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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2020-CP-40-02098

Appellate Case No. 2022-001722

Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,

Appellant.

MOTION TO DISMISS AND EXPEDITE

This is the *third* frivolous appeal filed by Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) in this case in less than six months.¹ The Supreme Court of South Carolina has warned Covil’s insurers that filing frivolous appeals to delay trial proceedings would

¹ On August 23, 2022, the Supreme Court of South Carolina denied Penn National’s petition for a writ of certiorari regarding a non-appealable discovery order (Appellate Case Number 2022-000785). On August 9, 2022, the Court of Appeals dismissed Penn National’s separate, parallel appeal on the same non-appealable discovery order (Appellate Case Number 2022-000761). Then, on November 15, 2022, the Court of Appeals denied Penn National’s motion for reconsideration (Appellate Case Number 2022-000761).

not be tolerated.² Penn National is aware of this admonishment from the Supreme Court against filing appeals in an attempt to delay the adjudication of cases involving Covil.³

Nonetheless, Penn National filed its latest, last minute frivolous Notice of Appeal to delay the commencement of a December 12, 2022 trial on narrow issues of insurance coverage law that are not triable to a jury. The three Causes of Action pleaded by the Receiver for Covil Corporation (“the Receiver”) against Penn National are all actions for Declaratory Judgment. The circuit court’s order confirming a non-jury trial on these declaratory judgment causes of action noted that it was not an appealable order. Accordingly, it is time for this Court to end what the circuit court described as Penn National’s “foot dragging operation.” (App. 73).

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Peter D. Protopapas, in his capacity as the Receiver, by and through the undersigned counsel, respectfully requests this Court dismiss the frivolous Notice of Appeal filed by Penn National on December 7, 2022.

² Unfortunately, this is not the first time Covil’s insurers have attempted to abuse our appellate courts to subvert justice and delay scheduled trials. For example, on December 21, 2020, other insurers of Covil, in a separate case, filed a Notice of Appeal from an unappealable bifurcation order setting a bench trial on certain non-jury matters on January 11, 2021. *See* Appellate Case No. 2020-001663. Two days after filing the Notice of Appeal, the insurer filed an emergency Petition for a Writ of Prohibition with the South Carolina Supreme Court requesting the Supreme Court review the same bifurcation order and prevent the bench trial from proceeding. *See* Appellate Case No. 2020-001670. The insurer later withdrew its Petition on January 4, 2021. *Id.* This Court dismissed the appeal on January 6, 2021, as not immediately appealable. The Supreme Court declined to review this dismissal. *See* Appellate Case No. 2021-000462. On March 9, 2021, the Supreme Court issued an order noting its expectation that “the parties and their attorneys in this and any other case . . . fully cooperate with the trial court in order to ensure the case is tried or otherwise disposed of in a timely manner” and cautioning that “[a]ny action taken for the purpose of delaying the disposition of this case will, under appropriate circumstances, merit the imposition of sanctions.” *See* Appellate Case No. 2020-001670.

³ *See* Appellate Case No. 2022-000785, Return to Petition for Writ of Certiorari at 9 n.7.

Summary dismissal is appropriate where, as here, no substantial question has been presented on appeal. South Carolina law is clear that a cause of action for declaratory judgment seeking the interpretation of an unambiguous insurance policy is not an issue that is triable to a jury. However, in contradiction to decades worth of case law governing appealability and the non-jury nature of a declaratory judgment action seeking the interpretation of an insurance policy, Penn National nonetheless appealed the December 7, 2022 Order of the Honorable Jean Hoefer Toal confirming that this declaratory judgment action would proceed as a non-jury trial beginning at 9:30 a.m. on December 12, 2022. The Receiver echoes Chief Justice Toal’s “firm[] belie[f] that this Order is not appealable.” (App. 191). This appeal is simply another attempt in a long line of recent attempts by Penn National to abuse our rules of procedure to subvert justice and delay circuit court rulings on important matters of South Carolina insurance law.

Given Penn National’s predilection to use our appellate courts to delay the adjudication of this matter, the Receiver respectfully requests the Court expedite briefing on this Motion.

PROCEDURAL BACKGROUND

By way of background, the Receiver filed this action against Penn National on April 27, 2020, seeking declarations as to the interpretation and meaning of insurance policies Penn National issued to Covil.⁴ (App. 8–19). Penn National admits it issued these insurance policies. (App. 24).

⁴ The Receiver also named insurance broker Sam J. Crain & Co., Inc. (“Crain”) and the South Carolina Property & Casualty Insurance Guaranty Association (“the Guarantee Association”) as defendants. The Receiver brought causes of action for failure to procure insurance and breach of contract against Crain and a declaratory judgment action against the Guarantee Association. (App. 70–71). However, neither of these defendants appeared in this action. The Receiver dismissed the Guaranty Association on September 8, 2021, and dismissed Crain on December 6, 2022. (App. 33–34). Thus, Penn National remains the only defendant in this action, and the only remaining causes of action are for a declaratory judgment related to the insurance policies.

In the wherefore clause contained in its Answer, Penn National prayed for “a trial by jury on all issues so triable.”⁵ (App. 30).

On September 6, 2022, the Receiver requested the circuit court schedule a non-jury trial on Covil’s declaratory judgment issues against Penn National to take place in December 2022. (App. 35–39). Penn National did not file any written response or objection to the Receiver’s request for a non-jury trial on his claims for declaratory relief. The circuit court held a status conference on September 8, 2022. (App. 62). At the status conference, the Receiver reiterated its request that the circuit court schedule a non-jury trial in December 2022. (App. 65, 71–72). The circuit court set the non-jury trial on December 12 or 14, 2022. (App. 74). Penn National did not object to a non-jury trial at the status conference. (App. 74). Its only request was for the Court to incorporate a mediation deadline in the forthcoming scheduling order. (App. 77). The circuit court agreed to do so and then asked the parties if there were any further matters to raise for the court’s consideration. (App. 77–78). Penn National was silent. (App. 78).

The circuit court issued a scheduling order on September 16, 2022, setting the non-jury trial for December 12 or 14, 2022, and a pretrial hearing for November 18, 2022.⁶ (App. 1–3). The scheduling order also included deadlines for the parties to attend mediation and to file proposed findings of fact and conclusions of law, trial exhibits, witness lists, deposition

⁵ It appears that Penn National mistakenly believed the Receiver brought the breach of contract action against Penn National because Penn National captioned its responsive pleading as “**ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT.**” (App. 23). However, a simple reading of the Complaint in this case shows the only causes of action brought against Penn National are for a declaratory judgment. Further, the Receiver has made it clear to Penn National that it seeks only declaratory relief against Penn National. (App. 60).

⁶ This pre-trial hearing was subsequently moved to November 14, 2022.

designations, and motions in limine. (App. 1–3). Penn National did not raise any objections or file a motion seeking reconsideration of the scheduling order.

It was not until November 7, 2022, that Penn National first raised to the circuit court any concerns with the non-jury trial scheduled in December 2022. (App. 192).

The case came before the circuit court for a pre-trial hearing on November 14, 2022. (App. 80). At the hearing, the circuit court reiterated that it scheduled a non-jury hearing to begin the week of December 12, 2022. (App. 171). Penn National requested “a jury trial to the extent there are factual issues as to the spoliation component for this case.” (App. 183). The circuit court indicated it was unsure, based on the record before it, what factual issues Penn National believed entitled it to a jury trial and reiterated that the non-jury trial in the declaratory judgment action would start on December 12, 2022. (App. 185–86). The parties subsequently conducted a number of remaining depositions and filed and exchanged motions in limine, deposition designations, witness lists, and trial exhibits in accordance with the scheduling order.

On December 2, 2022, only ten days before the non-jury trial would begin, Penn National filed a Motion to Confirm Jury Trial Demand.⁷ (App. 44). Penn National asserted “the case must proceed on the jury trial roster at this time” and alleged its jury trial demand was proper given “the existence of factual questions in this case.”⁸ (App. 47). The Receiver filed a Notice on December 6, 2022, reconfirming that he only seeks declarations against Penn National related to the insurance policies. (App. 60). The circuit court issued an order on December 6, 2022, reiterating that the non-jury trial was previously scheduled to begin on December 12, 2022, and would proceed on

⁷ Although the Motion was drafted on November 28, 2022, Penn National waited until December 2, 2022 to file it. (App. 48).

⁸ Penn National again stated its mistaken belief that the “Complaint alleges claims for breach of contract and declaratory judgment against Penn National.” (App. 44). As discussed above, this case only involves declaratory judgment actions against Penn National.

that date. (App. 4). The circuit court noted “[n]one of the matters” pending against Penn National “are triable to a jury.” (App. 4).

As the trial date loomed, Penn National filed the instant appeal from the December 7, 2022 Order. Subsequently, the circuit court postponed the non-jury trial due to the appeal until such a time that this case is remitted. (App. 191). As noted above, this is the third improper appeal Penn National has filed in this case in the last six months in its apparent continuing strategy to delay the adjudication of this declaratory judgment matter at any cost.⁹

DISCUSSION

I. The Circuit Court’s Order Is Not Appealable.

First, this order is not appealable because Penn National is clearly not entitled to a jury trial in this declaratory judgment matter. *See C & S Real Estate Servs. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (granting a motion to dismiss an appeal where the appellant did not have a right to a jury trial); *Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees*, 344 S.C. 522, 524–25, 544 S.E.2d 642, 643 (Ct. App. 2001) (dismissing an appeal from an order transferring a case to a non-jury roster because there was no right to a jury trial).

⁹ On May 31, 2022, Penn National attempted to appeal two interlocutory discovery orders of Chief Justice Toal to this Court. *See* Appellate Case No. 2022-000761. Contrary to fundamental appellate practice and procedure, and without allowing this Court any chance to consider the May 31, 2022 appeal, Penn National filed a Petition for Writ of Certiorari in the original jurisdiction of the South Carolina Supreme Court eight days later, seeking contemporaneous appellate review of the interlocutory discovery orders. *See* Appellate Case No. 2022-000785. When the Receiver noted, in his Return to the Petition for Writ of Certiorari, the impropriety of Penn National’s attempt to forum shop in our appellate courts to receive its desired outcome, Penn National refused to withdraw the improper simultaneous appeal. This Court dismissed Penn National’s appeal on August 9, 2022, finding the orders on appeal were not immediately appealable, and subsequently denied Penn National’s petition for rehearing. The Supreme Court denied the Petition for Writ of Certiorari on August 23, 2022.

South Carolina courts recognize that a determination of coverage under an insurance policy is a question of law to be tried to a bench. “Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.” *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). “The character of an action as legal or equitable depends on the relief sought.” *Bank of New York Mellon v. Lindsay*, No. 2015-UP-208, 2015 WL 1880195, at *1 (S.C. Ct. App. Apr. 22, 2015). “A declaratory judgment action is neither legal nor equitable, but is determined by the nature of the underlying issue.” *State Farm Fire & Cas. Co. v. Barrett*, 240 S.C. 1, 5, 530 S.E.2d 132, 134 (Ct. App. 2000) (quoting *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). “An action to determine coverage under an insurance policy is an action at law.” *Id.*; see also *Pennell v. Foster*, 338 S.C. 9, 14, 524 S.E.2d 630, 633 (Ct. App. 1999) (“A declaratory judgment action to determine the coverage under an insurance policy's omnibus clause is an action at law. An action to declare excess or secondary liability coverage is an action at law.”); see also *U.S. Fire Ins. Co. v. Macloskie*, 320 S.C. 459, 462, 465 S.E.2d 759, 760–61 (Ct. App. 1995) (same); *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 542, 677 S.E.2d 574, 578 (2009) (same). The interpretation of an unambiguous contract, including an insurance policy, is a question of law for the court to determine. See *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

In this case, the Receiver seeks a declaratory judgment against Penn National as to the interpretation of insurance policies that Penn National admits it issued.¹⁰ There are no ambiguities in the insurance policies, and Penn National has not attempted to point to any. Both the Receiver

¹⁰ At one point before the circuit court, Penn National attempted to argue an issue of fact existed as to the existence of the policies. (App. 41). However, this has never been a factual issue in this case as Penn National has at all times admitted that these policies exist. (App. 26).

and Penn National rely on the plain language of the policies in this case. Instead, the Receiver and Penn National disagree on the interpretation of the language, which necessitated the Receiver filing this declaratory judgment action in the first instance.

Penn National has failed to identify any specific factual issues in this declaratory judgment action that would give it a right to a jury trial. Penn National has continuously couched its request for a jury trial as a request for a jury trial “to the extent that there are factual issues” in the case without ever attempting to specify the factual issues it alleges exist. (App. 183). As noted by the circuit court, Penn National’s vague assertions that it wanted a jury trial on factual issues were not enough to inform the circuit court of why Penn National contended it was entitled to a jury trial. (App. 183–85). Even in its late-filed motion, Penn National did not identify any specific factual issues in this case as to the requested declaratory judgment. (App. 44–48). Because this case seeks only a declaration as to the meaning of unambiguous insurance policies, the circuit court properly found Penn National is not entitled to a jury trial.

II. The Circuit Court is Imbued with the Inherent Power To Consider Alleged Spoliation.

Second, any issues involving spoliation do not give Penn National a right to a jury trial.¹¹ South Carolina “does not recognize an independent tort for the negligent spoliation of evidence.” *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 154, 714 S.E.2d 537, 542 (2011). If the Supreme Court had wanted to provide litigants with a jury trial on issues of spoliation, it would have recognized a cause of action for spoliation. Instead, spoliation of evidence is recognized as a discovery

¹¹ Initially, the Receiver notes that the issues regarding spoliation were not yet before the circuit court. Although the Receiver noted its intent to seek a sanction for spoliation and requested that the court hold an evidentiary hearing during the non-jury trial, the Receiver has not yet moved for such. However, for the reasons contained herein, the Receiver requests the Court find that Penn National is not entitled to a jury trial on the evidentiary issue of spoliation arising during a non-jury trial.

violation potentially warranting sanctions, including the potential for an adverse inference, left to the discretion of the trial court. See *Kershaw County Bd. Of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). As discussed by the Fourth Circuit, the decision of whether to impose a sanction for spoliation of evidence is “an inherent power of . . . courts” to facilitate the orderly administration of the judicial process and litigation. *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449–50 (4th Cir. 2004); see also *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

As with other evidentiary rulings the circuit court makes, it has the power to hold an evidentiary hearing to determine whether spoliation occurred and then it can decide an appropriate sanction for the spoliation. As the Supreme Court of Texas has aptly explained:

[S]poliation is an evidentiary concept, not a separate cause of action. It is well-established that evidentiary matters are resolved by the trial court. Further, spoliation is essentially a particularized form of discovery abuse, in that it ultimately results in the failure to produce discoverable evidence, and discovery matters are also within the sole province of the trial court. Finally, presenting spoliation issues to the jury for resolution magnifies the concern that the focus of the trial will shift from the merits to a party's spoliating conduct. For these reasons, we agree with Justice Baker that the trial court, rather than the jury, must determine whether a party spoliated evidence and, if so, impose the appropriate remedy. The trial court may hold an evidentiary hearing to assist the court in making spoliation findings, but not in the presence of the jury. Placing the responsibility on the trial court to make spoliation findings and to determine the proper remedy is a key mechanism in ensuring the jury's focus stays where it belongs—on the merits.

Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 19–20 (Tex. 2014) (internal citations omitted).

Allowing Penn National a jury trial on an evidentiary matter that is properly left to the discretion of the circuit court would effectively reverse Supreme Court precedent and create a new cause of action for spoliation in South Carolina.

III. Penn National Waived Any Argument That It Is Entitled To A Jury Trial On The Receiver's Declaratory Judgment Claims Or Alleged Spoliation.

Finally, notwithstanding the fact that Penn National is not entitled to a jury trial in this declaratory judgment action, this order is not appealable because these arguments were waived by Penn National. Penn National failed to timely raise these issues to the circuit court and failed to appeal the September rulings of the circuit court scheduling the non-jury trial. *See Creed v. Stokes*, 285 S.C. 542, 542–43, 331 S.E.2d 351, 352 (1985) (finding a party waived any arguments that he was entitled to jury trial by failing to immediately appeal order referring the case to a master).

The Receiver requested a non-jury trial in its status report filed with the court on September 6, 2022. (App. 35). Penn National did not file any response to this status report or object to the Receiver's request for a non-jury trial. At the September status conference, the Receiver reiterated its request that the circuit court schedule a non-jury trial in December 2022. (App. 65, 71–72). The circuit court set the trial and stated it “would be non-jury.” (App. 73). Penn National did not object to the non-jury trial at the status conference. (App. 73).

Penn National waited until ten days before the start of the non-jury trial—which had been already scheduled for three months—to move for clarification from the circuit court about the non-jury trial. However, even then, Penn National did not provide any specificity as to any existing factual issues it alleged entitled it to a non-jury trial. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (noting an issue is not preserved for appellate review unless it is “raised to the trial court with sufficient specificity” (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))). Instead, Penn National argued “there was nothing in the record” showing it was “not entitled to a jury trial.” (App. 46). As noted by the circuit court, Penn National has never sufficiently articulated its arguments as to why it is entitled to a jury trial in this declaratory judgment matter.

CONCLUSION

This declaratory judgment action was set for a non-jury trial on December 12, 2022, but has now been frivolously delayed by this improper appeal – Penn National’s third improper appeal in the past six months in this case. The Receiver maintains Penn National is not entitled to a jury trial in this matter and, therefore, the December 7, 2022 Order is not appealable and this appeal should be dismissed. Because time is of the essence, the Receiver respectfully requests this Court require an expedited response to this Motion to Dismiss.

Respectfully submitted,

s/Shanon N. Peake

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December 14, 2022.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2020-CP-40-02098

Appellate Case No. 2022-001722

Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,

Appellant.

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MOTION TO DISMISS AND EXPEDITE**

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed receiver Peter D. Protopapas,

CASE NUMBER: 2020-CP-40-02098

Plaintiff,

PROPOSED SCHEDULING ORDER

v.

Pennsylvania National Mutual Casualty
Insurance Company; Sam J. Crain & Co.,
Inc.; and South Carolina Property & Casualty
Insurance Guaranty Association,

Defendants.

Upon consideration of the arguments made at the Status Conference held in the above referenced matter on September 8, 2022, the Court orders as follows:

1. Mediation shall occur on or before November 10, 2022.
2. A pre-trial hearing shall be held on November 18, 2022.
3. This matter is set for trial on December 12th or December 14th.
4. The parties shall submit and exchange Findings of Fact/Conclusions of Law (hereinafter "FOF/COL") no later than seven (7) days before the trial of this matter.
 - a. Responses to each party's FOF/COL shall be submitted and exchanged no later than four (4) days before trial.
5. The parties shall submit and exchange pre-marked trial exhibits no later than twenty-one (21) days before trial.
 - a. The parties shall submit and exchange objections to pre-marked trial exhibits no later than fourteen (14) days before trial.

- b. Responses to each party's exhibit objections shall be submitted and exchanged no later than seven (7) days before trial.
- 6. The parties shall submit and exchange trial witness lists to include expert witnesses no later than twenty-one days (21) days before trial.
- 7. The parties shall submit and exchange deposition designations no later than seven (7) days before trial.
 - a. The parties shall submit and exchange any objections and counter page/line designations of depositions to be read at trial no later than four (4) days before trial.
 - b. The parties shall submit and exchange any objections to counter page/line designations and any final counter designations no later than two (2) days before trial.
- 8. The parties shall file motions in limine no later than fourteen (14) days before trial.
 - a. Responses to each party's motions in limine shall be submitted and exchanged no later than seven (7) days before trial.

IT IS SO ORDERED.

[Signature Appears on following page.]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Scheduling Order

So Ordered

Jean H. Toal

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CASE NO.: 2020-CP-40-02098
Covil Corporation, by and through its duly	)	
appointed Receiver Peter D. Protopapas	)	
	)	
Plaintiff,	)	
	)	ORDER
v.	)	
	)	
Pennsylvania National Mutual Casualty Insurance	)	
Co.; Sam J. Crain & Co., Inc.; and South Carolina	)	
Property and Casualty Insurance Guaranty	)	
Association,	)	
	)	
Defendants.		

This matter comes before me upon Defendant Penn National's Motion to Confirm Jury Trial Demand, filed December 2, 2022 at 4:42 pm. This matter is scheduled for a nonjury trial in the Richland County Judicial Center at 9:30 am on December 12, 2022.

On April 27, 2020, Covil Corporation, through its Receiver Peter D. Protopapas, filed its Complaint against Pennsylvania National Mutual Casualty Insurance Co.; Sam J. Crain & Co., Inc.; and South Carolina Property and Casualty Insurance Guaranty Association. The Complaint recites the following causes of action:

First, Second, and Third Causes of Action are for Declaratory Judgments against Penn National, regarding the coverage and meaning of its policies of insurance for Covil. None of these matters are triable to a jury. The Fourth Cause of Action is for negligence for failure to procure insurance against the Crain Agency, Covil's insurance broker. Crain has never appeared or answered. The Fifth Cause of Action is for breach of contract against Crain. It has not answered or appeared. The Sixth Cause of Action is for a declaratory judgment against the

Guaranty Association for any amounts due Covil from Mission, a liquidated insurer which had excess coverage for Penn National.

The Prayers for Relief against Penn National ask the Court to declare the meaning of its insurance policies insuring Covil. None of the Causes of Action or Prayers for Relief as to Penn National raise issues which entitle Penn National to a jury trial. Plaintiff Covil has today filed a Notice that it seeks only declarations concerning its policies with Penn National. It has further dismissed Defendant Crain without prejudice. Crain was the only defendant against whom the at law causes of action for negligence and for breach of contract were brought.

Therefore, as previously scheduled, this nonjury matter will proceed to trial as to Penn National on Monday, December 12, 2022 at 9:30 am.

AND IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE TO FOLLOW]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Other

So Ordered

Jean H. Toal

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Case Number:

Plaintiff,

In Re:

Vs.

Asbestos Personal Injury Litigation
Coordinated DocketPennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,**SUMMONS**

Defendants.

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1329 Blanding Street, Columbia, South Carolina 29201, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Complaint.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLCs/ Jescelyn T. Spitz

Jescelyn T. Spitz (SC Bar 101880)

Rikard & Protopapas, LLC

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Attorney for the Receiver

This 27th Day of April, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Case Number:

Plaintiff,

In Re:

Vs.

Asbestos Personal Injury Litigation
Coordinated DocketPennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,**COMPLAINT FOR DECLARATORY
JUDGMENT AND
BREACH OF CONTRACT**

Defendants.

COMES NOW Covil Corporation by and through its duly appointed Receiver, Peter D. Protopapas (“Plaintiff” or “Covil”), complaining of the defendants Pennsylvania National Mutual Casualty Insurance Company (“Penn National”); Sam J. Crain & Co., Inc. (“Crain Agency”); and South Carolina Property and Casualty Guaranty Association (“Guaranty Association”), who through undersigned counsel respectfully shows unto the Court as follows:

PARTIES

1. Covil Corporation, appearing by and through its duly appointed receiver, Peter D. Protopapas (the “Receiver”), who maintains his principal place of business in Richland County, South Carolina, brings this action. This Court appointed the Receiver to undertake actions to administer all assets of Covil Corporation, including without limitation its insurance policies. See Exhibit A, Receiver Order, at 1 (“This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Covil

Corporation as well as any claims related to the actions of failure to act of Covil's insurance carriers").

2. Plaintiff is informed and believes that defendant Penn National is a corporation organized under the laws of the Commonwealth of Pennsylvania, with its principal place of business located in the Commonwealth of Pennsylvania.
3. Plaintiff is informed and believes that the Crain Agency is a South Carolina corporation.
4. Plaintiff is informed and believes that the Guaranty Association is an association formed under the laws of South Carolina.

JURISDICTION

5. This Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803, Article V of the Constitution of the State of South Carolina, and the Court's plenary powers. This Court appointed the plaintiff as Receiver of Covil.

VENUE

6. Venue is proper in this Court as it is the Receiver Court with cases pending and anticipated new filings in this Court. Further, on March 3, 2019, pursuant to the Order of the Supreme Court of South Carolina, Order Number 2017-03-03-01, the Honorable Jean H. Toal was appointed to have jurisdiction in all circuits in this state to dispose of all pretrial matters and motions, as well as trials, arising out of asbestos and asbestos litigation filed within the state court system. Thus, the Honorable Jean H. Toal will have jurisdiction over this matter.

FACTUAL BACKGROUND

7. Covil's operations from 1954 through 1991 included the installation, repair, replacement, removal or disturbance of thermal insulation and other building materials. Those

operations allegedly exposed persons to asbestos who thereby suffered bodily injury (the “Asbestos Allegations”). The alleged bodily injury resulting from the Asbestos Allegations has resulted in claims and lawsuits against Covil (“Covil Asbestos Suits”).

8. Penn National issued general liability policies to Covil (the “Penn National Policies”). The Penn National Policies have standard terms and conditions. It is the burden of Penn National to prove any limitation on or exclusion of coverage. Specifically, Penn National issued primary general liability coverage (policy nos. 515 50 28 53 7 and 515 50 28 53 8) to Covil for the policy periods March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988 with an annual \$1,000,000 combined single limit per occurrence for covered claims, with no limit to the number of occurrences, as follows:

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

9. Penn National has failed fully to acknowledge or accept its insuring obligations under the Penn National Policies, has reserved its rights, failed to acknowledge or respond to tender of covered Covil Asbestos Suits, and otherwise breached its contracts of insurance.
10. On information and belief, Mission Insurance Company (“Mission”) issued umbrella coverage that Covil contends “drops down” to provide “first dollar” coverage or coverage above a retained limit of less than \$25,000, for which the Receiver is not responsible, in

the event that there is no available primary coverage. The Mission policy is missing but was written on a standard form that provides for the payment or reimbursement of defense and indemnity costs, as those terms are understood in the insurance business. The Mission policy was issued for the period June 16, 1986 to March 31, 1987. Covil has experienced losses that “trigger” the Mission policy and would be sufficient in size to invoke the policy, which Covil contends, on information and belief, has a limit of liability of \$5,000,000.

11. On information and belief, Mission was liquidated on September 12, 1987.
12. The Guaranty Association was statutorily created to protect the policy holders of insolvent insurance companies like Mission. The Guaranty Association “is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.” S.C. Code Ann. § 38-31-60(b).
13. On November 2, 2018, Plaintiff was appointed Receiver of Covil, giving him the power and authority fully to administer all assets of Covil, accept service on behalf of Covil, engage counsel on behalf of Covil, and take any and all steps necessary to protect the interests of Covil, whatever they may be. Since appointment, the Receiver has expended substantial time and incurred expenses to identify potential assets and responsive policies and to defend Covil Asbestos Suits in fulfillment of his responsibilities as Receiver. The Receiver will continue to expend substantial time and incur expenses in connection with Covil Asbestos Suits.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

14. An actual and justiciable controversy exists between the Receiver for Covil and Penn National concerning Penn National's obligations to Covil, including its obligation to pay for the Receiver's defense of Covil.
15. Judicial declarations are necessary and appropriate at this time, under the circumstances alleged above, so that plaintiff may ascertain his rights against Penn National.
16. Pursuant to S.C. Code Ann. § 15-65-100, the Receiver shall be allowed such commissions as may be fixed by the Court appointing the Receiver.
17. Pursuant to the Supreme Court of South Carolina's ruling in *Ex Parte Simons*, 289 S.C. 1, 344 S.E.2d 151 (1986), a Receiver's fee is based on the value of the Receiver's services and at the appointing Court's discretion.
18. Plaintiff dedicated a substantial amount of time and incurred substantial expenses in his role as Receiver for Covil, including in connection with the defense of asbestos suits against Covil. The Receiver is continuing to devote such time to the defense of Covil and will continue to incur expenses in his role as Receiver, which defense obligations are those of Penn National.
19. Plaintiff respectfully requests this Court to declare that Penn National must fairly compensate Plaintiff for the substantial time, effort, and expenses Plaintiff expended in connection with the defense of asbestos suits potentially covered under the Penn National policies and to further declare that this obligation is unlimited and shall continue as long as there are Covil Asbestos Suits pending.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

20. Pursuant to *Jeffcoat v. Morris*, 300 S.C. 526, 389 S.E.2d 159 (Ct. App. 1989), a Receiver holds the property coming into his or her hands by the same right and title as the person for whose property he or she is receiver.
21. Upon information and belief, Covil purchased insurance policies from Penn National during the period 1986 to 1987 and 1987 to 1988. These policies are the property of Covil.
22. Plaintiff seeks a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including but not limited to such documents in the possession of Penn National are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

23. The Receiver seeks a declaration and order that Penn National issued primary general liability coverage (policy nos. 515 50 28 53 7 and 515 50 28 53 8) to Covil for the policy periods March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988; that each policy has a \$1,000,000 annual limit; that each policy has a \$1,000,000 combined single limit per occurrence for covered claims, with no limit to the number of occurrences; and that Penn National has an unlimited supplemental duty to defend and to pay or reimburse defense costs.
24. The Receiver seeks a declaration and order that Mission issued umbrella coverage to Covil (policy no. MA 002840) to Covil for the policy period June 16, 1986 to March 31, 1987.
25. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that Penn National and Mission issued to Covil (the “Covil Insurance

Policies”), as follows:

- a. The Covil Insurance Policies cover all Covil Asbestos Suits that allege bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the Penn National Policy periods;
- b. Each Covil asbestos suit “triggers” the Covil Insurance Policies as long as an asbestos plaintiff alleges injury during the period of the policy;
- c. Covil may select the policy or policy years to which to assign or allocate in full each Covil Asbestos Suit-related loss;
- d. In the case of any claimed ambiguity in any Covil Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Covil Insurance Policies;
- e. Defense costs for the Covil asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Covil Insurance Policies;
- f. If any allegation or cause of action in a Covil Asbestos Suit is potentially covered under the Covil Insurance Policies, then the insurer must fully defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;
- g. Each Covil Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of Covil Asbestos Suits;
- h. Each Covil Insurance Policy must indemnify covered Covil Asbestos Suits, in full, up to its “per occurrence” limit, regardless of whether a continuing injury spans multiple policy periods;
- i. The Covil Asbestos Suits that allege exposure to asbestos during Covil’s work are subject only to the “per occurrence” limits of the Covil Insurance Policies;

- j. Any aggregate limit on coverage in any of the Covil Insurance policies is a limitation on coverage, and therefore each insurer has the burden to prove, based on the evidence, that a Covil Asbestos Suit is subject to the aggregate limit in the Covil Insurance Policies, if any; and
 - k. Each insurer has the burden to prove, based on the evidence, that any particular Covil Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Covil Insurance Policies, in order for the insurer to disclaim coverage for a Covil Asbestos Suit against Covil otherwise alleging injury during any Covil Insurance policy period.
26. Actual and justiciable controversies therefore exist between Covil and defendants Penn National and the Guaranty Association concerning their obligations under the Covil Insurance Policies.

FOURTH CAUSE OF ACTION
FAILURE TO PROCURE INSURANCE

27. Defendant Crain Agency had a duty to exercise reasonable skill, care, and diligence to procure appropriate insurance coverage for Covil.
28. Upon information and belief, the Crain Agency was negligent and breached its duty to procure appropriate insurance coverage for Covil during each of the years Crain Agency was obligated to procure insurance.
29. This failure on the part of Defendant Sam Crain includes the failure to procure products/completed operations coverage for Covil, if it is determined that such coverage is provided by the Penn National and/or Mission Policies.
30. Defendant the Crain Agency is responsible for any shortfall or deficiency in coverage for Covil Asbestos Suits.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

31. Covil contracted with the Crain Agency to procure appropriate insurance for Covil.
32. Upon information and belief, Covil's insurance coverage is inadequate and inappropriate for its operations during the years in which the Crain Agency was contracted with to procure Covil's insurance.
33. Among other items, upon information and belief, the Crain Agency may not have secured products/completed operations coverage for Covil under the Penn National and/or Mission Policies.
34. As a direct and proximate result of the Crain Agency's breach of contract, Covil has suffered direct, indirect and consequential damages in an amount to be determined at trial.

SIXTH CAUSE OF ACTION
DECLARATORY JUDGMENT

35. At the time that Mission was liquidated on September 12, 1987, the Guarantee Association became statutorily required to take on the liabilities of Mission.
36. Plaintiff seeks a declaration that the Guarantee Association is responsible for any and all amounts Mission owes to Covil under the terms of the Mission insurance policy.

PRAYER FOR RELIEF

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

- A. For plaintiff's compensation in connection with the defense of asbestos suits against Covil potentially covered under the Penn National and Mission Policies, in an amount set by this Court;

- B. For an order requiring that Penn National and the Guarantee Association provide to plaintiff complete and authentic copies of any general liability and excess liability insurance policies it issued to Covil together with all other documents and things relating to these policies, including (but not limited to) certificates of insurance, underwriting manuals and documents, and claims files;
- C. For an order requiring Penn National and the Guarantee Association to defend Covil in full against all asbestos suits alleging bodily injury during the Penn National and Mission policy periods unless and until either Penn National or the Guarantee Association can show unequivocally, based on the evidence adduced in the litigation, that an exclusion in their respective policies otherwise bars coverage for a suit;
- D. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies:
- i. The Covil Insurance Policies cover all Covil Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods;
 - ii. Each Covil asbestos suit “triggers” at least one Covil Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy;
 - iii. Covil may select the policy or policy years to which to assign or allocate in full each Covil asbestos loss;
 - iv. In the case of a claimed ambiguity in any Covil Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Penn National Policies and Penn National bears the burden of proof as to any such ambiguity;
 - v. Defense costs for the Covil asbestos suits are supplemental, and the payment of

defense costs does not erode or impair any limit of liability of any of the Covil Insurance policies;

- vi. If any allegation in a Covil Asbestos Suit is potentially covered under the Covil Insurance Policies, then the insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;
 - vii. Each Covil Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Covil Asbestos Suits;
 - viii. Each Covil Insurance Policy must indemnify covered Covil Asbestos Suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods;
 - ix. The Covil Asbestos Suits that allege exposure to asbestos during Covil’s work are subject only to the “per occurrence” limits of the Covil Insurance policies;
 - x. Any aggregate limit on coverage in any of the Covil Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Covil Asbestos Suit is subject to the aggregate limit in the Covil Insurance Policies, if any; and
 - xi. Each insurer has the burden to prove, based on the evidence, that any particular Covil Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Covil Insurance Policies, in order for the insurer to disclaim coverage for a Covil Asbestos Suit against Covil otherwise alleging injury during the Covil insurance policy period.
- E. Defendant the Crain Agency breached its obligations by not procuring the appropriate insurance for Covil and is liable to the Receiver for money damages in an amount to be proven at trial.

- F. Defendant Guarantee Association is responsible for any and all amounts Mission owes to Covil under the terms of the Mission insurance policy.
- G. For such other and further relief as the Court may deem just and proper, including pre-judgment and post-judgment interest as provided by South Carolina law.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

Jescelyn T. Spitz

Jescelyn T. Spitz (SC Bar 101880)

Rikard & Protopapas, LLC

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Attorney for the Receiver

This 27th Day of April, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
DENVER D. TAYLOR and	)	
JANICE TAYLOR,	)	CASE NO. 2018-CP-40-04940
	)	
Plaintiffs,	)	Order Appointing a Receiver for Covil
	)	Corporation
v.	)	
	)	
AIR & LIQUID SYSTEMS	)	
CORPORATION, et al.	)	
	)	
Defendants.	)	

This matter comes before the Court by way of Plaintiff's Motion for Appointment of a Receiver pursuant to South Carolina Code § 15-65-10. This Court finds that the application is meritorious under the applicable statute because Covil Corporation has dissolved. Therefore, Plaintiff's motion is GRANTED.

This Court hereby appoints Attorney Peter Protopapas as Receiver at such rate of compensation as may be approved by the Court. Mr. Protopapas is hereby appointed Receiver in this case pursuant to § 15-65-10 with the power and authority to fully administer all assets of Covil Corporation ("Covil"). This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Respondent's property, to: 1) collect all accounts receivable of Respondent and all rents due to the Respondent from any tenant; 2) to change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the Respondent; redirect the delivery of any

mail addressed to the Respondent or any business of the Respondent, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Respondent, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Respondents; 6) hire any person or company to move and store the property of Respondent; 7) to insure any property belonging to the Respondents (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendants; 9) obtain from any landlord, building owner or building manager where the Respondent or the Respondent's business is a tenant, copies of the Respondent's lease, lease application, credit application, payment history and copies of Respondent's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Respondent may be situated, and to review and obtain copies of all documents related to same.

IT IS SO ORDERED.

SIGNED this _____ day of _____, 2018.

JEAN TOAL, CHIEF JUSTICE (Ret.)



Richland Common Pleas

Case Caption: Denver D Taylor , plaintiff, et al vs Air & Liquid Systems Corporation , defendant, et al
Case Number: 2018CP4004940
Type: Order/Appointment of Receiver

IT IS SO ORDERED.

s/ Jean H. Toal #2758

Electronically signed on 2018-11-02 13:22:24 page 3 of 3

5. Denied.

6. Denied.

7. The allegations of paragraph 7 are vague and lack clarity in that they allege certain allegations have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, the allegations of paragraph 7 are denied.

8. It is admitted that Penn National issued a Comprehensive General Liability policy to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988. Except as admitted, denied.

9. Denied.

10. Penn National is without information or knowledge sufficient to either admit or deny the allegations of paragraph 10. To the extent a response is required, denied.

11. Penn National is without information or knowledge sufficient to either admit or deny the allegations of paragraph 11. To the extent a response is required, denied.

12. The allegations of paragraph 12 state legal conclusions to which a response is not required. To the extent a response is required, denied.

13. It is admitted, upon information and belief, that Peter Protopapas was appointed as a Receiver in other civil actions to which Penn National was and is not a party and which are wholly unrelated to this action, and it is further admitted that Peter Protopapas is a lawyer who maintains his principal place of business in Richland County, South Carolina. Except as admitted, denied.

14. The allegations of paragraph 14 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without

any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether an actual or justiciable controversy indeed exists with respect to any particular allegations, cases, or matters asserted against Covil, and therefore, the allegations of paragraph 14 are denied.

15. The allegations of paragraph 15 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether “judicial declarations are necessary or appropriate at this time” with respect to any particular allegations, cases, or matters asserted against Covil, and therefore, the allegations of paragraph 15 are denied.

16. The allegations of paragraph 16 state legal conclusions to which a response is not required. To the extent a response is required, denied.

17. The allegations of paragraph 17 state legal conclusions to which a response is not required. To the extent a response is required, denied.

18. The allegations of paragraph 18 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, the allegations of paragraph 18 are denied.

19. The allegations of paragraph 19 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 19 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which

such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

20. The allegations of paragraph 20 state legal conclusions to which a response is not required. To the extent a response is required, denied.

21. It is admitted Penn National issued a Comprehensive General Liability policy to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988. Except as admitted, denied.

22. The allegations of paragraph 22 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 22 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

23. The allegations of paragraph 23 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 23 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

24. The allegations of paragraph 24 simply state a request for a declaration of this Court to which a response is not required. To the extent a response is required, Penn National does not have information or knowledge sufficient to either admit or deny the allegations of paragraph 24,

and therefore, denies such allegations. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

25. The allegations of paragraph 25, including each subpart, simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 25, including each subpart, are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

26. The allegations of paragraph 26 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether a justiciable controversy indeed exists with respect to any particular allegations, cases, or matters asserted against Covil, and the allegations of paragraph 26 are denied.

27. The allegations of paragraph 27 are not directed to Penn National. To the extent a response is required, denied.

28. The allegations of paragraph 28 are not directed to Penn National. To the extent a response is required, denied.

29. The allegations of paragraph 29 are not directed to Penn National. To the extent a response is required, denied.

30. The allegations of paragraph 30 are not directed to Penn National. To the extent a response is required, denied.

31. The allegations of paragraph 31 are not directed to Penn National. To the extent a response is required, denied.

32. The allegations of paragraph 32 are not directed to Penn National. To the extent a response is required, denied.

33. To the extent the allegations of paragraph 33 assert or imply that certain coverage existed under the Penn National's insurance policy, such allegations are specifically denied. The allegations of paragraph 33 otherwise appear not be directed to Penn National. To the extent a response to such allegations is required, denied.

34. The allegations of paragraph 34 are not directed to Penn National. To the extent a response is required, denied.

35. The allegations of paragraph 35 are not directed to Penn National. To the extent a response is required, denied.

36. The allegations of paragraph 36 simply state a request for a declaration of this Court to which a response is not required. Further, the allegations of paragraph 36 are not directed to Penn National. To the extent a response is required, denied.

GENERAL DENIAL

Except as specifically admitted above, Penn National denies each and every allegation of Plaintiff's Complaint.

FIRST DEFENSE

Penn National moves to dismiss this action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure in that there is no subject matter jurisdiction over the claims asserted inasmuch as (1) the Receiver does not have legal standing to pursue such claims, and (2) the Plaintiff has failed to comply with the conditions precedent to filing suit under Penn National's policy

issued to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988 (the “Penn National Policy”).

SECOND DEFENSE

Penn National moves to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure in that the Complaint fails to state a claim upon which relief can be granted. Specifically, Plaintiff fails to allege actual factual allegations to support a claim for a declaration by this Court as to coverage under Penn National’s policies. Plaintiff’s Complaint does not aver any policy language that it contends affords coverage for the claims at issue or the manner in which the claims asserted against Covil in the “Covil Asbestos Suits” could trigger coverage under the Penn National Policy or identify any of the “Covil Asbestos Suits” for which it seeks declarations from this Court as to coverage under the Penn National Policy.

THIRD DEFENSE

The Plaintiff failed to tender or submit the underlying lawsuits referenced in Plaintiff’s Complaint in a timely manner under the Penn National Policy and otherwise failed to comply with the provisions of the Penn National Policy. Therefore, Plaintiff’s claims in this action are barred.

FOURTH DEFENSE

Penn National’s rights, liabilities, and obligations are defined and controlled by the terms and provisions of the Penn National Policy. The terms and provisions of the Penn National Policy, including, but not limited to, any and all applicable policy definitions, conditions, exclusions, limitations, and endorsements, do not provide coverage for the claims, lawsuits, or matters alleged in Plaintiff’s Complaint. Accordingly, Plaintiff’s claims against Penn National in this action, which are grounded on the theory that Penn National had an obligation to provide coverage to

Covil under the Penn National Policy for the claims, lawsuits, or matters asserted against Covil should be dismissed.

FIFTH DEFENSE

Plaintiff's claims may be barred by failure to reduce or mitigate its damages as required by law.

SIXTH DEFENSE

Penn National pleads the equitable doctrines of waiver, estoppel, and laches in bar of the claims against Penn National in this action.

SEVENTH DEFENSE

Penn National pleads the applicable statute of limitations and/or statute of repose in bar of any claims or recovery against Penn National in this action.

WHEREFORE, Penn National respectfully prays the Court as follows:

1. That Plaintiff have and recover nothing of it in this action;
2. That the Plaintiff's claims against it be dismissed, with prejudice;
3. That the costs of this action be taxed against the Plaintiff;
4. For a trial by jury on all issues so triable; and
5. For such other and further relief as to the Court may seem just and proper.

This the 1st day of June, 2020.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

David G. Harris II (S.C. Bar No. 101951)

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Attorneys for Defendant Penn National

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the registered participants as identified on the Notice of Electronic Filing (NEF).

This the 1st day of June, 2020.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

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Attorney for Defendant Penn National

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver, Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

**Stipulation of Dismissal of South Carolina
Property and Casualty
Insurance Guaranty Association
(Without Prejudice)**

Pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, Plaintiff Covil Corporation and Defendant South Carolina Property and Casualty Insurance Guaranty Association (“the Association”) stipulate to the dismissal, without prejudice, of the Association from this action. The parties further agree that this stipulation does not operate as an adjudication on the merits and that the parties will each bear their own costs.

WE SO STIPULATE:

s/Erik T. Norton

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*Attorney for South Carolina Property
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Association*

s/ Marghretta H. Shisko

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Attorney for the Receiver

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Covil Corporation, by and through its
duly appointed Receiver Peter D.
Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.;
and South Carolina Property and
Casualty Insurance Guaranty
Association,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

NOTICE OF DISMISSAL OF
DEFENDANT
SAM J. CRAIN & CO., INC. WITHOUT
PREJUDICE

Pursuant to SCRCP Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, Plaintiff Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas, ("Covil"), hereby dismisses, without prejudice, all claims against Sam J. Crain & Co., Inc. (hereinafter "Crain") in the above referenced matter. Sam J. Crain & Co., Inc. has not served a responsive pleading in the above referenced matter.

Respectfully submitted,

This 6th day of November 2022

s./ Peter D. Protopapas

Peter D. Protopapas, SC Bar 68304

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Receiver

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

Case Number: 2020-CP-40-02098

Vs.

**RECEIVER FOR COVIL
CORPORATION
STATUS REPORT**Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

In response to this Court's scheduling of a status conference on September 8, 2022, the Receiver for Covil provides this status report of the case containing the following information: (1) procedural history of the case, (2) status of discovery, and (3) request for trial and anticipated length of trial.

I. PROCEDURAL HISTORY

The procedural history of this case is extensive and the below provides a chronology of relevant events:

4.27.2020 This matter began with the initial summons and complaint brought by the Receiver for Covil against Pennsylvania National Mutual Casualty Insurance Co., Sam Crain & Co. Inc, and South Carolina Property and Casualty Insurance Guaranty Association on April 27, 2020.

The Receiver brought causes of action against:

- a. Pennsylvania National Mutual Casualty Insurance Co. (“Penn National”) for Declaratory Judgment seeking a declaration that the Receiver is entitled to compensation (First Cause of Action), the Penn National policies and related documents in Penn National’s possession are the property of the Receivership (Second Cause of Action, and declaration of the rights and responsibilities of Penn National under the policies issued to Covil Corporation (Third Cause of Action).
- b. Sam Crain & Co for Failure to procure insurance (Fourth Cause of Action and for Breach of Contract (Fifth Cause of Action).
- c. The South Carolina South Carolina Property and Casualty Insurance Guaranty Association for a declaration as to their responsibilities for the Mission Insurance Company (“Mission”) umbrella policy where Mission is now out of business (Sixth Cause of Action).

5.22.2020	Penn National removed this matter to federal court.
6.1.2020	Penn National filed an Answer to Complaint.
6.16.2020	Covil moved the Federal Court to remand the matter to State Court.
3.30.2021	The Federal Court issued its Order remanding the case to State Court.
3.31.2021	Penn filed an answer to the complaint and sought a jury trial for “all issues so triable”.
4.9.2021	Discovery is initiated by Covil.
11.5.2021	The Court issues an Order addressing several discovery disputes.
2.11.2021	The Court issues an Order addressing additional discovery disputes.

- 5.5.2022 The Court issues an Order addressing further discovery disputes.
- 5.16.2022 Penn National moves the Court for Reconsideration of its 5.5.2022 Discovery Order, which Covil opposes.
- 5.26.2022 The Court issues its Order denying the Motion to Reconsider.

COURT OF APPEALS CHRONOLOGY

- 5.31.2022 Penn National files its Notice of Appeal of Orders dated 5.5.2022 and 5.26.2022.
- 6.6.2022 Covil moves the Court of Appeals to dismiss the appeal as interlocutory.
- 8.9.2022 Court of Appeal grants Covil's Motion to dismiss appeal as interlocutory.
- 8.24.2022 Penn National files its Petition for Rehearing En Blanc which is now **pending**.

SUPREME COURT CHRONOLOGY

- 6.16.2022 Penn National files Petition for Writ of Certiorari (Appellate case number 2022-000785).
- 8.22.2022 The Supreme Court issues its Order Denying Penn National's Petition for Writ of Certiorari.

II. STATUS OF DISCOVERY

On August 24, 2022, following the Supreme Court of South Carolina's denial of Penn National's petition for a writ of certiorari (Appellate Case Number 2022-000785), the Court of Appeals' dismissal of Penn National's separate, parallel appeal on the same issue (Appellate Case Number 2022-000761), and this Court's denial of Penn National's motion for reconsideration (Case Number 2020-CP-40-02098), counsel for the Receiver sent a letter to counsel for Penn National requesting that Penn National "immediately obey" the Court's May 5, 2022 Discovery Order, as instructed by the Court. To date, Penn National has not responded.

A. Outstanding Depositions

Immediate compliance with the Court's Discovery Order includes, but is not limited to, sitting for the depositions noticed by the Receiver on May 13th and May 31st respectively (i.e., Penn National's 30(b)(6) deposition and the deposition of Scott Maier). The Receiver has asked for deposition dates, but has not received a response.

B. Outstanding Documents

In addition, the Receiver has not received Penn National's responses to Covil's Fourth Set of Requests for Production, which was served on May 13th. The Receiver asked that Penn National provide all responsive documents by September 1, 2022, but has not received a response.

Finally, the Court's May 5, 2022 Discovery Order directed Penn National to "produce immediately" to Covil the following documents:

- "all code keys for its policy prefixes, including but not limited to the documentation identifying prefixes with policy lines of business identified in Ellis & Winters' report";
- "all information that was disclosed to Ellis & Winters and used as a basis for identifying policy numbers for the three newly discovered Covil insurance policies located by Ellis & Winters on March 17, 2022"; and
- "underwriting documentation in its possession, custody, or control for all the Receiverships for which Mr. Protopapas is the court-appointed Receiver."¹

Again, the Receiver asked Penn National to confirm that these documents would be produced by September 1, 2022, but has not received a response.

Upon completion of the above outstanding discovery, the Receiver will be ready for trial.

¹ See Court's May 5, 2022 Order at 10-11.

III. REQUEST FOR DATES FOR PRE-TRIAL CONFERENCE AND TRIAL

The Receiver respectfully requests that the Court set dates for:

- (1) pre-trial conference in November 2022; and
- (2) combined evidentiary hearing and non-jury trial in December 2022.

The Receiver requests an evidentiary hearing regarding Penn National's spoliation of evidence in order for the Court to make factual findings regarding the scope of the harm to Covil and to fashion appropriate remedies to address that harm. The Receiver also asks for a non-jury trial on Covil's declaratory relief against Penn National concerning Penn National's obligations to Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8.

The Receiver further requests that the Court combine the evidentiary hearing regarding spoliation with the trial on declaratory judgment issues into a single trial that lasts no more than three days. The Receiver also requests that the Parties be allowed to submit proposed findings of fact and conclusions of law in advance of trial. The Receiver anticipates calling three expert witnesses live at trial (with no more than 1 hour direct examination, 1 hour cross examination, and 15 minutes for redirect) and entering the testimony of three fact witnesses via deposition testimony. The Receiver also anticipates offering between 25 to 30 exhibits at trial.

Respectfully submitted,

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Attorney for the Receiver

This 6th Day of September, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through
its duly appointed Receiver
Peter D. Protopapas,

C.A. No.: 2020-CP-40-02098

Plaintiff,

**DEFENDANT PENN NATIONAL'S
RESPONSE TO THE RECEIVER'S
PRE-TRIAL STATUS REPORT**

v.

Pennsylvania National Mutual
Casualty Insurance Co.; Sam J. Crain &
Co., Inc.; and South Carolina Property
and Casualty Insurance Guaranty Association,

Defendants.

In advance of the pre-trial hearing to be conducted Monday, November 14, 2022, Pennsylvania National Mutual Casualty Insurance Company ("Penn National") submits this response to the Receiver for Covil Corporation's Pre-Trial Hearing Status Report ("Status Report") to address certain issues therein. This response is not meant to be inclusive of all issues that may be discussed at the hearing, but rather to specifically respond to the issue of Penn National's jury trial request and its preservation of same.

RESPONSE TO THE RECEIVER'S STATUS REPORT

In its Status Report, the Receiver for Covil Corporation (the "Receiver") contends that Penn National is not entitled to a jury trial based on the following three assertions: 1) the action is a declaratory judgment action and is, therefore, a non-jury action; 2) issues relating to spoliation are not jury issues; and 3) Penn National has waived its right to a jury trial. Penn National briefly addresses each of these contentions in turn.

(1) Factual Issues for Trial by Jury:

The Receiver recognizes that in determining whether there is a right to a jury trial the principle question is whether the action is legal or equitable inasmuch as there is no right to a trial by jury for equitable actions. See Receiver's Status Report p. 2. The Receiver further recognizes that a declaratory judgment action for the determination of insurance coverage is an "action at law." *Id.* However, while it is true that contracts may be construed by a court, "where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to the jury." *Soil Remediation Co. v. Nu-Way Env't'l*, 325 S.C. 231, 234, 482 S.E.2d 554, 555-56 (1997) (citing *Café Assoc. Ltd. V. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991); *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)). Under South Carolina law, the terms of an insurance policy "are to be construed according to contract law." *Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 5-6, 656 S.E.2d 17, 18-19 (2007) (citation omitted). Thus, just as with other contracts, the construction of an insurance policy may be a question of fact for the jury. *E.g. NGM Ins. Co. v. Low Country Finish Carpentry, Inc.*, 2012 U.S. Dist. LEXIS 200367 at * 7-9, (D.S.C. Oct. 31, 2012) (denying summary judgment and finding question of applicability of certain policy provisions was a jury question).

Here, there are factual issues that will need to be resolved by a fact-finder. For example, the existence of policies issued by Penn National is a fact issue that will need to be resolved by a fact-finder (as discussed below). Indeed, the Court's recent pre-trial scheduling order includes a deadline for the parties to submit proposed findings of fact. Any disagreement over these proposed findings of fact will result in a question of fact, and Penn National is entitled to have such questions, along with any ambiguities in construction, submitted to a jury.

See e.g. Collins v. Frasier, 378 S.C. 249, 252, 662 S.E.2d 464, 466 (Ct. App. 2008) (“Juries resolve questions of fact”).

(2) Jury Issues as to Alleged Spoliation:

As to spoliation, while there is no recognized cause of action, there are threshold issues of fact to resolve before there can be any determination that spoliation even took place. Courts have held that such determinations are properly put to a jury. *E.g. Evans v. Quintiles Transnat'l Corp.*, 2015 U.S. Dist. LEXIS 171750 at * 13-14 (D.S.C. Dec. 23, 2015) (holding that where there was a factual dispute as to whether an allegedly spoliated computer file ever even existed, it was proper to allow the jury to resolve the threshold issue of its existence). To the extent that the Receiver claims that Penn National has spoliated Covil policies, there will likely be factual issues regarding whether such alleged spoliated policies ever existed in the first place. For this reason, fact issues for a jury to determine would exist with respect to the issue of spoliation.

(3) Penn National Has Not Waived Its Right to a Jury Trial:

Penn National disputes that it has waived its right to a jury trial. Penn National made a proper demand for a jury trial in this action by way of its Answer to the Receiver’s Complaint for Declaratory Judgment and Breach of Contract. Counsel for Penn National has never agreed to a non-jury trial in this action and has not waived this right “by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record” as is required by Rule 39, SCR. Indeed, as is clear from the transcript of the September 8, 2022 hearing, counsel for Penn National, who had to attend the proceedings remotely because of COVID-19, advised the Court that he had difficulty hearing the Receiver’s requests as to possible trial dates and pre-trial deadlines, but yet repeated his understanding of same, which did not include

any discussion of the trial being a non-jury trial. Penn National has not waived its right to a jury trial on all issues so triable in this action, and any argument to the contrary should be disregarded.¹

Respectfully submitted, this the 11th day of November, 2022.

GOLDBERG SEGALLA LLP

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Attorneys for Defendant Penn National

¹ Penn National does not, at this time, have knowledge of all the factual issues that may be sought to be tried and, therefore, reserves its right to assert entitlement to a jury trial on any other issues in this action, as appropriate.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through
its duly appointed Receiver
Peter D. Protopapas,

C.A. No.: 2020-CP-40-02098

Plaintiff,

**DEFENDANT PENN NATIONAL'S
MOTION TO CONFIRM JURY
TRIAL DEMAND**

v.

Pennsylvania National Mutual
Casualty Insurance Co.; Sam J. Crain &
Co., Inc.; and South Carolina Property
and Casualty Insurance Guaranty Association,

Defendants.

COMES NOW Defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), pursuant to Rules 38, 39, and 40 of the South Carolina Rules of Civil Procedure, and hereby moves the Court to confirm its jury trial demand in this action.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, Covil Corporation, by and through its duly appointed Receiver Peter D. Protopapas (hereinafter "Receiver"), originally filed its Summons and Complaint in this action on April 27, 2020, asserting causes of action against Penn National for Declaratory Judgment and Breach of Contract. After the case was removed to federal court and ultimately remanded back to this Court, Penn National filed an Answer to the Receiver's Complaint on March 31, 2021. In this Answer, Penn National specifically requested "a trial by jury on all issues so triable."¹ At no time subsequent to the filing of Penn National's Answer has the Receiver ever moved to strike Penn National's jury trial demand, or otherwise moved for the action to be heard non-jury. Further, as

¹ A copy of Penn National's previously filed Answer is attached hereto as **Exhibit A**.

the Court has previously noted, Penn National has not waived its right to request entitlement to a jury trial “on all or any matters pertaining to this litigation.”²

The trial in this action is currently scheduled for the week of December 12, 2022. In preparation for trial, the parties are in the process of submitting proposed witnesses, exhibits, facts, and law to the Court. Further, the parties have been taking depositions in this action on contested issues for use at the trial of this case. During the November 14, 2022 pre-trial hearing in this matter, the Court stated that no determination as to whether or not the action was to proceed as a jury trial could be made because there was nothing pending before the Court at the time. Therefore, Penn National now brings this Motion requesting that the Court confirm its jury trial demand and entitlement to same.

ARGUMENT

Under South Carolina law, “[t]he right of trial by jury . . . shall be preserved to the parties inviolate.” Rule 38(a), SCRPC. Further, “[i]ssues of fact in an action for the recovery of money . . . or specific . . . personal property must be tried by a jury, unless a jury trial be waived.” *Id.* South Carolina’s rules of procedure allow a party to demand a jury trial by including same “upon a pleading of the party.” Rule 38(b), SCRPC. Where a party does not specify particular issues he wishes to be tried to jury, “he shall be deemed to have demanded trial by jury for all the issues so triable.” Rule 38(c), SCRPC.

Where a party has demanded a jury trial, “the action *shall* be designated upon the calendar and in the clerk’s filebook as a jury action.” Rule 39(a), SCRPC (emphasis added). Where such a demand is made:

[t]he trial of all issues so demanded *shall be by jury*, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral

² November 7 and November 8, 2022 correspondence, attached hereto as **Exhibit B**.

stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

Id. (emphasis added).

Thus, where a party makes a jury trial demand, pursuant to the South Carolina Rules of Civil Procedure the case is to be automatically placed upon the jury roster. Further, a case can only be removed from the roster by either a filed written stipulation, an oral stipulation of both parties made in open court and entered in the record, or by Court order upon a Motion or its own initiative. *Id.* Here, where there has been no stipulation filed or entered into the record, and no motion or Court order finding there are no issues of fact, under the plain language of the South Carolina Rules of Civil Procedure, the case *must proceed as a jury trial*. Therefore, Penn National asks that the Court confirm its right to a jury trial at this time.

Indeed, there is nothing in the record at this time that would demonstrate Penn National is not entitled to a jury trial on all factual issues. The Complaint alleges claims for breach of contract and declaratory judgment against Penn National. Both of these causes of action may be properly tried by a jury. *See Soil Remediation Co. v. Nu-Way Env'tl*, 325 S.C. 231, 234, 482 S.E.2d 554, 555-56 (1997) (citing *Café Assoc. Ltd. V. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991); *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)) (“where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to the jury.”); *Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 5-6, 656 S.E.2d 17, 18-19 (2007) (the terms of an insurance policy “are to be construed according to contract law”) (citation omitted); *NGM Ins. Co. v. Low Country Finish Carpentry, Inc.*, 2012 U.S. Dist. LEXIS 200367 at * 7-9, (D.S.C. Oct. 31, 2012) (denying summary judgment and finding question of applicability of certain policy provisions was a jury question); Rule 57, SCRCF (“the right to trial by jury [for a

declaratory judgment] may be demanded under the circumstances and in the manner provided in Rules 38 and 39”); S.C. Code § 15-53-90 (“When a [declaratory judgment action] involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions . . . [and] [a]ll existing rights to jury trials are hereby preserved.”). Further, while Penn National does not contend that spoliation is a cause of action, federal courts in South Carolina have held that where there is a question as to whether any spoliation occurred in the first instance, this determination is properly placed before a jury before determination of whether sanctions are merited. *See, e.g. Evans v. Quintiles Transnat’l Corp.*, 2015 U.S. Dist. LEXIS 171750 at * 13-14 (D.S.C. Dec. 23, 2015) (holding that where there was a factual dispute as to whether an allegedly spoliated computer file ever even existed, it was proper to allow the jury to resolve the threshold issue of its existence). Thus, Penn National’s jury trial demand is proper in this action and, absent an order to the contrary, Penn National is entitled to a trial by jury.

CONCLUSION

Based on the foregoing, Penn National respectfully asserts that proper demand has been made for a jury trial and, therefore, under the plain language of the South Carolina Rules of Civil Procedure, the case must proceed on the jury trial roster at this time, as no stipulation or order has found otherwise. Further, Penn National’s demand for a jury trial is proper in this action, given the settled law as to Plaintiff’s causes of action and the existence of factual questions in this case.

Respectfully submitted, this the 28th day of November, 2022.

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
 appointed Receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
 Insurance Company; Sam J. Crain & Co., Inc.;
 and South Carolina Property and Casualty
 Insurance Guaranty Association,

Defendants.

Case No. 2020-CP-40-02098

**DEFENDANT PENNSYLVANIA
 NATIONAL MUTUAL CASUALTY
 INSURANCE COMPANY'S
 ANSWER TO COMPLAINT FOR
 DECLARATORY JUDGMENT
 AND BREACH OF CONTRACT**

COMES NOW Defendant Pennsylvania National Mutual Casualty Insurance Company
 ("Penn National"), by and through counsel, and hereby responds to the Complaint as follows:

1. It is admitted, upon information and belief, that Peter Protopapas was appointed as
 a Receiver in other civil actions to which Penn National was and is not a party and which are
 wholly unrelated to this action, and it is further admitted that Peter Protopapas is a lawyer who
 maintains his principal place of business in Richland County, South Carolina. Except as admitted,
 denied.

2. It is admitted that Penn National is a corporation organized under the laws of
 the Commonwealth of Pennsylvania with its principal place of business located in
 the Commonwealth of Pennsylvania. Except as admitted, denied.

3. Defendant Penn National is without information or knowledge sufficient to admit
 or deny the allegations of paragraph 3. To the extent a response is required, denied.

4. Admitted, upon information and belief.

5. Denied.

6. Denied.

7. The allegations of paragraph 7 are vague and lack clarity in that they allege certain allegations have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, the allegations of paragraph 7 are denied.

8. It is admitted that Penn National issued a Comprehensive General Liability policy to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988. Except as admitted, denied.

9. Denied.

10. Penn National is without information or knowledge sufficient to either admit or deny the allegations of paragraph 10. To the extent a response is required, denied.

11. Penn National is without information or knowledge sufficient to either admit or deny the allegations of paragraph 11. To the extent a response is required, denied.

12. The allegations of paragraph 12 state legal conclusions to which a response is not required. To the extent a response is required, denied.

13. It is admitted, upon information and belief, that Peter Protopapas was appointed as a Receiver in other civil actions to which Penn National was and is not a party and which are wholly unrelated to this action, and it is further admitted that Peter Protopapas is a lawyer who maintains his principal place of business in Richland County, South Carolina. Except as admitted, denied.

14. The allegations of paragraph 14 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which

such allegations have been asserted. As such, it is unclear as to whether an actual or justiciable controversy indeed exists with respect to any particular allegations, cases, or matters asserted against Covil, and therefore, the allegations of paragraph 14 are denied.

15. The allegations of paragraph 15 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether “judicial declarations are necessary or appropriate at this time” with respect to any particular allegations, cases, or matters asserted against Covil, and therefore, the allegations of paragraph 15 are denied.

16. The allegations of paragraph 16 state legal conclusions to which a response is not required. To the extent a response is required, denied.

17. The allegations of paragraph 17 state legal conclusions to which a response is not required. To the extent a response is required, denied.

18. The allegations of paragraph 18 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, the allegations of paragraph 18 are denied.

19. The allegations of paragraph 19 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 19 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

20. The allegations of paragraph 20 state legal conclusions to which a response is not required. To the extent a response is required, denied.

21. It is admitted Penn National issued a Comprehensive General Liability policy to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988. Except as admitted, denied.

22. The allegations of paragraph 22 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 22 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

23. The allegations of paragraph 23 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 23 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

24. The allegations of paragraph 24 simply state a request for a declaration of this Court to which a response is not required. To the extent a response is required, Penn National does not have information or knowledge sufficient to either admit or deny the allegations of paragraph 24, and therefore, denies such allegations. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

25. The allegations of paragraph 25, including each subpart, simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 25, including each subpart, are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

26. The allegations of paragraph 26 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether a justiciable controversy indeed exists with respect to any particular allegations, cases, or matters asserted against Covil, and the allegations of paragraph 26 are denied.

27. The allegations of paragraph 27 are not directed to Penn National. To the extent a response is required, denied.

28. The allegations of paragraph 28 are not directed to Penn National. To the extent a response is required, denied.

29. The allegations of paragraph 29 are not directed to Penn National. To the extent a response is required, denied.

30. The allegations of paragraph 30 are not directed to Penn National. To the extent a response is required, denied.

31. The allegations of paragraph 31 are not directed to Penn National. To the extent a response is required, denied.

32. The allegations of paragraph 32 are not directed to Penn National. To the extent a response is required, denied.

33. To the extent the allegations of paragraph 33 assert or imply that certain coverage existed under the Penn National's insurance policy, such allegations are specifically denied. The allegations of paragraph 33 otherwise appear not be directed to Penn National. To the extent a response to such allegations is required, denied.

34. The allegations of paragraph 34 are not directed to Penn National. To the extent a response is required, denied.

35. The allegations of paragraph 35 are not directed to Penn National. To the extent a response is required, denied.

36. The allegations of paragraph 36 simply state a request for a declaration of this Court to which a response is not required. Further, the allegations of paragraph 36 are not directed to Penn National. To the extent a response is required, denied.

GENERAL DENIAL

Except as specifically admitted above, Penn National denies each and every allegation of Plaintiff's Complaint.

FIRST DEFENSE

Penn National moves to dismiss this action pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure in that there is no subject matter jurisdiction over the claims asserted inasmuch as (1) the Receiver does not have legal standing to pursue such claims, and (2) the Plaintiff has failed to comply with the conditions precedent to filing suit under Penn National's policy issued to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988 (the "Penn National Policy").

SECOND DEFENSE

Penn National moves to dismiss this action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure in that the Complaint fails to state a claim upon which relief can be granted. Specifically, Plaintiff fails to allege actual factual allegations to support a claim for a declaration by this Court as to coverage under Penn National's policies. Plaintiff's Complaint does not aver any policy language that it contends affords coverage for the claims at issue or the manner in which the claims asserted against Covil in the "Covil Asbestos Suits" could trigger coverage under the Penn National Policy or identify any of the "Covil Asbestos Suits" for which it seeks declarations from this Court as to coverage under the Penn National Policy.

THIRD DEFENSE

The Plaintiff failed to tender or submit the underlying lawsuits referenced in Plaintiff's Complaint in a timely manner under the Penn National Policy and otherwise failed to comply with the provisions of the Penn National Policy. Therefore, Plaintiff's claims in this action are barred.

FOURTH DEFENSE

Penn National's rights, liabilities, and obligations are defined and controlled by the terms and provisions of the Penn National Policy. The terms and provisions of the Penn National Policy, including, but not limited to, any and all applicable policy definitions, conditions, exclusions, limitations, and endorsements, do not provide coverage for the claims, lawsuits, or matters alleged in Plaintiff's Complaint. Accordingly, Plaintiff's claims against Penn National in this action, which are grounded on the theory that Penn National had an obligation to provide coverage to Covil under the Penn National Policy for the claims, lawsuits, or matters asserted against Covil should be dismissed.

FIFTH DEFENSE

Plaintiff's claims may be barred by failure to reduce or mitigate its damages as required by law.

SIXTH DEFENSE

Penn National pleads the equitable doctrines of waiver, estoppel, and laches in bar of the claims against Penn National in this action.

SEVENTH DEFENSE

Penn National pleads the applicable statute of limitations and/or statute of repose in bar of any claims or recovery against Penn National in this action.

WHEREFORE, Penn National respectfully prays the Court as follows:

1. That Plaintiff have and recover nothing of it in this action;
2. That the Plaintiff's claims against it be dismissed, with prejudice;
3. That the costs of this action be taxed against the Plaintiff;
4. For a trial by jury on all issues so triable; and
5. For such other and further relief as to the Court may seem just and proper.

This the 31st day of March, 2021.

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November 7, 2022

VIA E-MAIL ONLY (cposwal@sccourts.org)

The Honorable Jean H. Toal
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South Carolina Court Administration
1220 Senate Street, Suite 221
Columbia, SC 29201

RE: *Covil Corp. v. Penn National Mut. Cas. Ins. Co.* (Richland County);
2020-CP-40-02098

Dear Chief Justice Toal:

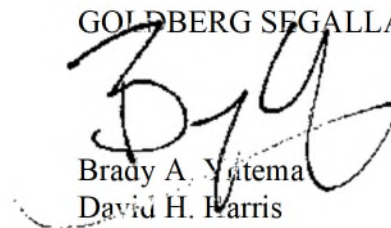
I am writing on behalf of Pennsylvania National Mutual Casualty Insurance Company ("Penn National") in advance of the Pre-Trial Hearing currently scheduled to be conducted on Monday, November 14, 2022. It is expected that the Receiver will request an "evidentiary" hearing on issues involving alleged spoliation and a non-jury trial on issues involving Penn National's coverage for Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8 – specifically regarding certain coverage issues regarding Penn National's aggregate coverage limit under such policies.

Penn National requested a jury trial on all issues so triable by way of its Answer to the Receiver's Complaint for Declaratory Judgment and Breach of Contract. Fact and expert witnesses are scheduled to be conducted by the parties in November and December leading up to the trial date of December 12 or 14, 2022. Please allow this letter to respectfully confirm that Penn National preserves its right to and requests a jury trial on all factual issues in this case, including on spoliation and coverage issues.

Should you need anything further with respect to this matter, please do not hesitate to contact me.

Sincerely,

GOLDBERG SEGALLA, LLP


Brady A. Yntema
David H. Harris

cc: All Counsel of Record

Please send mail to our scanning center at: PO Box 727, Buffalo NY 14201

From: Poswal, Chukwuzitelu <cposwal@sccourts.org>
Sent: Tuesday, November 8, 2022 10:42 AM
To: Carter, Jane
Cc: Lindsay Valek; Peter Protopapas; Nes, W. Brad; Jon Robinson; Patterson, Nancy L.; Shanon Peake; murrell@smithrobinsonlaw.com; Edwards, Brady; Harris, David G.; Yntema, Brady A.
Subject: RE: Covil v. Penn (2019CP4002098) Rescheduled Pretrial Hearing

Good morning, Mr. Yntema.

Chief Justice Toal has instructed me to inform you that your participation and your client, Penn National's participation in pretrial hearings, discovery activities and any other activities past, present or future pertaining to *Covil v. Penn National* will in no way waive Penn National's right to insist that it is entitled to a jury trial on all or any matters pertaining to this litigation. She will place an order reserving and preserving Penn National's position on its right to a jury trial on the record at the commencement of the Pretrial hearing on Monday, Nov. 14, 2022.

Best,

Zitel Poswal

Judicial Law Clerk
 South Carolina Court Administration
 1220 Senate Street, Suite 221
 Columbia, SC 29201
cposwal@sccourts.org
 Office: 803-734-0833

From: Carter, Jane <jcarter@goldbergsegalla.com>
Sent: Monday, November 7, 2022 2:35 PM
To: Poswal, Chukwuzitelu <cposwal@sccourts.org>
Cc: Lindsay Valek <Lindsay@rplegalgroup.com>; Peter Protopapas <pdp@rplegalgroup.com>; Nes, W. Brad <brad.nes@morganlewis.com>; Jon Robinson <jon@smithrobinsonlaw.com>; Patterson, Nancy L. <nancy.patterson@morganlewis.com>; Shanon Peake <shanonp@smithrobinsonlaw.com>; murrell@smithrobinsonlaw.com; Edwards, Brady <brady.edwards@morganlewis.com>; Harris, David G. <dharris@goldbergsegalla.com>; Yntema, Brady A. <byntema@goldbergsegalla.com>
Subject: Covil v. Penn (2019CP4002098) Rescheduled Pretrial Hearing

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Ms. Poswal:

Please find attached a letter from counsel for Penn National to Chief Justice Toal. If you have any questions, please do not hesitate to contact me.

Thank you.

Jane Carter

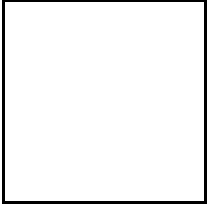
Jane Carter | Legal Assistant

701 Green Valley Road | Suite 310 | Greensboro, NC 27408

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STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its  
duly appointed Receiver Peter D.  
Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty  
Insurance Co.; Sam J. Crain & Co., Inc.;  
and South Carolina Property and  
Casualty Insurance Guaranty  
Association,

Defendants.

C.A. No. 2020-CP-40-02098

PLAINTIFF'S NOTICE THAT IT SEEKS  
ONLY DECLARATIONS CONCERNING  
ITS POLICIES WITH PENNSYLVANIA  
NATIONAL MUTUAL CASUALTY  
INSURANCE COMPANY

Plaintiff Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas, ("Covil"), hereby provides Notice to this Honorable Court and all interested parties that it seeks only declarations concerning its policies with Defendant Pennsylvania National Mutual Casualty Insurance Company (hereinafter "Penn National") in the above captioned matter. The Receiver has only pled causes of actions for declaratory relief as to Defendant Penn National. The Receiver's Complaint does not seek monetary damages from Defendant Penn National. The only legal cause of action was for breach of contract against Defendant Sam J. Crain & Co., Inc. who is a defunct entity and is being dismissed without prejudice simultaneously with this filing.

This 6th day of November 2022

s./ Peter D. Protopapas

Peter D. Protopapas, Esquire SC Bar 68304

Rikard & Protopapas, LLC

2110 N. Beltline Blvd

Columbia, SC 29204

803.978.6111

[pdp@rplegalgroup.com](mailto:pdp@rplegalgroup.com)

Receiver

State of South Carolina ) In The Court of Common Pleas  
County of Richland ) Fifth Judicial Circuit  
2020-40-02098

Covil Corporation,  
Plaintiff,  
vs.  
Pennsylvania National,  
et al.,  
Defendants.

Transcript of Record

September 8, 2022

Columbia, South Carolina

B E F O R E:

The Honorable Jean Hoefer Toal, Judge

## A P P E A R A N C E S:

W. Brad Nes, Esquire  
Peter D. Protopapas, Esquire  
Jonathan M. Robinson, Esquire  
G. Murrell Smith, Jr., Esquire  
Attorneys for Covil Corporation

Brady A. Yntema, Esquire (via Webex)  
David G. Harris, II, Esquire (via Webex)  
Attorneys for Pennsylvania National

Elizabeth B. Harris, CVR-M-CM  
Circuit Court Reporter

I N D E X

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NO EXHIBITS INTRODUCED.

1           THE COURT: All right, court will come to order. This  
2 is the matter of Covil, C-o-v-i-l, Covil Corporation  
3 against Pennsylvania National and others. This is  
4 2020-CP-40-02098. In the courtroom we have Mr. Protopapas  
5 for Covil; he is the receiver and a lawyer for Covil. We  
6 have Brad Nes and Murrell Smith from Morgan, Lewis, Bockius  
7 as counsel for the receiver. Mr. Brady Yntema from  
8 Goldberg and Segalla is Penn National's principal attorney.  
9 Mr. Yntema is attending via WebEx. He is ill with COVID,  
10 and we are deeply appreciative of his being willing to  
11 attend the hearing in this format. And Mr. David Harris is  
12 also here virtually.

13           Are you not, Mr. Harris? I see you.

14           And Mr. Harris is also with Goldberg and Segalla and  
15 is representing Penn National.

16           All right, Mr. Protopapas, you may proceed.

17           MR. PROTOPAPAS: Thank you, Your Honor. We'd like to  
18 give you a procedural status of the Covil-Penn matter. As  
19 the court's aware, this is the second Covil-Penn case. The  
20 first Covil-Penn case dealt with a coverage issue over 50  
21 or so thousand dollars for the Rollins case. That's  
22 currently -- Court of Appeals has affirmed. There's a  
23 petition for cert pending, and that case is working its way  
24 to ultimate conclusion.

25           *Covil v. Penn* two is the case we're here about today.

1 As the court recalls, there had been extensive discovery  
2 practice and motions practice in that matter that  
3 ultimately led to an order of this court in May of -- April  
4 of 2022 that Penn National, we argue, took an interrogatory  
5 appeal from. That appeal was to the South Carolina Court  
6 of Appeals. We moved to dismiss; Penn National opposed it,  
7 and the Court of Appeals granted the motion to dismiss in  
8 August. Penn National has moved to reconsider that order;  
9 we, of course, have opposed it at the Court of Appeals. On  
10 a parallel path, Penn National filed a petition for  
11 *certiorari* to the South Carolina Supreme Court. That  
12 petition was denied by the South Carolina Supreme Court as  
13 well as in August.

14 It seemed appropriate that with our 2020 civil action  
15 number that we give the court an update as to where we  
16 stand and advise the court of where we believe the best  
17 path forward is. Your Honor is intimately familiar with  
18 Covil and the two legacy liability insurance policies that  
19 Penn National issued and admits to issuing for '86 to '87  
20 and for 1987 to 1988. We believe those legacy liability  
21 policies are ripe for adjudication by this court as to the  
22 obligations that Penn National has to Covil to defend and  
23 to indemnify Covil for asbestos liability claims.

24 We believe, Your Honor, that that issue can be  
25 resolved in a nonjury trial as the court's schedule would

1 allow. It is a straight-up declaratory judgment on two  
2 insurance policies. Our research has indicated that that  
3 is a proper nonjury matter for this court.

4 We have three experts that would testify at trial. We  
5 don't believe it would take more than half to  
6 three-quarters of a day for us to put our case up. We  
7 don't believe that the rebuttal or response would be more  
8 than a day, and we could have the case finished in two  
9 nonjury days. And the pace this court operates, it could  
10 well be one day.

11 And so we feel thirty exhibits at most from the  
12 plaintiff's side. We think that what, what the court has  
13 done in the past, which is preliminary findings of fact  
14 with exhibits presented to the court in advance, then  
15 trial, the testimony, a presentation of the testimony, and  
16 a streamlined process. The court is educated on all these  
17 issues, and then that issue will end.

18 There is discovery that's still outstanding. As the  
19 receiver, Your Honor, I don't believe it's in the best  
20 interests of Covil to delay this trial and these policies  
21 to allow the six to nine-month process that Ellis Winters  
22 would need to comb through the microfiche that Penn  
23 National has if the motion to reconsider is ultimately  
24 denied by the Court of Appeals.

25 So, the heart of that appeal, Your Honor, is the Ellis

1 and Winters project which has been stalled since the court  
2 issued its order. So, nothing -- Ellis Winters has not had  
3 an opportunity to begin that process simply because of this  
4 appeal, and from the perspective of the receivership, we  
5 need this insurance policy to be as responsive as it can  
6 be.

7 Now, Penn National disagrees with us and the meaning  
8 of those policies, disagrees on the scope of the erosion or  
9 aggregate limits and all those traditional legacy liability  
10 issues. But what we would ask the court is allow Ellis and  
11 Winters at the appropriate moment to move forward with  
12 enforcement of that discovery order. Allow us to take our  
13 deposition of Penn National, allow them to depose our  
14 experts, and let's set this thing for a nonjury trial and  
15 put to bed a big chunk, perhaps the last, the last Covil  
16 coverage action, I believe, that is pending in federal or  
17 state court.

18 And it is a 2020 action, Your Honor, and I do  
19 apologize it's taken us this long to get here. I don't  
20 like having cases that are two years old before this court,  
21 but we'll be ready at trial to try those two policies and  
22 the spoliation issues surrounding those policies on the  
23 document destruction. We can be ready as soon as December,  
24 and that would...

25 THE COURT: Why is there a motion still pending for

1 reconsideration in light of the Supreme Court's denial of  
2 *certiorari*?

3 MR. PROTOPAPAS: It's a motion for an *en banc*  
4 decision, Your Honor, and we believe that will be -- we  
5 were hoping that would be denied in relatively quick order,  
6 but it deals only with this one discovery issue that Ellis  
7 and Winters is ---

8 THE COURT: I am very, very familiar with what it  
9 deals with, and I am very unhappy that we are still talking  
10 about sixty to ninety days or longer than that to do this  
11 discovery. I know what was said when the firms talked  
12 about this. These documents are stored at Iron Mountain, a  
13 national manager of paper records and digitized records for  
14 governments and private corporations all over America.  
15 It's not going to take them that kind of time to digitize  
16 these records and make them searchable. That's what  
17 they're in the business of doing. So, that piece of it is  
18 something I don't understand.

19 MR. PROTOPAPAS: Your Honor, we, we don't disagree  
20 with the court. We put our trust into Ellis and Winters,  
21 who, my understanding, has stopped all activity until the  
22 appeal is concluded, feeling that it would be inappropriate  
23 for them to proceed forward until that appeal is finally  
24 completed.

25 THE COURT: Have they been paid?

1 MR. PROTOPAPAS: I apologize, Your Honor. I have not  
2 asked. I, I ---

3 THE COURT: Let me turn to Mr. Yntema.

4 MR. YNTEMA: Your Honor, I apologize. You're breaking  
5 up on me a little bit, but I did hear that ---

6 THE COURT: I'm not hearing -- whoa, whoa, whoa. Wait  
7 a minute. I'm not hearing you.

8 (A PAUSE.)

9 THE COURT: Mr. Yntema, I'm going to come up here  
10 where I can see and hear you a little bit better. I'm at a  
11 podium right here.

12 First of all, tell me why appellate activity is still  
13 being pursued here in light of the fact that the Supreme  
14 Court denied *certiorari*.

15 MR. YNTEMA: Your Honor, the Supreme Court denied  
16 *certiorari* in its original jurisdiction. That's what we  
17 petitioned the Supreme Court to review. The Court of  
18 Appeals motion of the receiver did, in fact, dismiss the  
19 appeal. We've asked for a petition for rehearing *en banc*;  
20 that's currently pending. There was -- I won't go on in  
21 detail about the briefing, but the core issue was whether  
22 it was indeed a discovery order or essentially was a order  
23 holding Penn National in contempt or as a sanction order  
24 enforcing an order that had Penn National conducting a  
25 search at its sole expense by way of a third party, and

1 then allowing the microfiche to be digitized and be used at  
2 the receiver's sole expense. That was the main issue with  
3 respect to as to whether it was an interlocutory appeal or  
4 not.

5 THE COURT: Let me stop you there, Mr. Yntema. Those  
6 issues, you are raising these issues of whether it's a  
7 discovery or a sanctions order before the Court of Appeals  
8 now?

9 MR. YNTEMA: Yes, Your Honor, we have.

10 THE COURT: Well, you did not raise those issues in  
11 front of me. So, how in the world are you going to ask an  
12 appellate court to review trial court orders if you haven't  
13 asked the trial court to make any determinations about  
14 that?

15 MR. YNTEMA: I think in our motion for reconsideration  
16 we did address that issue at, at trial court level, and  
17 Your Honor denied our motion for reconsideration, which I  
18 appreciate and I understand.

19 THE COURT: Well, I won't spend a great deal of time  
20 debating it, but I certainly will go back and look at it.  
21 It strikes me that it's simply a delaying tactic, and I'm  
22 frustrated about that, to be honest with you. But  
23 hopefully that will be resolved fairly shortly when the  
24 Court of Appeals tells us whether it wants to continue with  
25 the case or whether it's going to dismiss the *en banc*

1 request. I guess we'll just have to wait on that.

2 Has Ellis and Winters been paid?

3 MR. YNTEMA: Your Honor, we did make a payment to  
4 them, I believe, in the spring after their first phase of  
5 searching through the insurance repository for Penn  
6 National was complete and after the reporting to the court  
7 was complete. They were paid in full. I'm not sure if  
8 they have incurred any other expenses since that time.  
9 I'm, I'm, I'm not sure if they have since if was mainly  
10 motion practice thereafter, and then an appeal was taken.  
11 So, I don't think there has been any conduct or expenses  
12 incurred by Ellis and Winters since that time, nor have I  
13 been notified of that.

14 THE COURT: Okay. All right.

15 (A PAUSE.)

16 MR. SMITH: Chief Justice, Murrell -- for the record,  
17 Murrell Smith for Covil. One issue we got is that, is that  
18 the experts are not going to be available on December 5th  
19 for us, and more importantly for me -- I hope to  
20 participate in this case. As you know, we have an  
21 organizational session after the election.

22 THE COURT: Oh, yeah.

23 MR. SMITH: And so it's going to be on December 6th  
24 and 7th. So, if we could try this case on the 12th, Your  
25 Honor, that would be great if you would -- could do that.

1 This is a nonjury case. Hopefully, Court Administration or  
2 if you got that December block carrying over -- but we  
3 would request December 12th would probably be the best time  
4 for us, and we could have our experts ready also.

5 And then, you know, Your Honor, I will -- if we have  
6 to try the case in the new year, I'll skip session, but  
7 it's a little difficult for me now for me to skip session  
8 where ---

9 THE COURT: No, you're the chief presiding officer, so  
10 you can't.

11 MR. SMITH: Yes, ma'am. That's, that's my concern is  
12 I have to turn it over to Mr. Pope, and you know how Mr.  
13 Pope can mess things up.

14 THE COURT: No comment.

15 MR. SMITH: Thank you.

16 THE COURT: All right, hang on for a minute. Let me  
17 go back.

18 MR. YNTEMA: I wonder if I may? I'm not sure if it's  
19 appropriate for me to ---

20 THE COURT: Yes, sir, say again?

21 MR. YNTEMA: Yes. Your Honor, yesterday was the first  
22 time that I had seen a suggestion of a December trial date  
23 and a suggestion that the receiver had three experts that  
24 have yet to be disclosed to us. I certainly haven't had an  
25 opportunity to check with any experts that we may have or

1 with respect to their availability during the December  
2 timeframe. So, I just wanted to put that out there for  
3 Your, for Your Honor's consideration.

4 I don't know. I know Mr. Smith may have some  
5 conflicts early on next year, and -- but as far as a trial  
6 date in, in, in 2023, we are certainly willing to consider  
7 that as well.

8 THE COURT: Well, I'm not inclined to wait until June  
9 of 2023 to try this matter, this nonjury matter; I'm not  
10 going to do that. I'm going to go back here and look at  
11 December just for a minute, but what you're asking is, in  
12 fact, to not have it tried until they get out of session  
13 next year. I'm not going to do that.

14 They've been ready to proceed on this thing and tried  
15 to get through the discovery and all this kind of thing,  
16 and it's been a foot dragging operation by Penn National  
17 the whole time and I just can't -- well, I'm not going to  
18 allow that to continue. Let me look at my calendar a  
19 minute.

20 (A PAUSE.)

21 THE COURT: What I'm going to do is this. I'm going  
22 to set this case for December the 14th -- that is a  
23 Wednesday -- with the thought that it would take no more  
24 than three days to try because I've got four cases in that  
25 December block. They're all in Charleston, and I can't

1 tell about these cases. We settled the one I thought we  
2 had there; that was disposed and now we've got these  
3 others, but one of them is a 2018 case. So, you know,  
4 unless it settles, that's probably the one that we would  
5 deal with, and it could be tried in a week, in which case I  
6 could move the thing up.

7 (A PAUSE.)

8 THE COURT: I'm going to tentatively say the 12th and  
9 as you all know, I'm going to meet with the Asbestos  
10 Steering Committee next Monday, and let me see what I can  
11 find out about this December term, but I'm going to  
12 tentatively set it for Monday here. So, we'll see if we  
13 can get a spot to lay our head, and it would be nonjury.  
14 So, if we had to go to one of those family court  
15 courtrooms, we could do it. And as I say, that's tentative  
16 right now. I will finalize that next Monday after I meet  
17 with the asbestos people, if that's okay.

18 MR. PROTOPAPAS: Thank you, Your Honor.

19 THE COURT: Okay. What else do we need first of all  
20 from you, Mr. Protopapas, or from Mr. Smith by way of this  
21 matter?

22 MR. PROTOPAPAS: Nothing further, Your Honor.

23 THE COURT: All right. Are there ---

24 MR. YNTEMA: Your Honor.

25 THE COURT: I'm get to you in a minute. I'm not

1 leaving you out. Don't worry, Mr. Yntema. You'll have  
2 plenty of chances.

3 Do we need any kind of pretrial hearing on any of this  
4 stuff? Probably so.

5 MR. PROTOPAPAS: I believe, Your Honor, thirty days in  
6 advance a pretrial, and we can propose with Mr. Yntema a  
7 schedule for proposed order, findings of fact, conclusions  
8 of law, and an exhibit list, and a trial schedule.

9 THE COURT: All right, the 24th is Thanksgiving. All  
10 right, all right, let's have a pretrial hearing on November  
11 the 18th; that's the previous Friday from Thanksgiving.  
12 So, we would have November the 18th for a pretrial hearing  
13 on all outstanding motions, and then we would have the  
14 trial on December the 12th.

15 Now I will turn to you, Mr. Yntema.

16 MR. YNTEMA: Yes. Thank you, Your Honor. Brady  
17 Yntema from Penn National. I, I -- you broke up on me.  
18 Now I, I hear you clearly now, and you have stated that  
19 you're looking at December 12th tentatively, and you were  
20 talking as though maybe the December 14th date may be the  
21 most likely for you. Is that right?

22 THE COURT: What's that?

23 MR. YNTEMA: You had broken up on me a little bit and  
24 I apologize, but it seems, it seems that you've, you've set  
25 the trial, tried to set the trial for December 12th and --

1 but you had, you had discussed potentially actual start  
2 date of that trial being in the middle of the week of  
3 December 14th. Is that correct?

4 THE COURT: Yes, and what I was trying to say is the  
5 second week of the Charleston term, that I've got asbestos  
6 cases then, but I don't know that I could say it's for more  
7 than a week. Are you saying the 14th works better for you  
8 than the 12th?

9 MR. YNTEMA: I can't speak to either right now. I  
10 haven't had that opportunity to speak to any of my folks.  
11 I just want to get an understanding from the court what  
12 your -- what the court is inclined as far as the dates. It  
13 sounds like you're setting it for December 12th tentatively  
14 but likely it may go on December 14th?

15 THE COURT: That's correct. I'm going to let you know  
16 for sure about that after I meet this coming Monday with my  
17 Asbestos Steering Committee. This is a group of plaintiff  
18 and defendants' bar that we try to work out the blocks for  
19 the whole year, and I can find out then from the people  
20 that are involved in that December block of four cases what  
21 realistically I can expect out of those, and then I can let  
22 you know about that week in December.

23 MR. YNTEMA: I appreciate that, and then, and then we  
24 have, just to be clear, November 18th is what you were  
25 inclined to have a -- schedule a pretrial conference?

1 THE COURT: Yeah. That would be on November the 18th.  
2 That's a Friday.

3 MR. YNTEMA: Yes, Your Honor, thank you, and then the  
4 last thing I think I understood -- I just want to make sure  
5 I'm clear -- is that I guess Mr. Nes will be contacting me  
6 or Mr. Protopapas will be contacting me to discuss the, the  
7 -- a scheduling order that we could have proposed to the  
8 court to -- for this case leading up to the pretrial  
9 conference.

10 THE COURT: Sure, sure, sure. You and Mr. Protopapas,  
11 Mr. Smith, and all the rest of the folks involved in this  
12 case will a full opportunity to see if you can get together  
13 and decide what an agenda is going to look like for this  
14 thing.

15 MR. YNTEMA: Appreciate that, and I guess just for  
16 other conversation is that I know Mr. Protopapas and I and,  
17 and the receivers' counsel have had some conversations  
18 about potential settlement options and things of that  
19 nature, and I, I would be inclined to continue to work  
20 toward that endeavor. I didn't know if the court would be  
21 amenable to having some sort of potential mediation  
22 deadline incorporated into the pretrial -- into the, into  
23 the, I guess, scheduling order.

24 THE COURT: Well, talk with them about how that would  
25 work. I am always amenable to things that encourage

1 settlement, as you know. So, and lord knows if there's a  
2 case where that ought to be done, it's this one. So, this  
3 doesn't exclude that at all.

4 Anything further?

5 MR. PROTOPAPAS: No, ma'am.

6 THE COURT: All right, I close the proceedings. Thank  
7 you very much so all.

8 --- END OF TRANSCRIPT OF RECORD ---

**CERTIFICATE**

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED  
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH  
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO  
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE  
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE  
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING  
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE  
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON  
THE 8TH DAY OF SEPTEMBER, 2022.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,  
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

*/s/ELIZABETH B. HARRIS, CVR-M-CM*

COLUMBIA, SOUTH CAROLINA

NOVEMBER 6TH, 2022

1 State of South Carolina ) Court of General Sessions  
 2 County of Richland ) Fifth Judicial Circuit  
 3  
 4 Covil Corporation, by and ) Transcript of Record  
 through its duly appointed )  
 5 Receiver, Peter D. Protopapas, )  
 )  
 6 Plaintiff, )  
 )  
 7 vs. ) 2020-CP-40-02098  
 )  
 8 Pennsylvania National Mutual )  
 Casualty Insurance Company, )  
 9 et al., )  
 )  
 10 Defendant. )

11  
 12 November 14, 2022  
 Columbia, South Carolina

13 B E F O R E:

14 The Honorable Jean H. Toal, Judge

15  
16 A P P E A R A N C E S:

17 W. Brad Nes, Esquire  
 Nancy L. Patterson, Esquire  
 18 Peter D. Protopapas, Esquire  
 On behalf of Covil Corporation

19 Brady A. Yntema, Esquire  
 20 Alexander E. Davis, Esquire  
 On behalf of Pennsylvania National Mutual Casualty  
 21 Insurance Company

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23 Reported by: Stacy S. Johnson, RPR  
 24 Circuit Court Reporter

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\*\*NO EXHIBITS WERE INTRODUCED\*\*

1           (The following proceedings were held November 14,  
2   2022, beginning at 10:21 AM.)

3           THE COURT: All right. The next matter is Covil  
4   Corporation, by and through its appointed receiver,  
5   Peter Protopapas, against Penn Mutual -- Penn National  
6   Mutual Casualty Insurance company. This is  
7   2020-CP-40-02098.

8           To be heard today is Covil's motion to compel  
9   Penn National. This is one in a series of motions to  
10  compel.

11          Mr. Protopapas is present along with his attorneys  
12  and Mr. Yntema is present along with his colleague,  
13  Mr. Davis.

14          MR. DAVIS: Yes, Your Honor.

15          THE COURT: And I'm ready to proceed.

16          Now let me say a few things on the front end just  
17  to be sure I clarify my communications at the beginning  
18  of this hearing.

19          Mr. Yntema sent me something while I was on the  
20  road with class reunions and family gatherings and all  
21  that kind of thing, concerned about waiving things by  
22  attending this hearing, I assume, and so I sent back  
23  the response to Mr. Yntema saying that his attendance  
24  at this hearing would not in any way waive anything.

25          I want to be sure that you understand that that

1 doesn't mean I ruled on all these other claims of waiver  
2 and so forth, but they're still out there. All I've done  
3 so far is to try to bring some closure to this bitterly  
4 fought issue of discovery.

5       So what I simply said was his principal in the  
6 insurance company does not need to be present at this  
7 hearing today and that his appearance here would not  
8 waive any claims he has about the responsibility of  
9 Penn National in this matter or any other arguments  
10 that would have to do with what this appearance means.

11       I can't really understand why that would have been  
12 of concern. This is a normal case that has been much  
13 complicated by this discovery dispute, but the case  
14 itself is a very straightforward matter and in that  
15 connection the plaintiff has sought for a good long  
16 time now, well over a year, maybe two years, to discover  
17 certain insurance policies and we're still at square  
18 zero on that matter.

19       So that's kind of where we are as I see it at the  
20 beginning of this hearing.

21       Mr. Protopapas, who speaks for you?

22       MR. PROTOPAPAS: Your Honor, Peter Protopapas,  
23 receiver for Covil. Brad Nes will be on my behalf on  
24 the motions to compel. Nancy Patterson will be dealing  
25 with the proposed trial schedule. We're currently set

1 for December -- or the week of December 12th for a  
2 nonjury trial regarding the coverage dispute between  
3 Covil and Penn. The parties are robustly engaged in  
4 discovery. We are mediating tomorrow. We have findings  
5 of fact, conclusions of law coming due, as well as any  
6 other appropriate pre-trial motions and activity.

7 So for purposes of today, Your Honor, I spoke with  
8 Mr. Yntema and we have the motions to compel issue and  
9 then we'd like to discuss with you the proposed trial  
10 schedule and the jury/nonjury issue that Mr. Yntema and  
11 his client has presented, and with that, Your Honor,  
12 I'll turn it over to Mr. Nes.

13 MR. NES: Thank you, Your Honor.

14 Brad Nes for the receiver for Covil Corporation.  
15 We have two motions to compel currently pending or two  
16 separate motions to compel, and I believe a brief history  
17 of how we got here would be helpful before we get to the  
18 actual substance of the motions.

19 In terms of the timeline, the Finch plaintiffs and  
20 the -- the lawyers for the Finch plaintiffs originally  
21 served Penn National with a subpoena in June of 2018  
22 asking for all of their liability policies. Then in  
23 2019 --

24 THE COURT: Stop right there.

25 MR. NES: Sure.

1           THE COURT: All right. Covil served a subpoena on  
2 Penn National June of 2018 asking for?

3           MR. NES: It was actually in June of 2018. It was  
4 the asbestos plaintiffs in Finch that served a subpoena  
5 directly on Penn National. It was not Covil yet that  
6 served that subpoena. They had come across -- the  
7 plaintiffs in Finch had come across policy numbers and  
8 two of those policy numbers were a 1986-1987 general  
9 liability policy and a 1987-1988 general liability policy.

10          So they served a subpoena on Penn National asking  
11 for those particular policies, as well as any liability  
12 policies that were issued to or covering Covil between  
13 1965 and, I believe, 1995.

14          THE COURT: All right. Now at that point the  
15 relationship between Covil and Penn National was that  
16 Covil was a defendant in a Federal court action in North  
17 Carolina brought by the Finch family against Covil for  
18 liability in connection with the development by Finch  
19 of mesothelioma?

20          MR. NES: That's correct, Your Honor.

21          THE COURT: Had that case been brought to verdict  
22 when this subpoena was filed?

23          MR. NES: It had not, Your Honor.

24          THE COURT: All right. So this is -- this is a  
25 pre-trial motion by the Finches against Penn National,

1     which they allege is one of its insurers for this  
2     particular suit in North Carolina, right?

3           MR. NES:   That's correct.   They were searching for  
4     all of the available coverage.

5           THE COURT:   Okay.   And so what happened?

6           MR. NES:   Then we skip to 2019.   There's the  
7     coverage action in North Carolina.

8           THE COURT:   Well, I mean, what happened with the  
9     subpoena?

10          MR. NES:   In response to the subpoena, Penn  
11     National did a very narrow search.   They looked for  
12     those particular policies numbers that the Finch  
13     plaintiffs provided and they produced certain parts of  
14     those policies to the Finch plaintiffs, but they did no  
15     further search because the argument that they developed  
16     in June of 2018, which is their argument to this day,  
17     is that unless you give us a specific policy number,  
18     there's nothing else we're going to do to search for  
19     the policy.

20          THE COURT:   And just out of curiosity, where did  
21     Finch get the policy numbers?

22          MR. NES:   I believe those policy numbers were  
23     in documents that were produced during the underlying  
24     asbestos litigation.   I don't recall exactly what  
25     document the policy number came from.

1           THE COURT:   Were they record -- what I'm trying  
2   to find out is whether Penn National had supplied those  
3   in the past.   I know there was -- at some point in that  
4   litigation the Federal judge involved in hearing the  
5   matter said I want -- there was a squabble about what  
6   kind of coverage existed and the Federal judge said  
7   bring forth the policies.

8           MR. NES:   It was not Penn National that brought  
9   forth any evidence of the coverage.

10          THE COURT:   I got you.

11          MR. NES:   Then we jump to 2019 and there's the  
12   coverage action in North Carolina and in the coverage  
13   action in North Carolina, a carrier, I believe it was  
14   Hartford, sent document requests to Penn National and  
15   similarly to the --

16          THE COURT:   Stop there.   This coverage action in  
17   North Carolina, was it in North Carolina Federal court  
18   or state court?

19          MR. NES:   It was in North Carolina Federal court,  
20   Your Honor, on the heels of --

21          THE COURT:   Was it the same -- same judge that  
22   had dealt with the Finch matter?

23          MR. NES:   Yes, Your Honor.

24          THE COURT:   It was, wasn't it?

25          MR. NES:   That's exactly right.   So on the heels

1 of the jury verdict in Finch, Zurich files a coverage  
2 action against Covil and the other defendants.

3 THE COURT: Right. The Finch verdict at that point  
4 had been rendered, 34 million dollars, and now the  
5 coverage action is brought and who brings that coverage  
6 action?

7 MR. NES: Zurich, Your Honor. Zurich Insurance  
8 Company.

9 THE COURT: Zurich, right. And it brings the  
10 action against who?

11 MR. NES: It brings the action against Covil and  
12 several carriers. I don't believe Penn National was  
13 among the original defendants in that coverage action.

14 THE COURT: But The Hartford was one of those  
15 names?

16 MR. NES: Yes. That's correct.

17 THE COURT: And The Hartford then tried to subpoena  
18 policies from Penn National, right?

19 MR. NES: That's right. They served discovery  
20 requests to Penn National in that coverage litigation.

21 THE COURT: And what happened then?

22 MR. NES: In response to Penn National -- in  
23 response to that discovery request, for the first time  
24 Penn National provided a very interesting response.  
25 They object to the scope of the request asking for all

1 policies, but interestingly they say we cannot search  
2 for all available policies that may be responsive  
3 because we can only search by policy number. That's  
4 the gist of what their response is.

5 So as of 2019 they are getting requests for all  
6 of the policies that may be covering Covil, but their  
7 response is we can't search our historic records which  
8 may have responsive documents because we can only search  
9 by policy number.

10 THE COURT: All right.

11 MR. NES: Then in 2021 we have this action or the  
12 early iteration of this action and the current action.

13 THE COURT: And this action was commenced in 2020?

14 MR. NES: That's correct, Your Honor.

15 THE COURT: And this action is an action brought  
16 by Covil against Penn National and others seeking  
17 coverage?

18 MR. NES: That's correct, Your Honor.

19 THE COURT: Coverage for what?

20 MR. NES: We are seeking coverage for declarations  
21 specifically as to how the current policies that are  
22 known, the 1986-1987 general liability policy, respond  
23 to asbestos cases, and then discovery of any other  
24 policies that may have been issued other than the two  
25 known policies.

1           THE COURT:   So the action that was brought in  
2   2020 by Covil against Penn National and others was a  
3   declaratory judgment action specifying that it sought  
4   a declaration as to the coverage of the known policies  
5   and to explore through discovery, obtain other policies,  
6   and seeking declarations as to the coverage of those  
7   policies on Covil's responsibility for mesothelioma  
8   claims, right?

9           MR. NES:   That's absolutely correct, Your Honor.

10          THE COURT:   All right.

11          All right.   And that was 2020 when that started?

12          MR. NES:   That's right.

13          THE COURT:   What then happened?

14          MR. NES:   We served discovery.   The same basic  
15   discovery that the Finch plaintiffs served and that  
16   was served in the North Carolina Federal coverage  
17   action asking for all policies that cover Covil either  
18   as a named insured or an additional or supplemental  
19   insured and the response back was exactly the same,  
20   it was cut and pasted, which is unless you provide us  
21   a policy number we can't search our historic records  
22   because the system was designed so that you could only  
23   search by policy number.

24          THE COURT:   Stop there for a moment.   The first  
25   time we get into a discussion with Penn National about

1 its coverage, it's in connection with the Finch case,  
2 and then ultimately what happens with Finch, the big  
3 verdict is entered in the Federal courts of North  
4 Carolina. A coverage action is brought with respect to  
5 Finch here in South Carolina in state court and that is  
6 the matter I hear and that involves Penn National and?

7 MR. NES: This current case? I'm sorry. I lost  
8 the --

9 THE COURT: This current case --

10 MR. NES: Yes.

11 THE COURT: -- is a case that involves coverage  
12 for Finch as well as?

13 MR. NES: Oh, I'm sorry, Your Honor. This case  
14 does not involve Finch. The current case that you have  
15 does not involve Finch.

16 THE COURT: Right. So what happened with -- with  
17 the Finch case in terms of their coverage?

18 MR. NES: So they made the argument that there pol  
19 -- the two known policies, the 1986 and 1987 policies,  
20 had an exclusion that would have preempted them from  
21 having to provide coverage for Finch --

22 THE COURT: Right.

23 MR. NES: -- and that was accepted at the time and,  
24 therefore, they were not asked to participate in the  
25 specific Finch case.

1           THE COURT: And that was accepted by what, the  
2 Federal court of North Carolina?

3           MR. NES: It was accepted by the parties because  
4 the exclusion had to do with a products exclusion and  
5 so here --

6           THE COURT: Okay. So this is -- in connection  
7 with the settlement, they resolved their differences  
8 in which the subpoena to Penn National was filed, they  
9 were resolved by settlement?

10          MR. NES: That's right. So it was ultimately  
11 determined that the claim -- the specific claim that  
12 was brought in Finch would not be covered by the  
13 two specific policies that Penn National provided,  
14 therefore, there was no further either discovery or  
15 motions practice with respect to Penn National.

16          THE COURT: And the policies that were provided by  
17 Penn National in the Finch case, were they commercial  
18 general liability policies?

19          MR. NES: They were, Your Honor.

20          THE COURT: All right. And they had exclusion  
21 for what?

22          MR. NES: They had -- both policies have forms  
23 contained in the documents that were produced that  
24 have an exclusion for completed operations and product  
25 claims.

1 THE COURT: Well, do the --

2 MR. PROTOPAPAS: Just to clarify on the Finch  
3 settlement portion, Your Honor, due to the actions of  
4 USF&G and due to the actions of Zurich, I didn't feel  
5 it appropriate to even push the issue even further with  
6 Penn National, which had not been put on notice of the  
7 Finch case on day one, and had proceeded for years  
8 without Penn National even knowing it was going on.

9 THE COURT: That's what I -- that's what I was  
10 getting to.

11 MR. PROTOPAPAS: I decided to stay away -- as  
12 receiver, I made a decision to focus on what I  
13 considered the wrongful actors.

14 THE COURT: The Covil case was tendered to -- for  
15 defense to USF&G and some others?

16 MR. PROTOPAPAS: Zurich.

17 THE COURT: Zurich. And then later on Zurich  
18 tried to look and see whether it was possible to get  
19 some contributions from other insurers. Penn National  
20 took the position yes, it had commercial general  
21 liability coverage, but it had an exclusion. Of course,  
22 that depends on what the nature of the lawsuit is. If  
23 the nature of the lawsuit involves things a CGL policy  
24 would normally cover, like per occurrence exposure,  
25 then that's a different situation from what was being

1 litigated with Penn National in connection with the  
2 Finch case. Am I right?

3 MR. NES: That's correct, Your Honor. So the  
4 scope, for example, of the declarations we seek in this  
5 case are -- relate to operations claims.

6 THE COURT: Right.

7 MR. NES: There was no operations claim in the  
8 Finch case.

9 THE COURT: Got you. Okay.

10 All right. Continue.

11 MR. NES: And to be clear, with respect to the  
12 exclusions, we do not necessarily accept that one of  
13 the two exclusions is actually part of the 1986 --

14 THE COURT: It hasn't been litigated.

15 MR. NES: Exactly.

16 THE COURT: It hasn't been raised or litigated.  
17 That is the gist of what Mr. Protopapas was trying to  
18 project. Penn National, as ultimately developed, has a  
19 policy that might relate to the matters -- it certainly  
20 relates to Covil and the question is whether it related  
21 to Finch and Mr. Protopapas, on behalf of Covil, who  
22 -- for whom these policies are assets, made the decision  
23 to settle the Finch case with the involvement of the --  
24 of other insurers, but not Penn National, and one of  
25 the reasonings behind that is they didn't know about

1 Penn National to begin with having tendered -- when  
2 Finch was first being considered.

3 Of course, some of that had to do with how Covil  
4 was represented at that time well before the receiver  
5 got involved. The situation changed dramatically when  
6 a receiver, who was representing Covil and not its  
7 insurers, got involved. Am I right?

8 MR. NES: That is correct, Your Honor.

9 THE COURT: All right.

10 MR. NES: So we're now in 2020. This current  
11 action in this court is filed and when discovery begins  
12 the same discovery is served. We want all policies that  
13 cover Covil either as a named insured or supplemental  
14 or additional insured and the response back is the same,  
15 which is the system is designed so that you can only  
16 search by policy number.

17 And as this Court will recall, we had many hearings  
18 as to how we could lighten the load for Penn National to  
19 try to search their facilities so that they could produce  
20 these policies and the response back time and time again  
21 was simply if you don't give us a policy number, we're  
22 not gonna search our historic records.

23 That culminated in an order in November of '21 in  
24 which the Court directed Covil's outside asbestos  
25 underlying counsel, Ellis and Winters, to examine the

1 documents in Penn National's historic warehouses and  
2 offsite at Iron Mountain and to come and report to the  
3 Court as to how these policies could be identified, and  
4 Ellis and Winters reported back in March of 2022. That  
5 followed a hearing in which these issues were discussed  
6 and one of their recommendations was to digitalize a  
7 certain percentage of those historic records and then  
8 once those historic records were digitalize, the receiver  
9 would be able to search for responsive documents in their  
10 possession.

11 THE COURT: Now stop right there.

12 All right. It develops -- we didn't know until  
13 Ellis and Winters got involved what the physical nature  
14 of the records in Iron Mountain was; isn't that correct?

15 MR. NES: That's correct. There was a -- there was  
16 a distinction between documents that were on historic  
17 microfiche, there were certain paper documents that  
18 were at Iron Mountain. It was very confusing as to how  
19 those policies were stored. There was a discussion  
20 about a terminal digit system and that was essentially  
21 the assignment that Ellis and Winters was given and  
22 throughout the -- between November and March is when  
23 they were able to identify and understand how it is  
24 that Penn National keeps those records.

25 THE COURT: And how it is they keep their records,

1 as I understand it, is that there are microfiche that  
2 contain all -- the universe of all the policies that  
3 you are trying to seek?

4 MR. NES: That's gonna --

5 THE COURT: They're all on microfiche, right?

6 MR. NES: That is what it currently appears. Part  
7 of the discovery that we've sought is to confirm that,  
8 which we still don't have formal discovery responses  
9 that would confirm that, but as we know right now the  
10 policies that would -- that you would expect to have,  
11 general liability policies covering Covil, are '92 or  
12 prior, and they've made the representation that all of  
13 those policies are, yes, on microfiche.

14 THE COURT: All right. And those microfiche are  
15 at Iron Mountain?

16 MR. NES: No, those are actually at Penn National's  
17 headquarters in a file room.

18 THE COURT: So just stopping there for a moment,  
19 why were we led around the mulberry bush for years about  
20 Iron Mountain when it turns out that these -- the records  
21 that we are -- that contain the material that has been  
22 requested many, many times in discovery is in Penn  
23 National's headquarters on microfiche? How did that  
24 happen?

25 MR. NES: That's an answer that I think,

1 respectfully, opposing counsel's gonna have to answer  
2 because we still don't have a -- what we think is a  
3 sufficient answer for that and part of what we want  
4 with the upcoming hearing both on spoliation and  
5 discovery sanctions is for the Court to take the broad  
6 view of how discovery has unfolded in this case and  
7 answer questions just as that.

8 THE COURT: But this whole squabble is a squabble  
9 about getting a copy of the insured's policy, right?

10 MR. NES: That's correct.

11 THE COURT: It's not any kind of big, huge,  
12 complicated electronic discovery thing or a trade  
13 secret thing or anything like that. These are policies  
14 of insurance that were issued covering Covil --

15 MR. NES: That's correct.

16 THE COURT: -- and that is what you are seeking?

17 MR. NES: Yes, Your Honor.

18 THE COURT: And turns out that the -- that all of  
19 those policies for the period of time you want, which  
20 is '92 and prior, are on microfiche at Penn National's  
21 headquarters?

22 MR. NES: Yes, Your Honor.

23 THE COURT: All right.

24 Now Ellis and Winters is the insurer's counsel?

25 MR. NES: No, Your Honor. That -- that is Covil's

1 underlying asbestos counsel.

2 THE COURT: Covil's underlying asbestos counsel.

3 All right. Now has -- and Covil's underlying --  
4 they are Covil's underlying defense counsel?

5 MR. NES: Yes.

6 THE COURT: And they are -- their contention is  
7 we are defending Covil and in that connection we are  
8 bringing a DJ action to find out about these policies?

9 MR. NES: No, Your Honor. To clarify Ellis and  
10 Winters' role, when we got to November of last year and  
11 Penn National kept telling you that if you don't have a  
12 policy number, we can't do anything, the Court decided  
13 an alternative path. Because Ellis and Winters is  
14 familiar with Covil as underlying defense counsel and  
15 because they have an independent obligation when they  
16 are asked for responsive insurance policies to produce  
17 those in the underlying litigation, the Court felt they  
18 were best positioned to review Penn National's archives  
19 to determine how could we as underlying asbestos counsel,  
20 who had to produce the same policies, how would we search  
21 through Penn National's records, and by doing interviews  
22 with the main individuals and custodians at Penn National  
23 is when they finally clarified what was offsite at Iron  
24 Mountain and what was contained on the microfiche and  
25 their suggestion to the Court in a March 22nd report was

1 take these microfiche, have them digitalize and then  
2 search those once they're in digital format.

3 THE COURT: Now so that's what happens in March of  
4 2020. Ellis and Winters makes the report. Then what  
5 happened?

6 MR. NES: Then this Court has a hearing in April  
7 which leads to a May 5th discovery order and then this  
8 Court does three important things. First, it orders  
9 exactly the relief that the receiver requested, which  
10 is -- or excuse me -- that Ellis and Winters recommended  
11 in their report, which was the microfiche would be  
12 processed and digitalized. Number two, that their motion  
13 to quash the deposition would be denied. And then the  
14 Court held in abeyance our other motion to compel on the  
15 theory that we should take the deposition first. If we  
16 can get the information that we want from the deposition,  
17 then the other motions are essentially not needed, and  
18 then we'll move on. The Court asked us to report back  
19 after we took our deposition as to whether or not the  
20 motions to compel would be needed.

21 We took the beginning of that motion -- excuse me  
22 -- the beginning of that deposition of Penn National on  
23 spoliation last week and having learned what we learned  
24 in that deposition, there are certain issues specifically  
25 in the prior motion this Court held in abeyance that we

1 believe are now ripe for ruling.

2 THE COURT: All right.

3 MR. NES: And I think in terms of the timeline,  
4 there are two other issues that I think are important.  
5 The first is that the May 5th order is still on appeal,  
6 and that has a bit of a convoluted history where Penn  
7 National appealed -- I'm sorry.

8 THE COURT: Well, pre-trial discovery matters are  
9 not appealable matters and the Court of Appeals has  
10 dismissed the appeal for that reason.

11 MR. NES: That's right, Your Honor. So the Court  
12 of Appeals dismissed it, the Supreme Court dismissed a  
13 direct appeal they made simultaneously. They have now  
14 filed a motion for reconsideration back in the Court of  
15 Appeals, which has not been ruled on yet.

16 THE COURT: Right.

17 All right. Of course, the rules say that a Court  
18 may continue to move forward with things that are not  
19 affected by appeal and if this thing is not an appealable  
20 matter, then why should the Court be delayed from looking  
21 at this motion to compel and moving forward?

22 MR. NES: We don't believe it should be. And  
23 there's also a separate reason, which is the May 5th  
24 order is forward looking. It says you've got your box  
25 of -- boxes of microfiche, how are we going to deal with

1     searching through those, but the May 5th order is looking  
2     forward. The discovery we're looking for has to do with  
3     spoliation, which we haven't even talked that. The  
4     spoliation piece has a similar time band.

5           THE COURT: Let me just stop you for a minute  
6     before we get to spoliation, all right? We now know  
7     from Ellis and Winters that there are several boxes of  
8     microfiche that are in the headquarters of Penn National  
9     and they contain the policies for the years we're talking  
10    about?

11          MR. NES: Yes, Your Honor. I believe it's --

12          THE COURT: General liability policies.

13          MR. NES: I believe it's 154 boxes.

14          THE COURT: All right. And has there been any  
15    attention given to how long a period of time that  
16    would take? I mean, we are now in an age where you can  
17    speak into a device and your voice can immediately be  
18    translated into language and we are in an era now of  
19    digitalization where things can be digitized very, very  
20    quickly and translated into a readable form and then  
21    searched to search for particular terms within those  
22    documents, and that technology is changing and has been  
23    changing even since 2020 when this dispute -- discovery  
24    dispute first arose. We're now in 2022 and digitization  
25    continues to be a very, very expansive situation.

1           Have you got any notion of what it would take to  
2           just go on and digitize these things?

3           MR. NES: Yes, Your Honor. I believe that Ellis  
4           and Winters said that it would be a rolling process,  
5           but it would take anywhere from three to nine months  
6           depending on the technology that was available,  
7           et cetera.

8           So they have not actually had vendors come in to  
9           make the specific bids because Penn National has taken  
10          the position that now that this is on appeal they don't  
11          have to do anything to enforce that order.

12          THE COURT: Okay.

13          MR. NES: As I mentioned though, that's forward  
14          looking, and the discovery that we're looking for right  
15          now is backwards looking because we have to look at that  
16          timeline again, which starts in 2018.

17          Throughout the course of this litigation, we  
18          discovered that Penn National did not issue a litigation  
19          hold in this case. We also discovered that they have a  
20          process in which an automatic destruction takes place at  
21          the end of or beginning of the next calendar year where  
22          they destroy historic insurance policies.

23          We learned this because of the Court's November  
24          order getting Ellis and Winters involved. The very  
25          first call with Ellis and Winters, opposing counsel, a

1 gentleman named Brent Reifsnyder, who's Penn National's  
2 director of administration, and myself, they were  
3 discussing how it was that we would go about examining  
4 the microfiche, and Mr. Reifsnyder mentioned almost in  
5 passing that the annual policy purge was coming, so we  
6 inquired well --

7 THE COURT: This was in November of 2021?

8 MR. NES: This is November of 2021.

9 So we immediately inquired on that call do you  
10 have a litigation hold in place and are you searching  
11 for the documents that you destroy on an annual basis  
12 for any reference to Covil, and the answer was no.

13 So that day we hang up the phone and we immediately  
14 issue a document request and a deposition notice. That  
15 discovery that we learned following November 2021 is  
16 this. First, that in 2018, 2019 and 2020, Penn National  
17 had their automatic purge policy where they destroyed  
18 historic general liability occurrence policies. Number  
19 two, that in all of those calendar years, 2018, 2019  
20 and 2020, they did not issue a litigation hold, and in  
21 each of those three calendar years they did not search  
22 for any of their insurances policies to determine whether  
23 Covil was a named insured or an additional insured.

24 Moreover, they did not keep a record of what they  
25 were destroying. So today they cannot tell us what

1 specific policies were destroyed in 2018, 2019 and 2020.  
2 They did not stop their annual purge until December 17th  
3 of 2021.

4 THE COURT: Now wait a minute. They purged in  
5 2018, 2019 and 2020, and what's the nature of the purge?  
6 What's the universe that they're purging each of those  
7 years?

8 MR. NES: So what they do is they take throughout  
9 the course of a calendar year and they pull documents  
10 that they believe are outside of their document  
11 destruction range. They --

12 THE COURT: And what -- what is the -- what I'm  
13 trying to figure out is if they've got some kind of  
14 timeline they follow, are we gonna take a hunk of the  
15 records from 2005 to 2006 and we're gonna destroy them  
16 if ten years is their window of destruction or twenty  
17 years or whatever it is? What's the detail on that?

18 MR. NES: So now you've hit what this motion is  
19 about. So their story is well, we only pull them if  
20 it hits twenty-five years from the date of nonrenewal,  
21 and it's automatic. Once you hit twenty-five years from  
22 nonrenewal, then you show up on a list, we then pull it  
23 during the calendar year and destroy it at the end of  
24 the year.

25 THE COURT: Well, how do they determine that a

1 particular group of records are in that twenty-five  
2 years from nonrenewal?

3 MR. NES: Penn National created a system in 2010  
4 called the 2K10 system.

5 THE COURT: What?

6 MR. NES: It's called a 2K10 document management  
7 system and this -- this brings to a head why we're in  
8 the situation we are. This is what Mr. Reifsnyder  
9 actually testified to last week for the first time.

10 In 2010, as the director of administration for  
11 Penn National's historic policies, one of his jobs was  
12 to figure out how he was going to keep the records, and  
13 what he decided to do was take all of these indexing  
14 and put it into a data system so it would be easily  
15 searchable.

16 THE COURT: What kind of things?

17 MR. NES: He took all of the historic policies that  
18 were on microfiche and he wanted to create a system so  
19 that they could search for those policies digitally so  
20 that they didn't have to manually --

21 THE COURT: So you're saying he had all of the  
22 microfiches, the same ones we're talking about that we  
23 want to digitize and search for Covil and he had them  
24 and he says they could only be searched by policy number,  
25 right?

1           MR. NES: That's right.

2           THE COURT: So he digitized now to search for some  
3 other term?

4           MR. NES: What he did is he took information from  
5 those microfiche that he took the policy numbers --

6           THE COURT: Well, how -- how did he do that? Did  
7 he look at each policy?

8           MR. NES: That -- that is what is -- apparently  
9 that is the testimony. He had --

10          THE COURT: So in 2010 they took the microfiche  
11 and looked at each policy to determine which ones were  
12 twenty-five years non-renewed or --

13          MR. NES: No, Your Honor. What they did was they  
14 took all of the microfiche and they just had essentially  
15 a clerk look for policy numbers and collate a policy  
16 number into the system so that if I then later wanted  
17 to say I have this particular policy number somebody  
18 gave me, I could put it into a computer system and it  
19 would tell me what box it was in. That was the system --

20          THE COURT: Do we know how long it took that person  
21 to do that?

22          MR. NES: We do not, Your Honor, but what we do  
23 know is that at the time that was being done they made  
24 a conscious choice not to look at those policies for  
25 insured name or additional insurance status, so.

1           THE COURT: But they did go through each one of  
2           them and select a particular piece of information and  
3           you're telling me now in 2022 they can't do a little  
4           better job if they went back through those microfiches  
5           and tried to pull out information on each policy --  
6           they pulled out it by a manual look it sounds like.

7           MR. NES: That's correct, Your Honor.

8           THE COURT: And they did it in 2010 and presumably  
9           there is some information about how long it took them  
10          to do that, right?

11          MR. NES: That's correct, Your Honor, and they --  
12          they have not provided that.

13          THE COURT: And you've asked them for that and  
14          they have not provided it?

15          MR. NES: That's correct.

16          THE COURT: Okay. So they went through each  
17          policy at that time and decided they were gonna pick  
18          out policy numbers and pieces that would be separately  
19          maintained?

20          MR. NES: That's right.

21          THE COURT: And then they did a search of  
22          microfiches to find that policy number?

23          MR. NES: That's right. And --

24          THE COURT: Now you're asking them with modern  
25          technology at our beck and call to go back through

1     them and look at each of those things again and digitize  
2     more than that, right?

3             MR. NES:   That's precisely correct.

4             THE COURT:   Okay.

5             MR. NES:   So what we also learned during these --  
6     both the written discovery and the depositions is that  
7     during the course of this litigation Mr. Reifsnyder  
8     would print out a copy of all of the policies they were  
9     gonna destroy in that calendar year and then he had a  
10    staff of five individuals --

11            THE COURT:   Print out a copy of the actual policy  
12    itself?

13            MR. NES:   No, a list of all the policies to be  
14    destroyed.

15            THE COURT:   A list of the numbers?

16            MR. NES:   That's right.

17            THE COURT:   So just print out the numbers?

18            MR. NES:   That's exactly right.

19            THE COURT:   How did they know what date those  
20    numbers referred to?  They obviously pulled out  
21    something more than just the policy number, right?

22            MR. NES:   So the other information that is  
23    contained in this 2K10 system is the date of nonrenewal,  
24    so the computer system can easily calculate, for example,  
25    a policy is non-renewed in 1995, twenty-five years

1 later it is X date, so in the beginning of the calendar  
2 year Mr. Reifsnyder can go to his computer and say I  
3 want to pull all of the documents that have been  
4 non-renewed in the last twenty-five years and then print  
5 that list out, leaves it outside of his office and a  
6 staff of five individuals at their leisure consult this  
7 list and throughout the course of the year pull those  
8 policies by hand, and that includes pulling microfiche.  
9 So microfiche was actually destroyed in 2018, 2019 and  
10 2020.

11 THE COURT: And have you determined the mic --  
12 which years of policy -- of nonrenewal were involved in  
13 the destruction?

14 MR. NES: No. That's the key problem because the  
15 story we get is that look, we -- we only pull it if  
16 it's twenty-five year later to the day, but we know that  
17 can't be the full story because Covil's policies exist.  
18 So if you have an '86 and an '87 policy, at some point  
19 that should have run up on the twenty-five year mark.

20 THE COURT: I mean, 2010, twenty-five years before  
21 is 1985.

22 MR. NES: Right. So what we have now is we get  
23 into the QC process. How is it that the staff when  
24 they go to pull those assets of companies, which are  
25 worth millions of dollars, what's the QC process, and

1 the answer was virtually nothing. Once those staff  
2 members, who are not full-time document custodians,  
3 once these staff members who have a huge portfolio of  
4 issues, they're dealing with real estate, they're  
5 dealing with leases, on their spare time, they look at  
6 this list, they go to the microfiche, they pull it out  
7 or they order documents from Iron Mountain, and in that  
8 process --

9 THE COURT: Why do they destroy them at all if  
10 the universe is just a bunch of case full boxes with  
11 the microfiche in them?

12 MR. NES: That is -- that would be consistent with  
13 their document retention policy that they would destroy  
14 even occurrence-based policies after twenty-five years.  
15 That is the policy of the company that clearly is not  
16 always followed.

17 So one of the problems we have though, and that  
18 relates directly to the request that we're moving to  
19 compel, is the request is Request Number 11. All  
20 documents and communications related to the process of  
21 identification, collection and disposal of insurance  
22 policies and policy-related documents pursuant to  
23 Penn National's document retention and purge policies  
24 and practices, and we narrowed that range for purposes  
25 of our motion to compel from 2010 to the present.

1           And the purpose for that is the story, again, that  
2   we've been told is that there are or there were at some  
3   time a spreadsheet that would identify what was actually  
4   destroyed. Not recreating it today to try to assume  
5   what we did two, three, four, years ago, but the actual  
6   spreadsheets that were used. They -- clearly the hard  
7   copies were not maintained, so what we want is for the  
8   e-mails of Mr. Reifsnyder and the five individuals that  
9   he mentioned during his deposition to be searched to  
10   see if they can pull the e-mail to determine what was  
11   actually destroyed.

12           I am skeptical that that exists because of the  
13   nature of how these documents were pulled and destroyed,  
14   but to the extent that they do exist, that would be  
15   probative for getting a report.

16           The second category of documents we asked for,  
17   there are, I believe, seventeen separate requests, but  
18   they essentially boil down to inquiries about the  
19   document retention policy itself.

20           As I said a minute ago, they have a real problem  
21   that their document retention policy calls for the  
22   destruction of documents twenty-five years after  
23   nonrenewal. We know that that process is not consistent  
24   because the Covil policies currently exist. So in -- the  
25   actual document retention policy calls for information I

1 think would be helpful. It calls for a random review of  
2 documents as Step 7, it calls for a scheduled review in  
3 addition to the random review to determine whether the  
4 document retention policy is being used correctly.  
5 Everyone who receives a litigation hold notice, for  
6 example, is supposed to send an acknowledgment that they  
7 received the litigation hold.

8         These are all parts of the policies and procedures  
9 that they would produce, so we asked them to produce  
10 those documents to clarify how the document retention  
11 policy actually works and with respect to the litigation  
12 holds who received those and did they acknowledge they  
13 received them, and for that set of discovery we have  
14 been given a -- clearly a wall.

15         THE COURT: All right. Now let me see if I  
16 understand this. They say they have a policy that they  
17 have not produced for you yet that talks about how a  
18 litigation hold is handled?

19         MR. NES: There are two policies; one of which  
20 they have produced, one of which they have not produced.

21         THE COURT: All right. What did they produce?

22         MR. NES: They produced a sheet that was essentially  
23 what the employee was supposed to do if they received a  
24 litigation hold and that includes collecting all the  
25 relevant documents, sending an acknowledgement letter,

1     having a call with the in-house counsel to determine  
2     where their responsive documents are.

3           THE COURT:   Now these are just clerical people,  
4     right?

5           MR. NES:    That's right.

6           THE COURT:   All right.   And who would they receive  
7     the litigation hold from?

8           MR. NES:    So there's a gentleman named Scott Maier,  
9     who's an in-house lawyer at Penn National.   He's the one  
10    who on December 17th sent the one and only litigation  
11    hold that we're aware of in this case and he only sent  
12    it to one person as far as we know, a gentleman named  
13    Brent Reifsnyder, but we have no acknowledgment e-mail  
14    or paper record as to how Mr. Reifsnyder responded to  
15    that.

16          And as we've said before, the e-mails, for example,  
17    that Mr. Reifsnyder had contemporaneously could have  
18    been critical if those doc -- if those e-mails still  
19    exist as to what documents were selected in '18, '19  
20    and '20, but we have no record even to this day that  
21    Mr. Reifsnyder stopped an e-mail purge that is also  
22    part of their e-mail system.

23          So the other set of documents that we are moving  
24    to compel on have to do with claim files.   At the trial  
25    of this case in four weeks, we will be identifying

1     fourteen asbestos claims that Penn National contributed  
2     to the settlement. They sent a letter to Mr. Protopapas  
3     on September 21st and they identified fourteen claims  
4     that they had contributed to and they claim that those  
5     fourteen cases apply to the aggregate limit. We are  
6     asking this Court, in part, for a declaration --

7             THE COURT: Now let me stop you a minute.

8             MR. NES: Yes.

9             THE COURT: They sent a list of fourteen asbestos  
10     claims that they claim have been settled and the part  
11     they -- the money they paid in settlement should be  
12     deducted from the remaining coverage of the rest of  
13     these things?

14            MR. NES: That's exactly right.

15            THE COURT: Now do you-all have the policies  
16     they're talking about or do you?

17            MR. NES: We do. We have those two policies.

18            THE COURT: This is the '85 and '86, '86 and '87  
19     policies?

20            MR. NES: '86 to '87, '87 to '88.

21            THE COURT: So those two policies they say they've  
22     settled fourteen asbestos claims against one or both of  
23     those policies and that has reduced the coverage in those  
24     policies?

25            MR. NES: That's right. We argue that they are

1 interpreting their policies incorrectly. That those  
2 claims do not apply to the aggregate limit or at least  
3 most of those claims do not apply to the aggregate limit  
4 because our argument is, is that these are operations  
5 claims and that under the plain language of the policies  
6 operations claims do not apply to the aggregate limit of  
7 either of those policies.

8 But as part of this understanding of how Penn  
9 National decided to characterize or categorize those  
10 claims as applying to the aggregate limit, we asked  
11 them to produce claim files. We asked for claim files  
12 at the very beginning of this litigation. It was  
13 Request Number 4. We didn't receive anything.

14 So in October, the beginning of last month, I sent  
15 an e-mail asking them to supplement their production  
16 to provide us with the claim files for those fourteen  
17 claims, I didn't receive a response, so I sent a separate  
18 e-mail asking them and reminding them to supplement the  
19 response. I did not get a response. Finally, I sent a  
20 letter saying if you do not produce these claim files,  
21 you're forcing us to move yet again for a motion to  
22 compel. No response. We file the motion, then in a  
23 footnote we get a response they will produce 61,000 pages  
24 of documents at some undetermined time, so clearly they  
25 are accepting that those documents are relevant --

1 THE COURT: 61,000?

2 MR. NES: 61,000 pages of documents in claim files.

3 THE COURT: For fourteen claim files?

4 MR. NES: Yes, Your Honor. And that number, to be  
5 fair, doesn't really shock my conscious because the  
6 claim file mostly will probably be the discovery of the  
7 underlying asbestos claims.

8 So once those -- those should be -- despite the  
9 breadth of the number, those are files that should be  
10 able to be pulled in a day. I mean, this is not  
11 complicated. An insurance company keeps a claim file.  
12 Those files normally in my experience have the internal  
13 correspondence of the claims adjuster, any analysis or  
14 assessments of coverage, aggregate limit, et cetera,  
15 and the underlying asbestos claim, and those should all  
16 be in a one or a couple of places.

17 They have accepted that those are relevant, they  
18 need to be produced, but they still forced us to file  
19 this motion to compel, so we would ask that the Court  
20 grant the motion and provide a date certain when they  
21 need to produce those documents and we would ask by no  
22 later than December 1st.

23 THE COURT: And all this search now, this laborious  
24 search for the claims files now, has been precipitated  
25 by their continued failure to produce the insurance

1 policies that insured Covil. This all goes back to the  
2 same old thing. You've been trying since 2020 to get  
3 copies of the pertinent insurance policies that covered  
4 Covil claims. They have now at some point said we paid  
5 fourteen claims for Covil, but they haven't produced a  
6 claims file. Presumably those claims files would have  
7 some reference to the insurance policies.

8 MR. NES: That's correct, Your Honor.

9 THE COURT: Right now we don't know what the period  
10 of time the claims files -- have they given you any  
11 information about over what period of time these claims  
12 -- or have you figured out any --

13 MR. NES: Well, we know that the fourteen claims  
14 are claims that we tendered -- the receiver tendered to  
15 Penn National for coverage and Penn National participated  
16 in these particular settlements with other carriers. So  
17 they were not --

18 THE COURT: So these are just receiver tendered.  
19 They don't go back in time at all to talk about the  
20 broader issue of this other coverage?

21 MR. NES: That's exactly right. This is a separate  
22 issue that none of these claims were tendered before  
23 February of 2020, so the claim file itself in terms of  
24 their analysis will be very small presumably. There  
25 will be correspondence with the receiver and there will

1 be internal correspondence.

2 THE COURT: And, again, the claims file is a  
3 backwards way of trying to get to the coverage of these  
4 policies, but relating for a minute to the destruction  
5 issue, these are all things that should be within the  
6 ambit of destruction, correct?

7 MR. NES: That's correct, Judge.

8 THE COURT: They're still in those microfiches that  
9 are sitting in the -- at Penn National headquarters as  
10 far as you know?

11 MR. NES: No, the claim files themselves --

12 THE COURT: No, no.

13 MR. NES: I'm sorry.

14 THE COURT: Getting these claim files may be of  
15 interest to you for other reasons, but the big thing  
16 that drove you there at this moment in connection with  
17 the suit I've got is because you can't figure out any  
18 other way to start getting concrete information about  
19 the policies that covered Covil?

20 MR. NES: That's correct.

21 THE COURT: And this is another way of doing that.

22 MR. NES: Yes, Your Honor.

23 THE COURT: And for these universe of things, have  
24 they put a litigation hold now on their destruction?

25 MR. NES: We have not seen any litigation hold that

1 applies outside of Mr. Brent Reifsnyder.

2 THE COURT: And Reifsnyder says what about the  
3 litigation hold?

4 MR. NES: So what he says is that when he received  
5 the litigation hold, he stopped what his purge process  
6 is and his purge process are the microfiche or anything  
7 at Iron Mountain. Because the fourteen claims for the  
8 currently -- the current asbestos claims are being  
9 handled in the present, we have no reason to believe  
10 that those would be offsite at Iron Mountain or apply to  
11 the document retention policy.

12 THE COURT: Okay. All right.

13 MR. NES: Thank you, Your Honor.

14 THE COURT: So just reviewing for a moment, at  
15 this time we have got a whole bunch of discovery that  
16 is still -- that I've issued orders on a good many  
17 times and that Penn National now claims is subject to  
18 a stay because of their continued appeal at the Court  
19 of Appeals. Meanwhile, we have a trial that's gonna  
20 take place on December the 14th, right?

21 MR. NES: That's right, Your Honor. And to be  
22 clear, we don't -- there were several requests that we  
23 made that related directly to the May 5th order and we  
24 communicated to counsel that to the extent that there  
25 were requests directly related to the May 5th order,

1 despite our difference about whether we think it really  
2 should be stayed or not, we're not asking for anything  
3 forward looking. Everything we're looking for right  
4 now is simply backwards looking that has nothing it do  
5 with the May 5th order, has to do with their document  
6 retention policy and how it applied. And to show that  
7 they're being inconsistent with their argument, one of  
8 the issues that was in the May 5th order was the motion  
9 to quash the depositions. This Court denied that motion  
10 and they did appeal that, but they put a witness up  
11 anyway. So despite the fact that the deposition --

12 THE COURT: Well, there shouldn't be anything more  
13 clearly a part of discovery than the taking of a  
14 deposition and those matters are clearly not stayed by  
15 appeal.

16 MR. NES: That's right, Your Honor. So the very  
17 matters that I deposed Mr. Reifsnyder on last week  
18 and the -- if I can depose him on it, surely I get  
19 the documents that I should have gotten before the  
20 deposition.

21 THE COURT: All right.

22 All right. Mr. Yntema.

23 MR. YNTEMA: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. YNTEMA: Brady Yntema for Penn National Mutual.

1           THE COURT:  You're gonna have to speak up a lot  
2 more than you are.  I'm not hearing you at all with  
3 that.

4           I don't mind if you sit, Mr. Yntema.  The main  
5 thing you need to do is speak into that microphone.

6           It's not working?  Has it got the green light on?

7           MR. YNTEMA:  The green light's on, yes.  I can --

8           THE COURT:  I'd prefer you to sit if that's what  
9 it's gonna take to be sure you're heard in this  
10 microphone.

11          MR. YNTEMA:  I don't think that microphone is  
12 actually even working.

13          THE COURT:  Well --

14          MR. YNTEMA:  I can -- I can speak louder.

15          THE COURT:  -- let's get that straight before you  
16 start on an argument here, okay?

17          MR. YNTEMA:  I can speak louder if that would help.

18          THE COURT:  Well, that's gonna be how it's gonna  
19 have to be.

20          All right.  Let me say this.  Hold for a minute.

21          It's about time that you've had a break anyway.

22          It's now -- well, they've got the clock wrong.

23          MR. NES:  11:15, Your Honor.

24          THE COURT:  It's 11:15, of course.

25          All right.  Let's take a fifteen minute break and

1 let's get some people from the clerk's office in here  
2 to get this sound system working correctly.

3 MR. NES: Yes, Your Honor.

4 THE COURT: Thank you so much.

5 Court will be at ease.

6 (Recess taken at 11:17 AM.)

7 (Back on the record at 11:31 AM.)

8 THE COURT: All right. Mr. Yntema for Penn  
9 National.

10 MR. YNTEMA: Yes, Your Honor. Again, Brady Yntema  
11 for Penn National, a defendant in this case.

12 Your Honor, I was not expecting an entire  
13 recitation this morning of -- of where we've been and  
14 why we're here today, but I'm happy to go back and  
15 point out a few things as far as from Penn National's  
16 perspective where we -- where we've been and kind of  
17 where we are today.

18 It is -- Mr. Nes is right. In 2018, Penn National  
19 first received a subpoena in the Finch case. That  
20 subpoena was ordered by the Court, and the firm Dean  
21 Omar, who represented the plaintiffs in that asbestos  
22 case, issued the subpoena to many insurance carriers,  
23 but one -- but the subpoena to many insurance carriers  
24 was received by Penn National and in that subpoena it  
25 listed a policy -- one policy number that they had record

1 of that Penn National could search for.

2 Penn National conducted that search and responded  
3 to the subpoena and produced all policies it could find  
4 based on the policy numbers that were provided in 2018.  
5 Thereafter -- and keep in mind Penn National had never  
6 been tendered the Finch case. Penn National to that  
7 point had never been notified of the Finch case.

8 Thereafter -- in fact, in Penn National's response  
9 I believe the verdict in Finch came down a few months  
10 after that. Penn National had never tendered any  
11 judgment or asked to participate in that judgment until  
12 it was brought into the lawsuit -- the coverage lawsuit  
13 that was pending in the Finch matter in the Middle  
14 District of North Carolina in 2019. I believe in the  
15 fall of 2019 either Zurich or The Hartford third-partied  
16 Penn National in. Covil did not file that action against  
17 Penn National -- the initial action against Penn National.

18 THE COURT: Let me just ask you something about  
19 what occurred then. The first you know about a dispute  
20 that might involve your coverage for Covil is 2018,  
21 correct, when you got subpoenaed like a lot of other  
22 insurance companies did in the Finch case and were  
23 provided a policy number, right?

24 MR. YNTEMA: Penn National wasn't aware of any  
25 coverage dispute. It was aware that they were receiving

1 a subpoena --

2 THE COURT: You received a subpoena in 2018 asking  
3 that you produce a policy that covered Covil Corporation,  
4 correct?

5 MR. YNTEMA: Yes, with --

6 THE COURT: In connection with the Finch matter,  
7 correct?

8 MR. YNTEMA: It was in the Finch matter. The  
9 subpoena was received -- it was issued in the Finch  
10 case, yes.

11 THE COURT: Right. Listen. We can spend all day  
12 doing this kind of dance. You -- you first got the  
13 notice in 2018 that there was interest in Penn National's  
14 coverage of Covil Corporation.

15 MR. YNTEMA: That's correct.

16 THE COURT: All right. At that time did you --  
17 did Penn National put any kind of litigation hold on the  
18 destruction of any policies for commercial general  
19 liability that might relate to this period of time?

20 MR. YNTEMA: No.

21 THE COURT: Why not?

22 MR. YNTEMA: At that time they were -- simply  
23 received a subpoena and it's not unusual to receive  
24 subpoenas -- you know, for an insurance carrier to  
25 receive a subpoena in any case across the country

1 wanting to know if they have coverage for a particular  
2 defendant. It may be an asbestos case or any sort of  
3 commercial general liability-type case.

4 THE COURT: All right. Then we move to 2019. By  
5 2019 you now know that they -- that Covil contends that  
6 you have coverage and they give you a policy number,  
7 correct?

8 MR. YNTEMA: In 2019, the -- the policy numbers  
9 that were provided were the same policy numbers that  
10 were provided --

11 THE COURT: Penn National was third-partied into  
12 an action in 2019, correct?

13 MR. YNTEMA: Yes, Your Honor.

14 THE COURT: And that third-partying we talk of  
15 colloquially here, but that was a contention by one of  
16 the other parties in the matter that Penn National had  
17 coverage for Covil, correct, in connection with  
18 commercial general liability?

19 MR. YNTEMA: Under the two policies that had been  
20 produced by way of their subpoena response in 2018.

21 THE COURT: All right. But -- you had knowledge  
22 at that point then of Covil, a big thermal insulation  
23 company in South Carolina and other places, and the  
24 contention was made in -- the matter in which your  
25 company was third-partied in is that it had coverage for

1 claims involving mesothelioma and liability flowing from  
2 asphalt from asbestos that Covil Corporation sold. You  
3 had information about that at that time; did you not?

4 MR. YNTEMA: That it was asbestos claims against  
5 Covil at that time in 2019?

6 THE COURT: Yes.

7 MR. YNTEMA: Yes.

8 THE COURT: And you also had information at that  
9 time that you had coverage; did you not?

10 MR. YNTEMA: We were aware we had -- we may have  
11 coverage under the policies that we produced in response  
12 to subpoena.

13 THE COURT: You had policies.

14 All right. At that point did you put a litigation  
15 hold on anything that would relate to the period of time  
16 for which it was claimed that exposures were had that  
17 led to possible coverage by your company?

18 MR. YNTEMA: No.

19 THE COURT: You would have known, would you not,  
20 at that time that the coverage that was being talked  
21 about was coverage related to not claims made coverage,  
22 but per occurrence coverage as it would have existed in  
23 policies for 1986-1987 and 1987-1988? You were aware  
24 that that was the claim being made; were you not?

25 MR. YNTEMA: Yes, I believe so. I think I

1 understand the question.

2 THE COURT: Right. And you put no other -- you  
3 put no hold on the destruction of records that might  
4 pertain to that period of time?

5 MR. YNTEMA: We had produced the two policies that  
6 we had received a request for and those were --

7 THE COURT: Now I'm not asking about that. You  
8 now know that there's a claim that your company  
9 provided coverage to Covil Corporation and you are  
10 aware from the third-party allegations made that there  
11 is a claim that you have coverage for far more than  
12 that period of time or a particular claim. It's a  
13 broader claim than that; is it not? That third-party  
14 situation.

15 MR. YNTEMA: And if Your Honor would look, I think  
16 Your Honor mentioned the whole world -- with the whole  
17 world that we're looking at and the world that we're  
18 looking at is Covil ceased operations, you know, before  
19 1992. Effectively ceased as a corporation.

20 THE COURT: So -- well, what -- what difference  
21 does that make to anything we're talking about now?  
22 You know somewhere between 2018 and 2019 that Covil  
23 Corporation is being sued and in that connection whether  
24 it's alive or not alive the contention is being made  
25 that your company wrote commercial general liability

1 policies covering Covil that might or might not have  
2 bearing on the coverage being asserted in these claims.

3 MR. YNTEMA: Covil ceased operations --

4 THE COURT: What does that have to do with anything?

5 MR. YNTEMA: I think it means a lot, Your Honor,  
6 if I -- if I can answer that question.

7 THE COURT: Yes, sir. You're not answering my  
8 question.

9 MR. YNTEMA: I'm going to.

10 THE COURT: You are not answering my question, so  
11 let me just say that to begin with. If part of that is  
12 that we don't care if they're out of business, that's  
13 something else to be litigated, but what I'm asking you  
14 is what your policy was for records that you have of  
15 Covil Corporation and you're trying to answer me by  
16 saying well, they've been out of business for a long  
17 time. That shouldn't make any difference in terms of  
18 your retention of records or anything, should it? Or  
19 do you go through them and figure out who's out of  
20 business and then knock those out?

21 MR. YNTEMA: Well, Penn National's document  
22 retention policy is twenty-five years from the date of  
23 cancellation or nonrenewal.

24 THE COURT: Well, then that -- so that doesn't  
25 make any difference whether the company is alive and in

1 business or not, does it?

2 MR. YNTEMA: Well, as far as the document retention  
3 policy for corporations that were -- that were dissolved  
4 in 1992, those -- those policies would have been slated  
5 for purge in 2017.

6 THE COURT: You mean you keep -- wait a minute.  
7 You mean you keep records of policyholders who are now  
8 dissolved or out of business? I thought what you were  
9 trying to tell me is that you just simply had something  
10 that said if they did not renew their policy with you,  
11 you would go twenty-five years from that time and then  
12 destroy the policy as I understood that to be.

13 Am I not --

14 MR. YNTEMA: Cancellation, non-renew date. Yes,  
15 Your Honor. Twenty-five years.

16 THE COURT: Well, then that cancellation non-renew  
17 date has nothing to do with whether the corporation was  
18 in business or not, does it?

19 MR. YNTEMA: Well, because the policy -- there  
20 couldn't have been a policy for Covil issued by Penn  
21 National. I mean, mind you -- I'll step back. The  
22 policies that were provided by Penn National were 1986  
23 through 1988. Those were the dates -- those are the  
24 years of coverage that Penn National we know of issued  
25 policies to Covil, but what the argument is, is that

1 Penn National should have put a litigation hold in place  
2 in 2018 when they received a subpoena.

3 Looking back twenty-five years from when Covil  
4 ceased operations, fast-forward twenty-five years, 2017  
5 would have been twenty-five years from the date it ceased  
6 operations. Those policies were subject to destruction  
7 in 2017 or before. Anytime I -- in 2018 or thereafter,  
8 a litigation hold would have been of no consequence. We  
9 had already moved on.

10 Now why was -- why was Covil's policy in existence?  
11 Why did Penn National have it and they were able to  
12 produce it and the answer has been we don't know; that  
13 it was there and it was in existence. That's the answer  
14 that Brent Reifsnyder just gave last week. He was the  
15 person that was in charge as the records custodian for  
16 the policies during that period of time and he said I  
17 don't know how that policy existed, but it did, and then  
18 also it shows that once we purge policies twenty-five  
19 years out or whatnot, we move on.

20 THE COURT: Well --

21 MR. YNTEMA: There will be another --

22 THE COURT: Mr. Yntema?

23 MR. YNTEMA: Yes.

24 THE COURT: You know, you don't get to decide based  
25 on not looking at your records that you don't have any

1 records because the company's been dissolved. You don't  
2 get to make that decision in discovery. In discovery,  
3 if you are being sued, which you are now for -- and the  
4 issue is the issue of coverage of policies, you don't  
5 get to decide that you're not gonna look and see unless  
6 there's a policy number. You've got the records. You  
7 say you've got the records. You got them in your main  
8 office, not at Iron Mountain the way we were told for  
9 over a year, that it would be terrible to search because  
10 it was all such a voluminous record, but you have them  
11 at your home office and they're on microfiche, the kind  
12 of technology that can be easily converted into something  
13 that can be searched.

14 So I don't understand the argument that it doesn't  
15 make any difference because this company has been out of  
16 business. You didn't keep records like that, did you?

17 MR. YNTEMA: Like what?

18 THE COURT: You didn't keep records of what you  
19 were gonna obtain based on whether a company was out of  
20 business, did you?

21 MR. YNTEMA: We kept a cancellation non-renew date.  
22 I'm trying to make -- I'm trying to bring sense to the  
23 gravity of what their argument is, is that twenty-five  
24 years from the date that Covil dissolved was 2017.

25 THE COURT: But you produced no records of any of

1     that kind. You just simply say I'm gonna tell you  
2     without you being able to look and see what their  
3     retention policy is, where it's written down or anything  
4     else; that this is when I say we started destroying  
5     records and this is why a litigation hold doesn't mean  
6     anything, but you have not showed them any basic records  
7     for them to be able to verify what you continue to assert  
8     to this Court and what your 30(b)(6) witness has to say  
9     about it. They are entitled to the records themselves  
10    to be able to test the truth of what you're telling this  
11    Court.

12           MR. YNTEMA: I want to make sure I understand,  
13    Your Honor. I'm not trying to be flippant about  
14    anything. The records that you're referencing that  
15    they're entitled to see, we have produced thousands of  
16    pages of records. We've produced the Y10K database that  
17    Mr. Nes referenced. It's sitting right here. We printed  
18    it out and we served it and we served it on --

19           THE COURT: The records they want are not any of  
20    that. The records they want are the policies themselves  
21    as issued to their clients and that -- that is something  
22    that's so basic that an insurance company has to produce.  
23    If a policyholder, even one from long ago, even one  
24    dissolved is sued and they ask for your records about  
25    whether you had a policy that covered them at a period in

1 time when policies covered such things as occurrences,  
2 meaning exposure that don't manifest until twenty-five  
3 years later, they are entitled to those policies. You  
4 say in answer we have those policies, but we have an  
5 awkward way of maintaining them on microfiche and you  
6 can only access the microfiche if you know the number.  
7 Now we know that before that became the method of  
8 searching them, you had those microfiche all along and  
9 at some point in 2010 you paid a clerk within Penn  
10 National operations to have an index made of those  
11 microfiche and you decided the way to make the index was  
12 the policy number and the last date of renewal or the  
13 date of nonrenewal, which would be the last date that  
14 the policy was effective is another way of saying that.  
15 That -- you did that in 2010. It's able to be done.

16 Now what they would like to do is look at that raw  
17 data just like your clerks did and see if they can  
18 determine more directly whether Covil has other policies  
19 that cover it. That's what this whole dispute is about.

20 MR. YNTEMA: We have opened our insurance  
21 repository to as you know --

22 THE COURT: You have not opened these microfiche  
23 for them to sit down and take those documents and  
24 digitize them and search them, have you?

25 MR. YNTEMA: We opened the insurance repository to

1 Ellis and Winters for their search, unfettered access to  
2 our microfiche, to all of our documents at Iron Mountain.  
3 They took a sampling. They went through the process from  
4 December or November all the way through -- until their  
5 report to the Court in March. They gave the clerk  
6 parameters. This -- these are the important policy  
7 documents. They're only the microfiche of concern  
8 because Covil existed up until like 1992 or before.  
9 Microfiche is what -- is the concern. The only way to  
10 do -- the only way to search the microfiche based on  
11 their report was by either a manual search, which would  
12 take years to do, or a -- or a digitized search.

13 THE COURT: How long did it take to do that search  
14 in 2010 that developed the index?

15 MR. YNTEMA: My understanding based on my  
16 recollection, and I may stand corrected, it was like  
17 nine months.

18 THE COURT: Well, gosh, that's not years and years  
19 and years, and that was a manual search --

20 MR. YNTEMA: Well, this was a manual --

21 THE COURT: Wait a minute. Wait a minute. That  
22 was a manual search that extracted a certain couple of  
23 pieces of information and put them on an index. It  
24 would have been a very simple matter to have done one  
25 further thing, which is to put on that index the name

1 of the insured. That was not done.

2 MR. YNTEMA: Historically Penn National had always  
3 saved their archived policies by policy number.

4 THE COURT: Well, I understand that, but that is  
5 not a helpful thing for an insured who does not have  
6 access to their records. We have an insured that's in  
7 that category and they quite reasonably now are saying  
8 you've still got the records, you took nine months in  
9 an age way before digitization. What would happen if  
10 you took each of those microfiche and ran it through  
11 any number of systems that can look at those things and  
12 translate them? Gosh, we know we can do that on our  
13 little cell phones now. We take a picture of something  
14 and then search it. I can do that right now with things  
15 that are just pieces of paper floating around my house  
16 that I want to send to somebody. This is not rocket  
17 science what's being asked here. These are microfiches  
18 and they can be digitized and it's not gonna take any  
19 nine months the way technology is today.

20 And so my question to you is why have you not  
21 allowed the -- the representatives of Covil to access  
22 this material and do just what I suggested?

23 MR. YNTEMA: There was great concern when your  
24 Court ordered Penn National to do just that and to  
25 digitize all of their microfiche and give it to the

1 receiver and receiver's counsel for their unfettered  
2 use. As I stated at the hearing last spring, we had  
3 grave concern as to the confidential nature of all of  
4 these policies being just simply digitized and handed  
5 over to receiver's counsel.

6 THE COURT: So your answer to that was to just not  
7 cooperate at all with discovery. I have corporations  
8 every day that come into my courtroom and what they do  
9 if they have concerns about the confidentiality of the  
10 information, they digitize it and then they provide it  
11 under a system where a protective order is issued. You  
12 decided on the front end simply to not provide any of it  
13 and then say it's because the way we had it set up, the  
14 time, we took nine months to make an index of it and sort  
15 it by policy number. I don't regard that as a good faith  
16 effort to respond to discovery, Mr. Yntema.

17 MR. YNTEMA: I think it's being taken out of -- out  
18 of context. I do, Your Honor. I do. I mean, I've  
19 been through this process. I've been in front of  
20 Your Honor many times and every time there's -- out  
21 of all due respect, I mean, I've been here and I've  
22 answered the questions that Your Honor has had about  
23 how Penn National stores its policies, and acknowledging  
24 we've had these discussions, and we had discussions.  
25 You've considered many affidavits from Penn National.

1 Penn National has been deposed on these exact questions  
2 repeatedly throughout -- throughout this case. And as  
3 far as --

4 THE COURT: Mr. Yntema?

5 MR. YNTEMA: Yes.

6 THE COURT: Answer me this. Again, the illustration  
7 I'm giving you, they are trying to determine whether  
8 there are other policies that cover Covil. You're saying  
9 you can't even determine that yourself because you are  
10 going to continue to rely on an index that was made by  
11 a clerk in 2010 that selected out the number and the  
12 expiration date of the policy or the nonrenewal date, as  
13 it's sometimes called, and you're saying that gives you  
14 blanket coverage from having to answer their discovery,  
15 but it has been suggested to you time and time again that  
16 the way to deal with that is to do just what I talked  
17 about, take a picture of the microfiche or in some way  
18 digitize it. If it took a hand effort of one clerk  
19 nine months to do it, I can't imagine why a concerted  
20 effort that involved a commercial company couldn't do  
21 all that in a lot less time than that with the use of  
22 digitized photography and then a search. That way is  
23 done all the time all over this country in every kind  
24 of context from a personal one to a business one. It's  
25 done every day. So don't tell me about how disappointed

1 you are that I don't agree with you in the various  
2 hearings we've had. I want you to respond specifically  
3 to what I just proposed to you now for the second time.

4 Why cannot these microfiche be digitized pretty  
5 simply and then searched for whatever wording there is  
6 in them that is needed to forward this litigation of  
7 that coverage?

8 MR. YNTEMA: It can be, but, again, I go back to  
9 Penn National's concern as to why Penn National felt  
10 the feel need to take it up on appeal was because of the  
11 concern about the confidentiality of all these other  
12 policies, the world that was being produced for the  
13 receiver's and their counsel's unfettered access.

14 THE COURT: You never raised confidentiality in any  
15 way to this Court when we argued this thing these many  
16 times. What you raised to the Court is it's impossible  
17 because it's by number and now we've got this thing of  
18 nonrenewal that's come up since. What it first was,  
19 was the numbers, we don't have the number, we can't  
20 do it and its onerous and terrible and the thing's  
21 too voluminous, then slowly but surely that's been  
22 chipped away, but now we're in a situation where after  
23 I make my ruling on what is now the seventh motion to  
24 compel, you finally say oh, we're concerned about  
25 confidentiality.

1           Did you ever make any projection to this Court  
2           about protecting the confidentiality of these records?

3           MR. YNTEMA:   In the spring of this past year when  
4           we had the hearing before the May 5th hearing.

5           THE COURT:   Of course, and that's when I got Ellis  
6           and Winters to be the mediator here and you didn't  
7           disclose to them what we're learning right now in this  
8           courtroom as of today.

9           MR. YNTEMA:   Yes, Your Honor.   Ellis and Winters  
10          was appointed by this Court in November to conduct its  
11          search and then after the search was conducted and they  
12          reported their recommendations, then thereafter the  
13          Court asked -- and then ordered that Penn National  
14          digitize all those microfiche records and incur the --  
15          the sole cost of that and give the receiver and its  
16          counsel unfettered use of all the policies that are  
17          listed on the microfiche and at that hearing I did state  
18          a concern, there was a concern of Penn National's as to  
19          the confidential nature of digitizing these microfiche  
20          and then producing them for --

21          THE COURT:   You haven't made any motion to that  
22          effect or prepared any kind of proposal to the Court  
23          about how confidentiality could be maintained.

24          MR. YNTEMA:   Just based on the unprecedented nature  
25          of that order, Penn National --

1           THE COURT: Unprecedented nature? What are you  
2 talking about?

3           MR. YNTEMA: For Penn National. Unprecedented  
4 nature for Penn National to have to digitalize all this  
5 microfiche and disclose it to other outside parties.  
6 Penn National felt that I had no choice but to appeal  
7 that. They felt it was more an order in contempt or  
8 sanctions.

9           THE COURT: We're not arguing here today about  
10 your appeal. We're arguing today about some specific  
11 information that this -- that Covil desires that looks at  
12 the -- what has occurred with all this other discovery  
13 dispute and now focuses itself rather specifically on  
14 fourteen policies and what it takes to get information  
15 about those policies.

16           So I don't understand where you're going with this  
17 broader argument about what the appeal means or doesn't  
18 mean. You know, the history would indicate that at  
19 a certain point in time that appeal will, again, be  
20 dismissed, and to me that has nothing to do with the  
21 hearing I'm having here today.

22           So how about respond to what's being said here  
23 today and whether you're gonna cooperate with them?

24           MR. YNTEMA: I think what Your Honor is --

25           THE COURT: Because what you've done every single

1 time every time a request is made you just don't answer  
2 it.

3 MR. YNTEMA: I disagree with that, Your Honor.  
4 We have answered those requests. We have complied with  
5 court orders, we have responded to discovery. The  
6 discovery that's at issue today is a fourth request for  
7 production that was served and then we took the appeal  
8 of the Court's order and the matter was up on appeal.

9 The Court's order was that -- that -- it's our  
10 understanding that there would be a time where there  
11 would be -- a Rule 30(b)(6) deposition would be conducted  
12 and then the motion to compel would be held in abeyance  
13 until that time. A Rule 30(b)(6) deposition has occurred  
14 and now we're here today on a motion to compel.

15 THE COURT: That's correct. And so far what I've  
16 heard you talk about is your appeal and a whole bunch  
17 of other things and the fact that you still rely on the  
18 fact that you can't easily access this material that's  
19 on microfiche to discover whether Covil's got other  
20 policies, but now it turns out they've got at least  
21 fourteen other policies because there are fourteen other  
22 claims that -- that you dealt with and they want to know  
23 about those policies.

24 MR. YNTEMA: Your Honor, just right now at issue  
25 in this case, in this case, are essentially two policies;

1 1986 through 1988.

2 THE COURT: Yeah, and you're saying that the  
3 fourteen claims there you've given them everything they  
4 want to know about the policies, but hey, by the way, we  
5 don't owe you anything or it's got to be reduced by what  
6 we've already paid out. That's basically your answer.  
7 That's not what they're asking.

8 They're asking a broader question and it's a  
9 response to the receiver's fourth request for production  
10 to which you've never made any response and now they  
11 have focussed very specifically on a piece of that and  
12 that is the one that they first propounded on October  
13 the 12th, you didn't respond, they then on October 27th  
14 asked you again, and here we still are with no response  
15 to those requests and now we've got the deposition's  
16 been taken and we know that there are fourteen cases  
17 in which there's coverage. You say it's all '86 and  
18 '87 and '88 policies. We don't know that. They're  
19 asking you for something different. In fact, to get  
20 at it the other way, they are also asking you for the  
21 claims files and you have not responded to that.

22 MR. YNTEMA: We have responded. I believe I  
23 responded in a prior e-mail to Mr. Nes, which I didn't  
24 print out today because I didn't think I would be arguing  
25 about this, but I did -- I did communicate that Penn

1 National would be producing its claims files.

2 THE COURT: That's not a -- that's not good enough  
3 with a trial date. Those things should be immediately  
4 produced. They are in the universe of things that is  
5 right there dead center of what they've already requested,  
6 which was broad enough to include these, but now they've  
7 zeroed in specifically on these claims files because of  
8 the 30(b)(6). They should have been immediately produced  
9 and still we had to come to court again for the seventh  
10 time and talk about compelling.

11 MR. YNTEMA: The claims files were agreed to be  
12 produced before this hearing and --

13 THE COURT: Well, they haven't been produced yet.

14 MR. YNTEMA: Right, and my understanding is that  
15 we agreed to produce them prior to December 1st for  
16 sure.

17 THE COURT: Well, that's --

18 MR. YNTEMA: As of this morning I hadn't checked  
19 with my client to see where in the process they are in  
20 getting that information so that I can produce it.

21 THE COURT: Well, that's a little beyond what it's  
22 gonna take to get ready for a December 14th trial,  
23 Mr. Yntema, with all of the other things that have to  
24 be done in this case.

25 How is it that you-all just kind of seized on

1 December the 1st as the date which you would produce  
2 those things?

3 MR. YNTEMA: I think it was suggested by Mr. Nes,  
4 but that's -- my recollection is that it was actually  
5 suggested by Mr. Nes this morning.

6 THE COURT: Well, prior to this morning's suggestion  
7 by Mr. Nes, you haven't yet responded and said yay, we're  
8 gonna produce them at a certain time, have you?

9 MR. YNTEMA: Yes. I mean, I think I was --

10 THE COURT: This morning?

11 MR. YNTEMA: This morning?

12 THE COURT: Is that when you told them December 1st  
13 is when you're gonna produce them?

14 MR. YNTEMA: No, Your Honor. No, Your Honor.  
15 I think that -- that was something that's been  
16 represented by -- by counsel and Mr. Nes before this  
17 morning --

18 THE COURT: Uh-huh.

19 MR. YNTEMA: -- and that's why, you know, we  
20 represented in our -- in our papers to the Court that  
21 we would be producing the claims file.

22 THE COURT: Well, how do you intend to relate that  
23 if you do, the claim file, back to the policies which  
24 back up that claim?

25 MR. YNTEMA: I think the claim file would just be

1 simply to address the asbestos cases that Penn National  
2 has been defending since it received its first tender  
3 in February of 2020. I mean, we -- Penn National has  
4 been participating in defense of Covil since it received  
5 the first asbestos tender under its coverage for Covil  
6 and has been participating in the defense, has been  
7 participating in mediations for every asbestos tender.  
8 And fourteen isn't the number to date that's been  
9 tendered. Mr. Protopapas may have the exact number,  
10 but it's been many, many, many, many more asbestos  
11 cases other than just the fourteen that was recently  
12 represented in Penn National's letter to the receiver  
13 saying now we've paid these settlement amounts for  
14 these particular fourteen cases and our position is  
15 this is an impairment of the policy limits under the  
16 two policies that are in dispute in this case.

17 THE COURT: And my projection to you is this.  
18 Only when you're -- when something serves your advantage,  
19 that being the contention that hey, yeah, we did  
20 participate in fourteen different claims, but we -- we  
21 want you to know on the front end that -- that all that  
22 money's gonna be taken out of what you can afford to  
23 look at for the claims you're now pursuing. That's --  
24 the fourteen claims we're talking about are not claims  
25 that they're tendering to you right now, they're claims

1     you've already paid and you already participated in  
2     settlement of and that is another way of through the  
3     back -- through another route trying to figure out what  
4     kind of policies you do have and what kind of claims  
5     you have paid because you've answered nothing based on  
6     the direct request for that except to say oh, it's too  
7     secret, it's too confidential, you're not gonna protect  
8     it or we can't access it because of our way of indexing  
9     these things since 2010 or it might already be gone  
10    because we've destroyed these things and even after we  
11    know there's plenty of litigation about coverage at  
12    Penn National, we continue to do whatever it is we're  
13    doing, which has not been quite defined in terms of  
14    destroying old policies. That's -- that's the picture  
15    I'm getting, Mr. Yntema.

16           MR. YNTEMA: I'm sorry I painted that picture and  
17    that wasn't my intent. I mean, I think that --

18           THE COURT: What was your intent then about saying  
19    that hey, the fourteen ones we've already paid, but  
20    we're still not gonna give you the policy numbers on any  
21    of that because we can't access them, but by the way, if  
22    we could give them to you, it's a declining policy so  
23    you don't get to look at as much coverage as you might  
24    think.

25           I mean, do you think that's a reasonable way to

1 deal with the more direct question of what kind of  
2 coverage do you have, what kind of policies do you have,  
3 and what periods of time, this or some other period,  
4 do they cover?

5 MR. YNTEMA: I'm just gonna tell you as far as  
6 those fourteen cases, it was a letter from Penn National  
7 just letting the receiver know how much they had paid  
8 in settlements for these block of fourteen cases.

9 THE COURT: And that was so that you --

10 MR. YNTEMA: It was updating the receiver on the  
11 status of -- of the policy.

12 THE COURT: So that -- so the receiver could know  
13 that the little handful of policies it's gotten for  
14 '86-'87 and '87-'88, by the way, we've already paid  
15 fourteen claims and so those policies don't have as  
16 much in them as you think. That was basically the  
17 purpose for that particular advisory to the receiver;  
18 was it not?

19 MR. YNTEMA: I think Penn National has somewhat  
20 of an obligation to inform its insured --

21 THE COURT: Right. No question about that.

22 MR. YNTEMA: -- about claims paid --

23 THE COURT: And don't they have a similar obligation  
24 to inform Covil of all the coverage that Penn National  
25 has got, if any?

1           MR. YNTEMA: All the coverage that Penn National is  
2 aware of, yes, and able to find.

3           THE COURT: Well, you're able to find more than what  
4 you've given them. Would you agree with that?

5           MR. YNTEMA: I don't --

6           THE COURT: You've got the microfiche. You haven't  
7 destroyed those, right?

8           MR. YNTEMA: Microfiche are still present at Penn  
9 National's headquarters, correct, yes.

10          THE COURT: And you've got the ability to search  
11 them by hand as you did before or digitize them or  
12 whatever it takes to see if there are policies, don't  
13 you?

14          MR. YNTEMA: There is a -- they can be digitized.  
15 There's no option to do that.

16          THE COURT: Well, you could --

17          MR. YNTEMA: Whenever Penn National was ordered to  
18 digitize it, it had never digitized -- no one had ever  
19 been ordered to digitize those documents, the microfiche  
20 anyway, prior to the spring of this past year, and we've  
21 spoken about the concern that Penn National had and why  
22 Penn National felt the need to have to appeal that order,  
23 which is on appeal right now.

24          THE COURT: Again, I'm not talking about  
25 appealability. I'm talking about whether you've got

1 the ability as a company to search your records and  
2 directly answer their discovery request about what kind  
3 of coverage you have. I don't care whether it's done  
4 by digitizing or whatnot. What was attempted to be done  
5 was to suggest the easiest way you could look again at  
6 these files. You did it by hand in 2010. Nobody's  
7 asking you to do it that awkward, old-fashioned way  
8 again, but what was suggested is you take a little bit  
9 more modern approach to how you might take those records  
10 and search them, and you're saying that your concern  
11 about the privacy of those records is preventing you  
12 from figuring out how you could search those records?

13 Is that what you're saying?

14 MR. YNTEMA: Not quite, Your Honor, but I think  
15 if -- if Your Honor understands me as saying that, I'm  
16 just trying to kind of spell out kind of where we are  
17 today and then you're asking me what is preventing  
18 Penn National from -- from digitizing the records --

19 THE COURT: I'm asking you what is preventing  
20 Penn National from using whatever methodology it  
21 wants to to try to look at all these microfiches and  
22 determine if there's other coverage. That is what  
23 Covil's been asking for months and months and months  
24 now and digitization was an attempt to more modernize  
25 how you would do it.

1           Now you've used that as a weapon to say oh, that's  
2   a terrible thing we've never been asked to do before?  
3   You picked your own method of laboriously going through  
4   those records, but it created a system that is very  
5   difficult to get into. You decided to do it that way.  
6   It would have been very simple for that index to have  
7   included one more piece of information, the name of the  
8   insured, but you decided in 2010 not to do that.

9           Now the request is being made to go back to those  
10   records and find out who's insured and the fact that  
11   digitization might be one way to do it is not the point.  
12   The point is you can do that, can you not, as a company?

13           MR. YNTEMA: The records can be digitized, Your  
14   Honor, yes.

15           THE COURT: No, sir. I'm not asking that question.  
16   That was simply a suggestion as to a method of making it  
17   easy to search those records, but you could figure out  
18   any way you want to. You have the records. You could  
19   search them and match up the name of the insured with  
20   the list of policies and expiration dates; could you  
21   not?

22           MR. YNTEMA: You can search the insured. At this  
23   point the only way without digitizing those documents  
24   is to manually go through each one of those.

25           THE COURT: Right. And you could do that; could

1     you not?

2           MR. YNTEMA:   It wouldn't be reasonable to do that.  
3     The --

4           THE COURT:   Well, you did it in -- you did it in  
5     2010 to develop a policy for destroying the documents,  
6     didn't you?

7           MR. YNTEMA:   In 2010, they recorded the policy  
8     numbers that had historically been recorded by Penn  
9     National long before 2010, but they were able to go  
10    through and look at the boxes or look at the microfiche  
11    and record the policy numbers, yes, ma'am.

12          THE COURT:   Well, they had to look at the individual  
13    policies to get that nonrenewal number. That wasn't on  
14    the outside of the box, the outside of the box had the  
15    numbers, but what your 30(b)(6) says is that in 2010 he  
16    developed a methodology -- he was trying to figure out  
17    how could he do something that would then relate to when  
18    to destroy the records and he came up with the policy  
19    number and the date of nonrenewal or expiration.

20          It would be very simple -- and that took about  
21    three months to six months or nine months or however  
22    much it is for one clerk to in their off hours with  
23    everything else they had to do to do that.

24          MR. YNTEMA:   I think there were many more people  
25    than just one though.

1 THE COURT: Well, whatever.

2 MR. YNTEMA: Sure.

3 THE COURT: But this is a discovery request where  
4 you're supposed to do what it takes to answer the  
5 discovery and it's about a central point in this  
6 coverage lawsuit. It's to find out what policies cover  
7 Covil and you've got the ability to go back to those  
8 boxes and add something to that index, which now contains  
9 the policy number and the expiration date, and that is  
10 the name of the insured. You can do that, can't you?

11 MR. YNTEMA: Potentially by way of digitizing the  
12 documents, yes.

13 THE COURT: But you could do it by hand.

14 MR. YNTEMA: By hand it would make months and months,  
15 but --

16 THE COURT: Well, it took you nine months before or  
17 six months or three. We've got a lot of different  
18 testimony about how long it took, but you could do it,  
19 correct?

20 MR. YNTEMA: Yeah, Penn National, I think, could  
21 do that. I mean, I think they recorded policy numbers.  
22 They can go back and go through manually each microfiche  
23 slide. It could take a while to do.

24 THE COURT: Right. And if they wanted some other  
25 more modern technical way to do it, they might be able

1 to do it that way, right?

2 MR. YNTEMA: Yes, Your Honor.

3 THE COURT: All right. So your request today is  
4 what?

5 They are asking that you produce some very specific  
6 stuff today.

7 MR. YNTEMA: And I'm happy to work with --

8 THE COURT: No, sir. It's not happy to work with.  
9 They are asking for some very specific information today  
10 in this hearing. That's why they moved to compel you.

11 MR. YNTEMA: They moved to compel our responses to  
12 the fourth request for production documents, which we  
13 hadn't responded to. It was our -- in our opinion that  
14 the matter was on appeal and that any issues with respect  
15 to documents and further discovery requests were held  
16 in abeyance until after a Rule 30(b)(6) deposition was  
17 conducted, which we even took the position up until  
18 recently when the Court had a status conference that  
19 all of that was on -- on a stay, but the Court found  
20 that there was a necessity for trial in December and  
21 so we allowed the Rule 30(b)(6) to take place of Brent  
22 Reifsnyder and of Scott Maier, which has still yet to  
23 be scheduled, and allow that to be proceed.

24 And we had -- and there's mention in -- with respect  
25 to the topics that -- or part of the Rule 30(b)(6) topics

1     that we did make objection to because we felt that they  
2     were duplicative, that they were -- that they -- that  
3     Penn National had already provided a Rule 30(b)(6) on  
4     those topics, but yet they were incorporated into this  
5     most current Rule 30(b)(6) notice as well.

6             We didn't file a motion for protection order, we  
7     didn't file a motion to quash those notices because that  
8     would have shut everything down. What we said is we're  
9     not gonna do that, but we're gonna say these are the  
10    topics that we can produce a designee or designees on  
11    and allow the depositions to go forward and allow a  
12    trial to go forward. We could have tried to say and  
13    argue that this is all on appeal, we're not gonna  
14    participate.

15            This is on appeal. It's our position it should be  
16    stayed and it's stayed up until this point. We didn't  
17    take depositions, we were trying to be cooperative,  
18    and so now we're progressing toward a trial. We've  
19    provided one designee. We've offered up another  
20    designee whose deposition's going to take place in a  
21    week or so and we've -- we've produced our experts and  
22    disclosed our experts and we're progressing to a trial  
23    in this case.

24            Now that can be discussed -- I have another topic,  
25    I think, by Ms. Patterson, and then we can see what

1 discovery in this trial looks like and what that entails.

2 THE COURT: All right, sir.

3 Your reply.

4 MR. NES: Yes, Your Honor.

5 I'd like to start where we started and that is  
6 spoliation and the --

7 THE COURT: Speak a little bit more directly into  
8 that or speak louder.

9 MR. NES: How is that? Does that work?

10 THE COURT: A little better. There you go.

11 MR. NES: How's that, Your Honor?

12 THE COURT: Perfect.

13 MR. NES: So let's start with -- what I'd like to  
14 do is walk through a couple of issues that I think the  
15 record is -- is incorrect at this point and correct that  
16 and then finally what it is that we are specifically  
17 asking for.

18 First, when we talk about the spoliation timeline,  
19 the Court correctly identified our concern is that as  
20 of June of 2018 Penn National knew there were asbestos  
21 cases being filed against Covil and that it issued  
22 Covil insurance policies. It did not yet know the  
23 universe of policies at issue, but it did not issue a  
24 litigation hold and that error is directly in front of  
25 this Court because as Mr. Yntema said, his witness --

1 Penn National's witness last week said I don't know why  
2 Covil's -- the '86 to '87, '87 to '88 policies exist  
3 today, they shouldn't, and that's exactly the problem  
4 that we face, is that if those policies were pulled from  
5 the records from the automatic destruction because the  
6 policy number was identified and then 2018 rolls around  
7 and any other Covil policy that we just didn't have a  
8 number for had been identified, they very well may have  
9 been pulled and destroyed, and there's no system that  
10 Penn National can show us that would have identified the  
11 policy, that they would have saved the policy, that they  
12 would have QC'd their checks to make sure that that  
13 policy wasn't destroyed.

14 So the last area that we can ask for to try to  
15 understand why it is that the documents were or were not  
16 destroyed in 2018 is this request. All documents and  
17 communications related to the process of identification,  
18 collection and disposal of insurance policies and  
19 policy-related documents pursuant to Penn National's  
20 document retention or purge policies.

21 In other words, if there are e-mails in 2018  
22 between Brent Reifsnnyder and his staff saying guys,  
23 here's the list for this year, here's the ones to go  
24 pull and destroy, that's a completely relevant document.  
25 That would show either Penn National's policy was being

1 followed and no Covil policies are on there, Penn  
2 National's policy wasn't being followed or Penn National's  
3 policy was being followed and there was a Covil policy,  
4 but they've refused to even give us those basic e-mails.

5 So, first and foremost, we are asking this Court to  
6 compel them to produce their correspondence to the extent  
7 it still exists related to the document destruction in  
8 2018, 2019, 2020 and 2021, and if the answer is we simply  
9 don't have those anymore because we didn't issue a  
10 litigation hold, then we want that answer, too, but we  
11 are -- we believe that with respect to topic -- Request  
12 Number 11 that's a narrow request and it's directly  
13 related to the spoliation issues that are going to be at  
14 issue four weeks from now. Number 1.

15 Number 2 is the fourth request for production of  
16 documents, and this was our most recent motion to compel,  
17 and on page 3 of our motion to compel we outline the  
18 topics that we requested in the fourth motion to compel  
19 and these topics are directly targeted at how their  
20 document retention policy works, how it itself is QC'd  
21 and the litigation holds, how the litigation holds are  
22 issued and QC'd, again, relevant to the issues that are  
23 gonna be tried in four weeks and very narrowly tailored.

24 Today we have not heard a single argument that  
25 these are irrelevant, that they're overly burdensome.

1 The only argument is a vague reference to these requests  
2 being issued after this Court's May 5th order, which  
3 they say is on appeal, but these requests do not relate  
4 to that order, therefore, they are not stayed and they  
5 are relevant to the issues looking back.

6 Finally, as this Court was inquiring of Mr. Yntema,  
7 we have claim files, basic claim files, from Mr. Wright,  
8 who is a claims handler at Penn National, for fourteen  
9 asbestos claims that they paid on. They have no argument  
10 that they're irrelevant, they have no argument that  
11 they're overly burdensome. They've, in fact, said now  
12 that they will produce it, but I want the record to be  
13 clear today at this hearing is the first time I've heard  
14 they will produce documents on December 1st.

15 This is what their footnote says in response to our  
16 motion to compel. The receiver's motion to compel also  
17 asks this Court to compel Penn National to supplement  
18 its production to Request Number 4 of the receiver's  
19 first set of requests for production by December 1st.  
20 That is what our request was. Their answer is Penn  
21 National is in the process of compiling the requested  
22 documents for production, which will include approximately  
23 61,000 pages and anticipate being able to comply with  
24 this request.

25 So even today when we've filed the motion and they

1 have no substantive response, they have not committed  
2 to producing the documents by December 1st. If that is  
3 the commitment that's being made, that's certainly what  
4 we've been asking for with the motion to compel. So  
5 those are the issues with respect to spoliation and the  
6 claims files.

7       There was lots of discussion about whether or not  
8 -- or the Court specifically asked Mr. Yntema what is  
9 preventing Penn National from doing the review that was  
10 ordered on May 5th. Just to be clear, the Court already  
11 ordered Penn National to digitalize all of their historic  
12 policies. It was based on a recommendation that Ellis  
13 and Winters made, not the receiver. Ellis and Winters  
14 made that recommendation, the Court adopted it and  
15 ordered that to be done May 5th. Confidentiality was  
16 addressed at that time. Confidentiality can easily be  
17 address by the receiver and the receiver's counsel  
18 signing confidentiality agreements.

19       The reason that this -- the reason that Penn  
20 National is not complying with the order is they have  
21 just said it's on appeal, we have no obligation to do  
22 anything with respect to the order. That is the only  
23 reason. It is not a technical reason, it is not a  
24 financial reason, it is not a manpower reason. It is  
25 simply their argument that it's on appeal, so we don't

1 have to do anything. And while we don't think that  
2 issue is correct, it is not the subject of our two  
3 motions to compel currently pending, nor is it an issue  
4 at trial.

5 The final issue I'd like to bring up is that  
6 opposing counsel says we had a deposition last week  
7 and Covil issued thirty-two topics with respect to the  
8 continued deposition of Penn National. They unilaterally  
9 said we will only put up a witness on fourteen -- I'm  
10 sorry, fifteen of your thirty-two topics.

11 Your Honor, because -- frankly because we have been  
12 in front of this Court on all of the motions to compel  
13 that we have, including the two that we're arguing about  
14 today, we simply chose not to burden the Court with one  
15 more motion to compel, but so the record is clear they  
16 simply unilaterally said we will not show up and answer  
17 questions with respect to seventeen of your thirty-two  
18 topics.

19 In response, we said okay, well, we're entitled  
20 to take the deposition of Mr. Wright, who is the claims  
21 handler. If you're not gonna put him up as a 30(b)(6),  
22 we're entitled to take him as an individual witness.  
23 In a letter, Mr. Yntema said we would have a response to  
24 that by November 11th. We still don't have deposition  
25 dates. We would like a deposition date for Mr. Wright

1 before December 1st so that we can adequately prepare for  
2 trial. He is listed as one of their fact witnesses. We  
3 certainly want that.

4 So, again, to recap, Your Honor, the main issues  
5 that we want are a motion to compel with respect to  
6 Request Number 11, that they have to search for  
7 responsive e-mails and communication on their document  
8 destruction, and we will narrow it from 2018 to the  
9 present.

10 Number 2, we want the documents that are in our  
11 fourth request for production to be produced, again,  
12 by December 1st. And then, finally, the claim files,  
13 which they've now agreed to.

14 And if the Court is inclined, we would like an  
15 order that Boyd Wright needs to at least have deposition  
16 dates provided because Mr. Yntema brought up that  
17 deposition issue and I think just so -- to clarify for  
18 everyone, it would be helpful if the Court notes a  
19 need for that.

20 Unless the Court has any other questions.

21 THE COURT: Thank you.

22 Mr. Yntema, I'm gonna come back one more time to  
23 you on each of these and see where we stand, and the  
24 first is the Request Number 11 for the e-mails and other  
25 correspondence that touches on the topic of destruction

1 of the -- the destruction policy, and that is from 2018  
2 to the present.

3 They now ask and they're trying to prevent spoliation  
4 and that's why they ask for it or address the issue of  
5 whether spoliation has taken place. So they're asking  
6 for those specific records and their contention is you  
7 have not responded to that one way or another.

8 What's the scoop?

9 MR. YNTEMA: Again, so Your Honor understands, it  
10 was our understanding that on appeal that the case was  
11 stayed. The --

12 THE COURT: Do you understand the appeal to stop  
13 all discovery?

14 MR. YNTEMA: Well, what I think Your Honor should  
15 know and I think that was -- was spelled out in our  
16 briefing, is that I had communicated with receiver's  
17 counsel, they had noticed two depositions or at least  
18 a 30(b)(6) of Penn National on various sundry topics  
19 early in the -- after the Court's May 5th order and also  
20 asked for Scott Maier's deposition individually, and in  
21 those e-mails that I think are a part of our papers to  
22 the Court for today's hearing, we specifically said we  
23 deem those depositions to be stayed until our appeal is  
24 had.

25 THE COURT: And so your answer on this Request

1 Number 11 is that it's stayed and that's the reason  
2 you're not gonna respond.

3 MR. YNTEMA: And then in August when the North  
4 Carolina Court of Appeals said no, we are dismissing  
5 this appeal and then we filed a motion en banc, but  
6 right after the notice -- right after the Court of  
7 Appeals spoke as to our appeal, we received a letter  
8 from Mr. Nes saying you must comply with our request for  
9 production of documents -- fourth request for production  
10 of documents immediately. We thereafter filed the --  
11 the motion for re-hearing en banc with the Court of  
12 Appeals; so, therefore, that the case is still currently  
13 on appeal.

14 And my memory serves me that I did mention that  
15 the -- the motion for rehearing en banc, at least I had  
16 mentioned to the receiver that we had filed it, and it  
17 was our impression that the deposition -- Rule 30(b)(6)  
18 depositions and the fourth request for production of  
19 documents was on stay during the appeal.

20 THE COURT: So then the answer directly again to my  
21 question on the first request they're making that Request  
22 Number 11 be answered, which is for correspondence,  
23 e-mails and otherwise relating to the destruction list,  
24 this is what's gonna be destroyed and so forth, you are  
25 saying that your ability or your response to that it is

1 stayed by your request for a re-hearing of the dismissal  
2 of your appeal before the Court of Appeals; is that  
3 correct?

4 MR. YNTEMA: The fact that the case is currently  
5 on appeal, yes.

6 THE COURT: All right. The second is for the  
7 fourth request for production. Their contention is that  
8 that is not stayed by the May 5th order, it's something  
9 separate and apart from that, and what is your response  
10 to that?

11 MR. YNTEMA: It's appealed. As far as leading up  
12 to today, that the appeal is in place and it's still  
13 pending on appeal.

14 THE COURT: Specifically how does the appeal relate  
15 to the fourth request for production and the May 5th  
16 order that I issued? Tell me what the relationship --  
17 you're appealing my May 5th order, correct?

18 MR. YNTEMA: Correct.

19 THE COURT: What in my May 5th order specifically  
20 is directed towards what they want in the fourth request  
21 for production?

22 MR. YNTEMA: My understanding is that it goes to  
23 the document retention issues.

24 THE COURT: Sir?

25 MR. YNTEMA: My understanding is that the fourth

1 request for production goes to document retention issues.

2 THE COURT: Well, I mean, we aren't -- we aren't  
3 talking documentation in general. We're talking about  
4 specific things that were ordered in the May 5th order  
5 and what I am trying to get you to do is relate to  
6 something that was specifically ordered and compelled  
7 in that May 5th order.

8 MR. YNTEMA: It was our position and our  
9 understanding that -- that the stay applied to the  
10 fourth request of production documents that were served  
11 on Penn National prior to our appeal --

12 THE COURT: So anything that was served on Penn  
13 National is stayed whether it was specifically discussed  
14 in the May 5th order or not? Is that your contention?

15 MR. YNTEMA: We received no communications otherwise  
16 until August --

17 THE COURT: Well, I'm communicating with you about  
18 my order. That's what we're trying to deal with right  
19 now.

20 MR. YNTEMA: Certainly, Your Honor.

21 THE COURT: Would you agree with me that the fourth  
22 request for production is not directly discussed in the  
23 May 5th order?

24 MR. YNTEMA: I don't believe it is, Your Honor.

25 THE COURT: Sir?

1 MR. YNTEMA: I don't believe it is, Your Honor.

2 THE COURT: It isn't. It wasn't. And they are  
3 asking that you respond to that fourth request for  
4 production. It's not stayed by the -- my May 5th order.  
5 I mean, by the appeal of my May 5th order. The appeal  
6 relates specifically to that order.

7 MR. YNTEMA: Judge --

8 THE COURT: You're saying despite the fact that the  
9 order doesn't mention it, that your responsibility to  
10 reply and give them what they want in that fourth request  
11 for production is stayed because you're appealing my  
12 May 5th order; is that right?

13 MR. YNTEMA: And in addition to the Rule 30(b)(6)  
14 notices as well.

15 THE COURT: All right, sir.

16 And then with regard to the claim files for fourteen  
17 years, you're in the process and anticipate compliance.  
18 They have agreed to December the 1st here in this  
19 courtroom today. Of course, I'm going to be sure that's  
20 clear as a crystal ball that that is by consent that you  
21 have agreed to provide those files and they're gonna be  
22 provided on December the 1st, correct?

23 MR. YNTEMA: Correct. If not before.

24 THE COURT: Sir?

25 MR. YNTEMA: If not before.

1 THE COURT: All right, sir.

2 And then with respect to the deposition that was  
3 had last week, one of the things that arose from that  
4 was their request for a deposition date for Mr. Wright.

5 Are we gonna have a deposition date for Mr. Wright  
6 or do I have to order that as well?

7 MR. YNTEMA: I don't think Your Honor has to order  
8 that, and that may be something that fell through on --  
9 through my office. I wanted to get dates to Mr. Nes  
10 by November 11th, and no disrespect to Mr. Nes at all,  
11 I am working to get dates for Mr. Wright. I should  
12 have those. I'm actually going to be with Mr. Wright  
13 tomorrow, so I will get dates for Mr. Wright's deposition  
14 to Mr. Nes tomorrow at the latest.

15 THE COURT: All right. Now explain to me when you  
16 had that deposition last week you simply projected that  
17 of the thirty-two topics we are not going to respond  
18 except to fourteen or sixteen of them.

19 How is that justified in terms of the rules of  
20 discovery? How -- how can you just do that?

21 MR. YNTEMA: I was finding a way to address our  
22 concerns as to all of those topics. Our concerns --  
23 okay. So it was fifteen topics that -- that we agreed  
24 to provide two Penn National designees for deposition.

25 THE COURT: Well, they asked you for thirty-two.

1   How do you -- how do you just get to do that with --  
2   it's an agreed upon deposition. They have the ability  
3   to let you know what they're gonna examine on. That's,  
4   interestingly enough, not really specified in the rules  
5   as closely as you may think, but it is what most people  
6   do is they tell you exactly what they're gonna examine  
7   on so they don't have to go back and forth to the judge  
8   about the pertinence of what they examine on because a  
9   deposition as we know, a discovery deposition, is not  
10   governed by issues of relevancy or the like. It's if  
11   it will produce or lead to the production of relevant or  
12   admissible information.

13           So how -- what was your justification for just  
14   deciding that you weren't gonna respond to some of the  
15   thirty-two topics?

16           MR. YNTEMA: As far as those other topics, beyond  
17   the first fifteen, beyond those first fifteen we had  
18   written a lengthy letter to Mr. Nes stating our  
19   objections. I forget the date of the letter, but we  
20   stated our objections many weeks ago as to -- as to  
21   the Rule 30(b)(6) topics that we took issue with and  
22   we had a back and forth with Mr. Nes. You know, we  
23   had communications back and forth as far as written  
24   communications, and at that point we made a decision  
25   that we're not going to just simply file a motion to

1 quash or protective order and bring this before the  
2 Court, but to provide our designees on these particular  
3 topics and maintain and preserve objections to the  
4 remaining.

5 THE COURT: Well, if you have objections and they  
6 decide that they're not going to honor your objections,  
7 then what you have to do is to move the trial judge to  
8 decide whether to quash a portion of the questions that  
9 they propose to ask or not, but that was not done,  
10 correct?

11 MR. YNTEMA: We did not pursue a motion to quash  
12 or a protective order for the reasons I stated. I  
13 didn't -- if I threw a wrench in that, it would have  
14 delayed both of those depositions from proceeding on  
15 any topics, and I don't think that was -- I didn't think  
16 at the time that was necessary.

17 THE COURT: Do you think that's something you'd be  
18 permitted to do under the aegis of this appeal of my  
19 May 5th order just to kind of take it unto yourself  
20 and decide what discovery you're gonna answer and what  
21 you're not gonna answer in connection with a set date  
22 for a trial on December the 14th?

23 MR. YNTEMA: No.

24 THE COURT: All right, sir. Well, I want to be  
25 sure I understand the universe of what I'm gonna be

1 dealing with. I have moved heaven and earth to get a  
2 time to have this nonjury trial on December the 14th.  
3 I don't want to have to go through all of the headache  
4 of getting ready for something like that only to be told  
5 at the last minute that you have decided for whatever  
6 reason that you're not obligated to go forward with that  
7 trial, so I need to understand exactly what we're talking  
8 about here.

9 MR. YNTEMA: Okay. So are we talking about the  
10 jury/nonjury issue? I mean, is that --

11 THE COURT: We're talking about whatever it is  
12 that would prevent you from trying a nonjury matter  
13 involving a declaratory judgment action, which I have  
14 set for trial on December the 14th. What I have said  
15 about that is if there are other matters that do not  
16 involve a declaratory judgment involving the declaration  
17 with respect to the issues that are presented in that  
18 that deal with the policy and its coverage, which is  
19 very clear under our law is not a jury issue, I need  
20 to know if we're gonna at the last minute say hey, none  
21 of this can go forward because, guess what, it's all a  
22 jury issue.

23 I have tried to very carefully carve out matters  
24 for trial on December the 14th given the posture of all  
25 of the parties and the fact that none of this could go

1 forward if we get into the months of January through  
2 June of next year for the reasons that have been  
3 discussed in the hearings we've had previously, so I  
4 carved out the nonjury piece of this to be sure that at  
5 least that could go forward and the baseline issues of  
6 what the law is with respect to coverage and the like  
7 can be dealt with.

8 I don't want to be sandbagged on this by some at  
9 the last hey, none of this can go forward, so tell me  
10 now what's going on here.

11 MR. YNTEMA: And that was it. That was the intent  
12 of my letter to Your Honor that I wrote a few weeks ago  
13 and that you responded to -- kindly responded to, which  
14 I appreciate, and thanks to Ms. Poswal for fielding my  
15 questions and -- and allowing you to answer them.

16 So, yes, we do think there could be issues of fact  
17 for trial. What our understanding was before today the  
18 issues for trial were a spoliation issue and there  
19 was --

20 THE COURT: There isn't a cause of action for  
21 spoliation; you realize that? Spoliation is a matter  
22 dealt with in connection with the enforcement of civil  
23 discovery rules and spoliation is an issue that deals  
24 with that. It's not a cause of action in a complaint  
25 that's been filed in this matter that deals with, quote

1 unquote, spoliation as a separate cause of action.

2       There is an issue of spoliation that so far you-all  
3 have resisted by not producing anything that we can  
4 see that can explore the issue of whether any of the  
5 relevant company records have been destroyed or otherwise  
6 spoliated. So spoliation is a pre-trial issue. The  
7 issue that is before us on trial is the declaratory  
8 judgment matter, not spoliation.

9       MR. YNTEMA: In our papers we do cite that -- I  
10 mean, for the spoliation issue to arise -- you know,  
11 there are two policies that we produced. We've discussed  
12 that.

13       THE COURT: Yes, sir. And that's what we're gonna  
14 be -- on December the 14th we're gonna have a trial  
15 about those policies, what they cover and what they  
16 don't, and a declaration has been requested respecting  
17 those policies. Now this whole thing we've gotten into  
18 with all of these other policies, potential policies,  
19 out there is in aid of this declaration with respect  
20 to these policies and they are permitted to have a  
21 wide ranging discovery as long as it targets in on  
22 something that could potentially be an issue at trial.  
23 The -- what these policies mean is very definitely gonna  
24 be impacted by the things they've asked for in discovery,  
25 but the trial itself is gonna be a trial about those

1 policies.

2 MR. YNTEMA: Those two policies.

3 THE COURT: Yes, sir. That doesn't mean they're  
4 not gonna introduce evidence about what you -- what  
5 the company did with respect to issuance of policies,  
6 handling of policies, handling of claims and all that,  
7 those are gonna be -- and what experts say about what  
8 that language in the policies means, all that's gonna  
9 be explored in this, in an action which speaks to have  
10 the Court declare the law with respect to the meaning of  
11 these policies. That's not a jury issue.

12 MR. YNTEMA: Okay. So there's two components to  
13 this jury trial is my understanding.

14 THE COURT: Two components to what?

15 MR. YNTEMA: In this jury trial. There's one,  
16 spoliation.

17 THE COURT: There's no jury trial involved.

18 MR. YNTEMA: Well, there's two components to this  
19 trial. One is spoliation and the next is a coverage  
20 issue.

21 THE COURT: Well, spoliation is a request that the  
22 Court determine whether or not you have deliberately  
23 destroyed records of the company that relate to the  
24 coverage they seek to determine. This is a question  
25 of trying to discover what coverage Covil Corporation

1 has and one of the sources of that is the policies  
2 themselves, which I will be asked to construe, and the  
3 other is whether records that relate to the conduct of  
4 Pennsylvania National Insurance Company with respect to  
5 coverage of Covil in these asbestos suits, and one of  
6 the aspects that will determine its posture with respect  
7 to coverage of these disputes is that whether or not  
8 they have deliberately destroyed any records of  
9 Pennsylvania National Mutual Insurance Company in respect  
10 to its coverage of Covil.

11 MR. YNTEMA: And if -- if the Court, indeed, does  
12 find that there was destruction -- intentional destruction  
13 or destruction of Covil insurance policy documents, then  
14 there's an order that results to that as to the finding  
15 of spoliation, correct?

16 THE COURT: Yes, there might be. There might be.  
17 There might be some other relief requested. Now I'm not  
18 quite sure yet until the case is tried and I hear what  
19 is presented with respect to that issue, but spoliation,  
20 as I understand that term, is aimed at reviewing a  
21 company's practice with respect to its records and  
22 physical materials and so forth that should be available  
23 and not destroyed and available for a party that sues  
24 it saying that it has some liability to it because of  
25 these materials. In your case, insurance policies and

1 the like.

2 And one of the issues is gonna be in determining  
3 whether you have some liability to Covil is, first of  
4 all, what do the policies say. That's the biggest thing,  
5 which we've been trying to get and it's still like  
6 pulling teeth, and the second is whatever might be said  
7 about your responsibility if you have deliberately  
8 destroyed those policies or other documents and  
9 correspondence related to your coverage of Covil.

10 It's a real simple straightforward suit and  
11 spoliation, if you've engaged in that kind of misconduct  
12 in connection with this litigation, will result in a  
13 request for certain forms of relief with respect to  
14 your responsibility to Covil as an insurer.

15 MR. YNTEMA: And as far as those forms of relief,  
16 therein can lie a factual issue as far when -- the form  
17 of relief that is granted should the evidence show and  
18 Your Honor concludes that there's been a spoliation of  
19 documents, should the receiver, for example, ask the  
20 Court to say well, with respect to the spoliation of  
21 documents, it should be deemed that Penn National had  
22 insurance coverage from 1953 to 1992?

23 THE COURT: Sure. Right. They can ask that.

24 MR. YNTEMA: And then the type of coverage that  
25 existed from 1953 through 1992, then that is a finding

1 of fact to be found by a jury, what was the coverage.

2 THE COURT: Oh, no, no, no, no.

3 MR. YNTEMA: That is --

4 THE COURT: No, sir. That's not a finding of fact  
5 by a jury at all. It is within the rules of civil  
6 procedure that if you have engaged in certain misconduct  
7 in connection with the retention of your records and the  
8 discovery of your records -- I'm not talking about you,  
9 lawyers, I respect you tremendously, you would never  
10 engage in anything like that, but if it is determined  
11 that your company, the company you represent, has engaged  
12 in misconduct in connection with discovery and spoliation  
13 is one of those kinds of misconduct, then the law allows  
14 me and the rules of civil procedure allow me to make  
15 certain determinations about your responsibility based  
16 on your violation of the rules. It has nothing to do  
17 with some tort factual thing that a jury has to decide.  
18 It has nothing to do with that. It has to do with what  
19 may happen if you have violated the rules of discovery.

20 MR. YNTEMA: And usually that's a negative insur --  
21 negative inference to --

22 THE COURT: No, this can be all -- oh, gosh, it  
23 could be all kinds of things. It can be striking your  
24 pleading. A jury doesn't get to decide that. It can  
25 be deeming you're responsible because of your destruction

1 of records that might prove that or otherwise. That's  
2 not for the jury to decide. All of those issues are for  
3 a court to decide in aid of its enforcement of the rules  
4 of civil procedure.

5 And I know you have argued otherwise and tried to  
6 make an appealable issue out of even what's been decided  
7 so far and what is basically a discovery dispute, and I  
8 won't get into that because we'll see what happens with  
9 that, but I can tell you with respect to spoliation,  
10 and I've looked quite extensively at that since you've  
11 kind of suggested that that might be a jury question,  
12 that is not a jury question. That is the enforcement of  
13 the rules of civil procedure.

14 MR. YNTEMA: We disagree. I think there is a  
15 component to the spoliation issue.

16 THE COURT: Well, I would love -- I would love to  
17 see the case you might cite to me from this jurisdiction  
18 or else-wise that has held that. I don't find it.

19 MR. YNTEMA: We cited one case in our -- in our  
20 papers, and I can hand up the citation. And I can do  
21 some more research on the fact that --

22 THE COURT: I suggest you spend your time getting  
23 ready for this trial rather than trying to assert  
24 something that is clearly contrary to any law I know  
25 anything about, which is how the rules of civil procedure

1 are enforced. Penn National would do a lot better to sit  
2 down here and try to get some clarity on what policies  
3 they have and what they cover because that's what this  
4 suit's all about. It has nothing to do with any kind of  
5 jury trial or anything else. It has to do with locating  
6 policies that may provide coverage to a company who's  
7 been sued in many, many asbestos cases because you've  
8 got legacy policies potentially that cover a period of  
9 time when exposure occurred but arise only now when a  
10 diagnosis is made that then puts the claimant on notice  
11 that they have a claim, and that -- that's what the  
12 receiver is desperately attempting to do. This receiver  
13 is a defendant in these pieces of litigation and is  
14 trying to provide an adequate defense and in the process  
15 benefit you by holding down what might be rendered by  
16 way of a settlement or a judgment, but to do that the  
17 receiver must have accurate and full information from  
18 your files about your coverage and we have to narrow  
19 that. There's been so many different obstacles put in  
20 the way of that simple finding. The receiver has got  
21 to be assured that the company hasn't destroyed those  
22 records, and that's what the spoliation would be about.

23 MR. YNTEMA: I understand as far as Your Honor's  
24 order today is that -- that any request for a jury trial  
25 with respect to what's going to be tried beginning

1 December 12th or 14th, that there is no issue of fact  
2 for a jury?

3 THE COURT: I would have to see what you say. I  
4 have not yet seen a request for a jury trial, but if  
5 you're talking about a jury trial with respect to these  
6 declaration matters on December the 14th, I certainly  
7 need to see that because I -- in what is before me I  
8 do not see anything that requires anything other than  
9 action by the Court on what these -- what coverage there  
10 is and whether the company has hidden the ball and  
11 destroyed any records that might further eliminate the  
12 basic issue, which is what kind of coverage is there of  
13 the exposures that Covil is now facing.

14 MR. YNTEMA: And to the -- to the receiver's  
15 complaint for declaratory judgment and breach of  
16 contract, we had served our answer long ago and preserved  
17 our right to a jury trial on factual issues just for the  
18 record.

19 THE COURT: I know nothing about that until it  
20 comes to me. Right now what I've got is the declaration  
21 I'm asked to make.

22 I don't know. Has it gone? Now it's not working  
23 anymore.

24 MR. YNTEMA: I'm sorry, Your Honor.

25 THE COURT: That's all right. It's not your fault.

1 MR. YNTEMA: We were in the throes of it there, so.

2 THE COURT: Well, listen. No, it's not your fault  
3 at all.

4 MR. YNTEMA: I interrupted. I apologize. I think  
5 we were coming to an end here.

6 THE COURT: The sin is on both sides. So, please,  
7 don't apologize. You're doing a good job.

8 MR. YNTEMA: I think we were kind of tapering it  
9 down to an end. We can wait for your law clerk to return  
10 or --

11 THE COURT: Can you hear?

12 THE COURT REPORTER: Yes. I'm fine.

13 THE COURT: I think you can continue.

14 MR. YNTEMA: I think the final thing I was going  
15 to say to Your Honor is that we had preserved our right  
16 to a jury trial and that was the sense of my letter to  
17 the Court as of recent and that we continue as far as  
18 on behalf of Penn National to preserve our right to a  
19 jury trial on the factual issues to be tried to a jury  
20 in this case.

21 THE COURT: And what I simply tell you is this.  
22 You have asserted that you want to preserve your right  
23 to a jury trial. So far I have not been asked to rule  
24 on a specific contention about what you regard as a  
25 jury trial matter such that I could either grant it,

1 deny it or do anything with it. All I have been asked  
2 to do is mediate a very thorny discovery dispute and  
3 kind of the last refuge for Penn National has been to  
4 say somehow or another that its right to a jury trial  
5 impacts on what I don't know, impacts this discovery  
6 dispute, and I can't -- I'm not understanding that yet.

7 This discovery dispute is about finding these  
8 policies and whether or not any records of the companies,  
9 including the policies, have been destroyed. Otherwise  
10 known as spoliated. Those are the two things I've been  
11 asked to deal with, so I haven't been asked to deal with  
12 anything other than those things and I have not yet heard  
13 a specific argument that says that spoliation is a jury  
14 matter. It clearly is not.

15 MR. YNTEMA: And I have stated on behalf of Penn  
16 National our concerns as to why we think the spoliation  
17 issue could be a factual issue, both in our papers and --

18 THE COURT: But I can't deal on could. I've got  
19 to deal on is on the basis of some specific request with  
20 respect to that and so far I haven't received that.

21 MR. YNTEMA: Based on the issues that the Court  
22 understands today, the Court would deny our request for  
23 a jury trial?

24 THE COURT: I've not -- I haven't got a request  
25 for a jury trial yet. You simply wanted to preserve

1 your right to make one and so far I haven't heard what  
2 you are requesting that would involve a jury trial.  
3 The only thing you and I have discussed specifically is  
4 spoliation and there isn't any question in my mind but  
5 what -- that's not a request for a jury trial because  
6 spoliation is not a jury trial matter. But you have  
7 filed no papers with me to say hey, one of the things  
8 you've got to try is spoliation and I want a jury trial  
9 on that. Do you agree with that?

10 MR. YNTEMA: On the record today, I would ask for  
11 a jury trial to the extent there are factual issues as  
12 to the spoliation component for this case.

13 THE COURT: Well, you put that in the some -- the  
14 form of some sort of motion and let them respond to it,  
15 then I'll see where we're going, but I can tell you at  
16 the present time I don't have enough in front of me to  
17 justify any sort of consideration for a jury trial  
18 because all you've done is said what you've spoken here.

19 MR. YNTEMA: And there's a component of coverage as  
20 I had stated before. That --

21 THE COURT: Sir?

22 Mr. YNTEMA: There's a component of coverage that  
23 could be a factual issue as well.

24 THE COURT: No, sir. What you've raised -- what  
25 you've raised in coverage and the factual example

1     you've given is not something we're being asked to  
2     consider here. All we're being asked to consider here  
3     is whether there are policies that provide coverage to  
4     Covil for these cases. That's -- that's where we are  
5     on coverage. We know of two policies that I'm asked to  
6     take a look and construe and with respect to construing  
7     those particular policies, I know of nothing that I'm  
8     asked to do about that that involves something a jury  
9     could decide. That is a pure question of law based on  
10    the meaning of these policies. It's not -- the cases  
11    you cite about policy meaning have to do with factual  
12    situations that are not in any way related to what we're  
13    being asked to do today, which is basically to decide  
14    the basic matter of existence of coverage, and that's  
15    what's being asked here, but a jury doesn't get to  
16    decide that.

17           So, again, that's gonna have to be fleshed out much  
18    more specifically than just saying well, my last refuge  
19    I'm just gonna kind of throw in here, I'm requesting a  
20    jury trial. You're gonna have to get more specific  
21    than that for me to be able to have any inclination  
22    as to how I might rule. Based on what I understand  
23    about what's gonna be tried in front of me, I think  
24    I've explained. It's the policies and it's the issue  
25    of whether you have suppressed any other evidence such

1     that spoliation's been committed and if spoliation has  
2     been committed, then what do we do about it.

3             MR. YNTEMA:   Again, so I am a lawyer --

4             THE COURT:    Yes, sir.

5             MR. YNTEMA:   -- and to protect the record, we are  
6     requesting a jury trial to the extent -- based on factual  
7     issues in this case period.

8             THE COURT:    All right.   Well, I will have to have  
9     much more specificity about that in order to rule on  
10    that request is what I'm saying to you --

11            MR. YNTEMA:   Thank you.

12            THE COURT:    -- and so far I don't have anything  
13    that gives me enough of a clue about what you think the  
14    factual issues are in the case to be able to make that  
15    determination.   Based on what I now know about the case,  
16    the only issues in front of me are issues that emanate  
17    from an action that is a declaratory judgment action.

18            MR. YNTEMA:   I believe I can say thank you for  
19    your time and allowing me to express my concerns and  
20    hearing this on behalf of Penn National.

21            THE COURT:    I understand.   Thank you, sir.

22            All right.   Anything further?

23            MS. PATTERSON:   Your Honor?

24            THE COURT:    Yes, ma'am.

25            MS. PATTERSON:   May I?   This is Nancy Patterson on

1     behalf of the receiver. We just want to confirm that  
2     we are starting on the 14th. Is that --

3             THE COURT: Yes. I mean, I don't know anything  
4     that would give you any reason to --

5             MS. PATTERSON: Well --

6             THE COURT: Well, no. What we're gonna do is start  
7     on the -- didn't I say the 12th?

8             MS. PATTERSON: That's why I was asking, Your Honor.  
9     I know at one point the last time we met we said the 12th  
10    and --

11            THE COURT: Yeah, and that was really subject to  
12    what you-all were working out about what Mr. Smith's  
13    schedule was, but -- so what is the schedule?

14            MS. PATTERSON: We were operating under the  
15    assumption of -- that we would begin on the 12th.

16            THE COURT: The Monday, yes.

17            MS. PATTERSON: Yes.

18            THE COURT: And that's what I'm operating under.

19            MS. PATTERSON: Okay. So -- okay, the 12th.

20            THE COURT: The matter will start on Monday,  
21    December the 12th, here in Richland County.

22            MS. PATTERSON: Thank you, Your Honor.

23            THE COURT: Now the other thing is I would not  
24    dare get out of here without having some understanding  
25    about whether what I've said on the record is enough

1 or whether we need an order with respect to the matters  
2 that have been discussed here.

3 MR. PROTOPAPAS: I believe there's enough on the  
4 record, Your Honor, and we'll be seeing each other  
5 tomorrow and I'll get a copy of the transcript.

6 MR. YNTEMA: At this point, I mean, Penn National  
7 would prefer a formal order, but we can discuss that  
8 with Mr. Protopapas tomorrow.

9 THE COURT: All right. But let me know about  
10 that, you know. I mean, I am aware of the history of  
11 this matter and my bet is that either we're gonna have  
12 to get a big transcript up here and then they'll appeal  
13 it or they'll appeal it anyway, and I want to at least  
14 be sensible about it.

15 What I think ought to be done is just go on and get  
16 up a draft order very quickly. Let me see something  
17 tomorrow, if possible. I'm not inviting a whole bunch of  
18 back and forth on it, but if you-all think this record  
19 is enough, that's fine. I, frankly, think they're gonna  
20 appeal it. I'm not asking Mr. Yntema tell me that, but  
21 I would be very surprised if they don't attempt to do  
22 just what they've done here, which is to appeal this  
23 matter and hope that stays or delays it.

24 I can tell you I surely don't think these orders  
25 today are appealable orders, but let's see what happens.

1 I believe you need to draft an order, send it to me as  
2 quickly as you can, and Mr. Yntema needs to respond as  
3 quickly as he can. I would intend to have an order in  
4 place before Wednesday. I would prefer to have it  
5 tomorrow.

6 My schedule is a very tough one. I have got a  
7 National Law Enforcement conference. I've got to cut  
8 in the middle of it. It's my very last time there, so,  
9 you know, being honored in retirement from this National  
10 Law Enforcement Commission. Then I've got to leave that  
11 Thursday and go to give one of the speeches at Michelle  
12 Childs' swearing in in D.C. and come back to St. Louis  
13 to complete the rest of the CALEA conference, so my  
14 schedule is very, very full.

15 I will try to do everything I can, but I don't  
16 want to have to get back here and then be forced at  
17 some later date to get involved in an appeal and all  
18 that kind of stuff. I want to know what the heck's  
19 going on here.

20 MR. NES: The parties will have it before the end  
21 of the day tomorrow.

22 THE COURT: Okay. Very good. Thank you.

23 MR. PROTOPAPAS: Thank you, Your Honor.

24 MS. PATTERSON: Thank you, Your Honor.

25 THE COURT: Court will be in recess.

1 MR. YNTEMA: Thank you, Your Honor.

2 (Whereupon, the proceedings were concluded at

3 1:01 PM.)

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## C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter  
for the Eleventh Judicial Circuit of the State of  
South Carolina, do hereby certify that the foregoing  
is a true, accurate and complete transcript of record  
of all the proceedings had and the evidence introduced  
in the hearing of the captioned case in Circuit Court  
on the 14th day of November, 2022, reported and  
transcribed by me to the best of my ability.

I do further certify that I am neither of kin,  
counsel, nor have an interest to any party hereto.

November 30, 2022

/s/ Stacy S. Johnson  
STACY S. JOHNSON  
CIRCUIT COURT REPORTER



## The Supreme Court of South Carolina

JEAN HOEFER TOAL  
CHIEF JUSTICE, RETIRED  
SENIOR ACTIVE JUDGE

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RE: Covil v. Penn National; C.A. No.: 2020-CP-40-02098

December 8, 2022

Dear Counsel:

I have received from Kirby Shealy as counsel for Defendant Penn National its Notice of Appeal to the South Carolina Court of Appeals of my Order regarding Penn National's Motion to Confirm Jury Trial. My Order was electronically signed, emailed to all counsel and transmitted to Richland County's Electronic Filing System on December 6, 2022. It was marked electronically filed by Richland County on December 7, 2022 at 8:43 am.

My Order repeated my long-stated rulings that this matter is a nonjury declaratory judgment matter. It has been set for a nonjury trial in Richland County on December 12, 2022, beginning at 9:30 am. Defendant Penn National's Answer requested "a trial by jury on all issues so triable." The three Causes of Action pled by Plaintiff Covil against Penn National are all actions for Declaratory Judgements. These actions are not triable to a jury; they are requests for Judicial Declaration of complex questions of insurance coverage law. These declarations are also affected by ongoing disputes regarding discovery of Penn National insurance policies and alleged spoliation of insurance policies and records. These are not jury questions. Several times after the conduct by me of hearings in this case, Penn National has attempted to appeal my discovery rulings. Those appeals have been dismissed by the Court of Appeals and the Supreme Court as non-appealable.

Although I firmly believe that this Order is not appealable, this appeal operates as a temporary stay of the nonjury trial in this matter. Accordingly, I will postpone this trial until such time as this Court receives a Remittitur of this matter.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Jean Hofer Toal", with a long horizontal flourish extending to the right.

Jean Hofer Toal  
Acting Circuit Court Judge

November 7, 2022

VIA E-MAIL ONLY (cposwal@sccourts.org)

The Honorable Jean H. Toal  
c/o Ms. Zitel Poswal  
Judicial Law Clerk  
South Carolina Court Administration  
1220 Senate Street, Suite 221  
Columbia, SC 29201

RE: *Covil Corp. v. Penn National Mut. Cas. Ins. Co.* (Richland County);  
2020-CP-40-02098

Dear Chief Justice Toal:

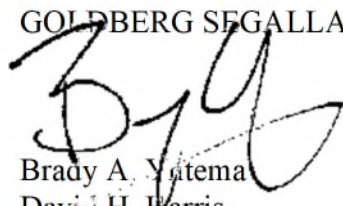
I am writing on behalf of Pennsylvania National Mutual Casualty Insurance Company ("Penn National") in advance of the Pre-Trial Hearing currently scheduled to be conducted on Monday, November 14, 2022. It is expected that the Receiver will request an "evidentiary" hearing on issues involving alleged spoliation and a non-jury trial on issues involving Penn National's coverage for Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8 – specifically regarding certain coverage issues regarding Penn National's aggregate coverage limit under such policies.

Penn National requested a jury trial on all issues so triable by way of its Answer to the Receiver's Complaint for Declaratory Judgment and Breach of Contract. Fact and expert witnesses are scheduled to be conducted by the parties in November and December leading up to the trial date of December 12 or 14, 2022. Please allow this letter to respectfully confirm that Penn National preserves its right to and requests a jury trial on all factual issues in this case, including on spoliation and coverage issues.

Should you need anything further with respect to this matter, please do not hesitate to contact me.

Sincerely,

GOLDBERG SEGALLA, LLP

  
Brady A. Yntema  
David H. Harris

cc: All Counsel of Record

Please send mail to our scanning center at: PO Box 727, Buffalo NY 14201

**RECEIVED**

**Dec 14 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2020-CP-40-02098

---

Appellate Case No. 2022-001722

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Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,

Appellant.

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**PROOF OF SERVICE**

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I certify that a true copy of the Motion to Dismiss and Expedite and Appendix in this case have been served on the following, this 14th day of December, 2022, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447).

David G. Harris II – dharris@goldbergsegalla.com  
Brady A. Yntema – byntema@goldbergsegalla.com  
Alexander Erwin Davis – aedavis@goldbergsegalla.com  
Kirby D. Shealy III – kirby.shealy@arlaw.com

*(Signature page follows)*

Respectfully submitted,

s/Shanon N. Peake

G. Murrell Smith, Jr. (S.C. Bar # 66263)

Jonathan M. Robinson (S.C. Bar # 68285)

Shanon N. Peake (S.C. Bar #102723)

Austin T. Reed (S.C. Bar #102808)

Smith Robinson Holler DuBose and Morgan, LLC

2530 Devine Street, Suite 1B

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(803) 254-5445

ATTORNEYS FOR RESPONDENT

December 14, 2022.

**From:** [Shanon Peake](#)  
**To:** [dharris@goldbergsegalla.com](mailto:dharris@goldbergsegalla.com); [byntema@goldbergsegalla.com](mailto:byntema@goldbergsegalla.com); [aedavis@goldbergsegalla.com](mailto:aedavis@goldbergsegalla.com); [kirby.shealy@arlaw.com](mailto:kirby.shealy@arlaw.com)  
**Cc:** [Jon Robinson](#); [Nes, W. Brad](#); [Dot Faulkenberry](#); [Lindsay Valek](#)  
**Subject:** Appellate Case No. 2022-001722: Covil v. Penn National  
**Date:** Wednesday, December 14, 2022 2:10:00 PM  
**Attachments:** [Motion to Dismiss, 5.pdf](#)  
[POS - Mtn to Dismiss, 2.pdf](#)  
[Appendix, 2.pdf](#)

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Good Afternoon,

Please find attached for service a copy of the Motion to Dismiss and Expedite and Appendix that we are filing with the Court of Appeals today.

Thank you,  
Shanon

**SMITHROBINSON**  
Forward thinking. Results driven.  
*Smith Robinson Holler DuBose and Morgan, LLC*  
[www.SmithRobinsonLaw.com](http://www.SmithRobinsonLaw.com)

**Shanon Peake**  
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