "the presumption that the . . . receiver ha[s] faithfully discharged [his] duties"); *B.E. Capital Mgmt. Fund LP v. Fund.com Inc.*, 171 A.3d 140, 146 n.28 (Del. Ch. 2017) ("The Receiver shall be presumed to have acted in good faith, reasonably, and in compliance with his fiduciary duties.") (internal quotation marks omitted). Here, the court unambiguously ordered the first receiver to publish the Notice, thereby triggering the presumption under South Carolina law that he faithfully discharged that duty.

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[34] R. p. __; May 12 Order at 5 ¶ 9.

[35] R. p. __; Nov. 12 Order at 2.

In addition, the court issued an Order "find[ing] that [the Receiver] has fully complied with the previous Orders of this Court in liquidating [Covil's] assets,"[36] without ever suggesting that the Receiver failed to carry out one of the duties that he had been expressly directed to discharge, as required by the SCBCA. That order is controlling as a matter of South Carolina law. *See Long v. McMillan,* 226 S.C. 598, 610, 86 S.E.2d 477, 482 (1955) (the "records of a court cannot be impugned upon matters within its jurisdiction, when offered in evidence, by counter evidence") (internal quotation marks omitted); *see also Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another."). Moreover, the court subsequently approved the abandonment by the Receiver of Covil's remaining assets, finalized Covil's dissolution, and discharged the first receiver in a Final Order fully winding up Covil's affairs.[37] The court could have done so only if he had been fully satisfied that all prior steps necessary to complete Covil's dissolution and winding-up had been completed as ordered. *See* S.C. Code Ann. § 33-14-330(b). The Final Order and the proceedings held in that matter are not facially deficient, and thus are "absolutely impregnably fortified against collateral attack" and may not be re-examined elsewhere, absent exceptions not present here. *Stone v. Mincey,* 180 S.C. 317, 185 S.E. 619, 621 (1936); *see also Travelers Indemn. Co. v. Bailey*, 557 U.S. 2195 (2009) (once orders become final on direct review they may not be collaterally attacked, even in the absence of subject matter jurisdiction).

The circuit court concluded that the evidence did not establish publication based in part on its finding that "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."

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[36] R. p. __; Nov. 12 Order at 2.

[37] R. p. __; Nov. 30 Order at 3 ¶¶ 7–8.

(R. p. __; Order at 6). In doing so, the Court ignored the fact that the prior receiver's accounting of reimbursable expenses contains a general category called "Receiver Expense" totaling $1,576.50, which clearly could have included the newspaper-publication expenses.[38] A presumption must be rebutted by "substantial evidence of opposition" for it to lose its force, 30 S.C. JUR. EVIDENCE § 21, and a negative inference and speculation about the absence of a specific line item in the first receiver's accounting does not meet this test. *See Whitcomb*, 90 S.C. 384, 73 S.E. at 777; *see also United States v. Young,* 324 F. Supp. 69, 72 (D. Minn. 1970) (noting that "negative inferences" cannot undermine "the presumption of regularity").[39]

In any event, questions of publication and sufficiency of notice present factual disputes that should not have been resolved in the Receiver's favor on the incomplete record presented by the Motion to Clarify. As noted above, the showing required to rebut a presumption under South Carolina law is one of "substantial evidence," and whether a notice requirement has been met "is a fact-intensive analysis that 'depends on the circumstances of a particular case.'" *In re Weiand Auto. Indus.*, 612 B.R. 824, 851 (Bankr. D. Del. 2020) (quoting *Wright v. Owens Corning*, 679 F.3d 101, 108 (3d Cir. 2012)). Courts are therefore loathe to resolve such questions without full

[38] *See* R. p. __; Petition of Receiver, *FSB v. Covil* (Nov. 11, 1992) (Ex. L to Motion to Clarify) at Ex. A.

[39] *See also Kline v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 877 F.2d 1175, 1180 n.15 (3d Cir. 1989) (explaining that it would be "problematic to allow the absence of evidence in a record to be sufficient to rebut a presumption" because "[t]he purpose of a presumption is to shift the burden of affirmative proof to the party seeking to rebut the presumed fact"); *SummitBridge Nat'l Invs. III, LLC v. Faison*, 915 F.3d 288, 294 (4th Cir. 2019) (holding that an "argument by negative inference" was insufficient to rebut the presumption that claims enforceable under state law are permitted in bankruptcy unless they are expressly disallowed); *People v. Fedalizo*, 200 Cal. Rptr. 3d 653, 659–60 (Cal. Ct. App. 2016) (rejecting attempt to invoke a negative inference that defendant had not authorized his lawyer to represent him where a "presumption exists that an attorney who appears on behalf of a party has authority to do so") (internal quotation marks omitted).

fact development. *See, e.g.*, *Weiand*, 612 B.R. at 851 (denying summary judgment on the adequacy of publication notice).[40]

Moreover, even *assuming* that notice was not published, that would not be fatal to application of the statute of repose where, as here, the creditor who allegedly did not receive notice could not have been prejudiced thereby. *See, e.g.*, *Winyah Nursing Homes, Inc.*, 282 S.C. at 562, 320 S.E.2d at 468 ("Failure to strictly comply with the mandates of the dissolution statutes effectively continues the corporation with respect to creditors *whose rights are prejudiced by the noncompliance*.") (emphasis added). As other courts have recognized, the "clear implication" of decisions such as *Winyah Nursing* is that "the dissolution would be valid as against" creditors *not* prejudiced by lack of notice. *Licht v. Ass'n Servs., Inc.*, 463 N.W.2d 566, 569–70 (Neb. 1990) (citing, *inter alia*, *Winyah Nursing*, 320 S.E.2d 464, and *Bonsall v. Piggly Wiggly Helms, Inc.*, 275 S.C. 593, 274 S.E.2d 298 (1981)). Whether notice was published in 1992, 2004, or not at all, is inconsequential to current claimants whose claims would not have accrued at that time (or, if they had, would clearly be time barred by the statute of limitations). Here, for example, plaintiffs in *Hutto* allege that the decedent, Donald Hutto, was diagnosed with asbestos-related mesothelioma

[40] *In re New Century TRS Holdings, Inc.*, 450 B.R. 504, 514 (Bankr. D. Del. 2011) ("Although the Debtors arguably complied with the stated minimum requirements of the Bar Date Order, without a more fully developed factual record, I am unable to determine whether the publication notice was reasonably calculated to provide notice to consumer mortgagors like the Whites."); *Albemarle Realty & Mortg. Co. v. Peoples Bank of Virginia Beach*, 34 N.C. App. 481, 485, 238 S.E.2d 622, 625 (N.C. Ct. App. 1977) (holding that "summary judgment for plaintiffs was improvidently entered" because a material issue of fact existed regarding compliance with a notice requirement prior to a foreclosure sale); *see also Deutsche Bank Nat. Tr. Co. v. Perfetto*, No. 288652, 2010 WL 571823, at *3 (Mich. Ct. App. Feb. 18, 2010) ("A genuine issue of material fact may exist regarding whether the weekly adjournment notices were actually posted by a sheriff's deputy at the place where the sheriff's sale was scheduled to occur or published in the newspaper in which the original notice was published.").

on March 14, 2013.[41] Any failure to publish notice of Covil's dissolution years before Mr. Hutto would have been aware he had a claim (and thus before it had even accrued) would not have prejudiced plaintiffs as a result. Notice of dissolution (or lack thereof) is of no consequence to a person who would not have been aware of the existence of a claim against the dissolved corporation at that time, and a statute of repose, unlike statutes of limitation, reflects the legislature's judgment that there should be an "absolute time limit beyond which liability no longer exists" and therefore bars a claim even before it accrues. *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). Thus, even if the circuit court properly found that Covil's prior receiver did not comply with statutory notice requirements despite the prior final orders to the contrary, it was error to end the analysis there, without considering whether any particular creditor would have been prejudiced by such alleged noncompliance.

In sum, all the Receiver cited to counter the presumption that the prior receiver published the notice in accordance with his duties was, essentially, a lack of documentary evidence corroborating the presumption of publication. Under any possibly relevant standard, that cannot suffice to conclusively establish that notice was not published as a matter of fact. Accordingly, the circuit court erred in resolving factual questions and drawing inferences in the Receiver's favor on a motion filed on an incomplete discovery record. At a minimum, to the extent the Court considers the question of publication to be relevant and unresolved by application of the presumption, the Court should vacate the order and remand so that the matter can be appropriately considered on a full record at summary judgment or trial.

[41] R. p. __; Complaint, *Hutto* at ¶ 52.

CONCLUSION

The circuit court's September 25, 2020 order granting the Receiver's Motion to Clarify should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned 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:

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