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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 H. Toal, Circuit Court Judge

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 Company,

Petitioner.

SUPPLEMENTAL APPENDIX

Pleadings and Motions

Receiver for Covil Corporation's Proposed Findings of Fact and Conclusions
of Law 1

Defendant Pennsylvania National Mutual Casualty Insurance Co.'s Proposed
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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.

CASE NUMBER: 2020-CP-40-02098

**RECEIVER FOR COVIL
CORPORATION'S PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

**RECEIVER FOR COVIL CORPORATION'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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Peter D. Protopapas, as Receiver for Covil Corporation (“Covil”), by and through the undersigned counsel, hereby respectfully submits the Receiver’s Proposed Findings of Fact and Conclusions of Law,¹ pursuant to Rule 52 of the South Carolina Rules of Civil Procedure, and in support thereof would respectfully intend to show the following:

I. INTRODUCTION

This Court appointed the Receiver to marshal the full extent of Covil’s assets including, without limitation its insurance policies.² For years, however, Penn National Mutual Insurance Company (“Penn National”) has obstructed the Receiver’s efforts. Despite receiving repeated requests for over three years to produce *all insurance policies* protective of Covil, Penn National refused to search its historic records unless it was provided with a specific policy number for each policy sought. Penn National’s intransigence forced this Court to issue a series of escalating orders compelling Penn National’s participation in the discovery process, including this Court’s November 2021 discovery order appointing Covil’s underlying defense counsel, Ellis & Winters, to conduct an independent review of Penn National’s files. But it was not until December 2021 that Penn National admitted that it had been actively and systemically *destroying* historic occurrence-based liability policies and policy-related documents *the entire time* on an *annual* basis. Penn National was destroying these historic policy documents:

(1) without issuing any litigation holds to prevent the automatic purges of Covil’s unlocated policy documents;

(2) without reviewing such historic policy documents for responsiveness to the Covil litigation requests before destruction; and

¹ The Receiver reserves the right to submit a revised/final Proposed Findings of Fact/Conclusions of Law after the evidentiary hearing/trial proceedings have concluded.

² Penn National Trial Ex. 1, Covil’s Complaint at Attachment 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 or failure to act of Covil’s insurance carriers”).

(3) without maintaining records of the historic, occurrence-based liability policies and policy-related documents Penn National had destroyed.³

It is axiomatic under South Carolina law that a party to potential litigation, such as Penn National, has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, or is otherwise disposed of, destroyed, or not preserved, then the court may order a range of measures to address the prejudice. Accordingly, the Receiver respectfully seeks an order from this Court, following an evidentiary hearing in order to make factual findings, that Penn National spoliated evidence and fashioning appropriate remedies to address the harm, as discussed below.

With this declaratory judgment action, the Receiver also seeks to resolve several threshold legal issues relating to the proper interpretation and meaning of the Penn National Policies, including, but not limited to:

- the proper interpretation of the aggregate limit of liability for bodily injury and property damage combined single limit contained on the declarations page of the Penn National Policies when applied to asbestos-related suits filed against Covil (“the Covil Asbestos Suits”);
- the proper interpretation of the “completed operations hazard” definition contained in Penn National’s Policies when applied to the Covil Asbestos Suits;
- which party bears the burden of proving that a bodily injury alleged in Covil Asbestos Suits falls within the “completed operations hazard” and “products hazard” for purposes of applying the aggregate limit of liability;
- whether the bodily injuries alleged in twelve covered Covil Asbestos Suits under the Penn National Policies and in which Penn National contributed to settlement payments – *Ashworth, Campbell, D’Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss* – are subject to and impair Penn National’s Policies’ aggregate limit of liability;

³ Penn National’s discovery misconduct resulted in numerous other discovery orders against Penn National in this case, including discovery orders granting Covil’s motions to compel on January 25, 2021; July 1, 2021; November 5, 2021; May 5, 2022; and November 16, 2022.

- whether each Penn National Policy is required to pay or reimburse “all sums” that Covil, as the insured, becomes legally obligated or reasonably required to pay as damages by reason of Covil Asbestos Suits; and
- whether the 1986-1987 Penn National Policy contains the “Completed Operations Hazard and Products Hazard” Exclusion, GL2104.

The facts relevant to these issues are not complex and may not be genuinely disputed by Penn National. Nonetheless, an actual and justiciable controversy exists between the Receiver for Covil and Penn National concerning Penn National’s obligations to Covil. Judicial declarations are necessary and appropriate at this time so that Covil may ascertain its rights against Penn National.

II. PROPOSED FINDINGS OF FACT

A. Covil Corporation’s Business and the Covil Asbestos Suits

Covil, a South Carolina insulation contractor, had a highly successful business, which included installing and removing insulation, including asbestos insulation, between 1948 and 1991. As more fully explained below, long after the company was administratively dissolved, in November 2018, it failed to respond to two asbestos personal injury suits brought against it, and this Court appointed a receiver for Covil. Since that time, Penn National, one of Covil’s insurers, has contributed to the defense and indemnity of certain Covil Asbestos Suits, but only based on its own understanding of the coverage afforded under those policies.

1. Covil was a Greenville, South Carolina-based insulation contractor between 1948 and 1991.

In 1948, Palmer Covil opened a small insulation contracting business in Greenville, South Carolina.⁴ The company was incorporated in 1954.⁵ Over the next thirty years, Covil grew to become a major regional insulation contractor, applying asbestos-containing insulation in a variety of heavy industrial facilities across South Carolina.⁶ In 1991, Covil was administratively dissolved.⁷

2. Covil was placed into receivership in November 2018.

When Covil failed to respond to two asbestos personal injury claims in South Carolina state court in November 2018, defaults were entered in both cases. *See* Order Granting Default Judgment against Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018); Order Granting Default Judgment against Covil Corporation, *Hill v. Advance Auto Parts*, C.A. No. 2018-CP-4004680 (S.C. Comm. Pl. Nov. 2, 2018). In addition to requesting entry of defaults in both cases, plaintiffs moved to appoint a receiver over Covil Corporation. *See Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018). On November 2, 2018, Peter Protopapas was appointed

⁴ *See* Covil Trial Ex. 79, Deposition of Palmer Covil in *Evelyn White v. Combustion Engineering Company, Inc., et al.*, D.S.C. Nos. 77-1369, 77-1384, Volume 1, at 9: 10-13 (“Q. This says prior to March of Nineteen Sixty-four, I assume that means back to Nineteen Forty-eight when you started? A. I think so.”); *see also* Volume 1 at 86:21-87:4 (“Q. And you worked as an apprentice or a mechanic up until about Nineteen Forty-two? A. No, I didn’t work all the time, I worked for about a couple or three years as an apprentice and then I got out of the insulation business and worked at something else until about Nineteen Thirty-six or Thirty-seven and went back to it at that time and I worked in the business in various capacities until Nineteen Forty-eight when I started my own business.”).

⁵ *See* Covil Trial Ex. 80, Certificate of Incorporation.

⁶ *See* Covil Trial Ex. 81 at COV_005788 (Covil promotional material, noting “Founded in 1947, we have for 32 years furnished the Southeast with insulation products from companies that set industry standards. As contractors our workmanship has proved to be of such high quality that we too, are setting standards throughout the Southeast.”); *id.* at COV_005785 (Resume of Work Performed by Covil Corporation); *id.* at COV_005787 (Resume of Work Performed by Covil Corporation).

⁷ Covil Trial Ex. 101, Certificate of Administrative Dissolution.

the Receiver of Covil Corporation. Order Appointing a Receiver for Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018). The Receiver was tasked with “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.” *Id.* at 1.

3. Covil continues to be sued in asbestos personal injury litigation.

Since the receiver’s appointment, Covil has continued to be sued in the asbestos litigation for claims arising out of Covil’s historic operations and the products that it supplied to industrial sites throughout the southeastern United States (the “Covil Asbestos Suits”).

As Covil’s expert, Sharla Frost, has attested, Covil faces potential verdict risks in the Covil Asbestos Suits based on a number of factors, including the plaintiff’s disease/medical diagnosis, the nature of the alleged asbestos exposures, the plaintiff’s job duties, along with case specific damage factors.⁸ Two of these factors are among the most salient considerations when evaluating verdict risk for the Covil Asbestos Cases: (1) the plaintiff’s disease/medical diagnosis and (2) the types of exposures that a plaintiff had to the defendant’s work operations or product at issue. *Id.*

As to the evaluation of verdict risk based on the plaintiff’s disease/medical diagnosis, Ms. Frost has attested as follows:

[P]laintiffs’ experts in the asbestos litigation have long testified that mesothelioma is a signature disease, meaning that if an individual is diagnosed with mesothelioma, the mesothelioma was almost certainly caused by exposure to asbestos. When a worker inhales a fiber of asbestos, that fiber can become lodged in the lung lining, the mesothelium, or in the interior of the lung. Over time, that asbestos fiber can cause a mutation in the cell; the mutation then replicates as the mutated cells divide; ultimately manifesting as mesothelioma, cancer of the lining of the lung, or as lung cancer, a tumor inside the lung itself. Most jurisdictions hold that a bodily injury occurs at the time that the plaintiff first inhales an asbestos fiber, and the bodily injury continues as cells continue to mutate until the point where the claimant develops a diagnosed case of either mesothelioma or lung cancer. Because

⁸ Covil Trial Ex. 103, Declaration of S. Frost at 3.

of the signature disease relationship between mesothelioma and asbestos, combined with the well-established medical literature regarding the nature of pain and suffering of a claimant diagnosed with mesothelioma, a claimant with a diagnosis of mesothelioma represents a relatively high risk of a verdict for a defendant in cases where a defendant can be tied to a specific asbestos exposure.

While mesothelioma cases present the highest verdict risk, lung cancer cases also present an elevated risk of an adverse verdict for a defendant. Because lung cancer can be attributed to a variety of causes other than asbestos, in contrast to mesothelioma, which is considered a signature disease, defendants may have opportunities to offer alternative causation theories for a particular plaintiff's lung cancer diagnosis. While an alternative causation defense does not guarantee a defense a verdict in a case, it may decrease the risk of an adverse verdict.

Id. at 3-4. Therefore, once a plaintiff's disease process is identified, an individual with experience in the asbestos litigation immediately will become aware of the relative risk the case presents from a disease perspective, as well as potential defenses to begin to employ in the case of a lung cancer diagnosis, as compared with a mesothelioma diagnosis.

As to the evaluation of verdict risk based on plaintiff's exposure to asbestos from Covil's ongoing work operations at a site, completed work operations at a site, or products supplied to a site, Ms. Frost has attested as follows:

Understanding the types of exposures that may arise from a particular defendant's work operations is critical to evaluating the verdict risk that a specific case represents. For an insulation contractor defendant like Covil, the cases that present the highest verdict risk involve direct worker exposures. That is, where Covil employees are present on a particular work site installing, removing, replacing, repairing, or maintaining asbestos containing thermal insulation, and where there is direct exposure to a worker resulting from or incident to that work being performed by the Covil insulation workers because that worker is working at that same site while the Covil operations are still in progress. When a worker is directly involved in the installation, removal, replacement, repair, or maintenance of asbestos containing thermal insulation there is, of course, a significant risk of exposure to asbestos. Likewise a worker whose job function is nearby on the jobsite where such insulation installation, removal, replacement, repair, or maintenance work is taking place, faces a significant risk of a high dose exposure because of the release of asbestos fibers into the air as a result of the insulation work being performed by the insulation contractor's—in this case, Covil's—employees, even if his personal job duties do not require him to manipulate the asbestos containing materials himself. (These workers are typically described in the relevant industrial hygiene and medical literature as "bystanders.") Stated simply, manipulation of asbestos containing thermal insulation is recognized to liberate asbestos into the ambient air. This presents an exposure risk for both the

insulation workers and any other workers who may be in proximity to them. Likewise, removal of old asbestos insulation, known in the trade as “rip out,” presents a particularly high-risk of worker exposure because old insulation deteriorates over time, making it more likely to release respirable particles into the air when it is disturbed. Application of asbestos cement products, used for insulating joints and connections also presents a risk of exposure for mixers, applicators, and bystanders. Those products typically came in dry form in bags requiring them to be mixed with water to create a cement paste. The process of mixing and applying those asbestos containing cement products has been described in the industrial hygiene literature as being very dusty and presenting a high risk of exposure to respirable fibers of asbestos

Id. at 4-5.

B. Penn National’s Insurance Policies and the Covil Asbestos Suits

1. Covil purchased insurance policies from Penn National.

During the company’s existence, Covil purchased a range of different insurance policies and policy renewals from Penn National, including but not limited to multiple years of comprehensive general liability, auto, and inland marine coverages.⁹ For example, Penn National admits in this lawsuit that it issued general liability coverage to Covil through Policy Number 515-50-28-53-7 for the period March 31, 1986 to March 31, 1987 (hereinafter “1986-1987 Policy”) and Policy Number 515-50-28-53-8 for the period March 31, 1987 to March 31, 1988 (hereinafter “1987-1988 Policy”) (collectively, “the Penn National Policies”),¹⁰ and produced what it characterized as “true and accurate” copies of those specific policies.¹¹ Penn National also issued auto coverage to Covil through Policy Number 130 03 87 00-6 for the period March 31, 1985 to March 31, 1986, Policy Number 130 03 87 00-7 for the period March 31, 1986 to March 31, 1987, and Policy Number 130 03 87 00-8 for the period March 31, 1987 to March 31, 1988 (hereinafter the “Auto Policies”).¹² Further, Penn National issued inland marine coverage

⁹ See Covil Trial Exs. 1, 2, 4, and 5.

¹⁰ Penn National Trial Ex. 2, Penn National’s Answer to Complaint, ¶ 8. Penn National failed to produce “true and accurate” copies of any other comprehensive general liability coverage issued to, or otherwise protective of, Covil as a named insured or additional/supplemental insured.

¹¹ Covil Trial Exs. 1-3.

¹² Covil Trial Ex. 5.

to Covil through Policy Number 900 0521 40-6 for the period March 31, 1985 to March 31, 1986, Policy Number 900 0521 40-7 for the period March 31, 1986 to March 31, 1987, and Policy Number 900 0521 40-8 for the period March 31, 1987 to March 31, 1988 (hereinafter the “Inland Marine Policies”).¹³

2. The Penn National Policies contain clear and unambiguous policy language.

In the “Insuring Agreement” of the comprehensive general liability insurance coverage part of the Penn National Policies, Penn National promises:

The company will pay on behalf of the **insured** all sums which the insured shall become legally obligated to pay as damages because of:

Coverage A. **bodily injury**, or

Coverage B. **property damage**.

[to] which this insurance applies, caused by an **occurrence**, and the company shall [have] the right and duty to defend any suit against the **insured** seeking damages on [account] of such **bodily injury** or **property damage**, even if any of the allegations of [the] suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company’s liability has been exhausted by payment of judgments or settlements.¹⁴

The “Limits of Liability” section of the Penn National Policies addresses “Coverage A,” which applies to bodily injury, as follows:

Coverage A—The total liability of the company for all damages, including damages for care and loss of services, because of **bodily injury** sustained by one or more persons as the result of any one occurrence shall not exceed the limit of **bodily injury** liability stated in the declarations as applicable to “each occurrence.”

Subject to the above provision respecting “each occurrence,” the total liability of the company for all damages because of (1) all **bodily injury** included within the **completed operations hazard** and (2) all **bodily injury** included within the

¹³ Covil Trial Ex. 4.

¹⁴ Covil Trial Ex. 1, 1986-1987 Policy at Penn National Policies at 000002; Covil Trial Ex. 2, 1987-1988 Policy at Penn National Policies at 000045.

product hazard shall not exceed the limit of **bodily injury** liability stated in the declarations as “aggregate.”¹⁵

The “Limits of Liability” further provide:

Coverages A and B—For the purpose of determining the limit of the [company’s] liability all **bodily injury** and **property damage** arising out of continuous or [repeated] exposure to substantially the same general conditions shall be considered as arising out of one **occurrence**.¹⁶

The applicable “Definitions” section of the Penn National Policies contains the following definitions:

- “**bodily injury**” means bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;¹⁷
- “**completed operations hazard**” includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. ‘Operations’ include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:
 - (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
 - (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
 - (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.¹⁸

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed;¹⁹
- “**occurrence**” means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured; and

¹⁵ Covil Trial Ex. 1, 1986-1987 Policy at Penn National Policies 000004; Covil Trial Ex. 2, 1987-1988 Policy at Penn National Policies at 000047.

¹⁶ *Id.*

¹⁷ Covil Trial Ex. 1, 1986 to 1987 Policy at Penn National Policies at 000036; Covil Trial Ex. 2, 1987 to 1988 Policy at Penn National Policies at 000081.

¹⁸ *Id.*

¹⁹ *Id.*

- “**products hazard**” includes bodily injury . . . arising out of the named insured’s products . . . but only if the bodily injury . . . occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.²⁰

There is no definition of the term “aggregate” in the “Definitions” section of the Penn National Policies.²¹

3. Penn National contributed to settlements to resolve covered Covil Asbestos Suits.

Penn National has paid more than \$600,000.00 to participate in the settlement of fourteen covered asbestos bodily injury claims against Covil under the Penn National Policies.²²

Considering the underlying defense file with regard to each of the fourteen Covil Asbestos Suits in which Penn National participated in settlement, Covil’s expert witness, Sharla Frost, evaluated each suit to explain the potential verdict risk the cases presented from the perspective of the disease/medical diagnosis with which the plaintiff presented, the job/job duties of each particular plaintiff, the work site(s) where each particular plaintiff performed work during his working life, the time period(s) the plaintiff worked at each such work site, and the overlap in terms of those time periods with periods of time when Covil insulation employees performed work operations at the same work site.²³

As detailed in Ms. Frost’s Declaration, twelve of the fourteen asbestos suit settlements for which Penn National participated under its insurance policies - *Ashworth, Campbell, D’Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss* – alleged that Covil performed contracting work at the plaintiff’s worksites at the same time that the plaintiff was working at those same jobsites, and Covil’s contracting work allegedly caused the

²⁰ *Id.*

²¹ *Id.*

²² See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas dated September 1, 2022.

²³ See Covil Trial Ex. 103, S. Frost Declaration at 3-22.

plaintiff to be exposed to asbestos. *Id.* As Ms. Frost explained, these cases each present a high verdict risk, and therefore are appropriate for resolution before trial, because the “worker is working at the same site while the Covil work activities are still in progress. When a worker is directly involved in the installation, removal, replacement, repair, or maintenance of asbestos containing thermal insulation there is, of course, a significant risk of exposure to asbestos. Likewise a worker whose job function is nearby on the jobsite where such insulation installation, removal, replacement, repair, or maintenance work is taking place, faces a significant risk of a high dose exposure because of the release of asbestos fibers into the air as a result of the insulation work being performed by the insulation contractor’s—in this case, Covil’s—employees, even if his personal job duties do not require the manipulation of the asbestos containing materials himself.”²⁴

C. Penn National Failed to Maintain Covil’s Historic Insurance Policies and Policy-Related Documents.

1. Penn National’s duty to preserve its historic insurance policies was independently triggered in 2018, 2019 and again in 2020.

Penn National was on notice in May 2018 that it should preserve its historic Covil insurance policies from automatic destruction or deletion when asbestos claimants in the *Finch* matter served Penn National with a subpoena requesting “all liability insurance policies and endorsements issued to Covil between 1969 and 1995[.]”²⁵ At that time, Covil faced significant potential liability in the asbestos personal injury case, *Ann Finch*, which ultimately resulted in a \$32 million verdict against Covil.²⁶ Although Penn National was not involved in the defense of the *Ann Finch* case, the underlying asbestos personal injury plaintiff counsel, Dean Omar, served the subpoena on Penn National. Penn National responded to the subpoena on June 15, 2018, but

²⁴ *Id.* at 4.

²⁵ Covil Trial Ex. 12, Finch Subpoena to Penn National, at p. 5.

²⁶ *Id.*

only searched for Covil policies by the exact policy numbers provided to it by the asbestos claimant's counsel.²⁷

Then, in October 2019, Penn National was named as a defendant in the Covil coverage litigation in the Middle District of North Carolina.²⁸ This put Penn National on notice that specific and identifiable litigation was filed against the company and that all evidence of Penn National's historic insurance policies covering Covil as a named insured or additional/supplemental insured would be relevant. Specifically, the Receiver immediately served discovery on Penn National, demanding that it identify "all insurance policies [Penn National] issued to Covil or which otherwise include Covil as an insured."²⁹ Penn National understood the Receiver's request to include policies covering Covil as a named insured or additional insured, claiming in response that it "*does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured.*"³⁰ Therefore, no later than October 2019, Penn National was on notice in that the Receiver sought both named insured as well as additional insured coverage for Covil in ongoing litigation.

At the same time, the Receiver requested that Penn National "describe [its] document retention policies, oral or written, that relate to insurance policies, underwriting information

²⁷ Covil Trial Ex. 13, Penn National Subpoena Response, dated June 15, 2018.

²⁸ On October 2, 2019, another of Covil's historical insurers, Hartford, named Penn National as a third-party defendant in the first Covil insurance coverage action, filed in the Middle District of North Carolina. *See Zurich Am. Ins. Co. v. Covil Corp.*, M.D.N.C. No. 1:18-cv-932, ECF 104 (Oct. 2, 2019). On November 20, 2019, Covil amended its Answer to include a third-party action against Penn National. *See id.*, ECF 131 at ¶¶ 118, 169, 174-176. Penn National moved to dismiss Covil's third-party complaint, but the motion was denied on February 24, 2020. *See id.*, ECF 227. Ultimately, Judge Eagles determined to narrow the scope of the Middle District of North Carolina action only to the insurance coverage implicated in the *Finch* case, and Penn National was dismissed, without prejudice, as a third-party defendant in that action for that reason. *See id.* at ECF 297.

²⁹ Covil Trial Ex. 42, Dec. 18, 2019 Penn National Discovery Responses at Interrogatory No. 1.

³⁰ *Id.*

related to such policies, and/or form language used in such policies issued by [Penn National] during the 1950-1986 time period.”³¹ Penn National did not produce or describe those policies, nor did it assert that they were confidential or proprietary.³²

In February 2020, the Receiver filed suit against Penn National in this Court.³³ The Receiver again served Penn National with discovery requesting any policy issued by Penn National that included Covil as an insured.³⁴ The Receiver also requested Penn National’s document retention policies from 1950 through 2018.³⁵ Penn National repeated its responses from the North Carolina case.³⁶

In April 2020, the Receiver filed this case against Penn National. In his Complaint, the Receiver made clear that he was seeking “an order requiring that Penn National . . . 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[.]”³⁷ Subsequent discovery revealed that that Penn National had not conducted a fulsome search of its records for policies covering Covil as either a named insured or an additional insured. The Receiver continued to serve requests for coverage, and Penn National continued to stonewall.³⁸

³¹ *Id.* at Interrogatory No. 9.

³² *Id.*

³³ Covil Corp. v. Pa. Nat’l Mut. Cas. Ins. Co., C.A. No. 2020-CP-40-01226 (Com. Pl. filed Feb. 28, 2020).

³⁴ Covil Trial Ex. 52, (May 15, 2020 Penn National Discovery Responses) at RFP No. 2.

³⁵ *Id.* at RFP No. 11.

³⁶ *See id.*

³⁷ Penn National Trial Ex. 1, Covil Complaint at p. 11(¶ B.).

³⁸ Ex. 57, May 10, 2021 Penn National Responses to Receiver’s Interrogatories at Interrogatory No. 1.

2. Penn National destroyed historic occurrence-based general liability insurance policies and policy-related documents as part of its annual document purges in 2018, 2019, and 2020 without issuing a litigation hold related to the Covil litigation.

On a November 19, 2021 call with the Receiver's counsel and Ellis & Winters, Penn National disclosed for the first time that it conducts an annual purge of archived general liability insurance policies as they age out of its retention period without any litigation hold in place related to the Covil litigation. This disclosure was confirmed a month later in Penn National's written discovery responses.³⁹ Based on Penn National's admission, it is clear that Penn National conducted annual document purges at the end of 2018, 2019, and 2020 (or the very beginning of 2019, 2020, and 2021)—all of which were performed *after* it was on notice of the need to preserve documents that potentially identify insurance coverage for Covil.⁴⁰

Specifically, Penn National has admitted that it (1) destroyed liability policies and policy-related documents in 2018, 2019, and 2020, (2) did not issue a litigation hold related to any litigation involving Covil until December 2021, (3) did not search the liability policies and policy-related documents that were destroyed between 2018 and 2020 for references to Covil

³⁹ Covil Trial Ex. 64, Dec. 20, 2021 Penn National Responses to Receiver's Second Requests for Production at RFP No. 1 ("Penn National has not issued any formal litigation hold notice at this time. . . . Pursuant to [Penn National's] retention policy, certain policy-related documents may be identified for purging throughout the course of the year. However, such a purge does not take place until the conclusion of the year/start of the following year. Because the discovery dispute at issue in this action relating to the assertion that Covil may have been listed as an 'additional insured' on the policies of other Penn National insureds – which dispute began in January 2021 – no policy-related documents have been destroyed or purged since the onset of the discovery dispute in this matter."). Penn National finally issued a litigation hold on December 17, 2021. See Covil Trial Ex. 10, Dec. 17, 2021 email litigation hold from S. Maier to B. Reifsnyder.

⁴⁰ See Covil Trial Ex. 84, B. Reifsnyder Dep. Transcript, dated Nov. 11, 2022 at 41-42 ("Q. Do you recall when policies were purged in 2018? A. We purge policies – we – we pull them. Everything is then purged the beginning of the new year. Q. So if a purge was taking place in 2018, it would have been January or February 2018? A. If we were doing a purge in 2018, then everything that was pulled to be destroyed – to be purged in 2018 would have been purged early, meaning January, 2019."); see also *id.* at 53 ("Q. So the documents identified to be purged in 2019, did you review any of those policies to determine whether Covil was identified as an insured on any of those policies before you destroyed them in 2020? A. From looking through them individually is the nature of the question? Q. Yes. A. The answer is no.")

before purging them, and (4) can no longer identify each and every named insured, additional insured or supplemental insured listed in the now destroyed policy-related documents, as follows:

- Penn National admitted that it identified policy-related documents by policy number that were beyond the scope of its retention timeframe for possible disposal in 2018, 2019, and 2020.⁴¹
- Penn National admitted that it disposed of policy-related documents pursuant to its standard record purge policy and practice in 2018, 2019, and 2020.⁴²
- Penn National admitted that it disposed of liability insurance policies in 2018, 2019, and 2020.⁴³
- Penn National admitted that it did not issue a litigation hold for any Covil litigation until December 2021.⁴⁴
- Penn National admitted that it did not review the policy-related documents for references to Covil before it disposed of the purged documents pursuant to its standard record purge policy and practice in 2018, 2019, and 2020.⁴⁵
- Penn National admitted that it did not review the liability insurance policies for any reference to Covil before it disposed of them in 2018, 2019, and 2020.⁴⁶
- Penn National admitted that it cannot identify each and every named insured, additional insured or supplemental insured listed in the paper and microfiche-policy-related documents it destroyed, purged, or otherwise disposed of since 2018.⁴⁷

3. Penn National can no longer locate all of its historic liability insurance policies and policy-related documents protective of Covil.

Penn National has asserted that it is unable to locate any additional policies or policy-related documents indicating coverage protective of Covil, but Penn National has not produced “complete and authentic copies” of each of the Covil policies and policy renewals issued to Covil, including general liability policies that pre-date the 1986-1987 Policy.⁴⁸

⁴¹ Covil Trial Ex. 68, Penn National’s Feb. 17, 2022 Resp. to RFA at 2.

⁴² *See id.* at 3, 5, 7.

⁴³ *See id.* at 4, 6, 8.

⁴⁴ *See id.* at 21.

⁴⁵ *See id.* at 11, 13, 15.

⁴⁶ *See id.* at 12, 14, 16.

⁴⁷ *See id.* at 23.

⁴⁸ Covil Trial Exs. 1, 4, and 5.

Likewise, the policies and policy-related documents that Penn National has produced in this case also demonstrate that Penn National policies include endorsements in which other companies or individuals are covered that are not identified on the declarations page of the policy. The 1986-1987 policy, for example, identifies the following entities and individuals as “Special Named Insureds”: Covil Corporation, Inc., Covil Residential Insulation, Inc., Covil Construction Co, Inc., C&J Realty Co., Inc., Industrial and Associated, Inc., John Hamrick Link, James P. Covil, Yvonne Wells, and Charles McWhorter.⁴⁹ The 1987-1988 policy includes a similar list on the “Special Named Insured” Endorsement.⁵⁰ Given the list of insureds identified in these endorsements, it follows that Covil may have been identified as an insured on other Penn National policies that Penn National may have been able to locate had it not destroyed historical policies.

As Penn National admitted in its first set of discovery responses on December 18, 2019, and consistently stated in discovery thereafter, it now has no reliable way to search its own records for this information: “Penn National does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured. Thus, Penn National has no reasonable method of identifying all documents that may be responsive to this interrogatory.”⁵¹

4. Insurers, such as Penn National, have known about the need to preserve legacy occurrence-based general liability policies since at least 1986.

The insurance industry as a whole has been on notice regarding the need to preserve legacy occurrence-based insurance policies because of the claims arising out of the asbestos personal injury litigation since at least 1986. As Sharla Frost explains, “The Manville Corporation filed for bankruptcy in 1982 and came out of . . . bankruptcy in 1986, starting the

⁴⁹ Covil Trial Ex. 1, p. 11.

⁵⁰ Covil Trial Ex. 2, p. 10.

⁵¹ Covil Trial Ex. 50, Penn National Answer to Interrogatory No. 1.

Manville Trust operations in 1988. Part of the controversy with the Manville bankruptcy initially had to do with the handling of the insurance proceeds that were contributed to the bankruptcy estate for use by the Manville Trust. That was done very early in the litigation. And from that point onward it was very obvious that one was going to have a long-tail litigation and there were going to be implications for the insurance proceeds.”⁵²

The U.S. Supreme Court, recounting the history of the Johns Manville Trust creation in *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 141 (2009), similarly explained, “In a settlement described as the ‘cornerstone’ of the Manville reorganization, the insurers agreed to provide most of the initial corpus of the Trust, with a payment of \$770 million to the bankruptcy estate, \$80 million of it from Travelers.” *Citing MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d. Cir. 1988); Bkrtcy. Ct. Op. 134(a); *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bkrtcy. S.D.N.Y. 1986). Not only was this information reported in the legal cases, but also newspapers published stories regarding the Manville Trust plan at the time it was negotiated.⁵³

Penn National has no excuse for failing to suspend its systemic document destruction or purge policy and failing to preserve all Covil documents with a litigation hold during the pendency of the litigation relating to Covil.

D. Penn National repeatedly failed to meet its basic discovery obligations.

Penn National’s delayed revelation of its policy document purge is directly related to its failure to meet its basic obligations to fully respond to written discovery and to produce witnesses prepared to testify as to key issues in this case. Penn National’s stonewalling activity led Covil to file six motions to compel against Penn National between January 15, 2021 and April 11, 2022,

⁵² Covil Trial Ex. 96, Dep. of Sharla Frost at 12:15-13:5.

⁵³ *See, e.g.* Covil Trial Ex. 102, Tamar Lewin, A New Set of Hurdles for Manville, N.Y. TIMES (Feb. 17, 1986) <https://timesmachine.nytimes.com/timesmachine/1986/02/17/591186.html> (“Under the plan, Manville would establish a trust to pay present and future claimants. The trust would be funded with \$615 million of insurance money, \$200 million in cash, notes and receivables, and up to 80 percent of Manville’s stock.”).

and this Court to enter six separate orders over the course of two years to extract basic information from the insurance company related to its issuance of insurance coverage to Covil, and its maintenance of historical policy documents. Despite Covil's efforts, and this Court's demands, Penn National still has yet to fully comply with its discovery obligations in this case.

1. Penn National refused to conduct an adequate and fulsome search of its records for Covil policy documents when required to do so.

Penn National's prolonged discovery intransigence focused on the premise that it could not access any possible historic occurrence-based liability coverage from its archives for Covil or for any other policyholder unless provided with a policy number.⁵⁴ As more fully detailed below, this was despite that Penn National itself, Covil, and later Covil's asbestos personal injury defense lawyers, Ellis & Winters, acknowledged that it was possible to engage a vendor to scan the historical policy documents in Penn National's remaining collection of paper and microfiche records to create a more searchable set of information. A solution clearly existed, but Penn National consciously elected to waste this Court's and the Receiver's resources in prolonged discovery fights.

This Court best summarized Penn National's misconduct in an order on May 5, 2022, as follows:

This Court has now lost all confidence in Penn National's willingness and ability to independently participate in discovery. The Court finds that Penn National's conduct with respect to its searches for historic Covil insurance 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, process 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 a policy number. That position turns out not to be so. This Court is left with no choice but to allow the Receiver to examine the records.⁵⁵

⁵⁴ Covil Trial Ex. 71, May 5, 2022 Order, p. 4.

⁵⁵ *Id.*, p. 4.

The stonewalling position extended beyond policy documents, to nearly every aspect of the litigation. Following the Court's May 5 discovery order, Penn National refused to produce its claim files related to fourteen asbestos claims until Covil filed a motion to compel; and refused to produce documents responsive to the Receiver's Fourth Request for Production. The Court granted Covil's motion to compel on November 16, 2022.

2. Penn National's additional discovery misconduct.

- a.** Penn National produced a witness who had no information regarding policy searches Penn National performed.

More than a year after first filing a case against Penn National, on January 7, 2021, Covil had its first opportunity to depose a Penn National corporate representative, Penn National's claims adjuster, Boyd Wright. In his deposition, Mr. Wright testified that he merely spent a few "minutes" in preparation for the deposition asking the Penn National clerical staff what they had done to perform a search for Covil policies – he could not specify the searches Penn National performed.⁵⁶ Mr. Wright was aware that the clerical personnel searched an electronic system, which he could only identify as "version 6 or version 7," and which he does not personally use because "it requires coding that [he] can't ever get straight."⁵⁷ He also confirmed that the clerical employees did not search for – and Penn National does not maintain – an index of insurance policies that include information identifying "additional insureds" covered by Penn National policies.⁵⁸ Finally, Mr. Wright confirmed that he was "not aware that a search . . . through the entire company records occurred."⁵⁹

In a hearing on January 25, 2021, related to the policy search deficiencies Mr. Wright's deposition uncovered, this Court ordered Covil to "develop a more complete list of job sites and

⁵⁶ See Covil Trial Ex. 76, B. Wright 1-7-21 Dep. at 9:5-12, 43:14-44:18.

⁵⁷ *Id.* at 39:7-16, 21-25.

⁵⁸ *Id.* at 45:14-25.

⁵⁹ *Id.* at 67:4-6.

possible agents that might have been involved in procuring this coverage from Penn National,” and “[gave] Penn National 15 days to respond to it.”⁶⁰ The Court warned Penn National against asking Covil “for something that’s just as ridiculous as what you say they asked for from you. They are not going to know policyholder’s numbers or policyholders.”⁶¹

b. Next, Penn National failed to comply with a subpoena, despite explicit instructions from the Court.

Fifteen days after the hearing, on February 8, 2021, Covil re-issued its subpoena to Penn National, this time listing relevant contractors and job sites as the Court requested.⁶² Despite this Court’s warning, Penn National’s first reaction to the subpoena included “a policy number for any policy that may relate to Covil or the Contractors listed.”⁶³ Ultimately, Penn National responded to the subpoena request, objecting on many grounds over the course of two pages, including that the subpoena did not provide “any policy number.”⁶⁴ Following its objections, Penn National asserted that it spent an “immense amount of time” conducting a search and exercised reasonable diligence in searching its files.”⁶⁵ However, the actual substance of the subpoena response was limited to a single two-page e-mail chain in which several policies issued to contractors from Covil’s list were identified, but Penn National determined were “not relevant to this action because such policies do not provide coverage to Covil Corporation.”⁶⁶

Given Penn National’s incomplete responses and improper objections to the Receiver’s subpoena, Covil filed a supplemental motion to compel on April 22, 2021, which this court heard on June 25, 2021. Just two weeks before the hearing, Penn National produced three policies

⁶⁰ Covil Trial Ex. 100, Hearing Transcript at 141.

⁶¹ *Id.* at 143.

⁶² Covil Trial Ex. 53, Letter and Subpoena to Penn National dated Feb. 8, 2021.

⁶³ Covil Trial Ex. 54, Letter from D. Harris to M. Shisko dated Feb. 12, 2021.

⁶⁴ Covil Trial Ex. 55, Penn National’s Subpoena Response, dated Feb. 22, 2021.

⁶⁵ *Id.*, p. 5.

⁶⁶ *Id.*, p. 7.

protective of Covil in its discovery responses in another case.⁶⁷ In its July 1 order following the hearing, the Court found:

The Court is unconvinced that Penn National has used the information provided by the Receiver to fully search its records, particularly given the fact that Penn National claimed in its March 9, 2021 subpoena responses to have ‘performed the necessary due diligence’ and ‘exercised reasonable diligence in searching its files,’ yet Penn National did not identify or produce the newly produced policies until June 11, 2021, in its supplemental discovery responses in a separate case. The Receiver’s efforts to locate Penn National policies providing coverage to Covil has been a matter of protracted litigation for quite some time, and the Court is troubled that Penn National asserted it conducted a reasonable, thorough search in response to the Receiver’s subpoena in this matter but, three months later, uncovered and produced additional policies protective of Covil.

Moreover, although Penn National asserts it has ‘exercised reasonable diligence in searching its files,’ Penn National’s response to the Receiver’s subpoena did not provide a sufficiently detailed description of its search efforts and the Receiver is not simply required to take Penn National at its word. . . This Court finds that Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver, and the Court is not satisfied that Penn National has fully complied with its instructions at the January 25 hearing. Additionally, the Court is not satisfied that Penn National is only able to search its paper records by policy number. In any event, without more detailed information from Penn National, the Receiver and this Court are unable to evaluate Penn National’s efforts to search for coverage.⁶⁸

The Court therefore ordered Penn National to “provide the Receiver with a detailed description of how Penn National maintains its paper records” by July 9, 2021, and to thoroughly search its paper records by July 23, 2021.⁶⁹

⁶⁷ Covil Trial Ex. 62, Order granting Covil’s motions to compel, dated July 1, 2021 (*Finch and Covil v. USF&G*, Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003), p. 4.

⁶⁸ *Id.*, pp. 5-6.

⁶⁹ *Id.*, p. 6.

c. Penn National ignored another set of explicit instructions from this Court to perform a physical search of paper documents.

Penn National relied on its Director of Administrative Services, Brent Reifsnyder, to provide the court-ordered detailed description of how it maintains its paper records.⁷⁰ In his July 9 affidavit, Mr. Reifsnyder explained that non-electronic archives were stored on microfilm and in paper form.⁷¹ The affidavit outlined the storage and search procedures for both archive forms. Importantly, Reifsnyder attested, “Policy documents that are stored on microfilm or paper are only searchable by policy number given that Penn National has historically organized such documents by using the terminal digit system” that marks each file with the last two digits of a policy number.⁷²

In a second affidavit dated July 23 – the date by which Penn National was to thoroughly search its paper records – Reifsnyder did not attest to having performed a thorough search.⁷³ Instead, he stated he “considered other alternative means of searching Penn National’s non-electronically-stored paper documents[.]”⁷⁴ He asserted, “the only alternative means of searching such [non-electronic] documents is by way of a manual search of each of the policy documents contained on microfilm at Penn National and in paper form This would entail a manual search of all non-electronically stored paper policy documents for policies that Penn National may have issued to any of the 240 contractors and 650 facilities listed by the Receiver that may or may not identify Covil Corporation as an additional insured.”⁷⁵

When deposed with regard to the content of his affidavits, Reifsnyder admitted the following:

⁷⁰ See Covil Trial Ex. 73., Aff. of B. Reifsnyder, dated July 9, 2021.

⁷¹ *Id.*, ¶ 6.

⁷² *Id.*, ¶¶ 8, 16.

⁷³ See Covil Trial Ex. 74, Aff. of B. Reifsnyder, dated July 23, 2021

⁷⁴ *Id.*, ¶ 6.

⁷⁵ *Id.*, ¶ 7.

- he spent *less than five minutes* trying to locate documents responsive to the Court's Order.⁷⁶
- he did not take any steps to search for policy-related documents based on the contractor or job site lists provided by Covil.⁷⁷
- he did not consult with anyone at Penn National or outside Penn National about how he might be able to search for documents other than by policy number.⁷⁸
- until preparing for his deposition, he had never reviewed the list of job sites the Receiver provided to Penn National to facilitate Penn National's searches.⁷⁹
- Penn National itself designed the system of organizing its records by policy number.⁸⁰
- he only considered one alternative means of searching: "[S]omebody would need to coordinate having somebody physically pull up and look through every conceivable record from microfilm and paper storage."⁸¹
- he never consulted with anyone how a manual search could be conducted, never determined how long such a search would take, never determined how many individuals it would take to conduct such a search, never discussed procuring additional staff or resources for a search, and never determined how much the search would cost, whether conducted internally or by an outside vendor.⁸²

Shortly thereafter, Covil deposed Penn National's 30(b)(6) deponent, Boyd Wright, who was in charge of Penn National's electronic document search. Like Mr. Reifsnyder's complete refusal to search Penn National's paper files, Mr. Wright doubled down on Penn National's assertion that "[y]ou'd have to have a policy number" to search electronically for an "additional insured," such as Covil, as well.⁸³ Without a policy number, Mr. Wright admitted, Penn National

⁷⁶ Covil Trial Ex. 77, August 3, 2021 B. Reifsnyder Dep. at 65:3–11.

⁷⁷ *Id.* at 49:20–50:1.

⁷⁸ *Id.* at 50:2–9.

⁷⁹ *Id.* at 47:10–24.

⁸⁰ *Id.* at 43:11–16.

⁸¹ *Id.* at 50:20–51:3.

⁸² *Id.* at 52:7–24, 55:23–56:5, 57:2–12, 59:8–13, 59:14–60:10, 62:17–63:3.

⁸³ Covil Trial Ex. 78, August 26, 2021 B. Wright Dep. at 23:22–24.

would “have to look in the policy documents to see if there was any supplemental insureds.”⁸⁴ But Mr. Wright testified that he did not even speak with Mr. Reifsnyder about the process or logistics for manually searching the paper archives for documents responsive to the Subpoena, let alone begin that task.⁸⁵

d. This Court ordered Penn National to permit Ellis & Winters to search Penn National’s policy documents – leading to the revelation of more discovery malfeasance.

Given this background, on November 5, 2021, the Court entered an order requiring Penn National “to open its repository of insurance policies and to facilitate a review supervised and performed by Covil’s insurer-appointed defense counsel, Ellis & Winters, LLP.”⁸⁶ The Order required interim reports, with the first to be made on December 7, 2021.⁸⁷

In so ordering, the Court reasoned: “This Court has ordered Penn National to meaningfully participate in discovery on multiple occasions. Penn National claims that it cannot search its documents unless Covil provides the policy numbers where Covil was designated as an additional insured. Despite this Court’s orders, Penn National has yet to perform a manual search or to scan the documents so that they can be searched electronically.”⁸⁸

3. Following the November 2021 Order, Penn National revealed its history of document destruction without a litigation hold in place.

No longer protected by its position that it would not perform a manual search of its policy records on its own, after the November 5, 2021 Order, it was quickly revealed that (a) Penn National purposefully downgraded its ability to perform policy searches in 2010, despite knowing the potential for claims from insulation contractor insureds with long-tail liability in the

⁸⁴ *Id.* at 23:22-24:1.

⁸⁵ *Id.* at 36:6-11.

⁸⁶ Covil Trial Ex. 63, November 5, 2021 Order, p. 1.

⁸⁷ *Id.*, p. 2.

⁸⁸ *Id.*, p. 1.

asbestos litigation; (b) Penn National routinely purged its policy documents, including microfiche; and (c) there was no litigation hold for Covil until December 2021.

a. In 2010, Penn National downgraded its ability to search for insurance policies by policyholder name.

Penn National's corporate representative testified in a 1991 deposition that it was possible to search their policy index by policyholder name.⁸⁹ Now, Brent Reifsnyder testified that the only way to search for historic policies is by policyholder *number* using the system he created in 2010.⁹⁰ In fact, Mr. Reifsnyder admitted that Penn National designed the 2010 electronic system of organizing its records by policy number only.⁹¹ Specifically, Mr. Reifsnyder himself designed the computer system, 2k10, in 2010 to provide only three pieces of information about Penn National's policies: (1) the policy number, (2) the date of policy cancellation or nonrenewal, and (3) the date the policy should be destroyed under Penn National's 25-year document retention policy for insurance policies.⁹²

The 2k10 System was designed with a specific purpose in mind: to determine what documents record clerks could destroy under the Penn National document retention policy. As Mr. Reifsnyder testified, the Penn National document retention policy specifies that policy documents can be destroyed 25 years after the date of the policy cancellation or nonrenewal.⁹³ The policy does not, however, provide details for how the document destruction process should

⁸⁹ See Covil Trial Ex. 83, E. Rice Dep. at 16:16-22 ("In order to find if there were policies issued to General Gasket, we went back and went through our indexing system by name as well as by the policy number that was – or the alleged policy number that was provided on the documents that you furnished."); see also Covil Trial Ex. 99, November 30 2022 B. Wright Dep. at 57:4-58:8 (confirming that he had seen the deposition previously, and "Q. But you have no reason to believe that this was not his 30(b)(6) deposition testimony on behalf of Penn National; correct? A. The document is what it is, and I accept it at face value.").

⁹⁰ See Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 112: 10-17.

⁹¹ Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 43:11-16.

⁹² See *id.* at 64: 1-24.

⁹³ *Id.* at 127:17-21; Covil Trial Ex. 8, Penn National Document Retention Policy.

take place.⁹⁴ As a result, Mr. Reifsnyder was left with preparing his own system, and he did: the 2k10 System.⁹⁵

Mr. Reifsnyder explained that in 2010, Penn National hired clerks to perform the task of inputting policy numbers into the computer system, and the company paid the clerks so little that they did not want the low-paid employees to do a complex analysis that a policyholder name entry would require.⁹⁶ Mr. Reifsnyder described the policyholder name as “extraneous information.”⁹⁷ Penn National produced a spreadsheet of the output of the 2k10 System in this case, which shows that the oldest policy subject to the destruction program as of the time the spreadsheet was printed was a 1982 policy.⁹⁸

b. Penn National purges policy documents on an annual basis, with no quality control mechanism in place.

Since the 2k10 System has been in place, on an annual basis, Mr. Reifsnyder prints out a list of all Penn National policies subject to destruction within the calendar year, which he places outside his office door.⁹⁹ His team of five document clerks locates all copies of the policy documents, in both paper and microfiche form, writing “done” next to each policy number on the

⁹⁴ Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep at 68: 5-12 (“Q. The process that you have described here today for identifying policies in a calendar year and destroying them in January of the next year, is that policy written anywhere? A. Not that I’m aware of. Our – our records retention policy offers that once they hit that destruction date, then they’re eligible to be purged.”).

⁹⁵ *Id.* at 59:17 – 60:22.

⁹⁶ *Id.* at 92:24-93:25 (“Q. When you were going through this 2k10 database exercise and pulling the policyholder number, at that period, you could have pulled the policyholder name as well, correct? A. We could have, however – however, the people doing that job would have no idea to know whether that was the policyholder name without looking at each form. They were not underwriting people. They were clerks. No experience in underwriting, no experience in dealing with policies. They were just basic clerks. . . . It was a manual [] task. We assigned the appropriate level staff from a dollar perspective to that task.”).

⁹⁷ *Id.* at 91:25-92:23.

⁹⁸ Covil Trial Ex. 11, Microfiche Destruction Spreadsheet; *see also* Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 62.

⁹⁹ Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 103.

printed list as the policies are collected.¹⁰⁰ No copies of those lists were maintained.¹⁰¹ In January of the calendar year after the documents are collected, the full set of policies to be destroyed, both in paper form and in microfiche form, are collected and sent to Iron Mountain for destruction.¹⁰²

Penn National is unable to recreate or understand who the policyholders were for the policies that were destroyed in previous years.¹⁰³ As Mr. Reifsnyder explained when asked about the policies that were destroyed in 2019, for instance, “So everything is only by policy number. Everything that was in – pulled was by policy number. I would have no idea out of all the records who was Covil, who was not.”¹⁰⁴

Mr. Reifsnyder testified that the document destruction process is not without errors. He explained that one of the most problematic pieces of the destruction process is that sometimes the microfiche stick together, which means that a document clerk may pull more sheets of microfilm than should be destroyed.¹⁰⁵ No one performs an independent quality control or spot

¹⁰⁰ 104:2-17 (“Q. Would they return that part of the list to you to QC or verify that they have done that section of the list? A. They would write done on it. That way we knew that that section . . . Done, D-O-N-E, on the sheet. As they worked through the sheet, they would check off each file so that they weren’t looking for something that they had already found. At the end of doing the list, they would just – we would know when they – the whole series was done because everything was marked off.”).

¹⁰¹ *Id.* at 104:19-105:2 (“Q. And this was all done by hand? A. Yes, sir. Q. Do you have a copy of that list from 2018? A. No. Do you have the list from 2019? A. No. Do you have that list from 2020? A. Not that I’m aware of.”).

¹⁰² *Id.* at 46-47; *see also id.* at 53 (“what was purged for 2019 would have been pulled 2018, 2019 in preparation for their eventual purge early the following year”).

¹⁰³ *Id.* at 44.

¹⁰⁴ *Id.*; *see also id.* at 67:4-22 (“I understand what you’re saying. There’s nothing that’s additional to say we destroyed them.”).

¹⁰⁵ *Id.* at 78:6-9.

checking of the documents to be destroyed.¹⁰⁶ Further, there is no list of destroyed policies for anyone to review over the course of the project of pulling the policies.¹⁰⁷

c. Penn National did not put a litigation hold notice in place until December 2021 – more than three years after it became aware of the need to search for Covil insurance policies.

On November 19, 2021, the parties held a telephone conference to discuss Penn National's policy search efforts.¹⁰⁸ During that call, Penn National's records custodian, Brent Reifsnyder, admitted when questioned that Penn National regularly destroyed or otherwise purged historic policy-related documents—and continued to do so after the Court's November 5, 2021 Order. This routine purge included destroying files in its repository of microfiche and paper policy documents without reviewing any of those documents to determine whether Covil was listed as an additional insured on those policies or whether the information was otherwise responsive to the sampling and review ordered by the Court.

Immediately upon the conclusion of the Parties' November 19, 2021 conference call, the Receiver prepared and served on Penn National a set of document requests seeking the litigation hold notices, if any, that Penn National issued related to the Covil litigation as well as all correspondence regarding such litigation holds. On December 20, 2021, in its response to the Receiver's discovery requests, Penn National admitted that it did not issue any litigation hold notices related to the Covil litigation until December 17, 2021, and the litigation hold it did issue on December 17 was only issued to a single person—Mr. Reifsnyder.¹⁰⁹

¹⁰⁶ *Id.* at 81:4-8 (“I do not look at a quality control at all. They pull the files. They prep them, meaning pull them out and – and date them, and we go to – they're sorted and put in boxes. I do not go through the files.”).

¹⁰⁷ *Id.* at 77:25-78:5.

¹⁰⁸ See Covil Trial Ex. 66, Motion for Protection dated Feb. 11, 2022, p. 2; see also Covil Trial Ex. 93, Penn National's Interim Report to the Court, dated December 7, 2021, p. 1.

¹⁰⁹ Covil Trial Ex. 64, Penn National's Responses to Plaintiff's Second Set of Requests for Production, dated December 20, 2021.

Out of concern that the December 17, 2021 litigation hold was insufficient, Covil filed a Motion for Protection, requesting the Court to order Penn National to preserve all its historic insurance policy documents.

On February 11, 2022, this Court entered an order requiring Penn National: “to preserve all historic insurance policies and policy-related information unless and until this Court orders otherwise. This Order includes not only historic insurance policies, but also policy-related information existing in electronic form, hard copy, handwritten notes, or any other format. As examples only, this Order includes insurance policies, certificates of insurance, underwriting files, claims files, and any other documentation, regardless of format, evidencing the terms and conditions of historic insurance coverage. Because some of this relevant material is likely stored in electronic forms, all auto-delete or other routine destruction policies for historic insurance policies and policy-related information must be suspended until further notice.”¹¹⁰

In so holding, this Court found, “It is clear to this Court Penn National only put a litigation hold in place on December 17, 2021, in response to the Receiver’s legitimate concerns regarding document preservation. Moreover, the Court is not persuaded that the current litigation hold, that was recently distributed to a single Penn National employee, is sufficient to preserve all relevant documents.”¹¹¹

This Court’s concern over the effectiveness of the litigation hold was not misplaced: not even Penn National was aware of its litigation hold procedure, and confusion remains as to who received a litigation hold from whom, and when. Scott Maier, an in-house lawyer for Penn National, was presented by Penn National as a corporate representative for deposition on November 21, 2022. During his deposition, Mr. Maier confirmed that he issued the litigation hold to Mr. Reifsnyder in December 2021 pursuant to the Penn National Legal Department’s

¹¹⁰ See Covil Trial Ex. 66, Motion for Protection dated Feb. 11, 2022, p. 3.

¹¹¹ *Id.*, pp. 2-3.

litigation hold policy.¹¹² Mr. Maier further testified that the Penn National Claims Department has its own litigation hold policy which is distinct from the Legal Department's litigation hold policy under which Maier issued the hold to Mr. Reifsnyder.¹¹³ At no time—not when he issued the December 2021 litigation hold to Mr. Reifsnyder and not when he was preparing to testify as a corporate representative—has Mr. Maier ever confirmed with the Claims Department whether it ever issued a litigation hold notice related to Covil.¹¹⁴

In a deposition on November 30, 2022, Boyd Wright testified that he did not receive a litigation hold notice from his supervisor in the Claims Department, Adam Parsons, but instead received a notice directly from Scott Maier:

Q. Did you receive a litigation hold for the Covil litigation?

A. When Scott presented this, yeah.

...

Q. When you say "Scott," are you referring to Scott Maier?

A. Yes, Scott Maier, corporate counsel.

Q. How did Mr. Maier present the litigation hold to you?

A. He sent an email out to a number of people that advised it was a legal hold. I don't know if Scott provided this specific document, but I went and pulled it if he didn't just, you, know, so that I would have it, from the center of my file.

Q. We spoke earlier about a gentleman named Mr. Parsons. Do you recall that?

A. Yes.

Q. Did you receive a litigation hold from Mr. Parsons related to Covil litigation?

A. No.¹¹⁵

¹¹² Covil Trial Ex. 10, Dec. 17, 2021 Litigation Hold Email.

¹¹³ Covil Trial Ex. 97, Scott Maier Dep. Transcript, dated November 21, 2022, at 45:3-6 ("Q. Do you know if the Claims Department has a separate litigation hold policy or procedure? . . . A. I've been advised they do.").

¹¹⁴ *Id.* at 56:15-57:1 ("Q. did Mr. Parson confirm to you that a Litigation Hold Notice had been issued by the Claims Department in connection with any of the Covil litigation? A. He did not confirm a notice went out, no. Q. As the corporate representative for Penn National, can you tell me whether the Claims Department ever issued a litigation hold notice under its policies or procedures related to any of the Covil litigation as that term is defined in the 30(b)(6) notice? A. I cannot.").

¹¹⁵ Covil Trial Ex. 99, Boyd Wright Dep. Transcript, dated Nov. 30, 2022 at 41:9-42:3.

When asked again specifically whether he received a litigation hold from the Claims Department related to the Covil litigation, Mr. Wright testified, “not from anyone in the claims division, but when Scott Maier’s litigation hold comes out, we accept it for what it is and don’t do anything to violate it until he tells us otherwise.”¹¹⁶ When asked whether Mr. Parsons received the litigation hold, Mr. Wright testified, “Oh, I’m sure he did. I mean, as far as I know or can remember or understand, it would be very common for every division within the company to be notified and Adam certainly would have been notified if there was a litigation hold. I mean, *if he wasn’t, that’s appalling.*”¹¹⁷

III. PROPOSED CONCLUSIONS OF LAW

A. **This Court Should Issue the Following Declarations As To The Interpretation and Meaning Of The Insurance Policies That Penn National issued to Covil.**

1. **Legal Standard for Interpreting Penn National’s Policies Under South Carolina Law.**

The Parties agree that South Carolina law applies. Under South Carolina law, “[i]nsurance policies are subject to the general rules of contract construction.” *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614 732 S.E.2d 626, 628 (2012) (quoting *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)); *see also Pres. Cap. Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013) (same). “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628. (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). “Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular

¹¹⁶ *Id.* at 44:9-15.

¹¹⁷ *Id.* at 54:4-11 (emphasis added).

meaning.” *Id.* (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)).

“Where the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628m (quoting *McGill*, 381 S.C. at 185, 672 S.E.2d at 574). Whether the language of a contract is ambiguous is a question of law for the court. *Id.* “An insurance contract is read as a whole document so that ‘one may not, by pointing out a single sentence or clause, create an ambiguity.’” *Beauford Cty. Sch. Dist. v. United Nat’l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) (quoting *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). However, this Court must construe “[a]mbiguous or conflicting terms in an insurance policy . . . liberally in favor of the insured and strictly against the insurer.” *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628 (quoting *Clegg*, 377 S.C. at 655, 661 S.E.2d at 797). “Interpretation of an unambiguous insurance policy, or a policy with a patent ambiguity, is for the court.” *Auto-Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144, 718 S.E.2d 137 (Ct. App. 2015) (citing *Beauford Cty.*, 392 S.C. at 526, 709 S.E.2d at 95-96). “A patent ambiguity is one that arises upon the words of a . . . contract.” *Id.*¹¹⁸

“Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) (citing *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979)).

¹¹⁸ As a general matter, “where a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties.” *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997) (citing *Klutts Resorts Realty, Inc. v. Down’Round Devp. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977); *Skinner v. Elrod*, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992)). “An ambiguous contract is one capable of being understood in more ways than just on or one unclear in meaning because it expresses its purpose in an indefinite manner. *Id.* (citations omitted).

2. The Aggregate Limit of Liability in the Penn National Policies Does Not Apply to Operations Claims – It Only Applies To Completed Operations and Products Claims.

a. The distinction between operations, completed operations, and products claims.

It has been long-established that the risk insured by the “products hazard” and the “completed operations hazard” is “the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself.”¹¹⁹ By contrast, “[w]here an insured begins an operation and the evidence shows it is still in progress” when an injury or damage occurs, the applicable hazard is “premises-operations” and not “completed operations.”¹²⁰

The Henderson article is the seminal academic exploration of the “products hazard” and the “completed operations hazard” in liability insurance policies. A Westlaw search reveals that courts have readily accepted Henderson’s formulation, *citing it more than 150 times*. For example, in *Boyer Metal Fab, Inc. v. Md. Cas. Co.*, 750 P.2d 1195, 1197 n.2 (Or. Ct. App. 1988), the Oregon Court of Appeals cited Dean Henderson’s article for the proposition that “the purpose of the product hazard and completed operations hazard coverage is to insure against the risk that the product or work, if defective, *will cause bodily injury or damage to property of others after it leaves the insured’s hands.*” (emphasis added); *see also W. Emp’rs Ins. Co. v. Arciero & Sons, Inc.*, 146 Cal. App. 3d 1027, 1031 (Ct. App. 1983) (quoting Henderson directly).

¹¹⁹ Covil Trial Ex. 30, Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971).

¹²⁰ *Id.* at 434–35; *see also, e.g., Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) (“*Gerling*”) (“Operations” coverage “protected [the insured] from claims for asbestos-related injuries resulting from asbestos exposure on [the insured’s] premises or during its business operations, for example, injuries occurring during the installation or removal of asbestos products”); *Travelers Cas. & Sur. Co. v. Employers Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured’s facility and injuries caused by a subcontractor’s negligent construction of a wall that fell on a worker while the job was in progress.”).

Another case that looked substantially to Dean Henderson's formulation is *Friestad v. Travelers Indemnity Co.*, 393 A.2d 1212 (Pa. Super. Ct. 1978). There, the Superior Court looked to Henderson's article in its discussion of the basic "timing" issues underlying the "products hazard" and "completed operations hazard" in liability insurance policies:

Regardless of the involvement of the insured's products, so long as an accident occurs on the insured's business premises or away from his premises, *but while he has the jobsite under his control, the premises operations clause obtains and coverage is afforded thereunder. It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.*

Id. at 1215 n.5 (emphases added). It is not surprising, then, that other courts have noted that the "products hazard" applies only when the injury *is caused by a defective product placed into the stream of commerce*, or when injury or damage is *caused by the insured's completed work*. See *B & R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985); see also *CPS Chem. Co. v. Cont'l Ins. Co.*, 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), *rev'd on other grounds by* 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985) ("Commentators are in *complete agreement* that [the completed operations hazard] refers to accidents *caused by defective workmanship which arise after completion of work* by the insured on construction or service contracts." (emphases added)).¹²¹

¹²¹ The case law and commentary is clear that the "products hazard" applies *only* when injury is caused by a "completed" product placed into the stream of commerce, *e.g.*, *B & R Farm Servs., Inc.*, 483 N.E.2d at 1077; *Szczeklik v. Markel Intern. Ins. Co., Ltd.*, 942 F. Supp. 2d 1254, 1265 (M.D. Fla. 2013), or by a product previously installed at a job site *and* the injury occurs *after* the insured "has relinquished control of [the] jobsite." See, *e.g.*, *Friestad*, 393 A.2d at 1215 n.5. Injuries caused by "un-completed" products, injuries caused by "component" products, or injuries caused by products installed as part of a continuing installation or construction project are *not* within the "products hazard." It is only *after* the insured "has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage." *Id.*

b. The clear and unambiguous policy language.

The Penn National Policies contain an “aggregate” on the declarations page for “Bodily Injury and Property Damage Liability Combined Single Limit.”¹²² The term “aggregate” is not defined in the Penn National Policies.¹²³ Therefore, to understand the parties’ intent with respect to the total limit of liability, the Penn National Policies must be read as a whole.¹²⁴ Penn National concedes that the “\$1 million per occurrence/aggregate policy limit” is “*subject to the terms, conditions and endorsements that compose the entire policy.*”¹²⁵

Section III of the Insuring Agreement in the Penn National Policies declares expressly and unequivocally which hazards are included with the “Limits of Liability.” The Penn National Policies expressly contain a limit of liability provision, which provides for both a per occurrence limit and an aggregate limit for bodily injury liability for damages because of bodily injury included with the **completed operations hazard** and **products hazard**, but not a limit for an **operations hazard**:

III. LIMITS OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain **bodily injury** or **property damage**, or (3) claims made suits brought on account of **bodily injury** or **property damage**, the company’s liability is limited as follows:

Coverage A – The total liability of the company for all damages, including damages for care and loss of services, because of bodily injury sustained by one or more persons as the result of any one occurrence shall not exceed the limits of bodily injury liability stated in the declarations as applicable to “each occurrence.”

Subject to the above provision respecting “each occurrence”, the total liability of the company for all damages because of (1) all bodily injury included within the **completed operations hazard** and (2) all bodily injury included within

¹²² Covil Trial Ex. 1, 1986-1987 Policy at 000028; Covil Trial Ex. 2, 1987-1988 Policy at 000071

¹²³ Covil Trial Ex. 1 at 000036; Covil Trial Ex. 2 at 000081.

¹²⁴ Covil Trial Ex. 99, B. Wright Dep. Transcript, dated Nov. 30, 2022, at 12:1-8.

¹²⁵ Covil Trial Ex. 14, B. Wright letter to P. Protopapas, dated September 1, 2022 (emphasis added).

the **products hazard** shall not exceed the limit of bodily injury liability stated in the declarations as “aggregate”.¹²⁶

Figure 1 – Reproduction of Penn National Policy at 1 & 4

Bodily Injury and Property Damage Liability
Completed Single Limit

Limit of Liability	Amount of Insurance
\$1,000,000	\$1,000,000

III. LIMITS OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain **bodily injury or property damage**, or (3) claims made or suits brought on account of **bodily injury or property damage**, the company's liability is limited as follows:

Coverage A—The total liability of the company for all damages, including damages for care and loss of services, because of **bodily injury** sustained by one or more persons as the result of any one occurrence shall not exceed the limit of **bodily injury liability** stated in the declarations as applicable to "each occurrence".

Subject to the above provision respecting "each occurrence", the total liability of the company for all damages because of (1) all **bodily injury** included within the completed operations hazard and (2) all **bodily injury** included within the products hazard shall not exceed the limit of bodily injury liability stated in the declarations as "aggregate".

Reading these contract provisions together (i.e., the declarations page and Section III of the Insuring Agreement), as is required under South Carolina law, the clear and unambiguous language of the Penn National Policies contain an aggregate or total limit of one million dollars for damages because of bodily injury included within the completed operations hazard and the products hazard only. The Penn National Policies contain no aggregate or total limit of liability for damages because of purely “operations” bodily injury claims. Accordingly, the operations coverage part for each of the Penn National Policies at issue in this case responds repeatedly to each and every “occurrence” without a total “cap” on Penn National’s liability to pay, subject only to a “per occurrence” limit of liability.¹²⁷

¹²⁶ Covil Trial Ex. 1 at 4 (emphasis in original; highlighting added).

¹²⁷ While the language of the Penn National policy is clear and unambiguous, this Court must construe any ambiguity in the Penn National Policies “liberally in favor of the insured and strictly against the insurer.” *Whitlock*, 399 S.C. at 615.

c. An aggregate limit of liability was generally not made applicable to premises-operations coverage in comprehensive general liability policies.

Covil's expert witness on insurance industry customs and practices, Charles Miller, is prepared to testify at trial that aggregate limits were not the norm for general liability claims in the 1973 Insurance Services Office ("ISO")¹²⁸ standard comprehensive general liability ("CGL") policy form, and the Penn National Policies are identical to the 1973 ISO standard CGL policy form language.¹²⁹ Many, if not most, insurers at that time included an aggregate limit for claims arising from "products" or "completed operations" hazards (e.g., sale or distribution of a product or the failings of a completed project causing injury at a later date), but had no aggregate limit for general liability claims that arose out of a policyholder's ongoing operations.¹³⁰ Insurers were willing to write CGL coverage without aggregate limits for certain hazards, primarily premises-operations hazards, because they were expected to have low loss frequency.¹³¹

* * * *

Covil respectfully requests that this Court declare, consistent with South Carolina law, that the one million dollar "aggregate" or "total limit" of liability in the Penn National Policies applies to "completed operations" and "products" bodily injury claims only; it does not apply to "operations" bodily injury claims.

3. The completed operations hazard includes asbestos claims only when a claimant is exposed to asbestos after Covil completes its operation.

a. The clear and unambiguous policy language.

The completed operations hazard described in the Penn National Policies, and the corresponding aggregate limits of liability in the policies that contain such aggregate limits of

¹²⁸ ISO is an organization that developed standard policy forms used in the insurance industry.

¹²⁹ See Covil Trial Ex. 98, Deposition Testimony of Covil's Expert Witness Charles Miller at 55:2-15.

¹³⁰ Exhibit 0006 to C. Miller's Dep. Transcript at 01376.

¹³¹ *Id.*

liability, apply only when a plaintiff is exposed to asbestos after Covil completed its installation or removal operations or work at a particular jobsite. The aggregate limit of liability in the Penn National Policies applies only to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos attributed to Covil after Covil completed its work at a particular jobsite. No aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite.

The determination of the applicable hazard depends upon the timing and cause of the injurious exposure to asbestos:

- If the exposure happens during operations, the resulting claim for damages is within the premises-operations hazard.
- If the injury is caused by the insured's operations, the resulting claim for damages is within the premises-operations hazard.
- If the exposure happens after operations are completed, the resulting claim for damages is within the completed operations hazard. If the injury is caused by the insured's completed operations, the resulting claim for damages is within the completed operations hazard.

The inception date of a particular policy is not pertinent to this analysis. It does not fix the "cause" of the injury and does not answer the fundamental question of which hazard the claimant's injury was caused by the insured work-in-progress or the insured's completed work.

The continuing nature of asbestos bodily injury running from initial exposure until manifestation of a clinical disease or death means that a plaintiff exposed to asbestos only during Covil's asbestos operations in the 1960s sustained injury while Covil's operations were ongoing in the 1960s *and* after those operations were completed, even absent additional exposure. Or, in other words, the bodily injury in the hypothetical *started* during operations and continued after those operations were completed.

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Perin National Policies 000036

DEFINITIONS APPLICABLE TO SECTION II

"Completed operations" means any operations or business conducted by the insured which are completed or abandoned at the time of the loss, whether or not the operations or business are completed or abandoned at the time of the loss, and whether or not the operations or business are completed or abandoned at the time of the loss.

"Bodily injury" means bodily injury, sickness or disease sustained by a person, or the death of a person, which is caused by an accident, happening or event which is the result of the operations or business conducted by the insured.

"Property damage" means damage to or destruction of tangible property, including the loss of use of such property, which is caused by an accident, happening or event which is the result of the operations or business conducted by the insured.

"Operations" means any operations or business conducted by the insured, whether or not the operations or business are completed or abandoned at the time of the loss, and whether or not the operations or business are completed or abandoned at the time of the loss.

"Premises" means any premises owned by or rented to the insured, whether or not the premises are owned by or rented to the insured, and whether or not the premises are owned by or rented to the insured.

"Contract" means any contract or agreement entered into by the insured, whether or not the contract or agreement is entered into by the insured, and whether or not the contract or agreement is entered into by the insured.

"Materials" means any materials, parts or equipment furnished in connection with the operations, whether or not the materials, parts or equipment are furnished in connection with the operations, and whether or not the materials, parts or equipment are furnished in connection with the operations.

"Completed operations hazard" means the hazard of bodily injury or property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage has been completed or abandoned at the time of the loss.

INFORMATION - COMMON POLICY CONDITIONS

"Completed operations hazard" includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage has been completed or abandoned at the time of the loss.

"Bodily injury" means bodily injury, sickness or disease sustained by a person, or the death of a person, which is caused by an accident, happening or event which is the result of the operations or business conducted by the insured.

"Property damage" means damage to or destruction of tangible property, including the loss of use of such property, which is caused by an accident, happening or event which is the result of the operations or business conducted by the insured.

"Operations" means any operations or business conducted by the insured, whether or not the operations or business are completed or abandoned at the time of the loss, and whether or not the operations or business are completed or abandoned at the time of the loss.

"Premises" means any premises owned by or rented to the insured, whether or not the premises are owned by or rented to the insured, and whether or not the premises are owned by or rented to the insured.

"Contract" means any contract or agreement entered into by the insured, whether or not the contract or agreement is entered into by the insured, and whether or not the contract or agreement is entered into by the insured.

"Materials" means any materials, parts or equipment furnished in connection with the operations, whether or not the materials, parts or equipment are furnished in connection with the operations, and whether or not the materials, parts or equipment are furnished in connection with the operations.

"Completed operations hazard" means the hazard of bodily injury or property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage has been completed or abandoned at the time of the loss.

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(b) the existence of tools, uninstalled equipment or abandoned or unused materials, or

(c) operations for which the classification stated in the policy or in the company's manuals specifies "including completed operations".

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the operations were completed for a resulting claim to fall within the “completed operations hazard,” the policies therefore foreclosed the possibility that “completed operations” claims could result from either exposures or accidents that happened during ongoing operations.

b. The underwriting intent.

All of this is consistent with long-understood underwriting intent, as expressed in historical writings, insurance textbooks, insurance industry interpretive materials, and in legal and academic commentary.

There is *nothing* in the policies that assesses coverage based on the insured’s activities or operations during the policy period. Instead, the policies cover *injury* or *damage* during the policy period, regardless of whether the injury-causing event happened during the policy period or before the policy period. One of the principal drafters of the standard “occurrence” policy language from which the policies in this case were derived explained the basic underwriting intent behind this coverage in an often-cited 1965 speech:

This brings into focus one important change in our policy - the fact that coverage no longer attaches when the accident occurs but rather when the injury or damage takes place. This means that the policy in force when a particular injury or damage takes place is the one which applies, regardless of when the causing accident took place. So if the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.

The policy limits are renewed every year, so the underwriter of a manufacturing risk may have his limits pyramid under this new contract...

So, even for new business, the underwriter must be more alert than ever. More potential losses may be inherited from the past. A harmful waste disposal practice unknown to the underwriter because it has since been corrected, or which the applicant promises to correct, may still produce serious losses during your period of coverage. This has always been true for products, but with gradual injury or damage being covered, the potential is a lot worse.¹³²

¹³² Covil Trial Ex. 29, Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 Conn. Ins. L.J. 349, 369-70 (2005/2006) (quoting Gilbert L. Bean (Liberty Mutual Insurance Company), “Address at the Mutual Insurance

Another principal author of the “occurrence” form noted that an intended feature of the policy is that multiple, consecutive policies will afford coverage in “exposure types of cases” that involve cumulative, long-term injury such as asbestos:

Note also the reference to injurious exposure to conditions which results in injury. This eliminates any requirement that the injury result from a sudden event. Although, it is most common that the injury takes place simultaneously with the exposure, there are many instances of injuries taking place over an extended period of time before they become evident. For example, slow ingestion of foreign substances or inhalation of noxious fumes. In cases such as these, the definition of occurrence serves to identify the time of loss for the purpose of applying coverage - the injury must take place during the policy period

In some exposure types of cases involving cumulative injuries, it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford coverage to the bodily injury or property damage which occurs during the policy period.

Stempel at 367 (quoting Richard H. Elliott, “The New Comprehensive General Liability Policy,” in *Liability Insurance Disputes*, 12-3, 12-5 (Sol Schreiber & Stuart J. Motelson eds., PLI 1968)).

Further, the Penn National Policies do not state or even suggest that “operations” coverage is limited only to the policy on the risk during the time that the insured conducted operations that resulted in cumulative, long-term injury that did not become known for years or decades later. The insurance industry knew by the mid-1960s at the latest that potential losses resulting from the “inhalation of noxious fumes,” for example, “may be inherited from the past,” yet neither of Penn National’s policies from the 1980s at issue contain an aggregate limit, or total “cap,” on the insurers’ liability for Covil’s “operations” losses.

Penn National addressed this particular problem as respects potentially inherited *product liability exposures* by placing an aggregate limit of liability on their policies for losses within the “products hazard.” Had Penn National wanted the aggregate limit of liability to apply to bodily injury resulting from “operations” exposures that happened before the inception date of

Technical Conference on New Comprehensive General and Automobile Program: The Effect on Manufacturing Risks” (Nov. 15-16, 1965)).

their policies to limit their liability for Covil's losses they "inherited from the past," they could have easily included language such as this in their policies:

The aggregate limit of liability applies to all damages for bodily injury or property damage to which this insurance applies because of an accident, an event or continuous or repeated exposures to conditions that occurred prior to the first date upon which this policy is in force.

This type of language does not appear in the Penn National Policies at issue, and Penn National cannot re-write its policies and add a limitation on their liability that it did not include when it contracted with Covil.

At its most fundamental level, a "hazard" in an insurance policy "is the source from which an accident may arise, or 'a danger or risk lurking in a situation which by chance or fortuity develops into an active agency of harm.'" *Ketona Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1968) (quoting *Hough v. Contributory Ret. Appeal Bd.*, 36 N.E.2d 415, 417-418 (Mass. 1941)); see also *Service Welding & Mach. Co. v. Mich. Mut. Liab. Co. of Detroit, Mich.*, 311 F.2d 612, 617 (6th Cir. 1962) ("The word 'hazard' as used in the policy must mean 'the source of a risk.' . . . Thus, a 'hazard' is a danger or risk lurking in a situation or place."). "Along with other meanings, the standard dictionary defines the noun 'hazard' as exposure to the chance of loss or injury." *Caminetti v. Guar. Union Life Ins. Co.*, 126 P.2d 159, 163 (Cal. 1942). The Merriam-Webster On-line Dictionary defines "hazard" to include "a source of danger." Available at www.Merriam-Webster.com (definition of "hazard"). See also *Travelers Cas. & Sur. Co. v. Employers Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) ("Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured's facility and injuries caused by a subcontractor's negligent construction of a wall that fell on a worker while the job was in progress.").

Commentators are in complete agreement the “premises-operations hazard” covers the insured against legal liability resulting from its work-in-progress, while the “completed operations hazard” covers the insured against legal liability resulting from its completed work.

For example, a standard risk management and insurance textbook sketched the scope of the two hazards succinctly: the “completed operations hazard” applies when “the liability arises from the unsatisfactory *outcome* of the work, not from the actual *performance* of the work, as with operations liability.”¹³³

The Insurance Services Organization promulgates standard policy forms used by Penn National. It published a training workbook for claims handlers in the mid-1980s that identified several examples of injuries as falling within the “products-completed operations hazard” of the standard general liability insurance policy, including the following:

The ACE Construction Company remodels one of the Case Company branch offices. ACE is the named insured, *After ACE has completed the job* a portion of the ceiling falls, injuring a customer.¹³⁴

¹³³ Covil Trial Ex. 31, James L. Athearn, S. Travis Pritchett & Joan T. Schmit, *Risk and Insurance*, at 510 (6th ed. 1989) (emphases added); *see also* Covil Trial Ex. 32, Mark S. Dorfman, *Introduction to Risk Management and Insurance*, at 397 (7th ed. 2001) (“Completed operations insurance. This type of policy covers claims from injuries arising after a service is rendered and the property’s control is returned to the owner. This coverage would help Leaky Louis, the plumber, whose negligence caused a water heater to explode.”); Covil Trial Ex. 35, Fire Casualty & Surety Bulletin, June 1985 (the “completed operations hazard. . . is the insured’s potential liability for bodily injury or property damage that arises out of the insured’s completed work”). The Fire Casualty & Surety Bulletin is “used by insurance agents and brokers to interpret standard insurance policy provisions.” *Md. Cas. Co. v. Reeder*, 221 Cal. App. 3d 961, 972 (1990). It is frequently cited by courts when interpreting disputed insurance policy provisions. *See, e.g., Ind. Ins. Cos. v. Granite State Ins. Co.* 689 F. Supp. 1549, 1555 (S.D. Ind. 1988) (citing the June 1985 Fire Casualty & Surety Bulletin for the proposition that “[c]ompleted operations coverage is designed to protect the insured from liability arising from the insured’s completed work”); *see also Prudential-LMI Comm. Ins. Co. v. Reliance Ins. Co.*, 22 Cal. App. 4th 1508, 1513 (1994) (Fire Casualty & Surety Bulletin admissible to determine whether insured’s policy interpretation was reasonable).

¹³⁴ Covil Trial Ex. 33, Insurance Services Office, *General Liability Coverage*, at 26 (1985) (emphasis added).

ISO contrasted this with examples of damage that were *not* within the “products-completed operations hazard” of the policy, including this one:

*During delivery of some ice machines to National Inns, a child is injured when one of the machines falls off the delivery truck.*¹³⁵

The ISO workbook later defined “Completed Operations Insurance” as “[a] form of insurance issued particularly to various types of contractors. It covers a contractor’s liability for accidents arising out of jobs or operations that he has completed.”¹³⁶ In sum, the ISO thus explained that “completed operations” coverage applies to injuries that happen after a job is completed, while “operations” coverage applies to injuries that happen during the performance of a job. The two coverages do not overlap.

The online Glossary of Insurance And Risk Management Terms, published by the International Risk Management Institute (“IRMI”), defines “premises-operations” in an identical manner. It is:

[o]ne of the categories of hazards ordinarily insured by a general liability policy. Composed of those exposures to loss that fall outside the defined ‘products-completed operations hazard,’ it includes liability for injury or damage arising out of the insured’s premises or out of the insured’s business operations while such operations are in progress.¹³⁷

Legal and academic commentators have concluded similarly that the “premises-operations hazard” covers liability resulting from the insured’s ongoing work, while the “completed operations hazard” covers liability resulting from the insured’s completed work. Whether the operations resulting in injury happened during the policy period is immaterial under policies that cover “injury” during the policy period as opposed to “operations” during the policy period.

¹³⁵ *Id.* at 28 (emphasis added).

¹³⁶ *Id.* at 106.

¹³⁷ Covil Trial Ex. 34, IRMI, Premises-Operations Definition, <http://www.irmi.com/online/insurance-glossary/terms/p/premises-operations.aspx>, (last visited Nov. 29, 2022).

For example, an attorney representing insurers *rejected* a broad interpretation of the “completed operations hazard”:

Given these seemingly clear [CGL] provisions [regarding completed operations] it should not be surprising that despite efforts by some parties (mostly insurers) to argue for a very broad interpretation of the completed operations hazard,

“commentators are in complete agreement that this [coverage] refers to accidents caused by defective workmanship which arise after completion of work by the insured on construction or services contracts.

See Covil Trial Ex. 29, Stempel, *supra*, at 389-90 (quoting Theodore A. Howard, “Products/Completed Operations Coverage 1997: Still Learning Professor Henderson’s Lessons 25 Years Later,” Coverage, Vol. 7, at 33, 38, n. 17 (Dec. 1997) (quoting *CPS Chem. Co.* 489 A.2d at 1270.

Academic commentary is in accord:

The natural reading of the words of the CGL policy suggests that tort claims arising from a policyholder's regular, ongoing operations are general premises-operations liability claims and do not evolve or transform into “completed operations” hazard claims merely because the construction activity comes to a conclusion sometime after the events that give rise to tort liability irrespective of the claimants’ relation to those later activities.

Id. at 385. Indeed, “completed operations” coverage has applied historically only to injuries *caused* by the insured’s completed work and not by its work-in-progress:

The concept of what constitutes a “completed operation” and the verbiage used to describe and define it has been generally consistent throughout the history of the CGL policy. The CGL policy language itself states the perhaps self-evident proposition that when a policyholder has finished a building or project and moved on to other activities, the building or project then becomes a “completed operation” much like a product that has been placed in the stream of commerce.

For injuries that begin after that time, the aggregate limits of the CGL policy applicable to products or completed operations claims set forth the insurer's maximum liability for third-party claims that arise because of failings of the building or project that cause injury. By contrast, injuries that begin during operations are properly classified as general liability injuries.

Id. at 387.

In short, if the plaintiffs' exposure to asbestos happened solely during the insured's ongoing operations, the aggregate limits of liability do not apply to the claim. In that instance, the source of the plaintiff's injury – the "hazard" or "risk" giving rise to the claim – was the insured's work-in-progress, and not the insured's completed work. The Second Circuit succinctly summarized this point in a dispute concerning insurance and reinsurance for claims asserted against Owens-Corning Fiberglas ("OCF") arising from its installation of the asbestos-containing "Kaylo" product over several decades. The insurance policies at issue in that case were sold by Travelers to OCF between 1952 and 1979:

Non-products coverage protected OCF from claims for asbestos-related injuries resulting from asbestos exposure on OCF's premises or during its business operations, for example, injuries occurring during the installation or removal of asbestos products... [I]f claims arising from multiple occurrences triggered non-products coverage, then Travelers was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how much Travelers had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected Travelers to liability anew.

Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of America, 419 F.3d 181, 184 (2d Cir. 2005).

This is how the policies at issue have applied historically. That is all that Covil seeks in this case.

4. Penn National has the burden to prove an asbestos claim is a completed operations or product hazard claim to apply it to the aggregate limit of liability.

Penn National bears the burden of proving any exclusion or limitation of coverage, including the application of aggregate limits to particular suits and the "exhaustion" of the aggregate limits of liability in its policies.

The South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: “Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Clayton*, 364 S.C. at 560, 614 S.E.2d at 614 (citing *Boggs*, 272 S.C. 460, 252 S.E.2d 565); *see also Benjamin*, 415 S.C. at 144–48, 781 S.E.2d at 141–44 (upholding circuit court decision to construe an ambiguous term in favor of coverage, and noting that “ambiguous terms are to be construed strictly against the insurer”). Courts have held that this basic principle also applies to “limitations” on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001) (“[o]nce the insured makes a prima facie showing of coverage, ‘the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.’” (quoting *Gen. Acc. Ins. Co. v. Am. Nat’l Fireproofing, Inc.*, 716 A.2d 751, 757 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (“[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense”).

Consequently, as to any individual asbestos lawsuit, it is Penn National’s burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability, if any, applicable to the “completed operations” provisions in its policies, where such aggregate limits have been proven by Penn National as to each specific policy or policy period. By definition, aggregate limits restrict coverage. Accordingly, Penn National bears the burden of demonstrating that aggregate limits in its policies, if any, apply to any particular asbestos suit.

5. The Ashworth, Campbell, D'Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss Claims Are Not Subject to the Penn National Policies' Aggregate Limit of Liability.

The settlement amounts that Penn National contributed to resolve the *Ashworth, Campbell, D'Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss* claims, as identified in Penn National's September 1, 2022 letter to the Receiver,¹³⁸ do not meet the definition of "completed operations hazard" or "product hazard" claims and therefore are not subject to the aggregate limit of liability in the Penn National Policies and do not impair the total limit of liability. Penn National has not carried, and cannot carry, its burden to prove otherwise. Rather, the evidence adduced in each of these cases reveals exposure to asbestos from Covil's *ongoing work operations* at a jobsite, and thus are subject only to the "per occurrence" limits of the policies.

Based on the forgoing, the bodily injury allegedly suffered by these claimants are "operations" claims and not "completed operations" or "products" claim. The Receiver requests that this Court declare as a matter of law that the aggregate limit of liability of the Penn National Policies do not apply to the above-referenced asbestos claims because the bodily injury liability arising from Covil's operations necessarily falls outside of the completed operations hazard and products hazard of the Penn National Policies.

6. Penn National Cannot Meet Its Burden To Prove that the 1986-1987 Policy Contains The "Completed Operations Hazard and Products Hazard" Exclusion.

Penn National asserts in this lawsuit that the Penn National Policies "do not provide coverage for the claims, lawsuits, or matters alleged in Plaintiff's Complaint."¹³⁹ Specifically, Penn National argues that certain asbestos claims that seek damages for bodily injury within the

¹³⁸ See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas dated September 1, 2022.

¹³⁹ Penn National Trial Ex. 2, Penn National Answer, p. 7 (Fourth Defense).

“completed operations hazard” and the “products hazard” of the 1986-1987 Policy are excluded by endorsement GL 21 04 (07/66), Exclusion (Completed Operations Hazard and Products Hazard).¹⁴⁰

Penn National cannot dispute that endorsement GL 21 04 (07/66) is not listed on the declarations page under the section which identifies all forms and endorsements applicable to the 1986-1987 Policy:

Figure 3 – Reproduction of Penn National Policy

The image shows a reproduction of a Penn National insurance policy declarations page. A yellow rectangular box highlights a section of the page containing the following text:

Section II - Forms and Endorsements only
 GL0104(7/66) GL9918(3/83) GL0032(4/84) GL2133(2/85) 70-1656(7/85)
 GL0031(4/84) CGL-1 MP-1 PI-1 GL0300(7/81) 70-260 73-3010
 Section III - Forms and Endorsements only
 MP0450(12/79) MP5231(7/77) MP0307(7/77)

Below the highlighted section, there is a table with columns for 'Form', 'Description', and 'Amount'. The table lists various forms and their corresponding amounts. At the bottom of the page, there is a small box with the number '1' and the text 'Penn National Policies 000001'.

Penn National therefore claims that the declarations page contains an error and that endorsement GL 21 04 (07/66) “was inadvertently left off the policy.”¹⁴¹ Specifically, Penn National asserts that a Change Endorsement was issued on May 23, 1986 adding the GL 21 04 endorsement.¹⁴² Penn National has proffered no evidence whatsoever that Covil, as the insured,

¹⁴⁰ See, e.g., Covil Trial Ex. 37, B. Wright Letter to P. Protopapas, dated August 21, 2019.

¹⁴¹ *Id.*

¹⁴² *Id.*

agreed to the Change Endorsement or that Covil ever intended for endorsement GL 21 04 (07/66) to be incorporated into the 1986-1987 Policy. Significantly, the “Insured’s Signature” is missing from the Change Endorsement. Likewise, GL 21 04 (07/66), which “required” certain information “when this endorsement is issued subsequent to preparation of policy,” as was allegedly the case here, is missing the “required” information and is not countersigned by an “Authorized Representative” of Covil:

Figure 4 – Reproduction of Penn National Policy

The image shows two forms from Penn National Policies. The left form is a 'CHANGE ENDORSEMENT' (MP 12 01 00 01 70) with sections for 'SECTION I - PROPERTY COVERAGE' and 'SECTION II - LIABILITY COVERAGE'. It has a line for 'Insured's Signature'. The right form is 'GL 21 04 (07/66)' with a section for 'Endorsement effective' information, including 'Policy No.', 'Endorsement No.', 'Named Insured', and a line for 'Countersigned by (Authorized Representative)'. Both forms have yellow boxes highlighting the missing 'Insured's Signature' and 'Named Insured' fields, with arrows pointing to them.

South Carolina Supreme Court authority makes clear that “insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Clayton*, 364 S.C. at 560, 614 S.E.2d at 614.

Here, Penn National cannot meet its heavy burden to show that the 1986-1987 Policy contains the “Completed Operations Hazard and Products Hazard” Exclusion. Covil therefore requests that this Court declare as a matter of law that, despite Penn National’s “Fourth Defense” to the contrary, Penn National cannot disclaim coverage for damages because of bodily injury

under the 1986-1987 Policy pursuant to a “Completed Operations Hazard and Products Hazard” Exclusion.

7. Coverage Should Be Allocated On an All Sums Basis.

The Court must next determine how Covil’s liability should be allocated. Courts take two different approaches to allocation. Some courts allocate liability on proportionate basis, an approach generally referred to as “pro-rata allocation.” Other courts allow an insured to allocate liability on a joint and several basis to a single triggered insurance policy, an approach generally referred to as “all-sums allocation.”

Which approach to allocation should be adopted here—like the initial coverage determination—is governed by the terms of the insurance policy. “Insurance policies are subject to general rules of contract construction.” *Standard Fire Co. v. Marine Cont. & Towing Co.*, 301 S.C. 418, 421, 392 S.E.2d 460, 461 (1990). The Court “must give policy language its plain, ordinary and popular meaning.” *Id.* This is a fundamental precept of insurance law in South Carolina that has been embraced repeatedly by the South Carolina Supreme Court.¹⁴³ It requires an insurer to fulfill the promise of coverage actually made to a policyholder under the terms of the insurance policy.

¹⁴³ See e.g., *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994) (“The Supreme Court must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning. We should not torture the meaning of policy language to extend or defeat coverage that was never intended by the parties.”); *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, No. 2021-001209, 2022 WL 3221920, at *2 (S.C. Aug. 10, 2022) (holding that policy terms “must be interpreted under their common meaning”); *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (holding the “[c]ourt must give policy language its plain, ordinary, and popular meaning. . . The court’s duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure [of the parties] to guard their interests carefully.”) (quotation and citations omitted); *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) (“An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law.”).

Adhering to this principal, the South Carolina Supreme Court has held that liability for progressive property damage spanning multiple policy periods must be allocated on a pro-rata basis to all triggered policies. *Crossmann Cmtys. of N.C. Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40 (2011). The Court reached this determination “rel[ying] heavily” on *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 364–65, 910 N.E.2d 290, 311 (2009), which the Court explained “provides the reading of the relevant policy language that we believe is correct.” In *Boston Gas*, the Massachusetts Supreme Judicial Court interpreted an Insuring Agreement that obligated the insurer to pay for “property damage . . . to which this insurance applies,” and a “Policy Period, Territory” provision that stated “[t]his policy applies to . . . property damage . . . which occurs anywhere during the policy period.” Essentially the same Insuring Agreement was before the Court in *Crossmann*, and the policies at issue expressly provided that “the insurance applied ‘only if . . . bodily injury or property damage occur[red] during the policy period.’” *Crossmann*, 395 S.C. at 53. The Court held that the limitation placed on property damage to which “the insurance applied” limited the insurer’s promise to pay to property damage that occurred during the policy period. *Id.* at 62.¹⁴⁴

The South Carolina Supreme Court has not been presented with the question of whether the same rule applies in progressive bodily injury cases. As was the case in *Crossmann*, the terms of the Penn National policies govern that question. Here, the policy terms that govern Covil’s progressive bodily injury claim are distinct from the policy terms at issue in *Crossmann* and notably do not limit the bodily damage to which “the insurance applies” to bodily damage that occurs during the policy period. To the contrary, the policy provisions define Penn National’s

¹⁴⁴ The Court further held that pro-rata allocation of liability in a progressive property damage case was consistent with the reasonable expectations of the contracting parties and public policy goals. *Crossmann*, 395 S.C. at 63-64.

obligation to insure Covil for bodily injury in broad terms that encompass all consequences of bodily injury, without regard to when they occur. In this case, an all sums approach to allocation is most consistent with the Penn National policy language. All sums allocation also best serves the contracting parties' reasonable expectations of bodily injury coverage and policy goals for bodily injury coverage.

A. The terms of the Penn National policies embrace all-sums allocation.

Three parts of the insurance policies determine the scope of coverage that the Penn National policies provide for bodily injury claims: the “Insuring Agreement,” the “Policy Territory” provision, and the “bodily injury” definition. In the “Insuring Agreement,” Penn National promises to “pay on behalf of the **insured** all sums which the insured shall become legally obligated to pay as damages because of . . . **bodily injury** . . . [to] which this insurance applies, caused by an **occurrence**[.]” The “Policy Territory Provision” addresses the “bodily injury” to which this insurance applies and provides that “[t]his insurance applies only to **bodily injury** or **property damage** which occurs within the **policy territory**.” The “Definitions” section of the policy defines “bodily injury” to mean “bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death *at any time* resulting therefrom[.]” (Emphases added).

None of these policy provisions impose a temporal or proportionate limit on Penn National’s obligation to defend or indemnify Covil for a progressive bodily injury claim. The Insuring Agreement imposes an open-ended obligation on Penn National that extends to include the overall legal liability borne by the insured “because of” bodily injury to which the insurance applies. Penn National promises to pay, without qualification, “all sums which the insured shall become legally obligated as damages” “because of” such bodily injury. Penn National agreed to protect Covil from its entire legal liability. That broad promise fulfills the purpose of

comprehensive general liability insurance, which the South Carolina Supreme Court has recognized “grants the insured broad liability coverage for . . . bodily injury which is then narrowed by a number of exclusions.” *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009).

The Insuring Agreement sets two preconditions on coverage and the imposition of this broad insuring obligation on Penn National. Covil’s legal liability must be because of “bodily injury . . . to which this insurance applies,” and the bodily injury must be “caused by an occurrence.” The provision that establishes the “bodily injury . . . to which the insurance applies,” and the “bodily injury” and “occurrence” definitions determine whether those preconditions are met. Each of these policy terms reinforce that Penn National’s insuring obligation extends to all consequences that flow from “bodily injury,” and is not limited to injury that occurs during the policy period.

What distinguishes this case from *Crossmann* is that the Penn National policy provision that establishes the “bodily injury . . . to which this insurance applies” does not place a temporal limitation on the scope of “bodily injury” covered by the policies. The “Policy Territory” provision of the policy states that “[t]his insurance applies only to **bodily injury** or **property damage** which occurs within the **policy territory**.” The policy language clearly imposes a limitation on coverage as it provides coverage applies “only” to certain “bodily injury” and “property damage.” However, unlike in *Crossmann*, the limitation placed on the “bodily injury” to which the policy applies is *only* a geographic limitation, not a temporal limitation. This fundamentally distinguishes the Penn National policies from the policies at issue in *Crossmann* and the *Boston Gas* decision relied on by the South Carolina Supreme Court. In both *Crossmann* and *Boston Gas* the policy provision establishing the scope of the property damage and bodily injury “to which this insurance applies”

required that the property damage and bodily injury occur “during the policy period.” That limitation is not part of the Penn National policies. Rather, the provision of the Penn National policies that establishes the “bodily injury . . . to which this insurance applies” establishes that it is only necessary that the bodily injury “occur within the policy territory.”

Crossmann, a case that dealt with coverage for progressive property damage, also did not address the “bodily injury” definition in the Penn National policies. That definition includes two references to time, and each serves a separate purpose. “Bodily injury means bodily injury, sickness or disease . . . which occurs during the policy period. . . including death at any time resulting therefrom.” The phrase “at any time” references the scope of the “bodily injury” encompassed by the policy. “Bodily injury” includes “bodily injury, sickness and disease” and also the consequences that flow therefrom, up to and including “death at any time.” The definition expressly rejects the idea that bodily injury covered by the policy is confined to bodily injury occurring during a limited temporal period by providing that “bodily injury” includes “death at any time.” *Am. Precision Indus., Inc. v. Fed. Ins. Co.*, No. 14-CV-1050-RJA-HKS, 2021 WL 8263499, at *11 (W.D.N.Y. Aug. 4, 2021) (“The “death at any time” provision necessarily extends the protection of each Primary Policy beyond the policy period.”); *Polar-Mohr Maschinenvertriebsgesellschaft GMBH, Co. KG v. Zurich Am. Ins. Co.*, No. 17-CV-01804-WHO, 2018 WL 1335880, at *4 (N.D. Cal. Mar. 15, 2018) (“The definition of “bodily injury” in the Zurich policy contemplates and promises indemnification to damages that arise outside of the policy period.”); *Cannon Elec., Inc. v. Ace Prop. & Cas. Co.*, No. BC 290354, 2017 WL 10992340, at *26 (Cal. Super. Ct. Aug. 17, 2017) (“These policies define bodily injury and damage to contemplate not simply a single injury, but also bodily injury resulting in death thereafter, even if the policy term has expired. These policies expressly provide a transfer of the liability risk from

the insured to the insurer for all consequential harms – past, present and future – flowing from that injury.”). If it is to be given its ordinary meaning, the phrase “at any time” cannot be interpreted as temporally truncating the “bodily injury” covered by the policy. Such a limitation is inimical to the meaning of the term “any,” which modifies the word “time.” “Any” is commonly understood to mean “unmeasured or unlimited in amount, number or extent” and “appreciably large or extended.”¹⁴⁵

The inclusion of the phrase “during the policy period” in the definition of “bodily injury” does not support a contrary interpretation. When a court interprets an insurance policy, it must give meaning to all words used in the policy. *Crossmann*, 395 S.C. at 62. Application of this principle to the “bodily injury” definition requires the Court give meaning to each part of the definition, and the significance of the phrase “during the policy period” must be harmonized with the phrase “at any time.” Interpreting “during the policy period” as importing a temporal limitation into the “bodily injury” definition puts one part of the “bodily injury” definition in conflict with another part. What harmonizes all elements of the definition is interpreting the phrase “during the policy period” as establishing a trigger of coverage. That is, through the use of the phrase “during the policy period” the definition of “bodily injury” requires that some of part of the bodily injury must occur during the policy period to trigger the policy.¹⁴⁶ Once a policy is triggered, the “bodily injury” encompassed by the policy includes the injury and consequences flowing from the injury up to and including death “at any time.”

¹⁴⁵ “Any.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/any>. Accessed 2 Dec. 2022.

¹⁴⁶ South Carolina has adopted a modified continuous trigger of coverage. *Crossmann*, 395 S.C. at 55. Coverage is triggered at the time of an injury-in-fact and continuously thereafter through progressive damage.

The occurrence definition also reflects an intention to impose on the insurer a broad obligation to insure bodily injury that is not subject to a temporal limitation. The policy anticipates that “bodily injury” might result from “continuous or repeated exposure to conditions.” The definition does not limit an occurrence to “bodily injury” that results from conditions that take place during the policy period. Rather, the definition uses expansive language to provide that an occurrence will encompass “bodily injury” that results from “continuous” conditions. The use of the word “continuous,” which is commonly understood to mean “marked by uninterrupted extension in space, time, or sequence,” reflects an intention that conditions that result in bodily injury not be temporally limited.¹⁴⁷

An all sums approach to allocating liability for progressive bodily injury claims gives meaning to all of the Penn National policy language that governs a progressive bodily injury claim and is most consistent with those terms:

This policy language is only consistent with an all sums approach to allocation. The result here should be the same as in *Am. Precision Indus.*, *Polar Mohr*, and *Canon Elec.*, where the court held:

[T]he . . . policies at issue here must be allocated based on an “all sums” methodology. Their insuring provisions expressly provide that the policyholder will be indemnified for “all sums” for which it is liable for damages arising from an occurrence, which may be continuous. These policies define bodily injury and damage to contemplate not simply a single injury, but also bodily injury resulting in death thereafter, even if the policy term has expired. These policies expressly provide a transfer of the liability risk from the insured to the insurer for all consequential harms – past, present and future – flowing from that injury. To give meaning to the policies’ provisions that extended protection beyond the policy period for continuing injuries means that “all sums” allocation must be applied. To do otherwise would be to disregard and render these provisions “surplusage”.

¹⁴⁷ “Continuous.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/continuous>. Accessed 2 Dec. 2022.

Cannon Elec., 2017 WL 10992340, at *26. Prorating the insurer’s liability would require the Court to disregard policy terms and rewrite the agreement between Penn National and Covil, which would be contrary to South Carolina law. *B.L.G. Enters.*, 334 S.C. at 535, 514 S.E.2d at 330 (“The court’s duty is limited to the interpretation of the contract made by the parties themselves[.]”)

B. All-sums allocation also is most consistent with the purpose of comprehensive general liability insurance coverage for progressive bodily injury claims.

The all-sums approach to allocation requires Penn National to protect Covil against both the immediate and long-range consequences of asbestos-related injuries, including death. That approach to allocation not only reflects the grant of coverage made by the terms of the Penn National policies. It also is most consistent with the overall purpose of comprehensive general liability (“CGL”) insurance, which is to protect the policyholder from liability.

As the South Carolina Supreme Court has recognized, “[t]he standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions.” *Newman*, 385 S.C. at 197, 684 S.E.2d at 546. The protection afforded by the policies is not limited to an injury occurring during a limited period of time. Rather, the policies insure against “consequential risk,” which flows from the policyholder’s tort liability for damage to persons or property. *Bennett & Bennett Const., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 8–9, 747 S.E.2d 426, 430 (2013) (citing *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565–66, 561 S.E.2d 355, 358 (2002), overruled in part on other grounds by *Crossmann Cmyts. of N.C., Inc.*, 395 S.C. 40, 717 S.E.2d 589. Consequential damages in tort, particularly for asbestos-related injury, compensate a victim for both the damages they have suffered and for the damages they will suffer up to and including death. A business with comprehensive general

liability coverage has taken steps to ensure that they are able to pay a claimant for the full scope of this liability.

B. This Court Should Issue A Finding That Penn National Spoliated Evidence.

1. Legal Standard for Spoliation.

The spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a current or reasonably anticipated legal proceeding. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Black's Law Dictionary* (8th Ed. 2004). The theory behind imposing sanctions for spoliation of evidence is that when a party destroys evidence, it is reasonable to infer that the party had “consciousness of guilt” or other motivations to avoid the evidence being heard or introduced to the jury.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three (3) independent elements before the Court may determine which sanction, if any, is appropriate. These elements are:

- (1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed;
- (2) that the evidence was destroyed with a culpable state of mind; and
- (3) that the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Hawkins v. Coll. of Charleston, No. 2:12-cv-0384, 2013 WL 6050324, *2 (D.S.C. Nov. 15, 2013) (quoting *Cytec Carbon Fibers, LLC v. Hopkins*, No. 2:11-cv-0217, 2012 WL 6044778 (D.S.C. Oct. 22, 2012)).

2. Penn National Admits that it Spoliated Historic Occurrence-Based Liability Insurance Policies and Policy-Related Documents During the Pendency of the Covil Litigation.

Penn National admits that it (1) issued multiple insurance policies to Covil, which included renewal policies,¹⁴⁸ (2) no longer has full, original copies of the policies or policy-related documents it issued to Covil,¹⁴⁹ (3) was first put on notice to search for “all liability policies” issued to Covil with a subpoena in the Finch underlying asbestos lawsuit in 2018 and received subsequent discovery requests as a defendant in insurance coverage litigations to identify and search for “all policies” issued to Covil throughout 2019, 2020, and 2021¹⁵⁰ (4) did not issue litigation holds to stop the destruction of Covil policies or policy-related documents for over three years later on December 17, 2021,¹⁵¹ and only *after* this Court was forced to issue a November 5, 2021 Order for Covil’s underlying asbestos defense counsel, Ellis and Winters, to conduct an independent review of Penn National’s document repositories¹⁵² (5) destroyed historic liability policies that were contained on microfiche on an annual basis in 2018, 2019, and 2020,¹⁵³ (6) did not search for Covil in the documents it destroyed in 2018, 2019, and 2020, and (7) has no record of the historic general liability insurance policies and policy-related documents it destroyed in 2018, 2019, and 2020. Penn National’s admissions warrant a finding of spoliation.

¹⁴⁸ See Covil Trial Exs. 1, 2, 3, 4, 5.

¹⁴⁹ See Covil Trial Ex. 99, Boyd Wright Dep. Transcript, dated Nov. 30, 2022 at 13:1-14:17.

¹⁵⁰ See Covil Trial Ex. 13, Penn National Subpoena Response, dated June 15, 2018; Covil Trial Ex. 50, Penn National’s Answers to Covil’s First Set of Interrogatories and Responses to Covil’s First Set of Requests for Admission, dated December 18, 2019 (*Zurich Am. Ins. Co. v. Covil Corp., et al.*, MDNC No. 1:18-cv-000932; Penn National Trial Ex. 1, Complaint.

¹⁵¹ See Covil Trial Ex. 97, Scott Maier Dep. Transcript, dated Nov. 21, 2022 at 83:3-8.

¹⁵² *Id.* at 169:1-22.

¹⁵³ See Covil Trial Ex. 68, Penn National response to RFA Nos. 2-7; Covil Trial Ex. 84, B. Reifsnyder Dep. Tr. at 97:13-98:11.

a. Penn National Had A Duty To Preserve Covil's Insurance Policy Related Documents At The Time It Was Destroying Historic, Occurrence-Based General Liability Policies.

As to the first element, Penn National had a duty to preserve this evidence. “A party has a duty to preserve evidence during litigation and at any time ‘before the litigation when a party reasonably should know that evidence may be relevant to anticipated litigation.’” *Id.* at *3 (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001)). There is a common law duty to preserve evidence, and a party can only be sanctioned for destroying evidence it had a duty to preserve. That duty arises when a party has notice that the party possesses evidence that is relevant to litigation or when a party should have known the evidence may be relevant to future litigation. Pre-litigation discussions or requests to inspect can also trigger a duty to preserve relevant evidence and it can be said that the obligation to preserve evidence runs first to counsel, who then has an ethical obligation to notify and advise their client on its obligations to safeguard and preserve the evidence relevant to the litigation on a continuing basis.

To support its contentions regarding the destruction of Covil policies and policy-related documents, the Receiver points to two points at which Penn National had notice as to the duty to preserve Covil's policies. First, as to the insurance industry's general awareness of the need to preserve historic occurrence-based general liability policies, the bankruptcy of Johns Manville, and subsequent litigation over the insurance proceeds that were contributed to the bankruptcy estate for use by the Manville Trust, as reported both in case law and by journalists, provided clear signals of the potential liability insurers faced in the wake of the asbestos litigation as early as 1986. *See infra* at 6-7. As a result, the insurance industry as a whole, and particularly those insurers who wrote occurrence-based general liability policies for insulation contractors, had notice that their insurance policies were potentially relevant evidence in future litigation related to long-tail liabilities, requiring preservation of those materials.

Even setting aside the insurance industry's awareness of long-tail liabilities raised by historic occurrence-based policies, here, Penn National continued to purge its insurance records

on an annual basis between 2018 and 2020, despite that Penn National faced subpoenas and active litigation regarding the historic occurrence-based insurance policies it issued to Covil. The existence of active requests for policy information both in the form of subpoenas and in the form of being named as a party to litigation involving the Covil asbestos cases and associated insurance established a duty on the part of Penn National to preserve its insurance policies.

b. Penn National Destroyed Historic, Occurrence-Based General Liability Policies With A Culpable State of Mind.

By failing to maintain documents relevant to pending and future asbestos personal injury and insurance litigation, Penn National had a culpable state of mind because it either intentionally or negligently destroyed the evidence. The destruction of the documentary evidence that Covil seeks significantly hampers Covil's Receiver's ability to reconstruct its insurance program and other information relevant to pending and future asbestos personal injury and insurance litigation.

The "culpable" state of mind requirement does not require willful destruction. Rather, the moving party need only show that the evidence was destroyed "knowingly, even without intent [to breach the duty to preserve it], or negligently." *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 109 (2d Cir. 2001). "[T]he Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of the sanctions." *Sampson v. City of Cambridge, Maryland*, 251 F.R.D. 172, 179 (D. Md. 2008) (citing *Silvestri*, 271 F.3d at 590).

Here, the evidence before the Court shows that Covil's conduct of destroying relevant documents satisfies the required minimum level of culpability needed for spoliation sanctions to be imposed. Because culpability encompasses everything from ordinary negligence to willful conduct, the culpable standard merely requires Penn National to have some degree of fault, which is the case in this matter. Whether the Court finds that Penn National was negligent, grossly negligent, or willful in destroying the evidence, the Court should conclude that Penn National had a culpable state of mind when it spoliated the evidence at issue.

c. The Destroyed Historic, Occurrence-Based General Liability Policies Were Relevant To The Receiver's Charge By This Court To Marshall Covil's Insurance Assets.

The last of the three independent elements, relevance to the party's claims, is also clearly present on these facts. Under Rule 401 of the South Carolina Rules of Evidence, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." "Evidence is relevant if it tends to establish or make more or less probable some matter at issue upon which it directly or indirectly bears." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Thus, any evidence which assists a fact finder at arriving at the truth of an issue is relevant. The determination of the relevancy of evidence is largely within the trial judge's discretion. *Strickland v. Coastal Design Assocs., Inc.*, 294 S.C. 421, 425, 365 S.E.2d 226, 228 (Ct. App. 1987).

Here, Covil has met its burden of showing the spoliated evidence is highly relevant to its case. The fact that Penn National destroyed such evidence is extremely damaging to Covil's ability to reconstruct its insurance policies. As such, Penn National should not profit or benefit from its failure to preserve this evidence. Of course, Covil has no way of knowing precisely what has been destroyed. However, there is reason to believe that the destroyed evidence would have aided Covil's position, which has suffered irreparable prejudice due to Penn National's spoliation.

By destroying relevant evidence, Penn National has succeeded in hiding significant evidence of its insurance coverage and attempted to deprive Covil of the opportunity to present critical evidence of insurance coverage. Thus, the Court should find that Penn National spoliated relevant evidence and issue an appropriate sanction to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field.

When a party destroys evidence, an inference may be drawn that the destroyed evidence would have been adverse to that party. *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*,

302 S.C. 390, 396 S.E.2d 369 (1990)). Over the years, courts have found numerous sanctions to be appropriate for the spoliation of evidence. Courts have allowed adverse inferences to be drawn from the loss or destruction of relevant evidence, dismissed cases or stricken pleadings, issued fines plus attorney's fees and applied almost every other sanction available for the failure to provide discovery.

Among the tools that judges may use to combat spoliation is the adverse inference presumption. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997). The presumption does not arise from the failure to present the evidence, but rather from the role that the spoliating party had in preventing it from being reviewed by the court. When a party destroys evidence, an inference may be drawn that the destroyed evidence would have been adverse to that party. *Gathers*, 311 S.C. at 83, 427 S.E.2d at 689 (citing *Kershaw Cty. Bd. of Educ.*, 302 S.C. at 395, 396 S.E.2d at 372).

Based on the evidence established by the Receiver regarding the existence of Covil insurance coverage issued by Penn National, and based on the evidence demonstrating Penn National's spoliation of evidence regarding the existence of the coverage, this Court should hold that Penn National issued primary general liability insurance coverage to Covil Corporation prior to the 1986-1987 policy period.

C. This Court Should Award Attorneys' Fees To Covil.

1. Covil is entitled to attorneys' fees as the prevailing party in this declaratory judgment action.

Covil seeks to recover its reasonable and necessary attorney's fees expended in prosecution of its declaratory judgment action. It is well-settled under South Carolina law that a prevailing insured in a declaratory action regarding coverage may recover attorney's fees. *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 471-72, 265 S.E.2d 38, 40-41 (1980); *see also Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 550, 243 S.E.2d 443, 444 (1978).

“There is no material difference in the legal effect between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgment is prosecuted to resolve the question of coverage.” *Id.* Accordingly, the South Carolina Supreme Court reasoned fees that are expended because of a declaratory judgment are themselves fees expended in defense of a claim. *See id.* And thus, said fees are recoverable. *See id.* “The legal fees incurred by [an insured], in successfully asserting [its] rights against [an insurer]’s attempt in the declaratory judgment action to avoid its obligation to defend, were damages arising directly as a result of the breach of the contract[ual]” obligation to defend. *Id.* at 550-51, 243 S.E.2d at 244 (citing *Cohen v. Am. Home Assur. Co.*, 255 Md. 334, 258 A.2d 225 (1969)).

Thus, in *Hegler*, the South Carolina Supreme Court laid down a rule that an insured who defends against a declaratory action by its insurer can recover fees. Two years later, in *Gordon-Gallup*, the court applied that holding to a situation wherein the insured “was forced to prosecute [an] action to enforce its rights under the policy with its insurer.” *Gordan-Gallup*, 274 S.C. at 472, 265 S.E.2d at 40. That is precisely what Penn Nation compelled Covil to do here.

These holdings have been reaffirmed and remain foundational jurisprudence in South Carolina. *See, e.g., First Fin. Ins. Co. v. Sea Island Sport Fishing Soc., Inc.*, 327 S.C. 12, 17, 490 S.E.2d 257, 259 (1997) (“We decline to overrule *Hegler*...”).

2. Covil is independently entitled to attorneys’ fees as a sanction for Penn National’s discovery misconduct and spoliation in this case.

The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw Cty. Bd. of Educ.*, 302 S.C. 390, 396 S.E.2d 369 (1990). Sanctions can range up to default or dismissal, and “[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg.*

Co., 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) (citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974)). The sanction should be aimed at the specific conduct of the party sanctioned. *Id.* at 198, 511 S.E.2d at 719 (citing *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990)).

A court may award reasonable expenses, including attorneys' fees, for a party's failure to make or cooperate in discovery. Rule 37(b), SCRCPP; *see, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 270, 762 S.E.2d 535, 537 (2014) (affirming award of attorneys' fees and costs as sanctions for refusal to comply with discovery rulings); *Arnal v. Arnal*, 363 S.C. 268, 297-98, 609 S.E.2d 821, 836 (Ct. App. 2005), *affd as modified*, 371 S.C. 10, 636 S.E.2d 864 (2006) (court imposed sanctions awarding attorneys' fees for discovery abuse); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (trial court granted attorneys' fees for failure to participate in discovery); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (trial court assessed attorneys' fees for discovery abuses); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (trial court awarded attorneys' fees for failure to comply with discovery order).

IV. CONCLUSION

For these reasons, Plaintiff Peter D. Protopapas, as the Receiver for Covil Corporation, respectfully requests that this Court enter judgment in favor of Covil on its declaratory judgment claim. The Receiver seeks a declaration as to the interpretation and meaning of the Penn National Policies as follows:

- The aggregate limit of liability for bodily injury damage in the Penn National Policies does not apply to operations claims, but applies to completed operations and products claims only;

- The aggregate limit of liability in the Penn National Policies does not apply to Covil Asbestos Suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite;
- Penn National bears the burden of proving any exclusion or limitation of coverage, including the application of the aggregate limit of liability to particular Covil Asbestos Suits and the exhaustion of the aggregate limit of liability in its policies;
- Penn National has not met its burden of proving that the bodily injury alleged in the twelve covered Asbestos Suits in which Penn National contributed to settlement payments – *Ashworth, Campbell, D’Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss* – are subject to and impair the Penn National Policies’ aggregate limit of liability;
- Penn National has not met its burden of proving that the 1986-1987 Penn National Policy contains the “Completed Operations Hazard and Products Hazard” Exclusion; and
- The Penn National Policies are required to pay or reimburse “all sums” that Covil, as the insured, becomes legally obligated or reasonably required to pay as damages by reason of Covil Asbestos Suits.

The Receiver also requests that this Court find that Penn National spoliated historic occurrence-based liability insurance policies and policy-related documents during the pendency of the Covil litigation and award sanctions against Penn National. Finally, the Receiver requests that (1) this Court award the Receiver his reasonable attorneys’ fees and costs as the prevailing party on his declaratory judgment claim and, independently, as a discovery sanction against Penn National for its discovery misconduct in this case and (2) set a briefing schedule for the submission of the Receiver’s attorneys’ fee petition.

December 5, 2022

Respectfully submitted,

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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

**DEFENDANT PENNSYLVANIA
NATIONAL MUTUAL CASUALTY
INSURANCE CO.'S PROPOSED
CONCLUSIONS OF FACT AND
LAW**

Defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), by and through undersigned counsel, respectfully submits that, after considering all evidence and legal argument submitted by Plaintiff and Penn National in connection with the trial of this matter, the jury should make the following findings of fact and the Court should make the following conclusions of law.

At the outset, Penn National objects to the requirement that it present the Court with its proposed findings of fact, as such findings are within the exclusive province of the jury which is to receive evidence from the parties at the forthcoming trial of this action and reach its own conclusions of fact based thereon. Penn National duly demanded a trial by jury in its March 31, 2021, Answer to the Complaint for Declaratory Judgment and Breach of Contract, and by submitting the following proposed findings of fact and conclusions of law does not in any manner waive its right to a trial by jury on all issues so triable.

I. FINDINGS OF FACT

A. The Parties

1. 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.¹

2. Covil effectively ceased operations in 1991, and its charter was thereafter administratively revoked.²

3. Pennsylvania National Mutual Casualty Insurance Company ("Penn National") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, that maintains a principal place of business in the Commonwealth of Pennsylvania, and is licensed and authorized to engage in the business of insurance in the State of South Carolina.³

4. By order dated November 2, 2018, Peter D. Protopapas was appointed as Receiver of Covil, and pursuant to the authority vested in him, commenced this action on or about April 27, 2020.⁴

B. The Complaint

5. On or about April 27, 2020, the instant action was commenced with the filing of a Complaint. With regard to Penn National, the Complaint sets forth the following causes of action, seeking the following specific relief:

Count I: Declaratory judgment asking that the Court 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 further declare that this

¹ Exhibit 1 - Complaint, ¶ 7.

² *Id.*

³ Exhibit 2 - Penn National Answer, at ¶ 2.

⁴ Exhibit 1 - Complaint, at ¶ 13.

obligation is unlimited and shall continue as long as here are Covil Asbestos Suits pending.⁵

Count II: Declaratory judgment asking the Court to declare 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.⁶

Count III: Declaratory judgment asking the Court to declare 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 combined \$1,000,000 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.

Plaintiff further seeks a declaration as to the interpretation of the Penn National policies, as follows:⁷

- 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 a 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;

⁵ Exhibit 1 - Complaint at ¶¶ 14-19.

⁶ *Id.* at ¶¶ 20-22.

⁷ *Id.* at ¶¶ 23-26.

- 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.

6. The Complaint does not address any specific underlying claim, or any specific facts of any specific claims that allegedly give rise to a duty on the part of Penn National to defend and/or indemnify Covil in connection with any particular legal action.

7. In its Answer to the Complaint, Penn National demanded a trial by jury on all issues so triable.⁸

C. The Penn National Insurance Policies

8. In connection with a prior litigation, *Finch v. BASF Catalysts LLC, et al.*, 16-CV-01077-CCE-JEP (M.D.N.C.), and in response to a motion to compel by the plaintiff therein, Covil produced a document dated May 25, 2018, listing the insurance companies that had issued policies to Covil, on a year by year basis, from 1967 through 1991 (“Covil Insurance History”). The Covil Insurance History further identifies the type of policy issued by each of Covil’s historical insurers and identifies the policies by number.⁹

9. Based upon Covil’s own document, Covil maintained commercial general liability insurance at all times from March 31, 1969 to March 31, 1992.¹⁰ There are no gaps in commercial general liability coverage shown in the Covil Insurance History.

10. Penn National appears on the Covil Insurance History list only twice, having issued commercial general liability policies to Covil with effective dates of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988.¹¹

11. The policy effective from March 31, 1986 to March 31, 1987 bears policy number 515502853-7. The policy effective from March 31, 1987 to March 31, 1988 bears policy number 515502853-8.¹²

12. The Penn National Policies each provide for a \$1,000,000 each occurrence limit of liability, with a \$1,000,000 aggregate limit of liability.¹³

⁸ Exhibit 2 - Penn National Answer, Wherefore Clause 4 at page 8.

⁹ Exhibit 3 - Subpoena to Penn National, dated May 29, 2018, Exhibits B at p. 2; Exhibit C.

¹⁰ *Id.*, Exhibit C.

¹¹ *Id.*, Exhibit C at p. 4

¹² Exhibit 3 - Penn National Subpoena Response, dated June 15, 2018.

¹³ *Id.*

13. In its Complaint filed in this action, Covil alleged that Penn National issued the two Penn National Policies. Covil does not allege that it purchased commercial general liability insurance from Penn National for any policy period other than for the policy periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988.¹⁴

14. Covil further alleged that the Penn National Policies provided for a \$1,000,000 each occurrence limit of liability, and a \$1,000,000 aggregate limit of liability.¹⁵

15. Section **III** of the Penn National Policies, entitled **Limits of Liability**, provides as follows:¹⁶

Coverage A—The total liability of the company for all damages, including damages for care and loss of services, because of **bodily injury** sustained by one or more persons as the result of any one **occurrence** shall not exceed the limit of **bodily injury** liability stated in the declarations as applicable to “each **occurrence**.”

Subject to the above provision respecting “each **occurrence**”, the total liability of the company for all damages because of (1) **bodily injury** included within the **completed operations hazard** and (2) all **bodily injury** included within the **products hazard** shall not exceed the limit of **bodily injury** liability stated in the declarations as “aggregate”.

16. Under the **Limits of Liability** provisions, the Penn National Policies direct that “[f]or the purposes of determining the limit of the company’s liability, all **bodily injury** and **property damage** arising out of continuous or repeated exposure to substantially the same general conditions shall be considered arising out of one **occurrence**.”¹⁷ Therefore, the occurrence limit in the Penn National Policies operates in the same manner as an aggregate limit.

¹⁴ **Exhibit 1** - Complaint, ¶ 8.

¹⁵ *Id.*

¹⁶ **Exhibit 5** - Penn National Policies, Bates 000004 and 000047.

¹⁷ **Exhibit 5** - Penn National Policies, Bates 000004 and 000047.

17. The Penn National Policies each contain a provision entitled **EXCLUSION (Completed Operations Hazard and Products Hazard)**, which provides as follows in clear and unambiguous terms:¹⁸

It is agreed that such insurance as is afforded by the Bodily Injury Liability Coverage and the Property Damage Liability Coverage does not apply to **bodily injury or property damage** included within the **Completed Operations Hazard** or the **Products Hazard**.

18. The Penn National Policies respectively define the “Completed Operations Hazard” and the “Products Hazard” as follows:¹⁹

“**completed operations hazard**” includes **bodily injury and property damage** arising out of the operations or reliance upon a representation or warrant made at any time with respect thereto, but only if the **bodily injury or property damage** occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. “**Operations**” include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the **named insured** under the contract have been completed,
- (2) when all operations to be performed by or on behalf of the **named insured** at the site of the operations have been completed, or
- (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The **completed operations hazard** does not include **bodily injury or property damage** arising out of

¹⁸ **Exhibit 5** - Penn National Policies 000001 and 000044.

¹⁹ *Id.* at 000036 and 000081.

- (a) operations in connection with the transportation of property, unless the **bodily injury or property damage** arises out of a condition in or on a vehicle created by the loading or unloading thereof,
- (b) the existence of tools, uninstalled equipment or abandoned or unused materials, or
- (c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations";

* * * *

"products hazard" includes **bodily injury** and **property damage** arising out of the **named insured's products** or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury or property damage** occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;

19. From Covil's very first tender of an asbestos claim under the Penn National Policies, Penn National has defended Covil against each and every claim and has made indemnity payments on behalf of Covil in fourteen (14) suits. Covil does not claim that Penn National has wrongfully refused to defend it against any specific claim.

20. The Section II commercial general liability coverage contains rating classifications that only apply to its installation operations. This means that Penn National only collected premium for Covil's operations exposures.²⁰

21. There were no product liability classifications codes or premium charges on the Penn National Policies. None were listed at the inception of the policy in the declarations schedules, and the Premium audits for the policies completed after expiration confirm that none were added during the policy period.²¹

²⁰ **Exhibit 5** - Penn National Policies, Bates 000002-000003, 000005 and 000045-000046, 000048

²¹ **Exhibit 6** - *Id.*; Penn National Underwriting File, Bates PNI-0350-351, and PNI-0390-391.

22. Covil maintained Products & Completed Operations insurance through insurers other than Penn National – namely, Imperial Casualty & Indemnity Co., under policy number 15GP04346.²²

D. Penn National's Document Retention and Production

23. At all relevant times, Penn National maintained a written document retention protocol that was in compliance with Pennsylvania corporate document retention laws, and Pennsylvania insurance regulations.

24. Penn National's written document retention protocol called for the company to retain non-workers compensation insurance policy documents for twenty-five (25) years from cancellation or non-renewal of the policy.²³

25. From the inception of its document retention protocol, decades prior to being involved in any asbestos coverage litigation, Penn National stored its historical insurance policies by policy number.²⁴ Policy numbers have been used to identify, organize, file and retrieve policies since the first liability policy issued in the United States in 1886. Policy numbers are an efficient method of identifying policies by line of business and by policyholder, whereas the names of companies often are similar and are easily confused. However, a policy number only identifies coverage the coverage in the policy for a specific policyholder, regardless of the similarity of the policyholder's name to any other company or business.

26. Penn National's system allows it to readily search for, identify, and obtain a copy of a policy of insurance once it is provided with a policy number.²⁵

²² **Exhibit 3** - Subpoena dated May 29, 2018, Exhibit C.

²³ **Exhibit 7** - Affidavit of Brent Reifsnyder, sworn to July 9, 2021, at ¶ 19.

²⁴ *Id.* at ¶ 8.

²⁵ *Id.*

27. The Penn National Policies at issue in this matter were originally located by Penn National approximately four years ago in response to a subpoena issued to Penn National on or about May 29, 2018. Attached to the subpoena was the Covil Insurance History, identifying Penn National as its insurer for the policy periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988.²⁶

28. Pursuant to that subpoena, and on or about June 15, 2018, Penn National located and produced copies of the Penn National Policies using the policy numbers provided. Penn National also conducted an electronic search of its records to determine whether any other commercial general liability policies were issued to Covil, and there were none.²⁷

29. Penn National further searched its databases for, amongst other things, insurance policies issued to 240 “Contractors” identified by the Plaintiff herein, “certificates of insurance or other documents evidencing insurance coverage” for any of 650 “Facilities” listed by the Plaintiff herein.²⁸

30. In addition to the 240 “Contractors” and 650 “Facilities”, Penn National further searched its databases for policy documents that related to any of the named defendants in the *Finch* matter, in connection with which the subpoena was served. The scope of Penn National’s search was for documents from 1954 to 1993.²⁹

31. As of June 11, 2021, Penn National’s Senior Home Office Claim Examiner, Boyd Wright, personally spent sixty-four (64) hours searching Penn Nationals’ records for additional policies of insurance related to the “Contractors,” “Facilities,” and *Finch* Defendants.³⁰

²⁶ Exhibit 3 - Subpoena dated May 29, 2018, Exhibit C.

²⁷ Exhibit 3 - Subpoena Response dated June 15, 2018; Affidavit of Boyd Wright

²⁸ Exhibit 8 - Affidavit of Boyd Wright, sworn to June 11, 2021, at ¶ 11.

²⁹ Exhibit 8 - Affidavit of Boyd Wright, sworn to June 11, 2021, at ¶ 11.

³⁰ *Id.* at ¶ 19.

32. As a result of his exhaustive search, only four (4) policies of insurance were identified as providing insurance coverage to “Contractors” within the date range of 1954 to 1993.³¹ One was an inland marine policy that does not apply to an asbestos exposure claim. The other three were commercial general liability policies issued to entities other than Covil for the policy periods of 3/16/1992 to 11/01/1994, 04/01/1992 to 04/01/1998, and 04/01/1991 to 04/01/1992.³²

33. In addition to Boyd Wright’s search, Penn National employee Brent Reifsnyder conducted a policy search for each of the above-referenced general liability policies that were issued to entities other than Covil. Mr. Reifsnyder’s search confirmed that pursuant to Penn National’s written document retention policy, the paper documents relating to the policy with a policy period of 03/16/1992 to 11/01/1994 were purged. However, Mr. Reifsnyder was able to locate paper policy documents relating to the policies with policy periods of 04/01/1992 to 04/01/1998 and 04/01/1991 to 04/01/1992.³³

34. The paper documents identified for the 04/01/1992 to 04/01/1998 and 04/01/1991 to 04/01/1992 general liability policies did not contain any information or documentation to indicate that these policies provided any type of coverage for Covil as an additional insured or otherwise, nor was there any indication that Covil had any relationship to the policies or to the respective named insureds under such policies.³⁴

35. As a result of his exhaustive search, no policies of insurance were located in relation to the 650 “Facilities” identified by the Plaintiff herein.³⁵

³¹ *Id.* at ¶ 13.

³² *Id.*

³³ *Id.* at ¶ 17.

³⁴ *Id.* at ¶ 18.

³⁵ *Id.* at ¶ 14.

36. As a result of his exhaustive search, no policies of insurance were located in relation to the *Finch* Defendants.³⁶

37. Covil's proffered expert, Charles Miller, agreed that prior to receiving a subpoena to produce the Penn National Policies, there would have been no reason for Penn National to either search for Covil-related policies, or initiate a litigation hold on any documents or materials related to Covil.³⁷

38. The subpoena that triggered Penn National's search was dated May 29, 2018, and called for a response on or before June 20, 2018.³⁸

39. Penn National's document retention policy required it to maintain documents for 25 years after the cancellation or non-renewal of a policy.³⁹

40. The final commercial general liability policy issued to Covil expired on March 31, 1988.⁴⁰

41. Twenty-five years from March 31, 1988 was March 31, 2013.

42. March 31, 2013 was five years, one month, and 30 days before the subject subpoena was issued.⁴¹

43. There is no insurance regulation, industry standard, or jurisprudential rule that suggests Penn National's method of cataloguing its historical insurance policies is ineffective or inappropriate.

³⁶ *Id.* at ¶ 16.

³⁷ **Exhibit 9** - Transcript of the deposition of Charles Miller ("Miller Deposition"), dated November 28, 2022, pg. 111, lines 1-8.

³⁸ **Exhibit 3** - Subpoena dated May 29, 2018.

³⁹ **Exhibit 10** - Penn National Document Retention Policy, PNI-0637-0639.

⁴⁰ **Exhibit 5** - Penn National Policy 515502853-8, Declaration Page.

⁴¹ **Exhibit 11** -

<https://www.timeanddate.com/date/durationresult.html?m1=03&d1=31&y1=2013&m2=05&d2=29&y2=2018&ti=on>, last visited December 3, 2022.

44. Covil's proffered expert witness on the issue of document retention, Charles Miller, agreed that there is no industry standard requiring insurance companies to maintain historical insurance policies in any particular manner or for any particular length of time.⁴²

45. Covil has never produced a single document to indicate that it purchased a commercial general liability policy from Penn National for any policy period other than from March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988.

46. Covil has not produced any business records, board meeting minutes, ledgers, premium invoices, receipts for paid premium, or cancelled checks for paid premium, indicating it purchased other commercial general liability policies from Penn National.⁴³

47. Covil has not produced or identified any excess or umbrella insurance policies indicating the existence of a Penn National commercial general liability policy issued to Covil, other than those identified for the policy periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988.⁴⁴

48. Covil has not produced any records from its insurance broker(s), such as quotes, binders, declaration pages, premium invoices, or certificates of insurance, indicating that any other commercial general liability policies were procured from Penn National.

49. No witnesses produced on behalf of Covil have testified that they possess personal knowledge of any other commercial general liability policies that were purchased from Penn National by Covil, or issued by Penn National to Covil.

50. Covil's proffered expert on policy reconstruction, Charles Miller, agreed that he is not aware of any secondary evidence to suggest the existence of any commercial general liability

⁴² Exhibit 12 - Miller Deposition, page 140, lines 5-9.

⁴³ Exhibit 13 - Miller Deposition, page 128, lines 6-18; page 143, lines 15-17.

⁴⁴ Exhibit 14 - Miller Deposition, page 129, lines 6-12; page 143, lines 15-17.

policies it purchased from Penn National other than the two policies identified by Penn National covering the policy periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988.⁴⁵

51. In addition to the absence of any evidence suggesting other commercial general liability policies were purchased from Penn National by Covil, for the seventeen (17) consecutive policy years prior to March 31, 1986, and for the four (4) consecutive policy periods following March 31, 1988, Covil was insured under commercial general liability policies issued by insurers other than Penn National.⁴⁶

52. Since the commencement of this action, Penn National has not destroyed or purged any policy related documents.⁴⁷

E. Penn National's Search Efforts

53. Penn National has undertaken substantial efforts to identify any additional commercial general liability policies that it may have issued to Covil.

54. In total, Penn National has responded to at least forty-eight (48) interrogatories, seventy-eight (78) requests for production of documents, and twenty-six (26) requests for admission, has produced for deposition Brent Reifsnyder, Penn National Director of Administrative Services, and has also produced three separate witnesses for Rule 30(b)(6) depositions of Penn National

55. As of June 11, 2021, Boyd Wright, Penn National's Senior Home Office Claims Examiner, personally spent sixty-four (64) hours searching Penn National's electronic and physical document repositories in search of material tending to suggest that Penn National issued

⁴⁵ Exhibit 15 - Miller Deposition, page 120, lines 1-5; page 143, lines 15-17.

⁴⁶ Exhibit 3 - Subpoena dated May 29, 2018, Exhibit C.

⁴⁷ Exhibit 16 - Affidavit of Brent Reifsnyder, sworn to December 22, 2021, at ¶ 9.

any commercial general liability policies to Covil other than those covering the policy periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988. He found none.⁴⁸

56. Pursuant to the Court's November 5, 2021 Order, Penn National provided unfettered access to personnel from Ellis & Winters LLP, to search Penn National records. Penn National further made its employees available for extensive interviews. Despite all of the efforts by Ellis & Winters LLP, it did not uncover any evidence of any commercial general liability policies issued by Penn National to Covil other than those covering the policy periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988.⁴⁹

57. No evidence exists to suggest that Penn National either issued any additional commercial general liability policies to Covil, or that Penn National destroyed any such policies in connection with its routine document retention protocols.

58. Penn National has engaged in each and every search effort directed by this Court, has responded to each and every discovery order of this Court, and has complied with each and every discovery order issued by this Court with the exception of the November 5, 2021 Order from which it has taken and perfected a lawful appeal, which remains pending before the South Carolina Court of Appeals.

II. CONCLUSIONS OF LAW

A. Interpretation of an Insurance Policy

1. In South Carolina, "[a]n insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts." *Canal Ins. Co. v. Nat'l House Movers, LLC*, 414 S.C. 255, 260, 777 S.E.2d 418, 421 (Ct. App. 2015) (citing *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008)). "Courts

⁴⁸ **Exhibit 8** - Affidavit of Boyd Wright, sworn to June 11, 2021, at ¶¶ 4, 11, 14, 15, 18, and 19.

⁴⁹ **Exhibit 17** - March 22, 2022 letter to The Hon. Jean H. Toal, at pages 1-3.

must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.” *Id.* at 594, 762 S.E.2d at 709-10 (quoting *Sloan Constr. Co. v. Cent. Nat’l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)). “The court cannot torture the meaning of policy language to extend coverage not intended by the parties.” *Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co.*, 410 S.C. 175, 183-84, 763 S.E.2d 598, 602 (Ct. App. 2014) (quoting *S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 105 (Ct. App. 2006) [internal quotation marks omitted]).

2. “Where the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Canal Ins. Co.*, 414 S.C. at 260, 777 S.E.2d at 421. “It is a question of law for the court whether the language of a contract is ambiguous.” *Id.* (quoting *S.C. Dep’t of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001)). “The construction of a clear and unambiguous contract is a question of law for the court to determine.” *Id.* (citing *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)). “Ambiguity may not be created in an insurance policy by singling out a sentence or a clause . . . [and] courts may not torture the ordinary meaning of language to extend coverage expressly excluded by the terms of a policy.” *Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 48, 524 S.E.2d 847, 850 (Ct. App. 1999) (quoting *Falkosky v. Allstate Ins. Co.*, 311 S.C. 369, 371, 429 S.E.2d 194, 196 (Ct. App.), *modified*, 312 S.C. 210, 439 S.E.2d 836 (1993) (internal citations omitted)).

3. The language of the Completed Operations Hazard and Products Hazard definitions and exclusion is unambiguous, valid, and enforceable. *See Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 48–49, 524 S.E.2d 847 (Ct. App. 1999); *Auto-Owners Ins. Co. v. Gordon & Assocs.*, Civil Action No. 9:15-4063-RMG, 2005 U.S. Dist. LEXIS 63588 at *7

(D.S.C. Aug. 22, 2016). Therefore, Penn National has no obligation to defend or indemnify Covil for any asbestos claims falling within the **Exclusion (Completed Operations Hazard and Products Hazard)**.

4. Each individual asbestos exposure case must be evaluated for coverage on a case by case basis, applying the specific facts involved in each individual claim to the terms, conditions, definitions, limitations, and exclusions of coverage under the Penn National Policies. *See Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 379 S.C. 573, 666 S.E.2d 897 (2008) (“In an action for a declaratory judgment, the obligation of a liability insurance company to defend and indemnify is determined by the allegations in the complaint. If the facts alleged in the complaint fail to bring a claim within the policy’s coverage, the insurer has no duty to defend.” [internal citations omitted]); *see also Auto-Owners Ins. Co. v. Madison at Park W. Prop. Owners Ass’n*, 495 F. App’x 383 (4th Cir. 2012) (“To qualify [as an Article III dispute], [i]t must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” [internal quotation marks omitted]); and *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 n.7, 127 S. Ct. 764, 166 L. Ed. 2d. 604 (2007) (“[A] litigant may not use a declaratory judgment action to obtain piecemeal adjudication of defenses that would not finally and conclusively resolve the underlying controversy.”).

B. Proving the Existence of “Lost Policies”

5. “[T]he proponent of a lost insurance policy must establish the fact of loss and the terms and conditions of the policies by clear and positive evidence.” *Klopman v. Zurich Am. Ins. Co.*, 233 F. App’x 256, 258 (4th Cir. 2007) (citing *In re Wallace & Gale Co.*, 275 B.R. 223, 230

(D. Md. 2002), *vacated in part on other grounds*, 284 B.R. 557 (D. Md. 2002), *aff'd*, 385 F.3d 820 (4th Cir. 2004) [internal quotation marks omitted]).

6. Courts evaluate lost policy claims “understanding that [a plaintiff’s] evidence must at least ‘leave no reasonable doubt’ as to the existence and the terms and conditions of the insurance policy he insists [the insurer] issued to him. *Klopman* at 259 (citing *Barranco v. Kostens*, 189 Md. 94, 54 A.2d 326, 328 (Md. 1947)).

7. In *Klopman*, the plaintiff produced a copy of the declarations page associated with the alleged policy and business ledgers showing two checks issued to his insurance agent for the exact amount of the premium provided on the declarations page. *Id.* at 259. He further produced evidence that the insurer defended and paid a claim under the alleged policy, including a settlement document reflecting the policy number, claim number, claimant, date of accident, and the amount of indemnity paid on the claim. *Id.* Based upon this secondary evidence, the Fourth Circuit held that the Plaintiff “produced sufficiently clear evidence for a reasonable fact-finder to conclude that [the insurer] issued [the] policy.” *Id.* at 260.

8. In contrast to the significant secondary evidence produced in *Klopman*, in *Pa. Nat’l Mut. Cas. Ins. Co. v. Tate Andale, Inc.*, Civil Action No. ADC-17-0670, 2019 U.S. Dist. LEXIS 3064 (D. Md. Jan. 7, 2019), a nearly identical situation to that at bar involving the same insurer and claims for coverage in relation to decades-old asbestos exposures, the District Court of Maryland held that the production of a check bearing a claim number, a policy number, the claimant, the insured and the date of the alleged accident, coupled with expert testimony on the subject of policy reconstruction, was *insufficient* to grant judgment to the alleged policyholder as a matter of law. In so holding, the District Court concluded that the evidence produced was “not sufficiently clear evidence for a reasonable fact-finder to conclude that [Plaintiff] issued [the]

polic[ies].” *Tate Andale* at *19. Notably, the District Court reached its conclusion despite the putative insured proffering a historical “schedule of insurance” reflecting six consecutive years of coverage from Penn National, which the District Court determined was admissible. *Id.* at 15-16.

9. In stark contrast to the evidentiary showings in *Klopman* and *Tate Andale*, Covil has not produced a single document to suggest that Penn National issued any commercial general liability policies to it beyond the two recognized and identified policies for the policy periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988. Accordingly, Covil cannot satisfy its evidentiary burden to provide the existence of a lost policy with “sufficiently clear evidence.”

C. Spoliation of Evidence

10. As a corollary, because Covil cannot demonstrate the existence of a policy with “sufficiently clear evidence,” there is no factual basis for the Court to conclude that Penn National lost or destroyed any evidence relating to such a policy, or to issue any sanctions for spoliation predicated upon such a finding.

11. “The spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a current or reasonably anticipated legal proceeding. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible.” *Hopper v. Air & Liquid Sys. Corp.*, 2019 S.C. C.P. LEXIS 5488, *10-11 (citing Black’s Law Dictionary (8th Ed. 2004)).

12. A party bringing a motion for sanctions based on spoliation bears the burden of establishing three (3) independent elements before the Court may determine which sanction, if any, is appropriate. These elements are:

- (1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed;

- (2) that the evidence was destroyed with a culpable state of mind; and
- (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Hopper v. Air & Liquid Sys. Corp., 2019 S.C. C.P. LEXIS 5488, *11 (citing *Hawkins v. College of Charleston*, 2013 WL 6050324 (4th Cir. 2013)).

13. As a threshold matter, Covil cannot be entitled to any sanctions for spoliation because it cannot establish with any degree of specificity that another policy of commercial general liability insurance was issued to it by Penn National in the first place, let alone that evidence of such a policy was destroyed.

14. Because Covil cannot demonstrate that any policy materials were destroyed by Penn National, Covil cannot demonstrate that Penn National “intentionally, recklessly, or negligently” destroyed evidence.

D. There is No Factual or Legal Basis for the Imposition of Discovery Sanctions.

15. SCRCP 37(b)(2) authorizes a Court to issue discovery sanctions “[i]f a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f)[.]” SCRCP 37(f) further instructs that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

16. Penn National has not failed to obey any order to provide or permit discovery, nor has it failed to obey an order entered under Rule 26(f). To the contrary, Penn National has adhered to and complied with each and every directive issued by this Court, with the exception of the November 5, 2021 Order requiring the digitalization of all Penn National policy data stored on microfiche, which is the subject of a pending appeal before the South Carolina Court of Appeals.

17. Because Penn National has complied with each and every court order, save the one presently contested on appeal, there is no factual or legal basis for the Court to impose any discovery sanctions against Penn National. This is particularly true with respect to any order directing that coverage exists for asbestos claims for each and every policy year of Covil's operations.

18. As previously noted, Covil has produced no evidence that it ever purchased a commercial general liability policy from Penn National for any policy period other than March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988. In the absence of any such secondary evidence to even merely suggest the existence of another commercial general liability policy, Penn National has engaged in thorough, diligent searches of its paper and electronically stored records, and has similarly not uncovered any evidence to suggest that any other policy of commercial general liability insurance was ever issued to Covil.

19. In view of Penn National's compliance with the Court's directives and diligent searches of its historical records in the only manner by which such records can be effectively searched, there is no factual or legal basis for the imposition of any sanction under SCRCF 37(b).

III. CONCLUSION

Penn National respectfully submits that the jury should reach findings of fact in accordance with the foregoing, and based upon those findings of fact, the Court should reach the foregoing conclusions of law, and accordingly dismiss Plaintiff's Complaint in its entirety.

Respectfully submitted, this the 5th day of December, 2022.

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