

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2020-CP-40-02098
Appellate Case No. 2022-001722

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

v.

Pennsylvania National Mutual Casualty Insurance Co. is the Appellant.

APPENDIX

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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

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

v.

Pennsylvania National Mutual Casualty Insurance Co. is the Defendant/Appellant.

NOTICE OF APPEAL

Pennsylvania National Mutual Casualty Insurance Co. (“Appellant”) appeals the order dated December 6, 2022 of the Honorable Jean H. Toal denying Appellant’s Motion to Confirm Jury Trial Demand, filed December 7, 2022. *See Exhibit 1.* Appellant received written notice of the lower court’s order denying its motion on December 6, 2022.

(signatures on following page)

Respectfully submitted,

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Exhibit 1

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff,

v.

Pennsylvania National Mutual Casualty Insurance
Co.; Sam J. Crain & Co., Inc.; and South Carolina
Property and Casualty Insurance Guaranty
Association,Defendants.IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CASE NO.: 2020-CP-40-02098

ORDER

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

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

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

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

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

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

AND IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE TO FOLLOW]



Richland Common Pleas

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

So Ordered

Jean H. Toal

Electronically signed on 2022-12-06 16:23:23 page 3 of 3

THE STATE OF SOUTH CAROLINA
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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

v.

Pennsylvania National Mutual Casualty Insurance Co. is the Defendant/Appellant.

PROOF OF SERVICE

I certify that I caused to have served the **Notice of Appeal** by depositing a copy of it in the United States Mail, postage prepaid, on December 7, 2022, addressed to all parties of record, as follows:

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Dec 14 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2020-CP-40-02098

Appellate Case No. 2022-001722

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

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,

Appellant.

MOTION TO DISMISS AND EXPEDITE

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

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

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

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

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

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

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

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

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

PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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December 14, 2022.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
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Jean Hoefer Toal, Chief Justice (Ret.)

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

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,

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**APPENDIX TO RESPONDENT’S
MOTION TO DISMISS AND EXPEDITE**

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

CASE NUMBER: 2020-CP-40-02098

Plaintiff,

PROPOSED SCHEDULING ORDER

v.

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

Defendants.

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

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

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

IT IS SO ORDERED.

[Signature Appears on following page.]



Richland Common Pleas

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

So Ordered

Jean H. Toal

Electronically signed on 2022-09-16 16:03:31 page 3 of 3

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

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

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

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

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

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

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

AND IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE TO FOLLOW]



Richland Common Pleas

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

So Ordered

Jean H. Toal

Electronically signed on 2022-12-06 16:23:23 page 3 of 3

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

Case Number:

Plaintiff,

In Re:

Vs.

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

Defendants.

TO THE ABOVE-NAMED DEFENDANTS:

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

Respectfully submitted,

RIKARD & PROTOPAPAS, LLCs/ Jescelyn T. Spitz

Jescelyn T. Spitz (SC Bar 101880)

Rikard & Protopapas, LLC

1329 Blanding Street Columbia, SC 29201

803.978.6111

jspitz@rplegalgroup.com

Attorney for the Receiver

This 27th Day of April, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

Case Number:

Plaintiff,

In Re:

Vs.

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

Defendants.

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

PARTIES

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

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

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

JURISDICTION

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

VENUE

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

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

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

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

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

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

Policies”), as follows:

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

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

FOURTH CAUSE OF ACTION
FAILURE TO PROCURE INSURANCE

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

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

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

SIXTH CAUSE OF ACTION
DECLARATORY JUDGMENT

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

PRAYER FOR RELIEF

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

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

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

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

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

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

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

Jescelyn T. Spitz

Jescelyn T. Spitz (SC Bar 101880)

Rikard & Protopapas, LLC

1329 Blanding Street

Columbia, SC 29201

803.978.6111

jspitz@rplegalgroup.com

Attorney for the Receiver

This 27th Day of April, 2020

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

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

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

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

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

IT IS SO ORDERED.

SIGNED this _____ day of _____, 2018.

JEAN TOAL, CHIEF JUSTICE (Ret.)



Richland Common Pleas

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

IT IS SO ORDERED.

s/ Jean H. Toal #2758

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

5. Denied.

6. Denied.

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

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

9. Denied.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GENERAL DENIAL

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

FIRST DEFENSE

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

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

SECOND DEFENSE

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

THIRD DEFENSE

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

FOURTH DEFENSE

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

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

FIFTH DEFENSE

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

SIXTH DEFENSE

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

SEVENTH DEFENSE

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

WHEREFORE, Penn National respectfully prays the Court as follows:

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

This the 1st day of June, 2020.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

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Attorneys for Defendant Penn National

CERTIFICATE OF SERVICE

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

This the 1st day of June, 2020.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

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Attorney for Defendant Penn National

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

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

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

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

WE SO STIPULATE:

s/Erik T. Norton

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Attorney for the Receiver

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

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

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

Respectfully submitted,

This 6th day of November 2022

s./ Peter D. Protopapas

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Receiver

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

Case Number: 2020-CP-40-02098

Vs.

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

Defendants.

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

I. PROCEDURAL HISTORY

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

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

The Receiver brought causes of action against:

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

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

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

COURT OF APPEALS CHRONOLOGY

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

SUPREME COURT CHRONOLOGY

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

II. STATUS OF DISCOVERY

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

A. Outstanding Depositions

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

B. Outstanding Documents

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

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

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

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

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

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

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

The Receiver respectfully requests that the Court set dates for:

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

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

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

Respectfully submitted,

s/Jescelyn T. Spitz
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Attorney for the Receiver

This 6th Day of September, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

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

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

RESPONSE TO THE RECEIVER'S STATUS REPORT

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

(1) Factual Issues for Trial by Jury:

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

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

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

(2) Jury Issues as to Alleged Spoliation:

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

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

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

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

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

GOLDBERG SEGALLA LLP

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Attorneys for Defendant Penn National

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

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

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

Plaintiff,

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

v.

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

Defendants.

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

FACTS AND PROCEDURAL BACKGROUND

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

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

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

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

ARGUMENT

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

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

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

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

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

Id. (emphasis added).

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

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

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

CONCLUSION

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

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

GOLDBERG SEGALLA LLP

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

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

Defendants.

Case No. 2020-CP-40-02098

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

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

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

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

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

4. Admitted, upon information and belief.

5. Denied.

6. Denied.

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

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

9. Denied.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GENERAL DENIAL

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

FIRST DEFENSE

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

SECOND DEFENSE

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

THIRD DEFENSE

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

FOURTH DEFENSE

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

FIFTH DEFENSE

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

SIXTH DEFENSE

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

SEVENTH DEFENSE

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

WHEREFORE, Penn National respectfully prays the Court as follows:

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

This the 31st day of March, 2021.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

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

dharris@goldbergsegalla.com

Brady A. Yntema (N.C. Bar No. 25771)

byntema@goldbergsegalla.com

701 Green Valley Road; Suite 310

Greensboro, NC 27408

Telephone: 336.419.4900

Facsimile: 336.419.4950

Attorneys for Defendant Penn National

November 7, 2022

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

The Honorable Jean H. Toal
c/o Ms. Zitel Poswal
Judicial Law Clerk
South Carolina Court Administration
1220 Senate Street, Suite 221
Columbia, SC 29201

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

Dear Chief Justice Toal:

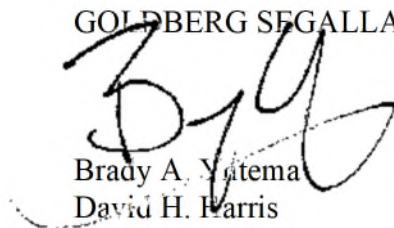
I am writing on behalf of Pennsylvania National Mutual Casualty Insurance Company ("Penn National") in advance of the Pre-Trial Hearing currently scheduled to be conducted on Monday, November 14, 2022. It is expected that the Receiver will request an "evidentiary" hearing on issues involving alleged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

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

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

Sincerely,

GOLDBERG SEGALLA, LLP


Brady A. Yntema
David H. Harris

cc: All Counsel of Record

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

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

Good morning, Mr. Yntema.

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

Best,

Zitel Poswal

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

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

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

Dear Ms. Poswal:

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

Thank you.

Jane Carter

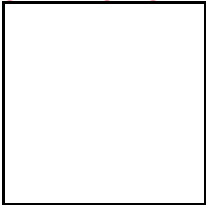
Jane Carter | Legal Assistant

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STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

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

Defendants.

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

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

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

This 6th day of November 2022

s./ Peter D. Protopapas

Peter D. Protopapas, Esquire SC Bar 68304

Rikard & Protopapas, LLC

2110 N. Beltline Blvd

Columbia, SC 29204

803.978.6111

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

Receiver

A0083

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I N D E X

| <u>Witness/Description</u>  | <u>Page No.</u> |
|-----------------------------|-----------------|
| Status Conference . . . . . | 3               |
| Certificate Page. . . . .   | 18              |

NO EXHIBITS INTRODUCED.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

25 THE COURT: Have they been paid?

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

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

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

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

8 (A PAUSE.)

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

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

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

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

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

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

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

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

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

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

2 Has Ellis and Winters been paid?

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

14 THE COURT: Okay. All right.

15 (A PAUSE.)

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

22 THE COURT: Oh, yeah.

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

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

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

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

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

14 THE COURT: No comment.

15 MR. SMITH: Thank you.

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

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

20 THE COURT: Yes, sir, say again?

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

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

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

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

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

20 (A PAUSE.)

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

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

7 (A PAUSE.)

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

18 MR. PROTOPAPAS: Thank you, Your Honor.

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

22 MR. PROTOPAPAS: Nothing further, Your Honor.

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

24 MR. YNTEMA: Your Honor.

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

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

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

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

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

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

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

22 THE COURT: What's that?

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



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

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

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

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

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

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

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

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

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

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

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

4 Anything further?

5 MR. PROTOPAPAS: No, ma'am.

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

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

**CERTIFICATE**

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

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

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

COLUMBIA, SOUTH CAROLINA

NOVEMBER 6TH, 2022

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

11  
 12 November 14, 2022  
 Columbia, South Carolina

13  
 14 B E F O R E :

15 The Honorable Jean H. Toal, Judge

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

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

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

22

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

25

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E X H I B I T S

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

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

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

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

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

14          MR. DAVIS: Yes, Your Honor.

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

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

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

25          I want to be sure that you understand that that

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

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

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

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

21       Mr. Protopapas, who speaks for you?

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



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

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

13 MR. NES: Thank you, Your Honor.

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

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

24 THE COURT: Stop right there.

25 MR. NES: Sure.

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

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

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

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

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

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

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

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

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

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

5           THE COURT:   Okay.   And so what happened?

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

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

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

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

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

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

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

10          THE COURT:   I got you.

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

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

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

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

23          MR. NES:   Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

21 THE COURT: And what happened then?

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

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

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

10 THE COURT: All right.

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

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

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

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

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

19 THE COURT: Coverage for what?

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

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

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

10          THE COURT:   All right.

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

12          MR. NES:   That's right.

13          THE COURT:   What then happened?

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

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

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

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

9 THE COURT: This current case --

10 MR. NES: Yes.

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

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

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

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

22 THE COURT: Right.

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



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

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

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

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

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

19          MR. NES: They were, Your Honor.

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

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

1 THE COURT: Well, do the --

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

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

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

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

16 MR. PROTOPAPAS: Zurich.

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

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

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

6 THE COURT: Right.

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

9 THE COURT: Got you. Okay.

10 All right. Continue.

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

14 THE COURT: It hasn't been litigated.

15 MR. NES: Exactly.

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

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

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

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

9 THE COURT: All right.

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

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

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

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

11 THE COURT: Now stop right there.

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

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

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

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

4 MR. NES: That's gonna --

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

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

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

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

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

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

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

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

10 MR. NES: That's correct.

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

15 MR. NES: That's correct.

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

17 MR. NES: Yes, Your Honor.

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

22 MR. NES: Yes, Your Honor.

23 THE COURT: All right.

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

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

1 underlying asbestos counsel.

2 THE COURT: Covil's underlying asbestos counsel.

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

5 MR. NES: Yes.

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

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



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

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

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

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

1 believe are now ripe for ruling.

2 THE COURT: All right.

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

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

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

16 THE COURT: Right.

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

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

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

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

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

12 THE COURT: General liability policies.

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

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

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

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

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

12          THE COURT: Okay.

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

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

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

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

7 THE COURT: This was in November of 2021?

8 MR. NES: This is November of 2021.

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

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

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

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

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

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

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

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

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

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

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

5 THE COURT: What?

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

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

16 THE COURT: What kind of things?

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

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

1 MR. NES: That's right.

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

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

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

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

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

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

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

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



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

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

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

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

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

15          MR. NES: That's correct.

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

20          MR. NES: That's right.

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

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

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

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

3             MR. NES:   That's precisely correct.

4             THE COURT:   Okay.

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

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

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

15            THE COURT:   A list of the numbers?

16            MR. NES:   That's right.

17            THE COURT:   So just print out the numbers?

18            MR. NES:   That's exactly right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5           MR. NES:    That's right.

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

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

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

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

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

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

8             MR. NES: Yes.

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

14            MR. NES: That's exactly right.

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

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

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

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

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

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



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

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

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

1 THE COURT: 61,000?

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

3 THE COURT: For fourteen claim files?

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

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

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

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

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

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

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

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

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

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

1 be internal correspondence.

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

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

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

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

12 THE COURT: No, no.

13 MR. NES: I'm sorry.

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

20 MR. NES: That's correct.

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

22 MR. NES: Yes, Your Honor.

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

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

1 applies outside of Mr. Brent Reifsnyder.

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

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

12 THE COURT: Okay. All right.

13 MR. NES: Thank you, Your Honor.

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

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

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

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

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

21 THE COURT: All right.

22 All right. Mr. Yntema.

23 MR. YNTEMA: Good morning, Your Honor.

24 THE COURT: Good morning.

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

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

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

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

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

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

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

13          THE COURT:  Well --

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

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

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

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

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

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

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

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

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

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

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

3 MR. NES: Yes, Your Honor.

4 THE COURT: Thank you so much.

5 Court will be at ease.

6 (Recess taken at 11:17 AM.)

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

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

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

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

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



1 of that Penn National could search for.

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

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

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

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

1 a subpoena --

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

5 MR. YNTEMA: Yes, with --

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

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

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

15 MR. YNTEMA: That's correct.

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

20 MR. YNTEMA: No.

21 THE COURT: Why not?

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

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

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

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

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

13 MR. YNTEMA: Yes, Your Honor.

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

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

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

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

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

6 THE COURT: Yes.

7 MR. YNTEMA: Yes.

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

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

13 THE COURT: You had policies.

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

18 MR. YNTEMA: No.

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

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

1 understand the question.

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

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

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

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

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

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

3 MR. YNTEMA: Covil ceased operations --

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

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

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

9 MR. YNTEMA: I'm going to.

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

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

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

1 business or not, does it?

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

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

13 Am I not --

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

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

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

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

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

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

20 THE COURT: Well --

21 MR. YNTEMA: There will be another --

22 THE COURT: Mr. Yntema?

23 MR. YNTEMA: Yes.

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



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

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

17 MR. YNTEMA: Like what?

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

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

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

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

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

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

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

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

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

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

25 MR. YNTEMA: We opened the insurance repository to

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

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

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

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

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

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

1 of the insured. That was not done.

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

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

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

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

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

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

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

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

4 THE COURT: Mr. Yntema?

5 MR. YNTEMA: Yes.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 1986 through 1988.

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

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

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

1 National would be producing its claims files.

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

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

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

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

17 THE COURT: Well, that's --

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

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

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

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

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

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

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

10 THE COURT: This morning?

11 MR. YNTEMA: This morning?

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

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

18 THE COURT: Uh-huh.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

21 THE COURT: Right. No question about that.

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

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

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

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

5           MR. YNTEMA: I don't --

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

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

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

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

16          THE COURT: Well, you could --

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

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

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

13 Is that what you're saying?

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

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

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

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

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

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

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

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

1     you not?

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

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

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

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

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

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

1 THE COURT: Well, whatever.

2 MR. YNTEMA: Sure.

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

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

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

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

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

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

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

1 to do it that way, right?

2 MR. YNTEMA: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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



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

2 THE COURT: All right, sir.

3 Your reply.

4 MR. NES: Yes, Your Honor.

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

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

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

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

11 MR. NES: How's that, Your Honor?

12 THE COURT: Perfect.

13 MR. NES: So let's start with -- what I'd like to  
14 do is walk through a couple of issues that I think the  
15 record is -- is incorrect at this point and correct that  
16 and then finally what it is that we are specifically  
17 asking for.

18 First, when we talk about the spoliation timeline,  
19 the Court correctly identified our concern is that as  
20 of June of 2018 Penn National knew there were asbestos  
21 cases being filed against Covil and that it issued  
22 Covil insurance policies. It did not yet know the  
23 universe of policies at issue, but it did not issue a  
24 litigation hold and that error is directly in front of  
25 this Court because as Mr. Yntema said, his witness --

1 Penn National's witness last week said I don't know why  
2 Covil's -- the '86 to '87, '87 to '88 policies exist  
3 today, they shouldn't, and that's exactly the problem  
4 that we face, is that if those policies were pulled from  
5 the records from the automatic destruction because the  
6 policy number was identified and then 2018 rolls around  
7 and any other Covil policy that we just didn't have a  
8 number for had been identified, they very well may have  
9 been pulled and destroyed, and there's no system that  
10 Penn National can show us that would have identified the  
11 policy, that they would have saved the policy, that they  
12 would have QC'd their checks to make sure that that  
13 policy wasn't destroyed.

14 So the last area that we can ask for to try to  
15 understand why it is that the documents were or were not  
16 destroyed in 2018 is this request. All documents and  
17 communications related to the process of identification,  
18 collection and disposal of insurance policies and  
19 policy-related documents pursuant to Penn National's  
20 document retention or purge policies.

21 In other words, if there are e-mails in 2018  
22 between Brent Reifsnnyder and his staff saying guys,  
23 here's the list for this year, here's the ones to go  
24 pull and destroy, that's a completely relevant document.  
25 That would show either Penn National's policy was being

1 followed and no Covil policies are on there, Penn  
2 National's policy wasn't being followed or Penn National's  
3 policy was being followed and there was a Covil policy,  
4 but they've refused to even give us those basic e-mails.

5 So, first and foremost, we are asking this Court to  
6 compel them to produce their correspondence to the extent  
7 it still exists related to the document destruction in  
8 2018, 2019, 2020 and 2021, and if the answer is we simply  
9 don't have those anymore because we didn't issue a  
10 litigation hold, then we want that answer, too, but we  
11 are -- we believe that with respect to topic -- Request  
12 Number 11 that's a narrow request and it's directly  
13 related to the spoliation issues that are going to be at  
14 issue four weeks from now. Number 1.

15 Number 2 is the fourth request for production of  
16 documents, and this was our most recent motion to compel,  
17 and on page 3 of our motion to compel we outline the  
18 topics that we requested in the fourth motion to compel  
19 and these topics are directly targeted at how their  
20 document retention policy works, how it itself is QC'd  
21 and the litigation holds, how the litigation holds are  
22 issued and QC'd, again, relevant to the issues that are  
23 gonna be tried in four weeks and very narrowly tailored.

24 Today we have not heard a single argument that  
25 these are irrelevant, that they're overly burdensome.

1 The only argument is a vague reference to these requests  
2 being issued after this Court's May 5th order, which  
3 they say is on appeal, but these requests do not relate  
4 to that order, therefore, they are not stayed and they  
5 are relevant to the issues looking back.

6 Finally, as this Court was inquiring of Mr. Yntema,  
7 we have claim files, basic claim files, from Mr. Wright,  
8 who is a claims handler at Penn National, for fourteen  
9 asbestos claims that they paid on. They have no argument  
10 that they're irrelevant, they have no argument that  
11 they're overly burdensome. They've, in fact, said now  
12 that they will produce it, but I want the record to be  
13 clear today at this hearing is the first time I've heard  
14 they will produce documents on December 1st.

15 This is what their footnote says in response to our  
16 motion to compel. The receiver's motion to compel also  
17 asks this Court to compel Penn National to supplement  
18 its production to Request Number 4 of the receiver's  
19 first set of requests for production by December 1st.  
20 That is what our request was. Their answer is Penn  
21 National is in the process of compiling the requested  
22 documents for production, which will include approximately  
23 61,000 pages and anticipate being able to comply with  
24 this request.

25 So even today when we've filed the motion and they

1 have no substantive response, they have not committed  
2 to producing the documents by December 1st. If that is  
3 the commitment that's being made, that's certainly what  
4 we've been asking for with the motion to compel. So  
5 those are the issues with respect to spoliation and the  
6 claims files.

7       There was lots of discussion about whether or not  
8 -- or the Court specifically asked Mr. Yntema what is  
9 preventing Penn National from doing the review that was  
10 ordered on May 5th. Just to be clear, the Court already  
11 ordered Penn National to digitalize all of their historic  
12 policies. It was based on a recommendation that Ellis  
13 and Winters made, not the receiver. Ellis and Winters  
14 made that recommendation, the Court adopted it and  
15 ordered that to be done May 5th. Confidentiality was  
16 addressed at that time. Confidentiality can easily be  
17 address by the receiver and the receiver's counsel  
18 signing confidentiality agreements.

19       The reason that this -- the reason that Penn  
20 National is not complying with the order is they have  
21 just said it's on appeal, we have no obligation to do  
22 anything with respect to the order. That is the only  
23 reason. It is not a technical reason, it is not a  
24 financial reason, it is not a manpower reason. It is  
25 simply their argument that it's on appeal, so we don't

1 have to do anything. And while we don't think that  
2 issue is correct, it is not the subject of our two  
3 motions to compel currently pending, nor is it an issue  
4 at trial.

5 The final issue I'd like to bring up is that  
6 opposing counsel says we had a deposition last week  
7 and Covil issued thirty-two topics with respect to the  
8 continued deposition of Penn National. They unilaterally  
9 said we will only put up a witness on fourteen -- I'm  
10 sorry, fifteen of your thirty-two topics.

11 Your Honor, because -- frankly because we have been  
12 in front of this Court on all of the motions to compel  
13 that we have, including the two that we're arguing about  
14 today, we simply chose not to burden the Court with one  
15 more motion to compel, but so the record is clear they  
16 simply unilaterally said we will not show up and answer  
17 questions with respect to seventeen of your thirty-two  
18 topics.

19 In response, we said okay, well, we're entitled  
20 to take the deposition of Mr. Wright, who is the claims  
21 handler. If you're not gonna put him up as a 30(b)(6),  
22 we're entitled to take him as an individual witness.  
23 In a letter, Mr. Yntema said we would have a response to  
24 that by November 11th. We still don't have deposition  
25 dates. We would like a deposition date for Mr. Wright

1 before December 1st so that we can adequately prepare for  
2 trial. He is listed as one of their fact witnesses. We  
3 certainly want that.

4 So, again, to recap, Your Honor, the main issues  
5 that we want are a motion to compel with respect to  
6 Request Number 11, that they have to search for  
7 responsive e-mails and communication on their document  
8 destruction, and we will narrow it from 2018 to the  
9 present.

10 Number 2, we want the documents that are in our  
11 fourth request for production to be produced, again,  
12 by December 1st. And then, finally, the claim files,  
13 which they've now agreed to.

14 And if the Court is inclined, we would like an  
15 order that Boyd Wright needs to at least have deposition  
16 dates provided because Mr. Yntema brought up that  
17 deposition issue and I think just so -- to clarify for  
18 everyone, it would be helpful if the Court notes a  
19 need for that.

20 Unless the Court has any other questions.

21 THE COURT: Thank you.

22 Mr. Yntema, I'm gonna come back one more time to  
23 you on each of these and see where we stand, and the  
24 first is the Request Number 11 for the e-mails and other  
25 correspondence that touches on the topic of destruction

1 of the -- the destruction policy, and that is from 2018  
2 to the present.

3 They now ask and they're trying to prevent spoliation  
4 and that's why they ask for it or address the issue of  
5 whether spoliation has taken place. So they're asking  
6 for those specific records and their contention is you  
7 have not responded to that one way or another.

8 What's the scoop?

9 MR. YNTEMA: Again, so Your Honor understands, it  
10 was our understanding that on appeal that the case was  
11 stayed. The --

12 THE COURT: Do you understand the appeal to stop  
13 all discovery?

14 MR. YNTEMA: Well, what I think Your Honor should  
15 know and I think that was -- was spelled out in our  
16 briefing, is that I had communicated with receiver's  
17 counsel, they had noticed two depositions or at least  
18 a 30(b)(6) of Penn National on various sundry topics  
19 early in the -- after the Court's May 5th order and also  
20 asked for Scott Maier's deposition individually, and in  
21 those e-mails that I think are a part of our papers to  
22 the Court for today's hearing, we specifically said we  
23 deem those depositions to be stayed until our appeal is  
24 had.

25 THE COURT: And so your answer on this Request



1 Number 11 is that it's stayed and that's the reason  
2 you're not gonna respond.

3 MR. YNTEMA: And then in August when the North  
4 Carolina Court of Appeals said no, we are dismissing  
5 this appeal and then we filed a motion en banc, but  
6 right after the notice -- right after the Court of  
7 Appeals spoke as to our appeal, we received a letter  
8 from Mr. Nes saying you must comply with our request for  
9 production of documents -- fourth request for production  
10 of documents immediately. We thereafter filed the --  
11 the motion for re-hearing en banc with the Court of  
12 Appeals; so, therefore, that the case is still currently  
13 on appeal.

14 And my memory serves me that I did mention that  
15 the -- the motion for rehearing en banc, at least I had  
16 mentioned to the receiver that we had filed it, and it  
17 was our impression that the deposition -- Rule 30(b)(6)  
18 depositions and the fourth request for production of  
19 documents was on stay during the appeal.

20 THE COURT: So then the answer directly again to my  
21 question on the first request they're making that Request  
22 Number 11 be answered, which is for correspondence,  
23 e-mails and otherwise relating to the destruction list,  
24 this is what's gonna be destroyed and so forth, you are  
25 saying that your ability or your response to that it is

1 stayed by your request for a re-hearing of the dismissal  
2 of your appeal before the Court of Appeals; is that  
3 correct?

4 MR. YNTEMA: The fact that the case is currently  
5 on appeal, yes.

6 THE COURT: All right. The second is for the  
7 fourth request for production. Their contention is that  
8 that is not stayed by the May 5th order, it's something  
9 separate and apart from that, and what is your response  
10 to that?

11 MR. YNTEMA: It's appealed. As far as leading up  
12 to today, that the appeal is in place and it's still  
13 pending on appeal.

14 THE COURT: Specifically how does the appeal relate  
15 to the fourth request for production and the May 5th  
16 order that I issued? Tell me what the relationship --  
17 you're appealing my May 5th order, correct?

18 MR. YNTEMA: Correct.

19 THE COURT: What in my May 5th order specifically  
20 is directed towards what they want in the fourth request  
21 for production?

22 MR. YNTEMA: My understanding is that it goes to  
23 the document retention issues.

24 THE COURT: Sir?

25 MR. YNTEMA: My understanding is that the fourth

1 request for production goes to document retention issues.

2 THE COURT: Well, I mean, we aren't -- we aren't  
3 talking documentation in general. We're talking about  
4 specific things that were ordered in the May 5th order  
5 and what I am trying to get you to do is relate to  
6 something that was specifically ordered and compelled  
7 in that May 5th order.

8 MR. YNTEMA: It was our position and our  
9 understanding that -- that the stay applied to the  
10 fourth request of production documents that were served  
11 on Penn National prior to our appeal --

12 THE COURT: So anything that was served on Penn  
13 National is stayed whether it was specifically discussed  
14 in the May 5th order or not? Is that your contention?

15 MR. YNTEMA: We received no communications otherwise  
16 until August --

17 THE COURT: Well, I'm communicating with you about  
18 my order. That's what we're trying to deal with right  
19 now.

20 MR. YNTEMA: Certainly, Your Honor.

21 THE COURT: Would you agree with me that the fourth  
22 request for production is not directly discussed in the  
23 May 5th order?

24 MR. YNTEMA: I don't believe it is, Your Honor.

25 THE COURT: Sir?

1 MR. YNTEMA: I don't believe it is, Your Honor.

2 THE COURT: It isn't. It wasn't. And they are  
3 asking that you respond to that fourth request for  
4 production. It's not stayed by the -- my May 5th order.  
5 I mean, by the appeal of my May 5th order. The appeal  
6 relates specifically to that order.

7 MR. YNTEMA: Judge --

8 THE COURT: You're saying despite the fact that the  
9 order doesn't mention it, that your responsibility to  
10 reply and give them what they want in that fourth request  
11 for production is stayed because you're appealing my  
12 May 5th order; is that right?

13 MR. YNTEMA: And in addition to the Rule 30(b)(6)  
14 notices as well.

15 THE COURT: All right, sir.

16 And then with regard to the claim files for fourteen  
17 years, you're in the process and anticipate compliance.  
18 They have agreed to December the 1st here in this  
19 courtroom today. Of course, I'm going to be sure that's  
20 clear as a crystal ball that that is by consent that you  
21 have agreed to provide those files and they're gonna be  
22 provided on December the 1st, correct?

23 MR. YNTEMA: Correct. If not before.

24 THE COURT: Sir?

25 MR. YNTEMA: If not before.

1 THE COURT: All right, sir.

2 And then with respect to the deposition that was  
3 had last week, one of the things that arose from that  
4 was their request for a deposition date for Mr. Wright.

5 Are we gonna have a deposition date for Mr. Wright  
6 or do I have to order that as well?

7 MR. YNTEMA: I don't think Your Honor has to order  
8 that, and that may be something that fell through on --  
9 through my office. I wanted to get dates to Mr. Nes  
10 by November 11th, and no disrespect to Mr. Nes at all,  
11 I am working to get dates for Mr. Wright. I should  
12 have those. I'm actually going to be with Mr. Wright  
13 tomorrow, so I will get dates for Mr. Wright's deposition  
14 to Mr. Nes tomorrow at the latest.

15 THE COURT: All right. Now explain to me when you  
16 had that deposition last week you simply projected that  
17 of the thirty-two topics we are not going to respond  
18 except to fourteen or sixteen of them.

19 How is that justified in terms of the rules of  
20 discovery? How -- how can you just do that?

21 MR. YNTEMA: I was finding a way to address our  
22 concerns as to all of those topics. Our concerns --  
23 okay. So it was fifteen topics that -- that we agreed  
24 to provide two Penn National designees for deposition.

25 THE COURT: Well, they asked you for thirty-two.

1 How do you -- how do you just get to do that with --  
2 it's an agreed upon deposition. They have the ability  
3 to let you know what they're gonna examine on. That's,  
4 interestingly enough, not really specified in the rules  
5 as closely as you may think, but it is what most people  
6 do is they tell you exactly what they're gonna examine  
7 on so they don't have to go back and forth to the judge  
8 about the pertinence of what they examine on because a  
9 deposition as we know, a discovery deposition, is not  
10 governed by issues of relevancy or the like. It's if  
11 it will produce or lead to the production of relevant or  
12 admissible information.

13 So how -- what was your justification for just  
14 deciding that you weren't gonna respond to some of the  
15 thirty-two topics?

16 MR. YNTEMA: As far as those other topics, beyond  
17 the first fifteen, beyond those first fifteen we had  
18 written a lengthy letter to Mr. Nes stating our  
19 objections. I forget the date of the letter, but we  
20 stated our objections many weeks ago as to -- as to  
21 the Rule 30(b)(6) topics that we took issue with and  
22 we had a back and forth with Mr. Nes. You know, we  
23 had communications back and forth as far as written  
24 communications, and at that point we made a decision  
25 that we're not going to just simply file a motion to

1 quash or protective order and bring this before the  
2 Court, but to provide our designees on these particular  
3 topics and maintain and preserve objections to the  
4 remaining.

5 THE COURT: Well, if you have objections and they  
6 decide that they're not going to honor your objections,  
7 then what you have to do is to move the trial judge to  
8 decide whether to quash a portion of the questions that  
9 they propose to ask or not, but that was not done,  
10 correct?

11 MR. YNTEMA: We did not pursue a motion to quash  
12 or a protective order for the reasons I stated. I  
13 didn't -- if I threw a wrench in that, it would have  
14 delayed both of those depositions from proceeding on  
15 any topics, and I don't think that was -- I didn't think  
16 at the time that was necessary.

17 THE COURT: Do you think that's something you'd be  
18 permitted to do under the aegis of this appeal of my  
19 May 5th order just to kind of take it unto yourself  
20 and decide what discovery you're gonna answer and what  
21 you're not gonna answer in connection with a set date  
22 for a trial on December the 14th?

23 MR. YNTEMA: No.

24 THE COURT: All right, sir. Well, I want to be  
25 sure I understand the universe of what I'm gonna be

1 dealing with. I have moved heaven and earth to get a  
2 time to have this nonjury trial on December the 14th.  
3 I don't want to have to go through all of the headache  
4 of getting ready for something like that only to be told  
5 at the last minute that you have decided for whatever  
6 reason that you're not obligated to go forward with that  
7 trial, so I need to understand exactly what we're talking  
8 about here.

9 MR. YNTEMA: Okay. So are we talking about the  
10 jury/nonjury issue? I mean, is that --

11 THE COURT: We're talking about whatever it is  
12 that would prevent you from trying a nonjury matter  
13 involving a declaratory judgment action, which I have  
14 set for trial on December the 14th. What I have said  
15 about that is if there are other matters that do not  
16 involve a declaratory judgment involving the declaration  
17 with respect to the issues that are presented in that  
18 that deal with the policy and its coverage, which is  
19 very clear under our law is not a jury issue, I need  
20 to know if we're gonna at the last minute say hey, none  
21 of this can go forward because, guess what, it's all a  
22 jury issue.

23 I have tried to very carefully carve out matters  
24 for trial on December the 14th given the posture of all  
25 of the parties and the fact that none of this could go



1 forward if we get into the months of January through  
2 June of next year for the reasons that have been  
3 discussed in the hearings we've had previously, so I  
4 carved out the nonjury piece of this to be sure that at  
5 least that could go forward and the baseline issues of  
6 what the law is with respect to coverage and the like  
7 can be dealt with.

8 I don't want to be sandbagged on this by some at  
9 the last hey, none of this can go forward, so tell me  
10 now what's going on here.

11 MR. YNTEMA: And that was it. That was the intent  
12 of my letter to Your Honor that I wrote a few weeks ago  
13 and that you responded to -- kindly responded to, which  
14 I appreciate, and thanks to Ms. Poswal for fielding my  
15 questions and -- and allowing you to answer them.

16 So, yes, we do think there could be issues of fact  
17 for trial. What our understanding was before today the  
18 issues for trial were a spoliation issue and there  
19 was --

20 THE COURT: There isn't a cause of action for  
21 spoliation; you realize that? Spoliation is a matter  
22 dealt with in connection with the enforcement of civil  
23 discovery rules and spoliation is an issue that deals  
24 with that. It's not a cause of action in a complaint  
25 that's been filed in this matter that deals with, quote

1 unquote, spoliation as a separate cause of action.

2       There is an issue of spoliation that so far you-all  
3 have resisted by not producing anything that we can  
4 see that can explore the issue of whether any of the  
5 relevant company records have been destroyed or otherwise  
6 spoliated. So spoliation is a pre-trial issue. The  
7 issue that is before us on trial is the declaratory  
8 judgment matter, not spoliation.

9       MR. YNTEMA: In our papers we do cite that -- I  
10 mean, for the spoliation issue to arise -- you know,  
11 there are two policies that we produced. We've discussed  
12 that.

13       THE COURT: Yes, sir. And that's what we're gonna  
14 be -- on December the 14th we're gonna have a trial  
15 about those policies, what they cover and what they  
16 don't, and a declaration has been requested respecting  
17 those policies. Now this whole thing we've gotten into  
18 with all of these other policies, potential policies,  
19 out there is in aid of this declaration with respect  
20 to these policies and they are permitted to have a  
21 wide ranging discovery as long as it targets in on  
22 something that could potentially be an issue at trial.  
23 The -- what these policies mean is very definitely gonna  
24 be impacted by the things they've asked for in discovery,  
25 but the trial itself is gonna be a trial about those

1 policies.

2 MR. YNTEMA: Those two policies.

3 THE COURT: Yes, sir. That doesn't mean they're  
4 not gonna introduce evidence about what you -- what  
5 the company did with respect to issuance of policies,  
6 handling of policies, handling of claims and all that,  
7 those are gonna be -- and what experts say about what  
8 that language in the policies means, all that's gonna  
9 be explored in this, in an action which speaks to have  
10 the Court declare the law with respect to the meaning of  
11 these policies. That's not a jury issue.

12 MR. YNTEMA: Okay. So there's two components to  
13 this jury trial is my understanding.

14 THE COURT: Two components to what?

15 MR. YNTEMA: In this jury trial. There's one,  
16 spoliation.

17 THE COURT: There's no jury trial involved.

18 MR. YNTEMA: Well, there's two components to this  
19 trial. One is spoliation and the next is a coverage  
20 issue.

21 THE COURT: Well, spoliation is a request that the  
22 Court determine whether or not you have deliberately  
23 destroyed records of the company that relate to the  
24 coverage they seek to determine. This is a question  
25 of trying to discover what coverage Covil Corporation

1 has and one of the sources of that is the policies  
2 themselves, which I will be asked to construe, and the  
3 other is whether records that relate to the conduct of  
4 Pennsylvania National Insurance Company with respect to  
5 coverage of Covil in these asbestos suits, and one of  
6 the aspects that will determine its posture with respect  
7 to coverage of these disputes is that whether or not  
8 they have deliberately destroyed any records of  
9 Pennsylvania National Mutual Insurance Company in respect  
10 to its coverage of Covil.

11 MR. YNTEMA: And if -- if the Court, indeed, does  
12 find that there was destruction -- intentional destruction  
13 or destruction of Covil insurance policy documents, then  
14 there's an order that results to that as to the finding  
15 of spoliation, correct?

16 THE COURT: Yes, there might be. There might be.  
17 There might be some other relief requested. Now I'm not  
18 quite sure yet until the case is tried and I hear what  
19 is presented with respect to that issue, but spoliation,  
20 as I understand that term, is aimed at reviewing a  
21 company's practice with respect to its records and  
22 physical materials and so forth that should be available  
23 and not destroyed and available for a party that sues  
24 it saying that it has some liability to it because of  
25 these materials. In your case, insurance policies and

1 the like.

2 And one of the issues is gonna be in determining  
3 whether you have some liability to Covil is, first of  
4 all, what do the policies say. That's the biggest thing,  
5 which we've been trying to get and it's still like  
6 pulling teeth, and the second is whatever might be said  
7 about your responsibility if you have deliberately  
8 destroyed those policies or other documents and  
9 correspondence related to your coverage of Covil.

10 It's a real simple straightforward suit and  
11 spoliation, if you've engaged in that kind of misconduct  
12 in connection with this litigation, will result in a  
13 request for certain forms of relief with respect to  
14 your responsibility to Covil as an insurer.

15 MR. YNTEMA: And as far as those forms of relief,  
16 therein can lie a factual issue as far when -- the form  
17 of relief that is granted should the evidence show and  
18 Your Honor concludes that there's been a spoliation of  
19 documents, should the receiver, for example, ask the  
20 Court to say well, with respect to the spoliation of  
21 documents, it should be deemed that Penn National had  
22 insurance coverage from 1953 to 1992?

23 THE COURT: Sure. Right. They can ask that.

24 MR. YNTEMA: And then the type of coverage that  
25 existed from 1953 through 1992, then that is a finding

1 of fact to be found by a jury, what was the coverage.

2 THE COURT: Oh, no, no, no, no.

3 MR. YNTEMA: That is --

4 THE COURT: No, sir. That's not a finding of fact  
5 by a jury at all. It is within the rules of civil  
6 procedure that if you have engaged in certain misconduct  
7 in connection with the retention of your records and the  
8 discovery of your records -- I'm not talking about you,  
9 lawyers, I respect you tremendously, you would never  
10 engage in anything like that, but if it is determined  
11 that your company, the company you represent, has engaged  
12 in misconduct in connection with discovery and spoliation  
13 is one of those kinds of misconduct, then the law allows  
14 me and the rules of civil procedure allow me to make  
15 certain determinations about your responsibility based  
16 on your violation of the rules. It has nothing to do  
17 with some tort factual thing that a jury has to decide.  
18 It has nothing to do with that. It has to do with what  
19 may happen if you have violated the rules of discovery.

20 MR. YNTEMA: And usually that's a negative insur --  
21 negative inference to --

22 THE COURT: No, this can be all -- oh, gosh, it  
23 could be all kinds of things. It can be striking your  
24 pleading. A jury doesn't get to decide that. It can  
25 be deeming you're responsible because of your destruction

1 of records that might prove that or otherwise. That's  
2 not for the jury to decide. All of those issues are for  
3 a court to decide in aid of its enforcement of the rules  
4 of civil procedure.

5 And I know you have argued otherwise and tried to  
6 make an appealable issue out of even what's been decided  
7 so far and what is basically a discovery dispute, and I  
8 won't get into that because we'll see what happens with  
9 that, but I can tell you with respect to spoliation,  
10 and I've looked quite extensively at that since you've  
11 kind of suggested that that might be a jury question,  
12 that is not a jury question. That is the enforcement of  
13 the rules of civil procedure.

14 MR. YNTEMA: We disagree. I think there is a  
15 component to the spoliation issue.

16 THE COURT: Well, I would love -- I would love to  
17 see the case you might cite to me from this jurisdiction  
18 or else-wise that has held that. I don't find it.

19 MR. YNTEMA: We cited one case in our -- in our  
20 papers, and I can hand up the citation. And I can do  
21 some more research on the fact that --

22 THE COURT: I suggest you spend your time getting  
23 ready for this trial rather than trying to assert  
24 something that is clearly contrary to any law I know  
25 anything about, which is how the rules of civil procedure

1 are enforced. Penn National would do a lot better to sit  
2 down here and try to get some clarity on what policies  
3 they have and what they cover because that's what this  
4 suit's all about. It has nothing to do with any kind of  
5 jury trial or anything else. It has to do with locating  
6 policies that may provide coverage to a company who's  
7 been sued in many, many asbestos cases because you've  
8 got legacy policies potentially that cover a period of  
9 time when exposure occurred but arise only now when a  
10 diagnosis is made that then puts the claimant on notice  
11 that they have a claim, and that -- that's what the  
12 receiver is desperately attempting to do. This receiver  
13 is a defendant in these pieces of litigation and is  
14 trying to provide an adequate defense and in the process  
15 benefit you by holding down what might be rendered by  
16 way of a settlement or a judgment, but to do that the  
17 receiver must have accurate and full information from  
18 your files about your coverage and we have to narrow  
19 that. There's been so many different obstacles put in  
20 the way of that simple finding. The receiver has got  
21 to be assured that the company hasn't destroyed those  
22 records, and that's what the spoliation would be about.

23 MR. YNTEMA: I understand as far as Your Honor's  
24 order today is that -- that any request for a jury trial  
25 with respect to what's going to be tried beginning



1 December 12th or 14th, that there is no issue of fact  
2 for a jury?

3 THE COURT: I would have to see what you say. I  
4 have not yet seen a request for a jury trial, but if  
5 you're talking about a jury trial with respect to these  
6 declaration matters on December the 14th, I certainly  
7 need to see that because I -- in what is before me I  
8 do not see anything that requires anything other than  
9 action by the Court on what these -- what coverage there  
10 is and whether the company has hidden the ball and  
11 destroyed any records that might further eliminate the  
12 basic issue, which is what kind of coverage is there of  
13 the exposures that Covil is now facing.

14 MR. YNTEMA: And to the -- to the receiver's  
15 complaint for declaratory judgment and breach of  
16 contract, we had served our answer long ago and preserved  
17 our right to a jury trial on factual issues just for the  
18 record.

19 THE COURT: I know nothing about that until it  
20 comes to me. Right now what I've got is the declaration  
21 I'm asked to make.

22 I don't know. Has it gone? Now it's not working  
23 anymore.

24 MR. YNTEMA: I'm sorry, Your Honor.

25 THE COURT: That's all right. It's not your fault.

1 MR. YNTEMA: We were in the throes of it there, so.

2 THE COURT: Well, listen. No, it's not your fault  
3 at all.

4 MR. YNTEMA: I interrupted. I apologize. I think  
5 we were coming to an end here.

6 THE COURT: The sin is on both sides. So, please,  
7 don't apologize. You're doing a good job.

8 MR. YNTEMA: I think we were kind of tapering it  
9 down to an end. We can wait for your law clerk to return  
10 or --

11 THE COURT: Can you hear?

12 THE COURT REPORTER: Yes. I'm fine.

13 THE COURT: I think you can continue.

14 MR. YNTEMA: I think the final thing I was going  
15 to say to Your Honor is that we had preserved our right  
16 to a jury trial and that was the sense of my letter to  
17 the Court as of recent and that we continue as far as  
18 on behalf of Penn National to preserve our right to a  
19 jury trial on the factual issues to be tried to a jury  
20 in this case.

21 THE COURT: And what I simply tell you is this.  
22 You have asserted that you want to preserve your right  
23 to a jury trial. So far I have not been asked to rule  
24 on a specific contention about what you regard as a  
25 jury trial matter such that I could either grant it,

1 deny it or do anything with it. All I have been asked  
2 to do is mediate a very thorny discovery dispute and  
3 kind of the last refuge for Penn National has been to  
4 say somehow or another that its right to a jury trial  
5 impacts on what I don't know, impacts this discovery  
6 dispute, and I can't -- I'm not understanding that yet.

7 This discovery dispute is about finding these  
8 policies and whether or not any records of the companies,  
9 including the policies, have been destroyed. Otherwise  
10 known as spoliated. Those are the two things I've been  
11 asked to deal with, so I haven't been asked to deal with  
12 anything other than those things and I have not yet heard  
13 a specific argument that says that spoliation is a jury  
14 matter. It clearly is not.

15 MR. YNTEMA: And I have stated on behalf of Penn  
16 National our concerns as to why we think the spoliation  
17 issue could be a factual issue, both in our papers and --

18 THE COURT: But I can't deal on could. I've got  
19 to deal on is on the basis of some specific request with  
20 respect to that and so far I haven't received that.

21 MR. YNTEMA: Based on the issues that the Court  
22 understands today, the Court would deny our request for  
23 a jury trial?

24 THE COURT: I've not -- I haven't got a request  
25 for a jury trial yet. You simply wanted to preserve

1 your right to make one and so far I haven't heard what  
2 you are requesting that would involve a jury trial.  
3 The only thing you and I have discussed specifically is  
4 spoliation and there isn't any question in my mind but  
5 what -- that's not a request for a jury trial because  
6 spoliation is not a jury trial matter. But you have  
7 filed no papers with me to say hey, one of the things  
8 you've got to try is spoliation and I want a jury trial  
9 on that. Do you agree with that?

10 MR. YNTEMA: On the record today, I would ask for  
11 a jury trial to the extent there are factual issues as  
12 to the spoliation component for this case.

13 THE COURT: Well, you put that in the some -- the  
14 form of some sort of motion and let them respond to it,  
15 then I'll see where we're going, but I can tell you at  
16 the present time I don't have enough in front of me to  
17 justify any sort of consideration for a jury trial  
18 because all you've done is said what you've spoken here.

19 MR. YNTEMA: And there's a component of coverage as  
20 I had stated before. That --

21 THE COURT: Sir?

22 Mr. YNTEMA: There's a component of coverage that  
23 could be a factual issue as well.

24 THE COURT: No, sir. What you've raised -- what  
25 you've raised in coverage and the factual example

1 you've given is not something we're being asked to  
2 consider here. All we're being asked to consider here  
3 is whether there are policies that provide coverage to  
4 Covil for these cases. That's -- that's where we are  
5 on coverage. We know of two policies that I'm asked to  
6 take a look and construe and with respect to construing  
7 those particular policies, I know of nothing that I'm  
8 asked to do about that that involves something a jury  
9 could decide. That is a pure question of law based on  
10 the meaning of these policies. It's not -- the cases  
11 you cite about policy meaning have to do with factual  
12 situations that are not in any way related to what we're  
13 being asked to do today, which is basically to decide  
14 the basic matter of existence of coverage, and that's  
15 what's being asked here, but a jury doesn't get to  
16 decide that.

17 So, again, that's gonna have to be fleshed out much  
18 more specifically than just saying well, my last refuge  
19 I'm just gonna kind of throw in here, I'm requesting a  
20 jury trial. You're gonna have to get more specific  
21 than that for me to be able to have any inclination  
22 as to how I might rule. Based on what I understand  
23 about what's gonna be tried in front of me, I think  
24 I've explained. It's the policies and it's the issue  
25 of whether you have suppressed any other evidence such

1     that spoliation's been committed and if spoliation has  
2     been committed, then what do we do about it.

3             MR. YNTEMA:   Again, so I am a lawyer --

4             THE COURT:    Yes, sir.

5             MR. YNTEMA:   -- and to protect the record, we are  
6     requesting a jury trial to the extent -- based on factual  
7     issues in this case period.

8             THE COURT:    All right.   Well, I will have to have  
9     much more specificity about that in order to rule on  
10    that request is what I'm saying to you --

11            MR. YNTEMA:   Thank you.

12            THE COURT:    -- and so far I don't have anything  
13    that gives me enough of a clue about what you think the  
14    factual issues are in the case to be able to make that  
15    determination.   Based on what I now know about the case,  
16    the only issues in front of me are issues that emanate  
17    from an action that is a declaratory judgment action.

18            MR. YNTEMA:   I believe I can say thank you for  
19    your time and allowing me to express my concerns and  
20    hearing this on behalf of Penn National.

21            THE COURT:    I understand.   Thank you, sir.

22            All right.   Anything further?

23            MS. PATTERSON:  Your Honor?

24            THE COURT:    Yes, ma'am.

25            MS. PATTERSON:  May I?   This is Nancy Patterson on

1     behalf of the receiver. We just want to confirm that  
2     we are starting on the 14th. Is that --

3           THE COURT: Yes. I mean, I don't know anything  
4     that would give you any reason to --

5           MS. PATTERSON: Well --

6           THE COURT: Well, no. What we're gonna do is start  
7     on the -- didn't I say the 12th?

8           MS. PATTERSON: That's why I was asking, Your Honor.  
9     I know at one point the last time we met we said the 12th  
10    and --

11          THE COURT: Yeah, and that was really subject to  
12    what you-all were working out about what Mr. Smith's  
13    schedule was, but -- so what is the schedule?

14          MS. PATTERSON: We were operating under the  
15    assumption of -- that we would begin on the 12th.

16          THE COURT: The Monday, yes.

17          MS. PATTERSON: Yes.

18          THE COURT: And that's what I'm operating under.

19          MS. PATTERSON: Okay. So -- okay, the 12th.

20          THE COURT: The matter will start on Monday,  
21    December the 12th, here in Richland County.

22          MS. PATTERSON: Thank you, Your Honor.

23          THE COURT: Now the other thing is I would not  
24    dare get out of here without having some understanding  
25    about whether what I've said on the record is enough

1 or whether we need an order with respect to the matters  
2 that have been discussed here.

3 MR. PROTOPAPAS: I believe there's enough on the  
4 record, Your Honor, and we'll be seeing each other  
5 tomorrow and I'll get a copy of the transcript.

6 MR. YNTEMA: At this point, I mean, Penn National  
7 would prefer a formal order, but we can discuss that  
8 with Mr. Protopapas tomorrow.

9 THE COURT: All right. But let me know about  
10 that, you know. I mean, I am aware of the history of  
11 this matter and my bet is that either we're gonna have  
12 to get a big transcript up here and then they'll appeal  
13 it or they'll appeal it anyway, and I want to at least  
14 be sensible about it.

15 What I think ought to be done is just go on and get  
16 up a draft order very quickly. Let me see something  
17 tomorrow, if possible. I'm not inviting a whole bunch of  
18 back and forth on it, but if you-all think this record  
19 is enough, that's fine. I, frankly, think they're gonna  
20 appeal it. I'm not asking Mr. Yntema tell me that, but  
21 I would be very surprised if they don't attempt to do  
22 just what they've done here, which is to appeal this  
23 matter and hope that stays or delays it.

24 I can tell you I surely don't think these orders  
25 today are appealable orders, but let's see what happens.



1 I believe you need to draft an order, send it to me as  
2 quickly as you can, and Mr. Yntema needs to respond as  
3 quickly as he can. I would intend to have an order in  
4 place before Wednesday. I would prefer to have it  
5 tomorrow.

6 My schedule is a very tough one. I have got a  
7 National Law Enforcement conference. I've got to cut  
8 in the middle of it. It's my very last time there, so,  
9 you know, being honored in retirement from this National  
10 Law Enforcement Commission. Then I've got to leave that  
11 Thursday and go to give one of the speeches at Michelle  
12 Childs' swearing in in D.C. and come back to St. Louis  
13 to complete the rest of the CALEA conference, so my  
14 schedule is very, very full.

15 I will try to do everything I can, but I don't  
16 want to have to get back here and then be forced at  
17 some later date to get involved in an appeal and all  
18 that kind of stuff. I want to know what the heck's  
19 going on here.

20 MR. NES: The parties will have it before the end  
21 of the day tomorrow.

22 THE COURT: Okay. Very good. Thank you.

23 MR. PROTOPAPAS: Thank you, Your Honor.

24 MS. PATTERSON: Thank you, Your Honor.

25 THE COURT: Court will be in recess.

1 MR. YNTEMA: Thank you, Your Honor.

2 (Whereupon, the proceedings were concluded at

3 1:01 PM.)

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## C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter  
for the Eleventh Judicial Circuit of the State of  
South Carolina, do hereby certify that the foregoing  
is a true, accurate and complete transcript of record  
of all the proceedings had and the evidence introduced  
in the hearing of the captioned case in Circuit Court  
on the 14th day of November, 2022, reported and  
transcribed by me to the best of my ability.

I do further certify that I am neither of kin,  
counsel, nor have an interest to any party hereto.

November 30, 2022

/s/ Stacy S. Johnson  
STACY S. JOHNSON  
CIRCUIT COURT REPORTER



## The Supreme Court of South Carolina

JEAN HOEFER TOAL  
CHIEF JUSTICE, RETIRED  
SENIOR ACTIVE JUDGE

1220 SENATE STREET (ZIP CODE 29201)  
P.O. BOX 12456  
COLUMBIA, S.C. 29211  
TELEPHONE (803) 734-1584  
FAX (803) 734-1047  
E-MAIL: jtoal@sccourts.org

RE: Covil v. Penn National; C.A. No.: 2020-CP-40-02098

December 8, 2022

Dear Counsel:

I have received from Kirby Shealy as counsel for Defendant Penn National its Notice of Appeal to the South Carolina Court of Appeals of my Order regarding Penn National's Motion to Confirm Jury Trial. My Order was electronically signed, emailed to all counsel and transmitted to Richland County's Electronic Filing System on December 6, 2022. It was marked electronically filed by Richland County on December 7, 2022 at 8:43 am.

My Order repeated my long-stated rulings that this matter is a nonjury declaratory judgment matter. It has been set for a nonjury trial in Richland County on December 12, 2022, beginning at 9:30 am. Defendant Penn National's Answer requested "a trial by jury on all issues so triable." The three Causes of Action pled by Plaintiff Covil against Penn National are all actions for Declaratory Judgements. These actions are not triable to a jury; they are requests for Judicial Declaration of complex questions of insurance coverage law. These declarations are also affected by ongoing disputes regarding discovery of Penn National insurance policies and alleged spoliation of insurance policies and records. These are not jury questions. Several times after the conduct by me of hearings in this case, Penn National has attempted to appeal my discovery rulings. Those appeals have been dismissed by the Court of Appeals and the Supreme Court as non-appealable.

Although I firmly believe that this Order is not appealable, this appeal operates as a temporary stay of the nonjury trial in this matter. Accordingly, I will postpone this trial until such time as this Court receives a Remittitur of this matter.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Jean Hofer Toal", with a long horizontal flourish extending to the right.

Jean Hofer Toal  
Acting Circuit Court Judge

November 7, 2022

VIA E-MAIL ONLY (cposwal@sccourts.org)

The Honorable Jean H. Toal  
c/o Ms. Zitel Poswal  
Judicial Law Clerk  
South Carolina Court Administration  
1220 Senate Street, Suite 221  
Columbia, SC 29201

RE: *Covil Corp. v. Penn National Mut. Cas. Ins. Co.* (Richland County);  
2020-CP-40-02098

Dear Chief Justice Toal:

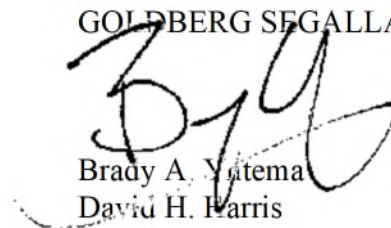
I am writing on behalf of Pennsylvania National Mutual Casualty Insurance Company ("Penn National") in advance of the Pre-Trial Hearing currently scheduled to be conducted on Monday, November 14, 2022. It is expected that the Receiver will request an "evidentiary" hearing on issues involving alleged spoliation and a non-jury trial on issues involving Penn National's coverage for Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8 – specifically regarding certain coverage issues regarding Penn National's aggregate coverage limit under such policies.

Penn National requested a jury trial on all issues so triable by way of its Answer to the Receiver's Complaint for Declaratory Judgment and Breach of Contract. Fact and expert witnesses are scheduled to be conducted by the parties in November and December leading up to the trial date of December 12 or 14, 2022. Please allow this letter to respectfully confirm that Penn National preserves its right to and requests a jury trial on all factual issues in this case, including on spoliation and coverage issues.

Should you need anything further with respect to this matter, please do not hesitate to contact me.

Sincerely,

GOLDBERG SEGALLA, LLP



Brady A. Yntema  
David H. Harris

cc: All Counsel of Record

Please send mail to our scanning center at: PO Box 727, Buffalo NY 14201

**RECEIVED**

**Dec 14 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2020-CP-40-02098

---

Appellate Case No. 2022-001722

---

Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,

Appellant.

---

**PROOF OF SERVICE**

---

I certify that a true copy of the Motion to Dismiss and Expedite and Appendix in this case have been served on the following, this 14th day of December, 2022, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447).

David G. Harris II – dharris@goldbergsegalla.com  
Brady A. Yntema – byntema@goldbergsegalla.com  
Alexander Erwin Davis – aedavis@goldbergsegalla.com  
Kirby D. Shealy III – kirby.shealy@arlaw.com

*(Signature page follows)*

**A0215**

Respectfully submitted,

s/Shanon N. Peake

G. Murrell Smith, Jr. (S.C. Bar # 66263)

Jonathan M. Robinson (S.C. Bar # 68285)

Shanon N. Peake (S.C. Bar #102723)

Austin T. Reed (S.C. Bar #102808)

Smith Robinson Holler DuBose and Morgan, LLC

2530 Devine Street, Suite 1B

Columbia, South Carolina 29205

(803) 254-5445

ATTORNEYS FOR RESPONDENT

December 14, 2022.

**RECEIVED**

**Dec 28 2022**

**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.

---

**PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE  
COMPANY'S RETURN TO MOTION TO DISMISS AND EXPEDITE**

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**A0217**



## **INTRODUCTION**

It is well-established in South Carolina that orders affecting the mode of trial must be immediately appealed. This rule is based on the principle that trial by jury is a fundamental and substantial right guaranteed by the South Carolina Constitution and the laws and rules of this State. Any order affecting such a substantial right is therefore immediately appealable. On December 7, 2022, the Circuit Court entered an order in this case in which it denied Defendant Pennsylvania National Mutual Casualty Insurance Company's ("Penn National") right to a jury trial of this case. To ensure the preservation of its right to a jury trial, Penn National immediately appealed the Circuit Court's order in accordance with well-settled law. Its actions in this case are entirely consistent with this State's jurisprudence.

Despite Penn National's clear and unequivocal right to appeal the order denying its right to a jury trial, Plaintiff Covil Corporation, by and through its appointed Receiver, Peter D Protopapas ("Covil") has taken the baseless position that Penn National's appeal is "frivolous" and should be immediately dismissed by this Court. Penn National's constitutional right to a jury trial is not "frivolous" to Penn National. Indeed, Penn National has unfailingly invoked its right to a jury trial throughout this litigation. Penn National respectfully requests that this Court summarily deny Covil's motion to dismiss this appeal and allow a full and fair review of the merits of the order at issue.

### **I. PROCEDURAL HISTORY**

On April 27, 2020, Covil filed a Complaint for Declaratory Judgment and Breach of Contract against Penn National, Sam J. Crain & Co., Inc. and South Carolina Property and Casualty Insurance Guaranty Association. In the Complaint, Covil alleged that "claims and lawsuits," unidentified by name or case number, have been filed against Covil alleging liability

resulting from asbestos exposure caused by Covil’s products. (Appx. pp.9-10, ¶7). Covil alleged that Penn National issued policies of general liability insurance to Covil for two policy periods: (1) March 31, 1986 to March 31, 1987; and (2) March 31, 1987 to March 31, 1988, and that Penn National has breached these policies. (*Id.*, ¶¶ 8-9). Specifically, the Complaint states:

9. Penn National has failed fully to acknowledge or accept its insuring obligations under the Penn National Policies, has reserved its rights, failed to acknowledge or respond to [the] tender of covered Covil Asbestos Suits, and otherwise breached its contract of insurance.

(*Id.*).

In the Complaint, Covil asserted three claims against Penn National: (1) declaratory judgment regarding compensation to be paid to the Receiver for Covil in defending unidentified “Covil Asbestos Suits” (*Id.*, p.12, ¶¶ 14-19); (2) declaratory judgment that all policies issued by Penn National are the property of the Receiver of Covil (*Id.*, p.13, ¶¶ 20-22); and (3) declaratory judgment regarding the terms of the Penn National policies, trigger of coverage, allocation, Penn National’s defense and indemnity obligations, number of occurrences, coverage for the Covil Asbestos Suits and the effect of exclusions. (*Id.*, pp.13-15, ¶¶23-26).

On June 1, 2020, Penn National filed its Answer. In its Answer, Penn National responded to the allegations contained in the Complaint and raised a number of defenses. (Appx., pp.23-30) Significantly, Penn National requested a jury trial:

WHEREFORE, Penn National respectfully prays the Court as follows:

\* \* \*

4. For a trial by jury on all issues so triable; and
- (*Id.*, p.30).

This case proceeded with discovery. On May 5, 2022, the Circuit Court entered an order requiring Penn National to incur the considerable expense to digitize its historical repository of

insurance policies (approximately 18 million pages of documents) and to allow Covil, its Receiver and their attorneys to have full and unfettered access to the created database. Because of the punitive nature of the order and the fact that the order affected a substantial right of Penn National that would be irrevocably lost absent immediate review, Penn National appealed the order.<sup>1</sup>

While this order remained on appeal and other discovery matters were unresolved (see, Appx., pp.37-38, listing outstanding discovery issues), Covil filed a Status Report with the Circuit Court on September 6, 2022 that, for the first time, demanded a trial:

The Receiver requests an evidentiary hearing regarding Penn National's spoliation of evidence in order for the Court to make factual findings regarding the scope of the harm to Covil and to fashion appropriate remedies to address that harm. The Receiver also asks for a non-jury trial on Covil's declaratory relief against Penn National concerning Penn National's obligations to Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8.

(*Id.*, p.39; *see also*, Appx., p.72 [Transcript from 9/8/2022 status conference]: Counsel for Penn National: "Your Honor, yesterday was the first time that I had seen a suggestion of a December trial date ..."). Significantly, Covil did not (and has not to date) filed a motion for summary judgment or any motion for sanctions resulting from alleged spoliation.

On November 7, 2022, Penn National sent a letter to Ret. Chief Justice Toal confirming that Penn National demanded a jury trial in this case and requesting that its right to such a trial be

---

<sup>1</sup> Throughout its motion to dismiss, Covil states that the current appeal is the "*third* frivolous appeal filed by [Penn National] in this case in less than six months." (Covil's Mot., p.1 [emphasis in original]; *see also*, p.11: "Penn National's third improper appeal in the past six months in this case"). These statements are, in fact, entirely untrue. The only previous appeal that Penn National filed in this case is from the order entered on May 5, 2022 in which the Circuit Court ordered the previously unprecedented and extraordinary remedy of requiring Penn National to digitize its repository of historical policy related records, incur the substantial costs associated therewith, and allow Covil, its Receiver and their attorneys unfettered access to these documents. (Appellate Case No. 2022-000761). No other appeal has been filed by Penn National in this case until the present mandatory appeal.

preserved:

Penn National requested a jury trial on all issues so triable by way of its Answer to the Receiver's Complaint for Declaratory Judgment and Breach of Contract. ... Please allow this letter to respectfully confirm that Penn National preserves its right to and requests a jury trial on all factual issues in this case, including spoliation and coverage issues.

(Appx., p.57). The next day, Zitel Poswal, judicial law clerk for Ret. Chief Justice Toal, sent an email to Penn National's counsel indicating that the court recognized that Penn National had requested a trial by jury and had not waived its right to a jury trial in this case:

Chief Justice Toal has instructed me to inform you that your participation and your client, Penn National's participation in pretrial hearings, discovery activities and any other activities past, present or future pertaining to *Covil v. Penn National* will in no way waive Penn National's right to insist that it is entitled to a jury trial on all or any matters pertaining to this litigation. She will place an order reserving and preserving Penn National's position on its right to a jury trial on the record at the commencement of the Pretrial hearing on Monday, Nov. 14, 2022.

(Appx., p.58).

However, at the November 14 hearing, the Circuit Court did not place an order on the record that the matter would proceed to a jury trial. Therefore, Penn National filed a Motion to Confirm Jury Trial Demand. (Appx., pp.44-59). On December 7, 2022, an order was entered denying Penn National's right to a jury trial of the issues in this case. (Appx., p.4-5). On the same day, Penn National filed a notice of appeal from this order.

## **II. ARGUMENT AND ANALYSIS**

### **A. Penn National Has The Unassailable Right To Appeal The Order Denying Its Right To A Jury Trial.**

The right to a jury trial is so significant that it is explicitly protected by the South Carolina Constitution. S.C. Const. art. I, § 14. This right is also preserved in the South Carolina Rules of Civil Procedure, which specifies how the right should be demanded:

**RULE 38**  
**JURY TRIAL OF RIGHT**

(a) **Right Preserved.** The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. ...

(b) **Demand.** Any party may demand a trial by jury of any issue trial of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directing to such issue. Such a demand may be endorsed upon a pleading of the party.

(c) **Same: Specification of Issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. ...

(d) **Waiver.** ... A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. ...

Rule 38, SCRPC.

At the very inception of this litigation, Penn National demanded a jury trial consistent with the requirements of the Rules of Civil Procedure. Penn National made the jury trial demand in its Answer, and specifically requested a jury trial on all issues so triable. (Appx., p.30). At no time did Penn National consent to the withdrawal of its demand for a jury trial. Indeed, Covil has not cited to any such withdrawal.

Despite Penn National's jury trial demand, the Circuit Court ordered that the issues in this case be "scheduled for a non-jury trial ..." (Appx., p.4). Once the Circuit Court ordered a non-jury trial in this case, Penn National was required to appeal the order immediately. Its failure to do so would have resulted in a waiver of Penn National's right to a jury trial. As the Supreme Court has held:

[O]rders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately. Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. Here,

Client's failure to immediately appeal the order designating this case as a non-jury matter bars his current appeal of that issue.

*Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (internal citations omitted).

*See also, Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008); *Foggie v. CSX*

*Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993); *Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 352 (1985); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389-90

(Ct. App. 2004). *See also, Jean Hoefer Toal, et al., Appellate Practice in South Carolina*, 156 (3d ed. 2016) ("The purpose of permitting immediate appeal in these cases is to preserve a party's constitutional right to a trial by jury which would otherwise be lost.").

Covil has now moved to dismiss Penn National's appeal as "frivolous" and as a "foot dragging operation." (Covil Mot., pp.1-2). Covil's motion is wholly without merit. Penn National was required to appeal the order directing that the mode of trial of this case be a non-jury trial. If Penn National failed to appeal the order, it risked losing its substantial constitutional right to a jury trial. Covil's motion to dismiss is without basis and serves no purpose other than to delay this Court's review of the merits of Penn National's appeal. Accordingly, Penn National requests that Covil's motion be summarily denied.

**B. Covil's Argument That There Is No Right To A Jury Trial For Declaratory Judgment Actions Is Contrary To The Law.**

Covil appears to base its motion to dismiss on the fallacious argument that parties to a declaratory judgment action are somehow not entitled to a jury trial. Covil's argument is contrary to the common and statutory law of this State.

**(1) The Present Matter Is An Action At Law Which Undeniably Entitles Penn National To A Trial By Jury.**

There is clearly no right to a jury trial in cases in equity. *See, Fountain v. Fred's, Inc.*, 436 S.C. 40, 47, 871 S.E.2d 166, 170 (2022). However, declaratory judgment actions are neither

legal nor equitable. The nature of a declaratory judgment action is determined by the underlying issue. *See, Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 5, 656 S.E.2d 17, 18 (2007). An action at law is not converted to an equitable action because it is brought pursuant to the Uniform Declaratory Judgment Act. *Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 127, 375 S.E.2d 1, 3 (Ct. App. 1988).

Indeed, the Uniform Declaratory Judgment Act expressly provides that a party has a right to a jury trial in declaratory judgment actions:

When a proceeding under this chapter involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. All existing rights to jury trials are hereby preserved.

S.C. Code Ann. § 15-53-90. *See also, Leggette v. Smith*, 226 S.C. 403, 416, 85 S.E.2d 576, 582 (1955) (quoting with approval, *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4<sup>th</sup> Cir. 1937) (“And, irrespective of this provision of the statute, it is clear that the right of jury trial in what is essentially an action at law may not be denied a litigant merely because his adversary has asked that the controversy be determined under the declaratory procedure.”).

It has long been established that a declaratory judgment action which requests declarations regarding coverage under an insurance policy is an action at law. *See, Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013); *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009); *Cook v. State Farm Auto. Ins. Co.*, 376 S.C. 426, 429, 656 S.E.2d 784, 786 (Ct. App. 2008); *Auto-Owners Ins. Co. v. Hamin*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006); *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 5, 530 S.E.2d 132, 134 (Ct. App. 2000); *Pennell v. Foster*, 338 S.C. 9, 14, 524 S.E.2d 630, 633 (Ct. App. 1999); *Travelers Indem. Co. v. Auto World, Inc.*, 334 S.C. 137,

140, 511 S.E.2d 692, 694 (Ct. App. 1999); *United States Fire Ins. Co. v. Macloskie*, 320 S.C. 459, 462, 465 S.E.2d 759, 760 (Ct. App. 1995). *See also*, Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina*, 559 (3d ed. 2016) (“A declaratory judgment action to determine coverage under an insurance policy is an action at law.”).

Because declaratory judgment actions seeking declarations regarding insurance coverage are actions at law, the parties are entitled to a jury trial on all factual issues. *See, State Farm Mut. Auto. Ins. Co. v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*, 263 S.C. 391, 394-95, 210 S.E.2d 613, 615 (1974) (upholding on appeal jury responses to special interrogatories in declaratory judgment action regarding coverage under a motor vehicle policy); *Government Employees Ins. Co. v. Mackey*, 260 S.C. 306, 316, 195 S.E.2d 830, 834 (1973) (“The issues of fact in this [declaratory judgment action brought by insurer] were properly submitted to the jury with a full and correct charge by the trial judge.”); *St. Paul Fire & Marine Ins. Co. v. American Ins. Co.*, 251 S.C. 56, 61, 159 S.E.2d 921, 923 (1968) (holding that issues of fact in insurance coverage action were properly determined by a jury); *Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 375, 415 S.E.2d 406, 409 (Ct. App. 1992) (reversing the grant of summary judgment for plaintiff because there existed genuine issues of material fact to be determined by a jury); *State Farm Mut. Auto. Ins. Co. v. Turner*, 303 S.C. 99, 100, 399 S.E.2d 22, 22 (Ct. App. 1990) (in declaratory judgment action brought by insurer, Court of Appeals affirmed submission of issues to a jury). *See also*, Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina*, 555 (3d ed. 2016) (“... the legal issues are for determination by a jury ...”).

In its motion to dismiss, Covil does not make the argument that the present action is one in equity. Therefore, it appears that even Covil concedes that its lawsuit against Penn National is one at law. Because the present action is one at law, it is beyond cavil that Penn National is



entitled to a jury trial on the issues.

**(2) Covil Wrongly Conflates The Fact That The Present Action Is One At Law With The Argument That Matters Can Be Decided “As A Matter Of Law.”**

Whether an action is one at law or in equity governs whether the parties have a right to have the issues decided by a jury. There is no right to a jury trial in cases in equity. *Fountain*, 436 S.C. at 47, 871 S.E.2d at 170. However, there is a right to a jury trial in cases at law. *Lester*, 327 S.C. at 266, 491 S.E.2d at 241; *Leggett*, 226 S.C. at 417, 85 S.E.2d at 582. The standard of appellate review is also different. With equitable cases, the appellate courts can review *de novo* both the factual findings and conclusions of law. If the case is one at law, appellate review extends only to the correction of any errors of law; factual findings by the fact-finder will not be disturbed unless the record shows no evidence to reasonably support those findings. *See, Townes Assocs., Ltd. v. Greenville*, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775 (1976) (setting the standard of appellate review for cases at law and in equity).

Covil appears to make the misleading argument that because the present action is one at law, Penn National has no right to a jury trial. This is obviously incorrect and contrary to the law in South Carolina. The right to a jury trial is inviolate in cases at law.

It appears that in making this argument, Covil conflates the fact that a declaratory judgment requesting coverage determinations is one *at law* with the notion that certain issues may be decided *as a matter of law* by a court. The Rules of Civil Procedure allow courts to decide issues as a matter of law under certain circumstances. For example, under Rule 56, courts are allowed to enter summary judgment in favor of a party where there are no genuine issues of material fact:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(c), SCRCF. However, the Supreme Court of South Carolina has characterized summary judgment as a “drastic remedy” that should be “cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.” *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C. 1975)).

In the present case, however, **Covil never moved for summary judgment.** To the contrary, Covil requested a trial of this case with findings of fact and conclusions of law:

The Receiver further requests that the Court combine the evidentiary hearing regarding spoliation with the trial on declaratory judgment issues into a single trial that lasts no more than three days. The Receiver also requests that the Parties be allowed to submit proposed findings of fact and conclusions of law in advance of trial.

(Appx., p.39). Covil then filed Proposed Findings of Fact and Conclusions of Law, containing thirty-one (31) pages of “Proposed Findings of Fact.” (Supp. Appx., pp.1-35) These proposed findings of fact included whether Penn National issued policies of insurance in addition to two policies which were stipulated to by Penn National; whether and when injuries occurred in fourteen asbestos liability cases asserted against Covil; whether Penn National had a duty to preserve historic policies; if such a duty existed, when Penn National’s duty to preserve its historic policies was triggered; whether Penn National destroyed policies potentially applicable to Covil’s asbestos liability with culpable intent; the propriety of Penn National’s business decision to store its historic policies by policy number; the underwriting intent in issuing the policies to Covil; and the adequacy of Penn National’s search for additional policies. (*Id.*). Penn National also filed its Proposed Findings of Fact and Conclusions of Law, which consisted of fifty-eight (58) proposed findings. (Supp. Appx., pp.73-94). Penn National is entitled to a jury

trial on these issues of fact.

It is clear that the present action is one at law that requires a trial by jury on all issues. By demanding that this Court summarily dismiss Penn National's appeal of the order entered by the Circuit Court which denies Penn National's right to a jury trial in this case, Covil attempts to avoid appellate review of the merits of this appeal. This Court should not allow the summary disposition of an order that deprives Penn National of a substantial constitutional right. Instead, this Court should deny Covil's motion to dismiss and allow the Circuit Court's order to be addressed on its merits.

**(3) *Penn National Has Not Waived Its Right To A Jury Trial In This Lawsuit.***

After arguing that Penn National's appeal of the order denying its right to a jury trial is "frivolous," Covil then makes the incongruous argument that Penn National actually has the right to appeal the designation of this case as non-jury but that it waived its right to a jury trial by not appealing sooner. Covil's argument is without merit.

First, the law is clear that a party must appeal from an **order** that abridges that party's constitutional right to a jury trial. *See, Lester*, 327 S.C. at 266, 491 S.E.2d at 241 (holding that even though party made its right to a jury trial an issue throughout the litigation, its failure to immediately appeal the order actually designating the case as a non-jury matter waived his latter appeal of issue). *See also, Foggie*, 315 S.C. at 23, 431 S.E.2d at 590 (stating that appeal must be from "order of the trial judge"); *Creed*, 285 S.C. at 542-43, 331 S.E.2d at 352 (holding that because party failed to immediately appeal from the "order of reference," he waived his objection); *Bateman*, 358 S.C. at 674, 596 S.E.2d at 390 ("The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal.").

Covil's oral references to its request for a non-jury trial is insufficient to trigger any duty

by Penn National to appeal. Only when an order is entered that affects the mode of trial is a party required to appeal or risk waiving its right to a jury trial. Here, there was no **order** entered by the Circuit Court until December 7, 2022, when the order was entered indicating that the trial in this case would be non-jury. (Appx., pp.4-6). Penn National filed its Notice of Appeal on the very same day. Penn National's actions in filing this appeal are entirely proper and consistent with the requirements of South Carolina law. Penn National did not waive its right to a jury trial.

Second, the law is clear that once invoked, a demand for a jury trial can only be waived through stipulation of the parties or court order:

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the calendar and the clerk's filebook as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

Rule 39(a), SCRPC. Here, Penn National never filed a written stipulation with the court indicating that it was waiving its right to a jury trial or entered into an oral stipulation in open court that it was doing so. Indeed, Covil does not and cannot point to any such stipulation. Therefore, under the Rules of Civil Procedure, Penn National has not waived its right to a jury trial in this case. To the contrary, Penn National is seeking to preserve its constitutional right to a jury trial by filing this appeal.

**C. Covil Is Not Entitled To A Non-Jury Trial Of The Issues Regarding Penn National's Alleged Spoliation.**

Covil makes the incredible argument in its motion to dismiss that the issue of spoliation was not before the Circuit Court for trial because Covil "had not yet moved for" sanctions from Penn National's alleged spoliation in this case. (Covil Mot., p.8, n.11). Although it is true that

Covil had not moved for sanctions resulting from any alleged spoliation, Covil actually requested that a trial be held on whether Penn National engaged in acts that amount to spoliation of evidence. Indeed, in its initial request to set a trial date, Covil demanded a trial where issues of spoliation would be tried with the other issues in this case:

The Receiver requests an evidentiary hearing regarding Penn National's spoliation of evidence in order for the Court to make factual findings regarding the scope of the harm to Covil and to fashion appropriate remedies to address that harm. The Receiver also asks for a non-jury trial on Covil's declaratory relief against Penn National concerning Penn National's obligations to Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8.

The Receiver further requests that the Court combine the evidentiary hearing regarding spoliation with the trial on declaratory judgment issues into a single trial that lasts no more than three days. ...

(Appx., p.39). Covil filed its proposed findings of fact and conclusions of law, which included findings of fact regarding whether additional policies of insurance issued by Penn National to Covil actually existed, Penn National's actions that allegedly resulted in the destruction of policies, Penn National's culpable intent, and conclusions of law regarding the sanction to be imposed on Penn National due to these alleged actions. (Supp. Appx., pp.15-21, 63-68). Clearly, Covil requested and intended to try the issues of spoliation.

Although not expressly adopted by South Carolina appellate court decisions, the Fourth Circuit Court of Appeals has held that a party requesting sanctions based on the spoliation of evidence has the burden of establishing three elements:

- (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. College of Charleston*, 2013 U.S. Dist. LEXIS 162714, \*5 (4<sup>th</sup> Cir. 2013). *See also*, *Hopper v. Air & Liquid Sys. Corp.*, 2019 S.C. C.P. LEXIS 5488, \*11, Case No, 2019-CP-00076 (S.C. Super. Ct. Order dated Oct. 31, 2019) (Ret. Chief Just. Toal) (holding that a party bringing a motion for sanctions based on spoliation bears the burden of establishing the three elements adopted by the Fourth Circuit in *Hawkins*). Therefore, prior to the imposition of any sanction, the party seeking such sanctions has the burden to prove whether the evidence actually existed, the opposing party's duty to preserve such evidence, and the opposing party's culpable state of mind - all factual findings within the purview of a jury. *See, Harleysville Group Ins. v. Heritage Cmty, Inc.*, 420 S.C. 321, 346, 803 S.E.2d 288, 302 (2017) ("These questions of the insured's intent are factual in nature."); *Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 32, 737 S.E.2d 857, 858 (Ct. App. 2013) (reversing directed verdict and finding that insured's intent was a factual issue that should have been decided by a jury). *See also, Evans v. Quintiles Transnational Corp.*, 2015 U.S. Dist. LEXIS 171750, \*13-14 (D.S.C. 2015) (holding that on spoliation issues a jury was to resolve "any credibility questions and make a determination, first, as to whether the alleged computer file even existed on Plaintiff's computer, whether and when Quintiles should have reasonably known that the evidence may be relevant to anticipated litigations, and, if so, whether Quintiles willfully lost or destroyed the file.")

Covil does not and cannot cite to a single case from South Carolina that states that these types of credibility and state of mind determinations are outside the jury's province. Instead, Covil quotes extensively from a Texas state court case for the proposition that it is within the Court's discretion to find whether a party engaged in destructive behavior and then what sanction to assess. (Covil's Mot., p. 9, quoting from *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014)). However, Texas law is not binding on this Court.

South Carolina courts have held that once factual findings are made regarding whether a party engaged in the willful destruction of relevant evidence that a party had a duty to preserve, the role of the trial court is to determine an appropriate remedy, including whether an adverse inference jury instruction should be given. However, such a sanction still leaves it within the jury's province to determine whether to accept the adverse inference or not:

Among these tools that judges may use to combat spoliation is the adverse inference jury instruction/presumption. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina.

*Hopper*, 2019 S.C. C.P. LEXIS 5488 at\*16, Case No, 2019-CP-00076 (Ret. Chief Just. Toal).

As Ret. Chief Justice Toal herself found in *Hopper*, a jury has the ultimate decision regarding the inference it should make as to evidence of any lost or destroyed evidence.

The Supreme Court's decision in *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990) is on point. The *Kershaw* case arose out of the remediation of asbestos tiles in Kershaw County schools. Prior to filing the products liability action against United States Gypsum Company, an asbestos manufacturer, a trial court issued an order that the School Board was to notify all potential asbestos manufacturers prior to its removal of asbestos from the school. There was one school, however, where the School Board failed to notify Gypsum of the removal of the asbestos tiles prior to its doing so. Gypsum requested the court to dismiss all claims arising from the removal of asbestos from that school. The trial court denied this motion, finding that an adverse inference jury instruction would be provided instead. *Id.* at 393-94, 396 S.E.2d at 371. The Supreme Court upheld the trial court's decision:

Gypsum moved for judgment in its favor on the claims related to Camden High School because Kershaw had violated Judge Smith's order by removing asbestos prior to Gypsum's inspection. The trial judge refused

this motion, but did include a jury instruction on the destruction of evidence. The trial court permitted Kershaw to explain the circumstances surrounding its failure to notify Gypsum and instructed the jury that when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party. We believe the trial court's decision was proper under the fact of this case.

*Id.* at 394, 396 S.E.2d at 372. The Supreme Court agreed that the jury should be allowed to hear the evidence regarding spoliation and make a determination regarding what effect such evidence had in the case. *Id.* at 395, 396 S.E.2d at 372. *See also, Welsh v. Gibbons*, 211 S.C. 516, 46 S.E.2d 147 (1948) (holding that it was proper for a jury to hear evidence regarding the unavailability of evidence and whether to draw an adverse inference); *Gathers v. South Carolina Elec. & Gas Co.*, 427 S.E.2d 687, 689 (Ct. App. 1993) (affirming the trial court's decision to submit evidence of the loss or destruction of evidence to the jury).

Covil argues that because South Carolina does not recognize a cause of action for spoliation, a jury is not entitled to determine the facts supporting any alleged spoliation. Although it is true that South Carolina has not adopted a cause of action for spoliation, the Supreme Court has held that spoliation may be a defense to a civil action. *See, Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 153, 714 S.E.2d 537, 542 (2011) ("However, our conclusion that Hobbs is unable to bring an independent claim does not preclude him from asserting spoliation as a defense to the declaratory judgment action brought by Cole Vision and Sears.") As with affirmative claims, it is within the purview of a jury to determine evidence regarding any defenses raised.

Despite Covil's attempt to divorce itself from its request for a trial on the spoliation issues in this case, Covil in fact requested that its evidence regarding spoliation be presented and determined at the trial. Penn National requested a jury trial on factual issues, including any



factual issues related to alleged spoliation. The Circuit Court denied Penn National's right to a jury trial of these issues. Penn National's appeal of this order is proper. Therefore, this Court should deny Covil's motion to dismiss appeal and consider this appeal on its merits.

### **CONCLUSION**

Penn National appropriately demanded a jury trial in this case within the dictates of South Carolina law and the rights guaranteed it by the South Carolina Constitution. When the Circuit Court denied its constitutional right to a jury trial by ordering that the issues in this case would be tried non-jury, Penn National had the absolute and inviolable right to appeal this order immediately. Despite the clear law from this and the Supreme Court that Penn National is required to appeal this order or be deemed to have waived its right to a jury trial, Covil has moved to dismiss this appeal. The basis of Covil's motion is that there is no right to a jury trial of the issues in this case. However, the merits of this appeal should not be decided summarily and on an expedited basis through a motion to dismiss. Instead, this Court should be allowed a full and fair opportunity to consider the merits and make its determinations after considering the briefing and fully developed arguments of the parties. This is especially true where, as here, Penn National's constitutional right to a jury trial is at stake. Accordingly, Penn National respectfully requests that this Court deny Covil's motion to dismiss its appeal and allow the parties to fully brief the merits of the issues on appeal for this Court's consideration.

December 28, 2022

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**Dec 28 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

---

Appellate Case No. 2022-001722

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Covil Corporation, by and  
through its duly appointed  
Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual  
Casualty Insurance Company,

Petitioner.

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**PROOF OF SERVICE**

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I certify that a true copy of **PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY'S RETURN TO MOTION TO DISMISS AND EXPEDITE and SUPPLEMENTAL APPENDIX** has been served on the following, this 28<sup>th</sup> day of December, 2022, by emailing a copy to each attorney listed below using their primary email address listed using their AIS E-mail address pursuant to Rule 262 of the South Carolina Appellate Court Rules:

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Dec 28 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
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**SUPPLEMENTAL APPENDIX**

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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,<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup>

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;

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<sup>3</sup> 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.<sup>4</sup> The company was incorporated in 1954.<sup>5</sup> 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.<sup>6</sup> In 1991, Covil was administratively dissolved.<sup>7</sup>

**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

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<sup>4</sup> *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.”).

<sup>5</sup> *See* Covil Trial Ex. 80, Certificate of Incorporation.

<sup>6</sup> *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).

<sup>7</sup> 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.<sup>8</sup> 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

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<sup>8</sup> 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.<sup>9</sup> 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”),<sup>10</sup> and produced what it characterized as “true and accurate” copies of those specific policies.<sup>11</sup> 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”).<sup>12</sup> Further, Penn National issued inland marine coverage

<sup>9</sup> See Covil Trial Exs. 1, 2, 4, and 5.

<sup>10</sup> 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.

<sup>11</sup> Covil Trial Exs. 1-3.

<sup>12</sup> 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”).<sup>13</sup>

**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.<sup>14</sup>

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

<sup>13</sup> Covil Trial Ex. 4.

<sup>14</sup> 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.”<sup>15</sup>

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**.<sup>16</sup>

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;<sup>17</sup>
- “**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.<sup>18</sup>

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;<sup>19</sup>
- “**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

<sup>15</sup> 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.

<sup>16</sup> *Id.*

<sup>17</sup> 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.

<sup>18</sup> *Id.*

<sup>19</sup> *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.<sup>20</sup>

There is no definition of the term “aggregate” in the “Definitions” section of the Penn National Policies.<sup>21</sup>

### 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.<sup>22</sup>

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.<sup>23</sup>

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

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas dated September 1, 2022.

<sup>23</sup> 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.”<sup>24</sup>

**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[.]”<sup>25</sup> 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.<sup>26</sup> 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

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<sup>24</sup> *Id.* at 4.

<sup>25</sup> Covil Trial Ex. 12, Finch Subpoena to Penn National, at p. 5.

<sup>26</sup> *Id.*

only searched for Covil policies by the exact policy numbers provided to it by the asbestos claimant's counsel.<sup>27</sup>

Then, in October 2019, Penn National was named as a defendant in the Covil coverage litigation in the Middle District of North Carolina.<sup>28</sup> 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."<sup>29</sup> 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.*"<sup>30</sup> 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

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<sup>27</sup> Covil Trial Ex. 13, Penn National Subpoena Response, dated June 15, 2018.

<sup>28</sup> 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.

<sup>29</sup> Covil Trial Ex. 42, Dec. 18, 2019 Penn National Discovery Responses at Interrogatory No. 1.

<sup>30</sup> *Id.*

related to such policies, and/or form language used in such policies issued by [Penn National] during the 1950-1986 time period.”<sup>31</sup> Penn National did not produce or describe those policies, nor did it assert that they were confidential or proprietary.<sup>32</sup>

In February 2020, the Receiver filed suit against Penn National in this Court.<sup>33</sup> The Receiver again served Penn National with discovery requesting any policy issued by Penn National that included Covil as an insured.<sup>34</sup> The Receiver also requested Penn National’s document retention policies from 1950 through 2018.<sup>35</sup> Penn National repeated its responses from the North Carolina case.<sup>36</sup>

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[.]”<sup>37</sup> 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.<sup>38</sup>

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<sup>31</sup> *Id.* at Interrogatory No. 9.

<sup>32</sup> *Id.*

<sup>33</sup> Covil Corp. v. Pa. Nat’l Mut. Cas. Ins. Co., C.A. No. 2020-CP-40-01226 (Com. Pl. filed Feb. 28, 2020).

<sup>34</sup> Covil Trial Ex. 52, (May 15, 2020 Penn National Discovery Responses) at RFP No. 2.

<sup>35</sup> *Id.* at RFP No. 11.

<sup>36</sup> *See id.*

<sup>37</sup> Penn National Trial Ex. 1, Covil Complaint at p. 11(¶ B.).

<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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

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<sup>39</sup> 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.

<sup>40</sup> 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.<sup>41</sup>
- Penn National admitted that it disposed of policy-related documents pursuant to its standard record purge policy and practice in 2018, 2019, and 2020.<sup>42</sup>
- Penn National admitted that it disposed of liability insurance policies in 2018, 2019, and 2020.<sup>43</sup>
- Penn National admitted that it did not issue a litigation hold for any Covil litigation until December 2021.<sup>44</sup>
- 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.<sup>45</sup>
- 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.<sup>46</sup>
- 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.<sup>47</sup>

**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.<sup>48</sup>

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<sup>41</sup> Covil Trial Ex. 68, Penn National’s Feb. 17, 2022 Resp. to RFA at 2.

<sup>42</sup> *See id.* at 3, 5, 7.

<sup>43</sup> *See id.* at 4, 6, 8.

<sup>44</sup> *See id.* at 21.

<sup>45</sup> *See id.* at 11, 13, 15.

<sup>46</sup> *See id.* at 12, 14, 16.

<sup>47</sup> *See id.* at 23.

<sup>48</sup> 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.<sup>49</sup> The 1987-1988 policy includes a similar list on the “Special Named Insured” Endorsement.<sup>50</sup> 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.”<sup>51</sup>

**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

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<sup>49</sup> Covil Trial Ex. 1, p. 11.

<sup>50</sup> Covil Trial Ex. 2, p. 10.

<sup>51</sup> 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.”<sup>52</sup>

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.<sup>53</sup>

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,

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<sup>52</sup> Covil Trial Ex. 96, Dep. of Sharla Frost at 12:15-13:5.

<sup>53</sup> *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.<sup>54</sup> 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.<sup>55</sup>

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<sup>54</sup> Covil Trial Ex. 71, May 5, 2022 Order, p. 4.

<sup>55</sup> *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.<sup>56</sup> 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."<sup>57</sup> 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.<sup>58</sup> Finally, Mr. Wright confirmed that he was "not aware that a search . . . through the entire company records occurred."<sup>59</sup>

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

<sup>56</sup> See Covil Trial Ex. 76, B. Wright 1-7-21 Dep. at 9:5-12, 43:14-44:18.

<sup>57</sup> *Id.* at 39:7-16, 21-25.

<sup>58</sup> *Id.* at 45:14-25.

<sup>59</sup> *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.”<sup>60</sup> 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.”<sup>61</sup>

**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.<sup>62</sup> 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.”<sup>63</sup> 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.”<sup>64</sup> 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.”<sup>65</sup> 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.”<sup>66</sup>

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

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<sup>60</sup> Covil Trial Ex. 100, Hearing Transcript at 141.

<sup>61</sup> *Id.* at 143.

<sup>62</sup> Covil Trial Ex. 53, Letter and Subpoena to Penn National dated Feb. 8, 2021.

<sup>63</sup> Covil Trial Ex. 54, Letter from D. Harris to M. Shisko dated Feb. 12, 2021.

<sup>64</sup> Covil Trial Ex. 55, Penn National’s Subpoena Response, dated Feb. 22, 2021.

<sup>65</sup> *Id.*, p. 5.

<sup>66</sup> *Id.*, p. 7.

protective of Covil in its discovery responses in another case.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup>

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<sup>67</sup> 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.

<sup>68</sup> *Id.*, pp. 5-6.

<sup>69</sup> *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.<sup>70</sup> In his July 9 affidavit, Mr. Reifsnyder explained that non-electronic archives were stored on microfilm and in paper form.<sup>71</sup> 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.<sup>72</sup>

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.<sup>73</sup> Instead, he stated he “considered other alternative means of searching Penn National’s non-electronically-stored paper documents[.]”<sup>74</sup> 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.”<sup>75</sup>

When deposed with regard to the content of his affidavits, Reifsnyder admitted the following:

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<sup>70</sup> See Covil Trial Ex. 73., Aff. of B. Reifsnyder, dated July 9, 2021.

<sup>71</sup> *Id.*, ¶ 6.

<sup>72</sup> *Id.*, ¶¶ 8, 16.

<sup>73</sup> See Covil Trial Ex. 74, Aff. of B. Reifsnyder, dated July 23, 2021

<sup>74</sup> *Id.*, ¶ 6.

<sup>75</sup> *Id.*, ¶ 7.

- he spent *less than five minutes* trying to locate documents responsive to the Court's Order.<sup>76</sup>
- he did not take any steps to search for policy-related documents based on the contractor or job site lists provided by Covil.<sup>77</sup>
- 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.<sup>78</sup>
- 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.<sup>79</sup>
- Penn National itself designed the system of organizing its records by policy number.<sup>80</sup>
- 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."<sup>81</sup>
- 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.<sup>82</sup>

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.<sup>83</sup> Without a policy number, Mr. Wright admitted, Penn National

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<sup>76</sup> Covil Trial Ex. 77, August 3, 2021 B. Reifsnyder Dep. at 65:3–11.

<sup>77</sup> *Id.* at 49:20–50:1.

<sup>78</sup> *Id.* at 50:2–9.

<sup>79</sup> *Id.* at 47:10–24.

<sup>80</sup> *Id.* at 43:11–16.

<sup>81</sup> *Id.* at 50:20–51:3.

<sup>82</sup> *Id.* at 52:7–24, 55:23–56:5, 57:2–12, 59:8–13, 59:14–60:10, 62:17–63:3.

<sup>83</sup> 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.”<sup>84</sup> 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.<sup>85</sup>

**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.”<sup>86</sup> The Order required interim reports, with the first to be made on December 7, 2021.<sup>87</sup>

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.”<sup>88</sup>

**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

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<sup>84</sup> *Id.* at 23:22-24:1.

<sup>85</sup> *Id.* at 36:6-11.

<sup>86</sup> Covil Trial Ex. 63, November 5, 2021 Order, p. 1.

<sup>87</sup> *Id.*, p. 2.

<sup>88</sup> *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.<sup>89</sup> Now, Brent Reifsnyder testified that the only way to search for historic policies is by policyholder *number* using the system he created in 2010.<sup>90</sup> In fact, Mr. Reifsnyder admitted that Penn National designed the 2010 electronic system of organizing its records by policy number only.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> The policy does not, however, provide details for how the document destruction process should

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<sup>89</sup> 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.").

<sup>90</sup> See Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 112: 10-17.

<sup>91</sup> Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 43:11-16.

<sup>92</sup> See *id.* at 64: 1-24.

<sup>93</sup> *Id.* at 127:17-21; Covil Trial Ex. 8, Penn National Document Retention Policy.

take place.<sup>94</sup> As a result, Mr. Reifsnyder was left with preparing his own system, and he did: the 2k10 System.<sup>95</sup>

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.<sup>96</sup> Mr. Reifsnyder described the policyholder name as “extraneous information.”<sup>97</sup> 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.<sup>98</sup>

**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.<sup>99</sup> 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

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<sup>94</sup> 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.”).

<sup>95</sup> *Id.* at 59:17 – 60:22.

<sup>96</sup> *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.”).

<sup>97</sup> *Id.* at 91:25-92:23.

<sup>98</sup> Covil Trial Ex. 11, Microfiche Destruction Spreadsheet; *see also* Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 62.

<sup>99</sup> Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 103.

printed list as the policies are collected.<sup>100</sup> No copies of those lists were maintained.<sup>101</sup> 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.<sup>102</sup>

Penn National is unable to recreate or understand who the policyholders were for the policies that were destroyed in previous years.<sup>103</sup> 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.”<sup>104</sup>

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.<sup>105</sup> No one performs an independent quality control or spot

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<sup>100</sup> 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.”).

<sup>101</sup> *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.”).

<sup>102</sup> *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”).

<sup>103</sup> *Id.* at 44.

<sup>104</sup> *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.”).

<sup>105</sup> *Id.* at 78:6-9.

checking of the documents to be destroyed.<sup>106</sup> Further, there is no list of destroyed policies for anyone to review over the course of the project of pulling the policies.<sup>107</sup>

**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.<sup>108</sup> 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.<sup>109</sup>

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<sup>106</sup> *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.”).

<sup>107</sup> *Id.* at 77:25-78:5.

<sup>108</sup> 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.

<sup>109</sup> 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.”<sup>110</sup>

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.”<sup>111</sup>

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

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<sup>110</sup> See Covil Trial Ex. 66, Motion for Protection dated Feb. 11, 2022, p. 3.

<sup>111</sup> *Id.*, pp. 2-3.

litigation hold policy.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup>

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<sup>112</sup> Covil Trial Ex. 10, Dec. 17, 2021 Litigation Hold Email.

<sup>113</sup> 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.").

<sup>114</sup> *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.").

<sup>115</sup> 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.”<sup>116</sup> 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.*”<sup>117</sup>

### 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

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<sup>116</sup> *Id.* at 44:9-15.

<sup>117</sup> *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.*<sup>118</sup>

“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)).

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<sup>118</sup> 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.”<sup>119</sup> 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.”<sup>120</sup>

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).

<sup>119</sup> 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).

<sup>120</sup> *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)).<sup>121</sup>

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<sup>121</sup> 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.”<sup>122</sup> The term “aggregate” is not defined in the Penn National Policies.<sup>123</sup> Therefore, to understand the parties’ intent with respect to the total limit of liability, the Penn National Policies must be read as a whole.<sup>124</sup> 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.*”<sup>125</sup>

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

<sup>122</sup> Covil Trial Ex. 1, 1986-1987 Policy at 000028; Covil Trial Ex. 2, 1987-1988 Policy at 000071

<sup>123</sup> Covil Trial Ex. 1 at 000036; Covil Trial Ex. 2 at 000081.

<sup>124</sup> Covil Trial Ex. 99, B. Wright Dep. Transcript, dated Nov. 30, 2022, at 12:1-8.

<sup>125</sup> 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”.<sup>126</sup>

Figure 1 – Reproduction of Penn National Policy at 1 & 4

**Bodily Injury and Property Damage Liability**  
Completed Single Limit  
\$ 1,000,000 each occurrence \$ 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.<sup>127</sup>

<sup>126</sup> Covil Trial Ex. 1 at 4 (emphasis in original; highlighting added).

<sup>127</sup> 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")<sup>128</sup> standard comprehensive general liability ("CGL") policy form, and the Penn National Policies are identical to the 1973 ISO standard CGL policy form language.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup>

\* \* \* \*

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

<sup>128</sup> ISO is an organization that developed standard policy forms used in the insurance industry.

<sup>129</sup> See Covil Trial Ex. 98, Deposition Testimony of Covil's Expert Witness Charles Miller at 55:2-15.

<sup>130</sup> Exhibit 0006 to C. Miller's Dep. Transcript at 01376.

<sup>131</sup> *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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**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 are completed or abandoned at the time of the loss, and whether or not the operations are completed or abandoned at the time of the loss.

**"Bodily injury"** means bodily injury, sickness or disease sustained by any person, and death resulting therefrom, occurring at any time.

**"Property damage"** means damage to, destruction of, loss of, or impairment of, tangible property, including property in the process of being completed or abandoned.

**"Operations"** means any operations or business conducted by the insured, whether or not the operations are completed or abandoned at the time of the loss, and whether or not the operations are completed or abandoned at the time of the loss.

**"Premises"** means any premises owned by or rented to the named insured, whether or not the premises are completed or abandoned at the time of the loss, and whether or not the premises are completed or abandoned at the time of the loss.

**"Contract"** means any contract or agreement entered into by the named insured, whether or not the contract or agreement is completed or abandoned at the time of the loss, and whether or not the contract or agreement is completed or abandoned at the time of the loss.

**"Materials"** means any materials, parts or equipment furnished in connection with operations, whether or not the materials, parts or equipment are completed or abandoned at the time of the loss, and whether or not the materials, parts or equipment are completed or abandoned at the time of the loss.

**"Operations"** means any operations or business conducted by the insured, whether or not the operations are completed or abandoned at the time of the loss, and whether or not the operations are completed or abandoned at the time of the loss.

**"Premises"** means any premises owned by or rented to the named insured, whether or not the premises are completed or abandoned at the time of the loss, and whether or not the premises are completed or abandoned at the time of the loss.

**"Contract"** means any contract or agreement entered into by the named insured, whether or not the contract or agreement is completed or abandoned at the time of the loss, and whether or not the contract or agreement is completed or abandoned at the time of the loss.

**"Materials"** means any materials, parts or equipment furnished in connection with operations, whether or not the materials, parts or equipment are completed or abandoned at the time of the loss, and whether or not the materials, parts or equipment are completed or abandoned at the time of the loss.

**"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 any time with respect thereto.

**"Operations"** means any operations or business conducted by the insured, whether or not the operations are completed or abandoned at the time of the loss, and whether or not the operations are completed or abandoned at the time of the loss.

**"Premises"** means any premises owned by or rented to the named insured, whether or not the premises are completed or abandoned at the time of the loss, and whether or not the premises are completed or abandoned at the time of the loss.

**"Contract"** means any contract or agreement entered into by the named insured, whether or not the contract or agreement is completed or abandoned at the time of the loss, and whether or not the contract or agreement is completed or abandoned at the time of the loss.

**"Materials"** means any materials, parts or equipment furnished in connection with operations, whether or not the materials, parts or equipment are completed or abandoned at the time of the loss, and whether or not the materials, parts or equipment are completed or abandoned at the time of the loss.

**"Operations"** means any operations or business conducted by the insured, whether or not the operations are completed or abandoned at the time of the loss, and whether or not the operations are completed or abandoned at the time of the loss.

**"Premises"** means any premises owned by or rented to the named insured, whether or not the premises are completed or abandoned at the time of the loss, and whether or not the premises are completed or abandoned at the time of the loss.

**"Contract"** means any contract or agreement entered into by the named insured, whether or not the contract or agreement is completed or abandoned at the time of the loss, and whether or not the contract or agreement is completed or abandoned at the time of the loss.

**"Materials"** means any materials, parts or equipment furnished in connection with operations, whether or not the materials, parts or equipment are completed or abandoned at the time of the loss, and whether or not the materials, parts or equipment are completed or abandoned at the time of the loss.

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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.<sup>132</sup>

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<sup>132</sup> 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

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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](http://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.”<sup>133</sup>

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.<sup>134</sup>

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<sup>133</sup> 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).

<sup>134</sup> 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.*<sup>135</sup>

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.”<sup>136</sup> 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.<sup>137</sup>

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.

<sup>135</sup> *Id.* at 28 (emphasis added).

<sup>136</sup> *Id.* at 106.

<sup>137</sup> 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,<sup>138</sup> 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."<sup>139</sup> Specifically, Penn National argues that certain asbestos claims that seek damages for bodily injury within the

<sup>138</sup> See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas dated September 1, 2022.

<sup>139</sup> 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).<sup>140</sup>

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.”<sup>141</sup> Specifically, Penn National asserts that a Change Endorsement was issued on May 23, 1986 adding the GL 21 04 endorsement.<sup>142</sup> Penn National has proffered no evidence whatsoever that Covil, as the insured,

<sup>140</sup> See, e.g., Covil Trial Ex. 37, B. Wright Letter to P. Protopapas, dated August 21, 2019.

<sup>141</sup> *Id.*

<sup>142</sup> *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

**CHANGE ENDORSEMENT**

**Insured's Signature**

**GL 21 04 (Ed. 07 66)**

(The following information is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective \_\_\_\_\_ Policy No. \_\_\_\_\_ Endorsement No. \_\_\_\_\_

Named insured \_\_\_\_\_

Countersigned by \_\_\_\_\_ (Authorized Representative)

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.<sup>143</sup> It requires an insurer to fulfill the promise of coverage actually made to a policyholder under the terms of the insurance policy.

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<sup>143</sup> 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.<sup>144</sup>

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

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<sup>144</sup> 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.”<sup>145</sup>

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.<sup>146</sup> 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.”

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<sup>145</sup> “Any.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/any>. Accessed 2 Dec. 2022.

<sup>146</sup> 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.<sup>147</sup>

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”.

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<sup>147</sup> “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,<sup>148</sup> (2) no longer has full, original copies of the policies or policy-related documents it issued to Covil,<sup>149</sup> (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 2021<sup>150</sup> (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,<sup>151</sup> 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 repositories<sup>152</sup> (5) destroyed historic liability policies that were contained on microfiche on an annual basis in 2018, 2019, and 2020,<sup>153</sup> (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.

<sup>148</sup> See Covil Trial Exs. 1, 2, 3, 4, 5.

<sup>149</sup> See Covil Trial Ex. 99, Boyd Wright Dep. Transcript, dated Nov. 30, 2022 at 13:1-14:17.

<sup>150</sup> 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.

<sup>151</sup> See Covil Trial Ex. 97, Scott Maier Dep. Transcript, dated Nov. 21, 2022 at 83:3-8.

<sup>152</sup> *Id.* at 169:1-22.

<sup>153</sup> 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), SCRCP; *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,

**SMITH | ROBINSON**

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ELECTRONICALLY FILED - 2022 Dec 05 9:36 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4002098

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.<sup>1</sup>

2. Covil effectively ceased operations in 1991, and its charter was thereafter administratively revoked.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

### 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

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<sup>1</sup> Exhibit 1 - Complaint, ¶ 7.

<sup>2</sup> *Id.*

<sup>3</sup> Exhibit 2 - Penn National Answer, at ¶ 2.

<sup>4</sup> Exhibit 1 - Complaint, at ¶ 13.

obligation is unlimited and shall continue as long as here are Covil Asbestos Suits pending.<sup>5</sup>

**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.<sup>6</sup>

**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:<sup>7</sup>

- 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;

<sup>5</sup> Exhibit 1 - Complaint at ¶¶ 14-19.

<sup>6</sup> *Id.* at ¶¶ 20-22.

<sup>7</sup> *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.<sup>8</sup>

**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.<sup>9</sup>

9. Based upon Covil’s own document, Covil maintained commercial general liability insurance at all times from March 31, 1969 to March 31, 1992.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup>

<sup>8</sup> Exhibit 2 - Penn National Answer, Wherefore Clause 4 at page 8.

<sup>9</sup> Exhibit 3 - Subpoena to Penn National, dated May 29, 2018, Exhibits B at p. 2; Exhibit C.

<sup>10</sup> *Id.*, Exhibit C.

<sup>11</sup> *Id.*, Exhibit C at p. 4

<sup>12</sup> Exhibit 3 - Penn National Subpoena Response, dated June 15, 2018.

<sup>13</sup> *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.<sup>14</sup>

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.<sup>15</sup>

15. Section **III** of the Penn National Policies, entitled **Limits of Liability**, provides as follows:<sup>16</sup>

**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**.”<sup>17</sup> Therefore, the occurrence limit in the Penn National Policies operates in the same manner as an aggregate limit.

<sup>14</sup> **Exhibit 1** - Complaint, ¶ 8.

<sup>15</sup> *Id.*

<sup>16</sup> **Exhibit 5** - Penn National Policies, Bates 000004 and 000047.

<sup>17</sup> **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:<sup>18</sup>

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:<sup>19</sup>

“**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

<sup>18</sup> **Exhibit 5** - Penn National Policies 000001 and 000044.

<sup>19</sup> *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.<sup>20</sup>

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.<sup>21</sup>

<sup>20</sup> **Exhibit 5** - Penn National Policies, Bates 000002-000003, 000005 and 000045-000046, 000048

<sup>21</sup> **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.<sup>22</sup>

**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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup>

<sup>22</sup> Exhibit 3 - Subpoena dated May 29, 2018, Exhibit C.

<sup>23</sup> Exhibit 7 - Affidavit of Brent Reifsnyder, sworn to July 9, 2021, at ¶ 19.

<sup>24</sup> *Id.* at ¶ 8.

<sup>25</sup> *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.<sup>26</sup>

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.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup>

<sup>26</sup> **Exhibit 3** - Subpoena dated May 29, 2018, Exhibit C.

<sup>27</sup> **Exhibit 3** - Subpoena Response dated June 15, 2018; Affidavit of Boyd Wright

<sup>28</sup> **Exhibit 8** - Affidavit of Boyd Wright, sworn to June 11, 2021, at ¶ 11.

<sup>29</sup> **Exhibit 8** - Affidavit of Boyd Wright, sworn to June 11, 2021, at ¶ 11.

<sup>30</sup> *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.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup>

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.<sup>34</sup>

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.<sup>35</sup>

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<sup>31</sup> *Id.* at ¶ 13.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at ¶ 17.

<sup>34</sup> *Id.* at ¶ 18.

<sup>35</sup> *Id.* at ¶ 14.



36. As a result of his exhaustive search, no policies of insurance were located in relation to the *Finch* Defendants.<sup>36</sup>

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.<sup>37</sup>

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.<sup>38</sup>

39. Penn National's document retention policy required it to maintain documents for 25 years after the cancellation or non-renewal of a policy.<sup>39</sup>

40. The final commercial general liability policy issued to Covil expired on March 31, 1988.<sup>40</sup>

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.<sup>41</sup>

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.

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<sup>36</sup> *Id.* at ¶ 16.

<sup>37</sup> **Exhibit 9** - Transcript of the deposition of Charles Miller ("Miller Deposition"), dated November 28, 2022, pg. 111, lines 1-8.

<sup>38</sup> **Exhibit 3** - Subpoena dated May 29, 2018.

<sup>39</sup> **Exhibit 10** - Penn National Document Retention Policy, PNI-0637-0639.

<sup>40</sup> **Exhibit 5** - Penn National Policy 515502853-8, Declaration Page.

<sup>41</sup> **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.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup>

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

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<sup>42</sup> Exhibit 12 - Miller Deposition, page 140, lines 5-9.

<sup>43</sup> Exhibit 13 - Miller Deposition, page 128, lines 6-18; page 143, lines 15-17.

<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup>

52. Since the commencement of this action, Penn National has not destroyed or purged any policy related documents.<sup>47</sup>

**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

<sup>45</sup> Exhibit 15 - Miller Deposition, page 120, lines 1-5; page 143, lines 15-17.

<sup>46</sup> Exhibit 3 - Subpoena dated May 29, 2018, Exhibit C.

<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup>

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

<sup>48</sup> **Exhibit 8** - Affidavit of Boyd Wright, sworn to June 11, 2021, at ¶¶ 4, 11, 14, 15, 18, and 19.

<sup>49</sup> **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 5<sup>th</sup> day of December, 2022.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

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# The South Carolina Court of Appeals

Covil Corporation, by and through its duly appointed  
Receiver Peter D. Protopapas, Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,  
Appellant.

Appellate Case No. 2022-001722

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## ORDER

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After careful consideration, Respondent's motion to dismiss is granted.

  
FOR THE COURT

Columbia, South Carolina

**FILED**  
**Feb 08 2023**

cc:

Kirby Darr Shealy, III, Esquire  
Alexander Erwin Davis, Esquire  
David Grant Harris, II, Esquire  
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Frederick Newman Hanna, Jr., Esquire  
Peter Demos Protopapas, Esquire  
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**A0333**

**RECEIVED**  
**Feb 23 2023**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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Appellate Case No. 2022-001722

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Covil Corporation, by and  
through its duly appointed  
Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual  
Casualty Insurance Company,

Appellant.

Of whom Pennsylvania National Mutual Casualty Insurance Company is the Appellant.

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**APPELLANT'S PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING *EN BANC***

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**A0334**

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## **INTRODUCTION**

The appeal in this case centers on whether the Circuit Court appropriately denied a party a right to a jury trial where (a) the party demanded a jury trial in its pleading, and (b) factual issues were set to be tried. Specifically, the Circuit Court entered an order denying Defendant/Appellant Pennsylvania National Mutual Casualty Insurance Company's ("Penn National") right to a jury trial of factual issues in this case. As required by decades of precedent from this Court and from the Supreme Court of South Carolina, Penn National immediately appealed this order so as to avoid any waiver of its right to a jury trial. Plaintiff/Respondent Covil Corporation, by and through its appointed Receiver, Peter D. Protopapas ("Covil"), moved to dismiss this appeal as being somehow "frivolous." In a one sentence order, a single judge from this Court granted Covil's motion to dismiss without any explanation.

Penn National petitions this Court for a rehearing of the motion to dismiss appeal on three grounds: (1) the dismissal of Penn National's appeal of the Circuit Court's order affecting the mode of trial directly conflicts with clear precedent from the Supreme Court requiring such appeals; (2) the dismissal was improper because there is no statutory authority or precedent from the appellate courts of this State that allows dismissal of an appeal in a civil case based on its alleged "frivolousness;" and (3) the dismissal creates new law that allows one party to nullify the other party's right to a jury trial by demanding a non-jury trial in declaratory judgment actions where factual issues are in dispute. The dismissal of Penn National's appeal was premature and wholly unfounded. Penn National respectfully requests that this Court accept its petition, vacate the order dismissing this appeal, and allow this appeal to proceed to a consideration of its merits.

**I. The Dismissal Of The Present Appeal Conflicts With The Supreme Court's Declaration That Orders Affecting The Mode Of Trial Must Be Immediately Appealed.**

The Supreme Court of South Carolina has clearly and unequivocally established that orders affecting the mode of trial must be appealed immediately and a party's failure to do so waives that party's right to a jury trial.

This Court has held that orders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately. Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. Here, Client's failure to immediately appeal the order designating this case as a non-jury matter bars his current appeal of that issue.

*Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (internal citations omitted).

*See also, Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008); *Foggie v.*

*CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993); *Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 352 (1985); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389-90 (Ct. App. 2004). *See also*, Jean Hoefer Toal, et al., *Appellate Practice in South Carolina*, 156 (3<sup>rd</sup> ed. 2016) ("The purpose of permitting immediate appeal in these cases is to preserve a party's constitutional right to a trial by jury which would otherwise be lost.").

In the present case, Penn National demanded a jury trial in its Answer consistent with the requirements of the South Carolina Rules of Civil Procedure. (App., p. 30). During a status conference, Covil requested a non-jury trial on its claims against Penn National. (App., p. 39). In response to this request for a non-jury trial, Penn National sent a letter to the Circuit Court requesting that its right to a jury trial be honored and preserved (App., p. 57), which the Circuit Court agreed to do (App. p. 58). When the Circuit Court subsequently refused to set this case for a jury trial, Penn National filed a Motion to Confirm Jury Trial Demand on December 2, 2022.

(App., pp. 44-59). The Circuit Court then entered an order on December 7, 2022, denying Penn National's right to a jury trial on the issues in this case and instead ordered that these issues be "scheduled for a non-jury trial." (App., p. 4-5).

In accordance with this State's jurisprudence, Penn National was required to, and did, immediately appeal the order entered by the Circuit Court that denied Penn National's right to a jury trial of the factual issues in this case. The Court of Appeals' dismissal of this mandatory appeal, without any explanation, is directly in conflict with the Supreme Court's mandate and decades of precedent. Therefore, Penn National respectfully requests that this Court accept its petition for rehearing and its suggestion for a rehearing *en banc*, vacate the dismissal, and allow this appeal to proceed for a consideration on the merits.

## **II. The Dismissal Of The Present Appeal Is Improper Because It Is Based Solely On Respondent's Unfounded Argument That The Appeal Is Frivolous.**

The appellate courts of South Carolina have consistently enforced a party's right to appeal, oftentimes liberally construing statutory provisions to ensure that the right to appeal is preserved. *See, Haughton v. Order of United Commercial Travelers*, 108 S.C. 73, 74-75, 93 S.E. 393, 393-94 (1917) ("Our decisions show that this Court is very reluctant to dismiss appeals on technical grounds. Therefore, we have construed the statutes and rules of Court liberally in favor of the right to appeal."); *O'Rourke v. Atlantic Paint Co.*, 91 S.C. 399, 403, 74 S.E. 930, 931 (1912) ("The Court should give a liberal construction to the Constitution and statutes, in favor of the right to appeal.").

Dismissal of an appeal in a civil case has generally only been allowed in two instances: (1) when the appellate court does not have jurisdiction over the appeal because of failure to adhere to appellate rules regarding timely filing of an appeal or because the appeal is interlocutory; and (2) when the appeal is moot. *See, e.g., S.C. Coastal Conservation League v.*

*Dominion Energy S.C., Inc.*, 432 S.C. 217, 223-24, 851 S.E.2d 699, 702 (2020) (affirming dismissal of appeal on mootness grounds); *Wachesaw Plantation E. Cmty. Servs. Ass’n v. Alexander*, 414 S.C. 355, 360, 778 S.E.2d 898, 901 (2015) (finding that issuance of deed did not moot the appeal of a foreclosure sale and remanding case to Court of Appeals for decision on merits); *Fields v. Regional Med. Ctr.*, 363 S.C. 19, 26-29, 609 S.E.2d 506, 509-11 (2005) (considering and ultimately denying respondent’s motion to dismiss appeal on jurisdictional grounds); *Byrd v. Irmo High School*, 321 S.C. 426, 430-32, 468 S.E.2d 861, 863-64 (1996) (denying motion to dismiss appeal on mootness grounds based on exception to doctrine); *Wallace v. Interamerican Trust Co.*, 264 S.C. 563, 569, 144 S.E.2d 813, 816 (1965) (granting motion to dismiss appeal of discovery order as being interlocutory); *Deal v. Deal*, 85 S.C. 262, 264, 67 S.E. 241, 242 (1910) (granting motion to dismiss appeal because order was interlocutory); *Atkins v. Wilson*, 417 S.C. 3, 18, 788 S.E.2d 228, 236 (Ct. App. 2016) (denying motion to dismiss appeal on jurisdictional grounds because appellant timely filed notice of appeal); *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 413 S.C. 642, 646, 776 S.E.2d 575, 577 (Ct. App. 2015) (granting motion to dismiss appeal because court did not have jurisdiction based on untimely filing of notice of appeal).

Neither basis for the dismissal of an appeal exists in the present case. This Court clearly has jurisdiction to consider the issues on appeal. Penn National timely filed its Notice of Appeal. In fact, Penn National filed its Notice of Appeal on the same day that the Circuit Court entered its order denying Penn National’s right to a jury trial in this case. (App. pp. 4-5: Order entered 12/7/2022; Notice of Appeal filed 12/7/2022). Additionally, the order on appeal is one affecting the mode of trial, and is therefore immediately appealable. *Lester*, 327 S.C. at 266, 491 S.E.2d at 241. The issue on appeal, whether Penn National has a right to a jury trial of the factual issues in

this case, has also not been rendered moot by any subsequent actions. Indeed, Covil did not cite either of these reasons in its motion to dismiss Penn National’s appeal. Therefore, no basis exists for this Court’s summary dismissal.

Instead, Covil based its motion to dismiss solely on its characterization of Penn National’s appeal as “frivolous.”<sup>1</sup> Even if this characterization were accurate—which it is not—this is clearly not a basis upon which to dismiss an appeal in a civil case, particularly one affecting a constitutional right. *See, e.g., Fishburne v. Minott*, 72 S.C. 567, 569, 52 S.E. 648, 648 (1905) (refusing to “entertain such a motion” which sought to strike case “on the ground that the same is frivolous and vexatious”). Indeed, Covil did not cite to any case law in its motion to dismiss where this Court has granted a motion to dismiss an appeal on the grounds of frivolousness.<sup>2</sup>

The Order from this Court granting Covil’s motion to dismiss is contrary to and directly conflicts with the Supreme Court’s decision in *Sumter Hardwood Co. v. Fitchette*, 133 S.C. 149, 130 S.E. 881 (1925). In *Sumter*, upon motion by the plaintiff, the circuit court referred the action to a master for determination of all issues. The defendant immediately appealed this decision and the plaintiff moved to dismiss the appeal. The Supreme Court began its analysis by reference to the “well-settled” canon that “if an order deprives a party of the mode of trial which the law allows him, it is appealable.” *Id.* at 151, 130 S.E. at 882. The Supreme Court then found

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<sup>1</sup> In its motion to dismiss, Covil also consistently (without citation or other support) refers to the present appeal as Penn National’s “third” appeal in this case. This is wholly false and improperly attempts to both dissuade this Court from considering the merits of this appeal and inappropriately bias this Court against Penn National. In truth, Penn National has filed **ONE** other appeal in this case. The previous appeal was from a discovery order dated May 5, 2022, in which the Circuit Court ordered Penn National to digitize its entire historical repository of insurance policies (approximately 18 million pages of documents) and allow Covil, its Receiver and its attorneys full and unfettered access to same. (See, Appellate Case No. 2022-000761).

<sup>2</sup> Indeed, the case law from South Carolina appellate courts is clear: assertions of frivolousness can only be considered in dismissals of appeals in criminal cases and only after counsel has filed an *Anders* brief and the court has made a full examination of the record on its own. *See, e.g., State v. McKennedy*, 348 S.C. 270, 279, 559 S.E.2d 850, 855 (2002).

that the circuit court improperly referred the case to a master as defendant was allowed to have the factual issues in the case decided by a jury. Therefore, the Supreme Court concluded:

The judgment of this Court is that the motion of the plaintiff to dismiss the appeal of the defendant be refused, that the order of reference be reversed, and that the case be remanded to the Circuit Court without prejudice to a motion by the plaintiff to amend its complaint if so advised.

*Id.* at 155-56, 130 S.E. at 884.

Similarly, in the present case, this appeal is appropriately in front of this Court. It is clear and without question that this Court has jurisdiction over the appeal of the Circuit Court's denial of Penn National's jury trial demand. It is similarly beyond doubt that the issue on appeal has not been rendered moot due to any subsequent actions. Therefore, this Court should have "refused" Covil's motion to dismiss this appeal, as directed by the *Sumter Hardwood* Court, and instead should have allowed the merits of this appeal to be fully considered by this Court.

### **III. This Court's Dismissal Of Penn National's Appeal Creates New Law That Would Allow One Party To Nullify Another Party's Right To A Jury Trial By Merely Demanding A Non-Jury Trial In A Declaratory Judgment Action.**

The present appeal is from an order directing that this case be scheduled for a non-jury trial. Covil argued in its motion to dismiss appeal that the present case is one that merely seeks an interpretation of insurance policy language, which is not subject to a jury trial. However, Covil's actions in this case belie its assertions to this Court. First, at no time did Covil affirmatively state in its motion to dismiss that there were, in fact, no factual issues in this case.<sup>3</sup> In truth, Covil could not so state. If Covil believed that there were no material issues of

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<sup>3</sup> Instead, Covil argued that Penn National did not identify any factual issues that justified a jury trial. (Mot., p. 8; Reply, p. 2). That is clearly untrue. Both parties filed Proposed Findings of Fact and Conclusions of Law in this case, consonant with the trial court's instructions. Covil conveniently did not provide these documents to this Court with its Motion to Dismiss Appeal. These documents, however, were submitted by Penn National for this Court's consideration when ruling on Covil's Motion to Dismiss Appeal. (Supp. App., pp. 1-94).

genuine fact, Covil should and would have moved for summary judgment. *See*, Rule 56(c), SCRCPP. However, Covil did not do so. Instead, Covil specifically requested a trial. (App., p. 1).

Second, in requesting a non-jury trial, Covil proposed a pretrial order (which was subsequently adopted by the Circuit Court without alteration) that required the parties to submit proposed findings of fact and conclusions of law, lists of trial exhibits, lists of witnesses to include expert witnesses, and motions in limine. (App., pp. 1-3). If indeed Covil believed that there were no factual issues to be tried, Covil would not have requested a trial on the issues in the case with witnesses and exhibits.

Finally, and significantly, Covil actually filed with the Circuit Court “Receiver for Covil Corporation’s Proposed Findings of Fact and Conclusions of Law.” This document contained thirty-one (31) pages of what Covil requested as “PROPOSED FINDINGS OF FACT.” (Supp. App., pp. 1-35). These proposed factual findings include: whether Penn National issued policies of insurance in addition to the two policies which were stipulated to by Penn National; whether and when injuries occurred in fourteen asbestos liability cases asserted against Covil; if such a duty existed, when Penn National’s duty to preserve its historic policies was triggered; whether Penn National “destroyed” policies potentially applicable to Covil’s asbestos liability with culpable intent; the propriety of Penn National’s business decision to store its historic policies by policy number; the underwriting intent in issuing policies to Covil; and the adequacy of Penn National’s search for additional policies. (*Id.*). To suggest in its Motion to Dismiss Appeal that Penn National is not entitled to a jury trial because this case is merely about the interpretation of insurance policy language is disingenuous and clearly contradicts filings actually made by Covil in this case.<sup>4</sup>

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<sup>4</sup> Covil is also judicially estopped from taking this position in its Motion to Dismiss Appeal because it is inconsistent with the position Covil has taken in requesting a non-jury trial and filing its proposed findings of fact.



In its Reply in support of its Motion to Dismiss, Covil attempts to obfuscate the fact that it has previously taken the position that there are factual issues in this case by demanding that this Court strike Penn National's filing of the parties' Proposed Findings of Fact and Conclusions of Law. There is no basis for this argument. Prior to the issuance of the order in this case, the Circuit Court was well aware that: (1) Covil did not move for summary judgment, but rather requested a non-jury trial in this case; (2) the parties were required to file their respective list of exhibits and witnesses for trial; and (3) the parties were required to file their respective proposed findings of fact and conclusions of law. The scheduling order providing deadlines for these submissions was entered by the Circuit Court on September 16, 2022. (App., p. 1-4). Indeed, the parties filed their respective proposed findings of fact and conclusions of law on December 5, 2022, prior to the issuance of the Circuit Court's order denying Penn National's right to a jury trial in this case on December 6, 2022. (Supp. App., pp. 1-94). Clearly, prior to issuing its order, the Circuit Court understood the nature of the matter before it, including that the parties contended that there were factual issues to be determined that required the presentation of witness testimony and exhibits at a trial.

It is axiomatic that a party is entitled to a jury trial even as to claims asserted under the Uniform Declaratory Judgment Act. S.C. Code Ann. § 15-53-90 ("When a proceeding under this chapter involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. All existing rights to jury trials are hereby preserved."). *See also, Leggette v. Smith*, 226 S.C. 403, 416, 85 S.E.2d 576, 582 (1955) ("And, irrespective of

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*See, Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. The purpose of the doctrine is to ensure the integrity of the judicial process ...") (internal citations omitted).

this provision of the statute, it is clear that the right of jury trial in what is essentially an action at law may not be denied a litigant merely because his adversary has asked that the controversy be determined under the declaratory procedure.”) (internal quotations and citations omitted).

This Court and the Supreme Court have held that parties are entitled to jury trials in declaratory judgment actions concerning insurance coverage. *See, State Farm Mut. Auto. Ins. Co. v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*, 263 S.C. 391, 394-95, 210 S.E.2d 613, 615 (1974) (upholding on appeal jury responses to special interrogatories in declaratory judgment action regarding coverage under a motor vehicle policy); *Government Employees Ins. Co. v. Mackey*, 260 S.C. 306, 316, 195 S.E.2d 830, 834 (1973) (“The issues of fact in this [declaratory judgment action brought by insurer] were properly submitted to the jury with a full and correct charge by the trial judge.”); *St. Paul Fire & Marine Ins. Co. v. American Ins. Co.*, 251 S.C. 56, 61, 159 S.E.2d 921, 923 (1968) (holding that issues of fact in insurance coverage action were properly determined by a jury); *Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 375, 415 S.E.2d 406, 409 (Ct. App. 1992) (reversing the grant of summary judgment for plaintiff because there existed genuine issues of material fact to be determined by a jury); *State Farm Mut. Auto. Ins. Co. v. Turner*, 303 S.C. 99, 100, 399 S.E.2d 22, 22 (Ct. App. 1990) (affirming submission of issues to a jury in declaratory judgment action brought by insurer).

By summarily dismissing Penn National’s appeal of the Circuit Court’s order referring this case for a non-jury trial and not addressing the merits of this appeal, this Court effectively created new law<sup>5</sup> which sanctions the ability of one party to nullify another party’s right to a jury trial in declaratory judgment actions even where factual issues are in dispute. In effect,

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<sup>5</sup> Only the Supreme Court can create new law. The Court of Appeals is bound to follow existing precedent. S.C. Const. art. V, § 9; *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (“[I]t is incumbent upon the court of appeals to apply [the Supreme Court’s] precedent.”).

this Court has declared that there is no right to a jury trial in declaratory judgment actions. That is not the law in South Carolina. Therefore, the dismissal of Penn National's appeal of the order requiring the factual issues in this case to be determined by a judge instead of a jury should be vacated. Instead, the merits of the appeal should be considered by this Court after full briefing of the issues and a careful analysis of the full record in this case.

**IV. The Issue Of Whether Penn National Engaged In Spoliation Of Evidence Is Also A Fact Issue That Must Be Decided By A Jury.**

In the order on appeal, the Circuit Court ruled that both the factual issues regarding coverage and the factual issues regarding whether or not Penn National engaged in spoliation of evidence in this case were to be tried without a jury. Covil has taken the position in its motion to dismiss appeal that the factual issues of whether Penn National actually engaged in spoliation of evidence should be decided by the judge and not a jury. Covil did not cite to any case law from South Carolina for this proposition, instead relying on case law from one other jurisdiction, Texas. (Mot., p. 9).

The South Carolina appellate courts have not determined what a party must prove in order to show that another party spoliated evidence, necessitating a sanction. Federal courts, however, have held that a party seeking sanctions regarding spoliation must establish three elements:

- (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. College of Charleston*, 2013 U.S. Dist. LEXIS 162714, \*5 (4<sup>th</sup> Cir. 2013).

This standard has actually been adopted by the circuit courts in this State. *See, Hopper v. Air & Liquid Sys. Corp.*, 2019 S.C. C.P. LEXIS 5488, Case No. 2019-CP-00076 (S.C. Com. Pl. Order dated Oct. 31, 2019).

Under the standard adopted by South Carolina federal courts, in order for a party to meet its burden of showing spoliation of evidence, that party has to show whether the evidence actually existed, the opposing party's duty to preserve such evidence, and the opposing party's culpable state of mind. These are all factual findings that are within the purview of a jury. *See, Harleysville Group Ins. v. Heritage Cmty's, Inc.*, 420 S.C. 321, 346, 803 S.E.2d 288, 302 (2017) ("These questions of the insured's intent are factual in nature."); *Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 32, 737 S.E.2d 857, 858 (Ct. App. 2013) (reversing directed verdict and finding that insured's intent was a factual issue that should have been decided by a jury). *See also, Evans v. Quintiles Transnational Corp.*, 2015 U.S. Dist. LEXIS 171750, \*13-14 (D.S.C. 2015) (holding that on spoliation issues a jury was to resolve "any credibility questions and make a determination, first, as to whether the alleged computer file even existed on Plaintiff's computer, whether and when Quintiles should have reasonably known that the evidence may be relevant to anticipated litigations, and, if so, whether Quintiles willfully lost or destroyed the file.").

Although South Carolina appellate courts have not expressly adopted the federal standard regarding spoliation of evidence, this Court and the Supreme Court have allowed evidence regarding spoliation to go to the jury. *See, Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990) (holding that a jury should be allowed to hear evidence regarding spoliation and make a determination regarding what effect

such evidence had in the case); *Welsh v. Gibbons*, 211 S.C. 516, 46 S.E.2d 147 (1948) (holding that it was proper for a jury to hear evidence regarding the unavailability of evidence and whether to draw an adverse inference); *Gathers v. South Carolina Elec. & Gas Co.*, 427 S.E.2d 687, 689 (Ct. App. 1993) (affirming the trial court's decision to submit evidence of the loss or destruction of evidence to the jury).

The right to a jury trial on issues regarding whether a party engaged in spoliation of evidence must not be ignored by this Court. Instead, this Court should take this opportunity to provide clear guidance regarding how issues of spoliation of evidence are to be determined in this jurisdiction.

### **CONCLUSION**

A single judge summarily and without explanation dismissed Penn National's appeal of an order by the Circuit Court that denied Penn National's constitutional right to a jury trial of the factual issues in this case. This dismissal, however, is contrary to the well-established precedent mandating that a party immediately appeal the denial of a jury trial or risk waiving its constitutional right to a jury trial. Furthermore, this dismissal was not based on this Court's lack of jurisdiction over the appeal or because the factual predicate of the appeal was somehow moot. Instead, the dismissal appeared to be based on the Respondent's bald assertion that the appeal was somehow "frivolous." Frivolousness has never before been used by this Court as a justification to dismiss an appeal outright without consideration of its merits. Allowing to stand a swift dismissal of Penn National's appeal of the order denying its right to a jury trial is contrary to South Carolina law and will create a new rule that parties in declaratory judgment actions are no longer entitled to a jury trial of factual issues. Clearly, this Court did not intend for such a cavalier quashing of a party's fundamental and substantial right to a jury trial. Accordingly,

Penn National respectfully petitions this Court to rehear the motion to dismiss, with a suggestion of an *en banc* rehearing, to vacate the dismissal of its appeal and allow the parties to proceed with the full briefing of the issues on appeal.

February 23, 2023.

/s/ Kirby D. Shealy III

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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Appellate Case No. 2022-001722

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Covil Corporation, by and  
through its duly appointed  
Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual  
Casualty Insurance Company,

Appellant.

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**PROOF OF SERVICE**

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I certify that a true copy of Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* has been served on the following, this 23<sup>rd</sup> day of February, 2023, by emailing a copy to each attorney listed below using their primary email address listed using their AIS E-mail address pursuant to Rule 262 of the South Carolina Appellate Court Rules:

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## The South Carolina Court of Appeals

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June 06, 2023

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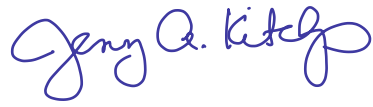
Re: Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Co.  
Appellate Case No. 2022-001722

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

**A0354**

Very truly yours,

A handwritten signature in blue ink, reading "Jenny A. Kitzg". The signature is fluid and cursive, with the first name "Jenny" and last name "Kitzg" clearly legible.

CLERK

cc: G. Murrell Smith, Jr., Esquire  
Jonathan M. Robinson, Esquire  
Shanon N. Peake, Esquire  
Austin Tyler Reed, Esquire  
Benjamin Hunter Limbaugh, Esquire  
Frederick Newman Hanna, Jr., Esquire  
Peter Demos Protopapas, Esquire  
William Bradley Nes, Esquire

# The South Carolina Court of Appeals

Covil Corporation, by and through its duly appointed  
Receiver Peter D. Protopapas, Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,  
Appellant.

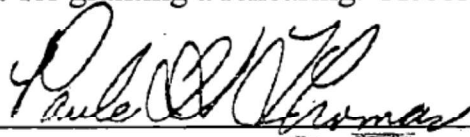
Appellate Case No. 2022-001722

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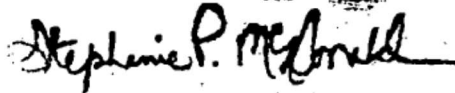
## ORDER

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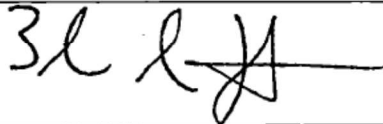
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_

J.

  
\_\_\_\_\_

J.

  
\_\_\_\_\_

J.

Columbia, South Carolina

cc:

Kirby Darr Shealy, III, Esquire  
Alexander Erwin Davis, Esquire  
David Grant Harris, II, Esquire

**FILED**  
**Jun 06 2023**

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