

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Court of Appeals Case No. 2020-001663
Circuit Court Case No. 2019-CP-40-03003

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S.C. SUPREME COURT

Ann Finch, Individually and as Executor of Estate of Franklin Finch; and
Peter D. Protopapas, as Court-Appointed Receiver for Covil
Corporation,.....

Respondents,

v.

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

Defendants,

Of Which

United States Fidelity and Guaranty Company is the

Petitioner.

APPENDIX IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

ANN FINCH, Individually and as Executor of
the Estate of FRANKLIN FINCH,

C/A NO. 2019-CP-42-3003

Plaintiffs,

vs.

**ANN FINCH AND COVIL
CORPORATION'S MOTION TO
BIFURCATE**UNITED STATES FIDELITY AND
GUARANTY COMPANY; ZURICH
AMERICAN INSURANCE COMPANY;
PETER PROTOPAPAS as Court Appointed
Receiver for COVIL CORPORATION; and
WALL, TEMPLETON & HALDRUP, P.A.,

Defendants.

COMES NOW the Receiver for Covil Corporation ("Covil") and Ann Finch, individually and as personal representative of the estate of Franklin Finch ("Finch" and together with Covil, "Plaintiffs") and move this Court to bifurcate this case which is currently set for trial on January 11, 2020 and would respectfully show this Court as follows:

BACKGROUND

This case arises out of a judgment in excess of \$32,700,000 against Covil Corporation by Finch in October of 2018.¹ Relevant to this motion, Plaintiffs complain that United States Fidelity & Guaranty Company ("USF&G"), Zurich American Insurance Company ("Zurich") (the "Alter-Egos") became, through their actions, the alter-egos of Covil Corporation and thus are liable both for the Finch Judgment and for the greater asbestos liabilities of Covil generally. Plaintiffs assert

¹ This judgment was affirmed by the 4th Circuit of United States Court of Appeals in 2020. *See Finch v. Covil Corporation*, 2020 WL 5014974 (4th Cir. August 24, 2020).

these claims directly and via cross claims. Because Covil and Finch are aligned in seeking to hold the Alter Egos responsible for the current and future damages incurred by Covil as a result of their actions, this Court, on motion, realigned Covil as a plaintiff.

In addition to the alter-ego claim, the Plaintiffs bring various other claims for malpractice, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and negligent failure to settle.

LAW AND ANALYSIS

Rule 42(b) of the South Carolina Rules of Civil Procedure provides that

[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claim, counterclaims, third-party claims or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

Rule 42(b), SCRPC. When a case involves both legal and equitable claims, the trial court has discretion to try both “side by side in the same action with the jury rendering a verdict on the legal issues and the court rendering a decision on the equitable matters” or try the claims in separate proceedings. *Johnson v. S.C. Nat. Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987). A trial may be bifurcated when “the issues are so distinct that trial of each alone would not result in injustice.” *Wright v. Hiester Const. Co.*, 389 S.C. 504, 516, 698 S.E.2d 822, 828 (Ct. App. 2010). The decision to bifurcate a trial will only be reversed for a trial court’s abuse of discretion. *Winthrop University Trustees for the State v. Pickens Roofing and Sheet Metals, Inc.*, 418 S.C. 142, 166, 791 S.E.2d 152, 165 (Ct. App. 2016).

The bifurcation of this trial is appropriate for several reasons.

A. Alter-ego is a non-jury question.

The question of whether to pierce the corporate veil via an allegation of alter-ego sounds in equity. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012). “In equity, the parties are not entitled, as a matter of right, to a trial by jury. . . . Courts of equity have always been permitted to decide issues without the intervention of a jury.” *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975). Therefore, the alter-ego claim in this case is an equitable claim that will be tried without a jury. Because the alter-ego claim will be tried without a jury, the Court should bifurcate this claim from the rest of the claims and conduct a separate bench trial in order to clarify and simplify the issues before the jury. *See Duham v. Vinson*, 360 S.C. 639, 645, 602 S.E.2d 760, 763 (2004) (encouraging trial judges to bifurcate trials in complex cases “particularly where bifurcation helps to clarify and simplify the issues”).

B. The elements of the claims do not overlap.

Because each claim asserted in this case, whether by Covil or Finch, consists of differing elements, bifurcation is appropriate. *See Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73, 533 S.E.2d 331, 333 (2000 (explaining the trial judge should determine whether issues are overlapping or distinct in determining whether there are separate issues that should be bifurcated)). The claim of alter-ego requires a party to prove “(1) total domination and control of one entity by another and (2) inequitable consequences caused thereby.” *Oskin*, 400 S.C. at 401, 735 S.E.2d at 465. Breach of Fiduciary Duty requires the Plaintiffs to establish “(1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant.” *RFT Management Co. LLC*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012). Aiding and abetting a breach of fiduciary duty requires the Plaintiffs to prove “(1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant’s knowing participation in the breach; and (3) damages.” *Bennett v. Carter*, 421 S.C. 374, 380, 807 S.E.2d 197, 200 (2017). Negligent failure to settle requires the Plaintiffs to prove that Covil’s

insurance carriers acted negligently when they failed to settle Finch's claims against Covil within the demanded limits of their insurance policies. *See Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933). Therefore, the alter-ego claim is a legally distinct claim that may be tried separately from the others, and a bifurcated trial will not result in prejudice to any party. *See Flagstar*, 341 S.C. at 73, 533 S.E.2d at 333 ("[T]rial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right.").

C. Bifurcation will result in efficiency and less jury confusion.

As the elements of the alter-ego claim do not overlap at all with any of the other remaining claims, there is no reason to burden a jury with the evidence regarding alter ego. This is particularly true as it relates to Ann Finch. If Finch prevails on her claim of alter-ego, the Alter-Egos become directly liable to Finch without further findings on her claims of breach of fiduciary duty or aiding and abetting a breach of fiduciary duty. Moreover, as the elements of each claim are different, the very real possibility of jury confusion becomes evident as multitudes of different evidence will be required for the differing claims. For example, a determination by the Court of whether the insurers acted as the alter-ego of Covil necessitates an exploration of the relationship between the insurers and Covil, Covil's history and dissolution, and the insurer's conduct, both in the Finch case and in other cases, over the past twenty-seven years. However, a determination of whether the insurers breached their fiduciary duty, aided and abetted the breach of fiduciary duty, and negligently failed to settle the Finch case involves a more specific look into the facts surrounding the *Finch* case and the *Finch* judgment. Therefore, bifurcating the separate issue of alter-ego from the remaining claims in this case best reduces the possibility of jury confusion and promotes judicial economy.

CONCLUSION

For the foregoing reasons, the Plaintiffs request that this Court bifurcate the claim of alter-ego from the remaining claims in this case, conduct a bench trial on the alter-ego claim, and grant such other and further relief to which they may be entitled. As the alter-ego claim may be determinative of some of the issues involved in the case, the Plaintiffs request the Court, in the interest of judicial economy, conduct a bench trial on the alter-ego claim on the scheduled trial date of January 11, 2021. The Plaintiffs request the Court schedule the trial on the remaining claims after January 11, 2021. The Plaintiffs certify that it would be futile to consult with USF&G, Zurich, and Wall, Templeton, & Haldrup, P.A.

Respectfully submitted,

s/ Mark W. Hardee
 Mark W. Hardee, Esquire
 S.C. Bar 7857
 The Hardee Law Firm
 2231 Devine Street Suite 202
 Columbia, South Carolina 29205
 Phone: 803-799-0905
 Fax: 803-799-0470
mwhardee@bellsouth.net

AND

s/Theile B. McVey
 Theile B. McVey (SC Bar 16682)
tmcvey@kassellaw.com
 John D. Kassel (SC Bar 3286)
jkassel@kassellaw.com
KASSEL MCVEY, ATTORNEYS AT LAW
 1330 Laurel Street
 Columbia, South Carolina 29202-1476
 T: 803-256-4242
 F: 803-256-1952
 Other email: emoultrie@kassellaw.com

s/ Charles W. Branham, III

Charles W. Branham, III (To be Admitted *PHV*)

Jonathan M. Holder (SC Bar No. 77935)

Dean Omar Branham SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

tbranham@dobslegal.com

jholder@dobslegal.com

Other email: tgilliland@dobslegal.com

This 2nd Day of October, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
ANN FINCH, Individually and as Executor of the	)	CIVIL ACTION NO. 2019-CP-40-03003
Estate of FRANKLIN FINCH, PETER	)	
PROTOPAPAS as Court Appointed Receiver for	)	
COVIL CORPORATION,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
UNITED STATES FIDELITY & GUARANTY	)	
COMPANY; ZURICH AMERICAN INSURANCE	)	
COMPANY; ENSTAR (US) INC.; AND WALL,	)	
TEMPLETON & HALDRUP, P.A.,	)	
	)	
Defendants.	)	
_____	)	

**OPPOSITION OF UNITED STATES FIDELITY AND GUARANTY COMPANY TO
ANN FINCH AND COVIL CORPORATION'S MOTION TO BIFURCATE**

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Defendant United States Fidelity and Guaranty Company (“USF&G”), by and through its undersigned counsel, hereby submits this opposition to Plaintiffs Ann Finch, the Executrix of the Estate of Franklin Finch (“Finch”), and the Receiver for Covil Corporation’s (“Receiver” and collectively with Finch, “Plaintiffs”) October 2, 2020 Motion to Bifurcate (the “Motion”).

INTRODUCTION

Plaintiffs do not dispute that USF&G and Zurich are entitled to a trial by jury with respect to the non-alter ego claims asserted against them. Plaintiffs nonetheless move to bifurcate trial, urging the Court to conduct a separate bench trial on their alter ego allegations prior to a jury trial of the remaining claims. Plaintiffs claim that such bifurcation is appropriate due to the risk of “burden” and “confusion” to the jury were it to consider the alter ego claims. Plaintiffs’ motion should be denied.

Where a right to a jury trial exists as to some but not all claims in the same action and the claims involve common factual issues, if the court bifurcates trial the jury must decide the at law claims *before* any bench trial on the equitable claims “absent the most imperative circumstances . . .” *Wachovia Bank, Nat’l Ass’n v. Blackburn*, 407 S.C. 321, 329–30, 755 S.E.2d 437, 441 (2014) (Toal, C.J.) (citation omitted). Here, the entire basis for Plaintiffs’ alter ego claims stems from USF&G’s and Zurich’s handling and participation in the defense of Covil since 1991 under their insurance contracts, including in connection with the *Finch* claim. Thus, Plaintiffs rely on most of the same factual allegations in support of their negligence, breach of contract, bad faith, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty claims as they do to support their alter ego claims. Because there are overlapping factual issues, any bifurcated trial of the alter ego claims must await the jury’s determination of Plaintiffs’ legal claims. To do otherwise would be contrary to controlling South Carolina law and would encroach on Defendants’ constitutionally protected jury trial rights.

Second, Plaintiffs' bifurcation proposal would not prevent confusion or in any way result in increased efficiency. Given the substantially overlapping claims, factual allegations, and defenses, it is implausible that the jury would be confused by inclusion of the alter ego claim when they will already be deciding many of the same disputed factual issues in connection with Plaintiffs' agency, instrumentality, negligence, breach of contract, bad faith, breach of fiduciary duty, and aiding and abetting claims. And the Court can address any hypothetical risk of confusion through appropriate instructions.

It is equally implausible that conducting two separate trials would be more efficient than conducting a single jury trial on all issues. To the contrary, it would be less efficient, not more efficient, to proceed in that fashion. Thus, bifurcation is not warranted under SCRCP 42. Instead, the Court should order a single jury trial on all claims. Indeed, if Plaintiffs are truly interested in efficiency, they should withdraw their motion for bifurcation and agree to a partial stay of those claims that are duplicative of the claims the parties are litigating in the first-filed federal coverage action in the Middle District of North Carolina and which are nearing completion, so as to further streamline the issues for resolution in a single jury trial.

BACKGROUND

On August 24, 2016, Finch filed suit in the United States District Court for the Middle District of North Carolina against Covil and other defendants, asserting causes of action arising out of Franklin Finch's exposure to asbestos. *See Finch v. BASF Catalysts, LLC*, No. 16-cv-01077 (M.D.N.C.) ("*Finch I*"). USF&G and Zurich were the only insurers that agreed to provide a defense to Covil for this action. *Finch I* went to trial against Covil, and on October 5, 2018, a jury issued a verdict in favor of Finch. The Fourth Circuit affirmed.

On November 6, 2018, Zurich commenced a declaratory judgment action in the Middle District of North Carolina against Covil, Covil's other insurers, Finch, and certain other asbestos claimants. *See* Ex. 1, Complaint, *Zurich Am. Ins. Co. et al. v. Covil Corp. et al.*, No. 18-cv-932 (M.D.N.C.) (the "MDNC Action"), ECF 1. That action seeks declarations regarding the amount of insurance coverage available to Covil and the amount available to Ann Finch for her judgment. Through its Receiver, Covil asserted counterclaims and cross-claims against USF&G and Zurich alleging breach of contract and bad faith, and seeking declaratory relief. On November 21, 2018, Covil, acting through its Receiver, sued Insurers and underlying asbestos claimants in the South Carolina Circuit Court. *See* Ex. 2, Complaint, *Covil Corp. v. Zurich Am. Ins. Co.*, No. 18-cv-3291-BHH (D.S.C) (the "DSC Action"), ECF 1-1. That action was removed to the District Court for the District of South Carolina, where it remains pending.

On May 30, 2019, Plaintiff Ann Finch filed the instant action in this Court, asserting that Sentry Insurance Company, USF&G, Zurich, and Wall Templeton, a law firm that defended Covil, are liable as Covil's alter egos for the full judgment entered against Covil in *Finch I*.¹ *See* Plaintiff's Original Complaint. On June 27, 2019, Defendants removed the action to the United States District Court for the District of South Carolina on the basis of diversity jurisdiction, and on July 8, 2019, Finch moved to remand. While the action was pending in federal court, the parties briefed motions to dismiss. On June 4, 2020, the District Court granted Finch's motion to remand, and denied the pending motions to dismiss as moot. Following remand, on June 15, 2020, USF&G moved to dismiss for failure to state a claim and for lack of personal jurisdiction, and moved in the alternative to transfer venue. On June 29, 2020, this Court denied the

¹ On October 9, 2020, Covil and Wall Templeton jointly moved, with the consent of Plaintiff Ann Finch, to sever all claims against Wall Templeton.

Defendants' motion to dismiss, apparently relying on the motion papers that had been previously filed in federal court despite the fact that USF&G's motion to dismiss in this Court was not fully briefed.

Finch subsequently filed a Second Amended Complaint in this action (the "SAC") on September 15, 2020 to add Enstar (US) Inc. as a defendant and to add claims against USF&G and Zurich for breach of fiduciary duty. SAC ¶¶ 6; 59. To support the breach of fiduciary duty claim, Finch relies on the same underlying factual allegations as alleged in support of the alter ego claims, including that Covil's insurers "operated Covil for their own benefit" after its dissolution with the ostensible aim of minimizing their liability. SAC ¶ 59; *accord id.* ¶¶ 40-42. In her complaint, Finch "demands a trial by jury on all issues."

Covil, through its Receiver (now realigned as a plaintiff), also filed cross-claims against USF&G and Zurich (as well as Wall Templeton & Haldrup, Covil's defense counsel in *Finch I*). *See* Receiver's Answer to SAC and Cross-Claims ("Cross-Claims"). Those cross-claims include a request for declaratory judgments (ninth cross-claim) that are substantially the same as the Receiver's claims against USF&G and Zurich in the DSC Action, as well as the Receiver's cross-claims against USF&G and Zurich in the MDNC Action. The cross-claims here also include claims for breach of contract and bad faith claims (fourth, fifth, and sixth cross-claims) that are likewise materially the same as the breach of contract and bad faith claims the Receiver asserted in the pending MDNC Action.

In addition, the Receiver, like Finch, also seeks a declaration that the insurers are responsible for Covil's liability under theories of alter ego, agency, or instrumentality (seventh cross-claim), in addition to asserting claims against the insurers for "aiding and abetting" a breach of fiduciary duty (third cross-claim) and negligence (eighth cross-claim). Just as with

Finch's claims, nearly all of the Receiver's cross-claims rely on the same core set of operative facts as those alleged in connection with Plaintiffs' alter ego claims, namely that USF&G and Zurich failed sufficiently to involve "an independent Covil" in the defense of the underlying *Finch* case and otherwise controlled and operated Covil for the insurers' own benefit in defending Covil since 1991. As with Finch, the Receiver demanded trial by jury "on all issues." *Ann Finch et al. v. Sentry Cas. Co., et al.*, No. 3:19-cv-01827, ECF 17, at 37.²

ARGUMENT

I. Regardless of Whether Bifurcation is Appropriate, the Jury Must Resolve All Common Issues of Fact Before a Bench Trial on Equitable Claims May Proceed

Plaintiffs do not dispute that USF&G and Zurich have a constitutional right to a trial by jury on all of the legal claims asserted by both Plaintiffs. Plaintiffs argue that trial should be bifurcated, however, and that the Court should defer those claims and conduct a bench trial first on their alter ego claims because they are equitable in nature and the "elements" of their alter ego claims differ from the elements of the other claims. Plaintiffs further argue that bifurcation would result in efficiency and less jury confusion. Putting aside whether bifurcated trials are appropriate here—and they are not as discussed further below—Plaintiffs overlook a critical fact: the legal and equitable claims involve numerous common questions of fact. It is well settled that "when issues common to both legal and equitable claims are to be tried . . . legal issues are to be determined *first*, and the findings of the jury are binding on the sitting judge, as trier of the equitable claims." *Johnson v. South Carolina Nat. Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 898 (1987) (emphasis added); *see also Wachovia Bank*, 407 S.C. at 329–30, 755 S.E.2d at 441.

² The Receiver's October 1, 2020 Answer to the SAC and amended crossclaims did not include a specific jury demand, although the body of the cross claims seeks "actual and consequential damages in an amount to be determined by a jury." *See, e.g.*, ¶ 94.

(same). This procedure is integral to preservation of the undisputed right to a jury trial on legal claims, of which “[n]either party should be deprived.” *Gardner v. Travis*, 316 S.C. 315, 318, 450 S.E.2d 54, 56 (Ct. App. 1994); *accord, Floyd v. Floyd*, 306 S.C. 376, 379, 412 S.Ed.2d 397, 398–99 (1991) (confirming right to jury trial on legal issues “[w]here legal and equitable issues and rights are asserted in the same complaint”). Plaintiffs’ motion, therefore, must be denied.³

A. USF&G and Zurich Have a Constitutional Right to Jury Trial

Plaintiffs assert a host of claims and cross-claims to which the right to a jury trial indisputably attaches. Those include:

- Finch’s claim for Breach of Fiduciary Duty (Fourth Cause of Action, SAC ¶¶ 56-61);
- Covil’s cross-claim for Professional Negligence against Covil’s lawyers (First Cross-Claim, ¶¶ 84-90);
- Covil’s cross-claim for Breach of Fiduciary Duty against Covil’s lawyers (Second Cross-Claim, ¶¶ 91-94);
- Covil’s cross-claim for Aiding and Abetting Breach of Fiduciary Duty against the insurers (Third Cross-Claim, ¶¶ 95-101);
- Covil’s cross-claim for Breach of Contract, asserting Bad Faith Failure to Defend (Fourth Cross-Claim, ¶¶ 102-110);

³ While *Wachovia Bank* and *Johnson* addressed this rule in the context of legal counterclaims asserted against equitable complaints, it is premised on the same jury trial right that attaches to legal claims where they are asserted alongside equitable ones in a single pleading. *See Floyd*, 306 S.C. at 380, 412 S.E.2d at 399. Accordingly, the requirement that a jury trial on legal claims precede a bench trial on equitable claims presenting common issues applies equally in the context of a complaint asserting both legal and equitable claims. *See, e.g., Bateman v Rouse*, 358 S.C. 667, 676, 596 S.E.2d 386, 391 (Ct. App. 2004) (defendant entitled to a jury trial on the plaintiff’s legal claims asserted in the same complaint as equitable claims and directing that “[i]f both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court.”).

- Covil's cross-claim for Breach of Contract, asserting Bad Faith Processing of Claims (Fifth Cross-Claim, ¶¶ 111-117);
- Covil's cross-claim in Tort, asserting Bad Faith Processing of Claims (Sixth Cross-Claim, ¶¶ 118-121); and
- Covil's cross-claim for Negligence (Eighth Cross-Claim, ¶¶ 130-136).⁴

The South Carolina Constitution “preserve[s] inviolate” the right to a jury trial. S.C. Const. art. I, § 14. “The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate.” Rule 38(a), SCRCP. The right to a jury trial is afforded “in those cases in which the parties were entitled to it under the law or practice existing at the time of the adoption of the Constitution.” *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997) (citing *Pelfrey v Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978)). It turns, therefore, on whether the action is legal or equitable in nature. *Bateman*, 358 S.C. at 673, 596 S.E.2d at 389 (citing *Lester*, 327 S.C. at 267, 491 S.E.2d at 242; *Nat’l Bank of South Carolina v. Daniels*, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (Ct. App. 1984)).

Here, Finch, the Receiver, USF&G, and Zurich have each demanded a jury trial on all issues. *See also* Rule 38(c), SCRCP (“In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so

⁴ In addition, to the extent Plaintiffs assert a claim that USF&G is liable based on a purported agency relationship with Covil or that the insurers are the “mere instrumentality” of Covil, those claims are triable by jury as well because the underlying nature of such a claim – personal injury liability to the Finches – arises in tort. *See Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004) (explaining that whether a declaratory judgment action is legal or equitable depends on the “nature of the underlying issue” and, where plaintiff commenced a suit seeking a declaratory judgment on a legal issue, insurance coverage, treating a determination regarding agency bearing on coverage as part of that legal issue); *see also Gathers v. Harris Teeter Supermarket*, 282 S.C. 220, 226, 317 S.E. 2d 748, 752 (Ct. App. 1984) (“If there are any facts tending to prove the relationship of agency, it then becomes a question for the jury.”)

triable.”). A “demand for trial by jury made [pursuant to SCRCPP 38] . . . may not be withdrawn without the consent of the parties” under the plain language of SCRCPP 38(d), and trial by the court is reserved for “[i]ssues of law and issues *not demanded for trial by jury* as provided in Rule 38” Rule 39(b), SCRCPP (emphasis added). Under these circumstances, Plaintiffs’ belated request for a bench trial should be deemed waived. In any event, although equitable claims are otherwise generally determined by the court, *Bateman*, 358 S.C. at 673, 596 S.E.2d at 389, the right to have legal claims decided by a jury, even where they exist alongside equitable ones, inures to parties on both sides, and the trial court must exercise caution to protect the parties’ constitutional right to a jury trial on the legal claims. *See Gardner*, 316 S.C. at 318, 450 S.E.2d at 56; Rule 38(b), SCRCPP (entitling either party to demand a jury trial on an issue triable of right by a jury).

“The same caution” with regard to jury trial rights in joint trials “ought also to be taken where separate trials are ordered.” *Gardner*, 316 S.C. at 318; 450 S.E.2d at 56. If the Court orders separate trials for the legal and equitable claims and “there are factual issues common to both,” the legal claim “must be tried first” in the absence of “imperative” circumstances requiring prioritization of the equitable claim. *Johnson*, 292 S.C. at 56, 354 S.E.2d at 897 (citing *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959)). “In such cases, the United States Supreme Court has cautioned that the discretion to try an equitable claim first ‘is very narrowly limited and must, whenever possible, be exercised to preserve jury trial,’” *i.e.*, the equitable claim should be tried first only “in the face of ‘irreparable harm’ to the plaintiff” otherwise. *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 510, 737 S.E.2d 515, 517 (Ct. App. 2013) (quoting *Beacon*, 359 US at 510).

B. Plaintiffs’ Legal Claims and Alter Ego Claims Involve Numerous Common Issues of Fact.

Plaintiffs' legal claims that must be tried to a jury are replete with issues common to the alter ego claims.⁵ To satisfy the "Control Prong" of alter ego, Plaintiffs will have to establish "total domination and control" of Covil by USF&G. *Colleton Cty. Taxpayers Ass'n v. School Dist. of Colleton Cty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (citing *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 148, 425 S.E.2d 764, 774 (Ct. App. 1992)). To satisfy the "Fairness Prong" of alter ego, Plaintiffs must establish at trial "a nexus between the fraud or injustice resulting from the misuse of the corporate form and an injury to [the plaintiff.]" *S.C. Elec. & Gas Co. v. UGI Utils., Inc.*, No. 2:06-CV-02627-CWH, 2012 WL 1432543, at *63 (D.S.C. Apr. 11, 2012). While USF&G maintains that no such showing can be made, Finch's allegations of domination and control, fraud or injustice and misuse of the corporate form include that:

- The insurers controlled the defense of all asbestos suits brought against Covil after it ceased operations in 1991;
- The insurers made "all determinations as to use and disposition of Covil's assets which consisted primarily of corporate documents and insurance policies";
- The insurers made "all determinations as to the disposition of Covil Asbestos Suits as well as the treatment and characterization of claims under the Covil insurance policies"; and,
- The insurers "unilaterally hired agents for Covil, including experts and a professional 30(b)(6) witness."

See SAC ¶¶ 14, 16–18, 23.

The Receiver makes similar allegations in support of all of his Cross-Claims, including

⁵ Alter ego is not so much a claim, but rather "describes a theory of procedural relief. . . . [T]he alter ego doctrine is merely a means of piercing the corporate veil." *Jones ex rel. Jones v. Enter. Leasing Co.-Se.*, 383 S.C. 259, 267, 678 S.E.2d 819, 823 (Ct. App. 2009) (quoting *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101 n. 1, 668 S.E.2d 798, 800 n. 1 (2008)).

that:

- “[T]he defense of the Covil Asbestos Suits was controlled by the Primary Insurers, specifically USF&G and Zurich”;
- “Zurich and USF&G managed Covil, making all determinations as to the use and disposition of Covil’s assets, which consisted primarily of corporate documents and insurance policies”;
- “The Primary Insurers made all determinations as to the disposition of Covil Asbestos Suits including decisions as to the waiver of conflicts of interests, as well as the treatment and characterization of claims under the Covil insurance policies”;
- “The Primary Insurers acted in concert for the common purpose of ensuring there was no independent person or entity acting by or on behalf of Covil”;
- “The Primary Insurers effectuated their common purpose of exclusive, unilateral control of Covil by running Covil’s affairs in all material respects”;
- “At no time did the Primary Insurers make efforts to appoint an independent person or entity to determine what was in Covil’s best interest,” and instead “unilaterally determined what was best for Covil, or disregarded what was best for Covil, acting in their own interest, regardless of whether there was an actual or potential conflict between their interest and Covil’s interest”;
- In addition to controlling the assets and affairs of Covil, the Primary Insurers hired agents for Covil, including but not limited to attorneys, experts, and a professional witness to act as and on behalf of, and to constitute Covil, *de factor* or *de jure*.”

Cross-Claims ¶¶ 51-59; *see also id.* ¶¶ 60-83.

Indeed, as Finch’s complaint and Covil’s cross-claims make clear, the entire basis for Plaintiffs’ alter ego claim stems from USF&G’s and Zurich’s handling and participation in the defense of Covil since 1991 under their insurance contracts, including in connection with the *Finch* claim. Thus, it is not surprising that Plaintiffs rely on the same factual allegations to support their alter ego claims as they do to support their claims for negligence, breach of contract, bad faith, breach of fiduciary duty, and aiding and abetting.

For example, the Receiver’s breach of contract and bad faith cross-claims are predicated on the assertions that USF&G and Zurich exercised “complete control over Covil and

management of Covil’s affairs, including, but not limited to, the Covil asbestos suits, extended to the *Finch* suit” (Cross-Claim ¶ 75), that the insurers “improperly determined not to convey” settlement demands to Covil and instead “kept Finch’s offer to compromise to themselves with the Insurers acting and being Covil” (*id.* ¶ 78), that the insurers “did not speak to any Covil representative” (*id.* ¶ 80), that “Defendants acted in concert when deciding not to tender Covil’s policy limits in response to Finch’s demand, and they did so without any input from an independent Covil,” that “[t]hese actions were in breach of their duties to Covil” (*id.* ¶ 83), and that the insurers failed to “inform an independent Covil of the [Finch] demand and its rights relating to the demand” (*id.* ¶ 99), and “improperly instructed each of Covil’s lawyers to breach their fiduciary duties to their insured, Covil, by treating the Primary Insurers as the client” (*id.* ¶ 100). The “bad faith processing of claims” cross-claim, which is not limited to the *Finch* suit, relies on these allegations as well. *See id.* ¶¶ 118-121.

Lest there be any doubt, in the pending MDNC Action, the Receiver recently moved for summary judgment on Covil’s claims for bad faith—among the very claims they are also asserting in this lawsuit—and argue in support of that motion that, “[a]fter Covil ceased commercial operations in 1991, the undisputed evidence shows that the Insurers [USF&G and Zurich] took control of Covil’s asbestos litigation,” including by defense counsel’s possession of Covil’s documents and other acts and omissions of the insurers and defense counsel during the period after 1991.” *See* Ex. 3, Memorandum in Support of Motion for Summary Judgment, *Zurich Am. Ins. Co. et al. v. Covil Corp. et al.*, No. 18-cv-932 (M.D.N.C.), ECF 357, at 3-4. Similarly, although the Receiver has not sought a declaration in that action that USF&G and Zurich are alter egos, the Receiver nonetheless argues in support of the bad-faith extra-contractual claims that:

[F]or **decades** the Insurers “engage[d] in conduct manifesting an inequitable assertion of power or position” over Covil, “including conduct which can be characterized as ‘unethical,’ . . . The Insurers knew Covil was defunct **but continued the façade of representation, making all decisions in their own interest, without attempting to consult their insured. They re-animated Covil instead of seeking the appointment of a Receiver to represent their insured. The Insurers treated Covil as their “mere instrumentality” and as their alter ego.**

Id., at 19-20 (emphasis added). In addition, the Receiver argues that USF&G and Zurich should be liable in bad faith as “equitable owners” of Covil—just as they allege in this action—and that “for decades, the Insurers continued an inequitable assertion of power or position over Covil.” *Id.* (internal quotations and citations omitted).

The Receiver’s fiduciary duty cross-claim, like the breach of contract and bad-faith claims, similarly alleges that the insurers participated in the lawyers’ decision “not to inform an independent Covil” of various issues relating to Covil’s defense. *See* Cross-Claim ¶¶ 99, 107; *compare with* Cross-Claim ¶ 125 (asserting in the alter-ego cross-claim that the insurers sought to “eliminat[e] Covil as a direct voice in the management of Covil’s assets”). The Receiver’s negligence claim also stems from the same alter ego allegations. Indeed, the Receiver’s alter ego claim even alleges that the “Insurers’ acts and omissions constitute negligence” (Cross-Claim ¶ 128), *i.e.*, that the same facts giving rise to alter ego liability also support a finding of negligence.

For her part, Finch similarly alleges in support of her breach of fiduciary duty claim that the insurers “operated Covil for their own benefit and breached their fiduciary duties to Covil Corporation and each of its creditors beginning at least by 1993.” SAC ¶ 59. While Plaintiffs have not asserted any cognizable injury to Finch arising from this alleged breach, there is certainly no separate injury pled with respect to the breach of fiduciary duty claim. Indeed, two elements of a negligence claim are “the breach was the actual and proximate cause of the plaintiff’s injury” and that “damages resulted from the injury.” *Parker v. Town of Erwin*, 243

N.C. App. 84, 110, 776 S.E.2d 710, 729–30 (2015). Plaintiff Finch’s proximate causation and damages allegations are inextricably tied to the alter ego allegation, for example by alleging that “[a]s a result of these breaches [of fiduciary duties,] Covil has been irrevocably damaged and without a finding of liability against the Alter Egos cannot be made whole.” SAC ¶ 60.

In short, regardless of whether their claims are couched in terms of alter ego, agency, equitable ownership, negligence, breach of contract, bad faith, breach of fiduciary duty, or aiding and abetting breach of fiduciary duty, the complaints and cross claims make clear that they all involve the same core set of operative facts: the insurers’ and defense counsel’s handling of and involvement in Covil’s asbestos lawsuits from 1991 through November 2, 2018 (the date of the Receiver’s appointment).

C. Conducting a Bench Trial on Alter Ego Before a Jury Trial on the Legal Claims Would be Impermissible.

Because the disputed factual issues bearing on resolution of the alter ego claims permeate the legal claims brought by the Receiver—claims on which USF&G and Zurich are indisputably entitled to a jury trial—these common issues must be resolved by a jury before the Court can decide the remaining equitable claims. *Johnson*, 292 S.C. at 55–56, 354 S.E.2d at 897. In fact, Rule 42(b), on which Plaintiffs’ request is based, itself makes clear that courts must “always preserv[e] inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.” Rule 42(b), SCRCF. Thus, regardless of whether the claims are bifurcated, the legal claims and common factual issues must be decided first by a jury, with its conclusions on common issues binding on the trial court’s decision regarding equitable claims. The opposite approach—disposing of common issues through a bench trial before they are tried to a jury—risks “limiting [a party’s] opportunity fully to try to a jury every issue” on which it is entitled to a jury trial, “for determination of the issue . . . by the judge might operate either by way of res

judicata or collateral estoppel.” *Beacon*, 359 U.S. at 504 (citation omitted). Because of the many factual issues common to the alter ego and other claims, a bench trial solely on the alter ego claims prior to the jury trial on the remaining claims would therefore necessarily impinge on USF&G’s and Zurich’s constitutional jury trial rights. *See Gardner*, 316 S.C. at 318, 450 S.E.2d at 56; *see also Plantation Fed. Bank*, 401 S.C. at 510–511, 737 S.E.2d at 517.

Finally, there is no basis to find that trying equitable issues first is warranted by the “narrowly limited” situation in which “imperative” circumstances require prioritization of the equitable claim. *Beacon*, 359 US at 510; *Johnson*, 292 S.C. at 56; 354 S.E.2d at 897; *Plantation Fed. Bank*, 401 S.C. at 517–18; 737 S.E.2d at 521. Plaintiffs do not suggest otherwise in their motion. Additionally, the Finch plaintiff ultimately seeks money damages, and post-judgment interest protects parties from any time-based delay even if she ultimately were to prevail on her claims. As to Covil, any monetary damages would be awarded for the benefit of claimants, and not Covil itself or its Receiver. Moreover, the Receiver’s declaratory judgment claims would not be final until there is a final, non-appealable judgment. In the meantime, USF&G and Zurich are continuing to defend and indemnify Covil in the underlying asbestos personal injury lawsuits asserted against Covil, and thus there is no conceivable basis on which either of the Plaintiffs could credibly claim the kind of “irreparable harm” or show any “imperative” circumstances that would justify depriving USF&G and Zurich of their constitutional jury trial rights.

II. The Court Should Order a Single Jury Trial on All Claims

When a case presents both legal and equitable issues, a trial court may either order bifurcated trials pursuant to SCRCP 42(b) (as urged by Plaintiffs) or a single trial for all claims. *See Johnson*, 292 S.C. at 55; 354 S.E.2d at 897. Thus, the existence of equitable claims does not prevent an action involving both legal and equitable claims from being tried in a single jury trial

where, as here, there are common issues of fact. *See id.*; *see also Wachovia Bank*, 407 S.C. at 330, 755 S.E.2d at 442 (where action involves equitable claims and legal counterclaims involving common factual issues the “trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding”). In exercising the court’s discretion, trial judges must continue “to heed the ‘separate issue’ mandate of Rule 42(b).” *Durham v. Vinson*, 360 S.C. 639, 645 n. 2, 602 S.E.2d 760, 763 n. 2 (2004); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73, 533 S.E.2d 331, 333 (2000) (trial judges are responsible for determining whether trial issues are distinct enough to warrant severability).

Given the significant overlap in the factual issues underlying Plaintiffs’ claims, bifurcating the trial as Plaintiffs urge would neither be workable nor efficient. Plaintiffs contend that because the *elements* of the alter ego claim do not overlap with any of the other remaining claims there is “no reason to burden a jury with the evidence regarding alter ego,” but they ignore the fact that they each seek to prove most of the remaining claims through the very same disputed factual allegations that support their alter ego claims. Plaintiffs state that “whether the insurers acted as the alter-ego of Covil necessitates an exploration of the relationship between the insurers and Covil, Covil’s history and dissolution, and the insurer’s conduct, *both in the Finch case and in other cases*, over the past twenty-seven years.” Mot., at 4 (emphasis added). They also concede that the fiduciary duty, aiding and abetting, and negligence claims will also require the jury to make determinations about the *Finch* case, yet fail to acknowledge that, as described above, they rely on the very allegations and evidence of “the relationship between the insurers and Covil, Covil’s history and dissolution, and the insurer’s conduct, *both in the Finch case and in other cases*, over the past twenty-seven years” (*id.* at 4) in support of their negligence, breach of contract, bad faith, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty

claims. In other words, while the alter ego claims involve a 27-year history of the insurers' involvement in Covil's defense, they also involve the insurers' defense and handling of the *Finch I* claim specifically. And while Plaintiffs emphasize that their legal claims focus on the *Finch I* claim, those claims also involve the same allegations of insurer involvement in Covil's defense and purported operations over the course of the same 27-year history. And Plaintiffs do not even mention their agency and "mere instrumentality" claims, which directly overlap the alter ego claims and which, like the other claims, are for the jury to decide.

For these reasons, the notion that a jury would somehow be confused by considering much of the very same evidence, involving the same factual allegations, by including a single claim alleging alter ego, is implausible. In any event, any theoretical risk of jury confusion can be addressed by appropriate jury instructions.

Moreover, proceeding with two separate trials on alter ego and the remaining claims would be less, not more, efficient, by delaying final resolution of this case. Plaintiffs argue that if "Finch prevails on her claim of alter ego, the Alter-Egos become directly liable to Finch without further findings on her claims of breach of fiduciary duty or aiding and abetting a breach of fiduciary duty." Mot., at 4. To the extent Plaintiffs are suggesting that the Court's findings on alter ego would compel judgment on the legal claims or narrow the issues required to establish liability on those claims, that would directly violate the insurers' jury trial rights—one of the principal reasons legal issues are required to be tried to a jury before equitable claims are tried to the court when there are overlapping factual issues.

To the extent Plaintiffs are instead suggesting the Finch plaintiff would not pursue her remaining claims if Finch prevailed on the alter ego claim, the argument is of no avail for

multiple reasons. First, Finch has not offered to dismiss those claims if she prevails on the alter ego claim and it is not apparent she would do so.

Second, because the legal and alter ego claims involve the same basic set of facts with insignificant factual differences, conducting a single jury trial on all issues would not be materially longer or more complicated for the jury than conducting separate jury and bench trials. That would be particularly so if the Court stays those claims asserted by the Receiver that are entirely duplicative of the claims that are proceeding and near completion in the federal and first-filed MDNC Action, as such a stay would further narrow the claims to be decided and streamline the case for the jury.

Even more fundamentally, neither the Finch plaintiff nor the Receiver is entitled to a separate bench trial on their alter ego claims before the jury trial concludes on the legal claims. The only lawful alternative to conducting consecutive and largely overlapping trials without encroaching on Defendants' constitutional jury trial rights would be to have a single jury trial on all issues. Clearly, that would be more efficient than Plaintiffs' proposed bifurcated trials.

CONCLUSION

For the reasons stated above, USF&G respectfully requests that the Court deny Plaintiffs' motion to bifurcate, order a single jury trial on all issues, other than as to those claims that are duplicative of the first-filed MDNC Action as to which such claims should be stayed.

Respectfully submitted:

/s/ M. Elizabeth O'Neill

M. Elizabeth O'Neill, S.C. Bar No.: 104013

Todd Carroll, S.C. Bar No.: 74000

WOMBLE BOND DICKINSON LLP

1221 Main Street, Suite 1600

Columbia, SC 29201

(704) 350-6310; Elizabeth.ONeill@wbd-us.com

(803) 454-7730; Todd.Carroll@wbd-us.com

William P. Davis, S.C. Bar No.: 1585
BAKER, RAVENEL & BENDER, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091; wdavis@brblegal.com

AND

Mary Beth Forshaw (pro hac vice)
Andrew T. Frankel (pro hac vice)
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017-3954
(212) 455-2846; mforshaw@stblaw.com
(212) 455-3073; afrankel@stblaw.com

*Attorneys for United States Fidelity and Guaranty
Company*

October 16, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
ANN FINCH , Individually and as Executor of the Estate of FRANKLIN FINCH ,	)	C/A NO. 2019-CP-40-3003
	)	
Plaintiff,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
UNITED STATES FIDELITY AND	)	
GUARANTY COMPANY , et al.	)	
	)	
Defendants.	)	

REPLY IN SUPPORT OF MOTION TO BIFURCATE

Ann Finch, individually and as the personal representative of Franklin Finch (“Finch”) and Covil Corporation, by and through its Receiver Peter Protopapas (“Covil” and together with Finch the “Realigned Plaintiffs” or “Plaintiffs”) file this, their Reply in Support of the Motion to Bifurcate and would respectfully show the Court as follows:

LAW AND ARGUMENT

USF&G misstates and misrepresents the law of bifurcation with respect to legal claims and equitable claims in response to the Realigned Plaintiffs’ Motion. USF&G relies on and quotes from *Wachovia Bank, Nat’l Ass’n v. Blackburn*, 407 S.C. 321 (2014) to support its assertion that in the event of bifurcation of Plaintiffs’ claims, where no counterclaim is pending, claims at law must proceed first. *Blackburn* says no such thing. As this Court well knows, *Blackburn* involved a lawsuit over a real estate deal gone bad where claims asserted by the plaintiff sounded in equity and the defendants’ counterclaims sounded at law. The *Blackburn* court laid out a very clear decision tree for determining when a jury trial was required:

- (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:
 - (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
 - (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
 - (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

Wachovia Bank, 407 S.C. at 329–30, 755 S.E.2d at 441–42. Thus the threshold issue is whether there are counterclaims. Here, the answer is no.¹ As there is no counterclaim at issue, there is no requirement that Plaintiffs' legal claims be tried prior to their equitable ones.

Nevertheless, even if *Blackburn* stood for such a proposition, the analysis does not end there. USF&G takes the position that, under the *Blackburn* analysis, affirmative legal claims are the same as legal counterclaims. If that is true, then the analysis under *Blackburn* must be

¹ USF&G attempts to solve this dilemma through a tortured reading of South Carolina case law, but as is demonstrated *infra*, this attempt fails.

continued. That is, are the affirmative legal claims asserted by the Plaintiffs compulsory? Again, the answer is, obviously not.

Finch brought claims against the defendants for alter-ego and breach of fiduciary duty and Covil brought claims against (1) USF&G and Zurich (the “Insurers”) for alter-ego, negligence and various bad faith claims, (2) Wall Templeton & Haldrup, P.A. for malpractice, professional negligence and breach of fiduciary duty,² and (3) USF&G and Zurich for aiding and abetting that breach. Covil also seeks declaratory relief related to the Insurers’ policies. None of those claims, even if evaluated as counterclaims, are compulsory. “By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing parties’ claim.” *Blackburn* at 330. “Claims that arise out of separate transactions or occurrences than the subject matter of the opposing parties claims are, instead, permissive.” *Id.*

Here Covil alleges that Wall Templeton & Haldrup, P.A. committed malpractice in the way in which it defended Covil in the course of a two-week trial. Covil further alleges that the direction the Insurers gave to Wall Templeton & Haldrup, P.A. induced Wall Templeton & Haldrup, P.A. to breach their duties to Covil and that the Insurers’ processing of the claim and failure to settle the Finch claim and was in bad faith. None of these claims arise out of the nearly thirty years of actions by these insurers in dominating and controlling Covil. Wall Templeton & Haldrup, P.A. did not begin representing Covil until early 2018, some twenty-five years after USF&G and Zurich began dominating and controlling their insured. The Finch case is but a snapshot in time, less than two out of the nearly thirty years. None of these claims, even if they were counterclaims, are compulsory.³

² Wall Templeton & Haldrup, P.A. have settled Covil’s malpractice and breach of fiduciary duty claims and are being dismissed from the Finch Alter-Ego action.

³ Interestingly, under *Blackburn*, if USF&G’s premise that claims and counterclaims are the same, then, because Covil’s claims here are permissive, there is no right to a jury trial at all. As *Blackburn* holds “if the complaint is

Perhaps it is a bit simplistic to suggest that when the Supreme Court used the word counterclaim, it meant counterclaim. Had it wanted to use “all claims” it certainly could have done so. USF&G relies on *Floyd v. Floyd*, 306 S.C. 376 (1991) for the proposition that it confirms the “right to a jury trial on legal issues where legal and equitable rights are asserted in the same complaint” and thus that bifurcation must be denied. USF&G is mixing apples and oranges. No one denies that USF&G and Zurich have a right to a jury trial on the issue of aiding and abetting the breach of fiduciary duty. But there is no obligation that the court hear the legal non-compulsory non-counterclaims first. Indeed, *Floyd* specifically notes that the “trial judge may . . . hear the equity case himself.” *Id.*

The plain language of *Blackburn* makes clear that it is only compulsory counterclaims that get a jury trial first. The heading the Supreme Court used references “Counterclaims in an Equitable Action.” *Blackburn*, 407 S.C. at 328 (emphasis added). The Supreme Court went on to state that “[h]owever, counterclaims – including those raised in equitable actions—may, at times, be entitled to a jury trial.” *Id.* (emphasis added). The decision tree set forth by the Supreme Court discusses a number of hypotheticals in laying out the rule. In none of those circumstances did the Court articulate that affirmative legal claims are the same as counterclaims. Because, of course, they are not. Here, Covil could easily have brought two or even three lawsuits with these separate claims. None were compulsorily required to be brought in the same case brought by Ann Finch, and by definition, none would have been required to be tried to a jury first.

CONCLUSION

equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.” Similarly, USF&G’s reliance on *Johnson v. South Carolina Nat. Bank*, 292 S.C. 51 (1987) is no more availing than its reliance on *Blackburn*. There again, the question was whether there was a right to a jury trial on a compulsory counterclaim, neither of which are present in the instant action.

At issue in this case are separate and distinct claims with different elements and facts spanning vastly different periods of time. USF&G's assertion that affirmative legal claims are the same as legal counterclaims is without support in law. While USF&G and Zurich may be entitled to a jury trial on the affirmative legal claims asserted against them, there is no requirement that such claims go first. USF&G's tortured interpretation of South Carolina precedent fails, but even if it did not, would entitle the Plaintiffs to a bench trial on all issues. For the reasons set forth above and in the Realigned Plaintiffs' original motion, the Realigned Plaintiffs request that this Court bifurcate the current trial setting and conduct a bench trial on the alter-ego claims and grant such further and other relief to which the Realigned Plaintiffs may be entitled.

s/Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

tmcvey@kassellaw.com

John D. Kassel (SC Bar 3286)

Jkassellaw.com

Jamie Rutkoski (SC Bar 103270)

jrutkoski@kassellaw.com

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, South Carolina 29202-1476

T: 803-256-4242

F: 803-256-1952

Other email: emoultrie@kassellaw.com

Charles W. Branham, III (Admitted *pro hac vice*)

Jonathan M. Holder (SC Bar No. 77935)

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

tbranham@dobslegal.com

jholder@dobslegal.com

Other email: tgilliland@dobslegal.com

ATTORNEYS FOR PLAINTIFFS

And

s/ Mark W. Hardee
Mark W. Hardee, Esquire
S.C. Bar 7857
The Hardee Law Firm
2231 Devine Street Suite 202
Columbia, South Carolina 29205
Phone: 803-799-0905
Fax: 803-799-0470
mwhardee@bellsouth.net

November 17, 2020

Columbia, South Carolina.

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-
Circuit Court Case No. 2019-CP-40-03003

RECEIVED

Dec 21 2020

SC Court of Appeals

Ann Finch, Individually and as Executor of the Estate of Franklin Finch;
and Peter D. Protopapas, as Court-Appointed Receiver for Covil
Corporation, ...

Plaintiffs/
Respondents,

v.

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

Defendants,

Of Which

United States Fidelity and Guaranty Company is the

Appellant.

USF&G'S NOTICE OF APPEAL

Please take notice that United States Fidelity and Guaranty Company respectfully notices its appeal of the order captioned "Order on Motion to Bifurcate." That order was entered on December 9, 2020, making this appeal timely.

This order is immediately appealable pursuant to South Carolina Code § 14-3-330(2), as it orders the parties to proceed with a bench trial on a single equitable claim prior to a jury trial on the pending legal claims where there are myriad common issues of fact among the legal and

equitable claims. Such a ruling impermissibly impairs USF&G’s constitutional right to a jury trial.¹ Because the December 9th Order deprives USF&G of a mode of trial to which it is legally entitled, the order is immediately appealable and must be immediately appealed.²

USF&G further states that all necessary transcripts for this appeal have previously been ordered from and provided by the appropriate court reporters. Finally, the orders approving the *pro hac vice* admission of USF&G’s counsel are attached.

Signature Page Attached

¹ E.g., *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 329, 755 S.E.2d 437, 441 (2014); *Johnson v. S.C. Nat’l Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987); *Bateman v. Rouse*, 358 S.C. 667, 676, 596 S.E.2d 386, 391 (Ct. App. 2004).

² See, e.g., *Creed v. Stokes*, 285 S.C. 542, 542–43, 331 S.E.2d 351, 352 (1985) (holding that the appellant waived his right to challenge a mode-of-trial ruling because he did not immediately appeal it); *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 93–94, 800 S.E.2d 488, 490–91 (Ct. App. 2017) (recognizing immediate right to appeal order of reference for determination of issues by master-in-equity in action involving both equitable and legal claims, and reiterating that “[t]he failure to immediately appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue” (quoting *First Union Nat’l Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998))); *Plantation Federal Bank v. Gray*, 401 S.C. 507, 510–12, 737 S.E.2d 515, 517–18 (Ct. App. 2013) (reversing, by way of an immediate appeal, the trial court’s order bifurcating trial for a bench trial to be held prior to jury trial); *Bateman*, 358 S.C. at 675, 596 S.E.2d at 390 (“[T]he purpose of requiring an immediate appeal of the denial of the right to a jury trial is to preserve a party’s constitutional rights that would otherwise be lost.”); see also *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539–40, 773 S.E.2d 144, 147 (2015) (“We decline the [respondent’s] invitation to base our decision on the manner in which the motion was characterized—one of bifurcation. Our review of trial court orders is not constrained by how the order is styled. The trial court’s order is quite distinct from other orders of bifurcation which have come before this Court. We are therefore free to evaluate the trial court’s order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable.”) (internal citations omitted).

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
todd.carroll@wbd-us.com
S.C. Bar No. 74000
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

BAKER RAVENEL & BENDER, LLP

William Pearce Davis
wdavis@brblegal.com
Susan D. Dubose
sdubose@brblegal.com
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, SC 29202
(803) 799-9091

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
Alan Turner (*admitted pro hac vice*)
aturner@stblaw.com
Michael S. Carnevale (*admitted pro hac vice*)
michael.carnevale@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and
Guaranty Company

December 21, 2020

Other Counsel of Record:

Theile B. McVey
Kassel McVey Attorneys at Law
1330 Laurel Street
Columbia, SC 29201
(803) 256-4242

Charles W. Branham, III
Jonathan M. Holder
Dean Omar Branham Shirley, LLP
302 N. Market Street
Dallas, TX 75202
(855) 722-5910

Counsel for the Respondent Ann Finch

Mark W. Hardee
Hardee Law Firm
2231 Devine Street, Suite 202
Columbia, SC 29205
(803) 799-0905

Jescelyn Tillman Spitz
Rikard & Protopapas, LLC
1329 Blanding Street
Columbia, SC 29201
(803) 978-6111

W. Brad Nes
Morgan, Lewis & Bockius LLP
221 Baden Street
Silver Spring, MD 20901
(202) 299-7033

Brady Edwards
Nancy Patterson
Morgan, Lewis & Bockius LLP
1000 Louisiana, Suite 4000
Houston, TX 77002
(713) 890-5110

Jonathan M. Robinson
G. Murrell Smith, Jr.
Shanon N. Peake
Smith Robinson Holler DuBose
and Morgan, LLC
2530 Devine Street, 3rd Floor
Columbia, SC 29205
(803) 254-5445

John B. White, Jr.
Marghretta H. Shisko
Harrison White P.C.
178 West Main Street
Spartanburg, SC 29306
(864) 585-5100

Christopher R. Jones
Harrison White P.C.
4425 Willingham Drive
Columbia, SC 29206
(864) 978-1399

Counsel for the Respondent Receiver for Covil Corporation

Other Counsel of Record Continued on Next Page

John S. Wilkerson, III
Turner Padgett Graham & Laney, P.A.
40 Calhoun Street, Suite 200
Charleston, SC 29401
(864) 576-2801

Beverly A. Carroll
Morton & Gettys, LLC
331 E. Main Street, Suite 300
Rock Hill, SC 29731
(803) 366-3411

Counsel for Zurich American Insurance Company

Warren C. Powell, Jr.
Chelsea C. Clark
Bruner Powell Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693

Counsel for Wall Templeton & Haldrup, P.A.

Daniel W. Nelson
Jason R. Meltzer
Noah P. Sullivan
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave. NW
Washington, DC 20036
(202) 955-8500

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:

Pleading(s): USF&G's Notice of Appeal

Parties Served:

Theile B. McVey (tmcvey@kassellaw.com)
Jonathan M. Holder (jholder@dobslegal.com)
Charles W. Branham, III (tbranham@dobslegal.com)

Counsel for Respondent Ann Finch

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Shanon N. Peake (shanon@smithrobinsonlaw.com)
Mark W. Hardee (mwhardee@bellsouth.net)
John B. White, Jr. (jwhite@spartanlaw.com)
Marghretta H. Shisko (mshisko@spartanlaw.com)
Christopher R. Jones (jonescr@gmail.com)
Brady Edwards (brady.edwards@morganlewis.com)
Nancy Patterson (nancy.patterson@morganlewis.com)
W. Brad Nes (brad.nes@morganlewis.com)

Counsel for the Respondent Receiver for Covil Corporation

By: /s/ M. Todd Carroll

December 21, 2020

RECEIVED
Dec 21 2020
SC Court of Appeals

Carroll, Todd

From: Carroll, Todd
Sent: Monday, December 21, 2020 4:34 PM
To: 'tmcvey@kassellaw.com'; 'jholder@dobslegal.com'; 'Trey Branham'; Jescelyn Spitz; Jon Robinson; Murrell Smith; 'shanon@smithrobinsonlaw.com'; mwhardee; jwhite@spartanlaw.com; Shisko, Marghretta; 'jonescr@gmail.com'; brady.edwards@morganlewis.com; Nancy.patterson@morganlewis.com; 'brad.nes@morganlewis.com'
Cc: 'Frankel, Andy T'; Forshaw, Mary Beth; O'Neill, Elizabeth; 'Carnevale, Michael S.'; Turner, Alan; DuBose, Susan; 'Davis, William P.'; Johnson, Debbie (US)
Subject: service of Notice of Appeal
Attachments: Notice of Appeal (Circuit Court Case No. 2019-CP-40-03003).pdf

Counsel,

Please find attached a Notice of Appeal in *Finch and Protopapas, as Receiver for Covil Corporation v. United States Fidelity & Guaranty Company, Zurich American Insurance Company, and Wall Templeton & Haldrup*, Circuit Court Case No. 2019-CP-40-03003, which we are electronically filing with the Court of Appeals today and are serving on you via this email, as permitted by Section (g)(3) of Supreme Court Order 2020-05-29-02. Best regards,

Todd

RECEIVED
Dec 21 2020
SC Court of Appeals

Carroll, Todd

From: Carroll, Todd
Sent: Monday, December 21, 2020 4:42 PM
To: 'Shanon Peake'
Subject: FW: service of Notice of Appeal
Attachments: Notice of Appeal (Circuit Court Case No. 2019-CP-40-03003).pdf

Shanon,

My apologies—it looks like I may have inadvertently left a “p” out of your email address when typing them in below. Best,

Todd

From: Carroll, Todd
Sent: Monday, December 21, 2020 4:34 PM
To: 'tmcvey@kassellaw.com' <tmcvey@kassellaw.com>; 'jholder@dobslegal.com' <jholder@dobslegal.com>; 'Trey Branham' <tbranham@dobslegal.com>; Jescelyn Spitz <jspitz@rplegalgroup.com>; Jon Robinson <jon@smithrobinsonlaw.com>; Murrell Smith <murrell@smithrobinsonlaw.com>; 'shanon@smithrobinsonlaw.com' <shanon@smithrobinsonlaw.com>; mwhardee <mwhardee@bellsouth.net>; jwhite@spartanlaw.com; Shisko, Marghretta <mshisko@spartanlaw.com>; 'jonescr@gmail.com' <jonescr@gmail.com>; brady.edwards@morganlewis.com; Nancy.patterson@morganlewis.com; 'brad.nes@morganlewis.com' <brad.nes@morganlewis.com>
Cc: 'Frankel, Andy T' <afrankel@stblaw.com>; Forshaw, Mary Beth <mforshaw@stblaw.com>; O'Neill, Elizabeth <Elizabeth.ONeill@wbd-us.com>; 'Carnevale, Michael S.' <Michael.Carnevale@stblaw.com>; Turner, Alan <aturner@stblaw.com>; DuBose, Susan <SDuBose@brblegal.com>; 'Davis, William P.' <WDavis@brblegal.com>; Johnson, Debbie (US) <Debbie.Johnson@wbd-us.com>
Subject: service of Notice of Appeal

Counsel,

Please find attached a Notice of Appeal in *Finch and Protopapas, as Receiver for Covil Corporation v. United States Fidelity & Guaranty Company, Zurich American Insurance Company, and Wall Templeton & Haldrup*, Circuit Court Case No. 2019-CP-40-03003, which we are electronically filing with the Court of Appeals today and are serving on you via this email, as permitted by Section (g)(3) of Supreme Court Order 2020-05-29-02. Best regards,

Todd



M. Todd Carroll
Direct Dial: 803.454.7730
Direct Fax: 803.381.9130
E-mail: todd.carroll@wbd-us.com

December 21, 2020

Via Electronic Filing

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
Dec 21 2020
SC Court of Appeals

Re: Ann Finch, Individually and as Executor of the Estate of Franklin Finch; and
Peter D. Protopapas, as Court-Appointed Receiver for Covil Corporation v.
United States Fidelity and Guaranty Company; Zurich American Insurance
Company; and Wall, Templeton & Haldrup, P.A.
Appellate Case No. 2020-
Circuit Court Case No. 2019-CP-40-03003
Notice of Appeal

Dear Ms. Kitchings:

Please find accompanying this letter a Notice of Appeal in the above-referenced matter. The Notice is being e-filed pursuant to Section (c)(5) of Supreme Court Order 2020-05-29-02. Pursuant to that same section, we shall mail the filing fee that accompanies this Notice within five days of this filing.

We have also served this filing via email on counsel for the Plaintiffs/Respondents, as permitted by Section (g)(3) of that Order. A copy of that service email is attached as well.

If the Court has any difficulty opening these electronically-submitted materials, please let us know, and we will be pleased to submit them via an alternate method.

Best regards,

/s/ M. Todd Carroll

Attachments

cc: Counsel for Plaintiffs/Respondents

IN 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

Case No. 2019-CP-40-03003

Appellate Case No. 2020-

RECEIVED

Dec 22 2020

SC Court of Appeals

Ann Finch, Individually and as Executor of the Estate of Franklin Finch; and Peter D.
Protopapas, as Court-Appointed Receiver for Covil
Corporation,.....Plaintiffs/Respondents,

v.

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

Of Which

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

**MOTION TO DISMISS
AND
ALTERNATIVE MOTION FOR EXPEDITED BRIEFING**

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Peter D. Protopapas, in his capacity as the Receiver for Covil Corporation (“the Receiver”), by and through the undersigned counsel, respectfully requests this Court dismiss the Notice of Appeal filed by United States Fidelity and Guaranty Company (“USF&G”) on December 21, 2020.

As this Court is well aware, the Receiver has been a party in several coverage litigation lawsuits involving Covil Corporation's insurers. Unfortunately, the Receiver is compelled to note Covil's insurers—especially USF&G—have repeatedly filed interlocutory and improper appeals requiring the Receiver to respond by filing motions to dismiss and occupying the valuable time of this Court and the South Carolina Supreme Court to review improper appeals and issue orders of dismissal. *See* October 16, 2019 Order, Appellate Case No. 2019-001651 (dismissing Zurich American Insurance Company's, USF&G's, and Sentry Insurance a Mutual Company's notices of appeal because the appealed order was an interlocutory discovery order); October 16, 2019 Order, Appellate Case No. 2019-001654 (denying petition for writ of certiorari to review an interlocutory discovery order); February 13, 2020 Order, Appellate Case No. 2020-000206 (dismissing Zurich American Insurance Company's and USF&G's notices of appeal as improper due to timely pending post-trial motions); May 22, 2020 Order, Appellate Case No. 2020-000749 (denying petition for writ of mandamus and finding it "not appropriate" because recusal decision was not ministerial); June 17, 2020 Order, Appellate Case No. 2020-000791 (dismissing USF&G's petition for a writ of supersedeas as improper due to no pending appeal); July 30, 2020 Order, Appellate Case No. 2020-000845 (dismissing USF&G's appeal due to its status as a non-party to the action). Because of USF&G's apparent methodology to avoid trial, subvert justice, deprive South Carolina courts from taking action to protect the rights of its citizens, and blatantly disregard the South Carolina Rules of Civil and Appellate Procedure, here we are—yet again—respectfully asking this Court to dismiss USF&G's Notice of Appeal.

The underlying case stems from a related case in which Plaintiff Ann Finch ("Finch") received a verdict in excess of \$32,000,000 against Covil Corporation ("Covil"), an administratively dissolved South Carolina Corporation. Thereafter, Finch filed suit in this matter

against USF&G, Zurich American Insurance Company (“Zurich” and collectively, with USF&G, the “Insurers”), and others for a declaratory judgment that the Insurers are the alter ego of Covil, as well as for claims involving alleged breaches of fiduciary duty by the Insurers and others. This case was removed to federal court by Zurich and then remanded to Chief Justice Toal by Order of Remand of Judge Bruce Howe Hendricks on June 4, 2020. Covil, by and through its Receiver, brought cross claims for alter ego, breach of fiduciary duty, negligence, malpractice, and other declaratory judgment actions. The circuit court realigned Finch and Covil for purposes of this litigation.

It is well-settled that equitable issues are for the court’s determination and legal issues are for a jury’s determination. *See, e.g., Floyd v. Floyd*, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991) (“Where legal and equitable issues and rights are asserted in the same complaint, legal issues are for determination by a jury and equitable issues for the judge sitting as chancellor.”). Because this case involves both legal and equitable claims, Finch and the Receiver moved to bifurcate the upcoming trial, requesting the circuit court try the equitable alter ego claim prior to the remaining legal claims.¹ This proposed sequence is most logical since the circuit court must *first* determine whether the Insurers were the alter ego of Covil *prior to* a jury’s consideration of the remaining legal claims. Specifically, Finch brings a claim against USF&G for breach of

¹ A motion to bifurcate is governed by Rule 42(b) of the South Carolina Rules of Civil Procedure. Rule 42(b) states:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

fiduciary duties. Finch concedes that claim can only be viable if USF&G is the alter-ego of Covil. On December 9, 2020, the Honorable Jean Hoefer Toal granted the Motion to Bifurcate. Chief Justice Toal, explaining “imperative circumstances” existed, set a bench trial on the alter ego claim on January 11, 2021, and set the remainder of the case for trial on May 11, 2021 (“the Bifurcation Order”).² *See* Order at 4.

This Court should dismiss USF&G’s attempted appeal because the Bifurcation Order is not immediately appealable. *See Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) (“An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed.”). An appellate court’s jurisdiction is governed by section 14-3-330 of the South Carolina Code. Our State has undoubtedly disfavored piecemeal appeals, such as the one currently before the Court. *See Hagood*, 362 S.C. at 194, 607 S.E.2d at 708.

Staying true to this policy to avoid piecemeal appeals, South Carolina courts have historically held that bifurcation orders are generally not immediately appealable. *See Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73, 533 S.E.2d 331, 333-34 (2000) (“Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence. We therefore hold that an order granting separate trials of issues in a contract case is not immediately appealable, either permissibly or mandatorily, pursuant to S.C. Code Ann. § 14-3-330(2) (1976).”); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 79, 533 S.E.2d 575, 578 (2000) (“We therefore hold that an order denying bifurcation of the issues of liability and damages in a personal injury case is not immediately appealable, either

² The Receiver notes that this last minute attempt to delay the trial comes on the heels of a notification to Receivership court that the Receiver, Finch and Zurich have reached a settlement agreement. As such, USF&G is the only remaining insurer Defendant.

permissibly or mandatorily, pursuant to S.C. Code Ann. § 14-3-330(2) (1976).”); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 540-41, 773 S.E.2d 144, 147-48 (2015) (Kittredge, J., dissenting) (explaining a bifurcation order before the Court neither discontinued an action nor prevented an appeal); *id.* at 540-41, 773 S.E.2d at 147 (“[E]rror in an order granting or denying bifurcation does not transform the order into an appealable one.”).

USF&G argues the Bifurcation Order is immediately appealable because it has been deprived of its constitutional right to a jury trial. This is not the case. USF&G will have a jury trial on all the legal claims. In fact, the published Asbestos Docketing Order has set the jury trial for the legal claims on May 11, 2020. However, USF&G will not have a jury trial on the equitable claim. Indeed, a party is not entitled to a jury trial on an equitable claim. *See Wachovia Bank, Nat’l Ass’n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) (providing parties are not entitled to a trial by jury in equitable actions).

USF&G grasps for support of its argument in the South Carolina Supreme Court’s decision in *Blackburn*. In *Blackburn*, the Supreme Court, when discussing *counterclaims*, explained, “If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.” *Id.* at 329, 755 S.E.2d at 441. USF&G argues that because Covil has brought legal claims, *Blackburn* requires the legal claims must be tried first. However, Covil made *crossclaims* not *counterclaims*. Even if somehow counterclaims and crossclaims mean the same thing, which respectfully they do not, the *Blackburn* Court found that where counterclaims were permissive, they could not support a required jury trial. *Id.* at 330, 755 S.E.2d at 442.

Further, if *Blackburn* applies, the circuit court made clear that “imperative circumstances”

required the equitable alter ego claim must be tried first. *See id.* (“If there are factual issues common to both claims, absent the *most imperative circumstances*, the at law claim must be tried first.” (emphasis added)). We are in the middle of a global pandemic. In fact, on December 3, 2020, the Supreme Court issued an Order mandating the circuit courts statewide shall not commence any jury trials after December 4, 2020. *See Re: Circuit Court Jury Trials*, S.C. Sup. Ct. Order dated December 3, 2020 (“[I]n light of the ongoing increase in COVID-19 cases throughout South Carolina, and the expectation by the medical community and experts that the number of positive cases will continue to increase in the near future, it is prudent to once again make changes to the operations of the circuit courts for the protection of those who work within the courts, as well as those who serve our state by participating in jury service.”). Additionally, an alter ego finding must be made by the trial court prior to any jury deliberations on the legal claims. It is entirely illogical to suggest a jury must be present for a lengthy trial in the midst of a global pandemic and wait for the circuit court to determine whether the Insurers are the alter ego of Covil. Not only is USF&G’s suggestion illogical, but it is also potentially dangerous to the health of the members of the jury. Chief Justice Toal’s decision to try the equitable claim first was well within her discretion, especially due to these imperative circumstances. *See Standard Warehouse Co. v. Atl. Coast Line R. Co.*, 222 S.C. 93, 103, 71 S.E.2d 893, 895 (1952) (“Where a case contains both legal and equity issues, it is discretionary with the trial Judge as to which shall be tried first, and ordinary that one is tried first which is more likely to aid in deciding the entire controversy.”).

Appealability matters are made on a case-by-case basis. *See Hagood*, 362 S.C. at 194, 607 S.E.2d at 708. Finch’s and the Receiver’s attempts to pursue justice in this litigation and other matters has unfortunately morphed into a stop-and-go enterprise due solely to USF&G’s litigation

tactics. At the core of this appeal, USF&G is attempting to delay going to trial on these issues. USF&G's attempts to avoid trial, subvert justice, deprive South Carolina courts from taking action to protect the rights of its citizens, and blatantly disregard the South Carolina Rules of Civil and Appellate Procedure should not be tolerated by this Court. To be sure, the avoidance of trial is not a substantial right. *See Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). This Court should dismiss USF&G's appeal.

The alter ego claim is set for a bench trial on January 11, 2021. The Receiver maintains USF&G's appeal should be dismissed. Because time is of the essence, the Receiver respectfully asks for this Court to require an expedited response to this Motion to Dismiss. If the Court ultimately decides the appeal should not be dismissed, the Receiver respectfully moves for briefing and consideration of the merits of the appeal to be expedited.

Respectfully submitted,

SMITH | ROBINSON

Smith Robinson Holler DuBose and Morgan, LLC

s/Jonathan M. Robinson

Jonathan M. Robinson (SC Bar # 68285)

G. Murrell Smith, Jr. (SC Bar # 68285)

Shanon N. Peake (SC Bar #102723)

Austin T. Reed (SC Bar #102808)

2530 Devine Street, 3rd Floor

Columbia, SC 29205

(803) 254-5445

ATTORNEYS FOR RECEIVER

This 22nd Day of December 2020

Columbia, South Carolina

IN 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

Case No. 2019-CP-40-03003

Appellate Case No. 2020-

RECEIVED
Dec 22 2020
SC Court of Appeals

Ann Finch, Individually and as Executor of the Estate of Franklin Finch; and Peter D.
Protopapas, as Court-Appointed Receiver for Covil
Corporation,.....Plaintiffs/Respondents,

v.

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

Of Which

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

PROOF OF SERVICE

I, the undersigned attorney of the law offices of Smith Robinson Holler DuBose and Morgan, LLC, do hereby certify that on December 22, 2020, I have served all counsel in this action with a copy of the pleading(s) hereinbelow in accordance with the Supreme Court's May 29, 2020 Administrative Order by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Documents Served: Motion to Dismiss and Alternative Motion for Expedited Briefing

Counsel Served: **E-Mail**

Matthew Todd Carroll – todd.carroll@wbd-us.com
M. Elizabeth O'Neill – elizabeth.oneill@wbd-us.com
Debbie Johnson – debbie.johnson@wbd-us.com
Womble Bond Dickinson (US) LLP
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

William Pearce Davis – wdavis@brblegal.com
Susan D. Dubose – sdubose@brblegal.com
Baker Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, SC 29202
(803) 799-9091

Mary Beth Forshaw – mforshaw@stblaw.com
Andrew T. Frankel – afrankel@stblaw.com
Alan Turner – aturner@stblaw.com
Michael S. Carnevale – michael.carnevale@stblaw.com
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
Admitted Pro Hac Vice

Attorneys for Appellant United States Fidelity and Guaranty Company

Theile B. McVey – tmcvey@kassellaw.com
Jonathan M. Holder – jholder@dobslegal.com
Charles W. Branham, III – tbranham@dobslegal.com

Attorneys for Respondent Ann Finch

(Signature page follows)

SMITH | ROBINSON

Smith Robinson Holler DuBose and Morgan, LLC

s/Austin T. Reed

Jonathan M. Robinson (SC Bar # 68285)

G. Murrell Smith, Jr. (SC Bar # 68285)

Shanon N. Peake (SC Bar #102723)

Austin T. Reed (SC Bar #102808)

2530 Devine Street, 3rd Floor

Columbia, SC 29205

(803) 254-5445

ATTORNEYS FOR RECEIVER

This 22nd Day of December 2020.

Columbia, South Carolina

From: [Austin Reed](#)
To: [Carroll, Todd](#); tmcvey@kassellaw.com; jholder@dobslegal.com; [Trey Branham](#); [Jescelyn Spitz](#); [Jon Robinson](#); [Murrell Smith](#); [Shanon Peake](#); mwhardee@bellsouth.net; jwhite@spartanlaw.com; [Shisko, Marghretta](#); jonescr@gmail.com; brady.edwards@morganlewis.com; Nancy.patterson@morganlewis.com; brad.nes@morganlewis.com
Cc: [Frankel, Andy T](#); [Forshaw, Mary Beth](#); [O'Neill, Elizabeth](#); [Carnevale, Michael S.](#); [Turner, Alan](#); [DuBose, Susan](#); [Davis, William P.](#); [Johnson, Debbie \(US\)](#); [Dot Faulkenberry](#)
Subject: RE: service of Notice of Appeal
Date: Tuesday, December 22, 2020 5:06:00 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[Motion to Dismiss Bifurcation Appeal - Finch v. USFG.FINAL .pdf](#)
[image005.png](#)

Good afternoon,

Please find attached the Receiver's Motion to Dismiss and Alternative Motion for Expedited Briefing in *Finch and Protopapas, as Receiver for Covil Corporation v. United States Fidelity & Guaranty Company, Zurich American Insurance Company, and Wall Templeton & Haldrup*, Circuit Court Case No. 2019-CP-40-03003, which we are electronically filing with the Court of Appeals today, served on you pursuant to subsection (g)(3) of the South Carolina Supreme Court's May 29, 2020 Amended Order discussing the operation of the appellate courts during the coronavirus emergency.

Thank you,

Austin



Austin Reed
Attorney at Law

E: austin.reed@smithrobinsonlaw.com
P: 803.254.5445
D: 803.888.1101
F: 803.254.5007

Columbia Office
2530 Devine Street
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From: Carroll, Todd <Todd.Carroll@wbd-us.com>
Sent: Monday, December 21, 2020 4:34 PM
To: tmcvey@kassellaw.com; jholder@dobslegal.com; [Trey Branham <tbranham@dobslegal.com>](mailto:TreyBranham@dobslegal.com); [Jescelyn Spitz <jspitz@rplegalgroup.com>](mailto:JescelynSpitz@rplegalgroup.com); [Jon Robinson <jon@smithrobinsonlaw.com>](mailto:JonRobinson@smithrobinsonlaw.com); [Murrell Smith <murrell@smithrobinsonlaw.com>](mailto:MurrellSmith@smithrobinsonlaw.com); shanon@smithrobinsonlaw.com; mwhardee@bellsouth.net; jwhite@spartanlaw.com; [Shisko, Marghretta <mshisko@spartanlaw.com>](mailto:Shisko,Marghretta@spartanlaw.com); jonescr@gmail.com; brady.edwards@morganlewis.com;

Nancy.patterson@morganlewis.com; 'brad.nes@morganlewis.com' <brad.nes@morganlewis.com>
Cc: Frankel, Andy T <afrankel@stblaw.com>; Forshaw, Mary Beth <mforshaw@stblaw.com>; O'Neill, Elizabeth <Elizabeth.ONeill@wbd-us.com>; Carnevale, Michael S. <Michael.Carnevale@stblaw.com>; Turner, Alan <aturner@stblaw.com>; DuBose, Susan <SDuBose@brblegal.com>; Davis, William P. <WDavis@brblegal.com>; Johnson, Debbie (US) <Debbie.Johnson@wbd-us.com>

Subject: service of Notice of Appeal

Counsel,

Please find attached a Notice of Appeal in *Finch and Protopapas, as Receiver for Covil Corporation v. United States Fidelity & Guaranty Company, Zurich American Insurance Company, and Wall Templeton & Haldrup*, Circuit Court Case No. 2019-CP-40-03003, which we are electronically filing with the Court of Appeals today and are serving on you via this email, as permitted by Section (g)(3) of Supreme Court Order 2020-05-29-02. Best regards,

Todd

Todd Carroll

Partner

Womble Bond Dickinson (US) LLP

d: 803-454-7730

m: 803-446-2883

e: Todd.Carroll@wbd-us.com

1221 Main Street

Suite 1600

Columbia, SC 29201



womblebond dickinson.com



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The South Carolina Court of Appeals

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V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

December 23, 2020

Mr. Jonathan M. Robinson, Esquire
2530 Devine Street
Columbia SC 29205

Rep. G. Murrell Smith, Jr., Esquire
PO Box 580
Sumter SC 29151-0580

Ms. Shanon N. Peake, Esquire
2530 Devine Street
Third Floor
Columbia SC 29205

Mr. Austin Tyler Reed, Esquire
2530 Devine Street
Third Floor
Columbia SC 29205

Re: Ann Finch v. United States Fidelity
Appellate Case No. 2020-001663

Dear Counsel:

This will acknowledge receipt of your motion to dismiss and alternative motion for expedited briefing.

By copy of this letter, opposing counsel is requested to file a return to this motion

no later than December 31, 2020. A reply to the return must be served and filed no later than January 5, 2021.

Very truly yours,

V. Claire Allen

CLERK

cc: Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
William Pearce Davis, Esquire
Susan Drake DuBose, Esquire
Michael S. Carnevale, Esquire
Andrew T. Frankel, Esquire
Mary Beth Forshaw, Esquire
Alan Turner, Esquire
Theile Branham McVey, Esquire
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Dec 31 2020

SC Court of Appeals

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. 2020-001663
Circuit Court Case No. 2019-CP-40-03003

Ann Finch, Individually and as Executor of Estate of Franklin Finch;
and Peter D. Protopapas as Court Appointed Receiver for Covil
Corporation, ... Plaintiffs/
Respondents,

v.

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

Of Which

United States Fidelity and Guaranty Company is the Appellant.

USF&G'S RETURN IN OPPOSITION TO MOTION TO DISMISS

The question before this Court on a motion to dismiss is whether the December 9, 2020 circuit court order (the "December 9 Order") is immediately appealable. The answer to the question is "yes." *See, e.g., Plantation Fed. Bank v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013) (immediate interlocutory appeal reversing order requiring separate bifurcated trials of a bench claim and jury claim with the bench claim to be tried first); *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004) (recognizing that orders requiring bench trial that impair jury trial rights are immediately appealable and must be appealed immediately to avoid waiver). *See* Jean H. Toal, *et al., Appellate Practice in South Carolina* 145 (3d ed. 2016) ("Orders denying a party's right to a mode of trial must be appealed immediately, and a party runs the risk of waiving the

right to appeal if that party fails to so immediately appeal.”); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948 (1959) (in actions involving both equitable and legal claims and common issues of fact, legal claims must be tried to a jury first to preserve jury trial rights); *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) (same); *Johnson v. S.C. Nat’l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987) (same).

That Order sets a bench trial on one equitable alter-ego claim against appellant United States Fidelity and Guaranty Company (“USF&G”) prior to a jury trial on several legal claims against USF&G in the same action—despite the fact that the legal and equitable claims all involve the same common issues of fact. Clear and unambiguous South Carolina law provides that where equitable and legal claims involve common issues of fact, the legal claims *must* be decided *first* by the jury; otherwise, the equity court’s findings on common issues would have preclusive effect in the later jury trial, thereby impairing constitutional jury trial rights. *See, e.g., Beacon Theatres*, 359 U.S. 500, 79 S.Ct. 948; *Blackburn*, 407 S.C. 321, 755 S.E.2d 437; *Johnson*, 292 S.C. 51, 354 S.E.2d 895; *Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515; *Bateman*, 358 S.C. at 676, 596 S.E.2d at 391 (“If both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court.”). This rule embodies a constitutional safeguard, long recognized by the United States Supreme Court, the South Carolina Supreme Court, and this Court. The circuit court’s decision to conduct a bench trial before a jury trial on the numerous legal claims clearly violated these principles.

The Order is immediately appealable under South Carolina Code § 14-3-330(2), because it deprives USF&G of a mode of trial to which it is legally entitled. *See, e.g., Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515 (reversing order providing for a bench trial to be held prior to

jury trial on interlocutory appeal). Indeed, failure to immediately appeal such an order risks waiver. *See Toal, et al., Appellate Practice in South Carolina, supra*, at 145 (“Orders denying a party’s right to a mode of trial must be appealed immediately, and a party runs the risk of waiving the right to appeal if that party fails to so immediately appeal.”).

These basic principles should suffice to resolve the only issue presently before the Court, which is whether the December 9 Order is immediately appealable under South Carolina Code § 14-3-330(2). Most of the arguments raised by the Receiver for Covil Corporation (the “Receiver”) in his motion to dismiss go to the merits of the appeal itself, and should be addressed following full briefing on the full appellate record. That is particularly so here, where the appeal raises important constitutional issues, the order under review so clearly violates settled law, and the only issue presently before the Court is being decided on an expedited basis, with limited briefing, and without a full record.

USF&G also respectfully notes at the outset that the Receiver’s assertions that USF&G is attempting to “avoid trial, subvert justice, [and] deprive South Carolina courts from taking action to protect the rights of its citizens,” and that USF&G is “blatantly disregard[ing] the South Carolina Rules of Civil and Appellate Procedure” (Mot. at 6-7) are both false and a thinly veiled invitation for this Court to put constitutional legal principles aside in the interest of punishing USF&G. As set forth herein, it is the circuit court’s order and the Receiver’s positions on this motion that are without support and contrary to established law. And the timing of this appeal was dictated by the timing of Respondents’ motion seeking to have Justice Toal decide the alter ego issues before any of the remaining claims are tried to the jury. USF&G acted to preserve its constitutional right to a jury trial at all relevant times, and it sought review of the circuit court’s trial sequencing order by

filing its notice of appeal well in advance of the deadline for doing so. Any delay in trial brought about by this appeal is a function of Respondents' own strategic decisions.

At bottom, the issue raised by the current motion is straightforward and narrow: whether the circuit court's order of December 9, 2020 is immediately appealable under South Carolina Code § 14-3-330(2) because it affects the mode of trial and involves a substantial right. For the reasons set forth herein, it clearly is, the Court should deny the Receiver's motion, and the appeal should be permitted to proceed in accordance with the South Carolina Appellate Court Rules, just like any other mode of trial appeal would.

I. BACKGROUND

This action arises from an asbestos-related tort action filed and litigated in federal court in North Carolina, in which Plaintiff Ann Finch ("Finch") received a verdict against Covil Corporation ("Covil"), a dissolved South Carolina corporation. *See Finch, et al., v. BASF Catalysts, LLC, et al.*, No. 16-cv-01077 (M.D.N.C.) ("*Finch I*"). After that judgment, Finch filed this action against Covil's insurers, including USF&G, and Covil's defense attorneys, under the novel (and legally unfounded) theory that insurers and defense counsel for a dissolved corporate tortfeasor should be liable as its alter ego based on the fact that USF&G (and other insurers) defended and indemnified Covil after it went out of business, despite the fact that insurers are *legally obligated* to continue defending and indemnifying an insured after it becomes bankrupt, insolvent, or is otherwise defunct. Finch later amended her complaint to assert a claim for breach of fiduciary duty. Covil's Receiver was also named by Finch as a defendant, but the complaint did not seek any relief against Covil or the Receiver.

The Receiver asserted cross-claims against USF&G and the other insurer and attorney defendants and was realigned as a plaintiff by the circuit court. Specifically, the Receiver not only joined plaintiff Finch in asserting a claim based on "alter ego, agency or instrumentality" liability

(App. 176-177, Finch’s 9/16/2020 Second Amended Complaint, First Cause of Action, ¶¶ 37-44; App. 202-203, Receiver’s 10/1/2020 Amended Cross-Claims, Seventh Cause of Action, ¶¶ 122-129), the Receiver also has asserted legal claims against USF&G including (i) aiding and abetting Covil’s attorneys’ alleged breach of their fiduciary duties to Covil; (ii) breach of contract for bad faith failure to defend Covil in *Finch I*; (iii) breach of contract for bad faith processing of claims; (iv) tortious bad faith processing of claims; and (v) negligence related to Covil’s defense.¹ Each of these claims and the agency allegations of the alter ego claim are jury trial issues. All parties have demanded trials by jury in their respective pleadings. *See* App. 224, USF&G’s 10/1/2020 Answer to the Second Amended Complaint at 16; App. 243, USF&G’s 10/16/2020 Answer to the Receiver’s Cross-Claims at 18; App. 180, Finch’s 9/16/2020 Second Amended Complaint at 16; App. 37, Receiver’s 7/18/2019 Cross-Claims, *Ann Finch v. Sentry Cas. Co., et al.*, No. 3:19-cv-01827 (D.S.C.), ECF 17, at 37.²

It is undisputed that numerous common factual issues exist here as between the legal and equitable alter ego claims. As counsel for Finch put it recently, in Respondents’ view, “the same facts are indicative of the different crimes.”³ Likewise, the Receiver’s principal alter ego expert, John Freeman, recently testified in his deposition that he is relying on the very same facts relevant

¹ The Receiver previously asserted claims against USF&G in a parallel pending federal coverage action, *Covil Corp., by and through its Receiver Peter Protopapas, and Ann Finch v. Zurich American Insurance Co., et al.*, No. 1:18-cv-932 (M.D.N.C.) (App. 40, ECF No. 72; App. 87, ECF No. 155), including breach of contract and bad faith claims that are nearly identical to the claims the Receiver asserts here. USF&G moved in this action to stay the Receiver’s duplicative claims, but the circuit court denied that motion, also on December 9, 2020.

² The Receiver’s October 1, 2020 Amended Cross-Claims did not include a specific jury demand, although the body of the cross-claims seeks “actual and consequential damages in an amount to be determined by a jury.” *See* App. 198, Receiver’s 10/1/2020 Amended Cross-Claims ¶ 94.

³ App. 267, 12/11/2020 email from C. Branham to A. Frankel.

to the Receiver's bad faith, breach of contract and other legal claims to support his alter ego opinions that the claims are "overlapping."⁴ In fact, Respondents' alter ego theory is virtually identical to the bad faith claim: that USF&G "dominated and controlled" Covil through its alleged actions related to defense and settlement in the *Finch I* case, as well as its defense of Covil in numerous other cases, which breached alleged tort and contract duties owed by USF&G to plaintiffs, constituting wrongful conduct sufficient to render USF&G liable for all of Covil's tort liabilities as its insured's purported alter ego.

On October 2, 2020, Respondents jointly moved to bifurcate trial of the alter ego claims from trial of the remaining claims, to first conduct a bench trial of the alter ego claims, and to schedule trial of the remaining claims for a later date. Appellant opposed Respondents' motion, arguing that conducting the bench trial before the jury trial would, given the myriad common issues of fact, impermissibly impair USF&G's constitutional jury trial rights. Oral argument on this and a host of other motions proceeded on November 23, 2020, and the circuit court orally ruled for Respondents during the hearing, and requested proposed orders. On December 9, 2020, the circuit court entered the order submitted by Respondents.

USF&G noticed its appeal of the December 9 Order on December 21, 2020. The Receiver (but not Respondent Finch) filed the instant motion to dismiss on December 22, 2020.

⁴ App. 263, Excerpt of 12/10/2020 John P. Freeman Deposition Tr., at 58:11-18 ("Q. It seems to me that a lot of the factual material that you've recited over the course of your last few answers [on the issue of alter ego liability] are directly relevant to the breach of contract and bad faith claims, would you agree with that? A. I would agree that they're relevant, but I also have this to say, it's very common in law to have overlapping claims, very common."). There is voluminous additional evidence that common issues of fact exist as between the equitable and legal claims. This point is undisputed and, if necessary, can be addressed in greater detail in connection with briefing on the merits of the appeal if the Receiver attempts to change course and argue that no such common issues exist.

II. THE DECEMBER 9 ORDER IS IMMEDIATELY APPEALABLE BECAUSE IT WOULD DEPRIVE APPELLANT OF A MODE OF TRIAL AND AFFECTS SUBSTANTIAL RIGHTS

The December 9 Order is immediately appealable under South Carolina Code § 14-3-330(2) because the appeal raises the issue of the mode of trial to which USF&G is legally entitled. *See, e.g., Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515, *supra*; *see also S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017) (recognizing right to immediately appeal order of reference requiring determination by master-in-equity of both legal and equitable claims). It is well-established that orders impacting mode of trial, including trial by jury, “affect substantial rights under S.C. Code Ann. § 14-3-330(2)” and are thus subject to immediate appeal. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997); *see also Hagood v. Sommerville*, 362 S.C. 191, 196–97, 607 S.E.2d 707, 709 (2005) (mode of trial is a “well-established exception to the general rule” that nonfinal orders are nonappealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000) (“The majority of cases requiring immediate appeal involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate.”) (collecting cases).

Not only *may* the issue be appealed immediately, it *must* be appealed on an interlocutory basis to avoid waiver of USF&G’s objections and its jury trial rights. *See, e.g., Lester*, 327 S.C. at 266, 491 S.E.2d at 241 (failure to immediately appeal “an order affecting the mode of trial effects a waiver of the right to appeal that issue”); *Bateman*, 358 S.C. at 675, 596 S.E.2d at 390 (“[T]he purpose of requiring an immediate appeal of the denial of the right to a jury trial is to preserve a party’s constitutional rights that would otherwise be lost”); Toal, *et al.*, *Appellate Practice in South Carolina*, *supra*, at 156 (“[T]he failure to timely appeal an order affecting the

mode of trial effects a waiver of the right to appeal that issue.”); *id.* at 157 (reiterating that “these orders must be appealed immediately”).

The Receiver does not seriously dispute these points. Instead, he attempts to characterize the December 9 Order as a run-of-the-mill bifurcation order, and from that faulty premise argues that it is not immediately appealable. USF&G does not dispute that ordinary bifurcation rulings, such as those bifurcating trial of liability and damages, are not orders that affect the mode of trial so as to authorize an immediate appeal. But the December 9 Order not only bifurcated the proceedings, it also ordered the equitable claims to be tried in a bench trial before a jury trial is held on legal claims, despite the numerous common issues of fact and clear authority prohibiting such a result due to the preclusive impact of a preceding bench trial on USF&G’s right to have legal claims tried fully to a jury.

In *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015), the South Carolina Supreme Court unequivocally ruled that the title of a document, including in that case an order styled as one of “bifurcation,” does not control the question of appealability:

We decline the [respondents’] invitation to base our decision on the manner in which the motion was characterized—one of bifurcation. Our review of trial court orders is not constrained by how the order is styled. The trial court’s order is quite distinct from other orders of bifurcation which have come before this Court. We are therefore free to evaluate the trial court’s order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable.

412 S.C. at 539–40, 773 S.E.2d at 147 (internal citations omitted). Likewise, this Court has heard immediate appeals of bifurcation orders where, as here, those orders required that a bench trial on equitable claims precede a jury trial on legal claims. *See Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515.

Nor are USF&G's jury trial rights preserved by virtue of the fact that the circuit court scheduled a jury trial on the legal claims following the bench trial. The South Carolina Constitution "preserve[s] inviolate" the right to a jury trial. S.C. Const. art. I, § 14. The South Carolina Rules of Civil Procedure reiterate that constitutional mandate, both in Rule 38(a) concerning the right to trial by jury and in Rule 42(b), governing bifurcation.⁵ As explained above, to protect this constitutional right, South Carolina Supreme Court precedent provides that "[i]f there are factual issues common to both [legal and equitable] claims, absent the 'most imperative circumstances,' the 'at law' claim must be tried first." *Johnson*, 292 S.C. at 56, 354 S.E.2d at 897 (quoting *Beacon Theatres*, 359 U.S. 500, 79 S.Ct. 948); *see also Blackburn*, 407 S.C. at 329, 755 S.E.2d at 441. This ensures that "the findings of the jury are binding on the sitting judge, as trier of the equitable claims." *Johnson*, 292 S.C. at 55, 354 S.E.2d at 897.⁶ The opposite approach—disposing of common issues through a bench trial before they are tried to a jury—risks "limit[ing] [a party's] opportunity fully to try to a jury every issue" on which it is entitled to a jury trial, because "determination of the issue . . . by the judge might operate either by way of res judicata or collateral estoppel" to preclude the jury from independently considering common issues. *Beacon Theatres*, 359 U.S. at 504, 79 S.Ct. at 953 (citation and internal quotation marks omitted). Put another way, the result of trying an equitable claim first is "that any issue common to both the legal and equitable claims [i]s finally determined by the court and the party seeking trial by jury

⁵ Rule 38(a), SCRCPP ("The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate."); Rule 42(b), SCRCPP ("The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . always preserving inviolate the right of trial by jury as declared by the Constitution").

⁶ As can be addressed further in merits briefing, this constitutional sequencing rule has been applied in state and federal decisions throughout the country.

on the legal claim [i]s deprived of that right as to these common issues,” thus “undercut[ting]” the jury trial right. *Dairy Queen v. Wood*, 369 U.S. 469, 472, 82 S.Ct. 894, 897 (1962) (where a complaint alleges combined legal and equitable claims with common fact issues, the legal claims must be tried to a jury first). Thus, just as the prospect of a later jury trial following a bench trial was not sufficient to prevent reversal of the bifurcation order in *Plantation Federal Bank*, 401 S.C. 507, 737 S.E.2d 515, the fact that the circuit court here left open the possibility of a jury trial to be held after the conclusion of a bench trial in which the court would necessarily make findings on factual issues common to the legal claims is of no moment for purposes of determining appealability.

Indeed, this appeal starkly illustrates why courts have imposed the sequencing rule as a critical safeguard of constitutional jury trial rights. Respondents undoubtedly believe they have a far greater likelihood of prevailing before the circuit court than a jury, perhaps because Justice Toal has repeatedly indicated in various pretrial rulings and statements, in this and other actions, her view that she has already concluded USF&G and other Covil insurers in fact “pretended to be Covil” as part of an alleged “scheme to operate Covil as an undisclosed alter ego of these insurance companies.”⁷ And the Respondents have made clear that all of the same basic factual allegations they rely upon to support the Receiver’s and Finch’s legal claims arising from insurers’ defense of Covil—whether breach of fiduciary duty, breach of contract, bad faith handling and processing of

⁷ See, e.g., App. 146, January 8, 2020 Order in *Falls v. CBS Corp., et al.*, No. 2015-CP-46-02155 (the “January 8 Order”), at p. 3, which was entered in an action in which USF&G was not a party and over its objection. USF&G filed a motion to reconsider, alter, or amend the January 8 Order on January 17, 2020, nearly a year ago. The circuit court has refused to rule on that motion and declined multiple efforts to schedule the motion for hearing, effectively depriving USF&G of any ability to obtain appellate review. Nonetheless, the Receiver intends to argue, through the Receiver’s purported alter ego expert, that the circuit court’s disputed findings in this order support a finding in this case that the insurers should be deemed responsible for Covil’s tort liabilities under the alter ego doctrine.

claims, or negligence—are also the basis for their novel alter ego claim. Thus, absent intervention by a higher Court, it appears that very little, if anything, would remain for the jury on any of these claims following the proposed bench trial, and USF&G’s constitutional rights would be trampled. Far from maintaining USF&G’s jury trial rights *inviolable*, this process would render those rights all but illusory.

In short, because the December 9 Order deprives USF&G of a mode of trial to which it is legally entitled, USF&G’s appeal from that order is proper under South Carolina Code § 14-3-330(2) and the Receiver’s motion should be denied.

III. THE RECEIVER’S REMAINING ARGUMENTS GO TO THE MERITS OF THE APPEAL AND ARE IRRELEVANT AND, REGARDLESS, SHOULD BE REJECTED

The Court should deny the Receiver’s motion and consider the Receiver’s remaining arguments, which go to the merits of the appeal itself, under the normal appellate process. Should, however, the Court choose to consider the Receiver’s additional arguments at this juncture without the benefit of full briefing or an appellate record, and despite the fact that those arguments go to the merits of the appeal itself, those arguments should be rejected for the reasons set forth below.

A. The Fact That The Receiver’s Legal Claims Were Styled As Cross-Claims Is Irrelevant To USF&G’s Jury Rights

The Receiver makes the convoluted argument that because it asserted legal claims against USF&G as cross-claims before the Receiver was realigned as a plaintiff, USF&G has no right to a jury trial on those claims. Specifically, the Receiver’s reasoning appears to be as follows: (i) under South Carolina precedent, a defendant that asserts legal counterclaims against a plaintiff that brought only equitable claims has a right to a jury trial on compulsory counterclaims, but not on permissive counterclaims; (ii) cross-claims are permissive, in that there is no rule of civil procedure equivalent to the rule that requires compulsory claims to be asserted as part of the same action; so

(iii) a defendant has no right to a jury trial on a legal claim if that claim is asserted by way of a cross-claim.

None of this remotely holds up to even modest scrutiny. As a preliminary matter, the Receiver has been realigned as a plaintiff. There are no claims against the Receiver, and that his claims against USF&G were originally asserted as cross-claims is a historical artifact. Thus, even if the Receiver’s reasoning made sense in the context of typical cross-claims among co-defendants (and it does not), it would not apply here because the Receiver is now a co-plaintiff, and where plaintiffs assert legal and equitable claims in the same case, the legal claims give rise to a jury trial right and must be determined first. *See, e.g., Bateman*, 358 S.C. at 676, 596 S.E.2d at 391 (defendant was entitled to a jury trial on legal claims asserted alongside equitable claims, and “[i]f both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court”). Cases such as *Bateman* and others are directly contrary to the Receiver’s suggestion that the sequencing rule only applies in the context of counterclaims.⁸

The Receiver’s argument also fails on its own terms. The different treatment of compulsory and permissive counterclaims is based on a waiver theory, and “waiver is a voluntary and intentional abandonment or relinquishment of a known right.” *Sanford v. State Ethics Comm’n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607, *clarified*, 386 S.C. 274 (2009). As to permissive counterclaims, courts have held that “[b]y electing to assert its counter-claim in response to [an]

⁸ In addition to this Court’s application of the sequencing rule when legal and equitable claims were asserted in the same complaint rather than in the context of counterclaims (*see, e.g., Bateman*, 358 S.C. at 676, 596 S.E.2d at 391), the South Carolina Supreme Court in *Johnson* cited to multiple federal cases applying the trial sequencing rule in similar circumstances. *See Johnson*, 292 S.C. at 55, 354 S.E.2d at 897 (citing, *inter alia*, *Roscello v. Sw. Airlines Co.*, 726 F.2d 217, 221, *reh’g denied*, 732 F.2d 941 (5th Cir. 1984)).

equitable action, [a defendant] waive[s] its right to a jury trial.” *John D. Hollingsworth on Wheels v. Arkon Corp.*, 273 S.C. 461, 463, 257 S.E.2d 165, 166 (1979) (citing *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691 (1912)). Compulsory counterclaims, however, do not result in waiver. *See C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986). This is because a waiver finding would deprive litigants of constitutionally-protected jury rights, not as a result of their own conscious choices but automatically, by operation of the rules of civil procedure. *See id.* (citing *Lisle Mills, Inc. v. Arkay Infants Wear, Inc.*, 90 F. Supp. 676 (E.D.N.Y. 1950)) (citations omitted); *cf.* Wright & Miller, 6 Fed. Prac. & Proc. Civ. § 1405, *Right to Jury Trial* (3d ed.) (“Since defendant is obliged to interpose the claim, it has been suggested that to compel defendant to waive the right to a jury trial by doing so is unconstitutional.”). But no such waiver concerns apply here, as USF&G has not waived any jury trial rights. And it cannot be that because ***the Receiver*** brought legal cross-claims against USF&G, that should result in a waiver by ***USF&G*** of its constitutional right to a jury trial on those claims (and the legal claim asserted by the Receiver’s co-plaintiff, Finch). Yet that is the import of what the Receiver is suggesting and further demonstrates the absurdity of the Receiver’s argument that the sequencing rule somehow only applies in the context of counterclaims.

In short, the reason courts require trial of jury issues first where there are common issues of fact is to safeguard constitutional jury trial rights, and has nothing to do with whether the bench and jury trial claims happen to have been asserted in the same complaint, in cross-claims, or in counterclaims.

B. The Fact that Finch’s Fiduciary Duty Claims Are Untenable Absent a Finding of Alter Ego Does Not Justify Impairing USF&G’s Jury Trial Rights

The Receiver next argues that USF&G is not entitled to a jury trial on his co-plaintiff’s legal claim for breach of fiduciary duty prior to a bench trial on alter ego because “Finch concedes

that [the fiduciary duty] claim can only be viable if USF&G is the alter-ego of Covil.” Mot. at 4. Because of this, the Receiver argues that “an alter ego finding must be made by the trial court prior to any jury deliberations on the legal claims.” *Id.* at 6. The Receiver contends that holding a jury trial first would be unnecessary and “potentially dangerous to the health of the members of the jury” and that by seeking to preserve its jury rights, USF&G is somehow seeking to require a jury to “be present for a lengthy trial in the midst of a global pandemic and wait for the circuit court to determine whether the Insurers are the alter ego of Covil.” *Id.* Thus, the Receiver concludes, the circuit court’s decision to first hold a bench trial is justified by “imperative circumstances.” *Id.* Again, the Receiver is mistaken, both on the facts and the law.

Review of the full record will reveal that the circuit court’s reference to imperative circumstances and the pandemic was not briefed or argued to the circuit court. It was instead inserted by counsel for Finch into a proposed order—following briefing, argument, and the circuit court’s oral ruling that was silent on this issue—that the circuit court then signed and adopted over Appellant’s objection. The Receiver’s arguments to this Court were never made below and, in any event, do not justify overriding USF&G’s jury trial rights.

As an initial matter, the Receiver’s argument makes no sense because the breach of fiduciary duty claim is not the sole legal claim in the case. Multiple legal claims brought by the Receiver are pending that arise from substantially the same factual allegations. Those claims, ranging from breach of contract, to bad faith, to negligence, do not depend on an alter ego finding, and will need to be tried to a jury. Thus, the circuit court’s finding that “in the event that the Court finds that the Insurers are not the alter ego of Covil, the jurors’ service would be needless” (App. 247, Dec. 9 Order at 3) is simply wrong. A jury *will* need to be empaneled for the trial of the Receiver’s legal claims, regardless of how the circuit court resolves the alter ego issue.

Second, USF&G is not seeking to risk the health of potential jurors, and the Receiver's speculation to the contrary is baseless and offensive. Any jury trial should only be held once it can be conducted safely—and indeed in an order issued December 17, 2020, the trial court set the *Finch* jury trial for May 11, 2021. Presumably that setting and all other asbestos jury trials docketed in December will commence after the public health crisis improves, and USF&G does not presume to speak for the appropriate State authorities on such issues. But that is a circumstance that is common to all litigants with constitutional rights to trial by jury. Thus, it cannot be that a litigant's jury rights can be overridden on a theory that pandemic-related delays constitute “imperative circumstances,” and to hold otherwise would set a dangerous precedent justifying widespread violations of litigants' rights to trial by jury.

Moreover, “the discretion to try an equitable claim first” under the “imperative circumstances” exception “is very narrowly limited and must, whenever possible, be exercised to preserve jury trial” and, importantly, “should only be exercised in the face of ‘irreparable harm’ to the plaintiff if the legal claims were to be tried first.” *Plantation Fed. Bank*, 401 S.C. at 510, 737 S.E.2d at 517 (quoting *Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956). Potential pandemic-related delays that apply to all litigants cannot justify denial of constitutional jury rights, particularly in cases that (as here) ultimately seek only payment of money.⁹ The Receiver, in fact, has *never* argued—in the circuit court or this Court—that the Receiver or Finch would be

⁹ See, e.g., *Beacon Theatres*, 359 US at 506-507, 79 S.Ct. at 954-55 (“The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable origins to be tried ahead of legal ones, since this has the same effect as an equitable injunction of the legal claims”); *Plantation Fed. Bank*, 401 S.C. at 511; 737 S.E.2d at 517-18 (imperative circumstances not justified by declining economy, to prevent payment of taxes, or to prevent sale of property as such concerns do not “represent the kind of ‘irreparable harm’ contemplated by the Supreme Court that would justify infringing on [a party’s] constitutional right to a trial by jury”).

irreparably harmed absent proceeding in a manner that would impair USF&G's jury trial rights, and for this reason alone the narrow "imperative circumstances" exception has no bearing in this appeal, let alone a basis to short circuit the appeal altogether through the guise of a motion to dismiss. As the United States Supreme Court recently cautioned, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) (*per curiam*).

Further undermining any suggestion that it is necessary to override USF&G's jury trial rights by expediting the Receiver's and Finch's bench trial claim before the legal claims as a result of the COVID-19 pandemic, the Receiver has amassed tens of millions of dollars in settlement proceeds for Covil (including \$45 million in prior settlements and an undisclosed sum under a recently announced settlement with Zurich American Insurance Company) presumably available to satisfy the *Finch I* judgment. The Receiver has also asserted breach of contract and bad faith claims for the amount of the judgment (beyond the full limits of the USF&G policy, which USF&G has already paid to Respondent Finch) in a parallel separate federal action in which cross-motions for summary judgment by the Receiver and USF&G have been fully briefed.¹⁰ Thus, there is already another court in a position to rule on the propriety of the Receiver's claims against USF&G, at least insofar as the Receiver seeks extra-contractual relief relating to the underlying *Finch I* judgment.

Finally, the Receiver argues that trying the alter ego claim prior to the fiduciary duty claim is "most logical" because the fiduciary duty claim depends on an alter ego finding. Mot. at 3. However, even if the fiduciary duty claim were the only legal claim in this case, procedural

¹⁰ See *Covil Corp., by and through its Receiver Peter Protopapas, and Ann Finch v. Zurich American Insurance Co., et al.*, No. 1:18-cv-932 (M.D.N.C.).

convenience or efficiency considerations cannot justify abrogation of constitutional jury rights, whether under the extremely narrow “imperative circumstances” exception or otherwise. *See, e.g., Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1107 (5th Cir. 1972) (applying *Beacon Theatres* to require a trifurcated proceeding, even though it would “wreak[] havoc with [the court’s] strong policies against piecemeal litigation,” in order to preserve the jury trial right). The right to jury trial has thus been upheld even where the jury triable claim is contingent on the resolution of an equitable claim. *See, e.g., Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1127 (5th Cir. 1978) (“The justification for the failure to pay royalties must be determined with respect to both the legal and equitable claims. Although the claim for damages cannot succeed unless the lease is cancelled, extenuation is an issue common to both. We do not find ‘imperative circumstances’ that would justify the court in deciding the common issue with respect to the equitable aspect of the case, thus denying a jury trial of that issue.”); *AMF Inc. v. Nat’l Boat Works, Inc.*, No. C-75-125, 1975 WL 21202, at *1 (M.D.N.C. Nov. 25, 1975) (“Where there is a claim for money damages which is both legal in nature and dependent upon the validity of equitable claims, the legal and equitable issues are common to each other and the parties are entitled to a determination by a jury of any factual questions related to the equitable issues.”). Indeed, this is reflected in the text of Rule 42(b), which provides that while a court may bifurcate trial “in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy,” it must, nevertheless, “always preserv[e] inviolate the right of trial by jury as declared by the Constitution.”

Thus, to the extent the procedural difficulties of which the Receiver now complains are the result of the need to harmonize USF&G’s jury rights with the bifurcated trial procedure he himself requested over USF&G’s objection, the Receiver’s complaints fail. Similar solicitude is not owed

to a party's desire to avoid a jury trial or to maximize perceived trial efficiencies as is owed to a party's constitutionally protected jury rights. *See, e.g., In re Lockheed Martin Corp.*, 503 F.3d 351, 358 (4th Cir. 2007) ("To permit the plaintiff's choice of a customary but not constitutionally required mode of trial to prevent a defendant from taking advantage of his constitutionally guaranteed mode of trial is inconsistent with the Supreme Court's admonition that the Seventh Amendment right to a jury trial must be preserved 'wherever possible.'") (quoting *Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956); *see also Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956 ("[T]he right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court"). In sum, even if the Court accepts in full the Receiver's framing of Finch's fiduciary duty claim, the motion must nonetheless be denied.

IV. CONCLUSION

For the reasons set forth herein, the circuit court's order of December 9, 2020 is immediately appealable under South Carolina Code § 14-3-330(2) because it affects the mode of trial and involves a substantial right, and thus the Receiver's motion to dismiss USF&G's appeal should be denied.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
todd.carroll@wbd-us.com
S.C. Bar No. 74000
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

BAKER RAVENEL & BENDER, LLP

William Pearce Davis
wdavis@brblegal.com

Susan D. Dubose
sdubose@brblegal.com
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, SC 29202
(803) 799-9091

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
Alan Turner (*admitted pro hac vice*)
aturner@stblaw.com
Michael S. Carnevale (*admitted pro hac vice*)
michael.carnevale@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and
Guaranty Company

December 31, 2020

PROOF OF SERVICE

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

Pleading(s): **USF&G’S RETURN IN OPPOSITION TO MOTION TO DISMISS**

Parties Served:

Theile B. McVey (tmcvey@kassellaw.com)
Jonathan M. Holder (jholder@dobslegal.com)
Charles W. Branham, III (tbranham@dobslegal.com)

Counsel for Respondent Ann Finch

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Shanon N. Peake (shanonp@smithrobinsonlaw.com)
Mark W. Hardee (mwhardee@bellsouth.net)
John B. White, Jr. (jwhite@spartanlaw.com)
Marghretta H. Shisko (mshisko@spartanlaw.com)
Christopher R. Jones (jonescr@gmail.com)
Brady Edwards (brady.edwards@morganlewis.com)
Nancy Patterson (nancy.patterson@morganlewis.com)
W. Brad Nes (brad.nes@morganlewis.com)

Counsel for the Respondent Receiver for Covil Corporation

By: /s/ Jodi Renner

December 31, 2020

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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. 2020-001663
Circuit Court Case No. 2019-CP-40-03003

Ann Finch, Individually and as Executor of Estate of Franklin Finch;
and Peter D. Protopapas as Court Appointed Receiver for Covil
Corporation, ... Plaintiffs/
Respondents,

v.

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

Of Which

United States Fidelity and Guaranty Company is the Appellant.

**APPENDIX IN SUPPORT OF USF&G'S
RETURN IN OPPOSITION TO MOTION TO DISMISS**

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Ann Finch, Individually and as Executor of
the Estate of Franklin Finch,

Plaintiff,

v.

Sentry Casualty Company; United States
Fidelity and Guaranty Company; Zurich
American Insurance Company; Peter
Protopapas as Court Appointed Receiver for
Covil Corporation, and Wall, Templeton &
Haldrup, P.A.,

Defendants.

Peter Protopapas as Court Appointed
Receiver for Covil Corporation,

Cross-Claimant,

v.

Sentry Insurance, A Mutual Company,
Named as Sentry Casualty Company;
United States Fidelity and Guaranty
Company; Zurich American Insurance
Company; and Wall, Templeton & Haldrup,
P.A.,

Cross-Defendants.

C/A No.: 3:19-cv-01827-BHH

**DEFENDANT PETER PROTOPAPAS', AS
COURT APPOINTED RECEIVER FOR
COVIL CORPORATION, ANSWER TO
PLAINTIFF'S FIRST AMENDED
COMPLAINT; AND CROSS-CLAIMS
AGAINST WALL TEMPLETON &
HALDRUP, P.A.; SENTRY INSURANCE,
A MUTUAL COMPANY, NAMED AS
SENTRY CASUALTY COMPANY;
UNITED STATES FIDELITY AND
GUARANTY COMPANY; AND ZURICH
AMERICAN INSURANCE COMPANY;
AND THIRD-PARTY COMPLAINT
AGAINST TIG INSURANCE COMPANY,
AS SUCCESSOR IN INTEREST TO
FAIRMONT SPECIALTY INSURANCE
COMPANY, F/K/A RANGER INSURANCE
COMPANY; HARTFORD ACCIDENT
AND INDEMNITY COMPANY; AND
FIRST STATE INSURANCE COMPANY**

(JURY TRIAL DEMANDED)

Peter Protopapas as Court Appointed
Receiver for Covil Corporation,

Third-Party Plaintiff,

v.

TIG Insurance Company, As Successor in
Interest to Fairmont Specialty Insurance
Company, F/K/A Ranger Insurance
Company; Hartford Accident and Indemnity
Company; and First State Insurance
Company

Third-Party Defendants.

Defendant Peter Protopapas, as Court Appointed Receiver for Covil Corporation (“Receiver”), presents the following answer and defenses to Plaintiff’s First Amended Complaint (“complaint”) and Cross-Claims against Sentry Insurance, A Mutual Company, named as Sentry Casualty Company (“Sentry”), United States Fidelity and Guaranty Company, Zurich American Insurance Company, and Wall, Templeton & Haldrup, P.A, and Third-Party Complaint against TIG Insurance Company, As Successor In Interest To Fairmont Specialty Insurance Company, F/K/A Ranger Insurance Company; Hartford Accident And Indemnity Company; First State Insurance Company. Any allegation in the complaint not specifically admitted herein is denied. In addition, the Receiver more specifically states as follows:

1. Defendant denies each and every allegation of the complaint which is not hereinafter specifically admitted.

AS TO PARTIES

2. Paragraphs 1 through 6 of the complaint are admitted.

3. Paragraph 7 of the Complaint is admitted insofar as Sentry, Zurich, and USF&G are collectively referred to as the “Primary Insurers.” However, the Receiver would draw a distinction regarding the other collective group references, as the Receiver contends that the Primary Insurers acted as “Alter-Egos” for Covil prior to the Receiver’s appointment, and “Lawyers” (Wall, Templeton & Haldrup, P.A.), acted as Agent of the Primary Insurers, who are the Alter-Egos of Covil for purposes of this action and otherwise.

AS TO JURISDICTION AND VENUE

4. Paragraphs 8 and 9 of the Complaint are admitted.

AS TO FACTUAL BACKGROUND

5. Paragraph 10 of the Complaint is admitted.
6. As to Paragraph 11 of the Complaint, the Receiver admits that Covil conducted these operations from at least 1964 until approximately 1991, after which Covil ceased to conduct business operations and, ultimately dissolved. The Receiver is without sufficient knowledge or information to admit or deny the “Asbestos Allegations” and, therefore, denies the same.
7. Paragraphs 12 through 17 of the Complaint are admitted.
8. Paragraph 18 of the Complaint is admitted to the extent Lawyers aided and worked with Primary Insurers for the unilateral control of Covil, thereby acting as the Agent for Covil.
9. Paragraphs 19 through 25 of the Complaint are admitted.
10. Paragraph 26 of the Complaint is admitted in part and denied in part. The Receiver admits that to the extent Lawyers were hired to protect Covil’s interest, Lawyers became part of the Primary Insurers’ scheme to run Covil as an effective subsidiary, agency or alter ego of the Primary Insurers. Lawyers followed the Primary Insurers’ instructions

and treated the Primary Insurers as Covil for representation and fiduciary duty purposes.

The Receiver denies, however, that the Lawyers in fact protected Covil's interest. The remaining allegations are denied insofar as they are directed at the Receiver.

11. Paragraph 27 of the Complaint is admitted.
12. Paragraph 28 of the Complaint is admitted in part and denied in part; the Receiver admits that Lawyers breached their duties to Covil by taking sole direction from the Primary Insurers, thereby acting as agent of Covil's Alter Egos. The remaining allegations are denied insofar as they are directed at the Receiver.
13. Paragraph 29 of the Complaint is admitted.
14. Paragraph 30 of the Complaint is admitted in part and denied in part. The Receiver admits Lawyers failed to ensure proper procedures were in place for Covil to express its interests; therefore, Lawyers were unable to ascertain what Covil wanted or to protect Covil's interests. The remaining allegations are denied insofar as they are directed at the Receiver.
15. Paragraph 31 of the Complaint is admitted.
16. Paragraph 32 of the Complaint is admitted in part and denied in part. The Receiver admits that the Primary Insurers unilaterally determined that Covil would not resolve the *Finch* suit for an amount within policy limits, acting on their own and through their agent, Lawyers. The Receiver admits that the Primary Insurers refused to reveal to the Finches the amount of available insurance and further admits that the Primary Insurers, their agent Lawyers, and others that were aware of the *Finch* case and its progress, failed to reveal such information to or consult with Covil. The Receiver admits that this resulted in Covil, at the direction of the Primary Insurers and their agent, being exposed

to a judgment many more times than Covil's policy limits. The remaining allegations are denied insofar as they are directed at the Receiver.

17. Paragraph 33 of the Complaint contains no allegations against the Receiver, as such no response is required; to the extent a response is deemed required, the Receiver is without sufficient knowledge or information to admit or deny the allegations of Paragraph 33 and, therefore, denies the same.
18. Paragraph 34 of the Complaint is admitted with the qualification that Primary Insurers acted as Alter Egos of Covil, and Lawyers acted as their agent.
19. As to Paragraph 35 of the Complaint, the Receiver admits that the other named Defendants acted in concert when deciding what actions to take or not take and without any input from an independent Covil, and these actions were in breach of their duties to Covil. The allegations in Paragraph 35 occurred prior to the Receiver's appointment; therefore, the Receiver denies the allegations to the extent that the allegations relate to the Receiver.

AS TO THE FIRST CAUSE OF ACTION

**Primary Insurers Are Fully Responsible for Conduct
Prior To November 2, 2018, as Covil's Alter Ego, Agency or Instrumentality**

20. As to Paragraph 36 of the Complaint, the Receiver repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through 35 of the Complaint as if fully set forth herein.
21. Paragraphs 37 through 43 of the Complaint are admitted.

AS TO THE SECOND CAUSE OF ACTION

Insurers Are Fully Responsible for Conduct

Prior To November 2, 2018, as Covil's Alter Ego, Agency or Instrumentality

22. As to Paragraph 44 of the Complaint, the Receiver repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through 43 of the Complaint as if fully set forth herein.
23. Paragraph 45 of the Complaint is admitted to the extent it is alleged that Primary Insurers improperly acted as Alter-Egos of Covil and Lawyers improperly acted as their agent.
24. Paragraph 46 of the Complaint is denied.
25. Paragraph 47 of the Complaint is admitted in part and denied in part. The Receiver admits that the Primary insurers improperly acted as Alter-Egos of Covil; however, Covil denies that Lawyers acted as an Alter-Ego of Covil but rather acted as an agent of the Primary Insurers.
26. Paragraph 48 of the Complaint contains no allegations against the Receiver, as such no response is required.

AS TO THE THIRD CAUSE OF ACTION

Insurers Are Fully Responsible for Conduct

Prior To November 2, 2018, as Covil's Alter Ego, Agency or Instrumentality

27. As to Paragraph 49 of the Complaint, the Receiver repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through 48 of the Complaint as if fully set forth herein.
28. Paragraphs 50 through 53 of the Complaint are admitted.

AS TO PRAYER FOR RELIEF

29. Plaintiff's prayer and request for relief as to the Primary Insurers is hereby admitted.

The remaining allegations are denied insofar as they are directed at the Receiver.

30. The Receiver denies all allegations of the Complaint not heretofore expressly admitted or modified.

FURTHER ANSWERING THE RECEIVER ALLEGES:

**CROSS-CLAIMS AGAINST DEFENDANTS WALL TEMPLETON & HALDRUP, P.A.;
SENTRY INSURANCE, A MUTUAL COMPANY, NAMED AS SENTRY CASUALTY
COMPANY; UNITED STATES FIDELITY AND GUARANTY COMPANY; AND
ZURICH AMERICAN INSURANCE COMPANY**

COMES NOW Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas ("Cross-Claimant"), for his cross-claims, who alleges upon knowledge as to his own acts and upon information and belief as to all other matters as follows:

PARTIES

31. The Receiver is a lawyer who was appointed as Receiver of Covil Corporation, a dissolved South Carolina corporation, by Order attached as **Exhibit 1**, on November 2, 2018 and who maintains his principal place of business in Richland County, South Carolina.

32. Wall, Templeton & Haldrup, P.A. ("Lawyers") is a professional association organized and existing in the state of South Carolina with its principal place of business in Charleston, South Carolina.

33. Sentry Insurance, A Mutual Company, named as Sentry Casualty Company (“Sentry”) is an insurance company operating as a corporation under the laws of the State of Wisconsin with its principal place of business in Stevens Point, Wisconsin. Sentry is the successor to, among others Hardware Mutual Casualty Company.
34. United States Fidelity and Guaranty Company (“USF&G”) is an insurance company, operating as a corporation organized and existing under the laws of the State of Connecticut with its principal place of business in the State of Connecticut. USF&G is a wholly-owned subsidiary of The Travelers Group of Insurance Companies.
35. Zurich American Insurance Company (“Zurich”) is an insurance company, operating as a corporation organized under the laws of the State of New York with its principal place of business located in the State of Illinois. Zurich is the successor by merger to Maryland Casualty Company and Northern Insurance Company of New York. Zurich American is a wholly-owned subsidiary of the Zurich Group of Insurance Companies.
36. Zurich, and USF&G are collectively referred to as the “Finch Primary Insurers.”

JURISDICTION AND VENUE

37. The South Carolina Court of Common Pleas for Richland County has subject matter jurisdiction over the Cross-Claimant’s claims for relief as the actions and omissions occurred in Richland County.
38. Venue of this case is proper in the State of South Carolina Court of Common Pleas for Richland County.
39. This Court lacks subject matter jurisdiction due to lack of diversity.

FACTUAL BACKGROUND

40. Covil was an installer of thermal insulation, including thermal insulation which at certain times contained asbestos.
41. Covil conducted these operations from at least 1964 until approximately 1991, after which Covil ceased to conduct business operations and, ultimately, dissolved.
42. It has been alleged that Covil's operations from 1964 through at least 1986 included the installation, repair, replacement, removal or disturbance of thermal insulation and other building materials and that those operations exposed persons to asbestos who thereby suffered bodily injury (the "Asbestos Allegations").
43. The alleged bodily injury resulting from the Asbestos Allegations has resulted in claims and lawsuits against Covil ("Covil Asbestos Suits").
44. From at least in or about 1991, until the appointment of the Receiver, on November 2, 2018, the defense of the Covil Asbestos Suits was controlled by the Primary Insurers, specifically defendants Zurich American Insurance Company ("Zurich"), Sentry Insurance, A Mutual Company ("Sentry") and United States Fidelity and Guaranty Company ("USF&G"). Moreover, on and after 1991, the Primary Insurers conducted all of Covil's affairs, including after Covil was dissolved, extending until appointment of the Receiver.
45. The Primary Insurers issued insurance policies to Covil from in or about 1964 until approximately 1978.
46. From at least in or about 1991, continuing until appointment of the Receiver, Zurich, Sentry, and USF&G managed Covil, making all determinations as to use and the

disposition of Covil's assets, which consisted primarily of corporate documents and insurance policies.

47. The Primary Insurers made all determinations as to the disposition of Covil Asbestos Suits as well as the treatment and characterization of claims under the Covil insurance policies.
48. Since as early as approximately 1991, the Primary Insurers acted in concert for the common purpose of ensuring that there was no independent person or entity acting by or on behalf of Covil. The Primary Insurers determined that the only Covil that could exist would be a Covil that was for all purposes the Primary Insurers' agency, subsidiary, alter ego, and/or controlled entity.
49. The Primary Insurers effectuated their common purpose of exclusive, unilateral control of Covil by running Covil's affairs in all material aspects.
50. At no time did the Primary Insurers make efforts to appoint an independent person or entity to determine what was in Covil's best interest. Rather, the Primary Insurers unilaterally determined what was best for Covil, or disregarded what was best for Covil, acting in their own interest, regardless of whether there was an actual or potential conflict between their interest and Covil's interest.
51. Each of the Primary Insurers' actions on behalf of Covil was for the purpose of protecting the Primary Insurers rather than Covil.
52. In addition to controlling the assets and affairs of Covil, the Primary Insurers unilaterally hired agents for Covil, including but not limited to attorneys, experts and a professional 30(b)(6) witness to act as and on behalf of, and to constitute Covil, *de facto* or *de jure*.

53. The Primary Insurers are required to act in good faith and to engage in fair dealing in all of their actions in regards to Covil.
54. The Insurers had and have a duty to provide a full defense in the Covil Asbestos Suits.
55. The Primary Insurers engaged Lawyers to provide a defense to certain of the Covil Asbestos Suits, including but not limited to the *Finch* suit.
56. In South Carolina, when an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured, *i.e.*, the insured client of the attorney. Pursuant to that relationship, the attorney owes the insured client—not the insurer—a fiduciary duty. The loyalties of the attorney may not be divided.
57. Lawyers were hired to protect Covil’s interest but improperly became part of the Primary Insurers’ scheme to run Covil as an effective subsidiary, agency or alter ego of the Primary Insurers. Lawyers improperly followed the Primary Insurers’ instructions and treated the Primary Insurers as Covil for representation and fiduciary duty purposes.
58. The attorney’s conduct of litigation involving an insured client is also governed by established law. *See, e.g.*, Rule 1.8(f), RPC, Rule 407, SCACR (“A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;”); Rule 5.4(c), RPC, Rule 407, SCACR (“[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services”).
59. Lawyers breached their duties to Covil by taking sole direction from the Primary Insurers.

60. Prior to the Receiver's appointment, Covil was nothing more than a façade behind which the Primary Insurers stood and directed actions of its lawyers. See **Exhibit 3**, *Hill and Taylor Order Denying Covil's Motion to Lift Entry of Default*.
61. Lawyers were hired in or about May 2018 to represent and defend Covil in all cases pending against Covil in South Carolina. See **Exhibit 2**, Mark Wall's 3.28.19 Affidavit.
62. At no time did Lawyers make any effort independently to determine Covil's needs and interests. Rather, Lawyers improperly acted at all times pertinent as if the Primary Insurers were Lawyers' clients.
63. Lawyers failed to ensure proper procedures were in place for Covil to express its interests, including but not limited to the procedures provided by S.C. Code Ann. § 15-65-10 and Rule 66, SCRCF; therefore, Lawyers were unable to ascertain what Covil wanted or to protect Covil's interests.
64. The Primary Insurers improperly required or requested Lawyers to treat the Primary Insurers as Covil.
65. Lawyers failed to communicate with the insured, Covil, as no proper procedures were in place as provided by S.C. Code Ann. § 16-65-10 and Rule 66, SCRCF to effectuate said communication.
66. Lawyers improperly accepted this arrangement of treating Primary Insurers as Covil, and Lawyers failed to advise Primary Insurers that the arrangement was contrary to South Carolina law, although Lawyers knew or should have known of these facts and circumstances.

67. Lawyers' actions, in breach of Lawyers' duties and at the direction of Primary Insurers, were to effectuate the Primary Insurers' desire that no Covil separate and apart from the Primary Insurers would exist.
68. The Primary Insurers' complete control over Covil, and management of Covil's affairs, including but not limited to the Covil asbestos suits, extended to the *Finch* suit.
69. Prior to the appointment of the Receiver, Primary Insurers and Lawyers unilaterally determined that Covil would not settle the *Finch* suit in response to Finch's demand for policy limits, thereby leaving Covil exposed to a verdict beyond all insurance coverage.
70. In *Finch*, Lawyers received and transmitted to Primary Insurers a settlement offer from Finch in the amount of the policy limits.
71. Primary Insurers and Lawyers improperly determined not to convey Finch's policy limits settlement demand to Covil. Rather, Insurers and Lawyers kept Finch's offer to compromise to themselves with the Insurers acting and being Covil.
72. Primary Insurers and Lawyers improperly chose not to advise Finch of Covil's policy limits in response to Finch's request. Primary Insurers and Lawyers improperly failed or refused to communicate the *Finch* policy limits demand to other Covil Insurers, including without limitation Ranger Insurance Company ("Ranger"), Hartford Accident and Indemnity Company and First State Insurance Company ("Hartford"), all of which had remaining responsive policy limits, or to so advise Covil, or to advise Covil to seek such limits from these other Covil insurers.
73. Primary Insurers and Lawyers did not speak to any Covil representative as none was available due to Lawyers' negligence.

74. As a result of the breach of duties by Lawyer and Insurers, the *Finch* suit proceeded to trial and a verdict was entered against Covil in the *Finch* suit in the amount \$35,582,365.99, inclusive of prejudgment interest, which continues to accrue post judgment interest. This verdict was rendered on October 19, 2018, prior to the appointment of the Receiver.

75. The communications between and among the defendants illustrates how defendants singlehandedly ran Covil. The pertinent communications include:

Date	From	To/CC	Subject	Key points of email
10/9/18 3:46 pm	Mark Wall	Irene Muse; Barb Davis; Steven Fries; Gerry Begley; John Weiss; Carol Weill; William Silverman; Pauline Burdin	New cases	Covil has been named in at least two new cases, but we have no Notice of Service. I'm assuming we need to be served before appearing. Agree.
10/18/18 1:49 pm	Mark Wall	Irene Muse Barb Davis; Steven Fries; Gerry Begley; John Weiss; Carol Weill; William Silverman; Pauline Burdin	New trial etc. / new cases	Unserved case Hill set for March; depo scheduled; recommend not appear.
10/19/18 9:07am	Barb Davis	Mark Wall Irene Muse Steven Fries Gerry Begley John Weiss Carol Weill William Silvernman Pauline Burdin Sarah Schrodetzki Tommy Boger	New cases	Do we really think we would not be served at some point? If we had already been served, would still recommend not attending the plaintiff deposition?

10/22/18 3:47pm	Mark Wall	Irene Muse Barb Davis Steven Fries Carol Weill	FW James Michael Hill v. Advance Auto Parts Amended NOD of James Michael Hill	FYI see attached communications.
10/22/18 3:57pm	Carol Weill	Barb Davis Mark Wall Irene Muse Steven Fries Gerry Begley John Weiss William Silverman Pauline Burdin Sara Schrodetzki Tommy Boger	New cases	Request for response to inquiries.
10/23/18 2:07pm	Mark Wall	Carol Weill; Barb Davis; Irene Muse Gerry Begley John Weiss William Silverman Pauline Burdin Steven Fries travelers Sara Schrodetzki Tommy Boger	Covil unserved cases	Maybe Jim stopped accepting service. If we get served later, and Hill is still alive, we re-depose him. If we were served, we should attend; however, we checked the docket and there was no proof of serviced filed.
10/23/18 4:15pm	Carol Weill	Mark Wall Barb Davis Irene Muse Steven Fries Gerry Begley John Weiss William Silverman Pauline Burdin Sara Schrodetzki Tommy Boger	Covil Unserved cases	Zurich would recommend that Mark not appear for depositions in cases where service has not yet been effectuated.
10/31/18 3:57pm	Mark Wall	Irene Muse Steven Fries Carol Weill	FW Hill and email from Theile asking about answers	It didn't take them very long to figure out. What response at this point?

		Barb Davis Gerry Begley John Weiss Pauline Burdin		
11/1/18 1:53pm	Mark Wall	Irene Muse Steven Fries Carol Weill Erin Corbally, Barb Davis Gerry Begley John Weiss	FW Hill and Taylor	FYI see below. Below is Mark's email stating that he had not been asked to represent Covil in Hill and Taylor and Theile's email from 11/1/18 at 10:34 A.M. asking about past due answers.
11/1/18 2:00pm	Steven Fries	Mark Wall, Irene Muse Carol Weill Erin Corbally Davis Barb Gerry Begley John Weiss	Re. Hill and Taylor	I thought you said yesterday that if approached by Plaintiff on these cases that we're going to tell them no record of service.
11/1/18 2:04pm	Mark Wall	Steven Fries Irene Muse Carol Weill Erin Corbally Barb Davis Gerry Begley John Weiss	Re. Hill and Taylor	In face of what has been filed today, I thought I would start slowly and leave service to last. I want to see what they say about service.

76. Defendants acted in concert when deciding not to tender Covil's policy limits in response to Finch's demand and without any input from an independent Covil. These actions were in breach of their duties to Covil.

FOR A FIRST CROSS-CLAIM
Professional Negligence as to Lawyers

77. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this cross-claim as if fully set forth herein.
78. Pursuant to S.C. Code Ann. § 15-36-100, Cross-Claimant has retained the services of Michael Virzi as an expert witness in this matter. Mr. Virzi's affidavit is attached as **Exhibit 4** and incorporated by reference.
79. As Covil's attorneys, Lawyers owed a legal duty to Covil to conform to the generally recognized and accepted practices of the legal profession in respect to the services that Lawyers performed for Covil.
80. Lawyers provided legal services contrary to the most minimal legal standards.
81. Lawyers breached their duties to Covil and failed to conform to the generally recognized and accepted practices of the legal profession in respect to the services performed by Lawyers. In particular, Lawyers were negligent, grossly negligent, reckless, willful and wanton in their:
- a. Failure to properly represent Covil;
 - b. Failure to communicate with their client;
 - c. Failure to identify Covil as their client and not Primary Insurers;
 - d. Failure to provide competent representation;
 - e. Failure to act diligently in the interest of Covil;
 - f. Failure to communicate with Covil sufficiently to allow Covil to make any informed decisions;
 - g. Failure to act with commitment and dedication to the interest of Covil;

- h. Failure to protect Covil;
- i. Failure to use all available proper procedures to protect Covil, including appointment of a receiver for Covil as provided by S.C. Code Ann. § 16-65-10 and Rule 66, SCRCF;
- j. Failure to advise Covil regarding the need to seek coverage from other Covil insurers, including without limitation Ranger and Hartford;
- k. Failure to recommend settlement within policy limits or to communicate at all with Covil;
- l. Lawyers failed to communicate with the insured, Covil, as no proper procedures were in place as provided by S.C. Code Ann. § 16-65-10 and Rule 66, SCRCF to effectuate said communication;
- m. Failure to properly identify and disclose the conflict of interest in representing the Primary Insurers and Covil; and
- n. Failure to properly defend or otherwise preserve appropriate objections at trial, which seriously affected the value and judgment in the *Finch* case.

82. Lawyers' actions and inactions were negligent, grossly negligent, reckless, willful and wanton.

83. As a direct and proximate result of Lawyers' negligence, the Cross-Claimant has suffered actual and consequential damages in an amount to be proven at trial.

FOR A SECOND CROSS-CLAIM
Breach of Fiduciary Duty as to Lawyers

84. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.
85. Lawyers served as attorneys for Covil.
86. As the attorneys for Covil, Lawyers had fiduciary duties and owed a duty of due care, good faith, and loyalty to Covil. Lawyers breached these duties owed to Covil.
87. As a result of Lawyers' negligent, grossly negligent, and wanton acts, Cross-Claimant has suffered actual and consequential damages in an amount to be determined by a jury.

FOR A THIRD CROSS-CLAIM
Aiding and Abetting the Breach of a Fiduciary Duty as To Primary Insurers

88. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.
89. Lawyers owed fiduciary duties to Covil.
90. Primary Insurers knew that Lawyers had a fiduciary duty to Covil and knowingly participated in the breach of fiduciary duty.
91. Primary Insurers knew Lawyers received notice of the *Finch* demand and not only were aware but also participated in Lawyers' decision not to inform an independent Covil of the demand and its rights related to the demand.
92. Further, Primary Insurers knew and improperly instructed Lawyers to breach their fiduciary duties to their insured, Covil, Lawyers' client, by treating the Primary Insurers as the client.

93. As a direct and proximate cause, Cross-Claimant suffered damages caused by these breaches of fiduciary duties and the aiding and abetting as described herein.

FOR A FOURTH CROSS-CLAIM
Breach of Contract – Bad Faith Failure to Defend
against Primary Insurers related to *Finch*

94. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.

95. The Primary Insurers have contractual obligations to Covil.

96. A copy of all policy materials known and available relating to the Zurich policies is attached hereto as **Exhibit 5**.

97. A copy of all policy materials known and available relating to the Sentry policies is attached hereto as **Exhibit 6**.

98. A copy of all policy materials known and available relating to the USF&G policies is attached hereto as **Exhibit 7**.

99. The Primary Insurers had, and have, a contractual duty to provide a defense to the Covil Asbestos Suits, including but not limited to the *Finch* suit, which the Primary Insurers breached.

100. The Primary Insurers breached their duty to defend Covil by determining what was best for Covil without consulting with an independent Covil or even consulting with Jim Covil who was their prior contact for Covil.

101. Primary Insurers knowingly failed to exercise an honest and informed judgment in providing a defense to Covil.

102. Primary Insurers are liable for all damages, without limitation, assessed against Covil, by way of settlement or judgment, as a result of the Primary Insurers' actions in failing adequately to defend Covil against the *Finch* suit.

FOR A FIFTH CROSS-CLAIM
Breach of Contract – Bad Faith Processing of Claims
against Primary Insurers related to *Finch*

103. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.

104. Primary Insurers each have valid contractual obligations to Covil.

105. Primary Insurers each have a contractual duty to administer and settle claims made against Covil in the Covil Asbestos Suits.

106. Primary Insurers have breached their respective contracts in bad faith by refusing to pay until judgment was entered against Covil in the amount of \$35,582,365.99, inclusive of prejudgment interest, which continues to accrue post judgment interest, and thereafter delaying payment of benefits justly due under the contract in *Finch*.

107. Furthermore, Primary Insurers have engaged in a bad faith processing of *Finch*.

108. Primary Insurers' actions in refusing to abide by their obligations under their respective contracts were unreasonable and in breach of the Primary Insurers' contracts as well as the implied covenant of good faith and fair dealing under the policies, including but not limited to the imposition of extra contractual duties and obligations upon Covil in furtherance of the Primary Insurers' interest and to the detriment of Covil.

109. As a direct and proximate result of Primary Insurers' acts and omissions, the Cross-Claimant has been damaged and is entitled to recover actual, compensatory, and punitive damages.

FOR A SIXTH CROSS-CLAIM
Tort Action – Bad Faith Processing of Claims
against Primary Insurers related to *Finch*

110. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.

111. Primary Insurers, willfully and with reckless disregard for Covil's rights, acted in bad faith and/or unreasonably in processing claim(s) under their mutually binding insurance contract.

112. Primary Insurers' willful, and with reckless disregard for Covil's rights, actions in refusing to abide by their obligations under their respective contracts were unreasonable and in breach of the Primary Insurers' contracts as well as the implied covenant of good faith and fair dealing under the policies, including but not limited to the imposition of extra contractual duties and obligations upon Covil in furtherance of the Insurers' interest and to the detriment of Covil.

113. As a direct and proximate result of Primary Insurers' acts and omissions, the Cross-Claimant has been damaged and is entitled to recover actual, compensatory, and punitive damages.

FOR A SEVENTH CROSS-CLAIM
Primary Insurers Are Fully Responsible for Conduct
Prior To November 2, 2018, As Covil's Alter Ego, Agency or Instrumentality

114. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.

115. Primary Insurers' pattern and practice has made the Primary Insurers fully responsible for all of Covil's liabilities prior to appointment of the Receiver.

116. Under a number of legal theories, Primary Insurers are Covil and acted as such in the *Finch* case.

117. Primary Insurers have entered into a joint venture with each other to take over Covil and become Covil. For example:

a. A special combination of the Primary Insurers and Covil for the specific venture of limiting or eliminating Covil as a direct voice in the management of Covil's assets so that the Primary Insurers would protect and save their money;

b. The retention of a separate corporate personality for Covil would promote fraud, wrong, injustice, and contravene public policy; and

c. Each Primary Insurer had an equal right to control the conduct of their joint venture and of Covil.

118. Covil has become the alter ego of the Primary Insurers:

a. The Primary Insurers have shown a total domination and control over Covil;

b. The domination was so complete that Covil never manifested separate corporate interests of its own and functioned solely to achieve the purposes of the Insurers;

c. The insurers misused their domination of Covil and were not entitled to dominate Covil; and

d. Inequitable consequences have resulted with the unilateral application of insurance proceeds, default judgments, and verdicts.

119. The Primary Insurers were the principals and Covil, the agent or agency:

- a. Primary Insurers manifested complete control over Covil and purported to act on Covil's behalf;
- b. The course of dealing between the principal and the agent clearly show no independent Covil; and
- c. Primary Insurers became active participants in Covil rather than simply insurers.

120. Primary Insurers' acts and omissions constitute negligence and/or gross negligence because they constitute an extreme departure from what a reasonably careful person would do in the same situation.

121. As a direct and proximate result of the Insurers' acts and omissions, the Cross-Claimant is entitled to recover actual, compensatory, attorneys' fees, and costs of this action as well as punitive damages for the Primary Insurers' negligent, grossly negligent, willful, and intentional conduct towards Covil.

FOR AN EIGHTH CROSS-CLAIM
Negligence as To Lawyers and Primary Insurers

122. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.

123. Lawyers and Primary Insurers had a contractual and fiduciary duty to protect Covil's interest.

124. Lawyers and the Primary Insurers negligently failed to conduct an adequate defense on behalf of Covil in respect of the *Finch* suit.

125. Lawyers and Primary Insurers should have taken steps necessary to avoid a judgment in the *Finch* suit, some or all of which are outlined in this complaint.

126. Primary Insurers knowingly permitted Lawyers to act negligently in defense of Covil and are responsible for failing or refusing to intercede to prevent Lawyers' negligence on behalf of Covil in the *Finch* suit.

127. As a direct and foreseeable consequence of the foregoing negligence, Covil has been damaged in an amount to be determined at trial.

128. Lawyers and the Primary Insurers are responsible for all damages incurred by Covil as a result of the foregoing negligence.

FOR A NINTH CROSS-CLAIM
Declaratory Judgment as to the Primary Insurers
And the Primary Insurers' Policies Related to *Finch*

129. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.

130. As to all of the Covil Insurance Policies issued by the Primary Insurers applicable to *Finch*, Covil seeks the following declarations:

a. The Covil Insurance Policies cover all damages of *Finch* because *Finch* alleges bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the policy periods;

b. Covil may select the policy or policy years to which to assign or allocate *Finch*-related loss;

c. In the case of a claimed ambiguity in any Covil Insurance Policy applicable to *Finch*, such ambiguity shall be construed in favor of the broadest coverage afforded under the Covil Insurance Policies;

d. Defense costs for *Finch* are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of Covil Insurance Policies;

e. Each of the Primary Insurers Covil Insurance Policies is required to pay or reimburse all sums that Covil is legally obligated to pay in *Finch*;

f. Each of the Primary Insurers Covil Insurance Policies must cover *Finch*, in full, including but not limited to its “per occurrence” limits;

g. *Finch*’s exposure to asbestos for which Covil is liable, during Covil’s operations, including Covil’s construction, installation, maintenance or removal activities, are, including but not limited to, subject only to the “per occurrence” limits of the Covil Insurance Policies, and not subject to “aggregate” limits, if any, of the Covil Insurance Policies;

h. For *Finch*, any aggregate limit on coverage in any of the Covil Insurance Policies is a limitation on coverage, and therefore each defendant Primary Insurer has the burden to prove any assertion that *Finch* is subject to the aggregate limits in the Covil Insurance Policies, if any;

i. Each Primary Insurer has the burden to prove, based on the evidence, that *Finch* is either a “products” claim or a “completed operations” claim, as those terms are defined in the Covil Insurance Policies, in order to subject the claim to the aggregate limits in the Covil Insurance Policies, if any;

j. Each of the Primary Insurers is fully responsible for all damages resulting from the *Finch* judgment and pursuant to the collateral source rule, Lawyers should not benefit from any payment from the insurers;

k. The damages for the *Finch* judgment are extracontractual in nature and derive from the Primary Insurers' failure or refusal to provide a defense, including but not limited to a competent defense, to *Finch*;

l. The damages for the *Finch* judgment cannot be allocated to any Covil Insurance Policy limit;

m. Each of the Primary Insurers has waived, or is estopped from asserting, any right of subrogation and any purported claim of equitable contribution against any other person, including but not limited to any other Covil insurer, except as explicitly pleaded herein; and

131. An actual and justiciable controversy exists between Covil and each of the defendant Primary Insurers concerning their obligations under the Covil Insurance Policies.

132. Judicial declarations are necessary and appropriate at this time, and under the circumstances alleged above, so that Covil may ascertain its rights under the Covil Insurance Policies in *Finch*.

PRAYER FOR RELIEF

WHEREFORE, Cross-Claimant respectfully prays for an award from this Court as to each cross claim in an amount to be determined at trial as well as an additional punitive award in an amount sufficient to impress upon the Cross-Claim Defendants the seriousness of their conduct and to deter such similar conduct in the future together with attorneys' fees, costs, prejudgment interest, and such further relief as the Court deems just and appropriate.

FURTHER ANSWERING THE RECEIVER ALLEGES:

**THIRD-PARTY COMPLAINT AGAINST TIG INSURANCE COMPANY, AS
SUCCESSOR IN INTEREST TO FAIRMONT SPECIALTY INSURANCE COMPANY,
F/K/A RANGER INSURANCE COMPANY; HARTFORD ACCIDENT AND
INDEMNITY COMPANY; AND FIRST STATE INSURANCE COMPANY**

COMES NOW Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas (“Receiver”), for his third-party complaint against TIG Insurance Company, As Successor In Interest To Fairmont Specialty Insurance Company, F/K/A Ranger Insurance Company; Hartford Accident And Indemnity Company; And First State Insurance Company, who alleges upon knowledge as to his own acts and upon information and belief as to all other matters as follows:

PARTIES

133. The Receiver is a lawyer who was appointed as Receiver of Covil Corporation, a dissolved South Carolina corporation, by Order attached as **Exhibit 1**, on November 2, 2018 and who maintains his principal place of business in Richland County, South Carolina.

134. Upon information and belief, TIG Insurance Company (“TIG”) is the successor in interest to Fairmont Specialty Insurance Company, formerly known as Ranger Insurance Company, and is a corporation organized and existing under the laws of the State of California with a principal place of business in the State of New Hampshire.

135. Upon information and belief, Hartford Accident and Indemnity Company (“Hartford”) is a corporation organized and existing under the laws of the State of Connecticut with a principal place of business in the State of Connecticut.

136. Upon information and belief, First State Insurance Company (“First State”, except

when referred to jointly with “Hartford,” in which case “Hartford” also applies to First State) is a corporation organized and existing under the laws of the State of Connecticut with a principal place of business in the State of Connecticut.

JURISDICTION AND VENUE

137. This Court has supplemental jurisdiction over the Receiver’s claims as Third-Party Plaintiff against TIG, Hartford and First State (collectively “Third-Party Defendants”), because the Third-Party Defendants are liable in whole or in part for the Plaintiff’s Claims against the Receiver.

138. Venue of this case is proper in the State of South Carolina Court of Common Pleas for Richland County.

139. This Court lacks subject matter jurisdiction due to lack of diversity.

FACTUAL BACKGROUND

140. The Receiver incorporates by reference the factual allegations set forth herein in the Receiver’s Cross-Claims.

141. In addition to the claims against the Primary Insurers, the Receiver also seeks declaratory relief against Covil’s additional insurers, TIG and Hartford.

142. Covil was named as a defendant in a lawsuit filed in the United States District Court for the Middle District of North Carolina, entitled “*ANN FINCH, Individually, and as Executrix of the Estate of Franklin Delenor Finch, Plaintiff, vs. BASF CATALYSTS LLC, individually and as successor-in-interest to EASTERN MAGNESIA TALC CO. and ENGELHARD, PITA REALTY LTD; COVIL CORPORATION; FOSTER WHEELER ENERGY CORPORATION; MCNEIL (OHIO) CORPORATION, INC.; MCNEIL &*

NRM, INC.; PFIZER, INC.; CBS CORPORATION f/k/a Viacom Inc. (sued as successor-by-merger to CBS Corporation f/k/a Westinghouse Electric Corporation) and also as successor-in-interest to BF Sturtevant; FMC CORPORATION, Individually and as successor in interest to Stearns Brakes; RED SEAL ELECTRIC COMPANY; and REXNORD INDUSTRIES, LLC MCNEIL (OHIO) CORPORATION, INC.; MCNEIL & NRM, INC.; PFIZER, INC.; CBS CORPORATION f/k/a Viacom Inc. (sued as successor-by-merger to CBS Corporation f/k/a Westinghouse Electric Corporation) and also as successor-in-interest to BF Sturtevant; FMC CORPORATION, Individually and as successor in interest to Stearns Brakes; RED SEAL ELECTRIC COMPANY; and REXNORD INDUSTRIES, LLC", file number 1:16-cv-01077 (the "*Finch* suit").

143. The *Finch* suit proceeded to trial and a verdict was entered against Covil in the *Finch* suit in the amount \$35,582,365.99, inclusive of prejudgment interest, which continues to accrue post judgment interest. This verdict was rendered on October 19, 2018, prior to the appointment of the Receiver.

144. The *Finch* suit is on appeal; however, if the judgment is sustained, and furthermore, Primary Insurers Zurich and USF&G are not determined to be fully responsible for the *Finch* judgment, then the Receiver seeks payment or apportionment of TIG and Hartford's applicable remaining limits under their various obligations to Covil, in addition to the obligations of the pertinent Primary Insurers.

145. As to TIG, Covil seeks declarations (i) that TIG must "drop down" and provide "first dollar" coverage above the retained limit of \$10,000 if there is no applicable underlying primary coverage; (ii) that, in such event, TIG is required to pay defense costs in addition to its applicable limits of liability; and (iii) that TIG's \$2,000,000 annual limit of liability

for each applicable policy period or portion thereof has no aggregate limit of liability for claims other than product liability claims, such that its \$2,000,000 occurrence limit for each applicable policy or policy period or portion thereof responds repeatedly to each and every occurrence, with no limit to the number of occurrences.

146. As to Hartford, Covil seeks declarations (i) that Hartford's policies provide coverage for non-products asbestos suits; (ii) that there is no aggregate limit for such asbestos suits in any Hartford policy, but only a "per occurrence" limit, with no limit to the number of occurrences; and (iii) that Hartford's policies provide for a supplemental defense in addition to their limits of liability.

THE TIG AND HARTFORD INSURANCE POLICIES

147. TIG and Hartford issued general liability policies to Covil. These policies all provide defense and indemnity coverage, in varying degrees, for the Covil asbestos suits, as those terms are used in the insurance industry. Certain of Covil's insurance policies are missing, in whole or in part. However, Covil's insurers have issued policies through standard terms and conditions applicable to general liability policies, and have provided secondary evidence of the issuance of such policies or the policies themselves. It is the burden of Covil's insurers to prove any limitation to or exclusion of coverage.

148. On information and belief, TIG issued umbrella coverage that "drops down" to provide "first dollar" coverage in the event there is no available primary coverage. This umbrella coverage, in such event, provides for an unlimited supplemental defense obligation. Each TIG policy year provides a \$2,000,000 annual limit of liability in each applicable annual period or portion thereof. TIG issued the following umbrella policies, each using

the language set forth in the policy form attached as **Exhibit 8**:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
July 25, 1976 – February 15, 1977	RU 309724	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense
February 15, 1977 – March 31, 1977	RU 308527	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense
March 31, 1978 – March 31, 1979	RU 430944	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense

149. On information and belief, Hartford issued the following primary insurance policies with \$500,000 in per occurrence limits (which were increased to \$1,000,000 per occurrence in 1984, 1985 and 1986), and no limit to the number of occurrences, and with an unlimited supplemental defense obligation, applicable to claims other than product liability suits:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1978 – March 31, 1979	22 C 936166	\$500,000 per occurrence; supplemental defense
March 31, 1979 – March 31, 1980	22 C 938625	\$500,000 per occurrence; supplemental defense
March 31, 1980 – March 31, 1981	22 C 941900	\$500,000 per occurrence; supplemental defense
March 31, 1981 – March 31, 1982	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1982 – March 31, 1983	22 C 943927	\$500,000 per occurrence; supplemental defense

March 31, 1983 – March 31, 1984	22 C 943927	\$1,000,000 per occurrence; supplemental defense
March 31, 1984 – March 31, 1985	22 C 943927	\$1,000,000 per occurrence; supplemental defense
March 31, 1985 – March 31, 1986	22 C 943927	\$1,000,000 per occurrence; supplemental defense

150. On information and belief, Hartford and First State, a Hartford company, issued umbrella coverage with the same “drop down” and supplemental defense provisions as TIG, responsive on a per occurrence basis with the exception of product liability claims, as follows:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1980 – March 31, 1981	22 RHU 371518	\$2,000,000 per occurrence
March 31, 1981 – March 31, 1982	22 RHU 371789	\$5,000,000 per occurrence
March 31, 1982 – March 31, 1983	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1983 – March 31, 1984	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1984 – March 31, 1985	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1985 – March 31, 1986	22 RHU EX 4908	\$5,000,000 per occurrence

COUNT I **Declaratory Judgment Against TIG and Hartford**

151. The Third-Party Plaintiff re-alleges and incorporates by this reference the preceding paragraphs of this Answer, Cross-Claims and Third-Party Complaint as if fully set forth herein.

152. Covil seeks a declaration and order that TIG issued umbrella coverage that “drops down” to provide “first dollar” coverage in the event there is no available primary coverage; that this umbrella coverage, in such event, provides for an unlimited supplemental defense obligation; that TIG's \$2,000,000 annual limit of liability for each

applicable policy period or portion thereof has no aggregate limit of liability for claims other than product liability claims, such that its \$2,000,000 occurrence limit for each applicable policy or policy period or portion thereof responds repeatedly to each and every occurrence, with no limit to the number of occurrences; and that TIG issued the following umbrella policies, each using the language set forth in the policy form attached as **Exhibit 8**:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
July 25, 1976 – February 15, 1977	RU 309724	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense
February 15, 1977 – March 31, 1977	RU 308527	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense
March 31, 1978 – March 31, 1979	RU 430944	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense

153. Covil seeks a further declaration and order that Hartford issued the following primary insurance policies with \$500,000 in per occurrence limits (which were increased to \$1,000,000 per occurrence in 1984, 1985 and 1986), and no limit to the number of occurrences, and with an unlimited supplemental defense obligation, applicable to claims other than product liability suits:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1978 – March 31, 1979	22 C 936166	\$500,000 per occurrence; supplemental defense

March 31, 1979 – March 31, 1980	22 C 938625	\$500,000 per occurrence; supplemental defense
March 31, 1980 – March 31, 1981	22 C 941900	\$500,000 per occurrence; supplemental defense
March 31, 1981 – March 31, 1982	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1982 – March 31, 1983	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1983 – March 31, 1984	22 C 943927	\$1,000,000 per occurrence; supplemental defense
March 31, 1984 – March 31, 1985	22 C 943927	\$1,000,000 per occurrence; supplemental defense
March 31, 1985 – March 31, 1986	22 C 943927	\$1,000,000 per occurrence; supplemental defense

154. Covil seeks a further declaration and order that Hartford and First State, a Hartford company, issued umbrella coverage with the same “drop down” and supplemental defense provisions as TIG, responsive on a per occurrence basis with the exception of product liability claims, as follows:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1980 – March 31, 1981	22 RHU 371518	\$2,000,000 per occurrence
March 31, 1981 – March 31, 1982	22 RHU 371789	\$5,000,000 per occurrence
March 31, 1982 – March 31, 1983	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1983 – March 31, 1984	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1984 – March 31, 1985	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1985 – March 31, 1986	22 RHU EX 4908	\$5,000,000 per occurrence

155. If Covil is held responsible for *Finch*, Covil seeks a declaration that TIG and Hartford must pay their limits as set forth above.

156. Further, as to all of the Insurance Policies issued by TIG and Hartford applicable

to *Finch* (“Covil Insurance Policies”), Covil seeks the following declarations:

- a. The Covil Insurance Policies cover all damages of *Finch* because *Finch* alleges bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the policy periods;
- b. Covil may select the policy or policy years to which to assign or allocate *Finch*-related loss;
- c. In the case of a claimed ambiguity in any Covil Insurance Policy applicable to *Finch*, such ambiguity shall be construed in favor of the broadest coverage afforded under the Covil Insurance Policies;
- d. Defense costs for *Finch* are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of Covil Insurance Policies;
- e. TIG and Hartford are required to apportion their remaining limits under their various obligations to the extent Covil is otherwise unable to meet the *Finch* judgment;
- f. *Finch*’s exposure to asbestos for which Covil is liable, during Covil’s operations, including Covil’s construction, installation, maintenance or removal activities, are, including but not limited to, subject only to the “per occurrence” limits of the Covil Insurance Policies, and not subject to “aggregate” limits, if any, of the Covil Insurance Policies;

- g. For *Finch*, any aggregate limit on coverage in any of the Covil Insurance Policies is a limitation on coverage, and therefore each defendant Primary Insurer has the burden to prove any assertion that *Finch* is subject to the aggregate limits in the Covil Insurance Policies, if any; and
- h. Each Insurer has the burden to prove, based on the evidence, that *Finch* is either a “products” claim or a “completed operations” claim, as those terms are defined in the Covil Insurance Policies, in order to subject the claim to the aggregate limits in the Covil Insurance Policies, if any.

157. An actual and justiciable controversy exists between Covil and Third-Party Defendants concerning their obligations under the Covil Insurance Policies.

158. Judicial declarations are necessary and appropriate at this time, and under the circumstances alleged above, so that Covil may ascertain its rights under the Covil Insurance Policies in *Finch*.

PRAYER FOR RELIEF

WHEREFORE, the Receiver seeks the declarations sought herein and, specifically, the declaration that TIG and Hartford are responsible to pay their apportioned limits to the extent the *Finch* judgment is upheld and is not covered by the Primary Insurers.

JURY DEMAND

The Receiver demands a trial by jury on all issues.

Signatures on following page

Respectfully submitted,

s/ Jescelyn T. Spitz
Jescelyn Tillman Spitz, Esquire
Fed. Bar 12159
Rikard & Protopapas, LLC
1329 Blanding Street
Columbia, South Carolina 29201
Post Office Box 5640 (29250)
PH: (803)978-6111
FAX: (803)978-6112
EMAIL: jspitz@rplegalgroup.com

*Attorneys for Covil Corporation, acting
through Peter D. Protopapas, Receiver of
Covil Corporation as to all causes of action*

Mark W. Hardee, Esquire
Fed. Bar 2314
The Hardee Law Firm
2231 Devine Street
Suite 202
Columbia, South Carolina 29205
PH: (803)799-0905
EMAIL: mwhardee@bellsouth.net

*Attorneys for Covil Corporation, acting
through Peter D. Protopapas, Receiver of
Covil Corporation as to all causes of action
related to Professional Negligence*

Signatures continued on following page

SMITH | ROBINSON
Smith Robinson Holler DuBose and
Morgan, LLC

G. Murrell Smith, Jr. (Fed. Bar 6120)
Jonathan M. Robinson (Fed. Bar 7755)
2725 Devine Street
Columbia, SC 29205
(803) 254-5445

*Attorneys for Covil Corporation, acting
through Peter D. Protopapas, Receiver of
Covil Corporation as to all causes of action
against Primary Insurers*

Paul Anton Zevnik
(Pro Hac Forthcoming)
Brady Edwards
(Pro Hac Forthcoming)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-3000

*Attorneys for Covil Corporation, acting
through Peter D. Protopapas, Receiver of
Covil Corporation as to all causes of action
against Primary Insurers*

July 18, 2019
Columbia, South Carolina

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CASE NUMBER: 1:18-CV-932**

ZURICH AMERICAN INSURANCE
COMPANY,

Plaintiff,

vs.

COVIL CORPORATION by and
through its duly appointed Receiver,
Peter D. Protopapas; SENTRY
CASUALTY COMPANY; UNITED
STATES FIDELITY AND
GUARANTY COMPANY; TIG
INSURANCE COMPANY, as successor
in interest to Fairmont Specialty
Insurance Company, f/k/a Ranger
Insurance Company; HARTFORD
ACCIDENT AND INDEMNITY
COMPANY; ANN FINCH, as Executrix
of the Estate of Franklin Delenor Finch,
DARRELL A. CONNOR, as Executrix
of the Estate of Charles Franklin Connor;
ROBERT A. MULLINAX, as Executor
of the Estate of Jack Junior Waugh;
ROBERT JOSEPH ELLIS; and
SHARON WHITEHEAD, as Executrix
of the Estate of James T. Whitehead,

Defendants.

**PETER PROTOPAPAS', AS COURT
APPOINTED RECEIVER FOR COVIL
CORPORATION, ANSWER TO
PLAINTIFF'S COMPLAINT;**

**ANSWERS TO CROSSCLAIMS
ASSERTED BY TIG INSURANCE
COMPANY AS SUCCESSOR IN
INTEREST TO FAIRMONT
SPECIALTY INSURANCE COMPANY,
F/K/A RANGER INSURANCE
COMPANY; SENTRY INSURANCE, A
MUTUAL COMPANY, NAMED AS
SENTRY CASUALTY COMPANY;
AND UNITED STATES FIDELITY
AND GUARANTY COMPANY;**

**COUNTERCLAIMS AGAINST
ZURICH AMERICAN INSURANCE
COMPANY; AND CROSSCLAIMS
AGAINST SENTRY INSURANCE, A
MUTUAL COMPANY, NAMED AS
SENTRY CASUALTY COMPANY;
UNITED STATES FIDELITY AND
GUARANTY COMPANY; TIG
INSURANCE COMPANY AS
SUCCESSOR IN INTEREST TO
FAIRMONT SPECIALTY INSURANCE
COMPANY, F/K/A RANGER
INSURANCE COMPANY; HARTFORD
ACCIDENT AND INDEMNITY
COMPANY AND FIRST STATE
INSURANCE COMPANY**

(JURY TRIAL DEMANDED)

Covil Corporation (hereinafter “Covil”), by and through its duly-appointed Receiver, Peter D. Protopapas (the “Receiver”), answering the complaint upon knowledge as to Covil, where known to the Receiver, and otherwise on information and belief, as follows:

FOR A FIRST DEFENSE

1. Covil denies each and every allegation of the complaint not hereinafter specifically admitted.

AS TO THE PARTIES

2. In response to the allegations contained in paragraph 1, upon information and belief they are admitted.
3. In response to the allegations contained in paragraph 2, only so much of said paragraph is admitted which states that Covil was incorporated and headquartered in South Carolina. Furthermore, Covil ceased conducting installation and removal operations in or about 1991 and was administratively dissolved by the South Carolina Secretary of State in and about 1993. Thereafter, Covil’s business records and business activities were controlled by Zurich American Insurance Company (“Zurich”), Sentry Insurance, a Mutual Company (“Sentry”), and United States Fidelity and Guaranty Company (“USF&G” or “Travelers”). Zurich, Sentry, and USF&G are collectively referred to as “Primary Insurers.” Any remaining allegations are denied.

4. In response to the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, and 11, upon information and belief they are admitted.

AS TO JURISDICTION AND VENUE

5. Paragraphs 12 and 13 state legal conclusions to which no response is required; however, to the extent that a response is required, Covil admits that Zurich is attempting to bring a declaratory judgment action in this Court, further admits that Zurich has engaged in forum shopping and manufacturing claims, but denies that this Court is the proper venue or that North Carolina is the proper jurisdiction for this dispute. The remaining allegations of the paragraphs are denied.

AS TO THE ALLEGED INSURANCE POLICIES

6. In response to the allegations contained in paragraph 14, Covil only admits so much of said paragraph which alleges that Zurich is one of the primary insurers for Covil with insurance policies in place for the years March 31, 1970 –March 31, 1976. Any other allegations of the paragraph are denied.
7. Covil is without sufficient information to admit or deny the allegations of paragraph 15. To the extent a response is required, it is denied.
8. Covil is without sufficient information to admit or deny the allegations of paragraph 16. To the extent the paragraph refers to insurance policies attached as **Exhibit A**, those policies speak for themselves and Covil makes reference to those policies for its terms and provisions. To the extent there are any remaining allegations, those allegations are denied.

9. Covil is without sufficient information to admit or deny the allegations of paragraphs 17 and 18. To the extent a response is required, it is denied.
10. In response to the allegations contained in paragraph 19, Covil only admits so much of said paragraph which alleges that Zurich is one of the excess insurers for Covil with excess insurance policies in place for the years March 31, 1970 –March 31, 1974. To the extent the paragraph refers to insurance policies attached as **Exhibit B**, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions. To the extent there are any remaining allegations, those allegations are denied.
11. In response to the allegations contained in paragraph 20, Covil is without sufficient information or belief to admit or deny the allegations. To the extent the paragraph refers to insurance policies attached as **Exhibit B**, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions. To the extent there are any remaining allegations, those allegations are denied.
12. In response to the allegations contained in paragraph 21, Covil is without sufficient information or belief to admit or deny the allegations. To the extent the paragraph refers to insurance policies attached as **Exhibit B**, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions. To the extent there are any remaining allegations, those allegations are denied.

13. Paragraph 22 states a legal conclusion which no response is required; however, to the extent a response is required, the allegations are denied.
14. In response to the allegations contained in paragraph 23, Covil admits so much of said paragraph which alleges that Sentry is a primary insurer of Covil for at least the years March 31, 1964 to March 31, 1970. Covil denies the remaining allegations of the paragraph.
15. In response to the allegations contained in paragraph 24, Covil admits so much of said paragraph which alleges that USF&G is a primary insurer of Covil for at least the years March 31, 1976 to March 31, 1978. Covil denies the remaining allegations of the paragraph.
16. In response to the allegations contained in paragraph 25, Covil admits so much of said paragraph which alleges that TIG was an excess liability insurer of Covil for the years March 31, 1976 to February 15, 1977. Covil denies that this is the only insurance policies issued to Covil by TIG and/or its predecessors. Furthermore, Covil denied any remaining allegations of the paragraph.
17. In response to the allegations contained in paragraph 26, Covil admits so much of said paragraph which alleges that Hartford issued policies of insurance to Covil and denies any remaining allegations.

AS TO THE UNDERLYING ACTIONS

18. Covil admits so much of paragraph 27 which alleges that Finch initiated a lawsuit in the United States District Court for the Middle District of North Carolina with

civil action number 1:16-cv-01077. Covil makes reference to that lawsuit and the documents filed in that lawsuit. To the extent any remaining allegations exist, they are denied.

19. Covil admits so much of paragraph 28 which alleges that a judgment was entered against Covil in the Finch lawsuit. Covil makes reference to that lawsuit and the documents filed in that lawsuit. Any remaining allegations are denied.

20. Covil admits so much of paragraphs 29 through 30 which allege that other lawsuits have been filed against Covil. Covil makes reference to those lawsuits for any allegations contained in them. Any remaining allegations are denied.

21. Paragraph 31 does not contain any allegations requiring a response. To the extent that a response is required, Covil admits that Zurich refers to other lawsuits as “Underlying Actions.”

22. Paragraphs 32, 33, 34, 35, and 36 state legal conclusions to which no responses are required; however, to the extent a response is required, the allegations are denied.

AS TO COUNT I

23. Covil admits so much of paragraph 37 which alleges that judgment-holder Finch initiated a lawsuit in the United States District Court for the Middle District of North Carolina with civil action number 1:16-cv-01077. Covil makes reference to that lawsuit and the documents filed in that lawsuit. To the extent any remaining allegations exist, they are denied.

24. Covil admits so much of paragraph 38 which alleges that judgment-holder Finch initiated a lawsuit in the United States District Court for the Middle District of North Carolina with civil action number 1:16-cv-01077. Covil makes reference to that lawsuit and the documents filed in that lawsuit. Covil further admits that Zurich has a duty to indemnify Covil under its policies. To the extent any remaining allegations exist, they are denied.
25. Covil admits so much of paragraph 39 which alleges that judgment-holder Finch initiated a lawsuit in the United States District Court for the Middle District of North Carolina with civil action number 1:16-cv-01077. Covil makes reference to that lawsuit and the documents filed in that lawsuit. To the extent any remaining allegations exist, they are denied.
26. Covil admits so much of paragraph 40 which alleges that judgment-holder Finch initiated a lawsuit in the United States District Court for the Middle District of North Carolina with civil action number 1:16-cv-01077. Covil makes reference to that lawsuit and the documents filed in that lawsuit. Covil further admits that Zurich has a duty to indemnify Covil under its policies. To the extent any remaining allegations exist, they are denied.
27. Covil denies the allegations of paragraphs 41 and 42 and makes references to the policies referred to by Zurich.
28. Covil admits so much of paragraph 43 which alleges that there are additional lawsuits against Covil which implicate Zurich's duty to defend and indemnify

Covil. Covil denies any remaining allegations and makes reference to the policies referred to by Zurich.

29. Covil admits so much of paragraphs 44, 45, 46, 47, 48, and 49 which allege that Zurich has a duty to defend and indemnify Covil in asbestos litigation. Covil denies any remaining allegations and makes reference to the policies referred to by Zurich.

AS TO COUNT II

30. In response to paragraphs 50 and 51, Covil denies the allegations and makes reference to the policies referred to by Zurich.

AS TO COUNT III

31. In response to the allegations contained in paragraph 52, Covil is without sufficient information or belief to admit or deny the allegations. To the extent the paragraph refers to insurance policies attached as **Exhibit B**, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions. To the extent there are any remaining allegations, those allegations are denied.

32. Covil denies the allegations of paragraphs 53, 54, 55, 56, and 57.

AS TO RELIEF REQUESTED

33. Covil denies that Zurich is entitled to the “RELIEF REQUESTED”.

FOR A SECOND DEFENSE

34. The complaint fails to state a claim upon which relief can be granted and therefore the complaint should be dismissed.

FOR A THIRD DEFENSE

35. Venue is appropriate and preferable in South Carolina as the insurance issues turn on South Carolina law, Covil is a dissolved South Carolina corporation appearing in this case through its Receiver and Zurich is not a North Carolina resident. Furthermore, there is a more complete action pending in South Carolina.

FOR A FOURTH DEFENSE

36. The declaratory relief that Zurich seeks will not have any impact on whether Zurich and the other Primary Insurers must indemnify Covil. Zurich and the other Primary Insurers have acted as and, under South Carolina law, have become Covil. Therefore, Zurich is not entitled to any relief.

FOR A FIFTH DEFENSE

37. Zurich and the other Primary Insurers are not entitled to any relief as they acted in bad faith and in breach of their contractual responsibilities when they failed to communicate any settlement offers to Covil from at least 1993 through November 2, 2018, failed to protect Covil's interests and failed to settle *Finch* within policy limits when they had the opportunity to do so.

FOR A SIXTH DEFENSE

38. Zurich and the other Primary Insurers are not entitled to any relief as they independently ran Covil and failed to make any efforts to appoint an independent person or entity to determine what was in Covil's best interest. Rather, the Primary Insurers unilaterally determined what was best for Covil, or disregarded what was

best for Covil, acting in their own interest, regardless of whether there was an actual or potential conflict between their interest and Covil's interest.

FOR A SEVENTH DEFENSE

39. Zurich and the other Primary Insurers are not entitled to any relief as they failed to implement proper claims handling processes required by their contracts with Covil and required by South Carolina law.

FOR AN EIGHTH DEFENSE

40. The Insurers are the only parties responsible for the liabilities to the Individual Defendants by and through Covil's applicable coverage and by and through the Insurers' negligent and improper actions which would make the Insurers responsible for the individual claims and not the Receiver or Covil.

FOR A NINTH DEFENSE

41. The Insurers are the only parties responsible for the liabilities to Finch by and through Covil's applicable coverage and by and through the Insurers' negligent and improper actions which would make the Insurers responsible for the Finch claims in full. Furthermore, the Finch claims can also be satisfied by the Receiver's right to recover from its attorneys at Wall Templeton Haldrup, PA (WTH).

FOR A TENTH DEFENSE

42. The complaint should be dismissed for failure to name and necessary party. Zurich has failed to name a necessary party, WTH which bears responsibility for the Finch claims through its breach of duties to Covil.

WHEREFORE, having fully answered the Complaint, the Receiver prays for a trial by jury and that the Complaint be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper, including but not limited to transfer of this action to South Carolina.

FURTHER ANSWERING COVIL ALLEGES:

**COVIL CORPORATION, BY AND THROUGH ITS DULY-APPOINTED
RECEIVER PETER D. PROTOPAPAS' ANSWER TO CROSSCLAIM OF TIG
INSURANCE COMPANY, AS SUCCESSOR IN INTEREST TO FAIRMONT
SPECIALTY INSURANCE COMPANY F/K/A RANGER INSURANCE
COMPANY**

Covil Corporation (hereinafter "Covil"), by and through its duly-appointed Receiver, Peter D. Protopapas (the "Receiver"), answering the Crossclaim of TIG Insurance Company, As Successor in Interest to Fairmont Specialty Insurance Company F/K/A Ranger Insurance Company ("TIG") upon knowledge as to Covil, where known to the Receiver, and otherwise on information and belief, as follows:

43. Covil denies each and every allegation of TIG's Crossclaim not hereinafter specifically admitted.
44. Covil hereby incorporates by reference all responses, allegations and defenses set forth in Covil's Answer to Zurich's Complaint and Answer to all other Crossclaims alleged herein.
45. In response to the allegations contained in paragraph 91 of TIG's Crossclaim, only so much of said paragraph is admitted which states that Covil was incorporated and headquartered in South Carolina. Furthermore, Covil ceased conducting installation

and removal operations in or around 1991 and was administratively dissolved by the South Carolina Secretary of State in and around 1993. Thereafter, Covil's business records and business activities were controlled by Zurich American Insurance Company ("Zurich"), Sentry Insurance, a Mutual Company ("Sentry"), and United States Fidelity and Guaranty Company ("USF&G" or "Travelers"). Zurich, Sentry, and USF&G are collectively referred to as "Primary Insurers." Any remaining allegations are denied.

46. In response to the allegations contained in paragraphs 92 through 99 of TIG's Crossclaim, upon information and belief they are admitted.

47. Paragraphs 100 and 101 of TIG's Crossclaim set forth abbreviations to which no response is required and contain no allegations against Covil. To the extent a response is required, Covil admits that TIG refers to Sentry, USF&G and Hartford as "Insurer Defendants," and TIG refers to Finch, Connor, Mullinax, Ellis and Whitehead as "Individual Defendants."

48. Paragraphs 102 through 105 of TIG's Crossclaim state legal conclusions to which no response is required; however, to the extent that a response is required, Covil admits that TIG is attempting to bring a declaratory judgment action in this Court by Crossclaim, further admits that Zurich and TIG have engaged in forum shopping and manufacturing claims, but denies that this Court is the proper venue or that North Carolina is the proper jurisdiction for this dispute. The remaining allegations of the paragraphs are denied.

49. In response to the allegations contained in paragraph 106 of TIG's Crossclaim, Covil admits so much of said paragraph which alleges that Sentry is a primary insurer of Covil for at least the years March 31, 1964 to March 31, 1970. Covil denies the remaining allegations of the paragraph.
50. In response to the allegations contained in paragraph 107 of TIG's Crossclaim, Covil admits so much of said paragraph which alleges that USF&G is a primary insurer of Covil for at least the years March 31, 1976 to March 31, 1978. Covil denies the remaining allegations of the paragraph.
51. In response to the allegations contained in paragraph 108 of TIG's Crossclaim, Covil admits so much of said paragraph which alleges that Hartford issued policies of insurance to Covil and denies any remaining allegations.
52. In response to the allegations contained in paragraphs 109 and 110 of TIG's Crossclaim, Covil admits so much of said paragraphs which allege that Covil is seeking Insurer Defendants to fulfill their duties to defend and to indemnify Covil in the Underlying Actions. Covil makes reference to those actions and the documents filed in those actions. To the extent any remaining allegations exist, they are denied.
53. In response to the allegations contained in paragraph 111 of TIG's Crossclaim, Covil denies its only assets are insurance policies, but rather, Covil's assets include but are not limited to Covil's insurance policies and Covil's claims and causes of action. To the extent any remaining allegations exist, they are denied.

54. In response to the allegations contained in paragraph 112 of TIG's Crossclaim, to the extent TIG seeks a declaration from this Court, Covil denies the same and seeks the following declarations: (i) that TIG must "drop down" and provide "first dollar" coverage above the retained limit of \$10,000 if there is no applicable underlying primary coverage; (ii) that, in such event, TIG is required to pay defense costs in addition to its applicable limits of liability; and (iii) that TIG's \$2,000,000 annual limit of liability for each applicable policy period or portion thereof has no aggregate limit of liability for claims other than product liability claims, such that its \$2,000,000 occurrence limit for each applicable policy or policy period or portion thereof responds repeatedly to each and every occurrence, with no limit to the number of occurrences. To the extent any remaining allegations exist, they are denied.

55. Covil denies all allegations contained in the Wherefore paragraph and Prayer for Relief of TIG's Crossclaim.

56. Covil denies all allegations of TIG's Crossclaim not heretofore expressly admitted or modified.

WHEREFORE, having fully answered TIG's Crossclaim, the Receiver prays for a trial by jury and that the Crossclaim be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper, including but not limited to transfer of this action to South Carolina.

FURTHER ANSWERING COVIL ALLEGES:

**COVIL CORPORATION, BY AND THROUGH ITS DULY-APPOINTED
RECEIVER PETER D. PROTOPAPAS' ANSWER TO CROSSCLAIMS OF
SENTRY INSURANCE, A MUTUAL COMPANY**

AS TO PARTIES, JURISDICTION AND VENUE

Covil Corporation (hereinafter “Covil”), by and through its duly-appointed Receiver, Peter D. Protopapas (the “Receiver”), answering the Crossclaim of Sentry Insurance, A Mutual Company , named as Sentry Casualty Company (“Sentry”) upon knowledge as to Covil, where known to the Receiver, and otherwise on information and belief, as follows:

57. Covil denies each and every allegation of Sentry’s Crossclaims not hereinafter specifically admitted.
58. Covil hereby incorporates by reference all responses, allegations and defenses set forth in Covil’s Answer to Zurich’s Complaint and Answer to all other Crossclaims alleged herein.
59. Upon information and belief, paragraph 68 of Sentry’s Crossclaim is admitted.
60. In response to the allegations contained in paragraph 69 of Sentry’s Crossclaim, only so much of said paragraph is admitted which states that Covil was incorporated and headquartered in South Carolina. Furthermore, Covil ceased conducting installation and removal operations in or around 1991 and was administratively dissolved by the South Carolina Secretary of State in and around 1993. Thereafter, Covil’s business records and business activities were controlled by Zurich American

Insurance Company (“Zurich”), Sentry Insurance, a Mutual Company (“Sentry”), and United States Fidelity and Guaranty Company (“USF&G” or “Travelers”). Zurich, Sentry, and USF&G are collectively referred to as “Primary Insurers.” Any remaining allegations are denied.

61. Paragraphs 70 through 72 of Sentry’s Crossclaim state legal conclusions to which no response is required; however, to the extent that a response is required, Covil admits that Sentry is attempting to bring a declaratory judgment action in this Court by Crossclaim, further admits that Zurich and Sentry have engaged in forum shopping and manufacturing claims, but denies that this Court is the proper venue or that North Carolina is the proper jurisdiction for this dispute. The remaining allegations of the paragraphs are denied.

AS TO SENTRY’S FIRST CROSS-CLAIM

62. As to paragraph 73 through 75 of Sentry’s Crossclaim, on information and belief, Sentry issued primary general liability coverage from 1964 to 1970, including (but not limited to) by and through Hardware Mutual Casualty Company policy 39 04132 02 (April 21, 1966 to March 31, 1967) and 39 04132 05 (for the three annual periods March 31, 1967 to March 31, 1970) with annual aggregate limits of \$300,000 for those claims (such as product liability claims) subject to an aggregate limit and \$300,000 per occurrence for claims not subject to an aggregate limit, with no limit to the number of occurrences. These primary policies also contain an unlimited supplemental duty to defend. Any remaining allegations are denied.

63. As to paragraph 76 through 78 of Sentry's Crossclaim, on information and belief, Sentry also issued umbrella coverage for the three separate annual periods March 31, 1967, to March 31, 1970, with \$1,000,000 in limits. Any remaining allegations are denied.

AS TO SENTRY'S SECOND CROSS-CLAIM

64. In response to the allegations contained in paragraphs 79 and 80 of Sentry's Crossclaim, Covil admits so much of said paragraphs which allege that Covil is seeking Sentry to fulfill its duties to defend and to indemnify Covil in the Underlying Actions. Covil makes reference to those actions and the documents filed in those actions. To the extent any remaining allegations exist, they are denied.

65. Covil admits so much of paragraphs 81, 82 and 83 of Sentry's Crossclaim which allege that judgment-holder Finch initiated a lawsuit in the United State District Court for the Middle District of North Carolina with civil action number 1:16-cv-01077. Covil makes reference to that lawsuit and the documents filed in that lawsuit. To the extent any remaining allegations exist, they are denied.

66. Covil admits so much of paragraphs 83 and 84 of Sentry's Crossclaim which allege that Crawford initiated a lawsuit in the South Carolina Court of Common Pleas for Spartanburg County with civil action number 2017-CP-42-04429. Covil makes reference to that lawsuit and the documents filed in that lawsuit. To the extent any remaining allegations exist, they are denied.

67. Paragraph 85 of Sentry's Crossclaim is denied.

AS TO SENTRY'S THIRD CROSS-CLAIM

68. In response to the allegations contained in paragraphs 86 and 87 of Sentry's Crossclaim, Covil admits so much of said paragraphs which allege that Covil is seeking Sentry to fulfill its duties to defend and to indemnify Covil in the Underlying Actions. Covil makes reference to those actions and the documents filed in those actions. To the extent any remaining allegations exist, they are denied.

AS TO SENTRY'S FOURTH CROSS-CLAIM

69. As to paragraphs 88, 89 and 90 of Sentry's Crossclaim, Covil denies the declarations sought by Sentry. To the extent the paragraphs refer to insurance policies issued by Sentry, Covil makes reference to those policies for their terms and provisions. Further, Covil makes reference to the Underlying Lawsuits and the documents filed in those actions. To the extent there are any remaining allegations, those allegations are denied.

AS TO SENTRY'S FIFTH CROSS-CLAIM

70. As to paragraphs 91 and 92 of Sentry's Crossclaim, Covil denies the declarations sought by Sentry. To the extent the paragraphs refer to insurance policies issued by Sentry, Covil makes reference to those policies for their terms and provisions. To the extent there are any remaining allegations, those allegations are denied.

AS TO SENTRY'S SIXTH CROSS-CLAIM

71. As to paragraphs 93 and 94 of Sentry's Crossclaim, Covil denies the declarations sought by Sentry. To the extent the paragraphs refer to insurance policies issued by

Sentry, Covil makes reference to those policies for their terms and provisions. Further, Covil makes reference to the Underlying Lawsuits and the documents filed in those actions. To the extent there are any remaining allegations, those allegations are denied.

AS TO SENTRY'S SEVENTH CROSS-CLAIM

72. As to paragraphs 95, 96 and 97 of Sentry's Crossclaim, Covil denies the declarations sought by Sentry. To the extent the paragraphs refer to insurance policies issued by Sentry, Covil makes reference to those policies for their terms and provisions. Further, Covil makes reference to the Underlying Lawsuits and the documents filed in those actions. To the extent there are any remaining allegations, those allegations are denied.

AS TO SENTRY'S EIGHTH CROSS-CLAIM

73. As to paragraphs 98 and 99 of Sentry's Crossclaim, Covil denies the declarations sought by Sentry. To the extent the paragraphs refer to insurance policies issued by Sentry, Covil makes reference to those policies for their terms and provisions. Further, Covil makes reference to the Underlying Lawsuits and the documents filed in those actions. To the extent there are any remaining allegations, those allegations are denied.

74. Covil denies all allegations contained in the Wherefore paragraph and Prayer for Relief of Sentry's Crossclaims.

75. Covil denies all allegations of Sentry's Crossclaims not heretofore expressly admitted or modified.

WHEREFORE, having fully answered Sentry's Crossclaim, the Receiver prays for a trial by jury and that the Crossclaim be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper, including but not limited to transfer of this action to South Carolina.

**COVIL CORPORATION, BY AND THROUGH ITS DULY-APPOINTED
RECEIVER PETER D. PROTOPAPAS' ANSWER TO CROSSCLAIMS OF
UNITED STATES FIDELITY AND GUARANTY COMPANY**

Covil Corporation (hereinafter "Covil"), by and through its duly-appointed Receiver, Peter D. Protopapas (the "Receiver"), answering the Crossclaim of United States Fidelity and Guaranty Company ("USF&G") upon knowledge as to Covil, where known to the Receiver, and otherwise on information and belief, as follows:

76. Covil denies each and every allegation of USF&G's Crossclaims not hereinafter specifically admitted.

77. Covil hereby incorporates by reference all responses, allegations and defenses set forth in Covil's Answer to Zurich's Complaint and Answer to all other Crossclaims alleged herein.

AS TO INTRODUCTION

78. As to paragraphs 1 through 6 of USF&G's Crossclaim, Covil denies the declarations sought by USF&G. To the extent the paragraphs refer to insurance policies issued by USF&G, Covil makes reference to those policies for their terms

and provisions. Further, Covil makes reference to the Underlying Lawsuits and the documents filed in those actions. To the extent there are any remaining allegations, those allegations are denied.

AS TO PARTIES

79. Upon information and belief, paragraph 7 of USF&G's Crossclaim is admitted.

80. In response to the allegations contained in paragraph 8 of USF&G's Crossclaim, only so much of said paragraph is admitted which states that Covil was incorporated and headquartered in South Carolina. Furthermore, Covil ceased conducting installation and removal operations in or around 1991 and was administratively dissolved by the South Carolina Secretary of State in and around 1993. Thereafter, Covil's business records and business activities were controlled by Zurich American Insurance Company ("Zurich"), Sentry Insurance, a Mutual Company ("Sentry"), and United States Fidelity and Guaranty Company ("USF&G" or "Travelers"). Zurich, Sentry, and USF&G are collectively referred to as "Primary Insurers." Any remaining allegations are denied.

81. Upon information and belief, paragraph 9 of USF&G's Crossclaim is admitted.

AS TO JURISDICTION AND VENUE

82. Paragraphs 10 and 11 of USF&G's Crossclaim state legal conclusions to which no response is required; however, to the extent that a response is required, Covil admits that USF&G is attempting to bring a declaratory judgment action in this Court by Crossclaim, further admits that Zurich and USF&G have engaged in forum

shopping and manufacturing claims, but denies that this Court is the proper venue or that North Carolina is the proper jurisdiction for this dispute. The remaining allegations of the paragraphs are denied.

AS TO FACTUAL BACKGROUND

83. In response to the allegations contained in paragraph 12 of USF&G's Crossclaim, Covil admits so much of said paragraph which alleges that USF&G is a primary insurer of Covil for at least the years March 31, 1976 to March 31, 1978. Covil denies the remaining allegations of the paragraph.

84. Covil admits so much of paragraph 13 of USF&G's Crossclaim which alleges that there are additional lawsuits against Covil which implicate USF&G's duty to defend and indemnify Covil. Covil denies any remaining allegations and makes reference to the policies referred to by USF&G.

85. Paragraph 14 and 15 of USF&G's Crossclaim are admitted.

86. As to paragraphs 16, 17 and 18 of USF&G's Crossclaim, Covil makes reference to the *Finch* case and the documents filed in *Finch*. All remaining allegations are denied.

87. As to paragraph 19 of USF&G's Crossclaim, Covil admits a verdict was entered against Covil in the *Finch* suit in the amount \$35,582,365.99, inclusive of prejudgment interest, which continues to accrue post judgment interest. All remaining allegations are denied.

AS TO USF&G'S POLICY

88. In response to the allegations contained in paragraphs 20 through 27 of USF&G's Crossclaim, Covil is without sufficient information or belief to admit or deny the allegations. To the extent the paragraphs refers to insurance policies issued by USF&G to Covil, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions. To the extent there are any remaining allegations, those allegations are denied.

AS TO THE DISPUTED COVERAGE ISSUES

89. As to paragraphs 28 through 34 of USF&G's Crossclaim, Covil admits USF&G, Zurich and Sentry are liable for all damages, without limitation, assessed against Covil, by way of settlement or judgment, as a result of the Primary Insurers' actions in failing adequately to defend Covil against the *Finch* suit. Covil makes reference to the *Finch* case and the documents filed in *Finch*. All remaining allegations are denied.

AS TO COUNT I

90. As to paragraph 35 of USF&G's Crossclaim, Covil repeats and incorporates by reference the foregoing responses, allegations and defenses as if fully set forth herein.

91. Paragraph 36 of USF&G's Crossclaim is denied.

AS TO COUNT II

92. As to paragraph 37 of USF&G's Crossclaim, Covil repeats and incorporates by reference the foregoing responses, allegations and defenses as if fully set forth herein.

93. Paragraphs 38 and 39 of USF&G's Crossclaim are denied.

AS TO COUNT III

94. As to paragraph 40 of USF&G's Crossclaim, Covil repeats and incorporates by reference the foregoing responses, allegations and defenses as if fully set forth herein.

95. Paragraph 41 of USF&G's Crossclaim is denied.

AS TO COUNT IV

96. As to paragraph 42 of USF&G's Crossclaim, Covil repeats and incorporates by reference the foregoing responses, allegations and defenses as if fully set forth herein.

97. Paragraph 43 of USF&G's Crossclaim is denied.

98. Covil denies all allegations contained in the Wherefore paragraph and Prayer for Relief of USF&G's Crossclaim.

99. Covil denies all allegations of USF&G's Crossclaim not heretofore expressly admitted or modified.

WHEREFORE, having fully answered USF&G's Crossclaim, the Receiver prays for a trial by jury and that the Crossclaim be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper, including but not limited to transfer of this action to South Carolina.

FURTHER ANSWERING THE RECEIVER ALLEGES:

COUNTERCLAIMS AGAINST ZURICH AMERICAN INSURANCE COMPANY; AND CROSSCLAIMS AGAINST DEFENDANTS SENTRY INSURANCE, A MUTUAL COMPANY, NAMED AS SENTRY CASUALTY COMPANY; UNITED STATES FIDELITY AND GUARANTY COMPANY; TIG INSURANCE COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; AND FIRST STATE INSURANCE COMPANY

100. Covil Corporation is a dissolved South Carolina corporation ("Covil"), appearing by and through its duly appointed receiver, Peter D. Protopapas, (the "Receiver"). This Court appointed the Receiver to undertake actions to administer all assets of Covil Corporation, including without limitation its insurance policies. See Receiver Order, p. 1 ("This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions of failure to act of Covil's insurance carriers.").
101. Upon information and belief, Zurich American Insurance Company ("Zurich") is a corporation organized under the laws of the State of New York with its principal place of business located in the State of Illinois. Zurich is the successor by merger to Maryland Casualty Company and Northern Insurance Company of New York.

102. Upon information and belief, Sentry Insurance, A Mutual Company (“Sentry”) is a corporation organized and existing under the laws of the State of Wisconsin with its principal place of business in the State of Wisconsin. Sentry is the successor by merger to, among others, Hardware Mutual Insurance Company.
103. Upon information and belief, United States Fidelity and Guaranty Company (“USF&G”) is a corporation organized and existing under the laws of the State of Connecticut with its principal place of business in the State of Connecticut.
104. Upon information and belief, TIG Insurance Company (“TIG”) is the successor in interest to Fairmont Specialty Insurance Company, formerly known as Ranger Insurance Company, and is a corporation organized and existing under the laws of the State of California with a principal place of business in the State of New Hampshire.
105. Upon information and belief, Hartford Accident and Indemnity Company (“Hartford”) is a corporation organized and existing under the laws of the State of Connecticut with a principal place of business in the State of Connecticut.
106. Upon information and belief, First State Insurance Company (“First State”, except when referred to jointly with “Hartford,” in which case “Hartford” also applies to First State) is a corporation organized and existing under the laws of the State of Connecticut with a principal place of business in the State of Connecticut.

107. Ann Finch is the Executrix of the Estate of Franklin Delenor Finch and upon information and belief a citizen and resident of North Carolina.

108. DARRELL A. CONNOR, as Executrix of the Estate of Charles Franklin Connor; ROBERT A. MULLINAX, as Executor of the Estate of Jack Junior Waugh; ROBERT JOSEPH ELLIS; and SHARON WHITEHEAD, as Executrix of the Estate of James T. Whitehead are claimants against Covil corporation and collectively referred to as “Individual Defendants.”

THE INSURANCE POLICIES

109. Each of Zurich, Sentry, USF&G, TIG and Hartford issued general liability policies to Covil. These policies all provide defense and indemnity coverage, in varying degrees, for the Covil asbestos suits, as those terms are used in the insurance industry. All of Zurich, Sentry and USF&G have admitted that they insured Covil and are responsible for Covil’s asbestos suits since they have been controlling Covil’s defense and making determinations regarding potential liability for Covil asbestos suits. Certain of Covil’s insurance policies are missing, in whole or in part. However, Covil’s insurers have issued policies through standard terms and conditions applicable to general liability policies, and have provided secondary evidence of the issuance of such policies or the policies themselves. It is the burden of Covil’s insurers to prove any limitation to or exclusion of coverage.

110. Zurich has admitted to the issuance of a series of commercial general liability insurance policies (policy nos. 41-190897 and 41-206393) issued by its

predecessors, to Covil for the six policy periods of March 31, 1970 to March 31, 1973 and March 31, 1973 to March 31, 1976 (collectively, the “Zurich Primary Policies”).

111. Though no policy documentation is available with regard to policy no. 41206393, Zurich admits that said policy contains the same terms and conditions applicable to policy no. 41- 190897, with the exception of certain increased limits of liability under policy no. 41-206393.

112. Each of the 1970 to 1973 Zurich primary policy years provides an annual aggregate limit of \$300,000 for those claims, such as product liability claims, for which an aggregate limit applies. This policy also provides coverage of \$100,000 per person and \$300,000 per occurrence for other covered claims, with no limit to the number of occurrences. These policy years have an unlimited supplemental defense obligation. Each of the 1973 to 1976 Zurich primary policy years provides an annual aggregate limit of \$500,000 for those claims, such as product liability claims, for which an aggregate limit applies. This policy also provides coverage of \$100,000 per person and \$500,000 per occurrence for other covered claims, with no limit to the number of occurrences. These policy years also have an unlimited supplemental defense obligation.

113. Zurich also issued a series of umbrella policies (policy nos. 48-001080, 48010333, and 48-019572) to Covil for the policy periods of March 31, 1970 to March 31, 1971, March 31, 1971 to March 31, 1972, March 31, 1972 to March 31,

1973, and March 31, 1973 to March 31, 1974 (collectively, the “Zurich Umbrella Policies”). The Zurich Umbrella Policies each has a \$1,000,000 limit, per occurrence, and in the aggregate for those claims subject to an aggregate limit, such as product liability claims, except for the period December 16, 1971 to January 26, 1972, when the limits (both per occurrence and aggregate) were increased to \$3,000,000. There is no limit to the number of occurrences covered by the Zurich Umbrella Policies.

114. On information and belief, Sentry issued primary general liability coverage from at least 1964 to 1970, including (but not limited to) by and through Hardware Mutual Casualty Company policy 39 04132 02 (April 21, 1966 to March 31, 1967) and 39 04132 05 (for the three annual periods March 31, 1967 to March 31, 1970) with annual aggregate limits of \$300,000 for those claims (such as product liability claims) subject to an aggregate limit and \$300,000 per occurrence for claims not subject to an aggregate limit, with no limit to the number of occurrences. These primary policies also contain an unlimited supplemental duty to defend.

115. On information and belief, Sentry also issued umbrella coverage for at least the three separate annual periods March 31, 1967, to March 31, 1970, with \$1,000,000 in limits.

116. On information and belief, USF&G issued primary commercial general liability policy SMP 490049, for the two annual periods March 31, 1976 to March 31, 1978, with \$300,000 in per occurrence and aggregate limits for claims for which an

aggregate limit pertains, with no limit to the number of occurrences. The USF&G policy years also contain an unlimited supplemental defense obligation. Each of the \$300,000 in limits (where applicable) applies separately to each of the two annual periods of this policy.

117. On information and belief, TIG issued umbrella coverage that “drops down” to provide “first dollar” coverage in the event there is no available primary coverage. This umbrella coverage, in such event, provides for an unlimited supplemental defense obligation. Each TIG policy year provides \$2,000,000 for claims that are subject to an aggregate limit and \$2,000,000 per occurrence for all other claims, with no limit to the number of occurrences. TIG issued the following umbrella policies:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
July 25, 1976 – February 15, 1977	RU 309724	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense
February 15, 1977 – March 31, 1977	RU 308527	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense
March 31, 1978 – March 31, 1979	RU 430944	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense

118. On information and belief, Hartford issued the following primary insurance policies with \$500,000 in per occurrence limits (which were increased to

\$1,000,000 per occurrence in 1984, 1985 and 1986), and no limit to the number of occurrences, and with an unlimited supplemental defense obligation, applicable to claims other than product liability suits:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1978 – March 31, 1979	22 C 936166	\$500,000 per occurrence; supplemental defense
March 31, 1979 – March 31, 1980	22 C 938625	\$500,000 per occurrence; supplemental defense
March 31, 1980 – March 31, 1981	22 C 941900	\$500,000 per occurrence; supplemental defense
March 31, 1981 – March 31, 1982	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1982 – March 31, 1983	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1983 – March 31, 1984	22 C 943927	\$1,000,000 per occurrence; supplemental defense
March 31, 1984 – March 31, 1985	22 C 943927	\$1,000,000 per occurrence; supplemental defense
March 31, 1985 – March 31, 1986	22 C 943927	\$1,000,000 per occurrence; supplemental defense

119. On information and belief, Hartford and First State, a Hartford company, issued umbrella coverage with the same “drop down” and supplemental defense provisions as TIG, responsive on a per occurrence basis with the exception of product liability claims, as follows:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1980 – March 31, 1981	22 RHU 371518	\$2,000,000 per occurrence
March 31, 1981 – March 31, 1982	22 RHU 371789	\$5,000,000 per occurrence
March 31, 1982 – March 31, 1983	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1983 – March 31, 1984	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1984 – March 31, 1985	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1985 – March 31, 1986	22 RHU EX 4908	\$5,000,000 per occurrence

THE UNDERLYING ACTIONS

120. Covil was named as a defendant in a lawsuit filed in the United States District Court for the Middle District of North Carolina, entitled “*ANN FINCH, Individually, and as Executrix of the Estate of Franklin Delenor Finch, Plaintiff, vs. BASF CATALYSTS LLC, individually and as successor-in-interest to EASTERN MAGNESIA TALC CO. and ENGELHARD, PITA REALTY LTD; COVIL CORPORATION; FOSTER WHEELER ENERGY CORPORATION; MCNEIL (OHIO) CORPORATION, INC.; MCNEIL & NRM, INC.; PFIZER, INC.; CBS CORPORATION f/k/a Viacom Inc. (sued as successor-by-merger to CBS Corporation f/k/a Westinghouse Electric Corporation) and also as successor-in-interest to BF Sturtevant; FMC CORPORATION, Individually and as successor in interest to Stearns Brakes; RED SEAL ELECTRIC COMPANY; and REXNORD INDUSTRIES, LLC MCNEIL (OHIO) CORPORATION, INC.; MCNEIL & NRM,*

INC.; PFIZER, INC.; CBS CORPORATION f/k/a Viacom Inc. (sued as successor-by-merger to CBS Corporation f/k/a Westinghouse Electric Corporation) and also as successor-in-interest to BF Sturtevant; FMC CORPORATION, Individually and as successor in interest to Stearns Brakes; RED SEAL ELECTRIC COMPANY; and REXNORD INDUSTRIES, LLC”, file number 1:16-cv-01077 (the “*Finch* suit”).

121. On October 19, 2018, a verdict in the amount of \$32,700,000, plus \$5,633,358.89 in pre-judgment interest, was entered against Covil in the *Finch* suit.

This verdict is now pending appeal.

122. Covil also has been named as a defendant in other underlying lawsuits.

123. The aforementioned underlying lawsuits are hereinafter collectively referred to as the “Covil asbestos suits.”

COUNT I.

COUNTERCLAIM AGAINST ZURICH AND CROSSCLAIM AGAINST SENTRY AND USF&G (Breach of Contract Against Zurich, Sentry and USF&G)

124. On October 19, 2018, verdict was entered against Covil in the *Finch* suit in the amount of \$32,700,000 plus \$5,633,358.89 in pre-judgment interest. That judgment is on appeal.

125. The *Finch* suit alleged wrongful death relating to plaintiff Franklin Delenor Finch’s exposure to asbestos first beginning on December 15, 1975, during the

Zurich primary policy with a policy period effective between March 31, 1975 to March 31, 1976, and continuing thereafter.

126. Finch contended and the jury found that Covil was responsible for plaintiff Franklin Delenor Finch's exposure to asbestos and a subsequent diagnosis of mesothelioma.

127. Covil's defense was controlled by Sentry, Zurich and USF&G for the *Finch* suit.

128. Finch issued to Sentry, Zurich and USF&G demands for policy limits in settlement of the Finch's claims and Sentry, Zurich and USF&G refused to settle the claim. Instead, Zurich, Sentry and USF&G placed their own interests above their insured.

129. Zurich and USF&G between themselves had not less than \$800,000 in per occurrence and \$1,300,000 in aggregate limits available to resolve the *Finch* suit in their pertinent policy years (1975 to 1978) and not less than \$4,800,000 in per occurrence and \$5,300,000 in aggregate limits otherwise available to resolve the *Finch* suit. Zurich and USF&G declined to resolve the *Finch* suit within policy limits although they had the opportunity to do so.

130. Each of Sentry, Zurich and USF&G is jointly and severally responsible to pay the entire verdict in the *Finch* suit, including all interest and ancillary damages.

131. The *Finch* suit is covered in its entirety under the policies of insurance issued, respectively, by Zurich and USF&G, each of which owes an independent duty fully to protect its insured, Covil, and injured parties with unsatisfied claims against

Covil. Sentry, Zurich and USF&G have breached their contracts of insurance by, among other things (i) failing to resolve the *Finch* suit within policy limits; (ii) failing or refusing to pay in full the *Finch* suit verdict; (iii) failing properly to treat claims as operations claims not subject to an aggregate limit of liability; and (iv) failing to protect the interests and rights of the claimants against Covil.

132. Covil seeks all compensatory, ancillary and consequential damages as a result of these breaches of contract by Sentry, Zurich and USF&G.

COUNT II

COUNTERCLAIM AGAINST ZURICH AND CROSSCLAIM AGAINST USF&G (Bad Faith Against Zurich and USF&G)

133. Covil repeats and realleges the above allegations and further alleges as follows:

134. The insurance policies issued by Zurich and USF&G contain an implied covenant of good faith and fair dealing. This covenant of good faith and fair dealing requires these defendants to put the interests of their insured above their own.

135. Zurich and USF&G breached their duties of good faith and fair dealing, placed their interests above those of Covil and Covil's claimants and creditors, and have engaged in bad faith. Among other things, Zurich and USF&G engaged in bad faith by failing or refusing to resolve the *Finch* suit within their policy limits; by allowing Covil to receive an adverse verdict of \$32,700,000 in the *Finch* suit; and by failing to protect the interests of Covil and its claimants and creditors.

136. As a remedy for such bad faith, Covil seeks an order requiring Zurich and USF&G jointly and severally, to pay for the *Finch* suit verdict in full, including all pre- and post-judgment interest, without impairing any limit of liability under any of their policies. In addition, Covil seeks an order requiring Zurich and USF&G to pay or reimburse Covil for all costs and expenses resulting from such bad faith conduct and to pay to Covil such damages as may be necessary to deter such bad faith conduct by these defendants and others.

COUNT III

COUNTERCLAIM AGAINST ZURICH AND CROSSCLAIM AGAINST SENTRY, USF&G, TIG AND HARTFORD (Declaratory Judgment Against Sentry, Zurich, USF&G, TIG and Hartford)

137. Covil repeats and realleges the above allegations and further alleges as follows:

138. Covil seeks a declaration and order that each of the 1970 to 1973 Zurich primary policy years under policy no. 41-190897 provides an annual aggregate limit of \$300,000 for product liability claims to which an aggregate limit applies; that this policy also provides coverage of \$100,000 per person and \$300,000 per occurrence for other covered claims, with no limit to the number of occurrences; and that these policy years have an unlimited supplemental defense obligation. Covil seeks a further declaration and order that each of the 1973 to 1976 Zurich primary policy years under policy no. 41-20639 provides an annual aggregate limit of \$500,000 for product liability claims for which an aggregate limit applies; that this policy

also provides coverage of \$100,000 per person and \$500,000 per occurrence for other covered claims, with no limit to the number of occurrences; and that these policy years also have an unlimited supplemental defense obligation.

139. Covil seeks a further declaration and order that Zurich also issued a series of umbrella policies (policy nos. 48-001080, 48010333, and 48-019572) to Covil for the policy periods March 31, 1970 to March 31, 1971, March 31, 1971 to March 31, 1972, March 31, 1972 to March 31, 1973, and March 31, 1973 to March 31, 1974 (collectively, the “Zurich Umbrella Policies”); that each Zurich Umbrella Policy has a \$1,000,000 limit, per occurrence, and in the aggregate for those product liability claims subject to an aggregate limit, except for the period December 16, 1971 to January 26, 1972, when the limits (both per occurrence and aggregate) were increased to \$3,000,000; and that there is no limit to the number of occurrences covered by the Zurich Umbrella Policies.

140. Covil seeks a further declaration and order that Sentry issued primary general liability coverage from 1964 to 1970, including (but not limited to) by and through Hardware Mutual Casualty Company policy 39 04132 02 (April 21, 1966 to March 31, 1967) and 39 04132 05 (for the three annual periods March 31, 1967 to March 31, 1970) with annual aggregate limits of \$300,000 for those product liability claims subject to an aggregate limit and \$300,000 per occurrence for claims not subject to an aggregate limit with no limit to the number of occurrences, and with an unlimited supplemental duty to defend.

141. Covil also seeks a declaration and order that Sentry issued umbrella coverage for the three annual periods March 31, 1967, to March 31, 1970, with \$1,000,000 in limits.

142. Covil seeks a further declaration and order that USF&G issued primary commercial general liability policy SMP 490049, for the two annual periods March 31, 1976 to March 31, 1978, with \$300,000 in per occurrence and aggregate limits for claims for which an aggregate limit pertains, with no limit to the number of occurrences; that the USF&G policy also contains an unlimited supplemental defense obligation; and that each of the \$300,000 in limits applies separately to each of the two annual periods of this policy for product liability claims.

143. Covil seeks a further declaration and order that TIG issued umbrella coverage that “drops down” to provide “first dollar” coverage in the event there is no available primary coverage; that this umbrella coverage, in such event, provides for an unlimited supplemental defense obligation; that each TIG policy year provides \$2,000,000 for claims that are subject to an aggregate limit and \$2,000,000 per occurrence for all other claims, with no limit to the number of occurrences; and that TIG issued the following umbrella policies:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
July 25, 1976 – February 15, 1977	RU 309724	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense

February 15, 1977 – March 31, 1977	RU 308527	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense
March 31, 1978 – March 31, 1979	RU 430944	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense

144. Covil seeks a further declaration and order that Hartford issued the following primary insurance policies with \$500,000 in per occurrence limits (which were increased to \$1,000,000 per occurrence in 1984, 1985 and 1986), and no limit to the number of occurrences, and with an unlimited supplemental defense obligation, applicable to claims other than product liability suits:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1978 – March 31, 1979	22 C 936166	\$500,000 per occurrence; supplemental defense
March 31, 1979 – March 31, 1980	22 C 938625	\$500,000 per occurrence; supplemental defense
March 31, 1980 – March 31, 1981	22 C 941900	\$500,000 per occurrence; supplemental defense
March 31, 1981 – March 31, 1982	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1982 – March 31, 1983	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1983 – March 31, 1984	22 C 943927	\$1,000,000 per occurrence; supplemental defense

March 31, 1984 – March 31, 1985	22 C 943927	\$1,000,000 per occurrence; supplemental defense
March 31, 1985 – March 31, 1986	22 C 943927	\$1,000,000 per occurrence; supplemental defense

145. Covil seeks a further declaration and order that Hartford and First State, a Hartford company, issued umbrella coverage with the same “drop down” and supplemental defense provisions as TIG, responsive on a per occurrence basis with the exception of product liability claims, as follows:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1980 – March 31, 1981	22 RHU 371518	\$2,000,000 per occurrence
March 31, 1981 – March 31, 1982	22 RHU 371789	\$5,000,000 per occurrence
March 31, 1982 – March 31, 1983	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1983 – March 31, 1984	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1984 – March 31, 1985	22 RHU EX 4908	\$5,000,000 per occurrence
<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1985 – March 31, 1986	22 RHU EX 4908	\$5,000,000 per occurrence

146. The foregoing policies of insurance are referred to as the “Covil Insurance Policies.” As to all of the Covil Insurance Policies, Covil seeks the following declarations:

- a. The Covil Insurance Policies cover all Covil asbestos suits that allege any of bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of their policy periods;
- b. Each Covil asbestos suit “triggers” all Covil Insurance Policies with policy periods from the date of first alleged exposure to asbestos up through and including the date of discovery, or “manifestation” of an asbestos-related disease;
- c. Covil may select the policy or policy years to which to assign or allocate each Covil asbestos suit-related loss;
- d. In the case of a claimed ambiguity in any Covil Insurance Policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Covil Insurance Policies;
- e. Defense costs for the Covil asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of Covil Insurance Policies;
- f. If any allegation or cause of action in a Covil asbestos suit is actually or potentially covered under the Covil Insurance Policies, each defendant insurer must defend or reimburse the costs of defending against all of said allegations and causes of action contained in such complaint;
- g. Each Covil Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Covil asbestos suits, unless there is an unambiguous exclusion or limitation that applies to any such suit or there

is no bodily injury or allegation thereof during the period of any such Covil Insurance Policy;

- h. Each Covil Insurance Policy must cover the Covil asbestos suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods;
- i. The Covil asbestos suits that allege exposure to asbestos for which Covil is alleged to be liable, during Covil’s operations, including Covil’s construction, installation, maintenance or removal activities, are subject only to the “per occurrence” limits of the Covil Insurance Policies, and not subject to “aggregate” limits, if any, of the Covil Insurance Policies;
- j. Any aggregate limit on coverage in any of the Covil Insurance Policies is a limitation on coverage, and therefore each defendant insurer has the burden to prove, based on the evidence, any assertion that any particular Covil asbestos suit is subject to the aggregate limits in the Covil Insurance Policies, if any; and
- k. Each defendant insurer has the burden to prove, based on the evidence, that any particular Covil asbestos suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Covil Insurance Policies, in order to subject the claim to the aggregate limits in the Covil Insurance Policies, if any.

147. An actual and justiciable controversy exists between Covil and each of the defendant insurers concerning their obligations under the Covil Insurance Policies.

148. Judicial declarations are necessary and appropriate at this time, and under the circumstances alleged above, so that Covil may ascertain its rights under the Covil Insurance Policies. A judicial declaration of Covil's rights will obviate *seriatim* litigation and a multiplicity of actions that otherwise would result from the actual and justiciable controversy between Covil and the insurance company defendants concerning their respective rights and obligations under the Covil Insurance Policies.

COUNT IV

(Declaratory Judgment Against Individual Defendants)

149. Covil repeats and realleges the above allegations and further alleges as follows:

150. A verdict has been awarded in the *Finch* suit in the amount of \$32,700,000. Covil contends that this entire verdict must be paid for by defendants Sentry, Zurich and USF&G without impairing any limit of liability under the insurance policies issued by these defendants. Covil also contends that Sentry, Zurich and USF&G may have improperly allocated prior settlement payments to the product liability coverage part of their policies.

151. In light of the foregoing, Covil seeks a declaration and order that certain rights and interests of the individually-named defendants be limited and curtailed as follows: (i) that any judgment obtained against Covil in a Covil asbestos suit be limited to all sums that may be collected from defendants Zurich, Sentry, USF&G, TIG and Hartford, individually or collectively; (ii) that punitive or exemplary

damages are not awardable against the Receiver or the Receiver acting on behalf of Covil pursuant to South Carolina Code § 15-65-10; and (iii) that any judgment obtained against Covil that is or may be subject to an aggregate limit of any insurance policy or policies issued to Covil must fairly and equitably take into account such other judgments that may be outstanding at the time of such judgment.

PRAYER FOR RELIEF

WHEREFORE, Covil Corporation, by and through its duly-appointed Receiver, demands judgment against defendants as follows:

A. On Count I, breach of contract damages, in amounts to be proven at trial, including all compensatory, ancillary and consequential damages;

B. On Count II, for a declaration and order that none of Sentry, Zurich or USF&G may enforce any purported policy limitation or exclusion allegedly running in their favor, for money damages in an amount to be proven at trial, and for exemplary or punitive damages in an amount to deter such bad faith conduct by these defendants and others;

C. On Count III, for the declarations sought therein, including but not limited to the following:

(i). The Covil Insurance Policies cover the Covil asbestos suits that allege any of bodily injury, personal injury injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of their policy periods;

(ii). Each Covil asbestos suit “triggers” all Covil Insurance Policies with policy periods from the date of first alleged exposure up through and including the date of discovery, or “manifestation” of an asbestos-related disease;

(iii). Covil may select the policy or policy years to which to assign or allocate any loss;

(iv). In the case of a claimed ambiguity in any Covil Insurance Policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Covil Insurance Policies;

(v). Each defendant insurer is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Covil asbestos suits;

(vi). Each Covil Insurance Policy must cover the Covil asbestos suits, in full, up to their “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods;

(vii). The Covil asbestos suits that allege exposure to asbestos during Covil’s operations, including construction, installation, maintenance or removal activities, are subject only to the “per occurrence” limits of the Covil Insurance Policies, and not subject to “aggregate” limits, if any, of the Covil Insurance Policies;

(viii). Any aggregate limit on coverage in any of the Covil Insurance Policies is a limitation on coverage that each insurer has the burden to prove; and

(ix). Each insurer has the burden to prove, based on the evidence, that any particular asbestos suit is either a “products” claim or a “completed operations” claim,

as those terms are defined in the CNA Policies, in order to subject the claim to the aggregate limits in its Policies, if any;

D. On Count IV, for the declarations sought therein; and

E. Such other and further relief as this Court deems just and proper.

JURY DEMAND

The Receiver hereby demands a trial by jury on all issues so triable.

Dated: July 30, 2019

/s/ William K. Davis
William K. Davis (N.C. Bar No. 1117)
BELL, DAVIS & PITT, P.A.
P.O. Box 21029
Winston Salem, North Carolina 27120-1029
T: (336) 714-4146
wdavis@belldavispitt.com

Paul Anton Zevnik
Brady Edwards
Nancy Patterson (Appearance Forthcoming)
W. Brad Nes
Clayton A. Morton (Appearance Forthcoming)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
T: (202) 739-3000

Attorneys for Covil Corporation, acting through
Peter D. Protopapas, Receiver of Covil
Corporation

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing brief via the Court's electronic filing system, pursuant to the Electronic Filing Procedures, on all attorneys of record who have entered an appearance by ECF in this matter.

This the 30th day of July, 2019.

/s/ William K. Davis

William K. Davis

N.C. State Bar No. 1117

BELL, DAVIS & PITT, P.A.

P.O. Box 21029

Winston Salem, North Carolina 27120-1029

(336) 714-4146

wdavis@belldavispitt.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CASE NUMBER: 1:18-CV-932**

ZURICH AMERICAN INSURANCE
COMPANY,

Plaintiff,

vs.

COVIL CORPORATION by and
through its duly appointed Receiver,
Peter D. Protopapas; SENTRY
CASUALTY COMPANY; UNITED
STATES FIDELITY AND
GUARANTY COMPANY; TIG
INSURANCE COMPANY, as successor
in interest to Fairmont Specialty
Insurance Company, f/k/a Ranger
Insurance Company; HARTFORD
ACCIDENT AND INDEMNITY
COMPANY; ANN FINCH, as Executrix
of the Estate of Franklin Delenor Finch,
DARRELL A. CONNOR, as Executrix
of the Estate of Charles Franklin Connor;
ROBERT JOSEPH ELLIS; and
SHARON WHITEHEAD, as Executrix
of the Estate of James T. Whitehead,

Defendants.

**PETER PROTOPAPAS', AS COURT
APPOINTED RECEIVER FOR COVIL
CORPORATION, AMENDED
ANSWER TO PLAINTIFF'S
COMPLAINT;
ANSWERS TO CROSSCLAIMS
ASSERTED BY TIG INSURANCE
COMPANY AS SUCCESSOR IN
INTEREST TO FAIRMONT
SPECIALTY INSURANCE COMPANY,
F/K/A RANGER INSURANCE
COMPANY; SENTRY INSURANCE, A
MUTUAL COMPANY, NAMED AS
SENTRY CASUALTY COMPANY;
UNITED STATES FIDELITY AND
GUARANTY COMPANY;
COUNTERCLAIMS AGAINST
ZURICH AMERICAN INSURANCE
COMPANY; AND CROSSCLAIMS
AGAINST SENTRY INSURANCE, A
MUTUAL COMPANY, NAMED AS
SENTRY CASUALTY COMPANY;
UNITED STATES FIDELITY AND
GUARANTY COMPANY; TIG
INSURANCE COMPANY AS
SUCCESSOR IN INTEREST TO
FAIRMONT SPECIALTY INSURANCE
COMPANY, F/K/A RANGER
INSURANCE COMPANY; HARTFORD
ACCIDENT AND INDEMNITY
COMPANY AND FIRST STATE
INSURANCE COMPANY; AND THIRD
PARTY DEMAND AGAINST
PENNSYLVANIA NATIONAL
MUTUAL CASUALTY INSURANCE
CO.**

Covil Corporation (hereinafter “Covil”), by and through its duly-appointed Receiver, Peter D. Protopapas (the “Receiver”), answering the complaint upon knowledge as to Covil, where known to the Receiver, and otherwise on information and belief, as follows:

FOR A FIRST DEFENSE

1. Covil denies each and every allegation of the complaint not hereinafter specifically admitted.

AS TO THE PARTIES

2. In response to the allegations contained in paragraph 1, upon information and belief they are admitted.
3. In response to the allegations contained in paragraph 2, only so much of said paragraph is admitted which states that Covil was incorporated and headquartered in South Carolina. Furthermore, Covil ceased conducting installation and removal operations in or about 1991, and was administratively dissolved by the South Carolina Secretary of State in or about 1993. Thereafter, Covil’s business records and business activities were controlled by Zurich American Insurance Company (“Zurich”), Sentry Insurance, a Mutual Company (“Sentry”), and United States Fidelity and Guaranty Company (“USF&G” or “Travelers”). Zurich, Sentry, and USF&G are collectively referred to as “Primary Insurers.” Any remaining allegations are denied.

4. In response to the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, and 11, upon information and belief they are admitted.

AS TO JURISDICTION AND VENUE

5. Paragraphs 12 and 13 state legal conclusions to which no response is required; however, to the extent that a response is required, Covil admits that Zurich is attempting to bring a declaratory judgment action in this Court, further admits that Zurich has engaged in forum shopping and manufacturing claims, but denies that this Court is the proper venue or that North Carolina is the proper jurisdiction for this dispute. The remaining allegations of the paragraphs are denied.

AS TO THE ALLEGED INSURANCE POLICIES

6. In response to the allegations contained in paragraph 14, Covil only admits so much of said paragraph which alleges that Zurich is one of the primary insurers for Covil with insurance policies in place for the years March 31, 1970 to March 31, 1976. Any other allegations of the paragraph are denied.
7. Covil is without sufficient information to admit or deny the allegations of paragraph 15. To the extent a response is required, it is denied.
8. Covil is without sufficient information to admit or deny the allegations of paragraph 16. To the extent the paragraph refers to insurance policies attached to the complaint as **Exhibit A**, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions. To the extent that such policies are missing or incomplete, Covil reserves the right to supplement these allegations after

discovery, it being understood that Covil further alleges that it is Zurich's burden to prove any limitation or exclusion of coverage. To the extent there are any remaining allegations, those allegations are denied.

9. Covil is without sufficient information to admit or deny the allegations of paragraphs 17 and 18. To the extent a response is required, it is denied.
10. In response to the allegations contained in paragraph 19, Covil only admits so much of said paragraph which alleges that Zurich is one of the umbrella or excess insurers for Covil with excess insurance policies in place for the years March 31, 1970 to March 31, 1974. To the extent the paragraph refers to insurance policies attached as **Exhibit B**, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions. To the extent that such policies are missing or incomplete, Covil reserves the right to supplement these allegations after discovery, it being understood that Covil further alleges that it is Zurich's burden to prove any limitation or exclusion of coverage. To the extent there are any remaining allegations, those allegations are denied.
11. In response to the allegations contained in paragraph 20, Covil is without sufficient information or belief to admit or deny the allegations. To the extent the paragraph refers to insurance policies attached as **Exhibit B**, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions. To the extent that such policies are missing or incomplete, Covil reserves the right to supplement these allegations after discovery, it being

understood that Covil further alleges that it is Zurich's burden to prove any limitation or exclusion of coverage. To the extent there are any remaining allegations, those allegations are denied.

12. In response to the allegations contained in paragraph 21, Covil is without sufficient information or belief to admit or deny the allegations. To the extent the paragraph refers to insurance policies attached as **Exhibit B**, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions. To the extent that such policies are missing or incomplete, Covil reserves the right to supplement these allegations after discovery, it being understood that Covil further alleges that it is Zurich's burden to prove any limitation or exclusion of coverage. To the extent there are any remaining allegations, those allegations are denied.
13. Paragraph 22 states a legal conclusion to which no response is required; however, to the extent a response is required, the allegations are denied.
14. In response to the allegations contained in paragraph 23, Covil admits so much of said paragraph which alleges that Sentry is a primary insurer of Covil for the years March 31, 1964 to March 31, 1970. Covil denies the remaining allegations of the paragraph.
15. In response to the allegations contained in paragraph 24, Covil admits so much of said paragraph which alleges that USF&G is a primary insurer of Covil for at least

the years March 31, 1976 to March 31, 1978. Covil denies the remaining allegations of the paragraph.

16. In response to the allegations contained in paragraph 25, Covil admits so much of said paragraph which alleges that TIG umbrella or is an excess liability insurer of Covil for the years March 31, 1976 to February 15, 1977. Covil denies that this is the only insurance policy issued to Covil by TIG and/or its predecessors. Furthermore, Covil denies any remaining allegations of the paragraph.
17. In response to the allegations contained in paragraph 26, Covil admits so much of said paragraph which alleges that Hartford issued policies of insurance to Covil and denies any remaining allegations.

AS TO THE UNDERLYING ACTIONS

18. Covil admits so much of paragraph 27 which alleges that Finch initiated a lawsuit in the United States District Court for the Middle District of North Carolina with civil action number 1:16-cv-01077 (the “*Finch* suit”). Covil makes reference to that lawsuit and the documents filed in that lawsuit. To the extent any remaining allegations exist, they are denied.
19. Covil admits so much of paragraph 28 which alleges that a judgment was entered against Covil in the *Finch* suit. Covil makes reference to that lawsuit and the documents filed in that lawsuit. Any remaining allegations are denied.

20. Covil admits so much of paragraphs 29 through 30 which allege that other lawsuits have been filed against Covil. Covil makes reference to those lawsuits for any allegations contained in them. Any remaining allegations are denied.
21. Paragraph 31 does not contain any allegations requiring a response. To the extent that a response is required, Covil admits that Zurich refers to other lawsuits as “Underlying Actions.”
22. Paragraphs 32, 33, 34, 35, and 36 state legal conclusions to which no responses are required; however, to the extent a response is required, the allegations are denied.

AS TO COUNT I

23. In response to the allegations contained in paragraph 37, upon information and belief, they are admitted.
24. Covil admits so much of paragraph 38 which alleges that judgment-holder Finch initiated a lawsuit alleging wrongful death due to exposure to asbestos. Covil makes reference to that lawsuit and the documents filed in that lawsuit. Covil further admits that Zurich has a duty to indemnify Covil under its policies. To the extent any remaining allegations exist, they are denied.
25. In response to the allegations contained in paragraph 39, upon information and belief, they are admitted.
26. Paragraph 40 does not contain any allegations requiring a response. To the extent that a response is required, Covil denies that Zurich is entitled to the relief requested.

27. Covil denies the allegations of paragraphs 41 and 42 and makes reference to the policies referred to by Zurich.

28. Covil admits so much of paragraph 43 which alleges that there are additional lawsuits against Covil which implicate Zurich's duty to defend and indemnify Covil. Covil denies any remaining allegations and makes reference to the policies referred to by Zurich.

29. Covil admits so much of paragraphs 44, 45, 46, 47, 48, and 49 which allege that Zurich has a duty to defend and indemnify Covil in asbestos litigation. Covil denies any remaining allegations and makes reference to the policies referred to by Zurich.

AS TO COUNT II

30. In response to paragraphs 50 and 51, Covil denies the allegations and makes reference to the policies referred to by Zurich.

AS TO COUNT III

31. In response to the allegations contained in paragraph 52, Covil is without sufficient information or belief to admit or deny the allegations. To the extent the paragraph refers to insurance policies attached to the complaint as **Exhibit B**, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions. To the extent that such policies are missing or incomplete, Covil reserves the right to supplement these allegations after discovery, it being understood that Covil further alleges that it is Zurich's burden to prove any

limitation or exclusion of coverage. To the extent there are any remaining allegations, those allegations are denied.

32. Covil denies the allegations of paragraphs 53, 54, 55, 56, and 57.

AS TO RELIEF REQUESTED

33. Covil denies that Zurich is entitled to the “RELIEF REQUESTED.”

FOR A SECOND DEFENSE

34. Venue is appropriate and preferable in South Carolina as the insurance issues turn on South Carolina law, Covil is a dissolved South Carolina corporation appearing in this case through its Receiver, and Zurich is not a North Carolina resident. Furthermore, there is a more complete action pending in South Carolina.

FOR A THIRD DEFENSE

35. The declaratory relief that Zurich seeks will not have any impact on whether Zurich and the other Primary Insurers must indemnify Covil. Zurich and the other Primary Insurers have acted as and, under South Carolina law, have become Covil. Therefore, Zurich is not entitled to any relief.

FOR A FOURTH DEFENSE

36. Zurich and the other Primary Insurers are not entitled to any relief as they acted in bad faith and in breach of their contractual responsibilities when they failed to communicate any settlement offers to Covil from at least 1993 through November 2, 2018, failed to protect Covil’s interests, and, as to Zurich and at least crossclaim

defendant USF&G, failed to settle *Finch* within policy limits when they had the opportunity to do so.

FOR A FIFTH DEFENSE

37. Zurich and the other Primary Insurers are not entitled to any relief as they independently ran Covil and failed to make any efforts to appoint an independent person or entity to determine what was in Covil's best interest. Rather, the Primary Insurers unilaterally determined what was best for Covil, or disregarded what was best for Covil, acting in their own interest, regardless of whether there was an actual or potential conflict between their interest and Covil's interest.

FOR A SIXTH DEFENSE

38. Zurich and the other Primary Insurers are not entitled to any relief as they failed to implement proper claims-handling processes required by their contracts with Covil and by South Carolina law.

FOR A SEVENTH DEFENSE

39. The Insurers are the only parties responsible for the liabilities to the Individual Defendants by and through Covil's applicable coverage and by and through the Insurers' negligent and improper actions which would make the Insurers responsible for the individual claims and not the Receiver or Covil.

FOR AN EIGHTH DEFENSE

40. The Insurers are the only parties responsible for the liabilities to Finch by and through Covil's applicable coverage and by and through the Insurers' negligent and

improper actions, which would make the Insurers responsible for the Finch claims in full. Furthermore, the Finch claims can also be satisfied by the Receiver's right to recover from Covil's former attorneys at Wall Templeton Haldrup, PA (WTH).

FOR A NINTH DEFENSE

41. The complaint should be dismissed for failure to name a necessary party. Zurich has failed to name a necessary party, WTH, which bears responsibility, in part, for the Finch claims through its breach of duties to Covil.

WHEREFORE, having fully answered the complaint, the Receiver prays for a trial by jury and that the complaint be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper, including but not limited to transfer of this action to South Carolina.

FURTHER ANSWERING COVIL ALLEGES:

**COVIL CORPORATION, BY AND THROUGH ITS DULY-APPOINTED
RECEIVER PETER D. PROTOPAPAS' ANSWER TO CROSSCLAIM OF TIG
INSURANCE COMPANY, AS SUCCESSOR IN INTEREST TO FAIRMONT
SPECIALTY INSURANCE COMPANY F/K/A RANGER INSURANCE
COMPANY**

Covil Corporation (hereinafter "Covil"), by and through its duly-appointed Receiver, Peter D. Protopapas (the "Receiver"), answering the crossclaim of TIG Insurance Company, As Successor in Interest to Fairmont Specialty Insurance Company F/K/A Ranger Insurance Company ("TIG") upon knowledge as to Covil, where known to the Receiver, and otherwise on information and belief, as follows:

42. Covil denies each and every allegation of TIG's crossclaim not hereinafter specifically admitted.
43. Covil hereby incorporates by reference all responses, allegations, and defenses set forth in Covil's Answer to Zurich's Complaint and Answer to all other crossclaims alleged herein.
44. In response to the allegations contained in paragraph 91 of TIG's crossclaim, only so much of said paragraph is admitted which states that Covil was incorporated and headquartered in South Carolina. Furthermore, Covil ceased conducting installation and removal operations in or around 1991 and was administratively dissolved by the South Carolina Secretary of State in or around 1993. Thereafter, Covil's business records and business activities were controlled by Zurich American Insurance Company ("Zurich"), Sentry Insurance, a Mutual Company ("Sentry"), and United States Fidelity and Guaranty Company ("USF&G" or "Travelers"). Zurich, Sentry, and USF&G are collectively referred to as "Primary Insurers." Any remaining allegations are denied.
45. In response to the allegations contained in paragraphs 92 through 99 of TIG's crossclaim, upon information and belief they are admitted.
46. Paragraphs 100 and 101 of TIG's crossclaim set forth abbreviations to which no response is required and contain no allegations against Covil. To the extent a response is required, Covil admits that TIG refers to Sentry, USF&G, and Hartford

as “Insurer Defendants,” and TIG refers to Finch, Connor, Ellis, and Whitehead as “Individual Defendants.”

47. Paragraphs 102 through 105 of TIG’s crossclaim state legal conclusions to which no response is required; however, to the extent that a response is required, Covil admits that TIG is attempting to bring a declaratory judgment action in this Court by crossclaim, further admits that Zurich and TIG have engaged in forum shopping and manufacturing claims, but denies that this Court is the proper venue or that North Carolina is the proper jurisdiction for this dispute. The remaining allegations of the paragraphs are denied.

48. In response to the allegations contained in paragraph 106 of TIG’s crossclaim, Covil admits so much of said paragraph which alleges that Sentry is a primary insurer of Covil for at least the years March 31, 1964 to March 31, 1970. Covil denies the remaining allegations of the paragraph.

49. In response to the allegations contained in paragraph 107 of TIG’s crossclaim, Covil admits so much of said paragraph which alleges that USF&G is a primary insurer of Covil for at least the years March 31, 1976 to March 31, 1978. Covil denies the remaining allegations of the paragraph.

50. In response to the allegations contained in paragraph 108 of TIG’s crossclaim, Covil admits so much of said paragraph which alleges that Hartford issued policies of insurance to Covil and denies any remaining allegations.

51. In response to the allegations contained in paragraphs 109 and 110 of TIG's crossclaim, Covil admits so much of said paragraphs which allege that Covil is seeking Insurer Defendants to fulfill their duties to defend and to indemnify Covil in the Underlying Actions. Covil makes reference to those actions and the documents filed in those actions. To the extent any remaining allegations exist, they are denied.
52. In response to the allegations contained in paragraph 111 of TIG's crossclaim, Covil denies its only assets are insurance policies, but rather, Covil's assets include but are not limited to Covil's insurance policies, its business records, and Covil's claims and causes of action, including without limitation its claims and causes of action against WTH. To the extent any remaining allegations exist, they are denied.
53. In response to the allegations contained in paragraph 112 of TIG's crossclaim, to the extent TIG seeks a declaration from this Court, Covil denies the same and seeks the following declarations: (i) that TIG must "drop down" and provide "first dollar" coverage above the retained limit of \$10,000 if there is no applicable underlying primary coverage; (ii) that, in such event, TIG is required to pay defense costs in addition to its applicable limits of liability; and (iii) that TIG's \$2,000,000 annual limit of liability for each applicable policy period or portion thereof has no aggregate limit of liability for claims other than product liability claims, such that its \$2,000,000 occurrence limit for each applicable policy or policy period or portion thereof responds repeatedly to each and every occurrence, with no limit to the

number of occurrences. To the extent any remaining allegations exist, they are denied.

54. Covil denies all allegations contained in the Wherefore paragraph and Prayer for Relief of TIG's crossclaim.

55. Covil denies all allegations of TIG's crossclaim not heretofore expressly admitted or modified.

WHEREFORE, having fully answered TIG's crossclaim, the Receiver prays for a trial by jury and that the crossclaim be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper, including but not limited to transfer of this action to South Carolina.

FURTHER ANSWERING COVIL ALLEGES:

**COVIL CORPORATION, BY AND THROUGH ITS DULY-APPOINTED
RECEIVER PETER D. PROTOPAPAS' ANSWER TO CROSSCLAIMS OF
SENTRY INSURANCE, A MUTUAL COMPANY**

AS TO PARTIES, JURISDICTION AND VENUE

Covil Corporation (hereinafter "Covil"), by and through its duly-appointed Receiver, Peter D. Protopapas (the "Receiver"), answering the Crossclaim of Sentry Insurance, A Mutual Company, named as Sentry Casualty Company ("Sentry") upon knowledge as to Covil, where known to the Receiver, and otherwise on information and belief, as follows:

56. Covil denies each and every allegation of Sentry's crossclaims not hereinafter specifically admitted.

57. Covil hereby incorporates by reference all responses, allegations and defenses set forth in Covil's Answer to Zurich's Complaint and Answers to all other Crossclaims alleged herein.
58. Upon information and belief, paragraph 68 of Sentry's crossclaim is admitted.
59. In response to the allegations contained in paragraph 69 of Sentry's crossclaim, only so much of said paragraph is admitted which states that Covil was incorporated and headquartered in South Carolina. Furthermore, Covil ceased conducting installation and removal operations in or around 1991, and was administratively dissolved by the South Carolina Secretary of State in or around 1993. Thereafter, Covil's business records and business activities were controlled by Zurich American Insurance Company ("Zurich"), Sentry Insurance, a Mutual Company ("Sentry"), and United States Fidelity and Guaranty Company ("USF&G" or "Travelers"), including by and through agents and attorneys retained by and reporting solely to these insurers. Zurich, Sentry, and USF&G are collectively referred to as "Primary Insurers." Any remaining allegations are denied.
60. Paragraphs 70 through 72 of Sentry's crossclaim state legal conclusions to which no response is required; however, to the extent that a response is required, Covil admits that Sentry is attempting to bring a declaratory judgment action in this Court by crossclaim, further admits that Zurich and Sentry have engaged in forum shopping and manufacturing claims, but denies that this Court is the proper venue

or that North Carolina is the proper jurisdiction for this dispute. The remaining allegations of the paragraphs are denied.

AS TO SENTRY'S FIRST CROSS-CLAIM

61. As to paragraph 73 through 75 of Sentry's crossclaim, on information and belief, Sentry issued primary general liability coverage from 1964 to 1970, including (but not limited to) by and through Hardware Mutual Casualty Company policy 39 04132 02 (April 21, 1966 to March 31, 1967) and 39 04132 05 (for the three annual periods March 31, 1967 to March 31, 1970) with annual aggregate limits of \$300,000 for those claims (such as product liability claims) subject, in certain policy years, to an aggregate limit and \$300,000 per occurrence for claims not subject to an aggregate limit, with no limit to the number of occurrences, but with no aggregate limit for any claims that has been proven by Sentry for certain policy years. These primary policies also contain an unlimited supplemental duty to defend. Any remaining allegations are denied.

62. As to paragraph 76 through 78 of Sentry's crossclaim, on information and belief, Sentry also issued umbrella coverage for the three separate annual periods March 31, 1967, to March 31, 1970, with \$1,000,000 in limits, per occurrence and otherwise, with no limit to the number of occurrences, including but not limited to each occurrence for premises and operations claims. Any remaining allegations are denied.

AS TO SENTRY'S SECOND CROSS-CLAIM

63. In response to the allegations contained in paragraphs 79 and 80 of Sentry's crossclaim, Covil admits so much of said paragraphs which allege that Covil is seeking Sentry to fulfill its duties to defend and to indemnify Covil in the Underlying Actions. Covil makes reference to those actions and the documents filed in those actions. To the extent any remaining allegations exist, they are denied.

64. Covil admits so much of paragraphs 81, 82, and 83 of Sentry's Crossclaim which allege that judgment-holder Finch initiated a lawsuit in the United State District Court for the Middle District of North Carolina with civil action number 1:16-cv-01077. Covil makes reference to that lawsuit and the documents filed in that lawsuit. To the extent any remaining allegations exist, they are denied.

65. Covil admits so much of paragraphs 83 and 84 of Sentry's Crossclaim which allege that Crawford initiated a lawsuit in the South Carolina Court of Common Pleas for Spartanburg County with civil action number 2017-CP-42-04429. Covil makes reference to that lawsuit and the documents filed in that lawsuit. To the extent any remaining allegations exist, they are denied.

66. Paragraph 85 of Sentry's crossclaim is denied.

AS TO SENTRY'S THIRD CROSS-CLAIM

67. In response to the allegations contained in paragraphs 86 and 87 of Sentry's crossclaim, Covil admits so much of said paragraphs which allege that Covil is seeking Sentry to fulfill its duties to defend and to indemnify Covil in the

Underlying Actions. Covil makes reference to those actions and the documents filed in those actions. To the extent any remaining allegations exist, they are denied.

AS TO SENTRY'S FOURTH CROSS-CLAIM

68. As to paragraphs 88, 89, and 90 of Sentry's crossclaim, Covil denies the declarations sought by Sentry. To the extent the paragraphs refer to insurance policies issued by Sentry, Covil makes reference to those policies for their terms and provisions, and where such policy terms and provisions are missing or ambiguous Covil alleges that Sentry bears the burden of proving any purported or claimed limitation on or exclusion to coverage. Further, Covil makes reference to the Underlying Lawsuits and the documents filed in those actions. To the extent there are any remaining allegations, those allegations are denied.

AS TO SENTRY'S FIFTH CROSS-CLAIM

69. As to paragraphs 91 and 92 of Sentry's crossclaim, Covil denies the declarations sought by Sentry. To the extent the paragraphs refer to insurance policies issued by Sentry, Covil makes reference to those policies for their terms and provisions, and where such policy terms and provisions are missing or ambiguous Covil alleges that Sentry bears the burden of proving any purported or claimed limitation on or exclusion to coverage. To the extent there are any remaining allegations, those allegations are denied.

AS TO SENTRY'S SIXTH CROSS-CLAIM

70. As to paragraphs 93 and 94 of Sentry's crossclaim, Covil denies the declarations sought by Sentry. To the extent the paragraphs refer to insurance policies issued by Sentry, Covil makes reference to those policies for their terms and provisions, and where such policy terms and provisions are missing or ambiguous Covil alleges that Sentry bears the burden of proving any purported or claimed limitation on or exclusion to coverage. Further, Covil makes reference to the Underlying Lawsuits and the documents filed in those actions. To the extent there are any remaining allegations, those allegations are denied.

AS TO SENTRY'S SEVENTH CROSS-CLAIM

71. As to paragraphs 95, 96, and 97 of Sentry's crossclaim, Covil denies the declarations sought by Sentry. To the extent the paragraphs refer to insurance policies issued by Sentry, Covil makes reference to those policies for their terms and provisions, and where such policy terms and provisions are missing or ambiguous Covil alleges that Sentry bears the burden of proving any purported or claimed limitation on or exclusion to coverage. Further, Covil makes reference to the Underlying Lawsuits and the documents filed in those actions. To the extent there are any remaining allegations, those allegations are denied.

AS TO SENTRY'S EIGHTH CROSS-CLAIM

72. As to paragraphs 98 and 99 of Sentry's crossclaim, Covil denies the declarations sought by Sentry. To the extent the paragraphs refer to insurance policies issued by

Sentry, Covil makes reference to those policies for their terms and provisions, and where such policy terms and provisions are missing or ambiguous Covil alleges that Sentry bears the burden of proving any purported or claimed limitation on or exclusion to coverage. Further, Covil makes reference to the Underlying Lawsuits and the documents filed in those actions. To the extent there are any remaining allegations, those allegations are denied.

73. Covil denies all allegations contained in the Wherefore paragraph and Prayer for Relief of Sentry's Crossclaims.

74. Covil denies all allegations of Sentry's Crossclaims not heretofore expressly admitted or modified.

WHEREFORE, having fully answered Sentry's Crossclaim, the Receiver prays for a trial by jury and that the Crossclaim be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper, including but not limited to transfer of this action to South Carolina.

**COVIL CORPORATION, BY AND THROUGH ITS DULY-APPOINTED
RECEIVER PETER D. PROTOPAPAS' ANSWER TO CROSSCLAIMS OF
UNITED STATES FIDELITY AND GUARANTY COMPANY**

Covil Corporation (hereinafter "Covil"), by and through its duly-appointed Receiver, Peter D. Protopapas (the "Receiver"), answering the Crossclaim of United States Fidelity and Guaranty Company ("USF&G") upon knowledge as to Covil, where known to the Receiver, and otherwise on information and belief, as follows:

75. Covil denies each and every allegation of USF&G's Crossclaims not hereinafter specifically admitted.

76. Covil hereby incorporates by reference all responses, allegations and defenses set forth in Covil's Answer to Zurich's Complaint and Answers to all other Crossclaims alleged herein.

AS TO INTRODUCTION

77. As to paragraphs 1 through 6 of USF&G's Crossclaim, Covil denies the declarations sought by USF&G. To the extent the paragraphs refer to insurance policies issued by USF&G, Covil makes reference to those policies for their terms and provisions, except to the extent any policy is missing in whole or in part. Further, Covil makes reference to the Underlying Lawsuits and the documents filed in those actions. To the extent that there are any remaining allegations, those allegations are denied.

AS TO PARTIES

78. Upon information and belief, paragraph 7 of USF&G's crossclaim is admitted.

79. In response to the allegations contained in paragraph 8 of USF&G's crossclaim, only so much of said paragraph is admitted which states that Covil was incorporated and headquartered in South Carolina. Furthermore, Covil ceased conducting installation and removal operations in or around 1991, and was administratively dissolved by the South Carolina Secretary of State in or around 1993. Thereafter, Covil's business records and business activities were controlled by Zurich American

Insurance Company (“Zurich”), Sentry Insurance, a Mutual Company (“Sentry”), and United States Fidelity and Guaranty Company (“USF&G” or “Travelers”). Zurich, Sentry, and USF&G are collectively referred to as “Primary Insurers.” Any remaining allegations are denied.

80. Upon information and belief, paragraph 9 of USF&G’s crossclaim is admitted.

AS TO JURISDICTION AND VENUE

81. Paragraphs 10 and 11 of USF&G’s Crossclaim state legal conclusions to which no response is required; however, to the extent that a response is required, Covil admits that USF&G is attempting to bring a declaratory judgment action in this Court by Crossclaim, and further admits that Zurich and USF&G have engaged in forum shopping and manufacturing claims, but denies that this Court is the proper venue or that North Carolina is the proper jurisdiction for this dispute. The remaining allegations of the paragraphs are denied.

AS TO FACTUAL BACKGROUND

82. In response to the allegations contained in paragraph 12 of USF&G’s crossclaim, Covil admits so much of said paragraph which alleges that USF&G is a primary insurer of Covil for at least the years March 31, 1976 to March 31, 1978. Covil denies the remaining allegations of the paragraph.

83. Covil admits so much of paragraph 13 of USF&G’s crossclaim which alleges that there are additional lawsuits against Covil which implicate USF&G’s duty to defend

and indemnify Covil. Covil denies any remaining allegations and makes reference to the policies referred to by USF&G.

84. Paragraphs 14 and 15 of USF&G's crossclaim are admitted.

85. As to paragraphs 16, 17, and 18 of USF&G's crossclaim, Covil makes reference to the *Finch* suit and the documents filed in *Finch*. All remaining allegations are denied.

86. As to paragraph 19 of USF&G's crossclaim, Covil admits a judgment upon a verdict was entered against Covil in the *Finch* suit in the amount \$35,582,365.99, inclusive of pre-judgment interest, which continues to accrue post-judgment interest, and further admits that USF&G is liable for the totality of the *Finch* judgment. All remaining allegations are denied.

AS TO USF&G'S COVERAGE

87. In response to the allegations contained in paragraphs 20 through 27 of USF&G's Crossclaim, Covil is without sufficient information or belief to admit or deny the allegations. To the extent the paragraphs refers to insurance policies issued by USF&G to Covil, those policies speak for themselves and Covil makes reference to those policies for their terms and provisions, except to the extent any policy is missing in whole or in part. To the extent that there are any remaining allegations, those allegations are denied.

AS TO THE DISPUTED COVERAGE ISSUES

88. As to paragraphs 28 through 34 of USF&G's crossclaim, Covil admits USF&G, Zurich and Sentry are liable for all damages, without limitation, assessed against Covil, by way of settlement or judgment, as a result of the Primary Insurers' actions in failing adequately to defend Covil against the *Finch* suit. Covil makes reference to the *Finch* suit and the documents filed in *Finch*. All remaining allegations are denied.

AS TO COUNT I

89. As to paragraph 35 of USF&G's crossclaim, Covil repeats and incorporates by reference the foregoing responses, allegations and defenses as if fully set forth herein.

90. Paragraph 36 of USF&G's crossclaim is denied.

AS TO COUNT II

91. As to paragraph 37 of USF&G's crossclaim, Covil repeats and incorporates by reference the foregoing responses, allegations and defenses as if fully set forth herein.

92. Paragraphs 38 and 39 of USF&G's crossclaim are denied.

AS TO COUNT III

93. As to paragraph 40 of USF&G's crossclaim, Covil repeats and incorporates by reference the foregoing responses, allegations and defenses as if fully set forth herein.

94. Paragraph 41 of USF&G's crossclaim is denied.

AS TO COUNT IV

95. As to paragraph 42 of USF&G's crossclaim, Covil repeats and incorporates by reference the foregoing responses, allegations and defenses as if fully set forth herein.

96. Paragraph 43 of USF&G's crossclaim is denied.

97. Covil denies all allegations contained in the Wherefore paragraph and Prayer for Relief of USF&G's Crossclaim.

98. Covil denies all allegations of USF&G's crossclaim not heretofore expressly admitted or modified.

WHEREFORE, having fully answered USF&G's crossclaim, the Receiver prays for a trial by jury and that the Crossclaim be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper, including but not limited to transfer of this action to South Carolina.

FURTHER ANSWERING THE RECEIVER ALLEGES:

**CROSSCLAIMS AGAINST DEFENDANTS SENTRY INSURANCE, A
MUTUAL COMPANY, NAMED AS SENTRY CASUALTY COMPANY;
UNITED STATES FIDELITY AND GUARANTY COMPANY; TIG
INSURANCE COMPANY; HARTFORD ACCIDENT AND INDEMNITY
COMPANY; FIRST STATE INSURANCE COMPANY AND
COUNTERCLAIMS AGAINST ZURICH AMERICAN INSURANCE
COMPANY; and THIRD-PARTY DEMAND AGAINST THIRD-PARTY
DEFENDANTS PENNSYLVANIA NATIONAL MUTUAL CASUALTY
INSURANCE CO.**

99. Covil Corporation is a dissolved South Carolina corporation (“Covil”), appearing by and through its duly appointed receiver, Peter D. Protopapas (the “Receiver”). This Court appointed the Receiver to undertake actions to administer all assets of Covil Corporation, including without limitation its insurance policies. *See* Receiver Order, p. 1 (“This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions of failure to act of Covil’s insurance carriers”).
100. Upon information and belief, Zurich American Insurance Company (“Zurich”) is a corporation organized under the laws of the State of New York with its principal place of business located in the State of Illinois. Zurich is the successor by merger to Maryland Casualty Company and Northern Insurance Company of New York.
101. Upon information and belief, Sentry Insurance, A Mutual Company (“Sentry”) is a corporation organized and existing under the laws of the State of Wisconsin with its principal place of business in the State of Wisconsin. Sentry is the successor by

merger to, among others, Hardware Mutual Insurance Company.

102. Upon information and belief, United States Fidelity and Guaranty Company (“USF&G”) is a corporation organized and existing under the laws of the State of Connecticut with its principal place of business in the State of Connecticut.

103. Upon information and belief, TIG Insurance Company (“TIG”) is the successor in interest to Fairmont Specialty Insurance Company, formerly known as Ranger Insurance Company, and is a corporation organized and existing under the laws of the State of California with a principal place of business in the State of New Hampshire.

104. Upon information and belief, Hartford Accident and Indemnity Company (“Hartford”) is a corporation organized and existing under the laws of the State of Connecticut with a principal place of business in the State of Connecticut.

105. Upon information and belief, First State Insurance Company (“First State,” except when referred to jointly with “Hartford,” in which case “Hartford” also applies to First State) is a corporation organized and existing under the laws of the State of Connecticut with a principal place of business in the State of Connecticut.

106. Upon information and belief, Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) is a corporation organized under the laws of the State of Pennsylvania with its principal place of business located in the State of Pennsylvania.

107. Ann Finch is the Executrix of the Estate of Franklin Delenor Finch and upon

information and belief, is a citizen and resident of North Carolina.

108. DARRELL A. CONNOR, as Executrix of the Estate of Charles Franklin Connor; ROBERT JOSEPH ELLIS; and SHARON WHITEHEAD, as Executrix of the Estate of James T. Whitehead, are claimants against Covil Corporation and collectively referred to as “Individual Defendants.”

THE INSURANCE POLICIES

109. Each of Zurich, Sentry, USF&G, TIG, and Hartford issued general liability policies to Covil. These policies all provide defense and indemnity coverage, in varying degrees, for the Covil asbestos suits, as those terms are used in the insurance industry. All of Zurich, Sentry, and USF&G have admitted that they insured Covil and are responsible for Covil’s asbestos suits since they have been controlling Covil’s defense and making determinations regarding potential liability for Covil asbestos suits. Certain of Covil’s insurance policies are missing, in whole or in part. However, Covil’s insurers have issued policies through standard terms and conditions applicable to general liability policies, and have provided secondary evidence of the issuance of such policies or the policies themselves. It is the burden of Covil’s insurers to prove any limitation to or exclusion of coverage.

110. Zurich has admitted to the issuance of a series of commercial general liability insurance policies (policy nos. 41-190897 and 41-206393) issued by its predecessors, to Covil for the six policy periods of March 31, 1970 to March 31, 1973 and March 31, 1973 to March 31, 1976 (collectively, the “Zurich Primary

Policies”).

111. Though no policy documentation is available with regard to policy no. 41206393, Zurich admits that said policy contains the same terms and conditions applicable to policy no. 41- 190897, with the exception of certain increased limits of liability under policy no. 41-206393.

112. Each of the 1970 to 1973 Zurich primary policy years provides an annual aggregate limit of \$300,000 for those claims, such as product liability claims, for which an aggregate limit applies. This policy also provides coverage of \$100,000 per person and \$300,000 per occurrence for other covered claims, with no limit to the number of occurrences. These policy years have an unlimited supplemental defense obligation. Zurich alleges that each of the 1973 to 1976 Zurich primary policy years provides an annual aggregate limit of \$500,000 for those claims, such as product liability claims, for which an aggregate limit applies. This policy also provides coverage of \$100,000 per person and \$500,000 per occurrence for other covered claims, with no limit to the number of occurrences. These policy years also have an unlimited supplemental defense obligation. Covil alleges that it is Zurich’s burden to prove any limitation on or exclusion to coverage, including (without limitation) any purported or claimed aggregate limit applicable to products or completed operations claims.

113. Zurich also issued a series of umbrella policies (policy nos. 48-001080, 48010333, and 48-019572) to Covil for the policy periods of March 31, 1970 to March 31,

1971, March 31, 1971 to March 31, 1972, March 31, 1972 to March 31, 1973, and March 31, 1973 to March 31, 1974 (collectively, the “Zurich Umbrella Policies”). The Zurich Umbrella Policies each has a \$1,000,000 limit, per occurrence, and in the aggregate for those claims subject to an aggregate limit, such as product liability claims, except for the period December 16, 1971 to January 26, 1972, when the limits (both per occurrence and aggregate) were increased to \$3,000,000. There is no limit to the number of occurrences covered by the Zurich Umbrella Policies.

114. On information and belief, Sentry issued primary general liability coverage from at least 1964 to 1970, including (but not limited to) by and through Hardware Mutual Casualty Company policy 39 04132 02 (April 21, 1966 to March 31, 1967) and 39 04132 05 (for the three annual periods March 31, 1967 to March 31, 1970) with annual aggregate limits of \$300,000 for those claims (such as product liability claims) subject in certain years to an aggregate limit and \$300,000 per occurrence for claims not subject to an aggregate limit, with no limit to the number of occurrences, but with no aggregate limit for any claims that has been proven by Sentry for certain policy years. These primary policies also contain an unlimited supplemental duty to defend.

115. On information and belief, Sentry also issued umbrella coverage for at least the three separate annual periods March 31, 1967 to March 31, 1970, with \$1,000,000 in limits, per occurrence and otherwise, with no limit to the number of occurrences, including not limited to occurrences for premises and operations claims.

116. On information and belief, USF&G issued primary commercial general liability policy SMP 490049, for the two annual periods March 31, 1976 to March 31, 1978, with \$300,000 in per occurrence and aggregate limits for claims for which an aggregate limit pertains, with no limit to the number of occurrences. The USF&G policy years also contain an unlimited supplemental defense obligation. Each of the \$300,000 in limits (where applicable) applies separately to each of the two annual periods of this policy.
117. On information and belief, USF&G also issued primary commercial general liability coverage for at least ten annual periods between 1954 and 1964 with policy limits or terms for which discovery is required.
118. On information and belief, Penn National issued primary general liability coverage (policy nos. 515 50 28 53 7 and 515 50 28 53 8) to Covil for the policy periods March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988 with a \$1,000,000 limit for those product liability claims subject to an \$1,000,000 annual aggregate limit, a \$1,000,000 combined single limit per occurrence for other covered claims, with no limit to the number of occurrences.

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1986 – March 31, 1987	515 50 28 53 7	\$1,000,000 per occurrence; \$1,000,000 aggregate where applicable
March 31, 1987 – March 31, 1988	515 50 28 53 8	\$1,000,000 per occurrence; \$1,000,000 aggregate where applicable

119. On information and belief, TIG issued umbrella coverage that “drops down” to provide “first dollar” coverage in the event there is no available primary coverage. This umbrella coverage, in such event, provides for an unlimited supplemental defense obligation. Each TIG policy year provides \$2,000,000 for claims that are subject to an aggregate limit and \$2,000,000 per occurrence for all other claims, with no limit to the number of occurrences. TIG issued the following umbrella policies:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
July 25, 1976 – February 15, 1977	RU 309724	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense
February 15, 1977 – March 31, 1977	RU 308527	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense

March 31, 1978 – March 31, 1979	RU 430944	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense

120. On information and belief, Hartford issued the following primary insurance policies with \$500,000 in per occurrence limits (which were increased to \$1,000,000 per occurrence in 1984, 1985 and 1986), and no limit to the number of occurrences, and with an unlimited supplemental defense obligation, applicable to claims other than product liability suits, and with coverage applicable to product liability and completed operations claims subject to discovery, potentially an aggregate limit, and dispute:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1978 – March 31, 1979	22 C 936166	\$500,000 per occurrence; supplemental defense
March 31, 1979 – March 31, 1980	22 C 938625	\$500,000 per occurrence; supplemental defense
March 31, 1980 – March 31, 1981	22 C 941900	\$500,000 per occurrence; supplemental defense
March 31, 1981 – March 31, 1982	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1982 – March 31, 1983	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1983 – March 31, 1984	22 C 943927	\$1,000,000 per occurrence; supplemental defense
March 31, 1984 – March 31, 1985	22 C 943927	\$1,000,000 per occurrence; supplemental defense

March 31, 1985 – March 31, 1986	22 C 943927	\$1,000,000 per occurrence; supplemental defense

121. On information and belief, Hartford and First State, a Hartford company, issued umbrella coverage with the same “drop down” and supplemental defense provisions as TIG, responsive on a per occurrence basis with the exception of product liability claims, and with coverage applicable to product liability and completed operations claims subject to discovery, a potential aggregate limit and dispute, as follows:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1979 – March 31, 1980	22 HU 371494	\$1,000,000 per occurrence; \$1,000,000 aggregate where applicable
March 31, 1980 – March 31, 1981	22 RHU 371518	\$2,000,000 per occurrence
March 31, 1981 – March 31, 1982	22 RHU 371789	\$5,000,000 per occurrence
March 31, 1982 – March 31, 1983	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1983 – March 31, 1984	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1984 – March 31, 1985	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1985 – March 31, 1986	22 RHU EX 4908	\$5,000,000 per occurrence

THE UNDERLYING ACTIONS

122. Covil was named as a defendant in a lawsuit filed in the United States District Court for the Middle District of North Carolina, entitled “*ANN FINCH*,

Individually, and as Executrix of the Estate of Franklin Delenor Finch, Plaintiff, vs. BASF CATALYSTS LLC, individually and as successor-in-interest to EASTERN MAGNESIA TALC CO. and ENGELHARD, PITA REALTY LTD; COVIL CORPORATION; FOSTER WHEELER ENERGY CORPORATION; MCNEIL (OHIO) CORPORATION, INC.; MCNEIL & NRM, INC.; PFIZER, INC.; CBS CORPORATION f/k/a Viacom Inc. (sued as successor-by-merger to CBS Corporation f/k/a Westinghouse Electric Corporation) and also as successor-in-interest to BF Sturtevant; FMC CORPORATION, Individually and as successor in interest to Stearns Brakes; RED SEAL ELECTRIC COMPANY; and REXNORD INDUSTRIES, LLC MCNEIL (OHIO) CORPORATION, INC.; MCNEIL & NRM, INC.; PFIZER, INC.; CBS CORPORATION f/k/a Viacom Inc. (sued as successor-by-merger to CBS Corporation f/k/a Westinghouse Electric Corporation) and also as successor-in-interest to BF Sturtevant; FMC CORPORATION, Individually and as successor in interest to Stearns Brakes; RED SEAL ELECTRIC COMPANY; and REXNORD INDUSTRIES, LLC”, file number 1:16-cv-01077 (the “Finch suit”).

123. On October 19, 2018, a verdict in the amount of \$32,700,000, plus \$5,633,358.89 in pre-judgment interest, was entered against Covil in the *Finch* suit. This verdict and resulting judgment is now pending appeal.

124. Covil also has been named as a defendant in other underlying lawsuits.

125. The aforementioned underlying lawsuits are hereinafter collectively referred to as the “Covil asbestos suits.”

COUNT I

COUNTERCLAIM AGAINST ZURICH AND CROSSCLAIM AGAINST SENTRY AND USF&G (Unfair and Deceptive Practices)

126. Covil repeats and realleges the above allegations and further alleges as follows:

127. Sentry, Zurich, and USF&G's actions in connection with this matter constitute violations of N.C. Gen. Stat. §§ 58-63-10 and 58-63-15, each of which constitute unfair and deceptive acts or practices in violation of N.C. Gen. Stat. § 75-1.1, *et seq.* Sentry, Zurich, and USF&G's unfair and deceptive acts and practices have included, without limitation, in addition to those described hereinabove, the following:

- a. Sentry, Zurich, and USF&G failed to attempt in good faith to effectuate prompt, fair, and equitable settlement of each of the underlying asbestos personal injury claims, in which liability had become reasonably clear;
- b. Sentry, Zurich, and USF&G failed to acknowledge and act reasonably promptly on communications with respect to the underlying asbestos personal injury claims;
- c. Sentry, Zurich, and USF&G failed and refused to pay claims based on an unreasonable interpretation of the policy and without reasonable investigation based on all available information;
- d. Sentry, Zurich, and USF&G otherwise engaged in unfair and deceptive practices in this matter.

128. Sentry, Zurich, and USF&G's actions in connection with this matter were in or

affecting commerce as defined in N.C. Gen. Stat. § 75-1.1.

129. Sentry, Zurich, and USF&G's actions in connection with this matter proximately caused injury to Covil by resulting in a jury verdict in excess of the policy limits and prior settlement demands.

130. Sentry, Zurich, and USF&G, therefore, have engaged in unfair and deceptive trade violations in violation of N.C. Gen. Stat. § 75-1.1.

131. Covil is therefore entitled to recover trebled damages and attorneys' fees under N.C. Gen. Stat. §§ 75-1.1, 75-16 and 75-16.1.

132. Covil further seeks a declaration that the failure of Sentry, Zurich, and USF&G to attempt in good faith to effectuate prompt, fair, and equitable settlement of each of the underlying asbestos personal injury claims, in which liability had become reasonably clear, was in fact an unfair and deceptive act.

COUNT II
COUNTERCLAIM AGAINST ZURICH AND
CROSS-CLAIM AGAINST USF&G
(Bad Faith in Insurance)

133. Covil repeats and realleges the above allegations and further alleges as follows:

134. The law imposes on an insurer the duty of carrying out in good faith its contract of insurance which includes a duty to its insured to act diligently and in good faith in effectuating settlements within policy limits, and, if necessary to accomplish that purpose, to pay the full amount of the policy.

135. Zurich and USF&G breached this duty, placing their interests above those of Covil and Covil's claimants and creditors.

136. On information and belief, Zurich and USF&G refused to pay after recognizing a valid claim against their insured.
137. On information and belief, Zurich and USF&G's failure to pay the claims was not based on a legitimate, honest disagreement as to the validity of the claim. Thus, Zurich and USF&G have engaged in bad faith.
138. Zurich and USF&G demonstrated aggravating or outrageous conduct by willfully and recklessly disregarding Covil's rights and interests.
139. Among other things, Zurich and USF&G engaged in bad faith by failing or refusing to resolve the *Finch* suit within their policy limits; by failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the *Finch* suit, even though liability had become reasonably clear; by allowing Covil to receive an adverse verdict of \$32,700,000 in the *Finch* suit; by compelling their insured to engage in litigation to recover amounts due under the policies by failing to make any reasonable offers; by failing to protect the interests of Covil and its claimants and creditors; and by otherwise acting in bad faith.
140. As a remedy for such bad faith, Covil seeks an order requiring Zurich and USF&G jointly and severally, to pay for the *Finch* suit verdict in full, including all pre- and post-judgment interest, without impairing any limit of liability under any of their policies. In addition, Covil seeks an order requiring Zurich and USF&G to pay or reimburse Covil for all costs and expenses resulting from such bad faith conduct.
141. Covil further seeks a declaration that the failure of Zurich and USF&G to act

diligently and in good faith in effecting settlements within policy limits, and, if necessary to accomplish that purpose, to pay the full amount of the policy, constitutes bad faith.

COUNT III
COUNTERCLAIM AGAINST ZURICH AND
CROSSCLAIM AGAINST USF&G
(Punitive Damages)

142. Covil repeats and realleges the above allegations and further alleges as follows:

143. Zurich and USF&G breached their duty to carry out in good faith their contract of insurance which includes a duty to its insured to act diligently and in good faith in effectuating settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy.

144. In so doing, Zurich and USF&G acted in bad faith, placing their interests above those of Covil and Covil's claimants and creditors.

145. Bad faith refusal by an insurance company to settle a policy claim permits the recovery of punitive damages.

146. Zurich and USF&G's conduct was reprehensible, and they knew it was likely to produce serious harm to Covil. Zurich and USF&G were aware of the probable consequences of their behavior, which lasted over the course of several years.

147. Given the expense of litigation and the sizeable jury verdict against it, Covil suffered significant damages as a result of Zurich and USF&G's bad faith. Zurich and USF&G concealed their conduct from Covil, acting independently of their insured and without respect for the consequences to Covil.

148. On information and belief, Zurich and USF&G's conduct was intentional and motivated by their own financial self-interest. Zurich and USF&G's conduct was in willful and wanton disregard of their contractual and fiduciary obligations, and done with a reckless indifference for the rights of the insured.

149. In addition, on information and belief, Zurich and USF&G have engaged in similar conduct of making claims decisions for a defunct or non-operating company without consulting with their insured. This conduct likewise was in willful and wanton disregard of their contractual and fiduciary obligations, done with a reckless indifference for the rights and interests of the insured, and resulted in significant profit to Zurich and USF&G at the expense of Covil.

150. As a direct and proximate result of the conduct of Zurich and USF&G as alleged hereinabove, and as an additional remedy for bad faith conduct, Covil is entitled to recover punitive damages against Zurich and USF&G in an amount to be determined at trial.

COUNT IV
COUNTERCLAIM AGAINST ZURICH AND
CROSSCLAIM AGAINST SENTRY AND USF&G
(Breach of Contract)

151. On October 19, 2018, verdict was entered against Covil in the *Finch* suit in the amount of \$32,700,000 plus \$5,633,358.89 in pre-judgment interest. That judgment is on appeal.

152. The *Finch* suit alleged wrongful death relating to plaintiff Franklin Delenor Finch's exposure to asbestos first beginning on December 15, 1975, during the Zurich

primary policy with a policy period effective between March 31, 1975 to March 31, 1976, and continuing thereafter.

153. Finch contended, and the jury found, that Covil was responsible for plaintiff Franklin Delenor Finch's exposure to asbestos and a subsequent diagnosis of mesothelioma.

154. Finch issued to Sentry, Zurich, and USF&G demands for policy limits in settlement of the Finch's claims and Sentry, Zurich, and USF&G refused to settle the claim. Instead, Zurich, Sentry, and USF&G placed their own interests above their insured.

155. Zurich, and USF&G, and at times Zurich, USF&G and Sentry, controlled Covil's defense for the *Finch* suit.

156. Zurich and USF&G between themselves had not less than \$800,000 in per occurrence and \$1,300,000 in aggregate limits available to resolve the *Finch* suit in their pertinent policy years (1975 to 1978) and not less than \$4,800,000 in per occurrence and \$5,300,000 in aggregate limits otherwise available to resolve the *Finch* suit. Zurich and USF&G declined to resolve the *Finch* suit within policy limits although they had the opportunity to do so.

157. Each of Sentry, Zurich, and USF&G is jointly and severally responsible to pay the entire verdict in the *Finch* suit, including all interest and ancillary damages.

158. The *Finch* suit is covered in its entirety under the policies of insurance issued, respectively, by Zurich and USF&G, each of which owes an independent duty fully

to protect its insured, Covil, and injured parties with unsatisfied claims against Covil. Sentry, Zurich, and USF&G have breached their contracts of insurance by, among other things (i) failing to resolve the *Finch* suit within policy limits; (ii) failing or refusing to pay in full the *Finch* suit verdict; (iii) failing properly to treat claims as operations claims not subject to an aggregate limit of liability; and (iv) failing to protect the interests and rights of the claimants against Covil.

159. Further, the insurance policies issued by Zurich and USF&G are contracts that contain an implied covenant of good faith and fair dealing. This covenant of good faith and fair dealing requires these defendants to put the interests of their insured above their own.

160. Zurich and USF&G breached their duties of good faith and fair dealing, placed their interests above those of Covil and Covil's claimants and creditors, and have engaged in bad faith. Among other things, Zurich and USF&G engaged in bad faith by failing or refusing to resolve the *Finch* suit within their policy limits; by failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the *Finch* suit, even though liability had become reasonably clear; by allowing Covil to receive an adverse verdict of \$32,700,000 in the *Finch* suit; by compelling their insured to engage in litigation to recover amounts due under the policies by failing to make any reasonable offers; by failing to protect the interests of Covil and its claimants and creditors; and by otherwise acting in bad faith.

161. Covil seeks all compensatory, ancillary and consequential damages as a result of

these breaches of contract by Sentry, Zurich, and USF&G.

COUNT V
COUNTERCLAIM AGAINST ZURICH,
CROSSCLAIM AGAINST SENTRY, USF&G, TIG, AND HARTFORD, AND
THIRD PARTY DEMAND AGAINST PENN NATIONAL
(Declaratory Judgment)

162. Covil repeats and realleges the above allegations and further alleges as follows:

163. Covil seeks a declaration and order that each of the 1970 to 1973 Zurich primary policy years under policy no. 41-190897 provides an annual aggregate limit of \$300,000 for product liability claims to which an aggregate limit applies; that this policy also provides coverage of \$100,000 per person and \$300,000 per occurrence for other covered claims, with no limit to the number of occurrences; and that these policy years have an unlimited supplemental defense obligation. Covil seeks a further declaration and order that each of the 1973 to 1976 Zurich primary policy years under policy no. 41-20639 provides an annual aggregate limit of \$500,000 for product liability claims for which an aggregate limit applies; that this policy also provides coverage of \$100,000 per person and \$500,000 per occurrence for other covered claims, with no limit to the number of occurrences; and that these policy years also have an unlimited supplemental defense obligation.

164. Covil seeks a further declaration and order that Zurich also issued a series of umbrella policies (policy nos. 48-001080, 48-010333, and 48-019572) to Covil for the policy periods March 31, 1970 to March 31, 1971, March 31, 1971 to March 31, 1972, March 31, 1972 to March 31, 1973, and March 31, 1973 to March 31, 1974

(collectively, the “Zurich Umbrella Policies”); that each Zurich Umbrella Policy has a \$1,000,000 limit, per occurrence, and in the aggregate for those product liability claims subject to an aggregate limit, except for the period December 16, 1971 to January 26, 1972, when the limits (both per occurrence and aggregate) were increased to \$3,000,000; and that there is no limit to the number of occurrences covered by the Zurich Umbrella Policies.

165. Covil seeks a further declaration and order that Sentry issued primary general liability coverage from 1964 to 1970, including (but not limited to) by and through Hardware Mutual Casualty Company policy 39 04132 02 (April 21, 1966 to March 31, 1967) and 39 04132 05 (for the three annual periods March 31, 1967 to March 31, 1970) with annual aggregate limits of \$300,000 for those product liability claims and policy years subject to an aggregate limit (but as to which Sentry has to date for certain policy years provided no proof of such aggregate limits) and \$300,000 per occurrence for claims not subject to an aggregate limit with no limit to the number of occurrences, and with an unlimited supplemental duty to defend. Covil further seeks a declaration that Sentry bears the burden of proving any limitation on or exclusion to coverage.

166. Covil also seeks a declaration and order that Sentry issued umbrella coverage for the three annual periods March 31, 1967 to March 31, 1970, with \$1,000,000 in limits.

167. Covil seeks a further declaration and order that USF&G issued primary commercial

general liability policy SMP 490049, for the two annual periods March 31, 1976 to March 31, 1978, with \$300,000 in per occurrence and aggregate limits for claims for which an aggregate limit pertains, with no limit to the number of occurrences; that the USF&G policy also contains an unlimited supplemental defense obligation; and that each of the \$300,000 in limits applies separately to each of the two annual periods of this policy for product liability claims.

168. Covil seeks a further declaration and order that USF&G issued primary commercial general liability coverage for at least ten annual periods between 1954 and 1964.

169. Covil seeks a further declaration and order that Penn National issued primary general liability coverage (policy nos. 515 50 28 53 7 and 515 50 28 53 8) to Covil for the policy periods March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988; that each policy has a \$1,000,000 limit for those product liability claims subject to an \$1,000,000 annual aggregate limit; that each policy has a \$1,000,000 combined single limit per occurrence for other covered claims, with no limit to the number of occurrences; and that Penn National has an unlimited supplemental duty to defend.

170. Covil seeks a further declaration and order that TIG issued umbrella coverage that “drops down” to provide “first dollar” coverage in the event there is no available primary coverage; that this umbrella coverage, in such event, provides for an unlimited supplemental defense obligation; that each TIG policy year provides

\$2,000,000 for claims that are subject to an aggregate limit and \$2,000,000 per occurrence for all other claims, with no limit to the number of occurrences; and that TIG issued the following umbrella policies:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
July 25, 1976 – February 15, 1977	RU 309724	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense
February 15, 1977 – March 31, 1977	RU 308527	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense
March 31, 1978 – March 31, 1979	RU 430944	\$2,000,000 per occurrence; \$2,000,000 aggregate where applicable; supplemental defense

171. Covil seeks a further declaration and order that Hartford issued the following primary insurance policies with \$500,000 in per occurrence limits (which were increased to \$1,000,000 per occurrence in 1984, 1985 and 1986), and no limit to the number of occurrences, and with an unlimited supplemental defense obligation, applicable to claims other than product liability suits:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1978 – March 31, 1979	22 C 936166	\$500,000 per occurrence; supplemental defense
March 31, 1979 – March 31, 1980	22 C 938625	\$500,000 per occurrence; supplemental defense

March 31, 1980 – March 31, 1981	22 C 941900	\$500,000 per occurrence; supplemental defense
March 31, 1981 – March 31, 1982	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1982 – March 31, 1983	22 C 943927	\$500,000 per occurrence; supplemental defense
March 31, 1983 – March 31, 1984	22 C 943927	\$1,000,000 per occurrence; supplemental defense
March 31, 1984 – March 31, 1985	22 C 943927	\$1,000,000 per occurrence; supplemental defense
March 31, 1985 – March 31, 1986	22 C 943927	\$1,000,000 per occurrence; supplemental defense

172. Covil seeks a further declaration and order that Hartford and First State, a Hartford company, issued umbrella coverage with the same “drop down” and supplemental defense provisions as TIG, responsive on a per occurrence basis with the exception of product liability claims, as follows:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1980 – March 31, 1981	22 RHU 371518	\$2,000,000 per occurrence
March 31, 1981 – March 31, 1982	22 RHU 371789	\$5,000,000 per occurrence
March 31, 1982 – March 31, 1983	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1983 – March 31, 1984	22 RHU EX 4908	\$5,000,000 per occurrence
March 31, 1984 – March 31, 1985	22 RHU EX 4908	\$5,000,000 per occurrence
<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1985 – March 31, 1986	22 RHU EX 4908	\$5,000,000 per occurrence

173. Covil reserves the right to seek further declarations as to policies issued by

Hartford and First State, including as to coverage for products and completed operations claims, after discovery.

174. The foregoing policies of insurance are referred to as the “Covil Insurance Policies.” As to all of the Covil Insurance Policies, Covil seeks the following declarations:

- a. The Covil Insurance Policies cover all Covil asbestos suits that allege any of bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of their policy periods;
- b. Each Covil asbestos suit “triggers” all Covil Insurance Policies with policy periods from the date of first alleged exposure to asbestos up through and including the date of discovery, or “manifestation” of an asbestos-related disease;
- c. Covil may select the policy or policy years to which to assign or allocate each Covil asbestos suit-related loss;
- d. In the case of a claimed ambiguity in any Covil Insurance Policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Covil Insurance Policies and the Insurers bear the burden of proof as to any such ambiguity;
- e. Defense costs for the Covil asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of Covil Insurance Policies;
- f. If any allegation or cause of action in a Covil asbestos suit is actually or

potentially covered under the Covil Insurance Policies, each insurer must defend or reimburse the costs of defending against all of said allegations and causes of action contained in such complaint;

- g. Each Covil Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Covil asbestos suits, unless there is an unambiguous exclusion or limitation that applies to any such suit or there is no bodily injury or allegation thereof during the period of any such Covil Insurance Policy;
- h. Each Covil Insurance Policy must cover the Covil asbestos suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods;
- i. The Covil asbestos suits that allege exposure to asbestos for which Covil is alleged to be liable, during Covil’s operations, including Covil’s construction, installation, maintenance or removal activities, are subject only to the “per occurrence” limits of the Covil Insurance Policies, and not subject to “aggregate” limits, if any, of the Covil Insurance Policies;
- j. Any aggregate limit on coverage in any of the Covil Insurance Policies is a limitation on coverage, and therefore each insurer has the burden to prove, based on the evidence, any assertion that any particular Covil asbestos suit is subject to the aggregate limits in the Covil Insurance Policies, if any; and
- k. Each insurer has the burden to prove, based on the evidence, that any particular Covil asbestos suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Covil Insurance Policies, in order to subject the claim to the aggregate limits in the Covil Insurance

Policies, if any.

175. An actual and justiciable controversy exists between Covil and each of the insurers concerning their obligations under the Covil Insurance Policies.

176. Judicial declarations are necessary and appropriate at this time, and under the circumstances alleged above, so that Covil may ascertain its rights under the Covil Insurance Policies. A judicial declaration of Covil's rights will obviate *seriatim* litigation and a multiplicity of actions that otherwise would result from the actual and justiciable controversy between Covil and the insurance companies concerning their respective rights and obligations under the Covil Insurance Policies.

COUNT VI
(Declaratory Judgment Against Individual Defendants)

177. Covil repeats and realleges the above allegations and further alleges as follows:

178. A verdict has been awarded in the *Finch* suit in the amount of \$32,700,000. Covil contends that this entire verdict must be paid for by defendants Sentry, Zurich, and USF&G without impairing any limit of liability under the insurance policies issued by these defendants. Covil also contends that Sentry, Zurich, and USF&G may have improperly allocated prior settlement payments to the product liability coverage part of their policies.

179. In light of the foregoing, Covil seeks a declaration and order that certain rights and interests of the individually-named defendants be limited and curtailed as follows:

(i) that any judgment obtained against Covil in a Covil asbestos suit be limited to all sums that may be collected from defendants Zurich, Sentry, USF&G, TIG, and

Hartford, individually or collectively; (ii) that punitive or exemplary damages are not awardable against the Receiver or the Receiver acting on behalf of Covil pursuant to South Carolina Code § 15-65-10; and (iii) that any judgment obtained against Covil that is or may be subject to an aggregate limit of any insurance policy or policies issued to Covil must fairly and equitably take into account such other judgments that may be outstanding at the time of such judgment.

PRAYER FOR RELIEF

WHEREFORE, Covil Corporation, by and through its duly-appointed Receiver, demands judgment against defendants as follows:

- A. On Count I, for the relief sought therein;
- B. On Count II, for the relief sought therein;
- C. On Count III, for the relief sought therein;
- D. On Count IV, breach of contract damages, in amounts to be proven at trial, including all compensatory, ancillary and consequential damages;
- E. On Count V, for the declarations sought therein, including but not limited to the following:
 - (i). The Covil Insurance Policies cover the Covil asbestos suits that allege any claim of bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of their policy periods;
 - (ii). Each Covil asbestos suit “triggers” all Covil Insurance Policies with policy periods from the date of first alleged exposure up through and including the

date of discovery, or “manifestation” of an asbestos-related disease;

(iii). Covil may select the policy or policy years to which to assign or allocate any loss;

(iv). In the case of a claimed ambiguity in any Covil Insurance Policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Covil Insurance Policies;

(v). Each insurer is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Covil asbestos suits;

(vi). Each Covil Insurance Policy must cover the Covil asbestos suits, in full, up to their “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods;

(vii). The Covil asbestos suits that allege exposure to asbestos during Covil’s operations, including construction, installation, maintenance or removal activities, are subject only to the “per occurrence” limits of the Covil Insurance Policies, and not subject to “aggregate” limits, if any, of the Covil Insurance Policies;

(viii). Any aggregate limit on coverage in any of the Covil Insurance Policies is a limitation on coverage that each insurer has the burden to prove; and

(ix). Each insurer has the burden to prove, based on the evidence, that any particular asbestos suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Covil Insurance Policies, in order to subject the claim to the aggregate limits in its Policies, if any;

F. On Count VI, for the declarations sought therein; and

G. Such other and further relief as this Court deems just and proper.

JURY DEMAND

The Receiver hereby demands a trial by jury on all issues so triable.

Dated: December 26, 2019

/s/ Brady Edwards
Paul Anton Zevnik
Brady Edwards
Nancy Patterson
W. Brad Nes
Clayton A. Morton (Appearance Forthcoming)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
T: (202) 739-3000

William K. Davis (N.C. Bar No. 1117)
BELL, DAVIS & PITT, P.A.
P.O. Box 21029
Winston Salem, North Carolina 27120-1029
T: (336) 714-4146
wdavis@belldavispitt.com

Attorneys for Covil Corporation, acting through
Peter D. Protopapas, Receiver of Covil
Corporation

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing brief via the Court's electronic filing system, pursuant to the Electronic Filing Procedures, on all attorneys of record who have entered an appearance by ECF in this matter.

This the 26th day of December, 2019.

/s/ Brady Edwards
Brady Edwards
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
T: (202) 739-3000

STATE OF SOUTH CAROLINA

COUNTY OF YORK

ROXANNE FALLS, Individually and as
Personal Representative of the Estate of
CHARLOTTE GAYE SMITH,

Plaintiffs,

vs.

CBS Corporation, et al.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT
C/A NO.: 2015-CP-46-02155

**ORDER FOR RULE TO SHOW CAUSE
HEARING**

STATE OF SOUTH CAROLINA

COUNTY OF YORK

TIMOTHY W. HOWE, Individually and as
Personal Representative of the Estate of
Wayne Ervin Howe, deceased, and Jeanette
Howe,

Plaintiffs,

vs.

Air & Liquid Systems Corporation, et al.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT
C/A NO.: 2015-CP-46-03456

**ORDER FOR RULE TO SHOW CAUSE
HEARING**

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
CHARLES T. HOPPER and REBECCA
HOPPER,

Plaintiffs,

vs.

Air & Liquid Systems Corporation, et al.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A NO.: 2019-CP-40-00076

**ORDER FOR RULE TO SHOW CAUSE
HEARING**

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
JAMES MICHAEL HILL,

Plaintiff,

vs.

Advance Auto Parts, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A NO.: 2018-CP-40-04680

**ORDER FOR RULE TO SHOW CAUSE
HEARING**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2018-CP-40-04940
	)	
DENVER D. TAYLOR and JANICE	)	
TAYLOR,	)	
	)	
Plaintiffs,	)	ORDER FOR RULE TO SHOW CAUSE
	)	HEARING
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

This matter comes before this Court by way of a Motion for a Rule to Show Cause initiated by Peter D. Protopapas, as the duly appointed Receiver of Covil Corporation ("Receiver"). The Receiver's Motion for a Rule to Show Cause against United States Fidelity and Guaranty Company ("USF&G"), Zurich American Insurance Company ("Zurich"), and Sentry Insurance, a Mutual Company ("Sentry") (collectively "Insurers") seeks an order holding these Insurers in contempt for violating this Court's (1) November 2, 2018 Order Appointing a Receiver for Covil Corporation;¹ (2) February 28, 2019 Order requiring Covil's Insurers to attend mediation;² (3) September 19, 2019 Order requiring Covil's Insurers to respond and produce required documents before September 30, 2019;³ and (4) October 28, 2019 Order for Rule to Show Cause.⁴

¹ See November 2, 2018, Order Appointing Receiver in *Taylor v. Air & Liquid, et al.* (C/A No. 2018-CP-40-04940).

² See February 28, 2019, Order Granting Plaintiff's Motion to Compel Attendance at Mediation in *Nolen v. Daniel, et al.* (C/A No. 2016-CP-40-04184); *Greene v. Armstrong, et al.* (C/A No. 2016-CP-40-00173); *Thompson v. Armstrong, et al.* (2016-CP-40-2498); and *Taylor v. Air & Liquid, et al.* (C/A No. 2018-CP-04940).

³ See September 19, 2019, Order for Rule to Show Cause in *Hopper v. Air & Liquid, et al.* (C/A/No. 2019-CP-40-00076).

⁴ See October 28, 2019, Order for Rule to Show Cause in *Hopper v. Air & Liquid, et al.* (C/A/No. 2019-CP-40-00076).

The South Carolina Supreme Court appointed the undersigned to serve as the Chief Judge of Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system. The asbestos litigation in South Carolina constitutes a significant number of complex multi-party cases. A typical case will include an injured plaintiff alleging that an asbestos-related cancer was caused by dozens of different defendants.

This Court has worked diligently to manage this docket and to organize this complicated statewide litigation into an orderly process whereby cases are assigned for trial in a predictable fashion. This process is designed to allow the litigants to participate in discovery in an orderly fashion to facilitate the evaluation of litigation positions well before trial, and to try the cases as necessary.

The Supreme Court's charge to this Court includes facilitating meaningful mediations of asbestos cases consistent with the South Carolina Rules of Alternative Dispute Resolution. The Rules mandate attendance at mediation of "a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim" on behalf of any insured party against whom a claim is made. SCRADR 6(b)(4).

Although this Court manages a large asbestos docket involving scores of different defendants, the matters associated with defendant Covil Corporation have required a very significant amount of this Court's time and attention for the reasons explained in more detail below.

From the time of its original formation in or about 1954, Covil Corporation was engaged in the installation and removal of insulation in various industrial facilities across South Carolina. Covil's operations involved the installation, removal and disturbance of insulation materials, typically supplied, required or acquired by other parties. At pertinent times insulation materials contained asbestos and Covil's operations are alleged to have resulted in bodily injury to South Carolina citizens. In 1991, Covil's business failed and it ceased operations. Thereafter, in 1993 the State of South Carolina rescinded Covil's corporate charter for failing to file the appropriate documentation with the Secretary of State.

Despite Covil's failure as a going concern and its subsequent forfeiture of its corporate charter, it continued to be sued in numerous asbestos cases. Through the management of the South Carolina asbestos docket, this Court observed several irregularities in the way that Covil conducted itself in its litigation. In the fall of 2018, Covil inexplicably defaulted on two mesothelioma asbestos cases pending before this Court, and shortly thereafter on November 2, 2018, the undersigned appointed Peter D. Protopapas to serve as a Receiver for Covil Corporation to manage its affairs according to South Carolina law.

During the ensuing months, this Court conducted numerous hearings regarding issues related to Covil. Over time, it became clear to this Court that certain of Covil's primary insurers (USF&G, Zurich, and Sentry) were operating an otherwise defunct Covil for purposes of managing Covil's asbestos litigation and had been doing so for over two decades without any apparent involvement from the insured – Covil Corporation. For over two decades, these primary Insurers pretended to be Covil. The primary insurers never sought the appointment of a receiver to represent Covil's interests in the defense of its asbestos cases. In fact, despite numerous opportunities to do so, at no time did any of Covil's Insurers even disclose to this Court their scheme to operate Covil as an undisclosed alter ego of these insurance companies.

As Covil's Receiver began to undertake his responsibilities, it became evident to this Court that Covil's Insurers would not willingly cooperate with the Receiver.⁵ In fact, several of these Insurers went to great lengths to thwart the Receiver's efforts to understand the basic nature and amount of the asbestos insurance coverage available to Covil. As a result of the insurers' refusal to cooperate, the Receiver began to seek this Court's intervention to determine the nature and amount of insurance available to Covil for its asbestos litigation. This information is critical to the Receiver's ability to manage Covil's asbestos

⁵ The Court's discussion of Covil's Insurers does not apply to TIG Insurance Company, as successor in interest to Fairmont Specialty Company, formerly known as Ranger Insurance Company ("TIG"). Unlike Covil's other insurers, TIG has cooperated with this Court and the Receiver. After producing the requisite materials, TIG acknowledged its responsibilities and reached an amicable settlement with Covil's Receiver. The Court commends TIG and its counsel for their cooperation and professionalism throughout this process. The Court also dissolved its Order to Show Cause as it related to Hartford and notes that Hartford also has reached an agreement to resolve its differences with Covil's Receiver.

litigation and, specifically, to participate meaningfully in mediation sessions scheduled for Covil's asbestos cases as required by the South Carolina Rules of Alternative Dispute Resolution.

Proceedings before this Court on the issue of Covil's participation in mediation exercises have demonstrated a lack of clarity regarding what constitutes "full authority" for claims filed against Covil Corporation. This lack of clarity continually delays settlement, stalls negotiations, and slows the ability of this Court to manage the South Carolina asbestos docket. An inquiry into the insurance coverage of Covil Corporation is warranted to fully determine the amount of authority available for settlement of asbestos personal injury actions filed against Covil Corporation.

Over time, this Court entered a series of escalating orders designed to require the Insurers to produce relevant insurance information to Covil's Receiver and to participate in asbestos mediations as scheduled on the South Carolina docket. Although several asbestos cases have been resolved under this system, except as noted above in note 5, the Insurers have yet to comply with this Court's Orders regarding the full production of the relevant insurance information to Covil's Receiver. These Insurers' defiance of this Court's lawful orders has impeded Covil's Receiver in his work under this Court's mandate, has interrupted this Court's ability to manage the numerous asbestos cases pending on its docket, and has required this Court unnecessarily to expend valuable time and resources in numerous hearings designed to encourage these Insurers to conduct themselves in accordance with the basic tenets of well-established South Carolina law. The Court has experienced problems with these Insurers when they were animating an otherwise defunct Covil and controlling its behavior in asbestos litigation before the appointment of the Receiver. *See* Order Granting Plaintiff's Motion for New Trial in *Crawford v. Ceeleanese Corp.*, C/A No. 2017-CP-42-04429 (where this Court found that Covil's insurers had been improperly operating, controlling, and abusing Covil for many years).

Unfortunately, this Court's persistence and patience have been unsuccessful in causing these Insurers fully to disclose and produce the insurance information or the details concerning their respective insuring relationship with Covil to the Receiver for their insured, Covil. After numerous attempts to achieve

compliance, this Court scheduled a show cause hearing on November 12, 2019, where the Insurers were directed to appear to discuss by policy and annual period (or portion thereof) the original and remaining limits of Covil's insurance policies under all applicable coverage parts, including separately as to the product liability/completed operations coverage part and the operations/premises coverage part and to provide an accounting of the amounts paid in settlement for each claim paid or settled, who authorized payment, under what coverage parts of the policies settlements or judgments were paid, documentation or other evidence supporting the analysis and characterization of claims as products/completed operations or operations/premises claims, method of allocation of settlements or judgments paid among Insurers, policies and policy years and if no payment was made because of a denial of coverage, the stated basis at the time of settlement for such denial. With the exceptions noted above in note 5, the Insurers failed and refused to comply with this order.

In sum, after months of work by this Court and its Receiver, it appears to this Court that these Insurers have refused to provide complete policy limits and settlement authority information to their insured's Receiver, even after this Court ordered the Insurers to provide the information by September 30, 2019, under penalty of perjury, and again in a show cause hearing scheduled on November 12, 2019. Despite their assertions in their memoranda submitted to this Court following the November 12, 2019 hearing, the Court has given the Insurers ample opportunity to respond to Receiver's arguments and explain to the Court why they should not be held in contempt for failing to abide by this Court's September 19, 2019 Order. Despite these Insurers not complying with the clear terms of the September 19, 2019 Order to respond to the areas of inquiry under the penalty of perjury by September 30, 2019, the Court allowed these Insurers to submit additional affidavits and evidence after the November 12, 2019 hearing. However, as the Court noted at the hearing, these Insurers were already in contempt of this Court's order by not providing proper responses under perjury by the September 30, 2019 deadline, and the supplemental submissions, although potentially helpful to the Court in making this ruling, do not necessarily cure the Insurers' contempt. The Court has diligently reviewed and considered the extensive filings submitted by both the

Receiver and these Insurers after the November 12, 2019 hearing. The Court finds the submissions by these Insurers are not relevant to, and do not cure, their contemptuous conduct. Rather, these filings have consumed additional countless hours of this Court's time while these Insurers continue to play games rather than comply with this Court's orders.

The Court is particularly concerned with the fact that these Insurers continue to claim ignorance surrounding their responsibility to their insured and their obligations under this Court's orders. The Court has held multiple hearings wherein the Court has allowed the Receiver and the Insurers to present arguments pertaining to these issues, and the Receiver has been trying to obtain the requested information since his appointment, well over a year ago. These Insurers cannot continue to plead ignorance in order to avoid the consequences of their own conduct and prolong the much-needed resolution of pending asbestos cases. The Insurers have continuously attempted to impede the Receiver's ability to determine the amounts of coverage available to Covil and have violated the South Carolina Alternative Dispute Resolution Rules by refusing to provide the Receiver with the necessary coverage information to fully participate in the mediation of these claims. In fact, because of these Insurers' obstinate refusal to comply with this Court's order and their past conduct, the Receiver has been forced to go to great lengths in order to present evidence to this Court and piece together the secondary evidence of insurance. While the Insurers have produced thousands of pages of documents, the production does not satisfy this Court's order as these Insurers have still not produced full coverage information or policies to the Receiver or fully disclosed the nature and extent of their insuring relationship.

During these hearings, the Court has been presented with evidence in the form of documents and sworn testimony indicating that Covil purchased products liability and completed operations liability insurance from USF&G (now a part of Travelers) from 1954 to 1964. Specifically, Palmer Covil (the founder of Covil Corporation) testified in a deposition in 1977 that Covil purchased USF&G general liability insurance coverage from 1954 to 1964. Moreover, Palmer Covil identified the Goldsmith Agency as the broker responsible for selling USF&G coverage to Covil. Former Lieutenant Governor Nick

Theodore provided an affidavit, as a former employee and partner of this agency, that he recalled selling USF&G insurance to Covil during this time period (until his agency lost the business to an agent selling insurance issued by Sentry). The Court finds this evidence and testimony to be persuasive, credible, and consistent with other known facts in this case.

On the other hand, USF&G reports only that it has been unable to locate these insurance policies. However, the Court has also been presented with evidence that USF&G undertook a systematic corporate program to destroy or discard its historical insurance policies which included policies and other related documentation from the period of time for which policies were issued to Covil as demonstrated by the evidence before this Court. In its arguments before the Court on November 12, 2019, and its memorandum submitted after the hearing, USF&G argues the Court should disregard its historical conduct because past conduct cannot be the basis of a finding of contempt. However, USF&G failed to inform the Court of the systematic destruction of policies until the Receiver brought the matter to the attention of the Court at the most recent hearing. The Court is concerned by the Insurers' failure to fully represent facts to the Court regarding the insurance coverage issued to Covil, especially considering that the Insurers acted as the alter ego of Covil for numerous years. The Court has given the Insurers ample opportunity to inform the Court of the necessary facts surrounding these coverage issues, and the Insurers have continuously refused to provide full information, misrepresented information, and attempted to prevent this Court from ruling on these issues.

The Court is deeply troubled by USF&G's historical behavior, including the widespread destruction of its insureds' insurance policies in an effort to evade liability under these policies. The Court is even more troubled by the fact that USF&G never mentioned, in numerous hearings on this very topic, that its policy destruction "purge" was the reason that USF&G is now unable to produce Covil's policies to the receiver. In this regard, USF&G has flagrantly defied this Court's orders and attempted to make a mockery of this Court's important work. Rarely, if ever, has this Court encountered such a degree of corporate

dishonesty as has been on display from USF&G during these proceedings. USF&G owes this Court a duty of candor, and should have been forthright.

The spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a current or reasonably anticipated legal proceeding. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Black's Law Dictionary* (8th Ed. 2004). The theory behind imposing sanctions for spoliation of evidence is that when a party destroys evidence, it is reasonable to infer that the party had "consciousness of guilt" or other motivations to avoid the evidence being heard or introduced to the jury.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three (3) independent elements before the Court may determine which sanction, if any, is appropriate. These elements are:

- (1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed;
- (2) that the evidence was destroyed with a culpable state of mind; and
- (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Hawkins v. College of Charleston, 2013 WL 6050324, *2 (4th Cir. 2013) (quoting *Cytec Carbon Fibers, LLC v. Hopkins*, No. 2:11-cv-0217, 2012 WL 6044778 (D.S.C. Oct. 22, 2012)).

As to the first element, USF&G had a duty to preserve this evidence. "A party has a duty to preserve evidence during litigation and at any time 'before the litigation when a party reasonably should know that evidence may be relevant to anticipated litigation.'" *Id.* at *3 (quoting *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). There is a common law duty to preserve evidence, and a party can only be sanctioned for destroying evidence it had a duty to preserve. That duty arises when a party has notice that the party possesses evidence that is relevant to litigation or when a party should have known the evidence may be relevant to future litigation. Pre-litigation discussions or requests to inspect can also trigger a duty to preserve relevant evidence and it can be said that the obligation to preserve evidence

runs first to counsel, who then has an ethical obligation to notify and advise their client on its obligations to safeguard and preserve the evidence relevant to the litigation on a continuing basis.

Covil is unable to identify a specific date on which USF&G's duty to preserve records arose. However, by 1976, USF&G had received correspondence from Covil requesting USF&G to respond to an asbestos case, and by June 1983, USF&G had received correspondence from Covil serving as Covil's final written demand that USF&G afford a defense to Covil in an asbestos case. As a result of this exchange of correspondence, USF&G knew by at least June 1983 that its insurance policies issued to Covil would be highly relevant documents for years to come. Despite this fact, USF&G reports that it has been unable to locate the early policies issued to Covil – policies that it denies having issued – or an actual copy of a later policy that it admits to having issued to Covil.

The evidence demonstrates that USF&G cannot locate the early policies USF&G issued to Covil, or the later policy it admits having issued to Covil, because USF&G destroyed the policies. In 1984, the year after Covil's counsel demanded a defense from USF&G, which was facing a growing number of long-tail claims like the asbestos claims here, USF&G deliberately began purging old policies and policy information, including information on policy limits. To support its contentions regarding the destruction of policies, the Receiver submitted documents from the *Western MacArthur* litigation; most importantly the Pillsbury Report, which USF&G Filed in *Western MacArthur* litigation (*Western MacArthur Company v. General Accident Insurance Company of America*, Case No. 721595-7, In the Superior Court for Alameda County, California).⁶

⁶ The Pillsbury Report is an 85-page document, filed in *United States Fidelity & Guaranty Company, et al. v. American Re-Insurance Company, et al.* Index No. 604517/2002, in the Supreme Court of the State of New York, County of New York. An expert witness, Philip L. Pillsbury, Jr., of the New York law firm, Pillsbury and Levinson, was retained by the reinsurers of USF&G to evaluate, in the context of California bad faith and insurance practice, the potential exposure for damages, which USF&G faced in a jury trial in 2002. This material was presented by Covil, at the November 12, 2019 hearing to describe the significant corporate misconduct leading to USF&G's contention that it was unable to locate copies of Covil's early insurance policies, which the Receiver found highly probative of the key issues in the proceeding. There was no objection regarding the Court's consideration of the documents, and Defendant

As stated in the Pillsbury report, an April 30, 1984 memorandum from Charles Watson, then a Vice President of USF&G, the new document destruction policy mandated the “purging of *each* file, not just files that can be discarded in entirety,” required that doubts should be resolved “in favor of discarding unless there are legal restraints,” and admonished that “we must be absolutely sure that we have thoroughly cleaned existing files.” Similarly, a March 16, 1984 Department Circular detailing the Records Management Program noted: “All existing departmental files are to be in full compliance including having been completely purged of all obsolete and duplicate material.”

As detailed in the expert report of Philip Pillsbury, which USF&G filed on February 21, 2017 as an exhibit to its opposition to a motion in the *Western MacArthur* reinsurance matter then pending in New York, USF&G’s employees were given just two months to comply with the document destruction. Relying on USF&G’s historical records, Mr. Pillsbury also described the deposition testimony of Randolph Rohrbaugh, the USF&G Vice President of Quality Assurance, who testified that, at a meeting concerning the USF&G document destruction program among USF&G management and attorneys in 1984, “there was a discussion as to whether USF&G should retain its records information about insureds’ policies given that insureds would bear the burden of proof as to those policies.” *See Pillsbury Report at 18.*

In short, the evidence shows that USF&G plainly undertook its purge of policy-related materials in anticipation of litigation. Having destroyed its policy records, USF&G then could require its policyholders to provide copies of their policies to USF&G in order for USF&G to provide coverage. Beginning in the late 1980s, however, USF&G realized that policyholders could prove coverage for long-tail liability claims with secondary evidence, even if USF&G had destroyed the actual historical policy records in its possession. In his report in the reinsurance matter, Mr. Pillsbury describes the USF&G decision to reverse course on the document destruction policy. *See Pillsbury Report at 18–19.* Summarizing the deposition of Kenneth Ford, the USF&G in-house counsel in the Claims Legal Division, Mr. Pillsbury notes that Ford

USF&G and others requested the court allow them to submit further documentation. The court has considered the report and the additional insurers’ submissions in drafting this order.

“testified at deposition that USF&G decided to ‘stop the destruction’ after policyholders began to prove coverage for the long-tail claims with ‘partial information concerning a policy,’ and the burden was shifted to the insurer to prove there wasn’t a policy or at least to prove the policy terms, and USF&G was not able to rebut some of that information.” *Id.* at 19. The reversal of course apparently occurred after USF&G destroyed evidence of the coverage it had provided to Covil between 1954 and 1964 and the actual policy it admits to having issued to Covil in the 1976 to 1978 periods.

Recently produced documents from USF&G itself further support that had USF&G not destroyed its historical policies, it would have been able to locate coverage it issued to Covil in the 1950s and 1960s and the actual policy it admits to having issued to Covil in 1976 to 1978. USF&G Claims Register documents⁷ produced to the Receiver by USF&G on November 22, 2019, and December 5, 2019, over two months after this Court’s deadline for production, show USF&G paid claims on Covil policies made by third-party business entities such as Daniel Construction, Tennessee Eastman, Raburn Mills, First Baptist Church and Hicks & Ingle Company during the period from 1955 to 1962, further supporting the fact that USF&G issued general liability insurance coverage to Covil during this timeframe and, due to its conduct, has been unable to produce full and complete coverage information. Furthermore, although it claims to have what it calls a “certified” copy of the 1976 to 1978 primary policy it admits having issued to Covil, USF&G has not been transparent with either Covil or the court. This so-called “policy” is a collection of forms, not an actual insurance policy, and there is no competent proof of an aggregate limit for products or completed operations claims. USF&G’s use of the word “certified” is also misleading since the documents have no independent verification of their source or accuracy.

⁷ The Court understands that USF&G utilized Claims Registers to maintain an index of all paid claims, and specifically that an entry was not placed on a claims register until a clerk had reviewed the relevant insurance policy to ensure that there was coverage for the loss. An April 1947 booklet entitled “Claim Department Clerical Instructions” detailed USF&G’s instructions to clerical staff regarding entry of claims in the claims register: “After the clerk has checked the policy or bond information to determine if there is coverage for the loss, she enters it on the claim register as provided on that form. She assigns the number next in order to the last one used. A separate sheet is used on each class of claims for each month. A carbon copy of the claim register is sent to the Home Office on the first of each month on AL [Automobile Bodily Injury], L [Other Bodily Injury], C [Compensation], and MP [Miscellaneous Property Damage] claims.”

By failing to maintain documents relevant to pending and future asbestos personal injury and insurance litigation, USF&G had a culpable state of mind because it either intentionally or negligently destroyed the evidence. The destruction of the documentary evidence that Covil seeks significantly hampers Covil's Receiver's ability to reconstruct its insurance program and other information relevant to pending and future asbestos personal injury and insurance litigation.

The "culpable" state of mind requirement does not require willful destruction. Rather, the moving party need only show that the evidence was destroyed "knowingly, even without intent [to breach the duty to preserve it], or negligently." *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107–12 (2d Cir. 2001). "[T]he Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of the sanctions." *Sampson v. City of Cambridge, Maryland*, 251 F.R.D. 172, 179 (D. Md. 2008) (citing *Silvestri*, 271 F.3d at 590).

Here, the evidence before the Court shows that USF&G's conduct of destroying or losing relevant documents satisfies the required minimum level of culpability needed for spoliation sanctions to be imposed. Because culpability encompasses everything from ordinary negligence to willful conduct, the culpable standard merely requires USF&G to have some degree of fault, which is the case in this matter. Whether the Court finds that USF&G was negligent, grossly negligent, or willful in destroying the evidence, the Court concludes that USF&G had a culpable state of mind when it spoliated the evidence at issue.

The last of the three independent elements, relevance to the party's claims, is also clearly present on these facts. Under Rule 401 of the South Carolina Rules of Evidence, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." "Evidence is relevant if it tends to establish or make more or less probable some matter at issue upon which it directly or indirectly bears." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Thus, any evidence which assists a jury at arriving at the truth of an issue is relevant. The determination of the relevancy of evidence is largely

within the trial judge's discretion. *Strickland v. Coastal Design Assocs., Inc.*, 294 S.C. 421, 425, 365 S.E.2d 226, 228 (Ct. App. 1987).

Here, Covil has met its burden of showing the spoliated evidence is highly relevant to its case. The fact that USF&G destroyed or lost such evidence is extremely damaging to Covil's ability to reconstruct its insurance policies. As such, USF&G should not profit or benefit from its failure to preserve this evidence. Of course, Covil has no way of knowing precisely what has been destroyed. However, there is reason to believe that the destroyed evidence would have aided Covil's position, which has suffered irreparable prejudice due to USF&G's spoliation. USF&G is hereby ORDERED to produce ALL documents related to these issues, including all transcripts, from the *Western Asbestos* litigation, including the subsequent re-insurance litigation, to Covil's Receiver by January 13, 2020.

By destroying relevant evidence, USF&G has succeeded in hiding significant evidence of its insurance coverage and attempted to deprive Covil of the opportunity to present critical evidence of insurance coverage. Thus, the Court finds that USF&G spoliated relevant evidence and will issue an appropriate sanction to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field.

When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)). Over the years, courts have found numerous sanctions to be appropriate for the spoliation of evidence. Courts have allowed adverse inferences to be drawn from the loss or destruction of relevant evidence, dismissed cases or stricken pleadings, issued fines plus attorney's fees and applied almost every other sanction available for the failure to provide discovery.

Among the tools that judges may use to combat spoliation is the adverse inference jury instruction/presumption. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d

679 (Ct. App. 1997). The presumption does not arise from the failure to present the evidence, but rather from the role that the spoliating party had in preventing it from being reviewed by the jury or court. When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. *Gathers v. S.C.E.&G. Co.*, 427 S.E.2d 687, 689 (S.C. Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ.*, 302 S.C. 390, 396 S.E.2d 369). Based on the evidence established by Covil's Receiver regarding the existence of Covil insurance coverage issued by USF&G, and based on the evidence demonstrating USF&G's spoliation of evidence regarding the existence of the coverage, this Court holds that USF&G's issued general liability insurance coverage to Covil Corporation on an annual basis, including products and completed operations coverage, between 1954 and 1964, without an aggregate limit of liability for damages paid for bodily injury or property damage. The court also makes a similar finding as to the 1976 to 1978 policy, SMP 490049.

Further, necessitated by the Supreme Court's charge to this Court to manage the South Carolina statewide asbestos litigation cases and as a direct result of these Insurers' recalcitrance in refusing to cooperate with this process, this Court and its Receiver are now left to discharge their respective duties by reconstructing the nature and scope of Covil's historical insurance program (without the cooperation of the Insurers) so as to facilitate the management of the South Carolina asbestos docket. In this effort, the Court will apply the following principles of South Carolina insurance law.

1. **"Trigger of Coverage."** The term "trigger of coverage" describes the necessary events for a liability policy to respond to a suit seeking damage because of bodily injury. The Court rules that the policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable. All of an insured's policies in effect from a person's first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded. This approach is called a "continuous trigger of coverage" or an "injury in fact trigger of coverage" inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of

asbestos fibers and continue progressively thereafter. As respects asbestos injury and death suits, the “continuous trigger of coverage” and the “injury in fact trigger of coverage” yield the same result such that the court need not choose between these conceptually similar approaches. *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996) (“We find no error in the trial court’s use of an injury-in-fact analysis to apply a continuous trigger.”).

2. The Distinction Between “Operations” and “Completed Operations.” The Court finds that the policies at issue contain separate and distinct coverage parts for “operations” and “completed operations.” As a general matter, the policies contain no aggregate limit of liability for the operations coverage part, although the Court has also held that the USF&G policies issued to Covil between 1954 and 1964 also contain no aggregate limit of liability for the products and completed operations coverage part as well. The operations coverage part for each one of the policies at issue in this case responds repeatedly to each and every “occurrence” without a total “cap” on the insurers’ liability to pay, subject only to a “per occurrence” limit of liability. The same is true of products and completed operations claims covered under the 1954 to 1964 USF&G policies. Most of the asbestos contracting claims against Covil invoke the operations coverage part because they did not result from its “completed operations.”

The insurers have conflated the separate “operations” coverage part with the “completed operations” coverage part and have applied their policies in a manner that has not been adopted by the state courts in South Carolina. The Court is aware that the insurers contend that aggregate limits of liability apply to any third party’s claim against Covil involving exposure to asbestos that took place before the *inception date* of their policies. The policies are not written in that manner, however. There is nothing in the definition of “completed operations” that focuses on the inception date of a policy.

This Court is aware that, in seeking to limit their obligations to Covil, the insurers would prefer to rely exclusively on federal decisions attempting to “guess” the view the Maryland Court of Appeals would take if the issue of interpreting the “completed operations” provisions of the policies were presented to it. The insurers take the position that the Fourth Circuit has “spoken” definitively on this issue. However,

this Court finds that federal decisions attempting to predict the interpretation of policy language under Maryland law are not pertinent to the determination of South Carolina law. This Court specifically finds that *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004) is not the law of South Carolina.

This Court finds that the “completed operations hazard” described in the insurers’ policies, and the corresponding aggregate limits of liability in the policies that contain such aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos *after* Covil completed its installation or removal operations or work at a particular jobsite.

The Court holds that any aggregate limit of liability in the insurers’ policies applies only to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos attributed to Covil *after* Covil completed its work at a particular jobsite. No aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite.⁸ See, e.g., *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) (“*Gerling*”) (“Operations” coverage “protected [the insured] from claims for asbestos-related injuries resulting from asbestos exposure on [the insured’s] premises or during its business operations, for example, injuries occurring during the installation or removal of asbestos products”); *Travelers Cas. & Sur. Co. v. Employers Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured’s facility and injuries caused by a subcontractor’s negligent construction of a wall that fell on a worker while the job was in progress.”).

⁸ Covil contends that policies in addition to those issued by USF&G between 1954 and 1964 do not contain any aggregate limits of liability at all. The court has not reached any conclusion as to this contention, except to conclude, in accordance with well-settled South Carolina law, that the burden is on the insurer to prove any limitation on coverage, including a limitation such as an aggregate limit of liability.

3. **Burden Of Proof.** The Insurers bear the burden of proving any exclusion or limitation of coverage, including the application of aggregate limits to particular suits and the “exhaustion” of the aggregate limits of liability in their policies.

The South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: “Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560 614 S.E.2d 611, 614 (2004) (citing *Boggs v. Aetna Cas. and Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979)); see also *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144–48, 781 S.E.2d 137, 141–44 (2015) (upholding circuit court decision to construe an ambiguous terms in favor of coverage, and noting that “ambiguous terms are to be construed strictly against the insurer”). Courts have held that this basic principle also applies to “limitations” on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001) (“[o]nce the insured makes a prima facie showing of coverage, ‘the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.’” (quoting *Gen. Accident Ins. Co. v. Am. Nat’l Fireproofing, Inc.*, 770 A.2d 403, 416 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (“[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense”).

Consequently, as to any individual asbestos lawsuit, it is the Insurers’ burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability, if any, applicable to the “completed operations” provisions in their policies, where such aggregate limits have been proven by each particular Insurer as to each specific policy or policy period. By definition, aggregate limits restrict coverage. Accordingly, the insurers bear the burden of demonstrating that aggregate limits in their policies, if any, apply to any particular asbestos suits.

4. **Occurrences.** The policies at issue provide coverage for legal liabilities resulting from an

“occurrence.” An “occurrence” is typically defined as an accident, including exposure to substantially similar conditions, that results in bodily injury during the policy period. Covil faces allegations in numerous lawsuits that multiple asbestos injury and wrongful death “occurrences” have resulted from its asbestos “operations.” Covil is therefore entitled to multiple “per occurrence” limits of liability to resolve each of the asbestos suits.

The asbestos insulation operations suits against Covil are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Covil’s operations exposed workers and other bystanders to asbestos. Courts have held that the type of asbestos operations claims against Covil resulted from multiple “occurrences” under the standard definition of “occurrence” used during the time of the insurers’ policies. *See, e.g., Gerling*, 419 F.3d at 184 (“[I]f claims arising from multiple occurrences triggered [operations] coverage, then Travelers was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how much Travelers had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected Travelers to liability anew.”).

5. Allocation of Losses to Covil’s Policies. Exposure to asbestos results in progressive injury spanning many years, thereby triggering coverage under multiple policies. Exposure to asbestos during the conduct of operations that results in bodily injury during the policy period or periods during which the operations were conducted also presents an allocation issue. And, here, Covil is in a Receivership, with no assets other than its insurance policies and proceeds, which also affects any allocation of loss since Covil itself cannot absorb any allocation of loss. Finally, the Court notes that the language of the policies typically requires the insurers to pay “all sums” – meaning everything – for which the insured is legally obligated to pay if a claimant sustains bodily injury during the period of the policy.

The Court is mindful of the South Carolina Supreme Court’s decision in *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), and notes that it speaks generally to allocation of loss in a continuous injury situation such as asbestos-related disease but does not

address the particular circumstances presented by this Receivership, *i.e.*, the applicability of operations coverage and the impracticability of allocation of loss to Covil itself. Therefore, the Court will apply the rule of *Crossman Communities of N.C., Inc.* except in the case of operations claims where the policies in effect during the conduct of the operations will apply on an “all sums” basis. The Court also interprets *Crossman* such that allocation of loss will not be made to policy years when Covil does not have any available or responsive coverage.

Finally, each individual insurer will nevertheless be protected fully against the possibility that it paid too much on a single asbestos claim by its right to seek contribution from any other insurer, but not from Covil, whose policy also was triggered by the asbestos suit. This approach “ensures that [Covil] is indemnified by one [or more] insurer for the full extent of the loss up to the policy’s limits, but apportions liability among all insurers whose policies were triggered by the claimant’s asbestos-related bodily injury.” *Armstrong*, 45 Cal. App. 4th at 55.

This Court further finds that no aggregate limit of liability for product liability or completed operations claims has been or can be proven, and therefore no aggregate limit for product liability or completed operations claims exists, for the following Covil insurance policies:

<u>Policy Period</u>	<u>Insurer</u>	<u>Policy Number</u>
April 21, 1964 – April 21, 1965	Hardware Mutual Casualty Co.	39 04132 02 01
April 21, 1965 – April 1, 1966	Hardware Mutual Casualty Co.	39 04132 02 01
April 21 1966 – March 31, 1967	Hardware Mutual Casualty Co.	39 04132 02
March 31, 1967 – March 31, 1968	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1968 – March 31, 1969	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1969 - March 31, 1970	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1974 – March 31, 1975	Maryland Casualty Company	41-206393
March 31, 1975 – March 31, 1976	Maryland Casualty Company	41-206393

March 31, 1976 – March 31, 1977	USF&G	SMP 490049
March 31, 1977 – March 31, 1978	USF&G	SMP 490049

This Court further orders that this Order be forwarded to the South Carolina Attorney General and to the South Carolina Department of Insurance for their consideration and further action, as they may deem appropriate.

AND IT SO ORDERED this 8 day of January, 2020.

Jean H. Toal, Chief Justice of the Supreme
Court, Retired, acting as Circuit Court Judge

Columbia, South Carolina.



York Common Pleas

Case Caption: Charlotte Gaye Smith , plaintiff, et al VS CBS Corporation ,
defendant, et al
Case Number: 2015CP4602155
Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

Electronically signed on 2020-01-08 11:32:39 page 23 of 23

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Ann Finch, Individually and as Executor of the
Estate of Franklin Finch,

Plaintiff,

v.

United States Fidelity And Guaranty Company;
Zurich American Insurance Company;
Enstar (US) Inc.; Peter Protopapas as Court
Appointed Receiver for Covil Corporation, and
Wall, Templeton & Haldrup, P.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No: 2019-CP-40-03003

**SECOND AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT**

(Jury Trial Demanded)

COMES NOW Ann Finch, individually and as the executor of the estate of Franklin Finch, by and through her attorneys, and for her complaint, who alleges upon knowledge as to her own acts and upon information and belief as to all other matters as follows:

INTRODUCTION

Covil Corporation (“Covil”), a South Carolina company founded on selling asbestos insulation throughout South Carolina and the southeast, began its corporate life in 1954. In 1993, Covil Corporation, after the death of its founder Palmer Covil from mesothelioma¹, understanding it had sold asbestos all over South Carolina and the immense implications for the health of workers of South Carolina, quietly dissolved its corporate existence leaving behind only insurance coverage. Between 1993 and 2018, Covil’s insurance carriers and their lawyers, without a representative of the insured or client, appeared for Covil, answered Covil’s lawsuits, decided how to defend the suits, what representations to make to court and counsel, answered discovery for

¹ [M]esothelioma, [is] an “invariably fatal cancer...for which asbestos exposure is the only known cause...” *In re Patenaude*, 210 F.3d 135, 138 (3d Cir.), cert. denied, 531 U.S. 1011 (2000).

Covil (making factual representations), determined how and when to make settlement offers, if any were made at all, and how, if at all, to respond to demands. In essence, Covil's insurers and their lawyers were Covil, put the coffee on in the morning and turned the lights off when they left and made every decision for Covil in between.

The Plaintiff here brought claims for the wrongful death of her husband in the U.S. District Court for the Middle District of North Carolina. The Plaintiff demanded that Covil tender its policy limits to resolve the case. Covil's carriers and lawyers determined that no such offer would be tendered, indeed, the Alter-Egos refused to even identify the policy amounts. After several weeks of trial, the jury found Covil responsible and the resulting judgment is \$35,582,365.99, inclusive of prejudgment interest. This judgment continues to accrue post judgment interest. Despite never having revealed this fact at or before trial, Covil, through its carriers now contends that it has only \$2.6 million in available coverage for this case.

Covil's lawyers and carriers have assumed the mantle of Covil. For nearly thirty years, they have acted for and as the company with no regard to the desires or wishes of their insured. The result is that they are the alter-egos of Covil and are responsible for all of the debts it has and continues to incur, including the Finch judgment.

PARTIES

1. Plaintiff is Ann Finch, individually and as executor of the estate of Franklin Finch. She resides at 5301 Boswellville Road, Wilson, North Carolina 27893.
2. Peter Protopapas is a lawyer who was appointed as Receiver of Covil Corporation, a dissolved South Carolina corporation, by Order attached as Exhibit 1, on November 2, 2018 and who maintains his principal place of business in Richland County, South Carolina.

3. Wall Templeton & Haldrup, P.A. (“Lawyers”) is a professional association organized and existing in the state of South Carolina with its principal place of business in Charleston, South Carolina.

4. United States Fidelity and Guaranty Company, individually, and as the alter ego to Covil Corporation (“USF&G” or “Covil’s Alter Ego”) is an insurance company, operating as a corporation organized and existing under the laws of the State of Connecticut with its principal place of business in the State of Connecticut. USF&G is a wholly-owned subsidiary of The Travelers Group of Insurance Companies.

5. Zurich American Insurance Company a/k/a Zurich North America, Inc., individually, and as the alter ego to Covil Corporation (“Zurich” or “Covil’s Alter Ego”) is an insurance company, operating as a corporation organized under the laws of the State of New York with its principal place of business located in the State of Illinois. Zurich is the successor by merger to Maryland Casualty Company and Northern Insurance Company of New York. Zurich American is a wholly-owned subsidiary of the Zurich Group of Insurance Companies.

6. Enstar (US) Inc., (“Enstar” or “Covil’s Alter Ego”) is a Delaware corporation with its principle place of business in Florida. On October 1, 2019 Enstar (US) Inc. became the successor-in-interest to Zurich American Insurance Company for certain of its asbestos liabilities including those of Covil Corporation and separately, as a result of succeeding to those liabilities became liable as the alter-ego of Covil Corporation and as such is directly liable for the tortious acts of Covil Corporation. Enstar (US) Inc. is registered to do business in the State of South Carolina and may be served with process through CT Corporation System, 2 Office Park Court, #103, Columbia, South Carolina 29223.

7. Zurich and USF&G are collectively referred to as the “Primary Insurers” and collectively with the “Lawyers” as the “Alter-Egos”.

JURISDICTION AND VENUE

8. The Court has subject matter jurisdiction over plaintiff's claims for relief as the actions and omissions occurred in this County.

9. Venue of this case is proper in Richland County.

FACTUAL BACKGROUND

10. Covil was a seller and installer of thermal insulation, including thermal insulation which at certain times contained asbestos.

11. Covil conducted these operations from at least 1964 until approximately 1991, after which Covil ceased to conduct business operations and, in 1993 ultimately, dissolved.

12. Covil's operations from 1964 through at least 1986 included the sale, installation, repair, replacement, removal or disturbance of asbestos-containing thermal insulation and other building materials, and those operations exposed persons to asbestos who thereby suffered bodily injury (the "Asbestos Allegations").

13. The alleged bodily injury resulting from the Asbestos Allegations has resulted in claims and lawsuits against Covil ("Covil Asbestos Suits") and in the resulting judgment which underlies this present action (the "Finch Judgment").

14. From at least in or about 1991, until the appointment of the Receiver, on November 2, 2018, the defense of the Covil Asbestos Suits was controlled by the Primary Insurers, specifically defendants Zurich American Insurance Company ("Zurich") and United States Fidelity and Guaranty Company ("USF&G"), and their prior lawyers. Moreover, on and after 1991, the Primary Insurers conducted all of Covil's affairs, including after Covil was dissolved,

extending until appointment of the Receiver.² Since their hiring, the Lawyers have also exerted control and domination of Covil sufficiently to qualify them as Alter-Egos.

15. The Primary Insurers issued insurance policies to Covil from in or about 1964 until approximately 1978.

16. From at least in or about 1991, continuing until appointment of the Receiver, Zurich and USF&G, in conjunction with their lawyers, managed Covil, making all determinations as to use and the disposition of Covil's assets which consisted primarily of corporate documents and insurance policies.

17. The Primary Insurers and, as of 2018, the Alter-Egos made all determinations as to the disposition of Covil Asbestos Suits as well as the treatment and characterization of claims under the Covil insurance policies.

18. Since as early as approximately 1991, the Primary Insurers in conjunction with their lawyers and, as of their hiring, with their Lawyers, acted in concert for the common purpose of ensuring that there was no independent person or entity acting by or on behalf of Covil. The Alter-Egos and prior to 2018, the Primary Insurers and their Lawyers, determined that the only Covil that could exist would be a Covil that was for all purposes the Primary Insurers' alter ego, and/or controlled entity.

19. The Primary Insurers and their lawyers and, as of 2018, the Lawyers effectuated their common purpose of exclusive, unilateral control of Covil by running Covil's affairs in all material aspects.

20. At no time did the Primary Insurers and their lawyers and, as of 2018, the Lawyers, make efforts to appoint an independent person or entity to determine what was in Covil's best

² For reasons set forth herein, the appointment of the receiver does not alleviate the obligations of the Alter-Egos as it relates to Covil's current and future debts.

interest. Rather, the Primary Insurers and their lawyers and, as of 2018, the Lawyers, unilaterally determined what was best for Covil, or disregarded what was best for Covil, acting in their own interest, regardless of whether there was an actual or potential conflict between their interest and Covil's interest.

21. Each of the Primary Insurers' actions on behalf of Covil was for the purpose of protecting the Primary Insurers rather than Covil.

22. Each of the Lawyers' actions on behalf of Covil was for the purpose of earning a fee from the Primary Insurers rather than protecting Covil.

23. In addition to controlling the assets and affairs of Covil, the Primary Insurers unilaterally hired agents for Covil, including experts and a professional 30(b)(6) witness to act as and on behalf of, and to constitute Covil, de facto or de jure.

24. The Primary Insurers are required to act in good faith and to engage in fair dealing in all of their actions in ~~regards~~ regard to Covil.

25. The Lawyers are required to exercise loyalty to Covil, and not the insurance companies that pay their bills. Statements made in open court by Mark Wall, name partner in the Lawyers' firm, demonstrates that the Lawyers did not understand, much less adhere to this requirement. During a hearing on the issue on February 21, 2019, Mark Wall stated:

[THIS SPACE INTENTIONALLY LEFT BLANK]

THE COURT: Those kind of things you have got to provide, Mr. Wall.

MR. WALL: Under what theory, Your Honor?

THE COURT: I have appointed these people as receivers for Covil.

MR. WALL: Yes, Your Honor.

THE COURT: Covil is your client. They stand in the shoes of Covil.

MR. WALL: Are they my client, Your Honor?

THE COURT: Sir?

MR. WALL: Are they my client?

THE COURT: Covil is your client.

MR. WALL: No, Your Honor, are they my client? That is the issue.

THE COURT: Yes, they are your client because they are the receiver for Covil.

MR. WALL: So I now have attorney-client privilege with them?

THE COURT: That's right.

MR. WALL: And that is protected by the Court?

THE COURT: Yes, sir.

MR. WALL: As long as --

THE COURT: And I get why you want that protection. I'm not saying this in a hostile way

26. In South Carolina, when an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured, *i.e.*, the insured client of the attorney. Pursuant to that relationship, the attorney owes the insured client—not the insurer—a fiduciary duty. The loyalties of the attorney may not be divided.

27. Lawyers were hired to protect Covil's interest but became part of the Primary Insurers' scheme to run Covil as an effective subsidiary, agency or alter ego of the Primary Insurers. Lawyers followed the Primary Insurers' instructions and together with the Primary Insurers acted as Covil.

28. The attorney's conduct of litigation involving an insured client is also governed by established law. *See, e.g.*, Rule 1.8(f), RPC, Rule 407, SCACR (“A lawyer shall not accept compensation for representing a client from one other than the client unless: ... (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; ...”); Rule 5.4(c), RPC, Rule 407, SCACR (“[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services”).

29. Lawyers by acting for Covil when Covil was in no position to act for itself stood in the shoes of Covil and became, in conjunction with the Primary Insurers, Covil’s Alter Ego.

30. Lawyers failed to ensure proper procedures were in place for Covil to express its interests including but not limited to the procedures provided by S.C. Code Ann. § 15-65-10 and Rule 66, SCRCF; therefore, Lawyers simply made decisions, in conjunction with the Primary Insurers about how to handle the litigation.

31. The result of the Alter-Ego’s actions were to effectuate the Primary Insurers’ desire that no Covil separate and apart from the Alter-Egos would exist.

32. The Alter-Egos’ complete control over Covil, and management of Covil’s affairs, including, but not limited to, the Covil asbestos suits, extended to the underlying Finch suit.

33. Prior to the appointment of the Receiver, the Alter-Egos unilaterally determined that Covil would not resolve the Finch suit for policy limits. Indeed, the Alter-Egos refused to reveal to the Finches the amount of available insurance. The result is ~~the~~ that Covil, at the direction of the Alter-Egos was exposed to a judgment many more times than their alleged liability under the insurance policies.

34. Asbestos litigation is littered with the bodies of those who made and sold asbestos-containing insulation. Some of the largest companies in the world, many of them insured by the

Primary Insurers, have gone bankrupt because of the harm asbestos insulation causes. That any reasonable person believed that Covil would not be found liable in amounts far exceeding the claimed liability limits of the Primary Insureds is difficult to fathom.

35. By way of example only, some communications between the Alter-Egos demonstrate how the Alter-Egos ran Covil. To be perfectly clear, these are the entities, the Lawyers and the Insurance companies, that made the decisions for Covil without regard to the position of Covil. We know this because there was not a single person employed by Covil, or appointed by a court to make those decisions. The Defendants here made all of the decisions for Covil without possibly having any idea of what Covil wanted or making any sort of informed decision at all. Some of the pertinent communications in just the recent year include:

Date	From	To/CC	Subject	Key points of email
10/9/18 3:46 pm	Mark Wall	Irene Muse; Barb Davis; Steven Fries; Gerry Begley; John Weiss; Carol Weill; William Silverman; Pauline Burdin	New cases	Covil has been named in at least two new cases, but we have no Notice of Service. I'm assuming we need to be served before appearing. Agree.
10/18/18 1:49 pm	Mark Wall	Irene Muse Barb Davis; Steven Fries; Gerry Begley; John Weiss; Carol Weill; William Silverman; Pauline Burdin	New trial etc. / new cases	Unserved case Hill set for March; depo scheduled; recommend not appear.

Date	From	To/CC	Subject	Key points of email
10/19/18 9:07am	Barb Davis	Mark Wall Irene Muse Steven Fries Gerry Begley John Weiss Carol Weill William Silverman Pauline Burdin Sara Schrodetzki Tommy Boger	New cases	Do we really think we would not be served at some point? If we had already been served, would still recommend not attending the plaintiff deposition?
10/22/18 3:47pm	Mark Wall	Irene Muse Barb Davis Steven Fries Carol Weill	FW James Michael Hill v. Advance Auto Parts Amended NOD of James Michael Hill	FYI see attached communications.
10/22/18 3:57pm	Carol Weill	Barb Davis Mark Wall Irene Muse Steven Fries Gerry Begley John Weiss William Silverman Pauline Burdin Sara Schrodetzki Tommy Boger	New cases	Request for response to inquiries.
10/23/18 2:07pm	Mark Wall	Carol Weill; Barb Davis; Irene Muse Gerry Begley John Weiss William Silverman Pauline Burdin Steven Fries Travelers Sara Schrodetzki Tommy Boger	Covil unserved cases	Maybe Jim stopped accepting service. If we get served later, and Hill is still alive, we re-depose him. If we were served, we should attend; however, we checked the docket and there was no proof of serviced filed.

Date	From	To/CC	Subject	Key points of email
10/23/18 4:15pm	Carol Weill	Mark Wall Barb Davis Irene Muse Steven Fries Gerry Begley John Weiss William Silverman Pauline Burdin Sara Schrodetzki Tommy Boger	Covil Unserved cases	Zurich would recommend that Mark not appear for depositions in cases where service has not yet been effectuated.
10/31/18 3:57pm	Mark Wall	Irene Muse Steven Fries Carol Weill Barb Davis Gerry Begley John Weiss Pauline Burdin	FW Hill and email from Theile asking about answers	It didn't take them very long to figure out. What response at this point?
11/1/18 1:53pm	Mark Wall	Irene Muse Steven Fries Carol Weill Erin Corbally Barb Davis Gerry Begley John Weiss	FW Hill and Taylor	FYI see below. Below is Mark's email stating that he had not been asked to represent Covil in Hill and Taylor and Theile's email from 11/1/18 at 10:34 am asking about past due answers.
11/1/18 2:00pm	Steven Fries	Mark Wall, Irene Muse Carol Weill Erin Corbally Davis Barb Gerry Begley John Weiss	Re. Hill and Taylor	I thought you said yesterday that if approached by Plaintiff on these cases that we're going to tell them no record of service.
11/1/18 2:04pm	Mark Wall	Steven Fries Irene Muse Carol Weill Erin Corbally Barb Davis Gerry Begley John Weiss	Re. Hill and Taylor	In face of what has been filed today, I thought I would start slowly and leave service to last. I want to see what they say about service.

36. Defendants acted in concert when deciding what actions to take or not take and without any input from an independent Covil. These actions were in breach of their duties to Covil.

FOR A FIRST CAUSE OF ACTION

**Primary Insurers are Fully Responsible for Conduct
Prior to November 2, 2018, as Covil's Alter Ego, Agency or Instrumentality**

37. Plaintiff re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.

38. Primary Insurers' pattern and practice has made the Primary Insurers fully responsible for all of Covil's liabilities prior to appointment of the Receiver.

39. Under a number of legal theories, Primary Insurers are Covil and acted as for nearly 30 years.

40. Primary Insurers have entered into a joint venture with each other to take over Covil and become Covil. For example:

- a. A special combination of the Primary Insurers and Covil for the specific venture of limiting or eliminating Covil as a direct voice in the management of Covil's assets so that the Primary Insurers would protect and save their money;
- b. The retention of a separate corporate personality for Covil would promote fraud, wrong, injustice and contravene public policy; and
- c. Each Primary Insurer had an equal right to control the conduct of their joint venture and of Covil.

41. Covil has become the alter ego of the Primary Insurers:

- a. The Primary Insurers have shown a total domination and control over Covil;

- b. The domination was so complete that Covil never manifested separate corporate interests of its own and functioned solely to achieve the purposes of the Insurers;
 - c. The insurers misused their domination of Covil and were not entitled to dominate Covil; and
 - d. Inequitable consequences have resulted with the unilateral application of insurance proceeds, default judgments, and verdicts.
42. The Primary Insurers were the principals and Covil the agent or agency:
- a. Primary Insurers manifested complete control over Covil and purported to act on Covil's behalf;
 - b. The course of dealing between the principal and the agent clearly show no independent Covil; and
 - c. Primary Insurers became active participants in Covil rather than simply insurers.

43. Primary Insurers' acts and omissions satisfy the elements of Alter-Ego under South Carolina law and the requested finding by the Court is that the Primary Insurers are the Alter-Ego of Covil and thus, responsible for satisfying the Finch judgment.

44. As a direct and proximate result of the Insurers' acts and omissions, plaintiff is entitled to recover attorneys' fees and costs of this action as well as the Finch judgment from the Primary Insurers.

FOR AN SECOND CAUSE OF ACTION
Lawyers are Fully Responsible for Conduct
Prior to November 2, 2018, as Covil's Alter Ego, Agency or Instrumentality

45. Plaintiff re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.

46. Lawyers in conjunction with the Primary Insurers acted to control and dominate Covil in such a way to ensure that Covil had no actual representation.

47. Lawyers in conjunction with the Primary Insurers acted intentionally to avoid the statutory procedures that would give Covil a voice in its representation, operation and defense.

48. The Lawyers' acts and omissions satisfy the elements of Alter-Ego under South Carolina law and the requested finding by the Court is that the Lawyers are the Alter-Ego of Covil and thus, responsible for satisfying the Finch judgment.

49. As a direct and proximate result of the Lawyers' acts and omissions, plaintiff is entitled to recover attorneys' fees and costs of this action as well as the Finch judgment from the Primary Insurers.

FOR A THIRD CAUSE OF ACTION

**Primary Insurers are Fully Responsible for Conduct
After November 2, 2018, as Covil's Alter Ego, Agency or Instrumentality**

50. Plaintiff re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.

51. Because the Primary Insurers, for nearly 30 years, have controlled Covil, they have made Covil's defense of asbestos litigation nearly, if not completely, impossible.

52. The Primary Insurers took no steps to accumulate or preserve Covil's documents. The Primary Insurers took no steps to procure or preserve the testimony of material fact witnesses who, through the passage of time, are now no longer available to Covil.

53. The result of these failures is that Covil is now irretrievably defenseless in asbestos cases. These failures will continue to haunt Covil at all times going forward. Because of this, the Primary Insurers can now no longer claim that any control or domination of Covil and the damages resulting therefrom ended in November of 2018 with the appointment of the receiver.

54. As of October 1, 2019 Enstar (US) Inc. announced that it had succeeded to Zurich in at least certain interests relating to asbestos liabilities of Covil Corporation and by virtue of that succession joined Zurich and USF&G, as an alter-ego of Covil Corporation.

55. Plaintiffs therefore seek a declaratory judgment that the Primary Insurers and Enstar are the Alter-Ego of Covil after November 2, 2018 as well as before.

FOR A FOURTH CAUSE OF ACTION
Breach of Fiduciary Duty by the Alter Egos

56. Plaintiff re-alleges and incorporates by this reference the preceding paragraphs of this complaint as if fully set forth herein.

57. At all times after 1993, Covil Corporation was insolvent.

58. At all relevant times as set forth above and incorporated in this count as if fully set forth herein, the United States Fidelity and Guaranty Company, Zurich American Insurance Company and Enstar (US), Inc.(the “Insurers”) as well as Wall Templeton & Haldrup (“WTH” and collectively with the Insurers, the “Alter Egos”) are and were the alter-egos, jointly and/or severally of Covil Corporation.

59. As the equitable owners and alter-egos of Covil Corporation, the Insurers and the Lawyers were obligated under the law of South Carolina to act as fiduciaries of the creditors of Covil Corporation. Instead, the Alter Egos operated Covil for their own benefit and breached their fiduciary duties to Covil Corporation and each of its creditors beginning at least by 1993.

60. As a result of these breaches, Covil has been irrevocably damaged and without a finding of liability against the Alter Egos cannot be made whole.

61. As a direct and proximate result of the Alter Egos acts and omissions, plaintiff is entitled to recover attorneys’ fees and costs of this action as well as the Finch judgment from the

Alter Egos. Plaintiff is also entitled to punitive damages stemming from the Alter Egos' breach of their fiduciary duties to Covil Corporation.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays for a finding as a matter of law that the Alter-Egos are the Alter-Ego of Covil and are therefore responsible for the damages incurred by Covil, including, but not limited to, the *Finch* judgment, for the time periods prior to November 2, 2018 as well as the time periods after.

JURY DEMAND

Plaintiff demands a trial by jury on all issues.

Respectfully submitted,

s/Theile B. McVey

Theile B. McVey (SC Bar 16682)

tmcvey@kassellaw.com

John D. Kassel (SC Bar 3286)

jkassel@kassellaw.com

KASSEL MCVEY, ATTORNEYS AT LAW

1330 Laurel Street

Columbia, South Carolina 29202-1476

T: 803-256-4242

F: 803-256-1952

Other email: emoultrie@kassellaw.com

Charles W. Branham, III (To be Admitted *PHV*)

Jonathan M. Holder (SC Bar No. 77935)

Dean Omar Branham SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

tbranham@dobslegal.com

jholder@dobslegal.com

Other email: tgilliland@dobslegal.com

ATTORNEYS FOR PLAINTIFFS

August 19, 2020

Columbia, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Ann Finch, Individually and as Executor of
the Estate of Franklin Finch,

Plaintiff,

v.

United States Fidelity and Guaranty Com-
pany; Zurich American Insurance Com-
pany; Enstar (US) Inc.; Peter Protopapas as
Court Appointed Receiver for Covil Corpo-
ration; and Wall, Templeton & Haldrup,
P.A.,

Defendants.

Peter Protopapas, as Court Appointed Re-
ceiver for Covil Corporation,

Cross-Claimant,

v.

United States Fidelity and Guaranty Com-
pany; Zurich American Insurance Com-
pany; and Wall, Templeton & Haldrup,
P.A.,

Cross-Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C/A NO. 2019-CP-42-3003

**THE RECEIVER FOR COVIL
CORPORATION’S, ANSWER TO
PLAINTIFF’S SECOND AMENDED
COMPLAINT; AND CROSS-CLAIMS
AGAINST WALL TEMPLETON &
HALDRUP, P.A.; UNITED STATES
FIDELITY AND GUARANTY COMPANY;
AND ZURICH AMERICAN INSURANCE
COMPANY**

Defendant Peter Protopapas, as Court Appointed Receiver for Covil Corporation (“Re-
ceiver”), presents the following answer and defenses to Plaintiff’s Second Amended Complaint
(“Complaint”) and Cross-Claims against United States Fidelity and Guaranty Company; Zurich

American Insurance Company; and Wall, Templeton & Haldrup, P.A. Any allegation in the Complaint not specifically admitted herein is denied. In addition, the Receiver more specifically states as follows:

1. Defendant denies each and every allegation of the Complaint which is not hereinafter specifically admitted.

AS TO PARTIES

2. Paragraphs 1 through 5 of the Complaint are admitted.
3. The Receiver is without sufficient information or belief to admit or deny paragraph 6.
4. Paragraph 7 of the Complaint is admitted insofar as Zurich and USF&G are collectively referred to as the “Primary Insurers.” However, the Receiver would draw a distinction regarding the other collective group references, as the Receiver contends that the Primary Insurers acted as “Alter-Egos” for Covil prior to the Receiver’s appointment and that “Lawyers” (Wall, Templeton & Haldrup, P.A.) acted as Agent of the Primary Insurers, who are the Alter-Egos of Covil for purposes of this action and otherwise.

AS TO JURISDICTION AND VENUE

5. Paragraphs 8 and 9 of the Complaint are admitted.

AS TO FACTUAL BACKGROUND

6. Paragraph 10 of the Complaint is admitted.
7. As to Paragraph 11 of the Complaint, the Receiver admits that Covil conducted these operations from at least 1954 until approximately 1991, after which Covil ceased to conduct business operations but was animated by the Primary Insurers as their Alter Ego.
8. In response to paragraph 12, the Receiver is without sufficient knowledge or information to admit or deny the “Asbestos Allegations” and, therefore, denies the same.

9. Paragraphs 13 is admitted and paragraph 14 is admitted in part and denied in part consistent with the response to paragraph 7.
10. Paragraph 15 is admitted to the extent the Primary Insurers wrote insurance from 1954–1964 and 1970–1978.
11. Paragraphs 16–18 are admitted
12. Paragraph 19 of the Complaint is admitted to the extent Lawyers aided and worked with the Primary Insurers for the unilateral control of Covil, thereby acting as the Agent for Covil.
13. Paragraphs 20 through 26 of the Complaint are admitted.
14. Paragraph 27 of the Complaint is admitted in part and denied in part. The Receiver admits that, to the extent Lawyers were hired to protect Covil’s interest, Lawyers became part of the Primary Insurers’ scheme to run Covil as an effective subsidiary, agency, or alter ego of the Primary Insurers. Lawyers followed the Primary Insurers’ instructions and treated the Primary Insurers as Covil for representation and fiduciary duty purposes. The Receiver denies, however, that the Lawyers in fact protected Covil’s interest. The remaining allegations are denied insofar as they are directed at the Receiver.
15. Paragraph 28 of the Complaint is admitted.
16. Paragraph 29 of the Complaint is admitted in part and denied in part. The Receiver admits that Lawyers breached their duties to Covil by taking sole direction from the Primary Insurers, thereby acting as agent of Covil’s Alter Egos. The remaining allegations are denied insofar as they are directed at the Receiver.

17. Paragraph 30 of the Complaint is admitted in part and denied in part. The Receiver admits that Lawyers failed to ensure proper procedures were in place for Covil to express its interests; therefore, Lawyers were unable to ascertain what Covil wanted or to protect Covil's interests. The remaining allegations are denied insofar as they are directed at the Receiver.
18. Paragraphs 31 and 32 of the Complaint are admitted.
19. Paragraph 33 of the Complaint is admitted in part and denied in part. The Receiver admits that the Primary Insurers unilaterally determined that Covil would not resolve the *Finch* suit for an amount within policy limits, acting on their own and through their agent, Lawyers. The Receiver admits that the Primary Insurers refused to reveal to the Finches the amount of available insurance, and further admits that the Primary Insurers, their agent Lawyers, and others that were aware of the *Finch* case and its progress failed to reveal such information to or consult with Covil. The Receiver admits that this resulted in Covil, at the direction of the Primary Insurers and their agent, being exposed to a judgment many more times than Covil's policy limits. This decision permanently raised Covil's profile in the national asbestos litigation. The remaining allegations are denied insofar as they are directed at the Receiver.
20. Paragraph 34 of the Complaint contains no allegations against the Receiver; as such, no response is required. However, to the extent a response is deemed required, the Receiver is without sufficient knowledge or information to admit or deny the allegations of Paragraph 34 and, therefore, denies the same.
21. Paragraph 35 of the Complaint is admitted with the qualification that the Primary Insurers acted as Alter Egos of Covil and Lawyers acted as their agent.

22. As to Paragraph 36 of the Complaint, the Receiver admits that the Primary Insurers and Lawyers acted in concert when deciding what actions to take or not take, and without any input from an independent Covil, and these actions were in breach of their duties to Covil. The allegations in Paragraph 36 occurred prior to the Receiver's appointment; therefore, the Receiver denies the allegations to the extent that they relate to the Receiver.

AS TO THE FIRST CAUSE OF ACTION

**Primary Insurers Are Fully Responsible for Conduct
Prior To November 2, 2018, as Covil's Alter Ego, Agency, or Instrumentality**

23. As to Paragraph 37 of the Complaint, the Receiver repeats, realleges, and incorporates herein by reference its responses to Paragraphs 1 through 36 of the Complaint as if fully set forth herein.
24. Paragraphs 38 through 44 of the Complaint are admitted.

AS TO THE SECOND CAUSE OF ACTION

**Lawyers Are Fully Responsible for Conduct
Prior To November 2, 2018, as Covil's Alter Ego, Agency, or Instrumentality**

25. As to Paragraph 45 of the Complaint, the Receiver repeats, realleges, and incorporates herein by reference its responses to Paragraphs 1 through 44 of the Complaint as if fully set forth herein.
26. Paragraph 46 of the Complaint is admitted to the extent it is alleged that the Primary Insurers improperly acted as Alter-Egos of Covil and Lawyers improperly acted as their agent.
27. Paragraph 47 of the Complaint is denied.
28. Paragraph 48 of the Complaint is admitted in part and denied in part. The Receiver admits that the Primary Insurers improperly acted as Alter-Egos of Covil; however, the Receiver

denies that Lawyers acted as an Alter-Ego of Covil but rather acted as agents of the Primary Insurers.

29. Paragraph 49 of the Complaint contains no allegations against the Receiver; as such, no response is required.

AS TO THE THIRD CAUSE OF ACTION
Insurers Are Fully Responsible for Conduct
After November 2, 2018, as Covil's Alter Ego, Agency or Instrumentality

30. As to Paragraph 50 of the Complaint, the Receiver repeats, realleges, and incorporates herein by reference its responses to Paragraphs 1 through 49 of the Complaint as if fully set forth herein.
31. Paragraphs 51 through 53 of the Complaint are admitted.
32. The Receiver is without sufficient information or belief to admit or deny Paragraph 54.
33. The Receiver admits Paragraph 55 as it pertains to the Primary Insurers, but the Receiver is without sufficient information or belief to admit or deny the allegations of Paragraph 55 as to Enstar.

AS TO THE FOURTH CAUSE OF ACTION
Breach of Fiduciary Duty by the Alter Egos

34. As to Paragraph 56, the Receiver repeats, realleges, and incorporates herein by reference its responses to Paragraphs 1 through 55 as if fully set forth herein.
35. Paragraph 57 is admitted.
36. Paragraph 58 is admitted in part, denied in part, and the Receiver is without sufficient information and belief in part. The Receiver admits that the Primary Insurers improperly acted as Alter-Egos of Covil. Covil denies that Lawyers acted as an Alter-Ego of Covil but

rather acted as agents of the Primary Insurers. The Receiver is without sufficient information and belief as it pertains to Enstar.

37. Paragraphs 59 through 61 are admitted in part and denied in part consistent with the response to paragraph 58..

AS TO PRAYER FOR RELIEF

38. Plaintiff's prayer and request for relief as to the Primary Insurers is hereby admitted. The remaining allegations are denied insofar as they are directed at the Receiver.

39. The Receiver denies all allegations of the Complaint not heretofore expressly admitted or modified.

FURTHER ANSWERING THE RECEIVER ALLEGES:

CROSS-CLAIMS AGAINST DEFENDANTS WALL TEMPLETON & HALDRUP, P.A.; UNITED STATES FIDELITY AND GUARANTY COMPANY; AND ZURICH AMERICAN INSURANCE COMPANY

COMES NOW Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas ("Cross-Claimant"), for his cross-claims, who alleges upon knowledge as to his own acts and upon information and belief as to all other matters as follows:

PARTIES

40. The Receiver is a lawyer who was appointed as Receiver of Covil Corporation, a dissolved South Carolina corporation, by Order, on November 2, 2018, and who maintains his principal place of business in Richland County, South Carolina.

41. Wall, Templeton & Haldrup, P.A. ("Lawyers") is a professional association organized and existing in the state of South Carolina with its principal place of business in Charleston, South Carolina.

42. United States Fidelity and Guaranty Company (“USF&G”) is an insurance company, operating as a corporation organized and existing under the laws of the State of Connecticut with its principal place of business in the State of Connecticut. USF&G is a wholly-owned subsidiary of The Travelers Group of Insurance Companies.
43. Zurich American Insurance Company (“Zurich”) is an insurance company, operating as a corporation organized under the laws of the State of New York with its principal place of business located in the State of Illinois. Zurich is the successor by merger to Maryland Casualty Company and Northern Insurance Company of New York. Zurich American is a wholly-owned subsidiary of the Zurich Group of Insurance Companies.
44. Zurich and USF&G are collectively referred to as the “Primary Insurers.”

JURISDICTION AND VENUE

45. The South Carolina Court of Common Pleas for Richland County has subject matter jurisdiction over the Cross-Claimant’s claims for relief as the actions and omissions occurred in Richland County.
46. Venue of this case is proper in the State of South Carolina Court of Common Pleas for Richland County.

FACTUAL BACKGROUND

47. Covil was an installer of thermal insulation, including thermal insulation which at certain times allegedly contained asbestos.
48. Covil conducted these operations from at least 1954 until approximately 1991, after which time Covil ceased to conduct business operations and, ultimately, dissolved.

49. It has been alleged that Covil's operations from 1954 through at least 1986 included the installation, repair, replacement, removal, or disturbance of thermal insulation and other building materials and that those operations exposed persons to asbestos who thereby suffered bodily injury (the "Asbestos Allegations").
50. The alleged bodily injury resulting from the Asbestos Allegations has resulted in claims and lawsuits against Covil (the "Covil Asbestos Suits").
51. From at least in or about 1991, until the appointment of the Receiver on November 2, 2018, the defense of the Covil Asbestos Suits was controlled by the Primary Insurers, specifically defendants Zurich and USF&G. Moreover, on and after 1991, the Primary Insurers conducted all of Covil's affairs, including after Covil was dissolved and extending until appointment of the Receiver.
52. The Primary Insurers issued insurance policies to Covil from in or about 1954 until approximately 1978.
53. From at least in or about 1991, continuing until appointment of the Receiver, Zurich and USF&G managed Covil, making all determinations as to the use and disposition of Covil's assets, which consisted primarily of corporate documents and insurance policies.
54. The Primary Insurers made all determinations as to the disposition of Covil Asbestos Suits including decisions as to the waiver of conflicts of interests, as well as the treatment and characterization of claims under the Covil insurance policies.
55. Since as early as approximately 1991, the Primary Insurers acted in concert for the common purpose of ensuring that there was no independent person or entity acting by or on behalf of Covil. The Primary Insurers determined that the only Covil that could exist would be a

Covil that was for all purposes the Primary Insurers' agency, subsidiary, alter ego, and/or controlled entity.

56. The Primary Insurers effectuated their common purpose of exclusive, unilateral control of Covil by running Covil's affairs in all material aspects.
57. At no time did the Primary Insurers make efforts to appoint an independent person or entity to determine what was in Covil's best interest. Rather, the Primary Insurers unilaterally determined what was best for Covil, or disregarded what was best for Covil, acting in their own interest, regardless of whether there was an actual or potential conflict between their interest and Covil's interest.
58. Each of the Primary Insurers' actions on behalf of Covil was for the purpose of protecting the Primary Insurers rather than Covil.
59. In addition to controlling the assets and affairs of Covil, the Primary Insurers unilaterally hired agents for Covil, including but not limited to attorneys, experts, and a professional 30(b)(6) witness to act as and on behalf of, and to constitute Covil, *de facto* or *de jure*.
60. The Primary Insurers are required to act in good faith and to engage in fair dealing in all of their actions in regard to Covil.
61. The Insurers had and have a duty to provide a full defense in the Covil Asbestos Suits.
62. The Primary Insurers engaged Lawyers to provide a defense to certain of the Covil Asbestos Suits, including but not limited to the *Finch* suit.
63. In South Carolina, when an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured, *i.e.*, the insured client of the attorney. Pursuant to that relationship, the attorney owes the insured client—not the insurer—a fiduciary duty. The loyalties of the attorney may not be divided.

64. Lawyers were hired ostensibly to protect Covil's interest but improperly became part of the Primary Insurers' scheme to run Covil as an effective subsidiary, agency, or alter ego of the Primary Insurers. Lawyers improperly followed the Primary Insurers' instructions and treated the Primary Insurers as Covil for representation and fiduciary duty purposes.
65. An attorney's conduct of litigation involving an insured client is also governed by established law. *See, e.g.*, Rule 1.8(f), RPC, Rule 407, SCACR ("A lawyer shall not accept compensation for representing a client from one other than the client unless . . . (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"); Rule 5.4(c), RPC, Rule 407, SCACR ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services").
66. Lawyers breached their duties to Covil by taking sole direction from the Primary Insurers.
67. Prior to the Receiver's appointment, Covil was nothing more than a façade behind which the Primary Insurers stood and directed the actions of its lawyers.
68. Lawyers were hired in or about May 2018 to represent and defend Covil in all cases pending against Covil in South Carolina.
69. At no time did Lawyers make any independent effort to determine Covil's needs and interests. Rather, Lawyers improperly acted at all times pertinent as if the Primary Insurers were Lawyers' clients.
70. Lawyers failed to ensure proper procedures were in place for Covil to express its interests, including, but not limited to, the procedures provided by S.C. Code Ann. § 15-65-10 and

Rule 66, SCRCPP; therefore, Lawyers were unable to ascertain what Covil wanted or protect Covil's interests.

71. The Primary Insurers improperly required or requested Lawyers to treat the Primary Insurers as Covil.
72. Lawyers failed to communicate with the insured, Covil, as no proper procedures were in place as provided by S.C. Code Ann. § 15-65-10 and Rule 66, SCRCPP, to effectuate said communication.
73. Lawyers improperly accepted this arrangement of treating the Primary Insurers as Covil, and Lawyers failed to advise the Primary Insurers that the arrangement was contrary to North Carolina and South Carolina law, although Lawyers knew or should have known of these facts and circumstances.
74. Lawyers' actions, in breach of their duties and at the direction of the Primary Insurers, were to effectuate the Primary Insurers' desire that no Covil separate and apart from the Primary Insurers would exist.
75. The Primary Insurers' complete control over Covil and management of Covil's affairs, including, but not limited to, the Covil asbestos suits, extended to the *Finch* suit.
76. Prior to the appointment of the Receiver, the Primary Insurers and Lawyers unilaterally determined that Covil would not settle the *Finch* suit in response to Finch's demand for policy limits, thereby leaving Covil exposed to a verdict beyond all insurance coverage.
77. In *Finch*, Lawyers received and transmitted to the Primary Insurers a settlement offer from Finch in the amount of the policy limits.

78. The Primary Insurers and Lawyers improperly determined not to convey Finch's policy limits settlement demand to Covil. Rather, Insurers and Lawyers kept Finch's offer to compromise to themselves with the Insurers acting and being Covil.
79. The Primary Insurers and Lawyers improperly chose not to advise Finch of Covil's policy limits in response to Finch's request. The Primary Insurers and Lawyers improperly failed or refused to communicate the *Finch* policy limits demand to other Covil Insurers, including without limitation Ranger Insurance Company ("Ranger") and Hartford Accident and Indemnity Company and First State Insurance Company ("Hartford"), which had remaining responsive policy limits, or to so advise Covil, or to advise Covil to seek such limits from these other Covil insurers.
80. The Primary Insurers and Lawyers did not speak to any Covil representative, as none was available due to Lawyers' negligence.
81. As a result of the breach of duties by Lawyer and Insurers, the *Finch* suit proceeded to trial and a verdict was entered against Covil in the amount \$35,582,365.99, inclusive of pre-judgment interest, which continues to accrue post judgment interest. This verdict was rendered on October 19, 2018, prior to the appointment of the Receiver.
82. The communications between and among the defendants illustrates how defendants single-handedly ran Covil. The pertinent communications include:

Date	From	To/CC	Subject	Key points of email
10/9/18 3:46 pm	Mark Wall	Irene Muse; Barb Davis; Steven Fries; Gerry Begley; John Weiss; Carol Weill; William Silverman;	New cases	Covil has been named in at least two new cases, but we have no Notice of Service. I'm assuming we need to be served before appearing. Agree.

		Pauline Burdin		
10/18/18 1:49 pm	Mark Wall	Irene Muse Barb Davis; Steven Fries; Gerry Begley; John Weiss; Carol Weill; William Silverman; Pauline Burdin	New trial etc. / new cases	Unserved case Hill set for March; depo scheduled; recommend not appear.
10/19/18 9:07am	Barb Davis	Mark Wall Irene Muse Steven Fries Gerry Begley John Weiss Carol Weill William Silverman Pauline Burdin Sarah Schrodetzki Tommy Boger	New cases	Do we really think we would not be served at some point? If we had already been served, would still recommend not attending the plaintiff deposition?
10/22/18 3:47pm	Mark Wall	Irene Muse Barb Davis Steven Fries Carol Weill	FW James Michael Hill v. Advance Auto Parts Amended NOD of James Michael Hill	FYI see attached communications.
10/22/18 3:57pm	Carol Weill	Barb Davis Mark Wall Irene Muse Steven Fries Gerry Begley John Weiss William Silverman Pauline Burdin Sara Schrodetzki Tommy Boger	New cases	Request for response to inquiries.
10/23/18 2:07pm	Mark Wall	Carol Weill; Barb Davis; Irene Muse Gerry Begley John Weiss	Covil unserved cases	Maybe Jim stopped accepting service. If we get served later, and Hill is still alive, we re-depose him.

		William Silverman Pauline Burdin Steven Fries travelers Sara Schrodetzki Tommy Boger		If we were served, we should attend; however, we checked the docket and there was no proof of serviced filed.
10/23/18 4:15pm	Carol Weill	Mark Wall Barb Davis Irene Muse Steven Fries Gerry Begley John Weiss William Silverman Pauline Burdin Sara Schrodetzki Tommy Boger	Covil Unserved cases	Zurich would recommend that Mark not appear for depositions in cases where service has not yet been effectuated.
10/31/18 3:57pm	Mark Wall	Irene Muse Steven Fries Carol Weill Barb Davis Gerry Begley John Weiss Pauline Burdin	FW Hill and email from Theile asking about answers	It didn't take them very long to figure out. What response at this point?
11/1/18 1:53pm	Mark Wall	Irene Muse Steven Fries Carol Weill Erin Corbally, Barb Davis Gerry Begley John Weiss	FW Hill and Taylor	FYI see below. Below is Mark's email stating that he had not been asked to represent Covil in Hill and Taylor and Theile's email from 11/1/18 at 10:34 A.M. asking about past due answers.
11/1/18 2:00pm	Steven Fries	Mark Wall, Irene Muse Carol Weill Erin Corbally Davis Barb Gerry Begley John Weiss	Re. Hill and Taylor	I thought you said yesterday that if approached by Plaintiff on these cases that we're going to tell them no record of service.

11/1/18 2:04pm	Mark Wall	Steven Fries Irene Muse Carol Weill Erin Corbally Barb Davis Gerry Begley John Weiss	Re. Hill and Taylor	In face of what has been filed today, I thought I would start slowly and leave service to last. I want to see what they say about service.

83. Defendants acted in concert when deciding not to tender Covil's policy limits in response to Finch's demand, and they did so without any input from an independent Covil. These actions were in breach of their duties to Covil.

FOR A FIRST CROSS-CLAIM
Professional Negligence as to Lawyers

84. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this cross-claim as if fully set forth herein.

85. Pursuant to S.C. Code Ann. § 15-36-100, Cross-Claimant has retained the services of Michael Virzi as an expert witness in this matter. Mr. Virzi's affidavit is attached as **Exhibit 1** and incorporated by reference.

86. As Covil's attorneys, Lawyers owed a legal duty to Covil to conform to the generally recognized and accepted practices of the legal profession with respect to the services that Lawyers performed for Covil.

87. Lawyers provided legal services contrary to the most minimal legal standards.

88. Lawyers breached their duties to Covil and failed to conform to the generally recognized and accepted practices of the legal profession with respect to the services performed by Lawyers. In particular, Lawyers were negligent, grossly negligent, reckless, willful, and wanton in their:

- a. Failure to properly represent Covil;

- b. Failure to communicate with their client;
 - c. Failure to identify Covil as their client and not the Primary Insurers;
 - d. Failure to provide competent representation;
 - e. Failure to act diligently in the interest of Covil;
 - f. Failure to communicate with Covil sufficiently to allow Covil to make any informed decisions;
 - g. Failure to act with commitment and dedication to the interest of Covil;
 - h. Failure to protect Covil;
 - i. Failure to use all available proper procedures to protect Covil, including appointment of a receiver for Covil as provided by S.C. Code Ann. § 15-65-10 and Rule 66, SCRCPP;
 - j. Failure to seek coverage from other Covil insurers, including without limitation Ranger and Hartford or at least advising Covil of the need to do so;
 - k. Failure to recommend settlement within policy limits or to communicate at all with Covil;
 - l. Failure to communicate with the insured, Covil, as no proper procedures were in place as provided by S.C. Code Ann. § 15-65-10 and Rule 66, SCRCPP, to effectuate said communication;
 - m. Failure to properly identify and disclose the conflict of interest in representing the Primary Insurers and Covil; and
 - n. Failure to properly defend or otherwise preserve appropriate objections at trial, which seriously affected the value and judgment in the *Finch* case.
89. Lawyers' actions and inactions were negligent, grossly negligent, reckless, willful, and wanton.

90. As a direct and proximate result of Lawyers' negligence, the Cross-Claimant has suffered actual and consequential damages in an amount to be proven at trial.

FOR A SECOND CROSS-CLAIM
Breach of Fiduciary Duty as to Lawyers

91. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this cross-claim as if fully set forth herein.

92. Lawyers served as attorneys for Covil.

93. As the attorneys for Covil, Lawyers had fiduciary duties and owed a duty of due care, good faith, and loyalty to Covil. Lawyers breached these duties owed to Covil.

94. As a result of Lawyers' negligent, grossly negligent, and wanton acts, Cross-Claimant has suffered actual and consequential damages in an amount to be determined by a jury.

FOR A THIRD CROSS-CLAIM
Aiding and Abetting the Breach of a Fiduciary Duty as To Primary Insurers

95. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this cross-claim as if fully set forth herein.

96. Each of Covil's lawyers owed fiduciary duties to Covil.

97. The Primary Insurers knew that each of Covil's lawyers had a fiduciary duty to Covil and knowingly participated in the breach of that fiduciary duty.

98. The Primary Insurers knew that each of Covil's lawyers had a duty to communicate and advise Covil.

99. One example is that the Primary Insurers received notice of the *Finch* demand and not only were aware but also participated in Lawyers' decision not to inform an independent Covil of the demand and its rights related to the demand.

100. Further, the Primary Insurers knew and improperly instructed each of Covil's lawyers to

breach their fiduciary duties to their insured, Covil, by treating the Primary Insurers as the client.

101. As a direct and proximate cause of the Primary Insurers' conduct, Cross-Claimant suffered damages caused by these breaches of fiduciary duties and the aiding and abetting as described herein.

FOR A FOURTH CROSS-CLAIM
Breach of Contract – Bad Faith Failure to Defend
against Primary Insurers

102. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this cross-claim as if fully set forth herein.

103. The Primary Insurers have contractual obligations to Covil.

104. A copy of all policy materials known and available relating to the Zurich policies is on file with this Court;

105. A copy of all policy materials known and available relating to the USF&G policies is on file with this Court

106. The Primary Insurers had, and have, a contractual duty to provide a defense to the Covil Asbestos Suits, including, but not limited to, the *Finch* suit, which the Primary Insurers breached.

107. The Primary Insurers breached their duty to defend Covil by determining what was best for Covil without consulting with an independent Covil or even consulting with Jim Covil, who was their prior contact for Covil.

108. The Primary Insurers knowingly failed to exercise an honest and informed judgment in providing a defense to Covil.

109. Covil suffered damages as a direct and proximate result of the Primary Insurers' breach of contract and bad faith failure to defend.
110. The Primary Insurers are liable for all damages including restitution, without limitation, assessed against Covil, by way of settlement or judgment, as a result of the Primary Insurers' actions in failing adequately to defend Covil against the *Finch* suit and all other suits resulting in damages to Covil.

FOR A FIFTH CROSS-CLAIM
Breach of Contract – Bad Faith Processing of Claims
against Primary Insurers

111. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this cross-claim as if fully set forth herein.
112. The Primary Insurers each have valid contractual obligations to Covil.
113. The Primary Insurers each have a contractual duty to administer and settle claims made against Covil in the Covil Asbestos Suits.
114. The Primary Insurers have breached their respective contracts in bad faith by unilaterally running Covil and, in particular, refusing to pay until judgment was entered against Covil in the amount of \$35,582,365.99, inclusive of prejudgment interest, which continues to accrue post judgment interest, and thereafter delaying payment of benefits justly due under the contract in *Finch*.
115. Furthermore, the Primary Insurers have engaged in a bad faith processing of claims against Covil and in particular of *Finch*.
116. The Primary Insurers' actions in refusing to abide by their obligations under their respective contracts were unreasonable and in breach of the Primary Insurers' contracts as well as the implied covenant of good faith and fair dealing under the policies, including, but not

limited to, the imposition of extracontractual duties and obligations upon Covil in furtherance of the Primary Insurers' interest and to the detriment of Covil.

117. As a direct and proximate result of the Primary Insurers' acts and omissions, the Cross-Claimant has been damaged and is entitled to recover actual, compensatory, and punitive damages.

FOR A SIXTH CROSS-CLAIM
Tort Action – Bad Faith Processing of Claims
against Primary Insurers

118. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this cross-claim as if fully set forth herein.

119. The Primary Insurers, willfully and with reckless disregard for Covil's rights, acted in bad faith and/or unreasonably in processing claim(s) under their mutually binding insurance contract.

120. The Primary Insurers' willful, and with reckless disregard for Covil's rights, actions in refusing to abide by their obligations under their respective contracts were unreasonable and in breach of the Primary Insurers' contracts as well as the implied covenant of good faith and fair dealing under the policies, including, but not limited to, the imposition of extracontractual duties and obligations upon Covil in furtherance of the Insurers' interest and to the detriment of Covil.

121. As a direct and proximate result of the Primary Insurers' acts and omissions, the Cross-Claimant has been damaged and is entitled to recover actual, compensatory, and punitive damages.

FOR A SEVENTH CROSS-CLAIM**Primary Insurers Are Fully Responsible for Conduct
Prior To November 2, 2018, As Covil's Alter Ego, Agency or Instrumentality**

122. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this cross-claim as if fully set forth herein.
123. The Primary Insurers' pattern and practice has made the Primary Insurers fully responsible for all of Covil's liabilities prior to appointment of the Receiver.
124. Under a number of legal theories, the Primary Insurers are Covil and acted as such in the *Finch* case.
125. The Primary Insurers have entered into a joint venture with each other to take over Covil and become Covil. For example:
- a. A special combination of the Primary Insurers and Covil for the specific venture of limiting or eliminating Covil as a direct voice in the management of Covil's assets so that the Primary Insurers would protect and save their money;
 - b. The retention of a separate corporate personality for Covil would promote fraud, wrong, injustice, and contravene public policy; and
 - c. Each Primary Insurer had an equal right to control the conduct of their joint venture and of Covil.
126. Covil has become the alter ego of the Primary Insurers:
- a. The Primary Insurers have shown a total domination and control over Covil;
 - b. The domination was so complete that Covil never manifested separate corporate interests of its own and functioned solely to achieve the purposes of the Primary Insurers;
 - c. The Primary Insurers misused their domination of Covil and were not entitled to dominate Covil; and

- d. Inequitable consequences have resulted with the unilateral application of insurance proceeds, default judgments, and verdicts. The Insurers have now permanently raised Covil's profile in national asbestos litigation.

127. The Primary Insurers were the principals and Covil was the agent or agency:

- a. The Primary Insurers manifested complete control over Covil and purported to act on Covil's behalf;
- b. The course of dealing between the principal and the agent clearly show no independent Covil; and
- c. The Primary Insurers became active participants in Covil rather than simply insurers.

128. The Primary Insurers' acts and omissions constitute negligence and/or gross negligence because they constitute an extreme departure from what a reasonably careful person would do in the same situation.

129. As a direct and proximate result of the Insurers' acts and omissions, the Cross-Claimant is entitled to restitution, including all proximately caused injuries to Covil and restitution for those claimants paid less than fair value for their claims between 1993-2018, attorney's fees, and costs of this action, as well as punitive damages for the Primary Insurers' negligent, grossly negligent, willful, and intentional conduct towards Covil.

FOR AN EIGHTH CROSS-CLAIM
Negligence as To Lawyers and Primary Insurers

130. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this cross-claim as if fully set forth herein.

131. Lawyers and the Primary Insurers had a contractual and fiduciary duty to protect Covil's interest.

132. Lawyers and the Primary Insurers negligently failed to conduct an adequate defense on behalf of Covil in respect of the *Finch* suit.
133. Lawyers and the Primary Insurers should have taken steps necessary to avoid a judgment in the *Finch* suit, some or all of which are outlined in this pleading.
134. The Primary Insurers knowingly permitted Lawyers to act negligently in defense of Covil and are responsible for failing or refusing to intercede to prevent Lawyers' negligence on behalf of Covil in the *Finch* suit.
135. As a direct and foreseeable consequence of the foregoing negligence, Covil has been damaged in an amount to be determined at trial.
136. Lawyers and the Primary Insurers are responsible for all damages incurred by Covil as a result of the foregoing negligence.

FOR A NINTH CROSS-CLAIM
Declaratory Judgment as to the Primary Insurers
And the Primary Insurers' Policies

137. The Cross-Claimant re-alleges and incorporates by this reference the preceding paragraphs of this cross-claim as if fully set forth herein.
138. As to all of the Covil Insurance Policies issued by the Primary Insurers, Covil seeks the following declarations:
- a. The Covil Insurance Policies cover all damages resulting from bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the policy periods;
 - b. Covil may select the policy or policy years to which to assign or allocate loss;

- c. In the case of a claimed ambiguity in any Covil Insurance Policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Covil Insurance Policies;
- d. Defense costs are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of Covil Insurance Policies;
- e. Each of the Primary Insurers' Covil Insurance Policies is required to pay or reimburse all sums that Covil is legally obligated to pay;
- f. Each of the Primary Insurers' Covil Insurance Policies must cover asbestos claims in full, including, but not limited to, its "per occurrence" limits;
- g. Exposure to asbestos for which Covil is liable during Covil's operations—including Covil's construction, installation, maintenance, or removal activities—are, including, but not limited to, subject only to the "per occurrence" limits of the Covil Insurance Policies, and not subject to "aggregate" limits, if any, of the Covil Insurance Policies;
- h. Any aggregate limit on coverage in any of the Covil Insurance Policies is a limitation on coverage, and therefore each defendant Primary Insurer has the burden to prove any assertion that any claim is subject to the aggregate limits in the Covil Insurance Policies, if any;
- i. Each Primary Insurer has the burden to prove, based on the evidence, that a claim is either a "products" claim or a "completed operations" claim, as those terms are defined in the Covil Insurance Policies, in order to subject the claim to the aggregate limits in the Covil Insurance Policies, if any;

- j. Each of the Primary Insurers is fully responsible for all damages resulting from the *Finch* judgment and, pursuant to the collateral source rule, Lawyers should not benefit from any payment from the insurers;
- k. The damages for the *Finch* judgment are extracontractual in nature and derive from the Primary Insurers' failure or refusal to provide a defense, including, but not limited to, a competent defense to Covil in the *Finch* case;
- l. The damages for the *Finch* judgment cannot be allocated to any Covil Insurance Policy limit;
- m. Each of the Primary Insurers has waived, or is estopped from asserting, any right of subrogation and any purported claim of equitable contribution against any other person, including, but not limited to, any other Covil insurer, except as explicitly pleaded herein.

139. An actual and justiciable controversy exists between Covil and each of the defendant Primary Insurers concerning their obligations under the Covil Insurance Policies.

140. Judicial declarations are necessary and appropriate at this time, and under the circumstances alleged above, so that Covil may ascertain its rights under the Covil Insurance Policies.

PRAYER FOR RELIEF

WHEREFORE, Cross-Claimant respectfully prays for an award from this Court as to each cross claim in an amount to be determined at trial, the imposition of restitution for the claimants paid less than the fair value of their claims from 1993 -2018, as well as an additional punitive award in an amount sufficient to impress upon the Cross-Claim Defendants the seriousness of their conduct and to deter such similar conduct in the future, together with restitution, attorney's fees,

costs, prejudgment interest, and such further relief as the Court deems just and appropriate.

Respectfully submitted,

s/ Jescelyn T. Spitz
Jescelyn Tillman Spitz, Esquire
Fed. Bar 12159
Rikard & Protopapas, LLC
1329 Blanding Street
Columbia, South Carolina 29201
Post Office Box 5640 (29250)
PH: (803)978-6111
FAX: (803)978-6112
EMAIL: jspitz@rplegalgroup.com

*Attorneys for Covil Corporation, acting
through Peter D. Protopapas, Receiver of
Covil Corporation as to all causes of action*

s/ Mark W. Hardee
Mark W. Hardee, Esquire
Fed. Bar 2314
The Hardee Law Firm
2231 Devine Street
Suite 202
Columbia, South Carolina 29205
PH: (803)799-0905
EMAIL: mwhardee@bellsouth.net

*Attorneys for Covil Corporation, acting
through Peter D. Protopapas, Receiver of
Covil Corporation as to all causes of action
related to Professional Negligence*

Signatures continued on following page

SMITH | ROBINSON
Smith Robinson Holler DuBose and Mor-
gan, LLC

s/ Jonathan M. Robinson
G. Murrell Smith, Jr. (SCBar 6120)
Jonathan M. Robinson (SCBar 7755)
2725 Devine Street
Columbia, SC 29205
(803) 254-5445

*Attorneys for Covil Corporation, acting
through Peter D. Protopapas, Receiver of
Covil Corporation as to all causes of action
against the Primary Insurers*

Paul Anton Zevnik
(Pro Hac Forthcoming)
Brady Edwards
(Pro Hac Forthcoming)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-3000

*Attorneys for Covil Corporation, acting
through Peter D. Protopapas, Receiver of
Covil Corporation as to all causes of action
against the Primary Insurers*

October 1, 2020

Columbia, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT
) C/A No. 2019-CP-40-03003
)
Ann Finch, Individually and as Executor of the)
Estate of Franklin Finch,)
)
Plaintiff,)
v.)
)
Sentry Casualty Company; United States Fidelity)
and Guaranty Company; Zurich American Insurance)
Company; Peter Protopapas as Court Appointed)
Receiver for Covil Corporation, and Wall,)
Templeton & Haldrup, P.A.;)
Defendants.

**DEFENDANT UNITED STATES FIDELITY AND GUARANTY COMPANY’S ANSWER
TO PLAINTIFF’S SECOND AMENDED COMPLAINT**

Comes now Defendant, United States Fidelity and Guaranty Company
(hereinafter “USF&G”), by and through its undersigned counsel, to answer the Second Amended
Complaint filed by Plaintiff in the above-captioned case.¹

INTRODUCTION

Each and every allegation in the complaint not hereinafter specifically admitted,
qualified or explained is denied.

The unnumbered Paragraphs under the heading “Introduction” are a summary of
Plaintiff’s allegations, therefore, upon information and belief, no response is required. To the
extent a response is required, USF&G incorporates herein its response to the numbered
paragraphs of the Complaint as set forth below, and otherwise denies.

PARTIES

¹ USF&G will separately respond to the cross-claims asserted against it by Peter Protopapas, as
court-appointed receiver for Covil Corporation (the “Receiver”), dated October 1, 2020, and is
not repeating here its prior responses to the Receiver’s prior cross-claims in this action.

1. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1.

2. USF&G admits, upon information and belief, that Peter Protopapas (the “Receiver”) maintains his principal place of business in Richland County, South Carolina. USF&G affirmatively avers, however, that Covil Corporation (“Covil”) had its principal place of business in Greenville County, South Carolina. Further responding, USF&G states that the Order attached to the First Amended Complaint as Exhibit 1 speaks for itself. USF&G denies all remaining allegations of Paragraph 2 including any implication that the Receiver was properly appointed in accordance with South Carolina law.

3. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3, which relate to parties other than USF&G.

4. USF&G admits that it is an insurance company organized and existing under the laws of the State of Connecticut with its principal place of business therein. The allegations remaining in Paragraph 4 constitute legal conclusions to which no response is required. To the extent a response is required, USF&G denies those allegations, including that it is a “wholly-owned subsidiary of Travelers Group of Insurance Companies,” as no such legal entity exists, and denies that it is or was the alter-ego of Covil Corporation.

5-6. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 5 and 6, which relates to parties other than USF&G.

7. Paragraph 7 is a definitional paragraph to which no response is required. To the extent a response is required, USF&G denies any and all allegations that USF&G is an “alter-ego.”

JURISDICTION AND VENUE

8. Paragraph 8 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies that this Court has jurisdiction over USF&G or Plaintiff's claims.

9. Paragraph 9 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies that venue is proper in the State of South Carolina Court of Common Pleas for Richland County.

FACTUAL BACKGROUND

10. USF&G admits upon information and belief that Covil sold and installed thermal insulation, among other business operations.

11-12. USF&G admits upon information and belief that Covil sold and in some cases installed insulation products at various times between 1964 and 1991 and that Covil's charter was purportedly administratively revoked, and further states that Covil was judicially dissolved in 1992. USF&G denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraphs 11 and 12.

13. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13, except admits that it is aware of certain lawsuits that have been filed against Covil alleging bodily injury resulting from asbestos exposure.

14. USF&G admits only that it fulfilled all its defense obligation to Covil under the USF&G Policy (as defined herein) by providing a defense to Covil for certain lawsuits pursuant to the terms and conditions of its insurance contract with Covil. USF&G otherwise denies the allegations of Paragraph 14.

15. USF&G admits that Fidelity and Guaranty Insurance Underwriters, Inc. issued policy number SMP 490049 to Covil Corporation for the period March 31, 1976 to March 31, 1978 (the “USF&G Policy”) and that other insurers issued policies providing liability insurance to Covil between 1964 until periods post-dating 1978.

16. USF&G denies the allegations of Paragraph 16.

17. USF&G admits that USF&G defended Covil pursuant to the terms and conditions of the USF&G Policy in connection with certain lawsuits against Covil from the late 1970s through the present, and that certain other insurers participated in Covil’s defense pursuant to the terms of such insurers’ policies. USF&G denies all remaining allegations of Paragraph 17.

18-19. USF&G denies the allegations of Paragraphs 18 and 19.

20. USF&G admits that USF&G retained defense counsel to defend Covil pursuant to the terms and conditions of the USF&G Policy in connection with certain lawsuits against Covil, and otherwise denies the allegations of Paragraph 20.

21. To the extent the allegations of Paragraph 21 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 21 insofar as they relate to other parties.

22. To the extent the allegations of Paragraph 22 are directed at USF&G, USF&G denies those allegations and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 22 insofar as they relate to other parties.

23. To the extent the allegations of Paragraph 23 are directed at USF&G, USF&G denies those allegations, except admits that it fulfilled its defense obligation under the USF&G Policy by providing a defense to Covil for certain lawsuits pursuant to the terms and

conditions of the USF&G Policy. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 23 insofar as they relate to other parties.

24. Paragraph 24 states legal conclusions as to which no response is required. To the extent a response is required, USF&G admits that contracts generally imply mutual covenants of good faith and fair dealing.

25-32. To the extent the allegations of Paragraphs 25 through 32 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 25 through 32 insofar as they relate to other parties. Further, Paragraphs 25 through 32 state legal conclusions as to which no response is required.

33. USF&G denies the allegations of Paragraph 33.

34. Paragraph 34 does not contain any allegations against USF&G as to which a response is required. To the extent a response is required, USF&G denies those allegations except admits that certain companies have filed for bankruptcy protection as a result of asbestos-related lawsuits.

35. USF&G denies the allegations in Paragraph 35 to the extent they are directed at USF&G, except admits that it fulfilled its defense obligation under the USF&G Policy by providing a defense to Covil for certain lawsuits pursuant to the terms and conditions of the USF&G Policy, and communicated with other insurers and defense counsel who were also involved in Covil's defense.

36. USF&G denies the allegations of Paragraph 36.

FIRST CAUSE OF ACTION

Alter Ego, Agency or Instrumentality (As to Insurers, Prior to November 2, 2018)

37. USF&G incorporates by reference its responses to Paragraphs 1 through 36.

38-44. USF&G denies the allegations of Paragraphs 38 through 44, including any subparagraphs. Further, Paragraphs 38 through 44 state legal conclusions as to which no response is required.

SECOND CAUSE OF ACTION

Alter Ego, Agency or Instrumentality (As to Lawyers, Prior to November 2, 2018)

45. USF&G incorporates by reference its responses to Paragraphs 1 through 44.

46-49. To the extent the allegations of Paragraphs 46 through 49 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 46 through 49 insofar as they relate to other parties. Further, Paragraphs 46 through 49 state legal conclusions as to which no response is required.

THIRD CAUSE OF ACTION

Alter Ego, Agency or Instrumentality (As to Insurers, After November 2, 2018)

50. USF&G incorporates by reference its responses to Paragraphs 1 through 49.

51-53. USF&G denies the allegations of Paragraphs 51 through 53.

54. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 54 insofar as they relate to other parties. To the extent the allegations of Paragraph 54 is directed at USF&G, USF&G denies those allegations. Further, Paragraph 54 states legal conclusions as to which no response is required.

55. Paragraph 55 consists of a description of the relief sought by Plaintiff, to which no response is required. To the extent a response is required, USF&G denies that Plaintiff is entitled to any relief against USF&G.

FOURTH CAUSE OF ACTION
Breach of Fiduciary Duty by the Alter Egos

56. USF&G incorporates by reference its responses to Paragraphs 1 through 55.

57. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 57.

58-60. USF&G denies the allegations of Paragraphs 58 through 60.

61. Paragraph 61 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies the allegations of Paragraph 61 and denies that Plaintiff is entitled to any relief against USF&G, including but not limited to an award of punitive damages.

RESPONSE TO PRAYER FOR RELIEF

As to the allegations in Plaintiff's Prayer for Relief, USF&G denies that it is liable to Plaintiff under any theory or cause of action for the damages and/or other relief requested therein.

AFFIRMATIVE DEFENSES

USF&G hereby asserts the following defenses and affirmative defenses in total and/or partial bar of the claims for relief and/or alleged damages sought in Plaintiff's Second Amended Complaint. By including the following defenses or affirmative defenses, USF&G does not assume the burden of proof where such burden lies with Plaintiff or parties other than USF&G.

FOR A FIRST DEFENSE

The Second Amended Complaint fails to allege facts sufficient to state a cause of action against USF&G and, accordingly, should be dismissed under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE

This Court lacks both general and specific personal jurisdiction over USF&G. There are not sufficient minimum contacts with the State of South Carolina to bring USF&G within the Court's jurisdiction pursuant to *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 423 S.E.2d (1992); *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 66 S. Ct. 154 (1945) and their progeny, S.C. Code Ann. § 36-2-803, the Constitutions of the State of South Carolina and the United States of America and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

USF&G's obligations to Plaintiff, if any, are limited by the terms of the USF&G Policy with Covil, including, without limitation, conditions, exclusions, declarations, endorsements, limits of liability, per occurrence and aggregate limits, definitions, deductibles, self-insured retentions, policy periods, requirements of exhaustion of other insurance, and notice requirements. USF&G expressly reserves, and does not waive, its rights under all of the terms of the USF&G Policy.

FOR A FOURTH DEFENSE

Plaintiff's claims against USF&G may be barred by the applicable statute of limitations and/or repose.

FOR A FIFTH DEFENSE

Upon information and belief, this action has been brought in an improper venue in that no Defendant resides in Richland County and the most substantial part of the alleged act or omission giving rise to the action occurred in a county(ies) other than Richland County.

FOR A SIXTH DEFENSE

Plaintiff's claims are premature because the judgment she obtained in the Middle District of North Carolina is subject to a motion for relief from judgment. Unless and until the judgment in Plaintiff's underlying case is final and not subject to further appeal, Plaintiff's claims are defective and should be stayed or dismissed.

FOR A SEVENTH DEFENSE

There is another prior pending action between USF&G and Plaintiff, *Zurich American Insurance Company v. Covil Corporation*, et. al., No. 1:18-cv-932 (M.D.N.C.). Accordingly, this action should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

FOR AN EIGHTH DEFENSE

USF&G has not exerted total dominance and control over Covil, nor has USF&G misused any control of Covil which has resulted in injustices or inequitable consequences to Plaintiff. Accordingly, Plaintiff's claims against USF&G are without merit and should be dismissed.

FOR A NINTH DEFENSE

Plaintiff's claims against USF&G are barred by the equitable doctrines of res judicata, waiver, release, laches, collateral estoppel, judicial estoppel, and/or conditions precedent or subsequent.

FOR A TENTH DEFENSE

To the extent Plaintiff has received payment in satisfaction of any of the alleged injuries and/or claims against USF&G or any other insurer, Plaintiff's claims are barred by the defense of payment and accord and satisfaction and, at a minimum, USF&G is entitled to a set off for any and all such payments.

FOR AN ELEVENTH DEFENSE

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 claims against USF&G are derivative of underlying asbestos claims against Covil.

FOR A TWELFTH DEFENSE

The Complaint fails to join as parties persons in whose absence complete relief cannot be afforded among those already parties, and/or persons who have an interest relating to the subject matter of this action and are so situated that the disposition of the action in their absence may as a practical matter impair or impede their ability to protect that interest or leave the persons already parties subject to a substantial risk of incurring double, multiple, or inconsistent obligations. The joinder of said persons is compulsory under South Carolina Rule of Civil Procedure 19 and, therefore, this action should be dismissed unless said persons are joined.

FOR A THIRTEENTH DEFENSE

Upon information and belief, Plaintiff has received payments from and granted releases to other parties. USF&G is entitled to setoff of the greater of the amount stipulated to in such release or the amount of consideration paid for such a release.

FOR A FOURTEENTH DEFENSE

USF&G pleads the provisions of the South Carolina Door Closing Statute, S.C. Code Ann. § 15-5-150. Plaintiff is alleged to be a resident of North Carolina, and upon information and belief, Plaintiff's claims are or may be barred by the Door Closing Statute.

FOR A FIFTEENTH DEFENSE

Plaintiff has not pled a local ancillary administration, nor has Plaintiff filed authenticated copies of her appointment and the will, if any. Accordingly, Plaintiff lacks standing to bring the claims she asserts in South Carolina pursuant to S.C. Code Ann. § 62-2-101 et. seq.

FOR AN SIXTEENTH DEFENSE

Plaintiff's claims for alter-ego are barred by the *Noerr Pennington* Doctrine.

FOR A SEVENTEENTH DEFENSE

This Court lacks subject-matter jurisdiction over Plaintiff's claims against USF&G.

FOR AN EIGHTEENTH DEFENSE

If USF&G is determined to be Covil's "alter ego", which USF&G specifically denies, then USF&G stands in Covil's shoes and is entitled to assert all claims and defenses that Covil would be entitled to assert.

FOR A NINETEENTH DEFENSE

Plaintiff lacks standing to bring claims based on USF&G's participating in the defense of Covil in other lawsuits.

FOR A TWENTIETH DEFENSE

Plaintiffs were not in privity with USF&G or any of its predecessors, affiliates or subsidiaries and Plaintiffs may not rely upon any warranties which may have been implied or imposed by law upon USF&G, which affirmatively states that it breached no warranty.

FOR A TWENTY-FIRST DEFENSE

USF&G alleges upon information and belief that Plaintiffs' claim for punitive damages violates: the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause as USF&G could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause because USF&G could be compelled to give testimony against itself in a penalty situation such as punitive damages; the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; USF&G's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills USF&G's exercise of that right; the Eighth Amendment's guarantee that excessive fines shall not be imposed; the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, Plaintiffs' claim for punitive damages should be dismissed

FOR A TWENTY-SECOND DEFENSE

USF&G requests, pursuant to S.C. Code Ann. §15-32-520, that any proceeding to determine punitive damages be bifurcated from any trial to determine liability and compensatory damages.

FOR A TWENTY-THIRD DEFENSE

Any award of punitive damages should not exceed the limits provided for in S.C. Code Ann. §15-32-530.

FOR A TWENTY-FOURTH DEFENSE

USF&G would show that, among other things, Plaintiff's claim for punitive damages is barred, reduced, bifurcated, capped, or otherwise impacted by the South Carolina Fairness in Civil Justice Act of 2011 and/or similar and/or related state statutes and limitations.

FOR A TWENTY-FIFTH DEFENSE

To the extent that the Second Amended Complaint asserts a demand for punitive damages, USF&G specifically incorporates by reference any and all standards and limitations regarding the determination and/or enforceability of punitive damage awards that arose in the decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1966); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

FOR A TWENTY-SIXTH DEFENSE

There has been no concert of action between USF&G and any of the other named defendants. The defendants are not joint tortfeasors, and USF&G therefore may not be held jointly and severally liable with the other named defendants. Accordingly, USF&G asserts that it is entitled to the benefit of the provisions set forth in S.C. Code Ann. § 15-38-15 in this action.

FOR A TWENTY-SEVENTH DEFENSE

There are no allegations against USF&G stated with sufficient particularity to constitute a cause of action for fraud, fraudulent concealment, concert of action, conspiracy, or the like to satisfy the requirements of Rule 9(b) of the South Carolina Rules of Civil Procedure.

FOR A TWENTY-EIGHTH DEFENSE

Because Plaintiff fails to allege that she suffered "particularized harm" as a result of USF&G's alleged wrongful conduct, she is precluded from asserting a direct claim for breach of fiduciary duty. *PCS Nitrogen, Inc. v. Ross Development Corp.*, 126 F. Supp. 3d 611, 629

(D.S.C. 2015) (citing *Stewart v. Ficken*, 149 S.E. 164, 165 (S.C. 1929)) (“[I]n order for a creditor to possess a direct claim, the creditor must have suffered some particularized harm at the hands of the breaching directors.”). Plaintiff has not alleged “particularized harm” that is “separate and distinct” from any generalized harm to the corporation that is suffered by all creditors equally. *Ward v. Griffin*, 367 S.E.2d 703, 704 (S.C. Ct. App. 1998).

FOR A TWENTY-NINTH DEFENSE

Plaintiff lacks standing to assert a derivative claim for breach of fiduciary duty against USF&G.

FOR A THIRTIETH DEFENSE

Plaintiff fails to plead a viable breach of fiduciary duty claim against USF&G because USF&G cannot be both Covil, as Covil’s alleged alter ego, and at the same a corporate fiduciary of Covil that owes duties to Covil’s creditors. In addition, an insurer cannot owe simultaneous duties to both its insured and the third party creditors suing its insured, as Plaintiff alleges. *See* SAC ¶ 59.

FOR A THIRTY-FIRST DEFENSE

Plaintiff fails to plead a breach of the limited duty owed to creditors of an insolvent corporation. In addition, Covil had no assets to distribute to its creditors, and thus there can be no breach of any fiduciary duty to preserve Covil’s assets for the benefit of creditors. *See, e.g., Kolb v. Cook*, 284 S.C. 598, 601 (1985) (“liability insurance coverage is not a [distributable] asset”).

FOR A THIRTY-SECOND DEFENSE

Plaintiff’s claim for breach of fiduciary duty should also be dismissed because it is duplicative of Plaintiff’s alter ego claims. *See, e.g., RFT Mgmt. Co. v. Tinsley & Adams*

L.L.P., 399 S.C. 322, 336–37 (2012) (affirming dismissal of breach of fiduciary duty claim as duplicative of legal malpractice claim).

FOR A THIRTY-THIRD DEFENSE

Plaintiff is not entitled to punitive damages because she asserts a derivative breach of fiduciary duty claim that sounds in equity. *See Blanton Enterprises, Inc. v. Burger King Corp.*, 680 F. Supp. 753, 776 n.24 (D.S.C. 1988) (quoting *Dibble v. Sumter Ice and Fuel Co.*, 322 S.E.2d 674, 679 (S.C. Ct. App. 1984)) (“[I]t is settled law that punitive damages may not be recovered in an equity suit in South Carolina.”).

FOR A THIRTY-FOURTH DEFENSE

Plaintiff is not entitled to punitive damages because her fiduciary duty claim is not based on alleged harm to Plaintiff, but rather based on Defendants’ alleged “breach of their fiduciary duties to Covil Corporation.” SAC ¶ 61.

FOR A THIRTY-FIFTH DEFENSE

USF&G reserves the right to allege additional facts and circumstances in support of its defenses as these facts become available.

FOR A THIRTY-SIXTH DEFENSE

USF&G reserves the right to assert additional affirmative defenses based on information it may receive during the course of this litigation.

FOR A THIRTY-SEVENTH DEFENSE

USF&G incorporates by reference herein, as if fully set forth, all defenses, both affirmative and otherwise, raised, pleaded, or asserted by all other answering defendants.

JURY TRIAL DEMAND

USF&G requests a trial by jury on all issues so triable.

WHEREFORE, USF&G prays the Court for the following relief:

1. That the Second Amended Complaint be dismissed with prejudice as to USF&G;
2. That Plaintiff and other defendants and/or third-party defendants have and recover nothing from USF&G;
3. That the costs of this action be taxed against Plaintiff and/or other defendants and/or third-party defendants;
4. That there be a trial by jury on all issues of fact; and
5. For such other and further relief as the Court deems just and proper.

Respectfully submitted:

WOMBLE BOND DICKINSON LLP

/s M. Elizabeth O'Neill

M. Elizabeth O'Neill, S.C. Bar No.: 104013

Todd Carroll, S.C. Bar No.: 74000

1221 Main Street, Suite 1600

Columbia, SC 29201

(704) 350-6310; Elizabeth.ONeill@wbd-us.com

(803) 454-7730; Todd.Carroll@wbd-us.com

William P. Davis, S.C. Bar No.: 1585

BAKER, RAVENEL & BENDER, LLP

3710 Landmark Drive, Suite 400

Post Office Box 8057

Columbia, South Carolina 29202

(803) 799-9091; wdavis@brblegal.com

AND

Mary Beth Forshaw (pro hac vice)

Andrew T. Frankel (pro hac vice)

SIMPSON THACHER & BARTLETT LLP

425 Lexington Avenue

New York, NY 10017-3954

(212) 455-2846; mforshaw@stblaw.com

(212) 455-3073; afrankel@stblaw.com

*Attorneys for United States Fidelity and Guaranty
Company*

October 1, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT
) C/A No. 2019-CP-40-03003
)
Ann Finch, Individually and as Executor of the)
Estate of Franklin Finch,)
)
Plaintiff,)
v.)
)
Sentry Casualty Company; United States Fidelity)
and Guaranty Company; Zurich American Insurance)
Company; Peter Protopapas as Court Appointed)
Receiver for Covil Corporation, and Wall,)
Templeton & Haldrup, P.A.;)
)
Defendants.

**UNITED STATES FIDELITY AND GUARANTY COMPANY’S ANSWER TO THE
RECEIVER FOR COVIL CORPORATION’S CROSS-CLAIMS AGAINST WALL
TEMPLETON & HALDRUP, P.A.; UNITED STATES FIDELITY AND GUARANTY
COMPANY; AND ZURICH AMERICAN INSURANCE COMPANY**

United States Guaranty and Fidelity Company (“USF&G”) answering the Cross-
Claims of Covil Corporation By and Through its Receiver (“Covil”) would respectfully show
unto the Court the following:

PARTIES

Each and every allegation in the complaint not hereinafter specifically admitted,
qualified or explained is denied.^{1 2}

¹ By answering Covil’s cross-claims, USF&G does not waive, and expressly reserves, its right to enforce the order enjoining Covil from seeking insurance coverage determinations in state court. *See Covil Corp. v. Zurich Am. Ins. Co.*, No. 7:18-3291-BHH, 2020 U.S. Dist. LEXIS 33140, at *42-43 (D.S.C. Feb. 27, 2020) (“Nonetheless, the Court finds it proper, as both expressly authorized by an Act of Congress and necessary in aid of its jurisdiction, to enjoin the Receiver from further pursuing judicial determinations in underlying state tort suits regarding insurance coverage issues arising from policies issued or allegedly issued to Covil by the Insurers,” including USF&G.).

² USF&G answers Covil’s cross-claims without waiver of its previously filed motions to dismiss Covil’s cross-claims.

40. USF&G admits, upon information and belief, that Peter Protopapas (the “Receiver”) maintains his principal place of business in Richland County, South Carolina. USF&G affirmatively avers, however, that Covil Corporation (“Covil”) had its principal place of business in Greenville County, South Carolina. Further responding, USF&G states that the Order entered on November 2, 2018 speaks for itself. USF&G denies all remaining allegations of Paragraph 40 including any implication that the Receiver was properly appointed in accordance with South Carolina law.

41. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 41 insofar as they are directed at entities other than USF&G.

42. USF&G admits that it is an insurance company organized and existing under the laws of the State of Connecticut with its principal place of business therein. USF&G denies that it is a “wholly-owned subsidiary of Travelers Group of Insurance Companies,” as no such legal entity exists.

43. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 43 insofar as they are directed at entities other than USF&G.

44. Paragraph 44 is a definitional paragraph to which no response is required. To the extent a response is required, the same is denied.

JURISDICTION AND VENUE

45. Paragraph 45 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies that this Court has jurisdiction over USF&G or Covil’s Cross-claims.

46. Paragraph 46 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies that venue is proper in the State of South Carolina Court of Common Pleas for Richland County.

FACTUAL BACKGROUND

47. In response to Paragraph 47, USF&G admits upon information and belief that Covil installed thermal insulation, among other business operations. USF&G lacks sufficient knowledge or information necessary to form an opinion or belief as to the truth of the remaining allegations set forth in Paragraph 47 and therefore denies the same.

48. In response to Paragraph 48, upon information and belief, USF&G admits that Covil conducted business operations until 1991 and that Covil's charter was purportedly administratively revoked, and further states that Covil was judicially dissolved in 1992.

49. Upon information and belief, USF&G admits that it has been *alleged* by individuals asserting claims and lawsuits against Covil that Covil's operations at certain times included the sale, installation, repair, replacement, removal or disturbance of thermal insulation and other building materials, and that it has been alleged that those operations and sales exposed persons to asbestos. USF&G denies any remaining allegations or inferences to be drawn from Paragraph 49.

50. USF&G admits upon information and belief that Covil has been the subject of various claims and lawsuits arising from alleged asbestos-related injuries.

51. USF&G admits only that it fulfilled its defense obligations to Covil under the USF&G Policy by providing a defense to Covil for certain lawsuits pursuant to the

terms and conditions of the USF&G Policy. USF&G denies the remaining allegations of Paragraph 51.

52. USF&G admits only that Fidelity and Guaranty Insurance Underwriters, Inc. issued policy number SMP 490049 to Covil Corporation for the period March 31, 1976 to March 31, 1978 (referred to herein as the “USF&G Policy”) and that other insurers issued policies providing liability insurance to Covil between 1964 until periods post-dating 1978.

53-58. USF&G denies the allegations of Paragraphs 53 through 58.

59. USF&G admits certain individuals were retained to act in defense of Covil as attorneys, as a Rule 30(b)(6) witness of Covil, and as an expert witness in claims made against Covil, all pursuant to and in conformance with the USF&G Policy. USF&G denies the remaining allegations of Paragraph 59.

60. Paragraph 60 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies the allegations of Paragraph 60, except admits that the USF&G Policy imposed on USF&G and Covil mutual contractual obligations of good faith and fair dealing.

61. To the extent Paragraph 61 is directed at USF&G, USF&G states that the USF&G Policy governs its obligations to Covil. USF&G denies all allegations of Paragraph 61 inconsistent with the USF&G Policy and further states that it is not obligated to provide a defense to Covil except as set forth in that policy.

62. To the extent Paragraph 62 is directed at USF&G, USF&G admits that it, pursuant to and in conformance with the USF&G Policy, engaged certain attorneys, in conjunction with Sentry and Zurich, to represent and defend Covil in certain lawsuits in which Covil was or is a named defendant, including but not limited to the *Finch* suit.

63. Paragraph 63 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies the allegations of Paragraph 63, except it admits that when an insurer hires an attorney to represent an insured, an attorney-client relationship arises between the attorney and the insured and that a common interest exists as between the insured and the insurer in connection with the insured's defense.

64. USF&G admits that it, in conjunction with Sentry and Zurich, retained lawyers to represent and defend Covil pursuant to and in conformance with the USF&G Policy. USF&G denies the remaining allegations of Paragraph 64.

65. Paragraph 65 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies the same, except refers to the Rules referenced therein and to the rules of professional responsibility applicable to each particular jurisdiction, which speak for themselves.

66. To the extent the allegations of Paragraph 66 are directed at USF&G, USF&G denies those allegations and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 66 insofar as they relate to other parties.

67. USF&G denies the allegations of Paragraph 67.

68. Responding to Paragraph 68, USF&G admits that, pursuant to the USF&G Policy, it retained Wall Templeton & Hardrup, P.A. ("WTH") in or about April 2018 to represent and defend Covil in litigation pending against Covil. USF&G denies any remaining allegations of Paragraph 68.

69. USF&G denies knowledge or information sufficient to form a belief as to the allegations of the first sentence and therefore denies the same. USF&G, in coordination

with other insurers, retained WTH to represent and defend Covil and expected WTH to comply with all applicable ethical duties. USF&G denies the second sentence of Paragraph 69.

70. USF&G responds that upon information and belief, WTH did not utilize S.C. Code Ann. § 15-65-10 or Rule 66, SCRCP; however, USF&G denies that such was necessary. *See* South Carolina Bar Ethics Advisory Opinion 19-04. Furthermore, USF&G denies that the referenced code section and South Carolina Rules of Civil Procedure applied to the *Finch* action. Upon information and belief, USF&G denies the remaining allegations of Paragraph 70.

71. USF&G denies the allegations of Paragraph 71.

72. USF&G denies the allegations of Paragraph 72.

73. Responding to Paragraph 73, USF&G admits that WTH never advised USF&G of the “arrangement” alleged in Paragraph 73 or that the alleged “arrangement” was contrary to North Carolina or South Carolina law. USF&G further responds that the representation of Covil by WTH was not contrary to North Carolina or South Carolina law. Any remaining allegations of Paragraph 73 are denied.

74-75. USF&G denies the allegations of Paragraphs 74 and 75.

76. USF&G denies that a demand was made by the Finch plaintiffs in a monetary amount equal to USF&G’s policy limits. USF&G denies the remaining allegations of Paragraph 76.

77. USF&G denies that a demand was communicated to USF&G in the *Finch* action in a monetary amount equal to USF&G’s policy limits. USF&G denies the remaining allegations of Paragraph 77.

78-80. To the extent the allegations of Paragraphs 78 through 80 are directed at USF&G, USF&G denies those allegations and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 78 through 80 insofar as they relate to other parties.

81. USF&G admits that a verdict was entered in the *Finch* suit on or about October 19, 2018, which speaks for itself. USF&G denies all remaining allegations of Paragraph 81.

82. To the extent the allegations of Paragraph 82 are directed at USF&G, USF&G refers to the contents of the alleged communications for their specific terms and import. USF&G denies all allegations, and any inference thereof, of Paragraph 82 inconsistent with the communications referenced therein. USF&G denies the remaining allegations of Paragraph 82.

83. Paragraph 83 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraph 83 to the extent such allegations are directed against USF&G and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 83 insofar as they relate to other parties.

FIRST CROSS-CLAIM
(Professional Negligence as to Lawyers)

84. USF&G incorporates by reference its responses to Paragraphs 40 through 83.

85. Paragraph 85 states conclusions to which no response is required.

86. Paragraph 86 states legal conclusions as to which no response is required.

87-90. USF&G denies the allegations contained in Paragraphs 87 through 90 to the extent such allegations are directed against USF&G and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 87 through 90 insofar as they relate to other parties.

SECOND CROSS-CLAIM
(Breach of Fiduciary Duty as to Lawyers)

91. USF&G incorporates by reference its responses to Paragraphs 40 through 90.

92. USF&G admits upon information and belief that Covil was represented at times by attorneys.

93-94. Paragraphs 93 and 94 state legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraphs 93 and 94 to the extent such allegations are directed against USF&G and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 93 and 94 insofar as they relate to other parties.

THIRD CROSS-CLAIM
(Aiding and Abetting Breach of Fiduciary Duty as to Primary Insurers)

95. USF&G incorporates by reference its responses to Paragraphs 40 through 94.

96. Paragraph 96 states legal conclusions as to which no response is required.

97-101. USF&G denies the allegations of Paragraphs 97 through 101.

FOURTH CROSS-CLAIM
(Bad Faith Failure to Defend Against Primary Insurers)

102. USF&G incorporates by reference its responses to Paragraphs 40 through 101.

103. To the extent Paragraph 103 is directed at USF&G, USF&G states that the USF&G Policy governs its obligations to Covil and Covil's obligations to USF&G.

104. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 104, which relates to parties other than USF&G.

105. USF&G denies knowledge sufficient to admit or deny the allegations of Paragraph 105, as Covil's allegation that materials are "on file with th[e] Court" is ambiguous and does not identify the documents that are the subject of the allegations of Paragraph 105 with adequate particularity.

106. To the extent Paragraph 106 is directed at USF&G, USF&G states that the USF&G Policy governs its obligations to Covil and Covil's obligations to USF&G. USF&G denies that it breached any contractual duty to Covil.

107-110. USF&G denies the allegations of Paragraph 107 through 110.

FIFTH CROSS-CLAIM
(Breach of Contract - Bad Faith Processing of Claims Against Primary Insurers)

111. USF&G incorporates by reference its responses to Paragraphs 40 through 110.

112-113. To the extent Paragraphs 112 and 113 are directed at USF&G, USF&G states that the USF&G Policy governs its obligations to Covil and Covil's obligations to USF&G.

114-117. USF&G denies the allegations contained in Paragraphs 114 through 117. In addition, Paragraphs 114 through 117 contain legal conclusions to which no response is required.

SIXTH CROSS-CLAIM**(Tort Action - Bad Faith Processing of Claims Against Primary Insurers)**

118. USF&G incorporates by reference its responses to Paragraphs 40 through 117.

119-121. Paragraphs 119 through 121 state legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraphs 119 through 121.

SEVENTH CROSS-CLAIM**(Alter Ego, Agency or Instrumentality Against Primary Insurers – Prior to November 2, 2018)**

122. USF&G incorporates by reference its responses to Paragraphs 40 through 121.

123-129. The allegations of Paragraphs 123 through 129 constitute legal conclusions or characterizations of the Covil's claims to which no response is required. To the extent a response is required, USF&G denies the allegations of Paragraphs 123 through 129 to the extent directed at USF&G.

EIGHTH CROSS-CLAIM**(Negligence as to Lawyers and Primary Insurers)**

130. USF&G incorporates by reference its responses to Paragraphs 40 through 129.

131-136. Paragraphs 131 through 136 state legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraphs 131 through 136.

NINTH CROSS-CLAIM**(Declaratory Judgment Against Primary Insurers and Primary Insurers' Policies)**

137. USF&G incorporates by reference its responses to Paragraphs 40 through 136.

138. The first sentence of Paragraph 138 does not contain any allegations to which a response is required. The remaining allegations in Paragraph 138 and its subparts constitute a characterization of Covil's claims to which no response is required. To the extent a response is required, USF&G denies those allegations.

139. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 139 to the extent they are directed at entities other than USF&G, and therefore denies the same. To the extent the allegations of Paragraph 139 are directed against USF&G, USF&G denies those allegations except that USF&G admits that to the extent a controversy exists, such is the subject of a first-filed action in the Middle District of North Carolina and therefore this Court must dismiss the Complaint pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure as set forth more fully hereinafter.

140. Responding to Paragraph 140, USF&G respectfully denies that declarations from this Court are necessary or appropriate. USF&G denies the remaining allegations of Paragraph 140.

PRAYER FOR RELIEF

As to the allegations in Covil's Prayer for Relief, USF&G denies that it is liable to Covil under any theory or cause of action for the damages and/or other relief requested therein.

AFFIRMATIVE DEFENSES TO COVIL'S CROSS-CLAIMS

USF&G hereby asserts the following defenses and affirmative defenses in total and/or partial bar of the claims for relief and/or alleged damages sought in the Cross-claim of Covil Corporation by and through its Receiver. By including the following defenses or

affirmative defenses USF&G does not assume the burden of proof where such burden lies with Covil or parties other than USF&G.

FOR A FIRST DEFENSE

Covil's Cross-claims fail to allege facts sufficient to state a cause of action against USF&G and, accordingly, should be dismissed under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. In particular, there are no facts alleged sufficient to constitute a cause of action for alter ego, and as a matter of law, USF&G is entitled to dismissal from this action.

FOR A SECOND DEFENSE

This Court lacks both general and specific personal jurisdiction over USF&G. There are not sufficient minimum contacts with the State of South Carolina to bring USF&G within the Court's jurisdiction pursuant to *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 423 S.E.2d (1992); *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 66 S. Ct. 154 (1945) and their progeny, S.C. Code Ann. § 36-2-803, the Constitutions of the State of South Carolina and the United States of America and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

Covil has been enjoined "from pursuing judicial determinations in underlying state tort suits regarding insurance coverage issued or allegedly issued to Covil by the Insurers." See Opinion and Order, *Covil Corporation By and Through Its Duly Appointed Receiver, Peter D. Protopapas v. Zurich American Insurance Company et al.*, 7:18-3291-BHH (D.S.C. February 27, 2020), p. 25 (the "Opinion and Order"). This Court should dismiss the Cross-claims as a matter of comity for the Federal courts and because the Receiver lacks standing to assert his causes of action in this Court.

FOR A FOURTH DEFENSE

Another action is pending between the same parties for the same claim; therefore, the Cross-claims should be dismissed pursuant to Rule 12(b)(8), SCRCP. USF&G and Covil are parties to numerous pending actions, including but not limited to *Zurich American Insurance Company v. Covil Corporation, et al.*, No. 1:18-CV-932-CCE-LPA (M.D.N.C.) (the “MDNC Action”); *Covil Corporation By and Through Its Duly Appointed Receiver, Peter D. Protopapas v. Zurich American Insurance Company et al.*, No. 7:18-3291-BHH (D.S.C.); and others. In certain other actions, the parties are litigating the same insurance-coverage issues that Covil now asserts in the Cross-claims. Indeed, Covil has been enjoined from raising these coverage-related issues in the state court. *See* Opinion and Order.

FOR A FIFTH DEFENSE

Covil’s Cross-claims were compulsory counterclaims in the MDNC Action, but Covil failed to present them by the deadline for amending pleadings. Accordingly, Covil is barred from asserting them in this action.

FOR A SIXTH DEFENSE

Covil’s Cross-claims are barred by Rule 13(g), SCRCP, which provides, “[a] pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.” Covil’s Cross-claims exceed the permissible scope of Rule 13(g), including because there is no property involved in Covil’s claims against USF&G, and USF&G was not alleged to be involved in the transaction or occurrence that is the subject matter of the original action filed by Plaintiffs.

FOR A SEVENTH DEFENSE

Upon information and belief, Covil's Cross-claims are barred or reduced by the doctrines of res judicata, waiver, release, laches, collateral estoppel, and/or conditions precedent or subsequent.

FOR AN EIGHTH DEFENSE

USF&G has not exerted total dominance and control over Covil, nor has USF&G misused any control of Covil which has resulted in injustices or inequitable consequences to Covil. Accordingly, all of Covil's claims against USF&G are without merit and should be dismissed.

FOR A NINTH DEFENSE

To the extent that Covil has received payment in satisfaction of any of the alleged injuries and/or claims against USF&G, Covil's claims are barred by the defense of payment and accord and satisfaction. Alternatively, USF&G is entitled to a set-off for any and all such payments.

FOR A TENTH DEFENSE

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.

FOR AN ELEVENTH DEFENSE

USF&G asserts that it is entitled to the benefit of the provisions set forth in S.C. Code Ann. § 15-38-15 in this action.

FOR A TWELFTH DEFENSE

Upon information and belief, Covil has failed to join as parties persons in whose absence complete relief cannot be afforded among those already parties, and/or persons who

have an interest relating to the subject matter of this action and are so situated that the disposition of the action in their absence may as a practical matter impair or impede their ability to protect that interest or leave the persons already parties subject to a substantial risk of incurring double, multiple, or inconsistent obligations. The joinder of said persons is compulsory under South Carolina Rule of Civil Procedure 19 and, therefore, Covil's Cross-claims should be dismissed unless said persons are joined.

FOR A THIRTEENTH DEFENSE

USF&G pleads the doctrine of setoff as a complete or partial bar to the allegations set forth in the Cross-claim.

FOR A FOURTEENTH DEFENSE

USF&G alleges upon information and belief that Covil's claim for punitive damages violates: the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause as USF&G could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause because USF&G could be compelled to give testimony against itself in a penalty situation such as punitive damages; the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; USF&G's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills USF&G's exercise of that right; the Eighth Amendment's guarantee that excessive fines shall not be imposed; the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, Covil's claim for punitive damages should be dismissed.

FOR A FIFTEENTH DEFENSE

USF&G requests, pursuant to S.C. Code Ann. §15-32-520, that any proceeding to determine punitive damages be bifurcated from any trial to determine liability and compensatory damages.

FOR A SIXTEENTH DEFENSE

USF&G pleads the applicable provisions of the South Carolina Noneconomic Damages Awards Act of 2005, § 15-32-200, et. seq., and § 15-38-15. Any award of punitive damages should not exceed the limits provided for in S.C. Code Ann. §15-32-530.

FOR A SEVENTEENTH DEFENSE

USF&G would show that, among other things, Covil's claim for punitive damages is barred, reduced, bifurcated, capped, or otherwise impacted by the South Carolina Fairness in Civil Justice Act of 2011 and/or similar and/or related state statutes and limitations.

FOR AN EIGHTEENTH DEFENSE

To the extent that the Cross-claims assert a demand for punitive damages, USF&G specifically incorporates by reference any and all standards and limitations regarding the determination and/or enforceability of punitive damage awards that arose in the decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

FOR A NINETEENTH DEFENSE

Covil's Cross-claims are barred by the *Noerr Pennington* Doctrine.

FOR A TWENTIETH DEFENSE

Covil has failed to fulfill conditions precedent to bringing its Cross-claims pursuant to the USF&G Policy. USF&G further avers that the USF&G Policy contains the following provision: "No action shall lie against the Company [referring to the insurer] unless, as

a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the Company." Insofar as no liability has been established against Covil in this action and/or that Covil has failed to satisfy conditions precedent to pursue its Cross-claims, such claims must be dismissed.

FOR A TWENTY-FIRST DEFENSE

Covil has failed to mitigate its alleged damages.

FOR A TWENTY-SECOND DEFENSE

Covil's Cross-claims are barred to the extent it breached the obligations to cooperate in the defense of claims against it.

FOR A TWENTY-THIRD DEFENSE

To the extent Covil or the Receiver engaged in any improper, wrongful or inequitable conduct, Covil's Cross-claims are barred under the doctrine of unclean hands.

FOR A TWENTY-FOURTH DEFENSE

To the extent the Receiver was not appointed in accordance with law or was appointed in contravention of USF&G's due process rights, or the appointment of Peter Protopapas as Receiver of Covil Corporation was improper in light of L. Winston Lee having been appointed as Covil's permanent receiver and/or in light of Covil's assets having been previously abandoned, the Receiver lacks standing to assert the Cross-claims on Covil's behalf.

FOR A TWENTY-FIFTH DEFENSE

To the extent Covil's Cross-claim alleging negligence against USF&G is based upon USF&G's alleged duties under the USF&G Policy, its claims under that contractual

agreement are limited to contract claims and Covil cannot assert a negligence claim against USF&G.

FOR A TWENTY-SIXTH DEFENSE

The Court lacks subject matter jurisdiction over Covil's Cross-claims.

FOR A TWENTY-SEVENTH DEFENSE

USF&G hereby incorporates by reference the affirmative defenses asserted in its Answer to Plaintiff's Complaint, insofar as success on those would extinguish any Cross-claim in this action.

JURY TRIAL DEMAND

USF&G requests a trial by jury on all issues so triable.

WHEREFORE, USF&G prays the Court for the following relief:

1. That the Cross-claims be dismissed with prejudice as to USF&G;
2. That Plaintiff have and recover nothing from USF&G;
3. That the costs of this action be taxed against Plaintiff and/or other defendants and/or third-party defendants;
4. That there be a trial by jury on all issues of fact; and
5. For such other and further relief as the Court deems just and proper.

Respectfully submitted:

/s/ M. Elizabeth O'Neill

M. Elizabeth O'Neill, S.C. Bar No.: 104013
Todd Carroll, S.C. Bar No.: 74000
WOMBLE BOND DICKINSON LLP
1221 Main Street, Suite 1600

Columbia, SC 29201
(704) 350-6310; Elizabeth.ONeill@wbd-us.com
(803) 454-7730; Todd.Carroll@wbd-us.com

William P. Davis, S.C. Bar No.: 1585
BAKER, RAVENEL & BENDER, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091; wdavis@brblegal.com

AND

Andrew T. Frankel
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017-3954
(212) 455-3073; afrankel@stblaw.com

*Attorneys for United States Fidelity and Guaranty
Company*

October 16, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
 ANN FINCH, Individually and as Executor of the Estate of FRANKLIN FINCH,	)	C/A NO. 2019-CP-40-3003
	)	
Plaintiff,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
UNITED STATES FIDELITY AND	)	
GUARANTY COMPANY, et al.	)	
	)	
Defendants.	)	

ORDER ON MOTION TO BIFURCATE

Before the Court is Ann Finch's, individually and as the personal representative of Franklin Finch ("Finch") and Covil Corporation's, by and through its Receiver Peter Protopapas, ("Covil" and together with Finch, the "Plaintiffs") Motion to Bifurcate. The Court has reviewed the pleadings of the parties and heard argument on this matter. Therefore, being fully apprised, the court hereby GRANTS the Motion to Bifurcate and enters this Order on the same.

BACKGROUND

This case arises out of claims brought by Ann Finch against United States Fidelity and Guaranty Company ("USF&G"), Zurich American Insurance Company ("Zurich" and together with USF&G, the "Insurers") and others for a declaratory judgment that the Insurers are the alter ego of Covil Corporation ("Covil"), a South Carolina Corporation, as well as for claims involving alleged breaches of fiduciary duty by the Insurers and others. Similarly, Covil, by and through its Receiver, brought cross claims for alter ego, breach of fiduciary duty, malpractice, negligence and certain other declaratory judgment actions. This Court realigned Finch and Covil for the purpose

of this case. The case arises primarily as a result of a verdict in excess of \$32,000,000 in favor of Finch against Covil.

LAW AND ARGUMENT

Rule 42(b) of the South Carolina Rules of Civil Procedure provides that

[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

Rule 42(b), SCRPC. The decision to bifurcate a trial will only be reversed for a trial court's abuse of discretion. *Winthrop Univ. Trs. for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 166, 791 S.E.2d 152, 165 (Ct. App. 2016). The bifurcation of this trial is appropriate.

A. Alter ego is a non-jury question

The alter-ego claim as set forth in the Plaintiff's pleadings has two parts. Plaintiff first requests a declaratory judgment that the insurance companies, USF&G and Zurich, are the alter egos of Covil Corporation, against whom Ms. Finch received a \$32-million verdict. Plaintiff then requests that if it is determined that these two insurance companies are the alter egos of Covil, Finch prays that the \$32-million verdict against Covil be enforced against USF&G and Zurich.

The question of whether to pierce the corporate veil via an allegation of alter ego sounds in equity. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012). As a result, the alter ego claims will be tried to the bench without a jury. *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975) (confirming that "[i]n equity the parties are not entitled, as a matter of right, to a trial by jury. Courts of equity have always been permitted to decide issues without the intervention of a jury."); *U.S. Bank N.A. v. Meisner*, No. 2019-UP-066, 2019 WL 581219, at *1 (Ct. App. Feb. 13, 2019).

B. Alter ego will be tried first to the Court

Finch's claim of Breach of Fiduciary Duties rests on the foundation that USF&G and Zurich are the alter egos of Covil. Finch concedes that if USF&G and Zurich are not the alter ego of Covil, then her breach of fiduciary duty claim fails. Thus, unless and until this Court finds that an Insurer is Covil's alter ego, the claim for breach of fiduciary duty cannot proceed. Both parties cite and rely on *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014). In *Blackburn*, the South Carolina set forth a decision tree through which trial courts can determine the order in which claims should be tried. In that decision, the Supreme Court stated:

If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.

Blackburn at 330, 755 S.E.2d at 442 (emphasis added). Here, the Insurers would insist on a jury sitting in place for a one to two week trial in the midst of a global pandemic¹ at the end of which, the jury must wait, however long, for the Court to make its findings relating to alter ego before it could possibly begin deliberating on the legal claims. Moreover, in the event that the Court finds that the Insurers are not the alter ego of Covil, the jurors' service would be needless. Given that it is mandatory that this Court determine the alter-ego status of the Insurers prior to any findings by a jury for claims of breach of fiduciary duty, the Court finds that imperative circumstances both as to the required alter-ego determination and that of the national pandemic require that the claims of alter ego be tried first.

¹ While this Court believes that with the appropriate measures a jury trial can be safely conducted, the Court further sees no reason to conduct such a trial needlessly.

C. Crossclaims are not compulsory

USF&G² contends that because Covil has brought legal claims, *Blackburn* dictates those claims be tried first. *See Blackburn* at 330, 755 S.E.2d at 442. Assuming, without deciding, that crossclaims and counterclaims are intended to be the same thing, USF&G fails to take the next step in the analysis of the issue.³ In *Blackburn*, the Supreme Court set forth a decision tree, beyond the facts of that case, to guide courts in how they deal with claims at law and in equity brought in the same manner. The *Blackburn* court concluded that where counterclaims were permissive, that they could not support a required jury trial. *See id.* Here it is undisputed that the Receiver could have, and in fact did, bring his crossclaims in a wholly separate lawsuit pending before this Court. That he also asserted them as crossclaims in the instant action is of no moment. While a strict reading of *Blackburn* suggests that because the crossclaims—again, assuming that they are the same as counterclaims—are permissive, no jury is required to decide them. Thus, the Court errs on the side of caution and bifurcates them for a later decision.

CONCLUSION

For the foregoing reasons this Court determines that the Plaintiffs' claim of alter ego must, for imperative circumstances, be tried first. Therefore, a bench trial on the alter ego claim will be conducted in the Richland County Judicial Center on January 11, 2021. The remainder of the case will be set for trial on May 11, 2021. The analysis of whether this proceeding will be a jury trial or bench trial will be determined at a later date. Therefore, for the reasons stated, the Court GRANTS Plaintiffs' Motion to Bifurcate.

² Zurich has joined USF&G's position on the matters presently before the Court.

³ This Court is of the opinion that the Supreme Court uses the words it means to use and means to use the words it uses.

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

Jean H. Toal, Chief Justice of the Supreme
Court, Retired, acting as Circuit Court Judge



Richland Common Pleas

Case Caption: Ann Finch , plaintiff, et al vs Sentry Casualty Company , defendant,
et al
Case Number: 2019CP4003003
Type: Order/Bifurcate

So Ordered

Jean H. Toal

Electronically signed on 2020-12-09 11:29:44 page 6 of 6



Deposition of:
John P. Freeman

December 10, 2020

In the Matter of:
**Finch, Ann v. Sentry Casualty
Company, et al.**

[A. William Roberts, Jr & Assoc.](#)
800-743-3376 | calendar-awr@veritext.com | www.veritext.com

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF CHARLESTON

3 ANN FINCH, INDIVIDUALLY AND

AS EXECUTOR OF THE ESTATE

4 OF FRANKLIN FINCH,

5 Plaintiffs,

6 vs.

CASE NO. 2019-CP-40-03003

7 SENTRY CASUALTY COMPANY,

UNITED STATES FIDELITY AND

8 GUARANTY COMPANY; ZURICH

AMERICAN INSURANCE COMPANY;

9
10 (Caption continued on Page 2)

11 VIDEOTAPED VIDEOTELECONFERENCE

12 DEPOSITION OF: JOHN P. FREEMAN

13 DATE: December 10, 2020

14 TIME: 10:03 a.m.

15 LOCATION: 200 West Highland Drive
Seattle, WA 18119

16 TAKEN BY: Counsel for the Defendant USG&G

17 REPORTED BY: SOLANGE RUIZ-URIBE, Court Reporter
18 Via VTC

(Caption continued)
PETER PROTOPAPAS AS COURT
APPOINTED RECEIVER FOR
COVIL CORPORATION; AND WALL,
TEMPLETON & HALDRUP, P.A.,

Defendants.

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFF

3 ANN FINCH, INDIVIDUALLY AND AS EXECUTOR OF
4 THE ESTATE OF FRANKLIN FINCH:

5 DEAN OMAR BRANHAM SHIRLEY, LLP

6 BY: CHARLES W. "TREY" BRANHAM, III

7 VIA VIDEOTELECONFERENCE

8 302 North Market Street, Suite 300

9 Dallas, TX 75202

10 (214) 722-5990

11 tbranham@dobslegal.com

12 AND

13 LAW OFFICES OF KASSEL McVEY

14 BY: THEILE McVEY

15 VIA VIDEOTELECONFERENCE

16 1330 Laurel Street

17 Columbia, SC 29201

18 (803) 256-4242

19 tmcvey@kassellaw.com

20 ATTORNEYS FOR THE DEFENDANT

21 PETER PROTOPAPAS AS COURT APPOINTED RECEIVER
22 FOR COVIL CORPORATION:

23 MORGAN LEWIS & BOCKIUS, LLP

24 BY: LAUREN A. McCULLOCH SEMLINGER

25 VIA VIDEOTELECONFERENCE

1000 Louisiana Street, Suite 4000

Houston, TX 77002

(713) 890-5000

lauren.semlinger@morganlewis.com

AND

HARRISON WHITE, P.C.

BY: MARGHRETA H. SHISKO

VIA VIDEOTELECONFERENCE

178 West Main Street

Spartanburg, SC 29306

(864) 585-5100

mshisko@spartanlaw.com

AND

(appearances continued)

(appearances continued)

SMITH ROBINSON HOLLER DUBOSE AND MORGAN, LLC
BY: JONATHAN M. ROBINSON
VIA VIDEOTELECONFERENCE
2530 Devine Street
Columbia, SC 29205
(803) 254-5445
jon@smithrobinsonlaw.com

AND

SMITH ROBINSON HOLLER DUBOSE AND MORGAN, LLC
BY: G. MURRELL SMITH, JR.
VIA VIDEOTELECONFERENCE
126 North Main Street
Sumter, SC 29151
(803) 778-2471
murrell@smithrobinsonlaw.com

AND

THE HARDEE LAW FIRM
BY: MARK HARDEE
VIA VIDEOTELECONFERENCE
2231 Devine Street, Suite 202
Columbia, SC 29205
(803) 799-0905
mwhardee@bellsouth.net

ATTORNEYS FOR THE DEFENDANT

WALL, TEMPLETON & HALDRUP, P.A.:

BRUNER, POWELL, WALL & MULLINS, LLC
BY: CHELSEA J. CLARK
VIA VIDEOTELECONFERENCE
1735 St. Julian Place, Suite 200
Columbia, SC 29204
(803) 252-7693
cclark@brunerpowell.com

(appearances continued)

1 (appearances continued)

2 ATTORNEYS FOR THE DEFENDANT

3 ZURICH AMERICAN INSURANCE COMPANY:

4 TURNER PADGET GRAHAM AND LANEY, P.A.

5 BY: HOOD DAWSON

6 VIA VIDEOTELECONFERENCE

1901 Main Street, 17th Floor

Columbia, SC 29201

(803) 254-2200

hdawson@turnerpaget.com

7
8 AND

9 GIBSON, DUNN & CRUTCHER, LLP

10 BY: DANIEL W. NELSON

VIA VIDEOTELECONFERENCE

1050 Connecticut Avenue, N.W.

11 Washington, D.C. 20036

(202) 887-3687

12 dnelson@gibsondunn.com

13 ATTORNEYS FOR THE DEFENDANT

USF&G AND THE WITNESS:

14 SIMPSON THACHER AND BARTLERR, LLP

15 BY: ANDREW T. FRANKEL

VIA VIDEOTELECONFERENCE

16 425 Lexington Avenue

New York, NY 10017

17 (212) 455-7908

afrankel@stblaw.com

18
19 AND

SIMPSON THACHER AND BARTLETTR, LLP

20 BY: SARAH E. PHILLIPS

VIA VIDEOTELECONFERENCE

21 425 Lexington Avenue

New York, NY 10017

22 (212) 455-7908

sarah.phillips@stblaw.com

23
24 AND

25 (appearances continued)

(appearances continued)

SIMPSON THACHER AND BARTLETT, LLP

BY: MARY BETH FORSHAW

VIA VIDEOTELECONFERENCE

425 Lexington Avenue

New York, NY 10017

(212) 455-7908

mforshaw@stblaw.com

AND

WOMBLE BOND DICKINSON, LLP

BY: BRYANT S. CALDWELL

VIA VIDEOTELECONFERENCE

1221 Main Street, Suite 1600

Columbia, SC, US 29201

(803) 454-6504

Bryant.Caldwell@wbd-us.com

AND

WOMBLE BOND DICKINSON, LLP

BY: MATTHEW T. CARROLL

VIA VIDEOTELECONFERENCE

1221 Main Street, Suite 1600

Columbia, SC, US 29201

(803) 454-6504

Todd.Carroll@wbd-us.com

ALSO PRESENT:

ASHLEY BOWLER, Videographer

LINDSAY VALEK, Paralegal at Rikard &

Protopapas, LLC

PETER PROTOPAPAS, Receiver for Covil

(INDEX AT REAR OF TRANSCRIPT)

1 policy exhaust.

2 Q. Okay. And when you say, another carrier,
3 you understand that that umbrella policy was not
4 issued by USF&G, right?

5 A. I didn't say it was.

6 Q. Okay. If -- let's -- let's turn briefly
7 to the Finch case to clarify my understanding at
8 least of some of your -- your last answer.

9 If USF&G had produced to the -- to
10 the counsel for the Finches a copy of its policy
11 with limits included in the copy of that policy,
12 would that have been a sufficient disclosure in
13 terms of USF&G?

14 MR. HARDEE: Object to form of the
15 question.

16 THE WITNESS: If -- if they -- if they had
17 dumped the policy on it and said, this is the policy
18 without any disclosure of what's available whether
19 it's \$1 or 250 or 500,000 or whatever. Just here is
20 the policy, you know, knock yourself out. Is that
21 enough, I don't believe it is.

22 BY MR. FRANKEL:

23 Q. How about if USF&G provided a copy of the
24 policy with the limits of the policy and in addition
25 provided information about prior erosion, would that

1 have been sufficient?

2 A. What do you mean information about prior
3 erosion?

4 Q. The amount by which the policy limits had
5 been exhausted, would that been sufficient for
6 USF&G?

7 A. In terms of the disclosure?

8 Q. Yes.

9 A. And we're talking about this on one sheet
10 of paper, which it easily could have been, or are we
11 talking about 65 pages of fine print and illegible,
12 semi-legible print?

13 Q. I'm not asking you the form of disclosure.
14 I'm just simply asking if USF&G said, here is a copy
15 of our policy, counsel for Ms. Finch. Here are the
16 limits of the policy and here is the extent to which
17 those limits have been exhausted. Would that have
18 been sufficient for USF&G?

19 A. She -- yeah, here -- here is my answer:
20 She was entitled to full and fair disclosure of all
21 material facts concerning USF&G's insurance coverage
22 applicable to Finch. If they gave disclosure of the
23 available policy limits then she would have had I
24 think crucial information.

25 And at that point there -- there

1 would be disclosure except if there is additional
2 information in the form of additional insurance that
3 is applicable or can become applicable, if that's
4 concealed then my answer is N-O.

5 Q. And if that --

6 A. And I want to explain my -- I want to
7 explain my answer.

8 Q. Please do.

9 A. Because what's happening in Finch, is
10 USF&G is wearing really two hats. It's wearing the
11 F and G -- USF&G hat. And wearing that hat USF&G
12 can say, well, you ask about USF&G, we'll talk about
13 USF&G and our available limits are 381,000. That's
14 what they are.

15 Now, it's not too hard to say that.
16 And so since it's not too hard to say that, I
17 don't -- I don't know why there's all the beating
18 around the bush and, you know, playing hide the ball
19 or anything. It's just that's what they are. And
20 on top of that, now, it's got another hat on. And
21 the other hat, which it has chosen to wear, is the
22 hat of Covil. Because Covil is really the person
23 that's -- that's crucial here. And it's Covil's
24 insurance, Covil's insurance, that Jessica Dean
25 wants to know about.

1 And to say, well, here you are,
2 ma'am, here's our -- you want insurance here's a
3 number 381. And oh, by the way, over there for
4 Zurich it's 250 and you add them together and you
5 get 631 and that's the number, ma'am, that's the
6 number.

7 And by the way, as Covil you are
8 hiding the \$2 million excess. Then I think that's
9 dirty pool. I think that's concealment of a very
10 material fact. A fact that was material enough to
11 pipe out about in Judge Eagles' courtroom in 2019.
12 But I didn't see anybody talking about this
13 \$2 million excess being available which it would be
14 upon exhaustion, if -- if -- if USF&G exhausted.

15 And I don't see anybody disclosing
16 that, but I know that Covil -- if the Covil -- if
17 Covil itself really wanted to get rid of the case,
18 Covil, if Peter Protopapas had been there, if some
19 independent person looking out for Covil had been
20 there that number would have been featured.

21 And it's interesting, again, Carol
22 Weill says that 1.9 million is, quote, in light of
23 the less than policy limits demand. 1.9 million
24 less than policy limits. What is she thinking
25 about? Unless she is thinking about the 2.6 being

1 the total policy limits because Riverstone is coming
2 on the scene.

3 That needed to be disclosed and I
4 think it's deceptive, and I think it's -- it's
5 inaccurate to make this a, well, USF&G only had one
6 responsibility and that is to tell you about the 381
7 and we did -- we did that or -- or it was there or
8 you could have figured it out on your own. When you
9 are Covil you should be talking about Covil's
10 insurance. That's what she wanted.

11 And -- and this is an important point
12 to me, Jessica Dean comes into this as she pointed
13 out at her deposition, distrustful, leery,
14 professionally concerned about the quality of
15 financial disclosure that she's getting about
16 insurance. And she wants to know all about it
17 before she makes a decision.

18 Just as USF&G is scurrying around with
19 Zurich at the time of the negotiations trying to
20 figure out how to allocate the money, agree on some
21 kind of allocation. People want to know how the
22 numbers are going to play out. She wanted to know
23 that and it was concealed from her and that is
24 troubling to me. And it was concealed by USF&G.

25 Q. Professor Freeman, have you seen any of

1 the pleadings in this case relating to the
2 receiver's claim of breach of contract and bad faith
3 claims handling?

4 A. I have reviewed that, yes.

5 Q. Have you reviewed the summary judgment
6 motion in the Northern District, I'm sorry, the
7 Middle District of North Carolina on the --

8 A. Bad faith?

9 Q. -- bad faith claims, yeah?

10 A. Yeah, I'm aware of that stuff.

11 Q. It seems to me that a lot of the factual
12 material that you've recited over the course of your
13 last few answers are directly relevant to the breach
14 of contract and bad faith claims, would you agree
15 with that?

16 A. I would agree that they're relevant, but I
17 also have this to say, it's very common in law to
18 have overlapping claims, very common. A fraud claim
19 and piercing claim and a creditors bill claim and a
20 receivership claim, a lot of overlap. I've been
21 involved in numerous investment fraud cases where
22 you may have 15 or 20 causes of action all arising
23 out of the same crooked deal, so yes, there is
24 overlap.

25 But let me tell you why it's

1 important here for piercing. Because one of the
2 issues, a key issue in piercing is unfair or
3 inequitable behavior and -- and not just -- not just
4 zigging when you should zag, but seriously wrongful
5 behavior that is contrary, deeply contrary to public
6 policy. And what I see here is -- is -- is -- is
7 multiple, multiple types of wrong.

8 For instance, Justice Toal has taken
9 the position that there's a significant public
10 policy in concerning asbestos litigation and that
11 public policy is in play in this case. There's a
12 public policy in favor of asbestos litigation being
13 handling expeditiously and fairly and properly.
14 She's announced that, she said that on the record
15 and I take that into account. So that's one area of
16 public policy.

17 Another area of public policy is
18 protection of -- of the public and also protection
19 of capitalism by allowing limited liability for
20 companies and companies are given limited liability
21 as a -- as caret to inspire investment and to
22 inspire business activity.

23 And so it's enjoyed by corporations,
24 LLC's, limited partnerships. And that's all
25 wonderful, but it can be abused. And when it's

1 abused court of equity is ready through piercing,
2 alter ego, instrumentality. And it's got to be
3 serious abuse. And then the third area where public
4 policy is important here is in the fairness of
5 litigation. And -- and if you take a look at the
6 unusual, deeply unusual, very unusual fact
7 situation, you see USF&G and Zurich running the
8 company. There is nobody else running the company.
9 The lawyer for the company cannot be the company.
10 Judge Eagles said that in a footnote. You got to
11 have -- you got to have a client -- your client has
12 to supervise you.

13 Well, who was the client, who was
14 running the client and who was supervising? And
15 maybe we have an answer to that about Mr. Bulfer's
16 article where he talks about South Carolina Ethics
17 Opinion 2019-4. And you know what he said, what
18 that opinion says, South Carolina advice, if the
19 company is defunct and the carriers running it, the
20 carriers are the company's agents.

21 So that's why I say that USF&G and
22 Zurich have special responsibilities here to the
23 company and, yes, you can talk about, well, this --
24 this could be a bad faith case, yes, and it's a very
25 fascinating unusual, but to me, tremendously

1 attractive alter ego slash piercing case because of
2 all that is stirred together in this case. It's --
3 it's going in the case force, I believe.
4 Fascinating case and with that I would like to take
5 a break.

6 MR. FRANKEL: Let's do that. Thank you.
7 Why don't we say about 10 minutes. How much time
8 you need.

9 THE WITNESS: Ten minutes is fine. Good.

10 THE VIDEOGRAPHER: We are going off
11 record. This is the end of media unit two -- end of
12 media unit one. The time is 11:26 a.m.

13 (A recess was taken.)

14 THE VIDEOGRAPHER: We are back on the
15 record. This is the beginning of media unit two.
16 The time a 11:35 a.m.

17 BY MR. FRANKEL:

18 Q. Good morning. Professor Freeman, did you
19 talk to anybody during the break?

20 A. No.

21 Q. You seem to have a bunch of notes in front
22 of you, do you have the ability to copy your notes?

23 A. Yes.

24 Q. Would you be willing to produce a copy of
25 your -- your notes to us?

From: Trey Branham <tbranham@dobslegal.com>
Sent: Friday, December 11, 2020 7:09 PM
To: Frankel, Andy T
Cc: Edwards, Brady; Carnevale, Michael S.; mwhardee@bellsouth.net; McCulloch Semlinger, Lauren A.; Patterson, Nancy L.; Lindsay@rplegalgroup.com
Subject: Re: Michelle Potter Deposition

*** External Email ***

As usual you intentionally refuse to acknowledge that the same facts are indicative of the different crimes. Give us dates.

Charles W. Branham, III, P.C.
Dean Omar Branham Shirley, LLP
302 N. Market Street
Suite 300
Dallas, Texas 75202
214-722-5990
214-722-5991 (fax)
tbranham@dobslegal.com

Please note the new email address.

On Dec 11, 2020, at 6:00 PM, Frankel, Andy T <afrankel@stblaw.com> wrote:

Yes, that's why we had designated Mr. Plitt as an expert. What was not clear was the extent to which the Receiver's corporate veil-piercing expert would wander into insurance bad faith issues in the guise of an alter ego opinion. No need to debate. He is on our witness list and if you want to re-depose him let us know.

Andy Frankel
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017

T: +1-212-455-3073
afrankel@stblaw.com

From: Trey Branham <tbranham@dobslegal.com>
Sent: Friday, December 11, 2020 6:30 PM
To: Frankel, Andy T <afrankel@stblaw.com>
Cc: Edwards, Brady <brady.edwards@morganlewis.com>; Carnevale, Michael S. <Michael.Carnevale@stblaw.com>; mwhardee@bellsouth.net; McCulloch Semlinger, Lauren A. <lauren.semlinger@morganlewis.com>; Patterson, Nancy L. <nancy.patterson@morganlewis.com>;

Lindsay@rplegalgroup.com

Subject: Re: Michelle Potter Deposition

*** External Email ***

Andy,

You know as well as I do that factual overlap happens. That's what Professor Freeman was saying and if you want to be obtuse about it that is your business. But don't act all shocked and surprised by it.

Charles W. Branham, III, P.C.
Dean Omar Branham Shirley, LLP
302 N. Market Street
Suite 300
Dallas, Texas 75202
214-722-5990
214-722-5991 (fax)
tbranham@dobslegal.com

Please note the new email address.

On Dec 11, 2020, at 4:47 PM, Frankel, Andy T <afrankel@stblaw.com> wrote:

Thanks. In view of Professor Freeman's testimony on "bad faith" claims handling issues, please be advised that USF&G intends to use Mr. Plitt at trial. He no longer has availability over the next few weeks if you plan to re-depose him but we will work with you to make him available before he testifies at trial if you wish. Also let us know if the dates we proposed for Harrington and Presser work on your end.

Andy Frankel
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017

T: +1-212-455-3073
afrankel@stblaw.com

From: Edwards, Brady <brady.edwards@morganlewis.com>
Sent: Friday, December 11, 2020 3:59 PM
To: Frankel, Andy T <afrankel@stblaw.com>
Cc: Carnevale, Michael S. <Michael.Carnevale@stblaw.com>; mwhardee@bellsouth.net;
McCulloch Semlinger, Lauren A. <lauren.semlinger@morganlewis.com>; Patterson, Nancy L. <nancy.patterson@morganlewis.com>; Lindsay@rplegalgroup.com
Subject: RE: Michelle Potter Deposition

*** External Email ***

Andy:

In an effort to streamline this case, the Receiver has decided not to call Michelle Potter as a witness for the alter ego trial on January 11, 2021. No need to depose her again.

Have a good weekend.

BSE

Brady Edwards

Morgan, Lewis & Bockius LLP

1000 Louisiana Street, Suite 4000 | Houston, TX 77002-5005

Direct: +1.713.890.5110 | Main: +1.713.890.5000 | Fax: +1.713.890.5001 | Mobile: +1.281.630.7359

brady.edwards@morganlewis.com | www.morganlewis.com

Assistant: Gabrielle Gonzalez | +1.713.890.5126 | gabrielle.gonzalez@morganlewis.com

From: Frankel, Andy T <afrankel@stblaw.com>

Sent: Friday, December 11, 2020 2:28 PM

To: Edwards, Brady <brady.edwards@morganlewis.com>

Cc: Carnevale, Michael S. <Michael.Carnevale@stblaw.com>; mwhardee@bellsouth.net;

McCulloch Semlinger, Lauren A. <lauren.semlinger@morganlewis.com>; Patterson,

Nancy L. <nancy.patterson@morganlewis.com>; Lindsay@rplegalgroup.com

Subject: Re: Michelle Potter Deposition

[EXTERNAL EMAIL]

That date works. We will send a NOD. What about Frost?

On Dec 10, 2020, at 4:51 PM, Edwards, Brady
<brady.edwards@morganlewis.com> wrote:

*** External Email ***

Andy:

If you want to depose Michelle Potter again, she can be available on December 16. She needs to attend to a prior commitment from 12:30-1:30EST on that day, but I am sure that we can figure out a way to accommodate that window.

Please let us know.

BSE

Brady Edwards

Morgan, Lewis & Bockius LLP

1000 Louisiana Street, Suite 4000 | Houston, TX 77002-5005

Direct: +1.713.890.5110 | Main: +1.713.890.5000 | Fax: +1.713.890.5001 | Mobile: +1.281.630.7359

brady.edwards@morganlewis.com | www.morganlewis.com

Assistant: Gabrielle Gonzalez | +1.713.890.5126 | gabrielle.gonzalez@morganlewis.com

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COLUMBIA 2530 Devine Street, Columbia, SC 29205
P: 803.254.5445 F: 803.254.5007

SUMTER 126 N. Main Street, Sumter, SC 29151
P: 803.778.2471 F: 803.778.1643

CAMDEN 935 Broad Street, Camden, SC 29020
P: 803.432.1992 F: 803.432.0784

January 4, 2021

RECEIVED

Jan 04 2021

SC Court of Appeals

Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Ann Finch, et al. v. United States Fidelity and Guaranty Company, et al.
Appellate Case No. 2020-001663

Dear Ms. Kitchings:

As you know, the deadline for Respondent Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas, to file a Reply to USF&G's Return to Respondent's Motion to Dismiss in the above-referenced appeal is tomorrow. Respondent, by and through the undersigned counsel, writes to let the Court know it does not intend to file a Reply. Respondent rests on its Motion and respectfully requests the Court to expeditiously grant its Motion in order to allow the trial to proceed forward on January 11, 2021.

Sincerely,

SMITH, ROBINSON, HOLLER,
DuBOSE AND MORGAN, LLC

s/G. Murrell Smith, Jr.

G. Murrell Smith, Jr.

GMS/SNP

cc: All counsel of record via email only

The South Carolina Court of Appeals

Ann Finch, Individually and as Executor of Estate of
Franklin Finch; and Peter D. Protopapas as Court
Appointed Receiver for Covil Corporation, Respondents,

v.

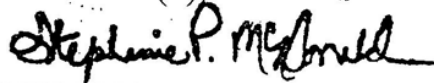
United States Fidelity and Guaranty Company; Zurich
American Insurance Company; and Wall, Templeton &
Haldrup, P.A., Defendants,

Of which United States Fidelity and Guaranty Company
is the Appellant.

Appellate Case No. 2020-001663

ORDER

After careful consideration of the parties' filings and the applicable authorities, this appeal is dismissed because the underlying order is not immediately appealable. The remittitur will be sent as provided in Rule 221(b), SCACR..



FOR THE COURT

Columbia, South Carolina

cc:

Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
William Pearce Davis, Esquire
Susan Drake DuBose, Esquire
Michael S. Carnevale, Esquire
Andrew T. Frankel, Esquire

FILED
Jan 06 2021

Mary Beth Forshaw, Esquire
Alan Turner, Esquire
Theile Branham McVey, Esquire
Mark Weston Hardee, Esquire
Jonathan M. Robinson, Esquire
G. Murrell Smith, Jr., Esquire
Shanon N. Peake, Esquire
Jescelyn Tillman Spitz, Esquire
John Belton White, Jr., Esquire
Marghretta Hagood Shisko, Esquire
Christopher Rutledge Jones, Esquire
Austin Tyler Reed, Esquire
The Honorable Jean Hoefer Toal

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. 2020-001663
Circuit Court Case No. 2019-CP-40-03003

RECEIVED

Jan 20 2021

SC Court of Appeals

Ann Finch, Individually and as Executor of Estate of Franklin Finch;
and Peter D. Protopapas as Court Appointed Receiver for Covil
Corporation, ... Plaintiffs/
Respondents,

v.

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

Of Which

United States Fidelity and Guaranty Company is the Appellant.

PETITION FOR REHEARING/REHEARING *EN BANC*

WOMBLE BOND DICKINSON (US) LLP

BAKER, RAVENEL & BENDER, L.L.P.

M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

William P. Davis
wdavis@brblegal.com
Susan D. DuBose
sdubose@brblegal.com
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, SC 29202
(803) 799-9091

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)

afrankel@stblaw.com

Mary Beth Forshaw (*admitted pro hac vice*)

mforshaw@stblaw.com

Alan Turner (*admitted pro hac vice*)

aturner@stblaw.com

Michael S. Carnevale (*admitted pro hac vice*)

michael.carnevale@stblaw.com

425 Lexington Avenue

New York, NY 10017

(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

January 20, 2021

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“The right of trial by jury shall be preserved inviolate.”¹

“The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate.”²

INTRODUCTION

The issue raised by this petition is whether a party may be deprived of constitutionally protected jury trial rights, contrary to directly on-point decisions of this Court and the South Carolina Supreme Court, and without even permitting its appeal of these issues to be heard on the merits.

Appellant United States Fidelity and Guaranty Company (“USF&G”) is an insurance company that, along with other insurers, provided commercial liability insurance to Covil Corporation (“Covil”), a former insulation supplier and contractor. Covil has been a serial defendant in asbestos litigation since the mid-1970s as a result of its sale and use of asbestos-containing insulation products between the 1950s and early 1970s. In 1991, Covil ceased all of its operations, and was judicially dissolved in 1992. Because the policy that USF&G issued to Covil in 1976 obligated USF&G to continue to defend and indemnify Covil after it ceased operations and became insolvent, USF&G, along with other insurers, has defended and settled claims against Covil continuously from the 1970s through the present.

Plaintiff Ann Finch (“Finch”) filed and litigated an asbestos-related tort action against Covil and other defendants in federal court in North Carolina. *See Finch, et al. v. BASF Catalysts, LLC, et al.*, No. 16-cv-01077 (M.D.N.C.) (“*Finch I*”). Following a favorable judgment against Covil, Finch, along with Covil’s recently-appointed receiver Peter D. Protopapas (the “Receiver”)

¹ S.C. Const. art. I, § 14.

² Rule 38(a), SCRPC.

asserted various claims against USF&G in this action arising from USF&G’s defense of Covil. In addition to the Receiver’s claims for breach of contract, alleged bad faith failure to settle the *Finch I* action, negligence, and other legal claims asserted by Finch and the Receiver, both Plaintiffs assert claims under the unprecedented theory that USF&G should be deemed to have inherited all of Covil’s tort liabilities—in perpetuity—as Covil’s purported alter ego, based on the fact that USF&G defended Covil as it was legally obligated to do after Covil had gone out of business. By order dated December 9, 2020 (the “December 9 Order”),³ the circuit court granted Plaintiffs’ motion to bifurcate the trial and scheduled the alter ego claims for a bench trial to be held *before* the jury trial on the Plaintiffs’ legal claims.

It is well established in South Carolina and throughout the country, however, that when a case involves both equitable claims triable to the court and legal claims triable to the jury, and those claims involve common issues of fact, the jury trial must proceed first with the jury’s findings binding on the court. Otherwise, the equity court’s findings on common issues would have preclusive effect in the later jury trial, thereby impairing the aggrieved party’s constitutionally protected right to have a jury, not judge, decide issues bearing on legal claims. *See, e.g., Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *Johnson v. S.C. Nat’l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987); *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013); *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004); *see also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948 (1959). This rule embodies a constitutional safeguard long recognized by the United States Supreme Court, the South Carolina Supreme Court, and this Court. The circuit court’s December 9 Order blatantly violated these principles.

³ USF&G previously submitted an Appendix in Support of its Return in Opposition to the Receiver’s Motion to Dismiss, which contains the December 9 Order, as well as other supporting documents.

USF&G seeks rehearing and rehearing *en banc* of this Court’s order dated January 6, 2021 (the “Dismissal Order”) dismissing USF&G’s appeal from the circuit court’s December 9 Order. In deciding without explanation or citation to authority that the December 9 Order is not immediately appealable, the Dismissal Order, issued by a single Judge of this Court, marked a stark departure from unambiguous South Carolina law—including this Court’s own precedent. *See, e.g., Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515 (immediate interlocutory appeal reversing order requiring separate bifurcated trials of a bench claim and jury claim with the bench claim to be tried first); *Bateman*, 358 S.C. 667, 596 S.E.2d 386 (recognizing that orders requiring bench trial that impairs jury trial rights are immediately appealable and must be appealed immediately to avoid waiver); *see also* Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 145 (3d ed. 2016) (“Orders denying a party’s right to a mode of trial must be appealed immediately, and a party runs the risk of waiving the right to appeal if that party fails to so immediately appeal.”).

This Court has recognized that orders directing that factual issues common to legal and equitable claims be tried first to the equity court rather than the jury are immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) (1976) because such orders deprive a party of a mode of trial to which it is legally entitled. *See, e.g., Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515 (reversing order providing for a bench trial to be held prior to jury trial on interlocutory appeal). Indeed, this Court has repeatedly held that “the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” *Frampton v. S.C. Dep’t of Transp.*, 406 S.C. 377, 386, 752 S.E.2d 269, 274 (Ct. App. 2013) (quoting *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997)); *accord, Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 431 S.E.2d 587, 590 (1993) (“Issues regarding mode of trial *must* be raised in the trial court at the *first opportunity*, and the order of the trial judge is *immediately appealable*.”) (emphasis added)

(citation omitted). This rule embodies a preference that mode-of-trial issues be fully and finally resolved *before* the parties and the trial court undergo the time and expense of a trial.

Respectfully, the Dismissal Order is contrary to an extensive body of South Carolina authority, most of which the Receiver has never confronted in this Court. The Dismissal Order overlooked or misapprehended this precedent and the impact of the December 9 Order on USF&G's constitutionally protected jury trial rights, departing from prior Supreme Court and Court of Appeals decisions in numerous, yet unexplained, ways. The Dismissal Order therefore presents a clear case for rehearing *en banc*. See Rules 219(a), 221(a), SCACR. Indeed, rehearing by the full Court is *particularly* warranted here, where this departure from settled law was decided by a single Judge, on an expedited basis, with limited briefing, and without a full record, in a proceeding that raises important constitutional issues.

ARGUMENT

The extensive South Carolina precedent supporting USF&G's position was discussed in detail in USF&G's Return in Opposition to the Receiver's Motion to Dismiss. The Receiver opted to rest on his opening brief, declining to address the majority of this authority at all. Nonetheless, the Dismissal Order provides only that "the underlying order is not immediately appealable," without any reasoning or indication of the basis for that decision.

Rehearing is warranted because the Order necessarily overlooks or misapprehends the circuit court's December 9 Order and governing law, including this Court's cases instructing that the circuit court's order must be appealed immediately. See Rule 221(a), SCACR. Accordingly, rehearing should be granted *en banc* in order to "maintain uniformity of [the Court's] decisions." See Rule 219(a), SCACR.

Rehearing by the entire court is also warranted because USF&G's appeal raises important constitutional concerns, and the Dismissal Order could be read as accepting restrictions on the

right to trial by jury not previously contemplated by South Carolina law, including a purported COVID-19-related “imperative circumstances” exception adopted by the circuit court in its December 9 Order. *See* Rule 219(a), SCACR (rehearing *en banc* appropriate “when the proceeding involves a question of exceptional importance”). Before this Court lends its imprimatur to such novel reasoning—never before upheld by this Court—it should consider this issue on the merits and issue a reasoned decision that will provide guidance in other similarly situated cases as well as those that may yet be unforeseen.

A. The December 9 Order Is Immediately Appealable As A Matter Of Settled Law.

South Carolina law—including this Court’s own precedent—provides a clear answer to the sole issue presented by Respondent’s Motion to Dismiss USF&G’s appeal: the December 9 Order is immediately appealable under S.C. Code Ann. § 14-3-330(2) (1976) because the appeal concerns the deprivation of a mode of trial to which USF&G is legally entitled. *See, e.g., Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515, *supra*; *see also S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017) (recognizing right to immediately appeal order of reference requiring determination by master-in-equity of both legal and equitable claims). It is well established that orders impacting mode of trial, including trial by jury, “affect substantial rights under S.C. Code Ann. § 14-3-330(2)” and are thus subject to immediate appeal. *Lester*, 327 S.C. at 266, 491 S.E.2d at 241; *see also Hagood v. Sommerville*, 362 S.C. 191, 196–97, 607 S.E.2d 707, 709 (2005) (mode of trial is a “well-established exception to the general rule” that nonfinal orders are nonappealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000) (“The majority of cases requiring immediate appeal involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate.”) (collecting cases); *N.C. Fed. Sav. & Loan Ass’n v.*

DAV Corp., 298 S.C. 514, 517, 381 S.E.2d 903, 904 (1989) (reversing in part an order dismissing, as not immediately appealable, an appeal from a trial court order denying a jury trial on legal claims).

Not only *may* such orders be appealed immediately, they *must* be appealed on an interlocutory basis in order to avoid waiver of any objections and of jury trial rights. *See, e.g., Lester*, 327 S.C. at 266, 491 S.E.2d at 241 (failure to immediately appeal “an order affecting the mode of trial effects a waiver of the right to appeal that issue”); *Bateman*, 358 S.C. at 675, 596 S.E.2d at 390 (“[T]he purpose of requiring an immediate appeal of the denial of the right to a jury trial is to preserve a party’s constitutional rights that would otherwise be lost”); Toal, *et al., Appellate Practice in South Carolina, supra*, at 156 (“[T]he failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.”); *id.* at 157 (reiterating that “these orders must be appealed immediately”).

The Receiver⁴ did not seriously dispute these points in his Motion to Dismiss. Instead, he attempted to characterize the December 9 Order as a run-of-the-mill bifurcation order, and from that faulty premise, argued that it is not immediately appealable. USF&G has never disputed that ordinary bifurcation rulings, such as those bifurcating trial of liability and damages, are not orders that affect the mode of trial so as to authorize an immediate appeal. But the December 9 Order was no ordinary bifurcation order, and South Carolina law precludes reliance on the mere styling of such orders in determining appealability. Indeed, Judge Hewitt of this Court secured the most recent pronouncement of this principle from the South Carolina Supreme Court in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015), in which the

⁴ The other Plaintiff, Ann Finch, did not move to dismiss this appeal or join in the Receiver’s motion.

court unequivocally recognized that the title of an order—in that case, as here, an order styled as one of “bifurcation”—does not control the question of appealability:

We decline the [respondents’] invitation to base our decision on the manner in which the motion was characterized—one of bifurcation. Our review of trial court orders is not constrained by how the order is styled. The trial court’s order is quite distinct from other orders of bifurcation which have come before this Court. We are therefore free to evaluate the trial court’s order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable.

412 S.C. at 539-40, 773 S.E.2d at 147 (internal citations omitted).

Likewise, this Court has heard immediate appeals of bifurcation orders where, as here, those orders required that a bench trial on equitable claims take place before a jury trial on legal claims. *See Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515. And this Court has repeatedly *refused* to consider appeals of orders affecting the mode of trial after final judgment where such orders were not appealed immediately. *See, e.g., First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998); *Preferred Sav. Bank v. Elkholy*, 303 S.C. 95, 98, 399 S.E.2d 19, 21 (Ct. App. 1990); *see also Salon Proz*, 420 S.C. at 93-94, 800 S.E.2d at 490 (recognizing that order of reference to court of equity despite a jury trial demand would affect mode of trial and that failure to immediately appeal would constitute waiver, but finding no waiver where there was no evidence party received notice of the order “and given the important right involved here”). This principle is so well established that the Court has taken to reinforcing it by way of *per curiam* summary opinions. *See, e.g., Triad Mech. Contractors v. Built Right Constr.*, No. 2017-001205, 2020 WL 1547839, at *1 (Ct. App. Apr. 1, 2020); *Vanderbilt Mortg. & Fin. v. Bull*, No. 2015-002194, 2018 WL 1747954, at *2 (Ct. App. Apr. 11, 2018) (refusing to consider whether special referee erred in ruling on validity of a mortgage, a claim in equity, prior to a jury trial on counterclaims where appellant failed to immediately appeal order of reference that would have deprived party of a mode of trial). As in *Plantation Federal Bank*, the December 9 Order not

only bifurcated the proceedings, it also ordered the equitable claims to be tried in a bench trial before a jury trial is held on legal claims, despite the numerous issues of fact common to the equitable and legal claims and clear authority prohibiting such a result.

Plaintiffs have never disputed that numerous common factual issues exist as between their legal claims and the equitable alter ego claims asserted against USF&G. Nor could they, as all of their claims arise out of USF&G's defense of Covil in asbestos-related tort actions, including the *Finch I* claim. Plaintiffs predicate their alter ego claims on a host of factual findings they seek from the circuit court about the sufficiency of the defense that USF&G provided to Covil and settlement efforts—findings that are nearly identical to the fact issues they must prove to a jury in connection with the Receiver's claims for breach of contract and bad faith, among other legal claims. And both the alter ego claims and the legal claims seek the same money damages based on the amount of the verdict in the *Finch I* case, in addition to unprecedented declarations they ask the circuit court to enter in the bench trial declaring that USF&G be deemed responsible for all of Covil's tort liabilities in perpetuity as Covil's alleged alter ego.

South Carolina precedent clearly prohibits the mode of trial ordered by the circuit court, due to the preclusive impact a preceding bench trial would have on USF&G's right to have legal claims tried fully to a jury. To the extent that the Court dismissed the appeal on the superficial rationale offered by the Receiver that the December 9 Order is a typical "bifurcation" order and for that reason not immediately appealable, the Court clearly misapprehended the nature of the order and its impact on USF&G's jury trial rights. As noted above, to protect the constitutional right to a jury trial, South Carolina Supreme Court precedent (consistent with U.S. Supreme Court and other state and federal decisions) provides that "[i]f there are factual issues common to both [legal and equitable] claims, absent the 'most imperative circumstances,' the 'at law' claim must

be tried first.” *Johnson*, 292 S.C. at 56, 354 S.E.2d at 897 (quoting *Beacon Theatres*, 359 U.S. 500, 79 S.Ct. 948); *see also Blackburn*, 407 S.C. at 329, 755 S.E.2d at 441. This ensures that “the findings of the jury are binding on the sitting judge, as trier of the equitable claims.” *Johnson*, 292 S.C. at 55, 354 S.E.2d at 897.

The opposite approach, taken by the circuit court and validated by this Court’s single-Judge Dismissal Order, disposes of common issues through a bench trial before they are tried to a jury and thus risks “limit[ing] [a party’s] opportunity fully to try to a jury every issue” on which it is entitled to a jury trial. *Beacon Theatres*, 359 U.S. at 504, 79 S.Ct. at 953. This is because “determination of the issue . . . by the judge might operate either by way of res judicata or collateral estoppel” to preclude the jury from independently considering common issues. *Id.* (citation and internal quotation marks omitted). Put another way, the result of trying an equitable claim first is “that any issue common to both the legal and equitable claims [i]s finally determined by the court and the party seeking trial by jury on the legal claim [i]s deprived of that right as to these common issues,” thus “undercut[ting]” the party’s constitutionally protected jury trial rights. *Dairy Queen v. Wood*, 369 U.S. 469, 472, 82 S.Ct. 894, 897 (1962) (where a complaint alleges combined legal and equitable claims with common fact issues, the legal claims must be tried to a jury first in order to protect the right to trial by jury).

In his Motion to Dismiss, the Receiver also disingenuously argued that USF&G’s jury trial rights were preserved because the circuit court scheduled a later jury trial on the remaining legal claims, ignoring the preclusive effect the bench trial would have on the numerous issues of fact common to the equitable and legal claims. The fact that the circuit court left open the possibility of a jury trial to be held after the conclusion of a bench trial is therefore of no moment for purposes of determining appealability, just as the prospect of a later jury trial following a bench trial was

not sufficient to prevent reversal of the bifurcation order in *Plantation Federal Bank*, 401 S.C. 507, 737 S.E.2d 515.

Based on these well-established principles, numerous decisions of this Court, exemplified in cases like *Plantation Federal Bank*, *Bateman*, and *Salon Proz*, confirm that a trial court order permitting a bench trial on fact issues common to equitable and legal claims, rather than requiring a jury to decide such issues, violates constitutional jury trial rights and is immediately appealable as impacting the mode of trial. *Plantation Fed. Bank*, 401 S.C. at 510, 737 S.E.2d at 517; *Bateman*, 358 S.C. at 674-76, 596 S.E.2d at 390-91; *Salon Proz*, 420 S.C. at 93, 800 S.E.2d at 490. These cases make clear that USF&G's appeal should not have been dismissed. The Dismissal Order represents a notable and unexplained deviation from this Court's prior decisions and, for that reason, warrants rehearing.

Further, because it is not clear from the Dismissal Order why the Court concluded that the December 9 Order is not immediately appealable in the face of this clear precedent, it leaves open the likelihood that the Dismissal Order may be interpreted as having been based on one of the alternative, merits-based explanations proffered by the Receiver, thereby preventing *any* appellate review of these important constitutional issues. Those alternative rationales, addressed in turn below, inappropriately delved into the merits of the appeal rather than the threshold issue of appealability that could be decided on a motion to dismiss, prior to merits briefing and without any record on appeal. In any event, those arguments are equally inconsistent with governing law, and even the possibility that this Court's decision could be interpreted as adopting one of these rationales in the context of this important constitutional appeal warrants rehearing *en banc*.

B. Any Reliance On The Fact That The Receiver's Legal Claims Were Styled As Cross-Claims Warrants Rehearing *En Banc*.

To the extent the Court relied in any part on the Receiver's argument that the jury

sequencing principles set forth above are inapplicable here because some of the legal claims asserted against USF&G were originally asserted as cross-claims before the Receiver was realigned as a plaintiff, rehearing by the full Court should be granted. The Receiver's reasoning on this point appeared to be as follows: (i) a defendant that asserts legal counterclaims against a plaintiff that brought only equitable claims has a right to a jury trial on compulsory counterclaims, but not on permissive counterclaims; (ii) cross-claims are permissive, in that there is no rule of civil procedure equivalent to the rule that requires compulsory claims to be asserted as part of the same action; (iii) therefore, a defendant has no right to a jury trial on a legal claim if that claim is asserted by way of a cross-claim. That reasoning has no support in this Court's precedents or in basic logic.

As a preliminary matter, the Receiver has been realigned as a plaintiff. There are no claims against the Receiver, and the fact that his claims against USF&G were originally asserted as cross-claims is a historical artifact. Thus, even if the Receiver's reasoning made sense in the context of typical cross-claims among co-defendants, it does not apply because the Receiver is now a co-plaintiff. Moreover, the trial sequencing rule is not confined to the context of counterclaims; rather, where plaintiffs assert against a defendant legal and equitable claims in the same case, the legal claims give rise to a jury trial right and must be determined first. *See, e.g., Bateman*, 358 S.C. at 676, 596 S.E.2d at 391 (defendant was entitled to a jury trial on legal claims asserted alongside equitable claims, and "[i]f both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court").⁵

⁵ In addition to this Court's application of the sequencing rule when legal and equitable claims were asserted in the same complaint rather than in the context of counterclaims (*see, e.g., Bateman*, 358 S.C. at 676, 596 S.E.2d at 391), the Supreme Court in *Johnson* cited to multiple

Even if not precluded by this Court’s decision in *Bateman*, the Receiver’s argument fails on its own terms. The different treatment of compulsory and permissive counterclaims is based on waiver principles, and “waiver is a voluntary and intentional abandonment or relinquishment of a known right.” *Sanford v. State Ethics Comm’n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607, *clarified*, 386 S.C. 274 (2009). As to permissive counterclaims, courts have held that “[b]y electing to assert its counter-claim in response to [an] equitable action, [a defendant] waive[s] its right to a jury trial.” *John D. Hollingsworth on Wheels v. Arkon Corp.*, 273 S.C. 461, 463, 257 S.E.2d 165, 166 (1979) (citing *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691 (1912)). Compulsory counterclaims, however, do not result in waiver. *See C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986). But no such waiver concerns apply here, as USF&G has not waived any jury trial rights, unlike a defendant that asserts permissive legal counterclaims in response to a complaint raising only equitable claims. And it cannot be that because *the Receiver* brought legal cross-claims against USF&G, that should result in a waiver by *USF&G* of its constitutional right to a jury trial on those claims (and the legal claim asserted by the Receiver’s co-plaintiff, Finch). Yet that would be the extraordinary import of what the Receiver argues in his Motion to Dismiss.

In short, the reason courts require trial of jury issues first, before a bench trial of equitable claims where there are common issues of fact, is to safeguard constitutional jury trial rights. That constitutional safeguard is not limited only to cases involving counterclaims, as argued by the Receiver and as accepted by the circuit court. This Court already confirmed the more general

federal cases applying the trial sequencing rule in similar circumstances, thus further demonstrating that the rule is not confined to cases involving only legal counterclaims. *See Johnson*, 292 S.C. at 55, 354 S.E.2d at 897 (citing, *inter alia*, *Roscello v. Sw. Airlines Co.*, 726 F.2d 217, *reh’g denied*, 732 F.2d 941 (5th Cir. 1984)).

applicability of the principle in *Bateman*, and the Dismissal Order deviated from that precedent to the extent it declined to apply the trial sequencing rule because of a belief that it is not applicable unless the legal claims were asserted by way of counterclaims as the circuit court reasoned. This warrants rehearing *en banc*. See Rule 219(a), SCACR.

C. Any Reliance On A Determination Of Imperative Circumstances Warrants Rehearing *En Banc*.

The Receiver also argued in his Motion to Dismiss that “imperative circumstances” justified impairing USF&G’s jury trial rights in this action. Specifically, the Receiver’s Motion to Dismiss argued that USF&G should not be entitled to a jury trial on his co-plaintiff’s legal claim for breach of fiduciary duty prior to a bench trial on alter ego because that claim “can only be viable if USF&G is the alter-ego of Covil.” Mot. at 4. Based on that premise, the Receiver argued that “an alter ego finding must be made by the trial court prior to any jury deliberations on the legal claims.” *Id.* at 6. The Receiver contended that holding a jury trial first would therefore be unnecessary and “potentially dangerous to the health of the members of the jury” and that by seeking to preserve its jury rights, USF&G was somehow seeking to require a jury to “be present for a lengthy trial in the midst of a global pandemic and wait for the circuit court to determine whether the Insurers are the alter ego of Covil.” *Id.* Thus, the Receiver concluded, the circuit court’s decision to first hold a bench trial is justified by “imperative circumstances.” *Id.*

To the degree the Dismissal Order relied on this argument in dismissing USF&G’s appeal, it ignored the claims asserted in this action by the Receiver and misapprehended the “imperative circumstances” exception to the trial sequencing rule—an exception never before accepted as a basis to deny jury rights in any ruling of a South Carolina appellate court—justifying rehearing under Rule 221. Reliance on “imperative circumstances” to deny USF&G’s right to a jury trial is not only a departure from this Court’s precedent, but also implicates important constitutional

concerns—*i.e.*, whether and when the current pandemic can justify infringing on a defendant’s constitutionally protected jury trial rights. Such a decision (to the extent it was a basis for the Dismissal Order) should not be based on a two-sentence order without explanation by a single Judge. Rather, the full Court should rehear the Dismissal Order to reconsider its import, if any. *See* Rule 219(a), SCACR (rehearing *en banc* appropriate when “necessary to secure or maintain uniformity of [the Court’s] decisions, or . . . when the proceeding involves a question of exceptional importance”); *see also Williamson v. Middleton*, 383 S.C. 490, 494, 681 S.E.2d 867, 869 (2009) (court may grant rehearing *en banc* for reasons not explicitly set forth in Rule 219); *Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 86-87, 459 S.E.2d 851, 855 (Ct. App. 1995) (granting rehearing and adopting “the better rule” “[a]fter full consideration of the policy reasons behind” the relevant statute and “after a review of the case law of other states dealing with this issue”), *aff’d*, 325 S.C. 248, 481 S.E.2d 706 (1997).

As an initial matter, the issue of imperative circumstances and the pandemic was not briefed or argued to the circuit court below. It was instead inserted by counsel for Finch into a proposed order—following briefing, argument, and the circuit court’s oral ruling that was silent on this issue—that the circuit court then signed and adopted over USF&G’s objection. Putting aside the unfairness of dismissing USF&G’s appeal on these merits-based grounds that were not argued below without providing it the opportunity for full briefing in this Court, the argument that “imperative circumstances” exist here is too consequential to adopt through expedited motion practice without full briefing and consideration by this Court.

As such full briefing would show, the Receiver is mistaken both on the facts and the law, as no “imperative circumstances” justify overriding USF&G’s jury trial rights. First, any adoption of the Receiver’s specific “imperative circumstances” argument overlooked that Finch’s breach of

fiduciary duty claim is *not* the sole legal claim in this case. Multiple legal claims brought by the Receiver are pending that arise from substantially the same factual allegations as those supporting his alter ego claim. Those claims, ranging from breach of contract, to bad faith, to negligence, in no way depend on an alter ego finding, and will need to be tried to a jury. Thus, the circuit court's finding that "in the event that the Court finds that the Insurers are not the alter ego of Covil, the jurors' service would be needless" (Dec. 9 Order at 3) was simply wrong. A jury *will* need to be empaneled for the trial of the Receiver's legal claims regardless of how the alter ego issue is resolved.

Second, to the degree this Court's Dismissal Order was motivated by the desire to protect potential jurors from sitting during a pandemic, the Court accomplished that objective by determining that the Receiver's interest in holding a bench trial trumped USF&G's constitutional right to trial by jury. Allowing the Receiver's interests in convenience and efficiency and other strategy choices to trump USF&G's constitutional rights would be a remarkable and unprecedented result. USF&G has never sought to risk the health of potential jurors or suggested that any jury trial should be held before it could be conducted safely. Indeed, the circuit court set the *Finch* jury trial for May 11, 2021, and scheduled numerous other cases for jury trial before May 2021. Presumably that setting and all other jury trials docketed by the circuit court will commence after the public health crisis improves. But the parties here are similarly situated in this regard to all litigants with constitutional rights to trial by jury that are facing COVID-19-related delays. It cannot be that a litigant's jury rights can be overridden on a theory that pandemic-related delays constitute "imperative circumstances," and to hold otherwise would set a dangerous precedent justifying widespread violations of litigants' rights to trial by jury.

The Dismissal Order, however, which provides no indication of the Court’s rationale, could be interpreted by lower courts in this State—including most obviously the circuit court, which presides over all asbestos-related matters pending in the State—as placing this Court’s endorsement on the wholesale substitution of bench trials for jury trials, even where a party has a right to a jury trial protected by the Constitution, for the duration of the pandemic. And it would encourage gamesmanship by enticing plaintiffs to add equitable claims seeking the same relief and based on the same facts as their legal claims to achieve the same result, yet without any constitutional jury trial safeguards. These risks as well warrant rehearing of the Dismissal Order *en banc*. See Rule 219(a), SCACR.

In addition, to the degree this Court relied on a finding of “imperative circumstances” to justify violation of USF&G’s jury trial rights, such a rationale deviates from this Court’s precedent in *Plantation Federal Bank*. As this Court explained in that case in reversing on immediate appeal a trial court order directing a bench trial on equitable claims prior to jury trial on the legal claims, the decision to try an equitable claim first based on imperative circumstances “is very narrowly limited and must, whenever possible, be exercised to preserve jury trial” and, importantly, “should only be exercised in the face of ‘irreparable harm’ to the plaintiff if the legal claims were to be tried first.” *Plantation Fed. Bank*, 401 S.C. at 510-11, 737 S.E.2d at 517-18 (potential financial losses do not “represent the kind of ‘irreparable harm’ contemplated by the Supreme Court that would justify infringing on [a party’s] constitutional right to a trial by jury”) (quoting *Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956). Pandemic-related delays that apply to *all* litigants cannot justify denial of constitutional jury rights, particularly in cases that (as here) ultimately seek

payment of money.⁶ The Receiver, in fact, has *never* argued—in the circuit court or this Court—that the Receiver or Finch would be irreparably harmed absent proceeding in a manner that would impair USF&G’s jury trial rights, and for this reason alone the narrow “imperative circumstances” exception could not serve as a basis for dismissing this appeal. As the United States Supreme Court recently cautioned, “even in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) (*per curiam*).

Finally, rehearing is also warranted to the extent the Court’s Dismissal Order credited the Receiver’s argument that trying the alter ego claim prior to the fiduciary duty claim is “most logical” because the fiduciary duty claim depends on an alter ego finding. Mot. at 3. Even if the fiduciary duty claim were the only legal claim in this case (which, as noted above, it is not), procedural convenience or efficiency considerations cannot justify abrogation of constitutional jury rights, whether under the extremely narrow “imperative circumstances” exception or otherwise. *See, e.g., Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1107 (5th Cir. 1972) (applying *Beacon Theatres* to require a trifurcated proceeding, even though it would “wreak[] havoc with [the court’s] strong policies against piecemeal litigation,” in order to preserve the jury trial right). The right to jury trial has thus been upheld even where the jury triable claim is contingent on the resolution of an equitable claim. *See, e.g., Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1127 (5th Cir. 1978) (“The justification for the failure to pay royalties must be determined with respect to both the legal and equitable claims. Although the claim for damages cannot succeed unless the lease is cancelled, extenuation is an issue common to both. We do not

⁶ *See, e.g., Beacon Theatres*, 359 US at 506-507, 79 S.Ct. at 954-55 (“The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable origins to be tried ahead of legal ones, since this has the same effect as an equitable injunction of the legal claims”).

find ‘imperative circumstances’ that would justify the court in deciding the common issue with respect to the equitable aspect of the case, thus denying a jury trial of that issue.”); *AMF Inc. v. Nat’l Boat Works, Inc.*, No. C-75-125, 1975 WL 21202, at *1 (M.D.N.C. Nov. 25, 1975) (“Where there is a claim for money damages which is both legal in nature and dependent upon the validity of equitable claims, the legal and equitable issues are common to each other and the parties are entitled to a determination by a jury of any factual questions related to the equitable issues.”). This is reflected in the text of Rule 42(b) itself, which provides that while a court may bifurcate trial “in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy,” it must, nevertheless, “*always preserv[e] inviolate* the right of trial by jury as declared by the Constitution.” Rule 42(b), SCRCP (emphasis added).

Thus, to the extent the Dismissal Order relied on the procedural difficulties of which the Receiver now complains, that Order misapprehended the trial sequencing rule and is contrary to Rule 42(b), SCRCP by ignoring the court’s obligation to “preserv[e] inviolate” the parties’ right to trial by jury. A party’s desire to avoid a jury trial or to maximize perceived trial efficiencies cannot override constitutionally protected rights. *See, e.g., In re Lockheed Martin Corp.*, 503 F.3d 351, 358 (4th Cir. 2007) (“To permit the plaintiff’s choice of a customary but not constitutionally required mode of trial to prevent a defendant from taking advantage of his constitutionally guaranteed mode of trial is inconsistent with the Supreme Court’s admonition that the Seventh Amendment right to a jury trial must be preserved ‘wherever possible.’”) (quoting *Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956); *see also Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956 (“[T]he right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court”). Thus, even if the Court accepted in full the Receiver’s framing of Finch’s fiduciary duty claim, such a conclusion could not justify dismissing this appeal.

* * * *

This case starkly illustrates why courts have imposed the sequencing rule as a critical safeguard of constitutionally protected jury trial rights. The Plaintiffs have made clear that the same factual allegations they rely upon to support their legal claims—whether breach of fiduciary duty, breach of contract, bad faith handling and processing of claims, or negligence—are also the basis for their novel alter ego claim. Absent intervention by a higher Court, it appears that very little, if anything, would remain for the jury on any of these claims following the proposed bench trial, thereby trampling USF&G’s constitutional rights. Far from maintaining USF&G’s jury trial rights *inviolate* as the Constitution, the Rules of Civil Procedure, and numerous decisions in this State and elsewhere require, the process imposed by the circuit court would render those rights all but illusory.

CONCLUSION

For the reasons set forth above, USF&G respectfully urges that the Court grant rehearing *en banc* pursuant to Rules 219 and 221, SCACR .

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
M. Elizabeth O’Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

BAKER RAVENEL & BENDER, LLP

William Pearce Davis
wdavis@brblegal.com
Susan D. DuBose
sdubose@brblegal.com

3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, SC 29202
(803) 799-9091

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
Alan Turner (*admitted pro hac vice*)
aturner@stblaw.com
Michael S. Carnevale (*admitted pro hac vice*)
michael.carnevale@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and
Guaranty Company

January 20, 2021

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SC Court of Appeals

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 petition with a copy of the pleading(s) specified below by emailing them as the addresses below:

Pleading(s): USF&G's Petition for Rehearing/Rehearing *En Banc*

Parties Served:

Theile B. McVey (tmcvey@kassellaw.com)
Jonathan M. Holder (jholder@dobslegal.com)
Charles W. Branham, III (tbranham@dobslegal.com)

Counsel for Respondent Ann Finch

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Shanon N. Peake (shanonp@smithrobinsonlaw.com)
Mark W. Hardee (mwhardee@bellsouth.net)
John B. White, Jr. (jwhite@spartanlaw.com)
Marghretta H. Shisko (mshisko@spartanlaw.com)
Christopher R. Jones (jonescr@gmail.com)
Brady Edwards (brady.edwards@morganlewis.com)
Nancy Patterson (nancy.patterson@morganlewis.com)
W. Brad Nes (brad.nes@morganlewis.com)

Counsel for the Respondent Receiver for Covil Corporation

By: /s/ M. Todd Carroll

January 20, 2021



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

April 05, 2021

Mr. Matthew Todd Carroll, Esquire
1221 Main Street
Suite 1600
Columbia SC 29201

Ms. Mary Elizabeth O'Neill, Esquire
Womble Bond Dickinson
301 South College Street, Suite 3500
Charlotte NC 28202

Mr. William Pearce Davis, Esquire
PO Box 8057
Columbia SC 29202

Mrs. Susan Drake DuBose, Esquire
PO Box 8057
Columbia SC 29202

Michael S. Carnevale, Esquire
425 Lexington Avenue
New York NY 10017

Andrew T. Frankel, Esquire
425 Lexington Avenue
New York NY 10017

Mary Beth Forshaw, Esquire
425 Lexington Avenue

New York NY 10017

Alan Turner, Esquire
425 Lexington Avenue
New York NY 10017

Ms. Theile Branham McVey, Esquire
Kassel Mcvey
PO Box 1476
Columbia SC 29202

Mr. Mark Weston Hardee, Esquire
2231 Devine St. Suite 202
Columbia SC 29205-2403

Mr. Jonathan M. Robinson, Esquire
2530 Devine Street
Columbia SC 29205

Rep. G. Murrell Smith, Jr., Esquire
PO Box 580
Sumter SC 29151-0580

Ms. Shanon N. Peake, Esquire
2530 Devine Street
Third Floor
Columbia SC 29205

Mrs. Jescelyn Tillman Spitz, Esquire
Rikard And Protopapas, LLC
1329 Blanding Street
Columbia SC 29201

Mr. John Belton White, Jr., Esquire
Harrison White, PC
PO Box 3547
Spartanburg SC 29304

Mrs. Marghretta Hagood Shisko, Esquire
178 West Main Street

PO Box 3547
Spartanburg SC 29306

Mr. Christopher Rutledge Jones, Esquire
4425 Willingham Drive
Columbia SC 29206

Mr. Austin Tyler Reed, Esquire
2530 Devine Street
Third Floor
Columbia SC 29205

Re: Ann Finch v. United States Fidelity
Appellate Case No. 2020-001663

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,



CLERK

cc: The Honorable Jean Hoefer Toal

The South Carolina Court of Appeals

Ann Finch, Individually and as Executor of Estate of
Franklin Finch; and Peter D. Protopapas as Court
Appointed Receiver for Covil Corporation, Respondents,

v.

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

Of which United States Fidelity and Guaranty Company
is the Appellant.

Appellate Case No. 2020-001663

ORDER

After careful consideration of the petition to rehear the dismissal of this appeal, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. From the filings provided by the parties, we cannot determine what factual issues (if any) necessarily overlap between the legal and equitable claims. Thus, it is not apparent that the circuit court's bifurcation order deprives appellant of a mode of trial.

Accordingly, the petition for rehearing is denied, and the appeal is dismissed. *See Stone v. Thompson*, 426 S.C. 291, 295-96, 826 S.E.2d 868, 870 (2019) (emphasizing our supreme court's practice of narrowly construing section 14-3-330 [of the South Carolina Code (2017)] and permitting appeal following a bifurcated hearing only where "a claim or defense has been finally determined."); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72-73, 533 S.E.2d 331, 333 (2000) ("[a]n order granting bifurcation of issues for trial simply does not strike to the heart of this Court's traditional analysis of claims of denial of a mode of trial. That

analysis proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case. In this case, no party is denied the right to a trial by jury. Moreover, after trial, [appellant] will be free to advance on appeal that the trial judge abused [her] discretion in ordering bifurcation and that it has thereby been effectively deprived of a fair and/or fully informed fact finder. An abuse of discretion, if any, by the trial court in its ruling can be corrected at that time.").

Stephen P. McNeill

J.

D. Hanlin

J.

32 l J

J.

Columbia, South Carolina

cc:

Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
William Pearce Davis, Esquire
Susan Drake DuBose, Esquire
Michael S. Carnevale, Esquire
Andrew T. Frankel, Esquire
Mary Beth Forshaw, Esquire
Alan Turner, Esquire
Theile Branham McVey, Esquire
Mark Weston Hardee, Esquire
Jonathan M. Robinson, Esquire
G. Murrell Smith, Jr., Esquire
Shanon N. Peake, Esquire
Jescelyn Tillman Spitz, Esquire
John Belton White, Jr., Esquire
Marghretta Hagood Shisko, Esquire
Christopher Rutledge Jones, Esquire
Austin Tyler Reed, Esquire
The Honorable Jean Hoefer Toal

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