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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

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

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) requests that the Supreme Court of South Carolina accept for review the May 5, 2022 order of the Circuit Court (Toal, J.) (the “Sanction Order”), an order of the Court of Appeals dated August 9, 2022, dismissing Penn National’s appeal (the “Dismissal Order”), and an order of the same court dated November 15, 2022, denying Penn National’s motion for rehearing.

The Circuit Court issued the Sanction Order as a direct and specific result of what the Circuit Court deemed “Penn National’s intransigence” (Appx., p. 13), awarding unprecedented relief and requiring Penn National to digitize from microfiche its entire historical repository of documents concerning commercial lines insurance, and to provide its adversary unrestricted and unfettered access to the digitized repository. The Circuit Court’s extreme relief further lacked any rational relationship to the apparent goal of the order—*i.e.*, to identify additional commercial general liability coverage for Covil—as not even a scintilla of evidence exists to even merely suggest that any other commercial general liability policies issued by Penn National to Covil exist in the first place. The microfiche records at issue contain approximately 18,000,000 pages of commercial lines policies, stored on approximately 300,000 microfiche cards, concerning more than 200,000 separate insurance policies issued to thousands of individuals and entities, none of which have any connection to Covil or this litigation. The Circuit Court further ordered Penn National to bear all financial costs of this punitive exercise, imposing an extraordinary financial burden and directly affecting Penn National’s property rights.

This matter presents special and important legal issues necessitating review by this Court, involving novel issues of law in the context of mass tort coverage litigation. First, if not immediately reviewed, the Circuit Court’s order will permit trial courts to unilaterally—and

retrospectively—determine how independently operating companies are permitted to maintain their business records and permit such trial courts to punish litigants if the historical manner in which their records are maintained does not meet an individual jurist’s standards, reshaping the discretionary authority of trial courts in South Carolina. Second, this matter involves the rights of thousands of Penn National’s insureds to which it issued insurance policies from approximately 1954-1991, and questions concerning the extent to which their private, confidential information can be ordered for disclosure in a case with which they have no factual connection or legal interest.

Penn National respectfully requests that this Court accept its Petition for Writ of Certiorari to review the Sanction Order, as well as the Dismissal Order of the Court of Appeals and its subsequent order denying Penn National’s request for rehearing. In the alternative, Penn National submits that the Court should remand the matter to the Court of Appeals for a ruling on the merits of Penn National’s appeal. Simply put, the punitive nature of the Sanction Order is readily apparent from its face, and the Court of Appeals’ Dismissal Order was in error. Consistent with long-standing South Carolina law, the Court of Appeals should have looked to the substance of the Sanction Order rather than merely the label given to the motions that produced it.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court abuse its discretion when sanctioning Penn National by directing to image and digitize its entire microfiche repository of historic commercial lines policies – approximately 18,000,000 pages at a cost of at least \$500,000 – in the absence of any evidence that additional Covil commercial general liability policies exist in the first place?
2. Did the Circuit Court err in granting Covil unrestricted and unfettered access to Penn National’s entire microfiche repository of historic commercial lines policies, which includes information for thousands of individuals and entities that have no relationship to Covil or this litigation?
3. Did the Court of Appeals err in concluding the Sanction Order was interlocutory in nature and dismissing Penn National’s appeal without ruling on the merits?

STATEMENT OF THE CASE

Covil Corporation (“Covil”), a South Carolina corporation formed in 1954, was in the business of selling, distributing, and installing insulation products, some of which allegedly contained asbestos. (Appx., pp. 25-26, ¶ 7) Covil effectively ceased operations in 1991, and its charter was thereafter administratively revoked. (*Id.*) Numerous lawsuits have been brought against Covil by individuals or their estates alleging injury from exposure to asbestos caused by Covil’s alleged distribution and/or installation of asbestos-containing products. (*Id.*)

In 2017, this Court appointed Retired Justice Jean Hoefer Toal as Chief Judge for Administrative Purposes over all asbestos litigation filed in the South Carolina state court system. In this role, Ret. Justice Toal has exercised jurisdiction over both liability lawsuits as well as related insurance coverage litigation. On November 2, 2018, on her own motion, Ret. Justice Toal appointed Peter D. Protopappas as Receiver for Covil to manage its affairs under South Carolina law. (Appx., pp. 37-39)

On or about May 29, 2018, and in connection with a pending motion to compel filed against Covil in an underlying asbestos exposure case, plaintiffs’ counsel served a third-party subpoena upon certain insurers, including Penn National, requesting copies of insurance policies issued to Covil from 1969 to 1995 (Appx., p. 357).¹ The subpoena attached as Exhibit C a spreadsheet created by Covil detailing by policy period the name of each insurer issuing a policy to Covil, together with the policy number and type of policy. (Appx., pp. 363-367) Importantly, Covil’s spreadsheet identified a specific commercial general liability insurer and specific commercial general liability policy number for every single consecutive annual policy period running from

¹ The subpoena was issued in *Finch v. BASF Catalysts, LLC, et al.*, Civil Action No. 1:16-cv-1077, United States District Court for the Middle District of North Carolina.

March 31, 1969 through March 31, 1992, with no gaps in coverage. (Appx., pp. 363-367) Of the twenty-two (22) consecutive years of commercial general liability coverages identified by Covil itself, only two policies were issued by Penn National: Policy No. 515 50 28 53-7, for the policy period of March 31, 1986 to March 31, 1987 (“1986-87 Policy”); and Policy No. 515 50 28 53-8, for the subsequent policy period of March 31, 1987 to March 31, 1988 (“1987-88 Policy”) (collectively, the “Penn National Policies”) (Appx., p. 366) Pursuant to the subpoena, and because Penn National was provided with policy number references, Penn National searched its records, and located and promptly produced copies of the Penn National Policies using the policy numbers provided by Covil. Penn National also conducted an electronic search to see if there were any other commercial general liability policies that were issued either before its 1986-87 Policy or after its 1987-88 Policy, identifying none. (Appx., p. 290) Since June 2018, Covil has possessed complete copies of the Penn National Policies. (Appx., p. 368)

On April 27, 2020, nearly two years after the Penn National Policies were provided in response to the subpoena, Covil commenced the present action against Penn National. In its Complaint, Covil asks the Circuit Court to issue several declarations concerning the interpretation and application of terms in the Penn National Policies, but does not in any manner allege that any other commercial general liability policies were ever issued by Penn National to Covil. (Appx., pp. 26 at ¶ 8; 29 at ¶¶ 21, 23)

1. *Penn National’s Document Repository.*

Penn National is a regional insurance company operating since 1919, issuing workers compensation, inland marine, property, commercial general liability, automobile liability, and excess insurance policies in eleven (11) states. (Appx., pp. 264-265, ¶ 18)

Decades before it was involved in any asbestos coverage litigation, Penn National created

a document retention system identifying its customer's historical policies by policy number. (Appx., p. 420) Under Penn National's established Document Retention Policy, all non-workers compensation policy documents must be retained for twenty-five (25) years from cancellation or non-renewal date. (Appx., p. 265, ¶ 19)

Initially, Penn National stored its historic insurance policies on microfiche cards. In 1992, Penn National implemented an electronic storage system, ImageRight, which was discontinued in 1995. Between 1995 and 2003, Penn National stored paper copies of its insurance policies, which are presently contained in 5,800 boxes located in an Iron Mountain facility in Pennsylvania. Between 2003 and 2005, Penn National stored its insurance policies in a hybrid of electronic and paper copies. Since 2005, all insurance policies issued by Penn National have been stored electronically. (Appx., pp. 264-265, ¶¶ 17-19)

Because its repository of non-electronic historic policies are stored by policy number, Penn National can readily search for and produce copies of a policy once it is provided with a policy number. If no policy number is provided, Penn National can conduct a search of its electronic underwriting records (for the time periods from 1992 to 1995, and 2003 to present) by entering an entity's name to determine if Penn National has any electronic record of a policy that was issued to that entity. (Appx., p. 256 at ¶ 8) Electronically stored policy information is organized in the system by the first, or primary, named insured shown on declarations pages of a policy. (*Id.*) Therefore, searches of the database will produce matches to the name searched, along with the insured's city and state, policy number, and type of coverage issued. Once the policy number is identified, Penn National can then search its repository of historic insurance policy documents to identify a copy of the policy. (Appx., pp. 256-257, ¶¶ 8-10)

2. *Penn National's Document Search Efforts*

Throughout this litigation, and in the absence of any information to suggest that Penn National ever issued any additional commercial general liability policies to Covil in the first place, Penn National has engaged in extensive discovery relating to its document repository and has performed repeated searches for Covil-related policy documents. Leading up to the Sanction Order, Covil served Penn National with forty-eight (48) Interrogatories, seventy-six (76) Requests for Production of Documents, and twenty-six (26) Requests for Admissions. (Appx., pp. 51-91, 178-82, 190-210, and 247-253) Penn National responded to each and every one of Covil's demands, producing (at the time the Sanction Order was entered) in excess of 3,500 pages of Covil-related policy documents, extensive information detailing Penn National's document retention protocols and practices, and the maintenance of its physical documents by Iron Mountain. (Appx., 92-137, 138-177, 183-189, and 211-246)

3. *Covil's Continued Fishing Expedition*

While Covil has never produced a policy number or any secondary evidence to suggest a single additional commercial general liability policy (other than the 1986-87 and 1987-88 Policies) was ever issued by Penn National to Covil, Covil nevertheless demanded that Penn National manually search its entire repository of historic policies to determine if any additional policies were issued to Covil, and if there are any policies under which Covil *could be* covered as an additional insured. (Appx., pp. 607-610) Penn National objected to performing a manual search as the same would be unduly burdensome without a policy number to guide the search. (Appx. pp. 611-624) Specifically, Penn National advised that it stores its historic policies on microfiche contained in 148 boxes—which include approximately 300,000 microfiche cards containing commercial lines policies for more than 200,000 insureds, each of which

comprises up to 60 images, resulting in approximately 18,000,000 pages of material—and in paper documents contained in 5,800 boxes stored at an Iron Mountain facility. (Appx., p. 268, ¶¶ 8-9; 653) Penn National established that a manual search of its entire historical document repository was unreasonable, would be all-consuming, and would take an inordinate amount of time.

Covil further demanded that Penn National search its historical document repository to find policies that Penn National may or may not have issued for 240 different “contractors” and 650 separate “facilities” under which Covil could, *theoretically*, qualify as an additional insured. (Appx., pp. 65-71) Covil made this request without any evidence to even suggest that Penn National issued policies to any of these 240 “contractors” or in relation to the 650 “facilities”, or that Covil itself had any factual or legal relationship with any of the “contractors” or “facilities”.

Notwithstanding the absence of a factual, legal, or rational relationship between Covil and these **890 separate and distinct entities**, Penn National searched its electronic system for information regarding the entities. After dedicating in excess of sixty-four (64) hours to this project, Penn National’s search generated a result of four (4) policies: an inland marine policy which did not provide general liability insurance coverage; a policy issued to an entity after Covil was no longer in existence and that had been purged pursuant to Penn National’s Document Retention Policy; and two additional general liability policies issued to other entities which did not provide coverage to Covil as an insured or additional insured. (Appx., pp. 255-259, ¶¶ 7-20) Internal Penn National communications concerning these policy-related documents were produced with Penn National’s responses to Covil’s discovery request, and Penn National confirmed that it would produce the policy documents subject to a protective order as the materials related to non-Covil entities with no relationship to this litigation. (Appx., p. 172)

Still not satisfied, Covil moved to compel Penn National to perform a manual search of

its historic files. After a hearing, the Circuit Court directed Covil’s asbestos defense counsel, Ellis & Winters, LLP (“Ellis & Winters”), to conduct a review of Penn National’s historic policy related documents to confirm whether there was a way to search Penn National’s archived records for policy documents for a specific insured without a policy number. (Appx., p. 652) Three Ellis & Winters employees spent two days and thirty-two (32) hours sampling approximately 100 boxes of paper documents (Appx., pp. 690-706), and later, two Ellis & Winters employees spent another two days and twenty-one and seven tenth’s (21.7) hours reviewing microfiche cards. (*Id.*) At the conclusion of its search, Ellis & Winters submitted a report to the Circuit Court, confirming that Penn National actually stored its historic policy documents by policy numbers, as Penn National had repeatedly represented. (Appx., pp. 652-656) With access to Penn National’s entire historical document repository, Ellis & Winters was unable to find **any** additional commercial general liability policies that were issued to Covil, or under which Covil was an additional insured.² (*Id.*)

All told, by the time that the Sanction Order was entered, Penn National had responded to forty-eight (48) interrogatories, seventy-six (76) requests for production of documents, and twenty-six (26) requests for admission, all served in an effort to identify additional commercial general liability policies where no facts have been established to support even a reasonable inference that any such policies exist in the first place. In addition to the foregoing written responses, Covil took the deposition of Brent Reifsnnyder, Penn National Director of Administrative Services (Appx., pp.

² The Ellis & Winters search was facilitated by a list of policy numbers provided by Covil, which were curiously not given to Penn National. Consequently, Ellis & Winters located three additional Covil-related policies because it possessed the corresponding policy numbers. (Appx., p. 654) The parties do not dispute that these three policies—an inland marine, a boiler machine, and a commercial automobile policy—are not applicable to and do not respond to Covil’s asbestos liability. (*Id.*)

408-507), and conducted multiple Rule 30(b)(6) depositions of Penn National, for which Boyd Wright, Penn National's Senior Home Office Claims Examiner, served as Penn National's corporate designee.³ (Appx., pp. 273-407, 508-606)

4. *The May 5 Sanction Order and Subsequent Appeal*

On April 11, 2022, the parties appeared before the Circuit Court to address Ellis & Winters' report and other pending motions. (Appx., pp. 657-675) As a result of the hearing, the Circuit Court issued the May 5 Sanction Order, which directed Penn National to: (1) image and digitize its entire microfiche repository of historic commercial lines insurance policies, and (2) provide Covil and its attorneys with unfettered access to this repository. In issuing its ruling, the Circuit Court explained that:

The Receiver and his outside counsel therefore must have full and unfettered access to every page of every insurance policy and policy-related document that Ellis & Winters and its selected vendor make available in the database. This will necessarily include reviewing records of other insureds' policies.

The Receiver will be entitled to review the policy records uploaded to the database to identify potentially responsive documents. The Receiver will be entitled to examine each and every policy to understand whether it is a policy that in any way, shape, or form covers Covil's asbestos responsibilities and liabilities. Because of Penn National's **intransigence**, the Court will not limit the Receiver's access to any of the information in the microfiche database. ...

(Appx., pp. 12-13) (emphasis added)

The "intransigence" referred to by the Court is Penn National's decision, made decades before its involvement in any asbestos coverage litigation, to store its historic insurance policies by policy number, Penn National's refusal to voluntarily comply with Covil's unreasonable demand that Penn National manually search in excess of 18,000,000 pages of historic insurance

³ In accordance with the Sanction Order, Covil took a third Rule 30(b)(6) deposition of Penn National's Associate General Counsel, Scott Maier.

policies for any policies issued to Covil, and Penn National's failure to voluntarily incur the enormous expense associated with imaging and digitizing its historic repository of insurance policy documents:

... This Court fully expects that an insurance company served with discovery requests from a receiver in this state, seeking the identification and production of insurance policies issued to the company as a named insured or which otherwise includes the company as a supplemental or additional insured, will search its entire repository of insurance policies and policy-related information for documents identifying the defunct company at issue. The Receiver need only provide the insurance company with the name of the defunct company for which it is seeking to marshal insurance assets. For the avoidance of doubt, this Court flatly rejects any assertion that an insurance company may refuse to search its repositories of insurance policies for responsive documents unless and until it is provided with a specific policy number.

* * *

Despite this Court's prior orders, as of November 5, 2021, Penn National had not performed a complete manual search of its historic insurance policies contained on microfiche cards. Nor had it processed the microfiche cards so that the information could be searched electronically. ...

* * *

... The Court finds that Penn National's conduct with respect to its searches for historic Covil insurance policies (as well as non-Covil Receivership policies) amounts to a total and complete refusal to comply with its discovery obligations. It could well have done exactly what Ellis & Winters has proposed here. Penn National could have selected a vendor, processed the information on its microfiche cards, and conducted a review. It did not. Instead, Penn National took the defiant stance that it could not search for historic policies on its microfiche cards without being provided with a policy number. ...

(Appx., pp. 7-8, 9, 11)

During the hearing, the Circuit Court made the following additional observations:

And your company has failed so completely at doing anything on its own to search these policies and determine the coverage, that I am going to allow an independent group to digitize these records. ...

They're going to be able to look at each and every policy to understand whether that is a policy that in any way, shape, or form covers Covil's responsibilities in this litigation because those are assets of Covil's.

* * *

I don't want to preclude them from searching. If they want to look at each policy individually and look at it whether it says Covil on top of it or, you know,

Disney World. ...

But the intransigence of your client [Penn National] has reached a point where I'm now on my fourth motion to compel, so I'm not inclined to do anything to limit Protopapas as receiver's access to each and every policy that's in the microfiche database.

* * *

They [Penn National] are living with the consequence of the approach they decided to take with respect to maintaining records that a covered insured ought to be able to obtain.

(Appx., pp. 668-669) (emphasis added)

During its investigation, Ellis & Winters determined it could take up to 45 minutes to print the images from a single microfiche card, meaning that it could take roughly **5,625 work weeks** to simply print the images from the 18,000,000 pages of commercial lines policies stored microfiche. (Appx., pp. 653, 656) Furthermore, Ellis & Winters found that the cost to image and digitize Penn National's microfiche repository of commercial lines policies would be between \$240,000 to \$960,000. (Appx., p. 656)

Based upon its dissatisfaction with Penn National's document retention methodology, Penn National's inability to locate further policy documents (in the absence of any information to suggest they existed to begin with), and Penn National not voluntarily incurring several hundred thousand dollars in vendor costs, the Circuit Court held that Penn National was "intransigent" and ordered Penn National to image and digitize its entire repository of history commercial lines policies and to provide counsel for the Receiver unfettered access to Penn National's document database. On May 26, 2022, the Circuit Court denied Penn National's Motion for Reconsideration of its May 5, 2022 Order.⁴ (Appx., pp. 20-23)

⁴ The Circuit Court's order also directs Penn National to produce yet further documents, including internal "policy prefix code keys", information provided by Penn National to Ellis & Winters during its review of Penn National's microfiche, and all underwriting documents for all Receivership entities. The punitive nature of the Sanction Order is further underscored by

Penn National thereafter sought review of the Sanction Order and the May 26, 2022 Order by the Court of Appeals and the Supreme Court in its original jurisdiction. (Appx., 707-731) Penn National's petition for a writ of certiorari for this Court's review in its original jurisdiction was denied on August 23, 2022. (Appx., p. 868) Covil moved to dismiss Penn National's appeal to the Court of Appeals contending that the Sanction Order was interlocutory in nature (Appx., 732-748), ignoring the clear facts that the Sanction Order was punitive and imposed discovery sanctions upon Penn National in the form of unilateral responsibility for funding the Receiver's ongoing fishing expedition, in the absence of any facts to suggest the effort would result in relevant information. By order dated August 9, 2022, the Court of Appeals dismissed Penn National's appeal without determining the merits thereof (Appx., p. 866), and on November 15, 2022, denied Penn National's request for rehearing. (Appx., p. 904) Penn National now moves this Court to accept its Petition for Certiorari after the Court of Appeals' decision.

ARGUMENT IN SUPPORT OF PETITION

I. THE SANCTION ORDER INVOLVES NOVEL QUESTIONS OF LAW THAT NECESSITATE THIS COURT'S REVIEW.

Rule 242(b)(1) provides the Supreme Court with the discretion to grant review of a lower court order “[w]here there are novel questions of law.” It is respectfully submitted that the Circuit Court's May 5 Sanction Order raises such novel questions of law such that certiorari should be granted. It is likewise well settled that review of trial court orders is not constrained by how the order is styled, and that “an appellate court should look to the effect of an interlocutory

the Circuit Court's directive that a copy of the order be sent to the South Carolina Department of Insurance. (Appx., pp. 13-14, 16-18) All of these orders were objected to and addressed by Penn National in its Motion for Reconsideration, and they are likewise included as issues that should be subject to review by this Court.

order to determine its appealability.” *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 147 (2015) (quoting *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011)).

The Circuit Court’s mandate for Penn National to image and digitize its entire historic microfiche repository of commercial lines insurance policies is an unprecedented sanction based upon nothing more than the Circuit Court’s displeasure with Penn National’s document retention protocols, developed decades prior to its involvement with long-tail asbestos exposure claims. (Appx., p. 420). There is no factual or legal justification for the imposition of such an onerous and expensive burden upon Penn National, particularly where no industry rule, insurance regulation, or established legal standard required Penn National to maintain its records in any particular fashion, and no information exists to suggest that this textbook fishing expedition will render any useful results.

Where the undisputed facts prove that Covil is not missing one single day of commercial general liability coverage from March 31, 1969 through March 31, 1992, and where Penn National’s extensive search efforts to date have yielded no information to even suggest that any other responsive policies ever existed, the punitive nature of the Sanction Order is clear. Underscoring the critical nature of this Court’s intervention, the Receiver is presently using the Sanction Order as authority to seek the imposition of similarly onerous, burdensome, and expensive changes to the operating protocols of other insurers in other asbestos-related matters.⁵

⁵ For example, in *Childers v. Davis Mechanical et al.*, Case No. 2021-CP-40-03484 (Richland County, SC), the Receiver has filed similar Motions to Compel seeking to require insurers to perform unreasonable searches of their historical policy documents. On May 16, 2022, the Receiver filed a Notice of Filing in the *Childers* action, placing the circuit court’s May 5, 2022 Order in the file and claiming that “this Order contains helpful guidance regarding this Court’s expectations regarding the administration of receiverships.” In that one case alone, the Receiver

The Circuit Court’s May 5 Sanction Order is an explicit effort to impose its own notions of appropriate record keeping upon entities doing business in South Carolina. The propriety of the Circuit Court’s Sanction Order—unprecedented in scope and imposing a remedy in the absence of harm—is a special and important issue of law worthy of this Court’s scrutiny. Simply put, trial courts should not be permitted to unilaterally mandate that companies conducting business in this State expend hundreds of thousands of dollars to revamp lawfully maintained information databases simply because a putative insured is unable to itself produce any evidence that an insurance policy is missing or unidentifiable.

In its Sanction Order, the Circuit Court justified the imposition of this extreme financial burden “as a result of Penn National’s intransigence.” (Appx., p. 10). This “intransigence,” however, amounts to nothing more than the facts that (1) Penn National has always stored its historic insurance policies by policy number, (2) it did not manually search millions of pages of paper documents or microfiche films for general liability coverage that may have been issued to Covil (where no reason exists to believe such policies were issued), and (3) it previously did not voluntarily image and digitize its repository of historic policies. The Circuit Court should not be permitted to punish Penn National for the manner in which it maintained its information databases simply because the Circuit Court dislikes the methodology.⁶

A. There Is No Legal Requirement That Penn National Store Its Insurance Policies In Any Particular Manner

on behalf of various entities has filed seven (7) motions to compel since late 2021 seeking to impose unreasonable obligations on various insurers to search for policy documents.

⁶ In the absence of any supporting evidence or testimony, during the hearing giving rise to the Sanction Order, Justice Toal erroneously speculated that Penn National’s intent in storing policy documents by policy number was to “make it much harder to find the policies.” (Appx. p. 666) However, the employee with Ellis & Winters charged with reviewing Penn National’s archived policy documents stated that the terminal digit system used by Penn National to store its policies is a common system that businesses use. (*Id.*)

At its core, the Circuit Court is punishing Penn National for the methodology employed to retain historic insurance policies. However, there is no federal or state statute or regulation, nor promulgated industry standard that requires how an insurance company should file and maintain historical policies of insurance. In the absence of a statute, regulation, or industry standard dictating a particular approach to this issue, there is no factual or legal basis for the Circuit Court to mandate that Penn National change its established practices, and particularly no basis to require Penn National to exclusively fund the endeavor. The Supreme Court of the United States addressed a similar question in *Oppenheimer Fund v. Sanders*, concluding:

In the context of a lawsuit in which the defendants deny all liability, the imposition on them of a threshold expense of \$16,000 to enable the plaintiffs to identify their own class hardly can be viewed as an insubstantial burden.

The panel dissent and the en banc majority suggested several additional reasons to justify the District Court's order, none of which we find persuasive. Both opinions suggest that the fact that part of these records are kept on computer tapes justifies imposing a greater burden on petitioners than might be imposed on a party whose records are kept in another form...

We do not think these reasons justify the order in this case. There is no indication or contention that these petitioners have acted in bad faith to conceal information from respondents. ... **Finally, the suggestion that petitioners should have used “different systems” to keep their records borders on the frivolous.**

437 U.S. 340, 362-63 (1978) (emphasis added).

In South Carolina, the legislature enacted The Insurance Law, S.C. Code Ann. §38-1-10, *et seq.* which governs many aspects of the insurance industry. For example, this law addresses the capital and surplus required of insurance companies (S.C. Code Ann. §§38-9-10, *et seq.*), the investment and investment practices of property and casualty companies (S.C. Code Ann. §§ 38-12-410, *et seq.*), the length of time—five years—that losses and claims are to be kept by

insurers (S.C. Code Ann. §38-13-130),⁷ and what constitutes improper claims practices (S.C. Code Ann. §38-59-20). However, The Insurance Law does not mandate, or even address, the methods by which insurance companies are legally permitted to store their historic insurance policies.

Penn National chose to store its historic insurance policies by policy number because policy numbers are unique and distinctive identifiers that are specifically associated with a particular insured, and insurance companies do not duplicate their policy numbers. This method avoids confusion associated with the significant potential for an insured's name, address, or location to be similar or even identical to that of another insured. As Mr. Wright testified in his deposition:

Insurance companies, and Penn National is no exception, issue policy numbers for a very specific reason. Name similarity, locations, and other things vary. Policy number is like a Social Security number. It's the identifier for that particular insured.

(Appx., p. 297) Because Penn National stores its historic policies by policy number, it can only reasonably search its microfiche or paper documents by policy number.

The Circuit Court has taken no measure to hide its displeasure with Penn National's methodology. As the Circuit Court announced in the Sanction Order:

For avoidance of doubt, this Court flatly rejects any assertion that an insurance company may refuse to search its repositories of insurance policies for responsive documents unless and until it is provided with a specific policy number.

(Appx., p. 8) The Circuit Court's statement further underscores the special importance of the legal issues raised by this Petition, as absent a statute, rule, or regulation establishing a standard for compliance, the Circuit Court should not be permitted to substitute its personal judgment as to how business records should be maintained for that of the independently operated company maintaining those records. It certainly should not be permitted to financially punish a company for failing to

⁷ Notably, pursuant to Penn National's document retention policy, the company retains documents for 25 years—*five times longer* than required under South Carolina law.

meet the Circuit Court's uncodified, personal preferences for searchability of records. However, that is precisely what the Circuit Court has done here.

B. There Is No Evidence That Penn National Issued Any Additional Commercial General Liability Policies To Covil.

While the Circuit Court's Sanction Order is on its face an abuse of discretion, the impropriety of the financial burden placed upon Penn National is rendered all the more irrational given that there is **no evidence**, in any form, that Penn National issued any general liability policy to Covil other than the 1986-87 Policy and the 1987-88 Policy. This is not a "lost policy" case, and no such claims were or ever have been asserted by Covil. The reason for this is simple: Covil has, at all times, possessed actual knowledge of its precise commercial general liability insurers, together with the specific policy numbers referable to each commercial general liability policy providing continuous, uninterrupted coverage from March 31, 1969 through March 31, 1992. (Appx., pp. 363-367)

Aside from knowing that it was not missing the identity of a single commercial general liability policy over the span of some twenty-two (22) consecutive years, Covil has not produced a shred of primary or secondary evidence to even remotely suggest that Penn National may have issued another general liability insurance policy to it at any point. See, *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968) (burden of proof on person seeking insurance benefits to prove coverage). Covil has not produced any business records, board meeting minutes, financial ledgers, premium invoices, receipts or cashed checks for paid premiums, quotes, binders, declaration pages, or certificates of insurance records from its brokers or agents showing the issuance of policies, excess or umbrella policies referencing scheduled underlying insurance, risk management records, or offered any testimony to establish even the possibility that Penn National issued additional commercial general liability policies to Covil. In stark contrast to

Penn National's documented good-faith efforts, there are no facts to even suggest that Covil used **any** reasonable means to search for secondary evidence within its own records or those of its agents.

Finally, the Sanction Order references the issue of whether Covil was an "additional insured" on commercial general liability policies issued by Penn National to other, non-party entities. For several reasons, this is a red herring. First, even if Penn National's historical document repository was imaged and digitized at enormous expense, the only means by which Covil could identify whether it qualified as an additional insured would be to first locate and identify trade contracts requiring other, non-party entities to name Covil as an additional insured, and to secondly engage in legal analysis to determine whether the terms and conditions of any such additional insured endorsements were triggered by the allegations asserted in each individual and specific underlying lawsuit. As the Court is well-aware, generally a business can only qualify as an additional insured on another entity's insurance policy if the policy contains an endorsement that broadens the definition of "Who Is An Insured" to include those with which the named insured has a contractual relationship requiring additional insurance. Further, those endorsements generally limit the applicability of such insurance to situations in which the additional insured's liability arises out of the named insured's work. See, *Dan Ryan Builders W.Va., LLC v. Main St. Am. Assur. Co.*, 452 F.Supp.3d 327, 332-33 (D.S.C. 2020). Because the determination of additional insured status will almost always require reference to other contracts and will necessarily involve applied legal analysis, it is **extremely improbable** that a manual search of Penn National's historic insurance policies would ever directly identify policies under which Covil qualified as an additional insured.

Secondly, and perhaps more critically, additional insured coverage is usually provided to

companies for whom the named insured is performing or has performed operations, such as general contractors qualifying for additional insured coverage under policies issued to a subcontractor. See, e.g., Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London, 788 F.3d 375, 377-78 (4th Cir. 2015); Lendlease (US) Constr. Inc. v. National Fire Ins. Co., 2021 U.S. Dist. LEXIS 180377 (D.S.C. 2021). Here, it is undisputed that Covil's alleged asbestos liability arises from Covil's work, or products that Covil brought to facilities in which it performed operations. See, e.g., Finch v. Covil Corp., 388 F.Supp.3d 593, 600-01 (M.D.N.C. 2019). Because Covil was the vendor or subcontractor retained by others, it is **extremely unlikely** that Covil, as the subcontractor, would be entitled to additional insured coverage under policies issued to businesses that retained Covil to provide products or performed operations.

In sum, the documented facts in this case establish that there was no factual or legal justification for the extraordinary remedy of requiring Penn National to image and digitalize its entire historical microfiche document repository of commercial lines insurance policies at a cost to Penn National of hundreds of thousands of dollars. Because the directives of the Sanction Order were clearly punitive in nature, and because the Circuit Court lacked any reasonable justification for imposing such financial burdens upon Penn National, this Petition brings up special and important questions of law that warrant review by this Court.

C. The Sanction Order Involves Exceptional Circumstances Warranting A Writ Of Certiorari.

In writing for the Supreme Court of South Carolina in *Laffite v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009), Ret. Justice Toal noted that a writ of certiorari may be issued when exceptional circumstances exist and granted the petition for certiorari because the discovery order at issue in *Laffite* “involve[d] a novel question of law in a matter that has been the subject of numerous claims in state and federal courts. A decision by this Court at this time best serves

the interests of judicial economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest.” *Id.* at 471-472. As established, the issues raised by this Petition are novel questions of law that if left unaddressed, will soon be the subject of numerous claims in the state and federal courts of South Carolina. See, fn. 5, supra at p. 15. Because the Court’s intervention in this matter will determine whether insurers operating in South Carolina can be required to alter their established and otherwise legal document retention practices, and bear all associated costs therewith, based upon a Circuit Court’s individual preference for how document repositories should operate, addressing the issue now will inure to the benefit of the State’s judicial economy.

In *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009), this Court established the framework by which a court should review discovery orders for abusiveness and undue burden by expense. Specifically, this Court held that if the party from whom discovery is being sought shows a particularized harm which will be caused by allowing the discovery, the person seeking the discovery has the burden of proving that the discovery sought is both relevant and necessary. *Id.* at 578, 683 S.E.2d at 498. In this case, Penn National has clearly shown that requiring it to perform a manual review of its historic policies of insurance would cause an undue burden by expense. (Appx. pp. 268-269, ¶¶ 11-12; 468-70) Ellis & Winters advised that Penn National’s archived microfiche records contain more than 300,000 microfiche cards corresponding to commercial line policies, with each card containing up to 60 images, meaning that there are roughly 18,000,000 pages of commercial lines policies stored on microfiche cards. (Appx. pp. 653, 656) Ellis & Winters further found that it could take up to 45 minutes to print the images on a single microfiche card, meaning that it could take roughly **5,625 work weeks** to just print the images stored on microfiche for commercial line policies if a manual review of the archived policy

documents were to be undertaken. (*Id.*)

The cost to image and digitize Penn National's microfiche repository is extreme and disproportionate to both the alleged need for disclosure and the likelihood that this burdensome endeavor will yield useful information. Ellis & Winters has estimated that the cost to image and digitize Penn National's microfiche repository of historic commercial lines policies would be between \$240,000 to \$960,000; a cost ordered by the Circuit Court to be paid solely by Penn National.⁸ (Appx., pp. 15, 656)

This Court's decision in *Hollman v. Woolfson* is instructive. In *Hollman*, this Court accepted a petition for writ of certiorari to review a discovery order that allowed one party to contact and interview the patients of the opposing party. In issuing the writ and vacating the circuit court's order, this Court held that the burden of showing that the requested discovery is necessary is on the party propounding the discovery request, and that the plaintiff failed to carry its evidentiary burden:

In determining whether information is necessary, the party seeking information must demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat. The trial court must determine whether there are reasonable alternatives available to discover the information.

Id. at 580, 683 S.E.2d at 500 (quoting *Laffitte*, 381 S.C. at 476, 674 S.E.2d at 163). By failing to make specific findings as to how the lack of information would impair the plaintiff's case,

⁸ The Circuit Court went so far as to prohibit Penn National from even participating in the choice of vendor to image and digitize Penn National's microfiche repository. Therefore, Penn National has no control over the vendor selected, the cost incurred to image and digitize its repository (a cost which the circuit court has imposed on Penn National), the electronic system used, or whether such system is compatible with and can be supported by Penn National's existing computer system. (Appx. p. 15: "The Court also DIRECTS Ellis & Winters to use its professional judgment to solicit bids from two or more vendors with experience imaging microfiche, to select an appropriate vendor (the "selected vendor") to award the bid, and to supervise the selected vendor's imaging of the microfiche cards into a format that is in a searchable database.")

this Court held that the circuit court abused its discretion in ordering the discovery:

The circuit court committed an abuse of discretion in determining the interviews with the nonparty patients were necessary. Petitioners' treatment of other patients is not necessary to establish any element of respondents' causes of action. In fact, no information obtained in the interviews could establish whether petitioners breached the standard of care when treating respondents or committed fraud on respondents. As to the UTPA cause of action, the circuit court did not make a specific finding as to exactly how the lack of information obtained from the interviews would impair respondents' presentation of the merits of that cause of action or that there were no reasonable alternatives available to discover the information.

Id. at 581, 683 S.E.2d at 500.

Here, Covil failed to meet its burden of showing that a manual search of Penn National's historic insurance policies is relevant and necessary to prosecute its declaratory judgment claims in this case. In its order, the Circuit Court did not make specific findings as to how the failure to perform a manual search would impair Covil's case, nor could it. Covil's declaratory judgment action seeks a declaration on the interpretation of only two policies: *to wit*, the two Penn National Policies that Covil has possessed since, at the absolute latest, June 2019. Accordingly, whether or not Penn National ever issued other commercial general liability policies to Covil could not affect the prosecution of its declaratory judgment action in relation to the two Penn National Policies. Because the Circuit Court did not appropriately support its order with the requisite factual findings, it abused its discretion in ordering that Penn National image and digitize its entire historical microfiche document repository.

The directives of the Sanction Order are nothing more than a court-sanctioned fishing expedition, long been disapproved by this Court. This Court's holding in *Boykin v. Hermitage Cotton Mills*, 180 S.C. 364, 185 S.E. 863 (1936), where the circuit court ordered discovery of eleven years of corporate minutes, applies equally here:

If discovery were allowed to this extent, the petitioner would obtain a great mass

of confidential matter, wholly irrelevant to his cause of action. Private records of the Hermitage Cotton Mills, unrelated to the warehouse company, would be opened before him, with resultant damage to the appellant, and with no advantage to the petitioner in the preparation of his pleadings. We can see no reasonable justification for adopting a course which would inevitably result in a fishing expedition.

Id. at 379-80, 185 S.E. at 869.

This Court's decision in *Royster v. Unity Life Insurance Company*, 193 S.C. 468, 8 S.E.2d 875 (1940) is also controlling, and reflects a conflict between the Circuit Court's order and existing South Carolina law. In *Royster*, the plaintiffs sought discovery of the insurance company's books and records, which the circuit court ordered. This Court noted initially that the discovery order "has all the earmarks of a fishing expedition, an enterprise which this Court has time and again stated it does not favor." *Id.* at 472, 8 S.E.2d at 877. This Court then vacated the discovery order, holding:

The order appealed from requires the insurance company to produce before the Clerk of Court of Williamsburg County its books and records; - there to be examined and inspected by these five plaintiffs.

This Court is of the opinion that the order should be vacated. To subject the insurance company to such a far-reaching order on the record therein would be vexatious in the extreme. Matters of a confidential and private nature would almost certainly be disclosed to plaintiffs.

Id. at 473, 8 S.E.2d at 877.

Here, the Circuit Court has ordered substantially the same relief as was ordered in *Royster*; that Penn National be required to divulge the entirety of its historical document repository and allow its adversaries to have unrestricted access to these records. Like in *Royster*, matters of a private and confidential nature, specifically policy and policy-related documents, including underwriting materials issued to individuals, companies, or organizations who are not in any way involved in this case, would then be disclosed without any consent or knowledge by

these policyholders. The Sanction Order, like that in *Royster*, is “vexatious in the extreme.” Penn National respectfully requests that this Court accept its Petition for Writ of Certiorari to review and vacate the Circuit Court’s Sanction Order.

D. The Sanction Order Affects Penn National’s Substantial Rights As Well As Those Of Its Insureds.

The Sanction Order requires Penn National to incur hundreds of thousands of dollars in vendor costs, and to provide counsel for the Receiver with complete and unfettered access to Penn National’s entire historical repository of documents relating to commercial lines policies. (Appx., 12-15) This mandate directly affects Penn National’s property rights insofar as compliance therewith will divest Penn National of substantial sums of money, which it will never recover. Before Penn National is compelled to expend inordinate sums of money to revamp its entire document preservation system, it should be entitled to have the propriety of Sanction Order scrutinized by an appellate court.

Further, as the Circuit Court itself noted during the April 11, 2022 hearing that gave rise to the Sanction Order, the Receiver is “going to be able to look at each and every policy to understand whether that is a policy that in any way, shape, or form covers Covil’s responsibilities in this litigation...” (Appx., p. 668) The non-Covil related information contained in Penn National’s historical records relates to thousands of individuals and entities that have no factual or legal connection to this matter. More critically, the Receiver has no legal right to possess or acquire the information contained within non-Covil related historical records because that information has no possibility of being both relevant and necessary to the prosecution of Covil’s declaratory judgment action. *Hollman*, 384 S.C. at 578, 683 S.E.2d at 498. Once the Receiver is permitted to access this private information that has no bearing on this matter, the damage has been done and status quo cannot be restored. Accordingly, this Court’s intervention is therefore necessary.

II. THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL

The Court of Appeals improperly dismissed Penn National's appeal as based upon "discovery orders" that "are not immediately appealable." (Appx., 866). The Court of Appeals failed to recognize the punitive directives of the Sanction Order, which impose significant sanctions and monetary penalties upon Penn National. As the Court of Appeals has often stated, the "narrow construction of section 14-3-330(2)(c) requires [it] to focus on the **effect** of the order, **not the label** given to the motion or to the order granting it." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (emphasis added). The effect of the Sanction Order is clearly to punish Penn National for its "intransigence".

Accordingly, if certiorari is not granted, the matter should at a minimum be remanded to the Court of Appeals for a determination of Penn National's appeal on the merits. Simply put, it would be entirely inequitable for the extreme directives and disproportionate relief awarded by the Circuit Court to be shielded from appellate review by mere nomenclature.

CONCLUSION

For the foregoing reasons, Penn National respectfully requests this Court to issue a writ of certiorari to review the Circuit Court's unprecedented May 5, 2022 Sanction Order. The Circuit Court imposed punitive relief simply because it disliked Penn National's methodology of maintaining historic insurance records, a conclusion that lacks any factual or legal justification. This matter therefore raises special and important novel issues of law, and presents the type of exceptional circumstances warranting review by the Supreme Court of South Carolina. Alternatively, Penn National requests that the Court remand this matter to the Court of Appeals for adjudication on the merits of Penn National's appeal.

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Dec 16 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

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

Petitioner.

PROOF OF SERVICE

I certify that a true copy of the Petition of Writ of Certiorari, Appendix Volume I, Appendix Volume II, Appendix Volume III and Appendix Volume IV have been served on the following, this 15th 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 to subsection (d)(1) of the South Carolina Supreme Court's November 15, 2022 Order. Pursuant to subsection (d)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

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