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April 16, 2013
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1015 Sumter Street
Columbia, South Carolina 29201

In re: Kirven v, Philadelphia Life Insurance Co., et al.
District Court Civil Action No.: 3:11-cv-2149-JFA
SC Supreme Court Case Number: 2013-00273

Dear Mr. Shearouse:

Enclosed for filing please find the original and nineteen (19) bound copies of the Final Brief of the Appellants with regards to this case. I would ask that you please file all copies and return four (4) copies back to our courier.

By copy of this correspondence, I am serving all counsel of record a copy of the same.

With warm regards, I am

Sincerely Yours

Graham L. Newman

/hmh
Enclosure
cc: All Counsel of Record

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPELLATE CASE NO.: 2013-00273

Diane Kirven, on behalf of herself and all others similarly situated,.....Plaintiffs,

v.

Central States Health & Life Company of Omaha and Philadelphia American Life Insurance Company, ...Defendants.

Certified Questions by Order of
The Honorable Margaret B. Seymour, District Court Judge
District Court Civil Action No: 3:11-cv-2149-MBS

FINAL BRIEF

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2. Can the South Carolina Department of Insurance mandate the application of the "actual charges" definition in S.C. Code Ann. § 38-71-242 to policies already in existence on the statute's effective date by prohibiting an insurance company from paying claims absent the application of that definition?

STATEMENT OF THE CASE

On August 11, 2011, Diane Kirven filed this case in the Columbia Division of the United States District Court for South Carolina. Kirven's complaint seeks a declaratory judgment adjudicating the term "actual charges" within her insurance contract and damages stemming from the alleged breach of that contract. Kirven also prays for a class to be certified of similarly situated insureds, though class certification has not yet been ruled upon.

After limited factual discovery, both Kirven and the Defendants agreed that the definition of the term "actual charges" within Kirven's policy (and the policies of the putative class members) was dispositive of the case. As a result, the parties jointly requested the District Court certify the questions above to the South Carolina Supreme Court. On February 5, 2013, the District Court granted the joint request for certification of questions. This Court, in turn, accepted the certified questions on March 8, 2013.

STATEMENT OF FACTS

The resolution of the certified questions turns upon the attempted application of the legislatively defined term "actual charges" (which was enacted in 2008) to the preexisting cancer insurance policy owned by Diane Kirven (which was purchased in 1999) in order to reduce the amount of insurance benefits due to Kirven under the terms of the policy. As shown below, Kirven has battled cancer and has filed claims on her insurance policy both before and after the 2008 enactment of the "actual charges" statute (Section 38-71-242). Also as shown below, while Kirven has been battling cancer and filing claims under her policy, the Fourth Circuit and District Court have twice ruled against attempted retroactive applications of Section 38-71-242.

i. Diane Kirven's Purchase of the Insurance Policy

Diane Kirven entered into a "cancer and specified disease—guaranteed renewable for life" contract of insurance (the "Policy") with Central States Health & Life Co. of Omaha ("Central States") on November 22, 1999. The Policy promised to pay Kirven a defined benefit in an amount equal to the "actual charges" for certain medical and pharmaceutical treatments, should she contract cancer. The Policy did not define the term "actual charges." (R. p. 1)

Kirven was diagnosed with cancer in February of 2003 and was required to undergo chemotherapy and radiation treatments. As a result, Kirven submitted claims for insurance benefits to Central States under the Policy. Central States paid Kirven a percentage of the "actual charges" for radiation and chemotherapy represented on her medical provider bills until her cancer fell into remission. (R. p. 2)

ii. Ward I: Initial "Actual Charges" Litigation

While Kirven was undergoing cancer treatment, South Carolina's first round of "actual charges" litigation was filed on March 7, 2003 in the case of Martha Ward v. Dixie National Life Ins. Co., 3:03-cv-03239-JFA (D.S.C.). Martha Ward possessed a cancer insurance policy similar to Kirven's in that it promised to pay benefits equal to the "actual charges" of cancer treatment should she contract cancer. Just as with the Kirven Policy, the term "actual charges" was not defined in the Ward policy and the ensuing breach of contract lawsuit centered upon two competing interpretations of the term: one, the full amount a medical provider billed patients for its services (which Ward sought); and two, the lesser amount a medical provider received as payment from insurers for its services (which Dixie sought).

On November 29, 2007, after over four years of litigation, the Fourth Circuit found the term "actual charges" to be patently ambiguous and remanded the case to the District Court with instructions to enter summary judgment on behalf of Martha Ward as to the definition of "actual charges." See Ward v. Dixie Nat. Life Ins. Co., 257 F. App'x 620, 627 (4th Cir. 2007)(unpublished) (hereinafter "Ward I"). The Fourth Circuit's mandate was entered on January 10, 2008. Martha Ward v. Dixie National Life Ins. Co., 3:03-cv-03239-JFA at Dkt. 288 (D.S.C.). Litigation continued, however, on the calculation of damages.

iii. Section 38-71-242 and Ward II: Legislating the Definition of "Actual Charges" and Its Effect on Pre-Existing Policies and Claims

On February 14, 2008—while Ward was still pending in the District Court—Senate Bill 1104 was introduced in the South Carolina Senate, seeking to legislatively establish the definition of "actual charges" in specified disease policies that do not define the term. 2008 Senate Journal, Vol. I at 974. The bill passed both houses of the General Assembly and was signed by the Governor on June 4, 2008, becoming effective on the same date as S.C. Code Ann. § 38-71-242. In effect, the statute sought to legislatively define the definition of "actual charges" advocated by the defendants in Ward I, setting forth the following:

> (A)(1) When used in any individual or group specified disease insurance policy in connection with the benefits payable for goods or services provided by any health care provider or other designated person or entity, the terms "actual charge", "actual charges", "actual fee", or "actual fees" shall mean the amount that the health care provider or other designated person or entity:
> (a) agreed to accept, pursuant to a network or other agreement with a health insurer, third-party administrator, or other third-party payor, as payment in full for the goods or services provided to the insured;

> (b) agreed or is obligated by operation of law to accept as payment in full for the goods or services provided to the insured pursuant to a provider, participation agreement, or supplier agreement under Medicare, Medicaid, or any other government administered health care program, where the insured is covered or reimbursed by such program; or
> (c) if both subitems (a) and (b) of this subsection apply, the lowest amount determined under these two subitems; and
> (2) must include any applicable deductibles, coinsurance requirements, or co-pay requirements applicable to the insured under any government administered health care program or any private primary health insurance coverage for the health care provider's goods or services provided to the insured.
>
> (B) This section applies to any individual or group specified disease insurance policy issued to any resident of this State that contains the terms "actual charge", "actual charges", "actual fee", or "actual fees" and does not contain an express definition for the terms "actual charge", "actual charges", "actual fee", or "actual fees".
>
> (C) Notwithstanding any other provision of law, after the effective date of this section, an insurer or issuer of any individual or group specified disease insurance policy shall not pay any claim or benefits based upon an actual charge, actual charges, actual fee, or actual fees under the applicable policy in an amount in excess of the "actual charge", "actual charges", "actual fee", or "actual fees" as defined in this section.

S.C. Code Ann. § 38-71-242 (Supp. 2012).

On August 28, 2008, the Department of Insurance issued Bulletin 2008-15, which directly addressed the newly codified § 38-71-242 and informed insurers of the following:

> Unless expressly required to do so by a final judgment issued before June 4, 2008 by a court of competent jurisdiction, insurers that have issued supplemental cancer policies or other specified disease policy in this state containing the term(s) "actual charge," "actual charges," "actual fee," or "actual fees" and that do not contain an express definition of those terms may not pay any claim or

> any benefit in excess of the amount specified in S.C. Code Ann. § 38-71-242.
>
> Every insurer licensed in this state that has issued a supplemental cancer policy or other specified disease policy subject to the provisions of S.C. Code Ann. § 38-71-242 shall transmit a notice, in a form approved by the Department, to the named insured or beneficiary of each such policy informing him or her of the content of S.C. Code Ann. § 38-71-242.

SCDOI Bulletin 2008-15, http://doi.sc.gov/bulletinsandorders/Pages/2008Bulletins.aspx (last visited April 4, 2013).

The enactment of Section 38-71-242 and the issuance of Bulletin 2008-15 occurred as the Ward case was nearing resolution on the question of damages. Despite the entry of the Fourth Circuit's opinion on the question of liability, however, the Ward defendants immediately moved for judgment on the pleadings, alleging that Section 38-71-242 and Bulletin 2008-15 constituted a change in legal authority and effectively overturned the Fourth Circuit's Ward I ruling. The District Court denied this motion and entered summary judgment for Ward on the question of damages. In order to simplify potential issues on appeal, however, class counsel in Ward agreed that the claims period for that class would have a cutoff date of June 4, 2008 (the effective date of the statute). Ward, 3:03-3239-JFA, Dkt. 374.

The Defendants appealed the District Court's ruling on the application of the statute, but the Fourth Circuit affirmed, finding "[n]either the statutory language nor the legislative history evinces any intent to apply the statute's definition to the insurance contracts in this case, and if anything, supports the opposite interpretation." Ward v. Dixie Nat. Life Ins. Co., 595 F.3d 164, 174 (4th Cir. 2010) (hereinafter "Ward II"). The Fourth Circuit further held that applying Section 38-71-242 to claims predating Section

38-71-242 "would undermine the presumption against statutory retroactivity and raise constitutional concerns." Ward II at 170.

iv. Montague v. Dixie National Life: the Litigation of Post-Section 38-71-242 Claims

While the appeal of Ward II was pending, Ward class members possessing policies predating the enactment of Section 38-71-242 who filed claims on such policies after the statute's effective date (June 4, 2008) filed the companion case of Montague v. Dixie National Life, et al. in the Richland County Court of Common Pleas. This case was subsequently removed to the District Court. See Montague v. Dixie National Life, et al., 3:09-cv-00687-JFA (D.S.C.). Montague sued for both breach of contract and a declaratory judgment that Section 38-71-242 did not apply to post-June 4, 2008 claims on policies that predated the statute. Montague also sought injunctive relief against the Department of Insurance, however, asking the court to enjoin the DOI from enforcing Bulletin 2008-15. (Dkt. 1-1 at 14-15)

The Department of Insurance moved to dismiss suit as to Bulletin 2008-15. In doing so, the DOI asserted "[t]his bulletin is not one of those authorized by the legislature to fill in the gaps in a statute. It does not interpret the law; it merely restates—in fact, quotes—the law to inform insurers of its existence." Id., Dkt. 10-1 at 5.

> The intent of the bulletin, which is obvious on its face, is to inform the affected insurers, and to ensure that the insurers inform their affected policyholders, of the new statute. Other than the directive to insurers to inform insureds of the existence of the statute, an innocuous requirement that the plaintiff cannot seriously argue is beyond the authority of the cabinet official charged with overseeing the most regulated industry in the state, the bulletin does not impose any requirement or restraint that is not specified in the statute.

Id., Dkt. 10-1 at 4. The DOI further asserted that "[t]he Department cannot 'enforce' Bulletin 2008-15." Id. at 6.

On the basis of this representation, the District Court dismissed the action against the Department, holding "Bulletin 2008-15 appears to be a mere statement of policy guidance; lacking force of law and expressly contemplated in S.C. Code Ann. § 1-23-10(4)." Id., Dkt. 47 at 8. "[T]he court finds that [the bulletin] cannot affect the legal relationship between any of the parties to this case." Id.

With the dismissal of the DOI, the sole remaining issue in the case was whether the Defendant insurance companies could utilize Section 38-71-242 in adjusting claims filed *after* June 4, 2008 (the effective date of the statute) on policies sold to insureds *before* the enactment of the statute. After the parties filed cross-motions for summary judgment, the District Court ruled in favor of Montague, holding that "section 38-71-242 does not apply to the Plaintiffs' insurance policies, which were issued before the statute's enactment date, because such application violates the Contract Clause of the United States Constitution." Montague v. Dixie Nat. Life Ins. Co., 2011 WL 2294146 at *19 (D.S.C. 2011)(unpublished). This order was not appealed to the Fourth Circuit as the case was finally settled on August 16, 2011. Id., Dkt. 145.

v. The Kirven Case: Revisiting Post-Section 38-71-242 Claims

Diane Kirven's cancer recurred in 2009 and she again underwent chemotherapy. As a result, Kirven filed a claim with Philadelphia American Insurance Company[1] for

[1] On December 31, 2005—while Ward I was pending in District Court—Philadelphia American Life Insurance Company ("Philadelphia American") acquired Central States' South Carolina "cancer and specified disease" policies and continued to pay benefits on such policies consistent with the "actual charges" set forth on its insureds' medical provider bills until approximately August 21, 2008. (R. p. 2)

"actual charges" benefits under the Policy. Unlike her "actual charges" claims in 2003, however, Kirven's claims were now adjusted by Philadelphia American with the definition of "actual charges" provided in Section 38-71-242. (R. p. 3)

On August 15, 2011, Diane Kirven filed the instant case in the District Court, seeking a declaratory judgment that Section 38-71-242 does not apply to her policy or other policies executed prior to the statute's enactment and breach of contract damages resulting from Philadelphia American's decision to apply Section 38-71-242 to preexisting contracts.

ARGUMENT

As noted, the two questions before the Court have been addressed by the Fourth Circuit Court of Appeals and the South Carolina District Court, but this Court has not addressed the scope of the application of Section 38-71-242 or whether the Department of Insurance has "mandated" retroactive application.

As shown below, concerns of retroactivity and constitutionality pertaining to the application of Section 38-71-242 to pre-existing contracts compel the statute be interpreted to apply only to contracts executed subsequent to its enactment. Furthermore, even if the Legislature intended to apply the statute to pre-existing contracts, such an application would violate the Contract Clause of the state and federal constitutions. Finally, the Department of Insurance has not mandated that Section 38-71-242 be applied to pre-existing contracts and, even if it did, such a mandate would be unconstitutional and beyond the scope of the Department's authority.

I. Can the definition of "actual charges" contained within S.C. Code Ann. § 38-71-242 be applied to insurance contracts executed prior to the statute's effective date?

Section 38-71-242 may not be applied to preexisting contracts for three reasons: 1) the presumption against statutory retroactivity requires a prospective construction of Section 38-71-242; 2) the doctrine of constitutional avoidance requires Section 38-71-242 be construed prospectively in order to avoid serious concerns of unconstitutionality; 3) a retrospective application of Section 38-71-242 to preexisting contracts would violate the contract clause of the state and federal constitutions. Each assertion will be discussed in turn.

a. Because statutes are presumed to be prospective, Section 38-71-242 may not be applied to preexisting insurance contracts.

The attempted application of Section 38-71-242 (or any statute) to a preexisting insurance policy immediately raises concerns of retroactivity. "A statute that becomes effective after the date of issuance of an insurance policy does not apply to that policy absent legislative intent that the statute be applied retroactively." Am. Nat. Fire Ins. Co. v. Smith Grading & Paving, Inc., 317 S.C. 445, 448, 454 S.E.2d 897, 899 (1995), citing Pulliam v. Doe, 246 S.C. 106, 142 S.E.2d 861 (1965); Mutual Aid Loan & Investment Co. v. Logan, 55 S.C. 295, 33 S.E. 372 (1899). Furthermore, statutes are presumed to be prospective, rather than retroactive. "In the construction of statutes there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary." Hyder v. Jones, 271 S.C. 85, 87-88, 245 S.E.2d 123, 125 (1978), citing Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973).[2] Due to this strong presumption, "[n]o statute will

[2] The presumption does not apply to "statutes which provide procedural or remedial benefits as opposed to statutes affecting vested or substantial rights." Goff v. Mills, 279 S.C. 382, 386, 308 S.E.2d 778, 780 (1983). This exception turns on whether the statute in question affects "the remedy and not the right" and has most often been observed in

be applied retroactively unless that result is so clearly compelled as to leave no room for reasonable doubt...". Hyder at 88, 245 S.E.2d at 125. Finally, the burden to prove legislative intent of retroactivity rests upon the party seeking such retroactivity.

> . . . the party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt. It is not necessary that the Court shall be satisfied that the Legislature did not intend a retroactive effect. It is enough, if it is not satisfied that the Legislature did intend such effect.

Id., quoting Ex Parte Graham, 47 S.C. Law (13 Rich. Law) 53 at 55-56 (1864); Pulliam v. Doe, 246 S.C. 106, 142 S.E.2d 861 (1965).

This Court provides a two-pronged analysis as to whether a statute may overcome the presumption against retroactivity. "It is well settled that, as a general rule, a statute will not be given a retrospective effect unless such is required by the express words of the statute or must necessarily by implied from the language used." Pulliam at 110, 142 S.E.2d at 863, citing Johnson v. Baldwin, 214 S.C. 545, 53 S.E.2d 785 (1949); Schumacher v. Chapin, 228 S.C. 77, 88 S.E.2d 874 (1955). As shown below, neither the express words of Section 38-71-242 nor any implication contained therein gives rise to "clear legislative intent" that the statute be construed retroactively. As a result, Section 38-71-242 may not be interpreted to apply to pre-existing contracts.

i. Absence of Express Provision of Retroactivity

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relation to recently enacted statutes of limitations. Hercules Inc. v. S. Carolina Tax Comm'n, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980). "The word 'remedial' as used in the cases refers to procedure rather than the right to collect some particular amount." Bartley v. Bartley Logging Co., 293 S.C. 88, 92, 359 S.E.2d 55, 56-57 (1987). Because the definition of benefits to be paid is a "vested or substantial right" that goes to "the right to collect some particular amount," the exception to the presumption against retroactive construction does not apply to Section 38-71-242.

Express provisions providing for statutory retroactivity may appear in the statute itself, e.g., S.C. Code Ann. § 39-24-50 ("[A]n oral authorization for substitution may be obtained from the prescribing practitioner by the pharmacist on any prescription issued prior to the effective date of this chapter."); S.C. Code Ann. § 24-21-645 ("This subsection applies retroactively to a prisoner who has had a parole hearing pursuant to Section 16-25-90 prior to the effective date of this act."), or in the text of the enacting legislation, e.g., Act No. 15, 1995 S.C. Acts 112, 115 ("This act takes effect upon approval by the Governor, but Section 1 shall apply retroactively to August 15, 1994."); Act No. 375, 1998 S.C. Acts 2267, 2271 ("This act takes effect upon approval by the Governor. The provisions of Sections 1 and 5 are remedial and apply retroactively to July 1, 1997..."); Act No. 320, 1986 S.C. Acts 2402, 2403 ("This act shall take effect upon approval by the Governor and is retroactive to January 1, 1984.")

More recently, the Legislature provided an excellent example of express retroactivity of a law. Just months after this Court issued its initial opinion in Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., 2011 WL 93716 (2011), withdrawn and superseded, 717 S.E.2d 589, the General Assembly legislatively defined the term "occurrence" within commercial general liability policies and did so, ostensibly, directly in response to the Crossman opinion. Within the body of the statute itself, the General Assembly expressly provided for the retroactive application the new definition.

> This section applies to any pending or future dispute over coverage that would otherwise be affected by this section as to all commercial general liability insurance policies issued in the past, currently in existence, or issued in the future.

S.C. Code Ann. § 38-61-70(E)(Supp. 2011).

No similar express provisions providing for retroactivity appear within either the body of Section 38-71-242 or the text of its enacting legislation. See Act No. 265, 2008 S.C. Acts 2240. As a result, one must examine the text of Section 38-71-242 to determine whether retroactivity is "necessarily implied."

ii. Absence of Necessary Implication of Retroactivity

In Ward II, the Fourth Circuit analyzed the substance of Section 38-71-242 and determined that evidence of legislative intent weighed against any finding of retroactivity.

> [T]he South Carolina statute falls quite short of this rigorous standard for overcoming the presumption against retroactivity. Neither the statutory language nor the legislative history evinces any intent to apply the statute's definition to the insurance contracts in this case, and if anything, supports the opposite interpretation.
>
> Three considerations require this conclusion. First, the statute states that it has no effect until "*after* the effective date," June 4, 2008. S.C. Code Ann. § 38–71–242(C) (emphasis added). Courts have repeatedly held that the inclusion of an effective date is inconsistent with legislative intent to apply the statute retroactively. "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."
>
> Second, by its own terms, the statute declares that insurers "*shall* not pay any claim" in excess of the statutory definition of "actual charges." S.C. Code Ann. § 38–71–242(C) (emphasis added). The word "shall" typically suggests that the legislature designed the statute to apply only prospectively; "[t]he use of the future tense ... effectually negatives any suggestion that the statute was intended to apply retroactively."
>
> Third and finally, nothing in the statute's legislative history evidences a legislative desire to apply the statute's definition to this case. The South Carolina legislature knew about this particular litigation when it enacted the statute

> and yet never suggested that the statute apply to it. If the legislature wanted to apply the statute to this case, it could have, should have, and likely would have made that wish more apparent.

Ward II at 174-75 (internal citations omitted).[3]

Consistent with the Fourth Circuit's reasoning, if the General Assembly truly intended for Section 38-71-242 to apply to existing contracts, it "could have, should have, and likely would have made that wish more apparent." Id. Instead, the only temporal reference within the statute is the phrase "after the effective date of this section." S.C. Code Ann. § 38-71-242(C).

> Finding nothing in this enactment beyond a statement of its "effective date," we must follow the well-settled rule that a statute may not be applied retroactively in the absence of specific provision or clear legislative intent to the contrary.

Schall v. Sturm, Ruger Co., Inc., 278 S.C. 646, 650, 300 S.E.2d 735, 737 (1983). Whatever implication this phrase may provide, it is certainly not "necessary" for the operation of the statute. If, in fact, the "general rule" of prospective application of the statute applies, the term "actual charges" will be legislatively defined only in policies issued after the enactment of Section 38-71-242.

* * *

Because no express provision provides for the retroactive application of Section 38-71-242 and such an application is not "necessarily implied," the presumption of

[3] In Montague, the District Court disagreed with the reasoning of the Fourth Circuit as to whether Section 38-71-242 should be construed to be retroactive, finding "[t]he fact that the claims in this case were submitted after the statute's June 4, 2008 effective date makes the issue of the statute's retroactivity different than the issue presented to the Fourth Circuit in its second Ward decision." Montague at *5. As shown below, however, the District Court went on to hold that retroactive application of the statute would be unconstitutional.

prospective application of statutes mandates that Section 38-71-242 be so construed. As Ward II noted,

> Although only a presumption, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." It has been described as "[a]mong the most venerable of the [ ] [judicial] default rules," a "time-honored presumption," and a "rule of general application."

Ward II at 172 (internal citations omitted). Whereas Section 38-71-242 must be presumed to operate prospectively only, the Court may answer the first certified question without considering additional points of law. As will be shown, however, the doctrine of "constitutional avoidance" and the Contract Clause of the state and federal constitutions compel the same result.

b. The doctrine of "constitutional avoidance" mandates that Section 38-71-242 be interpreted prospectively in order to avoid grave concerns of constitutionality

South Carolina adheres to the doctrine of "constitutional avoidance," which establishes that "[c]onstitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333 (1977); citing Casey v. South Carolina State Housing Authority, 264 S.C. 303, 215 S.E.2d 184 (1975). This rule is consistent with that of the United States Supreme Court, which observes a "cardinal principle" that "this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." United States v. Security Indus. Bank, 459 U.S. 70, 78, 103 S.Ct. 407, 412 (1982).

The Fourth Circuit, in Ward II, discussed the myriad of constitutional concerns raised by the potential retroactive application of Section 38-71-242 to pre-existing contracts.

> In many cases, retroactive legislation risks violating those provisions of the Constitution in which "the antiretroactivity principle finds expression." ... [I]n the civil context, retroactive application of statutes potentially implicates the Contract Clause, the Takings Clause, the Due Process Clause, and others.

Ward II at 176. In the context of the Contract Clause, this Court has observed that "[a] statute is viewed as substantially impairing a contract, for Contract Clause analysis, where it alters the reasonable expectations of the contracting parties." Anonymous Taxpayer v. S. Carolina Dept. of Revenue, 377 S.C. 425, 435, 661 S.E.2d 73, 78 (2008).

Here, applying Section 38-71-242 to pre-existing contracts would not only "alter reasonable expectations," it would alter the manner in which the Defendants have paid "actual charges" benefits for the decade preceding the statute. Thus a retroactive construction of the statute poses an overt threat to the constitutionality of Section 38-71-242 and must be rejected under the doctrine of constitutional avoidance.

c. Retroactive application of Section 38-71-242 to preexisting insurance contracts violates the Contracts Clause of the state and federal constitutions.

Finally, as suggested in the previous section, the definition of "actual charges" contained within S.C. Code Ann. § 38-71-242 cannot be applied to insurance contracts executed prior to the statute's effective date because doing so would violate the Contract Clause of the state and federal constitutions. The pertinent constitutional provisions are as follows:

> No State shall ... pass any ... law impairing the Obligation of Contracts.

U.S. Const. Art. I, § 10, cl. 1.

> No ... law impairing the obligation of contracts ... shall be passed.

S.C. Const. Art. I, § 4. Despite the textual differences, this Court recognizes that "[t]he mandate of the state and federal constitutions relating to impairment of contracts is basically the same," G–H Ins. Agency v. Continental Ins. Co., 278 S.C. 241, 246, 294 S.E.2d 336, 339 (1982), and recognizes federal precedent in interpreting the Contract Clause of the South Carolina Constitution. See, e.g., Ken Moorhead Oil Co., Inc. v. Federated Mut. Ins. Co., 323 S.C. 532, 539, 476 S.E.2d 481, 485 (1996). To establish a Contract Clause violation, the Court must examine "(1) whether there is a contractual relationship; (2) whether the change in the law impairs that contractual relationship; and (3) whether the impairment is substantial." Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 28-29, 736 S.E.2d 651, 658 (2012), quoting Hodges v. Rainey, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000); Gen. Motors Corp. v. Romein, 503 U.S. 181, 112 S.Ct. 1105 (1992).

i. Contractual Relationship between the Parties

In this case, the insurance policy possessed by Diane Kirven constitutes a contractual relationship between the parties. The existence of this contractual relationship is not in dispute.

ii. Substantial Contractual Impairment

"In determining whether an impairment is substantial and so not 'permitted under the Constitution,' of greatest concern appears to be the contracting parties' actual reliance on the abridged contractual term." City of Charleston v. Pub. Serv. Comm'n of W.

Virginia, 57 F.3d 385, 392 (4th Cir. 1995). Here, both Kirven and the Defendants relied upon Kirven's interpretation of "actual charges" prior to the enactment of Section 38-71-242. As the District Court's certification order states,

> According to Plaintiff, ... Central States paid benefits under its "cancer and specified disease" policies calculated on the charges billed to the insureds by their medical providers and/or pharmacies. Stated differently, Central States paid benefits based upon billed amounts and did not reduce the benefits based upon any discounts negotiated between Central States and Plaintiff's medical providers.

(R. p. 1-2). The parties do not dispute this fact.

The pre-Section 38-71-242 adjustment of policies consistent with the Ward I definition of actual charges was also present in Montague, which partially rested its determination of "substantial impairment" upon "the fact that the Defendants originally paid benefits in compliance with this industry-wide understanding of the term 'actual charges.'" Montague at *16. By "industry-wide understanding," the Montague court was referring to numerous definitions in use within the healthcare and insurance industries. According to that order, "the legislatively-established definition of 'actual charges' appears to directly contradict the industry-wide usage of the term of art, as it existed at the time of the parties' contracting and as it is presently understood." Id. at *15.

> For example, a review of the glossary of terms made available to users of the BlueCross BlueShield of South Carolina website reveals the following definition of the term "actual charge":
>
> Actual Charge—The amount a doctor or other health care provider actually bills a patient. You often see the phrase, "The actual charge may be different from the allowable charge." This means your health plan may only cover a portion of what your doctor charges you. For example, your doctor bills you $35.00 for an office visit. This is the actual charge. But your health plan may only accept $32.00 for an office visit. This is the allowable charge.

> BlueCross BlueShield of South Carolina, Understanding Your Coverage, Glossary (June 8, 2011), http://www.southcarolinablues.com/members/understandingyourcoverage/glossary.aspx [4]

Id. The court also noted that "of course, in Ward [I], the Fourth Circuit recognized several health care dictionaries that define 'actual charge' as the amount billed by the medical provider." Id., citing Ward I at 625–26, Mosby's Medical, Nursing, and Allied Health Dictionary 26 (4th ed. 1994) and Lee Hyde, The McGraw–Hill Essential Dictionary of Health Care 133 (1998). Because the definition established within Section 38-71-242 runs contrary to the usage of "actual charges within all of these sources, Montague held "the legislative alteration [of the policies] is not merely a technical alteration, but affects an important term used in the policies." Montague at *16. The court underscored the substantial nature of the impairment by noting the statute "defin[es] a critical term used in the supplemental cancer policies in a way that lessens the amount of benefits the Plaintiffs shall receive." Montague at *9.

The Court recently addressed a very similar question during a constitutional challenge to the General Assembly's response to Crossman. As mentioned above, the General Assembly enacted S.C. Code Ann. § 38-61-70(E) to define retroactively the term "occurrence" within various insurance policies implicated by the Crossman decision.

[4] The Montague court went on to cite numerous other examples of the healthcare and insurance industries' usage of the term "actual charges." See, e.g., Delaware Healthcare Association, Glossary of Health Care Terms and Acronyms, (June 8, 2011), http://www.deha.org/Glossary/GlossaryA.htm#top (defining "actual charge" to mean "The amount a physician or other provider actually bills a patient for a particular medical service, procedure or supply in a specific instance. The actual charge may differ from the usual, customary, prevailing, and/or reasonable charge."); Health Insurance Online, Insurance Dictionary (June 8, 2011), http://www.online-health-insurance.com/health-insurance-resources/dictionary/actual-charge.htm (defining "actual charge" to mean "The actual amount charged by a physician for medical services rendered.").

This Court held the express retroactivity provision to be unconstitutional, finding that "it violates the Contract Clause to apply this new definition retroactively as it substantially impairs pre-existing contracts by materially changing their terms." Harleysville Mut. Ins. Co. at 29-30, 736 S.E.2d at 658.

The constitutional infirmity is even more serious in the present case. In Harleysville Mut. Ins. Co., for example, the dissent pointed to the similarities of the statute at issue and the Court's previous interpretation of "occurrence" in its Crossman opinion, asserting that the statute was merely "a clarification, through codification, of extant law." Harleysville Mut. Ins. Co. at 32, 736 S.E.2d at 660. Here, however, no such opinion exists. To the contrary, the 2007 Ward I opinion predated the enactment of Section 38-71-242, which was enacted not to "clarify through codification" existing law but (if it is to be applied to existing policies) was enacted specifically "in order to overturn Ward I." Ward II at 175.[5] Thus, if retroactive, Section 38-71-242 does not codify an existing common law ruling, but rather overturns it, making the deprivation of existing contractual rights that much more apparent.

iii. Lack of Legitimate Exercise of State Power

Nevertheless, legislation may impair contractual rights if it is based "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 22, 97 S. Ct. 1505, 1518 (1977).

We do not accept this invitation to engage in a utilitarian

[5] Ward II, of course, rejected a finding of any retroactive intent, whatsoever. "As already discussed ... this view is unsupported by the statute's text and legislative history." Id. at 175.

> comparison of public benefit and private loss. . . . We can only sustain the [impairment] if that impairment was both reasonable and necessary to serve the ... important purposes claimed by the State.

Id. at 29. This Court recognizes the federal five-pronged analysis for determining whether a contractual impairment was "reasonable and necessary":

> Traditional analysis of reasonableness and necessity focuses on such issues as (1) whether an emergency exists justifying the impairment; (2) whether the law was enacted to protect a basic societal interest, rather than a favored group; (3) whether the law is narrowly tailored to the emergency at hand; (4) whether the imposed conditions are reasonable; and (5) whether the law is limited to the duration of the emergency.

Harleysville Mut. Ins. Co. at 30, 736 S.E.2d at 658-59, quoting Ken Moorhead Oil Co. at 545, 476 S.E.2d at 488-89. An analysis of the first two of these criteria raises major concerns over the "legitimacy of the state purpose" in applying Section 38-71-242 to the Dixie contracts.

In this case, no "emergency" existed to prompt the enactment of § 38-71-242 nor was the statute narrowly tailored (either in scope or duration) to protect some "basic societal interest." To the contrary, the statute was drafted and guided through the Legislature (by lobbyists hired by the Ward defendants) specifically "[i]n response to Ward I." Ward II at 171. The Montague court thoroughly analyzed this consideration as follows.

> There also does not appear to be an emergency situation, either permanent or temporary, arising out of the facts of this case. For years, the Defendants paid benefits based on what their specified disease policyholders were billed by their medical service providers; therefore, it is a stretch to contend that the Defendants now need protection from the terms of the adhesion contracts they issued the Plaintiffs. Had the insurance company sought to be contractually

> obligated to pay benefits equal to the allowed charges of their policyholders' primary insurers, it could have easily done so. Instead, they based their policies' benefits on the actual charges billed by the Plaintiffs' medical providers, and when they no longer preferred that contractual arrangement, they unilaterally altered their payment practice, despite the fact that their policies forbid them to. And when that attempt failed in the courts, they summoned the General Assembly to legislatively contract for them. All the while, the Defendants have the right to increase the premium payment for the Plaintiffs' policies to help offset any unexpected increase in benefits payable on the policy, which they have done on at least ten occasions. (Defs.' Mot. for S.J., Ex. A., Turner Aff. ¶ 5.) Therefore, there has been no showing that section 38–71–242's alteration of the meaning of "actual charges" in the Plaintiffs' policies was necessary to meet an important societal problem related to the affordability of specified disease policies going forward.

Montague at *18. Thus § 38-71-242 is precisely the type of legislation that the United States Supreme Court warned against as being "enacted to protect ... a favored group," Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242, 98 S. Ct. 2716, 2721 (1978), and thereby unable to justify contractual impairment.

* * *

The Court need not conduct this full-blown analysis of the constitutionality of a retroactive application of Section 38-71-242. In fact, as noted above, the presumption against retroactivity and the doctrine of constitutional avoidance are engineered precisely to avoid such considerations. As the Fourth Circuit observed,

> [t]hat defendants' argument raises these 'grave constitutional questions,' gives us reason enough to reject it. Absent a clearer statement of intent, we will not assume that the legislature sought to apply the new rule retrospectively and provoke a fight of constitutional dimensions.

Ward II at 178. The full-blown constitutional analysis, however, further underscores the constitutional infirmities of retroactive application of the statute. As a result, Question One should be answered "no," the definition of "actual charges" contained within S.C. Code Ann. § 38-71-242 cannot be applied to insurance contracts executed prior to the statute's effective date.

II. Can the South Carolina Department of Insurance mandate the application of the "actual charges" definition in S.C. Code Ann. § 38-71-242 to policies already in existence on the statute's effective date by prohibiting an insurance company from paying claims absent the application of that definition?

The answer to Question Two is also "no." Any attempt by the DOI to mandate the retroactive application of Section 38-71-242 would exceed the scope of the Department's authority and violate the Contract Clause of the state and federal constitutions. Furthermore, the DOI itself has already indicated that it has not and is not attempting to enforce retroactive application of the statute at issue.

a. The Department of Insurance has not attempted to mandate the application of Section 38-71-242 to preexisting insurance policies

The Montague challenge to the retroactive application of Section 38-71-242 included causes of action for declaratory judgment and injunctive relief brought against the DOI. Montague, Dkt. 1-1. The plaintiff's complaint sought a declaration that

> Bulletin 2008-15 exceeds the scope of the authority of the Director of the Department of Insurance, violates the United States and South Carolina constitutions, and is inconsistent with the plain language of S.C. Code Ann. § 38-71-242.

Id., Dkt. 1-1 at 14. Montague further requested an order "enjoining the [DOI] ... from enforcing, or attempting to enforce, Bulletin 2008-15." Id. at 18.

The DOI moved to dismiss suit as to Bulletin 2008-15, asserting "[t]his bulletin is not one of those authorized by the legislature to fill in the gaps in a statute. It does not interpret the law; it merely restates—in fact, quotes—the law to inform insurers of its existence." Id., Dkt. 10-1 at 5.

> The intent of the bulletin, which is obvious on its face, is to inform the affected insurers, and to ensure that the insurers inform their affected policyholders, of the new statute. Other than the directive to insurers to inform insureds of the existence of the statute, an innocuous requirement that the plaintiff cannot seriously argue is beyond the authority of the cabinet official charged with overseeing the most regulated industry in the state, the bulletin does not impose any requirement or restraint that is not specified in the statute.

Id. at 4. The DOI further declared that "[t]he Department cannot 'enforce' Bulletin 2008-15." Id. at 6.

On the basis of this representation, the District Court dismissed the action against the Department, holding "Bulletin 2008-15 appears to be a mere statement of policy guidance; lacking force of law and expressly contemplated in S.C. Code Ann. § 1-23-10(4)." Id., Dkt. 47 at 8. "[T]he court finds that [the bulletin] cannot affect the legal relationship between any of the parties to this case." Id.

DOI's assertions that Bulletin 2008-15 "merely restates the law" in order to "inform insureds of the existence of the statute" renders Question Two moot. As the District Court found in Montague, Bulletin 2008-15 "cannot affect the legal relationship between any of the parties to this case." Id. As a result, the Court need not reach the question of whether the DOI *can* mandate the application of Section 38-71-242 to preexisting policies, for the DOI—in its own words—has not done so.

b. A Department of Insurance mandate of retroactive application would exceed the scope of the agency's authority

Any hypothetical analysis of the DOI's ability to enforce application of Section 38-71-242 to preexisting policies must fist consider whether DOI may do so absent express instruction from the General Assembly. "As creatures of statute, regulatory bodies [such as the DOI] are possessed only of those powers which are specifically delineated." City of Columbia v. Bd. of Health & Envtl. Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987), citing South Carolina Electric and Gas Co. v. South Carolina Public Service Commission, 275 S.C. 487, 272 S.E.2d 793 (1980). The DOI's specifically delineated powers are limited to "follow[ing] the general policies and broad objectives enacted by the General Assembly regarding the operation of the insurance industry in this State." S.C. Code Ann. § 38-3-60. In order to follow these policies, the General Assembly mandates that the DOI

> see that all laws of this State governing insurers or relating to the business of insurance are faithfully executed and make regulations to carry out this title and all other insurance laws of this State, the enforcement or administration of which is not otherwise specifically provided for...

S.C. Code Ann. § 38-3-110(2). The DOI has not promulgated any regulations pertaining to this case. Furthermore, the South Carolina Supreme Court has expressly held that "[a]n Interpretive Bulletin [from the DOI] is not binding on the courts." Garris v. Cincinnati Ins. Co., 280 S.C. 149, 153, 311 S.E.2d 723, 726 (1984). Thus, even if DOI intended for Bulletin 2008-15 to "mandate" application of Section 38-71-242 to existing policies, it could not do so.

Furthermore, an agency's retroactive application of a statute in the absence of a legislative directive to do so also violates the limits of agency authority. "Executive agencies are required to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid." Edwards v. State, 383 S.C. 82, 91, 678 S.E.2d 412, 417 (2009), citing Layman v. State, 376 S.C. 434, 450, 658 S.E.2d 320, 328 (2008). This is particularly true in this case, as the plain language of § 38-71-242 makes no attempt to retroactively apply its provisions. "[W]here, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).

c. A Department of Insurance mandate of retroactive application would violate the Contract Clause

Finally, any attempt to utilize Bulletin 2008-15 so as to construe or interpret Section 38-71-242 in a manner that retroactively applies the statute to preexisting contracts would, once again, run afoul of the Contract Clause. While the DOI is an executive agency, its production of Bulletin 2008-15 is the exercise of legislatively-delegated powers under Sections 38-3-60 and 38-3-110. As the Supreme Court has noted,

> whilst thus uniformly holding that the [Contract Clause] is directed against legislative, but not judicial, acts, this courts, with like uniformity, has regarded it as reaching every form in which the legislative power of a state is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the state exercising delegated legislative authority.

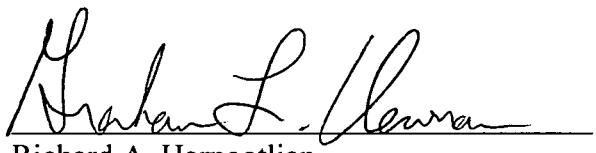
Ross v. State of Oregon, 227 U.S. 150, 162-63, 33 S. Ct. 220, 223 (1913), see also Grand Trunk W. Ry. Co. v. R.R. Comm'n of Indiana, 221 U.S. 400, 403, 31 S. Ct. 537 (1911)("a legislative act by an instrumentality of the state exercising delegated authority is of the

same force as if made by the legislature, and so is a law of the state within the meaning of the contract clause of the Constitution"). Thus, the DOI's hypothetical application of Section 38-71-242 to preexisting policies took place, the identical Contract Clause analysis shown above would invalidate the DOI's actions.

CONCLUSION

For the reasons stated herein, both Question One and Question Two should be answered "no."

Respectfully submitted,



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IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPELLATE CASE NO.: 2013-00273

Diane Kirven, on behalf of herself and all others similarly situated,.....Plaintiffs,

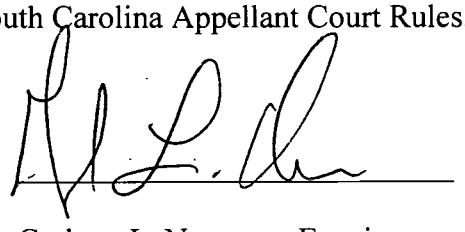
vs.

Central States Health & Life Company of Omaha and Philadelphia American Life Insurance Company, ...Defendants.

Certified Questions by Order of
The Margaret B. Seymour, District Court Judge
District Court Civil Action No: 3:11-cv-2149-MBS

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for the Plaintiffs, herby certifies that this final brief complies with Rule 211(b) of the South Carolina Appellant Court Rules.



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CERTIFICATE OF SERVICE

I, Heather M. Hardy, Assistant to Richard A. Harpootlian, PA, hereby certify that I have served, via Hand Delivery and U.S. Mail, on April 16, 2013, the named individual(s) with a copy of the following:

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