STATE OF SOUTH CAROLINA
In the Supreme Court

PETITION FROM RICHLAND AND YORK COUNTIES
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2020-
In the Supreme Court's Original Jurisdiction

Circuit Court Case Nos. 2015-CP-46-02155 (*Smith*), 2015-CP-46-03456 (*Howe*), 2019-CP-40-00076 (*Hopper*), 2018-CP-40-04680 (*Hill*), and 2018-CP-40-04940 (*Taylor*)

United States Fidelity and Guaranty Company ..... Petitioner,

v.

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

in the following cases:

Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith ..... Plaintiffs,

v.

CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power Supply Co. and Mill-Power Supply Company; Resolute FP US, Inc.; Union Carbide Corporation; United States Fidelity and Guaranty Company; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; and United Conveyor Corporation ..... Defendants,

and

Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin Howe, Deceased, and Jeannette Howe ..... Plaintiffs,

v.

Air & Liquid Systems Corp., Individually and as Successor-in-Interest to Buffalo Pumps, Inc; Airco, Inc.; Airgas USA, LLC, f/ka National Welding

Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC, Individually and as a Subsidiary of Davis-Standard LLC; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Productions, Inc., f/k/a Carolina Gasket and Rubber Company; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-Apco Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as Successor-in-Interest to Buell Engineering Co.; Flowserve Corporation, Individually and as Successor-in-Interest to Durco Pumps; Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as Successor-in-Interest to Buell Engineering Co.; Marsulex Environmental Technologies, LLC, as Successor-in-Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as Successor-in-Interest to Babock Borsig Power, Inc., and Riley Stoker Corporation, Individually and as Successor-in-Interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc., f/k/a Marley Cooling Technologies, Inc., f/k/a The Marley Cooling Tower Co.; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc., f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries ..... Defendants,

and

Charles T. Hopper and Rebecca Hopper..... Plaintiffs,

v.

Air & Liquid Systems Corp.; 3M Company; Advance Auto Parts, Inc.; Armstrong International, Inc.; Blackmer Pump Company; BW/IP, Inc.; CBS Corporation; CNA Holdings, LLC; Carrier Corporation; Circor Instrumentation Technologies, Inc.; Continental Tire the Americas, LLC; Covil Corporation; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; E.I. du Pont de Nemours and Company; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Flour Constructors International, Inc.; Fluor

Daniel Services Corporation; Flour Enterprises, Inc.; FMC Corporation; Ford Motor Company; Foster Wheeler Energy Corporation; Gardner Denver, Inc.; General Electric Company; Genuine Parts Company; Georgia Power Company; Goodrich Corporation; Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Honeywell International, Inc.; IMO Industries, Inc.; Ingersoll-Rand Company; International Paper Company; ITT LLC; The Lincoln Electric Company; Metropolitan Life Insurance Company; Miller Electric Mfg., LLC; National Automotive Parts Association; Newco Valves, LLC; O'Reilly Auto Enterprises, LLC; O'Reilly Automotive Stores, Inc.; Resolute FP US Inc.; Shell Oil Company; South Carolina Electric & Gas Company; South Carolina Public Service Authority; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc.; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Trane U.S.; Uniroyal Holding Inc.; Viking Pump, Inc.; Weir Valves & Controls USA, Inc.; The William Powell Company; Yeargin Potter Smith Construction, Inc.; Yuba Heat Transfer Corporation; and Zurn Industries ..... Defendants,

and

James Michael Hill, Jr., as Executor of the Estate of James Michael Hill ... Plaintiff,

v.

Advance Auto Parts, Inc.; 4520 Corp., Inc., successor-in-interest to Benjamin F. Shaw Company; Air & Liquid Systems Corporation, individually and as successor-in-interest to Buffalo Pumps; Alcoa, Inc., successor to Reynolds Metals Company; Aurora Pump Company; BW/IP, Inc., individually and as successor-in-interest to Byron Jackson Pumps; CB&I Group Inc., individually and as successor-in-interest to The Shaw Group, successor to Benjamin F. Shaw Company; CB&I Laurens, Inc., f/k/a B.F. Shaw, Inc.; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., successor by merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; Celanese Corporation; CNA Holdings, LLC, f/k/a Celanese Corporation f/k/a Hoechst Celanese Corporation, sued individually and as successor-in-interest to Fiber Industries, Inc.; Circor Instrumentation Technologies, Inc., individualy and f/k/a Hoke Inc.; Cleaver Brooks, Inc., f/k/a Aqua-Chem, Inc., d/b/a Cleaver-Brooks Division; Covil Corporation; Crane Co.; Crosby Valve, LLC; Dana Companies LLC; Daniel International Corporation; The Dow Chemical Company; Federal-Mogul Asbestos Personal Injury Trust, sued as successor to Felt-Products Manufacturing Co.; Fisher-Controls International, LLC, wholly owned subsidiary of Emerson Electric Company; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; General Electric Company; Genuine Parts Company, d/b/a Rayloc, a/k/a NAPA; The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Gorman-Rupp Company; Hollingsworth & Vose Company; Honeywell International, Inc.,

f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; Imerys Talc America, Inc., f/k/a Luzernac America, Inc., individually and as successor-in-interest to United Sierra Division of Cyprus Mines, Cyprus Industrial Minerals Company and Windsor Minerals, LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC, f/k/a ITT Corporation, ITT Industries, Inc., individually and as successor to ITT Fluid Products Corp., ITT Hoffman ITT Bell & Gossett Company and ITT Marlow; Johnson & Johnson; Johnson & Johnson Consumer Companies LLC, a subsidiary of Johnson & Johnson; Mallinckrodt LLC; Maremont Corporation; McDermott International, Inc., individually and as successor-in-interest to The Shaw Group, successor to Benjamin F. Shaw Company; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Mine Safety Appliances Company, LLC; National Automotive Parts Association; OfficeMax, Incorporated, f/k/a Boise Cascade Corporation; Pneumo Abex, LLC, individually, and as successor-in-interest to Abex Corporation; R.J. Reynolds Tobacco Company, individually and as successor-by-merger to Lorillard Tobacco Company LLC, f/k/a Lorillard Tobacco Company; Resolute FP US Inc., individually and successor-in-interest to Bowater, Inc.; Reynolds American, Inc., individually, and as successor-by-merger to Brown & Williamson Tobacco Corporation, successor-by-merger to The American Tobacco Company; Riley Power, Inc., f/k/a Riley Stoker Corporation and D.B. Riley, Inc.; Spence Engineering Company, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and successor-in-interest to Marley Cooling Towers Co.; Union Carbide Corporation; United Conveyor Corporation; The William Powell Company; and Zurn Industries, LLC, individually and as successor-in-interest to Zurn Industries, Inc. ..... Defendants,

and

Denver D. Taylor and Janice Taylor..... Plaintiffs,

v.

Air & Liquid Systems Corporation; Aurora Pump Company; BASF Catalyst LLC; BASF Corporation; Borgwarner Morse Tec, LLC; CBS Corporation; CNA Holdings, LLC; Cameron International Corporation; Carrier Corporation; Carver Pump Company; Caterpillar, Inc.; Celanese Corporation; Cleaver-Brooks, Inc.; Continental Tire The Americas, LLC; Covil Corporation; Crane Co.; Daniel International Corporation; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Frito-Lay, Inc.; Gardner Denver, Inc.; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC; John Crane, Inc.; The Lincoln Electric Company; Linde, LLC; McNeil (Ohio)

Corporation; McNeil & NRM, Inc.; McWane, Inc.; Metropolitan Life Insurance Company; Resolute FP US Inc.; Riley Power, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc.; Springs Global US, Inc.; Trane US, Inc.; Viking Pump, Inc.; Warren Pumps, LLC; Weir Valves & Controls USA, Inc.; York International Corporation; and Zurn Industries, LLC ..... Defendants.

USF&G'S PETITION FOR A WRIT OF SUPERSEDEAS

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May 20, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

INTRODUCTION

On January 8, 2020, the circuit court (Justice Jean H. Toal, sitting by appointment) entered a contempt order against United States Fidelity and Guaranty Company (USF&G) and other insurance companies, including Zurich American Insurance Company ("Zurich"), that is unprecedented in numerous ways and deficient in virtually every respect. It purports to make factual findings against these entities—***which are not even parties to the cases in which the contempt order was entered***—without any legitimate factual record: no discovery, no cross-examination, no trial, no evidentiary safeguards, no underlying pleadings or causes of action. And even though ***no questions of insurance law are pending in these cases***, the contempt order purports to dictate the parties' contractual relationship in contravention of well-established insurance law and this Court's jurisprudence. Indeed, the circuit court went so far as to effectively create a contractual relationship and impose specific contractual obligations on USF&G based on no evidence of such, all as a supposed sanction. The circuit court issued these rulings over petitioner's objections even though USF&G, Zurich, and the Receiver for Covil Corporation (which requested this relief and drafted the circuit court's order) ***are*** parties in pending federal court insurance coverage actions in which these factual and legal issues ***are*** squarely before those federal courts. And although the Receiver has since been enjoined from seeking rulings or discovery on these issues based on his overreaching conduct, the circuit court had already issued its ruling by the time the injunction had been issued.

USF&G timely sought reconsideration of the contempt order, supplemented its reconsideration motion, noticed an appeal of the contempt order out of an abundance of caution (which was dismissed without prejudice due to the pending reconsideration motion), and moved the trial court to stay the effect of its contempt order while the post-judgment motions and

subsequent appeal proceed. Those motions have been pending for months now. Although the Covid-19 pandemic has interrupted the courts' business, Justice Toal has continued to issue rulings on other matters involving the parties here, including by denying a separate motion for reconsideration and motion to stay (filed less than three weeks earlier) in one of the above-captioned actions, and which, among other things, impairs USF&G's contribution rights against certain settled insurers, enjoins USF&G from seeking contribution from those parties (in part on the basis that USF&G is not a party and did not intervene in the underlying tort action),[1] and approves an approximately $15 million (33.3%) contingency fee for the Receiver and his counsel. Given the lengthy delay of the motion for reconsideration and related motion for a stay at issue here, despite USF&G's request that the stay motion be considered on an expedited basis, it appears unlikely these motions will be addressed and resolved in the near future.[2]

In the meantime, the Receiver for the Covil Corporation is affirmatively presenting the contempt order in litigation in which USF&G actually is a party before the District of South Carolina and the Middle District of North Carolina, in which the questions of insurance law are actually pending, and in numerous underlying tort actions in which USF&G and Zurich have now been sued as defendants on the novel theory that, by defending their insured after the insured had ceased operations—as the insurers were contractually required to do—the insurers should be deemed to be alter egos and responsible for all of their insureds' liabilities. Similarly, plaintiffs in

[1] *Cf. Ex Parte Builders Mut. Ins. Co*., Op. No. 27970 (S.C. Sup. Ct. May 13, 2020) (Shearouse Adv.Sh. No. 19 at 48) (holding that insurers have no right to intervene in underlying action involving their insureds).

[2] Last year, Justice Toal issued yet another contempt ruling against USF&G for supposedly violating mediation confidentiality rules. USF&G disputes that it violated any such rule or order, and to preserve its ability to appeal Justice Toal's contempt sanctions, filed a motion for reconsideration of that ruling. That motion has been pending for nearly 8 months, effectively preventing any appellate review of the order in question.

those tort actions have cited to and relied on the contempt ruling in response to motions to dismiss that are pending before Justice Toal, as if the contempt order conclusively resolved disputed questions of fact and law that were not properly before the court.

In order to maintain the status quo without prejudicing the federal litigation and the numerous state-court actions over which Justice Toal is presiding, USF&G seeks this Court's assistance in its original jurisdiction to stay the effect of the contempt order so that it can be fully and fairly considered on appeal. Through this petition, USF&G is not asking the Court to correct the numerous factual and legal errors of the contempt order. That time will come. At this point, USF&G is simply asking the Court to place a "hold" on that order so that the issues it purports to resolve can be fairly and orderly addressed through appellate review.

BACKGROUND

The five cases captioned above involve plaintiffs who have become ill or who have died allegedly due to asbestos exposure created in whole or in part by the listed defendants. Covil Corporation, which was an insulator that went out of business in 1991 and was judicially dissolved in May 1992, is or was a defendant in each case.[3]

Covil has been a serial, nominal asbestos defendant for generations both before and subsequent to its dissolution, and it did have insurance coverage for at least some of the asbestos claims asserted against it.[4] Those insurance contracts obligated the insurers to provide a defense

[3] Covil had previously been dismissed with prejudice in the *Hill* and *Taylor* cases.

[4] USF&G and Zurich have recently become aware that Covil had been judicially dissolved after a prior receiver had been appointed in the early 1990s. Although USF&G and Zurich had been aware that a prior receiver had been appointed in connection with an unrelated litigation, as far as they have been able to confirm it had been their understanding (and the understanding of defense counsel retained by the insurers to defend Covil over the years) that Covil's management had decided not to formally dissolve. In April 2020, however, counsel for Zurich discovered various court orders that had been misfiled by the Greenville Court of Common Pleas reflecting that, in fact, Covil had been judicially dissolved on May 12, 1992. Consequently, the current asbestos

for Covil, an obligation that continued despite the fact that it ceased functioning as a going concern and no longer had any officers, employees, or operations as of 1992. Accordingly, USF&G, Zurich, and other insurers would retain counsel on Covil's behalf and defend the company against asbestos claims, as they were required to do as a matter of contract.

This not-uncommon situation played out for years without incident or concern, until a jury returned a multi-million dollar verdict against Covil in an asbestos matter in the Middle District of North Carolina. The judgment was entered on October 19, 2018, in *Finch v. BASF Catalysts LLC*, Case No. 1:16-cv-1077-CCE-JEP (M.D.N.C.). As would be expected when a large judgment is entered, Covil appealed the outcome. That appeal is presently before the Fourth Circuit as Appellate Case No. 19-1594, and will be argued later this month.

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claims against Covil should be barred pursuant to South Carolina Code § 33-14-107 as a result of that dissolution. Astonishingly, however, the current Receiver for Covil has taken the position that Covil should remain subjected to liability despite its prior judicial dissolution and the statute of repose contained in Section 33-14-107. The Receiver has gone so far as to request rulings from Justice Toal to that effect (to which Justice Toal has since agreed), and separately requested (by letter to the Greenville court, which was not disclosed to USF&G or Zurich at the time) that that court transfer the prior receivership case to Justice Toal. By order dated May 1, 2020, Judge Charles B. Simmons, Jr., who had exclusive jurisdiction over the prior receivership proceedings, agreed to that request and transferred the case to Justice Toal "for any and all further proceedings." A motion filed by Zurich to vacate the transfer order is currently pending. *First Savings Bank v. Covil Corp.*, Case No. 91-CP-23-4445 (Greenville). Given that USF&G has been paying, along with Zurich and other insurers, to defend and indemnify Covil, USF&G has repeatedly asked the Receiver's national coverage counsel to explain why or how the Receiver's recent filings and positions has *advanced*, rather than *undermined*, Covil's interest in minimizing its liabilities. To date, neither the Receiver nor his counsel has offered any such explanation. Instead, on May 18, 2020, the Receiver filed yet another motion for sanctions against USF&G and its counsel, personally, for contending that claims against Covil should be deemed barred as a result of the recently discovered orders judicially dissolving Covil. *Taylor v. Air & Liquid Systems Corp.*, Case No. 2018-CP-40-04940 (Richland). The notion that a party purporting to act in the best interests of a corporate insured would not only affirmatively seek to undermine the insured's own defenses, but take the additional step of seeking sanctions against its insurers (and its counsel) for asserting positions that would benefit the insured by minimizing its liabilities, is quite possibly a first in the annals of judicial history.

To this point, every case against Covil had been defended, settled, dismissed, or otherwise resolved, all at the expense of Covil's insurers. But everything changed on November 1, 2018.

Plaintiffs' Counsel Seek Receiver Appointed for Covil

That day, the plaintiffs' attorneys in *Finch* filed a petition to have a receiver appointed for Covil. Covil had been out of business for nearly three decades and certainly had no assets to satisfy that judgment. Ms. Finch's attorneys—who also represent the plaintiffs in each of the South Carolina asbestos cases captioned above and in other cases against Covil and numerous others—enlisted the South Carolina Circuit Court to appoint a receiver for Covil with the stated objective of "taking possession of and disposing of any remaining assets of Covil Corporation," which counsel conceded consisted only of "its insurance coverage." Appx. 25.[5] Counsel filed their request to appoint a receiver only in *Taylor v. Air & Liquid Systems Corp.*, Case No. 2018-CP-40-4940 (S.C. Cir. Ct.), without notice to any of Covil's insurers, and neither the plaintiffs nor the newly appointed Receiver has instituted any separate proceeding specifically to address issues associated with any receivership.

The circuit court granted the petition on November 2, 2018—the very next day, even though the receivership statute unambiguously requires no fewer than four days' notice for such a drastic action "to any party to the action in possession of such property claiming an interest therein under any contract," S.C. Code Ann. § 15-65-20—and appointed Peter Protopapas, Esq., to serve as Covil's receiver. Appx. 30.[6]

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[5] Ms. Finch's attorneys indicated that they were filing the petition because days earlier, defaults had been entered in the *Taylor* case and another case, due to Covil's failure to answer. Appx. 28. Those defaults resulted during a transition of new counsel appointed to defend Covil.

[6] Though a remedy that this Court describes as "drastic" and one that should rarely be used, *S. Trust Co. v. Cudd*, 166 S.C. 108, 114, 164 S.E. 428, 430 (1932), the asbestos plaintiffs' attorneys have begun to ask the circuit court to appoint Mr. Protopapas the receiver over other companies that have not existed for nearly thirty years: Southern Insulation (requested on May 1, 2019, and

Insurers Seek Declaratory Judgments Regarding Insurance with the *Finch* Court

Meanwhile, in light of the magnitude of the *Finch* judgment, Zurich commenced a declaratory judgment action in the Middle District of North Carolina to sort out each carrier's respective insurance obligations to Covil, and to resolve other coverage issues as between Covil and the insurers. That case is captioned *Zurich American Insurance Company v. Covil Corporation*, *by and through its Receiver, Peter D. Protopapas*, Case No. 1:18-cv-932-CCE-LPA (M.D.N.C.), and it was filed on November 6, 2018.

The Receiver Attempts to Evade Federal Jurisdiction on Insurance Issues

Though federal courts routinely construe insurance contracts and issue declaratory relief regarding insurance responsibilities, the Receiver has fought their involvement at every turn. The first stage of those efforts involved a series of procedural maneuvers, including filing duplicative state-level suits that were ultimately removed to the District of South Carolina:

Table 1 on Following Page

granted on May 7, 2019, in *Hopper v. Air & Liquid Systems Corp.*, Case No. 2019-CP-40-76) and Starr Davis (requested on January 18, 2019, and granted on February 22, 2019, also in *Hopper*). Just as with Covil, the plaintiffs' attorneys indicate that the only assets for these companies is the remaining insurance coverage for each, and in each case the Receiver has retained the same outside counsel to pursue insurance, apparently on a contingency fee basis.

TABLE 1: THE RECEIVER'S INITIAL ATTEMPTS TO EVADE FEDERAL JURISDICTION

November 27, 2018	The Receiver filed a lawsuit in South Carolina circuit court, in which he attempted to present all of the issues that were already pending before the Middle District of North Carolina to the state court. That case was removed to the District of South Carolina, where it is pending before Judge Hendricks, captioned *Covil Corp. v. Zurich American Insurance Co.*, Case No. 7:18-cv-3291-BHH (D.S.C.).
December 20, 2018	The Receiver moved to remand *Covil v. Zurich* from the District of South Carolina back to state court. Appx. 413.
January 18, 2019	The Receiver moved for the Middle District of North Carolina to abstain from resolving *Zurich v. Covil*. Appx. 338.
April 24, 2019	The Receiver filed yet another complaint in state court involving the insurance dispute. That case was also removed to the District of South Carolina, where it is also pending before Judge Hendricks. That case is captioned *Covil Corp. v. Wall Templeton & Haldrup, PA*, Case No. 3:19-cv-1635-BHH (D.S.C.).
June 14, 2019	Judge Hendricks denied Covil's motion to remand *Covil v. Zurich*, and she realigned the parties to make clear that the Receiver and the asbestos plaintiffs are marching in lockstep. Appx. 430.

Judge Hendricks's denial of the Receiver's motion to remand proved to be a turning point in this whole situation. With his forum-shopping stymied, the Receiver enlisted the state circuit court in an effort to undermine the federal cases.

The Receiver Enlists the Circuit Court to Usurp Issues Pending in Federal Court

Two business days after learning that these issues would be addressed by at least one federal court (the Middle District of North Carolina ultimately denied the Receiver's motion to abstain as well) the Receiver filed a request with the South Carolina circuit court (1) that it hold a "status conference" in all of the above-captioned asbestos cases; (2) that it "requir[e] attendance of representatives" from each of Covil's insurers; and (3) that it inquire into several topics, including *inter alia* "[p]rior management of the insurance policies," "[t]he remaining and applicable limits of Covil's insurance policies," " coverage available under various coverage parts

of the policies," and even the various federal cases in which these exact issues were pending. Appx. 45–47. The circuit court granted the motion on July 5, 2019, and held the requested status conference on July 11, 2019—even though it lacked jurisdiction over the insurers, and even though the issues raised by the Receiver's request were not pending in any of these actions.

Next, on September 13, 2019, the Receiver orally requested that the South Carolina circuit court again address the coverage issues that are pending before the federal courts. On September 19, 2019, the circuit court issued a "show cause" order in the above-captioned cases—again, to which the insurers are not even parties—requiring each insurer to produce hundreds of thousands of pages of information, dating as far back as 1954, and to do it all by September 30th—just eleven days. Appx. 184. The Receiver did not serve the insurers with that order until October 1, 2019—the day ***after*** their compliance deadline—and even then, the Receiver served the order by sending it to the Department of Insurance.

Finally, armed with an order with which compliance was literally impossible, the Receiver filed another request for a show cause hearing with the circuit court. Appx. 180. The Receiver filed that motion on October 24, 2019; the circuit court granted it five days later and issued an order requiring Covil's insurers to appear and "be prepared 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" and virtually everything else that was at issue in the insurance disputes pending before the District of South Carolina and the Middle District of North Carolina. Appx. 197. Once more, the circuit court ordered that "USF&G, Sentry, Zurich, and Hartford are required to attend." *Id.*

Circuit Court Issues Contempt Order Against Insurers

The circuit court held its show cause hearing in November 2019, and it issued the contempt order at issue in this petition on January 8, 2020. In that order, the circuit court—again, with no personal jurisdiction over the insurers, without any of the insurance issues actually pending before it, and without any kind of discovery process or evidentiary procedures—issued a 20-page ruling drafted and proposed by the Receiver that attempted to address and resolve almost every insurance-related issue that is the subject of the declaratory judgment actions pending in the District of South Carolina and the Middle District of North Carolina. Appx. 1.

The contempt ruling directly contravenes governing insurance law as well as the plain language of actual insurance contracts between Covil and its insurers, and even created additional coverage for Covil out of whole cloth, all as a purported sanction against entities that were not properly before the court. The order proposed by the Receiver and signed by Justice Toal ended with an unprecedented instruction 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." Appx. 23.

USF&G timely filed and served a motion to reconsider the contempt order. Appx. 201. It filed and served a notice of appeal with the Court of Appeals out of an abundance of caution. Appx. 252. And on February 7, 2020, USF&G filed and served a motion to stay the contempt order pending the resolution of the motion to reconsider and subsequent appeal, and sought prompt resolution of that motion given that numerous parties had been citing to and attempting to utilize the contempt order in multiple jurisdictions. Appx. 305. The Receiver has not filed any opposition to either motion, but both motions remain pending and have not been argued or ruled upon.

District of South Carolina Enjoins the Receiver from Further State Court Efforts

Following the circuit court's issuance of the sanctions order, Judge Hendricks issued an order designed to put an end to the Receiver's procedural fencing. Specifically, on February 27, 2020, in a 25-page decision, the federal court enjoined 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." Appx. 474.

Judge Hendricks's order suspended the Receiver's cross-claims against USF&G and other insurers in the state-level asbestos cases in which the Receiver has attempted to present all of the insurance coverage issues that are pending before two separate federal courts as cross-claims against Covil's insurers in individual tort actions filed against them as alleged "alter egos" of Covil. Although those cross-claims were filed in violation of Rules 12(b)(8) and 13(g), SCRCP, these efforts have now been enjoined by the District of South Carolina, at least those filed in his capacity as Receiver for Covil.

On February 28, 2020, USF&G filed a Supplemental Submission in Further Support of its January 17, 2020 Motion to Reconsider, Alter or Amend the contempt order, to apprise the circuit court of Judge Hendricks' injunction (which supported USF&G's prior objections to the propriety of the relief requested by the Receiver and adopted by the circuit court) and of positions taken by the Receiver in the federal coverage action that directly contravened the positions advanced by the Receiver as well as factual findings adopted by the circuit court. Appx. 329.

The Receiver Begins to Misuse the Contempt Order, Necessitating this Petition

Both USF&G's motion to reconsider the contempt order and its motion to stay that order remain pending before the circuit court. But the unsettled state of the unprecedented contempt order has not dissuaded the Receiver from attempting to use it to substantively disrupt the federal

proceedings. The Receiver has repeatedly cited the contempt order to federal courts in support of dispositive motions, procedural motions, and even as the basis for avoiding Judge Hendricks's injunction. For example:

TABLE 2: THE RECEIVER'S SUBSEQUENT ATTEMPTS TO EVADE FEDERAL JURISDICTION

February 10, 2020	The Receiver moved the Middle District of North Carolina to grant summary judgment in his favor on all insurance issues, arguing that the circuit court's contempt order conclusively settled all of the disputed insurance issues pending. Appx. 342.
February 11, 2020	The Receiver moved the Middle District of North Carolina to take judicial notice of the contempt order, arguing that it addressed substantive insurance issues raised on summary judgment in the Middle District of North Carolina action "head on," thus supporting rulings in the Receiver's favor. Appx. 346.
February 14, 2020	The Receiver asked the Middle District of North Carolina to stay the declaratory judgment portion of that case, arguing that the insurance issues "have been decided by a South Carolina state trial court." Appx. 351.
March 11, 2020	The Receiver cited the contempt order to the District of South Carolina as the basis for dissolving the injunction. Appx. 480.
March 13, 2020	The Receiver cited the contempt order to the Middle District of North Carolina as conclusively resolving the disputed insurance issues: "Indeed, Chief Justice Toal's order has resolved the pertinent South Carolina legal issues." Appx. 372.
March 17, 2020	The Receiver again cited the contempt order to the Middle District of North Carolina as a conclusive ruling: "Covil's Motion [for Summary Judgment] is based on the undisputed fact that Justice Toal resolved the issues Covil's motion raised, and accordingly pronounced South Carolina law, in her January 8, 2020 order." Appx. 382.
March 19, 2020	The Receiver cited the contempt order to the District of South Carolina as the basis for reconsidering Judge Hendricks's denial of the motion to remand the *Covil v. Zurich* case back to state court. Appx. 502.

Table 2 Continued on Following Page

March 25, 2020	The Receiver again cited the contempt order to the Middle District of North Carolina as a basis for federal abstention, arguing that "[a] South Carolina appellate court should hear [the] argument" that the contempt order was not a ruling on the merits, and that the coverage action should be halted in its tracks so that "the South Carolina appellate courts [have] an opportunity to consider Justice Toal's [contempt] [o]rder." Appx. 404.
March 26, 2020	The Receiver cited the contempt order to the District of South Carolina as the basis for federal abstention in the *Covil v. Wall Templeton* case. Appx. 519.
April 1, 2020	The Receiver again cited the contempt order as the basis for unwinding Judge Hendricks's injunction prohibiting additional attempts to evade federal jurisdiction. Appx. 529.

Asbestos Plaintiffs Also Misuse Contempt Order

The Receiver is not alone in attempting to misuse the contempt order. In every new asbestos case filed since the order's entry, asbestos plaintiffs are suing USF&G and other insurers as direct defendants in asbestos-related tort actions. They do not allege that these insurers manufactured any asbestos-containing products that caused the plaintiffs' injuries. They do not allege that these insurers owned any facilities where the plaintiffs breathed asbestos fibers. Instead, they allege that by providing Covil with a contractually required defense under various insurance contracts, these insurers became the "alter ego" of Covil and in so doing, allegedly assumed its debts and liabilities. It is an extreme theory that finds zero support in the law from any court in the country.

Cases pushing this unprecedented theory, which would wreak havoc on the ability of South Carolina policyholders to obtain coverage in the insurance markets if adopted by a court of last resort, are now being filed against USF&G and Zurich on a regular basis.[7] In response to motions

[7] These cases include *Pavlish v. Covil Corp.*, 2019-CP-42-3968 (Spartanburg) (filed November 8, 2019); *Hutto v. Covil Corp.*, Case No. 2019-CP-40-6956 (Richland) (filed December 12, 2019);

to dismiss filed by USF&G and Zurich, plaintiffs have quoted liberally from the contempt order and have argued that the issue has already been decided by Justice Toal. *See, e.g.*, Appx. 234. And plaintiffs have similarly relied on the contempt order in discovery, arguing, for example, that Covil must produce to its litigation adversaries all of Covil's attorneys' communications and work product about Covil's defenses over the course of decades and that neither Covil nor its insurers may assert privilege based on Justice Toal's prior rulings. *See, e.g.*, Appx. 240–44.[8]

In several of these actions, the Receiver—including as well in his capacity as a receiver for Starr Davis or Southern Insulation—has filed cross-claims against USF&G based on the same "alter ego" theory and seeking declarations on coverage issues in these tort actions based on the contempt order. In addition to filing such claims in asbestos-related personal injury and wrongful death actions in which USF&G has now been sued as a party, the Receiver has also filed several coverage litigations against USF&G and other insurers in multiple courts, oftentimes duplicative of lawsuits and cross-claims he has filed elsewhere and which again seek to leverage the contempt order. For example, on February 28, 2020, after being enjoined from seeking coverage rulings in state court in his capacity as Receiver for Covil, the Receiver sought summary judgment in an action he filed in his capacity as Receiver for Starr Davis against an affiliate of USF&G and several other insurers. The Receiver filed his motion solely against USF&G's affiliate (Travelers Casualty and Surety Company) and no other party, before it had even answered the complaint, arguing to

Hagan v. Armstrong Int'l, Inc., Case No. 2020-CP-40-265 (Richland) (filed January 15, 2020); *Rampey v. Covil Corp.*, Case No. 2020-CP-40-585 (Richland) (filed January 29, 2020); *Reilly v. Covil Corp.*, 2020-CP-40-952 (Richland) (filed February 17, 2020); *Jonas v. Air & Liquid Systems Corp.*, Case No. 2020-CP-40-1163 (Richland) (filed February 26, 2020); *Murphy v. Covil Corp.*, Case No. 2020-CP-40-1364 (Richland) (filed March 6, 2020); and *McCullough v. 4520 Corp.*, Case No. 2020-CP-40-01952 (Richland) (filed April 14, 2020).

[8] Justice Toal has not yet ruled on these motions.

Justice Toal that the contempt order should not be considered a sanction, but an adjudication on the merits of substantive insurance coverage issues on which he claims the court has already ruled:

> In its role as the Receivership Court for another South Carolina insurance contractor, Covil Corporation, this Court has already considered similar insurance coverage issues, and ***unequivocally determined*** that South Carolina law . . . governs the novel issues of South Carolina insurance law giving rise to Covil's insurance claims. Starr Davis respectfully asks this Court to ***recognize and adopt its prior order in full*** and enter a declaration consistent with the Court's prior order . . . .

Appx. 317–18 (emphasis added).

The Receiver's numerous arguments to Justice Toal and two federal courts after the contempt order was issued are strikingly different from what the Receiver represented to Judge Hendricks when the insurers first sought to enjoin the Receiver from using these actions as a means of circumventing the pending coverage cases. As USF&G and Zurich noted in their objections both before and after the circuit court issued the contempt order, the Receiver previously represented to Judge Hendricks that he was only seeking "documents and information" from Covil's insurers, not substantive findings of fact and rulings on legal issues that were (and remain) the subject of the federal coverage actions. For example, on October 14, 2019, the Receiver argued to Judge Hendricks:

> The Receiver has repeatedly indicated that his 'efforts are not an 'end run' around the coverage litigation, but, rather, solely an effort to obtain the documents and information necessary to defend the cases brought against Covil and to administer Covil's policies while the coverage litigation proceeds.'

Appx. 446.

The above is only a sampling of the filings, pleadings, and arguments that have been made by numerous parties to misuse the January 8, 2020 contempt order as reflecting South Carolina law and as the final word on the factual disputes between the Receiver and Covil's insurers;

USF&G has not attempted to catalogue them all in this petition. But these repeated attempts, combined with the circuit court's silence on USF&G's motion to stay the effect of the contempt order, require USF&G to file this petition and seek a writ of supersedeas that suspends the effect of the contempt order until it is fully reviewed on appeal. *See Hooper v. Rockwell*, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999) (holding that "a contempt order also is a final order that is immediately appealable"); *State v. Smith (In re Decker)*, 322 S.C. 212, 214, 471 S.E.2d 459, 461 (1995) (holding that a contempt order is not automatically stayed upon appeal and issuing a writ of supersedeas accordingly).

JURISDICTION

The purpose of a writ of supersedeas is to suspend a trial court's decision "to preserve the status quo pending" an appeal of that decision, and "to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (quoting parenthetically 4A C.J.S. *Appeal & Error* § 662, at 494–95 (1957)). Article V, Section 5 of the South Carolina Constitution vests this Court with jurisdiction to issue all "original and remedial writs," such as a writ of supersedeas. *See also* Rule 245(b), SCACR (vesting the Court with original jurisdiction to address extraordinary writs).

Rule 241(d)(1), SCACR, further authorizes a litigant who has been adversely impacted by a judgment to seek an appellate court's intervention through a writ of supersedeas when, as here, the litigant has sought a stay with the circuit court, but the circuit court has delayed ruling on the motion for over three months while the contempt order has been repeatedly abused in the interim.[9]

[9] As noted above, USF&G previously filed and served a notice of appeal of the contempt order with the Court of Appeals, while noting the pending motion to reconsider. The appeal was dismissed without prejudice due to the pendency of USF&G's motion to reconsider with the circuit court. Because there is technically no appeal pending before the Court of Appeals at this moment, it is unclear whether that court would have jurisdiction to issue a writ of supersedeas, as its

ARGUMENT

The issues involving Covil's insurance coverage and the respective contractual responsibilities that arise under the various policies issued several decades ago are pending for resolution before the Middle District of North Carolina and the District of South Carolina. Those courts are fully capable of addressing those issues, and, unlike the circuit court here, they have jurisdiction over the parties and subject matter to do so. However, the Receiver's and other parties' continuous citation to the circuit court's contempt order in their various motions to the federal courts should be balanced by an order from this Court indicating that the contempt order remains subject to further appellate review that has yet to occur. This is so for many reasons.

For one, absent a writ of supersedeas, the federal courts have been asked to determine what deference, if any, to give to the contempt order. It ostensibly addresses many of the same issues pending before the federal courts, but it is also the subject of a motion to reconsider and an inevitable appeal, and it was issued as a *sanction* by a court lacking jurisdiction, without any procedural safeguards, on an incomplete record, and without following governing South Carolina law. As a matter of comity with the federal bench, this Court should issue a writ of supersedeas and spare the federal courts from having to unpack the contempt order and all of the procedural posturing underlying it.

Similarly, as a matter of comity with the executive department, a writ of supersedeas would relieve the Attorney General and the Department of Insurance from having to assess the propriety

jurisdiction to do so is only "appellate jurisdiction." S.C. Code Ann. § 14-8-200(a). However, there cannot be any legitimate dispute about this Court's jurisdiction to issue the requested writ under the South Carolina Constitution, which is why USF&G is bringing its petition to this Court in its original jurisdiction.

or impropriety of the myriad misstatements in the sanctions order until the motion to reconsider and subsequent appeal have completed.

Finally, the contempt order is littered with legal and factual errors, as enumerated in USF&G's pending motion to reconsider the contempt order. To grant this petition, the Court does not have to address the merits, as the only issue on this petition is whether, as a matter of fairness and equity, the circuit court's contempt ruling should be stayed until South Carolina's appellate courts have an opportunity to review it. But USF&G's arguments are certainly meritorious and weigh heavily in favor of supersedeas here, as there is no support for the numerous conclusions that the circuit court reached in this egregious and unprecedented contempt order. *See In re Decker*, 322 S.C. at 214, 471 S.E.2d at 461 (issuing a writ of supersedeas regarding a contempt order because the issues raised in the case were "novel questions").

To summarize USF&G's objections:

No Jurisdiction: The circuit court lacked personal jurisdiction over USF&G, as USF&G is not a party to any of these cases, nor was it ever served with process. The circuit court also lacked subject matter jurisdiction to address the insurance issues purportedly resolved in the contempt order, as none of these issues are presented by any of the pleadings in any of these cases.[10] Nor did the circuit court give credence to any of USF&G's legitimate responses to the claim that it had somehow violated any of the circuit court's prior orders, which were also issued without appropriate jurisdiction. Accordingly, the contempt order is void *ab initio*. *See, e.g.*, *Long v. McMillan*, 226 S.C. 598, 608–09, 86 S.E.2d 477, 482 (1955) (holding that a contempt order is

[10] Recently, the Receiver has begun captioning his various motions and pleadings, "In re Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas." This is a creation of the Receiver, as there is no such action pending other than the prior receivership action from Greenville County that was recently transferred to Justice Toal at the Receiver's request, and which is subject to a pending motion to vacate the transfer. *See supra* n. 4.

"absolutely void" if the entity against which it is entered is not "allowed to offer evidence and argument in his defense," and that "disobedience of a void Order, Judgment, or Decree, or one issued without jurisdiction of subject matter and parties litigant, is not 'contempt'").

Contrary to "Alter Ego" Law: The contempt order states that by providing a contractually required legal defense for Covil in underlying tort suits, the insurers somehow became the "alter ego" of Covil. As noted above, the Receiver and numerous plaintiffs are now attempting to leverage that erroneous finding into a ruling that USF&G and Covil's other insurers are now responsible for all of Covil's underlying liabilities, regardless of the terms and conditions of the insurance contracts actually agreed to by Covil and its insurers. This is contrary to law.

To establish that a party is an alter ego of another, even on a *prima facie* basis, there must be a showing that the alleged alter ego or "dominant entity" exercised "domination or complete control" over the subservient entity, and the dominant entity must have engaged in fraudulent or self-serving conduct that results in "inequitable consequences." *See Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006). There was no evidence that USF&G was involved in *any* of Covil's business operations or that USF&G created or operated Covil for the sole purpose of using it as a shell company to further USF&G's own interests. USF&G has never possessed any ownership interest in Covil, it had no power to manage the affairs of Covil, and never had any involvement in any business operations of Covil. The alter ego finding was instead premised on the Receiver's assertions that USF&G controlled Covil's defense after Covil ceased operations.

Yet, by providing Covil with a defense, USF&G was exercising a contractual right and fulfilling a contractual duty under the policy issued to Covil. Covil's insurance policies authorize its insurers to retain lawyers and experts, and present witnesses on Covil's behalf, to defend Covil

in litigation. Significantly, an insurer's obligation to defend its policyholder in litigation continues even after the policyholder ceases operations and goes out of business.[11] Indeed, had the insurers *failed* to defend Covil on the basis that it had ceased operations or was otherwise defunct, they could have been subject to breach of contract or bad faith liability. *See Tadlock Painting Co. v. Marlyand Cas. Co.*, 322 S.C. 498, 504, 473 S.E.2d 52, 55 (1996) (recognizing a cause of action for a breach of the implied covenant of good faith and fair dealing when an insurer fails to perform its obligations to its insureds). Nor was the fact that Covil had ceased operations a secret to anyone, particularly litigants suing Covil in the years since Covil ceased operating.

The notion that an insurer should be deemed the alter ego of its insured in these circumstances is diametrically opposed to fundamental contract, tort, and insurance law principles. The circuit court's finding was based on ***no evidence*** on any of these issues. It was not ***briefed*** by any of the parties (or non-parties) on the merits. And it was not put at issue by any pleadings in these actions. Nonetheless, the circuit court issued this alter ego finding as part of its contempt ruling, and that finding is now being touted by the Receiver and other litigants in numerous courts as a substantive determination of liability. Even putting aside the due process, jurisdictional, and procedural defects of this purported finding, as a matter of public policy this alter ego theory would, if accepted, turn the insurance relationship on its head. It would threaten to transfer the insured's underlying tort liabilities to the insurer based on the insurer's limited contractual

[11] The policy issued by USF&G, for example, expressly provides that the obligations of USF&G continue in effect notwithstanding the bankruptcy or insolvency of the insured, and courts have so held. *See, e.g., Wang v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 2:10-CV-3146-RMG, 2012 WL 12898226, at *3 (D.S.C. Feb. 9, 2012) (where the insurance policy expressly provides that insolvency does not relieve the insurer of its defense obligations, "[t]he possibility of the insured's insolvency is not [] a basis for the insurer to avoid its duty to provide defense costs"). A recent opinion by the South Carolina Bar likewise confirms that attorneys retained by insurance carriers on behalf of an insured may defend even insureds who cannot be located. *See* Ethics Advisory Opinion 19-04.

agreement to accept the financial risk of such liabilities subject to all of the agreed terms, conditions and limitations set forth in the parties' agreed insurance contact.

Such a result would make it impossible for insurers and their insureds to accurately price coverage, which would threaten the availability and pricing of insurance to the detriment of insurers, South Carolina businesses and insureds, and ultimately to the underlying victims themselves. *See Pa. Nat'l Mut. Cas. Ins. Co. v. Roberts*, 668 F.3d 106, 115 (4th Cir. 2012) ("At bottom, an insurance contract is an agreement to accept a premium in exchange for a contractually defined risk. If an insurance company cannot limit its risk to a defined period, it will be unable to determine the precise risks assumed under a contract, which in turn will prevent it from accurately pricing coverage."). Thus, this issue alone raises important questions of law and public policy that should be reviewed and resolved on appeal.

Unlawful Receivership: The circuit court improperly appointed a receiver over Covil.[12] The statutorily-required notice period for the appointment was ignored. S.C. Code Ann. § 15-65-20. The receiver was appointed in the middle of the above-captioned asbestos cases, in violation of this Court's instruction not to appoint a receiver "during the progress of a cause" absent proof of a "danger that the property [over which the receivership is necessary] will be materially injured before the case can be determined." *Richland County v. S.C. DOR*, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018) (citing *Pelzer v. Hughes*, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887)). No such evidence was presented here, nor did the circuit court identify any such evidence in the receivership order, making the appointment itself reversible error. *See, e.g.*, *Southern Trust*, 166 S.C. at 116,

[12] As noted above, *see supra* n. 4, it has recently come to light that Covil had been judicially dissolved, which raises questions concerning the propriety and need for the circuit court's subsequent appointment of the Receiver. Those issues were not before the circuit court at the time of the January 8, 2020 Order.

164 S.E. at 430 (reversing appointment of a receiver because it was appointed "during the progress of a case" without any basis for such action). And because USF&G was not a party to the suit in which the Receiver was appointed, nor afforded notice, it was under no obligation to intervene and file an appeal to address these deficiencies. All of these due process errors should be corrected on appeal, if not sooner through USF&G's pending motion to reconsider.

Contrary to Insurance Law: Among other errors on substantive insurance law issues, the contempt order puts the burden of proof regarding Covil's insurance coverage on the insurers, rather than on the Receiver. This is contrary to law. *See, e.g.*, *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962) (holding that the insured was responsible for proving the contents of an insurance policy).

The contempt order finds that Covil is not responsible for covering its own losses incurred in any time periods in which it chose not to insure its risks and for periods in which insurance was unavailable. This is contrary to law. *See Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 45, 717 S.E.2d 589, 591 (2011) ("Using our 'time on risk' framework, the allocation of the damage award against Crossmann must conform to the actual distribution of property damage across the progressive damage period. Where proof of the actual property damage distribution is not available, the allocation formula adopted herein will serve as an appropriate default method for dividing the loss among Crossmann's insurers.").

It construes the "completed operations hazard" portion of the various insurance policies to be ambiguous and to find that any aggregate limit of liability applies only after Covil completed its work at a certain jobsite. This is a central issue in the pending coverage actions between Covil and its insurers, and is contrary to law. *See, e.g.*, *In re Wallace & Gale Co.*, 385 F.3d 820, 826, 834 (4th Cir. 2004) (affirming that a completed operation hazard, and thus the aggregate policy

limit, applies in policies where the bodily injury that occurred during the policy period took place after the insured completed its operations, and explaining that the very same provision of USF&G's policy as was included in its insurance contract with Covil was unambiguous).[13]

And the contempt order characterizes an aggregate policy limit as an exclusion in coverage. This, too, is contrary to law. *See Gaskins v. Firemen's Ins. Co. of Newark, N.J.*, 206 S.C. 213, 217, 33 S.E.2d 498, 499 (1945) (explaining that "the amount of insurance" is a "necessary term[]" of an insurance contract, not a policy exclusion).

None of those rulings bears any relationship to the harm that allegedly resulted from the insurers' alleged contempt, nor was there any claim or defense at issue before the circuit court that could have possibly justified any of these rulings. The contempt order should not be treated as a pronouncement of South Carolina insurance law until these issues and others related to them are fully reviewed and considered by the courts in the pending declaratory judgment actions that are actually adjudicating these issues.

Rewriting and Creating Insurance Contracts: The contempt order purports to rewrite USF&G's policy with Covil to eliminate the aggregate liability limit, even though there is no dispute that such a limit exists on the face of the policy. Indeed, despite the fact that USF&G produced its policy to the Receiver and it contained such a limit in plain and unambiguous terms, the Receiver argued, and the circuit court apparently agreed, that "USF&G has not been transparent with either Covil or the court," and that "[t]his 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

[13] *See also Gen. Ins. Co. of Am. v. U.S. Fire Ins. Co.*, 886 F.3d 346, 355 (4th Cir. 2018); *Ohio Valley Insulating Co. v. Md. Cas. Co.*, 2018 WL 6812527, at *3 (W.D. Pa. Dec. 27, 2018); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co.*, 331 B.R. 652, 668 (D. Md. 2005); *Johnson v. Studyvin*, 828 F. Supp. 877, 884 (D. Kan. 1993); *Plant Insulation Co. v Fireman's Fund Ins. Co.*, No. CGC06448618, 2013 WL 3286410, at *7 (Cal. Super. Ct. Apr. 08, 2013).

completed operations claims." Appx. 14. Yet, in the Middle of District of North Carolina, the Receiver ***stipulated*** to a different judge that the very ***same policy*** was "a complete and accurate copy of the Policy SMP 490049," including the policy limit that the circuit court here found—contrary to all evidence—did not exist. Appx. 477.

Even worse, the contempt order effectively ***creates*** new insurance contracts between Covil and USF&G for a ten-year period, despite the absence of evidence to support creating a decade's worth of new policies out of whole cloth, and without any discovery or trial on the point. It is unprecedented, as far as USF&G is aware, for a court to create a ten-year contractual relationship between two private parties as a putative contempt sanction.[14]

No Failure to Comply with an Order: In order to find a party in contempt, the record must show that it willfully disobeyed an order of the court. *Noojin v. Noojin*, 417 S.C. 300, 306, 789 S.E.2d 769, 772 (Ct. App. 2016). But there is no such order that USF&G "willfully disobeyed" here. The only order that ever required it to do anything—which, again, was issued without jurisdiction over USF&G, the other insurers, or the insurance issues pending before the federal courts—was not even served on USF&G until ***after*** the deadline for compliance had passed. And despite the inflammatory conclusions set forth in the contempt order, as USF&G demonstrated and will demonstrate on appeal, it complied with that order after extensive, time-consuming, burdensome, and thorough efforts, ultimately resulting in the production to the Receiver of approximately 750,000 pages of materials. Moreover, as this Court has previously recognized, an order issued where jurisdiction is lacking cannot serve as the basis for a contempt ruling. *Long*, 226 S.C. at 608–09, 86 S.E.2d at 482.

[14] In the pending coverage litigation, the Receiver and USF&G are addressing these very issues: the existence (or lack thereof), terms, and conditions, of alleged policies during this time period through expert testimony and other evidence taken in the course of actual discovery.

Erroneous and Unsupported "Factual Findings": The contempt order is replete with purported factual findings that simply have no evidentiary support, and that are the product of a process that had no discovery, no trial, no cross-examination, and no procedural safeguards. They are spelled out in detail in USF&G's motion to reconsider (Appx. 201) and will be briefed in full during the appellate process. For purposes of this petition, the Court need only note that there are legitimate objections to both the substance of the numerous "factual findings" in the contempt order and the absence of due process that led to those "findings."

In particular, the purported "findings" are based in large part on the notion of spoliation of documents from the ***early 1980s***, and that argument is based on a hearsay expert report submitted in an unrelated reinsurance dispute in a New York court that has nothing at all to do with Covil. There was no trial, no discovery, and no cross-examination permitted on these issues, nor was there any kind of process that could have possibly brought these issues to the circuit court in the first place. Instead, the Receiver pulled a publicly filed expert report written as an advocacy piece in an unrelated litigation, and sought to use that report as a substitute for actual evidence. And even if there had been some evidentiary basis to conclude that USF&G intentionally destroyed information pertaining to Covil (there wasn't), such document destruction could not possibly give rise to a finding that USF&G should be held in contempt for willfully violating orders entered decades later. There is simply no precedent for a contempt order being based on untested alleged actions from four decades prior, from a hearsay expert report from unrelated litigation in a different state that has no relation to anything actually pending before the sanctioning court.

Because there were no procedural safeguards that preceded the "factual findings," and no evidentiary record to support them, it would be fundamentally unfair for USF&G to have to defend against the contempt order in other litigation while it undergoes further review before the state

appellate courts. Accordingly, for this reason as well as those outlined above, the Court should issue a writ of supersedeas.

CONCLUSION

More than three months ago, USF&G sought a stay of the contempt order from the circuit court. Though the Receiver has never filed any opposition to that request, the circuit court has not ruled on the motion. In the interim, the Receiver has attempted to misuse the contempt order to short-circuit federal litigation in which issues associated with Covil's historical insurance coverage have been properly joined, and numerous other plaintiffs have joined in by making similar arguments in pursuit of novel theories of liability in a multitude of lawsuits that are both unprecedented and raise important issues of public policy.

At bottom, USF&G is prepared to fully brief all of the issues noted above at the appropriate time for appellate review. For now, though, it should not be further prejudiced in litigation to which it actually is a party by having the contempt order masquerade as conclusive findings regarding the issues pending before the federal courts, nor should USF&G be required to address these issues with any of the state's executive authorities until after the appellate courts have had an opportunity to considered the unprecedented and legally erroneous contempt order. To maintain the status quo and preserve USF&G's appellate rights, USF&G respectfully requests that the Court grant this petition and issue the requested writ of supersedeas.[15]

[15] Because the contempt order does not compel USF&G to take any action and Covil is (and always has been) defended in the underlying asbestos lawsuits, USF&G respectfully submits that there is no basis for requiring a bond or any other "undertaking" in order for a supersedeas to issue. Nor would the Receiver be prejudiced in any way by operation of a supersedeas, as the issues in the contempt order are actually being litigated in the District of South Carolina and the Middle District of North Carolina before courts with jurisdiction over the insurers, the Receiver, and the subject matter. USF&G noted the absence of any need for a bond in its motion to stay filed with the circuit court, and, as noted above, the Receiver has not made any objection to that request.

Respectfully submitted,

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May 20, 2020

Indeed, the Receiver has yet to respond at all to USF&G's pending motion for reconsideration or request for an expedited stay.

VERIFICATION

I, Craig P. Johnson, declare as follows:

1. I am Director, Strategic Resolution Group, The Travelers Indemnity Company, and authorized to submit this verification on behalf of United States Fidelity and Guaranty Company.

2. I have personal knowledge of the factual statements contained in this Petition For a Writ of Supersedeas based on a review of files and records in this case, and if called upon to testify, I would competently testify as to the matters stated herein.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.

Craig P. Johnson

PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Petitioner United States Fidelity and Guaranty Company, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by emailing a copy of the same to the email addresses for each of the below-listed counsel pursuant to the email addresses currently listed in the AIS database:

Pleading: USF&G's Petition for a Writ of Supersedeas

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